

Practice and Precedent in Historical Gloss Games

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Historical practices can help define the separation of powers. One branch’s claim of authority and another branch’s acquiescence can put a “gloss” on the sparse text of Articles I–III, especially when repeated over time. For example, Justice Frankfurter’s opinion in *Youngstown Sheet & Tube Co. v. Sawyer*—the opinion that coined the term “gloss”—turned on whether Congress had acquiesced in the President’s asserted practice of seizing private property during the course of armed conflict.¹

In these “gloss games” there are always at least two players: the branch that is claiming authority and the branch that is ceding it. Most prior scholarship in this area focuses on contests between the legislative and executive branches.² Officials in these branches can assert authority in various ways and when the same actions are repeated over time, they may coalesce into a form of historical practice. Members of Congress can issue statements, propose new laws, create and structure agencies, confirm nominees for federal office, vote for or against legislation, and so on. The President can make appointments, issue executive orders, veto legislation, direct troops, and the like. These actions are not compelled by other sources of law and may vary significantly from one actor (or set of actors) to the next. The potential for variation is what gives weight to practices that are “systematic, unbroken,” and unchallenged by the competing branch.³

In *Historical Gloss, Constitutional Conventions, and the Judicial Separation of Powers*, Professors Curtis Bradley and Neil Siegel challenge scholars to consider how historical practice might illuminate a different set

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

2. *See, e.g.*, 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).

3. *Youngstown*, 343 U.S. at 610 (Frankfurter, J., concurring).

of constitutional questions: those concerning Article III.⁴ Their principal goal is to unveil a set of argumentative methodologies based in historical practice;⁵ they do so by revisiting and recasting historical episodes involving “Court-packing” and “Court-stripping” (that is, restricting the appellate jurisdiction of the Supreme Court based on substantive disagreement on matters of law).⁶ Bradley and Siegel’s article suggests a new avenue of inquiry for federal courts scholarship, and they demonstrate convincingly that gloss and convention-based arguments—typically deployed in disputes about the boundaries between Articles I and II—can also shed light on questions about Article III.⁷

There is something striking about Bradley and Siegel’s historical examples, however: they feature two-branch games over what are arguably three-branch questions of authority. Although courts were the central subjects of the disputes over Court-packing and Court-stripping, courts were not really engaged in those disputes—at least not in ways that involved the kinds of “practices” that animate conventional gloss-based analysis. Participants in the debates made claims based on historical practice, to be sure, but they were not talking about the conduct of courts or judges. Instead, they were referring to legislative or executive practices.

In this response, we try to explain why courts were on the sidelines of these gloss games and why other disputes over Article III are likely to reflect a similar structure. The key, we think, lies in a distinctive feature of judicial decision making: the doctrine of *stare decisis*. Although judicial conduct may take various forms, the heart of the judicial function is deciding cases. Those decisions are subject to a system of precedent that gives them binding force and commands obedience by other judges. And adherence to precedent is importantly distinct from the types of legislative or executive practices that courts and commentators have treated as constitutionally salient. The point of *stare decisis* is to ensure that decisions in Case 2 and beyond are consistent with the decision in Case 1. Precedent therefore limits the potential for variance in judicial practice

4. Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Constitutional Conventions, and the Judicial Separation of Powers*, 105 GEO. L.J. 255 (2016).

5. *Id.* at 260.

6. *See id.* at 269, 287.

7. Bradley and Siegel distinguish between gloss and conventions, both of which may rest on historical practice. We focus here on gloss, though much of what we have to say would apply as well to arguments based on conventions—at least to the extent that such arguments turn on a pattern of power grabs and acquiescence repeated over time. For more on conventions, see Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1181–94 (2013).

and, in so doing, limits the reach of a practice-based approach to judicial separation-of-powers disputes.⁸

I. THREE KINDS OF GLOSS GAMES INVOLVING THE COURTS

The threshold challenge in thinking about historical practices and the courts is to identify the various roles courts might play in gloss games. At least three different roles seem possible. First, courts might act as *referees* in gloss games between the political branches. Second, courts might be the *subjects* of disputes between Congress and the President concerning the judiciary. Finally—and most importantly for our purposes—courts might be *players* in gloss games with another branch (or branches) regarding the judicial power.

A. COURTS AS REFEREES

Many disputes between Congress and the President never reach the courts. Sometimes, however, courts act as referees between the political branches. In such cases, courts might use the historical practices of the political branches to illuminate the boundaries between Articles I and II. Justice Frankfurter's opinion in *Youngstown* is an example,⁹ as is the Court's more recent decision in *NLRB v. Noel Canning*.¹⁰

These cases represent the standard story of a gloss game. In these instances, the legislative and executive branches create the relevant gloss in their interactions with one another, and the courts—if and when presented with a case—rely on those interactions in resolving it. Although courts assume a role in such disputes, they are not players in the relevant gloss game.

8. Following Bradley and Siegel, we focus on a particular theory about why practice matters. As noted in the text above, the theory of “historical gloss” credits practice because it tells us something about how actors in different branches conceive of their power and how they have resolved border disputes over the years. On that view, practices that are repeated over time have special force because they represent the accumulated judgment of a series of independent decision makers. See Bradley & Siegel, *supra* note 4, at 261–65. It is of course possible to imagine different reasons why longstanding practice might matter. See, e.g., Ernest A. Young, *Our Prescriptive Judicial Power: Constitutive and Entrenchment Effects of Historical Practice in Federal Courts Law*, 58 WM. & MARY L. REV. 535, 536 (2016) (offering a Burkean approach to historical practice under which “past practice derives authority from its sheer pastness”). The features that distinguish adherence to precedent from gloss-style “practice” may have less significance for theories that do not turn on repetition and acquiescence.

9. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring).

10. *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2559 (2014) (acknowledging the weight of prior practice); see also Bradley & Siegel, *supra* note 2 (describing the *Noel Canning* Court's invocation of historical practice to uphold the President's power to make recess appointments).

B. COURTS AS SUBJECTS

In a second set of cases, the political branches are involved in a dispute *about* the courts. Debates over Court-packing exemplify this kind of dispute. When the political branches fight over the courts, the practices of those branches might be relevant in resolving disputes between them. For example, Congress might attempt to hold a current President to his predecessor's practice of not attempting to pack the Supreme Court. Or, conversely, the President might argue that Congress has acquiesced repeatedly to changes to the Court's composition. In either direction, the argument is that one branch has validly ceded territory to the other.

As Bradley and Siegel show, this is precisely what happened when FDR proposed to pack the Court in 1937. Historical practices were regularly invoked throughout the debates over FDR's plan and were treated by many as having something like constitutional status.¹¹ The results of the game had important consequences for the courts,¹² but the practices in question were generally those of the political branches—not the courts themselves.

C. COURTS AS PLAYERS

There is a third category of gloss game involving the federal judicial power—one in which the courts are active players. Here, the courts are directly involved in a conflict with another branch over the scope of the federal judicial power. These cases differ from the first two categories precisely because they involve the courts as participants in the gloss game. In this category, courts' own practices become part of the gloss-based analysis, supplying evidence that courts have consistently asserted (or assumed) a certain power or that they have consistently acquiesced in power grabs by the other branches.

Disputes about the scope of judicial review or Court-stripping would seem to be natural candidates for this category because they might pit the judiciary against the political branches. Indeed, Bradley and Siegel's second major historical example involves various debates about the scope of Congress's authority to engage in Court-stripping. These debates are illuminating in their own right, and Bradley and Siegel have further enriched them by uncovering and describing a 1980s debate between John Roberts, then a Justice Department lawyer, and Theodore Olson, then head of the Office of Legal Counsel, regarding congressional authority to strip

11. Bradley & Siegel, *supra* note 4, at 274–75.

12. See Charles G. Geyh, *Judicial Independence, Judicial Accountability, and the Role of Constitutional Norms in Congressional Regulation of the Courts*, 78 IND. L.J. 153, 157 (2003) (“To understand judicial independence and its limits, then, we must look beyond ‘doctrinal’ independence as divined by courts, and examine the historical development of ‘customary’ independence as it has emerged in Congress.”).

Supreme Court jurisdiction.¹³ Roberts, Olson, and others sought to buttress their arguments with claims based on historical practice. But, again, the practices they invoked were not those of the courts. When Roberts argued in favor of the constitutionality of Court-stripping, the limited weight he gave to historical practice focused on the actions of Congress.¹⁴ In response, Olson sought to downplay the fact that the first Judiciary Act did not authorize the Court to exercise all of the appellate jurisdiction established by Article III. He emphasized that Congress later created a statutory regime under which the Court has broad appellate jurisdiction and noted that “throughout our history there have been movements to curb the Court’s jurisdiction which have never succeeded.”¹⁵

This is not to say that the Court had no influence on the debates; the participants regularly invoked its actions. But in doing so, they focused (properly, we think) on the Court’s core activity—deciding cases—and the results of that activity—precedent. In particular, political actors on both sides of the debates tried to make sense of the Court’s decision in *Ex parte McCordle*,¹⁶ which provided ambiguous authority for jurisdiction-stripping.¹⁷ But the debaters did not treat *McCordle*, or any other judicial decision, as a form of historical judicial practice. Instead, (and again, properly) they treated precedent as a conceptually distinct source of authority.

II. HOW COURTS CREATE GLOSS: PRACTICE AND PRECEDENT

Why do we not see courts playing a more active role in gloss games about the judicial separation of powers? We think the answer has to do with *stare decisis*—a doctrine unique to the courts. Actions by members of the legislative and executive branches do not trigger formal rules of precedent. Tomorrow’s President is not bound (at least not as tightly as a judge) to interpret Article II in the same way as today’s. That decisional freedom is critical to the theory of historical gloss: The potential for variation is what makes it meaningful when different political actors coalesce around a shared vision of their constitutional authority. But actions by courts often *are* binding, and the consequence is to leave less room for the accumulation of historical practice.

13. See Bradley & Siegel, *supra* note 4, at 302–311.

14. *Id.* at 305–06.

15. *Id.* at 309 (internal quotation marks omitted).

16. *Ex parte McCordle*, 74 U.S. (7 Wall.) 506 (1868).

17. See, e.g., Bradley & Siegel, *supra* note 4, at 305 (recounting Olson’s argument that *McCordle* “is simply the most prominent in a long and consistent line of judicial opinions reading the exceptions clause as meaning exactly what it says.”).

A. OBEDIENCE VS. AGREEMENT

Gloss-based reasoning relies on a particular form of government action. The relevant actions tend to be those followed continuously over time not because of a strong sense of legal obligation (at least not initially), but because successive decision makers either agree with, or defer to, the decisions of their predecessors. Such practices become constitutionally salient in large part *because* they are not obligatory at any given moment, but rather reflect a consistent series of choices—ideally independent of factors like party identity¹⁸—made by actors within a branch.

Some actions by members of the judicial branch seem to fit this mold. Judges can give speeches, testify before Congress, or adopt rules to govern the procedures of their courts. They can also follow certain conventions in the course of deciding cases: they can sit en banc or in panels, issue concurring or dissenting opinions, write dicta, follow majority rule in the resolution of cases, adhere to the “rule of four” in granting writs of certiorari, and so on. Such actions might vary over time and between actors, and we might assess them in much the same way as we assess “practice” by legislative or executive actors.

These exercises of soft power can be quite important, especially within the domain of internal judicial administration. And although they seem unlikely to have the kind of *constitutional* weight in interbranch disputes that would bring them within the framework Bradley and Siegel describe, it is not out of the question that past judicial practices could be persuasively deployed in a dispute between the judiciary and the political branches over funding, staffing, facilities, confirmations, or perhaps even jurisdiction. Bradley and Siegel note, for example, that “[r]esponding to concerns expressed by the Court that it was overburdened with mandatory appeals,” Congress repeatedly “made ‘exceptions’ to the Court’s mandatory appellate jurisdiction” and gave it more control over its docket.¹⁹

But the picture changes when we consider the conduct at the very core of the judicial power—the actual *decisions* in cases and controversies.²⁰

18. See Bradley & Morrison, *supra* note 2, at 460 (arguing that it matters that both Democratic and Republican administrations have claimed the power to conduct certain military operations without congressional authority).

19. Bradley & Siegel, *supra* note 4, at 294 (internal quotation marks omitted) (quoting Tara Leigh Grove, *Article III in the Political Branches*, 90 NOTRE DAME L. REV. 1835, 1846 (2015)).

20. Cf. David E. Pozen, *Self-Help and the Separation of Powers*, 124 YALE L.J. 2, 22 (2014) (“[W]hile there may be an intriguing debate to be had about the contours of judicial self-help, it is likely to remain a rarefied debate so long as we limit ourselves to irregular or judge-initiated practices and exclude the bulk of judicial review.”).

When judges decide cases, they create precedent. And precedent is distinct from the kinds of practices that animate gloss-based reasoning.²¹ *Stare decisis* gives presumptive, binding power to earlier decisions based not on the accumulation of agreement but on the authority of the decision maker.²² That authority does not depend on whether the decision in question is part of a “systematic [and] unbroken” practice pursued over time;²³ a single case on a matter of first impression can establish precedent. Lower courts are bound to follow the decisions of higher courts, regardless of any prior practice or what they might think about the wisdom of those decisions.

Precisely because (and to the degree that) precedent has binding force, the inferences that we can draw from consistent judicial action over time are weaker than in the traditional gloss context. The executive and legislature may see a strategic advantage in following the practices of their forbears and perhaps some obligation to defer to them in the absence of strong disagreement. But the notion of precedent means that courts are bound more strongly to their own past actions. As a result, their consistency is overdetermined: It may simply be a function of obedience, not of agreement or endorsement. And to the extent that it is the former, it is not the kind of considered historical practice that matters in a gloss game.

As an example, consider the converse of jurisdiction-stripping: the question of jurisdiction-declining, which presents the same kind of interbranch dispute that typically gives rise to invocations of gloss. Can a federal court decline to exercise jurisdiction that has been vested in it by

21. *But cf.* Young, *supra* note 8, at 563 (noting that “[w]e 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,” but arguing that “[t]he influence that past decisions have in resolving present controversies” is itself an “example of judicial reliance on past practice”). Professor Young takes pains to distinguish the theory of historical practice that he advances from the more familiar gloss analysis that Bradley and Siegel employ, and that is the focus here. *See id.* at 557 (“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.”).

22. Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1, 59 (1989) (“[I]f incorrectness were a sufficient condition for overruling, there would be no precedential constraint in statutory and constitutional cases.”); Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 GEO. WASH. L. REV. 68, 73 (1991) (supporting the “traditional view that precedents should be overruled only when the prior decision was wrongly decided *and* there is some other important disadvantage in respecting that precedent”).

23. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring).

Article III and by statute? When faced with a tedious or difficult diversity case, for instance, can the court simply demur?

The answer is, “it depends.” The Court has held repeatedly that federal courts have the “duty . . . to decide questions of state law whenever necessary to the rendition of a judgment.”²⁴ But there are exceptions to that rule—exceptions that form the complicated doctrines of abstention that federal courts scholars know and love. For our purposes, the details of those doctrines are not important. What matters is that they are *doctrines*. When a court today is confronted with the choice between deciding a case within its jurisdiction or abstaining, it has a long line of cases to guide it. And those cases are not just useful; they are authoritative.

Suppose, then, that our hypothetical court decides to exercise jurisdiction over the case. Is that decision further evidence in favor of the view “that federal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress”?²⁵ Is it, in other words, an act of acquiescence—a relevant practice for gloss analysis? Not really. It is an act of obedience—not to Congress, but to precedent.

We do not mean to overstate the binding nature of precedent nor to minimize its malleability. There are many ways for courts to evade, narrow, distinguish, and sometimes even overrule precedent. But even a strongly skeptical view of precedent must concede that courts are more tightly bound to their predecessors than presidents or legislators are to theirs. At the very least, the doctrine of stare decisis changes the conversation from one about historical practice and acquiescence to one about the rule of law and fidelity to precedent.

B. STARE DECISIS: PRACTICE IN THE SHADOW OF PRECEDENT

After precedent has been established, practices of various kinds may still be relevant going forward. Judges can continue to give speeches, write books, or testify before Congress on matters of interest, including matters that are governed by precedent. And although judges are obligated to follow precedent, they are free to criticize it, either in dissent or as they grudgingly go along. Thus, decisions in the wake of precedent may not reflect obedience *and nothing else*—there is often room left for independent decision making. If these actions are sufficiently widespread and continuous, they could constitute a species of historical judicial practice.

In what way might such post-precedent practices matter? First, they might affect the future vitality of some precedent. The distinction between matters that are governed by precedent and those that are not will not

24. *Meredith v. City of Winter Haven*, 320 U.S. 228, 234 (1943).

25. *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996).

always be clear, and judges have substantial discretion to interpret precedent narrowly or expansively. Judicial practices—public criticism, grumbling dicta, congressional testimony, and the like—may influence those decisions as to scope. For example, an oft-criticized precedent might be interpreted narrowly, thus leaving a wider range for cases of first impression (which might, in turn, incorporate practices).

Even where precedent is plainly on point, judicial practice might matter within the traditional *stare decisis* inquiry. Imagine that the Supreme Court is reconsidering the constitutionality of judicial review—perhaps the paradigmatic legal issue pitting courts against the political branches where constitutional text is unclear—214 years after deciding *Marbury v. Madison*.²⁶ We know from courts' consistent decisions over many, many years that they think they can invalidate legislative and executive actions as unconstitutional. But we also know that from reading *Marbury* itself.

If today's Supreme Court took up the question whether to overrule *Marbury*, the long line of cases exercising judicial review since *Marbury* would be considered through the lens of *stare decisis*. Certainly, the judiciary's treatment of *Marbury* in the intervening years would be relevant to that analysis. When courts determine whether to reconsider an established precedent, they consider a list of factors, including

whether the rule has proven to be intolerable simply in defying practical workability[,] whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation[,] whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine[,] or whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.²⁷

Post-precedent judicial practice—even in the form of public criticism or endorsement—might be relevant to at least the first, third, and fourth of these factors.

It should come as no surprise that judicial practices might inform courts' application of *stare decisis*; the reasons for adherence to precedent are similar—in some respects, at least—to the reasons for reliance on historical practice. For example, both approaches respect the accumulated

26. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

27. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 854–55 (1992) (citations omitted).

wisdom of prior practice²⁸ but permit change in response to “real world” necessities.²⁹ Given these similarities, one might conclude that the doctrine of stare decisis absorbs and translates the sort of historical gloss analysis courts employ in the absence of precedent. On that view, courts are asking a similar question in both contexts but using different language to describe their inquiry.

Though we think the overlap is worthy of attention, it is also important to attend to the differences between the analysis demanded by the doctrine of stare decisis and the analysis we see in cases like *Youngstown* or, more recently, *Noel Canning*. To return to our *Marbury* example, even if *Marbury* had been criticized—in other words, even if the courts’ practice had been far from uniform—stare decisis would still place a heavy thumb on the scale in favor of precedent. Stare decisis is all about settlement for the sake of settlement; it only takes one case to lock in a resolution.³⁰ On a gloss analysis, by contrast, courts (and other observers) look for evidence of interbranch agreement that emerges over time. A decision by one branch might be a move, but it is not the whole game. If an issue is eventually settled politically, then good reasons kick in for other actors to respect that settlement—and, as we’ve seen, those reasons tend to dovetail with the reasons for adherence to precedent. But stare decisis flips the burden of persuasion: Once the Supreme Court acts, its move is final unless a persuasive case can be made for change.

C. MORE PRECEDENT, LESS PRACTICE

When precedent clearly speaks to an issue, it (like other sources of binding law) tends to crowd out practice. Precedent takes away the discretion—the potential for variation—that otherwise makes consistent practice constitutionally meaningful. This point is not limited to the Article III context, but applies to gloss-based analysis more generally. When the Supreme Court weighs in on a question, the political branches have to listen, too, regardless of their prior practices.³¹ Thus, as other work

28. See Bradley & Morrison, *supra* note 2, at 414 (“[A]cquiesced-in government practices are sometimes privileged on the theory that they embody wisdom accumulated over time and are unlikely to threaten the basic balance of power between Congress and the Executive.”).

29. See *Casey*, 505 U.S. at 854 (noting the relevance of changing law and fact).

30. *Cf. Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring) (“We are not final because we are infallible, but we are infallible only because we are final.”).

31. See William Baude, *The Judgment Power*, 96 GEO. L.J. 1807 (2008) (arguing that the President must enforce a judgment regardless of agreement but may ignore a judgment if the issuing court lacked jurisdiction); *cf. Bradley & Siegel, supra* note 2, at 63 (noting the “inherent tension between the benefits of customary evolution and centralized judicial review. Given the authority that federal courts possess in our constitutional system today, practice is likely to coordinate around judicial decisions. As a result, a judicial decision crediting practice has the potential to freeze the practice in

on historical gloss makes clear, historical practices are most significant in separation of powers disputes where judicial review is most limited.³²

This helps to explain why gloss-based arguments have been deployed most frequently in disputes between the political branches: Such disputes are often nonjusticiable. The same will be true of many questions concerning the boundaries of the judicial power.³³ If, for example, Congress were to pass a law requiring publication of certiorari votes, in contravention of longstanding judicial practice,³⁴ it is not immediately clear whether anyone would have standing to challenge it.

Nevertheless, *as a relative matter*, disputes about the courts' own powers seem more likely to present justiciable controversies than disputes about the distribution of authority between the political branches. Compared to contests over Articles I and II, controversies about Article III appear to be poor candidates for the political question doctrine—at least to the extent that application of the doctrine turns on “a textually demonstrable constitutional commitment of the issue to a coordinate political department.”³⁵ And, given that the federal judicial power extends only to cases or controversies—disputes that, by definition, already have parties—standing is unlikely to pose an obstacle to the adjudication of many questions about the specifics of that power. If Congress tried to legislate on any of the procedural practices noted above (the size of judicial panels, the form of judicial opinions, the tradition of majority vote, etc.), the statute could immediately be challenged by parties involved in the affected cases. Jurisdiction-stripping statutes would seem to pose a serious challenge for judicial review because they take away courts' power to adjudicate certain disputes. Yet, even when they have conceded the loss of jurisdiction, courts generally have found ways to weigh in on the constitutional questions.³⁶

To be sure, a precedent-*setting* decision might well be informed by historical practice. With regard to matters of first impression, judges could

place.”). We bracket here debates about departmentalism. *See generally* Baude, *supra* note 31, at 1815–16 (explaining departmentalism).

32. *See* Bradley & Morrison, *supra* note 2, at 415.

33. *See* Grove, *supra* note 19, at 1836 (“As in other separation of powers arenas, many important questions arising under Article III have rarely, if ever, reached the judiciary and have instead been addressed by the political branches.”).

34. *Cf.* Jeffrey L. Fisher, Opinion, *The Supreme Court's Secret Power*, N.Y. TIMES (Sept. 24, 2015), http://www.nytimes.com/2015/09/25/opinion/the-supreme-courts-secret-power.html?_r=0 [https://perma.cc/Z3CD-NUGK] (arguing that the Court itself should do away with the practice).

35. Baker v. Carr, 369 U.S. 186, 217 (1962). *But cf.* Nixon v. United States, 506 U.S. 224 (1993) (using the political question doctrine to rebuff a challenge to the procedures used by the Senate to “try” a judicial impeachment).

36. *See, e.g.*, Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

consider the kinds of practices described above.³⁷ Suppose, for example, that Congress passes a law forbidding the publication of dissenting opinions by the Supreme Court and the Courts of Appeals. A court considering a challenge to this novel law might purport to do so on the basis of constitutional principles regarding judicial independence and decisional authority. But it might also invoke longstanding but nonprecedential judicial practices with respect to the publication of opinions. From that point forward, however, the precedent is what governs—the practices no longer have the same independent significance.

III. IMPLICATIONS FOR ARTICLE III GLOSS GAMES

We've argued that courts are likely to weigh in on questions concerning the judicial separation of powers via precedent rather than by engaging in the sorts of practices that typically inform arguments about historical gloss. What are the implications for gloss analysis in the Article III context—in the areas that Bradley and Siegel explore, and others like them?

One takeaway is that, as we expand the frame for gloss analysis to include Article III questions, it becomes particularly important to identify the relevant players. In Justice Frankfurter's original formulation, the question in *Youngstown* was whether one political branch had acquiesced in a longstanding assertion of authority by the other.³⁸ But acquiescence is only meaningful if the proper party is acquiescing. To take an extreme example, it would make no sense to say that the courts had "acquiesced" in a President's claim of unilateral authority to make war without congressional authorization: The relevant power is not theirs to waive.

Likewise, to the extent that courts have a legitimate role to play in defining the scope of the federal judicial power—a matter on which we express no opinion—any "acquiescence" by a political branch should be

37. See, e.g., *Mistretta v. United States*, 488 U.S. 361, 401 (1989) ("[T]raditional ways of conducting government . . . give meaning' to the Constitution. Our 200-year tradition of extrajudicial service is additional evidence that the doctrine of separated powers does not prohibit judicial participation in certain extrajudicial activity.") (omission in original) (citation omitted) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring)); *Stuart v. Laird*, 5 U.S. (1 Cranch) 299, 309 (1803) (rejecting the argument that "judges of the supreme court have no right to sit as circuit judges" on the ground that "practice and acquiescence under it for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction").

38. *Youngstown*, 343 U.S. at 610–11 (Frankfurter, J., concurring) ("[A] systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on 'executive Power' vested in the President by § 1 of Art. II.").

largely irrelevant, or at least not dispositive. The political branches might rely on their own historical practices to resolve disputes as between themselves, and in that sense they might be involved in a two-branch gloss game. But whatever settlement Congress and the President reach cannot fully resolve the underlying question if the relevant powers are not theirs to waive.

Thus, while gloss analysis can help solve constitutional puzzles, it also creates new puzzles of its own. Identifying the proper parties in gloss games will often turn on difficult questions about the Constitution's allocation of authority among the branches. For example, suppose the text of the Constitution is unclear as to whether the President or Congress gets to control the size of the Court, but that the text *is* clear that the Court itself has no say in the matter. Through that lens, the relevant gloss game is the one played between the political branches—power over the Court is just the spoils of the war. But if one believes that the Constitution is *not* clear on the matter (or even that past practice *makes* it unclear),³⁹ then the courts themselves might also have a valid role to play in the gloss game.

A second set of takeaways concerns the possible advantages that stare decisis might bestow on courts. Previous scholarship has noted that the President has a leg up in gloss games against Congress, given the executive branch's more unitary structure and institutional memory (including OLC's own commitment to internal precedent).⁴⁰ So too, perhaps, with courts. The judiciary's hierarchical structure and commitment to stare decisis allow it to avoid many of the collective action problems that plague multimember institutions and to commit to a common course of conduct, even in the face of disagreement and dissent. Granted, if the first decision establishing the precedent is power-denying rather than power-grabbing, obedience to precedent will work against the courts rather than in their favor. But the same is true of the executive. To the extent one believes that, all else equal, each branch would prefer to expand its power than to contract it,⁴¹ then the courts' commitment to precedent should make them particularly powerful players in Article III gloss games.

39. The existence of long-standing practices might impact the perceived clarity of constitutional commands. See generally Curtis A. Bradley & Neil S. Siegel, *Constructed Constraint and the Constitutional Text*, 64 DUKE L.J. 1213 (2015).

40. See *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2605 (Scalia, J., concurring) (“In any controversy between the political branches over a separation-of-powers question, staking out a position and defending it over time is far easier for the Executive Branch than for the Legislative Branch.”); Bradley & Morrison, *supra* note 2, at 438–47.

41. See THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961). For a skeptical view, see generally Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915 (2005).

Notably, moreover, precedent-setting decisions are relatively unlikely to cede power *because* of historical practice. That is, it is difficult (though not impossible⁴²) to think of examples in which a case of first impression might feature a history of acquiescence by the courts. Suppose that Congress makes an aggressive move, like the “no dissenting opinions” statute above. And suppose we’re right to think that such a statute could immediately be challenged. On the one hand, historical practice would be of little help to Congress in that scenario: This is the first such statute. (Perhaps practice could be relevant on Congress’s side of the contest if many prior bills had been proposed but rejected for unrelated reasons, but there would probably be no judicial acquiescence in that scenario.) On the other hand, practice *could* support the courts’ side. We can imagine a court’s reasoning: “We have always decided whether or not to publish our opinions, and Congress has never before claimed the power to tell us otherwise.” It seems possible, then, that gloss games in which courts are players will tend to function as a one-way ratchet favoring the courts.

CONCLUSION

Professors Bradley and Siegel have shed much-needed light on the intersection between historical gloss analysis and the judicial power. In this response, we have suggested that the institution of stare decisis may limit the purview of gloss analysis in the Article III context—or, at the very least, that courts will not “play” gloss games in quite the same way as the political branches. These are just a few of the important and difficult questions elicited by Bradley and Siegel that will enrich history-based federal courts scholarship going forward.

42. See *Stuart*, 5 U.S. (1 Cranch) at 307 (invoking “acquiescence” by founding-era justices as authoritative).