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H Jefferson Powell

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The United States as an Idea: Constitutional Reflections

*H. Jefferson Powell**

I'd like to begin my remarks with two completely unoriginal observations. The first is that United States is a nation that rests on ideas, in a sense that isn't quite true of many other nations. What we mean by, say, Denmark, or my ancestral country of Wales, certainly *is* tied up with ideas about what it means to be Danish or Welsh. To be Welsh is, among other things, to belong to a nation of poets: the greatest cultural achievement for any Welshman or woman—leaving aside organized sports!—is to be crowned Bard (chief poet) at the National Eisteddfod. But the ideas that characterize Denmark or Wales belong to a national community that did not begin with ideas and a conscious decision. There was no convention that established Denmark, no declaration that announced Wales, and it is pointless to ask when either nation was created.¹ Both emerged out of “the mists of time,” out of a particular human experience of geography, culture, language, religion, perceived physical kinship, and so on. But the ideas that characterize Denmark or Wales are not primarily political, and their national identity is distinct from their formal political structures. Denmark is a kingdom and Wales is a non-sovereign principality, but I don't think the creation of a Republic of Denmark or an independent Wales would dramatically change anyone's sense of what it is to be Danish or Welsh, however desirable some of us think the latter would be.

In this respect, the United States *is* different. Think about the name I just used: in full it does have a geographic reference—this is the United States *of America*—but we speak easily and without ambiguity about this nation when we use the purely political term “United States.” This is no accident: the American national identity is significantly shaped by our

* Professor of Law, Duke University. I am deeply grateful to Barry Sullivan and Alexander Tsesis for inviting me to be the keynote speaker on November 3, 2017, at the Eighth Annual Constitutional Law Colloquium at the Loyola University Chicago School of Law, and to the *Law Journal* for publishing my remarks. In their writing as scholars, and in the hard work of organizing this annual event, Professors Sullivan and Tsesis exemplify the practice of constitutional law as a contribution to the Republic that I called for in my talk.

1. *But see* GWYN A. WILLIAMS, *WHEN WAS WALES? A HISTORY OF THE WELSH* (1985). In fact, Professor Williams was making a rather different point in his wonderful book.

formal and constitutional arrangements. I'm planning to use the word "American" in these remarks, but will refer to the nation as "the United States" because I want us to keep in mind the fact that this nation is a political contrivance, artificial, the product of people making specific historical decisions at particular points in time and deliberately turning political ideas into political reality. You can ask the date on which the United States began—there are, to be sure, competing plausible answers. But the question isn't silly, and deciding which date you think more persuasive is a matter of deciding which *ideas* you think are the most fundamental to the nation's identity. Whatever else it is, the United States is an idea or set of ideas.

My second banal observation takes less time to state: a great many people, and I am one of them, think that this is a time of deep and disturbing divisions among Americans: some of the lines separating us are ethnic, religious, regional or economic, but we are also divided by sharp ideological and even philosophical disagreements. The United States is a nation built on ideas, but the people of the United States disagree about what those ideas are—not just in detail, but (it seems right now) at a basic level. It seems likely that a nation so constituted by ideas cannot permanently endure radical disagreement about its meaning. In such a time, the health, and indeed in some sense the survival of this country, depends on finding ways to further a broad national conversation about what the United States means, or can mean, to all its people.

Now let me finally say something that may be faintly original. Here's my claim in a nutshell: I think constitutional lawyers have something unique and valuable to contribute to a conversation about the meaning of the United States, about the ideas that make up our national identity. When I say this, I don't mean constitutional scholars speaking as political theorists or philosophers. Some of us are philosophers, and those who are can and should speak in that role. But most constitutional lawyers—and I am in this group—are not competent philosophers, and my proposal to you today does not rest on identifying—or confusing—legal arguments with philosophical ones. I really am suggesting that constitutional lawyers speaking *as lawyers*, as persons with knowledge and expertise in a particular and technical area, may have unique insights to bring to the question, "what is the meaning and idea of the United States?"

That may seem, at first hearing, both a little grandiose and quite laughable. Expertise in the Internal Revenue Code, sure: if I need a tax lawyer I want someone who's mastered a large and complicated body of information and knows how to use that information in effective ways. But expertise in constitutional law? Justice William Douglas claimed in his memoirs that Chief Justice Charles Evans Hughes once told him that "[a]t the constitutional level where we work, 90 percent of any decision is

emotional.”² Whatever Chief Justice Hughes may have *actually* said, Justice Douglas was expressing what many people genuinely believe about constitutional law: it’s nothing more than a matter of dressing up one’s moral and political predilections in a certain legal rhetoric, and hoping that whoever must make the final decision shares those predilections.

This view of constitutional law is widespread and longstanding. Several decades ago, the philosopher Alasdair MacIntyre offered a somewhat backhanded defense of the Supreme Court of the United States’ performance in ideologically driven disputes. In such cases, MacIntyre wrote, the Court “plays the role of a . . . truce-keeping body . . . negotiating its way through an impasse of conflict, not by invoking our shared moral first principles. For our society as a whole has none.”³ I agree with MacIntyre that we should not expect the Court to be a forum of principled philosophical discussion, but what interests me in his comment are his assumptions about law: if law is conflictual, it can be neither principled nor a source of genuine unity. For MacIntyre, writing in 1982, the paradigm of a constitutional law decision was the *Regents of the University of California v. Bakke* affirmative action case, in which eight justices disagreed with at least part of the decision’s rationale.⁴ In 2017, it’s generally thought that in many or most ideologically fraught cases, eight of the justices are unpersuadable, and the decision will turn on the vote of the ninth member of the Court. From the perspective of a MacIntyre, fragmented decisions like *Bakke*, and the fact that the same justice is the swing vote in many cases, prove that constitutional law is intrinsically conflicted and therefore without unifying principles. This in turn reveals the emptiness of talking about constitutional lawyers as having real expertise in anything beyond a certain kind of forensic rhetoric.

The interminability of constitutional disagreement is, furthermore, no late twentieth-century development. There is no lost, golden era of constitutional consensus buried somewhere in the past. During the course of a lengthy 1818 congressional debate over the scope of Congress’ powers, Representative Henry St. George Tucker (one of the best constitutional lawyers of his generation) finally got tired of arguments that were substantially the same as those that had divided the First Congress in 1791. “Do gentlemen suppose,” Tucker burst out in

2. WILLIAM O. DOUGLAS, *THE COURT YEARS 1939–1975: THE AUTOBIOGRAPHY OF WILLIAM O. DOUGLAS* 8 (1980).

3. ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* 253 (Univ. of Notre Dame Press 3d ed. 2007).

4. See generally *Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1978); see MACINTYRE, *supra* note 3, at 253 (discussing *Bakke* as exemplifying the Court’s role).

exasperation,

that if, which Heaven permit! this confederation of States shall last for a century, we shall, throughout that period, be continually mooting Constitutional points, holding nothing as decided, admitting no construction to have been agreed upon, and instead of going on with the business of the nation, continually occupied with fighting, over and over again, battles a thousand times won?⁵

I don't think Representative Tucker would be altogether pleased with the 2017 answer to his question. His prayer was granted, and this confederation of States has now lasted almost two centuries since he spoke. Furthermore, specific constitutional controversies sometimes do end in decisions that endure. But speaking broadly, in the last 199 years we *have* been continually mooting constitutional points, and we *have* been fighting constitutional battles of principle over and over again regardless of who wins in any particular controversy.

Thus, constitutional disagreement is not simply the fault of the modern Supreme Court or the product of American political polarization in recent years; constitutional law has been a field of battle from the beginning. Rather than being a means of avoiding ideological or philosophical disagreement, constitutional law has served as one of the key venues within which such disagreement takes place. Smart constitutional lawyers have never thought otherwise. In 1805, Chief Justice John Marshall dismissed as naïve the expectation that constitutional law can eliminate deep disagreement. Writing specifically about the national bank debate, Marshall observed that “[t]he judgment is so much influenced by the wishes, the affections, and the general theories of those by whom any political proposition is decided, that a contrariety of opinion on this great constitutional question ought to excite no surprise.”⁶ In other words, conflict, disagreement, and contrariety of opinion are *built into the very fabric of constitutional law*.

And that is precisely why (Professor MacIntyre and company notwithstanding) constitutional law—and constitutional lawyers—have something useful to contribute to any serious discussion about what the United States is as an idea in this time of radical partisan and ideological division. We are the students of, and participants in, a legal tradition marked through and through by radical controversy. We are experts in fundamental disagreement.

Our warring contentions are, on a regular basis, ideological, partisan, or both. But as constitutional lawyers we are accustomed to living with mutual contradiction without giving up on the common enterprise. In the

5. 32 ANNALS OF CONG. 1325–26 (1818).

6. 4 JOHN MARSHALL, LIFE OF GEORGE WASHINGTON 243 (Chelsea House 1983) (1805).

body of law that is our field of study, we subject even the most divisive controversies to traditional modalities of analysis and argument that transcend the disagreements and unite the lawyers speaking for the contending principles. Constitutional law lives in and through discrete and divisive “cases and controversies.” Its continuity lies not in empowering the Supreme Court or anyone else to put an end to debate, but in affording divided Americans a shared language of thought and decision that is continually updated without losing its roots in the past. Rhetoric, yes, but a rhetoric that embodies past and present substantive reflection on the meaning of the United States. Our unique contribution to the national conversation as constitutional lawyers, if we are to make one, will come out of our experience of what it is to argue endlessly but not pointlessly.

It’s clear, I trust, that in referring to constitutional law, I mean more than the collection of precedents and principles that make up the current and binding law that a scrupulous federal district judge tries to apply. To see all that constitutional law may reveal about the United States as an idea, we need to broaden our picture frame to consider not just what is currently authoritative, but also decisions and opinions that we would not cite in a brief but that may contribute (perhaps in surprising ways) to what the constitutional law tradition has to teach. So I want to encourage us, as constitutional lawyers, to play our specific role in the passion and action of our time not simply by speaking to immediate, current questions, vitally important as doing so is, but by asking of the whole tradition in which we are the experts what deeper themes we can identify that may shed light on the United States as an idea, that may assist the American political community in regaining a shared sense of that meaning. By way of encouragement I want to spend the rest of my time today giving two brief examples of the sort of inquiry into our tradition I have in mind. My main purpose is not to persuade you of my judgments—though a standing ovation to indicate agreement is fine—but to indicate the sort of project I am commending to you.

My first example is from a well-known case, *Chisholm v. Georgia*,⁷ decided by the Supreme Court over 200 years ago. But *Chisholm* is perhaps best known for the fact that it belongs to the short and select list of Supreme Court decisions overturned by constitutional amendment. The Court decided *Chisholm* on February 18, 1793; by early February 1795, eleven days short of exactly two years later, enough states had ratified the Eleventh Amendment to make it a part of the Constitution and thus nullify *Chisholm*. (Amusingly, as you probably know, no one

7. *Chisholm v. Georgia*, 2 U.S. 419 (1793).

actually noticed for a few years.)⁸ As a discrete legal decision, *Chisholm* is as dead as a doornail. However, as no less an authority than Justice Joseph Story wrote, in his great *Commentaries on the Constitution*, the justices' seriatim opinions in *Chisholm* "deserve a most attentive perusal, from their very able exposition of many constitutional principles."⁹ So, let us take Justice Story's advice, and consider what the opinion of Chief Justice John Jay may have to say about the United States as an idea.

Chisholm originated in a Revolutionary War supply contract the Georgia government made with a South Carolina merchant in 1777: the merchant performed but Georgia's agents never paid him.¹⁰ Eventually, in 1790 the merchant's executor, another South Carolina resident named Chisholm, sued to collect the debt in the new U.S. circuit court for the District of Georgia.¹¹ When that court dismissed his action, Chisholm went to the Supreme Court, relying on the high Court's jurisdiction over controversies "between a state and citizens of other states" conferred by the Judiciary Act and Article III.¹² Acting on the advice of the state attorney general, the governor of Georgia refused to obey the Supreme Court's process, so the argument in *Chisholm* was one-sided in form; however, everyone understood the state's legal objection to federal jurisdiction: Georgia is sovereign, sovereigns can't be sued without their consent, Georgia doesn't consent.¹³ End of story. Except that with one member dissenting, the Supreme Court held that it *did* have jurisdiction.¹⁴ The four justices in the majority came to their shared conclusion by different routes, but it is Chief Justice Jay's, I believe, that is most

8. The North Carolina legislature ratified the amendment on February 7, 1795, providing the twelfth state approval necessary under Article V (there were then fifteen states), but in the absence of a set method for informing the federal government about state action, the amendment's ratification was not confirmed for almost three years. See 5 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800 601-04 (Maeva Marcus ed., Columbia Univ. Press 1994).

9. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 548 n.1 (1833).

10. Doyle Mathis, *Chisholm v. Georgia: Background and Settlement*, 54 J. AM. HIST. 19, 20-21 (1967).

11. *Id.* at 22; see *Chisholm*, 2 U.S. at 438 (opinion of Iredell, J.).

12. Mathis, *supra* note 10, at 23; see *Chisholm*, 2 U.S. at 430 (opinion of Iredell, J.).

13. Mathis, *supra* note 10, at 25-26; see *Chisholm*, 2 U.S. at 430 (opinion of Iredell, J.).

14. Although no one bothered to inform the Supreme Court, the state negotiated a settlement of the claim at issue in *Chisholm* in December 1794. (The state did not fully satisfy its debt, however, until the legislature enacted legislation to do so in December 1848.) The Court continued *Chisholm* until it dismissed the suit after the official proclamation that the Eleventh Amendment had been ratified. See *Hollingsworth v. State of Virginia*, 3 U.S. 378, 382 (1798) ("The Court . . . delivered an unanimous opinion, that the amendment being constitutionally adopted, there could not be exercised any jurisdiction, in any case, past or future, in which a state was sued by the citizens of another state, or by citizens, or subjects, of any foreign state."). On the history of the controversy in *Chisholm*, see generally Mathis, *supra* note 10.

interesting for present purposes.

The problem with the argument everyone imputed to Georgia, Jay thought, was that it rested on an idea—sovereignty—borrowed from European political systems and based on what Jay called “feudal principles” and “feudal ideas.” To call a European monarch—the king of Great Britain, for example—the sovereign was to recognize in him, the pinnacle of the governmental system, the “fountain of honor and authority,” the source of “all franchises, immunities and privileges.”¹⁵ In principle, such a sovereign cannot stand “on an equal footing with a subject, either in a Court of Justice or elsewhere.”¹⁶

In his *Chisholm* opinion, Jay rejected all of this. “No such ideas obtain here; at the Revolution, the sovereignty devolved on the people; and they are truly the sovereigns of the country.”¹⁷ This language sounds like an American commonplace, but Jay meant it in a deeper and more radical sense than it sometimes receives. For Jay, the difference between what he called “this land of equal liberty” and feudal Europe was not that the king’s role as sovereign had simply been taken over by Georgia and the other states, or by the United States, or indeed by the nation and states uneasily perched together on what was once the king’s throne. Sovereignty in the United States for Jay was not a term that properly applies to any part of the political system, national or state. “[I]n establishing [the Constitution],” Jay said, “the people exercised their own rights, and their own proper sovereignty” not simply to replace a hereditary system with a republican one, but to dethrone government altogether.¹⁸ In the United States, furthermore, he argued that the language of “sovereignty” must be linked inextricably to a particular idea of “equality,” by which Jay meant the political dignity and moral claims of each individual who belongs to the political community: “all the citizens being as to civil rights perfectly equal, there is not . . . one citizen inferior to another.” The purpose of government therefore lies in “the preservation of . . . the equal sovereignty, and the equal right” of each individual who is part of the people.¹⁹

For Jay, this controlling idea of equality ruled out Rousseauian fantasies about the general will as much as it did the return of King George III: when he said that the people established the Constitution, he was not invoking an organic or mass society into which individual freedom is merged. The Constitution *is* a social compact, but it is a

15. *Chisholm*, 2 U.S. at 471 (opinion of Jay, C.J.).

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* at 471–72, 476.

“compact . . . to govern” ourselves “as to general objects, in a certain manner,” and central to that compact is the principle that every individual must have effective means of vindicating his or her dignity and rights: “true Republican government requires that free and equal citizens should have free, fair, and equal justice.”²⁰ Each of us has standing not just as against government, but as against the community itself. Citizens of the United States “are sovereigns without subjects . . . and have none to govern but themselves; the citizens of America are equal as fellow citizens, and as joint tenants in the sovereignty.”²¹

If Jay’s understanding of sovereignty and equality is part of the idea of the United States, then the notion of “sovereign immunity” on which Georgia was relying has no place in our system. The United States, Jay said, rests on,

this great moral truth, that justice is the same whether due from one man or a million, or from a million to one man [and] our free republican national Government [should] place all our citizens on an equal footing, and enable[] each and every of them to obtain justice without any danger of being overborne by the weight and number of their opponents.²²

In Jay’s United States, the claims of the individual to equal dignity and to justice do not disappear in the face of war or fiscal emergency or the preferences of the majority.²³

As Jay knew very well, just beneath the surface in *Chisholm* lurked widespread public anxiety, in particular over federal judicial enforcement of the peace treaty with Britain, which many feared would disturb post-Revolutionary land titles and render states financially liable to Loyalist and foreign claimants. From many perspectives, such great national concerns might very well seem to outweigh in importance a private legal action to collect money allegedly owed on a contract, but the Court’s decision in favor of *Chisholm* perfectly illustrates what Jay meant by equality: intrinsic to the very idea of the United States is this political community’s promise to all its members that each one’s claims matter, that no one is beyond the protection of the nation’s institutions, that our compact is to govern ourselves in such a manner that we lose sight of no individual, *even* in situations of public tension and concern. This doesn’t mean that Jay thought everyone’s rights are exactly the same; that children, for example, must have the same freedom of decision as adults. But the child no less than the adult is a member of the community, a citizen of the United States, and the nation’s institutions must respect and

20. *Id.* at 476.

21. *Id.* at 471, 476, 471–72.

22. *Id.* at 479.

23. *Id.*

act on that idea.

Now to say this is to bring us up against a harsh limit that Jay himself recognized on the actual scope of his idea of the United States in 1793. A couple of minutes ago I quoted the passage in which Jay said that the citizens of the United States are all, individually and equally, “the sovereigns of the country.”²⁴ But I left out a few words. Let me restore the clause: the citizens of the United States are “sovereigns without subjects (unless the African slaves among us may be so called).”²⁵ Now John Jay genuinely detested slavery, and not just in the abstract way that virtually all the Founders did; he was a leading member of the New York emancipation movement and as governor signed into law the bill providing for the gradual abolition of slavery. “I wish to see all unjust and all unnecessary discriminations everywhere abolished,” Jay once wrote, “and that the time may soon come when all our inhabitants of every colour and denomination shall be free and equal partakers of our political liberty.”²⁶ But soon is not now, and Jay recognized that race-based human chattel slavery made a mockery of the idea of the United States as the “land of equal liberty,” where there should be no inferiors. Until and unless “all [the] inhabitants” of the United States are “free and equal” in dignity and respect, on Jay’s understanding the nation betrays its own meaning by giving way to the feudal notion that there are those among us who are not our equals.²⁷

So, what does any of this mean in 2017? I do not want to be misheard as suggesting that Chief Justice Jay’s 1793 opinion in *Chisholm v. Georgia* can be transmuted by some sort of intellectual alchemy into a set of answers to any of today’s burning questions. For example, I’m not claiming that Jay’s opinion tells us what we should do, constitutionally or as a matter of policy, about immigration law and enforcement, or about the status of undocumented aliens. But if we read Jay’s opinion as a proposal for how to understand the idea of the United States, I think it is rich with implications for our current disagreements, and so let me take immigration as an example. Jay’s careful use, throughout his opinion, of the word “citizens” rather than “residents” or “inhabitants,” is a reminder that Jay’s concept of equality presupposes the existence of the United States as a discrete political community to which not everyone belongs. At the same time, the ongoing presence of human beings “among us,” as Jay put it, who are not treated equally as part of us, becomes immediately

24. *Id.* at 471.

25. *Id.* at 471–72.

26. Jake Sudderth, *Jay and Slavery*, THE PAPERS OF JOHN JAY, <http://www.columbia.edu/cu/libraries/inside/dev/jay/JaySlavery.html> (last visited Mar. 29, 2018) (quoting John Jay to Dr. Benjamin Rush, 3/24/1785, Jay ID #9450).

27. *Chisholm*, 2 U.S. at 472, 476 (opinion of Jay, C.J.).

problematic, disturbingly reminiscent (even with all the differences) of Jay's unhappy acknowledgment that the existence of slavery was a glaring anomaly in his picture of a people made up of equal sovereigns. The idea of the United States, as Jay understood it, precludes in principle the existence of any subordinate class or group of human beings within the United States, and, as he remarked at one point, demands that we also recognize "the justice due to" those who are not part of the United States.²⁸

I've left myself time only to mention with telegraphic brevity my second example, an opinion written in 1921 by the illustrious Judge Augustus Hand, when he and his still more famous cousin Learned Hand were both district judges. The opinion was written to explain Judge Hand's reasons for denying the U.S. government's motion for a preliminary injunction in a case called *United States v. Western Union Telegraph Co.*²⁹ Western Union had asked the Wilson administration's permission to land an underwater telegraph cable near Miami, Florida, to connect the United States with Brazil, and the administration had said no. When Western Union responded that it was instructing its British-flag cable layer to proceed anyway, the government informed the company and the British ambassador that it was prepared to use force to stop the operation. The result was a four-way diplomatic fracas involving the United States, the United Kingdom, Brazil, and Cuba, and a suit by the U.S. government in the Southern District of New York. The Justice Department argued that every president since Ulysses S. Grant (with a brief hiatus in Cleveland's second term) had claimed a nonstatutory power to grant or deny permission to land submarine telegraph cables on American shores. Unmoved by a plausible argument about the international embarrassment that might result from a decision in Western Union's favor, Hand denied the government's request for preliminary relief, and the Supreme Court ultimately dismissed the case as moot.³⁰ Hand's opinion then disappeared into that abyss that awaits so much hard intellectual work by lower court judges.

A constitutional lawyer of 2017 reading Judge Hand's 1921 opinion will find it strangely familiar. Here's his reasoning, ruthlessly summarized: if the president has the authority to interfere with Western

28. See *id.* at 476 ("[A]ll questions touching the justice due to foreign nations, or people, ought to be ascertained by, and depend on national authority. . . .").

29. See generally *United States v. Western Union Tel. Co.*, 272 F. 311 (S.D.N.Y. 1921), *aff'd*, 272 F. 893 (2d Cir. 1921), *rev'd in accordance with joint stipulation*, 260 U.S. 754 (1922).

30. On the remarkable history of the *Western Union* case, see 4 GREEN HACKWORTH, DIGEST OF INTERNATIONAL LAW 249–54 (1942); Arturo Gándara, *United States-Mexico Electricity Transfers: Of Alien Electrons and the Migration of Undocumented Environmental Burdens*, 16 ENERGY L.J. 1, 33–35 (1995); see also 1 JOHN MOORE, A DIGEST OF INTERNATIONAL LAW 409–10 (1906).

Union's plan, that authority must come either from the Constitution directly or indirectly through a statute. Neither the vesting clause, nor the commander-in-chief clause, nor the take-care clause, nor all of Article II taken together, confers any such power. There is no doubt an important national interest in regulating the attachment of foreign cables to American territory, but, under the Constitution, it is Congress that has the power, and Congress has enacted legislation under which Western Union can proceed. Whatever authority the president may have to conduct diplomacy does not extend to disregarding an act of Congress on a matter that Congress may address.³¹ There you have it: The Steel Seizure Case, with Justice Hugo Black's and Justice Robert H. Jackson's opinions neatly combined, thirty years before *Youngstown Sheet & Tube Co. v. Sawyer*! The resemblance to Justice Jackson's opinion is not accidental: in Jackson's *Youngstown* files there is a note in Jackson's handwriting with the citation for *Western Union Telegraph Co.* and a reminder that it was Judge Gus Hand who wrote the opinion.³² There is no way to be sure that Jackson found the opinion on his own—the brief for the steel companies also cited it—but I rather suspect he did. After all, it was Jackson who famously joked: “If I were to write a prescription for becoming the perfect district judge, it would be always to quote Learned and always to follow Gus.”³³

So what, you might say? Since we now have Justice Jackson's famous concurrence, we hardly need Judge Hand's opinion, but I'm not sure that's right. The Jackson concurrence is celebrated, of course, but lawyers tend to focus rather narrowly on what the Supreme Court has called Jackson's “familiar tripartite framework,” and to ignore the rest of what Jackson wrote.³⁴ Hand's opinion can't be so neatly dissected, and therefore brings to the fore the fundamental idea that underlies his and Jackson's thinking. Judge Hand reminds us that questions over the existence of executive power, even questions arising out of disputes that directly implicate the president's exercise of his diplomatic prerogatives, are—in this republic—questions of law. In a debate over the president's authority to take some action, the assertion, even the correct assertion, that it is in the national interest that he or she takes that action is not

31. *Western Union Tel. Co.*, 272 F. at 313–16, 321–23.

32. See Adam J. White, *Justice Jackson's Draft Opinions in the Steel Seizure Cases*, 69 ALB. L. REV. 1107, 1110–12 (2006).

33. Robert H. Jackson, Assoc. Justice, U.S. Supreme Court, *Why Learned and Augustus Hand Became Great*, Address before the New York County Lawyers' Association (Dec. 13, 1951), <http://www.roberthjackson.org/wp-content/uploads/migrated-files/thecenter/files/bibliography/1950s/why-learned-and-augustus-hand-became-great.pdf>.

34. *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2083 (2015) (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring)).

conclusive. As Hand wrote: “However true this may be, it does not follow that the Executive has the necessary authority.”³⁵ The idea of the United States involves at its core a commitment to government by and within law, and this commitment does not give way even in the face of genuine worries over international affairs and national security. Anyone who asserts that this principle must give way to a particular exigency is arguing not just for an exception to a legal rule, but for a compromise over the meaning of the United States. Once again, my point is not to offer, even by implication, an answer to any specific 2017 question. Indeed, the fact that Judge Hand wrote almost a century ago, and that the legal and political issues raised by his case are of no concern to us today, may highlight the enduring significance of his reasoning.

By now I’ve no doubt exhausted your patience, but allow me to close by borrowing a phrase from Justice Jackson in *Youngstown*. The claim that the United States is constituted by an idea or set of ideas that Americans share despite our divisions may be destined to pass away. But it is the duty of constitutional lawyers to be among the last, not the first, to give up on the ideas, and the ideal, for which the United States stands.³⁶

35. *Western Union Tel. Co.*, 272 F. at 313.

36. *Cf. Youngstown*, 343 U.S. at 655 (“[M]en have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations. Such institutions may be destined to pass away. But it is the duty of the Court to be last, not first, to give them up.”).