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CONGRESSIONAL RESTRICTIONS  
ON THE PRESIDENT'S APPOINTMENT POWER  
AND THE ROLE OF LONGSTANDING PRACTICE  
IN CONSTITUTIONAL INTERPRETATION

The District of Columbia and its courts have an unusual history, arising from the fact that the District is a creature of federal law but local concern. In particular, the selection of the District's municipal leadership has vacillated between the federal model of appointment by the President with the advice and consent of the Senate, and the local model of city-wide elections or nomination by local officials.

The Constitution gives Congress the authority to "exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States."<sup>1</sup> Congress established the District on July 16, 1790, and in the early nineteenth century it experimented with different forms of local government.<sup>2</sup> In 1820, Congress allowed the city of Washington a measure of self-rule by providing for the direct election of its mayor.<sup>3</sup> Fifty years later, in 1871, Congress abolished home rule for the District and instead authorized the President to appoint a "governor" and the upper house of the legislature.<sup>4</sup> Seven years later, Congress established the three-person, presidentially appointed Board of Public Works to manage the city.<sup>5</sup> During the nineteenth century and throughout most of the twentieth century, the U.S. Court of Appeals for the D.C. Circuit heard all local D.C. cases in addition to its federal docket.<sup>6</sup> But in 1970, Congress passed legislation setting up local courts for the District.<sup>7</sup> Finally, in 1973 Congress returned an elected government to the District through the Home Rule Act.<sup>8</sup>

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<sup>1</sup> U.S. CONST. art. I, § 8, cl. 17.

<sup>2</sup> See Note, *Democracy or Distrust? Restoring Home Rule for the District of Columbia in the Post-Control Board Era*, 111 HARV. L. REV. 2045, 2047 n.19 (1998) (citing JOAN T. THORNELL, STAFF OF HOUSE COMM. ON D.C., 101ST CONG., GOVERNANCE OF THE NATION'S CAPITAL: A SUMMARY HISTORY OF THE FORMS AND POWERS OF LOCAL GOVERNMENT FOR THE DISTRICT OF COLUMBIA, 1790 TO 1973 (Comm. Print 1990)).

<sup>3</sup> See Act of May 15, 1820, ch. 104, 3 Stat. 583; see also Note, *supra* note 2, at 2047.

<sup>4</sup> See An Act To Provide a Government for the District of Columbia, ch. 62, 16 Stat. 419 (1871).

<sup>5</sup> See An Act Providing a Permanent Form of Government for the District of Columbia, ch. 180, 20 Stat. 102 (1878).

<sup>6</sup> John G. Roberts, Jr., *What Makes the D.C. Circuit Different? A Historical View*, 92 VA. L. REV. 375, 387-88 (2006).

<sup>7</sup> District of Columbia Court Reorganization Act of 1970, Pub. L. No. 91-358, tit. I, sec. 111, §§ 11-701 to 11-709, 11-721 to 11-722, 84 Stat. 475, 478-81; see also Roberts, *supra* note 6, at 388.

<sup>8</sup> Pub. L. No. 93-198, 87 Stat. 774 (1973); see also Note, *supra* note 2, at 2048-49.

Section 433 of the Home Rule Act sets out the appointment method for local D.C. judges: “[T]he President shall nominate, from the list of persons recommended to him by the District of Columbia Judicial Nomination Commission . . . , and, by and with the advice and consent of the Senate, appoint all judges of the District of Columbia courts.”<sup>9</sup> The Act further establishes the selection criteria of the seven members of the Commission: one is appointed by the President, two by the Board of Governors of the D.C. bar, two by the District’s mayor, one by the District Council, and one by the Chief Judge of the federal district court.<sup>10</sup> This statutory scheme continues to govern the President’s appointment of D.C. judges.

Section 433 is an anomaly among federal appointment schemes.<sup>11</sup> The President, rather than selecting nominees in the first instance, is required to choose from among three candidates<sup>12</sup> selected by the Judicial Nomination Commission. This Note questions the constitutionality of section 433. Part I sets out the original understanding of the Appointments Clause, showing that two plausible interpretations exist: the “purist” view and the “office qualifications” view. Part II applies the original understanding to Section 433, as well as to two other perplexing Appointments Clause problems related to Section 433. The common theme that runs throughout all three problems is that although a given statute may violate the Appointments Clause as originally understood, it is supported by longstanding practice by both Congress and the President. Part III therefore zooms out to consider the broader jurisprudential issue of whether and how longstanding practice should impact constitutional interpretation.

An initial definitional point: This Note uses the term “longstanding practice” to refer to any practice accepted by both political branches over a period of several decades or more, with the exception of practices extant since the time of the Founding (running to roughly 25 years after the ratification of the Constitution). Such practices, which might be called “contemporaneous practice,” actually evidence the original understanding of the Appointments Clause. Courts frequently look, for instance, to statutes passed by the First Congress to discern constitutional meaning.<sup>13</sup> The use of contemporaneous practice —

<sup>9</sup> Home Rule Act § 433(a), 87 Stat. at 795–96.

<sup>10</sup> *Id.* § 434(b)(4), 87 Stat. at 797.

<sup>11</sup> In fact, such a scheme is unique among federal provisions, with only one exception. *See* 31 U.S.C. § 703(a) (2000) (indicating that the Comptroller General and Deputy Comptroller General shall be appointed by the President from a list of as few as three persons recommended by a commission of various members of Congress, though the President may ask the commission to recommend additional candidates).

<sup>12</sup> *See* Home Rule Act § 434(d)(1), 87 Stat. at 798.

<sup>13</sup> *See* Michael Bhargava, Comment, *The First Congress Canon and the Supreme Court’s Use of History*, 94 CAL. L. REV. 1745, 1748 (2006) (“The Supreme Court has invoked the First Con-

along with other traditional sources such as transcripts of the ratification debates in the state legislatures, contemporaneous dictionaries, popular legal treatises such as Blackstone's *Commentaries*, and publications such as *The Federalist* — to decode the meaning of words is methodologically distinct from looking to longstanding practice that commenced after the Founding period, which cannot be said to significantly illuminate the meaning of terms to the Founding generation. This distinction between contemporaneous practice and longstanding practice plays an important role in analysis of Appointments Clause problems because some potential violations have a long pedigree but do not extend back to the Founding period.

### I. THE ORIGINAL UNDERSTANDING OF THE APPOINTMENTS CLAUSE

Unlike the removal power, the President's appointment power has received little attention, either from judicial opinions or academic commentators.<sup>14</sup> In contrast to the precedents addressing the removal power, the case law on the appointment power takes its cue from an explicit textual source, the Appointments Clause of Article II, which states:

[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.<sup>15</sup>

The Supreme Court has explained that the Appointments Clause implicitly establishes three categories of federal officials: noninferior (or "principal") officers, inferior officers, and nonofficers (employees).<sup>16</sup> Principal officers must be appointed by the President with the advice and consent of the Senate. Congress may vest the appointment of inferior officers in the President, the head of a department, or a court.<sup>17</sup> At least on its face, therefore, this clause appears to vest plenary nomination power for principal officers in the President, with the ul-

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gress canon more than thirty times, beginning with the 1803 case of *Stuart v. Laird* and extending to *Eldred v. Ashcroft* exactly two centuries later.").

<sup>14</sup> But see Adam J. Rappaport, Comment, *The Court of International Trade's Political Party Diversity Requirement: Unconstitutional Under Any Separation of Powers Theory*, 68 U. CHI. L. REV. 1429 (2001).

<sup>15</sup> U.S. CONST. art. II, § 2, cl. 2.

<sup>16</sup> See *Buckley v. Valeo*, 424 U.S. 1, 125–26 & n.162 (1976) (per curiam).

<sup>17</sup> The Court has not definitively stated whether there is a nexus requirement between the appointed position and the body in whom Congress may vest appointment authority. Cf. *Morrison v. Olson*, 487 U.S. 654, 679 n.16 (1988) (noting that courts may appoint court officials).

timiate appointments of nominations subject only to the Senate's approval. Unsurprisingly, the few cases addressing the Appointments Clause have centered on whether Congress may vest the appointment of a particular officer in the courts or a lower executive branch official — i.e., whether the official is a principal or inferior officer.<sup>18</sup> Comparatively little judicial and academic attention has been devoted to whether Congress can impose restrictions on the President's appointment of officers. The case law seems to assume that Congress has little or no power to restrict the President's appointment power.<sup>19</sup> Even *Humphrey's Executor v. United States*,<sup>20</sup> a seminal removal power opinion rejecting an expansive view of presidential power, expressly stated that even independent agencies were subject to presidential control over the selection of their officials.<sup>21</sup>

The text and history of the Appointments Clause, as well as the limited commentary available, suggest two possible views of Congress's authority to restrict the President's appointment power: (i) the "purist" view that no qualifications are permissible and (ii) the "office qualifications" view that allows neutral qualifications designed to ensure competent officials.

#### A. The Purist View

Many in the Founding generation believed the Appointments Clause to mean what its plain language indicates: the President's nomination power is illimitable. Debates over the Appointments Clause at the Constitutional Convention focused on devising a structure that would maintain both accountability for appointments and a check on concentrated power.<sup>22</sup> The Framers addressed these two concerns by adopting New Hampshire delegate Nathaniel Gorham's proposal, modeled after the judicial appointments clause of the Massachusetts Constitution, in which officers would be appointed by the executive with the advice and consent of the Senate.<sup>23</sup> Gorham rejected

<sup>18</sup> See, e.g., *Edmond v. United States*, 520 U.S. 651, 660–61 (1997); *Morrison*, 487 U.S. at 670–71.

<sup>19</sup> For example, in *Edmond v. United States*, 520 U.S. 651, the Court stated: [T]he Appointments Clause of Article II is more than a matter of "etiquette or protocol"; it is among the significant structural safeguards of the constitutional scheme. By vesting the President with the exclusive power to select the principal (noninferior) officers of the United States, the Appointments Clause prevents congressional encroachment upon the Executive and Judicial Branches.

*Id.* at 659 (quoting *Buckley*, 424 U.S. at 125).

<sup>20</sup> 295 U.S. 602 (1935).

<sup>21</sup> *Id.* at 625.

<sup>22</sup> See 2 JAMES MADISON, THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA 294–303 (Gailard Hunt & James Brown Scott eds., 1920).

<sup>23</sup> See *id.* at 274–81.

the idea of giving nomination power to the Senate because that body was “too numerous, and too little personally responsible, to ensure a good choice.”<sup>24</sup> Instead, to promote accountability, the Framers gave the absolute power of nomination to the President — the “responsibility of the Executive” was seen as the “security for fit appointments.”<sup>25</sup> But to provide a check against potential abuse, the Framers subjected the President’s nominees to Senate approval. Gouverneur Morris pithily summarized the dual interests underlying this scheme: “[A]s the President was to nominate, there would be responsibility, and as the Senate was to concur, there would be security.”<sup>26</sup>

Alexander Hamilton in *The Federalist No. 76* echoed the view that the Appointments Clause ensures accountability:

In the act of nomination, [*the President's*] judgment alone would be exercised; and as it would be *his sole duty to point out the man* who, with the approbation of the Senate, should fill an office, his responsibility would be as complete as if he were to make the final appointment.<sup>27</sup>

Professor Akhil Amar emphasizes the linkage between accountability and the President as a first mover: “In appointments, as with treaties, the Senate could say no to what the President proposed but could not compel the President to say yes to the Senate’s first choice.”<sup>28</sup> The treaty analogy is instructive. Presumably no one would contend that Congress could set preconditions on the types of treaties the President could submit to the Senate for ratification. The same logic arguably holds true for the Appointments Clause, which is found in the same sentence as the Treaty Clause and which uses the same phrase “by and with the Advice and Consent of the Senate.”<sup>29</sup>

Additionally, some immediate post-enactment statements — particularly, if unsurprisingly, by the executive branch — support an interpretation of the Appointments Clause as vesting plenary authority in the President, subject only to Senate confirmation. Thomas Jefferson, as Secretary of State, emphasized that “*appointment* does not comprehend the neighboring acts of *nomination*, or *commission*,” which the Constitution gave “exclusively to the President,” and that

<sup>24</sup> *Id.* at 274–75.

<sup>25</sup> *Id.* at 301 (remarks of Edmund Randolph).

<sup>26</sup> *Id.* at 529.

<sup>27</sup> THE FEDERALIST NO. 76, at 456–57 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphases added); see also 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1529, at 389 (3d ed., Boston, Little, Brown & Co. 1858) (“[O]ne man of discernment is better fitted to analyze and estimate the peculiar qualities, adapted to particular offices, than any body of men . . . His sole and undivided responsibility will naturally beget a livelier sense of duty and a more exact regard to reputation.” (footnote omitted)).

<sup>28</sup> AKHIL REED AMAR, AMERICA’S CONSTITUTION 192 (2005).

<sup>29</sup> See U.S. CONST. art. II, § 2, cl. 2.

the Senate's role is "only to see that no unfit person be employed."<sup>30</sup> For Jefferson, therefore, Congress had no constitutional role in appointments beyond the Senate's advice and consent responsibilities. President Monroe likewise believed that any congressional intrusion on the President's appointment power, such as requiring particular qualifications for officers, would violate the Appointments Clause: "[A]s a general principle . . . Congress ha[s] no right under the Constitution to impose any restraint by law on the power granted to the President so as to prevent his making a free selection of proper persons for these [newly created] offices from the whole body of his fellow citizens."<sup>31</sup>

Thus, there is strong evidence that the original understanding of the Appointments Clause grants the President plenary appointment power contingent only on Senate confirmation.<sup>32</sup> As Justice Kennedy has put it: "No role whatsoever is given either to the Senate or to Congress as a whole in the process of choosing the person who will be nominated for appointment."<sup>33</sup>

### B. The Office Qualifications View

Cutting against these textual and historical arguments is evidence from the early Congresses that the Founding generation believed that some qualifications on presidential appointees were permissible. This evidence casts some doubt on a purist interpretation of the Appointments Clause. For example, the First Congress required that the Attorney General and district attorneys be "learned in the law."<sup>34</sup> This requirement was subsequently imposed on the U.S. Attorneys for various states.<sup>35</sup> Early Congresses also enacted statutes that imposed similarly slight restrictions on the President's appointment power.<sup>36</sup> The Seventh Congress required that the President's selection for mayor of

<sup>30</sup> Thomas Jefferson, Opinion on the Powers of the Senate Respecting Diplomatic Appointments (Apr. 24, 1790), reprinted in 16 THE PAPERS OF THOMAS JEFFERSON 378, 379 (Julian P. Boyd ed., 1961).

<sup>31</sup> James Monroe, Message to the Senate of the United States (Apr. 13, 1822), in 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1907, at 129, 132 (James D. Richardson ed., 1908).

<sup>32</sup> As Professor Michael Gerhardt argues, the clause's "structure does not provide explicit recognition of any exceptions, particular procedures, or special accommodations that must be reached between the president and the Senate in the course of making and ratifying different kinds of federal appointments." Michael J. Gerhardt, *Toward a Comprehensive Understanding of the Federal Appointments Process*, 21 HARV. J.L. & PUB. POL'Y 467, 477 (1998).

<sup>33</sup> Pub. Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 483 (1989) (Kennedy, J., concurring in the judgment).

<sup>34</sup> Act of Sept. 24, 1789, ch. 20, § 35, 1 Stat. 73, 92-93.

<sup>35</sup> Justice Brandeis's dissent in *Myers v. United States*, 272 U.S. 52 (1926), contains a comprehensive list of early statutes that imposed restrictions on the President's appointment power. See *id.* at 265-74 & nn.35-56 (Brandeis, J., dissenting).

<sup>36</sup> See *id.*

the city of Washington be a citizen of the United States and a resident of the city.<sup>37</sup> The Eighth Congress required that the presidentially appointed legislative council of Louisiana consist of land-holding residents of the Louisiana Territory.<sup>38</sup> And the Fifteenth Congress required that agents appointed by the President to receive persons returning to Africa after having been “seized in the prosecution of the slave trade” reside on the coast of Africa.<sup>39</sup>

There is, therefore, at least some historical support for the view that Congress can impose limited restrictions on the President’s appointment power. Even Chief Justice Taft, the author of the generally pro-executive power opinion in *Myers v. United States*,<sup>40</sup> believed, based on his evaluation of the original understanding, that Congress could set qualifications for the appointment of executive officers:

It is argued that the denial of the legislative power to regulate removals in some way involves the denial of power to prescribe qualifications for office, or reasonable classification for promotion, and yet that has been often exercised. We see no conflict between the latter power and that of appointment and removal, provided of course that the qualifications do not so limit selection and so trench upon executive choice as to be in effect legislative designation.<sup>41</sup>

Chief Justice Taft went on to quote a statement from Madison that “[t]he Legislature creates the office, defines the powers, limits its duration and annexes a compensation. This done, the Legislative power ceases.”<sup>42</sup> Chief Justice Taft’s analysis and citation to Madison presumably imply that certain types of qualifications are simply part of the definition of a given office. The principle that separates these qualifications from encroachments upon the executive appointment power is, as the Chief Justice explained, “that the qualifications do not so limit selection and so trench upon executive choice as to be in effect legislative designation.”<sup>43</sup> The reading of the Appointments Clause that is most deferential to Congress while still retaining some fidelity to constitutional text therefore might be called the office qualifications view, as contrasted to the purist view that would allow no restrictions whatsoever.<sup>44</sup> Even under the former, however, it would be patently

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<sup>37</sup> Act of May 3, 1802, ch. 53, § 5, 2 Stat. 195, 196.

<sup>38</sup> Act of Mar. 26, 1804, ch. 38, § 4, 2 Stat. 283, 284.

<sup>39</sup> Act of Mar. 3, 1819, ch. 101, § 2, 3 Stat. 532, 533.

<sup>40</sup> 272 U.S. 52.

<sup>41</sup> *Id.* at 128.

<sup>42</sup> *Id.* (quoting 1 ANNALS OF CONG. 604 (Joseph Gales ed., 1834))

<sup>43</sup> *Id.*

<sup>44</sup> Evidence that the early Congresses believed some restrictions were constitutional may nonetheless be reconcilable with the purist view. The qualifications codified by the First Congress — for example, that the Attorney General must be “learned in the law” — were arguably aspirational and noncontroversial, and hence not intended to be legally enforceable mandates. Moreover, because the qualifications did not significantly limit the pool from which the President could draw

unconstitutional for Congress to vest in itself the power to choose executive officers, as Chief Justice Taft made clear when he wrote that qualifications cannot be in effect a “legislative designation.”

### C. Supreme Court Precedent

Although the Supreme Court has not held whether the purist view or the office qualifications view is correct, its most important Appointments Clause opinion adhered to the original understanding that Congress could not vest in itself the power to appoint officers. In *Buckley v. Valeo*,<sup>45</sup> the Court held that the appointment scheme Congress had created for the Federal Election Commission violated the Appointments Clause.<sup>46</sup> The invalidated provisions authorized the President Pro Tempore of the Senate and the Speaker of the House to select two FEC commissioners each and subjected the President’s two appointments to confirmation by both the House and the Senate.<sup>47</sup> The Court made clear that giving members of Congress a role in the appointment power not sanctioned by the Constitution was impermissible. The Court explained that the Constitution “specifies the method of appointment only for ‘Officers of the United States’ . . . . But there is no provision of the Constitution remotely providing any alternative means for the selection of the members of the Commission or for anybody like them.”<sup>48</sup> Thus, no one other than the President (or, in the case of inferior officers, the President, heads of departments, or courts) may appoint officers. The Court has reiterated this principle in subsequent Appointments Clause cases. As the Court wrote in *Edmond v. United States*,<sup>49</sup> “[b]y vesting the President with the exclusive power to select the principal (noninferior) officers of the United States, the Appointments Clause prevents congressional encroachment upon the Executive and Judicial Branches.”<sup>50</sup>

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nominations, the “restrictions” were arguably little more than window dressing used to indicate basic expectations of both the President and Congress. Bolstering this view is the fact that judicial review was still in its nascent stage at the time of the First Congress. Thus, it is unclear whether the First Congress would have understood such restrictions as justiciable at all, or merely as dictates that could be enforced only at the ballot box if the President appointed utterly unqualified persons to the posts.

<sup>45</sup> 424 U.S. 1 (1976) (per curiam).

<sup>46</sup> *Id.* at 143.

<sup>47</sup> *Id.* at 126.

<sup>48</sup> *Id.* at 127 (quoting U.S. CONST. art. II, § 2, cl. 2).

<sup>49</sup> 520 U.S. 651 (1997).

<sup>50</sup> *Id.* at 659. It is worth noting one additional point on the meaning of the Appointments Clause: allowing Congress to set the requirements for presidential appointments raises a separation-of-powers problem not typically addressed in judicial opinions. When Congress passes such laws, it brings the House of Representatives into an area that the Constitution dictates is the exclusive province of the President and the Senate. *Cf.* *Fund for Animals, Inc. v. Kempthorne*, 472 F.3d 872, 881 (D.C. Cir. 2006) (Kavanaugh, J., concurring) (“In recent years, courts have hesitated

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Thus, although the Supreme Court has not hinted at which view of the original understanding is correct, it has at the very least seemed to reject a “functionalist” account of the Appointments Clause (unlike, for example, its treatment of the President’s removal power). The next Part applies the possible interpretations of the original understanding to Section 433 of the Home Rule Act and two related Appointments Clause problems.

## II. D.C. JUDGES AND TWO OTHER APPOINTMENTS CLAUSE PROBLEMS

### A. *Section 433 of the Home Rule Act*

Under either view of the Appointments Clause, the D.C. judicial appointment scheme is arguably unconstitutional. The difference between the statute invalidated in *Buckley* and section 433 of the Home Rule Act is that the latter allows the President to select a nominee for appointment from a pool of three candidates chosen by others, whereas the former vested the authority to appoint directly in congressional officials. But the Appointments Clause would be a virtual nullity if Congress could evade its constraints merely by choosing two or three candidates of which the President was required to select one. This would be the type of restriction that, in Chief Justice Taft’s words, “so limit[s] selection and so trench[es] upon executive choice as to be in effect legislative designation.”

Consider the following hypothetical: Were Congress to substitute itself for the nominating commission that presently formulates the lists under § 433, it could easily impose its will on the President in selecting D.C. judges. For any given appointment, Congress could find three candidates who would implement its policy preferences, not the President’s. Moreover, the scheme presents innumerable opportunities for gamesmanship: for example, Congress could select two utterly unqualified candidates — such as judicial nominees with no law degrees or poor legal records — and one preferred candidate. This would amount (de facto) to the scheme held unconstitutional in *Buckley* and

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to find a treaty self-executing — perhaps because the practical effect of finding a treaty self-executing is to eliminate the House of Representatives from the law-making process, even for laws that may have significant domestic impact.”). Although reasonable minds might disagree about the extent to which the Senate can take a more active role in nominations by structuring the President’s selection, it is abundantly clear that the Constitution creates no role for the House of Representatives. Yet statutes that set restrictions on the President’s exercise of his nomination power do precisely that.

would eviscerate the carefully balanced constitutional structure for the appointment of officials.<sup>51</sup>

Thus, the D.C. judicial appointment scheme seems highly problematic under the Appointments Clause, certainly on the purist view but also on the office qualifications view. Two other characteristics of the scheme suggest additional Appointments Clause problems that have gone unaddressed in judicial opinions and academic commentary. First, the Home Rule Act obviously attempts to set up a state-like government for the District. The judicial appointment scheme seems to be a compromise between a typical state scheme where the governor appoints the state judges and the traditional D.C. model of federal control. This suggests the question whether other statutory provisions that construct state-like governmental features in the District or in U.S. territories violate the Appointments Clause. Second, section 433 is evidently an attempt to ensure an apolitical, “independent” judiciary. The nominating committee is selected by a wide array of officials beyond just the President, such as the D.C. mayor and the D.C. bar, each with different constituencies. This suggests the question whether other, less egregious attempts to ensure independence from executive control — such as political party restrictions — through appointment restrictions are constitutional. As the following sections show, the unifying theme in both of these sets of problems is that although the restrictions in question are inconsistent with constitutional text (even under an office qualifications approach to the Appointments Clause), they are both supported by longstanding practice of the political branches.

### B. State-like Governments

The Home Rule Act aimed to transform D.C. government into a responsive democracy akin to a state government. Two stated purposes of the Act were to “grant to the inhabitants of the District of Columbia powers of local self-government” and “to the greatest extent possible, consistent with the constitutional mandate, relieve Congress of the burden of legislating upon essentially local District matters.”<sup>52</sup> The Act established an elected city council and an elected mayor.<sup>53</sup>

<sup>51</sup> It might be argued that in section 433, unlike in the statute at issue in *Buckley*, Congress has vested authority to appoint the judges not in itself, but rather in the Judicial Nomination Board, which is selected by the President, the D.C. mayor, the D.C. bar, and the D.C. council. See Home Rule Act, Pub. L. No. 93-198, § 434(b)(4), 87 Stat. 774, 797 (1973). But the Appointments Clause no more allows for the appointment of officials by an entity like the Judicial Nomination Commission than it does by members of Congress. It would be difficult to construct a principle from constitutional text that would allow for the former and not the latter.

<sup>52</sup> *Id.* § 102, 87 Stat. at 777.

<sup>53</sup> *Id.* §§ 401, 421, 87 Stat. at 785-86, 789-90. Indeed, the members of Congress who expressed concerns about the Act’s constitutionality at the time it was enacted focused not on appointments

In the context of the entire quasi-state that is the District, the judicial selection provision is only a small part of a bigger picture: the transformation of a federal entity, whose officers would ordinarily be appointed by the President, into a self-contained democracy. The problem is thus not only D.C. judges, but all D.C. officials who are properly considered “officers” under the Constitution — that is, those “exercising significant authority pursuant to the laws of the United States.”<sup>54</sup> Certainly the mayor and the city council would qualify — it would blink reality to call them “employees.” After all, the mayor of the District formerly was appointed by the President with the advice and consent of the Senate.<sup>55</sup> It would seem, then, that under a straightforward reading of constitutional text, all top D.C. officials must be appointed by the President (and subordinate officials should be appointed by the President, heads of departments, or courts).

Of course, this analysis would also mean that such democratic institutions in U.S. territories are unconstitutional. Congress has no more power to appoint executive officials in territories than in the District. Early practice supports this reading, as Congress required the appointment by the President of a territorial government for every U.S. territory until 1947.<sup>56</sup> Therefore, it seems that Congress may not vest the “appointment” of territorial officials in the people of the territory any more than it may vest the appointment of FEC commissioners in members of Congress.<sup>57</sup>

To be sure, there are arguments cutting against these conclusions. One argument, addressed in Part III of this Note, is that, at least in these types of separation of powers problems, the Court should defer to longstanding practices in which both political branches have acquiesced. Since the mid-twentieth century, the federal government has given territories locally elected governments.<sup>58</sup> And since the nineteenth century, Congress has provided for elected territorial legislatures,<sup>59</sup> which would seem to come under the Appointments Clause’s presidential exclusivity as much as territorial executives (just like agencies that promulgate rules do).<sup>60</sup> This longstanding practice, en-

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but rather on the delegation of Congress’s legislative authority over District affairs to a local governing body. See Jason I. Newman & Jacques B. DePuy, *Bringing Democracy to the Nation’s Last Colony: The District of Columbia Self-Government Act*, 24 AM. U. L. REV. 537, 569–73 (1975).

<sup>54</sup> Buckley v. Valeo, 424 U.S. 1, 126 (1976) (per curiam).

<sup>55</sup> See District of Columbia v. John R. Thompson Co., 346 U.S. 100, 105 (1953).

<sup>56</sup> See Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 CAL. L. REV. 853, 868 & n.85 (1990).

<sup>57</sup> *Id.* at 866–68 (stating that this conclusion follows from the “formalist” view).

<sup>58</sup> See *id.* at 868–70.

<sup>59</sup> See *id.* at 900.

<sup>60</sup> See *id.* at 900–01 (“To a formalist, . . . locally elected legislatures are even more clearly unconstitutional than are elected governors. . . . If their power is not legislative [and hence not an

dorsed by both political branches, might caution against enforcing the original understanding of the Appointments Clause in this context. Another argument is that the Appointments Clause applies only when Congress creates an *appointed* position; on this view, if Congress creates an *elected* position, the Appointments Clause is wholly inapplicable. This argument does not seem satisfying: Could Congress transform the Secretary of Defense into an elected office? Such an action would undermine the principles of executive control and accountability that underpin the Constitution.

A third argument is that Congress's plenary power to "make all needful Rules and Regulations respecting the Territory . . . belonging to the United States"<sup>61</sup> justifies its authority to transform territories into self-contained governments. But, as Professor Gary Lawson writes, a similar argument from Congress's plenary power over federal elections failed in *Buckley*.<sup>62</sup> A fourth argument, made in a memorandum by President Clinton's Office of Legal Counsel, is that D.C. and territorial officials do not exercise *federal* power but rather some sort of local power.<sup>63</sup> This view, however, is hard to reconcile with the Constitution, which recognizes only two sources of power: federal and state.

If there is no fully satisfying constitutional justification for what Congress has done here, it is perhaps because the modern preference for democratic self-government in U.S. territories is at odds with the Founding conception of those territories as federal wards until statehood or independence.

### C. Political Insularity

The nominating commission for D.C. judges seems designed to ensure "non-political" decisions because the commissions are chosen by officials representing a broad cross-section of constituencies. Although most provisions are not as extreme as the D.C. judicial appointment scheme,<sup>64</sup> restrictions aiming to ensure political insularity of appointed officials are ubiquitous in the U.S. Code. The most glaring examples are the political affiliation restrictions that characterize five-person independent commissions, limiting the commissions to no more than three persons from the same political party.<sup>65</sup> The FCC statute is typi-

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unconstitutional delegation], the only other plausible conclusion is that they exercise executive power by effectuating their congressionally enacted organic statutes.").

<sup>61</sup> U.S. CONST. art. IV, § 3, cl. 2.

<sup>62</sup> See Lawson, *supra* note 56, at 867 & n.78.

<sup>63</sup> The Constitutional Separation of Powers Between the President and Congress, 20 Op. Off. Legal Counsel 124, 145 (1996), available at <http://www.usdoj.gov/olc/delly.htm>.

<sup>64</sup> See *supra* note 11.

<sup>65</sup> See, e.g., 7 U.S.C. § 2(a)(2)(A) (Supp. IV 2004) (Commodity Futures Trading Commission); 12 U.S.C. § 1422(b)(2)(A) (2000) (Federal Housing Finance Board); 15 U.S.C. § 41 (2000) (Federal

cal: "The maximum number of commissioners who may be members of the same political party shall be a number equal to the least number of commissioners which constitutes a majority of the full membership of the Commission."<sup>66</sup> The obvious purpose of these provisions is to restrict the President's ability to appoint commissioners who agree with him.

On either the purist view or the office qualifications view, political party restrictions appear unconstitutional. As a deliberate attempt to dilute the President's ability to select appointees who will carry out his policy preferences, they cannot be understood as simply qualifications for the job.

One counterargument is that because the President can appoint a *majority* of the commissioners from his own political party,<sup>67</sup> his control over the agency is not severely hampered. This view rests on the assumption that courts can balance Congress's concerns about independence against the extent of the encroachment on executive power caused by the restriction. But, as noted, the text of the Appointments Clause does not easily allow a balancing test the way the removal power cases do. In Justice Kennedy's words:

Where a power has been committed to a particular Branch of the Government in the text of the Constitution, the balance already has been struck by the Constitution itself. It is improper for [the Supreme] Court to arrogate to itself the power to adjust a balance settled by the explicit terms of the Constitution.<sup>68</sup>

Like the restrictions on the President's appointment power in the context of U.S. territories, however, political party restrictions have a long history. They were first established in the late nineteenth century with the early independent commissions, such as the Interstate Commerce Commission,<sup>69</sup> and they have never been seriously challenged by

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Trade Commission); 15 U.S.C. § 78d(a) (2000 & Supp. IV 2004) (Securities and Exchange Commission); 15 U.S.C. § 2053(c) (2000) (Consumer Product Safety Commission); 42 U.S.C. § 5841(b) (2000) (Nuclear Regulatory Commission); 42 U.S.C. § 7171(b)(1) (2000) (Federal Energy Regulatory Commission); 47 U.S.C. § 154(b)(5) (2000) (Federal Communications Commission). A few statutes create bodies of three members, not more than two of whom may be members of, or affiliated with, the same political party. *See, e.g.*, 5 U.S.C. § 1201 (2000) (Merit Systems Protection Board); 12 U.S.C. § 2242(a) (2000) (Farm Credit Administration Board); 49 U.S.C. § 701(b) (2000) (Surface Transportation Board).

<sup>66</sup> 47 U.S.C. § 154(b)(5).

<sup>67</sup> A few statutes do not allow the President even to appoint a majority of members from one political party. These statutes create six-member bodies and forbid more than three members belonging to, or being affiliated with, the same political party. *See, e.g.*, 2 U.S.C. § 437c(a)(1) (2000) (Federal Election Commission); 19 U.S.C. § 1330(a) (2000 & Supp. IV 2004) (International Trade Commission).

<sup>68</sup> *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 486 (1989) (Kennedy, J., concurring in the judgment).

<sup>69</sup> Justice Brandeis, dissenting in *Myers v. United States*, 272 U.S. 52 (1926), compiled a list of statutes imposing political party restrictions on the President's nomination power, including the

the President. Part III considers what effect such longstanding practices should have on the interpretation of the Appointments Clause.

### III. THE ROLE OF LONGSTANDING PRACTICE IN CONSTITUTIONAL INTERPRETATION

The disconnect between the original understanding of the Appointments Clause and the actions of the political branches highlights a more fundamental question: how should longstanding practice affect constitutional interpretation? From the late nineteenth century on, the political branches have reached accommodations in which Congress has substantially restricted the President's appointment power in ways that implicate his policy prerogatives — particularly by ceding control over U.S. territories to locally elected bodies and by enacting restrictions on the President's appointments that directly hamper his ability to implement policy. Should these practices legitimate what might otherwise be an incorrect interpretation of the Appointments Clause?

Supreme Court precedent addressing the role of longstanding practice gives only a glimpse of a possible answer. Many of the most important cases addressing longstanding practice have come in the field of legislative-executive relations (which would include the Appointments Clause). Yet in many of those cases, the issue was whether the necessary congressional authorization could be inferred from longstanding acquiescence to a particular executive branch practice. For example, in *United States v. Midwest Oil Co.*,<sup>70</sup> the Court permitted the President to prevent private parties from acquiring certain public lands even though a statute required the lands to be open to occupation by U.S. citizens.<sup>71</sup> The Court reasoned that Congress was aware of longstanding executive practice of acquiring public lands.<sup>72</sup> More recently, in *Dames & Moore v. Regan*,<sup>73</sup> the Court upheld an executive order suspending claims by U.S. nationals against the government of Iran.<sup>74</sup> Although there was no explicit congressional authorization for the order, the Court found implicit authorization in the longstanding tradition of claim settlement by the President.<sup>75</sup> In both of these cases, longstanding practice was used not so much to interpret constitutional

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Act of Sept. 26, 1914, ch. 311, 38 Stat. 717 (Federal Trade Commission); the Act of June 10, 1890, ch. 407, 26 Stat. 131 (Board of General Appraisers); the Act of Feb. 4, 1887, ch. 104, 24 Stat. 379 (Interstate Commerce Commission); the Act of Jan. 16, 1883, ch. 27, 22 Stat. 403 (Civil Service Commission); and the Act of Mar. 22, 1882, ch. 47, 22 Stat. 30 (board of elections in Utah Territory). See *Myers*, 272 U.S. at 271 n.51 (Brandeis, J., dissenting).

<sup>70</sup> 236 U.S. 459 (1915).

<sup>71</sup> *Id.* at 466.

<sup>72</sup> See *id.* at 469–75.

<sup>73</sup> 453 U.S. 654 (1981).

<sup>74</sup> See *id.* at 686.

<sup>75</sup> *Id.* at 675, 678–83.

limits as to deduce whether Congress had authorized the executive action at issue.<sup>76</sup> Yet one could interpret the cases as having constitutional overtones because the congressional intent the Court found was so tenuous; in effect (if not explicitly in the opinions), longstanding practice altered the constitutional distribution of power between Congress and the President.

Justice Scalia, well known as an originalist, has indicated that longstanding practice should play a role in constitutional interpretation, although he has not given a full account of how longstanding (but post-enactment) practice gels with originalist principles. In his dissenting opinion in *United States v. Virginia*<sup>77</sup> criticizing the majority's holding that Virginia's all-male military academy violated the Equal Protection Clause, Justice Scalia wrote: "[I]t is my view that, whatever abstract tests we may choose to devise, they cannot supersede — and indeed ought to be crafted *so as to reflect* — those constant and unbroken national traditions that embody the people's understanding of *ambiguous* constitutional texts."<sup>78</sup> Justice Scalia went on to quote his dissent in *Rutan v. Republican Party*<sup>79</sup> (in which the Court held that certain forms of political patronage violate the Free Speech Clause<sup>80</sup>): "[W]hen a practice not expressly prohibited by the text of the Bill of Rights bears the endorsement of a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic, we have no proper basis for striking it down."<sup>81</sup> On Justice Scalia's view,

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<sup>76</sup> See Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2088 (2005) (describing how the *Dames & Moore* Court read congressional acquiescence to be congressional authorization); William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 74 (1988) (noting that "the Court will routinely infer legislative approval of executive practices, where 'Congress has consistently failed to object to such [interpretations or practices] . . . even when it has had an opportunity to do so'" (quoting *Dames & Moore*, 453 U.S. at 682 n.10) (alteration and omission in original)); Jack Goldsmith & John F. Manning, *The President's Completion Power*, 115 YALE L.J. 2280, 2289 (2006) ("*Dames & Moore* is . . . an extreme case of the completion power — a case in which the President completed a congressional scheme by taking an action that was only loosely related to the scheme."); Harold Hongju Koh et al., *The Treaty Power*, 43 U. MIAMI L. REV. 101, 119 (1988) ("[I]n *Dames & Moore v. Regan*, the Court recognized that the judiciary should refrain from invalidating executive action in foreign affairs in the absence of any clear legislative, or constitutional, check on the executive action." (footnote omitted)); Rebecca A. D'Arcy, Note, *The Legacy of Dames & Moore v. Regan: The Twilight Zone of Concurrent Authority Between the Executive and Congress and a Proposal for a Judicially Manageable Nondelegation Doctrine*, 79 NOTRE DAME L. REV. 291, 295 (2003) ("More often than not, the Court disposes of the *Dames & Moore*-esque constitutional challenge by identifying a congressional source of authority. . . . [I]t is almost impossible to imagine a realistic scenario where the Court could not identify [such a] source . . .").

<sup>77</sup> 518 U.S. 515 (1996).

<sup>78</sup> *Id.* at 568 (Scalia, J., dissenting) (second emphasis added).

<sup>79</sup> 497 U.S. 62 (1990).

<sup>80</sup> See *id.* at 76.

<sup>81</sup> *Virginia*, 518 U.S. at 568 (Scalia, J., dissenting) (quoting *Rutan*, 497 U.S. at 95 (Scalia, J., dissenting)) (internal quotation marks omitted).

then, longstanding practice seems to be a secondary source for constitutional interpretation if the text is ambiguous and the primary originalist sources have been exhausted.

Thus, although the case law suggests that longstanding practice might have a role to play in constitutional interpretation, it does not explain exactly what that role is. As a result, an analysis of how the Court would or should treat longstanding constitutional interpretations of coordinate branches may require resort to first principles. The following sections examine two ways to theorize the role of longstanding practice in constitutional interpretation. In doing so, they identify a fundamental uncertainty that has not been adequately resolved by commentators who advocate a place of prominence for longstanding practice: whether that practice changes the meaning of the Constitution or, rather, whether courts ought simply to defer to the reasonable interpretations of the political branches when the meaning of the text is uncertain. This question is by no means merely academic; its answer dictates the circumstances in which, and the extent to which, courts ought to defer to longstanding practice.

A. *“Burkean Minimalism” and Longstanding Practice  
as Constitutive of Constitutional Meaning*

Professor Cass Sunstein has recently set out a constitutional method he calls “Burkean minimalism.”<sup>82</sup> The focus of Burkean minimalism is on close adherence to longstanding practice. As Professor Sunstein writes, “Burkean minimalists believe that constitutional principles must be built incrementally and by analogy, with close reference to long-standing practices.”<sup>83</sup> A Burkean minimalist theory of judicial review rests on the assumption that “the central role of the courts is to protect long-standing practices against renovations based on theories, or passions, that show an insufficient appreciation for those practices.”<sup>84</sup> On this view, the judiciary is a guarantor of minority rights grounded in tradition against the ephemeral whims of temporary democratic majorities. This conception reflects Edmund Burke’s view that “[s]ociety cannot exist unless a controlling power upon will and appetite be placed somewhere, and the less of it there is within, the more there must be without.”<sup>85</sup> The role of the judiciary, for the Burkean minimalist, is to preserve traditions while allowing the passions of the populace to inch them forward.

<sup>82</sup> Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353, 356 (2006).

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 373.

<sup>85</sup> EDMUND BURKE, A LETTER TO A MEMBER OF THE NATIONAL ASSEMBLY 69 (photo. reprint, Woodstock Books 1990) (1791).

Thus, longstanding practice is elevated to a constitutive role in constitutional interpretation: the practice itself is the “Constitution” that judges seek to preserve and enforce. In other words, sustained institutional practices can alter constitutional meaning beyond the reasonable bounds of the text because interpretation is keyed toward practice, not text. Professor Sunstein explains that “Burkean minimalists . . . are entirely willing to accept rulings that do not comport with the original understanding when a decision to overrule them would disrupt established practices.”<sup>86</sup> This point highlights the key difficulty of Burkean minimalism: it supplies no special role for the text of the Constitution. Why should the judge limit herself to upholding those traditions with a plausible textual grounding if the purpose of judicial review is just to preserve traditional practices? The short answer is that the judge need not so limit herself and can invoke certain provisions, such as the Due Process Clauses, to justify the protection of any chosen historical tradition at whatever level of generality she prefers. Professor Sunstein basically suggests as much.<sup>87</sup>

As a result, it is relatively easy to analyze the Appointments Clause problems described above under this constitutive approach. Longstanding appointment practices such as the election of officials in U.S. territories and political party restrictions would be permissible simply because they are longstanding practices.<sup>88</sup> Indeed, the Burkean minimalist does not protect the text of the Constitution against such extratextual encroachment but rather does precisely the opposite: she protects the longstanding practices against encroachments by the plain meaning of the text. As Professor Sunstein writes: “When Burkeans recoil at the suggestion that the founding document should be understood to mean what it originally meant, they are embracing a conception of the Constitution as evolving . . . through a process in which social norms and practices play the key role.”<sup>89</sup>

There are good reasons, both practical and theoretical, to reject application of Burkean minimalism to interpreting the Appointments Clause (or any other constitutional provision). First, it is not apparent what the Burkean minimalist would do if Congress enacted a new, unprecedented restriction on the President’s appointment power: What are the criteria for accepting a new practice that goes against tradition? What does the Burkean minimalist inch toward? Second, Burkean minimalism does a poor job of explaining why it should be the function of *judges* to provide a foundation for the preservation of

<sup>86</sup> Sunstein, *supra* note 82, at 358–59; *see also id.* at 373, 389.

<sup>87</sup> *See id.* at 373–74.

<sup>88</sup> Indeed, Professor Sunstein says that Burkean minimalism is especially appropriate in the separation of powers context. *See id.* at 375.

<sup>89</sup> *Id.* at 389.

tradition. The central assumption on which Burkean minimalism seems to rely is that the judiciary is the most prominent nonmajoritarian institution and that the judiciary should therefore be entrusted with fortifying traditions against encroachment. It is unclear, however, why judges should be preferred to random groups of well-meaning citizens if the only objective is to supply a countermajoritarian bulwark against popular majorities. To put it differently, under *Marbury v. Madison*<sup>90</sup> judges are empowered to stifle expressions of majority will only because one law (statute) conflicts with a higher law (Constitution), and the judge must choose which rule of decision to apply.<sup>91</sup> Once text drops out and the only fealty of judges is to institutional practice and social tradition, it is unclear why judges are better suited to the task of preserving these things than any other institution or entity. Third, the Constitution itself expresses not so much a fear of the passions of popular majorities as a fear of factions undermining the common good. This concern about factions was Madison's focus in *The Federalist No. 10*,<sup>92</sup> and, as Professor Amar has convincingly shown, it was also the concern underlying the Bill of Rights.<sup>93</sup> (And the Reconstruction Amendments were obviously designed to be a bulwark *against* traditional prejudices.) Thus, to the extent that Burkean minimalism is motivated by the notion that there is some tradition-based countermajoritarian principle infusing the Constitution, it fails on this ground as well.

In sum, the Burkean minimalist position seems to rest solely on the idea that as a prominent countermajoritarian institution, the judiciary should be in the business of preserving tradition and institutional practices. This theory is not tied to the text of the Constitution. Such a theory undermines the special role of judges as compared to, say, "nine people picked at random from the Kansas City telephone directory."<sup>94</sup> Because of these practical and theoretical difficulties, Burkean minimalism is not a satisfying theory for how longstanding practice should affect the interpretation of the Appointments Clause.

### *B. Longstanding Practice as an Interpretation of Constitutional Text*

An alternative to the view that longstanding institutional practice is constitutive of constitutional meaning is that longstanding practice is a valid source of constitutional meaning to which judges should some-

<sup>90</sup> 5 U.S. (1 Cranch) 137 (1803).

<sup>91</sup> See *id.* at 177; Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 854 (1989).

<sup>92</sup> See THE FEDERALIST NO. 10 (James Madison), *supra* note 27, at 77–84.

<sup>93</sup> See AKHIL REED AMAR, THE BILL OF RIGHTS, at xii–xiii (1998).

<sup>94</sup> *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 293 (1990) (Scalia, J., concurring).

times defer. On this view, the point is not that the Constitution changes in response to actions by the political branches but that the courts should allow coordinate constitutional actors to adopt reasonable interpretations of constitutional provisions.

The idea that all three branches of the federal government have authority to interpret the Constitution has its roots in *Marbury*. As discussed briefly above, the foundation of *Marbury*'s holding was that in a given case the judiciary has a responsibility to apply the correct rule of decision, and when two rules conflict, the judiciary must choose one. As Chief Justice Marshall wrote: "Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each."<sup>95</sup> It follows that, just like the judiciary, Congress and the President must engage in constitutional interpretation within their respective spheres.<sup>96</sup> In fact, early generations of Americans understood the political branches to be the primary interpreters and protectors of the Constitution.<sup>97</sup> From that notion one might surmise that, for many of the same stability-promoting reasons that undergird *stare decisis*, courts should defer at least in certain contexts to longstanding interpretations of the other branches. The question is when.

This question might be answered cross-doctrinally by looking to other areas in which courts defer to political branches. The most obvious such context is the *Chevron* framework<sup>98</sup> in administrative law. That framework, as elaborated by *United States v. Mead Corp.*,<sup>99</sup> dictates that when there are indications that the executive branch has formally interpreted the meaning of ambiguous statutory terms and those interpretations are reasonable, the courts must defer to administrative agencies.<sup>100</sup> As the Court's recent decision in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*<sup>101</sup> makes clear, *Chevron* is an *interpretive* doctrine, not a *constitutive* one. *Brand X* held that an agency could under some circumstances adopt an inter-

<sup>95</sup> *Marbury*, 5 U.S. (1 Cranch) at 177.

<sup>96</sup> This principle is reflected in the mantra — often repeated just prior to invalidation of a federal statute — that "[d]ue respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds." *United States v. Morrison*, 529 U.S. 598, 607 (2000).

<sup>97</sup> See AMAR, *supra* note 28, at 183–85 (explaining that the Founders considered the President's veto the primary means for preserving the Constitution); *id.* at 185 (citing President Jackson's statement that "[i]t is as much the duty of the House of Representatives, of the Senate, and of the President to decide upon the constitutionality of any bill or resolution which may be presented to them for passage or approval, as it is of the supreme judges" (quoting 22 REG. DEB. 1st Sess. app. 76 (1834))).

<sup>98</sup> See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

<sup>99</sup> 533 U.S. 218 (2001).

<sup>100</sup> See *id.* at 229–34.

<sup>101</sup> 125 S. Ct. 2688 (2005).

pretation different from the one previously adopted by a court interpreting the same statutory provision.<sup>102</sup> As the Court explained, “the agency’s decision to construe that statute differently from a court does not say that the court’s holding was legally wrong. Instead, the agency may, consistent with the court’s holding, choose a different construction, since the agency remains the authoritative interpreter (within the limits of reason) of such statutes.”<sup>103</sup> Thus, *Chevron* adopts a posture of interpretive deference toward the political branches. The critical conditions for deference are that the agency interpretation be undertaken in a formal way, that the statutory text be ambiguous, and that the agency’s interpretation be reasonable.

This framework translates fluidly to the context of longstanding practice by the political branches.<sup>104</sup> The fact that a practice has been sustained over several decades demonstrates that the political branches have considered the interpretation adopted — it has a degree of institutional inertia that insulates it from ephemeral political objectives. And the condition that the position embody a reasonable interpretation of the Constitution ensures that the text still plays a prominent role in constitutional interpretation, despite a place for longstanding practice.<sup>105</sup> In this regard, the deference method contrasts with Burkean minimalism.

Thus, applying a *Chevron*-type analysis to deference to longstanding interpretations of the political branches leads to a sensible compromise between the textual integrity of the Constitution and the principle of respect for the interpretations of coordinate constitutional actors acting within their respective spheres. In addition, by granting deference to the interpretations of the political branches only when they are marked by longstanding practice, this approach encourages to some degree the stability of legal and social institutions that is of central concern to Burkean minimalists. This approach is also consistent with Justice Scalia’s analysis in *United States v. Virginia* and *Rutan*, according to which longstanding practice can affect the interpretation of only ambiguous constitutional texts and should count only when the

<sup>102</sup> *Id.* at 2701.

<sup>103</sup> *Id.*

<sup>104</sup> The analogy to *Chevron* has its limits: The *Chevron* doctrine arises because ambiguity in certain statutes is understood to be an implicit delegation to the implementing agency. It might be a stretch to read ambiguous constitutional provisions as delegations to the very government bodies they are meant to restrain.

<sup>105</sup> Cf. Michael J. Glennon, *The Use of Custom in Resolving Separation of Powers Disputes*, 64 B.U. L. REV. 109, 127 (1984) (“The test should prohibit ‘interpreting’ a constitutional provision by reference to extrinsic materials — such as custom or intent — if no rational basis exists for any meaning but one.”).

practice is “not *expressly* prohibited by the text of the Bill of Rights.”<sup>106</sup>

Professor Caleb Nelson takes a similar approach in theorizing about stare decisis, which, as with the consideration of longstanding practice, is simply a posture of deference toward other constitutional interpreters. Professor Nelson argues that the Court should defer to its precedents only when those precedents are reasonable interpretations of constitutional provisions.<sup>107</sup> Analogizing to *Chevron*, Professor Nelson writes that “when a court says that a past decision is demonstrably erroneous, it is saying not only that it would have reached a different decision as an original matter, but also that the prior court went beyond the range of indeterminacy created by the relevant source of law.”<sup>108</sup> This “unreasonableness” standard suggests an operational rule for when to overrule precedent: “One could recognize a rebuttable presumption *against* overruling decisions that are *not* demonstrably erroneous while simultaneously recognizing a rebuttable presumption *in favor of* overruling decisions that *are* demonstrably erroneous.”<sup>109</sup>

Combining Professor Nelson’s theory of stare decisis with the theory of longstanding practice as an interpretation of the Constitution yields a conceptually satisfying meta-principle: the Court, as only one point in a constellation of interpreters of legal texts with varying degrees of indeterminacy, should defer to the considered judgments of other interpreters (whether previous Courts or the political branches) when their interpretations are reasonably encompassed by the text. This approach gives appropriate attention both to the constitutional value embodied in the text at issue and to the constitutional concern with giving all three branches authority to interpret the Constitution.

#### CONCLUSION: A REASONABLE INTERPRETATION OF THE APPOINTMENTS CLAUSE?

Adopting the view that longstanding practice of the political branches ought to be given interpretive — but not constitutive — weight in constitutional interpretation alters the analysis presented in Part II of this Note. Instead of determining whether the best reading of the Appointments Clause permits political party restrictions, for example, a court should evaluate whether that practice could reasonably be allowed by the text. To the extent, therefore, that a judge believes the original understanding of the Appointments Clause is ambiguous

<sup>106</sup> *Rutan v. Republican Party*, 497 U.S. 62, 95 (1990) (Scalia, J., dissenting) (emphasis added).

<sup>107</sup> See Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 5–8 (2001).

<sup>108</sup> *Id.* at 8.

<sup>109</sup> *Id.*

with respect to the question at issue — be it the governance of U.S. territories or political party restrictions — she might defer to the reasonable longstanding practice of the political branches.

So, for example, one might argue that Article I's specific grant of power to Congress to regulate the District of Columbia and the territories, coupled with the Constitution's pervasive concern with ensuring democratic self-government, creates some doubt as to whether Congress could install an elected government in those areas. This potential ambiguity might justify deferring to the longstanding practice of permitting the citizens of non-states to choose their leaders. (Although this argument runs counter to the logic of *Buckley*, there the Court did not confront a longstanding practice of Congress appointing FEC commissioners, so deference would have been inappropriate in that case.)<sup>110</sup> Conversely, political party restrictions, which cut against both the plain text of the Appointments Clause and the ability of the President to carry out his executive program under both the Vesting Clause<sup>111</sup> and the Take Care Clause<sup>112</sup> of Article II, might lead a judge to give no deference to that longstanding practice.<sup>113</sup> Not an iota of contemporaneous practice supports these or any similar restrictions on the President's policy prerogatives. Quite simply, the political branches' longstanding endorsement of such restrictions is not a reasonable interpretation of the Constitution. For the Constitution's text to continue to have relevance, courts must be prepared in such situations to enforce the compromise embodied in the national Genesis and not the political deals struck in more recent times — a very Burkean notion.

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<sup>110</sup> In addition, the fact that Congress began to experiment with elected government in the city of Washington so soon after the Founding might lead one to believe that it is at least not entirely clear whether the Appointments Clause was meant to include the city. After all, at least some members of the Founding generation served in the 1820 Congress, and thus one might consider its enactments to be borderline contemporaneous practice.

<sup>111</sup> U.S. CONST. art. II, § 1, cl. 1.

<sup>112</sup> *Id.* art. II, § 3.

<sup>113</sup> *Cf.* *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 327 (1936) (“[T]his court may not, and should not, hesitate to declare acts of Congress, however many times repeated, to be unconstitutional if beyond all rational doubt it finds them to be so . . .”).