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Matthew Steilen

University at Buffalo School of Law, mjsteile@buffalo.edu

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Life and Afterlife in the *Steel Seizure Case*

MATTHEW STEILEN[†]

ABSTRACT

This Essay examines the proper role of the Supreme Court in deciding disputes between Congress and the President. Progressive commentators are now urging the Court to dismiss these cases as political questions, at least where doing so would give effect to congressional regulations of the President. The Court's interference is criticized as anti-democratic. This Essay advances a different conception of the Supreme Court's role by examining the famous Steel Seizure Case. In that case, the Court upheld an injunction barring President Truman from seizing the nation's steel mills, on grounds that doing so was inconsistent with congressional will and without any basis in the President's independent constitutional authority. The subsequent embrace of Justice Jackson's concurrence shows how Supreme Court decisions

[†]Professor, University at Buffalo School of Law. This Essay derives from remarks given at an event in February 2022 in celebration of Justice Jackson's 130th birthday. Thanks to the Jackson Center and to President Kristan McMahon for the invitation, and to Gerard Magliocca, Julian Davis Mortenson, and Robert Tsai for guidance. John Q. Barrett also shared some of his unmatched expertise on Justice Jackson. Thanks as well to my editors at the *Buffalo Law Review*, Patrick Callahan and Matthew Mason, who contributed some crucial, late-game research assistance.

can have an effect outside the immediate confines or “life” of a case. In its “afterlife”—its use by members of Congress, officers and employees in the executive branch, and legal educators and other members of the public—Jackson’s concurrence has acquired a kind of democratic authority. In Congress, for example, it was quoted in legislative debates preceding the passage of the War Powers Resolution, the National Emergencies Act, and the Presidential Recordings and Materials Preservation Act, among other statutes. Justice Jackson’s broad, theoretical language and flexible framework proved useful to legislators seeking to regulate the President. By constructing his concurrence this way, Jackson helped to give it a central place in structuring the political maintenance of our Constitution’s separation of powers.

INTRODUCTION

What is the Supreme Court's role in enforcing the Constitution's separation of powers? A central precedent for answering that question is *Youngstown Sheet & Tube Co. v. Sawyer*, commonly called the *Steel Seizure Case*, in which the Court sustained an injunction against President Truman's seizure of the nation's steel mills, on grounds that it was inconsistent with congressional will and without any basis in the President's independent constitutional authority.¹ I want to take another look at the case. But rather than focus on the historical context or the Justices' opinions, as able scholars have already done, I want to widen the frame and consider how the opinions were subsequently put to use by others. My hope is to illustrate a general principle, which I think probable, though I will not attempt to prove it here: that how judicial opinions are used over time is of far greater consequence in maintaining a separation of powers than what the Court did or said in the immediate context of a case. I take this to be a reason for the Supreme Court not to dismiss cases of interbranch conflict like the *Steel Seizure Case*, but to reach the substantive issues and provide robust written opinions. Crucially, *our* use, *off* the Court, of the justices' written handiwork is not necessarily subject to the criticism, often voiced against the Court itself, of being anti-majoritarian or anti-democratic.²

To see the idea, consider Chief Justice Vinson's opinion in the *Steel Seizure Case*. Justice Vinson dissented in the case and would have upheld President Truman's seizure as a means of supplying war materiel for the conflict in Korea.³ Vinson's opinion got only three votes. The opinion for the

1. *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure Case)*, 343 U.S. 579, 584–89 (1952).

2. For a recent, compelling example of this criticism, see generally Nikolas Bowie & Daphna Renan, *The Separation-of-Powers Counterrevolution*, 131 *YALE L.J.* 2020 (2022).

3. See *Steel Seizure Case*, 343 U.S. at 667 (Vinson, C.J., dissenting).

Court, authored by Justice Black, garnered six votes, making the Chief's loss decisive. But though he lost the case, Vinson's opinion gave voice to deep ideas about executive power that have continued to attract significant interest. Thus, in a 2006 essay, law professors Jack Goldsmith and John Manning described a constitutional "completion power," which they defined as a power in the President to "prescribe incidental details needed to carry into execution a legislative scheme, even in the absence of any congressional authorization."⁴ The "most comprehensive statement" of this power was to be found, they wrote, in Vinson's *Steel Seizure* dissent.⁵

The arc of Vinson's opinion from dissent to law is an example of what I call the "afterlife" of a case. The "life" of a case ends with what the Court *sets down*—what judgment it enters, what law it pronounces. Then begins its "afterlife," in which the broader legal community, the Congress, the President and the administration, courts of all types, later Supreme Courts, and even the public at large, *take up* the justices' writings, and make use of what the justices set down. The law is not only what is set down; the law is, over the long run, also what is taken up.

I suspect there are many examples of how the law taken up has changed the law set down—or even displaced it entirely.⁶ The seven opinions in the *Steel Seizure Case* certainly provide more than one illustration. Over time, Justice Black's opinion for the Court has receded in importance, while others have advanced. Though it is hard to predict which opinions will be taken up (for much the same reason that the future is hard to predict), the different fates of the *Steel Seizure* opinions do suggest some ideas about when an opinion is more likely to have future value for us

4. Jack Goldsmith & John F. Manning, *The President's Completion Power*, 115 YALE L.J. 2280, 2282–83 (2006).

5. *Id.* at 2282.

6. For a general theory of American Constitutional Law along these lines, see DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 33–49 (2010).

users of the law. At the very least, we can be confident in concluding that not all opinions are the same. How they are crafted matters.

This point is important for considering the prospect of Supreme Court reform. The appointment of Amy Coney Barrett to the Court in 2020 touched off a wave of anxiety among progressives about the number of its Justices appointed by Republican Presidents, who now outnumbered Democratic appointees six-to-three.⁷ In 2021, President Biden commissioned a blue-ribbon panel to study reform, though it declined to endorse any of the proposals generally favored by progressives, like adding seats to the Court or stripping it of jurisdiction or the power of judicial review.⁸ Yet the leak of a draft opinion for the Court in *Dobbs v. Jackson's Women's Health Organization*, which would overturn *Roe v. Wade*, appears to portend progressives' worst fear: that an emboldened conservative Court will eliminate cherished constitutional protections.⁹

The idea that adding seats to the Supreme Court will protect individual rights tends to reduce constitutional law to *vote-counting*. But the history explored here shows that *vote-counting* does not exhaust the Court's contribution to our law. *Opinion-measuring* is also important. By "opinion-measuring," I mean judging whether an opinion is a good one, all things considered—whether it is right for the times,

7. See, e.g., Adam Liptak, *The Precedent, and Perils, of Court Packing*, N.Y. TIMES (Oct. 12, 2020), <https://www.nytimes.com/2020/10/12/us/supreme-court-packing.html>.

8. See Exec. Order No. 14,023, 86 Fed. Reg. 19,569, 19,569–70 (Apr. 14, 2021) (forming the Presidential Commission on the Supreme Court of the United States); PRESIDENTIAL COMM'N ON THE S. CT. OF THE U.S., FINAL REPORT (Dec. 8, 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final-12.8.21-1.pdf>.

9. On *Dobbs* and *Roe*, see Josh Gerstein & Alexander Ward, *Supreme Court Has Voted to Overturn Abortion Rights, Draft Opinion Shows*, POLITICO (May 2, 2022, 8:32 PM), <https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473>; Adam Liptak, *Critical Moment for Roe, and the Supreme Court's Legitimacy*, N.Y. TIMES (Dec. 4, 2021), <https://www.nytimes.com/2021/12/04/us/politics/mississippi-supreme-court-abortion-roe-v-wade.html>.

whether it speaks a truth. Taking the measure of an opinion is not something the Court can do for itself. It depends on the judgment of folks off the Court, now and in the future. So, though appointees of Democratic Presidents are outnumbered on today's Supreme Court, a liberal opinion that is well-written, vigorously argued, and sensitive to the world outside the courtroom may end up being more persuasive and contributing more to our law than a majority opinion backed by six, seven, or even eight votes. If we stop focusing on who has the most votes and turn our attention to who writes the best opinions, then it is not obvious that the Supreme Court suffers from imbalance and would benefit from packing, at least in the long run.

I want to turn now to the most famous of the opinions in the *Steel Seizure Case*, the concurrence of Justice Robert H. Jackson. I want to ask: What was the afterlife of Jackson's opinion? How did it go from being one of seven opinions in the case, attracting support from not a single of his colleagues, to being regarded today as the fundamental statement of our Constitution's separation of powers?¹⁰

The remainder of this Essay has two parts: "Life" and "Afterlife." In Part One, "Life," I consider the factual background of the case, the state of the doctrine of separation of powers at the time it came before the Court, and aspects of the Justices' opinions. Since this is familiar ground, my aim here is not to be exhaustive, but to emphasize features of the context and the case that are relevant for understanding its afterlife. In Part Two, "Afterlife," I consider the public reception of the Court's decision, and then move forward from 1952 to the rise of Jackson's concurrence in the 1970s, focusing on its appearance in the Watergate litigation and in congressional deliberations over

10. This is a widespread judgment. Stephen M. Griffin, *The Executive Power*, in *THE OXFORD HANDBOOK OF THE U.S. CONSTITUTION* 343, 348 (Mark Tushnet, Mark A. Graber & Sanford Levinson eds., 2015) ("Justice Robert Jackson's concurrence has won the respect of history and fundamentally restructured the doctrinal playing field for presidential power . . .").

proposals to regulate presidential power. Brief as it is, this study will show how the expansive, general, theoretical character of Jackson's concurrence made it useful to congressmen. Broad opinions, like *dicta*, straying from the case or controversy before the Court, can invite sharp criticism for exceeding judicial power. But *judicial breadth has democratic value*. It gives folks off the Court a handhold for taking up an opinion and using it to serve their own ends and construct fundamental law anew.¹¹ At the very least, we ought to weigh this democratic value against the democratic cost of judicial interference in a dispute between the political branches. As we will see, in the *Steel Seizure Case*, Jackson intentionally addressed the political branches in his concurrence. He wrote it so they would use it.

I. "LIFE"

A. *The Background*

The basic facts of the *Steel Seizure Case* are well known. It arose out of a labor dispute between a union, the United Steelworkers of America, and management at the mills where its members worked. The union wanted a wage increase and threatened to strike, disrupting production.

The government was drawn into the case by the regulatory context. The country was experiencing significant inflation, and Congress had responded by passing a series of statutes that gave the President authority to impose price ceilings. When the United Steelworkers indicated their intent in late 1951 to negotiate for increased wages, plant management thought the threat of a strike might give them leverage to negotiate a price increase.¹² The President,

11. Cf. Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 580–81, 644 (1993) (arguing that the Court is not anti-democratic because it is engaged in an extended “dialogue” with the other branches about constitutional meaning).

12. See A.H. Raskin, *Steel Puts Pay Raise Up to Government*, N.Y. TIMES, Nov.

however, had subdelegated his power to an administrative board, and under its regulations prices were set by a formula that depended on industry profits. Despite the threat of a strike, then, there was no guarantee that a price increase was forthcoming. As it happened, the administrative agencies working on the dispute, the Office of Price Stabilization and the Wage Stabilization Board, did propose a price increase, along with an increase in wages, but the new price fell short of management demands. Negotiations stalled, and the union announced its intent to strike on April 4, 1952.¹³

These types of labor conflict had arisen before, beginning with the rise of large labor unions in the early twentieth century. In fact, during World War II, President Roosevelt had responded to strikes by seizing plants and sending in federal troops to ensure that workers did not disrupt production. In a memorandum from June 1941, just before he was appointed to the Supreme Court, then-Attorney General Robert Jackson concluded that a presidential proclamation seizing an airplane manufacturing plant was constitutional, resting his analysis on “the aggregate of Presidential powers derived from the Constitution itself and from statutes,” and pointing to statutes obligating the president to raise and equip the armed forces, which he thought implied a discretion to choose the means. In this particular case, thought Jackson, efforts by Communists to undermine labor negotiations and interfere with the manufacture of warplanes gave the strike the character of an

16, 1951, at 17 (“Whether our workers are to get a raise, and how much it will be if they do,’ Mr. Fairless said, ‘is a matter which probably cannot be determined by collective bargaining, and will apparently have to be decided finally in Washington.’”).

13. Patricia L. Bellia, *Story of the Steel Seizure Case*, in *PRESIDENTIAL POWER STORIES* 233, 235 (Christopher H. Schroeder & Curtis A. Bradley eds., 2009). As Professor Bellia reports, President Truman later accused the management of steel companies of attempting to “extort a substantial profit, at the expense of economic stability,” for refusing to accept the steel price proposed by the Office of Price Stabilization. *Id.* at 243.

“insurrection” against government, triggering the President’s authority under the Commander-in-Chief Clause.¹⁴ Several years later, Congress passed the War Labor Disputes Act, which gave the President statutory authority to seize plants when a labor dispute could interfere with war production.¹⁵

In the years following World War II, however, the legal regime for handling labor disputes shifted in crucial ways. They became subject to administrative rules and judicial review—something that was occurring in much of government.¹⁶ The War Labor Disputes Act was permitted to expire. In its place, the Taft-Hartley Act of 1947 authorized the President to appoint a board to investigate a dispute and the Attorney General to apply to a district court for a temporary injunction stopping a strike.¹⁷ The statute was notably passed over Truman’s veto.¹⁸ Disputes that resisted resolution by these means might be handled by passing special legislation that concerned only a single imminent strike.¹⁹ In addition, amendments to the Defense Production Act authorized the President to seek the condemnation of property needed for national defense by instituting an action

14. Louis Stark, *Roosevelt Explains Seizure; Jackson Cites Insurrection*, N.Y. TIMES, June 10, 1941, at 1 (quoting statement by then-Attorney General Jackson); *see also* Powers of the President Under the War Labor Disputes Act to Seize Properties Affected by Strikes, 40 Op. Att’y Gen. 312 (1944), *reprinted in* H. JEFFERSON POWELL, THE CONSTITUTION AND THE ATTORNEYS GENERAL 330–37 (1999) (similar opinion from AG Biddle and discussion of Jackson’s statement). Arguably it is Jackson’s memorandum, rather than Justice Vinson’s later opinion, that is the real source of the “completion power.”

15. War Labor Disputes Act, ch.144, 57 Stat. 163 (1943).

16. The Administrative Procedure Act was passed in 1946. Administrative Procedure Act, ch.324, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

17. Taft-Hartley Act, ch. 120, 61 Stat. 136 (1947) (codified as amended in scattered sections of 29 U.S.C.).

18. *See* Bellia, *supra* note 13, at 242.

19. 93 CONG. REC. 3836 (1947) (statement of Sen. Taft).

in an appropriate court.²⁰

B. *The Litigation*

President Truman did not use these mechanisms for dealing with the threat of a strike. Arguably, none of the statutes was a clear fit. Instead, he issued an executive order directing the Secretary of Commerce simply to take possession of the steel mills and operate them.²¹

It seems clear that the White House did not anticipate how unpopular a seizure would be. Blowback was immediate.²² The public seemed inclined to regard Truman's action as different from Roosevelt's wartime measures. There was apparently little sense that steel was scarce or that a strike would upend the supply chain.²³

Proceedings in the district court fed dislike of the President's position. As Professor Patricia Bellia has shown, the government's filings focused on the question of constitutional power, essentially cutting and pasting an argument from legal briefs previously filed in litigation challenging President Roosevelt's seizure of the Montgomery Ward department store, an act that did not clearly fall under

20. Defense Production Act of 1950, ch. 932, 64 Stat. 798, 799–800 (codified as amended at 50 U.S.C. §§ 2061–70); Defense Production Act Amendments of 1951, ch. 275, 65 Stat. 131, 132 (codified in scattered sections of 50 U.S.C., 33 U.S.C., and 40 U.S.C.).

21. Directing the Secretary of Commerce to Take Possession of and Operate the Plants and Facilities of Certain Steel Companies, Exec. Order No. 10,340, 17 Fed. Reg. 3139, 3139–41 (Apr. 10, 1952).

22. See, for example, the newspaper pieces quoted in Charles C. Hileman et al., *Supreme Court Clerks' Recollections of October Term 1951, Including the Steel Seizure Cases*, 82 ST. JOHN'S L. REV. 1239, 1265 (2008) (statement of moderator John Q. Barrett) ("The response to this action by President Truman was swift and negative. The *Chicago Daily News* called it 'leaping socialism.' The *New York Daily News* said 'Hitler and Mussolini would have loved this.' The *Washington Post* wrote, 'President Truman's seizure of the steel industry will probably go down in history as one of the most high-handed acts committed by an American President.'").

23. MAEVA MARCUS, TRUMAN AND THE STEEL SEIZURE CASE: THE LIMITS OF PRESIDENTIAL POWER 225 (1977).

defense production statutes.²⁴ The district judge in the *Steel Seizure Case*, a Roosevelt appointee named David Pine, seized on the government's constitutional arguments and, testing their boundaries, drew the government's lawyer into asserting that the President possessed a power to do what was necessary to meet an emergency.²⁵ When the colloquy was reported in the press, it led to widespread condemnation, and President Truman issued a statement disclaiming the view.²⁶ The government's handling of litigation had shifted the frame from a disruptive labor dispute to an extreme doctrine of presidential power.²⁷

These events also seem to have framed the case for the Supreme Court. Maeva Marcus, a legal historian whose 1977 book on the *Steel Seizure Case* remains its most comprehensive treatment, thought that public opinion must have influenced the Justices to take the case and resolve it as they did.²⁸ Like the public, some of the justices saw not a dangerous military crisis, but an effort by the President to govern outside law, a deliberate indifference to Congress, and a theft of private property.²⁹ From this perspective, the salient facts were that Congress had told the administration how to handle labor strikes, but the President had elected

24. Bellia, *supra* note 13, at 248.

25. Transcript of Record at 371, *Steel Seizure Case*, 343 U.S. 579 (1952) (Nos. 744, 745), *quoted in* Bellia, *supra* note 13, at 249–50.

26. *See, e.g.*, Joseph A. Loftus, *Truman Concedes Constitution Puts Limits on Powers*, N.Y. TIMES, Apr. 28, 1952, at 1.

27. On the doctrine of necessity and presidential power, see John C. Dehn, *The Commander-in-Chief and the Necessities of War: A Conceptual Framework*, 83 TEMP. L. REV. 599, 656–58 (2011).

28. MARCUS, *supra* note 23, at 223–25; *see also* Hileman et al., *supra* note 22, at 1268–69 (statement of Chief Justice Rehnquist, former clerk to Justice Jackson).

29. Justice Clark had written a memorandum as Attorney General defending the President's "inherent" powers to act in an emergency; it seems clear from Clark's opinion in *Steel Seizure Case* that he did not think such an emergency existed. *Steel Seizure Case*, 343 U.S. at 662 (Clark, J., concurring); *Hearings Before the Committee on Labor and Public Welfare on S.249*, pt. 1, 81st Cong. 232 (1949); MARCUS, *supra* note 23, at 209.

not to follow those procedures. If the Court was to insert itself into this sort of conflict, what it would need was a legal framework that articulated the nature of the relationship between the President and the Congress. Of course, today we have such a framework: the doctrine of “separation of powers.” At the time, however, only fragments of such a doctrine existed.

C. *The State of the Doctrine*

Here’s what there was. First, there was a body of theoretical political writing on the differences between legislatures, executives, and courts.³⁰ Some of this writing was quite old—think John Locke and the Baron de Montesquieu in the seventeenth and eighteenth centuries. Though their theories had cachet (they still do), a theory is not a doctrine: it’s not formulated to provide judges with a basis to resolve a litigated case.

Modern political scientists were also at work on the presidency, attempting to theorize the powers presidents were thought to enjoy over foreign policy and armed conflict. A leading voice in the area was Edward Corwin, professor at Princeton, whose book, *The President: Office & Powers*, was in its third edition by the time of the *Steel Seizure Case*. Corwin drew on Locke’s writings to argue that the grant of executive power to the President conveyed a broad discretion to handle crises in foreign affairs.³¹ The account fit the needs of the Cold War well. To keep the peace and control the spread of communism, the President would need a power to dispatch and station the armed forces around the globe.³²

30. See M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 64–73, 89–93 (1967).

31. EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS, 1787–1948, at 6–7 (3d ed. 1948). Another leading scholarly treatment of these issues can be found in the work of Clinton Rossiter. See CLINTON L. ROSSITER, CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES 13 (1948).

32. STEPHEN M. GRIFFIN, LONG WARS AND THE CONSTITUTION 4 (2013).

Beyond theory, however, there were only a handful of narrow judicial rules for resolving conflicts between the branches.³³ The law was probably most developed in the context of war and foreign policy. Though there were precedents here, they did not add up to a clear doctrine. Cases from the early nineteenth century tended to confirm the supremacy of Congress in matters like the scope of armed conflict,³⁴ identification of public enemies,³⁵ and the application of international law.³⁶ In one of these cases, *Little v. Barreme*, Chief Justice John Marshall invalidated the seizure of a ship that had been made under a presidential commission on grounds the commission exceeded the scope authorized by statute.³⁷

But later cases cut a different figure. In the final decades of the nineteenth century, the Supreme Court began to yield the President greater latitude and flexibility in conducting foreign affairs.³⁸ By 1936, with considerable instability in Europe, Asia, and South America, Justices on the Supreme Court were prepared to concede the President complete discretion in setting the nation's foreign policy. In *United States v. Curtiss-Wright*, the Court rejected an industry challenge to a statute that delegated authority to the president to prohibit the sale of arms to certain foreign

33. See, for example, WILLIAM BONDY, *THE SEPARATION OF GOVERNMENTAL POWERS IN HISTORY, IN THEORY, AND IN THE CONSTITUTIONS* v–vi (AMS Press, Inc. 1967) (1896), particularly the structure of Part III, which describes constitutional doctrine. Bondy's book is essentially a treatise, and its small size and scope in comparison to coeval treatises on due process and police power shows the limits of the separation-of-powers doctrine at the time. See generally, e.g., ERNST FREUND, *THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS* (1904); RODNEY L. MOTT, *DUE PROCESS OF LAW* (Da Capo Press 1973) (1926).

34. See *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 179 (1804).

35. See *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 39, 42, 44–45, 45 (1800) (concluding that France was a public enemy only if Congress had enacted a law making it so); Dehn, *supra* note 27, at 616–17 (describing the case).

36. See *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

37. *Barreme*, 6 U.S. (2 Cranch) at 177–78.

38. G. EDWARD WHITE, *THE CONSTITUTION AND THE NEW DEAL* 35–43 (2000).

nations at war. Justice Sutherland set out a general account of the power of the federal government over foreign affairs, which he thought did not derive from the Constitution at all but was “inherent” in sovereign government. “The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties,” he wrote, “would have vested in the federal government as necessary concomitants of nationality,” even if they had not been mentioned.³⁹ These powers were for the President to control. Seizing on language from a speech John Marshall had made while a member of the House of Representatives, Sutherland described the President as the “sole organ of the nation in its external relations.”⁴⁰

Domestic law was considerably less developed. We had strands of cases and ideas, each stitched to a sphere of policy and a legal context. Frank Strong’s popular constitutional law text from 1950 didn’t even have a chapter on “separation of powers.”⁴¹ His book did describe something called “merger of governmental function.” The first doctrine listed there was non-delegation doctrine (or, in his terminology, the problem of “delegational merger”). At the time the doctrine had been recently applied. Several decisions in the 1930s had struck down major pieces of New Deal legislation on non-delegation grounds.⁴² As the Court constructed it, the doctrine

39. *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 318 (1936).

40. *Id.* at 319–20 (quoting 10 ANNALS OF CONG. 613 (1800) (statement of then-Rep. John Marshall)). Scholars have long pointed out that Sutherland took the expression “sole organ” out of context, changing its meaning. *E.g.*, Louis Fisher, *The Staying Power of Erroneous Dicta: From Curtiss-Wright to Zivotofsky*, 31 CONST. COMMENT. 149, 150 (2016). The Supreme Court finally rejected the “sole organ” doctrine of presidential control over foreign affairs in *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2089–90 (2015).

41. See FRANK R. STRONG, AMERICAN CONSTITUTIONAL LAW ix–xii (1950).

42. See, e.g., *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928). The Court struck down domestic legislation on non-delegation grounds in *Panama Refining Co. v. Ryan*, 293 U.S. 388, 430 (1935), and *ALA Schechter Poultry Corp. v. United States*, 295 U.S. 495, 539–42 (1935). *Curtiss-Wright* also involved a non-delegation challenge, but there the Court sustained the law on grounds that it concerned foreign policy. See *Curtiss-Wright Exp. Corp.*, 299 U.S.

prohibited Congress from vesting executive agencies with legislative power, and required an “intelligible principle” for action, which agencies would fill in with details. These cases were some of the first in which the phrase “separation of powers” appeared in the text of a Supreme Court opinion.⁴³

A doctrine of presidential removal power existed but was also quite new. In the case of *Myers v. United States*, only about twenty-five years old in 1952, the Court had held that Congress could not restrict the president’s power to fire executive officers at will.⁴⁴ Chief Justice Taft based the holding on the Vesting Clause and Take Care Clause of Article II, arguing that if the President could not remove subordinates who had failed to do their job, he could not ensure that the law was “faithfully executed.”⁴⁵ Within a decade this basis was exploited to narrow the doctrine; job

at 306.

43. For the first appearance of the expression, see *Panama Refin. Co.*, 293 U.S. at 440 (Cardozo, J., dissenting). Variants can be discovered in case reports much earlier, sometimes from the arguments of counsel or from language taken from lower-court opinions; but it is only in the early twentieth century that usage conveys a clear sense that the phrase stands for a judicial doctrine. See, e.g., *Brush v. Ware*, 40 U.S. (15 Pet.) 93, 99 (1841) (“The executive of the United States, in issuing patents for land, is required to perform, and does perform certain acts of a judicial nature. And when an executive officer acts judicially, as he often must, (for the idea of a perfect separation of the powers of government, is a mere abstraction, and wholly unattainable in practice,) his decisions are as valid, and have the same effect as judgments pronounced by courts of justice; and are, ordinarily, far more difficult to revise, if erroneous, than the latter.” (argument of counsel)); *Shoemaker v. United States*, 13 S. Ct. 631, 371 (1893) (“Justice Story, in pointing out the true meaning of the principle of the separation of the powers of the government, (which is not declared in the federal constitution in direct words, as in most of the state constitutions, but is enjoined, practically, by assignment of the different powers to the three departments,) . . .” (quoting *United States v. Cooper*, 20 D.C. (9 Mackey) 104, 123–24 (1891)); *McGrain v. Daugherty*, 273 U.S. 135, 170 (1927) (“[I]t is not within the range of this power, but must be left to the courts, conformably to the constitutional separation of governmental powers . . .”).

44. *Myers v. United States*, 272 U.S. 52, 176 (1926).

45. *Id.* at 117; see U.S. CONST. art. II, §§ 1, 3. For connections between the *Myers* decision and the myth of the “Lost Cause,” a reactionary revision of the meaning and significance of the Civil War, see Bowie & Renan, *supra* note 2, at 2056–82.

protections for officers engaged in administrative adjudication or rulemaking were upheld on grounds that these activities differed from execution of the law.⁴⁶

If the eye could track a uniform movement across the various lines of cases, it was in the direction of the President. Seizures and condemnations of property evince this development, though precedents were a mix of cases involving foreign war, civil war, insurrection, and domestic policy. Early rules limiting seizures to congressional authorization gave way during the Civil War, when President Lincoln acted on his own initiative (though his conduct was later ratified by Congress), which the Court approved.⁴⁷ After the war, the Court also gave its support to direct presidential actions to protect the personnel and instrumentalities of the government, which at least once involved seizure without statutory authorization.⁴⁸ More relevant, in the 1915 case of *United States v. Midwest Oil Co.*, the Court reasoned that Congress should be understood to have consented to a long-standing executive practice (in this case, of setting aside lands opened for development), even where the practice was inconsistent with the text of a federal statute.⁴⁹ But to say these cases amounted to a general doctrine of presidential power to seize private property when ‘necessary’ would be too much. There is little evidence,

46. See, e.g., *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 627–28 (1935). *Humphrey’s Executor* was another of the earliest Supreme Court opinions to include the phrase “separation of powers.” See *id.* at 629–30 (“separation of the powers of these departments”).

47. For an early holding on wartime seizures that emphasizes congressional authorization, see *Brown v. United States*, 12 U.S. (8 Cranch) 110, 125–29 (1814). On the president’s power to order a blockade though no war had been declared, pursuant to which vessels might be seized, see *The Prize Cases*, 67 U.S. (2 Black) 635, 670 (1862). President Lincoln ordered the seizure of a variety of property during the war. See DANIEL FARBER, *LINCOLN’S CONSTITUTION* 115–44 (2003) (reviewing Lincoln’s seizures during the war).

48. *In re Neagle*, 135 U.S. 1, 75–76 (1890) (personnel); *In re Debs*, 158 U.S. 564, 599–600 (1895) (interstate railroads).

49. 236 U.S. 459, 474 (1915).

outside government briefs, of such an understanding.⁵⁰ Notably, as we've already discussed, Congress authorized most of the President's domestic industrial seizures during World War II.

Aside from a few other doctrines not relevant in the case (relating to things like pardons, congressional investigations, and judicial independence), that's what there was of "separation of powers" in the Supreme Court. Sensibly, then, several justices in the *Steel Seizure Case* framed their opinions as efforts to articulate a general judicial doctrine on the subject. As we will see, they made use of the materials they had at hand, including non-delegation doctrine. That they were attempting to do this at one fell swoop, in a high-profile, high-stakes case, is likely why we have seven different opinions. Justice Jackson began drafting his own opinion before oral argument—as was sometimes his custom—but even before receiving the briefs; his papers included drafts from May 7 and 8, while the government did not file its brief until May 8.⁵¹ One suspects that Jackson saw the occasion for an opinion that would transcend the confines of the parties and their case.

D. *The Opinions*

Though there are seven opinions in the case, commentators have long focused on four and sorted them into two groups: first, the opinions of Hugo Black and William Douglas; and second, the opinions of Felix Frankfurter and Robert Jackson. The sorting indeed reflects a basic divergence in approach to the task of constructing a general doctrine of separation of powers. At the same time, however, it tends to suppress an important difference between the opinions of Justices Frankfurter and Jackson.

50. For the perspective on these seizures in the government's *Steel Seizure Case* brief, see MARCUS, *supra* note 23, at 156–57.

51. *Id.* at 149; Adam J. White, *Justice Jackson's Draft Opinions in The Steel Seizure Cases*, 69 ALB. L. REV. 1107, 1109–10 (2006).

Jackson's opinion was more general and more theoretical, and this is crucial to explaining why it has enjoyed a more robust afterlife than Frankfurter's despite their similarities. Indeed, it was where Frankfurter was uncharacteristically general that his opinion has proved most useful to later generations: the idea that history could place a "gloss" on the meaning of executive power.

1. Formalists

The account of the Constitution's separation of powers given by Justices Black and Douglas is often described as "formalist." The justices distinguished legislative from executive power by defining the terms, drawing on ideas from political theory and the Court's non-delegation precedents. Thus, according to Justice Black, Truman's seizure order could not "be sustained because of the several constitutional provisions that grant executive power to the President," since those grants "refute[] the idea that he is to be a lawmaker."⁵² In other words, to have executive power was to be denied lawmaking power. What, then, was lawmaking power? In this context, it entailed settling on a policy for resolving domestic labor disputes of national significance. The President's seizure order had clearly exercised that power. "The President's order does not direct that a congressional policy be executed in a manner prescribed by Congress—it directs that a presidential policy be executed in a manner prescribed by the President."⁵³ In this way, Truman had usurped power granted to Congress. Justice Douglas's opinion sounded in a similar register.⁵⁴

One can think of the Justices' solution as incorporating

52. *Steel Seizure Case*, 343 U.S. 579, 587 (1952).

53. *Id.* at 588.

54. Article I of the Constitution, Justice Douglas observed, vested all legislative power in Congress. "The legislative nature of the action taken by the President seems to me to be clear," since it required compensation for the confiscated property, and only Congress could pay it. *Id.* at 630–31 (Douglas, J., concurring).

a “negative” or a “dormant” version of non-delegation doctrine. Non-delegation doctrine prohibited delegations of open-ended, policy-making discretion to the president, on grounds that they licensed his exercise of the legislative power given by the Constitution to Congress. Though there had been no delegation here, the Article I Vesting Clause by itself prohibited the president from exercising such a power.

2. Functionalists

The second group comprises Justices Frankfurter and Jackson. They based their account of the Constitution's separation of powers on a different source. Before Frankfurter was appointed to the Supreme Court in 1939, early in his career, he had taught classes on administrative law at Harvard Law School. A series of lectures were collected in a volume titled *The Public and Its Government*, published in 1930.⁵⁵ In those lectures, Frankfurter rejected the account of legislative and executive power extracted from political theory. The need to keep these powers distinct was simply “a principle of statesmanship,” which “the practical demands of government” made impossible to follow. It was “a political maxim and not a technical rule of law.”⁵⁶

A judicial doctrine of the separation of powers had to be built on something else. As Frankfurter put it in his concurring opinion in *Steel Seizure*, “the content of the three authorities of government is not to be derived from an abstract analysis.”⁵⁷ They couldn't be, because “[t]he areas are partly interacting, not wholly disjointed.”⁵⁸ The formalists would have the legislature settle new policies in response to the changing needs of society, and leave to the executive the task of simply carrying them out, filling in the

55. FELIX FRANKFURTER, *THE PUBLIC AND ITS GOVERNMENT* (1930).

56. *Id.* at 77; see also James Willard Hurst, *Themes in United States Legal History*, in FELIX FRANKFURTER: A TRIBUTE 199, 206–11 (Wallace Mendelson ed., 1964).

57. *Steel Seizure Case*, 343 U.S. at 610 (Frankfurter, J., concurring).

58. *Id.*

details as necessary.⁵⁹ But it was a euphemism to speak of the executive as “filling in the details’ of a policy set forth in statutes,” since, Frankfurter observed, “the ‘details’ are of the essence; they give meaning and content to vague contours.”⁶⁰ Effective regulation of modern society required this overlap in legislative and executive policymaking. One only had to look to the actual operation of government for evidence. As Frankfurter put it in his *Steel Seizure* concurrence, “the way the framework has consistently operated fairly establishes that it has operated according to its true nature.”⁶¹

In this case, however, history had not placed a “gloss” on executive power sufficient to sustain the president’s seizure. There was no long-standing practice of presidential seizures in times of peace or outside a battlefield. And Congress had rejected such a policy by deliberately selecting a different mechanism for resolving labor disputes and passing it into law over the President’s veto. To allow the President to simply ignore this mechanism would disrupt the “system of checks and balances” in the Constitution.⁶² It was balance, then, not formal separation, that a doctrine of separation of powers required.

Justice Jackson also began from the premise that a judicial doctrine of separation of powers must reflect how government actually worked. This ruled out the formalism of Justice Black. “The actual art of governing under our Constitution,” Jackson wrote, “does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context.” Such an approach would be inconsistent with Constitution’s aim to “integrate the dispersed powers into a

59. FRANKFURTER, *supra* note 55, at 10, 72.

60. Felix Frankfurter, *The Task of Administrative Law*, 75 U. PA. L. REV. 614, 614–15 (1927).

61. *Steel Seizure Case*, 343 U.S. at 610 (Frankfurter, J., concurring).

62. *See id.* at 593.

workable government.”⁶³

3. Justice Jackson's Contribution

Jackson's most long-lasting contributions, however, departed from Frankfurter. Where Justice Frankfurter expressed an unwillingness to sketch a general account of how the branches should work together, Jackson thought attempting such a thing was essential for giving guidance to the executive branch.

The key idea Jackson settled on was the *sequence* of governmental action.⁶⁴ Jackson's papers show that his scheme built on remarks made in an opinion by district judge Augustus Hand, but they went far beyond them, formalizing and generalizing Hand's intuitions.⁶⁵ As Jackson explained it, if Congress acted first and authorized what the President later did, then the President's act in effect rested on the two branches' combined constitutional authority, and the Court should nearly always defer. If Congress did not act, in contrast, it might invite the President to take the initiative, but he would need to rely on a power the Constitution committed to him. Since its distribution of power was sometimes uncertain, this would require the Court to consider both the text and the context. Lastly, if Congress acted first and *prohibited* what the President later did, then an exclusive constitutional basis for the President's action would need to be clear. Jackson didn't tell us whether there was any such power—only that the President's authority, in such a case, “is at its lowest ebb,” and that the Court must scrutinize his conduct with care.⁶⁶

Unlike Frankfurter, Jackson also took up the claim that

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

64. H. JEFFERSON POWELL, *THE PRESIDENT AS COMMANDER-IN-CHIEF: AN ESSAY IN CONSTITUTIONAL VISION* 51 & n.50 (2014) (quoting Philip Bobbit, *War Powers: An Essay on John Hart Ely's War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath*, 92 MICH. L. REV. 1364, 1388 (1994)).

65. White, *supra* note 51, at 1109–10.

66. *Steel Seizure Case*, 343 U.S. at 637–38 (Jackson, J., concurring).

the President enjoyed an “inherent power” to meet emergencies. He arguably had to, given that lawyers for the government had cited advice Jackson had given, while Attorney General, to the President on the subject.⁶⁷ In oral argument the Solicitor General had pressed the case for such a power as concomitant to the President’s office and the sovereignty of the national government. But, thought Justice Jackson, the construction was “nebulous,” and the text of the Constitution expressly provided for emergencies by vesting certain powers in Congress. There was good reason for this arrangement; not only would it encourage emergencies by vesting a power to declare them in the same hands that exercised the power—the President—but the arrangement would threaten the rule of law itself.

Jackson perceived a deep connection between the sequence of governmental action and the rule of law. He described this idea using the expression “free government.” Free government was government under law. Its essence was, he wrote, quoting a poem by the English writer Rudyard Kipling, “leave to live by no man’s leave, underneath the law.”⁶⁸ Legal historian Gerard Magliocca has noted that Jackson quoted the language in an argument at the Nuremberg trials as well.⁶⁹ Much of the Kipling poem, titled “The Old Issue,” is fanciful history. But in substance it recounts England’s very real experience with curbing abuses of royal power. The language was apt, thought Jackson, because Truman was attempting to seize the steel mills by “individual will.” Since Congress had acted first, denying the President this power, his conduct became “an exercise of

67. *See id.* at 645 & n.14 (citing Jackson’s opinion as Attorney General, Acquisition of Naval and Air Bases in Exch. for Over-Age Destroyers, 39 Op. Att’y Gen. 484 (1940)).

68. *Id.* at 654–55.

69. Gerard Magliocca, *Rudyard Kipling’s “The Old Issue,”* PRAWFSBLAWG, (May 2, 2021), <https://prawfsblawg.blogs.com/prawfsblawg/2021/05/rudyard-kiplings-the-old-issue.html>.

authority without law.”⁷⁰ For the Supreme Court to validate the seizure would mean giving up on free government. It fell to the Court, more than to any other institution, to insist that “the Executive be under the law, and that law be made by parliamentary deliberations.”⁷¹

This trend in Jackson’s thinking was already evident in cases decided after his return from Nuremberg. Agencies of the executive branch were coming under statutory and judicial control. The Administrative Procedure Act (APA), passed in 1946, created a set of procedures for adjudication and rulemaking within the executive branch and provided for judicial review. In a decision from 1950 that applied the APA to deportation proceedings, *Wong Yang Sung v. McGrath*, Justice Jackson explained that the aim of the statute was to ensure regularity, rule of law, and shared governance in administrative proceedings—governance by settled procedures involving more than one person. In these respects, the APA brought the Constitution’s Fifth Amendment Due Process Clause to bear on the operations of government.⁷² It was not yet known whether the APA bound the President himself, in contrast to executive agencies under his supervision. But in *Steel Seizure* Jackson suggested the Constitution did, even in emergencies, and that the Court had a special role to play in ensuring government proceeded under law rather than by individual whim.⁷³

70. *Steel Seizure Case*, 343 U.S. at 655 (Jackson, J., concurring).

71. *Id.*

72. *Wong Yang Sung v. McGrath*, 339 U.S. 33, 41 (1950).

73. A later Court declined to apply the APA to the President on grounds that the text did not clearly support it. See *Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992). But see generally Kathryn E. Kovacs, *Constraining the Statutory President*, 98 WASH. U. L. REV. 63 (2020) (arguing that *Franklin* was wrongly decided); Shalev Roisman, *Presidential Law*, 105 MINN. L. REV. 1269, 1271 (2021) (arguing that the Constitution imposes a duty to deliberate on the President before the exercise of statutory powers).

II. "AFTERLIFE"

A. *Immediate Reaction to the Steel Seizure Case*

The Supreme Court's order invalidating the seizure was widely celebrated. Nearly every major newspaper celebrated the Court's decision to curb a now broadly-unpopular President Truman. In an op-ed written just five days after the opinions were released, the journalist Arthur Krock surmised that "[t]he decision was one of the most popular ever rendered by the court because in substance it could be explained to the people as a holding that 'no man, including the President, is above the law' and that private property rights are still sacred in the United States."⁷⁴ Krock read the decision to "impose the first specific restraint in the annals of the Supreme Court, on a Presidential act based on a claim that a national emergency and legislation . . . required it."⁷⁵ Congress celebrated, too. Representatives seem to have grasped what moved Justice Jackson. Senator Harry Cain thought the Court's decision stood for the principle that "our Constitution is not to be employed to serve the purposes and whims of individual men."⁷⁶

There were some criticisms of the Supreme Court's work. A German newspaper op-ed I stumbled upon while researching this Essay, which a prior owner folded into my used copy of John Frank's constitutional law casebook, faulted Chief Justice Vinson for not preventing the proliferation of individual opinions.⁷⁷ Vinson, the author thought, had abandoned his former role (honed during his time in the Congress and administration) as a master of

74. Arthur Krock, *Powers of a President After the Steel Case*, N.Y. TIMES, June 8, 1952, at E3. Professor Marcus thought the Krock piece "typified newspaper reaction." MARCUS, *supra* note 23, at 212.

75. Krock, *supra* note 74, at E3.

76. 98 CONG. REC. 6289 (1952).

77. *Chief Justice und acht andere Greise*, DEUTSCHE ZEITUNG, Sept. 19, 1953.

compromise, instead giving in to a temptation to publicize his own unsupported intuitions about presidential power.⁷⁸ Professor Paul Freund's *Foreword* in the *Harvard Law Review* also complained about the many concurring opinions, and some legal scholars observed that it was difficult to identify the Court's holding, given the material differences between the views of the six Justices who had signed Black's opinion for the Court.⁷⁹ Other voices criticized the Court for activism. Judge Learned Hand, sitting on the Court of Appeals for the Second Circuit, opined in a private letter to his friend Frankfurter that "[s]uch jobs are not for judges"—that is, enjoining a presidential seizure on separation of powers grounds.⁸⁰

Jackson, of course, had gone considerably beyond Frankfurter in sketching out a general account of the relationship between the President and Congress. But few voices singled out the Jackson opinion for criticism or for praise. His was one of seven opinions, and if was known for anything, it was for adopting a more functional, realistic approach to the separation of powers, along with Justice Frankfurter.

B. "Taking Up" the Justices' Opinions

So, when did this change, and why? By all indications the *Steel Seizure Case* remains popular. But our contemporary interpretation of the rule coming out of the case is quite different from what it was in June 1952. Lawyers have come to identify the case with Jackson's concurrence—and in particular, with the broadest part of his concurrence, the three categories of presidential power. *Steel*

78. *Id.*

79. Paul Freund, *Supreme Court, 1951 Term: The Year of the Steel Case*, 66 HARV. L. REV. 89, 103–04 (1952); MARCUS, *supra* note 23, at 215 (reporting that the Court was "taken to task for the multiplicity of its opinions").

80. Letter from Learned Hand to Felix Frankfurter (June 13, 1952), *quoted in* MARCUS, *supra* note 23, at 222.

Seizure Case has come to be identified in the lawyerly mind with a theoretical concurrence that earned a single vote.

The first changes can be detected in the 1960s, when the formalism endorsed by Justices Black and Douglas began to retreat in the face of increasing presidential powers to determine foreign policy. In the 1965 case *Zemel v. Rusk*, the Court held that the Secretary of State could refuse to validate the passports of American citizens for travel to Cuba.⁸¹ The relevant statute, the Passport Act of 1926, authorized the Secretary of State to “grant and issue passports . . . under such rules as the President shall designate,” a completely open-ended delegation. Exercising this power, the President had issued an order authorizing the Secretary to refuse to issue passports for travel to “certain countries.” Justice Black now found himself in dissent. The “regulation of passports,” he wrote, “just like regulation of steel companies, is a lawmaking, not an executive, law-enforcing, function.”⁸² Such a power was vested in Congress and could not be delegated to the President.

Black’s formalist account of executive power was hard to square with governmental practice in the issuance of passports. Since Black would not permit Congress to delegate open-ended discretion to the President, any authority he enjoyed would have to derive from an independent grant of power in Article II, or perhaps an “inherent” power to conduct foreign affairs. This was of course how an earlier Supreme Court had framed matters in the *Curtiss-Wright* case. Later Supreme Courts were more cautious. One way they dealt with this difficulty was by developing a “political question doctrine,” a line of precedent that counseled judicial inaction when a decision was committed by the Constitution to the political branches or

81. 381 U.S. 1, 10–13 (1965).

82. *Id.* at 20–21 (Black, J., dissenting).

was in some way unamenable to judicial resolution.⁸³ In this way, at least, the Court avoided giving its blessing to a discretionary or inherent power. Of course, it also prevented the Court from intervening at all.

C. *President Nixon and Watergate*

It was President Nixon whose foreign policy strategy pressed this dilemma to its limit. After his election in 1970, he expanded the military operation authorized by Congress in 1964 in the Gulf of Tonkin Resolution by ordering bombing in Cambodia. In response to uneasiness in Congress about these operations, and a suggestion that Congress might try to stop them by restricting funding, presidential lawyers pressed the case that the President had an unregulated inherent power to conduct the foreign affairs of the country, including by using armed force, and that Congress lacked any power to interfere.⁸⁴ When the War Powers Resolution was passed over Nixon's veto in 1973, legislators cited Justice Jackson's interpretation of the Commander-in-Chief Clause in the *Steel Seizure Case*.⁸⁵

But it was with the 1974 litigation over executive privilege in the Watergate criminal conspiracy case that Jackson's opinion really emerged as the leading construction of the President's relation to Congress. We have long known that Jackson's concurrence figured in the Supreme Court's opinion sustaining the Special Prosecutor's subpoena of the Watergate tapes, in *United States v. Nixon*. Chief Justice Burger quoted Jackson's concurrence as he addressed the government's argument that the President's immunity from

83. In a concurring opinion in *Baker v. Carr*, however, Justice Douglas suggested that *Youngstown* showed that courts could involve themselves in matters that had a strong political cast. 369 U.S. 186, 217 (1962).

84. DAVID J. BARRON, *WAGING WAR: THE CLASH BETWEEN PRESIDENTS AND CONGRESS, 1776 TO ISIS* 317–21 (2016) (describing a memo by Tom Huston, "Assault on the Constitutional Power of the Presidency").

85. *See, e.g.*, 119 CONG. REC. 33,563 (1973) (statement of Sen. Dole).

a judicial subpoena must be unqualified and absolute.⁸⁶ If any interference by one branch with another was a violation of the Constitution's separation of powers, a judicial subpoena into the White House would be intolerable. What Jackson's opinion gave the Court was another way to conceive of the demands of separation of powers. The Constitution "contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity."⁸⁷

It seems to have been the initial Watergate Special Prosecutor, Archibald Cox, who was responsible for introducing Jackson's concurrence into the Watergate litigation. Cox of course had convened a grand jury in 1973 to investigate allegations by one of the Watergate burglars that the operation had been planned by high-ranking governmental officers. When it became known that the White House had taped meetings in the Oval Office, the grand jury requested their production. From the beginning, Nixon's team invoked a strong conception of separation of powers to justify their refusal to comply. The President's brief declared that if the district court held he was obligated to disclose the contents of private conversations, "the total structure of government—dependent as it is upon a separation of powers—will be impaired."⁸⁸ Cox naturally took a different view. He conducted extensive research into the history of presidential assertions of privilege against demands for the production of evidence.⁸⁹ He must have been

86. *United States v. Nixon*, 418 U.S. 683, 705–07 (1974).

87. *Id.* at 707 (quoting *Steel Seizure Case*, 343 U.S. 579, 645 (1952) (Jackson, J., concurring)).

88. Brief in Opposition at 2, *In re Subpoena to Nixon*, 360 F. Supp. 1 (D.D.C. 1973), quoted in MARCUS, *supra* note 23, at 241.

89. This research appears to have become part of a law review article published around the same time. Archibald Cox, *Executive Privilege*, 122 U. PA. L. REV. 1383, 1388 n.13 (1974). My father, James R. Steilen, was a research assistant for Professor Cox at Harvard Law School in the summer of 1972.

searching for a way to capture the lesson of this history and seems to have hit on Jackson's concurrence as a pithy summary. As District Court Chief Judge Sirica wrote in his opinion ordering the production of the tapes, "The Special Prosecutor has correctly noted that the Framers' intention to lodge the powers of government in separate bodies also included interaction between departments. A 'watertight' division of different functions was never their design." He then quoted Justice Jackson's language from the concurrence.⁹⁰

Of course, Frankfurter's *Steel Seizure* concurrence might also have been used on the question of the power of a court to subpoena presidential records, since Frankfurter, too, had denied that the branches could be formally separated. Indeed, in some ways Jackson was an inferior source, since he might also be cited by President Nixon's lawyers, as Jackson had authored an opinion as Attorney General asserting the President's right to withhold materials containing confidential communications.⁹¹ So why was Jackson's concurrence used? It is difficult to say, but Gerard Magliocca, a legal historian at Indiana University now working on a new book about the *Steel Seizure Case*, has suggested it was simply "because his opinion was more quotable."⁹²

Around the same time, Jackson's concurrence began to appear in other places as well. Nixon's post-presidency effort to preserve control over tapes of his presidential conversations led Congress to enact the Presidential Recordings and Materials Preservation Act, which the Supreme Court sustained in an opinion citing both Jackson's concurrence and its decision in *United States v. Nixon*.⁹³ As

90. *In re Subpoena to Nixon*, 360 F. Supp. at 8–9.

91. See Cox, *supra* note 89, at 1400 n.62.

92. Telephone Conversation with Gerard Magliocca, Professor, Ind. Univ. Robert H. McKinney Sch. of L. (Jan. 21, 2022).

93. *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 442–43 (1977).

Magliocca has pointed out, legislators were finding other parts of the concurrence useful. I have already noted its citation in legislative proceedings on the War Powers Resolution, which regulated presidential initiations of armed conflict. There was also the National Emergencies Act, which regulated presidential declarations of national emergency.⁹⁴ The legislative history of the act is replete with references to Jackson's concurrence, some in language that suggests it already enjoyed a sterling reputation. Senator Frank Church, a Democrat from Idaho, remarked that "Justice Jackson's widely quoted and praised concurring opinion stressed that our system of government is a 'balanced power structure' and pointed out that Executive power to act is a variable depending upon the collective will of Congress for its authority."⁹⁵ Legislators were making the opinion their own; the phrase "balanced power structure" occurs nowhere in *Steel Seizure*, and may have been Senator Church's own invention.

Law professors also began to feature the concurrence in their casebooks, incorporating it into their evolving theories of the law. Gerry Gunther's influential casebook, in its ninth edition by 1975 and for many years after probably the leading constitutional law casebook in the country, placed the *Steel Seizure Case* at the beginning of a lengthy chapter

94. Pub. L. No. 94-412, 90 Stat. 1255 (1976).

95. 124 CONG. REC. 29,376 (1978) (statement of Sen. Church). For other references to Jackson, see generally *Legislative History of the Act of September 14, 1976*, Pub. L. No. 94-412, H.R. 3884, 94th Cong., 90 Stat. 1255 (Westlaw) (last visited Apr. 28, 2022), and see specifically, for example, 121 CONG. REC. 27,635 (1975) (statement of Rep. Mazzoli); *National Emergencies Act: Hearings on H.R. 3384 Before the Subcomm. on Admin. L. & Governmental Rels. of the H. Comm. on the Judiciary*, 94th Cong. 23-24, 34 (1975) (statements of Sens. Mathias and Church); *National Emergencies Act: Hearings on H.R. 3384 Before the S. Comm. on Gov't Operations*, 94th Cong. 6-7 (1975) (statements of Sens. Mathias and Church); 120 CONG. REC. 34,013-14 (1974) (statement of Sen. Mathias); S. REP. NO. 93-1193, at 4-7 (1974); 120 CONG. REC. 29,977-78, 29,980, 29,982 (1974) (statements of Sens. Church and Mathias, and interim report by the Special Committee on National Emergencies and Delegated Emergency Powers in Support of a Recommended National Emergencies Act); S. REP. NO. 93-549, at 12-13 (1973).

titled “Separation of Powers,” in a subsection on “domestic affairs,” and excerpted more of Jackson’s concurrence than any other opinion in the case.⁹⁶ To be sure, not every scholar followed suit. Professor Marcus’s book on the *Steel Seizure Case*, published in 1977, does not feature Jackson’s concurrence over the other opinions in the case.⁹⁷ Professor Larry Tribe’s influential casebook likewise did not center it.⁹⁸

D. *The Concurrence in the Court, the Congress, and the Executive*

By the early 80s, defenders of a strong executive branch had begun to pay closer attention to the Jackson concurrence, too. One encounters scholarly criticisms that Jackson’s concurrence was an expression of “congressional primacy in foreign affairs.”⁹⁹ Then-Justice William Rehnquist showed that this was not the case by invoking the concurrence in his opinion for the Court in *Dames & Moore v. Regan*, sustaining an exercise of a presidential power to nullify judicial attachments of the property of foreign nationals and dismiss pending litigation.¹⁰⁰ President Carter took these steps in an effort to resolve the hostage crisis at the U.S. embassy in Iran. Critics accused Rehnquist of changing or even abandoning the logic of the concurrence, but a majority of the Supreme Court had never endorsed the concurrence, which remained the opinion of a single Justice

96. GERALD GUNTHER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* 401–14 (9th ed. 1975).

97. See MARCUS, *supra* note 23, at 228–48 (assessing the significance of the case). Even as late as 1986, an academic commentary on the separation of powers might treat the opinions on par. See, e.g., ALAN I. BIGEL, *THE SUPREME COURT ON EMERGENCY POWERS, FOREIGN AFFAIRS, AND PROTECTION OF CIVIL LIBERTIES 1935–1975*, at 135–50 (1986).

98. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 181–84 (1978).

99. See Bellia, *supra* note 13, at 271.

100. *Dames & Moore v. Regan*, 453 U.S. 654, 660 (1981).

in a case where the Court had authored an opinion.¹⁰¹ Rehnquist himself had been a Jackson law clerk in 1952 when the *Steel Seizure Case* was decided. What he accomplished in *Dames & Moore* was to make the concurrence the law of the Court and to show how it might be used in support of presidential powers over foreign policy. Later decisions of the Court have largely followed suit.¹⁰²

Formalist doctrines of separation of powers continued to prove unworkable and face abandonment. In *INS v. Chadha*, Chief Justice Burger wrote for the Court in holding that the legislative veto provision in the Immigration and Nationality Act was unconstitutional, on grounds that it reserved to each house of Congress a power to reverse decisions by the Attorney General by passing a resolution. The resolution, he reasoned, was “legislative in its character and effect” since it altered “the legal rights, duties, and relations of persons” outside Congress.¹⁰³ All such “legislative” acts had to go through both houses and be signed by the President. Although it remains good law, *Chadha* has never really been followed. Congress and the President continue to honor such “legislative vetoes” and add hundreds of them to new statutes. *Chadha* had little afterlife, because it discarded a tool too useful to the political branches, and which has not proved to pose an unmanageable threat of unbalancing them.¹⁰⁴

These same forces can be seen at work several years after *Chadha* in *Morrison v. Olson*, where the Court addressed one of the most important questions of separation of powers: the scope of Congress’s authority to limit the President’s power to fire an officer in the executive branch. Where did

101. See, e.g., 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, 91 & n.156 (1982).

102. See, e.g., *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2083–84 (2015).

103. *INS v. Chadha*, 462 U.S. 919, 952 (1983).

104. Louis Fisher, *The Legislative Veto: Invalidated, It Survives*, 56 LAW & CONTEMP. PROBS. 273, 286–91 (1993).

Rehnquist reach to answer this question? Not to the removal cases, still dominated by the *Myers* precedent, but to *United States v. Nixon* and the *Steel Seizure Case*, even though neither expressly addressed the issue.¹⁰⁵ What the cases captured was the particular shape of linkage between the Congress and the President, and thus the propriety of a power in Congress to limit presidential removals. Therefore, it was Jackson's (and Frankfurter's) functional conception of separation of powers that received the Court's imprimatur, rather than formalist doctrines, even where they privileged legislative power (as Justice Black and Douglas had, basing their doctrine on non-delegation).

Executive-branch lawyers embraced Jackson's concurrence as well, folding it into memoranda on the scope of presidential power.¹⁰⁶ Professor Bellia has argued that this was Jackson's intention—that he had essentially addressed the concurrence to the political branches.¹⁰⁷ To the executive branch the message had been prudence. Early drafts of Jackson's concurrence carry the implication that had Jackson still been attorney general, advice to seize the steel mills would never have been given.¹⁰⁸ Prudence in the executive meant exercising presidential power in ways that kept matters out of court, where the forum compelled testing boundaries and drawing lines. Prudence also counseled the use of a statutory regime where one was available. More generally, prudence in the exercise of power entailed

105. *Morrison v. Olson*, 487 U.S. 654, 693–94 (1988) (first quoting *United States v. Nixon*, 418 U.S. 683, 707 (1974); and then quoting *Steel Seizure Case*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)).

106. See, e.g., *Authority to Use United States Military Forces in Somalia*, 16 Op. O.L.C. 8, 10 (1992), reprinted in POWELL, *THE CONSTITUTION AND THE ATTORNEYS GENERAL*, supra note 14, at 554 (memorandum opinion written by Timothy E. Flanigan); see also POWELL, *THE PRESIDENT AS COMMANDER-IN-CHIEF*, supra note 64, at 44–45 (arguing that “most lawyers would think” *Steel Seizure* “the most relevant case” for settling the president's unilateral powers to provide for national security).

107. See Bellia, supra note 13, at 275.

108. *Id.* at 275–76.

judgment, reflection, caution, and sensitivity to implications, and contrasted with decision by “individual will” or “whim.”¹⁰⁹ Presidential whim would land the government in court, where judges would feel duty-bound, as institutional defenders of the rule of law, to give effect to congressional policy. The message in Jackson’s concurrence to Congress, then, was not to remain silent, since doing so would invite unilateralism in cases where the president perceived a crisis.¹¹⁰

CONCLUSION:

AFTERLIFE, AUTHORITY, AND THE ROLE OF THE COURT

The “afterlife” of a case is the period when others take up an opinion and make use of it. The Supreme Court set it down and gave it life, but we (in a broad sense) took it up and gave it an afterlife. Lawyers in all three branches and outside of government, including law teachers in law schools, find a use for words written by justices. They are constantly engaged in what I have called “opinion-measuring,” and since our needs change, our measure of the thing changes as well. Whereas the life of an opinion depends on the justices of the Court, its afterlife also depends on us, and what afterlife it has is a product of the usefulness, goodness, and legitimacy we see in it. It is the popular component of judge-made constitutional law.

Why was it that Jackson’s concurrence in *Steel Seizure* came to have such a prominent afterlife? Perhaps it was an historical accident—the fact that Cox, Sirica, and Burger admired Jackson and used his concurrence in the Watergate cases. In part, it was because Jackson was such a gifted prose stylist. He could also write with authority, having played an important role as a presidential legal advisor.

109. On the distinction between “whim” and “discretion” in this context, see Matthew Steilen, *Presidential Whim*, 46 OHIO N. U. L. REV. 485, 498–99 (2020).

110. See Bellia, *supra* note 13, at 275.

But there's something else that bears mention, too, and which touches directly on the question of Supreme Court reform, with which I began, and the role of the Court in the separation of powers. Many progressives want a more minimalist and deferential Court, which leaves collisions between the branches to a political resolution, as Frankfurter generally counseled and as Learned Hand wanted.¹¹¹ But by the time of the *Steel Seizure Case*, at least, Justice Jackson was comfortable with setting down something of a system for managing these conflicts. It was not minimalist at all, but a very general framework. What value did it have?

In a review of the Supreme Court's separation of powers jurisprudence in 1954, shortly after the *Steel Seizure Case*, the legal historian Willard Hurst observed that the Supreme Court's decisions had actually had little concrete effect on collisions between the branches. He thought "the practical influence of judicial review has been much exaggerated and importance has often been attributed to it for the wrong reasons."¹¹² Where the Court really had effect was "as a contributor to the symbols and ideas with which we conduct our politics." Hurst thought there was as yet little evidence that this contribution went beyond the "professional word-men" who filled the agencies of the federal government.¹¹³ But even if we confine our attention to them, the language of opinions can contribute ideas and bits of rhetoric that can function as channels for conducting disputes, for understanding what's at stake, and for marking the limits and possible resolutions. Justice Jackson began his opinion by reflecting on the difficulty these people faced—in particular the executive advisor, given the "poverty of really useful and unambiguous authority applicable to concrete

111. *See supra* note 80.

112. Willard Hurst, *Review and the Distribution of National Powers*, in *SUPREME COURT AND SUPREME LAW* 140, 140 (Edmond Cahn ed., 1954).

113. *Id.* at 167.

problems of executive power as they actually present themselves.”¹¹⁴ A Court that fails to give this guidance abjures its symbolic role, and loses an opportunity to channel and shape future disputes, which helps to ensure they are resolved within tolerable boundaries.

I think one reason Jackson’s concurrence has had such a significant afterlife is that it has helped us imagine and conduct interbranch politics in the national government. Not all judicial opinions are equivalent in this regard; in some cases, legal language can be stultifying. It may be too rigid, categorical, or out of touch, rendering it “unworkable.”¹¹⁵ An opinion like Justice Black’s in *Steel Seizure* simply could not be applied to the range of cases that presented themselves; it encouraged the Court either to bow out (political question doctrine) or to authorize sweeping assertions of power. Minimalism like the kind favored by Learned Hand would leave the meaning of Truman’s seizure to history, confining it to a political and legal context that has long passed away. An active, expansive, theoretical, eloquent concurrence like Jackson’s lifted ideas about the operation of government out of that context for us to use on other occasions as we saw fit. By giving people in all three branches ideas and a structure to work with, Jackson fostered the idea that separation of powers consisted in a linkage and sequence between departments of government. By being so expansive, he allowed for the popular authority of the opinion to increase over time.

Historians have given us reason to suspect this was Jackson’s intent. But whether it was his intent is really not

114. *Steel Seizure Case*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

115. See Bowie & Renan, *supra* note 2, at 2093–96, 2114. On the virtues of Jackson’s concurrence as a piece of judicial writing, see Sanford Levinson, *Introduction: Why Select a Favorite Case?*, 74 TEX. L. REV. 1195, 1197–98 (1996) (“For me, Jackson provides a magnificent, inspiring example of how a serious person wrestles with the difficult problem of preserving some notion of liberal democracy in a modern world full of horrendous threats and ‘emergencies’ calling for vigorous response.”).

the crucial point. The scope of Jackson's opinion is not settled by his private intent, but by what use we can find for it, according to generally prevailing contemporary methods. Other justices have written opinions with *ill* intent, or at least an intent we can no longer support.¹¹⁶ But here it seems right to say about the intent of Supreme Court justices what Frederick Douglass said about the intent of the Constitution's Framers with respect to the question of whether it protected race slavery:

What will the people of America a hundred years hence care about the intentions of the scribes who wrote the Constitution? These men are already gone from us, and in the course of nature were expected to go from us. They were for a generation, but the Constitution is for ages.¹¹⁷

As Douglass saw it, the principal advantage of having a written constitution was to give the political community words that it could use, interpreting them for itself in an effort to achieve the community's highest goals. When Douglass said "The Constitution is for ages," he did not mean that it was eternal—that we today are bound by the intent of men from a long-lost age—but that the Constitution is for all our ages, *our present age* as well as for their past age, and that we make it ours by making use of the text as we see fit. Whatever Justice Jackson's purpose was, then, in writing his *Steel Seizure* concurrence, he gave us words to use, and in so doing, enabled us to make those words our own.

116. See Bowie & Renan, *supra* note 2, at 2072–82 (describing Chief Justice Taft's aims in *Myers v. United States*, 272 U.S. 52 (1926)).

117. Frederick Douglass, *The Constitution of the United States: Is it Pro-Slavery or Anti-Slavery?*, Speech Delivered in Glasgow, Scotland (Mar. 26, 1860), reprinted in 2 *THE LIFE AND WRITINGS OF FREDERICK DOUGLASS* 467, 469 (Philip S. Foner ed., 1950).