Indiana Law Journal

Volume 96 | Issue 2 Article 8

Winter 2021

Congress's Competing Motivations: What Chevron Can Tell Us About Constitutional Acquiescence

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Congress's Competing Motivations: What *Chevron* Can Tell Us About Constitutional Acquiescence

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This Note asks under what conditions the Supreme Court would find evidence of post-Founding historical practice persuasive in separation of powers debates. This Note focuses on two theories of how evidence of a long-standing historical practice might be relevant in separation of powers disputes: constitutional liquidation and historical gloss. According to both theories, the authority of a long-standing historical practice depends in part on the motivations driving the relevant branch of government to engage in that practice. Current scholarship on constitutional liquidation and historical gloss, however, has not yet explored fully these motivations in a way that recognizes the actual dynamics of interbranch relations.

This Note explores those motivations in detail by examining the motivations driving Congress to grant its interpretive authority to an administrative agency under Chevron. *Ultimately, I conclude that Congress faces the same competing motivations when granting its interpretive authority to an administrative agency as when deciding to engage in a long-standing historical practice. As a result, understanding how the Court interprets congressional motivations in the* Chevron *context should inform how the Court views congressional motivations in the context of constitutional liquidation and historical gloss. Moreover, because* Chevron *is likely to be reformed in the near future, future changes to* Chevron *should indicate when and to what extent the Court will find constitutional liquidation or historical gloss persuasive in separation of powers debates.*

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* J.D. Candidate, 2021, Indiana University Maurer School of Law. B.A., 2018, University of Notre Dame. Thank you to my family and friends for their support throughout the writing process, and to the members of the *Indiana Law Journal* for their thorough review.

INTRODUCTION

"Constitutional law is . . . rife with claims of authority by historical practice."[1] This is because the Constitution's meaning is not always clear.[2] Historical practice is one type of evidence of the Constitution's meaning.[3] Specifically, it encompasses a wide range of sources interpreting the meaning of the Constitution after the Founding, such as judicial opinions, congressional determinations, and presidential actions.[4] Scholars have relied on the authority of historical practice in recent debates about court-packing schemes,[5] the President's power to declare war,[6] and the President's power to confer recess appointments.[7] Historical practice has informed understandings of the Constitution since the Founding. As James Madison wrote, "difficulties and differences of opinion might occasionally arise in expounding terms & phrases necessarily used in [the Constitution] . . . and . . . it might require a regular course of practice to liquidate & settle the meaning of some of them."[8] In his famous opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, Justice Frankfurter similarly recognized the importance of historical practice in shaping the President's constitutional powers, finding an unbroken practice that is long carried out by the President and unquestioned by Congress may be treated as a "gloss" on the executive powers of the President.[9]

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1. William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 3 (2019); *see also* Ryan D. Doerfler, *High-Stakes Interpretation*, 116 MICH. L. REV. 523, 537 (2018) ("[A] popular claim as of late is that postenactment practice can render constitutional text clearer or—more controversially—less clear.").

2. *See* Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 417–18 (2012); *see also infra* notes 42–54 and accompanying text.

3. *See* Baude, *supra* note 1, at 3 (referring to historical practice as "a source of constitutional meaning").

4. *See id.* ("Historical practice is not quite the same as precedent, because it expands well beyond judicial opinions."); *see also infra* notes 64–66 and accompanying text (discussing the repeated passage of statutes as well as various presidential actions as examples of historical practices).

5. *See, e.g.*, Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Constitutional Conventions, and the Judicial Separation of Powers*, 105 GEO. L.J. 255, 270 (2017) [hereinafter Bradley & Siegel, *Historical Gloss and the Judicial Separation of Powers*].

6. *See, e.g.*, Bradley et al., *supra* note 2, at 461–68.

7. *See, e.g.*, Curtis A. Bradley & Neil S. Siegel, *After Recess: Historical Practice, Textual Ambiguity, and Constitutional Adverse Possession*, 2014 SUP. CT. REV. 1 (2014) [hereinafter Bradley & Siegel, *After Recess*].

8. NLRB v. Noel Canning, 573 U.S. 513, 525 (2014) (quoting James Madison, Letter to Spencer Roane (Sept. 2, 1819), *in* 8 THE WRITINGS OF JAMES MADISON 447, 450 (Gaillard Hunt ed., 1908)).

9. 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring) ("[A] systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, 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.").

Nonetheless, the legitimacy of historical practice arguments has remained the subject of debate among scholars[10] and judges alike.[11] To some, historical practice arguments remain "a slippery, unhelpfully capacious notion masquerading as a mid-twentieth-century neutral principle."[12] Part of the reason for this characterization is that scholars have paid little academic attention to how historical practice arguments can be used to interpret the Constitution's separation of powers provisions.[13] What scholarship does exist on this topic suffers from another problem: it does not study historical practice in a way that recognizes the actual dynamics of interbranch relations.[14] This is particularly problematic because the efficacy of historical practice arguments in constitutional debates depends on the motivation driving that practice.[15]

This Note attempts to remedy this problem by arguing that the current debate about the constitutionality of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* can shed light on when courts will find historical practice arguments persuasive in debates about the separation of powers.[16] This is because the

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10. Baude, *supra* note 1, at 6–8; Michael B. Rappaport, *Why Non-Originalism Does Not Justify Departing from the Original Meaning of the Recess Appointments Clause*, 38 HARV. J.L. & PUB. POL'Y 889, 893 n.8 (2015) (finding not only that "[t]he use of practice as a mode of interpretation or construction within originalism is sometimes controversial" but also that the question of whether practice can liquidate the meaning of ambiguous provisions is a "complicated question").

11. *See Noel Canning*, 573 U.S. at 572–73 (Scalia, J., concurring) (finding that while "a governmental practice [that] has been open, widespread, and unchallenged since the early days of the Republic . . . should guide our interpretation of an ambiguous constitutional provision," a "self-aggrandizing practice adopted by one branch well after the founding, often challenged, and never before blessed by this Court . . . does not relieve us of our duty to interpret the Constitution in light of its text, structure, and original understanding").

12. Baude, *supra* note 1, at 3 (quoting Alison L. LaCroix, *Historical Gloss: A Primer*, 126 HARV. L. REV. F. 75, 77–78 (2013)); *see also* Shalev Roisman, *Constitutional Acquiescence*, 84 GEO. WASH. L. REV. 668, 674–75 (2016).

13. *See* Bradley et al., *supra* note 2, at 413 ("Surprisingly, however, there has been little sustained academic attention to the proper role of historical practice in the context of separation of powers."); Roisman, *supra* note 12, at 674–75 (calling attention to "a general, and surprising, lack of rigor in how historical branch practice is used in separation of powers interpretation"); *see also* Baude, *supra* note 1, at 8 (quoting Bradley et al., *After Recess*, *supra* note 7, at 29).

14. Bradley et al., *supra* note 2, at 413–14 ("[T]he existing literature has not assimilated insights from political science concerning the actual dynamics of congressional-executive relations, even though such work has heavily influenced other recent public law scholarship.").

15. *See infra* notes 26–30 and accompanying text.

16. In fact, in a recent law review article for the *Duke Law Journal*, Johnathan Hall noted the relationship between the scholarship surrounding historical gloss and the nondelegation doctrine, a doctrine closely related to *Chevron*. Specifically, Hall noted "the relationship between that recently blossoming area of scholarship and this age-old question deserves more attention." Johnathan Hall, *The Gorsuch Test*: Gundy v. United States*, Limiting the Administrative State, and the Future of Nondelegation*, 70 DUKE L.J. 175, 180 n.25 (2020). And while the focus of this Note is not the nondelegation doctrine, Hall seems to be suggesting that historical gloss can be used to analyze various administrative law issues. While not the primary focus of this Note, Section II.D can certainly be viewed as a historical gloss analysis of *Chevron*.

constitutional legitimacy of both long-standing historical practices and *Chevron* deference depends on Congress's motivations.[17] Moreover, while *Chevron*'s two-step framework has its problems,[18] *Chevron* is frequently debated and discussed and will likely be changed in ways that are more attuned to Congress's competing motivations in the near future.[19] As a result, the current debate surrounding *Chevron* can provide scholars of historical practice with critical insights into how the Court views evidence of Congress's motivations, and thus the persuasive authority of historical practice arguments.

This Note differs from other scholarship focused on the normative justifications for using historical practice arguments in separation of powers debates.[20] Instead, it considers how we will know if the current Court is receptive to such arguments. Part I of this Note introduces two theories of historical practice arguments: constitutional liquidation and historical gloss. Part I then discusses the difficulty of ascertaining Congress's motivations and explains why the authority of historical practice in constitutional interpretation depends on these motivations. Part II introduces *Chevron*'s interpretive framework. Part II then explains that the authority of *Chevron*'s interpretive framework also depends on Congress's motivations and that reforms to *Chevron* will indicate how the Court views evidence of congressional motivations. Part III explains why these reforms will indicate how the Court views evidence of historical practice in interpreting the Constitution's separation of powers provisions: Congress faces the same competing motivations in the *Chevron* context as when assessing the constitutionality of a historical practice.

I. HISTORICAL PRACTICE AND THE SEPARATION OF POWERS

There are a variety of theories of constitutional interpretation drawing on historical practice. The focus of this Note is on theories that look to a repeated course of practice as evidence of the Constitution's meaning. Such theories have more in common with the way the Court has applied *Chevron* than other theories of historical practice that do not require a repeated course of practice. Therefore, theories such as Bruce Ackerman's "constitutional moments" or Adrian Vermeule's "constitutional showdowns" will not be discussed.[21] Instead, the focus of this Note will be on the theories of constitutional liquidation and historical gloss. Section I.A discusses the basic principles of these theories. In short, both are theories of interpreting ambiguous provisions in the Constitution by looking beyond Founding-era evidence

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17. *See infra* notes 25–30, 124–26 and accompanying text.

18. *See infra* notes 112–15 and accompanying text.

19. *See infra* notes 102–07, 133–40 and accompanying text.

20. *See, e.g.*, Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Madisonian Liquidation, and the Originalism Debate*, 106 VA. L. REV. 1, 40 (2020) [hereinafter Bradley & Siegel, *Historical Gloss and the Originalism Debate*]; Bradley et al., *supra* note 2, at 461–68.

21. Though invoking evidence of historical practice, these theories focus on "particularly decisive moments in history" and "critical turning points" when the Constitution's meaning was decided. Bradley et al., *supra* note 2, at 427. For reasons that will become clear, these theories are less comparable to the well-established practice of deference to administrative agencies embodied by *Chevron*.

and judicial precedent and identifying agreements reached between the political branches on a practice's constitutionality.

A. Constitutional Liquidation and Historical Gloss

Both constitutional liquidation and historical gloss look beyond the limited scope of Founding-era evidence and modern notions of stare decisis and look to post-Founding historical practice by each of the branches of government to interpret the Constitution's meaning.[22] Specifically, arguments based on historical practice attempt to resolve uncertainty in constitutional provisions in a way that does not disturb long-standing practices of the political branches.[23] Arguments based in historical practice are often invoked in the separation of powers context because separation of powers disputes often "involve[] the 'acquiescence' of one branch in the actions of another."[24] But, like other theories of constitutional interpretation, historical practice theories do not attempt to explain the Constitution's meaning in all circumstances, and each theory differs in the way historical practice informs the Constitution's meaning.

Both constitutional liquidation and historical gloss use the acquiescence approach to determine whether a given historical practice serves as evidence of that practice's constitutionality.[25] Under the acquiescence approach, one branch's long-standing historical practice is indicative of the practice's constitutionality only if the other branch has "acquiesced" in that practice on the basis of constitutional analysis.[26] The primary justification for this approach is that acquiescence represents a legal or functional agreement about the constitutionality of the practice.[27] These justifications are most persuasive if, in the separation of powers context, the actions of the political branches are primarily motivated by constitutional analysis.[28] However, a branch

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22. *See generally* Baude, *supra* note 1, at 63 (discussing the similarities and differences liquidation has with "other methods of giving weight to historical practice" such as historical gloss).

23. *See* Randy J. Kozel, *Precedent and Constitutional Structure*, 112 NW. U. L. REV. 789, 814–15 (2018).

24. Bradley et al., *supra* note 2, at 414.

25. *See* Roisman, *supra* note 12, at 676 ("The primary way that historical practice is used in constitutional interpretation of separation of powers issues is through the acquiescence approach."); *see also* Curtis A. Bradley, *Doing Gloss*, 84 U. CHI. L. REV. 59, 75 (2017) ("If the claim is that the two political branches have long had a shared understanding of the separation of powers, the claim will require an especially strong form of acquiescence: actual interbranch agreement about the law.").

26. Roisman, *supra* note 12, at 676, 679. It is important to note, however, that "acquiescence" has been given a range of meanings. Bradley et al., *supra* note 2, at 433. The focus of this Note, however, is on instances where acquiescence reflects an agreement that the actions taken by the branches are lawful. In this context, the key question is whether the branches share an understanding of the constitutional question at issue. *Id.*

27. Roisman, *supra* note 12, at 677. Scholars have posited other justifications for the acquiescence approach as well. First, acquiescence should be privileged because it represents an "interbranch bargain." *Id.* at 678. Second, acquiescence may result in justifiable reliance by the branches or other third parties on past practice. *Id.* at 678–79.

28. *See id.* at 684. If this is the case, the acquiescence model makes sense: it would suggest

might act for any number of reasons without regard to the constitutional issue at hand.[29] For example, a political branch might act out of ignorance to the constitutional issue, it might act based on preference for a certain policy outcome, or it might act because it lacks the power to oppose another branch's actions.[30] Given the competing motivations of the political branches, scholars recognize that when past practice is used as evidence of the Constitution's meaning, especially strong evidence is required to show the political branches have reached an agreement on the basis of constitutional analysis.[31]

Both constitutional liquidation and historical gloss recognize political branches have motives beyond constitutional analysis and both consider how acquiescence based on constitutional analysis might be determined. To Madison, "[a]ll new laws . . . [were] considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications."[32] Madison's theory of constitutional liquidation rested on two central principles: (1) the Constitution does not have a fully determined meaning, and (2) indeterminacies could be settled through subsequent practice.[33] But not all long-standing practices could liquidate the Constitution's meaning. Rather, Madison's theory of liquidation had three requirements: (1) indeterminacy in the Constitution's text, (2) a regular course of deliberate practice, and (3) settlement.[34]

The theory of historical gloss, deriving from Justice Frankfurter's opinion in *Youngstown*,[35] takes a similar approach.[36] The basic idea of historical gloss "is that long-standing practices by one political branch that are acquiesced in by the other political branch should be given weight in discerning whether governmental conduct is consistent with the separation of powers."[37] An early example of the Court invoking historical gloss was *McCulloch v. Maryland*, where the Court used

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that the practice resulted from agreement on the constitutional authority in question. *Id.*

29. *Id.* at 684–85; *see also infra* notes 76–86 and accompanying text.

30. *See* Roisman, *supra* note 12, at 684–85.

31. *See id.* at 710 (proposing a method of looking to past practice that "will attempt to privilege only historic branch practice that is likely to be indicative of constitutional agreement between the branches—as opposed to practice resulting from branch ignorance, apathy, policy agreement, path dependence, or coercion"); *see also* Bradley, *supra* note 25, at 75 ("If the claim is that the two political branches have long had a shared understanding of the separation of powers, the claim will require an especially strong form of acquiescence: actual interbranch agreement about the law. Mere long-standing practice and lack of resistance by another branch will not be sufficient.").

32. THE FEDERALIST NO. 37, at 287 (James Madison) (John C. Hamilton ed., 1864).

33. Baude, *supra* note 1, at 9.

34. *Id.* at 13.

35. *See supra* note 9 and accompanying text.

36. *See* Bradley et al., *Historical Gloss and the Originalism Debate*, *supra* note 20, at 40 ("[I]t is not entirely clear whether and to what extent the concept of liquidation differs from the historical gloss approach. Indeed, as we noted in the Introduction, the majority in *Noel Canning* seemed to treat liquidation and gloss as the same phenomenon.").

37. Bradley et al., *After Recess*, *supra* note 7, at 21; *see also* Bradley et al., *Historical Gloss and the Judicial Separation of Powers*, *supra* note 5, at 261 (referring again to historical gloss as "giv[ing] weight to longstanding practices of the government" when interpreting "the distribution of constitutional authority between Congress and the President").

historical gloss to settle Congress's authority to establish the national bank.[38] While historical gloss theory does not impose the same requirements that constitutional liquidation uses to determine whether a long-standing practice can serve as evidence of the Constitution's meaning, historical gloss scholars have nonetheless contemplated the significance of acquiescence given the competing motivations driving political branch action.[39] As the following discussion will make clear, however, both constitutional liquidation and historical gloss lack a "consistent and rigorous *method* of determining when past practice should be treated as the result of constitutional agreement and when it should be treated as the result of other factors."[40]

B. Ascertaining Constitutional Agreement

The goal of Section I.B is to identify a problem for which current debates about *Chevron* may provide an answer: When should a political branch's long-standing practice serve as evidence of the Constitution's meaning?[41] Section I.B.1 notes that a long-standing practice can serve as evidence of the Constitution's meaning only in the presence of an ambiguous constitutional provision. Section I.B.2 notes that even when the constitutional text is ambiguous, a practice may not serve as evidence of the Constitution's meaning, because Congress often engages in practices without regard to that practice's constitutionality.

1. Indeterminacy

Whether a political branch has adopted a practice on the basis of constitutional agreement depends on the clarity of the Constitution's text.[42] In other words, for historical practice to be relevant in determining the meaning of the Constitution, the provision under consideration must be either ambiguous, meaning the word has more than one possible meaning, or vague, meaning the word lacks precision in borderline cases.[43] Madison specifically imagined historical practice could settle the meaning of the Constitution with regard to a specific kind of ambiguity: ambiguity in the Constitution's separation of powers provisions.[44]

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38. 17 U.S. 316, 401 (1819) (giving great weight to "[a]n exposition of the Constitution, deliberately established by legislative acts, on the faith of which an immense property has been advanced"); Bradley et al., *After Recess*, *supra* note 7, at 21–22 (describing *McCulloch* as an early example of the court invoking historical gloss in interpreting the constitutional authority of Congress and the President).

39. *See supra* notes 25–28.

40. Roisman, *supra* note 12, at 711 (emphasis in original).

41. *See id.* at 696 ("The problem is that we simply cannot automatically know from the fact that a government act was taken that it was taken for constitutional reasons.").

42. Bradley et al., *supra* note 2, at 430 ("The more an interpreter deems nonpractice evidence like the text and original understanding to be clear, the less likely the interpreter is to credit historical practice that points in a different direction.").

43. Baude, *supra* note 1, at 14.

44. *See id.* at 15 (discussing "the possibility of ambiguity in separation of powers disputes, an ambiguity that 'supposes the constitution to have given the power to one department only;

When the Constitution's text is ambiguous, historical practice may indicate an agreement on the basis of constitutionality. For example, in "Constitutional Liquidation," William Baude discusses the example of the debate over the constitutionality of the national bank. As Baude notes, the debate turned on a proper understanding of the Necessary and Proper Clause, specifically in relation to Congress's power to tax and borrow money.[45] Madison believed the bank was neither necessary nor "incident to the nature" of Congress's powers.[46] Congress, on the other hand, thought otherwise, and the bank bill passed.[47] Years later, when Chief Justice Marshall considered the constitutionality of the bank, he recognized that had the unconstitutionality of Congress's actions been clear, liquidation would be irrelevant.[48] It was only "a doubtful question, one on which human reason may pause" which could be "put at rest by the practice of the government."[49]

Modern debates, such as the debate about the constitutionality of recess appointments in *NLRB v. Noel Canning*, also indicate the importance of textual ambiguity to historical practice arguments.[50] In *Noel Canning*, the Court considered the scope of the phrase "the Recess of the Senate" in the Recess Appointments Clause.[51] After considering the possible meanings of "the recess," with consultation to Founding-era evidence, the Court found the text to be ambiguous, and only then were historical practice arguments invoked.[52] Other debates, such as the debate surrounding the constitutionality of court-packing schemes, indicate that some arguments based in historical practice may not require a specific ambiguous textual hook.[53] In fact, unlike constitutional liquidation, historical gloss does not view ambiguity as a "hard boundary"—where the text is clear, contrary historical practice is possible, it is just much less likely an interpreter will accept that practice as constitutional.[54]

Generally, however, where the constitutional text is clear, contrary historical practice cannot serve as evidence of that practice's constitutionality. For example, in *INS v. Chadha*, the Court dismissed the long-standing historical practice of Congress

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and the doubt to be to which it has been given'" (quoting James Madison, *Helvidius Number II* (1793), *reprinted in* THE PACIFICUS-HELVIDIUS DEBATES OF 1793–1794: TOWARD THE COMPLETION OF THE AMERICAN FOUNDING 65, 68–69 (Morton J. Frisch ed., 2007))).

45. *Id.* at 21.

46. *Id.* at 21–22.

47. *See id.* at 22.

48. *See id.* at 24.

49. *Id.* at 24 (quoting McCulloch v. Maryland, 17 U.S. 316, 401 (1819)).

50. 573 U.S. 513 (2014).

51. *Id.* at 518–19 (quoting U.S. CONST. art. II, § 2).

52. *Id.* at 526–28.

53. As Curtis Bradley and Neil Siegel note, there is little in the text directly addressing the constitutionality of court-packing. Bradley et al., *Historical Gloss and the Judicial Separation of Powers*, *supra* note 5, at 270. The authors discuss Article III and Article I as possible sources of authority, *id.* at 270, but note that debates about court-packing "lack . . . a textual hook in the Constitution," *id.* at 276.

54. *See* Bradley et al., *supra* note 2, at 431 ("The very fact that an interpreter deems that materials like the constitutional text and original understanding point clearly in a particular direction makes it less likely that the interpreter will accept an outcome pointing in another direction.").

enacting "legislative veto" provisions as unconstitutional.[55] Specifically, the Court noted that "the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution."[56] In finding the practice unconstitutional, the Court referred to the "[e]xplicit and unambiguous provisions of the Constitution" that "prescribe and define the respective functions of the Congress and of the Executive in the legislative process."[57]

It should come as no surprise, then, that criticisms of historical practice arguments tend to be originalist and formalist in nature. Formalists are those who believe the Constitution establishes clear, understandable, and enforceable rules for the proper separation of powers and are often associated with textualist approaches to interpretation.[58] *Chadha* is itself a textualist and formalist opinion.[59] Justice Scalia's concurring opinion in *Noel Canning* provides another example of originalist, and formalist, reasoning incompatible with historical practice arguments. In finding the long-standing practice of intra-session recess appointments to be unconstitutional,[60] Scalia determined, after consulting Founding-era evidence, the plain meaning of the text at issue, "the Recess," referred unambiguously to the gap between sessions, not "breaks in the midst of a session".[61] Justice Scalia, however, did not reject the use of historical practice arguments in all contexts and specifically recognized that "where a governmental practice has been open, widespread, and unchallenged since the early days of the Republic, the practice should guide our interpretation of an ambiguous constitutional provision."[62]

Both constitutional liquidation and historical gloss recognize, however, that more than ambiguity is required for historical practice to serve as evidence of the Constitution's meaning. Otherwise a "single act in the face of indeterminacy" would be sufficient evidence of constitutionality, and the Constitution's meaning would not limit government's actions as long as the relevant provision was indeterminate.[63]

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55. *See* 462 U.S. 919, 944 (1983); *see also* Bradley et al., *supra* note 2, at 423 (concluding that the Court in *INS v. Chadha* "held that a 'legislative veto' provision enacted by Congress was unconstitutional").

56. *Chadha*, 462 U.S. at 944.

57. *Id.* at 945.

58. John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1958 (2011) ("[W]ithin the tradition of ordinary textual interpretation . . . are formalist opinions resisting the perceived reassignment of a power from one branch to another, contrary to the allocation originally effected by one of the Vesting Clauses."). Functionalists, by contrast, believe the text of the Constitution provides little guidance. *Id.* at 1950. Given the Constitution's "silences," functionalists believe Congress, aided by the Necessary and Proper Clause, is responsible for determining how the government's powers are to be carried out. *Id.* at 1951.

59. Bradley et al., *supra* note 2, at 431.

60. *See* NLRB v. Noel Canning, 573 U.S. 513, 575 (2014) (Scalia, J., concurring).

61. *Id.* ("The Court's contrary conclusion—that 'the Recess' includes 'breaks in the midst of a session,' . . . —is inconsistent with the Constitution's text and structure, and it requires judicial fabrication of vague, unadministrable limits on the recess-appointment power . . . .").

62. *Id.* at 572.

63. Baude, *supra* note 1, at 16.

2. Deliberation and Settlement

Only a regular course of practice can fill out the meaning of an ambiguous constitutional provision.[64] Baude's discussion of the constitutionality of the national bank suggests the repeated actions of successive legislatures, specifically Congress's repeated passage of statutes reinforcing the constitutionality of the bank bill, constitutes such practice.[65] Curtis Bradley and Neil Siegel examined the extent to which congressional action supports the constitutionality of court packing, looking to repeated instances where Congress had altered the size of the Court after the Founding.[66] The Supreme Court in *Noel Canning* looked to presidential actions interpreting the recess appointment power and instances where a federal court affirmed that power.[67] The purpose of this requirement is to prevent practices that are engaged in for nonconstitutional reasons, such as political will, from being credited as interpreting the meaning of the Constitution.[68]

But Madison knew that even a regular course of practice may result from political will and not genuine constitutional agreement between the branches. This is because, as historical gloss theorists have studied more closely, political branches often act for a number of reasons beyond constitutional analysis.[69] To combat the possibility

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64. Madison had a variety of names for such a course of repeated practice: "[A] 'regular course of practice'; a 'course of practice of sufficient uniformity and duration'; a 'continued course of practical sanctions'; 'reiterated sanctions ... thro' a long period of time'; a 'settled practice, enlightened by occurring cases'; a 'course of authoritative, deliberate and continued decisions'; or a 'course of authoritative expositions sufficiently deliberate, uniform, and settled.'" *Id.* at 16 (footnotes omitted).

65. *See id.* at 23–24. Baude specifically discusses *McCulloch v. Maryland*, where Chief Justice Marshall stated the constitutionality of the bank had "been recognised by many successive legislatures" and that "[a]n exposition of the constitution, deliberately established by legislative acts, on the faith of which an immense property has been advanced, ought not to be lightly disregarded." *Id.* at 24 (quoting McCulloch v. Maryland, 17 U.S. 316, 401 (1819)).

66. *See* Bradley et al., *Historical Gloss and the Judicial Separation of Powers*, *supra* note 5, at 270–72. Bradley and Siegel specifically examined congressional statutes passed throughout the eighteenth and nineteenth centuries, the passing of which are discussed later in this section. *See infra* note 88 and accompanying text.

67. *See* NLRB v. Noel Canning, 573 U.S. 513, 528 (2014) ("In 1867 and 1868, Congress for the first time took substantial, nonholiday intra-session breaks, and President Andrew Johnson made dozens of recess appointments. The Federal Court of Claims upheld one of those specific appointments, writing '[w]e have *no doubt* that a vacancy occurring while the Senate was thus temporarily adjourned' during the 'first session of the Fortieth Congress' was 'legally filled by appointment of the President alone.'" (quoting Gould v. United States, 19 Ct. Cl. 593, 595–96 (1884))).

68. *See* Baude, *supra* note 1, at 16. To Madison, a practice could liquidate the meaning of the Constitution if it "ha[d] the uniform sanction of successive Legislative bodies, through a period of years and under the varied ascendancy of parties." *Id.* (quoting Letter from James Madison to Charles J. Ingersoll (June 25, 1831), *reprinted in* 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON, FOURTH PRESIDENT OF THE UNITED STATES 186 (Philadelphia, J.B. Lippincott & Co. 1865)).

69. *See supra* notes 22–24 and accompanying text. Each of these possible motivations will be discussed more fully below.

that a branch has engaged in a practice on grounds other than constitutional agreement, constitutional liquidation and historical gloss employ a method for determining when a practice should be treated as resulting from constitutional analysis and when it should be treated as resulting from other factors.[70] Madison's theory of liquidation requires constitutional "deliberation" and "settlement."[71] While not articulating any specific requirement, Curtis Bradley and Trevor Morrison's study of historical gloss suggests constitutional interpreters should look for affirmative evidence that the branches acted on the basis of constitutional understanding.[72] Both approaches can be viewed as variations of the constitutional acquiescence model, which states that past practice can inform constitutional meaning if one branch has engaged in conduct consistently and the other branch has "acquiesced" in that conduct.[73]

One possible source of evidence is the creation of reliance interests. As Bradley and Morrison note, when one branch of government has been engaging in a practice for a long time, that branch of government and affected third parties may begin to generate reliance interests if that practice is not resisted.[74] Bradley and Morrison use the example of the treaty process to illustrate the formation of such an "implicit bargain." While the Constitution states that the Senate should provide "Advice and Consent" to the conclusion of treaties, Presidents have not granted the Senate such a role since the early days of the Constitution.[75] Instead, the Senate has long exercised the power to consent to treaties with "reservations" on particular terms.[76] Similarly, in *Noel Canning*, the recess appointments case, the Court expressed concern for upsetting the compromises and working arrangements reached between the branches.[77] Such agreements may represent express agreement on the basis of constitutional law but might merely reflect the practice's utility, or an agreement over the practice's feasibility and desirability, rather than a formal notion of legality.[78]

This is because, even where branches have relied on the practices initiated by another branch, an agreement is not certain to have resulted from constitutional

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70. This method amounts to raising the standard of proof, requiring a branch make an affirmative showing that an agreement was reached based on constitutional factors, not other factors. *See* Bradley et al., *supra* note 2, at 448 ("[W]here acquiescence is the touchstone of the analysis, the standard for legislative acquiescence should be high.").

71. *See* Baude, *supra* note 1, at 18–19.

72. Bradley et al., *supra* note 2, at 451.

73. Roisman, *supra* note 12, at 672 (citing Ryan M. Scoville, *Legislative Diplomacy*, 112 MICH. L. REV. 331, 391 (2013)).

74. Bradley et al., *supra* note 2, at 435.

75. *Id.* at 436.

76. *Id.*

77. Bradley, *supra* note 25, at 74. The Court in *Noel Canning* expressed concern for "upset[ting] the compromises and working arrangements that the elected branches of Government themselves have reached" and about "seriously shrink[ing] the authority that Presidents have believed existed and have exercised for so long." NLRB v. Noel Canning, 573 U.S. 513, 526, 549 (2014). Moreover, the Court observed that "three-quarters of a century of settled practice is long enough to entitle a practice to 'great weight in a proper interpretation' of the constitutional provision." *Id.* at 533 (quoting Pocket Veto Case, 279 U.S. 655, 689 (1929)).

78. *See* Bradley, *supra* note 25, at 66.

analysis. For example, a historical practice may reflect a strategic decision to push through policy in a way that generates the least political resistance. As previously discussed, Article II of the Constitution allows the President to make treaties "by and with the advice and consent of the Senate . . . provided two thirds of the Senators present concur."[79] However, Presidents have long concluded treaties by receiving the approval of Congress instead.[80] Part of the reason for this alternative arrangement is not because of any express or indirect agreement on the constitutionality of such "congressional-executive" agreements but instead because "[t]he executive branch found it much easier to conclude international agreements by seeking the approval of a majority of Congress rather than that of two-thirds of the Senate."[81]

Moreover, Congress may agree, or fail to object, because it has difficulty resisting encroachments on its authority. First, Congress faces structural impediments—legislation is passed only where it has been approved by both houses of Congress, the President has declined to exercise his veto power, and, if the President does veto, a supermajority has been reached in both houses.[82] Beyond these procedural limitations, Congress also faces collective action problems—because all members of Congress benefit when legislative authority is enhanced, each individual member has little incentive to expend their own resources defending this power, especially because the gains are so dissipated.[83] As a result, even when the executive is expanding its power, Congress will have difficulty in defending its power from usurpation.[84]

The most direct evidence of constitutional acquiescence on the basis of constitutionality is express agreement by Congress that a practice is constitutional. As Bradley and Morrison note, however, such direct evidence is rare.[85] One example was when Congress, in the 1973 War Powers Resolution, expressly agreed with the executive branch that the President had constitutional authority to use military force when responding to "a national emergency created by attack upon the United States, its territories or possessions, or its armed forces."[86] Elsewhere in *United States v. Curtiss-Wright Export Corp.*, the Court noted Congress had long enacted statutes granting the President broad foreign affairs authority, which allowed the Court to

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79. Bradley et al., *supra* note 2, at 468 (quoting U.S. CONST. art. II, § 2, cl. 2).

80. *Id.* at 468–69.

81. *Id.* at 469.

82. *Id.* at 440.

83. *Id.* Eric Posner and Adrian Vermeule expound on this idea in *The Executive Unbound*, noting that because Congress is a "they," not an "it," legislators have a hard time organizing to oppose actions taken by the executive. ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND 24 (2010).

84. *See* Bradley et al., *supra* note 2, at 441. Moreover, members of Congress have less incentive than the President to protect the interests of the branch as a whole because their primary focus is largely on reelection. *See id.* at 441–42. Presidents, on the other hand, "have both the will and the capacity to promote the power of their own institution, but individual legislators have neither and cannot be expected to promote the power of Congress as a whole in any coherent, forceful way." *Id.* at 443 (quoting Terry M. Moe & William G. Howell, *The Presidential Power of Unilateral Action*, 15 J.L. ECON. & ORG. 132, 145 (1999)).

85. *See id.* at 433.

86. *Id.* at 433–34 (quoting H.R.J. Res. 542, 93d Cong. (1973) (codified at 50 U.S.C. § 1541(c) (2006))).

conclude the delegation of criminalization authority did not violate the separation of powers.[87]

But even direct evidence may result from nonconstitutional motivations. This may be the case where the relevant actors prefer an outcome as a matter of policy.[88] For example, though Congress had repeatedly passed statutes changing the size of the Court throughout the eighteenth and nineteenth centuries, it had often done so in politicized circumstances: among other examples, in 1801, the size of the Court was reduced from six to five by the lame-duck Federalist Congress in order to deny incoming President Thomas Jefferson an appointment; in 1837, with Democrats in control of the political branches, Congress increased the size of the Court to nine in order to place one justice in each of the nine circuits, which meant, because the majority of circuits were composed entirely of slave states, a majority of judges resided in slave states; and during the Civil War, the Court was expanded to ten to accommodate the addition of another circuit when California was added to the Union.[89] Bradley and Siegel suggest that the circumstances in which these actions were taken likely have some effect on how broadly these examples can be read as acquiescence on the basis of constitutionality.[90] Bradley and Morrison expressed similar concerns about the ability of past uses of force to act as precedent in the debate over the President's authority to initiate military conflicts without congressional authorization.[91]

In summary, the problem with using branch acquiescence as evidence of a practice's constitutionality is that we simply cannot know automatically from the fact of a government act whether that act was taken for constitutional reasons.[92] Baude claims constitutional liquidation is insulated from this criticism because liquidation

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87. Bradley, *supra* note 25, at 69 (citing United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 329 (1936)). In *Curtiss-Wright*, the Court found that "[t]he uniform, long-continued and undisputed legislative practice just disclosed rests upon an admissible view of the Constitution which, even if the practice found far less support in principle than we think it does, we should not feel at liberty at this late day to disturb." *Curtiss-Wright*, 299 U.S. at 329.

88. *See* Roisman, *supra* note 12, at 688–89 ("Several scholars have noted that past practice might be motivated by nonconstitutional reasons, such as policy agreement or politics.").

89. Bradley et al., *supra* note 5, at 271–72.

90. *See id.* at 272–73. That Congress has changed the size of the Court in a variety of circumstances, sometimes when politically motivated, may suggest Congress has broad authority to alter the Court, both for concerns over workload and efficiency and for ideological concerns. *Id.* Such practice may also indicate, however, that the power to change the size of the Court is limited to specific circumstances and may not support Congress changing the size of the Court in other contexts, as a reaction to disagreeing with specific decisions of the Court, for example. *See id.* at 273.

91. *See* Bradley et al., *supra* note 2, at 465 ("Prior uses of force have varied along numerous dimensions—such as duration, risk to U.S. forces, connection to U.S. national security interests, and level of international support—often making it debatable whether a given action in the present falls within past precedents."); *see also* Baude, *supra* note 1, at 47–48 (noting the usage of past practice can be problematic "because past practice often reflects nonconstitutional concerns, and, moreover, 'will systematically serve to validate the power of the more active and powerful branch.'" (quoting Roisman, *supra* note 12, at 673)).

92. Roisman, *supra* note 12, at 696.

requires "attention to the constitutional issue."[93] Certainly liquidation's "deliberation" requirement increases the likelihood that historical practice will be credited only when branches are acting on the basis of constitutional analysis. But Baude provides little direction on how "deliberation" may be shown.

Baude and Shalev Roisman offer two further methods of how acquiescence on the basis of constitutional analysis can be distinguished from acquiescence motivated by other factors. In addition to indeterminacy and deliberation, Baude discusses Madison's third requirement for liquidation: settlement. Settlement requires that (1) those that opposed the practice have stopped doing so, and (2) the practice received "public sanction."[94] In other words, the liquidated practice had been sufficiently repeated without controversy.[95] Roisman has articulated a similar but stronger requirement: not only must the constitutional authority be considered by the branches involved, but acquiescence would be most persuasive when acquiescence on nonconstitutional grounds is unlikely.[96] This would be the case where, for example, the branch disagrees with the resulting policy outcome or is controlled by the opposing party but nonetheless acquiesces in the practice.[97]

But whether the Court adopts Baude's or Roisman's approach or any other approach to constitutional acquiescence remains to be seen.[98] In the sections that follow, this Note argues that current debates about *Chevron* can indicate when the Court will find historical practice persuasive in interpreting the Constitution. This is because *Chevron*'s two-step framework, as well as current and future reforms, will demonstrate how the Court examines congressional intent.

II. *CHEVRON* AND ITS APPLICABILITY TO THE CONSTITUTIONAL ACQUIESCENCE MODEL

The goal of this Note is not to argue whether specific changes to *Chevron* should be imported into the constitutional acquiescence model. *Chevron*, as it now stands, is a mess[99] and is likely to be cabined and reformed in the future.[100] Nonetheless, this

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93. *See* Baude, *supra* note 1, at 48.

94. *See id.* at 18–19.

95. *See id.*

96. *See* Roisman, *supra* note 12, at 712–16.

97. *Id.* at 715–16.

98. *See* Baude, *supra* note 1, at 69 (stating that "[W]hether we adopt [liquidation] or reject it, we will learn much from it.").

99. Kurt Eggert, *Deference and Fiction: Reforming* Chevron's *Legal Fictions after* King v. Burwell, 95 NEB. L. REV. 702, 780 (2017); *see also* Cass R. Sunstein, Chevron *as Law*, 107 GEO. L.J. 1613, 1615 (2019) ("*Chevron*'s foundations are cracking."). *Chevron* originally stood for the notion that when considering the agency's construction of a statute, a court faces two questions. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842 (1984). The first question is "whether Congress has directly spoken to the precise question at issue." *Id.* If Congress's intent is clear, the court must give effect to Congress's intent. *Id.* at 842–43. If Congress is "silent or ambiguous with respect to the specific issue," however, the court considers whether the agency's interpretation is "based on a permissible construction of the statute." *Id.* at 843.

100. As Sunstein states, "the Court has been taking significant steps toward domesticating it; the process is well underway." Sunstein, *supra* note 99, at 1672.

Part argues that the way the Court cabins *Chevron* in response to this mess can inform models of constitutional acquiescence because both *Chevron* and the constitutional acquiescence model face the same challenges: specifically, that Congress often takes action for a host of reasons and it is often hard to determine whether Congress has acted on the basis of constitutional motivations. Section II.A proceeds with a brief explanation of *Chevron* step one. Section II.B discusses why constitutional arguments for overruling *Chevron* are not particularly persuasive and that the constitutional authority of *Chevron* rests on congressional instructions. Section II.C discusses recent reforms to *Chevron* as well as possible future reforms to *Chevron* and how they indicate the way the Court examines evidence of congressional motivations. Finally, Section II.D concludes with a discussion of the competing motivations Congress faces in passing a statute to which *Chevron* is applied. Because Congress faces the same competing motivations in the context of *Chevron* as when choosing to engage in a historical practice, the way the Court reforms *Chevron* will also indicate when it finds historical practice persuasive in interpreting the Constitution's separation of powers provisions.

A. Brief Overview of Chevron *Step One*

As the constitutional acquiescence model recognizes, it is difficult to know whether Congress has acted on the basis of constitutional motivations or other competing motivations.[101] Nonetheless, *Chevron* rests on the assumption that when Congress has not clearly resolved an issue, Congress has intended for an administrative agency, rather than a court, to fill the gap.[102] But this assumption is nothing more than a legal fiction.[103] As Eben Moglen and Richard Pierce note,

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101. *See* Sunstein, *supra* note 99, at 1623. Here, Sunstein points out a fundamental issue with the Supreme Court's current approach to deference: "Why is it right to assume that when agencies have exercised rulemaking or adjudicatory authority, Congress has instructed courts to defer to agency interpretations of law? There is no clear or direct evidence that Congress wanted that." *Id.* at 1663.

102. Randy J. Kozel, *Statutory Interpretation, Administrative Deference, and the Law of Stare Decisis*, 97 TEX. L. REV. 1125, 1154 (2019) (citing *Chevron*, 467 U.S. at 843–44 ("If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.")); *see also* United States v. Mead Corp., 533 U.S. 218, 229 (2001) ("Yet it can still be apparent from the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute . . . .").

103. Kurt Eggert, *Deference and Fiction: Reforming* Chevron's *Legal Fictions after* King v. Burwell, 95 NEB. L. REV. 702, 739–40 (2017) ("*Chevron* employs the fiction that any gap in a statute administered by an agency constitutes an implicit delegation of interpretive power to federal agencies."); David J. Barron & Elena Kagan, Chevron*'s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 224 n.85 (2001) (noting Justice Breyer's observation that "[f]or the most part courts have used 'legislative intent to delegate the law-interpreting function' as a

"Congress rarely 'intends' to give the President greater policymaking power."[104] In fact, though Congress could clearly make its intent known on the deference question, it rarely chooses to do so.[105] As the Court notes in *Chevron*, Congress may leave gaps in statutes for a number of reasons: Congress, for example, may simply desire the agency's expertise, it may simply not have addressed the question, or it may be unable to form a coalition around the issue.[106] Nonetheless, courts treat the presence of such gaps as a delegation of interpretive power to agencies because "[f]or judicial purposes, it matters not which of these things occurred."[107]

Of course, *Chevron* imposes *some* limits on when agency deference can be implied from Congress's actions. This approach is *Chevron*'s two-step standard of review,[108] which "instructs courts to defer to an agency's interpretation of a statute the agency administers if, at step one, the statutory provision at issue is ambiguous and then, at step two, the agency's interpretation of the statutory ambiguity is reasonable."[109] Focusing specifically on step one, in which the question of whether Congress intended to defer to an agency is considered, the Court in *Chevron* stated, "First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[110]

Step one, in other words, requires an inquiry into whether Congress's instructions are ambiguous.[111] The focus of this Note is on step one because step one will be most informative to the problem facing the constitutional acquiescence model: whether Congress acted on the basis of constitutional reasons or on the basis of other competing motivations.

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kind of legal fiction" (quoting Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986))). In determining whether Congress intended for delegation, however, the Court in *Mead* found authorizations to engage in rulemaking or adjudication that produces regulations entitled to deference were a good indicator. *Mead*, 533 U.S. at 229–30.

104. Eben Moglen & Richard J. Pierce, Jr., *Sunstein's New Canons: Choosing the Fictions of Statutory Interpretation*, 57 U. CHI. L. REV. 1203, 1213 (1990).

105. *See* Barron et al., *supra* note 103, at 212; John F. Manning, *Inside Congress's Mind*, 115 COLUM. L. REV. 1911, 1932 (2015) ("In no opinion has the Court premised its application of *Chevron* on the existence of legislative history suggesting that Congress preferred or disfavored a deferential approach under a given organic act.").

106. *Chevron*, 467 U.S. at 865.

107. *Id.*; Eggert, *supra* note 103, at 741.

108. Scholars have frequently referred to *Chevron*'s two-step interpretive framework as a standard of review. *See, e.g.*, Nicholas R. Bednar & Kristin E. Hickman, Chevron*'s Inevitability*, 85 GEO. WASH. L. REV. 1392, 1444 (2017) ("*Chevron* is, primarily, just a standard of review rather than a rule of decision."); Kevin M. Stack, *The Interpretive Dimension of* Seminole Rock, 22 GEO. MASON L. REV. 669, 680 (2015) (referring to *Chevron* as a standard of review); E. Garrett West, *A* Youngstown *for the Administrative State*, 70 ADMIN. L. REV. 629, 661 (2018) (stating *Chevron* is not a canon but is much like a standard of review).

109. Christopher J. Walker, *Attacking* Auer *and* Chevron *Deference: A Literature Review*, 16 GEO. J.L. & PUB. POL'Y 103, 110 (2018) (citing *Chevron*, 467 U.S. at 842–43 (1984)).

110. *Chevron*, 467 U.S. at 842–43.

111. *See supra* text accompanying note 109.

B. Constitutional Concerns

Chevron can inform our understanding of acquiescence because it is not likely to be found unconstitutional, despite arguments to the contrary. That is not to say judges are not concerned about *Chevron*'s constitutionality, however. For example, in his concurring opinion in *Michigan v. EPA*, Justice Thomas found that *Chevron* prevents judges from exercising their independent judgment to "say what the law is," thereby conflicting with Article III's vesting clause, which vests the judicial power exclusively with Article III courts, rather than administrative agencies.[112] Recent criticisms by Justice Gorsuch and Justice Kavanaugh have echoed these concerns.[113] In particular, Justice Kavanaugh has criticized *Chevron* on the grounds that it allows the executive branch to choose an interpretation of an ambiguous statute, and so long as that interpretation is reasonable, that interpretation carries the force of law even if everyone else tasked with interpreting the statute believes there is a better interpretation.[114] *Chevron* has also given rise to Article I concerns. As Justice Jordan of the Tenth Circuit pointed out in *Egan v. Delaware River Port Authority*, *Chevron* erodes Congress's legislative powers by encouraging Congress to abdicate its lawmaking authority by passing vague laws to be filled in and interpreted by agencies, rather than taking on the greater burden of reaching a consensus on difficult issues.[115]

These arguments are unconvincing for a number of reasons, however.[116] First, as a practical matter, the costs of overturning *Chevron* would be significant and would likely result in confusion, conflicts in the courts of appeals, and increased politicization of administrative law.[117] Moreover, not only has *Chevron* reduced the effects of judicial policy preferences—one of its intended goals—but it has also generated a significant amount of reliance interest among agencies and Congress.[118] Finally, as Nicholas R. Bednar and Kristin E. Hickman note, "[a]rguments abound

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112. Walker, *supra* note 109, at 111–12 (quoting *Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring) ("*Chevron* deference precludes judges from exercising that judgment, forcing them to abandon what they believe is 'the best reading of an ambiguous statute' in favor of an agency's construction.")).

113. Jonathan R. Siegel, *The Constitutional Case for* Chevron *Deference*, 71 VAND. L. REV. 937, 950 (2018) ("Reaching back to the foundational case of *Marbury v. Madison*, Justice Gorsuch pointed out that under that case, resolution of questions of private legal rights is a *judicial* function. *Chevron*, he said, 'seems no less than a judge-made doctrine for the abdication of the judicial duty.'" (quoting Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1152 (2016))); *see generally* Marbury v. Madison, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

114. Sunstein, *supra* note 99, at 1616–17. This is a result Justice Kavanaugh finds to be "[a]mazing." *Id.* at 1617 (quoting Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2150 (2016) (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2014))).

115. Egan v. Del. River Port Auth., 851 F.3d 263, 279 (3d Cir. 2017) (Jordan, J., concurring).

116. *See* Sunstein, *supra* note 99, at 1670 ("[E]ven for those who think that *Chevron* was not close to right, the argument for overruling it is not terribly strong.").

117. *Id.*

118. *Id.* at 1671–72.

justifying congressional delegations of discretionary power to agencies."[119] Among these reasons are a congressional desire to utilize agency policy and scientific expertise, which increase statutory quality and reduce enforcement headaches after passage.[120]

Nor is *Chevron* likely to be completely overturned as a matter of constitutional law. As an Article III issue, Professor Henry Monaghan has noted that the Court is not neglecting its duty to "say what the law is" by deferring to an agency's interpretation of a law; rather, the Court is simply applying a law made by a congressionally authorized agency.[121] As for Article I concerns, Congress can make a constitutionally permissible delegation by providing the authorized agency with an "intelligible principle" to guide its interpretation.[122] It is not difficult for Congress to satisfy the "intelligible principle" standard and avoid constitutional concerns.[123] In fact, the Court has stated that *Chevron* rests on the presumption that when Congress passes an ambiguous statute intended for an agency to interpret, Congress has delegated the agency, rather than the courts, the interpretive authority required by the ambiguity.[124]

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119. Bednar et al., *supra* note 108, at 1454.

120. *Id.*

121. Henry P. Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1, 27–28 (1983) ("In this context, the court is not abdicating its constitutional duty to 'say what the law is' by deferring to agency interpretations of law: it is simply applying the law as 'made' by the authorized law-making entity."); Siegel, *supra* note 113, at 960 ("That is, an ambiguous agency statute is simply another way of doing something that Congress does all the time—namely, authorize an agency to make a policy choice. Innumerable statutes expressly authorize agencies to make decisions and prescribe rules that have the force and effect of law, and such authorization is routinely approved as constitutional."); Sunstein, *supra* note 99, at 1639. Sunstein understands Monaghan to mean "it is (emphatically) the province of the judiciary to say what the law is. But sometimes the law is what the Executive Branch says that it is. When is that? When Congress says so." *Id.*

122. *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001) (quoting J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928)); *see also* Sunstein, *supra* note 99, at 1637.

123. *See Whitman*, 531 U.S. at 474 ("In the history of the Court we have found the requisite 'intelligible principle' lacking in only two statutes, one of which provided literally no guidance for the exercise of discretion, and the other of which conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring 'fair competition.'"); *see also* Sunstein, *supra* note 99, at 1637 ("If Congress uses a word like 'take,' 'source,' or 'diagnosis,' and stipulates that the agency may sort out ambiguities in such terms, then it has provided an intelligible principle; it has not given any kind of blank check.").

124. Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 740–41 (1996) (noting *Chevron* rests on the "presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows"); *see also* United States v. Mead Corp., 533 U.S. 218, 229 (2001) (noting while Congress may not have expressly delegated interpretive authority to an agency, "[w]hen circumstances implying such an expectation exist, a reviewing court has no business rejecting an agency's exercise of its generally conferred authority to resolve a particular statutory ambiguity simply because the agency's chosen resolution seems unwise").

As a result, *Chevron* seems to depend on congressional instructions.[125] That is, if Congress has instructed an agency to interpret an ambiguous statute, then *Chevron* deference is insulated from constitutional concerns.[126] Congress may instruct agency deference for a number of reasons. For example, part of the Court's reasoning in *Chevron* was a respect for the Executive Branch's democratic accountability.[127] The *Chevron* Court also recognized "agency expertise" as a possible rationale for deference, stating Congress may have "desired the [agency] to strike the balance at this level, thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so."[128] Congress may also defer to agencies on the basis of a desire for national uniformity.[129]

C. Current and Future Chevron Reforms

But just as the constitutional acquiescence model has recognized, congressional instructions are not always clear, and Congress often acts on the basis of political or other motivations.[130] To ensure agency interpretations are entitled to deference only when Congress has delegated interpretive authority to an agency, the Supreme Court has introduced additional steps into *Chevron*'s interpretive framework.[131] These inquiries can be viewed as a way the Court might examine whether Congress has "acquiesced" in a given application of *Chevron* because they consider evidence of Congress's intent. For example in *United States v. Mead*, the Court held that agency interpretations of statutes qualify for *Chevron* deference when Congress has delegated an agency the authority to act with the force of law and the "agency interpretation claiming deference was promulgated in the exercise of that authority."[132] The Court has also begun to develop a "major questions" exception to

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125. *See* Sunstein, *supra* note 99, at 1679; Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 836 (2001) ("The Supreme Court in recent years has endorsed the notion that *Chevron* rests on implied congressional intent.").

126. Sunstein, *supra* note 99, at 1679 ("So long as *Chevron* is understood as a response to congressional instructions, it does not offend anything in the Constitution.").

127. *See id.* at 1626; *see also* Richard J. Pierce, Jr., *The Future of Deference*, 84 GEO. WASH. L. REV. 1293, 1296 (2016) (describing *Chevron* as creating a "policy space" in which agencies are free to exercise discretion).

128. Kent Barnett, Christina L. Boyd, & Christopher J. Walker, *Administrative Law's Political Dynamics*, 71 VAND. L. REV. 1463, 1476–77 (2018) (citing *Chevron*, 467 U.S. at 865) ("As Justice Scalia noted decades ago, 'The cases, old and new, that accept administrative interpretations, often refer to the "expertise" of the agencies in question, their intense familiarity with the history and purposes of the legislation at issue, and their practical knowledge of what will best effectuate those purposes.'").

129. *See id.* at 1481–82.

130. These competing motivations will be discussed in greater detail in Part III.

131. For example, Chevron step zero is an "initial inquiry into whether the Chevron framework applies at all." Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 191 (2006). The Step Zero inquiry was introduced in *United States v. Mead Corp.*, discussed *infra* note 132 and accompanying text. The "major questions" exception, also discussed *infra* note 133–34 and accompanying text, is another step the Supreme Court has introduced into *Chevron*'s interpretive framework.

132. 533 U.S. 218, 226–27 (2001) ("We hold that administrative implementation of a

Chevron deference, which is a "[p]resumption against [a] congressional delegation of authority for [an] agency to make fundamental changes to society or the market."[133] The major questions doctrine in particular has been deeply criticized by scholars who view its "unpredictable application as highly destabilizing."[134] Nonetheless, the goal of both inquiries is to ascertain whether Congress has acted on the basis of constitutional motivations (an intention to delegate to an agency) or on the basis of other factors.[135] If Congress frequently acts on the basis of other factors when passing statutes to which a court applies *Chevron*, these additional inquiries can be viewed as a way to ensure Congress has properly acquiesced in a delegation of its interpretive power to an agency.[136]

Scholars and judges alike have proposed or hinted at numerous other ways to reform *Chevron* in ways that depend on an examination of congressional intent. Chief Justice Roberts himself has advocated for a more context-specific inquiry into whether Congress definitively authorized an agency to interpret a specific ambiguous provision.[137] Other scholars have suggested step one should be taken more seriously

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particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."); *see also* Thomas W. Merrill*, Step Zero after* City of Arlington, 83 FORDHAM L. REV. 753, 766 (2014).

133. WILLIAM N. ESKRIDGE, JR., INTERPRETING LAW 418 (2016). In other words, the so-called "major questions" exception is the idea that Congress could not have intended to delegate major legal questions to agencies to decide without sufficient textual support. *See* Nathan Richardson, *Keeping Big Cases from Making Bad Law: The Resurgent "Major Questions" Doctrine*, 49 CONN. L. REV. 355, 391–92 (2016). Under the "major questions" exception, the Court has granted agency interpretations of congressional statutes "little or no weight" when the stakes of the interpretive question are "sufficiently high." *Id.* at 358. While the Court has not laid out the specific factors that give rise to a "major question," *id.* at 381, the Court has cited the following reasons for finding a "major question" exception in recent cases: the agency interpretation (1) would result in a significant change in the scope of regulatory authority, (2) has great economic significance, (3) relates to an issue of ongoing political controversy, (4) is based on a thin statutory basis. *Id.* at 381–85.

134. Joshua S. Sellers, *"Major Questions" Moderation*, 87 GEO. WASH. L. REV. 930, 946 (2019). More specifically, critics view the major questions doctrine as a way to "selectively circumvent the traditional deference regime" and prevent agencies from interpreting the kinds of complex statutory ambiguities that they are best situated to resolve. *See id.* at 946–47.

135. *See id.* at 937–39.

136. As the following Section discusses, Congress often passes ambiguous statutes for reasons other than a constitutionally permissible intention to delegate. *See infra* notes 139–46 and accompanying text.

137. City of Arlington v. FCC, 569 U.S. 290, 320 (2013) (Roberts, J., dissenting) (emphasizing the Court's rationale for *Chevron* "rests on a recognition that Congress has delegated to an agency the interpretive authority to implement 'a particular provision' or answer '"a particular question."'") (citing United States v. Mead Corp., 533 U.S. 218, 229 (2001)); *see also* Eggert, *supra* note 103, at 784 ("[A]bsent real evidence of congressional intent, the courts should ask whether and to what extent a rational Congress would intend courts to defer in the circumstance in question."). In *Attacking* Auer *and* Chevron *Deference*, Christopher J. Walker characterizes Chief Justice Robert's approach as "a context-specific inquiry into objective congressional intent." Walker, *supra* note 109, at 117. The "major

so that *Chevron* only applies to genuinely ambiguous statutory provisions.[138] Still others propose that Congress state explicitly what level of deference a court should afford agency interpretations.[139] Again, each of these reforms, if adopted, will illustrate how the Court examines congressional intent because they show how the Court determines *Chevron* is applied on the basis of genuine congressional intent to delegate.[140] In fact, how the Court changes *Chevron* in the coming years will be particularly informative for the way the Court views evidence of congressional intent, and thus the persuasive authority of historical practice, because, as will be discussed in the following section, Congress faces the same competing motivations in the context of *Chevron* as when engaging in a long-standing historical practice.

D. Challenges in Ascertaining Congress's Motivations

Just as political branches have relied on long-standing historical practices, Congress and agencies have generated significant reliance interests on *Chevron*. As Justin Walker has recently noted, "[a]t the very least, eliminating *Chevron* deference would have 'major practical implications' for administrative agencies and the parties they regulate."[141] More specifically, Congress has long legislated against the background of *Chevron*, and many statutes reflect an understanding that the Court's deference doctrines will apply.[142] Agencies themselves have operated on a similar

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question" doctrine is an example of this context specific approach. *See id.* at 115–16; *see also supra* notes 115–16 and accompanying text.

138. Sunstein, *supra* note 99, at 1672; Walker, *supra* note 109, at 117 (noting Justice Scalia and Judge Kethledge among the advocates for this approach).

139. *See* Eggert, *supra* note 103, at 782. Eggert discusses two ways in which Congress could explicitly state the level of deference a court should afford to an agency interpretation. First, Eggert notes that Congress could codify *Chevron* by, for example, amending the Administrative Procedure Act (APA) to state exactly the conditions in which a court should defer to an agency. *Id*. Another possibility would be for Congress to specify in a particular statute when a court should give weight to an agency interpretation. *Id.*

140. *See* City of Arlington, 569 U.S. at 321–22 (Roberts, J., dissenting) ("An agency interpretation warrants such deference only if Congress has delegated authority to definitively interpret a particular ambiguity in a particular manner."); Sunstein, *supra* note 99, at 1678 (noting the goals of reforms to *Chevron* are to "to ensure the primacy of congressional instructions, to forbid arbitrariness, and to use time-honored principles—along with some new ones—to cabin the exercise of agency discretion"); Eggert, *supra* note 103, at 785 (noting reforms would allow courts to answer "pertinent policy questions" such as: "Has Congress given the agency the authority to engage in the kind of formalized rulemaking procedures that would lead the agency to make a thoughtful, informed determination? Has the agency appropriately used those procedures and explained its rationale? Is the agency likely to have particular expertise and/or institutional memory such that it is better able than a court to reach an appropriate interpretation?").

141. Justin Walker, *The Kavanaugh Court and the* Schecter-*to*-Chevron *Spectrum: How the New Supreme Court Will Make the Administrative State More Democratically Accountable*, 95 IND. L.J. 924, 960 (2020).

142. *See* Sunstein, *supra* note 99, at 1672. In fact, a survey of 137 congressional staffers in 2013 indicated eighty-two percent of respondents knew about *Chevron* and most of them used it when drafting statutes. Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons:*

assumption.[143] Just as in finding a longstanding historical practice unconstitutional, overturning *Chevron* would certainly involve "upset[ting] the compromises and working arrangements that the elected branches of Government themselves have reached."[144] Beyond mere reliance, there is at least some evidence that this approach is in fact desirable. As Kent Barnett, Christina Boyd, and Christopher Walker indicate, *Chevron* effectively and powerfully restrains partisanship as compared to other standards of review.[145] But just as with the acquiescence model, agreement by Congress may result from a number of competing reasons.

For example, as discussed earlier in the context of "congressional-executive" agreements,[146] Congress may act on the basis of a strategic political calculation. Much like the Executive found it easier to secure the approval of the majority of Congress rather than that of two-thirds of the Senate, individual legislators will often find it easier to delegate politically contentious questions to the Executive through passing ambiguous legislation.[147] As a result, the Executive Branch will increase its power and Congress will continue to abdicate its power "because jockeying for control of the Executive becomes a less transaction-costly way of shaping policy than the legislative process itself."[148] This is exactly the concern, highlighted earlier, that Congress faces collective action problems in protecting its constitutional authority.[149] Also discussed earlier, and applicable here, is that Congress faces procedural hurdles in protecting its constitutional authority.[150] As a result, if deference is granted to an agency interpretation when Congress did not intend to do so, it will have a difficult time passing legislation prohibiting deference, just as Congress has a difficult time passing legislation opposing historical practices.

Finally, there is the risk that both Congress and judges will be incentivized to defer to agencies on the basis of policy preferences rather than any determination that Congress sought deference on the basis of constitutional motivations. First,

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Part I, 65 STAN. L. REV. 901, 993–94 (2013).

143. Sunstein, *supra* note 99, at 1672.

144. Bradley, *supra* note 25, at 74.

145. Barnett et al., *supra* note 128, at 1524; *see also* Nicholas R. Bednar, *What to Do About* Chevron*—Nothing*, 72 VAND. L. REV. EN BANC 151, 153 (2019) (discussing Barnett, Boyd, and Walker's research).

146. *See supra* note 81 and accompanying text.

147. *See* Justin Hurwitz, Chevron's *Political Domain: W(h)ither Step Three?*, 68 DEPAUL L. REV. 615, 629 (2019); Lisa Schultz Bressman, Chevron's *Mistake*, 58 DUKE L.J. 549, 571 (2009) ("[S]cholars have observed that a divided Congress may choose deliberately ambiguous words to obtain consensus, thereby delegating interpretive authority to agencies or courts.").

148. Hurwitz, *supra* note 147, at 628. Hurwitz calls such broadly written laws a political "double-whammy" for legislators. *Id.* at 629. This is because legislators on both sides of the aisle can claim a victory in solving a problem, and, regardless of how the agency interprets the statute, legislators can either claim a victory and campaign on the policy's success or blame the agency and campaign on the policy's failure. *Id.*; *see also* Bressman, *supra* note 147, at 571 ("Congress chooses words that are imprecise enough for legislators with opposing views each to claim victory. Meanwhile, the language also allows those legislators to press for their favored positions at the later administrative or judicial level.").

149. *See* discussion *supra* note 83 and accompanying text.

150. *See* discussion *supra* note 72 and accompanying text.

empirical studies have indicated that judges are often more likely to defer to an agency's interpretation of a statute when their policy preferences align with those of the agency.[151] Justice Kavanaugh has expressed significant concern over this conflict, stating that "there can be serious incentives and pressures—often subconscious—for judges to find textual ambiguity or clarity in certain cases," as where a judge's policy preferences conflict with an agency's interpretation of a statute.[152] Congress itself is also more likely to defer to an executive branch that shares its policy preferences.[153] In other words, as in the constitutional acquiescence model, the question of whether Congress was motivated by constitutional reasons is complicated by the fact that Congress is often motivated by nonconstitutional reasons, such as policy preferences.

CONCLUSION

This Note discussed two competing theories used to determine when constitutional acquiescence applies to a long-standing historical practice: constitutional liquidation and historical gloss. Both theories, however, face the same problem when determining whether a long-standing practice between political branches can serve as evidence of that practice's constitutionality: Congress often acts without consideration of the constitutional issue at hand. Some scholars, such as Baude and Roisman, have attempted to remedy this problem. However, such scholarship lacks a rigorous method for determining how agreement over the practice's constitutionality can be determined in a way that recognizes the actual dynamics of congressional-executive relations. The current debate around *Chevron*'s two-step framework can remedy this problem because Congress faces the same challenges in expressing its intention to defer to an agency as in expressing its acquiescence in the constitutionality of an interbranch practice. Specifically, Congress faces constitutional barriers, collective action problems, and the temptation

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151. *See* Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155, 2171 (1998) (finding panels of D.C. Circuit Court of Appeals judges were thirty-one percent more likely to defer when its policy preferences are in line with those of the agency's); Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of* Chevron, 73 U. CHI. L. REV. 823, 851 (2006) (finding judges are more likely to defer to the agency's interpretation when the agency's decision is closer to the judge's political preference). *But see* Barnett et al., *supra* note 128, at 1523–24 ("Utilizing the most comprehensive circuit court dataset to date, we find that, while there are some statistically significant results as to partisan influence, *Chevron* deference has a powerful constraining effect on partisanship in judicial decisionmaking.").

152. Kavanaugh, *supra* note 114, at 2140 (stating judges who find the legislative history surrounding a statute is more in line with their policy preferences are subtly incentivized to call the statute ambiguous to allow a result more in line with their preferences; judges who disagree with the agency's interpretation are conversely incentivized to find the statute unambiguous).

153. Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2357 (2006) (noting members of Congress "are significantly more likely to vote to delegate discretion to an executive branch controlled by their party and that Congress does indeed delegate significantly less, and with significantly more constraints, when the opposing party controls the executive branch").

to take the path of least political resistance, as well as the temptation to act on the basis of policy preferences. And, unlike the merits of historical practice arguments, *Chevron* is more frequently and rigorously debated and discussed, providing robust signals about how the Court views congressional action. As a result, the Supreme Court's changing approach to *Chevron* will provide insight into whether the Court finds congressional agreement to be persuasive evidence of a practice's constitutionality in the future.