# Courts Aff WIP – TOC 2017

### notes

* this court case key – why it shapes precedent
* first amendment cases key to court power

http://heinonline.org/HOL/LandingPage?handle=hein.journals/tulr61&div=45&id=&page=

#### IF THEY READ HATE SPEECH OR OTHER PIC

* ask in CX – how do you stop the policy from being applied over-broadly? when they narrow the policy down, strengthens perm arg

## 1AC

### Plan Texts

#### Plan: Public colleges and universities in the US should remove restrictions on constitutionally protected speech in compliance with the Supreme Court's decision in Doe v. University of Michigan.

OR

RAV vs St. Paul's  
OR Sixth Circuit's decision in the case *McCauley v. University of the Virgin Islands*.

### Advantage – Trump

#### Existing speech regulation on public college campuses clearly violates constitutional doctrine from Doe v. Michigan– it's overbroad, overly vague, and picks viewpoints

Majeed 9 [Azhar Majeed (FIRE), "Defying the Constitution: The Rise, Persistence, And Prevalence Of Campus Speech Codes," Foundation for Individual Rights in Education, 11/18/2009] AZ

As previously discussed,[92] a statute or law regulating speech is overbroad “if it sweeps within its ambit a substantial amount of protected speech along with that which it may legitimately regulate.”[93] The courts have indicated that “[t]he doctrine of overbreadth, while extremely circumscribed in most applications, is generally afforded a broader application where First Amendment rights are involved.”[94] Therefore, “[b]ecause First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.”[95] Courts invoked the overbreadth doctrine to strike down speech codes in Booher, Bair, Roberts, and other cases.[96] Nonetheless, numerous universities continue to maintain overbroad speech codes. For instance, San Jose State University’s policy on “Harassment and/orAssault” prohibits “verbal remarks” and “publicly telling offensive jokes.”[97] Coast Community College District, a consortium of three California community colleges, bans “[h]ateful behavior aimed at a specific person or group of people” as well as “habitual profanity or vulgarity.”[98] The Lone Star College System, a five-campus community college system in Texas, similarly prohibits engaging in any “vulgar” or “indecent” expression.[99] These and many other existing speech codes bring within their ambit speech which easily falls under the protection of the First Amendment. A publicly told offensive joke or the use of vulgar or indecent language, for example, would not come close to meeting any of the carved-out exceptions to the First Amendment.[100] Likewise, terms such as “verbal remarks” quite obviously encompass much expression which is protected by the First Amendment. Universities would be hard-pressed to distinguish such policies appreciably from the speech codes which have previously been struck down on overbreadth grounds. Indeed, legal commentators have recognized that speech codes “tend to be overbroad, trying to eliminate any potentially offensive speech from the campus,” and that “[t]he broad sweep of these codes keeps them from surviving a constitutional challenge.”[101] Speech codes impermissibly “attempt to ‘cleanse public debate to the point where it is grammatically palatable to the most squeamish among us.'”[102] Thus, speech codes routinely encompass campus expression meriting First Amendment protection, creating a fundamental overbreadth problem. 2. Vagueness Second, university speech codes are often unconstitutionally vague. A statute or regulation is void for vagueness when “men of common intelligence must necessarily guess at its meaning.”[103] In order to escape the vagueness doctrine, a statute or regulation must “give adequate warning of what activities it proscribes” and “set out ‘explicit standards’ for those who must apply it.”[104] Significantly, the Supreme Court has held that “a more stringent vagueness test” should apply to laws that interfere with the right of free speech.[105] Courts struck down speech codes on vagueness grounds in Doe, UWM Post, Dambrot, and other decisions.[106] Nevertheless, universities continue to maintain vague speech codes. Texas Southern University, for example, prohibits “causing or attempting to cause . . . emotional, mental, physical or verbal harm to another person,” and provides such examples of this behavior as “emotional force, embarrassing, degrading or damaging information, assumptions, implications, remarks, or fear for one’s safety.”[107] Northeastern University bans students from using the school’s information systems or facilities to “[t]ransmit or make accessible material, which in the sole judgment of the University is offensive” or “annoying.”[108] Macalester College defines racial harassment to include “speech acts which are intended to insult or stigmatize an individual or group of individuals on the basis of their race or color, or speech that makes use of inappropriate words or non-verbals.”[109] These and many other speech codes are void for vagueness because they do not give students adequate warning of the speech to be prohibited and do not provide university administrators with specific standards for enforcement. Under the Texas Southern policy, for example, it is not immediately clear what type of verbal conduct would constitute an attempt to cause emotional or mental harm. The Northeastern and Macalester policies fail to provide a standard for “offensive” and “inappropriate” speech, respectively. Students at these institutions are left to guess at the intended meanings of the policies, while the definition in any particular case is left to the whims of the university’s administration. Indeed, the Northeastern policy explicitly reserves “sole judgment” to the university. Policies such as these are far too vague to withstand a constitutional challenge.[110] Legal commentators have recognized the vagueness problem associated with speech codes. As one commentator writes, “the exact language prohibited by the codes can be hard to define, giving those students punished under the codes little or no advance notice as to exactly what speech has been prohibited.”[111] Another commentator similarly observes, “Students, faculty, and administrators must necessarily guess as to what speech is permitted and what is prohibited by the codes.”[112] Nonetheless, despite the consensus in legal scholarship and in the case law, colleges and universities continue to draft and enforce unconstitutionally vague speech codes. 3. Content- and Viewpoint-Based Discrimination Third, many speech codes impermissibly discriminate against speech on the basis of content or viewpoint. The Supreme Court has stated that “[c]ontent-based regulations are presumptively invalid.”[113] This holds true with particular force on a college campus, as the Court has indicated that the “campus of a public university, at least for its students, possesses many characteristics of a public forum.”[114] To the extent that areas on a campus are traditional or designated public fora,[115] content-based restrictions on speech are invalid unless they are “necessary to serve a compelling state interest” and “narrowly drawn to achieve that end.”[116] Even in those campus areas that are more aptly characterized as limited public fora or nonpublic fora,[117] content-based regulations must be “reasonable” in light of the intended purposes of the forum and “not viewpoint-based.”[118] Moreover, viewpoint-based restrictions on speech are forbidden in all public, designated public, limited public, and nonpublic fora.[119] Courts struck down speech codes at least partly on the grounds of content-based discrimination in Corry and Dambrot.[120] Significantly, these decisions applied the holding from the Supreme Court’s landmark decision in R.A.V. v. St. Paul[121] that, even within otherwise proscribable classes of speech such as fighting words, the state cannot discriminate on the basis of content or viewpoint by, for instance, prohibiting the expression of fighting words directed at particular groups while allowing similar expression directed at other groups.[122] R.A.V., while not a speech code case, carries significant constitutional ramifications for speech codes and should counsel universities against the practice of discriminating on the basis of expressive content or viewpoint.[123] Yet in spite of these indications from the courts, universities continue to maintain speech codes that discriminate against speech on the basis of content or viewpoint. Kansas State University, for instance, prohibits “generalized sexist statements and behavior that convey insulting or degrading attitudes about women.”[124] This policy favors speech that conveys positive attitudes about women over speech that is deemed sexist. Jackson State University bans expression which “degrades, insult[s], taunt[s], or challenges another person” and “derogatory comments or remarks.”[125] This policy favors speech carrying a positive message over speech conveying a disparaging or derogatory message. As a result, it too presents the danger of guiding campus dialogue in a particular direction. Legal commentators have recognized that many speech codes discriminate against expression on the basis of content or viewpoint. One commentator writes that speech codes “are by definition content-based.”[126] Another commentator argues that many speech codes are “content-based restrictions on speech that select a particular viewpoint as the official government or university message on issues important in undergraduate and graduate education.”[127] Far too often, a speech code “selects a preferred view and limits speech that is counter to that view.”[128] These observations have been borne out in the case law and reiterated in other legal scholarship,[129] yet universities continue to draft and enforce speech codes which discriminate on the basis of expressive content or viewpoint.

#### Non-compliance by colleges with First Amendment doctrine has damaged Supreme Court legitimacy

Welch 14 [Benjamin Welch (M.A., University of Nebraska), "An Examination of University Speech Codes’ Constitutionality and Their Impact on High-Level Discourse," August 2014] AZ

Even today, the informal law of speech regulation has prospered, despite the outcome of legal battles in court. Could it be possible, then, that speech codes will eventually and ultimately have an effect on future First Amendment findings? The bounds of free speech continue to be pressed and reinterpreted despite court rulings advocating for the contrary. Jon Gould in his study comments that policies are rarely enforced, occurring at most once a year. He quotes a former college president, who says, “Adopting policies is easier than acting on actual cases… Policies are non-action,” which most college administrators prefer, he says. “The adoption does nothing.”68 Claims by opponents of indoctrinating young adults in schools may not be accurate, as well. A series of surveys conducted at the University of California at Los Angeles shows that freshmen arrive at school already with anti-hate speech ideals. In a 1993 survey, 58 percent of first-year students supported hate speech regulation.69 In 1994, two thirds approved of prohibitions,70 and by the early 2000s, the number had leveled off at around 60 percent of incoming students favoring control of hateful speech.71 Gould found that national media trends were similar; non-existent in 1988, picked up steam, peaked in the mid 1990s, and tapered off by the late ‘90s.72 But, as Anna Quindlen has said, media “do not make social policy, only reflect it once it moves convincingly from the fringe into the mainstream.”73 Simply, proponents of hate speech regulation conclude that it has triumphed in the face of formal constitutionalism. This is especially ironic, as traditional legal theory suggests that formal law prevails, and the support of legal institutions must be attained to secure constitutional rights. As Jon Gould, one of the foremost apologetics for campus speech policy, says, “What may have begun as an instrumental, intra-academic exercise has not been dispatched by its critics. In the early morning of a new century, the norm of hate speech regulation has grown to challenge the formal Constitution.”74

#### Independently, broad non-compliance undermines rule of law and separation of powers

Kapiszewski & Taylor 13 [Diana Kapiszewski (Assistant Professor in the Department of Political Science at the University of California, Irvine) and Matthew M. Taylor, "Compliance: Conceptualizing, Measuring, and Explaining Adherence to Judicial Rulings," 2013] AZ

Public authorities’ compliance with judicial decisions is a topic of empirical concern and theoretical importance. If courts’ rulings are not adhered to, they cannot constrain public authorities effectively, compromising courts’ contributions to politics and policy making. More broadly, compliance by political leaders is a central aspect of the rule of law, undergirding and reinforcing the institutional framework for legality and constitutionality. Further, compliance is often considered to be vital to democracy and the democratic process.1 National authorities’ compliance with judicial rulings can also have powerful feedback effects on judicial decision making, judicial independence, and judicial power. While compliance with judicial rulings is of particular concern in new democracies, the possibility of noncompliance is a central consideration for judges all over the world. Indeed, even in advanced democracies, the mere possibility of noncompliance by another branch of government can strongly shape judicial behavior and courts’ decisions in politically important cases (Vanberg 2001, 2005). Courts concerned that their rulings may not be obeyed may feel compelled to strategically “temper their commitment to principle” (Roux 2009, 107). Yet courts that adjust their rulings ex ante to ensure compliance or constrain themselves to avoid conflict are not fully independent. At the same time, if a court is free to follow its own preferences in its rulings, but its decisions are ignored, judicial independence means little. If we observe individuals, lower courts, state bureaucracies, or elected leaders failing to comply with court rulings, we should rightly question judicial power. In short, examining how much, when, and why elected leaders comply with judicial rulings helps us comprehend judicial behavior, interbranch relations, and, ultimately, the underpinnings of the rule of law

#### Compliance with Supreme Court decisions regardless of popularity or practicality is key to perception of court legitimacy the court to influence behavior– similarly, disobedience hurts legitimacy

Law 9 [David Law (Professor of Law and Professor of Political Science, Washington University in St. Louis; B.A., M.A., Ph.D., Stanford University; J.D., Harvard Law School), "A Theory of Judicial Power and Judicial Review," THE GEORGETOWN LAW JOURNAL, 2009] AZ

To conceive of judicial power as the power to coordinate behavior, however, leads to the opposite conclusion: one need not be popular in order to be powerful. A court’s ability to coordinate need not decrease simply because it renders unpopular (or unpersuasive, or unenforceable) decisions. To the contrary, the more often that a court renders unpopular (or unpersuasive, or unenforceable) decisions that are nevertheless obeyed, the greater the court’s power to coordinate may become. In the hypothetical case of George v. Albert, 181 for example, a controversial or unpersuasive decision in favor of George does not necessarily undermine the Court’s power to secure voluntary obedience to future decisions. Rather, if George successfully assumes the Presidency without overt resistance, the Court’s decision has instead reinforced the Court’s power. Mass compliance with the decision in favor of George is a brute demonstration of the Court’s ability to coordinate behavior on the outcomes that it announces. The effectiveness of this demonstration is only enhanced if the Court’s decision is unpersuasive on the merits, unenforceable as a practical matter, or opposed by a large segment of the population. Coordination upon a given focal point—be it a traffic light or a judicial ruling—depends entirely upon the existence of a widespread belief that others are coordinating upon that focal point. To observe countless people obeying a decision that they dislike, and that cannot easily be enforced, instills precisely this belief; it leads us to believe that people coordinate upon the Court’s rulings, and the existence of this belief, in turn, ensures that people will in fact coordinate upon the Court’s rulings. There are various ways to explain why people might obey such a decision: it might be normatively persuasive; it might be backed by a meaningful threat of enforcement; or it might simply ordain the outcome that people prefer. If we are forced to rule out these explanations, however, it becomes harder to resist the conclusion that people are coordinating upon the Court’s rulings. And once we conclude that others are coordinating upon a given focal point, our own best response is to coordinate upon the same focal point: it is costly to be the only person who rebels against the government, or ignores the traffic light, or defies the Court. To say that a decision the likes of George v. Albert only increases a court’s capacity to coordinate behavior upon the outcomes it chooses is not to say, however, that courts are incapable of self-inflicted injury. It is very simple for a court to undermine its own ability to coordinate: it need only render decisions that are visibly the object of disobedience. If courts secure obedience by cultivating and sustaining a certain set of expectations about how others will behave, then the worst thing that can happen to a court is to allow events to prove that those expectations are wrong. A court cannot afford to allow people to observe behavior that is off the equilibrium path—namely, defiance of the court that meets with no adverse consequences. Just as a traffic light ceases to coordinate behavior if it becomes known that everyone ignores the traffic light, the court’s ability to coordinate behavior collapses if people learn that their beliefs about how others react to judicial decisions are wrong. Once the belief spreads that there are no consequences to disobeying the court, the court will find it difficult to command obedience again. Imagine, by way of analogy, the plight of an aspiring socialite who wishes to cement her status by hosting parties that are well attended by the cream of society. The fickle glitterati whom the socialite needs most to attract share an interest in attending successful parties and avoiding unsuccessful ones, where a successful party may be defined as one that is well attended by their rarefied peers. From their perspective, failure to attend a successful party is costly: they lose an opportunity to see and to be seen, to accrue further social status, and perhaps even to enjoy themselves. But attendance at an unsuccessful party is also costly: not only have they wasted their time, but they also risk appearing desperate and suffer the ignominy of association with a failed event. Thus, whether elite guests attend her parties depends upon whether they believe that other elite guests will attend her parties. To host a successful party is, in other words, to coordinate the behavior of potential guests. The socialite’s challenge, therefore, is to promote a widespread belief that her parties are successful ones. If each of her potential guests believes that other elite guests will attend her parties, then everyone will, in fact, attend her parties. There are various strategies by which the socialite can cultivate this belief. She may signal that friendly paparazzi will be present; she may obtain commitments from elite guests and then publicize these commitments; she may publicize her lavish catering and entertainment arrangements. To a substantial extent, however, the beliefs that people hold about a given host’s parties are likely to depend upon the host’s record of success or failure. If the socialite hosts a party that fails miserably, people will update their beliefs about her parties for the worse. And if these doubts about attendance at her parties are allowed to grow, they will ultimately be self-fulfilling: people who doubt the attendance of others will cease to attend, which will only give people even greater cause to doubt the attendance of others. The result will be coordination upon a new equilibrium— namely, non-attendance at her parties. The ability of a court to coordinate behavior is a form of judicial power, while the ability of a host to coordinate behavior is a form of social popularity (although it might fairly be called a form of power as well). But both capacities for coordination are won, and lost, in similar fashion. To the extent that social popularity is a function of one’s ability to coordinate the behavior of others, a popular host is one who preserves the appearance and reputation of being popular. Likewise, to the extent that judicial power inheres in the ability to coordinate the behavior of others, a powerful court is one that preserves the appearance and reputation of being powerful. Conversely, a court jeopardizes its power by allowing people to observe that it is not obeyed.182 Public demonstration of a court’s inability to coordinate behavior encourages a belief that the court will be unable to coordinate behavior in future cases, and this belief, if allowed to grow unchecked, will become self-fulfilling. A court that seeks to preserve its capacity to coordinate behavior must therefore avoid such demonstrations of impotency. In sum, to the extent that courts derive their power from their ability to coordinate behavior, the impact of a given decision on the power of a court will be a function not of the decision’s popularity or persuasiveness, but rather of the extent to which people comply with it. Thus, for example, although Bush v. Gore may not have endeared itself to many people,183 it marked an increase of judicial power and was, in this sense, a victory for the Court: in the face of intense criticism and wide opposition, the Court coordinated a peaceful regime change and, in so doing, generated a widespread belief that it could do so again in the future. In intuitive terms, it is not difficult to grasp how the decision actually increased the power of the Court. Prior to Bush v. Gore, one might reasonably have doubted the ability of the Supreme Court to settle the result of a presidential election against the preferences of a majority of the nation’s voters. After Bush v. Gore, such doubts are harder to sustain. In the same manner that a successful party increases the likelihood that the socialite’s next party will be successful as well, Bush v. Gore fosters a widely held belief that everyone will comply with a similar decision in a similar case and thus enhances the actual likelihood of compliance with such a decision. This belief is only strengthened by the fact that the Court achieved compliance with its ruling in the face of both political opposition and intellectual obstacles.184 If the Court were to be called upon to determine the result of another presidential election, the likelihood of widespread compliance is higher as a result of the Court’s earlier realpolitik victory in Bush v. Gore. And if it were indeed to manage the same feat a second time, it would only increase its power to do so a third time. And so forth.

#### Judicial power prevents executive overreach that results in nuclear war – strong Constitutional principles solve

Spannaus 14 – Editor at the Executive Intelligence Review News Service. Mrs. Spannaus has written a book on The Political Economy of the American Revolution, and countless articles. (11/21/2014, Nancy, “A ‘Symbiotic Pathology’ Threatens U.S. Survival”, Executive Intelligence Review National, [http://larouchepub.com/eiw/public/2014/eirv41n46-20141121/09-11\_4146.pdf //](http://larouchepub.com/eiw/public/2014/eirv41n46-20141121/09-11_4146.pdf%20/) GK)

Nov. 17—“A symbiotic pathology between Executive overreach and Congressional abdication,” identified by Sen. Tim Kaine (D-Va.) in a Nov. 12 speech at the Woodrow Wilson Center in Washington, D.C., threatens to destroy the United States in the very short term. Specifically, this symbiosis is leading toward a lethal escalation of the Obama Administration’s war in Southwest Asia, as well as confrontation with Russia and China; both policies could result in nuclear war. The pathological players are the lawless, narcissistic President Obama, on the one side, and the pro-war fascist wing dominating the Republican Party, on the other. The only hope for the United States, and the world, is that a grouping of American patriots comes forward to dump both these players, and restore constitutional government and principles in the country. Under such conditions, the United States could be brought into an alliance with the anti-war, pro-development global coalition being led by the BRICS nations, and a lasting war avoidance policy based on cooperation around high-technology development could be put in place. The War in Iraq and Syria The U.S. policy and deployment in Iraq and Syria, in the war against the Islamic State (IS/ISIS/ISIL), is one of the major items on Congress’s agenda during the current lame duck session. President Obama himself, on the day after the election, announced his intention to send an additional 1,500 troops to Iraq, bringing the total number to 3,000 in his current illegal, undeclared war. A bill authorizing expenditures of $5 billion for this deployment is expected to be submitted by the Administration. What is not clear, however, is whether the Administration intends to submit an Authorization for Use of Military Force (AUMF) for the war in Iraq and Syria during the lame duck session. During a hearing at the House Armed Services Committee on Nov. 13, Secretary of Defense Chuck Hagel said he didn’t know specifically whether the White House was going to send up an AUMF for Congressional approval. In fact, there is every reason to believe that Obama—relying on the insane pro-war sentiment that dominates the Republican Party majority in both Houses of the new Congress— will wait until the new Congress convenes on Jan. 3, 2015, as House Speaker John Boehner has called for. Should he wait for the new Congress, Obama could count on warhawk Republicans such as Senators John McCain (R-Ariz.) and Lindsey Graham (R-S.C.), as the Republicans will take control over the Senate. Both have excoriated the President for failing to pursue an even more rabid policy of regime change globally, not only with Syria, but also against nuclear power Russia. There are ongoing discussions between Congress and the President on what to do about an AUMF and the course of the war. Several resolutions have previously been introduced into the Congress, calling for authorization of the use of force, with varying restrictions. What has not been done, despite an overwhelming vote July 25 by Congress that Obama should “not deploy or maintain United States armed forces in a sustained combat role in Iraq without specific statutory authorization for such use,” is to challenge the President on his defiance of that vote—his ongoing war deployment in Iraq and Syria. That deployment is, in fact, an impeachable offense. Yet precious few Republicans, many of whom are willing to talk about impeachment, are raising their voices against expanding the Iraq war policy. In the lead is Sen. Rand Paul (R-Ky.), who has declared unequivocally that “this war is now illegal,” and demanded that Congress fulfill its duty to act. On the House side, the lead voice is Rep. Walter Jones (RN.C.), who co-sponsored the July 25 resolution, and has opposed the Executive branch’s usurpation, by both Republican and Democratic Presidents, of Congress’s constitutional responsibility to declare war. Representtive Jones took a slightly different tack in his questioning of Secretary of Defense Hagel and Chairman of the Joint Chiefs of Staff Gen. Martin Dempsey at the Nov. 13 House hearing referenced above. He characterized President Obama’s strategy in Iraq as resembling that of then-Secretary of Defense Donald Rumsfeld in 2002-03, in that it got the U.S. into a war that wasn’t necessary (and also under false pretenses—ed.). Jones also reminded Hagel that, as a Senator, Hagel had opposed Rumsfeld’s war in 2002, and also the “surge” in 2007. After citing James Madison on the exclusive authority of Congress to declare, and judge the causes of, war, Jones went on to say that he hopes Congress “will look seriously at what is our responsibility.” Then Jones asked Hagel and Dempsey to provide, in written statements for the record, their opinions on how this war would end and what end the U.S. hopes to accomplish. “Please explain to the American people and to this Congress how this war is going to end someday, whether we are advisors or we’re fighting. And I hope to God we’re not fighting, and I hope we do not give the President a new AUMF,” Jones said. “But this, again, looks like we’re going down the same road that Secretary Donald Rumsfeld told us we had to do, we had to do, and yet we had no end point to that as well.” No Legal Authority for War Barack Obama, even more flagrantly than George W. Bush, claims that he can launch war on his own authority, and has done so repeatedly—from Libya, to Syria, and even to Russia, which he has attacked through sanctions and supporting “color revolutions”— against all standards of international law. Apparently believing that an illegal war started by a Democratic President is more acceptable than an illegal war started by a Republican one, the Democratic Party has generally given Obama a free ride. The only other explanation of its behavior is cowardice. Senator Kaine, however, has become increasingly outspoken against the President, with whom he previously had a close relationship. Kaine’s Nov. 13 speech Sen. Tim Kaine: When Congress doesn’t debate, “you not only violate the Constitution, but you force people to risk their lives without a consensus that the mission is in the national interest.” Rep. Walter Jones asked Defense Secretary Hagel and JCS Chairman Dempsey to provide written opinions on how the war would end and what the U.S. hopes to accomplish. Rep. John Garamendi: “Bottom line here is the obligation that we have under the Constitution to declare war.” November 21, 2014 EIR National 11 at the Wilson Center featured a sharp attack on both the President’s unconstitutional war in Iraq, and the deadly abstention by Congress on the issues of war and peace. After describing the constitutional requirement and the legal importance of Congress—not the President— deciding whether to commit the nation to war, Kaine said that in his view, “from about mid-August to now, there has not been legal authority that is sufficient to authorize this mission.... We have been engaged in a war that is not about imminent defense of the United States, without legal authority . .. there is currently no legal authority to support the action against ISIL unless and until Congress comes in, has the debate, and votes. That’s why I’ve introduced a resolution in the short term. We should deal with it right away.” Kaine then went into his discussion of the “symbiotic pathology between Executive overreach and Congressional abdication that has put us in a situation where Presidents like President Obama—and you can go all the way back—are more prone to start things unilaterally, without Congress.” “How dare we,” Kaine said, “ask people to risk [their lives and sanity in war] if we’re not willing to do our job to have a debate in front of the American public and then put our thumb-print on the mission and say, ‘This is in the national interest’? What, we’re afraid of having that debate? We don’t want to say it’s in the national interest, but still go risk your life? That seems to me to be the height of public immorality. ... What could you do that would be more publicly immoral than ordering people to risk their lives without having a discussion about whether the mission is worth it or not? That’s what’s really at stake, and, when you don’t have Congress have the debate, you not only violate the Constitution, but you force people to risk their lives without a consensus that the mission is in the national interest.” During the question-and-answer period at the Wilson Center, Kaine intimated that, if Congress did not get a vote on the war authorization, he and “some others” would take what action they could to stop the war. The illegality of the war was also challenged last week by Rep. John Garamendi (D-Calif.). In the House Armed Service Committee hearing, Garamendi asked General Dempsey whether the United States is engaged in a war in Iraq and Syria. When Dempsey answered, “Yes, we are at war with ISIL,” Garamendi said, “Since that is the case, would you, Secretary, please provide in writing the most recent legal authority for the United States to conduct such a war?” He went on to note that there had been talk about the War Powers Act, but that this seems to be no longer the case, as we’re now past the 90 days within which that Act requires the President to seek authorization from Congress, and the U.S. is still at war. “Bottom line here,” Garamendi said, “is the obligation that we have under the Constitution to declare war. ... We ought not wait until the next Congress.” - Who Wants War? According to Sen. Chris Murphy (D-Conn.), in a statement on MSNBC Nov. 11, “There’s a growing recognition on both sides of the aisle” that an AUMF debate “must happen.” Murphy himself thinks this must occur in the lame duck session, because “it’s impossible at this point to ignore the constitutional imperative,” and because “it is incumbent upon us as a nation to make sure that we ... never go into war divided.” According to a Politico story of Nov. 14, Senate Foreign Relations Committee Chairman Robert Menendez (D-N.J.) is working with the incoming chair, Sen. Bob Corker (R-Tenn.), to draft a bill authorizing the war. Meanwhile the international political climate is being shaped to try to assure that war goes ahead to the specifications of the British Empire—with a new beheading by IS, and the leaking of stories about the Obama Administration’s convergence with the policies of Turkey and Saudi Arabia, toward escalating war against Syrian President Bashar al-Assad (who has the only credible on-the-ground fighting force to confront IS). EIR’s sources report, however, that no decision has yet been made on such a policy shift, and the military command strongly opposes it. Nor can a decision for war, made between Obama and the warmongering Republicans, be separated from the overall British imperial policy of confrontation against all nation-states—and especially the strengthening alliance of the BRICS. All-out war in Southwest Asia would mean war against Syria and Iran, as stepping stones to attacks on Russia—as Moscow well understands. Real American patriots are needed to break this “symbiotic pathology,” before it’s too late. The only way to destroy IS is for the United States to ally with Russia, China, Syria, and Iran—and simultaneously break the control of the British Empire’s game. That means dumping the policies of Obama.

#### Courts are the only reliable check against an unchecked Trump—judicial power is key to overriding rash use of presidential power

Baker 17 [Peter Baker (chief White House correspondent for The New York Times covering President Donald J. Trump), "Trump Clashes Early With Courts, Portending Years of Legal Battles," New York Times, 2/5/2017] AZ

WASHINGTON — President Trump is barreling into a confrontation with the courts barely two weeks after taking office, foreshadowing years of legal battles as an administration determined to disrupt the existing order presses the boundaries of executive power. Lawyers for the administration were ordered to submit a brief on Monday defending Mr. Trump’s order temporarily banning refugees from around the world and all visitors from seven predominantly Muslim countries from entering the United States. An appeals court in California refused on Sunday to reinstate the ban after a lower court blocked it. As people from the countries targeted by Mr. Trump struggled to make their way to the United States while they could, the president for the second day in a row expressed rage at the judge in the case, this time accusing him of endangering national security. Vice President Mike Pence defended the president’s tone, but lawyers and lawmakers of both parties said Mr. Trump’s comments reflected a lack of respect for the constitutional system of checks and balances. Late in the day, Mr. Trump took to Twitter to pre-emptively blame the judge and the judiciary for what the president suggested would be a future terrorist attack. “Just cannot believe a judge would put our country in such peril,” Mr. Trump wrote, a day after referring to the “so-called judge” in the case. “If something happens blame him and court system.” Even before the latest post, Republicans joined Democrats in chiding him. Senator Mitch McConnell of Kentucky, the majority leader, said it was “best not to single out judges.” “We all get disappointed from time to time,” he said on CNN’s “State of the Union.” “I think it is best to avoid criticizing judges individually.” The White House offered no evidence for Mr. Trump’s suggestion that potential terrorists would now pour over the border because of the judge’s order. Since Sept. 11, 2001, no American has been killed in a terrorist attack on American soil by anyone who immigrated from any of the seven countries named in Mr. Trump’s order. The impassioned debate over the immigration order brought to the fore issues at the heart of the Trump presidency. A businessman with no experience in public office, Mr. Trump has shown in his administration’s opening days that he favors an action-oriented approach with little regard for the two other branches of government. While Congress, controlled by Republicans, has deferred, the judiciary may emerge as the major obstacle for Mr. Trump. Democrats and some Republicans said Mr. Trump’s attack on the courts would color the battle over the nomination of Judge Neil M. Gorsuch to the Supreme Court as well as the president’s relationship with Congress. Other presidents have clashed with the judiciary. The Supreme Court invalidated parts of Franklin D. Roosevelt’s New Deal, forced Richard M. Nixon to turn over Watergate tapes and rejected Bill Clinton’s bid to delay a sexual harassment lawsuit. The last two presidents battled with courts repeatedly over the limits of their power. The judiciary ruled that George W. Bush overstepped his bounds in denying due process to terrorism suspects and that Barack Obama assumed power he did not have to allow millions of unauthorized immigrants to stay in the country. Charles Fried, solicitor general under Ronald Reagan, said the ruling by a Federal District Court in Washington State blocking Mr. Trump’s order resembled a ruling by a Texas district court stopping Mr. Obama from proceeding with his own immigration order. But rarely, if ever, has a president this early in his tenure, and with such personal invective, battled the courts. Mr. Trump, Mr. Fried said, is turning everything into “a soap opera” with overheated attacks on the judge. “There are no lines for him,” said Mr. Fried, who teaches at Harvard Law School and voted against Mr. Trump. “There is no notion of, this is inappropriate, this is indecent, this is unpresidential.” Other Republicans brushed off the attacks, noting that judges have lifetime tenure that protects them from criticism. But even some Republicans said Mr. Trump’s order raised valid legal questions for the courts. “If I were in the White House, I’d feel better about my position if the ban or moratorium or whatever you call it were based on an actual attack or threat,” former Attorney General Alberto R. Gonzales, who served under Mr. Bush, said in an interview. Still, he said, when it comes to noncitizens overseas, “the executive has enjoyed great deference from the courts.” Judge James Robart, a Federal District Court judge in Seattle appointed by Mr. Bush, on Friday issued a nationwide suspension of Mr. Trump’s order while its legality was debated. The administration quickly asked the United States Court of Appeals for the Ninth Circuit to overrule the judge, but it refused early Sunday and instead ordered the government to file a brief on Monday. The quick briefing schedule indicated that the appeals court could issue a ruling on the merits of the president’s order within days. In the meantime, refugees vetted by the government can proceed to the United States, as can any travelers with approved visas from the seven targeted nations: Iran, Iraq, Libya, Somalia, Sudan, Syria and Yemen.

## Solvency Frontlines

### Compliance K2 Stop Trump

#### Compliance with Supreme Court decisions is more key than ever – a strong judiciary is necessary to coordinate compliance among federal officials to prevent executive overreach and maintain rule of law

Harper 17 [Keith Harper (Partner at Kilpatrick, Townsend & Stockton LLP. From 2014 to 2017, he served as United States Ambassador and Permanent Representative to the U.N. Human Rights Council), "The Importance of Judicial Contempt Proceedings in a Trump Era," 2/7/2017] AZ

Among the many peculiar characteristics of the recently elected President is Donald Trump’s unwillingness to follow the ordinary and established norms of the office of President. In some cases, these are not binding laws but traditions or rules of custom and decorum. Presidents traditionally, for example, release their taxes for greater transparency and as a bulwark against even the appearance of impropriety. Customarily, Presidents agree to avoid conflicts of interest and divest as necessary. Other rules are, for certain, binding legal proscriptions, such as those contained in the Emoluments Clause. President Trump has thus far refused—despite in some cases earlier promises, such as his commitment to release his tax returns—to follow any of these sorts of established norms. It is not at all surprising then that a President so willing to transgress the most well-settled rules and reasonable expectations, is seen by some in his administration to give them license not to follow norms either. That’s how such authority and institutions work. As a result, it cannot be entirely unexpected that when he issued what the President termed a “ban” on Muslims entering the U.S. from certain countries, and federal judges ordered, as one example, the Department of Homeland Security provide the detained access to lawyers, that such officials were reportedly comfortable flouting a federal court order. In light of the President’s predilection for transgression, non-compliance with judicial decrees by his administration will likely not be an isolated matter—that is, if left unchecked. This intolerable situation is precisely why courts should be prepared to exercise inherent and statutory contempt powers more rigorously. Permitting even small-scale or symbolic disobedience to lawful decrees would be exceedingly dangerous. Whether one agrees or disagrees with a particular court order, federal officials especially must comply or must be coerced to comply. They can appeal as appropriate to be sure, but allowing defiance of court orders weakens the very fabric of our legal system and undermines a key attribute of good governance – the rule of law. Rule of law is what distinguishes nations with relatively effective governance from those underdeveloped ones in cyclical crisis. It is not alarmist to say that the erosion of rule of law in the U.S. would be, over time, cataclysmic. We know this because there are too many examples in the world today where there is an absence of rule of law. In such places, norms are followed with far less regularity, with dire consequences for effective and stable governance and the ultimate prosperity and security of society. In certain countries, for example, citizens do not view the courts as equitable arbiters of disputes, either because the judiciary is perceived as packed with cronies of the ruling party, has a history of corruption, or other serious institutional infirmities. A recent case to better illustrate: In the Spring of 2015, Burundi’s President Pierre Nkurunziza sought to run for a third term. Armed with a novel interpretation of the constitution and ignoring the governing treaties, Burundi’s highest court agreed that Nkurunziza could seek re-election. He ran and won. However, because of the utter absence of trust of the judiciary by citizens who lacked confidence that the court had the capacity to resolve disputes fairly, Burundi fell into a state of utter chaos from which it has yet to emerge. At the end of the road, that is what lack of rule of law looks like. If citizens of a nation do not trust their judicial or other institutions to settle disputes equitably – whether commercial, political or other – then disputes will be resolved by other means, usually involving corruption or violence. What is more, it is self-evident that for any judiciary to serve this vital function of resolving disputes in a peaceful and legitimate manner, it must exercise effective means of enforcing its own decrees. In short, a necessary but not sufficient condition of effective governance and ultimately stability, security and prosperity for nations is ensuring that courts have both the perceived legitimacy among the citizenry and actual power to resolve disputes and ensure the rule of law. This brings us back to the peculiarities of President Trump and his administration. The United States has a long history, going back to Marbury v. Madison, of courts deciding what the law is and enforcing lawful decisions. And other than the occasional aberration such as President Andrew Jackson’s refusal to enforce the decision of Chief Justice John Marshall in the Cherokee Nation cases in the early 1830s, judicial decrees have reigned supreme, and through their regular and systematic enforcement established this as a nation governed by the rule of law. That system of rules and norms is a critical stabilizing force for sound democratic governance. For that reason if the Trump Administration fails to obey judicial decrees, it must be met with regular reliance by the judiciary on enforcement mechanisms such as contempt. Otherwise, the rule of law – the hallmark of successful governance – will erode. While the U.S. will not devolve into an ungovernable state like Burundi or South Sudan overnight, the erosion of rule of law will seriously damage one of the essential pillars of our democracy. Countenancing even a temporary failure to comply will simply encourage greater noncompliance. Contempt proceedings are effective because they immediately and convincingly personalize the cost of transgression. One does not jail the Customs and Border Protection Service; rather, a specific offending official is personally held to account in a civil contempt proceeding. By consistently personalizing the requirement to fulfill a judicial decree under jeopardy of incarceration in appropriate cases, the courts provide the official a clear choice. In this way, the courts play the essential role of ensuring that we remain a nation of laws. To be clear, I am not advocating that courts should use a different standard with the Trump Administration than it would ordinarily use in any other circumstance. Nor do I have any quarrel with the judicial admonishment that in contempt proceedings courts should use “the least possible power adequate to the end proposed.” My point is simply that because of the extraordinary belief of this President that he can act above the law, the courts should be prepared to use contempt authority more frequently than they have had to before. As for the role of the public, Americans should better appreciate how essential this particular authority is in maintaining effective governance. It may well be the case under a normal presidency where law and custom are followed, where truth rather than “alternative facts” guide, and where domestic and international stability is a key objective of the administration, that federal officials may be given the benefit of the doubt initially. But not here, not now. The President and his inner circle have made clear their predispositions to transgress our sacred trust and have demonstrated contempt for the rule of law. We are in unchartered waters and it requires an unconventional approach. Since Trump’s election, many commentators have expressed deep concerns, some on the verge of hysteria, regarding the impact he may have on our democratic institutions. They cite his plain autocratic tendencies and attempts to discredit important institutions – the media, the intelligence community and the national security bureaucracy, judges, and civil society, among others. Trump’s instincts are no less autocratic than Orban, Erdogan, Chavez and Putin. Nevertheless, I do not share the pessimism of these commentators. While we must remain vigilant in the Trump era and steadfast in defense of our values, we are not Hungary, Turkey, Venezuela or the Russian Federation. What distinguishes us are our institutions, which I believe are far more resilient. Our civil society is stronger. Our democratic traditions sturdier. We have a foreign service officer and civil servant class that is a bulwark guarding our values as a Nation. We have a society with an enduring faith in the Constitution. At the same time, we cannot underestimate the necessity of a strong and independent judiciary with the power to coerce compliance. As we have already seen, the courts will play an outsized role in the Trump era. And they will play that role effectively by ensuring compliance with the law, under pain of contempt where necessary.

## Courts Impacts

### Trump Impacts

#### Supreme Court only obstacle to Trump's policies

Greenhouse 17 [Linda Greenhouse, "Will the Supreme Court Stand Up to Trump?" NY Times, 2/4/2017] AZ

President Trump’s hyperactive first days in office, along with the evidence that the two Republican-controlled houses of Congress will do the president’s bidding with few questions asked, leaves the judiciary as the only branch of government standing between the new administration and constitutional chaos. Consider what would have happened last weekend had half a dozen federal judges not stepped in to prevent the immediate ouster from the country of legal permanent residents and carefully vetted refugees and visa holders. Whether those particular cases will make their way to the Supreme Court is uncertain. But the extraordinary scenes of recent days strongly suggest that the Roberts court will find itself in a national security spotlight. That’s an uncomfortable but hardly unknown place for the court to be: It was during the years after Sept. 11 that the court of Chief Justice William H. Rehnquist surprisingly pushed back against the Bush administration’s effort to create a legal black hole at Guantánamo Bay, where the administration had mistakenly calculated that detainees could be hidden away outside the reach of federal judges. To the extent that the presidential campaign focused on the Supreme Court with any specificity, the attention was on abortion, religion, gay rights, guns and other familiar issues on the social agenda. But going forward, the Roberts court may find the most pressing issues on its docket to concern core questions of civil liberties and the separation of powers. When the history of this period is written, the court will be judged by its answers to those questions. When the president, aided by his inner circle and his congressional enablers, pushes through some norm-shattering order, wipes away duly promulgated regulations with the flourish of a pen or drives a truck through the wall between church and state, where will the Roberts court be? (And where will Mr. Trump’s Supreme Court nominee, the appeals court judge Neil M. Gorsuch, be?) It’s hard to imagine two figures on the current public stage less alike than the button-down chief justice and the flamboyant president. What struck me eight years ago, when Chief Justice Roberts administered the oath of office to Barack Obama, was how each man embodied a different face of the generation that came of age after the fires of the 1960s had died away, both drawn by talent and ambition to the same place, Harvard Law School, from which they emerged to embark on such different paths to power. Watching Chief Justice Roberts administer the oath to Donald Trump, what struck me was the unlikelihood that these two men would even be sharing the same stage — and not only because during the campaign, Mr. Trump called the chief justice “an absolute disaster” for his votes to preserve the Affordable Care Act. If Donald Trump is the in-your-face chief executive, John Roberts has perfected the art of being the nearly invisible chief justice. He can be tough on the bench during arguments and in the justices’ private conference as well, but in public he exudes a self-deprecating diffidence. Here’s an example: In the early 1980s, when John Roberts was a Supreme Court law clerk, Chief Justice Warren E. Burger would travel every year to the American Bar Association’s midwinter convention to give a “state of the judiciary” speech, unrolled as a grand occasion in the manner of the State of the Union. His successor, William H. Rehnquist, dialed the speech back, issuing it through the press office rather than delivering it in person. At the end of 2009, his fifth year on the job, Chief Justice Roberts boiled it down to one page. He said that “when the political branches are faced with so many difficult issues, and when so many of our fellow citizens have been touched by hardship, the public might welcome a year-end report limited to what is essential.” All that people needed to know was that “the courts are operating soundly, and the nation’s dedicated federal judges are conscientiously discharging their duties.” Imagine President Trump stepping back from the stage in such a manner. The chief justice, a strategic thinker with exemplary work habits, is every bit a match for the president. He is a very good lawyer with very conservative instincts, and his own long-range game plan includes getting the government out of the business of taking account of race, even for the purpose of protecting voting rights or preserving the hard-won gains of integration. On rare occasions, notably in the two Affordable Care Act cases, his lawyerly instincts outweigh his ideological preferences.

### A2 Other Branches CP

#### Judicial resistance will be key

Buchanan 17 [Neil Buchanan (economist and legal scholar and a Professor of

Law at The George Washington University), "How Will America Resist Trump’s Lust for Absolute Power?," 2/16/2017] AZ

Resistance in the Judicial Branch Any executive-level victories for the voices of reason are likely to be quiet, because the federal workers who insist on obeying the law will be preventing bad things from happening (unless Trump decides to make a public spectacle of it, which is always a possibility), rather than doing something newsworthy. It will be difficult to acknowledge, or even to know about, these acts of courage. By contrast, the most high-profile showdown of the Trump era to date has played out in the courts. Federal judges who were placed on the bench by both Democratic and Republican presidents have fulfilled their constitutional role by reminding the president that his powers are limited. The courts are likely to be the most effective avenue by which state and local governments, as well as the press and the professions, will thwart Trump’s efforts. Indeed, the Ninth Circuit’s decision regarding Trump’s anti-Muslim immigration ban was the result of a challenge that was brought by two state governments. This is one of the reasons that I am proud to be a member of the legal community. The courts were created to prevent the raw exercise of power. If all we wanted was for the stronger party to win every dispute, after all, we would not need courts. The strong can dominate the weak, by definition. That does not mean that the weaker party will win every case, of course. Why would it? But the courts exist to make it possible for reason to win against muscle, for right to defeat might. And that is precisely what happened when Trump tried to impose a hateful (and legally embarrassing) executive order on people who have already proved (through extensive vetting) that they will be good Americans. Again, however, the power of the courts to oppose Trump is hardly absolute. Courts have limited time and resources, and it is virtually impossible to stop everything that Trump’s people will attempt to do as they turn his tweeted whims into executive actions.

### A2 Gorsuch Ruins It

#### Gorsuch opposes executive overreach, which outweighs – also, he's mostly moderate on judicial questions

Balko 17 [Radley Balko (staff writer), "In Gorsuch, Trump gave Democrats a gift. They should take it." Washington Post, 2/1/2017] AZ

It always seems a bit futile to speculate about how a Supreme Court nominee will behave down the line. Conservatives are still kicking themselves over David Souter. Eisenhower called Earl Warren the biggest mistake of his career. I personally was skeptical of Sonia Sotomayor’s history as a prosecutor and her judicial record on criminal-justice issues. She has turned out to be the court’s most reliable defender of due process and the rights of the accused. But, of course, we do need to look into nominees, and their records and personal histories are all we have. So let’s have a civil liberties-centric look at Neil Gorsuch, President Trump’s nominee to replace the late justice Antonin Scalia. The Good: As far as I’m concerned, the most important thing to look for in a Supreme Court justice right now is a willingness to stand up to executive power. For at least the next four years (in all likelihood), the White House will be occupied by a narcissist with a proclivity for authoritarianism. We aren’t yet two weeks in to Trump’s administration, and we’re already barreling toward one or more constitutional crises. Oddly and perhaps in spite of himself, of the three names said to be on Trump’s shortlist (Gorsuch, Thomas Hardiman and William Pryor), Gorsuch appears to be the most independent and has shown the most willingness to stand up to the executive branch. Here’s President Obama’s acting solicitor general, Neal Katyal, in the New York Times today: In particular, he has written opinions vigorously defending the paramount duty of the courts to say what the law is, without deferring to the executive branch’s interpretations of federal statutes, including our immigration laws. In a pair of immigration cases, De Niz Robles v. Lynch and Gutierrez-Brizuela v. Lynch, Judge Gorsuch ruled against attempts by the government to retroactively interpret the law to disfavor immigrants. In a separate opinion in Gutierrez-Brizuela, he criticized the legal doctrine that federal courts must often defer to the executive branch’s interpretations of federal law, warning that such deference threatens the separation of powers designed by the framers. A proven record of standing up to the executive branch when it oversteps its authority on immigration — that seems pretty important and relevant right now.

Katyal’s passage above also references the Chevron deference, a doctrine under which the courts defer to regulatory agencies’ interpretations of law unless those interpretations are unreasonable. Gorsuch has been critical of the doctrine. As a libertarian, I think that’s generally a good thing. The deference is premised on the notion that the executive is more subject to democratic checks — if we don’t like the policies of one president, we can vote in a new one. But the non-political positions within regulatory agencies can still wield a lot of power, and the courts ought to serve as a check on them. Progressives who might be troubled by Gorsuch’s skepticism of deference to regulatory agencies should keep in mind that we’re now in the Trump era. Not only will Trump be staffing those agencies and setting policy for them, but also he’s more likely than any recent president to staff them with appointees with little respect for previous norms. Recall that during the transition, Trump’s team rather forebodingly asked agencies for lists of careerists who work on hot-button issues, such as climate change. Moreover, while progressives may be worried by what Gorsuch’s skepticism of the Chevron deference means for the Environmental Protection Agency or the Food and Drug Administration, his record shows that of a judge willing to apply it to an agency like the Department of Homeland Security. Again, that’s important right now. His skepticism of executive branch power extends even to third-rail criminal-justice issues such as sex crimes. From CNN’s write-up of Gorsuch’s key rulings: In this [United States v. Nichols], in a dissent from the full 10th Circuit’s refusal to rehear a three-judge ruling with which he disagreed, Gorsuch strongly objected to how much regulatory power a federal statute — the Sex Offender Registration and Notification Act (SORNA) — gave to the Justice Department to apply its rules to those guilty of sex crimes predating the act’s enactment. In his words, “the framers of the Constitution thought the compartmentalization of legislative power not just a tool of good government or necessary to protect the authority of Congress from encroachment by the Executive but essential to the preservation of the people’s liberty …” On the Fourth Amendment, Gorsuch’s record is also encouraging, particularly for a nominee from a president with Trump’s blustery law-and-order rhetoric. Despite his reputation, Scalia was often very good on the Fourth Amendment. Gorsuch’s limited record at least suggests that he’d continue in that vein. In United States v. Carlos, he wrote a dissent to a majority opinion holding that police did not violate a suspect’s Fourth Amendment rights by approaching and knocking on his door despite several “No Trespassing” signs prominently posted on the property. Reason’s Damon Root writes of Gorsuch’s opinions in these instances: Gorsuch demonstrated admirable and reassuring judgment in these cases. Not only did he cast a principled vote against overreaching law enforcement, he cast a principled vote against the overreaching executive branch. It’s not difficult to imagine Gorsuch imposing the same severe judicial scrutiny against the misdeeds of the Trump administration. In United States v. Ackerman, Gorsuch argued that when the National Center for Missing & Exploited Children searched a man’s laptop, it was acting as a government agent. Even though the search turned up child pornography, Gorsuch found the search unconstitutional. Gorsuch is perhaps most known for his decision in the Hobby Lobby case, in which he wrote a strong opinion denouncing the birth-control mandate in the Affordable Care Act. Whether you think that’s a plus or a minus obviously depends on whether you prioritize reproductive rights or religious freedom. But even if you’re bothered by his opinion in that case, Gorsuch’s championing of religious freedom does at least seem to be careful and principled, and not partisan toward Christianity. In Yellowbear v. Lampert, a majority of his fellow appeals court judges ruled that a federal statute required the state of Wyoming to grant a Native American prisoner access to a sweat lodge on prison grounds. Gorsuch went farther, arguing that even prisoners still retain a right to practice their religion. Gorsuch is a critic of “overcriminalization,” or the massive and growing federal criminal and regulatory codes. I think that’s a good thing. The Volokh Conspiracy’s Ilya Somin points out that he has history of ruling that criminal laws should be read narrowly, with ambiguities resolved in favor of defendants. That, too, is a good thing. I was also struck by Gorsuch’s acceptance speech. It was noticeably un-Trumpian. He was humble, reverent of institutions and deferential to the office for which he had just been nominated. Unlike the man who nominated him, he came off as someone devoted to the law, not someone who believes he is above it.

### A2 Judicial Power Fake

#### Our impact isn't judicial power, but the ability of the court to coordinate compliance with future cases – obedience with one case inspires compliance in other cases – that's Law.

### ! – War Powers

#### Reigning in separation of powers violations is key to preventing unchecked war powers

**Barron 8** (David is a Professor of Law at Harvard Law School and Martin S. Lederman, Visiting Professor of Law at the Georgetown University Law Center, “The Commander in Chief at the Lowest Ebb -- A Constitutional History”, Harvard Law Review, February, 121 Harv. L. Rev. 941, Lexis)//cc

Thus, as future administrations contemplate the extent of their own discretion at the "lowest ebb," they will be faced with an important choice. They can build upon a practice rooted in a fundamental acceptance of the legitimacy of congressional control over the conduct of campaigns that prevailed without substantial challenge through World War II. Or they can cast their lot with the more recent view, espoused to some extent by most - though not all - modern Presidents, that the principle of exclusive control over the conduct of war provides the baseline from which to begin thinking about the Commander in Chief's proper place in the constitutional structure. We conclude that it would be wrong to assume, as some have suggested, that the emergence of such preclusive claims will be self-defeating, inevitably inspiring a popular and legislative reaction that will leave the presidency especially weakened. The more substantial concern is the opposite one. The risk is that the emergence of such claims will subtly but increasingly influence future Executives to eschew the harder work of accepting legislative constraints as legitimate and actively working to make them tolerable by building public support for modifications. Over time, the prior practice we describe could well become at best a faintly remembered one, set aside on the ground that it is unsuited for what are thought to be the unique perils of the contemporary world. Our hope, therefore, is that by presenting this longstanding constitutional practice of congressional engagement and executive accommodation as a workable alternative, such forgetting will be far less likely to occur. Part II reviews the history of the "lowest ebb" issue from 1789 through the Civil War. Part III concentrates on the disputes over this question that arose in the Civil War and its immediate aftermath. Part IV examines the developments occurring in the executive branch, the Congress, and the courts through World War II. Part V takes the story from Truman through the Clinton and Bush Administrations. In Part VI, we explain why, in our view, the history matters, and summarize what it shows regarding Congress's constitutional authority to regulate the conduct of campaigns. We also discuss some of the remaining puzzles with respect to the "superintendence" prerogative that the Commander in Chief Clause establishes. Part VII is a brief conclusion. [\*951] II. From Ratification Through the Antebellum Period The practices of the political branches during the first decades after the Constitution's ratification offer important insights into the founding generation's understanding of the structure of the new government. This is especially true with respect to the very first Congress, which included no fewer than twenty delegates to the Constitutional Convention. n14 More broadly, the entire period from ratification to the Civil War is important for what it shows about the "practical exposition" of constitutional war powers during the new nation's first confrontations with war and the first emergence of a standing military establishment. n15 The initial seventy years are also important for understanding what immediately followed. Those first seven decades of constitutional development established the legal tradition on which President Lincoln and the Civil War Congress relied in formulating their own war powers views. Because those views are so often invoked in contemporary executive war power controversies, their intellectual lineage merits a thorough examination. A review of constitutional practice between 1789 and the Civil War suggests that the Founding-era understanding of the Commander in Chief's ultimate subjection to statutory control continued to hold sway. Although the primary focus of war powers questions and debates in this period lay elsewhere (such as on whether certain conduct complied with international law), the question of a preclusive Commander in Chief power, particularly as to troop deployments, was not unknown. Some legislators occasionally raised constitutional concerns in congressional debates about proposed statutory restrictions; but this did not reflect the existence of a well-accepted view that the President possessed such preclusive powers. Certainly Congress did not act during the first few decades as if it assumed the President enjoyed unchecked authority in the field, even in wartime. And whereas the legislature often afforded the President substantial discretion as to how troops could be used, it also occasionally regulated ongoing military operations in quite specific and detailed ways in these early years. A review of the decades that followed, moreover, reveals no important signs of a different legislative practice emerging. The occasional constitutional concern was still voiced in the course of congressional debates, but the [\*952] legislature continued to enact, albeit only on occasion, important and constraining statutory measures both while hostilities were underway and in advance of their outbreak. Perhaps even more importantly, with one possible and equivocal exception during the Fillmore Administration, the Executive itself does not appear to have argued during the whole of the pre-Civil War period for such preclusive authority. Presidents would sometimes construe apparent restrictions in favorable ways, but they also complied with statutes even when it seems clear that they would have preferred not to. To be sure, there does not appear to be any case in which a President expressly acknowledged that because he lacked a preclusive constitutional power, he was bound by a statute he thought to be severely detrimental to the national interest. It is almost certainly the case, therefore, that considerations of politics and policy played a key constraining role independent of legal judgment. But it is striking nonetheless that throughout this period - again, with one cryptic exception - Presidents did not act or speak as if they possessed the constitutional authority to disregard attempts by Congress to impose restrictions on their powers over the military, in war or peace. Their actual posture, at least formally, was much more accepting of congressional power, and in fact, some administrations during this period issued legal opinions that conceded the constitutional plan precluded them from taking a more defiant stance. A. The Backdrop of the Laws of War The first seven decades of constitutional practice were not marked by a surfeit of legislative action specifically restricting the President's manner of engaging the enemy during battle. This was not the product of a consensus that the Commander in Chief must be unfettered in dealing with the enemy. It is better attributed to two other factors. First, Congress often made the unsurprising policy judgment that the President should be afforded broad discretion in deciding how to fight wars. In addition, and of more direct relevance for present purposes, the political branches, as well as courts and scholars throughout the period, shared the belief that the President was appropriately bound in his conduct of military operations by a body of widely accepted international legal norms - namely, the "laws and usages" of war. The laws and usages of war were customary, but they were still understood to constitute a critical component of the legal structure within which the President exercised his war powers. Indeed, there was a virtual consensus among the actors in the political branches, as [\*953] well as the courts, concerning their binding force. n16 Thus, notwithstanding recent suggestions that the Framers wished to ensure maximum executive flexibility and discretion in war, n17 it is a mistake to think that they envisioned the President would be acting in a law-free zone when employing military force. Precisely because war was at issue, it was understood that the President would be operating in a context that was quite substantially legalized. [\*954] The broad acceptance of this legal framework no doubt tempered the legislative impulse to impose independent strictures by statute. n18 The prospect of additional restrictions likely raised the understandable concern that they might unilaterally tie the hands of the young nation in its conflicts with belligerents in a manner that would not be reciprocated by our enemies. That makes it all the more striking that Congress enacted so much additional legislative regulation during this period and in subsequent decades, as we explain below. At the same time, there was great concern in the young republic about the nation's taking actions that, under customary international law, might provoke an actual war. n19 Accordingly, throughout this period Congress was careful to exercise its legislative power so as to ensure that the Executive would not, in the course of protecting the national defense, unnecessarily engage in conduct that would, under the laws of war, justify other nations to make war against the United States. Courts seemed to share this concern. In prominent cases, the Supreme Court treated the question of whether a given executive action complied with the laws and usages of war as if it were inseparable from the question of whether Congress, in authorizing the particular military conflict at issue, had intended to free the President to exercise the full complement of powers that customary international law would sanction in the case of a war. In this regard, early constitutional [\*955] analysis often proceeded as if there were a deep interrelationship between congressional power to define the terms of battle and the customary international laws of war, at least in part in order to ensure that the power to declare a full-fledged war would remain with the Congress. n20 B. The Washington Administration: Organization of the Military Establishment and the Calling Forth of the State Militia With this crucial background in place, we can now examine the first phase of the history of the statutory regulation of the federal military forces - a period coextensive with the Washington Administration. The young nation did not engage in military conflicts with foreign nations during Washington's tenure as President; the most prominent war powers questions of the time concerned whether Congress had in fact approved specific offensive actions (in particular, against the Wabash Indians on the western frontier). There were therefore no prominent debates about whether Congress could impose limits on the President's constitutional war authorities. Nevertheless, this initial period of constitutional practice offers some evidence on three matters that shed light on attitudes about the extent (or existence) of the President's preclusive war powers. In each case, the evidence tends to reinforce what appears to have been the assumption of permissible statutory control, even as to the conduct of campaigns, that ran through the Founding era. 1. Statutory Regulation of the Use of Military Force. - The very first statute Congress enacted to continue the military establishment from the preconstitutional system is instructive. It specified that U.S. troops "shall be governed by the rules and articles of war which have been established by the United States in Congress assembled, or by such rules and articles of war, as may hereafter by law be established." n21 In other words, the new Congress did not signal a desire to leave the President free of statutory encumbrances in exercising his powers of command in battle. Instead, it imposed on the armed forces themselves the rules promulgated in the Articles of War that the preconstitutional Congress had enacted in 1775 and 1776. n22 For the most part, those preexisting Articles of War did not materially constrain the Commander in Chief himself, at least not in the conduct [\*956] of war. Two other pieces of evidence from this period, however, suggest there was at least some comfort with the notion that Congress also had the authority to set forth legislative regulations concerning operational military judgments that pertained directly to how the Executive could use force. Specifically, in the Third Congress, during a debate over a bill to continue and regulate the military establishment, no less an authority than James Madison proposed an amendment providing "that the troops should only be employed for the protection of the frontier," n23 although the House ultimately voted down the proposed geographic restriction. n24 There is also some important early evidence of executive branch acceptance of congressional power to exercise detailed control over how force would be used, at least at the outset of specific conflicts. Beginning in 1785, the pirates of Algiers embarked on a campaign of attacks on American ships in which they seized U.S. nationals in order to demand ransom. In a 1790 report, after Algerian pirates had captured eleven U.S. ships and more than 100 prisoners, Secretary of State Jefferson acknowledged that the legislature controlled not only the general question of whether to offer a military response at all, but also the nature of any such response: "If war, they will consider how far our own resources shall be called forth, and how far they will enable the Executive to engage, in the forms of the constitution, the co-operation of other Powers." n25 2. Statutory Regulation of the Military Establishment. - For the very early years of constitutional practice, we have only these fragmentary indications of legislative and executive attitudes about the legitimacy of regulating the use of force by statute. The sparseness of the record may be due, in part, to the absence of anything like a modern military establishment during this period - a lack for which Congress was largely responsible. Because the founding generation was wary of standing armies and expected that most national military functions could and would be performed by state militia in the service of the federal government, Congress kept the military establishment in the early years very modest. In September 1789, for example, Congress passed a law "recognizing" the military establishment of about 700 [\*957] troops that had remained from the preconstitutional system. n26 And although Congress did gradually increase the size of the military, n27 there would be no significant buildup until the prospect of war with France during the Adams Administration. This circumstance gave Congress a powerful measure of de facto control. So long as the President lacked a significant non-militia force to command, he would necessarily be dependent on legislative approval for the conduct of most military affairs abroad, even at the operational level. To launch an attack by sea, for example, he might have no choice but to spell out to Congress just what battle plan he envisioned, if only in order to specify the funding and supplies the legislature would have to allow him to raise in order to implement such a battle plan. To be sure, Congress signaled early on that it had no general interest in policing tactical decisions in this way, and it enacted a number of statutes that expressly recognized the President's broad discretion over the use of the (limited) troops under his command. n28 But that did not mean the legislature resisted altogether the temptation to impose direct and detailed constraints on the military establishment it was slowly fortifying. (a) The Nature of Congressional Regulations of the Military Establishment. - During the first years of constitutional practice, Congress imposed numerous specific rules for the organization and government of the armed forces, concerning matters large and small. The comprehensive statute of 1790 providing for a permanent military establishment is the most telling example. It described the sorts of men who would constitute the armed forces ("able-bodied men," between the ages of eighteen and forty-six, "not under five feet six inches in height"), divided them into regiments and battalions, prescribed remuneration and rations, and once again directed that the preexisting Articles of War were to govern conduct until statutory amendment. n29 [\*958] Also striking were several enactments creating and providing for naval armaments, which specified precisely how many guns would be on each ship and how many warrant officers of every stripe would be employed, from yeoman of the gun room to carpenter's mates to cooks. n30 Those statutes even prescribed weekly menus for the ships: on Tuesdays, the ration included potatoes or turnips, and pudding; on Thursdays, a half-pint of peas or beans. n31 Congress also used the power of the purse to delimit what would otherwise be the Commander in Chief's broad discretion to command and structure the military establishment, and its specifications for military-related disbursements were often quite detailed. n32 Such intrusive and detailed regulations reflected a general assumption that Congress had the power to restrict at least some of the authorities that the Commander in Chief would otherwise be constitutionally entitled to exercise in the absence of statutory limits. That is to say, Congress did not appear to regard the constitutional powers established by the Commander in Chief Clause as necessarily preclusive of conflicting statutory regulation. This early legislative practice also suggests that Congress did not labor under the view that it was subject to an overarching constraint against regulating the military in too detailed a fashion, at least during peacetime. It clearly assumed it possessed the constitutional authority to impose quite niggling restrictions on the organization, action, and composition of the armed forces. How else to explain its decision to establish by statute the precise menu for the meals that sailors were to be served? As these restrictions were imposed outside the context of war, however, one cannot know for certain whether some allowance for greater constitutionally indefeasible executive discretion might have been accepted in the event actual hostilities were underway. (b) Executive Branch Responses to Detailed Congressional Regulation of the Military Establishment. - Even though Congress imposed detailed regulations on the budding military establishment in peacetime, the executive branch was hardly pleased by many of them. In consequence, there was no shortage of interbranch disputes with regard to legislative control of the military establishment and militia. In fact, the Washington, Adams, and Jefferson Administrations were marked throughout by pitched struggles over how much leeway the executive branch enjoyed to use appropriations as it thought most efficacious, and many of these fights concerned military appropriations in [\*959] particular. n33 To avoid what appeared to be statutory limits on appropriations, the executive branch during this period resorted to "various compensatory devices" that allowed it to "formally admit[] the principle of Congressional control" while at the same time "relaxing the severities of its application." n34 These practices were especially common in the context of military spending, where the Treasury Department concluded that broad, general grants for the War Department could be "issued according to exigencies" when "requisite for the public service." n35 This "practical" application of the appropriations laws regularly provoked the ire of many in Congress, especially Representative (and future Treasury Secretary) Albert Gallatin, who viewed the practice in the military and naval establishments, in particular, as "making the law a mere farce, since the officers of the Treasury did not consider themselves as at all bound by the specific sums." n36 Significantly, however, as far as we have been able to determine, the executive branch never once asserted any constitutional prerogative to disregard any of these statutory limits, let alone any such authority under the Commander in Chief Clause. Although some modern Presidents, beginning with Truman, n37 have used the Commander in Chief power to justify disregarding spending requirements set forth in military appropriations, the first President's Administration never [\*960] did. Instead, the Treasury Department (headed first by Alexander Hamilton and then, after 1795, by Oliver Wolcott) consistently engaged in what it called a "practical interpretation" of the appropriations laws, a construction that would avoid "absurd, or mischievous consequences" and that would not render any substantive acts of Congress "unsusceptible of execution." n38 Wolcott explained that Gallatin's efforts to micromanage the executive branch through "minute subdivisions of appropriations" would have "continually tended to ... paralize every branch of the public service." n39 Thus, it was the duty of the Treasury, wrote Wolcott, "so to interpret the Laws, as to counteract this tendency as much as possible." n40 This form of statutory interpretation, in Wolcott's view, was not only "reasonable" but, just as importantly, "at all times publickly avowed, and well understood, and deliberately sanctioned by Congress." n41 Some of these interpretations were extremely aggressive, which suggests that the line between constitutionally based defiance and creative construction may have been thin when it came to influencing what funds would be available to the President and for what purposes. But when Congress effectively foreclosed this sort of creative construction, the executive branch had not laid any legal predicate for asserting a constitutional trump. n42 No executive officials, as far as we are [\*961] aware, ever espoused any constitutional theory under which Congress would not have the last word if it chose to impose it - not even as a background constitutional principle that might bolster the strained interpretations being pressed. 3. Statutory Regulation of the Use of the Militia. - Important though regulation of the national military establishment was, the size and scope of that establishment remained modest. As a result, throughout the Washington Administration, war powers debates often centered on the President's use and control of the state militia. These were the military forces that the Framers assumed would be the principal means of serving the national government, in the absence of the sort of standing armies that they discouraged. n43 The Constitution provides that Congress has the power both to call forth the state militia into federal service "to execute the Laws of the Union, suppress Insurrections and repel Invasions," n44 and "to provide for organizing, arming, and disciplining the Militia, and for governing" them when they are employed in federal service. n45 And yet, of course, the Commander in Chief Clause also assigns the President the command of the militia once they are called into federal service. In form, then, the structure of control over the militia that confronted the early departments was not unlike that established by the Constitution for the land and naval forces. Congress could raise them and provide for their governance, organization, and discipline. The President would "command" them. Beyond those basic assignments of authority, a range of questions remained as to the extent of Congress's power to circumscribe the President's command discretion. From the outset, Congress chose to exercise its "calling forth" power largely by delegating it to the President. That choice reflected a general acceptance of the President's central role in the conduct of military affairs. At the same time, the relevant statutes specified categories of cases (mostly emergencies) in which the delegated authority could be exercised. They thus inaugurated a practice that would become even more common in the subsequent decades as to the use of military force more generally: Congress would enact a measure triggering the President's constitutional "command" authorities, but its delegation to the President to exercise such authorities would be confined so as to ensure they were exercised in a manner consistent with whatever objectives and directives Congress had expressly or implicitly prescribed. [\*962] Sometimes, moreover, those authorities would even be constrained by quite detailed delineations of the scope of the discretion conferred. The first such statutes were designed to protect settlers on the western frontier from attacks by the Wabash Indians. Congress delegated to President Washington the authority to call forth the militia of the states "as he may judge necessary for the purpose" of "protecting the inhabitants of the frontiers ... from the hostile incursions of the Indians." n46 A few years later, Congress authorized Washington to call forth the militia and station them "in the four western counties of Pennsylvania" for the purpose of suppressing unlawful combinations there and helping to enforce the laws. n47 Even though these and other laws put a military force at Washington's disposal, he did not think to use it other than as Congress had instructed - although this reticence might be explained in part by the view, common at the time, that the President did not enjoy an "inherent" constitutional power to initiate "offensive" action without legislative preapproval. n48 Even more interestingly, two of Congress's early general delegations of its "calling forth" power placed further conditions on the President's use of the militia for even statutorily prescribed purposes. For example, the Militia Act of 1792 provided that in cases where the President called forth the militia to stop an insurrection, he had to first "forthwith, ... by proclamation, command such insurgents to disperse, and retire peaceably to their respective abodes, within a limited [\*963] time." n49 Similarly, although that law gave Washington virtually unlimited authority to call forth the state militia "as necessary to repel such invasion," and to issue orders to officers of the militia "as he shall think proper," n50 it permitted him to use the militia to execute domestic laws only upon certification by an Associate Justice or district judge that the wrongdoers were "too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshals." n51 This restriction in effect imposed a neutral arbiter between the President and the force that would otherwise be available to him. n52 Congress eliminated this judicial certification requirement in the Militia Act of 1795, n53 but retained at least two important limitations on the President's control over the militia, each of which indicated that the legislature did not believe its constitutional authority to regulate the use of that force ceased the moment the militia were actually called into service. The first limitation provided that the militia could be used to help enforce domestic laws only until thirty days after the commencement of the next session of Congress. n54 It thus presaged a statutory approach to regulating ongoing military operations reflected in the modern War Powers Resolution. n55 The second limitation continued to require the President to issue the dispersal proclamation when he called forth the militia to stop an insurrection, although it no longer required that the proclamation occur before the militia were called forth. n56 In other words, Congress did not view its calling forth power as a simple on/off switch, by which it could either put the militia under presidential command or keep them reserved to state control. Instead, it felt no compunction about detailing how the President [\*964] could use the militia even once they had been called forth and were under his command. 4. Conclusion. - The first eight years of constitutional practice established that the Commander in Chief was a powerful actor, properly entrusted with broad discretion in exercising his powers of command. Indeed, he was even given the authority to determine the circumstances in which the main forces at his disposal, the state militia, could be called into service. There is no evidence that Congress attempted to wrest control from him of discrete tactical decisions on the basis of its own view as to how a particular battle should be handled. But these early years also showed that the Commander in Chief was constrained not only by political realities but also by law. In addition to the laws and usages of war, which figured prominently, there was a growing and detailed statutory landscape. It set terms by which the actual military establishment could be organized and supplied in quite particularized ways, and it carefully regulated the ways in which the President could use the state militia that he had been delegated the power to call forth, sometimes imposing limitations applicable even after those forces had been deployed. Nevertheless, it was not until the Adams Administration that the first direct confrontation with the precise constitutional question of the President's control over the conduct of campaigns actually occurred, as it was not until these years that the nation encountered its first brush with something akin to a full-fledged war. C. The Adams Administration and the Quasi-War with France In reaction to the United States's declaration of neutrality in the war between Great Britain and France, American ships became a target of French vessels. A wave of anti-French sentiment spread across the nation, fueled in part by the interparty political contests for popular favor. In consequence, by 1797, possible war with France loomed on the horizon, and Congress sprang into action. n57 As with its delegations of the power to call forth the militia, Congress once again looked to the President to carry out military operations and sought to empower him in ways that would permit him to be successful. In May of 1798, Congress enacted a law authorizing the President, "in the event of a declaration of war against the United States, or of actual invasion of their territory, by a foreign power, or of imminent danger of such invasion," to raise an army of up to 10,000 men to serve for as many as three years. n58 Less than two months later, Congress authorized the [\*965] President to raise an additional twelve infantry regiments and six troops of light dragoons, "to be enlisted for and during the continuance of the existing differences between the United States and the French Republic." n59 A further delegation to the President of power to increase the size of the army came the following year. n60 Of course, the very fact that the military establishment was significantly expanded made it possible for the President to assert a greater measure of command authority, rooted in his powers as Commander in Chief, once an armed conflict had commenced - at least if he were not limited by statute. But what if he were? Such limits were not simply a theoretical possibility, notwithstanding the broad discretion Congress had permitted him to exercise. Although Congress had enacted statutes that permitted the President to move the nation to a war footing against France, it was careful to avoid formally declaring war against that country. There was a great fear of engendering a conflict that could be disastrous for such a young nation. Congress instead passed a series of statutes that both triggered the President's constitutional war powers and calibrated just what sort of force could be exercised on behalf of the United States. The legislature acted, moreover, not in one fell swoop at the very outset of hostilities, but instead over a number of years, thereby changing the rules of engagement over time through a series of limited measures. The result was that, for the first time, constitutional questions concerning the extent of Congress's power to regulate the conduct of campaigns were presented to all three branches of the nascent government. 1. Legislative Action in the Run-up to the Quasi-War. - In 1797 and 1798, at the very outset of the conflict with France, the House of Representatives played host to an instructive set of debates over proposed conditions on the use of naval vessels. Proposed statutory language would have restricted such ships to U.S. waters and prohibited their use for convoys (which were thought likely to provoke war with France). n61 Unlike Madison's similarly restrictive proposal concerning the use of the militia during the Washington Administration, n62 these limitations would have affected regular forces, and they precipitated what was perhaps the most extensive legislative debate on the preclusive power question until 1862. n63 To be sure, most of the Representatives [\*966] who spoke against the conditions did so for policy or prudential reasons. n64 A number, however, argued that once Congress appropriated funds to provide for certain ships, it was not completely free to instruct the President on how to use them. n65 Other Representatives, particularly Gallatin, strongly opposed such a notion, arguing that the power to dictate the use of ships was ancillary to Congress's powers to provide funding for the ships in the first instance. n66 And somewhere between these two polar positions, Representative Harrison Gray Otis at first suggested that although Congress could impose certain limits on the objects for which the ships could be used, it could not prescribe precise instructions on how those objects should be advanced, such as by limiting the ships to U.S. waters. n67 Otis later indicated that although in his view Congress could direct the particular permitted and proscribed uses of the ships (for example, not as convoys), it would not be expedient for the legislature to do so. n68 [\*967] Notwithstanding the various positions (constitutional and otherwise) articulated in this debate, as the actual outbreak of armed conflict approached, Congress appeared to resolve it in practice by asserting its lawmaking authority to define the terms of battle in relatively detailed fashion. French seizure of U.S. vessels prompted Congress to enact several distinct statutes authorizing the use of military force, particularly against French naval vessels. The statutes in question - which established what would become known as the "undeclared war," or "Quasi-War," with France - each triggered the President's authority to use the armed forces in a manner permitted for a belligerent party, but only for particular sorts of actions against French vessels, in particular locations, for particular purposes. The first such law, enacted in May 1798, authorized the President to direct the commanders of U.S. armed vessels to seize - and to bring into a U.S. port for proceedings "according to the laws of nations" - French armed vessels that had committed "depredations on the vessels" of U.S. citizens or that were "hovering on the coasts of the United States" for that same purpose. n69 A follow-up statute one month later provided for the forfeiture and condemnation of goods and effects found on those seized French ships, with a proviso that forfeiture would not extend to any property of any citizen or resident of the United States that had been taken by the French crew. n70 Then, on July 9, 1798, Congress enacted yet another statute that eliminated the restriction on the types of armed French vessels that could be seized. This law authorized seizure of any armed French vessel found within the jurisdictional limits of the United States or elsewhere on the high seas. n71 These and related statutes meaningfully limited the sort of actions that the Commander in Chief could undertake in fighting France. He was not at liberty to do whatever he thought wisest to defeat the enemy. In particular, he was limited to a naval war - he could not, for instance, decide to take the army to France - and one that was circumscribed in particular ways. 2. The Supreme Court Enforces the New Legislation. - The highly reticulated framework established by these and other statutes produced a number of legal disputes. The most significant for present purposes led the Supreme Court, in the case of Little v. Barreme, n72 to [\*968] address whether executive action in the conduct of military operations conformed to statutory bounds. Even before the decision in Little, however, the Court indicated that it was likely to regard these limited authorizing statutes not only as having empowered the President to exercise his war powers, but also as having restricted what he could do with them. In Bas v. Tingy, n73 for example, the Court was asked to decide which of two statutes enacted in this period determined the amount of salvage that would be due for the recapture of an American ship. The question led the Court to canvass the international laws and usages of war in some detail, as the case hinged on what was meant by the statutory term "enemy." n74 The Court concluded that the ship, if taken from the French, was taken from the "enemy," and in explaining that conclusion Justices Samuel Chase and Bushrod Washington described the nature and effect of Congress's statutory scheme. n75 By enacting the series of statutes concerning military engagement with French vessels, Justice Chase explained, Congress had "authorised hostilities on the high seas by certain persons in certain cases," but had not given the President the authority "to commit hostilities on land; to capture unarmed French vessels, nor even to capture French armed vessels lying in a French port." n76 What Congress had in effect done, in other words, was to authorize a "limited" or "partial" war against France - a type of war that, in the words of Justice Washington, was "confined in its nature and extent; being limited as to places, persons, and things." n77 Justice Washington noted, in apparent accord with Justice Chase's understanding, that in such conflicts those authorities "who are authorised to commit hostilities ... can go no farther than to the extent of their commission." n78 The full impact of this notion - that included within Congress's authorizations for the use of military force in an undeclared war are implied statutory limitations on the Commander in Chief's war powers that must be followed - was revealed a few years later in Little. Several of the Quasi-War statutes authorized the interdiction and capture of certain ships. One aimed to restrict commerce with France by barring vessels owned, hired, or employed by U.S. residents, in whole or in part, from sailing to the territory of the French Republic or the West Indies, and prohibiting their employment in any traffic or commerce [\*969] with a French resident. n79 In order to enforce this latter provision, the law authorized the President to instruct commanders of public armed vessels to examine ships that were suspected of violating the Act, and imposed a duty on commanders to seize any ship that appeared to be "bound or sailing to any port or place within the territory of the French Republic, or her dependencies." n80 The Secretary of the Navy thereafter issued orders to public armed ships, but those orders were not limited, as were the words of the statute, to interdiction of ships bound to ports within the French Republic. They instead instructed the naval forces to "do all that in you lies to prevent all intercourse, whether direct or circuitous, between the ports of the United States and those of France and her dependencies." n81 More specifically, they directed American ships "to be vigilant that vessels or cargoes really American, but covered by Danish or other foreign papers, and bound to, or from, French ports, do not escape you." n82 In conformity with this order, Captain George Little, commander of the U.S. frigate Boston, seized the Flying Fish, a ship believed to be a U.S.-owned vessel sailing from a French port, and sought condemnation. n83 That seizure precipitated a court challenge. The circuit court held the seizure unlawful and assessed damages for trespass against Little, whose quite reasonable defense was that liability would be unfair because he was merely following presidential orders. n84 Yet the Supreme Court affirmed the judgment of the court below, in a unanimous opinion by Chief Justice Marshall. Chief Justice Marshall held, in effect, that even though the President might well have had the inherent constitutional power to issue such an order in the absence of a statute, n85 that did not matter because federal statutory law had prohibited the seizure by implication. By providing the Executive with "authority [to seize] vessels bound or sailing to a French port," he concluded, "the legislature seem to have prescribed that the manner in which this law shall be carried into execution, was to exclude a seizure of any vessel not bound to a French port." n86 In other words, a statute authorizing seizure of ships heading [\*970] in one direction implicitly restricted what might otherwise have been the Commander in Chief's constitutional authority to seize ships going in the opposite direction. And while Chief Justice Marshall was plainly troubled by his ultimate conclusion that the officer following the commander's orders enjoyed no good faith immunity from liability, n87 there is no suggestion in his opinion, or that of any Justice of the Court - and no evidence that any of the parties, including the Executive, argued - that Congress could not limit the President's tactical flexibility in this respect. n88 3. Additional Legislative Restrictions Arising Out of the Quasi-War. - Although the obvious aim of the statute at issue in Little was to bring a cessation to transactions between United States persons and the French that were thought to give aid to the enemy, it did not directly regulate military engagement with the enemy itself. It concerned instead how force could be deployed against American ships operating in an active combat zone. But during this same conflict with France, Congress did pass laws dealing specifically with the treatment of enemy personnel. One such statute was a retaliation measure enacted on March 3, 1799. The act "empowered and required" the President to "cause the most rigorous retaliation to be executed" on French citizens legally captured by the United States, if it were proven to the President that France had killed, or employed corporal punishment on, or "imprisoned [\*971] with unusual severity," any U.S. citizen who had been impressed by the French. n89 This statute imposed what appeared to be a significant limitation on President Adams's discretion over how best to engage the French. It also set forth an affirmative rather than restrictive command that was apparently contrary to Adams's preferred mode of dealing with the issue. n90 In the course of establishing the legal framework for the conduct of the Quasi-War with France, Congress also enacted statutes that sought to temper the degree of coercion that could be brought to bear upon prisoners and other detainees. n91 And in March 1799, Congress enacted rules and regulations for the government of the navy, which included an article making it unlawful for any person belonging to a ship or vessel of war in U.S. service, when on shore, to "plunder, abuse, or maltreat any inhabitant, or injure his property in any way." n92 That law also provided more generally that every navy commander in chief and captain, in making specific rules and regulations for his charges, [\*972] "shall keep in view also the custom and usage of the sea service most common to our nation." n93 There is no evidence that any of these measures gave rise to constitutional concerns, notwithstanding their seemingly intrusive regulatory features, and we have found no record of President Adams complaining that these statutes were inconsistent with the imperative of conducting the military conflict in an appropriate manner. Finally, in the midst of all this legislative action - some of a general framework variety, some much more detailed and conflict-specific - Congress passed the Alien Enemies Act of 1798. n94 That measure authorized the President in a time of war or invasion to detain and remove male natives, citizens, denizens, or subjects of the hostile nation, age fourteen and upward, found in the United States. n95 This Act, which is still in force in modified form, n96 was passed in anticipation of war with France. It was first employed against British aliens during the War of 1812. The Act not only empowered the Executive, but also restricted it by requiring the President to give most deportable aliens time to recover, dispose of, and remove their goods and effects, either by the terms of a governing treaty or "according to the dictates of humanity and national hospitality." n97 4. Conclusion. - The Quasi-War with France resulted in a de facto rise in executive war authority, if only because it precipitated a massive expansion of the military establishment and thus of the amount of force at the President's disposal. But that was not the only consequence of this first major military contest of the new nation. Perhaps because the conflict never resulted in a declaration of war, its parameters remained confined and carefully delineated by statute. Congress, far from simply authorizing the use of force and then leaving matters to the Executive, from the very onset of the hostilities with France asserted direct (and, as it turned out, ongoing) statutory control over many matters - from the rules of engagement at sea to the treatment of enemies at home. Although occasional voices in Congress expressed concern that some of these statutory measures infringed on inviolable executive powers, neither the Congress as a whole, the executive branch, nor the Supreme Court suggested at any point in these years that such a concern was well-founded. [\*973] D. The Jefferson Administration By the time Jefferson took office, the Quasi-War with France had ended. Jefferson therefore proposed a return to a peacetime posture, with reliance principally on the state militia rather than on the standing army. n98 Congress responded in 1802 by enacting a law reducing the size of the regular army from 5500 to approximately 3300 troops. n99 Congress then generally enacted statutes that afforded the new President wide discretion to use the military force that remained under his charge as he deemed necessary, such as to respond to naval attacks from Tripoli. n100 Indeed, in 1807, in the wake of the Burr conspiracy, Congress even authorized the President to employ the land or naval forces, as he judged necessary, to respond to domestic insurrections or obstructions of the laws in any case where the Militia Act of 1795 had previously authorized him to use the militia for such purposes. n101 And although this law, the Insurrection Act of 1807, did require the President to "first observe[] all the prerequisites of [the Militia Act of 1795]," n102 including the requirement that the President issue a proclamation that "insurgents" should "disperse, and retire peaceably to their respective abodes, within a limited time," n103 it reflected a growing acceptance of both the existence of a standing army and the President's quite substantial role in overseeing it. Notwithstanding these broad grants of discretion to the President, and even though no great armed conflict loomed that would prompt a flurry of statutory activity akin to that accompanying the Quasi-War, the question of when the President could act in conflict with statutory requirements in military matters arose in Jefferson's Administration in the context of a possibly unauthorized expenditure. As a general matter, appropriations and spending practices did not raise the constitutional [\*974] question of a Commander in Chief override. Even though Albert Gallatin was now Jefferson's Treasury Secretary, appropriations practice in the Jefferson Administration soon became "largely indistinguishable from practice during the Federalist period." n104 No matter how appropriations statutes were designed, it seemed, executive officials construed them flexibly, sometimes by reading them to allow general funds to be used to supplement specific statutory limits, other times by adjudging that they permitted "anticipatory" spending for essential functions authorized by Congress. Importantly, as was true during the Washington Administration, n105 such creative construction was not rooted in a claim of constitutional authority on the part of the President. Instead, the interpretive practice rested on policy-based arguments about the importance of affording the President flexibility in administration of an expanding bureaucracy, and on the contention (no doubt in part fanciful) that Congress itself should be deemed to have been legislating with such practicalities in mind. n106 But a military crisis in 1807 prompted Jefferson in one case to incur financial obligations for the nation without purporting to justify them by creative statutory construction. n107 Significantly, however, even in this outlier case, Jefferson's argument did not rest on the notion that Congress lacked the power to regulate decisions regarding military operations generally, nor even on the claim that the conduct of military campaigns is vested solely in the President by virtue of his designation as Commander in Chief. Instead, the Jefferson Administration's defense was premised on the far different, and conceptually much more limited, notion of temporary necessity - an argument that, in this case at least, does not appear to have been a constitutional trump at all. On June 22, 1807, while Congress was in recess, the British warship Leopard attacked the American frigate Chesapeake as it was leaving port at Hampton Roads, Virginia. It was widely believed this aggressive action might precipitate a war with England. The next month, Jefferson's cabinet voted to purchase on credit timber for about 100 gunboats, along with hundreds of tons of saltpeter and sulphur - the requisites for gunpowder. n108 Apparently no one in the executive branch thought the existing appropriations laws or any other statutes could be stretched to authorize such purchases, but Jefferson [\*975] entered into the contracts anyway, "on the presumption that Congress will sanction it." n109 The legal literature has traditionally treated the Chesapeake incident as a classic example of the Commander in Chief making an expenditure that could not be defended on even the most creative interpretation of appropriations statutes. n110 We question whether this is the best understanding of the incident. It is not clear that Jefferson transgressed any statute, or even that he violated the constitutional prohibition on drawing money from the treasury except "in Consequence of Appropriations made by Law"; n111 it appears instead that Jefferson merely incurred an obligation on behalf of the United States, not that he expended any funds. n112 Be that as it may, when Congress reconvened the following October, Jefferson did not argue that the existing statutes authorized the contract. Instead, he asserted a particular claim of limited necessity: The moment our peace was threatened, I deemed it indispensable to secure a greater provision of those articles of military stores with which our magazines were not sufficiently furnished. To have awaited a previous and special sanction by law would have lost occasions which might not be retrieved. I did not hesitate, therefore, to authorize engagements for such supplements to our existing stock as would render it adequate to the emergencies threatening us; and I trust that the Legislature, feeling the same anxiety for the safety of our country, so materially advanced by this precaution, will approve, when done, what they would have seen so important to be done, if then assembled. n113 As this passage reveals, Jefferson did not claim any constitutional power to ignore Congress's will simpliciter, or even to spend (or incur obligations) in violation of statute when Congress was sitting - let alone a broader Commander in Chief prerogative to deal with military crises as he saw fit. At most, his claim was that the President can act [\*976] as necessity demands in times of great crisis, where it is reasonable to anticipate that an authorizing statute will be forthcoming and when it would be infeasible to call upon the Congress for ex ante authorization. Of course, if the Jefferson Administration had actually expended funds, then as a practical matter the legislature would have been hard-pressed to divest the President of the power that he claimed necessity had entitled him to exercise. But the significance of Jefferson's justification is that he set forth such a narrow view of the predicate for executive resort to action based on necessity in the first instance. Jefferson appeared to assert such a power because Congress was not actually available - a circumstance that, to be sure, was not infrequent in that day, but one that also had a certain practical institutional justification underlying it. As we will see, Lincoln used this same limited theory of emergency power to justify unauthorized expenditures in Congress's absence at the outset of the Civil War. n114 For its part, Congress seemed intent on both recognizing and defining the bounds of the necessity defense that Jefferson had invoked. Congress promptly enacted an appropriation to pay for the obligations Jefferson had incurred. n115 More interesting, perhaps, is what happened next. In 1809, on the final day of Congress's session and the penultimate day of Jefferson's second term, Congress passed an appropriations law for the Treasury, War, and Navy Departments that included a variation of Gallatin's old restrictive clause from the 1797 Act n116: "The sums appropriated by law for each branch of expenditure in the several departments shall be solely applied to the objects for which they are respectively appropriated ... ." n117 But Congress also included a proviso that effectively codified an "emergency" exception akin to that Jefferson had invoked in the Chesapeake affair, although dealing only with actual expenditures: the Act authorized the President during a congressional recess, and "on the application of the secretary of the proper department, ... to direct ... that a portion of the monies appropriated for a particular branch ... in that department, be applied to another branch of expenditure in the same department" if, in the President's opinion, such a transfer was "necessary for the public service." n118 Congress thus did more than ratify what [\*977] Jefferson had done; it stressed that disregard of appropriations limitations would be unwarranted in circumstances in which Congress was available to consider and address the emergency. n119 E. The War of 1812 The War of 1812 constituted the first full-fledged military engagement of the young nation. It was a controversial war, occasioning passionate debate in Congress over whether the declaration of war was itself constitutional, the objection being that there had not been a sufficient predicate of hostile British action. n120 Nevertheless, and perhaps because Congress issued a formal declaration, the war did not, as the Quasi-War had done, produce a raft of legislation purporting to define operational limits on how force could be used. Congress did pass several statutes dealing with the specific issue of prisoners of war, authorizing the President to make such regulations and arrangements for their safekeeping and support "as he may deem expedient," but only "until the same shall be otherwise provided for by law." n121 Despite this relative paucity of congressional action, the War of 1812 does offer an important piece of evidence relating to Congress's constitutional authority to restrict executive war powers. It comes [\*978] from the Supreme Court's decision in Brown v. United States. n122 The U.S. Attorney in Massachusetts had filed an action to condemn over 500 tons of timber in the United States that had belonged to British subjects. The circuit court condemned the timber as enemy property forfeited to the United States. The Supreme Court, in an opinion by Chief Justice Marshall, reversed, holding that the seizure required statutory authorization that Congress had not provided. The Chief Justice agreed with the government that the laws of war generally permitted a sovereign to confiscate enemy property in its own territory during war, but he held that the power was the legislature's to exercise, thereby in effect denying the President the power to seize enemy property within the United States in the absence of separate statutory authority distinct from a declaration of war. n123 <Normal (Web)> In light of this holding, one could read the case solely as a construction of the scope of the President's inherent, or Category Two, powers (referring to the taxonomy Justice Jackson developed a century and a half later in Youngstown Sheet & Tube Co. v. Sawyer n124). But the real significance of the case, we think, inheres in what it reveals about early constitutional understandings of the extent of the President's subjection to statutory control. And the key to excavating that understanding is in Justice Story's fascinating dissenting opinion. Justice Story insisted that because the laws of war permit the sovereign to seize enemy property in the United States during a declared war, the President can make such a seizure as Commander in Chief, "as an incident of the office," even if Congress has not separately authorized the seizure by statute. n125 For Justice Story, that is to say - here, disagreeing with the majority - the President had the constitutional authority, the "discretion vested in him," to capture enemy property within the United States during a declared war, to the extent consistent with the law of nations. n126 But significantly, in so arguing, Justice Story emphasized the congressional role both in triggering and in limiting the exercise of such presidential power. As Justice Story explained, the reason for the President's capacity to exercise such power in the first place was that "the legislative authority ... has declared war in its most unlimited manner." n127 In other words, rather [\*979] than emphasizing inherent executive authority, Justice Story stressed that the scope of the President's war powers was vast because of Congress's declaration of war. n128 Moreover, Justice Story emphasized repeatedly that although the President had the power to seize domestic enemy property in a declared war, Congress had the authority to pass laws limiting or prohibiting such constitutional authority. Ordinarily, Justice Story explained, the President is vested with a "discretion ... as to the manner and extent" of prosecuting a declared war. n129 Thus, where the legislature has not further defined "the powers, objects or mode of warfare," reasoned Justice Story, the only law limiting the Commander in Chief's authority is "the law of nations as applied to a state of war." n130 However, "if, indeed, there be a limit imposed as to the extent to which hostilities may be carried by the executive, I admit that the executive cannot lawfully transcend that limit." n131 That is to say, Justice Story explained, if any of the acts permitted by the laws of war "are disapproved by the legislature, it is in their power to narrow and limit the extent to which the rights of war shall be exercised; but until such limit is assigned, the executive must have all the right of modern warfare vested in him." n132 [\*980] The Chief Justice's majority opinion, having concluded that under the laws of war the President could not confiscate the property absent specific statutory authorization, had no occasion to discuss whether a statute could limit such a hypothetical exercise of the Commander in Chief power. But there is certainly nothing in Chief Justice Marshall's opinion to suggest otherwise, and his earlier opinion in Little v. Barreme is consistent with Justice Story's view. n133 Of course, Brown did not formally address the question that Little addressed and that Bas discussed in dicta - that is, whether an existing statute imposed a constraint on the President's exercise of discretionary constitutional war powers. Nevertheless, like its precursors, Brown accords with the notion that those "who are authorised to commit hostilities ... can go no farther than to the extent of their commission." n134 This time, however, the discussion of that issue had occurred in the context of a case that involved the prospect of congressional restrictions being imposed in an actual declared war. F. The Antebellum Era As the preceding discussion indicates, although the question of the Commander in Chief's possible preclusive authority was not extensively considered in our early constitutional history, it was not utterly unknown to political actors. The idea that Congress might minutely manage the conduct of war did seem odd to at least some legislators - disfavored, at the very least, and possibly even constitutionally dubious. But there was certainly no consensus shared by the branches that such regulation was beyond Congress's constitutional ken or that Founding-era assumptions about the Commander in Chief's subjection to statutory regulation had broken apart on the shoals of lived experience. The final decades leading up to the Civil War, moreover, do not indicate any dramatic shift. The Executive's assertion of war powers in advance of legislative authorization became more aggressive in this period, establishing an important historical predicate for the claims of broader executive powers to deploy forces abroad that modern Presidents regularly assert. n135 But as much as the President often seized the initiative in this period, there was little indication that Congress was [\*981] forfeiting whatever restrictive powers it assumed it possessed (or had already exercised) in the years up to and including the War of 1812. With one possible exception, moreover, the Executive continued its practice of accepting the limitations Congress imposed or, at most, relying on creative modes of statutory interpretation rather than assertions of preclusive constitutional war powers to respond to those statutory limits that were of practical concern. 1. Continued Legislative Regulation. - In the years following the Jefferson Administration, Congress continued to enact statutes giving the President limited and specified authorizations to engage in hostilities or to take possession of particular contested territories, n136 directing where troops were to be stationed, n137 and even providing that no Marine Corps officer "shall exercise command over any navy yard or vessel of the United States." n138 Nor was it unprecedented for Congress, as part of a law regulating trade with the Indian tribes in 1834, to prescribe certain treatment for Indian detainees. n139 In short, right up to the Civil War itself, the legislative branch showed no signs of having developed a newfound hesitancy, let alone any serious constitutional self-doubt, about its authority to cabin what would otherwise be the Commander in Chief's constitutional discretion. And for the most part, there was little indication that the legislature was out of step with prevailing sentiment in so thinking. 2. Antebellum Constitutional Treatises. - The nineteenth century marked the beginning of the age of constitutional treatises in the United States. Although such works do not, strictly speaking, provide clear evidence of understandings within the political branches, they do [\*982] offer some insight into general legal understandings of the day. As we will see, by the early part of the twentieth century, academic discussions of the extent of the President's preclusive authorities to deploy troops and direct campaigns, brief though they often were, constituted a staple element of the genre's treatment of war powers and of the Commander in Chief Clause in particular. n140 But in the antebellum era, notwithstanding the legislative regulation that had by then become familiar, what Justice Jackson later identified as the "lowest ebb" issue was not one that scholarly commentators seemed to have much in view. Indeed, some of the major treatises of the day did not discuss it even in passing. n141 The leading scholarly work, Justice Joseph Story's Commentaries on the Constitution, contained extensive discussions of Congress's and the President's war powers n142 and indicated that the Commander in Chief's superintendence prerogative was preclusive. n143 But Justice Story's treatise did not quite engage the "lowest ebb" question directly. n144 Justice Story explained that "the direction of war" in particular necessitates a "single hand" but, as in The Federalist, the rejected alternative was not statutory control but rule by a plural executive. n145 Indeed, in discussing Congress's power to raise armies, Justice Story indicated that it would encompass means "unlimited in every matter essential to its efficacy," including the "formation, direction, and support of the national forces." n146 Moreover, Justice Story specified that Congress's power to declare war may be used to authorize "general hostilities, in which case the general laws of war apply to our situation; [\*983] or by partial hostilities, in which case the laws of war, so far as they actually apply to our situation, are to be observed." n147 While Congress followed the former course in 1812, Justice Story explained, "the latter course was pursued in the qualified war of 1798 with France, which was regulated by divers acts of congress, and of course was confined to the limits prescribed by those acts." n148 Still, despite this endorsement of the principle set forth in Bas and applied in Little, Justice Story never conclusively declared which department would have the final word in the event of an interbranch conflict on such matters in an actual declared war, or just how broad Congress's regulatory powers were even in a more limited conflict. n149 William Rawle's 1825 treatise came closer to addressing the question, albeit in a brief and less-than-illuminating manner. Rawle specifically recognized broad legislative powers as to the military in peacetime, appearing to leave little outside the legislative ambit. n150 As to "the emergencies of a war," however, Rawle noted that exigencies could justify the president ... in preferring the execution of his constitutional duties, to the literal obedience of a law, the original object of which was of less vital importance than that created by the exigencies of the moment, and there can be no doubt, that this necessary power would extend to the erecting of new fortresses, and to the abandoning of those erected by order of congress, as well as to the concentration, division or other local employment of the troops, which in his judgment or that of the officers under his command, became expedient from circumstances. n151 Although this passage would appear to argue for entrusting the President with substantial wartime power as a practical matter, even to ignore "the literal obedience of a law" in exigent circumstances, Rawle expressly disclaimed the idea that he was defending a President's right to defy congressional will: "This would not be a violation of the rules laid down in the preceding pages" requiring executive compliance with statutes pursuant to the President's duty to take care that the laws be faithfully executed, Rawle explained, "since the obligation of the law is [\*984] lost in the succession of causes that prevent its operation, and the constitution itself may be considered as thus superseding it." n152 In other words, Rawle appeared to be explaining that in war, a preexisting statutory limitation might be properly construed not to continue to have its full peacetime force and effect. Rawle said nothing directly, however, about what should happen in the event the President and the Congress disagree as to whether the President must abide by a restriction that is properly construed to apply to the conduct of war. The evidence from the treatises of the time, therefore, is fairly inconclusive. The most one can say with confidence is that there appeared to be a general understanding that Congress could exercise control over the armed forces at least in peacetime; that the function of the Commander in Chief Clause itself was, as Justice Story suggested, to establish a hierarchical guarantee within the military establishment; that the teachings of Bas and Little were endorsed; and that there was no consensus about a broad or unqualified preclusive executive power over the deployment of troops or the conduct of campaigns such as would come to dominate the views expressed in similar compendiums published in the decades following Reconstruction. 3. Executive Branch Views in the Antebellum Period. - Although Congress continued to regulate military matters throughout the period, the Supreme Court had no occasion to weigh in on this issue in the decades following Brown. But interestingly, just as the judiciary had less reason to address the issue, the Executive appeared to have more. In fact, some of the earliest and most significant statements of the extent of Congress's authority to regulate the Commander in Chief were offered during this time period. They touched on the full range of issues that concern us, from the existence of a preclusive power of superintendence over the armed forces to the extent of the Congress's authority to curb the President's substantive war powers. (a) Preclusive Superintendence Prerogatives. - As the antebellum period drew to a close, President Buchanan endorsed the indefeasible or preclusive power of superintendence over the military n153 in the fascinating case of Captain Meigs and the Washington Aqueduct. n154 In 1852, before Buchanan had taken office, Montgomery C. Meigs, a brilliant and eccentric captain in the Army Corps of Engineers, was assigned to survey the water supply for the cities of Washington and Georgetown and eventually to oversee the War Department's construction of an aqueduct along the Potomac River. Meigs's subsequent [\*985] report recommended that an aqueduct be built just above Great Falls, north of Washington. Congress approved that recommendation, and the Department of War began work on the aqueduct, led by Meigs himself. For several years, things ran very smoothly. In the Buchanan Administration, however, Meigs's relationship with Secretary of War John Floyd turned sour: Floyd dismissed Meigs and made sure the Administration's proposed budget included no funds for work on the aqueduct. Meigs himself, a beloved figure on Capitol Hill, then successfully lobbied Congress for a bill appropriating half a million dollars for the aqueduct to be spent "according to the plans and estimates of Captain Meigs, and under his superintendence." n155 In his signing statement to this appropriations bill, President Buchanan wrote that if Congress had meant to give Meigs discretionary authority to determine how the aqueduct project would proceed, it would interfere with the President's "right ... to be Commander in Chief." n156 Buchanan concluded, therefore, that it was "impossible that Congress could have intended to interfere with the clear right of the President to command the Army" by "withdrawing an officer from the command of the President and selecting him for the performance of an executive duty." n157 Buchanan thus construed the statutory "condition" as precatory rather than as mandatory. n158 The Secretary of War thereafter permitted Meigs to superintend the project, but denied him any discretionary authority by refusing to permit Meigs to be chief engineer of the Washington Aqueduct. Meigs complained to the President that this was in clear violation of the statute, and that the aqueduct had to be built not only according to his designs but, more importantly, under his superintendence - a power that Meigs understood to give him control over all discretionary decisions. This prompted an opinion of Attorney General Jeremiah Black to the President, affirming the constitutional inviolability of the army chain of command. Black agreed with the President that if the statute were construed to give Meigs the power to build the aqueduct "without accounting to his superior officers" and "according to his own uncontrolled will," n159 it would be constitutionally dubious: Congress could not make Meigs "independent of [the President]," even as a condition on an appropriation rather than through an outright requirement. n160 Therefore the Attorney [\*986] General rejected such a construction: "This clause of the appropriation bill was not intended to appoint Captain Meigs chief engineer of the acqueduct, nor was it meant to interfere with your authority over him or any other of your military subordinates." n161 (b) Preclusive Substantive Powers. - The Meigs case is sometimes cited in support of the theory of a substantive preclusive power of presidential command. n162 But neither Attorney General Black's opinion nor President Buchanan's signing statement adverted to any prerogative of the Commander in Chief to disregard substantive statutory commands, nor did the statute even concern actions during wartime. At most, Buchanan and Black were arguing that if Congress chooses to assign a certain function to the army, even outside the context of war, Congress may not assign discretionary aspects of that function to a lower-level officer to be carried out "according to his own pleasure," n163 with complete independence from presidential supervision or control. n164 [\*987] In fact, Black took an expansive view of congressional power to define the extent of substantive Commander in Chief powers in response to a subsequent request for an opinion on the subject from President Buchanan: To the chief executive magistrate of the Union is confided the solemn duty of seeing the laws faithfully executed. That he may be able to meet this duty with a power equal to its performance, he nominates his own subordinates, and removes them at his pleasure. For the same reason the land and naval forces are under his orders as their commander-in-chief. But his power is to be used only in the manner prescribed by the legislative department. He cannot accomplish a legal purpose by illegal means ... . n165 Indeed, with the possible exception discussed below, we have been unable to find any suggestion during the seventy years between ratification and Lincoln's election that the executive branch ever invoked any constitutional objections to statutory constraints on the Commander in Chief's tactical discretion or substantive command authorities, either in wartime or in peacetime. To be sure, such quiescence does not necessarily imply acceptance. But a series of antebellum-era Attorney General opinions affirm that the Executive's authority was subject to statutory supersession - even in areas where the President had extensive independent authority to regulate the operations and [\*988] government of the armed forces, including questions respecting command structure. n166 To be sure, these opinions did not deal with wartime tactical decisions, as such, but they are express in endorsing general constitutional assumptions regarding the supremacy of statutes over what would otherwise be a Commander in Chief's constitutional discretion. Moreover, in setting forth broad propositions about the Executive's subjection to statutory control, these opinions make no effort (as contemporary executive branch opinions frequently do) to exempt tactical judg-ments from their scope. n167 (c) Fillmore's Equivocal Discussion of Preclusive Substantive Pow-ers. - The possible exception to this pattern occurred in 1851, in a law enforcement - not war - setting. President Fillmore contemplated using both the militia and the armed forces to help enforce the Fugitive Slave Act against groups in Boston trying to rescue slaves from return to servitude. The Senate passed a resolution requesting information from Fillmore about the incident, the means he had adopted to deal with the issue, and whether, in his opinion, "any additional legislation is necessary to meet the exigency of the case, and to more vigorously execute existing laws." n168 In a letter to the Senate the next day, Fillmore explained that he had the power to deal with the issue under the 1795 Militia Act and the 1807 Insurrection Act, which respectively authorized the President to call forth the militia, and to use the armed forces, to enforce domestic laws. n169 Recall that the 1795 Act provided that "the President shall forthwith, by proclamation, command such insurgents to disperse, and retire peaceably to their respective abodes, within a limited time," and the 1807 Act appeared to incorporate by reference this "pre-requisite[]" of an advance dispersal warning to insurgents. n170 Fillmore wrote that there was "some doubt" whether the proclamation requirement of those older statutes applied when the militia and armed forces were called forth for purposes of executing the laws, as [\*989] opposed to suppressing insurrections. He urged Congress to clarify that there was no early-notice requirement in such situations. "Such a proclamation in aid of the civil authority," he argued, "would often defeat the whole object by giving such notice to persons intended to be arrested that they would be enabled to fly or secrete themselves." n171 Fillmore further suggested that he had a preexisting constitutional power to use the extant armed forces to enforce domestic laws, in which case the proclamation requirement would be a statutory condition imposed on the exercise of the Commander in Chief's Article II authority. Fillmore therefore wondered whether Congress's 1807 incorporation-by-reference of the proclamation prerequisite had been inadvertent. He insinuated that insofar as the 1807 law were construed to require advance warning of the use of the armed forces, and not just the militia, such a construction might raise constitutional questions: It appears that the Army and Navy are by the Constitution placed under the control of the Executive; and probably no legislation of Congress could add to or diminish the power thus given but by increasing or diminishing or abolishing altogether the Army and Navy... . Congress, not probably adverting to the difference between the militia and the Regular Army, by the act of March 3, 1807, authorized the President to use the land and naval forces of the United States for the same purposes for which he might call forth the militia, and subject to the same proclamation. But the power of the President under the Constitution, as Commander of the Army and Navy, is general, and his duty to see the laws faithfully executed is general and positive; and the act of 1807 ought not to be construed as evincing any disposition in Congress to limit or restrain this constitutional authority. n172 Fillmore was not clear as to the source of his constitutional objection - whether it derived from the Commander in Chief Clause, from the Take Care Clause, or from some combination of the two. In any case, Fillmore suggested that Congress could not disable the President from fulfilling his constitutional obligation to ensure that federal statutes were faithfully executed. Indeed, as to the question of whether Congress could add to or diminish his powers of control over land or naval forces already raised, Fillmore was notably equivocal, averring [\*990] only that such legislation would "probably" be unconstitutional. n173 In any event, he seemed to base that judgment not on any idea that wartime tactics or operational judgments on the battlefield were for the President alone, but rather on the much more sweeping and seemingly indefensible ground that all decisions pertaining to the armed forces are beyond statutory control. n174 Whatever Fillmore meant to assert, Congress can hardly have been said to have acceded to it, either in direct response or in debates shortly thereafter. A few weeks after the question of statutory amendment was referred to the Senate Judiciary Committee, the committee reported that, in light of the 1795 and 1807 statutes "and the experience of the past," n175 "further legislation is not essential to enable the President to discharge, ... with fidelity, his high constitutional duty to see that the laws are faithfully executed." n176 In so acting, the committee did not respond directly to Fillmore's request that it clarify whether the 1807 Act required an advance warning to lawbreakers that the President was about to use the armed forces. n177 Senator Andrew Butler did write separately, fearing that the committee's silence with respect to that question might otherwise be viewed as "a tacit recognition" of Fillmore's constitutional argument. n178 Butler appeared to reject Fillmore's suggestion that Congress could not condition the President's use of the armed services, but his reasoning was a bit ambiguous: For the specific and sometimes delicate purposes indicated [by statute], I think Congress has the direction of the President. When actually in command, for repelling invasion or for any other purpose, he must exercise his own judgment, under his constitutional discretion. In one sentence, [\*991] I deny that the President has a right to employ the army and navy for suppressing insurrections, &c., without observing the same prerequisites prescribed for him in calling out the militia for the same purpose. ... I would regard it as a fearfully momentous occasion to see the Army called out to shoot down insurgents without notice or proclamation. n179 Thus, although it is difficult to know quite what to make of the Senate committee's silence on the constitutional question, the legislature's refusal to amend the statute surely does not suggest that Congress assented to Fillmore's suggestion of constitutional difficulties. n180 4. The 1852 Troop Deployment Debate in the House of Representatives. - In a revealing 1852 debate in the House of Representatives about legislative direction of actual troop deployment, legislators expressed opposition to what would have been the broadest version of Fillmore's constitutional claim. Six years earlier, Congress had enacted a law raising a regiment of riflemen, ostensibly to protect emigrants to Oregon from the Native Americans in the area, although the law did not specifically instruct the President to station the troops in Oregon and instead only mentioned that purpose in its title. n181 When President Polk used the regiment in the Mexican War instead and then later assigned it to California, Delegate Joseph Lane, of the Oregon territory, introduced a resolution requesting the President to send the rifle regiment to Oregon, "the service for which said troops were created." n182 The debate that ensued marked the most serious and extensive discussion of Congress's powers to restrict the Commander in Chief in more than half a century. n183 Although it did not result in the enactment of a new legislative restriction, the debate indicates that the legislature had by no means suffered a general loss of confidence in its powers. [\*992] Representative Thomas Bayly opposed the resolution on the ground that the House had no power to direct the Commander in Chief's chosen troop movements, n184 an assertion that Representative Cyrus Dunham remarked was "so strange, so novel, and so important, that I do feel it ought not to pass unnoticed." n185 In Dunham's view, such a theory would in effect "neutralise the power which Congress has to declare war." n186 Representative David Cartter likewise called Bayly's doctrine "extraordinary" and "alarming," because it would "throw the whole safety of the empire into a single man's hands." n187 The President's designation as "Commander in Chief," said Cartter, means simply that he "is the drill officer of your forces." "With the detailed disposition of the Army he does hold the sovereign command, but that disposition must be subordinate to and resolved within the legislative purpose declared in creating the force, and disposing the point of defense." n188 Representative James Brooks then emphasized a central point as to which no rejoinder was made - the difference between the President being subject to control by one or both houses of Congress and the President being subject to control by statute. Like Bayly, Brooks, too, thought the resolution would be construed as directory and as such would be unconstitutional, but only because it was not in the form of an enacted law. Brooks did not deny that "the legislative power of the country" could control the direction of the army, n189 but he argued that the House of Representatives, standing alone, could not exercise such control - for then we would have not one Commander in Chief, "but two hundred and thirty-odd Commanders-in-Chief." n190 Nor could the two Houses of Congress collectively control the President's direction of the army: "It not only requires the assent of both Houses, but it must have the approval of the Executive before that control can be had." n191 Disposition of the army "is altogether in the Executive," Brooks explained, "when legislation has done with it." n192 [\*993] 5. Conclusion. - The decades following the War of 1812 were marked by presidential assertions of a limited unilateral authority to use force abroad. But even as the military establishment grew, and battles were being fought over whether the Congress's formal authority to declare war was being whittled away (as occurred with respect to the Mexican War and the Florida war), n193 no notion of preclusive executive power over the conduct of campaigns took root. Constitutional treatises of the era did not endorse it. Congress did not act in accord with it. And executive branch opinions, the Fillmore statement notwithstanding, consistently endorsed views inconsistent with it. III. The Civil War and Its Aftermath As with important aspects of the current conflict against al Qaeda, the Civil War occurred on U.S. soil, and the Union's prosecution of the war had a direct impact on U.S. citizens and residents, including those aligned with the enemy. Moreover, President Lincoln's actions, especially in the first weeks of the war, and then again in issuing various orders to suspend the writ of habeas corpus and in promulgating the Emancipation Proclamation, are generally understood to be the historical high-water mark of assertions of broad, unilateral executive war powers. Defenders of the Bush Administration's assertions of Commander in Chief prerogatives, therefore, often invoke Lincoln as an important historical precedent. For these reasons, the understanding of the Commander in Chief power during the Civil War and its aftermath is especially relevant to the current debate. This period is therefore the centerpiece of our historical survey. During and immediately after the Civil War, the argument for a preclusive, substantive Commander in Chief power first emerged in earnest. That argument did not, however, come from the source one might expect - President Lincoln. Lincoln himself never once asserted a broad power to disregard statutory limits, not even during his well-known exercise of expansive executive war powers at the onset of hostilities or when confronted with statutes that challenged his own tactical choices later in the war. He did draw upon certain claims of necessity, but he never made the broader contention at which Fillmore had hinted. The claim of a preclusive Commander in Chief prerogative, instead, found its first real flowering in three other sources: first, a series of impassioned speeches by Illinois Senator Orville Browning during the Senate's debate over the Confiscation Act of 1862; second, a dictum in Chief Justice Chase's concurrence in the postwar case of Ex [\*994] parte Milligan; n194 and third, the first edition of Professor John Norton Pomeroy's influential treatise, An Introduction to the Constitutional Law of the United States, published in 1868. The latter two sources have been invoked by proponents of similar claims throughout the remainder of our constitutional history. The actual conduct and understandings of Congress, the President, and the Court during the Civil War and its aftermath, however, accorded much more with the seventy years of prior constitutional practice than with these purported summations of constitutional wisdom. A. The Laws of War and the Lieber Code Like Presidents during the antebellum period, President Lincoln did not consider himself free to execute war in any manner he might choose, even in the absence of statutory limitations. He shared the traditional assumption n195 that the Commander in Chief's war powers were constrained by the laws of war, an assumption that continued to be unquestioned across all three branches. In fact, Lincoln resolved to memorialize the laws and usages of war in military regulations so that Union forces might better understand and honor them: in May 1863, the Adjutant General's Office issued what became colloquially known as the Lieber Code. n196 [\*995] Of course, even after this codification, the precise contours of the jus belli were not entirely clear, especially on the question of what constituted military "necessity." This ambiguity afforded Lincoln and other military commanders considerable interpretive discretion. n197 Nevertheless, Lincoln assumed, along with everyone else who opined on the subject, that his armed forces were constrained by those customary laws, the contents of which were not a product of the commander's own judgments but were, rather, determined by internationally accepted norms developed independent of any particular commander's discretionary choices. n198 It is not surprising, therefore, that, once again, many of the great war powers debates (as in the Quasi-War with France) turned on questions regarding whether Lincoln's chosen means of prosecuting the war - such as the blockade of [\*996] Southern ports and the Emancipation Proclamation - were consistent with the international laws of war. n199 Important as the laws of war were, however, a striking feature of the Civil War is the role that statutory enactments played, both in setting the terms of battle and in generating constitutional decisions and opinions concerning war powers. As with the war on terrorism, this was a military conflict that was being fought in a legal context thick with potentially applicable statutory provisions. That was in part because, as might be expected of any war taking place on American soil, there were seemingly relevant preexisting measures already in place (such as the habeas provision of section 14 of the Judiciary Act of 1789 n200). But it was also a function of the fact that there was an aroused Congress that was in important respects much more aggressive in its view of how the war should be prosecuted than was the chief commander himself. As we shall see, however, the Executive's [\*997] constitutional arguments in response to this legal reality were significantly different from those made in recent years. B. Lincoln's Assertion of Executive Prerogatives in the Spring of 1861 When the Confederacy initiated the war in April 1861, the federal armed forces were hardly a powerful fighting force. Moreover, Congress was not in session. The newly elected President thus found himself alone in Washington, with no obvious way to meet the impending challenge but also no legislative branch positioned to countermand him. It therefore should not be surprising that in the twelve weeks between the firing on Fort Sumter and Congress's return to Washington, Lincoln exercised several controversial unilateral executive war powers. The President's first order of business was to invoke his authority under Article II, Section 3, to convene Congress back into session - but only effective July 4, 1861, at which time he delivered a now-famous message to the legislature explaining his conduct in the intervening period. n201 The delay was perhaps justifiable in light of the rioting in Maryland and the prospect that Washington, D.C. (and Congress) might soon be behind enemy lines. n202 What is certain is that Congress's absence in the interim allowed Lincoln to act unilaterally and with dispatch, without the need to have his decisions debated and ratified (and possibly amended or barred) by Congress. Most of what Lincoln did during those twelve weeks would today be viewed as falling within the first two of Justice Jackson's Youngstown categories. Lincoln immediately issued a proclamation calling for the blockage of Southern ports and for the states to supply 75,000 new militia. As to each of these, Lincoln explained in his July 4 message to Congress, his action "was believed to be strictly legal," n203 by which Lincoln presumably meant to refer to the statutory delegations to the President in the Militia Act of 1795 and the Insurrection Act of [\*998] 1807. n204 (The Supreme Court would later hold in the Prize Cases that those statutes authorized the blockade. n205) Without statutory authorization, Lincoln dispatched war ships to Fort Sumter and instructed them to return fire if attacked, n206 but there was no contention that such action conflicted with any statute. Three other of Lincoln's actions, however, might fairly be said to have transgressed statutory limits. We discuss Lincoln's explanation of each of them in turn. As we shall see, Lincoln and his Administration repeatedly avowed that Congress, by statute, retained the final word as to not only these three matters but others. Lincoln also refrained from ever asserting any authority to disregard statutes regulating the conduct of the war. Indeed, on April 18, 1861, six days after the attack on Fort Sumter, one day after Virginia's secession, and just a day before the naval blockade, Attorney General Edward Bates wrote a formal opinion to Lincoln disclaiming that very authority. The opinion concluded that the President could not establish a separate Bureau in the War Department to supervise and regulate the newly called-up militia. n207 Bates explained that, as Commander in Chief, the President did have what we have been calling a "superintendence" prerogative: he could appoint the Secretary of War as his "regular organ" to promulgate rules and orders as the acts of the Executive, "binding on all within the sphere of his just authority." n208 That hierarchical authority was not, however, supplemented by a substantive preclusive prerogative, as Bates explained in the very next sentence: "But this power is limited and does not extend to the repeal or contradiction of existing statutes ... ." n209 1. Suspension of the Writ. - Beginning in April 1861, Lincoln authorized army generals to "suspend the writ of habeas corpus for the public safety" where necessary - first between Philadelphia and Washington (in response to rioting occurring in Maryland), and later in [\*999] other locations, reaching as far north as Maine. n210 Of course, the army generals were hardly in a position to "suspend" the statutory power of courts to issue writs, and no effort was made to use military force to compel judges to refuse to entertain habeas petitions. The notion of executive "suspension," then, is something of a misnomer. What Lincoln's order allowed was for army generals to detain persons without conforming to the procedural requirements otherwise applicable by virtue of constitutional or statutory requirements that usually govern such deprivations of liberty. n211 At the limit, the suspension orders even supplied a basis for refusing to produce detainees when ordered to do so by courts. Indeed, Lincoln went so far as to permit his officers to disregard actual judicial orders granting habeas relief, including one from Chief Justice Taney, sitting as a circuit judge, in the famous case of Ex parte Merryman. n212 To ignore such judicial orders was to scoff at an executive obligation that was arguably contemplated by statutory law n213 and to render the 1789 statute essentially meaningless insofar as its prime function had been to check unlawful executive detentions. In this sense, the "suspension" issue presented as serious a Category Three case as one could conjure. In his July 4 message to Congress, Lincoln defended his action in "suspending" the writ with his famous remark suggesting that a President might choose to violate a single law lest "all the laws but one ... go unexecuted." n214 But in making this statement, the President was not asserting a general constitutional power as Commander in Chief to pick and choose among statutory mandates regulating the conduct of war. He was instead remarking on the President's responsibility to take action on an emergency basis when doing so is necessary to preserve the nation. n215 Even here, Lincoln was careful to insist [\*1000] that Congress retained ultimate control, and he readily conceded that his bold initiatives, including those regarding the suspension of habeas, were subject to statutory qualification or override: "Whether there shall be any legislation upon the subject, and, if any, what, is submitted entirely to the better judgment of Congress." n216 In other words, Lincoln was arguing that so long as a power resided in the Congress, and the Congress was unable to act because it was not in session at a moment of emergency or crisis, the President could, in effect, act so as to preserve the nation. Although such initial executive action would clearly shift the burden of inertia sharply in the Executive's favor, Lincoln did not challenge Congress's authority to countermand the President's emergency actions. But as much as Lincoln made reference to necessity, he ultimately rested his legal position on an even more technical and bounded ground, albeit one that was and is still quite controversial. Lincoln argued that the Suspension Clause itself empowers the President to suspend the privilege of the writ of habeas corpus in cases of rebellion or invasion, at least when Congress is not in session. n217 In other words, Lincoln was claiming that the Suspension Clause authorized both Congress and the President to render the habeas statute ineffective in cases of emergency, making this particular exercise of emergency executive power especially legitimate as a legal matter. This may not have been the strongest reading of the Suspension Clause - Chief Justice Taney certainly did not think so n218 - but it was a far cry from a claim of a general power pursuant to the Commander in Chief Clause to defy statutes regulating the conduct of war. n219 [\*1001] 2. Expending Unappropriated Funds To Raise Troops. - On May 3, 1861, Lincoln issued a proclamation in which he "called into the service of the United States 42,034 volunteers to serve for the period of three years, ... to be mustered into service as infantry and cavalry," and in which he "directed" that the army "be increased by the addition of eight regiments of infantry, one regiment of cavalry, and one regiment of artillery, making altogether a maximum aggregate increase of 22,714 officers and enlisted men," and that the navy enlist an additional 18,000 seamen. n220 These increases in the army and navy did not, perhaps, transgress any express specific statutory limits; but they did violate the implied limit established by Congress's existing appropriations statutes. Therefore this conduct could fairly be viewed, as some have portrayed Jefferson's unilateral conduct in the Chesapeake incident in 1807, n221 as an executive initiative that violated a statutory restriction - in addition to violating the constitutional directives that "no Money shall be drawn from the Treasury, but in consequence of appropriations made by law," n222 and that it is for Congress to raise the army and provide and maintain a navy. n223 In defending this action in his July 4 address, Lincoln did not invoke any notion of a preclusive power over the conduct of a campaign, not even to suggest that Congress would be powerless to preclude him from using the troops now that they were under his command. He instead took a tack akin to the one Jefferson had taken after the Chesapeake incident. Lincoln mounted a bounded necessity defense, owing to Congress's absence at a moment of crisis. He explained that he had acted only because Congress was not available and because he was confident that he was a surrogate of the legislature, in effect acting in trust for it. In this sort of case, Lincoln argued, technical compliance with existing statutes might not be compelled: "These measures, whether strictly legal or not, were ventured upon under what appeared to be a popular demand and a public necessity, trusting, then, as now, [\*1002] that Congress would readily ratify them. It is believed that nothing has been done beyond the constitutional competency of Congress." n224 3. Secret and Unauthorized Expenditures to Private Persons To Raise Troops. - The third of Lincoln's apparent statutory transgressions is the least remarked upon but perhaps the most important for our purposes. On April 20, 1861, just eight days after the attack on Fort Sumter, Lincoln authorized naval commandants to purchase or charter, and arm, several steamships for public defense; directed the Secretary of War to authorize two New Yorkers (including the Governor) to make arrangements for the transportation of troops and munitions; and directed the Secretary of the Treasury to advance two million dollars to three New Yorkers - John Dix, George Opdyke, and Richard Blatchford - "to be used by them in meeting such requisitions as should be directly, consequent upon the military and naval measures, necessary for the defense and support of the Government." n225 These expenditures were inconsistent with Congress's appropriations. The private contracts also appear to have violated an existing statute that prohibited the Secretaries of State, Treasury, War, and the Navy from making any contract "except under a law authorizing the same, or under an appropriation adequate to its fulfillment." n226 They were also effected in secret, putatively because Lincoln was afraid the executive branch contained many disloyal employees who could not be trusted in such matters. n227 Notably, Lincoln omitted mention of these expenditures in his July 4, 1861, speech to Congress. They were not publicized until the following April, after the House of Representatives had censured former War Secretary Simon Cameron for, among other things, having involved the government in some of those private contracts. n228 Four weeks after the censure - more than one year after the events took place - Lincoln wrote to Congress to explain that Cameron had acted with the approval of the President and the entire cabinet, all of whom had convened on April 20, 1861 and unanimously decided to take such extraordinary steps. Consistent with his apparent notions of constitutional [\*1003] restraint, Lincoln did not attempt to justify his undisclosed extrastatutory actions on the ground that, like Jefferson before him, he had all along acted only on the assumption that he was doing what Congress would have wanted and that he was happy to have Congress inform him otherwise. He had, after all, kept the matter secret and waited well past the moment of exigency and the return of Congress to even disclose it. Perhaps for that reason, Lincoln confessed that some of these measures "were without any authority of law," but claimed they were justified nonetheless because they were needed to ensure that "the Government was saved from overthrow." n229 Lincoln did not claim that his actions were legal, let alone that he had a constitutional prerogative to disregard Congress's will as expressed in statutory directives. Instead, he confessed to being responsible for "whatever error, wrong or fault was committed." n230 Such a confession of error suggests Lincoln's unwillingness to articulate any notion that wartime decisions are constitutionally committed to the President alone. For if he had rested on that alternative sort of argument (a version of which Fillmore had obliquely hinted at years before n231), Lincoln could have cloaked all of his actions (including these) in the cover of the Constitution. And yet Lincoln did not invoke that argument. 4. Conclusion. - When Lincoln made his speech to Congress on July 4, 1861, he had good reason to believe Congress would ratify most of his decisions. And one month later, Congress did just that, as to virtually all of Lincoln's unilateral conduct other than the suspension of the habeas writ, which it did not address until 1863 (more about which below). n232 But Lincoln certainly did not suggest it was irrelevant whether he would obtain such approval from Congress; on the contrary, he portrayed himself as being subject to the legislature's ultimate determinations. n233 In light of the support and good will he enjoyed [\*1004] in Congress in July 1861, such deference to the legislature was certainly an advantageous posture for Lincoln to assume. But notably, Lincoln did not simply receive whatever authority he requested. As it happened, even after the crisis of April 1861, Congress occasionally enacted statutes that impinged on the President's discretion with respect to the conduct of the war. Although the legislature generally granted Lincoln broad discretion, in some cases Congress thought that he had gone too far in the exercise of war powers; and in other cases, [\*1005] not far enough. The Habeas Corpus Act of 1863 is one example of the former; the Confiscation Act of 1862 is an example of the latter. C. The Habeas Corpus Act of 1863 The one major initiative of Lincoln's that Congress did not immediately authorize in the summer of 1861 was the suspension of habeas corpus. When Congress began a new session in late 1861, some legislators thought it imperative to provide a legal framework for the exercise of this extraordinary power. The result of their work led all three branches to weigh in, in one form or another, on Congress's power to bind the President as to his preferred means of dealing with the enemy. 1. Congress Gives the President Less than He Wants. - Senator Lyman Trumbull, chair of the Senate Judiciary Committee, explained that although Lincoln's unilateral acts were "necessary when Congress had not assembled," once Congress convened "clothed with the power to grant whatever authority may be necessary to crush rebellion, ... we shall be derelict in our duty if we leave our positions here without having regulated by law the action of the Executive." n234 Trumbull proposed to codify, and thus to specify the terms and limitations of, the suspension of habeas that Lincoln had instituted earlier that year. n235 Without such legislation, Trumbull feared, the unregulated exercise of military authority upon citizens would be a "monstrous" prospect "in a free Government." n236 Thus the object of his bill was "to place the action of the Government in crushing this rebellion under the Constitution and the law, ... the most important object that can engage the attention of Congress." n237 Congress did not finally settle on habeas legislation until March 1863, when it passed the Habeas Corpus Act. n238 For the most part, the Act ratified what Lincoln had done. Section 1 of the Act nominally authorized the President to suspend the writ "in any case throughout the United States" whenever in his judgment the public safety might require it. n239 But significantly, sections 2 and 3 cabined some of the authority that Lincoln had been exercising. Those sections directed courts to discharge detainees, other than prisoners of war, from military custody if they were held in states where the administration of the laws had "continued unimpaired" by the war and if a grand jury had failed to indict them after their detention; section 2 also required [\*1006] officers having custody of such prisoners to obey such judicial orders. n240 2. The President Responds and the Supreme Court Weighs In. - Lincoln raised no constitutional objections to the newly restrictive legal framework, but he did construe the exemption in sections 2 and 3 very narrowly. In particular, his Administration construed it so it would not cover "aiders or abettors of the enemy" and all other prisoners who had previously been deemed "amenable to military law," n241 that is, "triable by military tribunals." n242 Three such persons to whom the Administration thought the exemption did not apply were William Bowles, Stephen Horsey, and Lambdin Milligan, U.S. citizens living in Indiana who had been convicted by military commission for offenses that included conspiring to overthrow the government, seizing munitions, and aiding the rebel army. They sought writs of habeas corpus, claiming that they should have been transferred out of military custody and tried, if at all, by the civilian courts that were open and available in Indiana. n243 The Supreme Court did not decide Ex parte Milligan until 1866, after the war had ended and after Lincoln had been assassinated. But although the Court's decision was issued after the guns had fallen silent, the Court plainly viewed the issue as concerning the constitutional war powers of the Executive. The case is most famously recalled for the majority's holding that the detainees had a constitutional right to be released from military custody - that even Congress could not authorize these citizens' military detention and trial, as long as civil courts were open (a question on which the Court divided 5-4). But before reaching that constitutional question, the Court addressed the statutory questions of whether Lincoln had properly suspended the detainees' right to seek the writ of habeas corpus, and, if not, whether their military detention itself conformed to the statute. The availability of habeas during the war would have been no small matter from the perspective of the Commander in Chief, especially with respect to detainees such as Milligan. n244 The Attorney General thus strongly urged the Court to hold both that Congress had afforded the President the detention authorization in question and that [\*1007] the constitutional liberties available to criminal defendants in peacetime were inapplicable in war. In support of the latter argument, he wrote in his brief: After war is originated, ... the whole power of conducting it, as to manner and as to all the means and appliances by which war is carried on by civilized nations, is given to the President. He is the sole judge of the exigencies, necessities and duties of the occasion, their extent and duration. During the war his powers must be without limit, because, if defending, the means of offense may be nearly illimitable; or, if acting offensively, his resources must be proportionate to the end in view - "to conquer a peace." New difficulties are constantly arising, and new combinations are at once to be thwarted, which the slow movement of legislative action cannot meet. n245 In pressing this broad argument about the inapplicability of traditional constitutional liberties (such as the rights to trial by jury, to be afforded a grand jury, and to confront one's accusers) because of the need for executive discretion in war, the government did not express any doubts about Congress's constitutional power to limit that discretion. Notwithstanding the Administration's claim that the Constitution of its own force imposed no such restrictions, its brief did not suggest that the Habeas Act would be unconstitutional if construed to protect the detainees. n246 The Attorney General went on to say that the free hand of the commander that he argued for was "axiomatic in the absence of all restraining legislation by Congress." n247 The Administration [\*1008] even cited approvingly Justice Story's pro-congressional-power language in Brown: "The sovereignty, as to declaring war and limiting its effects, rests with the legislature. The sovereignty as to its execution rests with the President." n248 Such a recognition of congressional power was no problem in Milligan itself precisely because, the government argued, Congress had authorized the President's actions in the case when it provided for the writ's suspension in the 1863 Act. As for the Court, prior to reaching the government's claim about the irrelevance of constitutional protections in wartime, it unanimously rejected the Executive's statutory argument. It held not only that the Habeas Corpus Act of 1863 had denied the President the authority to suspend habeas as to persons such as Milligan (because he was not a prisoner of war as defined by the statute), but also that the Act prohibited the military proceedings against Milligan, and that because civil judicial proceedings had not been commenced against Milligan within the specified period, he was entitled to release. n249 This unanimous holding is itself a strong indication of a general understanding during the Civil War era that the President did not enjoy an unbridled constitutional power to decide how best to prosecute a war, at least when it came to trial and detention of persons not immediately in the theater of combat. In addition, like the Court's decisions in Rasul v. Bush n250 and Hamdan v. Rumsfeld n251 almost 140 years later, n252 and the decision in Little half a century earlier, n253 the case provided further indication of the Court's willingness in war powers cases to construe ambiguous statutory language against the President. At the same time, however, dicta in Chief Justice Chase's concurring opinion represented the first instance in which the claim to a preclusive Commander in Chief power over tactics in wartime had been plainly endorsed in a Supreme Court opinion - a point to which we return at the close of our discussion of this era. n254 [\*1009] D. The Great Congressional Debate over the Confiscation Act of 1862 The Habeas Corpus Act of 1863 is the prime example of a Civil War statute that tempered the exercise of the President's war powers, in a case where Congress thought the Chief Executive was unduly infringing individual liberty. By contrast, one year earlier, Congress had enacted a statute largely animated by the opposite notion - that the President had been insufficiently aggressive in exercising his war powers. The Confiscation Act of 1862, or the Second Confiscation Act (SCA), is a striking example of Congress enacting legislation, in the midst of war, regulating the President's own war powers because of a sharp disagreement with the President about how best to prosecute that war against the enemy. In addition, the debate on the bill in the Senate contains what almost certainly is the most extensive and remarkable public discussion in our history concerning whether and to what extent Congress may enact legislation to regulate the exercise of the President's war powers. Of further interest is Lincoln's decision not to raise any constitutional war powers objection to the legislation. 1. The Run-up to the First Confiscation Act. - Soon after the war began, it became clear that the conflict would not be short-lived, and many in Congress began to question the conciliatory policies of the Union. At least at first, Lincoln preferred a measured response, with a minimum of provocation. He wished to ensure a peaceful reconciliation at war's end and, perhaps more importantly, thought it essential that the border states not be given any incentive to secede. There was, however, a movement among the Republicans in Congress (Radical and otherwise) to direct the war effort in a more aggressive manner. This relatively large faction believed the legislative branch possessed quite extensive war powers. Its members began to focus attention on a series of proposed statutes to seize and confiscate rebel property, and to deny rebels their slave labor. The initiative was fueled not only by hostile Southern actions, but also by the increasingly widespread impatience with the manner in which Lincoln was prosecuting the war. n255 2. The First Confiscation Act and the Fremont Affair. - The First Confiscation Act, enacted in the summer of 1861, authorized confiscation of rebel property (including slaves) that had actually been used to prosecute the war or to aid the insurrection. n256 Lincoln is reported to have signed the Act reluctantly, fearing that it would only prompt further rebellion. n257 His Administration implemented it only sporadically. [\*1010] Reflecting a similar concern, Lincoln required Army Major General John C. Fremont to temper his order confiscating all property of persons found in arms against the United States in Missouri, including an emancipation of their slaves. Although Fremont's action, which went beyond the terms of the First Confiscation Act, found a great deal of support in many segments of the North, the President argued that it would "alarm our Southern Union friends, and turn them against us - perhaps ruin our rather fair prospect for Kentucky." n258 When Fremont failed to modify his order as Lincoln requested, Lincoln responded by personally amending the order to go no further than the First Confiscation Act allowed. n259 This pleased Democrats and border-state Unionists, but abolitionists such as Senators Charles Sumner and Benjamin Wade saw it as a lost opportunity, and as yet further evidence that Lincoln would not be aggressive enough in prosecuting the war. n260 3. The Second Confiscation Act. - With Northern newspapers clamoring for more assertive prosecution of the war, Congress reconvened at the end of 1861. A sizeable congressional contingent was now committed to bringing harsher measures to bear against the enemy, spurred in part by the Fremont affair. Most famously, Congress established the Joint Committee on the Conduct of the War to oversee the Union war efforts. The committee convened 272 meetings in its four-year existence, keeping a fire lit under Lincoln and the Union army and, in a sense, micromanaging the conduct of the war by use of the threat of negative publicity and exposure of malfeasance, rather than through statutory or other formal enforcement mechanisms. n261 Intrusive as the committee was, many of the Republicans in Congress wished to go further than the mechanisms of investigation alone [\*1011] would allow. n262 And so the first substantive bill introduced in the Senate of the 37th Congress was a stricter confiscation law. The proposed statute took several forms in the many months it was debated in Congress, but all versions of the proposed statute contained one basic requirement - that the President seize certain categories of Southern property. In the final bill, enacted in July 1862, the power to seize was expressly described in the bill as an incident of war, an exercise of traditional belligerent authority undertaken for the purpose of prosecuting the conflict. It provided that "to insure the speedy termination of the present rebellion, it shall be the duty of the President of the United States to cause the seizure of all the estate and property, money, stocks, credits, and effects of [six classes of rebels], and to apply and use the same and the proceeds thereof for the support of the army of the United States." n263 The Act further included an emancipation provision in section 9, which declared that certain categories of slaves of armed rebels - those who would escape and take refuge with Union forces, those who would come under the control of the U.S. government, and those found in any territory occupied by U.S. forces - "shall be deemed captives of war, and shall be forever free of their servitude, and not again held as slaves." n264 4. The Debate Over the Second Confiscation Act. - The bill was under consideration for all of the second session of the 37th Congress, and "an amazing volume of oratory was poured forth in its discussion." n265 In addition to disputation about the wisdom of the legislation, legislators also addressed several constitutional issues. These ranged from whether the proposal conflicted with international laws and thus exceeded congressional powers; n266 to whether the Constitution [\*1012] permitted Congress to free slaves, even as an incident of war; n267 to matters concerning Fifth Amendment rights to due process and just compensation; and even to whether a permanent dispossession of property was consistent with the guarantee in Article III that "no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted." n268 But for all the constitutional debate the Second Confiscation Act sparked, and for all the scholarly parsing of it that has occurred in recent years, there has been remarkably little consideration of the discussion of the constitutional issue that is our immediate concern. Congress also engaged in a separation of powers debate concerning not whether confiscation and emancipation were permissible war tactics, but instead which branch of the federal government had ultimate control over the question of whether such tactics were to be used. n269 The issue first arose in the House of Representatives, in comments by William Sheffield of Rhode Island in late January 1862. Sheffield reasoned that if the confiscation were permissible under the laws of war, it would be for the President, not Congress, to determine whether to exercise that belligerent right, because "the execution and direction of a war is with the President." n270 Although the President was bound by the laws of war, in Sheffield's view, Congress did not have any right to instruct the Executive how to discharge that duty. n271 On this view, Congress could no more require him to confiscate enemy property than it could "pass a law to-day directing the President to fight the enemy to-morrow at Manassas." n272 From there, the vast majority of the separation of powers debate took place in the Senate. The next day, Senator Edgar Cowan of Pennsylvania carried Sheffield's theme much further, broadly asserting that Congress could not determine when, where, or how the army should fight, and averring that the contrary view was "monstrous." n273 [\*1013] Cowan's themes were taken up in much more detail, and with much greater erudition and at least equal passion, in late June 1862, by Republican Senator Orville Browning, Lincoln's close ally and friend from Illinois. Like Lincoln, Browning thought the confiscation measure was unwise, fearing that it would prolong the war. Because confiscation of enemy belligerents' property was, Browning argued, "an object which is now fully within the constitutional power of the Executive," n274 it was not something that Congress could compel. There is no indication that any Senator other than Cowan supported Browning's constitutional argument during the late June debate. Several Republican Senators (Wade and Sumner among them), however, subjected it to a withering counterargument in support of the notion that "Congress may make all laws to regulate the duties and the powers of the Commander-in-Chief." n275 After canvassing in great detail the context in which the Commander in Chief Clause was framed, for example, Senator Jacob Howard of Michigan emphasized that the title "Commander-in-Chief" could not possibly give the President a plenary power to control war unburdened by statutory constraint. Washington was designated "Commander-in-Chief" during the Continental Congress, and yet Congress plainly had the power to control his military maneuvering, Howard emphasized. n276 Nor, said Howard, had he found either "in the Federal convention, [or] in any State convention, one word, intimation, or hint, from any speaker in any one of these numerous bodies, affording a shadow of support for the claim now set up." n277 Browning responded that the example of General Washington proved exactly the opposite point. He contended that it was "the continued and repeated blundering and bungling of military operations when controlled and governed by Congress that influenced the convention to ignore the doctrine, and separate forever the direction of the Army from the control of Congress." n278 Browning's ingenious argument was that the Framers subjected the chief commander to some constraints - but only those imposed by the power that appointed him to be Commander in Chief. Under the Articles of Confederation, that appointing authority was the Continental Congress; after 1789, it was the Constitution itself. Thus, in such role the President [\*1014] "is subject to all the restraints that the Constitution imposes upon him, and he is subject to none others." n279 Most significantly for our purposes, Browning's principal tack was the syllogism that is so common in the modern debates - to reason outward from the presumption that Congress could not direct the Commander in Chief with respect to the day-to-day, specific operational and tactical decisions on the battlefield. If Congress could not regulate such "active operations in the field" - could not "direct the movements of the Army" - Browning reasoned, it necessarily followed that neither could Congress require the President to confiscate enemy property, or to perform any of the other wartime functions traditionally determined by the Commander in Chief. n280 Senator Howard and others responded by rejecting the premise that operations in the field cannot be regulated by statute. Howard did not disagree with Browning that it would be absurd, and counterproductive, for Congress to enact such laws micromanaging the details of military conflict. n281 He explained, however, that this background presumption could be overcome in order to check military folly, or worse, "irretrievable disaster." n282 Howard explained why Browning's view could lead to disastrous results: Should the President, as Commander-in-Chief, undertake an absurd and impracticable expedition against the enemy, one plainly destructive of the national interests and leading to irretrievable disaster, or should he basely refuse to undertake one, or, having undertaken it, insist upon retreating before the enemy, and giving over the war to the manifest prejudice of the country, or should he treacherously enter into terms of capitulation with the manifest intent to give the enemy an advantage, would the Senator rise in his seat here and insist that Congress has no power to interpose by legislation and prevent the folly and the crime? And yet his doctrines as here announced would impel him to exclaim, "the country is without remedy; Congress is powerless; the Constitution furnishes no means to arrest the approaching ruin; we must not travel out of the Constitution; and we must submit our necks to the yoke. It is the will of the Commander-in-Chief, and that, and that only, in such a case is the Constitution." Sir, this new heresy deserves rebuke. n283 Browning was taken aback by the forthrightness of Howard's argument. He praised his adversary for "meeting the question in the most direct and manly terms." n284 But he insisted the legislature was [\*1015] offered only an all-or-nothing choice: disbanding the army. Browning argued: When the Army is raised, when the Army is supported, when it is armed, when we are engaged in war, and it is in the field marshaled for the strife, I deny that Congress, any more than the humblest individual in the Republic, has any power to say to the President, do this or do that; march here or march there; attack that town or attack this town; advance to-day and retreat to-morrow; give up a city to be sacked and burned; shoot your prisoners. n285 5. Lincoln's Response. - In the end, Browning's view did not prevail. The Senate and the House passed the Second Confiscation Act, with Browning one of only three Republican Senators to vote against it. n286 Browning urged Lincoln not to sign the bill because "his course upon this bill was to determine whether he was to control the abolitionists and radicals, or whether they were to control him." n287 Although Lincoln submitted a veto statement to the House offering several objections to the bill, including some of a constitutional nature (dealing with the Treason and Due Process Clauses), n288 he conspicuously declined to raise any objections along the lines of Browning's Commander in Chief argument. Indeed, Lincoln eventually signed the bill, after Congress passed an "explanatory" resolution clarifying that the law would be only prospective and that the forfeiture of real property would not extend beyond the offender's natural life n289 - restrictions that tempered the bill somewhat but still left it, on its face, stricter than its predecessor. This compromise did not address Browning's separation of powers concern. But it did make the bill more palatable from the Administration's perspective. In fact, to the chagrin of the Radical Republicans, n290 the Act proved difficult to enforce, partly because the Attorney General pointedly refused to offer guidance on its meaning to district [\*1016] attorneys. n291 Nevertheless, the bill was, as Browning knew, a remarkable example of a law regulating the discretion of the Commander in Chief. It dealt specifically with a tactic to be applied directly to the enemy. It imposed not a restriction, but an affirmative obligation on the President, because Congress perceived him as being insufficiently aggressive. And it was enacted not as a background, framework statute to govern all wars, but in the midst of a particular war, as a corrective to what Congress saw as an inadequate executive policy toward a particular foe. Nevertheless, as far as we have been able to discern, no executive branch official - including the President and his Attorney General - contended at any point in the extensive debate that the Act unconstitutionally interfered with the President's constitutional war authority. n292 [\*1017] E. Regulating Military Dismissals and Tribunals As the war was drawing to a close, just before Lincoln's assassination, Congress continued in its assertive posture. It enacted a law that gave a court-martial the power to rule that the President's dismissal of a military officer was "wrongful[]," and to reverse that dismissal. n293 Lincoln did not object to the bill, and when, the next year, the Secretary of the Navy asked Attorney General Henry Stanberry for a legal opinion on the measure, Stanberry wrote that it fell "within the power conferred on Congress, by the fourteenth clause of section 8 of article I of the Constitution, "to make rules for the government and regulation of the land and naval forces.'" n294 He explained that it "proceeds upon an admission that the power of dismissal belongs to the President" and is "simply a regulation which is to follow a dismissal, providing, in certain contingencies, for the restoration of the officer to the service, and leaving the dismissal in full force if those contingencies do not happen." n295 To similar effect, in July 1865, Attorney General James Speed issued an opinion dealing with the question of whether the Lincoln assassination conspirators could be tried by a military commission created by presidential decree. n296 Speed explained that in the absence of a statute regulating such tribunals, the President could establish them, so long as they complied with the laws of war. n297 But he conceded at the outset that the President's authority was interstitial and secondary to Congress's: "Congress may prescribe how all such tribunals are to be constituted, what shall be their jurisdiction, and mode of procedure." n298 [\*1018] This ruling would presage the Supreme Court's recent holding to the same effect in Hamdan. n299 F. After Lincoln: The Emergence of the Preclusive Power Argument Senator Browning's view of a preclusive Commander in Chief prerogative - a view that in 1862 appeared idiosyncratic and disfavored - received support after the war from two important sources. The first was a concurring opinion of the Chief Justice of the United States, Salmon P. Chase. The second was a prominent constitutional treatise that elaborated on the principle set forth by the Chief Justice. 1. The Chase Dictum. - The first source of support, Chief Justice Chase's concurrence in Ex parte Milligan, was joined by three other Justices. n300 As explained above, the Court unanimously held in Milligan that Congress had limited the manner in which the President could prosecute the war. n301 Chief Justice Chase's concurrence, in particular, was an even stronger defense of the breadth of Congress's war powers. n302 Nevertheless, in the midst of his paean to Congress's "power to provide by law for carrying on war," the Chief Justice added the dictum that such congressional power "necessarily extends to all legislation essential to the prosecution of war with vigor and success, except such as interferes with the command of the forces and the conduct of campaigns. That power and duty belong to the President as commander-in-chief." n303 [\*1019] Whatever the motivation for this brief aside, n304 it was the first judicial expression of the theory of the substantive Commander in Chief preclusive power that is now the centerpiece of the Department of Justice's defense of the Bush Administration's views. n305 Part of Chief Justice Chase's aside was also repeated with favor as dicta in Hamdan's majority opinion, n306 and it is reflexively endorsed by many contemporary war powers scholars. n307 2. Pomeroy's Treatise. - In its own time, the dictum in Chase's concurrence received a strong endorsement in one of the leading legal treatises of the day, Professor John Norton Pomeroy's An Introduction to the Constitutional Law of the United States. The first edition of Professor Pomeroy's treatise in 1868 used the dictum in the Chase concurrence as the jumping-off point for a remarkable exegesis on the limits the Commander in Chief Clause imposes on Congress's war powers. n308 Importantly, Pomeroy's basic understanding of Article I and II powers was, in a fundamental respect, contrary to the modern understanding as articulated in Justice Jackson's Steel Seizure opinion. Pomeroy, like Senator Browning in the Second Confiscation Act debate before him, was partial to the alternative separation of powers model of the time, which insisted that legislative and executive functions were rigidly separated, rather than overlapping. n309 This conceptualization [\*1020] led Pomeroy to identify "two classes of powers and duties" of the President that "should be kept distinct." On the one hand, there was the President's duty to faithfully execute statutory enactments, where he acts not as commander but "as a supreme civil magistrate." On the other, there was the President's role as Commander in Chief, in which rather than executing positive laws, "he calls other attributes into action." n310 In the latter category, Pomeroy reasoned, statutes cannot bind the President. n311 Pomeroy cited virtually no authority, other than the dictum in Chief Justice Chase's concurrence, n312 in support of the exquisite distinctions that he drew between these two types of presidential functions. Pomeroy relied on his own understanding of the "policy of the Constitution," based on what he assumed was "felt" at the Founding, that "active hostilities, under the control of a large deliberative body, would be feebly carried on, with uniformly disastrous results." n313 Accordingly, reasoned Pomeroy (again, without the benefit of a single citation), "all direct management of warlike operations, all planning and organizing of campaigns, all establishing of blockades, all direction of marches, sieges, battles, and the like, are as much beyond the jurisdiction of the legislature, as they are beyond that of any assemblage of private citizens." n314 Pomeroy then proceeded to attempt to explain away Congress's seemingly overlapping Article I war powers. So, for instance, he reasoned that Congress's power to make "Rules concerning Captures on Land and Water" entitles Congress to determine only what the President may do once a capture is made, rather than who, or what, or when to capture. n315 Likewise, Pomeroy concluded that Congress's powers to raise and support armies and navies give the legislature the authority to determine the size, nature, and conditions of operation of [\*1021] the army and navy, on numerous matters large and small, n316 but that no "particular statutes" passed pursuant to these powers "can interfere with the President in his exercise of [the command of the forces raised]." n317 Similarly, Pomeroy argued that Congress's power to enact "necessary and proper" legislation "must be supplementary to, and in aid of, the separate and independent functions of the President as commander-in-chief; they cannot interfere with, much less limit, his discretion in the exercise of those functions." n318 Finally, and most revealingly, Pomeroy understood Congress's Article I power to make rules for the regulation and government of the armed and naval forces to permit Congress to do a great deal n319 - even to go so far as to "adopt a system of tactics" n320 - but only if it left the President free, even in peacetime, to "make all dispositions of troops and officers, stationing them now at this post, now at that"; to send naval vessels to "such parts of the world as he pleases"; and to distribute arms, munitions, and supplies in locations and quantities of his choosing. n321 In wartime, Pomeroy explained, the limits were even more severe, such that the statutory rules governing the military could not "interfere in any direct manner with the actual belligerent operations"; the President as Commander in Chief had to be free to conduct "warlike movements." n322 Pomeroy attempted to reconcile these seemingly irreconcilable positions by appealing to a distinction between rules, as such, which Congress could impose, and "exceptional, or transitory mandates," which were outside Congress's authority. n323 [\*1022] 3. Political Branch Practice in the War's Aftermath. - Notwithstanding these prominent expressions of support for a preclusive Commander in Chief power, the Reconstruction Congress was, if anything, more intent on asserting its power to control the conduct of military operations. Of course, there was, strictly speaking, no war occurring at the time, and so the statutory limits it enacted did not deal directly with the conduct of military campaigns against enemy forces. But neither was Reconstruction a period fairly characterized as peacetime. Thus, Congress's regulation of the command authority, chiefly by way of limits on the command structure of the military, was striking. Given the divide between the Congress and the President that resulted from Andrew Johnson's ascension to office, the interbranch battle for control over the military reached new levels of intensity, culminating in the new President's impeachment, though not conviction. But well before that climactic moment, the Republican-controlled Congress enacted several statutes designed to limit President Johnson's ability to control Reconstruction, at least two of which implicated his Commander in Chief authorities directly. n324 In each case, Congress cut back on the absolute discretion the President previously enjoyed as Commander in Chief to dismiss officers from the military service. n325 The Act of July 13, 1866, forbade dismissals of army and navy officers in peacetime without a sentence by court-martial. n326 This statute was in some respects a companion to the 1865 law that had given courts-martial the authority to reverse presidential orders of dismissal. n327 Much more significantly, the next year Congress enacted another statute - a rider to an appropriations bill that plainly shows Congress had not taken Chief Justice Chase's dictum to heart. The Act required that all orders relating to military operations by the President or Secretary of War be issued through the General of the Army (that is, Ulysses S. Grant), who could not be "removed, suspended, or relieved from command," except at his own request, without [\*1023] Senate approval. n328 The rider also fixed the General's headquarters in Washington, D.C. (where he would be more accessible to the legislature); prescribed that orders or instructions relating to military operations issued contrary to the statutory method be deemed void; and provided that any officer of the army who issued, knowingly transmitted, or obeyed any orders inconsistent with the provisions of the rider, would be subject to imprisonment. n329 President Johnson signed the bill reluctantly, protesting that "in certain cases [it] virtually [deprived] the President of his constitutional functions as Commander in Chief of the Army" and was therefore "out of place in an appropriation act." n330 Then, on February 22, 1868, in a private conversation with Army Major General William Emory, Johnson expressed the view that the rider was unconstitutional. This conversation became the basis of the Ninth Article of Impeachment against Johnson, in which the House accused Johnson of trying to thereby induce Emory, as Commander of the Department of Washington, to disregard the law by acting upon Johnson's direct orders, without Grant's participation. n331 President Johnson's constitutional doubts about the March 1867 Act were probably well-taken, even on the narrowest reading of the Commander in Chief Clause, which recognizes what we have called the "superintendence" prerogative - namely, that because the President is the Commander in Chief, discretionary decisions about how to use the armed forces (at least as to certain military functions) must be subject to his control, and that no other person may be given command authority that supersedes the President's. By requiring that all orders emanate from General Grant, and by forbidding Johnson from removing Grant from office, the act effectively meant that Grant, and not Johnson, was at the apex of the chain of command, and that Johnson could not effectuate his own orders in cases in which Grant disapproved. n332 This striking shift of military superintendence away from [\*1024] the President to a subordinate official was in sharp conflict with the prior eighty years of constitutional understandings of the limits of congressional authority over the Commander in Chief. G. Conclusion Precisely because the legislation just described was so aggressive, going so far as to all but displace the President as Commander in Chief, it is hard to review the evidence from the Reconstruction Era, Chief Justice Chase and Professor Pomeroy notwithstanding, as a defining moment in which the notion of a substantive preclusive Commander in Chief authority finally won widespread acceptance. Instead, the period running through the Civil War and its aftermath is largely continuous with what came before. To be sure, Lincoln asserted theories of necessity in sweeping ways, leaving one with a sense of just how much an Executive can achieve unilaterally in a moment of exigency. But the basic settlement to that point, in which the Executive assumed a posture of subjection to congressional control over war powers, was in some respects reinforced in the course of his doing so. In acceding to the Second Confiscation Act, President Lincoln prudently refused to antagonize a legislature that was clearly aroused. But it is by no means evident that Lincoln adopted merely a rhetorical stance in acknowledging congressional control. After all, Lincoln confessed unlawful actions to the Congress early on in the war, and later accepted legislation that he plainly disliked and that purported to direct him to deploy an actual tactic - the seizure of enemy property - that he had long declined to exercise. He did so, moreover, even as his ally Browning urged him to lay down a marker precisely because Congress was seized with as broad a view of legislative war powers as one could imagine. And yet, as much as this era suggests a deep wariness about the acceptability of preclusive executive war powers, it also, by the end, marked the first time in which the notion of a preclusive Commander in Chief power had won the kinds of endorsements that might suffice to make it a viable candidate for inclusion in the conventional understanding [\*1025] of the constitutional plan. Whether that candidacy would prove successful was still to be determined. IV. From Post-Reconstruction Through the Geneva Conventions of 1949 When Professor Pomeroy published his treatise in 1868, his expansive and detailed theory of the Commander in Chief's prerogatives was fairly unique. n333 By the end of the next half-century, it was no longer. Legal writers increasingly assumed - without citing much by way of authority - that there were significant limits on Congress's power to enact statutes imposing substantive restrictions on the President's command of the army and navy. n334 Indeed, by the end of the [\*1026] First World War, Pomeroy's basic analytic structure was dogma for many scholars. n335 This new wisdom was reflected most clearly in Professor Clarence Berdahl's influential 1920 volume, War Powers of the Executive in the United States. Berdahl asserted that the President alone is to decide "how the war is to be conducted" - a "despotic power," to be sure, but one that "nevertheless must be confided by a sound political science to the President." n336 [\*1027] Throughout this period, however, the emergent theory of presidential exclusivity remained more an article of faith of academic commentators - and one whose practical implications for existing statutes and treaties were rarely if ever considered - rather than an Executive position articulated in response to real-world circumstances. That was true even though the era witnessed two world wars, a host of lesser military engagements, and the enactment of a mass of new statutory and treaty-based regulation of the military, which grew to be as complex and detailed as most other parts of federal law. Indeed, today Title 10 of the United States Code, and several war-related treaties, establish a comprehensive legal framework for the organization and conduct of the armed forces. Although many of these laws were and are targeted at the peacetime organization and deployment of the armed forces, at least some of the statutes enacted, and treaties ratified, during these years threatened to place considerable constraints on the Commander in Chief's treatment of the enemy. n337 Still other regulatory statutes specifically countermanded the President's military designs, particularly during the Administrations of Theodore and Franklin Roosevelt. But notwithstanding the appearance of these seemingly significant legislative obstacles, the executive branch (with one passing exception in a Supreme Court oral argument during World War II) continued to adhere to the long-prevailing political branch practice, in accord with Founding-era assumptions. n338 [\*1028] A. The Increasing Importance of Treaty-Based Constraints As we have stressed throughout our survey, in our early constitutional history there was a general consensus that Presidents were constrained in their conduct of war by the laws and usages of war, even in the absence of statute. That same understanding remained in place in this latter period. n339 The Lieber Code - Professor Francis Lieber's great codification of the laws of land warfare - for instance, remained the standard instruction for the army during the Spanish-American War, and became such a revered source of guidance at West Point that Colonel Harry Smith referred to it as "our Bible in such matters ever since the Civil War." n340 Until very recently the armed forces professed to abide strictly by the laws of armed conflict. n341 What is more, the nation's chief commanders were increasingly subject to an additional set of treaty-based constraints on their actual conduct of war. Most of those treaties were multilateral instruments involving the so-called jus in bello, or the conduct of a belligerent state during war, such as the 1907 Hague Conventions (and the 1925 Geneva Protocol to the Hague Conventions). n342 The Hague rules were supplemented by even more stringent restrictions in the Geneva Conventions of 1929 and 1949. n343 [\*1029] Indeed, certain articles of the Geneva Conventions restrict what can only be described as war tactics, n344 while others prescribe rules for the proper treatment of prisoners of war and other detainees in armed conflicts. n345 These treaty-based restrictions on the President's military options would appear to raise the same issues with respect to the Commander [\*1030] in Chief Clause as do statutes - namely, whether and when they might impinge impermissibly on some core prerogatives of the President. n346 Yet as far as we are aware, no one in the executive branch or the Congress during this period publicly argued that the Commander in Chief has a constitutional prerogative to act in derogation of this wide array of treaty-based restrictions on the conduct of war. Nor was any theory proposed during this time that might explain why any preclusive power the President might enjoy as Commander in Chief would be less applicable to treaties than it is to statutes. n347 Although we do not independently address the constitutional issues raised by treaty restrictions in this Article, it is important to recognize that these additional, externally imposed constraints were fast being put in place, and apparently without occasioning any constitutional objections. n348 [\*1031] B. From Reconstruction to the Progressive Era Congress continued to impose statutory restrictions respecting the armed forces during the interwar period. None, however, provoked assertions by presidential administrations of preclusive executive war powers of the kind that the broad statements of Professors Pomeroy and Berdahl seemed to endorse. That was true even when statutes purported to regulate the mechanisms of promotion within the military, and when bills proposed to limit the use of military power for domestic law enforcement. Nevertheless, there were few statutory interventions in these years implicating wartime strategy and tactics such as those that occasioned constitutional discussion in the Quasi-War with France, or in the Civil War. 1. Statutory Regulations of Appointment, Promotion, and Dismissal. - As a Court of Claims decision from the end of the nineteenth century indicates, there was a general acceptance of the principle that the Commander in Chief's superintendence powers were inviolable. n349 But executive administrations of this era understood that this preclusive power of superintendence still afforded Congress substantial room to regulate the processes of military hiring, promotion, and discharge - even when such concessions seemed at odds with Pomeroy's assumption that there are no overlapping war powers. As noted above, Attorney General Stanberry opined in 1866 that it was constitutional for a statute to give courts-martial the power to rule that the President's dismissal of a military officer was "wrongful," and to reverse that dismissal. n350 In 1882, Attorney General Benjamin Brewster addressed the mirror-image question: he concluded that the President could not annul a court-martial's prior judgment that a commissioned officer should be cashiered and forever disqualified from holding federal office (a judgment that had at the time been confirmed by the President, in accord with statutory procedure), nor nominate the cashiered officer to the Senate for restoration to his former rank, where such reconsideration was contrary to statutory procedures. n351 In between these two opinions, Attorney General George Williams in 1873 exhaustively canvassed the history of both executive branch regulations pertaining to appointments and promotions in the [\*1032] military service, and statutory treatment of the same subjects. He concluded that although those functions are within the President's power in the absence of statutory regulation, there was a longstanding consensus between the political branches that Congress has significant superseding authority over the subject. n352 2. Regulations of the Use of Military Force. - We have already seen how the legislative impulse to regulate the President's use of force shifted course in the Civil War. Some statutes were designed to temper its use, while others sought to require it. In the late 1870s, Southern Democrats, resentful of the use of the federal military in the Reconstruction Era, were plainly in the tempering mode. They prevailed upon Congress to approve proposals restricting the use of the army for purposes of domestic law enforcement, thereby setting the stage for a possible executive branch assertion of the preclusive executive war powers theory. But no such argument was made. The most famous such restriction was the Posse Comitatus Act, which became law in 1878. n353 At the time of its enactment, as today, [\*1033] the statute had only a modest impact on the President's ability to use the army for law enforcement purposes, because other laws - most importantly, the 1807 Insurrection Act n354 - expressly authorized the President to use the armed forces in case of domestic uprisings. President Hayes did, however, veto at least two bills in 1879 that would have further limited the use of the military for domestic law enforcement. Those bills would have prohibited the use of federal armed men, including from the military, to keep "peace at the polls," except where necessary to repel armed enemies of the United States. Hayes's first veto statement was focused on the bill's restriction on the use of civil authorities to enforce election laws. n355 The limitation in the second bill, however, was confined to the use of military forces at polling places. Hayes's veto message called that limit "a dangerous departure from long-settled and important constitutional principles." n356 This objection might be viewed as a variation on President Fillmore's earlier constitutional objection to the dispersal requirement of the Insurrection Act n357 - an argument that the restriction would eviscerate the President's ability to exercise his duty to take care that federal law at election sites was enforced. "Under the sweeping terms of the bill," Hayes wrote, "the National Government is effectually shut out ... from the discharge of the imperative duty to use its whole executive power whenever and wherever required for the enforcement of its laws at the places and times when and where its elections are held." n358 Notably, however, Hayes did not make any mention of the preclusive Commander in Chief argument that Fillmore had included, albeit tentatively, some decades earlier. The gist of his argument was, instead, that Congress was putting the President to an impossible task: instructing him to take care that federal election laws were enforced, while denying him the necessary means of performing that duty. n359 [\*1034] The executive branch in this period does not otherwise appear to have embraced Pomeroy's model of nonoverlapping constitutional war powers. President McKinley, for example, asserted authority as Commander in Chief to establish a government in the Philippines in the context of the Spanish-American War. In doing so, however, he conceded that such a power would be valid only unless and until Congress acted, a balance the Supreme Court later confirmed. n360 C. Political Branch Practice from 1900 to 1939 In the course of a Senate debate in 1909, Senator Isidor Rayner referred offhandedly to a colleague's observation that "the President has frequently asserted, that as Commander in Chief of the Army and Navy he is not subject to the laws of Congress." n361 It may be that the President did so in private conversations with Senators or Representatives but, if so, we have found no evidence of that. n362 To be sure, throughout this period, as in most other eras, there were occasional debates in Congress about the extent to which legislation could be enacted to control the discretion of the Commander in Chief. n363 The executive [\*1035] branch, however, does not appear to have asserted the theory that scholars such as Professor Berdahl and others took to be settled. Nor did Congress act during this time as if it were the controlling constitutional rule. 1. The Theodore Roosevelt Presidency. - Perhaps the most assertive President of this age, Theodore Roosevelt, expressly conceded Congress's ultimate control over executive powers even as he set forth his expansive "stewardship" theory of the presidency. Inspired by the precedents of Jackson and Lincoln, Roosevelt asserted vast indepenent executive powers to act for the betterment of the nation in the absence of clear statutory authority, from intervening unilaterally in Cuba and Santo Domingo to building the Panama Canal. n364 But Roosevelt was careful to emphasize that he was ultimately bound by positive legislative enactments. n365 Although Roosevelt did not refer directly to executive war powers in confining the scope of his stewardship theory, he complied with statutory limits imposed even in the military context, and did so even though such limits appeared inconsistent with the broader theory of preclusive Commander in Chief powers that was fast gaining acceptance among academics. Roosevelt was clearly enamored of his navy, sending the "Great White Fleet" off on an unannounced around-the-world tour near the very start of his Administration. When news of the venture leaked out, there was a move in Congress to restrict appropriations needed to continue the tour due to a fear that the exercise would antagonize Japan. Roosevelt claimed no power to disregard such a funding curtailment, arguing only that he already had the money from prior appropriations and daring Congress to "try and get [the fleet] back." n366 Roosevelt confronted a much more serious legal problem two years later, again with respect to Congress's control over the navy. Having concluded that navy ships should be exclusively manned by naval officers, [\*1036] the President issued an executive order restricting the Marine Corps to on-shore bases. n367 Congress, however, cut off this initiative by enacting a law providing that no part of an appropriation for the Marine Corps could be expended unless there were at least eight Marines for every hundred navy enlisted men serving on all battleships and cruisers. n368 The bill occasioned an extensive war powers debate in Congress, perhaps the most significant one since the Second Confiscation Act. The opposition to the legislation was led by Senator William Borah of Idaho. Although Borah was an isolationist who had a very narrow view of the President's independent power to send troops abroad without congressional approval, n369 he argued on several occasions that Congress had limited authority to restrict the President's assignment of troops when doing so was within the President's constitutional power. n370 His opposition to the Marines-on-ships bill was representative of his position. Borah thought the bill would be unconstitutional because although Congress can raise, support, and regulate an army, it cannot "command" it, and therefore "Congress has not the power to say that an army shall be at a particular place at a particular time or shall maneuver in a particular instance." n371 Borah conceded that "Congress could undoubtedly previously establish a rule and regulation by which the President would be controlled in these matters," but he resisted the notion that Congress could second-guess a decision that the President had already made about the use of troops. n372 Senators Albert Cummins and Joseph Dixon briefly defended Borah's position, n373 but Senators Rayner, n374 Henry Cabot Lodge, n375 [\*1037] Eugene Hale, n376 Henry Teller, n377 and, somewhat more equivocally, Senator Charles Fulton, n378 all questioned or challenged it. Rayner explained that although Congress did have Article I powers to control the President's decisions with respect to troops, this did not mean the President was entirely at the whim of Congress, because the power of the veto would prevent much regulation contrary to the wishes of the Commander in Chief. Quoting a leading authority on courts-martial, he explained that "so contracted is the actual authority of the President that, but for the protective power of his qualified veto, his command might be so restricted by legislation as to destroy its utility." n379 Senator Hale added that, as a practical matter, it is "undoubted" that Congress has the power "not to abandon everything in the conduct and regulation of the army and the navy to the President, but to establish a rule that shall for the time override it." n380 In the end, Congress resolved this debate by choosing to regu-late - just as it had resolved the earlier debates over the constitutionality of the Second Confiscation Act and the force-restricting measures at issue in the Quasi-War with France. This is not, of course, conclusive evidence of the constitutional understanding that prevailed in this period. But it is significant that President Roosevelt, on his next-to-last day in office, signed the bill, apparently without objection. Moreover, as we explain below, the Attorney General in the Taft Administration thereafter formally opined that the Marines-on-ships requirement was constitutional. 2. Early Twentieth-Century Opinions of the Attorney General. - Despite the constitutional views of Senator Borah, President Taft's Attorney General, George Wickersham, concluded in his formal opinion on the Marines-on-ships legislation that he had "no doubt of the constitutionality [\*1038] of the provision." n381 "Inasmuch as Congress has power to create or not to create, as it shall deem expedient, a marine corps," he explained, "it has power to create a marine corps, make appropriation for its pay, but provide that such appropriation shall not be available unless the marine corps be employed in some designated way." n382 The next year, Attorney General Wickersham similarly concluded that where a series of statutes had prescribed that a floating dry dock be located at the naval reservation in Algiers, Louisiana, the President did not have authority as Commander in Chief to move that dry dock to the naval station in Guantanamo, Cuba, even where the Executive determined that the dock would be better adapted to fulfill its object if it were moved. n383 Wickersham reaffirmed this view at the end of the Taft Administration. n384 And later that same year, President Wilson's Attorney General, future-Justice James Clark McReynolds, opined that a navy regulation expressly approved by President Wilson, which would have permitted the commandant of the Marine Corps to determine the station and duties of Marine Corps "staff," was invalid because it was inconsistent with a legislative expectation, implicit in a statute, that the staff would have certain functions and duties that could only be performed at headquarters in Washington. n385 [\*1039] 3. (Former) President Taft Weighs In. - There was one notable exception in this period to what seemed to be the prevailing view in Congress and the executive branch. It came from what might be an unexpected source: former President William Howard Taft, writing as a Yale Law Professor. In 1915, two years after he left the White House and six years before he would join the Supreme Court, Taft gave a series of lectures at Columbia University that are commonly recalled for their rejection of Roosevelt's expansive "stewardship" theory of the presidency. Taft expressed a much less capacious view of the President's inherent powers to act unilaterally. n386 But while this rebuke of Roosevelt's theory as an "unsafe doctrine" n387 was the principal theme of his Columbia lectures, Taft also briefly addressed the question of what Congress could do to control the more narrowly defined constitutional powers that the President did enjoy. For the most part, Taft acknowledged Congress's broad authority, writing that "one of the chief functions of Congress" is to "fix[] the method in which Executive power shall be exercised." n388 Like McKinley, for instance, Taft appeared to believe that although the Commander in Chief could establish rules for governance of occupied [\*1040] territories, that power was provisional, and could be superseded by statute. n389 Moreover, Taft assumed that Congress could, pursuant to the Rules and Armies Clauses, provide by law a rule of eligibility for promotion in the army and navy. n390 He did, however, identify certain limits: Congress could not, for example, attempt to prevent the President's use of the army to "defend the country against invasion, to suppress insurrection and to take care that the laws be faithfully executed." n391 More to the point, Taft wrote that it is the President "who is to determine the movements of the army and of the navy." n392 In his lectures, Taft suggested two ways in which Congress might impermissibly impinge on this asserted discretion to determine troop movements. First, Congress could not place that discretion "beyond [the President's] control in any of his subordinates" n393 - a correct and fairly unobjectionable statement of what we have been calling the preclusive prerogative of superintendence. Second, Congress could not "themselves, as the people of Athens attempted to, carry on campaigns by votes in the market-place." n394 Of course, if what Taft meant by his Athenian analogy was simply that Congress cannot direct the military by a simple legislative plebiscite, as it did in the preconstitutional era, then of course that is unobjectionable, too, for Congress must instead act through bicameralism and presentment - that is, by the passage of statutes. However, in a cognate 1916 Yale Law Journal article published several weeks after publication of his lectures, Taft seemed to suggest something more, adding this one-sentence paragraph: "When we come to the power of the President as Commander-in-Chief it seems perfectly clear that Congress could not order battles to be fought on a certain plan, and could not direct parts of the army to be moved from one part of the country to another." n395 4. The Wilson Administration and the Era of Isolationism. - Taft presumably intended to confine his proviso concerning the movement of troops to cases involving regulations of the military within an actual theater of war. Insofar as this limitation on Congress's power to affect troop movements was meant to have a broader application (as Professor Pomeroy's treatise indicated the principle should), it was soon debated in Congress. Just after World War I, President Wilson stationed troops in Siberia without prior statutory authorization, which [\*1041] prompted fleeting discussion in Congress about whether it would be constitutional to enact a law requiring the withdrawal of troops from a nation with which we were at peace. n396 Representative William Mason said at a House hearing that Congress had an "absolute power" to impose such a requirement, whereas Representative Julius Kahn expressed skepticism. n397 At that same hearing, Secretary of War Newton Baker did not take issue with Kahn, or by extension Taft, but neither was he willing to opine on anything other than the most extreme case: he testified that Congress could not make a "rule" that "all the Army ... should live in the city of Washington and never be moved away, no matter what happens," for that would completely "paralyze" the Commander in Chief, n398 a view that arguably reflects a version of the Chase/Pomeroy position, albeit in an entirely academic form, without speaking to any more realistic questions, including the constitutionality of the proposed Siberia withdrawal hypothetical itself. n399 Although Congress took no action to compel the withdrawal of the troops from Siberia, the years between the World Wars were marked by a national legislature controlled by representatives fervently committed to avoiding U.S. involvement in European wars. This isolationist wing was able to spur the enactment of several "neutrality" statutes during this period, which to greater or lesser degrees prohibited the United States from providing assistance to belligerent states as long as the United States was a neutral party. These statutes were to figure prominently in the run-up to World War II. [\*1042] D. The Administration of Franklin Roosevelt and World War II On May 1, 1937, President Franklin Roosevelt signed the Neutrality Act of 1937, n400 which, among other things, imposed a strict arms embargo against states engaged in war (including the warring parties in the Spanish Civil War); a ban on loans and credits to such parties; and a prohibition on the use of U.S. ships to carry munitions to belligerents. Two years later, with European war looming, the Allied powers were desperate for aid from the United States. Roosevelt was eager to provide such assistance, which he thought critical for U.S. security purposes. He was severely limited, however, by the 1937 Neutrality Act and by a recalcitrant Congress that was not inclined to abandon its isolationist ways. Roosevelt strove to pass liberalizing legislation, but its prospects looked bleak in mid-1939. Vice President John Garner and Secretary of the Interior Harold Ickes urged Roosevelt to conclude that he had a constitutional prerogative to disregard the Neutrality Act. n401 Roosevelt wrote to Attorney General (and soon-to-be Justice) Frank Murphy on July 1, 1939, asking, "If we fail to get any Neutrality Bill, how far do you think I can go in ignoring the existing act - even though I did sign it?" n402 The question was vetted within the Department of Justice. Assistant Solicitor General Newman A. Townsend, Special Assistant to the Attorney General Edward Kemp, and Assistant Solicitor General Golden Bell all concurred "that in this instance the President could not safely rely on a claim of constitutional right to justify a disregard of the Neutrality Act as a matter of law" - that "to act without authority of Congress in the field of foreign relations is one thing," but "to disregard an express enactment of Congress ... is quite another thing." n403 Professor Robert Dallek reports that Roosevelt "did not pursue the question" further. n404 [\*1043] Thereafter, although Roosevelt repeatedly chafed at the limitations that the neutrality acts imposed, n405 he pursued a dual-pronged strategy. He sought legislative amendment if possible. Where that approach seemed untenable, he sought ways to construe the existing statutes narrowly to provide him some breathing room for aiding the Allied cause. n406 To be sure, the neutrality acts did not purport to regulate the conduct of war as such. They did, however, plainly curb Roosevelt's powers to deploy forces and materiel under his command at a time when the debate between the branches concerned the proper level of preparation for potentially imminent hostilities. Although Roosevelt would have had a strong basis for arguing that he could act in the absence of a legislative limitation, we have not found any evidence that he ever invoked any substantive, preclusive constitutional power as Commander in Chief in the prewar period. 1. The Torpedo Boats and the Destroyers Deal Before the War. n407 - On May 15, 1940, five days after Hitler's armies had invaded northern France and Winston Churchill had been installed as British Prime Minister, Churchill sent a telegram to President Roosevelt informing him of Western Europe's dire prospects - "The scene has darkened swiftly" - and pleading with him to take substantial steps short of war in order to assist the Allies: "You may have a completely subjugated, Nazified Europe established with astonishing swiftness." n408 The British were desperate for the United States to loan and convey to Britain several categories of military provisions. In particular, over the next weeks and months, the British repeatedly conveyed to the Americans their "naval priorities" n409 - namely, receipt of two types of ships for defense against a possible German invasion and the predations of German submarines: fifty old destroyers (which [\*1044] Churchill mentioned in his initial telegram) and part of a group of motor torpedo boats, or "mosquito boats," that were then being constructed for the U.S. navy, which could be provided to England by the manufacturers if the federal government signed off on the deal. n410 Roosevelt at first thought the transfer of the destroyers would be infeasible because it would require new legislation from Congress, n411 and so the British began to concentrate on obtaining the torpedo boats. n412 Roosevelt brushed aside legal concerns raised by naval lawyers, and set the wheels of the transaction into motion. When isolationists in Congress got wind of the deal, they began to raise objections. n413 In a cabinet meeting on June 20, 1940, Attorney General Robert Jackson was asked about the torpedo-boats matter, and he gave Roosevelt the bad news n414: Jackson concluded that the transfer would violate a much earlier neutrality law, the Espionage Act of 1917, which provided that during a war in which the United States was a neutral nation, it would be unlawful to send to a belligerent nation "any vessel built, armed or equipped as a vessel of war." n415 In light of Jackson's opinion (in which the President concurred), Roosevelt abruptly cancelled approval of the sale of the torpedo boats. n416 "It was clear from the context [of the White House statement] that the legislative bar cited by the Attorney General was the President's only reason for his order." n417 Senator Rush Holt, a leading isolationist, was quoted as saying, "I am glad Bob Jackson looked up the law on the subject." n418 Roosevelt then turned his attention to the possibility of conveying the over-age destroyers to Britain. Churchill continued to plead with him to do so imminently, in order to hold the English Channel, lest Britain fall to Hitler. n419 Roosevelt agreed about the surpassing importance [\*1045] of the deal: in a cabinet meeting on August 2, 1940, there was unanimity that (in Roosevelt's own words) "the survival of the British Isles under German attack might very possibly depend on their getting these destroyers." n420 But the neutrality acts posed a substantial impediment. In addition to the 1917 statute, isolationists led by Senator David Walsh had just enacted another statute in 1939 prohibiting transfers of armaments unless either of the service chiefs of staff had previously certified that they were not essential to the nation's defense. n421 Thus, Attorney General Jackson advised Roosevelt, and the cabinet agreed, that liberalizing legislation would be necessary, even as the proposal evolved into one involving a trade for bases rather than a flat-out sale. n422 Try as he might to persuade Congress to temper the statutory restrictions, however, Roosevelt was rebuffed. n423 The destroyers deal was salvaged by a creative statutory construction first suggested by Benjamin Cohen, a brilliant Interior Department lawyer. Cohen's analysis, which Roosevelt originally rejected as too convoluted and unworkable, n424 was taken up by Justice Frankfurter, who enlisted Dean Acheson and other respected lawyers to, with Cohen's help, write a full-page letter to the New York Times, presenting an updated version of Cohen's legal analysis. n425 Attorney General Jackson, meanwhile, referred Cohen's memo to Newman A. Townsend, a former judge serving in the Solicitor General's Office. n426 Over the days following the publication of the New York Times letter, Jackson and Townsend slowly came to the conclusion that the statutes could be satisfied if there were an exchange of the destroyers for [\*1046] strategic British naval and air bases in the Atlantic. Jackson finally reasoned that the 1939 statute could be avoided based on the Chief of Naval Operations' judgment that the deal would, on the whole, be a boon to U.S. defense interests. He also concluded that the 1917 statute could be construed to bar only transfers of vessels that had been built with the intent or expectation that they would be transferred to belligerents - which described the torpedo boats, but not the old destroyers. n427 According to Jackson, Roosevelt himself engaged in an extensive line-edit of Jackson's draft opinion, n428 which Jackson issued on August 27, 1940, n429 and the bases-for-destroyers deal was completed and announced on September 3. n430 Jackson's imaginative reading of the statutes was sharply (although not uniformly) criticized as unpersuasive. n431 What is important for present purposes, however, is that, as Jackson himself emphasized twelve years later in Youngstown, the Roosevelt Administration did not presume to rely upon any presidential claim as Commander in Chief to supersede statutory restriction. n432 Roosevelt would later describe the destroyer deal as the most important action in the reinforcement of the United States's own national defense since the Louisiana Purchase. n433 Yet at no time did he suggest a constitutional prerogative to trump congressional enactments. Indeed, through much of the summer of 1940, he had reluctantly conceded that this absolutely essential deal could not be made in the teeth of the governing law. It was only Cohen's and Jackson's creative statutory arguments that appeared to turn the tide. n434 Moreover, Jackson's [\*1047] opinion specifically concluded that, notwithstanding the President's broad constitutional authority as Commander in Chief, he could not authorize transfer of the "mosquito boats" to Britain, even as part of an exchange for bases, because the 1917 act plainly proscribed such a transaction. n435 Roosevelt's deference to statutory limits led him to vigorously lobby Congress for the passage of the Lend-Lease Act, which finally authorized him to transfer defense articles to belligerent nations without significant restrictions. n436 [\*1048] 2. The Deployment to Iceland Before the War. - Two weeks after the destroyers deal, Congress enacted the nation's first peacetime conscription bill. The isolationist Congress, however, designed it as a draft for defensive purposes only. It therefore included a condition limiting conscription to twelve months, and another that would prevent the deployment of draftees to the European theater. The law provided that persons inducted into the land forces under that act could not be deployed involuntarily "beyond the limits of the Western Hemisphere except in the Territories and possessions of the United States." n437 A few weeks earlier, Congress had enacted a virtually identical [\*1049] geographical restriction with respect to army reservists called to active duty. n438 In the spring of 1941, Roosevelt was determined to send sufficient U.S. troops to Iceland to relieve British troops garrisoned there and thereby to protect American security interests. n439 The statutory restrictions on sending reservists and selectees outside the Western Hemisphere, however, proved a serious obstacle to Roosevelt's objectives. There was no problem with respect to sending the Marines, because they were composed of active-duty volunteers and thus were not covered by the statutory prohibitions against sending reservists and draftees. But the army, which contained a substantial percentage of reservists and draftees, was a different story. n440 The problem of rounding up a sufficient army force therefore became the topic of considerable discussion and consternation within the Administration during the spring and summer of 1941. n441 Both Britain and Iceland desperately wanted the United States to replace Britain's entire 20,000-man force, but the statutory restrictions, as Time magazine complained in an editorial urging their repeal, ensured that the "occupation of Iceland was a move the Army could not have joined on anything but pipsqueak scale." n442 According to Army Chief of Staff General George Marshall, the statutory limits "required the use of Marines on a mission which was not a Marine Corps mission" and effectively prevented the use of the army "on a mission which was peculiarly an Army mission." n443 Moreover, even with respect to the army troops that could lawfully be sent to Iceland, the statutory limits proved very disruptive: to supplement the Marine contingent with army volunteers, it was necessary to obtain transfers from many places throughout the army, [\*1050] which, according to Marshall, would "require the disruption of approximately three regiments for every one sent." n444 In the end, Roosevelt deployed only about half the number of troops that Britain wanted and that he originally contemplated, a contingent comprised of a mix of Marines and statutorily eligible army forces. n445 It has sometimes been alleged that Roosevelt sent draftees to Iceland in violation of the statutory restriction, n446 but we have found no evidence supporting this conclusion. n447 Despite the fact that the statutory limits prevented him from taking action in a manner he deemed most efficacious for the national defense, Roosevelt honored the law [\*1051] while his Administration worked to have it repealed, n448 something it was not able to accomplish until after the bombing of Pearl Harbor. n449 3. Ex Parte Quirin. - As far as we can tell, the question of a substantive preclusive power of the Commander in Chief was publicly suggested for the first time in the Roosevelt Administration during the actual conduct of World War II itself, in the litigation resulting in the landmark decision in Ex parte Quirin. n450 President Roosevelt had decided to use a special military war crimes commission to try eight Nazi saboteurs who had secretly entered the United States on missions to destroy war industries and facilities. During their trial before the military tribunal, the defendants petitioned for a writ of habeas corpus in federal court. The Supreme Court heard argument in the expedited case on July 29 and 30, 1942, apparently after being informed privately that the President planned to proceed with the executions regardless of what the Court did. n451 The questions presented in Ex parte Quirin included whether Congress had authorized the saboteurs' military commission, whether the charges against them were consistent with the laws of war, and a statutory question - namely, whether the procedures used in the military tribunal were consistent with the congressionally enacted Articles of War. n452 At oral argument, Attorney General Francis Biddle argued that the commission's procedures were authorized by, and consistent with, the statute, n453 just as he had done in his brief. n454 But in the second day of his argument he added the suggestion - not set forth in his brief - that even if a statute specifically prescribed how such defendants were to be tried (such as by foreclosing the use of military tribunals), [\*1052] perhaps the President could insist upon his own rules "in the exercise of his great authority as the Commander-in-Chief during the war and in the protection of the people of the United States." n455 Chief Justice Stone, plainly surprised by this suggestion, quickly cut Biddle off, wondering whether the Court should entertain such an argument. Biddle replied that the Court "[did] not have to come to that." n456 A bit later, after Biddle seemed to suggest the tribunal's procedures could be "modified by Congress," he quickly corrected himself (after being prompted by Justice Frankfurter): Perhaps I narrowed that too much. I have always claimed that the President has special powers as Commander-in-Chief. It seems to me, clearly, that the President is acting in concert with the statute laid down by Congress. But ... I argue that the Commander-in-Chief, in time of war and to repel an invasion, is not bound by a statute. n457 As far as we have been able to determine, this interjection is the only occasion on which the Roosevelt Administration adverted to any claims of a substantive Commander in Chief prerogative. n458 In a short per curiam opinion on July 31, 1942, the Court denied the petition on the merits, n459 a disposition that led quickly to the trial and execution of six of the saboteurs. n460 In its full opinion justifying the judgment, issued on October 29, 1942, the Court held that Congress had authorized the use of the military commission n461 and that the [\*1053] petitioners were properly charged with violations of the laws of war. n462 In the final substantive paragraph of its opinion, the Court also rejected the claim that the commission's procedures were inconsistent with the Articles of War. n463 But that paragraph begins with an eye-opening sentence that seems to acknowledge the possibility Biddle had raised: "We need not inquire whether Congress may restrict the power of the Commander in Chief to deal with enemy belligerents." n464 The Court's cryptic suggestion that there was some question of Congress's power to regulate military tribunal procedures appears to have been the product of tumult within the Court after the oral argument. The Court's junior Justice, none other than Robert Jackson himself (who had been serving as Roosevelt's Attorney General one year earlier), had been at work on a proposed concurrence. Several of the early drafts of that separate opinion, including what appears to have been the first draft to be circulated to his colleagues, argued that the Articles of War should not be construed to limit the President's treatment of such belligerents because otherwise "we would have a serious question of the validity of any such effort to restrict the Commander in Chief in the discharge of his constitutional functions." n465 Justice Jackson's draft conceded Congress's power to enact procedural protections in military commission trials of "persons whose civil rights may well have been the proper concern of Congress," such as U.S. citizens, inhabitants of occupied foreign territory in which martial law applies, and "nonbelligerents who may be in our military power." n466 His opinion questioned, however, whether Congress's power extended to the protection of "those who come here as belligerents to destroy our institutions." n467 Justice Jackson added that "the magnitude and urgency of the menace presented by this hostile military operation and the measures to meet it were for the Commander in Chief to decide." n468 In the midst of several revisions of his separate opinion the following week, however, Justice Jackson abandoned the assertion that the Articles of War would be constitutionally problematic if applied to [\*1054] limit the President's discretion on the trial of enemy belligerents. n469 Instead, his later drafts, including what appears to have been the final draft distributed on Friday, October 23, pressed the view that Congress could not have intended the Articles to apply to such a case because "the seizure and trial of these prisoners is not in pursuit of the functions of internal government of the country," and their treatment "[was] an exclusively military responsibility." n470 Justice Jackson conceded, moreover, that his views (including presumably his initial constitutional doubts) were "not accepted by a single one of my respected seniors in service on this Court." n471 And he ultimately decided to join the Chief Justice's opinion rather than to write separately. It is not without interest, however, that the author of the Youngstown "lowest ebb" opinion himself was at least temporarily attracted to the distinction between the internal government of the country, which is clearly within Congress's responsibility, and the engagement of the enemy, [\*1055] which Justice Jackson tentatively viewed as an exclusively military responsibility. In fact, Justice Jackson adverted to a similar distinction in his concurrence in Youngstown itself. n472 E. Conclusion The ninety-plus years of constitutional practice just reviewed has brought the story of the "lowest ebb" full circle. It begins, as we have explained, with the now famous Chase dictum in the Milligan concurrence. That opinion, while arguing for the power of Congress to restrict the President's use of military commissions, contends nonetheless that the powers of the Commander in Chief as to the "command of the forces and the conduct of campaigns" cannot be limited by statute. In the intervening years, scholars seized upon this suggestion and inflated it. They were driven in part by Professor Pomeroy's rejection of the possibility of there being overlapping war powers, but also by the notion, best articulated by Professor Berdahl, that "political science" demands that the President alone control the conduct of war. As much as theorists pushed this notion, however, the political branches seemed wary of it in practice. Presidential administrations repeatedly complied (sometimes while expressly averring their duty to comply) with not only treaty-based restrictions on their conduct of war in actual conflicts, but also a number of statutes (albeit directed outside the context of actual ongoing hostilities) that regulated their ability to use and deploy forces as they thought best. Such compliance occurred even in cases, as in the run-up to World War II, when these restrictions seemed to the President to have serious implications for national security. Moreover, while the occasional dissenting voice on the constitutional question was heard in Congress, there is no indication that an anxiety of authority overtook Congress when it came to the exercise of the legislature's war powers. At the end of the period, however, President Franklin Roosevelt's Attorney General, in an almost offhand manner, suggested a position that goes far beyond the Chase dictum itself. He hinted to the Supreme Court that what even Chief Justice Chase had seemed to concede in Milligan to be within the authority of Congress - the power to set the terms by which persons could be tried on U.S. soil outside of civilian courts - might not be. To be sure, the Quirin Court did not endorse that view, but neither did the Court firmly reject it. Although Biddle's remarks went well beyond what the government had argued in its brief, his comments nonetheless stand as an indication that the constitutional theory of preclusive executive war powers was at long last making inroads in the political branches, more than a century and [\*1056] a half after the convention in Philadelphia. As we will see, like kudzu, executive branch claims of the sort would accumulate over the next half century, although not in any straightforward or systematic way. So, too, however, would new statutes that stood as a challenge to these very claims. V. The Modern Era The beginnings of the nuclear age and the emergence of the United States as a dominant world power had a galvanizing effect on questions of constitutional war powers. In June 1950, President Truman publicly committed to sending U.S. air, naval, and ground forces to assist South Korean forces against attack from the North. Truman did not seek Congress's approval before or after taking these steps, heeding Secretary of State Dean Acheson's advice to endeavor to establish a constitutional precedent for a broad unilateral prerogative. n473 In so acting, Truman took a dramatic step forward in a history of unilateral presidential use of military power, a development that had been building for over one hundred years, since at least the Mexican War, in various contexts short of full-scale hostilities against another nation's armed forces. n474 The ensuing controversy twenty years later over what were arguably unilateral presidential expansions of the Vietnam War to Cambodia and Laos only served to highlight the audacious nature of what Truman had done, thus ensuring that contentious disputation over the scope of the Commander in Chief's "inherent" power to deploy U.S. forces abroad would dominate war powers debates for most of the half-century after Korea. n475 By the conclusion of the Clinton Administration, however, it appeared that something of a practical settlement between the political branches regarding this long-contested constitutional question had been reached. By that time, Presidents were in rough agreement that, whatever the Founding-era understandings might have been, extensive historical practice had established that the Commander in Chief was, [\*1057] to some not fully specified extent, "authorized to commit American forces in such a way as to seriously risk hostilities ... without prior congressional approval." n476 Some Presidents made even bolder claims; n477 but executive branch precedent and opinions from after 1951 generally indicated that any conflict of a scale directly comparable to Korea or Vietnam must be carried out with legislative approval. n478 Congress, for its part, seemed largely resigned to this executive branch approach to the initiation question, and has therefore recently focused its attention more on policing the duration and conduct of campaigns, rather than on challenging their legality at the outset. Meanwhile, the courts have not had much to say about the question of unilateral executive use of military force. But even as the political branches appeared to be reaching a detente on the principles governing the Youngstown Category Two question of deployment and initiation, controversy was building over the equally fundamental Category Three question that is our focus. Here, too, the Truman Administration was the instigator. As we have seen, up until 1950 there had been a fairly consistent practice, with Presidents routinely defending their superintendence authority and occasionally asserting a power to act in contravention of statutes in times of emergency when Congress was unavailable. Otherwise, there was [\*1058] little in the way of executive assertion of preclusive war powers; this was true even as to legislative restrictions that had been passed in each era that intruded - sometimes very deeply - into decisions relating to the peacetime organization and deployment of the military and, in some instances, to the actual conduct of war (or, in Franklin Roosevelt's case, to preparation for imminent war). But just as Truman was claiming unsurpassed powers of unilateral military engagement and deployment, he simultaneously asserted, in a way no President had previously done, that the President's war authorities were not only extensive, but preclusive. This broader notion of preclusive presidential control was hardly unknown by the end of World War II. It had become prominent in the legal literature, n479 and the notion that there is some operational "core" of Commander in Chief authorities that are indefeasible, especially with respect to the "conduct of campaigns," has sounded a common theme in war powers scholarship right to the present day. n480 But it was at the beginning of the Cold War, and in the five decades that followed, that the executive branch first asserted such a claim in any forthright and sustained way. A clear change had occurred. Still, the developing presidential practice in this era did not produce a consensus, even within the executive branch, as to either the nature or the scope of the Commander in Chief's preclusive powers. Instead, pre-sidential assertions of such inviolable authority waxed and waned, and were often too cursory to reflect any coherent underlying theory or justification. Underscoring the protean quality of constitutional practice, Congress hardly acted as if it were resigned to the new claims that Presidents were pressing. Individual legislators did continue to articulate arguments for preclusive executive authority during congressional debates. n481 Congress as an institution, however, turned out to be as willing [\*1059] as ever (if not more so) to enact legislation restricting executive war powers, including highly intrusive measures concerning combat operations in specific conflicts. A. The Truman Administration In the years immediately following World War II, Congress increasingly saw fit to enact "framework" measures to govern the military, the intelligence agencies, and the conduct of war. n482 None of these measures occasioned constitutional claims by the President of preclusive executive authority. Nor did the Truman Administration rely on such preclusive claims in the most dramatic war powers confrontation of the modern era - the Youngstown litigation. To the contrary, the government's argument in that case was that Congress had been silent on the steel seizure, and therefore the President had begged Congress to pass legislation resolving the crisis. n483 In its brief to the Court, the Department of Justice stressed repeatedly that the President would abide by whatever statutory solution Congress prescribed. n484 The Attorney General's [\*1060] claim was simply that the President had taken "temporary action, of a type not prohibited by either the Constitution or the statutes, to avert the imminent threat, while recognizing fully the power of Congress by appropriate legislation to undo what he has done or to prescribe further or different steps." n485 A majority of the Justices, of course, concluded that Congress in an earlier enacted statute had prohibited the seizures. n486 When it came to two other matters touching on the powers of the Commander in Chief, however, the Truman Administration adopted a far less accommodating stance - one that had no real precedent in prior practice. 1. Preclusive Powers Concerning Deployment of Forces. - When Truman made his unilateral moves in Korea in 1950, there was little opposition in Congress, because the legislature largely favored what he had done. n487 The major debate in Congress came the following winter, when the war in Korea was beginning to go badly, and Truman announced that he was, without congressional authorization, sending four army divisions to reinforce the forces serving under NATO in Europe, where the Soviet threat was gathering. Truman contended that as Commander in Chief he could "send troops anywhere in the world" without consulting Congress. n488 This bold assumption of deployment authority set off an extended debate in the Senate, lasting more than three months. During the 1951 Senate debate, Secretary of State Acheson provided Senate committees with a State Department memorandum, the principal thrust of which was to justify Truman's bold assertion of unilateral deployment powers. n489 In the midst of that memorandum, [\*1061] however, was an even more aggressive claim - that such authority was not only inherent but preclusive of congressional control: 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. n490 In a follow-up memorandum submitted to the Senate in February 1951, the Administration more elaborately argued that "since the direction of the armed forces is the basic characteristic of the office of the Commander in Chief, the Congress cannot constitutionally impose limitations upon it." n491 With Congress focused on Truman's claim of initiative and deployment authorities, the Administration's preclusive-power argument did not receive much attention. n492 But it was the first of a number of [\*1062] related executive branch assertions - many but not all of which took aim at restrictions on the deployment power - over the next fifty-plus years. 2. Military Impoundments. - In addition to asserting an inviolable deployment power, the Truman Administration also asserted preclusive war power to challenge appropriations statutes that mandated particular military expenditures. For virtually all of the nation's history, Presidents had regarded most specific statutory appropriation prescriptions as permissive, rather than mandatory, and, going back at least to Jefferson, Presidents therefore on occasion "impounded" certain sums that Congress had appropriated for particular projects, including defense spending, in order to save money or because of changed circumstances. n493 In doing so, Presidents generally made no claim of any constitutional prerogative to ignore Congress's will. Impoundment was instead viewed as a function of a presumed legislative intent to confer discretion on the President not to spend all that was appropriated. By the middle of the twentieth century, however, Congress began to push back, and to make known its intent that the President was obligated to spend certain appropriated funds in the manner specified by statute. n494 Early in his Administration, Truman responded to one such legislative attempt in a dramatically new way. In 1949, the President requested funding for forty-eight Air Force groups. The House, however, [\*1063] insisted on the creation of fifty-eight groups. n495 Truman signed the bill, but, invoking his powers as Commander in Chief, he directed the Secretary of Defense to impound the extra $ 735 million, arguing that the ten extra groups would only make the Air Force less flexible. n496 Following Truman's lead, the executive branch continued to raise constitutional doubts, of varying degrees, about mandatory defense spending provisions until at least the mid-1970s, although it is not clear that the Commander in Chief Clause was ever again impressed as a necessary justification for an actual refusal to comply with an expenditure mandate. n497 [\*1064] B. Nixon, Ford, and the War in Indochina The constitutional debate that Truman's bold claims might have provoked was not fully joined until two decades later. n498 In the late 1960s and early 1970s, as congressional opposition to the war in Indochina reached its apex, Congress enacted a number of significant regulations of ongoing combat operations, thereby pushing its war powers [\*1065] as far as any Congress had since the Civil War. In response, both political branches gave serious consideration to the preclusive-power question. Congress basically held fast to what it believed to be its authority; the executive branch shifted back and forth between positions of defiance and acceptance of statutory limitations. 1. Congress's Restrictions on the Use of Force in Indochina. - Congress began to impose restrictions on the ongoing conflict in Vietnam when it included a provision in the 1970 Defense Appropriations Act forbidding the use of funds "to finance the introduction of American ground combat troops into Laos or Thailand." n499 "Unfortunately," Senator Thomas Eagleton would later write, "the Congress had picked the wrong countries," because on April 29, 1970, President Nixon sent troops into Cambodia. n500 So, the next year, the Senate engaged in a wide-ranging, seven-week debate on Congress's powers to regulate and limit the President's conduct of war in Cambodia - what Senator Bob Dole called "one of the greatest, most productive debates in the history of this body." n501 Congress did not pass any such restrictions in [\*1066] 1970, but at the outset of the following year the legislature enacted the Cooper-Church Amendment, which comprehensively provided that "none of the funds authorized or appropriated pursuant to this or any other Act may be used to finance the introduction of United States ground combat troops into Cambodia, or to provide United States advisers to or for Cambodian military forces in Cambodia." n502 By that time, all ground troops had left Cambodia, and the final legislation noted that the restrictions it imposed were "in line with the expressed intention of the President of the United States." n503 Nonetheless, the measure limited the President's tactical discretion going forward by strictly prohibiting the use of further ground troops in Cambodia, and it contained none of the exceptions that the Administration strenuously fought for when the measure had first been debated the year before. n504 As significant as the Cooper-Church Amendment was, Congress did not stop there. Two years later, revelations of President Nixon's bombing operation in Cambodia - an action that complied with the letter of the 1971 restriction - prompted efforts to impose even [\*1067] greater restrictions. Both houses of Congress approved an amendment to prohibit the use of all appropriated funds to support directly or indirectly any U.S. combat activities in Cambodia or Laos. n505 President Nixon vetoed the bill on policy grounds. He claimed that this "Cambodia rider" would undermine the possibility of a negotiated settlement in Cambodia, n506 but his veto message raised no constitutional objection. After the House fell thirty-five votes short of overriding the veto, n507 and the Paris Peace Treaty had been completed, Nixon eventually signed a bill that cut off all funds for combat activities in, over, or off the shores of North Vietnam, South Vietnam, Laos, and Cambodia, as of August 15, 1973 - arguably giving the President six additional weeks to continue operations, but no more. n508 During the following fifteen months, Congress enacted several additional laws prohibiting expenditures, absent express statutory authorization, for military action in North Vietnam, South Vietnam, Laos, Cambodia, and Thailand. n509 2. President Nixon's Legal Response. - Although President Nixon objected to Congress's newly assertive posture, and even raised constitutional concerns about some of its actions, he did not make a preclusive war powers claim in vetoing or signing any of these highly restrictive measures. Nonetheless, his Administration did briefly address the constitutionality of restrictions on ongoing military operations, in a May 1970 memorandum authored by the then-Assistant Attorney General for the Office of Legal Counsel (OLC), William Rehnquist. n510 In his memo, Rehnquist defended the President's authority to use U.S. [\*1068] armed forces to attack sanctuaries employed by the Viet Cong in Cambodia in the absence of legislation barring him from doing so. He also included a short section entitled, "Extent to Which Congress May Restrict by Legislation the Substantive Power Granted the President by Virtue of His Being Designated as Commander-in-Chief." n511 Rehnquist's discussion in that section was notably equivocal. It included none of the unqualified argumentation manifest in the earlier Truman Administration memoranda. Citing the then-recent Laos/Thailand proviso (which, Rehnquist noted, "was accepted by the Executive"); the 1940 statute prohibiting the deployment of inductees outside the Western Hemisphere (about which the Truman Administration had earlier expressed constitutional doubts, but with which Roosevelt had complied); and the Supreme Court's decision in Little v. Barreme; Rehnquist concluded that "Congress undoubtedly has the power in certain situations to restrict the President's power as Commander-in-Chief to a narrower scope than it would have had in the absence of legislation." n512 Rehnquist further noted, however - with the canonical cite to the dictum in Chief Justice Chase's concurrence in Milligan - that separation of powers problems "would be met in exacerbated form should Congress attempt by detailed instructions as to the use of American forces already in the field to supersede the President as Commander-in-Chief of the armed forces." n513 In a hearing several weeks later, Rehnquist similarly testified that "the power to repel sudden attacks, the power to determine how hostilities lawfully in progress shall be conducted, and the power to protect the lives and safety of U.S. forces in the field," were authorities that "indisputably belong[] to the President alone." n514 Rehnquist went so far at the hearing as to deny that Congress could constitutionally enact a statute prohibiting the President from initiating "war" without a congressional declaration. n515 Rehnquist further elaborated on his somewhat cryptic reservation of preclusive authority at a Senate Judiciary Committee hearing in 1971. The context was an examination of the President's constitutional claims of a right to "impound" appropriated funds. n516 Interestingly, Rehnquist had written a memorandum in 1969, which he submitted to the Senate committee, in which he disclaimed any general constitutional impoundment authority [\*1069] (thereby dissenting from the longstanding executive branch view) but did defend constitutional impoundment in the context of the President's role as Commander in Chief. n517 "Of course," Rehnquist wrote, if a Congressional directive to spend were to interfere with the President's authority in an area confided by the Constitution to his substantive direction and control, such as his authority as Commander-in-Chief of the Armed Forces and his authority over foreign affairs, a situation would be presented very different from the one before us. n518 At the 1971 Senate hearing, several Senators praised Rehnquist for his acknowledgement that Congress as a general matter had the authority to command specific expenditures. The Senators and their special counsel pressed him, however, on his continued insistence that the Commander in Chief Clause might establish an impoundment authority in the context of national defense spending. n519 This prompted a fascinating discussion in which Rehnquist and his defenders (principally Senator Samuel Ervin and Professor Ralph Winter, acting as counsel to the committee) attempted to navigate the uncertain "continuum" of possible statutory restrictions on the Commander in Chief - hypothesizing which were permissible, and which were not - in what Rehnquist called "the most difficult area of all of the Constitution." n520 Contrary to Truman's view, Rehnquist conceded that Congress would have the prerogative to prohibit the President from sending troops into the Eastern Hemisphere. n521 But Rehnquist contrasted those very intrusive restrictions with what he thought was an easy case of an unconstitutional statute - a law requiring that appropriated funds be used to equip all soldiers in Regiment A with blue uniforms, when the President does not want them to wear blue. n522 Rehnquist also hypothesized a law providing that in no circumstance should another assault be made on "Hamburger Hill" in Vietnam, [\*1070] which he thought - in accord with the position President Taft had set forth after leaving office - would be a "rather clear invasion of the President's power as Commander in Chief." n523 When pressed to explain the standards that might support such distinctions, he agreed that there was no obvious bright line: "I think it was designed by the framers to be amorphous and we just have to wrestle with it the best we can." n524 3. The War Powers Resolution. - There things stood until 1973, when Congress enacted a landmark framework statute dealing with military engagements in any setting: the War Powers Resolution n525 (WPR). This measure, perhaps more than any other, has spurred scholarly debate over the "lowest ebb" question. The measure, among other things, effectively requires the President to withdraw armed forces from hostilities within ninety days if Congress has not in the interim approved such engagement. n526 President Nixon vetoed the measure, setting forth a constitutional position seemingly broader than Rehnquist's, and echoing Truman's. Nixon argued that the durational limit was an unconstitutional "attempt to take away, by a mere legislative act, authorities which the [\*1071] President has properly exercised under the Constitution for almost 200 years." n527 Nixon's logic seemed to be that if the President may independently (that is without congressional authorization) introduce forces into battle in a particular situation, Congress could not "by a mere legislative act" place any limits on the duration of such hostilities. n528 Congress overwhelmingly disagreed with this constitutional view: it overrode the veto. n529 4. President Ford and the Rescues in Southeast Asia. - The limitations on combat operations in Indochina that Congress enacted during Nixon's tenure proved to be particularly important after President Ford took office and the long and unpopular war came to a chaotic close. In fact, so far as we are aware, these restrictions occasioned the first instance, outside the context of the impoundment of appropriated funds, in which a President invoked his authority as Commander in Chief to actually disregard a statutory mandate while Congress was sitting and (at least nominally) available to consider a statutory amendment. [\*1072] In April 1975, numerous U.S. nationals and others were trapped in Phnom Penh and Saigon. Statutory limitations barring the use of funds for the involvement of U.S. armed forces in "combat activities" and "hostilities" in Southeast Asia arguably prohibited the use of armed forces to rescue U.S. nationals and foreigners. n530 President Ford convened a rare joint session of Congress on April 10, at which he pleaded with Congress "to clarify immediately its restrictions on the use of U.S. military forces in Southeast Asia for the limited purposes of protecting American lives by ensuring their evacuation, if this should be necessary," and to revise the law "to cover those Vietnamese to whom we have a very special obligation and whose lives may be endangered should the worst come to pass." n531 As Congress searched for "language that would give Ford the authority he needed for the evacuations without possibly inviting military involvement in Southeast Asia," n532 Ford took action unilaterally. The day after his address to Congress, he ordered U.S. troops into the Khmer Republic to evacuate eighty-two U.S. citizens. According to Ford's message to Congress the next day, U.S. forces were fired at but did not fire back - so perhaps the statutory limit was not implicated in that instance. n533 But the statutory limitation did appear to bar what happened soon thereafter. On April 29, Congress still not having passed new legislation, U.S. troops entered South Vietnam airspace in order to rescue Americans in Saigon. A force of 70 evacuation helicopters and 865 Marines evacuated approximately 1400 U.S. citizens and 5500 third-country nationals and South Vietnamese. n534 This operation did result in a brief battle, and some U.S. forces were killed n535 - all in the apparent teeth of a statutory restriction, and while Congress was still deciding whether and how to authorize what the President was already [\*1073] doing. Two weeks later, the new Cambodian regime seized a U.S. merchant ship, the Mayaguez, and President Ford responded by sending troops into Thailand, where they engaged in hostilities against the Cambodians. More than a dozen Americans were killed, and U.S. troops employed significant weapons (including a seven-and-a-half-ton bomb), going so far as to bomb an airfield and storage depot after the Mayaguez crew had been rescued (apparently as a deterrent to such attacks on U.S. interests). n536 The Ford Administration insisted that the preexisting statutory restrictions on the involvement of U.S. armed forces in "combat activities" and "hostilities" in Southeast Asia did not cover its efforts to rescue U.S. nationals. It based its argument primarily on legislative intent purportedly reflected in a pair of colloquies that had taken place in Congress when those laws were being considered. n537 But the Ford Administration conceded that the evacuation of non-Americans did violate the funding limitations. n538 Accordingly, when President Ford went ahead with the rescue of non-Americans, he appears to have been relying on his authority as Commander in Chief, which he expressly invoked in both the Saigon and Mayaguez cases, as justification for ignoring statutory limits. n539 According to the State Department Legal Adviser: "My understanding is that the President thought that he had adequate constitutional power despite the funds limitation provisions to take out Americans and to take out those foreign nationals whose rescue was ... so interwoven with that of U.S. citizens that the two were impossible to segregate." n540 These incidents prompted Senator [\*1074] Eagleton to worry that a significant precedent had been set for the exercise of a preclusive executive war power. n541 5. The Ford Administration, Angola, and FISA. - Bold as President Ford's actions were in response to the fast-moving and exigent circumstances at the end of the Vietnam War, they did not appear to reflect an overarching theory that the President's otherwise available executive wartime authorities were preclusive. That much is clear from a couple of other settings in which the preclusive-power question arose during his administration. For example, when Congress enacted the 1976 Tunney Amendment, which prohibited the expenditure of procurement funds in Angola for any purposes other than intelligence gathering (including covert activity by the CIA), n542 Ford wrote that he was "deeply disappointed," and that "this provision is an extremely undesirable precedent that could limit severely our ability to play a positive and effective role in international affairs." n543 But he did not raise any constitutional objection. n544 [\*1075] The Ford Administration also took a much more accommodating view of congressional authority to restrict the powers of the Commander in Chief in another controversial area, involving proposals to regulate foreign intelligence collection efforts. Since at least 1940, Presidents had approved electronic surveillance by the military and other intelligence agencies, including within the United States, without any statutory authorization. n545 More specifically, the Executive had engaged in warrantless electronic surveillance of communications in wartime (for example, telegraph communications) since at least the Civil War. And during the Second World War, for instance, President Franklin Roosevelt authorized surveillance of virtually all communications coming into and going out of the United States. n546 The Church Committee hearings in the Senate in the 1970s, however, revealed many decades of extensive intelligence agency abuses of civil liberties in the exercise of unchecked electronic surveillance. These revelations prompted proposals for legislation to regulate domestic electronic surveillance for foreign intelligence purposes. n547 Although there were clearly divisions within the Ford Administration as to the constitutionality of such legislation, n548 Ford's Attorney General, Edward Levi, ultimately testified n549 on behalf of the legislation that was to become the Foreign Intelligence Surveillance Act of 1978 n550 (FISA). Levi repeatedly explained that the proposed bill then being considered covered an area - domestic surveillance for foreign intelligence purposes - where the President had inherent authority to act, but that such executive action could also "be directed by the Congress," [\*1076] and future Presidents would be bound to follow the procedures in the bill. n551 Levi explained: As you know, a difference of opinion may exist as to whether it is within the constitutional power of Congress to prescribe, by statute, the standards and procedures by which the President is to engage in foreign intelligence surveillances essential to the national security. I believe that the standards and procedures mandated by the bill are constitutional. The Supreme Court's decision in the Steel Seizure case seems to me to indicate that when a statute prescribes a method of domestic action adequate to the President's duty to protect the national security, the President is legally obliged to follow it. n552 Levi did say that there were other aspects of presidential power "which cannot be limited, no matter what the Congress says." n553 While he did not explain what this indefeasible core of executive authority might be, he hinted that it might involve purely overseas surveillance of foreign nations and their collaborators. n554 Even as to that, however, Levi did not argue that all foreign exercises of war powers were beyond congressional power to regulate. As to such entirely overseas surveillance, Levi hedged: "This is not to say that the development of legislative safeguards in the international communications area is impossible," and "that is a problem which obviously has to be faced." n555 Despite the Administration's support, however, no legislation reached the President's desk before Ford's term expired. [\*1077] C. The Carter Administration and FISA In the wake of the Watergate revelations, Nixon's impeachment, and the public outrage over President Ford's pardon of the disgraced former president, President Carter took office in a context notably hostile towards claims of unchecked executive authority. Not surprisingly, the Carter Administration's approach to preclusive war powers did not seek to capitalize on the ground that had been laid by the Truman, Nixon, and Ford Administrations. Instead, Carter appeared to push in the opposite direction. In particular, the Carter Administration expressly and publicly concluded that the time limit of section 5(b) of the War Powers Resolution was constitutional. n556 More importantly, Carter and his Administration promoted, negotiated, and signed FISA, which, with minor exceptions, permits the government to engage in electronic surveillance within the United States only upon demonstrating to a special FISA Court that there is probable cause to believe that the target of such surveillance is a foreign power or the agent of a foreign power. n557 Moreover, in the event of a declared war, the statute specifically authorizes warrantless domestic electronic surveillance, but only for the first fifteen days of the conflict. n558 In the years before FISA, the modest regulations of federal wiretapping then in place specifically preserved the President's constitutional authority to engage in foreign intelligence collection free from such constraints. n559 Near the end of the FISA legislative process in 1978, several Representatives argued that this statutory carve-out should be retained because Congress could not constitutionally limit such inherent powers of the Commander in Chief. They proposed that the new FISA, too, be amended to clarify that the President would retain [\*1078] all his constitutional prerogatives - particularly during war. n560 The House approved the amendment by voice vote. n561 In the conference committee, however, the Senate insisted on exactly the opposite result, and the Senate conferees prevailed. n562 Thus, as enacted, FISA specifically repealed the previous statutory provision preserving the President's constitutional authority, n563 and replaced it with language dictating that FISA and specific provisions of the U.S criminal code were to be the "exclusive means by which electronic surveillance ... may be conducted." n564 In making this dramatic change, Congress did not deny that the President had constitutional power to conduct electronic surveillance for national security purposes. It concluded, however, that even if the President has the inherent authority in the absence of legislation to authorize warrantless electronic surveillance for foreign intelligence purposes, Congress has the power to regulate the conduct of such surveillance by legislating a reasonable procedure, which then becomes the exclusive means by which such surveillance may be conducted. n565 The Carter Administration's Office of Legal Counsel specifically opined that the bill did not "trammel upon [foreign affairs] powers exclusively reserved to the Executive." n566 And Attorney General Griffin Bell testified that "we have had two Presidents in a row who are willing to cede power, and I think that is good." n567 When he signed FISA [\*1079] on October 25, 1978, President Carter explained that it "clarifies the Executive's authority to gather foreign intelligence by electronic surveillance in the United States," and he did not indicate any constitutional objection. n568 D. The Reagan Administration If Presidents Ford and Carter pulled back from Truman's unqualified claims of preclusive war powers, the Reagan Administration swung the pendulum in the other direction. President Reagan did accept, without constitutional objection, some highly intrusive statutory restrictions on matters that had long been thought to be within the scope of the Commander in Chief's authority. n569 And he negotiated and signed the Convention Against Torture, which requires the United States to categorically prohibit torture, with "no exceptional circumstances whatsoever," including "a state of war," to be invoked as a justification, and which further requires the United States to "undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment." n570 But in other respects, the Reagan Administration also claimed preclusive war powers [\*1080] that, if taken seriously, appeared to be broader than even those that Truman had asserted. n571 1. Restrictions on the Use of Force in Lebanon and the War Powers Resolution. - In 1983, Congress authorized the President to continue participation by U.S. armed forces in Lebanon. That authorization specified that it would expire in eighteen months (and even sooner, under certain circumstances), absent further authorization. n572 In his signing statement, President Reagan came close to endorsing the view that Nixon had first taken, but that Carter had reversed - namely, that the durational limit of the War Powers Resolution was unconstitutional. Such an "inflexible deadline[]," he wrote, "creates unwise limitations on Presidential authority," and he expressly disclaimed any acknowledgement that section 5(b) of the War Powers Resolution was [\*1081] constitutional. n573 Moreover, Reagan stated that "I do not and cannot cede any of the authority vested in me ... as Commander in Chief of the United States Armed Forces," and that he would not construe the eighteen-month limit of the bill itself "to revise the President's constitutional authority to deploy United States Armed Forces." n574 Despite laying down this marker, there was no actual statutory disregard, because hostilities in Lebanon did not extend beyond ninety days. 2. Regulation of Covert Actions and the Iran-Contra Affair. - The issue concerning preclusive executive war powers was more famously implicated in Reagan's second term, in connection with the Iran-Contra Affair. The scandal concerned, among other things, the possible violation of several laws that Congress had passed - known as the Boland Amendments - to restrict military and other assistance to the Contras in Nicaragua. One of the final such acts prohibited the use of all funds, by the Department of Defense, the CIA, and any other U.S. agencies involved in intelligence activities, for the purpose, or which would have the effect, of supporting any military or paramilitary operations in Nicaragua during fiscal year 1985. n575 Similarly, in 1986 Congress enacted a law that provided for renewed military aid and humanitarian assistance to Nicaragua, but that flatly prohibited all members of the U.S armed forces, and other employees of any agency or department of the United States, from entering Nicaragua to provide military advice, training, or logistical support to paramilitary groups operating inside that country. n576 Later that year, Congress enacted another statute of even greater specificity, providing that: United States Government personnel may not provide any training or other service, or otherwise participate directly or indirectly in the provision of any assistance, to the Nicaraguan democratic resistance pursuant to this title within those land areas of Honduras and Costa Rica which are within 20 miles of the border with Nicaragua. n577 [\*1082] Although the failure of actors within his Administration to comply with these laws gave rise to the most serious crisis of his presidency, Reagan did not publicly object to the constitutionality of any of the bills when he signed them into law. n578 Nonetheless, the Administration did take a position on a related matter that clearly called these provisions into constitutional question. In a 1974 statute, n579 Congress enacted the Hughes-Ryan Amendment to the Foreign Assistance Act of 1961, which prohibited the CIA from engaging in activities other than intelligence gathering (including covert action) unless and until the President makes a finding that the operation is "important to the national security of the United States and reports, in a timely fashion, a description and scope" of such activities to specified congressional committees. n580 A few years later, the Intelligence Authorization Act for Fiscal Year 1981 n581 continued a version of the Hughes-Ryan Amendment's executive reporting requirement, and also provided that the Director of Central Intelligence must give prior, instead of "timely," notice of "any significant anticipated intelligence activity," except in extraordinary circumstances, where the President must still give timely notice and a statement of the reasons for not giving prior notice. n582 In 1986, in connection with the Iran-Contra Affair, controversy arose over whether the Reagan Administration had complied with the "timely notice" requirement after the President indefinitely postponed [\*1083] notification of Congress of covert actions he took with respect to Iran. OLC wrote an opinion concluding that the statutory "timely notice" mandate should be construed to effectively give the President unbounded discretion in deciding when to inform Congress. n583 It rested this strained reading of the law n584 on the notion that such a requirement would otherwise be constitutionally dubious. OLC reasoned that Congress may not require the President to "relinquish any of his constitutional discretion in foreign affairs" (including through the mechanism of an appropriations condition). n585 More strikingly still, OLC asserted that Congress is almost powerless to act with respect to the world outside U.S. borders - that "the Constitution gave to Congress only those powers in the area of foreign affairs that directly involve the exercise of legal authority over American citizens," and that the President has virtually plenary authority "as to other matters in which the nation acts as a sovereign entity in relation to outsiders." n586 When pressed on the point by the Senate Intelligence Committee in 1987, the Assistant Attorney General for OLC conceded that Congress did have some Article I powers to affect foreign affairs, but continued to defend the notion that the President has certain "zones" of authority that "cannot be regulated," including with respect to authority over most covert activities. n587 In a memorandum responding to questions from Senator Arlen Specter, Assistant Attorney General Charles Cooper further argued that although the Rules for Government and Regulation Clause does give Congress the power to "prescribe a code of conduct governing military life," and to insist upon another code of conduct "for the individuals engaged in ... covert actions," that Article I authority does not permit Congress to pass laws "controlling actual military operations," or "intruding in any way upon the Commander-in-Chief's decisionmaking authority." n588 Thus, he wrote, "to the extent a covert action is analogous to a military action, ... the [\*1084] President as Commander-in-Chief retains complete control over the operation," including "the authority to decide when and to whom to disclose the operation." n589 E. Bush 41: Aggressive Expansion of Preclusive Claims Assertive as the Reagan Administration was, a qualitative change in the Executive's posture toward statutory regulation of issues concerning the military's organization and functions appears to have occurred in 1989, under the Administration of George H.W. Bush. n590 Part of this was a consequence of a broader, general invocation of executive prerogatives: OLC went so far as to write that "while Congress has a free hand in determining what laws the President is to enforce, we do not believe that Congress is constitutionally entitled to dictate how the executive branch is to execute the law." n591 But there was a particular aggressiveness with respect to the Commander in Chief Clause, reflected in a series of presidential signing statements on omnibus appropriations and authorizations bills. In them, the first President Bush indicated his intent not to fully enforce certain provisions to the extent they impinged on his understanding of his authority as Commander in Chief. Interestingly, most of these measures did not even deal with the regulation of military campaigns, as such, or treatment of the enemy - generally the provisions at issue were the sort of run-of-the-mine regulations of the organization and [\*1085] structure of the armed forces that appear all throughout Title 10 of the United States Code. The systematic nature of the objections to these measures, combined with the apparent breadth with which they were described, suggested that Truman's gambit on behalf of preclusive war powers had at last found a champion. It should be emphasized, however, that President Bush set forth many of these contentions in cursory fashion. Thus, the signing statements may have been designed as much to lay down markers for exceptional applications of the measures in question as to announce an actual intention to disregard them as a matter of routine administration. 1. Objections to Regulations Concerning National Security Information. - The Bush Administration's first publicly announced Commander in Chief Clause objection did not deal with the military at all. It instead concerned a provision of an appropriations act that proscribed the implementation of certain "nondisclosure" agreements the Executive had required of government employees who had access to classified information. n592 Relying on Department of the Navy v. Egan, n593 President Bush wrote that the Commander in Chief Clause gave the President the duty "to ensure the secrecy of information whose disclosure would threaten our national security." n594 The provision in question thus raised "profound constitutional concerns" in the President's view, because it regulated the manner in which he could prevent the disclosure of classified information "concerning our most sensitive diplomatic, military, and intelligence activities." n595 [\*1086] President Bush also objected to various statutes requiring the executive branch to disclose to Congress information about military intelligence and operations. In signing an annual defense appropriations act, for instance, the President wrote that he would interpret certain reporting or consultation provisions - such as a provision requiring a report on the measures that would be required to verify conventional force reductions in Europe, and another calling for a report on intelligence estimates on future Soviet tank production and operational capacities - "so as not to impose unconstitutional constraints upon my authority to protect sensitive national security information." n596 Again with respect to a supplemental appropriations act for the first Gulf War in 1991, President Bush suggested that he might not comply with reporting requirements - one that required notifying Congress of the proposed storage of certain equipment, supplies, or material in a prepositioned status for use by the U.S. armed forces; another that required a report on "all enemy equipment falling under the control ... of allied forces within the Desert Storm theater of operations"; n597 and a third that required a report on "any arrangement for a United States military presence that has been made or is expected to be made to the government of any country in the Middle East." n598 2. Objections to Statutes Regulating the Manner of Deploying the Armed Forces. - In a series of signing statements concerning regulations of deployments, the first President Bush evidenced a remarkably strong notion of a substantive Commander in Chief preclusive power - one that would allow him to ignore statutory regulation of the positioning of even peacetime armed forces if the statutes did not conform to his view of what was best for the defense of the nation. For example, President Bush issued constitutional objections to a provision that [\*1087] would have restricted the availability of certain members of the armed forces to fill positions in a new light infantry battalion; a provision that would have restricted the establishment or transfer of certain naval functions and billets until sixty days after a report to congressional committees; and a provision that would have prohibited certain Air Force weather reconnaissance squadrons from being operated at a reduced level. n599 More significantly, in a statement several days later the President singled out several provisions that "could be read as limiting the deployment of military personnel," such as one that would have limited the active-duty forces deployed in Europe, and another that would have restricted the President's authority to relocate defense personnel from an air base in Spain. n600 Even though the former provision specifically authorized a waiver upon a presidential determination that an exception was critical to the national security, Bush wrote that "I do not believe my discretion to deploy military personnel may be subject to such a statutory standard." n601 Therefore, "while I will respect the intent of such provisions as far as possible, I sign this bill with the understanding that they do not constrain my authority to deploy military personnel as necessary to fulfill my constitutional responsibilities as President and Commander in Chief." n602 This trend continued with respect to an even greater range of provisions in the signing statement for the National Defense Authorization Act for Fiscal Year 1991. n603 The President identified constitutional concerns in a provision that regulated the executive system of classification by requiring notice to the Congress regarding initiation of, or changes in, special access programs. n604 Bush also complained about provisions that limited the number of military personnel stationed in Japan and in Europe - even though such statutes provided for waivers when the President determined that national security required them. n605 He also noted that he would construe yet other provisions "consistent with my authority as Commander in Chief to deploy the Armed Forces as I see fit" - namely, a provision that required assignment of all Army Reserve operational forces to U.S. Forces Command, and provisions that established standards for the allocation of [\*1088] aircraft to Naval Reserve, Air Force Reserve, and Air National Guard units, and required assignment of the tactical airlift mission to the Air Force Reserve and Air National Guard. n606 Finally, in October 1992, President Bush announced a power to depart from two other statutory provisions related to troop deployments that would affect "my authority to deploy military personnel as necessary to fulfill my constitutional responsibilities": one that limited the use of funds to support only 100,000 troops in Europe as of October 1, 1995, and another that required a forty percent cut in U.S. forces overseas after September 30, 1996, absent a war or national emergency. n607 As these statutes demonstrate, however, Congress did not at all share President Bush's view of preclusive Commander in Chief war powers. Indeed, even in authorizing the first Gulf War, Congress provided that before the President could use the armed forces to achieve implementation of specified U.N. Security Council resolutions, he was required to provide to congressional leaders his determination that the United States had successfully tried "all appropriate diplomatic and other peaceful means to obtain compliance by Iraq" with those Security Council resolutions. n608 F. The Clinton Administration The Clinton Administration did not swing the pendulum back to where the Carter Administration had left it, but neither did it embrace the broader view of the preclusive war powers that the Bush Administration had pushed. Indeed, in some respects, the Clinton Administration was very generous in its respect for Congress's powers, though it, too, occasionally invoked a notion of preclusive powers broader than Presidents prior to Truman had seen fit to claim. Moreover, throughout this period, marked as it was by an often hostile legislature and a number of controversial military engagements abroad, Congress enacted a number of measures restricting the use of military force abroad, even when operations were already underway. [\*1089] 1. Acceptance of Congressional Restrictions. - President Clinton promoted and signed the 1994 federal torture statute, n609 as well as the War Crimes Act. n610 The latter statute, enacted in 1996 and amended in 1997, n611 established criminal penalties for conduct in violation of certain humanitarian treaty obligations: grave breaches of any of the Geneva Conventions; violations of Articles 23, 25, 27, or 28 of the Annex to the Fourth Hague Convention; n612 and, until recently, all violations of Common Article 3 of the Geneva Conventions. n613 Nor did President Clinton object to several enactments limiting the use of military force abroad. n614 For example, when Congress provided in November 1993 that funds could be obligated with respect to hostilities in Somalia beyond March 1994 only "to protect American diplomatic facilities and American citizens, and [for] noncombat personnel to advise the United Nations commander in Somalia," n615 Clinton did not raise a constitutional objection to this limitation, notwithstanding that the provision imposed a restriction on the use of combat forces in an area where hostilities had already broken out. n616 In 1997, Clinton [\*1090] did not raise a constitutional objection when Congress passed a law prohibiting the use of Department of Defense appropriations for the deployment of any U.S. ground combat forces in the Republic of Bosnia and Herzegovina after June 30, 1998, unless the President transmitted to Congress a certification that such deployment was "required in order to meet the national security interests of the United States" (and that such ground forces would not serve as civil police). n617 The Clinton Administration also carefully avoided adoption of a position on the constitutionality of the sixty-day limit in the War Powers Resolution. n618 Most notably, although Clinton deployed troops in hostilities in Kosovo for longer than the WPR time limit in 1999, his OLC justified such action not on the ground that the WPR was unconstitutional, but instead on a controversial statutory interpretation. n619 [\*1091] 2. Invocations of Preclusive Powers. - That said, the Clinton Administration frequently invoked Commander in Chief prerogatives, chiefly in areas concerning the internal structure of the military chain of command. In doing so, however, the Administration often reasoned in ways that hinted at broader notions of preclusive authority, such as those that former President Taft had pushed nearly a century before concerning the impermissibility of statutory regulation of troop movements, and that Assistant Attorney General Rehnquist had appeared to endorse while serving as Nixon's head of OLC. n620 (a) The U.N. Command Legislation. - The Clinton Administration's most direct assertion of preclusive power was set forth in an opinion that OLC issued in 1996, dealing with a bill that would have restricted the President's use of appropriated funds to place U.S. armed forces under the operational or tactical control of the United Nations. n621 OLC acknowledged Congress's broad power to establish [\*1092] rules creating and regulating "the framework of the Military Establishment." n622 The opinion then countered that "such framework rules may not unduly constrain or inhibit the President's authority to make and to implement the decisions that he deems necessary or advisable for the successful conduct of military missions in the field, including the choice of particular persons to perform specific command functions in those missions." n623 In doing so, the opinion did not cite, let alone discuss, Youngstown. Nor did it account for the fact that the proposed legislation would not have prohibited the President from assigning troops to U.N. command - he would have been entitled to do so upon a certification that it would serve the interests of national security, as long as he also filed a timely report to Congress explaining his decision. n624 The opinion was not clear as to what "core" power it was protecting. Some of the language suggested that the constitutional problem arose from the attempt to interfere with the President's capacity to choose his commanders rather than with its infringement of tactical judgments per se. n625 In that respect, the OLC analysis might be read as an aggressive, and perhaps unwarranted, application of the well-established principle that the Commander in Chief's superintendence of the military may not be compromised. n626 But the opinion also cited favorably Taft's Yale Law Journal article statement concerning the inviolability of executive decisions regarding troop movements, n627 and a Clinton signing statement characterized the offending provision as constitutionally problematic because it restricted "the President's authority to make and implement decisions relating to the operational or tactical control of elements of the U.S. armed forces." n628 [\*1093] (b) Legislation Regulating Foreign Deployments. - President Clinton also invoked the Commander in Chief Clause in several signing statements concerning measures regulating foreign deployments. The statements had a remarkably similar formulation, one that seemed designed to explain how the statutory language would be construed rather than to assert that a constitutional problem would be raised if such a construction were not adopted. Thus, although such statements certainly did not disclaim the existence of preclusive powers, they appeared to be serving notice that the measures would be interpreted to accord flexibility in emergencies. n629 Some of those signing statements objected to reporting requirements. n630 Others objected to more substantive requirements and limitations. [\*1094] For example, Clinton expressed concern with the alleged "inflexibility" of a 1994 appropriations measure that denied the availability of funds provided in that act for military participation to continue Operation Support Hope in or around Rwanda after October 7, 1994, except for any action necessary to protect the lives of United States citizens. n631 Similarly, in 1999, Congress passed a provision stating that "no funds available to the Department of Defense during fiscal year 2000 may be expended after May 31, 2000, for the continuous deployment of United States Armed Forces in Haiti pursuant to the Department of Defense operation designated as Operation Uphold Democracy." n632 Although Clinton had already decided to terminate the Haiti deployment, he issued a signing statement that the limitation "concerned" him, and that "I will interpret this provision consistent with my constitutional responsibilities as President and Commander in Chief." n633 In at least one instance, Clinton went further and appeared to claim a power to defy a restriction on his preferred use of troops abroad. The issue arose in connection with a provision of a budget bill that conditioned funding for diplomatic efforts in Vietnam on that country's actions in assisting to identify the remains of Americans, and to account for POWs and MIAs in Vietnam. n634 A footnote in an OLC Opinion focusing on other constitutional problems with the measure explained that "there is [an] apparent constitutional flaw in section 609: it purports to prescribe to the President the manner in which he must proceed to recover the remains ... . Such detailed prescriptions [\*1095] may well encroach on the President's constitutional authority as Commander in Chief. We do not press that objection here." n635 G. The George W. Bush Administration The Administration of George W. Bush has embraced the aggressive preclusive claims of its predecessors, and even pushed them to their logical extremes, while evincing none of the tempering impulses one detects in the statements of the Nixon, Ford, Carter, and Clinton Administrations. Most importantly, the Administration has gone beyond merely asserting the preclusive power in signing statements, veto messages, or memoranda to Congress. It appears to have relied upon such claims to engage in outright defiance of statutory restrictions in exercising coercive governmental authority. With the exception of the actions of President Ford in the extraordinary chaos of the last days of the Vietnam War, we are not aware of a similarly consequential act of executive disregard, premised on executive war powers, undertaken in the presence of a sitting Congress. n636 The Bush Administration has [\*1096] exercised this claimed power, moreover, for prolonged periods of time and on multiple fronts. The Administration first manifested its approach in the immediate aftermath of the attacks of September 11, 2001. Within a week of the attacks, Congress had overwhelmingly voted for, and the President had signed, legislation authorizing the President to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons. n637 Just one week later, OLC issued a lengthy memorandum espousing a broad view of what the President's unilateral constitutional (or Youngstown Category Two) authority would be in the absence of the legislative authorization that the President had just obtained. n638 The opinion went on, however, to address the Category Three question, contending that where the President is acting in response to a national "emergency" such as an attack from abroad, "we do not think [the President's Commander in Chief power] can be restricted by Congress through, e.g., a requirement that the President either obtain congressional authorization for the action within a specific time frame, or else discontinue the action." n639 And, in its final two sentences, the OLC memo asserted that neither the War Powers Resolution nor the force authorization law (nor presumably any other statute) "can place any limits on the President's determinations as to any terrorist threat, the amount of military force to be used in response, or the method, timing, and nature of the response. These decisions, under our Constitution, are for the President alone to make." n640 As we explained in greater detail in our previous Article, the Bush Administration proceeded to apply this robust constitutional position actively. It claimed that the President could disregard an array of important statutes and treaties - from the Torture Act to the Habeas Act of 1867; from the Foreign Intelligence Surveillance Act even to the War Crimes Act; and more - if they happened to interfere with the manner in which he concluded the conflict against al Qaeda should be prosecuted. n641 More recently, President Bush vetoed a bill because, [\*1097] among other things, it would have required initiation of a partial withdrawal of troops from Iraq and regulated the use of remaining troops thereafter - requirements as to which he expressed constitutional doubts. n642 Furthermore, in scores of signing statements, President Bush has invoked his power as Commander in Chief in objecting to statutory enactments, stating or suggesting that he will not fully comply with them (or will construe them contrary to their natural readings). n643 Some of these provisions have involved the manner in which the military shall conduct the campaign against al Qaeda or directives limiting troop deployment and combat operations. n644 Others have arguably been premised on the well-established superintendence prerogative. Like other Presidents since World War II, however, President George W. Bush has extended his assertion of preclusive powers beyond contexts involving the actual conduct of hostilities to others relating to the organization and use of the armed forces and intelligence agencies. n645 [\*1098] Most recently, the Bush Administration has promulgated a statement of administration policy threatening a veto of a defense authorization bill based on the Commander in Chief Clause if the legislation included a provision requiring an adjudication, with particular procedural protections, of the "unlawful enemy combatant" status of all detainees held for more than two years. n646 In that same statement, the Administration warned that if the bill contained any proposed amendments restricting actions to "deal effectively" with threats posed by Iran, the President would likely veto it, invoking an unqualified theory that "provisions of law that purport to direct or prohibit ... covert action[] or use of the armed forces are inconsistent with the Constitution's commitment exclusively to the presidency of the executive power[and] the function of Commander-in-Chief." n647 H. Conclusion There has been an undeniable expansion - one is even tempted to say explosion - of preclusive executive war powers claims between the start of the Korean War and the second Bush Administration. During this period, it appears that every President, save for Carter, invoked this authority in one form or another. These assertions extended beyond the confines of the superintendence and necessity claims that had a well-established pedigree in the period before 1950. Still, one must be careful in assessing this change in executive practice. Administrations varied greatly in the kinds of preclusive assertions they made. The fact that the invocations were so often brief and opaque - at least until some of the more developed and unqualified assertions of the current Bush Administration - adds to the difficulty of discerning the theory that animated them. In many cases, it is not easy to know whether these assertions were intended to lay down markers against unforeseen and exceptional circumstances that might arise, or instead to announce actual defiance of statutory restrictions. This uncertainty underscores the fact that, as much as Presidents plainly became enamored of these claims, the executive branch did not [\*1099] settle upon a set of common principles. Nor was there even agreement across presidencies as to whether such a preclusive power should extend much, if at all, beyond those understandings that were already accepted before 1950. Certainly there was no sustained practice of actually disregarding statutes similar to that we have seen since September 11, 2001. Indeed, some of the statutes that the current Bush Administration claims a constitutional authority to disregard are measures that modern administrations helped to craft and that modern Presidents signed without objection. Moreover, throughout this period, there was a surge in the flow of statutes directly restricting the President's war powers, even as to the conduct of ongoing campaigns. This countertrend belies the general assumption that Congress has been quiescent in matters of warfare in the face of presidential assertiveness. It also undermines any idea that there was a concord between the branches that military decisions and the command of campaigns are the exclusive preserve of the President. To be sure, one in search of historical practice to ground the dramatic assertions of preclusive power advanced by the Bush Administration since 2001 could do no better than to look within this fifty-year period. But this era did not establish anything like a consistent political branch practice akin to that concerning the unilateral executive power to deploy troops and to use force abroad. Instead, what resulted was an inchoate jumble of often ill-defined, and occasionally contradictory, executive branch claims sharing space with numerous intrusive statutory and treaty-based limitations, a number of which Presidents accepted as constitutional. VI. Bringing Our Constitutional Tradition To Bear on Disputes at the Lowest Ebb We have emphasized throughout these Articles that the "lowest ebb" issue is more important to the constitutional development of war powers than the prevailing congressional abdication paradigm would suggest. What, then, should happen when the President, in the exercise of his constitutional war powers, confronts a statutory restriction that is at odds with his preferred course of conduct? As we have explained, the text of the Constitution provides no conclusive answer. Nor does a broader examination of the affirmative constitutional powers, whether express or implied, of either of the political branches. In our view, the legislative and executive branches each possess quite substantial independent substantive war powers; these authorities, as Justice Jackson concluded in Youngstown, overlap and intersect in important respects. The key constitutional question, therefore, is which, if any, of the President's constitutional war powers are so central to his performance of his role as the Commander in Chief as to preclude Congress from regulating them. [\*1100] In broad terms, our historical review has shown that the view embraced by most contemporary war powers scholars - namely, that our constitutional tradition has long established that the Commander in Chief enjoys substantive powers that are preclusive of congressional control, especially with respect to the command of forces and the conduct of campaigns - is unwarranted. The fact that this longstanding scholarly assumption about historical consensus is mistaken, however, does not in itself explain what should happen at the "lowest ebb." Accordingly, we offer our own view of how this tradition bears on the ultimate constitutional conclusions that must be made by those responsible for resolving such issues - whether courts, members of Congress, or actors within the executive branch. In doing so, we do not mean to suggest that history is dispositive. Just because Presidents have not acted on a theory of preclusive authority - -and have only in recent decades even articulated it - -does not preclude its contemporary recognition. Past practice does not, in our view, freeze constitutional meaning. Even (and perhaps especially) as to the separation of powers, our constitutional tradition has always been much more tolerant of dynamism. Thus, just as we do not believe a Founding-era consensus can put an end to the need for the exercise of contemporary constitutional judgment in this area, neither do we think longstanding historical practice can entirely pretermit such an inquiry. We do mean to argue, however, that it is folly to think a sound constitutional judgment can be made as to the proper allocation of war powers without facing up to what the historical practice between the branches has actually shown. A change in constitutional practice cannot be made by turning away from history and examining the relative virtues of the President and the Congress in the abstract. Such an approach would be as impossible as it is indeterminate, because it would ask us to "both exorcise from ourselves the influences of our own traditions and ignore the lessons our society has learned over time." n648 Judgments about the proper constitutional roles of the political branches in war are necessarily embedded in historical narratives that, however unconsciously, inform present understandings. Precisely for that reason, a full account of the actual historical practice is valuable because it challenges the long-accepted narrative about the way Presidents are said to have always acted when it comes to war, and about the way Congress supposedly has long acceded to the imperative of permitting the exercise of such inviolate presidential authority. In particular, the history we have set forth suggests that commonly heard fears and concerns about unchecked executive power [\*1101] should not be discounted. Since we have not had a practice of recognizing such inviolate authority in the Commander in Chief, it cannot be said that such fears and concerns are necessarily overblown. In fact, the Executive's longstanding unwillingness to act in a way that might put those fears to the test itself suggests that they are more substantial than present-day defenders of preclusive Commander in Chief powers would acknowledge. At the same time, the history we have reviewed casts doubt on the functionalist contention that a President cannot possibly conduct a war so long as he understands himself to be subject to legislatively imposed restrictions. As we have seen, Presidents have long operated on just that assumption, and they have adjusted their actions accordingly - and in ways that cannot be said to have clearly imperiled the nation. Thus the history undermines assertions about the inherent or inevitable unmanageability or dangers of recognizing legislative control over the conduct of war. In other words, this history offers us valuable information about how things have worked in the past, and thereby helps to inform us about what consequences might follow from a constitutional judgment in the here and now. Moreover, this historical account performs at least one function beyond supplying information relevant to the empirical questions that may arise in constitutional war powers disputes. Such a history also provides important confirmation of what is widely taken to be a fundamental aspect of our national ethos - of how we collectively understand ourselves as a nation. It has long been a central tenet of the American idea - of the basic national story we tell ourselves as early as grade school - that our government is defined by separated and blended powers, with checks and balances that promote public reasoning and debate, preserve democratic self-governance, and protect against concentrations of power in a single figure. The history we have reviewed suggests that this felt understanding is not a myth belied by the way our government has actually operated in times of crisis. Rather, the history shows that this self-conception has deep roots in centuries of political branch practice concerning matters of the gravest national consequence. If a theory of presidential preclusive power were now to take root - such that Presidents began to act, as a matter of course, as if they were entitled to make wartime decisions free of the customary checks, and in ways that prior Presidents simply did not contemplate - then the longstanding narrative about the American system of government might adjust to better fit the new practice. Over time, a story highlighting the imperatives of executive action, and the need for unfettered presidential leadership, might begin to displace the narrative we presently celebrate. The avulsive change in the constitutional law of war powers that some now call for, then, portends consequences that reach far beyond the way that discrete interbranch battles over the constitutional law of war powers should be [\*1102] resolved. This new, preclusive constitutional practice, if accepted, could influence how we and future generations would conceive of the constitutional system as a whole, such that the ideal of checks and balances might no longer seem so central to what defines the American framework of government. At issue, therefore, is whether present circumstances demonstrate the need for a change that risks such a fundamental revision of our national identity.

#### SOP prevents nuclear war

**Forrester 89** (Ray, Professor at Hastings College of the Law, University of California, Former dean of the law schools at Vanderbilt, Tulane, and Cornell, “Presidential Wars in the Nuclear Age: An Unresolved Problem” George Washington Law Review, August 1989, 57 Geo. Wash. L. Rev. 1636, Lexis)

A basic theory--if not the basic theory of our Constitution--is that concentration of power in any one person, or one group, is dangerous to mankind. The Constitution, therefore, contains a strong system of checks and balances, starting with the separation of powers between the President, Congress, and the Supreme Court. The message is that no one of them is safe with unchecked power. Yet, in what is probably the most dangerous governmental power ever possessed, we find the potential for world destruction lodged in the discretion of one person. As a result of public indignation aroused by the Vietnam disaster, in which tens of thousands lost their lives in military actions initiated by a succession of Presidents, Congress in 1973 adopted, despite presidential veto, the War Powers Resolution. Congress finally asserted its checking and balancing duties in relation to the making of presidential wars. Congress declared in section 2(a) that its purpose was to fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations. The law also stated in section 3 that [t]he President in every possible instance shall consult with Congress before introducing United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated. . . .   Other limitations not essential to this discussion are also provided. The intent of the law is clear. Congress undertook to check the President, at least by prior consultation, in any executive action that might lead to hostilities and war.  [\*1638]  President Nixon, who initially vetoed the resolution, claimed that it was an unconstitutional restriction on his powers as Executive and Commander in Chief of the military. His successors have taken a similar view. Even so, some of them have at times complied with the law by prior consultation with representatives of Congress, but obedience to the law has been uncertain and a subject of continuing controversy between Congress and the President. Ordinarily, the issue of the constitutionality of a law would be decided by the Supreme Court. But, despite a series of cases in which such a decision has been sought, the Supreme Court has refused to settle the controversy. The usual ground for such a refusal is that a "political question" is involved. The rule is well established that the federal judiciary will decide only "justiciable" controversies. "Political questions" are not "justiciable." However, the standards established by the Supreme Court in 1962 in [Baker v. Carr, 369 U.S. 186,](http://www.lexisnexis.com.proxy-remote.galib.uga.edu/us/lnacademic/mungo/lexseestat.do?bct=A&risb=21_T6985987787&homeCsi=7338&A=0.6266105664536012&urlEnc=ISO-8859-1&&citeString=369%20U.S.%20186&countryCode=USA) to determine the distinction between "justiciable controversies" and "political questions" are far from clear. One writer observed that the term "political question" [a]pplies to all those matters of which the court, at a given time, will be of the opinion that it is impolitic or inexpedient to take jurisdiction. Sometimes this idea of inexpediency will result from the fear of the vastness of the consequences that a decision on the merits might entail.   Finkelstein, Judicial Self-Limitation, 37 HARV. L. REV. 338, 344 (1924)(footnote omitted). It is difficult to defend the Court's refusal to assume the responsibility of decisionmaking on this most critical issue. The Court has been fearless in deciding other issues of "vast consequences" in many historic disputes, some involving executive war power. It is to be hoped that the Justices will finally do their duty here. But in the meantime the spectre of single-minded power persists, fraught with all of the frailties of human nature that each human possesses, including the President. World history is filled with tragic examples. Even if the Court assumed its responsibility to tell us whether the Constitution gives Congress the necessary power to check the President, the War Powers Resolution itself is unclear. Does the Resolution require the President to consult with Congress before launching a nuclear attack? It has been asserted that "introducing United States Armed Forces into hostilities" refers only to military personnel and does not include the launching of nuclear missiles alone. In support of this interpretation, it has been argued that Congress was concerned about the human losses in Vietnam and in other presidential wars, rather than about the weaponry. Congress, of course, can amend the Resolution to state explicitly that "the introduction of Armed Forces" includes missiles as well as personnel. However, the President could continue to act without prior consultation by renewing the claim first made by President  [\*1639]  Nixon that the Resolution is an unconstitutional invasion of the executive power. Therefore, the real solution, in the absence of a Supreme Court decision, would appear to be a constitutional amendment. All must obey a clear rule in the Constitution. The adoption of an amendment is very difficult. Wisely, Article V requires that an amendment may be proposed only by the vote of two-thirds of both houses of Congress or by the application of the legislatures of two-thirds of the states, and the proposal must be ratified by the legislatures or conventions of three-fourths of the states. Despite the difficulty, the Constitution has been amended twenty-six times. Amendment can be done when a problem is so important that it arouses the attention and concern of a preponderant majority of the American people. But the people must be made aware of the problem. It is hardly necessary to belabor the relative importance of the control of nuclear warfare. A constitutional amendment may be, indeed, the appropriate method. But the most difficult issue remains. What should the amendment provide? How can the problem be solved specifically? The Constitution in section 8 of Article I stipulates that "[t]he Congress shall have power . . . To declare War. . . ." The idea seems to be that only these many representatives of the people, reflecting the public will, should possess the power to commit the lives and the fortunes of the nation to warfare. This approach makes much more sense in a democratic republic than entrusting the decision to one person, even though he may be designated the "Commander in Chief" of the military forces. His power is to command the war after the people, through their representatives, have made the basic choice to submit themselves and their children to war. There is a recurring relevation of a paranoia of power throughout human history that has impelled one leader after another to draw their people into wars which, in hindsight, were foolish, unnecessary, and, in some instances, downright insane. Whatever may be the psychological influences that drive the single decisionmaker to these irrational commitments of the lives and fortunes of others, the fact remains that the behavior is a predictable one in any government that does not provide an effective check and balance against uncontrolled power in the hands of one human. We, naturally, like to think that our leaders are above such irrational behavior. Eventually, however, human nature, with all its weakness, asserts itself whatever the setting. At least that is the evidence that experience and history give us, even in our own relatively benign society, where the Executive is subject to the rule of law.  [\*1640]  Vietnam and other more recent engagements show that it can happen and has happened here. But the "nuclear football"--the ominous "black bag" --remains in the sole possession of the President.

## Counterplans

### A2 Court Power CP – TL

#### Won't solve compliance – [whatever] institution simply won't comply with the Court, which destroys court legitimacy even further – that's Law.

#### Solvency deficit – the advantage isn't about some future ruling being effective, it removes this glaring example of the Court's ineffectiveness, which in turn promotes future compliance

### A2 First Amendment CP

#### Courts are weak now – counterplan can't solve First Amendment precedent

Gould 10 [Gould, Jon B (Professor in the Department of Justice, Law & Criminology at American University), Speak No Evil, edited by Jon B. Gould, University of Chicago Press, 2010. ProQuest Ebook Central, http://ebookcentral.proquest.com/lib/stanford-ebooks/detail.action?docID=496617] AZ

What I have described so far is a system of law and legal construction that centers both authority and meaning-making outside of formal institutions. My intention is not to disparage the courts or their powers, for the public generally defers to the judiciary’s declaration of law. Even when a critical mass opposes a legal decree, the courts still catalyze the legal meaning-making function. Nonetheless, neither the Supreme Court nor the lower courts as a whole are able to control the meaning of constitutional norms, most notably those based on the First Amendment. The courts necessarily rely on societal consensus for public acceptance and legitimacy, but even more, the meaning of law, both private and public, is based on extra-judicial processes. As other scholars have said, “the central norms of the constitutional regime depend for their effectiveness on the attitudes of the political community.”98 “The great battles for free expression will be won not in courts but in committee rooms and protest meetings, by editorials and letters to Congress and through the courage of citizens everywhere.”99 One reason extra-judicial processes have so much influence over legal meaning is that democratic societies are constantly balancing social pressures with judicial intervention to enforce behavioral norms. As Franklyn Haiman explains, “A free society will always draw the line between what it considers immoral and what it makes illegal as close as possible to the more serious, direct, immediate, and physical of the harms, and it will leave to the operations of social pressure, education and self-restraint the control of behaviors whose harms to others is less serious, less direct, less immediate, and less physical.”100 Put another way, the most clear, recognized moral wrongs101 will be codi- fied into law and enforced through the judicial system, but social pressures will be left to handle those issues that, while objectionable to many, are not so universally recognized as wrong. Here a diagram may be helpful. In the figure below, the center circle represents codified law, covering conduct widely accepted as wrong. The middle ring reflects the informal or hidden law that Jonathan Rauch has described—those social expectations and understandings of morality that regulate behavior. While there is agreement that particular behavior is immoral or improper, these views are not codified into law; either the consensus is not sufficiently strong or there is a sense that informal mechanisms are effective at enforcing the social norm. The outer ring then represents moral views that have not yet achieved societal support but maintain a constituency that seeks their acceptance and eventual codification. The relative size of the spheres reflects the number of norms that may exist in each region, not the extent to which they are controlling or powerful. It is axiomatic that a greater number of moral perspectives exist in society than ever achieve a critical level of acceptance. Similarly, as Rauch convincingly argues, formal law need not codify each of the various understandings and expectations that order social behavior.

### A2 Hate Speech CP/DA

#### Perm do both – Doe v Michigan only disagreed with speech codes that are overbroad and vague – the specificity of the CP would make it consistent with the plan

Rabe 3 [Lee Ann rabe (B.A., in English, The Ohio State University; M.A., in

Journalism, The Ohio State University; J.D., The Ohio State University

Moritz College of Law, Class of 2003), "Sticks and Stones: The First Amendment and Campus Speech Codes," 37 J. Marshall L. Rev. 205 (2003)] AZ

Federal district courts have cited to the overbreadth problem when striking down campus speech codes. In Doe v. University of Michigan,46 the district court declared the speech code adopted by the University of Michigan to be unconstitutional.47 The court first drew a distinction between "pure" speech and conduct, stating that the latter was open to prohibition and punishment while speech alone generally was not.4' The court went on to discuss the types of speech that the university might be able to regulate, including "fighting words" and speech "which has the effect of inciting imminent lawless action." 9 Regulations aimed at prohibiting such speech must be carefully targeted so it affects only the unprotected speech. If the regulation also bans a significant amount of speech protected by the First Amendment, the regulation is overbroad and cannot withstand constitutional challenge. The Michigan speech code was not so carefully targeted. Instead it prohibited both protected speech and potentially unprotected speech." The University's code vaguely described which types of speech were prohibited and the administration never considered whether the speech complained of might be protected by the First Amendment."1 The University noted that speech that did violate the code included classroom discussions on the origins of homosexuality" and informal discussions about the challenges faced by dentistry students.' Intense debate over the treatment of minorities in an academic program or the reasons an individual is homosexual are not the kind of speech contemplated by the "fighting words" doctrine.' Yet those topics were exactly the kind of speech the university saw as sufficiently harmful to warrant full hearings, counseling, and forced apologies.55 Such an overbroad scope ensured the unconstitutionality of the speech code because it conflicted with the protections of the First Amendment.' The district court also held that the Michigan speech code was void for vagueness because it was not sufficiently clear to put students on notice as to what was prohibited. 7 When a regulation places limits on a constitutional right, the standards by which the regulation will be applied must be even clearer.' The University attempted to set the standards by noting that if the effects were to "stigmatize" or "victimize" an individual, then such language was not protected. However, the general terms "stigmatize" and "victimize" were held to be too vague to give students a clear understanding of what was prohibited by the Michigan speech code. 9 No clear standards for distinguishing between protected and unprotected speech were ever established.' Absent clear standards as to what language was permissible and what was not permissible, the court was unwilling to allow the university to limit its students' First Amendment rights and found the code unconstitutional.

## Disads

## cutting board

### Wilhelm (2005)

Wilhelm 5 [Teena Wilhelm, "Judicial Policymaking: The Preemptive Role of State Supreme Courts Judicial Policymaking: The Preemptive Role of State Supreme

Courts," dissertation submitted to University of Arizona, 2005] AZ

#### Courts influence policy formation on education

Table 7.1 presents the summarized results for all models and stages in both policy areas. The number in each column represents how many models were significant in each policy area and stage of policymaking. Conclusively, there is evidence of a preemptive judicial influence across both policy areas. As expected, there is a greater influence in education policy than HMO regulation. All education models showed support for judicial influence, and to a much greater extent than HMO regulation. This was expected in consideration of judicial saliency with regard to both policy areas. Education policy has traditionally and historically been a more salient area of judicial influence Recall the crux of the theoretical argument for a preemptive influence of courts on legislative behavior builds from a notion that legislatures will alter their behavior in anticipation of court reaction. Some of these factors that legislatures reference when making policy decisions pertain to past court behavior as a guideline for anticipated court reactions and others pertain to prospective court behavior defined by preferences and institutional rules. Whether legislatures are more responsive to signals from past court actions or the current political environment seemingly speaks to the type of behavior in which legislatures behave vis-à-vis courts. For HMO policy, evidence of legislative responsiveness to courts indicates that legislative policymaking is more consistent with prospective rather than retrospective behavior. Court hostility or friendliness provided information to legislatures about future actions by state supreme courts. Moreover, when legislatures had the opportunity to request advisory opinions from the court, greater information about future court responses was exchanged between these branches. As a result, legislatures were better able to gauge their decisions to introduce or enact HMO regulation. Judicial influence was also evident when rules shaped the institutional environment in which courts and legislatures act. These rules also supplied prospective information to legislatures. Specifically, method of judicial selection and court discretionary docket control created an environment that, at times, constrained HMO policymaking. However, the extent to which these courts decided HMO cases and the ideological disposition of their decisions did not matter. In this way, retrospective information about courts did not factor into legislative behavior. Overall, preemptive judicial power in HMO policy is limited to the policymaking environment defined by ideological distance, method of selection, and discretionary docket control. 222 Alternatively, a preemptive power of courts in Alternatively, a preemptive power of courts in the area of education policy was manifest in the policymaking environment, defined by ideological distance and institutional rules, as well as by court involvement and disposition of cases. Here legislative policymaking seemed to reflect retrospective and prospective behavior. Combined, ideological distance and the existence of an advisory opinion rule predominately shaped the ideological proclivity of legislative policy introduction and enactment. Moreover, whether courts were elected and whether courts controlled their dockets influenced legislative behavior in the area of education policy. Legislative behavior was also altered by the amount of education cases decided by courts and the ideological outcome of these cases. Fundamentally, public education is a policy area in which legislative fear of state supreme courts is heightened and consequently judicial influence is greatest. The degree of judicial influence and the type of influence varied across these two policy areas, which offered some insight about the role of courts in the policymaking process. Whether or not other factors expected to influence legislative behavior varied across these policy areas also sheds light on this process. Consideration of the impact these alternative explanations have on HMO policy compared to education policy reveals two important findings. First, legislative ideology is a prevalent predictor of both HMO and education policy. Across nearly all models for both policy areas, introduced and enacted policies corresponded to measures of legislative ideology. As anticipated, legislatures reference their own preferences when they produce HMO and education policy.

#### Past research underestimates judicial influence on policy

This comparative assessment of judicial influence on policymaking in the American states demonstrates the limitations of traditional conceptions about how courts influence policy. Courts have been considered influential primarily as a result of decisions, or via their decision making. In this way, judicial influence was not a policymaking factor until after policy was passed. Conceptions of judicial influence in policymaking that do not take into account how legislative behavior is predictably impacted during policymaking in anticipation of future court reaction are missing an important consideration of the consequences of judicial behavior. As a result, the policymaking role of courts is considered marginal at best. Courts can and do make policy. Moreover, an important way courts make policy is preemptive, which places courts at center stage in the policymaking arena. Court and legislatures make policy. This research thus advances a more complete understanding of judicial behavior and in particular legislative-judicial relations in the policymaking process. The findings of this research also shed light on the shortcomings of traditional policy studies. Policy research in the American states has virtually ignored legislative-judicial relations. Although there is attention given to the executive-legislative connection to policy output, courts are not treated as a member of the policy process. This research demonstrates that, particularly in policy areas that have some saliency with the judicial branch, courts are fundamentally missing from policymaking models. Fundamentally, courts should be included in studies of policy adoption. Few studies have recognized the role of the judicial branch in policy adoption; none have addressed the agenda-setting possibility of court influence. This research shows that courts have a significant impact on legislative agendas in both HMO and education policy. Studies that examine the forces that influence legislative agendas must also include the courts if they are to advance a more complete understanding of the agenda-setting process. Moreover, evidence of judicial preemptive power in the introduction stage of the policy process implies that courts also influence their own agenda. Obviously a policy cannot be enacted unless it is introduced—i.e., on the agenda—and courts resolve conflict with enacted policy.

### Welch (2014)

Welch 14 [Benjamin Welch (M.A., University of Nebraska), "An Examination of University Speech Codes’ Constitutionality and Their Impact on High-Level Discourse," August 2014] AZ

#### Non-compliance by colleges influences First Amendment precedent

Welch 14 [Benjamin Welch (M.A., University of Nebraska), "An Examination of University Speech Codes’ Constitutionality and Their Impact on High-Level Discourse," August 2014] AZ

Even today, the informal law of speech regulation has prospered, despite the outcome of legal battles in court. Could it be possible, then, that speech codes will eventually and ultimately have an effect on future First Amendment findings? The bounds of free speech continue to be pressed and reinterpreted despite court rulings advocating for the contrary. Jon Gould in his study comments that policies are rarely enforced, occurring at most once a year. He quotes a former college president, who says, “Adopting policies is easier than acting on actual cases… Policies are non-action,” which most college administrators prefer, he says. “The adoption does nothing.”68 Claims by opponents of indoctrinating young adults in schools may not be accurate, as well. A series of surveys conducted at the University of California at Los Angeles shows that freshmen arrive at school already with anti-hate speech ideals. In a 1993 survey, 58 percent of first-year students supported hate speech regulation.69 In 1994, two thirds approved of prohibitions,70 and by the early 2000s, the number had leveled off at around 60 percent of incoming students favoring control of hateful speech.71 Gould found that national media trends were similar; non-existent in 1988, picked up steam, peaked in the mid 1990s, and tapered off by the late ‘90s.72 But, as Anna Quindlen has said, media “do not make social policy, only reflect it once it moves convincingly from the fringe into the mainstream.”73 Simply, proponents of hate speech regulation conclude that it has triumphed in the face of formal constitutionalism. This is especially ironic, as traditional legal theory suggests that formal law prevails, and the support of legal institutions must be attained to secure constitutional rights. As Jon Gould, one of the foremost apologetics for campus speech policy, says, “What may have begun as an instrumental, intra-academic exercise has not been dispatched by its critics. In the early morning of a new century, the norm of hate speech regulation has grown to challenge the formal Constitution.”74

### Gao (2012)

#### Courts too vague

Another possible determinant of judicial impact on agency actions concerns the way Court opinions are written. A bureaucracy, with hierarchies of control, expects clear and consistent objectives and directives in their effort to implement public policies (Baum 1981). Judicial opinion-writing is sometimes conducted in a vague manner, containing less straightforward policy demands, and more legal reasoning. As a result of judicial ambiguity, the likelihood of agency noncompliance or imperfect translation of Court decisions increases (Wasby 1970; Baum 1976; Johnson 1979). It has been hypothesized that the Supreme Court justices, similar to the legislators in Congress who use deliberate discretions in the legislation-drafting process (Huber and Shipan 2002), tend to use ambiguous language, in opinion-writing, in an attempt to reduce the chances of public resistance and defiance, especially when the opinions being delivered are highly controversial, and when the justices themselves are not absolutely certain about the policy outcomes (Baum 1981; Staton and Vanberg 2008). In reality, though, there will hardly be a “Brown v. Board II” for each other case that requires “all deliberate speed” to facilitate fast and effective implementation of Court decisions. The vagueness of judicial opinions may necessarily lead to less satisfactory execution by the federal agencies.

#### Court decisions won't be implemented – vagueness, institutional "stickiness," interest groups

Gao 12 [Yuan Gao "Investigating Supreme Court Impact on Federal Agency Efficiency

in Procurement and Contracting," 2012] AZ

As previous works suggest, even with the Court’s constitutional mandate, changes may not happen swiftly and radically, when there appears to be a huge gap between constitutional visions and the policy reality, where institutional “stickiness”, bureaucratic inertia, and long-established beliefs prevail. In the case of small business goaling, what may be discouraging federal agencies from developing race-neutral policies immediately following the Adarand decision in 1995? A major reason may be that the development of race-neutral alternatives itself is time-consuming, and expensive (La Noue and Sullivan 1995; La Noue 2008). If a bureaucracy had already been quite familiar with the pool of certified small minority business bidders, the agency would naturally tend to continue working with them. Exploring race-neutral alternatives necessarily means investing additional agency resources to search for evidence of past discrimination, to conduct racial disparity/availability studies, and to assess the agency’s interests in awarding contracts regardless of race. The U.S. Transportation Research Board published a report in 2009 on disparity/availability studies conducted across state-level departments of transportation6 . Their findings show that some states spent much more time developing the capacity, or finding qualified consultants, to conduct accurate studies of the market. Therefore, it is possible that the lack of immediate judicial effects resulted partly from the fact that agencies simply needed more time to respond to updated constitutional requirements. Another reason may be the influence of political principals. Rosenberg (2008) discussed the limited independent impact of Brown v. Board (1954), and the relatively swift changes brought by the Congress’ Civil Rights Act of 1964 and the Voting Rights Act of 1965. In this case, Congress passed the Small Business Regulatory Enforcement Fairness Act one year after Adarand, in the hope of promoting race-neutral policy-making and minimizing constituents’ complains on the grounds of state-sponsored reverse discrimination. Also in 1996, the Clinton Administration’s Department of Justice issued further guidance on race-neutral goal-setting in federal agencies. Judicial impact on agency decision-making may occur, in a rather indirect way, if the other political branches, to whom the bureaucracies directly report, begin to share similar agendas. Generally speaking, the efforts of the two political principals might have facilitated agency compliance more effectively than the Court decision. Even the U.S Commission on Civil Rights, in its 2005 report7 , called for prompt actions from Congress, to foster real incentives for federal agencies to comply with Adarand. Another factor concerns judicial ambiguity. Studies have demonstrated that textual vagueness of judicial opinions opens up too many alternatives in the implementation process, thus increasing the chances of agency noncompliance or their imperfect translation of Court decisions. Indeed, Adarand did not specify, in details, how the Court expected federal agencies to develop race-neutral measures, which were still relatively new concepts in 1995. As largesized organizations with hierarchical leadership structures, bureaucracies probably need clear objectives and policy guidance which are often found missing from Court opinions. Last but not least, a bureaucracy’s implementation of judicial policies may be precipitated by pressure groups. In this case, national interest groups that represent small businesses with raceneutral stances—such as National Small Business Association, National Federation of Independent Business—are not as well-known as, say, the Planned Parenthood or the NAACP, and are not as active as, for example, the NRA or Greenpeace. Even as the Adarand decision has allowed small businesses the opportunity to seek judicial review of federal agency contracting processes, small business advocacy groups need to have rich resources and legal talents to form coherent strategies to challenge agency actions on their behalf (Polich 2000). The shortage of such influential groups may further contribute to the lack of agency compliance with Adarand.

### Sarabyn (2008)

#### Free speech low

Sarabyn 8 [Kelly Sarabyn (Justice Robert H. Jackson Fellow, Foundation for Individual Rights in Education. B.A., University of Virginia, 2003; J.D., Yale Law School, 2007), "The Twenty-Sixth Amendment: Resolving the Federal Circuit Split Over College Students' Free Speech Rights," Texas Law Review, 2008] AZ

The free speech rights of public university students are in a precarious position. Since the mid-1980s, public universities across the country have routinely, and often unapologetically, restricted their students’ expression. In order to create welcoming and safe environments for their students, universities regulate student speech by promulgating civility codes; banning verbal harassment; censoring the student press; implementing overbroad time, place, and manner restrictions; and denying funding to student groups with disfavored views.1

#### Plenty of discussion on Hazelwood cases

Many student notes and comments have addressed the narrower issue of applying Hazelwood, the Supreme Court case enabling secondary schools to censor their students’ newspapers, to the college press. See, e.g., Daniel A. Applegate, Stop the Presses: The Impact of Hosty v. Carter and Pitt News v. Pappert on the Editorial Freedom of College Newspapers, 56 CASE W. RES. L. REV. 247, 271-79 (2005); Michael O. Finnigan, Jr., Extra! Extra! Read All About It! Censorship at State Universities: Hosty v. Carter, 74 U. CIN. L. REV. 1477, 1489-96 (2006); Jessica B. Lyons, Note, Defining Freedom of the College Press After Hosty v. Carter, 59 VAND. L. REV. 1771, 1792-94, 1804-07 (2006); Virginia J. Nimick, Schoolhouse Rocked: Hosty v. Carter and the Case Against Hazelwood, 14 J.L. & POL’Y 941, 982-96 (2006); First Amendment—Prior Restraint—Seventh Circuit Holds that College Administrators Can Censor Student Newspapers Operated as Nonpublic Fora—Hosty v. Carter, 412 F.3d 731 (7th Cir. 2005) (en banc), 119 HARV. L. REV. 915, 919-22 (2006); Jeff Sklar, The Presses Won’t Stop Just Yet: Shaping Student Speech Rights in the Wake of Hazelwood’s Application To Colleges, 80 S. CAL. L. REV. 641 (2007). One article dealt with the same issue of applying Hazelwood to the college press. Derigan A. Silver, Policy, Practice And Intent: Forum Analysis And The Uncertain Status Of The Student Press At Public Colleges And Universities, 12 COMM. L. & POL’Y 201 (2007)

#### Circuit court precedent very fragmented

Without sufficient guidance from the Supreme Court, the federal circuits have laid down incongruent standards regarding university students’ free speech rights. Federal circuits have variously applied the deferential secondary school standard found in Tinker, Fraser, and Hazelwood to universities wholesale, in part, or not at all. Other circuits have largely refrained from ruling on the issue, leaving their district courts to decide. This legal pastiche leaves university students across the country with varying levels of free speech rights, creating a noticeable instability with respect to a fundamental constitutional right. The Eleventh Circuit, at one end of the extreme, has applied the deferential secondary standard to universities wholesale.85 In Alabama Student Party v. Student Government Association of the University of Alabama, students objected to the University of Alabama’s regulations86 restricting the distribution of student government campaign literature to a few locations and to the three days prior to the election, as well as strictly limiting the place and time for election-related debates.87 The Eleventh Circuit upheld these severe restrictions on the students’ political speech by analyzing the case under the standards set out in Tinker, Hazelwood, and Fraser. 88 The court ignored the possibility that this line of cases might not apply to universities, adopting sub silentio the rule that university students possess the same free speech rights as secondary school students. The Alabama Student Party court acknowledged that such severe restrictions on political speech violated the free speech rights of adults as normally conceived. “But,” the court reasoned, “this is a university, whose primary purpose is education . . . . Constitutional protections must be analyzed with due regard to that educational purpose.”89 After detailing the standards laid out in Hazelwood and Tinker, the court continued, “[t]he University views its student government association, including the election campaigns, as a ‘learning laboratory,’ similar to the student newspaper [in Hazelwood],” concluding that “[t]he University should be entitled to place reasonable restrictions on this learning experience.”90 Foreshadowing Justice Thomas’s concurrence in Morse, the court emphasized that schools need institutional autonomy to function properly. It concluded its entire analysis by holding that courts should defer “to [university] school officials who seek to reasonably regulate speech and campus activities in furtherance of the school’s educational mission.”91 The Tenth Circuit has followed the Eleventh Circuit in applying the secondary school standard directly to universities. In Axson-Flynn v. Johnson, a Mormon student at the University of Utah’s Actor Training Program refused to use certain expletives during an in-class acting exercise.92 After initially accommodating the student’s refusal by allowing her to omit the expletives from the script, the teacher and school officials told the student that she would either have to start using the expletives or leave the acting program.93 The Tenth Circuit noted that the standards of review varied with the different types of speech on a university campus. Tinker, it held, governed student speech that happened to occur on campus. The speech in this case, because it took “place in the classroom context as part of a mandated school curriculum,” was “school sponsored” speech and, as such, was governed by Hazelwood. 94 Quoting Hazelwood directly, the court wrote, “We will uphold the [University of Utah’s Actor Training Program (ATP)]’s decision to restrict (or compel) that speech as long as the ATP’s decision was ‘reasonably related to legitimate pedagogical concerns.’ We give ‘substantial deference’ to ‘educators’ stated pedagogical concerns.’”95 Applying this high level of deference, the court found the school’s justifications for requiring the student to use expletives “reasonable” and upheld the requirement as constitutional. The court stressed its deference, pointing out, “The school’s methodology may not be necessary to the achievement of its goals and it may not even be the most effective means of teaching . . . or the most reasonable . . . . [It need only] be reasonable.”96 In Cummins v. Campbell, an earlier case, the Tenth Circuit addressed university administrators who prevented a student group from showing The Last Temptation of Christ, a film the administrators found too controversial.97 In the course of granting the administrators qualified immunity, the court stated that Hazelwood governed the speech of student organizations that were an organ or extension of the university.98 The court further found the student organization to be an organ of the school even though it had little connection with the school. It received student fees and had an advisor employed by the school; otherwise, it acted entirely independently, conducting its own affairs. As a result, the court not only applied Hazelwood’s standard in the university context, but potentially extended its reach to all but the most underground student groups.99 Other circuits, falling short of the direct application approach of the Tenth and Eleventh Circuits, have applied secondary school standards of review piecemeal to the university. The leading articulation of this piecemeal approach comes from the Seventh Circuit’s opinion in Hosty v. Carter. 100 Hosty concerned a university’s censorship of a student newspaper. In analyzing the university’s actions, the court stated, “Hazelwood provides our starting point.”101 Addressing the plaintiff’s objection to the application of the high school standard to the university, the court claimed that the Supreme Court’s Hazelwood opinion “does not even hint at the possibility of an on/off switch: high school papers reviewable, college papers not reviewable . . . . [T]here is no sharp difference between high school and college papers.”102 It then went a step further, denying the possibility that a bright line could separate the two levels of schools. “Not that any line could be bright; many high school seniors are older than some college freshmen, and junior colleges are similar to many high schools.”103 Revealing the larger confusion around this issue, the Seventh Circuit used a different standard a year later in Christian Legal Society v. Walker.104 In Walker, Southern Illinois University at Carbondale’s School of Law denied official recognition and its attendant benefits to the Christian Legal Society (CLS), a student organization, after CLS allegedly violated the school’s affirmative action policy by excluding avowed homosexuals from membership.105

#### Unconstitutional to treat college students *in loco parentis*

Universities with free speech zones in effect prohibit speech on most of their campuses, which include sidewalks, parks, lawns, and other public spaces. The only justification for such wide-reaching bans is that the universities believe that students, if allowed to speak freely in public spaces, will either react poorly, be unduly offended, or be persuaded to adopt harmful beliefs.367 This reasoning is not legitimate. Ensuring that students walking in public spaces are not confronted with speech they may dislike treats them as incapable of responding maturely to the expression of ideas, and keeps them from acting as adult citizens who are fully capable of speaking to fellow citizens in public spaces. Like other public institutions, the university must justify its restrictions on student speech by reference to its institutional function.368 This article has not attempted to define the specifics of the university’s legitimate function and thus, for example, does not detail the specific parameters bounding a professor’s sanctioning of in-class student speech. Nor does it address students who are also employees, who, insofar as they are acting in their capacity as employees, will face other legitimate speech restrictions.369 Instead, this article has argued that the ratification of the Twenty-Sixth Amendment rendered it unconstitutional for the university to regulate speech for the purpose of acting in loco parentis. In loco parentis paradigmatically refers to attempts to reproduce and inculcate morals, manners, and good citizenship in students; thus, when universities regulate speech for that reason, whether in-class or out of class, such regulation is unconstitutional.

### Gould (2010)

#### [A2 Speech Codes = Cultural Norm] Speech codes are implemented by elites with selfish motives

Gould 10 [Gould, Jon B (Professor in the Department of Justice, Law & Criminology at American University), Speak No Evil, edited by Jon B. Gould, University of Chicago Press, 2010. ProQuest Ebook Central, http://ebookcentral.proquest.com/lib/stanford-ebooks/detail.action?docID=496617] AZ

This book takes a different path in the hate speech controversy, tracking the rise of campus speech policies through an empirical study of multiple methods. Drawing from a random sample of colleges and universities from across the country, the book estimates that nearly one-third of American schools developed hate speech policies by 1992. Although this figure is sizeable, the severity of the policies varied, with less than 10 percent of schools adopting policies that challenged existing First Amendment principles. More significantly, the research fails to link the speech codes to an organized movement of identity politics. Based on quantitative research at one hundred schools and in-depth interviews and archival research at several institutions, the book instead identifies three distinct motives for the speech codes. In each case relativist or multicultural theory spurred the speech policies, but the pivotal actors were top collegiate administrators acting on instrumental motives. In many cases, officials crafted speech codes as symbolic responses to racial incidents on campus, seeing the policies as a sop of sorts to assure campus constituencies that action had been taken against intolerance. Another set of schools engaged in normative isomorphism—an academic version of “keeping up with the Joneses”—crafting hate speech codes to remain within what top officials saw as the mainstream of higher education administration. At a final, much smaller group of schools, speech policies were developed by student services administrators who legitimately believed in the merits of the codes. These were probably the closest model to the traditional explanation offered by speech code opponents, although they are but a small percentage of the schools. Even more, the speech codes in these cases were proposed and adopted by administrators, not the student or faculty activists envisioned by the anti-PC crowd. If anything, minority groups on campus were largely agitating for more tangible measures, including increased minority hiring and additional funding for scholarships, fellowships, and salaries. Few were outspoken advocates for hate speech policies.

#### Speech regulation at colleges spills over to other parts of society

If the speech codes’ opponents believe this message is limited to colleges and universities they misunderstand its reach, for the conceptual kernel has taken root in American society, bringing with it greater acceptance of hate speech regulation. Public opinion increasingly favors the informal prohibition of racist and sexist speech,24 newspapers and other media have eschewed expressions that vilify a racial, ethnic, or sexual group, and many Internet service providers have voluntarily removed or banned postings that malign another’s race, gender, ethnicity, or sexual orientation. For that matter, existing law reflects the tenets of hate speech regulation, albeit through a slightly different lens. Although addressed to action and not speech, the penalty enhancement provisions of hate crime legislation can be traced back to college speech codes. Moreover, sexual harassment law has expanded to punish employers when workplace speech denies employees equal opportunity. While some try to explain away this doctrine as an exception in which a “subcategory” of “proscribable speech” is “swept up incidentally within the reach of a statute directed at conduct rather than speech,”25 the hostile environment prong of sexual harassment law rests on the same basis as does hate speech regulation: Words not only wound, but severe or pervasive messages may also discriminate. Whether they have recognized it or not, hate speech regulation has quietly surpassed the wildest fears of its opponents to become an accepted norm in American society.

#### Civil society shapes interpretations of the Constitution

Over the last half-century both scholars and practitioners have come to recognize that judges construct constitutional law, that they apply their “experiences and world view”26 when establishing legal doctrine, creating rules that are not so much “natural” as reflections of the “power relationships in society.”27 More recently, researchers have suggested that other governmental branches, in this case Congress, construct constitutional meaning along with the courts.28 Even so, these interpretations still rest the Constitution’s meaning on governmental institutions. This book takes a step further, joining those commentators who argue that constitutional construction occurs in civil society among other influential yet nongovernmental institutions. Certainly, we have seen elements of this before in public law scholarship. Researchers have examined the public’s acceptance or rejection of court decisions, they have unpacked the public’s understanding of judicial rules, and they have chronicled the role of law in everyday life.29 Still, many seem reluctant to make the ultimate claim—that the Constitution and related court decisions are but one (and perhaps not even the most important) part of the legal meaning-making function. The essential arbiter for legal meaning is civil society and its institutions, which themselves construct constitutional law.

#### Good speech codes

Gould 10 [Gould, Jon B (Professor in the Department of Justice, Law & Criminology at American University), Speak No Evil, edited by Jon B. Gould, University of Chicago Press, 2010. ProQuest Ebook Central, http://ebookcentral.proquest.com/lib/stanford-ebooks/detail.action?docID=496617] AZ

On a topic so heated, I suppose it is only fair that the reader should know where I stand. In truth, I have struggled with the question of hate speech regulation, for I am sympathetic to the arguments behind hate speech codes but believe that they were applied too broadly. We have already decided as a society that there are some areas in which it is inappropriate, indeed illegal, to deny individuals certain benefits on the basis of their immutable characteristics. Education must be among those. The law has been willing to acknowledge, at least in the realm of sexual harassment, that speech can deny those benefits as much as action. To refuse this point is to live in a land of makebelieve, for persistent or severe epithets can cause real physiological or psychological harm.30 The key question, then, is not whether public bodies can restrict speech in the interests of preserving equal opportunity, but rather what test should be used to distinguish proscribable speech or conduct from the acceptable. In this respect sexual harassment law seems to have the threshold right: severe or pervasive speech directed against a subject who cannot avoid it, when the speech is both objectively discriminatory and subjectively objectionable to its target.31 This definition would weed out almost all of the cases that were prosecuted by colleges and universities as hate speech, and it should. The point is not to prohibit speech that is merely objectionable—for a point of college is to learn to deal with objectionable speech—but to punish expressive conduct that truly denies equal educational opportunity. Cases such as Rubin v. Ikenberry reach this level, where a professor repeatedly berated female students with comments like, “The problem in schools is uppity, greedy women. . . . If I were king, all women teachers would have to spend fifteen minutes on a moonlit night, in a canoe, on a lake with a drunken sailor.”32 Speech like this serves no value except to marginalize individuals on the basis of their immutable characteristics, a problem all the greater given the power differential between faculty members and their students. This definition would weed out almost all of the cases that were prosecuted by colleges and universities as hate speech, and it should. The point is not to prohibit speech that is merely objectionable—for a point of college is to learn to deal with objectionable speech—but to punish expressive conduct that truly denies equal educational opportunity. Cases such as Rubin v. Ikenberry reach this level, where a professor repeatedly berated female students with comments like, “The problem in schools is uppity, greedy women. . . . If I were king, all women teachers would have to spend fifteen minutes on a moonlit night, in a canoe, on a lake with a drunken sailor.”32 Speech like this serves no value except to marginalize individuals on the basis of their immutable characteristics, a problem all the greater given the power differential between faculty members and their students.

#### Even if not effective, symbolic gestures like speech codes have power

Gould 10 [Gould, Jon B (Professor in the Department of Justice, Law & Criminology at American University), Speak No Evil, edited by Jon B. Gould, University of Chicago Press, 2010. ProQuest Ebook Central, http://ebookcentral.proquest.com/lib/stanford-ebooks/detail.action?docID=496617] AZ

Speech rules need not reach public demonstrations or rallies, for a student’s education is hardly threatened when he can walk away, but they should cover classroom speech where the audience is in some sense captive. True, this practice may seem to threaten academic freedom, but no right is absolute, and academic freedom itself presumes that expression will be educationally appropriate. Moreover, the encroachment here is minimal, since the number of applicable cases is likely to be small.33 In fact, the better objection to hate speech regulation is its limited reach, for a speech rule of these proportions is likely to be more symbolic than operative. Nonetheless, as the findings of this book suggest, it would be a mistake to confuse symbolism with impotence. Symbols reflect society’s values and concerns and offer support (even if primarily moral) to those individuals a community aims to protect. Indeed, the hate speech codes prove this very point. Created primarily as symbolic measures, they have had larger and lasting societal influence.

#### Speech codes were developed to meet Title IX legislation

On their face the speech codes appeared to rewrite free speech norms to grant racial minorities special protections, but one of the ironies of the collegiate hate speech codes, not to mention the controversy they generated, is that they were intellectual cousins of sexual harassment policies that had been on the books for several years. Both prohibitions were or seem to be premised on Title VII of the Civil Rights Acts, which prevents employers from “discriminat[ing] against any individual with respect to his . . . conditions or privileges of employment because of such individual’s race, color, religion, sex or national origin.”43 Originally, this language was used to bring suits challenging wages and promotions, but over time courts have recognized that harassment can become “so severe and pervasive that it affects the conditions of employment” and thus violates Title VII’s prohibition of workplace discrimination.44 Sexual harassment has two bases, quid-pro-quo harassment and the creation of a hostile, intimidating, or offensive workplace. The former generally covers sexual advances or requests for sexual favors when presented as a condition of employment, but it is hostile workplace harassment (also called hostile work environment or HWE) that is most relevant to the speech policies. That tort has five elements: ◆ Verbal or physical conduct of a sexual or sex-based nature. ◆ That is unwelcome. ◆ That is directed against an individual because of her (or his) sex. ◆ That has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile or offensive working environment. ◆ That an employer knew or should have known of and did not take adequate action to stop or prevent.45 When compared to the terms of HWE, many of the campus speech codes look remarkably similar. Just as sexual harassment law singles out an immutable characteristic—sex—as the basis for protection, several speech codes offered protection on the basis of race, ethnicity, and the like. Both rules also cover unwelcome verbal or physical conduct. Although the hate speech codes did not define “unwelcome” explicitly, their requirement that conduct demean or stigmatize another presumed that an attack would be unwelcome. Finally, the hate speech codes used the same standard as HWE for triggering liability. Although occurring in an educational setting and not at the workplace, the requirement that conduct create an intimidating, hostile, or demeaning environment for educational pursuits is taken entirely from the law of sexual harassment.

#### Colleges blatantly violated constitutional precedent with speech codes

Given such precedent, the college hate speech codes were seen by many as a bold attempt to reformulate First Amendment norms. Several policies, including those from Michigan and Wisconsin, seemed to fly directly in the face of Collins and other free speech rulings of the 1960s and 1970s. In fact, the codes almost read like the group libel law from Beauharnais, with students subject to punishment if their conduct stigmatized or demeaned another on the basis of race, ethnicity, or the like. Other policies like Stanford’s appeared to take a more moderate approach by limiting their reach to fighting words. But even here, some rules exceeded common understandings of the term by defining fighting words to reach not only expressions that “incite a breach of the peace” but also those that “by their very utterance inflict injury.” These definitions had not been seen in constitutional law since the 1950s. In fact, taken as a whole, one might have concluded that the speech code “movement” was attempting to return First Amendment law to its prior status. The rise of campus speech codes would have tied a First Amendment absolutist in knots. If one accepted the Supreme Court’s view that expression should be as open as possible, then the speech policies were a serious threat. And the threat came from a variety of schools, both public and private. This alone may be surprising, since as a matter of law only public institutions are bound by the First Amendment.52 Private schools were free to experiment with whatever speech restrictions they wished—even those that challenged then-accepted notions of First Amendment law. But public schools too seemed willing to defy the constitutional line. In fact, some of the first (and most famous) speech policies were developed at the Universities of Michigan and Wisconsin, with similar rules adopted at many more public schools.

#### Racial violence didn't increase in the 1980s

Throughout the 1980s and early 1990s the National Institute Against Prejudice and Violence compiled reports of racial violence on campus and conducted studies about ethnoviolence.62 Howard Ehrlich was the research director of the Institute, and he regularly fielded calls from reporters covering the racial incidents. Ehrlich argues that the 1980s did not see an appreciable rise in the number of racial incidents nationally, a conclusion he says he could rarely convince reporters to accept.63 Racial violence had occurred on college campuses for decades. “Talk to any black student who attended college in the 1950s,” he explains. “They will tell you that they faced harassment from the beginning. . . . The incidents haven’t changed much since then. The differ ence is that they suddenly got more attention.” Ehrlich cites three factors for the heightened coverage: First, a number of national newspapers, including the New York Times, Washington Post, and Boston Globe, had student stringers at many of the schools that experienced racial violence, so when a fight broke out it was likely to be covered. Second, minority students and faculty had gained considerable political and social power since the 1950s, to the point that they were unwilling to endure insults, harassment, and violence. When incidents occurred, minority students and faculty responded with protests, which themselves begat news coverage. Third, many journalists believed that the conservative policies of the Reagan and Bush administrations were rubbing off on college students, and they latched onto reports of racial incidents as proof of this perspective. At the same time, Ehrlich says, a smaller group of reporters, including one notable representative from the New York Times, thought this storyline was bunk and criticized the work of the Institute, which it fingered as the source for the deluge of stories.64 Other observers claimed that racial incidents were really on the rise, or that they had at least changed in severity. Reginald Wilson, director of Minority Concerns for the American Council on Education, said, “I cannot remember a year prior to 1986 when as many incidents were reported.”65 Michael Olivas, a law professor at the University of Houston who chronicled reports of racial violence, agreed. According to Olivas, “Not only [was] there more careful reporting about incidents of racial harassment, but it is quite clear from the data that there are more incidents as well.”66 It is unclear from what sources Olivas made his claim, for at the time neither colleges nor law enforcement bodies had uniform standards for the reporting of racial harassment or violence. Some advocacy organizations had compiled data prior to Olivas’s work, including the Anti-Defamation League, the Southern Christian Leadership Conference, and even a few national, black fraternities. Yet, none of these groups used common standards in reporting. By the early 1990s Congress had ordered the collection of hate crime data, requiring colleges and universities to compile reports on campus crime. However, the definition of hate crime would have screened out all but the most serious incidents of violence. While U Mass would probably have been required to report the racial brawl, the incidents at Michigan, Wisconsin, Stanford, and many other schools could have gone unreported.

#### Speech codes have been ruled unconstitutional over and over again – colleges just don't comply

The initial controversy over college hate speech codes would last less than a decade, from the late 1980s to the mid-1990s, but its influence would be felt longer and more profoundly throughout society. Beginning in 1989, the courts would be called to involve themselves in the matter, and over the next several years every court that considered hate speech regulation found the measures unconstitutional. But anyone who thinks the courts have beaten speech codes “into retreat”134 has missed the greater ability of public understandings to overcome judicial pronouncements of rights. As the rest of this book describes, hate speech codes owe their rise to a combination of rights priming and utilitarian motives. Enacted largely as defensive measures, they have persevered in the face of contrary judicial precedent, as colleges have evaded, ignored, and resisted the courts. In the end, these policies have taken on a larger meaning, creating symbolic rights that have filtered out to society as a whole. What its opponents could only have feared when the first college speech codes sprouted has become an accepted norm in American civil society. Hate speech regulation not only lives, it has triumphed.

#### Courts aren't key to constitutional construction

This chapter offers a broad view of constitutional construction, using free speech and the First Amendment as a guide. The discussion begins by examining the theoretical bases behind the First Amendment, arguing not only that free speech law is socially constructed but also that informal understandings of speech rights have as much, if not more, sway in ordering civil speech norms than do judicial interpretations of the First Amendment. In this respect, the chapter distinguishes between the formal Constitution and mass constitutionalism, the latter representing popular practices and understandings of constitutional law. The scope of constitutional rights is greater than the four corners of the Constitution, showering constitutional connotations and constructions on other relationships that are not technically those between citizen and government. In the case of free speech, civil society has extended the reach of the First Amendment by using it as the benchmark for private behavior—thus placing the ultimate power of constitutional construction outside of the courts. The notion of extra-judicial law finds support from several scholars, most notably Gerald Rosenberg, Patricia Ewick and Susan Silbey, Stuart Scheingold, and Larry Kramer,2 who have chronicled the role that popular institutions and everyday people have on constitutional construction. But mass constitutionalism is not necessarily antithetical to positivist or court-centered notions of law. Given the low salience of most court decisions and the general respect with which people hold the judiciary, many decrees are likely to be followed. Even when they are not, the courts may still precipitate others’ responses. The courts, then, are an important piece of the legal meaning-making function, but they are not the central link. Particularly when the issues are highly contentious and morally imbued, the public is willing to substitute its interpretations for those of the courts, but even in “average” cases the courts’ decisions do not achieve their legitimacy and meaning until the public is willing to apply and accept these understandings. For that matter, informal or hidden law may exist in civil society even in the absence of the courts’ dictates. According to several scholars, “the bulk of American constitutional development has taken place outside of the courts, largely outside of the federal courts, and largely outside of the Supreme Court of the United States,”3 a conclusion reinforced by the work of Kramer, who claims that the American people and not the courts have historically had the power to construct the Constitution.4 This chapter continues that tradition, offering a vision of mass constitutionalism that centers legal-making in extra-judicial sources. It is this point—the fear that constitutional meaning can be constructed outside of the courts—that may have driven the opponents of the college hate speech codes.

#### The First Amendment isn't all-encompassing – constitutional protection is contingent on social context and interests

Yet this very argument shows the First Amendment’s meaning to be open to social construction. The fact that we present cultural and political rationales for the norm of free speech means that we determine its importance through social interactions. We use constitutional law to advance certain social values; in turn the meaning of these norms may change as our social, cultural, or legal needs change. As Gerald Rosenberg has said, the “First Amendment is not a substantive force in itself, but instead a forum for substantive arguments about the cultural definitions of liberty” and its relation to equality.24 This realization can be a scary proposition. As Stanley Fish explains, People cling to First Amendment pieties because they do not wish to face what they correctly take to be the alternative. That alternative is politics, the realization that decisions about what is and is not protected in the realm of expression will rest not on principle or firm doctrine but on the ability of some persons to interpret—recharacterize or rewrite—principle and doctrine in ways that lead to the protection of speech they want heard and the regulation of speech they want silenced.25 And yet this is exactly what courts do when they consider free speech cases. Regardless of the legal rule they claim to be following, judges implicitly must balance the value of the speech at issue against the potential harm it presents. Justice Stevens has acknowledged as much when, in R.A.V., he said: Admittedly, the categorical approach to the First Amendment has some appeal: Either expression is protected or it is not—the categories create safe harbors for governments and speakers alike. But this approach sacrifices subtlety for clarity and is, I am convinced, ultimately unsound. As an initial matter, the concept of “categories” fits poorly with the complex reality of expression. Few dividing lines in First Amendment law are straight and unwavering, and efforts at categorization inevitably give rise only to fuzzy boundaries. . . . Moreover, the categorical approach does not take seriously the importance of context. The meaning of any expression and the legitimacy of its regulation can only be determined in context. Whether, for example, a picture or a sentence is obscene cannot be judged in the abstract, but rather only in the context of its setting, its use, and its audience.26 We see these kinds of judgments most clearly when the courts approach symbolic acts. Cases like flag burning, the destruction of draft cards, and written epigraphs like “fuck the draft”27 reach the Supreme Court and have lasting importance because we recognize that they are not simply value-neutral actions being measured against immutable norms but instead represent symbolic ideas being interpreted and weighed by potentially fallible, and even biased, jurists.28 The Court takes on these cases, and we watch in rapt attention, because we understand that the Court is operating on the very heart of socially constructed behavior. Symbols are a way of socially constructing meanings. As one scholar explains, law “affects us primarily through communication of symbols—by providing threats, promises, models, persuasion, legitimacy, stigma, and so on.”29

#### Court legitimacy is key to accession on other issues

It is difficult to define critical mass precisely, for there is not an exact threshold of acceptance that signifies legitimacy or acquiescence. Since most Americans are unfamiliar with court decisions (even those of the Supreme Court),47 legitimacy turns more often on the public’s blind willingness to tolerate judicial decrees than on deliberative affirmation. Where individuals are familiar with the Supreme Court’s decisions but do not have strong preexisting opinions about the issues involved, they are likely to accede to the Court’s decrees.48 People may even accept decrees with which they disagree because of their larger respect for the judiciary.49 Small as this effect may be, researchers have documented instances in which the Supreme Court has augmented policy legitimacy by virtue of the public’s diffuse support for the Court.50

#### Widespread disagreement decreases court legitimacy

Legitimacy is lower when public opinion disfavors a decision and compliance is low. Institutions may react differently to case law than does public opinion, with public officials in particular deciding to comply with a judicial decree (perhaps prohibitions on school prayer) even when public opinion opposes the decision. The opposite may also be true, with the public broadly supportive of a decision but those covered by the decision refusing to implement the ruling (for example, a reporter who refuses to name her sources). Although the courts’ decrees are contested in both instances, the legitimacy of judicial decisions is most at risk when both public opinion and those parties covered by a decision oppose its implementation. This was the case in many parts of the United States following Brown v. Board of Education, where whole sectors of the country thumbed their noses at the Supreme Court’s ruling. ◆ The more broadly distributed the opposition to a court decision, the less powerful the ruling will be. Almost any judicial decision is likely to generate opposition, but no serious observer would believe that the courts’ legitimacy is threatened if a handful of people refuse to accept a decision. By the same token, few people would consider a decision to be “the law of the land” if sizeable majorities of the public rejected a decision. But it is not simply the absolute size of the opposition that matters; its breadth and depth are also influential. To the extent that opposition is broadly distributed and not confined to a particular region of the country or a limited demographic (e.g., conservatives, the poor, trade workers), defiance is a greater threat to the courts. This axiom reflects a basic premise of diffusion theory: that social ideas—in this case opposition to court decisions—are spread through interpersonal networks.55 Thus, the more networks of people who object to a court decision, the less controlling the ruling will be.

#### \*\*Courts are weak – counterplan can't solve

Gould 10 [Gould, Jon B (Professor in the Department of Justice, Law & Criminology at American University), Speak No Evil, edited by Jon B. Gould, University of Chicago Press, 2010. ProQuest Ebook Central, http://ebookcentral.proquest.com/lib/stanford-ebooks/detail.action?docID=496617] AZ

What I have described so far is a system of law and legal construction that centers both authority and meaning-making outside of formal institutions. My intention is not to disparage the courts or their powers, for the public generally defers to the judiciary’s declaration of law. Even when a critical mass opposes a legal decree, the courts still catalyze the legal meaning-making function. Nonetheless, neither the Supreme Court nor the lower courts as a whole are able to control the meaning of constitutional norms, most notably those based on the First Amendment. The courts necessarily rely on societal consensus for public acceptance and legitimacy, but even more, the meaning of law, both private and public, is based on extra-judicial processes. As other scholars have said, “the central norms of the constitutional regime depend for their effectiveness on the attitudes of the political community.”98 “The great battles for free expression will be won not in courts but in committee rooms and protest meetings, by editorials and letters to Congress and through the courage of citizens everywhere.”99 One reason extra-judicial processes have so much influence over legal meaning is that democratic societies are constantly balancing social pressures with judicial intervention to enforce behavioral norms. As Franklyn Haiman explains, “A free society will always draw the line between what it considers immoral and what it makes illegal as close as possible to the more serious, direct, immediate, and physical of the harms, and it will leave to the operations of social pressure, education and self-restraint the control of behaviors whose harms to others is less serious, less direct, less immediate, and less physical.”100 Put another way, the most clear, recognized moral wrongs101 will be codi- fied into law and enforced through the judicial system, but social pressures will be left to handle those issues that, while objectionable to many, are not so universally recognized as wrong. Here a diagram may be helpful. In the figure below, the center circle represents codified law, covering conduct widely accepted as wrong. The middle ring reflects the informal or hidden law that Jonathan Rauch has described—those social expectations and understandings of morality that regulate behavior. While there is agreement that particular behavior is immoral or improper, these views are not codified into law; either the consensus is not sufficiently strong or there is a sense that informal mechanisms are effective at enforcing the social norm. The outer ring then represents moral views that have not yet achieved societal support but maintain a constituency that seeks their acceptance and eventual codification. The relative size of the spheres reflects the number of norms that may exist in each region, not the extent to which they are controlling or powerful. It is axiomatic that a greater number of moral perspectives exist in society than ever achieve a critical level of acceptance. Similarly, as Rauch convincingly argues, formal law need not codify each of the various understandings and expectations that order social behavior.

#### colleges key

Why then would the codes’ critics fight policies that might literally have been an academic exercise? Precisely because they realized the influence of academe over American social life and mass constitutionalism. Much of the antiwar protest in the 1960s originated on college campuses, and colleges and universities proved receptive venues for civil rights and women’s rights activism. Academic research can grab the attention of opinion leaders, raising some issues to the national agenda. Moreover, the ideas introduced in collegiate settings can influence succeeding generations of American leaders who become acquainted with these perspectives and proposals while at college. In short, the codes’ opponents had much to fear from campus activism and legal mobilization. If academe—a venue that zealously prizes open inquiry— could restrict offensive speech, then others who looked to the academy’s lead might follow. What the opposition presciently understood was that this fight was for control of the public’s understanding and acceptance of free speech norms. It was, one might say, the ultimate exercise in the social construction of law.

#### Bad publicity is the single largest cause of speech codes

Even while resisting speech restrictions, the experience at Emilia College confirms the tale told at other schools chronicled here: The consideration or adoption of hate speech policies was not the work of mobilized constituencies with a leftist agenda. Certainly, the codes were linked to liberal and activist campuses, but unlike the anecdotal explanation propounded by the codes’ critics, the policies were not advanced by mobilized minority groups or liberal ideologues. Instead, the codes owe their development to high-level administrators operating under institutional or instrumental motives. Interestingly, the codes were connected to racial incidents or tensions on campus, a factor not picked up in the quantitative analysis. The qualitative investigation now explains why—administrators were not necessarily responding to incidents immediately preceding the policies, or even to events on their own campuses. Officials were spurred by a simmering undercurrent of racial tensions across the nation and saw their role as preserving order and maintaining their schools’ good names. There are several ways of looking at this. In some cases, administrators genuinely believed that hate speech policies would improve the campus climate and make their schools more welcoming to minorities. The experience at Mt. Michaels suggests as much, where student services staff were concerned about the “viciousness” directed against minority groups. So too, MU officials initially reacted to a series of racial incidents. In both cases administrators acknowledge they felt compelled to “do something” to improve the climate for minorities on campus, and it is instructive that administrators at both schools were quick to accept and propose a hate speech policy. Even at Emilia College, President Ertel initiated the Emilia Plan (albeit without a speech rule) because she sought to improve the campus climate. This is a plausible, and indeed even laudable, interpretation of the move to hate speech codes, but the better explanation is that administrators responded with policies to protect and even enhance the reputation of their schools and themselves. Put another way, they proposed administrative policy as a form of proactive crisis management. Officials feared that racial tensions would give way to serious incidents, which in turn would draw considerable and unfavorable attention to their schools. They certainly had an early warning. At Plains, the Klan’s visit received wide play within campus, local and regional media, and the perceived increase in racial tensions throughout the Millennium system even drew in state legislators. At other schools racial unrest spawned substantial, negative coverage. The 1986 brawl at the University of Massachusetts–Amherst reached the Boston Globe and the New York Times, and racial unrest at the University of Michigan generated no fewer than fifteen stories in the Chicago Tribune over the course of a month. Alumni, lawmakers, opinion leaders, potential applicants, peers, and even members of the campus community read these stories. At the very least the reports were embarrassing to an institution and its leaders, who often appeared in the stories as unable to gain control of their schools. At worst they painted schools as harboring racists, campuses where attitudes were so bigoted that few decent people would want to attend. Under these circumstances a campus executive would naturally seek to reduce tensions on campus, simultaneously taking a school out of the news while reassuring the public and campus constituencies that the school was committed to racial tolerance. This was the case at the University of Michigan, where interim president Robben Fleming put the university’s speech policy on a fast-track to enactment. There were also elements of this strategy at MU and Plains, although in both cases administrators were responding as much to the concerns of state leaders. At MU, Chancellor Tucker was faced with a state senator who publicized racial incidents from across the university system. Whether or not these incidents had reached a crisis point, Tucker undoubtedly felt he had to do something to appease legislators, if only to stop the potentially bad publicity about the university. Tucker may well have initiated administrative policy on his own to address racial harassment, but the fact that he had a pack of legislators sniffing around the state campuses meant that he had to take action quickly. A harassment policy, thus, served three important aims: It demonstrated the University’s commitment to address racial intolerance, it appeased legislative investigators, and in doing so it took the story of campus racism off the front pages. At Plains the crisis was not so immediate, as the board of trustees decreed a racial harassment policy two years before the notorious campus incident. But even here they were taking a prophylactic measure to guard against what they had seen arise at other schools. Indeed, in some ways the Plains’s policy reflected a kind of academic “keeping up with the Joneses.” Having watched racist incidents embroil institutions elsewhere, and aware that elite schools like Michigan, Brown, and Pennsylvania were drafting novel hate speech rules, the trustees called on Plains to adopt new antiharassment policies. Nor was this national preoccupation limited to administrators. Even after President Jaffe had adopted the university’s hate speech rule, the university senate responded to articles in Academe and the Chronicle of Higher Education and asked its Campus Relations Subcommittee to consider additional approaches to hate speech regulation. This explanation will undoubtedly strike some readers as too cynical, as if I am charging university administrators with adopting showy, expansive policies simply to cover their backs. That criticism has two elements: one, that administrators intended the speech codes to do no more than deflect attention from their schools, and two, that university leaders would not have acted but for potentially bad publicity. I do not doubt that administrators had concerns other than their schools’ reputations, and indeed this explanation may complement other motives. While I am not familiar with the former leaders of MU or Plains, I am acquainted with Robben Fleming, who presided over Michigan’s speech policy. Fleming had served as the university’s president from 1967 to 1979 and returned on an interim basis in the mid-1980s. I have no doubt that he thought Michigan’s speech policy would improve racial condi tions on campus, not just reduce press coverage.32 So too, Jaffe had been quite vocal in speaking out against racism and intolerance at Plains. Nevertheless as chapter 5 details, most of the speech codes were enforced so rarely that they effectively became symbolic measures. Given these circumstances, it is appropriate to ask whether administrators were serious in adopting the speech codes or whether they had different motives. At the same time, it is not simply the case that administrators acted to stave off controversy. The very fact that racial tensions would move them reflects some serious (and positive) changes in American social and political life. It seems inconceivable that fifty years ago college administrators would have been concerned about campus conditions for blacks or that the media would be poised to cover stories of racial harassment at college. In a sense the success of the civil rights movement (and perhaps even the women’s rights movement) influenced administrators, convincing them and others that improved race relations were an important societal goal. For that matter, it is important to recall that the speech codes were linked to prestigious, progressive, and activist institutions. Even if administrators feared their schools would attract press coverage over racial intolerance—the contradiction between liberal reputations and racial tensions too tempting for reporters—it is difficult to imagine officials taking action unless they believed that minorities had a right to better treatment on campus or they feared recriminations from minority academicians who would demand those rights.

#### R.A.V. clearly applies to campus speech codes

Relying on the legal restrictions of stare decisis is itself too narrow, for the power of judicial decisions is also explained by the manner in which they are communicated to interested audiences.14 In these cases the courts were not only speaking in a single voice, but their message was read and understood as such outside of the courtroom. R.A.V., in particular, was immediately recognized as applying to the speech codes. Said Justice Harry Blackmun in dissent, “I fear that the Court has been distracted from its proper mission by the temptation to decide the issue over ‘politically correct’ speech and ‘cultural diversity,’ neither of which is presented here.”15 Blackmun was hardly alone in suggesting that R.A.V. was directed against campus hate speech codes. The first commentators on the case offered a similar analysis. As the St. Louis Post-Dispatch reported, political correctness “never appeared in Justice Antonin Scalia’s decision on Monday striking down a hate-speech law from St. Paul . . . [b]ut legal scholars said Tuesday that Scalia’s opinion was clearly aimed at the proliferating state laws, municipal ordinances and campus codes aimed at racist, sexist and anti-Semitic speech.” Added Steven Shapiro of the ACLU: ‘’This decision was clearly written in the larger political context in which the conservative wing of the court is concerned about the political correctness movement.”16

#### First Amendment as "public discourse" applies to ALL dialogue at universities

Judge Warren did not answer this question, but the conventional explanation tells us that speech restrictions are acceptable in the workplace because, unlike college campuses, “the First Amendment has no application” there.75 According to commentators, the First Amendment protects “public discourse”—those “communicative processes necessary for the formation of public opinion.”76 By their very nature, universities are concerned with public discourse, but as the same commentators maintain, “speech in the workplace does not generally constitute public discourse.”77 “Within the workplace . . . an image of dialogue among autonomous self-governing citizens would be patently out of place.”78

#### Expression of students that disrupts classwork is NOT protected by the First Amendment

Gould 10 [Gould, Jon B (Professor in the Department of Justice, Law & Criminology at American University), Speak No Evil, edited by Jon B. Gould, University of Chicago Press, 2010. ProQuest Ebook Central, http://ebookcentral.proquest.com/lib/stanford-ebooks/detail.action?docID=496617] AZ

This approach, however, overstates the importance of campus speech while ignoring the fact that one of the most basic elements of university life— grading—routinely limits expression. Initially, we must remember that academic freedom is not an unfettered First Amendment right.111 To the contrary, colleges may regulate expression of students where it materially disrupts class work or other university activities or unduly interferes with the rights of others.112 In fact, as Cass Sunstein notes, “colleges and universities are often in the business of controlling speech, and their controls are hardly ever thought to raise free speech problems.”113 When faculty grade one answer as “right” and another as “wrong,” the First Amendment is untrampled, as it is when a professor cuts off a student in class for going “far afield from the basic approach of the course.”114 This point is born out by two cases on classroom speech. In Bishop v. University of Alabama and Rubin v. Ikenberry the courts made clear that academic speech is not immune from sanction. Both courts willingly deferred to a university’s attempt to restrict coercive and harassing speech during classroom discussion. The Eleventh Circuit was perhaps the more adamant of the two, ruling that “educators do not offend the First Amendment by exercising editorial control over the style and content of student (or professor) speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.”115

#### Bishop and Rubin decisions prove that sexual harassment/speech in the classroom isn't protected

There are those observers who would decry the Bishop and Rubin decisions, seeing them as clear cases of viewpoint discrimination.116 But if they are viewpoint discrimination, they are no different from HWE, which has historically punished individuals for specific speech—that which discriminates against women.117 The question is why so many observers, and several courts, instinctively flinch when similar prohibitions are applied to the college campus. Undoubtedly, some are worried about censorship or creeping restrictions on provocative thought. To be sure, there is precedent to fear censorship on campus. Apart from the McCarthy era, there have been cases in which university officials censored or expelled students because they deviated from “proper” values or beliefs.118 And, of course, the fear of chilling speech is real, especially in an environment that relies upon open dialogue. Still, it is possible to forbid harassment in the classroom without touching other speech that is endemic to the educational mission. That is exactly what the Bishop and Rubin decisions accomplished. The courts may think otherwise, but they have required such calculations for years. Just as employers must distinguish between harmless expressions of opinion and those that actively discriminate under Title VII,119 the hate speech codes required schools to intervene against those who interfered with the educational rights of others.

#### Framing matters when discussing speech codes

It is understood in political science that the public and policy-makers respond as much to the manner in which an issue is presented or framed as they do its actual merit. In the 1992 election, for example, Democrats and Republicans were able to influence public attitudes on government spending by focusing either on “broad, general appeals” or “specific forms of programmatic outlays.” When Republicans framed the issue generally—“government spending must be cut”—public opinion seemed to swing against further expenditures, but when Democrats highlighted particular programs—”it is important to fund medical care for the elderly”—voters tended to favor the spending.131 A similar phenomenon may play out in the courts, where judges are often persuaded by arguments or legal framing that appeal to their backgrounds, ideology, and values.132 In the case of college hate speech policies, opponents successfully framed the codes as a free speech issue. To be sure, the policies did regulate speech, but one might also have viewed them as antidiscrimination measures, as unusual but necessary responses to a new plague of collegiate racism. The national media had already reported that “Campus Racial Tensions—and Violence—Appear on [the] Rise.”133 Why, then, wouldn’t observers—and the courts—view college antidiscrimination policies through the prism of civil rights and equal opportunity? The answer to this question is complex, taking account of the broad (and potentially excessive) enforcement patterns of the hate speech policies, the lack of organized and vocal support for the speech codes, and the very fact that the policies regulated speech. But credit must also go to the codes’ opponents, who framed the policies as extensions of political correctness. PC was a hot topic in the late 1980s and early 1990s, and the litigants who challenged hate speech regulations attempted to disparage the rules as political correctness run amuck. In R.A.V., the petitioner equated St. Paul’s ordinance with “attempts to frame ‘politically correct’ speech codes on college campuses.”134 So too, the plaintiffs in Doe, UWM Post, and Corry all suggested that the respective universities were subverting free and fair inquiry for campus rules that privileged certain views and groups. It is difficult to say whether the trial judges in these cases responded to the opponents’ design, but at least in R.A.V. the Supreme Court seems to have thrown out hate speech regulations for fear of political correctness. The clearest evidence comes from Justice Blackmun, who in a concurrence summed up his concerns with the majority’s reasoning: [There] is the possibility that this case . . . will be regarded as an aberration—a case where the Court manipulated doctrine to strike down an ordinance whose premise it opposed, namely that racial threats and verbal assaults are of greater harm than other fighting words. I fear that the Court has been distracted from its proper mission by the temptation to decide the issue over “politically correct speech” and “cultural diversity,” neither of which is presented here. If this is the meaning of today’s opinion, it is perhaps even more regrettable.135 Several others have suggested that the R.A.V. decision was directed against PC. From newspaper reports to editorial commentary to academic analyses,136 many observers agreed that the “decision was clearly written in the larger political context in which the conservative wing of the court is concerned about the political correctness movement.”137

#### Courts aren't a valid authority – judges are too white

In this respect one cannot ignore the fact that the judges behind the hate speech cases are white and attended college at a very different time from the period in which the speech codes were adopted. Most of the judges graduated college in the 1940s or 1950s, a period in which few minorities attended college, let alone felt free to fight harassment against them on campus (or elsewhere). Thirty years later, nearly 17 percent of college students were nonwhite,138 and minority students felt empowered to organize for their own interests. Affirmative action had succeeded in allowing more minority students to go to college, but it also created conflicts between affluent white students who came from homogenous schools and communities, and the more diverse classmates they found on many college campuses.139 That schools crafted speech codes in response to ethnoviolence might have been lost on a judiciary that came of age in a different time. This is not to say that older judges cannot grow with the times or consider other perspectives. Indeed, Avern Cohn, the judge in Doe, has become a fan of the scholarship of Mari Matsuda, a leader in critical race studies.140 Nonetheless, one has to consider whether the Doe, UWM Post, CMU, and Corry courts were setting legal rules for an educational environment that no longer existed.

#### \*\*Court decisions against speech codes actually increased speech restrictions

Gould 10 [Gould, Jon B (Professor in the Department of Justice, Law & Criminology at American University), Speak No Evil, edited by Jon B. Gould, University of Chicago Press, 2010. ProQuest Ebook Central, http://ebookcentral.proquest.com/lib/stanford-ebooks/detail.action?docID=496617] AZ

On March 30, 1995, newspaper headlines declared that hate speech regulations were dead. After six years of litigating over university hate speech codes, a California superior court confirmed what four other courts before it had ruled—that collegiate hate speech codes, and in this case Stanford’s policy, were constitutionally suspect.1 In the wake of the Stanford decision, many commentators rejoiced. Nat Hentoff, a long-time critic of hate speech codes, hailed the end of a doctrine that had suffered from “fundamental weakness[es].” The Arizona Republic delighted that “the First Amendment has been reinstated on America’s college campuses.” And the Rocky Mountain News opined that hate speech codes were now “dead letters—unenforced law.”2 As happy as the critics were at their apparent victory, had they celebrated too soon? Had the speech code “movement” truly been silenced, or were critics unwittingly taking refuge in a line of case law that would fail to hold up? To be sure, under a traditional model of judicial precedent and impact—that legal decisions command public action and affect public opinion—one might have expected schools with suspect speech policies to amend or rescind their rules. From a California superior court all the way up to the highest court of the land, the judiciary appeared to be sending a unified message about the impropriety of restrictive speech codes at public colleges and universities. For that matter, given the courts’ influence beyond public bodies, and given the importance that many Americans ascribe to the First Amendment, we might also have expected many private schools to follow suit. The trend, however, was just the opposite. Returning to the sample of 100 schools surveyed earlier, tables 5.1 and 5.2 present data on speech codes at these institutions as of 1997, two years after Corry and a full five years following the Supreme Court’s decision in R.A.V. As these data indicate, the percentage of schools with speech policies actually jumped following the court cases. Indeed, the greatest rise was seen among the most restrictive speech codes, those that prohibited offensive expression. Although the rise may not be as dramatic when taking into account the confidence intervals, the number of speech policies clearly rose following the court decisions, with the largest percentage jump coming from the most restrictive speech policies. Moreover, as table 5.3 indicates, the vast majority of schools with constitutionally suspect speech policies kept theirs on the books in the face of contrary legal precedent. Table 5.4, too, provides a closer look at the various strategies that schools followed. There, “offending policies” reflect those speech restrictions considered unconstitutional by the relevant court cases—verbal harassment of minorities and offensive speech—while “nonoffending policies” cover fighting words and generic verbal harassment, restrictions that were still permitted after the decisions. While a majority of schools maintained speech policies neither before nor after the court cases, almost a quarter of institutions either retained offending policies or adopted new ones following these decisions. That the courts’ decisions had neither a powerful impact nor compelled widespread compliance is hardly novel, for as chapter 2 explained, the calculus to comply is a complex proposition. Two of the leading theorists of judicial impact, Bradley Canon and Charles Johnson, identify several factors that affect the process, including interpreting, implementing, consumer, and secondary populations.3 The interplay of these influences explains why some de- cisions are accepted and followed (such as tax rulings) and others are not (for example, Brown v. Board of Education).4 In the case of college hate speech codes, the question is why so many schools chose to ignore the terms, if not the spirit, of the courts’ rulings. Initially it is important to define what it means for a school to comply or not with the courts’ decisions. Returning a moment to table 5.4, not all of the schools there made a decision to accept or reject the emerging precedent. To comply with judicial holdings is to bring a school’s policies into line with the courts’ rules. Noncompliance, by contrast, means permitting speech policies that conflict with the cases. Thus, table 5.4 distinguishes between “offending policies”—those whose terms conflict with the courts’ holdings—and “nonoffending policies,” those that were not touched by the cases. Given these terms, a school that complied with the courts’ rulings would have removed an offending policy, replacing it either with a nonoffending policy or none at all. By contrast, noncompliance reflected two possibilities. Certainly, a school failed to comply with the decisions when it adopted an offending policy even after the cases, but schools that kept offending policies on the books were also in noncompliance. Put another way, noncompliance includes acts of both commission and omission.

#### FIRE exaggerates number of speech codes

FIRE is correct that many schools still retain their hate speech policies, some of them challenging or even overstepping constitutional norms. A reexamination of the 100 schools chronicled in chapters 3 and 5 finds that most still have the same speech rules on the books in 2004 that they maintained seven years earlier. But this fact does not tell the whole story, for FIRE’s claims are by turns both too broad and too narrow. FIRE has taken to rating college speech policies, claiming that upwards of two-thirds of public campuses have unconstitutional policies.6 This number, however, is an exaggeration. Among other things FIRE does not distinguish between enforceable rules and exhortative statements; it confuses examples with definitions; and it takes statements out of context. A good example is FIRE’s charge that the University of Michigan’s Policy and Guidelines Regarding Electronic Access to Potentially Offensive Material is unconstitutional for stating that “individuals should not be unwittingly exposed to offensive material by the deliberate and knowing acts of others.” At best this line is ambiguous—the debate being whether the policy is restricting expression that the offender knows is offensive or material that the offender believes a recipient would find offensive. The context of the policy, however, should answer this question in favor of Michigan, especially considering that the policy applies only to computer systems administrators, not to students or faculty. More shocking is FIRE’s exclusion of a line in the policy that clearly supports free speech and open expression: “[S]ystem administrators will have to guard against making judgments as to the appropriateness of the content of another person’s work. Research and instruction take many forms and may not be restricted through censorship.” Indeed, such luminaries as Robert O’Neil, director of the Thomas Jefferson Center for the Protection of Free Expression and former president of the University of Virginia, have contested FIRE’s claims and estimates. Says O’Neil, “I just can’t believe there are anything like that number of genuine speech codes.”7

#### Speech regulation is inevitable – it's become a norm—OR—no backlash, it's been accepted

Gould 10 [Gould, Jon B (Professor in the Department of Justice, Law & Criminology at American University), Speak No Evil, edited by Jon B. Gould, University of Chicago Press, 2010. ProQuest Ebook Central, http://ebookcentral.proquest.com/lib/stanford-ebooks/detail.action?docID=496617] AZ

THE LARGER WAR For all its focus on the precise number of college hate speech policies, FIRE risks missing the larger point that it is losing the war over hate speech regulation in general. Rather than being considered an unconstitutional pariah, hate speech restrictions are increasingly the norm among influential institutions of civil society, including higher education, the news media, and Internet service providers. Even as FIRE and its compatriots have won legal battles in court, the informal law of speech regulation has prospered. This, then, is the ultimate irony; adopted largely for utilitarian or instrumental purposes, the speech codes have had the very effect on mass constitutionalism and speech norms that their opponents originally feared. Without a court case won or a statute passed, the bounds of free speech have been reinterpreted and a new norm spread in civil society. Initially, some of the evidence may appear to the contrary. Throughout the qualitative research I found few schools that had actively enforced their hate speech policies, the highest rate constituting one case per year. Part of the reason, says a former college president, is that “adopting policies is easier than acting on actual cases. . . . Policies are non-action,” which most college administrators prefer, he says. “Usually, the least action a president can take is to adopt a policy. The adoption does nothing.” Action, by contrast, “scares everyone, not just the actor.” Yet the very adoption of hate speech policies has influenced behavior on several campuses. This point was repeated to me by many administrators at the schools I visited, who reported the rise of a “culture of civility” that eschews, if not informally sanctions, hateful speech. “Don’t mistake symbolism for impotence,” they regularly reminded me. Symbols shape and reflect social meaning, providing cues to the community about the range of acceptable behavior. Adopting a hate speech policy, then, could have persuasive power even if it were rarely enforced. Consider the dean of students at a northeastern liberal arts college, who spoke proudly of her school’s hate speech policy. Had the policy been formally invoked, I asked. “Rarely,” she told me, but the measure “sets a standard on campus. It gives us something we can point our finger to in the catalog to remind students of the expectations and rights we all have in the community.” This sentiment was repeated by the president of a well-known institution, who claimed that “we didn’t set out to enforce the policy punitively but to use it as the basis for our educational efforts at respecting individuality.” Still another administrator admitted that, “while we’ve rarely used the policy formally, it does give support to students who believe their rights have been violated. They’ll come in for informal mediation and point to the policy as the reason for why the other person must stop harassing them.” Sociologists would call this process norm production—that symbolic measures can condition and order behavior without the actual implementation of punitive mechanisms.8 Hate speech policies set an expected standard of behavior on campus; college officials employ orientation sessions, extracurricular programs, and campus dialogue to inculcate and spread the message; and over time an expectation begins to take root that hate speech is unacceptable and should be prohibited. Of course, this mechanism makes regulation a self-policing exercise—colleges need not take formal or punitive action—but the effect is to perpetuate a collective norm that sees hate speech as undesirable and worthy of prohibition. Moreover, considering the isomorphic tendencies of college administrators, the creation of speech policies—or speech norms—at respected and prestigious institutions has a “trickle down” effect throughout academe. Again, sociologists would call this process normative isomorphism, but most people know the phenomenon as “keeping up with the Joneses.”9 If Harvard, Berkeley, or Brown passes measures against hate speech, then institutions lower in the academic food chain are likely to take note and follow suit. If prestigious institutions advance campus norms that eschew hate speech, then both peer and “wannabe” institutions are likely to consider and replicate such informal rules. Indeed, this is the very fear of FIRE and its compatriots—that if PC policies are not checked now, their message will spread throughout academe infecting other campuses. What FIRE fails to say, but undoubtedly must be thinking, is that informal law and mass constitutionalism are at stake if the spread of speech regulation is not curbed. FIRE can hang its hat on R.A.V., Doe, UWM Post, and the other court cases in which judges have overturned college hate speech policies, but as hate speech regulation continues to flourish on college campuses, informal speech norms are at stake throughout the larger bounds of civil society. Whatever one thinks of FIRE and its agenda, its supporters are like the oldfashioned fire brigade that excitedly shows up at a burning building only to toss paltry pails of water on the inferno. Hate speech regulation has already crossed the firebreak between academe and the rest of civil society and is well on its way toward acceptance in other influential institutions. The initial signs are found in surveys of incoming college freshmen. Shortly after R.A.V., researchers began asking new freshmen whether they believe that “colleges should prohibit racist/sexist speech on campus.”10 In a 1993 survey, 58 percent of first-year students supported hate speech regulation, a number that has stayed steady and even grown a bit in the years following. By 1994, twothirds of incoming freshmen approved of hate speech prohibitions, with more recent results leveling off around 60 percent.11 Unfortunately, there are not similar surveys before 1993 to compare these results against, but it is a safe bet that support would have been minimal through the mid-1980s when the issue had not yet achieved salience. More to the point, the surveys show that support for speech regulation is achieved before students ever set foot on campus. If, as the codes’ opponents claim, colleges are indoctrinating students in favor of speech regulation, the influence has reached beyond campus borders. New students are being socialized to this norm in society even before they attend college. So too, surveys of the general population show an increasing queasiness with hate speech and a greater willingness to regulate such expression privately, especially when communicated over the Internet. In 1991, at the height of the speech code controversy, the CBS News/New York Times Poll asked the following question of American adults: Some universities have adopted codes of conduct under which students may be expelled for using derogatory language with respect to blacks, Jews, women, homosexuals and other groups of students. Which of the following comes closest to your view about this? A. Students who insult other students in this fashion should be subject to punishment; or B. The Bill of Rights protects free speech for these students, and they should not be subject to punishment. Among respondents, 60 percent agreed that hate speech deserved punishment; only 32 percent believed that the Bill of Rights should protect such expression, with 8 percent undecided.12 In 1994 the National Opinion Research Center (NORC) took the issue beyond campuses, asking a national sample whether, “under the First Amendment guaranteeing free speech, people should be allowed to express their own opinions even if they are harmful or offensive to members of other religious or racial groups.” At the time, 63 percent of respondents agreed, although only 21 percent did so strongly.13 However, when NORC dropped a direct reference to the First Amendment, asking whether “people should not be allowed to express opinions that are harmful or offensive to members of other religious or racial groups,” respondents were split almost evenly in their opinions. Forty-one percent supported such restrictions, 44 percent opposed them, and the remainder were either neutral or unsure.14 Both the CBS News/New York Times and NORC surveys were conducted in the early 1990s, as the speech code controversy was being played out on the front pages of major media. If respondents at the time seemed comfortable with different rules for separate venues—approving of hate speech measures on campus but split over regulations in larger society—this divergence seemed to narrow by the end of the decade. In 1999 the Freedom Forum con ducted a State of the First Amendment Survey. Among its several questions, the Forum queried: I am now going to read you some ways that people might exercise their First Amendment right of free speech. . . . [Do you believe that] people should be allowed to use words in public that might be offensive to racial groups?15 Even with the explicit reference to the First Amendment and the right of free speech, researchers found that 78 percent of respondents disagreed with the exhortation to open discourse. Indeed, an amazing 61 percent of respondents strongly disagreed with the statement, indicating a presumed willingness to regulate or restrict racial hate speech.16 The Freedom Forum has repeated this survey annually, and although support for hate speech regulation has dropped a bit, the level still hovers around two-thirds assent.17 The results from the Freedom Forum’s surveys are in line with other polling data about hate speech involving computers and the Internet. In 1999, National Public Radio, the Kaiser Foundation, and Harvard’s Kennedy School of Government teamed up to query Americans’ attitudes about government. As part of that survey, researchers asked two questions about online hate speech. Finding that over 80 percent of respondents believed that hate speech on the Internet was a problem,18 the survey asked whether “the government should do something about” these attacks against a person’s “race, religion, or ethnicity.” Nearly two-thirds of respondents believed the problem required governmental action,19 a number consistent with the 60 percent of respondents in a study by Princeton Survey Research Associates who agreed that “the government should put major new restrictions on the Internet to limit access to pornography, hate speech, and information about bomb-making or other crimes.”20

#### Hate speech is condemned despite formal law

THE MASS CONSTITUTIONALISM OF HATE SPEECH REGULATION If hate speech regulation is alive and well, how widespread and accepted is its practice? Certainly, no one would claim that the norm has been codified in the formal law, for the courts have been abundantly clear that public bodies may not prohibit hateful “expressions based on the underlying message.”42 With the exception of sexual harassment law, measures that impose “special prohibitions on those speakers who express views on the disfavored subjects of ‘race, color,’” and the like are considered constitutionally suspect.43 But, by the same token, hate speech regulation is hardly a fringe perspective, relegated to the realm of unaccepted moral views. Hate speech measures have become a part of informal law, as a critical mass of civil society has accepted the notion of hate speech regulation. This is not to say that hate speech rules are uniformly popular or that the public supports legislation to prohibit hateful expression. Quite the contrary, for as FIRE has shown, there are many detractors uneasy at what they consider a “scandal” of intellectual “tyranny.”44 Nonetheless, there is a growing sense in civil society, especially among its most influential institutions like academe and the media, that hate speech is not only inappropriate and dangerous but that it ought to be prohibited, if only through informal mechanisms. How is it that I can make this claim when almost no court has upheld a hate speech code? Part of the answer turns on the definition of a hate speech policy, for if the category includes rules that prohibit sexually demeaning expression, the kind that would lead to a hostile work or educational environment, several courts have sustained measures that prevent and punish harassment. But as chapter 4 argued, there is a disparity in American law between sexual harassment policies, which the courts largely accept even when applied to expression, and other measures that address hateful speech based on race, ethnicity, or sexual orientation. The latter category has largely been panned by the courts. Indeed, the closest that American law comes to punishing hate speech is hate crimes legislation, which imposes a “penalty enhancement” if a suspect picks his victim “because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person.”45

### Carrubba & Hankla (2008)

#### Judges are afraid of non-compliance

Carubba & Hankla 8 [Clifford Carrubba and Charles Hankla, "Judicial Behavior Under Political Constraints: Evidence from the European Court of Justice," American Political Science Review, 2008] AZ

These results have general implications for the study of judicial politics. First, they provide novel empirical evidence of strategic behavior by judges in the face of political constraints. Extant theory—particularly separation-of-powers models—indicates that judicial decisions should respond systematically to the interests of the executive and legislative branches. Specifically, threats of noncompliance and legislative override induce courts to alter their decisions to mollify those political interests responsible for compliance and legislation. Yet, with a few recent exceptions (e.g., Vanberg 2005), we have very little evidence that such constraints do indeed shape judicial behavior. Our analysis provides systematic evidence that judges at the European Court of Justice are sensitive to these two constraints. Moreover, these threats have a substantively large effect on judicial rulings. Second, our analysis allows us to compare the impact of these two political constraints on judicial behavior. Harvey and Friedman (2006) have demonstrated that U.S. federal courts are sensitive to threats of legislative override and Vanberg (2005) and Staton (2006) find evidence that constitutional courts in Germany and Mexico are sensitive to threats of noncompliance. But we are aware of no study that considers both threats in the same judicial setting. Our findings indicate that threats of noncompliance are more influential on judicial rulings than threats of override. We suspect that this is due to the ease with which threats of noncompliance can be executed compared to threats of override. The results of our analysis also have several important implications for our understanding of decision making by the European Court of Justice. First, and most obviously, they provide the first systematic evidence that political constraints substantially affect ECJ decision making. As stated previously, much of the evidence scholars point to in trying to evaluate judicial influence has proven uninformative because of the observational equivalence of their evidence. This study provides the first quantitative test that moves beyond this empirical impasse. Overall, the evidence is more consistent with the intergovernmentalist argument that political constraints should have large, systematic, and substantively significant effects on judicial decision making than with neofunctionalist arguments that, while these constraints might matter on the margin, the court has had the latitude to pursue an agenda independent of and contrary to member-state governments’ interests. Simply put, small shifts in the number of governments aligned on one side of a legal issue or another have large substantive effects on the ECJ’s likely decision.

#### Judges are afraid of non-compliance

Carubba & Hankla 8 [Clifford Carrubba and Charles Hankla, "Judicial Behavior Under Political Constraints: Evidence from the European Court of Justice," American Political Science Review, 2008] AZ

These results have general implications for the study of judicial politics. First, they provide novel empirical evidence of strategic behavior by judges in the face of political constraints. Extant theory—particularly separation-of-powers models—indicates that judicial decisions should respond systematically to the interests of the executive and legislative branches. Specifically, threats of noncompliance and legislative override induce courts to alter their decisions to mollify those political interests responsible for compliance and legislation. Yet, with a few recent exceptions (e.g., Vanberg 2005), we have very little evidence that such constraints do indeed shape judicial behavior. Our analysis provides systematic evidence that judges at the European Court of Justice are sensitive to these two constraints. Moreover, these threats have a substantively large effect on judicial rulings. Second, our analysis allows us to compare the impact of these two political constraints on judicial behavior. Harvey and Friedman (2006) have demonstrated that U.S. federal courts are sensitive to threats of legislative override and Vanberg (2005) and Staton (2006) find evidence that constitutional courts in Germany and Mexico are sensitive to threats of noncompliance. But we are aware of no study that considers both threats in the same judicial setting. Our findings indicate that threats of noncompliance are more influential on judicial rulings than threats of override. We suspect that this is due to the ease with which threats of noncompliance can be executed compared to threats of override. The results of our analysis also have several important implications for our understanding of decision making by the European Court of Justice. First, and most obviously, they provide the first systematic evidence that political constraints substantially affect ECJ decision making. As stated previously, much of the evidence scholars point to in trying to evaluate judicial influence has proven uninformative because of the observational equivalence of their evidence. This study provides the first quantitative test that moves beyond this empirical impasse. Overall, the evidence is more consistent with the intergovernmentalist argument that political constraints should have large, systematic, and substantively significant effects on judicial decision making than with neofunctionalist arguments that, while these constraints might matter on the margin, the court has had the latitude to pursue an agenda independent of and contrary to member-state governments’ interests. Simply put, small shifts in the number of governments aligned on one side of a legal issue or another have large substantive effects on the ECJ’s likely decision.

### Rubin v Ikenberry

#### Sexual speech that crosses the line

Hudson 10 [David Hudson (First Amendment contributing editor for the American Bar Association’s Preview of United States Supreme Court Cases, teaches First Amendment classes at Nashville School of Law and Vanderbilt University Law School), First Amendment Center, 2/4/2010] AZ

Rubin v. Ikenberry Louis Rubin was a tenured education professor at the University of Illinois. In 1990, Rubin allegedly made numerous in-class remarks of a sexual nature, including: discussing his prior sexual experiences, telling stories about his ex-wife and daughters, telling dirty jokes and making demeaning sexist comments. For example, Rubin asked a student if she would marry a paraplegic with “no vital functions from the waist down.” Rubin joked that teachers make good prostitutes because teachers make their customers (students) “do it again and again until they get it right.” Rubin argued that he was “teaching of modern values, morals and social conditions.” He also said that he talked about topics of a sexual nature because such comments held the interest of his students. The university removed Rubin from the classroom. After his termination, he sued, claiming a violation of his rights under the First Amendment and academic freedom. A federal district court rejected his arguments, finding that his in-class comments were “exceedingly remote from the First Amendment’s concern with protecting socially valuable expression.” “Rubin’s classroom comments which have a sexual focus do not appear connected to the course content and legitimate objective of teaching students how to teach elementary school social studies,” the court wrote. “The degree of departure from the expected course content to Rubin’s comments appear(s) extensive.”

#### Academic freedom distinguished from "constitutionally protected speech"

Hudson 10 [David Hudson (First Amendment contributing editor for the American Bar Association’s Preview of United States Supreme Court Cases, teaches First Amendment classes at Nashville School of Law and Vanderbilt University Law School), First Amendment Center, 2/4/2010] AZ

Some experts emphasize the duty to prevent sexual harassment and discrimination. “Sexually harassing behavior is not tolerated in the workplace, and it should not have to be tolerated in the classroom,” writes legal commentator Woodward. Similarly, George Mason University law professor Jon Gould warns that often the balance has swung too far in favor of university professors. He writes: “Unlike employment cases, courts often seem to balance faculty and student conduct with concerns for ‘academic freedom,’ in the process dismissing collegiate claims that would go forward in the workplace.” Gould adds that “academic freedom has the potential to become a defense that prohibits the prosecution of cases that deny women equal treatment in the university setting.” He contends that “academic freedom has been interpreted too broadly, becoming essentially a defense for courts — and perhaps collegiate administrators — who do not want the difficult but essential task of distinguishing constitutionally protected speech from harassment.” “Academic freedom is about education,” Gould writes. “When hostile behavior gets in the way of the educational process, academic freedom must give way to equal opportunity.” “What is needed is a clear test for evaluating the free speech rights of teachers in the classroom in situations where that speech collides with the students’ rights and the universities’ responsibilities,” Woodward writes.

### Law (2009)

https://www.researchgate.net/publication/232005644\_A\_Model\_of\_the\_Endogenous\_Development\_of\_Judicial\_Institutions\_in\_Federal\_and\_International\_Systems

#### good solvency card

Law 9 [David Law (Professor of Law and Professor of Political Science, Washington University in St. Louis; B.A., M.A., Ph.D., Stanford University; J.D., Harvard Law School), "A Theory of Judicial Power and Judicial Review," THE GEORGETOWN LAW JOURNAL, 2009] AZ

Courts that engage in judicial review perform monitoring and coordinating functions that help the people to solve both of these problems. First, a court engaged in judicial review serves the function of a whistleblower or fire alarm: it provides the people with reliable, low-cost information about whether their government has overstepped the bounds of its delegated power. Second, courts can coordinate popular action against usurping governments. People are unlikely to act openly against a tyrannical government unless they believe that others will act as well. They are therefore in need of a highly public signal that creates such beliefs on a large scale. A court can provide such a signal by ruling publicly against the government. The fact that constitutional courts perform monitoring and coordinating functions helps, in turn, to solve the puzzle of why governments obey them, notwithstanding the fact that they lack the power of either the purse or the sword. The ability of a court to mobilize the people against the government means that government disobedience of the court’s decisions carries potentially severe consequences This account has important empirical implications that directly contradict the conventional wisdom about the purported relationship between judicial legitimacy and judicial power. In particular, it is often thought that courts jeopardize their legitimacy, and thus their power, by rendering unpopular decisions. The theory proposed here suggests, however, that the opposite may be true. When a court renders an unpopular decision that nevertheless receives widespread compliance, it generates and reinforces strategic expectations about its efficacy in future cases. Thus, the successful exercise of judicial power in the face of opposition or criticism merely begets even more judicial power. The theory also helps to explain both judicial independence and public support for the courts in the face of decisions that may sometimes defy the wishes of a majority: because constitutional courts perform a watchdog function, the people have reason to support their independence even if specific judicial decisions happen to be unpopular.

#### Brown v Board is a good analogy – the Court lost power and only gained it back after federal enforcement of compliance

By contrast, the Court’s first decision in Brown v. Board of Education185 may have enhanced the moral stature of the Court like no other decision before or since, but it also risked severe injury to the power of the Court itself. In the immediate aftermath of the Court’s decision in Brown I, it became clear that the Court had every reason to fear massive resistance.186 The Court’s strategic response in Brown II187 was twofold: it shunted enormous responsibility and discretion to the lower courts,188 and it adopted infamously “loose phraseology” that “could neither constrain evasion nor bolster compliance.”189 As Michael Klarman observes, “precision enabled defiance, which the justices desperately wished to avoid.”190 In light of the prolonged defiance that nevertheless followed, Klarman characterizes Brown II as “a mistake from the Court’s perspective.”191 Insofar as the Court’s overriding goal was to preserve its own power, however, it is far from clear whether Brown II was, in fact, a strategic mistake. By rendering a decision on the question of implementation that was too permissive to be flaunted in an obvious way, and by substituting the handiwork of the lower courts for its own, the Court hindered the formation of a popular belief that it could not command obedience.192 For an institution that must rely upon the power of coordination to secure large-scale obedience, a popular belief that one lacks power is a self-fulfilling belief. Thus, insofar as they sought to preserve their own power,193 the Justices may have adopted exactly the right strategy: in the face of the violent resistance to school desegregation that ultimately followed, Brown II enabled the Court to cushion the blow to its reputation for commanding obedience. Measured against the goal of preserving the appearance—and thus the reality—of its own power, the Court’s next moves also made strategic sense. First, it chose to await a case in which it could issue a decision without appearing utterly ineffectual.194 Second, having found such a case, it then issued a decision that insisted unambiguously and emphatically upon complete obedience.195 For several years after Brown, the nation had every reason to doubt whether the federal government would make any effort to enforce school desegregation decisions against recalcitrant state officials.196 Only after President Eisenhower deployed the 101st Airborne Division to Little Rock197 was it once again safe for the Court to reassert itself without highlighting its impotence. This application of brute force gave the Court an opportunity not merely to salvage, but to burnish, its reputation for issuing decisions that elicit compliance. That opportunity arrived in the form of Cooper v. Aaron, and the result, not surprisingly, was a paean to federal judicial supremacy.198 In the face of massive noncompliance, the Court’s best hope for appearing powerful was to encourage the perception that its decisions were backed by the full force of the federal government. What better way for the Court to encourage such an impression than to issue a clear and firm order after federal force had already been brought to bear? It is obvious, given the sequence of events, that the Court’s aggressive assertion of power in Cooper could not have caused the President’s use of force. Rather, if there is any relationship of cause and effect to be drawn between the two events, it was the President’s use of force that led the Court to assert itself in Cooper. John Hart Ely once observed that “one of the surest ways to acquire power is to assert it.”199 The words ring true, but they must be qualified: the surest way to acquire power is to assert it when there is no risk of disobedience. The tactic is a time-honored one. Cowed by political peril, the Marshall Court did nothing to help William Marbury secure a judicial commission that in its view was rightfully his,200 and it capitulated to a constitutionally dubious purge of Federalist judges from the circuit courts.201 Yet in hindsight, we do not remember Marbury v. Madison as a sad chapter in the story of the Judiciary’s abject surrender to the Jeffersonians. We remember it, instead, as the cornerstone of judicial power in this country because the Court had the strategic sense to assert itself in a ruling that was at no risk of being disobeyed in any obvious way. Cooper v. Aaron is thus heir to the same tradition as Marbury in more ways than one: both are not merely assertions of judicial power, but rather opportunistic assertions of judicial power made under conditions of assured compliance. Having learned the weakness of its position by the time of Brown II, the Court squeaked like a mouse; after federal troops had cleared the way in Arkansas, it roared like a lion. Cooper stands as a monument to judicial power if we remember not the squeak, but the roar. And that is, perhaps, what we tend to remember. With the passage of time, the illusion of power has become the reality.

#### Compliance with the court augments its reputation, which increases chance of compliance in the future

Law 9 [David Law (Professor of Law and Professor of Political Science, Washington University in St. Louis; B.A., M.A., Ph.D., Stanford University; J.D., Harvard Law School), "A Theory of Judicial Power and Judicial Review," THE GEORGETOWN LAW JOURNAL, 2009] AZ

Although there is no obvious or foolproof way of generating a widespread, self-fulfilling belief in the efficacy of a constitutional court, there exist constitutional design options that may increase the likelihood of success. In particular, a division of powers among governmental actors, as in the form of federalism or a separation of legislative and executive functions, creates opportunities for constitutional courts to exercise power over other government actors and thus to generate self-fulfilling beliefs about their efficacy in a wider range of cases.241 In an interbranch dispute between the executive and the legislature, for example, any ruling on the merits necessarily favors one branch over the other. The result is a two-on-one dynamic, in which the constitutional court aligns itself with a powerful political actor that has both the incentive and the means to demand compliance from the other branch. Likewise, a constitutional court that is in the business of deciding federalism disputes can reasonably expect federal support, and thus compliance with its decisions, when it rules in favor of the federal government. The more that government actors comply with the court because compliance happens to be in their self-interest, however, the greater the opportunity for the court to consolidate a reputation for securing compliance, and the harder it may therefore become to defy the court. A constitutional court may be able to parlay a reputation for compliance earned in the context of federalism and separation-of-powers disputes into a generalized belief in its own efficacy in cases involving the government.

#### Concept of court legitimacy is too vague to do anything

Constitutional scholarship has long acknowledged that government obedience to the least dangerous branch cannot be taken for granted. It has not, however, addressed the problem in a coherent or satisfying way. For the most part, the relevant literature has simply assumed that courts possess some poorly defined quality known as legitimacy that, when mustered in sufficient quantity, leads government officials to comply.223 And having thus muddled the threshold question of why governments obey courts, it has tied itself in knots over the supposed dilemma that courts, armed with the awesome power of their own legitimacy, are in a position to foist upon the polity choices that lack majority support.224 This theoretical paradigm is deeply unsatisfying. It rests upon dubious empirical premises about the extent to which judicial review is actually countermajoritarian.225 It obscures the crucial underlying question of human motivation— namely, the extent to which government officials obey courts out of a sense of normative obligation, or instead for reasons of self-interest. And it is oddly circular: legitimacy enables courts to act in a countermajoritarian fashion, we are told, yet countermajoritarian behavior threatens the legitimacy of courts. Constitutional theory has consequently been preoccupied with finding ways of escape from a trap of its own making: how can courts perform judicial review without losing their legitimacy? How, in other words, can they have their cake and eat it too? If we are to move beyond this paradigm, we must avoid its peculiar assumptions and learn to address ourselves to a different and perhaps more interesting set of questions about the relationship between judicial power and judicial review. This Article has sought to do precisely that. Using as its starting point a hypothetical state of nature in which neither governments nor courts exist, it has constructed a theoretical account of what constitutional courts do, why people would choose to adopt such institutions, and why government officials would choose to obey them. Courts perform two crucial but largely overlooked functions—namely, monitoring and coordination—that enable them to elicit compliance even when they lack enforcement power of their own. In the context of judicial review, the performance of these functions by a constitutional court ameliorates the information and collective action problems that plague the principal-agent relationship between the people and their government. The ability of the court to inform and mobilize gives the people reason to embrace judicial review and judicial independence alike. The threat of action by an informed and mobilized public, in turn, gives the government reason to obey the court.

#### Judicial power is undermined by non-compliance—exposes powerlessness of the court

There is, to be sure, an important strategic reason why a court might wish to limit the cases that it can hear. Self-limitation may be motivated by selfpreservation. Lacking as they do the ability to enforce their decisions against unwilling governments, constitutional courts possess feet of clay: their power is dependent upon the beliefs that others hold about the consequences of disobedience.231 If the government seems likely not only to disobey judicial rulings on a particular question, but to do so at little or no cost to itself, a decision on the merits runs the risk of exposing—and thereby aggravating—the powerlessness of the court. Under conditions of uncertain government compliance, judicial self-censorship may seem prudent as a strategic matter.232 It is questionable, however, whether restrictions on justiciability constitute an especially useful means of judicial self-preservation. Justiciability doctrines are simply not designed for the purpose of identifying disputes that have the potential to undermine the appearance of judicial efficacy if resolved on the merits. Rules pertaining to the nature of the injury that a plaintiff must allege, for example, or the supposedly political character of the underlying legal issue, are poor proxies for the likelihood of government noncompliance that will embarrass and undermine the court in question. Indeed, the reflexive avoidance of politically divisive or controversial cases— via the political question doctrine, the acte de gouvernement doctrine, and the like233—might actually prove a counterproductive choice of strategy for a court keen to consolidate its power. This Article has argued that, contrary to conventional wisdom, controversial decisions have a tendency to enhance, rather than diminish, a court’s power, as long as they are obeyed.234 Accordingly, a court that already commands obedience and expects more of the same, such as the United States Supreme Court or the German Bundesverfassungsgericht, has little to fear and perhaps even something to gain from embracing controversy. By contrast, a court that lacks a similarly developed track record, such as a newly established constitutional court in an emerging democracy, faces greater risk that its decisions will be disobeyed and its reputation for obedience stillborn. Should it succeed in deciding such a case, however, it will engender expectations of future obedience that boost its power in subsequent cases. If those gains seem more than commensurate with the risks involved, adjudication becomes a prudent gamble. A truly strategic court, as opposed to a merely timid one, will recognize that its political environment is characterized not merely by risks, but also by rewards: nothing ventured, nothing gained.

#### Compliance with the court augments its reputation, which increases chance of compliance in the future

Although there is no obvious or foolproof way of generating a widespread, self-fulfilling belief in the efficacy of a constitutional court, there exist constitutional design options that may increase the likelihood of success. In particular, a division of powers among governmental actors, as in the form of federalism or a separation of legislative and executive functions, creates opportunities for constitutional courts to exercise power over other government actors and thus to generate self-fulfilling beliefs about their efficacy in a wider range of cases.241 In an interbranch dispute between the executive and the legislature, for example, any ruling on the merits necessarily favors one branch over the other. The result is a two-on-one dynamic, in which the constitutional court aligns itself with a powerful political actor that has both the incentive and the means to demand compliance from the other branch. Likewise, a constitutional court that is in the business of deciding federalism disputes can reasonably expect federal support, and thus compliance with its decisions, when it rules in favor of the federal government. The more that government actors comply with the court because compliance happens to be in their self-interest, however, the greater the opportunity for the court to consolidate a reputation for securing compliance, and the harder it may therefore become to defy the court. A constitutional court may be able to parlay a reputation for compliance earned in the context of federalism and separation-of-powers disputes into a generalized belief in its own efficacy in cases involving the government.

### Misc

#### Alt cause of low court power – presidential election

DeCosse 17 [David DeCosse, "Legitimacy of the Supreme Court harmed," San Francisco Chronicle, 2/1/2017] AZ

With the nomination of Donald Trump’s pick, Neil Gorsuch, to the U.S. Supreme Court, it’s time to acknowledge one other casualty of our divisive presidential election: the wounded legitimacy of the Supreme Court itself. The sin at the heart of the matter was committed before the election: The Senate Republicans’ unprecedented nonresponse to President Barack Obama’s nominee for the vacancy created by the death of Justice Antonin Scalia — Merrick Garland. You don’t have to be a constitutional lawyer to find the arguments in favor of this nonresponse to be preposterously partisan — and the very opposite of the fairness demanded by the Constitution. Despite the well-established practice in treating the nominees of a president to a hearing, the Senate Republicans kept churning up reasons for inaction that were transparent excuses for partisan motives. We have to stop and consider the lasting implications for the court’s legitimacy of this do-nothing-ism by the Senate. American moral philosopher John Rawls said that a simple notion underlies what makes democratic political power legitimate — the Golden Rule. That is: When dealing with constitutional essentials, treat other citizens the way you would like to be treated — and assume that others think of themselves as free, equal and sharing in common standards of human reason. We can see how Rawls’ standard challenges the Senate Republicans’ tactic. Assuming reciprocity, why not have the Senate Democrats, the next time they are in the majority, adopt the same tactic: Any GOP president’s nominee for the Supreme Court in an election year, when the majority of the court hangs in the balance, would get no hearing. No Republican would agree to such a principle. And that refusal confirms what is wrong about such an abuse of the Constitution: It violates the fundamental conditions of equality and reciprocity on which legitimacy depends. To be sure, the observance of correct constitutional procedures is a crucial dimension of legitimacy. On such grounds, Trump has a legitimate claim to the presidency. But other, ethical aspects of legitimacy cannot be dismissed out of hand. In the case of the election, these aspects pertain to such matters as the unjust practice of voter suppression. In the case of the Senate GOP’s refusal to consider Garland, the departure from fair procedures and the spirit of fair play (which sounds quaint but refers to the ethical glue that keeps us as a people bound by the Constitution) erode the basis of legitimacy. In an authoritarian style of government, procedures can be a waste of time — the sort of frivolous concerns of people who don’t get the big picture (like getting our preferred free-marketer or antiabortion supporter on the Supreme Court). But embedded in procedures are fundamental matters of human dignity and the justification of the exercise of political power. If you can’t give citizens reasons that both you and they could accept, then you are breaking faith with the people who constitute the political community. The legitimacy of the Supreme Court likely to take shape in a Trump presidency has been undermined. His election didn’t resolve the problem but perpetuated it. A correction is called for.

#### Past studies fail – the public is interested in the Supreme Court

James L Gibson, Professor of American and African American Studies, Department of Political Science, Director of Wedenbaum Center on Economy, Government and Public Policy, Fellow at the center of Comparative and International Politics @ Washington University in St. Louis. “Knowing the Supreme Court? A Reconsideration of Public Ignorance of the High Court.” [Journal of Politics](javascript:__doLinkPostBack('','mdb~~a9h%7C%7Cjdb~~a9hjnh%7C%7Css~~JN%20%22Journal%20of%20Politics%22%7C%7Csl~~jh','');); Apr 2009, Vol. 71 Issue 2, p429-441. Lexis. JM

**Even though widely accepted, the image of the American people as ignorant about courts rests upon a remarkably thin layer of empirical evidence. And, as we will demonstrate in this analysis, the measurement approach used to document mass ignorance is itself seriously flawed. Because, as we have suggested, important theoretical and policy implications flow from our understanding of the political competence of the American people in this realm, it is crucial that the empirical record be thoroughly examined and evaluated.** Consequently, our purpose here is to revisit the question of the ignorance of the American mass public about the U.S. Supreme Court. In doing so, we rely primarily upon two data sets. The first is a nationally representative telephone survey conducted in early 2001 in the midst of the controversy over the Supreme Court’s decision in Bush v. Gore. Because that survey most likely captures public knowledge of the Court at its apogee, we follow with a more extensive, nationally-representative, three- 1 wave panel study conducted in 2005-2006. The first interview in that panel (t , 2005) was conducted face-to-face; the follow-up interviews were via telephone during the debate over whether Judge Samuel 2 3 Alito should be confirmed to the U.S. Supreme Court (t , 2006) and several months thereafter (t , 2006). We know of no other data bases that address the issue of knowledge of the nation’s highest court in so thorough a fashion. (See Appendices A and B for the details of these surveys.) Our contributions here go considerably beyond the quality of the data on which we rely. By using closed-ended indicators of judicial knowledge, we take a different operational tack than have many previous researchers. In doing so, we follow an extensive body of literature indicating that knowledge is more reliably and validly measured using closed-end multiple-choice questions (for a summary see Mondak 2006). **Our empirical findings run deeply contrary to most extant research: The American people know orders of magnitude more about their Supreme Court than most other studies have documented. And, although knowledge of the Court was indeed particularly high during the litigation surrounding** the disputed presidential election of 2000, our findings from the 2005 survey reveal only a slight diminution in the levels of information people hold about the Court. Moreover, levels of knowledge are quite stable over time and do not merely reflect information gained (and perhaps not retained) during salient judicial Thus, Kritzer (2001, 34) remarks: Political scientists 2 “have long documented the minimal knowledge most citizens have about the Court.” Perhaps the most comprehensive investigation of the knowledge of the American people is that of Delli Carpini and Keeter 1996. -3- controversies. Empirical findings such as these have never before been reported. We also investigate how knowledge about the Supreme Court shapes attitudes and preferences. According to positivity theory, developed by Gibson and Caldeira, those who know more about the Supreme Court should be distinctive in the views they hold about courts and judges; the circumstances associated with higher levels of information and knowledge also contribute to the extension of legitimacy to the Supreme Court. This hypothesis we also test in this paper. **We conclude by suggesting that the American people may be more competent than is ordinarily thought at performing the role in the socio-legal process assigned them by democratic theory. Those who lampoon ordinary people for their supposed ignorance and who would rearrange the legal system to compensate for this perceived incompetence ought, we submit, to carefully consider our arguments and results.**

#### Unified and strong legal precedent key to judicial legitimacy

Lindquist & Cross 8 [Stefanie A. Lindquist and Frank C. Cross (Professor Emeritus of law at University of Texas Austin), "STABILITY, PREDICTABILITY AND THE RULE OF LAW: STARE DECISIS AS RECIPROCITY NORM," 2008 – last date cited] AZ

Similarly, the extent to which judges adhere to the consensual norm of stare decisis has implications for institutional legitimacy and authority, and, more fundamentally, for the rule of law. According to the norm of stare decisis, judges must follow principles of law enunciated in prior court decisions and apply them in all future cases that involve substantially similar facts.4 Occasional departures from precedent are justified when they allow judges to alter unsound or unjust legal doctrines that are no longer consistent with prevailing social or economic conditions, even in the absence of legislative intervention (Cardozo 1921; Levi 1949). As with dissent, however, frequent departures from the norm may have detrimental consequences for the judiciary and for the public good. The norm of stare decisis promotes private ordering of citizens‟ affairs by enabling them to plan their social and economic transactions with confidence that they act in compliance with existing law (Eskridge and Frickey 1994, 568; Hanssen 1999). Stare decisis also encourages private settlement of disputes by discouraging individuals from forum and judge shopping, furthers fair and efficient adjudication by sparing litigants the need to relitigate (and judges the need to reconsider) every issue in every case, and discourages a rush of litigation whenever a change of personnel occurs on the bench. Thus, stare decisis serves important functions that bolster institutional legitimacy and ultimately the rule of law. Where judges frequently reject existing precedent, the potential adverse institutional and social consequences are great. As Epstein and Knight observe in the context of the United States Supreme Court: To the extent that members of a community base their future expectations on the belief that others will follow existing laws, the Court has an interest in minimizing the disruptive effects of overturning existing rules of behavior. If the Court makes a radical change, the community may not be able to adapt, resulting in a decision that does not produce an efficacious rule (1998, 164). Because consensual norms within courts therefore have significant ramifications for the effective operation of judicial institutions and the rule of law, it is important that we understand the manner in which these norms develop and the institutional structures that are likely to sustain them.5 To do so, however, requires a theory that convincingly explains why cooperative norms emerge in judiciaries and that enables researchers to generate falsifiable hypotheses regarding the development and maintenance of those norms such that empirical evaluation is possible. This objective also requires research within a comparative institutional context because institutional rules and structures are likely to have a significant impact on the evolution and stability of cooperative norms. Research has clearly demonstrated that certain institutional arrangements have a significant impact on human cooperation (North 1990; Gürerk, Irlenbusch and Rockenbach 2006). Since the state supreme courts vary significantly on a wide variety of institutional characteristics, they offer an ideal natural laboratory to evaluate how institutions affect the development of consensual norms such as stare decisis. In ways that will become clear, the varied institutional structures that characterize these courts have the potential to constrain the development of cooperative norms within them. Their study could thus result in observations that shed light on the evolution and stability of cooperation within alternative governmental institutions, which has been described as “an issue of foremost importance for the science of politics” (Bendor and Swistak 1997, 290).

#### Court power is key to check Trump – here's a card from Pat Buchanan

retag – court stripping is possible

Buchanan 17 [Pat Buchanan (American paleoconservative political commentator, author, syndicated columnist, politician and broadcaster), "TRUMP MUST BREAK JUDICIAL POWER," WND, 2/9/2017]

When politicians don black robes and seize powers they do not have, they should be called out for what they are – usurpers and petty tyrants. And if there is a cause upon which the populist right should unite, it is that elected representatives and executives make the laws and rule the nation. Not judges, and not justices. Indeed, one of the mightiest forces that has birthed the new populism that imperils the establishment is that unelected justices like Warren and Brennan, and their progeny on the bench, have remade our country without the consent of the governed – and with never having been smacked down by Congress or the president. Consider. Secularist justices de-Christianized our country. They invented new rights for vicious criminals as though criminal justice were a game. They tore our country apart with idiotic busing orders to achieve racial balance in public schools. They turned over centuries of tradition and hundreds of state, local and federal laws to discover that the rights to an abortion and same-sex marriage were there in Madison’s Constitution all along. We just couldn’t see them. Trump has warned the judges that if they block his travel ban, and this results in preventable acts of terror on American soil, they will be held accountable. As rightly they should. Meanwhile, Trump’s White House should use the arrogant and incompetent conduct of these federal judges to make the case not only for creating a new Supreme Court, but for Congress to start using Article III, Section 2, of the Constitution – to restrict the jurisdiction of the Supreme Court, and to reclaim its stolen powers. A clipping of the court’s wings is long overdue.

#### Courts are the only reliable check against Trump's executive orders

Baker 17 [Peter Baker (chief White House correspondent for The New York Times covering President Donald J. Trump), "Trump Clashes Early With Courts, Portending Years of Legal Battles," New York Times, 2/5/2017] AZ

WASHINGTON — President Trump is barreling into a confrontation with the courts barely two weeks after taking office, foreshadowing years of legal battles as an administration determined to disrupt the existing order presses the boundaries of executive power. Lawyers for the administration were ordered to submit a brief on Monday defending Mr. Trump’s order temporarily banning refugees from around the world and all visitors from seven predominantly Muslim countries from entering the United States. An appeals court in California refused on Sunday to reinstate the ban after a lower court blocked it. As people from the countries targeted by Mr. Trump struggled to make their way to the United States while they could, the president for the second day in a row expressed rage at the judge in the case, this time accusing him of endangering national security. Vice President Mike Pence defended the president’s tone, but lawyers and lawmakers of both parties said Mr. Trump’s comments reflected a lack of respect for the constitutional system of checks and balances. Late in the day, Mr. Trump took to Twitter to pre-emptively blame the judge and the judiciary for what the president suggested would be a future terrorist attack. “Just cannot believe a judge would put our country in such peril,” Mr. Trump wrote, a day after referring to the “so-called judge” in the case. “If something happens blame him and court system.” Even before the latest post, Republicans joined Democrats in chiding him. Senator Mitch McConnell of Kentucky, the majority leader, said it was “best not to single out judges.” “We all get disappointed from time to time,” he said on CNN’s “State of the Union.” “I think it is best to avoid criticizing judges individually.” The White House offered no evidence for Mr. Trump’s suggestion that potential terrorists would now pour over the border because of the judge’s order. Since Sept. 11, 2001, no American has been killed in a terrorist attack on American soil by anyone who immigrated from any of the seven countries named in Mr. Trump’s order. The impassioned debate over the immigration order brought to the fore issues at the heart of the Trump presidency. A businessman with no experience in public office, Mr. Trump has shown in his administration’s opening days that he favors an action-oriented approach with little regard for the two other branches of government. While Congress, controlled by Republicans, has deferred, the judiciary may emerge as the major obstacle for Mr. Trump. Democrats and some Republicans said Mr. Trump’s attack on the courts would color the battle over the nomination of Judge Neil M. Gorsuch to the Supreme Court as well as the president’s relationship with Congress. Other presidents have clashed with the judiciary. The Supreme Court invalidated parts of Franklin D. Roosevelt’s New Deal, forced Richard M. Nixon to turn over Watergate tapes and rejected Bill Clinton’s bid to delay a sexual harassment lawsuit. The last two presidents battled with courts repeatedly over the limits of their power. The judiciary ruled that George W. Bush overstepped his bounds in denying due process to terrorism suspects and that Barack Obama assumed power he did not have to allow millions of unauthorized immigrants to stay in the country. Charles Fried, solicitor general under Ronald Reagan, said the ruling by a Federal District Court in Washington State blocking Mr. Trump’s order resembled a ruling by a Texas district court stopping Mr. Obama from proceeding with his own immigration order. But rarely, if ever, has a president this early in his tenure, and with such personal invective, battled the courts. Mr. Trump, Mr. Fried said, is turning everything into “a soap opera” with overheated attacks on the judge. “There are no lines for him,” said Mr. Fried, who teaches at Harvard Law School and voted against Mr. Trump. “There is no notion of, this is inappropriate, this is indecent, this is unpresidential.” Other Republicans brushed off the attacks, noting that judges have lifetime tenure that protects them from criticism. But even some Republicans said Mr. Trump’s order raised valid legal questions for the courts. “If I were in the White House, I’d feel better about my position if the ban or moratorium or whatever you call it were based on an actual attack or threat,” former Attorney General Alberto R. Gonzales, who served under Mr. Bush, said in an interview. Still, he said, when it comes to noncitizens overseas, “the executive has enjoyed great deference from the courts.” Judge James Robart, a Federal District Court judge in Seattle appointed by Mr. Bush, on Friday issued a nationwide suspension of Mr. Trump’s order while its legality was debated. The administration quickly asked the United States Court of Appeals for the Ninth Circuit to overrule the judge, but it refused early Sunday and instead ordered the government to file a brief on Monday. The quick briefing schedule indicated that the appeals court could issue a ruling on the merits of the president’s order within days. In the meantime, refugees vetted by the government can proceed to the United States, as can any travelers with approved visas from the seven targeted nations: Iran, Iraq, Libya, Somalia, Sudan, Syria and Yemen.

### Staton & Vanberg (2008)

Staton & Vanberg 8 [Jeffrey K. Staton (Emory University), Georg Vanberg (Chair of political science at Duke University), "The Value of Vagueness: Delegation, Defiance, and Judicial Opinions," American Journal of Political Science, July 2008] AZ

### Kapiszewski & Taylor (2013)

#### Non-compliance undermines rule of law

Kapiszewski & Taylor 13 [Diana Kapiszewski (Assistant Professor in the Department of Political Science at the University of California, Irvine) and Matthew M. Taylor, "Compliance: Conceptualizing, Measuring, and Explaining Adherence to Judicial Rulings," 2013] AZ

Public authorities’ compliance with judicial decisions is a topic of empirical concern and theoretical importance. If courts’ rulings are not adhered to, they cannot constrain public authorities effectively, compromising courts’ contributions to politics and policy making. More broadly, compliance by political leaders is a central aspect of the rule of law, undergirding and reinforcing the institutional framework for legality and constitutionality. Further, compliance is often considered to be vital to democracy and the democratic process.1 National authorities’ compliance with judicial rulings can also have powerful feedback effects on judicial decision making, judicial independence, and judicial power. While compliance with judicial rulings is of particular concern in new democracies, the possibility of noncompliance is a central consideration for judges all over the world. Indeed, even in advanced democracies, the mere possibility of noncompliance by another branch of government can strongly shape judicial behavior and courts’ decisions in politically important cases (Vanberg 2001, 2005). Courts concerned that their rulings may not be obeyed may feel compelled to strategically “temper their commitment to principle” (Roux 2009, 107). Yet courts that adjust their rulings ex ante to ensure compliance or constrain themselves to avoid conflict are not fully independent. At the same time, if a court is free to follow its own preferences in its rulings, but its decisions are ignored, judicial independence means little. If we observe individuals, lower courts, state bureaucracies, or elected leaders failing to comply with court rulings, we should rightly question judicial power. In short, examining how much, when, and why elected leaders comply with judicial rulings helps us comprehend judicial behavior, interbranch relations, and, ultimately, the underpinnings of the rule of law

#### Public authorities' compliance matters

We limit our focus here to public authorities’ compliance with the rulings of national courts for two substantive reasons. First, our work is motivated by a concern with the rule of law and the stability of political regimes, especially in developing democracies. Public authorities’ compliance with national high court rulings is a fundamental prerequisite for both, and likely sets a strong positive example for individuals as well as for lower courts.4 Further, while scholars assert that courts are emerging as more important political actors in many democracies (Tate and Vallinder 1995, among many others), accurately assessing compliance with their rulings is crucial for evaluating how politically relevant courts actually are and what broader effects the presumed expansion of judicial power may have.