

# Stanford Law Review

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## ARTICLE

## Constitutional Liquidation

William Baude\*

**Abstract.** James Madison wrote that the Constitution's meaning could be "liquidated" and settled by practice. But the term "liquidation" is not widely known, and its precise meaning is not understood. This Article attempts to rediscover the concept of constitutional liquidation, and thereby provide a way to ground and understand the role of historical practice in constitutional law.

Constitutional liquidation had three key elements. First, there had to be a textual indeterminacy. Clear provisions could not be liquidated, because practice could "expound" the Constitution but could not "alter" it. Second, there had to be a course of deliberate practice. This required repeated decisions that reflected constitutional reasoning. Third, that course of practice had to result in a constitutional settlement. This settlement was marked by two related ideas: acquiescence by the dissenting side, and "the public sanction"—a real or imputed popular ratification.

While this Article does not provide a full account of liquidation's legal status at or after the Founding, liquidation is deeply connected to shared constitutional values. It provides a structured way for understanding the practice of departmentalism. It is analogous to Founding-era precedent, and could provide a salutary improvement over the modern doctrine of stare decisis. It is consistent with the core arguments for adhering to tradition. And it is less susceptible to some of the key criticisms against the more capacious use of historical practice.

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\* Professor of Law and Aaron Director Research Scholar, University of Chicago Law School. This Article has been liquidated over time with the help of countless discussions with friends and colleagues, as well as indispensable research assistance from Nickolas Card, Margo Uhrman, Roberto Borgert, Douglas Gates, Kevin Keating, Martin Salvucci, and Natalie Peelish; and research support from the SNR Denton and Alumni Faculty Funds. This Article has benefitted as well from helpful comments by Akhil Amar, Judge Stephanos Bibas, Curt Bradley, Samuel Bray, Jud Campbell, Josh Chafetz, Nathan Chapman, Andrew Coan, Ryan Doerfler, Justin Driver, Richard Epstein, Lee Fennell, Chad Flanders, Jonathan Gienapp, Dick Helmholtz, Randy Kozel, Alison LaCroix, Marty Lederman, Saul Levmore, Richard McAdams, Michael McConnell, Bernie Meyler, David Pozen, Saikrishna Prakash, Richard Primus, Richard Re, Stephen Sachs, Lawrence Solum, Lance Sorenson, David Strauss, Kevin Walsh, Garrett West, Adam White, and Christopher Yoo; by workshop participants at Harvard, Stanford, the University of Arizona, the University of Chicago, the University of Pennsylvania, and the University of San Diego's Originalism Works-in-Progress Conference; and by Liz Klein, Jane Kessner, and other editors of the *Stanford Law Review*.

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## Introduction

Today's constitutional law looks to the past. The central document, of course, is an old one whose age and origins cause constitutional debate. And day-to-day judicial adjudication is often dominated by precedent, the examination of past court decisions. But precedent and originalism do not exhaust the role of historical argument in constitutional law. Constitutional law is also rife with claims of authority by historical practice. Historical practice is not quite the same as precedent, because it expands well beyond judicial opinions. Historical practice is not quite the same as originalism, either, because it frequently looks to what has happened in the generations *after* a text was originally written.

Yet theories of how exactly such practice works as a source of constitutional meaning are surprisingly scant, giving rise to the recent allegation that "there has been little sustained academic attention to the proper role of historical practice in the context of separation of powers"<sup>1</sup> and to the response that "[h]istorical practice is a slippery, unhelpfully capacious notion masquerading as a mid-twentieth-century neutral principle."<sup>2</sup>

Meanwhile, the history of constitutional law has also looked to the future. Over decades, James Madison carefully revised his notes from the Constitutional Convention with an eye to eventual public consumption.<sup>3</sup> After the Convention, Madison warned his new colleagues in Congress of the importance of their constitutional debates: "The decision that is at this time made will become the permanent exposition of the constitution; and on a permanent exposition of the constitution will depend the genius and character of the whole government."<sup>4</sup> He returned to these themes throughout his career, ever attentive to how political practice would set a precedent for tomorrow's constitutional law.

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1. Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 413 (2012).
  2. 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) (calling "attention to a general, and surprising, lack of rigor in how historical branch practice is used in separation of powers interpretation").
  3. *See generally* MARY SARAH BILDER, *MADISON'S HAND: REVISING THE CONSTITUTIONAL CONVENTION 179-240* (2015).
  4. The Congressional Register, Minutes of the House of Representatives (June 17, 1789), in 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, 4 MARCH 1789-3 MARCH 1791, at 904, 921 (Charlene Bangs Bickford et al. eds., 1992) [hereinafter DOCUMENTARY HISTORY OF THE FIRST CONGRESS] (statement of Rep. Madison); *see also* The Daily Advertiser, Minutes of the House of Representatives (June 17, 1789), in 11 DOCUMENTARY HISTORY OF THE FIRST CONGRESS, *supra*, at 895, 895 (statement of Rep. Madison).

This Article attempts to unite that past and present. It reconstructs James Madison's theory of postenactment historical practice, sometimes called "liquidation," as in: "All new laws . . . are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications."<sup>5</sup> Liquidation was a specific way of looking at post-Founding practice to settle constitutional disputes, and it can be used today to make historical practice in constitutional law less slippery, less capacious, and more precise.

The problems of how to reconcile text and precedent, of how to mediate between fixation and contestation, of how to be an originalist in a fallen world—none of these are new. And none of them were lost on Madison. His articulation of liquidation over the course of his life can be seen as an attempt to solve these problems—to explain the role of precedent in a system of text, to allow stability without forfeiting constitutional faith, to allow constitutional updating while adhering to original meaning.

This focus on Madison is expository and conceptual, not dictated either by history or constitutional law. Madison was not the only one to use the specific term liquidation, nor to avail himself of the general framework of settlement through constitutional practice.<sup>6</sup> And constitutional law, even on originalist premises, is not limited to the views of James Madison. Rather, this Article examines the concept of liquidation through Madison because Madison had an unusually extensive, thorough, and systematic discussion of it. Having his theory of it in hand will let us decide whether it is normatively desirable and help us explore whether it was a widespread part of the law at the Founding, issues this Article will also begin to sketch out. But before we can proceed to those questions, we must know what liquidation is.

This Article presents that concept of liquidation. Part I discusses modern attention to the concept. Part II breaks down the precise mechanics of Madison's concept of liquidation, synthesizing Madison's thought over the course of his career. Part III shows how liquidation is grounded in certain widely shared constitutional values. Part IV then attempts to work out some more detailed issues with liquidation on which Madison's own views may sometimes appear ambiguous or incomplete.

## I. Rediscovering Liquidation

Every time one turns around, a new law or official act is being assailed on grounds of being "unprecedented." Perhaps it is a new comprehensive health

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5. THE FEDERALIST NO. 37, at 236 (James Madison) (Jacob E. Cooke ed., 1961).

6. See *infra* Part II.D.

care reform<sup>7</sup> or the structure of a new independent agency.<sup>8</sup> Perhaps it is the Senate's failure to confirm (or even vote on) a Supreme Court nominee.<sup>9</sup> Perhaps it is the rumored possibility that the President might pardon himself.<sup>10</sup> The charge is supposed to sound not just in political norms but in constitutional law—to carry "a distinct whiff of impermissibility."<sup>11</sup>

And on the other hand, in recent years longstanding practices have been charged with constitutional invalidity. Look, for instance, at Congress's powers of contempt,<sup>12</sup> the appointment of civil service officials,<sup>13</sup> national injunctions by the federal courts,<sup>14</sup> the civil forfeiture of tainted assets,<sup>15</sup> or the designation of an "acting" cabinet official without Senate confirmation.<sup>16</sup> Here, too, history has sometimes been said to sustain these practices.

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7. See generally JOSH BLACKMAN, UNPRECEDENTED: THE CONSTITUTIONAL CHALLENGE TO OBAMACARE (2013).
8. See PHH Corp. v. Consumer Fin. Prot. Bureau, 839 F.3d 1, 21 (D.C. Cir. 2016) (Kavanaugh, J.) (calling the structure of the Consumer Financial Protection Bureau "unprecedented in our constitutional history"), *rev'd in part en banc*, 881 F.3d 75 (D.C. Cir. 2018).
9. See Josh Chafetz, *Essay, Unprecedented?: Judicial Confirmation Battles and the Search for a Usable Past*, 131 HARV. L. REV. 96, 108-09 (2017); see also Robin Bradley Kar & Jason Mazzone, *Essay, The Garland Affair: What History and the Constitution Really Say About President Obama's Powers to Appoint a Replacement for Justice Scalia*, 91 N.Y.U. L. REV. ONLINE 53, 60-82 (2016) (arguing that opposition to the elevation of Chief Judge Garland reflected "a major departure from more than two centuries of historical tradition").
10. See S.M., *Can Donald Trump Pardon Himself?*, ECONOMIST: DEMOCRACY IN AM. (July 25, 2017), <https://perma.cc/7LFT-B3GD> (referring to the notion as an "unprecedented courtesy").
11. Chafetz, *supra* note 9, at 96.
12. See, e.g., E. Garrett West, *Revisiting Contempt of Congress* 3-5 (June 25, 2018) (unpublished manuscript), <https://perma.cc/QD58-HBBE>.
13. See Jennifer L. Mascott, *Who Are "Officers of the United States?"*, 70 STAN. L. REV. 443, 545-58 (2018) (discussing various civil service officials who are arguably appointed in violation of the original meaning of the Constitution); see also Lucia v. SEC, 138 S. Ct. 2044, 2056 (2018) (Thomas, J., concurring) (adopting Mascott's analysis).
14. See Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 419-20 (2017).
15. Compare Leonard v. Texas, 137 S. Ct. 847, 849-50 (2017) (Thomas, J., respecting the denial of certiorari) (offering historical criticism of civil forfeiture practices), with Caleb Nelson, Feature, *The Constitutionality of Civil Forfeiture*, 125 YALE L.J. 2446, 2456 (2016) (concluding that civil forfeiture laws "are consistent with the original meaning of the Constitution as liquidated over time").
16. See Designating an Acting Attorney Gen., 2018 WL 6131923 (Office of Legal Counsel, U.S. Dep't of Justice Nov. 14, 2018); see also Will Baude, *Who Is Lawfully the Attorney General Right Now?*, REASON: VOLOKH CONSPIRACY (Nov. 10, 2018, 3:48 PM), <https://perma.cc/P6VV-2GM2>.

But history, it has been wisely observed, is neither self-interpreting nor self-enforcing.<sup>17</sup> Rather, constructing precedents and principles out of historical events requires a framework to tell us which events are relevant and why.<sup>18</sup> In the context of judicial precedent, such frameworks are ubiquitous, widely taught, and widely studied. But what about the less familiar genre of precedent and practice outside of the courts?

It turns out that at the Founding, there was such a framework, one developed with remarkable depth and theoretical insight by none other than James Madison: that of liquidation. The idea has made mysterious cameo appearances in recent cases and scholarship, but without full explanation, pedigree, or justification.

The U.S. Supreme Court reintroduced the concept a few years ago in its opinion in *NLRB v. Noel Canning*, which interpreted the Recess Appointments Clause of the Constitution for the first time.<sup>19</sup> The strongest arguments in the case boiled down to a clash between apparent longstanding practice and interpretive first principles such as original meaning and structure.<sup>20</sup> The case therefore became a battleground for recurring methodological questions: When should the Court invalidate longstanding practices in the political branches? Can subsequent practice trump the original meaning of the text? Indeed, at oral argument Justice Scalia and Solicitor General Don Verrilli sparred over this very point.<sup>21</sup>

While eventually finding the appointments invalid for other reasons, a majority of the Court nonetheless sided with the authority of historical practice over the challengers' argument from text and original meaning.<sup>22</sup>

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17. See H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659, 662-68 (1987).

18. See Chafetz, *supra* note 9, at 96, 130-31.

19. See 134 S. Ct. 2550, 2560 (2014); see also U.S. CONST. art. II, § 2, cl. 3 ("The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate . . .").

20. Compare *Noel Canning*, 134 S. Ct. at 2559-60, with *id.* at 2594-600 (Scalia, J., concurring in the judgment). As a matter of full disclosure, I coauthored an amicus brief on behalf of myself and other constitutional law scholars arguing that the appointments at issue were invalid on original meaning and other grounds. See Brief of Constitutional Law Scholars as Amici Curiae in Support of Respondent, *Noel Canning*, 134 S. Ct. 2550 (No. 12-1281), 2013 WL 6213263.

21. See Transcript of Oral Argument at 5-8, *Noel Canning*, 134 S. Ct. 2550 (No. 12-1281), 2014 WL 111105.

22. The majority invalidated the appointments on the grounds that they happened during brief three-day recesses between "pro forma sessions," *Noel Canning*, 134 S. Ct. at 2573-76, and that these three-day recesses were presumptively too short to trigger the recess appointment power, *id.* at 2566-67.

"[T]he longstanding ‘practice of the government,’" the Court wrote, "can inform our determination of ‘what the law is.’"<sup>23</sup> It continued:

That principle is neither new nor controversial. As James Madison wrote, it "was foreseen at the birth of the Constitution, that difficulties and differences of opinion might occasionally arise in expounding terms & phrases necessarily used in such a charter . . . and that it might require a regular course of practice *to liquidate & settle* the meaning of some of them." And our cases have continually confirmed Madison's view.<sup>24</sup>

This passage marked the first time that this use of "liquidate" had appeared in the body of a Supreme Court opinion.<sup>25</sup>

In this sense the Court was riding an early trend. "Liquidation" was also a foreign word to most legal scholars until Caleb Nelson introduced it in an article eighteen years ago.<sup>26</sup> Since then, liquidation has been invoked occasionally by a small corner of historical scholarship,<sup>27</sup> but it basically remains a piece of obscure jargon.

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23. *Id.* at 2560 (first quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 401 (1819); and then quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).
24. *Id.* (alteration in original) (emphasis added) (citation omitted) (quoting Letter from James Madison to Spencer Roane (Sept. 2, 1819), in 8 THE WRITINGS OF JAMES MADISON 447, 450 (Gaillard Hunt ed., 1908)). The Court cited nine such cases. See *id.* (citing *Mistretta v. United States*, 488 U.S. 361, 401 (1989); *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring); *The Pocket Veto Case*, 279 U.S. 655, 689-90 (1929); *Ex parte Grossman*, 267 U.S. 87, 118-19 (1925); *United States v. Midwest Oil Co.*, 236 U.S. 459, 472-74 (1915); *McPherson v. Blacker*, 146 U.S. 1, 27 (1892); *McCulloch*, 17 U.S. (4 Wheat.) 316; and *Stuart v. Laird*, 5 U.S. (1 Cranch) 299 (1803)).
25. As usual, Justice Black was the unappreciated precursor. I have found one single previous reference by the Supreme Court to liquidation: A footnote in Justice Black's opinion for the Court in *United States v. South-Eastern Underwriters Ass'n* cites Madison's use of the word in *Federalist No. 37*, and that footnote has attracted almost no attention. See 322 U.S. 533, 550 n.33 (1944) (quoting THE FEDERALIST NO. 37, at 193-94 (James Madison) (rev. ed. 1901)).
26. See Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 10-21 (2001) [hereinafter Nelson, *Stare Decisis*] (discussing both Madison and antebellum case law). For more recent discussions, see Nelson, *supra* note 15, at 2452-53; and Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 525-29 (2003) [hereinafter Nelson, *Originalism*]. For an important earlier discussion, see H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 910, 940-41 (1985).
27. See, e.g., William Baude, *Rethinking the Federal Eminent Domain Power*, 122 YALE L.J. 1738, 1808-12 (2013); John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663, 1728-33 (2004); Michael McConnell, Lecture, *Time, Institutions, and Interpretation*, 95 B.U. L. REV. 1745, 1773-76 (2015); Jeffrey A. Pojanowski & Kevin C. Walsh, *Enduring Originalism*, 105 GEO. L.J. 97, 142-46 (2016); Stephen E. Sachs, *The "Unwritten Constitution" and Unwritten Law*, 2013 U. ILL. L. REV. 1797, 1806-08. There is also a recent student note on the subject. See Paul G. Ream, Note, *Liquidation of Constitutional Meaning Through Use*, 66 DUKE L.J. 1645 (2017).

Yet as liquidation starts to creep into the legal lexicon, its underdevelopment has begun to raise questions and challenges. Michael Rappaport has called the permissibility of liquidation “a complicated question” and “sometimes controversial.”<sup>28</sup> Richard Fallon has observed that “the idea of ‘liquidation’ through practice—despite its Madisonian provenance—remains obscure in some respects.”<sup>29</sup> Aziz Huq has suggested that “neither Madison nor other Framers were pellucid as to who would do this liquidating.”<sup>30</sup> Curt Bradley and Neil Siegel have stated that “Madison never presented a detailed explanation of the idea, and it has received only limited attention in the academic literature.”<sup>31</sup> And Jack Rakove, writing about Madison’s discussion of linguistic instability in *Federalist No. 37*, has declared that “much more work needs to be done on the entire concept of political language as such.”<sup>32</sup> In short, liquidation has lacked any systematic exploration. This Article provides one.

## II. Understanding Liquidation

So what was James Madison’s understanding of liquidation, and how did it work? We now turn to these questions.

### A. Groundwork

Madison expounded the idea of liquidation over the course of his long political life. One of his earliest and most quoted discussions came in his essay *Federalist No. 37*. Writing as “Publius,” Madison pled that “many allowances ought to be made for the difficulties inherent in the very nature of the undertaking referred to the Convention.”<sup>33</sup> He went on: “All new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications.”<sup>34</sup>

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28. Michael B. Rappaport, *Why Non-Originialism Does Not Justify Departing from the Original Meaning of the Recess Appointments Clause*, 38 HARV. J.L. & PUB. POL’Y 889, 893 n.8 (2014).
  29. Richard H. Fallon, Jr., *The Many and Varied Roles of History in Constitutional Adjudication*, 90 NOTRE DAME L. REV. 1753, 1774 (2015).
  30. Aziz Z. Huq, *The Negotiated Structural Constitution*, 114 COLUM. L. REV. 1595, 1663 n.362 (2014).
  31. Curtis A. Bradley & Neil S. Siegel, *After Recess: Historical Practice, Textual Ambiguity, and Constitutional Adverse Possession*, 2014 SUP. CT. REV. 1, 29.
  32. Jack Rakove, *Tone Deaf to the Past: More Qualms About Public Meaning Originalism*, 84 FORDHAM L. REV. 969, 975-76, 976 n.28 (2015).
  33. THE FEDERALIST NO. 37 (James Madison), *supra* note 5, at 233; *see id.* at 239.
  34. *Id.* at 236.

There are two core ideas here. One is that legal texts, including the Constitution, do not have a fully determined meaning. That idea would have been familiar to readers of Enlightenment philosophers such as John Locke and Thomas Hobbes.<sup>35</sup> The other, and perhaps Madison's more important contribution, was that these indeterminacies could and would be settled by subsequent practice.<sup>36</sup> Madison returned to and developed these ideas repeatedly over time. While *Federalist No. 37* may mark the beginning of Madison's discussion of liquidation,<sup>37</sup> he continued to discuss and elaborate on the concept over the course of his life—in public and private, in the abstract and concretely.

In 1789, then-Representative Madison invoked the concept of settlement by practice during congressional debates about the President's power to remove executive officers. As Congress began to create and structure the first executive departments, it had to decide whether to make provision for the tenure of the officers in those departments. It quickly became clear that there were at least four competing positions about the scope of executive power, and Congress had to choose from among them.<sup>38</sup> Madison warned his colleagues that their deliberations had constitutional consequences: Their decision would stand as a “permanent exposition of the constitution,” and therefore must be approached with great care.<sup>39</sup>

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35. See, e.g., HANNAH DAWSON, LOCKE, LANGUAGE AND EARLY-MODERN PHILOSOPHY 210–38 (2007) (discussing Locke); GARY L. McDOWELL, THE LANGUAGE OF THE LAW AND THE FOUNDATIONS OF AMERICAN CONSTITUTIONALISM 76–77 (2010) (discussing Hobbes); Jack N. Rakove, *Joe the Ploughman Reads the Constitution, or, The Poverty of Public Meaning Originalism*, 48 SAN DIEGO L. REV. 575, 593–95 (2011) (discussing Locke).
36. Cf. McDowell, *supra* note 35, at 75–76 (suggesting that Hobbes would be hostile to customary law).
37. I have found one earlier reference by Madison to “settl[ing]” the “meaning” of a provision of the Articles of Confederation, but without much detail. See James Madison, Notes on Debates (1783), <https://perma.cc/S4AE-FY44>, reprinted in 6 THE PAPERS OF JAMES MADISON 35 (William T. Hutchinson & William M.E. Rachal eds., 1969). Citations to Madison's letters and other writings are to the University of Virginia's Founders Early Access project. See *Founders Early Access*, ROTUNDA, <https://perma.cc/3WP6-V363> (archived Oct. 7, 2018). For a discussion of the provenance of Founders Early Access documents, see Methodological Appendix below.
38. See Edward S. Corwin, *Tenure of Office and the Removal Power Under the Constitution*, 27 COLUM. L. REV. 353, 361 (1927) (describing the four camps); see also Saikrishna Prakash, *New Light on the Decision of 1789*, 91 CORNELL L. REV. 1021, 1034–42 (2006) (same). There is a historical debate about whether Congress in fact settled on only one of those four possibilities or split between two candidates. Compare *Myers v. United States*, 272 U.S. 52, 284–85 (1926) (Brandeis, J., dissenting) (arguing for ambiguity), and Corwin, *supra*, at 360–69 (same), with Prakash, *supra* (arguing that Congress settled on an executive power of removal).
39. See *The Congressional Register*, *supra* note 4, at 921 (statement of Rep. Madison); *The Daily Advertiser*, *supra* note 4, at 895 (statement of Rep. Madison). For more on the importance of this episode of constitutional interpretation, see Jonathan Gienapp, *footnote continued on next page*

Madison's concern with the establishment of constitutional precedent continued during subsequent legislative debates.<sup>40</sup> He repeatedly intervened when his colleagues were tempted to spend money for ends that Madison thought sympathetic but beyond federal power. Warning them against "establishing a dangerous precedent,"<sup>41</sup> he took the lead in revising these bills to bring them in line with his own view of the Constitution, and thus to avoid allowing an incorrect meaning of the Constitution to be liquidated and settled as precedent.<sup>42</sup>

But Madison's most controversial invocation of the concept of liquidation came later, after he assumed the presidency.<sup>43</sup> In 1791, Representative Madison had opposed the constitutionality of the first national bank, but it was ultimately enacted over his objections and persisted for twenty years.<sup>44</sup> In 1815 and 1816, now-President Madison was presented with bills chartering a new bank. He concluded that his earlier constitutional doubts had now been "precluded in my judgment by repeated recognitions under varied circumstances of the validity of such an institution in acts of the legislative, executive, and judicial branches of the Government, accompanied by indications, in different modes, of a concurrence of the general will of the nation."<sup>45</sup> He ultimately signed the new charter into law.<sup>46</sup>

Madison then continued to adhere to and explain these views even once he was out of office and retired from government service.<sup>47</sup> That was the context in which he wrote to Judge Spencer Roane that constitutional indeterminacy

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*Making Constitutional Meaning: The Removal Debate and the Birth of Constitutional Essentialism*, 35 J. EARLY REPUBLIC 375 (2015). See also NOAH FELDMAN, THE THREE LIVES OF JAMES MADISON: GENIUS, PARTISAN, PRESIDENT 264-67 (2017).

40. See *infra* Part II.C.

41. 4 ANNALS OF CONG. 170 (1794).

42. See *infra* notes 181-96 and accompanying text.

43. For a more extended discussion of liquidation and the national bank, see Part II.C.1 below.

44. See 2 ANNALS OF CONG. 1954, 1960 (1791); see also Act of Feb. 25, 1791, ch. 10, § 3, 1 Stat. 191, 192 (providing that the bank was to expire in 1811). There are two different printings of the first two volumes of the *Annals of Congress*, with different pagination. See William Baude & Jud Campbell, Early American Constitutional History: A Source Guide 11-12 (Oct. 31, 2018) (unpublished manuscript), <https://perma.cc/326P-Q9V7>. All citations in this Article are to the "History of Congress" printing.

45. James Madison, Veto Message (Jan. 30, 1815), in 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897, at 555, 555 (James D. Richardson ed., Washington, Gov't Printing Office 1897) [hereinafter Madison 1815 Veto Message]; see also 28 ANNALS OF CONG. 189-91 (1815) (recording Madison's veto message).

46. See Act of Apr. 10, 1816, ch. 44, 3 Stat. 266.

47. Madison retired after completing his second presidential term in 1817. See BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, 1774-2005, H.R. DOC. NO. 108-222, at 1488-89 (2005).

“might require a regular course of practice to liquidate and settle the meaning” of a given term,<sup>48</sup> and wrote similar accounts to many others.<sup>49</sup>

And most notably, Madison continued to adhere to his stance on liquidation and the bank even as the political winds began to change once again. In 1832, President Jackson vetoed a bill rechartering the bank on the grounds that it had been unconstitutional all along, thus vindicating Representative Madison in 1791 as against President Madison in 1816.<sup>50</sup> But Madison did not treat this incident as vindication. He subsequently received a letter from a group of folks in Ohio (“[t]he friends of free principles”) who planned a banquet to celebrate the death of the bank (“the emancipation of their country from the thralldom of the United States Bank”).<sup>51</sup> Figuring him as an “uncompromising enemy” of the unconstitutional bank, the group asked him to be an honored guest at their public dinner, or at least to send along “an appropriate sentiment to be given in your name.”<sup>52</sup> Madison respectfully declined, reminding them that even now, he retained his “convict[ion] heretofore officially, and otherwise expressed, that in expounding the Constitution, in the case of the Bank, the decision of the Nation had been sufficiently manifested, to over-rule individual opinions,” even including his own.<sup>53</sup> Hence even when opposing the bank had become popular,<sup>54</sup> Madison

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48. Letter from James Madison to Spencer Roane (Sept. 2, 1819), <https://perma.cc/5KHF-6ZAL>, *reprinted in* 1 THE PAPERS OF JAMES MADISON: RETIREMENT SERIES 500, 502 (David B. Mattern et al. eds., 2009).
49. *See, e.g.*, Letter from James Madison to Nicholas P. Trist (Dec. 1831), <https://perma.cc/DD2Y-EWYS>, *reprinted in* 9 THE WRITINGS OF JAMES MADISON 471 (Gaillard Hunt ed., 1910); *see also infra* Part II.B (citing many of Madison’s writings). Indeed, in one of these letters Madison repeated a formulation very similar to that in *Federalist No. 37*. *See* Letter from James Madison to Thomas S. Grimke (Jan. 15, 1828), <https://perma.cc/5AY2-KZZQ>, *reprinted in* 9 THE WRITINGS OF JAMES MADISON, *supra*, at 298, 299 (explaining that “new terms” are “always liable more or less till made technical by practice, to discordant interpretations”).
50. *See* Andrew Jackson, Veto Message (July 10, 1832), *in* 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897, *supra* note 45, at 576, 576 [hereinafter Jackson 1832 Veto Message].
51. Letter from Moses Dawson and Others to James Madison (Feb. 1, 1836), <https://perma.cc/6DGW-BUUM>.
52. *Id.*
53. Letter from James Madison to Moses Dawson and Others (Feb. 20, 1836), <https://perma.cc/H42C-55A6>, *reprinted in* 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON, FOURTH PRESIDENT OF THE UNITED STATES 427, 427 (Philadelphia, J.B. Lippincott & Co. 1865) [hereinafter LETTERS AND OTHER WRITINGS OF JAMES MADISON].
54. *See generally* Mark A. Graber, *Antebellum Perspectives on Free Speech*, 10 W.M. & MARY BILL RTS. J. 779, 807-08 (2002) (reviewing MICHAEL KENT CURTIS, FREE SPEECH, “THE PEOPLE’S DARLING PRIVILEGE”: STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY (2000)) (noting the political opposition to the bank after 1828).

did not return to his original, “individual opinion[.]”<sup>55</sup> Liquidation appears to have been a principled stance for him, not purely political pragmatism.

The rest of this Part will develop Madison’s theory and apply it to these incidents in somewhat greater detail. But first, one final note on terminology: The word “liquidate” may seem like an odd term for this concept. *Federalist No. 37* suggests taking amorphous or unformed meanings and giving them substance, structure, and boundaries.<sup>56</sup> So why “liquidate” rather than “solidify”?<sup>57</sup>

Etymologically, the term derives from the Latin word “*liquidus*” which could mean—among other things—“clear” or “evident.”<sup>58</sup> Since at least the seventeenth century, “liquidate” has been used to mean “[t]o make clear or plain (something obscure or confused); to render unambiguous; to settle (differences, disputes).”<sup>59</sup> Examples of its use include Bishop John Hacket’s description of John Williams, the sometime Keeper of the Great Seal of England, as having “discours’d with that depth of Learning, yet liquidating that depth with such facility of opening it,”<sup>60</sup> and Jeremy Bentham’s explanation that the “pains and pleasures” of the afterlife “are matter only of expectation” and thus “altogether unliquidated in point of quality.”<sup>61</sup> So to “liquidate” the meaning of a term is to “clarify” or “settle” it. This may also relate to other definitions that will be more familiar to today’s financially minded scholars: “[t]o determine and apportion by agreement or by litigation; to reduce to order, set out clearly (accounts)”<sup>62</sup> or “[t]o clear off, pay (a debt).”<sup>63</sup>

Whatever its origins, the term probably still sounds bizarre to modern readers, but the bizarre may actually be more perspicuous than the familiar. For instance, we could instead refer to “settlement” or “fixation” of meaning,

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55. See Letter from James Madison to Moses Dawson and Others, *supra* note 53, at 427.

56. See *supra* text accompanying notes 33-36.

57. Akhil Amar uses “clarified and concretized.” See AKHIL REED AMAR, AMERICA’S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 309 (2012).

58. See *Liquidus*, OXFORD REFERENCE: POCKET OXFORD LATIN DICTIONARY, <https://perma.cc/D2BM-VKZB> (archived Dec. 20, 2018) (defining “*liquidus*” as “liquid, fluid; clear; manifest; smooth; melodious; evident”); see also *Liquidate*, OXFORD ENG. DICTIONARY, <https://perma.cc/N56H-U4KQ> (archived Dec. 20, 2018) (noting the Latin origins of the word).

59. See *Liquidate*, *supra* note 58 (definition 1.a).

60. JOHN HACKET, SCRINIA RESERATA: A MEMORIAL OFFER'D TO THE GREAT DESERVINGS OF JOHN WILLIAMS, D.D. 19 (London, Edw. Jones 1692).

61. JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 27 (Clarendon Press 1907) (1789). Probably coincidentally, Hacket was also talking about a discourse on the afterlife. See HACKET, *supra* note 60, at 19.

62. *Liquidate*, *supra* note 58 (definition 2).

63. *Id.* (definition 3).

but it would be less clear that we were referring specifically to a technical Founding-era concept because those terms are widely used today for other interpretive concepts.<sup>64</sup> As was said of a different coinage, the archaism of “liquidation” makes it “ugly enough to be safe from kidnappers.”<sup>65</sup>

## B. Theory

So how exactly does liquidation work? The concept is spread throughout various passages of Madison’s writing, especially letters he wrote late in the course of his career explaining his own constitutional views. It is never quite systematically explained in a single place.

Many observers of Madison have suggested that he changed his constitutional views over time, or that his actions in office did not reflect a consistent constitutional theory.<sup>66</sup> But that inference is not necessary and may not be right. Three key features of liquidation recur throughout Madison’s writings, and taken together, they do mark a generally coherent theory, one that traces a steady path from *Federalist No. 37* to his twilight at Montpelier. Whatever Madison’s true motivations were, the point is that we can charitably reconstruct his theory of liquidation in a way that demonstrates great constitutional logic.<sup>67</sup>

That logic centered around three things: an indeterminacy, a course of deliberate practice, and settlement.

### 1. Indeterminacy

The first premise of liquidation is an indeterminacy in the meaning of the Constitution. If first-order interpretive principles make the meaning clear in a

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64. See, e.g., RANDY J. KOZEL, SETTLED VERSUS RIGHT: A THEORY OF PRECEDENT (2017); Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1 (2015).

65. Cf. 5 COLLECTED PAPERS OF CHARLES SANDERS PEIRCE 276-77 (Charles Hartshorne & Paul Weiss eds., 1934) (coining “pragmaticism”).

66. See, e.g., Ream, *supra* note 27, at 1657 (suggesting a “shift” and an “important evolution” in Madison’s thinking); see also *id.* at 1648 (“Madison changed his views on what liquidation might entail . . . ”).

67. There is a longstanding historical debate about whether “Madison’s thinking fundamentally changed in the decades after ratification” or whether it was marked by “continuity.” See Jonathan Gienapp, *How to Maintain a Constitution: The Virginia and Kentucky Resolutions and James Madison’s Struggle with the Problem of Constitutional Maintenance*, in NULLIFICATION AND SECESSION IN MODERN CONSTITUTIONAL THOUGHT 53, 55 n.6 (Sanford Levinson ed., 2016) (citing many sources). I do not take a position on the historical question, except to the point of emphasizing that there is an understanding of liquidation that is consistent with continuity from the Founding onward.

given context, there is no need to resort to liquidation. This is the beginning of *Federalist No. 37*'s discussion of liquidation, which stresses that liquidation is necessary when and because a new legal provision is "more or less obscure and equivocal."<sup>68</sup>

Similarly, Madison repeatedly described liquidation as needed because "difficulties and differences of opinion might occasionally arise, in expounding terms and phrases necessarily used in [the Constitution]"<sup>69</sup> and as arising in cases of "doubtful or contested meanings."<sup>70</sup>

What kind of indeterminacy? Modern technical vocabulary distinguishes between two kinds of indeterminacy: ambiguity and vagueness.<sup>71</sup> A term is ambiguous if "it has more than one sense," like the word "cool," which can mean either "low temperature" or "stylish."<sup>72</sup> A term is vague if it has one sense with borderline cases, like the word "tall," which leaves us with no precise number to differentiate those who are tall from those who are not.<sup>73</sup> One might imagine liquidation extending only to one of these kinds of indeterminacy,<sup>74</sup> but it seems that liquidation extended to *both* ambiguity and vagueness. Indeed, we might even equate Madison's "equivocal"<sup>75</sup> to "ambiguous" and his "obscure"<sup>76</sup> to "vague."

Madison included vagueness when he wrote that "[a]ll new laws" have a certain degree of indeterminacy.<sup>77</sup> Even if the law has a clear core, which it often does, there will always be edge cases. (This also means that a constitutional provision is not categorically clear or indeterminate in the abstract; it depends on the question.) For example, it might be very clear that Congress has the power to build lighthouses, but less clear whether it can

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68. THE FEDERALIST NO. 37 (James Madison), *supra* note 5, at 236.

69. Letter from James Madison to Spencer Roane, *supra* note 48, at 502.

70. Letter from James Madison to Martin L. Hurlbut (May 1830), <https://perma.cc/X5D7-LH72>, reprinted in 9 THE WRITINGS OF JAMES MADISON, *supra* note 49, at 370, 372.

71. See Lawrence B. Solum, *Essay, The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 97-98 (2010); see also Jill C. Anderson, *Misreading Like a Lawyer: Cognitive Bias in Statutory Interpretation*, 127 HARV. L. REV. 1521, 1534-35 (2014) (explaining this distinction).

72. Solum, *supra* note 71, at 97.

73. See *id.* at 98.

74. See, e.g., Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as It Sounds*, 22 CONST. COMMENT. 257, 269 (2005) ("Professor Nelson's proposal that initial practice can provide a precedent to fix original meaning that was indeterminate when enacted is more plausible when dealing with ambiguity than vagueness.").

75. THE FEDERALIST NO. 37 (James Madison), *supra* note 5, at 236.

76. *Id.*

77. *Id.*

create a university or finance a voyage to Baffin's Bay.<sup>78</sup> *Federalist No. 37* thus anticipated what we might now call open texture—the idea that “[n]othing can eliminate this duality of a core of certainty and a penumbra of doubt,” which “imparts to all rules a fringe of vagueness or ‘open texture.’”<sup>79</sup>

Madison also included ambiguity, most plainly in his essay *Helvidius Number II*, where he discussed the possibility of ambiguity in separation of powers disputes, an ambiguity that “supposes the constitution to have given the power to one department only; and the doubt to be to which it has been given.”<sup>80</sup> He similarly described “the exposition of the Constitution” as a way to settle which of “[f]our constructive doctrines” was the best account of the power to remove federal officers.<sup>81</sup> These are both descriptions of ambiguity, not vagueness.

Madison also suggested that such indeterminacies were particularly likely in the Constitution’s federalism provisions—“those which divide legislation between the General and local Governments.”<sup>82</sup> Of course that includes the debate over the constitutionality of a national bank, which was foremost a debate about the scope of Congress’s enumerated powers, and hence a debate about federalism. And indeed, the bank debates are what prompted many of Madison’s comments about liquidation.

The indeterminacy premise also implies that there are limits to the domain of liquidation. Not everything is up for grabs. Madison thus repeatedly said that while the Constitution could be “expounded,” it could “not [be] controvuled or varied by the subordinate authority of a legislature.”<sup>83</sup> He criticized the “fallacy . . . in confounding a question whether precedents could expound a

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78. See DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789-1801, at 69-72 (1997).

79. H.L.A. HART, THE CONCEPT OF LAW 123 (3d ed. 2012). For further discussion of open texture, see Frederick Schauer, *A Critical Guide to Vehicles in the Park*, 83 N.Y.U. L. REV. 1109, 1124-29, 1126 n.62 (2008); and Lawrence B. Solum, *Intellectual History as Constitutional Theory*, 101 VA. L. REV. 1111, 1120-22, 1121 n.20 (2015).

80. See James Madison, *Helvidius Number II* (1793), in THE PACIFICUS-HELVIDIUS DEBATES OF 1793-1794: TOWARD THE COMPLETION OF THE AMERICAN FOUNDING 65, 68-69 (Morton J. Frisch ed., 2007).

81. See Letter from James Madison to Samuel Johnston (June 21, 1789), <https://perma.cc/KL9R-FPX3>, reprinted in 12 THE PAPERS OF JAMES MADISON 249, 250 (Charles F. Hobson et al. eds., 1979)); see also *supra* notes 38-39 and accompanying text (discussing the congressional debate on this subject). But see Gienapp, *supra* note 39, at 392 (arguing that the participants in the removal debates “did not think that they were operating in a ‘construction zone,’ nor did they think that they were in that zone only because constitutional meaning had proved indeterminate”).

82. Letter from James Madison to Spencer Roane, *supra* note 48, at 502.

83. Letter from James Madison to Charles J. Ingersoll (June 25, 1831), <https://perma.cc/6ZNT-BY5C>, reprinted in 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON, *supra* note 53, at 183, 184.

Constitution, with a question whether they could alter a Constitution.”<sup>84</sup> Similarly, despite licensing the settlement of indeterminacy by practice, Madison condemned “constructive innovations”<sup>85</sup> of the Constitution or “expounding it with a laxity, which may vary its essential character.”<sup>86</sup> Liquidation was permissible within the extent of indeterminacy, but not beyond.

## 2. Course of deliberate practice

Once a constitutional provision was found indeterminate, practice could fill the gap in meaning. But it was not enough that there be a single act in the face of indeterminacy, which would make the Constitution effectively unconstraining whenever it was ambiguous. Rather, Madison repeatedly wrote that there must be a “course” of practice.

What defined such a course? Madison used many similar formulations: a “regular course of practice”;<sup>87</sup> a “course of practice of sufficient uniformity and duration”;<sup>88</sup> a “continued course of practical sanctions”;<sup>89</sup> “reiterated sanctions . . . thro’ a long period of time”;<sup>90</sup> a “settled practice, enlightened by occurring cases”;<sup>91</sup> a “course of authoritative, deliberate and continued decisions”;<sup>92</sup> or a “course of authoritative expositions sufficiently deliberate, uniform, and settled.”<sup>93</sup>

Sometimes his descriptions of an example of liquidation were even more emphatic: “that which has the uniform sanction of successive Legislative bodies, through a period of years and under the varied ascendancy of parties”;<sup>94</sup>

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84. Letter from James Madison to Nicholas P. Trist, *supra* note 49, at 477.

85. Letter from James Madison to John G. Jackson (Dec. 28, 1821), <https://perma.cc/LT6Q-Z4UG>, reprinted in 2 THE PAPERS OF JAMES MADISON: RETIREMENT SERIES 441, 442 (David B. Mattern et al. eds., 2013).

86. Letter from James Madison to Spencer Roane, *supra* note 48, at 503.

87. *Id.* at 502.

88. Letter from James Madison to Martin L. Hurlbut, *supra* note 70, at 372.

89. Letter from James Madison to Reynolds Chapman (Jan. 6, 1831), <https://perma.cc/V6GZ-RULY>, reprinted in 9 THE WRITINGS OF JAMES MADISON, *supra* note 49, at 429, 434.

90. Letter from James Madison to Lafayette (Nov. 1826), <https://perma.cc/C5ZE-GKKD>, reprinted in 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON, *supra* note 53, at 538, 542.

91. Letter from James Madison to Reynolds Chapman, *supra* note 89, at 434.

92. Letter from James Madison to Nicholas P. Trist, *supra* note 49, at 477.

93. Letter from James Madison to Charles E. Haynes (Feb. 25, 1831), <https://perma.cc/UR6T-W4YV>, reprinted in 9 THE WRITINGS OF JAMES MADISON, *supra* note 49, at 442, 443.

94. Letter from James Madison to Charles J. Ingersoll, *supra* note 83, at 186.

“reiterated and deliberate sanctions of *every* branch of the Govt: to all which had been superadded many positive concurrences of the State Govts and implied ones by the people at large”,<sup>95</sup> or “the uniform & practical sanction given . . . by every . . . Branch of the Genl. Govt. for nearly 40 years; with a concurrence or acquiescence of every State Govt. in all its Branches, throughout the same period; and it may be added thro’ all the vicissitudes of party, which marked the period.”<sup>96</sup> You get the idea: A practice had to happen repeatedly and consistently—to be neither a one-off nor a continually contested question.

And it was not enough for Madison that the practice be one of sheer political will; it must also be one of constitutional interpretation. For instance, in a letter explaining why the course of practice in favor of the bank’s constitutionality had not been “broken by the negative on a Bank bill” in 1811,<sup>97</sup> Madison explained that the outcome in that case (a split Senate leading to a tiebreaking vote against the bank by Vice President George Clinton)<sup>98</sup> was

the result of a Union of a number of members who objected to the expediency only of the Bill, with those wh[o] opposed it on constitutional grounds. On a naked question of Constitutionality, it was understood that there would have been a majority who made no objection on that score.<sup>99</sup>

Similarly, Madison specified that the practice must be “deliberate”<sup>100</sup> or the result of “a subject of solemn discussion in Congress.”<sup>101</sup> In an extended analogy between judicial precedent and liquidation (there called “legislative precedents”), Madison described judicial precedents as binding “when formed on due discussion and consideration,” being “an exposition of the law publicly made” and “deliberately sanctioned by reviews and repetitions,” and argued that

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95. Letter from James Madison to James Monroe (Dec. 27, 1817), <https://perma.cc/5ZQP-9DK8>, reprinted in 1 THE PAPERS OF JAMES MADISON: RETIREMENT SERIES, *supra* note 48, at 190, 190-91.

96. Letter from James Madison to Joseph C. Cabell (Sept. 18, 1828), <https://perma.cc/NR59-VRJU>, reprinted in 9 THE WRITINGS OF JAMES MADISON, *supra* note 49, at 316, 333; *see also id.* at 334 (describing as a “sound and safe test” of the Constitution’s meaning a “uniform interpretation by all the successive authorities under it, commencing with its birth, and continued for a long period, thro’ the varied state of political contests”).

97. *See* Letter from James Madison to George McDuffie (May 8, 1830), <https://perma.cc/PN4B-MGL5>, reprinted in 9 THE WRITINGS OF JAMES MADISON, *supra* note 49, at 364, 365.

98. *See infra* note 135 and accompanying text.

99. Letter from James Madison to George McDuffie, *supra* note 97, at 365 (alteration in original); *see also* Letter from James Madison to Charles J. Ingersoll, *supra* note 83, at 187 (“On a simple question of constitutionality, there was a decided majority in favor of it.”).

100. Letter from James Madison to Charles E. Haynes, *supra* note 93, at 443; Letter from James Madison to Nicholas P. Trist, *supra* note 49, at 477.

101. Letter from James Madison to James Monroe, *supra* note 95, at 190.

legislative precedents were analogous.<sup>102</sup> Thus, he said elsewhere, “Legislative precedents” were “entitled to little respect” when they were “without full examination & deliberation.”<sup>103</sup> As we will see, the next question was whether that deliberation had spanned the branches or otherwise resolved individual disagreements.

### 3. Settlement

Closely related to the idea of a course of deliberate practice was the question of when that practice had really *stuck*—what differentiated an ongoing constitutional controversy from one that had become liquidated.

Under Madison’s view, the course of deliberate practice became a binding one only once it culminated in some kind of settlement. That is why Madison sometimes described such practices as reaching “sufficient uniformity”<sup>104</sup> or being “settled.”<sup>105</sup> So long as the practice was an ongoing battle between two competing interpretations, even if one had the upper hand in reality, that did not mean that the course of practice had become binding. Rather, liquidation only occurred when that practice took a particular form, one that justified calling an end to the dispute and “overruling individual judgments”<sup>106</sup> or containing “an authority sufficient to overrule individual constructions.”<sup>107</sup> This kind of authority had two elements: acquiescence and public sanction.

*Acquiescence*: The key idea of acquiescence was that the losers in some sense gave up.<sup>108</sup> This might mean bipartisan acceptance. For instance, Madison described the requisite practice as “that which has the uniform sanction of successive Legislative bodies, through a period of years *and under the varied*

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102. See Letter from James Madison to Charles J. Ingersoll, *supra* note 83, at 183-84.

103. Letter from James Madison to Spencer Roane (May 6, 1821), <https://perma.cc/96ES-VULG>, reprinted in 2 THE PAPERS OF JAMES MADISON: RETIREMENT SERIES, *supra* note 85, at 317, 320.

104. Letter from James Madison to Martin L. Hurlbut, *supra* note 70, at 372.

105. Letter from James Madison to Reynolds Chapman, *supra* note 89, at 434.

106. Letter from James Madison to George McDuffie, *supra* note 97, at 365.

107. Letter from James Madison to Reynolds Chapman, *supra* note 89, at 434.

108. See Mark A. Graber, *Settling the West: The Annexation of Texas, The Louisiana Purchase, and Bush v. Gore*, in THE LOUISIANA PURCHASE AND AMERICAN EXPANSION, 1803-1898, at 83, 99-103 (Sanford Levinson & Bartholomew H. Sparrow eds., 2005) (“The constitutional status of Texas was settled when opponents of annexation abandoned the fight.”). This idea has also been harnessed by Bruce Ackerman, see BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 288-90 (1991) [hereinafter ACKERMAN, FOUNDATIONS]; BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 19-21 (1998) [hereinafter ACKERMAN, TRANSFORMATIONS], though his theory differs in important respects from liquidation, see *infra* text accompanying notes 396-99.

*ascendancy of parties.*<sup>109</sup> Or it might be institutional. For instance, we might look for whether other branches had acquiesced in a particular branch's interpretation, as opposed to that branch simply reasserting its own contested views. The strongest cases of acquiescence appeared to combine the two. Madison discussed practices that had adhered "under every administration preceding mine, with the general concurrence of the State authorities,"<sup>110</sup> or that had been followed "by every ... Branch of the Genl. Govt., by "every State Govt. in all its Branches," and "thro' all the vicissitudes of party."<sup>111</sup>

Either way, acquiescence distinguishes between sheer assertion and working agreement. Note that this means that liquidation ultimately depends on what is settled, not on what *ought to be* settled. Even if one thinks that one side has the better argument about a constitutional ambiguity, the question is not yet liquidated if both sides continue to stick to their guns, however unreasonably. The mechanics of liquidation thus track the actual amount of polarization among parties and institutions.

*Public sanction:* This brings us to the second aspect of settlement: Madison also described it as something that involved not just government officials but the public, too. A liquidated practice would "carry with it the public sanction."<sup>112</sup> It would reflect "the acquiescence of the people at large"<sup>113</sup> or "evidence of the Public Will."<sup>114</sup> Or as Madison put it in declining to celebrate the death of the national bank: "[T]he decision of the Nation had been sufficiently manifested, to over-rule individual opinions, and to sanction the power exercised, in establishing such an institution ...."<sup>115</sup>

Madison traced this requirement back to the principles of popular sovereignty that animated the Constitution in the first place: Liquidation

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109. Letter from James Madison to Charles J. Ingersoll, *supra* note 83, at 186 (emphasis added).

110. See Letter from James Madison to Lafayette, *supra* note 90, at 542.

111. Letter from James Madison to Joseph C. Cabell, *supra* note 96, at 333. While parts of these passages were omitted from some published collections of Madison's letters, they are visible in the original manuscript in the Library of Congress. See *James Madison to Joseph C. Cabell, September 18, 1828*, LIBR. CONGRESS, <https://perma.cc/4HYM-4TLR> (archived Oct. 5, 2018). For an explanation of the different versions of Madison's letters, see Methodological Appendix below.

112. Letter from James Madison to Martin L. Hurlbut, *supra* note 70, at 372.

113. Letter from James Madison to Lafayette, *supra* note 90, at 542.

114. Letter from James Madison to Charles E. Haynes, *supra* note 93, at 443.

115. Letter from James Madison to Moses Dawson and Others, *supra* note 53, at 427 (emphasis added); see *supra* text accompanying notes 50-53; see also Letter from James Madison to Nicholas P. Trist, *supra* note 49, at 477 ("[I]n the case of a Constitution as of a law a course of authoritative, deliberate and continued decisions, such as the Bank could plead, was an evidence of the public judgment, necessarily superseding individual opinions.").

required “solemnities & repetitions, sufficient to imply a concurrence of the judgment & the will of those who having granted the power have the ultimate right to explain the grant.”<sup>116</sup> A liquidated practice was “a construction put on the Constitution by the Nation, which having made it had the supreme right to declare its meaning.”<sup>117</sup> In other words, the people’s role as the ultimate source of binding constitutional norms made them the ultimate source of constructing its meaning as well. (Though, to be sure, this expression of popular sovereignty was presumably lesser in stature than the formal enactment of constitutional text, which is why it could “expound” but not “alter.”)<sup>118</sup>

These two principles—official acquiescence and public sanction—were intertwined. As Larry Kramer has argued, the “first principle of republicanism, as Madison understood it,” was that public opinion “not only would, but *should* control the course of government”—but only once it had been “settled” and “fixed.”<sup>119</sup> Madison saw the constitutional structure as a way to harness this republican principle. Federalism and the separation of powers resulted in a multiplicity of governments and branches, all (but the judiciary) ultimately accountable to the people.<sup>120</sup> Each group of officials would respond to the actions of the others in part by appealing to the people, whose judgment was ultimately the most important. “And in this way, separation of powers and federalism became instrumentalities for generating a robust public discussion, initiated and led by political leaders acting for their own reasons, through which the ‘reason of the society’ could be developed and ‘the people themselves’ retain control.”<sup>121</sup>

This account of Madison’s republicanism explains why liquidation might ultimately look to public sanction. On Madison’s model, the people had already provided a set of direct rules for governance in the clear text of the Constitution, which had been ratified by the people and therefore remained binding until they altered or amended it. Interstitial interpretations or questions left unresolved by the text could be answered by any officer into

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116. Letter from James Madison to Spencer Roane, *supra* note 103, at 320.

117. Letter from James Madison to Lafayette, *supra* note 90, at 542.

118. See Letter from James Madison to Nicholas P. Trist, *supra* note 49, at 477.

119. Larry D. Kramer, Lecture, “*The Interest of the Man*: James Madison, Popular Constitutionalism, and the Theory of Deliberative Democracy, 41 VAL. U. L. REV. 697, 717-18 (2006).

120. See *id.* at 734-35; see also Josh Chafetz, *Multiplicity in Federalism and the Separation of Powers*, 120 YALE L.J. 1084, 1122-28 (2011) (reviewing ALISON L. LACROIX, THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM (2010)).

121. Kramer, *supra* note 119, at 737.

whose jurisdiction they fell.<sup>122</sup> But those answers would become binding constitutional law—that is, would become liquidated—only once indirectly endorsed by the people who had the authority to promulgate binding constitutional norms in the first place. And because the popular endorsement was indirect and mediated, it was logical to treat it as a mere construction of the document, rather than an amendment.

### C. Examining Examples

As sketched above, Madison implemented the principles of liquidation throughout his public life, most thoroughly in debates over the constitutionality of the national bank,<sup>123</sup> and also in congressional debates over federal spending.

#### 1. The bank

Madison's participation in the constitutional controversy over the bank spanned three phases: his time in Congress, his presidency, and his correspondence in retirement.

Madison first confronted the bank problem in 1791, when as a representative in Congress he opposed the constitutionality of the first bill to charter it.<sup>124</sup> The constitutionality of the bank ultimately turned on whether it was "necessary and proper" to Congress's powers to tax and borrow money.<sup>125</sup> Madison thought not: To satisfy the Constitution, the bank must be both "necessary to the end, and incident to the nature" of the underlying enumerated

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122. See Letter from James Madison to Unknown Recipient (Dec. 1834), <https://perma.cc/JP5S-RNGA>, reprinted in 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON, *supra* note 53, at 349, 349 ("As the Legislative, Executive & Judicial Departments of the U.S. are co-ordinate, and each equally bound to support the Constitution, it follows that each must in the exercise of its functions, be guided by the text of the Constitution according to its own interpretation of it....").

123. For a succinct summary, see Richard S. Arnold, *Madison Lecture, How James Madison Interpreted the Constitution*, 72 N.Y.U. L. REV. 267, 286-90 (1997) (calling the bank controversy "[t]he most famous instance of Madison's use of the concept of precedent"). For an even more succinct one, see Nelson, *Stare Decisis*, *supra* note 26, at 12 n.33.

124. See 2 ANNALS OF CONG. 1894-902 (1791) (statement of Rep. Madison).

125. See *id.* at 1896-98; see also U.S. CONST. art. I, § 8, cl. 1 (giving Congress the power to "lay and collect Taxes"); *id.* art. I, § 8, cl. 2 (giving Congress the power to "borrow Money"); *id.* art. I, § 8, cl. 18 (giving Congress the power to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers").

powers, and the bank was neither.<sup>126</sup> He thought it depended on too tenuous a string of “remote” “implications” “linked together” and that the creation of a corporation was a “great and important power” which could not be implied or incidental.<sup>127</sup>

But Madison lost that debate, and the bank bill passed.<sup>128</sup> The constitutional question was meanwhile considered by President Washington, who was told that it was unconstitutional first by Attorney General Edmund Randolph and then by Secretary of State Thomas Jefferson as well.<sup>129</sup> Washington turned to Treasury Secretary Alexander Hamilton for a third opinion.<sup>130</sup> After receiving Hamilton’s defense of the bank, Washington ultimately concluded that it was constitutional and signed the bill.<sup>131</sup>

After the bank bill was enacted, Congress repeatedly passed other statutes that effectively reinforced its constitutionality.<sup>132</sup> But the bank’s charter was due to expire in 1811,<sup>133</sup> and by 1808, rumblings had begun about renewing the bank.<sup>134</sup> Thus began the second phase: James Madison was now President,

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126. See 2 ANNALS OF CONG. 1898-901 (1791) (statement of Rep. Madison).

127. See *id.* at 1899-900. For more on the latter point, see Baude, *supra* note 27, at 1749-55 (arguing that some powers are so “great” that if not granted explicitly by the Constitution, they ought not be implied). *But see* Robert J. Reinstein, *The Limits of Congressional Power*, 89 TEMP. L. REV. 1 (2016) (criticizing this theory).

128. See 2 ANNALS OF CONG. 1954, 1960 (1791).

129. See Opinion of Edmund Randolph, Attorney Gen. of the U.S. (Feb. 12, 1791), in LEGISLATIVE AND DOCUMENTARY HISTORY OF THE BANK OF THE UNITED STATES: INCLUDING THE ORIGINAL BANK OF NORTH AMERICA 86, 89 (M. St. Clair Clarke & D.A. Hall eds., Washington, Gales & Seaton 1832) [hereinafter HISTORY OF THE BANK]; Opinion of Thomas Jefferson, Sec’y of State (Feb. 15, 1791), in HISTORY OF THE BANK, *supra*, at 91, 91.

130. See Opinion of Alexander Hamilton on the Constitutionality of a National Bank (Feb. 23, 1791), in HISTORY OF THE BANK, *supra* note 129, at 95.

131. See S. JOURNAL, 1st Cong., 3d Sess. 282 (1791); Letter from George Washington to Alexander Hamilton (Feb. 23, 1791), <https://perma.cc/24F5-USLZ>, reprinted in 7 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES 452 (Dorothy Twohig ed., 1998) (recounting Washington’s discussions with Hamilton); *see also* Act of Feb. 25, 1791, ch. 10, 1 Stat. 191.

132. See HISTORY OF THE BANK, *supra* note 129, at 114 (collecting “supplementary act[s]” relating to the bank that were passed by Congress between 1791 and 1807); Gerard N. Magliocca, *Veto: The Jacksonian Revolution in Constitutional Law*, 78 NEB. L. REV. 205, 217-18 (1999) (noting that the “statutes authorizing the bank and bank-related matters” served as “repeated recognitions’ of the bank’s constitutionality”).

133. See Act of Feb. 25, 1791, § 3, 1 Stat. at 192.

134. See HISTORY OF THE BANK, *supra* note 129, at 115 (recounting the presentation in both the House and the Senate of the “memorial of the stockholders of the Bank of the United States, praying a renewal of their charter”).

giving opponents of the bank a friend in high places. In 1811, an attempt to renew the bank failed in the Senate when Vice President Clinton cast the tiebreaking vote against it.<sup>135</sup>

After financial troubles arising out of the War of 1812, Congress tried again, passing a new bank bill in 1815.<sup>136</sup> President Madison himself vetoed this one,<sup>137</sup> but the veto's reasoning is illuminating. When Madison had fought the bank in 1791, he had stressed both policy arguments and constitutional arguments.<sup>138</sup> In the message accompanying his 1815 veto, however, he explained that he was relying *only* on policy arguments. Why? Because of liquidation. As Madison put it, he was

[w]aiving the question of the constitutional authority of the Legislature to establish an incorporated bank as being precluded in my judgment by repeated recognitions under varied circumstances of the validity of such an institution in acts of the legislative, executive, and judicial branches of the Government, accompanied by indications, in different modes, of a concurrence of the general will of the nation.<sup>139</sup>

In other words, the bank's constitutionality had been liquidated by the previous course of practice.<sup>140</sup> And lest one think that the veto statement was cheap talk—a sort of departmentalist dictum, since Madison nonetheless

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135. See 22 ANNALS OF CONG. 329, 346-47 (1811). Then-Chief Judge Richard Arnold has mistakenly said that it was "Madison's Vice President, Elbridge Gerry," who cast the deciding vote, *see Arnold, supra* note 123, at 287, but Gerry didn't take office until 1813, after Clinton's death in 1812, *see BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, 1774-2005*, H.R. DOC. NO. 108-222, at 840 (2005) (Clinton); *id.* at 1113 (Gerry).

136. See 28 ANNALS OF CONG. 173, 176-77 (1815) (passage in the Senate); *id.* at 1043-45 (in the House); *see also* BRAY HAMMOND, BANKS AND POLITICS IN AMERICA: FROM THE REVOLUTION TO THE CIVIL WAR 227-31 (1957) (discussing the financial difficulties facing the United States between 1811 and 1815 and the concomitant desire for a national bank).

137. See Madison 1815 Veto Message, *supra* note 45; *see also* 28 ANNALS OF CONG. 189-91 (1815) (recording Madison's veto message).

138. See 2 ANNALS OF CONG. 1894-96 (1791) (statement of Rep. Madison) (elaborating on the "principal disadvantages" of the bank); *id.* at 1896-902 (making the constitutional argument).

139. Madison 1815 Veto Message, *supra* note 45, at 555; *see also* 28 ANNALS OF CONG. 189 (1815).

140. For an external perspective, see EDWARD McNALL BURNS, JAMES MADISON: PHILOSOPHER OF THE CONSTITUTION 133-34 (reprt. 1968) ("It is of course possible that the vital need for a Bank to rescue the country from the financial chaos of the War of 1812 aided [Madison] in making this discovery.").

vetoed the bill—Madison made good on his constitutional views a year later. In 1816 Congress passed a new bill at Madison’s encouragement<sup>141</sup> and he duly signed it,<sup>142</sup> further solidifying the constitutional settlement.

When the bank’s constitutionality was finally tested in the Supreme Court a few years later, that constitutional settlement framed the Court’s decision. In his opinion for the Court in *McCulloch v. Maryland*, Chief Justice Marshall began by announcing that “this can scarcely be considered as an open question.”<sup>143</sup> He noted that 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.”<sup>144</sup>

In this opening passage, Chief Justice Marshall’s opinion also hit the key elements of liquidation: indeterminacy, deliberation, and settlement.

*Indeterminacy:* Chief Justice Marshall acknowledged that such liquidation would not be dispositive if the unconstitutionality were clear (“a bold and daring usurpation”), but “a doubtful question, one on which human reason may pause,” could be “put at rest by the practice of the government” or at least “ought to receive a considerable impression from that practice.”<sup>145</sup>

*Deliberation:* The question “did not steal upon an unsuspecting legislature, and pass unobserved. Its principle was completely understood, and was opposed with equal zeal and ability.”<sup>146</sup>

*Settlement:* After extensive constitutional resistance, Chief Justice Marshall explained, the bill had gotten both Washington’s constitutional approval

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141. See 29 ANNALS OF CONG. 280-81 (1816) (passage in the Senate); *id.* at 1337, 1344 (in the House); James Madison, Seventh Annual Message (Dec. 5, 1815), in 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897, *supra* note 45, at 562, 564-66 (noting “the embarrassments arising from the want of an uniform national currency” and suggesting that if state banks are inadequate, “the probable operation of a national bank will merit consideration”); see also 29 ANNALS OF CONG. 494 (1816) (reporting bank bill from committee to respond to “that part of the President’s Message which relates to an Uniform National Currency”).

142. See H.R. JOURNAL, 14th Cong., 1st Sess. 627-28 (1816) (recording that the President had signed the bank bill); see also Act of Apr. 10, 1816, ch. 44, 3 Stat. 266.

143. 17 U.S. (4 Wheat.) 316, 401 (1819).

144. *Id.*

145. *Id.* Chief Justice Marshall also noted that the decision was one “of which the great principles of liberty are not concerned,” but rather one in which “the respective powers of those who are equally the representatives of the people, are to be adjusted.” *Id.* For a discussion of liquidation of individual rights provisions, see Part IV.A below.

146. *McCulloch*, 17 U.S. (4 Wheat.) at 402.

(“minds as pure and as intelligent as this country can boast”)<sup>147</sup> and had decades later earned Madison’s constitutional acquiescence (“those who were most prejudiced against the measure of its necessity”).<sup>148</sup>

The third phase was Madison’s retirement. In the years after *McCulloch*, Madison continued to discuss the bank’s constitutionality in terms of liquidation. (Indeed, the bulk of his writing on this topic seems to have been about the bank.) Madison continued to defend his views as a matter of interpretive principle. Just as he had implied in 1815,<sup>149</sup> he maintained that his views were a result of a consistent principle of liquidation. His “abstract opinion of the text of the Constitution is not changed,” he explained, but his “assent was given in pursuance of my early and unchanged opinion, that . . . a course of authoritative expositions sufficiently deliberate, uniform, and settled, was an evidence of the Public Will necessarily overruling individual opinions.”<sup>150</sup>

And indeed, the elements of liquidation seem to have been met not only from Chief Justice Marshall’s point of view, but even from Madison’s more skeptical point of view. First, the question was indeterminate. Madison had argued that the creation of the bank exceeded the implied powers reflected by the Necessary and Proper Clause,<sup>151</sup> but the principles he sketched out necessarily left quite a bit to constitutional construction.<sup>152</sup> Indeed, for all of Madison’s forceful condemnation of the bank in his 1791 speech in Congress, he also seemed to admit that the question was sufficiently indeterminate as to require such construction. He noted that “[t]he doctrine of implication is always a tender one.”<sup>153</sup> And he invoked canons of construction for “doubtful” and “controverted” cases.<sup>154</sup>

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147. *Id.*; see also Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 754-55 (1999) (suggesting that this remark contains “traces of ethical argument” and that Chief Justice Marshall was hinting that to contest the bank’s constitutionality “three decades later . . . [would be] to stain the name of our First Man—to be, if not unAmerican, at least unWashingtonian”).

148. *McCulloch*, 17 U.S. (4 Wheat.) at 402; see also Kurt T. Lash, *Essay, Federalism, Individual Rights, and Judicial Engagement*, 19 GEO. MASON L. REV. 873, 882 n.56 (2012) (suggesting that by this remark Chief Justice Marshall “had also implied that Madison, when President, had changed his mind about the constitutionality of the Bank”).

149. See *supra* notes 139-40 and accompanying text.

150. Letter from James Madison to Charles E. Haynes, *supra* note 93, at 442-43.

151. See *supra* text accompanying notes 124-27.

152. See Baude, *supra* note 27, at 1808-10.

153. 2 ANNALS OF CONG. 1899 (1791) (statement of Rep. Madison).

154. See *id.* at 1896; see also LANCE BANNING, THE SACRED FIRE OF LIBERTY: JAMES MADISON AND THE FOUNDING OF THE FEDERAL REPUBLIC 331 (1995) (“[I]t was apparent that the Constitution was unclear; and careful reading of his speech of February 2 shows that Madison was quite aware that neither strict nor broad construction of its language . . .

*footnote continued on next page*

Second, Madison thought the bank's constitutionality was supported by a course of practice. As he put it in one of the many letters:

The Act originally establishing a Bank had undergone ample discussions in its passage thro' the several branches of the Government: It had been carried into execution throughout a period of 20 years with annual legislative recognitions; in one instance indeed, with a positive ramification of it into a new State....<sup>155</sup>

To satisfy Madison's conception of liquidation, that course of practice had to have ultimately resulted in settlement—acquiescence and public sanction. But the question of settlement is tricky: When exactly did it occur? By the late 1820s it is easy to see why Madison would have thought there was adequate acquiescence—by then the Supreme Court had upheld the bank against state onslaughts in both *McCulloch v. Maryland*<sup>156</sup> and *Osborn v. Bank of the United States*.<sup>157</sup> And before that, Madison's decision to sign the 1816 bank renewal bill was a crucial moment of acquiescence—one of the bank's earliest and ablest opponents had publicly thrown in the towel.

But the trickier question is why Madison had thought there was an adequately settled course of practice as early as 1815 or 1816. Surely Madison's own decision to acquiesce can't be self-justifying. And what about that 1811 vote, where, as Madison acknowledged, his own<sup>158</sup> Vice President had stopped

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was actually—much less inherently—correct."); Lee J. Strang, *An Evaluation of Historical Evidence for Constitutional Construction from the First Congress' Debate over the Constitutionality of the First Bank of the United States*, 14 U. ST. THOMAS L.J. 193, 205 (2018) (arguing that participants in the bank debate, including Madison, (1) "appeared to believe that the Constitution's meaning did not clearly answer the constitutional question"; and (2) "appeared to believe that, after application of sufficient interpretative argumentation, the Constitution's meaning did answer the question"). *But see* Bradley & Siegel, *supra* note 31, at 36 ("Madison, however, did not believe that the meaning of the Constitution was ambiguous with respect to the permissibility of the national bank.").

155. Letter from James Madison to Charles J. Ingersoll, *supra* note 83, at 186.

156. 17 U.S. (4 Wheat.) 316 (1819).

157. 22 U.S. (9 Wheat.) 738 (1824).

158. In his June 1831 letter to Charles Ingersoll, Madison seemed to distance himself from Clinton, referring to him as if he were a legislator, not part of the Madison Administration. See Letter from James Madison to Charles J. Ingersoll, *supra* note 83, at 187 ("[A]s to the negative of the Senate by the casting vote of the presiding Officer;...."). Perhaps that was right; an expert on the vice presidency writes that "[t]he Constitution's original meaning conceived of the Vice President, although perhaps not a member of Congress, as occupying essentially a legislative position," and that "[e]arly leaders embraced this vision of the Vice President primarily as a legislative figure." Joel K. Goldstein, *Constitutional Change, Originalism, and the Vice Presidency*, 16 U. PA. J. CONST. L. 369, 386, 389 (2013) (footnote omitted); *see also id.* at 391-92 ("Senator John Quincy Adams observed that 'the only duty of a Vice president, under our Constitution, is to preside in Senate'; he thought it anomalous that George Clinton, the fourth Vice President, had been chosen for that position without any regard to his ability to fulfill that function." (quoting 1 MEMOIRS OF JOHN QUINCY ADAMS 385 (Charles Frances Adams ed., Philadelphia, J.B. Lippincott & Co. 1874))).

the bank in the Senate, “the vote being expressly given on the ground of unconstitutionality”?<sup>159</sup> Indeed, when casting the tiebreaking vote in 1811 Vice President Clinton had reprised objections that sounded just like then-Representative Madison’s original ones in 1791.<sup>160</sup>

Well, Madison explained:

[A]s to the negative of the Senate by the casting vote of the presiding Officer; it is a fact well understood at the time that it resulted not from an equality of opinions in that Assembly on the power of Congress to establish a Bank, but from a junction of those who admitted the power but disapproved the plan, with those who denied the power. On a simple question of constitutionality, there was a decided majority in favor of it.<sup>161</sup>

I do not know whether Madison’s reconstruction of what was “well understood” during the 1811 proceedings was in fact accurate. But if it was, it was plausible for him to have regarded the controversy as liquidated. (And even if it was incorrect, by the time he was writing in 1830 or 1831, the point may have been moot.)

To be sure, constitutional opinion in favor of the bank was never completely universal,<sup>162</sup> and as it turns out, Madison’s acquiescence was not the final chapter written during his lifetime. In 1832, after Madison had written most of his letters on liquidation and the bank’s constitutionality, President Jackson was presented with a bill to modify and continue the Second Bank of the United States.<sup>163</sup> President Jackson, unlike President Madison, vetoed his

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159. Letter from James Madison to Charles J. Ingersoll, *supra* note 83, at 186-87.

160. *Compare* 22 ANNALS OF CONG. 346 (1811) (“[T]he means must be suited and subordinate to the end. The power to create corporations is not expressly granted; it is a high attribute of sovereignty and in its nature not accessorial or derivative by implication, but primary and independent.”), *with* 2 ANNALS OF CONG. 1898 (1791) (statement of Rep. Madison) (“[The Necessary and Proper Clause’s] meaning must . . . be limited to means necessary to the end, and incident to the nature of the specified powers.”), *and id.* at 1900 (“[T]he power of incorporation exercised in the bill . . . could never be deemed an accessory or subaltern power, to be deduced by implication, as a means of executing another power; it was in its nature a distinct, an independent and substantive prerogative, which not being enumerated in the Constitution, could never have been meant to be included in it . . . ”).

161. Letter from James Madison to Charles J. Ingersoll, *supra* note 83, at 187; *see also* Letter from James Madison to Charles E. Haynes, *supra* note 93, at 443 (“[I]t is believed to be quite certain, that the equality of votes which referred the question to his casting vote, was occasioned by a union of some who disapproved the plan of the Bank only, with those who denied its Constitutionality; and that on a naked question of Constitutionality, a majority of the Senate would have added another sanction, as at a later period was done, to the validity of such an Institution.”).

162. *See* Chafetz, *supra* note 120, at 1105-07 (describing the continuation of the debate even after *McCulloch*).

163. *See* 8 REG. DEB. 1073-74 (1832) (passage in the Senate); *id.* at 3851-52 (in the House).

bank bill on constitutional grounds.<sup>164</sup> By this time, of course, the Supreme Court had held in *McCulloch* that the bank was constitutional, but Jackson did not care. In a much-repeated departmentalist cri de coeur, he said: “The Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution. Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others.”<sup>165</sup> And anyway, he added, *McCulloch’s* reasoning was distinguishable.<sup>166</sup>

Jackson also had a few words about liquidation. “Mere precedent is a dangerous source of authority,” he warned, referring to precedent in a capacious sense, not limited to judicial decisions.<sup>167</sup> Past practice therefore “should not be regarded as deciding questions of constitutional power except where the acquiescence of the people and the States can be considered as well settled.”<sup>168</sup> That exception, of course, sounded in one of the key elements of liquidation.

Jackson then went on to argue that the bank’s constitutionality was far from being liquidated:

One Congress, in 1791, decided in favor of a bank; another, in 1811, decided against it. One Congress, in 1815, decided against a bank; another, in 1816, decided in its favor. Prior to the present Congress, therefore, the precedents drawn from that source were equal. If we resort to the States, the expressions of legislative, judicial, and executive opinions against the bank have been probably to those in its favor as 4 to 1. There is nothing in precedent, therefore, which, if its authority were admitted, ought to weigh in favor of the act before me.<sup>169</sup>

Jackson read the evidence differently from Madison (who, recall, had a different view of what had actually happened in 1811<sup>170</sup>), and he also changed the denominator by emphasizing the role of the *states* in liquidation. But it is striking that he gave any nod to liquidation’s elements even as he went on to emphasize the irrelevance of judicial decisions.

Jackson’s veto is a reminder that whatever liquidation’s normative force, it may not always succeed at building an unshakable consensus.<sup>171</sup> Larry Kramer

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164. See Jackson 1832 Veto Message, *supra* note 50, at 576.

165. *Id.* at 582.

166. *See id.* (“But in the case relied upon the Supreme Court have not decided that all the features of this corporation are compatible with the Constitution.”).

167. *Id.* at 581; *see id.* (“It is maintained by the advocates of the bank that its constitutionality in all its features ought to be considered as settled by precedent *and* by the decision of the Supreme Court.” (emphasis added)).

168. *Id.* at 581-82.

169. *Id.* at 582.

170. *See supra* note 161 and accompanying text.

171. For further discussion, see Part IV.C below.

has also suggested that this episode modified Madison's thinking on interpretation, pushing him away from departmentalism and toward judicial supremacy, at least for questions of federalism.<sup>172</sup> Kramer discusses a long public letter Madison wrote to Edward Everett in 1830 emphasizing the Supreme Court's role in ensuring the "peaceable and authoritative termination of occurring controversies" and "uniform authority of the laws,"<sup>173</sup> but I am not sure that Madison drifted so far. Madison's letter to Everett was addressing the nullification movement,<sup>174</sup> and in that context, it is probably best read to be addressing a different structural issue: the importance of the Supreme Court's role in resolving *particular cases* rather than settling *broad principles* of law<sup>175</sup>—a distinction central to the history of the judicial power.<sup>176</sup> If so, then the letter is more relevant to intricate federal courts questions about the Supreme Court's appellate jurisdiction<sup>177</sup> and less likely to reflect a change in Madison's views on liquidation.

## 2. Federal spending

A different example of Madison's concern over liquidation can be seen in legislative debates over Congress's power to spend. Madison was a lifelong skeptic of Alexander Hamilton's view that Congress's power "[t]o lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States"<sup>178</sup> allowed it to spend money on matters outside of its enumerated powers.<sup>179</sup> (Madison was

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172. See Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We the Court*, 115 HARV. L. REV. 4, 107-09 (2001).

173. Letter from James Madison to Edward Everett (Aug. 28, 1830), <https://perma.cc/9DMC-8EE9>, reprinted in 9 THE WRITINGS OF JAMES MADISON, *supra* note 49, at 383, 388-95; see Kramer, *supra* note 172, at 107 & n.454.

174. See Letter from James Madison to Edward Everett, *supra* note 173, at 383 ("I have duly received your letter in which you refer to the 'nullifying doctrine' advocated, as a Constitutional right, by some of our distinguished fellow citizens; . . . and you express a wish for my ideas on those subjects.").

175. See *id.* at 397 (referring to "the concession of this power to the Supreme Court, *in cases falling within the course of its functions*" (emphasis added)).

176. See generally William Baude, *The Judgment Power*, 96 GEO. L.J. 1807 (2008).

177. See, e.g., *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816).

178. U.S. CONST. art. I, § 8, cl. 1.

179. For Hamilton's view, see Alexander Hamilton, Sec'y of the Treasury, Final Version of the Report on the Subject of Manufactures (Dec. 5, 1791), <https://perma.cc/39XM-69R2>, reprinted in 10 THE PAPERS OF ALEXANDER HAMILTON 230, 302-04 (Harold C. Syrett ed., 1966). For Madison's, see, for example, 2 ANNALS OF CONG. 1896-97 (1791) (statement of Rep. Madison); and James Madison, Veto Message (Mar. 3, 1817), in 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897, *supra* note 45, at 584, 584-85.

also skeptical, a fortiori, of the view, *even broader* than Hamilton's, that the General Welfare Clause allowed Congress effectively plenary power *to legislate*, not just to spend.)<sup>180</sup> As a representative in Congress, Madison seems to have focused on these issues with a particular eye to the problems posed by liquidation. He repeatedly worried that spending on sympathetic causes would create legislative precedent in support of a broader spending power.

For instance, in 1792, the Senate proposed to pay a "bounty" to those working in the cod fishing industry,<sup>181</sup> apparently in response to the heavy trade barriers the fisheries faced internationally.<sup>182</sup> In the debate on the bill in the House, Madison claimed to share the widespread "disposition . . . to afford every constitutional encouragement to the fisheries," but expressed a worry about a broad interpretation of the General Welfare Clause.<sup>183</sup> But, he argued, it might be different if the "bounty" were relabeled an "allowance,"<sup>184</sup> and so it was.<sup>185</sup> This minor change made a big difference to Madison, who argued that so long as the cod fishers were just receiving a tax break against preexisting taxes (such as the salt tax), no general spending power was needed.<sup>186</sup> Hence the cod fisheries bill could be passed<sup>187</sup> without setting a legislative precedent.

It happened again two years later, when a group of French citizens were driven off the island of Hispaniola and took refuge in Baltimore, where they begged for federal relief.<sup>188</sup> "Virtually everyone wanted to help."<sup>189</sup> Once again, Madison came up with a trick. He pointed out that the United States still owed money to France from the American Revolution, and could characterize the

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180. See Alison L. LaCroix, *Essay, The Shadow Powers of Article I*, 123 YALE L.J. 2044, 2082-83, 2083 n.162 (2014) (attributing this view to Judge Alexander Addison of Pennsylvania).

181. See 3 ANNALS OF CONG. 66-69 (1792) (passing the bill titled "An Act for the encouragement of the bank and other cod fisheries, and for the regulation and government of the fishermen employed therein").

182. See CURRIE, *supra* note 78, at 168-69.

183. 3 ANNALS OF CONG. 385-86 (1792) (statement of Rep. Madison).

184. See *id.* at 386.

185. See *id.* at 397 (debating "a motion to strike out the words 'bounty now allowed,' and insert *allowance now made*'); *id.* at 400-01 (passing the amended bill in the House).

186. *Id.* at 386 (statement of Rep. Madison) ("[I]f, in the allowance, nothing more is proposed than a mere reimbursement of the sum advanced, it is only paying a debt . . ."); see also *id.* at 366 (statement of Rep. Goodhue) ("[N]o bounty is required. We only ask, in another mode, the usual drawback for the salt used on the fish."); CURRIE, *supra* note 78, at 169; cf. JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 37 (1996) (suggesting that Madison was unusually influential in Congress because of his attention to legislative detail and ability "to dissect issues and alternatives with . . . rigor").

187. See Act of Feb. 16, 1792, ch. 6, 1 Stat. 229 (amended 1800).

188. See CURRIE, *supra* note 78, at 188.

189. *Id.*

spending as partial payment on the debt.<sup>190</sup> This allowed Congress “to relieve the sufferers” without “establishing a dangerous precedent” that would allow “a right to Congress of expending, on objects of benevolence, the money of their constituents.”<sup>191</sup>

In 1796, Congress had its biggest fight about the scope of the spending power over relief to the city of Savannah, which had been devastated by a fire.<sup>192</sup> Perhaps it is just a coincidence, but this time Madison was not around to come up with a dodge,<sup>193</sup> and the measure was defeated in the House.<sup>194</sup>

Madison’s repeated focus on avoiding “establishing a dangerous precedent”<sup>195</sup> suggests a recognition of the dynamics of liquidation. It wasn’t just judicial decisions that might be used to expand an ambiguous constitutional power; legislative decisions could do so, too.<sup>196</sup> To be sure, under liquidation as Madison expressed it, a single instance of legislative precedent did not itself settle the constitutional question—that took an accumulation of precedent, a course of practice. So Madison’s worry must have been one of two things: either he was trying to prevent even a single precedent in favor of a broad spending power because he was afraid they would build up, and wanted to fight each battle in the war, or he was in fact trying to establish the liquidation of *his view*—the narrower spending power—which might fail if there were clear instances of the contrary practice.

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190. See 4 ANNALS OF CONG. 171 (1794) (statement of Rep. Madison).

191. *Id.* at 170.

192. See 6 ANNALS OF CONG. 1712-27 (1796).

193. See *id.* at 1727 (showing Madison’s absence from the roll call vote). And where *was* James Madison during the Savannah fire debate on December 28, 1796? He was still a member of Congress for another few months, see BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, 1774-2005, H.R. DOC. NO. 108-222, at 1488-89 (2005), and he appeared in debates the day before and two days after, see 6 ANNALS OF CONG. 1705, 1744 (1796). I have been unable to find an explicit account of his disappearance, but we do know that it had recently been so cold that he was deterred from going outside. See Letter from James Madison to James Madison, Sr. (Dec. 25, 1796), <https://perma.cc/T7UE-KJAJ>, reprinted in 16 THE PAPERS OF JAMES MADISON 435, 436 (J.C.A. Stagg et al. eds., 1989) (“The weather has been so intensely cold that I have not yet gone out to the proper office with Saml. French’s Certificate.” (footnote omitted)). That session, Madison also faced “a housing problem, not eased by the fact that twenty-two-year-old Fanny Madison came along for the winter.” IRVING BRANT, JAMES MADISON: FATHER OF THE CONSTITUTION, 1787-1800, at 443, 445 (1950).

194. See 6 ANNALS OF CONG. 1727 (1796).

195. 4 ANNALS OF CONG. 170 (1794) (statement of Rep. Madison).

196. See MICHELE LANDIS DAUBER, THE SYMPATHETIC STATE: DISASTER RELIEF AND THE ORIGINS OF THE AMERICAN WELFARE STATE 20-23 (2013) (describing Congress’s fear of establishing precedent through spending legislation and suggesting it came from “[t]he perception of Congress as both legislature and court”).

In any event, it is worth noting one irony. Subsequent commentary suggests that Madison was quite right to worry about establishing a legislative precedent, but wrong to think that his formalisms would do the trick. When Justice Story later endorsed Hamilton's view of the General Welfare Clause, he remarked in support:

In regard to the practice of the government, it has been entirely in conformity to the principles here laid down. Appropriations have never been limited by congress to cases falling within the specific powers enumerated in the constitution . . . . In some cases, not silently, but upon discussion, congress has gone the length of making appropriations to aid destitute foreigners, . . . as in the relief of the St. Domingo refugees, in 1794 . . . . An illustration equally forcible, of a domestic character, is in the bounty given in the codfisheries, which was strenuously resisted on constitutional grounds in 1792; but which still maintains its place in the statute book of the United States.<sup>197</sup>

Justice Story was apparently unaware of, or unwilling to credit, Madison's justifications for these appropriations. Similarly, Edward Corwin would much later describe "a subsidy to the cod fisheries—a proposal against which Madison vainly urged his narrow doctrine of the power of expenditure."<sup>198</sup> Future interpreters failed to understand Madison's precedents, despite his careful maneuvering.<sup>199</sup>

#### D. Beyond Madison?

Of course, James Madison's views are not the only ones that matter. For instance, to the extent that scholars argue that Founding-era interpretive conventions remain binding today, it is either because they represent widespread "original methods" of interpretation or the "law of

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197. 2 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 988 (Boston, Hilliard, Gray & Co. 1833). "St. Domingo" was the contemporary reference for the French colony on the island of Hispaniola. See CURRIE, *supra* note 78, at 188.

198. Edward S. Corwin, *The Spending Power of Congress—Apropos the Maternity Act*, 36 HARV. L. REV. 548, 554 (1923). Corwin, unlike Justice Story, had the benefits of Benton's *Abridgment*, *see id.* at 554 & n.17 (citing 1 THOMAS HART BENTON, *ABRIDGMENT OF THE DEBATES OF CONGRESS, FROM 1789 TO 1856*, at 350-70 (New York, D. Appleton & Co. 1857)), but seems to have missed the combination of Madison's solution, *see* 1 BENTON, *supra*, at 361-62, and the subsequent amendment, *see id.* at 368-69. Or perhaps he simply found Madison's views so unpersuasive as not to merit comment. Cf. John Harrison, Book Review, 15 CONST. COMMENT. 383, 388 (1998) (reviewing CURRIE, *supra* note 78) (calling Madison's proposal a "sophistry . . . that somewhat undercut Madison's position"). But see John C. Eastman, *Restoring the "General" to the General Welfare Clause*, 4 CHAP. L. REV. 63, 79-80 (2001) (crediting Madison's approach).

199. For more on the path of constitutional spending debates as Madison's grip loosened, see Alison L. LaCroix, *The Interbellum Constitution: Federalism in the Long Founding Moment*, 67 STAN. L. REV. 397 (2015). See also DAUBER, *supra* note 196, at 29 (noting that in nineteenth-century congressional debates, "[o]ccasionally, hoary standards like Madison's vote in favor of the St. Domingo relief bill . . . were recounted").

interpretation.<sup>200</sup> While this Article does not attempt to provide an equally comprehensive examination of non-Madisonian liquidation, the general idea was invoked by others during the early years of the republic, if not necessarily in all its technical particulars.

For instance, after Madison's more famous reference to liquidation in *Federalist No. 37*,<sup>201</sup> Alexander Hamilton used the same term in two of his own essays focusing on judicial review. In *Federalist No. 78* he wrote that when "there are two statutes existing at one time, clashing in whole or in part with each other, . . . it is the province of the courts to liquidate and fix their meaning and operation."<sup>202</sup> And in the opening paragraph of *Federalist No. 82* he wrote of the constitutional system: "'Tis time only that can mature and perfect so compound a system, can liquidate the meaning of all the parts, and can adjust them to each other in a harmonious and consistent whole."<sup>203</sup>

We have already seen that the Supreme Court invoked a similar idea in Chief Justice Marshall's opinion for the Court in *McCulloch v. Maryland*.<sup>204</sup> So too had Justice Paterson's opinion for the Court a few decades earlier in *Stuart v. Laird*, which upheld the assignment of Supreme Court Justices to sit as circuit judges because "practice and acquiescence under it for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction."<sup>205</sup>

Similar ideas seem to have abounded in other courts, as Caleb Nelson has argued.<sup>206</sup> For instance, the Supreme Judicial Court of Massachusetts glossed an ambiguous statute in reliance on "the understanding and application of it, when the statute first [came] into operation, sanctioned by long acquiescence

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200. For more on the "original methods" view, see John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751 (2009). For more on the "law of interpretation" view, see William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079 (2017). See also Pojanowski & Walsh, *supra* note 27, at 143 ("The framers' law of the written Constitution included the idea of liquidation."). Another related view with roots back to Roman law is put forth by Richard Epstein. See Richard A. Epstein, Lecture, *Our Implied Constitution*, 53 WILLAMETTE L. REV. 295, 309 (2017).

201. See *supra* text accompanying notes 33-34.

202. THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 5, at 525.

203. THE FEDERALIST NO. 82 (Alexander Hamilton), *supra* note 5, at 553 (emphasis omitted).

204. 17 U.S. (4 Wheat.) 316, 401-02 (1819); see *supra* notes 143-48 and accompanying text.

205. 5 U.S. (1 Cranch) 299, 309 (1803).

206. See Nelson, *Stare Decisis*, *supra* note 26, at 14-21 ("The Madisonian concept of 'liquidation' dominated antebellum case law. Court after court used its framework to think about the effect of past decisions interpreting written laws."); see also *id.* at 14 n.42 (citing *Packard v. Richardson*, 17 Mass. (16 Tyng) 122, 144 (1821); *Respublica v. Roberts*, 1 Yeates 6, 7 (Pa. 1791) (per curiam); and *Minnis v. Echols*, 12 Va. (2 Hen. & M.) 31, 36 (1808) (opinion of Roane, J.)).

on the part of the legislature, and judicial tribunals.”<sup>207</sup> The Supreme Court of Pennsylvania did so in reliance on “constant practice.”<sup>208</sup> And Judge Roane of the Supreme Court of Appeals of Virginia, years before receiving Madison’s much-quoted letter on liquidation, invoked “the practice and general understanding of the country.”<sup>209</sup>

Many of these cases reflect what Aditya Bamzai has called the principles of “customary” and “contemporaneous” exposition,<sup>210</sup> which can be seen in U.S. Supreme Court interpretations of the Constitution as well. For instance, in *Cohens v. Virginia*, the Court upheld its jurisdiction over state court judgments in part because “in the Congress which passed [the Judiciary Act of 1789] were many eminent members of the Convention which formed the constitution.”<sup>211</sup> Justice Johnson made similar remarks in his separate opinion in *Ogden v. Saunders*.<sup>212</sup> And in *Prigg v. Pennsylvania*, the Court relied on both “long acquiescence” in Congress’s power to pass the Fugitive Slave Act and “contemporaneous expositions of it.”<sup>213</sup> It is arguable that these principles are another reflection of the concept of liquidation,<sup>214</sup> but they might also reflect distinct but related legal rules of interpretation. The widespread references to customary interpretation during this period did not always discuss the elements of liquidation that Madison consistently stressed: indeterminacy, deliberate practice, and settlement.

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207. See *Packard*, 17 Mass. (16 Tyng) at 144.

208. See *Respublica*, 1 Yeates at 7 (per curiam) (concluding from longstanding practice that an unmarried man who had sex with a married woman could be guilty only of fornication, not adultery); *see also id.* (“Had the case been *res integra*, the decision of the Court might be different from what it now is. It is true that practice *sub silentio* will not make the law, but it is strong evidence of what the law is.”).

209. See *Minnis*, 12 Va. (2 Hen. & M.) at 36 (opinion of Roane, J.); *see also* Letter from James Madison to Spencer Roane, *supra* note 48.

210. See Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 930-47 (2017).

211. 19 U.S. (6 Wheat.) 264, 420 (1821); *see also* Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85-87.

212. 25 U.S. (12 Wheat.) 213, 290 (1827) (opinion of Johnson, J.) (“[T]he cotemporaries of the constitution have claims to our deference on the question of right, because they had the best opportunities of informing themselves of the understanding of the framers of the constitution . . . .”); *see also* *Edwards’ Lessee v. Darby*, 25 U.S. (12 Wheat.) 206, 210 (1827) (same principles in statutory interpretation).

213. 41 U.S. (16 Pet.) 539, 620-21 (1842); *see also* Fugitive Slave Act of 1793, ch. 7, 1 Stat. 302.

214. See Bamzai, *supra* note 210, at 938-40 (connecting these principles to Madison’s and Hamilton’s essays in *The Federalist*). But see Philip A. Hamburger, *The Constitution’s Accommodation of Social Change*, 88 MICH. L. REV. 239, 310 (1989) (“Although only Madison and Hamilton appear to have descended on the liquidation of meaning, other Federalists also argued that interpretation would resolve difficulties.”).

To know for sure whether Madison's concept of liquidation has some kind of binding legal force today—whether as an original method, or as part of “our law” of interpretation—one would need to conduct a more systematic review of Founding-era views beyond Madison's. But one hopes that this explication of the concept will help frame and direct any such future investigations.

### III. Grounding Liquidation

Up until now, my analysis has been descriptive and analytic—an attempt to discover what liquidation is (or was). But liquidation is more than a historical curio. It also serves several deep constitutional values that may give it continuing relevance and allure today. As noted above, liquidation might turn out to be of importance to those who subscribe to various “originalist” methods of constitutional interpretation. But it is not, and need not be, just that. It also can be used to support and implement such broader constitutional norms as departmentalism, precedent, and tradition.

#### A. Departmentalism

Our Constitution's text, structure, and lived tradition all point to an important fact: Constitutional interpretation is a shared activity, not the monopoly of the federal courts. That is evident in the particular responsibilities that the Constitution imposes on each branch,<sup>215</sup> as well as in the broader principles of coordination and separation of powers that the document embodies.<sup>216</sup> At least as importantly, it is evident in our constitutional tradition, in which elected officials have frequently been sources of constitutional argument and forces for constitutional fidelity—and also for change.<sup>217</sup>

Liquidation provides a source of constitutional law that accommodates and encourages that departmentalism. Liquidation is shared among the branches,

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215. See Paul Brest, *Essay, The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585, 587-89 (1975); Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 906-13 (1989-1990).

216. See LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 128-44 (2004); Neal Devins & Louis Fisher, *Essay, Judicial Exclusivity and Political Instability*, 84 VA. L. REV. 83, 85-90 (1998); Michael Stokes Paulsen, *Essay, The Irrepressible Myth of Marbury*, 101 MICH. L. REV. 2706, 2724-31 (2003).

217. See KRAMER, *supra* note 216, at 128-44; Robert Post & Reva Siegel, *Reply, Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CALIF. L. REV. 1027, 1029 n.16, 1037-42 (2004); Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C. L. REV. 773, 804-06, 847-48 (2002); see also William Baude, *Response, Sharing the Necessary and Proper Clause*, 128 HARV. L. REV. F. 39, 39-42 (2014).

rather than being monopolized by the judiciary.<sup>218</sup> Indeed, as discussed above, Madison argued that the departmentalist nature of liquidation was key to its legitimacy: Each branch had reasons to seek popular approval of its views and hence to demonstrate the reasonableness of its interpretation to the public.<sup>219</sup> This “public sanction”<sup>220</sup> gave liquidation a sort of quasiconstitutional status. Popular ratification, of course, was responsible for the authority of the Constitution itself, and only a similar process could alter or abolish it. But an indirect public sanction still gave liquidated decisions enough connection to the basis of constitutional legitimacy that it had a subconstitutional legal status—one that was powerful enough to override individual judgments of government officials in indeterminate cases.<sup>221</sup>

At the same time, liquidation also tames one of the most cited risks of departmentalism, namely the risk of unceasing chaos and disorder.<sup>222</sup> Liquidation supplies a relatively specific doctrinal structure by which interbranch constitutional disputes can be judged and ultimately settled. It lets us get somewhere and move on.<sup>223</sup> And yet it does so in a way that is true to the core values of departmentalism, by avoiding the unilateral imposition of constitutional values by one branch upon the others.

## B. Precedent

Another widely shared constitutional value is that of judicial precedent. Indeed, entire theories of constitutional interpretation have been built around precedent, and even most originalists have grown to accommodate it.<sup>224</sup> Liquidation has a close relationship to the idea of judicial precedent, and it may

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218. See McConnell, *supra* note 27, at 1776; Nelson, *Originalism*, *supra* note 26, at 527.

219. See *supra* text accompanying notes 119-21.

220. See Letter from James Madison to Martin L. Hurlbut, *supra* note 70, at 372.

221. See *supra* text accompanying notes 116-18.

222. See Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 321-31 (1994) (discussing when departmentalism will and will not lead to final resolution).

223. For an argument that originalist legislators should find ways to avoid questioning “super precedent,” see Amy Coney Barrett & John Copeland Nagle, *Congressional Originalism*, 19 U.PA.J.CONST.L. 1, 23-42 (2016).

224. See William Baude, *Essay, Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2358-61 (2015). Likewise, those originalists who reject precedent entirely would probably reject liquidation for the same reasons. See, e.g., Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution’s Secret Drafting History*, 91 GEO. L.J. 1113, 1168-69 (2003); Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, 103 NW. U.L.REV. 857, 912-13 (2009); see also Peter J. Smith, *The Marshall Court and the Originalist’s Dilemma*, 90 MINN. L. REV. 612, 635-36 (2006) (criticizing such an approach).

therefore be able to find just as ready a place in constitutional law. Indeed, for departmentalists, liquidation could even go so far as to replace our current judge-centered doctrine of stare decisis.

Because the relationship between liquidation to precedent has changed over time, it helps to first consider liquidation's relationship to precedent at the Founding, and then consider its relationship to modern principles of stare decisis.

### 1. Founding-era precedent

Madison repeatedly analogized liquidation and precedent; one might even go so far as to say that liquidation simply *was* a form of precedent.<sup>225</sup> For instance, on several occasions Madison referred to liquidation as "legislative precedents."<sup>226</sup> The question, Madison wrote to Charles Ingersoll, was "how far legislative precedents expounding the Constitution, ought to guide succeeding legislatures, and to overrule individual opinions."<sup>227</sup> And the answer, wrote Madison, "has its true Analogy in the obligation, arising from Judicial expositions of the law on succeeding Judges; the Constitution being a law to the Legislator, as the law is a rule of decision to the Judge."<sup>228</sup>

Madison went on to argue that judicial precedents had "authoritative force" because they allowed the law to "be certain and Known" and because if they were "publicly made, and repeatedly confirmed," they were likely to have the sanction of the public.<sup>229</sup> By analogy, he said elsewhere, "Legislative precedents" were "entitled to little respect" when they were "without full examination & deliberation."<sup>230</sup>

The analogy had extra force at the Founding because the doctrine of judicial precedent was different than it is today. It generally required a line of cases, not just the dictate of a single case. John McGinnis and Michael Rappaport have examined "the English legal system" as well as "the American experience, first in the colonies, then in the independent states and during the ratification debates, and finally in the Supreme Court under the new

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225. For earlier work on the analogy, see Nelson, *Stare Decisis*, *supra* note 26, at 10-14.

226. See Letter from James Madison to Charles J. Ingersoll, *supra* note 83, at 183-84; Letter from James Madison to Spencer Roane, *supra* note 103, at 320.

227. Letter from James Madison to Charles J. Ingersoll, *supra* note 83, at 183-84.

228. *Id.* at 184.

229. *Id.*

230. Letter from James Madison to Spencer Roane, *supra* note 103, at 320.

Constitution” and concluded that “[i]n all of these periods . . . precedent rules conferred greater weight on a series of decisions than on a single decision,” though the exact details varied.<sup>231</sup>

According to another account, in England “the strict doctrine of *stare decisis* . . . under which the holding of a particular case is treated as binding . . . was a product of the nineteenth-century mind.”<sup>232</sup> By contrast, “the doctrine of precedent” that existed before that “was more closely related to the concept of *mos judiciorum*, judicial custom; it was a line of cases, rather than a single decision, that ought not to be overturned in the absence of very weighty reasons.”<sup>233</sup> Another study, this one of early American cases, suggests that “up to the year 1800,” the older precedent model controlled, and the modern doctrine of stare decisis “solidified” by 1850.<sup>234</sup> Whatever the exact historical details, the importance in the Founding era of a line of multiple cases suggests how natural it was for Madison to equate liquidation to the doctrine of judicial precedent.

As these accounts also show, the doctrine of precedent changed over the course of the nineteenth century to become closer to the stare decisis model we know today. And while the exact time and place of the transition is debated, the older vision of precedent remained important in constitutional law for some time after the Founding, as demonstrated by Abraham Lincoln.

In Lincoln’s first major speech on the force of the Supreme Court’s decision in *Dred Scott v. Sandford*,<sup>235</sup> he discussed precedent in terms resembling the model of liquidation. In that speech, Lincoln stressed the distinction between two functions of judicial decisions—their judgments in particular cases, which “absolutely determine the case decided,” and their prospective status as “precedents’ and ‘authorities.’”<sup>236</sup> Lincoln did not deny that Supreme Court

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231. John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 Nw. U. L. REV. 803, 809 (2009).

232. Harold J. Berman & Charles J. Reid, Jr., *The Transformation of English Legal Science From Hale to Blackstone*, 45 EMORY L.J. 437, 449 (1996).

233. *Id.* For further debate among scholars of English history about the timing of this point, see McGinnis & Rappaport, *supra* note 231, at 813 (citing CARLETON KEMP ALLEN, *LAW IN THE MAKING* 219 n.1 (7th ed. 1964); THEODORE F.T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 349-50 (5th ed. 1956); and W.S. Holdsworth, *Case Law*, 50 LAW Q. REV. 180, 180 (1934)).

234. See Frederick G. Kempin, Jr., *Precedent and Stare Decisis: The Critical Years, 1800 to 1850*, 3 AM. J. LEGAL HIST. 28, 50 (1959).

235. 60 U.S. (19 How.) 393 (1857), superseded by constitutional amendment, U.S. CONST. amend. XIV.

236. Abraham Lincoln, The *Dred Scott* Decision: Speech at Springfield, Illinois (June 26, 1857), in *ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS* 352, 355 (Roy P. Basler ed., 3d prtg. 1946) [hereinafter Lincoln *Dred Scott* Speech]. For a defense of this distinction, see generally Baude, *supra* note 176.

decisions had precedential force “when fully settled.”<sup>237</sup> But, he said, “[j]udicial decisions are of greater or less authority as precedents, according to circumstances.”<sup>238</sup> To wit:

If this important decision had been made by the unanimous concurrence of the judges, and without any apparent partisan bias, and in accordance with legal public expectation, and with the steady practice of the departments throughout our history, and had been in no part, based on assumed historical facts which are not really true; or, if wanting in some of these, it had been before the court more than once, and had there been affirmed and re-affirmed through a course of years, it then might be, perhaps would be, factious, nay, even revolutionary, to not acquiesce in it as a precedent.

But when, as it is true we find it wanting in all these claims to the public confidence, it is not resistance, it is not factious, it is not even disrespectful, to treat it as not having yet quite established a settled doctrine for the country.<sup>239</sup>

Lincoln’s criteria for settled precedent contain several similarities to those for liquidation. The search for “steady practice of the departments,” or else one having “been affirmed and re-affirmed through a course of years,” resembles liquidation’s requirement of a course of deliberate practice. The search for unanimity and a lack of partisanship mirror some of the elements of constitutional settlement or acquiescence. This suggests that the potential analogy between liquidation and judicial precedent persisted in some high quarters even in the second half of the nineteenth century.

## 2. Modern stare decisis

By contrast to the gradualism of the Founding era, under the modern doctrine of stare decisis, judicial precedent is generally thought to settle controversies in one go.<sup>240</sup> When parties argue a case before the Supreme Court today, even a single old case will be taken very seriously. Think of the effort the Justices spent parsing and distinguishing *United States v. Miller*.<sup>241</sup>

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237. Lincoln *Dred Scott* Speech, *supra* note 236, at 355. For more on Lincoln’s evolution on this issue, see Michael Stokes Paulsen, *Lincoln and Judicial Authority*, 83 NOTRE DAME L. REV. 1227 (2008).

238. Lincoln *Dred Scott* Speech, *supra* note 236, at 355.

239. *Id.*

240. See, e.g., Randy J. Kozel, *Original Meaning and the Precedent Fallback*, 68 VAND. L. REV. 105, 135-37 (2015) (asking the question, “Does a single decision carry the power to settle an issue?” and answering yes).

241. 307 U.S. 174 (1939).

when interpreting the Second Amendment in *District of Columbia v. Heller*,<sup>242</sup> or the focus the Court gave to *Kentucky v. Dennison*<sup>243</sup> when it reconsidered the case 126 years later in *Puerto Rico v. Branstad*.<sup>244</sup>

Even more emphatically, lower courts are not today supposed to say something along the lines of, “Well, I know that the Supreme Court just ruled the Voting Rights Act<sup>245</sup> (or a flag burning statute<sup>246</sup> or the U.S. Sentencing Guidelines<sup>247</sup>) unconstitutional, but I’m going to keep enforcing it for a while and see if the decision sticks.” And the apparent exceptions—such as Judge Silberman announcing that he would effectively nullify *Boumediene v. Bush* unless the Supreme Court made him stop,<sup>248</sup> or lower courts seeming to resist the Supreme Court’s decision in *Heller*<sup>249</sup>—are sufficiently rare and controversial to prove the point.<sup>250</sup> Whatever the reality, the modern ideal of judicial precedent is based on the settling power of a single case.

To be sure, a single controversial precedent may still face resistance. In some cases, for instance, a dissenting Justice will repeatedly dissent as an issue recurs, as Justice Breyer has famously done in sovereign immunity cases,<sup>251</sup> or as Justice Stevens did in hundreds of cases applying the obscure procedural rule of *Martin v. District of Columbia Court of Appeals*.<sup>252</sup> But in these examples of

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242. See 554 U.S. 570, 621-25 (2008); *id.* at 661-64, 663 n.30, 676-79 (Stevens, J., dissenting).

243. 65 U.S. (24 How.) 66 (1861), *overruled* by *Puerto Rico v. Branstad*, 483 U.S. 219 (1987).

244. See 483 U.S. at 220-21, 224-26.

245. See *Shelby County v. Holder*, 133 S. Ct. 2612, 2631 (2013).

246. See *United States v. Eichman*, 496 U.S. 310, 312 (1990); *Texas v. Johnson*, 491 U.S. 397, 402 (1989).

247. See *United States v. Booker*, 543 U.S. 220, 226-27 (2005).

248. See Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 GEO. L.J. 921, 963-65 (2016) (quoting *Esmail v. Obama*, 639 F.3d 1075, 1078 (D.C. Cir. 2011) (Silberman, J., concurring)); *see also Boumediene v. Bush*, 553 U.S. 723 (2008).

249. See Re, *supra* note 248, at 961-63 (citing *Friedman v. City of Highland Park*, 784 F.3d 406, 412 (7th Cir. 2015); and *United States v. Masciandaro*, 638 F.3d 458, 475 (4th Cir. 2011)).

250. See *id.* at 965-66 (arguing that this sort of “resistance will likely remain limited to only a small, if important, subset of Supreme Court cases”).

251. See, e.g., *Fed. Mar. Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743, 788 (2002) (Breyer, J., dissenting) (“Today’s decision reaffirms the need for continued dissent . . . .”); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 699 (1999) (Breyer, J., dissenting) (“I am not yet ready to adhere to the proposition of law set forth in *Seminole Tribe [v. Florida*, 517 U.S. 44 (1996)].”); *see also Charles Fried, Comment, Five to Four: Reflections on the School Voucher Case*, 116 HARV. L. REV. 163, 177-80 (2002) (collecting more examples); Allison Orr Larsen, *Essay, Perpetual Dissents*, 15 GEO. MASON L. REV. 447, 447-49, 454-58 (2008) (same).

252. 506 U.S. 1 (1992) (per curiam). The Court sanctioned James Martin, a pro se litigant seeking to file *in forma pauperis*, for his “repetitious and frivolous petitions for certiorari.” *Id.* at 2-3. Justice Stevens dissented on the basis that the Court’s resources “could be used more effectively by simply denying Martin’s petitions than by drafting,

*footnote continued on next page*

“perpetual dissents,”<sup>253</sup> the dissenting Justice was there when the first case was decided, watching the putative legal mistake unfold before his very eyes. As Allison Orr Larsen has observed, today’s Justices are “more willing to overrule precedents from which [they] dissented originally.”<sup>254</sup>

Modern stare decisis’s focus on the single case stands in opposition to Madison’s vision of liquidation, which required both repeated decisions and enough acquiescence that one could say that those decisions had acquired the public sanction. This meant that ramming through a controversial decision of constitutional principle was not enough to force others to accept that principle in future cases. For instance, the fact that the Fifth Congress passed the Sedition Act<sup>255</sup> did not mean that future legislators or Presidents were required to accept it as constitutional. Indeed, the Democratic-Republican repudiation of the Act contributed to ensuring that liquidation did not happen—or at least not in favor of the Act.<sup>256</sup>

Or for a modern example of the contrast between liquidation and modern stare decisis, consider the passage and litigation of the Affordable Care Act.<sup>257</sup> When the Act passed Congress and was signed by the President, that was obviously a big victory for those who supported the legislation. But it did not

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entering, and policing the order the Court enters today.” *Id.* at 4 (Stevens, J., dissenting). My Westlaw search found 290 “Martinization” orders from which Justice Stevens dissented. See also John Paul Stevens, *Foreword* to KENNETH A. MANASTER, ILLINOIS JUSTICE: THE SCANDAL OF 1969 AND THE RISE OF JOHN PAUL STEVENS, at ix, xi (2001) (“[A]t virtually every Court conference I find myself dissenting from three or four orders imposing special burdens on this disfavored class of litigants.”).

253. See generally Larsen, *supra* note 251.

254. *Id.* at 448; see also *id.* at 468-75 (criticizing this attitude as a form of “self stare decisis”). This difference might be explained if the judicial oath locks in at the time that a judge takes the bench; this would mean that he or she takes past legal changes as given, but leaves future changes more debatable. See Richard M. Re, *Promising the Constitution*, 110 NW. U. L. REV. 299, 330-33 (2016); see also William Baude, *The Power of Promises*, JOTWELL (July 10, 2015), <https://perma.cc/8WZX-9PMY> (reviewing Re, *supra*).

255. Ch. 74, 1 Stat. 596 (1798).

256. See Akhil Reed Amar, *Architexture*, 77 IND. L.J. 671, 693-94 (2002). The Supreme Court later claimed that “the great controversy over the Sedition Act . . . first crystallized a national awareness of the central meaning of the First Amendment” and that “the court of history” had concluded that “the Act, because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment.” N.Y. Times Co. v. Sullivan, 376 U.S. 254, 273, 276 (1964). For a critical analysis of this opposition to the Sedition Act, see Jud Campbell, *The Invention of First Amendment Federalism*, 97 TEX. L. REV. (forthcoming 2019), <https://perma.cc/966R-CAF4>. For a subsequent invocation of “the court of history,” see Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018) (expressing that *Korematsu v. United States*, 323 U.S. 214 (1944), “has been overruled in the court of history”).

257. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of the U.S. Code).

constitute liquidation. Its passage was just a single decision, not a course of decisions, and its passage by relatively tight and partisan margins did not bespeak confidence that the Act had the kind of broad public sanction that Madison would seek.<sup>258</sup> When the Act was (mostly) upheld by the Supreme Court,<sup>259</sup> that was also a big victory for its supporters. And this time it established a precedent. There were just as few decisions—one—and the margin was just as tight (though not quite as partisan). But a 5-4 Supreme Court vote is binding under the doctrine of stare decisis, while a 279-251 vote in Congress<sup>260</sup> and the President's signature do not constitute liquidation—as more recent attacks on the Affordable Care Act have confirmed.<sup>261</sup>

### 3. Implications

So what are we to make of these differences when thinking about how to use liquidation? One possibility is that they suggest liquidation is largely useless to the courts and would be relevant only to constitutional reasoning by the legislative and executive branches.<sup>262</sup> The argument would be that the doctrine of stare decisis is likely to crowd out the use of liquidation in many cases.<sup>263</sup> Maybe one reason that the Supreme Court didn't confront liquidation in so many words until 2014<sup>264</sup>—and so rarely confronts it even implicitly—is that it's unusual for the Court to get a case in which liquidation is relevant but judicial precedent is not. By the time a close question has come up repeatedly in the political branches, it has probably come up at least once in the Supreme Court, unless it is the kind of question that *never* comes up in court.

But there is another possibility: to use the insights of liquidation to move closer to the historical notions of precedent. Even putting aside their historical connection, liquidation and stare decisis have similar normative aims. Both doctrines are about generating legal certainty by giving weight to past

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258. See BLACKMAN, *supra* note 7, at 58-59, 71-73.

259. See Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 574 (2012).

260. See H.R.3590—Patient Protection and Affordable Care Act, CONGRESS.GOV, <https://perma.cc/VYE7-ZZ8H> (archived Nov. 25, 2018).

261. See, e.g., Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 11081, 131 Stat. 2054, 2092 (2017) (codified as amended at 26 U.S.C. § 5000A(c) (2017)) (eliminating the penalty for violating the Affordable Care Act's individual mandate).

262. For a related argument that "nonjudicial precedent[]" undercuts "judicial supremacy," see MICHAEL J. GERHARDT, THE POWER OF PRECEDENT 145-46 (2008). For a discussion of the even more radical argument that legislative precedent should supplant judicial review entirely, see Nelson, *Originalism*, *supra* note 26, at 528 n.38.

263. See Joseph Blocher & Margaret H. Lemos, *Practice and Precedent in Historical Gloss Games*, 106 GEO. L.J. ONLINE 1, 10-12 (2016).

264. See NLRB v. Noel Canning, 134 S. Ct. 2550, 2560-67 (2014); *supra* notes 19-25 and accompanying text.

decisions.<sup>265</sup> They seek certainty partly to avoid disruption—most people trying to get along in the world should not have to fear that settled legal decisions could be easily discarded. They seek certainty partly for epistemic reasons—it may not be possible for any one person (or even any one group of people at a particular moment in time) to adequately reason through every hard legal problem with adequate certainty. And they do so partly for reasons that border on humility—a sense that legal interpretation is a sufficiently shared enterprise that in some circumstances individual judgments should be subordinated to more widely shared ones.<sup>266</sup>

At the same time, both *stare decisis* and liquidation also recognize that however important certainty and stability and humility may be, mistakes are a bad thing. The accumulation of precedents accumulates the risk of error. In the case of constitutional interpretation, that means the risk of failing to fulfill the text's aims, and especially the risk that government agents will stray too far outside the boundaries of their legal commissions. Indeed, it has been charged that *stare decisis* inevitably “corrupts” and “works in opposition to correct interpretation of the Constitution.”<sup>267</sup>

So both *stare decisis* and liquidation try to compromise between ideal constitutional interpretation and accepted constitutional interpretation. *Stare decisis* does this, of course, through judicial decisions and the rules for overruling them. Liquidation does this through settlement, as well as the limits on that settlement (such as the indeterminacy requirement). But as noted above, liquidation does so in a manner that is truer to the departmentalism embedded in our constitutional structure and tradition.<sup>268</sup>

So those who support the basic goals of modern *stare decisis* might still consider whether those goals could be better accomplished by replacing *stare decisis* with something more gradual. Such a shift would yield a system that continued to mix settled law with an occasional return to first principles—but in a way that would be more democratic and more likely to match legal settlement to settlement in practice.

This shift could happen in a limited way or a broader one. The limited way might retain much of our current discourse and rules for *stare decisis* but tweak them by waiting for multiple concordant decisions to accumulate before calling an issue truly settled. This would be a liquidation-informed notion of judicial precedent.

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265. See McConnell, *supra* note 27, at 1776 (“Both allow for change, but only slowly.”).

266. See generally KOZEL, *supra* note 64.

267. Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289, 298 (2005).

268. See *supra* Part III.A.

A broader possibility is also worth considering. This would be to abandon our judge-centric tradition of precedent entirely, replacing it with the principles of liquidation. Courts would, like any other branch, adhere to constitutional settlements of indeterminate provisions resulting from a deliberate course of practice. A court's own precedents might become settled when the other branches of government acquiesced in them over time. But a court's precedents might need to be abandoned when met with a sufficiently widespread course of hostility, depending on the indeterminacy of the constitutional provision.

This kind of change would raise much broader questions of constitutional theory than can be dealt with here. It would of course butt against some assertions of judicial supremacy,<sup>269</sup> and there are debates about whether it would restore, or instead transform, our deepest commitments in constitutional law.<sup>270</sup> So for now it is simply worth observing that it is one path that liquidation might lead us toward, though not inevitably so.

### C. Tradition

Apart from liquidation's specific connection to legal rules of precedent, it can also be seen more generally as a form of tradition.

The normative arguments for following tradition are contested, but their general outline is well known. Some of those arguments come in a practical, consequentialist form. One practical argument draws on principles of natural selection. The argument is that a tradition's longevity reflects its conduciveness to human welfare: "If a practice is adopted by many different communities, and maintained for a considerable period of time, this provides strong evidence that the practice contributes to the common good and accords with the spirit and mores of the people."<sup>271</sup>

Another practical argument draws on principles of distributed information. Adherence to tradition is said to respect the "accumulated wisdom

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269. *Contra Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 867 (1992) ("[W]henever the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution . . . , its decision requires an equally rare precedential force to counter the inevitable efforts to overturn it and to thwart its implementation.").

270. For a preliminary exploration, see William Baude, *The Court, or the Constitution?*, in MORAL PUZZLES AND LEGAL PERPLEXITIES: ESSAYS ON THE INFLUENCE OF LARRY ALEXANDER (Heidi M. Hurd ed., forthcoming 2019), <https://perma.cc/6B4H-XE5P>.

271. Michael W. McConnell, *The Right to Die and the Jurisprudence of Tradition*, 1997 UTAH L. REV. 665, 683; *see also id.* ("To be sure, there can be bad, evil, or counterproductive traditions; but if so, one would expect to see a movement away from them.").

of many generations” and to “reflect a kind of rough empiricism.”<sup>272</sup> It is said to reflect “a recognition of bounded rationality.”<sup>273</sup> Others formalize this point through use of the Condorcet Jury Theorem, which holds that under certain assumptions, a greater number of independent minds are more likely to get to the truth.<sup>274</sup>

There are also more directly moral arguments for tradition, though these are harder to paraphrase. Most prominent are arguments from cultural continuity: for instance, the “ancient but now largely discredited idea that the past has an authority of its own” because “the world of culture that we inherit from it makes us who we are.”<sup>275</sup> Similarly, Edmund Burke described traditional rights as a “patrimony” (of course) and “an entailed inheritance derived to us from our forefathers, and to be transmitted to our posterity.”<sup>276</sup>

To be sure, these arguments have also met with extensive criticisms, including a call for “a pragmatic and critical attitude toward the blindness, cruelty, and selfishness of the past.”<sup>277</sup> The natural selection arguments have been said to founder because “lacking central direction, custom tends to lag behind social and economic change—or may be the product of incentives that diverge from the socially desirable.”<sup>278</sup> The information-based arguments have been said to be “intrinsically fragile and institutionally ungrounded.”<sup>279</sup> The

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272. David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 891-92 (1996).
273. *Id.* at 894; see also EDWARD SHILS, TRADITION 329 (1981) (“The fact is that our knowledge of future events is very poor and very unreliable.”).
274. See Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353, 370-72 (2006).
275. Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029, 1047, 1066 (1990); see also SHILS, *supra* note 273, at 328-30 (discussing the inherent value of tradition).
276. EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE: A CRITICAL EDITION 183 (J.C.D. Clark ed., Stanford Univ. Press 2001) (1790) (emphasis omitted). Burke also made a very brief version of the informational argument. *See id.* at 251 (“We are afraid to put men to live and trade each on his own private stock of reason; because we suspect that this stock in each man is small, and that the individuals would do better to avail themselves of the general bank and capital of nations, and of ages.”).
277. Martha C. Nussbaum, *Janus-Faced Law: A Philosophical Debate*, in THE TIMING OF LAWMAKING 249, 274 (Frank Fagan & Saul Levmore eds., 2017).
278. Richard A. Posner, *Hayek, Law, and Cognition*, 1 N.Y.U. J.L. & LIBERTY 147, 162 (2005); *see also id.* (“Customs may in short be vestigial and dysfunctional.”).
279. Adrian Vermeule, Essay, *Common Law Constitutionalism and the Limits of Reason*, 107 COLUM. L. REV. 1482, 1483 (2007); *see also* Nussbaum, *supra* note 277, at 256 (“The experience argument . . . gives us at best a default rule.”); Cass R. Sunstein, *Due Process Traditionalism*, 106 MICH. L. REV. 1543, 1570 (2008) (“[S]ome appealing defenses of due process traditionalism turn out to be quite fragile.”); Adrian Vermeule, *Many-Minds Arguments in Legal Theory*, 1 J. LEGAL ANALYSIS 1, 16-18 (2009) (criticizing “[t]he fallacious idea that tradition is the collective analogue of individual wisdom”).

argument that the past has its own normative force has been called “mystical”<sup>280</sup> and limited to benefiting “societies’ privileged and dominant members.”<sup>281</sup>

Wherever these debates stand, liquidation can be seen as a form of argument from tradition. By looking to a publicly acclaimed course of practice over time, liquidation may avail itself of both the welfarist and nonwelfarist justifications for tradition. That most people over time have favored a course of practice gives us added reason to think that practice is right. And if we think that adherence to tradition is valuable for its own sake, then liquidated constitutional traditions should have similar value.

Michael McConnell has been most explicit in making this connection, suggesting that the methodology of liquidation is the same as the “traditionalism” emblematized by cases like *Washington v. Glucksberg*, which focused on “history and tradition.”<sup>282</sup> Of traditionalism, he once argued that it is grounded in the many-minds argument—the assumption that when many people, over a period of many years, have come to a particular conclusion, this is more reliable than the attempt of any one person (even oneself) or small group of persons.<sup>283</sup> Others have invoked an explicitly Burkean idea of “conventionalism” as a reason to look at things like “postenactment legislation . . . grounded in an understanding of the contested provision” and “the evolved practice of different branches.”<sup>284</sup>

Liquidation provides a particularly democratic and structured way to harness this kind of traditionalism in constitutional law. The discarding of bad traditions is part of the natural selection account of tradition; by analogy, the indeterminacy requirement should result in the discarding of interpretations that are clearly inconsistent with the constitutional text. Liquidation also captures some benefit of the informational arguments, because it looks for multiple instances of practice before a settlement can be established. By requiring that practice to be deliberate, it also avoids the critique that tradition can be mindless or unthinking. By looking to settlement across both institutions and parties, and ideally with the public sanction, it attempts to entrench traditions that have been found acceptable by many groups of people.

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280. See Sunstein, *supra* note 274, at 369 n.82, 407.

281. Nussbaum, *supra* note 277, at 252-53.

282. See 521 U.S. 702, 720-21 (1997) (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion)); McConnell, *supra* note 27, at 1771 & n.106 (citing Michael W. McConnell, *Essay, Tradition and Constitutionalism Before the Constitution*, 1998 U.ILL.L.REV. 173, 174 [hereinafter McConnell, *Tradition*]).

283. McConnell, *supra* note 271, at 684.

284. See Thomas W. Merrill, *Bork v. Burke*, 19 HARV. J.L. & PUB. POL’Y 509, 509, 511-12 (1996).

And by giving these traditions some normative force and attempting to harmonize them with the constitutional text, liquidation bears some affinity with arguments from cultural continuity. Tradition provides yet another grounding for constitutional liquidation.

#### D. Possible Shortcomings

From its name down to its mechanics, liquidation has something unsatisfying about it. It doesn't invoke aspiration, the march of progress, or constitutional dreams working themselves pure. Nor does it invoke constitutional fidelity or perfection. It smacks of stagnation and compromise. It smacks of loss. Those connotations are not inapt, but that need not be a bad thing.

Liquidation itself seems designed to operate as a compromise on multiple levels. In the immediate sense, it is about enabling and adhering to stable political compromises. Rather than having us fight over every constitutional question at every moment, liquidation tries to settle many of them, so that the working business of government can go on.

Liquidation is also about compromise in the broader methodological sense. It is not quite an alternative, but rather an adjunct, to more complete methods of constitutional interpretation. Liquidation both presupposes that one has some other, preexisting theory of constitutional interpretation, and tries to provide occasions on which one should be willing to forgo that theory. For originalists, this means forgoing some attempts to divine the Constitution's true original meaning; for those with more aspirational theories, this means forgoing the best that the Constitution can be.<sup>285</sup> In a sense, liquidation is a response to imperfection, both in constitutional substance and constitutional interpretation.

Because liquidation draws from historical practice, it is also potentially vulnerable to the criticisms made against historical practice generally. But in fact, the specific mechanics of liquidation do a fair job of deflecting the criticisms of historical practice made in recent scholarship. For instance, Shalev Roisman has argued that some theories of historical practice in constitutional interpretation make overly profligate use of the concept of interbranch "acquiescence."<sup>286</sup> This usage can be problematic because past practice often reflects nonconstitutional concerns, and, moreover, "will systematically serve

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285. Cf. RONALD DWORKIN, LAW'S EMPIRE 407-13 (1986) (advocating for interpreting law in a way that helps us become "the people we want to be" and build "the community we aim to have").

286. See Shalev Roisman, *Constitutional Acquiescence*, 84 GEO. WASH. L. REV. 668, 672-74 (2016).

to validate the power of the more active and powerful branch.”<sup>287</sup> Roisman goes on to argue that looking to governmental acquiescence can still be justified, but only if “there is evidence that the branches were at least aware of the constitutional issue at hand and, if so, that they were likely motivated by constitutional analysis.”<sup>288</sup>

As it happens, liquidation provides a way to harness insights from historical practice that avoids this critique. As we have seen, Madison stressed both points. Liquidation required attention to the constitutional issue, and disdained reliance on “midnight precedents” from Congress, such as when “owing to the termination of their session every other year at a fixed day & hour, a mass of business is struck off as it were at short hand & in a moment.”<sup>289</sup> And it required a practice that reflected the “naked question of constitutionality,” rather than policy considerations.<sup>290</sup>

Leah Litman has also argued that courts are too willing to conclude that the novelty of a federal statute is evidence of its unconstitutionality.<sup>291</sup> She emphasizes that there are many possible explanations for past congressional inaction or for why a new congressional action might be unprecedented.<sup>292</sup> These objections are similarly remedied by requiring a deliberate course of practice together with the public sanction.<sup>293</sup> Just as with repeated enactments of a provision, the *unconstitutionality* of a law might be liquidated by repeated debates in Congress about whether it can be enacted, culminating in its rejection.<sup>294</sup>

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287. *Id.* at 673.

288. *Id.* at 674.

289. Letter from James Madison to Spencer Roane, *supra* note 103, at 320.

290. Cf. Letter from James Madison to George McDuffie, *supra* note 97 (discussing the failure of the bank bill in 1811). That said, I am not sure that liquidation answers Roisman’s argument against the use of acquiescence that is “coerced by political circumstances.” See Roisman, *supra* note 286, at 693-95. The ultimate question for liquidation is not whether the government officials *really believed* in the constitutional arguments they articulated, but rather whether their interpretations reflected the public sanction. See *supra* text accompanying notes 112-18.

291. See Leah M. Litman, *Debunking Antinovelty*, 66 DUKE L.J. 1407, 1412-13 (2017).

292. *See id.* at 1427-48.

293. To be sure, Litman goes further, criticizing even an approach that applies only “in cases involving statutes that prior Congresses did not enact because they harbored doubts about the statutes’ constitutionality.” *Id.* at 1448. She suggests that this narrower approach, much closer to liquidation, would be disruptive, inconsistent with originalism, and unworkable. *See id.* at 1448-52. I hope that this Article’s elaboration of liquidation will mitigate at least some of those concerns.

294. For an example, see Baude, *supra* note 27, at 1761-80 (describing repeated deliberations rejecting Congress’s power of eminent domain).

#### IV. Liquidating Liquidation? (Harder Questions)

As liquidation becomes part of our constitutional vocabulary, some harder questions arise about its exact mechanics. In this Part, I address those questions with the best inferences I can make from Madison's theory. Because these issues were not addressed as explicitly as the basic structure of liquidation described above, I do so more tentatively. But if liquidation is to become or remain a part of constitutional interpretation today, these are questions that will need to be answered.

##### A. What Kinds of Provisions Can Be Liquidated?

Any provision of the Constitution can be indeterminate, at least in some respect. Does that mean that every provision is equally susceptible to liquidation? *NLRB v. Noel Canning* was a separation of powers case,<sup>295</sup> as were most of the cases it cited as examples of liquidation.<sup>296</sup> And in explaining its reliance on historical practice, the Court noted that “[f]or one thing, the interpretive questions before us concern the allocation of power between two elected branches of Government,”<sup>297</sup> which seems to imply that historical practice might *not* be relevant to other kinds of interpretive questions.<sup>298</sup> Similarly, Curt Bradley and Trevor Morrison have focused on the use of “historical practice in the separation of powers context,” observing that “[r]elying on past practice in this area . . . does not typically raise concerns about the oppression of minorities or other disadvantaged groups the way that it does in some individual rights areas.”<sup>299</sup> By contrast, Michael McConnell has suggested that liquidation is also relevant to individual rights cases.<sup>300</sup>

It is plain that Madison's idea of liquidation wasn't limited *only* to separation of powers cases. After all, the archetypical example of liquidation was the controversy over the national bank, which was a question of

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295. See 134 S. Ct. 2550, 2559 (2014).

296. See *id.* at 2560. For the separation of powers cases cited by the Court, see *Mistretta v. United States*, 488 U.S. 361, 380 (1989); *Dames & Moore v. Regan*, 453 U.S. 654, 668 (1981); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 596-97 (1952) (Frankfurter, J., concurring); *The Pocket Veto Case*, 279 U.S. 655, 674-76 (1929); *Ex parte Grossman*, 267 U.S. 87, 119-20 (1925); and *United States v. Midwest Oil Co.*, 236 U.S. 459, 490-91, 510 (1915) (Day, J., dissenting).

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

298. Cf. *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2091 (2015) (“In separation-of-powers cases this Court has often ‘put significant weight upon historical practice.’” (quoting *Noel Canning*, 134 S. Ct. at 2559)).

299. Bradley & Morrison, *supra* note 1, at 416; see also Bradley & Siegel, *supra* note 31, at 25.

300. See McConnell, *supra* note 27, at 1775-76 (citing *Glossip v. Gross*, 135 S. Ct. 2726, 2745 (2015); and *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997)); McConnell, *Tradition*, *supra* note 282, at 175.

federalism rather than of separation of powers. And even *Noel Canning* repeatedly cited *McCulloch* as an example of liquidation.<sup>301</sup> But *McCulloch* itself had suggested that liquidation was appropriate because “the great principles of liberty are not concerned.”<sup>302</sup>

Are individual rights cases different?

There is a modern intuition that individual rights should be inherently countermajoritarian, and hence that notions like the public sanction should have no bearing on them. But it is not clear that Founding-era thought reflected that intuition.<sup>303</sup> And because liquidation only takes place in areas of indeterminacy, one could argue that it preserves whatever countermajoritarian core is most important.

The specific mechanics of Madison’s model of republican legitimacy can also be an odd fit for individual rights cases. Recall that under that model, different groups of officials would compete for the popular sanction, developing the “reason of the society.”<sup>304</sup> That competition happens in most conflicts over constitutional structure—whether between different departments of the federal government or between federal and state government entities. But in individual rights conflicts, government officials may only be on one side of the dispute, so Madison’s republican model would not squarely apply. That is the structural argument against liquidation of individual rights provisions.

On the other hand, there are at least two arguments in favor. First, the division between structure and rights may be somewhat artificial. Structure was supposed to have the effect of protecting individual rights,<sup>305</sup> and rights

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301. See *Noel Canning*, 134 S. Ct. at 2559-60. This is so despite the exchange between Madison and Edward Everett highlighted by Larry Kramer. See *supra* text accompanying notes 172-77. There, Madison arguably expressed doubt about how much liquidation should account for the views of states—not whether it applied to views about states.

302. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 401 (1819).

303. See Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246, 253-54, 268-80 (2017) (arguing that with democratic consent governments could restrain natural rights in service of the public good); see also Jud Campbell, *Republicanism and Natural Rights at the Founding*, 32 CONST. COMMENT. 85, 86-87 (2017) (reviewing RANDY E. BARNETT, OUR REPUBLICAN CONSTITUTION: SECURING THE LIBERTY AND SOVEREIGNTY OF WE THE PEOPLE (2016)) (“In short, natural rights called for good government, not necessarily less government.”).

304. See *supra* text accompanying notes 119-21.

305. See, e.g., Minutes of the Pennsylvania Convention (Nov. 28, 1787), in 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 382, 388 (Merrill Jensen ed., 1976) (James Wilson: “[I]n a government consisting of enumerated powers, such as is proposed for the United States, a bill of rights would not only be unnecessary, but, in my humble judgment, highly imprudent.”).

sometimes have a structural component.<sup>306</sup> Second, part of the point of Madison's model of legislative acquiescence was to ensure that a liquidated decision had the "public sanction."<sup>307</sup> So even though an individual rights case lacks a disagreement between two government entities, one of the government entities has been replaced by *the public itself*. Maybe that provides an even stronger source of legitimacy.

One further application that blurs the line between structure and rights is in the enforcement of the Reconstruction Amendments. Each of these Amendments grants individual rights that Congress is empowered to "enforce" through "appropriate legislation."<sup>308</sup> That enforcement necessarily requires Congress to take a position on the scope of those individual rights. (There is much debate over how much *deference* those positions deserve,<sup>309</sup> but no doubt that Congress may *take* a position.<sup>310</sup>) In cases where Congress exercises that power vigorously, it may turn individual rights disputes into structural ones, because the breadth of Congress's power will be entangled with the breadth of the constitutional right. And if Congress's positions reflect a deliberate, sanctioned course of practice, they could ultimately result in liquidation. Such a possibility shows that even if liquidation is limited to structural provisions, it will necessarily encompass many important questions of individual rights.

## B. What Does Liquidation Decide?

Apart from the domain of liquidation, we might also ask about its scope. How much, exactly, is settled by a given instance of liquidation? David Currie, for instance, has maintained that while the constitutionality of the annexation of Texas should be "considered settled" by practice, he was not ready to concede that the annexation of any *future state* would be settled by the same rule.<sup>311</sup> The analogy, he argues, "is to *res judicata*, not *stare decisis*; what is settled is not the

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306. See, e.g., AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 25-26, 89-93, 123-33 (1998) (discussing the interaction between rights and structure).

307. See Letter from James Madison to Martin L. Hurlbut, *supra* note 70, at 372; *supra* text accompanying notes 112-15.

308. U.S. CONST. amend. XIII, § 2; *id.* amend. XIV, § 5; *id.* amend. XV, § 2.

309. See Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1, 30-45 (2003) (criticizing the Supreme Court's claim to exclusive authority over constitutional law).

310. See, e.g., *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (acknowledging that "[i]t is for Congress in the first instance to 'determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment'" (second alteration in original) (quoting *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966))).

311. See David P. Currie, *Texas, in THE LOUISIANA PURCHASE AND AMERICAN EXPANSION, 1803-1898*, *supra* note 108, at 111, 112.

general principle but the particular case.”<sup>312</sup> Michael Gerhardt has argued that nonjudicial precedents are not “generally framed as rules or standards” and are therefore hard to discern.<sup>313</sup>

Indeed, construed at its narrowest, the liquidation of the national bank could settle only the constitutionality of the first bank, not any successors. Alternatively, construed at its broadest, the bank episode might seem to stand for the proposition that everything Alexander Hamilton said about broad federal power was correct. Neither approach is satisfying.

The precedent analogy points us toward the answer. Because a liquidated course of practice is a legislative precedent analogous to a judicial one, we might try to ask what its “holding” was, just as we would ask about a judicial precedent. So if the annexation issue had been liquidated, it could extend beyond Texas. When there is a course of practice, we should ask what legal question it necessarily decided.

For instance, Madison acquiesced in the constitutionality of the national bank, upheld in *McCulloch v. Maryland*.<sup>314</sup> But he did not acquiesce in everything that the opinion said about national power, namely, the part he called “the general & abstract doctrine interwoven with the decision on the particular case.”<sup>315</sup> Despite his acquiescence on the bank, he continued to reject “the high sanction given to a latitude in expounding the Constitution”; what he feared was the Court’s decision to “relinquish, by their doctrine, all controul on the Legislative exercise of unconstitutional powers.”<sup>316</sup> In disregarding this part of the opinion he likened it to judicial dictum and suggested that it was less reliable because it had “forego[ne] the illustration to be derived from a series of cases actually occurring for adjudication.”<sup>317</sup>

This inquiry is made possible by one of the features of liquidation, the requirement that the practice be a deliberate one in which the constitutional question was expressly considered and debated. These debates make it easier for the participants—and later readers—to know what was at stake.<sup>318</sup> And indeed, Madison linked the requirement of deliberation to the scope of a liquidated practice when he warned against “the use made of precedents which can not be

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312. *Id.*

313. GERHARDT, *supra* note 262, at 138; cf. Litman, *supra* note 291, at 1451 (“[O]perationalizing a principle concerned with identifying congressional consensus that a statute is unconstitutional would likely prove inadmissible.”).

314. 17 U.S. (4 Wheat.) 316 (1819).

315. Letter from James Madison to Spencer Roane, *supra* note 48, at 501.

316. *Id.*; see also RICHARD E. ELLIS, AGGRESSIVE NATIONALISM: *MCCULLOCH V. MARYLAND AND THE FOUNDATION OF FEDERAL AUTHORITY IN THE YOUNG REPUBLIC* 102-03 (2007).

317. Letter from James Madison to Spencer Roane, *supra* note 48, at 501.

318. Cf. GERHARDT, *supra* note 262, at 138-39 (“[T]he reasons given for particular actions may also matter....[I]t would help if [senators] explained their votes.”).

supposed to have had, in the view of their authors, the bearing contended for, and even where they may have crept, thro' inadvertence, into Acts of Congress.”<sup>319</sup>

To be sure, the dictum-holding distinction has sometimes proven elusive in judicial precedent<sup>320</sup> and may be more so in liquidation. The scope of liquidation may also depend on external methodological commitments—that is, on the many possible reasons one could have for using liquidation.<sup>321</sup> But our established norms of hunting for that distinction in case law may at least guide us in drawing similar distinctions when looking at the scope of a given liquidated practice.<sup>322</sup>

### C. Is Liquidation Necessarily Permanent?

Richard Fallon has recently asked:

Once practice has “liquidated” the meaning of a constitutional term, does the meaning as thus liquidated become fixed forever, or can evolving practice endow vague or ambiguous terms with historically changing meanings? In the leading historical study, Professor Caleb Nelson suggests that the former understanding enjoyed broad currency in the Founding generation ....<sup>323</sup>

Indeed, Nelson maintains that “[i]n the absence of ‘extraordinary and peculiar circumstances,’ . . . liquidations were expected to be permanent.”<sup>324</sup> And he points as well to several instances in which Madison implied permanence. During the 1789 congressional debates over the President’s removal power, “Representative Madison reminded his colleagues that the conclusion reflected in their statute would have lasting impact as a ‘permanent

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319. Letter from James Madison to James Monroe, *supra* note 95, at 191.

320. See, e.g., Kent Greenawalt, *Reflections on Holding and Dictum*, 39 J. LEGAL EDUC. 431, 442 (1989) (“[S]imple dichotomies such as holding-dictum . . . do not adequately capture our complex practices.”).

321. See Randy J. Kozel, *The Scope of Precedent*, 113 MICH. L. REV. 179, 220 (2014) (“The question of what a precedent ‘stands for’ cannot be determined in a vacuum. It depends on a web of normative and methodological premises that determine the proper ends of constitutional interpretation.”).

322. For a discussion of the holding-dictum distinction in the context of liquidation, see Smith, *supra* note 224, at 637–40.

323. Fallon, *supra* note 29, at 1774; see also Nelson, *Originalism*, *supra* note 26.

324. Nelson, *supra* note 15, at 2453 (quoting Letter from James Madison to Charles J. Ingersoll, *supra* note 83, at 185).

exposition of the constitution.”<sup>325</sup> And there and elsewhere, Madison associated liquidation with “fixing” the meaning of the constitutional text.<sup>326</sup>

Meanwhile, Michael McConnell has suggested that liquidation had a lesser, but substantial, degree of permanence. He writes that “[p]resumably, this ‘fixing’ is not irrevocable,” but also suggests that “departures require substantial justification and a similar process of deliberation and widespread acceptance.”<sup>327</sup> Liquidation plainly was supposed to have at least *some* prospective binding force. The very point of the liquidation concept was to give future interpreters a narrower range of meanings than earlier interpreters had. But the harder question is how binding it was.

Once again, answering this question requires some inference, but the analogy to precedent suggests that liquidation is not necessarily permanent.

It may help to consider the matter from two different perspectives. First, take the position of a contemporary interpreter looking back at the sweep of constitutional history. Suppose that for decades, a course of practice seemed to confirm one view and to represent a liquidated constitutional settlement. But later, somehow, a contrary practice took over. This new contrary practice was itself debated, but then became liquidated by a similar course of practice. What should the modern interpreter do?

The answer, suggests the precedent analogy, is to follow the *later* practice, not to treat the first practice as permanent and inviolate. Under both historical and modern doctrines of precedent, it was and is generally accepted that later precedent, once established, is controlling. As a matter of modern stare decisis, this is obvious. For instance, in 2015, the Supreme Court found a constitutional right to same-sex marriage,<sup>328</sup> contrary to a 1972 appeal in which it found that a claimed right to same-sex marriage presented no “substantial federal question.”<sup>329</sup> We all understand that going forward it is the 2015 opinion that establishes a precedent, and that all lower courts are expected to obey it.

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325. Nelson, *Originalism*, *supra* note 26, at 527 (quoting The Congressional Register, *supra* note 4, at 921 (statement of Rep. Madison); and The Daily Advertiser, *supra* note 4, at 895 (statement of Rep. Madison)).

326. See *id.* at 527-29; see also *id.* at 530-36 (discussing the notion of “fixing” meaning in the context of eighteenth-century lexicography).

327. McConnell, *supra* note 27, at 1774.

328. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607-08 (2015).

329. See *Baker v. Nelson*, 409 U.S. 810, 810 (1972), *overruled by Obergefell*, 135 S. Ct. 2584. The Court dismissed the appeal from *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971).

Similarly, the Supreme Court's 2010 decision in *Citizens United v. FEC*<sup>330</sup> is precedent even though it overruled parts of the 2003 decision in *McConnell v. FEC*,<sup>331</sup> and lower courts are expected to obey.<sup>332</sup> The examples are so plentiful as to be banal.<sup>333</sup>

Keeping in mind that Founding-era precedent emphasized lines of cases, the same idea nonetheless obtained when one line of cases was replaced by another. If the custom had once been *X*, but now the custom was *Y*, then the binding custom was *Y*. That is the logical implication of the Founding-era recognitions "that regional common law in America deviated in parts significantly from its English model"<sup>334</sup> and that, for instance, "various customs" had "materially altered" the "common law" in Massachusetts.<sup>335</sup> And it is reflected in Matthew Hale's *History of the Common Law*, which described the common law as changing over time "to be accommodated to the Conditions, Exigencies and Conveniencies of the People . . . as those Exigencies and Conveniencies do insensibly grow" so that "it is not possible to assign the certain Time when the Change began."<sup>336</sup>

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330. 558 U.S. 310 (2010).

331. 540 U.S. 93 (2003), *overruled in part by* *Citizens United*, 558 U.S. 310.

332. See Am. Tradition P'ship, Inc. v. Bullock, 567 U.S. 516, 516 (2012) (per curiam) ("The question presented in this case is whether the holding of *Citizens United* applies to the Montana state law. There can be no serious doubt that it does.").

333. Michael Stokes Paulsen has argued that under modern doctrine, "[w]hen earlier Precedent *A* (or line of cases) is inconsistent with later Precedent *B* (or line of cases), either one may be overruled," depending on which one is incorrect. Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute May Congress Remove the Precedential Effect of Roe and Casey?*, 109 YALE L.J. 1535, 1561 (2000). If that is right, it still means that earlier precedents qua precedents do not control later ones.

334. Bernadette Meyler, *Towards a Common Law Originalism*, 59 STAN. L. REV. 551, 575 (2006).

335. See *id.* at 576 (quoting LETTER OF THE JUSTICES OF THE SUPREME JUDICIAL COURT TO HIS EXCELLENCY THE GOVERNOR, WITH TWO JUDICIARY BILLS DRAWN BY THEM 11-12 (Boston, Young & Minns 1804)); see also Amy Coney Barrett, *The Supervisory Power of the Supreme Court*, 106 COLUM. L. REV. 324, 382 (2006) ("As for change, the common law, while an identifiable body of customs and rules, was not a static body of customs and rules. New customs developed to meet new situations. In keeping with this principle, James Kent explained that while settlers had taken the English common law with them to America, it was retained only 'so far as it was adapted to our institutions and circumstances.' (quoting 1 JAMES KENT, *COMMENTARIES ON AMERICAN LAW* \*343 (O.W. Holmes, Jr. ed., Boston, Little, Brown & Co. 12th ed. 1873) (1826))).

336. MATTHEW HALE, *THE HISTORY OF THE COMMON LAW OF ENGLAND* 57-58 (London, E. Nutt 2d ed. corrected 1716); see also McConnell, *Tradition*, *supra* note 282, at 186-89 (describing the popularity of Hale's view in America).

If it is right that contemporary lines of precedent controlled over ancient lines of precedent,<sup>337</sup> then the same should have been true under Madison's theory of liquidation. In other words, the analogy suggests that in practice, liquidated provisions can be unliquidated or reliquidated.<sup>338</sup> If a constitutional issue had been debated and settled over one period of time, but later debates had deviated from the original liquidation, the Madisonian view implies that later interpreters should follow the later practice, just as we would expect later judges to follow a later precedent. This is also consistent with liquidation's goal of providing stability by matching meaning to publicly accepted practice.

But now consider the matter from the perspective of a person at the time that the first practice remains settled. That person is not free to simply create a new, contrary practice on his own initiative. The fact that subsequent liquidations, once established, can control earlier ones does not mean that one is free to *initiate* a reliquidation. So how might such a subsequent practice legitimately arise?

The most obvious possibility is that subsequent interpreters would simply decide that the previous liquidation was just sufficiently bad on normative grounds. There are hints of this idea in Madison's writings about liquidation. In a letter to Reynolds Chapman he described a binding liquidation as being one "obviously conformable to the public good,"<sup>339</sup> which implies that a liquidation that was *not* good might not be binding. Another set of letters is even more explicit. To Charles Haynes, Madison wrote: "That cases may occur which transcend all authority of precedents, must be admitted, but they form exceptions which will speak for themselves and must justify themselves."<sup>340</sup>

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337. Note that this is not entirely free from doubt. For instance, Thomas Jefferson apparently "insisted on a very specific temporality for the common law, dating it back before the Magna Carta," and invoked pre-Magna Carta judicial decisions as against contemporary ones. See Meyler, *supra* note 334, at 568-69; cf. Nelson, *Stare Decisis*, *supra* note 26, at 21-27 (discussing competing views of the common law in the early republic). But it is not so clear whether Jefferson really meant to claim that older judicial customs trumped newer ones, or if he meant instead to deny that the later decisions were really established, or perhaps to appeal to "external" principles, see Nelson, *Stare Decisis*, *supra* note 26, at 25, in the same vein as unambiguous constitutional text. See generally Julius S. Waterman, *Thomas Jefferson and Blackstone's Commentaries*, in ESSAYS IN THE HISTORY OF EARLY AMERICAN LAW 451, 465-67 (David H. Flaherty ed., 1969) (describing Jefferson's views about the common law as stemming from the Saxon-Norman conflict).

338. See Bradley & Siegel, *supra* note 31, at 34 (making this analogy).

339. Letter from James Madison to Reynolds Chapman, *supra* note 89, at 434.

340. Letter from James Madison to Charles E. Haynes, *supra* note 93, at 443.

To Charles Ingersoll, he wrote: “That there may be extraordinary & peculiar circumstances controuling the rule . . . may be admitted . . .”<sup>341</sup> And a set of notes on his correspondence about tariffs with Joseph Cabell say:

Altho' it might be too much to say that no case could arise, of a character overruling the highest evidence of precedents & practice, in expounding a Constitution, it may be safely affirmed that no case wch. is not of a character far more exorbitant & ruinous than any now existing or that has occurred, can authorize a disregard of the precedents & practice . . .<sup>342</sup>

But these hints are fairly vague, and liquidation would not accomplish what Madison tasked it to do if ordinary normative disagreement were a sufficient ground for ignoring it. For liquidation to overrule individual opinions, or to explain why Madison was now making common cause with those who supported the bank,<sup>343</sup> it must surmount at least some ordinary normative disagreements.

Another way that a liquidation could nonetheless be overcome in practice is if subsequent interpreters decided that the constitutional provision was fully determinate in the first place. Because constitutional indeterminacy is a prerequisite to liquidation, such a provision should never have been liquidated at all—the interpretation would “alter” the Constitution rather than merely “expound” it.<sup>344</sup>

Relatedly, because people can disagree about indeterminacy itself, sometimes a small group that passionately (even if wrongly!) believes a constitutional provision to be determinate can successfully undermine a liquidated practice. For instance, one might conclude, as the *Noel Canning* Court did, that the Constitution was ambiguous as to whether “the phrase ‘vacancies that may happen during the recess of the Senate’ includes only ‘vacancies that initially occur during a recess’ or also ‘vacancies that initially occur before a recess and continue to exist during the recess.’”<sup>345</sup> And by 1862, one might have concluded, as Attorney General Edward Bates did, that though he “might have serious doubts” if considering the issue “for the first time,” the broader position was “settled . . . by the continued practice” of previous Presidents and attorneys general, “and sanctioned . . . by the unbroken acquiescence of the Senate.”<sup>346</sup>

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341. Letter from James Madison to Charles J. Ingersoll, *supra* note 83, at 185.

342. James Madison, Notes on Letters to Mr. Cabell (1828), <https://perma.cc/J23N-2DPU>, reprinted in 9 THE WRITINGS OF JAMES MADISON, *supra* note 49, at 322 n.1, 324 n.1. For one of the Cabell letters, see Letter from James Madison to Joseph C. Cabell, *supra* note 96.

343. See *supra* text accompanying notes 51-55; *supra* notes 149-61 and accompanying text.

344. See Letter from James Madison to Nicholas P. Trist, *supra* note 49, at 477.

345. NLRB v. Noel Canning, 134 S. Ct. 2550, 2567 (2014) (emphasis omitted) (quoting U.S. CONST. art. II, § 2, cl. 3).

346. President's Appointing Power, 10 Op. Att'y Gen. 356, 356 (1862).

(Indeed, the practice had even crossed the front: The Confederacy's Attorney General, Thomas Hill Watts, concluded that the "uniform and settled construction" of the *Union's* Recess Appointments Clause, as of 1861, had been incorporated into the Confederate Constitution's near-identical clause.)<sup>347</sup>

But just after Bates's conclusion, the Senate responded that Bates was wrong. A report by the Senate Judiciary Committee acknowledged "the great weight which such a continued practical construction is entitled to in considering the meaning and intent of a *doubtful* clause in a public act."<sup>348</sup> But it found "the language too plain to admit of a doubt or to need interpretation," and thought the narrower interpretation unambiguously required.<sup>349</sup> Congress subsequently implemented the report by passing legislation that eliminated salaries for recess appointments when the "vacancy existed while the Senate was in session."<sup>350</sup> Even for those who think the Recess Appointments Clause ambiguous, that legislation might have begun a new, liquidated understanding if it were confirmed by a subsequent course of practice.<sup>351</sup>

Similarly, Madison thought that the bank's constitutionality was ultimately liquidated by a course of practice.<sup>352</sup> President Jackson, by contrast, thought that its constitutionality had not yet been "well settled," and that precedents drawn from Congress "were equal" on both sides, while those from the states "have been probably . . . 4 to 1" against it.<sup>353</sup> Even if Jackson was wrong, his very veto sparked subsequent events that threatened to disrupt the bank's liquidated status.<sup>354</sup> Indeed, had events been slightly different, it is possible that the veto could have led to the overruling of *McCulloch* and to the development of a new liquidated understanding of congressional power.

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347. See Letter from Thomas Hill Watts, Attorney Gen., to John Reagan, Post-Master-Gen. (May 8, 1863), in THE OPINIONS OF THE CONFEDERATE ATTORNEYS GENERAL, 1861-1865, at 261, 261-64 (Rembert W. Patrick ed., 1950); see also Alison L. LaCroix, *Continuity in Secession: The Case of the Confederate Constitution*, in NULLIFICATION AND SECESSION IN MODERN CONSTITUTIONAL THOUGHT, *supra* note 67, at 274, 289-93 (discussing the pervasive Confederate incorporation of Union practice and precedent).

348. S. REP. NO. 37-80, at 7 (1863). The report had been written at the request of the full Senate. See CONG. GLOBE, 37th Cong., 3d Sess. 100 (1862).

349. S. REP. NO. 37-80, at 7.

350. Act of Feb. 9, 1863, ch. 25, § 2, 12 Stat. 642, 646.

351. It is debatable to what extent subsequent practice confirmed the Senate's position, and the statute was amended in 1940. See *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2572 (2014) ("In any event, the Senate subsequently abandoned its hostility."); see also Act of July 11, 1940, Pub. L. No. 76-738, 54 Stat. 751.

352. See *supra* text accompanying notes 136-42.

353. Jackson 1832 Veto Message, *supra* note 50, at 581-82.

354. See *supra* text accompanying notes 50-55; *supra* notes 163-69 and accompanying text.

It might be the case that liquidation was *expected* to be permanent,<sup>355</sup> but these expectations might not always come true. Rather, these examples help us see how liquidation is indeed “not irrevocable,” and how one liquidated understanding can be replaced with another through “a similar process of deliberation and widespread acceptance.”<sup>356</sup> At the same time, they do not necessarily imply that such a process of abandonment can begin for *purely* normative reasons, even with a “substantial justification.”<sup>357</sup>

#### D. Is Early Practice Privileged?

Once again, Richard Fallon has put the question well: “Is the capacity to ‘liquidate’ or settle meaning limited to practices that began closely proximately in time to the Constitution’s adoption, or can liquidation occur through later practice?”<sup>358</sup> Curt Bradley and Neil Siegel similarly have noted the uncertainty whether liquidation “may occur only through early post-Founding practice, or whether it also may occur through later practice long after the Founding,” and write that their “best sense . . . is that the liquidation concept turns on initial practice, which typically although not necessarily will be early practice.”<sup>359</sup> Some scholars seem to make similar assumptions;<sup>360</sup> others seem to assume that later practices can liquidate, too.<sup>361</sup>

Privileging early practice through liquidation is tempting but wrong. First the temptation: Connecting liquidation specifically to early practice might explain the many scholarly and judicial writings that seem to privilege the constitutional views of President Washington and of the First Congress. For example, Akhil Amar has argued that “[s]everal basic features of America’s enduring presidential system have been established less by the Constitution’s text than by the gloss on the text provided by President Washington’s actions,”

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355. See Nelson, *supra* note 15, at 2453.

356. McConnell, *supra* note 27, at 1774.

357. *See id.*

358. Fallon, *supra* note 29, at 1774.

359. Bradley & Siegel, *supra* note 31, at 29-30.

360. See, e.g., Mark A. Graber, *Essay, Establishing Judicial Review: Marbury and the Judicial Act of 1789*, 38 TULSA L. REV. 609, 637-38 (2003); John F. Manning, *Comment, The Independent Counsel Statute: Reading “Good Cause” in Light of Article II*, 83 MINN. L. REV. 1285, 1326 n.149 (1999); *see also* Aziz Z. Huq, *The Function of Article V*, 162 U. PA. L. REV. 1165, 1233 (2014) (supplementing this assumption with normative and structural arguments that “historical practice ought to matter if it emerged in the first few decades of constitutional history, but perhaps less so otherwise”).

361. See, e.g., Henry Paul Monaghan, *Supremacy Clause Textualism*, 110 COLUM. L. REV. 731, 786-87 (2010) (rejecting the view of “many prominent originalists” that “would accept only those liquidating precedents that arose close in time to the founding”).

and that the text “invites” us to read it as implicitly “delegat[ing] authority to George Washington to fill in the blanks of Article II and thereby sharpen the role of all future presidents.”<sup>362</sup>

Similarly, the First Congress is said to have “breathed life into the Constitution” and “established precedents that still guide the nation’s government.”<sup>363</sup> The Supreme Court has said that “[a]n Act ‘passed by the first Congress assembled under the Constitution, many of whose members had taken part in framing that instrument, . . . is contemporaneous and weighty evidence of its true meaning.’”<sup>364</sup> Other cases have similar formulations.<sup>365</sup> The invocations are so frequent that one observer has coined the term “the First Congress canon” to describe the practice.<sup>366</sup>

Despite its intuitive force, this is not Madison’s theory of liquidation, for much the same reason that liquidation is not entirely permanent. Liquidation proceeded by analogy to precedent. Madison’s argument for allowing post-Founding practice to liquidate constitutional meaning was never, so far as I can tell, that there had been a delegation of implicit authority specifically to the post-Founding generation.<sup>367</sup> It is rather that the repeated, sanctioned activity of public officials could create a form of constitutional precedent. And just as precedents can be established by judges 50 or 100 or 231 years after the Founding, so too can they be established by other officials 50 or 100 or 231 years after the Founding. Indeterminate provisions remain open to liquidation for as long as their meanings remain contested.<sup>368</sup>

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362. AMAR, *supra* note 57, at 313-14. To be clear, Amar rightly recognizes this argument as separate from the use of “institutional practice[]” to “gloss and clarify the text.” *See id.* at 335.

363. FERGUS M. BORDEWICH, THE FIRST CONGRESS: HOW JAMES MADISON, GEORGE WASHINGTON, AND A GROUP OF EXTRAORDINARY MEN INVENTED THE GOVERNMENT 1 (2016).

364. *Marsh v. Chambers*, 463 U.S. 783, 790 (1983) (second alteration in original) (quoting *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 297 (1888), *abrogated in other part by Milwaukee County v. M.E. White Co.*, 296 U.S. 268 (1935)).

365. *See, e.g.*, *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 57 (1884).

366. *See Michael Bhargava, Comment, The First Congress Canon and the Supreme Court’s Use of History*, 94 CALIF. L. REV. 1745 (2006).

367. *But see* Nelson, *Originalism*, *supra* note 26, at 551 (“[R]easonable members of the founding generation . . . might conceivably have read each indeterminate provision in the Constitution not only to define a range of permissible interpretations, but also to delegate power to the provision’s initial interpreters to make an authoritative selection within that range.”).

368. This implies that in *Noel Canning*, Justice Breyer’s opinion for the Court was right to look to practice “even when that practice began after the founding era,” *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2560 (2014), despite Justice Scalia’s criticism on this point, *see id.* at 2594 (Scalia, J., concurring in the judgment). *See also* Bradley & Siegel, *supra* note 31, at 18 (noting this dispute).

To be sure, the first generation of public officials may still have *hoped* and *aspired* that the liquidations created by their practices would last and be given special status, just as courts generally hope that judicial opinions they write will not be overruled. That may explain Madison's reference to the possibility of a "permanent exposition of the constitution,"<sup>369</sup> or his early suggestion that his work in Congress would "become every day more easy" as "the novelty of the business" decreased.<sup>370</sup> Indeed, in that letter he noted that "the exposition of the Constitution is frequently a copious source" of difficulty "and must continue so until its meaning on all great points shall have been settled by precedents."<sup>371</sup> Similarly, Madison apparently hoped that "the Constitution should be well settled by practice" before he decided to release his notes from the Constitutional Convention.<sup>372</sup> These references to permanent settlement do not necessarily reflect a belief that liquidation is definitionally permanent, but rather something like the Supreme Court's hope that "contending sides" will ultimately agree to "accept[] a common mandate rooted in the Constitution," that is, the Court's precedent.<sup>373</sup>

So does this mean that there is no reason at all to privilege the first post-Founding practices? Ought constitutional interpretation to stop focusing so heavily on the Decision of 1789,<sup>374</sup> the first congressional chaplains,<sup>375</sup> or even the establishment of the national bank?

I would not go that far. It is true that seen purely as a matter of liquidation, such decisions retain relevance only to the extent they continue to represent a liquidation with the force of law. But such decisions have interpretive relevance for an additional reason, namely that they can reflect some information about the Constitution's *original* meaning. Even though their practices came after the text was enacted, it may be possible "to derive evidence

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369. See *The Congressional Register*, *supra* note 4, at 921 (statement of Rep. Madison); *The Daily Advertiser*, *supra* note 4, at 895 (statement of Rep. Madison).

370. Letter from James Madison to Samuel Johnston, *supra* note 81, at 250.

371. *Id.*

372. See Letter from James Madison to Thomas Ritchie (Sept. 15, 1821), <https://perma.cc/7X9T-AHWP>, reprinted in 2 THE PAPERS OF JAMES MADISON: RETIREMENT SERIES, *supra* note 85, at 381, 381. Madison implied that he expected this settlement might even happen before his death! See *id.*

373. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 867 (1992).

374. See generally Prakash, *supra* note 38.

375. See *Marsh v. Chambers*, 463 U.S. 783, 787-90 (1983).

about the meaning of a text by consulting the interpretations of those who have the familiarity with the relevant context and linguistic conventions,”<sup>376</sup> that is to say, the framing generation.

To be sure, this information is only “reflected light,”<sup>377</sup> and there are many cautions about the extent to which postratification statements by members of the framing generation should be used as evidence of original meaning.<sup>378</sup> But they are a potentially important source of information nonetheless, and that importance provides some limited justification for the special interpretive status given to the First Congress<sup>379</sup> and even to George Washington.<sup>380</sup> Almost all interpreters, even non-originalists, give original meaning at least some weight in constitutional interpretation.<sup>381</sup> So to the extent that original meaning has some weight, post-Founding practice is relevant because it provides some evidence of that meaning.

In sum, members of the first post-Founding generation are not given privileged place by the theory of liquidation. Their decisions had the same capacity to liquidate as anybody else’s. But they have some additional weight, as they reflect original meaning. To the extent that constitutional interpreters

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376. John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 86 n.334 (2001) (citing Kent Greenawalt, *Essay, The Nature of Rules and the Meaning of Meaning*, 72 NOTRE DAME L. REV. 1449, 1451 (1997)).
377. See Baude, *supra* note 27, at 1811; see also Jack M. Balkin, *The New Originalism and the Uses of History*, 82 FORDHAM L. REV. 641, 656-57 (2013) (discussing the use of “post-ratification history” to “shed light on adoption history”); Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 984-86 (1995) (discussing such use in interpreting the Fourteenth Amendment).
378. See, e.g., Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541, 554 (1994); Robert G. Natelson, *The Agency Law Origins of the Necessary and Proper Clause*, 55 CASE W. RES. L. REV. 243, 247-48 (2004).
379. See William F. Ryan, *Rush to Judgment A Constitutional Analysis of Time Limits on Judicial Decisions*, 77 B.U. L. REV. 761, 770 (1997) (“This interpretive principle should apply with even greater force to Article III matters, given that Oliver Ellsworth was both the primary architect of the Judiciary and Process Acts of 1789 and a member of the Constitutional Convention’s Committee of Detail, which was responsible for adding the phrase ‘judicial Power’ to the Constitution.” (footnotes omitted)); see also Gruber, *supra* note 360, at 637.
380. On this theory, what matters about Washington is not so much that he was delegated the first presidency, as Amar argues, *see* AMAR, *supra* note 57, at 313-14, but rather that he was deeply immersed in the ratification of the Constitution, *see generally* EDWARD J. LARSON, *THE RETURN OF GEORGE WASHINGTON*, 1783-1789, at 187-233 (2014).
381. See Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1, 10 & n.21 (2009); Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 GEO. L.J. 1765, 1766 (1997).

give weight to original meaning, they could be justified in giving these earliest practices special attention. But interpreters should be careful to disentangle the importance of these practices as a matter of liquidation from their indirect relevance to original meaning.

#### E. Is Liquidation Meaningfully Distinct?

If liquidation is defined in these ways—as applying to all constitutional provisions, and as looking to the most recent settled practice rather than privileging early practice or the first fixed practice—a final question is whether liquidation is really meaningfully distinct from other methods of giving weight to historical practice.

In particular, this understanding puts liquidation more in line with the family of theories referred to as historical “gloss,” after Justice Frankfurter’s concurrence in *Youngstown*:

The 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. Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them. It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them. In short, a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on “executive Power” vested in the President by § 1 of Art. II.<sup>382</sup>

This theory of gloss has been most comprehensively expounded by Curt Bradley in a series of articles, some written with Trevor Morrison and Neil Siegel. In places, they have suggested gloss to be different from the technical concept of liquidation, but that may be because they understand liquidation to focus on early practice.<sup>383</sup> If that assumption is wrong, it raises the question whether liquidation and gloss have collapsed into one another.<sup>384</sup>

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382. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring).

383. See Bradley & Siegel, *supra* note 31, at 29-41; Bradley & Morrison, *supra* note 1, at 424 n.47, 478-79; Curtis A. Bradley, *Treaty Termination and Historical Gloss*, 92 TEX. L. REV. 773, 800-01, 801 n.148 (2014) [hereinafter Bradley, *Treaty Termination*]; see also Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Constitutional Conventions, and the Judicial Separation of Powers*, 105 GEO. L.J. 255, 262 (2017) (“The relationship between the historical gloss approach and the concept of liquidation is uncertain because little has been written about liquidation.”).

384. See Bradley & Siegel, *supra* note 31, at 29. Indeed, though the *Noel Canning* majority opinion does not use the word “gloss,” its references to Justice Frankfurter’s *Youngstown* footnote continued on next page

Maybe so. But liquidation has both a different pedigree and a different theoretical apparatus, and so it therefore seems to diverge from (or add to) the “gloss” project in at least three ways.

One way is through a different attitude toward the constitutional text. In liquidation, one must first ascertain that the constitutional text is indeterminate—that is, has a range of possible meanings. Subsequent practice can then narrow this range of possible meanings. Justice Frankfurter, by contrast, suggested that practice can “give meaning to the words of a text or supply them.”<sup>385</sup> To be sure, Justice Frankfurter did say that practice “cannot supplant the Constitution,” but the passage implies that he envisioned looking to practice first and text second, rather than the other way around.<sup>386</sup> The modern gloss theorists do also stress the relevance of ambiguity,<sup>387</sup> but they do not appear to view ambiguity as a hard boundary in the same way that liquidation does.<sup>388</sup>

A second way is through a different understanding of the relevant practice. Justice Frankfurter’s gloss focused on what those in power have actually *done*—whether an “exercise of power” has been made “part of the structure of our government.”<sup>389</sup> It is enough, apparently, that a longstanding course of action has been “never before questioned.”<sup>390</sup> Actions speak louder than words. Liquidation, by contrast, requires that the course of practice be the result of constitutional *deliberation*—and hence more than just silence.<sup>391</sup> (This difference may reflect different theoretical foundations—gloss seems to care

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concurrence appear to treat it as similar to liquidation. *See NLRB v. Noel Canning*, 134 S. Ct. 2550, 2560, 2573 (2014).

385. *Youngstown*, 343 U.S. at 610 (Frankfurter, J., concurring).

386. *See id.* at 610-11. On the effect of this kind of ordering, see generally Adam M. Samaha, *Starting with the Text—On Sequencing Effects in Statutory Interpretation and Beyond*, 8 J. LEGAL ANALYSIS 439 (2016).

387. *See Bradley & Morrison*, *supra* note 1, at 430-32.

388. *See Bradley, Treaty Termination*, *supra* note 383, at 830 n.317; *see also* Curtis A. Bradley & Neil S. Siegel, *Constructed Constraint and the Constitutional Text*, 64 DUKE L.J. 1213, 1241-42 (2015) (“[T]his standard bifurcation between clear and unclear text tends to overlook an important aspect of American interpretive practice: the same considerations that are potentially relevant in resolving the meaning of ambiguous text can also affect the perceived clarity of the text in the first instance.”).

389. *Youngstown*, 343 U.S. at 610-11 (Frankfurter, J., concurring).

390. *See id.*

391. Some modern gloss theorists would also “strongly prefer affirmative evidence” of acquiescence and “not just silence.” *See Bradley & Morrison*, *supra* note 1, at 451. But even so, gloss does not necessarily require evidence of “shared constitutional understandings.” *See* Curtis A. Bradley, *Essay, Doing Gloss*, 84 U. CHI. L. REV. 59, 73-74 (2017).

about what government officials have found workable;<sup>392</sup> liquidation ultimately cares about what the *people*, through the fiction of representation, have found acceptable.)

Finally, Bradley has suggested that gloss could be a family of different theories, in which the specific form of gloss depends on one's justification for adhering to it.<sup>393</sup> If so, it is possible that liquidation is actually a specific kind of gloss, whose specific rules relate to its specific justifications. Originalists might use liquidation because of its Founding-era pedigree. Burkeans might use liquidation because of its connections to tradition. Popular constitutionalists might use liquidation because of its incorporation of the public sanction.<sup>394</sup> Formalists might use liquidation because its theoretical apparatus provides a more structured, less "slippery" way to use historical practice.<sup>395</sup>

Liquidation also diverges from Bruce Ackerman's theory of "constitutional moments" at which a particular string of political practice and popular ratification can effectively amend the written Constitution.<sup>396</sup> Again, the two methods have some commonalities—both look to deliberate constitutional practice and subsequent acquiescence reflecting the public sanction. But liquidation is less epic, and more quotidian, in two respects. First, liquidation requires constitutional ambiguity as a gateway, which is why it can "expound" the Constitution but cannot "alter" it.<sup>397</sup> By contrast, Ackerman's constitutional moments act as a complete alternative to formalist and

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392. See *Youngstown*, 343 U.S. at 610 (Frankfurter, J., concurring) ("The 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."); see also Bradley & Morrison, *supra* note 1, at 432-35 (discussing how much weight to give historical practice where "the political branches have settled upon an institutional arrangement that they both deem desirable or at least practically workable and acceptable").

393. See Bradley, *Doing Gloss*, *supra* note 391, at 59-60; see also Bradley & Siegel, *supra* note 31, at 21 ("There are differing accounts of when such gloss should be credited and some of them do not precisely track Justice Frankfurter's articulation . . . ."); cf. Richard H. Fallon Jr., *Essay, Arguing in Good Faith About the Constitution: Ideology, Methodology, and Reflective Equilibrium*, 84 U. CHI. L. REV. 123, 134 (2017) ("Potentially distinct from the concept of liquidation—because it can be broader—is that of a 'historical gloss' on constitutional meaning.").

394. See *supra* text accompanying notes 112-18.

395. Cf. LaCroix, *supra* note 2, at 77-78 ("Historical practice is a slippery, unhelpfully capacious notion masquerading as a . . . neutral principle.").

Three of these justifications are not among the four considered by Bradley. See Bradley, *Doing Gloss*, *supra* note 391, at 64-67. Bradley does consider "Burkean consequentialism," see *id.* at 66-67, which as we have seen comprises a distinct subset of the arguments for tradition, see *supra* Part III.C.

396. See generally ACKERMAN, TRANSFORMATIONS, *supra* note 108, at 160-85, 316-42.

397. See Letter from James Madison to Nicholas P. Trist, *supra* note 49, at 477.

textualist theories that rely exclusively on the Article V amendment process.<sup>398</sup> Second, liquidation can happen on mundane constitutional questions that do not attract much public notice. By contrast, constitutional moments rely on the unusual activation of the people.<sup>399</sup> The public sanction acquired by a constitutional moment must be direct. Liquidation, by contrast, can be refracted through representative republicanism.

#### F. How Is Indeterminacy Determined?

A theory dependent on constitutional indeterminacy naturally prompts the question: What makes a constitutional provision indeterminate? Adopting Madison's perspective provides some basic answers. First of all, Madison plainly envisioned that some applications of the Constitution were unambiguously fixed, despite subsequent practice. That is why a constitutional indeterminacy was a prerequisite to liquidation,<sup>400</sup> and why Madison simultaneously stressed that subsequent legislative activity could not "controul[] or var[y]"<sup>401</sup> or "alter"<sup>402</sup> the Constitution. Hence, while Madison stated in *Federalist No. 37* that all new laws contained ambiguity (were "more or less obscure and equivocal"),<sup>403</sup> one should not mistakenly infer that he meant that all new laws were ambiguous in every respect.

Contrary to one recent piece of scholarship, this is an important difference between Madison's views of language and those of more modern thinkers like Ludwig Wittgenstein.<sup>404</sup> For Wittgenstein and his followers, use is the touchstone of meaning.<sup>405</sup> Under liquidation, subsequent practice is relevant only interstitially—only when textual meaning is unclear.<sup>406</sup> To read Wittgenstein into Madison is to be heedless of Madison's warnings about congressional alteration of the Constitution.<sup>407</sup>

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398. See ACKERMAN, TRANSFORMATIONS, *supra* note 108, at 15-17, 28-29, 183-85, 342-44.

399. See ACKERMAN, FOUNDATIONS, *supra* note 108, at 266-69; ACKERMAN, TRANSFORMATIONS, *supra* note 108, at 4-6.

400. See *supra* Part II.B.1.

401. Letter from James Madison to Charles J. Ingersoll, *supra* note 83, at 184.

402. Letter from James Madison to Nicholas P. Trist, *supra* note 49, at 477.

403. THE FEDERALIST NO. 37 (James Madison), *supra* note 5, at 236.

404. But see Ream, *supra* note 27, at 1666 ("Madison's idea of liquidation, though not mixed on the same philosophical palette as Wittgenstein's later thinking, turns out in practice to paint a similar picture of constitutional meaning as use in the ongoing activity of constitutional interpretation.").

405. See *id.* at 1665-66.

406. See *supra* Part II.B.1.

407. Ream does acknowledge "important differences" between "Wittgensteinian use-meaning" and "Madisonian use-meaning," but the indeterminacy requirement is not among them. See Ream, *supra* note 27, at 1670-73.

Second, in other writings Madison also set out various precepts of constitutional interpretation that can be used to tell us what those clear textual applications are. For instance, he advocated that “the legitimate meaning of the Instrument must be derived from the text itself; or if a key is to be sought elsewhere, it must be . . . in the sense attached to it by the people in their respective State Conventions where it [received] all the authority which it possesses.”<sup>408</sup> And Madison specifically rejected interpreting the text “in the changeable meaning of the words composing it,” emphasizing again “the propriety of resorting to the sense in which the Constitution was accepted and ratified by the nation.”<sup>409</sup> Indeed, he wrote, “[i]n that sense alone it is the legitimate Constitution.”<sup>410</sup> He also emphasized the “reasonable medium between expounding the Constitution with the strictness of a penal or other ordinary Statute, and expounding it with a laxity, which may vary its essential character.”<sup>411</sup>

To be sure, modern scholarship has raised questions about ambiguity that Madison did not address. For instance, indeterminacy can refer to one individual’s internal uncertainty about meaning, or instead to the extent of disagreement about meaning between individuals.<sup>412</sup> Madison did not address this issue directly, and passingly appears to have swept in both types of indeterminacy.<sup>413</sup> Nor did Madison specify an exact quantitative threshold of uncertainty or disagreement for a provision to lack determinate meaning.<sup>414</sup> A fully liquidated theory of liquidation might ultimately need to answer these questions too, but Madisonian precepts could go a long way toward outlining where the Constitution is indeterminate.

Things are more difficult, however, if we have so much disagreement over theories of interpretation more generally that we cannot even agree on the proper methods for finding ambiguity. Indeed, it might seem as if liquidation

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408. Letter from James Madison to Thomas Ritchie, *supra* note 372, at 381.

409. Letter from James Madison to Henry Lee (June 25, 1824), <https://perma.cc/QNX5-3DML>, reprinted in 3 THE PAPERS OF JAMES MADISON: RETIREMENT SERIES 338, 339 (David B. Mattern et al. eds., 2016).

410. *Id.*

411. Letter from James Madison to Spencer Roane, *supra* note 48, at 503.

412. See Ward Farnsworth et al., *Ambiguity About Ambiguity: An Empirical Inquiry into Legal Interpretation*, 2 J. LEGAL ANALYSIS 257, 258-60, 277-79 (2010).

413. See Letter from James Madison to Spencer Roane, *supra* note 48, at 502 (referring both to “difficulties and differences of opinion”).

414. Cf. Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2136-39 (2016) (reviewing ROBERT A. KATZMANN, *JUDGING STATUTES* (2014)) (noting the lack of a settled answer to this question in statutory interpretation generally).

necessarily falls apart if we don't all share Madison's first-order theories of constitutional interpretation, or at least share *some* method for finding ambiguity.

Even so, liquidation may remain perfectly workable. So long as we each have our own criteria for finding indeterminacy, we can reach an incompletely theorized agreement to use liquidation in the face of such indeterminacies, for reasons rooted in precedent, tradition, and compromise. An analogy might be to the modern rule of *Chevron* deference, which calls for deference to agency interpretations of ambiguous statutes, but only after a court has "employ[ed] traditional tools of statutory construction."<sup>415</sup> If judges disagree on what those traditional tools are or how to employ them, they will disagree on when ambiguity exists, but the *Chevron* doctrine may still be able to function despite this disagreement.<sup>416</sup>

But as a more practical matter, one is entitled to wonder. Without settled conventions on how to find indeterminacy or how to interpret, will liquidation really accomplish Madison's goals, or ours? The more that indeterminacy itself is indeterminate, the greater the risk that each interpreter will find indeterminacy whenever liquidation is convenient for her, and avoid it when liquidation is inconvenient.<sup>417</sup> Constitutional ambiguity might no longer be a gateway for liquidation but will be constructed according to the desirability of liquidation.<sup>418</sup> And in turn, liquidation will no longer serve as a constraint on constitutional decisionmaking but rather as a new degree of freedom.

I am not convinced we yet live in such a disarrayed world, but its possibility is a reminder that liquidation is not the solution to all constitutional disagreement. Nor is it a substitute for first-order constitutional theory about the interpretation of the Constitution. It is but a helpful tool to help us resolve constitutional disputes when the text alone cannot.

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415. *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984); *see id.* at 842-43.

416. *See ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* 188-89, 201-02 (2006). *But see Kavanaugh, supra* note 414, at 2154 (criticizing the *Chevron* doctrine as "indeterminate—and thus . . . antithetical to the neutral, impartial rule of law—because of the initial clarity versus ambiguity decision").

417. Cf. William Baude & Ryan D. Doerfler, *The (Not So) Plain Meaning Rule*, 84 U. CHI. L. REV. 539, 559-60 (2017) (expressing misgivings about the manipulability of the clarity-ambiguity threshold).

418. *See Bradley & Siegel, supra* note 388, at 1238-67; *see also* Richard Primus, *Unbundling Constitutionality*, 80 U. CHI. L. REV. 1079, 1098 n.45, 1103 n.59 (2013) (arguing that textual plausibility depends on current needs).

## Conclusion

As with “a new form of . . . verse,” Phillip Bobbitt tells us, “few things that can happen in the life of this nation are more important than the introduction of a new form of constitutional argument.”<sup>419</sup> Even if the argument has been latent in legal culture for centuries, a new reading can “create[] [its] own precursors by giving us a systematic way in which to read them.”<sup>420</sup>

I do not know whether liquidation should be labeled as a new form of constitutional argument, or rather should expand our understanding of the recognized forms of text, history, and precedent.<sup>421</sup> Either way, it has been left out of the existing typologies for too long. The time has come to reconstruct and evaluate Madison’s vision of liquidation. As with Madison’s other handiwork, whether we adopt or reject it, we will learn much from it. And we just might be able to put it to some use.

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419. PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 77 (1982) (quoting T.S. Eliot, *Introduction to SENECA: HIS TENNE TRAGEDIES; TRANSLATED INTO ENGLISH*, at v, xlxi-1 (Thomas Newton ed., Ind. Univ. Press 1927) (1581)).

420. See *id.* at 76-77.

421. Compare Philip Bobbitt, *War Powers: An Essay on John Hart Ely's War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath*, 92 MICH. L. REV. 1364, 1383-84 (1994) (reviewing JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH (1993)) (describing argument from presidential practice as a “kind[] of precedent” and perhaps “doctrinal”), with Philip C. Bobbitt, Feature, *The Age of Consent*, 123 YALE L.J. 2334, 2372 n.140 (2014) (“[D]octrinal argument—that is, the record of congressional and presidential practice that parallels the decision of cases and controversies by courts—is dispositive only to the extent of the most recent ‘holdings.’”).

## **Methodological Appendix**

James Madison's writings are a major source in this Article. Wherever possible, I have relied on the *Papers of James Madison* project, now directed by J.C.A. Stagg at the University of Virginia, which aims to become "a complete, comprehensive, and annotated edition of the entire corpus of Madison's correspondence and other papers," by contrast to earlier, "incomplete" compilations that were "marred by errors and other editorial misjudgments that have severely limited their utility for the purposes of modern historical scholarship."<sup>422</sup>

However, that collection has not yet finished publication of some of Madison's papers, such as his letters sent after February 1826. These later documents will eventually be included in *The Papers of James Madison* and are now made available in verified transcriptions by the Founders Early Access project, which has "copied carefully and faithfully" the original manuscripts, and matched "the current editorial style in use by *The Papers of James Madison* . . . as closely as possible," but which cautions that the documents "should . . . not be cited in formal research."<sup>423</sup> For these later letters, I have provided a link to the Founders Early Access transcriptions in the footnotes as an aid to the reader, as well as a citation to another published copy where possible. With one relevant exception,<sup>424</sup> the differences between the Founders Early Access documents and other available copies are minor.

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422. *History of The Papers of James Madison*, ROTUNDA, <https://perma.cc/94L7-6XMC> (archived Oct. 5, 2018).

423. *About Early Access Madison Documents*, ROTUNDA, <https://perma.cc/9VEP-CMHL> (archived Oct. 5, 2018).

424. See *supra* note 111.