

**OUR PRESCRIPTIVE JUDICIAL POWER:  
CONSTITUTIVE AND ENTRENCHMENT EFFECTS OF HISTORICAL PRACTICE  
IN FEDERAL COURTS LAW**

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*Scholars examining the use of historical practice in constitutional adjudication have focused on a few high-profile separation-of-powers disputes, such as the recent decisions in *NLRB v. Noel Canning* and *Zivotofsky v. Kerry*. This essay argues that “big cases make bad theory”—that the focus on high-profile cases of this type distorts our understanding of how historical practice figures in constitutional adjudication more generally. I shift focus here to the more prosaic terrain of federal courts law, in which practice plays a pervasive role. That shift reveals two important insights: First, while historical practice plays an important constitutive role, structuring and filling gaps in the judicial architecture, that practice is, in contrast to the practices in *Noel Canning* and *Zivotofsky*, rarely entrenched against ordinary legal change. Second, the authority of historical practice in high-profile separation-of-powers disputes generally rests on a theory of acquiescence by one branch in the other’s actions; the federal courts cases, in contrast, ignore acquiescence and instead ground practice’s authority in its longstanding observance.*

*The use of historical practice in federal courts law rests on a theory of prescription—that is, past practice derives authority from its sheer pastness. This essay explores the centrality of prescription in Burkean political theory and suggests that cases relying on past practices can contribute to the development of a distinctively Burkean theory of constitutional law. This theory suggests that past practice plays an important constitutive role, but as in the federal courts cases, that role is not entrenched against ordinary legal change. The fact that historical practice is not entrenched—and can be changed through democratic processes—helps to answer several key criticisms of relying on practice in constitutional adjudication.*

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**CONTENTS**

<b>I.</b>	<b>Historical Practice and Constitutional Functions.....</b>	<b>7</b>
A.	What Do We Mean by “Practice,” and How Do Courts Rely on It? .....	9
B.	The Constitutive and Entrenchment Functions of Constitutions .....	13
C.	Acquiescence and Prescription .....	15
<b>II.</b>	<b>Historical Practice in Federal Courts Law .....</b>	<b>20</b>
A.	Judicial Precedent .....	21
B.	Incorporation of Extant Bodies of Law .....	26
C.	Canons of Statutory Construction .....	34
<b>III.</b>	<b>The Constitutive and Entrenchment Effects of Practice.....</b>	<b>39</b>
A.	The Non-Entrenchment of Practice in Federal Courts Law.....	40
B.	Acquiescence and Prescription .....	46
C.	Nonentrenchment and the Critique of Prescription .....	52
	<b>Conclusion .....</b>	<b>56</b>

A spate of recent, high-profile separation of powers cases at the Supreme Court has turned a spotlight on courts' reliance on historical practice in constitutional cases. In *NLRB v. Noel Canning*,<sup>1</sup> the Court looked to the practice of past Presidents and Congresses in resolving three questions about the meaning of the Recess Appointments Clause. Likewise, in *Zivotofsky v. Kerry*,<sup>2</sup> the Court relied on Executive practice and Congress's acquiescence to determine that Congress may not regulate the President's power to recognize (or not recognize) the territorial claims of foreign governments. These and other cases have prompted an outpouring of scholarship concerning the courts' reliance on historical practice outside the usual parameters of originalist interpretation—that is, the use of historical practices that are not evidence of the Founders' intentions or understandings but that nonetheless may help resolve disputed questions of constitutional meaning.<sup>3</sup>

In this article, I suggest that high-profile disputes over the separation of powers can tell us only part of the story concerning the role of historical practice in constitutional analysis. I shift focus from separation of powers disputes to the somewhat more prosaic terrain of federal courts law.<sup>4</sup> That field, to be sure, has its share of high-stakes inter-branch confrontations—for example, over Congress's authority to restrict the federal courts' jurisdiction.<sup>5</sup> But federal courts doctrine often looks to historical practice in less dramatic ways. Consider, for example, a typical civil rights suit against a state officer under 42 U.S.C. § 1983 alleging an unreasonable search or seizure in violation of the Fourth Amendment. In adjudicating such a case, a court is likely to frame the plaintiff's "reasonable expectation of privacy" in terms of common social practices;<sup>6</sup> to look to

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<sup>1</sup> 134 S. Ct. 2550 (2014) (holding that the Recess Appointments Clause permits appointments during both inter- and intra-session recesses and covers vacancies that arise prior to the recess, but does not permit appointments when the Senate is in *pro forma* session).

<sup>2</sup> 135 S. Ct. 2076 (2015) (holding that Congress may not require the Secretary of State to designate "Israel" as the place of birth on a passport issued to a citizen born in Jerusalem, in contravention of Executive policy).

<sup>3</sup> See, e.g., Shalev Roisman, *Constitutional Acquiescence*, 84 GEO. WASH. L. REV. \_\_ (forthcoming 2016); Curtis A. Bradley & Neil S. Siegel, *After Recess: Historical Practice, Textual Ambiguity, and Constitutional Adverse Possession*, 2014 SUP. CT. REV. 1 (2015); Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411 (2012).

<sup>4</sup> By "federal courts" law, I mean the body of law governing the jurisdiction and remedial powers of the federal judiciary, as well as that judiciary's interaction with state law and state courts. See generally Richard H. Fallon, Jr., *Reflections on the Hart and Wechsler Paradigm*, 47 VAND. L. REV. 953, 961-63 (1994) (discussing the somewhat fuzzy boundaries of the federal courts field). I also construe the term broadly to include recurrent institutional problems arising in federal litigation, such as the courts' stance toward statutes and their own precedents. These are not *exclusively* problems of federal courts law, but they are much-discussed in that field.

<sup>5</sup> See, e.g., *Boumediene v. Bush*, 553 U.S. 723 (2008) (striking down restrictions on judicial review of determinations that Guantanamo Bay detainees were enemy combatants under the Suspension Clause); *Ex parte McCordle*, 74 U.S. (7 Wall.) 506 (1869) (upholding restriction on Supreme Court's jurisdiction to review challenge to military reconstruction of the South).

<sup>6</sup> See *Katz v. United States*, 389 U.S. 347, 360-62 (1967) (Harlan, J., concurring).

common law practice in assessing both the measure of damages<sup>7</sup> and the defendant's official immunity;<sup>8</sup> and to assess the availability of an injunction against future intrusions in light of the traditions of equity.<sup>9</sup>

Because it focuses on high-profile separation of powers disputes, the existing literature on historical practice in constitutional adjudication tends to ignore the sort of case just described. But practice is in fact pervasive in federal courts law. That body of law borrows from the common law and equity practice in shaping judicial procedure and remedies;<sup>10</sup> it employs canons of statutory construction designed, at bottom, to harmonize new law with longstanding practice;<sup>11</sup> and it structures the intricate relationship between the federal and state judicial systems by constant reference to longstanding usage.<sup>12</sup> These sorts of reliance on past practice differ in important ways from use of practice in cases like *Noel Canning* or *Zivotofsky*. Practice in federal courts law often bears a different relationship to the constitutional text, for example, and it rests on a different justificatory rationale. I submit that we miss a lot about historical practice by focusing only on the high-profile cases. One might thus sum up the line taken here as “Big cases make bad theory”—or at least *incomplete* theory.

Shifting the focus to federal courts law and the judicial power entails a second analytical move as well. This essay considers a variety of ways in which historical practices influence judicial decision—including judges' reliance on past precedents, their incorporation of preexisting common law or equitable doctrines to fill numerous gaps in our procedural and remedial regime, and the employment of canons of statutory construction—that are subconstitutional in nature. One might say that these practices are all “constitutional” in that they involve constructions of the “judicial power” recognized in Article III.<sup>13</sup> But while that is true, it also seems a bit too easy. It is more straightforward

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<sup>7</sup> See *Carey v. Phipus*, 435 U.S. 247, 257-58 (1978).

<sup>8</sup> See *Tower v. Glover*, 467 U.S. 914, 920 (1984).

<sup>9</sup> See *Giles v. Harris*, 189 U.S. 475, 486 (1903).

<sup>10</sup> See, e.g., *Alden v. Maine*, 527 U.S. 706 (1999) (grounding state sovereign immunity in the English common law); *Ex parte Young*, 209 U.S. 123 (1908) (recognizing private remedies against state officials, notwithstanding sovereign immunity, based in part on traditions of equitable relief against government officials in English practice).

<sup>11</sup> See, e.g., David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921 (1992).

<sup>12</sup> See, e.g., *Younger v. Harris*, 401 U.S. 37 (1971) (relying on longstanding equitable principles to forbid federal judicial interference with ongoing state criminal proceedings); *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590 (1874) (rejecting arguments that an amendment to the Supreme Court's jurisdictional statute was intended to fundamentally alter the relationship between that court and the state courts).

<sup>13</sup> See, e.g., *Anastasoff v. United States*, 223 F.3d 898, 900-04 (8th Cir.), *vacated as moot*, 235 F.3d 1054 (8th Cir. 2000) (suggesting that *stare decisis* is part of the meaning of the “judicial power”).

to say that these practices each perform a constitutional function—they help *constitute* the judicial power that Article III incompletely specifies—and thus form part of our “constitution outside the Constitution.”<sup>14</sup> This notion, that the canonical text of the Constitution includes only a subset of the principles that constitute our government, goes back at least as far as Karl Llewellyn’s idea of a “working constitution” in 1934.<sup>15</sup> I build on that notion here to suggest that any effort to assess the courts’ reliance on historical practice in public law should include not only its use to resolve controversies about the constitutional text but also the broader set of practices that constitute much of our working system of governance. Federal courts law provides particularly fertile ground for that broader assessment.

My exploration of the courts’ reliance on historical practice in the context of disputes about the judicial power yields two primary conclusions. The first is that using such practices to interpret the meaning of particular constitutional terms—which I will call historical “gloss”—is probably not the most common or the most important role that historical practice plays. When courts use practice to “gloss” a constitutional term, they tend to entrench that practice against change through ordinary legal means. Hence, in *Zivotofsky*, the majority read past practice by the President either recognizing or refusing to recognize territorial claims of foreign governments as a gloss on the meaning of Executive power, such that Congress could not regulate that practice by statute.<sup>16</sup> Constitutionalizing past practices dramatically raises the stakes of that kind of interpretation and may create all sorts of perverse incentives.

Much use of practice in federal courts law, however, supplements the text by filling in the many gaps in Article III’s plan for the judicial system. Critically, historical practice that supplements the constitutional text need not be—and generally *is not*—itself constitutionally entrenched. The jurisprudential literature on constitutional functions distinguishes between the constitutive function (establishing, empowering, and limiting governmental institutions) and the entrenchment function (immunizing those institutions from change through ordinary legal processes).<sup>17</sup> Much—but not all—of the historical usage pervading federal courts law performs a constitutive function but remains subject to change through ordinary legislation. Current law’s borrowing of common law principles

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<sup>14</sup> Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L. J. 408 (2007).

<sup>15</sup> Karl Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1 (1934). The notion that a constitution functionally includes all the legal materials that define, facilitate, and constrain a government’s exercise of its powers is commonplace in British law, which has long defined the “Constitution” as simply the sum of these materials. See A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 22 (8th ed. 1915).

<sup>16</sup> *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2095 (2015).

<sup>17</sup> See, e.g., Joseph Raz, *On the Authority and Interpretation of Constitutions: Some Preliminaries*, in CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS 152 (Larry Alexander, ed., 1998); Young, *Outside the Constitution*, *supra* note 14, at 415-28.

of official immunity,<sup>18</sup> for example, can be changed through statutory enactment. Incorporation of historical practice tends to be most controversial where this is *not* the case—where, for example, common law immunities are given entrenched constitutional status.<sup>19</sup>

My second point is that reliance on historical practice in federal courts law frequently rests on a different justificatory basis than the rationales featured in cases like *Noel Canning* and *Zivotofsky*. Those cases—and much of the academic literature that has grown up around them—speak primarily of rival institutions’ *acquiescence* in a particular branch’s exercise of power.<sup>20</sup> Much of the reliance on historical usage that I explore here, however, occurs in context where acquiescence seems largely beside the point. Instead, the turn to practice rests on more amorphous notions that past usage has its own legitimacy, if not authority, based on its very past-ness. Much reliance on historical practice in this area, I suggest, invokes a form of prescription.

Edmund Burke famously said that “[p]rescription is the most solid of all titles, not only to property, but . . . to government. . . . It is a presumption in favour of any settled scheme of government against any untried project, that a nation has long existed and flourished under it.”<sup>21</sup> Burke went so far as to insist that the authority of traditional practice “is a far better presumption even of the *choice* of a nation, far better than any sudden and temporary arrangement by actual election.”<sup>22</sup> Customary practice and prescriptive wisdom have long played an important role in American constitutionalism, but they remain underappreciated in constitutional theory. Reliance on tradition has been criticized from multiple directions as either too easy to manipulate<sup>23</sup> (and therefore a cover for judicial activism) or too confining<sup>24</sup> (and therefore likely to lock in an unjust status quo). And from a more positivist standpoint, reliance on historical practice in constitutional interpretation

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<sup>18</sup> See, e.g., *Tower v. Glover*, 467 U.S. 914, 920 (1984); *Harlow v. Fitzgerald*, 457 U.S. 800, 806 (1982).

<sup>19</sup> See, e.g., *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 165-68 (1996) (Souter, J., dissenting) (criticizing the majority for conferring constitutional status on state sovereign immunity that forecloses alteration by statute).

<sup>20</sup> See, e.g., *Zivotofsky*, 135 S. Ct. at 2091; *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2571-72 (2014); see also Roisman, *supra* note 3; Bradley & Siegel, *supra* note 3, at 44 (“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.”).

<sup>21</sup> Edmund Burke, *Speech on the Reform of Representation in the House of Commons* (1787), in 2 THE WORKS OF THE RIGHT HON. EDMUND BURKE, at 486, 487 (Henry G. Bohn ed., 1841).

<sup>22</sup> *Id.*

<sup>23</sup> See, e.g., J.M. Balkin, *Tradition, Betrayal, and the Politics of Deconstruction*, 11 CARDOZO L. REV. 1613, 1615 (1990).

<sup>24</sup> See, e.g., David A. Strauss, *Tradition, Precedent, and Justice Scalia*, 12 CARDOZO L. REV. 1699, 1708 (1991).

arguably permits changes in constitutional meaning that circumvent both Article V's amendment process and more general limits on judicial lawmaking.<sup>25</sup>

Distinguishing between the constitutive and entrenchment aspects of constitutionalism helps to address these criticisms. Much past practice in the federal courts field derives its authority from longstanding usage, largely independent of legitimation through some form of acquiescence. But because little of that practice is entrenched against legal change, it simply does not raise the same concerns about “constitutional adverse possession” that arise when historical practice is used to “gloss” the meaning of constitutional text. The weight of the “dead hand of the past”<sup>26</sup> is less oppressive when past practices are subject to legislative override.

Conversely, the incremental and evolutionary reform that prescription also entails is easier to defend when it does not involve change in the meaning of entrenched constitutional principles and structures. I do not deny that courts make law when, for example, they import common law or equitable principles to define the scope of federal jurisdiction or recognize and limit remedies against government actors. This sort of judicial lawmaking—the subject of an extensive literature on federal common law—raises legitimacy problems of its own.<sup>27</sup> But the Courts do not circumvent *Article V* so long as they do not seek to confer any sort of entrenched status on these norms. And the more general critique of judicial lawmaking is surely less compelling when such lawmaking conforms to roles that our courts have exercised since the beginning of the Republic. There is a certain circularity, of course, in saying that tradition legitimizes the courts' reliance on tradition. But prescriptive authority necessarily embraces that sort of circularity.<sup>28</sup>

By surveying the uses of historical practice, I hope to make three broader contributions to the literature in constitutional theory. As Richard Fallon has noted, all participants in debates about constitutional interpretation seem agree that history is relevant to that enterprise; it turns out, however, that history is used in multifarious ways and *not*

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<sup>25</sup> See, e.g., *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2617 (2014) (Scalia, J., dissenting) (arguing that by relying on ambiguous historical practice rather than the constitutional text, “[t]he majority replaces the Constitution's text with a new set of judge-made rules to govern recess appointments”).

<sup>26</sup> See, e.g., Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127 (1998) (discussing the “dead hand problem” in constitutional law).

<sup>27</sup> See generally Ernest A. Young, *Preemption and Federal Common Law*, 83 NOTRE DAME L. REV. 1639 (2008); Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881 (1986); Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 7–12 (1985).

<sup>28</sup> See Richard H. Fallon, Jr., *The Many and Varied Roles of History in Constitutional Adjudication*, 90 NOTRE DAME L. REV. 1753, 1808 (2015) (observing that “any practice-based theory of law contains an irreducible element of circularity: what is accepted as law determines what the law is, either directly in cases of consensus or partly when otherwise disputable questions must be resolved based on a mix of fit with past practice and normative attractiveness”).

simply to establish the original understanding of constitutional text.<sup>29</sup> The first contribution, then, is simply to expand our understanding of how past practices figure in debates about constitutional law.

The second contribution bears on the literature of constitutional change. That literature is driven by a single compelling observation—that is, that the structure of contemporary American governance and the array of rights that individuals possess are hard to square with the original understanding of the Constitution’s text, including the textual amendments.<sup>30</sup> The most prominent theories of constitutional change outside Article V—such as Bruce Ackerman’s theory of “constitutional moments”<sup>31</sup>—have dazzled more than they have persuaded.<sup>32</sup> If some form of “living constitutionalism” is a fact of modern life, we need a much more specific (and plausible) account of its mechanisms and some notion how those mechanisms are disciplined and constrained. I submit that historical practice plays a leading role in this story.

Finally, this essay draws on a philosophical tradition that is often neglected in constitutional debates. Those debates are dominated, on the Right, by a majoritarian and ultimately rationalistic vision that employs originalism as a constraint on the counter-majoritarian power of judges.<sup>33</sup> The Left, on the other hand, embraces a vision of living constitutionalism as a means of either furthering progressive moral values<sup>34</sup> or carving out a wider sphere for technocratic pragmatism.<sup>35</sup> This essay builds instead on an older tradition of classical conservative thought built around a Burkean commitment to prescriptive knowledge and organic, incremental change. Part of my objective here is to elaborate what a Burkean constitutional theory might look like.<sup>36</sup>

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<sup>29</sup> See *id.* at 1754-55.

<sup>30</sup> See Young, *Outside the Constitution*, *supra* note 14, at 455.

<sup>31</sup> BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991); see also Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457 (1994); Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043 (1988).

<sup>32</sup> See, e.g., Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221 (1995) (unpersuaded).

<sup>33</sup> See, e.g., Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CINN. L. REV. 849 (1989); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L. J. 1 (1971).

<sup>34</sup> See, e.g., RONALD DWORKIN, *LAW’S EMPIRE* (1986); GOODWIN LIU, PAMELA S. KARLAN, & CHRISTOPHER H. SCHROEDER, *KEEPING FAITH WITH THE CONSTITUTION* (2010); Rebecca L. Brown, *Assisted Living for the Constitution*, 59 *Drake L. Rev.* 985, 999 (2011); Frank I. Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969).

<sup>35</sup> See, e.g., STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2006); CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* (1993).

<sup>36</sup> A limited constitutional literature on Burke has developed in recent years, but it has been written primarily by scholars who self-identify as progressives. See, e.g., Cass R. Sunstein, *Burkean Minimalism*, 105 MICH.

Part I of this essay lays some theoretical groundwork. I try to be more specific about what we mean by reliance on historical practice, discuss the distinct constitutive and entrenchment functions of constitutions, and introduce Burke’s theory of prescription. Part II assesses several specific areas in which federal courts law relies upon historical practice: the doctrine of precedent; incorporation into federal doctrine of preexisting bodies of law, such as the English common law or equity practice; and the canons of statutory construction. None of these areas invokes practice as a historical “gloss” on the Constitution’s text in the manner of *Noel Canning* and similar separation of powers cases, and each tends to derive the legitimacy of practice from long duration rather than from notions of inter-branch acquiescence.

Part III draws some general conclusions. I argue that using historical practice as a gloss on constitutional text to resolve contested questions of separation of powers is neither the most common nor the most important way in which such practice contributes to our law. Entrenching such practice against legal change, I argue, tends to be counterproductive. Moreover, reliance on practice is best justified on prescriptive grounds. The primary alternative—practice as acquiescence—is both descriptively implausible and normatively unappealing. In the end, I hope to show that attendance to the uses of practice in the somewhat more prosaic setting of federal jurisdiction can both allay certain fears about reliance on practice and contribute to important current debates about constitutional interpretation.

## **I. Historical Practice and Constitutional Functions**

The appropriate role of history has long been a staple of debates about constitutional meaning. Attention has focused, however, on the use of historical materials to ascertain the intent of the constitutional Framers and the original understanding of terms appearing in the constitutional text.<sup>37</sup> Philip Bobbitt’s well-known modalities of constitutional argument, for example, defined the “historical” modality as focused on “the intentions of the framers and ratifiers of the Constitution”; none of his six modalities afforded a place to past practices that did not go to original intent.<sup>38</sup> But as Richard Fallon recently observed, “increasingly tired, stylized debates” about originalism in constitutional interpretation obscure the wide variety of ways in which history may influence the determination of

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L. REV. 353 (2006). That literature is useful and interesting, but for obvious reasons its embrace of Burke is partial and limited.

<sup>37</sup> Compare, e.g., Richard S. Kay, *Adherence to the Original intentions in Constitutional Adjudication: Three Objections and Responses*, 82 Nw. U. L. Rev. 226 (1988) (defending focus on the Framers’ intent), with Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. Rev. 204 (1980) (just like it sounds).

<sup>38</sup> PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 12-13 (1991).

constitutional meaning.<sup>39</sup> Post-founding practice, for example, may provide insights into the original understanding of constitutional terms, resolve disputes about that meaning that existed at the Founding, or suggest organic growth of constitutional meaning over time.<sup>40</sup>

Historical practice has particular significance in federal courts law. The constitutional text says little about the judicial power, and both the convention and ratification debates focused largely on other topics.<sup>41</sup> As a result, the structure of the federal judicial system, its modes of proceeding, and its relation both to the other national branches of government and to the state governments have been fleshed out through a wide variety of subconstitutional practices. These include a succession of judiciary statutes enacted by Congress, rules of procedure promulgated by the courts in the exercise of delegated authority, a robust array of common law and equitable doctrines, and a plethora of less formal norms and ways of proceeding that have grown up over time. These enactments and practices have legal force in their own right, but they also inform our understanding of “the judicial power” in Article III.

Notwithstanding the pervasive impact of historical practice on the law of federal jurisdiction, the phenomenon remains understudied in this field. Much of the recent literature on historical practice as a modality of constitutional interpretation focuses on separation of powers.<sup>42</sup> With certain important exceptions,<sup>43</sup> historical writing about federal jurisdiction has been in the originalist vein.<sup>44</sup> This may be more the case today than in the golden age of Legal Process scholarship that once dominated and defined the field of federal jurisdiction. That scholarship was often functionalist in its orientation, and when it turned to history it frequently looked to practice across the broad sweep of our national

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<sup>39</sup> Fallon, *History*, *supra* note 28, at 1753.

<sup>40</sup> On history’s relation to the organic growth of constitutional meaning, *see, e.g.*, Ernest A. Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. Rev. 619, 688-712 (1994).

<sup>41</sup> *See generally* RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER, & DAVID L. SHAPIRO, HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1 (7<sup>th</sup> ed. 2015) [hereinafter HART & WECHSLER].

<sup>42</sup> *See, e.g.*, sources cited in note 3, *supra*.

<sup>43</sup> A recent panel of the Association of American Law Schools Section on Federal Courts addressed “The Role of History in the Federal Courts Canon.” *See* Amanda L. Tyler, *Assessing the Role of History in the Federal Courts Canon: A Word of Caution*, 90 NOTRE DAME L. REV. 1739 (2015); Fallon, *History*, *supra* note 28; Tara Leigh Grove, *Article III in the Political Branches*, 90 NOTRE DAME L. REV. 1835 (2015).

<sup>44</sup> *See, e.g.*, Tyler, *History*, *supra* note 43, at 1739 (observing that “in the federal courts arena—more so than in the broader domain of constitutional law—originalism has always wielded tremendous influence over much of the judicial and scholarly thinking”).

experience, not simply to the Founding era.<sup>45</sup> Nonetheless, the broader current of contemporary constitutional theory may have something to add to the way that federal courts scholarship has thought about historical practice. And the Federal Courts literature may have something useful to say to the broader current of constitutional theory.

### A. What Do We Mean by “Practice,” and How Do Courts Rely on It?

It will help to begin by defining somewhat more precisely what we mean by historical practice. “Practice” is, of course, a very broad term; the Oxford English Dictionary defines it, for instance, as simply “[a]n action” or “a deed” and contrasts it with “theory.”<sup>46</sup> This definition is broad enough to include virtually any binding legal materials, such as a statute or a constitutional provision. To speak of historical practice as a distinct source of legal meaning, however, we need to distinguish it from past governmental actions that bind courts and other decisionmakers of their own force. For purposes of this discussion, I take a “practice” to be any past action of a public or private actor that is invoked to resolve a present legal dispute even though it has no direct binding effect on that dispute.

Common definitions of “practice” often incorporate the additional element of repetition and regularity; the OED speaks of “[t]he habitual doing or carrying on of something,” “usual, customary, or constant action or performance,” or “[a] habitual action or pattern of behavior.”<sup>47</sup> Hence, Justice Frankfurter emphasized the authority of a “systematic, unbroken, executive practice, long pursued”<sup>48</sup>; likewise, *Noel Canning* and *Zivotofsky* looked to past congressional and executive actions for a *pattern* of behavior, not simply a single authoritative instance.<sup>49</sup> I have little doubt that the influence of a practice will be at least partly a function of the degree and consistency of its repetition. At this definitional stage, however, I do not want to rule out the possibility that a single act might not have authoritative influence in certain situations.<sup>50</sup>

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<sup>45</sup> See, e.g., Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489 (1954); Herbert L. Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the Federal Government*, 54 COLUM. L. REV. 578 (1954).

<sup>46</sup> OXFORD ENGLISH DICTIONARY (3d ed. 2006), available at <http://www.oed.com/view/Entry/149226?rskey=ksMI1h&result=1&isAdvanced=false#eid> (definition 2b); see also *id.* (definition 2a: “The actual application or use of an idea, belief, or method, as opposed to the theory or principles of it . . .”).

<sup>47</sup> *Id.* (definitions 3a & 3b); see also *id.* (definition 3c: “Law. An established legal procedure, esp. that of a court of law; the law and custom on which such procedure is based.”).

<sup>48</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring).

<sup>49</sup> See, e.g., *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2091-94 (2015); *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2561-64 (2014).

<sup>50</sup> For example, George Washington’s decision not to run for a third term is a classic example of an historical practice that shaped public understandings of the Presidency. See, e.g., Stephen M. Griffin, *Understanding Informal Constitutional Change*, Tulane University School of Law Public Law and Legal Theory Working

What practice counts, temporally speaking? As one “present at the creation” of our government, at a time when American government had no truly “longstanding” practice of its own, James Madison understandably emphasized the force of precedents set by early politicians and courts in elucidating constitutional meaning.<sup>51</sup> But whether or not that very early practice has unique or even exclusive force in other areas of constitutional law,<sup>52</sup> the law of federal courts has frequently relied on both historical practice that long *predates* the Constitution (e.g., the traditions of English practice at common law and in equity and admiralty<sup>53</sup>) and that developed considerably after ratification (e.g., conventions about the role of the U.S. Supreme Court vis-à-vis state courts<sup>54</sup>). In these scenarios, the force of practice comes not so much from the status of politicians and judges closely associated with the Founding itself, but rather from the weight of longstanding usage over time.

Courts have relied on practice and usage in a variety of ways. Justice Frankfurter wrote in *Youngstown* that “[d]eeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them.”<sup>55</sup> This statement, occurring just before Frankfurter’s oft-quoted mention of “gloss,”<sup>56</sup> neatly articulates the two ways in which historical practice generally enters into constitutional analysis: practice helps us interpret the meaning of provisions in the constitutional text; and practice also supplements that canonical text, filling in its many gaps and thus becoming part of our “constitution outside the Constitution.”

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Paper No. 16-1, at 13 (Jan. 2016), available at <http://ssrn.com/abstract=2724580> (discussing the significance of this example). That decision derived considerable force from subsequent presidents’ repeated to conform their practice to Washington (at least until FDR). But much of its force surely derived from the prestige and personal authority of Washington himself. *See, e.g.*, RICHARD BROOKHISER, *FOUNDING FATHER: REDISCOVERING GEORGE WASHINGTON 185-90* (1996) (discussing the power of Washington’s example).

<sup>51</sup> *See* The Federalist No. 37, at 241, 245 (Isaac Kramnick, ed., 1987) (1788); *see also, e.g.*, STANLEY ELKINS & ERIC MCKITRICK, *THE AGE OF FEDERALISM: THE EARLY AMERICAN REPUBLIC, 1788-1800*, at 55-56 (1993) (discussing how very early interactions between President Washington and the Senate demonstrated the unworkability of the Senate “advising” the President before he took action on a matter, establishing a precedent emphasizing *ex post* “consent”).

<sup>52</sup> *See* Bradley & Siegel, *supra* note 3, at 29-41 (canvassing and rejecting arguments for exclusive reliance on early practice in the broader separation of powers context); *see also* William Baude, *Liquidation and Federal Judicial Power*, unpublished manuscript (Oct. 2015) (arguing that Madison gave primacy to *later* practice).

<sup>53</sup> *See* Section II.B, *infra*.

<sup>54</sup> *See, e.g.*, *Murdock v. Memphis*, 87 U.S. (20 Wall.) 590 (1874) (construing amendments to the Supreme Court’s jurisdictional statute not to disrupt the longstanding relationship between the Court and the state courts).

<sup>55</sup> *Youngstown*, 343 U.S. at 610 (Frankfurter, J., concurring).

<sup>56</sup> *See id.* (“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.”).

Much discussion of relying on historical practice in constitutional law has focused on the first category. Acknowledging that the Founding had failed to resolve all ambiguities in the constitutional document, James Madison said in Federalist 37 that indeterminacy is inevitable in “the institutions of man, in which the obscurity arises as well from the object itself as from the organ by which it is contemplated.”<sup>57</sup> Hence, “[a]ll new laws, 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.”<sup>58</sup> And as Madison’s subsequent conduct and statements made clear, he thought those subsequent “discussions and adjudications” might well occur outside the courts as well as within them.<sup>59</sup> In this vein, the *Noel Canning* majority turned to historical interactions between the President and Congress to establish the meaning of the Recess Appointments Clause.<sup>60</sup>

On the other hand, much reliance on past practice in the law of federal courts, which I discuss in Part II, seems supplemental in nature. Article III does not specify the scope of the Supreme Court’s appellate jurisdiction; in *Murdock v. Memphis*,<sup>61</sup> however, the Court imposed a strong presumption, derived from longstanding practice, that the Court may not review state courts’ resolution of questions of state law. Likewise, the Court has made clear that its broad conception of state sovereign immunity is not a “gloss” on either Article III or the Eleventh Amendment, but rather an artifact of preexisting practice under the English common law.<sup>62</sup>

Not surprisingly, however, the line between these two modes is not completely clean even in theory, much less in practice. One might describe phenomena such as the doctrine of precedent or adoption of preexisting bodies of law as a gloss on the meaning of the “judicial power” language in Article III without making any mistake of principle. The key consideration, to my mind, lies in the amount of work that the relevant textual provision

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<sup>57</sup> The Federalist No. 37, at 241, 244 (Isaac Kramnick, ed., 1987) (1788) (James Madison); *see also id.* at 245 (“When the Almighty himself condescends to address mankind in their own language, his meaning, luminous as it must be, is rendered dim and doubtful by the cloudy medium through which it is communicated.”).

<sup>58</sup> *Id.* at 245.

<sup>59</sup> *See, e.g.*, 1 Annals of Cong. 514 (1789) (Madison arguing to his colleagues in the First Congress that their practice regarding presidential removal of executive branch officers “will become the permanent exposition of the Constitution” on that point); *see also* Bradley & Siegel, *supra* note 3, at 34 (emphasizing that “Madison referred both to practice and to judicial decisions as involved in liquidation”).

<sup>60</sup> *See* NLRB v. Noel Canning, 134 S. Ct. 2550, 2561-64, 2570-73 (2014).

<sup>61</sup> 87 U.S. (20 Wall.) 590 (1874).

<sup>62</sup> *See* Alden v. Maine, 527 U.S. 706, 713 (1999); Seminole Tribe of Florida v. Florida, 517 U.S. 44, 69 (1996); *see also* Principality of Monaco v. Mississippi, 292 U.S. 313, 322 (1934) (“Manifestly, we cannot rest with a mere literal application of the words of § 2 of Article III, or assume that the letter of the Eleventh Amendment exhausts the restrictions upon suits against non-consenting States. Behind the words of the constitutional provisions are postulates which limit and control.”).

does in the analysis. In *Noel Canning*, for example, the text of the Recess Appointments Clause sharply defined and limited the relevant set of practices, and those practices in turn plainly reflected an effort by the respective political actors to interpret the Clause.<sup>63</sup> Hence, I would treat *Noel Canning* as a clear case of historical gloss.<sup>64</sup>

At the other end of the spectrum, consider the federal courts importing the longstanding equitable prohibition on enjoining a criminal prosecution to ground the doctrine of *Younger* abstention.<sup>65</sup> One might say that *Younger* is a gloss on the “judicial power” as it relates to the powers of federal judges vis-à-vis state courts, but the text of Article III does precious little work in the analysis of historical practice. It seems much more helpful to say simply that Article III leaves the relations of state and federal courts unspecified in a variety of important ways, and that *Younger* abstention supplements the canonical text by helping to constitute that relationship.

The *Zivotofsky* case poses an intermediate—and therefore more difficult—case. The only constitutional text in sight is Article II, which empowers the President to “receive ambassadors and other public ministers.”<sup>66</sup> The Court read Founding-era practice as a gloss on that language, concluding “that a Clause directing the President alone to receive ambassadors would be understood to acknowledge his power to recognize other nations.”<sup>67</sup> The Court relied on further evidence of practice—this time in international law—to conclude that this recognition power “may also involve the determination of a state’s territorial bounds.”<sup>68</sup> Finally, the Court canvassed extensive evidence of practices by presidents and the Congress concerning whether the recognition power is *exclusive* to the Executive.<sup>69</sup> Whether or not the Court correctly evaluated all this evidence of practice concerning recognition, it seems a considerable stretch to say that Article II’s text—which does not use the term and covers only receiving ambassadors—is doing much work. Better,

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<sup>63</sup> See *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2567-68 (2014).

<sup>64</sup> Some commentators have seen an important difference between the use of practices stretching over the course of our history to interpret ambiguous constitutional text (“gloss”) and a focus on immediate post-ratification practice to fix the meaning of ambiguous terms (“liquidation”). The important point for my purposes, however, is simply that both liquidation and gloss employ practice as an interpretive tool for discerning the meaning of ambiguous constitutional text.

<sup>65</sup> See *Younger v. Harris*, 401 U.S. 37, 43-44 (1971) (relying on English equity practice for rule barring federal court interference with pending state court criminal proceedings).

<sup>66</sup> U.S. CONST. art. II, § 3.

<sup>67</sup> 135 S. Ct. at 2085.

<sup>68</sup> *Id.* at 2084 (citing an international law treatise).

<sup>69</sup> See *id.* at 2091-94.

I think, to say that the Court is filling in the gaps in the President’s power—that is, supplementing the canonical text—by looking to past usage.<sup>70</sup>

A final critical issue involves the status of practice-based norms vis-à-vis legal efforts to alter or override them. In *Zivotofsky*, the Court held that Congress could not override the Executive’s decision concerning territorial recognition;<sup>71</sup> hence, the Court not only gave legal force to the past practice of Executive recognition but also entrenched that practice against change through ordinary lawmaking. I explore the importance of this move in the next section.

## B. The Constitutive and Entrenchment Functions of Constitutions

This essay is about the use of historical practice in constitutional cases, but I am employing a broader-than-usual view of what falls in that category. Contemporary constitutional theory seeks to unpack the various functions of constitutions.<sup>72</sup> As I have developed elsewhere, constitutions typically do at least three things: they *constitute* the government by creating institutions, defining those institutions’ powers and conferring jurisdiction upon them, and articulating rules for their operation; they frequently confer *rights* on individuals vis-à-vis the government (which is really just the flip-side of the constitutive function); and many (but certainly not all) constitutions entrench the institutions and rights they create against easy change in the future.<sup>73</sup> Our Constitution, unlike the British, seeks to encapsulate each of these functions in a single, canonical document. Writing in Federalist 37, however, James Madison candidly acknowledged the complexity of defining the powers and limits of governmental institutions as well the difficulty of reducing the requisite concepts to writing.<sup>74</sup>

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<sup>70</sup> See, e.g., LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 14-15 (2d ed. 1996) (identifying executive foreign affairs powers that are “missing” from the constitutional text but that have been filled in by practice).

<sup>71</sup> 135 S. Ct. at 2094-95.

<sup>72</sup> See, e.g., ADAM TOMKINS, *PUBLIC LAW* 3-6 (2003); Joseph Raz, *On the Authority and Interpretation of Constitutions: Some Preliminaries*, in *CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS* 152, 153-54 (Larry Alexander, ed., 1998); JOHN RAWLS, *POLITICAL LIBERALISM* 227 (identifying “constitutional essentials”).

<sup>73</sup> See Young, *Outside the Constitution*, *supra* note 14, at 415-16; Raz, *supra* note 72, at 153-54. The British Constitution, for example, is generally *not* entrenched because the King in Parliament retains authority to make or unmake any law. See TOMKINS, *supra* note 72, at 16-17.

<sup>74</sup> See Federalist No. 37, *supra* note 51, at 243-45; see also *Missouri v. Holland*, 252 U.S. 416, 433 (1920) (Holmes, J.) (“[W]hen we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters.”).

Hence, as John Marshall wrote in *McCulloch*, the Constitution’s nature “requires that only its great outlines should be marked [and] its important objects designated.”<sup>75</sup> This necessary incompleteness means that the Constitution can have no monopoly of the first of its functions; it cannot, in other words, constitute a complete government on its own. Hence, Article I describes Congress in greater detail than the other two branches, yet it leaves out critical details such as structures for deliberation, voting rules, or qualifications to vote in congressional elections.<sup>76</sup> These details have all been filled in through subconstitutional practices—some statutory, some internal House and Senate rules, and some unwritten conventions of behavior.<sup>77</sup> Article III, which describes the judiciary in far less detail, punted most of the crucial questions—such as whether to create lower federal courts at all—to the First Congress and continues to require considerable gap-filling.<sup>78</sup>

I have called the various forms of “ordinary law”—statutes, regulations, conventional practices—that perform these constitutive functions our “Constitution Outside the Constitution.”<sup>79</sup> But that does not mean that these rules and institutions share the *entrenched* status of the Constitution’s canonical text. To be sure, some of the historical practices that have fleshed out the meaning of the Article III judicial power have hardened into rules that Congress may not override. It seems safe to say, for example, that Congress could not now enact a statute empowering the Supreme Court to issue advisory opinions.<sup>80</sup> My point is simply that whether a given practice should be viewed as constitutive of our governmental institutions is a separate question from whether that practice is also entrenched against change through ordinary legal means.<sup>81</sup> In general, I would venture that

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<sup>75</sup> *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

<sup>76</sup> See Young, *Outside the Constitution*, *supra* note 14, at 418-20.

<sup>77</sup> See generally Llewellyn, *supra* note 15 (discussing the nation’s “working constitution”). As Stephen Griffin has pointed out, Professor Llewellyn took practice to have more than a gap-filling role; the practice *is* the Constitution, even where it may be inconsistent with textual rules. See Griffin, *supra* note 50, at 12.

<sup>78</sup> See HART & WECHSLER, *supra* note 41, at 4-47; JUSTIN CROWE, *BUILDING THE JUDICIARY: LAW, COURTS, AND THE POLITICS OF INSTITUTIONAL DEVELOPMENT* 24-31 (2012).

<sup>79</sup> See Young, *Outside the Constitution*, *supra* note 14, at 473.

<sup>80</sup> See Fallon, *History*, *supra* note 28, at 1817 (“At an early point in our history, *The Correspondence of the Justices* and the acceptance of its rationale by the Supreme Court, presidents, and the American public placed advisory opinions in the category of the constitutionally forbidden.”).

<sup>81</sup> See Young, *Outside the Constitution*, *supra* note 14, at 454-55. Other theories of a “functional” or “small c” constitution typically *do* assert that these additional rules and institutions are entrenched to some degree. See, e.g., WILLIAM N. ESKRIDGE, JR. & JOHN FERREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* (2013); BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 6 (1991); Llewellyn, *supra* note 15, at 26, 29; This creates a lot of pressure to define what is in and what is out—a burden that, in my view, these other theories have largely failed to carry. See Young, *Outside the Constitution*, *supra* note 14, at 448-54.

*most* governmental practices are constitutive to at least some degree, but very few are constitutionally entrenched.

One of the principal sources of discomfort about the use of historical practice in constitutional law stems from the fear that past practices will either alter entrenched constitutional norms or come to be entrenched against change in their own right. Dissenting in the recent *Noel Canning* decision, for example, Justice Scalia worried that relying on historical practice allows the Executive to “accumulate power through adverse possession,” in violation of entrenched constitutional norms.<sup>82</sup> But to say that American law sometimes “constitutionalizes” historical practice is all too often to conflate the different things that constitutions do. Many instances of reliance on historical practice—especially in the law of federal jurisdiction—treat that practice as constitutive without entrenching it against legal change;<sup>83</sup> other instances entrench past practice only partially, without putting them on the same plane as the Constitution itself.<sup>84</sup> Distinguishing between the different roles practice plays will help in assessing the normative attractiveness of appeals to practice in this area.

### C. Acquiescence and Prescription

Edmund Burke referred to reliance on longstanding practice in government as “prescription”—a word we do not use so much nowadays but which helpfully adds the notion of legal force to more general terms like “custom” or “historical practice.”<sup>85</sup> Prescription embodies “a choice not of one day, or one set of people” but rather “a deliberate election of ages and generations”; “it is a constitution made by . . . the peculiar circumstances, occasions, tempers, dispositions, and moral, civil and social habitudes of the people, which disclose themselves only in a long space of time.”<sup>86</sup> Against Enlightenment rationalists who set out to question “unthinking” adherence to tradition, Burke insisted that prescription involved a higher form of rationality. “[M]an is a most unwise, and a most wise, being,” he argued.<sup>87</sup> “The individual is foolish. The multitude,

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<sup>82</sup> *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2617 (2014) (Scalia, J., dissenting).

<sup>83</sup> *See, e.g., Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 732 (1996) (Scalia, J., concurring) (noting that the abstention doctrines, which are grounded in equity practice, are subject to Congress’s legislative power).

<sup>84</sup> *See, e.g., INS v. St. Cyr*, 533 U.S. 289 (2001) (holding Congress’s power to restrict federal court jurisdiction subject to a strong clear statement rule, but not constitutionally prohibited altogether).

<sup>85</sup> *See, e.g., Oxford English Dictionary, prescription*, at <http://www.oed.com/view/Entry/150650?rskey=Sqa4CN&result=1#eid> (3d ed. 2007) (defining “prescription” as “ancient or continued custom, esp. when regarded as authoritative” and a “[c]laim founded upon long use”).

<sup>86</sup> Burke, *Representation*, *supra* note 21, at 387.

<sup>87</sup> *Id.*

for the moment, is foolish, when they act without deliberation; but the species is wise, and when time is given to it, as a species, it almost always acts right.”<sup>88</sup>

As J.G.A. Pocock has demonstrated, Burke’s theory of prescription was rooted in the classic English doctrine of the ancient constitution that undergirded the development of the English common law.<sup>89</sup> William Blackstone’s *Commentaries* begin their discussion of the common law with an account of longstanding custom.<sup>90</sup> For Anthony Kronman, this sort of reasoning from prescriptive authority makes law inherently different from philosophy: “[T]he past is, for lawyers and judges, a repository of not just of information but of value, with the power to confer legitimacy on actions in the present, and though its power to do so is not limitless, neither is it nonexistent. In philosophy, by contrast, the past has no legitimating power of this sort.”<sup>91</sup> In a profound meditation on Burke, Professor Kronman argues that the past’s authority is distinct from any utilitarian or fairness-based argument for precedent—that it is, at bottom, essential to what “makes us who we are” as human beings.<sup>92</sup> These sorts of arguments seem to get short shrift in contemporary discourse.<sup>93</sup> One suspects that non-specialists rarely study Burke nowadays.

But in any event one need not go this far to accept the force of prescriptive reasoning. More practical rationales, resting on the need to treat some things as settled in order to address present problems in a manageable way, accord authority to past practice simply because of its longstanding and settled.<sup>94</sup> Likewise, concerns about the disruptive effect of radical change tend to support an incremental approach to constitutional development that takes much of past practice as given at any particular stage.<sup>95</sup>

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<sup>88</sup> *Id.*

<sup>89</sup> J.G.A. Pocock, *Burke and the Ancient Constitution—a Problem in the History of Ideas*, in *POLITICS, LANGUAGE AND TIME: ESSAYS ON POLITICAL THOUGHT AND HISTORY* 202, 227 (1971).

<sup>90</sup> 1 BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* \*67-68 (1765); *see also id.* at \*64 (observing that the ‘unwritten’ laws of England “receive their binding power, and the force of laws, by long and immemorial usage, and by their universal reception throughout the kingdom”).

<sup>91</sup> Anthony Kronman, *Precedent and Tradition*, 99 *YALE L. J.* 1029, 1032-33 (1990).

<sup>92</sup> *See id.* at 1065-66. For a different argument that the past has authority simply because it is the past, see Raz, *supra* note 72, at 173 (arguing that “[c]onstitutions, at least old ones, do not derive their authority from the authority of their authors,” but rather “are valid just because they are there, enshrined in the practices of their countries”).

<sup>93</sup> *See, e.g.*, Roisman, *supra* note 3, at 33 (stating, with little elaboration, that past practice cannot have authoritative force without some further normative reason behind it).

<sup>94</sup> *See, e.g.*, CHARLES FRIED, *SAYING WHAT THE LAW IS: THE CONSTITUTION IN THE SUPREME COURT* 7 (2004); Frederick Schauer, *Precedent*, 39 *STAN. L. REV.* 571, 599 (1987).

<sup>95</sup> *See* MICHAEL OAKESHOTT, *RATIONALISM IN POLITICS AND OTHER ESSAYS* 411-12 (expanded ed. 1991); Young, *Rediscovering Conservatism*, *supra* note 40, at 654-56 (discussing Burke’s preference for incremental change).

Burke’s notion that practice derives its authority from longstanding usage—that the past has authority simply because it is the past—runs counter to much contemporary discussion of historical practice as an aid to constitutional interpretation. That literature tends to ground the force of practice in the acquiescence of critical actors.<sup>96</sup> Likewise, Supreme Court opinions resolving high-profile separation of powers disputes among the branches of the national government tend to emphasize one branch’s acquiescence (or lack thereof) to the exercise of power by a rival branch.<sup>97</sup> To be sure, one may understand any longstanding usage as resting on a form of acquiescence; if the relevant political or legal actors had not accepted the practice over time, they would have changed it. Blackstone, for example, required that a custom “must have been *peaceable*, and acquiesced in; not subject to contention and dispute”; this was because “customs owe their origins to common consent.”<sup>98</sup> But the sort of acquiescence entailed by prescriptive authority tends to take place over a more extended period of time, and to involve a more diffuse set of actors, than that involved in high-profile separation of powers disputes. Moreover, the authority of longstanding practice tends not to depend on any sort of explicit airing of the relevant issue, to which the affected party might have been expected to object.

Interesting debates exist about the relationship between custom and the common law, about Blackstone’s particular theories of general and local custom, and the extent to which those theories were found persuasive in America.<sup>99</sup> But the basic point is simply that longstanding usage was integral to the English common law,<sup>100</sup> and this notion of prescriptive authority would have been part of the Founders’ basic intellectual equipment. Some influential figures in the early Republic, such as Thomas Jefferson, labored mightily to reject English traditionalism, and that way of thinking scored important victories in

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<sup>96</sup> See, e.g., Bradley & Siegel, *supra* note 3, at 44 (“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.”); Bradley & Morrison, *supra* note 3, at 414 (“The most common reason [for giving authority to historical practice] appears to be the idea that the cited practice involves the ‘acquiescence’ of one branch in the actions of the other.”); see also Michael J. Glennon, *The Use of Custom in Resolving Separation of Powers Disputes*, 64 B.U. L. REV. 109, 134 (1984) (arguing that for a historical practice to have force in construing the separation of powers, the other branch must have been on notice of the practice and “must have acquiesced” in it).

<sup>97</sup> See, e.g., *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2091 (2015); *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2571-72 (2014); *Dames & Moore v. Regan*, 453 U.S. 654, 684 (1981); see also *Youngstown*, 343 U.S. at 610-11 (Frankfurter, J., concurring) (emphasizing the force of presidential practice “long pursued to the knowledge of the Congress and never before questioned”).

<sup>98</sup> 1 BLACKSTONE, *supra* note 90, at \*77 (emphasis in original). There are, however, important differences between the sort of acquiescence involved in many separation of powers disputes and “consent” as that term is generally understood. Bradley & Siegel, *supra* note 3, at 44 n.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.”).

<sup>99</sup> See, e.g., DAVID J. BEDERMAN, *CUSTOM AS A SOURCE OF LAW* 27-41 (2010).

<sup>100</sup> See, e.g., J.G.A. POCOCK, *THE ANCIENT CONSTITUTION AND THE FEUDAL LAW* 30-31 (1967).

preventing any blanket reception of the common law into the federal Constitution and rejecting federal prosecutions for federal common law crimes.<sup>101</sup> Nonetheless, the newly-independent States' universal reception of the English common law<sup>102</sup> and the Framers' direct incorporation of innumerable common law concepts into the Constitution itself<sup>103</sup> suggests that the undeniable innovation of a written, higher-law Constitution was grafted onto a broader legal system that derived significant authority from ancient usage.<sup>104</sup> As my colleague Stephen Sachs has observed, “[n]ot even the American Revolution severed our links to the legal past: the change in government wasn’t thought to produce a wholesale change in law, especially private law.”<sup>105</sup>

Moreover, because the new written constitution provided only a framework of government and was designed to be accessible to the People at large, it necessarily lacked the institutional detail necessary to form a working government.<sup>106</sup> Post-ratification practice (defined broadly to include not simply informal actions but also sub-constitutional enactments and judicial decisions) has filled that gap. Many features of the early practice—such as the rejection of impeachment as a remedy for perceived judicial errors,<sup>107</sup> the prohibition on common law crimes,<sup>108</sup> the bar on advisory opinions,<sup>109</sup> the crucial distinction between remedies against the sovereign and remedies against the sovereign’s

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<sup>101</sup> See, e.g., *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 132-42 (1996) (Souter, J., dissenting); CHARLES WARREN, *A HISTORY OF THE AMERICAN BAR* 224–225 (1911) (noting a “prejudice against the system of English Common Law” in the years following the Revolution).

<sup>102</sup> See, e.g., Ford W. Hall, *The Common Law: An Account of Its Reception in the United States*, 4 VAND. L. REV. 791 (1951).

<sup>103</sup> See, e.g., U.S. Const. Art. I, § 9 (protecting the common law writ of *habeas corpus*); amdt. VII (protecting the common law right to a civil jury trial).

<sup>104</sup> See, e.g., WILLIAM E. NELSON, *AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830* (1975) (discussing the continuity of common law practice in the state courts before and after the Revolution); Stewart Jay, *Origins of Federal Common Law: Part II*, 133 U. PA. L. REV. 1231, 1234-41 (1985) (surveying the continuing importance of the English common law in the early Republic after independence).

<sup>105</sup> Stephen E. Sachs, *Constitutional Backdrops*, 80 GEO. WASH. L. REV. 1813, 1822 (2012).

<sup>106</sup> See, e.g., *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819) (observing that a constitution’s “nature . . . requires, that only its great outlines should be marked, its important objects designated”).

<sup>107</sup> See, e.g., GORDON S. WOOD, *EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789-1815*, at 422-25 (2009).

<sup>108</sup> See, e.g., Gary D. Rowe, *Note, The Sound of Silence: United States v. Hudson & Goodwin, the Jeffersonian Ascendancy, and the Abolition of Federal Common Law crimes*, 101 YALE L. J. 919 (1992).

<sup>109</sup> See *Correspondence of the Justices (1793)*, collected in HART & WECHSLER, *supra* note 41, at 50-52 (declining to render an advisory opinion on legal questions involving the interpretation of treaties with France and England submitted to the Court by Thomas Jefferson on behalf of the Washington administration).

officers,<sup>110</sup> and the requirement that judicial judgments be immune from non-judicial revision<sup>111</sup>—have endured for centuries.

Prescription is a fundamentally pre-democratic rationale for legal norms. As I will show, however, it persists throughout American legal practice. The most obvious example is the reception by the post-revolutionary American states of the English common law. While the reception itself was generally accomplished by legislative adoption and therefore a matter of democratic choice, the reception statutes made no effort to review and distinguish among substantive common law norms. Rather, reception was a democratic decision to adopt the pre-revolutionary law simply because it had been the law for a very long time and its results were generally perceived to be satisfactory. Just as the English legal system had transitioned from monarchy to parliamentary democracy over time, while retaining the common law and any number of other pre-democratic survivals, the newly-independent American colonists grafted a new commitment to constitutionalism onto pre-constitutional English system that, in most respects, was thought to be working reasonably well. There was no Bastille to storm, and no French revolutionary-style effort to rethink the legal system from the ground up.<sup>112</sup>

Both the nature of the prescriptive legal sources adopted in American law and the dynamics of their integration with majoritarian democracy and constitutionalism have important implications for the ways prescriptive practice can function in constitutional interpretation. As I hope to demonstrate in the remainder of this essay, prescriptive practice has always played an important and pervasive *constitutive* role. Reliance on past practice absolved the successful revolutionaries of any need to make the world anew; it allowed them to rely on pre-existing institutions and norms, holding most of the legal system constant and allowing them to focus on articulating the limited but important ways in which the new government would differ from the old.<sup>113</sup> But the notion of *entrenching* past practice would have run counter to both the way those practices had always worked and the new commitments to majoritarianism and constitutionalism. The English common law

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<sup>110</sup> See *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 857 (1824) (articulating the “party of record” rule that a suit against the government’s officers will not be treated as against the sovereign for purposes of sovereign immunity); see also *United States v. Lee*, 106 U.S. 196 (1882) (permitting a suit against military officers acting on behalf of the United States to proceed); *Ex parte Young*, 209 U.S. 123 (1908) (holding that state sovereign immunity does not bar a suit against a state officer for prospective relief).

<sup>111</sup> See *Hayburn’s Case*, 2 U.S. (2 Dall.) 408 (1792). It is worth noting that *Hayburn’s Case* itself did not produce an opinion for the Court. It is, rather, an instance of practice consisting of the Court’s pre-judgment proceedings in the case as well as correspondence from the circuit courts regarding the matter. See also HART & WECHSLER, *supra* note 41, at 83-87.

<sup>112</sup> See Sachs, *supra* note 105, at 1821 (noting that after the American Revolution, “the Founders didn’t declare a legal Year Zero, nor did they repeal and replace all prior law,” in contrast to the French revolutionaries, who *did* generally abrogate all former laws and replace them with the Code Napoleon).

<sup>113</sup> See, e.g., NELSON, *supra* note 104; Sachs, *supra* note 105, at 1821-23; Hall, *supra* note 102, at 798-800.

had generally not been entrenched, but—like the rest of English law, including constitutional law—had remained subject to alteration by a sovereign Parliament.<sup>114</sup> And the Philadelphia convention rejected proposals for a common law reception provision in the Constitution itself precisely because that might have rendered the common law immutable.

I do not argue here that historical practices should *never* be treated as shaping or supplementing constitutional meaning in a way that cannot be modified through ordinary legislation. But we should be terribly cautious about doing that. It is, after all, a mode of constitutional interpretation with little support in historical practice.

## II. Historical Practice in Federal Courts Law

This Part explores a variety of elements of federal courts law that, in one way or another, involve reliance on historical practices. I begin with three sets of familiar phenomena: judicial reliance on past decisions under the doctrine of *stare decisis*; federal incorporation of preexisting bodies of law, such as the English common law; and use of the canons of construction in interpreting federal statutes. These phenomena are so familiar that we generally do not think of them as part of the broader category of reliance on historical practice that figures in cases like *Noel Canning* or *Zivotofsky*.

Federal courts law does rely on practice in ways more analogous to *Noel Canning* and *Zivotofsky*. The basic structure of federal jurisdiction, such as the scope of the Supreme Court’s review in cases arising under state law or in the state courts, have acquired a strong sociological entrenchment arising from longstanding practice.<sup>115</sup> The availability and parameters of *habeas corpus* review are largely framed by practice.<sup>116</sup> And the amenability of senior executive officials to federal judicial process has been established largely by the President’s decision to comply at key points in our history.<sup>117</sup> Nonetheless, a key part of

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<sup>114</sup> See TOMKINS, *supra* note 72, at 16-17.

<sup>115</sup> See, e.g., Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 923 (1986) (concluding that the rules of *Erie* and *Murdock* “are a well-established foundation of the system on which many of our suppositions concerning federalism have been built. Even if not constitutionally required in any strict sense, they appear to be permanent features of our system”).

<sup>116</sup> See, e.g., *Boumediene v. Bush*, 553 U.S. 723, 739-52 (2008) (canvassing both English and early American practice on judicial review of executive detention, although concluding that the common that did not definitively answer the question before the Court); *Rasul v. Bush*, 542 U.S. 466, 473-75, 481-82 (2004) (relying on English and American practice in defining the territorial reach of the writ); *Williams v. Kaiser*, 323 U.S. 471, 484 n.2 (1945) (observing that *habeas corpus* is “a writ antecedent to statute . . . throwing its root deep into the genius of our common law”).

<sup>117</sup> See, e.g., *United States v. Nixon*, 418 U.S. 683 (1974); John P. MacKenzie, *Court Orders Nixon to Yield Tapes; President Promises to Comply Fully*, WASH. POST, July 25, 1974, available at [https://www.washingtonpost.com/politics/court-orders-nixon-to-yield-tapes-president-promises-to-comply-fully/2012/06/04/gJQAZSw0IV\\_story.html](https://www.washingtonpost.com/politics/court-orders-nixon-to-yield-tapes-president-promises-to-comply-fully/2012/06/04/gJQAZSw0IV_story.html).

my argument is that reliance on practice is pervasive and routine, and that reliance on past practice in these more prosaic settings can shed important light on the broader phenomenon.

### A. Judicial Precedent

We generally think of judicial precedent and the doctrine of *stare decisis* as their own modality of interpretation—not part of a broader reliance on historical practice.<sup>118</sup> But generally speaking, the “practice” that courts engage in overwhelmingly involves the decision of cases. There are, to be sure, certain aspects of internal housekeeping, such as the assignment of panels and cases or the Supreme Court’s *certiorari* policies,<sup>119</sup> as well as certain rulemaking functions of broader significance,<sup>120</sup> where judges engage in “practices” outside the decision of cases.<sup>121</sup> But the overwhelming majority of judicial practice consists of deciding cases. The influence that past decisions have in resolving present controversies is the most familiar example of judicial reliance on past practice—so familiar, in fact, that judges following precedent may be no more aware that they are invoking historical practice than Molière’s bourgeois gentleman was that he was speaking prose.<sup>122</sup>

Judicial precedent fits my definition of practice in two distinct respects. First, a prior decision is itself a past act by another actor that lacks direct binding authority on a current dispute. A judicial decision’s direct binding force is generally limited to the parties; this force is captured by the doctrine of *res judicata*, not *stare decisis*.<sup>123</sup> The influence of the past court’s decision is also conceptually distinct from the binding force of the underlying positive law—typically, a statute or constitutional provision—that the prior

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<sup>118</sup> See, e.g., BOBBITT, *supra* note 38, at 13 (identifying the “doctrinal” modality of “applying rules generated by precedent”).

<sup>119</sup> See, e.g., Adam S. Chilton & Marin K. Levy, *Challenging the Randomness of Panel Assignment in the Federal Courts of Appeals*, 101 CORNELL L. REV. 1 (2015) (discussing panel assignment); Sup. Ct. Rule 10, available at [https://www.law.cornell.edu/rules/supct/rule\\_10](https://www.law.cornell.edu/rules/supct/rule_10) (visited Oct. 2, 2015) (articulating criteria for granting *certiorari*); H.W. PERRY, JR., *DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT* (1994) (explicating the considerably more complex patterns of practice underlying Rule 10).

<sup>120</sup> See Rules Enabling Act, Pub. L. 73-415, 48 Stat. 1064 (June 19, 1934), codified at 28 U.S.C. § 2072 (delegating to the Supreme Court the authority to promulgate rules of procedure).

<sup>121</sup> Other examples would include the Chief Justice’s administrative powers over the judicial branch, see, e.g., Theodore W. Ruger, *The Judicial Appointment Power of the Chief Justice*, 7 U. PA. J. CONST. L. 341 (2004), and the dramatic authority of the Panel on Multidistrict Litigation to control the litigation of mass torts and other sorts of aggregate litigation, see, e.g., Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 90 N.Y.U. L. REV. 71 (2015).

<sup>122</sup> MOLIERE, *THE BOURGEOIS GENTLEMAN*, Act II, scene 4 (1670).

<sup>123</sup> See, e.g., Ernest A. Young, *Supranational Rulings as Judgments and Precedents*, 18 DUKE J. COMP. & INT’L L. 477 (2008) (distinguishing between the judgment and precedential force of judicial rulings).

decision applied. Consider, for example, the Supreme Court’s recent patent law decision in *Bilski v. Kappos*.<sup>124</sup> Section 101 of the Patent Act broadly states that “[w]hoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor.”<sup>125</sup> Nonetheless, “[t]he Court’s precedents provide three specific exceptions” for “‘laws of nature, physical phenomena, and abstract ideas.’”<sup>126</sup> Acknowledging that “these exceptions are not required by the statutory text,” the Court observed that “they are consistent with the notion that a patentable process must be ‘new and useful.’”<sup>127</sup> “And in any case,” the Court said, “these exceptions have defined the reach of the statute as a matter of statutory *stare decisis* going back 150 years.”<sup>128</sup> *Bilski* is thus a particularly self-conscious example of a course of decisions, taking place over an extended period of time, that supplements the meaning of the original textual provision that those decisions interpret and apply.

In constitutional law, the originalist critique of *stare decisis* has long insisted that judicial precedents interpreting the Constitution are not the same—and consequently lack the same authority—as the authoritative document itself.<sup>129</sup> For our purposes, the Supreme Court’s decision interpreting the Recess Appointments Clause in *Noel Canning* is not intrinsically different from the Congressional and Executive interpretations of the Clause that the justices debated in their opinions. Both involve interpretations of a constitutional provision by one or another branch of government at some time in the past. In the next dispute raising a recess appointments issue, the *Noel Canning* opinion will be one more past practice interpreting the clause that may bear on the present dispute.<sup>130</sup> The relative authority of past judicial interpretations vis-à-vis executive or legislative interpretations turns on complex matters of separation of powers, the *res judicata* effect of prior judgments on the original parties, the remedies granted in the prior litigation, and the like.<sup>131</sup> But if

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<sup>124</sup> 561 U.S. 593 (2010).

<sup>125</sup> 35 U.S.C. § 101.

<sup>126</sup> 561 U.S. at 601 (quoting *Diamond v. Chakrabarty*, 447 U.S. 303, 309 (1980)).

<sup>127</sup> *Id.* at 601-02.

<sup>128</sup> *Id.* at 602 (citing *Le Roy v. Taham*, 55 U.S. (14 How.) 156, 174-75 (1853)).

<sup>129</sup> See, e.g., Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J. L. & PUB. POL’Y 23 (1994).

<sup>130</sup> See, e.g., Lyle Denniston, *Is a Recess Appointment to the Court an Option?*, SCOTUSBLOG, Feb. 14, <http://www.scotusblog.com/2016/02/is-a-recess-appointment-to-the-court-an-option/> (parsing the *Noel Canning* opinions to assess the possibility of a recess appointment following the death of Justice Antonin Scalia).

<sup>131</sup> See, e.g., Daniel A. Farber, *The Supreme Court and the Rule of Law: Cooper v. Aaron Revisited*, 1982 U. ILL. L. REV. 387; Walter F. Murphy, *Who Shall Interpret? The Quest for the Ultimate Constitutional Interpreter*, 48 REV. OF POLITICS 401 (1986).

judicial precedents are typically more binding than legislative or executive ones,<sup>132</sup> it is not because adherence to judicial decisions is any less a matter of deferring to historical practice.

Second, the rule of *stare decisis*—that is, the respect that judges accord to prior decisions—is itself a judicial practice. The Constitution does not itself explicitly articulate a rule of precedent, and the Supreme Court has said that *stare decisis* is simply “a principle of policy and not a mechanical formula of adherence to the latest decision.”<sup>133</sup> The various nuances of the doctrine of precedent—the factors involved in its application, for example, or the notion that precedent binds more strongly in statutory cases than in constitutional ones—are likewise simply rules of practice distilled from the Court’s long experience deciding cases.<sup>134</sup> When courts follow the rule of *stare decisis*, they are adhering to the way they have done things in the past.

Notwithstanding the Court’s statements that *stare decisis* is a “principle of policy,” one often sees arguments that *stare decisis* is inherent in the meaning of the “judicial power” conferred on the federal courts in Article III.<sup>135</sup> I have considerable sympathy for that view, but I want to remain agnostic about it here. The important point is that the Article III claim is itself a good example of constitutional argument grounded in historical practice. Judge Richard Arnold’s famous opinion in *Anastasoff*, for example, urged that “in the late eighteenth century, the doctrine of precedent was well-established in legal practice (despite the absence of a reporting system), regarded as an immemorial custom, and valued for its role in past struggles for liberty.”<sup>136</sup> Judge Arnold’s view treats practice as a gloss on Article III’s “judicial power”; the Supreme Court’s more conventional invocation of *stare decisis* as a “rule of policy” accords that practice its own independent force. But whether

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<sup>132</sup> See generally Ernest A. Young, *Constitutionalism Outside the Courts*, in OXFORD HANDBOOK ON THE U.S. CONSTITUTION (Mark Graber, Sanford Levinson, & Mark Tushnet eds. 2015) (discussing the reasons why judicial interpretations of the Constitution tend to have a unique settlement function).

<sup>133</sup> *Payne v. Tennessee*, 501 U.S. 808 (1991) (quoting *Helvering v. Hallock*, 309 U.S. 106, 119 (1940)); cf. Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?* 109 YALE L. J. 1535 (2000) (arguing that *stare decisis* is subject to legislative abrogation).

<sup>134</sup> Cf. *Sachs*, *supra* note 105, at 1865 (discussing *stare decisis* as a backdrop).

<sup>135</sup> See, e.g., *Anastasoff v. United States*, 223 F.3d 898, 900-04 (8th Cir.), *vacated as moot*, 235 F.3d 1054 (8th Cir. 2000) (striking down rule prohibiting citation to unpublished opinions); Erica S. Weisgerber, Note, *Unpublished Opinions: A Convenient Means to an Unconstitutional End*, 97 GEO. L. J. 621 (2009); see also James S. Liebman & William F. Ryan, “Some Effectual Power”: *The Quantity and Quality of Decisionmaking required of Article III Courts*, 98 COLUM. L. REV. 696 (1998). But see *Hart v. Massanari*, 266 F.3d 1155, 1159-69 (9th Cir. 2001) (Kozinski, J.) (denying that *stare decisis* is baked into the “judicial power” language in Article III).

<sup>136</sup> 223 F.3d at 903. Judge Kozinski’s effort to refute Judge Arnold’s argument questioned the notion that past practice should be constitutionalized, but primarily argued that Arnold had misconstrued the practices of early courts and lawyers. See *Hart*, 266 F.3d at 1163-69.

courts respect *stare decisis* as a gloss on Article III or simply because it is a longstanding way of proceeding, the authority of past cases rests on past practice.

Like other forms of reliance on historical practice, the doctrine of precedent takes into account the actions of actors outside the courts. Precedential weight varies, for example, according to whether other actors may correct the courts' errors. Hence, the Court has said that "[c]onsiderations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done."<sup>137</sup> One can also frame this point as one of acquiescence: If Congress has *not* overridden a court's past construction of a statute, it may be read as agreeing with (or at least accepting) that construction.<sup>138</sup> Further, the reliance inquiry built into the *stare decisis* doctrine assesses whether other actors—most often private individuals but also public actors such as state governments—will be adversely affected by overruling a prior decision.<sup>139</sup>

The precedential value of a prior decision often seems more categorical than the sorts of non-judicial practices at issue in *Noel Canning* or *Zivotofsky*. But when courts call precedents into question, the similarities between *stare decisis* and other practice-based forms of argument come into focus. Consider, for example, the debate in *District of Columbia v. Heller*<sup>140</sup> concerning the force of the Court's prior decision in *United States v. Miller*,<sup>141</sup> which had seemed to embrace an interpretation of the Second Amendment grounded in militia service. In urging the Court to follow *Miller*, Justice Stevens's dissent emphasized that "hundreds of judges have relied on the view of the Amendment we endorsed there."<sup>142</sup> The majority instead stressed defects in the *Miller* Court's decisional process, such as the defendant's failure to appear and the Court's own failure to discuss the

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<sup>137</sup> *Hilton v. South Carolina Public Railways Comm'n*, 502 U.S. 197, 202 (1991) (quoting *Patterson v. McClean Credit Union*, 491 U.S. 164, 172-73 (1989)).

<sup>138</sup> *See, e.g., id.* ("Congress has had almost 30 years in which it could have corrected our decision in *Parden* if it disagreed with it, and has not chosen to do so. We should accord weight to this continued acceptance of our earlier holding."). There are, of course, any number of reasons not to infer too much from legislative inaction. *See, e.g., Johnson v. Transportation Agency, Santa Clara Cty., Cal.*, 480 U.S. 616, 672 (1987) (Scalia, J., dissenting) ("The 'complicated check on legislation' erected by our Constitution creates an inertia that makes it impossible to assert with any degree of assurance that congressional failure to act represents (1) approval of the status quo, as opposed to (2) inability to agree upon how to alter the status quo, (3) unawareness of the status quo, (4) indifference to the status quo, or even (5) political cowardice.") (quoting *The Federalist* No. 62, at 378 (Clinton Rossiter ed. 1961)).

<sup>139</sup> *See, e.g., Hilton*, 502 U.S. at 203.

<sup>140</sup> 554 U.S. 570 (2008).

<sup>141</sup> 307 U.S. 174 (1939).

<sup>142</sup> *Heller*, 554 U.S. at 638 (Stevens, J., dissenting). For similar emphasis on the concurrence of many judges, see *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 839-40 (1987) (Scalia, J.).

history of the Second Amendment<sup>143</sup>—much as the Justices in *Zivotofsky* and *Noel Canning* debated the extent to which past legislative and executive practices reflected considered constitutional judgments or had been consistent over time. Although in principle a single decision may set a binding precedent, repetition, longevity, and consensus plainly matter.<sup>144</sup> Indeed, some justices seem increasingly unwilling to accept a single decision, or even a course of a few decisions, as binding until they have been repeatedly reaffirmed over an extended period.<sup>145</sup> It may well be that courts generally view *stare decisis* as more obligatory than reliance on other forms of historical practice, but these sorts of examples demonstrate that there is no difference in kind.

Finally, the reasons that we follow past judicial interpretations are basically the same as those for deferring to other forms of historical practice. They involve the same notions of intellectual humility and the need to avoid social disruption that Burke invoked in defense of prescription:

An ignorant man, who is not fool enough to meddle with his clock, is, however, sufficiently confident to think he can safely take to pieces and put together, at his pleasure, a moral machine of another guise, importance, and complexity, composed of far other wheels and springs and balances and counteracting and cooperating powers. Men little think how immorally they act in rashly meddling with what they do not understand. Their delusive good intention is no sort of excuse for their presumption. They who truly mean well must be fearful of acting ill.<sup>146</sup>

There is no *a priori* reason to think that judges today are smarter than the judges of yesteryear, and longstanding precedents that have been continually applied and reaffirmed

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<sup>143</sup> See *Heller*, 554 U.S. at 623-24 (majority opinion).

<sup>144</sup> See Strauss, *Tradition*, *supra* note 24, at 1706 (“It is one thing if a judicial precedent has been followed on many occasions, has become widely accepted by society, and has created a web of institutions dependent on it. . . . It is a different matter if a precedent is relatively recent and has not met widespread acceptance—especially if the precedent itself overturned a widespread practice.”); see also *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 130 (1996) (Souter, J., dissenting) (demonstrating at exhaustive length the error of the Court’s prior holding in *Hans v. Louisiana*, but declining to call for overruling the century-old precedent).

<sup>145</sup> See, e.g., *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 97-98 (2000) (Stevens, J., concurring in part and dissenting in part) (“Despite my respect for *stare decisis*, I am unwilling to accept [*Seminole Tribe v. Florida*, 517 U.S. 44 (1996) (holding that Congress may not abrogate states’ sovereign immunity)] as controlling precedent.”); *Coll. Savings Bank v. Fla. Prepaid Postsecondary expense Bd.*, 527 U.S. 666, 699 (1999) (Breyer, J., dissenting) (“I am not yet ready to adhere to . . . *Seminole Tribe*.”); see also *Parents Involved in Community Schools v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 837 (2007) (Breyer, J., dissenting) (continuing to reject strict scrutiny for “benign” racial classifications despite several prior holdings establishing that standard); see generally Allison Orr Larsen, *Perpetual Dissents*, 15 GEO. MASON L. REV. 447 (2008).

<sup>146</sup> Edmund Burke, *An Appeal from the New to the Old Whigs* (1791), in EDMUND BURKE: SELECTED WRITINGS AND SPEECHES 623, 655-56 (Peter Stanlis, ed. 1963); see also Young, *Rediscovering Conservatism*, *supra* note , at 648-50 .

carry the endorsement of a much larger court than the present one.<sup>147</sup> As Burke’s mechanical metaphor suggests, any given precedent may have become integrated into the legal mechanism such that the effects of overruling it may be hard to anticipate. And judicial precedent also performs a settlement function, allowing the work of the law to proceed without reinventing the wheel in every new case.<sup>148</sup> As Charles Fried has put it, “[w]e want to avoid being like the man who cannot get to work in the morning because he must keep returning home to make quite sure he has turned off the gas.”<sup>149</sup> But reliance on other forms of historical practice—at least where they are not contested—also performs this function. At least for purposes of the present discussion, it is hard to see any reason to distinguish in principle between reliance on settled judicial practices of interpretation (precedent) and reliance on other forms of historical practice.

## **B. Incorporation of Extant Bodies of Law**

A related form of reliance on primarily judicial practice occurs in the many different areas where the law of federal jurisdiction incorporates pre-existing (and generally very old) bodies of non-constitutional law. Sometimes this incorporation has been mandated by statute. In the Process Acts of 1789 and 1792, for example, Congress required federal courts adjudicating suits at law to follow the forms of proceeding in the states in which they sat;<sup>150</sup> this generally meant that they would follow the English common law, as received by the relevant American state.<sup>151</sup> In equity and admiralty cases, the 1792 Act directed federal courts to employ the forms of proceeding used by English equity and admiralty courts.<sup>152</sup> Likewise, the federal piracy statute incorporates the definition of piracy in “the law of nations.”<sup>153</sup>

In other areas, the federal courts have taken it upon themselves to adopt these pre-existing bodies of law. Courts have grounded the sovereign immunity of government institutions—both federal and state—in the common law tradition inherited from

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<sup>147</sup> See Brest, *supra* note 37, at 228 (“[A] doctrine that survives over a period of time has the approval of a court composed, in effect, of all the judges who have ever had occasion to consider and apply it.”).

<sup>148</sup> See, e.g., BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 149 (1921) (“[T]he labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one’s own course of bricks on the secure foundation of the courses laid by others who had gone before him.”).

<sup>149</sup> FRIED, *supra* note 94, at 7.

<sup>150</sup> See Act of May 8, 1792, ch. 36, 1 Stat. 275 (repealed 1872); Act of Sept. 29, 1789, ch. 21, 1 Stat. 93 (repealed 1792).

<sup>151</sup> See Anthony J. Bellia & Bradford R. Clark, *The Original Source of the Cause of Action in Federal Courts: The Example of the Alien Tort Statute*, 101 Va. L. Rev. 609, 667-68 (2015).

<sup>152</sup> See *id.* at 614.

<sup>153</sup> 18 U.S.C. § 1651.

England.<sup>154</sup> The individual immunities of government officers have similar roots.<sup>155</sup> The various abstention doctrines rest in substantial part on the discretionary practices of English common law and equity courts,<sup>156</sup> and equity practice likewise provides remedies against unlawful state action.<sup>157</sup> Although the admiralty provisions of both Article III and the various judiciary acts are purely jurisdictional in form and do not specify the body of law to be applied, federal courts have read those provisions to incorporate the general maritime law, or *lex mercatoria*, which is a form of customary international law.<sup>158</sup>

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<sup>154</sup> See, e.g., *Alden v. Maine*, 527 U.S. 706, 713 (1999) (grounding state sovereign immunity in the common law rather than the text of the Eleventh Amendment); *United States v. Lee*, 106 U.S. (16 Otto) 196, 205 (1882) (observing that “the doctrine [of federal sovereign immunity] is derived from the laws and practices of our English ancestors”); *The Siren*, 74 U.S. (7 Wall.) 152, 153 (1869) (grounding sovereign immunity in the “familiar doctrine of the common law”). The Court has often been at pains to insist that state sovereign immunity does not rest *only* on the common law. Sometimes the Court has pointed to still other bodies of preexisting law. See *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 69 (1996) (pointing out that the Court’s decision expanding state immunities in *Hans v. Louisiana*, 134 U.S. 1 (1890), “found its roots not solely in the common law of England, but in the much more fundamental ‘jurisprudence in all civilized nations’”) (quoting *Hans*, 134 U.S. at 17). And sometimes the Court has relied on more abstract notions of state sovereignty. See *Alden*, 527 U.S. at 733-34. But when the Court says that immunity from suit was “a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today,” *id.* at 713, it is grounding that immunity in preexisting English common law background. See also *Pennsylvania v. Union Gas*, 491 U.S. 1, 32 (Scalia, J., dissenting) (“[T]he doctrine of sovereign immunity, for States as well as for the Federal Government, was part of the understood background against which the Constitution was adopted, and which its jurisdictional provisions did not mean to sweep away.”). See also *Samantar v. Yousuf*, 560 U.S. 305, 311 (2010) (“The doctrine of *foreign* sovereign immunity developed as a matter of common law long before the Foreign Sovereign Immunities Act was enacted in 1976.”) (emphasis added).

<sup>155</sup> See, e.g., *Wyatt v. Cole*, 504 U.S. 158, 163-64 (1992); *Harlow v. Fitzgerald*, 457 U.S. 800, 806 (1982); *Scheuer v. Rhodes*, 416 U.S. 232 (1974); *Spalding v. Vilas*, 161 U.S. 483, 494-99 (1896); see also *Samantar*, 560 U.S. at 325 (holding that the individual immunities of foreign officers are governed by the common law). As *Scheuer* points out, however, official immunity “has been the product of constitutional provision as well as legislative and judicial processes.” 416 U.S. at 240. But even the legislative immunities, which derive in part from the Speech and Debate Clause of Article I, have been importantly shaped by past practice. See *Tenney v. Brandhove*, 341 U.S. 367, 372-75 (1951) (grounding legislative immunities in English parliamentary practice).

<sup>156</sup> See, e.g., *Younger v. Harris*, 401 U.S. 37 (1971); *Railroad Comm’n v. Pullman Co.*, 312 U.S. 496, 500-01 (1941); see also *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 717 (1996) (“Our longstanding application of these [abstention] doctrine reflects the common-law background against which the statutes conferring jurisdiction were enacted” and emphasizing the equitable roots of those doctrines).

<sup>157</sup> See, e.g., *Armstrong v. Exceptional Child Center, Inc.*, 135 S. Ct. 1378, 1384 (2015) (“The ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England.”).

<sup>158</sup> See, e.g., *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 206 (1996) (“With admiralty jurisdiction . . . comes the application of substantive admiralty law.”); *Panama R.R. v. Johnson*, 264 U.S. 375, 386 (1924); see also Ernest A. Young, *Preemption at Sea*, 67 GEO. WASH. L. REV. 273, 281-82 (1999); William Tetley, *The General Maritime Law—the Lex Maritima (with a Brief Reference to the Ius Commune in Arbitration Law and the Conflict of Laws)*, 20 SYR. J. INT’L L. & COM. 105, 108 (1994) (“The general maritime law is a *ius commune*, is part of the *lex mercatoria* and is composed of the maritime customs, codes, conventions and

The history of the “general common law” provides a particularly striking example of judicial incorporation of preexisting law. Cases like *Swift v. Tyson*<sup>159</sup> read the Rules of Decision Act<sup>160</sup> to permit federal courts sitting in diversity to apply the general commercial law—another subclass of customary international law that was, as Justice Story explained, “not the law of a single country only, but of the commercial world.”<sup>161</sup> In the latter case, the law incorporated practice in a double sense: *Swift* adopted the practices of prior courts (including state and foreign courts) in applying the general commercial law, and that law itself derived its norms from the customs of merchants engaged in commercial intercourse.<sup>162</sup> When *Erie Railroad Co. v. Tompkins*<sup>163</sup> overruled *Swift*, it hardly rejected this process of incorporation; rather, it required federal courts to defer more strictly to the practices of the several states, which had themselves incorporated the *lex mercatoria* and the common law.<sup>164</sup> And in cases where courts continue to make federal common law based on the presence of uniquely federal interests, they have continued to draw on the general commercial law.<sup>165</sup>

Federal courts law incorporates the English common law and equitable practice, as well as the broader customs of maritime and commercial law, as a pragmatic solution to the generality of the Article III judicial power and its instantiation in the various judiciary acts. The Framers of these mandates left innumerable questions unanswered, and they could afford to do so because the common law background either already answered them or provided resources to do so in the future. As Peter Du Ponceau put it in the early Nineteenth Century, “[w] live in the midst of the common law, we inhale it at every breath, imbibe it at every pore . . . [and] cannot learn another system of laws without learning at

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practices from earliest times to the present, which have had no international boundaries and which exist in any particular jurisdiction unless limited or excluded by a particular statute.”).

<sup>159</sup> 41 U.S. (16 Pet.) 1 (1842)

<sup>160</sup> Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73, 92 (1789).

<sup>161</sup> 41 U.S. (16 Pet.) at 19; see generally William Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 Harv. L. Rev. 1513 (1984); Jay, *Federal Common Law II*, *supra* note 104, at 1263-64.

<sup>162</sup> See, e.g., RANDALL BRIDWELL & RALPH U. WHITTEN, *THE CONSTITUTION AND THE COMMON LAW: THE DECLINE OF THE DOCTRINES OF SEPARATION OF POWERS AND FEDERALISM* (1977) (describing the customary character of the general commercial law).

<sup>163</sup> 304 U.S. 64 (1938).

<sup>164</sup> See generally Ernest A. Young, *A General Defense of Erie Railroad Co. v. Tompkins*, 10 J. L. ECON. & POL'Y 17 (2013).

<sup>165</sup> See, e.g., *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943) (concluding that “the federal law merchant . . . stands as a convenient source of reference for fashioning federal rules applicable to these federal questions”).

the same time another language.”<sup>166</sup> Rebels against British rule, the founding generation nonetheless saw little need—and perhaps had little ability—to remodel the entire legal system; instead, the preexisting law shaped the new government at every turn.<sup>167</sup> Federal courts law maintains this basic conservatism today, preferring in nearly every instance “off the shelf” solutions based on some preexisting source of law to formulating new legal rules out of whole cloth.<sup>168</sup>

This sort of incorporation is by no means confined to federal courts law, of course. Search and seizure law, for example, incorporates important elements of the common law of property. In assessing the reasonableness of a search, the Court has noted “the great significance given to widely shared social expectations, which are naturally enough influenced by the law of property, but not controlled by its rules.”<sup>169</sup> The substantive due process cases have frequently invoked common law principles in defining the “liberty” protected by the Fifth and Fourteenth Amendments.<sup>170</sup> More broadly, the Court’s incorporation jurisprudence applying the Bill of Rights to the States relies not on Justice Black’s theory that the Fourteenth Amendment rendered the first eight amendments directly authoritative in state cases, but rather on the more indirect notion that the Bill of

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<sup>166</sup> PETER DU PONCEAU, A DISSERTATION ON THE NATURE AND EXTENT OF JURISDICTION OF COURTS OF THE UNITED STATES 91 (1824).

<sup>167</sup> See, e.g., NELSON, *supra* note 104, at 67 (“There is no evidence that any of the men who led Massachusetts into the War of Independence or any of those who followed acted for the purpose of bringing about fundamental changes in the rules and institutions of which the legal system was comprised. . . . The legal system that emerged from the war was, in short, virtually identical to the old colonial legal system.”); SACHS, *supra* note 105, at 1821-23. Professor Nelson goes on to document that “thereafter change was dramatic,” *id.*, but these changes had to do with adapting the common law to the needs of the growing republic and important shifts in the responsibilities of judge and jury; there was no wholesale rejection of English law. See *id.* at 8-10, 165-74.

<sup>168</sup> See, e.g., HART & WECHSLER, *supra* note 41, at 747-52 (discussing the practice of supplying limitations periods for federal causes of action that lack them by borrowing from analogous state statutes of limitation). State law qualifies as a “practice” in this context, because it is “borrowed” in situations in which it lacks direct legal force. Such state law practices may or may not be of longstanding duration. Similar borrowing also takes place to resolve ambiguities in federal statutory terms. See, e.g., *Field v. Mans*, 516 U.S. 59, 69 (1995) (“It is . . . well established that ‘[w]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.’”) (quoting *community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739 (1989)).

<sup>169</sup> *Georgia v. Randolph*, 547 U.S. 103, 111 (2006). See also *United States v. Jones*, 132 S. Ct. 945, 949-51 (2012) (acknowledging the reliance of Fourth Amendment jurisprudence on the common law of trespass); *Rakas v. Illinois*, 439 U.S. 124, 144 n.12 (noting that “reference to real or personal property law” can ground a reasonable expectation of privacy under the Fourth Amendment).

<sup>170</sup> See, e.g., *Cruzan by Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 269-70 (1990) (relying on the common law doctrine of informed consent to identify a “liberty interest” in refusing life-sustaining medical treatment); *Michael H. v. Gerald D.*, 491 U.S. 110, 124 (1989) (stating that “the legal issue in the present case reduces to whether the relationship between persons [here] has been treated as a protected family unit under the historic practices of our society,” and looking to the common law to define those practices).

Rights provides a helpful guide to identifying the principles of “fundamental fairness” that the Fourteenth Amendment protects.<sup>171</sup> As the younger Justice Harlan put it, “the Bill of Rights is evidence . . . of the content Americans find in the term ‘liberty’ and of American standards of fundamental fairness.”<sup>172</sup>

My friend and colleague Stephen Sachs has described our English inheritance of the common law and equity principles as a “constitutional backdrop.” He rightly observes that “[o]ur founding document is firmly rooted in the common law tradition, in which each new enactment is layered on top of an existing and enormously complex body of written and unwritten law.”<sup>173</sup> Professor Sachs’s discussion is tremendously helpful in illuminating the extent to which our legal system in general—and constitutional law in particular—builds on a body of preexisting legal principles and practices. But exploring the divergences between Sachs’s account and my own will help illuminate the approach advanced here.

A “backdrop,” as Professor Sachs uses the term, is not “historical practice” as I have defined it. An historical practice, for my purposes, is a prior action or rule that does not bind directly within the context of the dispute in which it is invoked. The Constitution itself is not “practice,” because it binds us today as law; neither are the portions of the 1789 Judiciary Act that remain in effect today. But the early Presidents’ tendency to issue Thanksgiving Day proclamations is a practice that might be relevant to contemporary disputes about the meaning of the Establishment Clause, because they may reflect a longstanding view about the permissibility of official invocations of the Deity.<sup>174</sup> At the same time, of course, those proclamations themselves have no binding force in contemporary Establishment Clause litigation.

For Professor Sachs, legal backdrops are relevant precisely because they continue to have binding legal force today. Because “the Constitution left most preexisting law alone,” he says, “[a]ny legal rule that wasn’t abrogated by the Constitution’s enactment simply kept on trucking after 1788.”<sup>175</sup> Hence, the English Common law, equity practice, and other bodies of preexisting law “remained in force subject to the Constitution’s requirements, to the privileged status of federal law under the Supremacy Clause, and to the ordinary processes of abrogation, amendment, and repeal.”<sup>176</sup> For Sachs, the common law is relevant because it simply remains the law—not because it is a practice that may

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<sup>171</sup> See, e.g., *McDonald v. City of Chicago*, 561 U.S. 742, 759-66 (2010).

<sup>172</sup> *Duncan v. Louisiana*, 391 U.S. 145, 177 (1968) (Harlan, J., dissenting).

<sup>173</sup> *Id.* at 1822.

<sup>174</sup> Compare, e.g., *Lee v. Weisman*, 505 U.S. 577, 622-25 (1992), with *id.* at 633-35 (Scalia, J., dissenting) (debating the significance of Thanksgiving proclamations for the Establishment Clause).

<sup>175</sup> Sachs, *supra* note 105, at 1823.

<sup>176</sup> *Id.*

influence the interpretation of existing law or, in some way, supplement the traditionally-binding legal materials. Moreover, what makes the common law a *constitutional* backdrop is that it is “preserved from change” in various ways.<sup>177</sup>

Certainly some aspects of the common law, equity practice, or other forms of preexisting law have continuing force in our legal system.<sup>178</sup> But the transition from English to American law was not seamless,<sup>179</sup> and it differed at the national and state levels. The states did not simply allow the English common law to continue in force. Rather, they expressly “received” it into state law through specific reception statutes or provisions in state constitutions,<sup>180</sup> and they took only those portions they found applicable to their local conditions.<sup>181</sup> And the framers of the national Constitution explicitly debated—but *rejected*—a parallel reception of the English common law into national law.<sup>182</sup> Writing to St. George Tucker, John Marshall stated that “I do not believe one man can be found” who maintains “that the common law of England has . . . been adopted as the common law of America by the Constitution of the United States.”<sup>183</sup> Nor is there any federal statute

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<sup>177</sup> *Id.*

<sup>178</sup> For example, Professor Sachs cites longstanding customary international law rules governing interstate borders, which not only have continuing legal force but are effectively insulated from change by constitutional prohibitions on reassigning territory from one state to another. *See id.* at 1828-34.

<sup>179</sup> *See generally* Hall, *supra* note 102, at 805-07; PAUL REINSCH, ENGLISH COMMON LAW IN THE EARLY AMERICAN COLONIES 58 (1899) (“The process which we may call the reception of the English common law by the colonies was not so simple as the legal theory would lead us to assume. While their general legal conceptions were conditioned by, and their terminology derived from, the common law, the early colonists were far from applying it as a technical system, they often ignored it or denied its subsidiary force, and they consciously departed from many of its most essential principles.”).

<sup>180</sup> *See, e.g.*, N.C. GEN. STAT. ANN. § 4-1 (“All such parts of the common law as were heretofore in force and use within this State, or so much of the common law as is not destructive of, or repugnant to, or inconsistent with, the freedom and independence of this State and the form of government therein established, and which has not been otherwise provided for in whole or in part, not abrogated, repealed, or become obsolete, are hereby declared to be in full force within this State.”); *see generally* Hall, *supra* note 102. One state received the common law through judicial decision. *See, e.g.*, *Baldwin v. Walker*, 21 Conn. 168, 181 (1851) (“We have, in our judicial practice, adopted so much of the common law as was operative as law, in the fatherland, when our ancestors left it, and which was adapted to the new state of things here, under our colonial condition. This was our inheritance.”).

<sup>181</sup> *See, e.g.*, *Van Ness v. Pacard*, 27 U.S. (2 Pet.) 137, 144 (1829) (Story, J.) (“The common law of England is not to be taken in all respects to be that of America. Our ancestors brought with them its general principles, and claimed it as their birthright; but they brought with them and adopted only that portion which was applicable to their situation.”); ROSCOE POUND, THE FORMATIVE ERA OF AMERICAN LAW 20 (1938) (noting that “[l]egislatures and courts and doctrinal writers had to test the common law at every point with respect to its applicability to America”).

<sup>182</sup> *See* Jay, *Federal Common Law Part II*, *supra* note 104, at 1254-62; *see also* *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 137-42 (1996) (Souter, J., dissenting) (discussing this history).

<sup>183</sup> Letter from John Marshall to St. George Tucker, Nov. 27, 1800, reprinted in Jay *Federal Common Law Part II*, *supra* note 104, App. A, at 1326; *see also* James Madison, *Report on the Virginia Resolutions*, *House*

receiving the common law *en masse* into national law. Hence, the Supreme Court in *Wheaton v. Peters* found it “clear there can be no common law of the United States. . . . The common law could be made a part of our federal system only by legislative adoption. When, therefore, a common law right is asserted, we must look to the state in which the controversy originated.”<sup>184</sup>

English rules of common law and equity, as well as the broader corpus of maritime law, thus do not become part of federal law because they simply remained in force notwithstanding “the late unpleasantness”—to borrow a Civil War euphemism—between Britain and its American colonies. Rather, they come in because particular provisions of federal law, such as the Process Acts or the Admiralty Clause in Article III, adopted them, or because federal judges, using their more limited authority to adopt federal common law rules to govern the cases before them, imported them as helpful “off-the-shelf” solutions to problems arising in federal litigation. As such, these older bodies of law were practices, whose legal force depended on a *current* decision to accept them as binding. In most situations, this conceptual hair-splitting will make little difference. But it does matter when aspects of the English “backdrop” are argued to be entrenched against change by ordinary legal means<sup>185</sup>—a problem I return to in Part III.

Incorporation of preexisting bodies of law may have a dynamic as well as a conservative impact on the law. Just as state courts used the common lawmaking powers that they received along with the substantive English common law to adapt that law to the context of the growing American states,<sup>186</sup> so too federal court law has adapted as it adopted preexisting bodies of law. The federal Constitution explicitly incorporated the English

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*of Delegates, Session of 1799–1800, Concerning Alien and Sedition Laws*, in 6 WRITINGS OF JAMES MADISON 381 (G. Hunt ed. 1906) (rejecting any general reception of the common law into federal law).

<sup>184</sup> 33 U.S. (8 Pet.) 591, 658 (1834). Professor Sachs writes that “the decision in *Wheaton* didn’t actually get rid of the “common law of the United States,” citing admiralty law as a counter-example. Sachs, *supra* note 105, at 1883. But maritime law was *not* treated as federal law until the Supreme Court’s much-criticized decision in *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917). See Young, *Preemption at Sea*, *supra* note 158, at 319-25; Fletcher, *supra* note 161, at 1549. Moreover, maritime law has not generally been understood as synonymous with “common law.” See also *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 364-66 (1959) (holding that “admiralty” is a distinct class of jurisdiction from “suits . . . at common law or in equity . . . arising under the . . . laws of the United States”); Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1280-83 (1996) (demonstrating maritime law’s roots in customary international law); Tetley, *supra* note 158, at 109-14 (documenting the origins of maritime law in the law of nations). Likewise, it is relatively well settled that the general commercial law applied under *Swift v. Tyson* was not considered federal. See Fletcher, *supra* note 161, at 1575. Its force depended on state choice of law rules mandating its application in commercial cases. See BRIDWELL & WHITTEN, *supra* note 162, at 72-73.

<sup>185</sup> See, e.g., Sachs, *supra* note 105, at 1816, 1878 (arguing that backdrops are insulated against most kinds of legal change); *id.* at 1873-75 (suggesting that the English common law doctrine of sovereign immunity is immune from congressional abrogation).

<sup>186</sup> See NELSON, *supra* note 104, at 8-10.

common law writ of *habeas corpus* as a restraint on executive detention,<sup>187</sup> but the Reconstruction Congress extended the writ to persons in state custody and the Supreme Court ultimately interpreted it as a basis for collateral attack on state convictions<sup>188</sup>—a remedy directed to the unique problems of American federalism. English admiralty law extended only to tidal waters, but American law stretched it to cover all navigable waterways by 1851, which had the intended effect of extending federal maritime jurisdiction to cover a broad swath of interstate commerce.<sup>189</sup> And the Supreme Court has both received and adapted the English common law of sovereign immunity—building upon such English remedies as the petition of right but then extending them to wholly new contexts, such as damages actions against law enforcement officers—to construct a relatively flexible array of remedies against government officials for constitutional violations.<sup>190</sup>

Federal courts law’s incorporation of preexisting bodies of law thus illustrates the flip-side of prescriptive authority, that is, its pairing of respect for the past with enablement of incremental change and reform. The most eloquent account of “living constitutionalism” in American law, the younger Justice Harlan’s dissent in *Poe v. Ullman*,<sup>191</sup> is grounded

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<sup>187</sup> See U.S. CONST. art I, § 9, cl. 2; see also Judiciary Act of 1789, 1 Stat. 81-82 (conferring authority on the federal courts to issue writs of habeas corpus for prisoners in federal custody).

<sup>188</sup> See Act of February 5, 1867, 14 Stat. 385; *Brown v. Allen*, 344 U.S. 443 (1953); see also HART & WECHSLER, *supra* note 41, at 1194 (“[P]ostconviction relief was not the original office of habeas corpus, which focused instead on whether extra-judicial detention—most often by the executive—was authorized by law.”).

<sup>189</sup> See generally Note, *From Judicial Grant to Legislative Power: The Admiralty Clause in the Nineteenth Century*, 67 HARV. L. REV. 1214, 1215-26 (1954).

<sup>190</sup> See, e.g., *United States v. Lee*, 106 U.S. (16 Otto) 196 (1882) (recognizing that the national government inherited the English crown’s immunity at common law, but holding by analogy to the petition of right that this immunity did not bar suits against officers for prospective relief); *Ex parte Young*, 209 U.S. 123 (1908) (extending officer suits to *state* officers and claims for prospective relief that do not rest on invasion of a common law interest); *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 404 (1971) (Harlan, J., concurring) (invoking “the distinctive historical traditions of equity as an institution” to affirm the federal courts’ power to recognize other remedies, including damages relief, against federal officers for constitutional violations).

<sup>191</sup> 367 U.S. 497, 542 (1961) (Harlan, J., dissenting from dismissal on jurisdictional grounds). Justice Harlan wrote:

Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court’s decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive,

squarely in the common law method. By incorporating preexisting bodies of law that themselves presuppose a strong role for judicial elaboration over time, this form of reliance on past practice also injects a degree of fluidity into federal courts doctrine.

### C. Canons of Statutory Construction

The canons of statutory construction defer to historical practice in at least three senses. The first is that most of these rules themselves represent venerable traditions of interpretation. Abbe Gluck’s recent work has investigated the fascinating and difficult question whether methodologies of statutory construction are themselves *law*—so that, for instance, federal courts interpreting state statutes would be required to apply *state* canons of construction.<sup>192</sup> But whether or not that is true, there is no doubt that the canons also represent longstanding regularities of practice within the judiciary.<sup>193</sup> Federal courts apply the canons because previous courts have applied those canons. And the stability of the canons is thought to provide a baseline against which Congress can legislate.<sup>194</sup>

The second and third ways in which the canons defer to historical practice turn on the nature of the canon in question. The statutory interpretation literature generally divides rules of interpretation into two classes: descriptive canons, which embody judgments about how the enacting legislature most likely would have preferred to resolve ambiguities that arise within a statute; and normative canons, which implement other values that the

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while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint.

*Id.*; see also *Planned Parenthood of Eastern Pa. v. Casey*, 505 U.S. 833, 848-50 (1992) (plurality opinion of O’Connor, Kennedy, and Souter, JJ.) (adopting Harlan’s reasoning); Young, *Rediscovering Conservatism*, *supra* note 40, at 695 (arguing that “Justice Harlan’s dissent in *Poe* demonstrates the application of the common-law model [of constitutionalism] to resolve actual cases”).

<sup>192</sup> See Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as “Law” and the Erie Doctrine*, 120 *YALE L. J.* 1898 (2011).

<sup>193</sup> See, e.g., Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 *GEO. L. J.* 341, 344-45 (2010) (discussing the canons as a form of customary law).

<sup>194</sup> See, e.g., *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 531 n.22 (1983) (“Congress ... appear[s] to have been generally aware that the statute would be construed by common-law courts in accordance with traditional canons.”); see also Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 *DUKE L. J.* 511, 517 (making this point about the *Chevron* rule construing statutory ambiguity as legislative intent to delegate interpretive authority to agencies). Scholars have questioned whether legislators are actually aware of judicial canons of statutory construction—and thus whether those canons can function as a baseline in this way. See, e.g., Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 *N.Y.U. L. REV.* 575 (2002). But the most recent empirical work on that subject suggests a higher degree of legislative awareness of the canons than the earlier academic conventional wisdom supposed. See Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 *STAN. L. REV.* 901, 929 (2013).

legislature may or may not share.<sup>195</sup> Descriptive canons generally seek to assess legislative preferences by reference to regularities in past legislative practice—the judgment, for example, that when the legislature passes a new statute, it generally does not mean to disrupt other aspects of the law unless it specifically says that it does. These canons thus embody deference to past legislative practice.

Normative canons, on the other hand, are problematic precisely because they so often fly in the face of likely legislative preference.<sup>196</sup> The rule of lenity, for example, holds that “when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language.”<sup>197</sup> This approach cannot, to put it mildly, plausibly rest on a judgment that legislators generally look out for and mean to protect the interests of criminal defendants; rather, it is traditionally justified as protecting due process values of fair notice.<sup>198</sup> As the rule of lenity suggests, sometimes normative canons trace directly to constitutional principles. Often, however, the values protected are more diffuse. The rule disfavoring repeals of preexisting law by implication from a new statute,<sup>199</sup> for example, is hard to ground in any specific constitutional principle.

David Shapiro has demonstrated, however, that canons like the one against implied repeals serve a broader function of maintaining continuity and coherence in the law. For Professor Shapiro, the most important interpretive canons “are those that aid in reading statutes against the entire background of existing customs, practices, rights, and obligations—in other words, those that emphasize the importance of not changing existing understandings any more than is needed to implement the statutory objective.”<sup>200</sup> This view of the canons takes in those rules of construction, like the rule of lenity or the presumption against preemption,<sup>201</sup> that point to specific constitutional principles, because those canons harmonize new laws with those principles without forcing an evaluation of actual

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<sup>195</sup> See, e.g., Stephen F. Ross, *Where Have You Gone, Karl Llewellyn? Should Congress Turn Its Lonely Eyes to You?* 45 VAND. L. REV. 561, 563 (1992); Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1586-87 (2000).

<sup>196</sup> See Ross, *supra* note 195, at 563; see also Nicholas S. Zeppos, *Judicial Candor and Statutory Interpretation*, 78 Geo. L. J. 389-90 (1989) (suggesting that these sorts of canons raise legitimacy problems as a form of judicial lawmaking).

<sup>197</sup> *McNally v. United States*, 483 U.S. 350, 359-60 (1987).

<sup>198</sup> See, e.g., Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315, 332 (2000).

<sup>199</sup> See, e.g., *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1018 (1984) (“[W]here two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective” (internal quotation marks omitted)).

<sup>200</sup> David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. Rev. 921, 925 (1992).

<sup>201</sup> See, e.g., *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

constitutional conflict.<sup>202</sup> But as the rule against implied repeals suggests, Shapiro’s notion of coherence also includes integration with the vast mass of preexisting subconstitutional law.<sup>203</sup> The canons respect the fact that subconstitutional law often plays a critical role in constituting our institutions, so that a repeal of a preexisting statute, regulation, or common law doctrine may be just as disruptive as a statute that undermines some constitutional value.<sup>204</sup>

Professor Shapiro’s notion of statutory construction as an instrument of continuity with past practice is nowhere more apparent than with respect to statutes construing the authority of the federal courts. In *Murdock v. Memphis*,<sup>205</sup> the Supreme Court construed an amendment to the statutory section prescribing the Court’s jurisdiction over appeals from the state courts to permit only review of federal questions, not any state law issues that might also be necessary to resolve the entire dispute. It did so notwithstanding a recent amendment that arguably broadened the Court’s jurisdiction, noting that if it were Congress intent to “revers[e] the policy of the government from its foundation in one of the most important subjects on which [Congress] could act, it is reasonably to be expected that Congress would use plain, unmistakable language in giving expression to such intention.”<sup>206</sup>

A different result in *Murdock* would have disrupted the established relationship between state and federal law. As Martha Field has explained, if the U.S. Supreme Court could substitute its own view of state law for that of the highest state court, “it would not be possible to identify any body of law as ‘state law.’ It is thus because of *Murdock* that the whole concept of state law as distinct from federal law is a meaningful one.”<sup>207</sup> While *Murdock* purported only to construe the Supreme Court’s jurisdictional statute, then, it is a profoundly *constitutive* decision; it is, as Professor Field observes, “such a fundamental part of our way of thinking about the boundary between state and federal power that many of our suppositions, constitutional and otherwise, are built upon it.”<sup>208</sup> The Court’s

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<sup>202</sup> See Ernest A. Young, *The Continuity of Statutory and Constitutional Interpretation: An Essay for Phil Frickey*, 98 Cal. L. Rev. 1371 (2010).

<sup>203</sup> See, e.g., *Norfolk Redevelopment & Housing Auth. v. Chesapeake & Potomac Tel. Co.*, 464 U.S. 30, 35 (1983) (“It is a well-established principle of statutory construction that ‘[t]he common law ... ought not to be deemed repealed, unless the language of a statute be clear and explicit for this purpose.’”) (quoting *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603, 623 (1812)).

<sup>204</sup> See also Sachs, *supra* note 105, at 1838-43 (discussing the notion of “defeasibility” in integrating new law with preexisting arrangements).

<sup>205</sup> 87 U.S. (20 Wall.) 590 (1874).

<sup>206</sup> *Id.* at 619.

<sup>207</sup> Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 883, 922 (1986).

<sup>208</sup> *Id.* at 920.

construction of the statutory amendment was thus predicated on the need to ensure continuity with this broader web of past (and ongoing) practices.

Likewise, the Court’s jurisdiction-stripping precedents—which consistently construe jurisdictional statutes in such a way as to minimize encroachments on the longstanding scope of federal jurisdiction—demonstrate the strength of the continuity impulse even in the teeth of aggressive new statutory language.<sup>209</sup> In *INS v. St. Cyr*,<sup>210</sup> for example, the Court confronted a statutory text that seemed unequivocally to deprive federal courts of jurisdiction to review deportation orders. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) provided that “[n]otwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed” certain enumerated criminal offenses.<sup>211</sup> Nonetheless, the Court found that this provision was not sufficiently clear to proscribe review by writ of habeas corpus. “[T]o conclude that the writ is no longer available in this context would represent a departure from historical practice in immigration law,” the Court said, noting that “[t]he writ of habeas corpus has always been available to review the legality of Executive detention.”<sup>212</sup> Moreover, the Court’s prior precedents had demanded explicit textual references to habeas corpus in order to foreclose that remedy—a reference that, for all its aggressive language, the IIRIRA provision failed to include.<sup>213</sup>

Amanda Tyler has explained that *St. Cyr* and similar cases rely on “a combination of the canon against implied repeals and a clear statement rule protecting structural harmony, as well as a heavy dose of stare decisis—namely, continuing and strong reliance on the model set forth in *Yerger*.”<sup>214</sup> One might also think of the Court’s requirement of a super-strong clear statement in order to cut off federal jurisdiction as embodying a constitutional norm against jurisdiction stripping, albeit one defeasible by Congress if it acts with sufficient clarity.<sup>215</sup> These two views are not necessarily in tension. Hard

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<sup>209</sup> See, e.g., *Ex parte Yerger*, 75 U.S. (8 Wall.) 85 (1868) (construing 1868 statute depriving the U.S. Supreme Court of *habeas* jurisdiction *not* to affect the original writ of *habeas* in the 1789 Judiciary Act); see also *Felker v. Turpin*, 518 U.S. 651 (1996) (construing restrictions on *habeas* in the 1996 Anti-Terrorism and Effective Death Penalty Act to nonetheless permit some *habeas* review under *Yerger*). See generally HART & WECHSLER, *supra* note 41, at 316-18, 336-38; Amanda L. Tyler, *Continuity, Coherence, and the Canons*, 99 Nw. U. L. Rev. 1389, 1438-60 (2004); Young, *Constitutional Avoidance*, *supra* note 195, at 1553-73.

<sup>210</sup> 533 U.S. 289 (2001).

<sup>211</sup> 8 U.S.C. § 1252(a)(2)(C).

<sup>212</sup> 533 U.S. at 305.

<sup>213</sup> See *id.* at 311-13.

<sup>214</sup> Tyler, *Canons*, *supra* note 209, at 1459.

<sup>215</sup> See Young, *Constitutional Avoidance*, *supra* note 195, at 1602-13.

constitutional limits on jurisdiction-stripping are hard to identify,<sup>216</sup> and the strongest arguments against such measures will generally be that they fly in the face of centuries of institutional practice concerning the relationship between Congress, the federal courts, and the courts of the states.<sup>217</sup> The canons of construction, in Professor Shapiro’s model, exist primarily as a means for ensuring that new legislation does not unduly disrupt such practices. What cases like *St. Cyr* illustrate most vividly is that the canons may be employed to enforce such continuity even in the teeth of what Congress almost surely intends.<sup>218</sup>

Of course, not everyone accepts Professor Shapiro’s view of statutory construction as a means primarily of maintaining continuity with the past. As Professor Tyler points out, “proponents of an engineering vision of courts in the realm of statutory interpretation generally contend for an interpretive approach by which courts ‘update’ the legislature’s work and absolve that body of the need to police judicial constructions that may no longer remain in keeping with prevailing political or social norms.”<sup>219</sup> William Eskridge thus argues that statutes “should—like the Constitution and the common law—be interpreted ‘dynamically,’ that is, in light of their present societal, political, and legal context.”<sup>220</sup>

But as Professor Eskridge’s invocation of the common law suggests, even “dynamic” takes on statutory interpretation are not fundamentally inconsistent with an emphasis on continuity with past practice. In Burke’s thought, organic growth is the flipside of prescriptive authority. For Burke, “the idea of inheritance furnishes a pure principle of conservation, and a sure principle of transmission, without at all excluding a principle of improvement.”<sup>221</sup> In *Swift v. Tyson*,<sup>222</sup> for example, Justice Story construed the Rules of Decision Act to be consistent with preexisting practice—in both America and elsewhere—extracting a general body of commercial law principles from the customs of

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<sup>216</sup> See *id.* at 1553-73; see also Paul M. Bator, *Congressional Power over the Jurisdiction of the Federal Courts*, 27 VILL. L. REV. 1030 (1982) (finding few, if any, limits); HART & WECHSLER, *supra* note 41, at 295-345 (surveying the terrain).

<sup>217</sup> See, e.g., Bator, *supra* note 216, at 1038-39 (concluding that certain restrictions on the Supreme Court’s appellate jurisdiction would “violate the spirit of the Constitution [by disrupting longstanding assumptions about the Court’s role] even if it would not violate its letter”).

<sup>218</sup> See, e.g., Ernest A. Young, *The Continuity of Statutory and Constitutional Interpretation: An Essay for Phil Frickey*, 98 CAL. L. REV. 1371, 1387-91 (2010) (arguing that the canons of statutory construction help ensure that statutes cohere with constitutional values).

<sup>219</sup> Tyler, *Canons*, *supra* note 209, at 1390.

<sup>220</sup> William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. Pa. L. Rev. 1479, 1479 (1987).

<sup>221</sup> Edmund Burke, *Reflections on the Revolution in France* (1791), in 8 THE WRITINGS AND SPEECHES OF EDMUND BURKE 53, 83-84 (Paul Langford ed., Clarendon Press 1989)

<sup>222</sup> 41 U.S. (16 Pet.) 1 (1842).

merchants.<sup>223</sup> Maintaining continuity with that longstanding practice also solidified the dynamic role of the federal courts in developing a nationally uniform body of commercial principles.<sup>224</sup>

But Burke insisted on an incremental method of change in which "[b]y "slow but well-sustained progress, the effect of each step is watched," and that any reforms "proceed upon the principle of reference to antiquity . . . [and] be carefully formed upon analogical precedent, authority, and example."<sup>225</sup> As later students of Burke have pointed out, this is the method of the common law tradition, whereby "custom was constantly being subjected to the test of experience, so that if immemorial it was, equally, always up to date."<sup>226</sup> Justice Story's general commercial law, for example, was tied to and disciplined by existing practice and the need to coordinate with other courts applying the same body of law.<sup>227</sup> Much as the common law tradition has frequently facilitated organic growth in American constitutionalism,<sup>228</sup> so too the canons of interpretation have facilitated institutional change by cushioning the shocks that might otherwise deter or short-circuit reform.<sup>229</sup>

### III. The Constitutive and Entrenchment Effects of Practice

The doctrines just discussed hardly exhaust the many ways in which federal courts law incorporates and defers to historical practice. Indeed, I have left out many of the more prominent examples in order to shine some light on instances where the dynamic may be less obvious. But the examples I have highlighted are enough, I think, to support a few more general points about deference to historical practice in this area. Crucially, federal

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<sup>223</sup> See, e.g., BRIDWELL & WHITTEN, *supra* note 162, at 61-97; Young, *Defense of Erie*, *supra* note 164, at 30-38.

<sup>224</sup> See, e.g., MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 245-52 (1977).

<sup>225</sup> Burke, *Reflections*, *supra* note 221, at 81, 217.

<sup>226</sup> Pocock, *supra* note 89, at 213; see also Young, *Conservatism*, *supra* note 40, at 655-56.

<sup>227</sup> See, e.g., Fletcher, *supra* note 161, at 1562-63. Ultimately, the general common law applied under *Swift* overflowed the constraints that had made it workable in the first half of the nineteenth century, creating the crisis that led to *Erie*. See generally Lawrence Lessig, *Erie-effects of Volume 110: An Essay on Context in Interpretive Theory*, 110 HARV. L. REV. 1785, 1792 (1997); Young, *Defense of Erie*, *supra* note 164, at 37-38. The broader, late version of the general common law tended to restrict the ability of states to change their laws to suit new financial and regulatory imperatives. See, e.g., Michael Collins, *Before Lochner—Diversity Jurisdiction and the Development of General Constitutional Law*, 74 TUL. L. REV. 1263 (2000). Hence, one effect of *Erie*'s decision to overrule *Swift* was to enhance the dynamism of the legal system by restricting federal courts' authority to disregard state innovations.

<sup>228</sup> See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965) (relying in part on common law protections of the home and marital privacy to recognize a new right of privacy under the Due Process clause).

<sup>229</sup> See, e.g., Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767 (1994) (demonstrating that the development of a presumption against preemption mitigated the disruptive effect of the Court's expansion of Congress's commerce power during the New Deal).

courts law uses historical practice in ways that diverge from its use in high-profile separation of powers disputes like *Noel Canning* and *Zivotofsky*. It is, I suggest, a mistake to focus only on these “big cases.”

Two points of divergence are critical. First, federal courts law uses practice primarily to supplement and fill gaps in other sources of binding law—not to “gloss” the meaning of particular constitutional provisions. Largely because of this, federal courts law rarely entrenches past practice against change by ordinary legal means. Second, federal courts law generally does not rely on some theory of acquiescence by the other branches to justify reliance on past practice. In many settings, such acquiescence seems largely beside the point. Instead, the examples I have canvassed tend to rely on practice based on its longstanding pedigree. Federal courts law thus embraces—albeit often implicitly—a prescriptive rationale for past practice. I argue below that this rationale is normatively superior to an acquiescence model of historical practice.

#### **A. The Non-Entrenchment of Practice in Federal Courts Law**

The vast majority of historical practices I have surveyed help constitute our judicial institutions—and in this sense properly fall under the rubric of “constitutional” interpretation—without entrenching those practices against change by ordinary political processes. The constitutive and entrenchment functions of constitutional law do not necessarily run together, and in federal courts law one frequently sees the former without the latter. This is true of each set of practices surveyed in the preceding Part.

The common law, for example, has generally been defeasible by statute; indeed, it was generally received into American law under the express condition that this would be so.<sup>230</sup> Both state and federal legislatures have interstitially supplanted that body of law as they deemed necessary.<sup>231</sup> Specific imports—such as the common law immunities of individual government officers or the equitable principles built into the abstention doctrines—can be modified or repealed by legislation.<sup>232</sup> Likewise, both the general

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<sup>230</sup> See, e.g., Hall, *supra* note 102, at 798-800 (noting that early state statutes receiving the common law stipulated that it could be modified by subsequent legislation); see also Madison, *Report on the Virginia Resolutions*, *supra* note 183, at 380 (explaining that the reason that the Philadelphia convention rejected receiving the common law into the Constitution was to avoid entrenching common law principles against legislative change).

<sup>231</sup> See, e.g., *Metro-North Commuter R. Co. v. Buckley*, 521 U.S. 424, 429 (1997) (noting that the Federal Employer’s Liability Act “expressly abolishes or modifies a host of common-law doctrines that previously had limited recovery” in railroad accident cases); *Easterling Lumber Co. v. Pierce*, 64 So. 461 (Miss. 1914) (upholding against constitutional challenge a state statute abrogating the fellow servant rule in tort).

<sup>232</sup> See, e.g., *Armstrong v. Exceptional Child Center, Inc.*, 135 S. Ct. 1378, 1385 (2015) (noting that “[t]he power of federal courts of equity to enjoin unlawful executive action is subject to express and implied statutory limitations,” and holding that the Medicaid Act foreclosed equitable relief); *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 732 (1996) (Scalia, J., concurring) (abstention rules subject to Congress’s legislative power); Mitchell N. Berman, R. Anthony Reese, & Ernest A. Young, *State Accountability for Violations of Intellectual Property Rights: How to “Fix” Florida Prepaid (And How Not To)*, 79 TEX. L. REV.

maritime law and the general commercial law have often been altered or superseded by federal and state legislation.<sup>233</sup>

The canons of construction are likewise largely unentrenched. This is obviously true with respect to the canons' impact on construction of particular statutes; where canons grounded in established practice influence the construction of a statute, Congress may override the courts' work.<sup>234</sup> The same thing is generally true of the canons themselves. Certainly the courts themselves change the canons over time, employing them more insistently in some eras than others, creating new canons from time to time, and allowing others to fall into disuse. To the considerable extent that descriptive canons of construction reflect patterns of legislative practice, they necessarily change as that practice changes over time.<sup>235</sup> Congress is able to control the process of interpretation by legislating general rules of construction (although these are often ignored)<sup>236</sup> and by enacting interpretive principles in particular statutes.<sup>237</sup>

The harder question is whether Congress may override particular normative canons—particularly those grounded in constitutional values. Although I cannot develop the point here, an attempt to prevent the courts from considering constitutional principles in statutory cases would present grave separation of powers concerns.<sup>238</sup> When Congress has effectively sought to do so, its actions seem best understood not as precluding the courts

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1037, 1127 (2001) (discussing Congress's power to override the doctrine of qualified immunity for government officers).

<sup>233</sup> See, e.g., *Chandris, Inc. v. Latsis*, 515 U.S. 347, 354-55 (1995) (observing that, in enacting the Jones Act, 46 U.S.C. App. § 688, Congress overrode the general maritime rule precluding a seaman's recovery for negligence by his vessel's master or crew); *AFC Interiors v. DiCello*, 544 N.E.2d 869 (Ohio 1989) (holding that Ohio's adoption of the Uniform Commercial Code had superseded the common law commercial doctrine of accord and satisfaction).

<sup>234</sup> See, e.g., Dodd-Frank Wall Street Reform and Consumer Protection Act, PL 111-203, 124 Stat. 1376, 1864-65 (July 21, 2010) (overruling the Supreme Court's application of the presumption against extraterritoriality in *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010)); see also Young, *Constitutional Avoidance*, *supra* note 195, at 1593-99 (discussing canons of construction as "resistance norms" that make certain sorts of legislative actions more difficult without foreclosing them entirely).

<sup>235</sup> Likewise, rules of interpretive deference to administrative agencies change as agency practice changes. See, e.g., *United States v. Mead Corp.*, 533 U.S. 218, 227-38 (2001) (tailoring the degree of deference to the degree of formality and deliberation in the agency's consideration of the issue).

<sup>236</sup> See, e.g., 1 U.S.C. § 1 (Dictionary Act, establishing certain interpretive presumptions for federal statutes); *Rowland v. California Men's Colony, Unit II Men's Advisory Council*, 506 U.S. 194 (1993) (considering the force of the Dictionary Act's presumptions).

<sup>237</sup> See, e.g., War Powers Resolution, 50 U.S.C. § 1547 (establishing rules for construing future legislation alleged to authorize the use of military force). Sometimes it does this implicitly. See, e.g., *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 541-43 (1994) (noting Congress's intent that the Federal Employer's Liability Act is to be "liberally construed").

<sup>238</sup> See, e.g., *Commodities Futures Trading Comm'n v. Schor*, 478 U.S. 833, 850-51 (1986) (suggesting that Congress may not encroach upon or aggrandize itself at the expense of the independent judiciary).

from considering the constitution but as either an exercise of its considerable power over remedies or a restriction on the courts' jurisdiction to decide a class of cases at all. But the critical point remains that canons set only default rules, and so Congress can always overcome them simply by clearly expressing its intent. In this ultimate sense, no canon is entrenched.

Judicial precedent presents a more difficult case. We must consider, first, the practice of *stare decisis* itself, and second, the entrenchment of particular decisions. Scholars have debated whether Congress may override the doctrine of *stare decisis* by statute.<sup>239</sup> If there is a limit on this option, however, it seems likely to stem from general separation of powers concerns about the encroachment of one branch into the functions of another—not from a notion that *stare decisis* is itself constitutionally entrenched. Certainly courts have long felt free to tailor the rules of *stare decisis* to particular situations and to set the force of precedent aside under particular circumstances. Even if some basic level of precedential force is constitutionally entrenched, that protection is unlikely to extend to the varied details of current practice with respect to precedents.

What about the entrenchment of particular decisions? Most judicial precedents, of course, are not constitutional ones and thus can generally be altered or overridden by ordinary legislation.<sup>240</sup> That is ordinarily not possible in constitutional cases,<sup>241</sup> but the Court has compensated by lowering the threshold for *judicial* overruling of constitutional precedents.<sup>242</sup> Moreover, the elements of the Court's *stare decisis* calculus—especially the workability of the prior precedent and changes to its legal or factual underpinnings—speak directly to concerns about entrenchment of past practice in the face of a changing world.<sup>243</sup>

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<sup>239</sup> See, e.g., Paulsen, *supra* note 133.

<sup>240</sup> See, e.g., William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L. J. 331 (1991) (finding that Congress overrides statutory construction decisions more frequently than previously thought).

<sup>241</sup> But see *Katzenbach v. Morgan*, 384 U.S. 641 (1966) (upholding provisions of the Voting Rights Act that effectively overruled the Court's holding in *Lassiter v. Northampton County Bd. Of Election*, 360 U.S. 45 (1959) that literacy tests for voting do not violate the Equal Protection Clause).

<sup>242</sup> See, e.g., *Agostini v. Felton*, 521 U.S. 203, 235 (1997) (observing that the policy of *stare decisis* “is at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions”); *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) (noting that “the Court has during the past 20 Terms overruled in whole or in part 33 of its previous constitutional decisions”).

<sup>243</sup> See, e.g., *Agostini*, 521 U.S. at 235-36 (overruling *Aguilar v. Felton*'s prohibition on government aid to religious schools on account of intervening changes in Establishment Clause law); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 544-45 (1985) (overruling the *National League of Cities* doctrine because it had proven unworkable in actual application); see generally *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 854 (1992) (joint opinion of O'Connor, Kennedy, & Souter, JJ) (“[T]he rule of *stare decisis* is not an inexorable command . . . . Rather, when this Court reexamines a prior holding its judgment is customarily informed by a series of prudential and pragmatic considerations . . . .”). *Casey* itself illustrates both the weight of *stare decisis* and the Court's freedom to modify significantly the rules set forth in prior

Constitutional precedents are largely entrenched against change from outside the Court, however,<sup>244</sup> and that has made the Court’s frequent recourse to a common law-like approach to constitutional development controversial.<sup>245</sup>

Even in the context of high-profile inter-branch disputes, the Court has generally been reluctant to entrench practice against change through ordinary legislation. The *Youngstown* concurrences, for example, viewed presidential authority as largely a function of congressional authorization or prohibition. Both Justices Jackson and Frankfurter turned to past practice in service of that inquiry—that is, they looked to past practice to determine whether Congress had, in fact, authorized or prohibited the sort of executive action in question.<sup>246</sup> But nothing in this approach entrenched the past practice against legislative change; even in areas where Congress had broadly authorized (or at least acquiesced in) executive action, Congress remained free to repeal that authorization and replace it with a prohibition.

However, the Court’s most recent presidential power decision—*Zivotofsky v. Kerry*<sup>247</sup>—goes a giant step further. In that case, the majority concluded from past practice not only that the President has authority to endorse or not endorse the claims of foreign sovereigns to particular territory, but also that this power is *exclusive* of Congress. Congress could not, in other words, limit the President’s authority by statute (as it had tried

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decisions. *See id.* at 875-76 (rejecting *Roe v. Wade*’s trimester framework in favor of a general “undue burden” standard for evaluating regulation of abortion)..

<sup>244</sup> Nonjudicial actors can, of course, seek to change the composition of the Court in hopes that it will overrule its precedents. Barry Friedman has demonstrated that, in large part because of the political check of new appointments over time, the Court rarely gets too far out of step with public opinion. *See* BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* (2009). The Court has sometimes suggested, however, that a change in the court’s composition is a particularly unacceptable reason to overrule a prior decision. *See* *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 864 (1992) (plurality opinion of O’Connor, Kennedy, & Souter, JJ); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 636, 94 S.Ct. 1895, 1914, 40 L.Ed.2d 406 (1974) (Stewart, J., dissenting) (“A basic change in the law upon a ground no firmer than a change in our membership invites the popular misconception that this institution is little different from the two political branches of the Government. No misconception could do more lasting injury to this Court and to the system of law which it is our abiding mission to serve.”).

<sup>245</sup> *See* Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Law*, *The Tanner Lectures on Human Values* 113-21 (March 8 & 9, 1995), available at [http://tannerlectures.utah.edu/\\_documents/a-to-z/s/scalia97.pdf](http://tannerlectures.utah.edu/_documents/a-to-z/s/scalia97.pdf) (criticizing application of the common law method to constitutional law).

<sup>246</sup> *See* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (Jackson, J., concurring) (“Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.”); *id.* at 597-613 (1952) (Frankfurter, J., concurring) (evaluating presidential authority to seize private property in light of congressional measures authorizing and forbidding such seizures in different circumstances).

<sup>247</sup> 135 S. Ct. 2076 (2015).

to do with respect to passports of infants born in Jerusalem).<sup>248</sup> The past practice of presidential recognition and congressional acquiescence had become constitutionally entrenched; presumably the only way to strip the President of this authority now would be to amend the Constitution.

The primary analogy in federal courts law is the Court's state sovereign immunity jurisprudence, which derives from longstanding common law practice a broad immunity against private suits that is *not* defeasible by federal legislation.<sup>249</sup> One might be tempted to call this principle of immunity a "gloss" on the text of the Eleventh Amendment, but the Court has clearly ruled out that interpretation. As Justice Kennedy has said, the phrase "Eleventh Amendment immunity" is "convenient shorthand but something of a misnomer, for the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment."<sup>250</sup> Rather, the principle of immunity supplements the text; it is "a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today."<sup>251</sup>

This is not the place to renew old debates about the soundness of the Court's state sovereign immunity jurisprudence. It is sufficient to say that the Court's position is highly controversial both on the Court and in the academy.<sup>252</sup> Justice Stevens has written, for example, that "[t]he kind of judicial activism manifested in cases like *Seminole Tribe* [and] *Alden v. Maine* . . . represents such a radical departure from the proper role of this Court that it should be opposed whenever the opportunity arises."<sup>253</sup> I submit that an important driver of this controversy is the Court's attempt to confer on freestanding

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<sup>248</sup> See *id.* at 2095-96.

<sup>249</sup> See, e.g., *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) (holding that Congress generally may not abrogate the states' sovereign immunity by statute).

<sup>250</sup> *Alden v. Maine*, 527 U.S. 706, 713 (1999). On the derivation of the immunity principle from common law principles and more abstract notions of state sovereignty, see generally Ernest A. Young, *Alden v. Maine and the Jurisprudence of Structure*, 41 WM. & MARY L. REV. 1601 (2000). Michael Rappaport has suggested that sovereign immunity is instead a gloss on the word "state" as it appears throughout the Constitution. Michael B. Rappaport, *Reconciling Textualism and Federalism: The Proper Textual Basis of the Supreme Court's Tenth and Eleventh Amendment Decisions*, 93 NW. U. L. REV. 819, 830-68 (1999). Certainly the text is not doing much work in this instance. See Young, *Alden*, *supra*, at 1624-26. And plenty of aspects of statehood under the Constitution, such as the basic power to legislate, are subject to override by a valid federal statute. See, e.g., *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001) (holding state regulation of tobacco advertising preempted by federal statute).

<sup>251</sup> *Alden*, 527 U.S. at 713.

<sup>252</sup> See, e.g., Daniel J. Meltzer, *The Seminole Decision and Sovereign Immunity*, 1996 SUP. CT. REV. 1; Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L. J. 1 (1988); William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather Than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033 (1983).

<sup>253</sup> *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 98-99 (2000).

historical practice the same constitutionally-entrenched status as the constitutional text itself. The Court has reached “[b]ehind the words of the constitutional provisions,” as it said in *Monaco v. Mississippi*, for “postulates which limit and control” based in common law practice<sup>254</sup>—and it has entrenched those postulates against legislative alteration. As Justice Souter pointed out in *Seminole Tribe*, the Court’s state immunity cases share the “characteristic vice” of *Lochner v. New York*,<sup>255</sup> in which the Court “treated the common-law background . . . as paramount, while regarding congressional legislation to abrogate the common law . . . as constitutionally suspect.”<sup>256</sup>

I suspect that *Zivotofsky*, which featured the same basic notion of presidential power immune from legislative limitation that one finds in the infamous Bush administration “torture memos,”<sup>257</sup> will prove similarly controversial. Entrenching practice raises a particularly difficult boundary problem that has bedeviled most practice-based theories of constitutional law.<sup>258</sup> If some practices are to have constitutional status, then it becomes critical to define with precision which practices are entrenched and which are not—and to justify the status of the favored practices. It is often exceedingly difficult to draw that line, and failure to draw it in a determinate and predictable way may well undermine the Court’s legitimacy.<sup>259</sup>

This problem either does not arise or arises in a considerably more tractable form when practices supplement other sources of law, but remain defeasible by ordinary legislation. That is why it is often helpful to decouple the constitutive function of extra-constitutional materials, like practice, from any claim to an entrenchment function. I do not mean to suggest that all doctrines that both supplement the constitutional text by reliance on practice and entrench that practice against change through ordinary legal processes are misguided. My point is simply that such instances will always be more vulnerable to general criticisms of reliance on historical practice, such as arguments that such reliance amounts to “constitutional adverse possession,” that it unduly freezes the progressive

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<sup>254</sup> 292 U.S. 313, 323 (1934).

<sup>255</sup> 198 U.S. 45 (1905).

<sup>256</sup> *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 166 (1996) (Souter, J., dissenting).

<sup>257</sup> See, e.g., JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 148-49 (2007) (noting that the memos concluded that Congress could not regulate the exercise of the President’s exclusive Commander-in-Chief authority). One can, of course, distinguish the two cases on any number of grounds. My point is simply that the memos relied on the theory that Congress may not use *its* enumerated powers (such as that to make rules to govern the armed forces) to regulate the President’s exercise of his own powers. The Court had never endorsed that theory prior to *Zivotofsky*.

<sup>258</sup> See *supra* note 81 and accompanying text.

<sup>259</sup> See generally Lawrence Lessig, *Translating Federalism: United States v. Lopez*, 1995 SUP. CT. REV. 125, 170-71, 174.

development of the law, or conversely that it provides ready fodder for judge-driven constitutional change. I consider these criticisms in greater detail in the next section.

## **B. Acquiescence and Prescription**

The use of past practice in federal courts cases often displays a second difference from its use in high-profile inter-branch controversies like *Noel Canning* and *Zivotofsky*. In the latter sort of case, courts often ground the authority of past practice in the acquiescence of rival branches.<sup>260</sup> The *Zivotofsky* court, for example, found that “[f]rom the first Administration forward, the President has claimed unilateral authority to recognize foreign sovereigns,” and “[f]or the most part, Congress has acquiesced in the Executive’s exercise of the recognition power.”<sup>261</sup> This is not new. In *Youngstown*, for instance, Justice Frankfurter emphasized the weight of presidential practice “long pursued to the knowledge of the Congress and never before questioned.”<sup>262</sup> Scholars have generally approved of this practice. My colleague Jeff Powell, for example, has written that “[a]greement between the political branches on a course of conduct is important evidence that the conduct should be deemed constitutional.”<sup>263</sup>

Acquiescence plays a considerably less central role in federal courts cases. The basic limitation on federal judicial power—subject matter jurisdiction—is particularly hostile to any notion of acquiescence. “[T]he rule, springing from the nature and limits of the judicial power of the United States is inflexible and without exception, which requires this court, of its own motion, to deny its jurisdiction, and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record.”<sup>264</sup> This means that “no action of the parties can confer subject-matter jurisdiction upon a federal court. Thus, the consent of the parties is irrelevant, principles of estoppel do not apply, and a party does not waive the requirement by failing to challenge jurisdiction early in the proceedings.”<sup>265</sup> As a result, “[e]very federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review, even though the parties are prepared to concede it.”<sup>266</sup> As with the parties, so too with Congress: the Court has made clear that

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<sup>260</sup> See generally Roisman, *supra* note 3; Michael J. Glennon, *The Use of Custom in Resolving Separation of Powers Disputes*, 64 B.U. L. REV. 109 (1984).

<sup>261</sup> *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2091 (2015).

<sup>262</sup> *Youngstown*, 343 U.S. at 610-11 (Frankfurter, J., concurring).

<sup>263</sup> H. Jefferson Powell, *The President’s Authority over Foreign Affairs: An Executive Branch Perspective*, 67 GEO. WASH. L. REV. 527, 539 (1999).

<sup>264</sup> *Mansfield, C. & L. M. R. Co. v. Swan*, 111 U.S. 379, 382 (1884).

<sup>265</sup> *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982) (citations omitted).

<sup>266</sup> *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 95 (1998) (internal quotation marks omitted).

Congress may not—by deliberate act, much less by acquiescence—confer federal jurisdiction that Article III does not permit.<sup>267</sup>

Many federal courts cases do involve inter-institutional conflicts at some level, but either the nature of those conflicts or the posture in which they arise may make acquiescence less salient. For example, the *Seminole Tribe* case<sup>268</sup> held that Congress may not abrogate state sovereign immunity when it uses its general legislative powers under Article I; it thus adjusted the allocation of power between Congress and the States. But the opinions in that case do not speak of acquiescence. Perhaps this is because acquiescence is more difficult to measure when it involves the actions of the fifty States vis-à-vis Congress. Or perhaps it is because although abrogation of sovereign immunity implicates the power of Congress over the States, it most directly affects the rights of individual plaintiffs suing the government. We do not generally look to acquiescence to establish the Government’s rights and immunities vis-à-vis individuals. Many instances where courts rely on past practice in federal courts cases—such as the individual officer immunity cases or the abstention cases—involve individual rights claims where it would seem odd to allow Congress’s acquiescence to diminish the rights of private plaintiffs.<sup>269</sup>

Most cases involving the judicial power implicate both structural and individual rights concerns in this way. As the Court recognized in *Commodities Futures Trading Commission v. Schor*,<sup>270</sup> for example, Article III “serves both to protect ‘the role of the independent judiciary within the constitutional scheme of tripartite government’ and to safeguard litigants’ ‘right to have claims decided before judges who are free from potential domination by other branches of government.’”<sup>271</sup> *Schor* and similar cases have held the individual interest to be waivable, but only by the individual litigant.<sup>272</sup> And the structural interest is generally treated as non-waivable by such litigants.<sup>273</sup>

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<sup>267</sup> See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (striking down federal statute authorizing suit by parties who lacked Article III standing); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (striking down statute expanding the original jurisdiction of the Supreme Court beyond the bounds of Article III).

<sup>268</sup> *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

<sup>269</sup> See, e.g., *Anderson v. Creighton*, 483 U.S. 635 (1987) (construing scope of official immunity in light of both common law and contemporary necessity, but not relying on any notion of congressional acquiescence).

<sup>270</sup> 478 U.S. 833, 848 (1986).

<sup>271</sup> *Id.* at 848 (quoting *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 583 (1985), and *United States v. Will*, 449 U.S. 200, 218 (1980)).

<sup>272</sup> See *id.* at 848-49.

<sup>273</sup> See *id.* at 851 (“When these Article III limitations are at issue, notions of consent and waiver cannot be dispositive because the limitations serve institutional interests that the parties cannot be expected to protect.”). The Court relied more heavily on the parties’ consent to litigate before a non-Article III bankruptcy judge in *Wellness International Network, Ltd. v. Sharif*, 135 S. Ct. 1932 (2015). But the Court nonetheless considered the other aspects of the *Schor* balancing test; consent was not dispositive. See *id.* at 1944-45.

Waiver of structural interests by the acquiescence of institutional actors is a more mixed bag. In the conditional spending cases, for example, the Court has allowed states to agree to statutory conditions that Congress could not impose directly without violating principles of federalism.<sup>274</sup> But the Court’s federalism cases have also rejected arguments from acquiescence. In *New York v. United States*,<sup>275</sup> for example, the Court considered “what appears at first to be a troubling question: How can a federal statute be found an unconstitutional infringement of state sovereignty when state officials consented to the statute’s enactment?” Justice O’Connor’s answer stemmed from the fundamental nature of structural principles:

The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals. . . . Where Congress exceeds its authority relative to the States, therefore, the departure from the constitutional plan cannot be ratified by the ‘consent’ of state officials.<sup>276</sup>

Because structural principles benefit everyone, then, they cannot be waived or bargained away by office-holders in particular units of the government.

One might argue that separation of powers and federalism are just different in this regard, perhaps because the branches of the federal government are coequal interpreters of the Constitution and (so the argument might go) the states are not. But Justice O’Connor’s opinion in *New York* explicitly equated federalism and separation of powers, insisting that “[t]he Constitution’s division of power among the three branches is violated where one branch invades the territory of another, whether or not the encroached-upon branch

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<sup>274</sup> See, e.g., *South Dakota v. Dole*, 483 U.S. 203 (1987); but see *National Fed. of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012) (invalidating a conditional spending regime as coercive).

<sup>275</sup> 505 U.S. 144, 181 (1992).

<sup>276</sup> *Id.* at 181-82; see also *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011) (“The limitations that federalism entails are not . . . a matter of rights belonging only to the States. . . . An individual has a direct interest in objecting to laws that upset the constitutional balance between the National Government and the States when the enforcement of those laws causes injury that is concrete, particular, and redressable.”). As Justice O’Connor pointed out in *New York*, moreover, separation of powers serves the same values of individual freedom. See *id.* at 181 (“Just as the separation and independence of the coordinate branches of the Federal Government serves to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.”) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991); see also *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2592 (2014) (Scalia, J., concurring in the judgment) (“[T]he Constitution’s core, government-structuring provisions are no less critical to preserving liberty than are the later adopted provisions of the Bill of Rights.”); *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring) (“Liberty is always at stake when one or more of the branches seeks to transgress the separation of powers.”)).

approves the encroachment.”<sup>277</sup> Hence, “[t]he constitutional authority of Congress cannot be expanded by the ‘consent’ of the governmental unit whose domain is thereby narrowed, whether that unit is the Executive Branch or the States.”<sup>278</sup> Tellingly, Congress’s decision to pass a law encroaching on its own powers has not generally prevented litigants from successfully challenging such a law on separation of powers grounds. In *Clinton v. New York*,<sup>279</sup> for example, the Court struck down the line-item veto statute on separation of powers grounds notwithstanding Congress’s own decision to back the law. Concurring, Justice Kennedy wrote that “[i]t is no answer, of course, to say that Congress surrendered its authority by its own hand . . . . Abdication of responsibility is not part of the constitutional design.”<sup>280</sup>

Broad notions of acquiescence are problematic for a second reason, grounded in the general inability of one Congress to bind its successors.<sup>281</sup> As Justice Souter explained in *United States v. Winstar*,<sup>282</sup> that principle derives from English political theory and practice but survives, in a more limited fashion, in America.<sup>283</sup> Hence Chief Justice Marshall’s opinion in *Fletcher v. Peck*<sup>284</sup> accepted the general principle “that one legislature is competent to repeal any act which a former legislature was competent to pass; and that one legislature cannot abridge the powers of a succeeding legislature.”<sup>285</sup> The notion that any given Congress may, through a course of action or simply by inaction, permanently cede power to another branch seems to fly in the face of this venerable principle. As Justice Kennedy put it in the line-item veto case, “[t]he Constitution is a compact enduring for

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<sup>277</sup> 505 U.S. at 182.

<sup>278</sup> *Id.*

<sup>279</sup> 524 U.S. 417 (1998).

<sup>280</sup> *Id.* at 451-52 (Kennedy, J., concurring).

<sup>281</sup> Although the notion of “parliamentary sovereignty” is generally discussed in the context of legislative lawmaking, it is unclear why it would not apply to lawmaking by the other branches of government as well. We do not generally think that executive orders issued by one President bind his or her successors, and common law decisions of one court can generally be reversed by a later tribunal. Congress can, of course, bind future incarnations of the *other* branches, but those branches are similarly limited in their ability to bind future versions of themselves.

<sup>282</sup> 518 U.S. 839 (1996).

<sup>283</sup> *See id.* at 872 (plurality opinion) (quoting BLACKSTONE, *supra* note 90, at \*90 (“Acts of parliament derogatory from the power of subsequent parliaments bind not.... Because the legislature, being in truth the sovereign power, is always of equal, always of absolute authority: it acknowledges no superior upon earth, which the prior legislature must have been, if it's [sic] ordinances could bind the present parliament.”)).

<sup>284</sup> 10 U.S. (6 Cranch) 87 (1810).

<sup>285</sup> *Id.* at 135.

more than our time, and one Congress cannot yield up its own powers, much less those of other Congresses to follow.”<sup>286</sup>

Chief Justice Marshall’s discussion in *Fletcher* recognized that America’s commitment to notions of higher law unknown in England necessarily imposed two crucial limits on parliamentary sovereignty. A legislature might create vested rights which a subsequent legislature must honor, and a legislature’s sovereignty is also limited more broadly by the requirements of the federal Constitution.<sup>287</sup> One might thus argue that acquiescence is simply a tool for ascertaining the meaning of these constitutional limitations—not an attempt by current political actors to bind their successors outside the Constitution. But that argument only works if we treat governmental practices simply as potentially persuasive *evidence* of what the Constitution means, without conferring on those practices any independent power to fix or change that meaning. Acquiescence would thus merely add to the persuasiveness of a branch’s past interpretation of constitutional meaning, because an at-least-potentially rivalrous branch has concurred in that interpretation.<sup>288</sup>

My sense is that cases like *Zivotofsky* tend to give past acquiescence more weight than this, and to that extent they raise considerable theoretical and practical difficulties. To the extent that post-ratification practice influences a court to choose a less plausible interpretation of a provision’s original meaning, one might object that such reliance amounts to a constitutional amendment outside Article V. Any use of practice raises problems of indeterminacy, but entrenching that practice against ordinary legal change raises the stakes considerably. And much of the writing on acquiescence has documented the advantage it affords to the more active branch. It is easy for the President to take actions establishing a particular practice, but because Congress generally cannot act without passing a law, it is difficult for it to affirmatively oppose presidential actions asserting executive prerogatives.<sup>289</sup>

Conversely, political actors may be reluctant *not* to assert their prerogatives in particular instances for fear of establishing an adverse precedent. In 2002, for example, Vice President Richard Cheney invoked executive privilege and refused disclose details of

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<sup>286</sup> *Clinton v. City of New York*, 524 U.S. 417, 452 (1998) (Kennedy, J., concurring).

<sup>287</sup> *Fletcher*, 10 U.S. (6 Cranch) at 135-36; *see also Winstar*, 518 U.S. at 873-74 (discussing *Fletcher*). Since those constitutional requirements include the Supremacy Clause, a *state* legislature’s sovereignty is necessarily limited by the requirements of a broader set of federal laws.

<sup>288</sup> *Cf.* Fed. R. Evidence 804(b)(3) (exception to the general exclusion of hearsay for statements against interest).

<sup>289</sup> *See* Roisman, *supra* note 3, at 27-28; Bradley & Morrison, *supra* note 3, at 448-52.

meetings that he held with officials from the troubled Enron Corporation.<sup>290</sup> It is far from clear that anything scandalous transpired, but Cheney would have had significant incentives to invoke the privilege regardless, lest he set an adverse precedent that such meetings are not covered. These sorts of incentives exacerbate the difficulty of political compromise—a commodity that is already in short supply.

The federal courts cases suggest a different ground for reliance on past practice. For the most part, federal courts cases seem to rely on past practice simply because it is past. Federal courts doctrine incorporates the common law and equity practice because it has been around for a long time and is already integrated into innumerable aspects of our law. The canons of statutory construction persist because they themselves represent a longstanding part of the process of construction and, equally important, they integrate new law with old law. And, as I have already discussed, the most persuasive judicial precedents are those that have been repeatedly reaffirmed and applied over long periods of time.

Past practice thus enjoys prescriptive authority in this field.<sup>291</sup> One might argue for this authority on any number of grounds. Burke argued that repeated and longstanding practices embodied a higher form of rationality, based on the concurrence of many minds over generations rather than the limited reason of present-day lawmakers.<sup>292</sup> As David Strauss has written,

The central traditionalist idea is that one should be very careful about rejecting judgments made by people who were acting reflectively and in good faith, especially when those judgments have been reaffirmed or at least accepted over time. Judgments of this kind embody not just serious thought by one group of people, or even one generation, but the accumulated wisdom of many generations. They also reflect a kind of rough empiricism: they do not rest just on theoretical premises; rather, they have been tested over time, in a variety of circumstances, and have been found to be at least good enough.<sup>293</sup>

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<sup>290</sup> See Akhil Reed Amar, *Cheney, Enron, and the Constitution*, TIME, Feb. 2, 2002, available at <http://content.time.com/time/nation/article/0,8599,198829,00.html>.

<sup>291</sup> Even prescription incorporates some notion of acquiescence: a longstanding practice derives part of its authority from the fact that, despite its long duration, no one has supplanted it with a different norm. Common law principles that persist to this day, for example, derive special weight from the fact that the legislature has chosen not to alter them. But the principal significance of this potential for legislative alteration is as an outer bound to the authority of past practice—not as a *source* of that authority in the first place.

<sup>292</sup> See *supra* text accompanying notes 85-88; see also ROGER SCRUTON, *THE MEANING OF CONSERVATISM* 31 (rev. 3rd ed. 2002) (observing that “tradition really is . . . not a custom or a ritual but a form of social knowledge”); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 891 (1996) (“[T]he traditionalism that is central to common law constitutionalism is based on humility and, related, a distrust of the capacity of people to make abstract judgments not grounded in experience.”).

<sup>293</sup> *Id.* at 891-92.

Others stress the disruptive effect of uprooting longstanding practices on settled expectations, as well as the difficulties of foreseeing all the potential consequences of such changes.<sup>294</sup> Anthony Kronman has even argued that continuity with the social norms and projects of past generations is what distinguishes humans from animals.<sup>295</sup> And still others have emphasized the sheer difficulty of undertaking anything new if one must constantly reinvent the wheel by reevaluating established ways of doing things.<sup>296</sup>

I have little to add to these justifications here. My primary interest is in the frequent critiques of giving legal force to the past. I turn to those criticisms in the next section.

### C. Nonentrenchment and the Critique of Prescription

Reliance on historical practice in constitutional law has been criticized from a number of different perspectives. Frequent critiques include the notions that employing past usage in constitutional interpretation results in a form of “constitutional adverse possession,” that respect for settled authority represents too great a concession to the “dead hand of the past,” and that—somewhat inconsistently with the first two critiques—allowing judges to invoke non-constitutional practices licenses judicial activism by conferring too much flexibility on judges. These are all criticisms worth taking seriously, and any court relying on historical practice would do well to keep them firmly in mind. The critical point, however, is that each of these critiques applies most strongly when past practice is elevated to the status of a constitutionally entrenched norm.

Take the “adverse possession” critique first. In *Noel Canning*, for example, Justice Scalia’s concurrence objected to the majority’s reliance on past practice to expand the scope of the President’s power to make recess appointments. “The majority justifies those atextual results on an adverse-possession theory of executive authority,” he complained, because “Presidents have long claimed the powers in question, and the Senate has not disputed those claims with sufficient vigor.”<sup>297</sup> Rather than defend an adverse possession approach in principle, the majority unsurprisingly denied that this was what it was up to. And as my colleagues Curt Bradley and Neil Siegel have shown, there are important differences between the historical gloss approach approved in *Noel Canning* and the rule of adverse possession in property law.<sup>298</sup> Most important, “[r]elying on historical practice to help resolve uncertainties about such allocations [of constitutional power] is different from allowing it to alter a clearly established allocation.”<sup>299</sup> But it is not *that*

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<sup>294</sup> See, e.g., OAKESHOTT, *supra* note 95, at 411.

<sup>295</sup> See Kronman, *supra* note 91, at 1051-55.

<sup>296</sup> See, e.g., FRIED, *supra* note 94, at 7.

<sup>297</sup> *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2592 (2014) (Scalia, J., concurring in the judgment).

<sup>298</sup> See Bradley & Siegel, *supra* note 3, at 52-55.

<sup>299</sup> *Id.* at 53.

different. Just as canons of statutory construction play a significant role only when they cause a court to adopt a statutory reading contrary to what they would have adopted if they had applied only the other traditional sources of statutory meaning,<sup>300</sup> so too historical practice is most significant when it tips the balance in favor of one constitutional interpretation rather than another.<sup>301</sup> In such cases, practice changes constitutional meaning from what it would otherwise be—at least to some extent.

Ambiguities plague the constitutional text, and courts often have to resolve them somehow. Hence, the more appropriate question may not be whether it is legitimate for historical usage to shape constitutional meaning but rather how past practice compares to other sources of constitutional meaning. But even from this perspective, there is something unattractive about the incentives that relying on practice gives to the various institutions of government to aggressively stake out their positions and maximize their own prerogatives. It is rather like allowing the foxes to design the security system for the henhouse. In this sense—the incentives that it gives to bad behavior—reliance on practice *can* resemble adverse possession.

This objection is far more troubling, however, when the rights and prerogatives secured in this manner are perpetual—that is, when reliance on past practice entrenches that practice against alteration by ordinary legal means. Hence, it is important to Professor Bradley’s and Siegel’s qualified defense of practice in *Noel Canning* that it rarely confers rights of the President that Congress cannot regulate.<sup>302</sup> They note that “in foreign affairs setting such as war powers, executive agreements, the termination of treaties, and the like, substantial historical practice supports unilateral presidential authority, but little practice establishes that Congress is disabled from restricting or regulating that authority.”<sup>303</sup> The Court’s subsequent decision in *Zivotofsky*, of course, casts some doubt on this conclusion. But the federal courts doctrines I have surveyed here *do* have that character—that is, they employ past practice to supplement the constitutional text and set default rules, but they do not purport to elevate that practice to entrenched constitutional status. To my mind, this strikes the right balance between the need for some source of law to answer questions

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<sup>300</sup> See Young, *Constitutional Avoidance*, *supra* note 195, at 1576-78.

<sup>301</sup> Moreover, Professors Siegel and Bradley concede that sometimes courts give so much weight to practice that it *creates* ambiguity in the first place. See *id.* at 53. That is arguably what happened in *Bond v. United States*, 134 S. Ct. 2077 (2014), in which federal law’s traditional tendency to leave petty domestic crime to the States seems to have created an ambiguity in the otherwise clear text of the Chemical Weapons Convention Implementation Act.

<sup>302</sup> See Bradley & Siegel, *supra* note 3, at 54-55. As they acknowledge, however, *Noel Canning* left Congress with only indirect means to regulate recess appointments. See *id.* at 55. Presumably Congress cannot override the Court’s determination of the Recess Appointments Clause’s meaning.

<sup>303</sup> *Id.* at 55.

unresolved in the constitutional text and the imperative to prevent (or at least mitigate) institutional self-aggrandizement.

A second objection to prescription is—not surprisingly—that it is too conservative. One need not be a Jeffersonian intent on holding a revolution every generation to be troubled by the prospect of locking in past practice.<sup>304</sup> For example, Justice Scalia suggested in *Burnham v. Superior Court*<sup>305</sup> that procedural practices, such as “tag” jurisdiction, that have endured throughout our history are *always* consistent with “due process.” “The short of the matter,” Scalia said, “is that jurisdiction based on physical presence alone constitutes due process because it is one of the continuing traditions of our legal system that define the due process standard of ‘traditional notions of fair play and substantial justice.’”<sup>306</sup> This drew a strong academic dissent from David Strauss, who argued that traditionalism “is not remotely an acceptable approach” because it would lock us in to any number of deplorable practices.<sup>307</sup>

I have assessed general arguments against traditionalism elsewhere;<sup>308</sup> for present purposes, two points are critical. First, as with “adverse possession,” concerns about the dead hand of past practice stifling innovation and change become radically less compelling when past practice is not constitutionally entrenched. The primary role of historical practice in federal courts law is to fill gaps—to supply procedures, remedies, or defenses that are necessary to constitute a functioning judicial system but unspecified in the constitutional text or the various judiciary acts. Far from embodying a “dead hand,” this sort of supplementation enables the legal system to live and function effectively.<sup>309</sup> And with only rare exceptions—e.g., state sovereign immunity—these gap-fillers are not themselves entrenched against change through ordinary legislation. Moreover, the courts themselves have modified past practices in light of contemporary necessities.<sup>310</sup>

Second, the past practices upon which federal courts doctrine relies are frequently themselves highly dynamic bodies of law. As Justice Scalia has noted, “[t]here is nothing

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<sup>304</sup> See, e.g., *Hart v. Massanari*, 266 F.3d 1155, 1163 (9th Cir. 2001) (Kozinski, J.) (“One danger of giving constitutional status to practices that existed at common law, but have changed over time, is that it tends to freeze certain aspects of the law into place, even as other aspects change significantly.”).

<sup>305</sup> 495 U.S. 604 (1990) (plurality opinion).

<sup>306</sup> *Id.* at 619 (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).

<sup>307</sup> Strauss, *Tradition*, *supra* note 24, at 1708, 1711-15.

<sup>308</sup> See Young, *Rediscovering Conservatism*, *supra* note 40, at 697-712.

<sup>309</sup> See, e.g., *D’Oench, Duhme & Co. v. Federal Deposit Ins. Corp.*, 315 U.S. 447, 470 (1942) (Jackson, J., concurring) (observing that, “[w]ere we bereft of the common law, our federal system would be impotent. This follows from the recognized futility of attempting all-complete statutory codes”).

<sup>310</sup> See, e.g., *Anderson v. Creighton*, 483 U.S. 635, 644-45 (1987) (rejecting argument that official immunity, though derived from the common law, is strictly limited by English common law rules).

new or surprising in the proposition that our unchanging Constitution refers to other bodies of law that might themselves change.”<sup>311</sup> Incorporating the common law or equity practice into various aspects of federal courts law not only facilitates the ability of that law to fulfill its (frequently progressive) purposes,<sup>312</sup> but also incorporates a tradition of judicial innovation in response to changing institutional needs. Even if, for example, the canons of construction may blunt some of the impact of reformist legislation, the imperative to integrate reform with existing legal structures and norms may ultimately make reform more palatable by reducing its associated risk of disruption. And the common law vision of constitutional law defined primarily by judicial precedent has frequently helped constitutional law address changing social practices and conditions.<sup>313</sup>

Five years after slamming Justice Scalia’s traditionalism as “just not an acceptable creed,”<sup>314</sup> Professor Strauss wrote an important article advocating “Common Law Constitutional Interpretation.”<sup>315</sup> That article rejected claims that the common law is too conservative, noting that “at various periods in its history the common law has shown a great capacity for innovation.”<sup>316</sup> My point is not to accuse one of our most thoughtful legal scholars of inconsistency; rather, he was—in a sense—right both times.<sup>317</sup> Both the conservatism that Strauss criticized and the organic reformism that he praised are essential elements of Burke’s theory of prescription. If reliance on past practice rests on norms of prescription, then that may encourage courts to implement that reliance in the organic, incremental, and disciplined fashion that prescription celebrates.

These observations, alas, play right into the third and final criticism of reliance on past practice—that far from being too conservative, it facilitates judicial activism by loosening the constraints on judicial reasoning.<sup>318</sup> Certainly, the strong role for practice described here empowers judges by proliferating the sources to which they may turn in construing the constitutional text, and by condoning the use of practice to supplement that canonical text in unprovided-for areas. In this sense, reliance on practice risks replicating

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<sup>311</sup> *Georgia v. Randolph*, 547 U.S. 103, 144 (2006) (Scalia, J., dissenting).

<sup>312</sup> *See, e.g., Ex parte Young*, 209 U.S. 123 (1908) (relying on equity to permit suits to enjoin state officers from violating federal rights); *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) (drawing an analogy to equity to support damages suits against federal officers for violating constitutional rights).

<sup>313</sup> *See Young, Rediscovering Conservatism, supra* note 40, at 688-97, 715-24.

<sup>314</sup> Strauss, *Tradition, supra* note 24, at 1711.

<sup>315</sup> Strauss, *Common Law, supra* note 292.

<sup>316</sup> *Id.* at 888.

<sup>317</sup> For reasons discussed in more depth elsewhere, *see Young, Rediscovering Conservatism, supra* note 40, at 701-06, I find the conservative aspect of traditionalism considerably more congenial than Professor Strauss does.

<sup>318</sup> *See, e.g., Fallon, History, supra* note 28, at 1815 (addressing this concern as an “obvious risk”).

the stock criticism of legislative history, which is that it is like “looking over a crowd and picking out your friends.”<sup>319</sup> Hence, Judge Kozinski has argued that constitutionalizing past practices “will allow judges to pick and choose those ancient practices they find salutary as a matter of policy, and give them constitutional status.”<sup>320</sup> On the other hand, the authority of established norms and practices is likely to rule out certain forms of activism, such as a reading of the Vesting Clause of Article I that invalidates the administrative state or a reading of the Fourteenth Amendment that enforces Rawlsian egalitarianism.

Reliance on practice is like any other modality of constitutional interpretation, in that it can get out of hand if not disciplined by the conventions of legal argument and the norms of the judicial craft.<sup>321</sup> It is unclear that any theory of the *sources* of constitutional interpretation can truly constrain courts.<sup>322</sup> What we *can* do is insist that most instances of judicial creativity remain subject to democratic checks. It is worth noting that Burke’s notion of prescription comes from a legal system built on a baseline of parliamentary sovereignty. Both the authority of tradition and the common law’s potential for organic growth and judicial creativity are tempered, in British law, by the democratic authority of Parliament to overrule traditions that are no longer useful or innovations that press too far. This comparative law point simply underscores the argument with which I began this Part—that is, that in most cases, historical practices should not be constitutionally entrenched unless they stem clearly and directly from the text of the Constitution. As long as that is true, excesses of both conservatism and activism will be subject to correction by later legislatures and courts.

## Conclusion

Burkean invocations of prescription have always rung a bit strange in America.<sup>323</sup> Our Constitution is not, like Burke’s, “a prescriptive constitution . . . whose sole authority is that it has existed time out of mind.”<sup>324</sup> Americans have, rather, a constitutive document

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<sup>319</sup> See William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 648 (1990) (quoting Judge Harold Leventhal).

<sup>320</sup> *Hart v. Massanari*, 266 F.3d 1155, 1163 (9th Cir. 2001) (criticizing the argument that Article III incorporates the practice of publishing opinions and giving them *stare decisis* effect).

<sup>321</sup> See Young, *Rediscovering Conservatism*, *supra* note 40, at 692-94; see also HARRY H. WELLINGTON, *INTERPRETING THE CONSTITUTION: THE SUPREME COURT AND THE PROCESS OF ADJUDICATION* 14 (1990); Charles Fried, *The Conservatism of Justice Harlan*, 36 N.Y.L. SCH. L. REV. 33, 44 (1991) (stressing craft norms).

<sup>322</sup> See Fallon, *History*, *supra* note 28, at 1813 (“It is difficult if not impossible to imagine a legal theory in which good judging did not require good judgment.”).

<sup>323</sup> See generally Young, *Rediscovering Conservatism*, *supra* note 40, at 660-64 (discussing difficulties in translating Burke to America).

<sup>324</sup> Burke, *Representation*, *supra* note 21, at 487.

whose authority can be grounded in specific democratic exertions, with a canonical text that can be parsed and debated, and identifiable Framers whose intents and understandings can be plumbed. We have this arrangement, moreover, as the result of a revolution that was, at least in part, a rather emphatic rejection of the prescriptive force of longstanding British institutions.<sup>325</sup>

Nonetheless, just as the new American nation adopted the English common law as a familiar, off-the-shelf set of default principles for the resolution of disputes after the Revolution, we have also adopted a broad tendency to rely on past practices to resolve present legal quandaries. This tendency is nowhere more evident than in the law of federal courts, which at every turn relies on extensive bodies of doctrinal precedents, incorporates preexisting bodies of law, and employs canons of statutory construction to harmonize new enactments with past practice. Although constitutional theory is beginning to wake up to the significance of historical practice as a distinctive modality of constitutional interpretation, theorists will do well not to overlook this body of law in favor of more high-profile inter-branch disputes over the separation of powers. Because federal courts law grounds its reliance on past usage in prescriptive authority and generally does not entrench practice against change through ordinary legislation, it provides a healthier model for how practice should figure across the board.

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<sup>325</sup> See, e.g., Schoolhouse Rock, *No More Kings*, available at <https://www.youtube.com/watch?v=cAZ8QJgFH0g> (visited Sept. 24, 2015).