

ADJUSTING THE REAR-VIEW MIRROR:
RETHINKING THE USE OF HISTORY
IN SUPREME COURT JURISPRUDENCE

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INTRODUCTION

Legal commentators continue to debate about the proper use of history in constitutional cases.¹ Since the 1980s, much of the debate has been shaped by the “original meaning” approach favored by many conservatives, including Justices Antonin Scalia and Clarence Thomas, Judge Robert Bork, and former Reagan attorney general Edwin Meese. Originalists argue that the Supreme Court should use history mainly to identify and implement the “original understanding” of the Framers.²

An example of this approach is the dissenting opinion of Justice Scalia in *Hamdi v. Rumsfeld*,³ in which Scalia relied heavily on history to argue that a citizen designated as an “enemy combatant” could not be held indefinitely by the Government.⁴ To support this conclusion, Scalia examined the legal systems of England and America before the Founding, to determine how those systems had traditionally treated citizens accused of aiding the enemy during wartime.⁵ Scalia determined that such citizens had traditionally been subject to criminal prosecution; that when such prosecutions were impractical due to military exigencies, the traditional remedy was to suspend the writ of habeas corpus; and that these had been the only two alternatives – that is, that indefinite imprisonment was

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¹ One Supreme Court justice who often resorted to history, though not an originalist in the mold of Justices Scalia or Thomas, was the late William Rehnquist. See Laura K. Ray, *A Law Clerk and His Justice: What William Rehnquist Did Not Learn From Robert Jackson*, 29 Ind. L. Rev. 535, 570-72 (1996); Jeff Powell, *The Compleat Jeffersonian: Justice Rehnquist and Federalism*, 91 Yale L.J. 1317 (1982).

² On originalism generally, see Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849 (1989); Edwin Meese III, *The Supreme Court of the United States: Bulwark of a Limited Constitution*, 27 S. Tex. L. Rev. 455 (1986); Michael Sink, Comment, *Restoring Our Ancient Constitutional Faith*, 75 U. Colo. L. Rev. 921 (2004); Vasani Kesavan & Michael Stokes Paulsen, *The Interpretative Force of the Constitution's Secret Drafting History*, 91 Geo. L.J. 113 (2003); Aileen Kavanagh, *Original Intention, Enacted Text, and Constitutional Interpretation*, 47 Am. J. Juris. 255 (2002); Jonathan G. O'Neill, *Raoul Berger and the Restoration of Originalism*, 96 Nw. U. L. Rev. 253 (2001); Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 Loy. L. Rev. 611 (1999); Mark D. Greenberg & Harry Litman, *The Meaning of Original Meaning*, 86 Geo. L.J. 569 (1998); Richard S. Kay, “Originalist” Values and Constitutional Interpretation, 19 Harv. J.L. & Pub. Pol’y 335 (1996); Jonathan R. Macey, *Originalism as an “Is”*, 19 Harv. J.L. & Pub. Pol’y 301 (1996).

³ 124 S. Ct. 2633 (2004).

⁴ *Hamdi*, 124 S. Ct. at 2660-74 (Scalia, J., dissenting).

⁵ *Hamdi*, 124 S. Ct. at 2663-69 (Scalia, J., dissenting).

not an available option.⁶ Based on this history, Scalia concluded that it was not the intent of the Framers to give the Government the power to hold enemy combatants for an indefinite period.⁷ Scalia's approach in *Hamdi* is an example of the originalist approach, which looks to history mainly as a resource for determining the Framers' original understanding.

The influence of originalism during the last two decades has been hailed by some, deplored by others – but impossible to ignore. Those who disagree with originalist tenets have nevertheless been forced to respond to originalist premises. (Tellingly, they are often called “non-originalists.”) They have argued, for example, that the historical record is too incomplete or inconclusive for modern-day readers to pinpoint the Framers' original meaning.⁸ Others have argued that the Framers themselves were not originalists, and did not intend their own “original intent” to bind later generations.⁹ Still others have argued that, even if it were possible, as a matter of history, to determine original understanding, lawyers and judges are ill-suited to do it. These critics contend that, because lawyers and judges lack the analytical rigor of professional historians, the resulting “law office history” tends to be shoddy, selective, and strategic.¹⁰

Whatever the merits of these critiques, they are mainly responses to the originalist claim: that the Court should use history to identify and implement the Framers' original understanding. Indeed, when it comes to the use of history, there have been times when the tone of non-originalism has bordered on the defensive, acknowledging that “history

⁶ *Hamdi*, 124 S. Ct. at 2663-69 (Scalia, J., dissenting).

⁷ *Hamdi*, 124 S. Ct. at 2663-69 (Scalia, J., dissenting). For discussions of Justice Scalia's brand of originalism, see Greenberg & Litman, *supra* note __, at __; David M. Zlotnick, *Justice Scalia and His Critics: An Exploration of Scalia's Fidelity to His Constitutional Methodology*, 48 Emory L.J. 1377 (1999); Erwin Chemerinsky, *The Jurisprudence of Justice Scalia: A Critical Appraisal*, 22 U. Haw. L. Rev. 385 (2000); Eric J. Segall, *A Century Lost: The End of the Originalism Debate*, 15 Const. Comment. 411 (1998); David B. Anders, *Justices Harlan and Black Revisited: The Emerging Dispute Between Justice O'Connor and Justice Scalia Over Unenumerated Fundamental Rights*, 61 Fordham L. Rev. 895 (1993); David Sosa, *The Unintentional Fallacy* (review of Antonin Scalia, *A Matter of Interpretation*), 86 Cal. L. Rev. 919 (1998).

⁸ For helpful discussions, see Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (1997); Paul Finkelman, *The Constitution and the Intentions of the Framers: The Limits of Historical Analysis*, 50 U. Pitt. L. Rev. 349 (1989); William G. Michael, *When Originalism Fails*, 25 Whittier L. Rev. 497 (2004); G. Edward White, *The Arrival of History in Constitutional Scholarship*, 88 Va. L. Rev. 485 (2002).

⁹ See Robert N. Clinton, *Original Understanding, Legal Realism, and the Interpretation of "This Constitution,"* 72 Iowa L. Rev. 1177 (1987); Charles A. Lofgren, *The Original Understanding of Original Intent?* 5 Const. Comment. 77 (1988); William G. Michael, *The Original Understanding of Original Intent: A Textual Analysis*, 26 Ohio N.U. L. Rev. 201 (2000); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 Harv. L. Rev. 885 (1985).

¹⁰ For helpful discussions of these issues, see Neil M. Richards, *Clio and the Court: A Reassessment of the Supreme Court's Uses of History*, 13 J.L. & Pol. 809 (1997); Laura Kalman, *Border Patrol: Reflections on the Turn to History in Legal Scholarship*, 66 Fordham L. Rev. 87 (1997); Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 Sup. Ct. Rev. 119; Buckner F. Melton, Jr., *Clio at the Bar: A Guide to Historical Method for Legists and Jurists*, 83 Minn. L. Rev. 377 (1998); Jack N. Rakove, *Fidelity Through History (Or To It)*, 65 Fordham L. Rev. 1587 (1997); William M. Wiecek, *Clio as Hostage: The United States Supreme Court and the Uses of History*, 24 Cal. W. L. Rev. 227 (1988).

has value, but:” we don’t have enough information to do it the way the originalists want; or lawyers don’t have the skills to do it right; or it’s not what the Framers wanted.

But there is another way to think about history, a way that suggests that the originalist approach is not the whole story. It is not a new way of thinking; in fact, it is very old. Its roots reach far back to a time before Justice Scalia, before Judge Bork, before, even, our own Framers, to the courtrooms and political arenas of ancient Greece and Rome. It is the ancient art of rhetoric.

If we take as our starting point the classical theory of persuasive discourse, we see that the great divide is not between those who think the Court should use history, on the one hand, and those who do not, on the other. Instead, the great divide is about history’s proper *purpose*. On one side are those who think that the only proper purpose is simply to know what happened in times past.¹¹ On the other side are those who think it is also proper to use history for other purposes: to think more deeply about times present and future; to know not only what happened in the past, but why; to use those events to better understand the problems of the present, both by drawing comparisons and by seeing how the present moment is the product of past decisions; to know more about how issues and institutions have evolved over time; and to use what we know of the past and present to make educated guesses about the future.

In this Article, I suggest two main ideas. The first idea, the subject of Part I-A, is that when we consider the “use of history” by Supreme Court justices, we should consider the *rhetorical purpose* for which that history is being used. This idea is borrowed from the classical rhetoricians of ancient Greece and Rome, who distinguished between two kinds of persuasive rhetoric: forensic and deliberative.¹² In *forensic* rhetoric, a speaker seeks to persuade an audience about the nature and character of events that took place in the past. In *deliberative* rhetoric, a speaker seeks to persuade an audience about decisions that should be made in the future. My point is that even when Supreme Court justices are talking about the past, their purpose might be oriented toward the future. That is, even their use of past events might have a deliberative purpose.

Notably, some of the commentators who have expressed concerns about the use of history by judges and lawyers have chosen to call it *forensic history*.¹³ That phrase reveals what the originalism debate is really about: all of the problems that arise if we assume that the only purpose of historical reasoning is to know about the past. In Part I-A of this Article, I introduce the idea of *deliberative history*, the idea that even when

¹¹ This view appeals to originalists who see the past as *per se* authoritative.

¹² For helpful discussions of the distinction between forensic and deliberative rhetoric, see Marie A. Failing, *The Justice Who Wouldn’t Be Lutheran: Toward Borrowing the Wisdom of Faith Traditions*, 46 Clev. St. L. Rev. 643, 647-55 (1998); Eugene Garver, *Why Should Anybody Listen? The Rhetoric of Religious Argument in Democracy*, 36 Wake Forest L. Rev. 353, 369 n.32 (2001); Marie A. Failing, *Not Mere Rhetoric: On Wasting Or Claiming Your Legacy, Justice Scalia*, 34 U. Tol. L. Rev. 425 (2003); Eileen A. Scallen, *Classical Rhetoric, Practical Reasoning, and the Law of Evidence*, 44 Am. U. L. Rev. 1717 (1995); Eileen A. Scallen, *Presence and Absence in Lochner: Making Rights Real*, 23 Hastings Const. L.Q. 621 (1996); Eileen A. Scallen, *Evidence Law as Pragmatic Legal Rhetoric: Reconnecting Legal Scholarship, Teaching and Ethics*, 21 Q.L.R. 813 (2003).

¹³ The term is John Phillip Reid’s. See Reid, *Law and History*, 27 Loy. L.A. L. Rev. 193, 193 (1993).

justices reason from history, they may do so not merely to argue about what *was*, but also to argue for what *should be*. Their purpose may not be to gain a precise forensic knowledge of everything that happened in the past, but instead to access the record of human experience to guide deliberations about the future. Considering the work of the Framers, a justice might seek to know more than *what* they did; a justice might also wish to know *why*, since the reasons that guided those decisions in the past might help guide the decisions we face in the present. The concept of deliberative history is the subject of Part I-A.

The second main idea, the subject of Part I-B, concerns the *content* of deliberative history. Once we accept deliberative history as a *concept*, we need better ways to describe what it looks like in practice. If Supreme Court justices do engage in deliberative history, what are they doing when they do?

In Part I-B, I suggest that we might be helped by the methods developed by Richard Neustadt and Ernest May in their 1986 book, *Thinking in Time*.¹⁴ Neustadt and May argued that the use of history by government decision-makers can be improved through systematic efforts. Neustadt and May also offered a variety of aids to historical reasoning, practical suggestions that they called “mini-methods.” While these methods were not specifically addressed to Supreme Court justices, they are, in effect, aids to the use of history in deliberative decision-making. In Part I-B, I suggest that they might therefore be adapted to help explain what Supreme Court justices do, or should do, when they engage in deliberative history. The remainder of Part I-B is a somewhat detailed summary of the five major practices that Neustadt and May suggest, with some thoughts about how those practices might be adapted to the purpose of considering the opinions of Supreme Court justices.

In Parts II, III, and IV, I apply these ideas to three opinions by Supreme Court justices. Part II considers the opinion of Justice Levi Woodbury in *Luther v. Borden*,¹⁵ an opinion in which Woodbury dissented on the issue of martial law, while Part III considers the concurring opinion of Justice Robert Jackson in *Youngstown Sheet & Tube Co. v. Sawyer*, the Steel Seizure Case.¹⁶ Both Justice Woodbury, in *Luther*, and Justice Jackson, in *Youngstown*, provide many examples of the approach I call *deliberative history*. Both justices also use rhetorical practices that resemble Neustadt and May’s practical suggestions for other deliberative decision-makers.

Justice Scalia’s dissent in *Hamdi* is the subject of Part IV. In that opinion, Scalia makes extensive use of history to reach his conclusion: that Hamdi must be released unless he is charged with a crime, or Congress chooses to suspend the writ of habeas corpus. Unlike the historical reasoning of Justices Woodbury and Jackson, however, the history Scalia offers is *forensic history*. Scalia uses history mainly to prove that “suspension of the writ on the one hand, and committal for criminal charges on the other

¹⁴ Richard E. Neustadt & Ernest R. May, *Thinking in Time: The Uses of History for Decision-Makers* (Free Press 1986)[hereafter “Neustadt and May”]. Neustadt and May’s book was based on their “Uses of History” course at Harvard’s John F. Kennedy School of Government.

¹⁵ 48 U.S. (7 How.) 1 (1849).

¹⁶ 343 U.S. 579 (1952).

hand, have been the only traditional means of dealing with citizens who levied war against their own country[.]” He sees his role as forensic, and uses history only to ask *what* was done, without dwelling on *why*. He does not engage in *deliberative history*, which would consider why the Framers’ approach was thought wise, or why subsequent historical events have proven it so, or why we should be guided by the Framers’ example.

Finally, in the Conclusion, I briefly review some of the main ideas in this Article, provide a few additional thoughts on the possibilities of deliberative history, and add a final reflection about how a “deliberative historian” might think about the legacy of the Framers.

I. DELIBERATIVE HISTORY AND *THINKING IN TIME*

A. *Deliberative History*

How should Supreme Court justices use history in constitutional cases?

That question, of course, is not a new one. In some ways, it goes back to the Republic’s beginnings, though it has escalated over the past few decades, following Alfred Kelly’s 1965 attack on the Warren Court’s use of “law-office history.”¹⁷ It was aggravated by what one commentator has called “significant blurring in the dividing line between history and law and between law professor and historian[.]”¹⁸ and a growing dispute over the use of history for legal advocacy, the purpose that John Phillip Reid has called *forensic history*.¹⁹

As Neil Richards has noted, this development had several causes.²⁰ Legal history emerged as a distinct area of study.²¹ Then, in the 1980s, conservative legal

¹⁷ Kelly, *supra* note __, at 157-58; *see also* Reid, *supra* note __; Richards, *supra* note __; Mark Tushnet, *Interdisciplinary Legal Scholarship: The Case of History-in-Law*, 71 Chi.-Kent L. Rev. 909 (1996); Reid, *supra* note __, at __; David A. Strauss, *Common Law, Common Ground, and Jefferson’s Principle*, 112 Yale L.J. 1717 (2003); Kalman, *supra* note __, at __; Honorable Jack L. Landau, *A Judge’s Perspective on the Use and Misuse of History in State Constitutional Interpretation*, 38 Val. U. L. Rev. 451 (2004); Martin S. Flaherty, *History “Lite” in Modern American Constitutionalism*, 95 Colum. L. Rev. 523, 526 (1995) (criticizing “habits of poorly supported generalization - which at times fall below even the standards of undergraduate history writing”); Mark Tushnet, *Interdisciplinary Legal Scholarship: The Case of History-in-Law*, 71 Chi.-Kent L. Rev. 909 (1996); Lucian E. Dervan, *Selective Conceptions of Federalism: The Selective Use of History in the Supreme Court’s States’ Rights Opinions*, 50 Emory L.J. 1295 (2001); Michael Stokes Paulsen, *Dirty Harry and the Real Constitution* [book review of *The Constitution and Criminal Procedure: First Principles* by Akhil Reed Amar], 64 U. Chi. L. Rev. 1457 (1997).

¹⁸ Richards, *supra* note __, at 809; *see also generally* Laura Kalman, *The Strange Career of Legal Liberalism* (1996).

¹⁹ Reid, *supra* note __, at 203-20.

²⁰ Richards, *supra* note __, at 809-10.

²¹ *Id.* at 810. For more on legal history as a distinct area of study, *see* William E. Nelson, *Standards of Criticism*, 60 Tex. L. Rev. 447 (1982); William E. Nelson & John P. Reid, *The Literature of American Legal History* (1985); James T. Kloppenberg, *The Theory and Practice of American Legal History*, 106 Harv. L. Rev. 1332 (1993) (reviewing Morton J. Horwitz, *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy* (1992)); David M. Rabban, *The Historiography of Late Nineteenth-Century American Legal History*, 4 Theoretical Inquiries L. 541 (2003); Lawrence M. Friedman, *American Legal History: Past and Present*, 34 J. Legal Educ. 563 (1984).

commentators developed originalism, “a theory of history-based jurisprudence which, they argued, should confine the judicial activism of the Supreme Court by restricting its constitutional interpretations to those consistent with the ‘original meaning’ of the Constitution.”²² In response to originalism, liberal legal commentators developed a variety of competing theories of constitutional interpretation, based in part on the work of academic historians.²³ Meanwhile, the historians themselves have responded, usually to criticize the poor methodology of lawyers and judges.²⁴ The ongoing dispute over “original intent” shows few signs of abating in coming years, despite some remarkably creative efforts to bridge the divide.²⁵ The result is a sort of stalemate, and conceptual confusion.

We might avoid this ongoing dispute over originalism by drawing a sharper line between the kinds of persuasive discourse.²⁶ Here we can take a page from the classical rhetoricians of ancient Greece and Rome,²⁷ who distinguished between the “forensic” rhetoric of trial courts²⁸ and the “deliberative” rhetoric of the public arena.²⁹ Forensic

²² See Kalman, *supra* note __, at 77-81. For discussions of the various strains of originalism, see, e.g., Richard S. Kay, “Originalist” Values and Constitutional Interpretation, 19 Harv. J.L. & Pub. Pol’y 335, 336-40 (1996); Martin S. Flaherty, *The Most Dangerous Branch*, 105 Yale L.J. 1725, 1746 (1996); Cass R. Sunstein, *Five Theses on Originalism*, 19 Harv. J.L. & Pub. Pol’y 311, 312-13 (1996).

²³ See, e.g., Cass R. Sunstein, *Beyond the Republican Revival*, 97 Yale L.J. 1539 (1988); Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. Chi. L. Rev. 1043, 1043, 1096 (1988). For more on the “republican revival,” and the civic republican school, see, e.g., Kalman, *supra* note __, at 95-103 (1997); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 Stan. L. Rev. 29 (1986); H. Jefferson Powell, *Reviving Republicanism*, 97 Yale L.J. 1703 (1988); Frank I. Michelman, *Foreword: Traces of Self-Government*, 100 Harv. L. Rev. 4 (1986); Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 Va. L. Rev. 543 (1986).

²⁴ See, e.g., Flaherty, *supra* note __, at 526. For historians who have been more tolerant of the use of history by lawyers and judges, see generally Rakove, *supra* note __; Kalman, *supra* note __.

²⁵ See, e.g., Powell, *supra* note __, at 885; Suzanna Sherry, *Natural Law in the States*, 61 U. Cin. L. Rev. 171, 171 (1992); Suzanna Sherry, *The Founders’ Unwritten Constitution*, 54 U. Chi. L. Rev. 1127, 1127 (1987).

²⁶ For more on persuasive discourse and classical rhetoric, see Michael Frost, *Ethos, Pathos & Legal Audience*, 99 Dick. L. Rev. 85 (1994); Linda Levine & Kurt M. Saunders, *Thinking Like a Rhetor*, 43 J. Legal Educ. 108 (1993); Kristen K. Robbins, *Paradigm Lost: Recapturing Classical Rhetoric to Validate Legal Reasoning*, 27 Vt. L. Rev. 483 (2003); Michael Frost, *Introduction to Classical Legal Rhetoric: A Lost Heritage*, 8 S. Cal. Interdisc. L.J. 613 (1999); Michael Frost, *Justice Scalia’s Rhetoric of Dissent: A Greco-Roman Analysis of Scalia’s Advocacy in the VMI Case*, 91 Ky. L.J. 167 (2002-03); John W. Cooley, *A Classical Approach to Mediation – Part I: Classical Rhetoric and the Art of Persuasion in Mediation*, 19 U. Dayton L. Rev. 83 (1993); Marie A. Failing, *Not Mere Rhetoric: On Wasting Or Claiming Your Legacy, Justice Scalia*, 34 U. Tol. L. Rev. 425 (2003); James Boyd White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. Chi. L. Rev. 684 (1985).

²⁷ See generally Edward P.J. Corbett & Robert J. Connors, *Classical Rhetoric for the Modern Student* (4th ed. 1999). The art of classical rhetoric is more than two thousand years old; it was invented in the fifth century B.C. by Corax of Syracuse, to help newly enfranchised citizens plead property claims in the law courts following the downfall of the tyrant Thrasylbulus. *Id.* at 490. Among the most prominent classical rhetoricians were Gorgias of Leontini, Isocrates, Aristotle, Cicero, and Quintilian. *Id.* at 490-97.

²⁸ See Corbett & Connors, *supra* note __, at 23. Forensic oratory is “sometimes referred to as *legal* or *judicial* oratory. This was the oratory of the courtroom, but it can be extended to include any kind of discourse in which a person seeks to defend or condemn someone’s actions[,]” including one’s own. *Id.*

²⁹ See Corbett & Connors, *supra* note __, at 23. Deliberative oratory is “also known as *political*, *hortative*, and *advisory*, in which one deliberated about public affairs, about anything that had to do with politics ... whether to go to war, whether to levy a tax, whether to enter into an alliance with a foreign power, whether

discourse, as the ancients used the term, is concerned mainly with arguments about past events. It focused on the *status* of a case. As Edward Corbett and Robert Connors have noted, to determine the status, classical rhetoricians used a formula that asked three questions: whether a thing is (*an sit*), what it is (*quid sit*), and of what kind it is (*quale sit*).³⁰ “The application of this formula settled the issue in a trial and in turn suggest[ed] the topics that lawyers resort to in arguing their case.”³¹

Deliberative discourse, on the other hand, is concerned mainly with arguments about the future. It includes “the appeals that we use when we are engaged in exhorting someone to do or not to do something, to accept or reject a particular view of things.”³² As Corbett and Connors put it, “When we are trying to persuade people to do something, we try to show them that what we want them to do is either good or advantageous. All of our appeals in this kind of discourse can be reduced to these two heads: (1) the worthy (*dignitas*) or the good (*bonum*) and (2) the advantageous or expedient or useful (*utilitas*).

This all makes sense. But the next step is to recognize that the work of the Supreme Court in constitutional cases is not entirely forensic, but is at least partly, and perhaps primarily, deliberative.³³ The clue is in Reid’s term *forensic history*.³⁴ It reflects what the controversy is really about: all of the problems that arise if we assume that

to build a bridge or a reservoir or a temple. More generally, however, deliberative discourse is that in which we seek to persuade someone to do something or to accept our point of view[.]” *Id.* Though forensic rhetoric is sometimes called “judicial” rhetoric, and deliberative rhetoric is sometimes called “political,” I avoid those terms here to avoid confusion, since I argue that much of the work of the Supreme Court – a judicial institution – is what the ancients would nevertheless have called political rhetoric.

³⁰ See Corbett & Connors, *supra* note __, at 124.

³¹ For instance, Corbett and Connors use the example of a murder trial in which the case for the prosecution and the defense could focus on one of three issues: (1) Did Brutus, as has been alleged, kill Caesar? (whether a thing is); (2) If it is granted that Brutus *did* kill Caesar, was the act murder or self-defense? (what is it?); and (3) If it was in fact murder, was Brutus justified in murdering Caesar? (what kind is it?) See Corbett & Connors, *supra* note __, at 28.

³² See Corbett & Connors, *supra* note __, at 121.

³³ The third kind of persuasive discourse is *epideictic rhetoric*, also known as *ceremonial rhetoric*. Ceremonial rhetoric is “the oratory of display,” in which “one is not so much concerned with persuading an audience as with pleasing it or inspiring it.” See Corbett & Connors, *supra* note __, at 23. While this Article does not address the matter of ceremonial rhetoric, it would be fascinating to consider the role of ceremonial rhetoric in Supreme Court opinions, and particularly interesting to consider the question of a *ceremonial history* species of rhetoric. For more on ceremonial or epideictic rhetoric, see Failinger, *supra* note __, at 649-50, 652-53; Failinger, *supra* note __, at 437-38, 443-44; Cooley, *supra* note __, at __; Levine & Saunders, *supra* note __, at __.

³⁴ Reid, *supra* note __, at __. Note that I do not use the term in quite the same way Reid does; he means it more in the sense of history used for an argumentative purpose. Still, it is instructive that history-as-argument is characterized as “forensic.” For more on forensic history, see Daniel J. Hulsebosch, *Bringing the People Back In* [book review of *The People Themselves: Popular Constitutionalism and Judicial Review*, by Larry D. Kramer], 80 N.Y.U. L. Rev. 653 (2005); Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. Pa. L. Rev. 1 (1998); Robert W. Gordon, *Foreword: The Arrival of Critical Historicism* [symposium foreword], 49 Stan. L. Rev. 1023, 1024-26 (1997); Daniel J. Hulsebosch, [book review of Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction*], 97 Mich. L. Rev. 1520 (1999); John Phillip Reid, *Lessons of Lumpkin: A Review of Recent Literature on Law, Comity, and the Impending Crisis*, 23 Wm. & Mary L. Rev. 571 (1982); Flaherty, *supra* note __, at __; Flaherty, *supra* note __, at 526.

arguing from history is forensic, not deliberative. It also suggests a way out: to consider what I will call *deliberative history*, that is, the use of history for future-oriented ends.

Let us suppose, as a working matter,³⁵ that the rhetoric of Supreme Court justices is more deliberative than forensic, or at least that it has a strong deliberative component.³⁶ Let us also suppose that this is true *even when they reason from history*. That is, even when they inquire as to past events, they do so not to argue about the past per se, but instead to argue for or against a future course of action.³⁷ The dispute over originalism is really a dispute about *forensic history* – about whether the Court has the ability, or even the duty, to resolve the case at hand by ascertaining as exactly as possible the Framers’ original understanding. It is not a dispute over *deliberative history*, which considers history not as an authoritative oracle but as a source of relevant human experience, one that present-day decision-makers can use as a resource to help choose a future course.

A theory of deliberative history – the idea that rhetoric about history can have deliberative ends – accomplishes several things. If nothing else, it adds to our understanding of the rhetoric itself. It is an obvious fact that Supreme Court justices use history not merely to argue about what was, but also to argue for what should or should not be. Acknowledging this would shed light on what the Court actually does, even if it addressed no conceptual problems.

However, it might also help address conceptual muddles. While it hardly puts an end to the originalism debate, it does let us clear our throats and change the subject. Though forensic history and deliberative history draw on the same source, they are nevertheless, as the ancients recognized, two very different species of rhetoric.³⁸ Even if

³⁵ A full elaboration and proof of this claim is beyond the scope of this Article. My main claim here is that the “mini-methods” developed by Neustadt and May can be adapted to add to our understanding of judicial opinions. However, it is hard to see the point in doing so without first distinguishing between forensic and deliberative uses of history.

³⁶ While some commentators have applied the elements of classical rhetoric to the analysis of judicial opinions – particularly Aristotle’s three modes of persuasion, *logos*, *pathos*, and *ethos* – surprisingly little has been written about the more fundamental question of whether the rhetoric of Supreme Court opinions is forensic, deliberative, or both. For an outstanding exception, addressed (literally) to Justice Scalia, see Failing, *supra* note __, at 434-35 (noting that “[w]hile [forensic] questions make up the warp and woof of standard trial court work, the work of the United States Supreme Court and of many state courts and lower federal appellate courts goes far beyond this very narrow set of inquiries” and that the Supreme Court’s work “ranges beyond the forensic, to deliberative and epideictic tasks necessary in the creation of an ongoing constitutional community of trust”).

³⁷ Of course, if you think the only task of the Supreme Court is to discover original intent, then you might believe that the Court’s work is entirely forensic. I do not purport to resolve the longstanding dispute about originalism and the Court’s proper role. My point is that a Supreme Court justice can reason from past events without averring a forensic purpose.

³⁸ In the originalism debate, this approach arguably places me closest to neorepublicans like Cass Sunstein and others, because of their emphasis on deliberation. See, e.g., Sunstein, *supra* note __, at __ (emphasizing the role of deliberation in politics as a core republican commitment and “civic virtue”). However, I think “deliberative history” actually removes us from the originalism debate entirely. Even the staunchest originalist, for whom all that matters is *what* the Framers intended, can see value in talking about *why*. Even the most rabid “living constitutionalist,” who doubts whether that intent can be known or should be given much weight, can see the value in using arguments made *then* to support an argument made *now*. This is also why I believe I am not merely recasting the originalism debate into “forensic” and

we cannot agree about forensic history – about the extent to which it is necessary or proper, or about the means and standards for conducting it – we nevertheless ought to be able to talk about deliberative history.

The idea of deliberative history also makes history usable again. If the Court's purpose in examining history is not to gain a precise forensic knowledge of everything that happened in the past, but instead to access the record of human experience to guide deliberations about the future, then we need not be alarmed that the Court does not handle history with the rigor we expect of professional historians. Supreme Court justices, in our system, are not historians; the ancients would have classified them as political decision-makers. Their rhetoric, including the arguments they make from history, aims mainly at deliberative prudence, not forensic exactitude. As with any political decision-maker, knowing more history will always be better than knowing less. But recognizing “deliberative history” does something useful: it makes it possible to know *enough*, without knowing *all*.

*B. The Content of Deliberative History:
Neustadt and May's Suggested Practices*

But how are we to describe the content of deliberative history? After all, if the Court uses history for a forensic purpose, we have standards for measuring its forensic value, that is, its accuracy, even if those standards are not always rigorously observed. But how should we think about deliberative history? I suggest, as a starting point, the practical suggestions of Neustadt and May.

In *Thinking in Time*,³⁹ Neustadt and May argue that the use of history by government decision-makers can be improved by systematic practice. To help accomplish this, they outline a variety of suggested practices, which they call “mini-methods,” as aids to historical reasoning. Although Neustadt and May's suggestions are not addressed to Supreme Court justices, they may nevertheless shed light on the question of how Supreme Court justices use, or should use, history. Neustadt and May's framework makes sense for this purpose because it is specifically addressed to deliberative decision-makers who wish to make better use of history.

Neustadt and May's framework in *Thinking in Time* is certainly not the only framework that might be potentially useful, of course.⁴⁰ It is, however, one of the few systematic attempts to improve the use of history by deliberative decision-makers, albeit in a non-judicial setting. The work of the Court is different, and certainly any system would require significant adaptation before it could make heads or tails of what Supreme

“deliberative” camps. Originalism is concerned with the forensic use of history – how feasible it is, how valuable it is. Deliberative history is almost a different dimension, one that can accommodate originalists and anti-originalists alike.

³⁹ Richard E. Neustadt & Ernest R. May, *Thinking in Time: The Uses of History for Decision-Makers* (Free Press 1986)[hereafter “Neustadt and May”]. Neustadt and May's book was based on their “Uses of History” course at Harvard's John F. Kennedy School of Government.

⁴⁰ For a fascinating alternative approach to “thinking in time,” applied to one of the cases I will consider *infra*, see Philip Bobbitt, *Youngstown: Pages from the Book of Disquietude*, 19 Const. Comment. 3 (2002) (modal analysis and scenario planning).

Court justices do. But the three opinions discussed in this Article suggest that Neustadt and May's ideas may help us think about what Supreme Court justices do when they use history for a deliberative purpose, rather than for a forensic one.

Thinking in Time is addressed to any decision-maker who seeks to use information about the past to make more prudent decisions about the future – that is, to use history for a deliberative purpose. For Neustadt and May, the most illustrative “success story” is the decision-making process of President Kennedy and the Executive Committee of the National Security Council [ExComm] that led to a successful resolution of the Cuban missile crisis.⁴¹ Kennedy's decisions in that case, say Neustadt and May,

originated in or at least were much influenced by resort to history in ways not ordinary for American government officials. If the happy outcome was due even in part to those choices by Kennedy and his ExComm, then *unusual* uses of history perhaps deserve part of the credit. . . .

[T]he uses made of history appear to have contributed, demonstrably, to the high quality of analysis and management apparent during the missile crisis. Right or wrong, Kennedy had the wherewithal for reasoned and prudent choice, and resort to history helped produce it.⁴²

In contrast to Kennedy's successful use of history during the missile crisis, Neustadt and May cite a variety of failures of the Carter Administration – failures that Neustadt and May attribute in part to the administration's consistent misuse of history in the decision-making process.⁴³

Of course, some people are more inclined by nature to think historically, or ahistorically, than others.⁴⁴ But Neustadt and May contend that everyone can make marginal improvements with the help of systematic practices, “practices which, if made

⁴¹ In that case Kennedy and his ExComm moved beyond the conventional approach and short-term impulses – which probably would have led to an air strike – and instead chose the more unconventional option of a naval quarantine, plus a negotiating stance that gave Khrushchev maximum room to defuse the crisis. Neustadt and May, *supra* note __, at 3-16.

⁴² Neustadt and May, *supra* note __, at 3-16. As a second success story, where resort to history seems to have contributed to prudent choice, Neustadt and May also cite the work of the National Commission on Social Security Reform in 1983. *Id.* at 17-31.

⁴³ These included, among others, the lack of focus of Carter's first “Hundred Days” in 1977; a bungled arms control initiative that same year (reflecting misjudgments not only of the Soviet negotiation position but also of the priorities of Senator Henry Jackson); a mini-crisis during the summer and fall of 1979 resulting from the mistaken belief that there was a Soviet military buildup in Cuba; and poor relations, throughout Carter's term, with German Chancellor Helmut Schmidt. Neustadt and May, *supra* note __, at 66-74 (Hundred Days); 111-32 (arms control initiative of 1977); 198-202 (Henry Jackson); 92-96 (Soviet military brigade); 186-89 (Helmut Schmidt).

⁴⁴ John Kennedy, in 1962, was an amateur historian who had published two distinguished works of history (*Why England Slept* and *Profiles in Courage*) and who read history for pleasure. Kennedy thought in terms of historical patterns and was inclined to think along the lines Neustadt and May suggest. By contrast, Jimmy Carter's thinking was more akin to that of an engineer, a technician who focused on the problem at hand. More importantly, he seems to have had an ahistorical cast of mind. See Neustadt and May, *supra* note __, at xiv (quoting James Fallows's description of “Carter's cast of mind: his view of problems as technical, not historical, his lack of curiosity about how the story turned out before”).

routine, could at least protect against common mistakes.”⁴⁵ Their aim is to “develop workaday procedures to get more history used better on the job by busy people preoccupied with daily decisions and other aspects of management.”⁴⁶

Though the practices suggested by Neustadt and May are tools for using history, that is, events from the past, their true purpose is to help make decisions about the future. They are, therefore, aids to deliberation, not forensics. To the extent that the content of Supreme Court opinions is deliberative, these tools might be usefully adapted to think about the deliberation of Supreme Court justices in constitutional cases.

The methods that Neustadt and May recommend can be grouped into five essential categories:⁴⁷

1. Define the present situation, first by identifying the important elements (Known, Unclear, or Presumed), and then by comparing historical analogies with the case at hand (Likenesses and Differences);
2. Compile a detailed issue history;
3. Evaluate presumptions;
4. Conduct “placement” of the relevant actors (individuals or institutions); and
5. “See time as a stream.”

I will discuss each of these in turn.

1. Define the present situation, first by identifying the important elements (Known, Unclear, or Presumed), and then by comparing historical analogies with the case at hand (Likenesses and Differences).

“For any decision,” Neustadt and May tell us, “the first step in analysis should be to take apart and thus define the situation that seems to call for action.”⁴⁸ As an initial “mini-method,” Neustadt and May recommend taking apart the situation at hand by separating out all important items that are Known, Unclear, or Presumed.⁴⁹ Next,

⁴⁵ See Neustadt and May, *supra* note __, at 2 (“We argue chiefly that uses now made of history can be more reflective and systematic, hence more helpful. . . . [O]ur purpose is prescriptive; we seek better practice and take aim at marginal improvements”).

⁴⁶ See Neustadt and May, *supra* note __, at xii. Neustadt and May “make no pretense of organizing a capital-M Methodology[,]” but offer “a set of guidelines we label ‘mini-’ or ‘small-m’ methods, intended to be easily remembered and applied for short times on short notice, as befits men and women at work. . . . a checklist of questions to be asked early instead of late.” *Id.* at xv-xvi.

⁴⁷ The groupings I describe here correlate roughly to the large categories outlined by Neustadt and May, although they are not identical.

⁴⁸ See Neustadt and May, *supra* note __, at 37.

⁴⁹ For example, when President Truman was considering how to respond to the North Korean invasion of South Korea in June 1950, his Knowns would have included the state of Cold War tensions in the world; the upcoming congressional elections; the “loss of China” issue. See Neustadt and May, *supra* note __, at 39. His Unclear items would have included whether South Korea could withstand the invasion without foreign assistance; what the Soviets planned to do elsewhere, and how they or the Chinese would respond to intervention by the U.S. or the United Nations. *Id.* at 40. His Presumed items would have included the presumptions that the Soviets were behind the North Korean attack; that the South Koreans wished to remain non-Communist; that the North Koreans were stronger militarily; that the Soviets did not intend to start a third world war; and that U.S. intervention to defend South Korea would strengthen American credibility with other countries and would enjoy broad political support at home (at least in the short term).

Neustadt and May recommend defining the situation further by identifying all purported historical analogies.⁵⁰ These analogies should then be closely inspected, by listing Likenesses and Differences with the present situation.⁵¹

How does *defining the situation*, through Knowns, Unclears, and Presumed, and through rigorous comparisons to analogies, take place in a Supreme Court opinion? As to items Known, Unclear, or Presumed, certainly the justices often identify such items, and often define the situation by reasoning from them. Of course, taking Knowns as an example, there will usually be many known facts that are not in dispute. But a fact is only a relevant Known, for our purposes, if a justice chooses to reason from it. That is, if Fact A is acknowledged as true by both Justice X and Justice Y, but Justice X relies on Fact A to support arguments, while Justice Y does not, then Fact A would be on Justice X's list of relevant Knowns, but would not be on Justice Y's list.⁵² All of this is equally true as to items that are Unclear or Presumed.⁵³

As to analogies, certainly the justices often identify historical analogies, often in the form of case precedents, and often define the situation by comparing the Likenesses and Differences between those analogies and the case at hand. Indeed, the Court probably uses this Neustadt and May mini-method more frequently, and more explicitly, than any other. Many of the arguments between justices are arguments about whether a particular analogy applies, often framed in terms of Likenesses and Differences.

2. Compile a detailed issue history.

According to Neustadt and May, “ExComm’s second noteworthy departure from usual practice took the form of attention to the issue’s history – to its sources and its

Id. I am deferring my discussion of Presumed to category three, *infra*. However, it is here that Neustadt and May recommend identifying Presumed for the first time.

⁵⁰ See Neustadt and May, *supra* note __, at 7-8 (“Kennedy and his ExComm departed from standard practice first of all in subjecting analogies to serious analysis. . . . All in all, the proceedings of ExComm are distinguished by the extent – unusual – to which analogies were invoked sparingly and, when invoked, were subjected to scrutiny”).

⁵¹ For example, in the case of the Korean decision of 1950, Truman specifically cited the Japanese invasion of Manchuria in 1931-32; Italy’s aggression against Ethiopia in 1935; and the German annexation of Austria in 1938. Some of the President’s advisers also cited the Rhineland crisis of 1936 and the Czech crisis of 1938. See Neustadt and May, *supra* note __, at 41. As Neustadt and May note, neither Truman nor his advisers appear to have considered another possible analogy, the Spanish Civil War. *Id.* While each of these analogies appears to have been considered at some point during the crisis, Neustadt and May believe that each might have been considered more usefully. Specifically, Neustadt and May believe that these and other analogies could have been examined more closely, by comparing particular Likenesses and Differences with the Korean situation. Doing so “would have underscored one point: The President’s chief concern was not Korea.” Instead, it was “the system of collective security that protected entities such as South Korea and, by doing so effectively, could deter a dictatorship like Stalin’s from pursuing piecemeal its expansionist goals.” This “would have emphasized that the purpose was to repel. It was not to punish, to seek retribution for, or to take advantage of.” This knowledge, in turn, “might have saved Truman from making a heedless choice of follow-up action when MacArthur neared the prewar border.” See Neustadt and May, *supra* note __, at 43 (internal quotation marks omitted).

⁵² This is not peculiar to Supreme Court justices, of course. In other decision-making settings, two or more individuals might agree that a fact is valid but disagree as to whether it is an important Known.

⁵³ I will have more to say about Presumed in a moment. See *supra* note __.

context. . . . [O]ne sees Kennedy himself repeatedly raising questions about the actual history of the issue.”⁵⁴

To compile a detailed issue history, Neustadt and May suggest several mini-methods. These include: (1) focusing on the “story,” rather than on the “problem;”⁵⁵ (2) creating a sequential timeline of dates associated with the issue’s history, beginning with the earliest date that seems significant; and (3) filling in the story, and the timeline, by asking traditional “journalist’s questions,”⁵⁶ focusing particularly on trends and on key turning points where politics appears to have played a decisive role.⁵⁷

When we examine Supreme Court opinions for the various mini-methods suggested by Neustadt and May, it is issue history (and analogies) that are the easiest to spot. When we say a justice “uses history,” this is usually what we mean. It means telling the story of how the issue has developed throughout history, as distinct from particular analogies or the specifics of the situation at hand. Issue history, Neustadt and May tell us, “comprises both trend lines and specifics. It is not a string of analogues or precedents; rather it is a series of connected happenings, which over time take on the form of trends.”⁵⁸ Certainly some Supreme Court justices, like some Presidents, are more inclined than others to investigate the historical record in this way. Some may do so in some cases, but not in others. For our purposes, the important points are that issue history can be used for deliberative reasons, not just forensic ones, and that it may be helpful to note when this is being done.

3. Evaluate presumptions.

In 1962, during the Cuban missile crisis, according to Neustadt and May, “in unusual degree Kennedy and his ExComm looked hard at key presumptions. . . . Kennedy

⁵⁴ See Neustadt and May, *supra* note __, at 8. Attention to issue history helped Kennedy consider how the Soviet decision to install missiles in Cuba compared to previous Soviet decisions, and whether the timing suggested anything about possible Soviet motives. See Neustadt and May, *supra* note __, at 9.

In contrast, Neustadt and May argue that an inattention to “the story” led the Carter Administration into an unnecessary crisis over the Soviet military brigade in Cuba during the summer of 1979. “The brigade became an issue only because Carter and his aides did not know the brigade had been there all along, hence supposed it indicative of some new move by the Russians[.]” See Neustadt and May, *supra* note __, at 96.

⁵⁵ Neustadt and May call this the “Goldberg rule” because they attribute it to Avram Goldberg, chief executive officer of Stop and Shop, a New England chain of grocery and discount department stores. See Neustadt and May, *supra* note __, at 106.

⁵⁶ Those questions were well-stated by Rudyard Kipling: “I keep six honest serving-men / (They taught me all I knew); / Their names are What and Why and When / And How and Where and Who.” Poem following “The Elephant’s Child,” in *Just So Stories* __ [1902].

⁵⁷ In another example, Neustadt and May argue that the successful creation of Social Security in 1935 had much to do with Franklin Roosevelt’s detailed study of the history of the issue of old-age insurance. Neustadt and May contrast Franklin Roosevelt with Lyndon Johnson, whose lack of a historical sense led him into Vietnam – “[i]n 1965 he did not seem to see either the past or the future of the struggle” – and “led him to create domestic programs [the Great Society] without built-in staying power.” See Neustadt and May, *supra* note __, at 103, 104. The exception that proves the rule is Johnson’s leadership in creating civil rights and voting rights laws: “[I]n race relations[,] Johnson, the Southerner, exhibited a sense of history keener than any predecessor, Lincoln not excepted.” *Id.* at 104. “In this domain Johnson’s vision reached far back and far ahead.” *Id.* at 105.

⁵⁸ See Neustadt and May, *supra* note __, at 131.

and his ExComm seem to us exemplary for the extent to which they asked: How well-founded are the presumptions on which we plan to act?”⁵⁹

Neustadt and May suggest that decision-makers, having already identified items Presumed,⁶⁰ first evaluate these items to determine what kind of presumption they are, and then test any presumptions that are of the testable kind. The three kinds of presumptions identified by Neustadt and May are Maybes, Truths, and If/Thens. Maybes are essentially predictions, “mere estimates of what will happen over time.”⁶¹ “They can range from calculations based on available evidence, to educated guesses, to surmises, to mere hunches. But in any case the central characteristic is that without much delay or pain the presumption can and will be altered as time passes and fresh evidence piles up.”⁶² In other words, Maybes are presumptions that will be proven, or disproven, with the advance of history. They are predictions that can be tested simply by comparing them to what actually happens as events unfold.

At the other extreme are Truths. A Truth is essentially an article of faith, a presumption that “is so value-laden that it cannot be challenged save in its own terms, by opposed values: Communists are bad, market mechanisms good; life matters more than money; and so forth.”⁶³ Such presumptions are “beliefs so tightly packed, their value content so solidified, that they are impervious to change unless catastrophe intervenes, if then.”⁶⁴

Finally, somewhere between Maybes and Truths, are what Neustadt and May call If/Thens. These are “presumptions that embody some element of faith but are not impervious to tests of evidence. . . . presumptions about what will happen when something else has happened first.”⁶⁵ “If this, then that: two sets of expectations, each a mixture of beliefs and facts, linked by a (usually implicit) causal theory.”⁶⁶ If/Thens are part Maybe, part Truth. Like Truths, they are based partly on faith. Unlike Truths,

⁵⁹ See Neustadt and May, *supra* note __, at 9, 11. This is a sharp contrast to the John Kennedy of 1961, who courted disaster during the failed Bay of Pigs invasion, largely by failing to closely examine the presumptions on which the operational plan was based. Among the unexamined presumptions supporting an invasion were the presumption that the CIA’s capabilities exceeded Castro’s, particularly in the air; that the CIA-trained Cuban refugees would have to be disposed of in some way; that Cubans living on the island were thirsting for constitutional government and would join in an uprising to support to an invasion force; and so on. See Neustadt and May, *supra* note __, at 140-51.

⁶⁰ This was done in step 1, *supra*, although you could also identify presumptions at any point in the process.

⁶¹ See Neustadt and May, *supra* note __, at 138.

⁶² See Neustadt and May, *supra* note __, at 138-39 (e.g., “American predictions of longevity for the successive governments of South Vietnam”; “Center for Disease Control assumptions about starting dates for mass immunization”).

⁶³ See Neustadt and May, *supra* note __, at 139.

⁶⁴ See Neustadt and May, *supra* note __, at 139 (e.g., “[n]ot only anti-Communism but also same naïve remnants of the ‘white man’s burden’ played a part in Korean decisions, as well as in Vietnam decisions”; “[i]n 1983 the symbols of insurance as an earnest of the work ethic remained . . . what they had been for fifty years and were decisive to the social security debate”; “Carter came to deep cuts in strategic arms partly out of conviction that all humans had to want the world rid of nuclear weapons”).

⁶⁵ See Neustadt and May, *supra* note __, at 139.

⁶⁶ See Neustadt and May, *supra* note __, at 139.

however, and like Maybes, they make predictions that may be proven or disproven by events.⁶⁷

According to Neustadt and May,

The first step toward testing presumptions is to sort them, to set aside the “maybes” least weighed down by “truths,” and also the free-standing “truths” that cannot be well tested. What remain are likely for the most part to be “if/thens” along with some truth-hiding “maybes”. We urge concentration on those remainders.⁶⁸

Once the testable presumptions have been identified, Neustadt and May suggest two methods for testing them. The first method is giving odds.⁶⁹ The second method is to ask what new information would change the presumption: “What new Knowns would bring you to change items Presumed? When? And why?”⁷⁰

How do these methods apply to the reading of Supreme Court opinions? Of all the practices that Neustadt and May suggest, testing presumptions is probably the least adaptable, and the least useful, to our purposes. While it is true that the Court often makes presumptions, stated or unstated, and often reasons from them, those presumptions are usually closer to untestable Truths than to testable Maybes, or even to the hybrid If/Thens. Usually, the presumptions of justices are not explicit predictions about specific events that are more or less likely to happen if a particular course is adopted. Usually, they are more in the nature of Truths – articles of faith, ways of looking at the world, even ideologies. Usually, they cannot be tested in any meaningful way.⁷¹

⁶⁷ See Neustadt and May, *supra* note __, at 139 (e.g., “LBJ’s presumptions about the effects of bombing North Vietnam”; “Carter’s presumptions that it did no harm to start with a deep cuts proposal”); see also *id.* (“But still more beliefs are packed into such presumptions. If we bomb North Vietnam, South Vietnamese morale will rise. If we cut old age benefits, the voters will retaliate. . .”).

⁶⁸ See Neustadt and May, *supra* note __, at 140.

⁶⁹ “If someone says [there is] ‘a fair chance’ [of something happening,] as before the Bay of Pigs . . . ask, ‘If you were a betting man or woman, what odds would you put on that?’ If others are present, ask the same of each, and of yourself too. Then probe the *differences*: Why?” See Neustadt and May, *supra* note __, at 152.

⁷⁰ See Neustadt and May, *supra* note __, at 153. Neustadt and May call this “Alexander’s question,” after Dr. Russell Alexander, a public health professor at the University of Washington, who asked a similar question at the Advisory Committee meeting in 1976 that considered whether to immunize the country against swine flu. *Id.* For instance, in the Bay of Pigs example, “[i]t is as though someone had said to JFK in 1960, after his election, ‘list the things which worry you about [the invasion] plan and then list all the things which, if they happened in the world or in the planning, would make your worry level rise; then have a watch kept to see if they are occurring. If any do, review.’” See Neustadt and May, *supra* note __, at 153.

⁷¹ This is understandable. First, political decision-makers naturally focus on the problem in the present situation – the moving parts of the moment are part of what concerns them – so they naturally make explicit predictions about which way the parts will move. Supreme Court justices, on the other hand, though presented with a specific case or controversy, purport to create a future rule with general effect. Moreover, one reason Neustadt and May suggest that government decision-makers should identify their If/Then predictions is so that those predictions may be “tickled,” and the decision altered if the predictions prove wrong. That is a practice that courts generally avoid. Even in instances when a rule proves unworkable, courts nevertheless address the problem on a high conceptual level. In any event, Supreme Court opinions normally do not include many If/Then presumptions that can be tested as predictions.

Still, though this practice is difficult to adapt for our purposes, there are ways it can be useful. For one thing, it can be helpful to isolate the presumptions that are pure Truths. Though these presumptions cannot be tested, they can tell us about the ideologies on which the opinion is based. Also, in those instances when a justice does make presumptions that are testable, whether those are contingent If/Thens or even noncontingent Maybes, we might find it helpful to test them, as Neustadt and May suggest. Even if we do not, we might find it helpful to isolate and identify them. If we seek to understand the reasoning of a particular justice, it helps to note when that justice presumes that adopting a particular rule would open the door to future dangers (If/Then), or makes specific predictions about future events (Maybe).⁷² At least, it might help to note those presumptions as to which justices appear to disagree, or differ in emphasis.

Since justices' presumptions are more often untestable Truths than testable If/Thens or Maybes, the practical suggestions for evaluating presumptions are probably the part of the Neustadt and May model that are hardest to adapt. Nevertheless, they are worthwhile to remember and may sometimes be worthwhile to apply. Having identified items Presumed, sort each presumption by asking, Can it be proven or disproven by events? If it can, then evaluate it further, with "bets and odds" or by asking how it might be changed by new facts. If it cannot, then treat it as part of the justice's underlying ideology.

4. Conduct "placement" of the relevant actors (individuals or institutions).

According to Neustadt and May,

Kennedy and his ExComm paid attention to organizational histories. . . . Kennedy himself seems to have given ExComm its cue. He seemed to understand in his bones the tendency of large organizations to act today as they acted yesterday.

[Llewellyn] Thompson and other Sovietologists also helped Kennedy and the members of ExComm appreciate the possibility that events on the Soviet side could be products of organizational routine or momentum rather than deliberate purpose. . . .⁷³

[I]t is crucial . . . to anticipate and take into account the different ways in which different actors see the world and their roles in it – not only organizationally but also humanly as individuals.⁷⁴

Neustadt and May call this practice *placement*. They recommend that decision-makers use history to "place" the individuals and institutions that are important to success.⁷⁵ Neustadt and May also contend that "[o]rganizations can be placed as well as

⁷² Of course, it might also be helpful, as a matter of historical hindsight, to consider whether the prediction appears to have been accurate.

⁷³ See Neustadt and May, *supra* note __, at 12-13.

⁷⁴ See Neustadt and May, *supra* note __, at 157.

⁷⁵ For example, "Kennedy and ExComm showed uncommon interest in the history in the heads of their adversaries." See Neustadt and May, *supra* note __, at 11. "According to Robert Kennedy, the President tried constantly to put himself in Khrushchev's position." This led Kennedy to choose to respond to a conciliatory cable from Khrushchev (which seemed to offer to withdraw the missiles), instead of responding to a later message from the Soviets that seemed to retract that offer. "Some of [the members of ExComm] thought later that this tactic [of was the source of their success, the means to bring the crisis to a

people, which is fortunate, because an organization's history can help just as an issue's does to serve up questions useful for a government decision."⁷⁶

Applying the idea of placement to Supreme Court opinions, the relevant actors that the justices "place" are usually institutions, not individuals.⁷⁷ Justices engage in institutional placement whenever they reason from the histories, traditions, or characteristics of particular institutions – when they observe, for example, that Congress has historically acquiesced to the President on questions of national security, or that the executive branch is the branch best able to act quickly, or that legislatures have not always been the best protectors of individual liberties. Sometimes justices engage in institutional placement of the judiciary, by considering the strengths, limits, and tendencies of the judicial branch – a practice we might call *self-placement*.

When we read constitutional cases for examples of institutional placement, the hard part is distinguishing arguments based on placement from arguments based simply on text. If a justice says that Article II of the Constitution designates the President as Commander in Chief, which logically includes the authority to direct the activities of the armed services, that is an argument based on text, not placement. If, however, a justice says that Presidents have not hesitated to use their command power where the security of the nation was at stake (or says that Congress has traditionally ratified or acquiesced in these exercises of executive authority), that is institutional placement. It relies not on the words of the job description in Article II, but on examples from history.

5. "See time as a stream."

Neustadt and May's final suggestion is not so much a method as a way of thinking about history. "In unusual degree," they contend, "Kennedy and his ExComm saw the issues before them as part of a time sequence beginning long before the onset of

close, yet they probably would not have settled on it had they not by then begun to think of Khrushchev as a person, with a history of his own." See Neustadt and May, *supra* note __, at 12.

⁷⁶ For example, during the Bay of Pigs affair, if Kennedy had asked more questions about the institutional history of the Central Intelligence Agency, he would have gained valuable insights into the agency's strengths, limits, and tendencies – insights that might have improved his understanding of the advice he was receiving from that agency. See Neustadt and May, *supra* note __, at 218. He would have learned, for instance, that the CIA "was ... a confederacy, in some respects similar to the Pentagon": "the Plans and Intelligence directorates were as far apart as the Army and the Navy. There was no Secretary of Defense, nor even a Chairman of the Joint Chiefs. The set-up resembled what the Pentagon would have been if it had no head other than one service chief acting as coordinator." *Id.* He would also have learned that "separateness in CIA was sanctified by a doctrine that *no one* should be told *anything* without an established "need to know." Operating procedures reinforced the doctrine." *Id.*

⁷⁷ Other government decision-makers will often speak explicitly in terms of individual actors: "What will Castro do?" Supreme Court justices, though, see asking such questions as antithetical to their own proper role. Indeed, they will often take pains to show that they are not doing so. See, e.g., *Youngstown*, *supra* note __, at 633-34 (Douglas, J., concurring)("Today a kindly President uses the seizure power to effect a wage increase and to keep the steel furnaces in production. Yet tomorrow another President might use the same power to prevent a wage increase, to curb trade unionists, to regiment labor as oppressively as industry thinks it has been regimented by this seizure"); see also *Youngstown*, *supra* note __, at 593 (Frankfurter, J., concurring)("It is absurd to see a dictator in a representative product of the sturdy democratic traditions of the Mississippi Valley").

crisis and continuing into an increasingly indistinct future.”⁷⁸ Moreover, “[t]he more [they] deliberated, the more they weighed consequences and the more they shifted from the simple question of what to do *now* to the harder question: How will today’s choices appear when they are history – when people look back a decade or a century hence?”⁷⁹

Neustadt and May call this *seeing time as a stream*:

To link conventional wisdoms of the present with past counterparts and future possibilities; to link interpretations of the past with the experiences of interpreters, and both with their prescriptions; to link proposals for the future with the inhibitions of the present as inheritances from the past - all these mean to think relatively and in terms of time, opening one’s mind to possibilities as far back as the story’s start and to potentialities as far ahead as relevant[.] That entails seeing time as a stream. It calls for thinking of the future as emergent from the past and of the present as a channel that perhaps conveys, perhaps deflects, but cannot stop the flow.⁸⁰

As an example, Neustadt and May cite the advice given in the spring of 1943 by General George Marshall, then Army Chief of Staff, to John Hilldring, who had just been given the task of organizing military governments in nations newly liberated by the Allies. Marshall warned Hilldring that those new governments should be organized and conducted so as to maintain the high levels of trust and confidence that civilians had traditionally placed in the U.S. military.⁸¹ He looked to both past and future to gain an overall perspective – the suggested practice that Neustadt and May call *seeing time as a stream*:

Though busy fighting a war, [Marshall] paused to ponder possible futures. He looked not only to the coming year but well beyond, and with a clear sense of the long past from which those futures would come. At least in some general way, he brought to bear an understanding of how military-civilian relations had evolved in other countries: in Britain

⁷⁸ See Neustadt and May, *supra* note __, at 14.

⁷⁹ See Neustadt and May, *supra* note __, at 14. “The initial debate in ExComm involved no evident thought beyond the next week or so. As early as the evening of the first day, however, a few participants had lifted their sights. . . . By the tenth and eleventh days of the crisis . . . Kennedy and his advisers talked about the possibility in terms of how it might fit a long sequence of events.” *Id.* Neustadt and May also cite President Kennedy’s comments to Robert Kennedy about *The Guns of August*, Barbara Tuchman’s book about the miscalculations that led to World War I: “I am not going to follow a course which will allow anyone to write a comparable book about this time, *The Missiles of October*. If anybody is around to write after this, they are going to understand that we made every effort to find peace and every effort to give our adversary room to move.” *Id.* at 15.

⁸⁰ See Neustadt and May, *supra* note __, at 246.

⁸¹ Among other things, Marshall told Hilldring:

[W]e [in the professional military] have a great asset and that is that our people, our countrymen, do not distrust us and do not fear us. Our countrymen, our fellow citizens, are not afraid of us. They don’t harbor and ideas that we intend to alter the government of the country or the nature of this government in any way. This is a sacred trust that I turn over to you today. . . . I don’t want you to do anything, and I don’t want you to permit the enormous corps of military governors that you are in the process of training and that you are going to dispatch all over the world, to damage this high regard in which the professional soldiers in the Army are held by our people, and it could happen, it could happen, Hilldring, if you don’t understand what you are about.

See Neustadt and May, *supra* note __, at 247-48.

before the Mutiny Act; in the France of the Dreyfus Affair; in Imperial and Weimar Germany. He recognized what was genuinely exceptional in America. He thought of what his concerns (or his successors') might be if Hilldring made day-to-day decisions without regard to imaginable long-term consequences. By looking back, Marshall looked ahead, identifying what was worthwhile to preserve from the past and carry into the future. By looking around, at the present, he identified what could stand in the way, what had potential to cause undesired changes of direction. Seeing something he had power to reduce, if not remove, he tried to do so.⁸²

Another example of seeing time as a stream, also cited by Neustadt and May, is Franklin Roosevelt's speech to the Commonwealth Club in 1932. In that speech, Roosevelt discussed the centuries-long evolution of the social contract and argued that such evolution must continue as social conditions continued to change.⁸³

When we look for *seeing time as a stream* in Supreme Court opinions – well, this practice is probably easier to illustrate, with examples, than it is to define. According to Neustadt and May, this kind of thinking appears to have three components: (1) “recognition that the future has no place to come from but the past, hence the past has predictive value”; (2) “recognition that what matters for the future in the present is departures from the past, alterations, changes, which prospectively or actually divert familiar flows from accustomed channels, thus affecting that predictive value and much else besides”; and (3) “continuous comparison, an almost constant oscillation from present to future to past and back, heedful of prospective change, concerned to expedite, limit, guide, counter, or accept it as the fruits of such comparison suggest.”⁸⁴

⁸² See Neustadt and May, *supra* note ___, at 248. As further illustrations of Marshall's capacity to see time as a stream, Neustadt and May cite two examples from his service as Secretary of State: his approach to the Chinese Civil War, and his role in creating the Marshall Plan for European recovery. *Id.* at 249-50. See also Marshall's “Washington's Birthday Remarks” at Princeton University on February 22, 1947 (“I doubt seriously whether a man can think with full wisdom and with deep convictions regarding some of the basic international issues of today who has not at least reviewed in his mind the period of the Peloponnesian War and the Fall of Athens”).

⁸³ See Neustadt and May, *supra* note ___, at 253:

Roosevelt talked of the rise of opposition to government and how that helped lead to the American Revolution. He summarized the differences between Hamilton and Jefferson, saying that the one had focussed more on the need for governmental power, the other on the dangers inherent in it. He described how, in Jefferson's day, factories and financial empires, together with the rise of cities and the closing of the frontier, had created new conditions. All that led to his central proposition:

Government is a relation of give and take, a contract, perforce, if we would follow the thinking out of which it grew. Under such a contract rulers were accorded power, and the people consented to that power on consideration that they be accorded certain rights. The task of statesmanship has always been the re-definition of these rights in terms of a changing and growing social order. New conditions impose new requirements upon Government and those who conduct Government.

⁸⁴ See Neustadt and May, *supra* note ___, at 251.

We can take this as a working definition and recognize that it has a few added implications. For one thing, it means that historical knowledge, even astounding historical knowledge, is not enough. It is not enough to cite a lot of examples from the past. It is true that doing so might serve some other deliberative practice – for example, those cases might form an issue history, or might be analogies that help define the situation, all of which might have a deliberative purpose, not a forensic one. Seeing time as a stream, though, means something more.⁸⁵ It means looking for the patterns of the past, to contemplate how those patterns might continue, or change, in the future.

A related point, which Neustadt and May also note, is that a decision-maker who sees time as a stream is “thereby made wary of ‘problem-solving’” on a case-by-case basis.⁸⁶ Of course, Supreme Court justices work on a case-by-case basis, and the specific situations they address will usually take the form of a particular case or controversy. Still, some justices are more likely than others to focus on the crisis at hand. A justice who sees time as a stream is more likely to be guided by the patterns of history, and is less likely to be influenced by the exigencies of the present emergency.⁸⁷

When we look for examples in Supreme Court opinions, it is tempting to say that we will know it when we see it. Perhaps, even, when we hear it, since the best examples can be found in those stirring passages with grand and sweeping language about the Framers’ foresight and about our debt to future generations.⁸⁸ A justice who cites the past not as forensic evidence but for its predictive value, a justice who tries to imagine present decisions from the standpoint of the future that will someday be shaped by them, a justice who bounces between past and future to make an argument about the present – this is a justice who sees time as a stream.

C. In Sum

Thus, if we distinguish between the use of history for a forensic purpose and the use of history for a deliberative one, we might describe the content of the deliberative history done by Supreme Court justices, by adapting Neustadt and May’s suggestions for other deliberative decision-makers. These are: defining the situation by identifying the important elements Known, Unclear, or Presumed, and by comparing historical analogies

⁸⁵ As an example of a decision-maker who did not tend to see time as a stream, Neustadt and May cite President Truman, who had an encyclopedic knowledge of history but who usually decided matters on a case-by-case basis. While Truman often had a ready supply of historical analogies – he could describe in detail why his problems were just like those that had plagued President Lincoln – he did not look for patterns of the past in the manner of a Marshall or an FDR. See Neustadt and May, *supra* note __, at 252-53. Compare *Youngstown*, *supra* note __, at 661 n.3 (Clark, J., concurring)(citing numerous “[d]ecisions of this Court which have upheld the exercise of presidential power[,]” but without appearing to discern any pattern in these decisions).

⁸⁶ See Neustadt and May, *supra* note __, at 254.

⁸⁷ See, e.g., *Luther*, *supra* note __, at 46 (“It was a state of war”); *Youngstown*, *supra* note __, at 667-80 (Vinson, C.J., dissenting) (focusing mainly on present exigencies as Knowns and noting that “[t]hose who suggest that this is a case involving extraordinary powers should be mindful that these are extraordinary times”).

⁸⁸ For an especially stirring example of this sort of floating between past, present, and future, see, e.g., *Whitney v. California*, 274 U.S. 357, 376-77 (1927) (Brandeis, J., concurring).

with the case at hand; compiling a detailed history of the issue; identifying and evaluating presumptions; placement of the relevant institutions; and seeing time as a stream. In the next three Parts of this Article, I will examine three opinions to consider whether these ideas have descriptive value.

Before I do so, however, I should add a few comments about my particular choice of opinions.

The idea of deliberative history, and Neustadt and May's practical suggestions, might help describe many types of judicial opinions in many types of cases. For example, these ideas might help describe other kinds of Supreme Court decisions, or constitutional cases before state supreme courts, or even the decisions of other appellate courts. In this Article, however, I focus on constitutional cases before the U.S. Supreme Court.

As for the particular cases, these three – *Luther*, *Youngstown*, and *Hamdi* – are simply examples. They were chosen not because they are related to each other, somewhat, but because they all relate to emergencies. *Thinking in Time* is addressed mainly to officials facing emergencies – the outbreak of war in Korea, or the Cuban missile crisis, or a possible flu outbreak. The purpose of Neustadt and May's tools is to help such officials weigh the exigencies of the present situation, the lessons of the past, and concerns for the future. My view was that, if Supreme Court justices used the same tools, or something like them, they would do so most explicitly in cases that also involved emergencies.⁸⁹

Since this is a piece about the reasoning and rhetoric of individual justices, I decided not to focus on majority opinions, but instead to consider opinions that justices had authored individually; the opinions I will discuss are two dissents and a concurrence. Majority opinions are often the product of collaboration and negotiation, a process that might have implications for the author's expressed reasoning and rhetoric. For purposes of this Article, I sought to hear the justices' own voices in a form that was as pure and unadulterated as possible.⁹⁰

Finally, it should be noted that, while the justices may sometimes follow the steps suggested in *Thinking in Time*, they do not take those steps in order, and do not organize their written opinions according to Neustadt and May's categories. Our walk through these opinions, therefore, is not like a walk through the zoo, in which we can point to these deliberative techniques as we stroll past them in their labeled cages. Our work is

⁸⁹ On emergency powers generally, see Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 Yale L.J. 1385 (1989); Mark Tushnet, *Defending Korematsu?: Reflections on Civil Liberties in Wartime*, 2003 Wis. L. Rev. 273, 298-307 (2003) (discussing the role of emergency powers in liberal constitutions); Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 Yale L.J. 1011 (2003); Bruce Ackerman, *The Emergency Constitution*, 113 Yale L.J. 1029 (2004); David Cole, *The Priority of Morality: The Emergency Constitution's Blind Spot*, 113 Yale L.J. 1753 (2004).

⁹⁰ Justice Woodbury's dissent in *Luther*, and Justice Jackson's concurrence in *Youngstown*, were not joined by any other justice. Justice Scalia's dissent in *Hamdi* was joined only by Justice Stevens. We cannot know whether Scalia made rhetorical concessions or other changes to win Stevens's support. As a purely subjective matter, however, Scalia's *Hamdi* dissent certainly *sounds* unadulterated.

more like a safari, in which we might observe these techniques in their natural habitat, that is, for brief moments, and in no particular order. Afterward, we might make educated guesses about what it was we think we saw. But let us begin.

II. JUSTICE WOODBURY'S MARTIAL-LAW DISSENT IN *LUTHER*

Luther v. Borden grew out of Dorr's Rebellion, a series of political agitations in Rhode Island in 1841-42, relating to the peculiar status of the state constitution at that time. Unlike the other colonies, Rhode Island had entered the Union without adopting a new constitution, choosing instead to continue operating under the royal charter granted by Charles II in 1663. This charter government endured until the early 1840s, when citizens began to call for various reforms to address legislative malapportionment, voting qualifications, and other issues. When these calls for reform were rejected by the charter government, a group of dissatisfied citizens called a constitutional convention, wrote a new state constitution, and submitted it to the voters, who overwhelmingly approved the new constitution (and rejected an alternative constitution proposed by the legislature). Voters also elected several insurgent state officials, including the rebel "governor," Thomas Dorr. However, the charter government - incumbent Governor Samuel King and the state legislature - refused to concede to Dorr, and declared all of the rebels' actions invalid under the charter government and its laws. The charter government also appealed to President John Tyler for military assistance in the event of violence. (Tyler pledged to help if necessary.) When Dorr and his supporters forcibly attempted to capture the state arsenal at Providence, the legislature imposed martial law across the entire state.⁹¹

Following the legislature's declaration of martial law, officers of the state militia entered and searched the home of a Dorr supporter, Martin Luther, without a warrant. Luther later brought a trespass suit against one of these officers, Luther Borden. Borden defended his actions by claiming that he had entered on the authority of the charter government's declaration of martial law. Luther countered by claiming that the declaration was invalid because the charter government had already ceased to be the lawful government of Rhode Island. Thus, the courts were asked to resolve the question of which government was the lawfully authorized government of the state.

The Supreme Court, speaking through Chief Justice Roger Taney, declined to address this question, holding instead that the question of a state government's legitimacy was a nonjusticiable "political question" to be answered by Congress or the President. The Court noted that President Tyler had recognized the charter government as the lawful authority, by promising federal assistance to suppress the insurrection, and that Congress had also recognized the charter government, by seating its elected representatives as Rhode Island's congressional delegation. Accordingly, Taney concluded, any additional intervention by the courts would only unsettle matters further.

In dicta, however, Taney also indicated that states did have the power to declare martial law where necessary to suppress civil unrest, and that states were the final arbiters of whether such measures were necessary. In the case of Rhode Island, Taney wrote,

⁹¹ Dorr was later arrested and convicted of treason by the Rhode Island Supreme Court.

“[i]t was a state of war; and the established government resorted to the rights and usages of war to maintain itself, and to overcome the unlawful opposition[.]” He reasoned that, “[w]ithout the power to do this, martial law and the military array of the government would be mere parade, and rather encourage attack than repel it.” These comments suggested that the state legislature could declare martial law when a state of war existed; that the judgment of whether a state of war did exist was the legislature’s to make; and that this judgment could not be reviewed or questioned by the courts.

Justice Levi Woodbury, dissenting, agreed as to the political question issue, but disagreed with Taney’s view of martial law.⁹² Woodbury believed that the Rhode Island legislature did not have power to impose martial law on the whole state. His dissent includes some excellent illustrations of the deliberative practices suggested by Neustadt and May.⁹³

For example, Woodbury compiles a detailed *issue history* to argue that martial law is inconsistent with English and American traditions.⁹⁴ He notes that since 1620 Parliament had sought to curb the abuses of martial law by the king,⁹⁵ efforts that had led to the Petition of Right and the Declaration of Rights in 1688.⁹⁶ Thus it had “become gradually established in England, that in peace the occurrence of civil strife does not justify individuals or the military or the king in using martial law over the people.”⁹⁷

Woodbury also engages in *institutional placement*, by distinguishing between the British Parliament and legislatures in the United States. Instead of stereotyping them

⁹² Helpful treatments of Levi Woodbury include William D. Bader, Henry J. Abraham, & James B. Staab, *The Jurisprudence of Levi Woodbury*, 18 Vt. L. Rev. 261 (1994); and Timothy A. Lawrie, *Interpretation and Authority: Separation of Powers and the Judiciary’s Battle for Independence in New Hampshire, 1786-1818*, 39 Am. J. Legal Hist. 310 (1995).

⁹³ I concentrate here only on the portions of Woodbury’s dissent that are concerned with martial law. For more on *Luther*, and martial law, see Jason Collins Weida, *A Republic of Emergencies: Martial Law in American Jurisprudence*, 36 Conn. L. Rev. 1397 (2004); Stephen I. Vladeck, *Emergency Power and the Militia Acts*, 114 Yale L.J. 149 (2004); Stephen I. Vladeck, *The Detention Power*, 22 Yale L. & Pol’y Rev. 153 (2004); Major Kirk L. Davies, *The Imposition of Martial Law in the United States*, 49 A.F. L. Rev. 67 (2000).

⁹⁴ In *Luther* it had also been suggested that the Legislature perhaps had not really intended to impose martial law, but had instead meant to adopt some lesser measure – for example, extending to civilians the military code that governs the army. 48 U.S. at 59-60 (Woodbury, J., dissenting). To refute this claim, Woodbury examines the issue history of such military codes in England (the Mutiny Act) and the United States (the Articles of War). He notes that these military codes, unlike martial law, had never applied to civilians and were always subordinate to the civil law. *Id.* at 59-63. This issue history, compared with the Knowns of the Rhode Island statute and its implementation, leads Woodbury to conclude that the legislature had intended “[nothing] other than the ancient martial law often used before the Petition of Right, and sometimes since[.]” *Id.* at 59.

⁹⁵ *Luther*, 48 U.S. at 63 (Woodbury, J., dissenting).

⁹⁶ *Luther*, 48 U.S. at 63 (Woodbury, J., dissenting).

⁹⁷ *Luther*, 48 U.S. at 64 (Woodbury, J., dissenting); see also *id.* at 63 (drawing an analogy to the martial law imposed by Queen Mary in 1558); *id.* at 62 (“[I]n every country which makes any claim to political or civil liberty, ‘martial law,’ as here attempted and as once practised in England against her own people, has been expressly forbidden there for near two centuries, as well as by the principles of every other free constitutional government”). Woodbury also includes a presumption that takes the form of a Truth: that it would be “not a little extraordinary, if the spirit of our institutions ... was not much stronger than in England against the unlimited exercise of martial law over a whole people[.]” *Id.*

both as “legislative bodies,” he sophisticates the stereotype by noting that Parliament enjoys unlimited power under the British constitution, and may impose martial law “under the theory, not that it is consistent with bills of rights and constitutions, but that Parliament is omnipotent, and for sufficient cause may override and trample on them all, temporarily.”⁹⁸ American legislatures, on the other hand, “no less than the executive and judiciary, are usually not regarded as omnipotent. They are in this country now limited in their powers, and placed under strong prohibitions and checks.”⁹⁹

Woodbury also *defines the situation* by differentiating *analogies*. For example, he acknowledges that martial law was not completely unknown in America; it had been imposed during the Revolution by some of the colonial governors. But he uses these analogies to define the situation, by showing differences,¹⁰⁰ and to support what he has already stated through issue history – that martial law is inconsistent with American traditions.¹⁰¹ In other words, these analogies only underscore that

[M]artial law' like this, ranging over a whole people and State, was not by our fathers considered proper at all in peace or during civil strife, and that, in the country from which we derive most of our jurisprudence, the king has long been forbidden to put it in force in war or peace, and that Parliament never, in the most extreme cases of rebellion, allows it, except as being sovereign and unlimited in power, and under peculiar restrictions[.]¹⁰²

Having used these methods to argue that martial law violates English and American tradition, Woodbury also uses *issue history* to argue that it also violates the royal charter of 1663.¹⁰³ That charter prohibited the legislature from passing laws “contrary and repugnant unto” the laws of England, and required the laws of Rhode Island to be, “as near as may be, agreeable” to English laws, which presumably included the Petition of Right and the English Bill of Rights.¹⁰⁴ Since there was no act of Parliament (in 1663 or 1776) providing for martial law over all of Rhode Island, the charter could not have allowed it in 1842.¹⁰⁵

⁹⁸ *Luther*, 48 U.S. at 64 (Woodbury, J., dissenting); see also *id.* at 66 (“[I]f Parliament now exercises such a power occasionally, it is . . . only because the power of Parliament is by the English constitution considered as unlimited or omnipotent”).

⁹⁹ *Luther*, 48 U.S. at 66 (Woodbury, J., dissenting).

¹⁰⁰ For example, unlike Rhode Island in 1842, hostilities in Massachusetts were much more advanced before the colonial governor, General Gage, imposed martial law. He finally did so in the summer of 1775, four months after Parliament had declared the colonies to be in rebellion, and two months after Lexington and Concord. *Luther*, 48 U.S. at 65 (Woodbury, J., dissenting).

¹⁰¹ Thus, when martial law was imposed by the colonial governor of Virginia, Lord Dunmore, it was “justly denounced by the Virginia Assembly as an ‘assumed power, which the king himself cannot exercise,’ as it ‘annuls the law of the land and introduces the most execrable of all systems, martial law.’” *Luther*, 48 U.S. at 65 (Woodbury, J., dissenting). In Woodbury’s words, our forebears saw this measure as “a return to the unbridled despotism of the Tudors[.]” *Id.*

¹⁰² *Luther*, 48 U.S. at 65-66 (Woodbury, J., dissenting).

¹⁰³ The royal charter had remained in effect, as the state constitution of Rhode Island, until the new constitution was adopted in 1842.

¹⁰⁴ *Luther*, 48 U.S. at 67-68 (Woodbury, J., dissenting).

¹⁰⁵ Of course, Woodbury also reasons from the charter’s plain text. He notes, for example, that the charter did provide for “martial law” to be declared in some instances, but only in circumstances very different

Of course, while Woodbury uses Neustadt and May's suggestions, he does not divide his reasoning into neat categories according to their methods; his rhetoric may partake of several at once. This sentence, for example, contains *presumption-truths*, *issue history*, *institutional placement*, and *analogies*:

It would be extraordinary ... if in England the king himself is restrained by Magna Charta and by the Petition [of Right] as well as Declaration of Rights, binding him to these limits against martial law since the Revolution of 1688, and yet he could grant a charter which should exonerate others from the obligations of Magna Charta and the general laws of the kingdom, or that they could be exonerated under it as to the power of legislation, and do what is against the whole body of English laws since the end of the sixteenth century, and what Parliament itself, in its omnipotence and freedom from restrictions, has never, in the highest emergencies, thought it proper to do without numerous limitations, regulations, and indemnities[.]¹⁰⁶

Similarly, this sentence contains a mixture of *institutional placement*, *issue history*, and, arguably, *seeing time as a stream*:

[I]t may well be doubted whether, in the nature of the legislative power in this country, it can be considered as anywhere rightfully authorized, any more than the executive, to suspend or abolish the whole securities of person and property at its pleasure; and whether, since the Petition of Right was granted, it has not been considered as unwarrantable for any British or American legislative body, not omnipotent in theory like Parliament, to establish in a whole country an unlimited reign of martial law over its whole population; and whether to do this is not breaking up the foundations of all sound municipal rule, no less than social order, and restoring the reign of the strongest, and making mere physical force the test of right.¹⁰⁷

Note, also, Woodbury's use of Presumeds, usually not explicitly stated, but which we can readily identify. This passage, for example, includes several presumptions about the circumstances in Rhode Island at the time, as well as presumptions about the future:

Whatever stretches of such power may be ventured on in great crises, they cannot be upheld by the laws, as they prostrate the laws and ride triumphant over and beyond them, however the Assembly of Rhode Island, under the exigency, may have hastily supposed that such a measure in this instance was constitutional.

And it is far better that those persons should be without the protection of the ordinary laws of the land who disregard them in an emergency, and should look to a grateful country for indemnity and pardon, than to allow, beforehand, the whole frame of jurisprudence to be overturned, and every thing placed at the mercy of the bayonet.¹⁰⁸

from the circumstances here, and certainly not over the entire state. *Luther*, 48 U.S. at 68 (Woodbury, J., dissenting).

¹⁰⁶ *Luther*, 48 U.S. at 68-69 (Woodbury, J., dissenting).

¹⁰⁷ *Luther*, 48 U.S. at 69 (Woodbury, J., dissenting). In Woodbury's view, this is "but a branch of the omnipotence claimed by Parliament to pass bills of attainder, belonging to the same dangerous and arbitrary family with martial law. But even those have ceased to succeed in England under the lights of the nineteenth century, and are expressly forbidden by the Federal Constitution; and neither ought ever to disgrace the records of any free government." *Id.* at 70 (citing Madison's denunciation of bills of attainder in Federalist No. 44).

¹⁰⁸ *Luther*, 48 U.S. at 69 (Woodbury, J., dissenting).

Here Woodbury makes several notable presumptions. He presumes that “great crises” will give rise to extraordinary “stretches” of power (i.e., overreaching) by the political branches. He seems also to presume that those who do overreach will naturally view such stretches as constitutional. The question is whether the courts *must* do so. Put another way, if an action is necessary, is it necessarily constitutional?

Woodbury presumes that exigencies will tempt the political branches to act outside the Constitution;¹⁰⁹ he presumes that those branches will have the physical ability to do so; he even seems to allow that doing so might be necessary. But not everything necessary is necessarily constitutional, and Woodbury believes it would distort the Constitution for courts to say afterward that it is. Instead, he presumes that it is better to expect the political branches to do what they think is proper, but recognizing that others will later judge whether their actions were unconstitutional or unnecessary or both.¹¹⁰

Having concluded that Rhode Island has no power to impose martial law when not in a state of war, Woodbury next considers whether the civil unrest in the state was so extreme that it gave Rhode Island certain “rights of war” to do what it could not normally do in peacetime. In previous sections, Woodbury relied mainly on *issue history* to make his points; here he instead focuses on *defining the situation*, with Knowns, Presumed (about what Rhode Island could have done instead of declaring martial law, and about what similarly-situated states could do in the future), and analogies.

First, as to Knowns:

[T]here had been no war declared by Congress, no actual invasion of the State by a foreign enemy, no imminent danger of it, no emergency of any kind, which prevented time or delay to apply to the general government, and remember that, in this stage of things, Congress omitted or declined to do any thing, and that the President also declined to consider a civil violence or insurrection as existing so as to justify his ordering out troops to suppress it. The State, then, in and of itself, declared martial law, and the defendants attempted to enforce it.¹¹¹

Woodbury also notes that Congress was in session and could have acted to declare war, or allow the militia from an adjoining state to be called out, “[b]ut Congress declared no war, and conferred no rights of war.”¹¹² The President, too, though in a position to assist, similarly “did nothing to cause or give belligerent rights to the State.”¹¹³ Woodbury uses

¹⁰⁹ If Justice Woodbury, like President Kennedy, uses deliberative reasoning to see beyond the exigencies of the situation at hand, then a justice who does not use deliberative reasoning might be more like President Carter, focusing on Knowns relating to the present emergency. Such a justice might be more likely than Woodbury to make arguments based on necessity and urgency, as Chief Justice Taney does in *Luther* and as Chief Justice Vinson does in his dissenting opinion in *Youngstown*. See *supra* note ____.

¹¹⁰ *Luther*, 48 U.S. at 69 (Woodbury, J., dissenting); see also *id.* at 87-88 (“[S]uch is the structure of our institutions, that officers, as well as others, are often called on to risk much in behalf of the public and of the country in time of peril. And if they appear to do it from patriotism, and with proper decorum and humanity, the legislature will, on application, usually indemnify them by discharging from the public treasury the amount recovered for any injury to individual rights”).

¹¹¹ *Luther*, 48 U.S. at 74-75 (Woodbury, J., dissenting).

¹¹² *Luther*, 48 U.S. at 76 (Woodbury, J., dissenting).

¹¹³ *Luther*, 48 U.S. at 76 (Woodbury, J., dissenting).

all of these Knowns to argue that the situation was not extreme enough to confer on Rhode Island any “belligerent rights” that would have permitted the legislature to impose martial law.¹¹⁴

Woodbury then uses several *presumptions* in describing the steps Rhode Island should have taken instead of declaring martial law. In Woodbury’s view, if civil authorities, with the help of the state militia, cannot stop an insurrection against the laws of the state – something “which has never yet happened in our history” – then the state should appeal to the federal government for additional force.¹¹⁵ “[S]uch an appeal had been made here, but not complied with, because, I presume, the civil authority of the State, assisted by its own militia, did not appear to have failed to overcome the disturbance.”¹¹⁶ If the federal government, “when applied to, refrains to declare war till a domestic force becomes very formidable,” a state should first “exert all her civil power through her judiciary and executive,”¹¹⁷ then, if that fails, order out the militia, “but only to strengthen the civil power in enforcing its processes and upholding the laws,”¹¹⁸ and finally, “if these fail, it is quite certain that the [federal] government will never hesitate to strengthen the arm of the State when too feeble in either of these modes to preserve public order.”¹¹⁹ But, Woodbury tells us,

affairs must advance to this extreme stage through all intermediate ones, keeping the military in strict subordination to the civil authority except when acting on its own members, before any rights of mere war exist or can override the community, and then, in this country, they must do that under the countenance and controlling orders of the [federal] government.¹²⁰

Here Woodbury relies on several Presumeds. He presumes that civil authorities, helped by state militia, will normally be able to stop insurrections against state laws, and that the authorities probably could have done so in Rhode Island. He presumes that in such situations the state militia will normally be able to reestablish control by supplying only that degree of force required to help the civil authority enforce its own laws. He presumes that if the civil authorities and state militia are unable to do so, “it is quite certain that the [federal] government will never hesitate to strengthen the arm of the State[.]”¹²¹ Finally, he presumes that the reason the federal government did not help Rhode Island was that the civil authorities and state militia appeared to have the situation under control.

Woodbury also uses *analogies* to support his most important presumption: that states will usually be able to suppress insurrection without federal intervention and without imposing martial law. To support this presumption, Woodbury cites several examples from “our unspotted, unbroken experience of this kind, as to the States, for half

¹¹⁴ *Luther*, 48 U.S. at 82-83 (Woodbury, J., dissenting).

¹¹⁵ *Luther*, 48 U.S. at 76 (Woodbury, J., dissenting).

¹¹⁶ *Luther*, 48 U.S. at 76 (Woodbury, J., dissenting).

¹¹⁷ *Luther*, 48 U.S. at 74 (Woodbury, J., dissenting).

¹¹⁸ *Luther*, 48 U.S. at 75 (Woodbury, J., dissenting).

¹¹⁹ *Luther*, 48 U.S. at 74 (Woodbury, J., dissenting).

¹²⁰ *Luther*, 48 U.S. at 82 (Woodbury, J., dissenting).

¹²¹ *Luther*, 48 U.S. at 74 (Woodbury, J., dissenting).

a century.”¹²² including Shay’s Rebellion,¹²³ the Whiskey Rebellion,¹²⁴ and the arrests made in connection with the conspiracy of Aaron Burr.¹²⁵

Thus, while in previous sections Woodbury emphasized *issue history* to argue that Rhode Island could not impose martial law when not in a state of war, here he focuses on *defining the situation* (through Knowns, Presumed, and analogies) to argue that no state of war existed.¹²⁶

Finally, Woodbury uses Knowns and Unclears to argue that even if the state legislators had been authorized to impose martial law, they had not been authorized to impose it on the whole state.¹²⁷ Even in the most extreme instances of civil strife, the rights of war are “not to extend beyond the place where insurrection exists[; n]or to portions of the State remote from the scene of military operations, nor after the resistance is over, nor to persons not connected with it[; n]or, even within the scene, can they extend to the person or property of citizens against whom no probable cause exists which may justify it[; n]or to the property of any person without necessity or civil precept.”¹²⁸

In this case, it was known only that Luther had been “in arms at Providence, several miles distant,” five days before the day of the trespass, June 29; it “does not seem to have been investigated” whether he was in arms on the day of the trespass; and

¹²² *Luther*, 48 U.S. at 74 (Woodbury, J., dissenting).

¹²³ *Luther*, 48 U.S. at 78 (Woodbury, J., dissenting). During Shay’s Rebellion, “the resort was not first had at all to the military, but to civil power, till the courts themselves were obstructed and put in jeopardy. And when the militia were finally called out, the whole State, or any part of it, was not put under martial law. The writ of habeas corpus was merely suspended for a limited time, and the military ordered to aid in making arrests under warrants, and not by military orders, as here. They were directed to protect civil officers in executing their duty, and nothing more, unless against persons when actually in the field obstructing them.” *Id.*

¹²⁴ *Luther*, 48 U.S. at 78 (Woodbury, J., dissenting). As Woodbury notes, even though this involved an insurrection against federal law, Congress did not declare martial law or even suspend the writ of habeas corpus. Instead, “the troops were called out expressly to cooperate with the civil authorities, these having proved insufficient. But that of itself did not seem to be considered as per-se amounting to war, or as justifying war measures. The government ... neither declared war, nor waged it without that declaration, but did what seems most humane and fit on such occasions, till greater resistance and bloodshed might render war measures expedient; that is, marched the troops expressly with a view only to ‘cause the laws to be duly executed.’” *Id.* Woodbury also notes that President Washington, “throughout the excitement, evinced [his] characteristic moderation and prudence[;],” and “constantly enjoined a subordination of the military to the civil power, and accompanied the troops in person to see that the laws were respected.” *Id.* at 80.

¹²⁵ *Luther*, 48 U.S. at 78 (Woodbury, J., dissenting). Here, too, Congress was not even willing to suspend the writ of habeas corpus, much less declare martial law. Such a step was considered “at the best but a species of dictatorship ... to be justified only by extreme peril to the public safety.” *Id.* at 81.

¹²⁶ *Luther*, 48 U.S. at 82 (Woodbury, J., dissenting) (finding “no rights of war on the part of the State when this act of Assembly passed, and certainly none which could justify so extreme a measure as martial law over the whole State”).

¹²⁷ Woodbury supports this view with a presumption that this approach has a “greater tendency to secure orderly and constitutional liberty instead of rude violence, to protect rights by civil process rather than the bayonet, and to render all domestic outbreaks less bloody and devastating than they otherwise would be.” *Luther*, 48 U.S. at 82-83 (Woodbury, J., dissenting).

¹²⁸ *Luther*, 48 U.S. at 83-84 (Woodbury, J., dissenting). Woodbury’s reasoning in this section is based on his understanding of the common law of war. *Id.* at 85-86.

Luther's wife "offered to prove there was no camp nor hostile array by any person in the town where this trespass was committed, on the 29th of June, nor within twenty-five miles of it in any part of the State," and that Dorr himself had called for an end to hostilities two days earlier.¹²⁹ In the city where the trespass took place, the civil strife on the day in question "seems to have been nothing ... beyond a few hundreds of persons, and nothing beyond the control of the courts of law, aided by the militia, if they had been wisely resorted to[.]"¹³⁰ This situation was

nothing which, when represented to the Executive of the United States, required, in his opinion, from its apprehended extent or danger, any war measures,--the calling out of the militia of other States, or aid of the public troops, or even the actual issue of a proclamation; and the persons who did assemble had, it appears, two days before the trespass, been disbanded, and further force disclaimed, without a gun being fired, or blood in any way shed, on that occasion.¹³¹

Woodbury thus *defines the situation* using Knowns and Unclears: Even if it was necessary to impose some war measures, it was certainly not necessary to impose them on the whole state.

Here Woodbury also does something like the reasoning that Neustadt and May call "seeing time as a stream," oscillating between the past:

Under the worst insurrections, and even wars, in our history, so strong a measure as this is believed never to have been ventured on before by the general government, and much less by any one of the States, as within their constitutional capacity, either in peace, insurrection, or war.¹³²

and the future:

And if it is to be tolerated, and the more especially in civil feuds like this, it will open the door in future domestic dissensions here to a series of butchery, rapine, confiscation, plunder, conflagration, and cruelty, unparalleled in the worst contests in history between mere dynasties for supreme power. It would go in practice to render the whole country--what Bolivar at one time seemed to consider his--a camp, and the administration of the government a campaign.¹³³

to gain an overall perspective, informed by issue history:

It is to be hoped we have some national ambition and pride, under our boasted dominion of law and order, to preserve them by law, by enlightened and constitutional law, and the moderation of superior intelligence and civilization, rather than by appeals to any of the semibarbarous measures of darker ages, and the unrelenting, lawless persecutions of opponents in civil strife which characterized and disgraced those ages.¹³⁴

¹²⁹ *Luther*, 48 U.S. at 84 (Woodbury, J., dissenting).

¹³⁰ *Luther*, 48 U.S. at 84 (Woodbury, J., dissenting).

¹³¹ *Luther*, 48 U.S. at 84 (Woodbury, J., dissenting).

¹³² *Luther*, 48 U.S. at 85 (Woodbury, J., dissenting).

¹³³ *Luther*, 48 U.S. at 85 (Woodbury, J., dissenting).

¹³⁴ *Luther*, 48 U.S. at 85 (Woodbury, J., dissenting).

Woodbury concludes that “when belligerent measures do become authorized by extreme resistance, and a legitimate state of war exists, and civil authority is prostrate, and violence and bloodshed seem the last desperate resort, yet war measures must be kept within certain restraints in all civil contests in all civilized communities.”¹³⁵

Thus in Woodbury’s martial-law dissent in *Luther* we can identify many of Neustadt and May’s tools in action. Woodbury assembles a detailed *issue history*, engages in *institutional placement*, and uses analogies to *define the situation*, all to argue that such a law is inconsistent with English and American traditions. He uses *issue history* to argue that the law violated the royal charter of 1663. He also *defines the situation* through (mostly unstated) *presumptions* about how the political branches are likely to act, about the value of judging their conduct afterward, and about the dangers of distorting the Constitution to hold all necessary acts to be automatically constitutional. He also *defines the situation* with Knowns, Presumed, and analogies, to refute the claim that the civil unrest in Rhode Island was so extreme as to confer upon the State certain “rights of war” to do what it could not normally do in peacetime. He uses analogies to support his most important Presumed: that states will usually be able to suppress insurrection without federal intervention and without imposing martial law. Finally, he uses Knowns and Unclears to argue that, even if the state legislators had been authorized to impose martial law, they had not been authorized to impose it on the whole state. He also engages in reasoning that resembles what Neustadt and May have called *seeing time as a stream*, oscillating between the past and the future to gain an overall perspective.

III. JUSTICE JACKSON’S CONCURRING OPINION IN *YOUNGSTOWN*

Justice Jackson’s concurring opinion in *Youngstown* uses history extensively, often engaging in something like the practices suggested by Neustadt and May. Importantly, Jackson’s purpose in using history is almost never forensic, almost always deliberative.

The events that led to *Youngstown* began in late 1951, when the United Steel Workers gave notice of their intent to strike when their contract expired at the end of the

¹³⁵ *Luther*, 48 U.S. at 85 (Woodbury, J., dissenting). Woodbury also argues that there are strict limits not only as to where martial law may be imposed, but as to when. We must also consider “whether the insurrection at the time of this trespass was not at an end.” *Id.* at 86. “[I]f one has previously been in arms, but the insurrection or war is over, any belligerent rights cease, and no more justify a departure from the municipal laws than they do before insurrection or war begins. If any are noncombatants, either as never having been engaged in active resistance, or as having abandoned it, the rights of civil warfare over them would seem to have terminated, and the prosecution and punishment of their past misconduct belongs then to the municipal tribunals, and not to the sword and bayonet of the military.” *Id.* As an example, Woodbury cites the Irish Rebellion Act, which “was expressly limited ‘from time to time during the continuance of the said rebellion.’” *Id.* Moreover, during “social or civil war,” people who are “not then in arms, though differing in opinion, are generally to be treated as noncombatants, and searched for and arrested, if at all, by the municipal law, by warrant under oath, and tried by a jury, and not by the law martial.” *Id.* Woodbury notes that “[o]ur own and English history is full of such arrests and trials, and the trials are held, not round a drum-head or cannon, but in halls of justice and under the forms of established jurisprudence.” *Id.*

year.¹³⁶ This greatly alarmed President Truman, who believed that a nationwide steelworkers strike would jeopardize the nation's war effort in Korea. Truman referred the dispute to his Wage Stabilization Board (WSB), but the WSB report and negotiations that followed failed to result in a settlement, though they did postpone the strike date to April 9, 1952. On April 8, a few hours before the strike was scheduled to start, Truman issued an executive order directing his secretary of commerce, Charles Sawyer, to seize most of the nation's steel mills in order to keep them operating.

The steel companies sued in federal district court, arguing that Truman's order amounted to lawmaking and was therefore beyond his authority. Truman, however, took the position that his action had been necessary to prevent a grave national emergency, and that he was acting within the aggregate of his powers as commander-in-chief of the armed forces, and as chief executive of the nation. The district court enjoined Sawyer from continuing the seizure, the injunction was stayed, and the case reached the Supreme Court in May.

In June the Court ruled against Truman by a vote of 6 to 3. Speaking through Justice Hugo Black, the majority issued a notably formal opinion, holding that any seizure power "must stem either from an act of Congress or from the Constitution itself." As to statutes, there was no statute that expressly authorized the seizure, and no statute from which that power could be implied; in fact, when Congress was considering the Taft-Hartley Act in 1947, it had expressly rejected an amendment that would have authorized such seizures in emergency cases. As to the Constitution, the Court held that the seizure was not authorized by Truman's powers as commander-in-chief: "Even though 'theater of war' be an expanding concept," the Court noted, "we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production. This is a job for the Nation's lawmakers, not for its military authorities." The Court also held that the seizure was not authorized by the constitutional provisions that grant executive powers to the president as chief executive of the nation. "In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker." In this case, the seizure order "does not direct that a congressional policy be executed in a manner prescribed by Congress – it directs that a presidential policy be executed in a manner prescribed by the President." Accordingly, the seizure order was struck down.

A. Jackson's Opinion: Opening Thoughts

¹³⁶ For more on *Youngstown* generally, see William H. Rehnquist, *The Supreme Court: How It Was, How It Is* (1987) (discussing Rehnquist's service as Jackson's law clerk during *Youngstown*); William H. Rehnquist, *Constitutional Law and Public Opinion*, 20 Suffolk U. L. Rev. 751 (1986); David Gray Adler, *The Steel Seizure Case and Inherent Presidential Power*, 19 Const. Comment. 155 (2002); Neal Devins & Louis Fisher, *The Steel Seizure Case: One of a Kind?* 19 Const. Comment. 63 (2002); Patricia L. Bellia, *Executive Power in Youngstown's Shadows*, 19 Const. Comment. 87 (2002); Roy E. Brownell II, *The Coexistence of United States v. Curtiss-Wright and Youngstown Sheet & Tube v. Sawyer in National Security Jurisprudence*, 16 J.L. & Pol. 1 (2000); Christopher Bryant & Carl Tobias, *Youngstown Revisited*, 29 Hastings Const. L.Q. 373 (2002); J. Gregory Sidak, *The Price of Experience: The Constitution After September 11, 2001*, 19 Const. Comment. 37 (2002); Michael Stokes Paulsen, *Youngstown Goes to War*, 19 Const. Comment. 215 (2002).

Jackson's concurring opinion begins, interestingly, with placement – not just placement but self-placement. Jackson, who had served Franklin Roosevelt as solicitor general and attorney general, and who had argued, in those roles, for a broad view of executive authority, begins his *Youngstown* concurrence by recognizing his own limitations. “[A]nyone who has served as legal adviser to a President in time of transition and public anxiety,” Jackson tells us, can see “[t]hat comprehensive and undefined presidential powers hold both practical advantages and grave dangers for the country[.]”¹³⁷

While an interval of detached reflection may temper teachings of that experience, they probably are a more realistic influence on my views than the conventional materials of judicial decision which seem unduly to accentuate doctrine and legal fiction. But as we approach the question of presidential power, we half overcome mental hazards by recognizing them.¹³⁸

Such mental hazards, Jackson acknowledges, imperil not only presidential advisers but also Supreme Court justices. He continues his self-placement by recognizing the limitations of his role as a judge:

The opinions of judges ... often suffer the infirmity of confusing the issue of a power's validity with the cause it is invoked to promote, of confounding the permanent executive office with its temporary occupant. . . . The tendency is strong to emphasize transient results upon policies--such as wages or stabilization--and lose sight of enduring consequences upon the balanced power structure of our Republic.¹³⁹

While Jackson will use history extensively in this opinion, his purpose is almost entirely deliberative rather than forensic. Toward the beginning he notes the limits of forensic history:

A judge, like an executive adviser, may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves. Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh. A century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question. They largely cancel each other.¹⁴⁰

¹³⁷ *Youngstown*, *supra* note __, at 634 (Jackson, J., concurring).

¹³⁸ *Youngstown*, *supra* note __, at 634 (Jackson, J., concurring). For more on Justice Jackson generally, see Stephen R. Alton, *Loyal Lieutenant, Able Advocate: The Role of Robert H. Jackson in Franklin D. Roosevelt's Battle With the Supreme Court*, 5 Wm. & Mary Bill Rts. J. 527 (1997); Victoria A. Graffeo, *Robert H. Jackson: His Years As a Public Servant "Learned in the Law"*, 68 Alb. L. Rev. 539 (2005); John Q. Barrett, *Albany in the Life Trajectory of Robert H. Jackson*, 68 Alb. L. Rev. 513 (2005); R. Hewitt Pate, *Robert H. Jackson at the Antitrust Division*, 68 Alb. L. Rev. 787 (2005); Dick Thornburgh, *Balancing Civil Liberties and Homeland Security: Does the USA PATRIOT Act Avoid Justice Robert H. Jackson's "Suicide Pact"?* 68 Alb. L. Rev. 801 (2005); Ray, *supra* note __, at __; Henry T. King, Jr., *Robert Jackson's Transcendent Influence Over Today's World*, 68 Alb. L. Rev. 23 (2004).

¹³⁹ *Youngstown*, *supra* note __, at 634 (Jackson, J., concurring).

¹⁴⁰ *Youngstown*, *supra* note __, at 634-35, 635 n.1 (Jackson, J., concurring) (citing conflicts between statements made by Madison and Hamilton, and between statements made by William Howard Taft when he was a law professor and when he was President).

Jackson's doubts about the possibilities of forensic history, and the abilities of judges to apply it, lead him to a more deliberative, pragmatic view of the judicial role:

The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity. Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.¹⁴¹

B. *The Three Categories of Presidential Power*

Jackson then sets out the three categories of presidential power for which his opinion is justly famous. Here he uses historical examples for a deliberative purpose, and his method is what Neustadt and May would call *defining the situation* through *analogies*. He considers the Likenesses and Differences between those previous cases and the present case in order to discern some sort of historical pattern.

In the first category, the President acts pursuant to an express or implied authorization of Congress. In such cases, "his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate."¹⁴² In the second category, the President acts in absence of either a congressional grant or denial of authority. In such cases, "he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility."¹⁴³ In the third category, the President takes measures incompatible with the expressed or implied will of Congress. In such cases, "his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter."¹⁴⁴

¹⁴¹ *Youngstown*, *supra* note __, at 635 (Jackson, J., concurring).

¹⁴² *Youngstown*, *supra* note __, at 635 (Jackson, J., concurring). "If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power. A seizure executed by the President pursuant to an Act of Congress would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it." *Id.* at 636-37. In this category Jackson includes, for example, *United States v. Curtiss-Wright Export Corp.* *Id.* at 635 n.2 (citing *Curtiss-Wright*, 299 U.S. 304 (1936)).

¹⁴³ *Youngstown*, *supra* note __, at 637 (Jackson, J., concurring). "In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law." *Id.* In this category Jackson includes, for example, Lincoln's suspension of the writ of habeas corpus, a presidential action that was ultimately ratified by Congress. *Id.* at 637 n.3.

¹⁴⁴ *Youngstown*, *supra* note __, at 637-38 (Jackson, J., concurring). "Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject." *Id.* In this category Jackson includes, for example, *Humphrey's Executor v. United States*, in which President Roosevelt's effort to remove a Federal Trade Commissioner "was found to be contrary to the policy of Congress and impinging upon an area of congressional control[.]" *Id.* at 638 n.4 (citing *Humphrey's Executor*, 295 U.S. 602 (1935)).

Having established the three categories, Jackson next asks where the steel seizure falls. Again, this is what Neustadt and May call *defining the situation through analogies* (Likenesses and Differences). He determines that the seizure does not fall in the first category (since Congress had not authorized the seizure), or the second category (since Congress had “not left seizure of private property an open field, but has covered it by three statutory policies inconsistent with this seizure,”¹⁴⁵ none of which were invoked). Thus, the seizure falls into category three, “where it can be supported only by any remainder of executive power after subtraction of such powers as Congress may have over the subject.”¹⁴⁶

Jackson’s purpose in using historical examples – to create the categories of executive power, and to determine, by comparison, where the present case fits – is mainly deliberative, not forensic. He wants to know what has worked in the past so he might know what will work in the future. Having determined that the seizure falls under category three, Jackson also takes a deliberative approach to determining whether it can be sustained under that category.

C. *Express Authority*

First, Jackson refutes the Government’s claims of express constitutional authority – for example, the claim that the seizure power is expressly authorized by the clause designating the President as commander-in-chief¹⁴⁷ – that is, the claim “that the President having, on his own responsibility, sent American troops abroad derives from that act ‘affirmative power’ to seize the means of producing a supply of steel for them.”¹⁴⁸ By sending troops to Korea, “it is said he has invested himself with ‘war powers.’”¹⁴⁹

Here Jackson does something like what Neustadt and May call seeing time as a stream. Here he looks mainly to the future:

I cannot foresee all that it might entail if the Court should indorse this argument. . . . [N]o doctrine that the Court could promulgate would seem to me more sinister and alarming than that a President whose conduct of foreign affairs is so largely uncontrolled, and

¹⁴⁵ These statutes were the Selective Service Act of 1948, the Defense Production Act of 1950, and the Taft-Hartley Act. *Youngstown, supra* note __, at 639 n.6, 639 n.7, 639 n.8.

¹⁴⁶ That is, “we can sustain the President only by holding that seizure of such strike-bound industries is within his domain and beyond control by Congress.” *Youngstown, supra* note __, at 640 (Jackson, J., concurring).

¹⁴⁷ Besides rejecting the Government’s claims of express authority in the Commander in Chief Clause, Jackson also rejects claims based on the Executive Power [Vesting] Clause and the Take Care Clause. As to the Vesting Clause, Jackson cites the historical context to argue that it cannot be a grant, as the Government had claimed, of “all the executive powers of which the Government is capable.” See *Youngstown, supra* note __, at 641 (Jackson, J., concurring) (“The example of such unlimited executive power that must have most impressed the forefathers was the prerogative exercised by George III, and the description of its evils in the Declaration of Independence leads me to doubt that they were creating their new Executive in his image.”) As to the Take Care clause, Jackson argues that its authority is circumscribed by the due-process requirements of the Fifth Amendment. *Youngstown, supra* note __, at 646 (Jackson, J., concurring).

¹⁴⁸ *Youngstown, supra* note __, at 642 (Jackson, J., concurring).

¹⁴⁹ *Youngstown, supra* note __, at 642 (Jackson, J., concurring).

often even is unknown, can vastly enlarge his mastery over the internal affairs of the country by his own commitment of the Nation's armed forces to some foreign venture.¹⁵⁰

Jackson then looks again to the past, in the form of issue history (supported by specific textual clauses) to argue that the military powers of the Commander in Chief were not to supersede representative government. He notes “indications that the Constitution did not contemplate that the title Commander-in-Chief *of the Army and Navy* will constitute him also Commander-in-Chief of the country, its industries and its inhabitants.”¹⁵¹ For example, “[t]ime out of mind, and even now in many parts of the world, a military commander can seize private housing to shelter his troops[,]” but in the United States, the Framers determined that “even in war time, his seizure of needed military housing must be authorized by Congress.”¹⁵² They also “expressly left to Congress to ‘provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions[.]’” Jackson argues that “[s]uch a limitation on the command power, written at a time when the militia rather than a standing army was contemplated as the military weapon of the Republic, underscores the Constitution's policy that Congress, not the Executive, should control utilization of the war power as an instrument of domestic policy.”¹⁵³

Next Jackson seems to oscillate between past and future, almost as though he were viewing them simultaneously:

The purpose of lodging dual titles in one man was to insure that the civilian would control the military, not to enable the military to subordinate the presidential office. . . . No penance would ever expiate the sin against free government of holding that a President can escape control of executive powers by law through assuming his military role.¹⁵⁴

¹⁵⁰ Jackson compares this doctrine to the actions taken in 1801 by Thomas Jefferson, who sent frigates into the Mediterranean to protect American commerce from the Tripolitan fleet, but believed he was “[u]nauthorized by the constitution, without the sanction of Congress, to go beyond the line of defence[.]” *Youngstown, supra* note __, at 642 n.10 (Jackson, J., concurring). When the fleet became engaged in a naval battle, Jefferson sent a message to Congress asking legislators to consider “whether, by authorizing measures of offence, also, they will place our force on an equal footing with that of its adversaries.” *Id.* Jefferson believed that this “important function [was] confided by the constitution to the legislature exclusively.” *Id.*

¹⁵¹ *Youngstown, supra* note __, at 643-44 (Jackson, J., concurring). Some of these indications are textual, of course. *See id.* at 643-45.

¹⁵² *Youngstown, supra* note __, at 644 (Jackson, J., concurring) (citing U.S. Const. amend. III).

¹⁵³ *Youngstown, supra* note __, at 644 (Jackson, J., concurring). Jackson also recognizes that executive advisors, including himself, had often made “broad claims under this rubric[.]” But “advice to the President in specific matters usually has carried overtones that powers, even under this head, are measured by the command functions usual to the topmost officer of the army and navy. Even then, heed has been taken of any efforts of Congress to negative his authority.” Thus, when Franklin Roosevelt proposed transferring overage destroyers and patrol boats to Great Britain in 1940, “[h]e did not presume to rely upon any claim of constitutional power as Commander-in-Chief. . . . [but] was advised that such destroyers . . . could be ‘transferred, exchanged, sold, or otherwise disposed of,’ because Congress had so authorized him”). *Id.* at 645 n.14. The “mosquito boats” then under construction were not transferred, because Congress had prohibited the President from doing so. *Id.*

¹⁵⁴ *Youngstown, supra* note __, at 646 (Jackson, J., concurring).

In rejecting the Government's claim of express authority, Jackson is clearly using history to support his rhetoric. But this is not a forensic history that presumes that the question can be answered simply by proving what *was*. It is a deliberative history that asks not just *what was*, but *why*, so we might consider *what should be*. Along the way, Jackson also uses some of Neustadt and May's suggested practices for the deliberative use of history – analogies, issue history, and seeing time as a stream.

D. *Implicit Authority*

Jackson next turns to the Government's claims of implicit presidential authority.¹⁵⁵ In his treatment of the implicit-authority claim, Jackson again relies heavily on historical reasoning. Again, his purpose is almost always deliberative, not forensic. Again, we can also observe that he uses most or all of the practices suggested by Neustadt and May.

1. Institutional (self-)placement

Jackson begins by acknowledging that such claims are a natural institutional tendency of presidents and their advisers:

The claim of inherent and unrestricted presidential powers has long been a persuasive dialectical weapon in political controversy. While it is not surprising that counsel should grasp support from such unadjudicated claims of power, a judge cannot accept self-serving press statements of the attorney for one of the interested parties as authority in answering a constitutional question, even if the advocate was himself.¹⁵⁶

2. Issue history, supported by historical analogies

Jackson notes that Presidents have traditionally avoided dealing with this question directly, by exercising their powers in a way that kept the issue out of court. “[P]rudence has counseled that actual reliance on such nebulous claims stop short of provoking a judicial test.”¹⁵⁷ He notes that Woodrow Wilson exercised broad authority in arming American merchant ships shortly before World War I, but nevertheless asked that the decision be approved by Congress.¹⁵⁸ He notes that Franklin Roosevelt, taking office

¹⁵⁵ The claim, Jackson says, is for “nebulous, inherent powers never expressly granted but said to have accrued to the office from the customs and claims of preceding administrations. The plea is for a resulting power to deal with a crisis or an emergency according to the necessities of the case, the unarticulated assumption being that necessity knows no law.” *Youngstown*, *supra* note __, at 646 (Jackson, J., concurring).

¹⁵⁶ *Youngstown*, *supra* note __, at 647 (Jackson, J., concurring).

¹⁵⁷ *Youngstown*, *supra* note __, at 646 (Jackson, J., concurring).

¹⁵⁸ *Youngstown*, *supra* note __, at 646 n.16 (Jackson, J., concurring). When Wilson asked for this authority, he told Congress:

No doubt I already possess that authority without special warrant of law, by the plain implication of my constitutional duties and powers; but I prefer in the present circumstances not to act upon general implication. I wish to feel that the authority and the power of the Congress are behind me in whatever it may become necessary for me to do. We are jointly the servants of the people and must act together and in their spirit, so far as we can divine and interpret it.

during a great national emergency, did not claim inherent presidential power to address the emergency, but looked to Congress to ratify his actions.¹⁵⁹ Jackson compares these approaches to an earlier commentator's description of "the powers of legislation by proclamation when in the hands of the Tudors. 'The extent to which they could be legally used was never finally settled in this century, because the Tudors made so tactful a use of their powers that no demand for the settlement of this question was raised.'"

3. Defining the situation, by differentiating an analogy (North American Aviation)

Franklin Roosevelt had seized the California plant of the North American Aviation Company in 1941, an analogy cited by the Government and by Chief Justice Vinson (probably in part because Jackson himself had been the president's legal adviser at that time). But Jackson differentiates the North American Aviation matter: "Its superficial similarities with the present case, upon analysis, yield to distinctions so decisive that it cannot be regarded as even a precedent, much less an authority for the present seizure."¹⁶⁰

4. Seeing time as a stream

As we have seen, Jackson doubts that this question can be resolved by resort to forensic history.¹⁶¹ His approach is deliberative because he nevertheless believes that we can be guided by what we do know about the past, particularly if we see time as a stream. We can use history to see today's decision as a product of yesterday's decisions, as a shaper of decisions tomorrow. We may not know everything about what the Framers meant to do, but we know enough to be guided by their view of the future:

Id. Franklin Roosevelt acted similarly before World War II, successfully asking that Congress authorize him to seize certain foreign vessels. *Id.*

¹⁵⁹ Jackson notes that FDR asked Congress to enact legislative measures and stated that if the emergency continued, "I shall ask the Congress for the one remaining instrument to meet the crisis – broad Executive power to wage a war against the emergency, as great as the power that would be given to me if we were in fact invaded by a foreign foe." *Youngstown, supra* note __, at 646 n.16 (Jackson, J., concurring). Jackson also notes that, in his Bank Holiday Proclamation, FDR "did not invoke constitutional powers of the Executive but expressly and solely relied upon" an earlier act of Congress, and that the President "relied steadily on legislation to empower him to deal with economic emergency[,] rather than claiming any inherent presidential powers to do so. *Id.*

¹⁶⁰ *Youngstown, supra* note __, at 648-49, 649 n.17 (Jackson, J., concurring). Among other differences, Jackson notes, first, that North American Aviation had been under direct contracts to supply defense materials to the Government, while no such contracts were claimed to exist in *Youngstown*. *Id.* Congress, in the North American Aviation case, had expressly authorized the President to seize plants which refused to comply with Government orders. *Id.* Also in that case, the plant owners had acquiesced in the seizure, and effectively consented, "admitt[ing] that the situation was beyond their control." *Id.* The seizure was also acquiesced in by national labor leaders, since it violated the collective bargaining agreement. *Id.* "It was described as in the nature of an insurrection, a Communist-led political strike against the Government's lend-lease policy. Here we have only a loyal, lawful, but regrettable economic disagreement between management and labor." *Id.* Finally, the North American Aviation plant "contained government-owned machinery, material and goods in the process of production to which workmen were forcibly denied access by picketing strikers. Here no Government property is protected by the seizure." *Id.*

¹⁶¹ See *supra* note __ and accompanying text.

They knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation. We may also suspect that they suspected that emergency powers would tend to kindle emergencies. Aside from suspension of the privilege of the writ of habeas corpus in time of rebellion or invasion, when the public safety may require it, they made no express provision for exercise of extraordinary authority because of a crisis. I do not think we rightfully may so amend their work, and, if we could, I am not convinced it would be wise to do so[.]¹⁶²

5. Defining the situation with analogies (other countries)

Jackson also considers analogies to the experiences of other countries with undefined emergency powers – Germany,¹⁶³ France,¹⁶⁴ and Britain.¹⁶⁵

This contemporary foreign experience suggests that emergency powers are consistent with free government only when their control is lodged elsewhere than in the Executive who exercises them. That is the safeguard that would be nullified by our adoption of the 'inherent powers' formula. Nothing in my experience convinces me that such risks are warranted by any real necessity, although such powers would, of course, be an executive convenience.¹⁶⁶

6. Issue history (statutory grants of emergency powers), combined with seeing time as a stream.

Jackson notes, “[W]e already have evolved a technique within the framework of the Constitution by which normal executive powers may be considerably expanded to meet an emergency. Congress may and has granted extraordinary authorities which lie dormant in normal times but may be called into play by the Executive in war or upon proclamation of a national emergency.”¹⁶⁷ In 1939, Jackson also notes, “the Attorney

¹⁶² *Youngstown, supra* note __, at 650 (Jackson, J., concurring). Jackson “exclude[s], as in a very limited category by itself, the establishment of martial law.” *Id.* at 650 n. 19.

¹⁶³ In Weimar Germany, the president “was empowered temporarily to suspend any or all individual rights [without legislative approval] if public safety and order were seriously disturbed or endangered. This proved a temptation to every government, whatever its shade of opinion, and in 13 years suspension of rights was invoked on more than 250 occasions. Finally, Hitler persuaded President Von Hindenberg to suspend all such rights, and they were never restored.” *Youngstown, supra* note __, at 651 (Jackson, J., concurring).

¹⁶⁴ The French Republic provided for a “state of siege” that “differed from the German emergency dictatorship, in that emergency powers could not be assumed at will by the Executive but could only be granted as a parliamentary measure. And it did not, as in Germany, result in a suspension or abrogation of law but was a legal institution governed by special legal rules and terminable by parliamentary authority.” *Youngstown, supra* note __, at 651 (Jackson, J., concurring).

¹⁶⁵ Jackson notes that Britain “had fought both World Wars under a sort of temporary dictatorship created by legislation.” *Youngstown, supra* note __, at 651 (Jackson, J., concurring). Like Justice Woodbury’s placement of the British Parliament, Jackson reminds us that “Parliament is not bound by written constitutional limitations” and thus could establish “a crisis government simply by delegation to its Ministers of a larger measure than usual of its own unlimited power[.]” *Id.* at 651-52. “Thus, parliamentary control made emergency powers compatible with freedom.” *Id.* Jackson quotes Churchill’s comment that “Parliament stands custodian of these surrendered liberties, and its most sacred duty will be to restore them in their fullness when victory has crowned our exertions and our perseverance.” *Id.*

¹⁶⁶ *Youngstown, supra* note __, at 652 (Jackson, J., concurring).

¹⁶⁷ *Youngstown, supra* note __, at 652 (Jackson, J., concurring).

General listed ninety-nine such separate statutory grants by Congress of emergency or war-time executive powers. They were invoked from time to time as need appeared.”

Under this procedure we retain Government by law--special, temporary law, perhaps, but law nonetheless. The public may know the extent and limitations of the powers that can be asserted, and persons affected may be informed from the statute of their rights and duties.¹⁶⁸

Jackson’s issue history shows that Presidents can and do receive broad emergency powers simply by requesting them from Congress. For the Court to grant them without such a request, he warns, would be unnecessary and dangerous:

Such power either has no beginning or it has no end. If it exists, it need submit to no legal restraint. I am not alarmed that it would plunge us straightway into dictatorship, but it is at least a step in that wrong direction.¹⁶⁹

7. Institutional placement (of the President)

Jackson also engages in institutional placement by noting “the gap that exists between the President’s paper powers and his real powers[.]”¹⁷⁰ To support his argument that the requested emergency powers are unnecessary, he thus “sophisticates the stereotype” of the executive. In particular, he notes the advantages afforded to the President by the increases in federal power,¹⁷¹ by the concentration of authority in a single person,¹⁷² and by the President’s role as party leader.¹⁷³ “I cannot be brought to

¹⁶⁸ *Youngstown, supra* note __, at 652-53 (Jackson, J., concurring).

¹⁶⁹ *Youngstown, supra* note __, at 653 (Jackson, J., concurring).

¹⁷⁰ *Youngstown, supra* note __, at 653 (Jackson, J., concurring). “The Constitution does not disclose the measure of the actual controls wielded by the modern presidential office. That instrument must be understood as an Eighteenth-Century sketch of a government hoped for, not as a blueprint of the Government that is.” *Id.*

¹⁷¹ *Youngstown, supra* note __, at 653 (Jackson, J., concurring). “Vast accretions of federal power, eroded from that reserved by the States, have magnified the scope of presidential activity.” *Id.*

¹⁷² *Youngstown, supra* note __, at 653-54 (Jackson, J., concurring):

Executive power has the advantage of concentration in a single head in those choice the whole Nation has a part, making him the focus of public hopes and expectations. In drama, magnitude and finality his decisions so far overshadow any others that almost alone he fills the public eye and ear. No other personality in public life can begin to compete with him in access to the public mind through modern methods of communications. By his prestige as head of state and his influence upon public opinion he exerts a leverage upon those who are supposed to check and balance his power which often cancels their effectiveness.”

Id.

¹⁷³ *Youngstown, supra* note __, at 653-54 (Jackson, J., concurring):

Moreover, rise of the party system has made a significant extraconstitutional supplement to real executive power. No appraisal of his necessities is realistic which overlooks that he heads a political system as well as a legal system. Party loyalties and interests, sometimes more binding than law, extend his effective control into branches of government other than his own and he often may win, as a political leader, what he cannot command under the Constitution.

Id.

believe,” he says, “that this country will suffer if the Court refuses further to aggrandize the presidential office, already so potent and so relatively immune from judicial review, at the expense of Congress.”¹⁷⁴

8. “Seeing time as a stream,” mixed with presumptions in the form of Truths

Finally, Jackson shows his deliberative view of history in his conclusion:

No one, perhaps not even the President, knows the limits of the power he may seek to exert in this instance and the parties affected cannot learn the limit of their rights. We do not know today what powers over labor or property would be claimed to flow from Government possession if we should legalize it, what rights to compensation would be claimed or recognized, or on what contingency it would end. With all its defects, delays and inconveniences, men 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.¹⁷⁵

Overall, Jackson’s concurrence in *Youngstown* contains many examples of the approach I have called “deliberative history,” and the particular practices suggested by Neustadt and May. He relies heavily on historical examples, and seems mindful of history’s sweep, but he declares himself a skeptic when it comes to history’s forensic value. Instead, his use of history is almost entirely future-oriented, that is, deliberative.

Moreover, the deliberative content of Jackson’s use of history can be described by the practices outlined by Neustadt and May. Among other things, he *defines the situation*, particularly through analogies; *assembles detailed issue histories*; *engages in institutional placement*, including self-placement; and has a special talent for *seeing time as a stream*. These are deliberative practices, and Jackson uses each of them at times to support his historical reasoning. His use of history is extensive, but no one would mistake him for an originalist; he takes forensic history off the table early in his opinion. And when the forensic content of history is taken away, the content which remains is deliberative history.

IV. JUSTICE SCALIA’S DISSENTING OPINION IN *HAMDI*

In his *Youngstown* opinion, Jackson uses history extensively, but mainly for deliberative ends. Justice Scalia, in his *Hamdi* dissent, uses history for ends that are mainly forensic.

The events that led to *Hamdi* began in December 2001, when a U.S. citizen, Yaser Hamdi, was captured in Afghanistan by Northern Alliance forces that were battling the

¹⁷⁴ *Youngstown, supra* note __, at 654 (Jackson, J., concurring). In what may also be a form of *institutional placement* – not of the President but of Congress – Jackson also warns that Congress must act: “I have no illusion that any decision by this Court can keep power in the hands of Congress if it is not wise and timely in meeting its problems. . . . [P]ower to legislate for emergencies belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers.” *Id.*

¹⁷⁵ *Youngstown, supra* note __, at 654 (Jackson, J., concurring).

Taliban.¹⁷⁶ Hamdi was later turned over to the U.S. military, which detained and interrogated him in Afghanistan before transferring him to the U.S. naval base at Guantanamo Bay. After it was learned that Hamdi was a U.S. citizen, he was moved again, to naval facilities in Norfolk, Virginia, and Charleston, South Carolina. Because the Government designated Hamdi an “enemy combatant,” he was held in solitary confinement and without access to counsel. In June 2002, Hamdi's father filed a petition on Hamdi's behalf for a writ of habeas corpus in federal district court. The petition alleged that the detention violated Hamdi's due process rights, since he had not been charged with a crime and since Congress had not suspended the writ of habeas corpus.¹⁷⁷ After a series of rulings and appeals concerning Hamdi's access to counsel and the sufficiency of the evidence against him, Hamdi's detention was upheld by the Fourth Circuit, and the issue was appealed to the Supreme Court.

In a plurality opinion authored by Justice O'Connor, the Court vacated the Fourth Circuit's decision.¹⁷⁸ The Court acknowledged that the capture and detention of enemy combatants, by “universal agreement and practice,” are “important incident[s] of war,” and that Congress had authorized such detentions when it passed the Authorization for Use of Military Force (AUMF) after September 11, 2001.¹⁷⁹ But the plurality also accepted Hamdi's claim that citizens designated as “enemy combatants” by the Government have a right to a hearing to contest that designation. Rather than ruling completely in favor of either Hamdi or the Government, the Court used a due process balancing test, developed in *Mathews v. Eldridge*, weighing Hamdi's physical-liberty interest against the Government's military and national security needs. The Court

¹⁷⁶ For more on *Hamdi* and enemy combatants, see Jerome A. Barron, *Citizenship Matters: The Enemy Combatant Cases*, 19 Notre Dame J.L. Ethics & Pub. Pol'y 33 (2005); Allison Elgart, *Hamdi v. Rumsfeld: Due Process Requires That Detainees Receive Notice and Opportunity to Contest Basis for Detention*, 40 Harv. C.R.-C.L. L. Rev. 239 (2005); Nicholas G. Green, *A “Blank Check”: Judicial Review and the War Powers in Hamdi v. Rumsfeld*, 56 S.C. L. Rev. 581 (2005); Juliet Stumpf, *Citizens of an Enemy Land: Enemy Combatants, Aliens, and the Constitutional Rights of the Pseudo-Citizen*, 38 U.C. Davis L. Rev. 79 (2004); Ingrid Brunk Wuerth, *The President's Power to Detain “Enemy Combatants”: Modern Lessons From Mr. Madison's Forgotten War*, 98 Nw. U. L. Rev. 1567 (2004); Gregory Dolin, *The Great Writ of Incoherence: An Analysis of the Supreme Court's Rulings on “Enemy Combatants”*, 36 Geo. J. Int'l L. 623 (2005); Danielle Tarin, *Will An Attack On America Justify An Attack On Americans?: Congressional and Constitutional Prohibitions On the Executive's Power to Detain U.S. Citizens As Enemy Combatants*, 44 Va. J. Int'l L. 1145 (2004); Erwin Chemerinsky, *Detentions Without Due Process of Law Following September 11th*, 20 Touro L. Rev. 889 (2005).

¹⁷⁷ While the parties disputed whether Hamdi's detention was authorized by the Authorization for Use of Military Force passed by Congress after September 11, 2001 (“AUMF”), all agreed that the AUMF did not amount to a suspension of the writ.

¹⁷⁸ Justice O'Connor's opinion was joined by Chief Justice Rehnquist, Justice Kennedy, and Justice Breyer. Justices Souter and Ginsburg believed that the President had no authority to detain Hamdi, but they concurred in the judgment in order to allow Hamdi the opportunity on remand to introduce evidence that he was not an enemy combatant. Justice Scalia, joined by Justice Stevens, dissented, as I will discuss *infra*, and Justice Thomas authored a separate dissent in which he largely accepted the position argued by the Government.

¹⁷⁹ The Court expressed sympathy with Hamdi's position that his detention was apparently of indefinite duration, and Justice O'Connor stressed that indefinite detentions were not authorized for the purpose of interrogation. However, the Court held that it was permissible to detain combatants in order to prevent them from rejoining enemy forces – in this case, as long as “United States troops are still involved in active combat in Afghanistan.”

concluded that the Government was authorized to detain citizens that it classified as enemy combatants, but that "a citizen-detainee seeking to challenge his classification ... must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker."

Justice Scalia's dissent begins with *issue history*, in a statement that could be construed as forensic, deliberative, or both: "The very core of liberty secured by our Anglo-Saxon system of separated powers has been freedom from indefinite imprisonment at the will of the Executive."¹⁸⁰ Scalia cites Blackstone and the Framers for support.¹⁸¹ From the outset of his opinion, Scalia's orientation toward history is essentially forensic: He discusses "[t]he two common-law ideas central to Blackstone's understanding – due process as the right secured, and habeas corpus as the instrument by which due process could be insisted upon by a citizen illegally imprisoned[...]"¹⁸² and notes that these understandings were incorporated into the Constitution,¹⁸³ but most of this issue history is an inquiry into *what* was done, without dwelling on *why*. Scalia highlights the importance of freedom from indefinite imprisonment at the will of the Executive as a matter of forensic constitutional history: he wants to know what *was*, because that will tell him what *is*.

For Scalia, "[t]he relevant question ... is whether there is a different, special procedure for imprisonment of a citizen accused of wrongdoing by aiding the enemy in wartime." This, too, is probably forensics – whether there *is* such a procedure, though there might be an undertone of the deliberative inquiry as to whether there *should* be. But the *issue history* he uses to answer the question is forensic, not deliberative.

To show that no such "different, special procedure" exists, Scalia uses issue history in three ways. First, he assembles a detailed issue history to show that such citizens were traditionally prosecuted criminally. (He does not, however, say why.) He

¹⁸⁰ *Hamdi, supra* note __, at 2661 (Scalia, J., dissenting).

¹⁸¹ *Hamdi, supra* note __, at 2661 (Scalia, J., dissenting). Blackstone's view was that If the magistrate could imprison people arbitrarily, "there would soon be an end of all other rights and immunities." *Id.* (citing 1 W. Blackstone, Commentaries on the Laws of England 132-133 (1765)). As Scalia notes, Hamilton quoted this passage from Blackstone in Federalist No. 84. *Id.*

¹⁸² *Hamdi, supra* note __, at 2661 (Scalia, J., dissenting). "The gist of the Due Process Clause, as understood at the founding and since, was to force the Government to follow those common-law procedures traditionally deemed necessary before depriving a person of life, liberty, or property." *Id.* The Clause "in effect affirms the right of trial according to the process and proceedings of the common law." *Id.* (citing 3 J. Story, Commentaries on the Constitution of the United States § 1783, p. 661 (1833)). "These due process rights," Scalia notes, have historically been vindicated by the writ of habeas corpus." *Id.* "In England before the founding, the writ developed into a tool for challenging executive confinement," in part through the Petition of Right and the Habeas Corpus Act of 1679. *Id.* at 2662.

¹⁸³ *Hamdi, supra* note __, at 2662-63 (Scalia, J., dissenting). When the Constitution was written, "the writ of habeas corpus was preserved ... the only common-law writ to be explicitly mentioned." *Id.* at 2662. Scalia does hint at deliberative history here, when he mentions Hamilton's praise for the writ as a protection against "the practice of arbitrary imprisonments . . . in all ages, [one of] the favourite and most formidable instruments of tyranny." *Id.* at 2662-63 (citing Federalist No. 84). "Indeed," Scalia notes, "availability of the writ under the new Constitution (along with the requirement of trial by jury in criminal cases[...]) was [Hamilton's] basis for arguing that additional, explicit procedural protections were unnecessary." *Id.* at 2663.

notes, for example, that in England as early as 1350, the Statute of Treasons made it a crime to levy war against the King, and that those accused of doing so were routinely prosecuted for treason. He also notes that the Framers “inherited the understanding that a citizen's levying war against the Government was to be punished criminally.”¹⁸⁴ He does not dwell on why they thought so. More recently, he notes, “citizens conspiring against the United States have been charged and tried in Article III courts, even when their noncitizen co-conspirators were not.”¹⁸⁵ This all amounts to *forensic history* – offering an issue history to demonstrate that such citizens were traditionally prosecuted criminally – not *deliberative history*, which would consider why this was thought wise.

Second, Scalia uses issue history to show that, while “[t]here are times when military exigency renders resort to the traditional criminal process impracticable,”¹⁸⁶ the Suspension Clause is the only available course. Again, Scalia uses history mainly to argue what the rule is, not to say why – either why the rule was adopted or why it should be continued. He notes that “English law accommodated such exigencies by allowing legislative suspension of the writ of habeas corpus for brief periods[.]”¹⁸⁷ that “[w]here the Executive has not pursued the usual course of charge, committal, and conviction, it has historically secured the Legislature's explicit approval of a suspension,” and that “[i]n England, Parliament on numerous occasions passed temporary suspensions in times of threatened invasion or rebellion.”¹⁸⁸ He does not say why. He is similarly forensic in his treatment of the Suspension Clause. He tells us that it “was by design a safety valve, the Constitution's only ‘express provision for exercise of extraordinary authority because of a crisis,’”¹⁸⁹ and he cites instances when Congress authorized executive suspension of the writ during the Civil War, Reconstruction, and by the governors of U.S. possessions in the Philippines and Hawaii. But this, too, is issue history for a forensic purpose: to support Scalia's conclusion that “suspension of the writ on the one hand, and committal for criminal charges on the other hand, have been the only traditional means of dealing with citizens who levied war against their own country[.]” A more deliberative approach would at least touch on the question of why any of this was thought wise.

Third, after recognizing that “it is theoretically possible that the Constitution does not require a choice between these alternatives[.]” Scalia uses issue history to argue that

¹⁸⁴ *Hamdi*, *supra* note __, at 2663 (Scalia, J., dissenting) (citing U.S. Const. art. III, § 3, cl. 1); *see also id.* at 2664 (citing 18 U.S.C. § 2381 and other provisions of Title 18).

¹⁸⁵ *Hamdi*, *supra* note __, at 2664 (Scalia, J., dissenting) (citing World War I conspiracy cases and *Ex parte Quirin*, 317 U.S. 1 (1942)). Scalia also notes that “[t]he only citizen other than Hamdi known to be imprisoned in connection with military hostilities in Afghanistan against the United States [John Walker Lindh] was subjected to criminal process and convicted upon a guilty plea.” *Id.*

¹⁸⁶ *Hamdi*, *supra* note __, at 2664 (Scalia, J., dissenting).

¹⁸⁷ *Hamdi*, *supra* note __, at 2664 (Scalia, J., dissenting).

¹⁸⁸ *Hamdi*, *supra* note __, at 2664-65 (Scalia, J., dissenting) (citing as examples 1 W. & M., c. 7 (1688) (threatened return of James II); 7 & 8 Will. 3, c. 11 (1696) (same); 17 Geo. 2, c. 6 (1744) (threatened French invasion); 19 Geo. 2, c. 1 (1746) (threatened rebellion in Scotland); 17 Geo. 3, c. 9 (1777) (the American Revolution)). *See also id.* at 2665 (citing the suspension of the writ in colonial Massachusetts during Shay's Rebellion).

¹⁸⁹ *Hamdi*, *supra* note __, at 2664-65 (Scalia, J., dissenting) (quoting *Youngstown*, *supra* note __, at 650 (Jackson, J., concurring)). Scalia also notes that even this limited option was one that early American governments were loath to exercise. *Id.* at 2665 (citing Jefferson's unsuccessful attempt to persuade Congress to suspend the writ in response to Aaron Burr's conspiracy to overthrow the government).

“substantial evidence does refute that possibility.” Again, this is a forensic inquiry. He notes that “the text of the 1679 Habeas Corpus Act makes clear that indefinite imprisonment on reasonable suspicion is not an available option of treatment for those accused of aiding the enemy, absent a suspension of the writ[,]” and that “[i]n the United States, this Act was read as ‘enforc[ing] the common law,’ and shaped the early understanding of the scope of the writ.”¹⁹⁰ He also cites “[w]ritings from the founding generation [that] suggest that, without exception, the only constitutional alternatives are to charge the crime or suspend the writ.”¹⁹¹ This is all largely forensic evidence that the Framers did not intend to give the executive indefinite wartime detention authority over citizens. It is not deliberative history that asks why they declined to do so, or asks why we should be guided by their example.

Elsewhere in his opinion, however, Scalia does do something that is arguably deliberative history. He argues that allowing the Executive to detain citizens indefinitely, even during wartime, would be inconsistent “with the Founders’ general mistrust of military power permanently at the Executive’s disposal”.¹⁹²

In the Founders’ view, the blessings of liberty were threatened by those military establishments which must gradually poison its very fountain. No fewer than 10 issues of the Federalist were devoted in whole or part to allaying fears of oppression from the proposed Constitution’s authorization of standing armies in peacetime. Many safeguards in the Constitution reflect these concerns. . . .¹⁹³

A view of the Constitution that gives the Executive authority to use military force rather than the force of law against citizens on American soil flies in the face of the mistrust that engendered these provisions.¹⁹⁴

This hints at deliberative history, inasmuch as it suggests that what the Framers intended was based on this mistrust of military power at the President’s disposal. Even here, however, Scalia’s real purpose seems forensic. He cites the Framers’ mistrust mainly as additional proof of *what* they meant to do, not to establish why they meant to do it, or why they were right. His real interest is in proving what happened in Philadelphia in 1787, and the Framers’ mistrust of military power is additional proof for his theory of the facts, since it helps to establish motive.

Thus, in reaching his conclusion that suspension is required if Hamdi is to be held without a criminal trial, Scalia sees his role as forensic, not deliberative. This can also be seen in how he *defines the situation* with historical analogies. He cites those analogies – the debate in the House of Representatives about whether to suspend the writ of habeas

¹⁹⁰ *Hamdi*, *supra* note __, at 2666 (Scalia, J., dissenting) (citing *Ex parte Watkins*, 3 Pet. 193, 202, 7 L.Ed. 650 (1830)).

¹⁹¹ *Hamdi*, *supra* note __, at 2666 (Scalia, J., dissenting) (citing a letter from Thomas Jefferson to James Madison in 1788).

¹⁹² *Hamdi*, *supra* note __, at 2668 (Scalia, J., dissenting).

¹⁹³ *Hamdi*, *supra* note __, at 2668 (Scalia, J., dissenting) (citations and internal quotation marks omitted). Scalia also notes Hamilton’s argument that “the President’s military authority would be ‘much inferior’ to that of the British King.” *Id.* (citing Federalist No. 69).

¹⁹⁴ *Hamdi*, *supra* note __, at 2669 (Scalia, J., dissenting).

corpus during Burr's conspiracy in 1807;¹⁹⁵ three cases from the War of 1812;¹⁹⁶ Lincoln's attempt to suspend the writ without congressional authorization during the Civil War¹⁹⁷ - primarily as forensic evidence that the only available options (other than releasing Hamdi) are criminal proceedings or a suspension of the writ.

Even Scalia's most important analogy, to *Ex Parte Milligan*,¹⁹⁸ is invoked not for its sweeping deliberative statements about the history of the struggles to preserve human liberty,¹⁹⁹ but as a forensic statement of its rule that the laws and usages of war "can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed."²⁰⁰ He hints at a

¹⁹⁵ *Hamdi*, *supra* note __, at 2666-67 (Scalia, J., dissenting).

¹⁹⁶ *Hamdi*, *supra* note __, at 2666-67 (Scalia, J., dissenting) (discussing *In re Stacy*, 10 Johns. 328 (N.Y. 1813); *Smith v. Shaw*, 12 Johns. 257 (1815); *M'Connell v. Hampton*, 12 Johns. 234 (N.Y. 1815)).

¹⁹⁷ *Hamdi*, *supra* note __, at 2667 (Scalia, J., dissenting). Lincoln "apparently did not doubt that suspension was required if the prisoner was to be held without criminal trial." *Id.*

¹⁹⁸ 71 U.S. 2 (1866).

¹⁹⁹ See, e.g., *Milligan*, *supra* note __, at 75-76:

No graver question was ever considered by this court, nor one which more nearly concerns the rights of the whole people; for it is the birthright of every American citizen when charged with crime, to be tried and punished according to law. The power of punishment is, alone through the means which the laws have provided for that purpose, and if they are ineffectual, there is an immunity from punishment, no matter how great an offender the individual may be, or how much his crimes may have shocked the sense of justice of the country, or endangered its safety. By the protection of the law human rights are secured; withdraw that protection, and they are at the mercy of wicked rulers. or the clamor of an excited people. . . .

These precedents inform us of the extent of the struggle to preserve liberty and to relieve those in civil life from military trials. The founders of our government were familiar with the history of that struggle; and secured in a written constitution every right which the people had wrested from power during a contest of ages. . . .

These securities for personal liberty thus embodied, were such as wisdom and experience had demonstrated to be necessary for the protection of those accused of crime. And so strong was the sense of the country of their importance, and so jealous were the people that these rights, highly prized, might be denied them by implication, that when the original Constitution was proposed for adoption it encountered severe opposition; and, but for the belief that it would be so amended as to embrace them, it would never have been ratified.

Time has proven the discernment of our ancestors; for even these provisions, expressed in such plain English words, that it would seem the ingenuity of man could not evade them, are now, after the lapse of more than seventy years, sought to be avoided. Those great and good men foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrevocable law. The history of the world had taught them that what was done in the past might be attempted in the future. . . .

²⁰⁰ Thus Scalia uses *Milligan* only as an analogy to *define the situation*. See *Hamdi*, *supra* note __, at 2668 (Scalia, J., dissenting) ("[T]he reasoning and conclusion of *Milligan* logically cover the present case. The Government justifies imprisonment of Hamdi on principles of the law of war and admits that, absent the

deliberative purpose when he notes that the *Milligan* Court “rejected the argument . . . that it is dangerous to leave suspected traitors at large in time of war[.]” But his conclusion is mainly forensic: he states what the *Milligan* Court did – “criminal process was viewed as the primary means – and the only means absent congressional action suspending the writ – not only to punish traitors, but to incapacitate them” - without saying why. Thus, while Scalia does use *Milligan* as an analogy to *define the situation*, he does so mainly to state the rule, not to tell us why rule is well-founded.

Scalia is also essentially forensic in his discussion of other possible analogies. He does not claim mainly that those decisions were unwise, or that it would be unwise to apply their logic here. He mainly claims that they do not displace *Milligan*. The most important of these analogies is *Ex parte Quirin*,²⁰¹ a World War II case upholding the trial by military commission of eight German saboteurs, one of whom was a U.S. citizen. The *Quirin* Court acknowledged *Milligan*’s statement that the law of war “can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed.” But the *Quirin* Court reasoned that *Milligan* had rested on the fact that the prisoner in that case was neither a belligerent or a prisoner of war:

[T]he [*Milligan*] Court was at pains to point out that Milligan, a citizen twenty years resident in Indiana, who had never been a resident of any of the states in rebellion, was not an enemy belligerent either entitled to the status of a prisoner of war or subject to the penalties imposed upon unlawful belligerents. We construe the Court’s statement as to the inapplicability of the law of war to Milligan’s case as having particular reference to the facts before it. From them the Court concluded that Milligan, not being a part of or associated with the armed forces of the enemy, was a non-belligerent, not subject to the law of war²⁰²

Scalia’s first argument is that the *Quirin* Court misread *Milligan*. He says: “*Milligan* had involved (among other issues) two separate questions: (1) whether the military trial of Milligan was justified by the laws of war, and if not (2) whether the President’s suspension of the writ, pursuant to congressional authorization, prevented the issuance of habeas corpus.”²⁰³ Scalia says that the key statement from *Milligan* – that the law of war can never apply to citizens where the courts are open – “was contained in [the *Milligan* Court’s] discussion of the first point.” The factors pertaining to whether *Milligan* could reasonably be considered a belligerent and prisoner of war, however, were relevant to the second point. Scalia’s view is that the *Milligan* Court held that the law of war can never apply to a citizen – any citizen – when the courts are open, and that

war, it would have no such authority. But if the law of war cannot be applied to citizens where courts are open, then Hamdi’s imprisonment without criminal trial is no less unlawful than Milligan’s trial by military tribunal.”). Here, too, Scalia approaches his role forensically. He says what *is* – the rule of *Milligan* is *X*, and *Milligan* controls. He does not say why the rule is a sound one, despite the highly deliberative rhetoric of *Milligan* itself.

²⁰¹ 317 U.S. 1 (1942). Scalia also distinguishes *Moyer v. Peabody*, 212 U.S. 78 (1909), see *Hamdi*, *supra* note __, at 2670 n.4, and the majority opinion in *Luther v. Borden*, which was cited in Justice Thomas’s dissent. See *id.* (“[M]artial law has not been imposed here, and in any case is limited to ‘the theatre of active military operations, where war really prevails,’ and where therefore the courts are closed”).

²⁰² *Quirin*, 317 U.S. at 45-46.

²⁰³ *Hamdi*, *supra* note __, at 2669 (Scalia, J., dissenting).

“*Milligan* thus understood was in accord with the traditional law of habeas corpus I have described: Though treason often occurred in wartime, there was, absent provision for special treatment in a congressional suspension of the writ, no exception to the right to trial by jury for citizens who could be called ‘belligerents’ or ‘prisoners of war.’”²⁰⁴

Even if it did not, however – “even if *Quirin* gave a correct description of *Milligan*, or made an irrevocable revision of it”²⁰⁵ – Scalia argues that *Quirin* would still not justify denying the writ in Hamdi’s case:

In *Quirin* it was uncontested that the petitioners were members of enemy forces. They were “admitted enemy invaders,” and it was “undisputed” that they had landed in the United States in service of German forces. The specific holding of the Court was only that, “upon the conceded facts,” the petitioners were “plainly within [the] boundaries” of military jurisdiction. But where those jurisdictional facts are not conceded – where the petitioner insists that he is not a belligerent – *Quirin* left the pre-existing law in place: Absent suspension of the writ, a citizen held where the courts are open is entitled either to criminal trial or to a judicial decree requiring his release.²⁰⁶

Whatever we think of Scalia’s view of the interplay between *Milligan* and *Quirin*, the point is that his primary purpose is forensic. He does *define the situation* with analogies, and discusses the Likenesses and Differences between *Milligan*, *Quirin*, and the present case.²⁰⁷ Yet he cites *Milligan* mainly as forensic evidence of what the rule is, not to echo its deliberative statements about why that rule makes sense.²⁰⁸ He cites Likenesses between *Milligan* and the present case, without saying why those Likenesses should matter. He attacks *Quirin* mainly for its forensic sloppiness. He cites Differences between *Quirin* and the present case without saying why those differences should matter. He views his role as that of a forensic historian, and his views of others seems mainly directed to whether he thinks they got the forensics right. His use of history, and his conclusion – that Hamdi is entitled to a habeas decree requiring his release unless (1)

²⁰⁴ *Hamdi*, *supra* note ___, at 2669-70 (Scalia, J., dissenting).

²⁰⁵ *Hamdi*, *supra* note ___, at 2670 (Scalia, J., dissenting).

²⁰⁶ *Hamdi*, *supra* note ___, at 2670 (Scalia, J., dissenting) (citations and internal quotation marks omitted).

²⁰⁷ Scalia also *defines the situation* by emphasizing the specific facts of this case, though he does not use history to do so. He notes that his “views in this matter [have] a relatively narrow compass”:

They apply only to citizens, accused of being enemy combatants, who are detained within the territorial jurisdiction of a federal court. This is not likely to be a numerous group; currently we know of only two, Hamdi and Jose Padilla. Where the citizen is captured outside and held outside the United States, the constitutional requirements may be different. Moreover, even within the United States, the accused citizen-enemy combatant may lawfully be detained once prosecution is in progress or in contemplation. The Government has been notably successful in securing conviction, and hence long-term custody or execution, of those who have waged war against the state.

Hamdi, *supra* note ___, at 2673 (Scalia, J., dissenting).

²⁰⁸ This is despite *Milligan*’s ample deliberative rhetoric. *See supra* note __.

criminal proceedings are promptly brought, or (2) Congress has suspended the writ of habeas corpus – are almost entirely forensic.²⁰⁹

Not until his peroration does Scalia wax deliberative – indeed, in something like “time as a stream”:

The Founders well understood the difficult tradeoff between safety and freedom. “Safety from external danger,” Hamilton declared,

“is the most powerful director of national conduct. Even the ardent love of liberty will, after a time, give way to its dictates. The violent destruction of life and property incident to war; the continual effort and alarm attendant on a state of continual danger, will compel nations the most attached to liberty, to resort for repose and security to institutions which have a tendency to destroy their civil and political rights. To be more safe, they, at length, become willing to run the risk of being less free.”

The Founders warned us about the risk, and equipped us with a Constitution designed to deal with it.

Many think it not only inevitable but entirely proper that liberty give way to security in times of national crisis—that, at the extremes of military exigency, *inter arma silent leges*. Whatever the general merits of the view that war silences law or modulates its voice, that view has no place in the interpretation and application of a Constitution designed precisely to confront war and, in a manner that accords with democratic principles, to accommodate it.²¹⁰

CONCLUSION

In this Article, I have tried to suggest two main ideas. First, when we consider the use of history by a Supreme Court justice, we should take special note of the justice’s apparent rhetorical purpose. As the classical rhetoricians would have recognized, even when justices speak of the past – even when they reason from history – they may do so not merely to argue about what *was*, but also to argue for what *should be*. Their purpose may not be to gain a precise forensic knowledge of everything that happened in the past,

²⁰⁹ Indeed, Scalia’s rhetoric is at its most deliberative when he is discussing subjects other than history, particularly when he takes issue with the Court’s “Mr. Fix-it Mentality”:

The plurality seems to view it as its mission to Make Everything Come Out Right, rather than merely to decree the consequences . . . of the other two branches’ actions and omissions. Has the Legislature failed to suspend the writ in the current dire emergency? Well, we will remedy that failure by prescribing the reasonable conditions that a suspension should have included. And has the Executive failed to live up to those reasonable conditions? Well, we will ourselves make that failure good, so that this dangerous fellow (if he is dangerous) need not be set free. The problem with this approach is not only that it steps out of the courts’ modest and limited role in a democratic society; but that by repeatedly doing what it thinks the political branches ought to do it encourages their lassitude and saps the vitality of government by the people.

Hamdi, *supra* note __, at 2673 (Scalia, J., dissenting).

²¹⁰ *Hamdi*, *supra* note __, at 2674 (Scalia, J., dissenting).

but instead to access the record of human experience to guide deliberations about the future. As I indicate in Part I, a theory of *deliberative history* has several potential advantages. It might add to our understanding of what justices really do, purely as a descriptive matter. It might help address conceptual confusion generated by the originalism debate. Finally, it might make history usable again, since deliberative history does not require the same analytical rigor or completeness of knowledge that forensic history does.

The second main idea is that Neustadt and May's methods can help us consider the *content* of deliberative history. While these methods are not addressed to Supreme Court justices, they are designed to improve the use of history in deliberative decision-making. Since some justices who use history do so for a deliberative purpose, we might be able to describe what they do by adapting the tools in *Thinking in Time*. Both Justice Woodbury, in *Luther*, and Justice Jackson, in *Youngstown*, seem to engage in deliberative historical reasoning, and both seem to use rhetorical practices that resemble the suggestions developed by Neustadt and May. Justice Scalia's *Hamdi* dissent, on the other hand, is an example of forensic history. While he makes extensive use of historical reasoning, his purpose is to prove "original understanding," and his orientation is primarily toward the past, rather than the present or future.

Whether or not we choose Neustadt and May as our guides, or create an entirely new framework, the possibilities of deliberative history are rich indeed, and new questions come readily to mind. First, of course, are the many more questions we could ask about these and other Supreme Court opinions. Though this Article did not do so, it is fascinating to compare how Levi Woodbury and Roger Taney use history differently in *Luther*, or how Taney's use of history in *Luther* differs from his use of history in *Ex parte Merryman*,²¹¹ or how Jackson and Black and Vinson differ from each other in *Youngstown*.

Deliberative history may also be relevant to an entirely different debate among legal commentators, about the role of "borrowing" in comparative constitutional law.²¹² In Argentina, for example, the Constitution of 1853 was closely modeled on that of the United States, and for many years the U.S. Constitution – and U.S. Supreme Court jurisprudence – were treated as authority by Argentine jurists.²¹³ Whatever the forensic merits of treating the U.S. Constitution as "talismán,"²¹⁴ what is the role of deliberative

²¹¹ 17 F. Cas. 144 (1861). Considering how little deliberative history Taney uses in *Luther*, at least on the martial-law question, his opinion in *Merryman* is striking in its use of deliberative history. Interestingly, in *Merryman* Taney takes a very different view of executive power and the role of exigent circumstances. *Id.*

²¹² See, e.g., Carlos F. Rosenkrantz, *Against Borrowings and Other Nonauthoritative Uses of Foreign Law*, 1 Int'l J. Const. L. 269 (2003); Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 Yale L.J. 1225, 1231 (1999); Mark Tushnet, *Returning With Interest: Observations on Some Putative Benefits of Studying Comparative Constitutional Law*, 1 U. Pa. J. Const. L. 325 (1998); A.E. Dick Howard, *The Indeterminacy of Constitutions*, 31 Wake Forest L. Rev. 383, 402-04 (1996).

²¹³ See generally Jonathan M. Miller, *Judicial Review and Constitutional Stability: A Sociology of the U.S. Model and its Collapse in Argentina*, 21 Hastings Int'l & Comp. L. Rev. 77 (1997).

²¹⁴ See Jonathan M. Miller, *The Authority of a Foreign Talisman: A Study of U.S. Constitutional Practice as Authority in Nineteenth Century Argentina and the Argentine Elite's Leap of Faith*, 46 Am. U. L. Rev. 1483 (1997).

history? What deliberative lessons can other countries draw from the entirety of our historical experience?²¹⁵ What lessons can we draw from theirs?

While this Article considered deliberative history in three justices' opinions from three different centuries – the nineteenth, twentieth, and twenty-first – the greatest example of deliberative history in the constitutional-law setting is from the eighteenth century. It is the Federalist Papers. A comprehensive analysis of the use of deliberative history by “Publius,” and, for that matter, by those who opposed him, both in and out of the Convention, is certainly in order, and awaits future scholars.

This leads to a final point. As we have said, forensic history, as an originalist enterprise, is above all concerned with the intent of the Framers: what matters is *what* they meant to do. Deliberative history, on the other hand, wants to know *why*, since the reasons that guided their decisions in the past might help guide our decisions in the present. In this sense, at least (and to the extent that we might find other sound reasons in other times and other places), the deliberative historian does not view the Framers with unthinking deference. They may have been exceptionally wise, but they were not magical beings.

But the deliberative historian will nevertheless view the Framers with a special kind of respect, and it is important to understand why. If deliberative history makes history usable again, it also restores to the Framers a measure of their humanity. The deliberative historian knows that their ideas may not be the last word for our time, but may still be one of the best. The Framers knew that their choices were epochal. They knew that they were part of a moment without parallel in history, and they thought of that history as a stream – the course of human events – the course of which would be changed, right or wrong, by the choices they made.²¹⁶ They knew that their work would be judged, and written about, in future centuries. And the qualities they brought to their task were the same that motivated Kennedy and his ExComm to think unconventionally about history: “intense concentration; effective secrecy[;] and a high average of mind ... along with breadth of experience[.]”²¹⁷ If ever there was a problem that presented “the blazing show of novelty and gravity combined,” it was the problem facing the Framers in

²¹⁵ For example, a review of U.S. constitutional history, particularly the Civil War period, might have helped the members of the Argentine Supreme Court following the military coup in 1930, shortly before they decided to recognize the new regime on a *de facto* basis – a decision that undoubtedly contributed to the breakdown of the separation of powers in that country. That breakdown is discussed in Manuel Jose Garcia-Mansilla, *Separation of Powers Crisis: The Case of Argentina*, 32 Ga. J. Int'l & Comp. L. 307 (2004); William C. Banks & Alejandro D. Carrio, *Presidential Systems in Stress: Emergency Powers in Argentina and the United States*, 15 Mich. J. Int'l L. 1 (1993). See also Tim Dockery, *The Rule of Law Over the Law of Rulers: The Treatment of De Facto Laws in Argentina*, 19 Fordham Int'l L.J. 1578 (1996).

²¹⁶ This, too, might equally be said of those who gathered at Philadelphia in 1787:

[They] saw the issues before them as part of a time sequence beginning long before the onset of crisis and continuing into an increasingly indistinct future. The more [they] deliberated, the more they weighed consequences and the more they shifted, the more they weighed consequences and the more they shifted from the simple question of what to do *now* to the harder question: How will today's choices appear when they are history – when people look back a decade or a century hence?

Neustadt and May, *supra* note ___, at 14.

²¹⁷ Neustadt and May, *supra* note ___, at 15-16.

Philadelphia in 1787. We need not be originalists to recognize that even “deliberative history” must maintain a special place of honor for the greatest deliberation in *our* history.

The real difference is that deliberative history gives *us* room to be wise. It recognizes that human beings, under the right conditions, can draw on the past as a resource for present action aimed at the future. And it recognizes that we have the same responsibility to the future that the Framers did. As they would have been the first to assert, our greatest histories have yet to be written.