Balancing Interests in the Separation of Powers

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There are two conventional methods for resolving separation of powers disputes: formalism and functionalism. Although both approaches have been around for decades, neither has proven capable of resolving the difficult separation of powers disputes that actually arise today. Such disputes—including over statutory removal restrictions, recognition, conduct of diplomacy, and executive privilege—do not involve instances where one branch is trying to exercise the other's exclusive power, as formalism posits. Nor is it clear how one could measure, or evaluate the effect of any one dispute on, the general balance of powers between the branches that functionalism seeks to maintain. Instead, difficult separation of powers questions involve separation of powers infringements—instances where both branches have power to act, but one branch's exercise of power infringes on or interferes with the other's exercise of power.

This Article proposes a method built to resolve precisely such cases: interest balancing. Accepting that both branches might have power to act over a matter, interest balancing asks whether one branch's exercise of power has infringed upon the other's and, if so, whether such infringement is justified by a sufficiently strong interest. This mode of analysis might sound familiar, as it is the standard method of addressing infringement on constitutional entitlements in the other half of constitutional law—individual rights. When someone alleges an individual rights violation, we do not ask whether the government or individual has "exclusive power" over the matter, nor do we resolve the dispute by asking how it might affect the "general balance of power" between the individual and the government. Instead, we ask whether a right has

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been infringed and, if so, whether such infringement can be justified by a sufficiently strong governmental interest.

Despite the long history of interest balancing in individual rights cases, scholars have failed to appreciate its utility in resolving separation of powers disputes. Yet, there is precedent for its use in the separation of powers. It was introduced in Nixon v. Administrator of General Services, *continues to be the standard method of resolving executive privilege disputes, and has been used, albeit never routinely, by executive branch actors and courts of appeals in various other domains. Notwithstanding this precedent, neither courts, nor scholars, have recognized interest balancing's potential as a general framework for resolving separation of powers disputes. This Article identifies interest balancing as a coherent method of separation of powers analysis that is both conceptually and practically well suited to address the separation of powers disputes that actually arise today. It explains how interest balancing is distinct from the prevailing approaches—including formalism, functionalism, Justice Robert Jackson's Category Three analysis in* Youngstown Sheet & Tube Co. v. Sawyer, *and recent proposals for categorical deference to statutes——and then evaluates its strengths and weaknesses relative to such approaches. Ultimately, it concludes that interest balancing is the approach best suited to resolve the difficult cases that actually arise—those of separation of powers infringements. The Article then theoretically develops how interest balancing can be operationalized and improved going forward.*

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INTRODUCTION

The political branches fight. All the time. Even every day. Yet, despite an enormous amount of scholarly effort spent figuring out who should prevail in such disputes,[1] we still lack a useful framework to resolve them.[2] This is because the prevailing methods to resolve separation of powers disputes are ill-suited to

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[1] The field is immense and continues to generate interesting scholarship. For classic accounts, see generally, for example, Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984) [hereinafter Strauss, *The Place of Agencies*]; Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488 (1987) [hereinafter Strauss, *Formal and Functional Approaches*]; Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513 (1991); Thomas W. Merrill, *The Constitutional Principle of Separation of Powers*, 1991 SUP. CT. REV. 225 (1991); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994); M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127 (2000) [hereinafter Magill, *The Real Separation*]; M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603 (2001) [hereinafter Magill, *Beyond Powers and Branches*]. For more recent pieces on the topic, see generally, for example, John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939 (2011); Aziz Z. Huq, *Separation of Powers Metatheory*, 118 COLUM. L. REV. 1517 (2018) (book review) [hereinafter Huq, *Metatheory*]; Nikolas Bowie & Daphna Renan, *The Separation-of-Powers Counterrevolution*, 131 YALE L.J. 2020 (2022); Ilan Wurman, *Nonexclusive Functions and Separation of Powers Law*, 107 MINN. L. REV. 735 (2022); Joshua C. Macey & Brian M. Richardson, *Checks, Not Balances*, 101 TEX. L. REV. 89 (2022); Aditya Bamzai & Saikrishna Bangalore Prakash, *The Executive Power of Removal*, 136 HARV. L. REV. 1756 (2023).

[2] *See, e.g.*, Magill, *Real Separation*, *supra* note 1, at 1128–29 ("[W]e cannot seem to solve the problem of separation of powers. We are not even close. We do not agree on what the principle requires, what its objectives are, or how it does or could accomplish its objectives."); Huq, *Metatheory*, *supra* note 1, at 1518 ("[S]cholars [still] disagree about the basic terms of the debate [in constitutional separation of powers]. They are at odds, that is, over a number of rather basic theoretical premises of the separation of powers.").

resolve the typical disputes that actually arise today. Such disputes do not involve instances where one branch is trying to exercise—or fully deny the exercise of—the other branch's exclusive power, as the prevailing doctrine in the Supreme Court would have it.[3] Rather, most separation of powers disputes involve instances where both branches have constitutional power to act but one branch's exercise of power infringes on or interferes with the other branch's exercise of power. Take a few examples:[4]

1. *Statutory Removal Restrictions*: Statutory for-cause removal restrictions on executive branch officers are typically conceived of as congressional intrusions on the President's exclusive power to control the executive branch.[5] But Congress has constitutional power to structure offices through its authority to create offices "by Law"[6] and pass laws "necessary and proper" to effectuate the exercise of such power.[7] Thus, disputes over for-cause removal restrictions can be conceived of as instances where Congress's exclusive power to structure offices interferes with or infringes on the President's exclusive power to control the executive branch. Conversely, the President's attempt to ignore such statutory requirements can be conceived of as the President infringing upon Congress's exclusive power to create and structure offices. The question is, therefore, not who has exclusive power, but who should prevail when one branch's exercise of power interferes with the other's.

2. *Conduct of Diplomacy*: Presidents frequently object to congressional statutes that regulate their ability to engage in diplomacy, arguing that such legislation violates their exclusive power to conduct diplomacy.[8] But in passing statutes that affect diplomacy, Congress often has its own exclusive power to, for example, regulate foreign commerce,[9] approve treaties,[10] appropriate

[3] *See infra* note 16 and accompanying text (explaining that the current Court is formalist).

[4] I expand on each of these examples in Part I.

[5] *See* U.S. CONST. art. II, § 1.

[6] *Id.* art. II, § 2, cl. 2.

[7] *Id.* art I, § 8, cl. 18; *see also infra* notes 64–66 and accompanying text.

[8] *See, e.g.*, Jean Galbraith, *The Runaway Presidential Power Over Diplomacy*, 108 VA. L. REV. 81, 81 (2022) ("The President claims exclusive control over diplomacy within our constitutional system. Relying on this claim, executive branch lawyers repeatedly reject congressional mandates regarding international engagement.").

[9] *See* U.S. CONST. art. I, § 8, cl. 3.

[10] *See id.* art. II, § 2, cl. 2.

funds,[11] or "define and punish . . . Offences against the Law of Nations."[12] Again, the question is not which branch has exclusive power over the matter, but who should prevail when both branches have power to act but one branch's exercise of power interferes with the other's.

3. *Recognition*: In *Zivotofsky v. Kerry*,[13] the Supreme Court held that Congress's attempt to require that the place of birth on U.S. passports designate Jerusalem as part of Israel violated the President's exclusive power to recognize the territorial boundaries of foreign states.[14] But as the majority acknowledged, Congress was exercising its own constitutional authority to regulate passports.[15] The question, again, was which branch should prevail when both branches had power to act, but one branch's exercise of power interfered with the other's.

4. *Executive Privilege*: Congress and the White House frequently fight over whether the President must reveal executive branch information to Congress. Like the examples above, both branches have power to act in such disputes: the President has power to control executive branch information, and Congress has power to gather information in service of its legislative functions. Which branch should prevail when one branch's exercise of power infringes on the other's?

We might think of these examples—instances where both branches have power to act, but one branch's exercise of power interferes with the other's—as cases of separation of powers infringements. Even though these comprise most of the difficult separation of powers cases that actually arise, the prevailing modes of resolving separation of powers disputes fail to provide a coherent or satisfying method to resolve them, i.e., to answer how much infringement is permissible and how much is not.

Formalism—the dominant mode of resolving separation of powers disputes on the current Supreme Court[16]—seeks to resolve separation of powers disputes by asking which branch has exclusive power over the matter at issue. Whichever branch has such

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[11] *See id.* art. I, § 8, cl. 12.

[12] *Id.* art. I, § 8, cl. 10.

[13] 576 U.S. 1 (2015).

[14] *See id.* at 31–32.

[15] *See id.*

[16] *See, e.g.*, Gillian E. Metzger, *The Roberts Court and Administrative Law*, 2019 SUP. CT. REV. 1, 3 (describing the Roberts Court as formalist); Kristin E. Hickman, *The Roberts Court's Structural Incrementalism*, 136 HARV. L. REV. F. 75, 77 (2022) (same).

exclusive power then prevails. Formalism thus might prove useful if Congress tried to pardon an individual,[17] or if the President sought to impeach a member of Congress.[18] But, essentially no difficult cases involve such instances of one branch trying to exercise the other's exclusive power.[19] Instead, the difficult cases involve instances where both branches have power to act and come into conflict. On this question, formalism has no useful guidance.[20]

The typical way formalists treat cases of infringement is to claim that *any* infringement on an exclusive power is unconstitutional.[21] But this cannot be the case. The Constitution clearly contemplates that the branches will interfere with each other's exercises of power, and they do so in uncontroversial ways all the time.[22] For example, even if we accept the formalist claim that the President has exclusive control over the executive branch's exercise of executive power,[23] Congress has the power to structure the executive branch in ways that obviously interfere with or infringe upon the President's exclusive control. For example, Congress creates the officer positions and departments that the President must rely on to execute the law, and the Senate must approve the principal officers that populate the executive branch.[24] In exercising these powers, Congress inevitably affects the President's control.[25] Indeed, regardless of whether officers have statutory for-cause removal protection, the President cannot fully control executive branch officials' exercises of power for the simple reason

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17 *Cf.* U.S. CONST. art. II, § 2, cl. 1 (granting the President the power to pardon).

18 *Cf. id.* art. I, § 2, cl. 5; *id.* art. I, § 3, cls. 6–7 (granting Congress the power over impeachments).

19 This assumes arguendo that the President's pardon power and Congress's impeachment powers are exclusive.

20 *See Zivotofsky*, 576 U.S. at 55 (Thomas, J., concurring) (stating that how "the Constitution would resolve a conflict between the political branches, each acting pursuant to the powers granted them under the Constitution," is a "difficult separation-of-powers question" that he "need not opine on"); *infra* Part II.A.

21 *See infra* note 96 and accompanying text; *see also* Manning, *supra* note 1, at 1961 (explaining that formalists often "deem [ ] legislation objectionable simply because it touches functions belonging to another branch of government").

22 *See infra* notes 97–101 and accompanying text.

23 *See infra* notes 61–62 and accompanying text.

24 *See infra* notes 100–101 and accompanying text; *see also* Blake Emerson, *The Departmental Structure of Executive Power: Subordinate Checks from Madison to Mueller*, 38 YALE J. ON REG. 90, 113–15 (2021) (suggesting that the Constitution gives Congress the power to define "duties of the principal officers" and "creat[e] and organiz[e] offices").

25 *See, e.g.*, Aaron L. Nielson & Christopher J. Walker, *Congress's Anti-Removal Power*, 76 VAND. L. REV. 1, 27–28 (2023) (noting uncontroversial ways that Congress can interfere with the President's removal power by using various congressional authorities, such as by signaling it will refuse to confirm a replacement).

that no one can fully control another person's actions.[26] In short, when Congress constructs the offices and departments that make up the executive branch and decides who will populate them—as the Constitution clearly contemplates and permits—it inevitably interferes with the President's "full control" of the executive power.

This is true in other domains as well. Even if we assume that the President has exclusive control over the conduct of diplomacy, it cannot be true that Congress cannot interfere with or infringe upon exercises of such authority. Congress can decline to confirm ambassadors, withhold funding for diplomatic posts, impose embargoes on foreign states, and, of course, declare war, even though all of these powers can quite obviously interfere with the President's preferred diplomatic conduct.[27] As a recent example, President Joe Biden cut short a diplomatic trip abroad to return to Washington, D.C., to negotiate a deal with congressional leaders to raise the debt ceiling.[28] This "interfered" with the President's conduct of diplomacy,[29] but no one thinks that Congress had to pass a statute increasing the debt ceiling to avoid affecting the President's diplomatic efforts.

In short, it is inevitable—and the Constitution clearly permits—that the political branches will use their own powers in ways that will interfere with each other's exercises of power. It thus cannot be true that *any* infringement is unconstitutional. The question is *how much* infringement or interference is permissible. But, on this question, formalism has nothing to offer.

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26 *See, e.g.*, Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1744 (2002) ("All institutions must take direction from a person, or a small group of people, but the leader of an institution cannot possibly perform all of its tasks directly.").

27 *See Zivotofsky*, 576 U.S. at 16 (discussing these congressional powers).

28 *See* Peter Baker, *For Biden, Crisis at Home Complicates Diplomacy Abroad*, N.Y. TIMES (May 17, 2023), https://www.nytimes.com/2023/05/17/us/politics/biden-japan-debt-limit.html:

> Mr. Biden's decision to head home early [to negotiate a debt ceiling deal] reinforces questions about American commitment to the Asia-Pacific region and leaves a vacuum that China may exploit . . . . [Failure to follow through on a] presidential visit to places like Papua New Guinea . . . speaks loudly about diplomatic priorities . . . . This is not the first time an American president has scrubbed a foreign trip to deal with domestic concerns.

29 *See id.*

Formalism's main competitor, functionalism, does no better.[30] Although it can conceive of the branches having overlapping powers, functionalism's mode of resolving disputes is to categorically protect each branch's core power, and, outside of core exercises of power, to try to resolve disputes by asking which branch should prevail to maintain a general balance of powers between the branches.[31] But, as many scholars have noted, there is no clear way to differentiate core from peripheral powers, nor any answer for what to do when two core powers come into conflict.[32] Moreover, the method of resolving disputes by determining their effect on the general balance of powers is inoperable. We have no means to tally up the total powers of each branch, figure out the existing balance of powers between them, or identify the effect of any one dispute on such balance. And even if these things could be calculated, there is no standard or baseline "balance of power" to compare to. This might explain why even some opinions typically deemed to be functionalist do not engage in this inquiry. But they too fail to provide any clear method to determine how much infringement is permissible and how much is not.[33] Like formalism, functionalism thus has little to offer in resolving the key question of how much infringement is permitted and how much is not in any given dispute.

Other modes of resolving separation of powers disputes fare no better. Perhaps the most famous separation of powers opinion there is, Justice Robert Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*,[34] fails to offer any coherent guidance for questions of infringement.[35] Although Justice Jackson's opinion is typically touted as a paradigm of pragmatic reasoning, it is actually quite formalist in Category Three—the only category where the branches come into conflict. In Category Three, Justice Jackson stated that the President can only prevail in a dispute with Congress if the President's power is "exclusive," "conclusive," and "preclusive" over the matter, which "disabl[es] the Congress

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[30] *See, e.g.*, Magill, *Real Separation*, *supra* note 1, at 1136 (describing functionalism as the main competitor to formalism); Manning, *supra* note 1, at 1950 (same).

[31] *See infra* notes 123–124 and accompanying text.

[32] *See, e.g.*, Bowie & Renan, *supra* note 1, at 2087 (arguing that "the core/periphery distinction simply does not supply a judicially manageable standard").

[33] *See infra* Part II.B (expanding on these critiques).

[34] 343 U.S. 579 (1952).

[35] *See infra* Part II.C.

from acting upon the subject."[36] But, as noted above, such formalist methods of resolving disputes by determining who has exclusive power fail to provide a method to resolve disputes where both branches have power to act, but come into conflict.

Justice Jackson's framework could be read to imply that Congress should prevail in infringement cases where both branches have power, but Justice Jackson equivocated on this in his opinion, suggesting that Congress's power to regulate the "land and naval Forces" can "impinge" upon the President's exclusive commander-in-chief power only "to some unknown extent."[37] Justice Jackson, however, failed to provide any guidance for determining the "extent" to which such "impingement" is permissible. But this is the core question at the heart of separation of powers infringements.

Justice Jackson's framework is thus not conceptually set up to resolve most difficult separation of powers cases. It is also problematic in practice. Because the President can only prevail under Justice Jackson's framework if their power is exclusive and of sufficiently wide scope to encompass the dispute at issue, this provides an obvious incentive to executive branch advisers—and sympathetic courts—to find that the relevant powers are exclusive and of sufficiently expansive scope to cover the dispute at issue. This is precisely what has happened—the President continues to find "exclusive" powers and their scope continues to grow.[38]

Meanwhile, in a recent influential article, Professors Nikolas Bowie and Daphna Renan have called for resolving separation of powers disputes by requiring courts to declare that any separation of powers arrangement that is in a statute is constitutional.[39] This form of categorical deference to statutes would provide an effective way to limit judicial supremacy over separation of powers disputes, which is Bowie and Renan's main target.[40] But, while their proposal is justified as a method of deferring to the

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36 *Youngstown*, 343 U.S. at 637–38 (Jackson, J., concurring).

37 *Id.* at 644 (quotation marks omitted) (quoting U.S. CONST. art. I, § 8, cl. 14) ("[Congress is] empowered to make rules for the 'Government and Regulation of land and naval Forces,' by which it may to some unknown extent impinge upon even [the President's exclusive] command functions." (quoting U.S. CONST. art. I, § 8, cl. 14)).

38 *See infra* Part II.C.

39 *See* Bowie & Renan, *supra* note 1, at 2113 ("[W]e think . . . the judiciary [should] accept as authoritative the separation-of-powers arrangements reached through the legislative process.").

40 *See id.* at 2108 ("The central question distinguishing the juristocratic and republican separation of powers is who should have the primary authority to determine which structures of republican government are compatible with the Constitution's limits.").

political branches' views about the constitutionality of the relevant statutory arrangement,[41] they do not specify what method the political branches themselves ought to use to make such judgments.[42] If we are to defer to the branches' constitutional judgments, the branches need some means to make such decisions. Without such a method, constitutionality would be determined purely by politics or power, rather than law.[43] Yet, we still have no method for the branches to use to resolve the difficult cases of infringement that typically arise.

This Article proposes a new method built for the difficult separation of powers cases that actually arise: separation of powers interest balancing. Interest balancing can accommodate disputes in which both branches have power to act over a certain matter and one branch's exercise of power interferes with or infringes upon the other's. It resolves such disputes by asking (1) whether one branch's exercise of power has infringed on the other's, and (2) whether that intrusion can be justified by a sufficiently strong interest in service of that branch's exercise of power.[44]

This method might sound familiar, as it is the standard method of resolving cases of infringement on constitutional entitlements in the other half of constitutional law: individual rights.[45] When the government is alleged to have infringed on an individual's constitutional rights, we do not ask who has exclusive power over the matter, nor do we try to identify the general balance of power between the individual and government. Instead, individual rights jurisprudence consists of various tests to determine whether (1) there has been an intrusion on a right, and (2) if so, whether that intrusion can be justified by a sufficiently strong governmental interest.[46] To be sure, there are exceptions to this

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41 *See infra* notes 156–158 and accompanying text; *see, e.g.*, Bowie & Renan, *supra* note 1, at 2116 ("[I]t is the representative branches . . . that determine whether any particular arrangement is compatible with the Constitution's separation of powers—that is, whether it is a valid use of the Necessary and Proper Clause to implement the powers and interrelationships of Congress, the presidency, and the executive branch.").

42 *See infra* Part II.D.

43 *See infra* Part II.D.

44 *See infra* Part III.A.

45 *See infra* notes 166–172 and accompanying text.

46 *See infra* notes 166–172 and accompanying text; *see also, e.g.*, Stephen Gardbaum, *The Myth and the Reality of American Constitutional Exceptionalism*, 107 MICH. L. REV. 391, 423–24 (2008) ("[There is a] standard two-step structure of rights adjudication employed throughout the modern constitutional world. The first step consists of determining whether a constitutional right has been infringed; the second step of whether the government can justify infringing the constitutional right."); MOSHE COHEN-ELIYA & IDDO PORAT, PROPORTIONALITY AND CONSTITUTIONAL CULTURE 16–17 (2013).

mode of reasoning in the rights domain,[47] and interest balancing continues to be the subject of critique and theoretical development where it does apply.[48] But it remains the conventional method to resolve the question of how much infringement on constitutional rights is and is not permissible.

Despite its longstanding use in the rights domain, scholars have largely failed to appreciate interest balancing's utility for the separation of powers. Yet, there is precedent for its use in this context. It was introduced in *Nixon v. Administrator of General Services*,[49] continues to be the standard method of resolving executive privilege disputes, and has been used, albeit never routinely, by executive branch actors and courts of appeals in various other domains.[50] Notwithstanding this history, neither courts nor scholars have seemed to recognize interest balancing's potential as a general method of resolving separation of powers disputes.

This Article introduces interest balancing as a coherent method of separation of powers analysis that is both conceptually and practically well suited to address the separation of powers disputes that actually arise. It explains how interest balancing is

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47 For example, the Court recently overruled what had been the norm in the courts of appeals of using "intermediate" and "strict scrutiny" interest balancing frameworks for Second Amendment challenges in favor of a more categorical approach. *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2126–27 (2022).

48 Professor Jamal Greene has made cogent arguments that, notwithstanding its ostensible interest balancing framework, rights analysis in the United States is too categorical. *See generally* Jamal Greene, *The Supreme Court, 2017 Term—Foreword: Rights as Trumps?*, 132 HARV. L. REV. 28 (2018) [hereinafter Greene, *Rights as Trumps*]; JAMAL GREENE, HOW RIGHTS WENT WRONG (2021) [hereinafter GREENE, HOW RIGHTS WENT WRONG]. Greene's claims on this front have not gone unchallenged. *See e.g.*, David Cole, *When Rights Went Right*, N.Y. REV. BOOKS (Apr. 21, 2022), https://www.nybooks.com/articles/2022/04/21/how-rights-went-wrong-jamal-greene-cole/ ("Greene overstates the extent to which rights in the American conception are absolute."). But, regardless, Greene's core claim is that we ought to move rights adjudication from a more categorical "rights as trumps" approach to a less categorical proportionality approach, like that used by many constitutional courts throughout the world. I advocate for an analogous move here. Moving to interest balancing in separation of powers disputes would be a move in the same direction by replacing the dominant mode of separation of powers analysis, formalism, which is categorical, with a more noncategorical approach. Thus, while Greene is critical of rights jurisprudence in the United States, many of his arguments would support moving toward interest balancing in the separation of powers from current prevailing alternatives, even if he might prefer to move even further on the noncategorical spectrum from interest balancing toward proportionality. I thus repeatedly draw on Greene's theoretical insights in what follows.

49 433 U.S. 425 (1977); *see id.* at 443 ("[T]he proper inquiry focuses on the extent to which [Congress's Act] prevents the Executive Branch from accomplishing its constitutionally assigned functions . . . [and, if so,] whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress.").

50 *See infra* notes 178–188 and accompanying text.

distinct from the prevailing approaches—including its closest noncategorical competitor, functionalism—and then evaluates its strengths and weaknesses relative to such approaches, ultimately concluding that interest balancing is the approach best suited to resolve the difficult cases that actually arise: those of separation of powers infringements.

After introducing and critically assessing interest balancing's potential for resolving separation of powers disputes, the Article theoretically develops the approach. Interest balancing asks whether there has been an intrusion on one branch's exercise of power that can be justified by a sufficiently strong interest on the part of the other branch. But which interests ought to count? Where should the default be set? And does there need to be a particular means-ends fit between the interest and the intrusion? None of these questions are simple, but we can make progress in answering them. This theoretical development can help respond to lingering doubts about interest balancing's conceptual apparatus and practical viability and, in the process, make it easier to operationalize going forward.

This Article proceeds as follows. Part I sets the stage by giving examples of standard separation of powers disputes and showing how they are better conceived of as instances of separation of powers infringements or interference, rather than examples of one branch trying to exercise or fully deny the exercise of the other's exclusive power. Part II discusses the prevailing modes to resolve such disputes—including formalism, functionalism, Justice Jackson's Category Three analysis, and recent calls for categorical deference to statutes—and explains why they fail to provide a coherent or useful method for resolving instances of separation of powers infringement. Part III then introduces separation of powers interest balancing as a competing method of separation of powers analysis that is conceptually well suited to address the separation of powers disputes that actually arise. It explains how interest balancing is distinct from its prevailing competitors and assesses its strengths and weaknesses relative to competing approaches. Part III concludes with an application of interest balancing to two case studies to show what it would look like in practice. Part IV theoretically develops how interest balancing can be operationalized and improved going forward. A brief conclusion follows.

Before moving on, a few caveats are in order. First, in discussing formalism and functionalism, I have tried to describe

what I see as the essential elements of each approach. Formalism and functionalism are well-known paradigms of separation of powers analysis used by numerous scholars, practitioners, and judges, but "no canonical form of either approach exists."[51] My goal is not to suggest that everyone using these approaches is subject to the critiques below, but to illuminate the flaws and potential improvements upon the standard ways of thinking of these methods.[52] Second, my focus in this paper is on disputes between the political branches. Of course, disputes also arise between the judiciary and either Congress or the President. Because such disputes implicate a unique line of cases, practices, and dynamics, I do not explore how to resolve such disputes in this Article, although my hope is that the contributions made below can help illuminate these debates as well. Third, because my focus is on disputes, I do not evaluate how to resolve separation of powers questions involving cooperation between the branches. For example, a highly controversial separation of powers issue that is not covered in this Article is the nondelegation doctrine, which—at least typically—involves instances where the political branches cooperate, rather than come into conflict. This is undoubtedly an important issue but outside the scope of this current project. Finally, in proposing interest balancing as a method to resolve disputes between the political branches, I am largely agnostic in this Article about which institution ought to conduct the interest balancing analysis. In principle, it could be conducted by courts—depending on one's view of when judicial resolution of separation of powers disputes is desirable—but it could also be conducted by actors within the political branches, scholars, or even interested members of the general public.

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This Article makes three primary contributions. First, it reconceptualizes difficult separation of powers disputes as instances

[51] Manning, *supra* note 1, at 1949.

[52] This is similar to Dean John Manning's approach to this issue. *See id.*:

> [F]unctionalism and formalism describe the approaches of many judges and scholars. No canonical form of either approach exists. In describing methodological difficulties with each approach, I do not suggest that all functionalists or formalists always commit the generality-shifting errors I identify. Rather than attempt a compendious survey of both philosophies, I try to distill the essential characteristics of the modern judicial opinions that make these tendencies most evident.

of separation of powers infringements or interferences. Second, it identifies interest balancing as a method built to resolve such disputes, properly conceived. Third, it draws attention to the utility of bridging the conventional divide in constitutional law between structure and individual rights by drawing on insights from rights analysis to inform separation of powers analysis.[53]

These contributions all come at an important time. Separation of powers disputes are at the heart of some of the most important questions of constitutional structure today, including who gets to control the administrative state at home and who is in charge of our foreign policy abroad. The analysis we use for these disputes will determine, for example, whether administrative law judges (ALJs)[54] or the Federal Reserve[55] can maintain their independence, whether the civil service is constitutional,[56] as well as how our foreign policy will be conducted.[57] To date, we

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[53] For another recent article trying to draw lessons from rights analysis to enrich separation of powers debates, see generally Z. Payvand Adhout, *Separation-of-Powers Avoidance*, 132 YALE L.J. 2360 (2023).

[54] One court of appeals has held for-cause removal protections for ALJs are unconstitutional, and the Supreme Court is likely to take the question up in the next few years. *See* CONG. RSCH. SERV., LSB10823, REMOVAL PROTECTIONS FOR ADMINISTRATIVE ADJUDICATORS: CONSTITUTIONAL SCRUTINY AND CONSIDERATIONS FOR CONGRESS (2022). After one court of appeals held that for-cause removal protections for SEC ALJs are unconstitutional, the Supreme Court took up the question. *See* Jarkesy v. SEC, 34 F.4th 446, 449 (5th Cir. 2022) (holding that "statutory removal restrictions on SEC ALJs violate . . . Article II"), *cert. granted*, 143 S. Ct. 2688 (2023).

[55] *See, e.g.*, Jonathan Swan, Charlie Savage & Maggie Haberman, *Trump and Allies Forge Plans to Increase Presidential Power in 2025*, N.Y. TIMES (July 17, 2023), https://www.nytimes.com/2023/07/17/us/politics/trump-plans-2025.html ("If Mr. Trump and his allies get another shot at power, the independence of the Federal Reserve . . . could be up for debate.").

[56] This question is likely to come up the next time a Republican wins the White House. *See, e.g.*, *id.* (noting plans to challenge the civil service protections on constitutional grounds); Erich Wagner, *The Legal Theories at the Heart of Trump's Order Politicizing the Civil Service*, GOV'T EXEC. (Nov. 3, 2020), https://perma.cc/9P9C-HZYT (discussing an internal White House memo from the Trump Administration stating that "the president has the power through Article II to dismiss any federal employee for any reason" and thus "civil service legislation and union contracts impeding that authority are unconstitutional"); Chris Cameron & Charlie Savage, *Ramaswamy Says He Would Fire Most of the Federal Work Force if Elected*, N.Y. TIMES (Sept. 13, 2023), https://www.nytimes.com/2023/09/13/us/politics/vivek-ramaswamy-dismantle-government.html:

> Vivek Ramaswamy, the Republican presidential candidate . . . , said in a policy speech . . . that he would fire more than 75 percent of the federal work force and shutter several major agencies . . . [and] claimed he could make the changes unilaterally if he were to be elected president, putting forward a sweeping theory that the executive wields the power to restructure the federal government on his own and does not need to submit such proposals to Congress for approval.

[57] *See generally* Galbraith, *supra* note 8 (discussing examples of such disputes).

have no coherent or useful way to resolve these instances of separation of powers infringements. The prevailing modes of analysis are not built for such cases. Interest balancing is. Scholars and courts have historically tried to resolve separation of powers disputes by evaluating each branch's *powers*.[58] It is time to start focusing on their *interests*.

I. SEPARATION OF POWERS INFRINGEMENTS

Before discussing the conventional modes of separation of powers analysis, we must first have a proper conception of the difficult separation of powers questions that actually arise. Instead of cases where one branch has exercised or sought to fully deny the exercise of another branch's exclusive powers, almost all difficult separation of powers cases involve instances where both branches have power to act, but one branch's exercise of power interferes with or infringes upon the other's exercise of power.

Below, I provide four examples of such disputes across a range of subject areas. Some scholars might disagree about the particulars of some of the examples. This is to be expected. In this Part, I am mostly agnostic about the extent of each branch's powers. The point is to show that in almost all difficult cases, both branches have plausible cases for exercising power, and that such exercises come into conflict. How to resolve such conflicts is not simple. But we cannot find a useful framework if we continue to misconceive what is at issue in these disputes.

A standard example of a separation of powers conflict involves instances where Congress, by statute, provides that executive officers can only be removed by the President if there is some form of cause, rather than at will. Whether such for-cause removal restrictions are constitutionally permissible has been the subject of almost a century of Supreme Court precedent and will continue to be the subject of review at the Court going forward.[59] Notwithstanding the Court's long history with such questions, it

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[58] Although typically thought of as competing methods, this is true of both formalism and functionalism. Formalism looks for exclusive powers, while functionalism seeks to balance them. *See infra* Parts II.A–B.

[59] *See, e.g.*, Jerry L. Mashaw, *Of Angels, Pins, and For-Cause Removal: A Requiem for the Passive Virtues*, U. CHI. L. REV. ONLINE (Aug. 27, 2020), https://perma.cc/Q36S-7BR5 ("For a century the Supreme Court has been attempting to answer a simple question: when is it constitutional for Congress to provide that an agency head or lower official can be removed only for cause?").

has failed to provide anything close to a coherent doctrine to resolve them. As Professor Jerry Mashaw recently put it, "the Court's precedents on for-cause removal are a jurisprudential train wreck. There is hardly a good constitutional argument to be found in the decisions taken as a whole."[60]

Recent cases have framed such disputes as involving the question of whether Congress can interfere with the President's exclusive power to control exercises of the executive power.[61] But this is not the only way—let alone the best way—to conceive of such disputes. Even if we assume arguendo that the President has exclusive power to control and remove executive branch officials,[62] this does not mean the President ought to prevail in such disputes.

For-cause removal disputes do not involve instances where Congress is trying to exercise or fully deny the exercise of the President's exclusive power over removal. Even if we assume the President has the exclusive power to remove officials, Congress is not seeking to remove such officials itself, nor is it prohibiting the President from removing them. Instead, it is limiting *when* the President can exercise this power. Congress is thus interfering with or perhaps infringing upon the President's power but not exercising it.

In doing so, Congress is itself exercising its own exclusive powers. Congress is the only branch that can, "by Law," create both principal and inferior officer positions,[63] and "make all Laws

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60 *Id.*

61 *See, e.g.*, Seila L. v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2191–92 (2020); Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 483–84 (2010); Morrison v. Olson, 487 U.S. 654, 659–60 (1988).

62 *See, e.g.*, *Seila L.*, 140 S. Ct. at 2191–92. For recent work contesting this view, see, for example, Andrea Scoseria Katz & Noah A. Rosenblum, *Removal Rehashed*, 136 HARV. L. REV. F. 404, 415 (2023); Jed Handelsman Shugerman, *Presidential Removal: The* Marbury *Problem and the Madison Solutions*, 89 FORDHAM L. REV. 2085, 2090 (2021); Daniel D. Birk, *Interrogating the Historical Basis for a Unitary Executive*, 73 STAN. L. REV. 175, 228–29 (2021); Christine Kexel Chabot, *Interring the Unitary Executive*, 98 NOTRE DAME L. REV. 129, 155–59 (2022); Jane Manners & Lev Menand, *The Three Permissions: Presidential Removal and the Statutory Limits of Agency Independence*, 121 COLUM. L. REV. 1, 21–27 (2021).

63 Article II provides that principal "Officers of the United States, whose Appointments are not herein otherwise provided for . . . shall be established *by Law*," and that "the Congress may *by Law* vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. CONST. art II, § 2, cl. 2 (emphasis added); *see also* Gary Lawson, *Command and Control: Operationalizing the Unitary Executive*, 92 FORDHAM L. REV. 441, 453 (2023) [hereinafter Lawson, *Command and Control*] ("One of the Constitution's most important moves was to make clear that the office-creating power was vested exclusively in Congress.").

which shall be necessary and proper for carrying into Execution" this power.[64] It is uncontroversial that Congress's power includes the ability to structure the offices it creates by, for example, imposing qualification requirements, term limits, procedures for executing the powers given, and limits on the substantive scope of authority of such officers.[65] Thus, when Congress creates an office and imposes a for-cause restriction on removal, it is exercising its exclusive power to create and structure such positions.[66]

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[64] *See* U.S. CONST. art I, § 8 ("The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.").

[65] *See, e.g.*, Manning, *supra* note 1, at 1967–68 (noting that statutes sometimes "structure and constrain the implementation of executive authority, for example, by prescribing administrative procedures for executive agencies, setting term limits for their officers, or protecting executive functionaries from various forms of discrimination"); Andrew Coan & Nicholas Bullard, *Judicial Capacity and Executive Power*, 102 VA. L. REV. 765, 788–89 (2016):

> [Congressional] interference [with presidential administration] . . . takes myriad forms. The creation of independent agencies is an obvious example that receives much attention. But Congress wields many other tools [aside from removal restrictions] to influence and control federal agencies. Congress can alter an agency's structure or jurisdiction, cut agency personnel, require agencies to give notice before taking action, mandate consultation with other agencies, require congressional review of proposed rules, order performance reviews, threaten special hearings, and cut or impose conditions on funding. . . . Last and perhaps most significantly, the Administrative Procedure Act itself functions as a powerful and sweeping restraint on the President's power to control administrative decision making.

See also Lawson, *Command and Control*, *supra* note 63, at 445; Nielson & Walker, *supra* note 25, at 27–28. Indeed, formalists have acknowledged Congress's power to remove officials through term limits or by disestablishing offices. *See, e.g.*, Bamzai & Prakash, *supra* note 1, at 1792 (suggesting that Congress can set tenure limits); *id.* at 1814 ("Congress could disestablish executive offices and thereby remove, in a manner of speaking, executive officers."). It is not clear why Congress's powers would not also include imposing limitations on when the President removes such officials. One might argue that Congress's internal power to promulgate such restrictions ought to be limited by the President's power to remove, but to make this claim convincing, one needs to explain why the opposite is not true: why Congress's power to promulgate such restrictions does not limit the President's power to remove. I do not have space in this Article to expand on this point, but it is the subject of a forthcoming work. *See generally* Shalev Gad Roisman, The Limits of Formalism [hereinafter Roisman, *Limits of Formalism*] (work in progress) (on file with author).

[66] *See, e.g.*, United States v. Perkins, 116 U.S. 483, 485 (1886) ("We have no doubt that when Congress, by law, vests the appointment of inferior officers in the heads of Departments it may limit and restrict the power of removal as it deems best for the public interest."); Manning, *supra* note 1, at 1967; MICHAEL W. MCCONNELL, THE PRESIDENT WHO WOULD NOT BE KING: EXECUTIVE POWER UNDER THE CONSTITUTION 153, 262 (2020); Lawson, *Command and Control*, *supra* note 63, at 452–53. And, for what it is worth, Congress has used such power since the Founding. *See, e.g.*, Katz & Rosenblum, *supra* note 62

Thus, rather than imagining the President's exclusive power violated by Congress, what we have is an instance where both branches have constitutional power to act but come into conflict. One branch's exercise of power interferes with another's. The question, then, is how much infringement is permitted and how much is not. Asking which branch has exclusive power cannot resolve such cases because *they both do*.

This is also true in various other areas of constitutional law. For example, the President frequently objects to and ignores statutory provisions that the President claims invade an exclusive presidential power to conduct diplomacy.[67] Recently, for example, the Department of Justice's Office of Legal Counsel (OLC) found that a statute prohibiting the Palestine Liberation Organization (PLO) from "establish[ing] or maintain[ing] an office in the United States and preventing anyone from expending funds in the United States on behalf of the PLO[68] was unconstitutional, because it interfered with the President's plans to engage with PLO officials at an office in Washington, D.C., and meet with a delegation of visiting Palestinian officials in Washington, D.C.[69] But, even if we assume the President has exclusive power to conduct diplomacy, this does not answer the question of who ought to prevail in this case, because Congress too has relevant constitutional power over this domain. Congress has exclusive Article I power to regulate foreign and interstate commerce,[70] and to "define and punish . . . Offences against the Law of Nations."[71] And,

at 413 (describing such history). In recent work, Professors Aditya Bamzai and Saikrishna Prakash argue that the Necessary and Proper Clause cannot justify imposing for-cause removal protections because it only gives authority to "implement federal power," not "to *transform* or *modify* the separation of powers." *See* Bamzai & Prakash, *supra* note 1, at 1785 (emphasis in original). But, their distinction between implementing federal powers and transforming or modifying cannot do the work they ask of it. For example, they suggest that for-cause removal restrictions would modify the President's executive power, but such restrictions could just as easily be seen as implementing Congress's power to create offices.

67 *See* Galbraith, *supra* note 8, at 90.

68 *See* 22 U.S.C. § 5202.

69 *See* Application of the Anti-Terrorism Act of 1987 to Diplomatic Visit of Palestinian Delegation, 46 Op. O.L.C., 2022 WL 16859386, at *6 (Oct. 28, 2022) ("[S]ection 1003(2) . . . would impermissibly infringe on exclusive presidential authorities to the extent it preclude[s] the expenditure of PLO funds necessary to facilitate meetings between PLO representatives and Executive Branch officials in Washington."); Statutory Restrictions on the PLO's Washington Office, 42 Op. O.L.C., slip op. at *2 (Sept. 11, 2018) ("[T]he [statute] may not constitutionally bar the PLO from maintaining its Washington office and undertaking diplomatic activities the Secretary of State wishes to authorize.").

70 U.S. CONST. art. I, § 8, cl. 3.

71 *Id.* art. I, § 8, cl. 10.

in passing the relevant statute, it was exercising both of these powers. It was, by law, regulating interstate and foreign commerce[72] by preventing spending funds on behalf of the PLO and exercising its power to "define and punish . . . Offences against the Law of Nations,"[73] by preventing the PLO from operating in the United States as a means of punishing it for its involvement in terrorist activities abroad.[74]

Thus, again, rather than an instance where Congress is exercising or denying the exercise of the President's exclusive power over diplomacy, we have a situation where both branches have exclusive power to act, but their exercises of power come into conflict. We can say that Congress is interfering with the President's exercise of exclusive power to conduct diplomacy, or we can say that the President's ignoring of the statutory restrictions is interfering with Congress's exclusive power to regulate commerce and "define and punish . . . Offences against the Law of Nations."[75] Finding an exclusive power simply does not tell us who should prevail when both Congress and the President are exercising their powers over foreign affairs and such exercises come into conflict.

Consider also the Court's decision in *Zivotofsky v. Kerry*, where it examined a statutory provision requiring that U.S. citizens be permitted to denote their place of birth on their passports as "Jerusalem, Israel," rather than "Jerusalem."[76] The President objected to the statute because it undermined the longstanding executive branch position to avoid recognizing Jerusalem as part of Israel.[77] The Court agreed and held that the statute was unconstitutional because it violated the President's exclusive power to

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72 *See id.* art. I, § 8, cl. 3.

73 *Id.* art. I, § 8, cl. 10.

74 *See, e.g.*, Mendelsohn v. Meese, 695 F. Supp. 1474, 1483 (S.D.N.Y. 1988) ("There is no question that the [Act] was passed pursuant to a grant of legislative authority under Article I."); *id.* at 1484 (explaining that "[i]n light of the many terrorist acts around the world for which credit has been claimed in the name of the PLO," "[t]he avowed interest asserted by Congress in favor of the [Act] is . . . to deny the PLO the benefits of operating in the United States"); Memorandum from Charles J. Cooper, Assistant Att'y Gen., Off. Legal Couns., to Edwin Meese, III, Att'y Gen. (Feb. 13, 1988) (listing Congress's Article I authorities for passing the Act at 20 n.19).

75 U.S. CONST. art. I, § 8, cl. 10. The same can be said of other conduct-of-diplomacy disputes involving Congress's attempt to limit how money it has appropriated—another exclusive Article I power—is used for diplomatic activities. *See, e.g.*, Constitutionality of Section 7054 of the Fiscal Year 2009 Foreign Appropriations Act, 33 Op. O.L.C., 2009 WL 2810454, at *10–12 (June 1, 2009) [hereinafter Section 7054 OLC Op.].

76 *Zivotofsky*, 576 U.S. at 7.

77 *See id.*

recognize foreign territorial boundaries.[78] But, even assuming arguendo that the President has exclusive power over foreign recognition, Congress's statute did not attempt to formally "recognize" Jerusalem as part of Israel.[79] The statute at issue thus did not involve an instance where Congress sought to exercise or fully deny the exercise of the President's recognition power. To be sure, the statute interfered with or infringed upon the President's longstanding policy to avoid recognizing Jerusalem as part of Israel,[80] but it did not exercise such power. Moreover, as the Court acknowledged, Congress has its own power in this domain, i.e., the power to regulate passports.[81] Thus, again, we have an instance where both branches have power to act, but their exercises of power come into conflict. Congress's exercise of its power to regulate passports interfered with the President's power to recognize foreign boundaries.[82] But who is to prevail in such cases of infringement?

As a final example, Congress and the President frequently fight over Congress's ability to require the President to divulge executive branch information despite claims of executive privilege. In such instances, both branches have ostensible exclusive power to act—the President has power to control executive branch information and Congress has power to gather information in service of its legislative functions.[83] The question is what to do when such exercises of power conflict. How much can one branch's exercise of power interfere with the other's?

I include this latter example to remind the reader of the choices made in framing these different separation of powers disputes. Unlike the examples above involving statutory for-cause removal restrictions, the conduct of diplomacy, and recognition,

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78 *See id.* at 32.

79 *See id.* at 30 ("[T]he statement required by [the statute] would not itself constitute a formal act of recognition.").

80 *See id.* at 7–8 (discussing the diplomatic fallout from Act).

81 *See Zivotofsky*, 576 U.S. at 31 ("The Court does not question the power of Congress to enact passport legislation of wide scope. . . . This is consistent with the extensive lawmaking power the Constitution vests in Congress over the Nation's foreign affairs.").

82 For a more in-depth discussion of *Zivotofsky*, see *infra* Part III.E.2.

83 *See, e.g.*, Annie L. Owens, *Thwarting the Separation of Powers in Interbranch Information Disputes*, 130 YALE L.J. F. 494, 494–95 (2021) ("[D]isputes between the political branches over control of and access to executive branch information . . . [typically] pit[ ] the Executive's interest in confidentiality and control of its internal information against Congress's need for the requested materials to inform legislation, conduct oversight, and provide advice and consent on presidential nominations . . . ."); Trump v. Mazars USA, LLP, 140 S. Ct. 2019, 2031 (2020) (acknowledging both branches' powers and setting up an inquiry into whether Congress's interests are sufficiently strong to outweigh intrusion).

executive privilege disputes are not typically resolved by resort to inquiries about who has exclusive power over the matter. Instead, they are conceived of as instances where both branches have power to act, and resolved by asking when an interference on one branch's exercise of power is permitted and when it is not.[84] Yet, as noted above, these other examples can be conceived of in exactly the same way. So why are disputes in these various domains treated so differently?

The answer is unclear. There is no obvious reason to treat any of these examples—whether about removal, diplomacy, recognition, or executive privilege—categorically different from one another. They all plausibly involve a clash of competing powers—e.g., between the President's removal power and Congress's power to create and structure offices; between the President's conduct of diplomacy power and Congress's power to regulate commerce or define and punish violations of the law of nations; between the President's power over recognition and Congress's power to regulate passports; and between the President's power to control executive branch information and Congress's power to gather information in aid of legislation. The Constitution does not tell us to prioritize one branch over the other in such disputes of competing powers. So what are we to do when one branch's exercise of power infringes on another's?

As the next Part shows, the prevailing modes of separation of powers analysis fail to provide a coherent or useful method to answer this question. But this is the question at the heart of the difficult separation of powers disputes that arise today.

II. THE STANDARD PICTURE AND INFRINGEMENTS

With a better understanding of what is actually at issue in most difficult separation of powers disputes, we can assess how the prevailing modes of separation of powers analysis seek to resolve them. In this Part, I introduce the dominant methods of separation of powers analysis and explain why they fail to provide a coherent or usable method to resolve the difficult separation of

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84 *See, e.g.*, Owens, *supra* note 83, at 497 ("Any congressional claim of entitlement to information the Executive claims is privileged . . . set[s] up a clash of competing prerogatives . . . [requiring] a weighing of the branches' conflicting interests, which the Supreme Court has articulated as a two-part balancing test."); *id.* at 499 ("[E]xecutive privilege must always be weighed against other competing governmental interests, including . . . the congressional need to make factual findings for legislative and oversight purposes." (quotation marks omitted)).

powers questions that actually arise: that is, cases of separation of powers infringements.

A. Formalism

The dominant method of separation of powers analysis on the Supreme Court today is formalism.[85] Formalism seeks to ensure the formal separation of powers between the branches. Under this method, with limited exceptions, all exercises of authority between the political branches are either the President's or Congress's—they cannot be both.[86] Formalists thus seek to resolve separation of powers conflicts by asking which branch has exclusive power over the matter in question.[87] Whichever branch has the exclusive power prevails, because once an exclusive power is identified, the other branch lacks power over the relevant matter.[88]

One can see the appeal of formalism. It seeks to provide concrete and clear answers to separation of powers questions.[89] It is categorical and rule-like in nature, suggesting that it might lead to predictability and stability in the separation of powers.[90] Despite this surface appeal, many scholars have critiqued formalism

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85 *See supra* note 16.

86 *See, e.g.*, Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 CALIF. L. REV. 853, 858 (1990) ("Any exercise of governmental power . . . must either fit within one of the three formal categories thus established or find explicit constitutional authorization for such deviation.") [hereinafter Lawson, *Territorial Governments*]; Steven G. Calabresi, *The Vesting Clauses as Power Grants*, 88 NW. U. L. REV. 1377, 1390 (1994):

> [A]ny governmental power exercised in our system must be either legislative or executive or judicial: the premises of the system do not allow for the conclusion that a power could be something other than one of these three (or that it could be two of them at the same time).

See also Magill, *Beyond Powers and Branches*, *supra* note 1, at 608 ("[Formalism] emphasizes that the Constitution divides governmental power into three categories and, with some explicit textual exceptions, assigns those powers to three different branches of government."). Although formalists sometimes acknowledge that there are areas that fall into the domain of both branches, these are treated as limited exceptions. *See, e.g.*, Lawson, *Territorial Governments*, *supra* note 82, at 859 (noting that formalism "views these areas of overlap . . . as limited"); Calabresi, *supra*, at 1390 n.46.

87 *See, e.g.*, Merrill, *supra* note 1, at 231–32 ("A pure formalist embraces what I will call an 'exclusive functions' interpretation of the relationship between functions and branches. On this view, each of the three branches has exclusive authority to perform its assigned function, unless the Constitution itself permits an exception."); Huq, *Metatheory*, *supra* note 1, at 1529.

88 *See, e.g.*, Bamzai & Prakash, *supra* note 1, at 1784 (concluding that, because the President has power to remove officials, Congress therefore has no power to "divest" or "encumber" that authority).

89 *See, e.g.*, Manning, *supra* note 1, at 1958.

90 *Cf. infra* Part III.D.1.

for the difficulty in identifying whether a particular action falls within the exclusive power of one branch or the other.[91] If we have no reliable means to identify exclusive powers, this would call into question the appeal of formalism's categorical nature, rendering its application prone to subjective judgment. But even apart from the difficulties in concluding which powers are truly exclusive, formalism is subject to a deeper critique.

The primary problem with formalism is that it is not set up to deal with the difficult cases that actually arise. Formalism might prove useful if Congress tries to pardon an individual or if the President tries to impeach a Supreme Court Justice. These would be plausible instances of attempts of one branch to exercise the exclusive power of the other branch.[92] But essentially no difficult separation of powers cases involve instances where one branch is seeking to actually exercise—or fully deny the exercise of—the exclusive power of another branch. Instead, as explained in Part I, most difficult cases involve instances where both branches have power to act and come into conflict. In such cases, even if we could identify exclusive powers, we cannot resolve who should prevail.

For example, statutory for-cause removal restrictions do not involve instances where Congress is trying to actually remove an executive branch official.[93] Instead, they involve instances where Congress seeks to constrain or interfere with the President's ability to remove such officials by providing criteria the President must find before removing an officer.[94] These are cases of, in Dean

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[91] *See, e.g.*, Magill, *Beyond Powers and Branches*, *supra* note 1, at 625–26 ("The debate . . . proceeds on the assumption that . . . there is a way to classify government authority into three categories and assure that the functions are exercised by distinct institutions. But we have no such method."); *id.* at 612 n.21 (collecting sources making this critique).

[92] I am assuming here arguendo that the President has exclusive control of federal pardons and Congress has exclusive control of when to impeach federal officials. *See supra* note 18.

[93] For example, even the statute at issue in *Myers v. United States*, 272 U.S. 52 (1926), did not involve an attempt to give Congress the power to remove officials on its own; rather, it gave Congress a role in approving such removal. *See id.* at 107. More recent cases involve no congressional role in removal of individual officers; instead, they involve statutes where Congress has laid out criteria of cause the President must satisfy for *the President* to remove such officials. *See infra* Part III.E.1. One arguable exception to this is *Bowsher v. Synar*, 478 U.S. 714 (1986), which involved Congress's ability to remove an official that the Court determined was exercising an "executive function." *Id.* at 734.

[94] *See, e.g.*, Manning, *supra* note 1, at 1960–61, 2021–22. Bamzai and Prakash recently argued that for-cause removal restrictions are unconstitutional. Bamzai & Prakash, *supra* note 1, at 1784. But, while Bamzai and Prakash focus on whether Congress has a

John Manning's words, "encroachment," rather than actual exercises of exclusive power.[95]

Formalists have no coherent method to resolve how much encroachment or interference is permitted and how much is not. When formalists explicitly confront infringement cases, they typically claim that *any* infringement on an exclusive power is unconstitutional.[96] But this cannot be true. The Constitution clearly foresees that the branches, using their own powers, will interfere with the exercise of each other's powers. For example, as noted

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"generic legislative power to modify the Constitution's allocation of powers to the branches," *id.* at 1784—which they conclude it does not—they do not focus on the more apt question of whether Congress has *specific* power to create offices with for-cause removal restrictions pursuant to its own enumerated powers. By framing it as a question of whether Congress has generic power to alter the President's constitutionally allocated power, rather than whether Congress has its own power to create a statute in the way that it did, they avoid the difficult question of what to do when both branches have power to act but come into conflict. *Cf. supra* note 66 (discussing Bamzai and Prakash's Necessary and Proper Clause argument). More broadly, their conclusion is primarily justified on the ground that for-cause removal restrictions are unconstitutional, because the "executive power" vested in the President includes the power to remove officials and there is no affirmative grant of authority to Congress to "defease that power." *See* Bamzai & Prakash, *supra* note 1, at 1789; *id.* ("The Chief Executive has a nondefeasible power to remove executive officers at pleasure because the Constitution grants a removal power via the 'executive power' and because it nowhere grants Congress power to defease that power."). But the result of their exclusive powers mode of analysis seems dependent on the order in which they ask the question of which branch has exclusive power. If, instead of starting with the President, they first asked whether Congress has power to create and structure officer positions, including to provide term limits and restrictions on when removal is permitted, they would presumably conclude that it has such power pursuant to its authority to, "by Law," create officer positions and pursuant to the Necessary and Proper Clause. *See supra* notes 63–66 and accompanying text; Rosenblum & Katz, *supra* note 62, at 413 (noting Congress has used such power since the Founding); MCCONNELL, *supra* note 66, at 262 ("Congress presumably has the enumerated power to determine tenure of office, under its power to create and define offices."); Calabresi & Prakash, *supra* note 1, at 582 (suggesting that Congress would have this power, but for their claim that the Executive Power Clause limits such power). Under Bamzai and Prakash's method, then, it would seem that, because the Constitution "nowhere grants [the President] power to defease [Congress's] power," Bamzai & Prakash, *supra* note 1, at 1789, the President cannot alter such for-cause removal restrictions. The result would be that Congress *can*, in fact, constitutionally implement for-cause removal restrictions. There is no clear reason why we should ask about the President first, rather than Congress, nor should the question of who has constitutional power depend on the order in which we inquire about the branches. The more compelling way to conceptualize the issue is that both branches have relevant power in this area and come into conflict. *See supra* Part I. For a more extended analysis of Bamzai and Prakash's important article, see generally Roisman, *Limits of Formalism*, *supra* note 65.

[95] *See* Manning, *supra* note 1, at 1960 ("[F]ormalists are quick to equate certain forms of legislative regulation or oversight of executive or judicial functions with *encroachment* on the coordinate branches." (emphasis in original)).

[96] *See, e.g.*, *id.* at 1961 (noting that formalists often conclude "legislation [is] objectionable simply because it touches functions belonging to another branch of government").

above, even if the President has exclusive power to conduct diplomacy or recognize foreign states, Congress can obviously interfere with these uses of diplomatic power through its powers to decline to approve treaties, impose tariffs, or declare war.[97]

Similarly, Congress can quite obviously interfere with or encroach on the President's purportedly exclusive power to control exercises of executive power.[98] Congress has the power to create executive offices[99] and decline to confirm nominees for those positions.[100] Surely this "interferes" with the President's control of the executive power by structuring who works under the President, on the one hand, and deciding whether the President's chosen officials will be able to do the jobs the President has selected them for, on the other.[101] But, again, Congress is not required to approve any executive official the President wishes to appoint or to create any officer positions the President desires. This is notwithstanding the fact that failing to do so "interferes with" the President's control of the executive power.

The question is not whether the branches can interfere with each other's exercises of exclusive powers; it is *how much* interference is permitted. On this question, standard formalism has nothing to offer.[102]

Formalism's limits are well exemplified in Justice Antonin Scalia's dissent in *Morrison v. Olson*,[103] "one of the most prominent formalist opinions in the U.S. Reports."[104] In *Morrison*, the

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[97] *Cf. Zivotofsky*, 576 U.S. at 16 (noting that Congress can interfere with the President's recognition power by using its powers over foreign commerce, confirming ambassadors, and declaring war).

[98] *See* Morrison v. Olson, 487 U.S. 654, 705 (1988) (Scalia, J., dissenting) (providing a formalist case for the President's exclusive power).

[99] *See supra* notes 63–66 (discussing the power to create offices).

[100] U.S. CONST. art. II, § 2, cl. 2 (providing that presidential appointment of "Officers of the United States" be made with the "Advice and Consent of the Senate"); *see also* Nielson & Walker, *supra* note 25, at 5 ("The most obvious source of Congress's anti-removal power is the Appointments Clause and, in particular, the Senate's plenary, unreviewable authority to reject a presidential nominee.").

[101] *See, e.g.*, MCCONNELL, supra note 66, at 344 ("Obviously, [the Senate's power to block presidential appointments] reduces the ability of the President to exercise full control over the operations of the executive branch."); *id.* at 345 ("A second provision of the Constitution that erodes the unity of the executive is that Congress is empowered to create offices and define their powers and responsibilities. It can thus require that particular decisions be made by particular officers.").

[102] *See supra* note 20 (noting that Justice Clarence Thomas conceded this point in *Zivotofsky v. Kerry*). For recent formalist attempts to provide more coherence and why they do not ultimately succeed, see *infra* note 122.

[103] 487 U.S. 654 (1988).

[104] Manning, *supra* note 1, at 1966.

Court held that Congress's imposition of for-cause removal protection on the independent counsel was constitutional.[105] In a famous dissent, Justice Scalia disagreed, stating that "the Constitution provides: 'The executive Power shall be vested in a President of the United States.' . . . [T]his does not mean *some of* the executive power, but *all of* the executive power."[106] As a result, Justice Scalia concluded that the President must have "exclusive control over" all exercises of executive power.[107] Because for-cause removal protection would interfere with the President's control of the independent counsel's exercise of "executive power," Justice Scalia concluded that it was, therefore, unconstitutional: "It is not for us to determine . . . how much of the purely executive powers of government must be within the full control of the President. The Constitution prescribes that they all are."[108] In sum, Justice Scalia concluded that, even though the act did not attempt to *exercise* the President's exclusive power to fully control exercises of executive power, it was unconstitutional because it *interfered* with such power.

But it cannot be true that any interference with the President's purported exclusive power is unconstitutional. The only way for the President to fully control the executive power would be for the President to be the only person working in the executive branch. As soon as the President must rely on subordinates to do their bidding, the President relinquishes full control.[109] This is true regardless of whether the President can remove all subordinates without cause.[110] No individual—not even the President—

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105 *See Morrison*, 487 U.S. at 691–93.

106 *Id.* at 705 (Scalia, J., dissenting) (emphasis in original) (quoting U.S. CONST. art. II, § 1, cl. 1).

107 *See id.* (declaring that a statute is unconstitutional if it "deprive[s] the President . . . of exclusive control over the exercise of [ ] executive power").

108 *Id.* at 709 (emphasis omitted).

109 Indeed, probably what most interferes with the President's "full control" of the executive branch is the fact that millions of people work in it. *The Executive Branch*, THE WHITE HOUSE, https://perma.cc/3MCV-B75H. One could make them all formally removable at will, and that still would not give the President full control over their actions. *See, e.g.*, Aziz Z. Huq, *Removal as a Political Question*, 65 STAN. L. REV. 1, 39 (2013); Lawson, *Command and Control*, *supra* note 63, at 454 ("There is a fatal flaw in all of the arguments that try to derive a presidential removal power as a structural inference from the need for presidential control of all executive power: a removal power does not actually give the President control of all executive power.").

110 *Cf.* Lawson, *Command and Control*, *supra* note 63, at 454. Professor Gary Lawson provided an interesting and elegant textual argument for presidential control in a recent article, but his argument still seems to find that provisions limiting presidential control over executive officers would involve Congress interfering with the President's control,

can fully control the work of another.[111] Yet, the Constitution clearly envisions that the President will have to rely on subordinates to exercise executive power,[112] and Congress clearly has a role in creating the executive branch apparatus that the President sits atop. Congress has the power to create "by Law" the officer positions that will populate the executive branch, as well as the departments in which they will sit.[113] Through these powers, Congress clearly has authority to affect—or interfere with or encroach upon—the President's control of exercises of executive power.[114] This is in addition to all the other ways in which Congress controls exercises of executive power by imposing statutory requirements on the qualifications an officer must have, how long their term of office should be, and what subject-matter areas they

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which would render them unconstitutional. *See id.* at 450 ("[V]esting authority in people who can act free of presidential control does not 'carry[ ] into Execution' the President's vested power; it hinders or prevents the actor with constitutionally vested power from carrying it into execution." (alteration in original) (emphasis omitted)). But finding that Congress hindered the President's control cannot be sufficient to render something unconstitutional if Congress was acting to further its own enumerated powers. In other words, if Congress is exercising its own enumerated power, it is not clear why it cannot hinder that of the President. Lawson's article seemed to assume that any structuring of offices would be in service of the President's powers, *see id.* at 450, but it could be necessary and proper to carrying into execution, for example, Congress's powers to create offices "by Law," U.S. CONST. art. II, § 2, cl. 2, and to "regulate Commerce . . . among the several States," *id.* art. I, § 8, cl. 3, which I take to be the bases for for-cause limitations like those implemented on financial regulators, *see* Seila L. v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2238 (2020) (Kagan, J., dissenting).

111 *See, e.g.*, Posner & Vermeule, *supra* note 26, at 1744 ("[T]he leader of an institution cannot possibly perform all of its tasks directly. Instead, the leader or principal delegates broad authority to agents."). This is why principal-agent problems exist. *See, e.g.*, Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 308 (1976) (noting that principal-agent problems arise because the principal must delegate "some decision making authority to the agent").

112 *See Seila L.*, 140 S. Ct. at 2197 ("[B]ecause it would be 'impossib[le]' for 'one man' to 'perform all the great business of the State,' the Constitution assumes that lesser executive officers will 'assist the supreme Magistrate in discharging the duties of his trust.'" (citation omitted)); Peter L. Strauss, *A Softer Formalism*, 124 HARV. L. REV. F. 55, 59–60 (2011) [hereinafter Strauss, *Softer Formalism*].

113 U.S. CONST. art. II, § 2, cl. 2; *see also* Emerson, *supra* note 24, at 93 ("The term 'Department' appears in the Opinion Clause and Appointments Clause of Article II as well as in the Necessary and Proper Clause of Article I. In each of these contexts, 'Department' means a durable organization of offices with a limited jurisdiction."); *id.* at 111 ("[T]he Constitution's departmental text contemplates an institutionally differentiated executive power that is grounded in statutory authority."); Geoffrey P. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41, 61.

114 *See, e.g.*, Lawson, *Command and Control*, *supra* note 63, at 449–50 (noting that "Congress can designate permissible, and therefore impermissible, recipients of presidential subdelegation[s]" of executive power).

can oversee.[115] Indeed, the entire field of administrative law impacts the President's control of exercises of executive power by requiring certain procedures before executive officials can exercise power.[116]

In short, the question of statutory for-cause removal restrictions cannot be resolved by suggesting that such limitations interfere with or infringe upon the President's power to control the executive branch because numerous uncontroversial exercises of legislative power do that. Some amount of interference with the President's control cannot be sufficient to render a statute unconstitutional.

Perhaps recognizing this, Justice Scalia did not actually take his point to its logical conclusion. Justice Scalia ended his opinion by suggesting that, while for-cause removal restrictions on *principal* officers are unconstitutional, they are permitted for *inferior* officers.[117] But this is incompatible with his premises—if for-cause removal restrictions interfere with the President's control of principal officers, they must also interfere with the President's control of inferior officers.[118] And if any interference is unconstitutional, then so too is for-cause removal protection for inferior officers.[119] Similarly, Justice Scalia claimed that Congress could always impeach a President if it disagreed with how the President executed the laws.[120] But, surely that would also interfere with the President's full control of the executive power. Yet Justice Scalia never explained why Congress can interfere with the executive power

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115 *See, e.g.*, Manning, *supra* note 1, at 1967–68 (listing familiar statutory restrictions on the exercise of executive power). And, as Professors Aaron Neilson and Christopher Walker have pointed out, Congress could do much more to impact the President's removal power using its own "exclusive" powers, such as by raising the number of votes required to confirm executive branch nominees, which would impact the President's desire to remove an official because it will be harder to confirm a replacement. *See* Nielson & Walker, *supra* note 25, at 55–56.

116 *See* Manning, *supra* note 1, at 196; Coan & Bullard, *supra* note 65, at 789.

117 *See Morrison*, 487 U.S. at 724 n.4 (Scalia, J., dissenting):

> [T]he President must have control over all exercises of the executive power. That requires that he have plenary power to remove principal officers . . . , but it does not require that he have plenary power to remove inferior officers. Since the latter are . . . subordinate to, *i.e.*, subject to the supervision of, principal officers.

118 *See id.* at 706 (noting that the President having "some control" rather than "exclusive control" is insufficient to save the statute in question).

119 The same would go for civil servants as well. *See, e.g.*, Lawson, *Command and Control*, *supra* note 63, at 453.

120 *See Morrison*, 487 U.S. at 711 (discussing, as a permissible check against the President, Congress's ability to impeach a President who fails to enforce the laws faithfully).

using its power of impeachment but not through its power to create and structure offices and departments.[121]

In short, Justice Scalia never gave any coherent method to determine which infringements are permissible and which are not. This is because formalism has no method to differentiate between permissible and impermissible interference. This might not be a problem if most cases involved one branch trying to exercise the exclusive power of another branch, but almost no difficult cases involve such disputes. Most difficult cases involve infringements. And, in such cases, formalism has not developed a coherent method to resolve such disputes.[122]

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121 *Cf.* Nielson & Walker, *supra* note 25, at 27 (noting the impeachment power forms part of Congress's "anti-removal power").

122 John Manning has acknowledged some of these problems and provided an alternative mode of formalism to avoid it. Under Manning's proposal, we would resolve separation of powers disputes by asking which branch has been given a more specific power accompanied by a "detailed" procedure to exercise such power, which would render such power "exclusive." *See* Manning, *supra* note 1, at 2006–07. Although an improvement on prevailing formalist accounts, Manning's method still fails to provide a coherent method to resolve difficult separation of powers cases for at least three reasons. First, it is often impossible to say which branch has a more "specific power" in an area. For example, in *Zivotofsky*, the President's relevant power was over recognition, and Congress's was over regulating passports. *See* 576 U.S. at 28, 31. It is not clear that one is more "specific" than the other. Moreover, although Manning seems to defend the President's removal power as exclusive, as Bowie and Renan point out, the most specific clause relating to removal is, in fact, the Impeachment Clause, yet "no modern scholar . . . argues that impeachment should provide the sole mechanism for firing civil officers." Bowie & Renan, *supra* note 1, at 2090. Second, Manning limits exclusive powers to where the text grants a power that is specific and includes "a detailed procedure for carrying [the specific] power into effect." Manning, *supra* note 1, at 2006. But very few textual provisions include such procedures. Third, and perhaps most importantly, Manning's method is fundamentally formalist and thus provides no way to differentiate permissible infringement from impermissible infringement. Even if we conclude that recognition is a more specific power than the power to regulate passports, what do we do when Congress regulates passports in a way that interferes with, but does not exercise, the power of recognition? Who should prevail in disputes where both branches have power to act but come into conflict? On this question, Manning's method does not provide a clear answer. *See id.* at 1961 n.114 (declining to provide a "burden of persuasion" for how to evaluate conflicts where both branches have power). Professor Ilan Wurman, meanwhile, has recently argued for an alternative formalist approach whereby "exclusive functions" must be exercised by the branch that possesses them, but "nonexclusive functions" can be exercised by different branches. *See* Wurman, *supra* note 1, at 742–43. This appears to be an important step in the right direction of recognizing how much overlapping power there is between the branches, but the approach does not explain what to do when both branches have nonexclusive (or exclusive) power to act and come into conflict.

A recent book by Professor Michael McConnell offers a novel method to resolve disputes that could, in principle, be applied to instances where both branches have power. Under McConnell's approach, the President would prevail when exercising a formerly royal "prerogative" power given to the President, but Congress would prevail if the President was exercising power based on the Vesting Clause, which McConnell has concluded

B. Functionalism

The prevailing alternative to formalism is functionalism. Instead of seeking to resolve separation of powers disputes by asking which branch has exclusive power over the matter, functionalism calls on decision-makers to resolve separation of powers conflicts by categorically defending each branch's "core" functions, and, in cases that do not involve such "core" functions, resolving disputes by determining the effect of any given dispute on the general balance of powers between the branches.[123] Although

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is "defeasible." *See* MCCONNELL, *supra* note 66, at 277. While McConnell's approach is quite elegant, it is not adequately grounded in the originalist method that underlies his approach and modern formalism in general. *See id.* at 13. For example, McConnell has not provided adequate historical grounding for the suggestion that the Constitution was either understood or intended to embody a rule that whenever a formerly "prerogative" power of the King was vested in the President, it could not be "abridged" by Congress. *See id.* at 277. McConnell has not explained why the original meaning should be understood to require that the President automatically prevails whenever exercising a formerly royal prerogative, even if Congress is exercising its own formerly royal prerogative power—like that of creating and defining offices, *see id.* at 68 & fig.4.1—in a conflicting way. If "prerogative" means, as McConnell has suggested, a power that cannot be abridged, *see id.* at 26–27, 277, it is not clear why we should assume that the President should automatically prevail over Congress when both branches are exercising such "prerogative" powers. At the least, McConnell has not provided adequate historical materials to establish that this was the original understanding of the Constitution. McConnell's argument that exercises of power under the Vesting Clause are defeasible is also not adequately grounded in originalist sources. McConnell's claim is based largely in a reading of Alexander Hamilton's essay, *Pacificus No. 1*, written during the Neutrality Proclamation Controversy, which opined on the relationship of the President's power to "determine the condition of the nation" regarding neutrality with Congress's power to declare war. *See* MCCONNELL, *supra* note 66, at 258–62 (quoting ALEXANDER HAMILTON, PACIFICUS NO. 1 (1793), *reprinted in* 15 THE PAPERS OF ALEXANDER HAMILTON 33, 41 (Harold Syrett et al., 1968)). McConnell's reading is not the most obvious way to read Hamilton's remarks on the topic, *see id.* at 260 (suggesting that Hamilton's reference to such powers as "concurrent," rather than defeasible, was "unfortunate"). But even if it were, Hamilton expressed no view on whether, in general, Congress's power should always override any exercise of power deriving from the Vesting Clause, rather than simply concluding that Congress could still declare war even if the President had proclaimed neutrality. *See, e.g.*, William R. Casto, *Pacificus & Helvidius Reconsidered*, 28 N. KY. L. REV. 612, 638 (2001) ("Because Hamilton's purpose in writing *Pacificus* was specifically to defend the Neutrality Proclamation, he did not elaborate upon conflicts between the Congress and the President over matters other than the Proclamation."). More importantly, even if McConnell's reading were the only way to read Hamilton's essay, it would take substantially more than a view expressed in a politically charged essay to establish this claim on originalist grounds. For an extended response to McConnell's intriguing framework, see Roisman, *Limits of Formalism*, *supra* note 65.

[123] *See* Strauss, *Formal and Functional Approaches*, *supra* note 1, at 522 ("[C]ourts should view separation of powers cases in terms of the impact of challenged arrangements on the balance of powers among the three named heads of American government."); Magill, *Beyond Powers and Branches*, *supra* note 1, at 609 ("Under [functionalism], the key ques-

functionalism is better able to conceptually accommodate the idea that both branches might have power over a given subject matter, its method of resolving disputes has been the subject of compelling scholarly critique on several grounds.

Functionalism is categorical when "core" powers are at issue—operating essentially as formalists in such cases.[124] But we lack any reliable means to differentiate "core" from "peripheral" exercises of power.[125] Moreover, even if we could make such a distinction, it is not clear why any infringement on "core" powers by another branch ought to be unconstitutional, nor do we know what to do when both branches are exercising "core" powers and come into conflict.

Outside of such "core" areas, functionalism tries to resolve disputes by evaluating their effect on the general balance of power between the branches. But, as Professor Elizabeth Magill and others have convincingly shown, we have no way of (1) adding up the cumulative power of the branches; (2) assessing the effect of any one dispute on such amounts of power if they could be calculated; or (3) determining any baseline to compare the level of equipoise between the branches even if such a level could be measured.[126]

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tion is whether an institutional arrangement upsets the overall balance among [the political] branches by permitting one of them to compromise the 'core' function of another."); Manning, *supra* note 1, at 1951–52 ("[F]unctionalists view the Constitution as emphasizing the balance, and not the separation, of powers."); Merrill, *supra* note 1, at 232 ("[A]ll functionalists believe that the primary objective of judicial review in separation of powers cases is to insure that each branch retains 'enough' governmental power to permit it to operate as an effective check on the other branches of government."); *see also Bowsher*, 478 U.S. at 776 (White, J., dissenting) ("[T]he role of this Court should be limited to determining whether the Act so alters the balance of authority among the branches of government as to pose a genuine threat to the basic division between the lawmaking power and the power to execute the law.").

124 *See, e.g.*, Merrill, *supra* note 1, at 232–33 (noting that "[m]ost functionalists . . . embrace a 'core functions' theory [that] posits the existence of a nucleus of activities that uniquely belongs to each of the three branches" and courts "would step in to prevent any tampering with the core").

125 *See, e.g.*, Bowie & Renan, *supra* note 1, at 2086–89 (arguing that the core/periphery distinction is inoperable); Magill, *Beyond Powers and Branches*, supra note 1, at 612 ("[T]here is no well-accepted doctrine or theory that offers a way to identify the differences among the governmental functions in contested cases."); Merrill, *supra* note 1, at 234–35 (making an analogous critique).

126 *See* Magill, *The Real Separation*, *supra* note 1, at 1145 ("Given that the balance among the departments is unlikely to be upset at an identifiable moment in time as the result of a single arrangement, the functionalist approach calls for a prediction that cannot accurately be made."); *id.* at 1196:

> Not only would we have to measure the quantum of power held by each institution and compare it to the others, we would also have to identify a baseline of

For example, if we sought to use functionalism to resolve the dispute at issue in *Zivotofsky*, it is not clear how we could do so. Even if we assume recognition is not a "core" power, how can we determine the effect on the general balance of powers between the branches of a statutory provision requiring the executive to, upon request, denote U.S. citizens' places of birth on passports as "Jerusalem, Israel," rather than "Jerusalem"? This would require (1) totaling up how much power all of Congress has and how much power the entire office of the Presidency has; (2) determining how resolving this particular dispute would affect either branch's power and the level of equipoise between them; and (3) determining which level of equipoise would be closer to a desirable balance of powers between the branches. These inquiries require impossible empirical calculations and abstract away from the dispute actually involved—an exercise of Congress's power to regulate passports that interfered with the President's preferred recognition policy.

The difficulty in applying the functionalist inquiry might explain why even some cases typically conceived of as functionalist do not actually engage in it. Take *Morrison v. Olson*, a case often used as an exemplar of functionalist reasoning.[127] In *Morrison*, the majority assessed whether statutory for-cause removal protection was permitted for the independent counsel.[128] In doing so, at points, it described the question in formalist terms suggesting *any* interference with the President's duties would be unconstitutional, stating that "[t]he analysis contained in our removal cases is designed . . . to ensure that Congress does not *interfere* with the President's exercise of the 'executive power.'"[129] But, at other

> appropriate power allocation among the spheres of government, and we would use that baseline to assess whether one sphere of government had too much power. How would we identify our baseline of the appropriate allocation of power among governmental institutions? Should that baseline be static or fluid?

See also Eric A. Posner, *Balance-of-Powers Arguments, the Structural Constitution, and the Problem of Executive "Underenforcement"*, 164 U. PA. L. REV. 1677, 1692 (2016) (asserting that "the skepticism underlying Magill's argument is correct: the balance of power is both normatively suspect and almost impossible to apply in a systematic matter").

127 *See, e.g.*, Manning, *supra* note 1, at 1952 & n.55; Wurman, *supra* note 1, at 737, 738 & n.11, 739 & n.13.

128 *See Morrison*, 487 U.S. at 685.

129 *Id.* at 689–90 (emphasis added); *see also id.* at 691 ("[T]he real question is whether the removal restrictions . . . *impede* the President's ability to perform his constitutional duty." (emphasis added)). Justice Elena Kagan, too, has described the issue in such formalist terms. *See Seila L.*, 140 S. Ct. at 2235 (Kagan, J., concurring in part and dissenting in part) (stating that the "governing rule" is "removal restrictions are permissible so long

times, it suggested some interference is permitted so long as it is not "undue" or "impermissible."[130] But the Court never gave any explanation for how to determine whether interference is "due" or "undue," or "permissible" or "impermissible." At no point did the Court engage in an effort to tally up the powers of the branches and ensure they were at some desirable level of equipoise. The Court did allude, at one point, to the primary reason why Congress chose to impose for-cause removal restrictions for the independent counsel—i.e., to protect the officer's independence in investigations of their superiors.[131] But it is not clear what this has to do with the general balance of powers between the branches,[132] nor was there any clear method explaining why such reasons mattered to figure out when for-cause protection—and the interference it imposes on the President's power—is permissible and when it is not.[133]

At bottom, *Morrison*, like the broader theoretical accounts of functionalism, thus fails to provide any useful method to resolve the core question at issue in the mine-run of difficult separation of powers cases: how to determine when infringements are permitted and when they are not.

C. *Youngstown* Category Three

Justice Jackson's *Youngstown* framework fares no better. Although Justice Jackson's opinion is typically conceived of as pragmatic,[134] it is actually formalist when the branches come into conflict in Category Three. It thus provides little guidance as to what to do when both branches have power to act but come into conflict.

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as they *do not impede* the President's performance of his own constitutionally assigned duties" (emphasis added)).

[130] *See Morrison*, 487 U.S. at 693–95.

[131] *See id.* at 693.

[132] *See infra* Part III.B (explaining how branch interests have no necessary relationship with branch powers).

[133] One way to make sense of this discussion of the reasons behind the for-cause protection is that what was driving the Court in *Morrison* was a rudimentary, implicit form of interest balancing. *See infra* note 208 and accompanying text. In this way, interest balancing might better explain cases like *Morrison* than standard accounts of functionalism. I thank Professor Daphna Renan for making this point clearer to me.

[134] *See, e.g.*, Mistretta v. United States, 488 U.S. 361, 381 (1989) (characterizing Justice Jackson's opinion as a "pragmatic, flexible view of differentiated governmental power"); Patricia L. Bellia, *Executive Power in* Youngstown*'s Shadow*, 19 CONST. COMMENT. 87, 106 (2002) (same).

The facts of *Youngstown* are well known. Claiming constitutional authority, President Harry Truman attempted to seize certain steel mills to avert a strike that he believed would jeopardize the war effort in Korea.[135] In a famous concurrence, Justice Jackson laid out a three-part framework to assess questions of presidential power. In the first category, the President acts with Congress's approval and presidential power is at its "maximum."[136] In Category Two, the President acts in the absence of congressional approval or denial, putting the President in a "zone of twilight."[137] Only in the third category, the "lowest ebb,"[138] do the branches come into direct conflict.

In Category Three, where the President's conduct is "incompatible with the expressed or implied will of Congress," Justice Jackson stated that "[c]ourts can sustain *exclusive* presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once *so conclusive and preclusive* must be scrutinized with caution."[139] In short, Category Three's method of resolving separation of powers conflicts is to determine if the President's power over the subject matter is "exclusive," "preclusive," and "conclusive," thereby "disabling the Congress from acting upon the subject."[140]

But, as discussed above, almost no difficult cases involve instances where one branch is trying to exercise or deny the exercise of the other's exclusive power. Yet, Justice Jackson did not explain what to do when both branches use their own constitutional power to interfere with *each other's* exercises of power.[141]

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135 *See Youngstown*, 343 U.S. at 582–83.

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

137 *Id.* at 637.

138 *Id.*

139 *Id.* at 637–38 (emphasis added).

140 *Youngstown*, 343 U.S. at 637–38.

141 Justice Jackson also never explained how to determine whether a power is "exclusive" to the President or not. He used an arithmetic metaphor suggesting we might determine exclusive power by taking the President's "own constitutional powers minus any constitutional powers of Congress over the matter," *id.* at 637, leaving the President with exclusive control over "any remainder of executive power after subtraction," *id.* at 640. But Justice Jackson never explained how such arithmetic is supposed to work. *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, 726 (2008) ("Justice Jackson . . . did not provide a neat doctrinal test for resolving the conflicts over authority that he clearly anticipated. Instead, he employed a subtraction metaphor . . . . This image, which suggests a kind of mathematical equation for determining constitutional powers, seems to us unhelpful."); LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 94 n.** (2d ed. 1996) ("When, in case of conflict,

One could read Justice Jackson's framework as implying that Congress should automatically prevail whenever both branches have power—in such instances, we might say that the President's power is therefore not exclusive. But Justice Jackson undermined this claim later in his opinion. Justice Jackson stated that Article II's Commander in Chief Clause gives the President "exclusive function to command the instruments of national force."[142] But Justice Jackson then stated that Congress's power to "make rules for the 'Government and Regulation of land and naval Forces,' . . . may *to some unknown extent* impinge upon even [the President's] command functions."[143] This passage makes little sense on his framework's terms. If the President's power is exclusive, then the President ought to prevail. If, on the other hand, Congress has power over the area, this would render the President's power non-exclusive, and so Congress ought to prevail. But Justice Jackson adopted neither approach, suggesting that, even where the President's power is exclusive, it can be "impinged upon" by Congress's power, but only "to some unknown extent."[144] Jackson thus failed to explain which "impingements"—or we might call them "infringements"—are permitted, and which are not. Yet, as discussed above, this is the key question in most separation of powers disputes.

Justice Jackson's framework thus proves conceptually unhelpful in resolving separation of powers infringement cases. Beyond this, it is problematic in practice. Because Justice Jackson's framework provides that the *only* way for the President to prevail is if their power is deemed exclusive and of sufficiently wide scope to cover a matter at issue, this creates an incentive for executive branch actors—and sympathetic courts—to find that a given power is exclusive and of sufficient scope to encompass the dispute at issue. And this is precisely what has happened. The President continues to find exclusive powers, and their scope continues to grow.[145] Moreover, because Justice Jackson's framework is formalist, once the President wins—once an "exclusive power" is

one 'subtracts' the constitutional power of Congress from that of the President . . . , how does one perform the subtraction, how much Presidential power remains, and what actions does it justify?").

142 *Youngstown*, 343 U.S. at 645 (Jackson, J., concurring).

143 *Id.* at 644 (emphasis added).

144 *Id.*

145 *See, e.g.*, Galbraith, *supra* note 8, at 84 n.6, 91–109 (describing the continued expansion of OLC's interpretation of the President's "exclusive" "conduct of diplomacy" power).

identified—the President wins forever. Congress is "disabl[ed] . . . from acting upon the subject."[146]

We see the problems inherent in Justice Jackson's framework in *Zivotofsky*, which applied the Category Three framework to conclude that a statutory requirement that passports refer to "Jerusalem, Israel" as a place of birth of U.S. citizens at their request violated the President's power over recognition.[147] Because the only way to rule in the President's favor under the Category Three framework was to conclude the President had exclusive power over recognition and that such power was of sufficient scope to govern the passport regulation, this is precisely what the Court held.[148] This was notwithstanding the fact that there was little support for the finding that the power over recognition is exclusive.[149]

There was even less justification for concluding that the exclusive recognition power encompasses place-of-birth designations on passports, which the Court, at first, acknowledged would not constitute a "formal act of recognition."[150]The Court was forced to later backtrack on this conclusion by stating that "[t]o allow Congress to control the President's communication [in a passport] in the context of a formal recognition determination is to allow Congress to exercise that exclusive power itself."[151] Because it had no way of assessing how much infringement is permitted and how much is not, the Court had to conclude that the passport regulation was an attempt to exercise the President's exclusive power itself, even though the Court had already acknowledged that it was not.[152]

The reality was that, while Congress's act did not constitute a formal act of recognition, it surely interfered with the President's recognition power by requiring executive branch agents to contradict the President's recognition policy.[153] Justice Jackson's

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146 *Youngstown*, 343 U.S. at 637–38 (Jackson, J., concurring).

147 *See Zivotofsky*, 576 U.S. at 1, 7, 10.

148 *See id.* at 21.

149 *See* Jack Goldsmith, Zivotofsky II *as Precedent in the Executive* Branch, 129 HARV. L. REV. 112, 121–22 (2015) (criticizing the claim that the President's power over recognition is exclusive).

150 *Zivotofsky*, 576 U.S. at 30.

151 *Id.* at 32.

152 *See id.* at 30 (acknowledging that the required passport designation was not a formal act of recognition).

153 *See id.* at 8 (discussing the diplomatic fallout); *id.* at 29 (noting that the act meant the President could not "maintain [his recognition] determination in his and his agent's statements").

framework gives no useful guidance for resolving questions of how much interference is permitted and how much is not, which led the Court to avoid this issue by concluding that, in fact, the President's power is exclusive and of sufficiently wide scope to cover the dispute at issue. This was the only way the President could prevail. And now that the President has prevailed in this instance, under Justice Jackson's framework, the President has this broad power forever.

In short, Justice Jackson's Category Three framework relies on a finding of exclusive power to resolve disputes that fails to provide guidance in the mine-run of separation of powers disputes, which involve infringement. In such cases, Justice Jackson's framework, like formalism and functionalism, fails to provide a coherent or useable method to resolve when infringement is permitted and when it is not.

D. Categorical Thayerism

In a recent and important article, Professors Nikolas Bowie and Daphna Renan provided an alternative method to resolve separation of powers disputes: categorically defer to whatever arrangements are in statutes.[154] Bowie and Renan's proposal's main purpose is to push back against judicial supremacy in the separation of powers—the "juristocratic separation of powers,"[155] as they call it—by deferring to the judgment of the political branches regarding which separation of powers schemes ought to be constitutional.[156] Bowie and Renan have concluded that Congress and the President, "working through the interbranch legislative process[,] . . . [should] determine whether any particular [institutional] arrangement is compatible with the Constitution's separation of powers."[157] While their proposed rule would be an effective

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[154] *See e.g.*, Bowie & Renan, *supra* note 1, at 2115–16. In another recent and insightful article, Professors Joshua Macey and Brian Richardson also proposed categorically deferring to accommodations in statutes, but their focus was on what might count as a violation of the "separation of powers principle," leaving aside what to do when both branches have power to act and come into conflict. *See* Macey & Richardson, *supra* note 1, at 99–100.

[155] Bowie & Renan, *supra* note 1, at 2108.

[156] *See id.* at 2108–09, 2116 ("When the Supreme Court confronts a statute that allegedly violates the separation of powers, . . . the Court should accept as authoritative the judgment of the political branches about what the Necessary and Proper Clause tolerates."); *see also infra* note 160.

[157] Bowie & Renan, *supra* note 1, at 2116; *see also id.* at 2103 (arguing for deference to "the considered judgment of the representative branches on how to structure the separation of powers"); *id.* at 2116 ("[I]t is the representative branches, working through the interbranch and supermajority legislative process, that determine whether any particular

check against Bowie and Renan's main target of judicial supremacy,[158] this method does not provide a means for the branches themselves to determine what separation of powers arrangements ought to be constitutional.[159] Without a method to decide which infringements are permitted and which are not, separation of powers disputes would be resolved by the contingencies of power and politics, rather than any sort of constitutional analysis.[160]

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arrangement is compatible with the Constitution's separation of powers . . . . [T]he Court should accept as authoritative the judgment of the political branches about what the Necessary and Proper Clause tolerates.").

158 *See, e.g.*, *id.* at 2108–10.

159 *Cf.* Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1079–80 (1980) (noting that Professor John Hart Ely's representation reinforcement theory of judicial review fails to give actors in the political branches guidance on how to interpret the Constitution).

160 Some might be comfortable with eliminating a role for the Constitution in the separation of powers entirely and leaving resolution of any disputes purely to politics. *See, e.g.*, JOSH CHAFETZ, CONGRESS'S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS 17–18 (2017). But Bowie and Renan have suggested a continued role for constitutional judgment in resolving separation of powers questions—just the judgment of the political branches, rather than of courts. *See, e.g.*, Bowie & Renan, *supra* note 1, at 2030:

> Our account of the separation of powers . . . argues that Congress and the President, working through the interbranch legislative process, should decide whether any particular institutional arrangement is compatible with the Constitution's separation of powers. That is, it is for the representative branches to decide whether a bill validly exercises the Necessary and Proper Clause to carry into execution the powers and interrelationships of Congress, the President, and the executive branch.

See also, e.g., *id.* at 2030 ("When the Supreme Court confronts a statute that allegedly violates the separation of powers, the normative values underlying the republican separation of powers suggest that the Court should defer to the judgment of the representative branches about what the Necessary and Proper Clause tolerates."); *id.* at 2115–16 (quoting U.S. CONST. art. 1, § 8, cl. 18):

> The separation of powers should continue to provide a characterizing principle that guides Congress and the President as they develop legislation. But so long as Congress and the President are exercising their authority to make laws that they deem appropriate for "carrying into Execution" the powers of the federal government . . . their handiwork simply does not implicate a judicially enforceable separation-of-powers principle. Rather, it is the representative branches, working through the interbranch and supermajority legislative process, that determine whether any particular arrangement is compatible with the Constitution's separation of powers—that is, whether it is a valid use of the Necessary and Proper Clause to implement the powers and interrelationships of Congress, the presidency, and the executive branch.

See also id. at 2108–10, 2095, 2115–16, 2122.

To be sure, Bowie and Renan's article sometimes emphasizes the use of nontechnically legal considerations in determining constitutionality. *See, e.g.*, *id.* at 2029, 2093. But I do not read such references as suggesting that there is no role at all for constitutional analysis in resolving separation of powers questions. If that were their claim, then it would be

Indeed, even if we had a useful method to resolve most difficult separation of powers disputes—like the interest balancing approach identified in Part III—it is not clear that categorical deference to statutes would track it. This is because Congress and the President agree to enact provisions in statutes for reasons other than constitutional judgment all the time.[161] The branches often act for reasons of policy or politics, rather than constitutionality, and sometimes they are entirely unaware that an arrangement raises a constitutional issue at all.[162] The fact that a statute was passed is thus insufficient to conclude that the political branches agreed on its constitutionality. Indeed, Presidents frequently make this explicit in so-called signing statements, when they disclaim any agreement on constitutionality by stating that provisions they have just signed into law are, in their judgment,

odd to phrase their position as deference to the political branches' judgment about what is constitutional, as opposed to simply arguing there is no content to the constitutional law of separation of powers, and, therefore, no constitutional question to be answered. If, however, that is their claim, I do not agree with it. I do think the Constitution has something to say about which separation of powers arrangements are and are not permitted. For example, if Congress passed a law permitting a President to serve a third term, this would conflict with the Constitution's two-term limit. U.S. CONST. amend. XXII. I think it clear that legal analysis is relevant to deciding whether such an arrangement is constitutional. This is true even if the best method for figuring out questions relating to separation of powers is far from obvious, even if there is no "essential or immutable separation of powers," Bowie & Renan, *supra* note 1 at 2029, and even if the language of what the Constitution permits ought to include more explicit discussions of "political morality" as part of the "vocabulary of modern constitutional discourse," *id.* at 2093. Put another way, if the claim is that we are better off ignoring the Constitution entirely than trying to interpret it, then that would require a different justification than the argument against judicial supremacy that I take to be at the heart of Bowie and Renan's important article. For some preliminary thoughts on arguments opposing constitutionalism in general, see Shalev Gad Roisman, *Betting it All: A Response to Doerfler and Moyn's Proposal to Abandon Constitutionalism*, BALKINIZATION (Sept. 13, 2022), https://perma.cc/UA93-G9GX. I do not have space in this Article to fully defend the use of legal analysis to resolve separation of powers disputes, but for a contrary view, see CHAFETZ, *supra* note 160, at 15–26 (providing a thoughtful account opposing the use of legal analysis to resolve such disputes). At the least, given that legal analysis is routinely used to resolve separation of powers disputes, the claim made below is that interest balancing is the best of the prevailing alternatives for how to conduct such legal analysis. *See infra* Part III.

[161] *See* Shalev Roisman, *Constitutional Acquiescence*, 84 GEO. WASH. L. REV. 668, 684–97 (2016) [hereinafter Roisman, *Constitutional Acquiescence*] (noting that branches often act because of policy agreement, politics, or coercion rather than constitutional analysis). To be clear, Bowie and Renan disclaim any reliance on standard "interbranch acquiescence" arguments, *see* Bowie & Renan, *supra* note 1, at 2029, but their reasons for deferring to legislation draw on a deference to the political branches' constitutional judgment that also forms the predicate of most justifications for acquiescence, *see* Roisman, *supra*, at 676–80.

[162] *See* Roisman, *Constitutional Acquiescence*, *supra* note 161, at 684–97.

unconstitutional.[163] This is an unsurprising feature of the modern regime of legislation, where Congress passes very few bills and bundles together the ones it does pass into massive, omnibus, must-pass legislation.[164] In such a regime, the President is unlikely to veto an otherwise must-pass piece of legislation simply because they believe one or another statutory provision unduly infringes on their constitutional powers.[165]

In short, Bowie and Renan's proposal would be an effective way to limit judicial power over separation of powers disputes by deferring to the judgment of the political branches. But it does not provide a method for the branches *themselves* to use to determine who ought to prevail in such disputes, and it seems to assume that statutes are the result of judgment by the branches regarding constitutionality, when they often are not. Their proposal would thus be an effective way to prevent judicial supremacy, but, like the other competing modes, it does not provide a method to resolve the core question in most separation of powers conflicts: How much infringement ought to be constitutionally permitted or prohibited?

III. INTEREST BALANCING IN THE SEPARATION OF POWERS

Almost all difficult separation of powers conflicts involve instances where both branches have power to act, but their exercises of power come into conflict. These typically involve cases of

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163 *See, e.g.*, TODD GARVEY, CONG. RSCH. SERV., RL33667, PRESIDENTIAL SIGNING STATEMENTS: CONSTITUTIONAL AND INSTITUTIONAL IMPLICATIONS 14 (2012).

164 See JAMES V. SATURNO & JESSICA TOLLESTRUP, CONG. RSCH. SERV., RL32473, OMNIBUS APPROPRIATIONS ACTS: OVERVIEW OF RECENT PRACTICES 8–9 (2016).

165 *See, e.g.*, Galbraith, *supra* note 8, at 146 n.87; Miller, *supra* note 113, at 84 ("The needs of government often compel Presidents to accept provisions in legislation that they consider undesirable or even unconstitutional."); *Nixon*, 433 U.S. at 491 (Blackmun, J., concurring in part). Bowie and Renan have suggested that the President should only be able to disagree with separation of powers arrangements through the veto power, *see* Bowie & Renan, *supra* note 1, at 2107, but it is not obvious why this should be the case on their account. If it is because the veto is mentioned in the Constitution's text, then this would assume a fixed role of separation of powers entitlements in contrast to Bowie and Renan's broader commitments to a fluid, dynamic separation of powers. *See id.* at 2030. Bowie and Renan have attributed the President's ability to ignore statutory provisions following signing statements to the Court's having made doing so "more sociologically palatable and politically costless." *Id.* at 2102. But such sociological and political legitimacy ought to matter on their account, which emphasizes the validity of such non-hyper-legal considerations relating to statecraft as part of constructing the separation of powers. *See, e.g.*, *id.* at 2107–08. In other words, on their account, the validity of this practice should depend, at least in part, on whether Congress and the President have accepted it. And, for better or worse, such signing statements seem to be an ordinary feature of current political practice.

separation of powers infringement. As explained in Part II, none of the conventional methods to resolve separation of powers disputes provide a coherent or usable mode to resolve such cases. This Part provides one: interest balancing.

Although interest balancing is an entirely commonplace mode of constitutional analysis, it has yet to take hold in the separation of powers. Once we see that most separation of powers disputes involve instances of separation of powers infringement, interest balancing's potential utility comes into view. After all, interest balancing is the standard method of resolving constitutional infringement cases in the other half of constitutional law—individual rights. In basic form, interest balancing in individual rights cases entails a two-step inquiry:

> The first stage . . . requires the claimant to establish that his or her right has been infringed by a governmental action. In the second stage, the government must show that the infringement is justified, i.e., that it has pursued a legitimate end and has properly balanced the right and the governmental interest.[166]

Interest balancing—the notion that the government can infringe on rights if, and only if, doing so is justified by a sufficiently strong interest—is a common feature of modern rights jurisprudence.[167] It is perhaps most familiar in the tiers-of-scrutiny framework in fundamental rights and equal protection jurisprudence, which provides that stronger justifications are needed when more important rights are being infringed.[168]

In a parallel to separation of powers, rights interest balancing arose out of a recognition of the inadequacies of formalism. Under the system of Langdellian formalism, rights were treated

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166 COHEN-ELIYA & PORAT, *supra* note 46, at 16–17; *see also* Gardbaum, *supra* note 46, at 423–24 (laying out the two-step inquiry).

167 For foundational work on this topic, see generally T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987). *See also* Gardbaum, *supra* note 46, at 425–26 (noting various instances of balancing in rights jurisprudence); Vincent Luizzi, *Balancing of Interests in Courts*, 20 JURIMETRICS 373, 377–86 (1980).

168 Under strict scrutiny, infringements on fundamental or suspect-class equal protection rights can only prevail if they are "narrowly tailored" or "necessary" to promote a "compelling governmental interest." Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1273 (2007) [hereinafter Fallon, *Strict Judicial Scrutiny*] (quotation marks omitted). Under intermediate scrutiny, an infringement requires a substantial relationship to an important governmental interest to be upheld. *See id.* at 1298. And under rational basis review, infringements on nonfundamental rights, such as economic liberty rights, require the government to show only that the infringement is rationally related to a legitimate governmental interest. *See id.* at 1274, 1287.

as absolute and any infringement on a right was deemed unconstitutional.[169] Beginning in the late nineteenth and early twentieth centuries, critics of such formalism argued that it overprotected rights and led to a series of incoherent and unjustifiable results.[170] Interest balancing emerged as a noncategorical "interpretive tool for preventing absolutism . . . by requiring that rights be balanced against other important interests."[171]

Despite its longstanding prominence in the rights field,[172] scholars and courts have failed to assess the potential utility of interest balancing for separation of powers. This Part does precisely that. Unlike the prevailing competitors, interest balancing can easily conceptually accommodate the mine-run of difficult separation of powers cases and provide a tractable method to resolve them. Interest balancing accepts that both branches can have power to act, but that one branch's exercise might interfere with or infringe upon another's exercise of power. In such cases, it asks whether such infringement can be justified by a sufficiently strong interest on the part of the infringing branch.

This Part begins by introducing interest balancing in the separation of powers. To do so, it need not start from scratch. Although it has been underappreciated, interest balancing has a strong pedigree in the separation of powers. Part III.A introduces separation of powers interest balancing and establishes its pedigree. Part III.B explains how interest balancing is distinct from the prevailing competitors. Parts III.C and III.D assess interest balancing's strengths and weaknesses relative to the competing modes of separation of powers analysis. Part III.E applies interest balancing to two case studies to show how it would operate in practice.

A. *Nixon* Balancing and Its Separation of Powers Pedigree

The Court's plainest formulation of interest balancing was put forward in *Nixon v. Administrator of General Services*.[173] Former President Richard Nixon challenged The Presidential Recordings

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169 *See* COHEN-ELIYA & PORAT, *supra* note 46, at 32–34, 37.

170 *See id.* at 32–33, 43; Greene, *Rights as Trumps*, *supra* note 48, at 65 (noting that the categorical "view [of rights] encourages judges either to stretch doctrinal frameworks that do not fit or to ignore such frameworks whenever they feel inconvenient").

171 COHEN-ELIYA & PORAT, supra note 46, at 32–33; *see also id.* at 43.

172 To be clear, there continues to be enormous debate regarding how rights adjudication ought to work in the United States. *See, e.g.*, *supra* note 48 and accompanying text (discussing recent work by Jamal Greene).

173 *See Nixon*, 433 U.S. at 443.

and Materials Preservation Act,[174] which gave the Administrator of General Services complete possession of President Nixon's White House tapes and the power to promulgate regulations relating to public access of President Nixon's presidential records.[175] President Nixon alleged that, among other things, the Act was unconstitutional because giving "a subordinate officer of the Executive Branch the [power] to disclose Presidential materials" represented an "impermissible interference by the Legislative Branch into matters inherently the business solely of the Executive Branch."[176] This interference, President Nixon alleged, "without more, [violated] the principle of separation of powers."[177] President Nixon's claim was a familiar formalist claim: any interference with the President's power was unconstitutional.

The Court rejected this formalist framing, laying out an interest balancing framework:

> [I]n determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions. Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress.[178]

Under this test, then, the question is not whether the President has an exclusive power that cannot be interfered with. Instead, the Court must determine (1) if the President's power has been infringed upon and, if so, (2) whether that infringement can be *justified* by an "overriding need to promote objectives within" Congress's power.[179]

The Court applied this framework, first concluding that there was an intrusion on the President's power, but that it was not severe, because the executive branch retained full control of the materials and that disclosure to the public was qualified by applicable privileges.[180] The Court then assessed whether Congress had sufficiently strong interests within its authority to justify the

174 44 U.S.C. § 2111 note.
175 *See id.* at 433–35.
176 *Id.* at 440.
177 *Id.* at 441.
178 *Id.* at 443 (citation omitted).
179 *Nixon*, 433 U.S. at 443.
180 *See id.* at 443–44.

intrusion. It explained that Congress has power to regulate and require the disclosure of executive branch documents, a power that was "augmented" given "the important interests that the Act seeks to attain."[181] These interests included preserving information for historical and governmental purposes, aiding incumbent Presidents in executing policy through access to past presidential records, and aiding the legislative process by helping Congress better understand how to structure any necessary "remedial legislation" to deal with scandals like Watergate.[182] Given these interests, the Court concluded that the intrusion on the President's power was justified and, therefore, the Act was constitutional.[183]

This is a basic application of separation of powers balancing: there is an inquiry into (1) whether one branch's exercise of power has infringed on the other branch's exercise of power, and, if so, (2) whether such an intrusion is justified by a sufficiently strong interest within the other branch's power. The Court was thus able to acknowledge that there was interference with the President's power but still conclude that Congress could prevail. The framework thus accommodated the existence of a separation of powers infringement and provided a method to resolve how much infringement was permitted and how much is not.

This form of interest balancing was not a one-off. Interest balancing remains the standard method of resolving executive privilege disputes,[184] with the Court's recent blessing.[185] It has also been used, albeit sporadically, by the Supreme Court[186] and courts

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[181] *Id.* at 445–46.

[182] *Id.* at 453; *see id.* at 452–53.

[183] *See Nixon*, 443 U.S. at 444–45.

[184] *See, e.g.*, Owens, *supra* note 83, at 497 (explaining that evaluating "[a]ny congressional claim of entitlement to information the Executive claims is privileged" requires "a weighing of the branches' conflicting interests, which the Supreme Court has articulated as a two-part balancing test [in *Nixon*]").

[185] *See* Trump v. Mazars, 140 S. Ct. 2019, 2035–36 (2020) ("[C]ourts should carefully assess whether the asserted legislative purpose warrants the significant step of involving the President and his papers.").

[186] *See, e.g.*, Nixon v. Fitzgerald, 457 U.S. 731, 753–54 (1982) ("[O]ur cases also have established that a court, before exercising jurisdiction [over the President], must balance the constitutional weight of the interest to be served against the dangers of intrusion on the authority and functions of the Executive Branch."). The OLC has suggested that *Clinton v. Jones*, 520 U.S. 681 (1997), implicitly used such balancing as well, because it assessed the "rather minor disruption to the President's office from defending against such civil actions [and] the interests in the private litigant in avoiding delay in adjudication." A Sitting President's Amenability to Indictment and Criminal Prosecution, 24 Op. O.L.C. 222, 245 n.17 (2000) (citing *Clinton*, 520 U.S. at 707–08); *see also*

of appeals in other domains.[187] Indeed, in some ways, interest balancing can make sense of allusions to the reasons behind congressional action in some classic functionalist cases that theoretical accounts of functionalism have trouble explaining.[188]

Meanwhile, interest balancing has been a regular, albeit never completely routine, feature of executive branch legal interpretation. The Department of Justice's Office of Legal Counsel has stated that *Nixon* balancing is one of the standard forms of separation of powers analysis[189] and has used it in various areas,

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Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 524–34 (2010) (Breyer, J., dissenting) (discussing interest balancing, among other methods, in arguing that for-cause protection is constitutional).

[187] *See, e.g.*, Ameron, Inc. v. U.S. Army Corps of Eng'rs, 809 F.2d 979, 997–98 (3d Cir. 1986) (balancing Congress's interest in ensuring that executive agencies comply with the competitive contract procurement mandate against the burden of congressional oversight on executive branch functioning); Ctr. for Arms Control & Non-Proliferation v. Pray, 531 F.3d 836, 843–44 (D.C. Cir. 2008) (concluding that the public disclosure provisions of the Federal Advisory Committee Act could not constitutionally apply to a commission on weapons of mass destruction because of the President's overriding need "to seek confidential information from many sources, both inside the government and outside" (citation omitted)); Comm. on Ways & Means, U.S. House of Representatives v. Dep't of Treasury, 45 F.4th 324, 334–35 (D.C. Cir. 2022) (concluding that Congress's interest in obtaining former President Donald Trump's tax returns to "learn whether the [Presidential] Audit Program [was] sufficiently staffed and resourced to handle such complex information" outweighed the "tenuous" burden of such disclosure on the executive); *cf.* Portland Audubon Soc. v. Endangered Species Comm., 984 F.2d 1534, 1546 (9th Cir. 1993) ("Congress' important objectives reflected in the enactment of the APA would, in any event, outweigh any *de minimis* impact on presidential power.").

[188] As noted above, the majority in *Morrison* did not engage in an inquiry into the general balance of powers between the branches. *See supra* notes 129–133 and accompanying text. But it did allude to the *reasons* why Congress wished to impose for-cause removal protection on the independent counsel. *See Morrison*, 487 U.S. at 693. Such reasons have no clear relevance to the general balance of powers inquiry that standard functionalism sets up but are quite relevant to an interest balancing analysis. In this way, *Morrison* can potentially be read as a rudimentary, albeit implicit, form of interest balancing. *See infra* note 208.

[189] *See* The Constitutional Separation of Powers Between the President and Congress, 20 Op. O.L.C. 124, 133 (1996) [hereinafter Constitutional Separation of Powers, OLC Op.] (noting that under the "general principle of separation of powers . . . 'in determining whether [an] Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions'" (alteration in original) (quoting *Nixon*, 433 U.S. at 443)).

including in evaluating whether a sitting president can be indicted[190] and in some conduct-of-diplomacy disputes.[191] Other executive branch actors have also used interest balancing. For example, the Department of Defense used it in assessing whether to abide by a statutory congressional-notice requirement before transferring Guantanamo Bay detainees in exchange for Bowe Bergdahl, a U.S. prisoner of the Taliban,[192] and the Mueller Report engages in an extensive interest balancing analysis relating to whether President Donald Trump could be subject to an obstruction of justice investigation.[193]

While there is clearly strong pedigree for interest balancing in the separation of powers, it has never been a standard method for resolving separation of powers disputes. To the contrary, it has tended to be either ignored or misconstrued. *Zivotofsky* provides a recent example. In discussing the passport legislation's interference with the President's recognition power, the Court stated that the "question becomes whether [the statute] infringes on the Executive's consistent decision to withhold recognition with respect to Jerusalem."[194] It then cited *Nixon* but described the case as holding that an "action [is] unlawful when it 'prevents the Executive Branch from accomplishing its constitutionally assigned functions.'"[195] This formulation misconstrues *Nixon*'s balancing

190 *See* A Sitting President's Amenability to Indictment and Criminal Prosecution, 24 Op. O.L.C. 222, 255 (2000) ("Having identified the burdens imposed by indictment and criminal prosecution on the President's ability to perform his constitutionally assigned functions, we must still consider whether these burdens are 'justified by an overriding need to promote' legitimate governmental objectives, in this case the expeditious initiation of criminal proceedings." (quoting *Nixon*, 433 U.S. at 443)).

191 *See, e.g.*, Section 609 of the FY 1996 Omnibus Appropriations Act, 20 Op. O.L.C. 189, 195 (1996). However, OLC has used an exclusive powers framework, rather than interest balancing, in its more recent diplomacy opinions. *See, e.g.*, Section 7054 OLC Op., *supra* note 75, at *4–5.

192 *See* Jack Goldsmith, *Was the Bergdahl Swap Lawful?*, LAWFARE (Mar. 25, 2015), https://perma.cc/9UNK-KY64 (quoting a Department of Defense memorandum, which relied on *Nixon* balancing to conclude that "[c]ompliance with a 30 days' notice requirement in these circumstances would have 'prevent[ed] the Executive Branch from accomplishing its constitutionally assigned functions,' without being 'justified by an overriding need' to promote legitimate objectives of Congress'" (alterations in original) (citation omitted)).

193 *See* 2 ROBERT S. MUELLER, III, U.S. DEP'T OF JUST., REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION 176–77 (2019) (applying *Nixon* balancing to conclude that "our assessment of the weighing of interests leads us to conclude that Congress has the authority to impose the limited restrictions contained in [the obstruction-of justice] statutes on the President's official conduct to protect the integrity of important functions of other branches of government").

194 *Zivotofsky*, 576 U.S. at 28–29.

195 *Id.* at 29 (citing *Nixon*, 433 U.S. at 443).

test by entirely omitting the second part of the inquiry, which provides that conduct that "prevents the Executive Branch from accomplishing its constitutionally assigned functions" is not necessarily unlawful if it is justified by a sufficiently strong interest.[196] This mischaracterization was in some ways necessary because interest balancing is fundamentally inconsistent with formalist frameworks, like Justice Jackson's Category Three, that seek to resolve disputes by reference to exclusive powers.

In short, while balancing has a place in separation of powers doctrine, it is a decidedly uncertain one. The next Section explains how interest balancing is distinct from the prevailing competitors.

B. The Distinctiveness of Interest Balancing

It is easy to see how interest balancing is different from its categorical competitors. Rather than resolving disputes, as formalism and Justice Jackson's Category Three analysis do, by seeking to place any given act into one branch's exclusive power,[197] or, as Bowie and Renan propose, by deeming any arrangement in a statute constitutional,[198] interest balancing is noncategorical. It resolves disputes by engaging in a standard-like analysis of which branch ought to prevail based on the relevant intrusion and interests at stake.[199]

Interest balancing is also different from the reigning noncategorical approach to separation of powers: functionalism. Functionalism is primarily concerned with ensuring that each branch's core powers are protected and then ensuring that there is a general balance of powers between the branches.[200] Interest balancing is distinct in several key ways.

First, functionalism is categorical in protecting core powers, permitting no intrusions on such powers.[201] Interest balancing, on

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[196] *See Nixon*, 433 U.S. at 443 ("Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress.").

[197] *See, e.g.*, Huq, *Metatheory*, *supra* note 1, at 1527 (noting that formalism "understand[s] each branch of government as a distinctive and stand-alone entity wielding a defined, delimited set of powers"); *supra* Part II.C (discussing the Category Three framework).

[198] *See supra* Part II.D (discussing their proposal for categorical deference to statutes).

[199] *Cf.* Merrill, *supra* note 1, at 230–31 ("At the methodological level, the formal/functional dichotomy parallels the familiar division in law between rules and standards.").

[200] *See supra* Part II.B.

[201] *See supra* notes 123–124 and accompanying text; *see also* Merrill, *supra* note 1, at 232–33 (noting that functionalists would "prevent any tampering with the core" power of each of the three branches).

the other hand, does not give categorical protection even to core powers, which can be infringed upon if there is a sufficiently strong interest.

Second, and more fundamentally, although both approaches utilize the metaphor of balancing, they balance two different things in service of two different ends. Functionalism seeks to balance *powers*; interest balancing seeks to balance *interests*. Where functionalists seek to tally the total amount of potential dominating force each branch has,[202] interest balancing asks about the purposes being served by the relevant governmental actor.[203] Meanwhile, the aims of the metaphorical balancing in each method are also distinct. Functionalism seeks to strike a balance or find a level of equipoise between the branches, whereas interest balancing seeks to determine whether one branch's interests sufficiently outweigh the other's.[204] These are two different inquiries—one seeks to find some level of parity, while the other seeks to evaluate if one branch's interest has sufficiently outweighed the other's.

Finally, where functionalism seeks to resolve disputes by reference to what would further the broad separation of powers value of checks and balances, interest balancing is more contextual. It does not seek to answer concrete cases by asking what would be best for the ostensible, abstract ends of separation of powers theory more broadly. Instead, it seeks to answer concrete cases by reference to the particular interests at hand in each dispute.

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[202] *See, e.g.*, Merrill, *supra* note 1, at 232 ("[A]ll functionalists believe that the primary objective of judicial review in separation of powers cases is to insure that each branch retains 'enough' governmental power to permit it to operate as an effective check on the other branches of government.").

[203] For example, Professor Harold Krent made the difference clear in his rejection of *Nixon*-style interest balancing in favor of the classic functionalist goal of assuring a broader system of checks and balances. *See* Harold J. Krent, *The Lamentable Notion of Indefeasible Presidential Powers: A Reply to Professor Prakash*, 91 CORNELL L. REV. 1383, 1398 (2005):

> In assessing the congressional intrusion, courts should thus not ask whether the intrusion is reasonable in light of the congressional objective, as in *Nixon v. Administrator of General Services* . . . . Rather, the Court should first ask whether the clash threatens to undermine one of the critical checks and balances in the Constitution itself.

See also id. at 1386 ("[S]hifting the balancing test to focus not on a weighing of the interests but on the importance of preserving the system of checks and balances prescribed in the Constitution brings at least some order to the ad hoc approach used today.").

[204] *Cf.* Aleinikoff, *supra* note 167, at 946 (distinguishing between these "two distinct forms" of balancing metaphors); Luizzi, *supra* note 167, at 387–88 (same).

Despite these differences, scholars have sometimes equated interest balancing with functionalism.[205] And, indeed, in *Nixon*, the Court seemed to introduce interest balancing as a method to further the functionalist goal of balancing power between the branches.[206] But this makes little sense. Balancing *interests* is not a good way to achieve a balance of *powers*. Whether or not a branch has a sufficiently strong interest in any given dispute has no reliable connection to the level of power between the branches. A branch could serve a very strong interest in a way that only minimally impacts the power of the branches, and a branch could augment its power dramatically based on a very weak interest. Interests and powers simply do not necessarily run together.

This is exemplified in *Nixon*. Whether or not Congress had a good reason to regulate how the executive branch stored and regulated the President's papers tells us nothing about (1) how much total power the President has; (2) how much total power Congress has; or (3) how the balance between (1) and (2) would be affected by resolution of the particular dispute. Whether an intrusion is sufficiently justified by a strong enough interest has no obvious connection to the level of equipoise between the branches. It is a question of justification—not balance of powers.

Indeed, one benefit of interest balancing is that it gives meaning to the reasons for any given interference. This might even better explain some cases typically deemed to be functionalist, like *Morrison v. Olson*, which alludes to the reasons Congress had for imposing for-cause removal protection on the independent counsel, i.e., to grant them independence in investigating their bosses.[207] This allusion in *Morrison* is hard to explain on conventional functionalist grounds because the reason for branch action is not relevant to the balance of powers. Under interest balancing, however, such reasons are essential to understanding whether an intrusion is justified.[208] One attractive feature of interest balancing, then, is that it makes the purposes behind particular governmental action

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[205] *See, e.g.*, Manning, *supra* note 1, at 1953 n.56 (citing *Nixon* as an example of functionalism); Magill, *The Real Separation*, *supra* note 1, at 1143 n.55 (same).

[206] *See Nixon*, 433 U.S. at 443.

[207] *See Morrison*, 487 U.S. at 693; *see supra* notes 127–133 and accompanying text.

[208] For a reading of *Morrison* that mirrors the interest balancing framework without calling it that, see JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION AND REGULATION 496 (2d ed. 2013) (asking whether *Morrison* "represents a commonsensical way of determining whether there is more than a *de minimis* intrusion on presidential power, and whether Congress had good reason for whatever intrusion there is").

relevant to whether branch conduct is constitutional in a way that conventional functionalism does not.

Despite their differences, both functionalism and interest balancing seek to resolve separation of powers disputes through a noncategorical standard, rather than through over- and underinclusive rules. This might make interest balancing attractive to those drawn to functionalism, because it can pursue these goals without being subject to the well-known critiques of functionalism.[209]

To be sure, interest balancing is subject to its own flaws—which I elaborate on in Part III.D—but the point for our purposes is that they are different flaws. Interest balancing is conceptually and practically distinct from any of the reigning competitor modes of separation of powers analysis. With this understanding in mind, we can assess its relative strengths and weaknesses.

C. Benefits

Interest balancing, like all legal methodologies, has its strengths and weaknesses.[210] In this Section, I assess its relative strengths, before addressing its weaknesses below.

1. Conceptual alignment and tractability.

One primary benefit of interest balancing is that it is conceptually aligned with the sorts of separation of powers conflicts that actually comprise difficult cases. As discussed above, most difficult separation of powers disputes involve instances where both branches have power to act, but one branch's exercise of power interferes with or infringes upon another branch's exercise of power. The prevailing competitors have little to offer in such cases because they do not provide a method to determine how much infringement is permissible and how much is not.[211]

The inability to conceptually accommodate such infringement cases has had consequences. It has led to incoherent line drawing in formalist opinions—like providing that for-cause removal is permitted for inferior officers, but not principal officers,[212] or for groups

[209] *See supra* notes 124–126 and accompanying text.

[210] *Cf.* Greene, *Rights as Trumps*, *supra* note 48, at 65 ("There is no perfect technology of judicial review.").

[211] *See supra* Part II.

[212] *See supra* notes 102–121 and accompanying text (discussing the incoherent lines of current removal doctrine under formalism).

of principal officers, but not individual officers[213]—and an expansion of the list and scope of exclusive powers the President is said to possess.[214] Part of the reason such categorical approaches have failed is that the categories they seek to utilize—exclusive powers—do not align with the problem at issue, which involves infringement, not exclusive powers.

Interest balancing, on the other hand, is built for precisely such cases. Rather than asking which branch has exclusive power to act, or deferring categorically to what is in a statute, interest balancing accepts both branches might have power to act and asks whose interest ought to prevail. Of the prevailing competitors, functionalism is closest to accommodating such disputes conceptually, but its mode of resolving them is subject to the serious conceptual and practical problems discussed above.[215] Interest balancing, on the other hand, can accommodate such disputes without being subject to these critiques.[216]

Moreover, while interest balancing is, like functionalism, noncategorical in method, it provides a more tractable approach to resolving disputes by reference to the actual interests at stake. It does not require the decision-maker to add up the total powers of the branches or determine how any one dispute will affect them. Instead, it calls on decision-makers to engage in an entirely familiar task of identifying and weighing the reasons behind government action. This task is not always simple, but it is the same analysis that courts and other decision-makers routinely engage

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213 *See supra* notes 102–121, *infra* notes 259–263, and accompanying text (discussing other examples of incoherent lines of current removal doctrine); *see also* Seila L. v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2191–92 (2020) (discussing two exceptions to "the President's unrestricted removal power").

214 *See supra* notes 145–146 and accompanying text (discussing the incentives and effects of Justice Jackson's Category Three framework).

215 *See supra* Part II.B.

216 *See supra* Part III.B.

in as part of rights analysis,[217] as well as in executive privilege disputes and various other areas in the separation of powers.[218]

In short, unlike the prevailing competitors, interest balancing provides an approach that is both conceptually well suited to addressing the difficult separation of powers questions and sufficiently tractable to allow courts or other constitutional decision-makers to engage in context-sensitive analysis to determine which branch should prevail in a particular case.

2. Lowering the stakes and avoiding arbitrary categories.

Because of its contextual and standard-like nature, interest balancing also lowers the stakes of any given dispute and allows decision-makers to avoid creating arbitrary categories with severe consequences. Under formalist methods, resolving disputes is all or nothing. If the President prevails in one dispute, they have exclusive power over the matter forever. Conversely, if the President loses, they have no exclusive power over the matter forever. This dramatically raises the stakes of any given dispute. Interest balancing avoids this trap.

Interest balancing allows the executive to win today and lose tomorrow and, perhaps as importantly, to lose today and win tomorrow. Because the dispute will be resolved based on interests, not exclusive powers, the resolution will depend on the dispute, not the subject matter. This reduces the incentive—created by formalism and Justice Jackson's Category Three framework—to find an "exclusive" power over particular conduct of sufficiently wide scope to cover the dispute at issue.[219] This also

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[217] *See supra* notes 166–172 and accompanying text (discussing the commonplace use of interest balancing in rights); Richard H. Fallon, Jr., *Constitutionally Forbidden Legislative Intent*, 130 HARV. L. REV. 523, 580 (2016) [hereinafter Fallon, *Legislative Intent*]:

> A question [ ] can arise about how we know individual legislators' private intentions or motivations. This is a genuine problem, but often nowhere nearly so severe as some suggest . . . . [T]he criminal law recurrently requires courts to determine defendants' intentions. In imputing intentions to people whom we know, we often rely on a mix of contextual factors, biographical information, and explicit statements. We can do the same with legislators.

See also Micah Schwartzman, *Official Intentions and Political Legitimacy: The Case of the Travel Ban*, *in* POLITICAL LEGITIMACY: NOMOS LXI 201, 205 (Jack Knight & Melissa Schwartzberg eds., 2019) ("[T]here is nothing epistemically distinctive about trying to discern the intentions of a particular public official for constitutional purposes.").

[218] *See supra* Part III.A.

[219] *Cf.* COHEN-ELIYA & PORAT, *supra* note 46, at 88 ("By opting for a reasoning based on balancing, a court limits its holding in a case to the particular circumstances. It thus refrains from the ambitious attempt to regulate a broad set of cases and to answer big

avoids the temptation to resolve separation of powers disputes by conjuring and attempting to prevent worst-case scenarios that might arise by interpreting the power to cover (or not cover) a particular dispute.[220]

Interest balancing also puts much less pressure on carving up the powers appropriately into exclusive bundles. Categorical approaches like formalism and Justice Jackson's Category Three framework make resolving separation of powers disputes a contestable interpretive exercise that requires divining exclusive powers from the vague constitutional text. Interest balancing allows decision-makers to avoid having to resolve broader and more questionable judgments about which branch has exclusive power over what,[221] and it shifts resolving disputes away from an interpretive exercise—which the more categorical approach pushes toward—and toward a more empirical exercise, focused on the justifications for government action, rather than the meaning of particular constitutional text.[222]

In contrast, categorical approaches require decision-makers to decide—now and forever—who has power over what. This means that if Congress can interfere in one case, it can interfere in all cases. We see this logic, for example, in recent work by Professors Aditya Bamzai and Saikrishna Prakash, which suggests that if statutory for-cause removal protection is ever allowed, it must be allowed no matter what.[223] On this view, if the head of the Federal Reserve can have for-cause protection, then so can the Secretary of Defense.[224] There is no way to permit for-cause removal for some officials, but not others, under formalist methodology. Interest balancing, on the other hand, can easily accommodate the notion that for-cause removal might be permitted for some, but not all, officials depending on the level of intrusion such

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theoretical questions."); Aleinikoff, *supra* note 167, at 961 ("Balancing suggest[s] a particularistic, case-by-case, common law approach that . . . reject[s] absolutes . . . . Today, the plaintiff might win because of the unjustified burden imposed by a governmental regulation; tomorrow, the government could demonstrate an adequate public interest to sustain its legislation.").

[220] *See* Bowie & Renan, *supra* note 1, at 2124–25 ("[W]e [ ] resist the premise that one should build separation-of-powers thought around worst-case scenarios.").

[221] *See, e.g.*, COHEN-ELIYA & PORAT, *supra* note 46, at 88.

[222] *Cf.* Greene, *Rights as Trumps*, *supra* note 48, at 78 (making an analogous point in favor of noncategorical proportionality in rights).

[223] *See* Bamzai & Prakash, *supra* note 1, at 1826.

[224] *See id.* ("If . . . Congress . . . can limit removal of the heads of agencies implementing domestic policy pursuant to law, it follows that Congress can likewise limit removal of the Secretaries of State and Defense.").

restrictions would cause and the interests being pursued in providing them.

Interest balancing thus provides less incentive to find exclusive powers to prevail, lowers the stakes of each dispute, and avoids the requirement that we glean exclusive powers from the vague constitutional text to resolve disputes.

3. Encouraging accommodation and deliberation.

Interest balancing also gives the branches reason to accommodate each other in a way that categorical approaches do not.[225] Under categorical approaches, the parties have little reason to respect the other side's interests in resolving separation of powers disputes. Whoever is determined to have exclusive power has power forever and will prevail. Because it is all or nothing, this can lead to more adversarial arguments about who has the relevant power.[226]

A virtue of interest balancing is that it pushes the branches to accommodate each other's interests—to "acknowledge the mutual and legitimate presence" of the other branch in the relevant subject area.[227] We see this, for example, in the accommodations process in executive privilege, which has resulted from the interest balancing approach.[228] This has led to routine conversations and negotiations between the branches as to who ought to prevail.[229] To be sure, such negotiations sometimes break down, but

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[225] *See* Greene, *Rights as Trumps*, *supra* note 48, at 81–82.

[226] *Cf. id.* at 80:

> If my assertion of rights depends strictly on your lack thereof, and vice versa, it is natural for me to see you not as a friend whose different commitments must be reconciled with mine but rather as an enemy who is, in too real a sense, out to destroy me.

[227] *Cf. id.* at 82:

> The benefit of proportionality done well is to force litigants and their fellow citizens . . . to acknowledge the mutual and legitimate presence within it of others who hold contrary values and commitments. On this view, constitutional law should seek . . . to structure politics so that those within that community are able to see, hear, and speak to each other.

[228] *See* Owens, *supra* note 83, at 496–99 (discussing the accommodation process, which "reflects a proper conception of the separation of powers by taking into account and attempting to satisfy the competing interests of both the executive branch and Congress").

[229] *See id.*

the interest balancing framework encourages accommodation between the branches in the first instance.[230] Moreover, when one branch loses a dispute, interest balancing's noncategorical nature encourages it to stay "in the game," because even if it lost this round, it can win the next one.[231]

Interest balancing also has broader deliberative benefits. Because the resolution of separation of powers conflicts depends on identifying the interests the branch is trying to further, this encourages branches to be more explicit about what precisely they are trying to achieve in a particular arrangement and how it relates to a constitutional power that they have. This can help each branch understand the other branch's relevant interests[232] and the public assess how it views the proper allocation of powers between the branches.[233] Put another way, interest balancing makes relevant *why* the branches think a particular arrangement is desirable in a way that existing approaches do not. By making resolution depend on the reasons behind particular governmental action, interest balancing makes the relationship of a given action to good government relevant to who should prevail. This encourages the sort of public deliberation about governance that we want to stimulate.

4. Allowing a dynamic separation of powers while promoting separation of powers values.

Because it is noncategorical, interest balancing also allows for a fluid and dynamic separation of powers.[234] This is partly the

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[230] Indeed, Professor Annie Owens attributed the breakdown in the accommodations process in executive privilege during the Trump administration, in part, to the adoption of a new and "overly formalist position." *Id.* at 502.

[231] *Cf.* Greene, *Rights as Trumps*, *supra* note 48, at 84 ("Proportionality invites parties . . . to remain invested in the constitutional system rather than alienated from it. It assures them that if they do not win today, they might win tomorrow on different facts.").

[232] *Cf. id.* at 82.

[233] *See, e.g.*, Josh Chafetz, *Multiplicity in Federalism and the Separation of Powers*, 120 YALE L.J. 1084, 1122 (2011) (book review) (stating that "[t]here is a great deal of republican virtue" in forcing "contending institutions . . . , as part of their project of winning the political battle, to make public, principled, constitutional arguments") [hereinafter Chafetz, *Multiplicity in Federalism*]; *see also* Anya Bernstein & Glen Staszewski, *Populist Constitutionalism*, 101 N.C. L. REV. 1763, 1767–74 (2023) (discussing analogous benefits under their conception of "agonistic republicanism").

[234] *Cf., e.g.*, Bowie & Renan, *supra* note 1, at 2028–29 ("As a principle of constitutional governance, the separation of powers is historically contingent, institutionally arbitrary, and inherently provisional."); Josh Chafetz, *Congress's Constitution*, 160 U. PA. L. REV. 715, 769–70 (2012) ("Conflict, tension, and tumult may be precisely what produces good government; easy, authoritative resolution may be the mark of dysfunction.").

goal of functionalism and Bowie and Renan's proposal for categorical deference.[235] Interest balancing can quite easily accommodate a fluid and dynamic separation of powers while maintaining a place for legal analysis in such decision-making. Unlike Bowie and Renan's proposal, interest balancing puts constitutional analysis front and center in how to resolve such disputes. And, unlike functionalism, interest balancing is not subject to the cogent critiques that Elizabeth Magill and others have made regarding its operability.[236] It thus can further the goal of resisting an overly rigid and fixed separation of powers in a more tractable way that still operates in service of a fluid and dynamic separation of powers.[237]

Interest balancing, moreover, can do all this in a way that is consonant with the twin aims of broader separation of powers values—ensuring both a separation of powers between the branches and checks and balances between them.[238] Interest balancing gives meaning to the *separation* in the separation of powers—the notion that the Constitution allocates certain powers to each branch. It asks whether one branch's exercise of constitutionally allocated power has been infringed upon. But it is alive to the possibility, indeed the reality, that the branches' constitutionally granted powers can come into conflict. In this way, it accommodates the value of checks and balances by allowing one branch to infringe on the other's power only if it has sufficiently strong interests in service of its own constitutional authorities. In short, interest balancing accepts that the constitutional allocation of powers means something important—it evaluates intrusions on such exercises of power and whether the interests being served are in service of such grants of power—but it also seeks to permit the branches to check each other's exercises of power, depending on the relevant interests at play.

In this way, interest balancing can promote the core values behind the Constitution's structural provisions—separating powers and checks and balances. It allows for commitment to the former while maintaining room for the latter.

[235] *See supra* Parts II.B and II.D.

[236] *See supra* note 126 and accompanying text.

[237] *See infra* Part III.D.2 (discussing the feasibility of interest balancing).

[238] *See, e.g.*, Strauss, *The Place of Agencies*, *supra* note 1, at 577–78 (discussing these two core values); Daryl J. Levinson, *The Supreme Court, 2015 Term—Foreword: Looking for Power in Public Law*, 130 HARV. L. REV. 31, 95 (2016) (same).

D. Costs

Above, I have described some of the strengths of interest balancing. In this Section, I discuss some of its weaknesses.

1. Subjectivity.

Interest balancing's standard-like nature makes it flexible and able to accommodate the nuances and context of any given dispute. But this standard-like nature makes it amenable to subjective and potentially biased decision-making.[239] Where formalism, in ideal form, gives decision-makers rules that make clear who has power over what, interest balancing's noncategorical nature might be thought to give the decision-maker too much discretion.

There is obviously something to this critique. Interest balancing requires exercising judgment. But, as with its benefits, interest balancing's costs must be evaluated relative to the competition.[240] Although, in its ideal type, formalism's categorical push toward exclusive powers provides definite rules to resolve disputes, in practice, formalists must also exercise discretion and judgment.[241] This is because, as explained above, the disputes formalism is asked to resolve rarely involve one branch exercising—or fully denying the exercise of—another branch's exclusive power. Instead, most disputes involve cases of infringement. But formalism has no way to resolve how much infringement is permitted and how much is not. Thus, although formalists claim they are applying a categorical rule forbidding any infringement, they instead are *exercising judgment* to decide some infringement is permitted—for example, for-cause removal of inferior officers, or interference with the recognition power through the treaty power—but other infringement is not—for example, for-cause removal for principal officers[242] or interference with the recognition power through the passport power.[243] In contrast to interest balancing, formalism applies this judgment *sub rosa* and without

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[239] *Cf.* Merrill, *supra* note 1, at 234–35.

[240] *Cf.* Luizzi, *supra* note 167, at 396 ("Even if interest balancing is ad hoc . . . , does that clearly distinguish it as a practice deviating from the usual workings' of the legal process? I think not."); Aleinikoff, *supra* note 167, at 1003 ("There may not always be a preferable alternative to balancing.").

[241] *See, e.g.*, Manning, *supra* note 1, at 1961 (noting that in encroachment cases, "formalists reason from a general principle of separation of powers to quite specific prohibitions against particular governmental practices," making them, "in short, insufficiently formalistic").

[242] *See supra* notes 117–119 and accompanying text.

[243] *See infra* notes 279–286 and accompanying text.

any explicit method or theory for identifying which infringements are permitted and which are not.

The only competing mode of analysis that is not clearly subject to this critique is Bowie and Renan's call for categorical deference to statutes. But, as noted above, their proposal is justified as a means to defer to the judgment of the branches themselves. Bowie and Renan's proposal provides a rule of decision for *courts* but does not provide a method for the *branches themselves* to exercise the judgment courts are supposed to defer to.[244] This would have the benefit of removing power from courts but, without a constitutional method for the branches to apply, would leave disputes to be resolved by politics or power, rather than law. If we want the branches to engage in constitutional analysis, they might use interest balancing.[245] But, whatever method they use will likely require some element of judgment.

In short, subjectivity is surely a feature of interest balancing. But this does not set it apart from its main competitors.

2. Feasibility.

A related critique of interest balancing is less about the judgment involved and more about whether the task is possible at all. Some might wonder how anyone can identify, let alone weigh, branch interests. Others might suggest that, even if interests could be identified, such weighing is impossible because it requires a comparison of incommensurable things. Again, while there is something to these critiques, they are not unique to interest balancing.

It will surely sometimes be difficult to identify or weigh branch interests. But this is a perfectly ordinary feature of constitutional decision-making, as evidenced by interest balancing's use in rights adjudication as well as in the separation of powers.[246] In such instances, decision-makers are called on to identify the reasons behind governmental conduct and weigh them.[247] To be

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[244] *See supra* notes 156–157 and accompanying text.

[245] Indeed, perhaps Bowie and Renan would be open to the branches using interest balancing, while maintaining a judicial rule of decision of categorical deference.

[246] *See, e.g.*, Luizzi, *supra* note 167, at 391–92. The difficulty of identifying interests is also present in many domains of life beyond adjudication. *See id.*

[247] *See supra* notes 166–171, 184–193, and accompanying text (describing interest balancing in rights and separation of powers); *see also supra* note 217 (collecting sources showing that the commonplace inquiry into reasons motivating conduct can be conducted

sure, identifying the reasons behind branch conduct will not always be easy, but it is a commonplace feature of constitutional decision-making. Indeed, it is hardly obvious that interest balancing is more difficult than the formalist method of divining exclusive powers from the vague constitutional text and using such interpretations to resolve separation of powers disputes.[248]

The same is true of the incommensurability critique. It might seem that we cannot weigh a branch's interests, on one hand, against an intrusion on a branch's powers, on the other. But courts—and ordinary people—balance ostensibly incommensurable values all the time.[249] This is routine in individual rights adjudication, which, if anything, requires weighing what seem like even more incommensurable things: governmental interests and individual rights.

In short, interest balancing will not always be easy, but this does not set it apart from most modes of constitutional decision-making, including most of its competitors in separation of powers.[250]

3. Instability.

A common intuition in the separation of powers is that stability is of paramount importance because it is necessary to ensure the branches know the rules to bargain around.[251] One concern about interest balancing is that its standard-like nature would render the rules of the game too unstable.

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with respect to the political branches); Huq, *Metatheory*, *supra* note 1, at 1552 ("Any plausible theory of the separation of powers needs an account of official motives, whether or not it admits as much.").

[248] *See* Bowie & Renan, *supra* note 1, at 2028–29 ("[T]he separation of powers . . . comprises a set of broad, vague, conflicting, and contested political ideas (thinly connected to sparse and ambiguous constitutional text) and a set of overlapping, interacting institutions that participate in the messy work of national governance.").

[249] *See* Aleinikoff, *supra* note 167, at 972:

> Some critics of balancing surely overstate their case by claiming that balancing, because it demands the comparison of "apples and oranges," is impossible. Whether or not we can describe how we do so, we seem regularly to reduce value choices to a single currency for comparison. In deciding whether to call or to write, to move to New York or to stay in Los Angeles, to see the raise or to fold, we often think of ourselves as weighing the costs and benefits of the alternatives. . . . Furthermore, we expect courts to make exactly these kinds of judgments in crafting common law doctrine.

[250] Bowie and Renan's method is likely the easiest for courts to apply, but, as noted above, this does not explain what the branches themselves are supposed to do to resolve separation of powers disputes. *See supra* notes 157–159 and accompanying text.

[251] *See, e.g.*, David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 918 (1996) ("[I]n dealing with separation of powers issues it is more important

It is not obvious interest balancing would lead to less stability than even its categorical competitors. The formalist modes of reasoning have hardly proved predictable or stable. For-cause removal jurisprudence provides a good example. As of this writing, for-cause removal is permissible for some inferior officers—which ones is not entirely clear[252]—but not for principal officers, unless, that is, they work as a group.[253] This is hardly a predictable or stable regime. Moreover, interest balancing—like other noncategorical approaches—can still use precedent to resolve disputes and reason analogically from one circumstance to another, which will lead to some level of stability.[254]

In any event, it is not exactly clear why stability ought to be prioritized over other values in the separation of powers. There is no obvious right answer to how much stability is necessary, nor is it obvious when we should trade it off with accuracy.[255] As Professor David Strauss put it, "[t]he more important the provision, the less formalistic its interpretation."[256] But, how are we to determine which provisions are sufficiently important to justify less formalism, and how formalist must we be? If we are comfortable with a lack of stability caused by interest balancing in rights adjudication, it is not obvious why we should not be comfortable with it in the separation of powers. If the idea is one area is more important than the other, then the questions are *in which cases* and *how important*. These sorts of abstract principles do not help answer concrete cases. And, of course, there is a long tradition of prioritizing precisely the opposite in the separation of powers—of

that the issue be settled than that it be settled just right.") [hereinafter Strauss, *Constitutional Interpretation*]; Huq, *Metatheory*, *supra* note 1, at 1563 (noting claims that "the stability of legal forms in the separation of powers is desirable").

[252] *See supra* note 54 and accompanying text (noting the lack of clarity on whether administrative law judges can have for-cause removal protection).

[253] *See Seila L.*, 140 S. Ct. at 2191–92 (holding that a single director cannot have for-cause removal but distinguishing prior cases involving groups of principal officers which ostensibly can).

[254] *Cf.* Greene, *Rights as Trumps*, supra note 48, at 95–96:

> It is . . . easy to overstate the disuniformity proportionality invites. Proportionality is fully consistent with a devotion to precedent . . . . It better approximates the common law method than does the categorical frame, for it makes relevant the kinds of comparative factual assessments that motivate common law reasoning; like cases are to be treated alike and different cases are to be treated differently.

[255] *See* Strauss, *Constitutional Interpretation*, *supra* note 251, at 918 & n.94 (interrogating the importance of settling separation of powers issues "just right").

[256] *Id.* at 918.

preferring conflict, dynamism, and tumult, to be better able to adapt to conditions as they arise.[257]

In short, while interest balancing might lead to some instability, it is not clear this sets it apart from even formalism, nor is it clear that we ought to prioritize stability over contextual decision-making in the first place.

* * *

Interest balancing clearly has strengths and weaknesses. But so do its competitors. For the reasons given above, interest balancing makes a strong case to be the best method to resolve the difficult separation of powers cases that actually arise. At the least, interest balancing deserves a place at the table. If decision-makers are to pick formalism, categorical Thayerism, or functionalism, they should at least do so knowing that there is another option.

E. Case Studies

Above, I have discussed some of the strengths and weaknesses of interest balancing. In this Section, I examine two case studies relating to for-cause removal restrictions on executive branch officers and recognition to show how interest balancing would operate differently than its competitors.

1. Removal.

Using an interest balancing framework to analyze whether Congress can impose for-cause removal restrictions on executive branch officers would lead to a different way to conceive of such disputes. The existing case law on for-cause removal has failed to provide any coherent way to determine when for-cause removal is permitted or prohibited—including in opinions using both formalist and functionalist reasoning.[258]

The current Court addresses such cases using formalism, but, because formalism cannot coherently answer how much infringement is permitted and how much is not, this has forced the Court to create a series of incoherent distinctions. As of this writing, for-cause removal protections are not permitted for principal officers,

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[257] *See* Bowie & Renan, *supra* note 1, at 2028–29; Chafetz, *Multiplicity in Federalism*, *supra* note 233, at 1128 ("[C]oncern for stability, predictability, and notice are at their weakest in the separation-of-powers context.").

[258] *See supra* notes 59–60, 102–121, & 127–133 and accompanying text.

unless they sit in a group,[259] or perhaps oversee a primarily adjudicative agency;[260] however, they are permitted for inferior officers,[261] although not if they sit under a principal officer with for-cause protection,[262] unless perhaps they are administrative law judges.[263] None of these distinctions make sense on the formalist premise that the President must control all executive power or on the view that the removal power is otherwise exclusively the President's and can never be interfered with. To be coherent, formalism should be all or nothing on this ground.

This is exemplified in a recent article by Aditya Bamzai and Saikrishna Prakash, who argued that the President has exclusive power over removal, and, therefore, Congress can never limit it.[264] They came to this conclusion, in part, because of a "parade of horribles" that would ensue if Congress could limit for-cause removal.[265] On their view, if Congress can restrict removal at all, then "[e]very executive department might be transplanted into an independent fourth branch, with the Chief Executive reduced to the Chief Bystander."[266] To accept for-cause removal in any case is to accept it in all cases. If the head of the Consumer Finance Protection Bureau (CFPB)—or presumably an administrative law

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259 *See Seila L.*, 140 S. Ct. at 2198–2200 (holding that for-cause removal is impermissible for single principal officers but is permissible, at least sometimes, for groups of principal officers). *But see id.* at 2242 (Kagan, J., dissenting):

> [T]o make sense on the majority's own terms, the distinction between singular and plural agency heads must rest on a theory about why the former more easily "slip" from the President's grasp. . . . In fact, the opposite is more likely to be true: . . . individuals are easier than groups to supervise.

260 *See* Collins v. Yellen, 141 S. Ct. 1761, 1783 n.18 (2021) (distinguishing cases involving "adjudicatory bod[ies]"); Constitutionality of the Commissioner of Social Security's Tenure Protection, 45 Op. O.L.C., 2021 WL 2981542, at *10 (July 8, 2021) ("We emphasize that . . . recent decisions leave open the possibility that certain agencies, including (and perhaps especially) some that conduct adjudications, may constitutionally be led by officials protected from at-will removal by the President.").

261 *See Seila L.*, 140 S. Ct. at 2199–2200 (stating that for-cause removal is permissible for "inferior officers with limited duties and no policymaking or administrative authority").

262 *See Free Enter. Fund*, 561 U.S. at 483–84 (holding that double for-cause removal protections are unconstitutional).

263 *See* Lucia v. SEC, 138 S. Ct. 2044, 2050 n.1, 2054 (2018) (holding that SEC ALJs are inferior officers but declining "to address the removal issue").

264 *See, e.g.*, Bamzai & Prakash, *supra* note 1, at 1782 ("While the Constitution grants the President authority to remove executive officers, it nowhere grants Congress the authority to depart from the 'at pleasure' baseline.").

265 *Id.* at 1844 (arguing that the position disagreeing with theirs would accept "every float in [a] parade of horribles" of Congress providing for-cause protection to various officials).

266 *Id.* at 1762.

judge—can have for-cause protection, then so too can the Secretary of Defense.[267] Meanwhile, under Bowie and Renan's proposal, Congress could, indeed, provide for-cause protection for any executive branch official.[268]

Unlike either of these categorical approaches, interest balancing can explain why some for-cause limitations might be permitted while others might not. It acknowledges that for-cause removal restrictions interfere with the President's control of the executive power to some extent and asks whether the intrusion can be justified by a sufficiently strong interest within Congress's powers.[269]

This approach avoids the attempt to draw incoherent lines between, for example, principal officers and inferior officers, sole principal officers and groups of them, and so on. Instead of trying to draw arbitrary yet rigid lines inconsistent with formalist premises, interest balancing would make the permissibility of for-cause protection depend on (1) the level of intrusion on the executive's control; and (2) Congress's particular interests in for-cause removal in that statute.

Under this approach, we could rather easily draw a distinction between giving the Secretary of Defense for-cause protection and giving it to the director of the CFPB. With respect to the CFPB, the intrusion imposed by for-cause removal was on the President's control of the "executive Power."[270] It is not clear how much control the President would desire to exert over the CFPB, but we can posit that this intrusion is not insignificant. We would then evaluate the interests at issue in Congress's giving the CFPB director for-cause protection. The CFPB was created under the Necessary and Proper Clause[271] to structure executive departments and offices[272] in service of Congress's power to regulate interstate commerce.[273] Pursuant to these authorities, Congress

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[267] *See id.* at 1826 ("If . . . Congress, under the Necessary and Proper Clause, can limit removal of the heads of agencies implementing domestic policy pursuant to law, it follows that Congress can likewise limit removal of the Secretaries of State and Defense.").

[268] *See generally* Bowie & Renan, *supra* note 1 (arguing for categorical deference to statutory enactments).

[269] *See, e.g.*, *Nixon*, 433 U.S. at 443 ("[W]e must determine whether [a disruption of the Executive Branch's constitutional power] is justified by an overriding need to promote objectives within the constitutional authority of Congress.").

[270] U.S. CONST. art. II, § 1, cl. 1.

[271] *Id.* art. I, § 8, cl. 18; *see also Seila L.*, 140 S. Ct. at 2227, 2238–39 (Kagan, J., dissenting).

[272] *Id.* art. II, § 2, cl. 2.

[273] *Id.* art. I, § 8, cl. 3.

sought to provide independence—through, among other things, for-cause removal restrictions—for an agency with a mandate to regulate and antagonize important financial interests with significant political power.[274] Under interest balancing, then, for-cause removal restrictions for the head of the CFPB could be justified if we believe these interests were sufficiently strong to outweigh the intrusion on the President's control of the CFPB.

One can conclude such an intrusion was justified based on these interests without concluding that such an intrusion would be justified for the Secretary of Defense. For-cause removal restrictions on the Secretary of Defense would seem to impose a larger intrusion on the President's control because it would impact not only the President's control of the executive power,[275] but also the President's power as the Commander in Chief of the armed forces.[276] Because the intrusion is greater than that involved with the CFPB, Congress's interests would thus have to be greater to render the removal restriction permissible. It is not clear what those interests would be, but the point is that under an interest balancing framework, one can provide for-cause removal protection for the CFPB, but not the Secretary of Defense, because (1) the level of intrusion is different and (2) the interests being advanced would be different.

Similarly, formalist premises would render civil service protections unconstitutional, as they surely interfere with the level of control the President has over executive branch governance.[277] But, even if for-cause removal restrictions are not always permitted for executive branch officers, they could still be justified for civil servants based on Congress's interests in structuring an independent and stable federal bureaucracy in service of its power

[274] *See Seila L.*, 140 S. Ct. at 2238 (Kagan, J., dissenting) ("No one had a doubt that the new agency should be independent. . . . Congress has historically given—with this Court's permission—a measure of independence to financial regulators like the Federal Reserve Board and the FTC.").

[275] U.S. CONST. art. II, § 1, cl. 1.

[276] *See id.* art. II, § 2, cl. 1. Bamzai and Prakash argue that military domains are no different because the removal power comes from the Vesting Clause, not the Commander in Chief clause. *See* Bamzai & Prakash, *supra* note 1, at 1825–26. But clearly limiting removal of the Secretary of Defense would still interfere with the President's commander-in-chief power.

[277] *See supra* notes 117–119 and accompanying text; Lawson, *Command and Control*, *supra* note 63, at 453 ("[I]f the Vesting Clause [trumps Congress's relevant power over office creation], it does so for *all* executive personnel, whether officers or employees. In that case, the President would have unlimited power to remove civil servants." (emphasis in original)).

to create "Offices" and "Departments," as well as under the Necessary and Proper Clause."[278]

Interest balancing would also be distinct from Bowie and Renan's proposal. Instead of a categorical rule holding that any for-cause protection in a statute is per se constitutional, interest balancing would make constitutionality turn on the level of intrusion and interests behind any given protection. So, to return to Bamzai and Prakash's example, if Congress tried to impose for-cause limitations on the Secretary of Defense, the constitutionality of such limitations would depend on whether Congress had a sufficiently strong interest to justify the level of intrusion on the President's power. That Congress passed the act (likely over a presidential veto) would not render it constitutional per se.

Finally, this approach is also distinct from functionalists' attempts to figure out the effect of any given for-cause protection on the general balance of power. It is not clear, for example, how giving the director of the CFPB for-cause protection would affect the balance of power between Congress and the President. The focus under interest balancing is not on the cumulative power of the branches, but on the particular interests at play in the relevant dispute.

2. Recognition.

Zivotofsky provides another example of how interest balancing would change the prevailing analysis. In *Zivotofsky*, the Court addressed what might seem like a classic infringement case: Congress has power to regulate passports and was using that power to interfere with the President's long-standing policy not to recognize Jerusalem as part of Israel.[279]

As noted above, the Court approached the dispute using Justice Jackson's Category Three framework. Under this framework, to rule in favor of the President, the Court had to conclude that the President's power over recognition was exclusive, and that it

[278] *See supra* notes 63–66, 113–115, and accompanying text (discussing these bases for Congress's power to structure officer positions and departments); Barry M. Mitnick, *Trump Wasn't the First President to Try to Politicize the Civil Service—Which Remains at Risk of Returning to Jackson's 'Spoils System'*, THE CONVERSATION (Jan. 28, 2021), https://perma.cc/H9LT-W4PZ (describing the history of the spoils system and reasons for the rise of the civil service).

[279] *See Zivotofsky*, 576 U.S. at 6, 31.

was of sufficiently wide scope to encompass the passport requirement at issue.[280] This is exactly what the Court did. First, it concluded—on contestable grounds[281]—that the President's recognition power was exclusive.[282] It then had to conclude that the power was of sufficiently wide scope to cover the contents of place-of-birth designations on passports.[283] This was not easy because, as the Court initially acknowledged, place-of-birth designations on passports do not constitute formal acts of recognition.[284] This presented a problem for the Court because it was not clear how, then, the statutory requirement fell under the President's exclusive power over recognition. The Court resolved this issue by contradicting itself and concluding that, in fact, the passport regulation was an attempt by "Congress to exercise [the President's] exclusive power itself,"[285] even though it had previously acknowledged this was not the case. These contortions are a direct result of Justice Jackson's formalist framework, which cannot accommodate cases of infringement.

Indeed, the Court acknowledged in its opinion that Congress could interfere with the President's recognition power using its powers over confirmation of ambassadors, approval of treaties, or even declarations of war.[286] But it never explained why Congress could use these powers, but not its power over passports, to interfere with the President's recognition power.

Meanwhile, Chief Justice John Roberts's and Justice Scalia's formalist dissents were equally uncompelling. Chief Justice Roberts claimed that the statute "*does not implicate recognition*"[287] at all, while Justice Scalia stated that it "has nothing to do with recognition" because it "does not require the Secretary to make a formal declaration about Israel's sovereignty over

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[280] *See supra* notes 147–149 and accompanying text.

[281] *See* Goldsmith, *supra* note 149, at 125.

[282] *See Zivotofsky*, 576 U.S. at 14–30.

[283] *See id.* at 30–32.

[284] *See id.* at 30 ("[T]he statement required by [the statute] would not itself constitute a formal act of recognition.").

[285] *Id.* at 32 ("To allow Congress to control the President's communication in the context of a formal recognition determination is to allow Congress to exercise that exclusive power itself.").

[286] *See id.* at 30 ("Congress may [ ] express its disagreement with the President in myriad ways. For example, it may enact an embargo, decline to confirm an ambassador, or even declare war."); *see also id.* at 16 ("If Congress disagrees with the President's recognition policy, there may be consequences. Formal recognition may seem a hollow act if it is not accompanied by the dispatch of an ambassador, the easing of trade restrictions, and the conclusion of treaties.").

[287] *Id.* at 64 (Roberts, C.J., dissenting) (emphasis in original).

Jerusalem."[288] Here, Chief Justice Roberts and Justice Scalia were also overclaiming. Even if the statute did not constitute a formal act of recognition, mandating that the Secretary of State label Jerusalem as part of Israel on an official document, of course, implicates and has something to do with recognition.[289] Justice Scalia and Chief Justice Roberts had to deny this fact because their formalist methodology does not permit them to allow any infringement on a power held by the President. Justice Clarence Thomas, meanwhile, justified his conclusion that the President should prevail by finding that Congress had no power to say what goes on a passport at all but does have power to dictate the contents of consular reports of birth abroad.[290] *Zivotofsky* thus provides a good example of how ill-suited Justice Jackson's Category Three analysis, and formalism more broadly, are to addressing infringement cases.

Unlike its formalist competitors, interest balancing can accommodate this case quite easily. It does not require us to find that recognition is an exclusive power that encompasses what goes on a passport. Nor does it require us to conclude that *any* interference with the President's power over recognition is unconstitutional. Likewise, it does not require us to pretend that the passport regulation at issue did not interfere with the President's recognition power *at all*. Rather, under interest balancing, we can accept that both branches have relevant power over the matter and ask whether any infringement by one on the other's exercise of power can be justified. In particular, the question is whether (1) the act intrudes on the President's power over recognition; and, (2) if so, whether such intrusion is justified by a sufficiently strong interest in service of Congress's constitutional authority.[291]

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[288] *Id.* at 71 (Scalia, J., dissenting).

[289] *See Zivotofsky*, 576 U.S. at 8 (noting the diplomatic fallout from the passage of the act).

[290] *See id.* at 33 (Thomas, J., concurring). *But see* MCCONNELL, *supra* note 66, at 295:

> It is puzzling [ ] why [Justice Thomas] does not think that Congress has any enumerated power to control the content of passports. . . . [T]he power [could be located] under the Naturalization Clause . . . . Passports also seem to fall within the power to regulate commerce with foreign nations, or at least to be necessary and proper to that power. Foreign trade . . . entails arrangements under which Americans are allowed to enter foreign countries and enjoy protection. Passports are our means for doing that, and listing the traveler's place of birth on the passport is useful for identification purposes.

[291] *See Nixon*, 433 U.S. at 443 ("[T]he proper inquiry focuses on the extent to which [the Act] prevents the Executive Branch from accomplishing its constitutionally assigned

By forcing the Secretary of State to contradict the President's recognition decision, the act clearly interfered with the President's authority over recognition, even if such authority is not exclusive.[292] The question, then, is what objectives "within the constitutional authority of Congress"[293] the statute sought to serve. As noted above, Congress was exercising its power to regulate passports.[294] This power likely stems from its power to "establish a[ ] uniform Rule of Naturalization,"[295] which includes the power to "furnish the people it makes citizens with papers [including passports] verifying their citizenship."[296] Congress thus has the power to require that passports include places of birth to "promote[ ] the document's citizenship-authenticating function . . . ."[297]

Congress was thus acting pursuant to its power to promote the identification of U.S. citizens by regulating passports. Once we understand this, we see that Congress's interests in requiring passports to state "Jerusalem, Israel," on individual request, were extremely limited. It is hard to see how specifying that someone was born in "Jerusalem, Israel," rather than "Jerusalem," will serve any meaningful identification-confirmation function.[298] In truth, the real purpose behind the provision, the interest Congress was *actually* trying to serve, appears to have been to interfere with the President's recognition policy.[299] This is not an interest within Congress's power that can justify its intrusion on the President's recognition power.

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functions. . . . [W]e then determine whether [it] is justified by an overriding need to promote objectives within the constitutional authority of Congress.").

[292] *See* Goldsmith, *supra* note 149, at 115 (noting that "[n]o one seriously questioned" that the President had "independent power[ ]" to recognize foreign states (quotation marks omitted) (quoting *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring)).

[293] *Nixon*, 433 U.S. at 443.

[294] *See Zivotofsky*, 576 U.S. at 31 ("The Court does not question the power of Congress to enact passport legislation of wide scope."); *id.* at 69 (Scalia, J., dissenting).

[295] U.S. CONST. art. I, § 8, cl. 4; *see also Zivotofsky*, 576 U.S. at 69 (Scalia, J., dissenting) (grounding the passport authority in this clause).

[296] *Zivotofsky*, 576 U.S. at 69 (Scalia, J., dissenting). It might also be grounded in Congress's foreign commerce power. *See* MCCONNELL, *supra* note 66, at 295.

[297] *Zivotofsky*, 576 U.S. at 69 (Scalia, J., dissenting); *see also id.* at 64 (Roberts, C.J., dissenting) (noting that "'identification' . . . is the principal reason that [U.S.] passports require 'place of birth'").

[298] *See id.* at 69 (Scalia, J., dissenting) ("[T]o be sure, recording Zivotofsky's birthplace as 'Jerusalem' rather than 'Israel' would fulfill [the citizenship-authentication] objective[ ].").

[299] *See id.* at 31 (majority opinion) ("[It is an] undoubted fact that the purpose of the statute was to infringe on the recognition power. . . . [I]t is clear that Congress wanted to express its displeasure with the President's policy by, among other things, commanding the Executive to contradict his own, earlier stated position on Jerusalem.").

Here, we can see the benefits of interest balancing. Interest balancing allows us to accept that Congress has power to regulate passports and that such power might sometimes interfere with the President's recognition power. But it provides that such interference can only be justified by sufficiently strong interests within Congress's constitutional authority. In this case, it was not, and Congress's statute was appropriately held unconstitutional. Interest balancing allows us to come to this conclusion without finding that the President has an exclusive power over recognition upon which Congress can never intrude. Nor does it require us to find that Congress has no power to regulate passports, as Justice Thomas would have it.[300]

Interest balancing also allows us to limit the disposition to this case. Going forward, then, Congress could potentially interfere with the President's recognition power, including through regulating passports, if it was done in service of sufficiently strong interests. So, if, for example, Congress sought to impose an embargo on or limit the use of passports for travel by U.S. citizens to a state recently recognized by the President, it could potentially do so under its foreign commerce power, even if doing so would interfere with the President's recognition power.[301] Rather than deciding, now and forever, that the President has an exclusive power that "disabl[es] [ ] Congress from acting upon the subject,"[302] the President can win a particular case but lose the next one, and vice versa. Among other things, this means that rather than being able to ignore Congress entirely now that the President is deemed to have exclusive power over the matter, interest balancing would require the President to continue to care about what Congress was trying to do when it passed legislation impacting the President's recognition power.[303]

300 *See id.* at 33 (Thomas, J., concurring).

301 Similarly, McConnell has criticized the *Zivotofsky* majority's reasoning, in part, because "[i]f . . . Congress passed a law declaring that imports from Jerusalem would be taxed as imports from Israel and counted against Israel's import quota, it is hard to believe that the President's Recognition Power would render that law unconstitutional." MCCONNELL, *supra* note 66, at 293. Interest balancing would permit the Court to strike down the regulation at issue in *Zivotofsky* but uphold a similar law, depending on the reasons that it was enacted.

302 *Youngstown*, 343 U.S. at 637–38 (Jackson, J., concurring).

303 *See supra* Part III.C.3.

IV. DEVELOPING INTEREST BALANCING IN THE SEPARATION OF POWERS

Separation of powers interest balancing requires an inquiry into the level of intrusion on the challenging branch's constitutional powers, and it demands that the intrusion be "justified by an overriding need to promote objectives within the constitutional authority of" the other branch.[304] Although this form of balancing would be a marked improvement over existing forms of separation of powers analysis, its structure has yet to be critically analyzed. This Part introduces and examines some of the biggest questions about how to operationalize interest balancing and suggests some options for improving it going forward. It addresses three key questions: (1) what branch interests ought to be relevant; (2) where the default should be set; and (3) whether a means-ends tailoring analysis ought to be explicitly incorporated. The goal of this Part is not to exhaust all the questions that interest balancing raises. One section cannot do that; even decades of scholarship on interest balancing in constitutional rights have not exhausted all the interesting or important issues in that domain.[305] Rather, the hope is to make progress in better understanding and operationalizing interest balancing going forward.

A. Which Interests?

Which interests ought to count in balancing between the branches? In *Nixon*, the Court stated that any intrusion on the President's power must be "justified by an overriding need to promote objectives within the constitutional authority of Congress."[306] The Court thus suggested that the relevant interests are those in service of the branch's constitutionally granted powers.[307]

Although the issue is not incontrovertible, these strike me as the proper interests to inquire into in separation of powers interest balancing. Grounding the interests in the constitutional allocation of powers to the branches provides a way to respect the Constitution's division of power between the branches without

[304] *Nixon*, 433 U.S. at 443.

[305] *See generally, e.g.*, Greene, *Rights as Trumps*, *supra* note 48 (critiquing interest balancing); Fallon, *Strict Judicial Scrutiny*, *supra* note 168 (raising a number of open theoretical questions regarding strict scrutiny).

[306] *Nixon*, 433 U.S. at 443.

[307] *See id.* at 452–53; *see also supra* notes 184–193 and accompanying text (discussing how interest balancing has been applied in other separation of powers situations).

making this allocation overly rigid.[308] Moreover, the notion that the relevant constitutional interests are those in service of the government's constitutional powers is consistent with a line of individual rights cases.[309] For example, in a First Amendment challenge to the Anti-Terrorism Act of 1987's[310] limitation on the PLO's activities in the United States, the court first inquired into whether Congress had power to pass the Act and then whether the interests served in furtherance of that power were sufficiently strong to override the relevant First Amendment infringements.[311] Similarly in *Nixon*, the Court examined several individual rights claims asserted by President Nixon, concluding that the same interests alluded to in the separation of powers analysis, those in service of its Article I powers, were sufficiently strong to justify the relevant intrusion on President Nixon's individual rights.[312] In short, there is precedent for, and normative appeal to, grounding the interests in how they serve the powers that the branch is trying to exercise.

That said, separation of powers interest balancing could accommodate other interests as well. For example, Professors Bowie and Renan put forward interests in promoting "political equality, nondomination, and the rule of law" as core to their theory of a "republican conception" of separation of powers.[313] Others have suggested the importance of furthering efficient and effective government or stability.[314] The interests used to justify intrusions on powers could incorporate normative values such as these

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308 *See supra* Part III.C.4 (discussing how interest balancing can further the values of separation of powers and checks and balances).

309 *See, e.g.*, Fallon, *Strict Judicial Scrutiny*, *supra* note 168, at 1321 ("[Courts and commentators] have argued . . . that values underlying the Equal Protection Clause give the states a compelling interest in eradicating private discrimination on the basis of race and gender."). That said, Professor Richard Fallon has noted that, even in the rights domain, "the Supreme Court has frequently adopted an astonishingly casual approach to identifying" which "compelling interests" matter. *Id.* at 1321.

310 22 U.S.C. §§ 5201–5203.

311 *See* Mendelsohn v. Meese, 695 F. Supp. 1474, 1483–86 (S.D.N.Y. 1988).

312 *See Nixon*, 433 U.S. at 465; *see also id.* at 467–68 ("[T]he First Amendment claim is clearly outweighed by the important governmental interests promoted by the Act.").

313 Bowie & Renan, *supra* note 1, at 2107.

314 *See, e.g.*, Gillian E. Metzger, *The Supreme Court, 2016 Term—Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 87 n.519 (2017) ("Effective governance was [ ] a central concern of leading separation of powers theorists."); Posner, *supra* note 126, at 1677 (proposing resolving separation of powers disputes by asking what "is likely to improve policy outcomes"); Strauss, *Constitutional Interpretation*, *supra* note 251, at 918 (emphasizing stability).

as well. One benefit of interest balancing is that it can be ecumenical in this way. So, while, in my view, the relevant interests ought to be the ones in service of constitutionally allocated powers, interest balancing could certainly accommodate other relevant interests.

B. Where Should the Default Be Set?

In the rights domain, it is accepted that the default should lie with the individual, i.e., the government has to justify its intrusion on the individual's rights, rather than the other way around.[315] But where should the default be set in separation of powers interest balancing? Although *Nixon* sets the default squarely with the President,[316] it is far from obvious that this is where the default should lie. While separation of powers disputes are typically framed as questions of Congress interfering with the President's exercise of power, we can frame the disputes in the opposite direction by asking whether the President's attempt to ignore statutory limitations interferes with Congress's power to pass laws. The question of where the default should lie is a *choice*.

This Section puts forward four options for where to set the default: (1) with Congress; (2) with the President; (3) based on historical gloss; or (4) based on core rather than peripheral powers.[317]

It is worth emphasizing that, while the question of where to set the default is a difficult one, it is not unique to interest balancing. Formalism has typically placed the default with the President—if the President's exclusive power is violated, Congress loses, rather than the other way around.[318] Meanwhile, Bowie and

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[315] *See supra* notes 166–168 and accompanying text.

[316] *See Nixon*, 433 U.S. at 443 (focusing on whether congressional action "prevents the Executive Branch from accomplishing its constitutionally assigned functions").

[317] Another alternative would be to proceed with no default at all on the view that the branches are presumptively coequal. I am open to this as a potentially fruitful method of resolving separation of powers disputes, but, because it seems at odds with both the regime set forth in *Nixon* as well as with rights adjudication, I do not explore it further here. I see the main downside of such an approach is that it is even more subjective than the alternatives below, and this room for interpretation might make it less helpful than having a default that is, admittedly, likely to be over- and under-inclusive. These are trade-offs worth exploring in future work.

[318] This is an accepted, but unstated, assumption in the Court's separation of powers cases, which treat the question as whether Congress can interfere with the President's power. *See, e.g.*, Seila L. v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2191–92 (2020); *Zivotofsky*, 576 U.S. at 5; *see also* Bamzai & Prakash, *supra* note 1, at 1763–64.

Renan set the default with Congress.[319] One benefit of interest balancing's framework is that, unlike its categorical competitors, the default is just that: a default that can be overcome.

1. Congress.

There are several plausible reasons to support a default in favor of Congress. This would mean that, when the branches' exercises of power come into conflict, rather than asking whether the President's powers are intruded upon and whether such intrusion is justified by a compelling interest of Congress, we would ask whether Congress's power is intruded upon and whether such intrusion is justified by a sufficiently compelling interest of the President.

Some might prefer this default on the ground that the legislature is meant to be the primary governing institution in a liberal democracy.[320] This primacy might justify providing a presumption in Congress's favor when the branches come into conflict. Others might prefer a congressional default because of the Necessary and Proper Clause.[321] On this view, because the Constitution states that Congress has the power to create laws "necessary and proper for carrying into Execution" not only Congress's powers, but also the President's,[322] it grants Congress explicit authority to regulate the President so long as such regulation is "necessary and proper."[323] Of course, there are counterarguments to both these suggestions. The danger of the primacy of the legislature has been used to justify a default against it.[324] And opponents of the broad reading of the Necessary and Proper Clause argue that what is "necessary and proper" entails examining what is "proper," and not all interference with the

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[319] *See* Bowie & Renan, *supra* note 1, at 2108–09.

[320] *See, e.g.*, SAMUEL ISSACHAROFF, DEMOCRACY UNMOORED: POPULISM AND THE CORRUPTION OF POPULAR SOVEREIGNTY 42 (2023) ("Democracies are conceived around legislative power . . . . The legislative arena, at least in theory, is the clearest institutionalized setting for democratic deliberation."); Jeremy Waldron, *Principles of Legislation*, *in* THE LEAST EXAMINED BRANCH: THE ROLE OF LEGISLATURES IN THE CONSTITUTIONAL STATE 15, 30 (Richard W. Bauman & Tsvi Kahana eds., 2006) (arguing that legislatures' decision-making procedures "give[ ] legislation its special claim to legitimacy in modern democratic societies").

[321] *See, e.g.*, Manning, *supra* note 1, at 1987; Macey & Richardson, *supra* note 1, at 106 ("Many academics have read the Necessary and Proper Clause broadly to empower Congress to pass any laws that support the exercise of its substantive powers.").

[322] U.S. CONST. art. I, § 8, cl. 18.

[323] *See, e.g.*, Barron & Lederman, *supra* note 141, at 737–38 (describing this view).

[324] *See, e.g.*, *Morrison*, 487 U.S. at 698–99 (Scalia, J., dissenting).

President's power would be.[325] In this way, the Necessary and Proper Clause does not per se justify congressional interference with the President's power.

Others might prefer a congressional default for more pragmatic reasons geared at the perceived modern imbalance of power between the branches. It is generally acknowledged that the executive's power has grown, and Congress's has receded, in modern times.[326] Thus, even if we can never identify a concrete baseline of equipoise, as functionalists would have it, we might accept that, generally speaking, Congress has stepped back and the President has stepped forward in modern times. If that is true, given the difficulties of passing legislation in a polarized Congress, some might prefer to default toward Congress to encourage it to pass more, not less, legislation.[327]

In short, some might prefer to default toward Congress but may be uncomfortable with a categorical rule in its favor for some of the reasons discussed above. But, while a categorical rule in favor of Congress might not be justified, a default that can be overridden by the President's sufficiently strong interests might seem more appealing for the reasons given above.

2. The President.

Others might maintain that the President should retain the default. This could be grounded in the view, espoused at one point by James Madison and repeated by Justice Scalia and others, that "[i]n republican government, the legislative authority necessarily predominates," suggesting that it is necessary to "forti[fy]" the executive to combat legislative overreach.[328] On this view, we ought to fear aggrandizement by the legislature and, thus, default toward the President in conflicts between the branches. Others might support a default toward the President on the view that

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325 *See, e.g.*, Barron & Lederman, *supra* note 141, at 737–38 ("[A]n otherwise 'proper' exercise of a congressional power [might] cease[ ] to be 'proper' at the point at which a preclusive [Article II] power kicks in."); *see also* Manning, *supra* note 1, at 1986.

326 *See, e.g.*, Richard H. Pildes, *Law and the President*, 125 HARV. L. REV. 1381, 1385 (2012) (book review) (noting that "presidential powers have expanded dramatically in recent decades").

327 I am grateful to Professor Alan Rozenshtein for elucidating this point.

328 *Morrison*, 487 U.S. at 698 (quoting THE FEDERALIST NO. 51, at 322–23 (James Madison) (Clinton Rossiter ed., 1961)); *see also* Constitutional Separation of Powers, OLC Op., *supra* note 189, at 126 (making an analogous point).

executive power will inevitably dominate and is, in any event, superior to congressional power in modern times.[329] Still, others might propose defaulting toward the President for precedential reasons. This is how the Court and other interpreters have typically examined these issues,[330] and, to the extent one believes in the value of continuity both inside and outside the courts, this would give some reason to default toward the President.

3. Historical gloss.

Another alternative would be to default toward historical gloss. Because the Constitution's text is spare and vague regarding the allocation of powers between the branches, interpreters have frequently looked to past branch practice to guide their decision-making.[331] Although the precise method for doing so remains subject to debate,[332] the basic approach asks whether one branch has consistently engaged in a particular practice over time and, if so, whether the other branch has acquiesced in such a practice.[333] This is said to provide a gloss on the constitutional text giving that branch power to engage in the relevant conduct.[334]

One critique of the use of historical practice has been that, while it might be robust enough to provide that one branch has constitutional power to engage in certain conduct, it will almost never be sufficient to find that such power is exclusive.[335] This is because the evidence to establish exclusivity would require repeated examples where one branch has opposed the other branch's action on constitutional grounds, permitted it to proceed,

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329 *See* ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC 16–17 (2013).

330 *See supra* note 318.

331 *See generally* Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411 (2012); Roisman, *Constitutional Acquiescence*, *supra* note 161, at 676–77.

332 *See* Curtis A. Bradley, *Doing Gloss*, 84 U. CHI. L. REV. 59, 59 (2017) (noting the "substantial uncertainty . . . about the proper methodology for determining [ ] 'historical gloss'").

333 *See* Roisman, *Constitutional Acquiescence*, supra note 161, at 676–77; Bradley & Morrison, *supra* note 331, at 432.

334 *See Youngstown*, 343 U.S. at 610–11 (Frankfurter, J., concurring) (dubbing this "historical gloss").

335 *See, e.g.*, CURTIS A. BRADLEY, HISTORICAL GLOSS AND FOREIGN AFFAIRS: CONSTITUTIONAL AUTHORITY IN PRACTICE (forthcoming 2024) (manuscript at 6) ("[H]istorical gloss rarely can establish such exclusivity.") [hereinafter BRADLEY, HISTORICAL GLOSS AND FOREIGN AFFAIRS].

and then declined to object on constitutional grounds in future actions.[336]

Using historical gloss as a default in interest balancing might provide a middle ground for those drawn to looking to historical practice, but who recognize it will almost never be sufficient to provide exclusivity.[337] This would mean that while past practice would matter, it would not be dispositive.

So, for example, even if historical practice is insufficient to show the President has exclusive power to recognize foreign countries, the President's regular practice of recognition might be sufficient to give the President a default allocation that can be overridden for sufficiently strong reasons.[338] Conversely, if Congress has developed a practice of authorizing and regulating the use of military commissions and the treatment of prisoners of war,[339] then the President could be required to show a strong interest to infringe on Congress's power in this domain.

This approach could respect historical practice in a way that is not overly fixed. Relative to adopting a default rule in favor of Congress, this would also put fewer existing practices in danger of being overturned. This might seem unappealing for those concerned with the imbalance between the branches today but appealing to those who wish to defer to precedent.

4. Core/periphery.

Another option would be to set the default with whichever branch has had its core functions intruded on by a peripheral exercise of power of the other branch. The core/periphery distinction has a long pedigree in separation of powers law.[340] Although this distinction has been critiqued for failing to provide a usable method to distinguish core from periphery,[341] some might be drawn to it if it is used to provide a default, rather than an exclusive, dispositive power. This would give meaning to the

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[336] *See* Bradley & Morrison, *supra* note 331, at 434.

[337] *See id.* at 432–36 (discussing the reasons to privilege past practice).

[338] *See* Goldsmith, *supra* note 149, at 122, 125 (questioning whether the President's power is "exclusive" but noting that "Presidents had often recognized foreign nations and governments on their own authority").

[339] *See* BRADLEY, HISTORICAL GLOSS AND FOREIGN AFFAIRS, *supra* note 335 (manuscript at 163–66).

[340] *See, e.g.*, Barron & Lederman, *supra* note 141, at 727 ("[S]uch a core/periphery distinction is commonly accepted as a prominent feature of many textually enumerated powers . . . ."); *see also* Strauss, *The Place of Agencies*, *supra* note 1, at 642.

[341] *See supra* note 125 and accompanying text.

core/periphery distinction[342] while allowing it to be overridden by a sufficiently strong interest.

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Above, I laid out different options for where to set the default, depending on various normative commitments. A default toward historical practice or Congress strikes me as likely the most appealing, but I can see plausible arguments for these other arrangements as well. And if the possibilities are overwhelming, we can simply stick with existing precedent by asking whether and how the President's power has been intruded on, and if such intrusion is justified by a sufficiently strong congressional interest. This would still be an improvement over the prevailing competitors for the reasons discussed above.

C. Means-Ends Tailoring

Another area worth exploring in separation of powers interest balancing is the potential role for a means-ends tailoring analysis. This is arguably required by the *Nixon* balancing test, which requires an "overriding need to promote objectives within the constitutional authority of Congress,"[343] but the Court does not actually engage in that analysis in its discussion of the separation of powers principle, concluding simply that the intrusion was relatively minor and that there were sufficiently strong interests to justify it.[344]

In analyzing the more specific claim that the Presidential Recordings and Materials Preservation Act violated executive privilege, however, the Court did engage in some means-end tailoring analysis, concluding that, in light of Congress's interests, the intrusion "cannot be said to be overbroad."[345] This was because the documents unrelated to Congress's objectives that implicated the privilege were "commingled with other materials whose preservation the Act requires," which "require[d] the comprehensive review and classification contemplated by the Act."[346]

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[342] Indeed, although otherwise critical, even Prakash notes that there are some obvious cases for this distinction. *See* Saikrishna Prakash, *Regulating Presidential Powers*, 91 CORNELL L. REV. 215, 237 (2005) (book review).

[343] *Nixon*, 433 U.S. at 443.

[344] *See supra* notes 180–183 and accompanying text.

[345] *Nixon*, 433 U.S. at 454.

[346] *Id.*

This sort of means-ends tailoring inquiry is common in rights balancing and has been justified as helping "smoke out" impermissible motives and ensuring greater deliberation.[347] This form of inquiry could be adopted as a standard feature of separation of powers interest balancing to provide a third step, where we would ask about (1) the extent of the intrusion on the President's interest; (2) the strength of Congress's interest; and (3) the tailoring and necessity of the scheme to further Congress's interest. That said, as has been pointed out in the rights domain, government action is almost never perfectly tailored to necessity,[348] which might render this form of analysis too restrictive and subject to unfair post hoc judgment.[349]

One middle-ground position would be to require that the political branches consider the means-ends fit of any intrusion ex ante—which could help encourage proportionate, rather than overbroad, intrusions[350]—but that such fit should not be used as a post hoc reason to render an arrangement unconstitutional. There is no obvious answer to whether means-end tailoring ought to be a formal part of interest balancing, but it is certainly an option worth considering.

D. Summary

This Part has identified and explored some of the most glaring theoretical questions in how to operationalize and improve interest balancing in the separation of powers. The point is not to suggest that these are the only issues in need of exploration and development.[351] Nor is it meant to suggest that, because there are

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[347] *See, e.g.*, COHEN-ELIYA & PORAT, *supra* note 46, at 68, 71 (discussing the use of means-ends tailoring to smoke out pretext and indifference); Fallon, *Strict Judicial Scrutiny*, *supra* note 168, at 1308–11, 1326–32.

[348] This led Professor Gerard Gunther to famously state that strict scrutiny was "strict in theory [but] fatal in fact." Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (quotation marks omitted). *But see* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 815 (2006) (contesting the accuracy of this statement in practice).

[349] Indeed, Fallon notes that true necessity has not reliably been required even in strict scrutiny cases. *See* Fallon, *Strict Judicial Scrutiny*, *supra* note 168, at 1332–33.

[350] *See id.* at 1330 (suggesting that a means-end inquiry serves a proportionality purpose).

[351] For example, using structured proportionality analysis, as practiced by constitutional courts throughout the world in the rights domain, is another option, even if it is not typically invoked in structural domains. *See, e.g.*, Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 3094, 3193 n.460 (2015).

open questions, interest balancing is hopelessly undertheorized. Indeed, many of the questions noted above are also undertheorized in the rights domain, and yet constitutional rights adjudication persists.[352] There is nothing unusual, let alone bad, about having things to figure out.

Constitutional interpretation and decision-making are difficult enterprises. We do ourselves no favors by ignoring that fact, nor by becoming despondent about it. The point is not that these various questions do not matter, but rather that there is often no obvious answer to them. That does not mean we ought not ask them.[353]

CONCLUSION

Separation of powers conflicts are a common feature of our government. Yet, we still lack a coherent method to resolve them. This is because we have been conceiving of them in the wrong way. Separation of powers conflicts almost never involve examples where one branch is exercising or fully denying the exclusive power of the other. Rather, almost all difficult cases involve instances where *both* branches have power to act but come into conflict. Existing methods have failed to provide a useful means to resolve such cases of infringement. This Article provides a method built precisely for such cases: interest balancing. Interest balancing is the default mode of assessing infringements in the other half of constitutional law involving individual rights but has somehow escaped the attention of separation of powers scholars. It turns out that interest balancing can better accommodate the separation of powers disputes that actually arise today than any of the prevailing competitors. This is because interest balancing is well suited for the difficult cases that actually arise—cases of separation of powers infringements. Like any method of constitutional decision-making, interest balancing is not perfect. But perfect is not the prevailing competitor. For too long, courts and scholars have sought to resolve disputes between the branches by examining their *powers*. It is time to start looking at their *interests*.

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[352] *See, e.g.*, Fallon, *Strict Judicial Scrutiny*, *supra* note 168, at 1315–32, 1336 (raising questions of what interest counts and how narrow tailoring can be conducted in strict scrutiny).

[353] *Cf. id.* at 1336–37 ("To say all this is not to say that the strict scrutiny formula has no significance in structuring analysis and determining results. Surely it does.").