

FOREIGN AFFAIRS ORIGINALISM IN *YOUNGSTOWN*'S SHADOW

STEPHEN I. VLADECK*

I

It is always a daunting task to write a response devoted entirely to an individual article. It is that much heavier a burden when the article is as thoughtful, careful, and, in the end, self-reflective as Professor Wuerth's contribution to this Symposium.¹

The central thesis of Professor Wuerth's article, as I take it, is that "originalism," under a number of different conceptualizations, is an "awkward fit" in the field of foreign affairs. In one sense, as Professor Wuerth suggests, originalism fails to answer many of the central questions of foreign affairs scholarship.² In another sense, certain foreign affairs questions may, in her words, "undermine the positive case for originalism."³ Either way, Professor Wuerth concludes, originalists should pay more attention to foreign affairs, and foreign affairs scholars should pay more attention to the competing methodologies of contemporary constitutional interpretation.⁴ There is always more, it seems, for us to do—and that is hardly a sentiment with which I can take serious issue, even if it encourages lawyers (or, even worse, law

* Associate Professor, American University Washington College of Law. This response was prepared in conjunction with the *Saint Louis University Law Journal*'s March 2008 symposium on "The Use and Misuse of History in U.S. Foreign Relations Law," for my participation in which I owe thanks to David Sloss. Thanks also to Christy Abbott, Thomas Harvey, Taylor Matthews, and the rest of the *Saint Louis University Law Journal* staff for their skilled editing and, as importantly, their patience.

By way of disclosure, I should note that I have played a recurring role on the legal team for the petitioner in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006). Needless to say, the opinions expressed herein are mine alone, and do not in any way represent the position of Hamdan or his counsel.

1. Ingrid Wuerth, *An Originalism for Foreign Affairs?*, 53 ST. LOUIS U. L.J. 5 (2008).

2. *Id.* at 6–7, 27.

3. *Id.* at 8.

4. *Id.* at 7–8.

professors) to play historians, a role to which we are not particularly well-suited.⁵

Rather than take up Professor Wuerth's thesis on its terms, in this short response, I want to focus on foreign affairs originalism and the *courts*, notwithstanding Professor Wuerth's quite accurate observation that a good deal of constitutional interpretation vis-à-vis foreign affairs takes place outside the courtroom.⁶ To be sure, my interest in this particular topic is partly selfish—my own research and writing tends to focus more on the courts and on constitutional doctrine than it does on questions of theory or interpretive method.

But it also cannot be gainsaid that one of the most powerful places in which questions about the scope of the President's "foreign affairs" powers arise is in lawsuits seeking to resolve conflicts between the President's claim of authority on the one hand, and the power of some other actor, be it Congress or the states, on the other. If ever there are to be definitive answers concerning how the Constitution allocates authority concerning foreign affairs, the courts will, presumably, have at least some significant role to play in providing them. In that instance, the question I want to ask (and hopefully answer) in the pages that follow is whether Professor Wuerth's careful analysis might actually make a difference. Put another way, is there a there, there?

I suspect that one could easily take from Professor Wuerth's article the sentiment that originalism is, ultimately, of exceedingly little help to contemporary courts in resolving serious and difficult foreign affairs questions, especially in the context of conflicts between the Legislative and Executive Branches. But my thesis is that the real culprit behind this difficulty is neither originalism as an interpretive method nor foreign affairs as a body of constitutional law.

Rather, the reason why the case for foreign affairs originalism may ultimately be so unconvincing is the movement toward functionalism as a means of resolving separation-of-powers conflicts, *particularly* in cases implicating foreign affairs. Thus, whatever may be said about the suitability or theoretical utility of originalism generally, or in the field of foreign affairs specifically, it is hard to square any case for foreign affairs originalism with the methodological framework at the heart of the Supreme Court's contemporary separation-of-powers jurisprudence.

5. For the classic critique of "law-office history," see Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119. See also Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523 (1995).

6. Wuerth, *supra* note 1, at 6.

That analytical framework, of course, finds its origins in Justice Jackson's concurring opinion in *Youngstown*,⁷ and his famous trifurcated taxonomical approach to resolving separation-of-powers conflicts.⁸ Thus, I begin in Part II with the competing approaches to the legal issue in *Youngstown*, and the extent to which originalism did—and did not—factor into the analysis of the six Justices in the majority, especially that of Justice Jackson in his celebrated concurrence.

As Part II explains (and as others have previously noted), there is an inherent incongruity between Jackson's separation-of-powers functionalism and foreign affairs originalism. Indeed, this incongruity does not just bear out Professor Flaherty's observation that Jackson's concurrence in *Youngstown* is "among the most anti-originalist opinions in the modern canon."⁹ Rather, it demonstrates how, in *Youngstown's* shadow, there is exceedingly little room for foreign affairs originalism in *any* form.¹⁰

In Part III, I turn to a pair of recent (and significant) Supreme Court decisions invoking Jackson's analysis—*Hamdan*¹¹ and *Medellin*.¹² As I've suggested previously, at least in regard to *Hamdan*, there are elements of the Court's analysis that suggest a step back from the analytical looseness of Jackson's framework.¹³ Read alongside Professor Wuerth's article, perhaps these cases further suggest that there *is* a future for foreign affairs originalism, and one that might provide a sounder platform from which to reconceptualize the fundamental separation-of-powers problem at the heart of *Youngstown*.

II

Youngstown, of course, was a mess of a case.¹⁴ The six Justices in the majority—Black, Burton, Clark, Douglas, Frankfurter, and Jackson—each offered their own opinion explaining why President Truman's extra-legislative

7. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634–55 (1952) (Jackson, J., concurring).

8. *Id.* at 635–38.

9. Martin S. Flaherty, *The Future and Past of U.S. Foreign Relations Law*, 67 LAW & CONTEMP. PROBS. 169, 172 (2004).

10. To be clear, my goal is not to critique functionalism in general, or Jacksonian functionalism in particular. Rather, I mean only to demonstrate how Justice Jackson's *Youngstown* framework is starkly anti-originalist, and how, as a result, the two interpretive approaches cannot coexist.

11. *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

12. *Medellin v. Texas*, 552 U.S. ___, 128 S. Ct. 1346 (2008).

13. Stephen I. Vladeck, *Congress, the Commander-in-Chief, and the Separation of Powers After Hamdan*, 16 TRANSNAT'L L. & CONTEMP. PROBS. 933, 960–61 (2007).

14. For what remains one of the best overall treatments of the decision, see MAEVA MARCUS, *TRUMAN AND THE STEEL SEIZURE CASE: THE LIMITS OF PRESIDENTIAL POWER* (1977).

seizure of the steel mills was unconstitutional.¹⁵ Justice Black delivered the opinion of the Court, offering a rationale that is usually described as “formalistic”¹⁶—relying on the conclusion that the Constitution confers no legislative power upon the Executive, and that Truman was “legislating” by seizing the steel mills.¹⁷ Justice Douglas echoed Black’s majority opinion, concluding that “[w]e could not sanction the seizures and condemnations of the steel plants in this case without reading Article II as giving the President not only the power to execute the laws but to make some.”¹⁸

To similar (but perhaps not quite as stark) effect, Justices Burton and Clark focused on the significance of congressional action in displacing a power that the President might otherwise possess. Justice Burton thus emphasized Congress’s omission of such seizure authority in the 1947 Taft-Hartley Act,¹⁹ concluding that “[t]he controlling fact here is that Congress, within its constitutionally delegated power, has prescribed for the President specific procedures, exclusive of seizure, for his use in meeting the present type of emergency.”²⁰

Justice Clark similarly invoked the Taft-Hartley Act, along with the Defense Production Act of 1950²¹ and the Selective Service Act of 1948,²² as providing procedures for the resolution of labor disputes such as that which prompted Truman’s seizure. In his words, “neither the Defense Production Act nor Taft-Hartley authorized the seizure challenged here, and the Government made no effort to comply with the procedures established by the Selective Service Act of 1948, a statute which expressly authorizes seizures when producers fail to supply necessary defense matériel.”²³

The two remaining Justices in the majority, Frankfurter and Jackson, were less convinced that the case could be resolved simply on the ground that Truman’s actions were wanting for congressional authorization. For Frankfurter, the issue was one of historical practice. After extensively summarizing prior congressional actions, Frankfurter analyzed the significance of the omission of seizure authority in Taft-Hartley by reference to precedent:

15. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

16. *See, e.g.*, Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408, 442 & n.168 (2007).

17. *Youngstown*, 343 U.S. at 585–89.

18. *Id.* at 633 (Douglas, J., concurring).

19. Labor Management Relations Act of 1947, Pub. L. No. 80-101, 61 Stat. 136 (codified as amended in scattered sections of 29 U.S.C.).

20. *Youngstown*, 343 U.S. at 660 (Burton, J., concurring).

21. Defense Production Act of 1950, Pub. L. No. 81-774, 64 Stat. 798 (codified as amended at 50 U.S.C. app. §§ 2061–2171 (2000)).

22. Selective Service Act of 1948, Pub. L. No. 80-759, 62 Stat. 604 (codified as amended at 50 U.S.C. app. §§ 451–471a (2000)).

23. *Youngstown*, 343 U.S. at 665–66 (Clark, J., concurring in the judgment).

In formulating legislation for dealing with industrial conflicts, Congress could not more clearly and emphatically have withheld authority than it did in 1947. Perhaps as much so as is true of any piece of modern legislation, Congress acted with full consciousness of what it was doing and in the light of much recent history. Previous seizure legislation had subjected the powers granted to the President to restrictions of varying degrees of stringency. Instead of giving him even limited powers, Congress in 1947 deemed it wise to require the President, upon failure of attempts to reach a voluntary settlement, to report to Congress if he deemed the power of seizure a needed shot for his locker. The President could not ignore the specific limitations of prior seizure statutes. No more could he act in disregard of the limitation put upon seizure by the 1947 Act.²⁴

In other words, in Frankfurter's view, the significance of the Taft-Hartley Act's omission of presidential seizure authority could be judged only by reference to prior practice, and *not* simply by reference to whether the measure was within Congress's constitutional authority in the first place.

Finally, and most famously, came the concurring opinion of Justice Jackson. That Jackson eschewed any "originalist" view of the separation of powers was clear from the outset:

Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh. A century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question. They largely cancel each other.²⁵

Thus, several pages *before* Jackson enunciated his tripartite taxonomy for resolving separation-of-powers disputes, he affirmatively disclaimed the utility of originalism as an aid to his efforts. Instead, as he put it, "The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context."²⁶ Perhaps as a response to Frankfurter's detailed summary of historical practice, Jackson argued that prior precedents did not resolve the issue one way or the other. Rather, "[w]e may well begin by a somewhat over-simplified grouping of practical situations in which a President may doubt, or others may challenge, his powers, and by distinguishing roughly the legal consequences of this factor of relativity."²⁷

24. *Id.* at 602 (Frankfurter, J., concurring).

25. *Id.* at 634–35 (Jackson, J., concurring). Jackson appended a footnote to the same passage, suggesting with more than a hint of sarcasm that "[a] Hamilton may be matched against a Madison. Professor Taft is counterbalanced by Theodore Roosevelt. It even seems that President Taft cancels out Professor Taft." *Id.* at 635 n.1 (citations omitted).

26. *Id.* at 635.

27. *Id.*

Jackson then introduced his three groupings of “practical situations”: (1) where the President acts with congressional authorization; (2) where “the President acts in absence of either a congressional grant or denial of authority”; or (3) where the President acts in the face of either the expressed or implied will of Congress.²⁸ In the first category, “[i]f his act is held unconstitutional . . . it usually means that the Federal Government as an undivided whole lacks power.”²⁹ In the second category,

[T]here is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.³⁰

Finally, in category three, where the President’s power “is at its lowest ebb,” Jackson’s opinion suggested that “[c]ourts can sustain exclusive Presidential control . . . only by disabling the Congress from acting upon the subject.”³¹

What is ironic about Jackson’s opinion, of course, is that it solves practically nothing. Even under Jackson’s trifurcation, the President can lose in category one, he can win in category three, and one is left to wonder just what category two means by “contemporary imponderables.” Indeed, and perhaps most importantly, Jackson’s opinion does little to elucidate those circumstances in which Congress can be “disabled” from placing limitations on presidential power, opening the door to decades of (seemingly unending) academic debate.³²

In rejecting the approach of his concurring brethren, Jackson implicitly suggested that there were other considerations at stake, considerations having excessively little to do with “original” understanding. The softness of Jackson’s three categories thus seems exceedingly difficult to reconcile with clear and categorical answers as to the Constitution’s allocation of foreign affairs power.

As Professor Ramsey has explained, it is not just that the framework seems difficult to reconcile with contemporary categorical answers. Instead, “[n]either Jackson nor Frankfurter . . . grappled with how the Constitution’s

28. *Youngstown*, 343 U.S. at 635–38 (Jackson, J., concurring).

29. *Id.* at 636–37.

30. *Id.* at 637.

31. *Id.* at 637–38.

32. See, e.g., David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689 (2008); David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941 (2008).

text *originally* allocated foreign affairs power. Like much modern scholarship, they assumed that the Constitution was incomplete on key foreign affairs matters, and that gaps would be filled in other ways”³³ And while that assumption would not necessarily be fatal to foreign affairs originalism in the abstract, Jackson championed a framework that did not really *allow* for filling the gaps with originalism, whether in the form of original public meaning, original legal meaning, or any other iteration thereof.

Of course, Jackson’s concurrence was just one of six opinions. But his opinion was later effectively adopted by the Supreme Court in *Dames & Moore v. Regan*, where then-Justice Rehnquist described Jackson’s framework as “analytically useful.”³⁴ Just last Term, Chief Justice Roberts described it as “the accepted framework for evaluating executive action in this area.”³⁵ Thus, the methodology adopted by the Supreme Court to resolve separation-of-powers conflicts, particularly in cases implicating “foreign affairs,” was one hostile to originalism in both its conceptualization and its implementation.

III

Fast-forward to 2006, and the Supreme Court’s decision in *Hamdan*.³⁶ At issue was the legality of military commissions established by President Bush pursuant solely to a November 2001 executive order.³⁷ And although the bulk of Justice Stevens’s plurality opinion (and Justice Kennedy’s partial concurrence) focused on questions of statutory interpretation, the constitutional imperative bolstering the statutory analysis unmistakably came from *Youngstown*. In the critical passage of Justice Stevens’s opinion, for example, the Court emphasized why the central question was whether the commissions established by President Bush comported with the substantive and procedural requirements of the Uniform Code of Military Justice (UCMJ)³⁸—an Act of Congress: “Whether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers.”³⁹

What is fascinating about this passage, as I’ve noted previously, is that it cites Jackson’s framework from *Youngstown* even while skipping a critical

33. MICHAEL D. RAMSEY, THE CONSTITUTION’S TEXT IN FOREIGN AFFAIRS 53 (2007).

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

35. *Medellin v. Texas*, 552 U.S. ___, 128 S. Ct. 1346, 1368 (2008).

36. *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

37. Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 3 C.F.R. 918 (2001), *reprinted in* 10 U.S.C. § 801 (2006) (notes).

38. 10 U.S.C. §§ 801–946 (2006).

39. *Hamdan*, 548 U.S. at 593 n.23 (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)).

step—*Hamdan* simply asserts that Congress *has* constitutionally interposed limitations on the President's powers, even though Jackson suggested that there would be circumstances where it might be "disabled" from doing so, and even though the Bush Administration had argued that this was one such circumstance.⁴⁰ In the process, *Hamdan* assumed that the relevant constitutional power was conferred upon Congress, without ever getting into the trickier business of either identifying the particular legislative authority or locating it textually.

A similarly cursory analysis of *Youngstown* can be found in last Term's decision in *Medellin*.⁴¹ There, in addition to holding that the International Court of Justice's *Avena* decision⁴² was not binding upon U.S. state courts,⁴³ the Supreme Court also rejected the applicability of a memorandum issued by President Bush that purported to command the state courts to comply with the ICJ judgment.⁴⁴

Specifically, in concluding that the President was without authority to order compliance by the state courts, the *Medellin* majority first explained how such power did not derive from U.S. treaty obligations,⁴⁵ before also rejecting the argument that the President's foreign affairs power entitled him to so provide.⁴⁶ And in analyzing the President's "foreign affairs" power, the majority's discussion was short and uncompromising:

The President's Memorandum is not supported by a "particularly longstanding practice" of congressional acquiescence, but rather is what the United States itself has described as "unprecedented action." Indeed, the Government has not identified a single instance in which the President has attempted (or Congress has acquiesced in) a Presidential directive issued to state courts, much less one that reaches deep into the heart of the State's police powers and compels state courts to reopen final criminal judgments and set aside neutrally applicable state laws.⁴⁷

Taking the absence of prior practice as affirmative evidence to the contrary, the *Medellin* majority thus suggested a categorical preclusion of presidential power in the field—at least absent *some* congressional quiescence.

40. See Vladeck, *supra* note 13, at 956–61 (explaining in more detail how *Hamdan*'s analysis is inconsistent with Jackson's *Youngstown* concurrence).

41. *Medellin v. Texas*, 552 U.S. ___, 128 S. Ct. 1346 (2008).

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

43. *Medellin*, 128 S. Ct. at 1356–67.

44. *Id.* at 1371–72; Memorandum from George W. Bush, President of the United States, to Alberto Gonzales, U.S. Att'y Gen. (Feb. 28, 2005), available at <http://www.whitehouse.gov/news/releases/2005/02/20050228-18.html>.

45. *Medellin*, 128 S. Ct. at 1368–71.

46. *Id.* at 1371–72.

47. *Id.* at 1372 (citations omitted).

My point is not to quibble with the analyses supplied by the Court in either *Hamdan* or *Medellin*.⁴⁸ At least on these points, I believe that the Court reached the correct result on both occasions. But leaving my own thinking to the side, the larger point here is that both of these opinions invoked Justice Jackson's framework, even while appearing to deviate from it—and in *Hamdan*, substantially at that.

It is hard to know just what to take away from such a small data set. Is the Court signaling a willingness to restore some degree of categorical formalism to its consideration of the President's foreign affairs powers? Is it simply giving short-shrift to analytical steps that it very much intends to include in the analysis? At best, the answer is unclear. But the more the Court suggests, contrary to Justice Jackson, that some of these disputes *do* have clear and categorical answers, the more I suspect there is room to reinvigorate an originalist view of foreign affairs powers.⁴⁹

IV

Suggestions in various opinions to the contrary notwithstanding,⁵⁰ there is nothing necessarily formalistic about separated powers—by which I mean there is no constitutional requirement that the branches be hermetically sealed.⁵¹ As Professor Rebecca Brown explained nearly two decades ago,

The best evidence that the Framers intended to reject a strict separation of powers is that they created a system of checks and balances requiring participation by each branch in some functions that may be considered part of the power of the others—itsself a violation of a pure theory of separated powers. “Checks and balances do not arise from separation theory, but are at odds with it. Checks and balances have to do with corrective *invasion* of the separated powers.” It is worth remembering that the federalist defense of the Constitution's treatment of governmental structure focused not on the use of

48. For more on the fate of Jackson's analysis in *Hamdan* and *Medellin*, see Michael J. Turner, Comment, *Fade to Black: The Formalization of Jackson's Tripartite Taxonomy by Hamdan and Medellin*, 58 AM. U. L. REV. (forthcoming 2009).

49. At least, in those cases where originalism provides answers. For example, in *Boumediene v. Bush*, 553 U.S. ___, 128 S. Ct. 2229 (2008), Justice Kennedy concluded that Founding-era sources were simply unclear as to whether non-citizens outside the United States would be protected by the writ of habeas corpus. *See id.* at 2248–51.

50. *See, e.g., Morrison v. Olson*, 487 U.S. 654, 705 (1988) (Scalia, J., dissenting) (suggesting that proper respect for the separation of powers requires recognizing that Article II's Vesting Clause “does not mean *some of* the executive power, but *all of* the executive power”).

51. *But see INS v. Chadha*, 462 U.S. 919, 951 (1983) (“Although not ‘hermetically’ sealed from one another, the powers delegated to the three Branches are functionally identifiable.” (citation omitted)).

the separation device, but on the Constitution's numerous deviations from the pure separation model.⁵²

Power sharing among the branches is therefore inevitable, as are disputes over where the line is between constitutionally appropriate checks and balances and the unconstitutional arrogation of one branch's prerogative by another.

For decades, we have assumed that the constitutional framework for resolving such disputes is provided by Justice Jackson's concurring opinion in *Youngstown*. For better or worse, though, Jackson's framework marginalizes originalism, suggesting that whatever we might learn by studying "originalist" sources will be necessarily incomplete, regardless of the potential utility of such knowledge. Writing a few years ago, Professor Flaherty poignantly observed that "Jackson merely *assumed* history was invariably inconclusive,"⁵³ without getting into the far more difficult and important work of proving as much.

Although Flaherty himself argues that "a careful reconstruction of the Founding era decisions tends to confirm [Jackson's] assumption,"⁵⁴ there are others who would disagree, and who have suggested, especially as of late, that at least *some* of the great questions concerning the allocation of constitutional foreign affairs powers *can* be answered by reference to originalism.⁵⁵ The point of this response has not been to suggest that I side with one school over the other in this debate—even though I *do* share much of Professor Flaherty's skepticism. For until and unless the Supreme Court's separation-of-powers jurisprudence begins to more powerfully reflect the idea that some of these questions *do* have categorical answers—a point that is at best implicit in the recent *Hamdan* and *Medellin* decisions—functionalism will remain the methodological watchword, and originalism will remain the fodder for interesting (but entirely academic) debates.

52. Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1531–32 (1991) (footnotes omitted) (quoting GARRY WILLS, *EXPLAINING AMERICA: THE FEDERALIST* 119 (1981)).

53. Flaherty, *supra* note 9, at 172 (emphasis added).

54. *Id.*

55. See, e.g., RAMSEY, *supra* note 33, at 53; see also H. JEFFERSON POWELL, *THE PRESIDENT'S AUTHORITY OVER FOREIGN AFFAIRS: AN ESSAY IN CONSTITUTIONAL INTERPRETATION* (2002) (arguing that there are clear lines of demarcation between the President's foreign affairs powers and Congress's authority in the field).