

HISTORICAL GLOSS, MADISONIAN LIQUIDATION, AND THE ORIGINALISM DEBATE

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The U.S. Constitution is old, relatively brief, and very difficult to amend. In its original form, the Constitution was primarily a framework for a new national government, and for 230 years the national government has operated under that framework even as conditions have changed in ways beyond the Founders' conceivable imaginations. The framework has survived in no small part because government institutions have themselves played an important role in helping to fill in and clarify the framework through their practices and interactions, informed by the realities of governance. Courts, the political branches, and academic commentators commonly give weight to such post-Founding governmental practice in discerning the Constitution's separation of powers. That approach has been referred to as the "historical gloss" method of constitutional interpretation, based on language that Justice Frankfurter used to describe the concept in his concurrence in the Youngstown steel seizure case. Some originalist commentators, however, have advanced a potentially competing approach to crediting post-Founding practice, which they refer to as "liquidation," an idea that they ascribe to James Madison and certain other members of the Founding generation.

To date, there has not been any systematic effort to compare gloss and liquidation, even though the differences between them bear on the constitutionality of a range of governmental practices relating to both domestic and foreign affairs in the fields of constitutional law and federal courts. This Article fills that gap in the literature. We first provide an account of what must be shown in order to establish historical gloss. Our account focuses on longstanding governmental practices that have proven to be stable—that is, practices that have operated for a significant amount of time without generating continued inter-branch contestation. We then consider the extent to which the liquidation concept differs from that of gloss and whether those differences render liquidation more or less normatively attractive than gloss. We argue that a narrow account of liquidation, such as the one offered by Professor Caleb Nelson, most clearly distinguishes liquidation from gloss, but that it does so in ways that are normatively problematic. We further argue that a broader account of liquidation, as recently offered by Professor William Baude, responds to those normative concerns by diminishing the distinction between liquidation and gloss, but that significant differences remain that continue to raise normative problems for liquidation. Finally, we question whether either account of liquidation is properly attributed to Madison.

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INTRODUCTION

In discerning the Constitution’s separation of powers, it is common for courts, the political branches, and academic commentators to give weight to post-Founding governmental practice.¹ Reliance on such practice is sometimes referred to as the “historical gloss” method of constitutional interpretation, based on the way that Justice Frankfurter described the concept in his concurrence in the *Youngstown* steel seizure case. In that decision, the Supreme Court held that President Truman had exceeded his constitutional authority in attempting to seize the nation’s steel mills during the Korean War to avert a strike.² Frankfurter wrote separately to consider whether and to what extent historical practice might support Truman’s authority to seize the mills.³

Frankfurter argued that historic governmental practice was relevant to the question of the President’s seizure authority, asserting that “[i]t 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.”⁴ In his view, although “deeply embedded traditional ways of conducting government” could not “supplant the Constitution or legislation,” they could “give meaning to the words of a text or supply them.”⁵ Frankfurter reviewed the historical practice concerning executive seizure of property, however, and found it insufficient to sustain Truman’s action. Finding only three instances of presidential seizures comparable to the one at issue in the case, all of which occurred in 1941, Frankfurter concluded that “these three isolated instances do not add up, either in number, scope, duration or contemporaneous legal justification, to the kind of executive construction of the Constitution [that we have previously credited],” “[n]or do they come to us sanctioned by long-continued acquiescence of Congress giving decisive weight to a construction by the Executive of its powers.”⁶

The Supreme Court’s reliance on historical practice in discerning the separation of powers long predates Frankfurter’s concurrence in *Youngstown*. For example, in a 1915 case, *United States v. Midwest Oil Co.*, the Court rejected a challenge to President Taft’s decision to temporarily withdraw certain public lands from private development, emphasizing the “long continued practice [of making] orders like the one here involved.”⁷ Along similar lines, the Court in the 1920s, in concluding that the President’s pardon power extends to a conviction for contempt of court, reasoned that “long practice under the pardoning power and acquiescence in it strongly sustains the construction it is based on.”⁸ And, in another decision from that period, the Court emphasized longstanding presidential practice when considering the circumstances

¹ See generally Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411 (2012).

² *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

³ *Id.* at 593 (Frankfurter, J., concurring).

⁴ *Id.* at 610.

⁵ *Id.*

⁶ *Id.* at 613.

⁷ 236 U.S. 459, 469 (1915).

⁸ *Ex parte Grossman*, 267 U.S. 87, 118–19 (1925).

under which the President’s “pocket veto” (that is, failure to sign a bill before Congress recesses) should be deemed to operate.⁹

A number of the Supreme Court’s modern separation of powers decisions have also relied heavily on historical practice. In 1981, in *Dames & Moore v. Reagan*, the Court upheld executive orders transferring billions of dollars in claims to an international tribunal in The Hague, as part of the resolution of the Iranian hostage crisis, in large part based on the historical practice of presidential settlement of claims.¹⁰ In doing so, the Court expressly invoked Justice Frankfurter’s discussion of historical gloss.¹¹ Two more recent decisions have particularly emphasized the importance of historical practice. In 2014, the Court in *NLRB v. Noel Canning* relied heavily on historical practice in construing the scope of the President’s authority to make recess appointments.¹² The Court explained that, because “the interpretive questions before us concern the allocation of power between two elected branches of Government,” it was appropriate to “put significant weight upon historical practice.”¹³ The following year, in *Zivotofsky v. Kerry*, the Court again emphasized historical practice, this time in concluding that the President has an exclusive authority to recognize foreign governments and their territories that cannot be limited by Congress.¹⁴

Reliance on historical practice has also long been a staple of constitutional reasoning within the executive branch. To take one of many examples, executive branch lawyers rely extensively on practice in discerning the scope of the President’s constitutional authority to use military force. In 2018, for instance, the Justice Department’s Office of Legal Counsel (OLC) concluded, based largely on historical practice, that President Trump had the power to direct airstrikes against Syria in response to its use of chemical weapons during the civil war there. Citing to earlier opinions from the Office, including one from 1970, OLC explained: “We have recognized that ‘[s]ince judicial precedents are virtually non-existent’ in defining the scope of the President’s war powers, ‘the question is one which of necessity must be decided by historical practice.’”¹⁵ Similarly, in 2011 OLC concluded, based largely on historical practice, that President Obama had the constitutional authority to direct U.S. military forces to take part

⁹ The Pocket Veto Case, 279 U.S. 655, 689 (1929) (“Long settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions of this character.”).

¹⁰ 453 U.S. 654 (1981).

¹¹ See *id.* at 684.

¹² 134 S. Ct. 2550 (2014); see also Curtis A. Bradley & Neil S. Siegel, *After Recess: Historical Practice, Textual Ambiguity, and Constitutional Adverse Possession*, 2014 SUP. CT. REV. 1 (analyzing the role of historical practice in the opinions in *Noel Canning*).

¹³ *Noel Canning*, 134 S. Ct. at 2559 (emphasis omitted).

¹⁴ 135 S. Ct. 2076, 2091 (2015) (quoting *Noel Canning* for the proposition that “[i]n separation-of-powers cases this Court has often ‘put significant weight upon historical practice’”).

¹⁵ Memorandum from Steven A. Engel, Assistant Attorney General, Office of Legal Counsel, to the Counsel for the President, *April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities* 5 (May 31, 2018), at <https://www.justice.gov/olc/opinion/file/1067551/download> (quoting Presidential Authority to Permit Incursion Into Communist Sanctuaries in the Cambodia-Vietnam Border Area, 1 Op. O.L.C. Supp. 313, 317 (May 14, 1970) (“Vietnam Border Area”)).

in bombing operations in Libya without first seeking congressional authorization.¹⁶ Quoting from an earlier legal opinion concerning a military intervention in Haiti, OLC asserted that “the pattern of executive conduct, made under claim of right, extended over many decades and engaged in by Presidents of both parties, evidences the existence of broad constitutional power.”¹⁷

Despite the prevalence of that sort of constitutional reasoning in the judiciary and the executive branch, until recently few academic commentators had given significant attention to it, or to its relationship to other approaches to constitutional interpretation. That started to change in 2012, when one of us co-authored an article exploring those questions.¹⁸ The *Noel Canning* decision two years later further heightened interest in the relevance of historical practice to the separation of powers. Since then, a number of commentators, including the two of us, have continued to try to unpack the concept of historical gloss.¹⁹

Some originalist commentators have invoked a different term to describe the relevance of post-Founding practice to constitutional interpretation: “liquidation.” Drawing on references to that term by James Madison and certain other members of the Founding generation, those commentators have outlined the conditions under which post-Founding practice can potentially “liquidate” indeterminate constitutional meaning such that it becomes “fixed.”²⁰ The Supreme Court, too, has sometimes invoked the idea of “fixing” constitutional meaning when referring to the relevance of historical practice to constitutional interpretation.²¹ The word “liquidation” is used in that context to mean essentially the opposite of the principal modern connotation of

¹⁶ See Memorandum Opinion from Caroline D. Krass, Principal Deputy Assistant Att’y Gen, Office of Legal Counsel, to the Att’y Gen, *Authority to Use Military Force in Libya* (Apr 1, 2011), at <http://www.justice.gov/sites/default/files/olc/opinions/2011/04/31/authority-military-use-in-libya.pdf>.

¹⁷ *Id.* at 7.

¹⁸ See generally Bradley & Morrison, *supra* note 1.

¹⁹ See generally Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Constitutional Conventions, and the Judicial Separation of Powers*, 105 GEO. L.J. 255 (2017); Curtis A. Bradley, *Doing Gloss*, 84 U. CHI. L. REV. 59 (2017); Bradley & Siegel, *supra* note 12.

²⁰ In referring to “indeterminacy” in this Article, we are using it as a shorthand to encompass a range of circumstances in which the meaning of the constitutional text is under-determinate, including instances of ambiguity, vagueness, gaps, and contradictions. See Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 469–70 (2013).

²¹ See, e.g., *Myers v. United States*, 272 U.S. 52, 175 (1926) (“[A] contemporaneous legislative exposition of the Constitution when the founders of our Government and framers of our Constitution were actively participating in public affairs, acquiesced in for a long term of years, fixes the construction to be given its provisions.”); *Stuart v. Laird*, 5 U.S. (1 Cranch) 299, 309 (1803) (rejecting a constitutional challenge to Congress’s requirement that Supreme Court Justices sit on circuit courts, explaining that “practice and acquiescence under it for a period of several years, commencing with the organization of the judicial system, afford an irresistible answer and have indeed fixed the construction”).

the word; instead of signifying dissolution (as in a “liquidation sale”), it is used to signify solidification or determination (as in “liquidated damages”).²²

In part because the concepts of gloss and liquidation have only recently begun to receive sustained academic attention, it is not entirely clear whether and to what extent they do or should differ from one another. In *Noel Canning*, the Court seemed to assume that liquidation and gloss were the same phenomenon. After quoting a reference to liquidation by Madison, the Court wrote that “our cases have continually confirmed Madison’s view.”²³ In its string cite of decisions, however, the Court included a number of decisions claimed by supporters of the gloss approach, including Frankfurter’s concurrence in *Youngstown*.²⁴ Legal scholars also appear confused about the distinction, if any, between gloss and liquidation. Writing a year after *Noel Canning*, Professor Richard Fallon expressed uncertainty, describing gloss as “closely related” to liquidation but “possibly more capacious.”²⁵

Although originalists often focus on history, usually it is history relating to the constitutional Founding and the pre-Founding period.²⁶ Perhaps because of that, until recently the only scholar to have extensively addressed liquidation was Professor Caleb Nelson, who described it in fairly narrow terms.²⁷ In a new article, however, Professor William Baude has offered a broader account of the concept.²⁸ Meanwhile, the historian Jonathan Gienapp has published an important study of how, over the course of the 1790s, Madison and others in the

²² The word “liquidate” derives from the Late Latin “liquidare,” one meaning of which was “to make clear or plain (something obscure or confused); to render unambiguous; to settle (differences, disputes).” 8 THE OXFORD ENGLISH DICTIONARY 1012 (2d ed. 1989).

²³ 134 S. Ct. at 2560.

²⁴ See *id.* (citing *Mistretta v. United States*, 488 U.S. 361, 401 (1989); *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J. concurring); *The Pocket Veto Case*, 279 U.S. 655, 689–90 (1929); *Ex Parte Grossman*, 267 U.S. 87, 118–19 (1925); *United States v. Midwest Oil Co.*, 236 U.S. 459, 472–74 (1915); *McPherson v. Blacker*, 146 U.S. 1, 27 (1892); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 401 (1819); and *Stuart v. Laird*, 5 U.S. (1 Cranch) 299 (1803)).

²⁵ Richard H. Fallon, Jr., *The Many and Varied Roles of History in Constitutional Adjudication*, 90 NOTRE DAME L. REV. 1753, 1775 (2015). See also Tara Leigh Grove, *The Origins (and Fragility) of Judicial Independence*, 71 VAND. L. REV. 465, 541 & n.424 (2018) (discussing “gloss” and stating that “[i]n a somewhat similar vein, Caleb Nelson and William Baude have suggested that political practice can ‘liquidate’ (that is, settle) the meaning of ‘contestable’ constitutional provisions”) (emphasis added).

²⁶ See Jack M. Balkin, *The New Originalism and the Uses of History*, 82 FORDHAM L. REV. 641, 655–57 (2013) (describing how originalism has traditionally focused on history relating to the adoption of the Constitution and its amendments).

²⁷ Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 525–53 (2003) [hereinafter “Nelson, *Originalism and Interpretive Conventions*”]; Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 10–21 (2001).

²⁸ William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1 (2019).

Founding generation changed their understanding of the nature of the Constitution, including its relationship to historical practice.²⁹

In this Article, we consider whether and to what extent the concept of liquidation, in either the narrow form developed by Nelson or the broader form developed by Baude, differs from that of gloss. We also consider whether, to the extent there are differences between liquidation and gloss, those differences render liquidation more or less normatively attractive than gloss. We argue that Nelson’s narrow account of liquidation most clearly distinguishes liquidation from gloss, but that it does so in ways that are normatively problematic. We then argue that Baude’s broader account of liquidation responds to those normative concerns by diminishing the distinction between liquidation and gloss, but that significant differences remain that continue to raise normative problems for liquidation. Finally, we question whether either scholar’s account of liquidation is properly attributed to Madison.

The differences between gloss and liquidation matter. In part because of recent judicial appointments to both the Supreme Court and the lower federal courts, originalism may be experiencing a resurgence. At the same time, originalist theory has become more receptive to accommodating various non-originalist materials, including historical practice. Unlike the changes in originalist theory over the years—from a focus on the intentions of the Framers, to the understandings of the ratifiers, to the original public meaning of the constitutional text—and unlike the originalist embrace of judicial precedent and the idea of “constitutional construction,”³⁰ originalist efforts to claim a greater role for historical practice as within the originalist project have not yet received much attention or recognition as such. Like those other “impurifications” of originalism, however, the originalist turn to practice presents originalists with difficult tradeoffs.³¹ As we will explain below, those tradeoffs vary depending on whether one opts for gloss or liquidation. More concretely, the constitutionality of many important and longstanding governmental practices in the fields of both constitutional law and federal courts may depend on that choice. Examples include the recess appointments practices accepted in *Noel Canning*; the extensive modern practice of using congressional-executive agreements in lieu of Senate-approved treaties; presidential authority to order small-scale or short-term uses of military force without congressional authorization; the authority of presidents to withdraw the United States from treaties; the longstanding practice of permitting non-Article III courts to adjudicate federal law cases subject to certain limitations; and the even longer practice of vesting less than the full Article III judicial power in the federal courts notwithstanding the ostensibly mandatory language of Article III.³²

Part I explains why attention to post-Founding historical practice fits more naturally with non-originalist theories of constitutional interpretation than with originalist theories, and

²⁹ See JONATHAN GIENAPP, *THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA* (2018).

³⁰ See *infra* notes 42–49 and accompanying text.

³¹ For analysis of the phenomenon of theory “working itself impure,” with originalism as one of several case studies, see generally Jeremy K. Kessler & David E. Pozen, *Working Themselves Impure: A Life Cycle Theory of Legal Theories*, 83 U. CHI. L. REV. 1819 (2016).

³² See *infra* text accompanying notes 50–51, 109–118.

it considers why some originalists are nevertheless paying increasing attention to practice. Part II describes the historical gloss approach and explains why, under most accounts, it does not require evidence of an inter-branch agreement about the meaning of the Constitution. It also argues that gloss is most defensible in the separation of powers context. Part III assesses the extent to which the liquidation approach as developed respectively by Professors Nelson and Baude differs from gloss, and it argues both that there are differences and that those differences render liquidation normatively less attractive than gloss. Part IV explains why it is doubtful that either Nelson's or Baude's version of the liquidation approach can properly be attributed to Madison. Part V concludes by underscoring the importance of historical practice in light of the age, brevity, and difficulty of amending the Constitution.

I. THE ORIGINALIST TURN TO PRACTICE

One of the central divisions in constitutional theory is between originalist and non-originalist approaches to constitutional interpretation. There are many versions of both originalism and non-originalism, but they each have certain core elements. In particular, originalists tend to insist that the meaning of the Constitution became fixed at the time that its text was ratified and that interpreters are bound by that original meaning. By contrast, non-originalists tend to accept that constitutional meaning can change even absent formal amendments to the text and that it can be appropriate for interpreters to apply the changed meaning.

Because non-originalist approaches accept that constitutional meaning can change over time, it is not difficult for them to accommodate post-Founding historical practice in constitutional interpretation. Many non-originalists are “pluralist” in that they are willing to credit a range of materials, including history of various types.³³ As Professor Eric Segall has noted, pluralists “argue that judges use well-recognized factors such as text, history, political practices, non-ratification era history, and evaluations of consequences to decide cases.”³⁴ And pluralists further argue that it is appropriate for interpreters to use those multiple forms of constitutional authority.

More specific non-originalist theories also tend to be compatible with looking to historical practice. For example, reliance on historical practice fits well with Burkean approaches to constitutional interpretation, which emphasize longstanding traditions and

³³ See, e.g., PHILIP BOBBITT, *CONSTITUTIONAL FATE* (1982) (discussing six “modalities” of constitutional argumentation, including text, structure, history, precedent, consequences, and ethos); Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1189–90 (1987) (observing that, “[w]ith only a few dissenters, most judges, lawyers, and commentators recognize the relevance of at least five kinds of constitutional argument”); see also Mitchell N. Berman & Kevin Toh, *Pluralistic Nonoriginalism and the Combinability Problem*, 91 TEX. L. REV. 1379, 1741 (2013) (attempting to set forth “a pluralistic nonoriginalist conception of constitutional law that is clear and plausible enough to provide a focal point for debates about constitutional interpretation”).

³⁴ Eric Segall, *Is Originalism a Theory?*, DORF ON LAW (Nov. 14, 2018), at <http://www.dorfonlaw.org/2018/11/is-originalism-theory.html>; see also Stephen M. Griffin, *Pluralism in Constitutional Interpretation*, 72 TEX. L. REV. 1753, 1753 (1994) (“Pluralistic theories of constitutional interpretation hold that there are multiple legitimate methods of interpreting the Constitution.”).

understandings.³⁵ It also fits well with the somewhat related idea—most extensively developed and defended by Professor David Strauss—of “common law constitutionalism,” which involves an incremental interpretation of the Constitution in light of both judicial precedent and tradition.³⁶ Arguments based on historical practice also overlap with non-originalist approaches that emphasize particularly decisive moments in history, such as Professor Bruce Ackerman’s theory of constitutional “moments.”³⁷

Non-originalists may be receptive to considering post-Founding historical practice in part because doing so can help address one of the principal objections to non-originalism. Nearly sixty years ago, Professor Alexander Bickel coined the term “the counter-majoritarian difficulty” to describe the democratic problem that exists when unelected judges use the power of judicial review to tell popular majorities that they cannot govern as they wish.³⁸ If the judges are relying on materials external to their own will, such as historical political branch practice, their decisions may be less counter-majoritarian, especially if the materials themselves have democratic elements.³⁹ Moreover, the counter-majoritarian difficulty is especially acute when courts seek to overturn longstanding practices accepted and relied upon by both coordinate branches of the government, which may justify particular judicial deference to such practices in constitutional interpretation.⁴⁰

In contrast to the general receptivity of non-originalism towards post-Founding historical practice, such practice is not a natural fit for originalism. Originalists tends to insist on what has been called the “fixation thesis,” which provides that the communicative content of the Constitution became fixed when the text of the Constitution was ratified.⁴¹ To be sure, variants of “new originalism,” which emphasize the idea of “constitutional construction” as an enterprise distinct from constitutional interpretation, appear to allow some role for post-

³⁵ See, e.g., Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353 (2006); Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619, 664 (1994).

³⁶ See, e.g., DAVID A. STRAUSS, *THE LIVING CONSTITUTION* (2010); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996).

³⁷ See 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991).

³⁸ ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 18 (1962).

³⁹ Of course, it cannot simply be assumed that political branch practice is majoritarian, especially given the many undemocratic institutions and practices within the political branches. See generally SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* (2006); PAUL BREST ET AL., *PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS* 147–51 (6th ed. 2015); Corinna Barrett Lain, *Upside-Down Judicial Review*, 101 GEORGETOWN L.J. 113, 144–157 (2012). But the political branches are still generally regarded as more majoritarian than the judiciary.

⁴⁰ See Bradley & Morrison, *supra* note 1, at 428–29, 434.

⁴¹ See Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1 (2015); see also Keith E. Whittington, *The New Originalism*, 2 GEO. J. L. & PUB. POL’Y 599, 599 (2004) (“Originalism regards the discoverable meaning of the Constitution at the time of its initial adoption as authoritative for purposes of constitutional interpretation in the present.”).

Founding practice to help determine the Constitution’s legal effect.⁴² But the concept of construction is controversial among originalists,⁴³ and the proper dividing line between interpretation and construction is contested and uncertain.⁴⁴ Moreover, depending on how it is applied, the construction concept has the potential to undercut another common tenet of originalism—the “constraint principle,” whereby “the communicative content of the Constitution should constrain constitutional practice, including decisions by courts and the actions of officials such as the President and institutions such as Congress.”⁴⁵ Indeed, as Professor Jack Balkin’s work illustrates, if the construction concept is applied broadly, it may largely collapse the distinction between originalism and non-originalism.⁴⁶ Anxiety about the potential breadth of the construction zone has recently moved one prominent originalist, Professor Randy Barnett, to propose resorting exclusively to the original purposes or spirit of constitutional provisions when operating within that zone,⁴⁷ a type of consideration that is typically anathema to formalists in matters of interpretation and so may not reassure other originalists.⁴⁸ For those reasons, some originalists may be prone to reject any consideration of post-Founding historical practice as in effect allowing for constitutional change without a formal textual amendment.⁴⁹

⁴² See, e.g., KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING* (1999); Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. PUB. POL’Y 65 (2011); Solum, *supra* note 20; Whittington, *supra* note 41, at 611–12.

⁴³ For a critique, see John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751 (2009); see also Solum, *supra* note 41, at 5 (“Both the interpretation-construction distinction and the construction zone are controversial.”).

⁴⁴ See Laura A. Cisneros, *The Constitutional Interpretation/Construction Distinction: A Useful Fiction*, 27 CONST. COMM. 71, 75 (2010) (“No one has developed a formula for predictably discerning between the two activities and it is doubtful that such a formula, if devised and presented, would win more than minority support among constitutional scholars.”); see also Curtis A. Bradley & Neil S. Siegel, *Constructed Constraint and the Constitutional Text*, 64 DUKE L.J. 1213, 1269 (2015) (“It is not clear that all of these theorists have precisely the same concepts in mind when they make this distinction [between interpretation and construction].”).

⁴⁵ Solum, *supra* note 41, at 8.

⁴⁶ See JACK M. BALKIN, *LIVING ORIGINALISM* 3 (2011) (arguing for “*framework originalism*, which views the Constitution as an initial framework for governance that sets politics in motion, and that Americans must fill out over time through constitutional construction”). For an argument that Balkin’s approach largely collapses the distinction between originalism and non-originalism, see Neil S. Siegel, *Jack Balkin’s Rich Historicism and Diet Originalism: Health Benefits and Risks for the Constitutional System*, 111 MICH. L. REV. 931 (2013) (book review); see also Ethan J. Leib, *The Perpetual Anxiety of Living Constitutionalism*, 24 CONST. COMMENT. 353, 355 (2007) (noting that “many originalists will read Balkin to be a living constitutionalist in disguise—and may not let him into their club”).

⁴⁷ See Randy E. Barnett & Evan Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1 (2018).

⁴⁸ See John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663 (2004); John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70 (2006).

⁴⁹ Cf. Peter J. Smith, *How Different Are Originalism and NonOriginalism?*, 62 HASTINGS L.J. 707, 710 (2011) (“Given modern originalism’s origins as a response to the perceived excesses of non-originalism, it is not surprising that many originalists have resisted refinements to the theory that would tend to collapse the distinction between originalism and non-originalism.”).

A complete rejection of historical practice, however, leaves originalism vulnerable in a number of serious ways and thus helps explain why originalists are paying increasing attention to it. First is the problem of where to go when the original meaning is unknown or unknowable. For some questions, there is little guidance in the constitutional text and no judicial precedent on point, in which case historical practice may provide the most objective material for making a decision. Issues relating to the scope of executive power are a prime candidate for historical practice because of the sparse nature of the text of Article II of the Constitution and the substantially changed nature of the presidency over the course of American history. To take one of many examples, although the text of the Constitution instructs how the United States is to enter into treaties (by presidents with the advice and consent of two-thirds of the Senate),⁵⁰ it says nothing about how the United States is to terminate or withdraw from them, something that has instead been worked out (largely in favor of unilateral presidential authority) through practice.⁵¹

A second problem for an originalism that rejects historical practice is the usual “dead hand” objection to being governed by the original meaning of a text that is both old and very difficult to amend. Since the Founding, there have been dramatic changes in both the nature and needs of American governance, as well as dramatic changes in social values (not just changes in facts, which strict versions of originalism can accommodate). As a result, it is not clear how the Constitution can retain its public legitimacy when interpreted only in accordance with a full-throated originalism. To be sure, some prominent originalists—including Professor Baude and our colleague Stephen Sachs—seem to treat it as sign of originalism’s intellectual integrity that, “for better or worse,” it might not be possible to make the theory “safe for the modern world.”⁵² But for most people, it is not a selling point of an interpretive theory that it can cause great disruptions to the fabric of the law and potentially cause catastrophic social harm in the process. As a result, most originalists, including those who wield judicial power, have in fact sought to make originalism relatively safe for most Americans living today. Consulting customary political branch practice may be one way to accomplish that task, as Baude himself appears to recognize.⁵³

A third objection to strict originalism is the charge that the theory is less consistent than non-originalism with how American constitutional law has actually operated and been understood throughout history—in other words, that originalism is mostly normative, not

⁵⁰ U.S. CONST. art. II, § 2, cl. 2.

⁵¹ See Curtis A. Bradley, *Treaty Termination and Historical Gloss*, 92 TEX. L. REV. 773 (2014). To address issues like that one, some originalists attempt to ground various executive powers in the Article II “vesting clause,” but there are serious questions about whether that interpretation is consistent with the original understanding of the clause, and only Justice Thomas on the current Supreme Court has embraced that interpretation. See *Zivotofsky*, 135 S. Ct. at 2098–2101 (Thomas, J., concurring in the judgment in part and dissenting in part); see also CURTIS A. BRADLEY & JACK L. GOLDSMITH, *FOREIGN RELATIONS LAW: CASES AND MATERIALS* 167–69 (6th ed. 2017) (describing the academic debate concerning that issue).

⁵² William Baude & Stephen E. Sachs, *Originalism’s Bite*, 20 GREEN BAG 2D 103, 107 (2016); see also *id.* (“We come not to bring peace but a sword.”).

⁵³ See generally Baude, *supra* note 28.

genuinely our law as a positive matter.⁵⁴ That is a problem for originalists who want to account for most of our constitutional practice, including the growth of the modern state over the course of the twentieth century and judicial decisions that are regarded as some of the greatest achievements of the Supreme Court.⁵⁵ It is also a problem for the realism of originalist proposals to transform our constitutional practice. Although there is a first time for everything, it seems unlikely that anything approaching strict originalism will ever become “our law” as applied, even with recent, originalism-friendly changes in the composition of the Supreme Court. We do not expect the Court in the years ahead to revisit, say, the constitutionality of the administrative state as a general matter, the modern scope of presidential power (again, as a general matter), or the constitutionality of longstanding entitlement programs like social security. Thus, to be realistic, originalism may need to take some account of historical practice.⁵⁶

Finally, many originalists are willing to accept judicial precedent interpreting the Constitution, pursuant to the doctrine of *stare decisis*, even if the precedent is not consistent with the original understanding. They do so either as a pragmatic exception to originalism,⁵⁷ or as a move that is ostensibly licensed by an original understanding of Article III.⁵⁸ But important precedents are also established outside the courts. As Professor Mitchell Berman has observed, “nonjudicial precedents have significantly shaped American politics and culture,” including many that have “never [been] subjected to legal challenge, hence never passed on by a federal court.”⁵⁹ Many of the standard values associated with deference to judicial precedent also apply to nonjudicial precedent.⁶⁰ For example, adherence to judicial precedent is said to

⁵⁴ For a provocative argument that originalism is our law as a positive matter, see generally William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349 (2015). For a response, see Richard Primus, *Is Theocracy Our Politics?*, 116 COLUM. L. REV. SIDEBAR 44 (May 11, 2016). In our view, Baude defines originalism so broadly that it loses much of its distinctiveness from non-originalism. He also fails to appreciate that judicial speech can differ from judicial practice for reasons other than a judicial belief that the practice contravenes applicable legal norms. For another effort to ground originalism in a positive account of American constitutional practice, see Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J. L. & PUB. POL’Y 817 (2015).

⁵⁵ For a powerful statement of that point, see BALKIN, *supra* note 46, at 31–34.

⁵⁶ Because of the disruptions it would cause, a shift to strict originalism would also create tensions with the rule of law and democratic legitimacy values that are often invoked in support of originalism. Cf. Lawrence B. Solum, *Originalist Theory and Precedent: A Public Meaning Approach*, 33 CONST. COMM. 451, 461–63 (2018) (suggesting that, for rule of law and democratic legitimacy reasons, it might make sense for an originalist to accept non-originalist precedent during a transition towards more originalist decisionmaking in order to avoid undue disruption).

⁵⁷ See ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 140 (1997) (describing *stare decisis* as “not part of [his] originalist philosophy,” but as “a pragmatic exception to it”).

⁵⁸ See, e.g., John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 NW. U. L. REV. 803, 809–23 (2009). *But see* Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL’Y 23 (1994); Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289 (2005).

⁵⁹ Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1, 34 (2009).

⁶⁰ See Bradley & Morrison, *supra* note 1, at 427–28; Michael J. Gerhardt, *Non-Judicial Precedent*, 61 VAND. L. REV. 713 (2008). For a general discussion of some of the values served by *stare decisis*, see RANDY J. KOZEL, *SETTLED VERSUS RIGHT: A THEORY OF PRECEDENT* 36–49 (2017).

promote stability, consistency, and predictability in the law by protecting reliance interests.⁶¹ Such interests, however, can presumably arise as a result of governmental practices as well as judicial decisions. As a result, those originalists who view *stare decisis* as a pragmatic exception to originalism may have a hard time explaining why there should not also be a pragmatic exception for non-judicial precedent. And originalists who view reliance on judicial precedent as part of the Article III judicial power may face difficulties explaining why reliance on historical practice is not also part of that power, even though the Supreme Court began consulting such practice very early in its history.⁶²

In short, there are a number of reasons why originalists might want to allow room for considering post-Founding historical practice in constitutional interpretation (or construction). At the same time, there is a serious risk that doing so will further collapse the distinction between originalism and non-originalism beyond what has been wrought by the attempts of many originalists to emphasize original meaning over original intent and to incorporate *stare decisis*.⁶³

In the balance of this Article, we analyze potentially competing approaches to incorporating post-Founding historical practice in constitutional interpretation. In Part II, we consider the historical gloss approach, which tends to be favored by non-originalists. In Parts III and IV, we turn to the liquidation approaches articulated by two originalist scholars, Professors Nelson and Baude.

II. THE HISTORICAL GLOSS APPROACH

There is no canonical account of the historical gloss approach to constitutional interpretation. It is most commonly invoked in connection with issues relating to the separation of powers, and we explain below why it is most defensible in that context. As the name “gloss” implies, it is not typically treated as a free-standing source of constitutional law. Instead, it is used to help interpret other constitutional materials, most notably the constitutional text and structural inferences from the text, when those materials are thought to be unclear with respect to the constitutional question under consideration.⁶⁴

The gloss approach is most famously associated with Justice Frankfurter’s concurrence in *Youngstown*, but the idea was not original to him, and he invoked an earlier decision in

⁶¹ See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 855–56 (1992).

⁶² See *Stuart v. Laird*, 5 U.S. (1 Cranch) 299, 309 (1803) (quoted *supra* note 21).

⁶³ See *supra* notes 42–49 and accompanying text (noting those changes over time in originalist theory); Kessler & Pozen, *supra* note 31, at 1844–47 (documenting the increasing “impurification” of originalism).

⁶⁴ That is one reason why it can be hazardous to analogize gloss to types of custom that do operate as freestanding law, such as customary international law. For commentators who make that analogy, see, for example, Michael J. Glennon, *The Use of Custom in Resolving Separation of Powers Disputes*, 64 B.U. L. REV. 109, 134 (1984), and Shalev Roisman, *Constitutional Acquiescence*, 84 GEO. WASH. L. REV. 668, 675 (2016).

support of it.⁶⁵ Moreover, Frankfurter described the approach as it applies to executive power in terms that, if strictly applied, would sharply limit its relevance:

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.⁶⁶

In reality, neither courts nor other interpreters have required that a practice have “never before [been] questioned” before being credited as gloss, presumably because very few practices would qualify as gloss if subjected to such a demanding test. Relatedly, such a test would mean that gloss would be of little help when it is most needed—that is, when there is a dispute over constitutional interpretation.⁶⁷

In this Part, we sketch the general contours of what we understand to be the gloss approach. In doing so, we give particular weight to the Court’s decision in *NLRB v. Noel Canning*,⁶⁸ because it is not only recent but also represents the Court’s most sustained and self-conscious consideration of the relevance of historical practice to the separation of powers. As we explain, gloss is focused on longstanding governmental practices that have proven to be stable—that is, practices that have operated for a significant amount of time without generating continued inter-branch contestation. After describing the core elements of gloss, we address two issues relating to gloss that—as will become apparent in Part III—are especially relevant when comparing gloss with liquidation: first, whether gloss requires evidence of a constitutional agreement between the acting branch and the affected branch; and second, whether gloss applies outside the domain of separation of powers.

A. General Requirements for Gloss

As illustrated by *Noel Canning*, there are at least three requirements for gloss: governmental practice, longstanding duration, and acquiescence, which we interpret below as requiring at least reasonable stability in the practice but not necessarily inter-branch constitutional agreement.

First, gloss is focused on *governmental practice*—that is, the actions and inactions of government institutions, whether executive, legislative, or judicial. It is not focused on

⁶⁵ See 343 U.S. at 611 (Frankfurter, J., concurring) (relying on *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915)).

⁶⁶ 343 U.S. at 610–11.

⁶⁷ Unless context indicates otherwise, we use the term “interpretation” here and elsewhere in this Article in the informal way that it is used by judges and other non-specialists rather than in the more specialized way that it is used by some originalist commentators. In other words, when referring to interpretation, we generally do not attempt to distinguish it from “construction.”

⁶⁸ 134 S. Ct. 2550 (2014).

historical traditions or events in general, or on public or social attitudes.⁶⁹ In addition, more weight is generally placed on the actual behavior of institutions than on their stated views, for the obvious reason that talk can be cheap in politics. Nonetheless, governmental statements and reasoning are still relevant, because, among other things, they can provide insights into how participants in a practice understand the practice and its scope, and also because it can be evidence of reliance on a practice. In *Noel Canning*, for example, the Court reviewed in detail both the history of presidential recess appointments and how the Senate responded to them, and it looked to executive branch memoranda in large part as confirmation that “upset[ting] this traditional practice . . . would seriously shrink the authority that Presidents have believed existed and have exercised for so long.”⁷⁰

Second, in order for the relevant practice to be credited, it must be of *longstanding duration*. There is no magic number of years, but the case for gloss is strongest when the practice has continued over numerous presidential administrations and has enjoyed the support of both major political parties (because such practices are less likely to be the product of mere partisan politics).⁷¹ The practice need not, however, date to or near the Founding period, and modern practice can potentially qualify as gloss even if it differs from earlier practice. In *Noel Canning*, the Court emphasized that, although “pre-Civil War history is not helpful”⁷² in resolving whether the President had the authority to make “intra-session” recess appointments, modern practice was sufficient to establish gloss:

Since 1929, and particularly since the end of World War II, Congress has shortened its inter-session breaks as it has taken longer and more frequent intra-session breaks; Presidents have correspondingly made more intra-session recess appointments. Indeed, if we include military appointments, Presidents have made thousands of intrasession recess appointments.⁷³

The Court explained that “three-quarters of a century of settled practice is long enough to entitle a practice to ‘great weight in a proper interpretation’ of the constitutional provision.”⁷⁴

Third, there must be *acquiescence* by the affected branch (for example, Congress in the case of an exercise of executive power), which means at least that the practice must have become reasonably stable over time. As we explain further below in Section B, stability does

⁶⁹ Not all commentators seeking to critique gloss have appreciated that point. See, e.g., Alison L. LaCroix, *Historical Gloss: A Primer*, 126 HARV. L. REV. F. 75, 77 (2013) (wondering whether the relevant historical practice for purposes of gloss is “custom, tradition, prescription, or something else”).

⁷⁰ 134 S. Ct. at 2573.

⁷¹ There is also no magic number in terms of the frequency or density of the practice, characteristics that will vary depending on how often the issue tends to arise. If the practice has been very infrequent, however, there may be questions about whether there is in fact a course of practice.

⁷² *Id.* at 2561.

⁷³ *Id.* at 2562.

⁷⁴ *Id.* at 2564 (quoting *The Pocket Veto Case*, 279 U.S. at 689). By contrast, as noted in the Introduction, Justice Frankfurter concluded in *Youngstown* that three recent and isolated instances of presidential property seizure were insufficient to establish a gloss on executive power. See *supra* text accompanying note 6.

not necessarily require that the relevant institutions have reached an agreement about the meaning of the Constitution, although if there is such an agreement the case for gloss is stronger because the likelihood of stability is higher. Instead, the practice must have operated for a significant amount of time without generating continued inter-branch contestation. Such stability might be confirmed by the inaction of an affected branch, even if such inaction does not necessarily show that there is a shared constitutional interpretation.⁷⁵ In *Noel Canning*, for example, the Court emphasized that although the Senate had been hostile at times to recess appointments made to fill vacancies that predated the recess, “the Senate subsequently abandoned its hostility” and, in addressing issues relating to recess appointments in the twentieth century, the Senate had not argued that the presidential practice was unconstitutional.⁷⁶ The fact that “[t]he Senate as a body has not countered this practice for nearly three quarters of a century, perhaps longer,”⁷⁷ gave the practice enough stability to qualify as gloss.

Because stability is required for gloss, one normative issue is the danger that it might unduly favor executive power over congressional authority because it is easier for the executive to engage in unilateral action, and it can be difficult for Congress as an institution to overcome collective action problems and contest such practice.⁷⁸ That is an important concern, but it can potentially be addressed by embracing a broad conception of what counts as contestation—for example, extending it beyond the enactment of opposing statutes and including various forms of congressional “soft law,” such as committee reports and nonbinding resolutions.⁷⁹ The Court in *Noel Canning* may have given a nudge to the consideration of such soft law in noting that “neither the Senate considered as a body *nor its committees*, despite opportunities to express opposition to the practice of intra-session recess appointments, has done so.”⁸⁰ (Isolated objections from individual members of Congress, however, presumably would not qualify as continued inter-branch contestation of a practice.)

To be clear, we are relying on *Noel Canning* here not because one should assume that the Supreme Court is necessarily right about how to implement a particular approach to constitutional interpretation. Instead, we are relying on it to help illustrate the approach to gloss that we are independently defending and will use as a reference point when comparing gloss with liquidation. Ultimately, the proper contours of an approach to gloss should depend on one’s normative justifications for relying on historical practice in constitutional interpretation,

⁷⁵ See, e.g., *Zivotofsky*, 135 S. Ct. at 2094 (treating as relevant the lack of congressional regulation of recognition issues throughout much of the twentieth century without attempting to establish that this inaction was the result of a perception by Congress that it lacked constitutional authority to regulate).

⁷⁶ 134 S. Ct. at 2572.

⁷⁷ *Id.* at 2573.

⁷⁸ See generally Terry M. Moe & William G. Howell, *The Presidential Power of Unilateral Action*, 15 J.L. ECON. & ORG. 132 (1999).

⁷⁹ For discussions of congressional soft law, see Josh Chafetz, *Congress’s Constitution*, 160 U. PA. L. REV. 716 (2012), and Jacob E. Gersen & Eric A. Posner, *Soft Law: Lessons from Congressional Practice*, 61 STAN. L. REV. 573 (2008).

⁸⁰ 134 S. Ct. at 2563 (emphasis added).

a point that we take into account in the next two Sections as we further refine our account of gloss.

We should also emphasize that our goal here is simply to outline the core elements of the gloss approach so that it can be compared with liquidation. As a result, we do not purport to address all of the methodological issues that gloss may implicate. For example, although we have mentioned the implications for stability of one branch's inaction in the face of longstanding practice by another branch, we have not addressed the implications of inaction for the constitutional authority of the inactive branch, which often (although not inevitably) is Congress. If a long period has passed in which one of the three federal branches has not engaged in a practice, to what extent does such inaction suggest that it lacks the constitutional authority to do so? The Supreme Court has in recent times emphasized that sort of past inaction—that it, is has emphasized the novelty of an action now taken by a federal branch—when concluding that the action is unconstitutional on either separation of powers or federalism grounds.⁸¹ Without attempting to resolve that issue here, we note that there can be a variety of reasons why action has not been taken before, including that there was not previously a perceived need for such action.⁸² For that and other reasons, if inaction is to be treated as evidence of a branch's lack of constitutional authority to act, as opposed to evidence of acquiescence in another branch's exercise of authority, it may make sense to apply a more stringent test than the one we are outlining here.⁸³

⁸¹ See, e.g., *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2091 (2015) (“‘[T]he most striking thing’ about the history of recognition ‘is what is absent from it: a situation like this one,’ where Congress has enacted a statute contrary to the President’s formal and considered statement concerning recognition.”) (quoting *Zivotofsky v. Secretary of State*, 725 F.3d 197, 221 (D.C. Cir. 2013) (Tatel, J., concurring)); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 505 (2010) (“Perhaps the most telling indication of the severe constitutional problem with the [Public Company Accounting Oversight Board] is the lack of historical precedent for this entity.” (quoting *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 537 F.3d 667, 699 (D.C. Cir. 2008) (Kavanaugh, J., dissenting) (internal quotation marks omitted), *aff’d in part, rev’d in part*, 561 U.S. 477)); *Medellín v. Texas*, 552 U.S. 491, 532 (2008) (emphasizing that the presidential action to compel Texas to comply with an international court’s decision was “unprecedented”); *Printz v. United States*, 521 U.S. 898, 905 (1997) (“[I]f . . . earlier Congresses avoided use of this highly attractive power, we would have reason to believe that the power was thought not to exist.”).

⁸² See generally Leah M. Litman, *Debunking Antinovelty*, 66 DUKE L.J. 1407 (2017) (rejecting the Supreme Court’s recent assertions that the novelty of a federal statute indicates its inconsistency with constitutional principles of federalism or separation of powers). See also Curtis A. Bradley, *Historical Gloss, the Recognition Power, and Judicial Review*, 109 AM J. INT’L L. UNBOUND 2 (2015) (doubting that the finding of a lack of congressional power in *Zivotofsky* was supported by historical gloss as opposed to structural and consequentialist considerations); Jack L. Goldsmith, *Zivotofsky II as Precedent in the Executive Branch*, 129 HARV. L. REV. 112, 122–23 (2015) (critiquing that aspect of the Court’s reasoning in *Zivotofsky*); Neil S. Siegel, *Distinguishing the “Truly National” from the “Truly Local”*: *Customary Allocation, Commercial Activity, and Collective Action*, 62 DUKE L.J. 797, 814, 815 (2012) (identifying various possible reasons for congressional inaction and concluding that “courts are wrong to presume that the unprecedented nature of an exercise of federal power renders the exercise unconstitutional”); *infra* Part II.C.2 (similar); Ernest A. Young, *Our Prescriptive Judicial Power: Constitutive and Entrenchment Effects of Historical Practice in Federal Courts Law*, 58 WM. & MARY L. REV. 535, 541, 591 (2016) (expressing concern about the use of historical gloss in *Zivotofsky* to disable Congress from legislating).

⁸³ See *infra* note 108 (suggesting one potential component of such a test). Cf. *Youngstown*, 343 U.S. at 638 (Jackson, J., concurring) (suggesting that courts “scrutinize[] with caution” claims that Congress lacks the authority to regulate presidential action).

B. Does Acquiescence Require Constitutional Agreement?

It is sometimes suggested by commentators that the third requirement for gloss is more demanding than reasonable stability—in particular, that the affected branch must have agreed that the practice is constitutional.⁸⁴ To understand why the third requirement is not best interpreted that way, it is useful to consider the principal justifications in support of relying upon historical practice as it relates to the separation of powers.

As one of us has previously outlined, a review of Supreme Court decisions and other materials suggests that there are at least three general sets of reasons for invoking gloss.⁸⁵ One set of reasons concerns what can be called “Burkean consequentialism.” The basic idea is that longstanding governmental practices are suggestive of what works well, or at least what works better than anything the courts are likely to impose.⁸⁶ Such practices reflect the realities of governance and changes in the needs of governance, and therefore, the reasoning goes, they have the potential to embody collective wisdom. Under that rationale, the very persistence of a practice is evidence of its utility, and deferring to it protects reliance interests, expectation interests, stability of governance, and settlement.⁸⁷ The emphasis here is less on constitutional interpretation by political actors and more on the functional problems associated with disturbing practices that have been working at least reasonably well over time and that may reflect various compromises that would be difficult to disentangle.⁸⁸

The Court in *Noel Canning* relied heavily on such Burkean consequentialist reasoning. In deferring to past practice concerning the scope of the President’s recess appointments power, the Court noted that the frequent and longstanding use of recess appointments “suggests that the Senate and President have recognized that recess appointments can be both necessary and

⁸⁴ See, e.g., Michael J. Glennon, *The Cost of “Empty Words”: A Comment on the Justice Department’s Libya Opinion* *3 (Harvard National Security Journal 2011), archived at <http://perma.cc/VA76-E2Y3> (contending that, although “practice can affect the Constitution’s meaning and allocation of power,” “[a] practice of constitutional dimension must be regarded by both political branches as a juridical norm” before it does so); Roisman, *supra* note 64, at 710 (contending that the only historical practice that should be credited is that which “is likely to be indicative of constitutional agreement between the branches”).

⁸⁵ See generally Bradley, *supra* note 19.

⁸⁶ For discussion of the Court’s arguably contrary view in *INS v. Chadha*, see *infra* note 218 and accompanying text.

⁸⁷ One of us previously identified reliance interests as a separate set of reasons for crediting gloss. See Bradley, *supra* note 19, at 67. But reliance interests are a kind of consequentialist consideration and thus, for analytical simplicity, can be grouped under Burkean consequentialism. Similarly, it is possible to break out the value of “settlement” as its own justification. Cf. Aziz Z. Huq, *Fourth Amendment Gloss*, 113 N.W. U. L. REV. 701, 717–18 (2019) (treating settlement as a separate justification for gloss). But that value is sufficiently related to Burkean consequentialist arguments that we have included it under that label, again for analytical simplicity.

⁸⁸ See, e.g., Mitchell Pearsall Reich, *Incomplete Designs*, 94 TEX. L. REV. 807, 831 (2016) (“A Burkean-minded judge deciding whether to upset a settled interpretation of a clause cannot contend just with history’s judgment that the interpretation of the clause itself is correct. She must also recognize history’s judgment that numerous institutional decisions that likely surround it—and which the judge may be unable to identify, let alone evaluate—are useful, workable, and correct as well.”); Sunstein, *supra* note 35, at 401 (“If Congress and [the President] have settled on certain accommodations, there is reason to believe that those accommodations make institutional sense.”).

appropriate in certain circumstances.”⁸⁹ The Court thereby emphasized the shared view of the political branches *on workability* rather than on constitutional interpretation. The Court also stressed reliance interests, noting that it was concerned about “upset[ing] the compromises and working arrangements that the elected branches of Government themselves have reached,” as well as about “seriously shrink[ing] the authority that Presidents have believed existed and have exercised for so long.”⁹⁰

A second set of reasons for invoking gloss concerns limits on decisional capacity.⁹¹ Sometimes interpreters invoke practice because other constitutional materials are perceived to offer insufficient guidance.⁹² That may be especially likely with respect to questions of executive power, given the limited textual guidance in Article II of the Constitution and uncertainties about questions of original meaning, as well as substantial changes in the nature of the presidency and international affairs over time.⁹³ For such issues, unless decisionmakers abstain altogether, relying upon practice may offer the best option for a reasoned disposition of the case that seeks to avoid appealing simply to a policy assessment, partisan calculation, or “choosing a side” in a dispute between the branches.

That sort of reasoning was also evident in *Noel Canning*. The Court resorted to historical practice only after determining that the text of the Recess Appointments Clause was doubly ambiguous.⁹⁴ The Court also emphasized the lack of judicial precedent, noting that “[w]e have not previously interpreted the Clause” and that it was “doing so for the first time in more than 200 years.”⁹⁵ Moreover, in evaluating how the recess appointments power worked during intra-session Senate breaks, original understandings of the recess appointments power

⁸⁹ 134 S. Ct. at 2560.

⁹⁰ *Id.* at 2560, 2573.

⁹¹ Limits on judicial capacity, *see* Bradley, *supra* note 19, at 65–66, are a subset of limits on decisional capacity. It is not just judges who may find that historical practice is the best available material. The OLC opinions quoted in the introduction to this Article, for example, specifically invoke that consideration. *See supra* text accompanying note 15.

⁹² *See, e.g., Noel Canning*, 134 S. Ct. at 2594 (Scalia, J., concurring in the judgment) (agreeing, while expressing reservations about practice-based arguments, that an “ambiguous constitutional provision” is ripe for historical analysis) (emphasis added).

⁹³ *See* Bradley & Morrison, *supra* note 1, at 417–18 (noting that Article II’s general language has given rise to a reliance on practice-based arguments concerning the scope of presidential powers).

⁹⁴ *See Noel Canning*, 134 S. Ct. at 2561, 2568; *see also supra* note 92 (quoting Justice Scalia’s statement that textual ambiguity justifies resort to historical practice). The question of whether the phrase “the Recess” in the Recess Appointments Clause includes intra-session recesses or only inter-session recesses strikes us as genuinely ambiguous, just as references to “the printing press” or “the automobile” can mean one thing in particular or the class of such things generally. As a purely textual matter, however, we are less confident than the Court was that the phrase “Vacancies that may happen during the Recess” includes vacancies that predate the Recess. On that issue, the Court’s finding of ambiguity may have been affected by its desire not to contradict longstanding political branch practice. For a discussion, *see* Bradley & Siegel, *supra* note 12, at 47.

⁹⁵ 134 S. Ct. at 2560.

were of limited use given that the Senate did not even begin taking significant intra-session breaks until after the Civil War.⁹⁶

Concerns about decisional capacity also explain why gloss reasoning is especially evident with respect to issues relating to presidential power in foreign affairs.⁹⁷ The text of Article II is spare with respect to those issues and judicial precedent is also usually very limited. In part for those reasons, historical practice is often the best material to explain the President's authority concerning matters such as recognizing foreign states, concluding executive agreements, terminating treaties, and using military force.⁹⁸ Moreover, as a general matter, gloss is more likely to thrive and be consulted in areas of law, like foreign affairs, where judicial interventions are infrequent.⁹⁹ Part of the reason is that when they have the choice, courts tend to prioritize their own precedents and reasoning over non-judicial materials. In addition, when there is frequent judicial review, political actors tend to coordinate around the judicial decisions, so such decisions are likely to disrupt the ongoing development of practice that is required for gloss. None of that is to say, however, that courts are always right to privilege their own decisions over political branch practice. There can be good Burkean consequentialist reasons for courts to pay close attention to such practice even when judicial precedent is more common.

A third set of justifications for gloss concerns deference to the constitutional interpretations of nonjudicial actors. The basic idea here is a type of departmentalism,¹⁰⁰ whereby the constitutional views of the political branches are entitled to weight along with judicial interpretations, especially when the political branches agree on an interpretation. Among other things, deferring to such views can help reduce the countermajoritarian difficulty,¹⁰¹ which is particularly strong when unelected judges overturn the longstanding positions of elected representatives. Those deference justifications tend to emphasize the views of the political branches about the constitutionality, and not just the desirability, of the practice in question, and such justifications look for whether a branch affected by a particular governmental practice acquiesces in the practice.

Of the three types of justifications, only the deference justification potentially requires an interbranch agreement about the meaning of the Constitution. And even some variants of the deference idea do not depend on a showing of agreement at the level of constitutional interpretation. In particular, if one branch has long articulated a constitutional view about the separation of powers and the other branch has been silent, it may not be clear whether there is any agreement between the branches. Nevertheless, the views of the branch that has maintained the position may still be entitled to some deference, especially if those views have been consistent and have reflected the positions of elected officials of both major political parties.

⁹⁶ *See id.* at 2564–65.

⁹⁷ *See* Bradley & Morrison, *supra* note 1, at 420–21.

⁹⁸ *See* BRADLEY & GOLDSMITH, *supra* note 51, at 38–39, 183–84.

⁹⁹ *See* Bradley, *supra* note 19, at 68–69.

¹⁰⁰ Departmentalism “is the theory that each branch of government has the power to apply its own interpretation of the Constitution to its own actions.” DANIEL A. FARBER & NEIL S. SIEGEL, UNITED STATES CONSTITUTIONAL LAW 27 (2019).

¹⁰¹ *See supra* text accompanying notes 38–40.

After all, as Justice Frankfurter observed in *Youngstown*, longstanding executive practice is “engaged in by Presidents who have also sworn to uphold the Constitution.”¹⁰² Similarly, in *Noel Canning*, the Supreme Court gave weight to the fact that “the publicly available opinions of Presidential legal advisers that we have found are nearly unanimous in determining that the [Recess Appointments] Clause authorizes” appointments during intrasession breaks.¹⁰³

Moreover, even if it requires a showing of agreement with respect to the meaning of the Constitution, the deference justification would not necessarily require interbranch agreement about the constitutional text. Instead, it could be premised on the idea that part of constitutional reasoning is pragmatic (such as structural reasoning, as well as of course consequentialist reasoning, which typically informs structural reasoning), and that the political branches will have a better understanding than courts do of the operational feasibility and desirability of particular separation of powers arrangements. That idea seems to be reflected in the suggestion that is sometimes made by the Supreme Court and executive branch lawyers that gloss entails a “practical construction” of the Constitution.¹⁰⁴ The more we accept that constitutional interpretation involves an exercise in pragmatic judgment, the less we will require that the nonjudicial actors have formulated understandings about the text or original understanding of the Constitution, as opposed to what works well in helping the constitutional system to function.

The other justifications for gloss have an even weaker connection to any requirement of agreement with respect to constitutional meaning. For example, Burkean consequentialism can support looking to historical practice even absent any evidence of such agreement because of its focus on the value of established ways of doing things and a concern about the risks of change.¹⁰⁵ Similarly, limits on decisional capacity can suggest deferring to practice even if it does not clearly reflect a common constitutional understanding of the political branches, because the practice can still provide a type of precedent external to an interpreter’s preferences or values.

An advantage of not requiring evidence of an interbranch agreement about the meaning of the Constitution is that it is often unclear why a legislature does what it does. Congress is a large “they,” not an “it,” and there are problems of aggregation and attribution in discerning legislative intent that are familiar to scholars of statutory interpretation.¹⁰⁶ Moreover, when discerning gloss, interpreters (such as the Court in *Noel Canning* and *Zivotofsky*) often

¹⁰² *Youngstown*, 343 U.S. at 610 (Frankfurter, J., concurring).

¹⁰³ 134 S. Ct. at 2562.

¹⁰⁴ See, e.g., *The Pocket Veto Case*, 279 U.S. 655, 675 (1929); *Field v. Clark*, 143 U.S. 649, 691 (1892); see also, e.g., Office of Legal Counsel, *Whether Uruguay Round Agreements Required Ratification as a Treaty: Memorandum Opinion for the United States Trade Representative*, 18 Op. Off. Legal Counsel 232, 233 (Nov. 22, 1994) (noting that “a significant guide to the interpretation of the Constitution’s requirements is the practical construction placed on it by the executive and legislative branches acting together”).

¹⁰⁵ Cf. Young, *supra* note 82, at 556–58 (noting that Burkean justifications for crediting historical practice do not require a showing of agreement and instead look to whether the practice is “subject to contention and dispute”) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES 77).

¹⁰⁶ See generally Kenneth A. Shepsle, *Congress Is a “They,” Not an “It”*: Legislative Intent as Oxymoron, 12 INT’L REV. L. & ECON. 239 (1992).

emphasize congressional *inaction* in response to longstanding executive branch practice,¹⁰⁷ yet it is often impossible to know whether such inaction represents constitutional agreement or is better attributed to other considerations.¹⁰⁸ As applied, therefore, the acquiescence component of gloss often has meant only reasonable stability in the practice.

Many important governmental practices have become at least reasonably well-settled without any clear evidence of an inter-branch agreement about the meaning of the Constitution. For example, it is not evident that the recess appointments practices accepted in *Noel Canning* were the product of such an agreement. The Court was content to observe that, while some Senators had disagreed with the President’s position that the Recess Appointments Clause allowed intra-session appointments, the Senate as a body had not taken “formal action” to oppose the President’s practices, which falls short of an actual agreement between the President and the Senate about anything, let alone about the meaning of the Constitution.¹⁰⁹ Similarly, the Court noted that while the Senate had at times opposed the President’s view that the recess appointments power applied to vacancies that occurred before a recess, the Senate had “subsequently abandoned its hostility,”¹¹⁰ which again falls short of an agreement about constitutional meaning.

Another prominent example, from the foreign affairs area, is the modern interchangeability of congressional-executive agreements with the Article II treaty ratification process.¹¹¹ Congressional-executive agreements are international agreements concluded by the executive with the authorization or approval of a majority of each house of Congress rather than with the advice and consent of two-thirds of the Senate. Although not clearly authorized by the text of the Constitution, congressional-executive agreements represent the vast majority of the international agreements concluded by the United States since World War II, and arguments about historical practice dominate discussions of their “interchangeability” with treaties.¹¹² It is clear that there has been much bipartisan practice and that such practice has been deemed useful by both political branches. But it is not clear that there is an interbranch agreement about the meaning of the Constitution’s Treaty Clause, and at times there have been disputes between

¹⁰⁷ See *supra* notes 75–77 and accompanying text (noting the Court’s emphasis on congressional inaction in *Noel Canning* and *Zivotofsky*).

¹⁰⁸ Cf. William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 69–70 (1988) (arguing, in the statutory interpretation context, that “legislative inaction should rarely be given much, or any, weight” as evidence of “the actual collective will or desire of the enacting legislature”). We are focused here only on inaction as evidence of acquiescence in another branch’s exercise of authority, not as evidence that the inactive branch itself lacks authority to act. See *supra* text accompanying notes 81–82. Before attributing the latter significance to inaction, it might make sense to require evidence that the inaction has been the result of perceived unconstitutionality. See, e.g., Bradley & Siegel, *supra* note 19, at 292–312 (documenting, in twentieth century debates in Congress and the executive branch, expressions of concern that stripping the appellate jurisdiction of the Supreme Court would be unconstitutional).

¹⁰⁹ 134 S. Ct. at 2564.

¹¹⁰ *Id.* at 2572.

¹¹¹ For a discussion of that phenomenon, which supports the claims made in this paragraph, see Bradley & Morrison, *supra* note 1, at 468–76.

¹¹² See, e.g., Peter J. Spiro, *Treaties, Executive Agreements, and Constitutional Method*, 79 TEX. L. REV. 961 (2001).

the Senate and the executive branch about the extent of interchangeability of Article II treaties and congressional-executive agreements.

Yet another example from the foreign affairs area, which we mentioned in the Introduction, is presidential authority to use military force in the absence of congressional authorization. The text of the Constitution assigns a variety of war-related powers to Congress, including the authority to declare war, and many scholars have concluded that the original understanding of those provisions was that presidents would need congressional authorization before ordering non-defensive uses of military force.¹¹³ At least since World War II, however, Presidents have often ordered small-scale or short-term uses of force that do not involve self-defense, without seeking congressional authorization, and many commentators have concluded that this practice must be given weight in the constitutional analysis.¹¹⁴ But there is no clear inter-branch agreement on the constitutionality of the practice, and, indeed, Congress in the 1973 War Powers Resolution expressed a sharply different view of presidential war powers authority than the one long maintained by the executive branch.¹¹⁵

Additional examples of practice-based gloss in the absence of constitutional agreement between two branches can be found when considering the relationship between Congress and the federal judiciary, which is another of the three coordinate branches. For example, the permissibility of Congress's use of non-Article III tribunals to adjudicate cases that fall within the Article III judicial power (including in administrative agencies) has been accepted by the Supreme Court (with some modest limitations) based in part on longstanding practice. Yet the Court has not suggested that it defers to such practice because of an agreement with Congress about the meaning of Article III; instead, it has indicated that it defers to such practice because it is longstanding.¹¹⁶ Similarly, the text of Article III can be read to suggest that Congress must fully vest all of the nine categories of judicial power in the federal courts (the text of Article III

¹¹³ See, e.g., JOHN HART ELY, *WAR AND RESPONSIBILITY* 3 (1993) (arguing that the original understanding of the Constitution was that “all wars, big or small, ‘declared’ in so many words or not . . . had to be legislatively authorized”); Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543, 1547 (2002) (concluding, based on textualist and originalist considerations, that “Congress generally has the power to initiate hostilities”).

¹¹⁴ See, e.g., Louis Henkin, *War Powers “Short of War,”* 50 U. MIAMI L. REV. 201, 204 (1995) (“History shows that Presidents have exercised authority to engage in ‘little wars,’ to deploy forces ‘short of war,’ in a number of cases—a goodly number—of differing importance.”); Peter J. Spiro, *War Powers and the Sirens of Formalism*, 68 N.Y.U. L. REV. 1338, 1355 (1993) (reviewing ELY, *supra* note 113) (“Ultimately, war powers law does not lend itself to refined parchment solutions. It is rather the ‘court of history,’ an accretion of interactions among the branches, that gives rise to basic norms governing the branches’ behavior in the area.”).

¹¹⁵ See 50 U.S.C. § 1541(c) (“The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.”).

¹¹⁶ See, e.g., *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 70 (1982) (plurality opinion) (“In sum, this Court has identified three situations in which Art. III does not bar the creation of legislative courts. In each of these situations, the Court has recognized certain exceptional powers bestowed upon Congress by the Constitution or by historical consensus.” (emphasis added)); see also *Stern v. Marshall*, 564 U.S. 462, 504–05 (2011) (Scalia, J., concurring) (“[A]n Article III judge is required in all federal adjudications, unless there is a firmly established historical practice to the contrary.” (emphasis added)). For additional discussion of practice-based influences on the law of federal courts, see Young, *supra* note 82.

provides that the federal judicial power “shall be vested”¹¹⁷), but that argument is viewed as a non-starter in large part due to very long historical practice to the contrary.¹¹⁸ But, again, it is not clear that judicial deference to such practice is the result of any agreement about the meaning of Article III.

* * *

In sum, under the historical gloss approach as we have described it, when the Constitution is perceived to be unclear or indeterminate as it relates to the separation of powers, longstanding governmental practices that have proven to be stable are consulted to inform constitutional interpretation. Those practices need not date to the early post-Founding period, and they can still qualify as gloss even if they differ from earlier practices. An inter-branch agreement about constitutional meaning is not required for gloss, although evidence of such an agreement will bolster the case for the requisite stability.

C. Gloss’s Domain

Recall how Justice Frankfurter described the idea of “gloss” in *Youngstown*: the actions and interactions of federal government institutions over time can help resolve questions about the constitutional scope of their respective authority. Under that conception, gloss would primarily be relevant to questions relating to the separation of powers. In this section, we explain why resort to gloss is most defensible in that context. This does not mean that reliance on historical practice is never appropriate in other domains; rather, our claim is simply that resort to practice is often less necessary outside the separation of powers context and tends to raise additional concerns that would need to be addressed. Nor do we mean to imply that there is always a clear division between separation of powers issues, on the one hand, and federalism and individual rights issues on the other, although we do think that those commonly-used categories are useful in many situations. Finally, we acknowledge that reasonable minds can differ on the question of gloss’s domain; we address it here not because it is essential to limit gloss to the separation of powers context in order for it to be normatively attractive, but rather because, if gloss were limited in that way, such a limitation might provide an additional basis for distinguishing it from liquidation.

1. Separation of Powers. As noted in the previous section, resort to historical practice is often necessary in separation of powers controversies given the paucity of alternative decisional materials. Part of the reason is that there does not exist among judges and commentators a well-developed normative sense of the horizontal division and interrelation of powers. The point is not that some jurists and scholars emphasize the values of efficiency and

¹¹⁷ U.S. CONST. art. III, § 1 (“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”). Supreme Court Justice Joseph Story construed that clause as requiring the vesting of all the judicial power in the federal courts, see *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 331 (1816), and Professor Akhil Amar has advanced a version of that argument. See Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 208–09 (1985); Akhil Reed Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499, 1503–05 (1990).

¹¹⁸ See, e.g., Daniel J. Meltzer, *The History and Structure of Article III*, 138 U. PA. L. REV. 1569, 1585 (1990).

accountability while others emphasize the importance of preserving individual liberty through a balance of powers among the branches;¹¹⁹ after all, disagreement is common in constitutional interpretation. The point, rather, is a widespread sense of uncertainty about which values are most central, as well as the severe under-determinacy of certain values (especially the notion of “balance”).¹²⁰ As a result, historical practice almost inevitably plays a more significant role in resolving separation of powers disputes than it does in resolving disputes that arise in other areas of constitutional law.

Decisional capacity is also limited in the separation of powers context because judicial precedent, textualism, and originalism are often of little help. Judges tend either to avoid separation of powers controversies or else to decide them narrowly, leaving little judicial precedent on point when the next controversy arises.¹²¹ Relative to other areas of constitutional law, justiciability doctrines such as standing requirements and the political question doctrine are particularly robust in that context (especially in the lower courts).¹²² As for textualism, Article II of the Constitution is notoriously obscure in spelling out the boundaries of executive power and how it interacts with legislative power. And originalism is of limited help because the Founders simply could not have imagined the nature of the modern presidency or the conditions under which it operates. That reality prompted Justice Jackson to offer a memorable observation in *Youngstown*:

A judge, like an executive adviser, may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves. Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh.¹²³

¹¹⁹ See, e.g., Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1729-30 (1996) (identifying balance among the branches, responsibility and accountability to the electorate, and energetic, efficient government as the objectives of the separation of powers); Kate Andrias, *Separations of Wealth: Inequality and the Erosion of Checks and Balances*, 18 U. PA. J. CONST. L. 419, 481 (2015, no. 2) (surveying the literature and identifying liberty, efficacy, and accountability as the functions of the separation of powers identified by different scholars and judges). See also *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring) (“While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government.”).

¹²⁰ See M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603, 604–05 (2001) (“[I]t is a hopeless enterprise to talk about balance among the branches of government. We have not come close to articulating a vision of what an ideal balance would look like.”).

¹²¹ The hierarchical relationship between historical gloss and judicial precedent is interesting and complex, and we cannot do it justice in this Article. In part because of modern norms of judicial supremacy, gloss of the sort we are focused on is unlikely to arise in the face of contrary judicial precedent. See Bradley, *supra* note 19, at 69. But if it does, that seems like at least one argument against *stare decisis*, which is concerned in part with protecting reliance interests. In any event, the scope of judicial precedent must be interpreted, and historical practice is likely to be a factor in such interpretation.

¹²² For example, lower courts continue to apply the political question doctrine with some frequency to cases concerning foreign relations and national security, many of which implicate separation of powers questions. See BRADLEY & GOLDSMITH, *supra* note 51, at 66–67.

¹²³ 343 U.S. at 634.

In addition, Burkean consequentialist and deference justifications for gloss fit best with the separation of powers context. At least as a general matter, the political branches are likely to have a better sense than the courts of what works well in matters of governance, especially in the face of substantially changed conditions. Moreover, because those branches routinely interact and bargain with each other, their practices are especially likely to reflect compromises and working adjustments that may be difficult to disentangle when examining particular constitutional issues in isolation.¹²⁴ Finally, because the separation of powers context implicates the interactions of co-equal federal branches, each charged with upholding and applying the Constitution, the case for judicial deference to the product of their interactions is higher than the case for deference to practice in other contexts.

2. *Federalism.* Gloss does not seem to be as well suited to issues of federalism, where the practices in question are not of co-equal branches but rather of the national government and the constituent states. For one thing, relative to the separation of powers, there appears to exist among many judges and commentators a more developed normative sense of the primary role of the federal government in the constitutional scheme. Of course, there are numerous heated disagreements in particular areas of constitutional federalism, and there are robust disputes among courts and commentators over whether preserving a prominent regulatory role for the states advances various so-called “values of federalism,” including individual liberty, political participation, accountability, responsiveness, value pluralism, democratic experimentation, and local efficiency.¹²⁵ Nonetheless, it is striking that an ideologically diverse array of commentators has emphasized the role of the federal government in solving problems that the states are not well situated to address on their own, especially multi-state collective action problems.¹²⁶ Although fully defending that claim would take this Article too far afield, it is supported by the historical background out of which the Constitution arose (i.e., states acted individually in the commercial and military spheres when they needed to act collectively to solve national problems, conduct international diplomacy, and defend the nation),¹²⁷ and by the

¹²⁴ Cf. Aziz Z. Huq, *The Negotiated Structural Constitution*, 114 COLUM. L. REV. 1595 (2014); John O. McGinnis, *Constitutional Review by the Executive in Foreign Affairs and War Powers: A Consequence of Rational Choice in the Separation of Powers*, LAW & CONTEMP. PROBS., Autumn 1993, at 293.

¹²⁵ For a discussion of the values of federalism, with citations to the literature, see generally Neil S. Siegel, *International Delegations and the Values of Federalism*, 70 LAW & CONTEMP. PROBS. 93 (2008).

¹²⁶ See, e.g., AKHIL REED AMAR, AMERICA’S CONSTITUTION: A BIOGRAPHY 107–08 (2005); Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1 (2010); Robert H. Bork & Daniel E. Troy, *Locating the Boundaries: The Scope of Congress’s Power to Regulate Commerce*, 25 HARV. J.L. & PUB. POL’Y 849 (2002); Steven G. Calabresi, “A Government of Limited and Enumerated Powers”: *In Defense of United States v. Lopez*, 94 MICH. L. REV. 752 (1995); Steven G. Calabresi & Nicholas Terrell, *The Number of States and the Economics of American Federalism*, 63 FLA. L. REV. 1 (2011); Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115 (2010); Richard E. Levy, *Federalism and Collective Action*, 45 U. KAN. L. REV. 1241 (1997); Donald H. Regan, *How to Think About the Federal Commerce Power and Incidentally Rewrite United States v. Lopez*, 94 MICH. L. REV. 554, 554–57 (1995); Robert L. Stern, *That Commerce Which Concerns More States Than One*, 47 HARV. L. REV. 1335 (1934).

¹²⁷ For a recent, detailed account, see generally GEORGE WILLIAM VAN CLEVE, WE HAVE NOT A GOVERNMENT: THE ARTICLES OF CONFEDERATION AND THE ROAD TO THE CONSTITUTION (2017); see also, e.g., JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 24–28, 47–48, 102–08, 167–68, 188–89 (1996) (cataloguing the problems with the Articles of Confederation); AMAR, *supra*

increasingly prominent role of the federal government in American life since the 1930s in addressing races to the bottom, interstate externalities, and certain rights violations.¹²⁸ As Steven Calabresi and Nicholas Terrell have written, “[t]he most compelling argument in American history for empowering our national government has been the need to overcome collective action problems.”¹²⁹

Historical practice, however, may have little correlation with what is required today to enable the federal government to address collective action problems. By definition, the states themselves have inadequate incentives to solve multistate collective action problems by regulating on their own. Their rationally self-interested incentives, rather, are to externalize costs onto other states. Accordingly, there may be a good deal of state regulation in an area of traditional state concern, but such regulation may be creating or exacerbating multistate collective action problems, not solving them.¹³⁰

Moreover, federal regulation may have long been absent for reasons having little to do with the existence or scope of a collective action problem. Alternative possibilities include competing political priorities (such as wars and depressions), changing social values (on such matters as environmental protection and civil rights), improperly imposed constitutional constraints on Congress (such as during the *Lochner* Era), and effective political resistance by powerful minority interests in Congress (such as the Southern opposition that doomed federal civil rights legislation in the twentieth century until 1964).¹³¹

Furthermore, the scope of collective action problems may change over time.¹³² A good example of changed conditions is the importance of education to economic productivity in an information economy with easy interstate mobility due to improved transportation networks.¹³³ Whatever may have been the scope of certain problems in the past, significant changes in

note 126, at 44–46, 106–08 (same); Larry D. Kramer, *Madison’s Audience*, 112 HARV. L. REV. 611, 616–23 (1999) (same).

¹²⁸ Many federal laws, including statutes regulating securities, the environment, civil rights, public health, and criminality, fit that description. See, e.g., Siegel, *Free Riding on Benevolence*, *supra* note 126, at 46–47 (defining collective action problems for the states and discussing examples in the areas of environmental law and civil rights); see also Richard L. Revesz, *Federalism and Interstate Environmental Externalities*, 144 U. PA. L. REV. 2341, 2342 (1996) (“The two justifications most prominently offered . . . for environmental regulation at the federal level focus on the existence of a ‘race to the bottom’ and of interstate externalities.”).

¹²⁹ Calabresi & Terrell, *supra* note 126, at 6. Ameliorating collective action problems is obviously not the only function of the federal government. It also plays a vital role in protecting individual rights, as illustrated in part by the amendments that were added to the Constitution after the Civil War and during the twentieth century. See U.S. CONST. amends. XIII, XIV, XV, XIX, XXIV, XXVI.

¹³⁰ See Siegel, *supra* note 82, at 812–13.

¹³¹ See *id.* at 813. For a collective action analysis of some of those examples, see Siegel, *Free Riding on Benevolence*, *supra* note 126, at 46–47. For the legislative story of the Civil Rights Act of 1964, see WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 2–23 (4th ed. 2007).

¹³² See Siegel, *supra* note 82, at 813.

¹³³ For a discussion of potential spillover effects on other states in such circumstances, see BALKIN, *supra* note 46, at 172–73.

society, the economy, and technology may mean that the scope of those problems is interstate in the present.¹³⁴ The customary allocation of regulatory authority between the federal government and the states is unlikely to track the existence of significant problems of collective action facing the states—however preferable reliance on custom may be to cost-benefit calculations in other settings.¹³⁵

Finally, in the federalism area, structural reasoning and judicial precedent abound, and originalist argumentation also plays a role. Indeed, invocations of historical practice in federalism cases are typically secondary to the other modalities of constitutional interpretation that drive the analysis. Prominent examples of federalism decisions that emphasize those other modalities include *McCulloch v. Maryland*¹³⁶ and *United States v. Lopez*.¹³⁷

3. *Individual Rights.* As Chief Justice Marshall appeared to sense in *McCulloch*, reliance on historical practice is most questionable in individual rights cases. In beginning his opinion in *McCulloch* by invoking historical practice, he offered the caveat that “the great principles of liberty are not concerned.”¹³⁸ Although he did not explain that qualification, he presumably assumed that how the political branches and the states traditionally interacted with one another raised different normative questions from how they interacted with private citizens.

One obvious potential difference between individual rights cases and structural cases is that individual rights cases can implicate concerns, generally not present in structural cases, about popular majorities continuing to oppress unpopular minorities. In addition, the practice potentially relevant to individual rights controversies tends to be different in kind from what is relevant to structural disputes. In particular, whereas the focus in structural disputes is on the practices of governmental institutions, individual rights cases involve the effects of general

¹³⁴ See *id.* at 172 (“If an area of concern has significant spillover effects on other states, or begins to do so, it shouldn’t matter that it was the traditional concern of state regulation.”). For a more general discussion of why it is problematic to assume that novelty of a federal statute renders it constitutionally suspect, see generally Litman, *supra* note 82.

¹³⁵ See generally Richard A. Epstein, *The Path to The T. J. Hooper: The Theory and History of Custom in the Law of Tort*, 21 J. LEGAL STUD. 1, 4 (1992) (“[G]iven the imperfections of the legal system, the conventional wisdom that places cost-benefit analysis first and custom second [in the law of negligence] is incorrect . . .”).

¹³⁶ 17 U.S. (4 Wheat.) 316 (1819) (beginning with historical practice but deciding the case primarily on structural grounds). See CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 15 (1969) (“In [*McCulloch*], perhaps the greatest of our constitutional cases, judgment is reached not fundamentally on the basis of that kind of textual exegesis which we tend to regard as normal, but on the basis of reasoning from the total structure which the text has created.”). For further discussion of the Court’s reasoning in *McCulloch*, see *infra* notes 265–274 and accompanying text.

¹³⁷ 514 U.S. 549 (1995) (emphasizing that criminal law and education are traditional subjects of state regulation only after deciding the case on the ground that Congress was regulating noneconomic activity). See Lawrence Lessig, *Translating Federalism: United States v. Lopez*, 1995 SUP. CT. REV. 125, 206 (writing of the *Lopez* Court’s invocation of traditional subjects of state regulation that “it is too late in this game to forgive the Court for this move” because “over and over, in a wide range of federalism contexts, just this line has proved itself Maginot”). Accord Ernest A. Young, “*The Ordinary Diet of the Law*”: *The Presumption Against Preemption in the Roberts Court*, 2011 SUP. CT. REV. 253, 335 (criticizing “the indeterminacy of any approach that tries to divide up the world into spheres of state and federal primacy”).

¹³⁸ *McCulloch*, 17 U.S. at 197.

social practices or beliefs on individuals—that is, the effects of “traditions” more broadly conceived.¹³⁹

To be sure, arguments from tradition are common, and at times highly controversial, in certain individual rights controversies.¹⁴⁰ Subject matter areas in which tradition may be invoked include substantive due process, the Establishment Clause, capital punishment, and gun rights.¹⁴¹ In such controversies, whether consulting tradition is normatively attractive is likely to divide courts and commentators ideologically and methodologically. Those who are concerned that past mistreatment of vulnerable individuals and groups risks furnishing its own justification for continuing to mistreat such individuals and groups¹⁴² will not think significant weight should be placed on tradition in individual rights controversies, at least as a general matter. Those who believe that conventional societal morality should significantly inform the scope of individual rights will likely disagree.¹⁴³ Such disagreement reflects a more basic disagreement about the purposes that certain rights provisions exist to accomplish. The key point here, however, is that looking to tradition in that way is a different enterprise from looking to the historical practice that is considered relevant under the historical gloss approach. Although the categories of public action and private action are often not clearly distinct, governmental actors in the rights context interact with those who possess far less power than the government to push back or advance contrary understandings. As a result, the institutional deference and Burkean consequentialist justifications for relying on practice are weaker in that context.¹⁴⁴

It also seems less necessary to rely upon historical practice in many individual rights cases, given the availability of alternative decisional materials beyond the personal preferences or values of the interpreter. Those materials primarily include judicial precedent, which is typically plentiful. When such precedent is unavailable or is thought to be insufficiently persuasive to be followed, courts and commentators sometimes can investigate the original

¹³⁹ See Bradley & Morrison, *supra* note 1, at 416.

¹⁴⁰ See generally Rebecca L. Brown, Essay, *Tradition and Insight*, 103 YALE L.J. 177 (1993); William N. Eskridge, Jr., *Sodomy and Guns: Tradition as Democratic Deliberation and Constitutional Interpretation*, 32 HARV. J.L. & PUB. POL’Y 193 (2009); Kim Forde-Mazrui, *Tradition as Justification: The Case of Opposite-Sex Marriage*, 78 U. CHI. L. REV. 281 (2011); Michael J. Perry, *The Authority of Text, Tradition, and Reason: A Theory of Constitutional “Interpretation,”* 58 S. CAL. L. REV. 551 (1985); Michael W. McConnell, *Time, Institutions, and Interpretation*, 95 B.U. L. REV. 1745 (2015).

¹⁴¹ See, e.g., *Washington v. Glucksberg*, 521 U.S. 702 (1997) (substantive due process); *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014) (Establishment Clause); *Glossip v. Gross*, 135 S. Ct. 2726 (2015) (capital punishment); *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (Second Amendment incorporation).

¹⁴² See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015) (“If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied.”). See also Sunstein, *supra* note 35, at 400 (“Under some constitutional provisions, above all the Equal Protection Clause, the Burkean [tradition-based] approach is hard or perhaps impossible to square with entrenched understandings in American constitutional law . . .”).

¹⁴³ See, e.g., McConnell, *supra* note 140, at 1775–76 (arguing that rights should be protected under substantive due process only if they are objectively, deeply rooted in American history and tradition).

¹⁴⁴ Cf. Huq, *supra* note 87, at 758–59 (arguing that the justifications for relying in gloss in the separation of powers context do not support relying on historical practice in the Fourth Amendment context).

meaning of the constitutional provision at issue.¹⁴⁵ Alternatively, if one is not of an originalist bent, or if original meaning has run out, one can seek to discern the basic purpose or structural function of the provision in the constitutional scheme.¹⁴⁶

In sum, the most defensible domain for the historical gloss approach is in the area of separation of powers. To be sure, some of the arguments for relying upon historical practice in that context might also apply in some federalism and individual rights controversies. Moreover, there is not always a perfectly neat division among the three contexts,¹⁴⁷ and there may be relevant distinctions among different cases falling within a particular context.¹⁴⁸ But some of the arguments for historical practice are specific to the separation of powers context, and extending such practice to other areas at least raises additional normative concerns.

III. LIQUIDATION AS AN ALTERNATIVE TO GLOSS

Over the past two decades, a small number of originalist scholars have become interested in the concept of “liquidation,” which would allow post-Founding historical practice to resolve indeterminacies in the Constitution’s original meaning and thereby “fix” its meaning.¹⁴⁹ That idea is frequently ascribed to James Madison, based on statements he made in *The Federalist* and in later writings. Madison never presented a detailed explanation of the idea, and it has received only limited, albeit increasing, attention in the academic literature. As a result, it is not entirely clear whether and to what extent the concept of liquidation differs from

¹⁴⁵ See, e.g., *District of Columbia v. Heller*, 554 U.S. 570 (2008) (holding on originalist and other grounds that the Second Amendment protects an individual right to possess a firearm, including a handgun, in the home for purposes of self-defense).

¹⁴⁶ See, e.g., *Washington v. Davis*, 426 U.S. 229, 239 (1976) (asserting that “[t]he central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race”); *Heller*, 554 U.S. at 637, 640 (Stevens, J., dissenting) (arguing that the structural function of the Second Amendment is to prevent Congress from disarming the state militias).

¹⁴⁷ To take the example in which the lines are perhaps the most blurred, constitutional questions about the scope of congressional power under the Reconstruction Amendments have a separation of powers dimension (because part of what is at stake is which branch controls the meaning of those amendments); a federalism dimension (because the broader one construes congressional power, the more state law is preempted); and an individual rights dimension (because the scope of congressional power is related to the content of the rights thought to be protected by the first section of each amendment). For discussions, see, for example, Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943 (2003); and Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juriscentric Restrictions on Section Five Power*, 78 IND. L.J. 1 (2003).

¹⁴⁸ For example, there are many different kinds of constitutional federalism questions, some of which have nothing to do with the existence or scope of collective action problems. There is no reason to assume that historical practice is equally relevant or irrelevant to all such questions.

¹⁴⁹ Such indeterminacies include instances of ambiguity and vagueness. Ambiguity exists when a text could mean more than one specific thing, while vagueness exists when the applicability of the text to particular circumstances is unclear. See, e.g., Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 97–98 (2010).

the historical gloss approach. Indeed, as we noted in the Introduction, the majority in *Noel Canning* seemed to treat liquidation and gloss as the same phenomenon.¹⁵⁰

As we have noted elsewhere,¹⁵¹ there are a number of uncertainties concerning the theory of liquidation. One such uncertainty is whether the settlement of constitutional meaning may occur only through early post-Founding practice, or whether it also may occur through later practice long after the Founding—and, if the latter, how likely it is that a settlement long after the Founding could take place. It is also unclear whether, under the liquidation theory, an initial settlement through liquidation may be undone by a subsequent settlement through a new liquidation. How one answers those questions will go a long way toward determining how much difference there is between the liquidation approach and the historical gloss approach.

Until recently, Professor Caleb Nelson had presented the only extensive academic account of the liquidation theory, and his analysis was often referenced by others when discussing the concept.¹⁵² In seeking to explain why originalism does not “self-destruct” as a result of evidence that the Founders themselves expected constitutional meaning to evolve, Nelson contends that the Founders had in mind the concept of liquidation, pursuant to which constitutional meaning would become “fixed” through practice in a way that would not lead to “a perpetually evolving” Constitution.¹⁵³ Under his account, the liquidation concept turns on initial practice, which typically although not necessarily will be early practice, and the first liquidation may not be undone through subsequent liquidation.

Another originalist scholar, William Baude, has recently presented a broader account of liquidation. Baude does not insist that liquidation be based only on early practice, and, in contrast to Nelson, Baude argues that the first liquidation may be undone through subsequent liquidation.¹⁵⁴

This Part critiques the idea of liquidation as both an actual and an attractive alternative to gloss. We argue that Nelson’s narrow account of liquidation distinguishes liquidation from gloss, but that it does so in ways that are normatively problematic. We then argue that, although Baude’s broader account of liquidation responds to some of our normative concerns by diminishing the distinction between liquidation and gloss, significant differences remain that continue to raise normative problems for liquidation. Those normative problems should matter to originalists and non-originalists alike who seek to address indeterminacies in the constitutional text by resort to post-Founding practice. Even for most originalists, the proper

¹⁵⁰ See *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2580 (2014) (citing a variety of decisions, some that have endorsed gloss, for the proposition that “our cases have continually confirmed Madison’s view”).

¹⁵¹ See Bradley & Siegel, *supra* note 12, at 29–30.

¹⁵² See, e.g., Randy Barnett, *Liquid Constitutionalism*, THE VOLOKH CONSPIRACY (April 13, 2017) (“[O]riginalists (and nonoriginalists) have been seriously examining the concept of ‘liquidating’ meaning for quite a long time: at least since Caleb Nelson’s 2001 article, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 Va. L. Rev. 1 (2001).”).

¹⁵³ See, e.g., Nelson, *Originalism and Interpretive Conventions*, *supra* note 27, at 521.

¹⁵⁴ See generally Baude, *supra* note 28. Although broader than Nelson’s account in that respect, there may be a way in which Baude’s account is narrower. Specifically, it is not clear that Nelson would require, as Baude does, that the liquidation be validated by public approval. See *infra* text accompanying note 221.

scope of that gap-filling enterprise, whether it is referred to as “constitutional construction” or part of “constitutional interpretation,” is a normative question that cannot itself be determined by the original meaning of the text.¹⁵⁵

A. *The Narrow Account: Normatively Attractive?*

1. *The Narrow Account of Liquidation.* One reason why originalist scholars might look to early post-Founding practice is that it might provide evidence of how the Constitution was understood by those who lived during the time when it was written and approved.¹⁵⁶ Some originalist scholars, however, have suggested that such practice might be relevant in a different way. Instead of looking to early practice as evidence of original meaning, those scholars attribute to the Founders the recognition that the constitutional text did not settle certain questions of constitutional meaning and that the answers to those questions would need to be worked out, or “liquidated,” through decisions and practices.¹⁵⁷ Once liquidated, the argument goes, the meaning of the Constitution on those questions would become “fixed” and so not subject to change.

The idea of liquidation through initial practice is most frequently associated with a statement made by James Madison in *Federalist No. 37*. “All new laws,” he wrote in that essay, “though penned with the greatest technical skill and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be

¹⁵⁵ The exception is “original methods originalists,” who insist that constitutional methodologies used today must be those that would have been used by the Founders. See *infra* text accompanying note 288. This Article does not attempt to engage with possible Founding understandings about constitutional methodology other than to raise questions in Part IV about whether the liquidation theory is properly attributed to James Madison.

¹⁵⁶ See Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. REV. 1487, 1498, 1537 (2005) (“Early interpretations evidence the original meaning of the Constitution because it is thought that early interpreters were likely to understand the meaning of the constitutional language and the context in which it was enacted.”); see also, e.g., *District of Columbia v. Heller*, 554 U.S. 570, 605 (2008) (describing “the examination of a variety of legal and other sources to determine the public understanding of a legal text in the period after its enactment or ratification” as “a critical tool of constitutional interpretation”).

¹⁵⁷ See, e.g., Nelson, *Originalism and Interpretive Conventions*, *supra* note 27, at 525–53; see also Caleb Nelson, *The Constitutionality of Civil Forfeiture*, 125 YALE L.J. 2446, 2453 (2016) (“[L]eading members of the Founding generation anticipated that post-Founding practices or precedents would settle on one of the permissible interpretations of provisions that lent themselves to multiple readings. In the absence of ‘extraordinary and peculiar circumstances,’ moreover, those liquidations were expected to be permanent”) (quoting Letter from James Madison to Charles J. Ingersoll (June 25, 1831), in 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 183, 185 (1865)); Philip A. Hamburger, *The Constitution’s Accommodation of Social Change*, 88 MICH. L. REV. 239, 309 (1989) (suggesting that Madison “expected vagueness in the Constitution to be resolved and made certain rather than that it would be an opportunity for flexibility and judicial adaptation of the Constitution to changing exigencies”). Without specifically endorsing the liquidation thesis, Akhil Amar has argued that a number of the institutional practices of the Washington administration have had lasting precedential effect on understandings of presidential authority. See AKHIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION* (2012) (Chapter 8). Our colleague Stephen Sachs reads Amar’s argument as embracing the idea of liquidation through early practice. See Stephen E. Sachs, *The “Unwritten Constitution” and Unwritten Law*, 2013 U. ILL. L. REV. 1797, 1806–08. In the next chapter of his book, however, Amar goes on to discuss how institutional practices of Congress, the Supreme Court, and administrative agencies, including practices long after the Founding, “gloss and clarify the text, inducing interpreters to read the otherwise indeterminate text in a highly determinate way.” *Id.* at 335.

liquidated and ascertained by a series of particular discussions and adjudications.”¹⁵⁸ As that passage makes clear, Madison was not tying liquidation specifically to constitutional interpretation; he was simply observing that it was something that one should expect with all new laws (including statutory law and the common law). Hamilton also made references to “liquidation” in *The Federalist*, similarly without suggesting that it was something specific to the Constitution.¹⁵⁹

Nelson argues that, when Founders such as Madison referred to the possibility that post-Founding practice would “fix” constitutional meaning, they were using that term in a manner similar to those who, like the famous Anglo-Irish satirist Jonathan Swift, had advocated “fixing” the English language so that its meaning would not change over time.¹⁶⁰ The possibility of preventing change in the meaning of language was controversial in eighteenth-century England, and Nelson notes that many Americans of the Founding generation probably assumed that change in language was inevitable. But Nelson observes that “[w]hatever their position on this issue . . . Americans certainly were familiar with the idea of ‘fixing’ the language, and they associated this concept with permanence and immutability.”¹⁶¹ Madison’s references to “fixing” the meaning of the Constitution, Nelson contends, must be understood in that context: “[a]lthough Madison conceded that the words used in the Constitution might well fall out of favor or acquire new shades of meaning in later usage, he was suggesting that their meaning *in the Constitution* would not change; once that meaning was ‘fixed,’ it should endure.”¹⁶²

Under Nelson’s account, the Founders were delegating to governmental actors, and to the courts, the task of resolving indeterminacies in the original meaning of the Constitution. As Nelson explains, regardless of whether the Founders viewed the liquidation process as part of the original meaning of the Constitution (thus binding as a matter of originalism today) or something associated with the background “general” law in existence at the time (thus not necessarily binding as a matter of originalism today), the basic idea of liquidation remained the

¹⁵⁸ THE FEDERALIST NO. 37 (Madison), at 229, in THE FEDERALIST PAPERS (Clinton Rossiter ed., 1961). Madison also referred to the liquidation idea in later writings, albeit decades after the Founding. See, e.g., Letter to Spencer Roane (Sept. 2, 1819), in 8 THE WRITINGS OF JAMES MADISON 450 (Gaillard Hunt ed., 1908).

¹⁵⁹ Alexander Hamilton observed in *Federalist No. 78* that, when two statutes conflict, “it is the province of the courts to liquidate and fix their meaning and operation.” THE FEDERALIST NO. 78 (Hamilton), at 468, in THE FEDERALIST PAPERS, *supra* note 158; see also THE FEDERALIST NO. 22 (Hamilton), at 150, in THE FEDERALIST PAPERS, *supra* (“Laws are a dead letter without courts to expound and define their true meaning and operation.”); THE FEDERALIST NO. 82 (Hamilton), at 491, in THE FEDERALIST PAPERS, *supra* (“‘Tis time only that can mature and perfect so compound a system, can liquidate the meaning of all the parts, and can adjust them to each other in a harmonious and consistent WHOLE.”).

¹⁶⁰ See Nelson, *Originalism and Interpretive Conventions*, *supra* note 27, at 530–35. Historian Jonathan Gienapp observes that “language itself had become an urgent problem in many corners of the eighteenth century as the prospect of linguistic instability haunted rhetoricians, grammarians, and philosophers alike.” GIENAPP, *supra* note 29, at 42; see also *id.* at 42–45 (discussing the epistemological concerns of Jonathan Swift, Samuel Johnson, Thomas Hobbes, and John Locke).

¹⁶¹ *Id.* at 534–35. Accord GIENAPP, *supra* note 29, at 45 (“These far-ranging meditations on the perils of linguistic instability informed colonial American intellectual life. The works of Swift, Johnson, Locke, and others were well-known . . .”).

¹⁶² *Id.* at 535 (emphasis added).

same: “reasonable members of the founding generation . . . might conceivably have read each indeterminate provision in the Constitution not only to define a range of permissible interpretations, but also to delegate power to the provision’s initial interpreters to make an authoritative selection within that range.”¹⁶³

As an aside, it is worth noting that this conception of liquidation goes beyond what might be entailed by analogizing the Swift-ian idea of fixing linguistic meaning to constitutional interpretation. Such an analogy might simply suggest that the meaning of specific words in the Constitution should not change merely because usages of language change. But no one contends otherwise, and that is not where the debate between originalists and non-originalists is centered. The idea of constitutional liquidation is different: it is that the meaning of *linguistically indeterminate* provisions, and potentially also *structural inferences* from those provisions, can be settled by post-Founding practice.

In any event, it is easy to see why the account of liquidation offered by Nelson would be attractive to at least some originalists. For one thing, it tells interpreters where to look for evidence of constitutional meaning when indeterminacies in the text render it impossible to discern the original meaning—typically, in early post-Founding deliberations or decisions. For another thing, by “fixing” the meaning, the account avoids the possibility that constitutional meaning might change over time absent a constitutional amendment. We assume for now (and question later) that the two elements of the approach—looking only (or primarily) to initial practice and decisions and disallowing a subsequent interpretation that contradicts the one reflected in initial practice¹⁶⁴—follow from Madison’s statements. Even if that is the case, we contend that those two elements are normatively problematic along a number of dimensions.

2. *Problems with the Narrow Account of Liquidation.* Assuming it could be shown that Madison did have in mind an approach whereby indeterminacies in original meaning could be settled by, and only by, initial practice, and assuming it could further be shown that some (or many or most) other Founders shared Madison’s view, those demonstrations would not themselves establish that constitutional interpreters today should accept such an approach. As careful originalists like Nelson acknowledge, originalism cannot establish its own validity.¹⁶⁵

¹⁶³ *Id.* at 551. Even if that approach is not binding as a matter of originalism today, Nelson notes that originalists might choose to follow it because “continuing to adhere to settled liquidations may help to promote the same sort of stability that attracts some people to originalism in the first place.” *Id.* at 550 n.136. For discussion of how “constitutional backdrops” might have contemporary legal force even if not part of the original meaning of the constitutional text, see Stephen E. Sachs, *Constitutional Backdrops*, 80 GEO. WASH. L. REV. 1813 (2012).

¹⁶⁴ See also, e.g., Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as It Sounds*, 22 CONST. COMM. 257, 267 (2005) (understanding the liquidation concept as presented by Nelson to mean that “very early decisions and practices can ‘fix’ the original meaning of the text where the text is open-ended and, once fixed, this meaning cannot then be trumped by later judicial decision”); Henry Paul Monaghan, *Supremacy Clause Textualism*, 110 COLUM. L. REV. 731, 787 (2010) (“Acknowledging that some constitutional provisions would require future liquidation, many prominent originalists, however, would accept only those liquidating precedents that arose close in time to the founding.”); Michael B. Rappaport, *Why Non-Originalism Does Not Justify Departing from the Original Meaning of the Recess Appointments Clause*, 38 HARV. J.L. & PUB POL’Y 889, 893 n. 8 (2015) (“If there is an early series of decisions that are consistent, which are then followed by a later series of decisions that adopt a different view, then it is by no means clear that the later series can liquidate the meaning.”).

¹⁶⁵ See, e.g., Nelson, *Originalism and Interpretive Conventions*, *supra* note 27, at 547–48. Modern variants of originalism, unlike the first generation of originalist scholarship, focus on the original meaning of the

A normative defense of the liquidation approach narrowly defined would need to address substantial objections.

The theory behind the liquidation idea, to reiterate, is that the Founders delegated the settlement of indeterminacies in constitutional meaning to subsequent governmental actors.¹⁶⁶ It is unclear, however, why it would have made sense for the Founders to decide that constitutional meaning should be determined dispositively by the particular political alignment that happened to exist whenever the issue first arose. In attempting to determine constitutional meaning, the initial generation of political actors presumably would be no less self-serving, partisan, and potentially short-sighted than later generations, and they would have much less experience in apprehending the needs of American governance.¹⁶⁷ While there was often talk of the importance of civic virtue in the Founding period,¹⁶⁸ the politics of the time were acrimonious, and the debates over ratification of the Constitution displayed sharp disagreements over basic issues such as the proper scope of national government power.¹⁶⁹ Moreover, the initial post-Founding generations obviously lacked knowledge of subsequent changes in conditions and values that could dramatically affect the implications of adopting one interpretation of the Constitution instead of another. Notwithstanding those substantial limitations, the liquidation approach would license earlier generations of politicians to bind more experienced successors through simple majoritarian politics.¹⁷⁰

Constitution rather than on original intent. *See, e.g.*, Keith E. Whittington, *Originalism: A Critical Introduction*, 82 *FORDHAM L. REV.* 375 (2013). That shift in focus further complicates any claim that a liquidation approach to the Constitution should be followed because Founders such as James Madison intended it. To be sure, considerations of intent and meaning may not be neatly separable, so it might be argued (for example) that liquidation was part of the background understandings about how the Constitution would operate. *Cf.* Sachs, *supra* note 163. Again, however, even if that could be shown, it would not by itself establish that liquidation should be followed.

¹⁶⁶ *See* Nelson, *Originalism and Interpretive Conventions*, *supra* note 27, at 551.

¹⁶⁷ A principal theme of the *Federalist Papers* is the importance of learning the lessons of experience. *See, e.g.*, THE FEDERALIST NO. 14 (Madison), at 104, *in* THE FEDERALIST PAPERS, *supra* note 158 (“Is it not the glory of the people of America, that, whilst they have paid a decent regard to the opinions of former times and other nations, they have not suffered a blind veneration for antiquity, for custom, or for names, to overrule the suggestions of their own good sense, the knowledge of their own situation, and the lessons of their own experience?”). The *Federalist Papers* do not suggest that the need to learn from experience would expire with the ratification of the Constitution.

¹⁶⁸ *See, e.g.*, THE FEDERALIST NO. 57, at 350 (Hamilton or Madison), *in* THE FEDERALIST PAPERS, *supra* note 158 (“The aim of every political constitution is, or ought to be, first to obtain for rulers men who possess most wisdom to discern, and most virtue to pursue, the common good of the society; and in the next place, to take the most effectual precautions for keeping them virtuous whilst they continue to hold their public trust.”).

¹⁶⁹ For a discussion, see generally RAKOVE, *supra* note 127.

¹⁷⁰ One common justification for *Chevron* deference to administrative agencies rests on a similar delegation account. “Deference under *Chevron* to an agency’s construction of a statute that it administers,” the Court has explained, “is premised on the theory that a statute’s ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps.” *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000) (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984)). Under *Chevron*, however, agencies are not precluded from changing their interpretations (and, indeed, *Chevron* itself involved a revised agency interpretation). *See, e.g.*, *National Cable & Telecommunications Association v. Brand*

Those objections are not overcome by positing that liquidation should be limited to situations in which the earlier generations deliberated with unusual seriousness.¹⁷¹ Even if one could identify a way to distinguish different levels of congressional or executive branch seriousness, the more fundamental problem would remain that subsequent generations might deliberate at least as seriously and they would necessarily possess substantially more knowledge and experience.¹⁷² The net effect of widespread acceptance of the narrow version of the liquidation idea would be a regime that possesses many of the “dead hand” disadvantages of originalism, but few of the theory’s asserted upsides—namely, preventing constitutional change outside the demanding supermajoritarian process of Article V, and conferring democratic legitimacy upon the institution of judicial review by limiting it to enforcement of the original supermajoritarian act of higher lawmaking.

Another problem with Nelson’s embrace of liquidation over historical gloss is that such an embrace is in tension with the acceptance by many originalists of judicial precedent, as discussed in Part I. Justice Scalia, for example, made clear that he accepted the presumptively binding force of precedent in a number of areas of constitutional law.¹⁷³ He described his approach to precedent as a pragmatic “exception” to his originalism that was based on interests in stability.¹⁷⁴ Similarly, Judge Robert Bork accepted that a decision “may be clearly incorrect but nevertheless have become so embedded in the life of the nation, so accepted by the society, so fundamental to the private and public expectations of individuals and institutions, that the result should not be changed now.”¹⁷⁵ But, as emphasized above,¹⁷⁶ interests in stability and related rule-of-law considerations, such as consistency, predictability, reliance, and transparency, can also be advanced by adhering to longstanding practices, regardless of whether they date to the early post-Founding period, and regardless of whether they were the initial practices.¹⁷⁷

X Internet Services, 545 U.S. 967, 981 (2005) (“Agency inconsistency is not a basis for declining to analyze the agency’s interpretation under the *Chevron* framework.”).

¹⁷¹ See *id.* at 528.

¹⁷² Cf. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819):

This provision is made in a Constitution intended to endure for ages to come, and consequently to be adapted to the various crises of human affairs. . . . To have declared that the best means shall not be used, but those alone without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances.

Id. at 415.

¹⁷³ See, e.g., *McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010) (Scalia, J., concurring) (“Despite my misgivings about Substantive Due Process as an original matter, I have acquiesced in the Court’s incorporation of certain guarantees in the Bill of Rights ‘because it is both long established and narrowly limited.’ *Albright v. Oliver*, 510 U.S. 266, 275 (1994) (Scalia, J., concurring).”).

¹⁷⁴ See SCALIA, *supra* note 57, at 139–40.

¹⁷⁵ ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 158 (1990).

¹⁷⁶ See *supra* notes 59–62 and accompanying text.

¹⁷⁷ See Bradley & Morrison, *supra* note 1, at 427–28; Cass R. Sunstein, *Originalism v. Burkeanism: A Dialogue Over Recess*, 126 HARV. L. REV. F. 126, 128 (2013). Compare Richard H. Fallon, Jr., *Stare Decisis and*

Other originalists like Professor Randy Barnett have suggested that deference to judicial precedent can be reconciled with originalism based in part on the idea of constitutional construction. As Barnett notes, “an original meaning originalist can take the abstract meaning as given, and accept that the application of this vague meaning to particular cases is left to future actors, including judges, to decide.”¹⁷⁸ But, as that sentence implies, the “future actors” need not be judges and could instead be political actors developing historical practice. Madison, it is worth underscoring, grouped judicial precedent and political practices together.¹⁷⁹ Indeed, even when referring to “adjudications” of constitutional meaning,¹⁸⁰ it is unlikely that he was referring only or primarily to judicial determinations, as opposed to legislative ones. Among other things, he was writing in the late eighteenth century, long before modern notions of judicial supremacy, at a time when most major constitutional questions were settled outside the courts.

In any case, if “liquidation” based on practice is like the development of judicial precedent, it should potentially include modern practice and be subject to revision.¹⁸¹ Many scholars—and particularly many originalists—believe that the Supreme Court should at least sometimes be willing to overrule its precedents when they conflict with what those same scholars understand to be the “proper” interpretation of the Constitution. If the Supreme Court can be wrong the first time it interprets the Constitution, surely the political branches can also be wrong the first time they interpret the Constitution. Consider, for example, the Judiciary Act of 1802, which reflected the Jeffersonian conviction that it was constitutionally permissible to end the tenure of Article III judges by abolishing their courts. The Jeffersonian view was not subsequently regarded as the final word on the meaning of the “good Behaviour” protection for judicial independence in Section One of Article III.¹⁸²

There are, to be sure, statements in a number of Supreme Court decisions suggesting that practices dating back to near the Founding can “fix[] the construction” to be given to constitutional provisions.¹⁸³ Those statements, however, do not contend that this is the only

the Constitution: An Essay on Constitutional Methodology, 76 N.Y.U. L. REV. 570, 588 (2001) (noting that *stare decisis* “promotes stability, protects settled expectations, and conserves judicial resources”).

¹⁷⁸ Barnett, *supra* note 164, at 264.

¹⁷⁹ As discussed in Part I, *see supra* note 58 and accompanying text, some originalists accept judicial precedent not as a pragmatic exception to originalism but as part of Article III judicial power, and so in that way might be able to reconcile an acceptance of judicial precedent with a rejection of nonjudicial precedent, depending on their grounds for accepting certain judicial precedents and not others, and also depending on whether consideration of nonjudicial precedent is part of the Article III judicial power.

¹⁸⁰ *See supra* text accompanying note 158.

¹⁸¹ When discussing the concept of liquidation as applied to judicial precedent, Professor Nelson has suggested that subsequent interpreters could reject a precedent if they “remained convinced that a prior construction went beyond the range of indeterminacy.” Nelson, *Stare Decisis*, *supra* note 27, at 14. In other words, under his account, a liquidation could be revisited if, but only if, subsequent interpreters concluded that it had not been an appropriate matter for liquidation in the first place. Within the zone of permissible liquidation, however, the views of early interpreters would be treated as dispositive.

¹⁸² For discussion of that history, see Grove, *supra* note 25, at 473-88.

¹⁸³ *See McGrain v. Daugherty*, 273 U.S. 135, 174 (1927) (“So, when their practice in the matter is appraised according to the circumstances in which it was begun and to those in which it has been continued, it falls

way in which constitutional meaning may legitimately be affected by practice. Moreover, those statements do not envision that meaning would become fixed merely as a result of the initial practice; rather, they expressly require longstanding acquiescence in the interpretation that was adopted. That is also true of Justice Scalia’s acknowledgment in *Noel Canning* that it would be appropriate to look to practices “unchallenged since the early days of the Republic.”¹⁸⁴ As a result, those statements do not appear to share the premise of the liquidation approach, as understood by scholars like Professor Nelson, that the initial post-Founding generation was delegated the authority to fix constitutional meaning. Instead, the statements in those decisions suggest that meaning would become fixed only if later generations continued to accept the early interpretation. The idea of fixation through longstanding acceptance of a practice, however, is fully consistent with a historical gloss approach to constitutional interpretation, as we explained in Part II.

In sum, originalist scholars like Nelson succeed in distinguishing liquidation from gloss by arguing that the initial liquidation fixes constitutional meaning forever absent a constitutional amendment. That approach is genuinely distinct from gloss, which does not insist on permanent fixation through practice and, relatedly, does not privilege early practice when it conflicts with longstanding subsequent practice. Indeed, the Burkean consequentialist, decisional capacity, and deference justifications for gloss, outlined above in Section II.B, suggest that, if anything, durable modern practices should be privileged over earlier ones (because, for example, those who have engaged in the modern practices are closer to contemporary conditions and problems). As we have explained, however, those very distinctions between the narrow account of liquidation and gloss render liquidation normatively problematic.

B. *The Broader Account: Gloss by Another Name?*

1. *The Broader Account of Liquidation.* In a recent article, another originalist scholar, Professor Will Baude, seeks to “reconstruct[] James Madison’s theory of post-enactment historical practice, sometimes called ‘liquidation.’”¹⁸⁵ According to Baude, that theory had three elements. First, the text of the Constitution had to be indeterminate with respect to the question at issue.¹⁸⁶ If a textual provision was clear, there was no occasion for liquidation. Second, government officials had to engage in a course of deliberate practice.¹⁸⁷ That element required repeated decisions or actions, not just one decision or action. Moreover, such repeated decisions or actions had to include reasoning about the constitutional question at issue, not simply decisions or actions publicly justified with whatever reasons, such as argumentation

nothing short of a practical construction, long continued, of the constitutional provisions respecting their powers, and therefore should be taken as fixing the meaning of those provisions, if otherwise doubtful.”); *Myers v. United States*, 272 U.S. 52, 175 (1926) (quoted *supra* note 21); *Stuart v Laird*, 5 U.S. (1 Cranch) 299, 309 (1803) (quoted *supra* note 21). Although the Court in *Stuart v. Laird* referenced acquiescence only for a period of several years, it is worth remembering that there were not many years to speak of in 1803.

¹⁸⁴ *Noel Canning*, 134 S. Ct. at 2594 (Scalia, J., concurring in the judgment).

¹⁸⁵ Baude, *supra* note 28, at 4.

¹⁸⁶ *Id.* at 13–16.

¹⁸⁷ *Id.* at 16–18.

about the policy wisdom or political expediency of the decisions or actions—although, Baude adds, such constitutional reasoning did not have to be genuine.¹⁸⁸ Third, the accretion of practice must have resulted in a settlement of the constitutional question.¹⁸⁹ That final element required both acquiescence by the dissenting side and “the public sanction,” which referred to “a real or imputed popular ratification” of the political settlement.¹⁹⁰

According to Baude, Madison’s theory of liquidation “look[s] to the most recent settled practice rather than privileging early practice or the first fixed practice.”¹⁹¹ Because past liquidations are not necessarily or characteristically permanent, Baude’s account of liquidation is broader than Nelson’s.¹⁹² Baude nonetheless resists the conclusion that his account is not “meaningfully distinct” from the historical gloss approach, reasoning that “liquidation has both a different pedigree and a different theoretical apparatus and so it therefore seems to diverge from (or add to) the ‘gloss’ project in at least three ways.”¹⁹³ The first way is “a different attitude toward the constitutional text.”¹⁹⁴ Whereas “[i]n liquidation, one must first ascertain that the constitutional text is indeterminate,” Justice Frankfurter “implies that he envisions looking to practice first and text second, rather than the other way around.”¹⁹⁵ Moreover, Baude suggests that the two of us in other writings “do not appear to view ambiguity as a hard boundary in the same way that liquidation does.”¹⁹⁶

Second, according to Baude, “[l]iquidation . . . requires that the course of practice be the result of constitutional *deliberation*—and hence more than just silence.”¹⁹⁷ By contrast, he writes, “Frankfurter’s gloss focused on what those in power have actually *done*. . . . Actions speak louder than words.”¹⁹⁸ Third, and switching from divergences between gloss and liquidation to a way in which liquidation adds to the gloss approach, Baude responds to the observation by one of us (referenced in Part II) that historical gloss is actually a cluster of different approaches that reflects different justifications for adhering to an accretion of political

¹⁸⁸ *Id.* at 48 n.290 (“The ultimate question for liquidation is not whether the government officials *really believed* in the constitutional arguments they articulated, but rather whether their interpretations reflected the public sanction.”).

¹⁸⁹ *Id.* at 18–21.

¹⁹⁰ *Id.* at 1; *see id.* at 19–20. Madison referenced “the public sanction” in an 1830 letter to Martin L. Hurlbut. *See* Letter from James Madison to Martin L. Hurlbut (reprinted as Hurlbert) (May 1, 1830), *in* 9 THE WRITINGS OF JAMES MADISON 370–72 (Gaillard Hunt ed., 1910).

¹⁹¹ Baude, *supra* note 28, at 63.

¹⁹² *See also* Michael W. McConnell, *Time, Institutions, and Interpretation*, 95 B.U. L. REV. 1745, 1774 (2015) (“Presumably, this ‘fixing’ [through liquidation] is not irrevocable, but, as in the case of precedent, departures require substantial justification and a similar process of deliberation and widespread acceptance.”).

¹⁹³ Baude, *supra* note 28, at 63–64.

¹⁹⁴ *Id.* at 64.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* (citing Bradley, *supra* note 19, at 830 n.317, and quoting Bradley & Siegel, *supra* note 44, at 1241–42).

¹⁹⁷ Baude, *supra* note 28, at 64.

¹⁹⁸ *Id.*

branch practice. “[I]t is possible,” he writes, “that liquidation is actually a specific kind of gloss, whose specific rules relate to its specific justifications.”¹⁹⁹

2. *Problems with the Broader Account of Liquidation.* We will address below whether either Baude’s broader account of liquidation or Nelson’s narrow account is properly attributed to Madison. Here we observe that Baude’s account, by looking to the most recently settled practice as opposed to the first fixed practice, is less vulnerable to the normative criticisms discussed above in evaluating Nelson’s account. But Baude reduces the force of those criticisms by diminishing the distinction between liquidation and gloss. Moreover, the differences that remain—which concern liquidation’s requirements that the course of practice be the result of constitutional deliberation and that the public approve a proposed settlement—are themselves vulnerable to substantial objections.

Contrary to what Baude suggests, gloss and liquidation do not necessarily imply a different attitude toward the constitutional text. Both accept that constitutional text that is perceived to be clear is controlling even when there is contrary historical practice. Justice Frankfurter said as much in part of his canonical formulation,²⁰⁰ and to the extent that he implied otherwise in another part,²⁰¹ it matters more what the modern Court has done in using the historical gloss approach, as well as what commentators have argued in defending such use.²⁰² As discussed in Part II, the Court in *Noel Canning* invoked historical practice only after concluding that the relevant portions of the text of the Recess Appointments Clause were unclear.²⁰³ And while we have argued that perceptions of textual clarity in American interpretive practice are themselves affected in part by various non-textual factors, including historical practice, that is a descriptive claim and is not inherent in the gloss approach.²⁰⁴ In addition, as discussed in the next Part, it is originalists attracted to the concept of liquidation who describe the Constitution as indeterminate (and so amenable to fixation by practice) on the

¹⁹⁹ *Id.* at 65.

²⁰⁰ See *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring) (“Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation . . .”).

²⁰¹ *Id.* (“Deeply embedded traditional ways of conducting government . . . give meaning to the words of a text or supply them.”).

²⁰² The modern Supreme Court’s most famous rejection of a gloss argument was in *INS v. Chadha*, 462 U.S. 919 (1983), where the Court held that a “legislative veto” provision was unconstitutional despite a longstanding congressional practice of including such provisions in legislation, in large part because the Court perceived the relevant constitutional text to be clear. See *id.* at 945 (“Explicit and unambiguous provisions of the Constitution prescribe and define the respective functions of the Congress and of the Executive in the legislative process.”).

²⁰³ See *supra* note 94 and accompanying text.

²⁰⁴ See generally Bradley & Siegel, *supra* note 44. But cf. David A. Strauss, *Foreword: Does the Constitution Mean What it Says?*, 129 HARV. L. REV. 1, 3 (2015) (“Adhering to the text would require us to relinquish many of the most important and well-established principles of constitutional law.”). For an argument that it is more difficult to “know” the meaning of statutory text in high-stakes situations and that this difficulty helps explain the tendency of courts to treat the text more loosely in such cases, see Ryan D. Doerfler, *High-Stakes Interpretation*, 116 MICH. L. REV. 523 (2018).

question of the constitutionality of a national bank,²⁰⁵ the issue regarding which “Madison implemented the principles of liquidation . . . most thoroughly.”²⁰⁶ It is also such originalists who ascribe a perception of indeterminacy to Madison and to Chief Justice John Marshall,²⁰⁷ even though—as detailed below—each argued vigorously and confidently in favor of their respective views of the bank’s constitutionality.²⁰⁸

Perhaps the disagreement that Baude senses between scholars who tend to favor gloss and scholars who tend to favor liquidation is not a different attitude toward the constitutional text but rather a different attitude toward “the Constitution.”²⁰⁹ Interpreters most likely to be attracted to liquidation might understand the Constitution as consisting only of the original meaning of the text. On that view, liquidation would be part of constitutional construction, which becomes permissible when the text is indeterminate, but not part of the Constitution. Interpreters most likely to be attracted to gloss, by contrast, might have a more expansive view of what qualifies as the Constitution, understanding it to include materials in addition to the original meaning of the text.²¹⁰ Any such difference, however, likely stems not from any inherent differences between liquidation and gloss, but from differences in the interpreters who tend to be attracted to one theory or the other. After all, historical practice standing alone is not considered part of the Constitution itself under either liquidation or gloss.²¹¹ And gloss, like liquidation, is compatible with the idea of constitutional construction.²¹² Moreover, while it is true that gloss might inform inferences about the constitutional structure as well as the interpretation of specific textual provisions,²¹³ many originalist judges and scholars supplement their originalism with structural argumentation,²¹⁴ and it is not clear why liquidation would be inapplicable to such argumentation. In short, some versions of originalism could accept gloss, and some versions of non-originalism could accept liquidation.²¹⁵

²⁰⁵ See, e.g., Baude, *supra* note 28, at 21–29.

²⁰⁶ See *id.* at 21.

²⁰⁷ See, e.g., *id.* at 24–25.

²⁰⁸ See *infra* Part IV.

²⁰⁹ For a recent study of the evolution in thinking about “the Constitution” during the decade after its adoption, see generally GIENAPP, *supra* note 29.

²¹⁰ Cf. WHITTINGTON, *supra* note 42, at 3 (“Examination of political efforts to construct constitutional meaning reveals that the governing Constitution is a synthesis of legal doctrines, institutional practices, and political norms.”).

²¹¹ See *supra* Part II (discussing our approach to gloss).

²¹² See Bradley & Morrison, *supra* note 1, at 425–26.

²¹³ See Bradley & Siegel, *supra* note 19, at 276–78.

²¹⁴ See, e.g., *Shelby County v. Holder*, 570 U.S. 529 (2013) (structural principle of equal state sovereignty); *Printz v. United States*, 521 U.S. 898 (1997) (anti-commandeering principle).

²¹⁵ There might be even more fundamental differences between originalists and non-originalists about the meaning of “law”—for example, about the extent to which law encompasses consequentialist as well as formal elements, an issue that connects to philosophical debates about legal positivism. Cf. Sachs, *supra* note 54, at 833 (“The originalist and the pluralist simply disagree on which sources [of law] matter.”). But, again, such differences do not seem intrinsic to the debate between liquidation and gloss.

Professor Baude’s second attempt to distinguish his broader account of liquidation from the historical gloss approach fares better. Whereas Professor Baude’s account would always require the course of practice to be the consequence of constitutional deliberation about the question at issue, gloss (as explained in Part II) need not rest on the idea that it reflects an agreement between the two political branches about questions of constitutionality. Gloss can additionally or alternatively rest on risk-averse Burkean arguments about what has worked at least tolerably well, about stability, and about reliance interests.²¹⁶ Such considerations may be deemed important when the practice has not been overly controversial and has enjoyed bipartisan participation, and also when it may be impossible to know all of the ways in which the practice reflects compromises and accommodations over time, such that one should be wary about attempts to pull on one component of the compromises or accommodations in isolation. In addition, as also discussed in Part II, gloss can rest on considerations of decisional capacity, which in some instances will mean that longstanding governmental practices provide the most defensible interpretive material regardless of whether they are found to reflect inter-branch constitutional agreement.

Both descriptively and normatively, it counts in favor of the gloss approach and against Professor Baude’s account of liquidation that the justifications for crediting gloss include not only deference to the constitutional judgments of government officials, but also Burkean consequentialism and considerations of decisional capacity. As a realist matter, such considerations almost certainly affect the constitutional reasoning of most judges and commentators,²¹⁷ and the gloss approach is more transparent than Professor Baude’s liquidation account about that aspect of interpretive practice. Statements like the following from *INS v. Chadha* may be true in a sense, but they are incomplete as accounts of our constitutional practice:

[T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government, and our inquiry is sharpened rather than blunted by the fact that congressional veto provisions are appearing with increasing frequency in statutes which delegate authority to executive and independent agencies²¹⁸

It is true that efficiency, convenience, and usefulness do not supersede “the Constitution,” and *Chadha* appears to have been a case in which the Court thought that the meaning of the constitutional text was clear, rendering resort to historical practice inappropriate. But functional concerns and historical practice do play an important role in discerning the constitutional separation of powers when the constitutional text and structure are not perceived to be clear. Relatedly, rhetoric to the effect that “we protect the Constitution even if it causes the heavens to fall” is likely to be somewhat disingenuous, or at least unrealistic, which is why it is

²¹⁶ See Bradley, *supra* note 19, at 66–67.

²¹⁷ See generally Bradley & Siegel, *supra* note 44.

²¹⁸ 462 U.S. 919, 944 (1983).

extraordinarily rare to find judges or commentators who think that enforcement of their own understanding of the Constitution would actually cause the heavens to fall.

Normatively, it seems too restrictive—and would likely prove destabilizing—always to require a strong showing of an inter-branch agreement or settlement about the meaning of the Constitution before historical practice could be credited in constitutional interpretation. As discussed in Section II.B, a number of important and longstanding government practices, relating to both domestic and foreign affairs, in the fields of both constitutional law and federal courts, do not clearly reflect any inter-branch agreement about constitutional meaning and yet have become well-accepted aspects of our constitutional practice. Moreover, it is not certain that early nineteenth-century political branch practice with respect to the national bank satisfies Baude’s criteria, given that constitutional opposition to the bank survived *McCulloch*²¹⁹ and culminated in the rejection by the popular (and populist) President Andrew Jackson of both the bank and Madison’s position that the constitutional question had been settled by practice.²²⁰

There is an additional way in which Baude distinguishes his broader account of liquidation from the historical gloss approach, although he does not take note of the difference. According to Baude, the liquidation process is not complete until the public directly or indirectly approves one proposed political settlement over others.²²¹ He never explains what counts as direct or indirect public approval and so how to discern it, but that requirement does seem distinct from accounts of historical gloss, which focus exclusively on the actions, inactions, and decisions of government officials, not on the approval of the general public.

Always requiring (and so having to detect) public approval of a political settlement before it can count as fixing the meaning of the Constitution for a time seems to us both unrealistic and normatively problematic. It is hard enough to use historical practice in a principled fashion when focusing only on the conduct and arguments of government officials. Discerning when “the public” has blessed the settlement seems a hopeless task: without some way of knowing which proposed settlements the public has or has not approved, that requirement seems impossible to operationalize. For example, as just discussed, Baude notes President Jackson’s reasons for disagreeing with Madison about whether the issue of the constitutionality of a national bank had been settled, but Baude offers no way of adjudicating the disagreement between them.²²²

In addition, as Baude notes, “liquidation can happen on mundane constitutional questions that do not attract much public notice.”²²³ If constitutional issues do not attract much public attention, it is not clear how “the public sanction” can be forthcoming. For example,

²¹⁹ See, e.g., *Osborn v. Bank of the United States*, 22 U.S. 738 (1824) (rejecting an attempt by an Ohio official in effect to relitigate *McCulloch*).

²²⁰ See Andrew Jackson, Veto Message (July 10, 1832), in 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789–1897, at 576–89 (James D. Richardson ed., 1896); see also Baude, *supra* note 28, at 28–29 (discussing that episode).

²²¹ See Baude, *supra* note 28, at 19–20.

²²² See *id.* at 27–29.

²²³ See *id.* at 66.

Baude observes that Justice Joseph Story failed to understand the subtlety of certain of Madison’s constitutionally conscientious maneuvers during spending debates in Congress.²²⁴ Baude does not explain how the less engaged, and less discerning, mass public could have figured out what Madison was up to.

Moreover, even when constitutional issues do attract public attention, the engaged public will rarely reach consensus on a given question. That is especially true in circumstances of cultural conflict or political polarization, which have existed for much of American history, and certainly exist today. The requisite percentage of the public that needs to sanction a settlement remains a mystery.

Requiring public approval also seems normatively undesirable, at least much of the time. Baude does not defend requiring “the public sanction” except to the extent he is making an originalist argument grounded in Madison’s own views. He expressly disclaims making such an originalist argument,²²⁵ even as he seems to imply throughout his article that his account of liquidation is justified by originalism and Madisonian “pedigree.”²²⁶ In any event, requiring public approval makes little sense with respect to many constitutional issues (such as the meaning of the Recess Appointments Clause or the scope of the President’s authority to recognize foreign governments), regarding which the mass public will not be directly informed or engaged. Relatedly, Baude does not address whether liquidation is, like gloss, relevant to illuminating structural principles of constitutional law in addition to resolving indeterminacies in specific textual provisions; if so, it becomes even more uncertain how a public sanction requirement would make sense given the public’s relative lack of awareness of structural principles.

Finally, whereas most defenses of gloss have focused on the separation of powers for the reasons discussed in Section II.C, liquidation under Baude’s account potentially applies to all issues of constitutional law, including federalism and individual rights controversies. Although Baude does not take a definitive position on the question of liquidation’s domain, he notes that “[a]ny provision of the Constitution can be indeterminate.”²²⁷ He also observes that the controversy over the national bank, which he describes as “the archetypical example of liquidation,” involved an issue of federalism.²²⁸ And while he acknowledges some difficulties associated with fitting “Madison’s model” to individual rights cases, he also observes in favor of such a fit that “Founding-era thought” may not have understood individual rights as

²²⁴ See *id.* at 32. Madison was worried that federal spending on sympathetic causes would set legislative precedents for an unconstitutionally broad spending power, so he sought to reframe certain instances of such spending as tax breaks or partial repayments of debts. See *id.* at 29–32.

²²⁵ See *id.* at 4 (“This focus on Madison is expository and conceptual, not dictated either by history or constitutional law.”); *id.* at 35–47 (grounding liquidation partly in departmentalism, precedent, and tradition).

²²⁶ See *id.* at 6, 32–33, 35, 50, 64, 65 (expressly or impliedly invoking originalism or Madisonian “pedigree” as normative justification for liquidation). Relatedly, in presenting the elements of his theory of liquidation, Baude repeatedly associates them with statements by Madison and yet avoids committing to having described what could genuinely be described as Madison’s own theory, see *id.* at 14, leaving the reader uncertain at times about precisely what work Madison is doing in the article. For further discussion, see *infra* Part IV.

²²⁷ *Id.* at 49.

²²⁸ *Id.*

countermajoritarian; that the line between constitutional structure and individual rights is often blurred; and that the “public sanction” element of liquidation may render the concept suitable for individual rights issues.²²⁹ As we discussed in Section II.C, however, there are serious questions about the normative desirability of relying on historical practice to resolve constitutional issues outside of the area of separation of powers, particularly in the domain of individual rights. Baude does not address those questions.

IV. MADISON’S THEORY?

Originalist scholars who offer a narrow account of liquidation, like Nelson, argue that they are discerning Madison’s views on the role of historical practice in constitutional construction. So does Baude in developing his broader account. Because the narrow and broader accounts offer partially inconsistent interpretations of Madison’s thought, they cannot both be right to claim the mantle of Madison. We are not persuaded that either, in its entirety, is properly attributed to Madison, but the broader account seems to us somewhat closer to the historical mark. Having said that, we do not think Baude has established that Madison worked out anything like the systematic, three-part “theory” of liquidation that Baude outlines.

Before beginning, it is worth asking why, exactly, originalists such as Nelson and Baude are so eager to equate their ideas with Madison—why they seek, in effect, to liquidate liquidation through Madison. Because they otherwise reject the idea that originalism can self-justify, they sometimes suggest that they are reconstructing Madison’s thinking concerning liquidation merely because his ideas merely help illuminate a key question that would be important and valuable regardless of whether he happened to endorse it. On the other hand, in attempting to link liquidation specifically with Madison, a Founder and one of the central architects of the Constitution, they appear to be seeking to give the theory an originalist pedigree (and, as noted above, Baude in fact repeatedly invokes the theory’s purported pedigree). Implicitly, those theorists seem to be suggesting that fixation through practice may be compatible with originalism only if it can be made part of the “Founding,” with all the intellectual and cultural weight that accompanies that designation.

Whatever the reason for focusing on Madison, in order to understand what he was getting at in *Federalist No. 37*, it is necessary to put his reference to liquidation in context. That *Federalist* essay responds to Anti-Federalist criticisms that much of the language of the proposed Constitution was indeterminate. Madison replied by emphasizing the extraordinary difficulties that the Framers had confronted in attempting to draft a new framework of government. He noted that federalism was a novel constitutional arrangement, so that the Framers had scant previous experience from which to draw.²³⁰ He added that the Constitutional Convention faced great challenges even in the area of separation of powers, where previous experience was more substantial.²³¹ “Among the difficulties encountered by the convention,” Madison explained, “a very important one must have lain in combining the requisite stability and energy in government, with the inviolable attention due to liberty and to the republican

²²⁹ *Id.* at 50.

²³⁰ THE FEDERALIST NO. 37 (Madison), at 226, *in* THE FEDERALIST PAPERS, *supra* note 158.

²³¹ *Id.* at 228.

form.”²³² In emphasizing the Herculean nature of those efforts, Madison pointed to the long experience of Great Britain in attempting to work out differences in categories of law and jurisdiction, a process that he noted was still ongoing.²³³ He then made the statement about liquidation.²³⁴

Liquidation was required, Madison wrote, for three reasons. The first was “the obscurity arising from the complexity of objects” needing to be distinguished, including the distinction between federal and state power, and the lines separating the executive, legislative, and judicial authorities.²³⁵ The second reason concerned “the imperfections of the human faculties,” which make it even more difficult to perceive those objects.²³⁶ The third reason involved the limits of language, which Madison characterized as “inadequateness of the vehicle of ideas.”²³⁷ “Hence, it must happen,” Madison wrote, “that however accurately objects may be discriminated in themselves, and however accurately the discrimination may be considered, the definition of them may be rendered inaccurate by the inaccuracy of the terms in which it is delivered.”²³⁸ As Madison must have known, none of those justifications would ever disappear, even after what he referred to as “particular discussions and adjudications” took place in the early years of life under the new Constitution—or even many decades hence.²³⁹ For example, just after recording his observation about the limited extent to which any use of language can convey determinate meaning, Madison wrote that “[w]hen 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.”²⁴⁰ *Federalist No. 37* is deeply skeptical of the determinacy of human language: when speaking through such language, not even God can write determinately, Madison was saying.

Recall also that Madison referred both to practice and to judicial decisions as involved in liquidation.²⁴¹ It seems unlikely, however, that he was referring only to initial judicial

²³² *Id.* at 226.

²³³ *Id.* at 228.

²³⁴ *Id.* at 228–29.

²³⁵ *Id.* at 229.

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.* Cf. GIENAPP, *supra* note 29, at 110–11 (“At no point during ratification did any participant offer a more sophisticated account of language, its inherent complexities, and the peculiar problems it posed for written constitutionalism.”).

²⁴¹ See McConnell, *supra* note 192, at 1776 (“The rationale for liquidation by longstanding practice of democratically accountable bodies is mostly the same as—but more democratic than—the rationale for liquidation by judicial precedent. Madison referred to both forms of liquidation in the same breath.”); Peter J. Smith, *The Marshall Court and the Originalist’s Dilemma*, 90 MINN. L. REV. 612, 634 (2006) (“That Madison believed that congressional deliberation or popular action could fix constitutional meaning does not mean that he rejected the notion that the courts could fix it in appropriate cases, as well. Indeed, his discussion in *The Federalist No. 37* and in other sources suggests that he saw both as viable means of liquidating the meaning of constitutional

decisions, because it would not have been reasonable to expect all—or even most—issues of textual indeterminacy to be resolved by the courts in the immediate aftermath of the Constitution’s ratification, or even over the Constitution’s first century. Given the common law tradition that Madison referenced in *Federalist No. 37*, it is also unlikely that he thought that a judicial decision would fix constitutional meaning in a way that would disallow subsequent reconsideration of the decision. There are differing accounts of how strongly the Founders conceived of *stare decisis*, but none of those accounts suggests that they thought judicial decisions could never be revisited absent an Article V amendment.²⁴²

For those reasons, Madison need not be read in *Federalist No. 37* as suggesting either that initial practice would freeze the meaning of the Constitution going forward or that only such practice was relevant to constitutional interpretation. Instead, as historian Jack Rakove notes, Madison can reasonably be understood as referring broadly to “the ongoing process of resolving ‘obscure and equivocal’ *ambiguities* through ‘particular discussions and adjudications’—in a word, interpretation.”²⁴³ Such a process of interpretation logically would include frequent consideration of practice long after the Founding. As Rakove points out, “only knowledge created by intervening developments could supply the ‘want of antecedent experience’ felt by the framers.”²⁴⁴

To be sure, Madison did tell his colleagues in the first Congress that their decision regarding the power of the President to remove executive branch officers unilaterally “will become the permanent exposition of the Constitution.”²⁴⁵ Although Madison may well have believed as a normative matter that future interpreters should give the decision weight, his reference to permanence here can simply be read either as an effort to focus his colleagues’ attention on the importance of the issue or as a prediction of the probable precedential and path-dependent consequences of the decision (he used the word “will,” not “should”). Madison surely knew that whether it would in fact “become the permanent exposition of the Constitution” would depend on whether future interpreters would accept the decision as authoritative. In that regard, it is noteworthy that Congress subsequently insisted on a greater

ambiguities.”). The same can be said of Hamilton in *The Federalist No. 78*, which specifically references the courts. See *supra* note 159 (quoting that essay).

²⁴² See, e.g., Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647 (1999); McGinnis & Rappaport, *supra* note 58, at 809–23; Lee J. Strang, *An Originalist Theory of Precedent: Originalism, Nonoriginalist Precedent, and the Common Good*, 36 N.M. L. REV. 419 (2006); see also Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 757 (1988) (“In the American common law, *stare decisis* states a conditional obligation: precedent binds absent a showing of substantial countervailing considerations.”).

²⁴³ RAKOVE, *supra* note 127, at 159 (emphasis in original). See also H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 910 (1985) (“Madison’s argument, which Hamilton had anticipated in *The Federalist No. 22*, was of course a restatement in somewhat abstract terms, of the old common law assumption, shared by the Philadelphia framers, that the ‘intent’ of any legal document is the product of the interpretive process and not some fixed meaning that the author locks into the document’s text at the outset.”).

²⁴⁴ RAKOVE, *supra* note 127, at 159. See also Charles A. Lofgren, *The Original Understanding of Original Intent?*, 5 CONST. COMMENT. 77, 110 (1998) (interpreting Madison to mean that “[e]arly and continued practice” would serve as “a check on (but not an invariable barrier to) subsequent reinterpretation”).

²⁴⁵ 1 ANNALS OF CONG. 514 (1789). For a description of different scholarly views about what, if anything, was actually agreed upon in this “Decision of 1789,” see Bradley & Morrison, *supra* note 1, at 477.

role in the removal process, and the Supreme Court, despite resisting some of those efforts in *Myers v. United States*,²⁴⁶ ultimately has allowed Congress the ability to limit presidential removal of a variety of officials.²⁴⁷ Normatively, moreover, it seems like an overreading to replace what Madison actually said with words to the effect that the decision of the first Congress regarding the President’s authority to remove executive branch officers unilaterally “should become the permanent exposition of the Constitution no matter what the future may hold.”

As noted above, another example commonly cited as evidence of Madison’s embrace of the liquidation idea is his shift in public position concerning the constitutionality of a national bank. In December 1790, Alexander Hamilton submitted a plan for a national bank that would be chartered by Congress. Madison, who had been elected to the first Congress from Virginia, opened the debate in the House by declaring emphatically that the bank was beyond the scope of Congress’s enumerated powers.²⁴⁸ By 1815, however, Madison was now President, and in vetoing on policy grounds a bill to reauthorize the bank, he

[w]aiv[ed] the question of the constitutional authority of the Legislature to establish an incorporated bank as being precluded in my judgment by repeated recognitions under varied circumstances of the validity of such an institution in acts of the legislative, executive, and judicial branches of the Government, accompanied by indications, in different modes, of a concurrence of the general will of the nation.²⁴⁹

In that veto message, Madison did not appear to be saying that initial practice had fixed the meaning of the Necessary and Proper Clause for all time absent a formal amendment. Instead, he seemed to be suggesting that, because the political branches and the general public had long agreed that the bank was constitutional, he no longer felt entitled as President to insist on his own private opinion of the constitutional text, original understanding, and constitutional structure in considering whether to sign the bill into law. Such a view is consistent with historical gloss, as is his analogy to judicial precedent in subsequent correspondence discussing the issue.²⁵⁰ It is also worth keeping in mind that, in his veto message, Madison was speaking as an elected statesman responsible for considering the overall national interest, an institutional position that may reflect considerations that will not necessarily carry over to other interpretive contexts.

²⁴⁶ 272 U.S. 52 (1926).

²⁴⁷ See, e.g., *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935); *Morrison v. Olson*, 487 U.S. 654 (1988).

²⁴⁸ James Madison’s Speech in Congress Opposing the National Bank (Feb 2, 1791), in JAMES MADISON: WRITINGS 480-90 (Jack N. Rakove ed., 1999) [hereinafter “Madison, Bank Speech”].

²⁴⁹ James Madison, Veto Message on the National Bank (Jan 30, 1815), at <http://millercenter.org/president/madison/speeches/speech-3626>. See also Richard S. Arnold, *How James Madison Interpreted the Constitution*, 72 N.Y.U. L. REV. 267, 286–90 (1997).

²⁵⁰ See, e.g., Letter from James Madison to Charles J. Ingersoll (June 25, 1831), at <https://rotunda.upress.virginia.edu/founders/default.xqy?keys=FOEA-print-02-02-02-2374> (analogizing to judicial deference to precedent).

Just as importantly, even if Madison had been suggesting that post-Founding practices and beliefs had fixed the meaning of the Constitution in favor of the permissibility of the bank, it would not have been an example of liquidation as that concept has been described by scholars such as Nelson and Baude. The liquidation concept posits that certain issues of constitutional meaning were left unresolved at the Founding because the constitutional text was indeterminate with respect to them. Madison, however, never believed that the meaning of the Constitution was indeterminate with respect to the permissibility of a national bank, which is why he argued so forcefully against its constitutionality in the first Congress—and why, as Baude himself observes, Madison wrote in an 1831 letter to Charles Haynes that his “abstract opinion of the text of the Constitution is not changed.”²⁵¹ Throughout his career in public life, he continued to believe that the Constitution supported his previous view.²⁵² He also suggested that, if it had been known at the time of the Founding that the Supreme Court would adopt the broad reasoning in *McCulloch* in support of the constitutionality of the bank, the Constitution might not have been ratified.²⁵³ But because too many other institutions and individuals had disagreed with him over an extended period of time, he ““did not feel [him]self, as a public man, at liberty to sacrifice all these public considerations to [his] private opinion.””²⁵⁴ In other words, in what is cited as the most significant example of Madison’s purported theory of liquidation, it is not even clear that Madison viewed it in those terms.²⁵⁵

Baude hedges in suggesting that Madison thought the Constitution was indeterminate on the question of the bank’s constitutionality,²⁵⁶ and he offers little supporting evidence. He relies upon Madison’s statement in the House opposing the first bank bill that “[t]he doctrine of implication is always a tender one,”²⁵⁷ as well as Madison’s references to interpretive rules for “controverted” or “doubtful” cases.²⁵⁸ Those few utterances, however, do not establish that

²⁵¹ See Baude, *supra* note 28, at 25 (quoting Letter from James Madison to Charles E. Haynes (Feb. 25, 1831), reprinted in 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 164, 165 (1865)).

²⁵² See Powell, *supra* note 243, at 940 (“His own ‘abstract opinion of the text’ remained unchanged: the words of the Constitution did not authorize Congress to establish the bank.”) (quoting Letter from Madison to Haynes, *supra* note 251).

²⁵³ See Letter from James Madison to Spencer Roane (Sept. 2, 1819), *supra* note 158 (“But it was anticipated, I believe, by few if any of the friends of the Constitution, that a rule of construction would be introduced, as broad and as pliant as what has occurred. Those who recollect, and still more, those who shared in what passed in the State Conventions, thro’ which the people ratified the Constitution, with respect to the extent of the powers vested in Congress, can not easily be persuaded that the avowal of such a rule would not have prevented its ratification.”).

²⁵⁴ Powell, *supra* note 243, at 940 (quoting Letter from James Madison to Marquis de LaFayette (Nov. 1826), reprinted in 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON 538, 542 (1865)).

²⁵⁵ See also Sandy Levinson, *Our Inevitably Living Constitution*, BALKINIZATION, Oct. 23, 2018, <https://balkin.blogspot.com/2018/10/our-inevitably-living-constitution.html> (“[Madison] never for an instant admitted that he had been mistaken in his 1791 opposition to the Bank, only that it was time in effect to move on.”).

²⁵⁶ Baude, *supra* note 28, at 25 (“Indeed, for all of Madison’s forceful condemnation of the bank in his 1791 speech in Congress, he also *seemed to admit* that the question was *sufficiently indeterminate* as to require such construction.”) (emphases added).

²⁵⁷ See *id.* (quoting Madison, Bank Speech, *supra* note 248, at 486).

²⁵⁸ See Baude, *supra* note 28, at 25 (quoting Madison, Bank Speech, *supra* note 248, at 482).

Madison perceived indeterminacy, and the overwhelming thrust of the speech in which they appear suggests otherwise.

After discussing the policy merits of the bank bill, Madison turned to its constitutionality, emphasizing his personal knowledge of the fact that the Constitutional Convention had decided against giving Congress the power to charter corporations.²⁵⁹ He then argued both that there was an attenuated link between federal power to charter a corporation and any enumerated power, and that the creation of a corporation was “a great and important power,” which meant that such a power, in order to exist at the federal level, had to be listed separately in Article I, Section 8; it could not be left to implication.²⁶⁰ Baude himself explains Madison’s argument when he writes that, in Madison’s view, “to satisfy the Constitution the bank must be both ‘necessary to the end, and incident to the nature’ of the underlying enumerated powers, and the bank was neither.”²⁶¹ And rather than suggest that he was offering a canon of construction in the face of indeterminacy, Madison grounded his argument in the Constitution: “The latitude of interpretation required by the bill is condemned by the rule furnished by the constitution itself.”²⁶² Madison’s summation of his argument similarly expressed no doubt and grounded his argument in the Constitution:

It appeared on the whole, he concluded, that the power exercised by the bill was condemned by the silence of the constitution; was condemned by the rule of interpretation arising out of the constitution; was condemned by its tendency to destroy the main characteristic of the constitution; was condemned by the expositions of the friends of the constitution, whilst depending before the public; was condemned by apparent intention of the parties which ratified the constitution; was condemned by the explanatory amendments proposed by Congress themselves to the Constitution; and he hoped it would receive its final condemnation, by the vote of this house.²⁶³

In light of the above evidence, it does not appear that Madison thought the meaning of the Constitution with respect to the permissibility of the national bank needed to be “liquidated.”²⁶⁴

²⁵⁹ Madison, Bank Speech, *supra* note 248, at 482 (“[H]e had reserved to himself, he said, the right to deny the authority of Congress to pass [the bank bill]. He had entertained this opinion from the date of the constitution. His impression might perhaps be the stronger, because he well recollected that a power to grant charters of incorporation had been proposed in the general convention and rejected.”).

²⁶⁰ *See id.* at 487 (arguing that examples drawn from the text of the Constitution “condemn the exercise of any power, particularly a great and important power, which is not evidently and necessarily involved in an express power”).

²⁶¹ Baude, *supra* note 28, at 21–22 (quoting Madison’s Bank Speech, *supra* note 248, at 484).

²⁶² Madison’s Bank Speech, *supra* note 248, at 486.

²⁶³ *Id.* at 490.

²⁶⁴ *Accord* Levinson, *supra* note 255 (“By the time he was opposing the Bank of the United States promoted by his former ally, and now bitter enemy, Alexander Hamilton, the Constitution was becoming less ‘cloudy’ and, Madison alleged, clearly adverse to Congress’s power to charter the Bank.”).

Much the same can be said in response to Baude’s argument that Chief Justice Marshall’s opinion for the Court in *McCulloch v. Maryland*²⁶⁵ “also hit the key elements of liquidation.”²⁶⁶ In the opening passage of the opinion, Marshall discussed the historical practice concerning the first and second banks and stated that such practice supported the second bank’s constitutionality.²⁶⁷ That discussion, although a noteworthy invocation of historical practice, was brief and was not the opinion’s central rationale, as Marshall himself indicated.²⁶⁸ His opinion in *McCulloch* has not been understood to reflect Madisonian liquidation in the face of textual indeterminacy. Instead, his opinion has long been understood primarily to reflect structural reasoning²⁶⁹: the federal government is supreme within its sphere of action,²⁷⁰ and if an end is within the scope of Congress’s enumerated powers (its sphere of action), then so are all convenient or useful means.²⁷¹ Indeed, Marshall had already decided that Congress had the power to create the bank by the time he got around to examining the language of the Necessary and Proper Clause.²⁷² Moreover, in holding for the Court that states lacked the power to tax the bank, Marshall also employed structural reasoning, emphasizing that a part of the Union may not tax the whole because the whole is not represented in the part;²⁷³ he expressly stated that there was no textual provision on point.²⁷⁴

²⁶⁵ 17 U.S. (4 Wheat.) 159 (1819).

²⁶⁶ Baude, *supra* note 28, at 24.

²⁶⁷ *McCulloch*, 17 U.S. at 197–98.

²⁶⁸ *Id.* at 198 (“These observations belong to the cause; but they are not made under the impression, that, were the question entirely new, the law would be found irreconcilable with the constitution.”).

²⁶⁹ See BLACK, *supra* note 136, at 13–15 (interpreting *McCulloch* as a structural opinion).

²⁷⁰ See *McCulloch*, 17 U.S. at 199 (“If any one proposition could command the universal assent of mankind, we might expect it would be this—that the government of the Union, though limited in its powers, is supreme within its sphere of action.”).

²⁷¹ See *id.* at 200 (“But it may with great reason be contended, that a government, intrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depends, must also be intrusted with ample means for their execution.”).

²⁷² See *id.* at 202 (“But the constitution of the United States has not left the right of congress to employ the necessary means, for the execution of the powers conferred on the government, to general reasoning. To its enumeration of powers is added, that of making ‘all laws which shall be necessary and proper’”).

²⁷³ See *id.* at 429 (articulating the “intelligible standard” that the states’ power of taxation extends only to “all subjects over which the sovereign power of a State extends”). For a discussion, see FARBER & SIEGEL, *supra* note 100, at 96–99.

²⁷⁴ After noting the absence of textual authority, Marshall drew inferences from the constitutional structure:

[T]he counsel for the bank place its claim to be exempted from the power of a state to tax its operations. There is no express provision for the case, but the claim has been sustained on a principle which so entirely pervades the constitution, is so intermixed with the materials which compose it, so interwoven with its web, so blended with its texture, as to be incapable of being separated from it, without rending it into shreds. This great principle is, that the constitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective states, and cannot be controlled by them.

To be sure, Baude’s broader account of liquidation, by not limiting liquidation to the first fixed practice, appears to make better sense of Madison’s various statements than Nelson’s narrow account. We are not persuaded, however, that Baude has rediscovered “James Madison’s theory of postenactment historical practice.”²⁷⁵ To our knowledge, no historian of Madison has discovered such a theory, and we are not convinced that there is one, at least not one that Madison had worked out in any systematic way. Baude significantly understates the problem when he writes that the theory was “never quite systematically explained in a single place.”²⁷⁶ We are skeptical that a modern legal scholar, even one as talented as Baude, can develop an entire theoretical framework and call it Madison’s theory based on snippets from Madison’s *Federalist* essays, letters, and other materials, over the course of many years, during which time Madison’s own roles and views on the scope of federal power, the nature of the Constitution, and the practice of constitutional interpretation were changing significantly.²⁷⁷

For example, we have no idea whether Madison would think that “the public sanction” should always be required for liquidation or gloss, even if Madison referred to such a sanction in some contexts. More specifically, Madison never told us whether he thought public approval was required even with respect to constitutional questions that, unlike the longstanding debate over the first and second banks, did not attract much public attention. We might be tempted to suggest that Madison was far too sensible a thinker to have thought such a thing, but in truth we would just be guessing as much as Baude appears to be guessing in suggesting otherwise. Notably, however, historian Jonathan Gienapp reads Madison as suggesting during the 1789 debate over the removal of executive branch officers that recourse to “the people themselves, instantiated in some form,” as Gienapp puts it, “was not actually necessary.”²⁷⁸ Our best sense is that Madison never developed a clear account of what would be required to establish the “public sanction.” He seemed convinced that the right sort of public approval could clarify or elaborate upon the meaning of the Constitution, but he did not seem able to explain exactly what that would mean in operation. Madison’s unresolved difficulties in that regard not only suggest the unworkability of a public sanction requirement, but they also cast doubt more generally on the possibility of maintaining a strict version of liquidation, with an operative set of rules, of the sort championed by Nelson or Baude.

McCulloch, 17 U.S. at 208. To be clear, Marshall himself may have viewed his structural reasoning as part of proper textual interpretation, as opposed to an alternative to it; our point is simply that such reasoning, rather than historical practice, was the central thrust of the opinion.

²⁷⁵ Baude, *supra* note 28, at 4.

²⁷⁶ *Id.* at 13.

²⁷⁷ See GIENAPP, *supra* note 29, at 161–62, 209, 321–22, 327–32 (discussing the changes over time in Madison’s views on those subjects). For other accounts documenting how Madison was in part a practicing politician who was not a model of consistency over time, see generally NOAH FELDMAN, *THE THREE LIVES OF JAMES MADISON: GENIUS, PARTISAN, PRESIDENT* (2017), and MARY SARAH BILDER, *MADISON’S HAND: REVISING THE CONSTITUTIONAL CONVENTION* (2015). For an argument that Madison developed his enumerated-powers objection late in the debate over the Bank and that the objection seemed to depart from his prior views about the Constitution, see Richard Primus, “*The Essential Characteristic*”: *Enumerated Powers and the Bank of the United States*, 117 MICH. L. REV. 415 (2018).

²⁷⁸ GIENAPP, *supra* note 29, at 142.

Relatedly, Baude never critically examines Madison’s statements to probe them for consistency or coherency, or for whether they are really about liquidation per se. To take one example, Madison’s statement to his colleagues in 1789 when debating the removal power that their decision would become the “permanent exposition of the Constitution”²⁷⁹ ostensibly contradicts Baude’s view of how liquidation works (because according to Baude, Madison thought that a liquidation is not necessarily permanent). Baude tries to explain this inconsistency by simply noting that “[i]t might be the case that liquidation was expected to be permanent, but these expectations might not always come true.”²⁸⁰ Our view, as we noted above, is that in at least some of the statements that Baude cites, Madison was probably making a practical point rather than any point about constitutional theory. When debating new issues (whether in a legislature or at a faculty meeting), people commonly talk about the need to be attentive to the precedent being set; that does not require a constitutional theory, let alone the liquidation theory as described by Baude. The same can be said of Madison’s occasional warnings to colleagues about “establishing a dangerous precedent”²⁸¹ in spending debates—that is just a common observation to make when contemplating any new actions. Baude’s effort, as he puts it, to “charitably reconstruct [Madison’s] theory of liquidation”²⁸² relies on various statements by Madison that he may not have intended to reflect a theory. If not, Baude’s account is not a reconstruction of Madison’s thought and so should not be confused with an originalist argument.

Although Supreme Court Justices are neither historians nor Madison specialists, it is noteworthy that the majority in *Noel Canning* seemed to interpret some of Madison’s statements on liquidation as consistent with the historical gloss approach. In explaining the propriety of looking to practice, the majority quoted a letter from Madison referring to liquidation, and then said that “our cases have continually confirmed Madison’s view.”²⁸³ As we noted in the Introduction, however, many of the decisions cited by the majority endorsed historical gloss.²⁸⁴ Indeed, the majority specifically included in that set of citations Frankfurter’s concurrence in *Youngstown*. The majority correctly described those precedents as “show[ing] that this Court has treated practice as an important interpretive factor even when the nature or longevity of that practice is subject to dispute, and even when that practice began after the founding era.”²⁸⁵ That statement is entirely consistent with the historical gloss approach. Thus, the majority—reasonably, we think—interpreted Madison’s reference to liquidation differently from how it has been interpreted by originalist scholars like Nelson and Baude.

Of course, even if Madison was endorsing a worked-out theory of liquidation, it is not clear what implications that fact would or should have for interpreters today. Nelson and Baude have not shown (and do not claim to have shown) that Madison’s views on that matter

²⁷⁹ 1 ANNALS OF CONG. 514 (1789).

²⁸⁰ Baude, *supra* note 28, at 59.

²⁸¹ 4 ANNALS OF CONG. 170–71 (1794).

²⁸² Baude, *supra* note 28, at 13.

²⁸³ *Noel Canning*, 134 S. Ct. at 2560.

²⁸⁴ *See supra* note 24.

²⁸⁵ *Noel Canning*, 134 S. Ct. at 2560.

represented a general consensus of the Founders about how the Constitution should be interpreted (or “constructed”).²⁸⁶ Moreover, Gienapp has recently emphasized the lack of a Founding consensus about what the Constitution was or how it should be interpreted.²⁸⁷ But even if it could be shown that there was such a consensus, the implications would still be unclear, given (to reiterate) that originalism cannot prove originalism. Originalists like Nelson and Baude seem to be trying to justify liquidation as originalist by tying it to Madison, while at the same time never quite claiming that such a connection would be sufficient.

Granted, if one accepts a particular species of originalism known as “original methods” originalism, *and* if it is shown that liquidation is the approach that would have been used by the Founders, then liquidation might carry through with the commitment to originalism.²⁸⁸ But it is far from clear that the concept of liquidation is an original Founding method for interpreting and applying the Constitution, and, in any event, most originalists are not original methods originalists. For most originalists, if they accept a role for post-Founding practice, it is because they accept the idea of “constitutional construction,” which is an enterprise that by definition is supposed to be distinct from “constitutional interpretation” and thus does not follow from the Constitution’s original meaning. For such originalists, as well as of course for non-originalists, the normative differences between liquidation and gloss should matter.

V. CONCLUSION

The U.S. Constitution is the oldest written constitution in the world, and it is also one of the most difficult to amend. Relatively short, it cannot be said to “partake of the prolixity of a legal code.”²⁸⁹ In its original form, the Constitution was primarily a framework for a new national government, and its first three articles outline the structure and powers of the three federal branches. For 230 years, the United States government has operated under that framework even as conditions have changed in ways beyond the Founders’ conceivable imaginations. Over the course of American history, the institutions of the federal government have themselves played an important role in helping to fill in and clarify the framework through their practices and interactions, informed by the realities of governance.

In recent years, legal scholars have become increasingly attentive to the constitutional role played by such governmental practice. Theories of “historical gloss” in particular have highlighted the role of historical practice and attempted to situate it within constitutional theory. The U.S. Supreme Court, in recent decisions, has also emphasized such practice. Although it is easier to accommodate a role for post-Founding practice within non-originalist approaches to constitutional interpretation, some originalist scholars have also sought to take account of at

²⁸⁶ Scholars sometimes generalize too quickly from Madison’s views to the views of “the Framers” or “the Founders” or “the Founding generation” as a whole. For a cautionary tale, see generally Larry D. Kramer, *Madison’s Audience*, 112 HARV. L. REV. 611 (1999).

²⁸⁷ See generally GIENAPP, *supra* note 29.

²⁸⁸ “Original methods originalism” is the view that interpreters today should apply the same methods of interpretation that the “enactors” of the Constitution would have employed. See, in particular, McGinnis & Rappaport, *supra* note 43. See also JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION chs. 7, 8 (2013).

²⁸⁹ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

least some of that practice, under the label “Madisonian liquidation.” In this Article, we have explained the originalist turn to historical practice, described the historical gloss approach, compared gloss with liquidation, and suggested that the differences between those theories concerning the proper role of historical practice in constitutional interpretation render liquidation less normatively attractive than gloss.