

# Constitution by Convention

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## INTRODUCTION

We are told that we live in the era of textualism.<sup>1</sup> Inspired by the commanding presence of Justice Antonin Scalia, many accounts of American

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1. See Harvard Law Sch., *The 2015 Scalia Lecture: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE (Nov. 25, 2015), <https://www.youtube.com/watch?v=dpEtszFT0Tg&feature=youtu.be> [<https://perma.cc/E8ZH-6ALV>] (“We’re all textualists now.”). Admittedly, Justice Kagan made this observation in the context of statutory interpretation, and textualism in that domain does not necessarily entail textualism when it comes to constitutional interpretation. But they often travel together in the toolkits of particular judges and other practitioners.

constitutional law focus on, and stress the preeminence of, the written word.<sup>2</sup> On this view, the contractual sense of the constitution as a defined pact means that the intentionality of the original agreement must command as to its application. As a result, much constitutional law scholarship of the past decades has turned on the interpretive tools necessary or permissible for the implementation of these textual commands.<sup>3</sup>

Reality is more complicated. The lexical primacy of the text leaves open much of the lived experience under a constitution, a problem not just for constitutions but for any controlling instrument, even an ordinary commercial contract. Contract law itself combines the centrality of the instrument with interpretive tools drawn from custom and the ways in which the parties have organized their behavior based on the presumed advantage of negotiated exchange.<sup>4</sup> In the domain of public law, even the most expansive view of textualism recognizes contemporary practice as a tool of interpretation, one that directs and constrains courts in their task of giving meaning to imprecise legislative and constitutional commands.

Indeed, constitutionalism has never been exclusively reduced to the written text either in terms of its commands or its interpretation. The American Framers drew deeply from the lessons of British constitutional structure, although Britain famously has no textual articulation of its constitutional law. Instead, Britain relies on a series of statutes, practices, and under-specified understandings to frame a constitutional order that, in turn, depends heavily, in the words of William Gladstone, on “the good faith of those who work it.”<sup>5</sup> Moreover, recognizing that constitutional commands must exist beyond the text neither undermines the primacy of text as an interpretive tool, nor licenses any particular form of expansive judicial role. Both Great Britain and Israel have robust levels

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2. See, e.g., William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1082 (2017) (evaluating the textualist argument that “[t]he law the text enacts just is whatever the text says it is”); Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127, 1135–36 (1998) (assessing the “logical underpinnings of textualism . . . as practiced by textualists like Justice Scalia”).

3. See, e.g., Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453 (2013) (situating interpretive strategies in the context of originalist and textualist theories). Of course, this trend has not gone without criticism or objection. See, e.g., Michael C. Dorf, *How the Written Constitution Crowds Out the Extraconstitutional Rule of Recognition*, in *THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION* 69, 75 (Matthew D. Adler & Kenneth Einar Himma eds., 2009) (“Because of the widespread but mistaken belief that the Constitution alone grounds legal authority, political actors feel the need to search for a constitutional hook for arguments that customary rules should be obeyed.”).

4. RESTATEMENT (SECOND) OF CONTRACTS § 202(5) (AM. LAW INST. 1981) (“Wherever reasonable, the manifestations of intention of the parties to a promise or agreement are interpreted as consistent with each other and with any relevant course of performance, course of dealing, or usage of trade.”); see also *id.* § 203 (“In the interpretation of a promise or agreement or a term thereof, the following standards of preference are generally applicable: . . . (b) express terms are given greater weight than course of performance, course of dealing, and usage of trade, course of performance is given greater weight than course of dealing or usage of trade, and course of dealing is given greater weight than usage of trade . . .”).

5. See *The Brexit Referendums and the British Constitution*, *ECONOMIST* (May 30, 2019) [hereinafter *The Brexit Referendums*], <https://www.economist.com/briefing/2019/05/30/the-brexit-referendum-and-the-british-constitution> [<https://perma.cc/3ZU7-443E>].

of constitutional law without a formal text. Yet in Britain, until recently, courts have played a constrained role in overseeing Parliament and did not even allow consideration of parliamentary history or what we would term the legislative record to be a part of judicial decision-making.<sup>6</sup> In Israel, by contrast, the absence of a formal constitutional text has coexisted with robust judicial review and piercing judicial assessments of legislative motive.<sup>7</sup>

In the United States, lived experiences and the institutional arrangements they have generated have been critical components of the actual practice of government since the early years of the Republic. As the Supreme Court put it recently, although the judiciary has the responsibility “‘to say what the law is,’ . . . it is equally true that longstanding ‘practice of the government’ . . . can inform our determination of ‘what the law is.’”<sup>8</sup> This is especially true when it comes to the distribution of authority among the branches of the federal government. Indeed, the idea that historical practice might inform that distribution is “neither new nor controversial.”<sup>9</sup> Two hundred years ago, James Madison recalled that it “was foreseen at the birth of the Constitution, that difficulties and differences of opinion might occasionally arise in expounding terms & phrases necessarily used in such a charter . . . and that it might require a regular course of practice to liquidate & settle the meaning of some of them.”<sup>10</sup> Chief Justice John Marshall expressed a similar view that same year in his opinion for the Court in *McCulloch v. Maryland*,<sup>11</sup> and the Court has reaffirmed it on numerous occasions in the two centuries since.<sup>12</sup> As most famously

6. Kenneth W. Starr, *Observations on the Use of Legislative History*, 1987 DUKE L.J. 371, 372 (quoting Walter Bagehot for the English tradition that “although the ‘nation, indeed, generally looks to the discussions in Parliament to enlighten it as to the effect of Bills,’ the English courts emphatically do not”).

7. RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* 21-26 (2004).

8. *NLRB v. Noel Canning*, 573 U.S. 513, 525 (2014) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

9. *Id.*

10. Letter from James Madison to Spencer Roane (Sept. 2, 1819), in 8 THE WRITINGS OF JAMES MADISON 447, 450 (Gaillard Hunt ed., 1908).

11. 17 U.S. (4 Wheat.) 316, 401 (1819) (“[A] doubtful question, one on which human reason may pause, and the human judgment be suspended, in the decision of which the great principles of liberty are not concerned, but the respective powers of those who are equally the representatives of the people, are to be adjusted; if not put at rest by the practice of the government, ought to receive a considerable impression from that practice.”).

12. See, e.g., *Mistretta v. United States*, 488 U.S. 361, 401 (1989) (noting that “‘traditional ways of conducting government . . . give meaning’ to the Constitution” (citation omitted)); *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981) (considering “long-continued practice” in evaluating the extent of the power of the executive); *The Pocket Veto Case*, 279 U.S. 655, 689 (1929) (stating that “[l]ong settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions” addressing executive and legislative power); *Ex parte Grossman*, 267 U.S. 87, 118-19 (1925) (finding that “long practice . . . and acquiescence in it” determined the scope of the presidential pardoning power); *United States v. Midwest Oil Co.*, 236 U.S. 459, 473 (1915) (holding that “weight shall be given to the usage itself—even when the validity of the practice is the subject of investigation”); *McPherson v. Blacker*, 146 U.S. 1, 27 (1892) (concluding that “where there is ambiguity . . . contemporaneous and subsequent practical construction is entitled to the greatest weight”).

articulated by Justice Felix Frankfurter in his concurrence in *The Steel Seizure Case*:

Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them. It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them.<sup>13</sup>

Nevertheless, the precise relation between written text and settled institutional practice remains a subject of disagreement and even confusion. The scholarly literature has only recently begun to treat these issues with the seriousness they deserve. Several years ago, one of us observed that “there has been little sustained academic attention to the proper role of historical practice in the context of separation of powers.”<sup>14</sup> This has started to change,<sup>15</sup> but much remains to be explored. Our aim here is to take up some of that exploration, especially as it relates to questions about the role of the courts in identifying and enforcing the institutional arrangements generated through the lived experience of the American project of democratic governance.

We bring to this debate a sensibility that beneath the Constitution’s text there lies a world of institutional settlement—a constitution by convention. On this understanding, all constitutional actors allow time-tested institutional resolutions of a range of questions to play a significant, sometimes dispositive, role in determining the content of the law. Much of the time, this process of institutional accommodation and settlement takes place beyond the reach and view of the judiciary. A constitutional system governed by convention is, first and foremost, a system generated by the actors responsible for the day-to-day running of the government itself. The growing literature on law and legal interpretation outside the courts recognizes this important fact. Occasionally, however, the courts are called upon to adjudicate cases that turn on whether and to what extent certain asserted institutional arrangements and conventions exist,

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13. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring). Some associate James Madison’s statement, discussed immediately above, with the idea of “liquidation,” or early post-Founding historical practice that fixes the meaning of otherwise ambiguous constitutional text. See, e.g., William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1 (2019); Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 525–53 (2003). Whether liquidation should be understood as importantly different from the “historical gloss” approach articulated by Justice Frankfurter and later embraced by the Court is not entirely clear. See Richard H. Fallon, Jr., *The Many and Varied Roles of History in Constitutional Adjudication*, 90 NOTRE DAME L. REV. 1753, 1775 (2015) (depicting the historical gloss approach as “[c]losely related” to liquidation but “possibly more capacious”). For sustained analysis of the issue, see Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Madisonian Liquidation, and the Originalism Debate*, 106 VA. L. REV. 1 (2020). It is not our focus here.

14. Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 413 (2012).

15. See, e.g., *id.*; Curtis A. Bradley, *Doing Gloss*, 84 U. CHI. L. REV. 59 (2017); Tara Leigh Grove, *The Origins (and Fragility) of Judicial Independence*, 71 VAND. L. REV. 465 (2018); Daphna Renan, *The Law Presidents Make*, 103 VA. L. REV. 805 (2017); Bradley & Siegel, *supra* note 13; Baude, *supra* note 13.

and whether and to what extent those arrangements and conventions should be accorded legal status. In those cases, courts very often do grant legal weight to institutional accommodations embedded in repeated historical practice.

The precise reasons why these accommodations, arrangements, and practices have gained such legal status may vary from context to context. Indeed, the judicial and academic literature suggests a variety of reasons, including institutional reliance, deference to the constitutional judgments of the primary institutional actors, deference to the practical judgments of those same actors, and a tradition-privileging preference for the status quo that we might associate with thinkers like Edmund Burke.<sup>16</sup> Evaluating any given institutional arrangement derived from historical practice may require judging it in light of one or more of those particular reasons. Our inclination is that, more often than not, the driving force is some kind of basic concern for practical workability and functionality, paired with an understanding that the courts are often not in a position to view or evaluate all the elements of the accommodations that other branches have worked out over time.<sup>17</sup> Our starting point here, however, is simply the recognition that practice-based institutional settlements are pervasive in the law.<sup>18</sup>

Not every practical resolution of how to get things done carries legal or other normative weight. Some such resolutions can be non-normative and on matters as small as office arrangements; others will address matters of the greatest legal consequence, such as the extraordinary powers that government may exercise in times of emergency.<sup>19</sup> In emphasizing the role of historical practice and institutional settlement in the law, we do not mean to suggest that every traditional way of doing things should or does take on legal status. Some practically helpful arrangements are merely that, with no pretense to legal status or authority. But what we are saying is that, in a constitutional order responsible for governing an immense and complicated polity, the need to find workable solutions to everyday problems of government is bound to find its way into the law over time. Ours is a constitution of making things work under conditions of uncertainty. It is a domain conditioned largely by experience in governance, by the imprecise processes of institutional accommodation. And while our focus is on the United States, the process of institutional settlement is a shared reality in the administration of the complex states of the modern world.

Today, established structures of governance in the United States and across much of the democratic world are perceived to be failing and are being systematically challenged. There are no doubt root causes stemming, at least in

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16. See Bradley & Morrison, *supra* note 14, at 417–32 (surveying these and other potential reasons for favoring “historical practice” in the separation of powers area in particular).

17. See, e.g., *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 967 (1983) (White, J., dissenting).

18. See, e.g., *Youngstown*, 343 U.S. at 634 (Jackson, J., concurring) (“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.”).

19. See DAVID DYZENHAUS, *THE CONSTITUTION OF LAW: LEGALITY IN A TIME OF EMERGENCY* 17–65 (2006) (arguing that governments can uphold the rule of law in responding to states of emergency).

part, from the continued fallout of the 2008 financial crisis.<sup>20</sup> But a large part is a repudiation of the norms of administering a democratic state that are seemingly transgressed on a regular basis, and done so under forceful assertion of prerogative authority of the executive. In this country, we are in an era of court challenge to the constitutionality of how the federal government functions perhaps without parallel in recent American history, at least not since the dislocations of the Great Depression and the transformation of the New Deal. No doubt, the questions of extraordinary powers will be compounded by the emergencies of a pandemic.

As this constitutional saga unfolds, the question of settled practice takes a central role in assessing which transgressions of governing norms are permissible, and which are not. When the transgressing authority takes the form of a largely unchecked executive, whether in the United States or abroad, a central responsibility falls to the courts to reinforce what are often imprecise constitutional boundaries. Older accounts have treated conventions as institutional settlements meaningful to the political branches but not enforceable in the courts. Our goal is to suggest that the concept of convention as a constraint should push beyond these traditional conceptions. Specifically, we introduce a role for courts both in terms of arbitrating what are such conventions of proven utility and integrating that experiential wisdom into formal, judicially elaborated constitutional doctrine.

In the United States, the doctrinal dimension of convention takes on increased importance to the extent that the political branches are no longer able to resolve matters in the “good faith” identified by Gladstone. Thus, our central concern is with how the courts can and should respond when a dysfunctional legislature seems to leave the judiciary as the sole counterweight to aggressive assertions of executive prerogative. Much of the Supreme Court’s jurisprudence frames the inquiry around whether challenged executive conduct falls within the general allocation of powers that have historically obtained—a view we seek to defend both descriptively and normatively. In our view, the great bulk of cases do and should turn on an assessment of whether the executive action in question fits within the bounds of established historical practice. Judges will divide on assessing that historical backdrop, and will do so with increased urgency given the lack of congressional vigor in policing the boundaries of separation of powers. But the importance of historical settlement informs why these institutional arguments do—and should—capture the attention of the judiciary.

At the same time, we must acknowledge that institutional arrangements emerging from repeated historical practice can be prone to bureaucratic encrustment. Organizational myopia is present in all established orders, compounded by the lumbering size of the modern state. The cry of “drain the swamp,” or of defeating “Brussels” looms large in the current populist moment in Western democracies and certainly captures significant frustration with distant bureaucracies and perceptions of indifference to the conditions of ordinary life.

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20. See Samuel Issacharoff, *Democracy’s Deficits*, 85 U. CHI. L. REV. 485, 512–13 (2018) (“[T]he financial crisis of 2008 appears to have been the defining blow that exposed the frailty of democracies.”).

Yet modern democratic governance is impossible without the broad institutional arrangements that provide the “guardrails”<sup>21</sup> to keep democratic politics within the bounds that can allow orderly electoral processes to replace one government with another without unhinging the capacity to govern. Thus, unlike in much of constitutional law as implemented by the courts, often the greatest threats to these institutional arrangements are actions we might call “anticonstitutional,” rather than unconstitutional in the conventional doctrinal sense, to borrow Neil Siegel’s helpful terminology.<sup>22</sup>

Precisely because of the politics of the moment across so much of the democratic West, the question of the constitutional foundations of the modern state looms large today. In particular, the frontal challenge to governmental institutions as the “deep state” or the repositories of evil now forces a confrontation with a central hard question: what is the constitutional status of state institutions whose existence and contours are the result of tradition and practice not traceable to particular textual commands or warrants? These are difficult conceptual challenges for all accounts of the priority given to institutionalized practices for which “the memory of man runneth not to the contrary”—as reflected in the jurisprudence of conservative thinkers such as Edmund Burke and A.V. Dicey.<sup>23</sup>

Identifying the constitutional foundations of democratic governance provides a counterpoint to populist critiques of the democratic state. In their impressive work on *How Democracies Die*, Steven Levitsky and Daniel Ziblatt look to the norms of tolerance that characterize healthy democratic societies: “Two basic norms have preserved America’s checks and balances in ways we have come to take for granted: mutual toleration, or the understanding that competing parties accept one another as legitimate rivals, and forbearance, or the idea that politicians should exercise restraint in deploying their institutional prerogatives.”<sup>24</sup> Much as these may have been assumed norms of democratic political culture, our contention is that they exist not simply as norms of conduct but often as an embedded set of institutional constraints on power.

Enforcement of these constraints has principally been a matter not of explicit judicial decrees, but tacit understandings shared by those responsible for carrying out the business of government on a day-to-day basis. Yet at the same time, these institutional arrangements reflect core constitutional values of democracy: (1) the limited time in office of incumbents subject to the electoral rise of the opposition; (2) the institutional separation of powers that delays the transmission of electoral gain to executive power into complete policy outcomes; (3) the limiting role of civil society through intermediary organizations such as churches, NGOs and the press; (4) the guarantees of governmental regularity

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21. STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* 101 (2018) (discussing institutional safeguards as “guardrails of democracy”).

22. Neil Siegel, *Political Norms, Constitutional Conventions, and President Donald Trump*, 93 IND. L.J. 177, 182 (2018) (“[T]o violate a constitutional convention is to engage in behavior that is anticonstitutional, as opposed to unconstitutional.”).

23. For further development of this concept, see *infra* Part I.A.

24. LEVITSKY & ZIBLATT, *supra* note 21, at 8–9.

through civil service protections and administrative procedural requirements; and (5) the buffers between the officeholders and the levers of power, including such core functions as policing and diplomacy. These arrangements are merely illustrative; the larger point is that institutional settlement and historical practice are vital to the constitutional order.

With that said, the goal of this project is not to propound a constitutional “solution” to Trumpism in the United States or comparable tradition-threatening regimes around the world. These are questions of constitutional politics not subject to uniform prescription. We do not purport to know all of the elements of what such a solution should look like under all national settings, or even comprehensively within one setting. Nor do we think remediation lies principally in the domain of judicially enforced law. Instead, our goal is both more and less than that. We seek to emphasize the importance that practice-based historical settlements play in our understanding of operative constitutional law, to describe the ways in which those settlements are amenable to judicial enforcement, and then to take up some current problems relating to the constitutional separation of powers that raise with particular urgency the role that courts can and should play with respect to the enforcement of historical settlement, or convention. Rather than offering any solutions to current executive transgressions in particular, we aim to suggest ways that courts can preserve an appreciation for practice-based historical settlement that can last beyond the aberrations of the current moment.

Our undertaking proceeds in two basic parts. In Part I, we lay out some of the elements of our understanding of what is entailed in looking to historical practice and institutional settlement to answer constitutional questions. One significant challenge is delimiting the designation of something as “constitutional” so that it is not simply a banal synonym for “important” or “desirable” or even “good.” To be “constitutional” on our account means that the settled practices must indeed provide identifiable “guardrails” in democratic governance, such that practices at odds with those settled practices can be understood as “anticonstitutional,” even if their precise institutional contours cannot be thought to be mandated by the text of the Constitution itself. Often, the task is not easy. But our system of government has long incorporated a range of historical practices and inter-institutional arrangements into prevailing understandings of constitutionality, including some judicially enforced.

We think this is a good thing. In particular, we think courts should give reasonably wide berth to systematic practices that have defined the way the government operates over a prolonged period of time. This is the domain of Justice Felix Frankfurter’s historical “gloss,” and practices that remain within the scope of that gloss should in our view be treated as presumptively permissible.<sup>25</sup> Departures from settled institutional practices, on the other hand, merit no such deference and require fresh examination and justification. To be sure, settled past practice cannot and should not serve as a straightjacket compelling narrow adherence to what has come before. For one thing, government must retain an ability to innovate in the face of change. For another,

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

strict obedience to historical settlements no longer favored by the institutions that gave rise to them is probably beyond the judicial capacity to enforce, at least as a general and ongoing matter. But courts need not go that far in order for historical practice to do considerable work.

To concretize our conceptual approach, we begin in Part I by demonstrating the pervasiveness of practice-based conventions in a wide range of public law contexts. Examples may certainly be found in the constitutional separation of powers area, as the newly emerging academic literature tends to emphasize. But as we document, they lie elsewhere as well, including the expansion of national territory and the availability of paper money.<sup>26</sup>

In Part II, we take up a set of case studies that illustrate some of the challenges that courts can face when trying to sustain settled institutional arrangements in the face of shifting political tides. We focus especially on issues relating to the constitutional separation of powers, where resort to historical practice and institutional settlement is most common and where many of the deepest challenges of the current political moment reside. Within that general area, the role of historical practice may be most prominent with regard to questions of executive power. As Sai Prakash has observed, “the Constitution does not grant the president any temporary or permanent emergency power, even during the direst crises.”<sup>27</sup> How, then, can one determine the extent of the government’s power to take extraordinary actions to manage crisis? Moreover, what is true of questions of emergency executive power may be generalized to many questions of executive authority beyond the emergency context. The text of Article II is spare and open-ended, and the Framers were not of one mind on these issues.<sup>28</sup> If tractable answers are to be found, they will often lie elsewhere, including in the practices and institutional arrangements that have accumulated over time. Sustaining those answers in times of heightened political conflict and contestation can present special difficulties. We take some of them up in discussing President Barack Obama’s recess appointments, President Donald Trump’s travel ban, and Congress’s subpoenas of President Trump’s financial records.

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26. In many individual rights contexts, the function of history may be quite different, reflecting not a practical accommodation among institutional repeat players but the oppression of relatively disempowered individuals or groups. We think the considerations going into whether to defer to historical practice in those kinds of circumstances are very different, and in the main we do not engage them here. See Bradley & Morrison, *supra* note 14, at 416 (“Relying on past practice in this area also does not typically raise concerns about the oppression of minorities or other disadvantaged groups the way that it does in some individual rights areas.”).

27. SAIKRISHNA BANGALORE PRAKASH, *IMPERIAL FROM THE BEGINNING: THE CONSTITUTION OF THE ORIGINAL EXECUTIVE* 208 (2015).

28. See *id.* at 323 (“[T]he Philadelphia delegates were inconsistent, never quite settling on a theme or a direction for the executive,” yielding “outcomes that cannot be traced to a grand theory.”).

## I.

## CONSTITUTIONALIZING THE PAST

*A. Conceptualizing a Constitution of Institutional Settlement*

All established political orders incorporate the institutional memory embodied in “long-term accretions of practice.”<sup>29</sup> Government, like any complex organization, must be able to function efficiently and allowing practices to settle allows coordination across diverse fronts.<sup>30</sup> Enforceable law must reach beyond the formal text to the “network of tacit understandings and unwritten conventions, rooted in the soil of social interaction.”<sup>31</sup> The idea of constitutional governance as a means of effectively coordinating societal needs derives from David Hume, and the insight that “the goods of human society stem largely from doing as others do, in certain limited but crucial matters, so that each person’s purposes in all other matters will mutually further others’ purposes instead of crossing them.”<sup>32</sup> The process of institutional settlement is then the integration of accepted mutually beneficial arrangements into the conduct of governmental affairs. Per Lon Fuller, this is the distinction between the top-down formal domain of made rules and the bottom-up world of implicit rules that emerge from conduct.<sup>33</sup> These conventional rules are “brought into being and kept alive by purposive effort and by the way each of the parties interprets the purposes of the other.”<sup>34</sup>

The difficulty comes with the concept of constitutionalizing any such practices. In general, the law gives force to the settled expectations of the citizenry to allow private ordering of life’s affairs.<sup>35</sup> No such private expectation interest can be recognized in the administration of government, save for whatever job protections might be afforded to career civil servants. Instead, it is the institutionalization of what has worked that yields force to settled practices, and it is the coordination of the complicated task of governing that recognition of such practices permits. Where such coordination has the historic force of horizontal interaction between co-equal branches of government, we submit that the practices should be able to claim a presumptive legal force in the course of allocating constitutional powers of government.<sup>36</sup>

Any effort to constitutionalize such rules of conventional practice, in the American context, immediately runs into the question of enforcement, including

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29. Bradley & Morrison, *supra* note 14, at 427.

30. For a clear exposition of the view of constitutionalism as a form of coordination, see RUSSELL HARDIN, *LIBERALISM, CONSTITUTIONALISM, AND DEMOCRACY* 5 (2003) (“Where there is broad consensus on order, we do not need Hobbes’s autocrat to rule us.”).

31. Gerald J. Postema, *Implicit Law*, 13 *LAW & PHIL.* 361, 361 (1994).

32. ANDREW SABL, *HUME’S POLITICS: COORDINATION AND CRISIS IN THE HISTORY OF ENGLAND* 6 (2012).

33. LON L. FULLER, *ANATOMY OF THE LAW* 44 (1968).

34. *Id.* at 195.

35. See HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 183–86 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (prefatory note as to the role of private ordering in the creation and application of law).

36. FULLER, *supra* note 33, at 191–95.

through judicial decree. The English constitutional tradition has long recognized that there are “legally unenforceable customs that regulate and restrain the formal powers granted to governmental actors.”<sup>37</sup> Such conventions derive from past practice, from the fact that officials believe themselves bound by the rule, and from the understanding that the rule appears reasonable as time goes on.<sup>38</sup> Under this view, “[c]ustoms and conventions arise from what people do, not from what they agree or promise.”<sup>39</sup> In the constitutional tradition exemplified by Edmund Burke, the foundations of constitutional government:

[E]volved slowly and incrementally over hundreds of years . . . because the existing institutional arrangements reflect the accumulated wisdom of centuries of political decisions; each incremental step is the product either of rational deliberation or natural development and has been tested by the experience of many years. The cumulative product reflects a reason far superior to that of any individual or generation.<sup>40</sup>

The aim of British constitutionalism “was to ensure that these legal powers, formally in the hands of the Crown, were in practice exercised by Ministers in accordance with the principles of responsible and representative government.”<sup>41</sup> As A.V. Dicey, the most recognized expositor of the English constitutional tradition, explained, the role of constitutional law, regardless of whether enforceable by judicial decree, was the preservation of democratic governance: “Our modern code of constitutional morality secures, though in a roundabout way, what is called abroad the ‘sovereignty of the people.’”<sup>42</sup> Even Edmund Burke’s conservative exposition acknowledges that the constitution compels the “constituent parts of a state . . . to hold their public faith with each other.”<sup>43</sup> At the same time, any constitutional constraints would be secured by official compliance alone, without fear of any judicial sanction, such that “if any or all of [the constraints] were broken, no court would take notice of their violation.”<sup>44</sup>

37. Dylan Lino, *Albert Venn Dicey and the Constitutional Theory of Empire*, 36 OXFORD J. LEGAL STUD., 751, 777 (2016).

38. IVOR JENNINGS, *THE LAW AND THE CONSTITUTION* 135 (4th ed. 1955).

39. P. S. ATIYAH, *PROMISES, MORALS AND LAW* 116 (1983); see also DAVID HUME, *MORAL PHILOSOPHY* 87–99 (Geoffrey Sayre-McCord ed., 2006) (identifying institutional arrangements that arise not from formal consent but from shared benefits from the utility of the practice).

40. Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619, 649 (1994).

41. GEOFFREY MARSHALL, *CONSTITUTIONAL CONVENTIONS: THE RULES AND FORMS OF POLITICAL ACCOUNTABILITY* 4 (1984).

42. A. V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 426 (8th ed. 1920).

43. Edmund Burke, *Reflections on the Revolution in France* 18, in *REFLECTIONS ON THE REVOLUTION IN FRANCE* (Frank M. Turner ed., 2003).

44. DICEY, *supra* note 42, at 26. Similarly, within the positivist tradition of John Austin, unconstitutionality connoted “a breach of principle or maxim to which is attached a merely moral sanction, but which incurs no legal pain or penalty, though it would probably incur censure and might meet with general resistance.” O. Hood Phillips, *Constitutional Conventions: Dicey’s Predecessors*, 29 MOD. L. REV. 137, 138 (1966). Even for Dicey, however, there might be enforceable constitutional laws that are premised on the conventional constitutional understanding. He gives the example of the convention that Parliament be summoned by the Crown at least once a year, clearly a convention that

The result is that “[p]artially written in various Acts and statutes and partially constructed out of conventions, practices, and understandings, the British constitution defies easy identification.”<sup>45</sup> The British experience shows that even without a clear textual root, institutional settlement may assume constitutional status based on acceptance by relevant actors. As constitutional historian Mark Graber argues, “Settlements take place, not when official law is pronounced, but when persons opposed to that constitutional status quo abandon efforts to secure revision.”<sup>46</sup>

The varying accounts of the role of convention in law draw from different wellsprings. The fact that a practice exists over time may prove that it emerged as the most beneficial among competing potential accommodations. Alternatively, it may prove the intrinsic value of the practice, establish the expectational interests of other actors or the general public as a matter of legal reliance, or it may simply represent the equilibrium point where matters of controversy came to rest. Each of these accounts might give a different valence to inherited practices and might yield either more or less conservative impulses among its adherents. Our aim is not to arbitrate among the competing considerations but to take from them all at least a strong presumption in favor of institutional settlement as a necessary feature of governing complex societies.

Yet we must also acknowledge that matters may change substantially once courts are added to the mix. Legal norms tend to have force when they are congruent with the way in which parties expect to conduct their affairs, to borrow once again from Lon Fuller.<sup>47</sup> Following Alexis de Toqueville’s observation that few issues of moment in America fail to end up in the courts, the question is how courts respond to fundamental accommodations of evolved institutional practice. Judicial enforcement of prior institutional accommodations may itself compromise a predicate understanding that helped generate those norms in the first place, namely the premise of judicial non-involvement.<sup>48</sup>

We are not the first to have pondered how institutional practice emerges with a doctrinal pedigree. Adrian Vermeule, for instance, incorporates constitutional custom as a means of fleshing out constitutional imprecision when the textual authority is “general, vague or ambiguous, but may not be used to

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he anticipates being unenforceable through the courts. Nonetheless, there are constitutional rules made enforceable through the Army Act and the Finance Act for which noncompliance would collapse the government. See DICEY, *supra* note 42, at 442–46.

45. Erin F. Delaney, *Brexit Optimism and British Constitutional Renewal*, in CONSTITUTIONAL DEMOCRACY IN CRISIS? 191, 193 (Mark A. Graber et al. eds., 2018).

46. Mark A. Graber, *Settling the West: The Annexation of Texas, The Louisiana Purchase, and Bush v. Gore*, in THE LOUISIANA PURCHASE AND AMERICAN EXPANSION 1803–1898 83, 85 (Sanford Levinson & Bartholomew H. Sparrow eds., 2005).

47. FULLER, *supra* note 33, at 106.

48. For an application in the employment contract setting of the idea that the prospect of judicial involvement may itself alter the terms of the original understanding, see Edward B. Rock & Michael L. Wachter, *The Enforceability of Norms and the Employment Relationship*, 144 U. PENN. L. REV. 1913, 1933 (1996) (arguing that in long-term employment contracts, “norms built around self-enforcing rules are superior to third party enforcement”).

override clear and specific text.”<sup>49</sup> Ernest Young pushes further to allow for a functional incorporation of tested practices such that “the Constitution permits basic constitutive questions to be answered by subconstitutional norms.”<sup>50</sup> Under this view, which we share, “while a constitution may require a priori validation at the outset, once it is in place it provides the validity criteria for all subsequent legal norms within the legal system.”<sup>51</sup>

Yet this cannot be the end of the story. Even under Burkean notions of conservative preservation of inherited traditions of governance, there must be an accommodation for the new. Accordingly, “norm decomposition is a pervasive phenomenon. In more and less subtle ways, government officials are constantly reformulating, reinterpreting, and renegotiating their relationships with one another and with nongovernmental actors and institutions.”<sup>52</sup> A constitutional order can neither ignore the “liquidation” of existing institutional practice, to return to the Madisonian formulation, nor can it lock into place momentary accommodations that may prove to be historic ballast.

Our concern here is two-fold. First, as we have each addressed previously, the boundaries of constitutional conventions have been presented to the courts with increased frequency under the separation of powers rubric as the legislative branch recedes in importance and the executive assumes greater power.<sup>53</sup> Second, we cannot avert our eyes from the present administration’s efforts to assert executive authority in derogation of longstanding institutional norms and customs. The combination of an expanded executive power and a clear rejection of many of the boundaries on the exercise of that power raise many of the difficult legal issues of the moment— as reflected in the Supreme Court’s efforts to parse what was novel and what was not in *Trump v. Hawaii*, to which we turn later.

Unlike Vermeule, we seek to frame the analysis of constitutional conventions not simply as an interpretive guide in areas of textual ambiguity, but rather as a robust means of constitutional analysis, even for courts. As Daphna Renan writes, “[p]ractices of judicial deference are sometimes premised on certain norm-based understandings of the presidency. When those presidential norms collapse, the norms of judicial deference adjust.”<sup>54</sup> It is not simply the norms of the presidency that are at issue, however. The presidency operates under a set of complex arrangements that sees other governmental actors,

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49. Adrian Vermeule, *Conventions in Court* 10 (Harvard Pub. Law Working Paper No.13-46, 2003), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2354491](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2354491) [<https://perma.cc/ZLK7-RRBM>].

50. Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408, 413 (2007).

51. *Id.* at 421.

52. Josh Chafetz & David E. Pozen, *How Constitutional Norms Break Down*, 65 UCLA L. REV. 1430, 1438–39 (2018).

53. See Samuel Issacharoff, *Political Safeguards in Democracies at War*, 29 OXFORD J. LEGAL STUD. 189, 204–06 (2009); Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, 5 THEORETICAL INQUIRIES L. 1, 35–36 (2004); Trevor W. Morrison, *Constitutional Alarmism*, 124 HARV. L. REV. 1688, 1702–03 (2011) (reviewing BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* (2010)); Bradley & Morrison, *supra* note 14, at 417–24.

54. Daphna Renan, *Presidential Norms and Article II*, 131 HARV. L. REV. 2187, 2242–43 (2018).

especially Congress, as the primary checks on presidential power. Focusing on institutional accommodation as a defining feature of a healthy political system allows a measured system of judicial engagement when issues of claimed constitutional norm violation reach beyond the political branches.

*B. Institutional Settlement as an Analytical Framework*

Examining some examples of courts' reliance on past practice reveals that a typology for reviewing constitutionality through the lens of institutional settlement already exists, one that harkens back to Justice Robert Jackson's famous analysis of the scope of executive authority in the *Steel Seizure Cases*. The framework provided in Justice Jackson's concurring opinion focused on the relation between the lawfulness of particular executive actions and the presence, absence, and nature of congressional action. At one end lay actions of the president following congressional mandates, while at the other was presidential action in disregard of what Congress deemed appropriate, either through affirmative legislation or by refusal to grant the claimed scope of executive authority.<sup>55</sup> In between was a "twilight" of indeterminacy where the branches had not yet spoken or where the nation was challenged in unfamiliar ways.<sup>56</sup>

By extension, a similar array of concerns is presented in cases of institutional accommodation outside the context of the powers of the executive. For example, the same methodology could apply in cases of accommodation between state and federal power. In the canonical decision of *Erie Railroad Co. v. Tompkins*,<sup>57</sup> Justice Louis Brandeis rejected the rule of *Swift v. Tyson* on multiple grounds, with two that frame the issue of a reliance interest. At one extreme, Justice Brandeis was willing to unravel a century of case law because of newly unearthed insight (by a "competent scholar," no less) about the original meaning of the federal judicial power—a move that leaves all institutional arrangements vulnerable to historical challenge.<sup>58</sup> At the other, and more in keeping with an institutional analysis, Justice Brandeis argued that *Swift v. Tyson*'s federalization of general commercial law had failed to yield stable market arrangements or realized expectational interests, as exemplified by *Black & White Taxi v. Brown & Yellow Taxi*. Thus, the federalization of the general commercial law had not settled market expectations as might have been hoped. While one of us has written critically of both the reasoning of *Erie* and the claimed commercial instability,<sup>59</sup> this aspect of Brandeis's opinion properly asks whether a reliance interest in institutional practices had indeed set in.

Although this Article is concerned with the structural arrangements of government, the same concern for institutional stability may be seen emerging

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55. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–36 (1952) (Jackson, J., concurring).

56. *Id.* at 637.

57. 304 U.S. 64 (1938).

58. *Id.* at 72.

59. See Samuel Issacharoff, *Federalized America: Reflections on Erie v. Tompkins and State-Based Regulation*, 10 J.L. ECON. & POL'Y 199 (2013); Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353 (2006).

in the rights-protection context. The Supreme Court's decision in *Dickerson v. United States*<sup>60</sup> relies on the "gloss" of historical settlement to treat the warnings mandated by *Miranda v. Arizona*<sup>61</sup> not simply as provisional, judicially crafted guidelines but as governing constitutional law. Although the constitutional text is utterly silent on the issue of police warnings in custodial interrogation (or any other context), Chief Justice William Rehnquist's opinion for the Court recognized the effects of settled practice: "*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture."<sup>62</sup> In *Dickerson*, the fact of that cultural embeddedness became the basis for embedding the warnings in constitutional law.<sup>63</sup>

We find these accounts of institutional practices to be present in legal commands across public law. Institutionalized practices provide guidance when the courts are called upon to formalize the constitutional impulse. There is in fact a long history of defining powers through settled institutional practice in domains reaching beyond the narrow separation of powers of the President and Congress. The initial colonial experience of writing state constitutions relied heavily on the enabling corporate charters for the exploration of America, which themselves only set out the forms of governance and enabled citizens as shareholders to exercise "full and absolute power and authoritie to correct, punishe, pardon, governe, and rule" anyone living in New England.<sup>64</sup> This authority included the rights to pass laws, to initiate and respond to legal proceedings, to acquire and sell property, and to admit new shareholders.<sup>65</sup>

From the colonial setting forward, practices were embodied in understood powers and obligations of governance. On occasion, as with the acquisition of territory starting with the Louisiana Purchase and continuing through the early

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60. 530 U.S. 428 (2000).

61. 384 U.S. 436, 441 (1966).

62. *Dickerson*, 530 U.S. at 443.

63. To be sure, the underlying constitutional issue in *Dickerson* and *Miranda* is one of individual right—namely the implications of the Fifth Amendment privilege against self-incrimination for custodial police interrogation of criminal suspects. In the main, our discussion of historical practice has steered clear of individual rights cases. Institutional arrangements and historical practices that implicate individual rights do not necessarily deserve a presumption of constitutionality in the way practices and arrangements between and among institutions do. Individuals frequently do not interact with the government in a practical, give-and-take sort of way, where repeat interactions can yield stable and sensible arrangements meriting judicial deference. This is especially so when government acts against relatively powerless or marginalized members of society, who may be most in need of the protections that individual constitutional rights provide against the tyranny of the majority. In *Dickerson*, however, the practice in question—providing custodial suspects with *Miranda* warnings—provided greater protection for the individual right at issue, at least when compared to the statutory provision purporting to supersede the *Miranda* requirement. Seen in that light, *Dickerson* arguably can be understood as an interbranch decision: it was about the relationship between the judiciary and the police. It elevated to constitutional status the rule that the Court had announced and applied to the police decades earlier in *Miranda* and, in so doing, approved the institutional arrangements and practices that police forces across the country had evolved in response to *Miranda*.

64. Nikolas Bowie, *Why the Constitution Was Written Down*, 71 STAN. L. REV. 1397, 1416 (2019) (quoting The Charter of the Colony of the Massachusetts Bay in New England, 1628–9, in 1 RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND 1, 17 (Nathaniel B. Shurtleff ed., Boston, William White 1853)).

65. *Id.*

stages of empire in the Spanish-American War, the issues are ultimately presented for judicial review directly. Others, such as the creation and mounting powers of the Federal Reserve, are discussed in constitutional terms by other actors even if not directly challenged in litigation. Finally, there are institutional practices within the executive, such as conformity to opinions of the Office of Legal Counsel or presidential avoidance of direct involvement in criminal investigations, that frame conduct and increasingly seem poised to emerge as constitutional tripwires.<sup>66</sup>

Following Justice Jackson's *Steel Seizure* framework, we suggest a similar divide between a presumption of a constitutional safe harbor when government actors perform within established frameworks and, as suggested by Professor Renan, a shifting of the presumption toward judicial skepticism when government officials move outside such frameworks. The past cannot be a straightjacket any more than doctrine can be ignorant of revealed institutional practices. But, following the common law concept of adverse possession, the more the institutional practice is established and public, the longer it has been in existence, the more repeated actors have accepted its legitimacy, and the more its implementation has been successful, the greater the safe harbor presumption. By contrast, if the conduct is in direct repudiation of similarly well-settled and publicly understood norms or practices, its propriety must be assessed on its own terms without the benefit of any historically based safe harbor—and perhaps with a measure of explicit judicial skepticism.

Here, we return by analogy to Justice Jackson's typology of executive authority in the *Steel Seizure Cases*. For Jackson, executive authority was at its apex when acting pursuant to direct congressional mandate, at its nadir when acting in contravention of express congressional action, and in a state of constitutional twilight when Congress has not acted. The Jackson typology is worth revisiting given the rise of unilateral executive action and the corresponding passivity of a dysfunctional Congress. Hopefully only metaphorically, we can ask how to govern in a perpetual state of twilight.

In crude form, we might consider courts confronting a range of proposed executive action and facing greater or lesser textual constraints and greater or lesser guidelines from historical practice. A preliminary take would yield a matrix along the following lines:

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66. See Morrison, *Constitutional Alarmism*, *supra* note 53.

|                                    | <b>Settled Practice</b>  | <b>No Settled Practice</b>   |
|------------------------------------|--|--|
| <b>Clear Text</b>                  | Court refers to institutionalized practice as a matter of interpretation only.   | Text controls.   |
| <b>No Clearly Controlling Text</b> | Historical gloss will guide judicial review with presumptive authority for established practice. The burden of justification belongs to parties who challenge practices. | Cognizable state interest is needed to justify unprecedented action. The burden of justification belongs to parties defending new practices. |

The difficulty with this type of schematic is that its identifiable quadrants understate the expansiveness of the domain of practices that emerge from trial and error and the ensuing accommodation of institutional actors. Even more problematic is that this generalized schematic fails to address whether, at the level of practical realism, historical gloss is sufficiently forceful to deny constitutional actors—invariably the executive—the power to act when not constrained by a textual prohibition. Can constitutional doctrine based on the institutional settlements that flow from historical practice withstand contrary assertions of power by contemporary political incumbents?

With those questions and limitations in mind, we offer an attempt first to fill in the boxes of the matrix with some examples to illustrate how institutional settlement can actually function in areas not commanded by text, depicted above by the bottom two quadrants. We do not engage debates about textualism and its methods. Instead, our goal here is to challenge the presumed dichotomy between *interpretation* as the constitutional function and *construction* as the practical political reality of the governing institutions.<sup>67</sup> We want to claim instead that the forms of *construction* actually condition *interpretation*, as well-settled practices become integrated into constitutional doctrine. Historical practice begins as custom but may be incorporated into doctrine.

Two examples help support our claim. First, in the administrative law context, consider the issue of whether Congress may vest the director of the Consumer Finance Protection Board (CFPB) with a five-year term of office, subject to removal by the President only for “inefficiency, neglect of duty, or malfeasance in office.”<sup>68</sup> When reviewing this question, the en banc D.C. Circuit applied a methodology similar to what we suggest here. For the majority, per Judge Cornelia Pillard, the case law governing agency independence had to be

67. For a kindred approach, see Curtis A. Bradley & Neil S. Siegel, *Constructed Constraint and the Constitutional Text*, 64 DUKE L.J. 1213, 1217 (2015) (proposing destabilization of the distinction between interpretation and construction).

68. PHH Corp. v. Consumer Fin. Prot. Bureau, 881 F.3d 75, 77 (D.C. Cir. 2018) (en banc) (*abrogated by* Seila Law, LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183 (2020)).

read against the backdrop of historical understanding that “Congressional alertness to the distinctive danger of political interference with financial affairs, dating to the founding era, began the longstanding tradition of affording some independence to the government’s financial functions.”<sup>69</sup> In the intervening time, and particularly since the New Deal, Congress had created many financial regulatory bodies with similar guarantees of independence from direct political control. It had done so free from executive interference or judicial repudiation.

In dissent, then-Judge Brett Kavanaugh took issue not with the majority’s methodology, but with the application. Historical acceptance could be constitutionally controlling, argued Judge Kavanaugh, but it had never settled the specific question of having a one-person agency headed by someone not removable by the president. For example, the fact that the Office of the Special Counsel had been a single-head independent agency for nearly forty years did not stop it from being a “controversial anomaly.”<sup>70</sup> Applying the same methodology as Judge Pillard, Judge Kavanaugh concluded that the CFPB structure failed for “lack of historical precedent for this entity.”<sup>71</sup> Without taking sides on the particular issue that divided the majority and the dissent, we here seek simply to emphasize the methodological convergence on issues of historical settlement and their scope. Both opinions treated the extent of historical settlement as central to the analysis, even as they disagreed on how best to apply that analysis in the case at hand.

The same analytic demarcation divided the Supreme Court when it reached the opposite result from Judge Pillard’s majority in an appeal from the Ninth Circuit.<sup>72</sup> The Court struck down as a historical aberration the vesting of significant executive power in an independent agency led by a single director. The result stands in stark contrast to the decision of the D.C. Circuit mentioned above, but the reasoning is similarly concerned with historical practice. In an opinion by Chief Justice John Roberts, joined by now-Justice Kavanaugh and three others, the Court explained that “‘the most telling indication of [a] severe constitutional problem’ with an executive entity ‘is [a] lack of historical precedent’ to support it.”<sup>73</sup> Accordingly, “[s]uch an agency has no basis in history and no place in our constitutional structure”<sup>74</sup> and is doomed as “an innovation with no foothold in history or tradition.”<sup>75</sup> Justice Elena Kagan’s dissent similarly trained on the historical record but drew different lessons from it. In her view, from the Founding on, “Congress debated and enacted measures to create spheres of administration—especially of financial affairs—detached

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69. *Id.* at 91.

70. *Id.* at 175 (Kavanaugh, J., dissenting) (quoting K. William O’Connor, *Foreword to U.S. MERIT SYS. PROT. BD., PROTECTING THE INTEGRITY OF THE MERIT SYSTEM: A LEGISLATIVE HISTORY OF THE MERIT SYSTEM PRINCIPLES, PROHIBITED PERSONNEL PRACTICES AND THE OFFICE OF THE SPECIAL COUNSEL* (1985)).

71. *Id.* at 181 (quoting *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 505 (2010)).

72. *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183 (2020)

73. *Id.* at 2201 (quoting *Free Enterprise Fund*, 561 U.S. at 505).

74. *Id.*

75. *Id.* at 2202.

from direct presidential control.”<sup>76</sup> That repeated practice was the key, according to Justice Kagan, to the constitutionality of the arrangement then before the Court.

*Medellin v. Texas*<sup>77</sup> provides a second example of how attention to historical practice can inform judicial interpretation of the law. In that case, the Court considered whether President George W. Bush could compel state court compliance with a decision of the International Court of Justice in possible derogation of state procedural rules. The Court’s framework reflects precisely our concern at present: “[I]f pervasive enough, a history of congressional acquiescence can be treated as a ‘gloss on “Executive Power” vested in the President by § 1 of Art. II.’”<sup>78</sup> But the effort to command state courts could not muster authority in precedent: “The President’s Memorandum is not supported by a ‘particularly longstanding practice’ of congressional acquiescence . . . but rather is what the United States itself has described as ‘unprecedented action.’”<sup>79</sup> The Court’s approach allows a privileged constitutional position for practices that have achieved the level of institutional settlement, with multiple actors acquiescing over extended periods of time, *and* a more exacting level of scrutiny for actions that are neither well-grounded in text nor demonstrated to have withstood the test of time.<sup>80</sup>

These cases all emphasize the importance of historical practice. At the same time, the decisions are vulnerable to the charge that they simply take an ends-oriented approach that yields predictable ideological divisions on the Court, as with the constitutionality of the CFPB. But this charge proves too much; any interpretive methodology is unlikely to be completely controlling in the rarified cases that reach the Supreme Court. There is always the risk that, as Dean John Manning wrote of the judicial and scholarly accounts of unilateral presidential power to remove executive officials, the historical record may be “highly ambiguous and prone to overreading.”<sup>81</sup> That there will be close cases at the margin does not doom any interpretive methodology, unless the margins are so ample as to vitiate any analytical gain. The question is whether a concern for historical practice helps identify the outliers and can inform the judicial inquiry as to what assertions of authority are constitutionally suspect. We contend that the answer is yes: historical practice directs the constitutional inquiry by shaping constitutional doctrine.

### C. Institutional Settlement at Work

Our core argument rests on the view that conventions established through settlement and repeated practice can come to shape both judicial interpretation

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76. *Id.* at 2225 (Kagan, J., concurring and dissenting in part).

77. 552 U.S. 491 (2008).

78. *Id.* at 531 (quoting *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981)).

79. *Id.* at 632 (citation omitted).

80. This account of *Medellin* is further developed in Morrison, *Constitutional Alarmism*, *supra* note 53.

81. *Seila*, 140 S. Ct. at 2230 (Kagan, J., dissenting) (quoting John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1965 n.135 (2011)).

and important domains of doctrine itself. A domain of accepted constitutional practice now at a remove from today's constitutional debates and not framed as a matter of separation of powers demonstrates this phenomenon. For example, few constitutionalists today worry about the government's authority to issue the currency we carry in our wallets—at least until recently. Yet issuing paper money was considered beyond the federal government's designated powers and suspect under the Contracts and Takings Clauses, as the wisdom of the early Republic was that issuing money not specie backed by metal reserves was necessarily inflationary and accordingly diminished the value of future contractual obligations.<sup>82</sup> This constitutional understanding was overcome during the Civil War through the Legal Tender Act, which allowed the printing of money to cover the war obligations. As later members of Congress explained, concern over the limited power of the federal government was necessarily suspended by the sheer power of wartime exigency: “[T]he fact that the legal-tender acts of Congress were from the first generally regarded as unconstitutional was either waived or admitted, but justified as a war necessity.”<sup>83</sup> Indeed, the Supreme Court ratified this understanding by declaring the Legal Tender Act unconstitutional after the end of the Civil War.<sup>84</sup>

For the justices who again considered the Legal Tender Act sixteen years later, however, the power to determine legal tender is expansive and may reach such boundaries “as accord with the usage of sovereign governments.”<sup>85</sup> A decision whether to issue paper money must be made on the basis of what is “wise and expedient” and is therefore “a political question, to be determined by congress when the question of exigency arises, and not a judicial question, to be afterwards passed on by the courts.”<sup>86</sup> Once recognized, such sovereign power over the financial system would not stop at the frontier between coined and printed money.

A more significant example may be found in the Federal Reserve Act of 1913, which expanded the banking authority of the federal government and, through Section 282, required all banks with national charters to submit to federal authority and deposit a certain percentage of their capital into the newly-created Reserve banks.<sup>87</sup> By the time the Fed faced formal constitutional

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82. For an extensive treatment of the centrality of the debates over paper money in the period leading up to the Philadelphia Convention and of the hostility of the Framers to populist demands for paper money, see MICHAEL J. KLARMAN, *THE FRAMERS' COUP: THE MAKING OF THE UNITED STATES CONSTITUTION* 126–256 (2016).

83. Passed in 1862, the Legal Tender Act first recognized paper money as legal tender for debts and was passed to help the federal government raise money during the Civil War. 50 CONG. REC. 4916 (1913) (statement of Sen. Cummins).

84. The Acts were declared unconstitutional in *Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603 (1869) (4-3 decision). In *The Legal-Tender Cases*, 110 U.S. 421, 450 (1884) (8-1 decision), the Legal Tender Act was found constitutional in both wartime and peacetime.

85. 110 U.S. at 447.

86. *Id.* at 450.

87. The final Federal Reserve Act of 1913 requires that all banks with national charters become members of the Federal Reserve System by subscribing to and buying stock in an amount “equal to six [percent] of the [bank’s] paid-up capital stock and surplus.” 12 U.S.C. § 282 (2018). Even at the time,

challenge in court, the reality of governmental fiscal control had taken hold. As Representative George Gorman argued in Congress, the constitutionality of this control lay not in the text or original structure of the Constitution, but in “the spirit of the Constitution which has made it responsive to the requirements of the increase and complexity of our population and our marvelous Territorial expansion. . . . Its letter may be fixed, rigid, and immovable, but its spirit is marching onward.”<sup>88</sup> Such constitutional concerns were raised—and largely ignored—as the power of the Fed expanded not just to bank oversight but to active bank regulation, despite challenges (all dismissed on standing or other prudential grounds) over appointments of private bankers to the Fed Board and on non-delegation grounds (again all dismissed on standing).<sup>89</sup> Despite doctrinally unresolved authority, the Fed assumed a central role in American governance, effectively resisting demands by virtually all presidents for inflationary credit-expansion on the eve of re-election.<sup>90</sup>

Representative Gorman’s reference to territorial expansion introduces another example of historical experience as the basis for constitutional mandates. Consider the initial problem of the expansion of the republic as presented in the Louisiana Purchase. The Constitution has no specific textual grant allowing for territorial acquisition. Yet, it does allow that “new states may be admitted by the Congress into this Union.”<sup>91</sup> While “Congress shall have power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States,”<sup>92</sup> there was no textual authorization for the acquisition of new territory or the grant of statehood to land not already in federal possession.<sup>93</sup> Constitutional uncertainty regarding geographic and, ultimately, imperial expansion had consequences. This was a matter of tremendous constitutional moment, as with the doctrinal holding of *Dred Scott*,<sup>94</sup> in which Chief Justice Roger Taney struck down the Missouri Compromise, in

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this was seen as a massive increase in the power of the federal government. *See, e.g.*, 50 CONG. REC. 4725 (1913) (statement of Sen. Prouty) (“They cannot take any man’s property. I say this for the gentleman’s information, and I will challenge any lawyer in the House to deny it—that there is not a single power in the Constitution of the United States by which the Government can take a dollar of any man’s property without compensation except by the process of taxation. I do not care how you whip it around the stump or through what kind of devious ways you trace it, there is not a single power given in the Constitution of the United States by which the great, strong arm of the Government can reach out and take a dollar of the richest or the poorest man’s property without compensation.”).

88. 50 CONG. REC. 4858 (1913) (statement of Rep. Gorman).

89. *See, e.g.*, *Melcher v. Fed. Open Mkt. Comm.*, 836 F.2d 561 (D.C. Cir. 1987) (dismissed on grounds of equitable discretion); *Comm. for Monetary Reform v. Bd. of Governors of the Fed. Reserve Sys.*, 766 F.2d 538 (D.C. Cir. 1985) (dismissed for lack of standing).

90. *See* Caroline W. Tan, *What the Federal Reserve Board Tells Us About Agency Independence*, 95 N.Y.U. L. REV. 326, 331 (2020) (chronicling successful Fed resistance to presidential pressure).

91. U.S. CONST. art. IV, § 3, cl. 1.

92. U.S. CONST. art. IV, § 3, cl. 2.

93. A fuller account of this may be found in Samuel Issacharoff, *Meriwether Lewis, the Air Force, and the Surge: The Problem of Constitutional Settlement*, 12 LEWIS & CLARK L. REV. 649 (2008).

94. *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856) (*superseded by constitutional amendment*, U.S. CONST. amend. XIV).

part, on the lack of federal power to hold territories without a clear plan of integration as states.<sup>95</sup> Although this part of *Dred Scott* is now obscured by the decision's role in prompting the Civil War,<sup>96</sup> the issue remained unsettled until the *Insular Cases*<sup>97</sup> at the end of the 19th century. Even there, the Court split 5-4 on the critical question of the inherent power of the federal government to expand the geographic reach of the United States.<sup>98</sup>

Critical for our purposes, the Court resolved the territory issue from the ground up, with doctrine following the historical accommodation. By the time the Supreme Court first addressed the issue in 1828 in the context of the Louisiana Purchase, the constitutionality of the purchase had been long settled as a practical matter. Little remained at stake constitutionally when Chief Justice Marshall solemnized the Louisiana transaction: "The Constitution confers absolutely on the government of the Union the powers of making war and of making treaties; consequently, that government possesses the power of acquiring territory, either by conquest or by treaty."<sup>99</sup> This was a matter of constitutional doctrine accommodating an irresistible practical reality, not a close parsing of constitutional text. The brute fact of the acquisition effectively dictated its constitutionality.

Subsequently, the Louisiana Purchase would serve as authority for the purchase of Florida from Spain, the annexation of Texas, the post-War acquisitions of Arizona, California, New Mexico, and Utah from Mexico. It also served as authority later on for the acquisition of Hawaii and the post-Philippine War expansion into the Far East.<sup>100</sup> Most notably, when Secretary of State William Seward proposed the Alaska Purchase, supporters of the purchase derided opponents for invoking arguments that "paralleled the foolish reluctance of some in 1803 to accept the Louisiana Purchase."<sup>101</sup> When applied to the spoils of the Spanish-American War, the pretense of territory being a prelude to

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95. See *id.* at 446 ("There is certainly no power given by the Constitution to the Federal Government to establish or maintain colonies . . . to be ruled and governed at its own pleasure; nor to enlarge its territorial limits in any way, except by the admission of new States.").

96. See, e.g., EARL M. MALTZ, *DRED SCOTT AND THE POLITICS OF SLAVERY* (2007) (shock waves of decision accelerated advent of Civil War); Jack M. Balkin & Sanford Levinson, *Thirteen Ways of Looking at Dred Scott*, 82 CHI.-KENT L. REV. 49, 67 (2007) ("[M]any people believe that *Dred Scott* hastened the Civil War . . .").

97. The *Insular Cases* were a group of cases decided in the early twentieth century addressing the extraterritorial effect of the Constitution. See *Dorr v. United States*, 195 U.S. 138 (1904); *Kepner v. United States*, 195 U.S. 100 (1904); *Hawaii v. Mankichi*, 190 U.S. 197, 211, 217 (1903); *De Lima v. Bidwell*, 182 U.S. 1, (1901); *Goetze v. United States*, 182 U.S. 221 (1901); *Dooley v. United States (Dooley I)*, 182 U.S. 222 (1901); *Armstrong v. United States*, 182 U.S. 243 (1901); *Downes v. Bidwell*, 182 U.S. 244, 246-48 (1901); *Huus v. N.Y. & P.R. S.S. Co.*, 182 U.S. 392 (1901); *Dooley v. United States (Dooley II)*, 183 U.S. 151 (1901); *The Diamond Rings*, 183 U.S. 176 (1901).

98. See *Downes*, 182 U.S. at 244.

99. *Id.* at 303 (quoting *Am. Ins. Co. v. 365 Bales of Cotton*, 26 U.S. (1 Peter) 511, 542 (1828)).

100. See Julian Go, *Modes of Rule in America's Overseas Empire: The Philippines, Puerto Rico, Guam, and Samoa*, in *THE LOUISIANA PURCHASE AND AMERICAN EXPANSION*, *supra* note 46, at 209, 212.

101. Richard E. Welch, Jr., *American Public Opinion and the Purchase of Russian America*, in *AN ALASKA ANTHOLOGY: INTERPRETING THE PAST* 102, 111 (Stephen W. Haycox & Mary Childers Mangusso eds., 1996).

citizenship was rejected on racialist grounds.<sup>102</sup> Nonetheless, based solely on historical experience of the 19<sup>th</sup> century, the Court in 1901 made a one-sentence reference in *De Lima v. Bidwell* to annexation as a self-evident power of the federal government: “acquiring territory, either by conquest or treaty . . . is . . . as if the annexation was made, as in the case of Texas and Hawaii, by act of Congress.”<sup>103</sup>

More recently, the Court confronted the role of the electors in selecting the President through the Electoral College mechanism. The original constitutional design placed decision-making in the hands of the Electoral College, and by extension in the state legislatures that controlled the selection of the Electors.<sup>104</sup> The rise of political parties, however, placed the actual selection of electors in the hands of voters, and fifteen states went further to mandate that electors follow the preferences of voters who placed them in that role.<sup>105</sup> In *Chiafalo v. Washington*, the Court upheld state laws prohibiting and punishing “faithless electors” by invoking “[l]ong settled and established practice” as the grounding for the “proper interpretation of constitutional provisions.”<sup>106</sup> That practice showed that:

Electors have only rarely exercised discretion in casting their ballots for President. From the first [election], States sent them to the Electoral College—as today Washington does—to vote for pre-selected candidates, rather than to use their own judgment. And electors (or at any rate, almost all of them) rapidly settled into that non-discretionary role.<sup>107</sup>

The Court then constitutionalized that historic understanding by recognizing the de facto power of the states to condition the role of the electors, a power existing since the first contested presidential election in 1796.

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The foregoing survey, while far from comprehensive, demonstrates that within American constitutional law, conventions established through settlement and repeated practice are not necessarily just a matter of institutional convenience standing apart from judicially elaborated doctrine, but can come to shape important domains of the doctrine itself. Questions remain, however, about just what courts can do to enforce doctrine grounded in such historical practices, especially when faced with deviant assertions of authority.

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102. The Court itself spoke of the newly acquired territories as “inhabited by alien races,” such that governance “according to Anglo-Saxon principles, may for a time be impossible.” *Downes*, 182 U.S. at 287 (1901); see also Samuel Issacharoff, Alexandra Bursak, Russell Rennie, & Alec Webley, *What is Puerto Rico?*, 94 IND. L.J. 1 (2019) (setting out unresolved status of territories held under this principle); Russell Rennie, Note, *A Qualified Defense of the Insular Cases*, 92 N.Y.U. L. REV. 1683, 1688–93 (2017) (attempting to modernize the doctrines of the *Insular Cases*).

103. *De Lima v. Bidwell*, 182 U.S. 1, 196 (1901) (internal citation and quotation marks omitted).

104. U.S. CONST. art. II, § 1.

105. *Chiafalo v. Washington*, 140 S. Ct. 2316, 2322 (2020).

106. *Id.* at 2326 (quoting *The Pocket Veto Case*, 279 U.S. 655, 689 (1929)).

107. *Id.*

## II.

## HOW AND WHEN CAN COURTS ENFORCE INSTITUTIONAL SETTLEMENT?

If institutional arrangements worked out through historical practice are ubiquitous in U.S. constitutional law, they are especially significant in matters relating to the distribution of power among the branches of the federal government. Because of the repeat interplay between Congress and the executive, any institutional arrangements likely derive from an ongoing negotiated balance between the branches involving a suite of powers, everything from appointments to budgeting. One risk of judicial involvement in these matters is that the courts may fail to distinguish between critical interbranch bargains over matters of real consequence and more superficial and even ephemeral arrangements that may obtain at any given point in time. These fleeting accommodations may not be the result of any significant institutional investment or commitment by either branch. Yet the courts have been drawn into disputes centering on the nature and scope of institutional settlement and historical practice on multiple occasions, and in so doing, they have been obliged to draw precisely on those distinctions, among others. In this Section, we take up three separation of powers case studies to illustrate some of the special possibilities and challenges that courts face when contending with practice-based conventions in this area.

When it comes to constitutional law based on historical institutional practice, the courts properly do not lead; they follow. By definition, they sit to observe—and, potentially, to ratify—arrangements worked out by the political branches. Other branches must as an initial matter negotiate arrangements that suit their policy or political or other aims while meeting their understandings of constitutional permissibility. Practical working arrangements may not be engaged initially as presenting matters of constitutional viability, but may acquire such dimensions as the practices become more entrenched. That explanation represents one way to understand the questions facing courts when they enter the fray on these matters: Should a given institutional arrangement be presumed constitutional, and/or should departures from it be presumed unconstitutional? Does the historical practice at issue have sufficient traction, both conceptually and practically, to yield judicially-enforceable constitutional doctrine?

To be sure, when courts take up these questions, they become active participants in the equation. To say that courts follow, rather than lead, the other branches on these matters is not to suggest that they are merely passive observers. When courts discern an enforceable constitutional norm from the contours of historical practice, they inevitably bring a new dimension to that practice. They will likely make explicit the content and boundaries of a norm that may have been merely implicit up until them. And in determining whether and to what extent a claimed practice or institutional arrangement is deserving of judicial enforcement, they will inevitably change the balance of power between the political branches on that issue. A jurisprudence that privileges practice-based institutional arrangements, in other words, is a jurisprudence in

which the very presence of judicial review affects the nature of the practices and arrangements at issue.

Sometimes, as noted above, the institutional arrangement in question may have been generated on the basis of an expectation that the courts would remain uninvolved in the matter. When that happens, judicial ratification of an arrangement may risk upending the premises upon which it was generated. We see no way around this, other than for courts to be sensitive to the reasons why the underlying institutional arrangement took hold and persisted over time. Such judicial craftsmanship requires understanding of what is at stake in deciding whether to render the arrangement susceptible to judicial enforcement. Beyond that, it is an inevitable consequence of any approach to constitutional decision-making that judicial intervention can itself shift the very constitutional ground the court means to survey.

Against this backdrop, we consider three recent examples of judicial engagement with historical practice in the separation of powers context.

*A. Policing Departures from Settlement, and Preserving the Settlement*

In order for a particular institutional arrangement generated through repeated historical practice to become part of judicially enforceable constitutional doctrine, the courts must be in a position both to describe the scope of the arrangement and to police departures from it. That is precisely what the Court did in *NLRB v. Noel Canning*.<sup>108</sup>

The case involved a challenge to President Obama's invocation of the Recess Appointments Clause<sup>109</sup> to appoint members of the National Labor Relations Board. Obama made the appointments on January 4, 2012. At that time, the Court explained, "the Senate was in recess pursuant to a December 17, 2011, resolution providing for a series of brief recesses punctuated by 'pro forma session[s],' with 'no business . . . transacted,' every Tuesday and Friday through January 20, 2012."<sup>110</sup> The pro forma sessions typically lasted no more than a minute, with only the convening senator in attendance.<sup>111</sup>

The case ultimately turned on whether the Senate remained sufficiently in session during those pro forma periods to preclude the President from making recess appointments. In the course of resolving that issue, the Court took up three questions: (1) can an *intrasession* recess qualify as a recess under the Recess Appointment Clause, or does only the formal *intersession* recess between sessions count; (2) does the Clause's reference to vacancies that "happen during the Recess" cover only vacancies that first arise during a recess, or does it also extend to vacancies that arise before a recess and still exist during the recess; and (3) when calculating whether an intrasession recess triggers the President's

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108. 573 U.S. 513 (2014).

109. U.S. CONST. art. II, § 2, cl. 3 ("The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.").

110. *Noel Canning*, 573 U.S. at 519 (quoting 157 CONG. REC. S8783 (daily ed. Dec. 17, 2011)).

111. See *Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions*, 2012 WL 168645, at \*1–2 (Off. Legal Counsel Jan. 6, 2012).

recess appointment power, should the Senate's pro forma sessions be disregarded?<sup>112</sup> It is of course possible to mine the answer from the constitutional text by reverse engineering the modern political practice onto an instrument that did not anticipate the kind of partisan divisions between the President and Congress that pervade modern government. The D.C. Circuit did just that and adopted a strict textualist approach to the first two questions, holding that the President's recess appointments power only activates when a vacancy first arises during the intersession recess.<sup>113</sup>

The Supreme Court rejected that approach in favor of one that privileged historical practice.<sup>114</sup> Indeed, Justice Stephen Breyer's majority opinion provides the most elaborate defense of looking to historical practice in constitutional interpretation of anything appearing in the United States Reports. As he put it:

Presidents have made recess appointments since the beginning of the Republic. Their frequency suggests that the Senate and President have recognized that recess appointments can be both necessary and appropriate in certain circumstances. 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.<sup>115</sup>

While acknowledging that there was no uniform history in this area dating all the way back to the Founding, the Court did describe a relatively consistent and frequently repeated practice of intrasession recess appointments dating back seventy-five years.<sup>116</sup> On the basis of that history, including the typical length of the recesses during which these appointments were made, the Court held that the President has the authority to make appointments during intrasession recesses of at least ten days in length.<sup>117</sup> The effect was to draw a constitutional circle around an accepted practice in a fashion reminiscent of *Dickerson*.

It bears noting that, in looking to historical practice to inform the meaning of the Recess Appointments Clause, the *Noel Canning* Court found the text of the Clause itself to be ambiguous. For us, the case thus stands as a textbook example of when judicially generated constitutional doctrine should privilege historical practice and the institutional settlement it generates. To be sure, the Court's inclination to view the constitutional text as ambiguous may well have been influenced by its reluctance to set aside decades or more of settled

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112. *Noel Canning*, 573 U.S. at 519.

113. *Noel Canning v. NLRB*, 705 F.3d 490, 590 (D.C. Cir. 2013).

114. *Noel Canning*, 573 U.S. at 524 (“[I]n interpreting the [Recess Appointments] Clause, we put significant weight upon historical practice.”).

115. *Id.* at 526.

116. *Id.* at 529. The Court also found a much longer history, dating back 200 years, of recess appointments to fill vacancies that arose before the recess and remained unfilled during that recess. *See id.* at 543.

117. *Id.* at 537–38. The Court held that recesses of less than ten days are “presumptively too short,” thus “leav[ing] open the possibility that some very unusual circumstance—a national catastrophe, for instance, that renders the Senate unavailable but calls for an urgent response—could demand the exercise of the recess-appointment power during a shorter break.” *Id.* at 538.

practice.<sup>118</sup> We need not blind ourselves to the possibility of motivated reasoning here. Still, at the level of explicitly articulated legal reasoning, we think reliance on historical practice is most easily justified in circumstances where the accommodation rests either beyond the scope of the text or in the context of asserted textual ambiguity.

We also think the *Noel Canning* Court got it right in holding that the Obama recess appointments there at issue fell outside the scope of the recess appointments power. Key here was the Court's determination that the Senate's pro forma sessions effectively broke up what would otherwise have been sufficiently long recesses into three-day breaks that were clearly too short to trigger the recess appointments power.<sup>119</sup> In 2007, the Democratic Senate majority began using pro forma sessions to prevent the Republican President, George W. Bush, from making recess appointments during intrasession breaks.<sup>120</sup> The Senate designed this procedural innovation to withhold from the President a power that historical practice and institutional settlement would otherwise have granted to him. At the time of the Obama recess appointments, the Senate remained in Democratic hands, which did not have the same partisan incentive to curtail Obama's ability to put his nominees in place through the recess appointment power. Yet the Democratic Senate Majority Leader Harry Reid continued the practice of pro forma sessions, apparently because the Republican leadership in the House of Representatives refused to authorize any Senate adjournment of longer than three days—precisely to prevent Obama from being able to use his recess appointment power.<sup>121</sup> Obama moved beyond the bounds of historical practice and the associated institutional settlement by making appointments during recesses that were, in light of the pro forma sessions, no more than three days long.

The Obama administration urged the Court to disregard the pro forma sessions as mere formalities and not actual opportunities to conduct Senate business in any “realistic” sense.<sup>122</sup> We think the Court correctly refused to look behind the formal fact that the Senate proclaimed to be in session and able to conduct business on each occasion.<sup>123</sup> To permit recess appointments in the face

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118. See *id.* at 526 (describing “hesitat[ion] to upset the compromises and working arrangements that the elected branches of Government themselves have reached”).

119. See *id.* at 549–56.

120. Renan, *supra* note 54, at 2245. Prior to that, the Senate did not use pro forma sessions “to satisfy the technical requirements of constitutional adjournment.” *Id.* (citing Memorandum from Christopher M. Davis, Analyst on Cong. and the Legislative Process, to Sen. Minority Leader (Mar. 8, 2012), published in 158 CONG. REC. S5954–56 (daily ed. Aug. 2, 2012)).

121. See David J. Arkush, *The Senate and the Recess Appointments*, 127 HARV. L. REV. F. 1, 8 (2013). The House leadership exerted this influence because of the constitutional provision that “[n]either House, during the session of Congress, shall, without the consent of the other, adjourn for more than three days.” U.S. CONST. art. I, § 5, cl. 4. Pro forma sessions provide a way for the Senate to take functional breaks of longer than three days without the consent of the House, which in this context withheld that consent precisely to ensure that the intrasession recess did not become long enough to activate the recess appointment power.

122. *Noel Canning*, 573 U.S. at 554.

123. *Id.* at 550 (“[F]or purposes of the Recess Appointments Clause, the Senate is in session when it says it is, provided that, under its own rules, it retains the capacity to transact Senate business. The Senate met that standard here.”).

of the pro forma sessions would extend the interbranch bargain beyond the scope of its historical practice. The underlying settlement resulted from accommodation by both branches, over a long period of time and under different alignments of partisan control.<sup>124</sup> If the Court had blessed Obama's recess appointments, it would have granted a new power to the President without any compensating adjustment to the bargain. That would have transformed the recess appointment power—which by definition has always depended upon interbranch cooperation sufficient to generate the recess in the first place—into a kind of presidential entitlement.<sup>125</sup> And that, in turn, would depart from the institutional settlement upon which the *Noel Canning* Court appropriately based its decision.

More broadly, if the relevant institutional actors that generated the settlement are no longer committed to the settlement, there is likely to be little the judiciary can do to ensure its continued vitality. For decades, the Senate and the White House coalesced around an understanding that intrasession senatorial breaks of at least ten days empowered the President to make recess appointments. And both institutions acted on that understanding often enough to enable thousands of such appointments.<sup>126</sup> The *Noel Canning* Court relied on that history to inform its interpretation of the Recess Appointments Clause, but that cannot serve to place the meaning of the Clause forever beyond the reach of the political branches. A historically-based presumption should not serve as a straightjacket from the past. If the Senate continues to use tactics like pro forma sessions to ensure it never sits in a lengthy recess, and if presidents do not pull the countervailing levers,<sup>127</sup> then the intrasession recess appointment power will surely atrophy. That, we think, remains an inescapable feature of constitutional doctrine derived from historical practice.

Departures from existing institutional arrangements are likeliest when there are shifts either in partisan alignments or in the priorities of the leaders of those alignments.<sup>128</sup> The time horizon of those motivated by raw political partisanship is often short and from that vantage point, the benefits of following settled

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124. In an era of extreme partisan polarization, the development and persistence of this settlement across different configurations of power among the parties holding executive and legislative primacy demonstrates special significance. See Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2316–33 (2006).

125. We read Daphna Renan arguing for precisely such an entitlement in urging that the Court should have disregarded the pro forma sessions on the ground that they violated a “structural norm . . . that the Senate does not use pro forma sessions to prevent the business of governance, including the exercise of presidential authority under Article II.” Renan, *supra* note 54, at 2245. We are unpersuaded of the existence of any such norm, at least in any robust sense. It is in the nature of the recess appointments power that the Senate—in deciding whether, when, and for how long to go into recess—has substantial ability to affect whether the recess appointment power is activated. Other than the recess that necessarily occurs (though perhaps only for a literal moment) between formal sessions of Congress, the President receives no entitlement to any constitutional minimum amount of recesses (and associated recess appointment opportunities).

126. *Noel Canning*, 573 U.S. at 529 (“[I]f we include military appointments, Presidents have made thousands of intra-session recess appointments.”).

127. See U.S. CONST. art. II, § 3 (“[I]n Case of Disagreement between [the Senate and House], with Respect to the Time of Adjournment, [the President] may adjourn them to such Time as he shall think proper.”).

128. See Levinson & Pildes, *supra* note 124, at 2316–25.

historical practice may be obscure. In those circumstances, we do not think the courts should encourage or abet the descent to short-termism and expedience. We suggest this, however, as a rule of interpretation of constitutional practice, not as a barrier to institutional change.

Realistically, the courts cannot impose upon the political branches institutional arrangements in which they lack the will to invest. A decision like *Noel Canning* translates decades of executive-legislative interaction around the issue of recess appointments into a kind of constitutional safe harbor that the branches may avail themselves of going forward. But it does not mandate that they take advantage of it. Perhaps the prior patterns of interbranch interaction will give way to some new equilibrium (in the appointments context, perhaps around presidential reliance upon White House “policy czars” and acting departmental and agency heads, rather than Senate-confirmed officers). Perhaps the political branches will refuse to cooperate at all and become trapped in a kind of political stalemate for a period of time. Either way, at some point the prior institutional settlement can no longer support the constitutional meaning. Call this constitutional change by desuetude.

#### B. *Identifying and Policing Executive Abuse*

*Noel Canning* and similar cases require the Court to define the boundaries of settled institutional practice and to declare the consequences of exceeding them. In the present political moment, a different and more challenging question presents itself. How should courts adjudicate claims that particular exercises of government power, though facially within the bounds of long-settled authority, should nonetheless be invalidated on grounds that the bias, abusiveness, dishonesty, or sheer self-dealing of the current leadership has effectively forfeited any claim to the benefits of the institutional bargains struck by their predecessors?

Any approach to constitutional exposition—or, more broadly, to governmental legitimacy—that privileges historical practice must be based on a presumption that the people occupying positions of governmental authority operate according to basic principles of good faith and democratic governance.<sup>129</sup> This is part of what grounds the “presumption of regularity” that courts grant to prosecutors and other governmental officials.<sup>130</sup> How, then, should courts react when litigants challenge government action that appears on its face to operate within the bounds of established historical practice but actually arises from the product of dysfunction or—even worse—malfeasance or animus?

These questions are not hypothetical, of course. Flouting settled norms of responsible government is quite arguably the defining characteristic of the

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129. This statement refers to Gladstone’s reference, noted earlier, to any functional democracy’s reliance on “the good faith of those who work it.” See *The Brexit Referendums*, *supra* note 5.

130. See, e.g., *United States v. Armstrong*, 517 U.S. 456, 464 (1996). More broadly, there is an affinity here with a core premise of the legal process school—namely that courts should presume that the legislature is “made up of reasonable people pursuing reasonable purposes reasonably . . . .” Philip P. Frickey, *Faithful Interpretation*, 73 WASH. U. L.Q. 1085, 1093 (1995).

Trump administration.<sup>131</sup> Repeatedly and in a wide variety of contexts, the President and senior members of his administration have taken actions and announced legal positions that disregard well established norms and practices. Some of this norm-flouting may be best viewed as simple indifference to the needs of effective governance, as when the President announces new policy positions on Twitter or at political rallies, without consulting or even informing in advance the officials charged with implementing the policy.<sup>132</sup> The human toll of such impetuosity can sometimes be massive, as when the President abandoned Kurdish fighters in northern Syria, apparently without any input from the State Department or the military.<sup>133</sup>

In other contexts, the norm may be seen as vital to a flourishing constitutional democracy, even if not susceptible to direct judicial enforcement. A President who regularly declares journalists “the enemy of the people” and singles out particular news media as guilty of “treason” may well undermine the capacity of a free press to play its important role in a free society.<sup>134</sup> Yet it is difficult to imagine the courts doing much about it. Similarly, it may well be impeachable for a President to withhold foreign aid in order to pressure a foreign government to launch an investigation of a domestic political rival for personal

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131. See Jack Goldsmith, *Will Donald Trump Destroy the Presidency?*, ATLANTIC (Oct. 2017), <https://www.theatlantic.com/magazine/archive/2017/10/will-donald-trump-destroy-the-presidency/537921/> [<http://perma.cc/3GD4-VVM3>] (“Donald Trump is a norm-busting president without parallel in American history.”); see also *Hot Topics*, JUST SECURITY, <https://www.justsecurity.org/main-archiv/> [<https://perma.cc/G92H-FF5N>] (containing the “Norms Watch” feature of the Just Security blog, whose co-Editor-in-Chief is our colleague Ryan Goodman).

132. See, e.g., Transcript of Telephone Conference at 5, *Kravitz v. U.S. Dep’t of Commerce*, 366 F. Supp. 3d 681 (D. Md. 2019) (statement by Department of Justice attorney, describing government’s position with respect to adding a citizenship question to the United States Census, after the Supreme Court struck down prior attempt to include such a question):

The tweet this morning was the first I had heard of the President’s position on this issue, just like the plaintiffs and Your Honor. I do not have a deeper understanding of what that means at this juncture other than what the President has tweeted. But, obviously, as you can imagine, I am doing my absolute best to figure out what’s going on.

133. For discussions on the response to the Presidential directive by Congressional and military actors uninvolved in the decision, see, for example, Robert Burns et al., *Trump Defends Decision to Abandon Kurdish Allies in Syria*, ASSOCIATED PRESS (Oct. 8, 2019), <https://apnews.com/ac3115b4eb564288a03a5b8be868d2e5> [<https://perma.cc/ZQR7-KA7W>]; Helene Cooper & Eric Schmitt, *Caught Between Trump, Turkey and Kurds, Pentagon Struggles to Piece Together Syria Strategy*, N.Y. TIMES (Oct. 7, 2019), <https://www.nytimes.com/2019/10/07/world/middleeast/syria-turkey-kurds-military.html> [<https://perma.cc/JM38-QT8B>].

134. See, e.g., Donald J. Trump (@realDonaldTrump), TWITTER (Apr. 5, 2019, 1:41 PM), <https://twitter.com/realDonaldTrump/status/1114221533461790721?s=20> [<https://perma.cc/TH6T-NUU8>] (“The press . . . are truly the ENEMY OF THE PEOPLE!”); Factbase Videos, *Interview: Pete Hegseth of Fox Interviews Donald Trump at Rally in Billings – September 6, 2018*, YOUTUBE (Sept. 7, 2018), [https://www.youtube.com/watch?time\\_continue=104&v=BVshIJVdnJY](https://www.youtube.com/watch?time_continue=104&v=BVshIJVdnJY) [<https://perma.cc/VH9P-NS9F>] (“The Times should never have done that, because really what they’ve done is, virtually, you know, it’s treason, you can call it a lot of things.”); Factbase Videos, *Speech: Donald Trump Holds a Rally in Billings, Montana – September 6, 2018*, YOUTUBE (Sept. 6, 2018), [https://www.youtube.com/watch?time\\_continue=2302&v=Fbg4Cs7wgZc](https://www.youtube.com/watch?time_continue=2302&v=Fbg4Cs7wgZc) [<https://perma.cc/FQN2-S7KR>]. (“I mean, you look at the Washington Post or the New York Times, I can never get a good story. I mean, you look at this horrible thing that took place today, it’s really —is it subversion? Is it treason? It’s a horrible thing.”).

political gain, and the same might be prosecutable as bribery if done by anyone other than a sitting President. The courts, on the other hand, seem unlikely to inject themselves into such matters.<sup>135</sup> That does not, however, deny the significance of what is at stake. Indeed, we may consider these and other norm-defying actions as part of a process of de-institutionalizing the presidency and inviting a form of individual dominance.<sup>136</sup> We typically associate this behavior more with the *caudillo* dominance of Latin American presidentialism than with established democracies.<sup>137</sup>

In contrast, other instances of presidential norm defiance arise in situations clearly subject to judicial review. A prominent example is President Trump's attempt to "[p]revent[] Muslim [i]mmigration," which was at the heart of the *Trump v. Hawaii* litigation.<sup>138</sup> The case involved a challenge to the third iteration of a presidential directive, issued under the Immigration and Nationality Act, restricting entry into the country of nationals of eight countries, six of which had predominantly Muslim populations.<sup>139</sup> The first such directive, hastily drafted and issued within days of Trump's inauguration, focused exclusively on seven majority Muslim countries (Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen) that had each also been "previously identified by Congress or prior administrations as posing heightened terrorism risks."<sup>140</sup> The lower courts quickly blocked the order.<sup>141</sup> The administration responded by rescinding the order and replacing it with a new one, which multiple lower courts blocked again.<sup>142</sup> The third order, issued in September 2017, came after the culmination of a "worldwide review" conducted by the Secretary of Homeland Security to determine the adequacy of information provided by foreign governments about their nationals seeking to enter the United States, for purposes of identifying individual threats to national security.<sup>143</sup> Purportedly on the basis of that review, the directive (in the form of a presidential proclamation) placed entry restrictions on the nationals of eight countries—five of the seven majority Muslim countries covered by the first order, plus Chad (which is also majority Muslim) and North Korea and Venezuela (which are not).<sup>144</sup>

The proclamation documented the extensive interagency review and consultation process that led to its issuance. Neither of the first two orders was the product of such a review. The proclamation also provided for case-specific waivers when a covered foreign national "demonstrates undue hardship, and that his entry is in the national interest and would not pose a threat to public

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135. Cf. *Nixon v. United States*, 506 U.S. 224, 236–37 (1993) (declining, on political question grounds, to decide constitutionality of procedures used by the Senate to try an impeachment).

136. See Daphna Renan, *The President's Two Bodies*, 120 COLUM. L. REV. 1119 (2020).

137. Issacharoff, *supra* note 20, at 504 n.73.

138. 138 S. Ct. 2392, 2417 (2018) (citing to a "Statement on Preventing Muslim Immigration" issued by then-candidate Trump that called for "a total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on") (citation omitted).

139. *Id.* at 2405.

140. *Id.* at 2403.

141. *Id.* at 2403–04.

142. *Id.* at 2404.

143. *Id.* at 2403–05.

144. *Id.*

safety.”<sup>145</sup> In addition, the proclamation established a mechanism for modifying or lifting the restrictions for any of the covered countries if the President, upon the recommendation of the Secretary of Homeland Security, deemed them no longer necessary. By the time *Trump v. Hawaii* reached the Supreme Court, the restrictions on Chad’s nationals had already been lifted on that basis.<sup>146</sup>

On the face of it, the proclamation seemed to comply with administrative requirements and resembled entry restrictions ordered by prior administrations.<sup>147</sup> Following the general approach defended in this Article, the path of least resistance for the Court was to consider whether the President’s claimed institutional authority fell within the parameters of historical practice, and to uphold it on that basis. The nagging question in the case, however, was whether the peculiarities of this particular President took the case outside the formal authority of the office. Specifically, did President Trump’s repeated anti-Muslim statements provide a basis for concluding that the proclamation—commonly known as the “travel ban”—was the product of animus toward Islam, thereby violating the Establishment Clause?<sup>148</sup>

While the majority tread cautiously on any declaration that presidential animus might render conduct ultra vires, the issue was joined. In her dissenting opinion, Justice Sonia Sotomayor (joined by Justice Ruth Bader Ginsburg) surveyed a mass of “harrowing” evidence supporting the claim of religious bias—and indeed, tending to suggest that the President’s anti-Muslim prejudice extended well beyond the domain of immigration.<sup>149</sup> In light of that evidence, Justice Sotomayor maintained that “a reasonable observer would conclude that the Proclamation was driven primarily by anti-Muslim animus, rather than by the Government’s asserted national-security justifications.”<sup>150</sup>

Writing for the majority, the Chief Justice did not deny the existence of Trump’s various anti-Muslim statements, nor did he deny that those statements “cast[] doubt” on the true purpose of the proclamation.<sup>151</sup> But deciding “whether to denounce the statements” was not the Court’s task, he insisted.<sup>152</sup> Instead, the Court was required to assess “the significance of those statements in reviewing a Presidential directive, neutral on its face, addressing a matter within the core of executive responsibility. In doing so, we must consider not only the statements of a particular President, but also the authority of the Presidency itself.”<sup>153</sup> Framed that way, the case implicated an important additional point of institutional settlement: the longstanding tradition of courts engaging in only “a circumscribed judicial inquiry” of entry restrictions challenged on constitutional

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145. *Id.* at 2406.

146. *Id.*

147. *See id.* at 2413 (citing and comparing orders by Presidents Reagan, Clinton, and Obama).

148. *See id.* at 2417 (“At the heart of plaintiffs’ case is a series of statements by the President and his advisers casting doubt on the official objective of the Proclamation.”).

149. *See id.* at 2435–38 (Sotomayor, J., dissenting).

150. *Id.* at 2438 (Sotomayor, J., dissenting).

151. *Id.* at 2417.

152. *Id.* at 2418.

153. *Id.*

grounds.<sup>154</sup> In other words, judicial deference was itself an integral part of the interbranch accommodation at the heart of the case.

The majority cited *Kleindienst v. Mandel* for the proposition that, when facing a claim that an entry restriction implicates the constitutional rights of U.S. citizens, the Court limits its review to “whether the Executive gave a ‘facially legitimate and bona fide’ reason for its action”; when such a reason is offered, the judiciary will not “look behind the exercise of that discretion.”<sup>155</sup> The reasons weighing in favor of this narrow judicial inquiry have “particular force,” the Court emphasized, in “admission and immigration cases that overlap with ‘the area of national security.’”<sup>156</sup>

In any ordinary case, then, the presence of a “facially legitimate and bona fide reason” for the proclamation’s restrictions would be sufficient to uphold it against constitutional challenge. In so doing, the Court would privilege a longstanding institutional arrangement that (1) accords broad leeway to the political branches in matters of immigration, (2) grants especially pronounced authority to the executive when establishing entry restrictions on the basis of national security, and (3) entails substantial judicial deference in this area.<sup>157</sup> That is essentially how the *Trump v. Hawaii* majority approached the case.<sup>158</sup> In upholding the proclamation, the Court emphasized that it “could have been [issued] by any other President.”<sup>159</sup> This historical pedigree not only guided the statutory inquiry, it animated the Court’s very strong presumption of constitutionality in the face of claims of impermissible motive.

To Justice Sotomayor, President Trump’s repeated and extensive anti-Muslim statements—and in particular his early calls for a travel ban seemingly based entirely on the religion of those covered—took the case outside the domain of ordinary government practice. Viewed this way, the case was a mirror image of other well-known cases involving executive actions taken in times of asserted

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154. *Id.* at 2419.

155. *Id.* (quoting *Kleindienst v. Mandel*, 408 U.S. 753, 769–70 (1972)).

156. *Id.* (quoting *Kerry v. Din*, 576 U.S. 86, 104 (2015) (Kennedy, J., concurring in judgment)).

157. *See id.* at 2418 (“For more than a century, this Court has recognized that the admission and exclusion of foreign nationals is a ‘fundamental sovereign attribute exercised by the Government’s political departments largely immune from judicial control.’” (quoting *Fiallo v. Bell*, 430 U.S. 787, 792 (1977)); *id.* at 2409 (“[P]laintiffs’ request for a searching inquiry into the persuasiveness of the President’s justifications is inconsistent with the broad statutory text and the deference traditionally accorded the President in this sphere.”)).

158. Although the Court arguably went beyond the ordinarily applicable standard of review in this case by subjecting the proclamation to rational basis review rather than the more constrained *Kleindienst* standard, rational basis review is still extremely deferential. *Id.* at 2420 (describing rational basis review as “consider[ing] whether the entry policy is plausibly related to the Government’s stated objective to protect the country and improve vetting processes. . . . [W]e may consider plaintiffs’ extrinsic evidence, but will uphold the policy so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds.”). The Court had relatively little difficulty in holding that the proclamation satisfied rational basis review. *Id.* at 2421 (“[B]ecause there is persuasive evidence that the entry suspension has a legitimate grounding in national security concerns, quite apart from any religious hostility, we must accept that independent justification.”).

159. *Id.* at 2423.

crisis.<sup>160</sup> In those cases, the government typically contends that the ordinary limits on its authority (whether discerned with reference to historical practice or otherwise) should give way to a broader understanding of its power, sufficient to meet the current emergency. Meanwhile, the party on the other side objects that the challenged actions violate constitutionally guaranteed individual rights, and that the asserted emergency should not weaken the judiciary's protection of those rights.

Cases of this sort are not easy for courts. Indeed, the contention that the moment of exception demands radical reallocations of power lurches toward the most provocative claims in public law and political theory.<sup>161</sup> Certainly, these are not easy moments for the judiciary. But the Supreme Court has found a way to manage. When confronted with claims of exigency by the political branches on the one hand, and demands for maximal judicial enforcement of individual rights on the other, the Supreme Court has devised a set of middle ground or minimalist strategies that mediate between the two sides while embracing neither in its most extreme form.<sup>162</sup>

*Trump v. Hawaii* presented the opposite scenario. In defending the proclamation, the Trump administration appealed to historical practice and settled judicial precedent, insisting that its actions fell well within the boundaries of that practice and precedent. It was left to those objecting to the proclamation to argue that it was the product of a government operating extraordinarily and unlawfully, and that the judiciary's ordinary posture of deference in such cases was inadequate to the task.

The case thus put the Court in an extremely difficult position. It could not, and should not, have simply ignored the President's myriad bias-filled statements, nor should it have been blind to the risk that his personal prejudices might have been the but-for cause of severe policies like the travel ban. There is real force to Justice Sotomayor's insistence that "[o]ur Constitution demands, and our country deserves, a Judiciary willing to hold the coordinate branches to account when they defy our most sacred legal commitments."<sup>163</sup> Moreover, the Court has developed doctrinal tools for discerning whether facially neutral measures are infected by discriminatory intent and therefore unlawful,<sup>164</sup> and it could have employed them to find against the President's proclamation.

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160. See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Korematsu v. United States*, 323 U.S. 214 (1944) (*abrogated by Trump v. Hawaii*, 138 S. Ct. 2392 (2018)); *Ex parte Quirin*, 317 U.S. 1 (1942).

161. Most famously Carl Schmitt argued that sovereign authority must entail the power to declare an exception and the power to determine what the exception would entail: "Sovereign is he who decides on the exception." CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 5 (George Schwab trans., 2005).

162. See Trevor W. Morrison, *The Middle Ground in Judicial Review of Enemy Combatant Detentions*, 45 WILLAMETTE L. REV. 453 (2009); Cass R. Sunstein, *Minimalism at War*, 2004 SUP. CT. REV. 47; Issacharoff & Pildes, *supra* note 53.

163. *Trump v. Hawaii*, 138 S. Ct. at 2448 (Sotomayor, J., dissenting).

164. See *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977); see also Katherine Shaw, *Beyond the Bully Pulpit: Presidential Speech in the Courts*, 96 TEX. L. REV. 71, 137–40 (2017) (suggesting that *Arlington Heights*, which involved consideration of statements by legislators, should apply to consideration of statements of Presidents as well).

Admittedly, those tools were not crafted in the immigration or national security contexts, where the Court's settled practice is not to inquire into the "actual purpose" of executive actions. Still, if *Trump v. Hawaii* had been about the first iteration of the travel ban—hastily drafted with little if any input from policy experts, focused exclusively on majority-Muslim countries, and issued very close in time to many of the President's most virulent anti-Muslim statements—a majority of the Court may well have found it impossible to see the order as anything other than the direct product of religious bigotry.

The proclamation before the Court, however, presented a much more complicated and vexed task. Not only did the proclamation closely resemble in form and substance orders issued by prior presidents, but also it followed a worldwide agency review process that generated a number of robust factual findings. Of course, none of that erased the fact of the President's bigoted and inflammatory anti-Muslim statements. But if the Court treated those statements as continuing to suffice all on their own to invalidate a proclamation that otherwise satisfied all legal requirements and fell easily within the boundaries of established practice, it would provoke a question: What is the limit? Would the Trump administration have any ability to "cleanse" a future presidential proclamation relating to entry restrictions of the taint emanating from Trump's past tweets and other statements? If not, the Court would effectively be saying that Trump's various statements forfeited the entire government's ability to rely on a settled institutional practice relating to immigration, national security, and foreign relations. That would elevate man over institutions in a way that could be dangerous for the long-term health of a system of government that depends on institutional practice and convention.<sup>165</sup>

If the Court were to go that far, why stop only at immigration restrictions? During the 2016 campaign and in the early months of his presidency, President Trump made many statements that evinced a desire not simply to eliminate or severely restrict Muslim immigration, but to impose legal restrictions and penalties on Muslims more broadly.<sup>166</sup> If such statements are enough to invalidate the travel ban, what other governmental actions are also infected (and constitutionally invalidated) by the President's rhetoric? And of course, this President has made statements that are offensive, animus-driven, or simply norm-destructive about a great many other individuals, groups, and things in the course of his still-short tenure. At some point, a constitutional analysis that trains on those statements, regardless of whether the government is otherwise following standard practice within boundaries settled through historical practice, may obligate the Court to deprive the incumbent administration of the benefits of *all* historical practices upon which the modern federal government has been

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165. See generally Renan, *supra* note 136 (distinguishing between a personal and an institutional understanding of the presidency and drawing doctrinal implications from the distinction).

166. See, e.g., *Trump v. Hawaii*, 138 S. Ct. at 2436 (Sotomayor, J., dissenting) ("[A]t a rally in South Carolina, Trump told an apocryphal story about United States General John J. Pershing killing a large group of Muslim insurgents in the Philippines with bullets dipped in pigs' blood in the early 1900's."); *id.* ("[Trump] called for surveillance of mosques in the United States, blaming terrorist attacks on Muslims' lack of 'assimilation' and their commitment to 'sharia law.' . . . A day later, he opined that Muslims 'do not respect us at all . . . .'" (citation omitted)).

built. That would be not only an unhappy day for the country but also a dangerous one for the Court. Too much of the apparatus of government turns on the presumed legitimacy of administrative decisions. The country needs the administrative state to function, even when the occupant of the White House is aberrant, animus-driven, and hostile to the very institutions upon which the administrative state depends. Categorically denying the federal government the presumption of legitimacy when it operates within the bounds of historical practice and understanding would compromise the government's capacity to respond to the demands of the day and to attend to public welfare. That result might be unavoidable in some extreme contexts. But the courts should come to that conclusion only with great reluctance.

We are mindful that, as a practical matter, the Court's varied and constant interactions with the federal executive branch are very different than its rare and narrowly confined contacts with entities like the Plan Commission of the Village of Arlington Heights, Illinois. Unlike a small municipality on the outskirts of Chicago, the presidency sits atop a vast state apparatus that is in constant interaction with the federal judiciary. Recalcitrant municipalities or even the Jim Crow South can have their customary functions suspended, placed in receivership, or even forced to preclear significant aspects of their governance to a higher federal command.<sup>167</sup> Yet if the judiciary were to do the same to the presidency itself, and by extension to the entirety of the executive branch, it would venture into uncharted territory.<sup>168</sup>

In the cases mentioned above involving assertions of extraordinary governmental authority, the courts have been reluctant to recognize an inherent executive emergency power. As Justice Jackson put it in *Youngstown*, such a power "either has no beginning or it has no end. If it exists, it need submit to no

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167. See 52 U.S.C. § 10304 (2018); *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966).

168. This is a point that bears emphasis, even if its full ramifications cannot be developed adequately in this Article. For all the importance of the structural injunction in moving the agenda of the civil rights era, for example, rarely has that power been wielded against the entirety of the federal government. Constitutional courts around the world are forced to confront central failings of governmental power in cases involving an executive stretching the constitutional bounds to stay in office, dissolving anticorruption authorities, or commandeering the election administration authority. Cf. SAMUEL ISSACHAROFF, *FRAGILE DEMOCRACIES: CONTESTED POWER IN THE ERA OF CONSTITUTIONAL COURTS* (2015) (analyzing the role of the courts in preserving core democratic integrity). When dealing in such cases with the national executive's core power, these courts must recognize the broad political dimensions and institutional risks of taking on the state's chief executive. See Rosalind Dixon & Samuel Issacharoff, *Living to Fight Another Day: Judicial Deferral in Defense of Democracy*, 2016 WIS. L. REV. 683, 705. Able to rest their rulings on neither a historical political consensus nor the claim that a particular geographic subjurisdiction is simply a constitutional outlier, such courts are left to rely on broad assertions that they have been given a constitutional mandate to defend the "basic structures" of democracy, to use the influential formulation of the Indian Supreme Court. See *Kesavananda Bharati v. Kerala*, (1973) 4 SCC 225 (India); see also SUDHIR KRISHNASWAMY, *DEMOCRACY AND CONSTITUTIONALISM IN INDIA* 24–26 (2009) (describing the implied limits doctrine). There is considerable courage in such rulings, just as there is great risk. And there is essentially no useful institutional analogy to be drawn between these front-burner confrontations with the heart of executive authority and cases against secondary political actors like the *Village of Arlington Heights*.

legal restraint.”<sup>169</sup> Once recognized, in other words, emergency power is not easily subjected to enforceable limits. We worry that relying on extracurricular presidential statements to invalidate a facially neutral travel restriction generated through ordinary administrative procedures poses a similar problem. In essence, it relies on the assertion that we are in a time of exception, where ordinary institutional practices and judicial precedents should not apply. If the Court recognizes the beginning of such a moment, how and when can it be declared to end?

Does that leave the Court having to choose between privileging the institutional arrangements upon which the government has relied and protecting individual rights—between upholding the travel ban in the face of President Trump’s anti-Muslim rhetoric and striking it down in a way that might destabilize the modern administrative state?

Not necessarily. Here we are attracted to Justice Breyer’s separate dissenting opinion (joined by Justice Kagan) in *Trump v. Hawaii*. Justice Breyer recognized that previous presidents had issued facially comparable travel restrictions, and that President Trump’s proclamation would be entitled to a significant benefit of the doubt if its actual operation resembled those prior orders.<sup>170</sup> On that point, he viewed as critical the “elaborate system of exemptions and waivers” contemplated by the proclamation.<sup>171</sup> Presidents Jimmy Carter and Ronald Reagan both issued orders restricting admission that contained similar waiver and exemption systems; evidence that those provisions in the Trump order were being implemented as written would show continuity with those prior orders. Moreover, if exemptions and waivers were granted to Muslim applicants, that “would help make clear that the Proclamation does not deny visas to numerous Muslim individuals (from those countries) who do not pose a security threat,” which in turn “would help to rebut the First Amendment claim that the Proclamation rests upon anti-Muslim bias rather than security need.”<sup>172</sup>

In contrast, if the government were not really implementing the contemplated waiver and exemption system, that would tend to undercut the claim that the proclamation was designed to protect national security. As Justice Breyer put it, “How could the Government successfully claim that the Proclamation rests on security needs if it is excluding Muslims who satisfy the Proclamation’s own terms?”<sup>173</sup>

The key feature of Justice Breyer’s opinion is its reliance on the proclamation’s own criteria to assess whether it was generated in good faith and in keeping with the tradition of facially similar orders from prior

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169. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 653 (1952) (Jackson, J., concurring).

170. *Trump v. Hawaii*, 138 S. Ct. at 2430 (Breyer, J., dissenting).

171. *Id.* at 2429 (Breyer, J., dissenting).

172. *Id.* at 2430 (Breyer, J., dissenting).

173. *Id.* (Breyer, J., dissenting). Noting that the existing record was insufficient to resolve this factual question with any confidence, Justice Breyer preferred to remand the case for further factfinding. It was only because the majority was unwilling to go along with a remand that he dissented. *Id.* at 2433 (Breyer, J., dissenting).

administrations.<sup>174</sup> That standard provides the government with a means of demonstrating that it remains entitled to a presumption of good faith and regularity, the hate-filled tweets of the President notwithstanding. The institutional arrangements and historical practices with which we are concerned in this Article are the product not principally of the personal commitments of individual presidents, but of the long-term, repeated interactions of the institutions of government and the civil servants who sustain them. And our concern in a case like *Trump v. Hawaii* is not with exonerating presidential animus, but with exploring possibilities for preserving the traditions, practices, and arrangements upon which modern government depends, if those institutions are prepared to operate responsibly.

In *Trump v. Hawaii*, therefore, we think much turns on whether the proclamation is actually implemented in a manner consistent with its “own terms.”<sup>175</sup> If so, then the Court should be very reluctant to deprive the executive branch of the benefits of settled institutional arrangements reached and ratified over the course of multiple past administrations. And if not, the Court may be left with no choice but to acknowledge the extent of the taint inflicted by the person of the President on the institution of the presidency, and on the federal government more broadly.

History may view the Trump presidency as a moment when the institutional capabilities of American constitutionalism were severely tested, a second coming of the Andrew Jackson presidency perhaps. If so, the best defense is to buttress the institutional barriers that can ultimately save us from the *caudillos* currently plaguing the democratic world. To do that, whether the Court upholds or strikes down an executive action like the travel ban, it should do so in a manner that privileges, and continues to encourage, responsible government.

### C. Policing Legislative Oversight of the Executive.

We finish with an example drawn from one of the most difficult areas for applying the history of institutional settlement as a guide to constitutional adjudication: Congress’s power to obtain access to sensitive presidential information as part of its oversight of the Executive Branch.

As we have noted, whenever courts intercede to enforce prospectively the results of institutional accommodation, they necessarily change the power dynamics going forward. In the language of game theory, the availability of courts as an additional player to resolve power battles between the executive and the legislature presents an outside option, in which one of the parties (generally the weaker) may seek to turn to a third party rather than resolve the bargain between the two initial parties.<sup>176</sup> The prospect of subsequent outside

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174. See Renan, *supra* note 136, at 1199-1200 (emphasizing this same aspect of the opinion).

175. 138 S. Ct. at 2430 (Breyer, J., dissenting).

176. The outside option refers to the ability to find alternative buyers or sellers in a market exchange, as set out in Avner Shaked & John Sutton, *Involuntary Unemployment as a Perfect Equilibrium in a Bargaining Model*, 52 *ECONOMETRICA* 1351, 1363 (1984); see also Ken Binmore et al., *An Outside Option Experiment*, 104 *Q.J. ECON.*, 753, 757 (1989) (testing the impact of an outside

enforcement, like that of judicial enforcement of legislative history, necessarily affects how the initial resolution is handled. Quite simply, the availability of judicial relief may strain the willingness of the primary parties to seek a measured accommodation.

This was a central concern in *Trump v. Mazars*, a case we return to as a key example of the use of history to guide contested separation of powers doctrine. As Chief Justice Roberts cautioned, by altering the boundaries of the legislative subpoena power previously negotiated between Congress and the President, the Court might undermine the process of political accommodation that had created the present understood boundaries. If the Court were to tilt too far in the direction of Congress, then “[i]nstead of negotiating over information requests, Congress could simply walk away from the bargaining table and compel compliance in court.”<sup>177</sup> And if the Court were to grant the President broad immunity from such inquiries, he too would have no incentive to find a compromise with Congress and the longstanding process of interbranch accommodation would be undermined.<sup>178</sup> The key for the Court, therefore, was to find an approach that honored rather than altered the institutional incentives as little as possible:

For more than two centuries, the political branches have resolved information disputes using the wide variety of means that the Constitution puts at their disposal. The nature of such interactions would be transformed by judicial enforcement of either of the approaches suggested by the parties, eroding a [d]eeply embedded traditional way[] of conducting government. . . . A balanced approach is necessary, one that takes a considerable impression from the practice of the government, . . . and resists the pressure inherent within each of the separate Branches to exceed the outer limits of its power.<sup>179</sup>

The risk of distortion by judicial intervention gives logic to the Diceyan view of English constitutional law, under which institutional settlement, though important for the working of government, is not necessarily judicially enforceable. It also buttresses the initial formulation of the political question doctrine in *Luther v. Borden*,<sup>180</sup> in which the Court left unreviewable other branches’ judgment as to the legitimacy of the Rhode Island government:

[W]hen the senators and representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government, and could not be questioned in a

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option on bargaining outcomes in a laboratory setting). For an application to constitutional bargaining, see ISSACHAROFF, *supra* note 168, at 227–31.

177. *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2034 (2020).

178. *See id.* at 2033 (observing that the “categorical approach [favored by President Trump and the Solicitor General] would represent a significant departure from the longstanding way of doing business between the branches, giving short shrift to Congress’s important interests in conducting inquiries to obtain the information it needs to legislate effectively.”).

179. *Id.* at 2035 (internal quotation marks and citations omitted).

180. 48 U.S. 1 (1849).

judicial tribunal.<sup>181</sup>

Thus formulated, the political question doctrine in *Luther* was, like its British progenitor, a rule of judicial non-interference.<sup>182</sup>

Indeed, accommodation between the political branches might be nurtured by the fear of each of losing a litigated controversy. The equilibrium here is one of threatened judicial involvement, even if as a practical matter there is precious little actual judicial involvement. If the courts weigh in and answer the questions comprehensively, the result may be to significantly alter (and perhaps undermine) the political branches' incentives to come to workable compromises between them. In areas where historical practice is a story of interbranch contestation and accommodation fitting this description, therefore, the best way to preserve the practices and arrangements in question may be for the courts to stay out, but without announcing that they will never enter the fray.

Yet there may be occasions where judicial involvement is unavoidable. Of the many recent confrontations concerning the Trump administration, *Trump v. Mazars*<sup>183</sup> introduces the greatest difficulty. In *Mazars* and a related case with which it was joined,<sup>184</sup> the judiciary was called upon to resolve the scope of legislative investigative powers, presented not as negotiations between the executive and the legislature, but as a demand by the President for a judicial limitation on Congress's subpoena power. In each case, the House of Representatives sought documents related to President Trump, either as part of an investigation into his financial dealings or as part of investigations pre-dating the impeachment process. The difficulty, as framed by Judge David Tatel for the D.C. Circuit, is that standard claims for judicial deference to the political branches cancel each other out in this context: "this deferential presumption finds its roots in the principle that 'every reasonable indulgence of legality must be accorded to the actions of a coordinate branch of our Government,' . . . and here, we arguably confront not one but two 'coordinate branch[es] of our Government'—Congress and the President."<sup>185</sup>

History easily guided the Court in addressing whether the President enjoyed absolute immunity from a criminal investigation by the New York district attorney. In *Trump v. Vance*,<sup>186</sup> decided the same day as *Mazars*, the Court could look to more than two centuries of practice to find that presidents had always

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181. *Id.* at 42.

182. For a modern recasting of *Luther* and the 19th century political question doctrine as being a rule of evidentiary presumptions about legislative fact finding, rather than a jurisdiction rule about what courts might consider, see Tara Leigh Grove, *The Lost History of the Political Question Doctrine*, 90 N.Y.U. L. REV. 1908, 1915–29 (2015).

183. 940 F.3d 710 (D.C. Cir. 2019) (examining challenge by President Trump, in his personal capacity, to House subcommittee investigative subpoena of financial records of President and related business entities in custody of his accountants).

184. *Trump v. Deutsche Bank AG*, 943 F.3d 627 (2d Cir. 2019) (examining challenge by President Trump, in his individual capacity, to power of Congress to subpoena third-party records of his financial transactions).

185. *Mazars*, 940 F.3d at 725 (alteration in original) (quoting *Watkins v. United States*, 354 U.S. 178, 204 (1957)).

186. 140 S. Ct. 2412 (2020).

been subject to the subpoena powers of federal criminal proceedings.<sup>187</sup> That left only the question whether some special immunity attached when the grand jury inquiry came under the auspices of a state court rather than a federal court. Finding no historical basis for such an immunity, the Court could conclude that “a President does not possess absolute immunity from a state criminal subpoena,” as framed by Justice Kavanaugh.<sup>188</sup>

In *Mazars*, by contrast, history proved only that “Congress and the Executive have nonetheless managed for over two centuries to resolve such disputes among themselves without the benefit of guidance from us.”<sup>189</sup> But what if that norm were to break down, as indeed it had? Reluctantly, the Court had to fashion a middle ground that limited each branch’s more extreme claims, in effect inviting renewed negotiation. This cautious conclusion was that a “balanced approach is necessary, one that takes a ‘considerable impression’ from ‘the practice of the government’ . . . .”<sup>190</sup> The opinion concludes with a series of prudential considerations drawn from historical examples, but without the clear guideposts that history might provide elsewhere. Unfortunately, where history reveals general good faith in the discharge of governmental functions, the resulting gloss only weakly addresses the sudden repudiation of prior norms.

In dealing with direct confrontation between the branches, the task for courts in these situations can be exceptionally difficult. For one, their view and understanding of the relevant historical evidence may be highly incomplete. Interbranch conflict and compromise can be exceedingly complex and may be driven by factors that are largely invisible except to a narrow set of inside players. When examining many years later the institutional arrangements and practices that such interactions have generated, courts may have access to only fragmentary evidence; as expressed by Chief Justice Roberts, “one case every two centuries does not afford enough experience for an exhaustive list.”<sup>191</sup> So the task is difficult. Yet to allow that difficulty to justify simply ignoring the history would be to disengage courts from reality. No matter the difficulty of the task, courts wanting to remain tethered to the real world of governance must contend with the fact that the constitutional law of interbranch relations in areas like this is inevitably a function of the branches’ historical interactions over time. Whatever the imprecision in *Mazars* as to the exact historical markers, the bottom line cannot be mistaken: “When Congress seeks information ‘needed for intelligent legislative action,’ it ‘unquestionably’ remains ‘the duty of *all* citizens to cooperate.’”<sup>192</sup>

#### CONCLUSION

Following the 2008 financial meltdown, the Treasury Department undertook a “stress test” of the country’s banks to determine which were

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187. *Id.* at 2423.

188. *Id.* at 2431 (Kavanaugh, J., concurring).

189. *Trump v. Mazars*, 140 S. Ct. 2019, 2031 (2020).

190. *Id.* at 2035 (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 401 (1819)).

191. *Id.* at 2036.

192. *Id.* (quoting *Watkins v. United States*, 354 U.S. 178, 187 (1957)).

sufficiently sound to survive the deteriorated market environment. That regulatory prodding was designed to force the institutions into a painful process of repair to sustain their institutional mandate.

The current period of democratic malaise may be thought of as a political stress test in which informal arrangements that have served in other periods are being challenged to see if they may continue to serve. Whereas a great part of constitutional law, particularly the parts that capture the attention of the academy, has involved the further stretches of the citizenry's important rights against the state, the current period pushes in a different direction. What is at issue now is centrally a matter of state capability and the persistent erosion of institutional arrangements that have proved beneficial over time, even if imperfect. When under attack, it is sometimes necessary to dig trenches and shore up existing fortifications.

Put another way, although dismay with the current fashion of attacking established institutional arrangements motivates our undertaking here, we do not purport to have any straightforward solution to the problem of President Trump in particular or populism more generally. Instead, our concern is with what comes after. How can we best preserve the institutional arrangements and practices that have long sustained government until now, and to which we will need to recur whenever the political dysfunction of the moment is overcome?? While one predicts the future with hesitancy, this project turns on the belief that addressing the institutional questions correctly is one of the legacies that the past and present can bequeath to the future.