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The Use and Limits of Longstanding Practice in Constitutional Law

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THE USE AND LIMITS OF LONGSTANDING PRACTICE IN CONSTITUTIONAL LAW

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Longstanding, post-adoption practice has become prominent in constitutional law, but its proper use remains unclear. As this Article shows, post-adoption longevity takes at least three argumentative forms: positive longevity, which uses the longevity of a practice as evidence of constitutionality; negative longevity, which uses the longstanding absence of a practice as evidence of unconstitutionality; and mandatory longevity, which requires longevity for a practice to be constitutional. Each use recognizes that longevity signals something about non-judicial interpretations of the Constitution, but each differs in what that something is. Prior scholarship has missed this range of appeals to longevity and their many claims about non-judicial interpretation, focusing instead on values that justify longevity itself rather than its particular form. As a result, the literature is missing a theory of longstanding practice that explains not only its proper use in constitutional argument but also its limits.

This Article fills that gap. Drawing on the non-judicial constitutionalism literature, it explains that non-judicial officials interpret the Constitution with different competencies and democratic responsiveness than courts. Longevity's value is that it draws out deliberate attempts by non-judicial officials to engage with constitutional meaning through those distinctive features. Incorporating the results into constitutional doctrine is essential for correcting the institutional deficiencies that courts face as interpreters. However, the same concern counsels against using longevity to prevent non-judicial officials from continuing to develop new practices that engage with constitutional meaning. These two principles—the incorporation principle and the continuing practice principle—guide the use of longevity in court.

Armed with those principles, the Article then evaluates the three uses of longevity in constitutional law. Mandatory longevity contravenes the continuing practice principle by using longevity to block new practices.

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Negative longevity mostly goes wrong for the same reason, although the incorporation principle occasionally justifies it. By contrast, positive longevity rightly incorporates non-judicial interpretations while allowing officials to change the practice if they choose. The result is an approach to post-adoption longevity that draws all that can be inferred from a longstanding practice without using that practice to constrain the future.

INTRODUCTION 12
I. THE USES OF LONGSTANDING PRACTICE 17
A. Positive Longevity 17
B. Negative Longevity 21
C. Mandatory Longevity 23
II. NON-JUDICIAL CONSTITUTIONALISM AND LONGSTANDING PRACTICE 27
A. The Value of Longevity 29
1. Settlement 30
2. Wisdom 32
3. Acquiescence 33
B. Why Non-Judicial Constitutionalism? 35
1. The Constitution Outside the Courts 35
2. Longevity 43
C. The Legal Significance of Longevity 47
1. Two Principles of Longevity 47
2. An Analogy to Convention 51
III. EVALUATING THE USES OF LONGEVITY 54
A. Mandatory Longevity 54
1. Tradition Alone and the Force of Wisdom 54
2. Tradition by Analogy 58
B. Negative Longevity 59
1. Understanding Absence 60
2. The Limited Use of Negative Longevity 64
C. Positive Longevity 66
1. Positive Longevity and Non-Judicial Constitutionalism 66
2. Longevity and Liquidation 69
3. Longevity and Historical Gloss 71
CONCLUSION 75

INTRODUCTION

Supposedly at a time of originalism,[1] a different kind of history has spread across constitutional law. In just the last few years, important constitutional decisions from the Supreme Court involving structural powers,[2] procedural rights,[3] abortion rights,[4] gun rights,[5] religious rights,[6] and speech rights[7] have relied on longstanding historical practice not from the founding but from the years since ratification. That reliance was not new. For decades, core aspects of constitutional law have turned on what courts make of longstanding, post-adoption practices. Originalism may have more rhetorical bite,[8] but it is not the only historical game in town.

As Justice Barrett recently noted, however, questions about the use of longstanding practice in constitutional law remain unanswered—questions as basic as why such practice is constitutionally relevant, who can engage in it, what they have to do, when, and for how long.[9] Intuitively, the idea that a practice has continued for two centuries or has never occurred before seems significant.[10] Yet what makes that significance constitutional is harder to pinpoint. Unlike originalism, longstanding practice cannot claim authority from a specific historical moment. Nor is it a matter of simple precedent binding subsequent actors. Without a clear logic for its use, courts have invoked post-adoption longevity in vastly different, and even conflicting, ways across constitutional law.[11]

1. *See, e.g.*, Donald Ayer, *The Supreme Court Has Gone Off the Rails*, N.Y. TIMES (Oct. 4, 2021), https://www.nytimes.com/2021/10/04/opinion/supreme-court-conservatives.html; Erwin Chemerinsky, *The Philosophy that Makes Amy Coney Barrett So Dangerous*, N.Y. TIMES (Oct. 21, 2020), https://www.nytimes.com/2020/10/21/opinion/supreme-court-amy-coney-barrett.html.

2. Moore v. Harper, 143 S. Ct. 2065, 2086–88 (2023); United States v. Texas, 143 S. Ct. 1964, 1970–71 (2023); Whole Woman's Health v. Jackson, 142 S. Ct. 522, 535 (2021); *cf.* Torres v. Texas Dep't of Pub. Safety, 142 S. Ct. 2455, 2464–65, 2468 (2022) (relying on post-adoption practice while noting the absence of founding-era history).

3. Mallory v. Norfolk S. Ry. Co., 143 S. Ct. 2028, 2035 (2023); Samia v. United States, 143 S. Ct. 2004, 2012–13 (2023).

4. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2248 (2022).

5. N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2136 (2022).

6. Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2431–32 (2022).

7. Counterman v. Colorado, 143 S. Ct. 2106 (2023); Hous. Cmty. Coll. Sys. v. Wilson, 142 S. Ct. 1253, 1259–60 (2022).

8. *See* Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545, 549 (2008) (arguing that originalism cannot be understood as a legal theory independent of its role in the conservative legal movement); *cf.* Jeremy K. Kessler & David E. Pozen, *Working Themselves Impure: A Life Cycle Theory of Legal Theories*, 83 U. CHI. L. REV. 1819, 1891 (2016) (similar).

9. *See Bruen*, 142 S. Ct. at 2162–63 (Barrett, J., concurring).

10. *See* Josh Chafetz, *Unprecedented?: Judicial Confirmation Battles and the Search for a Usable Past*, 131 HARV. L. REV. 96, 96 (2017).

11. *Cf.* Stephen E. Sachs, *Originalism: Standard and Procedure*, 135 HARV. L. REV. 777, 781 (2022) (explaining that the primary benefit of historical analysis in constitutional law is that it

Enter the academy. After decades of focus on originalist history,[12] scholarship about post-adoption practice—and post-adoption longevity in particular—has flooded constitutional theory.[13] Whether sounding in "liquidation"[14] or "historical gloss,"[15] law reviews abound with recent attempts to explain why longstanding, non-judicial practices carry constitutional significance. Though these theories differ in the details, they usually highlight how the longevity of a practice reflects its settlement,[16] wisdom,[17] or official acquiescence.[18] Such scholarship has greatly advanced the place of longevity in constitutional theory past its prior state of disregard. However, its focus on those values has caused it to miss the range of ways that courts use longevity and the different constitutional arguments those uses rest on. In short, the literature is missing a theory of longstanding practice that explains not only longevity's proper use, but also its limits as a form of constitutional argument.[19]

This Article provides that theory. Its first contribution is to show the variety of appeals to longevity across seemingly unrelated areas of doctrine, as well as how each relies on a different inference about non-judicial constitutional interpretation. Its second contribution is to evaluate those uses.

"constrains judicial behavior" (quoting John W. Compton, *What Is Originalism Good For?*, 50 TULSA L. REV. 427, 434 (2015))).

12. In his famous study of constitutional modalities, Professor Bobbitt described historical arguments as "depend[ing] on . . . the original understanding" of the Constitution. PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 9 (1982); *see also* CHARLES A. MILLER, THE SUPREME COURT AND THE USES OF HISTORY 4–6 (1969) (same). That omits post-adoption history. *See* Marc O. DeGirolami, *The Traditions of American Constitutional Law*, 95 NOTRE DAME L. REV. 1123, 1126–27 (2020) (noting this omission).

13. *See, e.g.*, Shalev Roisman, *Constitutional Acquiescence*, 84 GEO. WASH. L. REV. 668, 671–72 (2016); Richard H. Fallon, Jr., *The Many and Varied Roles of History in Constitutional Adjudication*, 90 NOTRE DAME L. REV. 1753, 1755 (2015); Jack M. Balkin, *The New Originalism and the Uses of History*, 82 FORDHAM L. REV. 641, 641–42 (2013).

14. *See* William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1 (2019); Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519 (2003).

15. *See, e.g.*, Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Constitutional Conventions, and the Judicial Separation of Powers*, 105 GEO. L.J. 255, 262–63 (2017) [hereinafter Bradley & Siegel, *Historical Gloss*]; Curtis A. Bradley & Neil S. Siegel, *After Recess: Historical Practice, Textual Ambiguity, and Constitutional Adverse Possession*, 2014 SUP. CT. REV. 1, 25 (2014) [hereinafter Bradley & Siegel, *After Recess*]; Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 424–28 (2012).

16. *See* Baude, *supra* note 14, at 42–43; *cf.* Curtis A. Bradley, *Doing Gloss*, 84 U. CHI. L. REV. 59, 66–67 (2017) (linking settlement to two separate values).

17. *See* Ernest A. Young, *Our Prescriptive Judicial Power: Constitutive and Entrenchment Effects of Historical Practice in Federal Courts Law*, 58 WM. & MARY L. REV. 535, 542–43 (2016).

18. *See* Roisman, *supra* note 13, at 671–72.

19. Some scholars have identified limits on individual uses of post-adoption longevity within specific institutional contexts. *See, e.g.*, Bradley & Morrison, *supra* note 15, at 424–28; Roisman, *supra* note 13, at 671–72. However, by exploring more general limits on post-adoption longevity as a mode of constitutional argument, this Article breaks new ground.

Drawing on the non-judicial constitutionalism literature, it explains that non-judicial officials interpret the Constitution with institutional competencies and democratic responsiveness that courts lack. Longevity's value is that it separates the non-judicial interpretations that reflect these features from more reactive, low-value practices. Incorporating such longstanding interpretations is essential for bringing these features into constitutional law to correct courts' institutional deficiencies. Because these features revolve around responding to changing conditions, however, courts cannot use longevity to prevent non-judicial officials from continuing to construct new constitutional practices. These two principles—the incorporation principle and the continuing practice principle—guide the use of longevity in court. Measured against them, one of the current uses of longevity is improper, one is mostly improper, and one is valid.

By grounding longevity in non-judicial constitutionalism, this Article takes the important step of reconciling post-adoption longevity with basic principles of constitutional theory. No matter how longstanding, practice cannot override constitutional text.[20] As such, longevity's significance must attach not to the past *qua* past but to what it reveals about established interpretations of the text. From that perspective, non-judicial constitutionalism highlights how courts are not the only, or even primary, interpreters of the Constitution.[21] Indeed, it is one of the only realistic ways to combat judicial hegemony over constitutional meaning.[22] At the same time, excessive deference risks making longevity an impediment to new experiments and democratic engagement[23]—a concern so serious that some argue courts should ignore post-adoption practice altogether.[24] That too would be a mistake. Two centuries of practice should prevent today's judges from imposing their idiosyncratic interpretations on the nation. Grounding longevity in non-judicial constitutionalism navigates these two poles,

20. *See* Adam M. Samaha, *Dead Hand Arguments and Constitutional Interpretation*, 108 COLUM. L. REV. 606, 615–16 (2008).

21. *See* GEORGE THOMAS, THE (UN)WRITTEN CONSTITUTION 131–33 (2021).

22. *See generally* Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CALIF. L. REV. 1027, 1029 (2004) [hereinafter Post & Siegel, *Popular Constitutionalism*].

23. *See generally* ROBERT W. GORDON, TAMING THE PAST: ESSAYS ON LAW IN HISTORY AND HISTORY IN LAW 5 (2017) ("[T]he historicized past poses a perpetual threat to the legal rationalizations of the present.").

24. *See, e.g.*, SAIKRISHNA BANGALORE PRAKASH, THE LIVING PRESIDENCY: AN ORIGINALIST ARGUMENT AGAINST ITS EVER-EXPANDING POWERS 123–25 (2020); Stephen M. Griffin, *Against Historical Practice: Facing Up to the Challenge of Informal Constitutional Change*, 35 CONST. COMMENT. 79, 106 (2020).

drawing all that can be inferred from a longstanding practice without using that practice to constrain the future.[25]

The Article proceeds as follows. Part I describes three vastly different uses of longstanding practice in constitutional law today. "Positive longevity" uses the longevity of a practice to support, but not conclusively determine, its constitutionality. "Negative longevity"[26] uses the longstanding absence of a practice to support, but not conclusively determine, the practice's unconstitutionality. Finally, "mandatory longevity" requires a practice to be longstanding, or traditional, to come within the Constitution. Each use is based on what longevity says about non-judicial interpretations of the Constitution,[27] but each takes longevity to say something different.

To identify what courts can validly draw from longevity, Part II turns to the literature on non-judicial constitutionalism.[28] As it explains, non-judicial officials interpret the Constitution through competencies and democratic inputs that are unavailable to courts.[29] As such, the value of longevity is not simply that a practice has existed at length, but that it allows courts to correct competence- and democracy-based deficiencies in their own interpretations. Yet that value also highlights the importance of not using longevity to close off non-judicial interpretation. Put differently, incorporating a longstanding practice into constitutional doctrine is justified by the institutional benefits that non-judicial interpretation offers, so courts should not use longevity to prevent that interpretation from continuing. In short, two related principles guide longevity's constitutional significance in court—one that calls for incorporating the interpretations that underlie longstanding practices, and one that calls for allowing new non-judicial practices to continue developing. These principles align with the judicial treatment of constitutional conventions, which are the other form of constitutionally significant post-adoption practice.

Part III applies the incorporation and continuing practice principles to the uses of longevity identified in Part I. Mandatory longevity runs headlong into the continuing practice principle because it requires non-judicial officials

25. *Cf.* Rebecca L. Brown, *Tradition and Insight*, 103 YALE L.J. 177, 180 (1993) (noting the importance of navigating these two concerns in historical analyses).

26. *See* Aziz Z. Huq, *Fourth Amendment Gloss*, 113 NW. U. L. REV. 701, 711 (2019) (noting but not exploring a "negative" appeal to longevity); *cf.* Leah M. Litman, *Debunking Antinovelty*, 66 DUKE L.J. 1407, 1413–14 (2017) (using the term "antinovelty").

27. *Cf.* Bradley & Siegel, *Historical Gloss*, *supra* note 15, at 257 (explaining that longevity "informs the content of constitutional law").

28. *See* Trevor W. Morrison, *Suspension and the Extrajudicial Constitution*, 107 COLUM. L. REV. 1533, 1542–43 (2007) (collecting theorists and noting general areas of overlap and disagreement).

29. *See generally* Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676, 678–79 (2005) (identifying these two values at the heart of non-judicial constitutionalism).

to either adhere to tradition or not exercise public power at all. Under the guise of opening the channels of non-judicial interpretation,[30] mandatory longevity actually closes them off. Negative longevity is more complicated. Usually courts should ignore the longstanding absence of a practice because it signals only a lack of need for the practice. Even if it does reflect a deliberate rejection of the practice, that rejection may be based on political or conventional values that courts must allow to change. In rare circumstances, however, the incorporation principle requires courts to treat the longstanding absence of a practice as evidence of unconstitutionality. Finally, positive longevity rightly treats longevity as substantial evidence of constitutionality, reflecting the proper balance between incorporating non-judicial practices and allowing them to change. Guided by non-judicial constitutionalism, this Part closes by showing how to apply positive longevity without committing the errors that doom other longevity theories, especially those of liquidation.

A final word before beginning. Longstanding practice has become central to American constitutional law recently, but it reflects a core public law problem: How should the Constitution out of court affect the Constitution in court?[31] The problem is widespread, even if it takes different forms in different systems. In England, a lack of centralized constitution has underscored the constitutive function of customary practice, though implications in court vary.[32] Elsewhere, as in Canada, evolving documents combined with inherited traditions and homegrown conventions have refashioned the issue into one of how written and unwritten constitutional sources interact.[33] Long considered the paradigm of written constitutionalism,[34] America's originalist turn has now made the document's relation to two centuries of practice into a pressing problem.[35] Even as the

30. *Cf.* Young, *supra* note 17, at 557–58 (noting this value of longevity); Bradley, *supra* note 16, at 66–67 (similar).

31. *See* Edward A. Hartnett, *A Matter of Judgment, Not a Matter of Opinion*, 74 N.Y.U. L. REV. 123, 156 (1999) (describing this as "perhaps *the* central question" in constitutional law).

32. *See generally* A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 22 (8th ed. 1915).

33. *See generally* ANDREW HEARD, CANADIAN CONSTITUTIONAL CONVENTIONS: THE MARRIAGE OF LAW AND POLITICS 5 (2d ed. 2013). *See also* Vanessa A. MacDonnell, *Rethinking the Invisible Constitution: How Unwritten Constitutional Principles Shape Political Decision-Making*, 30 MCGILL L.J. 175, 180 (2019).

34. For the history behind this feature of the American Constitution, see generally Nikolas Bowie, *Why the Constitution Was Written Down*, 71 STAN. L. REV. 1397, 1492–1504 (2021). *Cf.* LINDA COLLEY, THE GUN, THE SHIP AND THE PEN: WARFARE, CONSTITUTIONS AND THE MAKING OF THE MODERN WORLD 2–14 (2021) (noting the spread of written constitutions around the world during the latter half of the eighteenth century).

35. *See* Amy Coney Barrett & John Copeland Nagle, *Congressional Originalism*, 19 U. PA. J. CONST. L. 1, 3–5 (2016).

solution must be tailored to American constitutional theory, the ubiquity of the problem suggests it is worthy of attention.

I. THE USES OF LONGSTANDING PRACTICE

This Part provides a taxonomy of the different appeals to longstanding practice in constitutional law. Though scholars often treat post-adoption longevity as singular,[36] courts actually invoke longevity in at least three ways: positive longevity, where the longstanding presence of a practice suggests that it is constitutional; negative longevity, where the longstanding absence of a practice suggests that it is unconstitutional; and mandatory longevity, which requires longevity for a practice to be constitutional. As this Part also shows, each use draws from longevity a different inference about non-judicial interpretations of the Constitution.

A. Positive Longevity

Perhaps the most intuitive use of post-adoption practice, positive longevity treats the longevity of a practice as support for that practice when challenged. Importantly, however, it does not treat longevity itself as a source of constitutionality; an unlawful practice cannot become lawful simply by persisting for a long time.[37] Instead, positive longevity takes a longstanding practice to signal that non-judicial officials have long interpreted the Constitution to allow the practice,[38] lending "significant weight" to the practice's constitutionality.[39] Invoking that interpretive weight, positive longevity directs courts to interpret the Constitution to uphold the longstanding practice if they can.[40] If that is impossible, then the practice is unlawful despite its longevity.[41]

36. *Cf.* DeGirolami, *supra* note 12, at 1124 (arguing that the jurisprudence is "consistent").

37. *See* Walz v. Tax Comm'n, 397 U.S. 664, 678 (1970) ("It is obviously correct that no one acquires a vested or protected right in violation of the Constitution by long use."); Youngstown Sheet & Tube Co. v. Sawyer (*The Steel Seizure Case*), 343 U.S. 579, 613 (1952) (Frankfurter, J., concurring) (similar); *see also* Alison L. LaCroix, *Historical Gloss: A Primer*, 126 HARV. L. REV. F. 75, 76 (2013) (discussing Frankfurter's opinion and how it treated historical practice).

38. *See* Burson v. Freeman, 504 U.S. 191, 203–06 (1992) (plurality) (upholding against a First Amendment challenge a law limiting polling-place campaigning in part because every state had long had such laws, suggesting a "widespread and time-tested consensus" that they are constitutional); Smiley v. Holm, 285 U.S. 355, 369 (1932) ("General acquiescence cannot justify departure from the law, but long and continuous interpretation in the course of official action under the law may aid in removing doubts as to its meaning.").

39. NLRB v. Noel Canning, 573 U.S. 513, 524–26 (2014).

40. *See, e.g.*, Samia v. United States, 143 S. Ct. 2004, 2018 (2023) (using longstanding practice to support the constitutionality of evidentiary rules under the Confrontation Clause); JAMES E. PFANDER, CASES WITHOUT CONTROVERSIES 225–26 (2021) (using this approach to reconcile history and doctrine in Article III standing law).

41. *See, e.g.*, INS v. Chadha, 462 U.S. 919, 958–59 (1983).

Examples of positive longevity span constitutional law. Disputes over executive power are filled with positive longevity,[42] as are disputes about the scope of Article III[43]—including for determining whether a plaintiff has standing,[44] and whether a claim must come before a federal court rather than a non-Article III entity.[45] Disputes involving Congress likewise implicate positive longevity, whether for its authority to legislate,[46] appoint,[47] or investigate.[48] State power sometimes turns on positive longevity as well.[49] And individual rights adjudications, whether in denying a claim[50] or

42. *See, e.g.*, Am. Ins. Ass'n v. Garamendi, 539 U.S. 396 (2003); Dames & Moore v. Regan, 453 U.S. 654, 682–83 (1981); United States v. Pink, 315 U.S. 203, 223 (1942); United States v. Belmont, 301 U.S. 324, 330–31 (1937); The Pocket Veto Case, 279 U.S. 655, 689 (1929).

43. Sprint Commc'ns Co. v. APCC Servs., Inc., 554 U.S. 269, 274 (2008) (explaining that "history and tradition offer a meaningful guide to the types of cases that Article III empowers federal courts to consider"); Spokeo, Inc. v. Robins, 578 U.S. 330, 340–41 (2016) (noting that longevity is "instructive"); Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 473 (1982).

44. *See, e.g.*, *Spokeo*, 578 U.S. at 338; *Sprint Commc'ns*, 554 U.S. at 285–86; Vt. Agency of Nat. Res. v. Stevens, 529 U.S. 765, 773–74, 777 (2000) (finding longevity "well nigh conclusive" of whether *qui tam* suits were consistent with Article III).

45. Non-Article III courts may adjudicate "public rights," *see* Oil States Energy Servs. v. Greene's Energy Grp., 138 S. Ct. 1365, 1372–73 (2018), defined as a claim "that can be pursued only by grace of the other branches . . . or one that 'historically could have been determined exclusively by' those branches," Stern v. Marshall, 564 U.S. 462, 493 (2011) (quoting N. Pipeline Const. Co. v. Marathon Pipe Line Corp., 458 U.S. 50, 68 (1982)); *see also Ex parte* Bakelite Corp., 279 U.S. 438, 458 (1929). The converse issue—whether Congress may assign a non-judicial role to Article III judges—likewise relies on positive longevity. *See* Mistretta v. United States, 488 U.S. 361, 401 (1989).

46. *See, e.g.*, Dep't of Com. v. New York, 139 S. Ct. 2551, 2567 (2019) (finding, under the Enumeration Clause, that Congress had consistently asked demographic questions on the Census); Wisconsin v. City of New York, 517 U.S. 1, 20–22 (1996) (similar); Golan v. Holder, 565 U.S. 302, 320–24 (2012) (same for Copyright Clause); McCulloch v. Maryland, 17 U.S. 316, 401–02 (1819) (same for the Commerce Clause).

47. *See, e.g.*, Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC, 140 S. Ct. 1649, 1654–61 (2020); Freytag v. C.I.R., 501 U.S 868, 890 (1991) ("Congress' consistent interpretation of the Appointments Clause evinces a clear congressional understanding that Article I courts could be given the power to appoint.").

48. *See, e.g.*, Trump v. Mazars USA, LLP, 140 S. Ct. 2019, 2034 (2020).

49. The most prominent of these cases have involved states' power under the Presidential Electors Clause of Article II. *See, e.g.*, Chiafalo v. Washington, 140 S. Ct. 2316, 2322–23 (2020) (finding longstanding practice of states penalizing "faithless elector[s]"); Ray v. Blair, 343 U.S. 214, 229–30 (1952) (same for state law requiring electors to pledge their support for party nominees); McPherson v. Blacker, 146 U.S. 1, 10 (1892) ("[F]rom the formation of the government until now the practical construction of the clause has conceded plenary power to the state legislatures."). The Elections Clause has received the same treatment. *See* Moore v. Harper, 143 S. Ct. 2065, 2082–83 (2023); Evenwel v. Abbott, 578 U.S. 54, 73–74 (2016) (noting, in the context of applying the Equal Protection Clause's "one-person, one-vote principle" to the Elections Clause, that "[w]hat constitutional history and our prior decisions strongly suggest, settled practice confirms"); Smiley v. Holm, 285 U.S. 355, 369 (1932) (relying on "long and continuous interpretation of the Elections Clause" taken from "the established practice in the [s]tates").

50. This is common under the Due Process Clause. *See* Mallory v. Norfolk S. Ry. Co., 143 S. Ct. 2028, 2035 (2023); Nashville, Chatanooga & St. Louis Ry. v. Browning, 310 U.S. 362, 370

accepting it,[51] often emphasize the longstanding nature of a challenged practice. In each instance, the longevity of the challenged practice served as important evidence for constitutionality.

Two issues are prominent in any positive longevity case: what counts as longstanding and what counts as practice. In both instances, the answer is context-specific, but some generalities apply.

On the first issue, longevity that traces to the founding is particularly persuasive,[52] but a practice need not be that longstanding. It can begin in the latter half of the nineteenth century,[53] or even into the twentieth.[54] Moreover, a practice can be longstanding despite having experienced mild interruptions,[55] although sporadic precedent going far into the past may be less valuable than a more recent yet steadier practice.[56]

On the second issue, any exercise of discretionary power by a public official can contribute to a longstanding practice. Longevity scholars often emphasize unwritten practices by the executive,[57] but the practice can also be

(1940); Jackman v. Rosenbaum Co., 260 U.S. 22, 31 (1922); Ownbey v. Morgan, 256 U.S. 94, 104 (1921); Louisville & Nashville R.R. Co. v. Barber Asphalt Co., 197 U.S. 430, 434 (1905). The First Amendment has also lent itself to longevity—both for the Speech Clause, *see* Nevada Ethics Comm'n v. Carrigan, 564 U.S. 117, 122–25 (2011); Burson v. Freeman, 504 U.S. 191, 196–200 (1992); Brown v. Hartlage, 456 U.S. 45, 56–58 (1982); Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942), and the Establishment Clause. *See* Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2091 (2019); Town of Greece v. Galloway, 572 U.S. 565, 575–76 (2014); Marsh v. Chambers, 463 U.S. 783, 792 (1983) (explaining that the "unambiguous and unbroken history of more than 200 years" left "no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society"); Walz v. Tax Comm'n, 397 U.S. 664, 678 (1970) (noting that "an unbroken practice . . . is not something to be lightly cast aside"). The Second Amendment was the same, *see* District of Columbia v. Heller, 554 U.S. 570, 626–27 (2008), but has since morphed into a different use of post-adoption history. *See infra* Part I.C. Professor Huq has also flagged the Fourth Amendment as a site of positive longevity. *See* Huq, *supra* note 26, at 711; *see, e.g.*, Virginia v. Moore, 553 U.S. 164, 170–71 (2008) (explaining that the case was not one "in which the claimant can point to 'a clear answer [that] existed in 1791 and has been generally adhered to by the traditions of our society ever since,'"(alteration in original) (quoting Atwater v. Lago Vista, 532 U.S. 318, 345 (2001))). "Historical practice" has also appeared with the Confrontation Clause of the Sixth Amendment. *See* Samia v. United States, 143 S. Ct. 2004, 2012–14 (2023).

51. This is common for procedural rights. *Compare* Pennoyer v. Neff, 95 U.S. 714, 733 (1878), *with* Burnham v. Superior Ct. of Cal., 495 U.S. 604, 618–19 (1990) (explaining that cases after *Pennoyer* added to the traditional physical presence rule).

52. *See Marsh*, 463 U.S. at 792; *Jackman*, 260 U.S. at 31; *see also* Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 415 (2003).

53. *See, e.g.*, *Samia*, 143 S. Ct. at 2012 (relying on, in addition to an 1816 treatise, practice from the last decades of the nineteenth century); Mistretta v. United States, 488 U.S. 361, 400–01 (1989); The Pocket Veto Case, 279 U.S. 655, 688–90 (1929).

54. *See, e.g.*, *Burson*, 504 U.S. at 199–200.

55. *See* NLRB v. Noel Canning, 573 U.S. 513, 526 (2014); *Mistretta*, 488 U.S. at 400–01.

56. *Cf.* Trump v. Mazars USA, LLP, 140 S. Ct. 2019, 2036 (2020).

57. *See, e.g.*, Bradley & Morrison, *supra* note 15, at 416–17.

written and legislative.[58] In *Chiafalo v. Washington*,[59] for example, the Court invoked positive longevity to support a state law enforcing presidential electors' pledge to cast their ballots under Article II for the party nominee, relying on a longstanding practice composed of both unwritten customs by the electors and an array of statutes enacted across the country.[60] Judicial practice also has its place,[61] as long as the significance lies in its longevity rather than as common law precedent.[62] What matters is that the practice is a repeated exercise of public power, not that it is unwritten or executive.

Eager to avoid what Justice Scalia described as "adverse possession" of power,[63] however, positive longevity refrains from reducing a practice's constitutionality to its longevity. Instead, positive longevity uses longevity to infer that public officials have long understood the practice to be permissible. That understanding is what carries constitutional significance. Thus, even if longevity puts the permissibility of a practice "at rest" in a psychological sense,[64] the real issue is whether courts can confirm that inference based on their own modalities of interpretation.[65] Those confirmation attempts are more elaborate in some cases than others.[66] Indeed, the attempt is sometimes so bare that it seems nonexistent.[67] Even there, however, positive longevity involves postponing a constitutional explanation to a future case rather than foregoing one altogether.[68]

58. *See, e.g.*, Evenwel v. Abbott, 578 U.S. 54, 73 (2016) (finding a "settled practice" in state statutes and local regulations that have been "followed for decades, even centuries"); Golan v. Holder, 565 U.S. 302, 320–24 (2012) (finding a longstanding practice consisting of congressional statutes implementing the Copyright Clause).

59. 140 S. Ct. 2316 (2020).

60. *Id.* at 2326–28.

61. *See, e.g.*, Samia v. United States, 143 S. Ct. 2004, 2012 (2023) ("For most of our Nation's history, longstanding practice allowed a nontestifying codefendant's confession to be admitted in a joint trial so long as the jury was properly instructed not to consider it against the nonconfessing defendant."); Tutun v. United States, 270 U.S. 568, 576–77 (1926); *see also* Mila Sohoni, *The Lost History of the "Universal" Injunction*, 133 HARV. L. REV. 920, 1005 (2020) (noting that federal court injunctive power is a matter of post-adoption practice rather than original meaning).

62. *See* Joseph Blocher & Margaret H. Lemos, *Practice and Precedent in Historical Gloss*, 106 GEO. L.J. ONLINE 1, 5 (2016) (making this distinction for judicial practice).

63. NLRB v. Noel Canning, 573 U.S. 513, 613–15 (Scalia, J., concurring in the judgment).

64. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 401 (1819).

65. *See, e.g.*, *Samia*, 143 S. Ct. at 2018; Hous. Comm. Coll. Sys. v. Wilson, 142 S. Ct. 1253, 1260 (2022) (quoting *McCulloch*, 17 U.S. at 401). For the best study of this approach to the modalities, see Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1193–94 (1987).

66. *Compare* Stern v. Marshall, 564 U.S. 462, 493 (2011) (using longevity as a catch-all for cases that the doctrine misses), *with Tutun*, 270 U.S. at 576–77 (tailoring the doctrine to precisely the results of the historical inquiry).

67. *See, e.g.*, District of Columbia v. Heller, 554 U.S. 570, 626–27 (2008) (stating, without explaining, that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill").

68. *See, e.g.*, Franklin v. Massachusetts, 505 U.S. 788, 804–06 (1992).

Through this interaction with the other modalities, positive longevity carries an important disciplining function for constitutional doctrine.[69] Doctrinal tests are always at risk of becoming mechanical,[70] and positive longevity resists that tendency by suggesting the practice should be upheld even if the doctrine points in the other direction. Put differently, positive longevity tailors doctrine to practice rather than practice to doctrine.[71] In that fashion, it gives primacy to a non-judicial interpretation that has long settled in support of the practice by the time a court finally approaches the constitutional question.[72]

B. Negative Longevity

Negative longevity makes the opposite inference.[73] Rather than treat the longevity of a practice as support for its lawfulness, negative longevity treats the longstanding absence of a practice as support for its unlawfulness. Here too, the move is an interpretive one. With more than two centuries of opportunity, some institution or official would have engaged in the practice if they could have. The fact that no one has attempted the practice "would be amazing if [the practice] were not understood to be constitutionally proscribed."[74] As on the positive side, however, that inference about non-judicial understanding does not replace constitutional analysis.[75] That is, novelty is not itself a basis for unconstitutionality. Instead, it suggests that

69. *See generally* David E. Pozen & Adam M. Samaha, *Anti-Modalities*, 119 MICH. L. REV. 729, 737 n.29 (2021).

70. *See* Morton J. Horwitz, *The Constitution of Change: Legal Fundamentality Without Fundamentalism*, 107 HARV. L. REV. 30, 107–09 (1993).

71. *See, e.g.*, City of Austin v. Reagan Nat'l Advert. of Austin, LLC, 142 S. Ct. 1464, 1470 (2022) (refashioning Speech Clause doctrine to avoid applying strict scrutiny that would invalidate longstanding off-premises signs regulations); Dep't of Com. v. New York, 139 S. Ct. 2551, 2566–67 (2019) (similar refashioning for Congress's authority under the Enumeration Clause; Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 773–74 (2000) (similar refashioning of Article III standing doctrine to permit longstanding *qui tam* suits); *Heller*, 554 U.S. at 626–27 (similar refashioning to uphold longstanding firearms regulations under the Second Amendment).

72. *See, e.g.*, Bradley & Siegel, *Historical Gloss*, *supra* note 15, at 261; Samuel Issacharoff & Trevor Morrison, *Constitution by Convention*, 108 CALIF. L. REV. 1913, 1916 (2020); *see also* Michael J. Gerhardt, *Non-Judicial Precedent*, 61 VAND. L. REV. 713 (2008) (emphasizing that constitutional development often occurs without judicial review).

73. *See generally* Litman, *supra* note 26, at 1410. *See also* Huq, *supra* note 26, at 710–11 (noting the existence of a "negative use" of longevity). Another way to think of the argument is one of outliers, cropped not along a geographical trajectory but a temporal one. *See generally* Justin Driver, *Constitutional Outliers*, 81 U. CHI. L. REV. 929, 930 (2014).

74. Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 230 (1995); *see* New York v. United States, 505 U.S. 144, 177 (1992); Printz v. United States, 521 U.S. 898, 918 (1997).

75. *See* NFIB v. Sebelius, 567 U.S. 519, 549 (2012) ("Legislative novelty is not necessarily fatal; there is a first time for everything."); Mistretta v. United States, 488 U.S. 361, 385 (1989) (explaining that "mere anomaly or innovation" does not violate the Constitution); Arizona Emps.' Liab. Cases, 250 U.S. 400, 419 (1919) ("Novelty is not a constitutional objection . . . .").

courts should follow the longstanding interpretation by presuming the practice to be unconstitutional unless otherwise demonstrated.[76]

Early Bill of Rights cases feature negative longevity,[77] but it has recently gained prominence in disputes over the President's removal power. There, the Court has insisted that "the most telling indication of [a] severe constitutional problem . . . is [a] lack of historical precedent,"[78] and on that basis invalidated congressional attempts to design new agency structures that insulated officers from removal.[79] Similar concerns about novelty arose when Congress attempted to "commandeer" states into its legislative or executive service,[80] expose states to liability in their own courts,[81] require states to seek federal approval for their election laws,[82] and compel participation in interstate commerce.[83] When Texas sued the federal government for not enforcing its immigration laws strictly enough, it too met the objection that such suits were without precedent under Article III.[84]

Negative longevity may be the inverse of positive longevity, but the two often intersect. For one, positive longevity can drift into negative longevity seemingly by accident.[85] A court may, for example, find in the historical record not just a few scattered precedents insufficient to suggest a settled interpretation in support of the practice, but a lack of precedent altogether.[86]

76. *See Printz*, 521 U.S. at 918.

77. *See, e.g.*, Near v. Minnesota, 283 U.S. 697, 718–19 (1931). More recent invocations have involved laws motivated by anti-gay animus, *see* Romer v. Evans, 517 U.S. 620 (1997), and state limitations on elected judges' campaign activities, *see* Republican Party of Minn. v. White, 536 U.S. 765, 785–87 (2002).

78. Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2201 (2020) (alterations in original) (quoting Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 505 (2010)).

79. *See Free Enter. Fund*, 561 U.S. at 505–06; *see also* United States v. Arthrex, Inc., 141 S. Ct. 1970, 1983–85 (2021) (noting that Congress's unlawful insulation of administrative patent judges from review by superior officers was contrary to what "certainly is the norm" (internal quotation omitted)).

80. *See Printz*, 521 U.S. at 917–18, 925–26 (1997); New York v. United States, 505 U.S. 144, 177 (1992) ("The take title provision appears to be unique.").

81. *See* Alden v. Maine, 527 U.S. 706, 744 (1999) (explaining that federal "statutes purporting to authorize [suits against nonconsenting States in their own courts] are all but absent from our historical experience").

82. *See* Shelby County v. Holder, 570 U.S. 529, 534–35 (2013) (describing preclearance under the Voting Rights Act as "unprecedented" in its "drastic departure from basic principles of federalism"); *see also* NAMUDNO v. Holder, 557 U.S. 193, 203 (2009).

83. *See* NFIB v. Sebelius, 567 U.S. 519, 549 (2012).

84. *See* United States v. Texas, 143 S. Ct. 1964, 1971 (2023).

85. *See, e.g.*, Medellin v. Texas, 552 U.S. 491, 531–32 (2008) (finding a lack of longstanding practice to support the President's attempt to issue a directive to state courts, and going on to find that practice actually "unprecedented").

86. *Compare* United States v. Arthrex, Inc., 141 S. Ct. 1970, 1984 (2021) (noting a few recent precedents for an agency structure that "provide the [Patent Trial and Appeal Board] no foothold in history or tradition across the Executive Branch" (internal quotations omitted)), *with* Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2201 (2020) (explaining that a "lack of historical precedent" is "the most

The former appeals to the absence of positive longevity, while the latter highlights the presence of negative longevity.

In more complex cases, positive longevity and negative longevity arise concurrently. This occurs in separation of powers disputes, where one official's longevity claim relies on another's longstanding acquiescence.[87] Here, the particular use of longevity turns on the nature of the constitutional challenge being raised. For example, *Noel Canning v. NLRB*[88] and *Zivotofky v. Kerry*[89] both relied on a longstanding, post-adoption practice by the President that Congress had long acquiesced in. Yet from those facts, they drew different inferences. *Noel Canning* took the President's longstanding practice with Congress's acquiescence to support the President's practice—a matter of positive longevity.[90] By contrast, *Zivotofsky* took Congress's acquiescence in a longstanding presidential practice to signal that Congress lacked the power to object to the President's practice.[91]

These cases are often treated the same,[92] but their use of post-adoption longevity as a tool of non-judicial interpretation was fundamentally different. One drew on positive longevity's claim that longevity reflects sustained support for the practice. The other drew on negative longevity's inverse claim that the longstanding absence of a practice reflects a sustained belief against it.[93] In the result, one longstanding practice could continue, while the other was required to continue.

C. Mandatory Longevity

The final use of longevity takes a stricter approach to post-adoption practice. Sometimes described as a test of "history and tradition," this use maintains that a practice is constitutional if and only if it is longstanding.[94] In doing so, mandatory longevity still treats post-adoption practice as a proxy for non-judicial interpretation, especially by invoking tradition in place of multi-factor or balancing tests that are common in constitutional

telling indication of [a] severe constitutional problem" (alteration in original) (quoting Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 505 (2010))).

87. *See generally* Bradley & Morrison, *supra* note 15, at 414–15; Roisman, *supra* note 13, at 671–74.

88. 573 U.S. 513 (2014).

89. 576 U.S. 1 (2015).

90. *Noel Canning*, 573 U.S. at 538.

91. *Zivotofsky*, 576 U.S. at 28.

92. *See, e.g.*, Bradley, *supra* note 16, at 60–61; Griffin, *supra* note 24, at 84 (calling *Zivotofsky* a "companion case" to *Noel Canning*).

93. *Cf.* Young, *supra* note 17, at 553 (suggesting a difference in *Zivotofsky* between recognizing longstanding practice and entrenching it against legislative change).

94. *See* Randy E. Barnett & Lawrence B. Solum, *Originalism after* Dobbs, Bruen, *and* Kennedy*: The Role of History and Tradition*, 118 NW. U. L. REV. 433, 452–54 (2023).

adjudication.[95] Out of a concern that such tests embroil courts in policy,[96] mandatory longevity permits a practice in the face of constitutional scrutiny not because of how courts weigh the factors or values but because a tradition allows courts to "assume [a] settled" interpretation in its favor.[97] That said, the judicial attitude toward the challenged practice is one of skepticism, overridden only if the claimed tradition is sufficiently longstanding to reflect a settled interpretation in support of the practice.[98]

Despite its concern for tradition, mandatory longevity is relatively new. Prominent appearances occurred as the Court attempted to limit substantive due process to those rights that are deeply rooted in American history.[99] It has also spread to the Speech Clause,[100] which today protects all communicative activity unless it has "been historically unprotected."[101] According to the Court, this history causes the speech category to lose constitutional coverage not because it lacks constitutional value but simply because of the longevity itself.[102] Mandatory longevity has since arisen for

95. *See* RICHARD H. FALLON JR., THE NATURE OF CONSTITUTIONAL RIGHTS: THE INVENTION AND LOGIC OF STRICT JUDICIAL SCRUTINY 96–124 (2019) (describing the emergence of tests implementing constitutional values rooted in means-end tailoring).

96. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2246–48 (2022); United States v. Stevens, 559 U.S. 460, 472 (2010).

97. N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2133 (2022). *See* Joseph Blocher & Eric Ruben, *Originalism-by-Analogy and Second Amendment Adjudication*, 133 YALE L.J. 99, 128–37 (2023) (explaining that the turn to tradition in this context replaces the need for doctrines of means-end balancing); *see also* DeGirolami, *supra* note 12, at 1124–26 (emphasizing the political and social functions of tradition in placing demands on constitutional text).

98. *See Bruen*, 142 S. Ct. at 2120, 2153–54 (2022) (cautioning against identifying a tradition based on "outliers" and emphasizing that a "single law, in effect in a single [s]tate" is not a tradition); Michael W. McConnell, *The Right to Die and the Jurisprudence of Tradition*, 1997 UTAH L. REV. 665, 669–73. On how mandatory longevity empowers courts to make the moral judgments they claim to eschew, see Reva B. Siegel, *Memory Games:* Dobbs*'s Originalism as Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance*, 101 TEX. L. REV. 1127, 1181–92 (2023).

99. *See* Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997). That test has not described the modern law of substantive due process, *see* Lawrence v. Texas, 539 U.S. 558, 572 (2003); Obergefell v. Hodges, 576 U.S. 644, 663–64 (2015), although the Court has indicated that *Glucksberg* will govern going forward. *See Dobbs*, 142 S. Ct. at 2246–48. As this suggests, mandatory longevity can arise to constrain not just legislative or executive interpretations that lack a tradition, but also non-traditional interpretations by courts.

100. United States v. Stevens, 559 U.S. 460, 472 (2010). *Compare* Brown v. Hartlage, 456 U.S. 45 (1982) (suggesting another category because private attempts to bribe one's way into elected office are unprotected), *with* NIFLA v. Becerra, 138 S. Ct. 2361, 2373 (2018) (suggesting that the line between speech and conduct satisfies the *Stevens* rule).

101. *Stevens*, 559 U.S. at 472; R.A.V. v. St. Paul, 505 U.S. 377, 382 (1992).

102. *Stevens*, 559 U.S. at 471–72; Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 792 (2011); United States v. Alvarez, 567 U.S. 709, 717–18, 722 (2012). *But cf.* Counterman v. Colorado, 143 S. Ct. 2106, 2113–17 (2023) (explaining that the category of "true threats" has a longstanding history of falling outside First Amendment coverage, while defining "true threats" according to speech value rather than historical practice).

Article III standing,[103] and the Second Amendment.[104] Lower courts are headed there for the Establishment Clause as well.[105]

As these invocations suggest, mandatory longevity often begins as positive longevity, with the Court invoking longevity to support a practice and later differentiating a practice that lacks such longevity. That change is significant: The former turns to post-adoption history as one mechanism capable of legitimating a popular practice; the latter makes post-adoption history the sole mechanism for legality.[106] Whatever similarity it bears with positive longevity, then, mandatory longevity takes the distinct step of treating the settled understanding inferred from a traditional practice as the only tool capable of establishing constitutional validity.

In doing so, mandatory longevity can also resemble originalism, as both require historical support for a practice when interpreting text.[107] Yet they differ in their underlying logic, with important implications.[108] Originalism fixes the semantic meaning of the Constitution at its drafting or ratification, deriving authority from a specific moment of constitutional history.[109] Conversely, mandatory longevity derives authority from the extent of the practice and so can accept traditions born after the founding.[110] While originalism may allow for some post-adoption history as evidence of the

103. *See* TransUnion L.L.C. v. Ramirez, 141 S. Ct. 2190, 2204, 2209–10 (2021) (limiting Article III injuries to those that bear a "close relationship" to injuries traditionally cognizable in English or American courts).

104. *See* N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2130 (2022) (explaining that if a firearm regulation falls within the text of the Second Amendment, the "government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation"). *Bruen* cited *Stevens* as authority for this test. *Id.*

105. *See, e.g.*, Woodring v. Jackson County 986 F.3d 979, 981 (7th Cir. 2021) (holding that current doctrine "requires us to use a different, more historical framework to gauge the constitutionality of the County's nativity scene"); Perrier-Bilbo v. United States, 954 F.3d 413, 424–26 (1st Cir. 2020) (same); Freedom From Religion Found., Inc. v. County of Lehigh, 933 F.3d 275, 279 (3d Cir. 2019) (same). On the importance and complexity of lower courts' movement of the law, see generally Thomas P. Schmidt, *Judicial Minimalism in the Lower Courts*, 108 VA. L. REV. 829, 839–55 (2022).

106. *Compare* Locke v. Davey, 540 U.S. 712, 725 (2004), *with* Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2257–58 (2020). On the subtle shift in these perspectives, see Siegel, *supra* note 98, at 1181–84.

107. Unsurprisingly, then, originalist judges often rely on the authority of "tradition," despite its different principles. *See* Brown, *supra* note 25, at 179 (noting this for Justice Scalia); DeGirolami, *supra* note 12, at 1124–25 (same for Justices Gorsuch and Kavanaugh).

108. For a recent study linking some conceptions of "history and tradition" with originalism, see Barnett & Solum, *supra* note 94, at 446–52. As the authors recognize, an approach to "history and tradition" that treats tradition as a self-sufficient doctrine—that is, what this Article calls mandatory longevity—"is not a form of originalism." *Id.* at 453.

109. *See generally* JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 8 (1996); Fallon, *supra* note 13, at 1755–56.

110. *See* Bradley & Siegel, *After Recess*, *supra* note 15, at 27.

original meaning,[111] this is fundamentally distinct from mandatory longevity's assignment of value based on popular interpretation, for which tradition serves as a proxy.[112] By permitting practices born after the founding, mandatory longevity relies on the force of established interpretations independent of any commitment to founding-era beliefs.[113]

Mandatory longevity does share a problem with originalism, however, which is that of specificity between a practice and its historical support.[114] The jurisprudence on mandatory longevity varies over how close a practice must be to a tradition to benefit from its support. Some cases permit a non-traditional practice if it is at least analogous to a traditional one.[115] Others do not openly invite analogy, but they usually allow select departures from tradition in other ways. Under the Speech Clause, for example, the Court requires a longstanding history of regulation for a speech category to fall outside the First Amendment, but it defines the content of that category without reference to historical practice.[116] As with the selective availability

111. *See* Balkin, *supra* note 13, at 657.

112. This confusion is common for appeals to the First Congress. *See generally* Amanda L. Tyler, *Assessing the Role of History in the Federal Courts Canon: A Word of Caution*, 90 NOTRE DAME L. REV. 1739, 1742 (2015).

113. *See* Barnett & Solum, *supra* note 94, at 453. In *TransUnion*, for example, the Court considered sufficiently traditional injuries to individual privacy, *see* 141 S. Ct. 2190, 2204 (2021) (identifying "traditionally recognized" intangible harms as "disclosure of private information, and intrusion upon seclusion"), which the common law did not recognize until the end of the nineteenth century and were not widespread until well into the twentieth, *see generally* Neil M. Richards & Daniel J. Solove, *Prosser's Privacy Law: A Mixed Legacy*, 98 CALIF. L. REV. 1887, 1891–95 (2010); *see also* Samuel Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890) (noting the lack of common law action for invasion of privacy). Notwithstanding language about speech regulated "[f]rom 1791 to the present," the cases make clear that mandatory longevity under the Speech Clause looks to longevity itself rather than its connection to the founding. *See* Brown v. Ent. Merchants Ass'n, 564 U.S. 786, 792 (2011); United States v. Alvarez, 567 U.S. 709, 717–18, 722 (2012). For its part, the *Bruen* Court similarly took care to distinguish post-adoption history from originalist history. *See* N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2136–38 (2022).

114. For an argument that the problem of how specifically to define a practice or historical understanding is fatal to originalism, see ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM 95–97 (2022).

115. *See, e.g.*, *Bruen*, 142 S. Ct. at 2136–38 (Second Amendment); *TransUnion*, 141 S. Ct. at 2209–10 (Article III). The Court has yet to explain why that analogy saves a non-traditional practice. *See generally* Blocher & Ruben, *supra* note 97, at 128–37 (identifying the ambiguities of what the authors call "originalism-by-analogy" in *Bruen* and exploring its theoretical foundations). *Cf.* Darrell A.H. Miller, *Text, History, and Tradition: What the Seventh Amendment Can Teach Us About the Second*, 122 YALE L.J. 852, 903–05 (2013) (arguing that incorporating analogical reasoning is sound for constitutional rights that arose before the Constitution through the common law). What it has made clear is that the room for analogy is narrow. *See* Darrell A.H. Miller & Joseph Blocher, *Manufacturing Outliers*, 2022 SUP. CT. REV. 49, 60–63 (arguing that *Bruen* demonstrated significant creativity in showing that analogous regulations were meaningfully different from the challenged law).

116. *See, e.g.*, Counterman v. Colorado, 143 S. Ct. 2106, 2113–17 (2023) (true threats).

of analogy, however, the Court has not explained why speech categories must be traditional if their content need not be.

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To sum up—longstanding practice carries at least three distinct uses in federal court today: Positive longevity uses longevity to support the lawfulness of the practice; negative longevity uses the longstanding absence of a practice to support its unlawfulness; and mandatory longevity requires a practice to be longstanding to come within the Constitution. Despite these differences, two similarities arise across these forms of constitutional argument. First, each treats post-adoption longevity as a unique source of constitutional meaning and not simply a collection of individual precedents.[117] Second, each invokes longevity to draw inferences about non-judicial interpretations of the Constitution. Those interpretive inferences, and not longevity itself, are what carry constitutional value.

Because each use draws from longevity different, even conflicting, inferences about non-judicial interpretations, however, a theory is needed to determine what inferences are justified. The next Part explores that theory, and Part III will apply it to evaluate the three uses just described.

II. NON-JUDICIAL CONSTITUTIONALISM AND LONGSTANDING PRACTICE

After going mostly ignored in the academic literature, longstanding practice now enjoys the attention of two prominent academic theories: "liquidation,"[118] and "historical gloss."[119] Unfortunately, the labels of those

117. *See* Bradley & Siegel, *After Recess*, *supra* note 15, at 26–27 (distinguishing an appeal to longevity from an appeal to precedent).

118. The concept traces back to Madison's suggestion in Federalist 39 that post-adoption practice can "liquidate"—that is, settle—ambiguous text. *See supra* note 14 (collecting liquidation scholarship). Disagreement among scholars as to the content of the concept is pervasive. C*ompare* Nelson, *supra* note 14, at 521 (liquidation is permanent), *with* Michael W. McConnell, *Time, Institutions, and Interpretation*, 95 B.U. L. REV. 1745, 1774 (2015) (liquidation is not permanent). Further, the evidence for liquidation as a founding-era theory of constitutional practice is sparse. *See* Saul Cornell, *President Madison's Living Constitution: Fixation, Liquidation, and Constitutional Politics in the Jeffersonian Era*, 89 FORDHAM L. REV. 1761, 1775–80 (2021). This is not to say that liquidation is baseless, *cf. infra* Section III.C.2, only that its status as "original law" is contested. *Cf.* William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 NW. U. L. REV. 1455, 1457 (2019).

119. The Glossators were a medieval school of Bolognese jurists that viewed Justinian's sixth-century Roman texts as both the ultimate authority of God and "sufficient . . . to solve all legal problems." Harry Dondorp & Eltjo J. H. Schrage, *The Sources of Medieval Learned Law*, *in* THE CREATION OF THE IUS COMMUNE: FROM CASUS TO REGULA 30 (J. W. Cairns & Paul J. du Plessis eds., 2010). The Glossators studied Roman law by adding brief explanations in the margins of the original text to explain apparent inconsistencies, especially in the application to then-modern society. *See* GREGORY SAMUEL, RETHINKING LEGAL REASONING 15 (2018). Highly influential,

theories have distracted from the question of what actually makes a longstanding practice constitutionally significant. More instructive are the values those theories stand for, and longevity scholars typically rely on three in particular: settlement,[120] Burkean wisdom,[121] and acquiescence by public officials.[122] However, these values pose a serious problem. That is, they fail to resolve what Part I revealed to be a fundamental disagreement over what longevity says about non-judicial interpretations of the Constitution. Indeed, because they derive from longevity itself,[123] they (at best) say nothing about any limits on the uses of constitutional longevity and (at worst) deny that such limits exist. In light of Part I, this problem demands a solution.

This Part resolves the problem. Tying back to what Part I demonstrated, it first shows that the many values of longevity scholars point to actually boil down to just one: non-judicial constitutionalism. It then explains why and how non-judicial constitutionalism makes post-adoption longevity

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their work practically defined the transformation of Roman law in the Middle Ages. *See* Frederick W. Dingledy, *The* Corpus Juris Civilis*: A Guide to Its History and Use*, 35 LEG. REF. SERVS. Q. 231, 242 (2016). By the fourteenth century, the text had disappeared behind the accumulated gloss and the Glossators gave way to the Commentators, who expounded on contemporary law without reference to the original Roman texts. *See* Dondorp & Schrage, *supra*, at 21–22.

As a constitutional concept, gloss began with Justice Frankfurter. *See The Steel Seizure Case*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring) ("Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them. It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them. In short, a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on 'executive Power' vested in the President by § 1 of Art. II."). Scholars cite this passage as the genesis of constitutional gloss. *See* PRAKASH, *supra* note 24, at 123; Daphna Renan, *Presidential Norms and Article II*, 131 HARV. L. REV. 2187, 2243 n.301 (2018); Griffin, *supra* note 24, at 82–83; Fallon, *supra* note 13, at 1776.

Frankfurter actually provided an almost identical passage a decade earlier in the context of the state action doctrine. *See* Nashville, Chattanooga & St. Louis Ry. v. Browning, 310 U.S. 362, 369–70 (1940) ("Here . . . all the organs of the state are conforming to a practice, systematic, unbroken for more than forty years, and now questioned for the first time. It would be a narrow conception of jurisprudence to confine the notion of 'laws' to what is found written on the statute books, and to disregard the gloss which life has written upon it. Settled state practice cannot supplant constitutional guarantees, but it can establish what is state law. . . . Deeply embedded traditional ways of carrying out state policy, such as those of which petitioner complains, are often tougher and truer law than the dead words of the written text."). Almost word-for-word, Frankfurter transposed this appeal to longstanding practice amounting to customary state action in *Browning* into a theory of constitutional interpretation in *The Steel Seizure Case*.

120. *See* Huq, *supra* note 26, at 717–18.

121. *See* Young, *supra* note 17, at 557–58.

122. *See* Roisman, *supra* note 13, at 673–74.

123. Notably, they are the same values attributed to the longevity of non-constitutional interpretations. *See generally* Anita S. Krishnakumar, *Longstanding Agency Interpretations*, 83 FORDHAM L. REV. 1823, 1843–62 (2015) (noting that the same values characterize judicial approaches to longstanding agency interpretations of law).

significant for courts. As an extensive literature has explained,[124] many actors interpret the Constitution, each with their own competences and channels of democratic input.[125] The significance of a longstanding practice is therefore not simply that an interpretation has existed at length, but that it has done so in ways not available to courts.[126] Those differences justify courts incorporating longstanding, non-judicial practices into their interpretations of the Constitution. However, they also highlight the need for non-judicial officials to remain responsive to new problems and democratic inputs by continuing to construct constitutional practices. These two principles—the incorporation principle and the continuing practice principle—should guide how courts invoke constitutional longevity, as they do in other areas of constitutional law grounded in non-judicial practice.

A. The Value of Longevity

In grappling with the proper use of post-adoption longevity, the first question is why longevity matters at all. Despite differences among the uses of longevity, Part I revealed that all three depend on inferences about non-judicial constitutional interpretations: positive longevity infers that non-judicial officials have long supported the practice; negative longevity infers that non-judicial officials have long rejected the practice; and mandatory longevity infers that non-judicial officials are uniquely situated to guide the construction of open-ended constitutional text. In short, they all emphasize not just the longevity of the practice but its non-judicial character, splitting only over what the character says to courts.

Longevity scholars sometimes highlight this focus on non-judicial constitutionalism,[127] but they usually emphasize other reasons that courts can and should give constitutional significance to longevity: settlement, Burkean wisdom, and acquiescence.[128] As this Section shows, however, these values actually reduce to the single value of non-judicial constitutionalism. The rest of the Part explains why that matters.

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124. *See generally* Morrison, *supra* note 28, at 1542–43 (discussing sources).

125. *See* Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 920–22 (2003); Edward L. Rubin, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393, 1396 (1996).

126. *See generally* Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 2022–23 (2003) [hereinafter Post & Siegel, *Legislative Constitutionalism*].

127. *See, e.g.*, Bradley, *supra* note 16, at 59–60 (identifying "deference to the constitutional views of nonjudicial actors" as one of several practice-based values).

128. *See, e.g.*, Huq, *supra* note 26, at 706–07 (noting these three values in the scholarship on historical gloss).

1. Settlement

The most common reason given for why courts should not disturb a longstanding practice is that it has settled.[129] Put differently, the longevity of a practice signals that reliance interests have arisen around the practice and courts should not upset them.[130]

As a constitutional matter, settlement has two dynamics that need distinguishing. From one perspective, it is simply a matter of epistemic humility: The substantial reliance surrounding a settled practice imposes high costs on uprooting it, so courts should not impose those costs unless certain that the practice is impermissible.[131] While valid, this is a narrow view of longevity, little more than the ordinary presumption of constitutionality.[132] As that presumption attaches irrespective of longevity, grounding settlement in such economic pragmatism is not a theory of longevity at all.

The other understanding of settlement is that those reliance interests do have constitutional significance. This understanding runs into a fundamental principle of constitutionalism, which is that an unconstitutional practice cannot become constitutional simply by continuing at length.[133] Such an "adverse possession"[134] of power might be valid for an unwritten

129. *See* Baude, *supra* note 14, at 9–12; Huq, *supra* note 26, at 717–18.

130. *See* Bradley, *supra* note 16, at 67 (discussing settlement in terms of reliance interests); David A. Strauss, *Foreword: Does the Constitution Mean What It Says?*, 129 HARV. L. REV. 1, 55 (2015) (same).

131. *See* CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 263 (1999); *cf.* Christopher J. Peters, *Assessing the New Judicial Minimalism*, 100 COLUM. L. REV. 1454, 1457 (2000) (arguing that judicial minimalism, while often expressed in economic terms, is a theory of inter-branch competence).

132. *See generally* F. Andrew Hessick, *Rethinking the Presumption of Constitutionality*, 85 NOTRE DAME L. REV. 1447, 1449–50 (2010) (noting the existence of the presumption and arguing that it is better understood as "judicial deference to legislative interpretations of the Constitution"). For a recent study of the presumption in the specific context of the lower federal courts, see Schmidt, *supra* note 105, at 853–56.

133. *See* Walz v. Tax Comm'n, 397 U.S. 664, 678 (1970) ("It is obviously correct that no one acquires a vested or protected right in violation of the Constitution by long use.").

134. NLRB v. Noel Canning, 573 U.S. 513, 613–15 (2014) (Scalia, J., concurring in the judgment); *see also* JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH 10 (1993) (identifying an "adverse possession" approach to presidential war powers informed by presidential practice); PRAKASH, *supra* note 24, at 9 (same). The adverse possession metaphor is rhetorically enticing but analytically thin. It critiques the idea that longevity can cause one institution to acquire powers clearly given to another branch, but the real issue that longevity attempts to solve is whether the Constitution does, in fact, assign powers to one institution rather than another. *See* Bradley & Siegel, *After Recess*, *supra* note 15, at 52–55.

constitution,[135] but constitutional text prevents it.[136] As such, whatever constitutional significance settlement promotes, it cannot stem from settlement itself without threatening the text's primacy.[137] Even if a settled practice can create textual ambiguity, it still must operate within the space that the text allows.[138]

To avoid this problem, settlement must be concerned not with the constitutional value of settlement itself but with the settlement of a non-judicial interpretation of the Constitution. That is, the value of settlement stems from what it says about the text—or, more precisely, what non-judicial officials have repeatedly said about the text and that the public has repeatedly ratified.[139] The significance lies in that deliberate, non-judicial engagement with constitutional meaning, sustained over time. Otherwise, a century-old statute that Congress enacted then disregarded would attract respect rather than dust. What matters is the settled interpretation that a longstanding practice can signal, not the sheer age of the practice.

An interpretive approach to the settlement value is also a more accurate description of actual practice. Even when longstanding, a practice rarely settles completely.[140] Instead, longevity usually conceals important experiments and alterations in the details of the practice.[141] What has settled is less the practice itself than a longstanding determination that the Constitution permits the practice and others like it. If settlement matters, then, it is because of what it says about the non-judicial engagement with constitutional meaning that underlies the practice.

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135. *See, e.g.*, Attorneys-General (Provinces) v. Attorney-General (Canada), [1912] 3 D.L.R. 509, 515 (U.K. J.C.P.C.) (explaining that the House of Lords may have lost the legal authority to submit advisory questions to the law courts because the practice was customary and the House had failed to exercise it for half a century).

136. *See generally* Michael C. Dorf, *How the Written Constitution Crowds Out the Extraconstitutional Rule of Recognition*, *in* THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION 69, 75 (Matthew D. Adler & Kenneth Einar Himma eds., 2009); Issacharoff & Morrison, *supra* note 72, at 1914; Curtis A. Bradley, *Treaty Termination and Historical Gloss*, 92 TEX. L. REV. 773, 815–16 (2014). *See also* DAVID J. BEDERMAN, CUSTOM AS A SOURCE OF LAW 105 (2010) (noting the subordination of practice-based obligations to written law outside of the constitutional context as well).

137. *See* Samaha, *supra* note 20, at 615–16; *cf.* Strauss, *supra* note 130, at 16 (arguing that text has little role in constitutional litigation).

138. *See* Bradley & Siegel, *After Recess*, *supra* note 15, at 69.

139. *See* Baude, *supra* note 14, at 9–12.

140. *Cf.* Strauss, *supra* note 130, at 53–55 (discussing how the constitutional system balances settlement with the need for adaptation and sovereignty).

141. *See generally* Adam M. Samaha, *On the Problem of Legal Change*, 103 GEO. L.J. 97, 100 (2014) (noting the problem this constant tinkering presents for determining when a practice has meaningfully changed). *Cf.* Matthew Tokson, *Blank Slates*, 59 B.C. L. REV. 591, 597–601 (2018) (similarly noting the difficulty of determining whether a legal question arises against a "blank slate").

2. Wisdom

The second value attributed to longstanding practice—Burkean wisdom—recognizes that a practice can be longstanding despite some changes, and it lodges constitutional significance in that space. More specifically, it views longstanding practice as constitutionally significant because it carries the wisdom accumulated over its development period,[142] which a court should not presume to override.[143]

As a descriptive matter, Burkean wisdom carries only questionable accuracy. That is, it rightly recognizes that a longstanding practice has usually changed over time, but it assumes that these changes hone in on a final version of the practice.[144] In doing so, it suffers the normal flaws of Whig history by viewing the past as a progressive realization of the present.[145] At least for constitutional practice, this is an error.[146] Instead, changes to the practice usually result from changes to the problem itself, as well as the purpose of and resources behind the practice.[147] Indeed, rather than honing in on the optimal interpretation, tinkering with a longstanding practice often involves testing the outer limits of the authority that the practice recognizes.[148] Whatever descriptive accuracy Burkean wisdom has

142. *See* Young, *supra* note 17, at 542–43 (explaining the value of past practice as carrying "its own legitimacy, if not authority, based on its very pastness"); *see also* Edmund Burke, Speech on Parliamentary Reform (June 16, 1784), *in* 4 THE WRITINGS AND SPEECHES OF EDMUND BURKE 215, 219 (P. J. Marshall & Donald C. Bryant eds., 2015) ("Prescription is the most solid of all titles, not only to property, but . . . to government. . . . It is a presumption in favour of any settled scheme of government against any untried project, that a nation has long existed and flourished under it.").

143. *See* Bradley & Morrison, *supra* note 15, at 414–15 (explaining that past practice is valuable when it represents wisdom accumulated over time).

144. *See* Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353, 359 (2006); *see also* Mitchell Pearsall Reich, *Incomplete Designs*, 94 TEX. L. REV. 807, 831 (2016) (linking this idea to the reliance interests discussed under the settlement value); *cf.* J.G.A. Pocock, *Burke and the Ancient Constitution: A Problem in the History of Ideas*, 3 HIST. J. 125, 125 (1960) (emphasizing adaptation in Burke's political thought).

145. *See generally* Michael E. Parrish, *Friedman's Law*, 112 YALE L.J. 925, 954–55 (2003) (noting this critique as applied to legal history). *See also* HERBERT BUTTERFIELD, THE WHIG INTERPRETATION OF HISTORY 1–8 (1931) (criticizing an approach to historical research that views the past through the lens of the present, seeing history as a causal progression of the past that aims toward the enlightened present).

146. *See* Huq, *supra* note 26, at 740–41; *cf.* Strauss, *supra* note 130, at 55 (noting that reliance on the inherent wisdom of the accumulated past is an "implausibly grandiose" conception of a practice's evolutionary adaptation).

147. *See* Adrian Vermeule, *Common Law Constitutionalism and the Limits of Reason*, 107 COLUM. L. REV. 1482, 1519–32 (2007) (noting the problems these factors raise for inferring that an evolutionary approach to constitutional law reflects accumulated wisdom).

148. For a description of how this pattern influences the Office of Legal Counsel's ("OLC") interpretation of Article II, see Goldsmith, *supra* note 173, at 135–36.

for the common law,[149] the constitutional changes that a non-judicial practice undergoes are usually the result of everything but optimization.[150]

If the practice does embody wisdom, however, the proper source of that wisdom is not the past but the practitioner. Attributing value to the past itself creates the same problem of "adverse possession" for Burkean wisdom as with the settlement value. Put differently, a longstanding practice cannot carry such presumptive wisdom that it overrides the constitutional text.[151] What needs to accumulate is not time but the repeated engagement with constitutional values that time allows. If a longstanding practice reflects the accumulated wisdom of experience, then, it is not an "amorphous" value associated with "pastness,"[152] but the accumulated engagement by non-judicial officials.[153] Those attempts and the democratic response they elicit, rather than the past itself, are what give a longstanding practice its wisdom from a constitutional perspective.

As with settlement, then, the real significance of Burkean wisdom is the presence of non-judicial constitutionalism.

3. Acquiescence

The final value that longevity scholars often point to is acquiescence, which attributes significance to longevity because non-judicial officials who could have prevented the practice instead allowed it to continue. Justice Frankfurter highlighted this value,[154] and he made clear that it grows from Madisonian roots: Because non-judicial officials seek to maximize their own authority,[155] the fact that they allowed a coordinate official's practice to continue suggests they believed it to represent an unimpeachable interpretation of the Constitution.[156]

149. *See infra* note 309 (discussing historical scholarship that shows this premise and its embodiment in English common law to be empirically inaccurate); *see also* Gillian K. Hadfield, *Bias in the Evolution of Legal Rules*, 80 GEO. L.J. 583, 616 (1992) (noting that any conception of the common law's evolution as efficient and wise is necessarily "weak").

150. *See* Vermeule, *supra* note 147, at 1519–32.

151. *See* David E. Pozen, *Self-Help and the Separation of Powers*, 124 YALE L.J. 2, 80–81 (2014).

152. *See* Young, *supra* note 17, at 542–43.

153. *See* Christopher L. Eisgruber, *The Most Competent Branches: A Response to Professor Paulsen*, 83 GEO. L.J. 347, 348 (1994); David A. Strauss, *We the People, They the People, and the Puzzle of Democratic Constitutionalism*, 91 TEX. L. REV. 1969, 1978–81 (2013).

154. *See supra* note 119 (discussing the history of gloss as a constitutional concept).

155. *See* Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 920–23 (2005) (describing Madisonian thinking in the separation of powers).

156. *See* David Fontana & Aziz Z. Huq, *Institutional Loyalties in Constitutional Law*, 85 U. CHI. L. REV. 1, 3 (2018) (describing the presuppositions that Madisonian approaches to institutional reasoning rely on).

As many have explained, the premise of Madison's views on which the acquiescence value rests is unreliable, as public officials often have other interests than maximizing institutional power.[157] Thus, Professors Bradley and Morrison caution against equating institutional inaction with meaningful acquiescence,[158] and Professor Roisman argues more narrowly that acquiescence is meaningful only if the official can demonstrate that her inaction resulted from constitutional reasoning.[159] With such warnings, however, they emphasize that deliberate refusal by a public official to oppose a practice is an essential source of constitutional meaning.

What these refinements make clear is that acquiescence aims at capturing non-judicial interpretations of the Constitution. That is, they recognize that inaction itself has no constitutional significance.[160] Instead, what matters is deliberate constitutional practice by non-judicial officials, for which acquiescence can act as evidence.[161] To the extent the refinements call for ignoring that evidence unless it suggests the officials engaged in court-like interpretations, they risk missing the corrective benefits of non-judicial constitutionalism. I return to this below.[162] Here, I note only that the core concern of acquiescence is the deliberate engagement with constitutional values by non-judicial officials that acquiescence can signify.

Like the other values advanced by longevity, then, acquiescence is about one thing and one thing only: non-judicial constitutionalism.

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157. *See* Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311 (2006); *cf.* Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1809–10 n.222 (2007) (describing Levinson and Pildes's analysis as a "breakthrough" and an "essential reference" in any study of institutional behavior). As a former Attorney General, Justice Jackson understood this phenomenon well. *See The Steel Seizure Case*, 343 U.S. 579, 654 (1952) (Jackson, J., concurring) (explaining that "[p]arty loyalties and interests" can be "more binding than law"); *cf.* Jacob E. Gersen, *Unbundled Powers*, 96 VA. L. REV. 301, 356 (2010) (noting that departures from the constitutional text by government officials tend to be "consensual arrangements among the branches, not unilateral action by one branch").

158. *See* Bradley & Morrison, *supra* note 15, at 414–16.

159. *See* Roisman, *supra* note 13, at 673–74; *see also* Bradley & Morrison, *supra* note 15, at 448–52 (similarly allowing for some acquiescence as the root value for longstanding practice, but the concern about partisanship means that "the standard for legislative acquiescence should be high").

160. *See* Bradley & Morrison, *supra* note 15, at 414 (criticizing the idea of treating acquiescence as significant "based on nothing more than the absence of a visible objection by one branch to the other's actions").

161. *See* Smiley v. Holm, 285 U.S. 355, 369 (1932) ("General acquiescence cannot justify departure from the law, but long and continuous interpretation in the course of official action under the law may aid in removing doubts as to its meaning."); Huq, *supra* note 26, at 736 (explaining that acquiescence "assumes a dialogic process in which the constitutionality of a practice is recognized, and thus legitimated, by a second actor").

162. *See infra* Section II.C.1.

B. Why Non-Judicial Constitutionalism?

With the value of longevity linked to non-judicial constitutionalism, the question becomes what non-judicial constitutionalism has to do with the longevity of a practice. Diving into the non-judicial constitutionalism literature, this Section explains its characteristic elements and the effect of longevity on them.

1. The Constitution Outside the Courts

Although Alexander Hamilton insisted that federal courts are the "faithful guardians of the Constitution,"[163] reality is more complicated.[164] The Constitution picks out different institutions and officials to exercise public power, and they interpret that power in the process.[165] Courts usually have the final say, but it comes after extensive engagement by other officials.[166] Indeed, rather than simply answering a constitutional question, a court's task in constitutional adjudication is usually to decide how its answer should relate to the one non-judicial officials already provided.[167]

That the Constitution passes through different hands would be uninteresting if different interpreters performed the same task. The central principle of non-judicial constitutionalism is that they do not.[168] Although details of the differences vary by institution and theorist, the literature has emphasized at least two features of non-judicial interpretation that

163. THE FEDERALIST NO. 78, at 384 (Alexander Hamilton) (Lawrence Goldman ed. 2008); *see also* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

164. *See generally* MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999). Although Professor Tushnet is usually credited with beginning the non-judicial constitutionalism literature in earnest, a number of important books on the topic preceded him. *See, e.g.*, KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING (1999); SANFORD LEVINSON, CONSTITUTIONAL FAITH (1988); DONALD G. MORGAN, CONGRESS AND THE CONSTITUTION: A STUDY OF RESPONSIBILITY (1966). Before these books, non-judicial constitutionalism truly began with—and in some ways remains a footnote to—James Bradley Thayer. *See* James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 135–36 (1893).

165. For a study of the syntactical differences that the Constitution draws between different constitutional actors, see Nicholas Quinn Rosenkranz, *Subjects of the Constitution*, 62 STAN. L. REV. 1209, 1273–89 (2010); *see also* Nicholas Quinn Rosenkranz, *Objects of the Constitution*, 63 STAN. L. REV. 1005–08 (2011).

166. *Cf.* Richard H. Fallon, Jr., *Political Questions and the Ultra Vires Conundrum*, 87 U. CHI. L. REV. 1481, 1495–505 (2020) (explaining the patchwork of ways in which federal courts may or may not answer constitutional questions assigned to other branches).

167. *See* Hartnett, *supra* note 31, at 156. For a study evaluating non-judicial actors' success as constitutional interpreters, see MARK TUSHNET, WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW 111–48 (2009).

168. *See* Morrison, *supra* note 28, at 1579 (collecting sources on non-judicial constitutionalism).

distinguish it from judicial interpretation: institutional competence and democratic input.[169]

a) Institutional competence. – From a practical perspective, the most important dimension of non-judicial constitutionalism is that non-judicial officials interpret the Constitution without certain limits on institutional capacity that courts suffer.[170] This itself involves a pair of elements.

First, non-judicial officials interpret the Constitution proactively. That is, they can identify problems and invoke constitutional authority to address them.[171] Beneath each of these policy judgments is a non-judicial interpretation of constitutional authority.[172] Most of these judgments never reach the courts because they are political or otherwise non-justiciable,[173] or else because there are too many for courts to handle.[174] In legislative hands, these judgments include designing statutes according to the constitutional powers they implicate.[175] In executive hands, they include reviewing statutes for constitutionality at the point of signing and deciding how to advance

169. *See* Post & Siegel, *Legislative Constitutionalism*, *supra* note 126, at 2022–23 (emphasizing these features); Dawn E. Johnsen, *Functional Departmentalism and Nonjudicial Interpretation: Who Determines Constitutional Meaning?*, 67 LAW & CONTEMP. PROBS. 105, 105–109 (2004) (same); Pillard, *supra* note 29, at 679 (same). The literature on non-judicial constitutionalism is extensive and varied. In discussing these two principles, I do not mean to ignore the substantial disagreements theorists have—including over whether officials actually use their distinct approaches to interpretation. *Compare* TUSHNET, *supra* note 164, at 137–43, *with* James E. Fleming, *The Constitution Outside the Courts*, 86 CORNELL L. REV. 215, 217 (2000).

170. *See* Thayer, *supra* note 164, at 151–52; *see also* Elizabeth Garrett & Adrian Vermeule, *Institutional Design of A Thayerian Congress*, 50 DUKE L.J. 1277, 1279 (2001); *cf.* Vicki C. Jackson, *Thayer, Holmes, Brandeis: Conceptions of Judicial Review, Factfinding, and Proportionality*, 130 HARV. L. REV. 2348, 2348–50 (2017) (discussing various ways to read Thayer's essay and emphasizing this one).

171. *See* Gerhardt, *supra* note 72, at 765–66 (highlighting the "agenda setting" function of non-judicial interpretation); Aziz Z. Huq, *The Constitutional Law of Agenda Control*, 104 CALIF. L. REV. 1401, 1403–07 (2016) (discussing the range of such tools in constitutional law); *see also* Cary Coglianese & Daniel E. Walters, *Agenda-Setting in the Regulatory State: Theory and Evidence*, 68 ADMIN. L. REV. 93, 103–11 (2016) (discussing this feature among administrative agencies).

172. *See* JOSH CHAFETZ, CONGRESS'S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS 3–4 (2017).

173. *See* Garrett & Vermeule, *supra* note 170, at 1283 (listing constitutional issues shielded from judicial review, either de jure or de facto); Paul Brest, *Congress As Constitutional Decisionmaker and Its Power to Counter Judicial Doctrine*, 21 GA. L. REV. 57, 59 (1986) (emphasizing that the "place to begin looking for an answer [with non-judicial constitutionalism] is not the relatively rare instance when Congress seeks to contradict the Court, but the routine occasions when Congress is called upon to determine the constitutionality of the ordinary legislation it enacts"); *see also* David E. Pozen & Thomas P. Schmidt, *The Puzzles and Possibilities of Article V*, 121 COLUM. L. REV. 2317, 2380–81 (2021) (discussing Congress' exclusive power over constitutional amendments); Jack Goldsmith, Zivotofsky II *as Precedent in the Executive Branch*, 129 HARV. L. REV. 112, 135 (2015) (same for the executive).

174. *See* Garrett & Vermeule, *supra* note 170, at 1283 (discussing the disparity between the amount of congressional enactments and the size of the federal courts' docket).

175. *See* Brest, *supra* note 173, at 59.

constitutional values during implementation.[176] Together, the massive scale of these enterprises relative to the federal judiciary means that most constitutional questions receive a non-judicial answer only.[177] Even for those that do reach the courts, the proactive nature of non-judicial interpretation limits the available responses that judges can take.[178]

By contrast, courts play a reactive role in constitutional interpretation.[179] Despite the often-broad implications of a judgment, the case-or-controversy requirement limits courts to answering only the questions selected for them and properly raised within a concrete dispute.[180] Public interest litigation and the public law injunction have broadened the judicial role,[181] but the need for an actual dispute keeps courts largely passive in framing constitutional

176. *See* Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1270–71 (1996) (describing textual, structural, and historical bases for "presidential review" of legislative and executive actions); *cf.* Nina A. Mendelson, *Disclosing "Political" Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127, 1130 (2010) (identifying the influences different executive offices have on each other and arguing that intra-branch review is a powerful substitute for judicial review).

177. *See* NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 251 (1994). The actual extent of this numerical imbalance is difficult to pinpoint but it is in the orders of magnitude. There are "literally millions of federal servants . . . [and] millions of other public officials who work for state and local governments" all of which "are required by Article VI of the Constitution to pledge to that document their ultimate fealty." Sanford Levinson, *Constitutional Protestantism in Theory and Practice: Two Questions for Michael Stokes Paulsen and One for His Critics*, 83 GEO. L.J. 373, 375 (1994). At present, the number of federal judges wielding Article III powers is approximately 860. *See* ADMIN. OFF. OF THE U.S. CTS., AUTHORIZED JUDGESHIPS—FROM 1789 TO PRESENT (2022), https://www.uscourts.gov/judges-judgeships/authorized-judgeships.

178. *See* Louis Fisher, *Constitutional Interpretation by Members of Congress*, 63 N.C. L. REV. 707, 727–31 (1985) (explaining the ways that Congress can use its distinct resources and competency to shape constitutional issues). *But see* Abner J. Mikva, *How Well Does Congress Support and Defend the Constitution?*, 61 N.C. L. REV. 587, 588–89 (1983) (noting that Congress has historically left constitutional judgments to the courts, largely due to institutional pressures and constitutional convenience).

179. *See* PFANDER, *supra* note 40, at 5–9 (explaining how the case-or-controversy requirement is not necessarily adversarial but is reactive); *see also* William Baude, *The Judgment Power*, 96 GEO. L.J. 1807, 1832–33 (2008) (explaining that the judicial power binds government parties to the judgment, but other government officials are not obliged to accept its constitutional reasoning as applied to other issues).

180. *See* United States v. Sineneng-Smith, 140 S. Ct. 1575, 1578 (2020) (criticizing the Court of Appeal for identifying a First Amendment issue *sua sponte*, appointing an amicus curiae to argue the issue, and deciding the case on that ground). *But see* Amanda Frost, *The Limits of Advocacy*, 59 DUKE L.J. 447, 451–52 (2009) (arguing that this is common).

181. *See generally* Spencer G. Livingstone, Officer Injunctions and the Tradition of Public Law Remedies (2023) (unpublished manuscript) (on file with author). *See also* Seth Davis, *The New Public Standing*, 71 STAN. L. REV. 1229, 1260 (2019). For a challenge to the view that the judicial role has become less retrospective, Jonathan T. Molot, *An Old Judicial Role for A New Litigation Era*, 113 YALE L.J. 27, 32 (2003).

questions.[182] By the time an issue reaches the federal courts, non-judicial officials have narrowed a court's interpretive role to giving the end-product thumbs up or down.[183]

Second, the vast powers of non-judicial officials to enforce the Constitution also affect their interpretations. Take Congress, for example. It has an extraordinary capacity to conduct systemic factfinding and decide how best to intervene in complex, nationwide problems.[184] It then enacts generalized statutes aimed both at past remediation and future prevention based on value judgments of conflicting facts and goals.[185] With such enormous resources and enforcement powers, Congress can and does systematically overhaul the Constitution's everyday operation, even by changing the very structure of the federal government.[186] Similar features characterize executive enforcement, though with greater variation depending on the official's placement in the executive branch.[187]

182. *See* Schmidt, *supra* note 105, at 837–38 (emphasizing the dispute-resolution function of the district courts); *cf.* Henry Paul Monaghan, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665, 668 (2012) (arguing that the Supreme Court has unique tools to play a more systemic role). The generally passive role of the federal courts can be contrasted with the power of many state courts to render non-adversarial advisory opinions. *See generally* Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1909–15 (2001). More radically, some foreign courts have, in effect, dropped all pretext of adversity to better protect fundamental rights, as in India. *See generally* Burt Neuborne, *The Supreme Court of India*, 1 INT'L J. CONST. L. 476, 502–04 (2003).

183. *See* Thayer, *supra* note 164, at 135–36 (arguing that because of the constitutional decisions that lawmakers undertake, federal courts do not make a first-order judgment about constitutionality). The interpretive role that a court plays connects with its broader role within the constitutional order—a matter that changes depending on the *type* of court at issue. *Compare* Schmidt, *supra* note 105, at 837–38 (discussing the interpretive role of the district courts), *with* Monaghan, *supra* note 182, at 668 (discussing the unique interpretive features of the Supreme Court); *cf.* Sanford Levinson, *On Positivism and Potted Plants: "Inferior" Judges and the Task of Constitutional Interpretation*, 25 CONN. L. REV. 843, 849–50 (1993) (discussing the ordinary notion that lower courts' interpretive obligations are to the courts above them rather than the Constitution itself).

184. *See* Philip P. Frickey & Steven S. Smith, *Judicial Review, the Congressional Process, and the Federalism Cases: An Interdisciplinary Critique*, 111 YALE L.J. 1707 (2002). These resources include "large staffs, general subpoena power, and large [intrabranch] institutions such as the Congressional Research Service." Hessick, *supra* note 132, at 1473. For a discussion of whether Congress takes factfinding seriously, see Neal Devins, *Congressional Factfinding and the Scope of Judicial Review: A Preliminary Analysis*, 50 DUKE L.J. 1169, 1178–87 (2001).

185. *See* Evan H. Caminker, *"Appropriate" Means-Ends Constraints on Section 5 Powers*, 53 STAN. L. REV. 1127, 1132–33 (2001); *see also* Jeremy Waldron, *Judges as Moral Reasoners*, 7 INT'L J. CONST. L. 2, 19 (2009) (noting that legislatures are in a better position than courts to balance moral issues directly).

186. *See* Maggie Blackhawk, *Legislative Constitutionalism and Federal Indian Law*, 132 YALE L.J. 2205, 2266–72 (2023).

187. *See* Pillard, *supra* note 29, at 678; Mark Tushnet, *Non-Judicial Review*, 40 HARV. J. ON LEGIS. 453, 468–79 (2003) (emphasizing OLC and its power to instruct inferior executive officials to follow its interpretations); *see also infra* note 203.

For their part, courts interpret the Constitution within the scope of a single adjudication, with its narrow realm of facts and the corresponding limits on judicial enforcement.[188] Those facts are rarely systemic, and courts rely on litigants to bring them even when they are.[189] Moreover, courts' power to enforce their interpretations is similarly constrained to those narrow facts.[190] Officials may have reason to abide by judicial declarations about the Constitution, but non-judicial constitutionalism maintains that the only officials who *must* abide by such declarations are those made party to the judgment.[191] Broader compliance beyond the judgment rests on factors other than a court's narrow enforcement authority.[192]

The difference in enforcement authority impacts how institutions interpret the Constitution. As remedies scholars have noted, the scope of a court's remedial power is "inextricably intertwined" with how a court defines the substance of a right,[193] and Professor Fallon has explained how that connection reflects a deep link between institutional power and substantive law.[194] The result is that different enforcement capacities affect the "meaning" of constitutional values in practice.[195] To ask, for example, whether the First Amendment "require[s] religious exemptions from

188. *See* James E. Pfander & Jessica Dwinell, *A Declaratory Theory of State Accountability*, 102 VA. L. REV. 153, 183–94 (2016) (canvassing the practical steps required for enforcing a judgment, including how courts rely on executive enforcement).

189. *See* Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 240 (2002).

190. *See* Baude, *supra* note 179, at 1832–33 (2008) (arguing that this is a necessary aspect of Article III); *cf.* Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1271 (1996) (arguing that the one circumstance in which the President must accept judicial interpretations of the Constitution is by enforcing specific court judgments).

191. To the best of my knowledge, just one scholar argues that courts cannot bind coordinate branches through the judgment power. *See* Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 288–92 (1994). Scholars typically reject this view, emphasizing instead the space that the judgment power leaves for non-judicial interpretations rather than a non-judicial authority to ignore courts' judgments. *See, e.g.*, Zachary S. Price, *Reliance on Executive Constitutional Interpretation*, 100 B.U. L. REV. 197, 218 (2020) (discussing modern departmentalism).

192. *See generally* Neal Devins, *Why Congress Does Not Challenge Judicial Supremacy*, 58 WM. & MARY L. REV. 1495, 1498 (2017).

193. Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 858 (1999).

194. *See* Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—and Their Connections to Substantive Rights*, 92 VA. L. REV. 633, 637 (2006) ("[C]ourts . . . decide cases by seeking what they regard as an acceptable overall alignment of doctrines involving justiciability, substantive rights, and available remedies.").

195. *See* Post & Siegel, *Legislative Constitutionalism*, *supra* note 126, at 1967–68; Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 VA. L. REV. 1649, 1720 (2005).

generally applicable laws" is a category error.[196] The distinction between facially neutral and discriminatory statutes is a doctrinal tool that courts invented to protect constitutional values in light of scarce resources and limits on judicial power.[197] At other times, courts will over-enforce constitutional values to make up for those limits.[198] By contrast, Congress does not suffer from these problems of systemic enforcement but from the reverse: an inability to narrow its responses to correcting individual violations.[199] As such, Congress passes general statutes purporting to enforce constitutional values in circumstances that courts sometimes deem to not implicate the Constitution at all.[200] Among non-judicial constitutionalism scholars, few matters produce greater acrimony than when courts reject these statutes as attempts to override judicial interpretations rather than the inevitable result of different enforcement tools.[201]

Though limited in their own ways, Congress's different resources and enforcement techniques cause it to approve different constitutional practices than when courts interpret the same text.[202] Similar variance arises from the distinctive features of executive enforcement.[203]

196. *See, e.g.*, Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1882–83 (2021) (Barrett, J., concurring).

197. *See* Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After* Morrison *and* Kimel, 110 YALE L.J. 441, 459–67 (2000); *cf.* FALLON, *supra* note 95, at 40–67 (describing institutional features underlying the application of strict scrutiny compared to rational basis).

198. *See* Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1275, 1303–06 (2006).

199. *See* Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1239–42 (1978); *see also* Stephen F. Ross, *Legislative Enforcement of Equal Protection*, 72 MINN. L. REV. 311, 327–28 (1987).

200. *See, e.g.*, Allen v. Cooper, 140 S. Ct. 994, 1006 (2020) (holding invalid a patents statute because Congress had not found enough historical violations to justify a general remedial statute); Shelby County v. Holder, 570 U.S. 529, 553–55 (2013) (same for Congress's reauthorization of the Voting Rights Act under the Fifteenth Amendment); United States v. Morrison, 529 U.S. 598, 614–19 (2000) (same for Congress's enactment of the Violence Against Women Act under the Commerce Clause and Fourteenth Amendment).

201. For representative criticisms, see Frickey & Smith, *supra* note 184, at 1728–50; A. Christopher Bryant & Timothy J. Simeone, *Remanding to Congress: The Supreme Court's New "On the Record" Constitutional Review of Federal Statutes*, 86 CORNELL L. REV. 328, 384–89 (2001).

202. *See* Post & Siegel, *Legislative Constitutionalism*, *supra* note 126, at 1967. This principle has deep implications. Scholars often distinguish between purely semantic interpretation and practical concerns that arise during implementation. *See generally* Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 100–08 (2010). Yet this distinction breaks down in practice, as all interpretation occurs through the lens of institutional limitations. *See* Frederick Schauer, *Constructing Interpretation*, 101 B.U. L. REV. 103, 115–22 (2021). Whatever purely semantic meaning can be found in constitutional text, the need for implementation renders that endeavor largely academic. *See* Eisgruber, *supra* note 153, at 348.

203. The variety of executive functions prevent a fuller discussion of how institutional features affect the content of the Constitution in executive hands. For contextual explorations, see Eric S.

b) Democratic inputs. – The second feature of non-judicial constitutionalism is its responsiveness to democratic input. Though typically viewed as a negative—Hamilton called the federal courts "guardians of the Constitution" because of their insulation from democratic input[204]—scholars of non-judicial constitutionalism as far back as James Bradley Thayer have considered democratic responsiveness essential to a complete vision of constitutional practice.[205] Modern scholars of non-judicial constitutionalism echo that view.[206]

The role of democratic responsiveness in non-judicial constitutionalism follows from mixing the political branches' design with their power to engage in constitutional practice. Congress and the executive branch are both susceptible to public response and influence, including in their invocations of constitutional authority.[207] As a result, the voting public can make demands on how they interpret the Constitution.[208] It can also ratify or reject prior uses of constitutional authority to influence future interpretations.[209] In both respects, the openness to democratic response gives the public a direct channel to shape how non-judicial actors interpret and enforce the Constitution.[210]

Fish, *Prosecutorial Constitutionalism*, 90 S. CAL. L. REV. 237, 241 (2017) (discussing the role of interpretation by prosecutors); Emily Berman, *Weaponizing the Office of Legal Counsel*, 62 B.C. L. REV. 515, 520 (2021) (discussing OLC as constitutional interpreter); William Baude, *Signing Unconstitutional Laws*, 86 IND. L.J. 303, 304 (2011) (discussing limits on the President's power to enforce the Constitution at the point of signing bills into law).

204. *See* Michel Rosenfeld, *Executive Autonomy, Judicial Authority and the Rule of Law: Reflections on Constitutional Interpretation and the Separation of Powers*, 15 CARDOZO L. REV. 137, 148 (1993); *cf.* Aziz Z. Huq, *Why Judicial Independence Fails*, 115 NW. U. L. REV. 1055, 1060–62 (2021) (discussing the strengths and limits of independence).

205. Thayer, *supra* note 164, at 155–56; *see also* Jackson, *supra* note 170, at 2348–49 (discussing this aspect of Thayer's essay).

206. *See* Pillard, *supra* note 29, at 678–79.

207. *See generally* Jennifer L. Mascott, *Who Are Officers of the United States?*, 70 STAN. L. REV. 443, 458−63 (2018) (discussing the relation between Article II and the Appointments Clause in promoting democratic accountability for executive officers).

208. *Cf.* Nicholas O. Stephanopoulos, *Accountability Claims in Constitutional Law*, 112 NW. U. L. REV. 989, 1054–64 (2018) (canvassing empirical data that people tend to not vote based on public officials' past performance). Retrospective voting is just one tool for promoting democratic accountability. *See generally* GERGANA DIMOVA, DEMOCRACY BEYOND ELECTIONS: GOVERNMENT ACCOUNTABILITY IN THE MEDIA AGE 97–135 (2020).

209. *See generally* Lawrence G. Sager, *Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law*, 88 NW. U. L. REV. 410, 419 (1993); Larry D. Kramer, *Foreword: We the Court*, 115 HARV. L. REV. 5, 122 (2001). *Cf.* Gillian E. Metzger, *Administrative Constitutionalism*, 91 TEX. L. REV. 1897, 1928–29 (2013) (emphasizing that administrative officials are "constantly engaging with the public" and "with any number of executive branch entities" in constructing constitutional values).

210. While the present discussion is one of institutional design and capacity, the extent to which non-judicial actors are actually democratically accountable divides scholars. *See generally* Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1359–69 (2006).

Contrast that susceptibility with the Constitution in judicial hands. To state the obvious, the democratic public cannot directly ratify or reject a federal court's interpretation of the Constitution.[211] Judicial interpretation still infuses constitutional law with public values,[212] but the insulation of Article III ensures that those values come from elsewhere than the democratic public.[213] This is not a complaint about judicial review itself, which most scholars of non-judicial constitutionalism recognize can and should occur.[214] Rather, the risk is that non-judicial officials will abdicate their constitutional responsibilities by passing them onto courts.[215] Abdication of this kind encourages non-judicial officials to be "indocile, thoughtless, reckless, incompetent" in constitutional matters, relying on insulated courts to pick up the slack.[216] Because non-judicial officials are democratically responsive, keeping them engaged with constitutional values links those values to the democratic public.[217]

None of this advocates for democratic majorities to directly control individual judgments in court. The history of judicial independence speaks to the need for judges to decide concrete cases impartially.[218] As Professors Post and Siegel have explained, however, the legitimacy of a nation's

211. For an empirical study of how electoral accountability affects the voting behavior of elected state judges, and for what areas of law, see Joanna M. Shepherd, *Money, Politics, and Impartial Justice*, 58 DUKE L.J. 623, 628–30 (2009).

212. *See, e.g.*, Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479, 484–85 (2010) (exploring how courts police non-judicial decisions about the administrative state based on their own public values).

213. *See* Mark Tushnet, *Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty*, 94 MICH. L. REV. 245, 299–300 (1995); *cf. infra* note 246 (discussing other institutional tools by which democratic input can shape judicial interpretations).

214. *See, e.g.*, Post & Siegel, *Popular Constitutionalism*, *supra* note 22, at 1029. For an outlier view, see generally TUSHNET, *supra* note 164.

215. *See* Matthew D. Adler, *Judicial Restraint in the Administrative State: Beyond the Countermajoritarian Difficulty*, 145 U. PA. L. REV. 759, 848 (1997) (noting this distinction in justifying non-judicial constitutionalism); *cf.* Keith E. Whittington, *James Madison Has Left the Building*, 72 U. CHI. L. REV. 1137, 1148 (2005) (noting the possibility that judicial constitutionalism can prod non-judicial officials to engage in constitutional discourse).

216. Thayer, *supra* note 164, at 149; *cf.* Thomas C. Grey, *Thayer's Doctrine: Notes on Its Origin, Scope, and Present Implications*, 88 NW. U. L. REV. 28, 39–40 (1993) (linking Thayer to civic republicanism's emphasis on deliberation over constitutional values).

217. As with the institutional competence discussion, the precise role and extent of democratic input will vary by non-judicial institution. *See generally* Bertrall L. Ross II, *Administrative Constitutionalism as Popular Constitutionalism*, 167 U. PA. L. REV. 1783, 1806–19 (2019) (discussing democratic inputs for administrative constitutionalism).

218. For a thorough history of how tenure and salary protections became entrenched in the Settlement Act of 1701, 12 & 13 Will. 3, c. 2, § 3, after extended conflict over the King's power to remove judges at pleasure and culminating in the Bloody Assizes, see JOHN H. LANGBEIN, RENÉE LETTOW LERNER & BRUCE P. SMITH, HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS 657 (2009); *cf.* C. H. McIlwain, *The Tenure of English Judges*, 7 AM. POL. SCI. REV. 217, 223–24 (1913) (providing a shorter account).

constitutional law depends on its responsiveness to the nation's values.[219] That is, a constitution is not just a legal document cropping up in court but also a statement of national identity,[220] and the practices giving it effect must be capable of reflecting changes to that identity.[221] Article III prevents that reflection at the level of individual judgments, and non-judicial constitutionalism highlights an alternate path for such changes to occur through construction in non-judicial hands.

2. Longevity

When a practice extends over time, both elements of non-judicial constitutionalism acquire greater significance. Indeed, from a constitutional perspective, the distinctive features of non-judicial interpretation are not necessarily benefits. To the contrary, they introduce external influences into public power that are often cause for concern.[222] Longevity resolves those concerns to ensure that the practice represents a high-value interpretation by non-judicial officials.[223]

Regarding institutional competence, each repetition of a practice affirms that the practice is a deliberate use of constitutional authority. While courts give opinions in part to confirm that their use of public power is deliberate and reasoned,[224] proof of constitutional deliberation by other institutions is

219. *See* Post & Siegel, *Legislative Constitutionalism*, *supra* note 126, at 1950; Robert Post & Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 379–80 (2007) [hereinafter Post & Siegel, Roe *Rage*]; Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1, 3 (2003) [hereinafter Post & Siegel, *Protecting the Constitution*]; *see also* Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297, 302–03 (2001).

220. *See generally* VICKI C. JACKSON, CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA 155 (2010). *Cf.* Mila Versteeg, *Unpopular Constitutionalism*, 89 IND. L.J. 1133, 1137–38 (2014) (challenging this empirically based on international data that people tend to not know the content of their constitutions).

221. *See* Cristina M. Rodríguez, *Foreword: Regime Change*, 135 HARV. L. REV. 1, 7 (2021) (noting that every constitution embodies a tension between fixation and change).

222. *Cf.* Pillard, *supra* note 29, at 680 (noting the difficulty non-judicial constitutionalism faces in distinguishing between constitutional principle and political opportunism).

223. As this suggests, longevity confers different significance when viewed through the lens of non-judicial constitutionalism than other frameworks of analysis. *See, e.g.*, RANDY J. KOZEL, SETTLED VERSUS RIGHT: A THEORY OF PRECEDENT 19–34 (2017) (discussing the significance of longstanding judicial decisions); William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1362 (1988) (same for longstanding statutory interpretations). My aim is not to exclude these forms of longevity but to more precisely hone in on the significance of longevity that occurs through non-judicial practice in constructing constitutional values.

224. *Cf.* Robert Post, *The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court*, 85 MINN. L. REV. 1267, 1274–75 (2001) (discussing historical changes to the function of judicial opinions that track changes in the institutional role of the courts).

less clear. Legislatures sometimes state their constitutional authority in a statute but it is usually cursory,[225] and statements by individual committees or legislators attract suspicion rather than respect.[226] Though more varied, statements by executive officials explaining their authority are rarely more extensive.[227] The thinness of these explanations means that the non-judicial practice itself often cannot signal deliberate consideration of constitutional values. When the practice is longstanding, however, that signal becomes sounder.[228] Each repetition increases the likelihood that, whatever the practice's origins, those responsible for the practice have concluded that it is an acceptable use of public power.[229]

By honing the value of the underlying interpretation, deliberate continuation also has practical consequences for the constitutional system. Given the systemic nature of non-judicial enforcement, sustained interpretation by non-judicial officials allows the practices and programs that shape constitutional government to accumulate over time, constructing the systems of government that give concrete shape to abstract constitutional

225. *See* RULES OF THE HOUSE OF REPRESENTATIVES, 117TH CONG., R. XII, cl. 7(c)(1) (2021) (requiring the sponsor of any bill or joint resolution introduced in the House to include "a statement citing as specifically as practicable the power or powers granted to Congress in the Constitution to enact the bill or joint resolution"); *see also* Hanah Metchis Volokh, *Constitutional Authority Statements in Congress*, 65 FLA. L. REV. 173, 175 (2013) (arguing that Rule XII increases constitutional deliberation in Congress); *cf.* Garrett & Vermeule, *supra* note 170, at 1317 (suggesting an Office for Constitutional Institutions for Congress because it sometimes fails to conduct a constitutional analysis).

226. *See* Anita S. Krishnakumar, *Statutory History*, 108 VA. L. REV. 263, 270–76 (2022) (discussing the current antipathy toward legislative history in law and scholarship).

227. Some scholars of non-judicial constitutionalism highlight OLC as a constitutional interpreter, especially the way it produces written opinions that mirror judicial decisions. *See, e.g.*, Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448, 1451 (2010); *cf.* Berman, *supra* note 203, at 538–58 (noting the ways that OLC opinions differ from judicial opinions to the benefit of the executive branch). But OLC is anomalous. That is, it focuses on high-level policymaking that, at best, provides a generalized basis for more routine, common, and thinly explained decisions lower in the administrative hierarchy. *See, e.g.*, Shalini Bhargava Ray, *Immigration Law's Arbitrariness Problem*, 121 COLUM. L. REV. 2049, 2069–94 (2021) (describing the discretionary tools that the executive branch uses in the immigration context to impose "shadow sanctions" falling short of deportation, which it deems to comport with due process though often without providing explanation or consistent application).

228. *See* Eisgruber, *supra* note 153, at 355 (noting the capacity for Congress and the Executive to "have the best insight into how the Constitution balances competing principles" as a result of "[e]xperience and responsibility").

229. *Cf.* Garrett & Vermeule, *supra* note 170, at 1303–04 (emphasizing the importance of non-judicial officials publicly raising and deliberating over constitutional issues). Madison invoked the same principle by maintaining that past practice was "entitled to little respect" when it occurred "without full examination & deliberation"—that is, proof that the practice was purposeful. Letter from James Madison to Spencer Roane (May 6, 1821), *in* 2 THE PAPERS OF JAMES MADISON: RETIREMENT SERIES 317, 320 (David B. Mattern et al. eds., 2009). Professor Baude discusses these sources in relation to liquidation's similar need for the longstanding practice to be deliberate. *See* Baude, *supra* note 14, at 16.

values.[230] In Professor Balkin's formulation, which is only partly metaphorical, longstanding non-judicial practices are responsible for *building* the republic.[231] Without those practices, the American system of constitutional governance would be little more than a collection of judicial rules about what officials cannot do.[232]

The democratic dimension of non-judicial interpretation likewise takes on special significance through longevity. Valuing democratic input in constitutional interpretation seems contrary to a counter-majoritarian Constitution.[233] But democratic values and constitutionalism are inconsistent only at the level of individual actions.[234] At a higher level, democracy and constitutionalism are mutually reinforcing: The latter provides the rules for the former and the former influences the practices that shape the latter.[235] The difficulty just lies in distinguishing between democratically responsive practices that represent ordinary lawmaking and those that constitute the government itself.[236]

230. *See* WHITTINGTON, *supra* note 164, at ix.

231. *See generally* JACK M. BALKIN, LIVING ORIGINALISM 5–6 (2011) (describing the ability to accumulate non-judicial constitutional practices as akin to the literal construction of the constitutional state). *See also* Blackhawk, *supra* note 186, at 2266-72 (describing Congress as a "builder, overseer, and reformer of the structure of the U.S. government").

232. Courts can adopt prescriptive doctrines that supposedly require non-judicial officials to enforce the Constitution, but even here courts merely raise the incentives for non-judicial officials to act rather than actually compelling them to do so. *See* Neal Kumar Katyal, *Judges as Advicegivers*, 50 STAN. L. REV. 1709, 1710–11 (1998); *cf.* Mitchell Pearsall Reich, *Incomplete Designs*, 94 TEX. L. REV. 807, 809 (2016) (discussing the ineffectiveness of these doctrines because of problems they create for downstream actors).

233. *See generally* JON ELSTER, ULYSSES UNBOUND: STUDIES IN RATIONALITY, PRECOMMITMENT, AND CONSTRAINTS (2000); Eric Barendt, *Separation of Powers and Constitutional Government*, 1995 PUB. L. 599, 605–06. On the surprisingly underdeveloped nature of this function, see Richard H. Fallon, Jr., *Constitutional Constraints*, 97 CALIF. L. REV. 975, 977 (2009).

234. *See generally* SAMUEL ISSACHAROFF, FRAGILE DEMOCRACIES: CONTESTED POWER IN THE ERA OF CONSTITUTIONAL COURTS 8–12 (2015). Constitutional theory abounds with explanations of why and how judicial review advances rather than impedes democratic interests. *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980) (defending a model of "representation-reinforcing" judicial review by which constitutional scrutiny focuses on the channels of democratic power or attempts to use that power against minority groups); *see also* 1 BRUCE A. ACKERMAN, WE THE PEOPLE: FOUNDATIONS 6–7 (1991) (arguing that because the Constitution embodies popular sovereignty, its enforcement through judicial review does as well).

235. *See* Post & Siegel, *Popular Constitutionalism*, *supra* note 22, at 1042–43; Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 502–07 (1997).

236. *See* David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 COLUM. L. REV. 2047, 2050 (2010); Matthew D. Adler, *Popular Constitutionalism and the Rule of Recognition: Whose Practices Ground U.S. Law?*, 100 NW. U. L. REV. 719, 720 (2006); *see also* Pamela S. Karlan, *Foreword: Democracy and Disdain*, 126 HARV. L. REV. 1, 11–14 (2012) (noting this problem for constitutional decisions on the law of democracy).

For non-judicial practices, longevity is key to this distinction. Individual uses of constitutional authority often reflect ill-considered reactions to political pressures, exigencies, or pragmatism.[237] Where the practice repeats over time, however, its significance changes. Continued sanction by the public reflects democratic approval not of partisan interests but of constitutional authority.[238] Put differently, it ceases to operate within the ordinary push-and-pull of partisanship and instead reflects fundamental values that the nation insists on.[239] In this way, ordinary practices informed by democratic input can become constitutive rules that constrain non-judicial officials in pursuing more immediate, partisan goals.[240] The practices do not cease to be political, but they do cease to be partisan.[241]

The capacity for non-judicial practices to acquire a constitutive function is particularly important for democratizing the American Constitution. All constitutions require ongoing approval,[242] creating a need for processes by which popular movements can alter the fundamental rules of their government.[243] In America, the rigidity of Article V has forced most constitutive rules to develop sub-constitutionally,[244] making those rules and their non-judicial construction the primary method for public values to shape government practices.[245] Without these longstanding practices and their

237. *See* Barbara Sinclair, *Can Congress Be Trusted with the Constitution*?, *in* CONGRESS AND THE CONSTITUTION 293, 294–95 (N. Devins & K. Whittington eds., 2005).

238. *See* Jonathan S. Gould, *Law Within Congress*, 129 YALE L.J. 1946, 1950–58 (2020).

239. *See* WILLIAM N. ESKRIDGE & JOHN FEREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION 304 (2010); REBECCA E. ZIETLOW, ENFORCING EQUALITY: CONGRESS, THE CONSTITUTION, AND THE PROTECTION OF INDIVIDUAL RIGHTS 6 (2006); *see also* WHITTINGTON, *supra* note 164, at ix.

240. On the incentives non-judicial officials have to follow or break constitutive rules that are outside judicial review, see Ittai Bar-Siman-Tov, *Lawmakers as Lawbreakers*, 52 WM. & MARY L. REV. 805, 808 (2010).

241. *See* Post & Siegel, *Legislative Constitutionalism*, *supra* note 126, at 1947; *cf.* CHAFETZ, *supra* note 172, at 3–4 (identifying the necessary connection between constitutional power and its political context, and the implications this has for constitutional law more generally).

242. *See generally* Samaha, *supra* note 20, at 615–16 (discussing the prevalence of this problem for any approach to constitutional theory).

243. *See* ESKRIDGE & FEREJOHN, *supra* note 239, at 304; Post & Siegel, *Legislative Constitutionalism*, *supra* note 126, at 1947.

244. *See* Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408, 413–14 (2007); *see also* Tom Ginsburg & Eric A. Posner, *Subconstitutionalism*, 62 STAN. L. REV. 1583, 1596 (2010) (discussing the effect of sub-constitutional rules on agency costs in governance).

245. *See* Aziz Z. Huq, *The Function of Article V*, 162 U. PA. L. REV. 1165, 1168–69 (2014); Heather K. Gerken, *The Hydraulics of Constitutional Reform: A Skeptical Response to Our Democratic Constitution*, 55 DRAKE L. REV. 925, 927 (2007). For an argument that there is no functional basis for distinguishing between the Constitution and sub-constitutional documents, see Richard Primus, *Unbundling Constitutionality*, 80 U. CHI. L. REV. 1079, 1084–85 (2013).

constitutive function, entrenched rules of governance would come solely from courts, insulated though they are from public input.[246]

In short, longevity is not constitutionally significant in itself. What it does is bring out the characteristic elements of non-judicial constitutionalism, separating the noise of everyday practice from more deliberate engagement with the constitutive rules of public power. The result is not just that a practice and its underlying interpretation have persisted, but that they have done so based on competencies and inputs that courts lack.

C. The Legal Significance of Longevity

With longevity linked to non-judicial constitutionalism, the central issue remains: What inferences about constitutional interpretation can courts draw from non-judicial longevity? This Section argues that in light of non-judicial constitutionalism's distinct features, two principles guide the use of longevity in court. First, courts should incorporate longstanding, non-judicial engagement with constitutional values into their own interpretations of the Constitution. Second, courts should avoid using longevity to restrict continued engagement by non-judicial officials in the future. These principles—the incorporation principle and the continued practice principle—accord with other approaches to non-judicial practice in constitutional theory, especially the treatment of conventions in court.

1. Two Principles of Longevity

Begin on the positive side. That courts should respect non-judicial interpretations does not obviously follow from the distinct features of non-judicial constitutionalism. After all, courts have their own tools of constitutional interpretation—especially text, history, and structure[247]—and

246. *Cf.* David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1468 (2001) (highlighting the role of courts, in conjunction with more majoritarian processes, in promoting sub-constitutional change). Other avenues of democratic input on judicial interpretations are available, especially the appointment process for federal judges by political officials. *See* BALKIN, *supra* note 231, at 287–88. Article III independence prevents outside influence on the outcome of individual decisions, *see generally* Vicki C. Jackson, *Packages of Judicial Independence: The Selection and Tenure of Article III Judges*, 95 GEO. L.J. 965, 967 (2007) (distinguishing between institutional and decisional independence), but when extended over time that influence aims less at individual decisions than the capacity of the nation's fundamental law to reflect the nation. *See* Post & Siegel, *Popular Constitutionalism*, *supra* note 22, at 1042–43. Still, those appointments establish only an indirect link between democratic inputs and constitutional doctrine. *See* Pozen, *supra* note 236, at 2050.

247. *See generally* BOBBITT, *supra* note 12, at 5–8 (explaining that the modalities arise from conventions of practice that define the acceptable use of judicial power to decide constitutional questions); Fallon, *supra* note 65, at 1193–94 (same). *See also* Philip Bobbitt, *Reflections Inspired by My Critics*, 72 TEX. L. REV. 1869, 1872 (1994) (explaining that the judicial modalities are ultimately about "[w]hat legitimates judicial review").

they do not account for the institutional competence or democratic susceptibility of non-judicial officials. Indeed, both features of non-judicial constitutionalism center on its political nature, making them what Professors Pozen and Samaha call the "anti-modalities" that courts may not use.[248] Far from giving credence to non-judicial interpretation, then, courts' responsibility would seem to be to ignore it and answer interpretive questions for themselves.[249]

Yet this view misapprehends the relation between judicial and non-judicial interpretation. Just like the distinctive features of non-judicial constitutionalism, the modalities of judicial interpretation are tailored to courts' institutional strengths and weaknesses.[250] They are not inherent to constitutionalism itself but instead correspond to the judicial role,[251] reflecting the limits of judicial power rather than the limits of constitutional meaning.[252] Far from requiring institutions to ignore one another, then, those limits indicate that constitutional interpretation must be a shared process in which judicial and non-judicial officials incorporate each other's roles to correct their deficiencies.[253]

Call this the "incorporation principle."[254] While the modalities exclude political considerations from courts' engagement with the Constitution, they

248. *See* Pozen & Samaha, *supra* note 69, at 731–32.

249. *See* Frederick Schauer, *Judicial Supremacy and the Modest Constitution*, 92 CALIF. L. REV. 1045, 1046 (2004) (arguing that courts should reject political attempts to generate values in constitutional interpretation); *see also* Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997) (similar).

250. *See* BOBBITT, *supra* note 12, at 5–8; *cf.* Richard H. Fallon, Jr., *Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 59 (1997) (suggesting that the interpretation-implementation distinction can be useful but noting that both aspects are tailored to constraints on the judicial role).

251. *Cf.* Morrison, *supra* note 227, at 1451 (likening OLC opinions to judicial opinions).

252. *See generally* Aziz Z. Huq, *Tiers of Scrutiny in Enumerated Powers Jurisprudence*, 80 U. CHI. L. REV. 575, 581 (2013) (noting that the relation between officials' constitutional interpretations stems from institutional capacity differences rather than the substance of an interpretation). *See also* Corinna Barrett Lain, *Soft Supremacy*, 58 WM. & MARY L. REV. 1609, 1612–13 (2017) (explaining that non-judicial officials often accept judicial interpretations for institutionally beneficial reasons, not because courts' interpretations are more valid or accurate).

253. *See* Michael C. Dorf & Barry Friedman, *Shared Constitutional Interpretation*, 2000 SUP. CT. REV. 61, 62–63; Johnsen, *supra* note 169, at 109; Fisher, *supra* note 178, at 708 (using the term "coordinate construction" to describe the shared nature of constitutional interpretation across institutions); Neal Kumar Katyal, *Legislative Constitutional Interpretation*, 50 DUKE L.J. 1335, 1393 (2001); *cf.* Aziz Z. Huq, *The Negotiated Structural Constitution*, 114 COLUM. L. REV. 1595, 1674–82 (2014) (arguing that courts should defer to non-judicial practices for a possible reading of the Constitution without those practices carefully). *But see* Nikolas Bowie & Daphna Renan, *The Separation-of-Powers Counterrevolution*, 131 YALE L.J. 2020, 2028–30 (2022) (arguing that courts should not review congressional and executive arrangements for constitutionality).

254. *See generally* Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1184 (2013) (explaining how non-judicial constitutional practices can be "incorporated" into judicial interpretations). *Cf.* Richard Murphy, *The* Brand X *Constitution*, 2007 B.Y.U. L. REV.

do not exclude those considerations from non-judicial officials' activities.[255] Nor do they exclude the kind of social, moral, and pragmatic considerations that are central to those officials' responsibilities in constructing a constitutional system responsive to contemporary problems and values.[256] Both dimensions are beyond judicial competence but no less central to a complete account of constitutional practice. Where longevity reflects deliberate construction, it is worthy of incorporation into judicial analysis because of those unique features.

Yet that incorporation is of a particular kind. The fact that courts have their own interpretive modalities that exclude the distinctive features of non-judicial constitutionalism means that courts cannot simply accept even longstanding non-judicial interpretations.[257] Although scholars often use the term, incorporation cannot be a matter of "deferring" to non-judicial interpretations—in the sense of adopting those interpretations—without risking abdication of the judicial role.[258] The longstanding practice may reflect multiple interpretations,[259] or else factors that courts cannot rely on.[260] Yet non-judicial constitutionalism still calls for courts to give the practice significance if it is deliberate and longstanding.[261] Rather than deference, then, incorporation involves translation,[262] using the longstanding practice to

1247, 1255 (2007) (likening this deference to non-judicial interpretations of the Constitution where sufficiently deliberate to process-based deference in administrative law).

255. *See* Pozen & Samaha, *supra* note 69, at 731–32.

256. *See* Post & Siegel, Roe *Rage*, *supra* note 219, at 379–80.

257. *See* Robert A. Schapiro, *Judicial Deference and Interpretive Coordinacy in State and Federal Constitutional Law*, 85 CORNELL L. REV. 656, 658–59 (2000) (rejecting the idea that non-judicial constitutionalism "substitute[s] legislative supremacy or executive supremacy for judicial supremacy").

258. *See, e.g.*, Bradley, *supra* note 16, at 59 (identifying one of the justifications of longevity as "deference to the constitutional views of nonjudicial actors"); *cf.* John O. McGinnis, *The Duty of Clarity*, 84 GEO. WASH. L. REV. 843, 847 (2016) (characterizing Thayer as calling for "judicial deference" to non-judicial constitutional interpretations).

259. *See* Krishnakumar, *supra* note 226, at 318 (noting the problem of attributing to Congress a consistent intent when re-enacting a prior statute).

260. None of this prevents non-judicial officials from engaging in quasi-judicial interpretations. *See generally* Morrison, *supra* note 227, at 1451 (describing OLC's written opinions as similar to judicial opinions). *Cf.* Peter M. Shane, *Legal Disagreement and Negotiation in a Government of Laws: The Case of Executive Privilege Claims Against Congress*, 71 MINN. L. REV. 461, 465 (1987) (arguing that the lawyers of each government branch should "assume a quasi-adjudicative role" in determining questions of executive privilege for their branch).

261. *Cf.* CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 77 (1969) (arguing that the reasons to incorporate congressional interpretations do not apply to congressional judgments by inferior executive officials).

262. *See* Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 85–118 (1994) (discussing the concept of translation from non-judicial to judicial practice); *cf.* Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123, 125–26 (1994) (similar). For a more theoretical discussion of "translation"

shape how courts apply the modalities consistent with their institutional role.[263] Such incorporation allows courts to respect non-judicial interpretations while still acting as courts.

Now to the negative side. The same concern about incorporating non-judicial constitutional practices weighs against courts preventing non-judicial officials from continuing to construct constitutional meaning in the future. Call this the "continuing practice principle." The principle is partly textual: As non-judicial constitutionalism recognizes, the grant of constitutional authority to non-judicial institutions is a continuing power,[264] not for past officials to give away for the future.[265] Moreover, unlike originalism, non-judicial constitutionalism does not seek a definitive interpretation at a specified time. Rather, it is the practice itself and its capacity to construct constitutional governance over time in accordance with public morals that carries constitutional value.[266] Those public morals and the needs of contemporary governance change, and non-judicial constitutionalism highlights the capacity of non-judicial officials to respond.[267] Indeed, responsiveness is the core of the incorporation principle. Yet if courts should incorporate a longstanding practice into their interpretations, then they have equal reason to ensure that officials can continue constructing a responsive constitutional practice in the future.

As the continuing practice principle suggests, longevity operates differently in the constitutional context compared to statutory or regulatory contexts. For the latter, longevity can suggest that the practice reflects the correct interpretation because one institution controls the meaning of the text being interpreted.[268] With a statute, for example, because the task of

in constitutional interpretation, as well as its connection to institutional constraints on courts, see Lawrence Lessig, *Fidelity and Constraint*, 65 FORDHAM L. REV. 1365, 1371–76 (1997).

263. *See* Post & Siegel, *Legislative Constitutionalism*, *supra* note 126, at 1947 (providing that courts should apply a more relaxed standard of scrutiny to non-judicial constitutional interpretations as one form of incorporation); *see also* Fallon, *supra* note 65, at 1193–94 (discussing the interaction of the modalities and how presumptions about non-judicial interpretations fit with that interaction).

264. *See* United States v. Ballin, 144 U.S. 1, 5 (1892) (explaining that because of the textual grant of authority to Congress, "the power to make rules is not one which once exercised is exhausted. It is a continuous power, always subject to be exercised . . . .").

265. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 124–25 n.1 (3d ed. 2000) (maintaining that legislatures cannot enact statutes that restrict the exercise of legislative power by a subsequent legislature); *cf.* Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665, 1705 (2002) (arguing that legislatures frequently restrict the power of subsequent legislatures informally).

266. *Cf.* Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Madisonian Liquidation, and the Originalism Debate*, 106 VA. L. REV. 1, 8–9 (2020) (noting the importance of approaching longstanding practice from the perspective of the practice itself rather than a final and fixed settlement).

267. *See* Thayer, *supra* note 164, at 155–56.

268. *See* Nancy C. Staudt, René Lindstädt & Jason O'Connor, *Judicial Decisions as Legislation: Congressional Oversight of Supreme Court Tax Cases, 1954-2005*, 82 N.Y.U. L. REV. 1340, 1386–

interpretation is to ascertain what Congress intended at the point of enactment,[269] courts can take a longstanding interpretation as evidence that Congress accepts that interpretation to the exclusion of others.[270] In constitutional matters, however, no institution controls constitutional meaning. As explained, the process is shared as each institution compensates to correct its interpretive deficiencies. Thus, a longstanding practice does not signal to courts that other interpretations are impossible. Instead, the continuing practice principle recognizes the need to keep non-judicial officials engaged in constructing constitutional meaning on a responsive and ongoing basis.

2. An Analogy to Convention

These two principles of longevity are deeply rooted in constitutional theory. Indeed, they are expressed in the other area where non-judicial, post-adoption practice acquires constitutional significance: constitutional conventions.

Conventions are central to England's "unwritten" constitution,[271] and American constitutional scholars periodically rediscover how their Constitution also rests on norms guiding the use of public power, backed by political or moral sanction rather than legal force.[272] For example, the Speaker of the House's practice of inviting the President to deliver the State of the Union Address in-person each year is conventional rather than constitutional, just as convention rather than Constitution prevents Congress from changing the size of the Supreme Court to control its jurisprudence.[273]

88 (2007); *cf.* Randy J. Kozel, *Statutory Interpretation, Administrative Deference, and the Law of Stare Decisis*, 97 TEX. L. REV. 1125, 1142 (2019) (explaining that after a court has interpreted a statute, its function is finished and responsibility to correct it passes to Congress).

269. *See* Ethan J. Leib, David L. Ponet & Michael Serota, *A Fiduciary Theory of Judging*, 101 CALIF. L. REV. 699, 748 (2013) (explaining the conventional view that, in statutory interpretation cases, the judiciary is supposed to be a faithful agent of the legislature); *cf.* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 910–11 (2013) (noting an empirical disconnect between how legislation is drafted and the tools courts employ to capture legislative intent).

270. *See* Ethan J. Leib & James J. Brudney, *Legislative Underwrites*, 103 VA. L. REV. 1487, 1490–91 (2017); *cf.* FTC v. Bunte Bros., Inc., 312 U.S. 349, 352 (1941) (explaining that an agency's longstanding failure to interpret a statute in an expansive way is "significant in determining whether such power was actually conferred").

271. *See* DICEY, *supra* note 32, at 23.

272. *See* HERBERT W. HORWILL, THE USAGES OF THE AMERICAN CONSTITUTION 8–9 (1925); David E. Pozen, *Self-Help and the Separation of Powers*, 124 YALE L.J. 2, 29 (2014); Vermeule, *supra* note 254, at 1182; Keith E. Whittington, *The Status of Unwritten Constitutional Conventions in the United States*, 2013 U. ILL. L. REV. 1847, 1860.

273. *See* Jonathan S. Gould, *Codifying Constitutional Norms*, 109 GEO. L.J. 703, 716–17 (2021) (discussing these examples among others).

As relevant to the present discussion, longevity scholars have noted the similarity of constitutional conventions to longevity, as both recognize the constitutive function of practices that have developed since ratification.[274]

Yet the similarity goes deeper. Constitutional conventions typically develop over long periods of time, and that longevity helps establish them as the "normal" practices for which a breach is politically or morally sanctionable.[275] In that way, they often represent longstanding practices that exist because non-judicial actors and the public consider them necessary to maintain certain standards of public morality.[276] Conventions therefore allow the public to provide the rules governing constitutional power in ways that courts cannot do, playing off both the unique competency and democratic susceptibility of non-judicial officials.[277] In short, conventions are tools of non-judicial constitutionalism.

That conceptual overlap makes the treatment of conventions in court instructive. The legal rule is simple: Courts will recognize conventions, but they will not enforce them.[278] On the first, courts account for the existence of conventions because everyone else does.[279] As non-judicial officials understand their authority in relation to conventions, courts can similarly understand those officials only through those conventions.[280] That includes

274. *See generally* Bradley & Siegel, *Historical Gloss*, *supra* note 15, at 267; Bradley & Siegel, *After Recess*, *supra* note 15, at 27. *Cf.* Adrian Vermeule, *Conventions in Court*, 38 DUBLIN U. L.J. 283, 284 (2015) (suggesting a deeper connection between the two concepts).

275. *See* SIR W. IVOR JENNINGS, THE LAW AND THE CONSTITUTION 136 (5th ed. 1959) (explaining that conventions arise out of a series of precedents, though they are more than precedents). For similar reasoning about the creation of conventions, see Ashraf Ahmed, *A Theory of Constitutional Norms*, 120 MICH. L. REV. 1361, 1390–93 (2022); Pozen, *supra* note 272, at 29.

276. *See* Vermeule, *supra* note 254, at 1186 (distinguishing between "thin" and "thick" approaches to this enforcement obligation).

277. *See* DICEY, *supra* note 32, at 424 (explaining that conventions promote democratic accountability in the exercise of public power). *But see* Vicki C. Jackson, *The (Myth of Un)Amendability of the U.S. Constitution and the Democratic Component of Constitutionalism*, 13 INT'L J. CONST. L 575, 576 (2015) (arguing that conventions are undemocratic because they often arise in less visible areas of governance).

278. Referred to as "the Commonwealth approach" for its ubiquity throughout current and former Commonwealth countries, *see generally* Farrah Ahmed, Richard Albert & Adam Perry, *Judging Constitutional Conventions*, 17 INT'L J. CONST. L. 787, 788 (2019), formal expression of the dichotomy arose (though without the term) in the famous Canadian *Patriation Reference*, [1981] 1 S.C.R. 753, 877–78. English courts had previously taken the same approach. *See, e.g.*, Ibralebbe v. The Queen, [1964] AC 900 (PC) (appeal taken from Ceylon); Adegbenro v. Akintola, [1963] AC 614 (PC) (appeal taken from Nigeria); Carltona Ltd. v. Comm'rs of Works, [1943] 2 All ER 560 (CA); Liversidge v. Anderson, [1942] AC 206 (HL) (appeal taken from Eng.).

279. *See* Vermeule, *supra* note 274, at 284.

280. *See* Ahmed et al., *supra* note 278, at 789–90. To give two examples, courts could not properly interpret statutes without recognizing conventions of legislative drafting, *see* GEOFFREY MARSHALL, CONSTITUTIONAL CONVENTIONS: THE RULES AND FORMS OF POLITICAL ACCOUNTABILITY 9–11 (2001) (explaining that legislation would be unintelligible without conventions); *see also* THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW

not only taking judicial notice that a convention exists, but also "[i]ndirect recognition and incorporation through interpretation" of the legal text on which a conventional practice depends.[281] What courts will not do is enforce conventions as law.[282] Here, too, the reason is straightforward: Conventions are not law, no matter how strong the political sanction behind them.[283] If officials choose to constrain their own lawful discretion, that is itself a matter of discretion that courts cannot compel.[284]

This dual approach to constitutional conventions reflects the two principles of longevity. Conventions arise out of public values, either through a practice that non-judicial officials adopt and the public responds to over time or that the public demands directly.[285] As such, they "ensure that the legal framework of the constitution will be operated in accordance with the prevailing constitutional values or principles of the period."[286] Yet it is precisely that need for conventions to reflect public values that courts cannot treat a breach of convention as unlawful, as this would prevent non-judicial officials from changing conventions in response to public and pragmatic

309 (5th ed. 1956) (similar), nor could they properly assign official liability without conventions. *See generally* PETER W. HOGG, PATRICK J. MONAHAN & WADE K. WRIGHT, LIABILITY OF THE CROWN § 7.3(d)(i) (4th ed. 2011). More concretely, the U.K. Supreme Court recently held that the Prime Minister's unlawful advice to the Queen to prorogue Parliament rendered that prorogation unlawful because, even though the Queen could legally ignore the advice, she accepts it as a matter of constitutional convention. *See* R (on the application of Miller) v. The Prime Minister, [2019] UKSC 41, ¶¶ 69–70.

281. Vermeule, *supra* note 254, at 1184.

282. *See* Malcolm Rowe & Nicholas Déplanche, *Canada's Unwritten Constitutional Order: Conventions and Structural Analysis*, 98 CAN. BAR REV. 430, 431 (2020).

283. *See* Léonid Sirota, *Towards a Jurisprudence of Constitutional Conventions*, 11 OX. U. COMMONWEALTH L.J. 29, 51 (2011); *cf.* N. W. BARBER, THE CONSTITUTIONAL STATE 89 (2010) (maintaining that the difference between laws and conventions is one of degree).

284. Colin Munro, *Laws and Conventions Distinguished*, 91 L.Q. REV. 218, 228 (1975). Some argue that a convention can "crystallize" into law, *see, e.g.*, BARBER, *supra* note 283, at 89, but that remains an elusive "holy grail." *See* N.W. Barber, *Law and Constitutional Conventions*, 125 L.Q. REV. 294, 302 (2009). Indeed, "crystallization" has become an academic obsession, with new scholarship constantly claiming to identify it. *See, e.g.*, Jason N.E. Varuhas, *The Principle of Legality*, 79 CAMBRIDGE L.J. 578, 585–86 (2020) (describing a recent English case as "transmut[ing] a political norm into a legal one . . . at odds with the generally cautious judicial approach to conventions"); Ahmed et al., *supra* note 278, at 789–90 (similar for a decision from the Supreme Court of India). Close readings of the decisions tend to show courts either implementing constitutional structure rather than enforcing conventions as law, *cf.* Rowe & Déplanche, *supra* note 282, at 431 (explaining the difference between constitutional structure and constitutional conventions), or else recognizing conventions while stopping short of enforcement, *cf.* Joseph Jaconelli, *Do Constitutional Conventions Bind?*, 64 CAMBRIDGE L.J. 149, 154–60 (2005).

285. *See* Josh Chafetz & David E. Pozen, *How Constitutional Norms Break Down*, 65 UCLA L. REV. 1430, 1433–34 (2018).

286. *Patriation Reference*, [1981] 1 S.C.R. at 880.

demands.[287] These are the incorporation and continuing practice principles, and the logic of the former leads to the latter.

To be sure, conventions and longevity are not the same,[288] but the two are intertwined. Many conventions arise from longstanding practices or longstanding refusal to engage in a practice;[289] many longstanding, non-judicial practices are longstanding because they have formed into conventions. It is therefore not surprising that their judicial treatment should depend on the same principles. Courts recognize conventions not simply out of comity but to correct institutional and democratic deficiencies in judicial interpretation, giving them equal reason to avoid preventing new conventions from developing. Given the lack of agreement over whether a practice has become a convention,[290] it is only fitting that the same judicial logic should apply to the role of non-judicial longevity.

III. EVALUATING THE USES OF LONGEVITY

With the two principles of longevity in hand, Part I's taxonomy can be evaluated. Stated briefly: Mandatory longevity runs afoul of the continuing practice principle by using longevity to block new practices; negative longevity mostly goes wrong for the same reason, though the incorporation principle may require it in rare circumstances; and positive longevity rightly advances the two principles by using an established interpretation as non-dispositive support for a practice's constitutionality.

A. Mandatory Longevity

Grounding longevity in non-judicial constitutionalism reveals that mandatory longevity relies on impermissible inferences about non-judicial interpretation in court. Indeed, while purporting to open the channels of non-judicial interpretation, it actually does the opposite and runs headlong into the continuing practice principle.

1. Tradition Alone and the Force of Wisdom

As Part I explained, mandatory longevity arises when a court requires a practice to be longstanding, or traditional, for its constitutionality.[291] With

287. *See* Gould, *supra* note 273, at 712–13 (explaining that new conventions form out of the breakdown of prior ones).

288. *See* Bradley & Siegel, *Historical Gloss*, *supra* note 15, at 267.

289. *See* Vermeule, *supra* note 274, at 284.

290. *See* Ahmed, *supra* note 275, at 1364 (canvassing a range of definitions for conventions); *cf.* Vermeule, *supra* note 254, at 1186 (noting that the distinction between law and conventions "cannot be maintained, but there is a tolerably clear conceptual line between what courts may and may not do with conventions").

291. *See supra* Section I.C.

today's traditionalist Court,[292] examples of mandatory longevity are multiplying: To satisfy Article III standing, a plaintiff must allege an injury that closely resembles an injury traditionally cognizable in court;[293] and to satisfy the First or Second Amendments, a speech or firearm regulation must enjoy a longstanding tradition demonstrating its constitutionality.[294] As these examples show, mandatory longevity is less concerned about tradition itself than what it signals about interpretation. The indefinite nature of constitutional text creates the risk that courts will smuggle policy judgments under the guise of interpretation.[295] Mandatory longevity combats that risk by requiring a practice that engages the text to reflect longstanding support by non-judicial officials and the public.[296]

Half of this argument is consistent with non-judicial constitutionalism but, fatally, the other half is not. By recognizing that a longstanding practice reflects an established interpretation supporting the practice, mandatory longevity adopts the incorporation principle. However, it takes the further step of treating longevity as the sole source of such support. That is an error. Tradition matters because of what it says about non-judicial interpretation, but it is hardly the sole source of constitutional meaning available to courts.[297] By nevertheless demanding that constitutionality turn on non-judicial support, mandatory longevity goes beyond respecting the responsiveness of non-judicial interpretation and instead prevents non-judicial officials from exercising their authority in a responsive manner. Put differently, it allows non-judicial officials the choice of either adhering to the traditional use of power or not using their power at all.[298] This contravenes the continuing practice principle, blocking the responsiveness to institutional and democratic demands that make non-judicial interpretation meaningful. Yet the incorporation and continuing practice principles are two sides of the same

292. *See* DeGirolami, *supra* note 12, at 1125–26.

293. *See* TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2209–12 (2021).

294. *See* N.Y. State Rifle & Pistol Association, Inc. v. Bruen, 142 S. Ct. 2111, 2131–34 (2022); NIFLA v. Becerra, 138 S. Ct. 2361, 2373 (2018).

295. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2247–48 (2022) (making this point about the Due Process Clause); Corfield v. Coryell, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1825) (same for the Privileges and Immunities Clause); *cf.* Gerard N. Magliocca, *Rediscovering* Corfield v. Coryell, 95 NOTRE DAME L. REV. 701, 703 (2019) (discussing *Corfield* and its effect on subsequent interpretation of the Privileges and Immunities Clause).

296. *See* Blocher & Ruben, *supra* note 97, at 128–37; *see also* McConnell, *supra* note 98, at 685–91.

297. *See* Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029, 1047 (1990) (describing the notion that tradition embodies a unique form of wisdom as "largely discredited"); *cf.* ABNER S. GREENE, AGAINST OBLIGATION: THE MULTIPLE SOURCES OF AUTHORITY IN A LIBERAL DEMOCRACY 172–206 (2012) (similar).

298. *Cf.* Michael D. Gilbert, *Entrenchment, Incrementalism, and Constitutional Collapse*, 103 VA. L. REV. 631, 636–37 (2017) (arguing that incrementalism prevents alignment with popular preferences).

coin, with the logic of one leading to the other. Mandatory longevity misses that the very basis for incorporating longevity prohibits setting up longevity as a constitutional requirement.

That error was on full display in *TransUnion LLC v. Ramirez*.[299] There, the Court held that the statutory rights Congress created in the Fair Credit Reporting Act fell outside Article III because they authorized a non-traditional claim in federal court.[300] In doing so, the Court contrasted the lack of tradition underlying the statutory right with the privacy rights that have long been actionable in tort.[301] Yet those actions are traditional only now, having become traditional after emerging in the late-nineteenth-century.[302] Like all other longstanding practices, they began and evolved to reflect institutional and democratic demands.[303] Had tradition been a requirement during that development period, they never would have achieved the traditional status they now enjoy. The incorporation principle explains why their now-traditional status is meaningful—because of what it reveals about non-judicial interpretation—but it also highlights the need to allow new practices to develop and become traditional themselves.

By requiring tradition, mandatory longevity owes less to a valid concern about non-judicial constitutionalism than to customary common law.[304] Per that English doctrine,[305] royal courts would enforce the customs of a community if they were reasonable,[306] and, famously, if the community had accepted them from "time out of mind."[307] Often invoking the same language,

299. 141 S. Ct. 2190 (2021).

300. *Id.* at 2208–12.

301. *Id.* at 2204.

302. On this error, see Daniel J. Solove & Danielle Keats Citron, *Standing and Privacy Harms: A Critique of* TransUnion v. Ramirez, 101 B.U. L. REV. ONLINE 62, 67 (2021).

303. *See, e.g.*, Ashby v. White (1703) 6 Mod. 46, 48 (KB) (noting the novelty of an action for nominal damages to compensate a non-monetary legal injury, while explaining that novelty "is no reason against it" for this reason). In *Ashby*, the King's Bench found against the plaintiff and, ironically, the House of Lords' reversal to sustain the novel action has become the canonical citation that such actions are traditionally available. *See* Uzuegbunam v. Preczewski, 141 S. Ct. 792, 798–99 (2021).

304. *See* McConnell, *supra* note 98, at 683–85 (drawing this connection).

305. *See generally* PLUCKNETT, *supra* note 280, at 342; J. G. A. POCOCK, THE ANCIENT CONSTITUTION AND THE FEUDAL LAW 36 (1987).

306. *See* SIR EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWES OF ENGLAND; OR, A COMMENTARY UPON LITTLETON, NOT THE NAME OF THE AUTHOR ONLY, BUT OF THE LAW ITSELF, at ch. 10, § 170 (19th ed. 1832); SIR JOHN DAVIES, A REPORT OF CASES AND MATTERS IN LAW RESOLVED AND ADJUDGED IN THE KING'S COURTS IN IRELAND 87 (1762); *see also* John Lewis, *Sir Edward Coke (1552-1633): His Theory of "Artificial Reason" as a Context for Modern Basic Legal Theory*, 64 L.Q. REV. 330, 339 (1968); Eugene Heath, *Sir John Davies on Custom and the Common Law*, 82 REV. POL. 438, 456–58 (2020) (tracing this idea through common law theorists).

307. *See* SIR MATTHEW HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND 18 (Charles Gray ed., 1971) (1739) (identifying four conditions under which the common law will take up and

mandatory longevity sounds in this insistence that a practice must exist from time immemorial to demonstrate its wisdom.[308]

The problem is that courts do not have the same authority over constitutional practice that they have over the common law.[309] The ones charged with determining the wisdom of a practice are those on whom the Constitution confers the power to engage in it, subject to public oversight and judicial review. Incorporating longevity into constitutional doctrine respects how the Constitution makes non-judicial officials the arbiters of certain powers, yet requiring longevity withdraws from those officials the authority to dictate their proper use. In the words of its own defenders, mandatory longevity "allow[s] for change, but only slowly."[310] Under a written constitution, courts have no basis demanding that slowness.[311] Instead, requiring a practice to be traditional rings of an institutional power grab,

enforce local custom); COKE, *supra* note 306, at ch. 10, § 170 (explaining that the common law will take up local custom if it existed from "time out of mind" and is "continual"); LITTLETON'S TENURES (FIRST SERIES) § 170 (1854) ("[N]o custom is to be allowed, but such custom as hath been used . . . from time out of mind."); *see also* WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND *76–77 (3d ed. rev. 1884) (explaining that customs must "have been used so long . . . that, if anyone can shew the beginning of it, it is no good custom"). Coke later added to his criteria. *See* SIR EDWARD COKE, THE COMPLEAT COPYHOLDER: BEING A LEARNED DISCOURSE OF THE ANTIQUITY AND NATURE OF MANORS AND COPYHOLDS, WITH ALL THINGS THEREUNTO INCIDENT § 33 (1764 ed.) (identifying five requirements). For a thoughtful history, see Shaunnagh Dorsett, *"Since Time Immemorial": A Story of Common Law Jurisdiction, Native Title and the Case of Tanistry*, 26 MELB. U. L. REV. 32, 40 (2002).

308. *See* Young, *supra* note 17, at 557–58; *cf.* Burke, *supra* note 142, at 219 ("Prescription is the most solid of all titles, not only to property, but . . . to government. . . . It is a presumption in favour of any settled scheme of government against any untried project, that a nation has long existed and flourished under it.").

309. Even applied to the common law, custom's apparent concern for popular support was a fiction. Both Coke and Davies exaggerated the age of the common law to elevate it over new developments. *See* NICHOLAS BLOMLEY, LAW, SPACE AND THE GEOGRAPHIES OF POWER 73 (1994). Though the requirement that a custom exist from time immemorial is now familiar, *see* HALE, *supra* note 307, at 18; COKE, *supra* note 306, at ch. 10, § 170, the tool was for them "a new device and an effective one whenever the law courts wished to limit the operation of a custom." PLUCKNETT, *supra* note 280, at 312 ("When we get to this doctrine of immemorially old custom it is obvious that we are in modern and not mediaeval times."). Faced with novelty, law courts used that "artificial" tool to block new and popular practices, *id.*; *see also* Dorsett, *supra* note 307, 34–35 (explaining the relevance of jurisdictional disputes to the law courts' consideration of local custom), rather than as an actual inquiry into the implications of longevity. *See* Matthew Crow, *Thomas Jefferson and the Uses of Equity*, 33 L. & HIST. REV. 151, 156 (2015). Indeed, the turn to "time immemorial" coincided with the broader development of judicial tactics to prevent Parliament from derogating the superior courts' vision of what the common law should be. *See* Philip A. Hamburger, *Revolution and Judicial Review: Chief Justice Holt's Opinion in* City of London v. Wood, 94 COLUM. L. REV. 2091, 2096 (1994) (discussing these tactics).

310. *See* McConnell, *supra* note 118, at 1776.

311. *Cf.* David A. Strauss, *The Neo-Hamiltonian Temptation*, 123 YALE L.J. 2676, 2679–80 (2014) (describing a vision of constitutional law mirrored on the common law's evolutionary approach to tradition, one where courts and non-judicial officials inform public values together).

aimed more at preventing non-judicial input than allowing it.[312] The continuing practice principle bars such prevention.

2. Tradition by Analogy

The error of mandatory longevity is so apparent that the Court sometimes includes an escape hatch by upholding non-traditional practices if they are sufficiently analogous to traditional ones.[313] That is significant. Analogical reasoning does not take similarity itself as a legal argument, but instead uses similarity as a proxy for a legal theory that explains the lawfulness of the practices.[314] In the context of longevity, courts reasoning by analogy accept that an explanation for constitutional status exists other than sheer longevity, one that sustains both the longstanding practice and others like it. Even if that theory goes unarticulated until future cases, it allows new practices to develop.[315]

For this approach to accord with the continuing practice principle, however, the room for analogy must be meaningful. If the analogy must be too close to the longstanding practice, then courts are still, in effect, requiring traditional support. *TransUnion* once more demonstrates the problem. There, the Court understood defamation's traditional requirement that a false communication be disseminated as showing that the tort remedies an injury to reputation.[316] In the FCRA, however, Congress tried to legislate that falsity itself caused injury because it created the risk of reputational harm through future dissemination.[317] The Court held that this was not sufficiently analogous to the actual reputational injury made actionable in a traditional

312. *See generally* Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2166, 2178–79 (2015) (arguing that the New Deal Court invented the tradition that underlies Speech Clause mandatory longevity). *Cf.* J.M. Balkin, *Tradition, Betrayal, and the Politics of Deconstruction*, 11 CARDOZO L. REV. 1613, 1615 (1990) (noting the ease with which reliance on tradition can cover judicial activism).

313. *See, e.g.*, TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2204 (2021); N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2131–34 (2022).

314. *See* Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 923, 975 (1996) (discussing the mechanics of analogical reasoning).

315. *See* F.M. Kamm, *Theory and Analogy in Law*, 29 ARIZ. ST. L.J. 405, 412–14 (1997). There is a lively debate in legal theory as to whether the similarity between the old and the new practice is descriptive or normative. *See generally* Frederick Schauer & Barbara A. Spellman, *Analogy, Expertise, and Experience*, 84 U. CHI. L. REV. 249, 251–58 (2017) (describing the debate); Shivprasad Swaminathan, *Analogy Reversed*, 80 CAMBRIDGE L.J. 366, 368 (2021) (framing the debate as between backward-looking comparison and forward-looking). This issue is important yet beyond the present inquiry.

316. 141 S. Ct. at 2209–11.

317. *Id.*

defamation suit. True, the injuries are not identical.[318] But if difference alone defeats the claim then an analogy is not available and simple longevity becomes the metric once more.

As this suggests, mandatory longevity tests like those from *TransUnion* and *Bruen* can be saved through a relaxed approach to historical analogy. Lower courts should take this initiative,[319] and the Court should follow.[320] That said, the better course would be to avoid mandatory longevity altogether. With the Establishment Clause, for example, the Court has hinted that nothing constitutes establishment unless a tradition backs that understanding.[321] Lower courts have already interpreted the jurisprudence to provide this test.[322] As this Section has explained, that use of longevity conflicts with the logic of invoking longevity in the first place.

B. Negative Longevity

Negative longevity is more complicated. Sometimes a lack of precedent does represent an established and widespread understanding that the practice is unlawful. The incorporation principle requires taking that understanding

318. *Cf.* Daniel J. Solove & Danielle Keats Citron, *Risk and Anxiety: A Theory of Data-Breach Harms*, 96 TEX. L. REV. 737, 746–47 (2018) (noting the tangible effects of data-breach harms to people's experience of risk and anxiety).

319. Lower courts are struggling with how to read *TransUnion*. *See, e.g.*, Farrell v. Blinken, 4 F.4th 124, 133 (D.C. Cir. 2021) (analyzing whether an exact "right to expatriate" is traditional); Glen v. American Airlines, Inc., 7 F.4th 331, 334–35 (5th Cir. 2021) (finding sufficiently close analogy between an airlines' role in trafficking and the tort of unjust enrichment). The Fair Debt Collection Practices Act is likely the next front for the dispute over congressional power to create new causes of action. *Compare* Lupia v. Medicredit, Inc., 8 F.4th 1184, 1192 (10th Cir. 2021) (finding debt collection practice analogous to intrusion upon seclusion), *with* Wadsworth v. Kross, Lieberman & Stone, Inc., 12 F.4th 665, 668–69 (7th Cir. 2021) (finding the relevant injury to be emotional in nature, which did not satisfy Article III). *Lupia* properly corrects *TransUnion* by relaxing the analogy requirement and should be followed. On how lower courts can resist doctrinal changes suggested by recent Supreme Court decisions, see Matthew Tokson, *Judicial Resistance*, 82 U. CHI. L. REV. 901, 904 (2015).

320. *Cf.* Counterman v. Colorado, 143 S. Ct. 2106, 2113–17 (2023) (largely ignoring the traditional scope of "true threats" regulation in favor of defining that speech category according to contemporary practices and values). As of this writing, the Supreme Court has granted certiorari to consider the constitutionality of a federal law restricting the possession of firearms by those subject to certain domestic-violence restraining orders. *See* United States v. Rahimi, 143 S. Ct. 2688, 2689 (2023) (mem.). Applying *Bruen*, the Fifth Circuit held that restriction invalid under the Second Amendment because it lacked traditional support. *See* United States v. Rahimi, 61 F.4th 443, 461 (5th Cir. 2023). Given the absurdity of that result, *Rahimi* presents an opportunity for the Court to either directly limit *Bruen* or to do so indirectly by relaxing the proximity of the analogy that *Bruen* requires.

321. The Court frequently disciplines its Establishment Clause jurisprudence by upholding longstanding practices. *See supra* note 50 (collecting cases). Recent cases have eschewed other Establishment Clause tests for one of "historical practices and understandings," Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2428 (2022) (internal quotations omitted), suggesting but leaving open the extent to which that tradition is formally required.

322. *See supra* note 105.

seriously in a way that can create tension with the continuing practice principle. But these situations are rare. A lack of precedent more often shows only that the practice was unnecessary or barred by a sub-constitutional convention. In these situations, the fact that a practice is novel cannot mean that it is constitutionally suspect without running afoul of the continuing practice principle.

1. Understanding Absence

Often expressed as an anti-novelty argument,[323] negative longevity takes the longstanding failure to engage in a practice as "the most telling indication of [a] severe constitutional problem."[324] As Part I explained, this is grounded in an inference about non-judicial interpretation and the passage of time: After two centuries of practice, the lack of precedent "would be amazing if [the practice] were not understood to be constitutionally proscribed."[325] Put differently, enough time has passed since the founding that the longstanding absence of a practice from the historical record suggests that officials have long considered it unlawful.[326]

Yet non-judicial constitutionalism does not allow that suggestion. The incorporation principle approves of courts using a longstanding practice—or, in this instance, forbearance on a practice—to reflect deliberate continuation with settled constitutional meaning. But the inference does not run in the opposite direction. That is, the absence of a practice does not necessarily reflect a deliberate conclusion against the constitutionality of the practice.[327] As Professor Litman has demonstrated, it more likely reflects the lack of need for the practice, so the idea that if officials could have engaged in a practice then they would have is simply wrong.[328] Two centuries reveal not a closed universe of practices but an ongoing experiment with the redefinition of

323. *See generally* Litman, *supra* note 26, at 1410; *see also* Huq, *supra* note 26, at 711 (noting the existence of a "negative use" of gloss).

324. Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2201 (2020) (alteration in original) (internal quotations omitted).

325. Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 230 (1995).

326. *See* Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 203 (2009) (describing the Voting Rights Act as a single departure from "our historic tradition that all the States enjoy 'equal sovereignty'" (quoting United States v. Louisiana, 363 U.S. 1, 16 (1960))); Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 718 (1931) (noting that a longstanding absence "is significant of the deep-seated conviction that such restraints would violate constitutional right"). Scholars express a similar idea when they maintain that a longstanding practice can "fix" ambiguous text. *See* Bradley & Morrison, *supra* note 15, at 426; *see also* Bradley & Siegel, *Historical Gloss*, *supra* note 15, at 264 (suggesting that longstanding practice reveals what the text requires).

327. *See generally* ERWIN CHEMERINSKY, WORSE THAN NOTHING: THE DANGEROUS FALLACY OF ORIGINALISM 66 (2022) ("The absence of a specific practice at a specific time does not mean that those then in power thought that the practice was unconstitutional.").

328. *See* Litman, *supra* note 26, at 1414–15.

constitutional values in light of new problems and new democratic demands. If a practice has no precedent, the simplest explanation is that it was never contemplated or necessary.[329]

Even where longstanding absence is deliberate, however, that still does not necessarily reflect a settled interpretation of the Constitution. In many instances, deliberate forbearance stems from a constitutional convention, which officials follow for political or moral reasons rather than legal ones.[330] Indeed, conventions often reflect an understanding that the practice is constitutional but should not occur, at least until the underlying political morality changes.[331] Understandably, then, the jurisprudence on negative longevity is filled with public officials who broke old conventions as new problems demanded new responses,[332] or reflected outmoded conceptions of government regulation.[333] What underlies these conventions against a practice is not an understanding that the practice is illegal but, rather, that it is legal yet should not occur for other reasons—a belief that has since changed.[334]

The Court sometimes gets this right. Take *Trump v. Mazars USA, LLP*,[335] for example, where the Court noted that a convention had developed over two centuries by which Congress and the President would negotiate the scope of legislative subpoenas for presidential records without involving the courts.[336] When President Trump broke the convention by refusing to negotiate in good faith, the House also broke its end of the bargain by seeking a judicial order enforcing its subpoena. In finding the claim justiciable, the Court declined to treat Congress's longstanding failure to seek judicial enforcement of its subpoena as evidence that the Constitution prohibited it.[337]

329. Professor Litman limits her analysis to the lack of federal precedent, especially congressional precedent. Litman, *supra* note 26, at 1413–14. That is understandable given the special impediments to congressional action, but the argument's logic applies to generally reject the idea that public officials have had long enough to try all possible uses of authority. *See generally* Matthew B. Lawrence, *Subordination and Separation of Powers*, 131 YALE L.J. 78, 143 (2021).

330. *See supra* Section II.C.2.

331. *See* Jaconelli, *supra* note 284, at 163.

332. *See, e.g.*, Shelby County v. Holder, 570 U.S. 529, 534–35 (2013).

333. New York v. United States, 505 U.S. 144, 177 (1992) ("The take title provision appears to be unique.").

334. *Cf.* Ahmed, *supra* note 275, at 1417 (emphasizing that conventions are always "arbitrary"—that is, "[t]hey remind us that just because things have always been one way does not mean they have to be and vice versa").

335. 140 S. Ct. 2019 (2020).

336. *Id.* at 2031. For a more thorough description of the convention, see Issacharoff & Morrison, *supra* note 72, at 1952–53.

337. *Mazars*, 140 S. Ct. at 2031. For historical examples of inter-branch negotiations over executive privilege and their implications for non-judicial constitutionalism, see Peter M. Shane, *Legal Disagreement and Negotiation in a Government of Laws: The Case of Executive Privilege Claims Against Congress*, 71 MINN. L. REV. 461, 501–36 (1987).

Indeed, far from suggesting an interpretation against the practice, the fact that the House had never needed to make good on its threat to sue suggested an established understanding that it could.[338]

But *Mazars* is the exception rather than the rule, as *Seila Law LLC v. CFPB*[339] more representatively shows. Even as the Court insists on an almost-untrammeled presidential removal power under Article II,[340] important conventions prevent the President from firing agency directors for political reasons.[341] Relying on these conventions, Congress often leaves single directors removable at-will by the President because of the legislative bargaining power that it gains,[342] or else the democratic legitimacy it confers on the agency.[343] When the Great Recession made other concerns more prominent, Congress codified the conventional restriction on removal.[344] Unlike with *Mazars*, however, *Seila Law* treated the novelty of that codification in the CFPB's structure as a basis for inferring that prior Congresses had long believed it unconstitutional.[345]

That was incorrect. Non-judicial officials following a convention never exhaust their full power, so the best reading of the convention is that Congress long believed it *could* limit the President's removal power.[346] As is

338. *See* Daphna Renan, *"Institutional Settlement" in a Provisional Constitutional Order*, 108 CALIF. L. REV. 1995, 2001–02 (2020).

339. 140 S. Ct. 2183 (2020).

340. *See* Collins v. Yellen, 141 S. Ct. 1761, 1787 (2021); Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 513–14 (2010); *cf.* United States v. Arthrex, Inc., 141 S. Ct. 1970, 1985 (2021) (explaining that Administrative Patent Judges presented a constitutional problem either for the President's removal power or the Appointments Clause but not specifying which one, since "both formulations describe the same constitutional violation"). For a study of how this approach to Article II conflicts with the correct, norm-based approach, see Bowie & Renan, *supra* note 253, at 2028–31.

341. *See generally* Vermeule, *supra* note 254. For a more general catalogue of the norms governing administrative agencies, see Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239, 1250–56 (2017).

342. *See* Huq, *supra* note 253, at 1647–56 (discussing how incentives allow inter-branch negotiation to perform a constitutive function, including for executive removal).

343. *See* Vermeule, *supra* note 254, at 1186–91 (distinguishing between thin justifications for following conventions rooted in self-interest, and thick justifications rooted in political morality).

344. On the contextual parallels between the enactments of the CFPB and the FTC, the latter of which also broke from the non-insulation convention, see Hosea H. Harvey, *Constitutionalizing Consumer Financial Protection: The Case for the Consumer Financial Protection Bureau*, 103 MINN. L. REV. 2429, 2460–61 (2019).

345. *See* Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2201–02 (2020). Ironically, the structure did have precedent, which the Court pruned away soon after *Seila Law*. *See Collins*, 141 S. Ct. at 1783–84.

346. That convention was even more apparent in a prior case on the President's removal power. In *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, the Court held invalid what it considered a dual layer of insulation for the PCAOB in the *Sarbanes-Oxley Act of 2002*—the President could remove members of the SEC for-cause only, while the members of the SEC also could remove members of the PCAOB only for-cause. 561 U.S. 477, 484 (2010). Yet just one of

so often the case with non-judicial constitutionalism, such conventions implement both constitutional values and prevailing theories of political morality.[347] The incorporation principle calls on courts to use these practices to guide the modalities of interpretation where possible. But, as the continuing practice principle recognizes, the ability to change these practices as theories of political morality change is an essential aspect of incorporation. Having allowed past practice to form into a convention based on the institutional and political beliefs of the day, courts cannot deprive subsequent generations the same capacity to continue developing new responses to new problems, even if that means departing from old conventions.[348] Put simply, the *Seila Law* Court committed the blunder of enforcing a conventional practice as law.[349]

A longstanding convention can have some consequences for future practice. It may set up political and pragmatic barriers against the practice, creating an "expectation of future nonuse."[350] Even without a formal convention, extra-legal factors often make reclaiming a dormant power effectively impossible[351]—what scholars refer to as "constitutional desuetude."[352] But that term is a political metaphor. Legally, desuetude has no place in our statutory law,[353] and even less in the law of a written

these layers of insulation came from Congress. The prohibition on removing SEC members except for-cause is entirely a matter of unwritten convention. *See Free Ent. Fund*, 561 U.S. at 487 ("The parties agree that the Commissioners cannot themselves be removed by the President except . . . [for cause] and we decide the case with that understanding." (citations omitted)). After rightly recognizing this convention as applied to the SEC, the Court then wrongly went on to enforce it as law against the statutory insulation in the PCAOB. *Cf.* Gary Lawson, *Stipulating the Law*, 109 MICH. L. REV. 1191, 1195 (2011) (noting this feature of the decision but arguing it was correct).

347. *Cf.* Litman, *supra* note 26, at 1414–15.

348. *See* Bowie & Renan, *supra* note 253, at 2028–31.

349. It does not necessarily follow that the Court decided *Seila Law* wrongly, *cf.* Aziz Z. Huq, *Removal as a Political Question*, 65 STAN. L. REV. 1, 5 (2013) (arguing against the modern removal doctrine altogether), only that the Court was wrong to invoke the novelty of the statutory scheme for its conclusion.

350. Richard Albert, *Constitutional Amendment by Constitutional Desuetude*, 62 AM. J. COMP. L. 641, 654 (2014); *see also* Chafetz, *supra* note 10, at 96 (noting the political force of the argument that a practice has no precedent).

351. *See* Anita S. Krishnakumar, *How Long Is History's Shadow?*, 127 YALE L.J. 880, 884 (2018).

352. *See, e.g.*, Adrian Vermeule, *The Atrophy of Constitutional Powers*, 32 OX. J. LEG. STUD. 421, 422–23 (2012); Albert, *supra* note 350, at 654.

353. *See* Arthur E. Bonfield, *Abrogation of Penal Statutes by Nonenforcement*, 49 IOWA L. REV. 389, 392 (1964) ("American courts seem to disclaim any responsibility for barring the application of long-unenforced enactments."). *But see* John F. Stinneford, *Death, Desuetude, and Original Meaning*, 56 WM. & MARY L. REV. 531, 537 (2014) (arguing that the Eighth Amendment requires desuetude reasoning). Citing *Browning*, Frankfurter maintained that the longstanding non-enforcement of a statute made a challenge to that statute unripe. *See* Poe v. Ullman, 367 U.S. 497, 502 (1961).

constitution.[354] No matter how long the disuse, two-thirds of states can still petition for an Article V convention,[355] just as every state can choose presidential electors by direct appointment rather than by popular vote.[356] Politically, these powers may be impossible to exercise, and rightfully so. Legally, however, constitutional text confers "a continuous power, always subject to be exercised" regardless of how long it goes unused.[357]

2. The Limited Use of Negative Longevity

Beyond conventions, the real difficulty of negative longevity arises when the lack of precedent actually reflects an established interpretation by non-judicial officials that the practice is unconstitutional. That is, a court not only presumes that established interpretation but takes judicial notice of it. In this circumstance, the two principles of longevity pull in opposite directions. On the one hand, the incorporation principle indicates that courts should respect a longstanding non-judicial interpretation. On the other, the continuing practice principle indicates that courts should avoid using longevity to block non-judicial officials from developing new practices. In short, when a longstanding interpretation of the Constitution has the effect of narrowing future uses of public power by non-judicial officials, the two principles of longevity appear to call for opposite responses in court.

Resolving this tension requires narrowing the use of negative longevity. The incorporation principle respects the coordinate authority of institutional actors to interpret the Constitution through features that are distinctive to those officials. When the interpretation is against a practice, however, incorporation risks freezing those features in place to deny the practice in the future, despite inevitable changes that non-judicial constitutionalism seeks to protect. As this suggests, incorporating a non-judicial interpretation against a practice's constitutionality is appropriate only when that interpretation does not involve those permeable features—that is, when it is purely legal and relies on judicial modalities. Otherwise, incorporation would respect past non-judicial officials yet deprive subsequent officials the authority that

354. *See* Katherine Shaw, *Conventions in the Trenches*, 108 CALIF. L. REV. 1955, 1957 (2020) (describing the enforcement of conventions as "something like [the] opposite" of desuetude reasoning because of the attempt to carry political prohibitions into law).

355. U.S. CONST. art. V.

356. U.S. CONST. art. II, § 1, cl. 2.

357. United States v. Ballin, 144 U.S. 1, 5 (1892). That continuing power distinguishes negative longevity under the American Constitution from contexts in which public power is solely customary. *See, e.g.*, Stockdale v. Hansard (1839) 112 Eng. Rep. 1112, 1189 (QB) (explaining that a claim of parliamentary privilege would be sustained on a "shewing that it has been long exercised and acquiesced in"); *cf.* Ozan O. Varol, *Constitutional Stickiness*, 49 U.C. DAVIS L. REV. 899, 904–06 (2016) (arguing that adopting constitutional text often does not cause courts to break from prior, longstanding practice).

makes their predecessors relevant in court.[358] Such narrowing of the incorporation principle significantly limits the space for negative longevity. As Part II indicated, non-judicial officials often interpret the Constitution based on political factors, especially when raising constitutional objections to a practice.[359] Moreover, the line between a legal and a conventional prohibition will often be thin, if not nonexistent. Given this tendency, courts should avoid incorporating longstanding absence unless they are abundantly sure it reflects a settled and sound legal interpretation of the Constitution against the practice.[360]

Navigating these limits, *United States v. Texas*[361] reveals the most that negative longevity can signal. There, the Court noted the lack of precedent for a state to sue the federal government in federal court to enforce immigration laws more stringently.[362] As it explained, the novelty broke from an established interpretation of Article III by public officials across government institutions that had long rejected Texas's outlier submission. The Court then explained why that interpretation was correct.[363] That approach to negative longevity was exactly right. It ensured that the longstanding absence was deliberate rather than accidental and, crucially, a matter of constitutional law rather than political morality. The Court then confirmed the interpretation by linking it to the logic of its own precedents. Put differently, the Court applied negative longevity without suppressing novelty itself. In doing so, it navigated both the incorporation and continuing practice principles, respecting past interpretations while recognizing that "there is a first time for everything."[364]

358. *Cf.* Gillian E. Metzger, *The Roberts Court and Administrative Law*, 2019 SUP. CT. REV. 1, 53 (2019) (noting the frequent conflict between constitutional text and negative longevity jurisprudence related to the administrative state).

359. *See* David E. Pozen, Eric L. Talley & Julian Nyarko, *A Computational Analysis of Constitutional Polarization*, 105 CORNELL L. REV. 1, 4–6 (2019) (suggesting, based on empirical data, that political officials invoke the Constitution when they are in the political minority more than when they are in the majority).

360. *Cf.* Roisman, *supra* note 13, at 712–13 (arguing that this is always necessary for courts to treat longstanding non-judicial practice as constitutionally significant). As I explain below, and with the utmost respect to Professor Roisman, I consider this showing unnecessary for positive longevity. *See infra* Section III.C.3.

361. 143 S. Ct. 1964 (2023).

362. *Id.* at 1971 ("[T]his Court's precedents and longstanding historical practice establish that the States' suit here is not the kind redressable by a federal court.").

363. *Id.* ("Several good reasons explain why, as *Linda R. S.* held, federal courts have not traditionally entertained lawsuits of this kind.").

364. NFIB v. Sebelius, 567 U.S. 519, 549 (2012). Recent scholarship has provided an alternate defense of negative longevity, one rooted in democracy. That is, because rules of political morality provide the guardrails of democracy, *see* STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE 100–02 (2019); TOM GINSBURG & AZIZ Z. HUQ, HOW TO SAVE A CONSTITUTIONAL DEMOCRACY 207 (2018), courts have an obligation to protect those guardrails from breach by applying heightened scrutiny to novel practices. *See* Issacharoff & Morrison, *supra*

C. Positive Longevity

Positive longevity is simpler. Courts not only can use this mechanism, but the two principles of longevity suggest they should. Indeed, non-judicial constitutionalism shows how to apply positive longevity, correcting the errors of other longevity theories—especially liquidation and certain approaches to historical gloss.

1. Positive Longevity and Non-Judicial Constitutionalism

Unlike mandatory and negative longevity, positive longevity calls for courts to treat the longevity of a practice as support for its constitutionality. It represents an interpretive move, taking longevity not as constitutionally significant in itself but as evidence for an interpretation of the Constitution that has settled among non-judicial officials. By calling for courts to respect that interpretation, it uses longevity as support for the practice's constitutionality, even if judicial doctrine points against it.[365]

So described, positive longevity advances both principles of longevity. As Part II explained, a longstanding practice reliably reflects deliberate engagement with constitutional meaning by non-judicial officials through distinctive interpretive features that courts should take seriously. Yet the incorporation principle does not require courts to uphold a longstanding practice. Rather, it requires courts to guide their use of the judicial modalities according to the longstanding practice. In practical terms, that means presuming a longstanding practice is constitutional unless a court cannot

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note 72, at 1916; *cf.* Renan, *supra* note 338, at 2004 (arguing that courts should withhold any deference to governmental action that is contrary to a constitutional norm).

This argument goes too far in at least two senses. For one, the incorporation principle recognizes a need for democratic channels to influence the content of constitutional law. *See* Post & Siegel, *Legislative Constitutionalism*, *supra* note 126, at 1947. Far from preserving democracy, insisting that rules of political morality resist democratic demands is a primary way to lose a democracy, not to maintain it. *See* LEVITSKY & ZIBLATT, *supra*, at 194–95 (explaining how norm-breaking can be "democratizing"); Gerken, *supra* note 245, at 928–31 (same). The issue is not novelty in itself, but whether the change is justified. That leads to the second issue, which is that heightened scrutiny charges courts with deciding on justification. Non-judicial constitutionalism places that responsibility in the hands of those exercising public power, subject to response by the democratic public. At most, courts can shore up settled understandings against accidental or concealed attempts to develop novel practices through a clear statement rule. *See* William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 598 (1992); *cf.* Frederick Schauer, Ashwander *Revisited*, 1995 SUP. CT. REV. 71, 74 (noting that clear statement rules interpose the judiciary against legislative action to some degree). Such a rule leaves legislatures free to depart from that longstanding practice if willing to engage the political costs that ultimately rest at the heart of non-judicial constitutionalism. *See generally* Nicholas Bagley, *The Puzzling Presumption of Reviewability*, 127 HARV. L. REV. 1285, 1321 (2014).

365. *See, e.g.*, Dep't of Com. v. New York, 139 S. Ct. 2551, 2566–67 (2019).

interpret the Constitution to reasonably bear that result.[366] Incorporation of this kind respects the coordinate status of interpreters, disciplining judicial interpretations with those of non-judicial officials. Grounded in non-judicial constitutionalism, positive longevity calls for no more than that.

Though modest, such incorporation is essential. Prominent originalist attacks on positive longevity argue that courts should ignore the longevity of a practice in favor of looking only to founding-era sources for constitutional meaning.[367] While sounding in the irresolute "debate" between originalism and living constitutionalism,[368] this argument's more immediate flaw is that it denounces an actual for an ideal.[369] The search for original meaning, despite looking to the past, is a work of the present.[370] Under a claimed concern about history, it disregards two hundred years of settled interpretation in favor of a judge's contemporary approach to then-available founding-era material.[371] Without positive longevity, courts invoke originalism to grant themselves an interpretive monopoly that ignores both their institutional limits and the importance of sustained public input in constitutional interpretation.[372] In short, the problem with elevating originalist history over positive longevity is that the former is not historical enough.[373]

By calling for incorporation, positive longevity cabins judicial hegemony over constitutional interpretation in light of the widespread constitutional engagement that occurs outside the courts.[374] That does not mean giving up the independent obligation to confirm that the established understanding is a defensible reading of the Constitution.[375] But ensuring that positive longevity can discipline judicial interpretations means that courts

366. *Cf.* Thayer, *supra* note 164, at 151–52.

367. *See* PRAKASH, *supra* note 24, at 65–68.

368. *Cf.* Richard H. Fallon, Jr., *Arguing in Good Faith about the Constitution: Ideology, Methodology, and Reflective Equilibrium*, 84 U. CHI. L. REV. 123, 125 (2017) (advancing a basis by which the exchange between these theories can proceed in good faith).

369. The error is not in selecting a particular perspective, but in using one perspective to diagnose and another to prescribe. *See* Eric A. Posner & Adrian Vermeule, *Inside or Outside the System?*, 80 U. CHI. L. REV. 1743, 1747 (2013).

370. *Cf.* Stephen M. Griffin, *Rebooting Originalism*, 2008 U. ILL. L. REV. 1185, 1205–09 (describing originalism as "history without historicism").

371. *See* Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1, 6 (2009) (describing this as "hard originalism" and explaining that it is premised on faulty logic and erroneous premises, and similarly criticizing even a "soft" version).

372. *See* Neal Devins & Louis Fisher, *Judicial Exclusivity and Political Instability*, 84 VA. L. REV. 83, 103 (1998).

373. *See generally* Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 726 (1988).

374. *See* Fallon, *supra* note 13, at 1757 (noting that post-adoption history has this potential to cabin judicial discretion).

375. *See* Pozen, *supra* note 272, at 80–81 (explaining that longstanding practices may be unlawful, even if they embody accumulated wisdom).

should not use originalism as an excuse to disregard two centuries of practice. Instead, the incorporation principle calls for presuming that a practice supported by longevity is constitutionally valid unless they are unable to reconcile it with the modalities of interpretation.[376] Positive longevity does that, and the incorporation principle demands no less.

It also demands no more, and the other crucial dimension of positive longevity is that it adheres to the continuing practice principle. That is, it does not require courts to treat practices lacking longevity with suspicion—the practice simply loses out on the presumption of constitutionality.[377] If a court finds longevity and incorporates the practice, it affirms the practice but does not require it to continue. Future officials can change the practice as non-judicial competencies and channels of democratic input demand change. Thus, positive longevity respects both the established interpretation *and* the authority of non-judicial officials to depart from it in the future.

Admittedly, upholding a longstanding practice can entrench that practice further. After all, a judicial decision sustaining a practice changes the bargaining position of the relevant institutions.[378] By adding authority to the institution that most benefits from that negotiated process,[379] positive longevity may give officials reason to stick to the practice rather than experiment with novel arrangements.[380] Yet that is not, as some writers have claimed, a reason for courts to ignore longevity.[381] Courts should encourage constitutional engagement by non-judicial officials, incorporating the underlying interpretation while confirming the power to depart in the future.[382] That is all positive longevity requires. If officials nevertheless

376. *See, e.g.*, Hous. Cmty. Coll. Sys. v. Wilson, 142 S. Ct. 1253, 1259–60 (2022); Dep't of Com. v. New York, 139 S. Ct. 2551, 2566–67 (2019); Sprint Commc'ns Co. v. APCC Servs., Inc., 554 U.S. 269, 275 (2008).

377. For this reason, negative longevity is not wrong to note that a practice is unprecedented. *See, e.g.*, Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2201 (2020); Medellin v. Texas, 552 U.S. 491, 532 (2008). Its error lies in treating that unprecedented quality as a basis for turning to negative longevity. *See supra* Section III.B. The appropriate inference from a practice being unprecedented is to withhold the presumption of constitutionality, rather than to presume it is unconstitutional. *See, e.g.*, United States v. Arthrex, Inc., 141 S. Ct. 1970, 1984 (2021) (plurality).

378. *See generally* Huq, *supra* note 253 (arguing that government branches often allocate power based on "bargains" rather than text).

379. *See* Issacharoff & Morrison, *supra* note 72, at 1936–37 (making this point in relation to *Mazars*).

380. *See* Ahmed, *supra* note 275, at 1370; Young, *supra* note 17, at 553.

381. *See, e.g.*, Griffin, *supra* note 24, at 106.

382. *See* Thayer, *supra* note 164, at 151–52. The entrenchment concern has less to do with positive longevity than with bringing the practice before a court at all. Yet where a practice has developed without court involvement, and a party later brings the practice into court, the practice changes regardless of whether the court takes up the issue Even deciding to leave the practice to non-judicial officials signals that officials can act without fear of litigation. *Cf.* Jim Rossi, *Bargaining in the Shadow of Administrative Procedure: The Public Interest in Rulemaking Settlement*, 51 DUKE L.J. 1015, 1016–18 (2001) (applying the famous concept of "bargaining in the

forego responsiveness by persisting with a longstanding practice that has grown stale, it indicates only that constitutional practice is a shared endeavor with crucial responsibilities falling outside the courts.[383]

2. Longevity and Liquidation

This defense of positive longevity, though mandated by non-judicial constitutionalism, brings it into conflict with the most prominent theory of post-adoption practice today: liquidation theory.

As Professor Baude recounts, liquidation holds that a deliberate, post-adoption practice sustained by public approval can settle ambiguities in constitutional text.[384] More specifically, it allows longevity to support a post-adoption practice within the framework of new originalism and its two-step approach to constitutional adjudication.[385] At the first step, courts determine the semantic meaning of the constitutional text as understood at the founding.[386] Only if that process cannot resolve the constitutional question should courts turn to other sources of meaning,[387] including post-adoption history.[388] Though a marked improvement over pure originalism by leaving some room for post-adoption longevity, liquidation incorporates longevity only to resolve interpretive questions that a court cannot resolve alone.[389] An apparent link to James Madison has caused liquidation to find favor among

shadow of law" to institutional arrangements between public institutions). This too changes the practice. *See generally* Posner & Vermeule, *supra* note 369, at 1745 (describing the error of treating courts as "outside" the system). *See also* Laurence H. Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics*, 103 HARV. L. REV. 1, 31–32 (1989) (similar).

383. *See* Renan, *supra* note 338, at 2003; *see also* Pozen & Samaha, *supra* note 69, at 734 (2021) (arguing that if certain matters are beyond judicial competence, courts should let other branches decide them rather than force them into constitutional language).

384. *See* Baude, *supra* note 14, at 13–16.

385. *See generally* Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1, 4 (2018).

386. *See* John O. McGinnis & Michael B. Rappaport, *The Power of Interpretation: Minimizing the Construction Zone*, 96 NOTRE DAME L. REV. 919, 922–24 (2021); *cf.* Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 NW. U. L. REV. 703, 704 (2009) (noting the difference between original intent and original public meaning in originalist theory, but finding it irrelevant in practice).

387. *See* Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 458 (2013) (arguing that the "construction zone" is inevitable, though in some instances small).

388. *See* Jack M. Balkin, *The Construction of Original Public Meaning*, 31 CONST. COMMENT. 71, 89 (2016).

389. *See* Baude, *supra* note 14, at 13–16; Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 11–14 (2001). For a discussion of this relation between post-adoption practice and the courts, see N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2137 (2022).

some originalists,[390] including constitutional scholars who endorse it as "original law originalism."[391]

Yet non-judicial constitutionalism poses a problem for liquidation as a theory of longevity, especially its order of operations. From that perspective, positive longevity incorporates into judicial doctrine the constitutional understandings that have settled among non-judicial officials and the public.[392] It respects the coordinate authority among officials, who share the task of interpretation to correct each other's deficiencies. In short, it is a tool of "interpretive modesty," preventing courts from treating themselves as first-order interpreters when they are not.[393] If a court interprets the Constitution in conflict with the settled interpretation underlying a longstanding practice, that conflict should cast doubt on its interpretation.[394] Such doubt is not determinative, but it is equally relevant to resolving matters of semantic meaning as pragmatic construction.[395] If it were not, longevity would operate from a place of judicial primacy. To give non-judicial constitutionalism its full force, longevity must be able to correct judicial interpretations, not merely fill gaps that the latter leave.[396]

Unlike liquidation, then, positive longevity is rightly not restricted to instances where courts cannot resolve the interpretive question by appeal to semantic meaning alone. It breaks down liquidation's two-step process by denying that a non-judicial understanding is an afterthought for courts.[397]

390. *See, e.g.*, *Bruen*, 142 S. Ct. at 2136.

391. *See supra* note 118 (collecting sources and disagreements among scholars).

392. *See* Vermeule, *supra* note 274, at 284.

393. Heidi Kitrosser, *Interpretive Modesty*, 104 GEO. L.J. 459, 465 (2016) (arguing that new originalism's appreciation for the limits of founding-era semantic interpretation is not radical enough); *cf.* PFANDER, *supra* note 40, at 230 (describing the same "epistemic humility" that longstanding practice implicates).

394. *See* United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 329 (1936) (explaining that a "long-continued" and "undisputed legislative practice" should be seen as "rest[ing] upon an admissible view of the Constitution which, *even if the practice found far less support in principle than we think it does*, we should not feel at liberty at this late day to disturb" (emphasis added)); Field v. Clark, 143 U.S. 649, 691 (1892) (similar).

395. *See* Schauer, *supra* note 202, at 104–05 (rejecting a firm distinction between interpretation and construction); *see also supra* note 202 (discussing the rejection of this distinction as an essential aspect of non-judicial constitutionalism).

396. *See* Curtis A. Bradley & Neil S. Siegel, *Constructed Constraint and the Constitutional Text*, 64 DUKE L.J. 1213, 1217 (2015) (noting that whether constitutional text is unambiguous often turns on the clarity of subsequent practice).

397. *Cf.* Bradley & Siegel, *supra* note 266, at 8–9 (explaining a further distinction, namely that gloss permits "re-liquidating" practices that unsettle settled meanings, which liquidation bars). *But see* McConnell, *supra* note 118, at 1774 ("Presumably, this 'fixing' is not irrevocable . . . ."). There is historical support for the latter conception of Madisonian Liquidation. *See* Cornell, *supra* note 118, at 1761–62.

Instead, that understanding is the place for courts to begin.[398] Where the longevity of a practice is deliberate, the sole issue for courts is whether they can read it into the Constitution consistent with its ordinary modalities.

3. Longevity and Historical Gloss

The other theory of how longevity can support a practice is what the literature calls historical gloss. Rather abstractly, the theory maintains that longevity "informs the content of constitutional law" as a descriptive matter.[399] Unfortunately, however, it generally avoids explaining how courts should apply it to do so—including the basic issues of "what," "who," and "when."[400] This Section corrects that deficiency by briefly explaining how non-judicial constitutionalism and the two principles of longevity provide the basic rules for applying positive longevity in court.

a) The "what." – The first issue for courts applying positive longevity is to decide what counts as practice capable of informing that longevity. Scholarship has focused in particular on whether non-judicial officials must demonstrate a constitutional analysis for courts to consider the practice capable of contributing to a longstanding practice.[401]

Grounded in non-judicial constitutionalism, the answer is no. Courts need something to incorporate, but that need not be demonstrated through the modalities of constitutional interpretation. Those are judicial modalities derived from the limits on courts as interpretive institutions rather than constitutionalism itself.[402] As Part II explained, the entire aim of non-judicial constitutionalism is to correct for those limits, especially as they relate to enforcement competency and democratic responsiveness. Far from dooming a sustained interpretation, non-judicial considerations demonstrate the importance of incorporation when the issue comes before a court.[403]

Above all, what matters is that the practice be longstanding and deliberate. The latter ensures that the practice reflects a purposeful exercise of public power, while the former confirms the presence of an established understanding among non-judicial officials continuing to exercise that

398. *See* NLRB v. Noel Canning, 573 U.S. 513, 525–26 (2014). This was the law of post-adoption practice before *Bruen*, *see* Fallon, *supra* note 13, at 1776–77 (reading *Noel Canning* this way), and it should return to that status.

399. Bradley & Siegel, *Historical Gloss*, *supra* note 15, at 257.

400. *See* N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2162–63 (2022) (Barrett, J., concurring) (identifying these issues as "unsettled questions").

401. *See* Baude, *supra* note 14, at 17–18; Roisman, *supra* note 13, at 674.

402. *Cf.* Christopher Serkin & Nelson Tebbe, *Is the Constitution Special?*, 101 CORNELL L. REV. 701, 703 (2016) (suggesting that non-judicial officials may be no less concerned about constitutional text than courts).

403. As explained, a different conclusion obtains when the effect of the interpretation is to constrain the interpreters' future authority. *See supra* Section III.B.

power. It is that understanding that calls for incorporation, not simply that the practice is old. Thus, the Court was wrong in *Samia v. United States*[404] to find a "longstanding practice" "[f]or most of our Nation's history" based primarily on a pair of cases at the end of the nineteenth century.[405] As Justice Barrett rightly noted in her concurrence, these sources suggest only that at some point some jurists thought something.[406] Isolated precedents can persuade but they do not demand the same respect from coordinate interpreters as a longstanding practice, even if they are old. Only with longevity—where a practice receives repeated ratification over time from an array of constitutional minds—does the practice demand incorporation.

Contrast the isolated precedents in *Samia* with another decision released a few days later. In *Mallory v. Norfolk Southern Railway Co.*,[407] the Court upheld against a due process challenge Pennsylvania's law requiring an out-of-state firm to consent to suit in the state as a condition of registration,[408] affirming a decision from a century earlier.[409] Along with its own precedent, the Court invoked a range of statutes enacted between 1835 and 1915 that all made consent to suit a condition for incorporation, suggesting an established interpretation of due process that had settled over eight decades and that the Court's earlier decision had contemporaneously followed.[410] This extent of deliberate practice reflects not just a greater number of precedents but a different form of historical weight altogether—the difference between an isolated precedent plucked from the air and a settled understanding that courts would be anomalous for ignoring.

b) The "who." – Scholars have tended to focus on positive longevity among the federal branches, especially in executive-congressional relations.[411] Yet Part I showed that positive longevity appears outside that context, and Part II explained why. Any institution engaging with the Constitution can contribute to establishing a practice-based interpretation.[412]

404. 143 S. Ct. 2004 (2023).

405. *Id.* at 2012–13.

406. *Id.* at 2020 (Barrett, J., concurring).

407. 143 S. Ct. 2028 (2023).

408. *Id.* at 2044–45.

409. *See* Pa. Fire Ins. Co. of Phila. v. Gold Issue Mining & Milling Co., 243 U.S. 93, 95 (1917).

410. *Mallory*, 143 S. Ct. at 2035; *see also* Statutory Appendix to Brief for the Petitioner, *Mallory*, 143 S. Ct. 2028, at 1a–273a (No. 21-1168) (collecting those statutes).

411. *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2162–63 (2022) (Barrett, J., concurring) (asking whether longstanding practice is relevant beyond that context).

412. That includes judicial practice. *See, e.g.*, Tutun v. United States, 270 U.S. 568 (1926); PFANDER, *supra* note 40, at 87–102 (explaining the late-nineteenth century emergence of adversity as an Article III requirement that *Tutun* attempted to reconcile with past practice). Here, the "non-judicial constitutionalism" label should not be taken literally, as the aim is not to exclude the judiciary but to appreciate how different institutional dynamics affect the variety of constitutional interpreters. *See generally* Schapiro, *supra* note 257, at 658.

So long as public officials deliberately engage with constitutional values over time, they can inform a longstanding practice.

That said, courts applying positive longevity should be aware that some public officials have an easier time than others with the deliberate continuation of a practice. Particularly relevant is the variety of components that make up an institution delegated constitutional power.[413] At the federal level, for example, the singularity of presidential power makes it primed for continuing a use of authority.[414] By contrast, the plurality of legislators and veto points within Congress means that legislative inaction often does not reflect the same deliberation.[415] With such an imbalance in ease of action, Congress often "allows" an executive practice to continue in a way that does not necessarily reflect deliberate engagement with the use of power.[416]

At the state level, matters are even more complicated because states seldom settle on a shared constitutional practice. No matter how longstanding, a practice in New York or Nebraska says little about established understandings of the Federal Constitution. Indeed, the number of states and their partisan divide makes such singularity of practice rare.[417] Though cases like *Chiafalo* and *Mallory* show that it is possible,[418] it must depend on more than ingenuous advocacy. With so much regulatory activity across so many states and so much time, the fact that a litigant can create a patchwork of state-level regulation showing that a practice has existed somewhere for a century often owes more to creativity than an established understanding among state actors.[419] Given the force of incorporation that

413. *See generally* Jonathan S. Gould & David E. Pozen, *Structural Biases in Structural Constitutional Law*, 97 N.Y.U. L. REV. 59, 62–63 (2022) (discussing the need for courts to consider how structural differences between institutions affect their use of public power).

414. *Cf.* Anya Bernstein & Cristina Rodríguez, *The Accountable Bureaucrat*, 132 YALE L.J. 1600, 1606 (2023) (presenting evidence that executive action is more accountable when diffused among agencies rather than hierarchically linked to the President).

415. *See generally* Bradley & Morrison, *supra* note 15, at 414–15.

416. *See* Roisman, *supra* note 13, at 696 (arguing that this is a more general problem of inferring the reason for a practice from the practice itself).

417. *See* Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077 (2014). For a recent analysis of the effect of national parties on state-level political institutions, see JACOB M. GRUMBACH, LABORATORIES AGAINST DEMOCRACY: HOW NATIONAL PARTIES TRANSFORMED STATE POLITICS 97–122 (2022).

418. *See also* Hous. Cmty. Coll. Sys. v. Wilson, 142 S. Ct. 1253 (2022) (similarly showing a widespread state-level practice worthy of incorporation into the First Amendment); Burson v. Freeman, 504 U.S. 191, 203–06 (1992) (plurality) (noting that every state had for more than a century limited polling-place campaigning, suggesting a "widespread and time-tested consensus" that they are constitutional). As these decisions suggest, unanimity is not necessary. *See* NLRB v. Noel Canning, 573 U.S. 513, 538 (2014) (noting that a few historical anomalies did not undermine two centuries of settled practice); *cf.* Driver, *supra* note 73, at 930 (noting that where a constitutional interpretation has settled, "outliers" are constitutionally suspect).

419. *See, e.g.*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2248–49 (2022).

positive longevity involves, courts should ensure that a practice is sufficiently established before using it to discipline their interpretation.[420]

c) The "when." – The third issue concerns when the post-adoption practice must occur to contribute to positive longevity.[421] The most prominent answer in the literature currently comes from liquidation theorists, who emphasize post-adoption history as evidence of the public meaning of the text near its ratification,[422] with its relevance decreasing as it moves away from that moment.[423]

Yet limiting positive longevity in this fashion creates an obvious problem of line-drawing—one that has led to flatly contradictory statements in the jurisprudence: sometimes the end of the nineteenth century is too late; sometimes it is early enough.[424] Even without contradiction, however, the problem remains that it works in the wrong direction. Like originalism, a focus on founding-era practice attempts to restore an interpretation that once was established and was later lost.[425] But incorporating post-adoption practice independent of original meaning undermines any preference for the founding era, or any particular era for that matter.[426] Despite its other virtues, *Moore v. Harper*[427] demonstrates the error. There, the Court invoked "historical practice" that was "settled and established" in the years after ratification to confirm that state constitutions constrain state legislatures under the Elections Clause,[428] dismissing Story's outlier view because it came eight years too late to count as part of the founding era.[429] Now Story's

420. *See* Smiley v. Holm, 285 U.S. 355, 369 (1932) (noting that "established practice in the [s]tates . . . is eloquent of the conviction of the people of the states").

421. *See* N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2162–63 (2022) (Barrett, J., concurring); *see also* PRAKASH, *supra* note 24, at 124–25.

422. *See* Baude, *supra* note 14, at 62.

423. *See Bruen*, 142 S. Ct. at 2136; *cf.* Balkin, *supra* note 13, at 657 (emphasizing the prominence in historical argument of the Washington Administration rather than the Roosevelt, Truman, and Eisenhower Administrations, though they "did far more to shape the actual presidency we have and the actual powers that contemporary presidents enjoy").

424. *Compare* Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2258–59 (2020) (explaining that a practice arising in the "second half of the [nineteenth] century . . . cannot by itself establish an early American tradition"), *with Dobbs*, 142 S. Ct. at 2255 (emphasizing a tradition of states regulating pre-quickening abortions that began as "the [nineteenth] century wore on").

425. *Cf.* 2 BRUCE A. ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 259 (1991) (describing the "myth of rediscovery" on which originalism rests).

426. *See* Samia v. United States, 143 S. Ct. 2004, 2019 (2023) (Barrett, J., concurring in part and concurring in the judgment) (suggesting that the Court had no more reason to rely on post-adoption longevity from the 1890s than the 1940s).

427. 143 S. Ct. 2065 (2023)

428. *Id.* at 2086.

429. *Id.* at 2087–88 (describing Story as "although 'a brilliant and accomplished man, . . . not a member of the Founding generation'" (quoting U. S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 856 (1995) (Thomas, J., dissenting)); *cf.* Saul Cornell, Heller, *New Originalism, and Law Office*

view was wrong and an outlier at the time,[430] but the more pressing inconsistency was with the interpretation that has settled over two and a half centuries.[431]

Rather than restoring the founding era, non-judicial constitutionalism works in the other direction by bringing courts into a settled understanding of constitutional authority. For that reason, positive longevity begins at the time of the challenge and works backward to gauge the importance of incorporation. If the practice traces to the founding then that will be a particularly strong basis for incorporation, but it will be so due to the force of the repeated interpretation. This shift spreads the power of practice across the full span of constitutional history,[432] and it better accords with the actual system of American governance.[433] If the result is to make positive longevity more available, that is only because non-judicial interpretation is so widespread.

CONCLUSION

After extensive focus on originalist history, constitutional theory has rightly come around to recognizing the value of longstanding, post-adoption practice. However, in their efforts to explain why longevity is constitutionally important, scholars have provided courts with a basis for turning to longevity in whatever way suits their ends. Courts have grasped that opportunity, currently using longevity in vastly different ways that each makes an inference about non-judicial understandings of the Constitution without exploring whether those inferences are justified.

Drawing on the non-judicial constitutionalism literature, this Article has laid out what courts can infer about non-judicial interpretations from a longstanding practice and, importantly, what they cannot. It has highlighted two principles guiding the use of longevity in court, one based on

History: "Meet the New Boss, Same As the Old Boss", 56 UCLA L. REV. 1095, 1112 (2009) (noting disagreements over how to define the founding era).

430. For a study of Story's position in perspective, including its ambiguities, see Michael T. Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, 55 GA. L. REV. 1, 39–40 (2020); *cf.* Carolyn Shapiro, *The Independent State Legislature Theory, Federal Courts, and State Law*, 90 U. CHI. L. REV. 137, 184–95 (2023) (explaining the practical difficulties with Story's view).

431. *Cf.* Smiley v. Holm, 285 U.S. 355, 369–70 (1932) (noting a settled interpretation of the Elections Clause among the states tracing from the founding to the time of the challenge).

432. *See* Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1, 6–7 (1998) (arguing that constitutional interpretation should draw from our whole constitutional history); Terrance Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033, 1050 (1981) (same).

433. *See* Balkin, *supra* note 13, at 657 (noting, in the context of Article II, that the most relevant post-adoption history comes from the twentieth century rather than the Washington, Adams, or Jefferson administrations).

incorporating longstanding practice and the other on preserving space for non-judicial officials to continue engaging with constitutional values. Measured against those principles, mandatory longevity goes wrong, negative longevity mostly goes wrong, and positive longevity goes just right. In laying that framework, this Article does not purport to answer every question about post-adoption history in court. Many issues and ambiguities arise in everyday practice. That it leaves much to be worked out reflects how constitutional governance is an ongoing project of greater complexity than courts can, or should, shoulder alone.