

Doing Gloss

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It is common for courts, the political branches, and academic commentators to look to historical governmental practices when interpreting the separation of powers. There has been relatively little attention, however, to the proper methodology for invoking such “historical gloss.” This Essay contends that, in order to gain traction on the methodological questions, we need to begin by considering the potential justifications for crediting gloss. For judicial application of gloss, which is this Essay’s principal focus, there are at least four such justifications: deference to the constitutional views of nonjudicial actors; limits on judicial capacity; Burkean consequentialism; and reliance interests. As the Essay explains, these differing justifications have differing methodological implications, and disaggregating them helps explain variations in the types of evidence that courts have credited in discerning gloss. Perhaps most notably, it helps explain why courts are often less demanding in requiring evidence of institutional acquiescence than commonly recited standards for gloss would tend to suggest.

INTRODUCTION

In discerning the Constitution’s separation of powers among the three branches of the federal government, it is common for courts, the political branches, and academic commentators to give weight to post-Founding governmental practice. There is substantial uncertainty, however, about the proper methodology for determining such “historical gloss.” In order to make progress on the methodological questions, this Essay contends that it is important to consider the potential justifications for crediting gloss. For judicial application of gloss, which is this Essay’s principal focus, there are at least four such justifications: deference to the constitutional views of nonjudicial actors; limits on judicial capacity; Burkean consequentialism; and reliance interests. As the Essay explains, these differing justifications have differing methodological implications. This Essay considers in

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particular the differing implications that these justifications have for what constitutes relevant “practice” for purposes of determining gloss, and for the extent to which there must be a showing of institutional “acquiescence” in the practice. As the Essay shows, disaggregating the justifications for gloss helps explain variations in the types of evidence that courts have credited in discerning gloss. Perhaps most notably, it helps explain why courts are often less demanding in requiring evidence of institutional acquiescence than commonly recited standards for gloss would tend to suggest.

In recent scholarship and Supreme Court opinions, there has been increased attention to the relevance of post-Founding governmental practice in discerning the Constitution’s distribution of authority among the three branches of the federal government, as well as between the two houses of Congress.¹ This approach to constitutional interpretation can be termed the “historical gloss” approach, after Justice Felix Frankfurter’s description and defense of it in his concurrence in *Youngstown Sheet & Tube Co v Sawyer*.² Frankfurter wrote separately in *Youngstown* to emphasize the interpretive significance of “[d]eeply embedded traditional ways of conducting government,” which he contended could not “supplant the Constitution or legislation, but [could] give meaning to the words of a text or supply them.”³ Consistent with this idea, Frankfurter contended that “a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, . . . may be treated as a gloss on ‘executive Power’ vested in the President by § 1 of Art. II.”⁴

Although the Supreme Court has invoked gloss in a number of separation-of-powers decisions, both before and after *Youngstown*, its most extended consideration of this approach to constitutional interpretation occurred in 2014, in *National Labor Relations Board v Noel Canning*.⁵ In that case, the Court interpreted the Recess Appointments Clause of the Constitution, which provides that “[t]he President shall have Power to fill up

¹ See, for example, *Zivotofsky v Kerry*, 135 S Ct 2076, 2091–94 (2015); *National Labor Relations Board v Noel Canning*, 134 S Ct 2550, 2559 (2014). See also Curtis A. Bradley and Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 Harv L Rev 411, 417–24 (2012) (describing the prevalence of arguments rooted in historical gloss).

² 343 US 579, 610–11 (1952) (Frankfurter concurring).

³ Id at 610 (Frankfurter concurring).

⁴ Id at 610–11 (Frankfurter concurring).

⁵ 134 S Ct 2550 (2014).

all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session,”⁶ as allowing the president to make recess appointments during breaks within a yearly session of Congress and to fill governmental posts that become vacant before the breaks.⁷ In doing so, the Court placed “significant weight” on historical governmental practice relating to appointments.⁸ The Court explained that such weight was appropriate because the relevant constitutional text was ambiguous and “the interpretive questions before us concern the allocation of power between two elected branches of Government.”⁹ Reviewing its precedent, the Court observed that it had “treated practice as an important interpretive factor even when the nature or longevity of that practice is subject to dispute, and even when that practice began after the founding era.”¹⁰ The following year, in *Zivotofsky v Kerry*,¹¹ the Court again gave weight to historical governmental practice in concluding that the president had an exclusive power to recognize foreign sovereigns and their territories, and in doing so it invoked its analysis from *Noel Canning*.¹²

Outside the courts, the gloss approach has long been a prominent feature of executive branch legal reasoning. To take just a few examples from the last several decades, executive branch lawyers have invoked gloss in support of a broad executive authority to conclude binding international agreements without obtaining the advice and consent of two-thirds of the Senate;¹³ a unilateral executive authority to terminate or suspend treaty obligations;¹⁴ a presidential power to initiate certain

⁶ US Const Art II, § 2, cl 3.

⁷ *Noel Canning*, 134 S Ct at 2567, 2573.

⁸ *Id* at 2559 (emphasis omitted).

⁹ *Id*.

¹⁰ *Id* at 2560.

¹¹ 135 S Ct 2076 (2015).

¹² See *id* at 2091, 2096.

¹³ See Office of Legal Counsel, *Whether Uruguay Round Agreements Required Ratification as a Treaty: Memorandum Opinion for the United States Trade Representative*, 18 Op Off Legal Counsel 232, 233 (Nov 22, 1994) (contending that for this issue “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”).

¹⁴ See John C. Yoo and Robert J. Delahunty, *Memorandum for John Bellinger, III, Senior Associate Counsel to the President and Legal Adviser to the National Security Council: Authority of the President to Suspend Certain Provisions of the ABM Treaty* *13 (DOJ, Nov 15, 2001), archived at <http://perma.cc/Q6AR-KCBX> (“The normative role of historical practice in constitutional law, and especially with regard to separation of powers, is well settled.”).

military conflicts without congressional authorization;¹⁵ and an exclusive presidential authority to recognize foreign sovereigns and their territory.¹⁶ As these examples illustrate, invocations of gloss are especially common with respect to matters relating to US foreign relations, although they are not confined to that subject area. Although less systematically studied, gloss reasoning has also been common in deliberations and debates within Congress about the separation of powers.¹⁷

The effect of gloss is sometimes so strong that it essentially eliminates constitutional debate. For example, the argument (associated most notably with Justice Joseph Story¹⁸) that the text of Article III requires that Congress vest the federal courts with the full extent of the judicial power described in that Article is a nonstarter in light of the fact that Congress has never done so.¹⁹ Similarly, the Senate's power to attach reservations to its advice and consent to treaties is beyond serious question, in large part because the Senate has engaged in this practice—without significant objection by the executive branch—for much of American history.²⁰ Another example of constitutional authority that is now largely taken for granted as a result of long-standing practice is the president's authority, without seeking

¹⁵ See Office of Legal Counsel, *Authority to Use Military Force in Libya: Memorandum Opinion for the Attorney General* *7 (Apr 1, 2011), archived at <http://perma.cc/B9R5-L5YN> (“This understanding of the President’s constitutional authority reflects not only the express assignment of powers and responsibilities to the President and Congress in the Constitution, but also, as noted, the ‘historical gloss’ placed on the Constitution by two centuries of practice.”).

¹⁶ See Brief for the Respondent, *Zivotofsky v Kerry*, Docket No 13-628, *26 (US filed Sept 22, 2014) (available on Westlaw at 2014 WL 4924107) (“More than two hundred years of historical practice confirms what the Constitution’s text and structure make clear: The recognition power belongs exclusively to the Executive.”).

¹⁷ See generally, for example, Curtis A. Bradley, *Treaty Termination and Historical Gloss*, 92 Tex L Rev 773 (2014) (documenting the use of gloss reasoning in Congress about the Constitution’s distribution of authority to terminate or suspend treaty obligations); Curtis A. Bradley and Neil S. Siegel, *Historical Gloss, Constitutional Conventions, and the Judicial Separation of Powers*, 105 Georgetown L J 255 (2017) (documenting the use of gloss reasoning in Congress about whether it has the constitutional authority to change the size of the Supreme Court and restrict its jurisdiction).

¹⁸ See *Martin v Hunter’s Lessee*, 14 US (1 Wheat) 304, 328 (1816) (Story) (“The language of [Article III] throughout is manifestly designed to be mandatory upon the legislature.”).

¹⁹ See Daniel J. Meltzer, *The History and Structure of Article III*, 138 U Pa L Rev 1569, 1585–86 (1990) (noting that the first Judiciary Act did not extend full Article III jurisdiction to the federal courts).

²⁰ See Curtis A. Bradley and Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U Pa L Rev 399, 404–10 (2000).

authorization from Congress, to use military force to protect and rescue Americans endangered abroad.²¹

Despite the importance and prevalence of the gloss approach to constitutional interpretation, its methodological underpinnings have received relatively little attention. For example, Professor Philip Bobbitt's influential account of the "modalities" of constitutional interpretation does not even expressly consider gloss. Although Bobbitt refers to "history" as a modality, he defines it purely in originalist terms as focused on the intentions or understandings of the Framers and ratifiers of the text.²²

The methodological issues implicated by the gloss approach include the following: What counts as relevant "practice"? What is the required frequency, consistency, and duration of the practice? How does one decide on the proper level of generality at which to describe the practice? To what extent must there be institutional "acquiescence" or some other understanding of the practice? And how does gloss relate to other approaches to constitutional interpretation?²³ Professor Trevor Morrison and I considered the role of historical gloss at length in a 2012 article, *Historical Gloss and the Separation of Powers*,²⁴ and some of what is discussed here draws from that article. Nevertheless, our central focus in that article was demonstrating how modern congressional-executive relations complicate efforts to rely on governmental practice when interpreting the separation of powers,²⁵ and we generally avoided taking a position on the proper methodology for "doing gloss."

This Essay contends that, in order to gain traction on the methodological questions, it is important first to consider the potential justifications for relying on historical practice when discerning the separation of powers. As this Essay shows, different

²¹ See Curtis A. Bradley and Jean Galbraith, *Presidential War Powers as an Interactive Dynamic: International Law, Domestic Law, and Practice-Based Legal Change*, 91 NYU L Rev 689, 713–18 (2016).

²² See Philip Bobbitt, *Constitutional Interpretation* 12 (Basil Blackwell 1991) (describing the historical modality as "relying on the intentions of the framers and ratifiers of the Constitution"); Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* 9 (Oxford 1982) ("Historical arguments depend on a determination of the original understanding of the constitutional provision to be construed.").

²³ See Alison L. LaCroix, *Historical Gloss: A Primer*, 126 Harv L Rev F 75, 77–79 (2013).

²⁴ See generally Bradley and Morrison, 126 Harv L Rev 411 (cited in note 1).

²⁵ See *id.* at 448 (arguing that the "descriptive shortcomings" of James Madison's ideas about the separation of powers "carry several significant implications for relying on ideas of institutional acquiescence to resolve separation of powers controversies").

potential justifications for gloss have differing methodological implications. This disaggregation of justifications helps explain variations in the types of evidence that courts have credited in discerning gloss. Perhaps most notably, it helps explain why courts are often less demanding in requiring evidence of institutional acquiescence than commonly recited standards for gloss would suggest.

I. POTENTIAL JUSTIFICATIONS FOR CREDITING GLOSS

Any consideration of how to “do” an approach to law is inevitably intertwined with normative questions about the value of the approach, and that is true of the gloss approach to constitutional interpretation. This is not the place for a full normative evaluation of gloss, which would require not only an account of its potential benefits but also an assessment of its potential drawbacks. Nor does this Essay attempt to situate gloss more generally within constitutional theory, something that has been explored in other writings.²⁶ Instead, the aim here is simply to describe the most likely justifications for crediting gloss in discerning the separation of powers, particularly in judicial decisions.²⁷ A review of Supreme Court decisions and other materials that have invoked gloss suggests that there are at least four such justifications: deference to nonjudicial actors; limits on judicial capacity; Burkean consequentialism; and reliance interests. As will become apparent, probably the two most important, in terms of offering the most distinct visions about how to do gloss, are the deference justification and Burkean consequentialism.²⁸

A. Deference to Nonjudicial Actors

The deference justification rests on the proposition that the courts do not have a monopoly on constitutional interpretation. Other governmental actors are sworn to uphold the Constitution,

²⁶ See, for example, Bradley and Morrison, 126 Harv L Rev at 424–28 (cited in note 1).

²⁷ Although historical practice is potentially relevant to judicial decision-making in other areas of constitutional law, such as federalism and individual rights, those areas raise sufficiently distinct issues that they are not addressed here. In addition, this Essay is focused only on the relevance of the historical practices of governmental institutions and not on the relevance of other nonoriginalist history to constitutional analysis.

²⁸ The justifications for executive branch or congressional invocation of gloss may differ to some extent from the justifications for judicial invocation of gloss, and these potential differences are not explored here. For a discussion of some reasons why the executive branch relies on gloss, see Bradley and Morrison, 126 Harv L Rev at 457–61 (cited in note 1).

and they must of necessity interpret it as part of their duties.²⁹ Moreover, with respect to separation-of-powers issues, political branch actors are likely to have a better understanding than courts of the practical consequences of particular constitutional interpretations. Furthermore, judicial deference to political branch understandings can reduce countermajoritarian concerns associated with constitutional judicial review, concerns that are especially strong when both political branches share a view that is different from the judiciary's view, and have held that view for a long time. Giving weight to such views, this argument suggests, can be a way of making constitutional interpretation more democratically legitimate. For these reasons, this justification suggests that if the political branches have coalesced around a constitutional interpretation, and that understanding has persisted, it merits judicial deference.³⁰

B. Limits on Judicial Capacity

A related justification for gloss concerns limits on judicial capacity. Sometimes courts invoke practice because other constitutional materials are perceived to offer insufficient guidance.³¹ This may be especially likely with respect to questions of executive power, given the limited textual guidance in Article II of the Constitution as well as substantial changes in the nature of the presidential office and international affairs over time.³² For such issues, unless the courts abstain altogether, relying on practice may offer the best option for a reasoned disposition of the case that seeks to avoid appealing simply to a policy assessment or "choosing a side" in a dispute between the branches. This justification for looking to gloss is consistent with the concept of

²⁹ See Michael J. Gerhardt, *Non-judicial Precedent*, 61 Vand L Rev 713, 746 (2008) ("[V]irtually every question of constitutional law that the Court hears already has been considered by one or more non-judicial actors.").

³⁰ For illustrations of this attitude in practice, see, for example, *Zivotofsky*, 135 S Ct at 2094 ("The weight of historical evidence indicates Congress has accepted that the power to recognize foreign states and governments and their territorial bounds is exclusive to the Presidency."); *Dames & Moore v Regan*, 453 US 654, 680 (1981) ("Crucial to our decision today is the conclusion that Congress has implicitly approved the practice of claim settlement by executive agreement.").

³¹ See, for example, *Noel Canning*, 134 S Ct at 2594 (Scalia concurring in the judgment) (agreeing, while expressing reservations about practice-based arguments, that an "ambiguous constitutional provision" is ripe for historical analysis) (emphasis added).

³² See Bradley and Morrison, 126 Harv L Rev at 417–18 (cited in note 1) (noting that Article II's general language has given rise to a reliance on practice-based arguments concerning the scope of presidential powers).

“constitutional construction” articulated by some theorists, which envisions that interpreters can draw on various materials to resolve constitutional meaning “when the Constitution as written cannot in good faith be said to provide a determinate answer to a given question.”³³

C. Burkean Consequentialism

The Burkean consequentialist justification rests on the premise that long-standing practices are suggestive of what works well, or at least what works better than anything the courts are likely to impose.³⁴ These practices reflect the judgments of many actors over time, informed by 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 this rationale, the very persistence of a practice is evidence of its utility.³⁵ In *Noel Canning*, for example, the Court claimed that the frequent and long-standing use of recess appointments “suggests that the Senate and President have recognized that recess appointments can be both necessary and appropriate in certain circumstances.”³⁶

Burkean consequentialism also recognizes that long-standing practices are likely to be embedded within a broader array of understandings and institutional behavior, such that undoing them carries a risk of unforeseen consequences, including social and institutional disruption.³⁷ That is, even if one is uncertain about the extent to which a particular practice is

³³ Keith E. Whittington, *Constructing a New American Constitution*, 27 Const Comm’n 119, 120–21 (2010). See also Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 Const Comm’n 95, 96 (2010).

³⁴ See Cass R. Sunstein, *Burkean Minimalism*, 105 Mich L Rev 353, 359 (2006) (“The argument for Burkeanism is that respect for traditions is likely to produce better results, all things considered, than reliance on theories of one or another kind, especially when those theories are deployed by such fallible human beings as judges.”).

³⁵ See David A. Strauss, *Common Law Constitutional Interpretation*, 63 U Chi L Rev 877, 891–92 (1996) (noting that traditions “reflect a kind of rough empiricism: . . . they have been tested over time, in a variety of circumstances, and have been found to be at least good enough”).

³⁶ *Noel Canning*, 134 S Ct at 2560.

³⁷ See 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.

optimal, the risks associated with unsettling the practice may outweigh any potential benefits that would be achieved. This idea, too, appears in the reasoning in *Noel Canning*. In explaining why it should not overturn long-standing practice relating to recess appointments, the Court observed: “We have not previously interpreted the Clause, and, when doing so for the first time in more than 200 years, we must hesitate to upset the compromises and working arrangements that the elected branches of Government themselves have reached.”³⁸

D. Reliance Interests

A related justification, which concerns a particular type of consequentialist consideration, is one based on reliance interests. This idea, similar to one of the justifications for stare decisis,³⁹ is that over time both governmental actors and third parties (including, potentially, society at large) are likely to have adjusted their behavior to account for persistent practices, and that they may have made decisions and concessions based on this reliance. The more long-standing and entrenched the practice becomes, the more likely it is that the practice will have such reliance effects. This justification can also be found in *Noel Canning*, most notably in the Court’s observation that it was “reluctant to upset this traditional practice where doing so would seriously shrink the authority that Presidents have believed existed and have exercised for so long.”⁴⁰

* * *

In thinking about these potential justifications for crediting historical gloss, three additional points should be kept in mind. First, although these justifications are analytically distinct, they overlap and are potentially mutually reinforcing. For example, limits on judicial capacity can be a justification for deference to political branch interpretation, and also for the risk aversion

³⁸ *Noel Canning*, 134 S Ct at 2560. See also generally Aziz Z. Huq, *The Negotiated Structural Constitution*, 114 Colum L Rev 1595 (2014) (offering a descriptive and normative account of bargains between governmental institutions concerning their authority).

³⁹ See generally Randy J. Kozel, *Stare Decisis as Judicial Doctrine*, 67 Wash & Lee L Rev 411 (2010).

⁴⁰ *Noel Canning*, 134 S Ct at 2573. See also *United States v Midwest Oil Co*, 236 US 459, 472–73 (1915) (noting that “officers, law-makers and citizens naturally adjust themselves to any long-continued action of the Executive Department—on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice”).

associated with Burkean consequentialism. Moreover, the justifications are not mutually exclusive: it would not be inconsistent for an interpreter to invoke more than one justification—or even all of them—to justify resort to gloss. Nevertheless, as discussed below, it is possible to perceive differences in emphasis between the justifications offered by interpreters, in particular a difference in emphasis between justifications centered on deference and justifications centered on Burkean consequentialism.

Second, most if not all of the justifications assume that some amount of pragmatic reasoning is relevant to constitutional interpretation in the separation-of-powers area. As the Supreme Court explained (in somewhat-dated language) when relying on past governmental practice in *United States v Midwest Oil Co.*,⁴¹ “government is a practical affair intended for practical men.”⁴² The more that one conceives of constitutional interpretation as a formal enterprise, involving merely the application of objectively identifiable textual meaning or original understanding, the less one will perceive the various justifications for gloss to be relevant. Not surprisingly, therefore, the Supreme Court decision best known for declining to credit gloss, *Immigration and Naturalization Service v Chadha*,⁴³ is highly formal in its reasoning.⁴⁴ Nevertheless, it should be noted that even Supreme Court justices known for their commitment to constitutional formalism have accepted the potential relevance of gloss under some circumstances.⁴⁵

Third, another factor that is likely to affect the relevance of the above justifications for crediting gloss is the frequency of judicial review. Gloss argumentation thrives most when there is an absence of frequent judicial intervention, which is one reason it has been so common in the area of foreign affairs.⁴⁶ When

⁴¹ 236 US 459 (1915).

⁴² *Id.* at 472.

⁴³ 462 US 919 (1983).

⁴⁴ See *id.* at 945 (“[P]olicy arguments supporting even useful ‘political inventions’ are subject to the demands of the Constitution which defines powers and, with respect to this subject, sets out just how those powers are to be exercised.”).

⁴⁵ See, for example, *Noel Canning*, 134 S Ct at 2594 (Scalia concurring in the judgment) (“Of course, where a governmental practice has been open, widespread, and unchallenged since the early days of the Republic, the practice should guide our interpretation of an ambiguous constitutional provision.”); *Stern v Marshall*, 564 US 462, 504–05 (2011) (Scalia 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).

⁴⁶ See Bradley and Morrison, 126 Harv L Rev at 429 (cited in note 1).

engaging in constitutional reasoning, courts are more likely to focus on their own precedent and reasoning rather than on non-judicial practices, so extensive judicial interventions will tend to displace judicial reliance on gloss. Moreover, because of the tradition of judicial supremacy, political branch actors will typically coordinate around judicial decisions,⁴⁷ so such decisions are likely to disrupt the ongoing development of practice. As a result, it is less likely in that situation that practices will become long-standing before they are challenged, and also less likely that they will generate reliance interests.⁴⁸

II. IMPLICATIONS FOR GLOSS METHODOLOGY

These differing justifications for gloss have differing implications for methodological questions concerning how to “do” gloss. This Part analyzes two such questions: what should count as “practice” when discerning gloss and whether a showing of institutional acquiescence should be required in order to establish gloss.

A. What Counts as “Practice”?

The historical gloss approach takes account of post-Founding governmental practice in discerning the separation of powers. But what precisely constitutes the “practice” of governmental institutions? Presumably it includes the enactment of statutes, which is the most obvious way in which Congress as an institution takes action. In *United States v Curtiss-Wright Export Corp.*,⁴⁹ for example, the Court gave weight to the fact that Congress had long enacted statutes giving broad foreign affairs authority to the president to support its conclusion that the delegation of criminalization authority in that case did not violate the separation of powers.⁵⁰ Similarly, governmental practice also presumably includes presidential actions intended to have binding

⁴⁷ See Larry D. Kramer, *The Supreme Court 2000 Term—Foreword: We the Court*, 115 Harv L Rev 4, 5–7 (2001) (describing the historical evolution of judicial supremacy and noting that modern politicians assume judicial supremacy “as a matter of course”).

⁴⁸ Some of the tensions between judicial review and gloss can be eased by judicial “minimalism”—that is, “narrow, incompletely theorized rulings.” Sunstein, 105 Mich L Rev at 408 (cited in note 34).

⁴⁹ 299 US 304 (1936).

⁵⁰ See *id.* at 329 (“The uniform, long-continued and undisputed legislative practice just disclosed rests upon an admissible view of the Constitution which, even if the practice found far less support in principle than we think it does, we should not feel at liberty at this late day to disturb.”).

effect—for example, a directive that US troops engage in combat, the conclusion of an executive agreement, the appointment of officials during a Senate recess, or a declaration that the United States recognizes a particular foreign government.

There are a variety of additional congressional and executive branch materials, however, that take positions on separation-of-powers matters. For Congress, these materials include committee reports and nonbinding Senate and House resolutions. For the executive branch, they include legal memoranda (such as from the Office of Legal Counsel) and presidential signing statements. It is common for invocations of gloss to cite such materials,⁵¹ but there has been little express consideration of why they are relevant. If gloss concerns the iterative behavior of governmental institutions, one might think that the only relevant consideration is their actual behavior, not their verbal claims about their (or the other branches') authority.⁵²

The differing justifications for gloss yield potentially different answers. Because the deference justification is focused on the views of the political branches, it presumably would treat as relevant their articulations of those views, even if not accompanied by action. Indeed, their expression of constitutional views might be even more relevant than their actual behavior under this justification. Institutional behavior, after all, might be occurring for a variety of reasons other than a particular understanding of the Constitution.⁵³ What is most important for deference is that the political branches, staffed by officials sworn to uphold the Constitution, have considered the issue and endorsed a particular constitutional interpretation.

There is, of course, an inherent danger of “cheap talk” when statements about the law are not accompanied by action. This danger, however, merely suggests that such statements should be considered with caution, not that they are irrelevant. Moreover, there might be evidence of the costliness of the statements even in the absence of practice—for example, if the statements are

⁵¹ See, for example, *Noel Canning*, 134 S Ct at 2562–64 (examining numerous reports and opinions from both the legislative and executive branches to ascertain the branches' historical views concerning the Recess Appointments Clause).

⁵² See Michael J. Glennon, *The Use of Custom in Resolving Separation of Powers Disputes*, 64 BU L Rev 109, 134 (1984) (contending that “mere assertions of authority to act are insufficient”).

⁵³ See Shalev Roisman, *Constitutional Acquiescence*, 84 Geo Wash L Rev 668, 684–87 (2016) (describing how “a branch might act (let alone, not act) for many reasons not primarily motivated by constitutional analysis”).

contrary to short-term political interests. It is also worth keeping in mind that, in some instances, expressions of views about the separation of powers that are made in the abstract are likely to be less opportunistic than ones made in the midst of controversy.

A wide range of materials could be relevant to discerning the constitutional understandings of the political branches. Even statements by individual members of Congress would potentially be relevant. Although such statements would not by themselves tell us the understanding of Congress as a whole (or even of a house of Congress or one of its committees), they could help reveal which constitutional propositions were generally taken for granted and which were disputed. Just as with resort to legislative history for interpreting statutes (which, although controversial, is commonplace), more weight should presumably be given to committee reports than to statements by individual legislators. Even greater weight could be given to congressional resolutions voted on by one or both houses of Congress—that is, to congressional “soft law.”⁵⁴

As for the executive branch, greater weight could be given to internal legal reasoning (which later becomes public) than to public argumentation (such as that in signing statements), because the former would presumably reflect a more candid expression of views. And, again, expressions of constitutional views that are contrary to apparent political interests may be especially telling.

Another reason for looking to expressions of views by governmental officials stems from concerns about judicial capacity: it is difficult to know how to describe practice for purposes of making claims about gloss without considering how that practice is understood by its participants. As with all appeals to custom (and to judicial precedent⁵⁵), there will inevitably be a question about the appropriate level of generality at which to describe the past practice, something that the practice itself cannot resolve. To help resolve this issue, it can be useful to look to how participants in the practice understand its generalizability, which requires looking to the claims they make about gloss and not just to their practice.

⁵⁴ Jacob E. Gersen and Eric A. Posner, *Soft Law: Lessons from Congressional Practice*, 61 *Stan L Rev* 573, 603 (2008) (noting that nonbinding congressional resolutions and other forms of “soft law” are “better indicator[s] of legislative views than legislative inaction”).

⁵⁵ See generally Randy J. Kozel, *The Scope of Precedent*, 113 *Mich L Rev* 179 (2014).

Nevertheless, some of the other justifications for gloss would place more weight on the actual behavior of institutions than on their stated views. For example, Burkean consequentialism treats as presumptively valid long-standing patterns of governmental conduct, but the same rationale would not necessarily apply to mere long-standing claims about the Constitution unsupported by conduct.⁵⁶ The reliance justification falls somewhere in between: actual behavior is more concrete evidence that there has been reliance, but it is still possible that there will have been reliance, or institutional bargains, based on statements about the law.

If one is focused on institutional behavior, there is still a question of what constitutes behavior. In particular, there is a question about whether institutional *inaction* is a type of behavior. In theory, inaction could be relevant both for justifications focused on constitutional understandings and for justifications focused on patterns of behavior, although for different reasons.

Inaction in the face of action by another branch might be evidence of agreement with the constitutionality of that action, especially if there would otherwise be political incentives to contest the legality of the action. Similarly, if a branch considers acting and then refrains from doing so after legal claims are made against it, its inaction might suggest agreement with the claims. The Supreme Court relied on this sort of evidence in *Zivotofsky*, in support of an exclusive presidential power to recognize foreign sovereigns and their territory.⁵⁷

Of course, there will often be potential explanations for inaction other than constitutional agreement, such as political calculation, institutional paralysis, or inattention, so this sort of evidence must be examined carefully.⁵⁸ An institution's failure to raise a constitutional objection to another branch's practice should be given more weight when the institution is actively focused on the practice—for example, when it is opposing instances

⁵⁶ See Sunstein, 105 Mich L Rev at 356 (cited in note 34).

⁵⁷ See *Zivotofsky*, 135 S Ct at 2092 (emphasizing that Congress had refrained from recognizing the independence of Spanish colonies in South America in the early nineteenth century in the face of constitutional arguments that the recognition power rested exclusively with the president).

⁵⁸ Because of Congress's collective action and partisan limitations, it will often be difficult for it to oppose executive action through the formal act of passing legislation. As a result, it can be problematic to treat Congress's failure to enact legislation as "inaction," especially when Congress has engaged in other measures designed to express opposition. See Bradley and Morrison, 126 Harv L Rev at 446, 451–52 (cited in note 1).

of the practice on policy grounds or is otherwise regulating in the area. Thus, in *Noel Canning*, the Court emphasized that even when the Senate was addressing issues relating to recess appointments in the twentieth century, it had not argued that it was unconstitutional for the president to make recess appointments during intrasession breaks or for vacancies that occurred prior to the break.⁵⁹

Even when inaction does not show constitutional agreement, however, it could still show a pattern of institutional behavior and thus potentially be relevant to justifications that are not focused as much on shared constitutional understandings. In particular, inaction in the face of long-standing practice by another branch might confirm that the practice is stable or entrenched. This might help explain why the Court in *Zivotofsky* treated as relevant the lack of congressional regulation of recognition throughout much of the twentieth century without attempting to establish that this inaction was the result of a perception by Congress that it lacked authority to regulate.⁶⁰

In evaluating the weight to be given to either expressions of constitutional views or behavior, another complication is that of party affiliation.⁶¹ A significant limitation on the idea that the political branches will act to safeguard their institutional interests—an idea associated most famously with James Madison’s Federalist 51⁶²—is the commitment of governmental actors to their political party. This means, for example, that a Congress controlled by the president’s political party is less likely to resist presidential incursions on congressional authority than one controlled, in whole or in part, by the opposition party.⁶³ Congressional inaction in the face of presidential assertions of authority, therefore, is more probative when it occurs during periods of divided government, regardless of whether one is looking for common constitutional understandings or entrenched institutional

⁵⁹ See *Noel Canning*, 134 S Ct at 2563–64, 2572–73.

⁶⁰ See *Zivotofsky*, 135 S Ct at 2093–94.

⁶¹ See generally Daryl J. Levinson and Richard H. Pildes, *Separation of Parties, Not Powers*, 119 Harv L Rev 2311 (2006).

⁶² See Federalist 51 (Madison), in *The Federalist* 347, 349 (Wesleyan 1961) (Jacob E. Cooke, ed) (arguing that “the great security” of separation of powers “consists in giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others”).

⁶³ See Levinson and Pildes, 119 Harv L Rev at 2324 (cited in note 61) (observing that “the political interests of elected officials generally correlate more strongly with party than with branch”).

practice. Conversely, congressional opposition is more probative when it comes from the president's own party.

Whether focused on views or behavior, there is no precise metric for how long the practice must have persisted before being given weight as gloss. The deference justification would presumably require the least amount of time, given that the political branches could reach a common understanding about the Constitution in a relatively short period. Some of the other justifications, such as Burkean consequentialism and reliance interests, are, by contrast, likely to be focused on long-term accretions of practice. In *Noel Canning*, in which the Court was concerned about “upset[ting] the compromises and working arrangements that the elected branches of Government themselves have reached”⁶⁴ and about “seriously shrink[ing] the authority that Presidents have believed existed and have exercised for so long,”⁶⁵ the Court observed 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.”⁶⁶

In sum, determining what should properly count as “practice” depends in part on the justifications for gloss. In particular, justifications grounded in deference to political branch understandings are likely to credit a wide range of materials, including “soft law” materials, that help reveal such understandings. By contrast, Burkean justifications and justifications grounded in judicial capacity are likely to emphasize long-standing patterns of government action and inaction, even when it is not clear that the patterns are the result of constitutional understandings.

B. Must There Be Institutional “Acquiescence” in the Practice?

The Supreme Court has suggested in a number of decisions that, in order to establish gloss, it must be shown that the affected branch has “acquiesced” in the practice in question, and this is what Justice Frankfurter claimed in *Youngstown*.⁶⁷ This claim is also common in academic commentary about gloss.⁶⁸ The

⁶⁴ *Noel Canning*, 134 S Ct at 2560.

⁶⁵ *Id* at 2573.

⁶⁶ *Id* at 2564.

⁶⁷ See *Youngstown*, 343 US at 613 (Frankfurter concurring) (accepting that the “long-continued acquiescence of Congress” can “giv[e] decisive weight to a construction by the Executive of its powers”).

⁶⁸ See, for example, David J. Bederman, *Custom as a Source of Law* 111 (Cambridge 2010) (noting that for historical practice to inform interpretation of the separation of powers, one must ask “whether the opposing branch in the separation-of-powers struggle

executive branch has been less committed to this proposition, sometimes contending that long-standing executive branch practice made under claim of right is sufficient to establish gloss.⁶⁹

As with what counts as “practice,” whether acquiescence should be required, and the evidence that would be needed to establish it, will depend on the justifications for relying on gloss. As an initial matter, it is important to note that the idea of acquiescence could encompass a variety of interbranch relations. It could mean express agreement between the branches about a proposition of constitutional law.⁷⁰ Or it could involve agreement about operational feasibility and desirability, as opposed to legality in a formal sense. Or it could mean simply a failure by one branch to resist claims of constitutional authority by another branch, for whatever reason.

The justification that most closely depends on a showing of acquiescence is the deference justification. If the claim is that the two political branches have long had a shared understanding of the separation of powers, the claim will require an especially strong form of acquiescence: actual interbranch agreement about the law. Mere long-standing practice and lack of resistance by another branch will not be sufficient.⁷¹

Importantly, though, even some variants of the deference rationale might not depend on a clear showing of acquiescence. 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 these views have been consistent and have reflected the views of both major political parties.⁷² After

has actually accepted or ‘acquiesced’ in the practice”); Glennon, 64 BU L Rev at 134 (cited in note 52) (contending that the affected branch “must have acquiesced in the custom”).

⁶⁹ See Bradley and Morrison, 126 Harv L Rev at 459–60 (cited in note 1).

⁷⁰ See, for example, Michael J. Glennon, *The Cost of “Empty Words”: A Comment on the Justice Department’s Libya Opinion* *3 (Harvard National Security Journal 2011), archived at <http://perma.cc/VA76-E2Y3> (contending that, although “practice can affect the Constitution’s meaning and allocation of power,” “[a] practice of constitutional dimension must be regarded by both political branches as a juridical norm” before it does so).

⁷¹ For one articulation of this position, see Roisman, 84 Geo Wash L Rev at 710 (cited in note 53) (proposing that the only historical practice that should be credited is that which “is likely to be indicative of constitutional agreement between the branches”).

⁷² See Bradley and Morrison, 126 Harv L Rev at 460 (cited in note 1). See also, for example, Office of Legal Counsel, *Authority to Use Military Force in Libya* at *7 (cited in

all, as Frankfurter observed in *Youngstown*, long-standing executive practice is “engaged in by Presidents who have also sworn to uphold the Constitution.”⁷³ Similarly, in *Noel Canning*, the Supreme Court gave weight to the fact that “the publicly available opinions of Presidential legal advisers that we have found are nearly unanimous in determining that the [Recess Appointments] Clause authorizes” appointments during intrasession breaks.⁷⁴

Moreover, even if it requires a showing of acquiescence, the deference justification would not necessarily require interbranch agreement about the constitutional text. Instead, it could be premised on the idea that part of constitutional reasoning is pragmatic (such as structural reasoning, as well as of course consequentialist reasoning), 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. This 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.⁷⁵ The more that 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.

The other justifications for gloss have an even weaker connection to any requirement of acquiescence. For example, Burkean consequentialism might support looking to historical practice even in the absence of any evidence of acquiescence because of its focus on the value of established ways of doing things and a concern about the risks of change.⁷⁶ Similarly, limits on judicial capacity might suggest deferring to practice even if it does not clearly reflect a common understanding of the political

note 15) (stressing that the war powers practice not only “extended over many decades” but was also “engaged in by Presidents of both parties”).

⁷³ *Youngstown*, 343 US at 610 (Frankfurter concurring).

⁷⁴ *Noel Canning*, 134 S Ct at 2562.

⁷⁵ See, for example, *The Pocket Veto Case*, 279 US 655, 675 (1929); *Field v Clark*, 143 US 649, 691 (1892); 18 Op Off Legal Counsel at 233 (cited in note 13).

⁷⁶ See Ernest A. Young, *Our Prescriptive Judicial Power: Constitutive and Entrenchment Effects of Historical Practice in Federal Courts Law*, 58 Wm & Mary L Rev 535, 557–58 (2016) (contending that Burkean justifications for crediting historical practice do not require a showing of institutional acquiescence).

branches, because the practice can still provide a type of precedent external to a court's preferences.

Once again, the reliance justification is uncertain: it is possible to imagine reliance occurring even in the absence of acquiescence, but it is also possible to insist that such reliance be "reasonable" before it will be credited, which may simply take us back to the initial question whether acquiescence is required in order for gloss to be credited. That said, disrupting even unreasonable reliance can pose concerns about institutional and social upheaval and unintended consequences of the sort that underlie some of the risk aversion associated with Burkean consequentialism.

In short, under many of the potential justifications for gloss, institutional acquiescence is less central than is commonly assumed. Importantly, however, even if one does not require a showing of acquiescence, there may be other reasons for insisting on some sort of subjective understanding in addition to looking to patterns of practice. As noted above, looking to such an understanding may be needed in order to determine the appropriate level of generality at which to describe the practice. In addition, resort to such an understanding may be needed to distinguish gloss from what Commonwealth theorists call "constitutional conventions," which are "maxims, beliefs, and principles that guide officials in how they exercise political discretion."⁷⁷ Because both gloss and conventions concern practice-based norms of governmental conduct, it can be tempting to lump them together.⁷⁸ But doing so misses an important difference between them: whereas conventions rest on either a fear of political sanctions or a sense of political morality,⁷⁹ practice-based norms that amount to gloss also rest on claims about the content of constitutional law. Claims about gloss are claims about legal authority to act and the limits of such authority, and deviations are considered to be breaches not simply of political norms, but also of legal obligation. To be sure, appeals to gloss and to conventions sometimes overlap and can be difficult to distinguish, but this does not mean that they are analytically the same.

⁷⁷ Keith E. Whittington, *The Status of Unwritten Constitutional Conventions in the United States*, 2013 U Ill L Rev 1847, 1860.

⁷⁸ See, for example, Adrian Vermeule, *Conventions in Court*, 38 Dublin U L J 283, 284 (2015).

⁷⁹ See *id.* at 288.

The need to distinguish gloss from conventions is greater when courts are applying gloss than when it is invoked by non-judicial actors. In Congress, for example, those who invoke gloss can often afford to be vague or imprecise about the boundary between conventions and constitutional law—appealing, for example, to the “spirit” of the Constitution.⁸⁰ A court attempting to resolve a dispute, however, will need to be more precise about what falls within and without the domain of binding constitutional law.⁸¹ Similarly, executive branch lawyers providing legal advice may need to distinguish gloss from conventions. Such lawyers are unlikely to find it sufficient, for example, to lump together the convention of senatorial courtesy for judicial appointments with, say, gloss-based norms about the constitutional authority of the president to wage war.

That said, it is important to remember that gloss is not typically invoked as a freestanding source of constitutional law. Instead, as the word “gloss” implies, it is treated as operating with and upon other modalities of interpretation, such as text, structure, purpose, and consequentialism.⁸² In part, this is a function of having a written Constitution and, relatedly, a constitutional culture that gives primacy to the text when it is perceived to be clear. This means, among other things, that historical practice is typically said to be relevant only when the constitutional text is ambiguous or silent on a question.⁸³ In this respect, gloss is less

⁸⁰ See Bradley and Siegel, 105 *Georgetown L J* at 274–80 (cited in note 17) (describing Congress’s mixture of conventional and constitutional objections to President Franklin Delano Roosevelt’s Court-packing scheme); Tara Leigh Grove, *Article III in the Political Branches*, 90 *Notre Dame L Rev* 1835, 1860 (2015) (“There may [] be little reason for political actors to employ standards that would be deemed workable by the judiciary.”).

⁸¹ This distinction between judicial decision-making and political branch reasoning should not be overstated, however. Courts, too, are sometimes imprecise about the boundary between constitutional and subconstitutional norms, such as when they construe statutes to avoid “serious constitutional doubts.” See, for example, *Jones v United States*, 526 US 227, 239 (1999) (referring to “the rule, repeatedly affirmed, that where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter”) (quotation marks omitted).

⁸² See, for example, *Zivotofsky*, 135 S Ct at 2091, 2094 (contending that “on balance [historical practice] provides strong support for the conclusion [based on text, judicial precedent, and consequentialist considerations] that the recognition power is the President’s alone,” and that this practice “confirms the Court’s conclusion”); *Noel Canning*, 134 S Ct at 2561, 2570 (contending that historical practice “offers strong support” and “strongly favors” constructions of the Recess Appointments Clause that the Court otherwise found persuasive based on considerations of purpose and consequentialism).

⁸³ See LaCroix, 126 *Harv L Rev F* at 81 (cited in note 23) (“[H]istorical practice is relevant only in situations where the interpreter has first determined that text is unclear

imperialistic in its claims than some types of constitutional reasoning, such as some variants of textualism and originalism.

Because of the supplementary nature of gloss reasoning, there is less need for a subjective element for gloss than for something like customary international law, which is treated as a freestanding body of binding law.⁸⁴ Thus, if an interpreter is inclined for reasons other than gloss to think that an institution should have a particular type of authority, gloss may be useful even if it merely shows that the practice can be viewed as consistent with that conclusion. This is one way to understand the Court's decision in *Zivotofsky*: although it was unclear there whether the long-standing practice of presidential recognition of foreign governments was based on a shared constitutional understanding that Congress could not regulate the practice, the Court was able to cite the practice as at least not contradicting its determination of exclusivity—a determination based largely on the Court's views about constitutional structure and consequences.⁸⁵

CONCLUSION

To understand how to do gloss, it is important first to understand why one is doing it. As this Essay has explained, there are a number of possible justifications for doing gloss, and they have differing methodological implications. In particular, while

or ambiguous."); *Noel Canning*, 134 S Ct at 2561, 2568 (insisting that the relevant constitutional provisions were ambiguous). But see Curtis A. Bradley and Neil S. Siegel, *Constructed Constraint and the Constitutional Text*, 64 Duke L J 1213, 1262 (2015) (contending that perceptions of textual clarity and ambiguity can themselves be affected by historical practice and other considerations).

⁸⁴ See Restatement (Third) of the Foreign Relations Law of the United States § 102, comment j (1987) ("Customary law and law made by international agreement have equal authority as international law."). This is one reason for hesitation before drawing on theoretical work relating to customary international law to inform thinking about gloss. But see Glennon, 64 BU L Rev at 134 (cited in note 52) (borrowing the concept of *opinio juris* from customary international law); Roisman, 84 Geo Wash L Rev at 675 (cited in note 53) (analogizing gloss to customary international law). See also Vermeule, 38 Dublin U L J at 288–89 (cited in note 78) (analogizing to customary international law when discussing constitutional conventions).

⁸⁵ See *Zivotofsky*, 135 S Ct at 2094 ("This history confirms the Court's conclusion in the instant case that the power to recognize or decline to recognize a foreign state and its territorial bounds resides in the President alone."); Curtis A. Bradley, *Agora: Reflections on Zivotofsky v. Kerry*; *Historical Gloss, the Recognition Power, and Judicial Review*, 109 Am J Intl L Unbound 2, 6 (2015), archived at <http://perma.cc/CMY4-VJZS> ("The post-nineteenth century practice concerning recognition was dominated by the executive branch, and this fact helped to reinforce the Court's finding of exclusivity, even though it was not by itself sufficient to sustain that conclusion.").

justifications grounded in deference generally suggest looking for evidence of political branch understandings and agreement about the Constitution's distribution of authority, justifications grounded in judicial capacity and Burkean consequentialism suggest looking primarily for stable patterns of institutional behavior. The implications of the reliance justification are more difficult to assess, in part because it may turn on contestable notions of when reliance is justified. Disaggregating the justifications in this way helps explain why, for example, courts often place less emphasis on institutional acquiescence than commonly recited standards for gloss would tend to suggest. Whatever the justification, gloss is almost always treated as interconnected with other constitutional considerations rather than as a fully independent source of law, a phenomenon that reduces some of the pressure for methodological precision.