

# *NON-JUDICIAL PRECEDENT*

by

Michael Gerhardt\*

This Article provides the first comprehensive analysis of the constitutional significance of non-judicial precedent. Non-judicial precedent is an important phenomenon not usually counted among the conventional sources of constitutional meaning. The term, non-judicial precedent, encompasses the constitutional activities of non-judicial actors. Non-judicial precedent has several distinctive features, which the article describes and illustrates through various examples. First, non-judicial precedent is more extensive than its judicial counter-part and more enduring than many scholars suppose. Second, the binding effects of non-judicial precedent vary according to several factors, including their direction – operating vertically as orders imposed by superior upon inferior authorities or horizontally as persuasive authority across authorities with equal power over the same domains. For instance, presidential signing statements comprise a horizontal-horizontal non-judicial precedent, because they are merely persuasive authority to Congress and other presidents. Non-judicial precedent also has different impact over time. Moreover, non-judicial precedents, like judicial ones, perform multiple functions, including shaping the Court, its doctrine, culture, and national identity. The Article suggests that incorporating non-judicial precedent into the lexicon of constitutional discourse will refine constitutional analysis and provide important connections among seemingly disparate constitutional events that dominate our headlines and fill our history books.

## *Introduction*

When we think of precedent, we usually make a mistake. We usually assume precedent is synonymous with the constitutional judgments of courts, particularly those of the Supreme Court.<sup>1</sup> This assumption derives from the common practice of viewing constitutional law from

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\* Samuel Ashe Distinguished Professor of Constitutional Law & Director of the Center on Law and Government, University of North Carolina Law School. I am grateful for the feedback received from participants in workshops at Princeton University and at Duke, University of Illinois, University of Minnesota, and William & Mary Law Schools. I am also grateful for helpful comments on earlier drafts from Randy Barnett, Erwin Chemerinsky, Dan Farber, Robert George, Bill Marshall, Mike Paulsen, Eugene Volokh, and Keith Whittington. Thanks also to Jeremy Falcone and Mark Vaughn for superb research assistance.

<sup>1</sup> For how lawyers generally define precedent, *see* BLACK'S LAW DICTIONARY 1214 (Deluxe 8<sup>th</sup> edition, 2004) (defining precedent alternatively as either “the making of law by a court in recognizing and applying new rules while administering justice” or “a decided case that

the Supreme Court's perspective. Constitutional law casebooks and treatises focus on the Court's, not non-judicial actors', decisions.<sup>2</sup> A common assumption among constitutional scholars is that the Court handles the biggest questions in constitutional law.

This Article offers an alternative perspective on constitutional law by focusing on the constitutional activities of non-judicial actors. Non-judicial actors make constitutional judgments more frequently than courts do, and these judgments comprise precedents. Non-judicial precedent covers a much broader spectrum than judicial precedent does. Non-judicial precedent is the focus of every era's constitutional conflicts, including current ones over judicial appointments,<sup>3</sup> empire building,<sup>4</sup> Senate rule-making,<sup>5</sup> warrant-less eavesdropping,<sup>6</sup> presidential signing statements,<sup>7</sup> congressional oversight,<sup>8</sup> and searches of representatives' offices.<sup>9</sup> Non-judicial precedent is the common link among these and many other areas of constitutional law.

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furnishes a basis for determining later cases involving similar facts or issues"). For social scientists' conceptions of precedent, *see, e.g.*, THOMAS G. HANSFORD & JAMES F. SPRIGGS II, *THE POLITICS OF PRECEDENT ON THE U.S. SUPREME COURT* 5 (2006) (defining precedent as "the legal doctrines, principles, or rules established by prior court opinions").

<sup>2</sup> For a notable exception, *see, e.g.*, PAUL BREST, ET AL., *PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS* (4<sup>th</sup> edition, 2000).

<sup>3</sup> *See* Charles Babington, *Clash over Judicial Filibusters Nears Boiling Point*, WASH. POST, May 9, 2005, at A21 (discussing Bush's difficulty in getting his judicial nominations past the senate).

<sup>4</sup> *See, e.g.*, Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915 (2005) (analyzing empire-building as a tool of constitutional analysis).

<sup>5</sup> *See* Jeffrey Rosen, *The Senate Nears the Point of No Return*, N.Y. TIMES, May 22, 2005, § 4, at 1 (discussing debate over the future of the Senate rule governing the filibuster).

<sup>6</sup> *See* James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1.

<sup>7</sup> *See* Charlie Savage, *Bush Challenges Hundreds of Laws: President Cites Powers of His Office*, BOSTON GLOBE, Apr. 30, 2006, at A1.

By explicating the constitutional significance of non-judicial precedent, this Article seeks to refine constitutional analysis in several ways. First, introducing non-judicial precedent into the lexicon of constitutional discourse will improve the precision and clarity of the terms we employ in constitutional analysis. I use the term "precedent" to refer to prior constitutional judgments of either or both judicial and non-judicial actors, while I use the term "non-judicial precedent" to refer to all sets of constitutional decisions, values, and beliefs of non-judicial actors. I shall use the term "constitutional law" to refer to what public authorities have declared that the Constitution requires. Every non-judicial precedent is some past constitutional event.

Second, shifting perspective on constitutional law to the vantage point of non-judicial precedent exposes the fallacy of complaints about the Court's extreme "self-confidence" and "arrogance" in exercising judicial review.<sup>10</sup> Every constitutional question that the Court considers has already been decided by at least one non-judicial authority, and the Court overturns only a small fraction of the constitutional judgments of non-judicial actors that it chooses to review. The Court leaves intact most constitutional judgments made by non-judicial actors.

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<sup>8</sup> See Drake Bennett, *Can Congress Matter?: Congress, More than the Court, Scholars Say, Is the Branch That's Supposed to Keep Executive Power in Check: If It Has Failed, It Has No One but Itself to Blame*, BOSTON GLOBE, Jan. 15, 2006, at K1.

<sup>9</sup> See Kathy Kiely, *Both Party Leaders Decry Raid on Lawmaker's Office*, USA TODAY, May 25, 2006, at 4A.

<sup>10</sup> See, e.g., *Atkins v. Virginia*, 536 U.S. 304, 348 (2002) (Scalia, J., dissenting) (deriding the "arrogance" of the majority's ruling that the Eighth Amendment bars executions of people with cognitive disabilities found guilty of certain crimes); Laurence H. Tribe, *Erog v. Hsub and Its Disguises: Freeing Bush v. Gore from its Hall of Mirrors*, 115 HARV. L. REV. 170, 288 (2001) (claiming "[t]he Court's self-confidence in matters constitutional is matched only by its disdain for the meaningful participation of other actors in constitutional debate"); Samuel Issacharoff, *Political Judgments*, in *THE VOTE: BUSH, GORE, AND THE SUPREME COURT* 55, 57 (Cass R. Sunstein & Richard A. Epstein eds., 2001) (describing *Bush v. Gore* as a "swaggeringly confident").

Third, the domain of non-judicial precedent dwarfs that of judicial precedent. Non-judicial precedent is not merely the froth on the tidal wave of constitutional law; it constitutes most of the wave. Through the creation, construction, and maintenance of precedent, non-judicial actors exert great influence over the content and direction of constitutional law.<sup>11</sup>

Fourth, historical practices, tradition, and custom are not distinct activities to which courts sometimes defer. Instead, each is a collection of non-judicial precedent, while together they are overlapping sub-sets of “culture.”<sup>12</sup>

Fifth, non-judicial precedent, just like judicial precedent, performs multiple functions.<sup>13</sup> Non-judicial precedent constitutes, among other things, a mode of argumentation, facilitates a national dialogue on constitutional meaning, implements constitutional values, and shapes culture, national identity, and the constitutional milieu in which public authorities operate.

This Article proposes a framework for explaining the role of non-judicial precedent in constitutional law. Each part examines a distinctive feature of non-judicial precedent. Altogether, non-judicial precedent’s features reflect its complex contributions to constitutional law.

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<sup>11</sup> On how non-judicial actors’ constitutional decision-making helps to construct constitutional law, *see generally* KEITH WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING* (1999).

<sup>12</sup> Robert Post of Yale Law School defines “culture” as the “beliefs and values of nonjudicial actors.” Robert C. Post, *The Supreme Court, 2002 Term/ Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 8 (2003). Professor Post’s definition of “culture” is quite insightful, but it may be too amorphous. Some beliefs and values of non-judicial actors are more socially and politically salient than others. Consequently, I consider “culture” as comprised of the aggregation, within our society, of all the discrete sets of non-judicial actors’ various beliefs, values, and judgments on matters of constitutional law. I consider each set to constitute a different category or collection of non-judicial precedent.

<sup>13</sup> For a discussion of the multiple functions performed by judicial precedent, *see generally* Michael J. Gerhardt, *Attitudes about Attitudes*, 101 MICH. L. REV. 1733, 1761-1762 (2003) (reviewing JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002)).

Part I examines the extraordinary variety and extensiveness of non-judicial precedent. Non-judicial precedents differ in many ways. It may be categorized in such diverse terms as the numerous institutions besides the courts creating precedent, the means through which non-judicial authorities express their respective constitutional judgments, the different kinds of precedents produced by non-judicial authorities, and the different sources of authority for the constitutional judgments of non-judicial authorities.

Part II addresses the surprisingly extensive finality of non-judicial precedent. Contrary to popular opinion, judicial review is limited. Indeed, much more often the constitutional judgments of non-judicial review survive judicial review. For instance, judicial doctrines recognize a broad swath for constitutional decision-making outside the Court. The standing and political questions doctrines are two examples of the Court's efforts to insulate some significant questions of constitutional law from judicial review. Judges and justices are unlikely ever to review numerous other important instances in which presidents and the Congress make constitutional law. In addition, courts routinely defer to non-judicial precedent in certain forms, such as historical practices, tradition, and customs. Moreover, courts rarely employ heightened scrutiny in examining the constitutional activities of non-judicial actors. Courts usually use deferential review of non-judicial constitutional activity, and eventually approve the vast majority of the constitutional judgments of non-judicial authorities. Even when the Court uses heightened scrutiny, it upholds a few non-judicial constitutional judgments.

Part III describes the direction, nature, and timing of non-judicial precedent's influence. Generally, non-judicial precedent exerts influence in one of two directions – vertically or horizontally. Vertical influence entails the binding effect of an order, direction, or mandate imposed by a superior authority on an inferior authority. Vertical operation entails binding

authority imposed from the top-down usually within but sometimes across particular branches. Horizontal influence entails the non-binding, or merely persuasive authority, of one authority's constitutional judgments across, or on, other authorities with equal power over the same domain. While every non-judicial precedent fits within at least one of the four categories, some non-judicial precedents fit into more than one category, depending on whether they operate synchronically or diachronically. A precedent may have different impact across different administrations and sessions of Congress.

In Part IV, I analyze the multiple functions of non-judicial precedent. Non-judicial precedent performs many functions that judicial ones do.<sup>14</sup> First, non-judicial precedents impose limited path dependency on constitutional law – they rarely mandate certain outcomes. With no firm rules for identifying, construing, or constructing non-judicial precedent, the latter is usually framed to allow for easy manipulation by subsequent interpreting authorities. Yet, social science research indicates that the more entrenched a precedent becomes – the more impervious it is to challenge or dismantlement (either within or outside the Court) – the more path dependency it may generate or the more it may constrain subsequent choices. While a non-judicial precedents may not actually constrain (or preclude) much substantive constitutional decision-making they do perform several other important functions, including fortifying or weakening judicial doctrine, validating other sources of constitutional meaning and argumentation, facilitating a broad public dialogue on constitutional law, chronicling constitutional history, clarifying constitutional structure, and shaping American culture and national identity.

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<sup>14</sup> For a discussion of the different functions performed by judicial precedents, see generally Michael J. Gerhardt, *The Limited Path Dependency of Precedent*, 7 U. PA. J. CONST. L. REV. 903, 967-88 (2005).

Whereas the previous parts set forth a descriptive framework for explaining the constitutional significance of non-judicial precedent, the final part considers normative criteria for evaluating such precedent. It seeks to refine our standards for assessing the competency of non-judicial actors to make constitutional decisions.

Employing well-known and not-so familiar examples of non-judicial precedent, this Article shows that the Court may not be as supreme in making constitutional law as commonly supposed. Instead, the proliferation, durability, and significance of non-judicial precedent demonstrate the Court is supreme within a relatively narrow domain. Non-judicial actors are supreme in making constitutional law within a larger realm than that in which the Court operates.

## I.

### *The Extraordinary Variety and Extensiveness of Non-Judicial Precedent*

One distinctive feature of non-judicial precedent is its extraordinary variety and extensiveness. I examine various ways in which this feature manifests itself.

A. *The Extensive Variety of Non-Judicial Precedent.* The eminent constitutional scholar Philip Bobbitt has observed that “there are as many kinds of precedent as there are constitutional institutions creating them.”<sup>15</sup> In fact, numerous non-judicial actors produce precedents. Some of these actors are familiar, including Congress and the President. Other non-judicial actors who create less familiar precedent are cabinet and sub-cabinet officials and the heads of federal agencies, commissions, and bureaus. Moreover, in each of the fifty states, a wide range and large number of non-judicial authorities make precedent. These authorities include, among

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<sup>15</sup> Philip C. 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).

others, governors and other executive officials (including attorneys general, cabinet-level, and sub-cabinet officials), legislators, and administrative agencies. In localities around the country, non-judicial authorities include city and county officials and their respective subordinates.

In many instances, private citizens and organizations interact with public officials to make important contributions to constitutional law. First, there are the people who drafted the United States Constitution – the Framers and the Ratifiers of the original Constitution and of each of the subsequent 27 amendments. While the Framers drafted the Constitution behind closed doors,<sup>16</sup> the ratification process was a public event with many formal and informal participants.<sup>17</sup> These participants included not only the official representatives in state ratifying conventions but also the people who sent them there as well as State authorities and newspapers. Moreover, legal scholars, civil rights and other organized interest groups, and the American Bar Association have all contributed significantly to constitutional dialogues – for instance, the American Bar Association in evaluating judicial nominees and proposed legislation,<sup>18</sup> and the Lawyers’ Committee for Civil Rights Under Law in commenting on nominations, sponsoring or coordinating litigation, and lobbying for civil rights legislation.<sup>19</sup> Today, numerous media

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<sup>16</sup> See CATHERINE DRINKER BOWEN, *MIRACLE AT PHILADELPHIA: THE STORY OF THE CONSTITUTIONAL CONVENTION MAY TO SEPTEMBER 1787*, 22-23 (1966).

<sup>17</sup> See MICHAEL A. GILLESPIE & MICHAEL LIENESCH, *INTRODUCTION TO RATIFYING THE CONSTITUTION 1* (Michael A. Gillespie and Michael Lienesch eds., 1989).

<sup>18</sup> See generally THE ABA IN LAW AND SOCIAL POLICY: WHAT ROLE? (The Federalist Society for Law & Public Policy Studies, eds., 1994) (surveying the participation of the ABA in making policy decisions and recommendations on judicial nominees); see also Senator Orrin G. Hatch, *At Last a Look at the Facts: The Truth about the Judicial Selection Process: Each Is Entitled to His Own Opinion, but Not to His Own Facts*, 11 GEO. MASON L. REV. 467, 477-479 (2003) (discussing the role of the ABA in the judicial nomination process).

<sup>19</sup> See, e.g., *Lawyers Committee for Civil Rights Under Law Urges Rejection of John D. Ashcroft as Attorney General of the United States*, U.S. NEWSWIRE, Jan. 22, 2001 available in 2001 WL 4139263; Robert Belton, *A Comparative Review of Public and Private Enforcement of Title VII*

outlets – television, radio, cable, newspapers, magazines, and the Internet – provide information and commentaries on constitutional events, while the public expresses constitutional judgments through voting, polling, and lobbying. Moreover, people’s constitutional judgments are shaped in various settings inside and outside of the home.

*B. The Diverse Expressions of Constitutional Judgments.* The extraordinary variety of ways in which non-judicial actors express constitutional judgments complicates the systematic study of non-judicial constitutional activity. Studying the Court’s constitutional opinions is appealing, at least in part, because they are relatively small in number. In fact, the Supreme Court produces far fewer constitutional decisions each year than do non-judicial authorities such as the Congress, the executive branch, the States, or localities.

Moreover, justices and judges express their constitutional opinions through much narrower, more restrictive means than do non-judicial authorities. Whereas justices express their constitutional opinions in their formal decisions and sometimes in speeches, articles, interviews, and treatises, political leaders express their respective constitutional opinions through virtually unlimited means. For instance, legislators express their constitutional judgments through such diverse means as speeches, committee hearings and reports, floor statements, correspondence, media interviews, campaign activities (including debates), editorials, articles, and books.

Whereas judges and justices are formally restricted from ex parte contacts,<sup>20</sup> state and national

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*of the Civil rights Act of 1964*, 31 VAND. L. REV. 905, 923-933 (1978) (noting that the Lawyers’ Committee for Civil Rights Under Law contributed to early enforcement of Title VII through litigation); Susan M. Olson, *How Much Access to Justice from State “Equal Access to Justice Acts”?*, 71 CHI.-KENT. L. REV. 547, 555 (noting the Committee’s opposition to the Equal Access to Justice Act).

<sup>20</sup> See, e.g., 28 U.S.C. § 455(b) (2005) (specifying the situations in which judges must disqualify themselves).

political authorities are not. Political leaders are restrained in the extent of their contacts primarily by bribery and ethics laws.<sup>21</sup> They are thus left substantial discretion over the kinds of information they may consider in formulating their constitutional judgments, including the people with whom they consult. Political authorities are the conduits for a nearly endless stream of constitutional commentary. Party leaders, public intellectuals, pundits, academics, and interest groups are just a few of the participants in this wide-ranging dialogue. In addition, private organizations express their constitutional judgments through varied means, such as media campaigns, lobbying, petitions, and official and informal appearances before governmental bodies. Also, private citizens express their constitutional judgments through extensive means, including voting and lobbying. The Internet provides extensive means for constitutional dialogue through e-mails, websites featuring constitutional discussion, and blogging.<sup>22</sup>

*C. The Different Kinds of Constitutional Judgments.* A non-judicial precedent may have three kinds of substantive content. The first is purely constitutional. Non-judicial precedent with purely constitutional content consists of those decisions in which non-judicial authorities directly address constitutional questions. An obvious example can be found in the constitutional amendment process. Indeed, precedent guided the National Archivist in resolving the legality of the Twenty-Seventh Amendment.<sup>23</sup> The amendment was first proposed in 1791, but an insufficient number of states had voted to ratify the amendment by the end of the First

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<sup>21</sup> See, e.g., 2 U.S.C.S. § 31-2 (2005) (providing no senator, “or the spouse or dependent thereof, shall knowingly accept . . . any gift or gifts in any calendar year aggregating more than the minimum value as established by section 7342(a)(5) of title 5, United States Code, or \$250, whichever is greater[,] from any person, organization, or corporation...”).

<sup>22</sup> See generally CASS R. SUNSTEIN, REPUBLIC.COM (2001) (discussing, among other things, the Internet’s potential as a forum and means for constitutional discourse).

<sup>23</sup> U.S. CONST., amend. XXVII.

Congress. Without any time-limit or deadline for ratification imposed by Congress, it was unclear whether states joining the Union after the amendment was proposed were precluded from voting on its ratification. By 1992, 38 states had ratified the amendment. Following precedent, the national Archivist deferred to states' decisions and certified the amendment's adoption,<sup>24</sup> and Congress by joint resolution declared the amendment valid.

Another kind of substantive content for non-judicial precedent consists of mixed questions of policy and constitutional law. The Senate's rejection of President Franklin D. Roosevelt's controversial Court-packing plan exemplifies this kind of substantive content. Senators cited a combination of reasons for their opposition, including both constitutional and policy.<sup>25</sup> Non-judicial precedents with mixed content are predicated on constitutional judgments which are not always express.<sup>26</sup>

The third kind of substantive content for non-judicial precedent is primarily policy. Most non-judicial precedents comprise policy choices. Voting on a tax increase is typical of such content. Although the vote clearly pertains to a policy question, the approval of any policy may be construed as an implicit acceptance of its constitutionality.

Non-judicial precedent may, however, differ according to the context in which it is made. The range of activities potentially constituting non-judicial precedent abound. For instance, the most familiar activity potentially requiring the exercise or expression of constitutional judgments consists of formal floor votes in Congress. Votes occur with respect to the entire range of

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<sup>24</sup> See *With Little Fanfare, Amendment Is Signed*, N.Y. TIMES, May 19, 1992, at A14.

<sup>25</sup> See S. REP. NO. 75-711, at 13-14 (1937) (summarizing senators' explanations for their rejection of the Court-packing plan).

<sup>26</sup> See Post, *supra* note 12, at 79-80 (arguing that constitutional inquiries often depend on legal as well as social meanings).

congressional exercises of powers. Moreover, the exercise of power within each chamber encompasses decisions of the Parliamentarian and presiding officer in the House or Senate, or the House or Senate itself, concerning how its respective rules operate in practice. These precedents elaborate each chamber's understanding of its rules.<sup>27</sup> While not all of the latter precedents pertain to constitutional law, the formulation, retention, and amendment of rules depends on the members' understanding of their power to formulate rules.

Members of Congress do not just create precedent through formal lawmaking or rulemaking. They create precedent through inaction. Thus, members of Congress render constitutional judgments when they vote against legislation they deem to be unconstitutional and when they vote not to impeach or not to convict someone because they believe the misconduct at issue does not qualify as an impeachable offense. They make precedent when they refuse to declare war because they believe that it was not required by the Constitution under the circumstances; and they make precedent when they vote against presidential nominations based on their disapproval of the nominees' constitutional opinions.

Indeed, most congressional activity occurs off the House and Senate floors. Legislative committees create precedent through what they approve and disapprove. Nothing reaches the floor of the House or Senate without first being considered in committee. Committees are Congress' gatekeepers.<sup>28</sup> Usually, a committee's lack of endorsement is fatal, though exceptions

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<sup>27</sup> See, e.g., Betsy Palmer, *Changing Senate Rules: The "Constitutional" or "Nuclear" Option*, CRS Report for Congress, April 5, 2005, at 1 (describing the presiding officer's and institution's formal judgments on rules and their operation as governing "precedents" within the Senate).

<sup>28</sup> Arthur T. Denzau & Robert J. Mackay, *Gatekeeping and Monopoly Power of Committees: An Analysis of Sincere and Sophisticated Behavior*, 27 AM. J. POL. SCI. 740, 741-44 (1983).

are made through discharge petitions (requiring majority approval in the House and unanimous consent in the Senate).<sup>29</sup>

Yet another form of congressional constitutional judgments consists of informal practices, norms, and traditions.<sup>30</sup> For instance, seniority has been a longstanding but not binding criterion for committee assignments in the House and Senate.<sup>31</sup> The practice constitutes a continuing exercise of each chamber's authority to "determine Rules for its proceedings."<sup>32</sup> Each chamber's formal rules derive from the same explicit constitutional authority.

Presidents and other executive officials produce precedent in at least as many ways as Congress does. One is through constitutional judgments made by presidents in the course of exercising their unique authorities. For instance, President Jackson's veto of the second National Bank is one of the most famous statements and precedents bolstering the proposition that the "opinion of the judges has no more authority over Congress than the opinion of the Congress than the opinions of Congress has over the judges, and on that point the President is independent of both."<sup>33</sup> The different kinds of nominations made by presidents, as well as the manner in which they are made, constitute additional sets of precedent.<sup>34</sup>

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<sup>29</sup> See CONGRESSIONAL QUARTERLY, CQ GUIDE TO CONGRESS 425 (3<sup>rd</sup> edition 1982) (explaining the history and function of discharge petitions).

<sup>30</sup> See, e.g., *id.* at 195-96 (discussing the "norm" of senatorial courtesy and other longstanding practices of the Senate).

<sup>31</sup> See Elizabeth Garrett, *Term Limitations and the Myth of the Citizen Legislator*, 81 CORNELL L. REV. 623, 662-663 (1996) (charting the peaks and valleys of the seniority system over the course of the twentieth century).

<sup>32</sup> U.S. CONST., art. I, § 5.

<sup>33</sup> ANDREW JACKSON, VETO MESSAGE, July 10, 1832, 2 Messages and Papers of the Presidents 578-79 (Richardson ed., 1897). Jackson argued that the "authority of the Supreme Court must

Presidents also decide how to structure their office.<sup>35</sup> These decisions encompass choices made about the appropriate sizes of and distribution of powers among presidential staffs. For instance, President Nixon had only one White House counsel –John Dean – while President George W. Bush has almost 20 people in the White House Counsel’s office.<sup>36</sup> Other executive officials create precedents through their exercises of their respective authorities. For instance, the President may ask the Attorney General for formal advice on particular constitutional questions.<sup>37</sup> This advice is given in the form of official opinions of the Office of Legal Counsel of the Justice Department.<sup>38</sup> Both the advice and priorities of an Attorney General may produce precedent for his successors to consider following or rejecting.

There are more diverse repositories of presidential and other executive officials’ precedents than congressional ones. The former include, among others, presidents’ executive orders, federal regulations, and the official opinions and memoranda of legal counsel in every

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not . . . be permitted to control the Congress or the Executive when acting in their legislative capacities, but to have only such influence as the force of their reasoning may deserve.” *Id.*

<sup>34</sup> See MICHAEL J. GERHARDT, *THE FEDERAL APPOINTMENTS PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* 162-74 (revised edition 2003) (discussing the patterns in the Senate’s handling of different nominations).

<sup>35</sup> See, e.g., 1 *GUIDE TO THE PRESIDENCY* 816 (Michael Nelson, ed. 2002) (describing President Franklin D. Roosevelt’s efforts to modernize the organization of the White House).

<sup>36</sup> See Michael A. Fletcher, *Quiet but Ambitious White House Counsel Makes Life of Law*, *WASH. POST*, June 21, 2005, at A19 (mentioning White House Counsel Harriet Miers’ staff of thirteen lawyers); see also Dan Froomkin, *2004 White House Office Staff List*, *THE WASH. POST*, available at <http://www.washingtonpost.com/wp-srv/politics/administration/whbriefing/2004stafflistc.html>.

<sup>37</sup> See 2 *GUIDE TO THE PRESIDENCY* 1220-1221 (Michael Nelson, ed. 2002) (describing the changing priorities of the Attorney General and the Department of Justice through the Nixon, Ford, Carter, and Reagan administrations).

<sup>38</sup> See generally Douglas W. Kmiec, *OLC’s Opinion Writing Function: The Legal Adhesive for a Unitary Executive*, 15 *CARDOZO L. REV.* 337 (1993).

executive department and agency. Presidents and executive officials also render constitutional judgments in the forms of informal practices, norms, and traditions. For instance, presidents from Thomas Jefferson until Woodrow Wilson delivered their States of the Union by letter, but Wilson inaugurated what has become the customary presidential practice of delivering the address before a joint session of the Congress.<sup>39</sup> The practice has enhanced the prestige of the president. The choice of delivering the State of the Union is the consequence of presidents' judgments about how they would like to deliver their address and Congress' acquiescence.

State officials render constitutional judgments in as many different forms as federal officials do. State constitutions are the States' most prominent constitutional judgments; they provide additional governmental obligations and powers beyond those the federal Constitution requires.<sup>40</sup> State law, for instance, generally sets forth the legal definitions of life, marriage, and death.<sup>41</sup> Moreover, in 2004, 18 states amended their state constitutions to expressly prohibit gay marriage.<sup>42</sup> In addition, state law defines the authority of State Attorneys General to issue legal

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<sup>39</sup> H.W. BRANDS, *WOODROW WILSON* 30-31 (2003) (noting that this innovation “was one of [Wilson’s] lasting contributions to American governance”).

<sup>40</sup> JERRY MENIKOFF, *LAW AND BIOETHICS: AN INTRODUCTION*, 12 (Jerry Menikoff, ed., 2001) (“If...rights [created by a state constitution] are more expansive than those created by the United States Constitution, then that state constitution will effectively limit the powers wielded by its legislators.”).

<sup>41</sup> *See, e.g.* Cal. Health & Safety Code § 7180(a) (2005) (defining “death” as “irreversible cessation of circulatory and respiratory functions” and /or “irreversible cessation of all functions of the entire brain”).

<sup>42</sup> *See* Anna Badkhen, *In Massachusetts, Gay Weddings are Now Routine; Growing Acceptance of Same-Sex Nuptials on First Anniversary*, S.F. CHRONICLE, May 17, 2005, at A4.

opinions.<sup>43</sup> Because Governors usually do not appoint state Attorneys General, these officials may disagree over constitutional issues, and some states have developed special processes for resolving such disagreements.<sup>44</sup> Moreover, state legislatures create precedent not unlike that which Congress produces. All state legislators make judgments about legislation. Each state constitution sets forth procedures for removing or recalling certain public officials for misconduct in office,<sup>45</sup> and many have procedures for evaluating, appointing, or re-appointing judges. For instance, in 2003 the voters of California agreed to recall (and thus remove) then-Governor Gray Davis and to replace him with the actor Arnold Schwarzenegger.<sup>46</sup> In 2004, Connecticut Governor John Rowland resigned when confronted with the enormous likelihood of impeachment and removal for misappropriating funds,<sup>47</sup> while New Jersey Governor James

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<sup>43</sup> See NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, STATE ATTORNEYS GENERAL: POWERS AND RESPONSIBILITIES 61-75 (Lynne M. Ross, ed., 1990); see also Robert Toepfer, *Some Legal Aspects of the Duty of the Attorney General to Advise*, 19 U. CIN. L. REV. 201, 203 (1950).

<sup>44</sup> For instance, former Virginia governor Doug Wilder appointed special legal counsel to represent the Virginia Retirement System because he perceived that Mary Sue Terry, the attorney general, would have a conflict of interests. Though Terry filed suit, the state assembly resolved the impasse under Va. Code Ann. § 2.1-122(a) (1994) (current version at 2.2-510.1 (2006)) (specifying that the governor may appoint special counsel when the Attorney General's office is "unable" to render the service at issue).

<sup>45</sup> See, e.g., CAL. CONST. art. VII § 8 (disqualification from office; Bribery; Improper election practices); MO CONST. art. VII, §§ 1, 4 (impeachment and removal of officers not subject to impeachment); N.C. CONST. art. VI, § 8 (disqualifications for office).

<sup>46</sup> Charlie LeDuff, *The California Recall: The Governor-Elect*, N.Y. TIMES, Oct. 8, 2003, at A26.

<sup>47</sup> William Yardley, *Under Pressure, Rowland Resigns Governor's Post*, N.Y. TIMES, June 22, 2004, at A1.

McGreevey resigned in anticipation of an effort to remove him based on charges that he had sexually harassed a male employee and used his office to bestow favors upon the employee.<sup>48</sup>

Moreover, state law serves as the primary basis for the existence of some constitutionally protected interests. Contracts Clause, Takings, Eighth Amendment, and Due Process cases illustrate this aspect of state law. In cases requiring interpretation and application of the Contracts Clause,<sup>49</sup> courts need to determine whether a contract exists before deciding whether a particular contractual obligation has been impaired. Whether a contract exists depends on the relevant state law on the formation of contracts.<sup>50</sup> In cases involving construction of the Due Process Clause<sup>51</sup> or the Takings Clause,<sup>52</sup> the Court consults state law to determine whether an interest qualifies as “property”.<sup>53</sup> Moreover, the Court must determine whether a particular criminal sentence is “unusual” and therefore violates the Eighth Amendment<sup>54</sup> by determining its

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<sup>48</sup> Laura Mansnerus, *McGreevey Steps Down After Disclosing a Gay Affair*, N.Y. TIMES, Aug. 13, 2004, at A1.

<sup>49</sup> U.S. CONST. art. I, § 10 (“No State shall...pass any...Law impairing the Obligation of Contracts...”).

<sup>50</sup> *See, e.g.,* Indiana ex rel. Anderson v. Brand, 303 U.S. 96 (1938); Ogden v. Saunders, 25 U.S. 213, 256-59, 326 (1827).

<sup>51</sup> U.S. CONST. amend. XIV (“...nor shall any State deprive any person of life, liberty, or property, without due process of law...”).

<sup>52</sup> U.S. CONST. amend. V (“...nor shall private property be taken for public use, without just compensation”).

<sup>53</sup> *See, e.g.,* Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1 (1978); Board of Regents v. Roth, 408 U.S. 564 (1972); Fox River Paper v. Railroad Commission, 274 U.S. 651 (1927); Sauer v. New York, 206 U.S. 536 (1907).

<sup>54</sup> U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted”).

consistency with state punishment schemes.<sup>55</sup> In substantive due process cases, the Supreme Court defers to state practices or laws as establishing a benchmark against which to measure whether the law or practice at issue comports with, or deviates from, tradition. In *Lawrence v. Texas*,<sup>56</sup> the majority found “an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.”<sup>57</sup> The Court found no tradition or “longstanding history in this country of laws directed at homosexual conduct as a distinct matter”<sup>58</sup> and thus overruled *Bowers v. Hardwick*<sup>59</sup> because it had mistakenly identified a tradition supporting the criminalization of homosexual activity.

Another kind of non-judicial precedent is each source of constitutional meaning besides courts. Consider, for instance, the original understanding of the Constitution. There are many sets of Framers. There are the original delegates to the Constitutional Convention and State ratifying conventions as well as the pivotal actors in drafting and ratifying each of the subsequent 27 amendments to the Constitution. These Framers and Ratifiers established precedents for constitution-making.<sup>60</sup> Even unsuccessful amendments, such as the Equal Rights Amendment, enrich our understanding of the amending process.

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<sup>55</sup> See, e.g., *Lockyer v. Andrade*, 538 U.S. 63 (2003); *Ewing v. California*, 538 U.S. 11 (2003).

<sup>56</sup> 539 U.S. 558 (2003).

<sup>57</sup> *Id.* at 571-72.

<sup>58</sup> *Id.* at 568.

<sup>59</sup> 478 U.S. 186 (1986).

<sup>60</sup> See Louis Henkin, *A New Birth of Constitutionalism: Genetic Influences and Genetic Defects*, 14 *CARDOZO L. REV.* 533, 536-37 (1993) (assigning “major credit” to the United States for “establishing and spreading the constitutionalist ideology”); see also ZELMAN COWEN & LESLIE ZINES, *FEDERAL JURISDICTION IN AUSTRALIA* xiv-xv (2d ed. 1978) (“The influence of American precedents on Australian constitution making was considerable.”).

The text of the Constitution functions as a precedent as well. For anyone interested in constructing, or writing, constitution, the United States Constitution, including its amendments, is a popular place to begin. It is the ultimate precedent. It is arguably the single most important model for state constitutions and constitutions abroad. This is not to say that it is perfect or that it is perfectly adaptable to other countries or societies.<sup>61</sup> Nevertheless, it is a precedent – a prominent example of earlier – constitution-making.

The structure of our Constitution is another precedent for constitution-drafting. The division of our Constitution into three branches was not novel. The Framers drew on their knowledge of antiquity and European political philosophy to distribute the powers of the federal government among three different branches,<sup>62</sup> and the system of checks and balances set forth in the American Constitution has been a model not just for the states (whose own systems provided some guidance to the Framers) but for governments around the world.<sup>63</sup>

Yet another kind of non-judicial precedent involves popular sovereignty. All the different means through which the public expresses constitutional judgments comprise

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<sup>61</sup> For scholarly analysis of the United States Constitution as a model, see, e.g., J.M. Balkin, *Agreements with Hell and Other Objects of Our Faith*, 65 *FORDHAM L. REV.* 1703 (1997) (exploring the notion of constitutional fidelity and the problem of constitutional evil); *CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES* (William N. Eskridge, Jr. & Sanford Levinson, eds., 1998); *THE UNITED STATES CONSTITUTION: 200 YEARS OF ANTI-FEDERALIST, ABOLITIONIST, FEMINIST, MUCKRAKING, PROGRESSIVE, AND ESPECIALLY SOCIALIST CRITICISM* (Bertell Ollman & Jonathan Birnbaum, eds., 1990).

<sup>62</sup> See Donald L. Doernberg, “*We the People*”: *John Locke, Constitutional Rights, and Standing to Challenge Government Act*, 73 *CALIF. L. REV.* 52, 58 (1985) (describing the influences on the framers by various European and other political philosophers).

<sup>63</sup> See, e.g., Alfred Stepan and Cindy Skach, *Presidentialism and Parliamentarianism in Comparative Perspective*, in 1 *THE FAILURE OF PRESIDENTIAL DEMOCRACY* 119, 120 n.3 (Juan J. Linz & Arturo Valenzuela, eds. 1994) (noting that in the 1980s and 1990s, “all the new aspirant democracies in Latin American and Asia” chose governments modeled on the American system of separation of powers).

precedents of popular sovereignty. For instance, political campaigns provide significant opportunities for public interaction with political leaders (and those seeking to unseat them) on the constitutional issues of the day. Any way in which the public applies pressure to political leaders can be construed as an exercise of popular sovereignty, and the history (and consequences) of such pressure is an important part of our constitutional development.<sup>64</sup>

The constitutional judgments of non-judicial authorities further include enduring policy judgments. National political leaders are responsible for the major policy developments and judgments throughout American history. If one were to survey the 50 most important policy developments in the twentieth century, the Supreme Court could not claim responsibility for any. While judicial decisions helped the civil rights movement to flourish, they did so with the aid of significant presidential and congressional activities,<sup>65</sup> including the 1958 and 1964 Civil Rights Acts.<sup>66</sup> Nor should one forget that the private citizens helped to energize and direct the civil rights movement as well as helped to create an important precedent for subsequent organized activity to change the law.<sup>67</sup> The civil rights movement, particularly the cohesive litigation strategy to end state-mandated segregation, is the model for contemporary interest groups to advance their agendas through litigation over such diverse issues as gay marriage, abortion

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<sup>64</sup> See LARRY KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749 (1994).

<sup>65</sup> See generally MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* (2004).

<sup>66</sup> See Civil Rights Act of 1957, Pub. L. No. 71-634 (1957) and Civil Rights Act of 1964, Pub. L. No. 88-352 (1964).

<sup>67</sup> See, e.g., DERRICK BELL, *CONFRONTING AUTHORITY: REFLECTIONS OF AN ARDENT PROTESTOR* 21 (1994) (citing the participation by Southern blacks in direct action protests as a model for protest activities).

rights, teaching evolution in public schools, and disability.<sup>68</sup> Non-judicial actors make all these judgments. Congress and the President share responsibility for the policy judgments embodied in landmark legislation characterizing the New Deal<sup>69</sup> and Great Society<sup>70</sup> eras as well as the Clean Air and Water Acts.<sup>71</sup>

*D. The Explicit and Implicit Authorities of Congress and the Presidency.* The extensiveness of non-judicial precedent is illustrated further by the numbers and kinds of powers of principal executive and legislative authorities in federal and state governments. One way to measure the range of non-judicial precedents such officials make is to enumerate their constitutionally granted powers. For instance, the Constitution explicitly vests Congress with 75 powers, presidents with 14, and vice-presidents with five. Each time that the President or

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<sup>68</sup> See MARK V. TUSHNET, *THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950* 144 (1987) (describing a common perception of the NAACP's litigation campaign as a model for public interest law generally); see also Richard Thompson Ford, *Courting Trouble: A Story of Love, Marriage, and Litigation Strategy* from Slate.com (June 1, 2004): <http://www.slate.com/id/2101537> (arguing that gay marriage activism in California failed b/c parties in that state failed to follow litigation strategy established by Civil Rights...).

<sup>69</sup> See, e.g., National Labor Relations Act, Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified at 29 USC §§ 151 et seq (1988)); Social Security Act of 1935, Pub. L. No. 74-271, 49 Stat. 520 (codified in scattered sections of 26 U.S.C. and 42 U.S.C. (1994)); National Industrial Recovery Act, Pub. L. No. 73-67, 48 Stat. 195 (1933); Norris-La Guardia Act, Pub. L. No. 72-65, 47 Stat 70 (1932) (codified at 29 USC §§§ 101 et seq (1988)).

<sup>70</sup> See, e.g., Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (2000)); Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (codified as amended in scattered sections of 20 U.S.C.); Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified at 42 U.S.C. § 2000e-5 (2000)); Economic Opportunity Act of 1964, Pub. L. No. 88-452, 78 Stat. 508 (codified as amended at 42 U.S.C. 2991-2994 (1994)).

<sup>71</sup> See, e.g., Clean Water Act, Pub. L. No. 95-217, 91 Stat. 1566 (1977); Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676; Clean Air Act Amendments of 1966, Pub. L. No. 89-675, 80 Stat. 954; Motor Vehicle Air Pollution Control Act, Pub. L. No. 89-272, 79 Stat. 992 (1965)

Congress exercises one of its respective powers, its exercise has the potential to become a precedent to guide subsequent exercises of the same power. For instance, pursuant to express authority set forth in Article I, the House of Representatives has excluded 10 people from being seated because of their failures to satisfy the requirements for membership in the House,<sup>72</sup> expelled four people,<sup>73</sup> censured 22 members for misconduct,<sup>74</sup> and reprimanded eight members for misconduct, including Barney Frank and Newt Gingrich;<sup>75</sup> and the Senate has excluded six people from being seated,<sup>76</sup> expelled 15 people,<sup>77</sup> and reprimanded or censured nine people for misconduct.<sup>78</sup> Although these legislative decisions are routinely ignored in the study of precedent, they guide each chamber in dealing with the ticklish problem of how to handle the misconduct of members of the House and the Senate.

The powers of non-judicial actors differ in notoriety. Probably the best known executive powers are the President's authorities to act as "Commander-in-Chief" and to "take care that the

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<sup>72</sup> See ROBERT L. TIENKEN, PRECEDENTS OF THE HOUSE OF REPRESENTATIVES RELATING TO EXCLUSION, EXPULSION AND CENSURE (Washington, D.C.: Library of Congress, Congressional Research Service, 1973); *but see* Powell v. McCormack, 395 U.S. 486 (1969) (overturning exclusion of Adam Clayton Powell on grounds that he wrongfully diverted House funds for the use of others and himself and made false reports concerning expenditures of foreign currency)

<sup>73</sup> Jack Maskell, Expulsion, Censure, Reprimand, and Fine: Legislative Discipline in the House of Representatives, CRS Report RL 31382, 24-25 (2002).

<sup>74</sup> *Id.* at 22-23.

<sup>75</sup> *Id.* at 23-24.

<sup>76</sup> ANNE M. BUTLER & WENDY WOLFF, U.S. SENATE ELECTION, EXPULSION, AND CENSURE CASES, 1793-1990, S. DOC. NO. 103-33 xviii (1995).

<sup>77</sup> *Id.* at xxviii.

<sup>78</sup> *Id.* at xxix.

Laws be faithfully executed”,<sup>79</sup> both of which provide the textual foundation for the inherent powers most presidents claim.<sup>80</sup> The Vice-President’s authority to succeed to the presidency upon the death of the President is now taken for granted, though it only took hold after congressional leaders reluctantly accepted John Tyler’s claim that as Vice-President he was constitutionally entitled to take the presidential oath upon the death of the sitting President, William Henry Harrison.<sup>81</sup> Another discounted power is Congress’ authority to enact copyright, patent, and trademark legislation by virtue of its explicit authority “to promote the Progress of Science and useful Arts, by securing for limited times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”<sup>82</sup> Congress effectively has the last word in

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<sup>79</sup> U.S. CONST. art. II, §3.

<sup>80</sup> *See, e.g.*, Holdover and Removal of Members of Amtrak’s Reform Board, Sept. 22, 2003 Op. Off. Legal Counsel, *available at* <http://www.usdoj.gov/olc/amtrak.htm> (arguing that President Bush may remove a member from the Amtrak Reform Board without cause based on the Take Care Clause); The President’s Constitutional Authority to Conduct Military Operations against Terrorists and Nations Supporting Them, Sept. 25, 2001 Op. Off. Legal Counsel, *available at* <http://www.usdoj.gov/olc/warpowers925.htm> (arguing that the President has plenary authority to use military force abroad as Commander in Chief); Validity of Congressional-Executive Agreements that Substantially Modify the United States’ Obligations under an Existing Treaty, Nov. 25, 1996 Op. Off. Legal Counsel, *available at* <http://www.usdoj.gov/olc/treaty.top.htm> (claiming that the President’s authority in the field of foreign affairs flows largely from his role as Commander in Chief); Presidential Authority to Decline to Execute Unconstitutional Statutes, 18 Op. Off. Legal Counsel 199 (1994) (arguing that the President is sometimes entitled not to enforce laws that he believes to be unconstitutional, under both the Take Care Clause and the Commander in Chief power); Constitutionality of Statute Requiring Executive Agency to Report Directly to Congress, 6 Op. Off. Legal Counsel 632, 638-639 (1982) (arguing for a “unitary Executive” position disallowing executive officials to disclose information without the President’s authority based on the Take Care Clause).

<sup>81</sup> THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, S. DOC. NO. 103-6, 435 (Johnny H. Killian & George A. Costello, eds., 1996) (“When President Harrison died in 1841, Vice President Tyler, after initial hesitation, took the position that he was automatically President, a precedent which has been followed subsequently and which is now permanently settled by...the Twenty-Fifth Amendment.”).

<sup>82</sup> U.S. CONST. art. I, § 8, cl. 8.

exercising this power, as the Supreme Court recognized in *Eldred v Ashcroft*<sup>83</sup> upholding the constitutionality of the Copyright Extension Act on the basis of “an unbroken congressional practice of granting to authors of works and existing copyrights the benefit of term extensions.”<sup>84</sup> Similarly, we may discount the Vice-President’s authority, which Al Gore, Jr., undertook on his last day in office to settle the 2000 presidential election, as “President of the Senate” to oversee the final counting of electoral votes for the presidency, including opening “all the certificates” of electoral votes cast.<sup>85</sup> Thomas Jefferson effectively exercised this non-reviewable power to his advantage in the aftermath of the closely contested presidential election of 1800.<sup>86</sup>

Many other powers are often overlooked though still significant. For instance, the Constitution vests powers in each chamber of the Congress, such as empowering the House to “chuse their Speaker and other Officers”<sup>87</sup> and the Senate to “chuse their Officers”,<sup>88</sup> pursuant to which these chambers have chosen their leaders for more than two hundred years. Many other powers are implicit, though frequently deployed. In the few instances in which the Court has reviewed these powers, it has left political authorities’ decisions in tact. For instance, it did so with respect to the President’s authorities to rescind treaties and to use military force without

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<sup>83</sup> 123 S. Ct. 769 (2003).

<sup>84</sup> *Id.* at 778.

<sup>85</sup> U.S. CONST. amend. XII.

<sup>86</sup> See BRUCE A. ACKERMAN, *THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF PRESIDENTIAL DEMOCRACY* (2006).

<sup>87</sup> U.S. CONST. art. I, § 2, cl. 5.

<sup>88</sup> *Id.*, art. I, § 3, cl. 5.

congressional authorization,<sup>89</sup> and the Congress' authorities to abolish inferior courts and to expand or contract the Court's size.<sup>90</sup>

The sheer range of presidential and congressional powers says nothing about their finality. Part II demonstrates the durability and finality of the overwhelming number of non-judicial authorities' constitutional judgments, even when subject to judicial review.

## II.

### *The Finality of Non-Judicial Precedent*

Finality is an overlooked feature of non-judicial precedent. To be sure, several notable scholars proclaim ours an era of judicial supremacy,<sup>91</sup> in which the Court supposedly substitutes its constitutional judgment routinely for that of non-judicial actors. But, the record does not support the charge. Judicial review of non-judicial constitutional activity is limited, and non-judicial actors have the last word on a surprising range of constitutional law questions.

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<sup>89</sup> When President Carter terminated a treaty with Taiwan without Congressional approval, some members of Congress filed a claim that his actions usurped their prerogative to approve changes in the supreme law of the land. The Supreme Court ordered that the claim be vacated. Four Justices based their decision on the political question doctrine, while Powell concurred on the grounds that the claim was not yet ripe for judicial review because Congress had taken no action to assert its constitutional authority. See *Goldwater v. Carter*, 444 U.S. 996 (1979); See also SEPARATION OF POWERS LAW 807 (Peter M. Shane & Harold H. Bruff, eds., 2d ed., 2005) (“[T]he Executive has adhered to a constitutional view...that the President has unreviewable authority (a) to determine when the interests of the United States demand U.S. military action and (b) to commit our troops to the protection of U.S. interests, even without clear legislative authority.”).

<sup>90</sup> See Gerhardt, *supra* note 14, at 986-987.

<sup>91</sup> See KRAMER, *supra* note 64, at 227 (suggesting that the Supreme Court circa 2003 “went too far, seeking to control matters at the heart of contemporary politics...”); see generally Barry Friedman, *The History of the Counter-majoritarian Difficulty, Part One: the Road to Judicial Supremacy*, 73 N.Y.U.L. REV. 333 (1998).

A. *The Limited Scope of Judicial Review.* Judicial review of the constitutional activity of non-judicial actors is surprisingly limited. As anyone familiar with constitutional law knows, the Supreme Court cannot reach out to decide every question of constitutional law, even those the justices are eager to review.<sup>92</sup> By design, the Supreme Court must wait for constitutional questions to come to it. Indeed, the Court has never had jurisdiction to hear all possible constitutional claims.<sup>93</sup> Nor are all constitutional questions litigated. Of the constitutional questions that are litigated, not all are appealed to the Supreme Court.<sup>94</sup> Of those that are appealed, the Court chooses not to hear them all. It has never agreed to decide the merits of every constitutional question brought before it. Of the questions that the Court chooses to decide, not all are constitutional cases, and most constitutional cases involve the constitutional judgments of non-judicial authorities.<sup>95</sup> Hence, virtually *every question of constitutional law that the Court hears has already been considered by one or more non-judicial actors.* Thus, it is a

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<sup>92</sup> See ARCHIBALD COX, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT* 18 (1976) (noting the limitation that the courts may only decide constitutional issues as questions of law “*in the course of ordinary litigation*”).

<sup>93</sup> See generally RICHARD H. FALLON ET AL., *HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 320-323 (5<sup>th</sup> edition, 2003). See also Daniel Meltzer, *The History and Structure of Article III*, 138 U. PA. L. REV. 1569 (1990).

<sup>94</sup> For the 12-month period ending in March of 2004, 1,654,847 cases were filed in the bankruptcy courts; 278,212 cases were filed in the U.S. District Courts; and 60,505 cases were filed in the U.S. Court of Appeals. See Statistics Division of the Administrative Office of the United States Courts, *Federal Judicial Caseload Statistics* (March 31, 2005), available at <http://www.uscourts.gov/caseload2005/contents.html>. During the 2004 term, the Supreme Court considered 1727 petitions from the appellate docket, granting certiorari to 69, and 5815 petitions from the miscellaneous docket, granting certiorari to only 11. See *The Supreme Court—The 2004 Term: The Statistics*, 119 HARV. L. REV. 415, 426 (2005).

<sup>95</sup> See, e.g., Jonathan D. Glater, *As a Private Lawyer, Miers Left Little for the Public Record*, N.Y. TIMES, October 10, 2005, at A17 (citing statistics that, of 80 cases before the Supreme Court in the previous term, only 33 raised questions of constitutional law, and that such numbers are typical).

mistake to assume that judicial review makes the Court supreme or final in deciding constitutional issues.

In fact, most constitutional judgments of non-judicial actors survive judicial review.<sup>96</sup> First, the Supreme Court may not take any cases in which lower courts have already upheld the constitutional judgments of non-judicial institutions. For a significant portion of its history, the Court lacked the jurisdiction to review cases upholding federal laws or rights.<sup>97</sup> Its jurisdiction was limited to those overturning federal laws or impeding federal rights.

Second, the Supreme Court uses its most deferential review in most cases. Most judicial review involves the application of the rational basis test, which is the most deferential standard available for assessing the constitutionality of state action.<sup>98</sup> It is very rare for the Court to strike down governmental action for violating the rational basis test.<sup>99</sup>

Third, the standing and political question doctrines have precluded judicial review of several areas of constitutional law. Standing doctrine restricts who may litigate certain

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<sup>96</sup> For instance, during the 2004 term of the Supreme Court, three cases dealt with constitutional judgments of the federal government outside the criminal context. Of these cases, at least two were decided for the government. Likewise, thirteen cases dealt with the constitutional judgments of state or local actors. Of these, nine were decided in favor of the government. (Note, however, that this percentage shifts in the criminal context—of the three federal criminal cases involving constitutional issues, all were decided against the government, while six of eight state criminal cases involving constitutional issues were decided against the government.) See *The Supreme Court—The 2004 Term: The Statistics*, *supra* note 94, at 428-430; see generally LEE EPSTEIN, JEFFREY A. SEGAL, HAROLD J. SPAETH, & THOMAS WALKER, *THE SUPREME COURT COMPENDIUM* (3d edition, 2003).

<sup>97</sup> HART AND WECHSLER, *supra* note 93, at 320-21.

<sup>98</sup> See BLACK'S LAW DICTIONARY 1290 (deluxe 8th ed. 2004) (“Rational basis is the most deferential of the standards of review that courts use...”).

<sup>99</sup> For some notable exceptions, see *Lawrence v. Texas*, 539 U.S. 558 (2003); *Romer v. Evans*, 517 U.S. 620 (1996); *City of Cleburne v. Cleburne Living Center*, 437 U.S. 432 (1985).

constitutional claims in Article III courts.<sup>100</sup> For instance, the Court decided on standing grounds not to address the constitutionality of public schools' daily recitation of the Pledge of Allegiance.<sup>101</sup> By overturning on standing grounds a Ninth Circuit holding that the Pledge as currently worded violated the First Amendment's prohibition against establishment of religion,<sup>102</sup> the Court left intact Congress' decision made at the outset of the Cold War to revise the Pledge of Allegiance to include the words "under God."<sup>103</sup> When a district court subsequently ruled that Ninth Circuit precedent required overturning the Pledge on establishment clause grounds, members of Congress wasted no time in denouncing the decision and ratifying their earlier decision to include the words "under God" in the Pledge.<sup>104</sup>

Moreover, the Court in *Allen v. Wright*<sup>105</sup> refused on standing grounds to adjudicate claims that the Internal Revenue Service had not adopted sufficient standards and procedures to fulfill its obligation to deny tax-exempt status to racially discriminatory private schools. The Court stressed that political checks, rather than judicial review, provided the appropriate

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<sup>100</sup> See ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* 58 (4th ed., 2003) ("The notion is that by restricting who may sue in federal court, standing limits what matters the judiciary will address and minimizes judicial review of the actions of the other branches of government."); see also Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 881 (arguing that standing "is a crucial and inseparable element of [the separation of powers] principle, whose disregard will inevitably produce...an overjudicialization of the processes of self-governance").

<sup>101</sup> *Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 2301 (2004).

<sup>102</sup> U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof").

<sup>103</sup> See Act of June 14, 1954, Pub. L. No. 396, Ch. 297, 68 Stat. 249 (1954).

<sup>104</sup> See 148 CONG. REC. S6100, 6101-04 (2002) (quoting various senators referring to the decision as "twisted" (Sen. Lieberman), "nuts" (Sen. Daschle), and "stupid" (Sen. Reid)).

<sup>105</sup> 468 U.S. 737 (1984).

constraints on the Internal Revenue Service's obligations regarding the tax-exempt status of private schools. The Court deferred to the discretion of non-judicial authorities in resolving questions about the tax-exempt status of racially discriminatory private schools.

Through the political question doctrine, the Supreme Court has avoided reaching the merits of constitutional questions involving the powers of non-judicial actors.<sup>106</sup> The Court has held non-justiciable judicial challenges to the process for ratifying constitutional amendments,<sup>107</sup> using Senate trial committees to gather evidence and take testimony for judicial impeachment trials,<sup>108</sup> and enforcing the Republican guarantee clause.<sup>109</sup>

Fourth, the Court defers to non-judicial precedent in other forms. The Court accepts precedent as tradition,<sup>110</sup> historical practice,<sup>111</sup> and custom.<sup>112</sup> Though often loosely defined, these terms are meant to refer to separate actions. Tradition refers to the States' longstanding

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<sup>106</sup> See, e.g., *Nixon v. United States*, 506 U.S. 224 (1993); *Coleman v. Miller*, 307 U.S. 433 (1939); *Foster v. Neilson*, 27 U.S. 253 (1829).

<sup>107</sup> See *Coleman*, 307 U.S. at 450.

<sup>108</sup> See *Nixon*, 506 U.S. at 229-230. The Court determined that the test of the Constitution in various places, historical practices, and original understanding supported its treating judicial challenges to Senate trial committees as non-justiciable. In another context, the Court examined the constitutionality of a procedural rule under the rational basis test. See *United States v. Ballin*, 144 U.S. 1 (1892). Whether the Court refuses to consider the merits of constitutional challenges to certain procedures altogether or uses the rational basis test for determining the constitutionality of such procedures, the outcome is effectively the same – the Court lets the Congress' constitutional judgment stand.

<sup>109</sup> See *Luther v. Borden*, 48 U.S. 1 (1849).

<sup>110</sup> *Id.* at 10-12.

<sup>111</sup> See, e.g., *Eldred v. Ashcroft*, 537 U.S. 186, 204 (2003); *Marsh v. Chambers*, 463 U.S. 783 (1983).

<sup>112</sup> See, e.g., *Lee v. Weisman*, 505 U.S. 577, 581 (1992).

understandings or assumptions about the scope of personal autonomy in certain realms of behavior or their powers to restrict, or proscribe, personal autonomy.<sup>113</sup> Generally, historical practices refer to the federal government’s repeated or longstanding exercises of powers within particular realms.<sup>114</sup> Indeed, the Court’s willingness to uphold congressional acts on the basis of longstanding historical practice is not new. In *Stuart v. Laird*,<sup>115</sup> the Court upheld Congress’ requiring Supreme Court justices to ride circuit in a stunning endorsement of non-judicial precedent. Justice William Paterson explained for the unanimous Court “that practice and acquiescence . . . for a period of several years, commencing with the organization of the judicial system, affords an irresistable [sic] answer, and has indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled, and ought not now to be disturbed.”<sup>116</sup> Custom refers to either the habitual ways, or practices, of either localities or nations.<sup>117</sup> Custom is a longstanding

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<sup>113</sup> See, e.g., *Vacco v. Quill*, 521 U.S. 793, 807 (1997) (referring to traditional rights to bodily integrity and freedom from unwanted touching); *Washington v. Glucksberg*, 521 U.S. 702, 725 (1997) (referring to the “long legal tradition protecting the decision to refuse unwanted medical treatment”).

<sup>114</sup> See, e.g., *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 416 (2003) (referring to the “historical practice” of the Executive making postwar reparations settlements implicating private parties within belligerent states); *Norfolk & Western Ry. V. Ayers*, 538 U.S. 135, 162-163 (2003) (deferring to the historical practice of Federal Employers’ Liability Act courts allowing railroad employers to be held jointly and severally liable); *Eldred*, 537 U.S. at 204 (referring to Congress’ historical practice of applying newly enacted copyright terms to future and existing copyrights). In *Hudson v. Michigan*, 2006 U.S. Lexis 4677 (June 15, 2006), the Court held the exclusionary rule inapplicable in light of “changed circumstances” in police practices as a safeguard against violations of the ancient “knock-and-announce” rule.

<sup>115</sup> 5 U.S. 299 (1803).

<sup>116</sup> *Id.* at 308-309.

<sup>117</sup> See, e.g., *Rice v. Cayetano*, 528 U.S. 495, 500 (2000) (referring to well-established customs of Hawaiian people, including agriculture, fishing, and polytheism); *Bd. of Educ. v. Grumet*, 512

source of international law.<sup>118</sup> While the Supreme Court does not treat historical practices, custom, or tradition as sacrosanct (or immune to judicial review), it routinely acknowledges its respect for each of these categories and routinely upholds particular instances of each. It is rare for the Court to overturn traditions, historical practices, or customs.<sup>119</sup>

Moreover, Supreme Court precedent allows the States to render final judgments on the scope of their respective state sovereignty.<sup>120</sup> Eleventh Amendment<sup>121</sup> jurisprudence recognizes that states may waive their sovereign immunity against being liable for damages in federal court and that state law illuminates whether States have retained their sovereign immunity.<sup>122</sup> The Court also allows States to determine the scope of activities for which they may be held accountable under the Fourteenth Amendment's state action doctrine.<sup>123</sup>

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U.S. 687, 700 (1994) (referring to customary practice in New York of consolidating school districts); *Weisman*, 505 U.S. at 583 (referring to customary features of high school graduations).

<sup>118</sup> *See, e.g.*, Statute of the International Court of Justice, art. 38, 59 Stat. 1055, 1060 (1945) (listing "international custom" as a traditional source of international law).

<sup>119</sup> For two notable exceptions, *see* *United States v. Virginia*, 518 U.S. 515 (1996); *Loving v. Virginia*, 388 U.S. 1 (1967).

<sup>120</sup> *See, e.g.*, *Edelman v. Jordan*, 415 U.S. 651, 663-669 (1974); *Hans v. Louisiana* 134 U.S. 1 (1890); *Louisiana v. Jumel*, 107 U.S. 711 (1883).

<sup>121</sup> U.S. CONST. amend. XI.

<sup>122</sup> *See* *Alden v. Maine*, 527 U.S. 705, 724 (1999).

<sup>123</sup> *See, e.g.*, *College Sav. Bank v. Fla. Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666, 675 (1999) (holding that court will only find a waiver of immunity if the state voluntarily invokes the Supreme Court's jurisdiction, or if it makes a "clear declaration" that it intends to submit itself to Supreme Court jurisdiction); *Clark v. Barnard*, 108 U.S. 436, 447 (1883) (holding that a state's sovereign immunity "is a personal privilege which it may waive at pleasure"); *Beers v. Arkansas*, 61 U.S. 527, 529 (1858) (holding that the decision for a state to waive its immunity "is altogether voluntary on the part of the sovereignty").

Fifth, preoccupation with judicial review sometimes blinds people to the Court's deference to non-judicial precedent. For instance, the stridency of the dissents about the majority's activism in two recent, seemingly unrelated cases has deflected attention from the fact that common link between the cases was the Court's deference to non-judicial authority. In both cases, dissents charged the majorities with either abdicating their authority or engaging in judicial activism; and in both cases, the majorities deferred to political authorities. In particular, in *Gonzales v. Raich*,<sup>124</sup> the Court concluded that federal law criminalizing possession and distribution of marijuana pre-empted States from allowing doctors to authorize their patients to use marijuana for medical purposes. While the dissent complained that the majority had failed to give adequate respect to the States operating as laboratories,<sup>125</sup> the majority accepted Congress' formulation of a comprehensive national policy to regulate drugs. Similarly, in *Kelo v. City of New London*,<sup>126</sup> the majority upheld a locality's decision to take private property in a relatively poor neighborhood for the purpose of developing the land to benefit wealthier residents. The dissent complained that the majority's deference eviscerated the Takings Clause. Yet, the Court in *Kelo* merely allowed the locality – a non-judicial authority – the final say on the scope of its power. *Kelo* allows localities to reach different conclusions about the “public uses[s]” for which they may exercise control over private property.<sup>127</sup> A locality could make a more restrictive

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<sup>124</sup> 125 S. Ct. 2195 (2005).

<sup>125</sup> *Id.* at 2221 (O'Connor, J., dissenting).

<sup>126</sup> 125 S. Ct. 2655 (2005).

<sup>127</sup> Audrey G. McFarlane, *The New Inner City: Class Transformation, Concentrated Affluence and the Obligations of the Police Power*, 8 U. PA. J. CONST. L. 1, 49 (2006) (“...the holding in *Kelo* affirms the guarantee...of local government autonomy, not just in matters of development, but also as in matters of property ownership in general.”).

determination of what constitutes “public use” for purposes of eminent domain, and this determination would be just as constitutional as the judgment of the City of New London (and for the same reasons). Similarly, if the Congress were to make exceptions for medical marijuana, this judgment would be just as constitutional as the judgment, upheld in *Raich*, to disallow any such exceptions. A different Congress could make exceptions for medical marijuana.

A similar deference to the constitutional choices of Congress was apparent in *Eldred v. Ashcroft*.<sup>128</sup> There, the Court upheld the Copyright Extension Act extending copyright terms to the point at which they no longer seemed to be just for the “limited times” as proscribed by the Constitution.<sup>129</sup> Though harshly criticized by the nation’s pre-eminent expert on copyright law and lawyer for the plaintiff in *Eldred*,<sup>130</sup> *Eldred* is significant for leaving Congress with the final say over the degree to which it will extend, or shorten, terms for copyright. Congress’ judgment to extend such ownership repeatedly is just as constitutional as a different congressional judgment to shorten such terms based on an entirely different construction of the relevant constitutional authority. Nothing in the Constitution compels Congress to repeatedly extend copyright terms, and nothing in the Constitution compels Congress to forego extending them. The choice of extension belongs to the Congress, and the relevant precedent for Congress is its longstanding recognition that the pertinent discretion belongs to it and to it alone.

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<sup>128</sup> 123 S. Ct. 769 (2003).

<sup>129</sup> U.S. CONST. art. I, § 8, cl. 7.

<sup>130</sup> See Lawrence Lessig, Op-Ed., *Protecting Mickey Mouse at Art’s Expense*, N.Y. TIMES, January 18, 2003, at A17.

Sixth, there are many other areas that the Supreme Court has not subjected to judicial review and is unlikely ever to do so. For instance, the federal impeachment process is rife with final congressional judgments on constitutional questions, such as which kinds of misconduct qualify as the lawful grounds for removal from office and whether censure is constitutional.<sup>131</sup> Similarly, presidents and senators make the final, constitutional judgments on the criteria for assessing judicial, cabinet, and sub-cabinet nominations.<sup>132</sup> Other areas of effectively final, non-reviewable decision-making are presidential transitions,<sup>133</sup> the powers of congressional committees and their respective jurisdictions,<sup>134</sup> rule-making within the House and the Senate,<sup>135</sup> and reorganizing the federal government (as occurred recently with the creation of the

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<sup>131</sup> See generally MICHAEL J. GERHARDT, *THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORY ANALYSIS passim* (2d edition, 2000) (discussing these and other constitutional issues arising in impeachment proceedings).

<sup>132</sup> See *Judicial Nominations, Filibusters, and the Constitution: When a Majority is Denied Its Right to Consent: Hearing before the S. Comm. on the Judiciary*, 108th Cong. (2003) (statement of Douglas Kmiec) (“The original understanding gives unfettered nomination authority to the President...”); Michael J. Gerhardt, *The Federal Appointments Process as Constitutional Interpretation*, in *CONGRESS AND THE CONSTITUTION* 110 (Neal Devins & Keith Whittington, eds., 2005) (discussing the ways in which the Senate effects unreviewable constitutional interpretation through its authority over federal appointments). See also David A. Strauss & Cass R. Sunstein, *The Senate, the Constitution, and the Confirmation Process*, 101 *YALE L. J.* 1491 (1992) (criticizing the deference of the Senate to the President’s choice of nominees).

<sup>133</sup> See generally Jack M. Beerman & William P. Marshall, *The Constitutional Law of Presidential Transitions*, 84 *N.C. L. REV.* 1253 (2006).

<sup>134</sup> See generally Keith E. Whittington, *Hearing about the Constitution in Congressional Committees*, in *CONGRESS AND THE CONSTITUTION*, *supra* note 132, at 87 (suggesting that committees engage constitutional issues as evidenced through their hearings).

<sup>135</sup> Each chamber’s rule-making is effectively final for two reasons. First, courts have deferred to these rules. See *United States v. Ballin*, 144 U.S. 1 (1892). Second, courts have dismissed judicial challenges to each chamber’s procedural rules on standing and political question grounds. See *Skaggs v. Carlyle*, 110 F.3d 831 (D.C. Cir. 1997); *Nixon v. United States*, 938 F.2d 239 (D.C. Cir. 1991); *Hoffman v. Jeffords*, 175 F. Supp. 2d 49 (D.D.C. 2001); *Page v. Shelby*, 995 F. Supp. 23 (D.D.C. 1998).

Department of Homeland Security, which overtook the responsibility of coordinating a number of offices and agencies that had been located in other federal departments<sup>136</sup>). Presidential decisions on vetoes and pardons are invariably final.<sup>137</sup>

Even when the Court has employed heightened scrutiny, it has not always been fatal.<sup>138</sup> The Court reviewed the constitutionality of the University of Michigan's law school admissions program under strict scrutiny, but upheld it nevertheless.<sup>139</sup> It adopted Justice Lewis Powell's approach in his pivotal concurrence in *Bakke v. California Regents*<sup>140</sup> to uphold for the first time a racial preference for professional schools. The Court subjected the Bi-Partisan Campaign Finance Reform Bill<sup>141</sup> and Family Leave Act<sup>142</sup> to heightened scrutiny, but upheld both laws.

The Court rarely overturns the constitutional judgments of non-judicial actors. Indeed, it has overturned less than 190 federal laws,<sup>143</sup> and the Roberts Court did not overturn a single

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<sup>136</sup> Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (codified as amended in scattered sections of 6 U.S.C.).

<sup>137</sup> *See, e.g.*, *Schick v. Reed*, 419 U.S. 256, 266 (1974) ("Presidents throughout our history as a Nation have exercised the power to pardon or commute sentences upon conditions that are not specifically authorized by statute [and] such conditions have generally gone unchallenged.").

<sup>138</sup> *See Adarand Constructors v. Peña*, 515 U.S. 200, 237 (1995) (declaring that "we wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'" (citation omitted).

<sup>139</sup> *Grutter v. Bollinger*, 539 U.S. 306 (2003).

<sup>140</sup> 438 U.S. 265 (1978).

<sup>141</sup> *See McConnell v. Fed. Election Comm'n*, 540 U.S. 93 (2003) (upholding the constitutionality of the Bipartisan Campaign Finance Reform Bill).

<sup>142</sup> *See Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721 (2003) (upholding the constitutionality of the Family Leave Act).

<sup>143</sup> Through the 2002 Term, the Supreme Court had struck down only 169 federal laws as unconstitutional. Of those, 13 were struck down during the 1930s, while as of 2003, 41 were struck down under the Rehnquist Court. *See Linda Greenhouse, Because We Are Final: Judicial Review Two Hundred Years After Marbury*, 56 SMU L. REV. 781, 786 (2003). For a table

federal law in its first Term. This rate of overturning averages less than one federal law per year. Even though the Rehnquist Court overturned over 40 federal laws,<sup>144</sup> those numbers are misleading. While the Rehnquist Court overturned more federal laws than all prior Courts had, they constitute a tiny fraction of the thousands of federal laws enacted during the same period.<sup>145</sup>

During its nearly 19-year lifespan, the Rehnquist Court struck down a tiny fraction of the constitutional activities of actors besides Congress. For instance, the Rehnquist Court struck down only a small number of States' constitutional judgments in its last few years.<sup>146</sup> The Court overturns presidential judgments more rarely than it does congressional actions. Over the past half century, the Court has overturned less than a dozen presidential acts, most of which involved

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providing the number of federal and state laws struck down by decade, *see* HAROLD W. STANLEY & RICHARD G. NIEMI, VITAL STATISTICS ON AMERICAN POLITICS 2003-2004 292 (2003); *see also* SUPREME COURT COMPENDIUM, *supra* note 96, at 163-66.

<sup>144</sup> *See* Neal Devins, *Conservative and Progressive Legal Orders: The Majoritarian Rehnquist Court?*, 67 LAW & CONTEMP. PROB. 63 (2004) (discussing, *inter alia*, the significance of the numbers of federal laws overturned by the Rehnquist Court).

<sup>145</sup> From 1986 through April 30, 2006, the Senate passed 11,642 total measures, while the house passed 13,257, for a grand total of 24,899. For instance, in 2004, the Senate passed 663 of 1318 measures introduced, while the House passed 747 of 2338 measures introduced. In 1997, the Senate passed 385 of 1840 measures introduced, while the House passed 544 of 3728 measures introduced. *See* cumulative résumés, posted in the back of the CONG. REC. for the first edition of each month. Yearly résumés available at [http://www.senate.gov/pagelayout/reference/two\\_column\\_table/Resumes.htm](http://www.senate.gov/pagelayout/reference/two_column_table/Resumes.htm).

<sup>146</sup> From 1980-1989, the Supreme Court struck down 169 state or local laws; from 1990-1999, however, this number dipped to 61. From 2000-2002, the Court had only struck down 9 state or local laws, fewer than then number of federal laws struck down in the same period (11). *See* STANLEY & NIEMI, *supra* note 143, at 163-166. While not all of these laws were necessarily struck down on constitutional grounds, a look at the 2004 term may be illustrative. Of the thirteen cases involving the constitutional judgments of state or local actors, only nine were struck down. *See The Supreme Court—the 2004 Term*, *supra* note 94, at 429; *see also* SUPREME COURT COMPENDIUM *supra* note 96, at 193.

presidential efforts to thwart judicial inquiries into their conduct.<sup>147</sup> To be sure, the Court overturned the constitutional judgments of executive officials, including President Bush, in three cases – each involving the constitutional foundations for President Bush’s restrictions on access to courts by people detained in the military conflicts in Afghanistan and Iraq.<sup>148</sup> Yet, its compliance with the Court’s rulings remains unclear.<sup>149</sup> The few other cases in which the Court has overturned presidents’ actions involved presidential usurpations of legislative authority.<sup>150</sup>

*B. The Significance of the Timing of Judicial Review.* The timing of judicial review has significant ramifications for non-judicial precedent. The longer it takes for the Court to review the constitutional judgments of non-judicial actors, the longer those judgments endure. For instance, the Congress enacted the Tenure in Office Act as a curb on the power of President Andrew Johnson to remove Republicans from his cabinet,<sup>151</sup> but the Supreme Court did not review its constitutionality until almost six decades later.<sup>152</sup> In the meantime, 12 presidents had

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<sup>147</sup> See, e.g., *Clinton v. Jones*, 520 U.S. 681 (1997); *United States v. Nixon*, 418 U.S. 683 (1974).

<sup>148</sup> See *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004); *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004); *Rasul v. Bush*, 124 S. Ct. 2686 (2004).

<sup>149</sup> See Jerry Markon, *U.S. to Free Hamdi, Send Him Home*, WASH. POST, Sep. 23, 2004, at A01.

<sup>150</sup> See, e.g., *Clinton v. City of New York*, 524 U.S. 417 (1998); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). A close reading of *Youngstown* indicates that every justice would have upheld a congressional delegation of authority to the President to seize control of the nation’s steel mills under certain circumstances. A close reading of *Clinton v. City of New York* suggests little or no practical option, as the Constitution currently stands, for presidents to exercise what are in effect vetoes of portions of enactments. While a constitutional amendment is needed to provide the President with line-item veto authority, a number of states have constitutionally authorized their governors to exercise line-item vetoes.

<sup>151</sup> See MICHAEL LES BENEDICT, *THE IMPEACHMENT AND TRIAL OF ANDREW JOHNSON* 46-47 (1973).

<sup>152</sup> See *Myers v. United States*, 272 U.S. 52 (1926).

to accommodate their differing opinions about its constitutionality. The most famous conflict was the first. After President Andrew Johnson refused to comply with the act's requirement to get congressional approval before removing a cabinet official whose nomination the Senate had approved, the House impeached and the Senate nearly convicted him.<sup>153</sup> Senators' contemplating other presidents' misconduct must clarify the meaning of Johnson's acquittal.<sup>154</sup>

The significance of the ramifications of belated judicial review is evident with respect to the ways in which the moral and ethical dilemmas raised by advancements in medical technology – known as bioethics – are handled prior to their relatively rare disposition by the Supreme Court. For instance, Oregon's assisted suicide law had been in effect for a number of years prior to a challenge to its constitutionality came before the Supreme Court.<sup>155</sup> The Court did not render a judgment on the constitutionality of this law until 2005, more than a decade after the state had enacted the legislation.<sup>156</sup> Since no court had barred implementation of the statute in the meantime, almost 200 people had chosen to die pursuant to the act's procedures. The law was final for these people, their health care providers, and their families.

Courts may never resolve many other hotly contested bioethical issues. These issues are largely governed by a combination of diverse sources of law, of which judicial decisions comprise only a small part. Bioethical issues largely turn on relevant portions of federal statutes (enacted pursuant to Congress' Commerce and Spending Clause powers), federal regulations,

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<sup>153</sup> See generally M. BENEDICT, *supra* note 151, *passim*.

<sup>154</sup> See, e.g., 145 CONG. REC. S1462 at 1465 (1999) (statement of Sen. Feingold) (using Johnson's acquittal to establish a framework for addressing the Clinton impeachment).

<sup>155</sup> The Oregon Death With Dignity Act, Or. Rev. Stat §§ 127.800-897 (2003).

<sup>156</sup> *Gonzales v. Oregon*, 126 S. Ct. 904 (2005).

professional standards and licensing, state statutes and regulations, and hospital policies, codes of ethics, and protocols.<sup>157</sup> The courts generally have not addressed whether states may prohibit reproductive cloning or genetic screening for determining the gender or other characteristics of children whose conception may be facilitated through artificial technologies.<sup>158</sup> The population of increasingly older Americans may raise issues ranging from government financing of gene therapies to the legalization of pain-killing drugs.<sup>159</sup> While the Court upheld Congress' authority to fashion a comprehensive national drug policy,<sup>160</sup> lobbying may increase to expand the opportunities for using marijuana or other currently prohibited drugs for medical purposes.<sup>161</sup> President Bush's threatened veto of proposed legislation to expand the use of embryonic stem cells for medical research was the last move in an ongoing, expanding conflict over legally defining life and its constitutional protections.<sup>162</sup> Questions about using medical technology to extend life and ease pain are still largely left to non-judicial authorities.

*C. The Relevance of Non-Judicial Precedent in Constitution Crises.* National political leaders, rather than courts, have made the critical decisions to resolve the three different kinds of crises arising in our legal system – political, judicial, and constitutional.

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<sup>157</sup> See generally JANET L. DOLGIN & LOIS L. SHEPHERD, *BIOETHICS AND THE LAW* (2005).

<sup>158</sup> See, e.g., *Sheils v. Univ. of Pa. Med. Ctr.*, No. 97-5510, 1998 U.S. Dist. LEXIS 3918 (E.D. Pa. Mar. 23, 1998) (dismissing a claim challenging Pennsylvania's prohibition on reproductive cloning on the grounds that the alleged harm was too speculative since cloning was not yet possible).

<sup>159</sup> See Jeffrey Rosen, *Roberts v. The Future*, N.Y. TIMES, Aug. 28, 2005, § 6 (Magazine), at 24.

<sup>160</sup> See *Gonzales v. Raich*, 125 S. Ct. 2195 (2005).

<sup>161</sup> See Rosen, *supra* note 159, at § V, ¶ 3.

<sup>162</sup> See Sheryl G. Stolberg, *In Rare Threat, Bush Vows Veto of Stem Cell Bill*, N.Y. TIMES, May 21, 2005, at A1.

A political crisis arises when national political leaders dispute each other's constitutional authority. A classic example is the House's impeachment and the Senate's near conviction of President Andrew Johnson for violating the Tenure in Office Act. The rules employed by the Senate for Johnson's trial<sup>163</sup> and Johnson's acquittal have served as important precedents guiding the Senate subsequently in handling presidential misconduct. The Senate followed the same rules in President Clinton's impeachment trial,<sup>164</sup> and affirmed Johnson's acquittal as a precedent for not treating a president's policy disagreements with Congress as grounds for removal.<sup>165</sup>

A second kind of crisis is judicial, which arises when state or national political authorities challenge, or refuse to follow, a constitutional directive of the Supreme Court. In the modern era, the Supreme Court's decision in *Brown v. Board of Education*<sup>166</sup> triggered a judicial crisis. Southern political leaders proclaimed *Brown* illegitimate and refused to abide by it. They endorsed the Southern Manifesto, which proclaimed that the Constitution allowed the States through the concept of interdiction to refuse to comply with any federal directive that they considered unconstitutional. The precedent for interdiction was John Calhoun's repeated reliance on it as a basis for State resistance to federal policies or mandates whose constitutionality they questioned. Eventually, segregation ended, but only with the pivotal help

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<sup>163</sup> *Procedure and Guidelines for Impeachment Trials in the Senate* (rev. ed.), 99th Cong., 1st Sess., S. DOC. NO. 93-33, 2-8 (1986).

<sup>164</sup> See Editorial, *Keep Trial Fully Open*, L.A. TIMES, Jan. 13, 1999, at B6 (noting that the Senate is relying on rules adopted in 1868 for Clinton's impeachment).

<sup>165</sup> See WILLIAM H. REHNQUIST, *GRAND INQUESTS: THE IMPEACHMENT AND TRIALS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON* (1992).

<sup>166</sup> 347 U.S. 483 (1954).

of national political leaders.<sup>167</sup> Subsequently, *Brown* has come to stand as an abject lesson in the judiciary's need for strong political support to support its politically salient decisions.<sup>168</sup>

A constitutional crisis is a rare event when political authorities recognize that the Constitution does not provide the means for resolving a fundamental dispute among them. We have had a few such crises in American history, but the most famous constitutional crisis is secession. The Supreme Court helped to set the stage for this crisis with its decision in *Dred Scott v. Sandford*.<sup>169</sup> *Dred Scott* exacerbated ongoing friction among national political leaders, which culminated in secession. Neither side conceded that the Constitution provided a mechanism for peacefully resolving their differences. Thus, *Dred Scott* precipitated a judicial crisis, or the peculiar circumstance in which political authorities to refuse to accept or be bound by a judicial ruling with whose lawfulness they disagreed. Courts could do nothing to solve the judicial crisis that *Dred Scott* precipitated or to prevent its evolving into a constitutional crisis. Courts had no power to stop secession as the final, formal break between Northern and Southern states in an ongoing dispute over state autonomy in protecting slavery from federal intervention and regulation. War settled the constitutional conflict over secession.

The Court has yet to resolve a genuine constitutional crisis. It lacks the means to resolve political crises, and national political leaders have been instrumental in resolving judicial crises.

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<sup>167</sup> See KLARMAN, *supra* note 65, at 389-408.

<sup>168</sup> See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 244-257 (2d ed., 1986).

<sup>169</sup> 60 U.S. 393 (1857).

On the few occasions when courts have triggered crises, political branches have resolved them.<sup>170</sup> Courts have not settled any judicial crises.

By their nature, constitutional crises are not amenable to judicial resolution. They require constitutional change. For instance, when Thomas Jefferson and Aaron Burr tied in the Electoral College after the 1800 presidential election, the matter was referred to the House of Representatives.<sup>171</sup> The outcome was not obvious in the House, even though Burr had run as Jefferson's Vice-President. After the House declared Jefferson the winner, the Twelfth Amendment was drafted and ratified to preclude similar controversies from arising in the future.<sup>172</sup> The solution was political, not judicial. The 1800 election and its aftermath served as a precedent for the next election dispute. When no one won the 1820 presidential election outright, a political crisis ensued, and the House settled the matter after Henry Clay threw his support to John Quincy Adams rather than Andrew Jackson, whom he disliked.<sup>173</sup>

In 1876, the House decided not to follow its precedent. When neither of the major candidates in the 1876 presidential election had a majority in the Electoral College, the House referred the matter to a special commission.<sup>174</sup> Both candidates agreed, so both were bound by the commission's decision. Democratic leaders in Congress never judicially challenged the

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<sup>170</sup> See BICKEL, *supra* note 168, at 252 (“In an enforcement crisis of any real proportions, the judiciary is wholly dependent upon the Executive.”).

<sup>171</sup> For a detailed analysis of the constitutional significance of this contest and its aftermath, see BRUCE A. ACKERMAN, *THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF PRESIDENTIAL DEMOCRACY* (2006).

<sup>172</sup> See U.S. CONST. amend XII.

<sup>173</sup> See SEAN WILENTZ, *THE RISE OF AMERICAN DEMOCRACY* 255-57 (2005).

<sup>174</sup> See generally WILLIAM H. REHNQUIST, *CENTENNIAL CRISIS: THE DISPUTED ELECTION OF 1876* (2004).

outcome. Many saw a political advantage in continuing to question the legitimacy of the decision and Hayes' presidency over the next four years. They chose the political process as the forum for working out their differences over the outcome of the election, and this has been the model for resolving subsequent disputes in presidential elections. Even though the Court in *Bush v. Gore*<sup>175</sup> ended the legal battles following the 2000 presidential election, Democrats chose not to contest the outcome.<sup>176</sup> The resolutions of political crises have depended on the willingness of non-judicial actors to reach accommodations through pre-existing constitutional mechanisms. Each accommodation is a precedent for resolving crises.

### ***III.***

#### ***The Horizontal and Vertical Influence of Non-Judicial Precedent***

Non-judicial precedent may exert influence in several ways. It may do so vertically, which entails the imposition of a superior official's constitutional judgments from the top-down upon inferior authorities. A non-judicial precedent applies horizontally if it only has persuasive, not binding, authority on other officials; it operates suggestively across or within particular branches or institutions. Non-judicial precedent may be configured differently, depending on timing, subject matter, direction, and the institutions and powers involved.

*A. Vertical-Vertical Non-Judicial Precedent.* The first kind of non-judicial precedent operates vertically within the institution creating it and vertically on other institutions.

Presidential pardons are examples of vertical-vertical non-judicial precedent. The President has

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<sup>175</sup> 531 U.S. 98 (2000).

<sup>176</sup> See Don Van Natta Jr., *Gore Lawyers Focus on Ballot in Palm Beach County*, N.Y. TIMES, Nov. 16, 2000, at A29 (quoting Gore lawyers as emphasizing that a legal challenge was an option of the "last resort").

the unique power to pardon people for federal crimes.<sup>177</sup> Once pardons are issued, they are binding on other authorities. No other constitutional authority may undo, or undermine, a presidential pardon. Not even a subsequent president may withdraw a predecessor's pardon. Pardons bind every branch at the top as well as every inferior federal and state official.

President Ford's pardon of Richard Nixon illustrates the binding effect of a presidential pardon.<sup>178</sup> The Congress lacks the authority to erase the pardon through legislation.<sup>179</sup> The most that the Congress may have been able to do was to hold hearings to inquire into the reasons for President Ford's pardoning Nixon.<sup>180</sup> Moreover, President Carter, who followed President Ford in office, had no power to erase Ford's pardon of Nixon. In addition, state and federal courts had to accept the pardon on its own terms; it barred any prosecutor from prosecuting Nixon for the misconduct for which he had been pardoned.<sup>181</sup> Federal or state prosecutors may not prosecute people for the criminal misconduct for which they have been formally pardoned.

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<sup>177</sup> U.S. CONST. art. II, § 2, cl.1.

<sup>178</sup> Proclamation No. 4311, 39 Fed. Reg. 32601 (Sept. 8, 1974).

<sup>179</sup> *United States v. Klein*, 80 U.S. 128 (1871) (overturning a congressional enactment aimed at limiting the effects of presidential pardons); *Ex Parte Garland*, 71 U.S. 333 (1867) (holding, among other things, that the President's pardon power is "not subject to legislation" that "Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders. ...It was competent for the President to annex to his offer of pardon any conditions or qualifications he should see fit...").

<sup>180</sup> *Pardon of Richard M. Nixon and Related Matters: Hearing Before the House Subcomm. On Criminal Justice*, 94<sup>th</sup> cong. (1975).

<sup>181</sup> *Id.* Nor, for that matter, did the courts have the power to adjudicate its merits. The only person with standing to challenge Nixon's pardon would probably have been Nixon, but he of course had no reason to challenge the pardon. It is quite likely the Court would have dismissed any challenge to the pardon power as non-justiciable.

The most troublesome constitutional question raised about the pardon power is whether a president may pardon himself. While there are credible arguments to be made for and against such pardons,<sup>182</sup> no court will ever likely address them. The ways in which presidents may exercise their pardon power has been left to presidents to work out over time.<sup>183</sup> Their constitutional judgments have been formed based on their respective balancing of different sources of constitutional argumentation, including historical practices.<sup>184</sup>

A second example of a vertical-vertical non-judicial precedent is a conviction of an impeached official for misconduct by more than two-thirds of the Senate. Once more than two-thirds of the Senate convicts a public official in an impeachment trial, that official is automatically removed from office.<sup>185</sup> No appeal, to any authority, is possible.<sup>186</sup> Every other authority must honor the removal. If, for instance, the President were the convicted official, no other authority in our system of government may overrule the conviction and his removal from

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<sup>182</sup> See Brian C. Kalt, *Pardon Me?: The Constitutional Case Against Presidential Self-Pardons*, 106 YALE L.J. 779, 792-93 (1996).

<sup>183</sup> See generally *Presidential Pardon Power: Hearing before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 107th Cong. (2001) (testimony of Daniel T. Kobil, Professor of Law at Capital University Law School in Columbus, Ohio).

<sup>184</sup> *Id.*

<sup>185</sup> See GERHARDT, *supra* note 131, at 78 (noting that the Senate treats removal as the automatic consequences of a two-thirds vote to convict).

<sup>186</sup> Legal scholars disagree about the propriety of judicial review of a conviction in a Senate impeachment trial. Most believe that it is not. See, e.g., GERHARDT, *supra* note 131, at 118-123; CHARLES BLACK, *IMPEACHMENT: A HANDBOOK* 53-64 (1974); Ronald D. Rotunda, *An Essay on the Constitutional Parameters of Federal Impeachment*, 76 KY. L.J. 707, 728 (1987-1988). Many scholars believe that considerations such as the need for finality preclude a court's ever second-guessing the outcome of an impeachment trial. A few other scholars believe judicial review of impeachment trials is permissible though it might be so deferential as to discourage filing a lawsuit. See RAOUL BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* 103-121 (1973); IRVING BRANT, *IMPEACHMENT: TRIALS AND ERRORS* 183-187 (1972).

office. Indeed, the Constitution explicitly provides that the pardon power is inapplicable to impeachments and removals.<sup>187</sup> The finality of a Senate’s judgment to convict an impeached official may not be undone.

A conviction in a Senate impeachment trial has limited binding effects. The Constitution provides that “the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.”<sup>188</sup> If the Senate were to decide not to disqualify a convicted official, the person remains constitutionally eligible to serve in another federal or state office.<sup>189</sup> For instance, the Senate convicted Alcee Hastings for bribery and removed him from a federal district judgeship, but it did not vote to disqualify him from serving in other federal offices. Hence, he was eligible to serve in another federal office.<sup>190</sup> Not long after his removal, Hastings ran successfully for a seat in the House, where he currently serves.<sup>191</sup>

*B. Vertical-Horizontal Non-Judicial Precedent.* A second kind of non-judicial precedent is vertical-horizontal, which applies from the top-down within the institution producing it but operates as persuasive authority across other institutions. A prime example of a vertical-horizontal non-judicial precedent is a procedural rule in the House or the Senate. Each chamber’s procedural rules govern the internal proceedings within each chamber, even those

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<sup>187</sup> See U.S. CONST. art. II, § 2, cl. 1.

<sup>188</sup> U.S. CONST. art. I, § 3, cl. 7.

<sup>189</sup> See GERHARDT, *supra* note 131, at 77-79 (examining the sanctions the Senate may impose upon conviction for impeachment).

<sup>190</sup> See Clifford Krauss, *Bedfellows for a Day: Politeness and Politics*, N.Y. TIMES, Jan. 5, 1993, at A16 (discussing Hastings’ conviction in impeachment hearings and subsequent election to the House).

<sup>191</sup> Kenneth J. Cooper, *Hastings Joins His Former Accusers: Ousted Judge Takes Seat Among Those Who Impeached Him*, THE WASH. POST, January 6, 1993, at A10.

relating to their amendment.<sup>192</sup> But, each chamber's procedural rules are not binding externally – they do not bind outside each chamber's respective domain. House rules do not bind how the Senate operates. Nor do Senate rules bind the House. Nor, for that matter, do the rules of either chamber bind the federal judiciary or the executive branch. A president, for instance, has no formal powers to direct the House and Senate on which procedural rules they may adopt or employ, though he is free to offer – or to refrain from offering – his independent judgment about the constitutionality of each chamber's procedural rules. None of the President's recommendations are binding on, or authoritative within, either the House or the Senate. In practice, courts have generally refrained from second-guessing each chamber's procedural rules,<sup>193</sup> and the Court's ruling that the Constitution does not allow legislative standing – through which some members of Congress might challenge a legislative action undertaken by the Congress<sup>194</sup> – makes it practically impossible for judicial challenges to be made against the internal rules of either the House or the Senate.

*C. Horizontal-Horizontal Non-Judicial Precedent.* A third kind of non-judicial precedents operates as persuasive authority within the institution creating it and across other institutions. This kind of non-judicial precedent includes most things that are commonly lumped together as traditions, customs, and historical practices. Historical precedents for preventive war are examples of non-judicial precedent. While there are almost 200 instances of presidents

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<sup>192</sup> See Michael B. Miller, *The Justiciability of Legislative Rules and the "Political" Political Question Doctrine*, 78 CALIF. L. REV. 1341, 1341 (1990) (declaring that "the entire legislative process is subject to" the rules created by the two legislative chambers).

<sup>193</sup> See *United States v. Ballin*, 144 U.S. 1 (1892).

<sup>194</sup> See *Raines v. Byrd*, 521 U.S. 811, 830 (1997).

overseeing military absent direct congressional authorization,<sup>195</sup> none binds presidents or members of Congress in deciding whether to initiate, or not to initiate, a particular military action.<sup>196</sup> They are relevant only to the extent that national political leaders find that they are persuasive authority for exercising power in certain ways.

A second example of a horizontal-horizontal non-judicial precedent is the longstanding practice within the Congress to open its sessions with a prayer. The Court upheld this practice because of its longevity and its inconsequential effect on business within the Congress,<sup>197</sup> but the House, or the Senate, could each choose to end the practice without offending the Constitution.

Another example of a horizontal-horizontal non-judicial precedent consists of presidents' choices of how (if not when) to comply with their constitutional obligation to report on the State of the Union.<sup>198</sup> President Jefferson chose to submit a letter to the Congress at the outset of each congressional session.<sup>199</sup> President Wilson decided, however, to appear in person before a joint session of Congress.<sup>200</sup> Subsequent presidents have followed Wilson's example.

The State of the Union put the Senate in a difficult position in the midst of President Clinton's impeachment trial. His defense began its arguments in his Senate trial on the same day

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<sup>195</sup> See Jane E. Stromseth, *Understanding Constitutional War Powers Today: Why Methodology Matters*, 106 YALE L. J. 845, 877 (1996) (reviewing LOUIS FISHER, *PRESIDENTIAL WAR POWER* (1995)).

<sup>196</sup> See Bobbitt, *supra* note 15, at 1383-88 (discussing various arguments that may be employed against precedents that suggest that the President possesses the sole power to enter into armed conflicts absent congressional authorization).

<sup>197</sup> See *Marsh v. Chambers*, 463 U.S. 783, 792-795 (1983).

<sup>198</sup> U.S. CONST. art. II, § 3.

<sup>199</sup> See BRANDS, *supra* note 39, at 30.

<sup>200</sup> *Id.* at 30-31.

on which he was scheduled to deliver his State of Union address.<sup>201</sup> Senate leaders were uncertain how to proceed, because allowing the President to proceed as scheduled enabled him to take center stage in spite of his being on trial. Rescheduling or canceling the appearance might have allowed the Senate to preserve an institutional advantage, but it would have been an advantage attained at too high a cost, for it would have appeared to have been driven by partisan, rather than constitutional, preferences. The President would not have agreed to any rescheduling and would have balked at a cancellation, so rescheduling or canceling the address would have provoked an additional conflict between the branches for which congressional leaders were not prepared to take the responsibility. The Republican majority decided to adjourn early to allow the President to give his address.<sup>202</sup> It was a choice dictated not by the Constitution or the binding force of precedent but rather because of the political exigencies of the moment as calculated at the time by the Republican majority in the Senate.

Horizontal-horizontal non-judicial precedents came into play after Chief Justice William Rehnquist's death. President Bush had to decide initially whether he would follow the norm of not naming a sitting justice as Chief Justice of the United States.<sup>203</sup> Presidents usually appoint someone from outside the Court as Chief Justice, in part to avoid friction among sitting justices who might have wanted the job or were opposed to one of their colleagues from becoming Chief Justice. President Bush chose to follow the norm. Timing was another issue: President Bush had to decide whether to fill two vacancies on the Court at the same time or, instead, nominate a

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<sup>201</sup> See Editorial, *State of the Agendas*, N.Y. TIMES, Jan. 19, 1999, at A18.

<sup>202</sup> 145 CONG. REC. S495 (1999) (statement of Sen. Lott).

<sup>203</sup> See Patty Reinert, *William Rehnquist: 1924-2005*, HOUSTON CHRONICLE, Sep. 4, 2005, at A6 (“Bush can nominate a sitting justice as chief and pick someone else to round out the nine-member court, or nominate someone not currently on the court as chief.”).

successor to the Chief Justice and forego naming someone to replace Justice O'Connor until after the Senate had confirmed Rehnquist's successor.<sup>204</sup> The circumstance was unprecedented – never before had a chief justice died pending hearings on a nomination to replace another justice, and never before had a president had the opportunity to withdraw a nomination so that he could re-nominate the person to the Chief Justiceship.<sup>205</sup> President Bush made precedent with his nomination of Roberts to two different seats on the Court within the span of a few months.

*D. Limited Horizontal and Vertical Effects.* A fourth kind of non-judicial precedent has limited horizontal and vertical effects within the institutions producing them and on other authorities. This is the largest category of non-judicial precedents. A wide range of non-judicial activity fits within this category, including the judgments of the House in impeachment proceedings,<sup>206</sup> presidential and gubernatorial executive orders, and impeachment or removal trials in the state assemblies. Other institutions are bound by the outcomes of these activities (i.e., other institutions cannot undo these decisions and must follow them to the extent they are relevant to the functioning of those institutions), but none of the outcomes formally preclude the institutions creating them from subsequently reaching different constitutional judgments on similar or even identical issues. The outcomes constitute persuasive authority within an

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<sup>204</sup> See Julie Hirschfield Davis, *Bush to Nominate Rehnquist's Successor on Court 'Promptly'; President Must Choose Nominee, Chief Justice; Transition in the Supreme Court*, THE BALTIMORE SUN, Sept. 5, 2005, at 1A.

<sup>205</sup> See generally GERHARDT, *supra* note 131, *passim*.

<sup>206</sup> Impeachment decisions by the House affect the House and Senate differently. Once the House impeaches someone, its decision has been regarded (within both the House and the Senate) as binding the Senate to take some action in response. But, the House's decision to impeach a particular official does not constitute anything more than persuasive (or instructive) authority on how the House ought to exercise its impeachment authority. See *Id.*, at 33-35 (describing how the Senate responds to impeachment judgments by the House).

institution on how it ought to wield the same authority in a similar circumstance in the future. For instance, a president's executive order functions horizontally with respect to the president who has issued the order and his successors.<sup>207</sup> The order operates vertically on every executive branch official other than the President, who may overturn, or modify, his or other presidents' executive orders.<sup>208</sup>

Senatorial courtesy is a classic example of a non-judicial precedent with limited horizontal and vertical effects.<sup>209</sup> Senatorial courtesy entails the longstanding practice of presidents' deferring to the recommendations for nominations made by senators from his party to federal offices in their respective states. Presidents are not bound by these recommendations and thus by senatorial courtesy. They can ignore the recommendations, and thus they appear to be merely horizontal. But refusals to abide by senatorial courtesy are usually not cost-free. Senators generally support senatorial courtesy for the simple reason that it benefits them whenever a president from their party is in office. They will often then support it, regardless of the merits or quality of the recommendations some senator(s) have urged upon the President. Yet, the fact that costs are frequently exacted for presidential refusals to abide by senatorial courtesy does not transform this norm into a binding precedent for either the President or the

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<sup>207</sup> See 16A AM JUR 2d *Constitutional Law* § 252 (2004) (stating that "by promulgating rules and regulations, the President may 'legislate' ...[which] has the force and effect of law unless overturned by the Courts or Congress"); see also L. Harold Levinson, *Presidential Self-Regulation Through Rulemaking: Comparative Comments on Structuring the Chief Executive's Constitutional Powers, Part I*, 9 VAND. J. TRANSNAT'L. L. 695, 697-98 (1976) (suggesting that President Ford's 1974 pardon of Richard Nixon conflicted with a 1962 Executive Order by President Kennedy).

<sup>208</sup> See, e.g., Executive Order 12183 (December 1, 1979) (revoking President Johnson's executive orders 11322 and 11419 pertaining to trade sanctions on Zimbabwe).

<sup>209</sup> See generally GERHARDT, *supra* note 34, at 29-34 (tracing the history of senatorial courtesy).

Senate. The reason is that senatorial courtesy is not an inflexible rule; it can be waived, or can become a bargaining chip in negotiations between presidents and senators over judicial appointments. Senatorial courtesy has persuasive authority, precisely because it helps to persuade or convince presidents in making, or not making, judicial nominations.

Presidential signing statements and official opinions from the Attorney General constitute two other examples of limited horizontal-vertical non-judicial precedent. President Bush, for instance, has executed almost 800 signing statements, which clarify the extent to which he feels bound by any laws he approves.<sup>210</sup> The Office of Legal Counsel produces official opinions for the Attorney General in response to requests from her, other executive branch officials or authorities, and the President.<sup>211</sup> These opinions generally have binding authority throughout the executive branch; everyone within the executive branch is bound to follow the opinion. Yet, OLC opinions are not binding on a differently composed Office of Legal Counsel. Nor do these opinions or presidential signing statements bind subsequent presidents, who are free to reject them as they please. Indeed, President Bush exercised this discretion when he openly rejected the counsel expressed in several OLC opinions on whether the President was bound to follow certain international laws or agreements barring the torture of prisoners of war.<sup>212</sup> Even then, he felt the need to explain his deviation from the usual path of presidents' following OLC

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<sup>210</sup> See Savage, *supra* note 7, at ¶ 1 (“President Bush has quietly claimed the authority to disobey more than 750 laws enacted since he took office, asserting that he has the power to set aside any statute passed by Congress when it conflicts with his interpretation of the Constitution.”).

<sup>211</sup> See Kmiec, *supra* note 38, at 337.

<sup>212</sup> R. Jeffrey Smith, *Slim Legal Grounds for Torture Memos*, WASH. POST, July 4, 2004, at A12.

opinions.<sup>213</sup> He had to explain himself just as other people do when they feel pressure to explain why they have changed their minds. While OLC opinions and presidential signing statements have limited vertical effects within the executive branch, neither has any binding effect on officials in other branches. Outside the executive branch, OLC opinions and presidential signing statements constitute persuasive authority.

Another excellent example of a non-judicial precedent with limited vertical and horizontal effects is the Judiciary Committee's failure to approve a judicial nomination. If the Judiciary Committee were to fail to act by the end of the session in which the nomination was made, Senate Rule XXXI directs that the nomination will have lapsed.<sup>214</sup> The President must respect that judgment; he has no power to undo it. But, he can re-nominate the same individual. Nor does the decision to disapprove a judicial nomination bind the Judiciary Committee subsequently. It may refuse to act on a nomination more than once or may decide later to confirm the nominee. Subsequent committees are not bound to follow the Committee's prior judgments.<sup>215</sup> For example, in 1992, the Judiciary Committee failed to act on President George

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<sup>213</sup> See Mike Allen & Susan Schmidt, *Memo on Interrogation Tactics is Disavowed; Justice Document Had Said Torture May Be Defensible*, THE WASH. POST, June 23, 2004, at A01.

<sup>214</sup> S. DOC. NO. 106-1, R. XXXI § 6 at 6 (2003).

<sup>215</sup> The full Senate's consideration of a nomination also qualifies as a limited horizontal-vertical non-judicial precedent. Even if the Senate were to reject a nominee to a particular office, it could reconsider and approve the same nominee for the same position. Of course, the timing makes a difference. A differently composed Senate could approve a nominee for the same or a different post. For instance, the Senate rejected President Jackson's nominations of Roger Taney as Treasury Secretary and as Associate Justice but later confirmed Taney as Chief Justice of the United States. In a subsequent contest of wills with the Senate, President Tyler nominated Caleb Cushing three times to be Secretary of the Treasury, and the Senate rejected, by increasing margins, the nomination each time. Though with no different result, President Coolidge re-nominated Charles Warren as Attorney General immediately after the Senate had formally rejected his nomination. John Cornyn, *Our Broken Judicial Confirmation Process and the Need for Filibuster Reform*, 27 HARV. J.L. & PUB. POL'Y 181, n.19 (2003).

H.W. Bush's nomination of John Roberts to the U.S. Court of Appeals for the District of Columbia.<sup>216</sup> Nine years later, President George W. Bush re-nominated Roberts to the same court, but the then-Democratically led Senate Judiciary Committee took no action on the nomination.<sup>217</sup> After the 2002 mid-term elections, Republicans took control of the committee, Bush re-nominated Roberts, and the Committee approved the nomination. The Senate subsequently confirmed his appointment by a unanimous voice vote.<sup>218</sup> Upon first nominating Roberts to replace Justice O'Connor, President Bush pointed to the latter as a reason to expect that the nomination would receive bipartisan support.<sup>219</sup> After the Senate confirmed Roberts as Chief Justice, his confirmation became a precedent for the kind of nomination Bush had to make to avoid a divisive, protracted battle in the Senate.

Similarly, House impeachments have limited vertical effects. As a practical matter, the failure to impeach means that the targeted official is not subject to any further congressional proceedings in the same congressional session for the same misconduct, while a formal impeachment by the House imposes an obligation on the Senate to take some formal action in response. Yet, the House may still consider impeaching a person on a different basis than that for which the House previously impeached the person or failed to impeach him. There is no

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<sup>216</sup> See Neil A. Lewis, *Waiting for Clinton, Democrats Hold up Court Confirmations*, N.Y. TIMES, Sep. 1, 1992, at A1.

<sup>217</sup> See Jeffrey Rosen, *Obstruction of Judges*, N.Y. TIMES, August 11, 2002, § 6 (Magazine), at 38.

<sup>218</sup> Karen Masterson, *Bush to Note the 2<sup>nd</sup> Anniversary of Owen's nomination*, HOUSTON CHRON., May 9, 2003, at A8.

<sup>219</sup> See Todd S. Purdum, *Bush Picks Nominee for Court; Cites His 'Fairness and Civility'*, N.Y. TIMES, July 19, 2005, at A1.

constitutional principle barring the House from impeaching someone for misconduct that is the same as that for which it did not impeach him or others.<sup>220</sup> This is what happened to President Andrew Johnson: Though the House had failed twice to impeach Johnson for obstructing Congress, it impeached him for violating the Tenure in Office Act.<sup>221</sup> Choices about whether or not to impeach are persuasive authority within the House on what it may do next. The same is true for Senate impeachment trials: Prior acquittals do not preclude the Senate from subjecting the same person for different misconduct or different people for similar misconduct as that for which it has previously acquitted others.

Other examples of limited-vertical and –horizontal effects precedents involve executive and legislative privileges. Presidential decisions on what material to keep confidential bind every other official in the executive branch, while the House or Senate set the rules governing what its members may keep confidential.<sup>222</sup> Presidents’ decisions on executive privilege do not bind subsequent presidents because executive privilege belongs to the office and not to a particular occupant. Nor do presidents’ claims of executive privilege bind Congress. At most, they are persuasive authority. Similarly, congressional assertions of privilege against executive action do not bind subsequent congresses or presidents. These assertions are persuasive authority. Hence, most claims of executive or legislative privilege are resolved through mutual accommodations

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<sup>220</sup> See GERHARDT, *supra* note 131, at 103-11 (discussing the elusive and case-by-case nature of the scope of impeachable offenses).

<sup>221</sup> ELEANORE BUSHNELL, *CRIMES, FOLLIES, AND MISFORTUNES: THE FEDERAL IMPEACHMENT TRIALS* 134-137 (1992).

<sup>222</sup> See, e.g., *New Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198, 210 (2002) (noting that the Senate currently limits public access to Senate records, and retains the discretion to extend that access period for its own records); see also H.R. Rule XI(2)(k)(7): “No evidence or testimony taken in executive session may be released or used in public sessions without the consent of the committee.”

reached between presidents and the Congress. Moreover, neither presidents' nor legislators' claims of privilege do not bind the courts. The Supreme Court declared, for instance, in *United States v. Nixon*<sup>223</sup> that presidents are entitled to qualified executive privileges. The latter require courts to balance competing considerations.<sup>224</sup> Similarly, the Court has not been constrained by congressional understandings in interpreting the Speech or Debate Clause.<sup>225</sup> The Court treats each branch's understanding of its respective privileges as persuasive authority.

#### IV.

##### *The Limited Path Dependency of Non-Judicial Precedent*

Determining the directional and temporal influence of a non-judicial precedent does not fully illuminate its role in constitutional law. Even acknowledging that a precedent is supposed to be binding authority does not clarify the practical extent to which it imposes path dependency – subsequently foreclosing or constraining certain choices. Non-judicial precedent shares with judicial precedent the characteristic of generating limited path dependency, by which I mean that it rarely forecloses or mandates specific choices.<sup>226</sup> Some scholars may point out that the apparent lack of path dependency undermines the claim of judicial precedent to the status of law,

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<sup>223</sup> 418 U.S. 683, 706 (1974).

<sup>224</sup> *Id.* at 708-709.

<sup>225</sup> *See, e.g.,* *Hutchinson v. Proxmire*, 443 U.S. 111, 123-133 (1979) (holding the Speech or Debate Clause does not protect the publication of libelous remarks); *see also* *Doe v. McMillan*, 412 U.S. 306 (1973) (cautioning that the Speech or Debate Clause has not been extended beyond the legislative sphere); *United States v. Brewster*, 408 U.S. 501, 508 (1972) (holding that the American speech or debate privilege only protects legislative independence, but does not connote legislative supremacy).

<sup>226</sup> *See generally* Gerhardt, *supra* note 14, at 905 (defining path dependency).

(if it were law, it would constrain justices' discretion more robustly).<sup>227</sup> Yet, these scholars would be mistaken in assuming that any kind of precedent – judicial or otherwise – has to have relatively strong path dependency to attain the status of law. As I have argued elsewhere, precedents are not designed to impose much path dependency,<sup>228</sup> while they perform many other functions.

A. *Beyond Standards and Rules.* While judicial precedents are generally framed as rules or standards,<sup>229</sup> the same cannot be said of non-judicial precedent. Non-judicial precedent may arise from a myriad of circumstances and thus can take multiple forms. They may be expressed in various ways and through various means, and non-judicial authorities rarely explain in detail the reasons for their actions or inaction.<sup>230</sup> In many instances, non-judicial precedents are the outcomes of an institutional decision-making process or conflict. Much of the underlying reasoning that has gone into the making of a non-judicial precedent is never reduced to writing.

A complicating factor is that the reasons for the outcomes of non-judicial authorities' constitutional activities are hard to fathom. Rational choice theory suggests that collegial institutions such as the House or the Senate will reach inconsistent, incoherent results, in part

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<sup>227</sup> See SEGAL & SPAETH, *supra* note 13, at 48-49 (“Clearly...precedent as a legal model provides no guide to the justices' decisions. [...] All that one can say is that precedent is a matter of good form, rather than a limit on the operation of judicial policy preferences.”).

<sup>228</sup> See Gerhardt, *supra* note 14, at 922-963 (exploring the various ways in which the Court's precedent rarely imposes strong path dependency on constitutional adjudication).

<sup>229</sup> See CHARLES FRIED, SAYING WHAT THE LAW IS: THE CONSTITUTION IN THE SUPREME COURT 1-12 (2004); *see also* Jack Knight & Lee Epstein, *The Norm of Stare Decisis*, 40 AM. J. POL. SCI. 1018, 1021 (1996) (stating that “precedent can serve as a constraint on Justices acting on their personal policy preferences”).

<sup>230</sup> See *supra* notes 21-22 and accompanying text.

because of the different orderings and intensities of preference among its members.<sup>231</sup> Without knowing the orderings or intensities of preferences, it may be hard to know why the House or the Senate did what it did. Nevertheless, the outcome may take on a life of its own; an acquittal in an impeachment trial may, for instance, depend more on how subsequent generations have come to understand it than on what senators said at the time they rendered judgment. Yet, the reasons given for particular actions may also matter. Just as the significance of a judicial precedent may oftentimes depend on the quality, or persuasiveness, of its reasoning, the same could be said of non-judicial precedent. To understand why particular senators voted in the ways that they did (in impeachment trials or on other matters), it helps if they were to have explained their votes; however, not all senators will provide such explanations. Moreover, members of Congress might have had different reasons for their votes, might have prioritized the reasons for their votes differently, and might not have disclosed fully (or perhaps at all) the reasons for their votes.

President Clinton's impeachment trial is another precedent whose meaning is hard to nail down. At the end of Clinton's trial, only 72 senators formally explained their votes.<sup>232</sup> These 72 included 34 of the 45 Democrats who voted not guilty on both articles of impeachment, four of the five Republicans who voted not guilty on both impeachment articles, and three of the five Republicans who voted not guilty on the first article but guilty on the second article. With most of the senators voting guilty on both articles not bothering to explain their votes publicly, we are left to speculate about the precise reasons for their votes. While more than half of those voting to acquit Clinton explained their votes, we still do not know for sure why the Senate voted to

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<sup>231</sup> See Barry R. Weingast, *A Rational Choice Perspective on Congressional Norms*, 23 AM. J. OF POL. SCI. 245 (1979).

<sup>232</sup> GERHARDT, *supra* note 131, at 175 (describing the views expressed in the written statements of senators released in the aftermath of Clinton's acquittal).

acquit Clinton, and we still face the challenge of finding the common ground among the statements that we do have.

Similarly, the precise meaning or significance of the nation's second impeachment is unclear. It involved District Judge John Pickering, whom the House impeached on March 2, 1803, by a vote of 45-8.<sup>233</sup> The impeachment articles charged drunkenness and profanity on the bench and the rendering of judicial opinions based neither on law nor fact. Although Pickering did not appear on his own behalf before the Senate, his son filed a petition claiming that Pickering was so ill and deranged that he was incapable of exercising any sound judgment whatsoever and that he should therefore not be removed from office for misconduct attributable to insanity. Nevertheless, the Senate voted 18-2 to accept evidence of his insanity, 19-7 to convict, and 20-6 to remove from office. Consequently, he became the first federal official to have been impeached and removed from office.

Yet, disagreement among scholars and members of Congress persists about whether Pickering's removal established a precedent for removal based on non-indictable misconduct, i.e., misbehavior that is violative of some criminal law. On the one hand, Simon Rifkind, counsel for Justice Douglas in the House's impeachment inquiry against him in 1970, suggested Pickering was charged "with three counts of willfully violating a federal statute relating to the posting of bond in certain attachment situations, and the misdemeanors of public drunkenness and blasphemy."<sup>234</sup> On the other hand, some experts claim that "no federal statute made violation of the bond-posting act a crime, nor obviously were drunkenness or blasphemy federal

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<sup>233</sup> *Id.* at 50-51.

<sup>234</sup> *Id.* at 50 (citation omitted).

crimes. The Pickering impeachment [confirms] that the concept of high crimes and misdemeanors is not limited to criminal offenses.”<sup>235</sup>

Either of these views has merit, “because the question of guilt was put in the form of asking senators whether the judge stood guilty as charged,” rather than whether the acts he allegedly committed constituted impeachment offenses.<sup>236</sup> The Senate’s votes to convict may not reflect an acknowledgment by the Senate that violations of impeachable offenses were actually involved. Indeed, five senators withdrew from the court of impeachment when the Senate agreed to put the question in the form of “guilty as charged.” Two senators – both Federalists – objected to procedural irregularities and claimed that the question put to them failed to ask whether the charges actually described high crimes and misdemeanors.<sup>237</sup> John Quincy Adams claimed that the other senators who withdrew – all Republicans – objected to procedural irregularities but did not want to separate from their party by voting to acquit the judge.

A related problem with using the Pickering impeachment and removal as a precedent is that the party fidelity seems to have played a major role in the Senate’s votes to admit the evidence of insanity and to remove Pickering. All 19 of the Senate’s votes to acquit the Federalist judge were cast by Republicans, while Federalists cast the seven acquittal votes.<sup>238</sup> Even the seemingly bipartisan vote to admit evidence on Pickering’s insanity can be explained on partisan grounds: The Federalist senators may have wanted to introduce this evidence because they hoped that proof of his insanity would have led to an acquittal given their position

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<sup>235</sup> *Id.* (citation omitted).

<sup>236</sup> *Id.* at 51 (citation omitted).

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

that insanity was not an impeachable offense, while the Republicans might have expected the admission of the evidence to lead to the judge's conviction because they thought it demonstrated the need to remove him before he damaged the political system any further. In any event, the party-line voting was consistent with an apparent Republican strategy to employ the impeachment process to create vacancies in the federal judiciary by ousting Federalist judges, of which one of the easiest to remove was Pickering.<sup>239</sup>

*B. Additional Complicating Factors.* The path dependency of non-judicial precedents is complicated by several other factors. First, any given non-judicial activity may not have a single, fixed meaning. For instance, the failure to act has legal significance in both judicial and non-judicial fora. The fact that legislatures may have failed to do certain things – such as foregoing criminal prosecution of homosexual activity on a wide scale basis – may be significant to the extent that the Court recognizes this failure as constituting a tradition.<sup>240</sup> Moreover, the Senate Judiciary Committee might have failed, for various reasons, to hold hearings or votes on pending judicial nominations.<sup>241</sup> But, the absence of a hearing does not rob the event of precedential significance. It might have been the result of a chair's decision simply not to schedule a hearing or a vote, and the Chair might have done this with, or without, consultation

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<sup>239</sup> See, e.g., REHNQUIST, *supra* note 165, at 127-128.

<sup>240</sup> There is no consensus on how to determine, or even to approach, tradition as a relevant source in constitutional interpretation. Consequently, non-judicial authorities routinely disagree on a wide range of issues relating to tradition, including how to find it.

<sup>241</sup> See Hatch, *supra* note 18, at 486 (arguing that a number of Clinton nominees did not get hearings because they lacked requisite paperwork or were nominated too late in the Congressional session to allow meaningful Committee consideration); Carl Tobias, *Federal Judicial Selection in a Time of Divided Government*, 47 EMORY L.J. 527 (1998) (referring to the Judiciary Committee's "inability or reluctance" to hold hearings for, and vote on, nominees); Helen Dewar, *Estrada Abandons Court Bid*, WASH. POST, Sep. 5, 2003, at A01 (explaining that Senate Republicans "bottled up" nearly 60 of President Clinton's Judicial nominees).

with other members of the Committee.<sup>242</sup> A committee's prior failures to hold hearings are precedent on the basic authority of its chair to schedule hearings or votes as he see fit.

Yet, this is hardly the extent of the legal significance that committee inaction may have. In the absence of a formal hearing, there is no occasion – and no need – for either the Chair or the committee's meetings to explain themselves. The Senate rules provide, however, that a nomination lapses and becomes void if it is not approved or acted upon by the end of the legislative session in which it was made.<sup>243</sup> Senate rules invest inactivity with some significance. Failures to hold hearings or votes make the significance of inactivity malleable. Such failures can mean almost anything – or nothing, depending on the interpreter's needs. Thus, the Senate Judiciary Committee's failure to hold a hearing on President Clinton's nomination of Elena Kagan to the U.S. Court of Appeals for the District of Columbia means different things to different senators. For some, it means nothing, for the Committee never held a hearing or vote on her nomination.<sup>244</sup> For others, the failure to hold a hearing or vote resulted from the need to accommodate other pressing business. For still others, the failure was the consequence of a longstanding impasse between Democrats and Republicans over whether the court's caseload justified filling a vacant seat.<sup>245</sup> For others, the failure was a consequence of the desire to keep

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<sup>242</sup> Senator Durbin seemed to regard the Republican blockage of several of President Clinton's nominees as a precedent in his decision to reject President Bush's nomination of Charles Pickering. See 148 CONG. REC. S 1915, 1918 (2002).

<sup>243</sup> S. DOC. NO. 106-1, R. XXXI § 6 at 55 (2003).

<sup>244</sup> See *Confirmation Hearing on Federal Appointments*, S. HRG. 108-35, Pt. 1, 11-12 (Jan. 29, 2003) (statement by Sen. Leahy).

<sup>245</sup> See *Confirmation Hearing on the Nomination of Janice R. Brown, of California, To be Circuit Judge for the District of Columbia Circuit*, S. HRG. 108-463, 4 (Oct. 22, 2003) (statement by Sen. Durbin).

the seat open for the next President to fill for others.<sup>246</sup> And for still others the failure to hold a hearing for Kagan was driven by a desire by some senators to prevent the confirmation of a potentially activist judge. Each of these interpretations is credible, and all can be measured in terms of how well it fits the facts.

A similar interpretive challenge arises even when the Judiciary Committee formally recommends not sending nominations to the full Senate. Only occasionally do Committee members explain their votes before casting them. Senators tend to be most expansive in high-profile hearings, as demonstrated in the confirmation proceedings on John Roberts' nomination as Chief Justice.<sup>247</sup> With the proceedings covered by national media including television, senators had strong incentive for being there for as much as possible. The committee members each had lengthy statements, and each had relatively long questions – or comments – to pose to the witness. In lower profile proceedings, the record tends to be more incomplete. Even when senators explain their votes, they may not make full statements, and it is possible their statements do not include all the reasons for their votes. Many statements might draw from prior proceedings, but not because the latter are binding, but rather because they are persuasive authority. Thus, the Senate Judiciary Committee's rejection of President Bush's nomination of Priscilla Owen to the Fifth Circuit in 2001 meant different things to Democrats and Republicans. Many Democrats construed the event as an instance in which they blocked confirmation of a

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<sup>246</sup> See *Confirmation Hearing on Federal Appointments*, S. HRG. 108-35, Pt. 1, 7 (Jan. 29, 2003) (statement by Sen. Leahy).

<sup>247</sup> See, e.g., 151 CONG. REC. S 10631, Sep. 29, 2005 (containing statements from various senators explaining at length the reasons for their votes on the Roberts nomination).

nominee with a judicial ideology with which they disapproved,<sup>248</sup> while most Republicans construed Owen's rejection as driven by a petty desire for payback for Republicans' failure to confirm some of President Clinton's judicial nominees or hostility to any jurisprudential outlooks other than liberal activist ones.<sup>249</sup> A similar interpretive problem arose with respect to the Democrats' successful filibuster against President Bush's nomination of William Pryor to the Eleventh Circuit in 2003. Many Democrats defended the filibuster as precluding the confirmation of a conservative ideologue or activist,<sup>250</sup> while some Republicans charged that Pryor's opposition was based on anti-Catholic bias.<sup>251</sup> The arguments opposing his nomination were identical to those held by devout Catholics, including opposition to abortion.

A second, related factor limiting the path dependency of non-judicial precedent is that its meaning, like that of all precedents, depends on the interpretations of other actors. There can be so many opinions expressed in support of the outcome of a particular event that subsequent decision-makers have great leeway in choosing on which, if any, of those opinions to rely in similar or analogous events. Such is the case when, for instance, the full Senate votes on particular nominations. The significance of a particular vote depends not just on how senators construe it at the time they vote but also how subsequent senators understand it. Thus, events such as the Senate's rejections of President Washington's nomination of John Rutledge as Chief

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<sup>248</sup> See Neil A. Lewis, *Democrats Reject Bush Pick in Battle Over Court Balance*, N.Y. TIMES, Sept. 6, 2002, at A1.

<sup>249</sup> Audrey Hudson, *Texas Judge Rejected for the Federal Bench; Came under Fire for Being a Court 'Activist,'* WASH. TIMES, Sept. 6, 2002, at A4.

<sup>250</sup> See Bob Dart, *Democrats Block Vote on Judgeship*, ATLANTA J. CONST. Nov. 7, 2003, at 15A.

<sup>251</sup> See Neil A. Lewis, *Judicial Nominee Advances Amid Dispute over Religion*, N.Y. TIMES, July 24, 2003, at A17.

Justice and President Reagan's nomination of Robert Bork do not have firmly fixed, clear constitutional significance. Their meaning depends in significant part on how subsequent senators construe them. Rutledge's rejection is often cited as the first instance in which the Senate rejected a nominee based on his ideology,<sup>252</sup> while others argue that the rejection had at least as much to do with concerns about sanity.<sup>253</sup> Depending on the commentator, Bork's rejection stands as a watershed event in which the Senate targeted nominees because of their ideology,<sup>254</sup> payback for Bork's firing of special prosecutor Archibald Cox and other misdeeds,<sup>255</sup> and Bork's confirmation conversion in which he appears to have abandoned prior positions he had taken for the sake of getting confirmed.<sup>256</sup> Others believe it resulted from the convergence of many factors, including President Reagan's belated defense of Bork against public attacks and Bork's alienating many senators in his public testimony.<sup>257</sup>

A third factor complicating the path dependency of non-judicial precedent arises from the basic congressional norm of the members' recognizing that each has the freedom to render his or

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<sup>252</sup> See GERHARDT, *supra* note 34, at 51-52 (2003).

<sup>253</sup> See HENRY FLANDERS, *THE LIVES AND TIMES OF THE CHIEF JUSTICES OF THE SUPREME COURT* 640 (William S. Hein 1971) (1875).

<sup>254</sup> See NORMAN VIEIRA & LEONARD GROSS, *SUPREME COURT APPOINTMENTS: JUDGE BORK AND THE POLITICIZATION OF SENATE CONFIRMATIONS* 247 (1998); Senator Orrin Hatch, *The Dangers of Political Law*, 75 *CORNELL L. REV.* 1338, 1351 (1990) (reviewing ROBERT H. BORK, *THE TEMPTATION OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1989)); STEPHEN L. CARTER, *THE CONFIRMATION MESS* 133 (1994).

<sup>255</sup> See, GERHARDT, *supra* note 34, at 163; CARTER, *supra* note 254, at 168.

<sup>256</sup> ETHAN BRONNER, *BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA* 241-246 (1989).

<sup>257</sup> See, GERHARDT, *supra* note 34, at 83. See also, Michael Gerhardt, *Interpreting Bork*, 75 *CORNELL L. REV.* 1358, 1386-1391 (1990) (reviewing ROBERT H. BORK, *THE TEMPTATION OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1989)); CARTER, *supra* note 254, at 168.

her own independent judgment on constitutional matters.<sup>258</sup> In practice, this means that legislators are free to challenge procedures or prior judgments (made by committees or the entire bodies) that they regard as unconstitutional. Their independence extends to making their own determinations in fact-finding and figuring out what standard governs their decision-making in different contexts. For instance, in Supreme Court confirmation hearings, senators recognize that they each may decide for themselves the burden of proof that nominees must meet.<sup>259</sup> Similarly, in removal trials senators have long recognized that they may decide for themselves on the applicable burdens of proof (preponderance of the evidence, clear and convincing, or beyond a reasonable doubt) and evidentiary rules (pertaining to such things as the relevance, reliability, or hearsay).<sup>260</sup> Thus, previously rendered constitutional judgments have limited relevance for subsequent decision-making. An individual senator may feel obliged to follow his or her earlier practice in addressing the same constitutional question(s), though this is not always the case.<sup>261</sup> Other senators feel free to follow whatever they regard as the best, or most persuasive, course of action on the constitutional matter at hand.

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<sup>258</sup> See generally Louis Fisher, *Constitutional Interpretation by Members of Congress*, 63 N.C. L. REV. 707 (1985).

<sup>259</sup> GERHARDT, *supra* note 34, at 314.

<sup>260</sup> GERHARDT, *supra* note 131, at 112-16.

<sup>261</sup> Senate-majority leader Bill Frist, who has vigorously protested the use of the filibuster on judicial nominees, had previously participated in filibusters against President Clinton's judicial nominees. See DEMOCRATIC POLICY COMMITTEE, THE REPUBLICAN FLIP-FLOP ON FILIBUSTERS (2003), [http://democrats.senate.gov/dpc/dpc-new.cfm?doc\\_name=sr-108-1-199](http://democrats.senate.gov/dpc/dpc-new.cfm?doc_name=sr-108-1-199). The broader point is that Senators are not bound by their prior positions on constitutional matters. See GERHARDT, *supra* note 131, at 41.

C. *The Ramifications of Disparate Entrenchment.* Non-judicial precedent is entrenched in at least three ways. Each way illustrates how the more entrenched a precedent becomes the more path dependency it will be able to generate.

1. *Legislative Inertia.* The first means by which non-judicial precedent becomes entrenched is by legislative inertia or institutional resistance to change. Several factors account for such resistance.<sup>262</sup> One reason that judges or justices may not deviate from one of their prior rulings is because they refuse to change their minds. This is equally true for non-judicial authorities, who may resist deviating from established policies or practices because of stubbornness, refusal to acknowledge error, or belief in the policies' or practices' merits.

Partisanship bolsters this resistance to changes in policies or practices. The more central a particular policy is to a party's identity or success the harder party leaders will work to keep their party unified in preserving it.<sup>263</sup> In addition, undoing an established policy may be difficult because certain constituencies have become attached to it. Thus, it is generally harder to abolish or revise an existing policy than it is to get the policy enacted in the first place. Imagine the difficulty of trying to abolish tax cuts that the Republican Congress enacted shortly after President George W. Bush took office.<sup>264</sup> The tax cuts are a central element of the Republicans'

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<sup>262</sup> See Earl M. Maltz, *The Emergence of State Constitutional Law: The Dark Side of State Court Activism*, 63 TEX. L. REV. 995, 997 (citing "bicameralism, the committee system, and other vagaries of parliamentary procedure" as disincentives for legislating in the absence of strong advocacy by political groups).

<sup>263</sup> See generally DAVID W. ROHDE, PARTIES AND LEADERS IN THE POSTREFORM HOUSE 1-16 (1991) (discussing various factors that influence party voting).

<sup>264</sup> See, e.g., Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, 115 Stat. 38.

agenda, they are popular with core constituencies throughout the country, and the alternative – restoring some higher taxes – is anathema to them.

In his insightful book *Disjoined Pluralism*, Eric Schickler proposes how institutional change occurs in the Congress.<sup>265</sup> His model integrates rational choice theory with historical institutionalism. He suggests that institutional change does not occur simply because a sufficient number of members of Congress have recognized that change is in their self-interest or because the institution has been structured to accommodate change. Instead, he argues, “that the dynamics of institutional development derive from the interactions and tensions among competing coalitions promoting several different interests.”<sup>266</sup> According to Schickler, institutional development deriving from such forces has at least four distinct features. First, “Multiple collective interests typically shape each important change in congressional institutions.”<sup>267</sup> Change is achieved when it is being sought because “multiple interests, and the interactions among coalitions promoting these interests typically determine the effects of each change.”<sup>268</sup> Besides producing change, the change produced might have “unintended effects” because of tensions among the multiple interests. Second, “[e]ntrepreneurial members build support for reform by framing proposals that appeal to groups motivated by different interests.”<sup>269</sup> Innovators in the legislative process “succeed by devising proposals and framing

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<sup>265</sup> ERIC SHICKLER, *DISJOINED PLURALISM: INSTITUTIONAL INNOVATION AND THE DEVELOPMENT OF THE U.S. CONGRESS* (2001).

<sup>266</sup> *Id.* at 4.

<sup>267</sup> *Id.* at 12.

<sup>268</sup> *Id.* at 13.

<sup>269</sup> *Id.* at 14.

issues in ways that appeal to distinct member interests.”<sup>270</sup> Third, “Congressional institutions typically develop through an accumulation of innovations that are inspired by competing motives, which engenders a tense layering of new arrangements on top of preexisting structures.”<sup>271</sup> Schickler acknowledges that the “layering process” institutional development “is in some ways path dependent . . . The options available to decision makers today depend on prior choices.”<sup>272</sup> Because there may be “constituencies dedicated to the preservation of established power bases [,] . . . institution-builders often attempt to add new institutions rather than dismantle the old.”<sup>273</sup> Fourth, “[a]doption of a series of changes intended to promote one type of interest typically will provoke contradictory changes that promote competing interests.”<sup>274</sup> The problem with emphasizing path dependence in institutional development is that the “emphasis on continuity underestimates the incidence of major changes in congressional institutions. . . . Rather than pushing Congress in one particular direction, the multiple interests motivating members produce a more wayward, or even oscillatory, trajectory.”<sup>275</sup> Thus, rather than ever achieving “equilibrium” (as some social scientists have claimed), the Congress operates

as [a] multilayered historical composite[] that militate[s] against any overarching order in legislative politics. Congressional development is disjointed in that members incrementally add new institutional mechanisms, without dismantling preexisting

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<sup>270</sup> *Id.* at 15.

<sup>271</sup> *Id.* at 15.

<sup>272</sup> *Id.* at 16.

<sup>273</sup> *Id.*

<sup>274</sup> *Id.*

<sup>275</sup> *Id.*

institutions and without rationalizing the structure as a whole... The resulting tensions mean that significant numbers of members will ordinarily be dissatisfied with established ways of doing business. This enables entrepreneurs to devise innovations that serve as common carriers, momentarily uniting those dissatisfied with the status quo. As a result, institutional development is an ongoing, open-ended process. The interplay of coalitions promoting contradictory objectives produces institutions that are tense battlegrounds rather than stable, coherent solutions.<sup>276</sup>

Schickler's model supports what I am suggesting is the process by which entrenchment occurs in Congress. First, it shows how difficult change can be within the Congress and particularly how change at the institutional level has tended to occur because of the convergence of a number of different forces (or coalitions) coming together in favor of certain change(s). It is important to keep in mind that innovators within the legislative process do not operate on a blank slate. They are part of a system with a lot of formal and informal mechanisms and procedures already in place. Their objective is to change the status quo in some way, and the status quo includes some resistance to change.

Second, change is not always possible in the legislative process. Even if innovators were constantly trying to change certain aspects of the institution, they cannot change everything at once. At a given moment (or period), some things are and indeed must be stable. No institution can accommodate total, constant change. Thus, the ongoing tensions within Congress transform it into the "tense battlefield" that Schickler describes, but only some skirmishes are won and, even then, not always quickly or all at once. This dynamic is equally true for policy-making. Members of Congress lack the time, will, and resources to redo every

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<sup>276</sup> *Id.* at 17-18.

policy that has been previously enacted. If Shickler's model holds true for major policy changes, then we would expect they derive from different coalitions coming together for different reasons to support a major change in preexisting policy. Major changes within the legislative process are not likely to result from a single factor.

2. *Repetition.* A second way in which entrenchment – or imperviousness to change – may occur is through an institution's repeated refusals to change. Repetition helps to explain why, for instance, some prior decisions are harder to undo than others. Such has been the case, for instance, with the Congress' refusals to expand or contract the size of the Supreme Court since 1869.<sup>277</sup> The failure of President Roosevelt's Court-packing plan to win congressional approval fortified this trend; it is the closest the Congress has come, since 1869, to approving a change in the Court's size in retaliation against the Court or a president. While this refusal does not foreclose Congress from tinkering again with the size of the Court, the fact that the Congress has refrained from doing so for almost 150 years places a heavy burden of persuasion on those seeking to overcome it. Similarly, the Congress has not enacted a court-stripping measure since at least 1930 that would preclude Supreme Court or other Article III court jurisdiction over certain constitutional claims.<sup>278</sup> While the House did approve such a measure in 2004 stripping all federal jurisdictions over challenges to state and federal Defense of Marriage Acts, the Senate never approved it.<sup>279</sup>

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<sup>277</sup> HART & WECHSLER, *supra* note 93, at 34 n.43.

<sup>278</sup> *Id.* at 351.

<sup>279</sup> See 108 CONG. REC. H6580 (2004). See also Jessica Vascellaro, *House Passes Ban on Gay Marriage Rulings Would Bar Decisions by Federal Judges on States' Recognition*, THE BOSTON GLOBE, July 23, 2004, at A2. The Senate rejected a constitutional amendment that would limit marriage to opposite sex couples by a procedural vote of fifty to forty-eight. 108 CONG. REC. S7962 (2004)).

Non-judicial precedent may become entrenched through repeated acceptances of an institution's actions. The Senate, for instance, has generally accepted that presidents may use their power to make recess appointments to fill certain offices temporarily, regardless of the reason or timing for the vacancy. This has been true for recess appointments of Article III judges,<sup>280</sup> in spite of the claim that it would be unconstitutional for a judge without life tenure to exercise the power of an Article III court.<sup>281</sup> Presidents zealously have protected their prerogative to make these kinds of temporary appointments, and the Senate has accepted these appointments. Recently, Democrats retaliated against President Bush's recess appointment of William Pryor to the Eleventh Circuit by exacting a promise from him not to make any recess appointments to Article III courts in exchange for their agreeing not to filibuster all but his most controversial nominees to the federal appellate courts.<sup>282</sup> The agreement did not include Pryor, whose recess appointment was simply the most recent of more than 300 such appointments to Article III courts, including the Supreme Court, since 1789.<sup>283</sup> Similarly, the

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<sup>280</sup> Paul Solomon, Comment, *Answering the Unasked Questions: Can Recess Appointees Constitutionally Exercise the Judicial Power of the United States?*, 54 U. CIN. L. REV. 631, 632 (1985).

<sup>281</sup> See *United States v. Woodley*, 751 F.2d 1008 (1985); *United States v. Alocco*, 305 F.2d 704 (1962).

<sup>282</sup> See Neil A. Lewis, *Deal Ends Impasse Over Judicial Nominees*, N.Y. TIMES, May 19, 2004, at A19; Helen Dewar, *President, Senate Reach Pact on Judicial Nominations; Bush Vows He Won't Use Recess Appointments*, WASH. POST, May 19, 2004, at A21.

<sup>283</sup> *Woodley*, 751 F.2d at 1011 (1985). See also Henry B. Hogue, *The Law: Recess Appointments to Article III Courts* 34 PRESIDENTIAL STUD. Q. 656, 659 ("Prior to the Pickering and Pryor appointments, president had made recess appointments to the federal judiciary only twice since 1964.").

Congress has accepted unilateral trade agreements<sup>284</sup> and military operations in the absence of declarations of war,<sup>285</sup> bolstering the status of these events as precedent.

3. *Rules.* Formalized rules provide the means for most deeply entrenching a particular practice. This is especially true for a frequently ratified, or re-approved, rule. A prime example is the filibuster, which has become entrenched through Senate rules (by requiring a super-majority to end filibusters of motions to amend the rules)<sup>286</sup> and its repeated approval – and use – in the Senate.<sup>287</sup> The filibuster has become entrenched through the rule impeding amendment of the Senate rules, and the ultimate failure of the attempt by a Republican majority in 2005 to circumvent the rules – by means of the so-called “nuclear option” – to dismantle Rule XXII extended the Senate’s unbroken practice of only amending its rules in accordance with its rules.<sup>288</sup>

One significant problem with the nuclear option is that it is unprecedented. Both the Senate Parliamentarian and the Congressional Research Service found that Senate precedents

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<sup>284</sup> Whether Uruguay Round Agreements Required Ratification as a Treaty, 18 U.S. Op. Off. Legal Counsel 232, 234-235 (1994) (noting that historical practices have established that the President may negotiate and Congress approve major international trade agreements outside of the Treaty Clause).

<sup>285</sup> See *supra* note 89 and accompanying text.

<sup>286</sup> S. DOC NO. 106-1, R. XXII §2, at 21.

<sup>287</sup> See, e.g., 151 CONG. REC. S 5453, 5501 (daily ed. May 19, 2005) (statement of Sen. Bingaman) (arguing that the use of the filibuster ensures that minority views are respected, and that the filibuster has been used by Republicans and Democrats alike to block judicial nominees in the past).

<sup>288</sup> See 151 CONG. REC. S 5828, 5828-29 (daily ed. May 24, 2005) (statement of Sen. Byrd) (lauding the resolution of the “nuclear option” debate by the “gang of fourteen”); see also Carl Hulse, *Bipartisan Group in Senate Averts Judge Showdown*, N.Y. TIMES, May 24, 2005, at A1 (providing an overview of the agreement reached by the “gang of fourteen”).

do not support the nuclear option.<sup>289</sup> Thus, filibustering judicial nominations depends on the willingness of a critical mass of senators to follow Senate precedent, as it has been understood within the Senate, or to create an entirely new one. The risk of the nuclear option is that it would support a majority's changing the rules whenever it suited them to do so. Such a precedent would signal the end of the written rules of the Senate as binding authority within the Senate over time.

Rule XXII is not the only Senate rule binding future legislatures. One study indicates that the Senate had eight rules requiring super-majority voting.<sup>290</sup> Near the end of Clinton's impeachment trial a motion was made to alter the Senate's rule requiring closed deliberations on the President's guilt; the Senate recognized its rules could be changed only by supermajority vote and failed to muster the requisite votes for an amendment, even though this allowed an earlier Senate rule to remain in effect.<sup>291</sup> If a past Senate lacked the authority to bind the hands of a future one, then the Senate acted illegally when it voted to reject the motion to open to the public its final deliberations on Clinton's guilt. No one has ever suggested Chief Justice of the United States William Rehnquist as Presiding Officer and the Parliamentarian failed to recognize, much less to prevent, the supposed breach of the Constitution engendered by this procedure.

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<sup>289</sup> See Geoff Earle, *Parliamentarian Would Oppose "Nuclear Option,"* THE HILL, April 14, 2005 (reporting that the Senate Parliamentarian determined that Senate precedents did not support the "nuclear" option); Betsy Palmer, Congressional Research Memorandum: Changing the Senate Rules: The "Constitutional" or "Nuclear" Option, April 5, 2005 (suggesting that implementing the "nuclear" option required disregarding Senate precedents).

<sup>290</sup> Richard S. Beth, Congressional Research Service Memorandum, Supermajority Vote Requirements Currently in Effect in Congress, 3-4 (January 20, 1995).

<sup>291</sup> 145 CONG. REC. 1069, 1071-72 (Jan. 28, 1999) (Amend. 1, 44-55, Amend. 2, 43-55).

*D. The Multiple Functions of Non-Judicial Precedent.* Even if a particular non-judicial precedent were not entrenched, it would not lack significance. Non-judicial precedent, like its judicial counterpart, performs many functions besides constraining constitutional decision-making. I examine a few of these below.

*1. Non-Precedent as a Modality of Constitutional Argumentation.* Non-judicial precedent functions as a modality of constitutional argumentation. Non-judicial authorities are mindful of the fact that they create precedent each time they act.<sup>292</sup> Indeed, a sure way to defeat a proposal is to point out that it has never been done that way before.<sup>293</sup> Senator Lyman Trumbull provided a famous instance of a senator's refusing to take certain action because of the precedent it would set when he refused to convict President Johnson because it would have meant that "no future President will be safe who happens to differ with the majority of the House and two-thirds of the Senate on any measure deemed by them important."<sup>294</sup>

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<sup>292</sup> See, e.g., 152 CONG. REC. S 898, 955 (daily ed. Feb. 9, 2006) (statement of Sen. Thune) (opposing the creation of a federal fund for victims of asbestos poisoning on the grounds of the precedent such a fund might create); see also 145 CONG. REC. S 1462, 1497 (1999) (printed statement of Sen. Abraham) (considering the precedent that would be set regarding what is acceptable Presidential behavior by not convicting President Clinton on the articles of impeachment).

<sup>293</sup> See, e.g., CONG. WILLIAM S. WHITE, CITADEL: THE STORY OF THE U.S. SENATE 74 (1957) ("To the [Senate type,] precedent has an almost mystical meaning and where the common run of members will reflect twice at least before creating a precedent, the Senate type will reflect so long and so often that nine times out of ten he will have nothing to do with such a project at all . . . His concern for the preservation of Senate tradition is so great that he distrusts anything out of the ordinary . . ."). See also 145 CONG. REC. S 1660, 1663 (1999) (statement of Sen. Inhofe) (opposing a censure resolution against President Clinton because there is no precedent for censure in the Constitution or in the impeachment context); 145 CONG. REC. S 2898, 2908 (1999) (statement of Sen. Thomas) (arguing that a second vote to allow China to accede to the World Trade Organization should not be required because it would be unprecedented).

<sup>294</sup> See, e.g., REHNQUIST, *supra* note 165, at 243-44 (quoting Senator Trumbull) (citation omitted in the original). For other examples, see 152 CONG. REC. S 35, 99 (daily ed. Jan 25, 2006) (statement of Sen. Ensign) (arguing that confirming judges on basis of partisanship, and not

A recent example of non-judicial precedent as constituting a modality of argumentation arose in the deliberations over whether to deploy the “nuclear option,” which would have allowed a majority of the Senate to bar judicial filibusters without following the Senate rules.<sup>295</sup> Some senators opposed the option for setting a bad precedent allowing a majority to disregard the Senate’s rules for amending the rules whenever it was inclined to do so.<sup>296</sup>

Precedent was a significant mode of argumentation during President Clinton’s impeachment proceedings.<sup>297</sup> The critical question before both the House and the Senate was the extent to which Clinton’s misconduct resembled the misconduct of previously impeached

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judicial experience, would set a dangerous precedent); 151 CONG. REC. S 5715, 5722 (daily ed. May 23, 2005) (statement of Sen. Feinstein) (arguing that changing Senate rules regulating cloture would be to throw out precedent); 15 CONG. REC. H 3455, 3541 (daily ed. May 18, 2005) (statement of Rep. Cox) (seeking to establish a precedent in voting on funding for a Homeland Security authorization bill); *See, e.g.*, 145 CONG. REC. S 1775, 1778 (1999) (statement of Sen. Sessions) (explaining he voted to convict President Clinton to set a good “precedent”).

<sup>295</sup> *See generally* Martin B. Gold & Dimple Gupta, *The Constitutional Option to Change Senate Rules and Procedures: A Majoritarian Means to Overcome the Filibuster*, 28 HARV. J. L. & PUB. POL’Y 205 (2004).

<sup>296</sup> *See, e.g.*, 151 CONG. REC. S4806, 4807 (daily ed. May 10, 2005) (statement of Sen. Feinstein) (“The strategy of a nuclear option will turn the Senate into a body that could have its rules broken or changed at any time by a majority of Senators unhappy with any position taken by the minority.”); Senator Robert Byrd, Address at Center for American Progress (Apr. 25, 2005) (available online at [http://byrd.senate.gov/speeches/2005\\_april/04\\_25\\_2005.html](http://byrd.senate.gov/speeches/2005_april/04_25_2005.html)) (“If this nuclear option is employed ... [t]here is nothing, then, except good sense ... to prevent majority cloture of any filibuster on any measure or matter, whether on the legislative or the executive calendar. Think of that! Rules going back for over 200 years and beyond ... can be swept away by a simple majority vote”).

<sup>297</sup> Arguments invoking precedent included those both for Clinton’s conviction and those against it. *See, e.g.*, 145 CONG. REC. S 1337, 1355 (1999) (statement by Rep. McCollum) (“Can you imagine how damaging that would be to our constitutional form of government, to set the precedent that no President will be removed from office for high crimes and misdemeanors unless polls show that the public wants that to happen?”); 144 CONG. REC. H 11774, 11800 (statement by Sen. Lofgren) (“By [voting for conviction]...you will set the dangerous precedent that the certainty of presidential terms, which has so benefited our wonderful America, will be replaced by the partisan use of impeachment”).

and convicted officials. For those urging his impeachment and removal from office, Clinton's misconduct was precisely the same as that for which three other officials were impeached and removed from office in the 1980s – Harry Claiborne for income tax evasion and thus for misconduct that had no formal connection to his duties as a judge, Alcee Hastings for perjury, and Walter Nixon for making false statements to a grand jury.<sup>298</sup> Some seeking Clinton's ouster likened his misconduct to the obstruction of justice set forth in the second article of impeachment approved by the House Judiciary Committee against Richard Nixon.<sup>299</sup> Clinton's defenders viewed his misconduct as unlike any prior misconduct for which officials had been removed from office. Instead, they argued, it resembled either Richard Nixon's alleged income tax evasion for which the House Judiciary Committee decided not to draft an impeachment article<sup>300</sup> or the misconduct of Andrew Johnson – consisting of his failure to abide by the Tenure in Office Act<sup>301</sup> for which the Senate ultimately acquitted him.

2. *Non-Judicial Precedent as Facilitating a Constitutional Dialogue.* Non-judicial authorities often render constitutional judgments in response to, or in anticipation of,

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<sup>298</sup> 145 CONG. REC. S1791, 1792-3 (1999).

<sup>299</sup> 145 CONG. REC. S869, 873 (1999).

<sup>300</sup> See 145 CONG. REC. S 1775, 1778 (1999) (statement by Sen. Sessions) (citing argument that Nixon's alleged tax evasion was not an impeachable offense because it was not directly related to one of the President's duties); see also Sen. Patrick Leahy, *Procedural and Factual Insufficiencies in the Impeachment of William Jefferson Clinton*, reprinted in 145 CONG. REC. S 1564, 1588 (1999) (citing Professor Tribe's argument that Clinton's behavior, like Nixon's tax evasion, presents no threat of becoming a model of emulation).

<sup>301</sup> See Senator Joseph Biden's *Comprehensive Statement on Impeachment*, reprinted in 145 CONG. REC. S 1462, 1481 (1999) (arguing that Clinton's impeachment proceedings, like Johnson's, were motivated by "policy disagreements and personal animosity").

the judgments of other constitutional actors. They participate, in other words, in an ongoing constitutional dialogue with the other branches.<sup>302</sup>

For instance, precedent became an important issue when President George W. Bush's then-National Security Adviser, Condoleezza Rice, was deciding whether to testify under oath before the September 11, 2001 Commission.<sup>303</sup> The back and forth between Rice and the White House on the one hand and the Commission on the other (as an agent of Congress) constituted a classic constitutional dialogue. Initially, Rice refused based on her (and the President's) concern that such testimony was unprecedented. She claimed that no sitting National Security Adviser had ever testified under oath before Congress or a congressionally-created commission, and suggested that forcing her to so testify violated the principle of executive privilege, which she construed as protecting absolutely the confidentiality of conversations between the President and his advisers on national security matters. Public pressure mounted in favor of her testifying, particularly after she had publicly appeared in

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<sup>302</sup> See Lisa A. Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C. L. REV. 1003, 1041 (1994) ("Congress and other non-judicial actors in our system have numerous ways to respond to judicial decisions: to revise legislation, or to distinguish or develop the Court's pronouncements on constitutional issues through new legal challenges."); see generally LOUIS FISHER, CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS (1988).

<sup>303</sup> Dr. Rice initially refused to testify under oath before the congressionally-created commission charged with investigating intelligence prior to the September 11, 2004 terrorist attacks against the United States. Her refusal to speak with the Commission only behind closed doors and not under oath sparked enormous controversy, particularly because at the same time she was defending this refusal she appeared frequently on the media to rebut charges made against her and the administration by other witnesses who had appeared before the Commission. After intense public pressure (and requests from commission members from both parties), Rice relented. See generally Philip Shenon, *Rice Questioners May Avoid Partisanship*, N.Y. TIMES, April 8, 2004, at A25; Vincent Morris, *Condi Won't Say Sorry*, N.Y. POST, April 8, 2004, at A10; Greg Miller, *Rice's Comments to Face Scrutiny at Hearings*, L.A. TIMES, April 8, 2004, at A14; Charlie Savage, *Rice Set to Detail Bush's Side Testimony before 9/11 Panel As Seen as Response to Clarke*, THE BOSTON GLOBE, April 8, 2004, at A3.

other fora (including the media) to counter statements made under oath by other witnesses before the Commission. In the end, the administration allowed her to testify under oath based on a special understanding, spelled out in a letter from the White House Counsel to the Commission, that requested, *inter alia*, her appearance not be construed as a precedent with respect to the testimony of White House officials before legislative bodies.<sup>304</sup>

The resolution of the conflict over Rice's testimony shows how non-judicial precedent may facilitate constitutional dialogues. The first is the perennial concern of governmental leaders about the extent to which their actions form precedent. Obviously, they want to create precedent that protects their prerogatives but otherwise keeps their options open in the future.

Second, the dispute over the conditions of Rice's testimony demonstrated the absence of any rules for guiding the construction or interpretation of non-judicial precedent. There was no clearly governing precedent to settle the policymakers' dispute, and the arguable relevance of past events depended heavily on the meaning the contending sides gave to them. For instance, Dr. Rice claimed, correctly, no sitting National Security Adviser had ever publicly testified under oath before the Congress.<sup>305</sup> Yet, the other side maintained, correctly, that the

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<sup>304</sup> See Letter from Chief White House Counsel Alberto Gonzalez to Chairman Thomas Keane and Vice-Chairman Lee Hamilton, National Commission on Terrorist Attacks Against the United States (March 30, 2004) (stating, *inter alia*, "we have now received assurances from the Speaker of the House and the Majority Leader of the Senate that, in their view, Dr. Rice's public testimony in connection with the extraordinary events of September 11, 2001, does not set, and should not be cited as, a precedent for future requests for a National Security Adviser or any other White House official to testify before a legislative body."), available at <http://www.whitehouse.gov/news/releases/2004/03/20040330-3.html>.

<sup>305</sup> See Philip Shenon, *9/11 Panel Rejects White House Limits on Interviews*, N.Y. TIMES, March 3, 2004, at A12 ("A spokesman for the National Security Council, Sean McCormack, said Tuesday that the White House believed it would be inappropriate for Ms. Rice to appear at a public hearing as a matter of legal precedent. 'White House staff have not testified before legislative bodies,' Mr. McCormack said. 'This is not a matter of Dr. Rice's preferences.'").

September 9, 2001 Commission was unique. Moreover, President Clinton's National Security Adviser, Sandy Berger, though no longer presently occupying the office, had testified before the 9/11 Commission even though President Bush Clinton controlled whatever Berger could reveal that might have been clothed with executive privilege.<sup>306</sup> In addition, Dr. Rice, as a government officer, was obliged as a public official to tell the truth whenever she spoke to public officials on national security matters.<sup>307</sup> Thus, Dr. Rice helped to create a precedent of public testimony that undercut her claim about not setting a precedent to testify publicly. The agreement reached between Rice and the White House tracked a line of non-judicial precedent extending from the administration of George Washington to the presidency of George W. Bush in which accommodations are reached between presidents and members of Congress with respect to executive privilege.<sup>308</sup>

Third, the dispute over the conditions of Rice's testimony showed how far public officials will go to control the meanings of the precedents at the time they are creating precedents. The claim of the White House Counsel that Rice's testimony should not be construed as creating a precedent seems eminently reasonable given the uniqueness of the commission and unusual pressure put on her to testify before the Commission. Yet, the White House's claim was pointless, given that the request made by Gonzales does not bind officials who remain free, as they have done in the past, to cite any prior activity with which they approve as guiding or

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<sup>306</sup> On the development and law of executive privilege, *see* LOUIS FISHER, *THE POLITICS OF EXECUTIVE PRIVILEGE* (2003).

<sup>307</sup> *See NBC Nightly News*, NBC News Transcript, (NBC television broadcast, March 25, 2004) *available at* LEXIS (David Gregory reporting an interview with Chief White House Counsel Gonzales where he indicated that Rice's testimony under oath was "unnecessary, because administration officials are duty-bound to tell the truth anyway.").

<sup>308</sup> *See generally* FISHER, *supra* note 305, *passim*.

helpful precedent.<sup>309</sup> The significance of Rice’s agreement to testify will be forged in an ongoing dialogue about executive privilege in a legislative setting.

### 3. *Non-Judicial Precedent as Shaping Constitutional History and Structure.*

Non-judicial precedents perform historical and structural functions. I explore each in turn.

Non-judicial precedent performs several historical functions. First, they make constitutional history, as did congressional legislation regulating slavery in the territories before the Civil War.<sup>310</sup> In *Dred Scott*,<sup>311</sup> the Supreme Court struck down federal law restricting expansion of slavery into a federal territory; it had been one in a series of congressional compromises over slavery.<sup>312</sup> Each compromise required members of Congress to wrestle with the extent to which the Congress had the authority to regulate slavery within the

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<sup>309</sup> A classic example is President Ford’s request that the Congress not treat as a precedent his testimony before it to explain his pardon of Richard Nixon. Ever since, Ford’s testimony has been frequently cited as a precedent to support presidential testimony before the Congress and to counter claims made by chief executives that they cannot be compelled to appear before the Congress. See James V. Grimaldi and Dan Eggen, *Criminal Probe of Pardon Begins; Gifts From Ex-Wife of Rich Are Focus*, WASH. POST, Feb. 15, 2001, at A1 (quoting Benton Becker, an advisor to Ford on his pardon of Nixon who said, “I think President Clinton ought to take note of President Ford’s openness, and candor and frankness with the Congress and the American people back in 1974.”); Greg Miller and Maura Reynolds, *Bush, Cheney Meet with Sept. 11 Panel*, LOS ANGELES TIMES, April 30, 2004 (indicating that Bush’s testimony to the 9/11 Commission was the fifth time a president has been interviewed by an investigatory committee, including the precedent set by Ford).

<sup>310</sup> See DAVID CURRIE, *THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS 1801-1829*, 232-49 (2001).

<sup>311</sup> 60 U.S. 393 (1857).

<sup>312</sup> See Bruce E. Fein, *Original Intent and the Constitution*, 47 MD. L. REV. 196, 210 (1987) (“From the 1820 Missouri Compromise to the 1854 Kansas-Nebraska Act...Congress struggled with the issue of slavery in the territories. While legislative compromises did not settle the slavery question, they held the Nation together.”).

territories of the United States. These compromises held off secession and the Civil War, until the Court barred their further use in *Dred Scott*.

Moreover, historical practices are not isolated; they are history in the making. So, President Thomas Jefferson's decision as president to forego congressional approval for the Louisiana Purchase not only significantly expanded the United States but also set an important precedent on the necessity for getting congressional approval for similar acquisitions in the future.<sup>313</sup> Similarly, President Jefferson's decision to direct military force against the Barbary pirates without congressional approval not only helped to eliminate a threat to American commerce and lives but also was one of the earliest in a series of unilateral presidential initiatives to employ military force without explicit congressional approval.<sup>314</sup> More recently, filibusters significantly impacted our history by preventing the Congress from approving any civil rights bill from the Reconstruction era until 1958.<sup>315</sup>

Second, non-judicial authorities frequently do their own historiography. Non-judicial authorities reach historical findings or put together their own histories of pertinent subjects or events. For instance, many of the official memoranda of the Justice Department's Office of Legal Counsel include the office's own historiography on pertinent issues.<sup>316</sup> Opinions thus

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<sup>313</sup> CURRIE, *supra* note 311, at 112-13.

<sup>314</sup> *Id.* at 124.

<sup>315</sup> See ROBERT CARO, 3 THE YEARS OF LYNDON JOHNSON 683-1012 (2002).

<sup>316</sup> See, e.g., Deputization of Members of Congress As Special Deputy U.S. Marshals, 18 Op. Off. Legal Counsel 125 (1994) (arguing that deputization of members of Congress as special Deputy U.S. Marshals is inconsistent with historical practices); Recess Appointments during an Intrasession Recess, 16 Op. Off. Legal Counsel 15, 16 (1992) (arguing that past practice suggests that the President can exercise the recess appointment power during an intrasession recess of eighteen days); Reimbursement for Detail of Judge Advocate General Corps Personnel to a United States Attorney's Office, 13 Op. Off. Legal Counsel 188, 189 n.2 (1989) (arguing that

become important for both the counsel and the historical support or background they provide. The Senate Legal Counsel similarly relies on the Senate historian's office and other institutions to give the courts a sense of the history of Congress,<sup>317</sup> and congressional committees routinely undertake their own historical inquiries. Hence, in preparation for its hearings on President Nixon's misconduct, the House Judiciary Committee asked the eminent historian C. Vann Woodward to coordinate an historical inquiry into the origins and scope of the federal impeachment power.<sup>318</sup> The ensuing study is still required reading for anyone interested in the history of the federal impeachment process.

In undertaking their own historiography, non-judicial authorities construct their own, valuable distillations of precedent. The Congressional Record is replete with Congress' prior constitutional activities, which can be assembled by anyone who wants to take the time and effort to plumb through it to assemble them. Consequently, there are several noteworthy compilations of congressional precedents.<sup>319</sup> Moreover, members of Congress may direct

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historical practices suggest the executive branch should not consider itself bound by legal opinions of the Comptroller General when they conflict with legal opinions of the Attorney General or Office of Legal Counsel).

<sup>317</sup> Louis Fisher, *Constitutional Analysis by Congressional Staff Agencies*, CONGRESS AND THE CONSTITUTION, *supra* note 132, at 75.

<sup>318</sup> C. VANN WOODWARD, *RESPONSES OF THE PRESIDENT TO CHARGES OF MISCONDUCT* (1974).

<sup>319</sup> See 6-11 CLARENCE CANNON, *CANNON'S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES INCLUDING REFERENCES TO PROVISIONS OF THE CONSTITUTION, THE LAWS, AND DECISIONS OF THE UNITED STATES SENATE* 10-16; LEWIS DESCHLER & WILLIAM HOLMES BROWN, *DESCHLER-BROWN PRECEDENTS OF THE UNITED STATES HOUSE OF REPRESENTATIVES*; LEWIS DESCHLER, *PROCEDURE IN THE U.S. HOUSE OF REPRESENTATIVES*, 97<sup>TH</sup> CONGRESS: A SUMMARY OF THE MODERN PRECEDENTS AND PRACTICES OF THE HOUSE 86<sup>TH</sup> CONGRESS-97<sup>TH</sup> CONGRESS (1982); 1-6 ASHER C. HINDS, *HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES, INCLUDING REFERENCES TO PROVISIONS OF THE CONSTITUTION, THE LAWS, AND DECISIONS OF THE UNITED STATES SENATE*.

constitutional questions to the Congressional Research Service, which routinely produces memoranda describing and analyzing pertinent precedents. In addition, past presidential decisions are reported in *The Messages and Papers of the President*, which includes executive orders, veto messages, States of the Union Messages, and other official presidential directives or actions. Different units within the executive branch as well as the White House Counsel's Office also compile useful distillations of precedent. They may record their own past judgments or perhaps longer distillations of relevant precedents for some desired action(s). For example, in 1966 the State Department Legal Adviser's Office produced a memorandum collecting over 125 incidents in which the President used the armed forces abroad without obtaining prior congressional authorization.<sup>320</sup>

In addition, non-judicial precedent clarifies and shapes constitutional structure. Besides sometimes settling conflicts among non-judicial authorities, non-judicial precedents may help non-judicial authorities avoid such conflicts. They often show the paths that non-judicial authorities need to follow in order to achieve their desired objectives.

International trade agreements are an excellent example of non-judicial precedent shaping constitutional structure. Presidents and the Congress have worked out together several alternatives for reaching international trade agreements. The first and most obvious is a treaty. Ratification of treaties requires votes of approval by at least two-thirds of the Senate,<sup>321</sup> but questions regarding negotiation and termination of treaties have been largely left to the political branches to work out between themselves. Over time, presidents have claimed the

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<sup>320</sup> Memorandum from the Office of the Legal Advisor, U.S. Dep't of State, *The Legality of United States Participation in the Defense of Viet-Nam* (1966), *reprinted in* 1 *THE VIETNAM WAR AND INTERNATIONAL LAW* 583, 597 (Richard A. Falk, ed., 1968).

<sup>321</sup> U.S. CONST. art. II, § 2.

prerogative to unilaterally terminate and to negotiate treaties, though both are often done with substantial congressional consultation.<sup>322</sup>

A second alternative for international agreements is an executive agreement. Although the Constitution does not mention executive agreements, they were known even in President Washington's day, and have become the predominant form of international agreement for the United States.<sup>323</sup> Even Congress has recognized the constitutionality of negotiating executive agreements by enacting the Case Act, which requires the Secretary of State to transmit the text of agreements other than treaties to each chamber for informational purposes.<sup>324</sup>

There are three types of executive agreement. First, treaty-based executive agreements are made, as their name implies, pursuant to treaties.<sup>325</sup> They enjoy the same legal status as the treaties that authorize them so long as they are consistent with and within the scope of those treaties. Second, congressional-executive agreements are those authorized by statute. These agreements are complete alternatives to treaties.<sup>326</sup> They are approved not by a super-majority vote in the Senate but rather by majority vote in each chamber of Congress. Like treaties, these agreements (including NAFTA) may become the supreme law of the land and thus supersede inconsistent state laws and any inconsistent provisions in earlier treaties, other international agreements, or statutes. Third, executive agreements are those international agreements that a

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<sup>322</sup> See JOHN N. MOORE, *THE NATIONAL LAW OF TREATY IMPLEMENTATION* 378-405 (2001).

<sup>323</sup> B. Ackerman & D. Golove, *Is NAFTA Constitutional?* 108 HAR. L. REV. 801, 820 (1995).

<sup>324</sup> 1 U.S.C. § 112b (2004).

<sup>325</sup> RESTATEMENT (3RD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 303 cmt. f (1987).

<sup>326</sup> *Id.*, § 303 cmt. e.

president makes solely under his own authority.<sup>327</sup> Thus, the President, as Commander-in-Chief, may make armistice agreements. The questions whether particular agreements are usually determined outside the courts, but even when litigated they have been approved by courts. For instance, the Supreme Court has held that a president's authority to recognize foreign governments is sufficient to authorize unilateral-executive agreements to settle issues that are necessary to establish diplomatic relations.<sup>328</sup>

Also, without any interference or input from the courts, presidents and members of Congress have worked out several routes by which the United States can be legitimately taken to war.<sup>329</sup> First, there is a declaration of war, which usually follows the incidence of war and gives formal recognition to a preexisting state.<sup>330</sup> A declaration might also initiate hostilities if it were, for instance, in the form of an ultimatum. A second option is a statute. Statutes may become the basis on which a president may validly commit the armed forces to combat without returning to Congress for further authorization.<sup>331</sup> Third, treaties may provide the basis for military action. They may do this because they have, by virtue of Article VI of the Constitution, the same legal force as statutes.<sup>332</sup> Fourth, joint resolutions may provide a basis

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<sup>327</sup> *Id.*, § 303 cmt. g.

<sup>328</sup> *See* *United States v. Belmont*, 301 U.S. 324 (1937).

<sup>329</sup> *See generally*, W. TAYLOR REVELEY III, *WAR POWERS OF THE PRESIDENT AND CONGRESS* (1981).

<sup>330</sup> Bobbitt, *supra* note 15, at 1393.

<sup>331</sup> *Id.*

<sup>332</sup> *Id.* at 1394.

for using military force.<sup>333</sup> In recent years, joint resolutions authorized military actions in Kuwait, Afghanistan, and, most recently, Iraq. Last but not least, the context of an emergency may provide the basis for warfare.<sup>334</sup> Thus, military force may be used to rebuff an imminent threat to American forces, national security, Americans abroad, or civil order. Just as with international agreements, the constitutionality of taking the country to war by any of these routes depends not on courts but on the judgments of national political leaders. Political accountability, rather than judicial review, provides the primary check on these judgments.

4. *The Educative Function of Non-Judicial Precedent.* Among the most important functions of any precedent is educating the public about constitutional law. This is especially true of high-profile events, which are televised or widely covered by the media. For instance, judicial nominees may learn from prior judicial confirmation hearings on what they should say (or not to say) in order to get confirmed by the Senate. The Senate's confirmation hearings on Robert Bork's nomination as Associate Justice have been described sometimes as a seminar on constitutional law.<sup>335</sup> In its aftermath, Senator Joseph Biden pointed to those hearings as an example of the proper functioning of the Senate on Supreme Court nominations.<sup>336</sup> In the midst of the confirmation hearings on John Roberts' nomination as Chief Justice, Republican and Democratic senators disagreed over the extent to which the

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<sup>333</sup> *Id.* at 1365.

<sup>334</sup> *Id.* at 1394.

<sup>335</sup> See CARTER, *supra* note 254, at 6; Laurence H. Tribe, Lawrence v. Texas: *The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1901 n.28 (2004).

<sup>336</sup> See Joseph R. Biden, *The Constitution, The Senate, and the Court*, 24 WAKE FOREST L. REV. 951 (1989) (arguing that the Senate should be able to reject judicial nominees on the basis of their judicial philosophies).

earlier confirmation hearings on Ruth Bader Ginsburg’s nomination to the Court provided an example of either a candid or reticent nominee.<sup>337</sup> Senators treated her hearings as instructive on how forthcoming a Supreme Court nominee ought to be before the Senate Judiciary Committee.<sup>338</sup> Some senators and commentators referred to the 1987 confirmation hearings on Robert Bork’s nomination as an Associate Justice as illustrating the problems with a judicial nominee’s being too candid, or forthcoming, in his comments before the Judiciary Committee.<sup>339</sup> Immediately after being sworn into office, Chief Justice Roberts told his audience what lesson his confirmation taught – that he (and thus they too should) understand his Senate confirmation as a ratification of his belief that judging is distinct from politics.<sup>340</sup> The Roberts hearings are hardly the only instance of non-judicial authorities’ efforts to educate the public about the constitutional significance of particular constitutional events.

5. *Shaping American Culture and National Identity.* A final function of precedent generally and of non-judicial precedent in particular is that it shapes our culture and national identity. Non-judicial precedent gives culture specific content, and it constitutes the legal

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<sup>337</sup> See 151 CONG. REC. S 10461, 10467-68 (daily ed. Sept. 27, 2005) (statement of Sen. Graham) (approvingly reciting Justice Ginsburg’s refusals to answer questions in her own confirmation hearings); *but see* 151 CONG. REC. S 9908, 9909 (daily ed. Sept. 12, 2005) (statement of Sen. Boxer) (suggesting that Justice Ginsburg was far more forthcoming than Republican senators at the Roberts hearing were suggesting).

<sup>338</sup> 151 CONG. REC. S 9211, 9212-13 (July 28, 2005) (citing Senator Hatch urging the application of the Ginsburg rule (“no hints, no forecasts, no previews” at the Roberts hearing).

<sup>339</sup> See CARTER, *supra* note 254, at xi (lamenting the idea that “the Supreme Court should be limited to people who have adequately demonstrated their closed-mindedness”).

<sup>340</sup> John G. Roberts, Remarks upon being sworn in as Chief Justice (Sep. 29, 2005) (transcript available at <http://www.whitehouse.gov/news/releases/2005/09/20050929-3.html>) (“I view the vote this morning as confirmation of what is for me a bedrock principle, that judging is different from politics...”).

framework within which our culture develops.<sup>341</sup> Of equal importance, non-judicial precedent is instrumental to the construction of national identity. For instance, the notion of “manifest destiny” helped to define the United States in the first half of the nineteenth century; it encapsulated the driving forces within the nation, particularly at its highest levels, to acquire new territories and to expand the nation to include them.<sup>342</sup> More recently, the Bush administration’s approval of warrant-less eavesdropping and reluctance to acknowledge any limits whatsoever on the President’s authority in war time have sparked discussions about whether these decisions are consistent with our national identity.<sup>343</sup>

## V.

### *Normative Criteria for Evaluating Non-Judicial Precedent*

The first four parts of this Article provide a comprehensive framework for analyzing non-judicial precedent, while this final part explores possible criteria for evaluating non-judicial precedent. Each criterion has costs and benefits.

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<sup>341</sup> See Post, *supra* note 12, at 77 (noting a “general truth: law is both a cultural product and a vehicle for the regulation and discipline of culture”). Recall that Post equates “culture” with the beliefs and judgments of nonjudicial actors.

<sup>342</sup> See generally ANDERS STEPHANSON, *MANIFEST DESTINY: AMERICAN EXPANSIONISM AND THE EMPIRE OF RIGHT* (1995); FREDERICK MERK, *MANIFEST DESTINY AND MISSION IN AMERICAN HISTORY, A REINTERPRETATION* (1963); ALBERT K. WEINBERG, *MANIFEST DESTINY: A STUDY OF NATIONALIST EXPANSIONISM IN AMERICAN HISTORY* (1935).

<sup>343</sup> See, e.g., Bob Herbert, Op-Ed., *What’s Left Unsaid*, N.Y. TIMES, Jan. 23, 2006, at A19 (suggesting that wiretapping is corrosive to the First Amendment, “that cornerstone of free speech”); Editorial, *The War President: Spying without Oversight No Mere Matter of Trust*, DETROIT FREE PRESS, Dec. 20, 2005, at 10 (arguing that the liberty fundamental to the American system of government is “severely compromised by a president who finds it acceptable to spy on citizens without so much as a secret court review...”); Editorial, *Spying on Americans*, THE WASH. POST, Dec. 18, 2005, at B06 (arguing that “the tools of foreign intelligence are not consistent with a democratic society”).

A. *Measuring Quality.* There are various ways to measure the quality of a non-judicial precedent. One is to evaluate the consistency in its production, maintenance, or construction. Consistency is difficult to measure because a precedent is often amenable to more than one plausible interpretation and thus may be subject to broad or narrow constructions, depending on the interests of subsequent authorities to follow or distinguish them. Of particular interest may be whether leaders are faithful to the precedents they helped to create or defer to ones whose creation they had opposed. It is rare for national leaders to face precisely the same constitutional question more than once, and when they do they reserve the right to change their minds. This is precisely the sequence followed by the Congress in enacting the Independent Counsel Act.<sup>344</sup> Gravely concerned about the extent to which presidents and other high-ranking authorities could avoid liability for breaking the law, the Congress enacted a law insulating an independent counsel from the control of the authorities whom she was empowered to investigate. Republicans questioned the act's constitutionality, which the Supreme Court upheld, with only Justice Antonin Scalia dissenting.<sup>345</sup> Ten years later, Democrats abandoned their defense of the law after Independent Counsel Kenneth Starr had targeted President Clinton and recommended grounds to the Congress for his impeachment and removal from office. After Clinton's acquittal, Congress allowed the law to lapse, and we have reverted back to the pre-1978 system which allowed the Attorney General to appoint a special prosecutor and which defined the circumstances for his or her discharge. Concerns about consistency did not lead any Democrats to change their minds on the desirability of the law.

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<sup>344</sup> 28 U.S.C. § 591-99 (1994).

<sup>345</sup> *See Morrison v. Olson*, 487 U.S. 654 (1987).

A second option for evaluating non-judicial precedent is assessing whether it was correctly decided.<sup>346</sup> The question is whether a particular practice is constitutional, regardless of whether it is ever decisively settled or subject to judicial review. Thus, one might simply ask whether the filibuster or a particular military action such as the war in Iraq is constitutional.

Third, one may measure members' "entrepreneurial" leadership by examining their relative success in changing constitutional law. Political scientist David Mayhew uses this approach in evaluating the leadership of particular members of Congress.<sup>347</sup> This approach focuses on legislators' achievements of their objectives. Consequently, non-judicial precedent may be measured by the extent to which it helps to secure constitutional or other legal change. This approach attaches less significance – indeed, none – to legislative attempts to preserve or restore the status quo, even though they end up comprising non-judicial precedent.

A final criterion measures the extent of an institution's commitment to a practice by examining the resources invested on its behalf. The Congress, for instance, invests considerable resources in constitutional counsel: Each chamber has its own legal counsel (and staff), committees devote time and energy to studying certain constitutional questions,<sup>348</sup> and the Congressional Research Service exists in part to provide careful analysis of any

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<sup>346</sup> At the very least, whoever is evaluating the constitutionality of a particular activity will need a mode for determining which constitutional interpretations are correct and which are not.

<sup>347</sup> DAVID MAYHEW, *AMERICA'S CONGRESS: ACTIONS IN THE PUBLIC SPHERE, JAMES MADISON THROUGH NEWT GINGRICH* (2000).

<sup>348</sup> See Keith E. Whittington, *Hearing about the Constitution in Congressional Committees*, CONGRESS AND THE CONSTITUTION, *supra* note 132, at 87 (examining the public hearings of congressional committees and finding that Congress considers a wide range of constitutional topics).

constitutional question submitted by a member of Congress.<sup>349</sup> Moreover, it is possible to measure the numbers of hearings devoted to particular subjects. Yet, the resources expended might be misleading. They do not tell us who read any documents produced, how long members of committees actually attend the hearings at which they are recorded as having attended, the quality of members' questions or statements, or how well members understood the constitutional questions before them.

These standards are far from perfect. There is no settled norm that requires non-judicial actors (any more than it requires Supreme Court justices) to adhere to constitutional decisions to whose creation they objected. Moreover, most non-judicial actors appear pragmatic in rendering constitutional decisions. This means that they are inclined to be sensitive to the practical consequences, such as voter disapproval, of certain decisions.

*B. A Case Study: The Filibuster.* Recent conflicts within the Senate over the filibuster have called attention to normative questions its persistent use raises. These questions merit some attention here because they allow us to explore in greater depth the challenges of developing normative criteria for evaluating non-judicial precedents.

1. *Ensuring the Quality of Constitutional Debate.* The constitution provides several institutional safeguards for ensuring the quality of constitutional debate in the Senate. The political accountability of senators, their unusually long terms, and the Senate's function as a counter-majoritarian institution to counter-balance popular passions have been designed to prod senators to take the long, rather than the expedient, view in deciding constitutional

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<sup>349</sup> See Louis Fisher, *Constitutional Analysis by Congressional Staff Agencies*, CONGRESS AND THE CONSTITUTION, *supra* note 132, at 64 (discussing the Congressional Research Service as a resource available to Congress to aid in understanding and deciding constitutional issues).

questions.<sup>350</sup> Add around-the-clock media coverage to the mix,<sup>351</sup> and it would appear as if there were many incentives for senators to rise above partisanship in deliberating over the constitutionality of Rule XXII.

Measuring the quality of legislative debate is not easy,<sup>352</sup> but by at least two, admittedly imperfect standards the Senate debate in 2002 and 2003 on the need to reform Rule XXII was mixed at best. One possible standard would be monitoring or measuring the extent of debate, including the institutional resources devoted to debate. The latter measures only how much formal debate on the filibuster occurred. According to this measure, the Senate debate on the filibuster consisted of four hearings scheduled over the course of less than two months;<sup>353</sup>

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<sup>350</sup> Every source supports the Senate as a unique institution designed to resist popular pressure to deliberate and to act upon the long-term interests of the Republic and the Constitution. *See generally* Chemerinsky, *The Vanishing Constitution*, 103 HARV. L. REV. 43, 63-69 (1989) (discussing the implications of the original design of the Senate as a counter-majoritarian institution). For instance, consider the implications of the facts that the least populous states are represented on a par with the most populous states in the Senate and that over 50% of the Senate is elected by no more than 16% of the nation. Such design was intended to ensure that senators would be less prone than their House counter-parts to implement simple, majoritarian preferences. Whether this system operates as it was originally intended or designed is a question to which political scientists have devoted considerably more attention than legal scholars.

<sup>351</sup> *See generally* ROBERT A. KATZMANN, *COURTS AND CONGRESS* (1997).

<sup>352</sup> For one of the few exceptions to the general absence of legal scholars' development of criteria to measure the quality of constitutional discourse within the Senate, see the following exchange: Louis Fisher, *Constitutional Interpretation by Members of Congress*, 63 N.C.L. REV. 707 (1985) and Abner Mikva, *How Well Does Congress Support and Defend the Constitution?* 61 N.C.L. REV. 587 (1983). Fisher and Mikva disagree over, inter alia, the extent to which the members of Congress have the time, expertise, and interest to master constitutional analysis and to which either the House or Senate devote special resources to support members in undertaking constitutional analysis either generally or on specific occasions.

<sup>353</sup> *See Markup on S. Res. 138, S. Res. 148, S. Res. 178 Before the Senate Rules Committee*, 108<sup>th</sup> Cong. (2003) (approving proposals to amend Rule XXII); *Hearing on Senate Resolution 151, Requiring Public Disclosure of Notices of Objection ("Holds") to Proceedings to Motions or Measures in the Senate Before the Senate Rules Committee*, 108<sup>th</sup> Cong. (2003); *Hearing on Senate Rule XXII and Proposals to Amend This Rule Before the Senate Rules Committee*, 108<sup>th</sup>

relatively sparse attendance at three of the four hearings (at three of the hearings, no more than four members of the committees were ever present at the same time); a simple majority of a committee was present at only one hearing, at which no Democrats attended; the committees produced no findings or reports; the special evening sessions designed to embarrass the Democrats featured only a few extended discussions about the constitutionality of Rule XXII;<sup>354</sup> and neither the Congressional Research Service nor the Office of Senate Legal Counsel produced any official studies or reports to assist the committees. Perhaps most importantly, the critical discussion culminating in a bi-partisan agreement among 14 senators to oppose the nuclear option occurred behind closed doors. Only the agreement became public,<sup>355</sup> not the discussions leading up to them. The fallout from the agreement also occurred away from the Senate floor and the committee rooms; it was informal and not part of any official record of the Senate.

A second standard is measuring the consistency in members' statements or votes, particularly whether they would maintain their position if they were on opposite sides of the

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Congress, (2003). Interestingly, at no point in any of these hearings did the Republican majority address, much less reconcile their arguments with, the House's rule requiring a super-majority vote to approve tax increases. For a description of the rule, see MICHAEL J. GRAETZ, *THE UNITED STATES INCOME TAX: WHAT IT IS, HOW IT GOT THAT WAY, AND WHERE WE GO FROM HERE* 286-88 (1999); see also *An Open Letter to Congressman Gingrich*, 104 *YALE L.J.* 1539 (1995) (critiquing the rule). Given the House rule and Rule XXII, one has to wonder whether there is anything the Senate may not do in the rule-making process, i.e., whether there is a point, even for defenders of the constitutionality of the filibuster, at which entrenchment can transform into a constitutional difficulty within the legislative process. This is a big question, but a short answer, for purposes of this paper, is that the Senate may adopt any procedural rule it wants as long as it does it in accordance with its own rules.

<sup>354</sup> See Neil A. Lewis, *Marathon in the Senate: The Talk Is Long, but Temper Short*, *N.Y. TIMES*, Nov. 14, 2003, at A24.

<sup>355</sup> Memorandum of Understanding on Judicial Nominations, 151 *CONG. REC.* S 5828, 5830-5831 (daily ed. May 24, 2005).

constitutional question before the Senate. This test measures the extent to which senators seeking change have made arguments in good faith. An argument may or may not be sound, but if a senator would only support an argument only when it helps him then one could fairly accuse him of inconsistency if not lack of principle (assuming he has no coherent explanation for his seemingly incoherent positions). Thus, this standard would have required asking whether the Republicans who favored the impeachment and removal of President Clinton would have favored impeaching and removing a Republican president who had engaged in the same misconduct as Bill Clinton had committed. The debate over Rule XXII provides a decent measure of the consistency of argumentation about filibuster. In 1995, Democratic Senators Tom Harkin and Joseph Lieberman proposed amending Rule XXII almost precisely along the lines suggested by Majority Leader Frist in 2003.<sup>356</sup> A joint commission subsequently studied the question, but the Senate took no action upon any of its analyses. A decade later, every Democrat who had denounced the filibuster in 1995 changed positions to defended the constitutionality of the filibuster while every Republican who had defended the filibuster in 1995 changed positions to question its constitutionality.<sup>357</sup> Thus, many if not most senators have taken conflicting stances on the filibuster and failed to rise above partisan concerns.

There are several plausible explanations for this failure. First, district court and appellate court appointments tend to have relatively low political salience.<sup>358</sup> There is no evidence

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<sup>356</sup> See 104 CONG. REC. S422 (1995). See also Ross Mackenzie, *The Democratic Filibuster Invites "Systemic Collapse,"* RICHMOND TIMES DISPATCH, June 12, 2003, at A17.

<sup>357</sup> See THE REPUBLICAN FLIP-FLOP ON FILIBUSTERS, *supra* note 260, *passim*; Donald Lambro, *Democrats Flip-Flop on Filibusters,* THE WASH. TIMES, May 23, 2005, at A04.

<sup>358</sup> Cf. Roger E. Hartley & Lisa M. Holmes, *The Increasing Senate Scrutiny of Lower Court Judicial Nominees,* 117 POLITICAL SCIENCE QUARTERLY 259 (2002) (suggesting, *inter alia*,

indicating the public is either generally aware of, or is concerned about, lower court nominations. Second, united government (in which the same political party controls the White House and the Senate) generally lacks incentives for extended hearings or debate. Such was the case, of course, with the filibuster debate.<sup>359</sup> The final reason for the failure is that Senate rules stacked the deck in the filibuster's favor. The super-majority vote required to end a filibuster of any motion to amend the rules is a high hurdle that, by design, is hard to meet.<sup>360</sup>

A change in perspective might allow one to view Senate Rule XXII differently. Rule XXII makes its amendment difficult. It conditions revisions on widespread consensus. In the

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senators' scrutiny of judicial nominees have relatively low political salience except for periods of divided government).

<sup>359</sup> The proposal to amend Rule XXII went further through the legislative process in a united than in a divided government. The Senate Rules Committee approved amending the rule in 2003, while no committee took any action on a similar proposal in 1995 in spite of a joint commission's inquiry into the subject. The reason is that with united government the party in power had an incentive to protect those interests of the presidency that it considers to coincide, or overlap, with its own. There was no such overlap when the Republicans controlled the Senate during Bill Clinton's presidency.

<sup>360</sup> The fact that the Senate has not yet taken formal action on the "nuclear option" is telling. The failure to act may signal different majorities on different questions, or perhaps the absence of any majoritarian preference, within the Senate on the constitutionality of the filibuster. For instance, the absence of floor action may derive from a majority's support for the status quo, though its composition (and the intensity of its members' preferences) are unclear. There may also be a majority that does not support the constitutionality of Rule XXII, though its composition, too, is unclear. There may be a majority of senators who disapprove of Rule XXII but for different reasons. An obvious reason for the failure of the nuclear option was the bipartisan agreement among 14 senators to allow floor votes on some filibustered judicial nominations, but the durability of the agreement is unclear. It may be possible that the nuclear option has failed because the Majority Leader has not persuaded even his own side of the authority of its position. There may even be a super-majority that favors amending Rule XXII in accordance with the rules but not along the lines proposed by the Majority Leader. The literature on the inherent difficulties of defining or clarifying majoritarian will is huge, but for some classic works, *see, e.g.*, WILLIAM H. RIKER, *LIBERALISM AGAINST POPULISM* (1982); KENNETH ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (2d ed., 1963).

absence of such consensus, the default position is the status quo. The rule, in other words, facilitates stability and order within the system. It creates an enormously high hurdle for change, but it is not an impossible hurdle to clear. On four occasions, the requirements for cloture have been significantly modified,<sup>365</sup> but each time changed occurred it did so only in accordance with the super-majority voting requirements. A mechanism that encourages arguments to have broad, bipartisan appeal to effect change is another safeguard for ensuring the quality of constitutional debate within the Senate.

The fact that no formal action has been taken – yet – to amend Rule XXII does not mean that the debate on the constitutionality of the filibuster or efforts to amend it are over. As I have previously suggested, inaction should never be confused with either indifference or the absence of discourse. The formal debates on the filibuster do not reflect the full extent to which the Senate engaged with the arguments over the constitutionality of the filibuster. Left out of this picture is the significant discourse about the constitutionality of the filibuster that occurred in numerous venues outside of the Senate chambers, including but not limited to party caucuses, visits with or speeches to constituents, the hallways in the Senate, the dining rooms, offices, telephone exchanges, network coverage, newspaper commentaries, and lobbying by interested parties (including academics). Senators are not nearly as restricted as judges in the range of information – or evidence – that they may take into account or even seek out in the course of deliberating on constitutional questions. While the Senate has yet to take any final action on the Majority Leader’s proposal, one may safely assume that there were a number of informal exchanges between the Majority and Minority Leaders and their respective caucuses over the

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<sup>365</sup> The most significant alterations to the filibuster were made in 1917, 1949, 1975, and 1985. See DEMOCRATIC STUDY GROUP, SPECIAL REPORT: A LOOK AT THE SENATE FILIBUSTER, No. 103-28, at 1 (1994).

constitutionality of Rule XXII and their respective strategies for maintaining – or thwarting – the filibusters against the President’s judicial nomination. (Indeed, one can safely assume these exchanges occur only within, as opposed to across, the membership of each caucus.) This extensive discourse about the constitutionality of Rule XXII cannot, and should not, be discounted in measuring the quality of constitutional discourse within the Senate. Such discourse is essential to meaningful deliberation within the Senate, because it constitutes the manner in which senators receive background information on a problem. It is likely to enrich constitutional deliberation, because, behind closed doors, senators will be more candid with each other and avoid posturing. This discourse is consistent with – and has been encouraged within – the design of the Senate, even though the full extent of this discourse can never be known.

The other problem with Rule XXII is not unique to the controversy over its constitutionality or utility. It involves the weight, if any, to attach to historical practices as a source of constitutional meaning. While the Supreme Court, for more than two centuries, has emphasized the relevance of historical practices for determining the constitutionality of a contested action,<sup>366</sup> some scholars might question its relevance. They point to the absence of any standard for distinguishing which practices ought to count and which ought not to count in guiding constitutional interpretation. The longevity of a practice arguably constitutes a dubious basis for its constitutionality given that some longstanding practices, such as segregation, are generally regarded as unconstitutional.

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<sup>366</sup> See, e.g., *Marsh v. Chambers*, 463 U.S. 783, 792 (1983) (upholding practice of legislative prayers that began in First Congress and continued through “the unambiguous and unbroken history of more than 200 years”); *Waltz v. Tax Comm’n*, 397 U.S. 664, 678 (1970) (noting that “an unbroken practice . . . is not something to be lightly cast aside” by constitutional challenge); *The Pocket Veto Case*, 279 U.S. 655, 689 (1929) (noting that “long settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions”).

Many critics of Rule XXII have treated historical practices as irrelevant to the rule's constitutionality.<sup>367</sup> They have taken this position in part because historical practices do not help their cause. As we have seen, the filibuster has consistently been a practice within the Senate throughout its history. Moreover, arguing against the entrenchment of the filibuster in Rule XXII requires critics of the filibuster to argue for the institution to do something it has never previously done, i.e., they want the Senate to amend its rules without following its rule.

The fact that the Senate has invariably amended its rules in accordance with its rules carries enormous weight with many senators.<sup>368</sup> As a practical matter, it raises the burden of persuasion on those seeking change.<sup>369</sup> Yet, as we have also seen, senators historically have

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<sup>367</sup> See, e.g., Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, STAN. L. REV. 181, 249 n.401 (arguing that Rule XXII is just as unconstitutional as entrenched laws, omitting a discussion of the Senate's historical practice of making a distinction between entrenched laws and rules); see also Michael J. Gerhardt, *The Constitutionality of the Filibuster*, 21 CONST. COMMENT. 445, at 475-476 (2004) (explaining two ways critics of Rule XXII dismiss dispose of historical practices).

<sup>368</sup> Proposals favoring cloture by majority vote were defeated in 1925, 1947, 1949, and in every Congress between 1961-1975, with the exception of 1971 when there was no vote on the question. See SENATE COMMITTEE ON RULES AND ADMINISTRATION, 99<sup>TH</sup> CONG., SENATE CLOTURE RULE, LIMITATION OF DEBATE IN THE UNITED STATES SENATE, LEGISLATIVE HISTORY OF RULE XXII OF THE STANDING RULES OF THE UNITED STATES SENATE (Comm. Print 1985) [hereinafter SENATE CLOTURE RULE]. See also *Complete List of Cloture Votes Since Adoption of Rule 22*, 32 CONG. Q. WKLY REP. 317, 317 (February 9, 1974).

<sup>369</sup> The major problem with relying on historical practices as a possible source of constitutional meaning is not just the absence of a standard for distinguishing legitimate from illegitimate ones but also the fact many people do not trust the Congress to make altruistic judgments about the scope of its own power. The concern is that the Congress will be prone to make judgments in its own institutional self-interest about the scope of its powers, particularly if its members know courts may defer to (and perhaps not even review) those practices. This concern might serve as a good reason for not allowing historical practices to be absolutely binding on either the courts or the Congress, but it does not justify depriving them of any relevance to constitutional interpretation. Institutional self-interest does not necessarily lead to indefensible or even incoherent results. It sometimes might lead members of the Congress to make judgments that

reached their own judgments about, for instance, the relevance of ideology in confirmation proceedings, the burden of proof in a vote on whether to approve a presidential nomination, and the burden of proof and the rules of evidence in impeachment proceedings. The normative weight of a non-judicial precedent, within the Senate, is thus a function of the extent to which senators choose to defer, or not to defer, to it.

The normative weight of a non-judicial precedent outside the Senate is a different matter, and one over which the Senate understandably has limited control. Its only control over how much other authorities defer to its practices is to provide persuasive authority for them. Thus, the Senate has an institutional incentive to invest resources in creating and formulating non-judicial precedent, so that the public and other branches have confidence in its constitutional judgments. As a practical matter, the officials in other branches remain free to disagree with either the outcomes of Senate proceedings or the bases for the Senate action or inaction. Even then, there may be political costs for presidents who interfere (at least openly) with the internal operations of the Senate. One can, for instance, suspect but not prove that President Bush, or at least his agents, strongly encouraged Republican senators, or their staffs, to consider amending Rule XXII to ease the requirements to invoke cloture. There is a fine line between encouragement and pressure, and senators may be offended by pressure from the President on how they should do their business. Even from a popular president, senators will not appreciate being told how to wield their institutional prerogatives. Such pressure, for instance, persuaded James Jeffords to switch parties,<sup>370</sup> it eroded relations between Jimmy Carter and the Democratic

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increase the public's confidence in what they do as well as to facilitate stability, order, or even efficiency in the operations of the institution.

<sup>370</sup> See Richard L. Berke, *News Analysis: A Question of Governing from the Right*, N.Y. TIMES, May 25, 2001, at A1.

senators he had urged to adopt merit selection panels (and thus diminished the extent to which he would have deferred to senatorial courtesy in judicial nominations);<sup>371</sup> and it had no apparent effect when the Republican-controlled Senate refused to adopt President Bush's urged it in 2002 to schedule committee and floor votes on every judicial nomination.<sup>372</sup>

In the case of the filibuster, non-judicial precedent has significant weight. It falls within an area in which the Constitution vests special power in the Senate to devise internal rules of governance. The Senate's procedural rules are matters that are of greatest importance to the Senate itself, and the institution has devoted considerable resources to their maintenance, including employing a full-time Parliamentarian and the Office of the Senate Legal Counsel to provide counsel on the rules. The Senate has also considered the filibuster's constitutionality several times. Each time it has come down squarely on the side of upholding the constitutionality of the filibuster. If a court were to have followed a similar pattern, most people would be inclined to think overturning itself on the matter in question was not just becoming increasingly difficult, but it would also appear to have been coming close to the point of achieving closure on the matter in question. There is no reason to think differently about the Senate's posture on an issue it has repeatedly embraced.

None of this means that the filibuster is immune to amendment. Senators still "reserve the right" to change their minds about constitutional judgments. This keeps some constitutional questions open or unsettled. Moreover, senators always have the option of amending Rule XXII

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<sup>371</sup> SHELDON GOLDMAN, *PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN* 260-264 (1997).

<sup>372</sup> See Elisabeth Bumiller, *Bush Wants Fast Vetting on Judges*, N.Y. TIMES, Oct. 31, 2002, at A18 (describing Bush's proposal to impose a 180-day time limit for the Senate to vote on his nominated judges).s

in accordance with the rules, a past course which has proven fruitful in lowering the number of senators required to invoke cloture. Even apart from challenging the filibuster on constitutional grounds, senators retain the discretion to question the utility of the filibuster. They may ask whether it is good or bad, whether it helps or hinders the Senate. In the meantime, the starting point for any discussion of the merits, or constitutionality, of the filibuster is not a blank slate. The Senate's historic practices constitute a serious obstacle to its dismantlement; they effectively create a contestable presumption of constitutionality. The fact that this presumption is still intact demonstrates another way in which entrenchment is a feature of the legislative process.

### *Conclusion*

Non-judicial precedent makes many significant contributions to constitutional law. First, the Supreme Court is shaped by non-judicial precedent in the form of choices made by non-judicial actors about the Court's size, composition, jurisdiction, and funding comprise different sets of non-judicial precedent. Non-judicial authorities decide which views to represent on the Court and which to keep off; they decide which Supreme Court cases they want to fortify with their appointments or which ones they want to weaken through their appointments decisions.

Second, non-judicial precedent constitutes public practices to which the Court routinely defers. Historical practices, tradition, customs, and norms are simply different sets of non-judicial precedent on which the Court relies heavily in constitutional adjudication. Each of these concepts refers to the past activities of some non-judicial actor(s), and each has the same status in constitutional law as a set, or category, of non-judicial precedent.

Third, non-judicial precedent constitutes the tangible connection between what courts do and culture. Courts operate within particular social, political, legal contexts, which in turn are

shaped by the constitutional decision-making of non-judicial actors. Non-judicial precedent is not restricted to the realm of governmental activity; it encompasses the full range of the activities of public and private actors outside the Court.

Fourth, non-judicial precedent performs many functions within and outside courts. A non-judicial precedent may, serve as a mode of constitutional argumentation; facilitate a public dialogue about the Constitution, implement constitutional values, and shape national identity.

Fifth, non-judicial precedent may be categorized in directional and temporal terms. They may constitute binding authority either within or across public institutions. Their endurance depends on the support of non-judicial actors, as well as courts, over time.

Sixth, non-judicial precedent has limited path dependency. Several factors limit the extent to which a non-judicial precedent – just like its judicial counterpart – constrains constitutional decision-making, even in circumstances in which it is supposed to constitute binding authority. These factors include the absence of a formal record for a good deal of constitutional activity outside the Court, the lack of candor in setting forth the bases for non-judicial activities, the different consequences of framing judgments as standards or rules, and the dynamic of collegial bodies (such as legislatures) not to produce coherent, consistent results.

Seventh, non-judicial actors are primarily responsible for producing criteria for evaluating judicial performance as well as their own constitutional decision-making. While there is no consensus on the criteria they may employ, they may be held accountable for the quality of their constitutional decision-making by the public, their colleagues, or other non-judicial actors.

Moreover, non-judicial precedent is as important as any other source of constitutional argumentation. Even when non-judicial authorities consult other sources, they pay attention to the kind of precedent they will make. Non-judicial actors know that once they make a

constitutional decision it will become a precedent to guide decision-making within, and by, their institution. This awareness is a check on their exercise of power.

Finally, non-judicial precedent underscores the significance of constitutional decision-making outside the Court. The realm of non-judicial precedent is more extensive than that of judicial precedent. Viewing constitutional law from the perspective of non-judicial actors calls attention to the immense constitutional activity outside the Court that has significance quite apart from what the Court decides within the confines of its relatively narrow jurisdiction. Shifting perspective from judicial to non-judicial precedent illuminates how the most significant realm of constitutional activity may be outside the Supreme Court.