
ORIGINALISM AND HISTORICAL PRACTICE IN SEPARATION-OF-POWERS CASES

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CONTENTS

INTRODUCTION	41
I. HISTORICAL PRACTICE AS A “MAINSTAY” OF SEPARATION-OF-POWERS DEBATES	44
A. <i>The History of Historical Practice (In Brief)</i>	44
B. <i>Historical Practice in NLRB v. Noel Canning</i>	45
C. <i>Historical Practice in Zivotofsky v. Kerry</i>	48
D. <i>A Fundamental Tension?</i>	50
II. ORIGINALISM.....	51
A. <i>Basics</i>	51
B. <i>Reasons to Look to Historical Practice</i>	53
1. <i>Precedent and Practice</i>	53
2. <i>Departmentalism</i>	54
3. <i>Respect for Other Branches</i>	55
III. IMMIGRATION.....	57
A. <i>Text and History</i>	58
B. <i>Historical Practice</i>	61
CONCLUSION.....	62

INTRODUCTION

Recent years have seen no shortage of significant separation-of-powers cases in the courts, and the trend appears poised to continue. In 2014, for example, the Supreme Court decided *NLRB v. Noel Canning*, which challenged the constitutionality of certain recess appointments made by President Obama.¹ In 2015, the Court decided *Zivotofsky v. Kerry*, which asked whether Congress can constitutionally require the Secretary of State, on request, to record that an American citizen born in Jerusalem was born in “Israel” on a Consular Report of Birth Abroad

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1. 134 S. Ct. 2550, 2556 (2014).

and on a United States passport.² And in 2016, the Court will be hearing a challenge to President Obama's executive action on immigration, which directs Department of Homeland Security officials to exercise discretion, on a case-by-case basis, to defer the removal of certain parents of U.S. citizens or lawful permanent residents.³

All of these cases raise different merits questions, but one anterior question is nonetheless central to them all: *how* do courts decide these cases? In an important work in the *Harvard Law Review*, Curtis Bradley and Trevor Morrison provide one significant answer to that question, noting the important role that arguments related to historical practice often play in separation-of-powers cases. Such arguments are, they write, "a mainstay of debates about the constitutional separation of powers."⁴ And this is nothing new. As they note, Justice Frankfurter endorsed this use of "historical practice" in his *Youngstown* concurrence, explaining that "a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned . . . may be treated as a gloss on 'executive Power' vested in the President by Section 1 of Art. II."⁵ And the Supreme Court has repeatedly relied on evidence of "historical practice" in the years since,⁶ most recently in *Zivotofsky v. Kerry* in which it noted that "[i]n separation-of-powers cases this Court has often 'put significant weight upon historical practice.'"⁷

While there can be no doubt that as a descriptive matter, historical practice is often central to the Court's decision-making in separation-of-powers cases, an important question remains: what is the normative basis for looking to historical practice, and is looking to such evidence consistent with other approaches to constitutional interpretation that the Court often professes to follow? Bradley and Morrison "do not attempt . . . a freestanding defense of relying on historical practice as against . . . other approaches" to constitutional interpretation, but they

2. 135 S. Ct. 2076, 2081 (2015).

3. See *United States v. Texas*, 2016 WL 207257 (2016).

4. Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 412 (2012). Bradley and Morrison note that these historical practice arguments are "especially common in debates over the distribution of authority between Congress and the executive branch." *Id.* at 413.

5. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring), quoted in Bradley & Morrison, *supra* note 4, at 418.

6. See *infra* Sections I. B–C.

7. 135 S. Ct. at 2091 (quoting *NLRB v. Noel Canning*, 134 S. Ct. 2556, 2559 (2014)); see *id.* at 2090 ("[J]udicial precedent and historical practice teach that it is for the President alone to make the specific decision of what foreign power he will recognize as legitimate . . .").

do briefly consider “its relationship to” debates about such approaches.⁸ For example, they conclude that while “some versions of originalism are compatible with practice-based arguments, various nonoriginalist approaches are likely to be more receptive to such arguments.”⁹ In a subsequent article, Bradley (this time writing with Neil Siegel) takes the same position, arguing that although “certain variants of originalism . . . are potentially compatible with the consideration of historical practice,” they conclude that “it is more difficult to reconcile the historical gloss approach with many originalist theories of interpretation [than with nonoriginalist approaches].”¹⁰

In this Essay, I argue that looking to historical practice can be done in a way that is entirely consistent with an originalist approach to constitutional interpretation that places primacy on the Constitution’s text and history. Under such an approach, any inquiry into the Constitution’s meaning will begin by looking to the document’s text and history, but it will also acknowledge that there will be cases in which the Constitution’s text and history do not provide a determinate answer. In such cases, the inquiry cannot end there, and in such cases, it will often be appropriate to look to historical practice.

Indeed, looking to historical practice, in addition to the Constitution’s text and history, can often be quite helpful in elucidating contemporary separation-of-powers problems. *Noel Canning* and *Zivotofsky* are two recent examples in which the Court did just that. The challenge to President Obama’s executive action on immigration will present another opportunity.¹¹

In this Essay, I first introduce the use of historical practice in elucidating separation-of-powers problems and discuss the Court’s use of it in *Noel Canning* and *Zivotofsky*. I then turn to originalism and discuss, in particular, the brand of originalism known as “new textualism.” I argue that resort to historical practice is entirely consistent with this brand of originalism. Finally, in the last part, I use the pending immigration case as a brief case study to demonstrate how text and history can go hand in hand with historical practice in answering contentious separation-of-powers questions.

8. Bradley & Morrison, *supra* note 4, at 416, 424.

9. *Id.* at 426.

10. Curtis A. Bradley & Neil S. Siegel, *After Recess: Historical Practice, Textual Ambiguity, and Constitutional Adverse Possession*, 2014 SUP. CT. REV. 1, 27–28.

11. See *United States v. Texas*, 2016 WL 207257 (2016).

I. HISTORICAL PRACTICE AS A “MAINSTAY” OF SEPARATION-OF-POWERS DEBATES

A. *The History of Historical Practice (In Brief)*

Separation-of-powers disputes are, of course, nothing new. Neither is resort to historical practice to resolve those disputes. In his concurrence in *Youngstown*, Justice Frankfurter observed that “[t]he Constitution is a framework for government. Therefore the way the framework has consistently operated fairly establishes that it has operated according to its true nature.”¹² Frankfurter then proceeded to consider previous cases and the extent of congressional authorization for presidential action in order to understand the proper scope of executive authority.¹³

In their significant work on the topic, Bradley and Morrison demonstrate that Frankfurter is hardly alone in his emphasis on “practice-based ‘gloss’” in determining the scope of presidential power and, in particular, the “distribution of authority between Congress and the executive branch.”¹⁴ Indeed, as they note, “the full Supreme Court, executive branch lawyers, and academic commentators frequently invoke historical practice in similar terms.”¹⁵ They then provide a thorough demonstration of the importance of such arguments, particularly in “debates over the scope of presidential power,”¹⁶ illustrating that both the existence of historical practice and its absence have proven critical to debates about presidential power across a range of issue areas.¹⁷ As just one example, they discuss a 1929 Supreme Court case about the President’s authority to exercise a “pocket veto,” in which the Court noted that “[l]ong settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions of this character.”¹⁸

And this work by Bradley and Morrison is hardly the only one to have discussed the significance of historical practice to debates about

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

13. *Id.* at 611.

14. Bradley & Morrison, *supra* note 4, at 413.

15. *Id.*

16. *Id.* at 417.

17. *Id.* at 417–23.

18. *Id.* at 421 & n.28 (quoting *The Pocket Veto Case*, 279 U.S. 655, 689 (1929)). They also discuss examples involving foreign relations, wartime and national security powers, the pardon power, and executive privilege. Bradley & Morrison, *supra* note 4, at 420–21.

executive power. In a separate piece, Bradley has discussed the importance of historical gloss to constitutional debates about “presidential authority to terminate treaties,”¹⁹ and other commentators have discussed the issue in the context of the self-executing nature of treaties²⁰ and the legality of using military commissions,²¹ to name just two examples.

And, if anything, the Court’s emphasis on the importance of historical practice to separation-of-powers debates has only grown in recent years. As I discuss in the next two sections, historical practice arguments have been central to the Supreme Court’s decision-making in two significant separation-of-powers cases it decided in recent years. But as I also discuss below, at least some commentators have suggested that those decisions’ emphasis on historical practice makes them inconsistent with an originalist approach to constitutional interpretation.

B. Historical Practice in NLRB v. Noel Canning

In *NLRB v. Noel Canning*, the Court considered the constitutionality of President Obama’s recess appointments to the National Labor Relations Board.²² The Constitution provides that the President “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all other Officers of the United States”²³ It also provides that “[t]he President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.”²⁴

In *Noel Canning*, the Court faced three questions about the clause: (1) whether the term “Recess” included both inter-session and intra-

19. Curtis A. Bradley, *Treaty Termination and Historical Gloss*, 92 TEX. L. REV. 773, 774 (2014) (presenting a “detailed case study of historical gloss, focused on presidential authority to terminate treaties”).

20. Jean Galbraith, *Congress’s Treaty-Implementing Power in Historical Practice*, 56 WM. & MARY L. REV. 59, 62 (2014). Galbraith argues that the use of historical practice in these contexts is one reason that “[t]he absence of historical practice from the debate over Congress’s power to implement treaties is problematic” *Id.*

21. See Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2131 (2005) (“The historical practice of using military commissions during war, even without specific congressional authorization, suggests that they are part of the ‘incidents of war’ that Congress implicitly authorized in the AUMF.”); Christopher M. Evans, Note, *Terrorism on Trial: The President’s Constitutional Authority To Order the Prosecution of Suspected Terrorists by Military Commission*, 51 DUKE L.J. 1831, 1836–38 (2002).

22. 134 S. Ct. 2550, 2556 (2014).

23. U.S. CONST. art. II, § 2, cl. 2.

24. *Id.* art. II, § 2, cl. 3.

session recesses,²⁵ (2) whether “vacancies that may happen” included both vacancies that first come into existence during a recess or also those that arose before the recess, and (3) whether the Senate’s decision to hold pro forma sessions (i.e., sessions in which no business would be conducted) interrupted periods of recess.²⁶ Although the Court ultimately held that the specific recess appointments at issue in that case were unconstitutional because pro forma sessions of the Senate punctuated the period of recess, thus making it too short to permit recess appointments, the Court nonetheless upheld a broad understanding of the Recess Appointments Clause.²⁷

The Court began its analysis by identifying “two background considerations that [it found] relevant to all three [questions].”²⁸ The first, relying on the text of the Constitution and the Federalist Papers, was that “*the Recess Appointments Clause sets forth a subsidiary, not a primary, method for appointing officers of the United States.*”²⁹ The second was that “*in interpreting the Clause, we put significant weight upon historical practice.*”³⁰ Citing both *McCulloch v. Maryland* and *The Pocket Veto Case*, the Court explained that “[l]ong settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions’ regulating the relationship between Congress and the President.”³¹ While the Court recognized that “the separation of powers can serve to safeguard individual liberty” and “it is the ‘duty of the judicial department . . . to say what the law is,’” “it is equally true that the longstanding ‘practice of the government’ can inform [the Court’s] determination of ‘what the law is.’”³² According to the Court, “[t]hat principle is neither new nor controversial,”³³ and indeed such practice is “an important interpretive factor even when the nature or longevity of that practice is subject to dispute, and even when

25. *Noel Canning*, 134 S. Ct. at 2556.

26. *Id.* at 2556–57.

27. *Id.* at 2574.

28. *Id.* at 2558.

29. *Id.*

30. *Noel Canning*, 134 S. Ct. at 2559.

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

32. *Id.* at 2559–60 (citations omitted).

33. *Id.* at 2560. As Bradley and Siegel discuss, there is “[a] variant of originalism, known as ‘liquidation,’ [which] would allow initial post-Founding practice to resolve ambiguities in the Constitution’s original meaning and thereby ‘fix’ the meaning against subsequent change” and “[t]his idea is frequently ascribed to James Madison.” Bradley & Siegel, *supra* note 10, at 2. Bradley and Siegel note that “it is not entirely clear whether and to what extent it differs from the historical gloss approach,” but “the majority in *Noel Canning* seemed to treat liquidation and gloss as the same phenomenon.” *Id.*

that practice began after the founding era.”³⁴

In answering the first of the specific questions before the Court, the Court began with the text of the relevant provisions, citing, for example, numerous dictionaries and founding-era legislative materials to understand the scope of the term “recess” at the time the text was written.³⁵ The Court then considered the purpose of the Clause, a purpose made clear by founding-era history, though admittedly the Court did not focus on that history:

The Clause gives the President authority to make appointments during “the recess of the Senate” so that the President can ensure the continued functioning of the Federal Government when the Senate is away. The Senate is equally away during both an inter-session and an intra-session recess, and its capacity to participate in the appointments process has nothing to do with the words it uses to signal its departure.³⁶

The Court then turned to historical practice, noting (among other things) that “between the founding and the Great Depression, Congress took substantial intra-session breaks (other than holiday breaks) in four years And in each of those years the President made intra-session recess appointments.”³⁷

The Court’s analysis of the second question followed largely the same path. Considering first the text of the Recess Appointments Clause, the Court concluded that “the Clause’s language, read literally, permits, though it does not naturally favor, our broader interpretation.”³⁸ The Court then considered the Clause’s purpose, concluding that it “strongly supports the broader interpretation. That purpose is to permit the President to obtain the assistance of subordinate officers when the Senate, due to its recess, cannot confirm them.”³⁹ Finally, the Court turned to “[h]istorical practice,” noting that such practice “over the past 200 years strongly favors the broader interpretation.”⁴⁰

Concurring in the judgment, Justice Scalia (joined by the Chief

34. *Noel Canning*, 134 S. Ct. at 2560.

35. *Id.* at 2561.

36. *Id.*

37. *Id.* at 2562 (citations omitted).

38. *Id.* at 2567.

39. *Noel Canning*, 134 S. Ct. at 2568. Notably, that purpose is strongly supported by founding-era history, although the Court did not address that history. *See, e.g.*, Brief of Constitutional Accountability Center as Amicus Curiae in Support of Petitioner, *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014) (No. 12-1281), 2013 WL 5323364, at *21–26.

40. *Noel Canning*, 134 S. Ct. at 2570 (“The tradition of applying the Clause to pre-recess vacancies dates at least to President James Madison.”).

Justice, Justice Thomas, and Justice Alito) chastised the majority's examination of historical practice, arguing that it:

swe[pt] away the key textual limitations on the recess-appointment power. . . . [and] justify[d] those atextual results on an adverse-possession theory of executive authority: Presidents have long claimed the powers in question, and the Senate has not disputed those claims with sufficient vigor, so the Court should not "upset the compromises and working arrangements that the elected branches of Government themselves have reached."⁴¹

Unsurprisingly, in the aftermath of the Court's decision in *Noel Canning*, commentators noted the decision's strong emphasis on historical practice as the appropriate guidepost when answering separation-of-powers questions. Bradley and Seigel, for example, observed that *Noel Canning* "contain[ed] an especially strong and sustained endorsement of the relevance of historical practice to discerning the Constitution's distribution of authority between Congress and the President."⁴² Indeed, they noted, "[t]he Court did so . . . as part of a self-conscious approach to constitutional interpretation."⁴³

C. Historical Practice in *Zivotofsky v. Kerry*

In *Zivotofsky v. Kerry*, the Court considered the constitutionality of a "congressional mandate that allows a United States citizen born in Jerusalem to direct the President and Secretary of State, when issuing his passport, to state that his place of birth is 'Israel.'"⁴⁴ To the majority, answering that question required considering whether "the President has the exclusive power to grant formal recognition to a foreign sovereign."⁴⁵

The Court clearly set out its methodology for answering that question: "To determine whether the President possesses the exclusive power of recognition the Court examines the Constitution's text and structure, as well as precedent and history bearing on the question."⁴⁶

41. *Id.* at 2592 (Scalia, J., concurring) (quoting *id.* at 2650 (majority opinion)).

42. Bradley & Siegel, *supra* note 10, at 1. Still other scholars have taken the importance of historical practice as a given, but argued that "judges and scholars should be less sanguine about the current approaches to presidential power" because "congressional authorizations [of presidential power] may result from the failure of checks and balances." David H. Moore, *Taking Cues from Congress: Judicial Review, Congressional Authorization, and the Expansion of Presidential Power*, 90 NOTRE DAME L. REV. 1019, 1052–53 (2015).

43. Bradley & Siegel, *supra* note 10, at 1.

44. 135 S. Ct. 2076, 2081 (2015).

45. *Id.*

46. *Id.* at 2084.

To start, the Court noted that “[d]espite the importance of the recognition power in foreign relations, the Constitution does not use the term ‘recognition,’ either in Article II or elsewhere.”⁴⁷ The Court then considered the clause which the Secretary of State argued gave rise to the recognition power, the Reception Clause, which provides that the President “shall receive Ambassadors and other public Ministers.”⁴⁸ To determine whether that Clause gave rise to a recognition power, the Court looked to the ratification debates, as well as the views of the Clause at the Founding and immediately thereafter. The Court also considered other Article II powers that “supported” “[t]he inference that the President exercises the recognition power,” as well as Court precedent relevant to the issue.⁴⁹

The Court then proceeded to the next step of its analysis: “Having examined the Constitution’s text and this Court’s precedent, it is appropriate to turn to accepted understandings and practice.”⁵⁰ Quoting *Noel Canning*, the Court observed that “[i]n separation-of-powers cases this Court has often ‘put significant weight upon historical practice.’”⁵¹ Looking at this history, the Court concluded that while “history is not all on one side, . . . on balance it provides strong support for the conclusion that the recognition power is the President’s alone.”⁵² As the Court explained, “[f]rom the first Administration forward, the President has claimed unilateral authority to recognize foreign sovereigns,” and “[f]or the most part, Congress has acquiesced in the Executive’s exercise of the recognition power.”⁵³ Having concluded that the President alone has “the power to recognize foreign states,” the Court unsurprisingly concluded that Congress may not “force the President himself to contradict” his earlier determinations about recognition.⁵⁴

Justice Thomas agreed with the majority that Congress could not mandate that the President list “Israel” as the place of birth of Jerusalem-born citizens on their passports, but to him the source of the constitutional problem was the Constitution’s “vest[ing of] the residual foreign affairs powers of the Federal Government . . . in the President by way of Article II’s Vesting Clause.”⁵⁵ Thomas began his analysis by

47. *Id.*

48. *Id.* at 2085 (quoting U.S. CONST. art. II, § 3).

49. *Zivotofsky*, 135 S. Ct. at 2085.

50. *Id.* at 2091.

51. *Id.* (quoting *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2559 (2014)).

52. *Id.*

53. *Id.*

54. *Zivotofsky*, 135 S. Ct. at 2094–95.

55. *Id.* at 2096–97 (Thomas, J., concurring in part and dissenting in part).

identifying the relevant constitutional provisions and then focused on “[f]ounding-era evidence” and “[e]arly practice of the founding generation.”⁵⁶

Justice Scalia dissented, in an opinion joined by Chief Justice Roberts and Justice Alito.⁵⁷ According to Justice Scalia, “[t]he Constitution contemplates that the political branches will make policy about the territorial claims of foreign nations the same way they make policy about other international matters: The President will exercise his powers on the basis of his views, Congress its powers on the basis of its views,” and “[t]hat is just what has happened here.”⁵⁸ Scalia faulted the majority for making a decision not grounded in “text or history or precedent,” but instead one that “comes down to ‘functional considerations.’”⁵⁹

D. A Fundamental Tension?

Noel Canning and *Zivotofsky* both make clear that historical practice is an incredibly important part of constitutional interpretation, but the Court’s emphasis on historical practice has led some to suggest that the Court’s opinions in these cases are in tension with an originalist approach to constitutional interpretation.⁶⁰

In the case of *Noel Canning*, for example, one prominent law professor wrote that Breyer’s opinion “offer[ed] the most forceful defense of what’s often termed ‘living constitutionalism’ to appear in a majority Supreme Court opinion in a generation.”⁶¹ It is, he writes,

Interestingly, Thomas saw no problem with the congressional statute “insofar as it regulates consular reports of birth abroad” because such reports were developed to serve different purposes than passports and their regulation does not fall within the President’s foreign affairs powers. *Id.* at 2097.

56. *Id.* at 2098–101.

57. *Id.* at 2116 (Scalia, J., dissenting). The Chief Justice also wrote a separate dissent, joined by Justice Alito, to “underscore the stark nature of the Court’s error on a basic question of separation of powers.” *Zivotofsky*, 135 S. Ct. at 2113 (Roberts, C.J., dissenting).

58. *Id.* at 2116 (Scalia, J., dissenting).

59. *Id.* at 2123.

60. See Alison L. LaCroix, *Historical Gloss: A Primer*, 126 HARV. L. REV. F. 75, 81 (2013) (“To the extent that an interpreter actually believes in a particular mode of interpretation (textualism, certainly, but also common law constitutionalism, originalism, or welfarism), when she is operating within that system, she will typically not engage in a calculus weighing practice and nonpractice evidence. For such interpreters, historical practice is an inferior source of authority.”).

61. Adam Winkler, *Active Liberty Lives! Justice Breyer’s Opinion in the Recess Appointments Case Deals a Blow to Originalism*, SLATE (July 8, 2014, 11:38 AM), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/07/justice_breyer_s_theory_of_constitutional_interpretation_finally_gets_its.html. Winkler does acknowledge that “Breyer’s approach to constitutional interpretation doesn’t ignore the framers; the views of

“giving originalism a good race.”⁶² Similarly, another prominent law professor wrote that “the most important questions in the case produced a sharp split between Justice Antonin Scalia’s approach to constitutional interpretation and that of Justice Stephen Breyer.”⁶³

In the case of *Zivotofsky*, as well, some academics have suggested that looking to historical practice is inconsistent with an originalist approach to constitutional interpretation. One prominent originalist scholar, for example, noted that Justice Thomas’s concurrence “relies on extensive originalist materials” and described Justice Scalia’s dissent as “also originalist.”⁶⁴ He did not apply that same label to Justice Kennedy’s majority opinion,⁶⁵ even though that opinion explicitly noted that answering the question presented required “examin[ing] the Constitution’s text and structure, as well as precedent and history bearing on the question.”⁶⁶

In the next section, I challenge the idea that there is necessarily a tension between originalism and looking to historical practice. I argue instead that looking to historical practice complements, rather than contradicts, an approach to constitutional interpretation that gives primacy to the Constitution’s text and history.

II. ORIGINALISM

A. Basics

Countless books and articles have been written on originalism—what it is and what it should be, its strengths and its weaknesses as a method of constitutional interpretation—and I will not retread all of that territory here.⁶⁷ Suffice it to say, originalism has evolved over time, and

Madison, Jefferson, Washington, and Marshall are all taken carefully into account.” *Id.*

62. *Id.*

63. Cass R. Sunstein, *Breyer’s Greatest Triumph over Scalia*, BLOOMBERG VIEW (July 2, 2014, 8:00 AM), <http://www.bloombergvew.com/articles/2014-07-02/breyer-s-greatest-triumph-over-scalia>.

64. Michael Ramsey, *Originalism in Zivotofsky v. Kerry*, THE ORIGINALISM BLOG (June 8, 2015, 8:14 PM), <http://originalismblog.typepad.com/the-originalism-blog/2015/06/originalism-in-zivotofsky-v-kerrymichael-ramsey.html>.

65. *Id.* (noting that Justice Kennedy’s opinion “ranges over precedent, practice, recent history, and functional needs, but also devotes substantial attention to immediate post-ratification understandings”).

66. *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2084 (2015).

67. See, e.g., Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989); Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1 (2009); Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085 (1989); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985); Richard S. Kay, *Original Intent and Public Meaning in Constitutional*

even today there are many different variants of originalism.⁶⁸ Here, I present one version of originalism that, in my view, gives primacy to the Constitution's text and history in understanding the Constitution's original meaning, but also recognizes that historical practice may sometimes have an important role to play in elucidating that meaning and how it should be applied in specific cases.

As Professor Jim Ryan observed in his article on "new textualism," "the ultimate justification for following the original meaning of the Constitution is that the enacted text is a legal document. It *is* the law and universally recognized as such."⁶⁹ This does not mean, however, that the Constitution is "frozen in time and inextricably linked to the concrete expectations of the framers or ratifiers."⁷⁰ Rather, the "open-ended provisions of the Constitution establish general principles," and while "the general principles . . . do not change," the "application of those principles" can.⁷¹

One challenge, of course, is deciding what the Constitution means in the many cases in which its text is not clear or does not directly address the constitutional question at hand.⁷² The idea that the text is authoritative may seem like an irrelevant one if the text is very often indeterminate. But, in fact, even where the text is general or not clear, the structure of the Constitution and its history can help elucidate the purposes of particular constitutional provisions, which can in turn help inform our understanding of what those provisions mean and how they should be applied to specific constitutional questions.⁷³

Under this view, text and history is the place to start an inquiry into constitutional meaning, but that does not mean that text and history alone can answer every question.⁷⁴ Indeed, text and history often do more to reject certain possible answers than to provide one definitive

Interpretation, 103 NW. U. L. REV. 703 (2009).

68. James E. Ryan, *Laying Claim to the Constitution: The Promise of New Textualism*, 97 VA. L. REV. 1523, 1529–46 (2011).

69. *Id.* at 1539 (emphasis added).

70. *Id.*

71. *Id.* (discussing a number of prominent scholars who have contributed to the theoretical foundation for this view). A discussion of those contributions is beyond the scope of this Essay, but for a brief survey of those works, see *id.* at 1539–52.

72. Ryan, *supra* note 68, at 1539.

73. *Id.* at 1554 ("[T]ext itself indicates the level of generality at which to interpret the language and that general principles can lead to different applications over time. . . . [H]istory can shed important light on the purposes and principles underlying the more general and abstract phrases in the documents.").

74. See *id.* at 1560 ("[M]ost new textualists admit that text and history do not provide precise answers to every constitutional question.") (emphasis added).

one. As Ryan has discussed, to many originalists,

constitutional adjudication often requires two steps—determining the meaning of the constitutional provision at issue as precisely as possible and then applying that meaning to the issue at hand. That second step may entail following precedent, or it may entail reliance on broader theories of adjudication like judicial restraint or political process theory.⁷⁵

That second step may also involve looking to historical practice, as I discuss in the remainder of this Part.

B. Reasons to Look to Historical Practice

1. Precedent and Practice

As noted above, many originalists believe that constitutional adjudication entails two steps. Both steps are particularly important in the context of separation-of-powers cases because “[u]nlike the extensive list of powers granted to Congress in Article I, the text of the Constitution provides relatively little guidance about the scope of presidential authority.”⁷⁶ In other words, where the Constitution’s text and history cannot provide a precise answer to a question, it is advisable, if not necessary, to look beyond the Constitution’s text and history to other sources that might elucidate the Constitution’s original meaning and how that original meaning should be applied to the question at hand.

The proper sources to examine will depend on the specific question at issue, but as Professor Ryan notes, one important source will often be precedent.⁷⁷ Indeed, it makes sense to think that precedent might be particularly good evidence of what the Constitution requires because it reflects the judgment of Supreme Court justices undertaking to fulfill their obligation to “say what the law is.”⁷⁸ Supreme Court justices can certainly be wrong in their assessments of the constitutionality of a law or practice—there are ample examples of that in the Court’s history—

75. *Id.* at 1560–61.

76. Bradley & Morrison, *supra* note 4, at 417–18.

77. Ryan, *supra* note 68, at 1560. For a different defense of using precedent in an originalist framework, see, for example, JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 154–96 (2013).

78. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Whether it is appropriate to look to precedent to elucidate the original meaning of the Constitution and how that meaning should be applied in specific cases is distinct from the more difficult question to what extent precedent should be followed in cases where it conflicts with the original meaning of the Constitution. See John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 NW. U. L. REV. 803 (2009).

but their views and their reasoning are nonetheless highly useful in considering a constitutional question.

Like judicial precedent, historical practice can be an important part of this second step of constitutional adjudication, an additional source of evidence as to what the Constitution requires when its text and history cannot provide a clear answer to the question. At least one scholar has likened historical practice to precedent in this way, arguing that “historical practice by the executive and legislative branches is a kind of precedent—specifically, non-judicial precedent—that is comparable to the more familiar judicial precedent.”⁷⁹ Indeed, it is a particularly valuable source of evidence because it reflects the views of other governmental actors with an obligation to try to follow the Constitution, as I discuss in the next section.⁸⁰

2. Departmentalism

It has long been a core principle of the American legal system—albeit one that now finds itself the subject of some debate⁸¹—that “[i]t is emphatically the province and duty of the judicial department to say what the law is.”⁸² As the Supreme Court stated in *Cooper v. Aaron*, “[*Marbury v. Madison*] declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system.”⁸³ But there is no dispute that all branches of government are required to follow the Constitution.⁸⁴ Indeed, there is now a prominent school of thought within the academy that the other branches’ obligation to follow the Constitution means that they should not have to

79. David A. Strauss, *Constitutional Fundamentalism and the Separation of Powers: The Recess Appointments Case*, 83 U. CIN. L. REV. 347, 360 (2014).

80. *Id.* at 361 (“Both kinds of precedent are the product of decisions made by officials who have taken an oath to uphold the Constitution.”).

81. See, e.g., Dale Carpenter, *Judicial Supremacy and Its Discontents*, 20 CONST. COMMENT. 405, 420 (2003) (noting that “there is now a substantial body of scholarship challenging at least some aspects of judicial supremacy”); Robert A. Schapiro, *Judicial Deference and Interpretive Coordinacy in State and Federal Constitutional Law*, 85 CORNELL L. REV. 656, 658 (2000) (“Even as judicial supremacy gains ascendancy in the courts, its star is on the decline in the legal academy.”); Frederick Schauer, *Judicial Supremacy and the Modest Constitution*, 92 CALIF. L. REV. 1045, 1045 (2004) (“Judicial supremacy is under attack.”).

82. *Marbury*, 5 U.S. at 177.

83. *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

84. See, e.g., Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1378 (1997) (noting that the President and Congress are “both obliged to follow the Constitution”).

defer to the courts' interpretation when it conflicts with their own.⁸⁵

Regardless of whether one subscribes to that particular school of thought, the fact that the President and Congress are obliged to follow the Constitution means there is reason to assume that if they have engaged in some action, they view it as constitutional. And those views are at least evidence of the action's constitutionality.⁸⁶ The other branches could, of course, be wrong in their assessments, or they could be violating their obligations to act constitutionally. Thus, this evidence is certainly rebuttable, and the courts can disregard such practice where the Constitution's text and history make clear that the other branches erred in their constitutional interpretations. But where the text and history of the Constitution are unclear and do not provide an answer to the specific question at hand, it makes sense to at least consider what other actors with an obligation to uphold the Constitution have concluded over time.

3. *Respect for Other Branches*

As just discussed, historical practice can help elucidate the original meaning of constitutional provisions and the proper application of those provisions in situations when the Constitution's text and history cannot precisely answer that question. In situations where the Constitution's original meaning is unclear, it can also make sense for courts to at least consider historical practice because, as commentators have noted, "practice may reflect a 'gloss' on the text that has received popular approval through the political process and forms a baseline understanding of interbranch roles on which both Congress and the President may rely."⁸⁷ As the Court noted in *Noel Canning*, "we must hesitate to upset the compromises and working arrangements that the elected branches of Government themselves have reached."⁸⁸

It is important to note that I do not subscribe to the view that the courts should never step into separation-of-powers disputes because

85. See, e.g., Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 222 (1994) (arguing that the President has the power "to interpret the law, including the Constitution, independently of the other branches' interpretations").

86. To be sure, one can question how conscientiously or completely the political branches comply with this obligation to adhere to the Constitution's requirements, but that is not reason to discount the views of the other branches altogether. That said, the case for following historical practice might be particularly strong where there is evidence that the other branches were sensitive to the constitutional dimensions of their actions.

87. Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 716–17 (2014).

88. *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2560 (2014).

they present political questions or are otherwise not susceptible to review by the courts. As the ultimate arbiters of the meaning of the Constitution, I think the courts have an important role to play in policing separation-of-powers disputes and in ensuring that the Constitution is respected; indeed, this role is, if anything, more important today in an age of polarized politics in which the political branches may be less likely to guard institutional prerogatives than they once were.⁸⁹

But active involvement by the courts does not mean that they have to ignore the views of the other branches, or the fact that the other branches may have been operating under long-established understandings of what the Constitution permits. Where the Constitution's original meaning is unclear, it makes sense that the Court would at least consider those long-established understandings of the other branches. Doing so not only shows respect for the coordinate branches of government, but also diminishes the likelihood that the Court will disrupt the effective operation of the government.

* * *

There are thus several reasons why it will make sense in many cases for the Court to look to the Constitution's text and history, as well as historical practice, as the Court has done in recent important separation-of-power cases. Notably, historical practice is important not only because there may be reliance on such practice, but also because such practice can help elucidate the Constitution's original meaning and its proper application, even if it is not dispositive evidence of it. As I discuss in the next section, there is another significant separation-of-powers case currently pending at the Supreme Court. Although the Constitution's text and history, combined with the relevant statutory law, should be sufficient to resolve this case, the Court may find it helpful to look to historical practice, as well.

89. See, e.g., Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CAL. L. REV. 273 (2011) (discussing the causes of political polarization); Neal Devins, *Measuring Party Polarization in Congress: Lessons from Congressional Participation as Amicus Curiae*, 65 CASE WESTERN RES. L. REV. 933, 934 (2015) (discussing "why today's polarized Congress is less prone to defend its institutional prerogatives than earlier less polarized Congresses").

III. IMMIGRATION

On November 20, 2014, the Secretary of the Department of Homeland Security (DHS) issued a series of directives to establish priorities for DHS officials' exercise of their discretion when enforcing federal immigration law. Among other things, these directives clarified that the federal government's enforcement priorities in the immigration context "have been, and will continue to be national security, border security and public safety."⁹⁰ These directives also indicated that, consistent with those priorities and given limited enforcement resources, federal officials should exercise their discretion, on a case-by-case basis, to defer removal of certain parents of U.S. citizens or lawful permanent residents.⁹¹ Texas and roughly two dozen other states sued, alleging that the directives violate the Constitution's Take Care Clause, which provides that the President "shall take Care that the Laws be faithfully executed,"⁹² and the Administrative Procedure Act, which requires that rules only be promulgated following notice-and-comment procedures.⁹³

A district court in Texas granted the plaintiffs' request for a preliminary injunction, concluding that the states were likely to succeed on their claim that notice-and-comment procedures were required.⁹⁴ (The district court did not rule on the plaintiffs' constitutional challenge, although rhetoric in the opinion indicated that it was sympathetic to the plaintiffs' arguments on that front.) A panel of the Fifth Circuit, in a divided decision, denied the federal government's motion to stay the district court decision pending appeal,⁹⁵ and then a panel of the Fifth Circuit, again in a divided decision, affirmed the district court's grant of

90. Memorandum from Jeh Charles Johnson, Sec'y, U.S. Dep't of Homeland Sec. to Thomas S. Winkowski, Acting Dir., U.S. Immigration & Customs Enf't, et al., Policies for the Apprehension, Detention and Removal of Undocumented Immigrants 2 (Nov. 20, 2014), http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf [hereinafter Policies Memo]; see also Memorandum from Jeh Charles Johnson, Sec'y, U.S. Dep't of Homeland Sec. to León Rodríguez, Dir., U.S. Citizenship & Immigration Servs., et al., Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents 3 (Nov. 20, 2014), http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf [hereinafter DAPA Memo.].

91. Policies Memo at 2; DAPA Memo at 2.

92. Amended Complaint for Declaratory and Injunctive Relief at 26–28, *Texas v. United States*, 86 F.Supp.3d 591 (S.D. Tex. 2015) (No. 1:14-cv-254), 2014 WL 7497780.

93. *Id.* at 28–29.

94. *Texas v. United States*, No. B-14-254, 2015 WL 648579, at *61 (S.D. Tex. Feb. 16, 2015).

95. *Texas v. United States*, 787 F.3d 733, 769 (5th Cir. 2015).

a preliminary injunction, again without reaching the constitutional issue.⁹⁶

The United States asked the Supreme Court to hear the case, and in January 2016, the Court agreed to do so and asked the parties to brief and argue the constitutional question, as well as the issues reached by the Fifth Circuit.⁹⁷ When the Supreme Court decides this case, it may choose to consult both the Constitution's text and history and historical practice, as it did in both *Noel Canning* and *Zivotofsky*. After doing so, it should conclude that the President's immigration action is completely lawful. A comprehensive defense of the President's immigration action is beyond the scope of this article, but I briefly outline here some of the arguments that should guide the courts in considering this challenge.

A. Text and History

When considering whether the President's action violates the Take Care Clause, the appropriate place to start is, of course, the text and history of that Clause and the Article of which it is a part. Consideration of that text and history establishes important first principles that are highly relevant to the constitutional question presented in the case. Most significantly, that constitutional text and history make clear that the executive generally has authority to exercise significant discretion in determining how best to enforce the laws passed by Congress. And in this case, that general authority is buttressed by specific statutory authority that Congress has conferred on the executive, statutory authority which is itself sufficient to uphold the Administration's actions.

Article II of the U.S. Constitution provides that "[t]he executive Power shall be vested in a President of the United States of America."⁹⁸ The Constitution's establishment of a single, independent executive was a direct response to perceived infirmities of the precursor Articles of Confederation. Among other things, the Articles of Confederation vested executive authority in the Continental Congress,⁹⁹ not an independent executive, and, as a result, the nation's laws were not effectively enforced.¹⁰⁰ Because of these experiences under the Articles

96. *Texas v. United States*, --- F.3d ---, 2015 WL 6873190 (5th Cir. Nov. 25, 2015). Notably, the two judges who were in the majority when the Fifth Circuit issued its first decision in the case were also on the panel (and again in the majority) when it issued its second.

97. *United States v. Texas*, 2016 WL 207257 (Jan. 19, 2016).

98. U.S. CONST. art. II, § 1, cl. 1.

99. ARTICLES OF CONFEDERATION of 1781, art. IX, paras. 4, 5.

100. STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE:

of Confederation, by the time the Framers drafted what became the Constitution, “the general antipathy toward executive power that dominated the post-1776 period immediately following independence had given way to a 1787 consensus in favor of an executive that was far more independent and energetic.”¹⁰¹

The Constitution thus vested “executive Power” in an independent President in order to ensure that the government would be able to effectively enforce the nation’s laws.¹⁰² This new President was given the responsibility to “take Care that the Laws be faithfully executed,”¹⁰³ which the Supreme Court has long recognized is “essentially a grant of the power to execute the laws.”¹⁰⁴ One long-standing manifestation of this “power to execute the laws” is the power to determine how best those laws should be enforced within the statutory limits set by Congress. As the Supreme Court recognized in *Heckler v. Chaney*, agency decisions about how best to enforce the law “share[] to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict,” and that is a decision that “has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to ‘take Care that the Laws be faithfully executed.’”¹⁰⁵ As the Court further explained in *Chaney*, the executive branch is particularly well-positioned to make such decisions because it “is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities.”¹⁰⁶

PRESIDENTIAL POWER FROM WASHINGTON TO BUSH 32–33 (2008) (“The American experience with vesting executive power in a plural body proved just as problematic under the Articles of Confederation as it had under the earliest state constitutions.”).

101. *Id.* at 33; see also Saikrishna B. Prakash & Michael D. Ramsey, *The Goldilocks Executive*, 90 TEX. L. REV. 973, 982 (2012) (“The Founders had experience with extraordinarily weak executives . . . and had judged them to be failures.”) (reviewing ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* (2010)).

102. See, e.g., THE FEDERALIST NO. 70 (Alexander Hamilton) (“[A]ll men of sense will agree in the necessity of an energetic Executive . . .”); Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power To Execute the Laws*, 104 YALE L.J. 541, 599–603 (1994) (“[T]he Constitution’s clauses relating to the President were drafted and ratified to energize the federal government’s administration and to establish one individual accountable for the administration of federal law.”); cf. AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 131 (2005) (“The Constitution’s ‘President’ . . . bore absolutely no resemblance to the ‘president’ under the Articles of Confederation.”).

103. U.S. CONST. art. II, § 3.

104. *Myers v. United States*, 272 U.S. 52, 117 (1926).

105. 470 U.S. 821, 832 (1985) (quoting U.S. CONST. art. II, § 3).

106. *Id.* at 831–32. (“[T]he agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, . . .

The executive branch thus generally enjoys the discretion to determine how the nation's laws can best be enforced, including what the nation's enforcement priorities should be, unless Congress explicitly prohibits the exercise of such discretion.¹⁰⁷ There are limits on this power, of course—the executive branch cannot, as a general matter, “‘consciously and expressly adopt[] a general policy’ that is so extreme as to amount to an abdication of its statutory responsibilities”¹⁰⁸—but an agency determining how best to implement its statutory responsibilities in a manner consistent with the guidance provided by Congress is a far cry from an agency abdicating its statutory responsibilities. Moreover, when Congress has specifically conferred discretion on the executive branch, it is even clearer that action taken in exercise of that discretion does not run afoul of the Take Care Clause. To the contrary, by exercising the discretion conferred on him by statute and acting in a manner consistent with that statute and other governing laws, a president is, in fact, fulfilling his obligation to “take Care that the Laws be faithfully executed.”¹⁰⁹

Importantly, in this context Congress has conferred substantial authority on the executive to implement the nation's immigration laws.¹¹⁰ In the Immigration and Nationality Act (INA), for example, Congress authorized the Secretary of Homeland Security to “establish such regulations; . . . issue such instructions; and perform such other acts as he deems necessary for carrying out his authority” under the statute.¹¹¹ And in the Homeland Security Act of 2002, Congress directed the Secretary to establish “national immigration enforcement policies and priorities.”¹¹² In short, executive discretion to determine how best to

whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all.”).

107. See Saikrishna Bangalore Prakash, *The Statutory Nonenforcement Power*, 91 TEX. L. REV. SEE ALSO 115, 117 (2013), <http://www.texasrev.com/the-statutory-nonenforcement-power/> (“[T]he enacting Legislature may grant [discretion not to enforce a law] in its statute, either explicitly or implicitly. Typically, such discretion will be implicit and not explicit.”); *id.* (“The highway patrol need not ticket every speeder they trap. If legislators desired total, unremitting, and discretionless enforcement, they would have to specify as much in their enacting law.”).

108. *Heckler*, 470 U.S. at 833 n.4 (quoting *Adams v. Richardson*, 480 F.2d 1159, 1162 (D.C. Cir. 1973)).

109. U.S. CONST. art. II, § 3.

110. Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458, 463 (2009) (explaining that the immigration laws enacted by Congress “delegate[e] tremendous authority to the President to set immigration screening policy”).

111. 8 U.S.C. § 1103(a)(3) (2014).

112. Homeland Security Act of 2002, Pub. L. No. 107–296, § 402(5), 116 Stat. 2135, 2178 (2002) (codified at 6 U.S.C. § 202(5) (2014)).

implement the laws passed by Congress is intentionally imbedded in the INA and the nation's other immigration laws.

Indeed, the Supreme Court just a few years ago specifically recognized the importance of executive discretion in the immigration context in particular, noting that “[a] principal feature of the removal system is the broad discretion exercised by immigration officials” and that “[f]ederal officials, as an initial matter, must decide whether it makes sense to pursue removal at all.”¹¹³ The exercise of such discretion is particularly important—indeed, necessary—in the immigration context because Congress has made roughly 11.3 million undocumented immigrants deportable, but has only appropriated funds to remove roughly 400,000 per year.¹¹⁴

Thus, constitutional text and history, not to mention the relevant laws passed by Congress, all support the constitutionality of the executive action at issue in this case. And, in this case, historical practice also provides ample support for the executive action, as the next section discusses.

B. Historical Practice

There is a long history of presidents exercising the discretionary authority Congress has conferred on the executive in the immigration context in ways strikingly similar to the way President Obama has exercised it in the challenged action. As the Department of Justice's Office of Legal Counsel noted in its memo assessing the legality of the executive action, “[t]he practice of granting deferred action dates back several decades.”¹¹⁵ Indeed, as the memo describes, “[f]or many years after the INA was enacted, INS exercised prosecutorial discretion to grant ‘non-priority’ status to removable aliens who presented ‘appealing humanitarian factors,’”¹¹⁶ and that is a practice that continues today.¹¹⁷ Moreover, “[f]or decades, INS and later DHS have also implemented broader programs that make discretionary relief from removal available for particular classes of aliens,”¹¹⁸ and “[o]n at least five occasions since

113. *Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012).

114. The Dep't of Homeland Sec.'s Auth. to Prioritize Removal of Certain Aliens Unlawfully Present in the U.S. & to Defer Removal of Others, 38 Op. O.L.C., Nov. 19, 2014, at 1, 1, <http://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/20/2014-11-19-auth-prioritize-removal.pdf> [hereinafter Office of Legal Counsel Opinion].

115. Office of Legal Counsel Opinion, *supra* note 114, at 13.

116. *Id.* (noting that “[t]his form of administrative discretion was later termed ‘deferred action’”).

117. *Id.* at 14.

118. *Id.*

the late 1990s, INS and later DHS have also made discretionary relief available to certain classes of aliens through the use of deferred action.”¹¹⁹

What is more, this practice is so long-standing that it “has become a regular feature of the immigration removal system that has been acknowledged by both Congress and the Supreme Court.”¹²⁰ As the memo notes, “Congress has long been aware of the practice of granting deferred action, including in its categorical variety . . . and it has never acted to disapprove or limit the practice.”¹²¹ To the contrary, it has repeatedly explicitly acknowledged the existence of such programs, even “enact[ing] legislation appearing to endorse such programs.”¹²² The Court, too, has recognized the existence of deferred action, observing that the executive branch has long “engag[ed] in a regular practice (which ha[s] come to be known as ‘deferred action’) of exercising [its] discretion for humanitarian reasons or simply for its own convenience.”¹²³

In sum, without even attempting a comprehensive examination of the relevant historical practice, it is clear that there is a long history of executive action similar to the action that is currently being challenged in *United States v. Texas*.

CONCLUSION

Significant separation-of-powers lawsuits seem to be on the rise, and so too does the use of historical practice in resolving those suits. In this brief Essay, I argue that the use of historical practice is entirely consistent with an originalist approach to constitutional interpretation; indeed, the use of historical practice can be an invaluable contribution to an originalist approach in cases where the Constitution’s text and history do not provide a determinate answer to the question at hand. While historical practice alone cannot establish an action’s

119. *Id.* at 15.

120. Office of Legal Counsel Opinion, *supra* note 114, at 13.

121. *Id.* at 23.

122. *See, e.g.*, Immigration & Nationality Act, 8 U.S.C. § 1154(a)(1)(D)(i)(II), (IV) (2014) (noting that Violence Against Women Act self-petitioners may be “eligible for deferred action”); *id.* § 1227(d)(2) (noting that denial of a stay request does not “preclude the alien from applying for . . . deferred action”); National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108–136, § 1703(c), (d) (2003) (identifying individuals who are “eligible for deferred action”); *see also* *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 472, 485 (1999) (concluding that Congress enacted 8 U.S.C. § 1252(g) “to give some measure of protection to ‘no deferred action’ decisions and similar discretionary determinations”).

123. *Reno*, 525 U.S. at 483–84.

constitutionality, it can—as in the case of President Obama’s executive action on immigration—certainly support it.