

1/10/15

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AFTER RECESS: HISTORICAL PRACTICE, TEXTUAL AMBIGUITY, AND CONSTITUTIONAL ADVERSE POSSESSION

The Supreme Court’s decision last Term in *NLRB v. Noel Canning* contains an especially strong and sustained endorsement of the relevance of historical practice to discerning the Constitution’s distribution of authority between Congress and the President.¹ In interpreting the scope of the Recess Appointments Clause,² the Court gave significant attention to how governmental actors had understood and applied the Clause throughout history. The Court did so, moreover, as part of a self-conscious approach to constitutional interpretation. When construing “constitutional provisions regulating the relationship between Congress and the President,” the Court explained, “great weight” should be given to “[l]ong settled and established practice.”³ In large part because of the practice, the Court concluded that the Recess Appointments Clause conferred broad recess appointments authority upon the President. The Court invalidated, however, the particular appointments at issue in the case, which in the Court’s view lacked historical support.

The Court was unanimous as to the result, but four Justices concurred only in the judgment.⁴ Writing a de facto dissent for that group, Justice Scalia objected, first, to the

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AUTHORS’ NOTE: For their helpful comments and suggestions, we thank Will Baude, Stuart Benjamin, Joseph Blocher, Guy Charles, Richard Fallon, Darrell Miller, Jeff Powell, Jed Purdy, Stephen Sachs, Jim Salzman, Chris Schroeder, Peter Spiro, David Strauss, and Jonathan Wiener, as well as participants in the inaugural Yale-Duke Foreign Relations Law Roundtable.

¹ See 134 S Ct 2550 (2014).

² US Const art II, § 2, cl 3 (“The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.”).

³ 134 S Ct at 2559, quoting *The Pocket Veto Case*, 279 US 655, 689 (1929).

⁴ *Noel Canning* was one of several decisions in the 2013-14 Term in which the Court was unanimous as to the result but deeply divided on the reasoning. See also *Bond v United States*, 134 S Ct 2077 (2014), and *McCullen v Coakley*, 134 S Ct 2518 (2014).

way in which the majority had relied on historical practice. He accepted that “where a governmental practice has been open, widespread, and unchallenged since the early days of the Republic, the practice should guide our interpretation of an ambiguous constitutional provision.”⁵ In this case, however, Justice Scalia argued that the relevant text was clear, and that the historical practice relied upon by the majority neither dated to the early days of the Republic nor was uncontested. Justice Scalia also characterized the majority as applying “an adverse-possession theory of executive power,” which he feared would “have the effect of aggrandizing the Presidency beyond its constitutional bounds and undermining respect for the separation of powers.”⁶

The majority, by contrast, invoked James Madison for the proposition that the meaning of some constitutional provisions could be “liquidated” through “a regular course of practice” after the constitutional Founding, and it contended that “our cases have continually confirmed Madison’s view.”⁷ The majority did not explain the contours of this “liquidation” concept, however, and its reasoning about the scope of the Recess Appointments Clause seemed to be based on a potentially distinct and broader concept of “historical gloss”—a concept most famously articulated by Justice Frankfurter in his concurrence in the *Youngstown* steel seizure case.⁸ Indeed, judging from the way in which the concept of liquidation has been developed by originalist scholars, it would seem to accord more closely with Justice Scalia’s views in *Noel Canning* than with those of the majority.

Justice Scalia also disagreed with the majority about the clarity of the relevant constitutional text. Justice Scalia and the majority did agree that if the text of the Recess Appointments Clause was clear, it controlled the outcome regardless of other considerations. The majority maintained, however, that “the Clause’s text, standing alone, is ambiguous,”⁹ and that it was therefore appropriate to consider other sources of constitutional authority, including historical practice. Justice Scalia, by contrast, argued that the text was clear, and he insisted that “[t]he historical practice of the political branches is, of course, irrelevant when the Constitution is clear.”¹⁰

This Article engages these two disputes in *Noel Canning* by examining the relationship between interpretive methodology and historical practice, and between historical practice and textual ambiguity. We begin in Part I by describing the historical

⁵ 134 S Ct at 2594 (Scalia, J, concurring in the judgment).

⁶ Id at 2592, 2617-18.

⁷ Id at 2580.

⁸ See *Youngstown Sheet and Tube Co. v Sawyer*, 343 US 579, 610-11 (1952) (Frankfurter, J. concurring) (“[A] systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on ‘executive Power’ vested in the President by § 1 of Art. II.”).

⁹ 134 S Ct at 2577.

¹⁰ Id at 2600.

background and issues in *Noel Canning*. In the next two Parts, we consider the relationship between historical practice and constitutional methodology. In Part II, we explain how a reliance on historical practice fits with various non-originalist and originalist approaches to constitutional interpretation. In Part III, we critique the idea of “liquidation” of constitutional meaning to the extent that it is something separate from—and narrower than—reliance on historical gloss more generally.

We turn in Part IV from the relationship between methodology and practice to the relationship between practice and ambiguity. We explain that historical practice was relevant not only to the majority’s effort in *Noel Canning* to resolve perceived ambiguities in the constitutional text, but also to the majority’s very perception of ambiguity in the first instance. As a result, the decision is an example of how the constitutional text is often interpreted through a process that we have described elsewhere as “constructed constraint.”¹¹ Finally, in Part V we assess Justice Scalia’s contention that crediting historical gloss licenses a form of adverse possession by the President. We conclude that Justice Scalia’s analogy to adverse possession usefully suggests caution in crediting historical practice, but that the analogy obscures more than it clarifies because it misses critical differences between the values underlying the adverse possession doctrine in property law and those animating a historical gloss approach to the separation of powers. In responding to Justice Scalia, we also offer thoughts on how best to define a historical gloss approach, including how to specify its limits.

I. Historical Practice and Recess Appointments

A. A Brief History of Recess Appointments

The Constitution provides that federal officers are to be appointed through nomination by the President with the advice and consent of the Senate.¹² It also provides, however, that the President may “fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of [the Senate’s] next Session.”¹³ Alexander Hamilton explained in *The Federalist* that the Framers had included this Recess Appointments Clause in the Constitution because “it would have been improper to oblige [the Senate] to be continually in session for the appointment of officers” and because “vacancies might happen *in their recess*, which it might be necessary for the public service to fill without delay.”¹⁴

Each Congress has a two-year term, which traditionally has been divided into two yearly sessions.¹⁵ The break between those sessions is referred to as an inter-session

¹¹ See Curtis A. Bradley & Neil S. Siegel, *Constructed Constraint and the Constitutional Text*, 64 Duke LJ (forthcoming 2015).

¹² US Const art II, § 2, cl 2.

¹³ *Id.*, cl 3.

¹⁴ The Federalist No 67 at 410, in *The Federalist Papers* (Penguin, Clinton Rossiter ed, 1961).

¹⁵ See generally Henry B. Hogue, *Recess Appointments: Frequently Asked Questions* (Cong Res Serv, June 7, 2013), online at <https://www.senate.gov/CRSReports/crs-publish.cfm?pid='0DP%2BP%>

recess. By contrast, breaks during a session are referred to as intra-session recesses. The Constitution provides that neither chamber of Congress may take a break for more than three days without the consent of the other, which gives the House of Representatives substantial ability to affect the length of Senate breaks.¹⁶

Historically, there have been three principal issues concerning the scope of the Recess Appointments Clause: first, whether the Clause’s reference to “the Recess” covers only inter-session recesses, or whether it also encompasses at least some intra-session recesses; second, whether the Clause’s reference to vacancies “that may happen during the Recess” limits the Clause to vacancies that *occur* during the recess or whether it also encompasses vacancies that *exist* during the recess; and, third, whether there is a minimum time period required in order for a break in Senate operations to be considered a “recess” for purposes of the Clause.¹⁷

1. “The Recess”

There was no sustained practice of making intra-session recess appointments before the twentieth century. Prior to the Civil War, presidents apparently made no intra-session recess appointments at all. There was relatively little opportunity to do so, however, because this was a period in which Congress took very long breaks between sessions—typically at least half a year—and no more than short breaks (of about a week) during the sessions.¹⁸ When Congress took long intra-session breaks during the presidency of Andrew Johnson, he made a number of intra-session recess appointments. After this episode, Congress soon returned to having only short intra-session recesses, and there were apparently no more intra-session recess appointments until 1920.

In 1901, Attorney General Philander Knox advised President Theodore Roosevelt that the Recess Appointments Clause did not apply to intra-session recesses.¹⁹ Knox

5CW%3B%20P%20%20%0A. The President can also call one or both houses of Congress into session “on extraordinary Occasions,” see US Const art II, § 3, and this has happened at various times. Congressional leadership can also call the houses of Congress into special session during a recess.

¹⁶ See US Const art II, § 3. If the houses of Congress cannot agree on an adjournment, the President “may adjourn them to such Time as he shall think proper.” *Id.* Under Senate practice, Sundays are not counted for purposes of the Adjournments Clause.

¹⁷ For discussions of the relevant post-Founding history, see Edward A. Hartnett, *Recess Appointments of Article III Judges: Three Constitutional Questions*, 26 *Cardozo L Rev* 377 (2005); Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 *UCLA L Rev* 1487 (2005); Jonathan Turley, *Constitutional Adverse Possession: Recess Appointments and the Role of Historical Practice in Constitutional Interpretation*, 2013 *Wis L Rev* 965; and Michael A. Carrier, Note, *When Is the Senate in Recess for Purposes of the Recess Appointments Clause?*, 92 *Mich L Rev* 2204 (1994).

¹⁸ In the post-Founding period, inter-session recesses typically lasted six months or longer. See Rappaport, 52 *UCLA L Rev* at 1498 (cited in note 17). When the Senate took intra-session recesses in this period, they were typically around the Christmas holiday and lasted only about a week. See Hartnett, 26 *Cardozo L Rev* at 408 (cited in note 17).

¹⁹ 23 *Op Atty Gen* 599, 601 (1901).

reasoned that, although a break during a session “may be *a* recess in the general and ordinary use of that term,” it is not “*the* Recess” referred to in the Recess Appointments Clause.²⁰ Controversy subsequently developed when, in December 1903, Roosevelt made 160 recess appointments (mostly involving military officers) as the Senate transitioned without break from a special session (which had been convened after adjournment of the prior regular session) to a new regular session. Roosevelt claimed that there was a “constructive recess” between the two sessions that triggered his appointments authority.²¹ In 1905, the Senate Judiciary Committee published a report criticizing the appointments and arguing that “the Constitution means a real recess, not a constructive one.”²² Although the Committee’s functional definition of a recess potentially could have been applied to an intra-session recess as well as an inter-session recess,²³ Roosevelt had not claimed an intra-session recess appointments power, and the Report did not specifically consider that issue.

In 1921, Attorney General Harry Daugherty concluded that, contrary to the Knox opinion, the President has the authority to make recess appointments during an intra-session recess.²⁴ Daugherty explained that the appointments provisions in the Constitution are designed to “to prohibit the President from making appointments without the advice and consent of the Senate whenever that body is in session so that its advice and consent can be obtained.”²⁵ The relevant question as he saw it, therefore, was “whether in a *practical* sense the Senate is in session so that its advice and consent can be obtained.”²⁶ Daugherty also reasoned that a contrary interpretation of the Clause could lead to “disastrous consequences.”²⁷

Since 1921, executive branch lawyers consistently have interpreted the Clause to apply to intra-session recesses. Particularly since the 1940s, moreover, presidents have made numerous recess appointments during intra-session recesses.²⁸ In 1948, the Comptroller General, an officer of Congress, cited Daugherty’s opinion as representing

²⁰ Id.

²¹ See T.J. Halstead, *Recess Appointments: A Legal Overview* 10 (Cong Res Serv, July 26, 2005), online at <http://fpc.state.gov/documents/organization/50801.pdf>.

²² S Rep No 4389, 58th Cong, 3d Sess, p 4.

²³ The Committee explained that a recess is “the period of time when the Senate is *not sitting in regular or extraordinary session*[;] . . . when its members owe no duty of attendance; when its Chamber is empty; when, because of its absence, it can not receive communications from the President or participate as a body in making appointments.” Id at 2.

²⁴ 33 Op Atty Gen 20 (1921).

²⁵ Id at 21.

²⁶ Id at 21-22.

²⁷ Id at 23. See also id (“If the President’s power of appointment is to be defeated because the Senate takes an adjournment to a specified date, the painful and inevitable result will be measurably to prevent the exercise of governmental functions.”).

²⁸ See Carrier, 92 Mich L Rev at 2212 (cited in note 17) (noting that “[f]requent presidential use of the recess appointment power during intrasession recesses began in 1947” with appointments by Truman).

“the accepted view” on the question.²⁹ At various times, however, individual senators have disagreed with this view.³⁰

2. “Vacancies that May Happen During the Recess”

President Washington’s Attorney General, Edmund Randolph, opined that the recess appointments power was limited to executive branch positions that become vacant during a recess. Instead of focusing on the semantic meaning of the text of the clause, Randolph reasoned that “[t]he Spirit of the Constitution favors the participation of the Senate in all appointments” and that the recess appointments power should be viewed as “an exception to the general participation of the Senate” and “interpreted strictly.”³¹ Despite this opinion, presidents since at least the Madison administration (and perhaps earlier) have used the recess appointments power at various times to fill posts that became vacant before the relevant recess.³²

In 1823, President Monroe’s Attorney General, William Wirt, reached a conclusion contrary to Randolph’s, reasoning that the phrase “may happen” “seems not perfectly clear,” because it could mean either “happen to take place” or “happen to exist.”³³ Wirt thought that the first reading would be more consistent with the “letter of the constitution,” but that the second would be “most accordant with its reason and spirit.”³⁴ He observed that the purpose of the recess appointments power was to ensure that offices could remain filled and that if the President could not use this power to fill positions that remained vacant when the Senate went into recess, “the powers are inadequate to the purpose, and the substance of the constitution will be sacrificed to a dubious construction of its letter.”³⁵ After some inconsistency of views within the executive branch on this issue through the mid-nineteenth century, the President’s legal

²⁹ 28 Comp Gen 30, 34 (1948).

³⁰ In 1993, for example, the Senate Legal Counsel drafted an amicus brief, to be filed in a pending case, *Mackie v Clinton*, arguing that the recess appointments power applied only during inter-session recesses. The brief, which was prepared at the request of Senator George Mitchell, was never filed due to objections from Senate Republicans. See 139 Cong Rec 15266-74 (July 1, 1993). Similarly, in 2004 Senator Edward Kennedy filed an amicus curiae brief arguing that the President’s recess appointments authority is limited to inter-session recesses. See Brief for Sen. Edward M. Kennedy as *Amicus Curiae* in *Franklin v United States*, OT 2004, No. 04-5858 (Oct. 12, 2004).

³¹ Edmund Randolph, *Opinion on Recess Appointments* (July 7, 1792), reprinted in 24 *The Papers of Thomas Jefferson* 165-67 (John Catanzariti et al eds, 1990).

³² See, for example, Hartnett, 26 *Cardozo L Rev* at 400 (cited in note 17) (“While there is good reason to believe that both President Adams and President Jefferson made recess appointments that were inconsistent with Randolph’s interpretation of the Recess Appointments Clause, I am confident that President Madison did so.”).

³³ William Wirt, *Executive Authority to Fill Vacancies*, 1 *Op Atty Gen* 631, 631-32 (Oct 22, 1823).

³⁴ *Id.* at 632.

³⁵ *Id.*

advisers since that time have consistently agreed with Wirt's conclusion and have treated the question as settled.³⁶

In 1863, the Senate Judiciary Committee issued a report concluding that the recess appointments power applies only to positions that become vacant during the recess.³⁷ The Committee expressly disagreed with Wirt's reasoning, pointing out that keeping governmental offices filled is not the only constitutional interest at issue, and that another interest is ensuring that the offices are filled by well-qualified individuals. The Committee also expressed the concern that, if a President could fill pre-existing vacancies during recesses, he could deliberately bypass the senatorial process of advice and consent.³⁸

Shortly thereafter, Congress enacted the Pay Act, which prohibited paying recess appointees who were filling vacancies that pre-existed the recess until the Senate confirmed their appointments.³⁹ The Act was enacted in the context of disputes over President Lincoln's appointment of military officers during the Civil War. The legislation was introduced by Senator Trumbull, who said that he did not think that the President had the constitutional authority to make recess appointments for pre-existing vacancies but that "some other persons think he has that power."⁴⁰ Senator Harris questioned Trumbull's constitutional claim, noting, among other things, that "however we may read the Constitution, for forty years the precedents have been against that theory."⁴¹

Notwithstanding the Act, the executive branch continued to endorse Wirt's conclusion about the scope of the Recess Appointments Clause, and presidents continued to make occasional recess appointments to pre-existing vacancies. Congress paid those appointees retroactively after they were confirmed, and sometimes voted to pay them even if they were not confirmed. In 1927, the Comptroller General expressed the view that "there is no question but that the President has authority" to make those appointments.⁴² In 1940, Congress amended the Pay Act to allow for the payment, under various conditions, of recess appointees who were filling pre-existing vacancies.⁴³

³⁶ See Halstead at 5-6 (cited in note 21).

³⁷ See S Rep No 80, 37th Cong, 3d Sess (Jan 28, 1863). The Committee also expressed the view that the recess appointments power applied only to inter-session recesses. See *id.* at 3.

³⁸ *Id.* at 6. See also *id.* ("In the hands of an ambitious, corrupt, or tyrannical executive, this use of the power would soon bring about the very state of things which the Constitution so carefully guards against, by requiring, in express terms, that the advice of the Senate shall first be taken, and its consent obtained, before an appointment shall be made.").

³⁹ See Act of Feb. 9, 1863, ch 25, § 2, 12 Stat 642, 646

⁴⁰ Cong Globe, 37th Cong, 3d Sess 565 (Jan 29, 1863).

⁴¹ *Id.*

⁴² 7 Comp Gen 10, 11 (1927).

⁴³ See Act of July 11, 1940, ch 580, 54 Stat 751 (codified, as amended, at 5 USC § 5503).

3. Duration of the Senate Break

The duration of the break taken by the Senate generally has not been a significant issue for inter-session recess appointments. The one exception is the controversy, noted above, about Theodore Roosevelt’s appointments in 1903 during an instantaneous transition between Senate sessions. On other occasions, there has not been much controversy over inter-session appointments even when the breaks have been fairly short, including when they have been less than ten days.⁴⁴

The length of the break has been an issue, however, for intra-session recess appointments. Attorney General Daugherty addressed that issue in the 1921 opinion discussed above. Although the recess in question there was almost a month long and thus seemed long enough, Daugherty thought it important to address the required length of the break “so as to avoid any misconception as to the scope of this opinion.”⁴⁵ “If the President is empowered to make recess appointments during the present adjournment,” he asked, “does it not necessarily follow that the power exists if an adjournment for only 2 instead of 28 days is taken?”⁴⁶ Daugherty “unhesitatingly answer[ed] this by saying no.”⁴⁷ He also disputed that “an adjournment for 5 or even 10 days can be said to constitute the recess intended by the Constitution.”⁴⁸ Beyond that, Daugherty doubted that one could specify a precise “line of demarcation,” and he suggested that the President “is necessarily vested with a large, although not unlimited, discretion to determine when there is a real and genuine recess making it impossible for him to receive the advice and consent of the Senate.”⁴⁹

Subsequent executive branch legal opinions considered the minimum length of time that was needed before an intra-session break would trigger the President’s recess appointments authority. In 1992, for example, the Justice Department’s Office of Legal Counsel (OLC) concluded that “[p]ast practice is consistent with exercise of the recess appointment power during an intrasession recess of eighteen days.”⁵⁰ In 2004, it advised the Counsel to the President that the recess appointments power could be exercised during an 11-day recess.⁵¹

⁴⁴ For example, as the majority noted in *Noel Canning*, “President Truman also made a recess appointment to the Civil Aeronautics Board during a 3-day inter-session recess. . . . President Taft made a few appointments during a 9-day recess following his inauguration, and President Lyndon Johnson made several appointments during an 8-day recess several weeks after assuming office.” 134 S Ct at 2567.

⁴⁵ Memorandum from Harry M. Daugherty, *Executive Power—Recess Appointments*, 33 Op Atty Gen 20, 24 (1921).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 25.

⁴⁹ *Id.*

⁵⁰ Memorandum Opinion for the Deputy Counsel to the President, *Recess Appointments During an Intrasession Recess*, 16 Op OLC 15, 16 (1992).

⁵¹ Memorandum for Alberto R. Gonzales, Counsel to the President (Feb 20, 2004) (heavily redacted), at 2, online at <http://www.documentcloud.org/documents/369213-redacted-goldsmith-olc-memo>

Starting in 2007, when Democrats assumed control of the Senate, they began a practice of conducting pro forma sessions during intra-session recesses in an effort to block President George W. Bush from making recess appointments during those periods. The practice ended in 2008 but was revived by congressional Republicans during the Obama administration.⁵² Although the Republicans did not control the Senate, they did control the House of Representatives, and the House insisted on the pro forma sessions as a condition of the House's constitutionally required consent to Senate adjournments of longer than three days.⁵³

Shortly after President Obama made the appointments at issue in *Noel Canning*, OLC issued an opinion concluding that the appointments were valid. OLC took the position that “while Congress can prevent the President from making any recess appointments by remaining continuously in session and available to receive and act on nominations, it cannot do so by conducting pro forma sessions during a recess.”⁵⁴ OLC reasoned that the purpose of the Recess Appointments Clause is to allow the President to fill positions when the Senate is unavailable to consider nominations, and that this purpose is implicated even when a long Senate break is interrupted by pro forma sessions, because as a practical matter the Senate is not available to give its advice and consent during such a period.

B. Treatment of Historical Practice in *Noel Canning*

On December 17, 2011, the Senate adjourned, subject to an order adopted by unanimous consent providing that it would reconvene “for pro forma sessions only, with no business conducted,” on four dates between December 17 and the end of the congressional session on January 3, 2012.⁵⁵ The order further provided that when the new congressional session began on January 3, the Senate would reconvene “for pro forma sessions only, with no business conducted,” on five dates between January 6 and January 20. Although the order stated that no business would be conducted during the

recess-appointments.html. Without deciding the issue, the memorandum also observes that “[a]rguably, the three days set by the Constitution as the time during which one House may adjourn without the consent of the other, US Const. art. I, § 5, cl. 4, is also the length of time amounting to a ‘Recess’ under the Recess Appointments Clause.” Id at 3.

⁵² See Jennifer Steinhauer, *Sometimes a Day in Congress Takes Seconds, Gavel to Gavel*, N.Y. Times (Aug 6, 2011), at A12.

⁵³ See US Const art I, § 5, cl 4 (“Neither house, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.”).

⁵⁴ Memorandum Opinion for the Counsel to the President, *Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions* 4 (Jan 6, 2012), online at <http://www.justice.gov/sites/default/files/olc/opinions/2012/01/31/pro-forma-sessions-opinion.pdf>.

⁵⁵ 157 Cong Rec S8783 (daily ed Dec 17, 2011).

pro forma sessions, it was still possible for the Senate to act in those sessions through unanimous consent, and some minor business was conducted during this period.⁵⁶

On January 4, 2012, during a three-day gap between pro forma sessions, President Obama announced that he was using his recess appointments authority to fill three of the five positions on the National Labor Relations Board (NLRB).⁵⁷ The Noel Canning Corporation, a Pepsi-Cola distributor, subsequently challenged a decision of the NLRB finding that it had committed an unfair labor practice, arguing that the Board had lacked a quorum because the President had exceeded his authority in making the appointments. The U.S. Court of Appeals for the D.C. Circuit agreed, ruling broadly that the President's recess appointments power applies only during inter-session recesses, and only to positions that become vacant during the recess.⁵⁸

The Supreme Court unanimously affirmed, but it was sharply divided on the rationale. In large part based on historical practice, the five-Justice majority (consisting of Justice Breyer writing also for Justices Kennedy, Ginsburg, Sotomayor, and Kagan) concluded that the President had the authority to make appointments during intra-session recesses and to fill vacancies that predated the recess, but that there was an insufficiently long recess in this case because of the pro forma sessions. Justice Scalia, writing for himself, the Chief Justice, and Justices Thomas and Alito, concurred only in the judgment.

1. "The Recess"

The majority reasoned that the phrase "the Recess" was ambiguous. Based on Founding-era dictionaries, the majority noted, the phrase might refer only to the recess between sessions of the Senate, or it might refer to any break of substantial length, regardless of whether it is during a session or between sessions. Because the text is ambiguous, the majority reasoned, it was appropriate to consider the purpose of the Clause. This purpose, according to the majority, is to "ensure the continued functioning

⁵⁶ On December 23, 2011, the Senate agreed, by unanimous consent, to a process for passing the Temporary Payroll Tax Cut Continuation Act of 2011. See Sen. Harry Reid, "Unanimous Consent Agreement" Remarks in the Senate, 157 Cong Rec S8789 (daily ed Dec 23, 2011).

⁵⁷ See Press Release, President Obama Announces Recess Appointments to Four Key Administration Posts (Jan 4, 2012), online at <http://www.whitehouse.gov/the-press-office/2012/01/04/president-obama-announces-recess-appointments-key-administration-posts>. The same day, President Obama invoked his recess appointments authority to fill the position of Director of the new Consumer Financial Protection Bureau.

⁵⁸ See *Noel Canning v NLRB*, 705 F3d 490 (DC Cir 2103). The Third and Fourth Circuits subsequently agreed that the recess appointments power was limited to inter-session recesses, see *NLRB v New Vista Nursing & Rehabilitation*, 719 F3d 203 (3d Cir 2013), and *NLRB v Enterprise Leasing Co. Southwest, LLC*, 722 F3d 609 (4th Cir 2013). These three decisions conflicted with a 2004 decision from the Eleventh Circuit, *Evans v Stephens*, 387 F3d 1220, 1224-26 (11th Cir 2004) (en banc), a case that involved an intra-session recess appointment of a federal judge. Several circuits also had concluded, unlike the DC Circuit in *Noel Canning*, that the President's recess appointments authority extended to vacancies that pre-existed the recess. See *Evans*, 387 F3d at 1226-27; *United States v Woodley*, 751 F2d 1008, 1012-13 (9th Cir 1985); *United States v Alloco*, 305 F2d 704, 712-13 (2d Cir 1962).

of the Federal Government when the Senate is away,”⁵⁹ a purpose that the majority thought is served by applying the Clause to lengthy intra-session recesses. “The Senate is equally away during both an inter-session and an intra-session recess,” the majority observed, “and its capacity to participate in the appointments process has nothing to do with the words it uses to signal its departure.”⁶⁰

In support of that conclusion, the majority placed significant weight on historical practice. The majority acknowledged that there was not much supportive practice in the period before the Civil War, but it said that this was so because Congress did not take significant intra-session breaks during that era. It pointed to the intra-session appointments made by President Johnson in the 1860s as well as appointments made in 1921 and 1929. In addition, it observed that “[s]ince 1929, and particularly since the end of World War II, Congress has shortened its inter-session breaks as it has taken longer and more frequent intra-session breaks” and that “Presidents have correspondingly made more intra-session recess appointments.”⁶¹

The majority also emphasized the repeated view of presidential legal advisers since Daugherty’s opinion in 1921 that intra-session recess appointments were valid. While the majority acknowledged that individual senators had sometimes taken a contrary view, it noted that “neither the Senate considered as a body nor its committees, despite opportunities to express opposition to the practice of intra-session recess appointments, has done so.”⁶² The majority recognized that “the Senate cannot easily register opposition as a body to every governmental action that many, perhaps most, Senators oppose.”⁶³ But it noted that the Senate had at various times been actively engaged with the issue of recess appointments and that, in those situations, it had tended to adopt a functional approach to the nature of a “recess” without questioning the authority of the President to make intra-session recess appointments.

Justice Scalia responded by emphasizing the lack of intra-session appointments early in history and the scarcity of such appointments before the 1920s. He also emphasized the change of position by presidential legal advisers, from the Knox opinion to the Daugherty opinion. He observed that “[n]o Presidential legal adviser approved th[e] practice [of intra-session recess appointments] before 1921, and subsequent approvals have rested more on precedent than on independent examination.”⁶⁴ Justice Scalia further noted that individual senators at various times have disputed the claim.

Turning from historical practice to the purpose of the Recess Appointments Clause, Justice Scalia disputed the majority’s argument that its purpose favored the

⁵⁹ 134 S Ct at 2561.

⁶⁰ Id.

⁶¹ Id at 2562.

⁶² Id at 2563.

⁶³ Id at 2564.

⁶⁴ Id at 2604.

broad reading of the phrase “the Recess.” In his view, the majority “disregards another self-evident purpose of the Clause: to preserve the Senate’s role in the appointment process.”⁶⁵ He also pointed out that changes in travel and communications mean that it is now much easier than it was historically for the Senate to reassemble in order to consider nominations—a change, he suggested, that renders the recess appointments power an anachronism.⁶⁶

2. “Vacancies that May Happen During the Recess”

The majority concluded that the phrase “vacancies that may happen” in the Recess Appointments Clause also is ambiguous. It acknowledged that the word “happen” in the phrase most naturally seems to refer to vacancies that occur during a recess. But it insisted that this was “not the only possible way to use the word.”⁶⁷ Rather, the majority reasoned, the word can be read more broadly to refer to vacancies that exist during a recess, and such a broader reading would be more consistent with the purpose of the Clause, which the majority thought was “to permit the President to obtain the assistance of subordinate officers when the Senate, due to its recess, cannot confirm them.”⁶⁸

In addition, the majority again emphasized longstanding historical practice, this time with a lineage dating back much closer to the constitutional Founding. From as early as the Madison administration, the majority noted, presidents have used the recess appointments power for vacancies that occurred prior to the recess, and executive branch legal advisors since the Monroe administration have advised presidents that they have such authority. Although conceding that the precise numbers of such appointees are unknown, the majority thought it apparent that a large proportion of recess appointments throughout American history have involved vacancies that predated the recess. As for the Pay Act, the majority argued that it did not clearly reflect a congressional judgment that the president lacked constitutional authority to use the Recess Appointments Clause to fill pre-existing vacancies and that, in any event, Congress’s amendment of the Act in 1940 showed that the Senate had “in effect supported the President’s interpretation of the Clause.”⁶⁹

⁶⁵ Id at 2597.

⁶⁶ See id at 2598. During oral argument, Justice Kagan asked the Solicitor General whether the Recess Appointments Clause was “essentially an historic relic, something whose original purpose has disappeared and has assumed a new purpose that nobody ever intended it to have.” Transcript of Oral Argument, *NLRB v Noel Canning*, No 12-1281, at 19 (Jan 13, 2014), online at http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-1281_3d9g.pdf. The Solicitor General responded by suggesting that, although not its original purpose, the Recess Appointments Clause might operate today as a “safety valve” to address political intransigence in the Senate in the appointments process. See id at 20.

⁶⁷ 134 S Ct at 2567. See also id at 2573 (noting that there was “some linguistic ambiguity”).

⁶⁸ Id at 2568.

⁶⁹ Id at 2573.

Justice Scalia responded by noting that appointments for pre-recess vacancies did not become common until the mid-nineteenth century, and only after much uncertainty and inconsistency of position within the executive branch on the issue. He also contended that the Senate Judiciary Committee's report in 1863, as well as Congress's enactment of the Pay Act, showed that the Senate did not acquiesce in the executive branch's claim about the meaning of the word "happen." As for the amendment of the Pay Act in 1940, Justice Scalia argued that it simply reflected Congress's desire not to punish appointees caught in the dispute between the branches over the scope of the recess appointments power, not an acquiescence in the President's constitutional claim.

The majority and Justice Scalia had differing views about the consequences of reading the Clause to be limited to vacancies occurring during a recess. The majority thought, like Attorney General Wirt, that it was problematic to interpret the Clause in a way that "would prevent the President from making any recess appointment that arose before a recess, no matter who the official, no matter how dire the need, no matter how uncontroversial the appointment, and no matter how late in the session the office fell vacant."⁷⁰ Justice Scalia responded that Congress has allowed "acting" officers to carry out the duties associated with vacant offices, and that the President has the power to call Congress into special session to consider a nomination. As for the majority's view that those mechanisms were "inadequate expedients," Justice Scalia argued that inefficiency associated with separation of powers "is not a bug to be fixed by this Court, but a calculated feature of the constitutional framework."⁷¹

For his part, Justice Scalia expressed the concern that the majority's interpretation of the Clause might allow the President to evade the Constitution's advice and consent requirement for appointments. "On the majority's reading," Justice Scalia said, "the President would have had no need *ever* to seek the Senate's advice and consent for his appointments: Whenever there was a fair prospect of the Senate's rejecting his preferred nominee, the President could have appointed that individual unilaterally during the recess, allowed the appointment to expire at the end of the next session, renewed the appointment the following day, and so on *ad infinitum*."⁷² The majority acknowledged this concern but noted that Congress had tools for responding to abuses, such as staying in session or enacting laws like the Pay Act. It also noted that "the Executive Branch has adhered to the broader interpretation for two centuries, and Senate confirmation has always remained the norm for officers that require it."⁷³

3. Duration of the Senate Break

Turning to whether the recess in this case was long enough, the majority reasoned that, "for purposes of the Recess Appointments Clause, the Senate is in session when it

⁷⁰ Id at 2569-70.

⁷¹ Id at 2610.

⁷² Id at 2607.

⁷³ Id at 2569.

says it is, provided that, under its own rules, it retains the capacity to transact Senate business.”⁷⁴ The majority made clear that this deference to the Senate “cannot be absolute,” and thus that if “the Senate is without the *capacity* to act, under its own rules, it is not in session even if it so declares.”⁷⁵ But the majority reasoned that the Senate did have such capacity here, because under Senate rules it could have conducted (and, in fact, did conduct) business by passing a unanimous consent agreement. As a result, the majority concluded that the appointments in this case were made during what amounted to a three-day recess between the pro forma sessions.⁷⁶

The majority also held that in order to constitute a sufficient recess for purposes of the Recess Appointments Clause, the Senate break must in all cases be more than three days in length and presumptively must be at least ten days in length.⁷⁷ Based on the fact that the Constitution does not require a chamber of Congress to obtain the consent of the other to adjourn unless the break is for more than three days, the majority reasoned that a break of three days or less is *de minimis* and thus insufficient to trigger the President’s recess appointments authority. The majority also noted that it had not found a single instance in which an intra-session recess appointment had been made during a break of less than ten days. “The lack of examples,” the majority inferred, “suggests that the recess-appointment power is not needed in that context.”⁷⁸

Justice Scalia objected that the majority’s three- and ten-day limitations lacked support in the constitutional text. He also complained that the majority had failed to establish any clear standard for when a break of longer than three days will be too short to qualify as a recess, and had failed to make clear whether there will ever be circumstances in which a break of more than ten days will not be long enough. Justice Scalia argued more generally that the majority had engaged in “judicial fabrication of vague, unadministrable limits on the recess-appointment power . . . that overstep the judicial role.”⁷⁹

II. Historical Gloss and Constitutional Theory

Noel Canning revealed methodological agreements and disagreements between the majority and Justice Scalia. This Part begins by briefly noting them, and then

⁷⁴ Id at 2574.

⁷⁵ Id at 2575.

⁷⁶ During the oral argument, Justice Kagan suggested how a reliance on historical practice would lead to this result, explaining to the Solicitor General that “if you are going to rely on history and on the development of an equilibrium . . . then it seems to me that you also have to look to history and the development of an equilibrium with respect to Congress’s definition of its own power to determine whether it is in recess or not.” Transcript of Oral Argument at 25-26 (cited in note 66).

⁷⁷ The majority deemed the presumption rebuttable in emergencies. See 134 S Ct at 2567.

⁷⁸ Id at 2566. The majority acknowledged that there had been a few instances of recess appointments made during *inter-session* recesses of fewer than ten days, but it said that it regarded “these few scattered examples as anomalies.” Id at 2567.

⁷⁹ Id at 2595.

describes the “historical gloss” approach to discerning the separation of powers. Finally, it identifies some ways in which the historical gloss approach overlaps with various non-originalist theories of constitutional interpretation, such as Burkeanism and common law constitutionalism, as well as with variants of originalism that emphasize the distinction between interpretation and construction.

A. Methodological Disputes in *Noel Canning*

The *Noel Canning* majority maintained that the Court should give “significant weight” to historical practice when resolving issues concerning “the allocation of power between two elected branches of the government.”⁸⁰ Justice Scalia did not deny that historical practice might be relevant to some separation of powers issues, but he argued that this is true only when the constitutional text is ambiguous, and the Recess Appointments Clause, he said, was clear. The majority accepted Justice Scalia’s premise but insisted that the text was ambiguous.⁸¹

The majority and Justice Scalia also disagreed about the conditions under which historical practice should be considered to help resolve the meaning of ambiguous text. Justice Scalia would consult historical practice only when it has been “open, widespread, and unchallenged since the early days of the Republic.”⁸² The majority, by contrast, read the precedents as “show[ing] that the Court has treated practice as an important interpretive factor even when the nature or longevity of that practice is subject to dispute, and even when that practice began after the founding era.”⁸³ The majority emphasized that, regardless of how one reads the nineteenth century practice, the modern practice supported its conclusions.⁸⁴

Justice Scalia criticized the majority’s approach to historical practice on several related grounds. First, he suggested that it involved an abdication of judicial responsibility. In cases that are justiciable, Justice Scalia wrote, the judiciary has a duty to determine the meaning of the Constitution’s structural provisions, so it should not defer to the resolutions of those questions by other branches.⁸⁵ Second, he contended that the majority’s approach amounted to an “adverse-possession theory of executive power,” whereby the President could gain constitutional authority simply by acting in a certain way without sufficient congressional opposition.⁸⁶ Such an approach, Justice Scalia

⁸⁰ Id at 2559.

⁸¹ See id at 2561, 2568, 2577.

⁸² Id at 2594.

⁸³ Id at 2560.

⁸⁴ See id at 2564 (“[T]here-quarters of a century of settled practice [of intra-session recess appointments] is long enough to entitle a practice to ‘great weight in a proper interpretation’ of the constitutional provision.”), quoting *The Pocket Veto Case*, 279 US at 689; id at 2573 (“The Senate as a body has not contested this practice [of filling pre-existing vacancies] for nearly three-quarters of a century, perhaps longer.”).

⁸⁵ See id at 2593.

⁸⁶ Id at 2617; see also id at 2592.

contended, “will systematically favor the expansion of executive power at the expense of Congress.”⁸⁷ Finally, Justice Scalia argued that even if the Senate had acquiesced in the historical practice, it lacks the constitutional authority to give away its institutional power. Structural constitutional provisions, he argued, exist in large part to protect individual liberty. As a result, Justice Scalia said, “the Senate could not give away [the limitations in the Recess Appointments Clause] even if it wanted to.”⁸⁸

In support of those arguments, Justice Scalia emphasized the Court’s 1983 decision in *INS v. Chadha*.⁸⁹ In *Chadha*, the Court held that a “legislative veto” provision violated the bicameralism and presentment provisions of Article I, Section 7, of the Constitution even though Congress had enacted hundreds of similar provisions since the 1930s. According to the Court in *Chadha*, “the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution.”⁹⁰ Moreover, in rejecting the application of the political question doctrine in that case, the Court observed that “[n]o policy underlying the political question doctrine suggests that Congress or the Executive, or both acting in concert and in compliance with Art. I, can decide the constitutionality of a statute; that is a decision for the courts.”⁹¹ Relatedly, the Court emphasized that the mere fact of an agreement by Congress and the President to enact legislative veto provisions did not immunize them from judicial review.⁹²

The majority in *Noel Canning* responded to those points primarily by suggesting that, at this late date, the judiciary should accord deference to longstanding arrangements worked out by the coordinate branches of government: “We have not previously interpreted the [Recess Appointments] Clause, and when doing so for the first time in more than 200 years, we must hesitate to upset the compromises and working arrangements that the elected branches of Government themselves have reached.”⁹³ The majority also expressed concern about disturbing expectation interests surrounding the practice. With respect to the filling of pre-existing vacancies, for example, the majority said that it was “reluctant to upset this traditional practice where doing so would seriously shrink the authority that Presidents have believed existed and have exercised for so long.”⁹⁴

⁸⁷ Id at 2605.

⁸⁸ Id.; see also id at 2594 (“[T]he political branches cannot by agreement alter the constitutional structure.”).

⁸⁹ 462 US 919 (1983).

⁹⁰ Id at 944.

⁹¹ Id at 941-42. For similar reasoning about the political question doctrine, see *Zivotofsky v Clinton*, 132 S Ct 1421, 1427-28 (2012).

⁹² 462 US at 942 n 13. The Court also observed, however, that “11 Presidents, from Mr. Wilson through Mr. Reagan, who have been presented with this issue have gone on record at some point to challenge congressional vetoes as unconstitutional.” Id.

⁹³ 134 S Ct at 2560.

⁹⁴ Id at 2573.

Those methodological disagreements between the majority and Justice Scalia in *Noel Canning* invite an examination of how reliance on historic governmental practices relates to various non-originalist and originalist approaches to constitutional interpretation. We begin with a description of the “historical gloss” approach.

B. The Historical Gloss Approach

Invocations of historic governmental practices are common in debates and decisions concerning the constitutional separation of powers.⁹⁵ Giving weight to such practices is sometimes referred to as the “historical gloss” approach to constitutional interpretation, following Justice Frankfurter’s oft-quoted statement in the *Youngstown* steel seizure decision that “a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on ‘executive Power’ vested in the President by § 1 of Art. II.”⁹⁶ There are differing accounts of when such gloss should be credited and some of them do not precisely track Justice Frankfurter’s articulation, especially his reference to practice “never before questioned.”

There are additional issues that must be confronted in determining the contours of the historical gloss approach. Those issues include what kind of history counts, how unequivocal the history must be in order to count, what the relationship of that history is to the constitutional text, and whether the gloss approach is limited to separation of powers questions or instead applies more broadly. One of us has previously explored some of those issues,⁹⁷ and we will offer additional thoughts about how best to conceive of the historical gloss approach in responding to Justice Scalia’s “adverse possession” complaint in Part V. For now, it suffices to note the basic idea of historical gloss, which is that longstanding practices by one political branch that are acquiesced in by the other political branch should be given weight in discerning whether governmental conduct is consistent with the separation of powers.⁹⁸

The Supreme Court has long invoked historical gloss in construing the constitutional authority of both Congress and the President. An early example is

⁹⁵ See Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 Harv L Rev 411, 417-24 (2012).

⁹⁶ *Youngstown Sheet and Tube Co. v Sawyer*, 343 US 579, 610-11 (1952) (Frankfurter, J. concurring). See also *id.* at 610 (“It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them.”).

⁹⁷ See Bradley & Morrison, *Historical Gloss* (cited in note 95).

⁹⁸ Although not the focus of this Article, historical gloss is also likely relevant to discerning the judicial power. See, for example, Charles G. Geyh, *Judicial Independence, Judicial Accountability, and the Role of Constitutional Norms in Congressional Regulation of the Courts*, 78 Ind LJ 153, 157 (2003) (“To understand judicial independence and its limits, then, we must look beyond ‘doctrinal’ independence as divined by courts, and examine the historical development of ‘customary’ independence as it has emerged in Congress.”).

McCulloch v. Maryland.⁹⁹ In affirming Congress’s authority to establish a national bank, Chief Justice Marshall invoked historical practice near the outset of his opinion:

[A] doubtful question, one on which human reason may pause and the human judgment be suspended, in the decision of which the great principles of liberty are not concerned, but the respective powers of those who are equally the representatives of the people, are to be adjusted; if not put at rest by the practice of the Government, ought to receive a considerable impression from that practice.¹⁰⁰

Marshall also explained that, in interpreting “a Constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs,”¹⁰¹ great weight should be given to “[a]n exposition of the Constitution, deliberately established by legislative acts, on the faith of which an immense property has been advanced.”¹⁰²

Given when *McCulloch* was decided, the historical practice to which Marshall referred necessarily dated from the early post-Founding period. When the Court has had more history with which to work, it has not always insisted on such lineage. In *The Pocket Veto Case*,¹⁰³ for example, the Court considered whether a law presented by Congress to the President less than ten days before an inter-session recess becomes a law if it is neither signed nor returned by the President. Article I, Section 7, of the Constitution provides that “[i]f any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.”¹⁰⁴ In concluding that an inter-session recess qualifies as an adjournment and so prevents the return of a bill to Congress for purposes of this provision, the Court emphasized not only the constitutional text and structure, but also the historical practice concerning how presidents and Congresses had treated bills in that situation. The Court observed that “[l]ong settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions of this character.”¹⁰⁵ The Court also quoted from a state court decision for the proposition that “a practice of at least twenty years’ duration ‘on the part of the executive department, acquiesced in by the legislative department, while not absolutely binding on the judicial department, is entitled to great regard in determining the true construction of

⁹⁹ 17 US (Wheat) 316 (1819).

¹⁰⁰ *Id.* at 401.

¹⁰¹ *Id.* at 415.

¹⁰² *Id.* at 401.

¹⁰³ 279 US 655 (1929).

¹⁰⁴ US Const art I, § 7, cl 2.

¹⁰⁵ 279 US at 689.

a constitutional provision the phraseology of which is in any respect of doubtful meaning.”¹⁰⁶

Practice-based reasoning has been especially common in debates and decisions concerning foreign relations.¹⁰⁷ In *United States v Curtiss-Wright Export Corporation*, for example, the Supreme Court upheld a congressional delegation of authority to the President to criminalize arms sales to countries involved in a conflict in Latin America, based in part on the fact that Congress already had established a pattern of delegating broad authority to the President in the area of foreign affairs.¹⁰⁸ The Court explained that “[a] legislative practice such as we have here, evidenced not only by occasional instances, but marked by the movement of a steady stream for a century and a half of time, goes a long way in the direction of proving the presence of unassailable ground for the constitutionality of the practice, to be found in the origin and history of the power involved, or in its nature, or in both combined.”¹⁰⁹

Similarly, in *Dames & Moore v Regan*, the Court invoked historical practice in upholding a presidential suspension of legal claims as part of the resolution of the Iranian hostage crisis. The Court reasoned that, although Congress had not “directly authorize[d]” a presidential suspension of claims in that situation, the presidential action was supported by “inferences to be drawn from the character of the legislation Congress has enacted in the area,” as well as “the history of [congressional] acquiescence in executive claims settlement.”¹¹⁰ The Court explained that “[p]ast practice does not, by itself, create power, but ‘long-continued practice, known to and acquiesced in by Congress, would raise a presumption that the [action] had been [taken] in pursuance of its consent’”¹¹¹ Finally, the Court made clear that even if the practice of executive claims settlement prior to 1952 should be disregarded because it occurred during a time when foreign sovereigns could not be sued in U.S. courts, “congressional acquiescence in settlement agreements since that time supports the President’s power to act here.”¹¹²

Dames & Moore illustrates the connection between the historical gloss approach and Justice Jackson’s famous tripartite categorization of presidential power in *Youngstown*. Under that categorization, the President’s power is at its highest when supported by express or implied congressional authorization, and is at its lowest when expressly or implicitly opposed by Congress. When Congress has neither supported nor

¹⁰⁶ Id at 689-90, quoting *State v South Norwalk*, 77 Conn 257, 264, 58 A 759, 761 (1904). The state case concerned the interpretation of a Connecticut constitutional provision providing that a bill would become law if the governor did not return it to the state legislature within three days of being presented with it.

¹⁰⁷ Bradley & Morrison, 126 Harv L Rev at 420-21 (cited in note 95).

¹⁰⁸ See 299 US 304 (1936).

¹⁰⁹ Id at 327-28.

¹¹⁰ 453 US 654, 678, 686 (1981).

¹¹¹ Id, quoting *United States v Midwest Oil Co*, 236 US 459, 474 (1915).

¹¹² Id at 684.

opposed presidential action, the President’s power is in an intermediate “zone of twilight.”¹¹³ That intermediate zone, Justice Jackson explained, is one in which the President and Congress “may have concurrent authority, or in which its distribution is uncertain.”¹¹⁴ Historical practice is especially pertinent in cases arising in that zone (although, as *Dames & Moore* illustrates, the pertinence of historical practice is not limited to the intermediate zone).

The Court, however, does not inevitably credit historic governmental practices. Probably the most famous example in which it did not do so is *Chadha*. In *Chadha*, part of the Court’s disinclination to credit practice appears to have stemmed from its conviction that the text and structure of the Constitution were clear. The Court stated, for example, that “[e]xplicit and unambiguous provisions of the Constitution prescribe and define the respective functions of the Congress and of the Executive in the legislative process.”¹¹⁵ The Court also seemed to view claims about modern practice as methodologically inconsistent with its self-described originalist approach to interpretation in that case. It wrote, for instance, that it was applying the “choices we discern as having been made in the Constitutional Convention,”¹¹⁶ rather than by “Congress or the Executive, or both acting in concert.”¹¹⁷

The significance of gloss is not limited to judicial reasoning. In particular, this approach to constitutional interpretation is a staple of legal reasoning in the executive branch. To take one relatively recent example, the Justice Department’s Office of Legal Counsel (OLC) issued an opinion in 2011 concluding, based largely on historical practice, that President Obama had the constitutional authority to direct U.S. military forces to take part in bombing operations in Libya without first seeking congressional authorization.¹¹⁸ Quoting from an earlier legal opinion concerning a military intervention in Haiti, OLC asserted that “the pattern of executive conduct, made under claim of right, extended over many decades and engaged in by Presidents of both parties, evidences the existence of broad constitutional power.”¹¹⁹

C. Relationship to Other Interpretive Methodologies

There is overlap between the historical gloss approach and a variety of non-originalist approaches to constitutional interpretation. Reliance on historical practice fits

¹¹³ See *Youngstown*, 343 US at 635-38 (Jackson, J., concurring).

¹¹⁴ *Id.* at 637.

¹¹⁵ 462 US at 945.

¹¹⁶ *Id.* at 959.

¹¹⁷ *Id.* at 942.

¹¹⁸ See Memorandum Opinion from Caroline D. Krass, Principal Deputy Assistant Att’y Gen, Office of Legal Counsel, to the Att’y Gen., *Authority to Use Military Force in Libya* (Apr. 1, 2011), online at <http://www.justice.gov/sites/default/files/olc/opinions/2011/04/31/authority-military-use-in-libya.pdf>.

¹¹⁹ *Id.* at 7.

well with “Burkean” approaches,¹²⁰ which emphasize longstanding traditions and understandings, although most invocations of the gloss approach focus on the separation of powers rather than on other aspects of constitutional structure¹²¹ or on individual rights.¹²² Reliance on historical practice also fits well with non-judge-centered versions of “common law constitutionalism,” which involves an incremental interpretation of the Constitution in light of both judicial precedent and tradition.¹²³ Like Burkeanism, this approach is deferential to the “accumulated wisdom of many generations” and to judgments that “have been tested over time, in a variety of circumstances, and have been found to be at least good enough.”¹²⁴ Both Burkeanism and common law constitutionalism, like the historical gloss approach, allow for the possibility that constitutional law can adapt to changing circumstances.¹²⁵ A consideration of historical gloss is also consistent with more general “pluralist” theories of interpretation, which are open to a variety of kinds of constitutional authority.¹²⁶

In addition, historical gloss arguments partially overlap with approaches to constitutional law that emphasize decisive moments in history, such as Bruce Ackerman’s account of constitutional “moments” and Eric Posner and Adrian Vermeule’s account of “constitutional showdowns.”¹²⁷ Those accounts of constitutional law are similar to practice-based arguments in that both place special weight on the actions of the political branches. Such approaches, however, tend to focus on critical turning points, whereas invocations of the historical gloss method tend to emphasize longer-term accretions of practice.

¹²⁰ For discussions of Burkean approaches to constitutional interpretation, see, for example, Cass R. Sunstein, *Burkean Minimalism*, 105 Mich L Rev 353 (2006), and Thomas W. Merrill, *Bork v. Burke*, 19 Harv JL & Pub Pol’y 509 (1996).

¹²¹ Notwithstanding the above quotation from *McCulloch*, there may be concerns with relying on historical practice to determine the expanse and limits of Congress’s enumerated powers, especially when reliance on state practice or on the *lack* of federal practice would thwart the ability of Congress to solve multi-state collective action problems that previously did not exist or previously went unaddressed for any number of reasons. See Neil S. Siegel, *Distinguishing the “Truly National” from the “Truly Local”*: *Customary Allocation, Commercial Activity, and Collective Action*, 62 Duke LJ 797 (2012).

¹²² Cf Sunstein, 105 Mich L Rev at 400 (cited in note 120) (“Under some constitutional provisions, above all the Equal Protection Clause, the Burkean [tradition-based] approach is hard or perhaps impossible to square with entrenched understandings in American constitutional law . . .”).

¹²³ See David A. Strauss, *Common Law Constitutional Interpretation*, 63 U Chi L Rev 877 (1996).

¹²⁴ *Id* at 892.

¹²⁵ See *id* at 905 (arguing that common law constitutionalism helps explain why “the most important changes to the Constitution—many of them, at least— . . . have come about either through changes in judicial decisions, or through deeper changes in politics or in society”); Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 NC L Rev 619, 664 (1994) (explaining that, under a Burkean approach, “institutions become effective in meeting the needs of society through a continuing process of adaptation that may or may not be consistent with the original intentions of the founders”).

¹²⁶ See, for example, Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 Harv L Rev 1189 (1987).

¹²⁷ See Bruce Ackerman, 1 *We the People: Foundations* 22 (Belknap, 1991); Eric A. Posner & Adrian Vermeule, *Constitutional Showdowns*, 156 U Pa L Rev 991 (2008).

Similarly, the gloss approach is related to, but distinct from, the claim that some discrete non-judicial acts can come to be viewed as “precedent.” Michael Gerhardt has developed the idea of non-judicial precedent,¹²⁸ and Keith Whittington’s emphasis on “constitutional construction” (discussed below) includes discussion of various non-judicial events that are asserted to qualify as precedent.¹²⁹ The proposition that discrete non-judicial actions can have precedential effect is not the same as gloss’s focus on longstanding practices, but the ideas are complementary in that longstanding practices are likely to have their roots in particular precedents. As is the case with gloss, moreover, there is nothing inherent in the idea of non-judicial precedent that would limit it to a particular period of U.S. history, or that would preclude it from being overtaken by later developments.¹³⁰

Historical gloss also can be relevant to “functional” approaches to the separation of powers. Functional approaches evaluate not whether governmental arrangements are consistent with certain categorical distinctions between different kinds of government power, but rather whether those arrangements are beneficial and consistent with the values underlying the system of separation of powers and checks and balances.¹³¹ Longstanding historical practice may show that an arrangement is working well, or at least that it is not unduly problematic. As *Chadha* illustrates, gloss might be harder to reconcile with “formal” approaches, which attempt to discern whether arrangements are consistent with the Constitution’s separation of authority into executive, legislative, and judicial categories. That said, historical practice might shed light on what falls within the different categories—or on when to allow exceptions to the categorization. For example, the Supreme Court’s formalist opinions concerning the permissibility of non-Article III tribunals allow for exceptions based on historical practice, and even self-identified originalist Justices like Justice Scalia have accepted those exceptions.¹³²

As *Chadha* also illustrates, it is more difficult to reconcile the historical gloss approach with many originalist theories of interpretation, particularly (but not

¹²⁸ See Michael J. Gerhardt, *The Power of Precedent* ch 4 (Oxford, 2008).

¹²⁹ See Keith E. Whittington, *Constitutional Construction: Divided Powers and Constitutional Meaning* (Harvard, 1999).

¹³⁰ Some non-judicial precedents also may help to establish “constitutional conventions,” which involve norms about proper conduct by governmental actors but that do not necessarily entail understandings of what is constitutionally required or permissible. For discussions of the idea of constitutional conventions, see Keith E. Whittington, *The Status of Unwritten Constitutional Conventions in the United States*, 2013 U Ill L Rev 1847, and Adrian Vermeule, *Conventions of Agency Independence*, 113 Colum L Rev 1163, 1181-94 (2013).

¹³¹ For a discussion of functional versus formal approaches to the separation of powers, see M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U Pa L Rev 603 (2001).

¹³² See *Northern Pipeline Construction Co. v Marathon Pipeline Co.*, 458 US 50 (1982) (plurality opinion); see also *Stern v Marshall*, 131 S Ct 2594, 2621 (2011) (Scalia, J, concurring) (“[A]n Article III judge is required in *all* federal adjudications, *unless* there is a firmly established historical practice to the contrary.” (second emphasis added)).

exclusively) those that were developed in the 1970s and 1980s.¹³³ To be sure, some originalists are likely to credit early post-Founding practice as evidence of the Constitution’s original meaning, based on the idea that the governmental actors in that period had a particularly good sense of that meaning.¹³⁴ But such a rationale would not justify looking to modern governmental practice, as, for example, the majority did in *Noel Canning*.¹³⁵

There are, however, certain variants of originalism that are potentially compatible with the consideration of historical practice for reasons other than as evidence of original meaning. In particular, in recent years a number of theorists associated with the “new originalism” have distinguished between “constitutional interpretation” and “constitutional construction,”¹³⁶ a distinction we discuss in greater detail in Part III. It is not clear that those theorists all have precisely the same concepts in mind when they make that distinction. In general, however, they aim to distinguish determinations that are closely linked to the constitutional text (which they call “interpretation”) from those that supplement the text (which they call “construction”).

Adding the idea of “construction” to the originalist’s tool kit closes the gap between originalist and non-originalist approaches, which may be why certain originalists resist it.¹³⁷ Given the existence of “the construction zone,” the new originalism seems receptive to at least some historical gloss on the separation of powers. While new originalists believe that the original semantic meaning of the constitutional text must be applied when that meaning is discernible regardless of historical practice, they also allow other legal materials to be brought to bear—presumably, including historical practice—when “interpretation” does not yield an answer. Nothing about the distinction between interpretation and construction would appear to commit new originalists to rejecting longstanding historical practices as building materials for construction, and theorists like

¹³³ For a discussion of first- and second-generation originalism, see Keith E. Whittington, *Originalism: A Critical Introduction*, 82 *Fordham L Rev* 375 (2013).

¹³⁴ See Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 *UCLA L Rev* 1487, 1498, 1537 (2005) (“Early interpretations evidence the original meaning of the Constitution because it is thought that early interpreters were likely to understand the meaning of the constitutional language and the context in which it was enacted.”).

¹³⁵ See Jack M. Balkin, *The New Originalism and the Use of History*, 82 *Fordham L Rev* 641, 657 (2013) (“The practices of the Washington Administration immediately after adoption of the Constitution are generally thought relevant to understanding the original meaning of Article II. But the practices of the Roosevelt, Truman, and Eisenhower Administrations—which did far more to shape the actual presidency we have and the actual powers that contemporary presidents enjoy—are not relevant to the originalist model of authority.”).

¹³⁶ See Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 *Geo LJ* 713, 714 (2011); Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 *Fordham L Rev* 453, 467-69 (2013).

¹³⁷ See, for example, John O. McGinnis & Michael B. Rappaport, *Originalism and the Good Constitution* ch 8 (Harvard, 2013). See also Peter J. Smith, *How Different Are Originalism and Non-Originalism?*, 62 *Hastings LJ* 707, 710 (2011) (“Given modern originalism’s origins as a response to the perceived excesses of non-originalism, it is not surprising that many originalists have resisted refinements to the theory that would tend to collapse the distinction between originalism and non-originalism.”).

Whittington are expressly receptive to that possibility. Likewise, Balkin’s invocation of the full array of modalities of constitutional argument suggests that historical gloss is a legitimate part of constitutional construction,¹³⁸ and his robust construction zone seems especially compatible with regular consideration of historical practice.¹³⁹ Even versions of originalism that posit a smaller construction zone do not seem incompatible with the historical gloss approach so long as one is operating within the construction zone because original meaning has run out.

III. Madisonian Liquidation

A variant of originalism, known as “liquidation,” would allow initial post-Founding practice to resolve ambiguities in the Constitution’s original meaning and thereby “fix” the meaning against subsequent change. This idea is frequently ascribed to James Madison, based on statements he made in *The Federalist Papers* and in later writings. Madison never presented a detailed explanation of the idea, and it has received only limited attention in the academic literature. As a result, it is not entirely clear whether and to what extent it differs from the historical gloss approach. Indeed, the majority in *Noel Canning* seemed to treat liquidation and gloss as the same phenomenon.¹⁴⁰

Among the uncertainties with the liquidation concept are whether the settlement of constitutional meaning may occur only through early post-Founding practice, or whether it also may occur through later practice long after the Founding—and, if the latter, how likely it is that a settlement long after the Founding could take place. It is also unclear whether, under the liquidation theory, an initial settlement through liquidation may be undone by a subsequent settlement through a new liquidation. How one answers those questions will go a long way towards determining how much difference in practice there is between the liquidation approach and the historical gloss approach.

Judging from the limited extent to which the liquidation concept has been explored in the literature—most notably by Caleb Nelson—it appears to be narrower in various ways than the historical gloss approach. Our best sense, which informs the following analysis, is that the liquidation concept turns on initial practice, which typically although not necessarily will be early practice, and that the liquidation may not be undone through subsequent liquidation. These limitations, moreover, are what make liquidation potentially compatible with some versions of originalism. Not surprisingly, therefore, it is Justice Scalia’s opinion in *Noel Canning*, not the majority’s, that seems

¹³⁸ For a discussion of six “modalities” of constitutional argumentation that are common in U.S. constitutional decisions and debates, see generally Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* ch 6 (Oxford, 1982), and Philip Bobbitt, *Constitutional Interpretation* (Blackwell, 1993).

¹³⁹ See, for example, Neil S. Siegel, *Jack Balkin’s Rich Historicism and Diet Originalism: Health Benefits and Risks for the Constitutional System*, 111 Mich L Rev 931, 952 (2013) (emphasizing the thinness of Balkin’s version of originalism).

¹⁴⁰ See 134 S. Ct. at 2580 (citing a variety of decisions, including some that have endorsed gloss, for the proposition that “our cases have continually confirmed Madison’s view”).

receptive to an understanding of liquidation that would be narrower than, and distinct from, gloss. In this Part, we question whether this narrower conception is properly attributed to Madison, and we argue that it is in any event normatively unattractive as an alternative to gloss.

A. The “Liquidation” Theory

Instead of looking to early practices as evidence of original meaning, and instead of embracing the idea of constitutional construction, some originalist scholars attribute to the Founders the recognition that the constitutional text did not settle certain questions of constitutional meaning and that the answers to those questions would need to be worked out, or “liquidated,” through decisions and practices.¹⁴¹ Once liquidated, the argument goes, the meaning of the Constitution on those questions would become “fixed” and so not subject to change. This idea of liquidation through initial practice is most frequently associated with a statement made by James Madison in *Federalist No. 37*. “All new laws,” he wrote in that essay, “though penned with the greatest technical skill and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications.”¹⁴² As this passage makes clear, Madison was not tying liquidation specifically to constitutional interpretation; he was simply observing that it was something that one should expect with all new laws (including statutory law and the common law). Hamilton also made references to “liquidation” in *The Federalist*, similarly without suggesting that it was something specific to the Constitution.¹⁴³

¹⁴¹ See, for example, Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U Chi L Rev 519, 525-53 (2003), and Philip A. Hamburger, *The Constitution’s Accommodation of Social Change*, 88 Mich L Rev 239, 309 (1989) (suggesting that Madison “expected vagueness in the Constitution to be resolved and made certain rather than that it would be an opportunity for flexibility and judicial adaptation of the Constitution to changing exigencies”). Without specifically endorsing the liquidation thesis, Akhil Amar has argued that a number of the institutional practices of the Washington Administration have had lasting precedential effect on understandings of presidential authority. See Akhil Reed Amar, *America’s Unwritten Constitution* ch 8 (Basic, 2012). Our colleague Stephen Sachs reads Amar’s argument as embracing the idea of liquidation through early practice. See Stephen E. Sachs, *The “Unwritten Constitution” and Unwritten Law*, 2013 U Ill L Rev 1797, 1806-08. In the next chapter of his book, however, Amar goes on to discuss how institutional practices of Congress, the Supreme Court, and administrative agencies, including practices long after the Founding, “gloss and clarify the text, inducing interpreters to read the otherwise indeterminate text in a highly determinate way.” Amar at 335.

¹⁴² *The Federalist No. 37*, at 229 (James Madison), in *The Federalist Papers* (cited in note 14). Madison also referred to the liquidation idea in later writings, albeit decades after the Founding. See, for example, Letter to Spencer Roane (Sept. 2, 1819), in 8 *The Writings of James Madison* 450 (G. Hunt ed, 1908).

¹⁴³ Alexander Hamilton observed in *Federalist No. 78* that, when two statutes conflict, “it is the province of the courts to liquidate and fix their meaning and operation.” *The Federalist No. 78*, at 468 (Alexander Hamilton), in *The Federalist Papers* (cited in note 14); see also *Federalist No. 22*, at 150 (Hamilton), in *The Federalist Papers* (cited in note 14) (“Laws are a dead letter without courts to expound and define their true meaning and operation.”); *Federalist No. 82*, at 491 (Hamilton), in *The Federalist Papers* (cited in note 14) (“’Tis time only that can mature and perfect so compound a system, can liquidate the meaning of all the parts, and can adjust them to each other in a harmonious and consistent WHOLE.”).

Caleb Nelson has developed the most detailed account of the liquidation concept. Nelson argues that, when Founders such as Madison referred to the possibility that post-Founding practice would “fix” constitutional meaning, they were using that term in a manner similar to those who, like the famous satirist Jonathan Swift, had advocated “fixing” the English language so that its meaning would not change over time.¹⁴⁴ The possibility of preventing change in the meaning of language was controversial, and Nelson notes that many Americans of the Founding generation probably assumed that change in language was inevitable. But Nelson observes that “[w]hatever their position on this issue, though, Americans certainly were familiar with the idea of ‘fixing’ the language, and they associated this concept with permanence and immutability.”¹⁴⁵ Madison’s references to “fixing” the meaning of the Constitution, Nelson contends, must be understood in that context: “[a]lthough Madison conceded that the words used in the Constitution might well fall out of favor or acquire new shades of meaning in later usage, he was suggesting that their meaning *in the Constitution* would not change; once that meaning was ‘fixed,’ it should endure.”¹⁴⁶

Under that account, the Founders were delegating to governmental actors, and to the courts, the task of resolving ambiguities in the original meaning of the Constitution. As Nelson explains, regardless of whether the Founders viewed the liquidation process as part of the original meaning of the Constitution (thus binding originalists today) or something associated with the background “general” law in existence at the time (thus not binding originalists today), the basic idea of liquidation remained the same: “reasonable members of the founding generation . . . might conceivably have read each indeterminate provision in the Constitution not only to define a range of permissible interpretations, but also to delegate power to the provision’s initial interpreters to make an authoritative selection within that range.”¹⁴⁷

It is easy to see why the liquidation account would be attractive to some originalists. For one thing, it tells interpreters where to look for evidence of constitutional meaning when ambiguities in the text render it impossible to discern the original meaning—typically, in early post-Founding deliberations or decisions. For another thing, by “fixing” the meaning, the account avoids the possibility that constitutional meaning might change over time. Upon close examination, however, it is not clear that either of the two elements of the approach—looking only to initial practice and decisions, and disallowing a subsequent interpretation that contradicts the one reflected in initial practice—follows from Madison’s statements. In any event, a showing that Madison or other Founders had this view would not establish that it should be followed (as Nelson is careful to acknowledge), and it is normatively problematic along a number of dimensions.

¹⁴⁴ See Nelson, 70 U Chi L Rev at 530-35 (cited in note 141).

¹⁴⁵ Id at 534-35.

¹⁴⁶ Id at 535 (emphasis added).

¹⁴⁷ Id at 551.

B. Madison's Views

To understand what Madison was getting at in *Federalist No. 37*, it is necessary to put Madison's reference to liquidation in context. This *Federalist Paper* responds to criticisms about the proposed Constitution by emphasizing the extraordinary difficulties that the Framers had confronted in attempting to draft a new framework for government. Madison noted that federalism was a novel constitutional arrangement, so that the Framers had scant previous experience from which to draw.¹⁴⁸ He added that the Convention faced great difficulties even in the area of separation of powers, where previous experience was more substantial.¹⁴⁹ "Among the difficulties encountered by the convention," Madison explained, "a very important one must have lain in combining the requisite stability and energy in government, with the inviolable attention due to liberty and to the republican form."¹⁵⁰ In emphasizing the challenging nature of those efforts, Madison pointed to the long experience of Great Britain in attempting to work out differences in categories of law and jurisdiction, a process that he noted was still ongoing.¹⁵¹ He then made the statement about liquidation.¹⁵²

Liquidation was required, Madison wrote, for three reasons. The first was "the obscurity arising from the complexity of objects" needing to be distinguished, including the distinction between federal and state power, and the lines separating the executive, legislative, and judicial authorities. The second reason concerned "the imperfections of the human faculties," which make it even more difficult to perceive those objects. The third reason involved the limits of language, which Madison characterized as "inadequateness of the vehicle of ideas."¹⁵³ "Hence, it must happen," Madison wrote, "that however accurately objects may be discriminated in themselves, and however accurately the discrimination may be considered, the definition of them may be rendered inaccurate by the inaccuracy of the terms in which it is delivered."¹⁵⁴ As Madison must have known, none of those justifications would ever disappear, even after what he referred to as "particular discussions and adjudications" took place in the early years of life under the new Constitution—or even many decades hence.¹⁵⁵

It also bears mention that Madison referred both to practice and to judicial decisions as involved in liquidation.¹⁵⁶ It seems unlikely, however, that he was referring

¹⁴⁸ The *Federalist* No. 37, at 226, in *The Federalist* (cited in note 14).

¹⁴⁹ *Id.* at 228.

¹⁵⁰ *Id.* at 226.

¹⁵¹ *Id.* at 228.

¹⁵² *Id.* at 228-29.

¹⁵³ *Id.* at 229.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ See Peter J. Smith, *The Marshall Court and the Originalist's Dilemma*, 90 *Minn L Rev* 612, 634 (2006) ("That Madison believed that congressional deliberation or popular action could fix constitutional meaning does not mean that he rejected the notion that the courts could fix it in appropriate

only to initial judicial decisions, because it would not have been reasonable to expect all—or even most—issues of textual ambiguity to be resolved by the courts in the immediate aftermath of the Constitution’s ratification, or even over the Constitution’s first century. Given the common law tradition that Madison referenced in *Federalist No. 37*, it is also unlikely that Madison thought that a judicial decision would fix constitutional meaning in a way that would disallow subsequent reconsideration of the decision. There are differing accounts of how strongly the Founders conceived of stare decisis, but none of those accounts suggests that they thought judicial decisions never could be revisited absent an Article V amendment.¹⁵⁷

For those reasons, Madison need not be read in *Federalist No. 37* as suggesting either that initial practice would freeze the meaning of the Constitution going forward or that only such practice was relevant to constitutional interpretation. Instead, as historian Jack Rakove notes, Madison can reasonably be understood as referring broadly to “the ongoing process of resolving ‘obscure and equivocal’ *ambiguities* through ‘particular discussions and adjudications’—in a word, interpretation.”¹⁵⁸ Such a process of interpretation logically would include frequent consideration of practice long after the Founding. As Rakove points out, “only knowledge created by intervening developments could supply the ‘want of antecedent experience’ felt by the framers.”¹⁵⁹

To be sure, Madison did tell his colleagues in the first Congress that their decision regarding the power of the President to remove executive branch officers unilaterally “will become the permanent exposition of the Constitution.”¹⁶⁰ That statement, however,

cases, as well. Indeed, his discussion in *The Federalist No. 37* and in other sources suggests that he saw both as viable means of liquidating the meaning of constitutional ambiguities.”). The same can be said of Hamilton in *Federalist No. 78*, which specifically references the courts.

¹⁵⁷ See, for example, Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 Vand L Rev 647 (1999); John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 Nw U L Rev 803, 809-23 (2009); Lee J. Strang, *An Originalist Theory of Precedent: Originalism, Nonoriginalist Precedent, and the Common Good*, 36 NM L Rev 419 (2006); see also Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 Colum L Rev 723, 757 (1988) (“In the American common law, stare decisis states a conditional obligation: precedent binds absent a showing of substantial countervailing considerations.”).

¹⁵⁸ Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 159 (Vintage, 1996) (emphasis in original). See also H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 Harv L Rev 885, 910 (1985) (“Madison’s argument, which Hamilton had anticipated in *The Federalist No. 22*, was of course a restatement in somewhat abstract terms, of the old common law assumption, shared by the Philadelphia framers, that the ‘intent’ of any legal document is the product of the interpretive process and not some fixed meaning that the author locks into the document’s text at the outset.”).

¹⁵⁹ Rakove at 159 (cited in note 158). See also Charles A. Lofgren, *The Original Understanding of Original Intent?*, 5 Const Comm 77, 110 (1998) (interpreting Madison to mean that “[e]arly and continued practice” would serve as “a check on (but not an invariable barrier to) subsequent reinterpretation”).

¹⁶⁰ 1 Annals of Cong. 514 (1789). For a description of different scholarly views about what, if anything, was actually agreed upon in this “Decision of 1789,” see Bradley & Morrison, 126 Harv L Rev at 477 (cited in note 95).

could be read simply as a prediction of the probable precedential and path-dependent consequences of the decision. Madison surely knew that whether Congress's decision would in fact "become the permanent exposition of the Constitution" would depend on whether future interpreters would accept the decision as authoritative. In that regard, it is noteworthy that Congress subsequently insisted on a greater role in the removal process, and, despite resisting some of those efforts in *Myers v United States*,¹⁶¹ the Supreme Court ultimately has allowed Congress the ability to limit presidential removal of a variety of officials.¹⁶²

Another example commonly cited as evidence of Madison's embrace of the liquidation idea is his shift in public position concerning the constitutionality of the national bank. In December 1790, Alexander Hamilton submitted a plan for a national bank that would be chartered by Congress. Madison, who had been elected to the first Congress from Virginia, opened the debate in the House by declaring the bank beyond the scope of Congress's enumerated powers.¹⁶³ By 1815, however, Madison was now President, and in vetoing on policy grounds a bill to reauthorize the bank, he "[w]aiv[ed] the question of the constitutional authority of the Legislature to establish an incorporated bank as being precluded in my judgment by repeated recognitions under varied circumstances of the validity of such an institution in acts of the legislative, executive, and judicial branches of the Government, accompanied by indications, in different modes, of a concurrence of the general will of the nation."¹⁶⁴ In that veto message, Madison did not appear to be saying that initial practice had fixed the meaning of the Necessary and Proper Clause for all time absent a formal amendment. Instead, he seemed to be suggesting that, because the political branches and the general public had long agreed that the bank was constitutional, he no longer felt entitled to insist on his own view of the constitutional text and the original understanding in considering whether to sign the bill into law. Such a view is consistent with historical gloss.¹⁶⁵

¹⁶¹ 272 US 52 (1926).

¹⁶² See, for example, *Humphrey's Executor v United States*, 295 US 602 (1935), and *Morrison v Olson*, 487 US 654 (1988).

¹⁶³ James Madison's Speech in Congress Opposing the National Bank (Feb. 2, 1791), in *James Madison: Writings* 480-490 (Library of America, Jack N. Rakove ed 1999).

¹⁶⁴ James Madison, Veto Message on the National Bank (Jan. 30, 1815), online at <http://millercenter.org/president/madison/speeches/speech-3626>. See also Richard S. Arnold, *How James Madison Interpreted the Constitution*, 72 NYU L Rev 267, 286-90 (1997).

¹⁶⁵ Historian Drew McCoy views Madison's change regarding the bank as an application of "one of his cardinal rules of interpretation," which "was to respect the authority of 'early, deliberate and continued practice under the Constitution.'" Drew R. McCoy, *The Last of the Fathers: James Madison and the Republican Legacy* 80 (Cambridge, 1989), quoting Letter from James Madison to Martin L. Hurlbert (May 1830). Notably, Madison's principle required practice that was continued. When the bank again became controversial during Madison's retirement, McCoy notes, Madison proclaimed that declaring the bank unconstitutional in the 1830s would constitute "a defiance of all the obligations derived from a course of precedents amounting to the requisite evidence of the national judgment and intention." *Id.* at 81, quoting Madison. Such statements suggest that Madison was not insisting upon liquidation only by initial practice.

Moreover, even if Madison had been suggesting that post-Founding practices and beliefs had fixed constitutional meaning in favor of the permissibility of the bank, it would not have been an example of liquidation as that concept has been described by scholars like Nelson. The liquidation theory posits that certain issues of constitutional meaning were left unresolved at the Founding. Madison, however, did not believe that the meaning of the Constitution was ambiguous with respect to the permissibility of the national bank. On the contrary, he continued to believe that the text supported his previous view.¹⁶⁶ But because too many other institutions and individuals had disagreed with him over an extended period of time, he ““did not feel [him]self, as a public man, at liberty to sacrifice all these public considerations to [his] private opinion.””¹⁶⁷

The majority in *Noel Canning* seemed to interpret some of Madison’s statements on liquidation as consistent with the historical gloss approach. In explaining the propriety of looking to practice, the majority quoted a letter from Madison referring to liquidation, and then said that “our cases have continually confirmed Madison’s view.”¹⁶⁸ Many of the decisions that the majority cited, however, endorsed historical gloss.¹⁶⁹ Indeed, the majority correctly described those precedents as “show[ing] that this Court has treated practice as an important interpretive factor even when the nature or longevity of that practice is subject to dispute, and even when that practice began after the founding era.”¹⁷⁰ Thus, the majority—reasonably, we think—interpreted Madison’s reference to liquidation differently from how it has been interpreted by some originalist scholars.

To be sure, the majority never clearly committed to a potential feature of the historical gloss approach, which is the possibility that constitutional meaning might change over time. It is precisely the possibility of change in meaning over time that leads many originalists, including those who subscribe to the liquidation idea, to reject gloss and to limit liquidation to the resolution of textual ambiguities. Moreover, the majority emphasized the modern practice relating to recess appointments over the earlier practice, and it made clear that three-quarters of a century of practice is enough to merit substantial weight in interpreting the separation of powers.¹⁷¹ The majority insisted, however, that

¹⁶⁶ See Powell, 98 Harv L Rev at 940 (cited in note 158) (“His own ‘abstract opinion of the text’ remained unchanged: the words of the Constitution did not authorize Congress to establish the bank.”), quoting Letter from James Madison to C.E. Haynes (Feb 25, 1831), reprinted in 4 *Letters and Other Writings of James Madison* 164, 165 (1865).

¹⁶⁷ Powell, 98 Harv L Rev at 940 (cited in note 158), quoting Letter from James Madison to Marquis de LaFayette (Nov 1826), reprinted in 3 *Letters and Other Writings of James Madison* 538, 542 (1865).

¹⁶⁸ 134 S Ct at 2560.

¹⁶⁹ See 134 S Ct at 2560, citing *Mistretta v United States*, 488 US 361, 401 (1989); *Dames & Moore v Regan*, 453 US 654, 686 (1981); *Youngstown Sheet & Tube Co. v Sawyer*, 343 US 579, 610-611 (1952) (Frankfurter, J., concurring); *The Pocket Veto Case*, 279 US 655, 689-90 (1929); *Ex parte Grossman*, 267 US 87, 118-19 (1925); *United States v Midwest Oil Co.*, 236 US 459, 472-74 (1915); *McPherson v Blacker*, 146 US 1, 27 (1892); *McCulloch v Maryland*, 17 US (4 Wheat) 316, 401 (1819); and *Stuart v Laird*, 5 US (1 Cranch) 299 (1803).

¹⁷⁰ 134 S Ct at 2560.

¹⁷¹ *Id.* at 2564, 2573.

the earlier practice did not establish a contrary understanding of the recess appointments power. For the issue of intra-session recess appointments, for example, the majority described the pre-Civil War history as simply “not helpful” to resolving the question one way or the other, rather than as contradictory.¹⁷² For the issue of appointments to pre-existing vacancies, the majority suggested that there simply were differing views about the issue prior to Attorney General Wirt’s 1823 opinion.¹⁷³

The majority’s silence about the possibility of changes in constitutional meaning outside of the Article V amendment process is characteristic of the Court’s other decisions that have endorsed historical gloss. It is also consistent with the Court’s constitutional law decisions more generally, even in areas in which it might seem obvious that constitutional meaning has shifted, such as with respect to certain individual rights. The Court’s silence likely reflects anxieties about the counter-majoritarian difficulty, especially in areas in which there is significant public debate.¹⁷⁴ Despite the Court’s reluctance to acknowledge it openly, there is nothing inherent in the logic of the historical gloss approach that would disallow a constitutional interpreter from crediting a shift in practice over time.

C. Problems with the Liquidation Concept

Even if it could be shown that Madison did have in mind an approach whereby ambiguities in original meaning could be settled by, and only by, initial practice, and even if it could further be shown that some (or many or most) other Founders shared Madison’s view, those demonstrations would not themselves establish that constitutional interpreters today should accept such an approach. As careful originalists acknowledge, originalism cannot establish its own validity.¹⁷⁵ A normative defense of the liquidation approach would need to address substantial objections.

The theory behind the liquidation idea, to reiterate, is that the Founders delegated the settlement of ambiguities in constitutional meaning to subsequent governmental

¹⁷² *Id.* at 2562.

¹⁷³ See *id.* at 2570.

¹⁷⁴ Justice Scalia sometimes exploits those anxieties. See, for example, Transcript of Oral Argument at 38 ll.3-8, *Hollingsworth v Perry*, 133 S Ct 2652 (2013) (No. 12-144) (“I’m curious, when . . . did it become unconstitutional to exclude homosexual couples from marriage? 1791? 1868, when the Fourteenth Amendment was adopted? [S]ome time after *Baker* [*v Nelson*, 409 US 810 (1972)], where we said it didn’t even raise a substantial Federal question? When . . . did the law become this?”).

¹⁷⁵ See, for example, Nelson, 70 U Chi L Rev at 547-48 (cited in note 141). Modern variants of originalism, unlike the first generation of originalist scholarship, focus on the original meaning of the Constitution rather than on original intent. See, for example, Whittington, 82 Fordham L Rev (cited in note 133). That shift in focus further complicates any claim that a liquidation approach to the Constitution should be followed because Founders such as James Madison intended it. To be sure, considerations of intent and meaning may not be neatly separable, so it might be argued (for example) that liquidation was part of the background understandings about how the Constitution would operate and thus was part of its original meaning. See Sachs, 2013 U Ill L Rev at 1807 (cited in note 141). Again, however, even if that could be shown, it would not establish that liquidation should be followed. Some justification external to originalism would be needed.

actors.¹⁷⁶ It is unclear, however, why it would have made sense for the Founders to decide that constitutional meaning should be determined dispositively by the particular political alignment that happened to exist whenever the issue first arose. In attempting to determine constitutional meaning, the initial generations presumably would be no less self-serving and potentially short-sighted than later generations, and they would have much less experience in apprehending the needs of American governance. Moreover, those initial generations obviously would lack knowledge of subsequent changes in conditions and values that could dramatically affect the implications of adopting one interpretation of the Constitution instead of another. Notwithstanding those substantial limitations, the liquidation approach would license earlier generations to bind more experienced successors through simple majoritarian politics.

Those objections are not overcome by positing that liquidation should be limited to situations in which the earlier generations deliberated with unusual seriousness.¹⁷⁷ Even if one could identify a way to solve the practical problem of distinguishing different levels of congressional or executive branch seriousness, the more fundamental problem would remain that subsequent generations might deliberate at least as seriously and they would necessarily possess substantially more knowledge and experience. The net effect of widespread acceptance of the liquidation idea would be a regime that possesses many of the “dead hand” disadvantages of originalism, but few of the asserted upsides of originalism beyond limiting interpretive discretion—namely, preventing constitutional change outside the demanding supermajoritarian process of Article V, and conferring democratic legitimacy upon the institution of judicial review by limiting it to enforcement of the original supermajoritarian act of higher lawmaking.¹⁷⁸

Another problem with originalist efforts to distinguish between liquidation and historical gloss is that such a distinction is in tension with the acceptance by many originalists of judicial precedent. Justice Scalia, for example, has made clear that he accepts the presumptively binding force of precedent in a number of areas of constitutional law.¹⁷⁹ Justice Scalia describes his approach to precedent as a pragmatic

¹⁷⁶ See Nelson, 70 U Chi L Rev at 551 (cited in note 141).

¹⁷⁷ See *id.* at 528.

¹⁷⁸ One common justification for *Chevron* deference to administrative agencies rests on a similar delegation account. “Deference under *Chevron* to an agency’s construction of a statute that it administers,” the Court has explained, “is premised on the theory that a statute’s ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps.” *FDA v Brown & Williamson Tobacco Corp.*, 529 US 120, 159 (2000), citing *Chevron U.S.A. Inc. v Natural Resources Defense Council*, 467 US 837, 844 (1984). Under *Chevron*, however, agencies are not precluded from changing their interpretations (and, indeed, *Chevron* itself involved a revised agency interpretation). See, for example, *National Cable & Telecommunications Association v Brand X Internet Services*, 545 US 967, 981 (2005) (“Agency inconsistency is not a basis for declining to analyze the agency’s interpretation under the *Chevron* framework.”).

¹⁷⁹ See, for example, *McDonald v City of Chicago*, 130 S Ct 3020, 3050 (2010) (Scalia, J., concurring) (“Despite my misgivings about Substantive Due Process as an original matter, I have acquiesced in the Court’s incorporation of certain guarantees in the Bill of Rights ‘because it is both long established and narrowly limited.’ *Albright v Oliver*, 510 U. S. 266, 275 (1994) (Scalia, J., concurring).”).

“exception” to his originalism that is based on interests in stability.¹⁸⁰ Similarly, Robert Bork accepted that a decision “may be clearly incorrect but nevertheless have become so embedded in the life of the nation, so accepted by the society, so fundamental to the private and public expectations of individuals and institutions, that the result should not be changed now.”¹⁸¹ But interests in stability and related rule-of-law considerations, such as consistency, predictability, reliance, and transparency, also can be advanced by adhering to longstanding practices, regardless of whether they date to the early post-Founding period.¹⁸² Madison, it is worth repeating, grouped judicial precedent and political practices together.¹⁸³

There are, to be sure, statements in a number of Supreme Court decisions suggesting that practices dating back to near the Founding can “fix[] the construction” to be given to constitutional provisions.¹⁸⁴ Those statements, however, do not contend that this is the only way in which constitutional meaning may legitimately be affected by practice. Moreover, those statements do not envision that meaning would become fixed merely as a result of the initial practice; rather, they expressly require longstanding acquiescence in the interpretation that was adopted. This is also true of Justice Scalia’s acknowledgment in *Noel Canning* that it would be appropriate to look to practices “unchallenged since the early days of the Republic.”¹⁸⁵ As a result, those statements do not appear to share the premise of the liquidation approach (as understood by scholars like Caleb Nelson) that the initial post-Founding generation was delegated the authority

¹⁸⁰ See Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 139-40 (Princeton, 1997).

¹⁸¹ Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* 158 (Free Press, 1990).

¹⁸² See Bradley & Morrison, 126 Harv L Rev at 427-28 (cited in note 95); Posner & Vermeule, 156 U Pa L Rev at 999 (cited in note 127); Cass R. Sunstein, *Originalism v. Burkeanism: A Dialogue Over Recess*, 126 Harv L Rev F 126, 128 (2013). Cf Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 NYU L Rev 570, 588 (2001) (noting that stare decisis “promotes stability, protects settled expectations, and conserves judicial resources”).

¹⁸³ Some originalists accept judicial precedent not as a pragmatic exception to originalism but as part of Article III judicial power, and so in that way might be able to reconcile an acceptance of judicial precedent with a rejection of non-judicial precedent, depending on their grounds for accepting certain judicial precedents and not others. See McGinnis & Rappaport (cited in note 137).

¹⁸⁴ See *Myers v United States*, 272 US 52, 175 (1926) (“[A] contemporaneous legislative exposition of the Constitution, when the founders of our Government and framers of our Constitution were actively participating in public affairs, acquiesced in for a long term of years, fixes the construction to be given its provisions.”); *McGrain v Daugherty*, 273 US 135, 174 (1927) (“So, when their practice in the matter is appraised according to the circumstances in which it was begun and to those in which it has been continued, it falls nothing short of a practical construction, long continued, of the constitutional provisions respecting their powers, and therefore should be taken as fixing the meaning of those provisions, if otherwise doubtful.”); *Stuart v Laird*, 5 US (1 Cranch) 299, 309 (1803) (“[P]ractice and acquiescence under it for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction.”). Although the Court in *Stuart v Laird* referenced acquiescence only for a period of several years, it is worth remembering that there were not many years to speak of in 1803.

¹⁸⁵ 134 S Ct at 2594.

to fix constitutional meaning. Instead, the statements in those decisions suggest that meaning would become fixed only if later generations continued to accept the early interpretation. The idea of fixation through longstanding acceptance of a practice, however, is fully consistent with a historical gloss approach to constitutional interpretation.

IV. Historical Practice and the Constitutional Text

Arguments based on historical practice are common in the area of separation of powers, but the constitutional text is almost always treated as controlling when it is perceived to be clear, even in the face of contrary historical practice. Indeed, it is generally agreed that when the text is clear, it controls. As we will explain, however, historical practice can affect perceptions about the clarity or ambiguity of the text. This phenomenon, which we have referred to elsewhere as “constructed constraint,”¹⁸⁶ is evident in *Noel Canning*.

A. The Modality of Textual Argumentation

It is widely accepted that the constitutional text is controlling when it is perceived to be clear. More precisely, it is widely agreed that the constitutional text must be followed when it is understood to be (i) clear, (ii) applicable to the constitutional question under consideration, and (iii) comprehensive in the sense that the text says all that there is to be said about the question. It is almost never an acceptable move in constitutional practice to argue for a disregard of the text.¹⁸⁷

Only occasionally does one encounter suggestions to the contrary. For example, during the oral argument in *Noel Canning*, Justice Scalia repeatedly asked the Solicitor General whether longstanding practice ever could trump clear constitutional text.¹⁸⁸ The Solicitor General replied that such practice, at least if it extended back to the Founding, could trump clear text.¹⁸⁹ He also stressed, however, that it would be “extremely unlikely” for longstanding practice to develop in a way that is contrary to clear text.¹⁹⁰ Unlike the Solicitor General, neither the majority nor Justice Scalia in *Noel Canning*

¹⁸⁶ See Bradley & Siegel, *Constructed Constraint* (cited in note 11).

¹⁸⁷ For example, while Jack Balkin and David Strauss, two prominent constitutional theorists, disagree about *why* clear text possesses that degree of interpretive authority, they emphatically agree that it does. See Jack M. Balkin, *Living Originalism* 3, 55 (Belknap, 2011), and David A. Strauss, *The Living Constitution* 102-03 (Oxford, 2010).

¹⁸⁸ See Transcript of Oral Argument at 6-8 (cited in note 66).

¹⁸⁹ *Id.* at 6, 8.

¹⁹⁰ See *id.* at 8. Not surprisingly, when Justice Alito asked counsel for *Noel Canning* the same question, he said that in such a situation “the language has to govern.” *Id.* at 42. Justice Kagan, however, questioned his answer. See *id.* at 43. Justice Breyer also pointed out that both the Due Process Clause and the Commerce Clause had acquired meanings different from what the language of those clauses might suggest. See *id.* at 48.

suggested that practice—or any other modality for that matter—could trump clear text.¹⁹¹ Instead, the majority repeatedly stated that it was relying on non-textual modalities only because it concluded that the text of the Recess Appointments Clause was ambiguous.¹⁹² The majority thus seemed to embrace the proposition, emphasized by Justice Scalia, that clear text is controlling, regardless of other considerations.¹⁹³

In that regard, the Justices in *Noel Canning* were reflecting the orthodox view in American constitutional interpretation. Similarly, in numerous prior decisions, the Supreme Court has endorsed the proposition that the modality of textual argumentation is distinct from the other modalities, and that non-textual modalities may appropriately be considered only to resolve ambiguities in the text.¹⁹⁴ Moreover, when dissenting opinions invoke that proposition, the majority does not contest it; instead, the majority typically argues that the text is unclear, inapplicable, or not a comprehensive provision.¹⁹⁵ The proposition that clear text is controlling has rhetorical power exactly because of the widely shared understanding that it is effectively an incontestable principle of American constitutional interpretation.

Of particular relevance to this Article, that shared understanding means that the constitutional text has rhetorical primacy over claims based on historical practice. In addition, as Michael Dorf has observed, the constitutional text tends to have the effect of crowding out freestanding claims based upon practice even when those claims do not contradict the text.¹⁹⁶ As a result, practice-based claims generally must be connected in some fashion to the text. That is not, however, an inevitable effect of having a legal text. Under international law, for example, custom is a free-standing source of law that

¹⁹¹ Dissenting in *INS v Chadha*, 462 US 919 (1983) (discussed above at text at notes 115-117), Justice White emphasized the longstanding practice of legislative vetoes but did not claim that such practice could override clear text. Instead, he argued that there was a “silence of the Constitution on the precise question.” *Id.* at 977 (White, J., dissenting). Specifically, White reasoned that the Presentment Clause applies to exercises by Congress of “original lawmaking authority,” and that “[t]he power to exercise a legislative veto is not the power to write new law without bicameral approval or presidential consideration.” *Id.* at 979-80.

¹⁹² See 134 S Ct at 2561 (“The constitutional text is thus ambiguous.”); *id.* at 2568 (“The question is whether the Clause is ambiguous.”); *id.* at 2577 (“We believe that the Clause’s text, standing alone, is ambiguous.”).

¹⁹³ See, for example, *id.* at 2617 (Scalia, J., concurring in the judgment) (“What the majority needs to sustain its judgment is an ambiguous text and a clear historical practice.”).

¹⁹⁴ See, for example, *Reid v Covert*, 354 US 1, 8 n.7 (1957) (plurality opinion) (“This Court has constantly reiterated that the language of the Constitution where clear and unambiguous must be given its plain evident meaning.”).

¹⁹⁵ Compare, for example, *Seminole Tribe of Florida v Florida*, 517 US 44, 116 n13 (1996) (Souter, J., dissenting) (“[P]lain text is the Man of Steel in a confrontation with ‘background principle[s]’ and ‘postulates which limit and control’”) (citations omitted), with *id.* at 69 (“The dissent’s lengthy analysis of the text of the Eleventh Amendment is directed at a straw man”).

¹⁹⁶ See Michael C. Dorf, *How the Written Constitution Crowds Out the Extraconstitutional Rule of Recognition*, in *The Rule of Recognition and the U.S. Constitution* 69 (Matthew D. Adler & Kenneth Einer Himma eds, Oxford, 2009).

operates alongside written treaties, and it can operate even in opposition to that written law.¹⁹⁷ Custom does not work that way in U.S. constitutional law. On the contrary, while “judges sometimes admit that constitutional interpretation is sensitive to historical evolution and that history adds a ‘gloss’ on the text,” those same judges “never admit to deriving the authority for the decision from outside the constitutional text.”¹⁹⁸ Consistent with that phenomenon, the majority in *Noel Canning* claimed only that historical practice was “an important interpretive factor.”¹⁹⁹

B. Constructed Constraint

We have argued elsewhere that the orthodox view of the role of the constitutional text is correct as far as it goes, but that it does not go far enough.²⁰⁰ When the constitutional text is perceived to be clear, applicable, and comprehensive, it acts as a meaningful constraint on constitutional interpretation by limiting and shaping argumentation and thereby affecting the available courses of conduct that will be considered constitutional. The perceived clarity or ambiguity of the text, however, is often partially constructed by “extra-textual” considerations. More precisely, the perceived clarity or ambiguity of the text is not only a product of typical “plain meaning” considerations such as dictionary definitions and linguistic conventions, but also can be affected by the other modalities of constitutional argumentation, which are commonly thought to come into play only in resolving ambiguities in the meaning of the text.²⁰¹ In other words, perceived textual clarity is not just some linguistic fact of the matter that exists apart from the overall process of constitutional interpretation.

Our theory of constructed constraint resurrects certain insights from the Critical Legal Studies movement in the 1980s, without accepting the claim of some CLS scholars in constitutional law that there are no limits on the extent to which textual clarity is subject to extra-textual construction.²⁰² Under our account, the clarity and ambiguity of the constitutional text is partially constructed, but in any given situation there are limits on the extent to which construction is available, including limits on the degree to which

¹⁹⁷ See, for example, *Restatement (Third) of the Foreign Relations Law of the United States* § 102 n.4 (1987) (“Provisions in international agreements are superseded by principles of customary international law that develop subsequently, where the parties to the agreement so intend.”).

¹⁹⁸ Andrzej Rapaczynski, *The Ninth Amendment and the Unwritten Constitution: The Problems of Constitutional Interpretation*, 64 Chi-Kent L Rev 177, 192 (1988)

¹⁹⁹ 134 S Ct at 2560.

²⁰⁰ See Bradley & Siegel, *Constructed Constraint* (cited in note 11).

²⁰¹ When referring to “ambiguity” in this Part, we do so in the loose way that the Supreme Court often does—that is, as a reference both to situations in which the applicability of the text to particular circumstances is unclear (what legal philosophers would term “vagueness”) and to situations in which the text could mean more than one specific thing (what legal philosophers would term “ambiguity”). See, for example, Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 Const Comm 95, 97-98 (2010). While the distinction between vagueness and ambiguity is important in some contexts, the distinction is not material for our account of constructed constraint.

²⁰² For a discussion, see Bradley & Siegel, *Constructed Constraint* (cited in note 11).

interpreters can persuasively identify textual workarounds in the face of constraining text. For example, under ordinary circumstances, almost no one would be persuaded by a “purposive” construction of the various clauses in the Constitution imposing age qualifications for federal offices—for example, a claim that someone under the age of thirty-five lawfully could be elected president as long as he or she had a certain level of maturity, or a claim that the age requirement is actually higher than thirty five because, with increasing longevity, people tend to mature more slowly today. Similarly, even though before ratification of the Twenty-Second Amendment presidents sometimes contemplated violating an unwritten norm against running for a third term (and Franklin Roosevelt did so), after the Amendment no one seriously contemplates that possibility.²⁰³

In many other instances, however, perceptions about textual clarity or ambiguity have been subject to construction. For example, there is a consensus that the First Amendment applies to the entire federal government, not just to Congress, notwithstanding the express and distinctive textual limitation of the Amendment’s strictures to Congress.²⁰⁴ For a variety of purposive, structural, consequentialist, and ethos considerations, as well as extensive judicial precedent, almost all interpreters of the First Amendment read the text more broadly than would be suggested by traditional “plain meaning” considerations. In fact, so powerful is this construction that interpreters typically do not even *see* the first word of the First Amendment.²⁰⁵

The construction of textual ambiguity also is evident in the U.S. Supreme Court’s state sovereign immunity jurisprudence. In resisting the proposition that the expanse and limits of the states’ sovereign immunity from private lawsuits is covered by the text of the Eleventh Amendment, the Court has not simply ignored the text, as some of its critics have suggested. Rather, for purposive, structural, and consequentialist reasons, the Court has understood the Amendment as a non-comprehensive provision—that is, as not covering all that there is to be said about the extent of the states’ immunity from suit. As the Court has explained, it has “understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms.”²⁰⁶ On that view, the Amendment was a targeted response to a mistaken Supreme Court decision, not a comprehensive statement of the extent of the states’ immunity from suit. It is noteworthy that even the dissenters in those sovereign immunity decisions have not pushed for a literal approach to the Eleventh Amendment—that is, one that would disallow even federal question suits against states by citizens of another state while allowing such suits

²⁰³ See, for example, Frederick Schauer, *Easy Cases*, 58 S Cal L Rev 399, 414 (1985) (“The parties concerned know, without litigating and without consulting lawyers, that Ronald Reagan cannot run for a third term . . .”). But see Mark V. Tushnet, *A Note on the Revival of Textualism in Constitutional Theory*, 58 S Cal L Rev 683, 687 (1985) (hypothesizing a situation in which this prohibition might be disregarded). Hypothesizing an unlikely scenario in which the text would be disregarded does not show that the text is unconstraining. Rather, it shows only that the text is not infinitely constraining.

²⁰⁴ See US Const amend I (“Congress shall make no law . . .”).

²⁰⁵ See Bradley & Siegel, *Constructed Constraint* (cited note 11).

²⁰⁶ *Blatchford v Native Village of Notak*, 501 US 775, 779 (1991).

if brought by citizens of the state.²⁰⁷ Instead, for structural and purposive reasons, the dissenting Justices have contended that the Amendment should be interpreted as “simply repeal[ing] the Citizen-State Diversity Clauses of Article III for all cases in which the State appears as a defendant.”²⁰⁸

Noel Canning, too, exemplifies the construction of textual ambiguity. While the majority insisted that the relevant text was ambiguous, it did not appear simply to invoke the other modalities of constitutional interpretation to clarify ambiguous text. Instead, the majority’s decision to regard the text as ambiguous seems itself to have been affected by its understanding of the purpose of the Recess Appointments Clause, historical practice, and the consequences of an alternative interpretation. Or, to put it differently, those extra-textual considerations seemed to have motivated a search for ambiguity. That is most evident in the majority’s treatment of the phrase “vacancies that happen” during a recess.

The majority plausibly concluded that the linguistic meaning of the words “the Recess” was ambiguous because those words could mean either the single break between yearly sessions of the Senate or any substantial break in Senate business. As a linguistic matter, the phrase “the Recess,” like the phrase “the person in the street,”²⁰⁹ can be understood to reference one phenomenon or multiple phenomena.²¹⁰ By contrast, the Court’s finding of ambiguity for the phrase “vacancies that may happen” suggests substantial extra-textual construction. In that part of its analysis, the Court articulated a thin understanding of ambiguity, allowing ready invocation of extra-textual considerations. Critically for present purposes, that thin understanding seems itself to have been prompted in part by the extra-textual considerations.

As the Court conceded, “the most natural meaning” of the word “happen” as applied to the word “vacancy” is that the vacancy must occur during the recess.²¹¹ The Court insisted, however, that this was “not the only *possible* way to use the word,”

²⁰⁷ The Eleventh Amendment provides that the federal judicial power “shall not be construed to extend to *any suit* in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” US Const amend XI (emphasis added).

²⁰⁸ See, for example, *Seminole Tribe of Florida v Florida*, 517 US 44, 109-10 (1996) (Souter, J., dissenting); *Atascadero State Hospital v Scanlon*, 473 US 234, 289 (1985) (Brennan, J., dissenting).

²⁰⁹ See, for example, Sunstein, *Originalism v. Burkeanism*, 126 Harv L Rev F at 127 (cited in note 182) (“In ordinary language, a reference to ‘the car,’ or ‘the ordinary American,’ or ‘the horse’ need not suggest that there is only one!”).

²¹⁰ In *Dred Scott v Sandford*, 60 US 394, 436 (1856), the Supreme Court controversially interpreted the phrase “the Territory” in Article IV, Section 3, of the Constitution to mean only territory held by the United States at the time of the Founding, and on that basis (among others) held that Congress could not prohibit slavery in American territories acquired after ratification of the Constitution.

²¹¹ It could be argued, however, that the phrase “during the recess” in the Clause modifies only “fill up” and not the word “happen.” See Michael Herz, *Re-Diagramming the Recess Appointments Clause* (Jan 8, 2014), Balkinization, at <http://balkin.blogspot.com/2014/01/re-diagramming-recess-appointments.html>.

because “happen” also may mean “exist.”²¹² The Court then reasoned that the purpose of the Recess Appointments Clause and historical practice supported the broader reading. Those extra-textual considerations were pertinent, the Court stated, because there was “some linguistic ambiguity.”²¹³ Importantly, however, the only reason for the majority to have sought out a *possible* reading—but not the most natural reading—were the extra-textual considerations. In other words, if the Court’s understanding of the practice and the purpose of the Clause had not been contrary to the most natural meaning of the phrase, it seems unlikely that the Court would have characterized the text as ambiguous. But, as the Court emphasized, it was unprepared to “render illegitimate thousands of recess appointments reaching all the way back to the founding era.”²¹⁴ Indeed, while the meaning of the word “happen” seems less ambiguous in context than the meaning of the phrase “the Recess,” there was a substantially longer historical practice bearing on the term “happen” than there was regarding the phrase “the Recess.” Accordingly, the thinness of the Court’s understanding of ambiguity appears to have been inversely related to the duration of the historical practice.

Justice Scalia, by contrast, argued that the Recess Appointments Clause was clear, and that its clear meaning supported a substantially narrower recess appointments authority. Even in his opinion, it is possible to see the influence of extra-textual considerations. In particular, throughout his opinion—and not merely in response to the majority’s contrary arguments—Justice Scalia stressed what he believed to be the purpose of the Clause: to operate as “a tool carefully designed to fill a narrow and specific need,”²¹⁵ while “preserv[ing] the Senate’s role in the appointment process.”²¹⁶ Given that understanding of the purpose of the text, Justice Scalia concluded, for example, that the Clause clearly prohibited the use of recess appointments to avoid senatorial opposition to appointees, even though such use has been characteristic of practice since the 1920s. “The need [that the Clause] was designed to fill no longer exists,” he wrote, “and its only remaining use is the ignoble one of enabling the President to circumvent the Senate’s role in the appointment process.”²¹⁷ Accordingly, both opinions in *Noel Canning* exemplify how perceptions of textual ambiguity or clarity can themselves be affected by extra-textual modalities.

²¹² 134 S. Ct. at 2567 (emphasis added).

²¹³ Id at 2573.

²¹⁴ Id at 2577.

²¹⁵ Id at 2592 (Scalia, J., concurring in judgment).

²¹⁶ Id at 2597.

²¹⁷ Id at 2598. For another decision from the October 2013 Term in which the Court relied on extra-textual considerations in determining that the text was unclear, this time in the context of statutory interpretation, see *Bond v United States*, 134 S Ct 2077, 2090 (2014) (“In this case, the ambiguity derives from the improbably broad reach of the key statutory definition given the term—‘chemical weapon’—being defined; the deeply serious consequences of adopting such a boundless reading; and the lack of any apparent need to do so in light of the context from which the statute arose—a treaty about chemical warfare and terrorism.”).

C. Implications for “Constitutional Construction”

As discussed earlier, a number of theorists associated with the “new originalism” have distinguished between “constitutional interpretation” and “constitutional construction.” Under that approach, constitutional determinations that are closely linked to the text (“interpretation”) are distinguished from those that supplement the text (“construction”). The approach is more receptive to historical practice than earlier originalist accounts and is also more receptive than the Madisonian liquidation approach. Nevertheless, the phenomenon of constructed constraint described above presents difficulties for the distinction that this approach seeks to make.

Political scientist Keith Whittington—a prominent advocate of the distinction between interpretation and construction—explains that interpretation “takes the text as its touchstone,” whereas construction does not “deal[] so explicitly and obsessively with the terms of the document itself.”²¹⁸ Randy Barnett similarly makes clear that construction primarily occurs in situations in which the semantic meaning of the constitutional text is unclear, such that there is not enough information “contained in the text” to resolve an issue.²¹⁹ Lawrence Solum agrees that practitioners are in “the construction zone” when the constitutional text is “vague or irreducibly ambiguous.”²²⁰

Jack Balkin, in setting out his theory of “framework originalism,”²²¹ likewise relies on the distinction between interpretation and construction. In Balkin’s rendition, the constitutional text establishes the basic framework of governance upon which participants in constitutional debates can build constitutional constructions. Balkin expressly distinguishes the “ascertainment of the meaning” of the text (which he calls “interpretation”) from the activity of constitutional construction, which he says involves “arguments from history, structure, ethos, consequences, and precedent.”²²² Constructions, as Balkin further explains, “exist to fill out and implement the text.”²²³

The phenomenon of constructed constraint, however, unsettles the distinction that those theorists seek to draw between interpretation and construction. The considerations

²¹⁸ Whittington at 9 (cited in note 129); see also Keith E. Whittington, *Constructing a New American Constitution*, 27 Const Comm 119, 119-20 (2010) (“Interpretive practice is supplemented through a process of constitutional construction. . . . Construction picks up where interpretation leaves off.”).

²¹⁹ Randy E. Barnett, *Interpretation and Construction*, 34 Harv JL & Pub Pol’y 65, 67 (2011); see also Randy Barnett, *Restoring the Lost Constitution* ch 5 (Princeton, 2004).

²²⁰ Solum, 82 Fordham L Rev at 458 (cited in note 136); see also Whittington, 27 Const Comm at 120-21 (cited in note 218) (defining “the realm of construction” as “when the Constitution as written cannot in good faith be said to provide a determinate answer to a given question”).

²²¹ See generally Balkin (cited in note 187).

²²² Id at 4.

²²³ Id at 54; see also Whittington, 27 Const Comm at 121 (cited in note 218) (“[C]onstitutional constructions are built within the boundaries, or to use Jack Balkin’s phrase, within the framework, of the interpreted Constitution.”).

that are relevant to construction do not merely supplement the determination of the meaning of the text, and they do not come into play only when the text is unclear. Rather, they also affect the threshold assessment of whether the text is unclear. Construction, in other words, not only takes place on top of the textual framework, but also partially determines the framework itself. Thus, it is artificial to separate constitutional interpretation from (to use Solum’s phrase) the “construction zone.”

One attraction of the idea of “constitutional construction,” as those theorists use the term, is that it makes originalism descriptively more accurate of existing practice. In particular, by acknowledging the phenomenon of constitutional construction, originalists have accepted the insight—emphasized by critics of originalism—that the Constitution sometimes enacts broad principles or standards rather than specific rules, and that in those situations the semantic meaning of the text does not—because it cannot—resolve concrete cases.²²⁴ As noted earlier, that concession is too strong for some originalists. The theory of constructed constraint suggests, however, that originalists have conceded too little ground, not too much. Participants in constitutional interpretation characteristically feel bound by constitutional text that they deem clear, but their perception of its clarity is often not determined primarily—let alone exclusively—by its original semantic meaning.²²⁵

Accordingly, it is difficult to limit the relevance of historical practice in constitutional interpretation to questions falling within the new originalist “construction zone.” Historical practice itself may affect perceptions of whether one is in the construction zone. As a result, even constitutional construction, which is more receptive to historical practice than both traditional originalism and liquidation, does not go far enough because of its effort to strictly distinguish between textual meaning and construction.

* * *

Because historical gloss can both affect perceptions of textual clarity and shift over time, that approach to constitutional interpretation can in theory result in a reallocation of governmental authority and not just a resolution of ambiguity concerning such authority. That possibility is the premise of Justice Scalia’s charge in *Noel Canning* that the majority was enabling executive aggrandizement by “adverse possession.” Although his analogy to adverse possession highlights some reasons to be cautious before crediting historical practice, we explain in the next Part why the analogy is largely misplaced.

²²⁴ Colby, 99 Geo LJ at 731 (cited in note 136).

²²⁵ For ways in which the theory of constructed constraint complicates other efforts in recent constitutional theory to distinguish between the textual and non-textual aspects of American constitutionalism, see Bradley & Siegel, *Constructed Constraint* (cited in note 11).

V. Constitutional Adverse Possession

In *Noel Canning*, Justice Scalia repeatedly accused the majority of applying an “adverse possession” approach to the separation of powers.²²⁶ The majority, Justice Scalia complained, would allow presidents to expand their constitutional authority simply by acting in a certain way for a long period of time as long as Congress failed to contest the practice “with sufficient vigor.”²²⁷ In addition to his originalist objections, Justice Scalia raised two structural concerns. First, he argued that a practice-based approach to the separation of powers would unduly favor the expansion of executive authority given various differences between the structure of Congress and that of the executive branch. Second, he contended that such an approach would allow Congress and the executive branch to disregard constitutional limitations that are designed to protect the public. The majority denied the adverse possession characterization, but it did so without much explanation. It did note, however, that it was considering not only historical practice but also constitutional text and purpose,²²⁸ presumably to contest Justice Scalia’s premise that the President was taking powers that originally belonged to Congress.

Justice Scalia is not the first to analogize the historical gloss approach to the adverse possession doctrine in property law.²²⁹ The analogy does shed some light on what the historical gloss approach entails and what its justifications are. But the adverse possession analogy is in many ways problematic. While Justice Scalia’s concerns should be taken seriously, they do not warrant a general disallowance of practice-based authority.

A. Problems with the Adverse Possession Analogy

Under the adverse possession doctrine in property law, someone who uses someone else’s real property for a specified period of time can, under certain conditions, acquire valid ownership of the property.²³⁰ Such a doctrine might seem strange, in that it potentially allows what could be considered a form of theft through a wrongful act of trespass as long as the trespass lasts long enough.²³¹ In analogizing the historical gloss

²²⁶ See 134 S Ct at 2592, 2605, 2614, 2617.

²²⁷ Id at 2592.

²²⁸ See id at 2578. Scalia contended that the adverse possession label was a “characterization the majority resists but does not refute.” Id at 2617.

²²⁹ See, for example, John Hart Ely, *War and Responsibility* 10 (Princeton, 1993) (critically describing an “adverse possession” approach to presidential war powers based on presidential practice), and Jonathan Turley, *Constitutional Adverse Possession: Recess Appointments and the Role of Historical Practice in Constitutional Interpretation*, 2013 Wis L Rev 965, 971 (“It creates a type of constitutional adverse possession where the simple success of a president in usurping congressional territory is treated as proof of the validity of the underlying interpretation.”).

²³⁰ See generally Joseph William Singer, *Property* ch 4 (3d ed 2010).

²³¹ See Henry W. Ballantine, *Title by Adverse Possession*, 32 Harv L Rev 135, 135 (1918) (“Title by adverse possession sounds, at first blush, like title by theft or robbery, a primitive method of acquiring land without paying for it.”).

approach to the adverse possession doctrine, critics are suggesting that it, too, allows unlawful behavior—usurpation of another branch’s authority—to become a basis for the lawful acquisition of power.

Of course, adverse possession is a longstanding and well-accepted feature of property law, so it is not obvious why the analogy indicts the historical gloss approach. But in any event, there are several ways in which the analogy is not particularly apt.

Uncertain allocations. The original owner of a parcel of land is typically known, and it is clear when an alteration is being made to the owner’s rights. The separation of powers, by contrast, is frequently marked by debate and uncertainty about the allocation of powers. That is particularly true of constitutional provisions relating to foreign affairs, which Edward Corwin famously described as “an invitation to struggle for the privilege of directing American foreign policy.”²³² But it also characterizes a number of issues of domestic law as well, including, for example, the authority of the President to remove executive officials from office,²³³ an “executive privilege” to withhold information from Congress or the courts,²³⁴ and the “legislative privilege” (concerning, among other things, the internal powers of the two houses of Congress).²³⁵

Relying on historical practice to help resolve uncertainties about such allocations is different from allowing it to alter a clearly established allocation. To be sure, as discussed in Part III, the perceived clarity of the Constitution’s allocations of governmental authority itself can be affected by historical practice, and that appears to have been the case in at least part of the majority opinion in *Noel Canning*. Nevertheless, it is still true that many separation of powers disputes do not implicate allocations thought to be clearly established at the Founding. Indeed, the Madisonian liquidation idea recognizes that possibility.

As noted above, the majority in *Noel Canning* resisted the idea that it was reallocating authority. Instead, the majority insisted that the relevant constitutional text was ambiguous regarding both intra-session appointments and pre-existing vacancies. Moreover, while the majority placed particular emphasis on modern practice in its interpretation of the Recess Appointments Clause, it did not concede that the early practice clearly established or confirmed a contrary constitutional interpretation. Indeed, the majority pointed out that, as a practical matter, Justice Scalia’s approach would reallocate authority, as it “would render illegitimate thousands of recess appointments reaching all the way back to the founding era.”²³⁶ That concern highlights the more general point that the application of originalism can require dramatic changes in the

²³² Edward S. Corwin, *The President: Office and Powers* 171 (NYU, 4th ed 1957).

²³³ See, for example, Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive: Presidential Power from Washington to Bush* (Yale, 2008).

²³⁴ See, for example, Archibald Cox, *Executive Privilege*, 122 U Pa L Rev 1383 (1974).

²³⁵ See, for example, Josh Chafetz, *Democracy’s Privileged Few* 10-19 (Yale, 2007).

²³⁶ 134 S Ct at 2577.

landscape of constitutional law, even as it purports to resist the idea of constitutional change outside of the Article V amendment process.²³⁷

Implications of acquiescence. Another distinction between property law and the separation of powers concerns the implications of acquiescence. Under most accounts of historical gloss, there must be some acquiescence in the practice by the other political branch of government in order for the practice to be credited. Recall, for example, Frankfurter’s reference to executive practices “long pursued to the knowledge of the Congress and never before questioned.”²³⁸ For adverse possession, by contrast, acquiescence actually can destroy the adverse possessor’s claim, because the possession needs to be “hostile.”²³⁹ Given that difference, historical gloss sounds at least partly in contractual course of dealing rather than property terms and therefore does not present the same concern about the acquisition of rights through “theft.”²⁴⁰ To be sure, acquiescence is a fraught concept in the separation of powers, especially when based on mere silence or inaction. As discussed below in Section C, however, the difficulties with that concept suggest caution about inferring acquiescence, not abandonment of the concept.

Concurrent versus exclusive rights. Another potential difficulty with the analogy concerns the results of adverse possession. When successful in property law, it results in a complete transfer of property rights, such that the original owner can now be excluded from using the property. While it is possible to imagine historical practice supporting a claim of exclusive congressional or executive authority, in many instances its invocation shows no more than concurrent authority. For example, in foreign affairs areas such as war powers, executive agreements, the termination of treaties, and the like, substantial historical practice supports unilateral presidential authority, but little practice establishes

²³⁷ See, for example, Jack Balkin, *Is Noel Canning a Victory for the Living Constitution? Constitutional Interpretation in an Age of Political Polarization* (Sept 24, 2014) (“Scalia’s argument in *Noel Canning* is radical, not in the sense of being left-wing, but radical in the sense of seeking to return to the root of things and argue them once again based on first principles.”), online at <http://balkin.blogspot.com/2014/09/is-noel-canning-victory-for-living.html>.

²³⁸ *Youngstown*, 343 US at 610-11 (Frankfurter, J, concurring). See also, for example, Michael J. Glennon, *The Use of Custom in Resolving Separation of Powers Disputes*, 64 BU L Rev 109, 134 (1984) (contending that in order for historical practice to be credited in discerning the separation of powers, the other branch must have been on notice of the practice and “must have acquiesced” in it); Peter J. Spiro, *War Powers and the Sirens of Formalism*, 68 NYU L Rev 1339, 1356 (1993) (reviewing Ely (cited in note 229) (“[T]he other branch must have accepted or acquiesced in the action.”)).

²³⁹ See Singer at 149 (cited in note 230) (noting that “all states require the adverse possessor to show that possession was not permissive”).

²⁴⁰ To the extent that historical gloss is premised only on the acquiescence of the affected branch, it is not thought to require an actual agreement or bargain between the branches. Cf Aziz Z. Huq, *The Negotiated Structural Constitution*, 114 Colum L Rev 1595 (2014) (considering how allocations of authority between governmental institutions that are the product of “interbranch bargains” should be treated). In *Noel Canning*, for example, the majority did not claim that Congress or the Senate had authorized the President to exercise a broad recess appointments authority. Rather, it claimed that the Senate had not taken “any formal action . . . to call into question” intra-session recess appointments and had not “countered th[e] practice” of filling pre-existing vacancies. See 134 S Ct at 2564, 2573.

that Congress is disabled from restricting or regulating that authority. In other words, separation of powers custom does not yield many instances of a disallowance of congressional regulation—that is, situations in which the President would prevail under Justice Jackson’s third category from *Youngstown*.²⁴¹ To the extent that custom-based presidential authority is considered non-exclusive, it is more analogous to some sort of license or easement than to adverse possession.²⁴²

Moreover, even when historical gloss does produce something like exclusive executive authority, Congress often will be able to regulate it indirectly. That appears to be true, for example, for recess appointments. As a result of the majority’s decision in *Noel Canning*, presidents are permitted to make recess appointments during substantial intra-session as well as inter-session recesses, and can do so for vacancies that predate the recess. In a sense, that authority resembles an exclusive property right. As the majority made clear, however, Congress or one of its houses can take various actions to restrict the exercise of that right. Options include not taking a substantial recess that would trigger the recess appointments authority, breaking up a long recess with pro forma sessions, and using the appropriations power to disallow payment of certain recess appointees, as it long did (and still does to some extent) under the Pay Act.

B. Justifications for Crediting Practice

Although the analogy between the adverse possession doctrine in property law and the separation of powers is problematic for the reasons discussed above, some of the justifications for allowing adverse possession have potential relevance to the separation of powers. Perhaps more importantly, there are additional justifications for deferring to historical practice in the separation of powers context that are specific to constitutional law.

1. Reasons for Allowing Adverse Possession

There are a number of reasons why property law has long allowed acquisitions through longstanding use. Some of the reasons are historical and, as such, are specific to property law, but there are functional justifications as well. Some of the most commonly cited justifications include: promoting clarity of title; encouraging the most productive use of the resource; protecting reasonable expectation interests; and incentivizing the

²⁴¹ See *Youngstown*, 343 US at 637 (Jackson, J, concurring) (“When the President takes measures incompatible with the expressed or implied will of Congress, 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”).

²⁴² This is not to suggest that the President is entirely lacking in exclusive authority, and the pending *Zivotofsky* case may address the boundaries of such authority as it concerns the recognition of foreign governments. See *Zivotofsky v Secretary of State*, 725 F3d 197 (DC Cir 2103), cert. granted, 134 S Ct 1873 (2014). Even there, however, the practice better supports presidential unilateralism relating to recognition than it does exclusive presidential authority. See, for example, Robert J. Reinstein, *Is the President’s Recognition Power Exclusive?*, 86 Temple L Rev 1 (2013). But other modalities of constitutional interpretation, such as inferences from the constitutional structure and consequentialist considerations, may help to compensate for ambiguities in the practice.

monitoring and policing of boundaries.²⁴³ It is instructive to consider how those justifications might map onto a practice-based approach to the separation of powers.

Clarity of title. By vesting title in a possessor of land after a prescribed period of time, the adverse possession doctrine can help to clarify title by eliminating potential disputes. At first glance, that justification seems to have little relevance to the historical gloss method of interpretation, given the lack of any specified period in which separation of powers custom becomes a legal entitlement. Moreover, a custom of exercising particular powers is likely to be more amorphous than a custom of using land. Indeed, it is an almost inevitable feature of custom-based claims that there will be disputes about the scope of what the practice covers.²⁴⁴

Nevertheless, there might be instances in which crediting longstanding practice is the best way of achieving clarity in the distribution of constitutional authority. For example, sometimes the constitutional text is unclear or silent about a particular issue of authority, in which case the practice may offer the most concrete decisional material. To take one example, the text describes how treaties are to be made by the United States but says nothing about how they are to be terminated. Allowing longstanding practice to resolve the issue might provide more clarity than having the issue continually subject to (potentially new) arguments about the implications of text or original understandings.²⁴⁵ Similarly, for war powers, once it is conceded that the President has some (but not unlimited) constitutional power to direct the use of military force without congressional authorization beyond repelling attacks, it may be difficult to discern the boundary of that power without at least some consideration of past practice.²⁴⁶

²⁴³ See Singer at 155-62 (cited in note 230).

²⁴⁴ See, for example, Martin S. Flaherty, *Post-Originalism*, 68 U Chi L Rev 1089, 1105 (2001) (reviewing David P. Currie, *The Constitution in Congress: The Jeffersonians, 1801-29* (Chicago, 2000)) (“As a theoretical matter, custom has its own problems. Not least among these are the questions of what counts as the relevant custom, at what level of generality, and for how long.”). Cf Michael D. Ramsey, *The Limits of Custom in Constitutional and International Law*, 50 San Diego L Rev 867 (2013) (attempting to distinguish between applications of custom that do not involve contested value judgments and those that do); Frederick Schauer, *Pitfalls in the Interpretation of Customary Law*, in *The Nature of Customary Law* 27 (Amanda Perreau-Saussine & James Bernard Murphy eds, Cambridge, 2007) (noting that custom always can be described at differing levels of generality).

²⁴⁵ Modern practice supports a unilateral presidential authority to terminate treaties, although that does not appear to have been the general understanding in the nineteenth century. See Curtis A. Bradley, *Treaty Termination and Historical Gloss*, 92 Tex L Rev 773, 800-01 (2014).

²⁴⁶ Cf Spiro, 68 NYU L Rev at 1355 (cited in note 238) (“Ultimately, war powers law does not lend itself to refined parchment solutions. It is rather the ‘court of history,’ an accretion of interaction among the branches, that gives rise to basic norms governing the branches’ behavior in the area.”); Jane C. Stromseth, *Understanding Constitutional War Powers Today: Why Methodology Matters*, 106 Yale LJ 845, 876 (1996) (reviewing Louis Fisher, *Presidential War Power* (Kansas, 1995)) (“[W]here the constitutional text is genuinely ambiguous or silent, as it is regarding issues such [as] the President’s power as Commander in Chief to deploy forces abroad for foreign policy purposes in peacetime or the precise scope of the President’s authority to ‘repel sudden attacks,’ longstanding and consistent historical practice can shed light on how we should understand the President’s constitutional power today.”).

Encouraging productive use. Another potential justification for allowing the acquisition of property rights through adverse possession is that it will encourage productive use of the property. Again, the fit with separation of powers is not immediately obvious. Nevertheless, it might be argued that, when one branch assumes authority that potentially falls within the prerogatives of the other branch, and continues to exercise that authority for a long period of time without substantial objection, it is likely that, as between the two branches, the actor exercising the authority is the best positioned to use it.²⁴⁷

Originalists understandably will object that, for better or worse, the Constitution settled the question of allocations of authority. One problem with the originalist position, however, is that the Founders' functional assessments do not take account of genuinely monumental changes in the nature of governance and international relations. Consider, for example, the rise of the administrative state. Even if the widespread delegation by Congress of what amounts to lawmaking authority to administrative agencies seems to offend original understandings of the separation of powers, the Founders could not have anticipated the nature of the modern national economy or the widely expected role of government in that economy. Another example is the rise of congressional-executive agreements in the twentieth century. Even if the Founders thought that all international agreements needed to be approved by two-thirds of the Senate, they entertained that thought at a time when the United States was expected to maintain only a handful of bilateral treaty relationships. The functional assessment is potentially very different in a post-United Nations era in which the United States has an interest in maintaining thousands of treaty relationships, including on many topics that overlap with the traditional regulatory authority of Congress (and not merely the Senate).²⁴⁸

This is not to suggest that the judiciary always will be able to make those functional assessments. The point, rather, is that the judiciary may reasonably conclude for some separation of powers issues that it cannot do a better job of making those assessments than can the political branches. That is what the Court in *Noel Canning* seemed to suggest when it noted that “[w]e have not previously interpreted the [Recess Appointments] Clause, and, when doing so for the first time in more than 200 years, we must hesitate to upset the compromises and working arrangements that the elected branches of Government themselves have reached.”²⁴⁹ Moreover, to reiterate an earlier

²⁴⁷ Cf. Huq, 114 Colum L Rev at 1646-56 (cited in note 240) (arguing, on efficiency and other grounds, against a categorical prohibition on bargains between government institutions about the exercise of authority); Sunstein, *Minimalism*, 105 Mich L Rev at 401 (cited in note 120) (“If Congress and President Bush have settled on certain accommodations, there is reason to believe that those accommodations make institutional sense.”).

²⁴⁸ See, for example, Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 Harv L Rev 799, 805 (1995), and Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 Yale LJ 1236 (2008). This does not mean, however, that historical practice necessarily supports complete interchangeability between treaties and executive agreements. See, for example, Peter J. Spiro, *Treaties, Executive Agreements, and Constitutional Method*, 79 Tex L Rev 961 (2001).

²⁴⁹ 134 S Ct at 2560.

point, if judicial precedent can compromise original understandings (as even many originalists allow), historical practices of the political branches—especially those practices that respond to monumental changes in the world—should be able to do the same.

Reliance interests. For the use of land, one reason for giving weight to longstanding use is that someone may have invested time and resources based on the belief that she would continue to reap the benefits of the investment. The majority in *Noel Canning* seemed to be concerned that, in the separation of powers context, historical practice can similarly generate institutional reliance interests. It noted, for example, that it was “reluctant to upset this traditional practice where doing so would seriously shrink the authority that Presidents have believed existed and have exercised for so long.”²⁵⁰ By contrast, in holding that Senate breaks of less than ten days are presumptively too short to trigger the President’s recess appointments authority, the majority said that it did not perceive any presidential reliance on a recess appointments power for breaks of fewer than ten days.²⁵¹ For his part, Scalia denied that the historical practices in question had “created any justifiable expectations that could be disappointed by enforcing the Constitution’s original meaning,”²⁵² but he did not elaborate on the claim.

In general, reliance does not appear to be an especially strong argument for crediting historical practice in the area of separation of powers. After all, a branch of government that has been exercising a particular type of authority presumably could simply cease exercising the authority going forward. Of course, there might be *third-party* reliance interests created by governmental actions taken in the past,²⁵³ such as the NLRB decisions that had been made by recess appointees, but there are legal doctrines (such as the *de facto* officer doctrine) that might safeguard such interests.²⁵⁴ And while it seems unlikely that such doctrines always would prevent externalities, it is also possible that such externalities might themselves reduce the likelihood that courts would deem an issue justiciable.²⁵⁵

²⁵⁰ 134 S Ct at 2573.

²⁵¹ See id at 2566.

²⁵² Id at 2617.

²⁵³ See, for example, *United States v Midwest Oil Co.*, 236 US 459, 472-73 (1915) (noting that “officers, law-makers and citizens naturally adjust themselves to any long-continued action of the Executive Department—on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice”).

²⁵⁴ See David H. Carpenter & Todd Garvey, *Practical Implications of Noel Canning on the NLRB and CFPB* (Cong Res Serv, Apr. 1, 2013), at <http://www.cfpbmonitor.com/files/2013/04/Practical-Implications.pdf>.

²⁵⁵ See, for example, *Made in the USA Foundation v United States*, 242 F3d 1300, 1318 (11th Cir 2001) (holding that the government’s decision to conclude the NAFTA trade agreement as a “congressional-executive agreement” rather than as an Article II treaty presented a political question, in part because holding this process unconstitutional “would potentially undermine every other major international commercial agreement made over the past half-century”).

Nevertheless, there may be instances in which a longstanding exercise of authority is embedded in what in essence is an inter-branch bargain, pursuant to which the branch exercising authority has ceded another type of authority. If a court invalidated only one half of such a bargain, it might unsettle reliance interests. A possible example is the Senate's practice of attaching reservations to its advice and consent to treaties. That practice was novel, both domestically and internationally, when the Senate first initiated the practice in connection with the Jay Treaty in 1794.²⁵⁶ Importantly, the Senate developed that practice in response to the President's effort to avoid Senate involvement in the treaty negotiation process, notwithstanding the Constitution's assignment to the Senate of "advice and consent" authority, and it is one reason the Senate acquiesced in having that dual role reduced primarily to one of "consent." Invalidating the reservations authority at this late date might place the Senate in the difficult institutional and political position of having to recover a role in the treaty process that it has not effectively exercised since the early days of the nation.

Policing boundaries. The doctrine of adverse possession is also said to give owners of property an incentive to monitor and police the boundaries of the property. In some ways, that justification might seem to have the best fit with separation of powers, but in fact it highlights one of Justice Scalia's concerns. James Madison wrote in *Federalist No. 51* that the separation of powers would be self-enforcing by "giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others."²⁵⁷ Under such a scheme, Madison posited, "[t]he interest of the man must be connected with the constitutional rights of the place," and "[a]mbition must be made to counteract ambition."²⁵⁸ The possibility of losing a prerogative through inaction should heighten the incentive.

The problem with that justification, as a number of scholars have discussed, is that congressional-executive relations do not work in a Madisonian fashion, at least in the modern era.²⁵⁹ In particular, because of collective action difficulties, veto-gates, the focus of legislators on reelection, a strong identification of individual members with partisan interests, and a strong dis-identification of members with the institution given its unpopularity, Congress as an institution does not consistently seek to protect its institutional prerogatives. (One of the many signs of this phenomenon is that Congress lacks an institutional counterpart to the Office of Legal Counsel.) Of course, Congress frequently does resist the policy initiatives of the executive branch, especially during

²⁵⁶ See Curtis A. Bradley, *International Law in the U.S. Legal System* 35-36 (Oxford, 2013).

²⁵⁷ The *Federalist* No. 51 at 321-22 (James Madison), in *The Federalist Papers* (cited in note 14).

²⁵⁸ *Id.* at 322. We take no position here on whether or to what extent those statements in *Federalist No. 51* reflected Madison's actual views. Cf. Samuel Kernell, "The True Principles of Republican Government": Reassessing James Madison's Political Science, in *James Madison: The Theory and Practice of Republican Government* 92, 93 (Stanford, Samuel Kernell ed, 2003) (arguing that *Federalist No. 51* "does not represent Madison's sincere theoretical views of the Constitution").

²⁵⁹ See, for example, Bradley & Morrison, 126 *Harv L Rev* at 438-47 (cited in note 95); Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 *Harv L Rev* 657, 671 (2011); Eric A. Posner & Adrian Vermeule, *The Credible Executive*, 74 *U Chi L Rev* 865, 884 (2007).

times of divided government, and it has a variety of tools for doing so. But such resistance overlaps only imperfectly with institutional policing.²⁶⁰

2. Additional Reasons for Crediting Practice

In sum, the justifications for allowing adverse possession in property law are not a close fit with the context of separation of powers disputes, although some of those justifications have partial relevance in that context. Importantly, however, there are additional justifications for crediting historical practice that are more specific to the constitutional law of separation of powers and that are therefore not captured, at least not fully, by the analogy to property law.

Respect for the coordinate branches. One justification for courts to defer to historic governmental practices relates to the “countermajoritarian” nature of constitutional judicial review.²⁶¹ Although the concerns animating the countermajoritarian difficulty can be overstated, those concerns are particularly strong when both political branches share a view that is different from the judiciary’s and have held that view for a long time. Judicial deference to the longstanding practices of the political branches can reduce those concerns. That is true regardless of whether one holds a “judicial supremacist” or a “departmentalist” view of constitutional interpretation. That is because the issue is not whether the Supreme Court should be understood as having the last word on constitutional issues, but rather how much respect it should give to the considered views of other constitutional actors when it decides those issues.²⁶² This justification for giving weight to the practices of the political branches is most applicable when there is evidence that those branches understand the practice in constitutional terms.

Limits on judicial authority and capacity. Deference to historical practice also can reflect limitations on judicial authority and capacity. Part of the idea here is that if the judiciary is too assertive in disturbing institutional practices, it risks having its judgments ignored by the political branches. It is in part for this reason that courts will likely be reluctant, for example, to decide the constitutionality of a war. But even assuming that the political branches will adhere to judicial decisions policing the

²⁶⁰ Thus, the majority in *Noel Canning* was too casual in suggesting that “the Senate, like the President, has institutional ‘resources,’ including political resources, ‘available to protect and assert its interests.’” 134 S Ct at 2569, quoting *Goldwater v Carter*, 444 US 996, 1004 (1979). See Bradley & Morrison, 126 Harv L Rev at 446 (cited in note 95).

²⁶¹ On the “countermajoritarian difficulty,” see generally Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 16-23 (1962). For a recent critique of this purported difficulty, see generally Barry Friedman, *The Will of the People* (Farrar, Strauss and Giroux, 2009).

²⁶² Cf *City of Boerne v Flores*, 521 US 507, 535-36 (1997) (“Our national experience teaches that the Constitution is preserved best when each part of the government respects both the Constitution and the proper actions and determinations of the other branches.”). For a judicial supremacist, deference to longstanding historical practice is unlike deference to a statute that responds to an unpopular judicial decision. Notably, Justice Kennedy wrote the “judicial supremacist” opinion of the Court in *Boerne* and yet also joined the majority in *Noel Canning*.

relationship between legislative and executive power, not all aspects of that relationship are reducible to justiciable cases and controversies appropriate for judicial resolution. For instance, courts will not always have a sense of whether a given practice by one political branch truly intrudes upon the prerogatives or powers of the other, or what the ripple effects will be if the judiciary changes the status quo ante in a fundamental way. Moreover, the judicial tools for remedying such intrusions may be rather blunt and imprecise. If Justice Scalia’s view had prevailed in *Noel Canning*, for example, it likely would have resulted in the end of the President’s recess appointments power as a practical matter, given the relatively short length of modern inter-session recesses.

Constitutional updating. Another reason to credit historic governmental practice in separation of powers disputes is that the U.S. Constitution is very old and difficult to amend, and so is subject to serious “dead hand” objections. Crediting historic practice in the area of separation of powers allows the Constitution to evolve in response to the changing needs of the government. To reconcile that feature with the rhetorical appeal of originalism and textualism, historical practice is frequently described as an “interpretive gloss” rather than as a free-standing claim of constitutional meaning. At least in theory, that gloss is available only where the textual assignments of authority are unclear or incomplete, although, as discussed above, it seems likely that there is a feedback loop whereby perceptions of clarity and coverage are themselves affected by practice.

3. Role of Judicial Review

The last point—about constitutional updating—implicates an inherent tension between the benefits of customary evolution and centralized judicial review. Given the authority that federal courts possess in our constitutional system today, practice is likely to coordinate around judicial decisions. As a result, a judicial decision crediting practice has the potential to freeze the practice in place. That possibility might counsel courts to pursue an approach that Cass Sunstein has called “judicial minimalism” when they engage with customary practice, particularly where it appears that the practice is still in flux.²⁶³ In some instances, it might even suggest judicial abstention altogether, through the political question doctrine or other mechanisms.

For example, in the Jerusalem passport case that has now returned to the Supreme Court, *Zivotofsky v Secretary of State*,²⁶⁴ the Court, having previously rejected the applicability of the political question doctrine,²⁶⁵ is confronted with a choice between two potentially problematic options: endorsing executive disregard of a statute, or allowing congressional intrusion in sensitive Middle East diplomacy in a manner that is contrary to longstanding executive branch positions held by Presidents of both parties. In a case like

²⁶³ See Sunstein, *Minimalism* (cited in note 120). One can approve of minimalism in this context without approving of it as a general approach to constitutional adjudication. For a general critique, see Neil S. Siegel, *A Theory In Search of a Court, and Itself: Judicial Minimalism at the Supreme Court Bar*, 103 Mich L Rev 1951 (2005).

²⁶⁴ 725 F3d 197 (DC Cir 2103), cert. granted, 134 S Ct 1873 (2014).

²⁶⁵ See note 91.

that one, some uncertainty about the distribution of authority may be optimal. In other words, unlike in property law, clarity of title may not always be the desired aim in the area of separation of powers.

Furthermore, if one is concerned about the growth of executive power, one should not assume that more robust judicial review will be a corrective, because it is possible, if not probable, that courts will end up legitimating many exercises of executive authority.²⁶⁶ For example, interpreters who regard the justiciability of *Zivotofsky* as a close question may be inclined to favor resolving a similarly close question on the merits in such a way as to preserve the state of affairs that would have prevailed in the absence of judicial intervention.²⁶⁷ In *Zivotofsky*, that would mean holding in favor of the President's position.

This does not mean, however, that either abstention or minimalism is always the best course. For example, the majority opinion in *Noel Canning* was closer to maximalism than to minimalism. It decided all three of the questions before it, even though the case could have been resolved on the narrowest ground, which concerned the minimum length of a recess and the effect of the pro forma sessions.

On balance, we think the majority's decision to resolve all three issues made sense. First, the historical practice concerning both intra-session appointments and pre-vacancy appointments was well established before the D.C. Circuit's decision in the case, and further customary evolution was unlikely. Second, the decision of the D.C. Circuit was itself maximalist, and it would have been left in place had the Supreme Court ruled narrowly. Third, because appointments to bodies like the NLRB implicate the legitimacy of administrative decisionmaking, with a multitude of consequences for third parties, there were strong reasons for not leaving the questions unsettled in the face of the new uncertainty.²⁶⁸ Fourth, other cases already were pending in the lower courts that implicated the broader questions,²⁶⁹ so a minimalist approach would not have had much effect in terms of clearing space for a non-judicial resolution. Finally, as noted above, the

²⁶⁶ Cf Eric A. Posner & Adrian Vermeule, *Inside or Outside the System?*, 80 U Chi L Rev 1743, 1752 (2013) (“[A]rguments for ‘Madisonian’ judging go wrong by assuming that judges stand outside the Madisonian system.”).

²⁶⁷ We are not suggesting that the Court should decide the merits of a case incorrectly in order to take proper account of justiciability concerns. We are instead suggesting that, in cases presenting close questions both of justiciability and on the merits, justiciability concerns may have a role to play in tipping the balance one way or the other even after the Court decides to reach the merits. Cf Bradley & Morrison, 126 Harv L Rev at 430 (cited in note 95) (suggesting that the political question doctrine and the historical gloss method of interpretation can be viewed as simply reflecting different degrees of deference to political branch practice); Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 Harv L Rev 1274, 1306 (2006) (“Viewed along a spectrum, a determination of nonjusticiability due to the absence of judicially manageable standards is simply the limiting case of a decision to underenforce constitutional norms.”).

²⁶⁸ Cf Siegel, 103 Mich L Rev at 2007 (cited in note 263) (emphasizing that judicial minimalism may compromise the guidance function of the rule of law).

²⁶⁹ See 134 S Ct at 2558.

decision in *Noel Canning* leaves the Senate with several options for resisting broad exercises of the recess appointments power, so the effect of the decision on the relative balance of authority between the branches may be relatively modest.

C. Executive Aggrandizement and Individual Liberty

Despite those potential justifications for crediting historical practice in the area of separation of powers, Justice Scalia's two objections are serious ones. First, he expressed concern that a practice-based approach to the separation of powers would unduly favor the expansion of executive authority. "In any controversy between the political branches over a separation-of-powers question," Justice Scalia noted, "staking out a position and defending it over time is far easier for the Executive Branch than for the Legislative Branch."²⁷⁰ Crediting practice, he therefore argued, will allow the President to continue accreting power vis-à-vis Congress over time.

That concern has force, and one of us has emphasized it elsewhere.²⁷¹ Nevertheless, it suggests caution in crediting historical practice, not a rejection of it. One way to reduce the concern would be calibrate the test for historical gloss in a way that would take account of the institutional realities of the congressional-executive relationship. For example, given the diminished incentive of members of Congress to challenge the President if he or she is of the same party, more weight should be given to acquiescence in practice by the opposing party as well as non-acquiescence by the same party.²⁷² In addition, to take account of Congress's greater collective action difficulties as compared with the executive branch, mere congressional inaction or silence rarely should be considered sufficient to constitute legally significant acceptance of a practice. Relatedly, evidence of congressional non-acquiescence should extend beyond the enactment of opposing statutes and should include various forms of congressional "soft law," such as committee reports and non-binding resolutions.²⁷³ And, in those instances in which Congress actually has managed to enact legislation restricting executive authority without constitutional objection from the President, arguments for contrary executive authority based on practice should be viewed with skepticism.²⁷⁴ At the same time, when Congress has actively regulated in an area, what it chooses *not* to regulate

²⁷⁰ Id at 2605, citing Bradley & Morrison, 126 Harv L Rev at 439-47 (cited in note 95).

²⁷¹ See Bradley & Morrison, 126 Harv L Rev at 438-47 (cited in note 95).

²⁷² See id at 454.

²⁷³ For discussions of congressional soft law, see Josh Chafetz, *Congress's Constitution*, 160 U Pa L Rev 716 (2012), and Jacob E. Gersen & Eric A. Posner, *Soft Law: Lessons from Congressional Practice*, 61 Stan L Rev 573 (2008). The majority in *Noel Canning* may have given a nudge to the consideration of soft law in noting that, "neither the Senate considered as a body *nor its committees*, despite opportunities to express opposition to the practice of intra-session recess appointments, has done so." 134 S Ct at 2563 (emphasis added).

²⁷⁴ For example, the existence of the 1978 Foreign Intelligence Surveillance Act, which limited and regulated electronic surveillance, should have made the Bush administration's practice-based arguments in support of a broader surveillance power difficult to sustain. See Bradley & Morrison at 449 (cited in note 95).

potentially can be evidence of acquiescence, because in those instances Congress by assumption has overcome at least some of its collective action difficulties.

Given the greater ability and incentives of the executive branch to defend its institutional prerogatives, the test for executive acquiescence in assertions of authority by Congress should be less stringent. Thus, for example, longstanding executive inaction in the face of congressional assertions of authority should receive significant weight in discerning congressional authority. This point serves as a reminder that, although historical gloss is frequently invoked to justify claims of executive authority (and that is how Frankfurter described it), there is nothing inherent in the historical gloss approach to the separation of powers that would preclude Congress from gaining authority through custom. Indeed, as a general matter (putting aside for a moment conflicts with the President), Congress almost certainly has gained authority in that way. For example, a key reason that the vast majority of Justices and commentators reject a narrow approach to Congress's enumerated powers is that Congress long has exercised broad powers to tax, spend, and regulate. Another reason, of course, is judicial precedent affirming the broader authority, including the *McCulloch* decision discussed in Part II. But it is easy to forget that deferring to such precedent itself can allow a form of "adverse possession," albeit by one group of Supreme Court Justices vis-a-vis a later group.

In *Noel Canning*, the majority's decision to credit the historical practice of broad presidential exercise of the recess appointments power is defensible even in light of the cautionary approach suggested above. That practice is longstanding and has been relied upon by presidents of both major political parties, during times of both unified and divided government. Moreover, allowing such presidential authority does not disable either Congress or the Senate from taking actions to resist exercises of that authority. Regarding the specific practice of intra-session recess appointments, Congress has done nothing, either as a body or even through committee action, to resist the exercise of presidential authority, even when Congress otherwise has regulated in the area. As for appointments to fill pre-existing vacancies, even if one concludes that the 1863 Pay Act signified Congress's non-acquiescence, it seems reasonable to credit the 1940 amendments to the Act as signifying a change of position, especially after the Comptroller General already had observed in 1927 that presidential authority to make those appointments was settled.

Scalia's second objection was that third-party interests are at stake in the distribution of institutional authority. In particular, Scalia emphasized that the purpose of distributing governmental authority is not to provide particular entitlements to the branches per se, but rather to protect liberty by diffusing power. Again, that is a legitimate concern, but it paints too broadly.

As an initial matter, protecting liberty may be a central justification for the Constitution's checks and balances, but that is only one aspect of the separation of powers. Another aspect is the distribution of authority in a manner that enables effective

governance.²⁷⁵ Liberty is also a deeply contested concept, and effective governance may itself be essential for the promotion of a positive conception of liberty. Moreover, even under a purely negative conception of liberty, effective governance may be essential for liberty in the long term—for example, by safeguarding against external threats. Consistent with these points, the majority in *Noel Canning* quoted Alexander Hamilton from the first *Federalist Paper* for the proposition that the “vigour of government is essential to the protection of liberty.”²⁷⁶

In any event, not all separation of powers issues have a direct connection to liberty. The connection between liberty interests and the recess appointments issues in *Noel Canning*, for example, are abstract and attenuated. Similarly, for other governmental practices that have been heavily informed by practice—such as the practice of having Congress rather than a supermajority of the Senate approve many international agreements—there is no obvious tension with individual liberty. Of course, some separation of powers issues *are* directly connected to negative liberty. An obvious example would be the separation of the power over criminal lawmaking from the powers over criminal law enforcement and interpretation. This is one reason why there was so much concern about the Bush administration’s use of military commissions prior to the enactment of the Military Commissions Act.²⁷⁷ Importantly, as the *Hamdan v Rumsfeld* decision disallowing those commissions illustrates, it is precisely where individual liberty interests are most implicated that judicial review is most likely to occur, which in turn leaves less space for the accretion of constitutional custom.²⁷⁸

Conclusion

The significance of *Noel Canning* extends well beyond its resolution of important questions about the scope of the President’s recess appointments power. The decision stands as one of the Supreme Court’s most significant endorsements of the relevance of “historical gloss” to the interpretation of the separation of powers. More generally, *Noel Canning* exemplifies how the constitutional text, perceptions about clarity or ambiguity, and “extra-textual” considerations such as historical practice operate interactively rather than as separate elements of interpretation. The decision also provides a useful entry point into critically analyzing the concept of constitutional liquidation, which the

²⁷⁵ See *Youngstown*, 343 US at 635 (Jackson, J., concurring) (“While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government.”).

²⁷⁶ 134 S Ct at 2577.

²⁷⁷ See, for example, Harold Hongju Koh, *The Case Against Military Commissions*, 96 Am J Int’l L 337, 339 (2002) (“Fundamentally, [Bush’s] Military Order undermines the constitutional principle of separation of powers.”); *Hamdan v Rumsfeld*, 548 US 557, 638 (2006) (Kennedy, J., concurring in part) (“Trial by military commission raises separation-of-powers concerns of the highest order.”). Another separation of powers concern relating to the commissions is that they bypass the regular federal courts, and that concern was not eliminated by Congress’s authorization of the commissions in 2006.

²⁷⁸ Cf *Boumediene v Bush*, 553 US 723, 765 (2008) (“[T]he writ of habeas corpus is itself an indispensable mechanism for monitoring the separation of powers.”).

majority in *Noel Canning* seemed to conflate with historical gloss but which seems more consistent with the approach to historical practice reflected in Justice Scalia's concurrence in the judgment. Finally, the decision illustrates that the historical gloss approach, when applied cautiously and with sensitivity to the potential concerns that Justice Scalia and others have raised, is not vulnerable to the charge of licensing executive aggrandizement by "adverse possession."