



The Modes of Constitutional Analysis: Historical Practices (Part 8)

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This Legal Sidebar Post is the eighth in a nine-part series that discusses certain “methods” or “modes” of analysis that the Supreme Court has employed to determine the meaning of a provision within the Constitution. (For additional background on this topic and citations to relevant sources, please see CRS Report R45129, *Modes of Constitutional Interpretation*.)

Judicial precedents are not the only type of precedents that are arguably relevant to constitutional interpretation. Prior decisions of the political branches, particularly their long-established, historical practices, are an important source of constitutional meaning to many judges, academics, and lawyers. Courts [have viewed](#) historical practices as a source of the Constitution’s meaning in cases involving questions about the separation of powers, federalism, and individual rights, particularly when the text provides no clear answer.

An example of judicial reliance on historical practices—sometimes described as tradition—in constitutional interpretation is the Supreme Court’s decision in *National Labor Relations Board v. Canning*. When determining, among other things, that the President lacked authority to make a recess appointment during a Senate recess of fewer than 10 days, the Court cited long-settled historical practices showing an absence of a settled tradition of such recess appointments. The Court determined these historical practices were relevant to the resolution of a separation-of-powers question that the Constitution did not specifically address.

Another example of the influence of historical practices on constitutional interpretation is the Court’s decision in *Zivotofsky v. Kerry*. In that case, the Supreme Court held that the President had the exclusive power to recognize formally a foreign sovereign and its territorial boundaries, and that Congress could not effectively require the State Department to issue a formal statement contradicting the President’s policy on recognition. In deciding the case, the Court relied in part on the long-standing historical practice of the President in recognizing foreign sovereigns without congressional consent.

An example of the use of historical practices as a method of constitutional interpretation in a case involving the limits of government power is *Marsh v. Chambers*. In *Marsh*, the Court considered whether the First Amendment’s [Establishment Clause](#), which prohibits laws “respecting an establishment of religion,” forbade the State of Nebraska from paying a chaplain with public funds to open each legislative session with a prayer in the Judeo-Christian tradition. The Court held that the state’s chaplaincy practice

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did not violate the Establishment Clause, attaching significance to the long-standing practices of Congress (including the Congress that adopted the First Amendment as part of the Bill of Rights) and some states in funding chaplains to open legislative sessions with a prayer. The Court wrote: “The opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country. From colonial times through the founding of the Republic and ever since, the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom.”

The debate over historical practices as a mode of interpretation echoes many of the elements of debates over [original meaning](#), [judicial precedent](#), and arguments based on a “[national ethos](#).” Functionalists, for example, [attach](#) considerable importance to historical practices as a source of constitutional meaning, while formalists generally regard them as irrelevant. Those employing this method often argue that, when the Constitution’s text is ambiguous, the use of historical practices has legitimacy as an interpretive tool. They also contend that such an approach provides an objective and neutral basis for decisionmaking, leading to more predictability and stability in the law upon which parties can rely. Moreover, according interpretive significance to historical practices in cases concerning the allocation of power among the branches of government [may help](#) to preserve settled expectations that have resulted from long-standing compromises among the branches regarding such allocations.

Those opposing reliance on historical practices as a source of the Constitution’s meaning argue that it may be difficult to establish definitively what the relevant historical practices are in order to interpret the Constitution properly. They suggest that not all historical practices are authorized by the Constitution’s written text, and that historical sources may differ and thus might not be helpful in illuminating patterns in historical practices. Such commentators also warn that this methodology could allow judges to engage in a form of what has been [called](#) “law office history”—simply choosing the sources that support the historical practices they wish to ratify or reject. Thus, it could be argued that historical practices may not lend themselves to easy, consistent, or clear interpretation. Moreover, they can lead to results inconsistent with the Constitution’s original meaning.

Another possible problem with reliance on historical practices in constitutional interpretation, according to some critics, is that courts could end up legitimizing long-standing historical practices that offend modern moral principles, such as slavery or segregation. Giving historical practices a special place in constitutional interpretation could lead courts to fail to protect minority rights or to preserve the [basic structure of government](#) established by the Constitution. At the same time, reliance on historical practices [might undermine](#) the political branches’ attempts to be innovative or ability to apply novel solutions to old problems.

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