

## ARTICLES

### Historical Gloss, Constitutional Conventions, and the Judicial Separation of Powers

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*Scholars have increasingly focused on the relevance of post-Founding historical practice to discerning the separation of powers between Congress and the Executive Branch, and the Supreme Court has recently endorsed the relevance of such practice. Much less attention has been paid, however, to the relevance of historical practice to discerning the separation of powers between the political branches and the federal judiciary—what this Article calls the “judicial separation of powers.” As the Article explains, there are two ways that historical practice might be relevant to the judicial separation of powers. First, such practice might be invoked as an appeal to “historical gloss”—a claim that the practice informs the content of constitutional law. Second, historical practice might be invoked to support nonlegal but obligatory norms of proper governmental behavior—something that Commonwealth theorists refer to as “constitutional conventions.” To illustrate how both gloss and conventions enrich our understanding of the judicial separation of powers, the Article considers the authority of Congress to “pack” the Supreme Court and the authority of Congress to “strip” the Court’s appellate jurisdiction. This Article shows that, although the defeat of Franklin Roosevelt’s Court-packing plan in 1937 has been studied almost exclusively from a political perspective, many criticisms of the plan involved claims about historical gloss; other criticisms involved appeals to constitutional conventions; and still others blurred the line between those two categories or shifted back and forth between them. Strikingly similar themes emerge in debates in Congress in 1957–1958, and within the Justice Department in the early 1980s, over the authority of Congress to*

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*prevent the Court from deciding constitutional issues by restricting its appellate jurisdiction. The Article also shows—based on internal Executive Branch documents that have not previously been discovered or discussed in the literature—how Chief Justice John Roberts, while working in the Justice Department and debating Office of Legal Counsel head Theodore Olson, failed to persuade Attorney General William French Smith that Congress has broad authority to strip the Court’s appellate jurisdiction. The Article then reflects on the implications of historical gloss and conventions for the judicial separation of powers more generally.*

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### INTRODUCTION

The practices of governmental institutions since the constitutional Founding are a potential source of normative guidance in separation of powers controversies. There are at least two ways that such practices might be relevant to constitutional analysis. First, these practices might be invoked as an appeal to “historical gloss”—a claim that the practice informs the content of constitutional law. Such appeals are common when legal academics confront constitutional issues relating to the distribution of authority between Congress and the executive branch,<sup>1</sup> and recent endorsements of gloss by the Supreme Court—in *Zivotofsky v. Kerry* and *NLRB v. Noel Canning*—came in that context.<sup>2</sup> By contrast, surprisingly little work has examined the potential relevance of post-Founding governmental practice to discerning the separation of powers between the political branches and the courts.<sup>3</sup>

Second, instead of informing the content of legal norms, historical governmental practice might be invoked in support of what British (and more broadly, Commonwealth) legal and political theorists have termed “constitutional conventions.” Such conventions, as Keith Whittington has explained, may be “understood as maxims, beliefs, and principles that guide officials in how they exercise political discretion.”<sup>4</sup> To act contrary to a convention, as Whittington further notes, “is to violate the spirit of the constitution, even if it does not violate any particular rule.”<sup>5</sup> There has been less attention in legal scholarship to conventions than to gloss. To the extent that this scholarship has considered conven-

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1. See generally Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411 (2012).

2. See *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2091 (2015) (relying on historical practice relating to the recognition of foreign sovereigns and their territories); *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2559 (2014) (relying on historical practice relating to recess appointments).

3. An exception is Tara Leigh Grove, *Article III in the Political Branches*, 90 NOTRE DAME L. REV. 1835 (2015), which considers how the political branches have reasoned about jurisdiction-stripping and asks whether courts should credit that reasoning. Unlike this Article, Grove’s article does not consider broader theoretical issues surrounding the role of historical practice in constitutional interpretation, and it does not consider the relevance of such practice for constitutional conventions. For a history of judicial independence that identifies conventional protections (but does not analyze the concept of conventions), see CHARLES GARDNER GEYH, *WHEN COURTS & CONGRESS COLLIDE: THE STRUGGLE FOR CONTROL OF AMERICA’S JUDICIAL SYSTEM* (2006).

4. Keith E. Whittington, *The Status of Unwritten Constitutional Conventions in the United States*, 2013 U. ILL. L. REV. 1847, 1860.

5. *Id.* at 1852.

tions, it has (as with scholarship on gloss) primarily focused on the interactions between the political branches of the national government.

This Article examines the role of both historical gloss and constitutional conventions in interpretive debates about the distribution of authority between the political branches and the courts—what the Article calls the “judicial separation of powers.” To do so, it considers two longstanding issues raised when one or both political branches have sought to affect the Supreme Court’s decision making: the authority of Congress to pack the Court, and the authority of Congress to strip the Court’s appellate jurisdiction.

According to the conventional wisdom among scholars, the political branches “[o]f course” can “exercise some control over the Court . . . by changing the size of the Court (which has happened seven times over the years),”<sup>6</sup> even though most scholars are quick to add that Congress ought not to do so as a “policy” matter. Although more contested, the conventional wisdom also holds that Congress can “create issue-based exceptions to the Supreme Court’s [appellate] jurisdiction,”<sup>7</sup> even though, again, most scholars believe that it would be bad policy for Congress to do so. Under this view, it makes no difference to the constitutional analysis if Congress adds Justices due to specific disagreements with the Court’s decisions (a narrow definition of “Court-packing”), or for the purpose of more generally influencing the Court’s decision making going forward (a broader definition of “Court-packing”). Nor does it matter constitutionally if a congressional restriction on the Court’s appellate jurisdiction reflects disagreement with the Court’s actual or expected decision making (which this Article defines as “Court-stripping”).

The conventional wisdom about Court-packing is thought to be confirmed by the debate in 1937 over President Franklin D. Roosevelt’s (FDR’s) plan to expand the size of the Supreme Court. That debate has been extensively studied by both historians and legal scholars—so much so that it might seem unlikely that there would be anything new to say about it. Most discussions of the defeat of FDR’s plan, however, have focused on the lack of sufficient political demand for Court-packing—resulting from, for example, the purported “switch in time” by the Supreme Court in its approach to the New Deal.<sup>8</sup> In part because of that focus, no one has yet considered the debate from the perspective of either historical gloss or constitutional conventions.<sup>9</sup> As this Article will show by

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6. RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 318 (7th ed. 2015).

7. Richard H. Fallon, Jr., *Jurisdiction-Stripping Reconsidered*, 96 VA. L. REV. 1043, 1064 (2010); see also PETER W. LOW, JOHN C. JEFFRIES, JR. & CURTIS A. BRADLEY, FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS 438 (8th ed. 2014) (“Many respected commentators—enough so that this can be called the traditional view—believe that Congress has the power to make exceptions to the jurisdiction of the Supreme Court over any category of cases, constitutional or otherwise.”).

8. See *infra* Section II.E.

9. Adrian Vermeule has usefully written about both constitutional conventions and the Court-packing debate, but he has not connected the topics. See Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1167 (2013) [hereinafter Vermeule, *Conventions*]; Adrian

reviewing the Senate hearings and other materials from 1937, many criticisms of the Court-packing plan involved claims about historical gloss, which were often tied to claims about the constitutional structure. Other criticisms involved appeals to nonlegal but obligatory constitutional conventions. And still others blurred the line between those two categories or shifted back and forth between them.

Strikingly similar themes emerge in debates over the authority of Congress to prevent the Court from deciding particular constitutional issues by restricting its appellate jurisdiction. In the academy, defenders of plenary congressional power have tended to view the issue as a policy matter for the political branches to decide, and they have based that conclusion primarily on the perceived clarity of the Exceptions Clause in Article III, Section 2, of the Constitution, as well as on its asserted original meaning, general structural commitments, and the Court's Reconstruction Era decision in *Ex parte McCordle*.<sup>10</sup> Academic opponents of Court-stripping have emphasized Section 2's lack of clarity, other language in Article III, other Founding-Era evidence or expectations, and a more muscular structural vision of the role of the Court in the federal system. Opponents have also read *McCordle* narrowly, especially in light of the Court's assumption of jurisdiction a few months later in *Ex parte Yerger*.<sup>11</sup>

When one turns from the academic debate to decades of debates in the political branches over various Court-stripping proposals, a richer interpretive picture emerges. To be sure, government officials and witnesses testifying before Congress defended their positions in those debates by making arguments that can be categorized as textualist, originalist, structuralist, or doctrinalist. But as this Article will show, officials and witnesses have also often relied upon historical gloss, and they have tied gloss to the constitutional structure. In other instances, they have effectively invoked a constitutional convention against Court-stripping. And in still other instances, they have not been clear about whether they were making a constitutional or a conventional claim, but they have appealed to normative commitments that transcend policy preferences.

This Article cannot examine all of the numerous Court-stripping debates in the political branches. Instead, it will offer suggestive evidence by focusing on two debates in particular: the congressional debate in 1957 and 1958 about proposals to restrict the Supreme Court's appellate jurisdiction over cases involving alleged subversive activities, and the debate within the Justice Department in the early 1980s about efforts to restrict the Court's jurisdiction over cases involving school prayer, busing, and abortion. In the latter debate, internal Executive Branch documents, two of which were released publicly for the first

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Vermeule, *Political Constraints on Supreme Court Reform*, 90 MINN. L. REV. 1154 (2006) [hereinafter Vermeule, *Political Constraints*]. Without considering the 1937 debate, David Pozen has suggested that there is a convention against Court-packing. See David E. Pozen, *Self-Help and the Separation of Powers*, 124 YALE L.J. 2, 34, 69 (2014).

10. 74 U.S. (7 Wall.) 506 (1868).

11. 75 U.S. 85 (8 Wall.) (1868). For discussion of those debates, see *infra* Section III.A.

time to the authors of this Article, show that Chief Justice John Roberts, while working in the Justice Department, championed the traditional academic view that Congress has broad authority to engage in Court-stripping. Importantly, however, his argument failed to persuade then-Attorney General William French Smith, who sided with Theodore Olson, the head of the Office of Legal Counsel. This episode is unknown to most scholars writing on the subject.

The primary purpose of this Article is to unveil certain forms of constitutional and conventional arguments in high-stakes debates over judicial independence, not to determine the soundness of those arguments. It therefore does not opine on the ultimate constitutionality of Court-packing or Court-stripping. The materials described in this Article show, however, that for the actual participants in debates over Court-packing and Court-stripping, the constitutional questions have been perceived to be more serious, and more complex, than previous accounts have suggested.

The issues of judicial independence considered in this Article are of continuing importance. For example, while the Supreme Court in *Obergefell v. Hodges* was considering whether the Constitution protects same-sex marriage,<sup>12</sup> a member of Congress introduced a bill proposing to strip the federal courts, including the Supreme Court, of jurisdiction over marriage cases.<sup>13</sup> This proposal received little support, even though there were many critics of same-sex marriage in Congress. Other commentators have usefully identified political safeguards that make it difficult to enact such legislation.<sup>14</sup> This Article helps explain why such Court-stripping proposals are likely to encounter not only political opposition, but also constitutional and conventional objections. More recently, historical practice, not constitutional text or original meaning, dominated the debate in the wake of Justice Scalia's death over when and how the Senate is obliged to respond to a presidential nomination to fill a Supreme Court vacancy.<sup>15</sup>

Part I briefly explains both the historical gloss approach and the concept of constitutional conventions. Parts II and III show how gloss and conventions were invoked in prominent debates over Court-packing and Court-stripping. Part IV reflects on the implications of historical gloss and conventions for the judicial separation of powers more generally.

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12. 135 S. Ct. 2584 (2015).

13. See *Restrain the Judges on Marriage Act of 2015*, H.R. 1968, 114th Cong. (2015) (introduced by Rep. Steve King).

14. See, e.g., Tara Leigh Grove, *The Structural Safeguards of Federal Jurisdiction*, 124 HARV. L. REV. 869 (2011); Vermeule, *Political Constraints*, *supra* note 9.

15. See Curtis Bradley & Neil Siegel, *Constitutional Conventions, the Judicial Separation of Powers, and Justice Scalia's Replacement*, BALKINIZATION (Feb. 14, 2016), <http://balkin.blogspot.com.br/2016/02/constitutional-conventions-judicial.html> [<https://perma.cc/9EQR-PTXD>]; see also Robin Bradley Kar & Jason Mazzone, Essay, *The Garland Affair: What History and the Constitution Really Say About President Obama's Powers to Appoint a Replacement for Justice Scalia*, 91 N.Y.U. L. REV. ONLINE 53, 105 (2016) ("Virtually everyone who has weighed in on the process for filling the seat left vacant by Justice Scalia's death considers historical practice relevant . . .").



## I. HISTORICAL PRACTICE AND CONSTITUTIONAL CONVENTIONS

## A. THE HISTORICAL GLOSS APPROACH

When analyzing the distribution of constitutional authority between Congress and the President, both courts and political actors often give weight to longstanding practices of the government.<sup>16</sup> Giving weight to such practices is sometimes referred to as the “historical gloss” approach to constitutional interpretation, based on Justice Frankfurter’s discussion of the concept in his concurrence in the *Youngstown* steel seizure case. Justice Frankfurter observed that “[i]t is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them.”<sup>17</sup> Applying this observation to the assessment of executive authority, he contended that “a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, . . . may be treated as a gloss on ‘executive Power’ vested in the President by § 1 of Art. II.”<sup>18</sup>

Although the Supreme Court has invoked historical practice in a number of separation of powers decisions, it recently gave an especially strong endorsement to practice in construing the scope of the President’s recess appointments authority in *NLRB v. Noel Canning*.<sup>19</sup> In part because “the interpretive questions before us concern the allocation of power between two elected branches of Government,” the Court wrote that it would “put significant weight upon historical practice.”<sup>20</sup> The Court also made clear that practice is “an important interpretive factor even when the nature or longevity of that practice is subject to dispute, and even when that practice began after the founding era.”<sup>21</sup>

Reliance on historical practice is even more common in legal reasoning within the Executive Branch than it is in the courts, especially regarding separation of powers issues for which there is little judicial precedent. This is true, for instance, in the area of foreign affairs. To take one prominent and fairly recent example, in 2011 the Justice Department’s Office of Legal Counsel (OLC) gave significant weight to historical practice in concluding that President Obama had the constitutional authority to use military force in Libya without first seeking congressional authorization.<sup>22</sup> Citing past instances involving presidential uses of force, OLC contended that “[t]his historical practice is an

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16. See generally Bradley & Morrison, *supra* note 1, at 417–24.

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

18. *Id.* at 610–11.

19. 134 S. Ct. 2550 (2014); see also Curtis A. Bradley & Neil S. Siegel, *After Recess: Historical Practice, Textual Ambiguity, and Constitutional Adverse Possession*, 2014 SUP. CT. REV. 1 (analyzing the Court’s uses of historical practice in *Noel Canning*).

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

21. *Id.* at 2560.

22. See Memorandum from Caroline D. Krass to the Attorney Gen. 7 (Apr. 1, 2011), <http://www.justice.gov/sites/default/files/olc/opinions/2011/04/31/authority-military-use-in-libya.pdf> [<https://perma.cc/ZV7E-SYJG>].

important indication of constitutional meaning, because it reflects the two political branches' practical understanding, developed since the founding of the Republic, of their respective roles and responsibilities with respect to national defense."<sup>23</sup>

Although courts and government officials commonly employ the historical gloss approach in the separation of powers area, the contours of the approach are not fully defined.<sup>24</sup> There is no precise metric for knowing what constitutes qualifying practice or how long it must be followed in order to be credited. Moreover, as with all efforts to apply custom to determine legal rules, there are inevitably questions about the proper level of generality at which to describe the past practice. Furthermore, although formulations of gloss in congressional-executive conflicts often purport to require some degree of acquiescence in the actions of the other branch by the branch or house of Congress whose prerogatives are implicated by the practice, it is not clear what constitutes sufficient acquiescence.<sup>25</sup> Actual applications of gloss, including in *Noel Canning*, have not tended to be as demanding as Justice Frankfurter's formulation, especially his reference to practice "never before questioned."<sup>26</sup>

Nor is it always clear how the historical gloss approach fits with other approaches to constitutional interpretation. There is tension between this approach and strict versions of originalism, because the gloss approach hypothesizes that constitutional meaning can be established by practice long after the Founding. The tension is even greater if one accepts that constitutional meaning can change over time as a result of gloss. To be sure, some originalists accept the idea that practice can "liquidate" the meaning of ambiguous constitutional text.<sup>27</sup> The relationship between the historical gloss approach and the concept of liquidation is uncertain because little has been written about liquidation. Depending on how it is defined, liquidation may differ from gloss to the extent that it primarily emphasizes early practice, disallows room for constitutional change after some initial instance of liquidation, or imposes more demanding requirements than gloss before a liquidation can be reopened and reliquidated.<sup>28</sup>

Less strict versions of originalism appear more amenable to gloss. For example, variants of "new originalism," which emphasize the idea of "constitu-

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23. *Id.*

24. See Bradley & Morrison, *supra* note 1, at 424 (noting various uncertainties surrounding the gloss approach).

25. See *id.* at 432–38; see also Curtis A. Bradley, *Doing Gloss*, 84 U. CHI. L. REV. (forthcoming 2016) (noting that the extent to which a showing of institutional acquiescence should be required depends on the justification for relying on historical gloss); Shalev Roisman, *Constitutional Acquiescence*, 84 GEO. WASH. L. REV. 668 (2016) (arguing that a strong showing of institutional acquiescence should be required before crediting gloss).

26. See Bradley & Siegel, *supra* note 19, at 21.

27. See Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 525–53 (2003).

28. For preliminary thoughts on potential differences between gloss and liquidation, see Bradley & Siegel, *supra* note 19, at 29–41.



tional construction” as an enterprise distinct from constitutional interpretation, seem to allow a role for post-Founding practice in informing such construction.<sup>29</sup> Similarly, Jack Balkin’s theory of “framework originalism”—which views the Constitution as providing “an initial framework for governance that sets politics in motion”—is compatible with relying on historic governmental practice to build upon the framework.<sup>30</sup>

Whatever the compatibility of historical gloss with various forms of originalism, the gloss approach is more naturally aligned with nonoriginalist approaches. It overlaps with Burkean and common law approaches to constitutional interpretation, because it both credits the past and allows room for incremental change.<sup>31</sup> Gloss also overlaps with theories that would give weight to “non-judicial precedent”<sup>32</sup> or particular governmental “showdowns,”<sup>33</sup> although gloss is focused more on the long-term accretion of practice than on specific decisions or events. In addition, gloss bears some resemblance to popular constitutionalism, although gloss focuses on governmental practices rather than on broader social movements or the evolving traditions of the American people. More generally, gloss is consistent with an increased emphasis in constitutional theory in recent years on the idea of constitutional law outside the courts.<sup>34</sup>

The relationship of historical gloss to the constitutional text, like its relationship to constitutional theory, is also somewhat unclear. Often, gloss (as its name suggests) is invoked to help clarify purportedly ambiguous text, such as the Recess Appointments Clause in *Noel Canning*.<sup>35</sup> Under Justice Frankfurter’s formulation from *Youngstown*, gloss would help give content to the more general “executive Power” vested in the President by Article II, Section 1, of the Constitution.<sup>36</sup> Similarly, as discussed in Part II, the historical practice of Congress regarding changes to the size of the Supreme Court can be thought of as a gloss on the meaning of the word “proper” in the Necessary and Proper

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29. See, e.g., KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING* (1999).

30. JACK M. BALKIN, *LIVING ORIGINALISM* 3 (2011).

31. Cf. David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 892–94 (1996).

32. See, e.g., Michael J. Gerhardt, *Non-Judicial Precedent*, 61 VAND. L. REV. 713 (2008).

33. See generally Eric A. Posner & Adrian Vermeule, *Constitutional Showdowns*, 156 U. PA. L. REV. 991 (2008).

34. See, e.g., LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999); Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373 (2007).

35. See *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2559 (2014) (“[I]n interpreting the Clause, we put significant weight upon historical practice.”).

36. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring). For debate about whether the Vesting Clause was originally understood to confer authority on the President beyond the powers otherwise specified in Article II, compare Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231 (2001) (yes), with Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545 (2004) (no).

Clause of Article I, Section 8, of the Constitution, which is the principal (although under-determinate) textual source of Congress's power to set the size of the Court. In addition, as discussed in Part III, the historical practice of Congress regarding the appellate jurisdiction of the Supreme Court can be thought of as a gloss on the meaning of the Exceptions Clause of Article III, Section 2.

In other instances, however, gloss is invoked to fill in perceived gaps in the constitutional text, which is distinct from the idea of glossing the text. For example, although the text specifies the process by which the United States can join treaties—by obtaining presidential approval with two-thirds senatorial advice and consent<sup>37</sup>—it does not specify the process by which the United States can terminate its treaty commitments, and the Executive Branch has invoked historical practice in support of the proposition that the President has a unilateral power of termination.<sup>38</sup> Similarly, the President's power to recognize foreign sovereigns, addressed in *Zivotofsky v. Kerry*, is not referenced in the constitutional text.<sup>39</sup> As Justice Frankfurter explained in *Youngstown*, although “[d]eeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation,” they can “give meaning to the words of a text *or supply them*.”<sup>40</sup>

To be sure, constitutional interpreters still often invoke provisions of the constitutional text in these gap-filling contexts, so it is not clear to what extent historical practice is operating independently of the text. Michael Dorf has argued that the existence of a written Constitution in the United States makes it difficult to formulate freestanding claims based on historical practice. “Because of the widespread but mistaken belief that the Constitution alone grounds legal authority,” he contends, “political actors feel the need to search for a constitutional hook for arguments that customary rules should be obeyed,” which has “lamentable consequences” in part because “for some customary rules, there is no readily available hook, and as a consequence, political actors may be tempted to violate them.”<sup>41</sup>

Although there is substantial truth to Dorf's observation, it may be overstated because it tends to conflate the Constitution with the constitutional text. As this Article shows in discussing both Court-packing and Court-stripping, practice-based claims can be linked to potentially persuasive claims about the requirements of the constitutional structure, as opposed to specific text. Moreover,

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37. See U.S. CONST. art. II, § 2.

38. See generally Curtis A. Bradley, *Treaty Termination and Historical Gloss*, 92 TEX. L. REV. 773 (2014) (discussing how presidents have, in the absence of judicial review, incrementally expanded executive power to terminate treaties unilaterally).

39. 135 S. Ct. 2076, 2084 (2015) (“Despite the importance of the recognition power in foreign relations, the Constitution does not use the term ‘recognition,’ either in Article II or elsewhere.”).

40. *Youngstown*, 343 U.S. at 610 (1952) (Frankfurter, J., concurring) (emphasis added).

41. Michael C. Dorf, *How the Written Constitution Crowds Out the Extraconstitutional Rule of Recognition*, in THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION 69, 75 (Matthew D. Adler & Kenneth Einar Himma eds. 2009).

some well-established exercises of governmental authority, generally thought today to be constitutional, seem in tension with the text—for example, the Senate’s practice of giving only consent, not advice, on treaties;<sup>42</sup> the frequent conclusion by Presidents of “executive agreements” in lieu of Article II treaties;<sup>43</sup> and Congress’s assignment of adjudicatory authority to administrative law judges and other personnel who lack the tenure and salary protections mandated by Article III.<sup>44</sup> Furthermore, one should not assume that the perceived clarity or ambiguity of the text is unaffected by other modalities of constitutional interpretation, including gloss.<sup>45</sup>

#### B. CONSTITUTIONAL CONVENTIONS

Historical gloss, which has the authority of constitutional law, is not the only way in which historical practice might enable or constrain exercises of governmental authority. Instead of creating binding legal norms, such practice might generate what British (and more broadly, Commonwealth) legal and political theorists have termed “constitutional conventions,” which are “maxims, beliefs, and principles that guide officials in how they exercise political discretion.”<sup>46</sup> As Keith Whittington has observed, to act contrary to a convention “is to violate the spirit of the constitution, even if it does not violate any particular rule.”<sup>47</sup>

Britain has an unwritten constitution, and British commentators—most famously, Albert Venn Dicey during the late nineteenth century—have distinguished between constitutional law and constitutional conventions on the basis of judicial enforceability.<sup>48</sup> As Dicey explained, British constitutional law includes only judicially enforceable rules, while constitutional conventions “consist of conventions, understandings, habits, or practices which, . . . regulate the conduct of the several members of the sovereign power, . . . [but] are not in reality laws at all since they are not enforced by the Courts.”<sup>49</sup> Importantly,

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42. See CURTIS A. BRADLEY, *INTERNATIONAL LAW IN THE U.S. LEGAL SYSTEM* 33 (2d ed. 2015).

43. See, e.g., Peter J. Spiro, *Treaties, Executive Agreements, and Constitutional Method*, 79 *TEX. L. REV.* 961 (2001).

44. See, e.g., Paul M. Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 *IND. L.J.* 233, 234 (1990) (“Congress may leave the initial adjudication of some or all of [A]rticle III’s list of cases to the state courts, but if federal adjudication is felt to be needed, the requirements of [A]rticle III automatically come into play and specify what sorts of courts Congress must employ for federal adjudication.”). But see James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 *HARV. L. REV.* 643, 651 (2004) (contending that “tribunals” created by Congress under Article I need not be staffed by life-tenured judges because “Article III does not formally invest these tribunals with the judicial power of the United States,” but that they “must remain inferior to the Supreme Court and the judicial department”).

45. For an argument that the perceived ambiguity or clarity of the constitutional text is partially constructed, in part by historical practice, see Curtis A. Bradley & Neil S. Siegel, *Constructed Constraint and the Constitutional Text*, 64 *DUKE L.J.* 1213 (2015).

46. Whittington, *supra* note 4, at 1860.

47. *Id.* at 1852.

48. See A. V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* chs. 14–15 (London, MacMillan & Co. 3d ed. 1889).

49. *Id.* at 24.

Dicey viewed conventions as obligatory, even though not judicially enforceable. A convention specifies how discretionary governmental power “ought to be exercised,” Dicey wrote, although the obligation it imposes has political and moral status rather than legal status.<sup>50</sup> Under this account, violating a constitutional convention is considered a breach of “constitutional morality.”<sup>51</sup> That is, the violation constitutes not simply bad policy, but a deviation from norms of good institutional citizenship that help sustain the constitutional system.

At times, theorists have considered the extent to which the concept of constitutional conventions applies to constitutional practice in the United States. In 1925, for example, Herbert Horwill, a scholar at Oxford University, published a study entitled *The Usages of the American Constitution*.<sup>52</sup> Invoking Dicey, Horwill explained that, although conventions are considered part of the British Constitution, they “are not laws at all but mere usages.”<sup>53</sup> Like Dicey before him, Horwill observed that the United States, like Great Britain, had various “customs, practices, maxims and precepts which are not enforced by the courts, and which thus correspond to the English [constitutional conventions].”<sup>54</sup> As an example, Horwill pointed to “the understanding that Presidential Electors shall not cast their votes according to their independent judgment but shall do no more than formally ratify the results of a previous popular vote.”<sup>55</sup>

Although the distinction between constitutional law and constitutional conventions offers a useful way of thinking about certain practice-based norms relating to the operations of the U.S. government, translating the concept to U.S. constitutional law requires care. Most notably, the sharp distinction that Dicey drew between law and judicially unenforceable norms of governmental practice is problematic in the United States for at least two reasons.<sup>56</sup> First, the political question and other nonjusticiability doctrines presuppose that certain questions

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50. *Id.* at 346.

51. *Id.*

52. HERBERT W. HORWILL, *THE USAGES OF THE AMERICAN CONSTITUTION* (1925); see also Pozen, *supra* note 9, at 29–39 (discussing the concept of constitutional conventions and considering their relevance to U.S. separation of powers).

53. HORWILL, *supra* note 52, at 5.

54. *Id.* at 7.

55. *Id.* This convention came under pressure in the wake of the November 2016 presidential election. See, e.g., Kyle Cheney, *Democratic Presidential Electors Revolt Against Trump: The Electoral College Could See a Historic Number of “Faithless” Electors*, POLITICO (Nov. 22, 2016), <http://www.politico.com/story/2016/11/democrats-electoral-college-faithless-trump-231731> [<https://perma.cc/L7WU-RULM>].

56. Dicey developed his account against the background of an Austinian conception of law, which views formal sanctions as a crucial element of law. This conception has been disputed by modern legal theorists, most notably H.L.A. Hart, who instead have defined law in terms of an internalized sense of obligation. See H.L.A. HART, *THE CONCEPT OF LAW* ch. 3 (1961). But see FREDERICK SCHAUER, *THE FORCE OF LAW*, at ix (2015) (questioning “whether force and coercion are as irrelevant to explaining the nature of law as perhaps Hart and certainly his legions of followers have assumed”). In part due to Hart’s influence, some modern Commonwealth theorists reject the sharp distinction that Dicey drew between law and conventions. See, e.g., SIR IVOR JENNINGS, *THE LAW AND THE CONSTITUTION* 74 (5th ed. 1959);

of constitutional law will be resolved outside the courts,<sup>57</sup> and modern academic writings on popular constitutionalism readily accept that constitutional law extends beyond what courts do.<sup>58</sup> As a result, the mere fact that practice-based norms of governmental conduct might not be judicially enforceable would not, in the United States, automatically cause them to fall outside the domain of constitutional law. Second, as illustrated by decisions like *Noel Canning*, some practice-based norms of governmental conduct *are* judicially enforceable in the United States.<sup>59</sup>

In order to better accord with jurisprudential understandings of U.S. law, it is useful to distinguish between practice-based norms that have legal status (in which case they would constitute historical gloss) and those that do not (in which case they would constitute constitutional conventions), regardless of whether they are subject to judicial review.<sup>60</sup> Such a distinction might rest on either empirical or normative grounds.<sup>61</sup> Under an empirical approach, what would make a practice-based norm nonlegal would be an understanding by members of the relevant interpretive community that breach of the norm was not a violation of the law—even though they understood breach to be improper. A possible example was the norm, prior to the adoption of the Twenty-Second Amendment in 1951, against presidents serving more than two terms. The constitutional text did not limit the number of presidential terms, but George Washington stepped down after two, and it was generally thought thereafter that it would be improper to deviate from his example.<sup>62</sup> This norm does not appear, however, to have been viewed as binding constitutional law: a number of

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GEOFFREY MARSHALL, CONSTITUTIONAL CONVENTIONS: THE RULES AND FORMS OF POLITICAL ACCOUNTABILITY 12–13 (1984).

57. See ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 184 (2d ed. 1986); see also *Vieth v. Jubelirer*, 541 U.S. 267, 292 (2004) (plurality opinion) (“The issue . . . is not whether severe partisan gerrymanders violate the Constitution, but whether it is for the courts to say when a violation has occurred, and to design a remedy.”). The political question doctrine can be thought of as a strong form of respect for practice—that is, allowing the relations between the branches to be worked out by practice rather than judicial decision. See Bradley & Morrison, *supra* note 1, at 430.

58. See *supra* note 34.

59. See *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2559 (2014); see also Bradley & Siegel, *supra* note 19 (discussing the Court’s reliance on historical practice in *Noel Canning*).

60. Although he does not consider the concept of historical gloss in detail, Adrian Vermeule has suggested that, because gloss involves governmental practices that have obligatory status, it should simply be considered a species of constitutional conventions. See Adrian Vermeule, *Conventions in Court*, 38 DUBLIN UNIV. L.J. 283, 284 (2015). Lumping gloss with conventions, however, obscures how the nature of the obligation associated with gloss is specifically legal in character, whereas this need not be true of conventions. See *id.* at 288 (describing conventions as resting on “precepts of political morality”).

61. By analogy, some rights determinations—such as whether imposing capital punishment contravenes evolving standards of decency, or whether an asserted liberty right is fundamental—may turn on empirical or normative considerations, or both. For a discussion, see PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 1525–27 (6th ed. 2015).

62. See JAMES ALBERT WOODBURN, THE AMERICAN REPUBLIC AND ITS GOVERNMENT 115 (2d ed. 1916) (“[I]t may now be said to be a part of the unwritten constitution that no President is eligible to a third

presidents considered running for a third term, and Franklin Roosevelt did so (and successfully ran for a fourth term).<sup>63</sup>

In addition to an empirical analysis, there might be normative bases for assigning legal status to a practice-based norm, stemming from constitutional or political theory. As Whittington notes in discussing the circumstances under which a certain practice should be deemed obligatory (although not necessarily legally binding), someone might conclude that a practice should be treated as obligatory, “even if political participants do not themselves recognize it,” because assigning the practice this status “would be useful in better effectuating constitutional goals.”<sup>64</sup> The same observation potentially applies in determining whether a practice-based norm has legal status.

Although the idea of conventions may be less familiar to students of the American constitutional system than to students of Commonwealth legal systems, a potential value of the conventions category in the U.S. system is that it allows some understandings relating to the separation of powers to have normative force without carrying the same limits on flexibility and defeasibility that might be associated with categorizing them as law. Relatedly, the conventions category could operate as a “way station” for some norms between the purely political realm and the legal realm, so that participants in constitutional practice have an opportunity to apply the norm over an extended period of time before deciding whether to accord it legal significance.<sup>65</sup> Nevertheless, as Parts II and III will show, it can be difficult to distinguish between conventions, which are viewed as obligatory only for nonlegal reasons, and historical gloss, which is viewed as obligatory at least partly for legal reasons. There may also be differing understandings of that question regarding the same practice, both at a given point in time and over time. This uncertainty is especially likely to exist absent judicial review, because there is often less need to be precise about the issue of legal status when practice-based norms are discussed and enforced outside the courts.<sup>66</sup>

### C. CONCLUSION

As noted above, scholarship in the United States on both historical gloss and constitutional conventions has generally focused on the relationship between

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term.”) *But see* HORWILL, *supra* note 52, at 99 (“The usage, if usage it be, is not so firmly established as absolutely to deter an ambitious man from making the venture.”).

63. Presidents and their supporters contemplated the possibility of a third term on a number of occasions prior to Roosevelt. *See* MICHAEL J. KORZI, PRESIDENTIAL TERM LIMITS IN AMERICAN HISTORY: POWER, PRINCIPLES & POLITICS 43–78 (2011); Bruce G. Peabody & Scott E. Gant, *The Twice and Future President: Constitutional Interstices and the Twenty-Second Amendment*, 83 MINN. L. REV. 565, 579–84 (1999).

64. Whittington, *supra* note 4, at 1853.

65. For an examination of how certain forms of federalism reasoning can act as a way station between political and legal understandings of individual rights claims, see Neil S. Siegel, *Federalism as a Way Station: Windsor as Exemplar of Doctrine in Motion*, 6 J. LEGAL ANALYSIS 87 (2014).

66. As discussed in Part IV, however, Executive Branch lawyers may need to be precise about the question of legal status when they are assessing the legality of proposed conduct.



Congress and the executive branch. The federal judiciary, however, is also an important part of the separation of powers framework, and there is no inherent reason why gloss and conventions would not be relevant in assessing issues relating to the independence and authority of the federal courts—that is, to the judicial separation of powers. The next two parts—on Court-packing and Court-stripping—illustrate how government officials and respected witnesses in congressional hearings have consulted historical practice to reason through difficult normative questions relating to the judicial separation of powers. The Article focuses on those two examples in part because they each involve well-known challenges to judicial independence, regarding which there is extensive historical practice. But the Article also focuses on them because efforts to pack the Court or strip its appellate jurisdiction have arisen during periods of intense political controversy—contexts in which it might seem unlikely that one would find serious, sustained argumentation about normative constraints imposed by either the Constitution or conventions. The history suggests otherwise.

## II. HISTORICAL PRACTICE AND COURT-PACKING

### A. TEXT AND HISTORY

Consider a 2007 op-ed in *The New York Times* written by the prominent biographer Jean Edward Smith.<sup>67</sup> Expressing concern about the Roberts Court’s “manifestly ideological agenda,” Smith noted that “there is nothing sacrosanct about having nine [J]ustices on the Supreme Court,” and that “[i]t requires only a majority vote in both houses to add a [J]justice or two.”<sup>68</sup> Smith further observed that, throughout history, “the method most frequently employed to bring the [C]ourt to heel has been increasing or decreasing its membership.”<sup>69</sup> Yet the most recent example he could give of a change in the size of the Court was from the 1860s. He also mentioned Franklin Roosevelt’s 1937 Court-packing proposal, which would have allowed one Justice to be added to the Court, up to a total membership of fifteen, for each Justice over the age of seventy who had served at least ten years and who did not retire within six months of his seventieth birthday.<sup>70</sup> But that proposal encountered substantial opposition, including within FDR’s own political party, and was never adopted.

In evaluating arguments like Smith’s, it is worth reflecting on the materials

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67. Jean Edward Smith, Opinion, *Stacking the Court*, N.Y. TIMES (July 26, 2007), [http://www.nytimes.com/2007/07/26/opinion/26smith.html?\\_r=0](http://www.nytimes.com/2007/07/26/opinion/26smith.html?_r=0) [<https://perma.cc/X2VH-YA4N>]; see also Ian Millhiser, *In Defense of Court-Packing*, SLATE (Feb. 23, 2015), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2015/02/fdr\\_court\\_packing\\_plan\\_obama\\_and\\_roosevelt\\_s\\_supreme\\_court\\_standoffs.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2015/02/fdr_court_packing_plan_obama_and_roosevelt_s_supreme_court_standoffs.html) [<https://perma.cc/64V4-2ZKB>] (contending that the Roberts Court has been “arbitrarily ignoring both the text of the law and their own previous decisions in service of a political agenda” and opining that “[a] future president, . . . could confront a dilemma that no president has faced since Roosevelt”).

68. Smith, *supra* note 67.

69. *Id.*

70. See *id.*; see also PRESIDENT OF THE UNITED STATES, RECOMMENDATION TO REORGANIZE JUDICIAL BRANCH, H.R. Doc. No. 75-142 (1937).

that one should consider to assess the constitutionality of a plan to pack the Court. Almost everyone would agree that the constitutional text should be consulted. There is little in the text, however, that is directly on point. Article III specifies the existence of “one supreme Court” and provides that “[t]he Judges” on the Court “shall hold their Offices during good Behaviour,”<sup>71</sup> which perhaps implies that the Court must consist of more than one Justice. Article III also describes the scope of the Court’s original jurisdiction and states that in all other cases the Court shall have appellate jurisdiction “with such Exceptions, and under such Regulations as the Congress shall make,”<sup>72</sup> thus giving Congress some control over the cases that the Court can or must hear but not necessarily the size of the Court. Article II provides that presidents shall nominate federal judges and appoint them with the advice and consent of the Senate,<sup>73</sup> which does not appear to speak to the permissibility of Court-packing. Likewise, Article I includes among Congress’s Section 8 powers the authority “[t]o constitute Tribunals inferior to the supreme Court,”<sup>74</sup> but it does not mention any power concerning the composition of the Court.

To be sure, Article I, Section 8, also gives Congress the power “[t]o make all Laws which shall be necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution in the Government of the United States,”<sup>75</sup> including the Judicial Branch. This clause provides textual support for congressional authority to set the size of the Court by statute. But the Necessary and Proper Clause does not identify when, if ever, the exercise of this authority would exceed what is “necessary and proper.”

As noted in Part I, where the constitutional text is not perceived to speak clearly and comprehensively to a question, many interpreters would turn to historical practice, especially on issues relating to the separation of powers.<sup>76</sup> An examination of such practice regarding the issue of Court-packing would show, as Smith emphasized in his op-ed, that Congress has at times altered the size of the Court, and that it sometimes has done so in highly politicized circumstances. It would not show, however, that Congress has engaged in Court-packing akin to what FDR attempted in 1937—that is, altering the size of the Court as a result of disagreement with Supreme Court decisions. Moreover, although the practice might show that Congress sometimes altered the size of the Court in order to affect its general decision making going forward, even that practice is now a century and a half old.

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71. U.S. CONST. art. III, § 1.

72. *Id.* art. III, § 2, cl. 2.

73. *Id.* art. II, § 2, cl. 2.

74. *Id.* art. I, § 8, cl. 9.

75. *Id.* art. I, § 8, cl. 18.

76. Some interpreters would also make originalist inquiries. This Article does not because its concerns lie elsewhere and because it is unlikely that the original meaning of the Constitution, even if knowable, would settle the permissibility of a plan to pack the Court.

In the Judiciary Act of 1789, Congress provided that the Court would have six Justices.<sup>77</sup> This number was related to the circuit court system established by the Act: In addition to creating thirteen district courts, the Act created three judicial circuits, and it directed that these circuits were to hold two sessions per year and would be staffed by two Supreme Court Justices and one district court judge.<sup>78</sup> (To reduce the burden of circuit-riding, Congress changed the law in 1793 to require that only one Supreme Court Justice would have to sit with a district court judge in a given circuit session, which meant that each Justice would have to ride circuit only once per year.<sup>79</sup>) Except for a brief interruption in 1801, discussed immediately below, the close connection between the size of the Court and the structure of the circuit court system persisted until 1869, which is also the last time that Congress altered the size of the Court.<sup>80</sup>

In 1801, the lame-duck Federalist Congress directed that upon the next vacancy on the Court, its size would be reduced to five, apparently to deny incoming President Thomas Jefferson an appointment.<sup>81</sup> Congress also provided in that statute for separate staffing of the circuit courts.<sup>82</sup> The incoming Democratic-Republican Congress, however, quickly restored the number to six (before there was a vacancy) and reestablished the connection between the size of the Court and the circuit court system.<sup>83</sup> In 1807, Congress established a seventh judicial circuit consisting of the new states Ohio, Kentucky, and Tennessee, and, as contemplated by the statutory scheme, increased the size of the Court to seven, giving Jefferson another appointment.<sup>84</sup>

In 1837, when the Democrats finally controlled both political branches, Congress reorganized the judiciary, creating nine judicial circuits and increasing the size of the Court to nine.<sup>85</sup> Because a majority of the resulting circuits were composed entirely of slave states, and because of the convention of having one Justice reside in each circuit, those changes had the effect of ensuring that a majority of Justices resided in slave states, a pattern that continued throughout the rest of the antebellum period.<sup>86</sup>

During the Civil War, a Republican Congress added another judicial circuit to accommodate the admission of California into the Union and increased the number of Justices to ten,<sup>87</sup> giving Republican President Abraham Lincoln

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77. Judiciary Act of 1789, ch. 20, § 1, 1 Stat. 73, 73.

78. *Id.* § 4.

79. *See* Act of Mar. 2, 1793, ch. 22, § 1, 1 Stat. 333.

80. *See* JOHN V. ORTH, HOW MANY JUDGES DOES IT TAKE TO MAKE A SUPREME COURT? 5 (2006).

81. *See* Act of Feb. 13, 1801, ch. 4, § 3, 2 Stat. 89, 89.

82. *Id.* § 7.

83. *See* Act of Mar. 8, 1802, ch. 8, 2 Stat. 132.

84. Act of Feb. 24, 1807, ch. 16, 2 Stat. 420; *see also* FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM 34 (1927).

85. *See* Act of Mar. 3, 1837, ch. 34, 5 Stat. 176.

86. 1 HOWARD GILLMAN, MARK A. GRABER & KEITH E. WHITTINGTON, AMERICAN CONSTITUTIONALISM, STRUCTURES OF GOVERNMENT 195 (2013).

87. Act of Mar. 3, 1863, ch. 100, 12 Stat. 794.

another appointment.<sup>88</sup> After Lincoln was assassinated and Andrew Johnson became President, Congress decreased the size of the Court to seven, arguably in an effort to block Johnson, a Democrat who sympathized with the South, from making appointments.<sup>89</sup> Relations between Congress and Johnson were so fraught that the House of Representatives subsequently impeached Johnson, although he was not convicted in the Senate. After Ulysses Grant was elected, Congress passed the 1869 Judiciary Act, which increased the number of Justices back to nine (which matched the number of circuits at that time), a number that has since remained unchanged.<sup>90</sup>

This last change in the size of the Court, along with Justice Grier's subsequent retirement, gave Grant two new appointments. It is sometimes said that Grant used those appointments to "pack" the Court because, after the appointments, the Court reversed a controversial decision that Grant opposed. In *Hepburn v. Griswold*, the Court had held that the national government was powerless to issue paper money.<sup>91</sup> A year later, after Grant made the new appointments, the Court overruled *Hepburn*.<sup>92</sup> Importantly, the 1869 Judiciary Act had been enacted prior to the *Hepburn* decision and Congress did not appear to have had that case specifically in mind. Thus, regardless of the extent to which Grant himself selected Justices for the purpose of overturning *Hepburn*, a matter of some controversy,<sup>93</sup> no previous *statute* accomplished what FDR sought to accomplish with his 1937 Court-packing plan.

Even if Congress has never engaged in Court-packing *per se*, the various changes in the size of the Court, some of which appeared politically motivated, might suggest that Congress has extensive authority to alter the size of the Court not only for considerations relating to judicial efficiency and workload, but also

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88. The effect of this change was to ensure that, at the end of the Civil War, seven of the ten Justices resided in states that had abolished slavery long before the war. See GILLMAN ET AL., *supra* note 86, at 254.

89. The point has been disputed. Compare ORTH, *supra* note 80, at 6 (contending that the reduction was designed to deny Johnson appointments), with Charles Fairman, *Reconstruction and Reunion, 1864-1888: Part One*, in VI THE OLIVER WENDELL HOLMES DEVISE: A HISTORY OF THE SUPREME COURT OF THE UNITED STATES 1, 166-70 (Paul A. Freund ed., 1971) (documenting that Chief Justice Chase had proposed the reduction in an effort to persuade Congress to increase the Justices' salaries). Cf. GEYH, *supra* note 3, at 68-69 (concluding that "deliberation preceding adoption of the 1866 amendment to reduce the size of the Supreme Court from ten to seven was so truncated that no conclusive inferences can be drawn as to Congress's underlying motivations"). The actual number of Justices did not fall below eight before Congress restored the number of seats to nine in the 1869 Judiciary Act after Johnson had left office. See ORTH, *supra* note 80, at 7.

90. See Act of Apr. 10, 1869, ch. 22, 16 Stat. 44. For the current version, see 28 U.S.C. § 1 ("The Supreme Court of the United States shall consist of a Chief Justice of the United States and eight associate justices, any six of whom shall constitute a quorum.").

91. 75 U.S. (8 Wall.) 603, 604 (1869), overruled by *Knox v. Lee*, 79 U.S. (12 Wall.) 457 (1870).

92. See *Knox*, 79 U.S. (12 Wall.) 457.

93. See Barry Friedman, *The History of the Counter-majoritarian Difficulty, Part II: Reconstruction's Political Court*, 91 GEO. L.J. 1, 43 (2002) (describing the controversy).

for the purpose of changing its ideological composition.<sup>94</sup> An initial question, however, is how broadly to understand the historical examples.<sup>95</sup> The past changes to the size of the Court each involved particular circumstances, motivations, and results, and it is not clear to what extent they should serve as precedent in other contexts. For example, as noted, Congress has never altered the Court's size because of disagreement with specific Court decisions.

Another question is whether some examples might actually constitute “negative non-judicial precedent” akin to infamous judicial decisions like *Plessy v. Ferguson*,<sup>96</sup> *Lochner v. New York*,<sup>97</sup> and *Korematsu v. United States*.<sup>98</sup> Historical practice, like judicial decisions, can sometimes create negative precedent—that is, precedent about what not to repeat rather than what is constitutionally permissible. Just as certain infamous judicial decisions have come to be regarded as “anticanonical,”<sup>99</sup> intrusions on the separation of powers—including intrusions on judicial authority—might come to stand for what should not be repeated.

There are also issues relating to the timing of the practice. For example, does relatively early practice settle or “liquidate” the meaning of the Constitution for all time, or is later practice also relevant?<sup>100</sup> And what should one make of the fact that Congress has not altered the size of the Court for almost 150 years, despite many protracted controversies about Supreme Court decisions, including *Brown v. Board of Education*<sup>101</sup> and *Roe v. Wade*?<sup>102</sup>

Finally, one would need to consider the precedential significance of FDR's failed Court-packing plan. Does the fact that it was seriously contemplated confirm Congress's authority to pack the Court? Or does the resounding defeat of the plan, notwithstanding FDR's broad national popularity and the Democratic Party's unprecedented degree of control of Congress, suggest the impermissibility of Court-packing?

The balance of this Part examines the debate over FDR's plan in light of the above historical and methodological questions. The objective is not to resolve

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94. See, e.g., WOODBURN, *supra* note 62, at 335 (“The reversal of the Supreme Court's decision in the legal-tender cases revealed the weak point in its organization. It is within the power of Congress and the President to ‘pack’ the Court, if they have a mind to do so. The number of the Court can be increased by act of Congress from nine to fifteen, or to any other convenient number.”).

95. Cf. Bradley & Morrison, *supra* note 1, at 424 (“Any practice- or precedent-based approach naturally must confront questions about how to specify the scope of the past practice or precedent.”).

96. 163 U.S. 537 (1896).

97. 198 U.S. 45 (1905).

98. 323 U.S. 214 (1944); see, e.g., Richard A. Primus, *Canon, Anti-Canon, and Judicial Dissent*, 48 DUKE L.J. 243, 245 (1998); Deborah A. Widiss, Note, *Re-Viewing History: The Use of the Past as Negative Precedent in United States v. Virginia*, 108 YALE L.J. 237, 238 (1998).

99. See, e.g., Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379 (2011).

100. See, e.g., *Stuart v. Laird*, 5 U.S. (1 Cranch) 299, 309 (1803) (“[P]ractice and acquiescence under it for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction.”). On potential differences between liquidation and gloss, see Bradley & Siegel, *supra* note 19, at 29–41.

101. 347 U.S. 483 (1954).

102. 410 U.S. 113 (1973).

the constitutionality of Court-packing but to better understand the nature of the arguments that were made in 1937 and how they fit within the landscape of U.S. constitutional law.

#### B. THE DEBATE OVER FDR'S PLAN

FDR's Court-packing plan was both defended and criticized based upon assessments of historical practice. Within the executive branch, it was thought that, of the possible approaches to addressing the Court's resistance to the New Deal (including Court-stripping, which was rejected as too constitutionally problematic), Court-packing was "the only [option] which is certainly constitutional" because "Congress has on numerous occasions changed the membership of the Court."<sup>103</sup> Similarly, in what was probably the most able defense of the plan, Robert Jackson—the Assistant Attorney General at the time—reasoned that "[I]n legislation creating or abolishing vacancies in the Court is authorized by the Constitution and validated by historical practice as a method of bringing the elective and nonelective branches of the Government back into a proper coordination."<sup>104</sup> Jackson discussed "six instances" in which Congress had exercised this authority, and he concluded that "[w]hen immediate and effective action has been necessary, the method which the President now proposes has been used throughout our constitutional history."<sup>105</sup>

By contrast, in recommending rejection of the plan, the Senate Judiciary Committee, in its long-awaited and widely circulated report,<sup>106</sup> characterized the plan as "an invasion of judicial power such as has never before been attempted in this country," and argued that no historical example cited in support of the proposal was in fact supportive.<sup>107</sup> The closest example, the Committee reasoned, was the 1866 law passed by the Reconstruction Congress disallowing new appointments to the Court until its membership had been reduced from ten to seven. "[W]hatever the motive," the Committee wrote, "a

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103. Memorandum from Warner W. Gardner, Dep't of Justice, to the Solicitor Gen. 55, 57 (Dec. 10, 1936) [hereinafter Gardner Memorandum] (on file with the authors).

104. *Reorganization of the Fed. Judiciary: Hearings Before the Comm. on the Judiciary*, 75th Cong. 40 (1937) [hereinafter *Hearings*].

105. *Id.* at 41; see also Stephen R. Alton, *Loyal Lieutenant, Able Advocate: The Role of Robert H. Jackson in Franklin D. Roosevelt's Battle with the Supreme Court*, 5 WM. & MARY BILL RTS. J. 527, 577 (1997) (noting that "Jackson's testimony before the Senate Judiciary Committee represented the most effective advocacy of the administration's position").

106. See William E. Leuchtenburg, Comment, *FDR's Court-Packing Plan: A Second Life, a Second Death*, 1985 DUKE L.J. 673, 675–76 ("The Government Printing Office soon found that it had a runaway best seller. Thirty thousand pamphlets were sold to the public in less than a month while Congressmen gobbled up another seventy thousand for free distribution.").

107. S. COMM. ON THE JUDICIARY, REORGANIZATION OF THE FEDERAL JUDICIARY, S. REP. NO. 75-711, at 11 (1937) [hereinafter SENATE REPORT]. In his Senate testimony, Professor Erwin Griswold similarly explained why the historical practice invoked in support of the Court-packing plan was distinguishable. See *Hearings*, *supra* note 104, at 761–64. Among other things, he contended that, in the prior instances, "it cannot be shown that the dominant purpose in increasing the size of the Court was ever the desire to influence or control the results of its decisions." *Id.* at 763.



reduction of members at the instance of the bitterest majority that ever held sway in Congress to prevent a President from influencing the Court is scarcely a precedent for the expansion of the Court now.”<sup>108</sup> The Committee thus deemed past examples distinguishable or negative precedent, as did other critics of the plan.<sup>109</sup>

The Committee also argued that, by relying so heavily on historical practice, the proponents of the Court-packing plan “show how important precedents are and prove that we should now refrain from any action that would seem to establish one which could be followed hereafter whenever a Congress and an executive should become dissatisfied with the decisions of the Supreme Court.”<sup>110</sup> In rejecting the plan, the Committee saw itself as “set[ting] a salutary precedent that will never be violated.”<sup>111</sup>

Notably, the Committee expressly lodged constitutional objections. It declared that the plan was “contrary to the spirit of the Constitution” and that “[u]nder the form of the Constitution it seeks to do that which is unconstitutional.”<sup>112</sup> The Committee expanded upon the “constitutional impropriety” of the bill by describing how the American constitutional system functions, and is supposed to function, in practice:

For the protection of the people, for the preservation of the rights of the individual, for the maintenance of the liberties of minorities, for maintaining the checks and balances of our dual system, the three branches of the Government were so constituted that the independent expression of honest difference of opinion could never be restrained in the people’s servants and no one branch could overawe or subjugate the others. That is the American system.<sup>113</sup>

“Constitutionally,” the Committee concluded, “the bill can have no sanction.”<sup>114</sup> It “is in violation of the organic law.”<sup>115</sup>

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108. SENATE REPORT, *supra* note 107, at 13.

109. *See, e.g., Hearings, supra* note 104, at 1016 (testimony of New York University Law School Dean Frank H. Sommer) (“Precedents are of bad and good repute. The repute of this [1866 example] is evil.”).

110. SENATE REPORT, *supra* note 107, at 14.

111. *Id.*

112. *Id.* at 9, 23. Others also arguably voiced constitutional concerns, although whether they understood themselves as making a legal argument is unclear. *See, e.g., Hearings, supra* note 104, at 767 (testimony of Erwin Griswold) (“Despite the assertion that the bill raises no constitutional problem, it is obvious that it presents the deepest sort of constitutional issue, an issue of a system of government. Our system would in fact be changed if this bill goes through.”).

113. SENATE REPORT, *supra* note 107, at 8.

114. *Id.* at 9.

115. *Id.*

## C. HISTORICAL GLOSS AND CONSTITUTIONAL STRUCTURE

As just shown, some criticisms of FDR's Court-packing plan were based directly on historical practice, and some objections to the plan were framed in constitutional terms, despite the lack of a textual hook in the Constitution. At times, as in the above quotation from the Senate Judiciary Committee, the constitutional claims involved appeals to the "spirit" of the Constitution.<sup>116</sup> Such appeals were also made by a number of prominent witnesses in the Senate hearings. For example, New York University Law School Dean Frank Sommer testified that packing the Court for the purpose of altering its decisions "while conforming to the letter, would violate the spirit of the Constitution."<sup>117</sup> Thus, while appeals to the spirit of the Constitution will sometimes reflect claims based on constitutional conventions, they will also sometimes involve appeals to constitutional law.

Michael Dorf views the need that participants in the 1937 debate felt to distinguish the Constitution's spirit from its form as evidence that the constitutional text crowds out the articulation of constitutional claims based on practice.<sup>118</sup> One can, however, also read the Judiciary Committee and some of the witnesses before it as invoking the constitutional structure, which would potentially operate as binding law.<sup>119</sup> Such a reading is especially plausible because, as flagged above, the Committee invoked structural concerns by emphasizing the proper functioning of the constitutional system. For example, one frequently expressed concern was that Court-packing would excessively compromise judicial independence and thereby undermine the constitutional system of checks and balances, as well as judicial protection of civil liberties.<sup>120</sup> To invoke the spirit of the Constitution or some other form of law is to invoke its purpose.<sup>121</sup>

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116. In its report, the Committee referred to the "spirit" of the Constitution numerous times. *Id.* at 3, 9, 15, 16.

117. *Hearings*, *supra* note 104, at 1011; *see also id.* at 1014 (contending that the Court-packing bill "violates the spirit of the Constitution"). Some witnesses, by contrast, argued that Court-packing would not contravene either the letter or the spirit of the Constitution. *See, e.g., id.* at 231 (testimony of Northwestern University Law School Dean Leon Green).

118. *See Dorf*, *supra* note 41, at 81.

119. *See, e.g., Hearings*, *supra* note 104, at 853 (contending that "the present proposal is contrary to the fundamental principle of the separation of powers"). A representative of the American Bar Association, in explaining the Association's opposition to Court-packing, similarly linked the "spirit" of the Constitution to the constitutional structure. *Id.* at 1461 (testimony of Sylvester C. Smith) ("It is not the mere letter of the Constitution which is important; it is the spirit of the Constitution. Its spirit essentially demands the division of the powers of government into three separate branches; that the judicial power be exercised wholly uninfluenced and uncontrolled by any other branch of the Government.").

120. *See SENATE REPORT*, *supra* note 107, at 8, 14–15, 19–23 (stressing the relationship between judicial independence and protection of individual rights); *see also* BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* 222 (2009) ("This evolving image of the Court as protector of civil liberties posed a serious challenge to Roosevelt's plan, and his administration struggled to deal with the issue.").

121. A famous, controversial example in the field of statutory interpretation is *Holy Trinity Church v. United States*, 143 U.S. 457, 459 (1892) ("It is a familiar rule that a thing may be within the letter of the

Accordingly, to invoke the spirit of the Constitution is to invoke the purpose of the Constitution as a whole, or of some important part of it. When relied upon to support a claim of constitutionality or unconstitutionality, this can be understood as structural reasoning.<sup>122</sup>

In contrast to this potential structural account, Akhil Amar voices the more conventional view that Congress possesses broad authority to change the size of the Court. In his book, *America's Unwritten Constitution*, Amar contends that Congress should prevail as a constitutional matter not only if it has “a sincere good-government reason for altering the Court’s size,” but “[e]ven if, in a given instance of resizing the Court, Congress was retaliating against what it perceived as Court abuses—say, a string of dubious rulings and judicial overreaches.”<sup>123</sup> Amar so concludes for a combination of originalist, historical, and textual reasons. First, he believes that “[a] strong case can be made that the written Constitution was designed precisely to allow Congress to rein in or resize a Court that Congress believes has acted improperly.”<sup>124</sup> Second, he emphasizes the nineteenth century practice of altering the size of the Court, discussed above, as well as the fact that the rejection of FDR’s Court-packing plan in 1937 was not the result of an express settlement between the political branches on a matter of constitutional principle.<sup>125</sup> Third, Amar argues that although “customary practice [can] attach[] to and help[] define a specific constitutional word or phrase, . . . the familiar number nine has no . . . clause to which it can comfortably adhere. Nor does the Constitution give the decision about Court size to the Court itself and thereby create a strong incentive structure that might limit the imaginable options.”<sup>126</sup>

This Article takes no position on whether Amar is ultimately right. The point, rather, is that the normative picture becomes more complex when, like the participants in the 1937 debate, one also takes historical gloss into account. Pursuant to the gloss methodology, the last century and a half of practice—during which time there has been no alteration to the size of the Court—and all of American history—during which time Court-packing of the sort attempted by FDR has never occurred—can be tied to structural reasoning and does not require tethering to a particular word or phrase in the constitutional text (although, to reiterate, the word “proper” in the Necessary and Proper Clause is available). To be sure, the gloss and structural modalities of interpretation do not suggest that “[t]he long-standing tradition of a Supreme Court with exactly

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statute and yet not within the statute, because not within its spirit nor within the intention of its makers.”).

122. For discussions of structural reasoning in constitutional law, see BALKIN, *supra* note 30, at 142, CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969), and PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 74–92 (1982).

123. See AKHIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* 354–55 (2012).

124. *Id.* at 355.

125. *Id.* at 354–55.

126. *Id.* at 356.

nine seats” is unalterable, but these modalities do provide grounds for questioning the conclusion of Amar and others that the tradition is “ultimately entrusted to other branches to maintain or modify as they see fit.”<sup>127</sup> Furthermore, Amar moves too quickly in suggesting that the failure of FDR’s Court-packing plan was an instance in which Congress declined to adopt a particular policy proposal.<sup>128</sup> As just shown, constitutional concerns played a prominent role in the Court-packing debate.

#### D. CONVENTIONS AND THE CONSTITUTION

Although not using the term, Michael Dorf has suggested that the norm against Court-packing may be a constitutional convention. He stresses the existence of a norm against Court-packing that constrains the political branches, but he doubts that it has the status of constitutional law. “If, say, Congress were to increase the size of the Supreme Court to eleven Justices,” he states, “neither the Court itself, nor any member of Congress, could plausibly claim that in so doing it was acting unconstitutionally.”<sup>129</sup> Based on both the constitutional text and the nineteenth century practice, he adds, “we have excellent textual and historical reasons to think that the Constitution poses no obstacle.”<sup>130</sup> But Dorf also submits that we “have very good reasons to think that Court packing is something that Congress and the President *just cannot do*.”<sup>131</sup> He reasons that it is difficult for the norm against Court-packing to have legal status because the written-ness of the Constitution tends to crowd out practice-based norms of constitutional law that are not tethered to the text, and he contends that “there is no readily available [textual] hook” prohibiting Court-packing.<sup>132</sup>

This Article agrees that governmental conduct may be impermissible—because it violates a constitutional convention—even though it is not unconstitutional or subject to judicial review. For example, even if Americans are not constitutionally entitled to vote directly for the President,<sup>133</sup> it would still widely be perceived as a breach of constitutional morality for state legislatures to bypass the voters and name state electors. Dorf may also be right that it is difficult to make constitutional claims in the U.S. legal tradition that are based only on practice, although it is worth reiterating that some constitutional criticisms of FDR’s Court-packing plan were based on historical practice.

The constitutional text, however, appears to have less of a crowding effect on practice-based constitutional norms than Dorf posits. As discussed above, the 1937 debate in the Senate over Court-packing shows that such norms can be

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127. *Id.*

128. *See id.* at 354.

129. Dorf, *supra* note 41, at 79.

130. *Id.* at 74.

131. *Id.*

132. *Id.* at 75.

133. *See* U.S. CONST. art. II, § 1 (“Each State shall appoint, *in such Manner as the Legislature thereof may direct*, a Number of Electors . . .” (emphasis added)).

incorporated in claims about the constitutional structure, especially when there is no specific text contradicting the practice.<sup>134</sup> Practice-based norms can also be incorporated in claims emanating from what today would be called popular constitutionalism, which may not be tethered to the text, or which may be tethered to unconventional text, such as the Preamble. Some objections to FDR's plan were framed in such terms. Yale Law School Professor Edwin Borchard sounded this theme in his testimony before the Senate, arguing that, although "[i]n a narrow sense [the Court-packing plan] is legal and it is within the letter of the Constitution. In a broader sense, the Webster or English sense, it is unconstitutional, because in the minds of many it is calculated to make the Supreme Court subservient to the Executive."<sup>135</sup> That popular constitutionalist objections need not be tied to the text, or even to an accurate account of history, is delightfully captured by an elderly woman's complaint about FDR's plan that "[i]f nine judges were enough for George Washington, they should be enough for President Roosevelt."<sup>136</sup> To correct her account of history is to miss the deeper point that she was conveying.

What may be most significant about objections to FDR's Court-packing plan is their ambiguity. Reading the Senate Hearing Transcript and Report, it is not always clear whether the objection was that Court-packing would be normatively improper but legally permissible, or would be normatively improper *and* legally impermissible. References to the "spirit" of the Constitution were at times similarly ambiguous. Because these remarks were made in the Senate, as opposed to in a court, there was less need to be precise about the distinction. Relatedly, conceptions of "the Constitution" can be broader outside the courts than in an argument before a court. This is important to bear in mind in separation of powers law, because much of it is enforced by nonjudicial actors.<sup>137</sup>

A number of prominent critics of FDR's Court-packing plan seemed to straddle the line between constitutional conventions and constitutional law. For example, in his Senate testimony, Raymond Moley—a professor of public law

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134. See Bradley & Siegel, *supra* note 45, at 1230 n.77; *supra* Section II.C; see also Printz v. United States, 521 U.S. 898, 905 (1997) ("Because there is no constitutional text speaking to this precise question, the answer to the [petitioners'] challenge must be sought in historical understanding and practice, in the structure of the Constitution, and in the jurisprudence of this Court.").

135. *Hearings*, *supra* note 104, at 827.

136. See WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* 139 (1995).

137. Cf. Grove, *supra* note 3, at 1836 ("The political branches may approach the process of constitutional interpretation in a way that differs considerably from what a judge deems appropriate."). Nevertheless, it is easy to overstate differences between constitutional reasoning by judicial and nonjudicial actors. Judges, especially Justices, often do not provide clear guidance; they may not accord stare decisis substantial weight; and they may credit nonlegal considerations, raising questions about the purity of their motives. Meanwhile, government officials, like judges, often reason from precedent and other interpretive modalities, and it may be difficult for judges to improve upon certain relatively unmanageable standards that government officials articulate. See, e.g., *infra* Section III.C.2 (discussing an OLC opinion that relied on Henry Hart's famous *Dialogue*).

at Columbia University and an editor at *Newsweek* magazine—contended that there was now a “custom of the Constitution” against Court-packing, which he contended was “as binding upon public officials as a written provision of the Constitution itself.”<sup>138</sup> This statement might suggest that he was making a claim about constitutional law. But he proceeded to give examples of other such constitutional customs, some of which were probably conventional rather than legal: the obligation of presidential electors to cast their votes in accordance with the election returns; the norm against presidents serving more than two terms; and the “custom of the British Constitution that the King shall give effect to the will of Parliament.”<sup>139</sup>

Harvard Law School Professor Erwin Griswold, in his Senate testimony, also seemed to tack back and forth between constitutional law and constitutional conventions. Noting that “arguments . . . could be made in support of the proposition that [the Court-packing plan] is unconstitutional,” Griswold contended that “[t]he constitutionality of the present proposal is not the real issue.”<sup>140</sup> Emphasizing that “not all things that are constitutional are things that should be done,” Griswold observed that “[i]t would be constitutional for Congress to impeach a President on purely political grounds,” but that “[t]he verdict of history is that it is not good government to try it.”<sup>141</sup> Similarly, he noted that “[i]t would be constitutional for a President to seek a third term,” but that “[o]ur traditions, of long standing, are against it on the ground of wisdom, not of power.”<sup>142</sup>

#### E. THE ROLE OF POLITICS

To say that a purported constitutional or conventional norm against Court-packing *might* have played an important role in the defeat of FDR’s plan does not mean that it did. The fact that many actors in the debate talked in legal or conventional terms is suggestive, but not dispositive, because it might have been cheap talk masking other motivations or otherwise might have been immaterial to the outcome.

Using the defeat of FDR’s plan as an example, Adrian Vermeule contends that the very political conditions that are necessary to attempt controversial judicial reform are also the conditions that make such reform difficult.<sup>143</sup> Among other things, Vermeule suggests that a political party with a narrow majority is unlikely to have enough cohesion to overcome barriers in the

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138. *Hearings*, *supra* note 104, at 546.

139. *Id.*

140. *Id.* at 767.

141. *Id.*

142. *Id.*; *see also id.* at 1011 (testimony of N.Y.U. School of Law Dean Frank Sommer) (“Though the exercise by Congress of this power for a purpose or end other than that for which the power was left with Congress would constitute an abuse of power, it could not be successfully challenged in the Supreme Court.”).

143. *See Vermeule, Political Constraints*, *supra* note 9, at 1154.



legislative process and that a party with a large majority, such as the Democrats under FDR, is likely to trigger public resistance because of fears about too much power residing in too few hands.<sup>144</sup>

Vermeule describes the latter possibility as a purely political account. In doing so, he appears to pass over how participants in the Court-packing debate perceived interconnections among law, conventions, and politics. For example, he notes that many opponents of FDR's plan gave weight to the fact that there had been nine Justices on the Court since the 1860s, an example of the "normative power of the factual."<sup>145</sup> "Such longstanding rules or invented traditions, whose dubious origin is usually lost in the mists of time," Vermeule explains, "often come to seem normatively significant."<sup>146</sup> But he does not show that people attribute such weight to historical practice only when they have political concerns about party domination. Nor does he show that this consideration is merely political, which seems especially unlikely when the concerns are expressed by members of the dominant party. Recall that FDR was re-elected overwhelmingly in 1936—a pivotal election in American history—yet his Court-packing plan was opposed vigorously by many members of his own party.<sup>147</sup>

Vermeule also submits that FDR was constrained in how he attempted to sell the plan. Correctly identifying the "widespread perception that the court-packing plan was a disingenuous proposal," Vermeule writes that FDR could emphasize judicial workload and efficiency, which risked seeming disingenuous (because it was), or he could more candidly advocate the need to change the composition of the obstructionist Court, which risked intensifying the opposition and so would not have improved his chances of success.<sup>148</sup> "Political actors are constrained to offer a public-regarding justification for reform," Vermeule suggests, "one that does not map too obviously onto their ideological views or partisan interests."<sup>149</sup>

FDR did indeed face a dilemma, but there is more to say about why FDR was reluctant to present a more candid explanation of the Court-packing plan. Vermeule suggests that such an explanation would have seemed "partisan."<sup>150</sup> Perhaps, but it is not clear why that would have counted against it. The Democratic Party, although far from homogenous and therefore potentially vulnerable to splintering, was dominant to an extent that seems difficult to imagine today: it held more than three-fourths of the seats in the House and

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144. *See id.* at 1161–62.

145. *Id.* at 1162 (quoting LEUCHTENBURG, *supra* note 136, at 137–42).

146. *Id.* at 1162–63.

147. For example, seven of the ten Senators who signed the adverse report of the Senate Judiciary Committee were prominent Democrats. *See* LEUCHTENBURG, *supra* note 136, at 146. Moreover, Senator Burton Wheeler of Montana, a progressive Democrat, played a leading role in opposing the plan. *See id.* at 137, 140.

148. *See* Vermeule, *Political Constraints*, *supra* note 9, at 1163.

149. *Id.* at 1164.

150. *See id.*

seventy-five of the Senate's ninety-six seats.<sup>151</sup> Moreover, it was already enacting numerous statutes that could similarly be described as partisan. The debates recounted above suggest a more likely reason for FDR's perception of constraint: the candid explanation would have triggered powerful separation of powers concerns. When considered that way, the story becomes less clearly one that is simply about politics. Opposition to Court-packing stemmed in part from normative commitments that are difficult to reduce to politics.<sup>152</sup>

Internal debates within FDR's administration provide additional support for the above account of the constraints that FDR perceived. Members of his administration debated whether to give the disingenuous explanation or the candid explanation for Court-packing, with Robert Jackson and others pushing for candor.<sup>153</sup> Eventually, FDR came around to that position, and he became much more forthright about the justifications for the Court-packing plan—most famously in a “fireside chat” in March 1937.<sup>154</sup> Jackson himself gave similar justifications in his Senate testimony.<sup>155</sup> But, sure enough, those explanations—which everyone had already perceived anyway—generated expressions of intense concern about judicial independence.<sup>156</sup> It is also noteworthy that many objections to the plan in and out of Congress were not about whether action should be taken to rein in the Court, but about *how* to do so—through a statute or a constitutional amendment.<sup>157</sup> That process concern does not seem purely political.

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151. See U.S. GOV'T PRINTING OFFICE, OFFICIAL CONGRESSIONAL DIRECTORY, 75th Cong., 1st Sess. 3–130 (2d. ed. 1937).

152. Cf. JOSEPH ALSOP & TURNER CATLEDGE, *THE 168 DAYS* 29 (Da Capo Press 1973) (1938) (“[FDR and his Attorney General] realized that [Court-packing] offended against what they privately called a ‘taboo,’ but they believed that the taboo had been greatly weakened by the Court’s own behavior.”); LEUCHTENBURG, *supra* note 136, at 118–19 (“Both the Attorney General and the President had been attracted to ‘Court-packing’ for a long time, but they recognized that the proposition violated a taboo and that some principle would have to be found to legitimate it.”).

153. MARIAN C. MCKENNA, *FRANKLIN ROOSEVELT AND THE GREAT CONSTITUTIONAL WAR: THE COURT-PACKING CRISIS OF 1937*, at 331 (2002).

154. See *id.* at 351–52. In the speech, FDR contended that his plan will “save our Constitution from hardening of the [judicial] arteries,” and he denied that he would appoint “spineless puppets.” *Id.* at 355.

155. See *id.* at 342.

156. See *id.* at 303 (noting that “[t]he proposal was denounced for perverting the Constitution, undermining judicial integrity, and destroying judicial independence”). Critics of the plan invoked the specter of developments in Europe, and publicly worried that the United States might be heading down the path towards dictatorship. See, e.g., JEFF SHESOL, *SUPREME POWER: FRANKLIN ROOSEVELT VS. THE SUPREME COURT* 303 (2010).

157. See MCKENNA, *supra* note 153, at 303–04 (quoting letters to Congress making this point); see also *Hearings*, *supra* note 104, at 719–20 (testimony of Dean of Columbia Law School Young B. Smith) (arguing that the only proper approach for addressing the Supreme Court’s resistance to the New Deal was “submitting the question to the people” through a proposed constitutional amendment); SENATE REPORT, *supra* note 107, at 7, 10 (emphasizing that amendment is “the course defined by the framers of the Constitution” and “the rule laid down by the Constitution itself”); Vermeule, *Political Constraints*, *supra* note 9, at 1170–71 (noting that FDR’s Court-packing plan “was also opposed by some, such as Senator George Norris, who genuinely favored the substance of the proposal but who also genuinely thought that constitutional amendment was the proper path”).

Of course, factors other than constitutional or convention-based objections to Court-packing contributed to the defeat of FDR's plan. Relishing surprise, FDR had kept Congress, most of his Cabinet, and the public in the dark about the plan until it was announced—a move that generated backlash. As noted above, FDR also initially tried to sell the plan with justifications that were perceived to be disingenuous.<sup>158</sup> Those justifications were also undermined when Chief Justice Hughes sent a letter to the Senate carefully rebutting FDR's claim that the Court was behind in its work and also explaining that enlarging the Court would *decrease* its efficiency.<sup>159</sup> The case for the plan was further undercut by the purported “switch in time” of Justice Owen Roberts on the constitutionality of New Deal legislation and by the retirement of Justice Van Devanter.<sup>160</sup> To add insult to injury, FDR's remaining chance to get a revised Court-packing bill through Congress evaporated when the chief spokesperson for the bill in the Senate, Joe Robinson, died unexpectedly.<sup>161</sup>

The point is not to deny the importance of those factors, some of which—such as the belief that the Court would be developing a more defensible jurisprudence going forward, thereby making packing less justified—could fairly be described as legal. The suggestion, rather, is that gloss-based or convention-based objections to Court-packing also played a meaningful role in defeating the plan, even if those legal or conventional concerns were defeasible and would have been overcome under a certain set of facts.<sup>162</sup> It is easier to see the ways in which participants in the Court-packing debate perceived a role for law or conventions when one considers the ways in which historical practice can inform normative understandings.<sup>163</sup>

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158. See LEUCHTENBURG, *supra* note 136, at 133–34.

159. See MCKENNA, *supra* note 153, at 377 (quoting Robert Jackson as saying that Hughes' letter “pretty much turned the tide” against FDR's proposal). *But see* Richard D. Friedman, *Chief Justice Hughes' Letter on Court-Packing*, 22 J. SUP. CT. HIST. 76, 85 (1997) (concluding that the letter “did not have a very profound effect”).

160. See MCKENNA, *supra* note 153, at 435–36, 453–57; *see also* Gregory A. Caldeira, *Public Opinion and the U.S. Supreme Court: FDR's Court-packing Plan*, 81 AM. POL. SCI. REV. 1139, 1149 (1987) (concluding, based on polling data, that “[t]wo crucial events—*Jones* and *Laughlin Steel* and Justice Van Devanter's resignation—spelled doom for FDR's bill”).

161. See LEUCHTENBURG, *supra* note 136, at 152.

162. Concluding that FDR's plan raised constitutional or conventional concerns does not answer whether those concerns would have prevailed if events had unfolded differently—for example, if the Court had continued to strike down New Deal legislation. *Compare* 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 335 (1998) (suggesting that if the Court had remained oppositional “the President could have won the battle for court-packing”), *with* BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* 25 (1998) (deeming it “doubtful that even a compromise bill could survive both a Senate filibuster and the House Judiciary Committee”).

163. During his long tenure in office, FDR was able to appoint eight Justices to the Court, all committed New Dealers, using the regular appointments process. It may reasonably be asked why that sort of ideological influence on the Court is not perceived as violating a legal or conventional norm akin to the one invoked in 1937. One possible answer is that, unlike the direct control over the Court entailed by changing the number of Justices, politicians do not control when a vacancy occurs. In addition, there may be virtues to slowing down the process by which politicians affect the ideological orientation of the Court. *Cf.* Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional*

## F. CODA: A PROPOSED COURT-PROTECTING AMENDMENT

Beginning in 1946, and with the events of 1937 in mind, leaders of the American bar mounted a decade-long campaign, now mostly forgotten, to protect the Supreme Court's independence by means of a constitutional amendment.<sup>164</sup> After earning the support of the New York City Bar Association, the American Bar Association, and such legal luminaries as retired Justice Owen Roberts (the alleged switcher in time in 1937<sup>165</sup>), the campaign persuaded Senator John Marshall Butler of Maryland, a conservative Republican who sat on the Judiciary Committee, to propose a constitutional amendment. In substantial accordance with the bar proposals, Butler's amendment would have set the size of the Court at nine, ensured the appellate jurisdiction of the Court for all constitutional questions, and required the Justices to retire at the age of seventy-five.<sup>166</sup> Butler introduced the proposal "to forestall future efforts by a President or a Congress seeking to nullify or impair the power of the judicial branch of the Government."<sup>167</sup> He urged that "[t]here are loopholes in the strict letter of the Constitution as it now reads through which such a thrust might be made."<sup>168</sup>

Butler's proposal received nothing but praise at a hearing held by a subcommittee of the Senate Judiciary Committee.<sup>169</sup> The full Judiciary Committee

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*Revolution*, 87 VA. L. REV. 1045, 1082 (2001) (emphasizing that "cumulative acts of partisan entrenchment" in the courts, through judicial appointments, can produce "constitutional change . . . quickly or slowly, depending on how the forces of politics operate").

164. The campaign was initiated by Edwin Falk of the New York City Bar Association. See Edwin A. Falk, *In Time of Peace Prepare for War*, 1 REC. ASS'N B. CITY N.Y. 245, 250-54 (1946). For an account of the campaign, albeit one that focuses on the effort to impose a mandatory retirement age for Justices, see David J. Garrow, *Mental Decrepitude on the U.S. Supreme Court: The Historical Case for a 28th Amendment*, 67 U. CHI. L. REV. 995, 1028-43 (2000). For first-hand accounts, see Edwin A. Falk, Letter to the Editor, *Integrity of Supreme Court: Background Given on Studies Made to Reinforce Its Inviolability*, N.Y. TIMES, May 19, 1954, at 30, and Leonard D. Adkins, *Protecting Supreme Court: Details Given as to Publicity on Adoption of Amendments*, N.Y. TIMES, May 22, 1954, at 14.

165. See Owen J. Roberts, *Now Is the Time: Fortifying the Supreme Court's Independence*, 35 A.B.A. J. 1 (1949) (discussing various constitutional amendments that were proposed regarding the Supreme Court).

166. See 98 CONG. REC. S5084 (daily ed. May 13, 1952) (introducing S.J. Res. 154, 82nd Cong., 2nd Sess.); 99 CONG. REC. S1106-1108 (daily ed. Feb. 16, 1953); 100 CONG. REC. S6256 (daily ed. May 10, 1954). Butler's proposal also would have prohibited Justices who left the Court from serving as President or Vice President for five years, but that provision was dropped because it "might be considered to be a reflection on the Supreme Court or on some of its members." 100 CONG. REC. S6344 (daily ed. May 11, 1954) (statement of Sen. Butler).

167. 99 CONG. REC. S1106 (daily ed. Feb. 16, 1953) (statement of Sen. Butler). Two days later, Representative Edward Miller of Maryland introduced an identical measure in the House. See 99 CONG. REC. H1231 (daily ed. Feb. 18, 1953) (introducing H.J. Res. 194, 83rd Cong., 1st Sess.).

168. 99 CONG. REC. S1106 (daily ed. Feb. 16, 1953) (statement of Sen. Butler). Some editorial boards also referenced "loopholes" in the text of the Constitution. See Editorial, *The Size of the Supreme Court*, L.A. TIMES, May 20, 1954, at A4 ("[T]here is a loophole . . . by which a complaisant Congress and a dictatorial executive could change the whole character of the government by a mere legislative enactment . . ."); Editorial, *Insulating the Supreme Court*, WASH. POST, May 14, 1954, at 26 (similar).

169. See *Composition and Jurisdiction of the Supreme Court: Hearing on S.J. Res. 44 Before the S. Comm. on the Judiciary*, 83rd Cong. (1954). At the hearing, supporters of the amendment included

added a section requiring the retirement of lower federal court judges at age seventy-five and unanimously reported the resolution to the full Senate.<sup>170</sup> On the Senate floor, Senator Butler reiterated that he was proposing the amendment during a period of calm because it was “an excellent opportunity to forestall future attempts to undermine the integrity and independence of the Supreme Court.”<sup>171</sup> In May 1954, the Senate passed Butler’s proposed resolution by a vote of 58–19.<sup>172</sup> But the proposal received less interest in the House; after a subcommittee hearing,<sup>173</sup> it was ultimately tabled (and thus effectively killed) by the House Judiciary Committee.<sup>174</sup>

It is difficult to draw strong inferences from this episode, one way or the other, concerning the status of any norm against Court-packing. On the one hand, the episode may illustrate the perceived absence of constitutional constraints on Court-packing, because if such constraints had been thought to exist, it might seem puzzling why proponents of the proposal would have thought it necessary to amend the Constitution. On the other hand, some supporters may have believed that a constitutional prohibition on Court-packing would be stronger, and thus less likely to be violated, if it was reflected in the text of the Constitution rather than only in historical practice and structural inferences that could be dismissed in the future as vague.

In any event, the proposed constitutional amendment was never adopted, and some opponents of it apparently thought that it was unnecessary because there was already a sufficient constitutional or conventional norm against Court-packing in place. For example, Senator Thomas Hennings, a liberal Democrat from Missouri, believed that the amendment was “wholly unnecessary” because “an attempt to ‘pack’ the Court . . . would certainly meet with the most vigorous opposition,” for “in the past such opposition has been substantial, effective, and

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retired Justice Roberts, Harrison Tweed (President of the American Law Institute), Albert Jenner (Chairman of the ABA Standing Committee on Jurisprudence and Law Reform), and the aforementioned Edwin Falk.

170. JOHN MARSHALL BUTLER, S. COMM. ON THE JUDICIARY, COMPOSITION AND JURISDICTION OF THE SUPREME COURT, S. REP. NO. 83-1091, at 1 (2d Sess. 1954). After discussing past efforts to change the size of the Court, the Senate Report stated that “[t]his recital of history demonstrates that legislative manipulation of the Court is not a theoretical proposition unbuttressed by experience.” *Id.* at 3.

171. 100 CONG. REC. S6256 (daily ed. May 10, 1954) (statement of Sen. Butler). Butler made this statement when the Court’s decision in *Brown I* was just a week away, yet no reference to the litigation appears in the Congressional Record within the context of debate over the proposed amendment.

172. 100 CONG. REC. S6347 (daily ed. May 11, 1954) (recording the vote). An amendment eliminated the prohibition on Justices serving as President or Vice President for a period of five years. *See supra* note 166.

173. *See Composition and Jurisdiction of the Supreme Court: Hearings on S.J. Res. 44 and H.J. Res. 194, H.J. Res. 27, and H.J. Res. 91 Before the H. Comm. on the Judiciary*, 83rd Cong. (1954). The subcommittee favorably reported the proposal to the full committee.

174. *See C. P. Trussell, Court Amendment Tabled in House: Judiciary Group, 11–8, Kills Bid to Fix Size at 9 and Retire Justices at 75*, N.Y. TIMES, Aug. 4, 1954, at 11.



decisive.”<sup>175</sup> Along similar lines, Professor John O’Reilly of the Boston College Law School invoked a constitutional convention, writing that “we must proceed on the assumption that those who hold high office, whether in the White House, in the Congress, or on the Court, will continue to have and to manifest, on basic issues, a sense of responsibility and of the proprieties consistent with accepted American tradition.”<sup>176</sup>

An additional complication is that the proposed amendment would have gone beyond disallowing Court-packing because it would have barred any enlargement of the size of the Court, even for reasons of workload. Some opponents of the proposal expressed concern about this feature.<sup>177</sup> A still further complication is that the proposed amendment contained multiple provisions, and it is not clear which ones opponents found most problematic and why.<sup>178</sup>

In part because the debate over Butler’s proposal occurred outside the context of an actual or proposed effort to change the size of the Court, participants in the debate were not required to take a firm position on the status of any norm against Court-packing. The fact that any such norm had not been breached, and was not facing any imminent danger of breach, also likely contributed to the defeat of the proposal. Some opponents of the proposal argued, for example, that the defeat of FDR’s Court-packing plan, notwithstanding all of the political advantages that he enjoyed, showed that a constitutional amendment was unnecessary.<sup>179</sup>

These arguments suggest that the defeat of Butler’s proposal may have been due in part to a belief that one should run the risk of amending the Constitution when—and only when—it is deemed necessary to do so because certain normative limits have been transgressed. Three years earlier, the Twenty-Second Amendment had been ratified, providing in part that “[n]o person shall be

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175. 100 CONG. REC. S6341, 6343 (daily ed. May 11, 1954) (statement of Sen. Hennings); *see also High Court Bill Opposed: Hennings Raps Amendment Proposed by Butler*, BALTIMORE SUN, Apr. 4, 1954, at 4.

176. *Composition and Jurisdiction of the Supreme Court: Hearings on S.J. Res. 44 and H.J. Res. 194, H.J. Res. 27, and H.J. Res. 91 Before the H. Comm. on the Judiciary*, 83rd Cong. 53 (1954) [hereinafter O’Reilly Letter] (letter from Professor John D. O’Reilly, Jr. to Senator Butler).

177. *See, e.g.*, 100 CONG. REC. S6342 (daily ed. May 11, 1954) (statement of Senator Hennings that he thought it “entirely conceivable that at some time, some day, we may wish to increase the number [of Justices] to accommodate a greater workload of the Court”); O’Reilly Letter, *supra* note 176, at 52 (explaining that although he opposed Court-packing, he also opposed any restriction that might in the future prevent the Court from “most efficiently” performing its functions).

178. Also contributing to the defeat of the proposal was the decision of the House subcommittee to reinsert the prohibition on Justices serving as President or Vice President for five years. *See* REP. OF THE STANDING COMMITTEE ON JURISPRUDENCE AND LAW REFORM 244 (1954).

179. *See, e.g., House Vote Against the Supreme Court Amendment*, BALTIMORE SUN, Aug. 15, 1954, at 12 (“For, said Representative Celler, if Congress beat the court-pack of 1937, could it not be trusted to handle a similar effort in the future without the need of a constitutional amendment? This argument gained weight among those who recalled the circumstances in which Mr. Roosevelt had acted in 1937.”). Emmanuel Celler was a Brooklyn Democrat and former chair of the House Judiciary Committee who had opposed FDR’s Court-packing plan. *See* Trussell, *supra* note 174, at 11.



elected to the office of the President more than twice.”<sup>180</sup> That amendment was adopted only after there had been a breach in practice of the norm against serving more than two presidential terms. (Rather than signifying that the norm did not exist, the campaign for an amendment signified that the norm had been breached.) There was ultimately no such breach with respect to Court-packing. Indeed, as the next Part documents, the Court-packing episode became a cautionary precedent that was invoked in the ensuing years in debates over jurisdiction-stripping.

### III. HISTORICAL PRACTICE AND COURT-STRIPPING

It is widely agreed that Congress enjoys significant authority to define and restrict the jurisdiction of the federal courts.<sup>181</sup> The constitutional limits on Congress’s exercise of that authority, however, are deeply contested. In addition, there has been almost no discussion of possible constitutional conventions that might operate to constrain congressional action. This Part focuses on one form of jurisdiction-stripping: a congressional restriction on the appellate jurisdiction of the Supreme Court that reflects a substantive disagreement with how the Court has decided, or is expected to decide, a constitutional question. This Article calls the imposition of such a limitation on the Court’s appellate jurisdiction “Court-stripping.” As discussed below, although academics have given relatively little attention to the relevance of historical practice to constitutional issues relating to Court-stripping, such practice has featured prominently in debates between, and within, the political branches.

#### A. ACADEMIC DEBATES

Participants in academic debates over Court-stripping have emphasized textualist, originalist, structuralist, and doctrinalist arguments in favor of either plenary congressional control or limited congressional authority. The debate remains unresolved because the text sends mixed messages, the original understanding is disputed, general structural reasoning turns on contestable visions of the fundamental role of the Court in the federal system, and the most relevant Supreme Court decision offers something for everyone.

Article III begins by declaring that “[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”<sup>182</sup> The first clause of Article III, Section 2, extends the federal judicial power to nine categories of cases and controversies, including “all Cases . . . arising under” federal law.<sup>183</sup> Clause 2 grants the Supreme Court original jurisdiction in certain cases, and provides—in what has come to be known as the Exceptions Clause—that “[i]n

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180. U.S. CONST. amend XXII, § 1.

181. *See, e.g.*, FALLON ET AL., *supra* note 6, at 30–33.

182. U.S. CONST. art III, § 1.

183. *Id.* § 2, cl. 1.

all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.”<sup>184</sup>

The plain meaning of the Exceptions Clause might be thought to authorize Court-stripping as an “Exception” to the general rule of Supreme Court appellate jurisdiction, so long as Congress does not violate some constitutional limit external to Article III (such as the Habeas Suspension Clause of Article I, Section 9). “This language,” Paul Bator wrote, “plainly seems to indicate that if Congress wishes to exclude a certain category of federal constitutional (or other) litigation from the appellate jurisdiction, it has the authority to do so.”<sup>185</sup> Martin Redish also emphasized the plain meaning of the constitutional text, concluding that “[t]here is . . . no internal method of construing the exceptions clause to mean anything other than what it says.”<sup>186</sup> “On its face,” Gerald Gunther agreed, “the exceptions clause . . . seems to grant a quite unconfined power to Congress to withhold from the Court a large number of classes of cases potentially within its appellate jurisdiction.”<sup>187</sup> More recently, Michael Dorf wrote that, “under the most straightforward reading of the text of Article III, Congress could . . . eliminate all appellate jurisdiction of the Supreme Court.”<sup>188</sup>

Bator’s use of the locution “plainly seems” and Gunther’s similar hedge, however, may reflect a recognition that the semantic meaning of the text may not be clear. Purely as a linguistic matter, reference to an exception may presuppose a rule that the exception is not permitted to swallow. If so, the Exceptions Clause would not authorize Congress to eliminate all of, or perhaps even most of, the Supreme Court’s appellate jurisdiction. Moreover, it may not be obvious how to reconcile the Exceptions Clause with the language of Article III, Section 1, which requires the existence of “one *supreme* Court” and which requires that it “*shall* be vested” with “[*t*]he judicial Power”<sup>189</sup>—presumably not some of that power, but all of it. A Court that lacks both original and appellate jurisdiction to decide a federal question seems neither supreme with respect to that question nor vested with all of the federal judicial power.<sup>190</sup> Note also that the text requires federal judicial power to be vested in the Supreme Court “and”—not “or”—in whatever lower federal courts that Congress creates.

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184. *Id.* § 2, cl. 2.

185. Paul M. Bator, *Congressional Power over the Jurisdiction of the Federal Courts*, 27 VILL. L. REV. 1030, 1038 (1982).

186. Martin H. Redish, *Congressional Power to Regulate Supreme Court Appellate Jurisdiction Under the Exceptions Clause: An Internal and External Examination*, 27 VILL. L. REV. 900, 915 (1982).

187. Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 901 (1984).

188. Dorf, *supra* note 41, at 81. Notably, however, Dorf does not argue that there are no Article III limits on the scope of the Exceptions Clause. *See id.* at 81–82.

189. U.S. CONST. art III, § 1 (emphasis added).

190. For additional discussion of the implications of the vesting language in Article III, see *infra* text accompanying notes 381–84.

More adventurously, the Exceptions Clause might be thought to apply to questions of “Fact,” not “Law,” as some scholars have argued on textualist and originalist grounds.<sup>191</sup> Or it might be thought to license Congress only to move cases from the Court’s appellate jurisdiction to its original jurisdiction, as other scholars have argued on similar grounds notwithstanding the contrary holding of *Marbury v. Madison*.<sup>192</sup> In short, the plain text of Article III does not by itself resolve the question of the permissibility of Court-stripping.<sup>193</sup>

Without attempting to canvas here the originalist literature relating to the Exceptions Clause, it seems fair to say that this literature has not yielded an interpretive consensus. As a general matter, the Framers did not focus on Article III to nearly the extent that they focused on other parts of the Constitution. More specifically, the Exceptions Clause was added by the Committee of Detail, not the Constitutional Convention itself, and the Committee’s purposes in doing so remain unknown, in part because the addition triggered no discussion, let alone debate, on the floor of the Convention.<sup>194</sup> To be sure, most modern originalists would focus not on the intent of the Framers, but on the original semantic meaning of the Exceptions Clause or of Article III more broadly.<sup>195</sup> But scholarship has not established that the original semantic meaning of the word “Exceptions” was relatively clear and permitted plenary congressional authority, or that it was originally understood to imply that there was no point at which an exception to a rule would eviscerate that rule. Moreover, modern originalists often consult evidence of original intent as evidence of original meaning, and the Founders who debated whether the existence of lower federal courts should be mandatory, permissible, or prohibited all assumed that the Supreme Court would enjoy jurisdiction to hear appeals from the judgments of state courts on issues of federal importance.<sup>196</sup>

Given the apparent under-determinacy of textualist and originalist arguments, participants in academic debates over Court-stripping have shored up their positions with general structural argumentation that is often tied loosely to

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191. See, e.g., RAOUL BERGER, *CONGRESS V. THE SUPREME COURT* 285–96 (1969). Others disagree. See, e.g., Bator, *supra* note 185, at 1040 (“The historical evidence is far from conclusive, but the evidence to support the proposition that the exceptions clause was to be reserved exclusively to issues of fact is weak.”); Gunther, *supra* note 187, at 901 (describing the “facts only” limitation on congressional power as “at least contrary to the punctuation of the relevant phrase” and as “enjoy[ing] very little academic support today”).

192. 5 U.S. (1 Cranch) 137, 173–75 (1803); see Steven G. Calabresi & Gary Lawson, *The Unitary Executive, Jurisdiction Stripping, and the Hamdan Opinions: A Textualist Response to Justice Scalia*, 107 COLUM. L. REV. 1002, 1037–38 (2007).

193. For another important textual argument, see James E. Pfander, *Jurisdiction-Stripping and the Supreme Court’s Power to Supervise Inferior Tribunals*, 78 TEX. L. REV. 1433, 1435 & n.10 (2000) (contending that the grant of power to Congress in Article I to “constitute Tribunals inferior to the supreme Court” carries with it limitations on Congress’s ability to restrict the Supreme Court’s supervisory authority over the lower federal courts).

194. See, e.g., FALLON ET AL., *supra* note 6, at 18, 314.

195. For an overview of the reasons for that change in emphasis over time, see Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375, 378–82 (2013).

196. See, e.g., FALLON ET AL., *supra* note 6, at 18–19; Bator, *supra* note 185, at 1038–39.

claims about original intent. Herbert Wechsler, reflecting the modest, dispute resolution model of judicial review of the early editions of the *Hart & Wechsler* federal courts casebook, argued in this fashion in defending plenary congressional control:

[T]he plan of the Constitution for the courts . . . was quite simply that the Congress would decide from time to time how far the federal judicial institution should be used within the limits of the federal judicial power; or, stated differently, how far judicial jurisdiction should be left to the state courts, bound as they are by [the Supremacy Clause].<sup>197</sup>

Agreeing with Wechsler, Charles Black, the dean of structural constitutional argumentation, insisted that the authority of Congress to restrict the Court's appellate jurisdiction constitutes "the rock on which rests the legitimacy of the judicial work in a democracy."<sup>198</sup> On that structural vision, the permissibility of Court-stripping plays a pivotal role in reconciling judicial supremacy with majoritarian democracy.

By contrast, although Paul Bator agreed with Wechsler and Black that Court-stripping would be constitutional, he expressed the originalist and structural concern that Court-stripping would contravene the "spirit" of the Constitution because it "would create a system inconsistent with the structure that the Framers assumed to be appropriate" in the debate over the constitutional status of lower federal courts.<sup>199</sup> According to Bator, "the structure contemplated by the instrument makes sense—and was thought to make sense—only on the premise that there would be a federal Supreme Court with the power to pronounce uniform and authoritative rules of federal law."<sup>200</sup>

Henry Hart went further, suggesting the possibility that the Constitution does not "authoriz[e] exceptions which engulf the rule" of appellate jurisdiction, and that "the exceptions must not be such as will destroy the essential role of the Supreme Court in the constitutional plan."<sup>201</sup> Leonard Ratner attempted to render Hart's "essential role" idea less indeterminate by arguing that "exceptions" to the Court's appellate jurisdiction may not "negate" the Court's "essential constitutional functions of maintaining the uniformity and supremacy of federal law."<sup>202</sup> Applying that structural standard, Ratner declared the unconstitutionality of "legislation that precludes Supreme Court review in every case

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197. Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1005 (1965).

198. Charles L. Black, Jr., *The Presidency and Congress*, 32 WASH. & LEE L. REV. 841, 846 (1975); see also CHARLES L. BLACK, JR., DECISION ACCORDING TO LAW: THE 1979 HOLMES LECTURES 37–38 (1981).

199. Bator, *supra* note 185, at 1038.

200. *Id.* at 1039.

201. Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1364–65 (1953).

202. Leonard G. Ratner, *Congressional Power over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157, 201–02 (1960).

involving a particular subject.”<sup>203</sup>

As with those differing structural visions, Supreme Court precedent offers support for both sides of the academic debate. The key case, *Ex parte McCardle*, not-coincidentally arose during a period of changes in the size of the Court—Reconstruction.<sup>204</sup> In *McCardle*, the Court had to decide the constitutionality of an 1868 federal statute that repealed a provision enacted the previous year. The 1867 provision had authorized appeals to the Supreme Court from denials of habeas relief by a federal circuit court. Congress in 1868 acted with the apparent—albeit not express—purpose of preventing the Court from deciding the then-pending *McCardle* case.<sup>205</sup> On the merits, the case involved a constitutional challenge to *McCardle*’s criminal prosecution before a military commission and possibly to the Military Reconstruction Act more generally, which provided for military rule in the South.<sup>206</sup> The Court dismissed the appeal for want of jurisdiction, concluding that Congress had acted permissibly in 1868 under the “express words” of the Exceptions Clause and that it was “not at liberty to inquire into the motives of the legislature.”<sup>207</sup> Defenders of plenary congressional power emphasize these portions of the decision: the Reconstruction Congress anticipated that it would disagree with the Court’s decision, and the Court upheld congressional authority to prevent it from deciding the case.

Opponents of Court-stripping, however, have not had much difficulty distinguishing *McCardle* from more recent Court-stripping proposals. The Court in *McCardle* pointedly emphasized at the end of its opinion that Congress had left open a distinct, pre-existing basis for appellate review in habeas cases.<sup>208</sup> Mere months after *McCardle*, moreover, in *Ex parte Yerger*, the Court exercised jurisdiction under that alternate basis.<sup>209</sup> Thus, perhaps *McCardle* is not authority for Court-stripping, which would foreclose all avenues of Supreme Court review, but is instead authority only for the limited proposition that Congress may eliminate one avenue of appellate jurisdiction if, but only if, another avenue remains available.<sup>210</sup> Much closer to the present, the Court in *Felker v.*

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203. *Id.* at 201.

204. 74 U.S. (7 Wall.) 506 (1868).

205. See Caleb Nelson, *Judicial Review of Legislative Purpose*, 83 N.Y.U. L. REV. 1784, 1790–91 (2008) (arguing that the alleged tension between *McCardle* and *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872), “dissolves once we appreciate the then-prevailing norms of judicial review,” according to which “courts could impute impermissible purposes to a statute when ‘the language of the proviso’ made them clear (as in *Klein*), but not when the imputation required reference to things beyond the face of the statute (as in *McCardle*)” (quoting *Klein*, 80 U.S. at 145)).

206. See FALLON ET AL., *supra* note 6, at 316.

207. *McCardle*, 74 U.S. (7 Wall.) at 514.

208. See *id.* at 515 (“Counsel seem to have supposed, if effect be given to the repealing act in question, that the whole appellate power of the court, in cases of *habeas corpus*, is denied. But this is an error.”).

209. 75 U.S. (8 Wall.) 85 (1868).

210. See, e.g., Fallon, *supra* note 7, at 1078 (“But *McCardle* would be an easily distinguishable precedent for a Supreme Court that wanted to distinguish it”). As noted in Section II.B, when considering options for restraining the Court during the New Deal, Deputy Solicitor General Warner

*Turpin* relied upon a similar rationale in upholding a congressional restriction on Supreme Court review of certain habeas petitions.<sup>211</sup> Finally, given the enormous political pressure under which the Court in *McCardle* was operating (discussed further below), the parts of the decision that are emphasized by defenders of plenary congressional control may actually constitute negative judicial precedent.<sup>212</sup>

Participants in the academic debate over Court-stripping have occasionally referenced potentially relevant historical practices of the political branches. Legal academics have not tended, however, to emphasize the interpretive relevance of historical practice as an independent source of constitutional authority.<sup>213</sup> Moreover, few legal scholars seem to have entertained the possibility that a constitutional convention prohibits Court-stripping. When academics have mentioned congressional practice, they have typically done so in passing as a relatively minor consideration, and they have tended to emphasize early practice, especially the Judiciary Act of 1789.<sup>214</sup> In addition, academics have focused generally on whether Congress has made exceptions to the Court's appellate jurisdiction, not specifically on whether Congress engaged in Court-stripping—that is, made exceptions based upon actual or anticipated substantive disagreement with Supreme Court decision making. The inattention of academics to the possibility of gloss or conventions is nicely captured by Gunther's famous quip that the essential functions idea “confuses the familiar with the necessary, the desirable with the constitutionally mandated.”<sup>215</sup> That statement has been quoted approvingly far more frequently than it has been critically analyzed.

#### B. HISTORICAL PRACTICE

Inspection of the relevant historical practice shows that, although Congress has long regulated the appellate jurisdiction of the Supreme Court, it has almost never engaged in Court-stripping, despite many calls over the years for it to do so. Furthermore, the principal instance in which it did so, in 1868, may constitute negative nonjudicial precedent. Although this history has been of relatively limited importance to academics, it has been of great importance to members of Congress and Executive Branch officials when they have considered the permissibility of limiting the Court's appellate jurisdiction.

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Gardner counseled against Court-stripping. He described *Yerger* as indicating that the Court's decision in *McCardle* “was a grudging one and that [the Court] would not welcome subsequent legislation of that character.” Gardner Memorandum, *supra* note 103, at 50.

211. 518 U.S. 651, 660–61 (1996).

212. See *infra* text accompanying notes 219–23.

213. Cf. Fallon, *supra* note 7, at 1047 (criticizing “the originalist and textualist style of reasoning that has characterized nearly all leading academic writings on congressional control of jurisdiction”).

214. See, e.g., Grove, *supra* note 3, at 1836 (noting that, as compared with other separation of powers work, “[t]here is . . . far less focus on political branch practice in Article III scholarship”).

215. Gunther, *supra* note 187, at 905.



In the Judiciary Act of 1789, Congress did not authorize the Court to exercise the full range of appellate jurisdiction established by Article III.<sup>216</sup> Nonetheless, the First Congress did authorize Supreme Court appellate jurisdiction over a broad range of cases, including over federal habeas corpus cases and state court decisions invalidating federal statutes or upholding state statutes against federal constitutional challenge.<sup>217</sup> That jurisdictional grant, which was conferred by section 25 of the First Judiciary Act, suggests that Congress was focused primarily on ensuring the supremacy of federal law over the states, and less on ensuring the uniformity of federal law throughout the nation.

The Marshall Court was similarly concerned with federal supremacy. It exercised appellate jurisdiction under section 25 in the service of nationalism, which proved intensely controversial and resulted in state defiance of certain Supreme Court judgments.<sup>218</sup> In 1831, the House Judiciary Committee voted to repeal section 25, which would have constituted Court-stripping if it had succeeded. Congress, however, rejected this effort by a wide margin. The minority report opposing the bill, authored by then-Representative James Buchanan together with William W. Ellsworth and E.D. White, argued that without section 25 “there would be no uniformity in the construction and administration of the Constitution, laws, and treaties of the United States” and that “its repeal would seriously endanger the existence of this Union” by compromising the supremacy of the federal government over the states.<sup>219</sup> This report has been hailed as “one of the great and signal documents in the history of American constitutional law.”<sup>220</sup>

In 1868, as discussed above, the Reconstruction Congress apparently sought to engage in Court-stripping for the first time in U.S. history.<sup>221</sup> The politically fraught circumstances of that action, however, may limit the extent to which it serves as precedent, and, indeed, may suggest that it should be viewed as negative nonjudicial precedent. Among other things, when Congress enacted the jurisdiction-stripping measure over President Johnson’s veto, it was holding impeachment hearings against him, and Chief Justice Chase had been presiding

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216. See FALLON ET AL., *supra* note 6, at 24–25 (noting the \$2,000 amount-in-controversy requirement, the absence of a provision for review of federal criminal cases, and the absence of a provision for review of state court decisions upholding federal statutes or invalidating state statutes on federal constitutional grounds).

217. See Judiciary Act of 1789, ch. 20 § 25, 1 Stat. 73, 85–87.

218. See, e.g., Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 393–404 (1998) (discussing state defiance of Marshall Court decisions); Barry Friedman, “*Things Forgotten*” in *the Debate Over Judicial Independence*, 14 GA. ST. U. L. REV. 737, 741–42 (1998) (same).

219. H.R. REP. NO. 21-43, at 15 (1831).

220. 2 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 199 (1922); see also FRANKFURTER & LANDIS, *supra* note 84, at 44 n.143 (describing the minority report as “one of the famous documents of American constitutional law”). For an assessment of the political conditions that contributed to the defeat of the bill, see Mark A. Graber, *James Buchanan as Savior? Judicial Power, Political Fragmentation, and the Failed 1831 Repeal of Section 25*, 88 ORE. L. REV. 95 (2009).

221. See *supra* Section III.A.

over those proceedings.<sup>222</sup> Even at the time, Congress thought better of following its own practice. The Court was able to exercise jurisdiction in *Yerger* mere months after *McCardle* because, as Barry Friedman has noted, “the Republican Congress declined to act yet again to strip the Court of jurisdiction.”<sup>223</sup> Even though Congress had enacted the original Court-stripping provision over President Johnson’s veto, that provision “was so criticized that once passions cooled, and reflection prevailed, Congress and the country saw the error of trying to affect substantive decisions with jurisdictional tools.”<sup>224</sup>

Congress subsequently turned from stripping the Court’s appellate jurisdiction to enhancing it. In 1891, Congress authorized the Court to exercise appellate jurisdiction in federal criminal cases.<sup>225</sup> And in 1914, Congress authorized the Court to exercise appellate jurisdiction over state court decisions invalidating state laws on federal constitutional grounds or upholding federal laws against constitutional challenge.<sup>226</sup> Moreover, “on many occasions from 1891 to 1988, Congress made ‘exceptions’ to the Court’s mandatory appellate jurisdiction and granted it discretionary review via writs of certiorari.”<sup>227</sup> Responding to concerns expressed by the Court that it was overburdened with mandatory appeals, Congress acted to enable the Justices to devote their scarce institutional resources to ensuring uniformity on important questions of federal law.<sup>228</sup>

In the modern, post-*Brown* era of constitutional law, many Court-stripping measures were proposed in Congress. Their subject matters included jurisdiction over the admissibility of confessions in state criminal cases, state legislative apportionments, alleged subversive activities, busing, school prayer, abortion, the Defense of Marriage Act, and the Pledge of Allegiance.<sup>229</sup> But, like the doomed 1831 effort, they all failed.

To be sure, during the last several decades, Congress has enacted some controversial limitations on federal court jurisdiction—concerning federal habeas corpus review of state criminal convictions, judicial review of immigration deportation orders, and federal habeas corpus review of the detention of alleged

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222. See Gunther, *supra* note 187, at 904–05. On the atmosphere in which Congress acted, see Daniel J. Meltzer, *The Story of Ex parte McCardle: The Power of Congress to Limit the Supreme Court’s Appellate Jurisdiction*, in *FEDERAL COURTS STORIES* 57 (Vicki C. Jackson & Judith Resnik eds., 2010), and William W. Van Alstyne, *A Critical Guide to Ex Parte McCardle*, 15 *ARIZ. L. REV.* 229 (1973).

223. Friedman, “*Things Forgotten*” in *the Debate Over Judicial Independence*, *supra* note 218, at 761.

224. *Id.*

225. See FALLON ET AL., *supra* note 6, at 297.

226. See Act of Dec. 23, 1914, ch. 2, 38 Stat. 790.

227. Grove, *supra* note 3, at 1846.

228. See *id.*; see also Tara Leigh Grove, *The Exceptions Clause as a Structural Safeguard*, 113 *COLUM. L. REV.* 929, 931 (2013) (“Congress has not generally sought to curtail the Supreme Court’s appellate jurisdiction but instead has steadily expanded it—precisely so that the Court could settle disputed federal questions.”).

229. See FALLON ET AL., *supra* note 6, at 297–98.

terrorists in Guantanamo Bay, Cuba. Most of these limitations, however, have concerned either federal district court jurisdiction or general judicial review over non-Article III adjudications, not efforts to use the Exceptions Clause to limit the Supreme Court's jurisdiction. The one provision that did expressly concern the Supreme Court's appellate review—a restriction on review of Circuit Court determinations concerning whether to allow the filing of a successive habeas petition—was not, unlike the restriction at issue in *McCardle*, focused on any particular Supreme Court decisions. The Court found that restriction, in a move reminiscent of *McCardle*, not to eliminate the Supreme Court's ability to issue original writs of habeas corpus,<sup>230</sup> and since then Congress has not attempted to foreclose that alternate avenue of review.

### C. DEBATES IN THE POLITICAL BRANCHES

Numerous jurisdiction-stripping measures were proposed in Congress and considered by the Executive Branch in the decades after *Brown*. This Section focuses on two of those debates: the congressional debate during 1957–1958 over proposals to restrict the Court's appellate jurisdiction over cases involving alleged subversive activities, and the debate within the Executive Branch in the early 1980s over efforts to restrict the Court's jurisdiction over cases involving school prayer, busing, and abortion. These debates illustrate the importance of arguments based on both historical gloss and constitutional conventions in political branch reasoning concerning the judicial separation of powers.

#### 1. Congressional Debates in 1957 and 1958

In a long series of cases from 1953 to 1958 involving the investigation and sanctioning of alleged political subversives, the Supreme Court repeatedly ruled against the government.<sup>231</sup> The cases arose in a variety of legal contexts (noted below), and they were decided on a variety of legal grounds, some technical and statutory, others constitutional. Taken together, they generated widespread condemnation of the Court in and out of Congress.<sup>232</sup>

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230. See *Felker v. Turpin*, 518 U.S. 651, 660–62 (1996). The Court applied similar reasoning in concluding that Congress had not deprived the federal courts of habeas jurisdiction to review an Executive Branch determination that an individual was not eligible for discretionary relief from deportation. See *INS v. St. Cyr*, 533 U.S. 289, 298–99 (2001). In addition, the Court held that Congress's attempt to restrict federal court habeas jurisdiction over the detainees at Guantanamo violated the Suspension Clause in Article I, Section 9. See *Boumediene v. Bush*, 553 U.S. 723, 771 (2008).

231. See Philip P. Frickey, *Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation in the Early Warren Court*, 93 CALIF. L. REV. 397, 417–26 (2005).

232. See, e.g., *id.* at 426 (“By 1957, hostility toward the Court was widespread.”); Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 195 (2002) (“During this period the Court faced its most serious institutional attack since 1937 (and indeed the last serious attack it has faced since).”).

Among the “orgy of proposals countering the Court”<sup>233</sup> that members of Congress produced during this period was a bill proposed by Senator William Ezra Jenner, a Republican from Indiana, that would have stripped five categories of cases out of the Court’s appellate jurisdiction. The categories of proposed jurisdiction-stripping reflected the contexts in which the Court, over the previous several terms, had protected alleged communists: (1) state laws concerning bar admissions; (2) congressional committee procedures, including contempt proceedings against witnesses; (3) the employee loyalty program of the executive branch; (4) state statutes on subversive activities; and (5) loyalty programs in educational institutions. Jenner contended that “Congress has conveyed upon [the] Supreme Court the appellate power which it has, and Congress can curtail or limit that power, under article III, paragraph 3, section 2 of the Constitution.”<sup>234</sup> Jenner also noted that “[i]t may be there are other areas in which the appellate jurisdiction of the Supreme Court should be restricted or with respect to which such jurisdiction should be withdrawn.”<sup>235</sup>

A brief hearing was held on the bill in August 1957,<sup>236</sup> and extensive hearings were subsequently held in February and March 1958.<sup>237</sup> Republican Senator John Marshall Butler of Maryland—the same Senator who, a few years earlier, sought to protect the Court’s independence—then moved to amend the bill so that, among other things, it would strip the Court’s appellate jurisdiction only over cases involving state bar admissions. With this significant reduction in the jurisdiction-stripping aspects of the legislation (and other changes not relating to jurisdiction, including provisions designed to overturn certain Court decisions), what was now the Jenner–Butler bill was approved by the Senate Judiciary Committee.

In defending the constitutionality of the bill, the Committee report explained that “[w]ithdrawal of appellate jurisdiction from the Supreme Court in a single area, as would be effected by enactment of this bill as amended, is a minimal use of the congressional power to regulate and make exceptions to the appellate jurisdiction of the Supreme Court.”<sup>238</sup> As for the decision to strike out the other four limitations on appellate jurisdiction that Jenner had urged, the report explained that:

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233. Frickey, *supra* note 231, at 427; see William G. Ross, *Attacks on the Warren Court by State Officials: A Case Study of Why Court-Curbing Movements Fail*, 50 *BUFF. L. REV.* 483, 502 (2002) (“While most Court-curbing bills vanished into obscurity the moment they were dropped into the hopper, more Court-curbing measures received serious consideration during 1957–58 than at any time in the nation’s history.”).

234. *Limitation of Appellate Jurisdiction of the United States Supreme Court: Hearing on S. 2646 Before the Subcomm. to Investigate the Admin. of the Internal Sec. Act and Other Internal Sec. Laws of the S. Comm. on the Judiciary*, 85th Cong. 22–23 (1957) [hereinafter *1957 Subcommittee Hearings*] (statement of Sen. William E. Jenner).

235. *Id.* at 24.

236. See generally *id.*

237. See JOHN MARSHALL BUTLER, S. COMM. ON THE JUDICIARY, LIMITATION OF SUPREME COURT JURISDICTION AND STRENGTHENING OF ANTISUBVERSIVE LAWS, S. REP. NO. 85-1586, at 13 (1958).

238. *Id.* at 4.

While it is clear that Congress has the power to withdraw jurisdiction as proposed in these clauses, the committee has concluded that while Congress has a duty to exercise its constitutional power with the objective of restoring a proper balance of powers, it would be wisest for now to confine the use of this power to a single area.<sup>239</sup>

Despite the support of the Judiciary Committee, the Jenner–Butler bill was ultimately tabled in the full Senate, on a vote of 49 to 41, effectively killing it.<sup>240</sup> Commentators have offered a range of explanations for the Senate’s show of restraint. Those explanations include then-Senate Majority Leader Lyndon Johnson’s use of his mastery of the Senate to oppose the bill for various political reasons.<sup>241</sup> It also may have hurt the cause of proponents of the bill that it attracted the support of segregationist members of Congress, who loathed the Court.<sup>242</sup> In addition, as it had done in 1937 with respect to New Deal measures, the Court appeared to temper its decision making with respect to anticommunist measures, thereby reducing some of the pressure for reform.<sup>243</sup> Finally, Congress became more liberal as a result of the 1958 midterm elections, and this ideological change reduced the likelihood that Court-stripping proposals would be adopted.<sup>244</sup> Those political explanations for the defeat of Court-stripping efforts in this period should not be dismissed, just as they should not be dismissed in accounting for the defeat of FDR’s Court-packing proposal.

As was the case in 1937, however, constitutional and conventional concerns also figured prominently in the debate over the proposal. The Senate subcommittee hearings held in early 1958 on what was still the Jenner Bill comprise more than one thousand printed pages, and many of the statements and letters submitted in opposition to the proposed restrictions on the Court were framed in constitutional or conventional terms.<sup>245</sup> Moreover, just as in 1937, opponents

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239. *Id.* at 5.

240. *See* 104 CONG. REC. S18,687 (daily ed. Aug. 20, 1958).

241. *See* Frickey, *supra* note 231, at 430 (explaining that Johnson “opposed [the restrictions on the Court] because they were Republican measures designed to split the Democrats, because they . . . made the Senate look bad, and because of his own burning desire to be President, which required him to demonstrate autonomy from the Southern bloc, seem ‘presidential’ rather than petty, and maintain legitimacy in moderate and liberal circles”); *see also* ROBERT A. CARO, *THE YEARS OF LYNDON JOHNSON: MASTER OF THE SENATE* 1031–33 (2002) (detailing Johnson’s efforts to table the bill).

242. *See* Friedman, *supra* note 232, at 196.

243. *See* C. HERMAN PRITCHETT, *CONGRESS VERSUS THE SUPREME COURT: 1957–1960*, at 121 (1961) (“[T]he Court itself contributed to the defeat of the anti-Court legislation by subsequent moderation of the position taken in some of its controversial decisions.”); Friedman, *supra* note 232, at 196 (noting that the Court “tempered its prior positions in a series of decisions that might be called a second ‘switch in time,’ at least creating the appearance that it was backing away from the earlier controversial decisions”).

244. *See* LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 140–41 (2000).

245. *See* *Limitation of Appellate Jurisdiction of the United States Supreme Court: Hearings on S. 2646 Before the Subcomm. to Investigate the Admin. of the Internal Sec. Act and Other Internal Sec. Laws of the S. Comm. on the Judiciary*, 85th Cong. (2d. Sess. 1958) [hereinafter *1958 Subcommittee Hearings*].

frequently appealed to the “spirit” of the Constitution, and this time they were able to cite the defeat of FDR’s proposal as further support for their claim.

Illustrative is the testimony of Joseph Rauh, Jr., vice-chairman (and former chairman) of the Americans for Democratic Action and a leading civil rights lawyer. Invoking Henry Hart’s thesis regarding the Supreme Court’s “essential role” in the constitutional system,<sup>246</sup> Rauh contended that the Jenner Bill ran afoul of the principle embodied in the thesis and speculated that the Supreme Court would likely hold the bill unconstitutional.<sup>247</sup> “[E]ven if I am mistaken in this view,” said Rauh, “most professional opinion would agree that the bill, at the very least, is anticonstitutional, because it violates the basic assumption of the rule of law which is the essential characteristic of a free government—an independent judiciary.”<sup>248</sup> Rauh further testified that “[w]ere you to take away substantial jurisdiction from the Supreme Court in important areas of American life, you would be going contrary to the spirit of the Constitution and to the jurisdiction of the Supreme Court.”<sup>249</sup>

Jefferson Fordham, Dean of the University of Pennsylvania Law School, expressed similar views. He began by noting that “tradition requires that every proposal to cut down the power of the Court be approached with great care and subjected to detailed scrutiny.”<sup>250</sup> He declined to take a position on the constitutionality of the Jenner Bill, noting only that there is a “respectable theory” that it was unconstitutional.<sup>251</sup> But he argued that, even if the proposed legislation was not unconstitutional, it would “impugn the integrity of the judicial process.”<sup>252</sup>

Erwin Griswold, who also features in Part II of this Article because he had testified before the Senate two decades earlier in opposition to FDR’s Court-packing plan,<sup>253</sup> submitted a written statement opposing the Jenner Bill. Now Dean of the Harvard Law School, he explained that although the bill was “probably constitutional,” “not everything that is constitutional is wise or desirable.”<sup>254</sup> In particular, Griswold argued that the bill was “contrary to the spirit of the Constitution,” because “[i]t is of the essence of the Constitution that we have an independent judiciary,” whereas “[w]e will not have an independent judiciary if the Congress takes jurisdiction away from the Supreme Court whenever the Court decides a case that the Congress does not like.”<sup>255</sup> Griswold also noted that the bill was “in many ways, like the Court-packing plan advanced by President Roosevelt in 1937,” which he described as

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246. See Hart, *supra* note 201, at 1365.

247. See 1958 Subcommittee Hearings, *supra* note 245, at 45.

248. *Id.*

249. *Id.* at 50.

250. *Id.* at 272.

251. *Id.* at 282.

252. *Id.* at 273.

253. See *supra* text accompanying notes 140–42.

254. 1958 Subcommittee Hearings, *supra* note 245, at 357.

255. *Id.*



“an unwise and unfortunate proposal.”<sup>256</sup>

Attorney General William Rogers wrote a letter to the Committee opposing the Jenner Bill, stating that “it is clear that this proposal is not based on general considerations of policy relating to the judiciary,” but rather was “motivated instead by dissatisfaction with certain recent decisions of the Supreme Court in the areas covered and represents a retaliatory approach of the same general character as the Court packing plan proposed in 1937.”<sup>257</sup> He explained that he had “disapproved of such an approach [in 1937] and I do now.”<sup>258</sup> Rogers also noted that “[o]nly once in our history has Congress enacted any legislation of this kind,” namely “in 1868 during the troublous days of reconstruction when jurisdiction was withdrawn from the Supreme Court in cases arising under the Habeas Corpus Act,” an action that he said was subsequently realized to have been a “mistake.”<sup>259</sup> Finally, Rogers expressed concern that “[t]his type of legislation threatens the independence of the judiciary” because “[t]he natural consequences of such an enactment is that the courts would operate under the constant apprehension that if they rendered unpopular decisions, jurisdiction would be further curtailed.”<sup>260</sup>

Also testifying in opposition to the Jenner Bill was Senator Thomas Hennings, who expressed “very serious misgivings as to the constitutionality of [the Bill].”<sup>261</sup> He also was concerned that the bill “[w]ould establish a very dangerous precedent and would be a first step toward the destruction of our present judicial system.”<sup>262</sup> In addition, Hennings reflected on the events of “almost 100 years ago, when Congress enacted the only statute limiting the Court’s jurisdiction”—namely, the legislation at issue in *McCardle*.<sup>263</sup> Hennings quoted from a senator who had objected to that legislation, while also noting that, unlike that legislation, the Jenner Bill did not leave open an alternative avenue of Supreme Court review.<sup>264</sup>

During this period, the House of Delegates of the American Bar Association (ABA) passed a resolution opposing the Jenner Bill, even though the Association was strongly anti-communist and was critical of the Court’s decisions.<sup>265</sup> The House of Delegates recalled the ABA’s support some years earlier for a

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256. *Id.* at 357–58.

257. *Id.* at 573 (printing letter from William P. Rogers, Attorney Gen., to Senator James O. Eastland, Chairman, Comm. on the Judiciary, dated March 4, 1958).

258. *Id.*

259. *Id.*

260. 1958 *Subcommittee Hearings*, *supra* note 245, at 574.

261. *Id.* at 383. As discussed in Section II.F, four years earlier Hennings had opposed Senator Butler’s proposed constitutional amendment concerning Court-packing. Assuming that Hennings spoke candidly and that his views had not changed between 1954 and 1958, his concerns about the Jenner Bill’s constitutionality suggest that his opposition to the Butler amendment was not based on a belief that Court-stripping would be permissible.

262. *Id.* at 384.

263. *Id.* at 382.

264. *See id.* at 382–83.

265. *See id.* at 359.

proposed constitutional amendment (discussed at the end of the previous Part) that would have, among other things, ensured that the Court had appellate jurisdiction over all constitutional matters, and it described the Jenner Bill as “contrary to the maintenance of the balance of powers set up in the Constitution.”<sup>266</sup>

Similar criticisms were directed at the Jenner–Butler bill, even though it had only one (rather than five) Court-stripping measures. A minority of the Senate Judiciary Committee, in opposing the Committee’s endorsement of the bill, emphasized both constitutional and conventional concerns. Invoking structural constitutional claims and historical practice, the minority argued that the remaining restriction on the Court’s appellate jurisdiction in that bill “strikes directly at our historical tradition of separation of powers.”<sup>267</sup> The minority also worried that, if enacted, the bill would “establish a dangerous precedent” because it would “open the way to Congress to whittle away at the Federal judiciary whenever the majority disagreed with a decision of the Supreme Court.”<sup>268</sup> The minority further pointed out that “[t]he deans of most American law schools, the house of delegates of the American Bar Association, the Attorney General, and many outstanding lawyers have voiced strong opposition to this provision.”<sup>269</sup> Attached to the minority report was, among other things, a legal memorandum prepared by Senator Hennings in which he argued that “mere disagreement with a decision of the Supreme Court is not grounds for withdrawing jurisdiction,” and that “[v]iolence will be done to the spirit of the United States Constitution even by this limited withdrawal of jurisdiction and a dangerous precedent will be established.”<sup>270</sup>

During the full Senate debate over the Jenner–Butler bill, opponents similarly invoked constitutional and conventional concerns. Senator Alexander Wiley argued that, although the Jenner–Butler bill was less objectionable than the original Jenner Bill, “[i]t would do violence to the basic structure of American government.”<sup>271</sup> He acknowledged that Congress had power to make exceptions to the Supreme Court’s appellate jurisdiction, but he denied that this was “a total right.”<sup>272</sup> In his view, the line marking the precise boundaries of this power was uncertain, and, as a result, “the Founding Fathers expected we would depend upon . . . the moral sense of the legislators.”<sup>273</sup> As examples of what should be avoided, he invoked what he described as “two great instances of mortal error”—the legislation at issue in “the notorious *McCardle* case” and

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266. 1958 Subcommittee Hearings, *supra* note 245, at 359.

267. S. REP. NO. 85-1586, at 12 (1958).

268. *Id.* at 16.

269. *Id.*

270. *Id.* at 30.

271. 104 CONG. REC. S18,682 (daily ed. Aug. 20, 1958).

272. *Id.*

273. *Id.* at 18,683.

FDR's Court-packing plan.<sup>274</sup>

Senator Hennings made similar arguments against the bill.<sup>275</sup> In addition, in a move somewhat akin to the introduction of the letter from Chief Justice Hughes during the 1937 debate over Court-packing, Hennings submitted a letter concerning the Jenner Bill that he had solicited from Judge Learned Hand, the highly esteemed judge from the Second Circuit.<sup>276</sup> Hand, who by that point had retired from the bench, had recently delivered the Holmes lectures at Harvard Law School, in which he had criticized the Warren Court's broad use of the power of judicial review.<sup>277</sup> Those lectures were invoked numerous times during the hearings on the bill, both by supporters and opponents.<sup>278</sup> Hennings explained to Hand that he thought certain provisions in the bill "raise very serious constitutional questions," and he said that he "would appreciate [Hand's] views on this bill."<sup>279</sup> In his response, Hand wrote that, although he did not think it appropriate for him as a retired judge to comment on the constitutional questions raised by the bill, in his opinion "such a statute if enacted would be detrimental to the best interests of the United States," and that in his view it was "desirable that the Court should have the last word on questions of the character involved."<sup>280</sup> As noted by Gerald Gunther in his magisterial biography of Hand, "Hand's letter to Senator Hennings cut the ground out from under reactionaries' and segregationists' efforts to invoke him in support of their plans."<sup>281</sup>

In sum, many of the themes illustrated by the debate over FDR's Court-packing plan reemerged in the 1957–1958 debates over Court-stripping. Opponents appealed to a mix of constitutional and conventional concerns, sometimes blurring the two categories, and in doing so they frequently invoked either the spirit of the Constitution or the idea that legislation could be anticonstitutional even if not technically unconstitutional. They also attributed normative weight to a long history of lack of congressional restriction, and they expressed a fear that even a small step towards restriction would set a dangerous precedent. Furthermore, they suggested that earlier efforts to restrict the Court, including FDR's proposal, should be treated as negative precedent.

Like the defeat of FDR's Court-packing plan, the defeat of the Jenner–Butler Bill probably also further bolstered the perceived constitutional or conventional

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274. *Id.* at 18,682.

275. *See id.* at 18,686.

276. *See id.* at 18,685.

277. The lectures were published in *LEARNED HAND, THE BILL OF RIGHTS* (1958).

278. *See, e.g., 1958 Subcommittee Hearings, supra* note 245, at 76–77, 91, 211, 219, 266, 430–31, 500, 502, 534–35, 573, 678, 680.

279. 104 CONG. REC. S18,673 (daily ed. Aug. 20, 1958).

280. *Id.* Hand made clear in a follow-up letter that he had been addressing only the desirability of limiting Court review, not other aspects of the bill. *See id.* For an account of Hennings' role in opposing both the Jenner and Jenner–Butler Bills, including his solicitation of the Hand letter, see Irving Dilliard, *Senator Thomas C. Hennings, Jr., and the Supreme Court*, 26 MO. L. REV. 429 (1961).

281. GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* 661 (1994); *see also* POWE, *supra* note 244, at 132 ("Without Hand [supporting the legislation], it really was the yahoos against the establishment.").

norm against taking such action. In a book-length treatment of the efforts in this period to strip the Court's jurisdiction, C. Herman Pritchett, a political scientist, concluded that the defeat of the Jenner–Butler Bill might have “had the effect of permanently neutralizing what is perhaps the most drastic congressional authority over the Court, the control of its appellate jurisdiction.”<sup>282</sup> Pritchett explained that, whatever the scope of Congress's power to limit Supreme Court jurisdiction as an original matter, historical practice and norms may now have had the effect of limiting this power:

It may well be argued that the clause in the Constitution giving Congress control over the Court's appellate jurisdiction has in effect now been repealed by the passage of time and by the recognition that exercise of such power would be in the truest sense subversive of the American tradition of an independent judiciary.<sup>283</sup>

## 2. Executive Branch Debate in the Early 1980s

In November 1980, Ronald Reagan was elected President and the Republican Party took control of the Senate for the first time since 1955. Congressional Republicans were finally positioned to give voice to long-simmering conservative frustration over perceived liberal decisions of the Warren and Burger Courts in the areas of reproductive rights, school desegregation, and school prayer. One response they contemplated was to strip the federal courts, including the Supreme Court, of jurisdiction to hear cases relating to those issues. In the early 1980s, more than twenty Court-stripping bills were circulating in Congress.<sup>284</sup> Sponsors of the bills, including North Carolina Republicans Jesse Helms and John P. East, were “frank to say that the theory behind their efforts is simple—if you don't like the way the court decides a case, tell the judges they can't decide it.”<sup>285</sup> Although the existence of those bills is well-known, much less well-known is the robust debate that they triggered within the Justice Department over the permissibility of Court-stripping—and the role in that debate of the current Chief Justice of the United States.

On July 16, 1981, Theodore Olson, then-head of the Office of Legal Counsel (OLC), distributed a fifty-one page, single-spaced memorandum from OLC concluding that it would be unconstitutional for Congress to engage in Court-stripping.<sup>286</sup> In this memorandum, which the authors of this Article obtained through a request under the Freedom of Information Act, Olson reported that OLC had concluded that most of the proposed Court-stripping bills “would

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282. PRITCHETT, *supra* note 243, at 121–22.

283. *Id.* at 122.

284. *See, e.g.*, Nadine Cohodas, *Members Move to Rein in Supreme Court*, 39 CONG. Q. WKLY. REP. 947, 947 (1981) (describing the “new court-curbing bills—23 in the House, four in the Senate”).

285. *Id.*

286. *See* Memorandum from Theodore B. Olson, Assistant Attorney Gen., Office of Legal Counsel, to the Attorney Gen. (July 16, 1981) [hereafter Memorandum from Olson] (on file with the authors).

probably be held unconstitutional by the Supreme Court,” and he noted that similar views about the unconstitutionality of Court-stripping had been expressed by Attorney General William Rogers in 1958 concerning the Jenner Bill.<sup>287</sup> Olson explained that “[t]he power to adjudicate the constitutionality of state and federal laws is unquestionably at the heart of the federal judicial power.”<sup>288</sup> While he acknowledged that “Supreme Court decisions are inconclusive on the question,”<sup>289</sup> he insisted that “neither *McCardle* nor *Yerger* constitutes an authoritative statement in support of the constitutionality of bills that purport to deprive the Court of any opportunity to assess a constitutional issue.”<sup>290</sup>

Olson thought that the text of Article III “offers some support for the limited proposition that Congress is not authorized to carve out so many exceptions as to engulf the general grant of appellate jurisdiction to the Supreme Court,” but he conceded that “[t]hat proposition does not . . . provide dispositive guidance on the constitutionality of the bills under consideration.”<sup>291</sup> He reasoned, however, that “[c]onstitutional tradition and history suggest that the Supreme Court must exercise the critical function of reviewing state and federal actions for consistency with the Constitution.”<sup>292</sup> In addition to considering Founding history, Olson looked (for almost six pages) to post-Founding “[h]istorical practice . . . with particular emphasis on the practice in the decades immediately succeeding ratification of the Constitution.”<sup>293</sup> After reviewing this early practice, Olson then turned to modern history, noting that “[w]e are not aware of any attempts to limit the Court’s jurisdiction during the first half of the Twentieth Century.”<sup>294</sup> He also observed that “[i]n the years between 1953 and 1968 . . . over sixty bills were introduced to eliminate the jurisdiction of the federal courts over certain subjects,” and he emphasized that “[n]one was enacted.”<sup>295</sup> Olson concluded this portion of his analysis by explaining the pertinence of historical practice to his constitutional analysis. “The historical practice with respect to the Exceptions Clause,” he wrote, “does not, of course, establish that the Clause was not intended to confer plenary power on Congress.”<sup>296</sup> “However,” he continued, “the facts that many members of Congress have expressed constitutional reservations over the years, and that no Congress except during 1868 ever decided to exercise the supposed power, are not

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287. *Id.* at 16; see also *supra* text accompanying notes 257–60 (discussing Rogers’ position on the Jenner Bill).

288. Memorandum from Olson, *supra* note 286, at 18.

289. *Id.* at 19.

290. *Id.* at 22.

291. *Id.* at 25–26.

292. *Id.* at 26.

293. *Id.* at 32.

294. Memorandum from Olson, *supra* note 286, at 37.

295. *Id.*

296. *Id.* at 37–38.

without significance.”<sup>297</sup>

Olson also argued that “the structure of the Constitution is inconsistent with the view that the Exceptions Clause confers plenary power on Congress to eliminate the Supreme Court’s jurisdiction to adjudicate constitutional questions.”<sup>298</sup> He predicted that “Professor Hart’s approach”—his essential functions thesis—“in one form or another[] would most probably be embraced by the Supreme Court.”<sup>299</sup> More specifically, he expected the Court to hold that, “in making exceptions to the appellate jurisdiction of the Supreme Court, Congress may not enact provisions that eliminate the Court’s essential functions of declaring the constitutional boundaries dividing the federal government, the States, and the people, and assuring uniformity in the interpretation of the Constitution.”<sup>300</sup>

Olson’s memorandum prompted a vigorous response from another Justice Department attorney, John Roberts, who was at that time a Special Assistant to Attorney General William French Smith. Whereas Olson pushed back against conservative frustration with the Court, Roberts defended the constitutionality of its expression.

Roberts prepared a twenty-seven-page, single-spaced memorandum setting forth constitutional arguments in favor of Congress’s power to control the appellate jurisdiction of the Supreme Court.<sup>301</sup> The memorandum, which did not become publicly available until 2005 as part of a document release by the National Archives when Roberts was nominated to the Court, indicates that it was prepared at the suggestion of Ken Starr, who at that time was a counselor to Attorney General Smith. Roberts made clear that he prepared the memorandum “from a standpoint of advocacy” and that his analysis “does not purport to be an objective review of the issue.”<sup>302</sup> Consistent with that description, the memorandum reads like it was written by a skilled advocate, not an impartial judge or seasoned academic, even as it relies heavily on the views (canvassed above) of scholars like Wechsler, Bator, Redish, Van Alstyne, and Paul Mishkin. Nevertheless, the memorandum appears to have reflected Roberts’ own views at the time, as he confirmed in writing a few years later (although he also made clear at that time that he opposed Court-stripping as a policy matter).<sup>303</sup>

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297. *Id.* at 38.

298. *Id.*

299. *Id.* at 41–42.

300. *Id.* at 42.

301. See Memorandum from John Roberts, Special Assistant to the Attorney Gen. to the Attorney Gen. (no date), <http://www.archives.gov/news/john-roberts/accession-60-89-0172/006-Box5-Folder1522.pdf> [<https://perma.cc/7SXX-NLXX>] [hereinafter Roberts Memo]. Although the memorandum is undated, it was apparently prepared in October 1981, after Roberts attended an American Enterprise Institute conference early that month entitled “Judicial Power in the United States: What are the Appropriate Constraints?” See *id.* at 1.

302. *Id.* at 2.

303. See *infra* note 307; see also Mark Agrast, *Judge Roberts and the Court-Stripping Movement*, *CTR. FOR AM. PROGRESS* (Sept. 2, 2005), <https://www.americanprogress.org/issues/>“lar issues, but he



In his analysis, Roberts began by emphasizing the plain meaning of the Exceptions Clause, contending that its “clear and unequivocal language is the strongest argument in favor of congressional power.”<sup>304</sup> He then turned to the Founding history of this clause, concluding that it “is not particularly revealing and does not justify a departure from the plain meaning of the words.”<sup>305</sup> Roberts relied more heavily on judicial precedent, especially the Court’s reasoning in *McCardle*.<sup>306</sup> “*McCardle*,” he wrote, “is simply the most prominent in a long and consistent line of judicial opinions reading the exceptions clause as meaning exactly what it says.”<sup>307</sup>

For the most part, Roberts did not invoke longstanding practice as an independent source of constitutional authority supporting his position. Rather, he primarily invoked historical practice in the course of contesting the emphasis of proponents of the essential functions thesis on the pivotal role of the Court in ensuring the uniformity and supremacy of federal law. Roberts explained that the essential functions thesis “confuses a permissive grant of constitutional authority [to grant jurisdiction to the Court] with a constitutional requirement.”<sup>308</sup> He also noted that, from the beginning, Congress withheld certain categories of appellate jurisdiction that might have been useful in maintaining uniformity and supremacy—specifically, over state court decisions striking down state laws on federal constitutional grounds until 1914, over state court decisions upholding the validity of federal statutes throughout the nineteenth century, and over federal criminal cases until 1889—and yet those limitations were widely accepted.<sup>309</sup> The relatively minor role of historical practice in the

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added that ‘intiff show beyond a ” parties to enforce statutory provisions? legal rights.y suffices for Acivil-liberties/news/2005/09/02/1622/judge-roberts-and-the-court-stripping-movement/ [https://perma.cc/7CSP-5JHL] (“[I]t is hard to read [the 1981 memo] as anything other than an expression of Roberts’ enthusiastic personal views.”); David Espo, *Files Reveal Roberts’ Work Under Reagan*, WASH. POST (July 27, 2005), [http://www.washingtonpost.com/wp-dyn/content/linkset/2005/07/27/LI2005072701850\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/linkset/2005/07/27/LI2005072701850_pf.html) [https://perma.cc/5SUK-ADV4] (“As a lawyer in the Reagan White House, John Roberts wrote that Congress had authority to strip the Supreme Court of jurisdiction over cases involving school prayer and similar issues, but he added that ‘such bills were bad policy and should be opposed.’”).

304. Roberts Memo, *supra* note 301, at 2.

305. *Id.* at 4.

306. *Id.* at 8–10.

307. *Id.* at 12. Roberts used similar language while working in the White House Counsel’s Office in 1985, in response to an inquiry about the constitutionality of a Court-stripping bill involving cases challenging voluntary school prayer; he explained that his views on the constitutionality of Court-stripping “did not carry the day” within the Justice Department, which issued an opinion “concluding that the [Exceptions Clause] did not mean what it said.” Memorandum from John G. Roberts to Fred F. Fielding (May 6, 1985), <http://www.reagan.utexas.edu/roberts/Box48JGRSchoolPrayer1.pdf> [https://perma.cc/N52F-ALLH]. Roberts also wrote that “[t]here is much to be said for the virtues of stare decisis in this area, and I think I would recommend that we adhere to the old misguided opinion and let sleeping dogs (an apt reference, given my view of the opinion) lie.” *Id.* “On the other hand,” he continued, “I know this issue has been close to the hearts of some who are now over at Justice, so there could be a push for reconsideration.” *Id.*

308. Roberts Memo, *supra* note 301, at 15.

309. *See id.* at 16–18. Roberts also wrote that “[t]hose who truly believe that the exercise of this exceptions power threatens the system of checks and balances should pursue the remedy suggested by

Roberts memorandum reflects the interpretive orientation of the legal academics upon whom he principally relied.

The following spring, on April 12, 1982, Olson distributed another memorandum on the topic.<sup>310</sup> That memorandum, which became publicly available in 2005 along with the Roberts memorandum, detailed “policy and/or political arguments” that “might be made for and against the legislation which would withdraw Supreme Court appellate jurisdiction over classes of constitutional cases.”<sup>311</sup> The beginning of the memorandum noted arguments in favor,<sup>312</sup> but the bulk of it developed “Arguments Against Jurisdictional Withdrawal.”<sup>313</sup> Although labeled policy or political arguments, what is most interesting about these arguments is their tendency to bleed into conventional claims and their invocation of the negative precedent of FDR’s attempt to pack the Court in 1937.

Olson noted that “[e]liminating Supreme Court jurisdiction over specific classes of cases would deprive the nation of a single and authoritative statement of what the Constitution means in these areas,” which was worrisome in part because the “Court has an important, intangible institutional role in ensuring due respect for the Constitution and the rule of law in our society.”<sup>314</sup> Olson seemed to think that more was at stake for the functioning of the constitutional system than a question of policy or politics.

Olson next observed that “[e]liminating Supreme Court jurisdiction would remove the possibility of modifying or overruling existing precedent.”<sup>315</sup> He also reasoned that:

If the purpose of these bills is to obtain decisions by state or federal courts which depart from the rules previously announced by the Supreme Court, that purpose implicitly contains an invitation to state and federal court judges to

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Justice [Owen] Roberts, namely amendment of the Constitution to remove Congress’ exceptions power.” *Id.* at 21. John Roberts observed (as detailed in Section II.F, *supra*) that the ABA had supported such an amendment, but that it was tabled in the House. *Id.* “In light of the foregoing,” he continued, “it is perhaps not unfair to criticize those who argue against the power of Congress under the exceptions clause as the ones who are circumventing the amendment process.” *Id.*

310. Memorandum from Theodore B. Olson, Assistant Attorney Gen., Office of Legal Counsel, to the Attorney Gen. (Apr. 12, 1982), [http://www.washingtonpost.com/wp-srv/nation/documents/olson\\_04\\_12\\_1982.pdf](http://www.washingtonpost.com/wp-srv/nation/documents/olson_04_12_1982.pdf) [<https://perma.cc/6ZDC-YFKC>] [hereinafter Olson Policy Memo].

311. *Id.* at 1. Roberts wrote skeptical comments on the Olson policy memorandum. See R. Jeffrey Smith et al., *Documents Show Roberts Influence in Reagan Era*, WASH. POST (July 27, 2005), [http://www.washingtonpost.com/wp-dyn/content/article/2005/07/26/AR2005072602070\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2005/07/26/AR2005072602070_pf.html) [<https://perma.cc/6GB9-YZDC>].

312. See Olson Policy Memo, *supra* note 310, at 1–2 (stating that “[s]uch legislation is needed to curb judicial activism,” is “a way of expressing popular disenchantment with the Court’s decisions,” and is “strongly supported by the President’s most loyal and powerful constituents”).

313. *Id.* at 3; see *id.* at 3–9.

314. *Id.* at 3–4.

315. *Id.* at 5.

violate their oaths and the principle of respect for law by issuing opinions inconsistent with binding authority.<sup>316</sup>

Although not arguing that such a purpose would render the bills unconstitutional, Olson did suggest that it would be normatively problematic.

Olson then argued that Court-stripping bills “are, in effect, attempts to amend the Constitution without resort to the constitutional processes for doing so.”<sup>317</sup> “Even if not unconstitutional,” he insisted, “they run counter to the evident purposes of the Framers,”<sup>318</sup> an invocation that is similar to previous invocations of the spirit of the Constitution. Olson appeared to draw lessons from the two ways in which FDR had sought to change the composition of the Court. “It is entirely proper,” he wrote, “for the President to appoint individuals whose judicial philosophy is in accordance with his views and the popular mood,” but Court-stripping, “[e]ven if not unconstitutional, . . . would short-circuit this accepted and legitimate way of creating the potential for altering the prevailing interpretation of the Constitution.”<sup>319</sup>

Olson also feared setting a precedent that would damage the constitutional structure. “Once the principle is established,” he wrote, “immense pressures will be generated by special interest groups to divest the Supreme Court of jurisdiction in any number of fields.”<sup>320</sup> Moreover, “[e]ven if not unconstitutional,” he maintained that “these bills would upset the policy of checks and balances embodied in the Constitution” because the Court “has traditionally acted as a check on popular passions.”<sup>321</sup>

Finally, Olson noted that the Court-stripping bills in circulation “are opposed by the vast majority of the bench and bar,” and that “[i]gnoring this opposition will appear to be unwise or anti-constitutional—an undesirable image to develop.”<sup>322</sup> Although phrased in terms of public perception, which may be a political matter, the reference to “anti-constitutionality” echoes conventional arguments made over the previous decades in debates over Court-packing and Court-stripping. Likewise, Olson thought there were “sound political reasons to oppose these bills.”<sup>323</sup> “History suggests,” he wrote, “that the people are

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316. *Id.* Decades later, Richard Fallon independently developed this point and argued that it was constitutional in stature. See Fallon, *supra* note 7, at 1083 (“Because it is almost always reprehensible for government officials—including judges—to engage in law-breaking, Congress’s power over jurisdiction should not be interpreted as a license to encourage lawbreaking by either state or federal officials or by state court judges. Legislation barring both Supreme Court and lower federal court jurisdiction over challenges to anti-abortion legislation or school prayer should, accordingly, be held invalid based on its constitutionally forbidden purpose of encouraging defiance of applicable Supreme Court precedent.” (internal citations omitted)).

317. Olson Policy Memo, *supra* note 310, at 6.

318. *Id.*

319. *Id.*

320. *Id.* at 7.

321. *Id.*

322. *Id.* at 6.

323. Olson Policy Memo, *supra* note 310, at 8.

extremely wary of any frontal assault on the Court,” and that it was “instructive” to consider FDR’s “experience in 1937.”<sup>324</sup> Olson also opined that “[o]pposition to jurisdictional limits on constitutional grounds will be considered as a position of courage, integrity and principle.”<sup>325</sup> Again, Olson framed these considerations in terms of public perception of the President, but his belief that the public would perceive a question of integrity and principle to be at stake suggests his recognition that Court-stripping would potentially violate perceived norms of proper governmental behavior.

Olson appears to have presupposed that he had only two conceptual categories to work with: constitutional law and ordinary policy/politics. Thus, any argument against Court-packing that he did not believe fit within the first category he apparently felt the need to shoehorn into the second. Upon inspection, however, it is apparent that Olson was working with three categories, not two: law, conventions, and policy/politics.

One week later, Olson returned to the law category. On April 19, 1982, he distributed another memorandum, which states that it was designed to supplement the constitutional analysis in the July 1981 memorandum, given all that has been “written and spoken on the subject since then.”<sup>326</sup> This memorandum, which Mr. Olson provided to the authors of this Article, has not previously been made publicly available.

The April 19 memorandum, which is twenty-one single-spaced pages, appears to have been at least in part a response to Roberts. In the memorandum, Olson critiqued four arguments, one of which was that “[t]here is no support in the debates at the Constitutional Convention, the *Federalist* papers, the cases, or the actions of early Congresses for the view that Congress does not have the authority to remove any and all of the Supreme Court’s appellate jurisdiction.”<sup>327</sup> He insisted that “[s]ome of the most significant Supreme Court decisions in our history have articulated the Supreme Court’s vital function in ensuring uniformity and consistency in constitutional law,”<sup>328</sup> that “[n]umerous statements at the Constitutional Convention recognized the Supreme Court’s appellate jurisdiction as constitutionally essential to maintain the uniformity and supremacy of federal law,”<sup>329</sup> that “[t]he *Federalist* also contains a number of significant statements recognizing the Supreme Court’s essential role in the constitutional scheme,”<sup>330</sup> and that “[t]he failure of Congress in the First

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324. *Id.*

325. *Id.* at 9.

326. See Memorandum from Theodore B. Olson, Assistant Attorney Gen., Office of Legal Counsel, for the Attorney Gen. 1 (April 19, 1982) [hereinafter Second Olson Constitutional Memo] (on file with the authors).

327. *Id.* at 13.

328. *Id.* (discussing *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 306 (1806), *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 416 (1821), and *Ableman v. Booth*, 62 U.S. (21 How.) 506, 517–18 (1858)).

329. *Id.* at 15.

330. *Id.* at 16 (discussing THE FEDERALIST NOS. 39, 80, 82) (James Madison).

Judiciary Act to provide the Court with the full appellate jurisdiction authorized under Article III does not . . . cast any substantial doubt on our conclusion that Congress cannot divest the Supreme Court of jurisdiction over constitutional cases, for several reasons.”<sup>331</sup>

Substantiating the last point, Olson noted that the first Congress “recognized the Court’s appellate jurisdiction over an extremely broad range of constitutional cases,” most significantly under section 25 of the Judiciary Act notwithstanding “the intense controversy which it sparked among the states.”<sup>332</sup> He further reasoned that, “[t]o the extent that any inferences can be drawn from the failure of the First Judiciary Act explicitly to recognize the full range of the Supreme Court’s appellate jurisdiction over constitutional cases, those inferences are subject to refutation by later events.”<sup>333</sup> He explained that “the Supreme Court now has appellate jurisdiction over all federal cases,” that “[e]ach of the areas of incomplete jurisdiction has long since been fulfilled,” and that “[t]he vast majority of constitutional decisions which are on the books today, and which affect our national life in many and important ways, have been rendered by the Court under a statutory regime which included such broad appellate jurisdiction.”<sup>334</sup> Invoking Justice Frankfurter’s articulation of the authority of historical gloss in *Youngstown*, Olson urged that “[t]he gloss which life has written on the Supreme Court’s jurisdiction is one in which the Court stands as the final arbiter of constitutional questions.”<sup>335</sup> Olson also thought it “noteworthy” that “throughout our history there have been movements to curb the Court’s jurisdiction which have never succeeded.”<sup>336</sup> Finally, Olson observed that “none of the provisions of the Judiciary Act which have been read to deny the Court appellate jurisdiction over classes of constitutional cases were ever challenged in court.”<sup>337</sup>

Importantly, Attorney General Smith sided with Olson over Roberts.<sup>338</sup> Smith went public in a letter to the Chairman of the Senate Judiciary Committee dated May 6, 1982, which was deemed sufficiently important that it was made a formal OLC opinion.<sup>339</sup> Smith explained that he was writing in response to

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331. *Id.* at 18.

332. Second Olson Constitutional Memo, *supra* note 326, at 18–19.

333. *Id.* at 19.

334. *Id.*

335. *Id.*

336. *Id.* at 19–20.

337. *Id.* at 20.

338. Why Smith sided with Olson is both interesting and potentially overdetermined. Part of the explanation may be that he was more persuaded by Olson’s analysis of the relevant constitutional, conventional, and policy considerations. Another part of the explanation may have to do with the institutional incentives of the Executive Branch to support judicial independence. See Tara Leigh Grove, *The Article II Safeguards of Federal Jurisdiction*, 112 COLUM. L. REV. 250, 263–66, 301–06 (2012) (discussing the incentives of the Department of Justice, the Attorney General, and the Solicitor General).

339. Constitutionality of Legis. Withdrawing Supreme Court Jurisdiction to Consider Cases Relating to Voluntary Prayer, 6 Op. O.L.C. 13, 13 (1982) [hereinafter Smith Letter]. Olson has explained that he

earlier inquiries from members of the committee concerning a bill that would strip the Court's appellate jurisdiction in all cases arising out of any state regulation relating to voluntary prayer in public schools and public buildings. Smith emphasized that such legislation raised fundamental and unsettled constitutional questions under the separation of powers doctrine, and he quoted Frankfurter and Landis in explaining why the questions were so difficult: "The accommodations among the three branches of government . . . are undefined, and in the very nature of things could not have been defined, by the Constitution."<sup>340</sup> Smith concluded that Congress possesses some authority under the Exceptions Clause to regulate the appellate jurisdiction of the Court (and possesses substantially more authority to regulate the jurisdiction of the lower federal courts), but that Congress may not, "consistent with the Constitution, make 'exceptions' to Supreme Court jurisdiction which would intrude upon the core functions of the Supreme Court as an independent and equal branch in our system of separation of powers."<sup>341</sup>

Smith made several arguments in support of the Justice Department's adoption of the "essential functions" thesis. Most importantly for present purposes, Smith invoked historical practice—"the historical record regarding the authority actually asserted by Congress to control the Court's appellate jurisdiction"<sup>342</sup>—as an independent source of constitutional authority. Like Olson's second memorandum on the constitutional issues, Smith conceded that the First Judiciary Act did not authorize the Court to exercise all of the appellate jurisdiction established by Article III. Nevertheless, he thought it noteworthy that the statute "recognized the Court's appellate jurisdiction over an extremely broad range of constitutional cases," most significantly under section 25, notwithstanding "the intense controversy which it sparked among the states."<sup>343</sup> In addition, Smith expressly invoked Justice Frankfurter's articulation of the authority of historical gloss, noting that even if "inferences can be drawn from the failure of the First Judiciary Act explicitly to recognize the full range of the Supreme Court's appellate jurisdiction over constitutional cases, those inferences are subject to refutation by later events."<sup>344</sup> Reproducing Olson's statements about the modern scope of the Court's appellate jurisdiction, Smith concluded that "[t]he gloss which life has written on the Supreme Court's jurisdiction is one which protects the essential role of the Court in the constitutional plan."<sup>345</sup>

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drafted the letter for Smith. See Emails from Theodore B. Olson, to Neil S. Siegel (Nov. 17, 2015, 5:06 PM) (on file with authors). The letter draws heavily from Olson's memoranda.

340. Smith Letter, *supra* note 339, at 14 (quoting Felix Frankfurter & James M. Landis, *Power of Congress Over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in Separation of Powers*, 37 HARV. L. REV. 1010, 1016 (1924)).

341. *Id.*

342. *Id.* at 24.

343. *Id.*

344. *Id.* at 25.

345. *Id.*



Smith closed by purporting to move from constitutional law to “concerns as a policy matter” with Court-stripping.<sup>346</sup> Like the Olson policy memorandum, however, Smith’s concerns sounded at least as much in conventions as it did in policy or political considerations. He wrote that “[h]istory counsels against depriving th[e] Court of its general appellate jurisdiction over federal questions.”<sup>347</sup> Emphasizing the need to ensure the uniformity and supremacy of federal law, he concluded that the “integrity of our system of federal law depends upon a single court of last resort having a final say on the resolution of federal questions.”<sup>348</sup>

This early 1980s debate within the Justice Department contains many of the same themes that were present in the 1957–1958 debates over Court-stripping and the 1937 debate over Court-packing. Moreover, like the upshot of those earlier debates, the Smith OLC opinion—which remains the Justice Department’s most recent official position on the issue—likely reinforced the perceived constitutional or conventional norm against frontal attacks on the independence of the Court. The 1980s episode confirms that, in controversies between the political branches about the courts, historical practice may be relevant not only to members of Congress, but also to high-ranking Executive Branch officials.

Equally noteworthy, however, are the differences between the 1980s debate within the Justice Department and the earlier debates. Olson and Smith appealed to both constitutional and conventional concerns, but, perhaps because they wrote in their capacity as modern lawyers, they did not tend to blur those two categories. Indeed, Olson wrote separate memoranda on those subjects. Olson and Smith instead tended to blur the categories of conventions and politics/policy, and did not appear to comprehend that they were separate categories. Just as the concept of a constitutional convention appears to have been lost for a time in much American constitutional scholarship, so it appears to have been lost for a time in the arguments of at least some high-ranking government officials.<sup>349</sup>

#### D. CONCLUSION

As with the discussion of the 1937 debate over FDR’s Court-packing plan, the foregoing accounts of debates over Court-stripping proposals are not meant

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346. Smith Letter, *supra* note 339, at 26.

347. *Id.*

348. *Id.*

349. This Article can only speculate about why the concept of conventions became less prominent for a time in American constitutional reasoning. Part of the explanation may be an increased tendency to equate constitutional law with Supreme Court decision making, which itself may have resulted from the more active role played by the Court in addressing controversial social issues starting in the 1950s. The subsequent rise of originalism as an interpretive theory during the 1970s and 1980s—something evident in the debate between Olson and Roberts—may also have had a tendency to suppress consideration of conventions. As noted in Part I, efforts to credit post-Founding governmental practice are more compatible with nonoriginalist approaches to constitutional interpretation.

to deny the importance of political factors in contributing to the defeat of the proposals. Among other things, as Tara Grove has explained, the veto points associated with the constitutional process for lawmaking may themselves operate as a protection against Court-stripping.<sup>350</sup> The claim animating this Part, rather, is that a focus only on politics misses the extent to which the political branches have grappled with constitutional and conventional concerns about Court-stripping.

#### IV. IMPLICATIONS OF GLOSS AND CONVENTIONS FOR THE JUDICIAL SEPARATION OF POWERS

Using insights obtained from the debates over Court-packing and Court-stripping, this Part reflects on the implications of historical gloss and constitutional conventions for the judicial separation of powers more generally. It begins by noting some ways in which the potential benefits of gloss and conventions, typically considered only in the context of the political branches, appear to translate to the context of the federal judiciary, while also noting some differences between those contexts. Next, it reflects on a central feature of the debates recounted above about Court-packing and Court-stripping: the uncertain line between politics and conventions, and between conventions and gloss, as well as the frequent blurring of those categories in normative argumentation. Finally, this Part highlights a number of other issues relating to the authority and independence of the federal courts that might benefit from similar consideration in light of gloss and conventions.

##### A. GLOSS AND CONVENTIONS IN THE JUDICIAL CONTEXT

The previous two Parts have shown that, in debates over Court-packing and Court-stripping, there have been repeated and, by all appearances, serious appeals to historical gloss and constitutional conventions. Put differently, gloss and conventions appear to be doing important work in normative arguments about the judicial separation of powers outside the courts. Although the causal influence of those normative arguments in defeating various proposals is difficult to establish, debates within Congress and the Executive Branch at least suggest that purely political explanations for the defeat of Court-packing in 1937 and Court-stripping in the 1950s and 1980s are descriptively incomplete.

Whether historical practice *should* do such work in interpretive debates about the independence of the Supreme Court, or other questions relating to the judicial separation of powers, is a separate question. The principal goal of this Article is to show that the concepts of historical gloss and constitutional conventions can shed new light on how participants in interpretive debates reason about the judicial separation of powers, not to offer a normative defense of those concepts or to apply them as part of a normative inquiry into the

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350. See generally Grove, *supra* note 14.

permissibility of Court-packing or Court-stripping. As a result, this Article does not take a position on whether Court-packing or Court-stripping is constitutional. The debates recounted in this Article suggest that if one accepts the authority of gloss and conventions, and if other historic debates about packing or stripping included similar forms of reasoning with similar influence and results, then serious arguments can be made that Court-packing and Court-stripping violate either the Constitution or constitutional conventions. But that is all this Article can establish.

It is worth noting, however, that many of the potential justifications for relying on historical practice in separation of powers disputes—explored in other scholarship<sup>351</sup>—potentially apply in the context of the judicial separation of powers. For example, the practice might reflect the considered constitutional views of the institutions involved, and those views might merit deference by courts or subsequent institutional actors. Such deference could be warranted for a variety of reasons, some of which reflect the expertise of government officials and some of which are similar to the reasons for deferring to past judicial decisions, such as promoting the rule-of-law values of consistency and predictability. Another somewhat related rationale for crediting longstanding practice is that such practice might be evidence of an arrangement that has worked reasonably well, an important consideration for constitutional analyses that, whether expressly or implicitly, incorporate Burkean and consequentialist reasoning. There might also be reliance interests at stake if the institutions involved or third parties have organized their conduct around the practice. In addition, in situations in which other modalities of constitutional interpretation do not provide much guidance, so that it is difficult to develop a normative sense of what the proper allocation of power between the branches should be, practice may offer the most objective decisional material. Finally, if the foundations of law lie in acceptance, as H.L.A. Hart famously argued,<sup>352</sup> historical practice may inform the actual terms of that acceptance. All of these justifications for crediting historical practice seem just as potentially applicable in interpretive debates between the political branches about the limits of their own authority vis-à-vis the courts as they are in interpretive debates about the limits of their own authority vis-à-vis one another.

Another attraction of historical gloss and constitutional conventions is the interpretive flexibility that they offer in light of perceived changes over time in the needs of American governance. That feature, too, seems relevant to the judicial separation of powers. Just as the Executive Branch has changed dramatically since the Founding, so too has the federal judiciary, along various dimensions. Among other things, there have been substantial changes in the number of federal judges and courts; the organization of the lower federal courts; the number of cases; the scope of jurisdiction; and the nature of the appointments

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351. See Bradley & Morrison, *supra* note 1, at 426–28.

352. See HART, *supra* note 56, at 58–60.

process.<sup>353</sup> Those changes heighten the need for flexibility in constitutional analysis in this area so that such analysis can continue protecting the independence of the judiciary while also allowing for majoritarian checks on the judiciary.

Even more significant than the above changes may be the explosion of constitutional rights since *Brown v. Board of Education*. On the one hand, the dramatic expansion of judicial protections may reflect a public expectation that courts have a muscular role to play in vindicating individual rights. On the other hand, the robust regime of judicial review that exists today may mean that there will be more frequent occasions in which politicians will threaten federal courts with various kinds of punishment for controversial decisions. The debates over Court-stripping discussed in Part III offer evidence of that dynamic. Given the vastly different role that courts play in American society today, as opposed to 1789—when Article III became operative—it is not clear why originalism should exclusively determine the limits on the authority of politicians to punish judges for controversial decisions by, say, adding to their membership, stripping their jurisdiction, or impeaching them.

Although the justifications for crediting historical practice in the congressional–executive realm also apply to the judicial realm, there are important differences between those two contexts. For example, most discussions of historical practice as it relates to the distribution of authority between Congress and the Executive Branch focus on disputes between those two branches. Historical practice is potentially relevant to questions of judicial independence and power, however, not only when there are disputes between the political branches and the courts, but also when there are disputes between the President and Congress *about* the courts. The judiciary, in other words, can be a *player* in a separation of powers dispute or it can be the *subject* of such a dispute.<sup>354</sup> More subtly, the judiciary may end up being a player when it is the subject, by tempering its decision making or otherwise acting to help defuse a situation, as arguably happened in both the Court-packing and Court-stripping debates described in this Article.

The concept of institutional “acquiescence,” often thought to be a key component of gloss as between Congress and the executive branch,<sup>355</sup> may also operate differently or be less applicable in the context of the judicial separation of powers. Courts can act institutionally only when they have cases properly before them, and they have relatively few “soft law” tools to indicate their views about the law. Courts may thus have less opportunity to express acquiescence or nonacquiescence than other institutions.<sup>356</sup> That said, one tool of

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353. For an overview, see FALLON ET AL., *supra* note 6, at 1–47.

354. We thank our colleagues Joseph Blocher and Maggie Lemos for suggesting this distinction.

355. See Bradley & Morrison, *supra* note 1, at 432–38.

356. The Court has engaged in limited nonacquiescence concerning Congress’s establishment of non-Article III tribunals. See, e.g., *Stern v. Marshall*, 564 U.S. 462, 494 (2011); *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 63–64 (1982).

nonacquiescence that the Supreme Court has used several times in the context of jurisdiction-stripping, including arguably in *McCardle* as discussed above, is narrow statutory interpretation.<sup>357</sup> Moreover, as this Article has documented, the Court has the ability to affect political debates over judicial independence by modulating its own behavior, and even by injecting itself into such debates in ways that help preserve its independence.<sup>358</sup>

Another issue that arises with respect to the use of historical gloss in the context of congressional–executive relations is that it might favor the executive branch, which for a variety of reasons can more easily engage in unilateral action than can Congress and has more of an incentive to promote its institutional interests.<sup>359</sup> Concerns about potential aggrandizement are more complex when applied to the judiciary. On the one hand, the Supreme Court has an advantage over the other branches of government: given the strong popular and political branch support for judicial review that exists today, the Court can purport to have the last word on the constitutional significance of practice. As a small body with lifetime appointees, moreover, the Court is likely to have an incentive to promote its institutional interests.<sup>360</sup> For those reasons, the danger of aggrandizement might seem especially acute in this context. If so, one might object to viewing historical practice as evidence of gloss, as opposed to a convention, on the ground that courts require the potential threat of political interventions like Court-packing and Court-stripping to keep them sufficiently in check, or at least to facilitate expressions of dissatisfaction with their decisions. For example, federal courts scholar Paul Mishkin once testified that there may not be circumstances “which would seem to me sufficient to actually abrogate the jurisdiction, but the possibility of it, and the existence of the power, seem to me to be healthy parts of the system,” because “there ought to be the opportunity for Congress to direct itself to questions of jurisdiction, indeed as a response to Court decisions.”<sup>361</sup>

On the other hand, the federal judiciary, as Alexander Hamilton noted in the *Federalist Papers*, lacks power over either the sword or the purse and in that sense is the weakest branch.<sup>362</sup> Moreover, unlike political actors, federal judges have limited ability to directly mobilize political constituencies, especially

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357. See *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868); see also *Hamdan v. Rumsfeld*, 548 U.S. 557, 576–77 (2006); *Felker v. Turpin*, 518 U.S. 651, 658 (1996); *Webster v. Doe*, 486 U.S. 592, 600 (1988).

358. Recall, for example, the letter of Chief Justice Hughes that effectively refuted FDR’s claims that the Justices needed additional personnel in order to get their work done. See *supra* note 159 and accompanying text.

359. See *Bradley & Morrison*, *supra* note 1, at 438–47.

360. But see Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 963 (2005) (“[I]t is hard to see how the interests of judges would lead to a consistently expansionist federal judiciary.”).

361. *The Supreme Court: Hearings Before the Subcomm. on Separation of Powers of the S. Comm. on the Judiciary*, 90th Cong. 202 (1968).

362. THE FEDERALIST NO. 78 (Alexander Hamilton).

because they do not sit for re-election and so must depend on the other branches to determine their future composition. Furthermore, as illustrated by the debates in Parts II and III, many issues relating to the judicial separation of powers never get to the Court, so its potential ability to have the last effective word on the meaning of the Constitution will often not come into play.

Finally, a question worth exploring is whether institutional self-restraint, as opposed to acquiescence or waiver, plays more of a role in the context of the judicial separation of powers than in separation of powers controversies not concerning the courts. Much of the historical practice invoked in debates over Court-packing and Court-stripping has involved a failure to act, not a longstanding pattern of action acquiesced in by another branch of government.<sup>363</sup> By contrast, action by the Executive Branch acquiesced in by Congress may be the most common type of gloss scenario outside the context of the judicial separation of powers (such as making recess appointments, using military force, and terminating treaties). Even so, practice-based claims resting on a pattern of inaction are not unique to the judicial separation of powers. For example, the historical practice credited by the Court in *Zivotofsky* was primarily the longstanding lack of congressional action similar to the statute at issue in that case.<sup>364</sup> Presumably, whether institutional inaction should constitute historical gloss will depend on the reasons for the inaction, in particular whether it was motivated by normative concerns or instead was simply a function of the issue not having arisen before.<sup>365</sup>

#### B. DISTINGUISHING AMONG GLOSS, CONVENTIONS, AND POLITICS

The previous parts of this Article also show how gloss and conventions, and conventions and politics, are often blurred in argumentation outside the courts. In the debates over Court-packing and Court-stripping, appeals to historical gloss can be difficult to distinguish from appeals to constitutional conventions, just as appeals to conventions can be difficult to distinguish from appeals to politics. That blurring complicates efforts at categorization. Moreover, the debates suggest that some constitutional understandings may straddle the divide between law and conventions, or between conventions and politics, and potentially shift among those categories over time.<sup>366</sup> Recognizing such blurring and

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363. See, e.g., *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 230 (1995) (“[W]e know of no [other] instance in which Congress has attempted to set aside the final judgment of an Article III court by retroactive legislation. That prolonged reticence would be amazing if such interference were not understood to be constitutionally proscribed.”).

364. See *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2091 (2015).

365. See *id.* at 2094 (“The weight of historical evidence indicates Congress has accepted that the power to recognize foreign states and governments and their territorial bounds is exclusive to the Presidency.”). But see Curtis A. Bradley, *Agora: Reflections on Zivotofsky v. Kerry, Historical Gloss, the Recognition Power, and Judicial Review*, 109 AM. J. INT’L L. UNBOUND 2, 5 (2015) (questioning whether historical practice supported this conclusion in *Zivotofsky*).

366. One development that might contribute to the shift of a practice-based norm among the categories of politics, conventions, and gloss would be a high level of political polarization, such as



overlap allows for a richer and more nuanced account of American constitutional law. As Parts II and III demonstrate, when one has the potential blurring among categories in mind, it is possible to see things in hearings, reports, and memoranda that one did not see before. At the same time, the blurring raises important questions about when it matters whether a practice is labeled as gloss, convention, or “mere” politics, and also about how an observer would be able to distinguish the three.

In some contexts, precise categorization will be unnecessary. For example, when political actors object to proposals to pack the Court or strip its jurisdiction, they can appeal to the spirit of the Constitution without committing to whether they are making a legal claim. As recounted in Parts II and III, that happened frequently in the debates in 1937 and 1957–1958. Blurring of the categories is potentially useful because it allows for greater flexibility in constitutional argumentation: actors can appeal to the Constitution without necessarily claiming that a particular course of action is illegal, either presumptively or under all circumstances. Moreover, by being unclear about the categorization, political actors can preserve the shadow of some threat of disciplining the federal judiciary in the future, something that would be valuable if—as discussed in the last Section—one is concerned about the danger of judicial aggrandizement.<sup>367</sup> Finally, uncertainty about categorization allows room for continued iterative evolution of the norm in interactions among the branches.

Contrary to what some have suggested, however, it is necessary in some contexts to distinguish gloss from conventions.<sup>368</sup> If a court is determining in litigation whether the actions of another branch of government should be given effect—the recess appointments at issue in *Noel Canning*, for example—it will need to determine whether a potentially conflicting norm has constitutional status. Similarly, lawyers within the executive branch, when providing advice about whether to take executive action or to support congressional action, need to be clear about what is and is not a legal constraint. That is why in the early

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exists in contemporary American politics, when certain conventions have been under stress. *See supra* note 55; *infra* note 387. Another development would be some sort of constitutional showdown between branches of the government. *Cf.* Eric A. Posner & Adrian Vermeule, *Constitutional Showdowns*, 156 U. PA. L. REV. 991, 999 (2008). Constitutional conventions can also break down during periods of high-stakes politics associated with changes from one constitutional order to another. *See* Mark Tushnet, *Constitutional Hardball*, 37 JOHN MARSHALL L. REV. 523, 523 & n.2, 544 (2004) (referring to conventions as “pre-constitutional understandings,” which are “the ‘go without saying’ assumptions that underpin working systems of constitutional government” and so are “conceptually prior to the Constitution, . . . not necessarily temporally prior,” and arguing that “[p]olitical leaders play hardball when they believe that they are in a position to shift from one [constitutional] order to another, or when they believe themselves to be threatened with the possibility of such a shift”).

367. *Cf.* *Nixon v. United States*, 506 U.S. 224, 239 (1993) (White, J., concurring) (arguing that, although the Court should give substantial deference to the Senate’s view of what it means to “try” an impeachment, it should not “announce an unreviewable discretion in the Senate”); *id.* at 253–54 (Souter, J., concurring) (similar argument).

368. *Cf.* Pozen, *supra* note 9, at 38 n.160 (“[I]t is not clear to me what hangs on the quest to distinguish bona fide ‘historical gloss’ from the mass of constitutional conventions.”).

1980s, as seen in Part III, Ted Olson and John Roberts argued primarily over what the Constitution allowed Congress to do regarding the Supreme Court's jurisdiction, and over what materials should be consulted in answering that question. They were clear about the distinction between legality and other kinds of arguments, even as Olson was unclear about the distinction between conventional and policy arguments.

As noted in Part I, unless one relies on a constitutional or political theory, the categorization of a norm as a convention or as historical gloss will depend on how participants in the practice understand the norm.<sup>369</sup> An important piece of evidence in making such a determination would be how critics of a contemplated breach of a norm have responded—in particular, whether they have framed their objections in legal terms. Practice-based claims that cross party lines may be entitled to particular weight because they are less likely to be aimed at promoting party interests. It is significant, for example, that resistance to Court-packing and Court-stripping was not merely partisan: Democrats pushed back against FDR in 1937, and there was Republican opposition within the Justice Department in the 1980s to Republican efforts in Congress to discipline the Court.<sup>370</sup> In discerning the constitutional views of government actors, internal documents not intended for the public may be especially probative because they are less likely to be opportunistic. That is one reason why the Executive Branch memoranda in 1937 and the OLC documents in the 1980s, which concluded that Court-stripping would be constitutionally problematic, are important. To be sure, giving greater weight to internal documents might increase the likelihood that they will be prepared opportunistically with an eye towards influencing assessments of historical gloss, especially if it is expected that such documents will eventually be made public. But they are still likely to be less self-serving than public pronouncements made at the time of a dispute.

The focus of the examples in this Article has been on constitutional reasoning outside the courts. Judicial application of gloss and conventions would present additional issues. Because constitutional conventions (as this Article, following the Commonwealth tradition, has defined them) do not have legal status, they would not be candidates for direct judicial application, although one could imagine that they might inform sub-constitutional reasoning such as statutory construction.<sup>371</sup>

By contrast, gloss is a potential candidate for direct judicial application, and, as noted at the beginning of this Article, the Supreme Court has invoked it in recent decisions. Nevertheless, there may be particular challenges associated with judicial application of gloss concerning restrictions on Court-packing and Court-stripping. One possible challenge is that, as documented in Parts II and

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369. See *supra* notes 60–63 and accompanying text.

370. See Bradley & Morrison, *supra* note 1, at 415, 455 (explaining why practice reflecting bipartisan views has particular weight).

371. See, e.g., Vermeule, *Conventions*, *supra* note 9.

III, the consistency of congressional action with any historic norm against Court-packing or Court-stripping probably turns on Congress's purpose, and it might be difficult for courts to discern the purpose. It is beyond the scope of this Article to analyze the extent to which courts, and not just political officials, should conduct purpose inquiries relating to congressional limitations on the federal judiciary. That said, it is worth noting that, despite the Court's disinclination to consider Congress's purpose back in *McCardle*, purpose inquiries (whether objective or subjective) are substantially more common in modern, judicially enforced constitutional law, including under the Free Speech Clause, the Establishment Clause, the Free Exercise Clause, the Confrontation Clause, the Equal Protection Clause, the Due Process Clauses, the Privileges and Immunities Clause, and the dormant Commerce Clause.<sup>372</sup> It is also worth noting that some purposes of political actors, like FDR's in 1937, are relatively easy to discern.

Another issue implicated by judicial application of gloss concerns the potential that it will make the practice-based norm too static. The Supreme Court's confirmation of a practice-based norm of constitutional law may make the norm more specific and categorical than it otherwise would be, and subsequent practice is likely to coordinate around the Court's decision, thus preventing further evolution of the norm. That is part of a broader tension between any custom-based system of law and centralized judicial review.<sup>373</sup> As discussed elsewhere, relatively minimalist judicial decisions relating to historical practice may be presumptively required in order to manage the tension.<sup>374</sup> Moreover, the concern has less force outside the context of an accepted binding arbitrator and thus is less relevant to claims about gloss in the political branches and in scholarship that is not court-centered.

#### C. IMPLICATIONS FOR OTHER FEDERAL COURTS ISSUES

Beyond Court-packing and Court-stripping, the concepts of historical gloss and constitutional conventions can shed new light on other topics relating to judicial independence and power. For example, gloss and conventions likely play a substantial role in explaining the permissible use of non-Article III federal tribunals, notwithstanding language in the text of the Constitution that arguably requires the use of Article III courts in all cases falling within the federal judicial power that are adjudicated outside the state courts.<sup>375</sup> Another possible example concerns the appropriate grounds for removing a federal judge

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372. See, e.g., Fallon, *supra* note 7, at 1080–81; Nelson, *supra* note 205, at 1785–86.

373. See Bradley & Siegel, *supra* note 19, at 63.

374. See *id.*

375. See, e.g., *Stern v. Marshall*, 564 U.S. 462, 504–05 (2011) (Scalia, J., concurring) (“[A]n Article III judge is required in *all* federal adjudications, *unless there is a firmly established historical practice to the contrary.*” (emphasis added)); *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 70 (1982) (plurality opinion) (“In sum, this Court has identified three situations in which Art. III does not bar the creation of legislative courts. In each of these situations, the Court has recognized certain exceptional powers bestowed upon Congress by the Constitution *or by historical consensus.*” (emphasis added)).

from office. Based in part on longstanding practice, it is assumed that federal judges can be removed from office only through impeachment, and that impeachment cannot be used merely because of a disagreement with a judge's decisions.<sup>376</sup> Those assumptions endure even though it can be argued that the Constitution's directive that federal judges are to hold their offices during "good Behavior" reflects an original understanding that impeachment was not the only basis for removing federal judges.<sup>377</sup>

Yet another example may be the duties that can validly be assigned to federal judges. For instance, service by Article III judges on the U.S. Sentencing Commission has been deemed permissible in part because of the long history of extrajudicial service by federal judges, as reflected both in "the historical practice of the Founders after ratification" and in the "[s]ubsequent history."<sup>378</sup> In addition, historical practice may be relevant to the circumstances in which Congress may strip the lower federal courts (as opposed to the Supreme Court) of jurisdiction. There have been several historic instances in which Congress has withdrawn the jurisdiction of lower federal courts apparently based on disagreement with how those courts were deciding cases.<sup>379</sup> Historical practice may also inform issues of justiciability, such as standing. In *Raines v. Byrd*, for example, the Court rejected legislative standing in part by observing that members of the political branches historically had not sued under similar circumstances.<sup>380</sup>

Focusing on the normative significance of historical practice also sheds light on an important debate in the federal courts literature about whether Congress is constitutionally required to vest in the federal judiciary some or all of the judicial power referenced in Article III. Article III states that the judicial power "shall be vested" in the Supreme Court and any lower federal courts that Congress creates, and that this power "shall extend to" three categories of "Cases" and six categories of "Controversies."<sup>381</sup> Seizing on that mandatory language, Justice Story famously suggested that Congress was legally obliged to vest in the federal courts "the whole judicial power . . . either in an original or in

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376. See GEYH, *supra* note 3, at 113–70.

377. See Saikrishna Prakash & Steven D. Smith, *How to Remove a Federal Judge*, 116 YALE L.J. 72, 76 (2006).

378. See *Mistretta v. United States*, 488 U.S. 361, 398, 400 (1989).

379. See FALLON ET AL., *supra* note 6, at 307–14.

380. See 521 U.S. 811, 826 (1997) ("[H]istorical practice appears to cut against [appellees]."); see also *Sprint Commc'ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 274 (2008) (noting, in considering whether assignees of a claim have standing to sue, that "[w]e have often said that history and tradition offer a meaningful guide to the types of cases that Article III empowers federal courts to consider"); cf. *U.S. House of Representatives v. Burwell*, 130 F. Supp. 3d 53, 80 (D.D.C. 2015) (allowing suit by House of Representatives against executive officials despite lack of historical practice supporting such a suit because "[t]he refrain by either branch from exercising one of its options does not mean that the option was unavailable; there will never be a history of litigation until the first lawsuit is filed").

381. U.S. CONST. art. III, §§ 1–2.

appellate form.”<sup>382</sup> That vesting theory has never gained much traction, but Akhil Amar partially revived it in a series of articles.<sup>383</sup> According to Amar, Article III should be read as requiring Congress to vest the three categories of “Cases” referred to in Article III, which would include all cases arising under federal law, but not the six categories of “Controversies” (such as when jurisdiction is based on diversity of citizenship). Modern commentators have dismissed both the Story theory and the Amar theory because of, among other things, their inconsistency with the more limited jurisdiction that has historically been granted to the federal courts, starting with the Judiciary Act of 1789.<sup>384</sup>

From the perspective of historical gloss, however, Amar’s theory is substantially more tenable than Story’s. Whereas the federal courts have never been vested with all of the judicial power encompassed by the “Controversies” mentioned in Article III, since 1914 they have had the ability to review essentially all matters encompassed by the three categories of “Cases” referred to in Article III.<sup>385</sup> Just as in *Noel Canning*, where historical gloss was identified primarily on the basis of the past seventy-five years of presidential removal practice,<sup>386</sup> gloss potentially supports Amar’s theory given its consistency with the past century of jurisdictional practice. That key point is missed if historical practice is considered only for its connection to the constitutional Founding.

#### CONCLUSION

Scholars and courts have increasingly recognized that the conduct of government institutions over time can play an important role in defining understandings of the separation of powers. Such conduct can result in the development of either “historical gloss” or “constitutional conventions.” As this Article has explained, gloss and conventions are categories of practice-based norms that overlap but that are analytically distinct. To date, much of the scholarly and judicial attention to gloss and conventions has focused on the relationship between Congress and the executive branch.

The federal judiciary, however, is also an important component of the federal separation of powers. Debates over Court-packing and Court-stripping illustrate

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382. *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 331 (1816); see also FALLON ET AL., *supra* note 6, at 309 (discussing this aspect of the reasoning in *Hunter’s Lessee*).

383. See Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 208–09 (1985); Akhil Reed Amar, *Reports of My Death Are Greatly Exaggerated: A Reply*, 138 U. PA. L. REV. 1651, 1652 (1990); Akhil Reed Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499, 1503–05 (1990).

384. See, e.g., Daniel J. Meltzer, *The History and Structure of Article III*, 138 U. PA. L. REV. 1569, 1585 (1990).

385. As discussed in Section III.B, in 1914 Congress for the first time gave the Court jurisdiction to hear appeals from state courts in cases in which state courts held in favor of federal claims.

386. See *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2564 (2014) (“[T]hree-quarters of a century of settled practice is long enough to entitle a practice to ‘great weight in a proper interpretation’ of the constitutional provision.” (quoting *The Pocket Veto Case*, 279 U.S. 655, 689 (1929))).

how the historical practices of government institutions, including their principled decisions not to act and their concerns about creating or following “negative precedent,” play an important role in interpretive debates relating to what this Article calls the judicial separation of powers.<sup>387</sup> More generally, those debates confirm that, in the context of the separation of powers, sharp distinctions between law and politics tend to be oversimplified. Not only are there at least three categories, not two, but the arguments of some participants in separation of powers disputes strikingly reflect the uncertain boundaries between gloss and conventions, and between conventions and politics.

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387. This Article does not consider whether high levels of polarization stifle constitutional or conventional inquiry by political actors. Notably, however, no Court-curbing proposals have gained traction in Congress during the current period of polarization, despite controversy over a number of judicial decisions. *See supra* text accompanying notes 12–13. As this Article was being edited in the fall of 2016, Donald Trump had been elected President, and the Republicans had maintained their majorities in both houses of Congress. While other constitutional and conventional norms seemed potentially at risk in the wake of the highly contentious presidential campaign, there was no specific challenge to norms against Court-curbing.