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THE PROTECTIVE POWER OF THE PRESIDENCY

*Henry P. Monaghan**

The executive Power shall be vested in a President of the United States of America.¹

The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution²

Obviously, . . . the Constitution's central mechanism of separation of powers depends largely upon common understanding of what activities are appropriate to legislatures, to executives, and to courts.³

INTRODUCTION

Walter Bagehot's still-admired study of the English Constitution⁴ distinguished between its "dignified" and "efficient" parts. Bagehot argued that the English Constitution's "dignified" theory of parliamentary supremacy masked the (then) dominant reality of cabinet government.⁵ Attacking what he described as the "literary" theory of the American Constitution, Woodrow Wilson posited a similar distinction. Writing in 1885, Wilson asserted that the "literary" theory of American government embodied in *Federalist's* "ideal checks and balances of the federal system" obscured its efficient principle: "government by the chairmen of the Standing Committees of Congress."⁶ An ardent admirer of ministerial government, Wilson especially lamented the condition of the American presidency:

The business of the president, occasionally great, is usually not much above the routine. Most of the time it is *mere* administration, mere obedience of directions from the masters of policy, the Standing Committees. Except in so far as his

* Copyright 1992, Henry Paul Monaghan, Harlan Fiske Stone Professor of Constitutional Law, Columbia University School of Law.

1. U.S. Const. art. II, § I.

2. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952) (*Steel Seizure*).

3. *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2136 (1992).

4. Walter Bagehot, *The English Constitution* (Cornell Univ. Press 1963) (1915).

5. See *id.* at 65-66. "The efficient secret of the English Constitution may be described as the close union, the nearly complete fusion, of the executive and legislative powers" through the cabinet. *Id.* For Bagehot, the cabinet possessed a genuine collegial aspect, and parliament did play some independent checking role. R. H. Crossman's excellent introduction to the 1963 edition observes that the current reality is the dominance of a single figure, the Prime Minister. *Id.* at 51-52.

6. Woodrow Wilson, *Congressional Government* 30-31, 82 (Johns Hopkins Paperbacks 1981) (1885). Wilson consciously emulated Bagehot. See *id.* at 11.

power of veto constitutes him a part of the legislature, the President might, not inconveniently, be a permanent officer; the first official of a carefully graded and impartially regulated civil services system.⁷

When Wilson revisited this topic a little more than two decades later, he had undergone a conversion. He now believed that the President could become a figure comparable to the Prime Minister: "The President is at liberty, both in law and conscience, to be as big a man as he can."⁸ Wilson insisted, however, that this position was contrary to the "Whig" theory of the founding generation:

The makers of the Constitution seem to have thought of the President as what the stricter Whig theorists wished the king to be: only the legal executive, the presiding and guiding authority in the application of law and the execution of policy. His veto upon legislation was only his 'check' on Congress,—was a power of restraint, not of guidance.⁹

Wilson saw no tension between his belief that the Constitution contemplated only a Whig Executive and his conception of the President as Prime Minister because he was quite dismissive of the relevance of constitutional theory;¹⁰ his concern was with the realities of governmental power. Among modern students of the presidency, Wilson's pragmatic orientation has flourished. Thus, in his influential book Richard Neustadt insisted that "*the probabilities of [presidential] power do not derive from the literary theory of the Constitution*";¹¹ he argued that its real source stems from the President's power to persuade.¹²

7. *Id.* at 170. While Wilson's general scholarly ability has been subject to challenge, see Garry Wills, *The Presbyterian Nietzsche*, N.Y. of Rev. Books, Jan. 16, 1992, at 3-4, his account of the Presidency is defended in Theodore J. Lowi, *The Personal Presidency* 28 (1985). In 1891, Justice Samuel Miller described the executive department as "the most crippled, confined, and limited in its practical use . . . of the power really conferred on it," Samuel F. Miller, *The Executive Branch of Government*, in *Lectures on the Constitution of the United States* 157 (New York, Bank and Brothers 1891).

8. Woodrow Wilson, *Constitutional Government in the United States* 70 (1908) [hereinafter Wilson, *Constitutional Government*]. In his elegant and witty work, Professor Arthur Schlesinger takes note of the numerous proposals that, following Wilson, would make the American governmental system more like a parliamentary one, even though English and Canadian reformers are advocating changes that would make their governments more like ours. Arthur M. Schlesinger, Jr., *The Imperial Presidency* 464-73 (2d ed. 1989).

9. Wilson, *Constitutional Government*, *supra* note 8, at 59.

10. Wilson wrote that the Constitution "cannot be regarded as a mere legal document," but must be understood "as a vehicle for life." Wilson, *Constitutional Government*, *supra* note 8, at 192. Despite his assertion that the Constitution envisaged the Whig theory of the presidency, he insisted that "the constitution contains no theories." *Id.* at 60.

11. Richard E. Neustadt, *Presidential Power and the Modern Presidents* 37 (1990).

12. See *id.* at 10-11, 30-32. For a rare dissent among political scientists as to the importance of constitutional law, see Richard M. Pious, *The American Presidency* 17 (1979) ("[T]he fundamental and irreducible core of presidential power rests not on

Even for hard-nosed realists, however, the constitutional theory of the greatest political office on earth cannot simply be brushed aside. Time has only confirmed the wisdom of Judge Story's observation that "What is the best constitution for the executive department, and what are the powers, with which it should be entrusted, are problems among the most important, and probably the most difficult to be satisfactorily solved, . . . in the theory of free governments."¹³

The Constitution seemingly contemplates only a "law enforcement" Executive; that is, the President simply "executes" the will of Congress. Professor Mansfield characterizes this as the "dictionary" conception of executive power.¹⁴ This conception recognizes little independent presidential authority, at least when presidential authority would directly interfere with pre-existing private rights. As Justice Scalia recently observed:

The Executive . . . , in addition to "tak[ing] Care that the Laws be faithfully executed," Art. II, § 3, has no power to bind private conduct in areas not specifically committed to his control by Constitution or statute; such a perception of "[t]he Executive power" may be familiar to other legal systems, but is alien to our own.¹⁵

In *Currin v. Wallace*, the government's brief put this theory of the executive power well: "[T]he Executive was excluded from legislative functions beyond those considered necessary in filling in the details of legislation and in determining its applicability."¹⁶ *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*¹⁷ provides the classic illustration of this conception of presidential authority. There, the Supreme Court invali-

influence, persuasion, public opinion, elections, or party, but rather on the successful assertion of constitutional authority to resolve crises and significant domestic issues." More recently, Terry Eastland made a similar claim, see Terry Eastland, *Energy in the Executive* 9-12 (1992), but his focus was in reality only on political leadership by the President during the Reagan and Bush administrations.

13. Joseph Story, *Commentaries on the Constitution of the United States* 515 (Carolina Academic Press 1987) (1833) (abridged by the author) [hereinafter *Story, Commentaries*]. This version is an abridgement of Judge Story's earlier three-volume work, and should not be confused with a work intended for popular consumption, Joseph Story, *A Familiar Exposition of the Constitution of the United States* (Regnery Gateway 1986) (1840).

14. Harvey C. Mansfield, *Taming the Prince* 2-4 (1989). Mansfield's work is a comprehensive examination of ideas about executive power from the perspective of political theory. For a briefer treatment of the same material, see Harvey C. Mansfield, *The Modern Doctrine of Executive Power*, 17 *Presidential Stud. Q.* 237 (1987).

15. *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439, 2450 (1991) (Scalia, J., concurring).

16. Brief for the United States at 47, *Currin v. Wallace*, 306 U.S. 1 (1939) (No. 275) [hereinafter *Currin v. Wallace Brief*]. But see William Howard Taft, *Our Chief Magistrate and His Powers*, 78-79 (1916) ("Statutory construction is practically one of the greatest of executive powers," particularly in cases that do not "affect private right[s], . . . [which are] likely to come before the courts.").

17. 343 U.S. 579 (1952).

dated President Truman's attempt to seize the nation's steel mills in the face of a threatened strike that Mr. Truman feared would jeopardize the national defense and military operations in the Korean conflict.¹⁸ The Court said that "[i]n the framework of our constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker."¹⁹ While the Court did not see the issue before it as involving in any significant way presidential authority in foreign affairs,²⁰ its premise is fully applicable to presidential conduct in foreign as well as domestic affairs: no independent, free-standing presidential law-making authority exists insofar as the rights of American citizens are concerned.²¹

Well before *Steel Seizure*, however, the reality behind the constitutional theory of the law enforcement Executive had been transformed. Alexander Hamilton wrote that "[t]he essence of the legislative authority is to enact laws, or in other words, to prescribe rules for the regulation of the society."²² In theory, this congressional authority was nondelegable,²³

18. President Truman ordered the Secretary of Commerce to "seize" the mills and keep them running. See *id.* at 582-83. See generally Maeva Marcus, *Truman and the Steel Seizure Case* (1977). Truman decried the selfishness of the companies in refusing to offer reasonable wage increases to the unions. See David McCullough, *Truman* 896-903 (1992). The steel companies in turn challenged the seizure. See 343 U.S. at 582-83. The "opinion of the Court" sustained the challenge, on the ground that no statute authorized the conduct and that the President had no independent constitutional authority to so act. See *id.* at 585-88 (plurality opinion). Several concurring opinions concluded that the President's conduct was contrary to existing legislation. See *id.* at 598-602 (Frankfurter, J., concurring); *id.* at 631 (Douglas, J., concurring); *id.* at 639 (Jackson, J., concurring); *id.* at 659 (Burton, J., concurring); *id.* at 662-66 (Clark, J., concurring). Three justices dissented in an elaborate opinion by Chief Justice Vinson. See *id.* at 667-710 (Vinson, C.J., dissenting).

19. *Id.* at 587. "And the constitution is neither silent nor equivocal about who shall make laws which the President is to execute." *Id.*

20. See Schlesinger, *supra* note 8, at 144; Paul G. Kauper, *The Steel Seizure Case: Congress, the President and the Supreme Court*, 51 Mich. L. Rev. 141, 175 n.99, 182 (1952).

21. My earlier views need at least some revision on this point. See Henry P. Monaghan, *Presidential War-Making*, 50 B.U. L. Rev. 19, 31-32 (1970 Special Issue) ("Like federalism, the doctrine of separation of powers should, at least in the area of foreign affairs, be viewed as essentially a political, not a legal construct."). Harold Koh, relying on *Steel Seizure*, goes perhaps further than my claim in the text and argues that 'normal' separation-of-powers principles were intended to be applicable in the foreign affairs context. See Harold H. Koh, *The National Security Constitution: Sharing Power after the Iran-Contra Affair* 105-13 (1990).

22. *The Federalist* No. 75, at 504 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (emphasis added); accord Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 136 (1810) (using virtually identical language to describe the nature of legislation).

23. The Court's efforts in such cases as *The Brig Aurora*, 11 U.S. (7 Cranch) 382 (1813), and *Field v. Clark*, 143 U.S. 649 (1892), to stay within the maxim are reviewed in Louis Fisher, *Delegating Power to the President*, 19 Emory J. Pub. L. 251, 252, 255-56 (1970). Interestingly, early students of public administration insisted that the nondelegation principle applied only to delegations to the President and not to administrative agencies, Nathan D. Grundstein, *Presidential Power, Administration and*

but—and the “but” is pretty nearly everything—the nondelegation barrier, never very sturdy, has collapsed. Only the fiction remains.²⁴ The reality is that frequently executive officials shape and reshape the relevant legal rules.²⁵ Congress itself is no longer required to “prescribe [the] rules for the regulation of society;”²⁶ it can, instead, transfer much of that task to the executive. As *Steel Seizure* illustrates, what remains of the old constitutional jurisprudence is the quite different requirement that, from the President on down, all executive officials must exhibit some statutory warrant at least when their conduct invades the private rights of American citizens.²⁷

Current practice, however, seems both to obscure the underlying constitutional theory and to demonstrate the need for an adequate legal conception of presidential authority. The concept of the law-enforcement Executive cannot give a full account of the nature of the Presidency. Quite plainly, for example, this model cannot account for the policy-setting authority of the President in foreign affairs. However, there have been troublesome claims of presidential authority. The relevant examples go well beyond the highly controversial presidential efforts to use military force as a discretionary instrument of presidential foreign policy.²⁸ Theodore Draper argues persuasively

Administrative Law, 18 Geo. Wash. L. Rev. 285, 304–05 (1950), and the government advanced such an argument in *Curran v. Wallace* Brief, *supra* note 16, at 47.

24. U.S. Const. art. I, § 1 means “that Congress may not constitutionally delegate its legislative power to another Branch of government.” *Touby v. United States*, 111 S. Ct. 1752, 1755 (1991). Fig leaf declarations that no “forbidden” delegation occurs if Congress supplies an “intelligible principle” to guide the executive and the courts, *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (citing *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)), cannot conceal the transformative and (to my mind irreversible) change that has occurred in public administration. See generally Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 Colum. L. Rev. 369, 380–85 (1989) (characterizing statutes that authorize administrative officials to make rules as “intransitive”).

25. See *infra* text accompanying notes 265–287. For a recent example of a regulatory agency shaping and then reshaping rules under an open-ended grant of legislative authority, see *Mobil Oil Exploration v. United Distribution Co.*, 111 S. Ct. 615 (1991) (finding that regulatory agency’s authority to set price ceiling for gas was not restricted by formula).

26. *The Federalist* No. 75, at 504 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

27. This requirement was, of course, inherent in the premise that Congress must prescribe the rules governing society, and is today so deeply ingrained in our constitutional tradition that it is seldom articulated. For example, in *Rust v. Sullivan*, 111 S. Ct. 1759 (1991) (abortion counseling case in which the Court rejected First and Fifth Amendment challenges to executive regulations restricting abortion referrals by recipients of federal family planning funds), every Justice assumed that the executive regulations required adequate statutory underpinning. See *id.* at 1767–69 (Rehnquist, C.J., opinion of Court); *id.* at 1778 (Blackmun, J., dissenting); *id.* at 1787–88 (Stevens, J., dissenting); *id.* at 1789 (O’Connor, J., dissenting).

28. The legal controversy surrounding the Middle East war is a recent example of the generally most noticed constitutional issue: presidential “war-making.” President

that much of the wrongdoing in the Iran-Contra episode flowed directly from the constitutionally impermissible conceptions of presidential power held by administration officials such as Admiral John Poindexter and Colonel Oliver North.²⁹ To dismiss such views ad hominem is unacceptable; very considerable disagreement exists concerning many legal aspects of the Presidency.³⁰

Bush sought Congressional authorization for United States military action in Iraq in 1991, see Authorization for Use of Military Force Against Iraq Resolution, Pub. L. No. 102-1, 105 Stat. 3 (1991), and, in finally securing it, averted a serious constitutional controversy. Many constitutional law specialists had insisted on the need for at least this much if the original constitutional understanding was to be respected. See Memorandum Amicus Curiae of Law Professors at 3, *Dellums v. Bush*, 752 F. Supp. 1141 (D.D.C. 1990) (No. 90-2866); see also Michael J. Glennon, *The Gulf War and the Constitution*, Foreign Aff., Spring 1991, at 84, 87-89 (arguing that "Framers' intent was clear and abundant" to vest war-making power in Congress). But see Eastland, *supra* note 12, at 124-31 (describing the President's action before the war as "a rebuke to the unconstitutional assumption" that congressional authorization was necessary). In *Dellums*, the district court dismissed a challenge to presidential authority on, *inter alia*, ripeness grounds, see 752 F. Supp. at 1149, but it also opined that Congressional authorization would be needed. See *id.* at 1145. The administration nonetheless proclaimed victory: "[t]he prerogatives of the president have been undisturbed." Stephanie Saul, *Judge Backs Bush on War Consent*, *Newsday*, Dec. 14, 1990, *News*, at 7 (statement of Assistant Attorney General Gerson). Then-Deputy Attorney General Barr advised President Bush that the President had the power to act, but that this was a constitutional gray area and that the President should thus seek congressional authorization. See Bob Woodward, *The Commanders* 356-57 (1991). Defense Secretary Cheney opposed seeking authorization, expressing distrust for Congress in the war context. See *id.* at 355. Mr. Bush himself seems to have believed that he had authority to act, see Interview with Middle Eastern Journalists, 27 *Weekly Comp. Pres. Doc.* 275, 284 (Mar. 8, 1991), and he suggested, erroneously in my judgment, that the U.N. resolutions alone provided a sufficient source of presidential legal authority. See Theodore Draper, *Presidential Wars*, *N.Y. Rev. of Books*, Sept. 26, 1991, at 64.

At the risk of being a textualist (that is, reading the document itself), it is worth noting that the President is not my (or your, or Congress') Commander-in-Chief. He is the Commander-in-Chief only of the armed forces and of the militia in active service. See U.S. Const. art. II, § 2, cl. 1. In any event, when the President acts as a warrior-king, nothing much generally happens, because, as Professor Ely tirelessly points out, Congress hides from its own constitutional responsibilities. See John H. Ely, *Kuwait, the Constitution, and the Courts: Two Cheers for Judge Greene*, 8 *Const. Commentary* 1, 4 (1991); see also John H. Ely, *Suppose Congress Wanted a War Powers Act That Worked*, 88 *Colum. L. Rev.* 1379 (1988) (proposing amendments to the War Powers Resolution of 1973 to make it effective).

29. See Theodore Draper, *A Very Thin Line* 219-20, 580-92 (1991).

30. Indeed, at the end of the 1991 term, the Supreme Court emphasized the "unique constitutional position of the president" and on that basis alone concluded that presidential conduct does not constitute "agency action" subject to review under the Administrative Procedure Act. *Franklin v. Massachusetts*, 112 S. Ct. 2767, 2775 (1992) (plurality opinion). A plurality went on to state that it was an open question whether the President "might be subject to a judicial injunction requiring the performance of a purely 'ministerial' duty . . . but [that] in general 'this court has no jurisdiction . . . to enjoin the president in the performance of his official duties.'" *Id.* at 2776-77 (plurality opinion) (quoting from *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 501 (1866)). The Court's reliance on *Johnson* was misplaced. Jurisdiction was declined, in a brief and

Former President Nixon's well-known interview with David Frost presents, I believe, a particularly striking illustration of the need for an adequate theory of the scope of the President's constitutional powers. An accomplished lawyer who had appeared before the Supreme Court, Mr. Nixon insisted that the Constitution itself invested the President with a wide ranging "national security" power.³¹ In its name, he defended a White House intelligence plan that included *domestic* wiretappings, burglaries, and so forth.³² Referring to the President as the "sovereign," Mr. Nixon stated that "by definition" presidential approval of a domestic national security plan meant that the ensuing conduct was not illegal:

FROST: So what, in a sense, you're saying is that there are certain situations, . . . where the President can decide that it's in the best interests of the nation or something, and do something illegal.

NIXON: Well, when the President does it, that means that it is not illegal.

FROST: By definition.

NIXON: Exactly. Exactly. If the President, for example, approves something because of the national security, or in this case because of a threat to internal peace and order of significant magnitude, then the President's decision in that instance is one that enables those who carry it out, to carry it out without violating a law. Otherwise they're in an impossible position.³³

Here, too, Mr. Nixon's challenge cannot be brushed aside on rhetorical

opaque opinion, not because the President was a defendant but because the issues raised by the litigation were thought to be essentially political in nature. See *Johnson*, 71 U.S. (4 Wall.) at 499. For criticism of *Johnson*, see David P. Currie, *The Constitution in the Supreme Court: The First Hundred Years, 1789-1888*, at 299-301 (1985). Justice Scalia's concurring opinion went even further, flatly denying that the Court could "direct the President to take an official act," save perhaps of a ministerial nature. *Franklin*, 112 S. Ct. at 2788 (Scalia, J., concurring).

31. See Excerpts from Interview with Nixon About Domestic Effects of Indochina War, N.Y. Times, May 20, 1977, at A16.

32. See *id.*

33. *Id.* The sweep of Mr. Nixon's claim for presidential prerogative perhaps becomes more apparent when joined with his strong claim to an executive right to secrecy. He remarked that C.I.A. and F.B.I. covert operations had been "disclosed on a very, very limited basis to trusted members of Congress. I don't know whether it can be done today or not." *Id.* Mr. Nixon emphasized that the existence of such presidential power was not dangerous because adequate political controls exist, such as elections and the need for congressional appropriations. See *id.* Mr. Nixon did not distinguish between limits imposed on the President because of a lack of statutory authority and limits imposed by the Bill of Rights. Cf. *United States v. United States Dist. Ct.*, 407 U.S. 297, 321 (1972) (constitutional power of President justifying warrantless domestic surveillance to protect national security held to be limited by Fourth Amendment); *Halperin v. Kissinger*, 606 F.2d 1192, 1201-02 (D.C. Cir. 1979) (power to authorize domestic wiretap limited by First and Fourth Amendments to reasonableness standard

grounds, for example, by condescendingly explaining that in American constitutional theory the president is not "sovereign." The failure of any such move is apparent once one examines Nixon's subsequent but little-noticed restatement of his position. The President is not above the law, Mr. Nixon said; rather "[t]he question is what the law is and how it is to be applied with respect to the President in fulfilling the duties of his office."³⁴

That twentieth-century Presidents and their advisers should hold expansive and perhaps ill-formed views of "inherent" presidential power is not surprising. Most Americans expect modern Presidents to provide solutions for every significant political, military, social, and economic problem.³⁵ In the face of such demands, various organizational and legal categories possess little meaning for the President. As Richard Neustadt describes it:

In the American political system the President sits in a unique seat and works within a unique frame of reference. The things he personally has to do are no respecters of the lines between "civil" and "military," or "foreign" and "domestic," or "legislative" and "executive," or "administrative" and "political." At his desk—and there alone—distinctions of these sorts lose their last shred of meaning. The expectations centered in his person converge upon no other individual; . . . His place and frame of reference are unique.³⁶

Modern Presidents, moreover, frequently must operate in a high-pressure, "fast track" context. In Theodore Lowi's characterization:

The Fast Track is the track of secrecy, unilateral action, energy, commitment, decisiveness, where time is always of the essence. The Slow Track is a Separation of Powers Track, per-

and, in cases not involving national security, by Title III of Crime Control Act), *aff'd in part*, appeal dismissed in part, 452 U.S. 713 (1981).

34. Boston Globe, June 5, 1977, at 1.

35. See Neustadt, *supra* note 11, at 184–85. To be sure, identification of the President with American society at large is a long-standing phenomenon, see Schlesinger, *supra* note 8, at 429–30 (discussing Taft's view of the presidency), and modern communication has only increased that identification. But the Whig theory of the presidency—which stressed congressional dominance in the formulation of policy—held up throughout much of the nineteenth century. Now, as the recent election shows, the President is blamed for much of what is "wrong" in society at any moment. Professor Lowi, for example, argues that presidential "failure" is inevitable because the President has too many constituencies to satisfy, and thus constituency alienation is inevitable. See Lowi, *supra* note 7, at 11. For recent empirical accounts of the nature and interaction between Congress and the President in the legislative process marked by "divided government," see Mark A. Peterson, *Legislating Together: The White House and Capitol Hill from Eisenhower to Reagan* (1990); David R. Mayhew, *Divided We Govern: Party Control, Lawmaking, and Investigations, 1946–1990* (1991).

36. Neustadt, *supra* note 11, at 154. "Presidents now routinely try to shape the nation's political agenda . . . Those outside the White House—Congress, the bureaucracy, the news media and the public—have responded to presidential direction by expecting more of it." John P. Burke, *The Institutional Presidency* 34 (1992).

mitted by a longer time horizon, and desirable wherever time permits, yet highly unpredictable, uncontrollable, public, full of leaky holes, and dominated not merely by the legislature but by a large and pluralistic process fueled by greed, otherwise called the pursuit of happiness. Unfortunately, the distinction of the two tracks, while logical, is breaking down because conservative drivers on the Fast Track are like Pac-Man characters eating up the pedestrians of the Slow Track.³⁷

In the environment in which Presidents must operate, it is not surprising that "law" of any kind (the Constitution included) can easily become merely one more factor to be considered, or even an obstacle to be overcome.³⁸

An article directed towards contributing to an adequate "literary" theory of presidential power must be limited to manageable proportions. My primary focus is the extent of presidential authority to invade the "private rights" of American citizens *absent legislative authority*—that is, presidential authority independently to alter negatively what in common legal understanding would be viewed as a prior liberty or property baseline.³⁹ I do not, of course, refer to presidential invasions of consti-

37. Theodore J. Lowi, Afterword: Presidential Power and the Ideological Struggle Over Its Interpretation, in *The Constitution and the American Presidency* 227, 238–39 (Martin L. Fausold & Alan Shank eds., 1991) [hereinafter *American Presidency*]. Lowi expands on a metaphor introduced earlier in the foreign affairs context by Louis Koenig.

38. For example, the congressional committees investigating the Iran–Contra Affair concluded that executive officials "viewed the law not as setting boundaries for their actions, but raising impediments to their goals. When the goals and the law collided, the law gave way." Report of the Congressional Committees Investigating the Iran–Contra Affair, H.R. Rep. No. 433, S. Rep. No. 216, 100th Cong., 1st Sess. 18 (1987). Another example is the recent claim that high administration officials impermissibly allowed U.S. credits to be used to aid Iraq. See, e.g., Notes and Comments, *The New Yorker*, Aug. 17, 1992, at 21–22; Elaine Sciolino, U.S. Was Aware the Iraqis Were Buying Technology, *N.Y. Times*, July 22, 1992, at A10.

39. "Citizens" is intended, somewhat awkwardly, to include corporations. What I seek to avoid here is an inquiry into "Whose Constitution," that is, who, other than conventional American litigants, can assert constitutional separation-of-power claims, as well as claims of statutory violation. See generally Gerald L. Neumann, *Whose Constitution?*, 100 *Yale L.J.* 909 (1991) (exploring personal and geographical scope of constitutional rights in both historical and contemporary terms). My thesis may have implications for "noncitizens," but I have not focused on them. Some light on this issue may come from *Haitian Ctrs. Council, Inc. v. McNary*, 969 F.2d 1350 (2d Cir. 1992), cert. granted, 61 U.S.L.W. 3215 (U.S. Oct. 6, 1992) (No. 92-344), involving a challenge to the President's executive order allowing interdiction of aliens on the high seas. In order to avoid another potential diversion, I also exclude from my focus presidential conduct that affects American citizens located in foreign countries. See, e.g., *Weinberger v. Rossi*, 456 U.S. 25 (1982) (holding that executive agreement providing for preferential treatment of Filipino citizens at U.S. military base did not violate U.S. statute prohibiting employment discrimination against U.S. citizens on military bases overseas); *Monroe Leigh & Jo Anne Swindler, Constitutional Restraints on Foreign Economic Sanctions, in Private Property and National Security* 31 (1991) (providing examples and arguing that "the obstacles to proving a 'takings' claim in the foreign affairs context are not entirely insurmountable"). Whether the separation-of-powers

tutionally protected interests, because Congress could confer no such authorization. But the President is not Congress, and so the question persists: to what extent can the President, acting on his or her own, invade the rights of American citizens in circumstances which Congress could—but did not—authorize. As used here, the term “private rights” is conventional in nature. The point of reference is to contemporary legal understanding. The term includes those liberties secured by the common law, as well as presidential imposition of conditions upon those receiving government contracts and benefits when, in the framework of the modern administrative state, the conditions would be perceived in common understanding to have altered a commonly understood baseline of liberty.⁴⁰

I argue that such a presidential “law-making” authority is virtually nonexistent, and in so doing I make two fundamental claims.⁴¹ First, the law-enforcement model of the Presidency is substantially accurate insofar as the President’s authority to invade the private rights of American citizens is concerned. *Steel Seizure* represents the bedrock principle of the constitutional order: except perhaps when acting pursuant to some “specific” constitutional power, the President has no inherent power to invade private rights; the President not only cannot act *contra legem*, he or she must point to affirmative legislative authorization when so acting.⁴² Whether, despite the foregoing, the President possesses

thesis described below needs modification in either of these contexts requires a separate inquiry.

40. *Rust v. Sullivan*, 111 S. Ct. 1759 (1991), is, of course, an excellent example of the latter situation. It is most frequently discussed in the literature under the rubric of unconstitutional conditions. Other examples of such conditions would include “downstream” restrictions on the internal management of government contractors, such as affirmative action requirements. See *infra* notes 278–280 and accompanying text. In invoking the label “private rights” to describe all these instances, I consciously reshape a familiar term. Historically, constitutional law has, for many purposes, distinguished between governmental interference with nongovernmentally created—i.e. “private”—rights, and governmental burdens imposed in connection with governmental largesse. See, e.g., Henry P. Monaghan, *Marbury and the Administrative State*, 83 Colum. L. Rev. 1, 14–30 (1983) (indicating contexts within which this distinction is made, including the meaning of due process, the right to trial by jury, and Article III). But in the specific context of the President’s independent regulatory power both categories can be grouped together as involving claims of private right.

41. My inquiry consciously proceeds from the perspective of original understanding supplemented by the Presidency’s subsequent line of growth in our nation’s experience. See *Missouri v. Holland*, 252 U.S. 416, 433 (1920) (“The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.”).

42. The one exception, as noted, is where the President acts pursuant to “specific” constitutional power. See *infra* notes 59–64 and accompanying text. Professors Eskridge & Frickey decry as silly any idea that the President lacks law-making authority apart from delegation; however, they do not tell us the extent of this power, nor do they cite any decision inconsistent with the thesis advanced in this Article. See William N. Eskridge, Jr. & Philip P. Frickey, *Cases and Materials on Legislation: Statutes and the Creation of Public Policy* 264 (1988).

some narrow residuum of lawful authority to act in a genuine national emergency is a troublesome question that has existed since the foundation of the Republic. While I argue no presidential authority to act *contra legem* exists, I otherwise do not attempt to resolve that issue. Second, the considerable debate on the issue of a presidential emergency power has obscured the existence of a narrower, inherent executive authority, namely, an executive "protective" power. I contend that the constitutional conception of a Chief Executive authorized to enforce the laws includes a general authority to protect and defend the personnel, property, and instrumentalities of the United States from harm. While the occasion for exercise of this presidential authority will often arise in emergencies, some relatively small, such as assigning a marshal to protect the life of a judge, the protective power is, strictly speaking, *not* a doctrine of emergency power. For example, acting without statutory authority, the Executive has standing to enforce the contract or property rights of the United States.

The reader is asked to be forgiving. No such endeavor (at least not mine) can claim to account satisfactorily for all the relevant data.⁴³ This Article is intended to be a working paper only, whose thesis represents a partial contribution towards a more comprehensive understanding of the legal nature of the American presidency.⁴⁴ Part I consists of an analysis of the sources traditionally cited concerning the nature of "The executive Power," including sources that both pre-date and antedate the Constitution, the notion of a "residuum" power in the executive, and the parameters of the presidential emergency power controversy. Part II addresses the modern dimensions of the "law enforcement" executive. Part III draws on constitutional case law to establish a presidential protective power and concludes with a sketch of the limits of this protective function.

43. I especially regret what because of inadvertence I fear to be inevitable: the failure to give adequate credit to those writers on whom I have drawn and who have contributed to this topic before I did, making the relevant points far more lucidly than I.

44. The best known work on this general topic is, of course, Edward Corwin, *The President: Office and Powers 1787-1984* (Randall W. Bland et al. eds., 5th ed. 1984). Elegantly written, full of information, and providing genuine insight, the book is nonetheless disappointingly lacking in systematic and close reasoning about the legal nature of the presidency. Superior from a lawyer's perspective is Louis Henkin, *Foreign Affairs and the Constitution* (1972). Abraham D. Sofaer's *War, Foreign Affairs and Constitutional Power: The Origins* (1976) is an admirable historical study of our constitutional beginnings. Other historical studies include Henry B. Cox, *War, Foreign Affairs and Constitutional Powers: 1829-1901* (1984), which provides a careful analysis of constitutional theory during the nineteenth century, and James G. Randall, *Constitutional Problems Under Lincoln* (1926). Interestingly, much of the best current writing on the legal nature of presidential power is by political scientists and historians. See Joseph M. Bessette & Jeffrey Tullis, *The Presidency in the Constitutional Order* (1981); *The Constitution and the American Presidency* (Martin L. Fausold & Alan Skank eds., 1991); *Inventing the American Presidency* (Thomas E. Cronin ed., 1989) [hereinafter *Inventing*].

1. SOURCES OF THE CONCEPT OF "THE EXECUTIVE POWER"

Here, as elsewhere, language matters. The terminology expressing claims of presidential authority all too frequently obscures clear analysis. The terminology must be unpacked, a process that requires not only examination of the language used but also of the historical context that has affected conceptions of presidential power.

A. Historical Antecedents and Textual Sources of Executive Authority

The rich tradition out of which the concept of "The executive Power" sprang is best explored through Locke's notion of executive power, which was in place nearly a full century before ratification of the American Constitution. This vantage point provides insight into the concepts of executive that the Framers understood and transformed.

1. *John Locke's Taxonomy of Executive Power.* — Eighteenth-century English conceptions of legislative authority did not include many of the substantive powers now held wholly or partially by Congress. Moreover, English conceptions did not include the notion of a Parliament actively shaping policy so much as that of a Parliament either assenting to or rejecting policy formulated by the Executive.⁴⁵ As St. George Tucker recognized, "the laws do in fact originate with the executive."⁴⁶ In allocating the powers of their new national government, the framers of the American Constitution clearly broke new ground; indeed, the American Constitution can be seen as a revolutionary document both in the powers it assigned to Congress and in the "active" role it contemplated for that body. In the process, the Constitution's terminology displaced that of Locke.

In 1690, John Locke described three kinds of powers possessed by the executive department,⁴⁷ powers, I should add, that were thought to be compatible with the Glorious Revolution's principle of parliamentary supremacy.⁴⁸ First, Locke mentioned executive power in what, for us, is its "law enforcement" sense: "Execution of the Laws."⁴⁹ Second, Locke described the federative power: "This therefore contains the Power of War and Peace, Leagues and Alliances, and all the Transactions, with all Persons and Communities without the commonwealth,

45. See John P. Reid, *The Concept of Representation in the Age of the American Revolution* 7, 28–30 (1989).

46. St. George Tucker, *Blackstone's Commentaries with Notes of Reference to the Constitution and Laws of the Federal Government of the United States and of the Commonwealth of Virginia* 324 (1970) [hereinafter *Tucker Appendix*].

47. See John Locke, *Second Treatise of Civil Government* §§ 144–148, 155–168, at 106–08, 113–25 (Gateway Editions 1955) (1690).

48. Corwin, however, argues that, "what Locke gives us in the final analysis is *not* legislative supremacy really, but—as his Whig commentators pointed out—'a balanced constitution.'" Corwin, *supra* note 44, at 8.

49. See Locke, *supra* note 47, § 144, at 106. Of course, the modern "law-enforcement" executive possesses large law-making powers conferred by statute.

and may be called *Federative*, if any one pleases. So the thing be understood, I am indifferent as to the name."⁵⁰ Third, and finally, Locke referred to "prerogative" power. This term is not now common in American legal discourse because, for the founding generation, it was invariably a term of opprobrium.⁵¹ While prerogative is often simply a synonym for the exercise of lawfully conferred discretion,⁵² Locke posited two other troublesome formulations. Prerogative, he said, is "nothing but the Power of doing public good without a Rule,"⁵³ that is, without statutory authority. Indeed, he went further: "This Power to act according to discretion, for the publick good, without the prescription of the Law, and sometimes even against it, is that which is called Prerogative."⁵⁴ Three-quarters of a century later, Blackstone endorsed similar conceptions of prerogative power, although apparently not including the authority to disregard legislation.⁵⁵

Behind the Lockean taxonomy stood important conceptions of the nature of what powers were inherent in the "Executive." With the exception of taxation, most of the great governmental powers were held by the Executive, including the legal right to make treaties, to decide on war and peace, to lay embargoes, to create offices, to raise armies and navies, to act in emergencies, and so on.⁵⁶ And, as noted, "laws" generally originated in the Executive. Even after the Glorious Revolution, the Executive remained the dominant figure in government, as Bagehot fully recognized. But even advocates of a strong American Chief Exec-

50. Id. § 146, at 107 (emphasis added). This seems to embrace most of the foreign affairs power.

51. "The first thing to notice is that Americans [in the founding era] only rarely used the word 'prerogative' in connection with the laws and then always, it appears, in a pejorative way." Robert Scigliano, *The President's "Prerogative Power," in* *Inventing*, supra note 44, at 248. This, of course, rested on a rejection of the substantive conception of executive authority prerogative avowed. Thus, the Virginia constitution stated that the governor "shall not, under any pretence, exercise any power or prerogative, by virtue of any law, statute or custom of England." Francis N. Thorpe, *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories and Colonies Now or Heretofore Forming the United States of America 38162-17* (1909). "'[P]rerogative' it is presumed was annihilated in America with kingly government," wrote St. George Tucker in his famous treatise. See St. George Tucker, 2 *Blackstone's Commentaries: With Notes and References to the Constitution and Laws of the Federal Government and of the Commonwealth of Virginia* 237 n.1 (1970).

52. As it is so used, American lawyers would find many illustrations for the concept. They would include such diverse instances as the President's authority to urge measures or to veto proposed legislation when, in his or her judgment, the public good so requires, and presidential exercises of statutorily delegated discretion.

53. Locke, supra note 47, § 166, at 122-23. Locke advanced the still-classic defense of the need for such a power: the delays inevitably inherent in the legislative process and the impossibility that any legislation could adequately take into account all future contingencies.

54. Id. § 160, at 119.

55. See 1 William Blackstone, *Commentaries* *243-44.

56. See, e.g., id. at 249-52.

utive distanced themselves from the Crown as an acceptable conception of executive authority.⁵⁷ This is reflected in the disappearance of Lockean terminology from American legal discourse.

2. *The Constitution and the "Law Enforcement" Executive.* — In the overwhelming majority of cases, presidential conduct is defended on the straightforward ground that the President has simply "executed" identifiable congressional commands.⁵⁸ This is the "law enforcement" President—a President who simply executes the authority (however open-ended) conferred by Congress.

When, however, no readily identifiable legislative warrant exists, and arguably the President is implementing presidential policy alone, a different constitutional vocabulary surfaces. The Vesting Clause,⁵⁹ the Take Care Clause,⁶⁰ the Presidential Oath to "preserve, protect and defend the constitution of the United States,"⁶¹ and the President's "inherent," "implied" or "aggregate" powers are all invoked in defense of the President's conduct.⁶²

With one exception, each of these terms is simply a different formulation of the fundamental claim that the President's conduct is valid even though no statutory authority exists. Like the term "The executive Power," terms such as "inherent" and "aggregate" presidential power derive their substantive content from some external reference points, express or implied. Accordingly, one may assign all such claims of inherent, implied, or aggregate presidential power to the Vesting Clause, that is, "The executive Power." Moreover, the same seems true of both the Take Care and Oath Clauses; at bottom, they are simply expressions of the constitutional nature of "The executive Power."⁶³

The term "implied powers" is not invariably amenable to such a reduction. To be sure, some such claims are. On analysis, however, other such claims rest on the notion of implied legislative authoriza-

57. In *The Federalist*, Hamilton repeatedly disclaims the Crown as a model for the American Presidency. See, e.g., *The Federalist* Nos. 67–77 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

58. See, e.g., *AFL-CIO v. Kahn*, 618 F.2d 784 (D.C. Cir.), cert. denied, 443 U.S. 915 (1979). Congressional authorization can generally be subdivided into instances in which Congress specifies the private duties that result when the President makes certain findings and those in which the President himself shapes the real scope of those duties. But in the late twentieth century that distinction lacks constitutional significance.

59. "The executive Power shall be vested in a President of the United States of America." U.S. Const. art. II, § 1.

60. "[H]e shall take Care that the Laws be faithfully executed." Id. § 3.

61. Id. § 1.

62. In *Steel Seizure*, Justice Jackson decried the "[l]oose and irresponsible use of [such] adjectives." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 646 (1952) (Jackson, J., concurring).

63. Cf. Westel Woodbury Willoughby, *An Introduction to the Study of the Government of Modern States* 254–55 (1919) (contending that the executive power simply established the political independence of the President and the Take Care clause has independent content).

tion, and thus invoke the "law enforcement" executive envisaged by the Whig theory. Some implied power claims, moreover, are based upon a "specific" presidential grant or duty, such as the grant of pardon power or the president's "duty" to receive foreign ambassadors. Since the Washington Presidency, the latter "duty" has been understood by presidents to imply a concomitant presidential power, namely, to decide the issue of recognition, *vel non*, of foreign countries.⁶⁴ As we shall see, implied powers in this sense are an important, albeit limited, source of an independent presidential law-making authority.

3. *Early American Constitutional History*. — We turn now from terminology to the substance behind the terminology. Whatever other uncertainties may exist about the founding generation's vision of the American presidency, no reasonable doubt existed on one point: the President possessed no independent law-making power. A good deal of the relevant evidence is negative in character, inferable simply from the complete absence of any claims.⁶⁵ The silence is, however, fully consistent with what *was* said. Jefferson's Proposed Constitution for Virginia,⁶⁶ drafted in 1783, contains perhaps the best statement of the limited nature of American conceptions of "executive power":

By executive powers, we mean no reference to those powers exercised under our former government by the crown as of its prerogative, nor that these shall be the standard of what may or may not be deemed the rightful powers of the Governor. We give them those powers only, which are necessary to execute the laws (and administer the government), *and which are not in their nature either legislative or judiciary*. The application of this idea must be left to reason.⁶⁷

64. This development was by no means inevitable; not only does the duty appear to be only ministerial, but as Judge Story recognized, the power has important ramifications for the nation. The Senate could have claimed at least to share such a power, because of its right to participate in the treaty making process. See Story, Commentaries, *supra* note 13, at 578. Compare The Federalist No. 69, at 468 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (describing the clause as "more a matter of dignity than of authority") with Restatement (Third) Foreign Relations Law of the United States § 204 (1987) [hereinafter Restatement Foreign Relations] (describing presidential prerogative in terms of recognition of foreign nation).

65. Like the silence of Sherlock Holmes' famous dog, this absence of affirmative claims is instructive.

"Is there any point to which you would wish to draw my attention?"

"To the curious incident of the dog in the night-time."

"The dog did nothing in the night-time."

"That was the curious incident."

Arthur Conan Doyle, *Silver Blaze*, in 1 The Complete Sherlock Holmes 335, 347 (1905).

66. See Thomas Jefferson, Proposed Constitution for Virginia, reprinted in 3 The Writings of Thomas Jefferson 320 (Paul L. Ford ed., 1894) [hereinafter Jefferson, Writings].

67. *Id.* at 155–56 (emphasis added). This document was referred to by Madison in The Federalist No. 48, at 335–36 (James Madison) (Jacob E. Cooke ed., 1961). The state practice prior to the adoption of the Constitution is consistent with Mr. Jefferson's

This is, of course, the "Whig" theory of executive power, one that is incompatible with the recognition of an independent executive regulatory power, or indeed with much of the modern presidency, because the modern Executive quite plainly executes laws that "are . . . in their nature . . . [both] legislative or judiciary."⁶⁸ Jefferson went on, moreover, to reject specific substantive attributes of the Crown's federative and prerogative powers:

We do however expressly deny him the prerogative powers of *erecting* courts, *offices*, boroughs, corporations, fairs, markets, ports, beacons, light-houses, and sea marks; of *laying embargoes*, of establishing precedence, of retaining within the State, or *re-calling to it any citizen thereof*, and of making denizens, except so far as he may be authorized from time to time by the legislature to exercise any of those powers."⁶⁹

Although Jefferson was concerned only with the powers of a state governor, the Constitutional Convention reflected similar views of the American Chief Executive.⁷⁰ The delegates acknowledged the need for both efficiency in public administration and restriction of legislative excesses, but their response was entirely institutional: a strong, legally and politically independent chief executive who could enforce national law.⁷¹

The Constitutional Convention focused on the various "specific" powers conferred on the President by Article II.⁷² On only one occasion did it seriously address the general nature of executive power, when it rejected proposals that might have inched beyond the "law en-

description of executive power in his "Draft". It shows a pattern of legally weak governors, except in New York and perhaps Massachusetts. See Charles C. Thach, Jr., *The Creation of the Presidency 1775-1789: A Study in Constitutional History* 25-54 (1923); see also Charles J. Cooper, et al., Symposium, *What the Constitution Means by Executive Power*, 43 U. Miami L. Rev. 165, 168-69 (1988) (Charles J. Cooper) [hereinafter Symposium]. Even in New York, however, no evidence exists that the governor had an independent ordinance power that could be employed when that official's political leadership and veto power failed to bring about the desired result.

68. See 3 Jefferson, Writings, supra note 66, at 326.

69. *Id.* (emphasis added).

70. That history has been ably canvassed far too many times to justify any extensive discussion here, most notably in Charles Thach's elegant study, *The Creation of the Presidency*. See Thach, supra note 67, at 76-139.

71. Thus the President was given a salary and duration in office that were independent of Congress. The sole "legislative" power assigned to the President under the Constitution is the qualified veto. Before he became Chief Justice, Taft wrote, "The character of the veto power is purely legislative. . . . It has been suggested by some that the veto power is executive. I do not quite see how." Taft, supra note 16, at 14. Taft went on to argue that the Constitution's use of the word "approve" confirmed the legislative role of the veto. See *id.* at 16. But see Wilson, quoted supra in text accompanying note 9.

72. The various ratifying conventions also seemed concerned with specific presidential powers. See Herbert J. Storing, *What the Anti-Federalists Were For* 49 (1981); see also *The Antifederalists* 87, 194, 299 (Cecelia M. Kenyon ed., 1966) (reproducing texts of editorials and a speech protesting powers granted to President).

forcement" Executive. Resolution 7 of the Virginia plan had provided for an executive who would possess the "general authority to execute the National laws [and] enjoy the Executive rights vested in Congress by the Confederation."⁷³ On June 1, 1787, Madison proposed to add "and to execute such Powers, not legislative nor judiciary in their nature, as may from time to time be delegated by the national legislature."⁷⁴ Advanced to allay concerns that "improper powers" could be delegated to the President, this proposal was nonetheless rejected, apparently because it was perceived to be unnecessary; under the Constitution, no "improper" powers could be delegated.⁷⁵

Not surprisingly, therefore, the most important datum—the Constitution itself—contains no hint of an independent presidential regulatory power. The great powers of the national government are vested in Congress. Some of the Crown's important powers—to create offices, to declare war—were transferred outright to Congress; other formerly important "executive" powers, such as making appointments and treaties, were shared with the Senate.⁷⁶ Forrest McDonald summarizes the matter quite well: "Article II vests 'the executive power' in the president, but only after Article I has given most of the traditional royal prerogatives, or at least a share in them, to one or both houses of Congress."⁷⁷

Federalist, the great canonical authority, is fully consistent with this view. Hamilton expressly disclaimed the Crown's powers as a model for the American presidency. While he emphasized that "[e]nergy in the executive is a leading character in the definition of good government,"⁷⁸ that energy largely consisted in authority to use the military,

73. 1 The Records of the Federal Convention of 1787, at 21 (Max Farrand ed., rev. ed. 1966) [hereinafter Farrand].

74. *Id.* at 63.

75. See *id.* at 67; Sidney M. Milkis & Michael Nelson, *The American Presidency: Origins and Development, 1776–1990*, at 50 (1990). On the same day, the Convention also rejected a proposal to invest the President with "the executive rights vested in Congress by the confederation." 1 Farrand, *supra* note 73, at 63. Later, the Convention passed over a proposal, pending a committee report, concerning the President's use of the military. See 2 Farrand, *supra* note 73, at 69–70.

76. One writer observes of the treaty power that "from the perspective of the framers, this arrangement probably represented the Senate sharing its powers with the President, rather than the converse." Jack S. Weiss, *The Approval of Arms Control Agreements as Congressional-Executive Agreements*, 38 UCLA L. Rev. 1533, 1540 (1991) (emphasis omitted). Justice Scalia's assertion that "[t]he Appointments Clause is, intentionally and self-evidently, a limitation on Congress" is a misleading oversimplification. *Freytag v. Commissioner*, 111 S. Ct. 2631, 2652 n.4 (Scalia, J., concurring).

77. Forrest McDonald, Foreword, in *American Presidency*, *supra* note 37, at ix. "So strong is the position of Congress that we might easily have had a complete government if the Framers had stopped at the end of Article I." Charles L. Black, Jr., *The Presidency and Congress*, 32 Wash. & Lee L. Rev. 841, 853 (1975).

78. The *Federalist* No. 70, at 471 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

when necessary, to enforce national law and for the common defense.⁷⁹ Similarly, none of the famous treatises by Tucker, Kent, Story, or Rawle even hint that the founding generation envisaged any independent presidential law-making power.⁸⁰

Governmental practice in the early decades of American government proceeded on this premise. Washington's conduct was particularly noteworthy. During Washington's first term, he did not "attempt to achieve by executive order any matter which the strictest interpretation of the Constitution could regard as within the legislative domain."⁸¹ During his administration, moreover, a singularly illuminating illustration of the absence of presidential law-making au-

79. See *id.* Nos. 72, 74 (Alexander Hamilton).

80. Tucker's discussion appears as an appendix to his edition of Blackstone. See Tucker Appendix, *supra* note 46. His work, the first, is also the most penetrating. Tucker so feared a powerful President that he argued against legislative delegations giving the President discretion. "[C]ongress have [sic], from time to time, with a liberal hand, conferred other[] [powers] still more extensive; many of them altogether discretionary, and not infrequently questionable, as to their constitutionality." *Id.* at 348-49; cf. Sofaer, *supra* note 44, at 74-77 (expansive delegations given early on in the foreign affairs context). Tucker's narrow conception of executive power is illuminated in his discussion of presidential proclamations: "[p]roclamations are then only binding, when they reinforce the observance of a duty, enjoined by law, but connected with some particular fact, which it may be the duty of the executive to make known." See Tucker Appendix, *supra* note 46, at 346-47. In a footnote, Tucker asserted that two former Presidents had exceeded their power when, in proclamations, they recommended fasting and prayer to the nation. See *id.*

Kent's entire discussion of American constitutional law is disappointingly superficial. For him, the Constitution envisaged only a dictionary executive narrowly conceived: "But when laws are duly made and promulgated, they only remain to be executed. No discretion is submitted to the executive officer. It is not for him to deliberate and decide upon the wisdom or expediency of the law." 1 James Kent, *Commentaries on American Law* 253 (1826).

Rawle, referring to the Take Care Clause, wrote:

The simplicity of the language accords with the general character of the instrument. It declares what is [the President's] duty, and it gives him no power beyond it. The Constitution, treaties, and acts of congress, are declared to be the supreme law of the land. He is bound to enforce them; if he attempts to carry his power further, he violates the Constitution.

William Rawle, *A View of the Constitution of the United States of America* 148-49 (2d ed. 1829).

While Justice Story rejected the idea of a "feeble executive," he too gives no hint of a presidential regulatory power. See Story, *Commentaries*, *supra* note 13, at 516-18. Speaking of the Take Care Clause, he writes that the carrying out, by the President, of "the duty imposed upon him to take care, that the laws be faithfully executed . . . [is] [t]he great object of the executive department" *Id.* at 576. Beyond that he has nothing to say.

81. James T. Flexner, *George Washington and the New Nation* 221 (1st ed. 1969); accord Forrest McDonald, *The Presidency of George Washington* 27-28 (1974) (describing President Washington's restlessness while waiting for Congress to take some action for him to enforce). The most recent study is Glenn Phelps, *George Washington and American Constitutionalism* (forthcoming) (manuscript on file with Columbia Law Review).

thority occurred. In 1794, and for a decade-and-a-half thereafter, Congress repeatedly authorized the President to impose or lift trade embargoes upon certain conditions.⁸² While some in Congress claimed that the President's role offended nondelegation principles,⁸³ no one, the President included, suggested that the President independently possessed the Crown's prerogative to impose embargoes.⁸⁴ Thus, whatever its scope, presidential power, even in the context of foreign relations, was not understood to include the power to prescribe rules for the regulation of the rights of American citizens.⁸⁵

For a number of reasons, little sustained discussion of the legal nature of presidential power occurred until the presidency of Andrew Jackson.⁸⁶ In 1833, as part of his bitter "war" on the Bank of the United States, Jackson asserted the power to remove Secretary of the Treasury Duane to enforce his decision that government-owned specie be withdrawn from the Bank of the United States.⁸⁷ The matter is best judged a stand-off: Jackson succeeded in his efforts, but in the Senate debate, Senators Webster, Clay, and Calhoun denounced his conduct, in the process strongly attacking the idea of any inherent executive power.⁸⁸ Not until the war administration of Lincoln was any serious

82. See Resolution of Mar. 26, 1794, S. Con. Res. 2, 3d Cong., 1st Sess., 1 Stat. 400; Act of June 4, 1794, ch. 41, 1 Stat. 372. See generally Sofaer, *supra* note 44, at 132, 175-76 (discussing amount of presidential discretion during early administrations). At the Constitutional Convention, one delegate recognized that imposition of an embargo could constitute an act of war. See 2 Farrand, *supra* note 73, at 362.

83. See Fisher, *supra* note 23, at 253-56. These concerns were tersely brushed aside by the Supreme Court in *The Brig Aurora v. United States*, 11 U.S. (7 Cranch) 382, 386-88 (1813), the first of the delegation cases.

84. As noted, Jefferson had already denied that the executive Power included any such power; indeed, The Declaration of Independence listed that power as one of the grievances justifying independence, and the Constitution assigned to Congress power over foreign commerce. See *supra* text accompanying notes 67-70.

85. See Henkin, *supra* note 44, at 253 ("[T]he President's plenary power in foreign affairs, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution."); *id.* at 99 ("The Courts will be particularly reluctant to uphold unilateral executive acts that impinge on individual rights").

86. Some of those reasons were a long period of weak domestic national government and the increasing dominance of the Whig theory of the American Presidency. De Tocqueville saw the dormant nature of the national government clearly. See 1 Alexis De Tocqueville, *Democracy in America* 125-32 (Phillips Bradley ed., Random House 1954) (1835); see also Robert H. Wiebe, *The Opening of American Society* 200-08 (1984) (describing dormant nature of national government). The "Whig theory" of the Presidency—the law-enforcement Executive combined with congressional political dominance—took early hold.

87. For discussions of the incident, see 3 Robert V. Remini, *Andrew Jackson and the Course of American Democracy, 1833-1845*, 84-107 (1984); Merrill D. Petersen, *The Great Triumvirate* 236-52 (1987).

88. Their arguments are ably summarized by Justice McReynolds in his dissenting opinion in *Myers v. United States*, 272 U.S. 52, 178-81 (1926) (McReynolds, J., dissenting).

challenge made to the Whig conception of the American presidency.⁸⁹

The absence of any significant discussion of a presidential law-making authority in the Constitutional Convention, *Federalist*, the early treatises, and early governmental practice confirms that:

[T]he original design [of the Constitution] was intended to give Congress the legislative authority that was, in fact, the power to determine national policy. The president had the capacity to stimulate the exercise of this legislative power by his information and his recommendations and to constrain or even negate it by his veto but not to assume it by virtue of any inherent or implied executive or legislative power.⁹⁰

Given the foregoing, many modern commentators reject the claim that "The executive Power" has any independent substantive content.⁹¹ For them, the power confirms the idea of a unitary Executive and, perhaps, constitutes a short-hand phrase for the powers subsequently conferred by Article II. Otherwise, they contend, Article II could have been limited to a single sentence, the Vesting Clause.⁹²

B. *The Residuum Argument*

The view that the "executive Power" lacks independent substantive content has not gone unchallenged. Implicitly taking the Crown's powers (or Locke's description) as a bench-mark, some commentators have insisted that, in 1789, "The executive Power" had a substantive content.⁹³ Accordingly, unless the Constitution reallocates formerly "executive" powers to Congress generally, or to the Senate particularly, whatever power was held by the "Executive" in 1789 must have been understood to inhere in the President.⁹⁴

89. For a discussion of Lincoln, see *infra* notes 131-136 and accompanying text.

90. Stephen J. Wayne, *The Legislative Presidency* 7 (1978).

91. See Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 Harv. L. Rev. 1155, 1169 nn.75-76, 1198 n.222 (1992) (collecting citations).

92. See A. Michael Froomkin, Note, *In Defense of Administrative Agency Autonomy*, 96 Yale L.J. 787, 799-800 (1987).

93. Speaking of the English Constitution, Herman Finer observes that the executive is the "residuary legatee in government after other claimants like Parliament and the law courts have taken their share." Herman Finer, *Theory and Practice of Modern Government*, in 5 *Handbook of Political Science* 173 (1975).

94. See, e.g., Calabresi & Rhodes, *supra* note 91, at 1165-68; see also *id.* at 1166 nn. 54-57 (citing sources) Symposium, *supra* note 67, at 177 ("[T]he founding generation understood executive power as conferring a broad authority beyond the mere execution of the laws.") (Charles J. Cooper). Early Congresses met infrequently, poor communications and travel conditions prevented contact between the seat of central government and the periphery, and the god-like Washington was certain to be the first President. These factors point to some substantive conception of executive power. The confidence of the Convention's delegates in Washington's character proved to be fully warranted. See Gerhard Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 Wm. & Mary L. Rev. 211, 260-61 (1989). Moreover, even though most state governors were legally weak, the governor of New York, the

Writing as "Pacificus," Hamilton first articulated the public foundation for this "residuum" argument in June 1793 in his well-known defense of Washington's Proclamation of Neutrality in the conflict between Great Britain and France.⁹⁵ Emphasizing the language differences between the Constitution's grants of "all legislative Powers hereinafter granted" and "The executive Power," Hamilton insisted that the Constitution embodied an independent, substantive conception of executive power. Article II's subsequent "enumerations" of specific executive powers were, he insisted, only "intended by way of greater caution, to specify and regulate the principal articles implied in the definition of Executive Power."⁹⁶

In *Myers v. United States*,⁹⁷ Chief Justice Taft appeared to endorse the Hamiltonian conception: "The executive power was given in general terms, strengthened by specific terms where emphasis was regarded as appropriate, and was limited by direct expressions where limitation was needed."⁹⁸ Taft attacked the notion that the subsequent grants of power to the Executive were unnecessary if the Vesting Clause possessed an independent substantive content. He insisted that much of Article II, such as the treaty and appointments powers, limited

closest model for the presidency, was invested with the "supreme executive power and authority." Thach, *supra* note 67, at 35 (quoting N.Y. Const. of 1777, art. 17).

95. See Pacificus No. 1 (June 29, 1793), reprinted in 15 *The Papers of Alexander Hamilton*, June 1793–January 1794, at 33–43 (Harold C. Syrett et al. eds., 1969) [hereinafter *Hamilton*]. Hamilton had long held expansive conceptions of executive authority. See Pious, *supra* note 12, at 36–37.

96. 15 *Hamilton*, *supra* note 95, at 39. Hamilton also noted: "The general doctrine then of our constitution is, that the EXECUTIVE POWER of the Nation is vested in the President; subject only to the *exceptions* and *qualifications* which are expressed in the instrument." *Id.* Madison, writing in response as "Helvidius," made the classic statement of the "law enforcement" executive narrowly conceived: "[t]he natural province of the executive magistrate is to execute laws, as that of the magistrate is to make laws. All his acts, therefore, properly executive, must presuppose the existence of laws to be executed." James Madison, *Letters of Helvidius* No. 1 (Aug.–Sept. 1793), reprinted in 6 *The Writings of James Madison* 138–51 (Gaillard Hunt ed., 1906) [hereinafter *Madison, Writings*]. For Madison, the President's power over foreign affairs was "instrumental only," embracing only "matters of fact." *Id.* Madison had earlier recognized a doctrine of implied powers in the national government. See Fisher, *supra* note 23, at 9. But the existence of those powers does not establish that they exist other than in Congress. Cf. *United States v. Hudson*, 11 U.S. (7 Cranch) 31, 33–34 (1812) (existence of implied powers in national government does not mean that they are in the courts); Corwin, *supra* note 44, at 180.

97. 272 U.S. 52 (1926) (Taft, C.J.).

98. *Id.* at 118. Justice McReynolds' powerful but now neglected dissent rejected Hamilton, and Taft to the extent that he embraced Hamilton. For McReynolds, it was "beyond the ordinary imagination to picture forty or fifty capable men, presided over by George Washington, vainly discussing, in the heat of a Philadelphia summer, whether express authority to require opinions in writing should be delegated to a President in whom they had already vested the illimitable executive power." *Id.* at 207 (McReynolds, J., dissenting).

powers that otherwise would have been plenary in the Executive.⁹⁹ Taft's endorsement was, however, limited, focusing only on presidential control over public administration, specifically on the President's power to remove subordinates he appointed.¹⁰⁰ For Taft, this control was an inherent aspect of executive power. While Taft wrote an elaborate opinion, in fact, he thought the issue so clear that in *Our Chief Magistrate And His Powers*,¹⁰¹ a set of lectures given at Columbia University several years before, he devoted only two unequivocating sentences to it.¹⁰² Later in that work, however, the former President elaborately criticized Theodore Roosevelt's expansive conceptions of presidential power, insisting that "[t]here is no undefined residuum of power which [the president] can exercise because it seems to him to be in the public interest."¹⁰³

Moreover, the "legislative history" of the difference in language between the legislative powers "herein granted" and "The executive Power" provides no basis for ascribing any importance to this difference. That discrepancy occurred late in the Convention, on September 12, 1787, as a result of a Report of the Committee on Style, which had narrowed Congress' legislative powers to those "herein granted," but left unchanged "The executive Power."¹⁰⁴ This change seemed designed only to reflect the limits of federalism on national regulatory power, not to ratify or to recognize substantive executive power.¹⁰⁵

Nonetheless, defenders of the "residuum" position must be awarded the palm. Rejection of a simple "law enforcement" model of the Presidency is inherent not only in my defense of a protective power, but also in the fact of the President's independent and wide-ranging policy-setting powers in the foreign affairs area. The real question, however, is the size of the palm. General arguments about the nature of executive power invariably yield to more specific analysis. Quite plainly, for example, any executive residuum can operate only on what remains after the enormous reallocation of former Crown powers to

99. *Id.* at 128-30, 164 (Taft, C.J.).

100. Outside that area, however, the Vesting Clause, standing alone, cannot be understood to limit congressional power over administration. See Louis Henkin, *Constitutionalism, Democracy, and Foreign Affairs* 29-32 (1990). Even in the foreign affairs context, "[n]one of these [early nineteenth century] presidents ever claimed that he possessed inherent constitutional powers as chief executive or commander-in-chief that lay beyond legislative control." Koh, *supra* note 21, at 80.

101. See Taft, *supra* note 16, at 56.

102. For Taft, the first Congress settled the point that "the President had the absolute power to remove [officials] without consulting the Senate. This was on the principle that the power of removal was incident to the Executive power and must be untrammelled." *Id.*; see also *id.* at 76 (reemphasizing President's power to remove officials as a means of carrying out executive responsibility).

103. *Id.* at 140.

104. See 2 Farrand, *supra* note 73, at 590, 597 (describing a Report of the Committee on Style).

105. See Sofaer, *supra* note 44, at 37.

Congress or to the Senate. Accordingly, "under no circumstances does the [residuum] argument allow any strong basis for claiming an implied grant of [executive] powers inconsistent with specific grants to other branches."¹⁰⁶ Nor did Hamilton contend otherwise. He advanced only a theory of concurrent power, and perhaps only in the foreign affairs context: "From the division of the Executive Power there results, in reference to it, a *concurrent* authority"¹⁰⁷ Hamilton recognized, however, that Congress had the final say.¹⁰⁸ During the founding generation, apparently "[n]o doubt was entertained about the ultimate authority of the Congress."¹⁰⁹ Even more to the point is Lincoln's presidency. Acting as Commander-in-Chief, Lincoln generally claimed no more than Hamilton's "*concurrent* authority"; he generally acknowledged that, if it so chose, Congress could completely prescribe the terms of Reconstruction. As the administration's principal constitutional theorist framed it: "'The power of Congress to pass laws on the subjects expressly placed in its charge by the terms of the constitution cannot be taken away from it, by reason of the fact that the President . . . also has powers, equally constitutional, to act upon the same subject-matters.'"¹¹⁰ Indeed, during Reconstruction the real disagreement was over whether the President, even when acting as Commander-in-Chief, had any independent regulatory power when Congress was silent.¹¹¹

106. *Id.* But see Symposium, *supra* note 67, at 200–04 (arguing that congressional legislation that "micromanages" foreign policy is unconstitutional invasion of executive prerogative) (Orrin Hatch).

107. Hamilton, *supra* note 95, at 42. In asserting the concurrent authority of the President, Hamilton fully anticipated Justice Jackson's well known "zone of twilight" in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) (*Steel Seizure*) ("When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain.").

108. Hamilton acknowledged that congressional power "includes the right of judg[ing] whether the Nation is under obligations to m[ake] war or not." Hamilton, *supra* note 95, at 40.

109. Casper, *supra* note 94, at 246; accord Sofaer, *supra* note 44, at 56 (discussing congressional supremacy even in the context of foreign affairs); cf. *Chambers v. NASCO, Inc.*, 111 S. Ct. 2123, 2134 (1991) (opinion of the Court) (recognizing that the claim of "inherent judicial power" was subject to ultimate congressional control); *id.* at 2141 (Scalia, J., dissenting) (same); *id.* at 2143 (Kennedy, J., dissenting) (same); Locke, *supra* note 47, at 150 ("[T]he king's authority being given him only by the law, he cannot empower any one to act against the law, or justify him by his commission in so doing.").

110. Michael L. Benedict, *The Constitution of the Lincoln Presidency and the Republican Era*, in *American Presidency*, *supra* note 37, at 45, 56 (quoting William Whiting, Lincoln's Solicitor of the War Department). The Supreme Court agreed. See the discussion of *Texas v. White*, *infra* note 259.

111. "[W]here congressmen divided was not over *Congress's* power to legislate on Reconstruction, but the *president's*. Despite the growing power of the president as a political force, legal theory held that, except for the veto power, his office was divorced

Laid bare, the limitations of an acceptable residuum argument must be stressed. Its principal use is in the area of foreign affairs, to free the President from the need for statutory authority for every action taken. But even here we shall see that it provides no basis for a claim that the President can disregard the will of Congress or invade the private rights of American citizens without statutory warrant.

C. *Presidential Power to Violate the Law*

The Supreme Court has steadfastly held that the President lacks authority to act *contra legem*, even in an emergency.¹¹² *Little v. Barreme*¹¹³ settled that fundamental point long ago. During the naval war with France at the end of the eighteenth century, an American warship, acting in accordance with presidential instructions, seized a ship contrary to the terms of an Act of Congress.¹¹⁴ Chief Justice Marshall said that while the seizure might have been lawful had Congress not spoken, Congress had "prescribed . . . the manner in which this law shall be carried into execution."¹¹⁵ Accordingly, the President's instructions could not "change the nature of the transaction, or legalize an act which without those instructions would have been a plain trespass."¹¹⁶

Presidents, however, have asserted the need, if not the right, to act *contra legem*, at least in an emergency. Jefferson wrote:

Sir, . . . The question you propose, whether circumstances do not sometimes occur, which make it a duty in officers of high trust, to assume authorities beyond the law, is easy of so-

from legislation." Michael L. Benedict, *A Compromise of Principle* 74 (1974); accord *infra* text accompanying notes 180-183.

112. In *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524 (1838), a case in which pension payments were being withheld, the Court went out of its way to state that Presidential "dispensing power . . . has no countenance for its support in any part of the constitution." *Id.* at 613; accord *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979) (interpretive agency regulations issued pursuant to executive order cannot permit agency disclosure of information protected by statute absent sufficient nexus between such regulations and some delegation of requisite legislative authority by Congress); *Train v. City of New York*, 420 U.S. 35, 47 (1975) (President cannot impound funds in contravention of an appropriations statute). For an illuminating discussion of *Kendall*, see Grundstein, *supra* note 23, at 309-21.

113. 6 U.S. (2 Cranch) 170 (1804); see also *United States v. Smith*, 27 F. Cas. 1192, 1230 (C.C.D.N.Y. 1806) (No. 16,342) (Patterson, Cir. J.) ("The president of the United States cannot control the statute, nor dispense with its execution, and still less can he authorize a person to do what the law forbids.").

114. See 6 U.S. (2 Cranch) at 176-77.

115. *Id.* at 177-78.

116. *Id.* at 179. Indeed, the instructions were insufficient even to confer a qualified immunity to a damage action. See *id.*; see also *Butz v. Economou*, 438 U.S. 478, 485-96 (1978) (re-affirming *Little v. Barreme* and rejecting absolute immunity for official actions that violate constitutional limits). The result in *Little v. Barreme* is entirely consistent with *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 168-73 (1803), which gave no hint that the President could have authorized the Secretary of State to violate the law.

lution in principle, but sometimes embarrassing in practice. A strict observance of the written laws is doubtless *one* of the high duties of a good citizen, but it is not *the highest*. The laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation.¹¹⁷

Jefferson appeared to embrace the premise of *Little v. Barreme*, invoking the "justice of his country," not that of the courts: "[T]he good officer is bound to draw [the line of discrimination between important and unimportant occasions] at his own peril, and throw himself on the justice of his country and the rectitude of his motives."¹¹⁸

Professor Wilmerding and others argue that a "political" defense of emergency presidential conduct, such as Jefferson's, comports with the Framers' general understanding: emergency conduct, either not authorized by statute or contrary to statute, is extra-constitutional in nature. While an emergency could not justify presidential conduct, the President and his subordinates could expect indemnification.¹¹⁹ Per-

117. Letter from Thomas Jefferson to John B. Colvin (Sept. 20, 1810) in 9 Jefferson, Writings, *supra* note 66, at 279 [hereinafter Jefferson, Colvin Letter]. Jefferson discussed unauthorized land purchases, use of unappropriated funds in anticipation of hostilities, and the Burr/Wilkinson affair. While Jefferson denied that this power existed with respect to "persons charged with petty duties, where consequences are trifling, and time allowed for a legal course," he thought that "those who accept of great charges, [must] risk themselves on great occasions, when the safety of the nation, or some of its very high interests are at stake." *Id.* at 281; see also Sofaer, *supra* note 44, at 226 (under Jefferson's doctrine of emergency power, "a President is permitted to violate the Constitution in an emergency, though he does so at the risk of having his judgment rejected by the legislature or the people"). Jefferson repeated this theme frequently. See Schlesinger, *supra* note 8, at 23-25; George M. Dennison, *Martial Law: The Development of a Theory of Emergency Powers*, 1776-1861, 18 Am. J. Legal Hist. 52, 58 (1974); Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 Yale L.J. 1385, 1392, 1393 (1989); see also Clinton L. Rossiter, *Constitutional Dictatorship: Crisis Government in Modern Democracies* 218 (1948) (defending presidential emergency power in wartime); J. Malcolm Smith & Cornelius P. Cotter, *Powers of the President During Crises* 5-7 (1960) (discussing Locke and Rousseau's recognition of the need for an executive emergency power); George Winterton, *The Concept of Extra-Constitutional Executive Power in Domestic Affairs*, 7 Hastings Const. L.Q. 1, 10 (1979) (drawing parallel between common recognition by Locke and Jefferson that necessity could support legitimate use of extra-constitutional powers). Harry S. Truman said that "in the interest of the people," the President "must use whatever power the Constitution does not expressly deny him." Marcus Cunliffe, *The Presidency* 296 (3d ed. 1987) (quoting Harry S. Truman).

118. Jefferson, Colvin Letter, *supra* note 117, at 279.

119. "That this doctrine was accepted by every single one of our early statesmen can easily be shown." Lucius Wilmerding, Jr., *The President and the Law*, 67 Pol. Sci. Q. 321, 324 (1952); accord Lobel, *supra* note 117, at 1394-96. Professor Lobel, see *id.* at 1395, quotes Judge Story's opinion in *The Apollon*, 22 U.S. (9 Wheat.) 362 (1824):

It may be fit and proper for the government, in the exercise of the high discretion confided to the executive, for great public purposes, to act on a sudden emergency, or to prevent an irreparable mischief, by summary measures, which are *not* found in the text of the laws. Such measures are properly matters of state, and if the responsibility is taken, under justifiable

haps the best solution is to "separat[e] and protect[] the normal constitutional order from the dark world of crisis government."¹²⁰ Wilmerding argued, for example, that the President would become more cautious in invoking an emergency power than if such a power were legally institutionalized.¹²¹

This separation has significant costs. First, our constitutional theory is upended. The Constitution need not be amended in order to change it, at least temporarily; acting outside the framework of Article V, popular or congressional approval as a form of indemnification provides the President with a vehicle for temporarily suspending constitutional limitations.¹²² Second, the political process almost invariably will sustain popular presidential conduct even though it sacrifices an individual interest or that of some "discrete and insular" group.¹²³ Finally, the reference to an "indemnity" can mislead. Such references in judicial decisions and by commentators suggest compensation for the

circumstances, the Legislature will doubtless apply a proper indemnity. But this Court can only look to the questions, whether the laws have been violated; and if they were, justice demands, *that the injured party should receive a suitable redress.*

Id. at 366-67 (emphasis added).

120. Lobel, *supra* note 117, at 1388.

121. See Schlesinger, *supra* note 8, at 148-49; Wilmerding, *supra* note 119, at 329.

122. Rossiter acknowledged the power of the presidency in an emergency, but insisted on the need for an active Congressional role: "constitutional dictatorship should be *legitimate*." Rossiter, *supra* note 117, at 300. However, this does not address the point that there may be conduct that even Congress lacks the power to authorize. For a recent treatment of the emergency topic, in the context of Northern Ireland and Germany, see John E. Finn, *Constitutions in Crisis: Political Violence and the Rule of Law* (1991).

123. Cf. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938) (recognizing that political process may sometimes fail to protect "discrete and insular minorities," and suggesting that statutes impinging their rights may be subject to higher level of scrutiny). In his engaging work, *Our Chief Magistrate and His Powers*, Taft makes much of the point. He recounts the travails of Edward Livingston objecting to Jefferson's unauthorized presidential interference with his property. An elegant and lucid writer, Livingston attacked the political check argument:

When a public functionary abuses his power by an act which bears on the community, his conduct excites attention, provokes popular resentment, and seldom fails to receive the punishment it merits. Should an individual be chosen for the victim, little sympathy is created for his sufferings, if the interest of all is supposed to be promoted by the ruin of one. The gloss of zeal for the public is therefore always spread over acts of oppression, and as a brilliant exertion of energy in their favor, which, when viewed in its true light, would be found a fatal blow to their rights.

In no government is this effect so easily produced as in a free republic; party spirit, inseparable from its existence, there aids the illusion, and a popular leader is allowed in many instances impunity, and sometimes rewarded with applause for acts that would make a tyrant tremble on his throne.

Taft, *supra* note 16, at 150. Taft thought those remarks fully applicable to a proposal entertained by Theodore Roosevelt to seize certain coal mines, even though no statute conferred such authority to invade private rights. See *id.* at 145-50.

injured party with the costs ultimately removed from the official to the United States.¹²⁴ This was the result in *Little v. Barreme*.¹²⁵ But "indemnity" acts need not so operate; from their origins in English history, they were frequently immunity acts.¹²⁶ Thus, the Indemnity Act of 1863, as amended in 1866 and 1867, provided retrospective defenses in damage actions brought against federal officials for alleged misconduct based upon presidential directives.¹²⁷ In *Mitchell v. Clark*,¹²⁸ the Supreme Court sustained the constitutionality of the legislation as "ordinary acts of indemnity passed by all governments when the occasion requires it."¹²⁹

A bloody Civil War, an event wholly unforeseen by the founding generation, may not be a fruitful source for deriving constitutional lessons.¹³⁰ Lincoln's war-time conduct involved massive interference with private rights, including arrests, suspension of habeas corpus, and even conscription.¹³¹ To the extent that his actions contravened positive law, Lincoln's conduct was illegal.¹³² Lincoln's response was to ask:

124. See *supra* note 119 and accompanying text.

125. 6 U.S. (2 Cranch) 170 (1804). For an illuminating discussion of this result, see Lobel, *supra* note 117, at 1394; see also Sofaer, *supra* note 44, at 333-36 (describing congressional grant of indemnity to General Jackson many years after underlying events had occurred).

126. See Randall, *supra* note 44, at 188.

127. See Act of Mar. 3, 1863, ch. 81, 12 Stat. 755, 756, amended by Act of May 11, 1866, ch. 80, 14 Stat. 46, and Act of Mar. 2, 1867, ch. 155, 14 Stat. 432. The "failure to preserve remedies for the individual was frequently referred to by the opponents of the act." Randall, *supra* note 44, at 205. Randall added: "A different course might well have been taken; for the injured party could have been permitted to recover damages, and then the damages could have been assumed by the United States." *Id.*

128. 110 U.S. 633 (1884).

129. 110 U.S. at 640; cf. *Bean v. Beckwith*, 85 U.S. (18 Wall.) 510, 516 (1873) (*dictum*) (assuming, for purpose of assessing adequacy of pleadings invoking defense under Acts of 1863 and 1867, that these statutes are constitutional); *The Prize Cases*, 67 U.S. (2 Black) 635 (1862) (upholding constitutionality, against *ex post facto* challenge, of congressional legislation retroactively ratifying President Lincoln's assumption of power to blockade Confederate ports at start of Civil War). Moreover, under modern "official immunity" case law, many officials will possess an immunity from damage suits even for unconstitutional conduct. See *infra* text accompanying notes 331-332. In these circumstances, the injured party will not receive compensation. But this is a problem of greater dimension on the state rather than on the national level.

130. Professor Dunning long ago argued that during war a "temporary dictatorship" must be admitted as part of the constitutional system, William A. Dunning, *The Constitution of the United States in Civil War*, 1 Pol. Sci. Q. 163, 175 (1886), and many years later Clinton Rossiter, reflecting on World War II, agreed. See Rossiter, *supra* note 117 at 4-8; see also *supra* note 122.

131. See, e.g., Randall, *supra* note 44, at 36-37. See generally Mark E. Neely, Jr., *The Fate of Liberty: Abraham Lincoln and Civil Liberties* (1991) (emphasizing that Lincoln did not cause arrests simply on the basis that persons disagreed with his policies); Lincoln the War President: *The Gettysburg Lectures* (Gabor Borrit ed. 1992) (seven essays by prominent historians tracing origins and conduct of Civil War and development of Lincoln Presidency).

132. For a summary, see Randall, *supra* note 44, at 35-41.

"[A]re all the laws but one to go unexecuted, and the government itself go to pieces, lest that one be violated?"¹³³ While his question builds on unassailable intuition that the Constitution and laws exist for the nation and not *vice versa*,¹³⁴ the legal answer to Lincoln's question has been clear from the very beginning: yes.¹³⁵ That Lincoln himself understood this is reflected in the fact that he assumed the need for congressional ratification for his conduct.¹³⁶

133. Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), in 6 Complete Works of Abraham Lincoln 297, 309 (John G. Nicolay & John Hay eds., 1894) [hereinafter Lincoln, Complete Works]. "Was it possible to lose the nation and yet preserve the Constitution?" Alexander J. Groth, Lincoln and the Standards of Presidential Conduct, XXII Presidential Stud. Q. 765, 766 (1992)(quoting President Lincoln). He might have also observed that the President's oath to "execute the office of the President of the United States, and [to] preserve, protect and defend the Constitution of the United States," U.S. Const. art. II, § 1, does not in its terms refer to laws.

134. In Jefferson's words, "To lose our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means." See Jefferson, Colvin Letter, *supra* note 117, at 279.

135. In *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 114-16 (1866), the entire Court agreed that, even acting as Commander-in-Chief, President Lincoln could not disregard a statutory requirement governing the release of prisoners, although, to be sure, the decision was rendered after the Civil War had ended. For a discussion of *Ex parte Milligan*, see Clinton L. Rossiter & Richard P. Longaker, *The Supreme Court and the Commander in Chief* 26-39 (1976). The field of international law is instructive here. Earlier on, the Court held that international law was part of our law and was of binding force on a theory that we would now call federal common law. In *Brown v. United States*, 12 U.S. (8 Cranch) 110, 153-54 (1814), the Court recognized that the President (but not Congress) was bound by these norms. Disagreement exists to this day as to whether this is sound doctrine. See *Fernandez-Roque v. Smith*, 622 F. Supp. 887, 903 (N.D. Ga. 1985) ("[T]he President has the authority to ignore our country's obligations arising under customary international law . . ."), order stayed in part on other grounds sub. nom. *Garcia-Mir v. Meese*, 781 F.2d 1450 (11th Cir. 1986). For a succinct and admirable recent discussion of the problem, see *The Supreme Court 1991 Term, Leading Cases*, 106 Harv. L. Rev. 163, 322-28 (1992) (expressing doubt that President has power to violate customary international law).

136. Indeed, Lincoln claimed to be exercising powers no greater than those possessed by Congress, and that "Congress would readily ratify them. It is believed that nothing has been done beyond the constitutional competency of Congress." 6 Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), in Lincoln, Complete Works, *supra* note 133, at 308. Randall criticizes as a "bad practice" executive conduct taken in anticipation of congressional ratification. See Randall, *supra* note 44, at 58-59. Congress did ratify most of Lincoln's statutory transgressions and invasions of private right. See Act of Aug. 6, 1861, ch. 63, § 3, 12 Stat. 326; *The Prize Cases*, 67 U.S. (2 Black) 635, 670-71 (1862) (blockade of the southern ports authorized by legislation "approving, legalizing, and making valid all the [President's prior] acts, proclamations, and orders"); see also *Mitchell v. Clark*, 110 U.S. 633, 640 (1884) ("[A]ct passed after the event, which in effect ratifies what has been done . . . is valid, so far as Congress could have conferred such authority before . . ."); *supra* text accompanying notes 128-129. In *The Prize Cases*, the dissent refused to find the congressional ratification effective because, they said, the legislation constituted an *ex post facto* law. 110 U.S. at 697-98 (Nelson, J., dissenting).

Outright claims of "executive Power" to disregard statutes are now seldom advanced before the senior judges.¹³⁷ In *Steel Seizure*, for example, the President did not deny in the Supreme Court that Congress was the ultimate master of the situation.¹³⁸ There is, however, one sweeping claim of presidential prerogative that should not go unmentioned. In September of 1942, during his World War II presidency, President Franklin D. Roosevelt demanded that Congress repeal a provision of the Emergency Price Control Act.¹³⁹ His demand was not an arbitrary one; the offending provision was a protectionist measure for farmers that the President believed seriously impeded his administration's efforts to control inflation.¹⁴⁰ The President stated that "[i]n the event that the Congress should fail to act, and act adequately, I shall accept the responsibility, and I will act."¹⁴¹ What is not well known is that the President made this threat only after having been advised by Wayne Morse, then Dean of the Oregon Law School, that "if you decide that a certain course of action is essential as a war measure, it supersedes congressional action."¹⁴² Congress yielded, one day after the presidential deadline.

Could the Supreme Court have sustained so bold a presidential prerogative, even during the dark days of World War II? The unbounded nature of Roosevelt's claim is particularly striking at the end of the President's message, when, after referring to the Civil War, he said:

137. In circumstances in which no private rights are concerned, Presidents during times of stress have often treated statutes as no more than paper barriers. See, e.g., Pious, *supra* note 12, at 53-55 (describing President Franklin Roosevelt's conduct before the Second World War).

138. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 676-77, 701 (1952) (Vinson, C.J., dissenting) (administration was at all times willing to obey congressional mandate in this matter). The President argued, however, that not only did no relevant statute prohibit his conduct, but also that his conduct implemented specific congressional legislation. The lengthy dissenting opinion of Chief Justice Vinson draws extensively on the government's submission. See *id.* at 667-710. Justice Jackson's well known concurring opinion distinguished among presidential conduct with Congressional authorization, without it, and contrary to the expressed or implied will of Congress. *Id.* at 635-38 (Jackson, J., concurring). As to the latter, he said the President's "power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." *Id.* at 637 (Jackson, J., concurring). While the bulk of his opinion was devoted to a demonstration that the President's seizure could not be sustained under the last category, Jackson's analysis made no contact whatever with the government's submission.

139. The relevant events, including the behind-the-scenes activities of Justices Black and Byrnes, are described in Frank Freidel, *Franklin D. Roosevelt: A Rendezvous With Destiny* 437-39 (1990).

140. See *id.*

141. 88 Cong. Rec. 7044 (1942).

142. Freidel, *supra* note 139, at 437.

I cannot tell what powers may have to be exercised in order to win this war.

The American people can be sure that I will use my powers with a full sense of my responsibility to the Constitution and to my country. The American people can also be sure that I shall not hesitate to use every power vested in me to accomplish the defeat of our enemies in any part of the world where our own safety demands such defeat.

When the war is won, *the powers under which I act automatically revert to the people*—to whom they belong.¹⁴³

This is dangerous and unconstitutional doctrine. No matter how closely the President approaches a "plebiscitary presidency" as a matter of political reality, no such legal relationship is contemplated by the Constitution.¹⁴⁴ The President does not stand in some direct and un-

143. 88 Cong. Rec. 7044 (1942) (emphasis added). It is, perhaps worth noting here that although Roosevelt exercised wide powers during the war, most of the justifications asserted were statutory in nature. See Arthur M. Schlesinger, Jr., War and the Constitution: Abraham Lincoln and Franklin D. Roosevelt 144, 162-74 in *Lincoln the War President: The Gettysburg Lectures*, supra note 131. Indeed, even when invoking his powers as Commander-in-Chief, Lincoln "generally signified only the narrow and traditional view of the Commander-in-Chief as the fellow who gave orders to the armed forces." *Id.* at 168.

144. On the "plebiscitary" presidency, see Schlesinger, supra note 8, at 254-55; see also Koh, supra note 21, at 97. In *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the opinion of the Court suggests that its holding was grounded on the special nature of the presidency:

In contrast [to courts], an agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgements. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices . . .

Id. at 865. This paragraph was, it should be noted, uttered in the context of demonstrating the institutional superiority of the executive over the courts in resolving ambiguous policy questions. That point may be well-taken if generalized to all administrative agencies: all agencies are politically more accountable than courts. But the authority exercised by the President (and other administrative officials) under *Chevron* in fact exists only by virtue of a congressional delegation. See Pauley v. Bethenergy Mines, Inc., 111 S. Ct. 2524, 2534 (1991); Antonin Scalia, Judicial Deference to Administrative Interpretations of Law, 1989 Duke L.J. 511; Michael Herz, Deference Running Riot: Separating Interpretation and Law Making under *Chevron*, 6 Admin. L.J. Am. U. 187, 188-89 (1992). Executive authority is not the result of some invisible radiation from the President's supposed special "accountability" to the people. As Henry Clay put it in his dispute with Jackson, "By what authority does the president derive power from the mere result of an election . . . I had supposed that the Constitution and the laws were the sole source of executive authority." Remini, supra note 87, at 126. The Court's careless language is, moreover, potentially dangerous. Taken literally, the Court intimates that Congress itself could not overrule *Chevron* and require courts, rather than the executive, to resolve all issues of statutory ambiguity. Moreover, the Court implies that, as against other executive and administrative officials, the President legally must have the last say on the meaning of all ambiguous statutes, a result that would overturn a vast amount of administrative law.

mediated relationship with "the people," drawing legal authority from them. The President is not "democracy personified, the nation made man."¹⁴⁵

Whether or not any president can live with it, the literary theory of "The executive Power" recognizes no presidential license to disregard otherwise concededly applicable legislation, even in an emergency.¹⁴⁶ The *Steel Seizure* Court endorsed this proposition,¹⁴⁷ and decisions too numerous to cite fully assume it.¹⁴⁸ Yet, in the last half of this century, challenges to this doctrine have been increasing, particularly when the President claims to be acting as Commander-in-Chief and invoking the special presidential role in foreign affairs. This challenge did not emanate from the "hard right" only;¹⁴⁹ in fact, the strongest such claim came during the Truman Administration. Testifying before the Senate Committees on Foreign Relations and Armed Services on the President's proposal to send four additional divisions to Europe, Secretary of State Acheson said:

Not only has the President the authority to use the Armed Forces in carrying out the broad foreign policy of the United States and implementing treaties, but it is equally clear that this authority may not be interfered with by the Congress in the exercise of powers which it has under the Constitution.¹⁵⁰

While now a staple of presidential advocacy, Secretary Acheson's testimony is startling if read to make claims concerning the nature of the President's authority beyond that possessed as Commander-in-Chief. Even were it conceded—although I would not—that the Commander-in-Chief could move the military forces at will even in defiance of Congress, that is the limit of permissible argument. If Mr. Acheson is also suggesting that the President's important role in foreign affairs and in implementing treaties permits executive defiance of Congress, that po-

145. See Schlesinger, *supra* note 8, at 254 (quoting Laboulaye on Napoleon III); see also text accompanying notes 31–34, where President Nixon comes close to asserting such a proposition. Professor Schlesinger argues that the Nixon presidency pushed hard the idea that the President's accountability diminished need for a strict reading of constitutional limitations, "Nixon was carrying the imperial Presidency toward its ultimate form in the plebiscitary Presidency—with the President accountable only once every four years . . ." Schlesinger, *supra* note 8, at 255.

146. This difficulty is significantly ameliorated by conventional tools of statutory construction and the recognition of a protective function (and perhaps of some residuum of a general emergency presidential power). See *infra* text accompanying notes 188–202.

147. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 586 (1952) (*Steel Seizure*).

148. See, e.g., *Rust v. Sullivan*, 111 S. Ct. 1759, 1767 (1991). For other cases, see *supra* notes 112 and 116.

149. On claims by the Nixon administration, see Schlesinger, *supra* note 8, at 165–67. Professor Schlesinger's elegant work treats the Nixon administration as seeking a revolution in the constitutional theory of the presidency. See *id.* at 187–93.

150. Quoted in Rossiter & Longaker, *supra* note 135, at 135.

sition finds little support in our constitutional heritage. Moreover, Mr. Acheson's claim sits quite uneasily with the Truman administration's concession in *Steel Seizure* that Congress was the ultimate master. Whatever the extent of congressional authority to regulate in the few areas in which the President has "specific" authority,¹⁵¹ no doubt should exist that the congressional will must prevail when the President possesses only concurrent authority.¹⁵²

D. Presidential Emergency Power.

Advocates of presidential emergency power seldom distinguish between claims concerning presidential emergency conduct contrary to law and such conduct when statutes are silent. The fact that this distinction is not made is not surprising: an emergency is an emergency, and the need for a "Fast Track" response is apparent, whether or not some law seems more or less applicable.¹⁵³ Moreover, the very coherence of the underlying distinction is troublesome.¹⁵⁴ Nonetheless, the Court's unanimous opinion in *Little v. Barreme* apparently made the dis-

151. This is not necessarily true, however, when the President acts pursuant to a specific power, such as the pardon power. See, e.g., *United States v. Klein*, 80 U.S. (13 Wall.) 128, 141-42 (1871). In his *Myers* dissent, Justice McReynolds wrote that "[i]f it be admitted that the Constitution by direct grant vests the President with all executive power, it does not follow that he can proceed in defiance of congressional action." *Myers v. United States*, 272 U.S. 52, 231 (1926) (McReynolds, J., dissenting).

152. See Henkin, *supra* note 100, at 33-34 (President's powers "includ[e] perhaps [the power to initiate] covert activities and even some uses of the armed forces for foreign policy purposes short of war. But those activities are subject to control by Congress, whether by legislation or by control of appropriations."). There are some dissenters. See, e.g., Joint Hearings Before the Senate Select Comm. on Secret Military Assistance to Iran and the Nicaraguan Opposition and the House Select Comm. to Investigate Covert Arms Transactions with Iran, 100th Cong., 1st Sess. Part II 36-39 (1987) (testimony of Lt. Col. Oliver L. North) (President has inherent power to use unappropriated funds in foreign affairs context); Koh, *supra* note 21, at 28 (citing a Justice Department memorandum filed in support of Oliver North in the Iran-Contra trials); Geoffrey Miller, *The Appropriations Power and the Necessary and Proper Clause*, 68 Wash. U. L.Q. 640, 643 (1990) ("[The] appropriations power cannot be used to circumvent or intrude on the President's inherent authority."); Symposium, *supra* note 67, at 200-04 (Congress cannot constitutionally micromanage foreign affairs) (Orrin Hatch). The appropriations argument is an old one, see Sofaer, *supra* note 44, at 170-73, and it has never received the assent of Congress. But the Constitution may impose some funding obligations on Congress. See, e.g., Harvey Flaumenhaft, *The Effective Republic* 122-23 (1992) (describing Hamilton's argument that Congress must fund the salaries of judges).

153. See *infra* text accompanying notes 170-176.

154. An examination of the concurring opinions and the dissent in *Steel Seizure* shows that, even for judges, the distinction can prove difficult to apply, even if conceptually plausible. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (*Steel Seizure*). In *The Apollon*, for example, Judge Story first rejected two purported statutory justifications for the executive's conduct; in the end, however, he thought that the executive seizure violated positive law, specifically, settled principles of international law. See *The Apollon*, 22 U.S. (9 Wheat.) 362, 367-72 (1824).

tion, and it is a plausible one.¹⁵⁵

The American Constitution contains no general provision authorizing suspension of the normal governmental processes when an emergency is declared by an appropriate governmental authority. While the grants of power to the national government include some emergency powers, they seem largely confined to protection against violence, both foreign and domestic, including the power to repel sudden attacks, "suppress Insurrections," suspend the privilege of habeas corpus in cases of "Rebellion or Invasion," and protect the states against "domestic violence."¹⁵⁶ Moreover, the literary theory holds that the relevant constitutional limitations are not suspended during an emergency.¹⁵⁷ To be sure, on occasion some limited emergency power *within* the Constitution has been recognized by the Supreme Court: "for the government, within the Constitution, has all the powers granted to it which are necessary to preserve its existence."¹⁵⁸ But

155. See 6 U.S. (2 Cranch) 170 (1804). The Court held that although the President may have had the power to order that ships suspected of trading with France during wartime be seized, such power was limited by Congress' express designation of the limits of seizure. See *id.* at 177-79. But one must proceed with caution here. "No single fault has been the source of so much bad history as the reading back of later and sharper distinctions into earlier periods where they have no place." Charles H. McIlwain, *The American Revolution: A Constitutional Interpretation* 64 (Great Seal Books 1958) (1923).

156. U.S. Const. art. I, § 8, cl. 15; *id.* art. I, § 9, cl. 2; *id.* art. IV, § 4.

157. See *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 121 (1866) ("No doctrine, involving *more* pernicious consequences, was ever invented by the wit of man than that any of [the Constitution's] provisions can be suspended during any of the great exigencies of government.") (emphasis added). Many Latin American constitutions do provide for extensive derogations from rights in emergencies. See generally Claudio Grossman, *States of Emergencies*, in 16 *The International Bill of Rights: The Covenant and Political Rights* (Louis Henkin ed., 1981).

The general problem of reconciling the tradition of limited (i.e. constitutional) government with the need for effective government in times of emergency is one that affects all liberal democracies. In his message to Congress of July 4, 1861, Lincoln put the dilemma well, "Must government, of necessity, be too strong for the liberties of its own people, or too weak to maintain its own existence?" Abraham Lincoln, *Message to Congress in Special Session* (July 4, 1861), in 6 *Lincoln, Complete Works*, *supra* note 133, at 301.

In *The Democratic and Authoritarian State*, Franz Neumann wrote:

No society in recorded history has ever been able to dispense with political power. This is as true of liberalism as of absolutism, as true of *laissez faire* as of an interventionist state. No greater disservice has been rendered to political science than the statement that the liberal state was a "weak" state. It was precisely as strong as it needed to be in the circumstances. It acquired substantial colonial empires, waged wars, held down internal disorders, and stabilized itself over long periods of time.

Franz Neumann, *The Democratic and the Authoritarian State* 8 (Herbert Marcuse ed., 1957). I accept the proposition that the government will act in an emergency when the dominant interests so require. And so, for me the question is whether in legal analysis the national government's emergency power is extra-constitutional.

158. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 121 (1866); see also Rossiter,

more typical of the literary theory are statements that an "[e]mergency does not create power . . . or diminish the restrictions imposed upon power granted."¹⁵⁹

Objections to any residuum of presidential emergency power traditionally have run along two lines: federalism and separation of powers. The federalism justification, simply put, is that no general emergency power can exist in the presidency because none exists in the national government.¹⁶⁰ Twentieth-century developments, however, have eviscerated that argument because the powers of Congress, as now construed by the courts, are fully adequate to deal with any emergency.¹⁶¹ Put differently, an emergency does create powers, at least as against any argument resting on the supposedly "limited" nature of congressional power.

But the President is not Congress. What "emergency" powers, then, can the President claim? While the President cannot lawfully disregard positive law in an emergency, what if no relevant positive law exists? Given its origin and line of growth, should presidential authority be understood to include some emergency power?¹⁶² Powerful ar-

Constitutional Dictatorship, *supra* note 117, at 211-15 (framers believed that Constitution conferred adequate powers to deal with an emergency).

159. *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 425 (1934).

160. See *supra* notes 156-159 and accompanying text. With respect to the Louisiana Purchase, Jefferson believed not that the President, but that the entire national government lacked constitutional authority to acquire the territory: "The constitution has made no provision for our holding foreign territory, still less for incorporating foreign nations into our Union." Letter from Thomas Jefferson to John C. Breckenridge (Aug. 12, 1803), in 8 *Jefferson, Writings*, *supra* note 67, at 244; see also Schlesinger, *supra* note 8, at 23-25 (discussing Jefferson's beliefs that the Louisiana Purchase was outside the power of the federal government and that, as a practical matter, presidential acts done in an emergency, and with impending congressional approval, are necessary even if not lawful); cf. *American Ins. Co. v. Canter*, 26 U.S. 388, 410, 1 Pet. 511, 542 (1828) (power to acquire territory implied from treaty provision of U.S. Const. art. II, § 2, cl. 2).

161. Cf. Henry P. Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 *Colum. L. Rev.* 723, 730-34 (1988) (describing collapse of federalism limits on congressional power). Daniel Franklin fails to see this point, arguing that emergency powers, while once powers of the Crown, are now powers of the state as a whole, and are extra-constitutional. See Daniel P. Franklin, *Extraordinary Measures: The Exercise of Prerogative Powers in the United States* 12-13, 20-24 (1991). This argument conflates political theory with constitutional law: Congress now has all the legal authority needed to deal with virtually any emergency. I deal here only with a case in which it is assumed that Congress could legislate. Lincoln, it is true, at one point suggested the existence of a presidential emergency power not possessed by Congress. See Benedict, *supra* note 111, at 83.

162. "Prerogative" power is authority that "accrue[s] to all states" outside "the limits of the written constitution" that allows the government to "take extraordinary actions for the protection of the state." Franklin, *supra* note 161, at 3. Emergency powers, by contrast, allow the President to "go beyond the bounds of the Constitution or laws," by "exercis[ing] the legislative powers," Pious, *supra* note 12, at 44, but do not allow the President to take actions that are beyond the power of the federal

guments against any such prerogative can be adduced: The President already possesses considerable delegated "emergency" powers;¹⁶³ no further need exists to aggrandize the legal position of the greatest political office on earth; judicial recognition of a general, inherent presidential "emergency" power would result in authority both indefinite in description and uncontainable in practice; the result would threaten separation-of-power and civil liberties values.¹⁶⁴ Even in the truncated manner just stated, this argument has considerable force.

For me, however, the most troublesome question is whether judicial recognition of any general presidential emergency power would in practice simply amount to a routine discretionary authority in the President to act whenever the President thought it expedient: "Let him once win the admiration and confidence of the country, and no other single force can withstand him, no combination of forces will easily overpower him."¹⁶⁵ So wrote Woodrow Wilson many years ago.¹⁶⁶ President Theodore Roosevelt's stewardship theory has been repeatedly criticized along precisely these lines.¹⁶⁷ No acceptable conception of "The executive Power" can permit the Presidency to function so in its routine operation.¹⁶⁸ The general conception of executive authority

government as a whole. The distinction in terminology is, of course, conventional, not intrinsic.

163. See 10 U.S.C. §§ 332-334 (1988) (authorizing President to use armed forces to enforce laws or suppress rebellion, insurrection, or domestic violence); see also Lobel, *supra* note 117, at 1390 ("[L]iberalism seeks to separate emergency rule from the normal constitutional order, thereby preserving the Constitution in its pristine form while preserving the executive with the power, but not legal authority, to act in an emergency."); Sofaer, *supra* note 44, at 378 (early Presidents made no claim of inherent presidential power to initiate conflicts).

164. See Schlesinger, *supra* note 8, at 442-64. William Pitt noted in 1783 that "[n]ecessity is the plea for every infringement of human freedom. It is the argument of tyrants; is the creed of slaves." Mark M. Stavsky, *The Doctrine of Necessity in Pakistan*, 16 Cornell Int'l L.J. 341, 341 (1983) (quoting William Pitt, Speech in the House of Commons, Nov. 18, 1783).

165. Wilson, *Constitutional Government*, *supra* note 8, at 68.

166. More recently, an able commentator has observed that "in times of stress a president can comfortably assume that he can act without systematic institutional restraints." Rossiter & Longaker, *supra* note 150, at xi.

167. See William H. Harbaugh, *The Constitution of the Theodore Roosevelt Presidency and the Progressive Era in The Constitution and the American Presidency* 63, 67-68 (Martin Fausold & Alan Shank eds., 1991); Taft, *supra* note 16, at 143-47.

168. These fears are compounded by a recognition that no real countervailing check through judicial review will exist. Perhaps a court will be able to say no more than, "we can't tell you what all the defining characteristics of an emergency are, but we can't say that the presidential judgment here is out of bounds." See, e.g., *Martin v. Mott*, 25 U.S. (12 Wheat.) 12, 17-20, 28-33 (1827) (President is initial judge of existence of emergency); see also *Sterling v. Constantin*, 287 U.S. 378, 399 (1932) (governor, as executive, has discretion to determine whether an emergency requiring military aid exists); *United States v. Russell*, 80 U.S. (13 Wall.) 623, 627-28 (1871) ("immediate, imminent, and impending" danger and "extreme and imperative" emergency required for military requisition of private property); *Mitchell v. Harmony*,

posited in *Steel Seizure* would be sharply undercut. A requirement of subsequent affirmative congressional ratification of the President's emergency conduct would ameliorate this difficulty but would not entirely avoid it, so long as the public generally approves of what the President has done.¹⁶⁹

Yet, to deny the legal existence of a power that every government must possess is also problematic.¹⁷⁰ To be sure, our legal tradition already denies presidential authority to act contrary to positive law. Need we go still further, however, and deny all emergency power to the President, even when those who deny the lawfulness of such a power recognize its practical necessity?¹⁷¹ President after President has as-

54 U.S. (24 How.) 115 (1851) (necessity of taking by an Officer is based on Officer's opinion of the facts); *Luther v. Borden*, 48 U.S. (7 How.) 1, 47-48 (1849) (discussing *Mott* with approval, giving President sole power to determine what is an emergency). See generally Rossiter & Longaker, *supra* note 135, at 14-17 (discussing origin of discretionary power in *Luther* and *Mott*). Perhaps, in practice, the judges require little more than a presidential *ipse dixit* a proclamation of an emergency—and, in the case of emergency covert operations, no such proclamation at all. Structural legislation can ameliorate but not resolve the problem of the indefiniteness of any "emergency" standard. See, e.g., The National Emergencies Act of 1976, 50 U.S.C. §§ 1601-1651 (1988) (establishing procedures for the declaration and termination of future (undefined) emergencies); War Powers Resolution of 1973, 50 U.S.C. §§ 1541-1548 (1988).

169. In response, commentators have attempted to frame highly restrictive definitions of what can properly count as an "emergency," in an effort to legitimate and constrain Roosevelt's claim that the President must act when a "national imperative" so demands. For example, Professor Arthur Schlesinger, Jr. formulated an eight-part test, which required a "clear, present and broadly perceived danger to the life of the nation and to the ideals for which the nation stands." Schlesinger, *supra* note 8, at 459. Professor Schlesinger contemplates conduct "beyond the laws and Constitution." *Id.* Richard Pious, a political scientist, proposes a thoughtful seven-part formulation, the most important aspect of which is a "national emergency, when the continued existence of the Union and the physical safety of the people is at stake, when delay might prove fatal, and when traditional constitutional procedures would involve such delay." Pious, *supra* note 12, at 84.

170. Eugene Rostow, a vigorous supporter of executive power, insists that "the President's prerogative powers will survive, and indeed prevail, if Presidents fight for them, because they correspond to the nature of things and the necessities of government in the United States." Symposium, *supra* note 67, at 190 (Eugene V. Rostow). Unlike the question of an independent presidential regulatory authority, the issue of an emergency presidential power cannot be meaningfully resolved by any clear non-controversial understanding of the nature of separation of powers. "Disagreement about the doctrine is probably inherent because, as stated in The Federalist No. 47, a large variety of institutional arrangements can satisfy the separation of powers norm. . . . [Moreover,] [m]ost late eighteenth century . . . accounts of the . . . doctrine were very superficial." William B. Gwyn, *The Indeterminacy of the Separation of Powers in the Age of the Framers*, 30 Wm. & Mary L. Rev. 263, 264 (1989).

171. "[I]t is not lightly to be assumed that, in matters requiring national action, 'a power which must belong to and somewhere reside in every civilized government' is not to be found." *Missouri v. Holland*, 252 U.S. 416, 433 (1920) (quoting *Andrews v. Andrews*, 188 U.S. 14, 33 (1903)). Of course, "that power exists in the Government does not vest it in the President." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S.

sented such a power, or perhaps more accurately, at least the need to act.¹⁷² Although *Steel Seizure* seems to reject the existence of any executive emergency power, a careful examination of all seven opinions filed does not support such a definitive assertion. An analysis of the concurring and dissenting opinions indicates that a majority of the justices embraced the existence of some residual presidential emergency power.¹⁷³ They divided on the question whether Congress nonetheless had impliedly prohibited the President's conduct.¹⁷⁴ Moreover, despite the government's argument and President Truman's statement, no emergency existed. Ample time existed for congressional action,

579, 604 (1952) (*Steel Seizure*). Congress now has adequate power, but to be effective, some emergency power must, at least on occasion, initially be in the Executive because of the need for an immediate response. In the emergency context, "the Executive is authorized to exert the *power of the United States*." Brief for the United States at 99, *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915) (No. 278); see also *Lobel*, *supra* note 117, at 1404-07 ("President has inherent power to do . . . anything not explicitly forbidden by the Constitution."). President Lincoln put the point most eloquently, at least if his remarks are not understood to sanction conduct *contra legem*: "'Was it possible to lose the nation and yet preserve the Constitution? . . . I felt that measures, otherwise unconstitutional, might become lawful, by becoming indispensable to the preservation of the Constitution, through the preservation of the nation. Right or wrong, I assumed this ground, and now avow it!'" Groth, *supra* note 133, at 766 (quoting President Lincoln).

172. "Whatever the six justices of the Supreme Court meant by their differing opinions, . . . [the President] must always act in a national emergency." 2 Harry S. Truman, *Memoirs: Years of Trial and Hope* 478 (1956) (responding to the *Steel Seizure* decision); see also Alan I. Bigel, *Presidential Power and Political Questions*, XXI *Presidential Stud. Q.*, at 663, 667 (1991) (concept of political question frequently involved when measures responding to domestic emergencies taken by President). Jefferson claimed an emergency authority for all "high" executive officials. See *supra* text accompanying notes 117-18. The claim can be narrowed and made more persuasive if limited to the President. Like Congress and the Supreme Court, the President is special for many purposes. See, e.g., *Franklin v. Massachusetts*, 112 S. Ct. 2767, 2775-76 (1992) (discussing "unique constitutional position of the President"). In *Midwest Oil*, the government's argument emphasized that the test of presidential power to meet an emergency should not be the same as the standards applicable to any administrative clerk. See *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915).

173. See Schlesinger, *supra* note 8, at 147-48.

174. Compare *Steel Seizure*, 343 U.S. at 585-86 (existing statutes did not give President power to seize plants) and *id.* at 620-32 (Douglas, J., concurring) (same) and *id.* at 601-02, 609-10 (Frankfurter, J., concurring) (Congress had explicitly denied President such power) and *id.* at 639 (Jackson, J., concurring) (same) and *id.* at 657-58 (Burton, J., concurring) (same) and *id.* at 662 (Clark, J., concurring) (same) with *id.* at 671-73 (Vinson, C.J., Reed and Minton, JJ., dissenting) (war legislation gave President implied power to seize plants). Any presidential emergency power on behalf of the United States, it should be emphasized, is justified only to the extent necessary to overcome congressional inability to respond to the emergency. Accordingly, if the Takings or Due Process Clause would otherwise require compensation for any congressional conduct, then such a claim arises on the basis of the President's conduct. The idea that the President can incur takings obligations without appropriations troubled Justice Douglas. See *id.* at 631-32 (Douglas, J., concurring). But I see this as an inescapable concomitant to the existence of an emergency power.

both before and after the seizure, yet Congress did nothing.¹⁷⁵ To transform political deadlock into an emergency would drain the concept of emergency of all content.¹⁷⁶

If we assume that the President can act in an emergency, our constitutional theory would suggest that subsequent congressional approval is necessary, because that requirement seems to provide the least intrusive *presidential* authority needed to cope with the emergency. This requirement would seem to induce caution in the executive, while not being so onerous as to deter the President from acting when necessity warrants. Does this condition mean that any limitation on the President's authority to act *beyond* statutory authority in an emergency is wholly illusory, because congressional ratification is available even if no emergency existed, or even if the President has acted contrary to a statute? While the question is a troubling one, I think that it must be answered in the negative. Absent statutory authority, the President should not act unless a genuine emergency exists. Perhaps more importantly, the remedial implications of the two situations differ. Convinced of an emergency, a court should stay its hand until the President has had a reasonable opportunity for congressional ratification. When no emergency exists, or when the President acts contrary to positive law, no similar judicial constraint should be exercised.¹⁷⁷

II. THE MODERN "LAW ENFORCEMENT" EXECUTIVE

Before turning to the question of whether the President possesses some inherent protective authority, it is necessary to say something more about the legal dimensions of the modern "law enforcement" Executive, because it is against that background that any need to recognize an independent protective power is best assessed.

In explaining his well-known "stewardship theory," Theodore Roosevelt insisted that the President is "a steward of the people bound actively and affirmatively to do all he [can] for the people"¹⁷⁸ and that

175. While Professor Schlesinger does not believe that Truman's conduct was justified on an emergency theory, see Schlesinger, *supra* note 8, at 458-59, but he recognizes that international communism engendered a "profound conviction" of "unprecedented, and at times unbearable, strain" for American foreign policy. *Id.* at 163. But see Edward Corwin, *The Steel Seizure Case: A Judicial Brick Without Straw*, 53 *Cloum. L. Rev.* 53, 65 (1953) ("The Chief Justice's dissenting opinion is impressive for the delineation of the emergency. . ."). For Corwin, the President has the power to act in a "serious" emergency until Congress disapproves. See *id.* at 65-66.

176. See *id.* at 142.

177. Indeed, perhaps the requirement of irreparable injury for an injunction should be relaxed because the President has contravened the fundamental constitutional requirement that he act on the basis of statutory authority except in emergencies.

178. Theodore Roosevelt, *An Autobiography* 389 (1913). To be sure, Roosevelt sometimes added that the qualification of this executive power should be invoked only when "imperatively necessary for the Nation," *id.*, but at least for him this limitation was window-dressing. See Harbaugh, *supra* note 167, at 67; Taft, *supra* note 16, at 144-46.

"the executive power [is] limited only by specific restrictions and prohibitions appearing in the Constitution or imposed by Congress."¹⁷⁹ Roosevelt's robust claim of executive power misstates the constitutional theory of the American Presidency. As *Steel Seizure* makes plain, executive officials ordinarily must point to the presence of legislative authority, not to its absence, to justify conduct that burdens private rights. While the collapse of the delegation doctrine has transformed the underlying reality of the "law enforcement" Executive, that collapse does not yet support the existence of a general, independent law-making executive power to act as a steward of the people.

A. Execution of the Law

From the beginning, the general understanding was that even the "law-enforcement" model of "The executive Power" necessarily included some measure of executive discretion "to fill in the details" in implementing legislation. Hamilton strongly insisted that public administration was largely an executive function, and he assumed that this necessarily entailed some discretion as to means.¹⁸⁰ Jefferson espoused a perhaps even more expansive version of executive power. While consistently denying that the Executive could be invested with "legislative" or "judiciary" powers, he wrote to Governor Cabell that "if means specified by an act are impracticable, the constitutional [executive] power remains, and supplies them This aptitude of means to the end of a law is essentially necessary for those who are executive; otherwise the objection that our government is an impracticable one would really be verified."¹⁸¹ Jefferson's claim of a right to fill in the details was not, however, understood as tantamount to presidential possession of a blank check. The President could not violate positive law;¹⁸² moreover, as Justice Brandeis put it, "[t]here [was] no express

179. Roosevelt, *supra* note 178, at 388.

180. See *The Federalist* No. 72, at 486-87 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). "Upon [the] foundation of popular representation, Hamilton sought to erect a structure of effective administration." Flaumenhaft, *supra* note 152, at 5; see *id.* at 75-76 (describing Hamilton's belief that administration "is an affair of detail").

181. Corwin, *supra* note 44, at 430-31 n.108 (quoting Letter from Thomas Jefferson to Governor Cabell (Aug. 7, 1807)). Jefferson's comments were made in the context of a hypothetical law that specified that "the service of thirty thousand volunteers should be accepted," *id.* at 431, without any specification of the means of acceptance. Determination of those means would then fall within the Executive's discretion. See *id.*

182. What should fairly count as a congressional prohibition of presidential conduct presents issues different from Jefferson's time. Jefferson presumed that congressional authorization of one mode should not be presumed to foreclose other alternatives. See *id.* at 431. That presumption made a good deal of sense at the beginning of the nineteenth century, when the national government was just getting started and Congress met infrequently. Courts might readily assume that legislation had not prescribed completely the mode by which legislative policy was to be implemented. But see *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 177-78 (1804) (while President may

grant to the President of incidental powers resembling those conferred on Congress by the [Necessary and Proper Clause]."¹⁸³

Accordingly, Taft argued that, while explicit justification for every presidential step was not required, nonetheless

the President can exercise no power which *cannot be fairly and reasonably traced to some specific grant of power or justly implied and included within such express grant as proper and necessary to its exercise.*

Such specific grant must be either in the Federal Constitution or in an act of Congress passed in pursuance thereof.¹⁸⁴

This standard, of course, marks—but does not define—a boundary between what can fairly be described as presidential discretion in implementing legislation and unauthorized presidential law-making. Jefferson noted that the proper scope of presidential authority must be

have had power, absent congressional action, to authorize one method of naval seizure, congressional action "prescribe[s] . . . the manner in which this law shall be carried into execution"). In the modern era, however, perhaps a reversal or at least a weakening of Jefferson's presumption is now in order. At the end of the twentieth century, in the age of statutes and administrative rulemaking, courts might fairly hesitate to embrace such a presumption. The concurring opinions in *Steel Seizure*, except for that of Justice Douglas, are, of course, consistent with this hesitation. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 586 (1952) (*Steel Seizure*); id. at 609 (Frankfurter, J., concurring); id. at 639 (Jackson, J., concurring); id. at 660 (Burton, J., concurring). This reluctance to acknowledge alternative presidential means might draw limited support from the private rights of action cases; invoking legislative intent, the Court has now rather completely shut the door on the implication of such rights, at least when a newly enacted comprehensive congressional legislation includes a remedial framework. See, e.g., *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 14 (1981) ("In view of these elaborate enforcement provisions it cannot be assumed that Congress intended to authorize by implication additional judicial remedies . . ."). To be sure, the President vindicates public, not private interests. But the point is the fair implementation of what Congress has enacted. Beyond rulemaking, and *Chevron* delegations, it is not evident that Congress intended additional executive discretion to implement statutory directives. On the other hand, several decisions point in a contrary direction, recognizing executive rights of action beyond those statutorily specified. See *Wyandoth Transp. Co. v. United States*, 389 U.S. 191, 199–200 (1967); *United States v. Republican Steel Corp.*, 362 U.S. 482, 491–92 (1960); Paul M. Bator et al., *Hart and Wechsler's The Federal Courts and the Federal System* 913 n.4 (3d ed. 1988) [hereinafter *Hart & Wechsler*] (stating that "the circumstances in both cases were unusual and difficult to anticipate in the framing of statutory remedies").

183. *Myers v. United States*, 272 U.S. 52, 246 (1926) (Brandeis, J., dissenting). The *Steel Seizure* dissent insisted that "the President is a constitutional officer charged with taking care that a 'mass of legislation' be executed. Flexibility as to mode of execution . . . is a matter of practical necessity." 343 U.S. at 702 (Vinson, C.J., dissenting) (quoting *In re Debs*, 158 U.S. 564, 580 (1895)). Albeit urged only in what the dissent insisted was an emergency context, this claim asserts a range of executive choice in implementing statutory directives equivalent to the rational basis test of the modern Necessary and Proper Clause cases.

184. Taft, *supra* note 16, at 139–40 (emphasis added). Taft added: "The grants of Executive power are necessarily in general terms in order not to embarrass the Executive within a field of action plainly marked for him, but his jurisdiction must be justified and vindicated by affirmative constitutional or statutory provision, or it does not exist." Id.

left to "reason."¹⁸⁵ This is not quite right. Just last term, the Supreme Court more aptly referred to the "common understanding[s] of what activities are appropriate to legislatures, [and] to executives"—that is, a standard based upon convention, the contemporary understanding of the legal community.¹⁸⁶ However, application of conventional understandings to measure executive action ostensibly implementing legislation must reflect the perception that executive power "is at best interstitial and ancillary to the policy-forming powers of congress."¹⁸⁷

The boundary between presidential law-making and presidential law-application is, of course, context-sensitive and malleable: its application necessarily will depend upon evolving historical understandings and upon various intuitions that cannot be quantified or captured more precisely in any legal formula.¹⁸⁸ Particularly during periods of national emergency, the distinction will seem problematic. *Steuart & Bro., Inc. v. Bowles*,¹⁸⁹ which arose during Franklin Roosevelt's war administration, provides a well-known example. The Office of Price Administration (OPA) had administratively suspended a retail fuel oil dealer from receiving oil for resale for one year because, contrary to the Price Control Act, the dealer had violated an OPA rationing order.¹⁹⁰ Conceding the validity of the underlying rationing order, the dealer nonetheless challenged the suspension order as a statutorily unauthorized

185. Jefferson, *supra* note 66.

186. *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2136 (1992).

187. See Black, *supra* note 77, at 848. That formulation gives the standard a dimension analogous to judicially developed federal common law, but I am unclear how close the parallel expression implies a parallel mode of analysis. The independent "lawmaking" powers of the federal courts present issues too complex to be considered in detail here. See generally Hart & Wechsler, *supra* note 182, at 849–59, and the excellent symposium in a recent *Pace Law Review*, which contains articles by Professors George D. Brown, Larry Kramer, Martha A. Field and Thomas W. Merrill. See 12 *Pace L. Rev.* 227 (1992). Professor Merrill posits the relevance of *Steel Seizure* to the development of federal common law, see Thomas W. Merrill, *The Judicial Prerogative*, 12 *Pace L. Rev.* 327, 332–33 & n.20 (1992), an orientation I share. See Henry P. Monaghan, Book Review, 87 *Harv. L. Rev.* 889, 892 (1974). Professor Brown views federal common law largely as implicating federalism concerns. See George D. Brown, *Federal Common Law and the Role of the Federal Courts in Private Law Adjudication—A (New) Erie Problem?* 12 *Pace L. Rev.* 229, 254–60 (1992).

188. These intuitions will also be affected by the perceived emergency of the situation and by the nature of the executive decision-maker. One can expect that high executive officials, particularly the President, will get the benefit of close calls. See, e.g., *Rust v. Sullivan*, 111 S. Ct. 1759 (1991) (upholding denial of federal funding for abortion counseling); *AFL-CIO v. Kahn*, 618 F.2d 784 (D.C. Cir.) (en banc) (permitting withholding of government contracts from companies who contravened "voluntary" wage and price controls), cert. denied, 443 U.S. 915 (1979).

189. 322 U.S. 398 (1944). For an overview of the presidential exercise of power during World War II, see Rossiter & Longaker, *supra* note 135, at 98–102.

190. Petitioner had obtained oil without surrendering the necessary coupons and "delivered many thousands of gallons of fuel oil to consumers" without requiring coupons. *Steuart*, 322 U.S. at 401. The suspension was far more likely to be effective than a criminal prosecution brought pursuant to the Price Control Act. See *id.* at 407.

"penalty." The government defended the suspension order on the basis of a different act, the Second War Powers Act of 1942, which, in general terms, authorized the President or his delegate (the OPA) to "allocate" needed "materials or facilities . . . to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense."¹⁹¹ After describing the importance of the entire rationing scheme, the Court rejected the challenge, relying on the Second War Powers Act. Speaking for the Court, Justice Douglas thought it clear that, under the Act, the President could divert a previous supply of needed material from a wasteful factory to an efficient one. As Justice Douglas framed it, "[I]f the President has the power to channel raw materials into the most efficient industrial units and thus save scarce materials from wastage it is difficult to see why the same principle is not applicable to the distribution of fuel oil."¹⁹² While *Bowles*, in its structure, formally professes to be only an illustration of the Taft formulation, the latitude of the Court's application demonstrates (were any such demonstration needed) that context necessarily plays an important part.¹⁹³

I wish, however, to draw the reader's attention to a different point. Many current statutes now delegate to the Executive authority substantially equivalent to an executive "necessary and proper" power.¹⁹⁴ Moreover, under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,¹⁹⁵ a legislative delegation may be made by implication.¹⁹⁶ Thus, a broad congressional delegation may arise from "ambiguous" language,

191. *Id.* at 399 (quoting Second War Powers Act of 1942, ch. 199, § 301(a)(2), 56 Stat. 176, 178, 179).

192. *Id.* at 405-06. As Professor Corwin noted, "[S]anctions were constitutional when the deprivations they wrought were a reasonably implied amplification of the substantive power that they supported and were directly conservative of the interests that this power was created to protect and advance." Corwin, *supra* note 44, at 284 (emphasis added).

193. Rossiter and Longaker describe the case as one that "would seem to have infinite and explosive possibilities," Rossiter & Longaker, *supra* note 135, at 99, and give the President the equivalent of a Necessary and Proper Clause—"the president can make just about any use of . . . law he sees fit." *Id.* at 100; see Corwin, *supra* note 44, at 284-85. In situations that do not involve national security issues, the courts are less inclined to strain legislative grants of powers. One such example is *SEC v. Sloan*, 436 U.S. 103 (1978), in which the Commission's ten-day summary suspension for illegal securities trading was held not to include the power to continue tacking on additional ten-day suspensions indefinitely to effectively suspend trading. The Court said that the power to suspend trading was "awesome" and thus a "clear mandate from Congress . . . is necessary to confer this power." *Id.* at 112.

194. In one well-known decision, for example, the Supreme Court said, "[w]here the empowering provision of a statute states simply that the agency may 'make . . . such rules and regulations as necessary to carry out' [the act, the regulation will be upheld] so long as it is 'reasonably related to the purposes of the enabling legislation.'" *Mourning v. Family Publications Serv., Inc.*, 411 U.S. 356, 369 (1973) (quoting *Thorpe v. Housing Auth.*, 393 U.S. 268, 280-81 (1969)).

195. 467 U.S. 837 (1984).

196. See *id.* at 842-44.

as in *Chevron*,¹⁹⁷ or as a by-product of general, umbrella-like legislative authority, as in *Haig v. Agee*.¹⁹⁸ *Haig* warrants close attention here. The Court stated the controlling issue as follows: "[W]hether the President, acting through the Secretary of State, has authority to revoke a passport on the ground that the holder's activities in foreign countries are causing or are likely to cause serious damage to the national security or foreign policy of the United States."¹⁹⁹ The Court concluded that the following provision of the 1926 Passport Act was sufficient to confer such authority on the President:

The Secretary of State may *grant* and issue *passports*, and cause passports to be granted, issued, and verified in foreign countries by diplomatic representatives of the United States . . . *under such rules as the President shall designate and prescribe* for and on behalf of the United States, and no other person shall grant, issue, or verify such passports.²⁰⁰

This general language, the Court said, approved "the longstanding and officially promulgated view that the Executive had the power to withhold passports for reasons of national security and foreign policy."²⁰¹ *Haig*, therefore, recognized that the President can acquire the authority to subordinate rights of American citizens to discretionary executive foreign policy determinations solely on the basis of largely unfocused, umbrella-like legislation.²⁰²

197. See *id.* at 842-43.

198. 453 U.S. 280 (1981).

199. *Id.* at 282.

200. *Id.* at 290 (quoting The Passport Act of 1926, 22 U.S.C. § 211a (1988) (emphasis added)).

201. *Haig*, 453 U.S. at 301. This practice, such as it was, developed well before passports were legally necessary for travel. I do not address the merits of the Court's reasoning. Nor do I address the claim that *Haig* was one of several decisions that repudiated earlier decisions holding that general congressional delegations should not be read to authorize executive infringement of civil liberties. For other examples, see *Regan v. Wald*, 468 U.S. 222 (1984) (regulations severely restricting travel to Cuba upheld on basis of broad congressional grant of authority); *Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980) (per curiam) (CIA can protect national security "by imposing reasonable restrictions on employee activities that in other contexts might be protected by the First Amendment"); cf. Harold Edgar & Benno C. Schmidt, Jr., *Curtiss-Wright Comes Home: Executive Power and National Security Secrecy*, 21 Harv. C.R.-C.L. L. Rev. 349, 371-76, 384-86 (1986). After discussing cases, including *Snepp* and *Regan*, Edgar and Schmidt conclude that although "[o]ur legal tradition insists that reasonably clear statutory statements . . . precede . . . imposition[s] . . . on constitutionally-protected individual rights[.]" in the arena of national security the Supreme Court has consistently supported "executive empowerment." *Id.* at 407-08.

202. *Haig* provides further evidence, were more needed, of the moribund nature of the idea that Congress has a nondelegable duty to prescribe rules for the regulation of society. *Regan v. Wald*, 468 U.S. at 240-43, provides another example.

B. *Beyond Mere Execution*: Midwest Oil

*United States v. Midwest Oil Co.*²⁰³ is occasionally cited as a decision—the *only* decision, I should add—in which the Supreme Court upheld presidential law-making contrary to the terms of an Act of Congress.²⁰⁴ That interpretation, however, is untenable. Nothing in the Court's opinion or in the dissent suggested that the Court had endorsed such far-reaching doctrine.²⁰⁵ Fairly read, however, *Midwest Oil* does recognize the existence of some presidential authority to "burden private rights" even absent direct statutory authority or *Haig*-like umbrella legislation.

In *Midwest Oil*, Congress had provided that certain government lands containing mineral oils were "free and open to occupation, exploration and purchase by citizens of the United States [for a nominal amount] . . . under regulations prescribed by law."²⁰⁶ For various reasons, some oil lands were being depleted so rapidly that governmental ownership would last only a few months. Fearing that its own oil needs would soon require the government to buy back at market prices the very oil it was giving away, the Secretary of the Interior recommended suspension of further grants as a conservation measure.²⁰⁷ Acknowledging doubt about his authority,²⁰⁸ President Taft temporarily withdrew some of the California and Wyoming lands "[i]n aid of" legislation that would be proposed.²⁰⁹ The withdrawal order was challenged as contrary to the terms of the access statute.²¹⁰

A divided Court rejected the argument. The Court's opinion began by stating that it "need not consider whether, as an original question, the President could have withdrawn from private acquisition what Congress had made free and open to occupation and purchase,"²¹¹ because the access statute had been enacted against "a long continued practice to make orders like the one here involved."²¹² The Court then said:

It may be argued that while these facts and rulings prove a

203. 236 U.S. 459 (1915).

204. See, e.g., Peter M. Shane & Harold H. Bruff, *The Law of Presidential Power* 60 (1988).

205. Indeed, the dissent took note of the government's explicit concession of a "lack of [presidential] authority . . . to deal with the laws otherwise than to see they are faithfully executed." *Midwest Oil*, 236 U.S. at 505 (Day, J., dissenting).

206. *Id.* at 466 (quoting Act of Feb. 11, 1897, ch. 216, 29 Stat. 526, superseded by 30 U.S.C.A. §§ 181 et seq. (1986 & West Supp. 1992)).

207. See *id.* at 466-67.

208. See *id.* at 467.

209. See *id.*

210. Petitioner's argument in the Supreme Court was straightforward: "The executive power [to withdraw public lands] is dependent on congressional authority," and no such authority existed for the government's action. *Id.* at 461.

211. *Id.* at 469.

212. *Id.*

usage they do not establish its validity. But government is a practical affair intended for practical men. Both officers, law-makers and citizens naturally adjust themselves to any long-continued action of the Executive Department—on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice. That presumption is not reasoning in a circle but the basis of a wise and quieting rule that in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself—even when the validity of the practice is the subject of investigation.²¹³

Contrary to the understanding of some commentators, the Court's analysis of presidential power was not confined to the limited issue of presidential withdrawal of public lands.²¹⁴ After the language just quoted, the Court cited numerous decisions in a wide variety of contexts in support of its reasoning.²¹⁵

Midwest Oil can support several different propositions. Considerable language in the Court's opinion, for example, could justifiably limit the decision to no more than a fact-specific implied delegation case—with the President's construction of the access statute reasonable in light of a long-standing administrative practice.²¹⁶ For me, that reading does not quite fit. No *Haig*-like umbrella provision existed under

213. *Id.* at 472–73.

214. See Lee R. Marks & John C. Grabow, *The President's Foreign Economic Powers After Dames & Moore v. Regan*: Legislation by Acquiescence, 68 Cornell L. Rev. 68, 86 (1982). Marks and Grabow's argument confuses illustration of the principle with the principle itself. See *infra* text accompanying notes 247–251.

215. *Midwest Oil*, 236 U.S. at 473; see also *Myers v. United States*, 272 U.S. 52, 175 (1926) (citing cases in which an “interpretation . . . acquiesced in for a long term of years, fixes the construction to be given [a statute's] provisions”). The dissenting opinion in *Midwest Oil* denied that presidential authority could arise from the “tacit consent of Congress in long acquiescence in such executive action resulting in an implied authority from Congress to make such withdrawals in the public interest as the Executive deems proper and necessary.” *Midwest Oil*, 236 U.S. at 491 (Day, J., dissenting). The dissent could find “nothing in the Constitution suggesting or authorizing such augmentation of executive authority.” *Id.* (Day, J., dissenting) The dissent went on to distinguish the prior withdrawals as either in accord with a declared congressional policy, or the product of such fundamental conflicts in congressional directives that withdrawal was necessary “until Congress had opportunity to relieve the ambiguity.” *Id.* at 492 (Day, J., dissenting). The dissent failed to explain why, in its view, the latter conduct was permissible.

216. *Cf. Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843–45 (1984). Unless one is completely mesmerized by the epistemological and linguistic charms of the plain-meaning rule, it was surely open for the *Midwest Oil* Court to conclude as a matter of statutory construction that the access statute was not intended to apply in the circumstances found by the President. In this respect, recall the early appropriation cases, in which Presidents refused to spend appropriated funds when it was clear that the congressional purposes would not be achieved. See, e.g., Sofaer, *supra* note 44, at 170–73 (discussing executive control over expenditures during Jefferson's terms). There is a line between presidential refusal to enforce a statute because he or she believes, in the circumstances, that to do so is consistent with

which the executive order could, at least formally, be subsumed. *Midwest Oil* extends the boundary of presidential law-making at least a little distance beyond that recognized in *Haig*.²¹⁷

Midwest Oil could also be confined to that presidential regulatory power necessarily incident to the President's role as "chief administrator" in connection with government lands and perhaps other property.²¹⁸ So viewed, the presidential withdrawal order could be defended in "common [legal] understanding" as an incident of normal public administration, rather than as impermissible presidential law-making.²¹⁹ One must note, however, that the "common understanding" has been quite different when the President has purported to lay down norms in other contexts in which government property (including government funds) is implicated, that is, when the government has sought to subject government contractors or recipients of federal funding to such conditions as wage and price controls, affirmative action, or prohibitions on abortion counselling referrals.²²⁰

In fact, *Midwest Oil* has not been confined as a precedent to the notion of the President as chief administrator. As we shall see, the Court understands the decision to sanction presidential conduct invading private rights if this conduct is supported by congressional acquiescence or tacit consent,²²¹ and the question then becomes what congressional conduct suffices for that purpose. Congressional inaction is not enough; *Midwest Oil* requires that, fairly read, "adjacent"

congressional will, and the same refusal predicated on a disagreement with the legislative policy enacted by the statute.

217. In *Our Chief Magistrate*, Taft devotes only a single, unhelpful paragraph to the *Midwest Oil* decision. See Taft, *supra* note 16, at 136. The long practice of congressional acquiescence in such withdrawals, "justified the exercise of the power and made it legal as if there had been an express act of Congress authorizing it." *Id.* This paragraph follows a paragraph in which Taft claims that custom can create executive power and thereby seem almost to amend the Constitution. *Id.* at 135.

218. See *Midwest Oil*, 236 U.S. at 474. This view of the decision would reflect the nineteenth-century view that government largesse was second-class property. See Monaghan, *supra* note 40, at 15-16. The opinion refers to Congress as the "proprietor" of public lands, and to the President as the "agent in charge"; it notes that the President had issued "a multitude of [comparable] orders . . . known to Congress," and it concludes that "acquiescence all the more readily operated an implied grant of power in view of the fact that its exercise was not only useful to the public but did not interfere with any vested right of the citizen." *Midwest Oil*, 236 U.S. at 474-75.

219. So viewed, the order simply triggered duties independently defined by the common law (e.g., the duty not to trespass). Cf. *Wells v. Nichols*, 104 U.S. 444, 447 (1881) (Interior Department had "gradually come to assert the right" to recover timber cut on U.S. land; appropriation legislation sufficient authority for appointment of timber agents.).

220. See the discussion *infra* text accompanying notes 278-287.

221. See *infra* text accompanying note 250. Two even broader interpretations of the opinion are that the President can invade private rights (1) if he has done so for a long time without congressional challenge, or (2) at least in an emergency. Neither such claim seems supported by the reasoning of the opinion.

congressional legislation must presume the validity of a prior presidential practice.²²²

So understood, *Midwest Oil* puts very little strain on the *Steel Seizure* theory that the President must possess statutory authority in order to justify the invasion of private rights. The *Steel Seizure* requirement, it will be recalled, is satisfied by open-ended congressional delegations of authority. Very little difference exists between sustaining longstanding presidential invasion of private rights on the basis of *Haig*-like umbrella provisions and sustaining such invasion on the basis of "adjacent" legislation that assumes the validity of presidential conduct. The Court understood the 1926 Passport Act to have been enacted by Congress on the premise that the prior executive practice was valid.²²³ Thus, the umbrella-like statute was read to ratify prior presidential conduct. The family resemblance between *Haig* and *Midwest Oil* is strong.

C. Foreign Affairs

Differing accounts have been proffered about the origins of our nation's "foreign affairs power," a term that is not itself mentioned in the Constitution. *United States v. Curtiss-Wright*'s²²⁴ claim that the power is "extra-constitutional" has been sharply challenged.²²⁵ But from the

222. Professor Carter apparently believes that it is sufficient that Congress has not resisted claims of presidential authority; no affirmative congressional action is necessary. See Stephen L. Carter, *The Constitutionality of the War Powers Resolution*, 70 Va. L. Rev. 101, 124 (1984) ("[T]he President can exercise a purportedly inherent power if Congress has historically acquiesced and *if Congress does not try to stop him*."). Both Professor Carter's formulation and mine recognize that some presidential power affecting private rights can be acquired by prescription. I recognize that, from the beginning, controversy has existed in the separation of powers area about any "doctrine of prescriptive constitutional rights." See Jefferson Powell, *Languages of Power: A Sourcebook of Early American Constitutional History* 11-13 (1991) (quoting 22 Annals of Cong. 643 (1811) (statement of Rep. Porter)). Obviously, this Article is not the place to consider so large a topic. I say here only that in the separation-of-powers context, I am quite sympathetic to the proposition "that practice and acquiescence under it for a period of several years, . . . affords an irresistible answer, and has indeed fixed the [meaning of the Constitution]." *Stuart v. Laird*, 5 U.S. (1 Cranch) 299, 309 (1803); see Currie, *supra* note 30, at 77, 92 (discussing *Stuart*). In 1830, Madison wrote that it was hardly surprising that in a novel and complex venture difficulties would arise; but that "a course of practice of sufficient uniformity and duration to carry with it the public sanction shall settle doubtful or contested meanings." Letter from James Madison to M.L. Hurlbert (May 1830), in 9 Madison, Writings, *supra* note 96, at 370, 372. While the Court in *Stuart* referred to a judicial practice whose origins were themselves contemporaneous with the ratification of the Constitution, other longstanding executive and judicial practices have largely—but not entirely—received similar treatment. But see *INS v. Chadha*, 462 U.S. 919, 958-59 (1983) (overturning decades-old practice of legislative vetoes on the basis of the Presentment Clause and separation of powers considerations).

223. See *Haig v. Agee*, 453 U.S. 280, 293-95 (1981); *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

224. 299 U.S. 304 (1936).

225. Professor Lofgren's excellent analysis concludes that "it is more accurate to

beginning, virtually everyone recognized that in foreign affairs the President enjoys a freedom of movement and authority quite different from that in the domestic realm.²²⁶ As a starting point, accordingly, virtually every modern commentator acknowledges "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress."²²⁷ *Curtiss-Wright* could be expanded to hold that the President inherited

say that the power is vested in the federal government because it is explicitly and implicitly granted by the Constitution and that it ultimately derives not from Britain but from whatever body [i.e., the states or 'the People'] legally ordained and established the Constitution." Charles A. Lofgren, "Government from Reflection and Choice": Constitutional Essays on War, Foreign Relations, and Federalism 188 (1986). It is interesting to note that President Taft, who it can be argued was more aggressive in foreign affairs than President T.R. Roosevelt, had no such understanding of the extra-constitutional nature of foreign affairs power when he retired from the Presidency. See Taft, *supra* note 16, at 104–18. Of course, all of this debate still leaves us pretty nearly where we began: under Lofgren's analysis, are the national government's "foreign affairs powers" to be viewed, in *McCulloch* fashion, as inferences from the enumerated powers and the Necessary and Proper Clause, or are the important powers not mentioned (e.g., purchase of territory) independently implied as part of the "sovereign's" (the People's or the States') decision to establish a national government? For a discussion of Jefferson's view on the nation's authority to acquire the Louisiana Territory, see *supra* note 160. More importantly, the constitutional text itself is quite meager in terms of its allocation of the country's foreign affairs power. See, e.g., Henkin, *supra* note 100, at 18–21. The net result has been a struggle over the direction of foreign policy, with Congress and the President each possessing certain formidable advantages, both legal and political. See generally Cecil V. Crabb & Pat M. Holt, *Invitation to Struggle: Congress, the President and Foreign Policy* chs. 1–2 (4th ed. 1984); Michael Glennon, *Constitutional Diplomacy* 27–33 (1990).

226. See, e.g., *The Federalist* No. 64, at 434–36 (John Jay) (Jacob E. Cooke ed., 1961) (although President may form treaties only with advice and consent of Senate, "he will be able to manage the business of intelligence in such manner as prudence may suggest"). Jefferson went even further, writing that "[t]he transaction of business with foreign nations is *executive altogether*." 3 Jefferson, *Writings*, *supra* note 66, at 161 (emphasis added). The President's authority now clearly includes more than simply the right to speak for the country (as if speaking were not itself conducting foreign policy). Cf. James Madison, *Letters of Helvidius* No. 3 (Sept. 7, 1793), reprinted in 6 Madison, *Writings*, *supra* note 96, at 162–64 (arguing for the more restrictive view). Compare Koh, *supra* note 21, at 94 (suggesting that *Curtiss-Wright* can be so limited) with Ruth Wedgwood, *The Revolutionary Martyrdom of Jonathan Robbins*, 100 *Yale L.J.* 229, 351–52 (1990) (suggesting that *Curtiss-Wright* correctly takes a "more radical" position on executive power than Koh and others "have mistakenly suggested").

227. *Curtiss-Wright*, 299 U.S. at 320. Accordingly, the great "mass of decisions and actions that are the stuff of the daily relations of the United States with other countries," Henkin, *supra* note 44, at 19, fall within the President's domain.

President Wilson observed that the "initiative in foreign affairs, which the President possesses without any restriction whatever," meant that the President has "virtually the power to control [foreign relations] absolutely." Wilson, *Constitutional Government*, *supra* note 8, at 77. This fact, in turn, necessitates that the President stand at the front of the government. See *id.* at 59. Years later, Professor Schlesinger wrote "The Imperial Presidency was essentially the creation of foreign policy." Schlesinger, *supra* note 8, at 208.

the Crown's "federative power," except as it was specifically reallocated to Congress generally, or to the Senate specifically. This seems to be the central thrust of Hamilton's *Pacificus* letters.²²⁸ The claim is, however, historically dubious. Although the President's "special responsibility . . . for the maintenance of foreign affairs was understood," early governmental practice was not consistent with a premise of a presidential "federative" power.²²⁹ Thus, whatever the range of autonomous presidential authority in the foreign affairs context, presidential authority stops well short of an independent, free-standing law-making authority.²³⁰ Nor has the President acquired such authority by prescription.²³¹ Professor Henkin rightly observes that "[n]o one has suggested that under the President's 'plenary' foreign affairs powers he can, by executive act or order, enact law directly regulating persons and property in the United States."²³²

228. See *supra* notes 95–96 and accompanying text.

229. Casper, *supra* note 94, at 261.

230. See *infra* text accompanying note 233. Professor Koh writes that "the Framers designed the checks-and-balances scheme to apply *principally* in the realm of foreign affairs." Koh, *supra* note 21, at 83.

231. In particular, see *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5, 13 (1936) ("History and practice not only do not support, but they rather negative, . . . implied discretionary power."); see also Henkin, *supra* note 44, at 308 n.48 ("President probably had authority pursuant to treaty . . . but not . . . in the absence of treaty."). Yet in *Haig v. Agee*, 453 U.S. 280 (1981), the Court, in an obscure footnote, at least hints to the contrary. See *id.* at 289 n.17.

Presidential authority in immigration has been held, at least in some instances, to exist absent statutory language to the contrary. See, e.g., *United States v. Alvarez-Machain*, 112 S. Ct. 2188, 2196 (1992) (After asserting that treaty did not preclude criminal jurisdiction over a kidnapped Mexican, Court asserted "the decision of whether respondent should be returned to Mexico, as a matter outside of the Treaty, is a matter for the Executive Branch."); *Knauff v. Shaughnessy*, 338 U.S. 537, 542–43 (1950) (suggesting presidential control over admission of aliens absent a statutory restriction).

President John Adams' surrender of Jonathan Robbins, a seaman in the British Navy who claimed American citizenship, to trial (and certain death) before an English court-martial presents a more difficult issue. No statute authorized the President's conduct; rather, as Taft stated, "[t]he matter [of extradition] stood on the naked words of the treaty." Taft, *supra* note 16, at 86. Whether the Robbins affair is consistent with *Valentine* is an interesting question, but marginal to present concerns. The Robbins affair is explored in a first-class manner in Wedgwood, *supra* note 226.

Haig v. Agee makes clear that presidential control over passports rests at least formally on statutory authority. From the beginning, the Executive issued passports on the basis of considerations of national interest, but passports were not legally required in a non-emergency context for travel by an American citizen. See *Haig*, 453 U.S. at 292–93. Travel without a passport seems to have been forbidden, however, during The War of 1812 and the Civil War. See *id.* at 293 n.22. Legislation existed in 1812 prohibiting the State Department from knowingly issuing passports to aliens. See *id.* at 294 n.25. In 1861, an "emergency" restriction was imposed that the *Haig* Court assumed—quite unconvincingly—to be authorized by the Passport Act of 1856. See *id.* at 294–95; cf. Randall, *supra* note 44, at 149–50 (describing passport requirement in context of a series of other measures of doubtful constitutionality undertaken by Secretary of State Seward).

232. Henkin, *supra* note 44, at 57. I would substitute the word "citizen" for

Early American history is particularly illuminating. The Embargo Act of 1794²³³ and the Non-Intercourse Act of 1809²³⁴ rested on the assumption that the President needed legislative authority to interfere with foreign exchange actions by embargo or by tariff restrictions.²³⁵ Washington's celebrated 1793 Proclamation of Neutrality provides an even earlier illustration of the lack of independent presidential law-making authority in the foreign affairs context.²³⁶ Hamilton's defense grounded the Proclamation in the President's duty to interpret treaties and the law of nations.²³⁷ The Proclamation sought to avoid governmental responsibility for the misguided conduct of some American citizens, and it gave "warning to all within its jurisdiction . . . [of the] penalties which the laws of the land (of which the law of Nations is a part) annexes to acts of contravention."²³⁸ The Proclamation itself runs only three paragraphs, and, out of deference to Jefferson, it did not even mention the word "neutrality." The first two paragraphs briefly describe the reasons for the Proclamation. In the final and longest paragraph, Washington expressed Hamilton's premise:

"person." See *supra* note 39. The closest decision contrary to my view is Judge A.N. Hand's district court opinion in *United States v. Western Union Tel.*, 272 F. 311 (S.D.N.Y. 1921). At issue was whether, in the absence of congressional legislation, the President could prevent the operation of submarine cables to foreign countries in a manner he opposed. See *id.* at 313. The government argued that the President had done so on a number of instances in the past and Congress had remained silent. See *id.* at 316. Judge Hand was sympathetic to the argument that the President and the Congress had concurrent authority in the matter, but in the end he avoided deciding the issue of independent presidential authority by declaring the issue to be a nonjusticiable political question. *Id.* at 316-19. I should add here that postal agreements between the United States and foreign governments were made by the Executive without congressional participation until the 1840s. See Taft, *supra* note 16, at 135 (citing this development for the proposition that "[e]xecutive power is sometimes created by custom, and so strong is the influence of custom that it seems almost to amend the Constitution").

233. Ch. 41, 1 Stat. 372, repealed by Non-Intercourse Act of 1809, ch. 24, § 19, 2 Stat. 528, 533.

234. Ch. 24, 2 Stat. 528 (expired). The conditional delegation in the Non-Intercourse Act of 1809 was upheld in *The Brig Aurora*, 11 U.S. (7 Cranch) 382, 387-88 (1813). See Fisher, *supra* note 23, at 253-56; see also Sofaer, *supra* note 44, at 291 (arguing that Congress made broad delegations in the foreign affairs context).

235. See Fisher, *supra* note 23, at 253-55 (describing early delegations concerning embargoes).

236. 32 George Washington, Proclamation of Neutrality of 1793, reprinted in *The Writings of George Washington* 430, 430-31 (John C. Fitzpatrick ed., 1939) [hereinafter *Washington Proclamation*].

237. The proposition that the President has primary responsibility to interpret treaties was strongly defended by John Marshall in his "sole organ" speech in the House of Representatives. See Wedgwood, *supra* note 226, at 338-52.

238. 15 Hamilton, *supra* note 95, at 34. Hamilton closed with a defense of the President's "duty, as Executor of the laws, to proclaim the neutrality of the Nation, to exhort all persons to observe it, and to warn them of the penalties which would attend its nonobservance." *Id.* at 43. For citations to sources discussing the Proclamation, see Symposium, *supra* note 67, at 171-72 n.45 (Charles J. Cooper).

And I do hereby also make known . . . that I have given instructions to those officers to whom it belongs, to cause prosecutions to be instituted against all persons, who shall, within the cognizance of the Courts of the United States, violate the law of nations, with respect to the powers at war, or any of them.²³⁹

That is, the Proclamation itself did not purport to define the primary legal duties of American citizens; it simply triggered obligations independently established by international law. These obligations existed as part of our law wholly independent of the President's will.²⁴⁰ Although Chief Justice Jay charged the jury in accordance with the premise of the Proclamation, an effort to bring "common law" criminal charges failed in *Henfield's* case,²⁴¹ well before the general collapse of the concept of federal common law crimes.²⁴²

Statutes constitute the main source of presidential authority to invade private rights in the foreign affairs context. As Professor Koh aptly observes, "The vast majority of the foreign affairs power the president exercises daily are not inherent constitutional powers, but rather powers that Congress has expressly or implicitly delegated to him by statute."²⁴³ What is more, statutes originally designed to confine executive discretion have been transformed into tools that permitted the "president . . . to conduct . . . economic warfare . . . by declaring a national emergency with respect to a particular country . . . virtually without regard to whether bona fide 'emergencies' have existed."²⁴⁴ The pattern continues: a recent executive order proclaimed that the strife in what was once Yugoslavia "constitute[d] an unusual and ex-

239. Washington Proclamation, *supra* note 236, at 430.

240. Thus, the President's conduct in issuing the Proclamation was in principle identical to that in question in *United States v. Curtiss-Wright*, 299 U.S. 304 (1936). In that case, the Presidential proclamation simply triggered duties independently established by Congress.

241. 11 F. Cas. 1099 (C.C.D. Pa. 1793) (No. 6,360).

242. For a discussion of *Henfield's Case*, see Stephen Presser, *The Original Misunderstanding* 67-86 (1991); *United States v. Coolidge*, 14 U.S. (1 Wheat.) 415 (1816) (denying federal court jurisdiction in common-law crimes against the United States); cf. 1 Charles Warren, *The Supreme Court in U.S. History* 117-18 (1922) (arguing that by the decision in *Glass v. Sloop Betsy*, 3 U.S. (3 Dall.) 6 (1794), "foreign nations were formally notified that . . . the legal effects of breaches of our neutrality . . . might be tested in the Courts of the United States"); Gary P. Roue, Note, *The Sound of Silence: United States v. Hudson & Goodwin, The Jeffersonian Ascendancy and the Abolition of Federal Common Law Crimes*, 101 Yale L.J. 919 (1992) (illuminating student note describing collapse of the idea of common law crimes).

243. Koh, *supra* note 21, at 45.

244. *Id.* (referring to the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-1706 (1977)). In *Federal Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548 (1976), the Court rejected an unconstitutional delegation challenge to the Trade Expansion Act, which authorized the President to restrict imports when the "national security" so required. *Id.* at 559. The factors to be considered by the President were open-ended, showing the evident weakness in the foreign affairs context of any strictures against delegation. *Id.* at 570.

traordinary threat to the national security, foreign policy, and economy of the United States," and on that basis declared a "national emergency to deal with that threat."²⁴⁵ The executive order reflects both the form and the reality of the current literary theory: the President's need for statutory authority has been met by lavish (and sometimes misused) congressional grants, especially in the foreign affairs context. Moreover, in the foreign affairs context, the constitutional requirement of "adequate" legislative authority is applied in a relaxed manner,²⁴⁶ and decisions such as *Haig v. Agee* and *Midwest Oil* play an important role.

*Dames & Moore v. Regan*²⁴⁷ is an important illustration of the foregoing. Petitioner challenged an executive order implementing settlement of the bitter Iran-U.S. controversy. The order affected claims that were then pending in the American courts against Iranian governmental entities. The Court found adequate congressional authority insofar as the executive order nullified prior attachments and transferred frozen Iranian assets.²⁴⁸ No such authority, however, could be found for the order's suspension of the claims then pending in the American courts in favor of international arbitration. After noting the long-standing executive practice of settling claims, the Court concluded that considerable existing congressional legislation was predicated upon the validity of that practice.²⁴⁹ The Court then said:

[Given] the inferences to be drawn from the character of the legislation congress has enacted in the area, such as the IEEPA and the Hostage Act, and from the history of acquiescence in executive claims settlement—we conclude that the President was authorized to suspend pending claims pursuant to Executive Order No. 12294. As Justice Frankfurter pointed out in [*Steel Seizure*], "a systematic, unbroken executive practice, long pursued to the knowledge of the Congress and never before questioned . . . may be treated as a gloss on 'Executive Power' vested in the President by § 1 of Art. II." Past practice does not, by itself, create power, but "long-continued practice, known to and acquiesced in by Congress, would raise a pre-

245. Exec. Order No. 12,808, 57 Fed. Reg. 23299 (1992); see also Exec. Order No. 12,810, 57 Fed. Reg. 24,347 (1992) (blocking property of and prohibiting transactions with the Federal Republic of Yugoslavia (Serbia and Montenegro)). The orders were based on the International Emergency Economic Powers Act, 50 U.S.C. § 1701 et seq., and blocked assets of the governments of Serbia and Montenegro.

246. The Court has been quite explicit on this point. See, e.g., *Haig v. Agee*, 453 U.S. 280, 291–92 (1981) (holding that Secretary of State may revoke citizen's passport in the interest of national security and U.S. foreign policy, as "congressional silence [in foreign policy] is not to be equated with congressional disapproval"). *Curtiss-Wright* long ago made the same point in the delegation context. See *United States v. Curtiss-Wright*, 299 U.S. 304, 320 (1936); see also *Algonquin*, 426 U.S. at 558–60 (Congress provided adequate standards to guide presidential discretion).

247. 453 U.S. 654 (1981).

248. See id. at 669–74. This aspect of the opinion is sharply challenged by Marks and Grabow, *supra* note 214, at 77–83, and in Koh, *supra* note 21, at 139.

249. *Dames & Moore*, 453 U.S. at 685–86.

sumption that the [action] has been [taken] in pursuance of its consent" *United States v. Midwest Oil Co.*, 236 U.S. 459, 474 (1915). See *Haig v. Agee*[, 453 U.S. at 291-92]. Such practice is present here and such a presumption is also appropriate. In light of the fact that congress may be considered to have consented to the President's action in suspending claims, we cannot say that action exceeded the President's powers.²⁵⁰

While the Court cited no precedent for extending the practice of executive claims settlement to include presidential interference with ongoing judicial proceedings,²⁵¹ the perceived need for avoiding inflexible rules constraining the President in settling major international controversies clearly drove its reasoning.²⁵² More interesting for our purposes, however, the Court's analysis fused together two closely related but analytically distinct ideas: Justice Frankfurter's statement in *Steel Seizure* is a claim about the constitutional nature of executive power; *Haig* is a claim of implied congressional ratification/delegation; *Midwest Oil* is either or both of the foregoing. For me, *Dames & Moore* illustrates yet again the nature and scope of the President's power to invade private rights.

Two additional matters demonstrate the existence of some independent but limited presidential law-making authority. First, the Supreme Court has apparently recognized some independent presidential law-making authority in foreign affairs when the president invoked the recognition power; and second, some decisions seemed to sanction presidential law-making in the application of the act-of-state or the foreign-sovereign-immunity doctrine in judicial proceedings.

First, in *United States v. Belmont*²⁵³ and *United States v. Pink*,²⁵⁴ the Supreme Court apparently assumed the existence of some independent presidential law-making authority.²⁵⁵ Both decisions concerned the Litvinov agreement, an executive agreement in which the United States

250. Id. at 686.

251. Its opinion has been the subject of criticism on that score. See Peter E. Quint, *The Separation of Powers Under Carter*, 62 Tex. L. Rev. 785, 819-20 (1984) (implied consent appropriate only for relatively minor matters); see also Marks & Grabow, *supra* note 214, at 80-83, 85-87 (stating that Court furnished no support for contentions and instead cited a series of distinguishable "vesting" cases as support for broad grant of presidential powers); Evan T. Bloom, Note, *The Executive Claims Settlement Power: Constitutional Authority and Foreign Affairs Applications*, 85 Colum. L. Rev. 155, 162-63 (1985) (arguing that Court in *Dames & Moore* failed to provide a standard for constitutional analysis of future executive branch claims settlements).

252. For another striking example, see *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221 (1986) (sustaining Secretary of Commerce's refusal to certify to President that executive order "demonstrated the effectiveness" of international whaling convention).

253. 301 U.S. 324 (1937). For a detailed account of *Belmont*, see Stephen M. Millet, *The Constitutionality of Executive Agreements: An Analysis of United States v. Belmont* (1990).

254. 315 U.S. 203 (1942).

255. *Pink*, 315 U.S. at 229-30; *Belmont*, 301 U.S. at 330; see also Rossiter &

recognized the Soviet Union and gave extraterritorial effect to one of its expropriation decrees. No one disputed President Franklin Roosevelt's authority to recognize the government of the Soviet Union,²⁵⁶ but the executive agreement's provision giving effect to the expropriation decree outside the Soviet Union was contrary to the otherwise applicable New York substantive law. The Supreme Court held that the agreement displaced contrary state law.²⁵⁷ While neither *Belmont* nor *Pink* involved the rights of American citizens, nothing in either opinion suggests that this fact was of importance to the Court's separation-of-powers reasoning.²⁵⁸ For me, these results illustrate a more general proposition: the President's "specific" constitutional powers, such as the Commander-in-Chief power and the powers "implied" from presidential duties, now (whatever the original understanding) imply some independent presidential law-making power.²⁵⁹

Longaker, *supra* note 135, at 153–59 (policy of presidential independence affirmed by *Belmont* and *Pink*).

256. See also Restatement Foreign Relations, *supra* note 64, § 303(4) cmts. g–j; *id.* reporters' notes 7, 11 ("[T]he President, on his own authority, may make an international agreement dealing with any matter that falls within his independent powers under the Constitution."); Millet, *supra* note 253, at 174 ("The President can make executive agreements . . . only in the areas where he has exclusive constitutional authority: administrative procedure, recognition of foreign sovereigns, and military affairs."); Taft, *supra* note 16, at 78–81 (discussing the "quasi-legislative and quasi-judicial duties" of the President).

257. See *Pink*, 315 U.S. at 232; *Belmont*, 301 U.S. at 327.

258. The *Pink* Court did emphasize this point in its analysis to dispose of a separate due process challenge:

There is no [constitutional] reason why [the federal government] may not, through such devices as the Litvinov Assignment, make itself and its nationals whole from assets here before it permits such assets to go abroad in satisfaction of claims of aliens made elsewhere and not incurred in connection with business conducted in the country.

Pink, 315 U.S. at 228.

259. See *id.* at 229–30; *Belmont*, 301 U.S. at 330; see also Henkin, *supra* note 44, at 56–65 (arguing that acts within zones of exclusive presidential authority have effect of law); Louis Henkin, *The President and International Law*, 80 Am. J. Int'l L. 930, 934 (1986) ("Acts within [presidential] constitutional authority may . . . themselves make law and have effect as law . . ."). For me, the difficult question is the extent to which the President's specific powers are "exclusive" in the sense that they cannot be superseded by congressional legislation, rather than simply "concurrent" and thus subject to the will of Congress. See, e.g., *United States v. Klein*, 80 U.S. (13 Wall.) 128, 141 (1872) (invalidating congressional interference with President's pardon power). *Texas v. White*, 74 U.S. (7 Wall.) 700 (1869), expressed a different premise with regard to presidential regulatory power incident to the President's acting as Commander-in-Chief. The Court said that

so long as the [civil] war continued, it cannot be denied that [the President] might institute temporary government within insurgent districts occupied by the National forces, or take measures, in any State, for the restoration of state government faithful to the Union, employing, however, in such efforts, only such means and agents as were authorized by constitutional laws.

Id. at 730. The Court stressed, however, that Congress was the ultimate master. See *id.*;

But no such implied law-making authority can inhere in the general grants of the executive power contained in the Vesting and Take Care clauses. Otherwise, the fundamental premises of the constitutional order are overturned. Consider, for example, *Belmont* and *Pink*. Unless confined to executive recognition agreements, these decisions imply that legally the President might be able to dispense with Congress: so long as the President could find a foreign policy concern and a willing foreign partner, the President could issue executive orders affecting private rights, at least when not acting contrary to statute. To overturn these executive orders, Congress would have to overcome a presidential veto, which means that the President would need the support of only one-third plus one of the members of one House of Congress. Even if successful, the congressional role would be substantially limited to that of a checking function, a pattern contrary to our constitutional traditions. The Constitution contemplates no such law-making prerogative in the President. Unfortunately, dictum in *Dames & Moore v. Regan* muddies the water here. No "specific" presidential power clause supported the executive order, yet at the close of its opinion the Court cited both *Belmont* and *Pink* in a free-standing, "by-the-way" manner.²⁶⁰ The Court placed no real reliance on these decisions, however; its casual, unfocused dictum should, therefore, not be viewed as inadvertently extending the President's law-making power to any executive agreement that settles diplomatic disputes.²⁶¹

Second, in the development of both the foreign-sovereign-immunity and the act-of-state doctrines, Presidents have in the past asserted the right to determine when either doctrine is properly invoked in judicial proceedings.²⁶² Congress has now enacted extensive regulation in

see also *Swaim v. United States*, 165 U.S. 553, 558 (1897) (President has power to convene general court martial "in absence of legislation expressly prohibitive"); *Santiago v. Noguerras*, 214 U.S. 260, 265-66 (1909) (upholding military government in Porto Rico pursuant to Commander-in-Chief Clause until Congress acts after treaty of peace with Spain in 1898); Currie, *supra* note 30, at 313-14 (discussing *White*); Rossiter & Longaker, *supra* note 135, at 90 n.44 (General Orders, No. 100, Articles of War, prescribed by President); *id.* at 120-23 (describing President's authority over conquered territory); Taft, *supra* note 16, at 98-99 (describing role of President in territories acquired after Spanish-American War).

260. See *Dames & Moore v. Regan*, 453 U.S. 654, 682-83 (1981).

261. But see *United States v. Holliday*, 70 U.S. (3 Wall.) 407, 419 (1865) (deferring to President on status of Chippewas as Indian tribe for purpose of statute restricting sale of liquor). Currie claims that this was a "political question" case. See Currie, *supra* note 30, at 304 n.122. Whether or not he is correct, Currie's discussion highlights the point that the practical result of the "political question" doctrine may be to invest the President with some law-making power. Cf. Bigel, *supra* note 172, at 37.

262. The doctrines have common intellectual underpinnings. See Alfred Dunhill of London, Inc. v. Cuba, 425 U.S. 682, 693-94, 705 (1976) (difference between sovereign immunity and act-of-state doctrines unimportant for purposes of this case); Restatement Foreign Relations, *supra* note 64, §§ 443-444, 451-460; Henkin, *supra* note 44, at 57-64. But see *Dunhill*, at 728 (Marshall, J., dissenting) (stating that the doctrines are distinct, and that "exceptions . . . to sovereign immunity ought not be transferred

both areas, and seems to have precluded any independent presidential "regulatory" role.²⁶³ But even before that point, a number of justices had become uncomfortable with suggestions that, independently of statute, the President could turn off-and-on again the act-of-state doctrine, or could determine the extent to which state law is preempted by the foreign affairs power of the United States.²⁶⁴

D. *The Chief Administrator*

A final dimension of the "law enforcement" executive deserves further consideration. The prior discussion of *Midwest Oil* suggested the potential impact on private rights of the President's role in public ad-

automatically . . . to the act-of-state doctrine"). The view that judicial deference to the Executive should be viewed as deference to Executive applications of international law rather than as deference to discretionary executive foreign policy determinations gives plausibility to the Executive's claim of authority. See Wedgwood, *supra* note 226, at 260-61; see also Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 *Yale L.J.* 969, 1003-05 (1992) (arguing that executive interpretations of law may create precedents for courts). Nonetheless, to the extent that the courts defer to the Executive acting without statutory authority, it is the latter who claims the right to define the legal rights of American citizens.

263. See 22 U.S.C. § 2370(e)(2) (1988) (act-of-state doctrine); Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended in scattered sections of 28 U.S.C.). Pursuant to the Foreign Sovereign Immunities Act, the courts independently decide whether foreign states may be subject to suit in the U.S. on the basis of criteria defined by the statute. See, e.g., *Republic of Arg. v. Weltover, Inc.*, 112 S. Ct. 2160, 2164-69 (1992) (holding that Argentina's bond refinancing constituted "commercial activity" with "direct effect" on United States and thus rendered Argentina amenable to suit). More light on the Executive's role may be shed by *Nelson v. Saudi Arabia*, in which, at the government's urging, the Court has granted a petition for certiorari. See *Nelson v. Saudi Arabia*, 923 F.2d 1528 (11th Cir. 1991) (holding that Saudi government's recruitment and hiring of U.S. citizen within United States rendered Saudi Arabia amenable to suit), cert. granted, 112 S. Ct. 2937 (1992).

264. In *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 765-70 (1972), only three Justices espoused an executive prerogative in the act-of-state area. Cf. *W.S. Kirkpatrick v. Environmental Tectonics Corp.*, 110 S. Ct. 701, 704 (1990) (outlining possible exceptions to act-of-state doctrine based on "modern international comity" rather than on executive permission); *Dunhill*, 425 U.S. at 724-25 (Marshall, J., dissenting) (noting that "task of defining the role of the Judiciary is for this Court, not the Executive Branch"). On the executive role in sovereign immunity, see *Dunhill*, 425 U.S. at 695-706 (looking, in part, to executive branch to determine whether to extend act-of-state doctrine to commercial acts of foreign governments); see also *id.* at 724-28 (Marshall, J., dissenting) (arguing that Executive's importance with respect to act-of-state doctrine did not necessarily dictate similar results in cases involving sovereign immunity); *United States v. Nixon*, 418 U.S. 683, 704 (1974) (judicial power cannot be shared with executive branch). Of course, here as elsewhere, Congress knows how to delegate discretion to the Executive. See, e.g., 22 U.S.C. § 2370(e)(2) (1988) (act of state); *Banco Nacional*, 406 U.S. at 789 n.13 (Brennan, J., dissenting) (arguing that less deference to Executive is appropriate in situations involving act-of-state doctrine than in those involving sovereign immunity); *Kraft Gen. Foods v. Iowa Dep't of Revenue*, 112 S. Ct. 2365, 2372-74 (1992) (Rehnquist, J., dissenting) (declining to follow executive assertion of no-preemption of state law in the foreign commerce context); *Zschernig v. Miller*, 389 U.S. 429, 432-41 (1968) (same).

ministration.²⁶⁵ Writing nearly a century ago, the first students of public administration—Freund, Wyman, Goodnow, and later Willoughby—insisted, in varying degrees, that the Constitution itself secured only the President's "political" independence.²⁶⁶ For them, the President's administrative (and, a fortiori, regulatory) powers depended entirely on statute. Thus, Ernst Freund insisted that "one of the fundamental principles of our administrative system [is] no executive power without *express* statutory authority."²⁶⁷ This claim was plainly wrong even when written; it had no basis in the case law, at least if the words "no" and "express" are given anything approaching their ordinary meaning. Well before *Midwest Oil*, the Supreme Court had endorsed a spacious conception of the Executive's "managerial" power to fill in the details of statutes. Very early on, for example, the Supreme Court recognized a right in the Executive "to enter into a contract, or to take a bond, in cases not previously provided for by some law."²⁶⁸ Similarly, the Court

265. This topic goes quite unnoticed by Professor Corwin, except for his passing reference to President Truman's loyalty-security program, which, though Corwin does not mention it, regulated government contractors as well as government employees. Corwin himself thought it obvious that the loyalty-security program implemented Congressional legislation, but even his description resembles more of a *Haig/Midwest Oil* analysis. See Corwin, *supra* note 44, at 115–25 (discussing administration of loyalty-security program).

266. Grundstein offers an excellent review of those writers. See generally Grundstein, *supra* note 23. These early commentators pointed to *Marbury v. Madison*'s sharp contrast between judicial protection of vested rights and judicial interference when the President

is invested with certain important political powers, in the exercise of which he is to use his own discretion. . . . The subjects are political. They respect the nation, not individual rights, and being intrusted to the executive, the decision of the executive is conclusive. The application of this remark will be perceived by advertng to . . . the department of foreign affairs.

Marbury v. Madison, 5 U.S. (1 Cranch) 137, 165–66 (1803). These writers apparently conflated the terms "political" and "discretionary." Taft, however, does make such a distinction, differentiating between situations in which executive's acts are beyond judicial review because they involve discretion and those that are similarly insulated because they are political. See Taft, *supra* note 16, at 47. These early commentators recognized and fully approved of the fact that the President had gained ascendancy in public administration, but insisted that this was largely because Congress had so ordained. The best (though controversial) modern account of separation-of-powers concepts and public administration is by my colleague Peter L. Strauss. See Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 Colum. L. Rev. 573, 640–67 (1984) (arguing that Congress' power to create and control public administration must take President's need for day-to-day oversight of government into account); see also A. Michael Froomkin, Note, *In Defense of Administrative Agency Autonomy*, 96 Yale L.J. 787, 798–808 (1987) (Congress' power to structure executive branch implies power to create administrative agencies partially shielded from President's removal power).

267. Ernst Freund, *The Law of the Administration in America*, 9 Pol. Sci. Q. 403, 410 (1894) (emphasis added). Freund added, "In contrast . . . we find in Europe executive powers independent of statute, discretionary powers of action . . ." *Id.*

268. *United States v. Tingle*, 30 U.S. (5 Pet.) 115, 128 (1831).

sustained the standing of the Executive, without express statutory authority, to enforce the contract and property rights of the United States, a matter to which I will return.²⁶⁹

In *United States v. MacDaniel*,²⁷⁰ the Court deferred to the department head's construction ("usage") of an ambiguous statute governing an employee's compensation, while acknowledging that future department heads could change that construction. Speaking more generally, Justice McLean wrote that "practical knowledge" made clear that "the head of a department, in the distribution of its duties and responsibilities, is often compelled to exercise his discretion."²⁷¹ He added:

[The department head] is limited in the exercises of his powers by the law; but it does not follow, that he must show statutory provision for everything he does. No government could be administered on such principles. To attempt to regulate, by law, the minute movements of every part of the complicated machinery of government would evince a most unpardonable ignorance on the subject. Whilst the great outlines of its movements may be marked out, and limitations imposed on the exercise of its powers, there are numberless things which must be done, that can neither be anticipated nor defined, and which are essential to the proper action of the government.²⁷²

This view seems clearly correct, and the result is that the chief administrator's authority to fill in details could entail some incidental burdens on private rights. Surely, acting under the most general statutes or under no statute at all, the executive could prescribe rules for regulating access to federal buildings and lands. A violation of their content would in turn constitute a trespass under the general standing law. The incidental impact on the liberty or property interests of private parties would not in "the common understanding" be viewed as executive

269. See Hart & Wechsler, *supra* note 182, at 910-11 (collecting cases). In these suits, it should be noted that the Executive did not claim authority to define the primary legal rights and duties of the affected private parties; those rights were independently defined by statute or common law. In the contract cases, the law generally permitted the parties to specify the terms of their bargain, and the Executive operated within that framework. The Executive claimed only a right of action (as chief administrator) to enforce the pre-existing legal duties.

270. 32 U.S. (7 Pet.) 1 (1833).

271. *Id.* at 14.

272. *Id.* at 14-15. This understanding of the executive's managerial authority was readily embraced in several Attorney General opinions, and it seems to have underpinned a good deal of actual administrative practice. See Appointment of Acting Purser, 6 Op. Att'y Gen. 357, 365 (1854) ("The filling up a vacancy by an appointment of one to act ad interim . . . is in its nature an executive, ministerial and administrative power."); Navy Regulations, 6 Op. Att'y Gen. 10, 12-19 (1853) (opining that Executive has no power, outside a specific statutory grant, to promulgate rules for the Navy). During the Civil War, Lincoln issued a general order fashioning rules of war to govern the military, an act quite arguably inconsistent with U.S. Const. art. 1, § 8, cl. 14. See Randall, *supra* note 44, at 38-39; *supra* note 259.

"law-making," that is, as altering a prior legally protected baseline of freedom.

MacDaniel itself could be viewed as another case of implied delegation under umbrella-like statutes or as simply explicit recognition of executive power that necessarily includes some independent authority to "fill in the details" in managing the internal affairs of government.²⁷³ The latter conception seems to me far more persuasive. That conception is implicit in the writings of Hamilton and Jefferson and in the early case law. Nonetheless, limits exist as to the kinds of presidential conduct that fairly can be justified as simply an incident to public administration.²⁷⁴ Moreover, these limits must be understood in the context of the modern "administrative state," with its extensive licensing and entitlement programs.²⁷⁵ No precise boundary between management and law-making can be formulated, and, no doubt, the boundary will reflect contemporary understandings of what properly may be denominated as "merely" public administration. But that some such boundary exists seems clear. For example, in *Rust v. Sullivan*,²⁷⁶ no one supposed that the President's authority as chief administrator alone obviated his need for statutory authority to impose his anti-abortion counselling restrictions.²⁷⁷

Currently, the most troublesome cases regarding the scope of legitimate public administration—as opposed to impermissible presiden-

273. Implied delegation concepts might also explain early executive agreements, governing international postal conventions, that were entered into without statutory authority. See *supra* note 232.

274. See Navy Regulations, 10 Op. Att'y Gen. 413 (1862). The Attorney General's opinion dealt with the power of the President to fix the relative rank of Navy line and civil staff officers. The Attorney General concluded that the President had no such power absent a statute, because such conduct "is in no just sense an exercise of Executive Power, for it is the *prescription* of a rule and not the *execution* of a rule already prescribed." *Id.* at 414. Cf. Grundstein, *supra* note 23, at 228 n.3 (quoting Ernst Freund, who described as one of the "fundamental principles of our administrative law . . . [the] minute regulation of nearly all executive functions . . .").

275. With its licensing and entitlement programs, the modern administrative state erodes earlier efforts to sharply divide administrative law into its "internal" and "external" branches, with the former confined to the realm of the relationships between administrative officials and their superiors. See, e.g., Bruce Wyman, *The Principles of the Administrative Law Governing the Relations of Public Officers* § 50, at 180 (1903). But the general distinction between internal governmental management and law-making has not gone by the boards. For a discussion of the controversy on the point in the First Amendment context, compare *International Soc'y for Krishna Consciousness v. Lee*, 112 S. Ct. 2701, 2705 (1992) (when government acts as proprietor rather than as legislator, its actions will not be subjected to highest scrutiny) with *id.* at 2716 (Kennedy, J., concurring) (admonishing majority for introducing "strict doctrinal line between the proprietary and regulatory" functions of government). It must be recognized, however, that the distinction may play a different and lesser role when the Bill of Rights is concerned. See *id.* at 2712 (O'Connor, J., concurring) (noting that government may not wholly disregard First Amendment even when acting as proprietor).

276. 111 S. Ct. 1759 (1991).

277. See *id.*

tial law-making—concern government contractors. These contractors must now comply with restrictions not clearly related to the nature or cost of the product they supply, but to their own internal management. For example, contractors must comply with presidentially imposed affirmative action programs.²⁷⁸ This requirement was initially established by Executive Order 11246, the statutory origins of which, as the Supreme Court gingerly observed in *Chrysler Corp. v. Brown*,²⁷⁹ “are somewhat obscure and have been roundly debated by commentators and courts.”²⁸⁰

Earlier, similar concerns of legality had surrounded President Carter’s wage and price control program. A sweeping delegation of wage and price control authority to the President had expired.²⁸¹ President Carter, by executive order, nonetheless managed to impose the controls by, in substance, denying government contracts worth more than five million dollars to contractors who would not comply with his “voluntary” wage and price standards.²⁸² In the same year as *Brown*, a divided en banc court for the District of Columbia Circuit concluded in *AFL-CIO v. Kahn*²⁸³ that the restrictions were sufficiently cost-related as to be authorized by federal procurement legislation.²⁸⁴ Three circuit judges dissented,²⁸⁵ as did three justices from the denial of certio-

278. Affirmative action programs currently affect more than 95,000 entities collectively employing 27 million workers, and involve contracts worth a total of \$184 billion. See Steven A. Holmes, *Affirmative Action Plans are Now Part of the Normal Corporate Way of Life*, N.Y. Times, Nov. 22, 1991, at A20. More than 500 persons are employed by the Office of Federal Contract Compliance Programs to monitor the compliance process. See Chester E. Finn, Jr., *Quotas and the Bush Administration*, Commentary, Nov. 1991, at 17, 21.

279. 441 U.S. 281 (1979).

280. *Id.* at 304. Section 201 of the Executive Order directed the Secretary of Labor to “adopt such rules and regulations and issue such orders as he deems necessary and appropriate to achieve the purposes [of the Executive Order].” *Id.* (quoting Exec. Order No. 11,246, § 201, 3 C.F.R. 339 (1965 Supp.), reprinted in 42 U.S.C. § 2000e (1988)). The Court held that the Order did not authorize regulations permitting the release of affirmative action programs filed by government contractors, finding these regulations in conflict with the Trade Secrets Act, which barred disclosures not “authorized by law.” *Id.* at 315–16 (citing Trade Secrets Act, 18 U.S.C. § 1905). Justice Marshall concurred, concluding that the Court did not decide that the Executive Order “must be founded on a legislative enactment.” 441 U.S. at 320 (Marshall, J., concurring). See generally Michael Brody, *Congress, the President, and Federal Equal Employment Policymaking: A Problem in Separation of Powers*, 60 B.U. L. Rev. 239, 269–81 (1980) (arguing that Executive Order 11,246 imposes certain legal obligations distinct from those imposed by Congress under Title VII and that the order contravenes the will of Congress).

281. The delegation was sustained in *Amalgamated Meat Cutters & Butcher Workmen v. Connally*, 337 F. Supp. 737, 744–63 (D.D.C. 1971).

282. Exec. Order No. 12,092, 43 Fed. Reg. 51375 (1978).

283. 618 F.2d 784 (D.C. Cir.), cert. denied, 443 U.S. 915 (1979).

284. See *id.* at 787–96.

285. See *AFL-CIO v. Kahn*, 618 F.2d 784 (D.C. Cir. 1979) (MacKinnon, Robb, Wilkey, JJ., dissenting).

rari.²⁸⁶ The *Kahn* majority intimated that presidential affirmative action programs could also rest on the same procurement legislation. But even that majority expressed deep reservations about an earlier Third Circuit suggestion that "implied Presidential authority" alone sufficed to support such programs.²⁸⁷

The judicial effort to locate adequate statutory authority for the President's affirmative action and wage and price control programs finds its counterpart in *Midwest Oil*'s effort to find adequate congressional approval. This search for sufficient legislative warrant rests on the intuition that the President's administrative role provides frail support for conduct that, in "the common understanding," burdens private rights. Moreover, the search reflects another intuition: the President's administrative role cannot be analogized to that of the modern Chief Executive Officer in a major corporation. That officer does have law-making authority. The modern CEO wields the authority described by T.R. Roosevelt's stewardship theory; that officer can act unless restricted. A CEO could impose affirmative action, price controls, and other downstream restrictions on those who deal with the corporation. But the American President is not a CEO. Our tradition is that no official—from the President down—can invade private rights unless authorized by legislation.

III. THE PROTECTIVE POWER

Some of the precedents relied upon to establish the existence of an emergency presidential power can also be read to establish a narrower authority: an executive power to preserve, protect, and defend the personnel, property, and instrumentalities of the national government. In addition to spelling out a justification for this claim, I consider the probable contours of such a protective power.

A. *In re Neagle* and *In re Debs*

We begin with a consideration of two perplexing late nineteenth-century decisions: *In re Neagle*²⁸⁸ and *In re Debs*.²⁸⁹ In each case, the Court spent considerable energy in demonstrating what no one would now deny: that the protection of federal officials and instrumentalities

286. See *AFL-CIO v. Kahn*, 443 U.S. 915 (1979) (Brennan, White, and Marshall, JJ., dissenting); see also Kimberley A. Egerton, Note, Presidential Power over Federal Contracts Under the Federal Property and Administrative Services Act: The Close Nexus Test of *AFL-CIO v. Kahn*, 1980 Duke L.J. 205, 217-33 (arguing that *Kahn* Court had failed to articulate clear limits on presidential regulatory power and suggesting examination of congressional intent to determine those limits).

287. 618 F.2d at 791 n.40 (criticizing *Contractors Ass'n v. Secretary of Labor*, 442 F.2d 159, 170-71 (3d Cir.), cert. denied, 404 U.S. 854 (1971)). The court noted that in the case before it, the government had made no such claim. See *id.* at 787.

288. 135 U.S. 1 (1890).

289. 158 U.S. 564 (1895).

and the protection of interstate commerce fall within the regulatory power of the national government. The underlying difficulty in both cases was the absence of a plainly controlling statute to which the President could point to support his conduct. No reference was made to any concept of emergency power in the national government, but the Court seemed deeply reluctant to acknowledge the lack of *existing* governmental authority, despite the lack of any apparently controlling legislation. Accordingly, the Court was compelled to fashion novel and difficult propositions of law in order to sustain the President's conduct. In so doing, however, the Court purported to follow the format of the "law enforcement" executive: (a) the relevant legal norms were located in the structure and relationships established by the laws and the Constitution; and (b) the President's conduct was viewed as fairly and reasonably implementing those norms.²⁹⁰

In *Neagle*, the Attorney General had assigned a federal marshal to guard Justice Field, whose life had been threatened, while he was on circuit duty in California.²⁹¹ The marshal killed Justice Field's assailant in a railroad dining car, and for that conduct he was held by the state on homicide charges. The marshal sought his discharge on a writ of habeas corpus, and the litigants focused on whether his detention was contrary to the "laws of the United States," and thus, "the Constitution."²⁹² The ultimate issue turned on whether the Attorney General had lawfully assigned the marshal to protect Justice Field. If not, the marshal possessed only the authority of a private citizen under California law, which meant that a jury could find that he had committed criminal and tortious conduct.²⁹³ Eminent counsel appeared for the marshal: the Attorney General and Mr. Joseph H. Choate. They conceded that "[i]t is not pretended that there is any single specific statute making it [the Attorney General's] duty to furnish this protection."²⁹⁴

At the close of its opinion, the Court purported to find adequate statutory authority for the marshal's conduct. Congress, it said, had invested federal marshals with the statutory powers of the local sheriff, which the Court found fully adequate to sustain the marshal's defense

290. Thus, in form, the Court here too did not permit the President to define the content of primary rights and duties of private parties; it simply recognized the existence of executive action taken to implement the underlying norms.

291. The actual facts would make a first class movie. *Neagle*, 135 U.S. at 3-7, 42-54. Professor Carl Swisher's biography of Justice Field includes some facts omitted from the Court's opinion out of a sense of delicacy. See Carl B. Swisher, Stephen J. Field: Craftsman of the Law 328-61 (1930).

292. *Neagle*, 135 U.S. at 27. The Attorney General's argument collapsed the distinction between statutory and constitutional issues. See *id.* at 12.

293. Cf. *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 178-79 (1804) (holding military officer liable for tortious damages when Court concluded that instructions given to him, although misleading, did not legalize his act, which without those instructions was plainly a trespass).

294. *Neagle*, 135 U.S. at 27.

of Justice Field.²⁹⁵ But what is of most interest is the main ground of the Court's opinion. The Court insisted that the constitutional structure itself implied the Executive's right to protect federal officers in the discharge of their duties.²⁹⁶ At this point, a step seems to have been assumed: that "the protection implied by the nature of the government under the constitution"²⁹⁷ imposes duties not only upon state officials but also upon private parties.²⁹⁸ Although it has not fared well and is in tension with our general understanding, the concept that, even apart from the Thirteenth Amendment, the Constitution itself imposes some duties directly on private parties was an important idea in the constitutional jurisprudence of the late nineteenth century.²⁹⁹ For the Court, then, the issue was whether, even without statutory sanctions, the President's "take care" responsibilities included vindication of a constitutional norm:

Is this duty [to protect federal officials] limited to the enforcement of acts of Congress or of treaties of the United States according to their *express terms*, or does it include the rights, duties and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution?³⁰⁰

The Court's answer was in the affirmative, but the reasoning was unclear.

*In re Debs*³⁰¹ arose out of the famous Pullman strike of 1894. The Attorney General sought an injunction alleging the existence of a conspiracy to use force, intimidation, violence, and the destruction of

295. See *id.* at 68–69.

296. See *id.* at 54–58.

297. *Id.* at 64.

298. As the dissent observed, historically Congress had relied on state law for the protection of federal officers. See *id.* at 96 (Lamar, J., dissenting).

299. See, e.g., *Logan v. United States*, 144 U.S. 263, 294–95 (1892) (holding that citizen in custody of United States Marshal for offense against United States has right to be protected from lawless violence). *Neagle* and *Logan* are not the only examples from this era of the emergence of novel constitutional doctrine from the lack of clearly relevant specific statutory authorization. The Court frequently reached out to doctrine that ensured that the national government was not seen as impotent in circumstances when it simply "couldn't" be. See, e.g., *In re Quarles*, 158 U.S. 532, 536–37 (1895) (opining that relegating the enforcement of federal laws and rights to the states "would tend to defeat the independence and the supremacy of the national government"); *Ex parte Yarbrough*, 110 U.S. 651, 662–67 (1884) (holding that federal government could pass laws to protect rights "essential to the healthy organization of the government itself"). Of course, the entire "state action" problem could have been avoided if the Court had held that it was not the Constitution but the statutes that implied protection for federal officers. By implication, the statutes would also invest the President with authority to vindicate that protection.

300. *Neagle*, 135 U.S. at 64. This essay is not the occasion to develop a full inquiry into the troublesome question of what it means to say that the President is implementing constitutional norms rather than statutory directives. See *infra* note 320 and accompanying text.

301. 158 U.S. 564 (1895).

property in order to obstruct the carriage of the mails, and, more importantly, the processes of interstate commerce.³⁰² No act of Congress expressly prohibited the complained-of conduct or authorized the executive to seek an injunction. Accordingly, the case might have been described in *Steel Seizure* terms: the executive was executing no policy save its own. A unanimous Court, however, concluded otherwise. The President was seen as executing some uncertain mixture of legal norms embodied in the Constitution and existing statutes that mandated unobstructed channels of interstate commerce: "As, under the Constitution, power over interstate commerce and the transportation of the mails is vested in the national government, and Congress by virtue of such grant has assumed actual and direct control, it follows that the national government may prevent any unlawful and forcible interference therewith."³⁰³

The national government's power having been established, and some legislation, albeit not sufficiently dispositive, having been cited, what then of the President's conduct? Congress, the Court said, could have legislated criminally against the obstruction; but the Court asked, "is that the only remedy?"³⁰⁴ Answering its own question in the negative, the Court stated that "[t]he entire strength of the nation may be used,"³⁰⁵ which, for the Court, meant that the President was free to use "the army of the Nation, and all its militia" to remove the obstruction to interstate commerce.³⁰⁶ From the latter premise, which, I should add, petitioners' counsel apparently conceded,³⁰⁷ the Court concluded that "[w]hen the choice is between redress or prevention of injury by force and by peaceful process, the law is well pleased if the individual [i.e. the executive] will consent to waive his right to the use of force and await [the law's] action."³⁰⁸ The remainder of the Court's opinion was devoted to showing that, in addition to his authority to protect the property and contract rights of the United States, the President had the authority to remove obstructions to interstate commerce. In reaching its conclusion, the Court cited numerous English and state authorities.³⁰⁹

302. See *id.* at 565-70.

303. *Id.* at 581.

304. *Id.* The Court did not stop to notice that Congress could have legislated civilly too, for example, by prohibiting such obstruction and authorizing the Executive to seek an injunction. Cf. Labor Management Relations (Taft-Hartley) Act, 29 U.S.C. § 160(j) (1988) (authorizing injunction after certain procedures are exhausted).

305. 158 U.S. at 582.

306. *Id.*; cf. Story, Commentaries, *supra* note 13, § 782 (President has no authority to use public force to enforce treaties).

307. See 158 U.S. at 573-77; cf. 10 U.S.C. §§ 332-334 (1988) (authorizing President to use armed forces when unlawful obstructions make it impracticable to enforce laws of United States).

308. 158 U.S. at 583.

309. See *id.* at 586-96.

Essentially, *Debs* raised two questions. First, why was the obstruction of rail traffic illegal? No express congressional prohibition existed. The Court believed that the obstruction was illegal as a result of a combination of the Commerce Clause itself and of the implications of existing statutes. Indeed, the Court intimated that the Commerce Clause alone made the obstruction illegal: "If a State with its recognized powers of sovereignty is impotent to obstruct interstate commerce, can it be that any mere voluntary association . . . has a power which the State itself does not possess?"³¹⁰ This seems wrong. The Commerce Clause is a limitation on state action. Private obstructions to interstate trade may violate antitrust laws, but not the Commerce Clause. The argument based on then-existing federal statutes is also implausible: to read any of the statutes cited in the Court's opinion as having, by implication, forbidden the conduct complained of in the suit seems excessive. Of course, adding the Commerce Clause and the statutes together goes nowhere. Summing zeroes yields zero, as it always does.

Second, assuming that the obstruction to interstate commerce did contravene existing federal law, what is the source of executive standing to invoke judicial process? Arguably, the railroads had an implied right of action to do so, but it is unclear why the executive had such standing. In addition, in measuring the President's authority, the Court does not explain why common law suits by English and state officials are relevant.³¹¹

What for us remains of deepest interest, however, is that in both *Neagle* and *Debs* the Court sought to meet the presidential law-making objection without either overtly invoking emergency concepts foreign to our jurisprudence or abandoning the idea of the "law enforcement" executive.

B. *A Protective Function*

Since 1792, the President has had the statutory authority to use the military to enforce federal law when the processes of civil government are unable to do so because of domestic violence.³¹² Quite arguably, this power exists absent statute; *Debs* and other decisions so imply in referring to the "peace of the United States," which the President could protect.³¹³ Be that as it may, *Neagle* can be defended, and *Debs* at least

310. *Id.* at 581.

311. Arguably no such "inherent" power to vindicate constitutional norms should be recognized. Compare *Sanitary Dist. v. United States*, 266 U.S. 405, 425-26 (1925) (Holmes, J.) (relying on obstructing commerce rationale of *Debs* and treaty obligations) with *United States v. City of Philadelphia*, 644 F.2d 187, 199-201 (3d Cir. 1980) (Executive cannot sue to enforce Fourteenth Amendment rights absent statutory authority).

312. See 10 U.S.C. §§ 332-334 (1988) (corresponds to Act of May 2, 1792, ch. 28, 1 Stat. 264 (repealed 1795)).

313. See, e.g., *In re Neagle*, 135 U.S. 1, 60-68 (1890). *Ex parte Siebold*, 100 U.S. 371, 395 (1879), stated, apparently for the first time, that the "incontrovertible

understood, in similar terms: inherent in the concept of the American Chief Executive is the power (and perhaps the duty) to use force as necessary to enforce federal law when a breakdown in the normal civil process has occurred, and not only to defend the United States against sudden attack, but also to "protect" the government's personnel, property, and instrumentalities.³¹⁴ While this latter "protective" power finds its clearest illustrations in cases of immediate danger, it is, in principle, not so limited. It includes the general right of the executive, without express statutory authority, to make contracts and, more importantly, to sue to protect the personnel and the property interests of the United States, and when necessary to use force and other resources to protect them.

The President takes an oath to "preserve, protect and defend the Constitution of the United States."³¹⁵ The *Neagle* dissent justly observes that this oath must be understood in the context of a Constitution that assigns law-making power to Congress alone. The Oath Clause, however, need not be read as purely formal. It describes in some measure what the President was expected to do. Hamilton described the need for executive "energy" in terms that contemplate more than executive protection against foreign attack.³¹⁶ Hamilton referred to a similar need for an executive protection power to ensure "the steady administration of the laws" and to guard "against those irregular and highhanded combinations, which sometimes interrupt the ordinary course of justice," and finally, to guard "against the enterprises and assaults of ambition, of faction and of anarchy."³¹⁷ Executive authority, he added, included the use of force, if necessary, to enforce the laws of the United States.³¹⁸

Hamilton's position reflected a great deal of then-current English and American political and legal thought, which emphasized protection of the individual as one of the major functions of government.³¹⁹ We

principle" that the government may by means of physical force execute its powers and functions "necessarily involves the power to command obedience to its laws, and hence the power to keep the peace to that extent." *Id.* at 395. This concept of governmental authority refers to the President's power to ensure that the enforcement of federal law is not overcome by force or violence, a power recognized by 10 U.S.C. §§ 332-34 (1988).

314. 10 U.S.C. §§ 332-334 (1988) authorizes the use of force to enforce federal law when there is a breakdown in civil government. Our concern, of course, is with situations far less drastic.

315. U.S. Const. art. II, § 1.

316. See *The Federalist* No. 70, at 471 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

317. *Id.*

318. "[T]he execution of the laws and the employment of the common strength, either for this purpose or for the common defence, seem to comprise all the functions of the executive magistrate." *The Federalist* No. 75, at 504 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). See generally Flaumenhaft, *supra* note 152, at 85-98 (discussing Hamilton's views on role of the Executive).

319. From Hobbes on down, political philosophers emphasized that "protection"

may assume here that at the national level of our governmental system, this protective function exists largely in Congress alone, not in the Executive (unless delegated). We may thus assume that, without statutory authorization, the President does not possess a general, free-standing "protective" power to enforce federal law, even to enforce the guarantees of the Fourteenth Amendment.³²⁰ But a limited presidential power respecting the personnel, property, and instrumentalities of the government that the President is supposed to administer is a different matter.³²¹ This is the claim of executive authority reflected in *Neagle*. But the most salient illustration of this power, however, is President Lincoln's conduct before the outbreak of the Civil War. Repeatedly denying that he desired war, Lincoln publicly justified all of his conduct in protecting Forts Sumter and Perkins in terms of protecting the personnel and property of the United States.³²² Indeed, even President

of the individual in both person and property is a core purpose of government. See Thomas Hobbes, *Leviathan* 272 (Crawford B. McPherson ed., 1968) ("The end of [a subject's] Obedience is Protection"). The concern for the security of "men's bodies and properties . . . is an emphatically modern principle emanating from the doctrines of Hobbes and Locke." See Richard Cox, *Executive and Prerogative: A Problem for Adherents of Constitutional Government*, in 11 *E Pluribus Unum: Constitutional Principles and the Institutions of Government* 102, 104 (Sarah Thurow ed., 1988). Protection of liberty and property was a central purpose of the creation of an effective national government, and also of the Fourteenth Amendment's Equal Protection Clause. The latter clause was designed not so much as a guarantee of equal laws, but of the equal *protection* of the laws. See Harrison, *Reconstructing the Privileges and Immunities Clause*, 101 *Yale L.J.* 1385, 1434-36 (1992); Earl A. Maltz, *The Concept of Equal Protection of the Laws—A Historical Inquiry*, 22 *San Diego L. Rev.* 499, 499 (1985); Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 *Duke L.J.* 507, 563-66 (1991).

320. See *United States v. City of Philadelphia*, 644 F.2d 187, 199-201 (3d Cir. 1980). Such power is reserved to the President in the event of a breakdown in civil government. See 10 U.S.C. §§ 332-334 (1988); see also Maeva Marcus & Robert Teir, *Hayburn's Case: A Misinterpretation of Precedent*, 1988 *Wis. L. Rev.* 527, 534-41 (suggesting that presidential authority to vindicate national law was broader than now understood).

321. Cf. *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 226 (1821) (recognizing inherent power in Congress to punish for contempt because "if there is one maxim which, necessarily rides over all others, in the practical operation of government, it is, that public functionaries must be left at liberty to exercise the powers which the people have entrusted to them.").

Professor Heyman's recent study shows that in English constitutional and political theory and in the early American experience, the Executive was strongly associated with the idea of protection, especially when enforcing the protections of existing laws. See Heyman, *supra* note 319, at 519-20.

322. See David M. Potter, *Lincoln and His Party in the Secession Crisis* xxxi (1971). Professor Potter's careful introduction to the 1962 edition reviews the conflicting evidence on the point. Lincoln's inaugural address set the tone: "You [secessionists] have no oath registered in heaven to destroy the Government, while I shall have the most solemn one 'to preserve, protect, and defend it.'" First Inaugural Address Abraham Lincoln, in *The Inaugural Addresses of Presidents of the United States* 141 (United States Government Printing Office 1989).

Buchanan refused to yield Fort Sumter after the initial stages of secession, although no one believed that he would use force to put down the secession itself.³²³

In this century, illustrations of the protective power appear, but in less sharp a focus. The elaborate modern loyalty-security programs initially created by Presidents Truman and Eisenhower through executive orders provide one modern example of the exercise of the protective power—one that fully requires an article of its own. It is, however, a topic for which this Article has implications.³²⁴ Loyalty-security programs impose restrictions not only on government employees, but also on those dealing with the government. Their modern form originated with executive orders of Presidents Truman and Eisenhower, neither of which purported to rely on statute and both of which expanded prior limited secrecy programs throughout all levels of the government.³²⁵ The result was, *inter alia*, to exclude some contractors from government programs. Immediate analogies are, therefore, suggested to *Rust v. Sullivan*, to the affirmative action cases, and to the wage and price control cases, in which the executive orders were assumed to be invalid if not adequately authorized by Congress.³²⁶ I believe, however, that in general terms the executive orders were lawful exercises of a protective function inherent in the President's foreign affairs and Commander-in-Chief powers. The President has authority to protect his version of national security against dangers resulting from misuse of government property and information in which the government had a direct and continuing interest. *Department of Navy v. Egan*³²⁷ sustained this view in strong terms:

The President, after all, is the "Commander in Chief of the Army and Navy of the United States." U.S. Const., Art. II, § 2. His authority to classify and control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position in the Executive Branch that will give that person access to such

323. See Potter, *supra* note 322, at 253-54; David M. Potter, *The Impending Crisis: 1848-1861*, at 538-45 (Dan E. Fehrenbacher ed., 1976); Cox, *supra* note 44, at 213-16.

324. The topic is surveyed with great wit, elegance and sense in Schlesinger, *supra* note 8, at 331-76; see also *Developments in the Law—The National Security Interest and Civil Liberties*, 85 Harv. L. Rev. 1130, 1198-99 (1972) (discussing statutory and constitutional authority for classification system created by Executive Order).

325. See Schlesinger, *supra* note 8, at 339-40. The expansion had its origins in the Cold War: "The secrecy system was, so to speak, the privilege of permanent government. It was a radiation from the national security establishment." *Id.* at 331. Of course all executive orders here or elsewhere are subject to the Bill of Rights limitations. See *United States v. United States Dist. Ct.*, 407 U.S. 297, 314-21 (1972) (government's need to safeguard domestic security using electronic surveillance trumped by Fourth Amendment warrant requirement).

326. See *supra* text accompanying notes 276-299.

327. 484 U.S. 518 (1988).

information flows primarily from this constitutional investment of power in the President and exists quite apart from any explicit congressional grant.³²⁸

Alas, I ultimately discovered that I cannot claim paternity for the idea that some protective function is an attribute in "The executive Power." The *Steel Seizure* dissent quoted from the government's brief submitted by a legendary advocate, Solicitor General John W. Davis, in *Midwest Oil*, which said: "'As we understand the doctrine of the *Neagle case*, . . . it is clearly this: The Executive is authorized to exert *the power of the United States* when he finds this necessary for the protection of the agencies, the instrumentalities, or the property of the Government.'" ³²⁹ I agree. Of course, on occasion, presidential use of the protective power can perhaps be shown to be "legislative" in nature. But, as I have said, any boundary between impermissible law-making and permissible public administration is not analytical, but conventional. Limited and protective presidential conduct would not ordinarily be understood to be presidential law-making, whatever the analytical resemblance.

The foregoing discussion raises the question whether the "protective function" is a power of the President alone, or of any officer who exercises official responsibility. I think the latter, although the President's responsibilities are unlimited in range when compared with those of any subordinate official.³³⁰ This conclusion requires re-examination of the so called "official immunity" cases. I begin from the premise that no executive official, the President included, can disregard the commands of positive law, express or implied. What result, however, when, acting under general statutes, an executive official commits what otherwise would be a tort or breach of contract? The case law bars damages against officials exercising discretionary powers who act within the "outer perimeter" of their duties.³³¹ This formula masks considerable confusion. If officials act within the "outer perimeter" of their duties, is the reasoning that an immunity for damages exists despite the premise that the conduct was wrongful, or is it a conclusion

328. *Id.* at 527 (citing *Cafeteria & Restaurant Workers Union, Local 473 v. McElroy*, 367 U.S. 886, 890 (1961)).

329. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 691 (1952) (*Steel Seizure*) (Vinson, C.J., dissenting) (quoting Brief for United States at 88, *Solicitor General John W. Davis in United States v. Midwest Oil Co.*, 236 U.S. 459 (1915) (No. 278)). Mr. Davis was carried for the steel companies.

330. This view seems to be endorsed in *In re Debs*, 158 U.S. 564, 588-89 (1895) (citing cases in which courts recognized protective power of administrative officials within the general areas over which they have statutory authority). This might be one distinction between a presidential protective power and a claim of presidential "emergency" power, which might inhere in the President alone. The latter power, if it exists, might turn on the special character of the Presidency (although Jefferson believed that it was inherent in all high officials). See *supra* text accompanying note 117.

331. See, e.g., *Butz v. Economou*, 438 U.S. 478, 485-96 (1978) (reaffirming *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804)).

that the underlying conduct was authorized and, as such, valid?³³² While I do not wish here to pursue all the complexities, on the analysis offered, whatever protective conduct falls within the outer perimeter of an official's role is valid conduct, not simply wrongdoing shielded from damage liability.

C. *The Limits of the Protective Power*

The claim for recognition of an executive protective power is advanced to meet only the separation-of-power objection. What limits exist on the protective power, if it is not to amount to recognition of a general presidential emergency power to act without statutory authority? My response is that the protective power contended for here is limited to the protection of the personnel, property, and instrumentalities of the United States.³³³ Examples of appropriate responses to such clear and direct threats include Lincoln's defensive moves prior to the opening of the Civil War, the protection of Justice Field, and suits brought to vindicate the contract and property rights of the United States.

1. *Private Parties*. — Little justification exists for extending the protective power analysis to the routine protection of the rights of private parties under federal law.³³⁴ I find deeply troublesome, therefore, *Neagle's* approval of the "Kotza" incident—the case of the "embryo" American citizen as Taft characterized it.³³⁵ Mr. Kotza, a Hungarian, had declared his intention to become a U.S. citizen. On that basis alone, a U.S. naval vessel compelled an Austrian vessel to surrender him to U.S. custody. "Upon what act of Congress then existing can anyone lay his finger in support of the action of our government in the

332. Of course, conduct validly authorized under congressional legislation cannot constitute a tort or breach of contract under state law, unless the authorization itself is unconstitutional.

333. As indicated *supra* note 312 and accompanying text, federal statutes confer power on the President to use military force to vindicate federal law when there is a breakdown in federal government. "Whether the statutes [10 U.S.C. §§ 332-334 (1988)] prohibit any independent exercise of power by the President [to use troops to protect 'the peace of the United States'] is an unsettled question." Rossiter & Longaker, *supra* note 135, at 197. In *In re Neagle*, 135 U.S. 1, 15-16 (1890), however, the Attorney General argued that Congress could not control the President's protective duty. This is at best surely an overstatement, although it may be that the President could not be so controlled if no reasonable protective mechanism existed. I believe that the statutes codify inherent presidential "protective" authority in this regard, but I do not defend that position in this paper.

334. I quite agree with the circuit authority holding that, absent statutory mandate, the President has no standing to enforce Fourteenth Amendment rights against the states. Cases considering the right of the United States to sue in the absence of statutory authority are collected in Hart & Wechsler, *supra* note 182, at 915. The situation is different of course, when there is a complete breakdown in civil government, in which case the use of the armed forces is authorized. See 10 U.S.C. §§ 332-334 (1988); *supra* note 320.

335. Taft, *Our Chief Magistrate*, *supra* note 16, at 92.

matter?" asked the Court.³³⁶ Taft explained this incident as a valid exercise of the President's Commander-in-Chief powers. These powers "grow not out of any specific act of Congress, but out of that obligation, inferable from the Constitution, of the government to protect the rights of an American citizen against foreign aggression."³³⁷ He added what in retrospect is, to say the least, an exceedingly curious comment: In practice, the use of "the naval marines for such a purpose has become so common that [it] is treated as a mere local police measure, whereas [use of] troops of the regular army . . . seems to take on the color of an act of war."³³⁸

Based on incidents such as that involving Mr. Kotza,³³⁹ modern Presidents now insist on the right to use force to protect American citizens anywhere in the world against foreign aggression.³⁴⁰ In the modern world, this claim means that the President can commit acts of war anywhere, as the recent events in Grenada and Panama show. Perhaps these incidents can be fairly defended as aspects of a special presidential protective role as Commander-in-Chief and sole organ for the conduct of foreign affairs. But I am skeptical. Recognition of any such presidential prerogative would eviscerate the constitutional assignment of the war power to Congress. One could also argue, of course, that the President has acquired by prescription the right to wage small-scale wars.³⁴¹ If so, that presidential prerogative goes well beyond the general protective function contended for here.

2. *Indirect Threats*. — When the President purportedly acts to protect U.S. interests threatened as a by-product of a dispute between private parties, the situation is, ordinarily at least, beyond the protective function. Consider *Debs*, even on the (doubtful) assumption that Congress had impliedly prohibited obstruction of interstate commerce. Absent statutory authority, that prohibition is not one that the President is empowered to enforce. The sole conceivable interest of the United States itself was in protecting the transmission of the mails, yet the injunctive decree affirmed by the Supreme Court went considerably further than that.³⁴²

336. In re Neagle, 135 U.S. 1, 64 (1890).

337. Id. at 95.

338. Id.

339. See, e.g., *Durand v. Hollins*, 8 F. Cas. 111 (C.C.S.D.N.Y. 1860) (No. 4,186) (Justice Nelson, sitting as circuit justice, sustained President's authorization to naval commander to bombard Greytown in Nicaragua to protect the lives and property of American citizens there); see also Schlesinger, *supra* note 8, at 55-56 (discussing *Durand*); Koh, *supra* note 21, at 84 (same).

340. See, e.g., Koh, *supra* note 21, at 88 (President Carter's use of *Neagle* and *Durand* to support claim to inherent, constitutional power to use force to protect American citizens abroad).

341. See Monaghan, *supra* note 21, at 26-27. But see Memorandum Amicus Curiae of Law Professors, *supra* note 28, at 3-8 (arguing that President must consult with and receive authorization from Congress before engaging in war).

342. See In re Debs, 158 U.S. 564, 570-72 (1895). Compare the facts underlying

Similarly, neither President Roosevelt's war-time plant seizures nor President Truman's steel seizures involved the exercise of protective power as I would define it. No direct threat to the property of the United States existed; all that had occurred were controversies between third parties that threatened to interrupt governmental operations. In such circumstances, presidential intervention is in the "common understanding" akin to law-making.³⁴³ I do not wish to be categorical here, but some line between direct and indirect interference with the functions of the national government should be maintained, at least presumptively.³⁴⁴ I do not believe that, ordinarily, interferences with governmental operations that result from third-party controversies fall within the protective function, any more than I believe that the Executive on its own can seize property of private litigants to ensure the future payment of a litigant's debts to the United States.

3. *Defining Primary Conduct.* — Ordinarily, a prohibition against unlawful "primary conduct" must exist before any executive official can invoke the protective power. When it can be seen as determining the content of the primary legal duties of American citizens, the President's conduct cannot ordinarily be justified under the protective power. *New York Times Co. v. United States*³⁴⁵ is a good illustration. In seeking to enjoin private publication of the Pentagon Papers, the government placed no reliance on any statute in its argument before the Supreme Court. The government's brief simply referred to the President's authority "to protect the nation against publication of information whose disclosure would endanger the national security."³⁴⁶ Thus, in contrast to the situation in *Haig*, no source outside the President's will (i.e., the President's own conception of the national interest) was cited as rendering the decision to publish illegal.³⁴⁷ In essence, the President claimed the right to define the primary legal duties of those who had received unauthorized government documents, and then to enlist the

Debs with President Nixon's use of the military to sort and deliver mail in the 1970 postal strike. That conduct is sharply criticized in James B. Jacobs, *Socio-Legal Foundations of Civil-Military Relations* 56-75 (1986). For a comprehensive discussion of presidential use of troops in the context of domestic violence and an argument that the regulations implementing the statutes go beyond what the statutes authorize, see Rossiter & Longaker, *supra* note 135, at 196-204.

343. For an excellent critical discussion of the use of federal and state military in labor disputes, see Jacobs, *supra* note 342, at 51-75.

344. Like most legal lines, this line will on occasion be blurred. It is not clear to me, for example, whether the forcible interference with the mails in *Debs* should be characterized as a direct threat to government operations or simply as a by-product of a third-party dispute.

345. 403 U.S. 713 (1971).

346. Brief for the Petitioner at 13, *New York Times Co. v. United States*, 403 U.S. 713 (1971) (No. 1873).

347. In his opinion in *New York Times Co. v. United States*, Justice Black, the author of *Steel Seizure*, denies "that the President has 'inherent power' to halt the publication of news by resort to the courts." See 403 U.S. at 719 (Black, J., concurring).

courts to enforce those duties.³⁴⁸ "In sum, the courts were to become executors of the President's discretion."³⁴⁹

4. *Deprivations of Individual Liberty*. — *Korematsu v. United States*³⁵⁰ suggests a final potential limit on the reach of the protective function. The curfew, relocation, and internment programs of people of Japanese descent during the Second World War may very well have violated the Constitution at least with respect to the American citizens among the internees.³⁵¹ But, as noted, we are concerned only with the separation-of-powers dimensions of such programs. The President's order rested both on whatever constitutional powers he possessed and on explicit congressional delegation. Suppose, however, that the President had acted on his own, without statutory sanction; more specifically, suppose that the claim was just as it was in *Korematsu*, namely, that the President acted on the belief that some number of Japanese were prepared to engage in sabotage, but because it was unclear which individuals would so act, wholesale curtailment of rights was necessary. Would his conduct have been a valid illustration of the protective power? On the separation-of-powers issue, the answer is not free of doubt.³⁵² If the threat to national security is real, its diffuse and hard to detect character should not alone bar protective action.

The protective power is, it must be recalled, no talisman. Its limits are, in the end, practical ones, limits that, as the Court said in *Lujan v. Defenders of Wildlife*,³⁵³ are grounded in our "common understanding" of what conduct is appropriately "executive" in our scheme of separation of powers.³⁵⁴ There may be controversy over what the understanding is. If so, here, as elsewhere, history and the felt intuitions of the times are likely to count far more than anything else. My own con-

348. See Edgar & Schmidt, *supra* note 201, at 360–61. Unlike *Haig*, where a similar national security claim was made with respect to a citizen's right to travel, no statute could be cited as justification for such presidential law making. A similar inherent power argument was made in *United States v. United States Dist. Ct.*, 407 U.S. 297 (1972) (No. 70-153). The Court did not reach the issue because it held that the Fourth Amendment barred the conduct at stake. See *id.* at 321.

349. Rossiter & Longaker, *supra* note 135, at 183.

350. 323 U.S. 214 (1944); accord *Hirabayashi v. United States*, 320 U.S. 81, 95–99 (1943) (upholding constitutional authority of Congress and President, based on protective power, to impose curfew on all persons of Japanese descent).

351. *Korematsu* itself arose as a criminal prosecution under an Act of Congress for violating an executive order. See *Korematsu*, 323 U.S. at 216. The conviction was upheld—and the Executive Order vindicated—on the basis of a power to protect that was "commensurate with the threatened danger." *Id.* at 219–20.

352. The Court has consistently avoided questions of this order. The Court relied on congressional approval in *Hirabayashi*, 320 U.S. at 92, as it did in the creation of the military commission in *Ex parte Quirin*, 317 U.S. 1, 29 (1942); accord *Ex parte Endo*, 323 U.S. 283, 297–303 (1944) (holding that Executive Order authorizing removal of people of Japanese ancestry from military areas did not authorize prolonged detention of such people).

353. 112 S. Ct. 2130 (1992).

354. See *id.* at 2136.

clusion is that my thesis need not countenance the presidential conduct in the Japanese curfew, relocation, and interment program. Lincoln's unauthorized wartime arrests notwithstanding, so drastic and massive an invasion of the liberty of American citizens would *in common understanding* be thought to be so contrary to our traditions and aspirations that, at the minimum, any such restrictions could be imposed only through legislation.³⁵⁵

CONCLUSION

Controversy over the precise dimensions of "The executive Power" should not obscure the existence of a valid presidential power to protect the personnel, property, and instrumentalities of the United States. As the Attorney General argued in *Neagle*, "No one questions the right or duty of the President to furnish guards for the mail or an escort for a paymaster carrying government treasure wherever danger is apprehended."³⁵⁶ Perhaps, however, the existence of such an independent power is now academic. "Delegation" reasoning alone would support such a power, even if the delegation were not explicit. But if, for example, an executive authority to bring suit to enforce the contract rights of the United States is understood to rest upon implied delegations under generally worded statutes, then the substance of what I contend for, a protective power, will exist, albeit under a different label: statutory construction. Behind the delegation reasoning would exist "postulates which limit and control."³⁵⁷ Courts will routinely read protective powers into existing statutory authority, because the need to recognize such a power will drive statutory construction, and not *vice versa*. In the nineteenth century, the opportunities to defend presidential conduct simply on the basis of an existing statutory authority seemed more difficult, as *Neagle*, *Debs*, and *Midwest Oil* show. It was, accordingly, necessary to fashion apparently novel principles that would reflect the deeply felt conviction that the President possessed a protective power.

355. Cf. Rebecca L. Brown, Separated Powers and Ordered Liberty, 139 U. Pa. L. Rev. 1513, 1565-66 (1991) (arguing for use of separation-of-powers concept to protect civil liberties). In the past, the Court has expressed separation-of-powers concerns when individual liberty interests are clearly implicated, but recent decisions evince no such concern. See *supra* note 201.

356. *In re Neagle*, 135 U.S. 1, 14 (1890) (argument of Attorney General).

357. *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322 (1934).