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### Historical Gloss, Madisonian Liquidation, and the Originalism Debate

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## *ARTICLES*

### HISTORICAL GLOSS, MADISONIAN LIQUIDATION, AND THE ORIGINALISM DEBATE

*Curtis A. Bradley\* & Neil S. Siegel\*\**

*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*

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*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 interbranch 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, which would focus primarily on early historical practice and disallow “re-liquidation” of constitutional meaning once it had become settled by practice, 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. We also 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.<sup>1</sup> 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 *Youngstown Sheet & Tube Co. v. Sawyer*.<sup>2</sup> 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.<sup>3</sup> Frankfurter wrote separately to consider whether and to what extent historical practice might support Truman's authority to seize the mills.<sup>4</sup>

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."<sup>5</sup> In his view, although "[d]eeply 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."<sup>6</sup> 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."<sup>7</sup>

The Supreme Court's reliance on historical practice in discerning the separation of powers long predates Frankfurter's concurrence in

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<sup>1</sup> See generally Curtis A. Bradley & Trevor W. Morrison, Historical Gloss and the Separation of Powers, 126 Harv. L. Rev. 411 (2012).

<sup>2</sup> 343 U.S. 579 (1952).

<sup>3</sup> Id. at 582–84.

<sup>4</sup> Id. at 593–628 (Frankfurter, J., concurring).

<sup>5</sup> Id. at 610.

<sup>6</sup> Id.

<sup>7</sup> Id. at 613.

*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."<sup>8</sup> 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."<sup>9</sup> And, in another decision from that period, the Court emphasized longstanding presidential practice when considering the circumstances under which the President's "pocket veto"—that is, failure to sign a bill before Congress recesses—should be deemed to operate.<sup>10</sup>

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. Regan*, 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.<sup>11</sup> In doing so, the Court expressly invoked Justice Frankfurter's discussion of historical gloss.<sup>12</sup> 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.<sup>13</sup> 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."<sup>14</sup> The following year, in *Zivotofsky v. Kerry*, the Court again emphasized historical practice, this time in concluding that the President has an

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<sup>8</sup> 236 U.S. 459, 469 (1915).

<sup>9</sup> Ex parte Grossman, 267 U.S. 87, 118–19 (1925).

<sup>10</sup> 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.").

<sup>11</sup> 453 U.S. 654 (1981).

<sup>12</sup> See id. at 686.

<sup>13</sup> 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 *Noel Canning*).

<sup>14</sup> *Noel Canning*, 134 S. Ct. at 2559 (emphasis omitted).

exclusive authority to recognize foreign governments and their territories that cannot be limited by Congress.<sup>15</sup>

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.<sup>16</sup> 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.'"<sup>17</sup> 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 in bombing operations in Libya without first seeking congressional authorization.<sup>18</sup> 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."<sup>19</sup>

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.<sup>20</sup> The *Noel Canning* decision two years later further heightened

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<sup>15</sup> 135 S. Ct. 2076, 2091 (2015) ("In separation-of-powers cases this Court has often 'put significant weight upon historical practice.'" (quoting *Noel Canning*, 134 S. Ct. at 2559)).

<sup>16</sup> April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities, 42 Op. O.L.C. \_\_\_ (May 31, 2018), <https://www.justice.gov/olc/opinion/file/1067551/download> [<https://perma.cc/QN7Q-HZKR>].

<sup>17</sup> *Id.* at 5 (quoting Presidential Authority to Permit Incursion into Communist Sanctuaries in the Cambodia-Vietnam Border Area, 1 Op. O.L.C. Supp. 313, 317 (1970)).

<sup>18</sup> See Authority to Use Military Force in Libya, 35 Op. O.L.C. \_\_\_ (Apr. 1, 2011), <http://www.justice.gov/sites/default/files/olc/opinions/2011/04/31/authority-military-use-in-libya.pdf> [<https://perma.cc/G8RU-VLF7>].

<sup>19</sup> *Id.* at 7 (internal quotation marks omitted) (quoting Deployment of United States Armed Forces into Haiti, 18 Op. O.L.C. 173, 178 (1994)).

<sup>20</sup> See Bradley & Morrison, *supra* note 1.

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.<sup>21</sup>

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.”<sup>22</sup> The Supreme Court, too, has sometimes invoked the idea of “fixing” constitutional meaning when referring to the relevance of historical practice to constitutional interpretation.<sup>23</sup> The word “liquidation” is used in that context to mean essentially the opposite of the principal modern connotation of the word; instead of signifying dissolution (as in a “liquidation sale”), it is used to signify solidification or determination (as in “liquidated damages”).<sup>24</sup>

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

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<sup>21</sup> See, e.g., Curtis A. Bradley & Neil S. Siegel, Historical Gloss, Constitutional Conventions, and the Judicial Separation of Powers, 105 *Geo. L.J.* 255 (2017) (examining the concept of historical gloss and its relationship to nonlegal but obligatory “constitutional conventions”); Curtis A. Bradley, Doing Gloss, 84 *U. Chi. L. Rev.* 59 (2017) (examining the relationship between how the historical gloss approach is implemented and the reasons for crediting historical practice); Bradley & Siegel, *supra* note 13 (analyzing the role of historical practice in *Noel Canning*).

<sup>22</sup> 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, 469–72 (2013).

<sup>23</sup> 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, affords an irresistible answer, and has indeed fixed the construction”).

<sup>24</sup> An obsolete meaning of “liquidate,” which is derived from the Late Latin “liquidare,” is “to make clear or plain (something obscure or confused); to render unambiguous; to settle (differences, disputes).” *Liquidate*, *The Oxford English Dictionary* (2d ed. 1989).

Madison, the Court wrote that “our cases have continually confirmed Madison’s view.”<sup>25</sup> 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*.<sup>26</sup> Legal scholars also appear to be confused about the distinction, if any, between gloss and liquidation. Writing a year after *Noel Canning*, Professor Richard Fallon expressed uncertainty, describing gloss as “[c]losely related” to liquidation but “possibly more capacious.”<sup>27</sup>

Although originalists often focus on history, usually it is history relating to the constitutional Founding and the pre-Founding period.<sup>28</sup> Perhaps because of that, for many years the only scholar to have extensively addressed liquidation was Professor Caleb Nelson, who described it in primarily historical terms.<sup>29</sup> In a more recent article, however, Professor William Baude has offered a more detailed and contemporary account of the concept.<sup>30</sup> Meanwhile, the historian Jonathan Gienapp has published an important study of how, over the course of the 1790s, Madison and others in the Founding generation changed their understanding of the nature of the Constitution, including its relationship to historical practice.<sup>31</sup>

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<sup>25</sup> 134 S. Ct. 2550, 2560 (2014).

<sup>26</sup> See *id.* (citing *Mistretta v. United States*, 488 U.S. 361, 401 (1989); *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981); *Youngstown*, 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)).

<sup>27</sup> 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)).

<sup>28</sup> 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).

<sup>29</sup> 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) [hereinafter *Nelson, Stare Decisis*].

<sup>30</sup> William Baude, *Constitutional Liquidation*, 71 *Stan. L. Rev.* 1 (2019).

<sup>31</sup> Jonathan Gienapp, *The Second Creation: Fixing the American Constitution in the Founding Era* (2018).

In this Article, we consider whether and to what extent the concept of liquidation differs from that of gloss. We also consider whether, to the extent that there are differences between liquidation and gloss, those differences render liquidation more or less normatively attractive than gloss. We argue that a narrow account of liquidation, which would look primarily to early historical practice and disallow “re-liquidation” once constitutional meaning had become settled through practice, 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 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.<sup>32</sup> At the same time, originalist theory has become more receptive to accommodating various non-originalist materials, including historical practice.<sup>33</sup> 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,”<sup>34</sup> originalist efforts to claim a greater role for post-Founding 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.<sup>35</sup> As we will explain below, those tradeoffs vary depending on whether one opts for gloss or

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<sup>32</sup> See, e.g., Lawrence B. Solum, *Legal Theory Lexicon 019: Originalism*, Legal Theory Blog (last revised Aug. 11, 2019), [https://lsolum.typepad.com/legal\\_theory\\_lexicon/2004/01/-legal\\_theory\\_le\\_1.html](https://lsolum.typepad.com/legal_theory_lexicon/2004/01/-legal_theory_le_1.html) [<https://perma.cc/UVY2-E25D>] (“The current Supreme Court has at least two members who seem strongly influenced by originalist constitutional theory—Associate Justices Neil Gorsuch and Clarence Thomas. Three other[] Justices, John Roberts, Samuel Alito, and Brett Kavanaugh[,] may also be receptive to originalist arguments—at least in some cases.”).

<sup>33</sup> See *infra* notes 45–53 and accompanying text.

<sup>34</sup> See *id.*

<sup>35</sup> For analysis of the phenomenon of theory “working itself impure,” with originalism as one of several case studies, see Jeremy K. Kessler & David E. Pozen, *Working Themselves Impure: A Life Cycle Theory of Legal Theories*, 83 *U. Chi. L. Rev.* 1819 (2016).

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.<sup>36</sup>

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 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 interbranch 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 is distinct from gloss. It argues that, even under the relatively broad account of the concept recently offered by Baude, there are differences, and that those differences render liquidation normatively less attractive than gloss. Part IV explains why it is doubtful that the liquidation approach as described by scholars such as Nelson and Baude can properly be attributed to Madison. The Article 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

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<sup>36</sup> See *infra* notes 54–55, 115–124 and accompanying text.

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.<sup>37</sup> 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.”<sup>38</sup> 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 understandings.<sup>39</sup> 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.<sup>40</sup> Arguments based on historical practice also overlap with non-originalist approaches

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<sup>37</sup> See, e.g., Philip Bobbitt, *Constitutional Interpretation* 11–22 (1991) (discussing six “modalities” of constitutional argumentation: historical, textual, structural, doctrinal, ethical, and prudential); Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 *Harv. L. Rev.* 1189, 1189 (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” (footnote omitted)); see also Mitchell N. Berman & Kevin Toh, *Pluralistic Nonoriginalism and the Combinability Problem*, 91 *Tex. L. Rev.* 1739, 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”).

<sup>38</sup> Eric Segall, *Is Originalism a Theory?*, *Dorf on Law* (Nov. 14, 2018), <http://www.dorfonlaw.org/2018/11/is-originalism-theory.html> [<https://perma.cc/MH6N-TDQG>]; 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.”).

<sup>39</sup> 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).

<sup>40</sup> See, e.g., David A. Strauss, *The Living Constitution* (2010); David A. Strauss, *Common Law Constitutional Interpretation*, 63 *U. Chi. L. Rev.* 877 (1996).

that emphasize particularly decisive moments in history, such as Professor Bruce Ackerman's theory of "constitutional moments."<sup>41</sup>

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.<sup>42</sup> 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.<sup>43</sup> 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.<sup>44</sup>

In contrast to the general receptivity of non-originalism towards post-Founding historical practice, such practice is not a natural fit for originalism. Originalists tend 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.<sup>45</sup> 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-Founding practice to

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<sup>41</sup> See Bruce Ackerman, *We the People: Foundations* (1991). Alternatively, Professor Ackerman can be thought of as an originalist of sorts—namely, an originalist who recognizes a greater number of Founding periods than do most originalists (and nonoriginalists).

<sup>42</sup> Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 16 (2d ed. 1986).

<sup>43</sup> 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 Paul Brest et al., *Processes of Constitutional Decisionmaking: Cases and Materials* 147–48 (6th ed. 2015); Sanford Levinson, *Our Undemocratic Constitution: Where the Constitution Goes Wrong (And How We the People Can Correct It)* (2006); Corinna Barrett Lain, *Upside-Down Judicial Review*, 101 *Geo. L.J.* 113, 144–57 (2012). But the political branches are still generally regarded as more majoritarian than the judiciary.

<sup>44</sup> See Bradley & Morrison, *supra* note 1, at 428–29, 434.

<sup>45</sup> See Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 *Notre Dame L. Rev.* 1, 6–7 (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.").

help determine the Constitution's legal effect.<sup>46</sup> But the concept of construction is controversial among originalists,<sup>47</sup> and the proper dividing line between interpretation and construction is contested and uncertain.<sup>48</sup> Moreover, depending on how it is applied, the construction concept has the potential to undercut another common tenet of originalism—the “[c]onstraint [p]rinciple,” 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.”<sup>49</sup> 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.<sup>50</sup> 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,<sup>51</sup> a type of consideration that is typically anathema to formalists in matters of interpretation and so may not

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<sup>46</sup> See, e.g., Keith E. Whittington, *Constitutional Construction: Divided Powers and Constitutional Meaning* 6 (1999); Randy E. Barnett, *Interpretation and Construction*, 34 *Harv. J.L. & Pub. Pol'y* 65, 65–66 (2011); Solum, *supra* note 22; Whittington, *supra* note 45, at 611–12.

<sup>47</sup> 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, 752 (2009); see also Solum, *supra* note 45, at 5 (“Both the interpretation-construction distinction and the construction zone are controversial.”).

<sup>48</sup> See Laura A. Cisneros, *The Constitutional Interpretation/Construction Distinction: A Useful Fiction*, 27 *Const. Comment.* 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].”).

<sup>49</sup> Solum, *supra* note 45, at 8.

<sup>50</sup> 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) (“[M]any originalists will read Balkin to be a living constitutionalist in disguise—and may not let him into their club . . .”).

<sup>51</sup> See Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 *Geo. L.J.* 1, 1 (2018).

reassure other originalists.<sup>52</sup> For those reasons, some originalists may be inclined to reject any consideration of post-Founding historical practice as in effect allowing for constitutional change without a formal textual amendment.<sup>53</sup>

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 the President with the advice and consent of two-thirds of the Senate),<sup>54</sup> 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.<sup>55</sup>

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

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<sup>52</sup> See John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 *Yale L.J.* 1663, 1665 (2004); John F. Manning, *What Divides Textualists from Purposivists?*, 106 *Colum. L. Rev.* 70, 76 (2006).

<sup>53</sup> Cf. Peter J. Smith, *How Different Are Originalism and Non-Originalism?*, 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.”).

<sup>54</sup> U.S. Const. art. II, § 2, cl. 2.

<sup>55</sup> 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, U.S. Const., art. II, § 1, cl. 1, but there are serious questions about whether that interpretation is consistent with the original understanding of the clause. Only Justice Thomas on the current Supreme Court has embraced that interpretation. See *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2097–101 (2015) (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).

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 a 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.”<sup>56</sup> 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.<sup>57</sup>

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 genuinely our law as a positive matter.<sup>58</sup> 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.<sup>59</sup> It is also a problem for the realism of originalist

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<sup>56</sup> William Baude & Stephen E. Sachs, *Originalism’s Bite*, 20 *Green Bag* 2d 103, 107 (2016); see also *id.* at 107–08 (“We come not to bring peace but a sword. Originalism is a commitment to follow our original law, as lawfully altered; that commitment can and almost surely will require rejecting some contemporary practice.”).

<sup>57</sup> See, e.g., Baude, *supra* note 30, at 46 (“By looking to settlement across both institutions and parties, and ideally with the public sanction, [liquidation] attempts to entrench traditions that have been found acceptable by many groups of people.”).

<sup>58</sup> Professors Baude and Sachs have provocatively argued that originalism is our law as a positive matter. See, e.g., William Baude, *Is Originalism Our Law?*, 115 *Colum. L. Rev.* 2349 (2015); William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 *Nw. U. L. Rev.* 1455 (2019). For responses, see, for example, Charles L. Barzun, *Constructing Originalism or: Why Professors Baude and Sachs Should Learn to Stop Worrying and Love Ronald Dworkin*, 105 *Va. L. Rev. Online* 128 (2019); Charles L. Barzun, *The Positive U-Turn*, 69 *Stan. L. Rev.* 1323 (2017) (arguing that Baude and Sachs’s “positive turn” is unsupported by any articulation of legal positivism); Richard Primus, *Is Theocracy Our Politics?*, 116 *Colum. L. Rev. Sidebar* 44 (2016); Eric J. Segall, *Originalism Off the Ground: A Response to Professors Baude and Sachs*, 34 *Const. Comment* 313, 314 (2019).

<sup>59</sup> For a powerful statement of that point, see Balkin, *supra* note 50, at 31–34.

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.<sup>60</sup> 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.<sup>61</sup>

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,<sup>62</sup> or as a move that is ostensibly licensed by an original understanding of Article III.<sup>63</sup> 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.”<sup>64</sup> Many of the standard values associated with

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<sup>60</sup> See *supra* note 32 and accompanying text (noting those changes in the Court’s composition).

<sup>61</sup> 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. Comment* 451, 461–63 (2018) (reviewing Randy J. Kozel, *Settled Versus Right: A Theory of Precedent* (2017)) (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).

<sup>62</sup> 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 “a pragmatic *exception to it*”).

<sup>63</sup> See, e.g., John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 *Nw. U. L. Rev.* 803, 823–25 (2009). But see Gary Lawson, *The Constitutional Case Against Precedent*, 17 *Harv. J.L. & Pub. Pol’y* 23, 24 (1994) (“[T]he practice of following precedent is not merely nonobligatory or a bad idea; it is affirmatively inconsistent with the federal Constitution.”); Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 *Const. Comment.* 289, 289 (2005) (“[*S*]tare decisis, understood as a theory of adhering to prior judicial precedents that are contrary to the original public meaning, is completely irreconcilable with originalism.”).

<sup>64</sup> Mitchell N. Berman, *Originalism Is Bunk*, 84 *N.Y.U. L. Rev.* 1, 34 (2009).

deference to judicial precedent also apply to nonjudicial precedent.<sup>65</sup> For example, adherence to judicial precedent is said to promote stability, consistency, and predictability in the law by protecting reliance interests.<sup>66</sup> 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.<sup>67</sup>

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*.<sup>68</sup>

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 describe the liquidation concept, in both its narrow and broader forms, and we argue that in either form it is normatively less attractive than gloss.

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<sup>65</sup> See Bradley & Morrison, *supra* note 1, at 427–28; Michael J. Gerhardt, Non-Judicial Precedent, 61 *Vand. L. Rev.* 713, 736–64 (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); see also Baude, *supra* note 30, at 36–37 (“Liquidation has a close relationship to the idea of judicial precedent, and it may therefore be able to find just as ready a place in constitutional law.”).

<sup>66</sup> See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 855–56 (1992).

<sup>67</sup> See *Stuart v. Laird*, 5 U.S. (1 Cranch) 299, 309 (1803).

<sup>68</sup> See *supra* notes 46–53 and accompanying text (noting those changes over time in originalist theory); Kessler & Pozen, *supra* note 35, at 1844–47 (documenting the increasing “impurification” of originalism).

## 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.<sup>69</sup>

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 support of it.<sup>70</sup> 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.<sup>71</sup>

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.<sup>72</sup>

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<sup>69</sup> 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).

<sup>70</sup> See 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring) (discussing *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915)).

<sup>71</sup> *Id.*

<sup>72</sup> 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

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*,<sup>73</sup> 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: (1) governmental practice; (2) longstanding duration; and (3) 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. Gloss is not focused on historical traditions or events in general, or on public or social attitudes.<sup>74</sup> 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

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words, when referring to interpretation, we generally do not attempt to distinguish it from “construction.”

<sup>73</sup> 134 S. Ct. 2550 (2014).

<sup>74</sup> 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. Forum* 75, 77 (2013) (wondering whether the relevant historical practice for purposes of gloss is “custom, tradition, prescription, or something else”).

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.”<sup>75</sup>

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).<sup>76</sup> 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” in resolving whether the President had the authority to make “intra-session” recess appointments,<sup>77</sup> 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 intra-session recess appointments.<sup>78</sup>

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.”<sup>79</sup>

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

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<sup>75</sup> 134 S. Ct. at 2573.

<sup>76</sup> 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 and the nature and context of particular events. If the practice has been very infrequent, however, there may be questions about whether there is in fact a course of practice.

<sup>77</sup> 134 S. Ct. at 2561.

<sup>78</sup> *Id.* at 2562.

<sup>79</sup> *Id.* at 2564 (quoting *The Pocket Veto Case*, 279 U.S. 655, 689 (1929)). 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 7.

we explain further below in Section II.B, stability does not necessarily require that the relevant institutions have reached an agreement about the meaning of the Constitution, although if there is such an agreement then 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.<sup>80</sup> 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.<sup>81</sup> The fact that “[t]he Senate as a body has not countered this practice for nearly three-quarters of a century, perhaps longer”<sup>82</sup> 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.<sup>83</sup> 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.<sup>84</sup> 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

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<sup>80</sup> See, e.g., *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2094 (2015) (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).

<sup>81</sup> 134 S. Ct. at 2572.

<sup>82</sup> *Id.* at 2573.

<sup>83</sup> See generally Terry M. Moe & William G. Howell, *The Presidential Power of Unilateral Action*, 15 *J.L. Econ. & Org.* 132 (1999) (describing the President’s power to act unilaterally, in part due to collective action problems faced by Congress).

<sup>84</sup> For discussions of congressional soft law, see Josh Chafetz, *Congress’s Constitution*, 160 *U. Pa. L. Rev.* 715, 742–61 (2012), and Jacob E. Gersen & Eric A. Posner, *Soft Law: Lessons from Congressional Practice*, 61 *Stan. L. Rev.* 573 (2008).

opposition to the practice of intra-session recess appointments, has done so.”<sup>85</sup> (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, 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 is, it 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.<sup>86</sup> Without attempting to resolve that

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<sup>85</sup> 134 S. Ct. at 2563 (emphasis added).

<sup>86</sup> 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. Sec’y 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))); *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” (quoting

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.<sup>87</sup> 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.<sup>88</sup>

### *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 actually *agreed* that the practice is constitutional.<sup>89</sup> To understand why the third requirement is not best

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Brief for the United States as Amicus Curiae Supporting Respondents at 29, *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006) (Nos. 05-51 and 04-10566)); *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.”).

<sup>87</sup> See 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, and offering a variety of other reasons for congressional inaction); see also Curtis A. Bradley, *Historical Gloss, the Recognition Power, and Judicial Review*, 109 *Am. J. Int'l L. Unbound* 2, 5–6 (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 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”); 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); *infra* Subsection II.C.2 (identifying various possible reasons for congressional inaction).

<sup>88</sup> See *infra* note 114 (suggesting one potential component of such a test); cf. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637–38 (1952) (Jackson, J., concurring) (suggesting that courts “scrutinize[] with caution” claims that Congress lacks the authority to regulate presidential action).

<sup>89</sup> See, e.g., Michael J. Glennon, *The Cost of “Empty Words”: A Comment on the Justice Department's Libya Opinion*, *Harv. Nat'l Security J.F.*, 2011, at 3, [https://harvardnsj.org/wp-content/uploads/sites/13/2011/04/Forum\\_Glennon\\_Final-Version.pdf](https://harvardnsj.org/wp-content/uploads/sites/13/2011/04/Forum_Glennon_Final-Version.pdf) [<http://perma.cc/VA7-6-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 69, at 709–10

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 several general sets of reasons for invoking gloss.<sup>90</sup> One group of reasons concerns what has been described as “Burkean consequentialism.” The idea is that longstanding practices of government institutions are indicative of what works well, or at least what works better than anything the judiciary is likely to impose.<sup>91</sup> 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.<sup>92</sup> 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.<sup>93</sup>

The Court in *Noel Canning* relied heavily on such Burkean consequentialist reasoning. In deferring to past practice concerning the

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(contending that the only historical practice that should be credited is that which “is likely to be indicative of constitutional agreement between the branches”).

<sup>90</sup> See generally Bradley, *supra* note 21 (outlining potential justifications for judicial application of gloss).

<sup>91</sup> See *id.* at 66–67. For a discussion of the Court’s arguably contrary view in *INS v. Chadha*, 462 U.S. 919 (1983), see *infra* note 226 and accompanying text.

<sup>92</sup> One of us previously identified reliance interests as a separate set of reasons for crediting gloss. See Bradley, *supra* note 21, 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. See Aziz Z. Huq, *Fourth Amendment Gloss*, 113 Nw. 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.

<sup>93</sup> 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 39, at 401 (“If Congress and [the President] have settled on certain accommodations, there is reason to believe that those accommodations make institutional sense.”).

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 appropriate in certain circumstances.”<sup>94</sup> 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.”<sup>95</sup>

A second set of reasons for invoking gloss concerns limits on decisional capacity.<sup>96</sup> Sometimes interpreters invoke practice because other constitutional materials are perceived to offer insufficient guidance.<sup>97</sup> 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.<sup>98</sup> 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.<sup>99</sup> The Court also

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<sup>94</sup> 134 S. Ct. 2550, 2560 (2014).

<sup>95</sup> *Id.* at 2560, 2573.

<sup>96</sup> Limits on judicial capacity—discussed in Bradley, *supra* note 21, 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* note 17 and accompanying text.

<sup>97</sup> 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)).

<sup>98</sup> 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 power).

<sup>99</sup> See *Noel Canning*, 134 S. Ct. at 2561, 2568; see also *id.* at 2594 (Scalia, J., concurring in the judgment) (acknowledging 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

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.”<sup>100</sup> Moreover, in evaluating how the recess appointments power worked during intra-session Senate breaks, original understandings of the recess appointments power were of limited use given that the Senate did not even begin taking significant intra-session breaks until after the Civil War.<sup>101</sup>

Concerns about decisional capacity also explain why gloss reasoning is especially evident with respect to issues relating to presidential power in foreign affairs.<sup>102</sup> 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.<sup>103</sup> 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.<sup>104</sup> 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.<sup>105</sup> 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

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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 13, at 47–48.

<sup>100</sup> *Noel Canning*, 134 S. Ct. at 2560.

<sup>101</sup> See *id.* at 2564–65.

<sup>102</sup> See Bradley & Morrison, *supra* note 1, at 417–21.

<sup>103</sup> See Bradley & Goldsmith, *supra* note 55, at 38–39, 183–84.

<sup>104</sup> See Bradley, *supra* note 21, at 68–69.

<sup>105</sup> See *id.* at 69.

a type of departmentalism,<sup>106</sup> 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 counter-majoritarian difficulty,<sup>107</sup> 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. After all, as Justice Frankfurter observed in *Youngstown*, longstanding executive practice is “engaged in by Presidents who have also sworn to uphold the Constitution.”<sup>108</sup> 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 intra-session breaks.<sup>109</sup>

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,

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<sup>106</sup> 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 Farber & Neil S. Siegel, *United States Constitutional Law* 27 (2019).

<sup>107</sup> See *supra* text accompanying notes 42–44.

<sup>108</sup> 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring).

<sup>109</sup> 134 S. Ct. 2550, 2562 (2014).

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.<sup>110</sup> 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.<sup>111</sup> 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.<sup>112</sup> Moreover, when discerning gloss, interpreters (such as the Court in *Noel Canning* and *Zivotofsky v. Kerry*) often emphasize congressional *inaction* in

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<sup>110</sup> 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., *Whether Uruguay Round Agreements Required Ratification as a Treaty*, 18 Op. O.L.C. 232, 233 (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”).

<sup>111</sup> Cf. Young, *supra* note 87, 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)).

<sup>112</sup> See generally Kenneth A. Shepsle, *Congress Is a “They,” Not an “It”*: Legislative Intent as Oxymoron, 12 *Int’l Rev. L. & Econ.* 239 (1992) (arguing that those engaged in statutory interpretation should not rely on legislative intent because intent cannot necessarily be inferred from legislative history).

response to longstanding executive branch practice,<sup>113</sup> yet it is often impossible to know whether such inaction represents constitutional agreement or is better attributed to other considerations.<sup>114</sup> 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 interbranch 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.<sup>115</sup> 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,"<sup>116</sup> 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. 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.

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<sup>113</sup> See *supra* notes 80–82 and accompanying text (noting the Court's emphasis on congressional inaction in *Noel Canning* and *Zivotofsky*).

<sup>114</sup> 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* notes 86–87 and accompanying text. Before attributing the latter significance to inaction, it might make sense to require evidence that the inaction has been the result of perceived unconstitutionality. Cf. Bradley & Siegel, *supra* note 21, 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).

<sup>115</sup> *Noel Canning*, 134 S. Ct. 2550, 2564 (2014).

<sup>116</sup> *Id.* at 2572.

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.<sup>117</sup> Arguments about historical practice dominate discussions of these agreements’ “interchangeability” with treaties.<sup>118</sup> 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 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.<sup>119</sup> 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.<sup>120</sup> But there is no clear interbranch agreement on the constitutionality of the practice, and, indeed, Congress in the 1973 War Powers Resolution expressed a sharply different view of presidential

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<sup>117</sup> See Bradley & Morrison, *supra* note 1, at 468–76.

<sup>118</sup> See, e.g., Peter J. Spiro, *Treaties, Executive Agreements, and Constitutional Method*, 79 *Tex. L. Rev.* 961 (2001).

<sup>119</sup> See, e.g., John Hart Ely, *War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath* 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” (footnote omitted)); 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”).

<sup>120</sup> 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 119) (“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.” (footnote omitted)).

war powers authority than the one long maintained by the executive branch.<sup>121</sup>

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.<sup>122</sup> 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,<sup>123</sup> but that argument is viewed as a non-starter in large part due to very long historical practice to the contrary.<sup>124</sup> Again, however, it is not clear that judicial deference to such practice is the result of any agreement about the meaning of Article III.

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<sup>121</sup> See 50 U.S.C. § 1541(c) (2012) (“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.”).

<sup>122</sup> 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.*” (second emphasis added)). For additional discussion of practice-based influences on the law of federal courts, see Young, *supra* note 87.

<sup>123</sup> The text of Article III provides that the federal judicial power “shall be vested.” U.S. Const. art. III, § 1. 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). Professor Akhil Amar has also 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, 231–33 (1985); Akhil Reed Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. Pa. L. Rev. 1499, 1503–05 (1990).

<sup>124</sup> See, e.g., Daniel J. Meltzer, *The History and Structure of Article III*, 138 U. Pa. L. Rev. 1569, 1628–31 (1990).

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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 interbranch 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 simply that some jurists and scholars emphasize

the values of efficiency and accountability while others emphasize the importance of preserving individual liberty through a balance of powers among the branches.<sup>125</sup> More fundamentally, there is a widespread sense of uncertainty about which values are most central, and the values that are invoked in this context are often severely under-determinate (especially the notion of “balance”).<sup>126</sup> 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.<sup>127</sup> 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).<sup>128</sup> As for textualism, Article II of the

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<sup>125</sup> See, e.g., Kate Andrias, Separations of Wealth: Inequality and the Erosion of Checks and Balances, 18 U. Pa. J. Const. L. 419, 481 (2015) (surveying the literature and identifying liberty, efficacy, and accountability as the functions of the separation of powers identified by different scholars and judges); Martin S. Flaherty, The Most Dangerous Branch, 105 Yale L.J. 1725, 1729–30 (1996) (identifying the objectives of the separation of powers as “balance among the branches”; “responsibility or accountability to the electorate”; and “energetic, efficient government”); see also *Youngstown*, 343 U.S. 579, 635 (1952) (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.”).

<sup>126</sup> 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.”).

<sup>127</sup> 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 21, 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.

<sup>128</sup> 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 55, at 66–67. Although not a foreign affairs case, the Supreme Court recently emphasized concerns about decisional capacity in concluding that a constitutional challenge to partisan gerrymandering presented a political question. See *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506–07 (2019). Whether

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.<sup>129</sup>

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.<sup>130</sup> Finally, because the separation of powers context implicates the interactions of coequal 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 coequal branches but rather of the national government and the constituent states. For one

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those concerns are persuasive, however, is a distinct question, and the Justices fractured in part over that question. See, e.g., *id.* at 2509 (Kagan, J., dissenting).

<sup>129</sup> 343 U.S. at 634 (Jackson, J., concurring).

<sup>130</sup> Cf. Aziz Z. Huq, *The Negotiated Structural Constitution*, 114 *Colum. L. Rev.* 1595, 1600 (2014) (offering “a descriptive and a normative account of institutional negotiation and its limits”); John O. McGinnis, *Constitutional Review by the Executive in Foreign Affairs and War Powers: A Consequence of Rational Choice in the Separation of Powers*, 56 *Law & Contemp. Probs.* 293, 294 (Autumn 1993) (suggesting that constitutional authority is “neither indivisible nor immovable” and may be allotted according to the branch that has the most to gain from its exercise).

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.<sup>131</sup> 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 multistate collective action problems.<sup>132</sup> Although fully defending that claim would take this Article too far afield (and we are bracketing here reasonable debates about what constitutes a collective action problem), that basic intuition 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),<sup>133</sup> and by the increasingly prominent role of the federal government in American life since the 1930s in

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<sup>131</sup> 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*, 71 *Law & Contemp. Probs.* 93, 96–99 (Winter 2008).

<sup>132</sup> See, e.g., Akhil Reed Amar, *America’s Constitution: A Biography* 107–08 (2005); Jack M. Balkin, *Commerce*, 109 *Mich. L. Rev.* 1, 6 (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, 852 (2002); Steven G. Calabresi, “A Government of Limited and Enumerated Powers”: In Defense of *United States v. Lopez*, 94 *Mich. L. Rev.* 752, 780–81 (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, 609 (1995); Robert L. Stern, *That Commerce Which Concerns More States Than One*, 47 *Harv. L. Rev.* 1335, 1336–37 (1934).

<sup>133</sup> For a recent, detailed account of the causes of the collapse of the Articles of Confederation, 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., Amar, *supra* note 132, at 44–47, 106–08 (cataloguing the problems with the Articles of Confederation); Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 24–28, 47–48, 167–68, 188–89 (1996) (same); Larry D. Kramer, *Madison’s Audience*, 112 *Harv. L. Rev.* 611, 616–23 (1999) (same).

addressing races to the bottom, interstate externalities, and certain rights violations.<sup>134</sup> As Professors 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.”<sup>135</sup>

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, as one of us has previously noted, 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.”<sup>136</sup>

Moreover, the absence of a collective action problem may not explain why federal regulation has long been absent. There may have been other political priorities (including wars and depressions), or different social values (on issues like environmental protection and civil rights). Perhaps there were judicially imposed constraints on Congress (such as during the *Lochner* era), or successful resistance to federal intervention by powerful interests in Congress (like the Southern opposition that doomed federal civil rights legislation in the twentieth century until 1964).<sup>137</sup>

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<sup>134</sup> Many federal laws, including statutes regulating securities, the environment, civil rights, public health, and criminality, fit that description. See, e.g., Neil S. Siegel, *Free Riding on Benevolence: Collective Action Federalism and the Minimum Coverage Provision*, 75 *Law & Contemp. Probs.* 29, 46–47 (2012) (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.”).

<sup>135</sup> Calabresi & Terrell, *supra* note 132, 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.

<sup>136</sup> See Siegel, *supra* note 87, at 813–14.

<sup>137</sup> See *id.* at 814. For a collective action analysis of some of those examples, see Siegel, *supra* note 134, 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).

Furthermore, the scope of collective action problems is likely to change over time.<sup>138</sup> 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.<sup>139</sup> Whatever may have been the scope of certain problems in the past, significant changes in society, the economy, and technology may mean that the scope of those problems is interstate in the present.<sup>140</sup> 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.<sup>141</sup>

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 those other modalities of constitutional interpretation. Prominent examples of federalism decisions that emphasize those other modalities include *McCulloch v. Maryland*<sup>142</sup> and *United States v. Lopez*.<sup>143</sup>

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<sup>138</sup> See Siegel, *supra* note 87, at 814.

<sup>139</sup> For a discussion of potential spillover effects on other states in such circumstances, see Balkin, *supra* note 50, at 172–73.

<sup>140</sup> 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 87.

<sup>141</sup> 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 . . .”).

<sup>142</sup> 17 U.S. (4 Wheat.) 316, 402 (1819) (“These observations [about historical practice] 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.”); see also 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 275–283 and accompanying text.

<sup>143</sup> 514 U.S. 549, 561–64 (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 also Lawrence Lessig, *Translating Federalism: United States v. Lopez*, 1995 *Sup. Ct. Rev.* 125, 205–06 (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”); Ernest A. Young, “The Ordinary Diet of the Law”: The

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.”<sup>144</sup> 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 social practices or beliefs on individuals—that is, the effects of “traditions” more broadly conceived.<sup>145</sup>

To be sure, arguments from tradition are common, and at times highly controversial, in certain individual rights controversies.<sup>146</sup> Subject matter areas in which tradition may be invoked include capital punishment, the Establishment Clause, gun rights, and substantive due process.<sup>147</sup> In such controversies, whether consulting tradition is normatively attractive is

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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”).

<sup>144</sup> 17 U.S. at 401.

<sup>145</sup> See Bradley & Morrison, *supra* note 1, at 416.

<sup>146</sup> See generally Rebecca L. Brown, Essay, Tradition and Insight, 103 Yale L.J. 177, 183 (1993) (“Tradition has become one of the few sources of authority in constitutional interpretation that ostensibly need no justification.”); William N. Eskridge, Jr., Sodom 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) (noting that respect for tradition was often used to justify the ban on same-sex marriage and questioning the persuasiveness of such arguments from tradition); Michael W. McConnell, Time, Institutions, and Interpretation, 95 B.U. L. Rev. 1745, 1775–76 (2015); Michael J. Perry, The Authority of Text, Tradition, and Reason: A Theory of Constitutional “Interpretation,” 58 S. Cal. L. Rev. 551 (1985).

<sup>147</sup> See, e.g., *Glossip v. Gross*, 135 S. Ct. 2726, 2731–32 (2015) (capital punishment); *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1825 (2014) (Establishment Clause); *McDonald v. City of Chicago*, 561 U.S. 742, 767–68 (2010) (Second Amendment incorporation); *Washington v. Glucksberg*, 521 U.S. 702, 710 (1997) (substantive due process).

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 groups will not think significant weight should be placed on tradition in individual rights controversies, at least as a general matter.<sup>148</sup> Those who believe that conventional societal morality should significantly inform the scope of individual rights will likely disagree.<sup>149</sup> 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 typically 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.<sup>150</sup>

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 meaning of the constitutional provision at issue.<sup>151</sup> Alternatively, if one is not of an originalist bent, or

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<sup>148</sup> 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 39, 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 . . .”).

<sup>149</sup> See, e.g., McConnell, *supra* note 146, 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).

<sup>150</sup> Cf. Huq, *supra* note 92, at 758–59 (arguing that the justifications for relying on gloss in the separation of powers context do not support relying on historical practice in the Fourth Amendment context).

<sup>151</sup> See, e.g., *District of Columbia v. Heller*, 554 U.S. 570, 600–05 (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).

if original meaning has run out, one can seek to discern the basic purpose or structural function of the provision in the constitutional scheme.<sup>152</sup>

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,<sup>153</sup> and there may be relevant distinctions among different cases falling within a particular context.<sup>154</sup> 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.<sup>155</sup> That idea is frequently ascribed to James Madison based on statements he made

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<sup>152</sup> 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, 661–62 (Stevens, J., dissenting) (arguing that the structural function of the Second Amendment is to prevent Congress from disarming the state militias).

<sup>153</sup> 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 of the relationships among those three dimensions in Section Five cases, 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, 1946–47 (2003), and Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 *Ind. L.J.* 1, 2–3 (2003).

<sup>154</sup> 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.

<sup>155</sup> 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).

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 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.<sup>156</sup>

As we have observed elsewhere,<sup>157</sup> 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.<sup>158</sup> 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.<sup>159</sup>

Nelson was focused more on setting out the historical foundation for the liquidation approach than on fleshing out its operational details, and

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<sup>156</sup> See *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2560 (2014) (citing a variety of decisions, some that have endorsed gloss, for the proposition that “our cases have continually confirmed Madison’s view”).

<sup>157</sup> See Bradley & Siegel, *supra* note 13, at 29–30.

<sup>158</sup> See, e.g., Randy Barnett, *Liquid Constitutionalism, The Volokh Conspiracy* (Apr. 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).”), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/04/13/liquid-constitutionalism/> [https://perma.cc/C8TV-ALZM].

<sup>159</sup> See, e.g., Nelson, *Originalism and Interpretive Conventions*, *supra* note 29, at 521.

he was writing before the recent academic literature on gloss. As a result, it is not clear how broadly he conceived of the concept, or, relatedly, the extent to which his conception of liquidation differs from gloss. There are suggestions in what he wrote, however, of a fairly constrained conception of the concept of liquidation. For example, he emphasized that Founders like Madison believed that early constitutional interpretations, such as about the scope of the President's removal power, should become "permanent" expositions of constitutional meaning.<sup>160</sup> The focus of Nelson's account was on practices and debates in the early years of the nation, and, more importantly, on the permanent "fixation" of constitutional meaning through such practices and debates.

Another originalist scholar, Professor William Baude, has recently presented a more detailed and contemporary account of liquidation. Baude makes clear that, under his account, liquidation is not limited to early practices, and that the first liquidation may be undone through subsequent liquidation.<sup>161</sup> Baude does not contend that his account is necessarily broader than Nelson's, although he suggests that it might be, particularly with respect to the possibility of re-liquidation.<sup>162</sup> Because we are uncertain about Nelson's views, we will refer in our analysis to a "narrow" view of liquidation without specifically attributing it to Nelson and to a "broader" view that we will attribute to Baude. Our aim is simply to highlight different possible ways of conceiving of liquidation, each of which presents difficult tradeoffs, not to create a contrast between Nelson and Baude in particular.

We argue that a narrow account of liquidation successfully 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 resorting to post-Founding practice. Even for most originalists, the proper scope of that gap-filling enterprise, whether it is referred to as "constitutional construction" or part of "constitutional

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<sup>160</sup> See *id.* at 527–29.

<sup>161</sup> See generally Baude, *supra* note 30.

<sup>162</sup> See *id.* at 53–54.

interpretation,” is a normative question that cannot itself be determined by the original meaning of the text.<sup>163</sup>

*A. The Narrow Account: Normatively Attractive?*

*1. A 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.<sup>164</sup> 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.<sup>165</sup>

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<sup>163</sup> 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* note 300 and accompanying text. 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.

<sup>164</sup> See Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 *UCLA L. Rev.* 1487, 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”).

<sup>165</sup> See, e.g., Nelson, *Originalism and Interpretive Conventions*, *supra* note 29, at 525–53; 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 . . .” (footnotes omitted) (quoting Letter from James Madison to Charles J. Ingersoll (June 25, 1831), in 4 *Letters and Other Writings of James Madison* 183, 185 (New York, R. Worthington 1884))); see also 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, Professor 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: The Precedents and Principles We Live By* 307–32 (2012). Our colleague Stephen Sachs reads Amar’s argument as embracing the idea of liquidation through early practice. See Stephen E. Sachs, *The “Unwritten Constitution” and Unwritten Law*, 2013 *U. Ill. L. Rev.* 1797, 1806–08. In the next chapter of his book, however, Amar goes on to discuss how institutional practices

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 liquidated and ascertained by a series of particular discussions and adjudications.”<sup>166</sup> 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.<sup>167</sup>

Professor 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.<sup>168</sup> 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

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of Congress, the Supreme Court, and administrative agencies, including practices long after the Founding, “gloss and clarify the text, inducing interpreters to read the otherwise indeterminate text in a highly determinate way.” Amar, *supra*, at 335.

<sup>166</sup> The *Federalist* No. 37, at 229 (James Madison) (Clinton Rossiter ed., 1961). Madison also referred to the liquidation idea in later writings, albeit decades after the Founding. See, e.g., Letter from James Madison to Spencer Roane (Sept. 2, 1819), in 8 *The Writings of James Madison* 447, 450 (Gaillard Hunt ed., 1908).

<sup>167</sup> 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, *supra* note 166, at 468 (Alexander Hamilton); see also The *Federalist* No. 22, *supra* note 166, at 150 (Alexander Hamilton) (“Laws are a dead letter without courts to expound and define their true meaning and operation.”); The *Federalist* No. 82, *supra* note 166, at 491 (Alexander Hamilton) (“’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.”).

<sup>168</sup> See Nelson, *Originalism and Interpretive Conventions*, *supra* note 29, 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 31, at 42; see also *id.* at 42–45 (discussing the epistemological concerns of Jonathan Swift, Samuel Johnson, Thomas Hobbes, and John Locke).

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.”<sup>169</sup> Madison’s references to “fixing” the meaning of the Constitution, Nelson contends, must be understood in that context: “Although 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.”<sup>170</sup> 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 same: the Founders expected that governmental actors and the courts after the Founding period would resolve indeterminacies in the original meaning of the Constitution, and that once they did so the meaning would become fixed.<sup>171</sup>

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.

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<sup>169</sup> See Nelson, *Originalism and Interpretive Conventions*, supra note 29, at 534–35; see also Gienapp, supra note 31, 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 . . .”).

<sup>170</sup> Nelson, *Originalism and Interpretive Conventions*, supra note 29, at 535.

<sup>171</sup> *Id.* at 551–53. 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).

As we noted above, because Nelson was focused primarily on explaining the general idea of liquidation and its historical foundation, he did not seek to lay out all of its operational details. Moreover, he was writing before the recent academic literature on gloss, so he would not have had any reason to identify potential differences between liquidation and gloss. It is possible to read Nelson as having a circumscribed conception of liquidation that would be readily distinguishable from gloss, but whether he holds such a conception is not clear from what he wrote. For this Article's purposes, what is important is not his specific position but rather the implications of what we will call a "narrow" view of liquidation—one that focuses primarily on early historical practice, and that disallows re-liquidation of constitutional meaning once the meaning has become "fixed" through practice.

It is easy to see why a narrow account of liquidation might 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 practice<sup>172</sup>—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

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<sup>172</sup> See, e.g., Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as It Sounds*, 22 *Const. Comment* 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, 786 (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.").

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.<sup>173</sup> 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 expected that indeterminacies in constitutional meaning would be resolved by subsequent governmental actors.<sup>174</sup> 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 alignments that happened to exist whenever the issue arose the first time or subsequent times. In attempting to determine constitutional meaning, the initial generations 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.<sup>175</sup> While there was

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<sup>173</sup> See, e.g., Nelson, *Originalism and Interpretive Conventions*, *supra* note 29, at 547–48. Modern variants of originalism, unlike the first generation of originalist scholarship, focus on the original meaning of the Constitution rather than on original intent. See, e.g., Keith E. Whittington, *Originalism: A Critical Introduction*, 82 *Fordham L. Rev.* 375, 380–82 (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 171 (explaining that certain background rules of law both have continuing legal force and are insulated by the text from change). Again, however, even if that could be shown, it would not by itself establish that liquidation should be followed.

<sup>174</sup> See Nelson, *Originalism and Interpretive Conventions*, *supra* note 29, at 547.

<sup>175</sup> A principal theme of the Federalist Papers is the importance of learning the lessons of experience. See, e.g., *The Federalist No. 14*, *supra* note 166, at 104 (James Madison) (“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. Years later, another Founder, Thomas Jefferson, observed that learning from experience was, if anything, even more important after the Constitution's ratification. Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), *in* 10 *The Papers of Thomas Jefferson: Retirement Series* 222, 226 (J. Jefferson Looney ed., 2013) (“[The time of the Founding] was very like the present, but without the experience of the present: and 40[”

often talk of the importance of civic virtue in the Founding period,<sup>176</sup> 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.<sup>177</sup> 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, a narrow account of liquidation would license earlier generations of politicians to bind more experienced successors through simple majoritarian politics.

Those objections are not overcome by positing that liquidation should be limited to situations in which the earlier generations deliberated with unusual seriousness.<sup>178</sup> 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.<sup>179</sup> 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 an originalist embrace of a narrow account of liquidation is that, by potentially disregarding settled modern practices, it

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years of experience in government is worth a century of book-reading: and this they would say themselves, were they to rise from the dead.”).

<sup>176</sup> See, e.g., The Federalist No. 57, supra note 166, at 350 (James Madison) (“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.”).

<sup>177</sup> For a discussion, see generally Rakove, supra note 133 (detailing the central arguments and aims of the Federalists and Anti-Federalists during the debate over ratification).

<sup>178</sup> See Nelson, Originalism and Interpretive Conventions, supra note 29, at 528.

<sup>179</sup> Cf. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415–16 (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.”).

would be 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.<sup>180</sup> He described his approach to precedent as a pragmatic “exception” to his originalism that was based on interests in stability.<sup>181</sup> 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.”<sup>182</sup> But, as emphasized above,<sup>183</sup> 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.<sup>184</sup>

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.”<sup>185</sup> 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.<sup>186</sup> Indeed, even when referring to “adjudications” of

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<sup>180</sup> 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.’” (quoting *Albright v. Oliver*, 510 U.S. 266, 275 (1994) (Scalia, J., concurring))).

<sup>181</sup> See Scalia, *supra* note 62, at 139–40.

<sup>182</sup> Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* 158 (1990).

<sup>183</sup> See *supra* notes 64–66 and accompanying text.

<sup>184</sup> See Bradley & Morrison, *supra* note 1, at 427–28; Cass R. Sunstein, *Originalism v. Burkeanism: A Dialogue over Recess*, 126 *Harv. L. Rev. Forum* 126, 128 (2013); see also Richard H. Fallon, Jr., *Stare Decisis and 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”).

<sup>185</sup> Barnett, *supra* note 172, at 264.

<sup>186</sup> See, e.g., Letter from James Madison to Charles J. Ingersoll (June 25, 1831), in *4 Letters and Other Writings of James Madison* 183, 184–86 (New York, R. Worthington 1884).

constitutional meaning,<sup>187</sup> 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.<sup>188</sup> 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 or two they interpret the Constitution, even if that interpretation initially becomes settled. 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.<sup>189</sup>

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.<sup>190</sup> Those

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(analogizing respect for past political practices to judicial deference to precedent). As discussed in Part I, see *supra* note 63 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.

<sup>187</sup> See *supra* note 166 and accompanying text.

<sup>188</sup> 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 29, 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.

<sup>189</sup> For discussion of that history, see Grove, *supra* note 27, at 473–88.

<sup>190</sup> 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 nothing short of a practical construction, long continued, of the

statements, however, do not contend that this is the only way in which constitutional meaning may legitimately be affected by practice. Moreover, those statements do not envision that meaning would become fixed merely as a result of the initial practice; rather, they expressly require longstanding acquiescence in the interpretation that was adopted. 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."<sup>191</sup> As a result, those statements do not suggest that the initial post-Founding generation was expected to have the authority to fix constitutional meaning. Instead, the statements 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, a narrow account of liquidation 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 the narrow account of 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 postenactment historical practice, sometimes called 'liquidation.'"<sup>192</sup> According to Baude, that theory had three elements. First, the text of the Constitution had to be indeterminate with respect to

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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); *Stuart v. Laird*, 5 U.S. (1 Cranch) 299, 309 (1803). 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.

<sup>191</sup> *Noel Canning*, 134 S. Ct. 2550, 2594 (2014) (Scalia, J., concurring in the judgment).

<sup>192</sup> Baude, *supra* note 30, at 4.

the question at issue.<sup>193</sup> If a textual provision was clear, there was no occasion for liquidation. Second, government officials had to engage in a course of deliberate practice.<sup>194</sup> 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 about the policy wisdom or political expediency of the decisions or actions—although, Baude adds, such constitutional reasoning did not have to be genuine.<sup>195</sup> Third, the accretion of practice must have resulted in a settlement of the constitutional question.<sup>196</sup> 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.<sup>197</sup>

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.”<sup>198</sup> Because past liquidations are not necessarily or characteristically permanent, Baude’s account of liquidation is broader than Nelson’s.<sup>199</sup> 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.”<sup>200</sup> The first way is “a different attitude toward the constitutional text.”<sup>201</sup> Whereas “[i]n liquidation, one must first ascertain that the constitutional text is indeterminate,” Justice Frankfurter “implies that he envisions looking to

<sup>193</sup> Id. at 13–16.

<sup>194</sup> Id. at 16–18.

<sup>195</sup> 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.”).

<sup>196</sup> Id. at 18–21.

<sup>197</sup> Id. at 1; see also 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, 370–72 (Gaillard Hunt ed., 1910).

<sup>198</sup> Baude, *supra* note 30, at 63.

<sup>199</sup> 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.”).

<sup>200</sup> Baude, *supra* note 30, at 63–64.

<sup>201</sup> Id. at 64.

practice first and text second, rather than the other way around.”<sup>202</sup> 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.”<sup>203</sup>

Second, according to Baude, “[l]iquidation . . . requires that the course of practice be the result of constitutional *deliberation*—and hence more than just silence.”<sup>204</sup> By contrast, he writes, “Frankfurter’s gloss focused on what those in power have actually *done* . . . . Actions speak louder than words.”<sup>205</sup> 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 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.”<sup>206</sup>

*2. Problems with the Broader Account of Liquidation.* We will address below whether either a narrow account of liquidation or Baude’s broader 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 that we described above concerning the narrow account. But Baude’s account also diminishes the distinction between gloss and liquidation and therefore reduces the need for a separate theory of liquidation. Moreover, the differences that remain between Baude’s account of liquidation and the theory of gloss—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

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<sup>202</sup> Id.

<sup>203</sup> Id. (first citing Bradley, *supra* note 21, at 830 n.317; and then citing Bradley & Siegel, *supra* note 48, at 1241–42).

<sup>204</sup> Baude, *supra* note 30, at 64.

<sup>205</sup> Id.

<sup>206</sup> Id. at 65.

much in part of his canonical formulation,<sup>207</sup> and to the extent that he implied otherwise in another part,<sup>208</sup> 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.<sup>209</sup> 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.<sup>210</sup> 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.<sup>211</sup> 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 question of the constitutionality of a national bank,<sup>212</sup> the issue regarding which “Madison implemented the principles of liquidation . . . most thoroughly.”<sup>213</sup> It is also such originalists who ascribe a perception of indeterminacy to Madison and to Chief Justice John Marshall,<sup>214</sup> even though—as detailed below—each argued vigorously and confidently in favor of their respective views of the bank’s constitutionality.<sup>215</sup>

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<sup>207</sup> See *Youngstown*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring) (“Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation . . .”).

<sup>208</sup> *Id.* (“Deeply embedded traditional ways of conducting government . . . give meaning to the words of a text *or supply them.*” (emphasis added)).

<sup>209</sup> 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.”).

<sup>210</sup> See *supra* note 99 and accompanying text.

<sup>211</sup> See generally Bradley & Siegel, *supra* note 48. 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).

<sup>212</sup> See, e.g., Baude, *supra* note 30, at 21–29.

<sup>213</sup> See *id.* at 21.

<sup>214</sup> See, e.g., *id.* at 24–25.

<sup>215</sup> See *infra* Part IV.

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.”<sup>216</sup> 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.<sup>217</sup> 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.<sup>218</sup> And gloss, like liquidation, is compatible with the idea of constitutional construction.<sup>219</sup> Moreover, while it is true that gloss might inform inferences about the constitutional structure as well as the interpretation of specific textual provisions,<sup>220</sup> many originalist judges and scholars supplement their originalism with structural argumentation.<sup>221</sup> 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.<sup>222</sup>

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<sup>216</sup> For a recent study of the evolution in thinking about “the Constitution” during the decade after its adoption, see generally Gienapp, *supra* note 31.

<sup>217</sup> Cf. Whittington, *supra* note 46, 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.”).

<sup>218</sup> See *supra* Part II (discussing our approach to gloss).

<sup>219</sup> See Bradley & Morrison, *supra* note 1, at 425–26.

<sup>220</sup> See Bradley & Siegel, *supra* note 21, at 276–78.

<sup>221</sup> See, e.g., *Shelby County v. Holder*, 570 U.S. 529, 542–44 (2013) (structural principle of equal state sovereignty); *Printz v. United States*, 521 U.S. 898, 918–25 (1997) (anti-commandeering principle).

<sup>222</sup> 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. Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 *Harv. J.L. & Pub. Pol’y* 818, 833 (2015) (“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.<sup>223</sup> 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 interbranch constitutional agreement.<sup>224</sup>

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,<sup>225</sup> 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

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<sup>223</sup> See Bradley, *supra* note 21, at 66–67.

<sup>224</sup> See *supra* notes 96–104 and accompanying text.

<sup>225</sup> See generally Bradley & Siegel, *supra* note 48, at 1213 (arguing that “whether [a] text is perceived to be clear is often affected by various ‘modalities’ of constitutional interpretation that are normally thought to come into play only after the text is found to be vague or ambiguous”).

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 agencies . . . .<sup>226</sup>

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 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—to always require a strong showing of an interbranch 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 interbranch 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*<sup>227</sup> 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.<sup>228</sup>

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<sup>226</sup> 462 U.S. 919, 944 (1983).

<sup>227</sup> See, e.g., *Osborn v. Bank of the U.S.*, 22 U.S. (9 Wheat.) 738, 765 (1824) (rejecting an attempt by an Ohio official to essentially relitigate *McCulloch*).

<sup>228</sup> See Andrew Jackson, Veto Message (July 10, 1832), in 2 A Compilation of the Messages and Papers of the Presidents, 1789–1897, at 576, 581–83, 589–90 (Washington, James D. Richardson ed., 1897); see also Baude, *supra* note 30, at 28–29 (discussing that episode).

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.<sup>229</sup> 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.<sup>230</sup>

In addition, as Baude observes, “liquidation can happen on mundane constitutional questions that do not attract much public notice.”<sup>231</sup> If constitutional issues do not attract much public attention, it is not clear how “the public sanction” can be forthcoming. For example, Baude observes that Justice Joseph Story failed to understand the subtlety of certain of Madison’s constitutionally conscientious maneuvers during spending debates in Congress.<sup>232</sup> 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

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<sup>229</sup> See Baude, *supra* note 30, at 19–20.

<sup>230</sup> See *id.* at 27–29.

<sup>231</sup> See *id.* at 66.

<sup>232</sup> 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.

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,<sup>233</sup> even as he can be read to imply throughout his article that his account of liquidation is justified in part by originalism and Madisonian “pedigree.”<sup>234</sup> 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.”<sup>235</sup> He also observes that the controversy over the national bank, which he describes as “the archetypical example of liquidation,” involved an issue of federalism.<sup>236</sup> 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 counter-majoritarian; that

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<sup>233</sup> 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).

<sup>234</sup> See *id.* at 6, 32–33, 35, 50, 64, 65 (expressly or implicitly appearing to invoke originalism or Madisonian “pedigree” as at least a partial normative justification for liquidation).

<sup>235</sup> *Id.* at 49.

<sup>236</sup> *Id.*

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.<sup>237</sup> As we discussed in Section II.C, however, there are serious questions about the normative desirability of relying on historical practice to resolve many 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?

Both Nelson and Baude have attributed the liquidation concept to Madison. We are not persuaded that the concept, in either its narrow form or the broader form suggested by Baude, is properly attributed to Madison, although the broader account seems to us somewhat closer to the historical mark. In any event, 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 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 repeatedly appears to invoke the theory’s purported pedigree).<sup>238</sup> 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

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<sup>237</sup> Id. at 50.

<sup>238</sup> See supra note 234.

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.<sup>239</sup> He added that the Constitutional Convention faced great challenges even in the area of separation of powers, where previous experience was more substantial.<sup>240</sup> “Among the difficulties encountered by the convention,” Madison explained, “a very important one must have lain in combining the requisite stability and energy in government with the inviolable attention due to liberty and to the republican form.”<sup>241</sup> 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.<sup>242</sup> He then made the famous statement about liquidation.<sup>243</sup>

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.<sup>244</sup> The second reason concerned “the imperfection of the human faculties,” which make it even more difficult to perceive those objects.<sup>245</sup> The third reason involved the limits of language, which Madison characterized as “inadequateness of the vehicle of ideas.”<sup>246</sup> “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.”<sup>247</sup> 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.<sup>248</sup> For example, just after

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<sup>239</sup> The Federalist No. 37, *supra* note 166, at 226 (James Madison).

<sup>240</sup> *Id.* at 228.

<sup>241</sup> *Id.* at 226.

<sup>242</sup> *Id.* at 228.

<sup>243</sup> *Id.* at 229.

<sup>244</sup> *Id.*

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

<sup>246</sup> *Id.*

<sup>247</sup> *Id.*

<sup>248</sup> *Id.*

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.”<sup>249</sup> *Federalist No. 37* is thus deeply skeptical of the determinacy of human language: when speaking through such language, Madison was saying, not even God can write determinately.

Recall also that Madison referred both to practice and to judicial decisions as involved in liquidation.<sup>250</sup> It seems unlikely, however, that he was referring only to initial judicial 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 (or even a series of decisions) 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 settled precedent concerning constitutional meaning could never be revisited absent an Article V amendment.<sup>251</sup>

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<sup>249</sup> Id.; cf. Gienapp, *supra* note 31, 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.”).

<sup>250</sup> See McConnell, *supra* note 199, 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 ambiguities.” (footnotes omitted)). The same can be said of Hamilton in *The Federalist No. 78*, which specifically references the courts. *The Federalist No. 78*, *supra* note 166, at 468 (Alexander Hamilton) (“[I]t is the province of the courts to liquidate and fix [laws’] meaning and operation.”).

<sup>251</sup> See, e.g., Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 *Vand. L. Rev.* 647, 662–66 (1999); McGinnis & Rappaport, *supra* note 63, at 809–23; 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.”); Lee J. Strang, *An Originalist Theory of Precedent*:

For those reasons, Madison need not be read in *Federalist No. 37* as suggesting either that an initial course of 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 enterprise of resolving ‘obscure and equivocal’ *ambiguities* through ‘particular discussions and adjudications’—in a word, interpretation.”<sup>252</sup> 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.”<sup>253</sup>

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.”<sup>254</sup> Although Madison may well have believed as a normative matter that future interpreters should give the decision weight, his reference to permanence here can be read more simply as either an effort to focus his colleagues’ attention on the importance of the issue or 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 role in the removal process, and the Supreme Court, despite resisting

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Originalism, Nonoriginalist Precedent, and the Common Good, 36 N.M. L. Rev. 419, 462–66 (2006) (discussing debates about the role of precedent during ratification).

<sup>252</sup> Rakove, *supra* note 133, at 159; 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.” (footnote omitted)).

<sup>253</sup> Rakove, *supra* note 133, at 159; see also Charles A. Lofgren, The Original Understanding of Original Intent?, 5 Const. Comment. 77, 110 (1988) (interpreting Madison to mean that “[e]arly and continued practice” would serve as “a check on (but not an invariable barrier to) subsequent reinterpretation”).

<sup>254</sup> 1 Annals of Cong. 514 (1789) (Joseph Gales ed., 1834). 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.

some of those efforts in *Myers v. United States*,<sup>255</sup> ultimately has allowed Congress the ability to limit presidential removal of a variety of officials.<sup>256</sup> 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 bill was beyond the scope of Congress's enumerated powers.<sup>257</sup> By 1815, however, Madison was 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.<sup>258</sup>

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

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<sup>255</sup> 272 U.S. 52, 176 (1926) (holding that "the provision of the law of 1876, by which the unrestricted power of removal of first class postmasters is denied to the President, is in violation of the Constitution, and invalid").

<sup>256</sup> See, e.g., *Humphrey's Ex'r v. United States*, 295 U.S. 602, 631–32 (1935); *Morrison v. Olson*, 487 U.S. 654, 692–93 (1988).

<sup>257</sup> Speech in Congress Opposing the National Bank (Feb. 2, 1791), in James Madison: Writings 480 (Jack N. Rakove ed., 1999) [hereinafter Madison, Bank Speech].

<sup>258</sup> James Madison, Veto Message on the National Bank (Jan. 30, 1815), in 1 A Compilation of the Messages and Papers of the Presidents, 1789–1897, supra note 228, at 555, 555; see also Richard S. Arnold, How James Madison Interpreted the Constitution, 72 N.Y.U. L. Rev. 267, 288–89 (1997).

insist on his own private opinion of the constitutional text, original understanding, and constitutional structure in considering whether to sign the bill into law.<sup>259</sup> Such a view is consistent with historical gloss, as is his analogy to judicial precedent in subsequent correspondence discussing the issue.<sup>260</sup> 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.

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.”<sup>261</sup> Throughout his career in public life, he continued to believe that the Constitution supported his previous view.<sup>262</sup> 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.<sup>263</sup> But because too many other institutions

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<sup>259</sup> See Arnold, *supra* note 258, at 289–90.

<sup>260</sup> See, e.g., Letter from James Madison to Charles J. Ingersoll (June 25, 1831), in 4 Letters and Other Writings of James Madison 183, 184–85 (New York, R. Worthington 1884) (analogizing respect for historical practice to judicial deference to precedent).

<sup>261</sup> See Baude, *supra* note 30, at 25 (quoting Letter from James Madison to Charles E. Haynes (Feb. 25, 1831), in 9 The Writings of James Madison 442, 442–43 (Gaillard Hunt ed., 1910)).

<sup>262</sup> See Powell, *supra* note 252, 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 James Madison to Charles E. Haynes (Feb. 25, 1831), in 9 The Writings of James Madison 442, 442–43 (Gaillard Hunt ed., 1910))).

<sup>263</sup> See Letter from James Madison to Spencer Roane, *supra* note 166, at 450–51 (“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 & as pliant as what has occurred. And those who

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.”<sup>264</sup> 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.<sup>265</sup>

Baude hedges in suggesting that Madison thought the Constitution was indeterminate on the question of the bank’s constitutionality,<sup>266</sup> 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,”<sup>267</sup> as well as Madison’s references to interpretive rules for “controverted” and “doubtful” cases.<sup>268</sup> Those few utterances, however, do not establish that 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.<sup>269</sup> He then argued both that there was an attenuated link between federal power to charter a corporation and any

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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, cannot easily be persuaded that the avowal of such a rule would not have prevented its ratification.”).

<sup>264</sup> Letter from James Madison to Marquis de LaFayette (Nov. 1826), in 3 Letters and Other Writings of James Madison 538, 542 (New York, R. Worthington 1884).

<sup>265</sup> See also Noah Feldman, *The Three Lives of James Madison* 611 (2017) (“He had opposed Hamilton’s proposed national bank as unconstitutional . . . . But he had come to accept that the bank *became* constitutional after Congress and the president adopted it anyway and it functioned for twenty years.” (emphasis added)); Sandy Levinson, *Our Inevitably Living Constitution*, Balkinization, (Oct. 23, 2018, 9:00 AM), <https://balkin.blogspot.com/-2018/10/our-inevitably-living-constitution.html> [<https://perma.cc/X5EL-T7RB>] (“[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.”).

<sup>266</sup> Baude, *supra* note 30, 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.” (emphasis added)).

<sup>267</sup> See *id.* (alteration in original) (quoting Madison, Bank Speech, *supra* note 257, at 486).

<sup>268</sup> See *id.* (quoting Madison, Bank Speech, *supra* note 257, at 482).

<sup>269</sup> Madison, Bank Speech, *supra* note 257, 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.”).

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.<sup>270</sup> Baude himself explains Madison’s argument when he writes that, in Madison’s view, “[t]o 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.”<sup>271</sup> 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.”<sup>272</sup> 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 the 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.<sup>273</sup>

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.”<sup>274</sup>

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* “also

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<sup>270</sup> 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”).

<sup>271</sup> Baude, *supra* note 30, at 21–22 (quoting Madison, Bank Speech, *supra* note 257, at 484).

<sup>272</sup> Madison, Bank Speech, *supra* note 257, at 486.

<sup>273</sup> *Id.* at 490.

<sup>274</sup> Accord Levinson, *supra* note 265 (“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.”). For additional discussion of Madison’s constitutional arguments against the bank, see Feldman, *supra* note 265, at 319–23.

hit the key elements of liquidation.”<sup>275</sup> In the opening passage of the opinion, Marshall discussed the historical practice concerning the First and Second Banks, stating that such practice supported the Second Bank’s constitutionality.<sup>276</sup> That discussion, although a noteworthy invocation of historical practice, was brief and was not the opinion’s central rationale, as Marshall himself indicated.<sup>277</sup> 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 reasoning<sup>278</sup>: the federal government is supreme within its sphere of action,<sup>279</sup> 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.<sup>280</sup> 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.<sup>281</sup> 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.<sup>282</sup> He expressly stated that there was no textual provision on point.<sup>283</sup>

<sup>275</sup> Baude, *supra* note 30, at 24.

<sup>276</sup> *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 401–02 (1819).

<sup>277</sup> *Id.* at 402 (“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.”).

<sup>278</sup> See Black, *supra* note 142, at 13–15 (interpreting *McCulloch* as a structural opinion).

<sup>279</sup> See *McCulloch*, 17 U.S. at 405 (“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.”).

<sup>280</sup> See *id.* at 408 (“But it may with great reason be contended, that a government, entrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depends, must also be entrusted with ample means for their execution.”).

<sup>281</sup> See *id.* at 411–12 (“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 . . .’”).

<sup>282</sup> See *id.* at 429 (articulating the “intelligible standard” that the states’ power of taxation extends only to “[a]ll subjects over which the sovereign power of a State extends”). For a discussion, see Farber & Siegel, *supra* note 106, at 96–99.

<sup>283</sup> *McCulloch*, 17 U.S. at 426 (“There is no express provision for the case . . .”). 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

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 a narrow account. We are not persuaded, however, that Baude has rediscovered "James Madison's theory of postenactment historical practice."<sup>284</sup> 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."<sup>285</sup> 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.<sup>286</sup>

For example, we have no idea whether Madison would think that Baude's "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

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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.

Id. 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.

<sup>284</sup> Baude, *supra* note 30, at 4.

<sup>285</sup> Id. at 13.

<sup>286</sup> See Gienapp, *supra* note 31, at 161–62, 209, 321–22, 327–32 (discussing the changes over time in Madison's views on those subjects). 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).

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.”<sup>287</sup> Our best sense is that Madison never developed a clear account of what the “public sanction” was<sup>288</sup> or when it was required.<sup>289</sup> He seemed convinced that the right sort of public approval in the right sort of circumstance 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 given his concerns that the people were capable of behaving badly and that political leadership was required to avoid such behavior by the mass public.<sup>290</sup> 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 Baude.

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

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<sup>287</sup> Gienapp, *supra* note 31, at 142.

<sup>288</sup> See Jonathan Gienapp, *How to Maintain a Constitution: The Virginia and Kentucky Resolutions and James Madison’s Struggle with the Problem of Constitutional Maintenance*, in *Nullification and Secession in Modern Constitutional Thought* 53, 76 (Sanford Levinson ed., 2016) (“Public opinion, by which Madison meant not public sentiment (which was often impassioned and frenzied) but the true rational interests of the people at large (buried beneath the passions and the product of prudent reflection), was the source of sovereignty in the United States. Here Madison handled the great problem inherent in popular sovereignty (that the people could behave recklessly) by locating sovereignty not immediately in the people but in the best version of themselves.”).

<sup>289</sup> See *id.* at 77 (“Madison wrote not about what was but what he hoped would be, suggesting that the American republic lacked the kind of public opinion necessary to maintain the constitutional system. . . . Appeals to the people would be selective, based on the emergency of the situation . . .”).

<sup>290</sup> Gienapp explains that Madison was better at wrestling with the right question than he was at formulating an answer that satisfied him:

How can the public be activated—in prudential, moderate ways—such that their sovereign authority not only undergirds the Constitution’s authority but also its ongoing interpretation? How can the people be active in not only initiating the Constitution but also in maintaining it? To Madison these were urgent questions. Although he perhaps never offered clear answers, that was perhaps because he had hit upon an enduring insight: that the matter was anything but simple. It is thus worth asking whether we have reckoned with these questions as seriously as Madison did.

*Id.* at 90.

would “become the permanent exposition of the constitution”<sup>291</sup> 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.”<sup>292</sup> 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”<sup>293</sup> 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”<sup>294</sup> 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.”<sup>295</sup> As we noted in the Introduction, however, many of the decisions cited by the majority endorsed historical gloss.<sup>296</sup> 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

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<sup>291</sup> 1 Annals of Cong. 514 (1789) (Joseph Gales ed., 1834).

<sup>292</sup> Baude, *supra* note 30, at 59 (footnote omitted).

<sup>293</sup> 4 Annals of Cong. 170–71 (1794).

<sup>294</sup> Baude, *supra* note 30, at 13.

<sup>295</sup> *Noel Canning*, 134 S. Ct. 2550, 2560 (2014).

<sup>296</sup> See *supra* note 26 and accompanying text.

founding era.”<sup>297</sup> 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 represented a general consensus of the Founders about how the Constitution should be interpreted (or “constructed”).<sup>298</sup> Moreover, Gienapp has recently emphasized the lack of a Founding consensus about what the Constitution was or how it should be interpreted.<sup>299</sup> 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.<sup>300</sup> 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”

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<sup>297</sup> *Noel Canning*, 134 S. Ct. at 2560.

<sup>298</sup> 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, 611 (1999) (“Madison’s argument [in *Federalist No. 10*], particularly those aspects that are important to theorists today, played essentially no role in shaping the Constitution or its ratification.”).

<sup>299</sup> See generally Gienapp, *supra* note 31, at 116–23 (explaining the uncertainty surrounding the Federalists’ and Anti-Federalists’ “fractured, partial, and contradictory” rules of interpretation).

<sup>300</sup> “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, e.g., McGinnis & Rappaport, *supra* note 47; John O. McGinnis & Michael B. Rappaport, *Originalism and the Good Constitution* 116–38 (2013) (arguing “that the enactors in 1789 deemed originalist interpretive methods applicable to the Constitution”).

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.

#### 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.”<sup>301</sup> 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 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.

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<sup>301</sup> *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).