Constitutional Acquiescence

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When courts, scholars, and government decisionmakers debate constitutional separation of powers questions, they primarily analyze past branch practice to divine the answer. Yet, despite the long pedigree and widespread contemporary use of this method of constitutional interpretation, precisely how interpreters should look to past practice has remained surprisingly undertheorized. This Article analyzes, critiques, debunks, and ultimately resurrects the predominant method of looking to past practice in constitutional separation of powers law—the acquiescence approach.

Under the acquiescence approach, past practice is deemed to be indicative of constitutional meaning if one of the branches has acted consistently and the other has "acquiesced" in that action. However, as this Article establishes, this approach relies on an embedded—but unrecognized—assumption: that branch conduct is motivated primarily by constitutional analysis. Yet, as the Article explains, this assumption is simply not categorically true. Branch conduct might be motivated by any number of nonconstitutional reasons, including ignorance, apathy, policy agreement, politics, other legal authority, or coercion. In addition, acquiescence suffers from a deep normative flaw: its very structure will tend to privilege the more active and powerful branch. After fleshing out these descriptive and normative critiques, the Article shows how they undermine the traditional justifications for acquiescence. To determine if acquiescence is worth salvaging, it explores possible alternatives to acquiescence, ultimately concluding that that the best way forward is to keep acquiescence, but change it. The Article then proposes a novel method of finding acquiescence called the "articulation or deliberation approach" that is sensitive to the problems identified above. It then explains the new approach's unique benefits and costs, and applies it to two contemporary case studies.

In the process, the Article identifies a lack of rigor and consistency in how past practice has been used that has enabled interpreters to manipulate it. To combat such manipulation and promote more accurate assessments of past

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practice, the Article calls for more nuanced and systematic analysis of past practice under the new acquiescence approach.

Table of Contents

Introduction

History dominates separation of powers law. When courts, scholars, and government decisionmakers decide separation of powers questions regarding the political branches, they look primarily to past branch practice for the answer. For example, when President Obama authorized airstrikes without specific congressional approval against Libya in 2011 and the Islamic State of Iraq and the Levant ("ISIL") in 2014, those debating whether he had the constitutional authority to do so examined whether such strikes were consistent with analogous past branch practice. Had presidents authorized analogous military force

in the past without specific congressional authorization? Had Congress acquiesced in such use of force? What sort of nonjudicial constitutional precedent would this action set? These were the questions to be asked.[1] There was no case law to consult. Similarly, when then-Speaker of the House John Boehner invited Israeli Prime Minister Benjamin Netanyahu to address Congress without consulting the executive branch, scholars debated whether historical branch practice supported congressional constitutional authority to engage in such "legislative diplomacy."[2]

Past practice plays a prominent role in deciding separation of powers questions before the Supreme Court as well. For example, the Court determined the scope of the President's recess appointment authority in *NLRB v. Noel Canning*,[3] largely by asking whether the Executive had made certain recess appointments in the past, and

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1 *See, e.g.*, Auth. to Use Military Force in Libya, 35 Op. O.L.C. 1, 7–8 (2011) [hereinafter Libya Memo] (citing past executive use of force and congressional acquiescence in it as support for the President's authority); Bruce Ackerman & Oona Hathaway, *Obama's Illegal War*, FOREIGN POL'Y (June 1, 2011), http://foreignpolicy.com/2011/06/01/obamas-illegal-war-2/ ("Unlike with many other areas of law, the courts can't be counted on to translate abstract principles into concrete rules. So far as war-making is concerned, they have left it to the political branches to work the matter out . . . . Obama's action [in Libya] is unprecedented."); Bruce Ackerman, *Obama's Betrayal of the Constitution*, N.Y. TIMES, (Sept. 11, 2014), http://www.nytimes.com/2014/09/12/opinion/obamas-betrayal-of-the-constitution.html?_r=0 (arguing that "President Obama's declaration of war against . . . [ISIL] marks a decisive break in the American constitutional tradition" and that Obama's war powers constitutional precedents will be worse than those of President Bush); Jack Goldsmith & Matthew Waxman, *Obama, Not Bush, Is the Master of Unilateral War*, NEW REPUBLIC (Oct. 14, 2014), http://www.newrepublic.com/article/119827/obamas-war-powers-legacy-he-must-seek-congressional-authorization (arguing that "the war powers precedents Obama has established . . . will constitute a remarkable legacy of expanded presidential power to use military force"); Shalev Roisman, *Rejecting the Bush Comparison: A Response to Goldsmith & Waxman*, JUST SECURITY (Oct. 17, 2014, 12:38 PM) [hereinafter Roisman, *Bush*], http://justsecurity.org/16499/rejecting-bush-comparison-response-goldsmith-waxman/ (contesting argument that Obama's constitutional precedents are more expansive than Bush's and noting that debate "raises interesting issues of how historical precedent is used or should be used in determining separation of powers law"); Shalev Roisman, *A Response to Bruce Ackerman's NYT Op-Ed on the President's War Powers*, JUST SECURITY (Sep. 12, 2014, 3:35 PM) [hereinafter Roisman, *Ackerman*], http://justsecurity.org/14961/response-bruce-ackermans-nyt-op-ed-presidents-war-powers/.

2 *See, e.g.*, Ryan Scoville, *Boehner Invites Bibi: A Closer Look at Historical Practice*, JUST SECURITY (Jan. 27, 2015, 11:36 AM), http://justsecurity.org/19411/boehner-invites-bibi-closer-historical-practice/; Peter Spiro, *Is Boehner's Netanyahu Invite Unconstitutional?*, OPINIO JURIS (Jan. 22, 2015, 8:18 AM), http://opiniojuris.org/2015/01/22/boehners-netanyahu-invite-unconstitutional/ (noting that "th[is] episode will set a precedent for congressional bypass of executive branch foreign policy"); *see also* Ryan M. Scoville, *Legislative Diplomacy*, 112 MICH. L. REV. 331, 381 (2013) [hereinafter Scoville, *Legislative Diplomacy*] (concluding that Congress has some legislative diplomacy powers in part based on "longstanding legislative practice and executive acquiescence").

3 NLRB v. Noel Canning, 134 S. Ct. 2550 (2014).

whether Congress had "acquiesced" in them.[4] And the major separation of powers case before the Court this past term also raised significant questions regarding past branch practice and acquiescence. In *Zivotofsky ex rel. Zivotofsky v. Kerry*,[5] the Court held that a statute providing that Americans born in Jerusalem could list "Israel" as their place of birth on their passports was unconstitutional.[6] The Court held that the statute infringed on the Executive's "exclusive" power to recognize foreign nations, and relied partly on past practice and purported congressional acquiescence to justify its holding, concluding that "[t]he weight of historical evidence indicates Congress has accepted that the power to recognize foreign states and governments and their territorial bounds is exclusive to the Presidency."[7]

As these examples show, prominent debates regarding important separation of powers questions often revolve largely around interpreting historical branch practice. This resort to past practice makes sense. The constitutional text does not give much guidance on these questions, and courts largely tend to avoid answering them due to a variety of justiciability, standing, and deference doctrines.[8] With little else concrete to look to, interpreters have turned to analyzing historic branch practice as an aid in determining the content of separation of powers law.[9]

This method of looking to past practice to understand what the Constitution permits or prohibits is widespread and has been around since the Founding Era.[10] But, despite its long history and frequent

4 *Id.* at 2559–60; *see also infra* Section III.D.1.

5 Zivotofsky *ex rel.* Zivotofsky v. Kerry, 135 S. Ct. 2076 (2015).

6 *Id.* at 2094, 2096.

7 *Id.* at 2094; *see id.* at 2091 ("[I]t is appropriate to turn to accepted understandings and practice. In separation-of-powers cases this Court has often 'put significant weight upon historical practice.'" (quoting *Noel Canning*, 134 S. Ct. at 2559)); *cf. id.*, 135 S. Ct. at 2114 (Roberts, C.J., dissenting) ("The majority . . . falls short of demonstrating that 'Congress has accepted' the President's exclusive recognition power."). Whether the Executive has engaged in exclusive recognition authority in the past and whether Congress "acquiesced" in such authority were also major issues in the decision below and in the briefing before the Court. Zivotofsky *ex rel.* Zivotofsky v. Sec'y of State, 725 F.3d 197, 207 (D.C. Cir. 2013) ("Both parties make extensive arguments regarding the post-ratification recognition history of the United States. As the Supreme Court has explained, longstanding and consistent post-ratification practice is evidence of constitutional meaning."); *see also* Brief for the Respondent at 26–36, *Zivotofsky*, 135 S. Ct. 2076 (No. 13-628); Brief for the Petitioner at 34–57, *Zivotofsky*, 135 S. Ct. 2076 (No. 13-628).

8 *See, e.g.*, Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 417–18, 424–30 (2012) (noting that "the Constitution's textual references to executive power are so spare and . . . there are relatively few judicial precedents in the area").

9 *See id.*

10 *See, e.g.*, Stuart v. Laird, 5 U.S. (1 Cranch) 299, 309 (1803) ("practice and acquiescence

and widespread contemporary use, precisely how historic branch practice should be used to interpret constitutional law has remained surprisingly undertheorized.[11] This Article seeks to add to this literature by analyzing, critiquing, debunking, and ultimately resurrecting in new form the predominant method of looking to past practice in constitutional separation of powers law—the acquiescence approach.

Under the traditional approach to looking at past practice, past practice is deemed to be indicative of constitutional meaning if one branch has engaged in certain conduct consistently over time and the other has "acquiesced" in that conduct.[12] If there has been such "ac-

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under it for a period of several years . . . has indeed fixed the construction"); *see also* Bradley & Morrison, *supra* note 8, at 417–24 (discussing prevalence of use of historical practice in separation of powers interpretation by courts, scholars, and government interpreters); Curtis A. Bradley & Neil S. Siegel, *After Recess: Historical Practice, Textual Ambiguity, and Constitutional Adverse Possession*, 2014 SUP. CT. REV. 1, 20–24 (discussing relationship of looking to practice to variety of constitutional interpretive methodologies).

11 Bradley & Morrison, *supra* note 8, at 413 ("Surprisingly, . . . there has been little sustained academic attention to the proper role of historical practice in the context of separation of powers."); Michael J. Glennon, *The Use of Custom in Resolving Separation of Powers Disputes*, 64 B.U. L. REV. 109, 111 (1984) ("Despite the frequency and import of [separation of powers] cases, the Court has failed to articulate a consistent theoretical framework for determining the significance of custom in resolving such disputes."). Remarkably, in the last thirty years, there have been only two articles seeking to examine the use of historical practice in separation of powers law writ large. *See* Bradley & Morrison, *supra* note 8, at 413 n.5 ("The only general treatment of the subject was written more than twenty-five years ago." (citing Glennon, *supra*)). Since Bradley and Morrison's article regarding this general topic in 2012, they have written other articles relating to how historic branch practice is used in more specific areas. *See, e.g.*, Curtis A. Bradley, *Treaty Termination and Historical Gloss*, 92 TEX. L. REV. 773 (2014); Curtis A. Bradley & Trevor W. Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, 113 COLUM. L. REV. 1097 (2013) [hereinafter Bradley & Morrison, *Presidential Power*]; Bradley & Siegel, *supra* note 10; Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Constitutional Conventions, and the Judicial Separation of Powers*, 105 GEO. L.J. (forthcoming 2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2721346&download=yes. For forthcoming work on the use of historical practice in constitutional interpretation regarding judicial power and federal court law, see *id.*; Ernest A. Young, *Our Prescriptive Judicial Power: Constitutive and Entrenchment Effects of Historical Practice in Federal Courts Law* (Feb. 28, 2016) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2739305). For recent work on the use of history in constitutional adjudication more generally, see, e.g., Richard H. Fallon, Jr., *The Many and Varied Roles of History in Constitutional Adjudication*, 90 NOTRE DAME L. REV. 1753, 1755 (2015) (noting that "there has been so little specific attention to the varied roles of nonoriginalist history in constitutional adjudication"); Jack M. Balkin, *The New Originalism and the Uses of History*, 82 FORDHAM L. REV. 641 (2013).

12 *See, e.g.*, Scoville, *Legislative Diplomacy* ("A standard view holds that one branch's acquiescence to the official practice of the other informs constitutional meaning, either because it demonstrates an interbranch agreement about the practice's constitutionality or practical workability or because it is evidence that the acquiescing branch has waived its institutional prerogatives."); Bradley & Morrison, *supra* note 8, at 432; DAVID J. BEDERMAN, CUSTOM AS A SOURCE OF LAW 111 (2010); Jane E. Stromseth, *Understanding Constitutional War Powers Today: Why Methodology Matters*, 106 YALE L.J. 845, 880 (1996); Peter J. Spiro, *War Powers and the Sirens*

quiescence," we are to assume that the practice was constitutional, primarily because practice and acquiescence evince some sort of agreement between the branches on the constitutionality of the practice.[13] This Article examines this approach systematically and unearths a previously unacknowledged assumption that underlies it: the acquiescence approach assumes that branch conduct is motivated primarily by constitutional analysis. For example, the traditional approach primarily conceives of past practice as evincing agreement, "compromise," or "working arrangements" between the political branches regarding a constitutional issue.[14] But conceiving of past practice as evincing agreement or arrangement regarding a legal or functional consideration only makes sense if the branches first engage in analysis regarding that issue and act on it.

But, as this Article establishes, the assumption that branches act based on constitutional analysis is simply not categorically true. Branch conduct can be motivated by any number of nonconstitutional reasons.[15] Branches might be entirely ignorant of the relevant constitutional issue, apathetic to it, or aware of it, yet act based on policy, politics, or other legal authority. In some circumstances, they might even be coerced to act or accept a practice, believing that they have no other choice. In short, this embedded assumption is descriptively flawed. In addition, acquiescence suffers from a deep normative flaw.[16] Acquiescence's very structure—requiring an initiating branch to act and another branch to accept such action—will systematically serve to validate the power of the more active and powerful branch. This aggrandizement of the more powerful branch—the Executive in modern times—is inconsistent with virtually any normative theory of separation of powers law. Together, these descriptive and normative flaws undermine nearly all of the traditional dominant justifications for acquiescence—including that it serves to privilege legal or func-

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of Formalism, 68 N.Y.U. L. Rev. 1338, 1356 (1993) (reviewing John Hart Ely, War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath (1993)); Harold Hongju Koh, The National Security Constitution 70–71 (1990); Glennon, *supra* note 11, at 134; *see also* Dames & Moore v. Regan, 453 U.S. 654, 680–81 (1981); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring); United States v. Midwest Oil Co., 236 U.S. 459, 473 (1915) (citing *Stuart*, 5 U.S. (1 Cranch) at 309).

13 *See infra* Part I.A.

14 *See, e.g.*, NLRB v. Noel Canning, 134 S. Ct. 2550, 2560 (2014) (deferring to past practice in order to avoid "upset[ting] the compromises and working arrangements that the elected branches of Government themselves have reached"); *see also infra* Part I.A. (describing these prominent justifications for acquiescence).

15 *See infra* Part I.C.1.

16 *See infra* Part I.C.2.

tional constitutional agreement, interbranch bargains, or justifiable reliance.[17]

Given the deep flaws that undermine the justifications for the acquiescence approach, the Article asks whether the approach should be abandoned altogether. To answer that question, it considers alternatives to acquiescence in interpreting separation of powers law—including looking to historical practice *alone* or not at all. After laying out the alternatives, the Article provides a useful (and novel to the separation of powers field) way of conceiving these alternatives on a spectrum from inductive "apologist" to deductive "utopian" methods, and ultimately concludes that the best way forward is to keep acquiescence, but change it.[18]

The Article then proposes a novel method of looking at past branch conduct, termed the "articulation or deliberation approach," which is sensitive to the descriptive and normative flaws discussed above.[19] Under this new approach, past branch practice would only be indicative of acquiescence if there is evidence that the branches were at least aware of the constitutional issue at hand and, if so, that they were likely motivated by constitutional analysis, as opposed to apathy, politics, other legal authority, or coercion. The new approach explicitly rejects the tendency under the traditional acquiescence approach to declare "winners" or "losers" from the outcomes of discrete constitutional debates, focusing instead on the subsequent practice of the branches as more likely to be indicative of *branch* views of whether and how the constitutional question was settled. The Article then explains the new approach's unique benefits—which include encouraging public constitutional deliberation and accountability of the political branches and enabling branches to *avoid* creating constitutional precedents—and its costs.[20] It then shows how the new approach would work in practice by applying it to two recent case studies where constitutional questions were determined largely by looking to past practice: the scope of the President's recess appointments power and authority to terminate treaties without congressional approval.[21]

Throughout, the Article calls attention to a general, and surprising, lack of rigor in how historical branch practice is used in separation

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17 *See infra* Part I.D.

18 *See infra* Part II.

19 *See infra* Part III.A.

20 *See infra* Part III.B-C.

21 *See infra* Part III.D.

of powers interpretation. For example, interpreters often characterize past practice consistent with their legal conclusions as motivated by honest constitutional agreement, while characterizing inconsistent past practice as motivated by crude politics. While there is nothing per se wrong with describing some past practice as based on constitutional motives and others as not, this seemingly biased method has gone unappreciated, and interpreters have done far too little to justify this differential treatment. Beyond this method, interpreters too often seek to graft clarity onto history by providing clean narratives of past practice when the history does not support such a clear story. The Article identifies this general lack of rigor and calls for more nuanced and systematic analysis of past practice both to encourage more accurate assessment of such practice and to make its manipulation more difficult.

The Article also draws attention to a surprisingly fruitful lens of comparative analysis in the customary international law literature. Customary international law and constitutional separation of powers law bear some striking similarities. Both operate largely outside the bounds of robust judicial review, and, partially as a result, both seek to understand how law can be formed by looking to past practice. Both bodies of scholarship have also traditionally relied on an acquiescence theory to do so. But unlike the relatively undertheorized way historical *branch* practice has been treated in the separation of powers literature, the use of historical *state* practice to determine customary international law has spawned an enormous and sophisticated literature.[22] Throughout, the Article highlights how reference to this more highly theorized body of scholarship can help illuminate how we should think of the use of past practice in separation of powers law.[23]

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22 *See, e.g.*, BEDERMAN, *supra* note 12, at 135 ("Why, especially in comparison with discussions about the place of custom in domestic legal doctrines . . ., has customary international law (CIL) been overemphasized and overtheorized?").

23 Although an even more sustained discussion of how the customary international law literature can inform the separation of powers literature is beyond the scope of this Article, the Article seeks to show how fruitful that comparison can be. A few other scholars have recently remarked on the general similarity between the fields. *See, e.g.*, Michael D. Ramsey, *The Limits of Custom in Constitutional and International Law*, 50 SAN DIEGO L. REV. 867, 870–71, 875 (2013). However, there has been no sustained effort to incorporate lessons from the customary international law literature into the separation of powers literature for over thirty years. *See* Glennon, *supra* note 11, at 111. For background on the general similarities and a call for more intellectual arbitrage between constitutional law and international law, see Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1791 (2009). For a project taking lessons from international law and applying them to different aspects of constitutional law, see David E. Pozen, *Self-Help and the Separation of Powers*, 124 YALE L.J. 2 (2014). For a project taking lessons from the constitutional law literature

In short, historical practice plays an outsized role in separation of powers law. Courts, scholars, and government decisionmakers rely heavily on assessing past branch practice to answer questions of constitutional separation of powers law. Yet, as this Article shows, the predominant method by which they do so suffers from serious descriptive and normative flaws that must be taken into account. In addition, interpreters should be compelled to look to past practice in more rigorous and systematic ways than they currently do. The hope of this Article is to take into account these issues with the use of past practice and ameliorate them. While any method of looking to history to divine constitutional meaning will be subject to some amount of error, we can do better. And given the importance of these issues to contemporary debates and to the constitutional scheme in general, now is the time to do so.

The Article proceeds as follows: Part I sets out the predominant method of how historical practice is used to divine separation of powers law—acquiescence—explaining its deep descriptive and normative failings and how they undermine its traditional justifications. Part II suggests alternatives to acquiescence, puts them on a novel analytic spectrum, and concludes that the alternatives are less attractive than retaining, but changing, the acquiescence approach. Part III proposes a new approach to looking at past conduct that can help ameliorate the concerns raised by the descriptive and normative critiques raised above and applies it to two cases studies. A brief conclusion follows.

I. Acquiescence and Its Flaws

A. Traditional Theory and Its Justifications

The primary way that historical practice is used in constitutional interpretation of separation of powers issues is through the acquiescence approach. Under this approach, the fact that a branch has engaged in a certain practice over time is indicative of that practice's constitutionality only if the other branch is deemed to "acquiesce" in that practice.[24] There are thus two steps: first, the initiating actor must engage in a practice over some amount of time with some level of consistency, and, second, the acquiescing branch must accept the validity of that practice.[25] There is no settled way of determining whether either element is present, but traditionally interpreters simply

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and applying it to the international law literature, see Shalev Roisman, *Constraining States: Constitutional Lessons for International Courts*, 55 Va. J. Int'l L. 729 (2015).

24 *See supra* note 12 (collecting sources discussing dominant acquiescence approach).

25 *See, e.g.*, Bederman, *supra* note 12, at 110–11; Glennon, *supra* note 11, at 128–33.

ask whether one branch engaged in particular conduct consistently for a sufficiently long time and whether the other branch overtly accepted or failed to object to the practice.[26]

The acquiescence approach has been justified on several grounds. The dominant justification has been that it represents legal or functional agreement between the branches regarding the constitutionality of the practice. Many courts,[27] scholars,[28] and government interpreters[29] have suggested that acquiescence is an indication that one branch

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26 *See, e.g.*, BEDERMAN, *supra* note 12, at 110–11.

27 *See, e.g.*, Zivotofsky *ex rel.* Zivotofsky v. Kerry, 135 S. Ct. 2076, 2094 (2015) ("The weight of historical evidence indicates Congress has accepted that the power to recognize foreign states and governments and their territorial bounds is exclusive to the Presidency."); NLRB v. Noel Canning, 134 S. Ct. 2550, 2560, 2563, 2572 (2014); Dames & Moore v. Regan, 453 U.S. 654, 680–81, 686 (1981) ("Crucial to our decision today is the conclusion that Congress has implicitly approved the practice of claim settlement by executive agreement. . . . Congress did not question the fact of the settlement or the power of the President to have concluded it. . . . Finally, the legislative history of the IEEPA further reveals that Congress has accepted the authority of the Executive to enter into settlement agreements."); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 700 (1952) (Vinson, C.J., dissenting) ("[T]he fact that Congress and the courts have consistently recognized and given their support to such executive action indicates that such a power of seizure has been accepted throughout our history."); The Pocket Veto Case, 279 U.S. 655, 690 (1929); *Ex Parte* Grossman, 267 U.S. 87, 118–19 (1925) ("[L]ong practice . . . and acquiescence in it strongly sustains the construction it is based on.").

28 *See, e.g.*, KOH, *supra* note 12, at 70 (noting that "quasi-constitutional" customary rules, "generated by the historical interaction" of the political branches through acquiescence, "represent informal accommodations between two or more branches on the question of who decides with regard to particular foreign policy matters"); Bradley & Morrison, *supra* note 8, at 433–34; Bradley & Siegel, *supra* note 10, at 50 (noting justification for acquiescence as deference where "both political branches share a view . . . and have held that view for a long time"); Alan B. Morrison, *The Sounds of Silence: The Irrelevance of Congressional Inaction in Separation of Powers Litigation*, 81 GEO. WASH. L. REV. 1211, 1224 (2013) [hereinafter A. Morrison] ("[C]ongressional silence is relevant only if it leads to the inference that Congress agrees that the President had the legal authority to do what he did."); H. Jefferson Powell, *The President's Authority over Foreign Affairs: An Executive Branch Perspective*, 67 GEO. WASH. L. REV. 527, 531, 539 (1999) ("Agreement between the political branches on a course of conduct is important evidence that the conduct should be deemed constitutional."); Spiro, *supra* note 12, at 1356; Eric A. Posner & Adrian Vermeule, *Constitutional Showdowns*, 156 U. PA. L. REV. 991, 997 (2008) [hereinafter Posner & Vermeule, *Showdowns*].

29 *See, e.g.*, Libya Memo, *supra* note 1, at 7–8 ("Congress itself [in the War Powers Resolution] has implicitly recognized this presidential authority."); Memorandum from John C. Yoo, Deputy Assistant Attorney Gen. & Robert J. Delahunty, Special Counsel, Office of Legal Counsel, U.S. Dep't of Justice, to John Bellinger, III, Senior Assoc. Counsel to the President & Legal Adviser to the Nat'l Sec. Counsel Regarding Authority of the President to Suspend Certain Provisions of the ABM Treaty 9 (Nov. 15, 2001) [hereinafter OLC ABM Memo] ("The executive branch has long held the view that the President has the constitutional authority to terminate treaties unilaterally, and the legislative branch seems for the most part to have acquiesced in it."); Whether Uruguay Round Agreements Required Ratification as a Treaty, 18 Op. O.L.C. 232, 235 (1994) [hereinafter Uruguay Memo] (suggesting that historical branch practice reflects "the considered constitutional judgments of the political branches"); Presidential Power to Use

has come to an agreement with the other that the practice in question is, in its view, constitutional. Such agreement is traditionally thought to be most clear if there is explicit acceptance by one branch as to the constitutionality of the other's conduct,[30] but such situations are rare, and acquiescence is also found if there has been implicit acceptance of the practice,[31] or if one branch has simply failed to object to the other's conduct.[32] An alternative agreement-based justification is that acquiescence represents agreements regarding the functional utility (as opposed to legal validity) of a practice. On this view, the fact that one branch has engaged in a practice and the other has "acquiesced" in it suggests that the branches have come to some sort of practical understanding, apart from the practice's legal justifiability.[33]

Related to this justification is the claim that acquiescence should be privileged because it represents one part of some sort of implicit "interbranch bargain."[34] The idea here is that one branch's acquiescence to another's power might be in exchange for authority in another area, and disrupting such acquiescence would be interfering in only one side of the interbranch "bargain."[35] Acquiescence has also

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the Armed Forces Abroad Without Statutory Authorization, 4A Op. O.L.C. 185, 187 (1980) [hereinafter Presidential Powers Memo].

30 For example, Congress's implication in the War Powers Resolution ("WPR") that the President has "[t]he constitutional power[ ] . . . to introduce United States Armed Forces into hostilities . . . [if there is] a national emergency created by attack upon the United States," War Powers Resolution, 50 U.S.C. § 1541(c) (2012), has been used as an example of congressional acquiescence in the Executive's constitutional authority to use force abroad in response to such an attack without ex ante congressional authorization. *See* Bradley & Morrison, *supra* note 8, at 467. Relatedly, the Executive's suggestion in an Office of Legal Counsel ("OLC") opinion that the WPR's sixty-day limit on the use of armed forces without authorization was permissible "as a general constitutional matter," has been interpreted as acceptance of its constitutionality. *See* Presidential Powers Memo, *supra* note 29, at 196; Bradley & Morrison, *supra* note 8, at 467.

31 *See, e.g.*, *Dames & Moore*, 453 U.S. at 680–81, 686; Bradley & Morrison, *supra* note 8, at 434.

32 *See, e.g.*, *Youngstown*, 343 U.S. at 610–11 (Frankfurter, J., concurring); Bradley & Morrison, *supra* note 8, at 434; Glennon, *supra* note 11, at 147.

33 *E.g.*, NLRB v. Noel Canning, 134 S. Ct. 2550, 2560 (2014); Uruguay Memo, *supra* note 29, at 233 ("[A] significant guide to the interpretation of the Constitution's requirements is the practical construction placed on it by the executive and legislative branches acting together."). This justification is also thought to be supported by Burkean theory. *See* Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353, 401 (2006) [hereinafter Sunstein, *Burke*].

34 Bradley & Morrison, *supra* note 8, at 435–36; Bradley & Siegel, *supra* note 10, at 49, 60; *see* Aziz Z. Huq, *The Negotiated Structural Constitution*, 114 COLUM. L. REV. 1595, 1602, 1621–24 (2014); John O. McGinnis, *Constitutional Review by the Executive in Foreign Affairs and War Powers: A Consequence of Rational Choice in Separation of Powers*, 56 LAW & CONTEMP. PROBS. 293, 294 (1993); J. Gregory Sidak, *To Declare War*, 41 DUKE L.J. 27, 63, 65 (1991).

35 Bradley & Siegel, *supra* note 10, at 49. For example, Bradley and Morrison suggest that the Senate's use of "reservations" when approving treaties could be seen as part of an implicit

been justified as privileging justifiable reliance of the branches or third parties on past practices.[36] Finally, for courts, acquiescence has been justified as a testament to the limits of judicial review, out of a belief that leaving constitutional meaning to the branches is necessary because court intervention would be futile in any event.[37]

Although scholars have failed to appreciate this, almost all of these traditional justifications rely, at least implicitly, on the notion that when the branches act and acquiesce in conduct, they do so based on some sort of deliberate constitutional analysis. This is easiest to see with regard to what is the dominant justification for acquiescence: that it represents constitutional legal or functional agreement between the branches.[38] For acquiescence to signal such constitutional agreement, it must be that the initiating branch acts based on constitutional analysis and the acquiescing branch accepts that act based on such analysis as well.[39] But this assumption is also endemic to theories that would privilege acquiescence as based on interbranch bargaining. After all, in order for the branches to "bargain" over their constitutional entitlements, they must first *consider* and *act on* an analysis of which branch has which entitlement. If they are unaware of the constitutional issue, or acting for other reasons, there is no reason to think that they have made some sort of "interbranch bargain" or "compromise" regarding the constitutional authority in question.[40] Even some

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bargain in response to the Senate's exclusion from a robust "Advise and Consent" role prior to treaty signing that the Constitution arguably envisions. Bradley & Morrison, *supra* note 8, at 435–36.

36 *Id.* at 435; Bradley & Siegel, *supra* note 10, at 48; *see* United States v. Midwest Oil Co., 236 U.S. 459, 472–73 (1915).

37 *See* Bradley & Morrison, *supra* note 8, at 436–38; *Youngstown*, 343 U.S. at 654 (Jackson, J., concurring) ("[O]nly Congress itself can prevent power from slipping through its fingers."); *see also* Huq, *supra* note 34, at 1682–83.

38 *See supra* notes 27–33 and accompanying text; *see also, e.g.*, Bradley & Siegel, *supra* note 10, at 62 (noting justification for acquiescence of respecting coordinate branches as based on respect for where "both political branches share a view," which is strongest when the "branches understand the practice in constitutional terms"); A. Morrison, *supra* note 28, at 1224 (noting that "Congress's alleged acquiescence by silence . . . . is relevant only if it leads to the inference that Congress agrees that the President had the legal authority to do what he did."); McCulloch v. Maryland, 17 U.S. (1 Wheat.) 316, 401 (1819) (noting that great weight should be given to "[a]n exposition of the constitution, *deliberately established* by legislative acts") (emphasis added).

39 This applies both to legal and functional agreement. It is most obvious when it comes to legal agreement, but if the notion of acquiescence is that it signals an agreement between the branches that one should have authority over some conduct for functional reasons, such agreement also only makes sense if the branches have considered the (functional) reasons for keeping or giving up certain authority and then acted on those reasons.

40 *Cf.* Huq, *supra* note 34; Bradley & Siegel, *supra* note 10, at 47; NLRB v. Noel Canning,

justifications based on privileging reliance interests depend on an assumption that the branches act based on some constitutional analysis if reliance is based on a theory of *knowing*, as opposed to unintentional, waiver. Again, if the branches are entirely unaware that a constitutional issue is raised, knowing waiver cannot be found and reliance on another branch's perceived waiver would not be justified.[41] Of course, there are some variations of justifications that do not depend on this assumption—for example, if one were to privilege reliance interests based on a waiver theory that did not require intentional waiver,[42] or if one privileged past practice per se based on stability interests.[43] However, these arguments do not seem to be the primary reasons for supporting acquiescence, and they are also significantly undermined by the normative problem discussed below.[44]

I return to the prevalence of this assumption and its importance for the justifications of acquiescence in Part I.D. But, for now, the point is that the dominant justifications for crediting acquiescence rely implicitly on an assumption that when the initiating branch acts and the acquiescing branch accepts that action, both branches are aware of and motivated primarily by constitutional analysis. However, as shown below, neither of these conditions should simply be assumed.[45]

B. Recent Criticism of Acquiescence

Before delving into the descriptive and normative flaws of acquiescence, it is worth addressing an excellent recent Article regarding the acquiescence approach. Although, as noted above, the use of past practice in separation of powers law has received surprisingly little scholarly attention, an important and insightful Article by Curtis Bradley and Trevor Morrison in the *Harvard Law Review* seeks to

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134 S. Ct. 2550, 2560 (2014) ("[W]e must hesitate to upset the compromises and working arrangements that the elected branches of Government themselves have reached.").

41 *Cf.* Bradley & Morrison, *supra* note 8, at 435 (explaining that acquiescence can be viewed "as a kind of waiver of the affected branch's institutional prerogatives, which may in turn generate institutional reliance interests").

42 That being said, as explained below, reliance should only be privileged if it is *justified* for some reason, and that reason is likely to be undermined if the branches act unaware of, or unmotivated by, constitutional analysis. And, there is, in fact, good reason to think that reliance should not be the primary justification for looking to past practice. *See infra* Part I.D; *see also* Bradley & Siegel, *supra* note 10, at 59 ("In general, reliance does not appear to be an especially strong argument for crediting historical practice in the area of separation of powers.").

43 I discuss why I do not find this to be a particularly compelling justification for looking to past practice in Part II.A. In any event, it is not clear that this is a justification for *acquiescence*, so much as for looking to past practice, alone.

44 *See infra* Parts I.D, II.A.

45 *See infra* Part I.C.

reinvigorate focus on the use of historical practice in separation of powers law, in part through critiquing and modifying the acquiescence approach. Bradley and Morrison argue that acquiescence relies on a Madisonian assumption that each branch will be able, and adequately motivated, to protect its own prerogatives from infringement by the other branch.[46] However, as they point out, Madison's assumption that each branch's "ambition" would automatically counteract the other's "ambition"[47] has been thrown into serious doubt by recent political science and public law scholarship showing that branch officials—particularly in Congress—will not automatically be able or motivated to protect their branch's interests.[48]

Structurally, Congress will have a more difficult time acting than the Executive because of collective action problems and internal and external "veto-gates."[49] But, perhaps more fundamentally, it is not clear that members of Congress will have the motivation to protect branch prerogatives. While scholars debate the extent to which reelection is Congress members' primary motivation, there is general consensus that members of Congress cannot be counted on to systematically protect congressional interests.[50] Presidents, on the other hand, enjoy a greater share of benefits from the institutional power of the executive branch and thus are more incentivized to protect the Executive's power as a whole.[51] The result is another imbalance between the branches.[52] Aside from these nonreciprocal pathologies,

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46 Bradley & Morrison, *supra* note 8, at 438–39.

47 THE FEDERALIST NO. 51, at 318–19 (James Madison) (Clinton Rossiter ed., 2003).

48 Bradley & Morrison, *supra* note 8, at 438–47. For seminal accounts debunking this Madisonian assumption, see, e.g., Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915 (2005); Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311 (2006).

49 *E.g.*, Bradley & Morrison, *supra* note 8, at 438–47. Internal "veto-gates" include the Committee structure and filibusters, and external "veto-gates" include the President's veto power. And because each member benefits from the protection of Congress's prerogatives without needing to contribute to such protection, there is underinvestment and free-riding. *See, e.g.*, *id.* at 440; Terry M. Moe & William G. Howell, *The Presidential Power of Unilateral Action*, 15 J.L. ECON. & ORG. 132, 140, 144 (1999).

50 *See, e.g.*, Levinson, *supra* note 48, at 920; MORRIS P. FIORINA, CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT 39 (1977) ("[T]he primary goal of the typical congressman is reelection."). *But see* Elizabeth Garrett & Adrian Vermeule, *Institutional Design of a Thayerian Congress*, 50 DUKE L.J. 1277, 1287–88 (2001) (questioning that reelection is primary motive); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 48–49 (1985) [hereinafter Sunstein, *Interest Groups*] (noting continuum of interpretations of legislative behavior, but concluding that "[i]t is clear that constituent pressures play a significant role in many legislative decisions").

51 Levinson, *supra* note 48, at 956.

52 *See* Moe & Howell, *supra* note 49, at 145.

the political party system further undermines the Madisonian model as members of Congress tend to act in accordance with the preferences of their party—not necessarily of their branch.[53]

Bradley and Morrison conclude that because of the Madisonian assumption's flaws, acquiescence should be modified.[54] On the legislative side, they suggest that the standard for finding acquiescence should be higher and that silence should not necessarily be deemed indicative of acquiescence because it could be motivated by partisanship or the result of collective action problems.[55] But they find that easy cases of acquiescence will remain if Congress *does act*, for example, by passing a statute explicitly or implicitly approving of executive branch practice.[56] At the opposite end of the spectrum are cases where Congress has passed legislation explicitly or implicitly disapproving of an executive branch practice.[57] And in between these polar cases, they suggest that interpreters should look to congressional "soft law" for signals of congressional *non*acquiescence, as opposed to reading acquiescence easily from a lack of formal congressional objection.[58] If, however, presidents have undertaken a practice for decades without "any formal legislative response" or public disapproval by congressional party leadership, then they conclude that acquiescence can justifiably be found.[59] Bradley and Morrison conclude acquiescence can be found more easily for the Executive—including through silence—because the Executive faces fewer collective action problems in acting and has offices, like the Office of Legal Counsel ("OLC"), invested in actively protecting branch prerogatives.[60] At bottom, then,

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53 *See* Levinson & Pildes, *supra* note 48, at 2312–15, 2338–42, 2347–53; Bradley & Morrison, *supra* note 8, at 443.

54 Bradley & Morrison, *supra* note 8, at 438 ("If the political branches do not consistently guard their institutional prerogatives, it is not clear that the nonobjection of one branch to the practices of the other should be taken to reflect any agreement about the constitutionality of those practices. Nor is it clear that acquiescence should be treated as a valid waiver of institutional prerogatives, since there would be no assurance that the acquiescence reflects a mutually acceptable institutional bargain or achieves a desirable balance of power."); *see also id.* at 443, 448.

55 *Id.* at 448.

56 *Id.* at 449 ("At one end of the spectrum are relatively straightforward cases where Congress, in legislation, specifically refers to and approves of a particular executive practice. . . . Similarly, there may be cases where a legislative enactment clearly implies congressional approval of an executive practice.").

57 *Id.*

58 *Id.* at 450–51; *see also* Jacob E. Gersen & Eric A. Posner, *Soft Law: Lessons from Congressional Practice*, 61 STAN. L. REV. 573, 579–86 (2008) (describing different types of congressional "soft law").

59 Bradley & Morrison, *supra* note 8, at 451.

60 *Id.* at 452–54.

while Bradley and Morrison critique the use of congressional nonobjection as evidence of acquiescence, they conclude that affirmative congressional conduct accepting executive practice, and executive overt acceptance and nonobjection to congressional practice, are valid signals of acquiescence.

While Bradley and Morrison's proposed modifications are insightfully attuned to the collective action problems hindering congressional action, they do not adequately respond to the motivational problems that they identify. Bradley and Morrison suggest that "[i]f the political branches do not consistently guard their institutional prerogatives, it is not clear that the nonobjection of one branch to the practices of the other should be taken to reflect any agreement about the constitutionality of the practices."[61] But it is not clear why this problem would apply only to *nonobjection*, as opposed to overt action. If the concern is that we cannot know that the branches' nonobjection is driven by the sort of constitutional analysis we wish to validate, then that concern is no less present when Congress *acts* as opposed to when it *fails to object*.[62] Either way, we cannot know what drives the branches to act (or not act). Thus, Bradley and Morrison's conclusion that congressional inaction *should not* signal acquiescence but that congressional action *should* seems flawed. In fact, this proposed solution seems to rely on the same embedded assumption discussed above—that when the branches *do act* they do so based on constitutional analysis and, therefore, we can accept that act as evidence of interbranch agreement, bargaining, or intentional waiver.[63] It is to debunking that assumption that I turn in the next Section.

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61 *Id.* at 438.

62 David Moore has recently made a similar point about Bradley and Morrison's approach treating congressional action and inaction inconsistently. *See* David H. Moore, *Taking Cues from Congress: Judicial Review, Congressional Authorization, and the Expansion of Presidential Power*, 90 NOTRE DAME L. REV. 1019, 1026–27 (2015).

63 I do not mean to suggest that Bradley and Morrison believe that branch conduct is always driven by constitutional analysis; they have made clear that they do not believe this is the case. *See* Bradley & Morrison, *Presidential Power*, *supra* note 11, at 1100–01, 1149. Nonetheless, their proposed modification to acquiescence still seems to rely on the embedded assumption that when branches do act, they do so for constitutional reasons that we may wish to credit. In fact, while Bradley and Morrison do not explicitly adopt any single justification for their version of acquiescence, at times they seem to rely on acquiescence as evidence of interbranch agreement or bargaining for support. *See, e.g.*, Bradley & Morrison, *supra* note 8, at 451 (justifying the fact that their proposal "will substantially shrink the universe of cases" where Congress is said to have acquiesced as "all to the good" solely on agreement rationale); *id.* at 473–75 (relying on agreement rationale); *id.* at 448–49. These justifications, as explained above, presume that branch conduct is motivated by constitutional analysis.

Before doing so, it is worth noting that the assumption I identify above is different than the Madisonian assumption that Bradley and Morrison argue underlies acquiescence. The Madisonian assumption relies on branch actors being motivated by "empire-building" such that they will systematically try to expand their own power at the expense of their competitor branch.[64] This assumes that the branches will be aware of constitutional issues and act on them, not based on any sort of honest constitutional interpretation, but based on avarice.[65] The assumption that I argue underlies acquiescence is more general. It also requires that the branches are aware of—and act based on—constitutional analysis, but it does not require that the constitutional analysis be motivated by empire-building, specifically. In other words, the assumed constitutional analysis might be driven by honest or dishonest (e.g., power-maximizing) motives. The broader assumption underlying acquiescence is simply that branches know and act on constitutional analysis. This assumption is prevalent but flawed, and I turn now to explaining why that is so.

C. Deeper Problems with Acquiescence

1. The Descriptive Problem with Acquiescence

Traditional and recent theories of acquiescence are premised on an assumption: when a branch acts in the separation of powers realm, it acts primarily based on constitutional analysis. If this assumption is correct, then the acquiescence approach makes some sense: the initiating branch's conduct is taken following a deliberate constitutional analysis finding that the conduct is constitutionally authorized, and the acquiescing branch's decision to act or not act is primarily motivated by a similar deliberate constitutional analysis. If this is true, the fact that the conduct occurred and was accepted by the acquiescing branch suggests that they agreed on the constitutional authority in question.

However, a branch might act (let alone, not act) for many reasons not primarily motivated by constitutional analysis. First, it might act (or not act) without any awareness that there is a constitutional issue at hand. Second, it might act (or not act) based primarily on policy grounds—i.e., it may accept the other branch's conduct not because it believes it is constitutional, but because it agrees with the outcome it seeks to further. Relatedly, it might act (or not act) because it be-

64 *See* Levinson, *supra* note 48, at 917–19.

65 *Id.* at 919.

lieves that certain conduct is legal, but based on nonconstitutional legal authority such as statutory or international law. Third, a branch might act (or not act) because it feels it has no other choice.[66]

Before fleshing out these alternative explanations for branch conduct, it is worth clarifying the claim I am making. The claim is emphatically *not* that constitutional law *never* constrains or motivates government officials.[67] Surely, law constrains and motivates government actors sometimes.[68] The point is that we should not simply as-

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66 A branch might also act (or not act) based primarily on partisan motives, or it might fail to act because of collective action problems or veto-gates preventing action. I do not focus on these potential motives, because Bradley and Morrison have already comprehensively pointed them out. *See supra* Part I.B.

In a valuable recent Article, David Moore has laid out some other reasons why Congress might act in a way that does not reflect its institutional interests in checking the Executive. *See* Moore, *supra* note 62, at 1030–40. Moore's claim that "congressional authorizations may reflect a failure of checks and balances," *id.* at 1042, relates to the descriptive problem I identify in this Section, but the claims I make in this Article are distinct in several respects. First, Moore's claim applies only to Congress, and only when it *acquiesces* in executive conduct through explicit authorization. The point I make is significantly broader. I argue that, whether they are initiating conduct or acquiescing in it, both branches—the Executive and Congress—might act (or fail to act) without being aware of or otherwise motivated by the constitutional issue. Second, Moore—consistent with the traditional acquiescence approach—seems to assume that when branches act, they are at least aware of the constitutional authority question at issue, and act based on a thoughtful analysis of who should have authority over that general area of conduct. Indeed, several of Moore's suggestions for why Congress might give the Executive authority in contravention of "checks and balances" indicate that Congress is motivated by a very thought-through analysis of good governance, either to take advantage of the Executive's supposed functional advantages in foreign affairs or as a way of overcoming predictable congressional collective action problems that might impede good governance. *See id.* at 1035–38. Yet, when Congress authorizes the President to engage in particular conduct, it should not be assumed that it does so based on such a thoughtful (public-spirited) functional analysis of which branch should possess broad constitutional authority over a general category of conduct. In fact, as I show below, both branches might act entirely ignorant of the constitutional question at hand. Third, Moore focuses his argument on foreign affairs, *e.g.*, *id.* at 1030, whereas the critiques I make below are trans-substantive. Finally, Moore seems to focus exclusively on how *courts* should look at past practice, suggesting that they abstain from deciding the relevant separation of powers questions. *See id.* at 1045–52. I focus more broadly on how *any interpreter*—scholars, government actors, or courts—should look at past practice. Abstention is not always available to interpreters of separation of powers questions—particularly in the government—and may be an unsatisfying solution for many scholars. Therefore, I propose a solution that could potentially be used by all interpreters to better and more carefully examine past practice to determine how it should be (or should not be) relevant to constitutional interpretation. *See infra* Part III.

67 Posner and Vermeule seem to take the view that law never constrains the Executive, *see generally* ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND (2010), and several scholars have cogently opposed it, *see, e.g.*, Richard H. Pildes, *Law and the President*, 125 HARV. L. REV. 1381, 1424 (2012) (reviewing POSNER & VERMEULE, *supra*); Julian Davis Mortenson, *Law Matters, Even to the Executive*, 112 MICH. L. REV. 1015, 1016–17 (2014) [hereinafter Mortenson, *Law Matters*] (reviewing POSNER & VERMEULE, *supra*).

68 *See, e.g.*, JACK L. GOLDSMITH, THE TERROR PRESIDENCY 182 (2007); Mortenson, *supra*

sume that because a branch undertakes certain conduct—or fails to undertake certain conduct—that such action (or inaction) was motivated primarily by constitutional analysis. Sometimes it will be, but sometimes it will not be. Similarly, in making the normative critique I discuss below, I am not making a claim that Congress *never* constrains the Executive. Surely, it does sometimes.[69] The point is that we cannot count on Congress to systematically do so, nor should we assume it does so based on constitutional analysis.

a. Ignorance

Branch action or inaction might be undertaken without any awareness that it raises a constitutional issue.[70] This is particularly true of Congress, but has also been true of the executive branch, particularly in the pre-modern, pre-OLC era.

Several scholars and courts have noted that Congress will not always be aware of or act based on constitutional analysis.[71] In fact, scholars have suggested that Congress will systematically underinvest in constitutional interpretation.[72] And, in the analogous context of interpreting congressional inaction regarding *statutory* interpretation, the Supreme Court has typically sought affirmative proof that Congress was aware of a particular statutory interpretation before

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note 67, at 1027, 1036–38 ("We need not reach far for examples of executive branch actors who have defended their view of the law at significant professional risk."); Trevor W. Morrison, *Constitutional Alarmism*, 124 HARV. L. REV. 1688, 1718 (2011) (reviewing BRUCE ACKERMAN, THE DECLINE AND FALL OF THE AMERICAN REPUBLIC (2010)); David Johnston, *Bush Intervened in Dispute over N.S.A. Eavesdropping*, N.Y. TIMES, May 16, 2007, at A1 (noting then-Deputy Attorney General James Comey's testimony that he "literally ran up the stairs" to intercept White House officials visiting then-Attorney General John Ashcroft's hospital sickbed after Comey refused to approve a surveillance program).

69 *See, e.g.*, David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941, 949 (2008); Mortenson, *Law Matters*, *supra* note 67, at 1024.

70 Note that this is a different inquiry than whether or not the acquiescent branch is aware of the *practice* of the other branch. *Cf.* Glennon, *supra* note 11, at 134 (requiring that branch be on notice of *practice*); Spiro, *supra* note 12, at 1356 (same).

71 *See, e.g.*, NLRB v. Noel Canning, 134 S. Ct. 2550, 2611 (2014) (Scalia, J., concurring) (noting that Congress may not have considered constitutionality of pre-recess vacancy appointments); A. Morrison, *supra* note 28, at 1225 ("[E]ven if Members are aware of a presidential action, they may not be aware of the means by which it was carried out, let alone have considered the relevant statutes and the doctrines involving inherent presidential power and determined whether they applied or not."); Moe & Howell, *supra* note 49, at 165; Huq, *supra* note 34, at 1673–74.

72 Garrett and Vermeule argue that because constitutional deliberation is a public good, individual legislators will not internalize all the benefits of such deliberation, and therefore such constitutional inquiry will be underproduced. *See* Garrett & Vermeule, *supra* note 50, at 1298, 1300–01.

presuming that Congress "acquiesced" in it—evincing an acknowledgment that Congress is not always aware of the legal issues implicated by its conduct.[73] The point is that there is strong reason to think that Congress sometimes responds to executive conduct without considering the constitutional implications. To take just one example, the dissenting judge in the D.C. Circuit's decision in *Goldwater v. Carter*[74]—a case addressing the President's authority to terminate a mutual defense treaty with Taiwan without congressional approval—called the Executive's reliance on past precedents of unilateral executive termination "almost farcical," emphasizing that these precedents "were of such minor impact, or so non-controversial and widely approved that no person would have suspected that such instances would later be claimed as precedents to support an *absolute* Presidential unilateral power to terminate major defense treaties."[75] Judge MacKinnon's point, in part, was that Congress may well not have thought that permitting such unilateral treaty termination raised any sort of constitutional question at all.[76]

The Executive can also be ignorant of the constitutional implications of branch conduct. For example, although the Supreme Court and D.C. Circuit recently relied on President Washington's recognition of France without congressional authorization as evidence of the Executive's exclusive power to recognize foreign countries,[77] Jean Galbraith explains that the constitutional issue of whether the Executive had "exclusive power" vis-à-vis Congress to recognize foreign governments was "barely considered" at the time of Washington's recognition.[78] The focus at the time was instead on complying with the law of nations.[79] Relatedly, although the Washington Administration's failure to internally debate whether congressional authorization was necessary to terminate a treaty could be interpreted as evincing a belief that the Executive had unilateral authority to terminate the

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73 *See* William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 71 (1988) ("[T]he Court will usually justify reliance on legislative inaction by pointing to Congress' awareness of the interpretative issue, and some deliberation about it. In contrast, when the Court refuses to credit significance to legislative inaction, it will usually point to Congress' inattention to the issue.").

74 Goldwater v. Carter, 617 F.2d 697 (D.C. Cir.), *vacated*, 444 U.S. 996 (1979).

75 *Id.* at 733–34 (MacKinnon, J., dissenting in part, concurring in part).

76 *See id.*

77 Zivotofsky *ex rel.* Zivotofsky v. Kerry, 135 S. Ct. 2076, 2085 (2015); Zivotofsky *ex rel.* Zivotofsky v. Sec'y of State, 725 F.3d 197, 207–08 (D.C. Cir. 2013).

78 Jean Galbraith, *International Law and the Domestic Separation of Powers*, 99 VA. L. REV. 987, 1012, 1044 (2013).

79 *Id.* at 1044.

treaty, the lack of discussion of the issue can alternatively be explained by the fact that they simply did not consider the issue.[80] Similarly, although proponents of inherent executive authority to settle U.S. citizens' claims against foreign countries have cited the Washington Administration's use of a sole executive agreement to settle American claims against the Dutch government regarding the *Wilmington Packet*, Galbraith points out that there is no evidence that the executive branch officials involved considered whether they had the constitutional power to make the agreement at all.[81]

In his concurrence in *Noel Canning*, Justice Scalia similarly dismissed evidence that James Madison made recess appointments to positions that were vacant prior to the recess as unconvincing evidence of such appointments' constitutionality because "there is no indication that any thought was given to their constitutionality, either within or outside the Executive Branch."[82] He similarly dismissed Andrew Johnson's appointment of officials during an intrasession, as opposed to intersession, recess as irrelevant to the question of such recess appointments' constitutionality because there was no evidence that Johnson's Attorney General, or anyone else at the time, considered whether such appointments were constitutional.[83]

In short, it simply cannot be assumed that just because one branch engages in conduct and the other branch accepts it that either branch has done so based on a deliberate legal (or functional) analysis that such conduct is constitutional. To the contrary, there are examples where it seems quite likely that both the Executive and Congress engaged in or accepted conduct without being aware that it raised a constitutional question at all.

b. Policy Agreement, Politics, and Nonconstitutional Authority

Just as apathy or ignorance might drive Congress or the Executive to act or accept conduct, so too might more basic political calculations, policy agreement, or nonconstitutional legal reasons. Several scholars have noted that past practice might be motivated by nonconstitutional reasons, such as policy agreement or politics.[84] For exam-

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80 *See* Bradley, *supra* note 11, at 797–98 ("Their silence might suggest that they assumed that the President had this authority . . . but this is reading a lot into mere silence."); *cf.* OLC ABM Memo, *supra* note 29, at 16.

81 Galbraith, *supra* note 78, at 1028–29.

82 NLRB v. Noel Canning, 134 S. Ct. 2550, 2611 (2014) (Scalia, J., concurring).

83 *Id.* at 2601.

84 *See* KOH, *supra* note 12, at 133 ("[I]ndividual members face voting dilemmas when the president violates congressionally imposed procedural constraints in pursuit of substantive poli-

ple, when President Reagan sent troops to Grenada and bombed Libya without complying with the War Powers Resolution, those who supported his policy aims did not object to his actions, but such nonobjection can be explained by policy agreement with the President's decision, as opposed to agreement with its constitutionality.[85] Political science scholars have often suggested that Congress's reaction to presidential action will be motivated by constituent concerns, not constitutional analysis.[86] And, in the foreign affairs area, it is widely agreed that Congress has ceded authority to the Executive "without a fight."[87] This has been explained as motivated by the calculation that avoiding taking positions in the foreign affairs area is safer politically, not by a belief that the Executive had such authority.[88] Executive conduct has also been explained as based on political motivations, not constitutional analysis. For example, Sidak suggests that the Executive accepted an explicit legislative veto in the 1989 Bipartisan Accord on Central America not because it agreed about the constitutionality of the veto, but because it needed to agree to it to get its preferred policy enacted.[89] There is, in fact, a wide range of scholarship on the difficulty of determining whether conduct is taken for constitutional, as opposed to political, reasons.[90] But somehow, for the acquiescence inquiry, the assumption seems to be that all conduct, if undertaken, is presumptively undertaken primarily for constitutional reasons.[91] It is not clear why.

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cies that they favor."); A. Morrison, *supra* note 28, at 1224–25 ("[I]f Congress as a whole agrees with the substance of the President's decision, it would be a rare Member indeed who would protest solely over the means to achieve a desired end."); Posner & Vermeule, *Showdowns*, *supra* note 28, at 1004–05.

85 *See* Stromseth, *supra* note 12, at 881 n.187; *cf.* McGinnis, *supra* note 34, at 309–10 (suggesting that Congress's nonobjection to President George H.W. Bush's refusal to enforce a legislative provision was the result of the "political[ ] implausi[bility]" of impeachment "because of both the relative unimportance of the issue in the public's perception and the general level of support the President enjoyed among the public and Congress at the time").

86 *See, e.g.*, Moe & Howell, *supra* note 49, at 144; Levinson, *supra* note 48, at 953.

87 ELY, *supra* note 12; Levinson, *supra* note 48, at 955; *see* KOH, *supra* note 12, at 117–33.

88 KOH, *supra* note 12, at 132–33; Levinson, *supra* note 48, at 955; Moore, *supra* note 62, at 1031–33; *see* ELY, *supra* note 12, at 175 n.34.

89 *See* Sidak, *supra* note 34, at 65, 69; *cf.* Zivotofsky *ex rel.* Zivotofsky v. Kerry, 135 S. Ct. 2076, 2107 (2015) (Thomas, J., concurring in the judgment, dissenting in part) ("[T]he argument from Presidential acquiescence here is particularly weak, given that the Taiwan statute is consistent with the President's longstanding policy on Taiwan.").

90 *See* Bradley & Morrison, *Presidential Power*, *supra* note 11, at 1114–24; Pildes, *supra* note 67, at 1423–24; *see also* Mortenson, *Law Matters*, *supra* note 67, at 1016.

91 *See, e.g.*, Bradley & Morrison, *supra* note 8, at 449 (arguing that explicit or implicit congressional approval of executive conduct is enough to find acquiescence).

In fact, interpreters of past practice have acknowledged that such nonconstitutional motives might drive branch conduct, but have done so in sporadic and often self-serving ways, and without incorporating this insight into the doctrine. A frequent method of distinguishing unhelpful historical precedent has been to suggest that it was driven by politics, not constitutional reasoning. For example, the majority in *Noel Canning* treated the 1863 Pay Act, which forbade payment to certain recess appointees following a report by the Senate Judiciary Committee that such appointments were unconstitutional, as "equivocal" evidence of the Senate's view that such appointments were unconstitutional.[92] But, when discussing an amendment to that Act in 1940 permitting payment to some of these appointees, the majority indicated that the Act was evidence of the Senate's approval of the President's constitutional authority to make these appointments.[93] Justice Scalia took a similar tack—but in the opposite direction. He claimed that the 1863 Act "embodied the Senate's rejection of the [Executive's interpretation permitting such appointments]," but that the 1940 Act did not reflect senatorial constitutional approval, but "at most a desire not to punish public servants caught in the crossfire of interbranch conflict."[94] In short, when the precedent helped their argument, the Justices treated it as motivated by constitutional analysis, and when it hurt it, they treated it as motivated, instead, by politics.[95]

The Court is not the only body to try this tack of dismissing unhelpful precedent as based on politics while embracing helpful precedent as based on constitutional analysis. Other courts have done it,[96]

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92 NLRB v. Noel Canning, 134 S. Ct. 2550, 2572–73 (2014).

93 *Id.* at 2573 ("By paying salaries to this kind of recess appointee, the 1940 Senate (and later Senates) in effect supported the President's interpretation of the Clause.").

94 *Id.* at 2613–15 (Scalia, J., concurring in the judgment) (citation omitted).

95 *See also, e.g.*, Zivotofsky *ex rel.* Zivotofsky v. Kerry, 135 S. Ct. 2076, 2091 (2015) ("On occasion, the President has chosen, as may often be prudent, to consult and coordinate with Congress" but concluding such examples "establish[ ] no more than that some Presidents have chosen to cooperate with Congress, not that Congress itself has exercised the recognition power"); Myers v. United States, 272 U.S. 52, 148–54, 164–65 (1926) (emphasizing the "decision of 1789" to remove explicit statutory removal authority as based on constitutional analysis that the President had exclusive constitutional removal authority, but explaining the 1867 Tenure of Office Act limiting the President's removal power as motivated by crude Reconstruction-era politics).

96 For example, the D.C. Circuit in *Zivotofsky* sought to emphasize examples where Congress failed to insert itself into recognition of foreign countries as evidence of constitutional agreement that the Executive had exclusive authority, but dismissed examples of presidential inclusion of a congressional role in recognition as based on mere political expediency. *See, e.g.*, Zivotofsky *ex rel.* Zivotofsky v. Sec'y of State, 725 F.3d 197, 210 (D.C. Cir. 2013) ("Jackson merely enlisted the support of the Congress as a matter of political prudence.").

as have scholars and government actors.[97] In academic writing, John Yoo has frequently sought to cabin executive practice acceding to Congress as based on political choice, while giving analogous congressional practice acceding to the President constitutional significance.[98] For example, Yoo states that President Eisenhower's decision to seek the cooperation of Congress before engaging military in the Suez Canal Crisis was motivated "more for political than constitutional reasons," an interpretation that Julian Mortenson explains "directly contradicts Eisenhower's internal statement to his own National Security Committee."[99] Yoo, however, is not alone, as other scholars have sought to cast precedents inconsistent with their views as motivated by nonconstitutional reasons and precedents consistent with their views as motivated by constitutional ones.[100] Yet, while interpreters have acknowledged sporadically that some branch practice is motivated by nonconstitutional reasons, the acquiescence approach still presumes that when conduct is undertaken, it is undertaken for constitutional reasons.

Apart from being motivated by political or policy motivations, conduct by either branch might also be explained by other legal, but nonconstitutional, concerns. For example, Jean Galbraith provides a very rich account of how international law can provide alternative explanations for why past practices occurred in the war powers, recognition, and treaty-making domains.[101] Branch conduct might also be explained as based on statutory, not constitutional, authority.[102] A recent example of this is the President's justification of strikes against ISIL as based on statutory authority instead of inherent Article II authority.[103] The President has grounded his authority, arguably very

97 *Cf.* OLC ABM Memo, *supra* note 29, at 14 ("Although Presidents have prompted congressional or Senate action in treaty termination, they have at least sometimes done so for political or diplomatic reasons. These examples represent the workings of practical politics, rather than acquiescence in a constitutional régime.").

98 *See, e.g.*, Julian Davis Mortenson, *Executive Power and the Discipline of History*, 78 U. CHI. L. REV. 377, 381 n.17, 427–28 (2011) (book review).

99 *Id.* at 428. Eisenhower told the National Security Committee that any "offensive attack on China would require congressional authorization 'since it would be a war'" and apparently later made clear his view that "'[w]hatever we do must be done in a Constitutional manner,' which required 'Congressional authorization' for any attack on China." *Id.* (citations omitted).

100 *Cf., e.g.*, Bradley, *supra* note 11, at 798–99 (characterizing President McKinley's unilateral termination of a treaty as potentially based on statutory conflicts).

101 *See, e.g.*, Galbraith, *supra* note 78, at 1044–45.

102 *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 648–49 & nn.16–17 (1952) (Jackson, J., concurring) (explaining prior presidential conduct as based on statutory—not constitutional—authority); *see also* Bradley, *supra* note 11, at 798–99.

103 The Administration has argued that these strikes were authorized by the 2001 and 2002

deliberately, in statutes, not the Constitution,[104] but, because acquiescence focuses on looking to historic branch *practice*—without asking whether or how it was legally justified—acquiescence theory would seem to credit this as a constitutional precedent. And prominent academics have suggested that this will serve as a constitutional precedent that the President can undertake such strikes without congressional involvement.[105] Moreover, under traditional acquiescence theory and even Bradley and Morrison's recent improvements to it, congressional statutory approval of these strikes—which is being

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Authorizations for Use of Military Force against Al Qaeda and Iraq, respectively. *See, e.g.*, Ryan Goodman & Shalev Roisman, *Assessing the Claim that ISIL is a Successor to Al Qaeda—Part 1 (Organizational Structure)*, JUST SECURITY (Oct. 1, 2014, 9:04 AM), https://www.justsecurity.org/15801/assessing-isil-successor-al-qaeda-2001-aumf-part-1-organizational-structure/; Ryan Goodman & Shalev Roisman, *Assessing the Claim that ISIL is a Successor to Al Qaeda—Part 2 (Organization Goals)*, JUST SECURITY (Oct. 6, 2014, 9:01 AM), https://www.justsecurity.org/16003/assessing-claim-isil-successor-al-qaeda-part-2-organizational-goals/; Ryan Goodman, *White House Relies on 2002 Iraq Authorization—But What's the Theory?*, JUST SECURITY (Sept. 13, 2014, 8:36 AM), https://www.justsecurity.org/14980/white-house-relies-2002-iraq-authorization-but-whats-theory/; Jack Goldsmith, *Obama's Breathtaking Expansion of a President's Power to Make War*, TIME (Sept. 11, 2014), http://time.com/3326689/obama-isis-war-powers-bush/.

Another example of this might be the President's recent immigration decision, which was justified primarily on statutory, not constitutional, grounds. *See, e.g.*, The Department of Homeland Security's Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others, 38 Op. O.L.C. 1, 4–5, 23–24 (2014) [hereinafter OLC Immigration Memo]; Marty Lederman, *What it is Not: Dispelling the Myths of the New DHS Immigration Initiative*, BALKINIZATION (Nov. 20, 2014), http://balkin.blogspot.com/2014/11/dispelling-myths-of-new-dhs-immigration.html ("[I]t is important to emphasize that the new DHS enforcement priorities and deferred action status policy are being promulgated pursuant to *statutorily delegated* discretion. . . . And OLC's ultimate conclusion is that the new initiative is '*consonant with* congressional policy embodied in the [Immigration and Nationality Act].' . . . [I]t's not an exercise of constitutional 'executive power' at all: The President and Secretary of DHS are not invoking any Article II authority, let alone an authority to override or disregard statutes. [I]ndeed, it relies upon statutory authority.") (citations omitted); Adam Cox & Cristina Rodriguez, *Executive Discretion and Congressional Priorities*, BALKINIZATION (Nov. 21, 2014), http://balkin.blogspot.com/2014/11/executive-discretion-and-congressional.html ("Again and again, the [OLC immigration] memo emphasizes the importance of whether a discretionary decision is 'consistent with . . . the priorities established by Congress' in the Immigration and Nationality Act.").

104 *See* Roisman, *Ackerman*, *supra* note 1 (noting that the President's statutory argument is likely a "very deliberate move," and is "importantly, not a claim that he has the inherent Article II authority to attack [ISIL] without congressional approval"); *see also* Roisman, *Bush*, *supra* note 1; *cf.* Dawn Johnsen, *Power Wars Symposium: A Study in Contrasting Views of Executive Authority*, JUST SECURITY (Nov. 25, 2015, 8:30 AM), https://www.justsecurity.org/27891/contrasting-views-executive-authority/ (stating with respect to other Obama Administration decisions that new leadership in OLC "helped President Obama ground his assertions of war powers in authorities conferred by Congress, specifically the post-9/11 Authorization for the Use of Military Force, rather than the overbroad claims of preclusive constitutional authority of the early Bush years.").

105 *See, e.g.*, Ackerman, *supra* note 1; Goldsmith & Waxman, *supra* note 1.

debated now—would be interpreted as evincing constitutional agreement regarding executive authority to engage in the strikes, even if it were driven by policy concerns rather than agreement between the branches regarding such executive authority.

The point is that, as many interpreters have noted sporadically, branch conduct might be motivated by several nonconstitutional reasons, such as policy agreement, politics, or other legal analysis, yet this insight has yet to be incorporated in a systematic way into the acquiescence approach.[106]

c. Coercion

Just as political calculations or policy agreement might play a role in motivating branch conduct, a branch might also act because it believes it has no other choice. This is particularly true with respect to Congress in the war powers arena. As Jane Stromseth has noted, the President has the power to create a *fait accompli*, or, in Alexander Hamilton's words, "an antecedent state of things," that makes it very difficult for Congress to oppose him.[107] For example, after President Clinton sent troops to Haiti without congressional approval, members of Congress opposed President Clinton's plan but also opposed cutting off funds ex ante because doing so might interfere with the President's ability to negotiate, or ex post, because that would undermine support for American troops in the field and harm American credibility.[108]

In fact, such coercion need not be limited to the war powers arena.[109] For example, during the financial crisis, Congress passed the Emergency Economic Stabilization Act (EESA), creating the Troubled Asset Relief Program, which authorized the Secretary of the Treasury to buy toxic assets from insolvent banks.[110] Although Congress did initially push back to some extent on Treasury Secretary Paulsen's

106 As noted above, Bradley and Morrison seek to adjust acquiescence theory to account for partisan motivations or collective action problems, but they do not focus on these other nonconstitutional motives that drive branch conduct. *See, e.g.*, Bradley & Morrison, *supra* note 8, at 414–15, 438–44.

107 Stromseth, *supra* note 12, at 881 n.187, 909; *see also* Moe & Howell, *supra* note 49, at 145–47, 162. Levinson and Pildes suggest that the Executive may also be able to coerce Congress through partisan power during periods of unified party government. *See* Levinson & Pildes, *supra* note 48, at 2354.

108 Stromseth, *supra* note 12, at 910; Moe & Howell, *supra* note 49, at 146, 162.

109 *See* Adam B. Cox & Cristina M. Rodriguez, *The President and Immigration Law*, 119 YALE L.J. 458, 490–91, 527–28 (2009) (noting that Congress may have permitted executive immigration authority in part because the issue arose during times of emergency).

110 Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, 122 Stat. 3765;

proposed resolution, it would have had a hard time meaningfully opposing the statute given the free-fall of the economy, even if it believed that it was unconstitutional—as some suggested at the time (and after).[111]

And full-on national security or financial crises are not necessary for coercion to take place. Laurence Tribe suggests that the Senate's agreement in the 1940s to permit bicameral majority approval of international agreements—instead of requiring a two-thirds majority in the Senate—was not based on constitutional agreement, but rather, that the Senate agreed to "*circumvent* what national leaders still widely saw as [the Constitution's] unambiguous command," because it felt coerced by political circumstances.[112] The point is that acquiescent conduct, even seemingly affirmative conduct, can be driven by coercive political forces rather than constitutional agreement.[113] This, of course, is also true of initiating branch conduct. The Executive, in particular, might be forced to act, especially in times of crisis, not necessarily because it believes it has constitutional authority to do so, but because it fears it has no other choice. By automatically inferring that such conduct is driven by constitutional analysis—as acquiescence theory does—conduct can create a constitutional precedent even when the executive branch might not wish it to.

In fact, in dealing with crises, one might take a note from Justice Jackson's famous dissent in *Korematsu v. United States*,[114] which warns that judicial precedents from times of crisis might "lie[ ] about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need."[115] While *Korematsu* suggests courts should abstain from interpreting principles in times of crisis lest those principles be used later in a noncrisis atmosphere, the

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Eric A. Posner & Adrian Vermeule, *Crisis Governance in the Administrative State: 9/11 and the Financial Meltdown of 2008*, 76 U. CHI. L. REV. 1613, 1613–14 (2009).

111 Congress did modify the proposal that the Executive initially put forward but arguably gave the Executive even more authority in the process. *See* Posner & Vermeule, *supra* note 110, at 1624–26. For arguments that TARP was unconstitutional, see, e.g., Robert A. Levy, *Is the Bailout Constitutional?*, CATO INSTITUTE (Oct. 20, 2008), http://www.cato.org/publications/commentary/is-bailout-constitutional ("[T]he bailout quite clearly violates the Constitution's separation-of-powers principle . . . ."); John Schwartz, *Some Ask if Bailout Is Unconstitutional*, N.Y. TIMES, Jan. 16, 2009, at A16; Gary Lawson, *Burying the Constitution Under a TARP*, 33 HARV. J.L. PUB. POL'Y 55, 58–59 (2010).

112 Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1284–85, 1301 (1995).

113 *See* Sidak, *supra* note 34, at 64.

114 Korematsu v. United States, 323 U.S. 214 (1944).

115 *Id.* at 246 (Jackson, J., dissenting).

political branches often do not have the luxury of abstention. If we nonetheless continue to treat those crisis-generated precedents as implicating constitutional analysis and authority, we invite the danger Justice Jackson warned about in the judicial context of potentially allowing a precedent that ought to be limited to its facts to speak to a larger principle with broader application. Courts are well aware that "hard cases make bad law,"[116] but they do not seem to acknowledge that validating branch practice during crises may well do the same. Even if the law is not "bad," it is unlikely to be the result of thoughtful constitutional analysis of the type that acquiescence is thought to justify.

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This Section has sought to show that the assumption in traditional and recent modifications of acquiescence—that branch conduct is motivated by constitutional analysis—is flawed. Such conduct might be motivated by any number of nonconstitutional reasons. Before crediting a practice as based on constitutional agreement, more should be required than the simple fact that one branch engaged in, and the other accepted, the practice.

One might object to this conclusion by arguing that even if we do not assume that constitutional analysis drove branch practice in each specific instance of branch conduct, we might still assume that *over time*, if the practice continues, it is likely to have been driven by constitutional reasons. This is an empirical question, but I do not see why we should assume this is true. Given the number of potential motivations present in each instance, it is not clear to me why we would assume that if a number of instances occur over time, they would tend to occur based on constitutional analysis. Moreover, any systemic analysis of this sort is likely to be hindered by the fact that many practices that are analyzed using history in the separation of powers field rely on too small a sample size of past practice to make any sort of statistical analysis robust.[117]

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116 N. Sec. Co. v. United States, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting).

117 For example, the claim that congressional authorization to use force against an enemy includes authorization to use force against that enemy's co-belligerents is based essentially on *one* precedent. *See* Ryan Goodman, *Debunking the "Vichy France" Argument on Authorization to Use Force Against Co-Belligerents*, JUST SECURITY (Nov. 17, 2014, 10:37 AM), http://justsecurity.org/17516/debunking-vichy-france-argument-authorization-force-co-belligerents/. And, in fact, the Vichy France precedent is particularly telling, as there is no indication that any lawyers were present in making the decision whether the attack on Vichy France was consistent with congressional authorization, rendering its use as evidence of legal authority particularly doubtful. *See id.* In any event, while relying on only one precedent may be an extreme example, many

Before moving on, it is also worth noting that the descriptive problems run deeper than the problems that Bradley and Morrison highlight in critiquing traditional acquiescence. Bradley and Morrison do an excellent job recognizing and explaining the import of Congress's collective action problems and that partisanship might cause collusion between the branches.[118] But the problem is more fundamental. The problem is that we simply cannot automatically know from the fact that a government act was taken that it was taken for constitutional reasons.[119] Indeed, the inability to determine the motive behind government conduct is present under any theory of acquiescence. This is highlighted by reference to analogous critiques made for decades regarding acquiescence theory in the customary international law literature. Customary international law is typically considered to have two elements: the first consists of the general and consistent practice of states, and the second consists of a determination that the practice was followed out of a sense of legal obligation, or *opinio juris*.[120] One of the traditional ways to determine whether state practice was followed out of a sense of legal obligation was to look to whether other states "acquiesced" in that state practice.[121] If one state acted and another state failed to object to that action, it was thought to implicitly consent to it, suggesting that such conduct was followed out of a sense of legal obligation. However, as scholars in that literature have long pointed out, it is nearly impossible to distinguish between a situation where a state failed to object, or "acquiesced," to another state's conduct because of a belief that such

relevant practices occur infrequently. *See, e.g.*, OLC ABM Memo, *supra* note 29, at 14 ("It seems clear that the United States has terminated relatively few treaties. . . . One review has found that of these terminations, the President acted alone nine times, seven were by congressional directive, and two by Senate command."); Robert J. Reinstein, *Is the President's Recognition Power Exclusive?*, 86 TEMPLE L. REV. 1, 8 (2013) (noting that "the number of incidents involving the allocation of the recognition power is fairly small"). That being said, there are some historical practices that do have large sample sizes. *See, e.g.*, Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236, 1260 (2008) (table listing 2,744 congressional-executive agreements).

118 *See supra* notes 49, 53 and accompanying text.

119 *Cf.* MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 437 (2005) ("[W]e cannot automatically infer anything about State wills or beliefs—the presence or absence of custom—by looking at the State's external behaviour.").

120 *See, e.g.*, Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT'L L. 757, 757 (2001); *see also* INTERNATIONAL COURT OF JUSTICE STATUTE ART. 38(1)(b) (describing international custom as "evidence of a general practice accepted as law").

121 Roberts, *supra* note 120, at 758; I.C. MacGibbon, *Customary International Law and Acquiescence*, 33 BRIT. Y.B. INT'L L. 115, 138–40 (1957).

conduct was legal, as opposed to because nonobjection was coerced, convenient, or justified by political or diplomatic reasons having nothing to do with legality.[122] The fact that this descriptive problem emerges where the actors are likely to be more self-interested, wary of encroachment on their powers, and less likely to collude helps highlight how deep the descriptive flaws described above are and that they cannot be attributed solely to partisan loyalty or Congress's collective action problems.[123]

2. The Normative Problem with Acquiescence

On top of this descriptive problem, there is also a serious normative problem with the acquiescence approach. Any theory of acquiescence is likely to privilege the more active and powerful actor. This is inherent in its structure. Recall that acquiescence has two steps: first, the initiating branch engages in conduct, and, second, the responding branch acquiesces (or not) in that conduct. Because the more active branch can act more, it can create more potential precedents to which the acquiescing branch must respond. Moreover, because a more powerful branch can act more easily, it can also object to the other branch's initiating conduct more easily. Finally, a more powerful branch might also be able to coerce the less powerful branch to acquiesce.[124] In short, the very structure of acquiescence will tend to privilege the more active and powerful branch. In modern times, this has been the Executive and its power has, in fact, grown significantly.[125] Although commentators have suggested that looking to historical practice, in general, will tend to favor the Executive for similar rea-

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122 *See, e.g.*, ANTHONY A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 68–70 (1971) (critiquing acquiescence theory because it can credit decisions made due to coercion, diplomatic or political reasons, fear of futility, or belief that usage falls outside legal realm, belonging to realm of social courtesy or comity); KOSKENNIEMI, *supra* note 119, at 181, 435, 437; MICHAEL BYERS, CUSTOM, POWER AND THE POWER OF RULES: INTERNATIONAL RELATIONS AND CUSTOMARY INTERNATIONAL LAW 142–43 (1999).

123 To be sure, states are not always "self-interested" in the realist sense, nor can they always rebut encroachment on their powers, and they can collude. But the critiques of acquiescence in the customary international law literature go beyond these issues, helping highlight their depth in the separation of powers area.

124 For example, this can be done by the Executive by creating an "antecedent state of things," or by using partisan leverage to coerce Congress. *See supra* notes 107–11 and accompanying text.

125 *See, e.g.*, Pildes, *supra* note 67, at 1381 ("It is widely recognized that the expansion of presidential power from the start of the twentieth century onward has been among the central features of American political development.").

sons, there has not been enough of a focus on how the *acquiescence approach* in particular presents these normative problems.[126]

In fact, analogous normative critiques in customary international law show that such problems are endemic to acquiescence and other similarly inductive approaches to customary law. A common critique of the traditional approach to customary international law, and its reliance on acquiescence, has been that it privileges more active and powerful states at the expense of less active and less powerful states, leading to an "apology for the . . . power" of the more powerful states.[127] As Anthea Roberts has noted, "[i]f norms are based primarily on actions, then only states with the ability to act can form and reject customs," leading to "[p]owerful states wield[ing] disproportionate . . . influence" in customary international law.[128] The same might be said regarding branches in separation of powers law.

This tendency to privilege the more active and powerful branch presents serious normative problems for almost any conception of separation of powers.[129] We may wish that the branches battle each other for power, but few would wish to credit a theory that allows the more powerful branch simply to win.[130]

D. Acquiescence's Flaws Undermine Its Justifications

The implications of these descriptive and normative flaws for the acquiescence approach are fairly devastating. If we accept these descriptive and normative flaws in acquiescence, we see that they under-

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126 *See, e.g.*, Bradley & Morrison, *Presidential Power*, *supra* note 11, at 1109; Galbraith, *supra* note 78, at 1004; Huq, *supra* note 34, at 1673; NLRB v. Noel Canning, 134 S. Ct. 2550, 2605–06 (2014) (Scalia, J., concurring). Indeed, David Bederman has suggested that "[w]hether the acquiescence requirement for a binding constitutional custom unduly favors the presidency in its separation-of-powers struggles with Congress remains hotly contested." BEDERMAN, *supra* note 12, at 111–12.

127 William Thomas Worster, *The Inductive and Deductive Methods in Customary International Law Analysis: Traditional and Modern Approaches*, 45 GEO. J. INT'L L. 445, 451–52 (2014); *see* KOSKENNIEMI, *supra* note 119, at 325.

128 Roberts, *supra* note 120, at 767–68 (footnotes omitted); *see also* Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113, 1114 (1999) ("The content of CIL seems to track the interests of powerful nations.").

129 *See, e.g.*, John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1950–71 (2011) (describing predominant formalist and functionalist approaches to separation of powers). There are some scholars who are comfortable with executive aggrandizement. *See* POSNER & VERMEULE, *supra* note 67, at 3–5.

130 Of course, this is not the only normative critique of such a theory. For example, some have also suggested that the branches cannot simply consent—willingly or via waiver—to give up their own power to another branch. *See, e.g.*, New York v. United States, 505 U.S. 144, 182 (1992); Alison L. LaCroix, *Historical Gloss: A Primer*, 126 HARV. L. REV. F. 75, 83 n.43 (2013); Tribe, *supra* note 112, at 1281; *see also* Young, *supra* note 11 (manuscript at 49–50).

mine any of the prominent justifications for it. Most directly, the descriptive flaws undermine the justification that acquiescence represents an agreement between the branches regarding their legal or functional utility.[131] Such a theory would require assuming that simply because a practice occurred and was accepted—by action or inaction—such practice was undertaken and accepted *for constitutional reasons*.[132] Yet, as I have shown above, there is little reason to assume that constitutional reasons, as opposed to other reasons, drove such conduct or acceptance.

A related justification for acquiescence might be that it satisfies Burkean goals by reflecting collective wisdom generated by the judgments of numerous actors over time.[133] However, as Cass Sunstein argues, Burkeanism is "most appealing when traditions have been accepted by many independent minds," as opposed to reflecting a "cascade, in which most people simply followed the initial practice," or where the tradition was the product of "some kind of injustice and coercion."[134] Such Burkean support is undermined because it is not clear that the branches are even aware of the constitutional issue, let alone that past practices are the result of independently minded, thought-through decisions. To the extent the branches are motivated, instead, by path dependence, short-term interests, ignorance, apathy, or coercion, there will be little such Burkean reason to credit acquiescence.[135]

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131 *See, e.g.*, Bradley & Siegel, *supra* note 10, at 50.

132 *Cf.* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring) ("[A] systematic, unbroken, executive *practice*, long pursued to the knowledge of the Congress and never before questioned . . . may be treated as a gloss on 'executive Power' . . . ." (emphasis added)).

133 *See, e.g.*, Bradley & Morrison, *supra* note 8, at 426, 435 (noting justification for acquiescence drawing "support from Burkean thinking, which . . . treats longstanding traditions as likely to reflect accumulated wisdom"); Sunstein, *Burke*, *supra* note 33, at 375.

134 Sunstein, *Burke*, *supra* note 33, at 405; *but see* Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029, 1066–67 (1990) (arguing for Burkean approach that respects "the past for its own sake," not just because it constitutes "accumulated wisdom"); *id.* at 1036–37, 1043, 1068; *see also* Young, *supra* note 11 (manuscript at 16) (noting Kronman's argument that "the past's authority is distinct from any utilitarian or fairness-based argument for precedent—that it is, at bottom, essential to what 'makes us who we are' as human beings"); Sunstein, *Burke*, *supra* note 33, at 359, 369 n.82, 387 (countering Kronman's approach).

135 *See, e.g.*, Jamal Greene, *The Supreme Court as a Constitutional Court*, 128 HARV. L. REV. 124, 153 (2014) ("Burkean approaches to interpretation suppose that sustained practices reflect wisdom, but those practices may instead reflect little more than power—the power of the Executive, relative to the Senate and the Court, to mobilize in favor of its preferred reading of the Constitution." (footnote omitted)); *see also* Cox & Rodriguez, *supra* note 109, at 530 (noting role of "happenstance and path dependency" in allocation of powers between branches); Galbraith, *supra* note 78, at 1043. There is, in fact, good reason to think that branch practice, even

Justifying acquiescence as a way of privileging interbranch bargains fares no better.[136] Descriptively, there is no reason to think that when a branch "acquiesces" in conduct it does so because it achieves some other power in return. Moreover, normatively, such implicit bargain theory seems to assume that the branches will have equal or at least comparable abilities to engage in practices and acquiescence, when, in reality, the Executive is likely to dominate.

These descriptive and normative problems also undermine many reliance-based justifications for acquiescence.[137] First, it is worth noting that if reliance interests were the primary justification for looking to past practice, then we would expect interpreters to look to past practice *alone*, regardless of whether the other branch acquiesced.[138] And, of course, the inquiry cannot be meant to privilege *any* reliance interests—such reliance must be *justifiable*.[139] Thus, looking to acquiescence to justify reliance interests perhaps suggests that reliance is justifiable when one branch knowingly and intentionally waives some sort of interest.[140] However, for such knowing waiver to occur, at the

executive branch practice, might be motivated by path-dependent behavior. For example, because OLC uses stare decisis, once an opinion is written, it is less likely to be independently reevaluated. *See* Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448, 1451–53, 1480 (2010).

While some Burkeans respect "the past for its own sake," *see, e.g.*, Kronman, *supra* note 134, at 1036–37, 1043, 1068. I am not aware of such an approach being used to justify acquiescence in the separation of powers field. *Cf.* Young, *supra* note 11 (manuscript at 4, 17, 40, 46, 51) (arguing that, unlike separation of powers law's reliance on acquiescence, federal courts law generally relies "on past practice simply because it is past"). However, such a justification for the acquiescence approach in the separation of powers area would be subject to the normative critique identified above. If we simply respect the past because it occurred, this would tend to systematically advantage the more active branch, which would contravene most normative theories of separation of powers. *See infra* notes 143–46, and accompanying text.

136 *See* Bradley & Morrison, *supra* note 8, at 435–36 ("[I]n some cases, the practices of one political branch may have caused the other to assert new powers as a countervailing response. Acquiescence on one front may thus purchase new authority on another, and privileging acquiescence may be a way to honor the implicit bargain."); Bradley & Siegel, *supra* note 10, at 49.

137 *See, e.g.*, *id.* at 427–28, 435; Bradley & Siegel, *supra* note 10, at 48.

138 *See also* Bradley & Siegel, *supra* note 10, at 59 ("In general, reliance does not appear to be an especially strong argument for crediting historical practice in the area of separation of powers."). Similar arguments emphasizing consistency, stability, and predictability would also be satisfied by looking to practice writ large, and do not rely specifically on looking at acquiescence. *See, e.g.*, Bradley & Morrison, *supra* note 8, at 427–28.

139 *Cf.* KOSKENNIEMI, *supra* note 119, at 329–31, 413–14 (contending that arguments privileging tacit consent based on reliance fall into the problem of failing to show why reliance was legitimate).

140 The reliance justification has generally been derived from dicta in *United States v. Midwest Oil Co.*, 236 U.S. 459, 472–73 (1915), where the Court decided that the Executive had authority to withdraw lands from oil explorations that had been declared by Congress as open for such explorations without ex ante congressional approval. In that case, the Court noted that

very least, the branch must be *aware* of the constitutional issue at stake, which will not necessarily be the case. And, if the branches are aware, but driven by politics, short-term policy, or, worse, coercion, it is not clear reliance interests should be deemed justified. In any event, while some reliance-based justifications may not be subject to the descriptive critiques discussed above, the normative problem raises further concerns. If acquiescence is privileged because of reliance interests, regardless of whether the branches have come to any sort of legal or functional agreement as to the proper authority of the practice, then it will tend to systematically privilege the more active branch.

The final justification that has been given for acquiescence has been that judicial review cannot force the branches to protect their own prerogatives.[141] However, this justification confuses the question of who should decide whether a practice is constitutional with the question of *how* that actor should decide. Debates over constitutionality of branch practices frequently occur outside the courts, and they invoke historical practice. Whether those debates should look to acquiescence is the question at hand here, and whether judicial review is a good method of incorporating acquiescence does not answer whether we should salvage it at all.[142]

Finally, it is worth noting that if these flaws are true, then acquiescence is incompatible with both of the predominant doctrinal theories of separation of powers, formalism and functionalism.[143] Acquiescence theory is clearly inconsistent with formalist approaches to separation of powers law, which emphasize the distinctness of the three branches and oppose intermingling of their powers.[144] But a re-

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"[b]oth officers, lawmakers, and citizens naturally adjust themselves to any long-continued action of the Executive Department—on the *presumption* that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice." *Id.* (emphasis added). Perhaps the reason reliance in *Midwest Oil* was justifiable was this "presumption," but if the descriptive problems discussed above are true, it is not clear that such a "presumption" is warranted. Moreover, in *Midwest Oil*, the branches had articulated and deliberated the constitutional authority in question such that it was clear both branches were at least aware of the constitutional issue. *See Midwest Oil*, 236 U.S. at 473–76. In any event, the Court ultimately did not seem overly concerned with reliance interests, at least of third parties, as it seemed to ignore the reliance interests of the private litigants on the relevant prior congressional authorizations in ruling that the Executive had the authority in question.

141 Bradley & Morrison, *supra* note 8, at 436–38.

142 In other words, the fact that judicial review might be inadequate only suggests that judicial review is inadequate. It does not mean that, absent judicial review, when interpreters determine whether branch conduct is constitutional they should use acquiescence to do so.

143 *See* Manning, *supra* note 129, at 1942–43.

144 *Id.*

alistic version of acquiescence is also inconsistent with functionalist accounts.[145] Functionalists are willing to override textual implications on the view that what matters is that a "general balance of powers is intact."[146] But, given the descriptive and normative flaws discussed above, there is little reason to believe that looking to "acquiescence" will result in a desirable "balance of power," as opposed to a one-sided power grab.

II. Alternatives To Acquiescence

If we take the descriptive and normative problems I have laid out above seriously, then acquiescence theory's flaws become clear. Whether these flaws should be fatal to acquiescence depends on its alternatives. In this Part, I lay out the primary alternatives to acquiescence theory and explain why I find them unsatisfactory.[147]

A. Privileging History

Even without any acquiescence inquiry, there are still arguments for privileging historical practice in constitutional interpretation in the separation of powers field. Some would involve looking to historical practice without more, and others would make different inquiries into past practice.

One relatively extreme alternative would be looking to historical practice alone as indicative of constitutional authority. The most likely reason for doing this would be to privilege stability.[148] But, while stability surely has some value in separation of powers law, there are strong reasons to doubt that it should be the *primary* driver of how to conduct constitutional analysis in the separation of powers context. Normatively, if we accept as a premise that some sort of balance is desirable in the separation of powers, then, given the nonreciprocal pathologies between the branches, privileging all histor-

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145 *See id.* at 1952. *Contra* Bradley & Morrison, *supra* note 8, at 435 (arguing that acquiescence is consistent with functionalism).

146 Manning, *supra* note 129, at 1952.

147 I acknowledge that the alternatives I lay out below are not exhaustive, and there may well be others. However, due to space considerations, I am unable to examine every potential alternative to acquiescence in this Article. What I try to do below is summarize what I see as the primary alternatives to the acquiescence approach, and explain why I find them to be unsatisfying.

148 As David Strauss puts it, "in dealing with separation of powers issues it is more important that the issue be settled than that it be settled just right." David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. Chi. L. Rev. 877, 918 (1996). Strauss makes this point as a defense of what he calls common law constitutionalism—not of historical practice—but the point seems to translate.

ical practice will serve to systematically validate expanded executive power.[149] In fact, scholars have noted that merely privileging what has happened between the branches will be suboptimal from any number of normative viewpoints.[150] Meanwhile, other scholars have noted the significant benefits of *instability* and contestation in separation of powers law.[151]

Aside from stability, others might seek to validate historical practice per se under the theory that "it is what it is." In other words, if a historical practice is deeply entrenched, then it should simply be accepted as lawful, as there is nothing that finding it unconstitutional will do.[152] Such claims tend to be directed at limiting judicial review,[153] but would also seem to validate looking to historical practice per se. However, claims for accepting historical practice *tout court*—whether grounded in stability, futility, or other reasons—are subject to the normative critique made above that it will result in too great of an imbalance of power between the branches.[154] Such approaches are also subject to a critique frequently made in the international law literature, i.e., that approaches to determining the content of custom-

149 *See, e.g.*, Moe & Howell, *supra* note 49, at 171 ("Both theory and evidence suggest that Congress cannot protect itself very effectively, and thus when the Court calls on Congress to fight its own battles with the president, it is virtually guaranteeing . . . that presidents will win out over the long haul.").

150 *See, e.g.*, Pozen, *supra* note 23, at 80–81; Posner & Vermeule, *Showdowns*, *supra* note 28, at 1043 ("In the separation of powers system, there is no invisible-hand mechanism that systematically aligns the decentralized pursuit of institutional interests with social welfare or the public good, however those notions are construed.").

151 *See, e.g.*, Josh Chafetz, *Congress's Constitution*, 160 U. PA. L. REV. 715, 769–70 (2012) [hereinafter Chafetz, *Congress*] ("Conflict, tension, and tumult may be precisely what produces good government; easy, authoritative resolution may be the mark of dysfunction."); Josh Chafetz, *Multiplicity in Federalism and the Separation of Powers*, 120 YALE L.J. 1084, 1128 (2011) [hereinafter Chafetz, *Multiplicity*] (book review) ("[C]oncern for stability, predictability, and notice are at their weakest in the separation-of-powers context . . . ."); Michael Stokes Paulsen, *The Civil War as Constitutional Interpretation*, 71 U. CHI. L. REV. 691, 716 (2004) (book review) ("Does not our Constitution deliberately prefer division, tension, uncertainty, and dynamic equilibrium over 'authoritative' resolution?").

152 This is how I read Henry Monaghan's claim that "[f]or better or worse . . . . [a] practice so deeply embedded in our governmental structure should be treated as decisive of the constitutional issue." Henry P. Monaghan, *Presidential War-Making*, 50 B.U. L. REV. 19, 31 (1970); *see also Youngstown*, 343 U.S. at 654 (Jackson, J., concurring) ("If not good law, there was worldly wisdom in the maxim attributed to Napoleon that 'The tools belong to the man who can use them.'").

153 *Cf., e.g.*, Strauss, *supra* note 148, at 891–92, 894, 898.

154 This critique would also apply to a justification for looking to past practice, alone, grounded in a Burkean theory that the past should be respected in and of itself. *See supra* notes 134–35; *cf.* Kronman, *supra* note 11, at 1068 (supporting Burkean theory that "honors the past for its own sake," albeit not in the separation of powers context).

ary international law that focus exclusively on state practice without further normative inquiry will result in a body of law that is not, in fact "law," but rather a "mere sociological description."[155] In this telling, we need some metric to differentiate what the *law is* from what *has happened*, or else the law has no independent authority.[156]

Other justifications for focusing on historical practice might be seen as attempts to privilege reliance interests. However, for reliance interests to be justified, one must come up with a theory for when reliance on past practice is reasonable, such that it should be privileged.[157] To my knowledge, no such theory yet exists—apart from acquiescence—and there would be difficult interpretive questions in deciding *when* such reliance was justified. For example, how long must the practice go on? How consistent must it be? And so on. And there are reasons that privileging reliance would have undesirable effects. First, any rule that privileges reliance will tend to privilege the first branch that acts—because then actors will rely on it—giving that branch a serious first-mover advantage.[158] Second, privileging reliance will tend to freeze constitutional interpretations even when we might wish to change them because of changed circumstances.[159] In short, creating a theory of justifiable reliance is likely to be just as fraught as acquiescence theory, while tending to systematically privilege the first-mover that can create reliance interests. Moreover, if we accept normatively that some balance of power between the branches is desirable, it is not clear why we should privilege reliance interests so highly.[160]

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155 KOSKENNIEMI, *supra* note 119, at 17 ("A law which would lack distance from State behaviour, will or interest would amount to a non-normative apology, a mere sociological description.").

156 *See id.*

157 *See* Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162, 2258 (2002) ("Whether people will rely on a [constitutional] interpretation depends on whether the law tells them they can rely."). To the extent the theory would privilege reliance on any activity that has happened, this would simply validate executive power and be indistinguishable from a "mere sociological description." *See supra* note 155.

158 *Cf.* Elhauge, *supra* note 157, at 2259.

159 *Cf. id.*

160 Burkeans, too, might still seek to privilege past practice, but to the extent that their support relies on believing that past practice is based on "reflective, good faith" judgments worth validating, looking to past practice per se will not be sufficient. *See supra* note 135 and accompanying text. And, as noted above, to the extent that Burkeans would look to past practice, alone, grounded in a theory that the past should be respected for its own sake or for other reasons, such justifications are undermined by the normative critique that such a method would systematically privilege the more active and powerful branch. *See supra* notes 135, 154 and accompanying text; *see also, e.g.*, Young, *supra* note 11 (manuscript at 15–17, 51–52) (noting various justifications for Burkean reliance on past practice). This, of course, does not mean that one could not construct

Another justification for looking to historical practice might be that it is presumptively the result of interbranch bargaining over authority that is likely to result in increased welfare.[161] However, given that the branches will often be driven by various motives apart from protecting their prerogatives, it is not clear why we should privilege any such bargains as presumptively desirable. And, in fact, even scholars like Aziz Huq, who support privileging interbranch bargains as desirable by default, would not privilege any past practice, but only practice that is the result of interbranch "bargaining."[162] To the extent Huq would only privilege interbranch "bargains" where it is clear that the branches have made thought-through decisions, his approach is, in fact, consistent with the approach to looking at past practice I lay out below. However, to the extent Huq would simply assume that past practice is indicative of interbranch bargaining and that such bargaining is presumptively desirable, his claim is subject to the descriptive critiques laid out above.[163]

Posner and Vermeule offer an alternative account of how past practice should be used whereby they would validate past practice as indicative of constitutional law when it is the result of a public "consti-

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a theory for separation of powers law that would seek to identify past practice most in line with particular Burkean justifications, however, I am not aware of such a theory having been constructed.

Moreover, although failing to privilege past practice per se might lead to greater uncertainty, to the extent Burkeans privilege past practice as a general matter, they might, in fact, be comfortable with a high level of uncertainty in separation of powers law. After all, separation of powers law has suffered from uncertainty—even on very important questions like authority to go to war—for generations. *E.g.*, Posner & Vermeule, *Showdowns*, *supra* note 28, at 1038–39. Thus, for those inclined to credit the past as "good enough," accepting this uncertainty might also be viewed as presumptively "good enough." *See* Strauss, *supra* note 148, at 892.

161 *See, e.g.*, Huq, *supra* note 34, at 1603–04.

162 *See, e.g.*, *id.* at 1665–74, 1683–86. McGinnis also provides a Coasean model of interbranch bargaining, but he seems to assume that both branches will adequately and systematically seek to protect their own prerogatives. *See* McGinnis, *supra* note 34, at 295, 324.

163 I find Huq's claim that such "bargains" should be treated as presumptively valid unpersuasive. In the context of separation of powers "bargains," Huq acknowledges that Congress cannot be relied on to act in a public-regarding manner due to collective-action and partisan pathologies, but he still suggests that such past "bargains" should be seen as presumptively valid. *See, e.g.*, Huq, *supra* note 34, at 1604, 1671–74. However, given that *one of the two* actors in the so-called bargaining between the Congress and the Executive cannot be counted on to act in a way that will maximize its interests, privileging these "bargains" as presumptively efficient seems strange. Note also that Huq's model assumes that the branches cannot be coerced and that the "bargains" he seeks to validate involve "instances in which institutions actively negotiate the allocation of entitlements created by the Constitution, resulting in a bargained-for agreement between institutional actors." *Id.* at 1607. As noted above, there is little reason to think that just because Congress or the Executive has engaged in particular conduct that such conduct was undertaken and accepted based on such a thoughtful exchange.

tutional showdown[ ]" between the branches regarding constitutional authority.[164] But even if their theory is plausible,[165] it is quite limited, as it only arises when there is a clear "showdown" between the branches about constitutional *authority* that is so public and debated that it is actually resolved by the public's newfound view on that authority. Such an approach is unlikely to be able to answer most separation of powers questions.

B. Ignoring History

Although there are several alternatives to looking at historical practice apart from acquiescence, none of them seem desirable. The next alternative to consider, then, is avoiding looking to historical practice altogether. Some constitutional theories, of course, already do this. Strict textualists or formalists, for example, might seek to ignore historical practice as irrelevant to deciding constitutional questions, relying on other sources for authority.[166] Originalists, too, might seek to ignore historical practice, that is, unless it is used exclusively to determine the Founders' understanding of the constitutional text.[167] However, I find that theories that seek to eliminate the use of historical practice entirely in interpreting separation of powers law unappealing for at least two reasons. First, many of the separation of

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164 POSNER & VERMEULE, *supra* note 67, at 78.

165 And I am not convinced that it is. Posner and Vermeule claim that showdowns are settled by the "mysterious process" of "public constitutional sentiment" formation, which is actualized when the public "throw[s] its weight behind one branch" and the other acquiesces. POSNER & VERMEULE, *supra* note 67, at 77–78. But the method by which this public sentiment is formed and the causal method by which it decides the winner is exogenous and unexplained. *See id.* at 82–83. And it does not seem realistic. It is not clear why we would assume that when one branch acquiesces it does so because the public has declared it a winner rather than because of other political or policy considerations. Nor is it clear that this public sentiment would be about constitutional authority at all, as opposed to the one-off policy outcome that is at issue. Moreover, even in the limited circumstances in which such very public "showdowns" occur, it is not clear why there would be any settled resolution of the issue, or to the extent there is one, how we are to determine what it is. As noted below, when there are public constitutional debates between the branches, determining who "won" or "lost" is often impossible. In short, Posner and Vermeule seem to assume that the "prevail[ing]" branch wins because the public believes it has constitutional authority, but they never explain why the public is the ultimate decider, how the branches figure out whom the public supports, or why, following the "showdown," there is any real "settlement" of the issue. *See id.* at 77–78.

166 *See* LaCroix, *supra* note 130, at 81. To be clear, many decisionmakers will ignore historical practice if they view the text as clear, even if they do not generally subscribe to these constitutional interpretive theories. *See, e.g.*, ELY, *supra* note 12, at 10; Spiro, *supra* note 12, at 1357. *INS v. Chadha*, 462 U.S. 919 (1983), can also be read as ignoring historical practice because it viewed the textual answer as being clear. *See, e.g.*, Glennon, *supra* note 11, at 118–19.

167 *See* Bradley & Morrison, *supra* note 8, at 425; Tribe, *supra* note 112, at 1280.

powers issues that use historical practice as an interpretive tool are not answerable based solely on text, and many will not be subject to judicial review.[168] Without historical practice there will be little concrete for any constitutional interpreter to use to determine the answer to these questions. Looking to practice can provide some baseline to anchor interpretation to the real world.[169] Second, and relatedly, to the extent these theories ignore practice entirely, they risk being labeled "utopian," or entirely divorced from lived reality.[170]

Other suggestions that would reduce the use of historical practice—without abandoning it—would rely on increased judicial review to answer separation of powers questions, instead of relying so heavily on historical practice.[171] In a recent article, Jamal Greene draws lessons from European constitutional courts specifically empowered to adjudicate public law disputes and suggests that "where constitutional disputes concern a *rule* that specifies the division of powers between governmental institutions, the Court should be permitted to engage in abstract review, to grant institutional standing to public organs, and to bind nonparties to the case."[172] If greater judicial review is the solution, then, it would also make sense to use "private attorney[s] general[ ]" to police violations of separation of powers principles.[173] Although increased judicial review of separation of powers questions might help enforce constitutional prerogatives that the branches have insufficiently protected,[174] there are also dangers in increased judicial review of separation of powers questions, including a fear that the Su-

168 *See, e.g.*, Powell, *supra* note 28, at 534–35.

169 *See, e.g.*, Spiro, *supra* note 12, at 1358 n.84 ("[I]t is better to start with something more than the slate of meager constitutional command."); Gerhard Casper, *Constitutional Constraints on the Conduct of Foreign and Defense Policy: A Nonjudicial Model*, 43 U. CHI. L. REV 463, 478 (1976) ("Lawyers like to reason by means of precedents, and nonjudicial precedents seem to be better than no precedents at all.").

170 KOSKENNIEMI, *supra* note 119, at 17 ("A law which would base itself on principles which are unrelated to State behaviour, will or interest would seem utopian, incapable of demonstrating its own content in any reliable way."); *see also* H.L.A. HART, THE CONCEPT OF LAW 94–99 (2d ed. 1994); Bradley & Morrison, *supra* note 8, at 456; Monaghan, *supra* note 152, at 31 (critiquing certain "commentators' conception[s] of separation of powers" because they "do[ ] not and cannot describe existing political reality").

171 *See, e.g.*, Greene, *supra* note 135, at 153.

172 *Id.* at 128.

173 *See* KOH, *supra* note 12, at 182–84 (calling for use of "private attorney generals" to police violations of proposed national security framework statute, for giving Congress standing, and for limiting judicial abstention doctrines); *cf.* JACK GOLDSMITH, POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11, at 173–74 (2012) (noting how civil society groups can be effective in constraining executive).

174 There is reason to think that, despite claims often made to the contrary, courts are capable of deciding separation of powers questions, including national security issues, at least in

preme Court will only serve to validate historical practice, not rigorously assess it.[175] In any event, substantially increased judicial review of the type that has been proposed, while potentially useful, is unlikely to occur any time soon.[176] Therefore, I propose a different way forward.

C. From Apology to Utopia

Having laid out a spectrum of alternatives to acquiescence for how historical practice might be used to determine the content of separation of powers law, it is worth putting the different options in perspective. At one pole is a purely inductive approach that would derive legal content entirely from what has happened in the past (regardless of constitutional theory or principle), and at the other is a purely deductive approach that would derive legal content entirely from constitutional theory or principle (regardless of past practice). Each pole has its virtues and its vices. A purely inductive approach will be more descriptively accurate, but it will arguably be *too* descriptive—serving as an "apology for power" by describing what *has happened* as *legal* and thus validating the actions of the more active and dominant executive branch. A purely deductive approach, on the other hand, would be more principled and perhaps more normatively desirable, but it would arguably be *too* normative, too "utopian"—failing to meaningfully describe the world we live in. Thus, we might think of the different methods we might adopt as standing on a spectrum between "apology" and "utopia." This spectrum has been famously laid out in the international law literature by Martti Koskenniemi, who argues that when we derive law from practice, arguments about its content will operate between the two poles of inductive apology and deductive utopia, moving back and forth between the two extremes.[177] While this conception has yet to be incorporated into separation of powers

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some circumstances. *See generally* DAVID SCHARIA, JUDICIAL REVIEW OF NATIONAL SECURITY (2015).

175 *See, e.g.*, Bradley, *supra* note 11, at 829 ("[C]ourts are themselves part of the separation of powers structure, and thus there is no guarantee that they will be less acquiescent than Congress when faced with Executive unilateralism."); Eric A. Posner & Adrian Vermeule, *Inside or Outside the System?*, 80 U. CHI. L. REV. 1743, 1750–54 (2013).

176 Jamal Greene's proposal might require a constitutional amendment to be implemented, Greene, *supra* note 135, at 128 n.17, 150–52, and Harold Koh's proposal for a framework statute incorporating more judicial review has gone unheeded. *See* KOH, supra note 12. These broad changes to standing and abstention doctrines are unlikely to occur in the near future.

177 *See* KOSKENNIEMI, *supra* note 119, at 437–38; *see also* David Kennedy, *When Renewal Repeats: Thinking Against the Box*, 32 N.Y.U. J. INT'L L. & POL. 335, 355 (2000).

law, it is quite useful in assessing the different alternatives for how historical practice should be used in separation of powers law.

Looking at the state of the field, the prevailing method of looking to historical practice has been largely inductive. The Supreme Court and scholars using traditional acquiescence have largely tended to look at what practices have occurred in the past, and conclude that because they occurred, they were legal.[178] The result of this largely inductive method is not surprising: executive power has been aggrandized and generally what *has been* is now what the law *is*. The inductive and apologist nature of current methodology is a problem if we accept as a normative baseline—as I do for purposes of this Article—that the Constitution envisions, and interpretations of constitutional law should enforce, some sort of separation and balance of powers between the branches.[179]

However, the more normative we make our method of determining separation of powers law, the more we move away from descriptive accuracy towards normative theory; the more the law will fail to describe reality. While there is no right answer for where we should end up on this spectrum, given the normative concerns laid out above, I propose moving towards a less inductive approach. Because I am not satisfied with any of the alternatives listed above, I propose doing so through a new, more robust and rigorous method of looking for acquiescence. I find the notion of privileging acquiescence as a method of attempting to divine constitutional agreement the most normatively desirable justification for the acquiescence approach. In my view, this is, in fact, the predominant underlying theory of why most scholars and courts treat acquiescence as relevant to constitutional analysis.[180] Thus, my proposed method of looking to past prac-

178 Of course, there are a few exceptions to this. *See, e.g.*, INS v. Chadha, 462 U.S. 919 (1983); Clinton v. City of New York, 524 U.S. 417 (1998).

179 John Manning has recently argued that there, in fact, is no overarching theory of separation of powers in the Constitution. *See* Manning, *supra* note 129, at 1993–2005. Jeremy Waldron in a compelling essay argues that even if Manning is right that there is no overarching theory in the Constitution, the separation of powers principle serves desirable purposes. *See* Jeremy Waldron, *Separation of Powers in Thought and Practice?*, 54 B.C. L. REV. 433, 433–36, 458–60, 467 (2013).

180 Establishing this claim would require more space than I can devote to it in this Article, but, as an example, note that even Bradley and Morrison, who appear to try to stay agnostic about the reasons to privilege acquiescence, often seem to see agreement as the key justification. *See supra* note 63. *Cf.* Moore, *supra* note 62, at 1047 ("If it were clear that Congress had, in consideration of its institutional interests, developed an understanding of the constitutional distribution of congressional and executive power and enacted authorizations consistent with that understanding, judicial reliance on congressional authorization might be justified."). Moreover, the fact that many interpreters seek to distinguish inconsistent past practice as based on crude

tice will attempt to privilege only historic branch practice that is likely to be indicative of constitutional agreement between the branches—as opposed to practice resulting from branch ignorance, apathy, policy agreement, path dependence, or coercion.

By limiting the types of past practice that are worth crediting in constitutional analysis, the method I propose below will be less inductive than current methods of looking to acquiescence. This is unlikely to outright "fix" the normative concerns regarding the modern executive's greater power, but it is a step in the right direction. By only privileging past acquiescence that is indicative of constitutional agreement, the hope is that this approach will serve as something of a bulwark against the aggrandizement of the more active and powerful branch—the Executive. And, because the new approach looks beyond the simple fact that branches have engaged in certain conduct and avoids privileging conduct driven by coercive forces, this new approach should limit the traditional advantages the Executive has enjoyed under the traditional acquiescence approach (and recent improvements to it). Of course, the move away from the current doctrine's apologist tendencies will lead to a more uncertain and more "utopian" method of looking to past practice, but, in my view, this is a better alternative than maintaining the current inductive approach, or supporting an even more inductive one.[181]

III. A New Approach

In his concurrence in *Youngstown*, Justice Frankfurter articulated what has been something of a seminal account of acquiescence, concluding that "a systematic, unbroken, executive *practice*, long pursued to the knowledge of the Congress and never before questioned . . . may be treated as a gloss on 'executive Power' . . . ."[182] Justice Frankfurter's focus on "practice" has been followed by subsequent scholars theorizing acquiescence.[183] However, as shown above, looking merely at *practice* is not enough. Practice can be undertaken and accepted for any variety of reasons. If we look at acquiescence as evidence of con-

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political considerations, but consistent past practice as based on constitutional analysis or agreement, also suggests that constitutional agreement is seen as the goal of looking to past practice. *See supra* notes 92–100 and accompanying text.

181 This is one reason I do not adopt privileging reliance interests as the dominant justification. Privileging reliance would seem to call for a *more* inductive approach of privileging past practice than current doctrine and lead to more of an "apology for power."

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

183 *See, e.g.*, Bradley & Morrison, *supra* note 8, at 432; Glennon, *supra* note 11, at 134.

stitutional agreement, then we need to look beyond just whether one branch has engaged in and the other has accepted a certain *practice*. Interpreters have, off and on, seemed to acknowledge this in part by treating past practice that undermines their constitutional interpretation as based on crude politics, while treating practice consistent with their interpretation as based on constitutional analysis, but they have done so in an inconsistent and biased way.[184] What is needed is a consistent and rigorous *method* of determining when past practice should be treated as the result of constitutional agreement and when it should be treated as the result of other factors. I propose such an approach below.[185]

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184 *See supra* notes 92–100 and accompanying text.

185 There is also an important, and undertheorized, question that I wish to highlight but cannot adequately address in this Article. This question is what types and forms of past "practice" should count for purposes of this inquiry. Historically, interpreters of past practice have pointed to all manners of what I will call "types" of past practice—for example, action, inaction, decisions *not to* act, articulation, etc.—and "forms" of past practice—for example, kinetic action, executive legal opinions, executive official testimony or public statements, congressional legislation, resolutions, committee reports, floor statements, etc.—as equally indicative of acquiescence, without explaining which types or forms should count as relevant "practice," and which might be more or less indicative of constitutional views. Yet it is not obvious that all types or forms should "count," and it is certainly not obvious that they should all count equally. But thus far, scholars have barely even acknowledged that this is a question worth asking.

To the extent scholars have discussed what types or forms of past conduct should be relevant to constitutional separation of powers interpretation, they have generally suggested that only "acts," not "assertions," should count. *See, e.g.*, Glennon, *supra* note 11, at 134 (noting that for practice to be constitutionally relevant it must "consist of acts; mere assertions of authority to act are insufficient"); Bradley & Morrison, *supra* note 8, at 432 (stating that Glennon's criterion is "easily justified"). But it is not clear that this distinction is even coherent when it comes to Congress, which only "acts" through "assertions." If the point is that only "Acts" of Congress—i.e., statutes that have gone through the bicameralism and presentment requirements in the Constitution—should count for Congress, this would put Congress at another distinct disadvantage relative to the President, who can "act" in many more ways, with far fewer collective action problems. Indeed, if only formal congressional "Acts" count, this would give the President a literal veto power over Congress's ability to create constitutional precedents. And it is not clear why we should focus on congressional action that satisfies the bicameralism and presentment requirements in this context. The inquiry into historical practice is not an inquiry into whether Congress has legislated; it is an inquiry into branch constitutional views. Therefore, it makes little sense to require the same procedural steps that would be undertaken for Congress to enact a law. In any event, while "actions" might speak louder than "words," there is little reason to think that articulations of authority should *never* count, nor that "actions" should *always* count more than "articulations." *Cf.* Pierre-Hugues Verdier & Erik Voeten, *Precedent, Compliance, and Change in Customary International Law: An Explanatory Theory*, 108 AM. J. INT'L L. 389, 414–15 (2014) (discussing debate regarding whether o nly "acts," not "statements," should count as relevant past state practice for customary international law and noting "the mainstream view that both verbal and physical acts can constitute state practice . . . and that, in each case, probative value should be assessed as a matter of weight, rather than in terms of bright-line rules that exclude certain types of practice") (footnotes omitted). Even beyond this "acts"/"statements"

Before doing so, it is worth clarifying once more the scope of my proposal. The method proposed below is meant to improve how interpreters analyze past practice to find (or not) evidence of agreement between the branches regarding a constitutional issue. This assumes a particular justification for looking to past practice—that it represents interbranch agreement. As discussed above, this is not the only justification for looking to past practice.[186] To the extent that interpreters look to historical practice for reasons other than validating interbranch agreement—such as a desire to preserve stability or protect certain reliance interests—the method I propose below may not necessarily be the best means of interpreting the relevance and weight of historical practice. This serves to highlight the importance of explaining one's justifications for looking to historical practice before interpreting it. Whatever justification one has for looking to past practice should inform one's interpretation.

A. The Articulation or Deliberation Approach

The approach I propose has several steps. First, in order for past practice to be used as evidence of constitutional agreement, the constitutional authority in question must have been articulated publicly by the initiating branch or deliberated by the accepting branch.[187] If

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distinction, many questions remain regarding what types or forms of branch conduct are most likely to be indicative of the branches' constitutional views. Surely all types and forms are not equal, but interpreters have thus far failed to grapple with how we should rank or prioritize the different types and forms. *Cf., e.g.*, William N. Eskridge, Jr., *The New Textualism*, 37 U.C.L.A. L. REV. 621, 636–40 (1990) (discussing hierarchy of legislative history sources).

While a full analysis of how to prioritize these different types and forms of practices—a topic that I plan to address in future work—would require far more fleshing out than I can attempt in this Article, the hope is that by at least calling attention to this issue, interpreters will be more careful about citing to all manner of past "practice" as equally indicative of constitutional views of the branches.

186 *See supra* Parts II.A, II.D.

187 I am only aware of two other scholars who have emphasized when practice is accompanied by articulation, but both do so only in passing. *See* Stromseth, *supra* note 12, at 880 (suggesting that acquiescing branch must accept practice "and claim of authority"); Powell, *supra* note 28, at 538–39 (suggesting that "presumptive acceptance of . . . legitimacy" of branch conduct by acquiescence should only apply "with full force" where initiating branch articulated constitutional authority) (footnote omitted). Courts, OLC, and scholars have tended to emphasize instances when there has been articulation or deliberation, but have not made it a requirement. *See, e.g.*, United States v. Midwest Oil Co., 236 U.S. 459, 236 U.S. at 481–82 (1915) (discussing practice made under "claim of . . . right"); *Youngstown*, 343 U.S. at 614 (Frankfurter, J., concurring) (discounting precedents because no "contemporaneous legal justification"); *Deployment of United States Armed Forces into Haiti*, 18 Op. O.L.C. 173, 178 (1994) (emphasizing past practice "made under claim of right"); Uruguay Memo, *supra* note 29, at 235 n.16 (noting that "[i]n light of . . . vigorous and protracted debate, it is strange that Professor Tribe should dismiss the political branches' practice as a mere matter of 'political convenience'"); Bruce Ackerman & David

there has been no discussion of the constitutional authority in question, the practice might have been just as easily initiated and accepted without any thought to its constitutional implications. Thus, historical precedents that have not been accompanied or preceded by any articulation or deliberation of constitutional authority should not count as evidence of constitutional agreement. The branches cannot be said to agree on a question of constitutional authority that has never been asked.[188]

If there has been some articulation or deliberation of the constitutional authority in question, then the practice can be viewed as potentially indicative of constitutional agreement, but it should not automatically be credited. Once there has been some sort of debate over the constitutional question, it is important to try to avoid the desire to declare a winner or loser—or any clear settlement of the issue.[189] For example, if Congress debates whether executive conduct was constitutional and follows that debate by passing a statute approving that conduct, then acquiescence theory would typically consider that a clear example of constitutional agreement.[190] But, even in such a situation, it is not clear that the statute was passed because Congress agreed with the Executive's constitutional claim—it may have agreed with the practice as a policy matter, but disagreed (or been uncertain) about the constitutional claim.[191] Or, if Congress considers enacting legislation that arguably infringes on executive authority, but does not pass it following constitutional objections being raised, traditional theory might suggest that such failure to pass the bill indicated Congress's view that it lacked authority. But the failure to pass could be explained by any number of reasons. The point is that looking merely at the discrete conduct that resolves a particular constitutional debate cannot resolve the question of whether the branches agreed or dis-

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Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799, 927 (1995) (emphasizing that Senate reached its decision "after an extended period of debate and deliberation").

188 Calls for articulation have been made in the customary international law literature as well to differentiate state conduct taken on nonlegal grounds from conduct taken on legal grounds. *See, e.g.*, D'AMATO, *supra* note 122, at 74–87; Roberts, *supra* note 120, at 757.

189 This is contrary to Posner and Vermeule's vision of "constitutional showdowns," *see generally* Posner & Vermeule, *Showdowns*, *supra* note 28, and also contrary to how courts often describe actions following constitutional debates. *See, e.g.*, Zivotofsky *ex rel.* Zivotofsky v. Sec'y of State, 725 F.3d 197, 208 (D.C. Cir. 2013).

190 *See, e.g.*, Bradley & Morrison, *supra* note 8, at 449 (explicit or implicit acceptance by Congress of executive practice shows valid congressional acquiescence).

191 *Compare* NLRB v. Noel Canning, 134 S. Ct. 2550, 2564 (2014) (citing 1940 Pay Act as evidence of Senate's constitutional agreement), *with id.* at 2615 (Scalia, J., concurring) (arguing that the 1940 Pay Act was evidence of desire to pay appointees, not constitutional agreement).

agreed *on the constitutional question* at issue. We can interpret passing a statute as indicative of constitutional agreement or not; we can interpret rejection of a proposed statute as indicative of constitutional rejection or not. It will all be observationally equivalent. Thus, the frequent attempt to pick "winners" or "losers" and find final settlement following constitutional debates should be avoided.[192]

Rather than trying to read the tea leaves of what drove a particular action by Congress (or the Executive), we might instead view how they acted *after the debate* as potentially indicative of how *the branches* viewed the resolution of the debate. So, if, following a debate over the constitutionality of a particular executive practice in which Congress passed a statute accepting the practice, a meaningful number of members of Congress continue to contest the constitutional validity of that practice, this would seem indicative of the fact that Congress did not view the issue as having been resolved in the previous debate. Rather than interpreting subsequent conduct as *inconsistent* with the settled view of Congress, we might view it, rather, as consistent with the view that Congress had no settled view.[193] If, on the other hand, Congress stopped contesting the issue—even when it had other incentives to do so—this might indicate that Congress viewed the issue as settled.

To avoid erroneously reading branch conduct or silence[194] as evidence of constitutional agreement, we might only credit it in certain prescribed circumstances where the branch had other incentives to op-

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192 An example of the common attempt to pick "winners" or "losers" from such events can be found in the D.C. Circuit's opinion in *Zivotofsky*. There, the court characterized the fact that Congress failed to pass Henry Clay's proposed amendment to a bill in 1817—which would have involved a congressional role in recognition of foreign countries—after constitutional objections were raised about it, as the President "prevail[ing] in a standoff with [the] Speaker of the House . . . over the recognition power." *Zivotofsky*, 725 F.3d at 208. But such failure to pass could be explained by other reasons. Indeed, as evidence of the fact that there was no constitutional settlement of the issue following the 1817 debate, in 1864, the House passed a resolution stating that "Congress has a constitutional right to an authoritative voice in declaring and prescribing the . . . recognition of new Powers as in other matters." *Id.* at 208–09 n.10. The Court also seemed to credit a failed Senate resolution to recognize Cuba in 1896 as a congressional recognition of executive authority, *see id.* at 208–09, but the failure to pass the resolution could be explained by any number of nonconstitutional reasons, including that the Senate feared upsetting Spain, that it feared for the safety of U.S. citizens abroad, or that it felt coerced by presidential pressure. *See Congress Powerless*, N.Y. TIMES, Dec. 19, 1896, at 1 (noting these concerns and discussing congressional objection to executive's constitutional claim).

193 *Cf.* Bradley, *supra* note 11, at 811, 821 (treating congressional opposition to 1978 treaty termination as the "exception" to a general pattern of congressional conduct, as opposed to evidence of a lack of settlement regarding the issue prior to debate).

194 Note that privileging such nonobjection will involve privileging congressional silence in certain prescribed circumstances as evidence of acquiescence. For discussion of the well-known

pose the conduct. So, if, for example, Congress was aware of the constitutional issue and had a policy disagreement with the President about certain conduct, but did not make an objection about constitutional authority, then this might indicate that Congress views the question of presidential authority as settled. Similarly, if Congress was controlled by the opposing party or if objection was relatively easy to register, then interpreting congressional acceptance or nonobjection as evidence of constitutional agreement might be justified. The easy case, then, would be where, following a constitutional debate about the issue, Congress had a policy disagreement with the Executive about certain executive conduct, was controlled by the opposing party, and could easily object to that conduct. In such a case, nonobjection can be viewed as more likely indicative of constitutional agreement than simple policy agreement, inertia, or partisanship.

Moreover, in examining past practice, interpreters should be mindful of *nonconstitutional* legal reasons that might motivate the branches to engage in conduct. So, if the President engages in conduct and articulates a statutory basis for doing so, then such conduct should not be seen as indicative of constitutional authority to undertake such conduct.[195] And, to avoid privileging past practice that resulted from coercive circumstances, as opposed to deliberate constitutional agreement, interpreters should also examine whether the initiating or acquiescing branch had any reasonable alternative to initiating or accepting the conduct in question. If it did not, then such practice is just as likely to be indicative of coercion as constitutional agreement.

In short, once there has been some articulation or deliberation of the constitutional authority in question, then subsequent practice may well be indicative of constitutional agreement. However, we must be careful about when we conclude that it is. Where subsequent acceptance or nonobjection occurs by an accepting branch that agrees with the conduct as a policy matter, when it is coerced, or where the other branch has given nonconstitutional legal authority as a basis for the conduct, then we should not read that acquiescent conduct as indicative of constitutional agreement. If, on the other hand, a constitutional debate is followed by acquiescent conduct where the

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dangers of treating legislative silence as indicative of legislative intent, *see, e.g.*, Eskridge, *supra* note 73, at 90–108.

195 Similarly, if an international law justification is given, we might also discount the historical precedent as being indicative of constitutional authority. *See* Galbraith, *supra* note 78, at 998–1001, 1012.

acquiescing branch disagrees on the policy behind the conduct, is controlled by the opposing party, or the like, then we might view such conduct as indicative of constitutional agreement by the branches. This approach will raise the bar of relevant historical practice and make findings of practice indicative of constitutional agreement less frequent, but this seems to me the price of greater accuracy.[196]

As with any interpretive approach, there will be line-drawing problems in its implementation. Questions of how much articulation or deliberation is sufficient to be sure that both branches were aware of the constitutional issue will remain, as will questions about how much objection is enough following an articulation or deliberation to undermine a finding of acquiescence. For example, if one member of Congress continues to oppose a constitutional authority following constitutional debate, this would likely be an insufficient basis to conclude that the branches have not agreed on the constitutionality of the practice. In fact, if one member continues to oppose a practice and is unable to gather any support, this might be even more indicative that Congress views the constitutional issue as settled. In any event, while line-drawing problems remain, they do not seem fatal or meaningfully distinct from the line-drawing problems that already exist under acquiescence theory or recent proposed improvements to it.[197]

B. The Benefits of the Articulation or Deliberation Approach

There are several unique benefits to the articulation or deliberation approach.

Preventing Ignorance and Coercion—Historic branch practice has, in the past, been used as constitutional precedent regardless of whether there was any sort of articulation or deliberation of constitutional authority. This has permitted interpreters to treat practice as indicative of constitutional agreement when, in fact, it was taken ignorant of the constitutional authority in question.[198] By only privileging precedents when the constitutional issue has been articulated or deliberated, we avoid crediting practice taken entirely ignorant of constitutional implications. Moreover, by being sensitive to the coercive pressures that can affect branch conduct, this new approach also seeks

196 And relevant examples do exist. *See infra* Section III.D.2. (discussing policy disagreement regarding ABM Treaty termination without meaningful constitutional objection).

197 *See* Bradley & Morrison, *supra* note 8, at 451 (noting line-drawing problems in their approach).

198 *See supra* Part I.C.1.a.

to avoid crediting past practice that was coerced, as opposed to undertaken based on constitutional analysis.

Enabling Public Deliberation and Accountability—Requiring articulation or deliberation of constitutional authority before crediting branch practice permits the public to have a chance to deliberate on the constitutional issue and hold the branches accountable. As acquiescence is currently practiced, constitutional precedents can be made by, for example, the Executive engaging in conduct and Congress accepting it. This permits the establishment—and change—of constitutional law *sub silentio*, without the public being notified and given a chance to weigh in on the constitutional question. By requiring articulation or deliberation, this theory can enable public deliberation,[199] deliberation within Congress,[200] and public constitutional dialogue between the branches.[201] Aside from deliberative benefits, such public debate between the branches would also enable the public to hold the branches accountable for their constitutional conduct.[202] In other words, it would require the branches to bear the public costs of articulating potentially expansive constitutional authority theories or conceding in them. And there is good reason to think that, at least in some instances, there will be such costs. For example, broad claims of executive authority by the George W. Bush Administration caused

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199 *See, e.g.*, JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS 287–308 (William Rehg trans. 1996); Sunstein, *Interest Groups*, *supra* note 50, at 45–48 (considering benefits and costs of Madisonian deliberation). *See generally* DELIBERATIVE DEMOCRACY (Jon Elster ed. 1998) (discussing benefits and costs of deliberative democracy).

200 Benefits of such deliberation would include encouraging the revelation of private information from the public about the issue, exposing extreme views to moderating arguments, legitimating the outcome by providing reasons for the outcome to "losing" parties, and encouraging the articulation of public-regarding justification for legislators' votes. *See* Garrett & Vermeule, *supra* note 50, at 1291; *see also* Jacob E. Gersen, *Unbundled Powers*, 96 VA. L. REV. 301, 347 (2010) (discussing benefits of deliberation in Congress). Of course, such deliberation would also create costs by potentially reducing candor, encouraging posturing, silencing dissenters and encouraging herd behavior. But, even accepting these downsides, this would seem better than the alternative of validating instances where Congress has not deliberated at all on important issues of constitutional authority. *See* Garrett & Vermeule, *supra* note 50, at 1292 ("[T]he alternative to deliberation is simply voting without discussion . . . ."). Such deliberation would also seem beneficial on Burkean terms since it will increase the likelihood that decisions are at least thought-through, rather than engaged in through path dependence. *See supra* notes 133–35 and accompanying text.

201 *See* Chafetz, *Multiplicity*, *supra* note 151, at 1122 (noting "[t]here is a great deal of republican virtue" in arrangements where branches are "forced, as part of their project of winning the political battle, to make public, principled, constitutional arguments"); Chafetz, *Congress*, *supra* note 151, at 771–72 ("[I]nterbranch conflict can enhance democratic deliberation."); *see also* Michael J. Gerhardt, *Non-Judicial Precedent*, 61 VAND. L. REV. 713, 766 (2008) (noting benefit of constitutional dialogue as "educating the public about constitutional law").

202 *See, e.g.*, Levinson & Pildes, *supra* note 48, at 2328.

significant public backlash.[203] Under the current approach, future executives could seek to undertake similar actions, without making these broad claims, and create the same precedents without the same backlash. There is no good reason why the acquiescence approach should accommodate this.

Enabling Avoiding Constitutional Precedents—By requiring focus on the justifications for branch conduct, the articulation or deliberation approach would also permit initiating branches to avoid creating constitutional precedents by, for example, relying on statutory authorization. Although the prevalence of such a motive has yet to be fleshed out in the literature, there is reason to think that branches might want to avoid creating constitutional precedents.[204] In fact, such a motive might explain President Obama's reliance on what some have suggested are debatable statutory authorizations—as opposed to inherent constitutional authority—to justify actions implicating separation of powers questions. For example, when President Obama ordered strikes against ISIL, he relied on statutory authority, not inherent Article II authority, to do so.[205] This might have been motivated by a desire to avoid creating a constitutional precedent that future executives could rely on.[206] Despite this potential motive, current acquiescence theory's focus on *practice* would treat this precedent like any other constitutional precedent.[207] And, if Congress passes a new authorization for use of military force against ISIL,[208] current acquiescence doctrine would seem to treat this authorization—an explicit congressional acceptance of executive conduct—as an acceptance of

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203 *See, e.g.*, *Poll: Public Opposes Increased Presidential Power*, USA TODAY (Sept. 15, 2008, 8:04 AM), http://usatoday30.usatoday.com/news/politics/election2008/2008-09-15-Poll-presidential-power_N.htm.

204 *See, e.g.*, Roisman, *Ackerman*, *supra* note 1.

205 *See, e.g.*, *id.*; Roisman, *Bush*, *supra* note 1; *supra* notes 103–107 and accompanying text.

206 President Obama's reliance on statutory authority is in marked contrast to expansive claims of executive authority made by the Bush Administration. *See, e.g.*, Johnsen, *supra* note 104; Authority of the President Under Domestic and International Law to Use Military Force Against Iraq, 26 Op. O.L.C. 143, 197 (2002) (concluding that the President possessed "independent constitutional authority" to use military force against Iraq, which was "supplemented" by the 2002 AUMF).

207 Indeed, a number of prominent scholars have suggested that this will serve as a constitutional precedent going forward. *See, e.g.*, Ackerman, *supra* note 1; Goldsmith & Waxman, *supra* note 1.

208 The President has sent over such a new draft authorization. *See* Press Release, Office of the Press Sec'y, *Letter from the President—Authorization for the Use of United States Armed Forces in Connection with the Islamic State of Iraq and the Levant*, THE WHITE HOUSE (Feb. 11, 2015), https://www.whitehouse.gov/the-press-office/2015/02/11/letter-president-authorization-use-united-states-armed-forces-connection.

the President's constitutional authority, even though neither the initiating branch nor the acquiescing branch necessarily sought to agree on any sort of constitutional precedent.[209] Similarly, though the President sought to ground his authority for recent immigration reforms primarily in statutory authority,[210] many scholars have raised concerns about the constitutional precedent that it might set.[211] Focusing more on the specific legal authority that the President uses—as required under the articulation or deliberation approach—would reduce the ability of such statutory-authority-based precedents to serve as broad constitutional precedents going forward.

In short, focusing on the legal authority given by the initiating branch enables branches to avoid creating constitutional precedents when they do not wish to do so.[212] In fact, some might want to encourage such conduct by the Executive, in particular, because it allows Congress to contest the President's statutory authority through modification or repeal of the statute more easily than it would be able to contest constitutional authority.

Enabling Merits Review—Crediting articulation or deliberation would encourage the articulation of constitutional theories, which would enable easier post hoc constitutional review of practices based on explicit constitutional justifications. This would facilitate better merits review—by courts, government actors, or scholars—because they would have explicit constitutional theories to evaluate, rather

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209 For example, Congress might pass such an authorization because it agrees with the policy that the strikes are meant to further, without necessarily agreeing that the President had constitutional authority to engage in those strikes without specific congressional authorization.

210 *See supra* note 103; OLC Immigration Memo, *supra* note 103, at 4–5; Cox & Rodriguez, *supra* note 103; Lederman, *supra* note 103 (stating that the immigration initiative's legal basis is "not an exercise of constitutional 'executive power' at all . . . . [I]ndeed, it relies upon statutory authority.").

211 *See, e.g.*, David A. Martin, *Concerns about a Troubling Presidential Precedent and OLC's Review of Its Validity*, BALKINIZATION (Nov. 25, 2014), http://balkin.blogspot.com/2014/11/concerns-about-troubling-presidential.html (noting that "recent executive initiatives . . . set[ ] a dangerous precedent that will be used by future Presidents to undercut other regulatory regimes"); Marty Lederman, *Even if It's Lawful . . . Should We Be Concerned that it Might Set a Dangerous Precedent?*, BALKINIZATION (Nov. 25, 2014), http://balkin.blogspot.com/2014/11/even-if-its-lawful-should-we-be.html; Zachary Price, *Two Cheers for OLC's Opinion*, BALKINIZATION (Nov. 25, 2014), http://balkin.blogspot.com/2014/11/two-cheers-for-olcs-opinion.html ("[T]he [OLC] opinion raises the question of what weight we should give to past executive practice. . . . The bigger question is what effect this example will have on the practice of future Presidents.").

212 Similarly, as Jean Galbraith suggests, we should be cognizant of when executive or congressional action is justified on international law grounds, as opposed to constitutional grounds, to avoid creating constitutional precedents from practice motivated by international, not constitutional, law. *See* Galbraith, *supra* note 78, at 998–1001, 1012.

than presuming that there is some constitutional theory underlying conduct, guessing what it might be, and then evaluating it.[213]

Encouraging Rigor—Finally, adopting the approach I set out above would help provide more rigor to how historical practice is used. Past practice should not be treated like judicial opinions—with lawyerly arguments as to how favorable past practice evinces constitutionality, while unfavorable practice is distinguishable. By seeking to compel closer analysis and consistency with regard to when past practice should be treated as indicative of constitutional agreement and when it should not be, the hope is that such manipulation will be harder to engage in. There are good reasons to treat some practice as evidence of constitutional authority, and others as not, but interpreters should at least have to give those reasons before doing so.

C. The Costs of the Articulation or Deliberation Approach

This new approach would also, of course, have costs. Chief among them is that it would likely create greater uncertainty in separation of powers law by narrowing the number of historical precedents that can be said to signal constitutional agreement. However, this seems to me simply the cost of greater accuracy or of avoiding crediting past practice that does not necessarily signal constitutional agreement.[214] The reality is that historical practice cannot often be said to signify constitutional agreement between the branches. This is because history is *messy*. We might be better off simply accepting this, rather than trying to graft clarity onto what is, in fact, quite unclear.

Apart from creating greater uncertainty, others might suggest that requiring articulation or deliberation might encourage "cheap talk," particularly by the acquiescing branch, to avoid creating constitutional precedent.[215] However, this critique loses sight of the purpose of acquiescence as constitutional agreement. If we look to acquiescence as evidence of constitutional agreement, then it would seem bi-

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213 *Cf.* Sunstein, *Interest Groups*, *supra* note 50, at 72–73 (suggesting heightened "reasoned analysis" requirement be used more broadly in public law to enable more rigorous judicial review).

214 *Cf.* Bradley & Morrison, *supra* note 8, at 451 ("Expanding the inquiry to include a wider array of congressional responses to executive action will substantially shrink the universe of cases where Congress can truly be said to have remained silent, which will in turn shrink the number of cases drawing inferences from such silence. That is all to the good . . . . If acquiescence is supposed to reflect a constitutional understanding that is sufficiently widespread to be attributed to Congress as an institution, courts and other interpreters should strongly prefer affirmative evidence of that understanding, not just silence.").

215 This critique would also apply to Bradley and Morrison's proposal of privileging nonacquiescence signaled by congressional "soft law."

zarre to discard what the branches *actually* say when they engage in conduct, in order to label their conduct in line with a constitutional vision based on some sort of legal fiction.[216] While ignoring such statements might make finding constitutional agreement easier, it would come at the price of accuracy. In any event, talk is not always "cheap"; public statements will often have constraining effects.[217] Conversely, some may argue that requiring deliberation will simply push Congress to insert some sort of "boilerplate" language stating that it accepts the constitutional authority of the Executive, when it, in fact, does not.[218] This is certainly possible. But, even if true, the inclusion of mere "boilerplate" language still serves some prophylactic function and can create deliberative benefits.[219]

One might be concerned that the dynamic effects of this new approach could potentially play into the asymmetry between the branches. Going forward, the Executive will have an advantage in its ability to more easily articulate constitutional authority for its actions than Congress, making it relatively harder for Congress to create relevant precedents than for the Executive. This problem could be solved, however, by presuming deliberation on the part of the Executive when Congress acts, which seems like an arguably fair assumption at least in the modern era, given OLC's practice of assessing new statutes for their effect on executive prerogatives. Note, though, that even if the Executive could take advantage of its ability to articulate, this would not seem any worse than the current acquiescence approach, which does not require any sort of articulation or deliberation in the first place. And, if the approach does encourage more articula-

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216 Posner and Vermeule seem to suggest such an outcome. *See* Posner & Vermeule, *Showdowns*, *supra* note 28, at 1000. Such a theory might make sense if we thought that the branches were consistently motivated to act based on constitutional analysis, but might lie about why they were acting. If that were true, we might ignore what they say, focus on what they do, and this would reveal what they truly thought about the constitutional authority in question. However, as discussed above, there is little reason to assume that when branches act, they do so primarily based on their view of relevant constitutional authority (if they have, in fact, thought of it).

217 *See, e.g.*, Gerry Mackie, *All Men Are Liars: Is Democracy Meaningless?*, *in* DELIBERATIVE DEMOCRACY, *supra* note 199, at 69, 69–92 (taking on "cheap talk" theories); Gersen & Posner, *supra* note 58, at 588–90 (noting that even cheap talk can be credible in certain circumstances); Garrett & Vermeule, *supra* note 50, at 1289 (noting constraining effect of "civilizing force of hypocrisy").

218 *See, e.g.*, Sunstein, *Interest Groups*, *supra* note 50, at 78.

219 *Id.* For example, requiring such language would eliminate instances where even the "boilerplate" is unattractive to legislators, help focus legislators' attention on issues in a way that might change their calculus, and serve the deliberative function of forcing legislators to appeal to the broader public good and thus encourage legislators to act for more public-regarding, rather than private-regarding, purposes. *See id.*

tion by the executive branch, such public articulation would have constraining effects and deliberative benefits. In fact, if such claims were made public, one would expect Congress to concede constitutional authority to the President (and perhaps the President to push for constitutional authority) less—not more—often.

A bolder option for fixing the asymmetry might entail creating an equivalent to the Office of Legal Counsel within Congress.[220] Such an office could help police congressional prerogatives, articulate constitutional authority, and, as appropriate, push back against executive articulations of constitutional authority.[221]

Finally, one might object that there is no reason to try to fix the descriptive flaws underlying acquiescence at all, because it is not uncommon for interpretive methods to rely on assumptions that are not empirically true (think of the constitutional avoidance or *Charming Betsy* canons).[222] But, maintaining an assumption that is empirically inaccurate must be justified based on some normative reason.[223] In this case, however, there does not appear to be a good normative reason to assume that the branches act based on constitutional analysis, when we know they often do not. To the contrary, given the nonreciprocal pathologies of the branches, assuming that the branches acted based on constitutional analysis would seem to disserve, not serve, the normative goals underlying the separation of powers.

It is worth acknowledging that, of course, the articulation or deliberation approach will not fully "solve" the descriptive problems mentioned above. Requiring articulation does not force the branches to act based on such articulation, and we will still never truly *know*

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220 *See* KOH, *supra* note 12, at 169–70; Huq, *supra* note 34, at 1685. Congress does have legal counsel offices, but they do not operate like OLC. *See* Louis Fisher, *Constitutional Analysis by Congressional Staff Agencies*, *in* CONGRESS AND THE CONSTITUTION 64, 75–81 (Devins & Whittington eds., 2005).

221 Some scholars have already made headway in discussing how such an office might be set up to avoid partisan capture and the like. *See* KOH, *supra* note 12, at 169–70 (suggesting potential design); Huq, *supra* note 34, at 1685 (suggesting alternative design); *see also* Garrett & Vermeule, *supra* note 50, at 1317–18 (proposing similar "Office for Constitutional Issues").

222 For example, the presumption that Congress intends its acts to be constitutional, which underlies some justifications for the constitutional avoidance canon, has been criticized as descriptively inaccurate. *See, e.g.*, Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1209 (2006); Frederick Schauer, Ashwander *Revisited*, 1995 SUP. CT. REV. 71, 74.

223 For the constitutional avoidance canon, for example, the empirical falsity can be justified because the canon acts as a "resistance norm" raising the costs of violating the Constitution and, thereby, furthering the values underlying the constitutional provisions that create the "constitutional doubt" in the first place. *See, e.g.*, Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1551–52 (2000).

what motivates the branches—as if they had single, easily identifiable motives.[224] What I endeavor to do here is to provide an approach that will best serve to single out historical practice that is more likely to be indicative of constitutional agreement between the branches than of ignorance, apathy, politics, coercion, or the like. As with any general approach to looking at history and attributing motives or beliefs to branches, there are times when the approach will fail. But, the goal is to do better than simply assuming that because a practice occurred and was accepted, it was undertaken and agreed to for constitutional reasons.

D. Case Studies

While the articulation or deliberation approach would have some costs, they seem to be clearly outweighed by its benefits. To show how this new approach would work in practice, this Part applies it to two recent case studies where historic branch practice was used as an aid in constitutional interpretation. First, it discusses the recent Supreme Court case deciding the constitutionality of certain recess appointments by President Obama, and, second, it discusses whether the President has unilateral authority to terminate treaties, a question analyzed in a recent article by Curtis Bradley. The case studies help highlight that we should not simply assume that the branches are aware of relevant constitutional issues, or that, once they are, that their conduct is motivated by constitutional analysis regarding the issue.

1. Recess Appointments

The Recess Appointments Clause ("the Clause") provides an exception to the typical requirement that the President get the "Advice and Consent of the Senate" before appointing "Officers of the United States."[225] The Clause permits the President alone "to fill up all Vacancies that may happen during the Recess of the Senate."[226] At issue in 2014's *Noel Canning* decision were two questions relating to the Clause: first, whether the phrase "Recess of the Senate" included only "inter-session" recesses—meaning a break between formal sessions of Congress—or also "intra-session" recesses—meaning breaks during

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224 *See, e.g.*, Sunstein, *Interest Groups*, *supra* note 50, at 77, 80–81 (noting difficulties in determining congressional "motive" but finding it best of imperfect solutions).

225 U.S. CONST. art. II, § 2, cl. 2; NLRB v. Noel Canning, 134 S. Ct. 2550, 2556 (2014).

226 U.S. CONST. art. II. § 2, cl. 3.

formal sessions.[227] Second, whether the phrase "vacancies that may happen" included vacancies that occurred *prior* to the start of the recess, in addition to vacancies that occurred during it.[228] The majority, relying heavily on historic branch practice, concluded that both intrasession recess appointments and appointments of officials to vacancies that arose prior to a recess were constitutionally permissible.[229] Justice Scalia, concurring only in the judgment, concluded that both were unconstitutional.[230] Below, I lay out the relevant history, how the Court treated it, and how the articulation or deliberation approach would come out differently.

Intrasession Recesses—The first question the Court addressed was whether the Clause only permitted appointments during intersession recesses, as opposed to intrasession recesses. There is no record of this specific question being raised by either executive or legislative branch officials until 1901. Before then, a few intrasession recess appointments were made in 1867 and 1868, but it is not clear that branch officials knew they were intra-, not intersession, recess appointments, or that such a distinction was potentially meaningful.[231] The majority and concurrence draw very different inferences from this. The majority suggests these appointments support its conclusion, while Justice Scalia suggests that the lack of a substantial number of appointments and attention to the issue means "the relevance of those appointments to our constitutional inquiry is severely limited."[232] Under the articulation or deliberation approach, we would ask when the constitutional question was first articulated or debated. Because the question was

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227 *Noel Canning*, 134 S. Ct. at 2556. Each two-year Congress typically consists of two formal one-year sessions, separated by an "inter-session" recess announced via a resolution stating that the Congress will "adjourn *sine die*," meaning without a specific date of return. *Id.* at 2560–61. Intrasession recesses occur in the midst of a formal session when one of the houses adopts a resolution that will adjourn to a fixed date. *Id.* at 2561.

228 *Id.* at 2556. The Court also considered whether the length of a "recess" should include "*pro forma* session[s]" with "no business . . . transacted," such as the one during which the appointments in question occurred. *Id.* at 2556–57. The Court concluded that such "*pro forma* sessions" counted as individual recesses, and that, as a result, the three-day recess during which the appointees in question were appointed was too short to constitute a valid recess appointment. *Id.* I do not focus on this question here, however, because the Court did not rely heavily on historical practice to answer this question. *See id.* at 2573–77.

229 *Id.* at 2558–73.

230 *Id.* at 2617–18 (Scalia, J., concurring).

231 *See id.* at 2562 (majority opinion).

232 *Compare id.* at 2562, *with id.* at 2600–01 (Scalia, J., concurring); *see also id.* at 2601 ("More than half a century went by [between 1869 and 1920] before any other President made an intra-session recess appointment, and there is strong reason to think that during that period neither the Executive nor the Senate believed such a power existed.").

never raised, contrary to the majority's and concurrence's suggestions, the history is entirely indeterminate (for both branches) in the nineteenth century. The question was never asked (and therefore never answered).

The first time the question was considered by either branch was apparently in 1901, when the Attorney General found such appointments unconstitutional and advised President Roosevelt not to make certain proposed appointments.[233] This position was reversed in 1921, and the Executive has made intrasession recess appointments ever since.[234] In 1948, the Comptroller General, who is an "officer of the Legislative Branch," concluded that intrasession recess appointments were permissible, but it is not clear that the Senate was aware of or consulted in his opinion.[235] The Senate, in fact, did not explicitly discuss the constitutionality of intrasession recess appointments until 1984, when several Senators opposed a nomination to the Federal Reserve Board during a twenty-one-day intrasession recess, which these Senators argued was too short to permit such an appointment.[236] They did not, however, argue that intrasession recess appointments were unconstitutional per se. Following this, there have been two amicus briefs filed, one in *Noel Canning* itself and one filed solely by Senator Kennedy in 2004, suggesting that intrasession recess appointments were unconstitutional, and one brief that was drafted by the Senate's Office of Legal Counsel in 1993 but never filed, concluding the same.[237] The majority concludes that this history supports the view

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233 *Id.* at 2563 (majority opinion). Two years later, President Roosevelt made controversial *inter*session recess appointments during an "infinitesimal fraction of a second" between formal sessions of Congress, which spawned a 1905 Senate Judiciary Committee Report concluding that these intersession appointments were unconstitutional. *Id.* at 2602–03 (Scalia, J., concurring). Although the Committee did not consider whether intrasession recess appointments were constitutional, the majority uses the definition of permissible appointments adopted in the report, which can be read to include certain intrasession recess appointments, as indicative of a senatorial view that intrasession recess appointments were permissible. Justice Scalia, on the other hand, concludes that because the report did not address the intrasession question, "the Judiciary Committee surely believed, consistent with the Executive's clear position at the time, that 'the Recess' was limited to . . . breaks *between sessions*." *Id.* at 2603 (Scalia, J., concurring).

234 *Id.* at 2562–63 (majority opinion). Justice Scalia acknowledges this opinion reversing the position, but, as with the majority's treatment of the 1901 memo, he contests the opinion on the merits. *See id.* at 2603–04 (Scalia, J., concurring).

235 *Id.* at 2564; *id.* at 2604 (Scalia, J., concurring).

236 *Id.* at 2616.

237 The majority treats these objections as the objections of "individual Senators," *id.* at 2563 (majority opinion), while Justice Scalia describes them as "sharp criticism from . . . both sides of the aisle." *Id.* at 2604 (Scalia, J., concurring).

that the branches have agreed that intrasession recess appointments are constitutional, while Justice Scalia finds no such agreement.[238]

Under the articulation or deliberation approach, as noted above, the practice of the branches should not be deemed relevant to their constitutional views unless there is evidence that they were *aware* of the constitutional issue at all. As noted, the first time the issue was raised was in 1901, when the Executive found such appointments unconstitutional, but it then reversed this position in 1921, and has made intrasession recess appointments ever since.[239] Following 1921, then, we might privilege executive practice of such appointments as potentially indicative of constitutional agreement, but only if we assume the Senate was aware of the constitutional issue and agreed with the Executive's assertion that the Constitution empowers it to make such appointments. This seems possible, but raises some line-drawing issues because the question of whether intra- as opposed to intersession recess appointments were constitutional was not raised explicitly in the Senate until 1984.[240] While the 1921 executive opinion concluding that the Executive had authority to appoint officials during intrasession recesses was public and the Comptroller General was aware of the issue in 1948, it is not clear this knowledge should be attributed to the Senate.[241] Indeed, one might fairly doubt that the average Senator would have read the Executive's, or the Comptroller General's, opinion on this issue.

Even if we assume that the Senate was aware of the Executive's claimed authority, the Senate's failure to object should only be relevant if it was aware of the issue, *and*, importantly, otherwise had some reason to object to these appointments. It appears that when there was policy opposition to one of these appointees in 1984, constitutional objections were raised regarding the length of the intrasession recess, but they were limited.[242] This may provide some indication that there was agreement that *some* intrasession recess appointments were constitutionally permitted. Indeed, the fact that only seven Senators opposed these intrasession appointments on constitutional grounds at all, and that other Senators opposed the appointment on policy grounds without raising the constitutional objection, might well suggest that the Senate, as a whole, viewed the constitutional issue as

238 *Id.* at 2564 (majority opinion); *id.* at 2605 (Scalia, J., concurring).

239 *Supra* note 234 and accompanying text.

240 *Noel Canning*, 134 S. Ct. at 2604 (Scalia, J., concurring).

241 *See id.*

242 *See id.* at 2563 (majority opinion), 2604 (Scalia, J., concurring).

settled.[243] What would be most indicative of constitutional agreement would be evidence that a meaningful number of Senators opposed certain intrasession recess appointees before or, particularly, following this debate on policy or partisan grounds, but did not make constitutional objections. In fact, there is evidence that some intrasession recess appointees were opposed on policy grounds, between 1921 and 1984[244] and after 1984,[245] without raising meaningful constitutional objections.[246] Particularly after 1984, this practice would seem relevant, since it might more fairly be assumed that the Senate was aware of the constitutional issue by then. Thus, the majority may arguably have gotten this question right, but there is far less historical support than it suggests. And the relevant questions to be asked are when the Senate became aware of the issue, and, once it was, whether it otherwise had reasons to object—not simply whether the Executive made such appointments and whether the Senate failed to object.

In short, while an argument can be made that the post-1984 history supports the majority's interpretation, this is a rather brief history. And one might fairly counter that, especially given the limited evidence of knowledge of the issue by the Senate prior to 1984, the

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243 *See* 130 CONG. REC. 22767-69 (1984).

244 Between 1945 and 1984, presidents made over 100 intrasession recess appointments. *See* Michael A. Carrier, Note, *When Is the Senate in Recess for Purposes of the Recess Appointments Clause?*, 92 MICH. L. REV. 2204, 2212 n.48 (1994); HENRY B. HOGUE ET AL., CONG. RESEARCH SERV., THE *Noel Canning* Decision and Recess Appointments Made from 1981–2013, at 4–6 (2013). Before 1984, it does not appear that the Senate raised constitutional objections on this ground, even though it did raise some policy concerns at least two times. *See, e.g.*, *Foes of Energy Secretary Nominee Hope to Hinder His Confirmation*, N.Y. TIMES, Nov. 29, 1982, at B9 (Senator raised policy objections); *Truman Names 11 Rebuffed by GOP*, N.Y. TIMES, June 23, 1948, at 17 (same).

245 Between 1984 and 2013, presidents made over 250 intrasession recess appointments. *See* HOGUE ET AL., *supra* note 244, at 4–28. During this time, there were instances of policy and political objection to certain nominees, but there does not appear to have been significant constitutional objection. *See, e.g.*, Christopher Marquis, *Clinton Sidesteps Senate to Fill Civil Rights Enforcement Job*, N.Y. TIMES, Aug. 4, 2000, at A14 (policy and political objections); Sheryl Gay Stolberg, *Obama Bypasses Senate Process, Filling 15 Posts*, N.Y. TIMES (Mar. 27, 2010), http://www.nytimes.com/2010/03/28/us/politics/28recess.html?_r=0 (policy and political objections); Rachel L. Swarns, *Democrats Criticize Appointment at Immigration Agency*, N.Y. TIMES, Jan. 8, 2006, at 16 (policy and political objections). *But see* Elisabeth Bumiller & Sheryl Gay Stolberg, *President Sends Bolton to U.N.; Bypasses Senate*, N.Y. TIMES (Aug. 2, 2005), http://www.nytimes.com/2005/08/02/politics/president-sends-bolton-to-un-bypasses-senate.html (Senators Reid and Lautenberg objecting to nomination as "abuse of power" and "bend[ing] the rules"); Katharine Q. Seelye, *Clinton Appoints Gay Man as Ambassador as Congress Is Away*, N.Y. TIMES, June 5, 1999, at A16 (Senator Helms's spokesman criticizing President for "contempt for the constitutional process").

246 The only potentially meaningful exception to the Senate's nonobjection is the amicus brief signed by forty-four Senators in the *Noel Canning* litigation itself, discussed *infra* note 247.

amicus brief filed in *Noel Canning* arguing that such appointments were unconstitutional suggests that the Senate had not settled on a view regarding the constitutionality of intrasession recess appointments.[247]

Pre-Recess Vacancies—The Court next considered whether the President could appoint officials to vacancies that arose *before*, as opposed to *during*, a recess.

The practice of appointing officials to vacancies that arose prior to a recess goes back to the time of James Madison, although his Administration's views regarding such appointments' constitutional validity are unclear. Madison apparently made five recess appointments to vacancies that arose before the recess in question—with no record of any consideration of their constitutionality—but also declined to appoint someone to a pre-recess vacancy because he was warned that such an appointment would be unconstitutional.[248] Early congressional action was also indeterminate, as statutes were passed authorizing pre-recess vacancy appointments, which may have suggested either that they were constitutional, or that, without specific authorization, they were not.[249] In 1814, Senator Gore suggested such appointments would be unconstitutional, and an 1822 Senate Committee used similar language.[250] Then, in 1823, Attorney General Wirt advised President Monroe that he had the power to fill a pre-recess vacancy appointment, and this advice has largely been adopted—with some exceptions in the 1830s and 40s—by subsequent executive legal

247 Brief of Senate Republican Leader Mitch McConnell et al. as Amici Curiae in Support of Certiorari, *Noel Canning*, 134 S. Ct. 2550 (No. 12-1281). This amicus brief raises some difficult questions because normally the number of Senators who signed it (forty-four) would be sufficient to raise meaningful institutional objection. But, there is good reason not to overly privilege amicus briefs in ongoing litigation as indicative of historic branch views. The inquiry into historical practice asks whether the branches have agreed, *in the past*, regarding a constitutional question. It would be problematic if a branch—or party—could simply wait until litigation regarding an issue occurred to file a brief, and then express its views regarding the practice and have those views be treated as dispositive. This would essentially give the current branches or parties a veto power over the constitutionality of the practice. Moreover, because the relevant inquiry is into *historical* practice—the current views of the Senate do not necessarily bear on, and cannot definitively answer, whether *past* practice evinces interbranch agreement. For this reason, I would not conclude that briefs in pending litigation are *dispositive* of constitutional views of the branches. But that does not mean they are irrelevant. Indeed, how to weigh such briefs is a difficult question and, as such, their weight should likely be context-dependent.

248 Not surprisingly, the majority emphasizes the five appointments that were made, *see Noel Canning*, 134 S. Ct. at 2571, while Justice Scalia discounts them, because "there is no indication that any thought was given to their constitutionality, either within or outside the Executive Branch." *Id.* at 2611 (Scalia, J., concurring).

249 *Id.* at 2572 (majority opinion); *id.* at 2608 (Scalia, J., concurring).

250 *Id.* at 2571–72 (majority opinion).

advisers.[251] The Senate, meanwhile, did not mention the issue again until 1863, after President Lincoln appointed a Supreme Court Justice to a pre-recess vacancy post.[252] Following this appointment, the Senate directed the Judiciary Committee to assess the constitutionality of such pre-recess vacancy recess appointments, and the resulting Committee report concluded that such appointments were unconstitutional.[253] The same day the report was released, the Senate passed the Pay Act of 1863, which prohibited payment to any person appointed during a recess "to fill a vacancy . . . [which] existed while the Senate was in session."[254]

Despite this Act, the executive branch continued to rely on Wirt's analysis in making pre-recess vacancy recess appointments, although how many such appointments were made is unclear.[255] In 1905, during debates regarding a Senate Judiciary Committee Report (which did not mention pre-recess vacancy appointments) that grew out of controversial intersession recess appointments made by President Roosevelt in 1903, two Senators suggested that the 1863 report did not represent the Senate's view, and one of those Senators suggested that "'the Senate ha[d] acquiesced' in the President's 'power to fill' pre-recess vacancies."[256] Following this, there were some other actions that arguably indicated a Senate view that such appointments were constitutional. In 1916, the Senate voted to pay an appointee of a pre-recess vacancy and, during the debate, both Senators to address the question agreed that the President had the constitutional power to make the appointment, even though one of them would have voted against paying him.[257] In 1927, the Comptroller General stated that there is "no question" that the President could fill a pre-recess vacancy.[258] And, in 1940, the Senate amended the Pay Act to authorize payment to certain appointees that had been appointed to pre-recess

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251 *Id.* at 2612 (Scalia, J., concurring).

252 During that time, between 1823 and 1863, Justice Scalia emphasizes that only ten recess appointments filled pre-recess vacancies and most were to "minor offices . . . unlikely to have gotten the Senate's attention." *Id.* at 2613.

253 *Id.* at 2572 (majority opinion); *id.* at 2613 (Scalia, J., concurring).

254 Act of Feb. 9, 1863, § 2, 12 Stat. 646. As noted above, Justice Scalia suggests that the passage of the Pay Act indicated that the Senate viewed such recess appointments as unconstitutional, *Noel Canning*, 134 S. Ct. at 2615 (Scalia, J., concurring), while the majority concludes that the evidence of this is "equivocal." *Id.* at 2572 (majority opinion).

255 *Noel Canning* 134 S. Ct. at 2614 (Scalia, J., concurring).

256 *Id.* at 2572 (majority opinion).

257 *Id.* at 2572–73.

258 *Id.*; Appointments—Recess—Foreign Service, 7 Comp. Gen. 10, 11–12 (1927).

vacancies.[259] Since the 1940 Pay Act, the Executive has continued to make pre-recess vacancy appointments, and the Senate has not formally objected to any of them. In 1984, when several Senators opposed a pre-recess vacancy appointment to the Federal Reserve Board, seven Senators suggested such appointments were unconstitutional.[260] No other constitutional objection was made until the Senators' amicus brief in *Noel Canning* itself. Based on this history, the majority concludes that the President has the authority to appoint officials to pre-recess vacancy appointments,[261] while Justice Scalia suggests that the evidence is merely evidence of a "long-simmering interbranch conflict."[262]

Based on the articulation and deliberation approach, the majority's ultimate conclusion may be right, but not for the reasons it gives. This question of constitutional authority had been debated for a long time, and we might more fairly assume that both branches were aware of the issue from the mid-1860s onwards.[263] With some early exceptions, from 1821 on, the Executive articulated and acted on an apparent belief that it had constitutional authority to make such appointments.[264] The Senate did not debate the question in earnest until 1863, when a report suggested that the practice was unconstitutional, which was followed by a statute that seemed to reject the Executive's practice.[265] Following this, a few Senators expressed views that such appointments were constitutional in 1905 and 1916, and the Senate then permitted payment to some pre-recess vacancy appointments in 1940.[266] We cannot know if the decision to pass the 1940 Act was

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259 Payment was permitted, with some exceptions, where "(1) the 'vacancy arose within thirty days prior to the termination of the session,' (2) 'at the termination of the session' a nomination was 'pending,' or (3) a nominee was 'rejected by the Senate within thirty days prior to the termination of the session.'" *Noel Canning*, 134 S. Ct. at 2573 (quoting Act of July 11, 1940, Pub. L. No. 76-738, 54 Stat. 751, 751 (codified at 5 U.S.C. § 56 (1946))). The majority concludes that passage of this Act signaled that "the 1940 Senate (and later Senates) in effect supported the President's interpretation of the Clause." *Noel Canning*, 134 S. Ct. at 2573. Justice Scalia, on the other hand, concludes that the 1940 Act "'reflect[ed] at most a desire not to punish public servants caught in the crossfire' of interbranch conflict." *Id.* at 2615 (Scalia, J., concurring).

260 *Id.* at 2616.

261 *Id.* at 2573 (majority opinion).

262 *Id.* at 2617 (Scalia, J., concurring).

263 Of course, whether we should presume that subsequent Senates, following the debate in the 1860s, were aware of the issue is a question of legitimate debate. However, even if one assumes that the Senate was not, as a body, aware of the issue until the 1940s when it passed the Pay Act, the ultimate conclusion of the analysis may well be the same.

264 *See supra* note 234 and accompanying text.

265 *See supra* note 253 and accompanying text.

266 *See Noel Canning*, 134 S. Ct. at 2555.

the result of the Senate's constitutional agreement with the Executive that pre-recess vacancy appointments are constitutionally valid (as the majority suggests),[267] but if we assume that the Senate was aware of the constitutional issue—which, given the prior robust debates over the issue, seems at least potentially fair—and chose to pay the employees, then we can examine subsequent practice to see if it suggests a stable constitutional agreement. Following the 1940 Act, the President continued to make such appointments, and the Senate never meaningfully objected on constitutional grounds with the exception of the statements of several Senators in 1984. This is despite the fact that there was policy objection to several pre-recess vacancy appointments.[268] Given presumed senatorial awareness of the issue, other senatorial objections to such recess appointments, the fact that the Senate did not object to any such appointments on constitutional grounds prior to 1984 or after, and that only seven Senators made such objections then, this nonobjection can arguably be seen as evidence of constitutional agreement.[269]

While the majority thus may have gotten this question right, it went wrong in trying to shoe-horn nineteenth-century branch practice into some sort of consistent vision of constitutional agreement and in trying to distinguish the 1863 Pay Act as "equivocal," while embracing the 1940 Pay Act as evidence that "the 1940 Senate . . . in effect supported the President's interpretation of the Clause."[270] The question of the authority to make pre-recess vacancy appointments was subject

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267 *See id.* at 2564.

268 Between 1945 and 1984, Senators frequently opposed pre-recess vacancy appointments for policy or political reasons, but it does not appear that they raised constitutional concerns. *See, e.g.*, *President Names U.S. Controller*, N.Y. TIMES, Dec. 15, 1954, at 21; Philip Shabecoff, *Nominee Opposed by Businesses Gets Temporary Job at N.L.R.B.*, N.Y. TIMES, Dec. 28, 1979, at A17; *see also* S. COMM. ON THE JUDICIARY, 86TH CONG., REP. ON NOMINATION OF POTTER STEWART 5 (1959). Since 1984, some number of Senators opposed pre-recess vacancy recess appointments at least a dozen times, but it does not appear that there was any meaningful constitutional objection. *See, e.g.*, Neil A. Lewis, *Bush Names Affirmative Action Critic to Civil Rights Post*, N.Y. TIMES, Mar. 30, 2002, at A12 (policy objection); Nathaniel C. Nash, *Washington Talk; It's Act First, Face Questions Later for Some Appointees*, N.Y. TIMES (Jan. 12, 1987), http://www.nytimes.com/1987/01/12/us/washington-talk-it-s-act-first-face-questions-later-for-some-appointees.html (policy objection); Leslie Wayne, *The Comptroller for the Moment*, N.Y. TIMES, Dec. 8, 1998, at C1 (policy objection). *But see* Seelye, *supra* note 245; Bumiller & Stolberg, *supra* note 245.

269 Again, this raises the difficult question of what weight to give the Senate's amicus brief in *Noel Canning* itself. *See supra* note 247. Given the arguably longer history of potential acquiescence, we might more fairly discount the amicus brief for the reasons mentioned above, *see id.*, including that a present Senate's views or representation of past branch practice do not necessarily accurately reflect that past practice. But it is admittedly a difficult question.

270 *Noel Canning*, 134 S. Ct. at 2571–73.

to constitutional debate from the outset. Starting in 1823, with Attorney General Wirt's conclusion that such appointments were constitutional, we did not have constitutional agreement between the branches, but apparent constitutional disagreement. All indications by the Senate were that they disapproved of the practice until early in the twentieth century. While the 1863 Pay Act does not necessarily indicate that the Senate viewed these appointments as unconstitutional (as Justice Scalia claims), it is hard to say that it suggests the Senate agreed that such appointments were constitutional. And just as the 1863 Pay Act was indeterminate, so too was the 1940 Pay Act—it could not signal clear constitutional agreement any more than the 1863 Act signaled disagreement. Such discrete instances of constitutional debate do not often render clear winners or losers, nor can they suggest dispositive proof of constitutional agreement or disagreement. But the subsequent practice can be telling. Given that the Senate was likely aware of the issue, the subsequent practice, not the 1940 Act itself, arguably suggests that the Senate viewed the issue as settled in the Executive's favor. The majority would have been better off leaving it at that.

2. Treaty Termination

Although Article II provides that the President has the power to make treaties "by and with the Advice and Consent of the Senate,"[271] it says nothing about how treaties can be terminated. In a recent article, Curtis Bradley provides a rich and detailed account of historical practice seeking to answer the question of whether the President can unilaterally terminate treaties without congressional authorization.[272] His account raises some of the difficulties that can arise in the assessment of historical practice, and provides another example of how the articulation or deliberation approach might change how we view such practice.[273]

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271 U.S. CONST. art. II, § 2, cl. 2.

272 *See generally* Bradley, *supra* note 11. In 2001, OLC issued an opinion concluding that the President had unilateral authority to terminate treaties, relying heavily on historic branch practice and acquiescence. *See* OLC ABM Memo, *supra* note 29, at 13. Parts of this memo were later repudiated at the end of the Bush Administration. Nonetheless, reference to this memo is still useful in understanding how constitutional interpreters look to historical practice. *Cf.* Kristen E. Eichensehr, *Treaty Termination and the Separation of Powers*, 53 VA. J. INT'L L. 247, 265–66 (2013) (noting that the memo's rationale is still an instructive example of executive power arguments).

273 Indeed, this example highlights how the articulation or deliberation approach might operate differently than Bradley and Morrison's recent proposed improvements to acquiescence.

The question of whether the President could unilaterally terminate a treaty came up briefly in the Founding era within the executive branch, but the views were indeterminate and the President did not unilaterally terminate a treaty—nor is there evidence that he thought of doing so—before 1864.[274] Prior to 1864, Congress authorized several terminations of treaties, which the President then complied with, but there is no evidence that anyone in either branch considered whether the President could unilaterally terminate a treaty without congressional approval.[275] In 1864, President Lincoln gave notice of termination of a treaty with Great Britain.[276] This was the first time the President had unilaterally terminated a treaty, and it provoked some constitutional debate in the Senate about his authority to do so—one Senator called post hoc ratification of the termination a "mischievous precedent" sanctioning an "unauthorized act by the President," and others suggested that congressional approval was necessary, but it could be given retroactively.[277] Congress then "ratified" the termination via a joint resolution. In 1876, President Grant informed Congress that he would stop complying with an extradition treaty with Great Britain, unless Congress told him to continue to comply, noting that "[i]t is for the wisdom of Congress to determine whether the article of the treaty relating to extradition is to be any longer regarded as obligatory on the Government of the United States . . . ."[278] In 1899, for the first time, the McKinley Administration terminated certain clauses in a treaty without ex ante or ex post congressional approval.[279]

Bradley concludes that the nineteenth-century practice suggests "an understanding that congressional or senatorial approval was constitutionally required for the termination of U.S. treaties."[280] Under

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274 George Washington's cabinet debated action that would imply suspension or termination of a treaty with France in 1793, but ultimately decided against the proposed action. In their debate, the cabinet members did not consider the question of Congress's potential role in such terminations. OLC treated this episode as evincing a "clear[ ] belie[f] that the President had the unilateral constitutional authority to suspend treaties with another nation," OLC ABM Memo, *supra* note 29, at 16, whereas Bradley acknowledges this conclusion would be "reading a lot into mere silence." Bradley, *supra* note 11, at 797–98.

275 Congress authorized treaty terminations in 1798 and 1846, and the Senate alone authorized termination of a treaty in 1855. Bradley, *supra* note 11, at 789–90, 793. The congressional authorization in 1846 was preceded by a request from President Polk for a notice of termination. *Id.* at 790.

276 *Id.* at 794.

277 *Id.*

278 *Id.* at 791.

279 *Id.* at 798.

280 *Id.* at 800.

the articulation or deliberation approach, there is not sufficient evidence for this conclusion. It appears that there was little or no consideration of whether the President had such authority during that time.[281] While the very limited discussion of the issue in the Senate in 1864 suggests some Senators believed Congress had a role in treaty termination, the Senate ultimately approved of the termination, making it unclear whether it viewed the President's unilateral authority as constitutional or not.[282] Meanwhile, the Executive never publicly articulated or deliberated views regarding this question. It proposed termination of a treaty on its own in 1864, and while it acknowledged that Congress could reverse its unilateral termination in 1876, it then unilaterally, and without explanation, terminated certain provisions of a treaty in 1899, with no objection from Congress.[283] Under the articulation or deliberation approach, this does not mean we should assume the Executive believed it had unilateral constitutional authority to terminate treaties in 1899, nor that Congress "acquiesced" in that view by not objecting—it may have agreed with the termination as a policy matter, or simply not considered it. But it is hard to see how the limited debate and inconsistent practice can support any sort of clear interbranch "understanding that congressional or senatorial approval was constitutionally required."[284] To the contrary, the question seems to barely have been asked or answered during the nineteenth century.

The lack of such settlement also seems reflected in subsequent practice in the twentieth century. In 1909, the Solicitor of the State Department wrote an internal memorandum concluding that it was constitutional for the President to unilaterally terminate a treaty, citing the 1899 unilateral termination as an example.[285] Two years later, in 1911, President Taft gave notice of termination to Russia regarding

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281 *Cf. id.* ("The chief debate was simply over whether the full Congress or merely the Senate should be involved in treaty terminations . . . .").

282 In fact, under the traditional acquiescence approach, this congressional approval would likely be treated as acquiescence to executive authority. *See also* Bradley & Morrison, *supra* note 8, at 449.

283 While Bradley suggests that the 1899 termination might be explained as relating to conflicts with a statute, *see* Bradley, *supra* note 11, at 798–800, it does not appear that the executive branch ever made this claim, so it is not clear that the statute drove its analysis.

284 *Id.* at 800.

285 *Id.* at 801–02. It acknowledged that presidential action pursuant to congressional authorization might be more "effective and unquestionable," but found that the President could terminate "upon his own initiative" without a resolution from either house of Congress. *Id.* Note that this would have been an odd conclusion if the historical practice of the nineteenth century reflected a clear interbranch understanding that Congress had a necessary role to play.

a commercial treaty and submitted the matter to the Senate "with a view to its ratification and approval."[286] Congress "adopted and ratified" the termination through a joint resolution.[287] The debates on the resolution discussed whether both houses, or just the Senate, should be involved, but did not discuss whether the President could unilaterally terminate.[288]

In 1919, for the first time since the brief mention of the issue in 1864, the Senate debated whether the Executive had unilateral authority to terminate treaties. The discussion arose during senatorial debate over whether to consent to the Versailles Treaty.[289] Senator Henry Cabot Lodge proposed attaching a reservation to senatorial consent stating that the United States could withdraw from the treaty through enactment of a concurrent resolution by Congress.[290] During the debate, one Senator suggested such a provision would infringe on the President's authority to terminate, another suggested that the President could unilaterally withdraw from the treaty regardless of the proposed reservation, and others suggested that congressional authorization would be required for the President to withdraw.[291] The proposed reservation was ultimately rejected,[292] and the Senate ultimately did not consent to the treaty, even with reservations.[293] The Senate's view on the question thus remained decidedly unclear. In fact, this provides a good example of how hard it is to infer clear meaning from discrete instances of branch conduct. A Senator could have voted to reject the reservation if he believed the Executive had unilateral termination authority, if he believed the Senate had a constitutionally mandated role, or if he was unsure.

In any event, following this, no unilateral treaty terminations occurred until 1927, when the Coolidge Administration unilaterally terminated a treaty with Mexico.[294] Such unilateral presidential terminations became more common under President Roosevelt's ad-

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286 *Id.* at 795, 802.

287 *Id.* at 795.

288 Taft in later writing made clear that he thought the President could not unilaterally terminate a treaty unless he had specific authority by the terms of the treaty. *Id.* at 796.

289 *Id.* at 803.

290 *Id.*

291 *Id.* There was some discussion of Taft's termination in 1911, which at least one Senator regarded as a precedent of unilateral executive termination. *Id.* at 804.

292 *Id.* at 804–05.

293 *Id.* at 805.

294 *Id.* Congress had apparently expressed concerns about Mexico's confiscation of American property, which suggests that it might have agreed, as a policy matter, with the termination. *See id.* at 806.

ministration—often pursuant to internal executive memoranda concluding he had constitutional authority to do so.[295] President Roosevelt announced a unilateral termination of a treaty with Greece in 1933, unilaterally terminated a treaty with Italy in 1936,[296] with Japan in 1939,[297] a protocol relating to a Latin American trademark treaty in 1944, and suspended treaties unilaterally in 1939 and 1941.[298] The 1950s saw more unilateral presidential terminations, but usually in "low-profile situations that did not generate much attention."[299] In 1962, the Kennedy Administration unilaterally terminated a commercial treaty with Cuba, following the Cuban revolution, and, in 1965, the Johnson Administration gave notice that it would withdraw from a treaty governing international air carrier liability, but then withdrew the notice.[300]

These unilateral terminations did not generate any debate in the Senate. The question of unilateral authority became a topic of sustained debate, however, when President Carter announced unilateral termination of a mutual defense treaty with Taiwan pursuant to a policy of normalization with China.[301] Prior to this announcement, Congress passed a statute—signed by Carter—expressing "the sense of the Congress that there should be prior consultation between the Congress and the executive branch on any proposed policy changes" affecting the Taiwan treaty.[302] A few months later, President Carter announced recognition of China and termination of the Taiwan Treaty, creating substantial constitutional debate on the topic. Senator Byrd offered a resolution stating that it was "the sense of the Senate that approval of the U.S. Senate is required to terminate any mutual defense treaty between the United States and another nation."[303] The Foreign Relations Committee held three days of hear-

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295 *Id.*; *see also* OLC ABM Memo, *supra* note 29, at 15, 17.

296 Bradley, *supra* note 11, at 806–07.

297 Proposed resolutions supporting withdrawal from this treaty were made in both houses, suggesting potential policy agreement. *Id.* at 808.

298 *Id.* at 808–09. Roosevelt's Attorney General in 1941, Francis Biddle, stated that the Executive could unilaterally suspend the treaty but seemed to imply that he could not terminate it without congressional involvement. Even so, President Roosevelt unilaterally terminated a different treaty in 1944. *Id.*

299 *Id.* at 809.

300 *Id.* at 810.

301 *Id.* at 810–11.

302 *Id.* at 811; *accord* International Security Assistance Act of 1978, Pub. L. No. 95-384, § 26(b), 92 Stat. 730, 746. Carter did not mention this provision in his signing statement. Statement on Signing S. 3075 into Law, 2 PUB. PAPERS 1636 (Sept. 26, 1978).

303 Bradley, *supra* note 11, at 811.

ings on the resolution, hearing testimony and prepared statements from scholars and witnesses on both sides of the constitutional debate regarding whether the President had unilateral authority.[304] The Committee rejected the Byrd resolution, and reported out a resolution that would authorize unilateral presidential termination in fourteen prescribed instances—one of which would have permitted President Carter's action.[305] After that resolution reached the Senate floor, the Senate (voting 59–35) substituted the Byrd Resolution for the one reported out of the Committee.[306] The Senate, however, never actually voted on the resolution.[307] Meanwhile, former Senator Barry Goldwater, eight current Senators, and sixteen House members filed a lawsuit in D.C. federal district court seeking to prevent the termination of the treaty on constitutional grounds. The district court concluded that the President needed congressional approval, but was reversed by the D.C. Circuit, which held that the President had unilateral termination authority.[308] Without argument, the Supreme Court vacated the D.C. Circuit's decision on justiciability grounds, which effectively ended the controversy.[309]

Since the Taiwan Treaty controversy, the United States has terminated dozens of treaties, almost all via unilateral presidential action.[310] There has been little senatorial opposition in the meantime.[311] One controversy, however, bears mention. In 2002, President Bush announced he would withdraw from the Anti-Ballistic Missile (ABM) Treaty with Russia.[312] Thirty-two members of Congress brought suit challenging the constitutionality of the termination, but the suit was dismissed for lack of standing.[313] Some members of the House proposed a resolution that would have opposed termination of the ABM treaty on policy grounds, without taking a position on the constitu-

304 *Id.* at 811–12.

305 *Id.* at 812.

306 *Id.*

307 *Id.*

308 Goldwater v. Carter, 617 F.2d 697, 699 (D.C. Cir.), *judgment vacated*, 444 U.S. 996 (1979).

309 Bradley, *supra* note 11, at 814.

310 *Id.* For example, in 1985, Reagan terminated a treaty with Nicaragua. *Id.*

311 In 1985, Senator Goldwater introduced a resolution that would have provided that Senate approval was required for termination, but the Senate never voted on it. *Id.* at 814 n.243 (citing S. Res. 40, 99th Cong., 131 CONG. REC. 678, 679–80 (1985)).

312 *Id.* at 815.

313 *Id.*

tional question, but the House never voted on it.[314] Ultimately, no formal effort was made by Congress as a body to oppose the termination.[315] In the meantime, OLC released a memo concluding that the President had unilateral authority.[316] The treaty was ultimately terminated, and Congress approved funding for Bush's missile defense plan.[317] Since then there has been no senatorial opposition.[318]

Bradley ultimately concludes that "as a matter of practice, presidents today exercise a unilateral power of treaty termination."[319] He emphasizes that the precedent dates back to the end of the nineteenth century, it has been especially robust since the 1930s, and that Congress "has not seriously opposed" this authority.[320] He acknowledges that crediting congressional inaction as acquiescence is perilous, but suggests it is valid in this case because it is longstanding, involved numerous congresses and presidents over unified and divided government, and that, "[w]ith the exception of the debate over the . . . Taiwan Treaty, there has been a century of congressional passivity in the face of presidential treaty terminations."[321] However, if we look at acquiescence for a realistic indication of constitutional agreement, these reasons do not seem sufficient.[322]

Under the articulation or deliberation approach, the practice seems entirely indeterminate in the nineteenth century, and, while the Executive seems to have concluded it had authority in 1909, the question of unilateral presidential authority was not actually debated in Congress until 1919—but the Senate's views were unclear. The President did, indeed, begin unilateral treaty terminations in earnest in the 1930s, but the examples in the 1930s and 1940s do not clearly evince senatorial constitutional agreement, as they seem to have been congruent with congressional policy and they occurred under a unified

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314 *Id.* at n.249. And at least one Senator (Senator Kyl) took to the floor in favor of executive unilateral termination authority. *Id.* at 816 n.254.

315 *Id.* at 816.

316 *Id.* at 815–16.

317 *Id.* at 816. Under Bradley and Morrison's theory, this approval of Bush's missile defense plan would arguably be a signal of congressional acquiescence via a statute implicitly accepting the Executive's conduct.

318 President Bush terminated a protocol to a consular convention in 2005 and a tax treaty with Sweden in 2007. *Id.*

319 *Id.* at 821.

320 *Id.*

321 *Id.*

322 Again, there might be reasons to credit historical practice other than constitutional agreement, which Bradley discusses. *See id.* at 822–23.

government largely during a world war.[323] This would hardly seem the time for the Senate to pick a fight about constitutional authority. The precedents in the 1950s were, as Bradley states, regarding "low-profile situations," and the sole unilateral termination of a treaty in the 1960s with Cuba was congruent with congressional policy desires.[324] Thus, even assuming the Senate was on notice regarding the constitutional issue, congressional nonobjection at this time would not seem to be very indicative of congressional agreement.

Then came the 1970s, and a robust debate over executive unilateral termination authority regarding the Taiwan Treaty.[325] The outcome was, as is typical, indeterminate, but it is hard to say that the debate, itself, was the "exception" to a constitutional understanding, as opposed to indicative of a lack of consensus on the question. In fact, it is not entirely surprising that the Senate would not have previously come to a constitutional consensus on the question, given that previous unilateral terminations were either low-profile or in line with policy goals. Perhaps because there was substantial policy disagreement, the Senate finally felt the need to debate the issue in earnest.

But, while the settlement of the debate in 1979 was unclear, subsequent conduct by the Senate—after being put on clear notice of the issue—might well be indicative of senatorial agreement, assuming the Senate had other reasons to oppose such terminations. The 2002 ABM treaty debate provides at least one such example, where there seems to have been significant policy disagreement with the termination, but no meaningful organized effort to challenge it on constitutional grounds. This suggests that the Senate had, in fact, come to a consensus view that the Executive had unilateral authority. Thus, while we end up in the same place under the articulation or deliberation approach, the way of getting there is quite different. The 1978

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323 For example, the termination of the treaty with Japan in 1939 followed proposed resolutions in both houses to terminate the treaty. The termination with Mexico in 1927 also followed congressional concerns being raised about Mexican conduct. *Id.* at 805–06.

324 In fact, President Kennedy noted that the embargo, of which the treaty termination was a part, was pursuant to congressional authorization. *See* Proclamation No. 3447, 27 Fed. Reg. 1085 (Feb. 7, 1962), *reprinted in* 76 Stat. 1446 (1962) ("I . . . [am] acting under the authority of section 620(a) of the Foreign Assistance Act of 1961 . . . ."); *see also* Bradley, *supra* note 11, at 810 (noting treaty termination was "part of the United States' embargo policy following the Cuban revolution"). Congress had explicitly authorized Kennedy to prohibit trade with Cuba in September 1961, five months before he did so. Foreign Assistance Act of 1961 § 620(a)(1), 22 U.S.C. § 2370(a)(1) (2014). Both the House and Senate versions of the law contained total-embargo authorizations, and no members of Congress objected to such a provision. *See* 17 CONGRESSIONAL QUARTERLY ALMANAC 293–310 (1961).

325 Bradley, *supra* note 11, at 810–11.

debate is not an "exception" but perhaps an instigation to real debate, and the practice after the debate would seem to support Bradley's view—but the amount of relevant, supportive practice that exists is significantly less than under his approach.

CONCLUSION

For better or worse, historical practice plays a crucial role in interpreting separation of powers law. The aim of this Article has been to better understand precisely how such practice does and should inform our understanding of separation of powers. I have sought to highlight some of the interpretive pitfalls of looking to past practice. But, pointing out these flaws and difficulties is not enough. The use of history in interpreting separation of powers law is here to stay. As a result, I have not only highlighted these pitfalls, but also suggested a way forward. Acquiescence is subject to deep and unappreciated critiques. But many of them can be overcome if we recognize and respond to them when assessing past practice. The articulation or deliberation approach I have proposed above seeks to do just that. Of course, this new approach cannot out-and-out *solve* the descriptive (or normative) problems underlying the acquiescence approach. So long as we look at past practice as an indication of branch constitutional views or arrangements, we will always bear the risk of misinterpreting past practice. We simply cannot *know* what drives the branches to act the way they do. But, we can do better. We can do better in winnowing out when past practice is indicative of constitutional analysis and agreement, rather than ignorance, apathy, or coercion. And, we can do better in how rigorously we look at different instances of past practice. Given the frequency with which past practice is used and its import to our understanding of constitutional law, we need to do better if we seek to truly understand the *history* of separation of powers.