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 discern 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 what Commonwealth theorists have termed “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 non-legal 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 in Congress in 1957-58, and within the Justice Department in the early 1980s, over the authority of Congress to 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 gloss and conventions for the judicial separation of powers more generally.

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For helpful comments, we thank Will Baude, Joseph Blocher, Josh Chafetz, Erwin Chemerinsky, Barry Cushman, Ryan Doerfler, Michael Dorf, Richard Fallon, Barry Friedman, Amanda Frost, Tara Grove, Aziz Huq, Margaret Lemos, Marin Levy, Ted Olson, James Pfander, H. Jefferson Powell, David Pozen, David Strauss, and participants in the Constitutional Culture conference at Queen’s University, a faculty workshop at Washington & Lee, the Duke Federal Courts Roundtable on Historical Practice and the Federal Judicial Power, and the Constitutional Law workshop at the University of Chicago. We also thank John Bailey for able research assistance and Jane Behrens, Jennifer Behrens, and Marguerite Most of the Duke Law Library for extraordinary persistence in finding sources.
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The practices of government 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”—that is, 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, and recent endorsements of gloss by the Supreme Court—in NLRB v. Noel Canning and Zivotofsky v. Kerry—came in that context. 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.

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.” To act contrary to a convention, as Whittington further notes, “is to violate the spirit of the constitution, even it does not violate any particular rule.” There has been less attention in legal scholarship to conventions than to gloss. To the extent that this scholarship has considered conventions, it has primarily examined their relevance only to 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

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 essay 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).
5 Id. at 106.
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),” 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 use its authority to make “Exceptions” to the Court’s appellate jurisdiction to “create issue-based exceptions to the Supreme Court’s [appellate] jurisdiction under Article III, Section 2,” even though, again, most scholars believe that it would be bad policy for Congress to do so. According to this view, it makes no difference to the constitutional analysis if Congress adds Justices due to disagreements with the Court’s decision-making (a narrower definition of “Court-packing”), or for the purpose of changing 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 Roosevelt’s plan to expand the size of the Supreme Court. That debate, of course, 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 Roosevelt’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. In part because of that focus, no one has yet considered the debate from the perspective of either historical gloss or constitutional conventions. As this Article will show by 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 non-legal

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7 Richard H. Fallon, Jr., Jurisdiction Stripping Reconsidered, 96 Va. L. Rev. 1043, 1064 (2010); see also Peter W. Low, John C. Jeffries, Jr., and 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 Part 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); Adrian Vermeule, Political Constraints on Supreme Court Reform, 90 Minn. L. Rev. 1154 (2006).
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 Article III, Section 2, as well as on its asserted original meaning, general structural commitments, and the Court’s Reconstruction-Era decision in *Ex parte McCcardle.* 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 *McCcardle* narrowly, especially in light of the Court’s assumption of jurisdiction a few months later in *Ex parte Yerger.*

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 have sought to defend 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 in effect invoked a non-legal 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 over 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 over efforts to restrict the Court’s jurisdiction over cases involving school prayer, busing, and abortion. In the latter debate, internal executive branch documents 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 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

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10 74 U.S. (7 Wall.) 506 (1869).

11 75 U.S. (8 Wall.) 85 (1869). For discussion of those debates, see infra Part III.A.
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 was considering whether the Constitution protects same-sex marriage in Obergefell v. Hodges, Representative Steve King introduced a bill proposing to strip the federal courts, including the Supreme Court, of jurisdiction over marriage cases. This proposal received little support even though there were many critics of same-sex marriage in Congress. This Article helps explain why such Court-curbing proposals are likely to encounter constitutional and conventional objections, not just political opposition.

Part I briefly explains both the historical gloss approach and the concept of non-legal 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 gloss and conventions for the judicial separation of powers more generally.

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. 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.” 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.”

Although the Supreme Court has invoked historical practice in a number of separation of powers decisions, it recently gave an especially strong endorsement to

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14 See generally Bradley & Morrison, supra note 1, at 417-24.
15 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring).
16 Id. at 611.
practice in construing the scope of the President’s recess appointments authority in *NLRB v. Noel Canning*. 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.” 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.”

Reliance on historic practice is even more common in legal reasoning within the executive branch than it is in the courts, especially for separation of powers issues regarding 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. Citing past instances involving presidential uses of force, OLC contended that “[t]his historical practice is an 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.”

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. 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 require some degree of acquiescence by the institution whose prerogatives are implicated by the practice, it is not clear what constitutes acquiescence. Actual applications of gloss, including in *Noel Canning*, have been analyzed extensively. For example, in *Noel Canning*, the Court cited historical practice as a significant factor in its decision. This approach is common in legal reasoning within the executive branch, especially for separation of powers issues regarding 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. Citing past instances involving presidential uses of force, OLC contended that “[t]his historical practice is an 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.”

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**Footnotes:**


18 134 S. Ct. at 2059.

19 Id. at 2060.


21 Id. at 7 (quoting Haig v. Agee, 453 U.S. 280, 292 (1981)).

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

23 See id. at 432-38; see also Shalev Roisman, *Constitutional Acquiescence*, 84 Geo. Wash. L. Rev. (forthcoming 2016).
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Canning, have not tended to be as demanding as Justice Frankfurter’s formulation, especially his reference to practice “never before questioned.”

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. Depending on how it is defined, however, this liquidation concept may envision a reliance primarily on early practice and, unlike gloss, may not leave room for constitutional change after some initial instance of liquidation—or may impose more demanding requirements than gloss before a liquidation can be re-opened and re-liquidated.

Less strict versions of originalism appear more amenable to gloss. For example, variants of “new originalism,” which emphasize the idea of “constitutional construction” as an enterprise distinct from constitutional interpretation, seem to allow a role for post-Founding practice in informing such construction. 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 as part of “constitutional construction,” which builds upon the framework.

Whatever the compatibility of historical gloss with various forms of originalism, the gloss approach is more naturally aligned with non-originalist approaches. It overlaps with Burkean and common law approaches to constitutional interpretation, because it both credits the past and allows room for incremental change. Gloss also overlaps with theories that would give weight to “non-judicial precedent” or particular governmental “showdowns,” 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

24 See Bradley & Siegel, supra note 17, at 21.
26 How Frankfurter-style gloss may be related to the concept of liquidation, an idea associated with James Madison, is uncertain because little has been written about liquidation. For preliminary thoughts on potential differences between gloss and liquidation, see Bradley & Siegel, supra note 17, at 29-41.
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.\(^\text{32}\)

The relationship between historical gloss and the constitutional text is also somewhat unclear. Often, gloss is invoked to help clarify purportedly ambiguous text, such as the Recess Appointments Clause in \textit{Noel Canning}.\(^\text{33}\) Under Justice Frankfurter’s formulation from \textit{Youngstown}, gloss would help give content to the more general “executive Power” vested in the President by Article II, Section 1, of the Constitution.\(^\text{34}\) 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 Clause of Article I, Section 8, 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 Frankfurter’s idea of glossing the text. For example, although the text specifies the process by which the United States can join treaties (that is, presidential approval with two-thirds senatorial advice and consent),\(^\text{35}\) 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.\(^\text{36}\) Similarly, the President’s recognition power, addressed in \textit{Zivotofsky v. Kerry}, is not referenced in the constitutional text.\(^\text{37}\)

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

\(^{32}\) \textit{See}, e.g., \textsc{Larry D. Kramer}, \textsc{The People Themselves: Popular Constitutionalism and Judicial Review} (2004); \textsc{Mark Tushnet}, \textsc{Taking the Constitution Away from the Courts} (1999); \textsc{Robert Post \\& Reva Siegel}, \textsc{Roe Rage: Democratic Constitutionalism and Backlash}, \textsc{42 Harv. Civil-Rights Civil-Lib. L. Rev.} 373 (2007).

\(^{33}\) \textit{See} 134 S. Ct. at 2559 (“[I]n interpreting the Clause, we put significant weight upon historical practice.”) (emphasis in original).

\(^{34}\) 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 \textsc{Saikrishna B. Prakash \\& Michael D. Ramsey}, \textsc{The Executive Power over Foreign Affairs}, \textsc{111 Yale L.J.} 231 (2001) (yes), with \textsc{Curtis A. Bradley \\& Martin S. Flaherty}, \textsc{Executive Power Essentialism and Foreign Affairs}, \textsc{102 Mich. L. Rev.} 545 (2004) (no).

\(^{35}\) \textit{See} U.S. Const. art. II, § 2.

\(^{36}\) \textit{See generally} \textsc{Curtis A. Bradley}, \textsc{Treaty Termination and Historical Gloss}, \textsc{92 Tex. L. Rev.} 773 (2014).

\(^{37}\) \textit{See} 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.”)
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 not readily available hook, and as a consequence, political actors may be tempted to violate them.” This observation may be overstated, however, 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, 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; the frequent conclusion by Presidents of “executive agreements” in lieu of Article II treaties; 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. Furthermore, one should not assume that the perceived clarity or ambiguity of text is unaffected by other modalities of constitutional interpretation, including gloss.

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

\[38\] 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 Einer Himma eds., 2009).

\[39\] See Curtis A. Bradley, International Law in the U.S. Legal System 33 (2d ed. 2015).


\[41\] See, e.g., Paul M. Bator, The Constitution as Architecture: Legislative and Administrative Courts Under Article III, 65 Ind. L.J. 233 (1990) (“Congress may leave the initial adjudication of some or all of article III’s list of cases to the state courts, but if federal adjudication is felt to be needed, the requirements of article 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”).

\[42\] 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).
officials in how they exercise political discretion.” As Keith Whittington has observed, to act contrary to a convention “is to violate the spirit of the constitution, even it does not violate any particular rule.”

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. 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.”

Importantly, Dicey viewed constitutional conventions not only as identifiable patterns of political behavior, but also as a binding part of Britain’s unwritten constitution even though they were not judicially enforceable. A convention “defines duties and obligations,” he wrote, but these duties and obligations have political and moral status rather than legal status. Under this account, violating a constitutional convention is considered a breach of “constitutional morality.” That is, the violation constitutes not simply bad policy, but a deviation from norms of good institutional citizenship that help sustain the constitutional system. As Adrian Vermeule has noted, this concept of constitutional conventions thus envisions that conduct can be “legal but unconstitutional.”

At times, theorists have considered the extent to which the concept of a constitutional convention applies to constitutional practice in the United States. In 1925, for example, Herbert Horwill, a scholar at Oxford University, published a study on The Usages of the American Constitution. Invoking Dicey, Horwill explained that, although conventions are considered part of the British constitution, they “are not laws at all but mere usages.” 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].” As an example, Horwill pointed to “the understanding that Presidential

43 Whittington, supra note 4, at 114.
44 Id. at 106.
46 Id. at 24.
47 Adrian Vermeule, Conventions in Court (draft paper at 9).
49 Horwill, supra note 48, at 5.
50 Id. at 7.
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.”

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. As an initial matter, it might help avoid confusion in the American context to use somewhat different terminology to describe the normative status of a non-legal constitutional convention. For example, it might make sense to refer to conduct that violates such a convention as “legal but anti-constitutional,” as opposed to “unconstitutional,” because the latter term tends to connote illegality in U.S. constitutional discourse. Likewise, as will become clear in Parts II and III, referring in the United States to “the spirit of the constitution” can be a way of making a structural constitutional argument, which is asserted to have legal status, rather than a conventional claim. Terminological precision is especially important because constitutional conventions and structural principles of constitutional law both may seek to accomplish fundamental purposes of the constitutional system, such as facilitating democratic self-government and maintaining judicial independence.

More significantly, the sharp distinction that Dicey drew between law and judicial non-enforceability is problematic in the United States for at least two reasons. First, the political question and other nonjusticiability doctrines presuppose that certain questions of constitutional law will be resolved outside the courts, and modern academic writings on popular constitutionalism readily accept that constitutional law extends beyond what courts do. Second, U.S. courts use the historical gloss approach to enforce some practice-based norms relating to governmental conduct that might otherwise be termed

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51 Id.

52 “In the British context,” Whittington writes, “the ultimate purpose of constitutional conventions is to secure the supremacy of Parliament over the monarch and the democratic accountability of the legislature.” Whittington, supra note 4, at 106 (footnote omitted).

53 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 (2d ed. 1961). But cf. FREDERICK SCHAUER, THE FORCE OF LAW ix (2015) (“question[ing] 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., IVOR JENNINGS, THE LAW AND THE CONSTITUTION 74 (5th ed. 1959); see also GEOFFREY MARSHALL, CONSTITUTIONAL CONVENTIONS: THE RULES AND FORMS OF POLITICAL ACCOUNTABILITY 12-13 (1984) (discussing this issue).

54 See ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 184 (1962); see also, e.g., 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 a judicial decision. See Bradley & Morrison, supra note 1, at 430.

55 See supra note 32 (citing work on popular constitutionalism).
conventions. As noted earlier, the Court in *Noel Canning* gave “significant weight” to the historic practices of the President and the Senate relating to executive branch appointments. 56 Notably, some modern Commonwealth theorists suggest, contrary to Dicey, that conventions can play some role in judicial decisionmaking, a position that is at least closer to U.S. practice. 57

In order to better accord with jurisprudential understandings of U.S. law, it is useful to distinguish between constitutional conventions that have a normative character that is legal (in which case they would constitute historical gloss) and those that do not, regardless of whether they are subject to judicial review. Such a distinction might rest on either empirical or normative grounds. 58 Under an empirical approach, what would make a convention non-legal would be an understanding by members of the relevant interpretive community that breach of the convention was not a violation of the law—even if 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. 59 This convention does not appear, however, to have been viewed as binding constitutional law: a number of presidents considered running for a third term, and Franklin Roosevelt did so (and successfully ran for a fourth term). 60

In addition to an empirical analysis, there might be normative bases for assigning legal status to a convention, stemming from constitutional or political theory. As Whittington notes in discussing the circumstances under which a convention should be deemed obligatory (although not necessarily legally binding), someone might conclude that a convention should be treated as obligatory, “even if political participants do not

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56 See 134 S. Ct. 2550, 2559 (2014). See also Bradley & Siegel, *supra* note 2 (discussing the Court’s reliance on historical practice in *Noel Canning*).

57 See, e.g., N.W. Barber, *The Constitutional State* 90 (2011); Marshall, *supra* note 53, at 13-17. Cf. Vermeule, *Conventions of Agency Independence*, *supra* note 9, at 1167 (suggesting that “U.S. courts interpreting statutes and constitutional rules that bear on agency independence should adopt the leading Commonwealth approach, according to which judges may ‘recognize’ conventions and incorporate them into their interpretation of written law, although they may not directly enforce conventions as freestanding obligations”).

58 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).

59 See James Albert Woodburn, *The American Republic and Its Government* 115 (1903) (“[I]t may now be said to be a part of the unwritten constitution that no President is eligible to a third term.”). But cf. Horwill, *supra* note 48, at 99 (“The usage, if usage it may be, is not so firmly established as absolutely to deter an ambitious man from making the venture.”).

themselves recognize it,” because assigning the convention this status “would be useful in better effectuating constitutional goals.” The same observation potentially applies in determining whether a convention 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. Nevertheless, as Parts II and III will show, it can be difficult to distinguish between conventions that are viewed as obligatory only for non-legal reasons and those that are viewed as obligatory at least partly for legal reasons. There may also be differing understandings of that question regarding the same convention, both at a 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 conventions are discussed and enforced outside the courts.

* * *

As noted above, scholarship in the United States on both historical gloss and constitutional conventions has generally focused on the relationship between 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 about 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, concerning which there is extensive historical practice. But it 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 to find serious argumentation about normative constraints imposed by either the Constitution or non-legal conventions. The history suggests otherwise.

61 Whittington, supra note 4, at 107.

62 For an examination of how certain forms of federalism reasoning can act as a way station, see Neil S. Siegel, Federalism as a Way Station: Windsor as Exemplar of Doctrine in Motion, 6 J. LEGAL ANALYSIS (2014).
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. Expressing concern about the Roberts Court’s “manifestly ideological agenda,” Smith noted that “[t]here is nothing sacrosanct about having nine justices on the Supreme Court,” and that “[i]t requires only a majority vote in both houses to add a justice or two.” Smith further observed that, throughout history, “[t]he method most frequently employed to bring the court to heel has been increasing or decreasing its membership.” 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 70 who had served at least ten years and who did not retire within six months of his 70th birthday. 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 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 Behavior,” 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,” 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, 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,” but it does not mention any power concerning the composition of the Court.

63 Jean Edward Smith, Stacking the Court, N.Y. TIMES (July 26, 2007); see also, e.g., Ian Millhiser, In Defense of Court-Packing, SLATE (Feb. 23, 2015) (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”).

64 Judicial Procedures Reform Bill of 1937, announced by President Roosevelt on February 5, 1937.

65 U.S. CONST. art. III, § 1.


67 U.S. CONST. art. II, § 2.

68 U.S. CONST. art. I, § 8, cl. 9.
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,”69 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.70 An examination of such practice regarding the issue of Court-packing would show, as Smith emphasized in his Op-Ed, that Congress had at times altered the size of the Court, and that it sometimes did 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.

In the Judiciary Act of 1789, Congress provided that the Court would have six Justices.71 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.72 (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.) 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.73

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.74 Congress also provided in that statute for separate staffing of the circuit courts. The incoming Democratic-Republican Congress, however, quickly restored the number to six (before there was a vacancy) and reestablished the

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69 U.S. CONST. art. I, § 8, cl. 18.

70 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.

71 Act of Sept. 24, 1789, ch. 20, 1 Stat. 73, § 1.

72 Act of Sept. 24, 1789, ch. 20, 1 Stat. 73, § 4.

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

74 Act of Feb. 13, 1801, ch. 4, 2 Stat. 89.
connection between the size of the Court and the circuit court system. 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.

In 1837, when the Democrats finally controlled both political branches, Congress reorganized the judiciary, creating nine judicial circuits, a majority of which were composed entirely of slave states, and increasing the size of the Court to nine. Because of the convention of having one Justice reside in each circuit, these 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.

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, giving Republican President Abraham Lincoln another appointment. 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. 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.

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75 Act of March 8, 1802, ch. 8, 2 Stat. 132.
80 This change had the effect of ensuring that, at the end of the Civil War, seven of the ten Justices resided in states that had abolished slavery long before the war. GILLMAN et al., supra note 78, at 254.
81 The point has been disputed. Compare ORTH, supra note 73, at 6 (contending that the reduction was designed to deny Johnson appointments), with CHARLES FAIRMAN, VI HISTORY OF THE SUPREME COURT: RECONSTRUCTION AND REUNION, 1864-69 (PART ONE), at 166-70 (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 73, at 7.
82 See Act of April 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.”).
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. A year later, after Grant made the new appointments, the Court reversed Hepburn. Importantly, though, 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 selected Justices for the purpose of overturning Hepburn, a matter of some controversy, no previous statute accomplished what President Roosevelt 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 for the purpose of changing its ideological composition. An initial question, however, is how broadly to understand the historical examples. 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, Lochner v. New York, and Korematsu v. United States. Historical practice, like judicial decisions, can sometimes create negative precedent—that is, precedent about what not to repeat rather than about what is constitutionally permissible. Just as certain

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83 75 U.S. (8 Wall.) 603 (1870).
85 See Barry Friedman, The History of the Countermajoritarian Difficulty, Part II: Reconstruction’s Political Court, 91 GEORGETOWN L.J. 1, 43 (2002) (describing the controversy).
86 See, e.g., JAMES ALBERT WOODBURN, THE AMERICAN REPUBLIC AND ITS GOVERNMENT 335 (1903) (“The reversal of the Supreme Court’s decision in the legal-tender cases revealed a weak point in its organization. It is within the power of Congress and the President to ‘pack’ the Supreme Court if they have a mind to do so. The number of the Court can be increased from nine to fifteen, or to any other convenient number.”).
87 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.”).
88 163 U.S. 537 (1896).
89 198 U.S. 45 (1905).
infamous judicial decisions have come to be regarded as “anticanonical,” 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? And what should one make of the fact that Congress has not altered the size of the Court for 147 years, despite many protracted controversies about Supreme Court decisions, including Brown v. Board of Education and Roe v. Wade?

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 history and methodological questions. The objective is not to resolve 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.” Similarly, in what was probably the most able defense of the plan, Robert Jackson—then the Assistant Attorney General—reasoned that “[l]egislation 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.” Jackson discussed “six instances” in which Congress had exercised this authority, and he concluded that “[w]hen immediate and effective action has been

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92 See, e.g., Stuart v. Laird, 5 U.S. (1 Cranch) 299 (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 2, at 29-41.

93 Memorandum from Warner W. Gardner, Dep’t of Justice, to the Solicitor Gen., Congressional Control of Judicial Power to Invalidate Legislation, at 57 (Dec. 10, 1936) (on file with the authors).

necessary, the method which the President now proposes has been used throughout our constitutional history.”

By contrast, in recommending rejection of the plan, the Senate Judiciary Committee, in its long-awaited and widely circulated report, 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. 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 10 to 7. “[W]hatever the motive,” the Committee wrote, “a 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.” The Committee thus deemed past examples distinguishable or negative precedent, as did other critics of the plan.

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.” In rejecting the plan, the Committee saw itself as “set[ting] a salutary precedent that will never be violated.”

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.”

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95 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”).

96 See William E. Leuchtenburg, 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.”).

97 Senate Comm. on the Judiciary, Reorganization of the Federal Judiciary, S. Rep. No. 711, 75th Cong., 1st Sess. 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 94, 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.

98 Senate Report, supra note 97, at 13.

99 See, e.g., Hearings, supra note 94, at 1016 (testimony of New York University Law School dean Frank Sommer) (“Precedents are of bad and good repute. The repute of this [1866 example] is evil.”).

100 Id. at 14.

101 Id.

102 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 94, at 767
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.103

“Constitutionally,” the Committee concluded, “the bill can have no sanction.”104 It “is in violation of the organic law.”105

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.106 That assertion was 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.”107

Michael Dorf views the felt need of participants in the 1937 debate 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.108 One can, however, also read the Judiciary Committee and some of the witnesses before it as invoking the constitutional structure.109 Such a reading is especially plausible because, as flagged

(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.”).

103 Senate Report, supra note 97, at 8.
104 Id. at 9.
105 Id.
106 In its report, the Committee referred to the “spirit” of the Constitution numerous times. See id. at 3, 9, 15, 16.
107 Hearings, supra note 94, 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 Leon Green, Dean of Northwestern University Law School).
108 See Dorf, supra note 38, at 81.
109 See, e.g., Hearings, supra note 94, 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
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.\footnote{110}{See Senate Report, supra note 97, 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 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.”).}

To invoke the spirit of the Constitution or some other form of law is to invoke its purpose.\footnote{111}{A famous, controversial example in the field of statutory interpretation is Church of the Holy Trinity v. United States, 143 U.S. 457, 459 (1892) (“It is a familiar rule that a thing may be within the letter of the statute and yet not within the statute because not within its spirit nor within the intention of its makers.”).} 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.\footnote{112}{For discussions of structural reasoning in constitutional law, see CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969), PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION ch. 6 (1982), and BALKIN, supra note 28, at 142-43.}

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.”\footnote{113}{See AKHLI REED AMAR, AMERICA’S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 354, 355 (2012).} 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.”\footnote{114}{Id. at 355.} 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.\footnote{115}{Id. at 355, 354.} 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.”

This Article takes no position on whether Amar is 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 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.”

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. As just shown, constitutional concerns played a prominent role in the Court-packing debate.

### D. Conventions and the Constitution

Although not using these terms, Michael Dorf has suggested that the norm against Court-packing may be a non-legal 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 doing so it was acting unconstitutionally.”

Based on both the constitutional text and the nineteenth century practice, he adds that “we have excellent textual and historical reasons to think that the Constitution poses no obstacle.” 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.” He reasons that it is difficult for the norm against Court-packing to have legal status because the writtenness 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.

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116 Id. at 356.
117 Id.
118 See id. at 354.
119 Dorf, supra note 38, at 70-71, 79.
120 Id. at 74.
121 Id.
122 Id. at 75.
This Article agrees that governmental conduct may be impermissible—because it violates a non-legal 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,\textsuperscript{123} 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 directly on historical practice.

The constitutional text, however, appears to have less of a crowding effect on practice-based constitutional norms than Dorf posits. To reiterate what is revealed by the 1937 debate over Court-packing in the Senate, such norms can be incorporated in claims about the constitutional structure, especially when there is no specific text contradicting the practice.\textsuperscript{124} For example, in holding that federal commandeering of state legislative or executive officials is incompatible with the Constitution’s federal structure, the Rehnquist Court relied in part on historical practice—most notably, on the absence of commandeering legislation throughout American history.\textsuperscript{125} Moreover, in invalidating the coverage formula in Section 4(b) of the Voting Rights Act of 1965, the Roberts Court did not rely on any particular constitutional text, but rather on what it called a “‘fundamental principle of equal sovereignty’ among the states,”\textsuperscript{126} which it earlier defended as grounded in “our historic tradition that all the States enjoy ‘equal sovereignty.’”\textsuperscript{127} Whether these asserted structural principles are sound—an issue regarding which this Article takes no view—depends in part on how persuasively they can be tied to past practice.

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. For example, some objections to FDR’s plan were framed in terms of popular constitutionalism and the shared constitutional culture of the nation. Yale Law School professor Edwin Borchard sounded this theme in his testimony before the Senate, arguing that, although “in a narrow sense [the Court-packing plan] is legal and it is within the letter of the Constitution . . . [i]n 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

\begin{footnotes}
\item[123] See U.S. CONST. art. II, § 1 (“Each state shall appoint, \textit{in such manner as the Legislature thereof may direct}, a number of electors . . .”\textemdash (emphasis added)).
\item[124] See supra Part II.C; Bradley & Siegel, \textit{supra} note 42, at 1230 n.77.
\item[125] See 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.”).
\item[127] \textit{Northwest Austin}, 557 U.S. at 203.
\end{footnotes}
the Executive.” 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 that “[i]f nine judges were enough for George Washington, they should be enough for President Roosevelt.” 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 non-judicial actors.

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

Harvard Law School Professor Erwin Griswold, in his Senate testimony, also seemed to tack back and forth between constitutional law and non-legal constitutional conventions. After noting that “arguments could be made in support of the proposition

128 Hearings, supra note 94, at 827.


130 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 overstater differences between constitutional reasoning by judicial and non-judicial actors. Judges, especially Justices, often do not provide clear guidance; they may not accord stare decisis substantial weight; and they may credit non-legal 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 Part III.C.2 (discussing an OLC opinion that relied on Henry Hart’s famous Dialogue).

131 Hearings, supra note 94, at 546.

132 Id.
that [the Court-packing plan] is unconstitutional,” Griswold contended that “[t]he constitutionality of the present proposal is not the real issue.”

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.”

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.”

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 meant that it did. The fact that many actors in the debate over FDR’s plan 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 conditions that make such reform difficult. Among other things, Vermeule suggests that a political party with a narrow majority is unlikely to have enough cohesion to overcome veto-gates in the 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.

Vermeule describes that 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.” “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.” 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

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133 Hearings, supra note 94, at 767.
134 Id.
135 Id. See also id. at 1011 (testimony of NYU Law School 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.”).
136 See Vermeule, Political Constraints, supra note 9.
137 Id. at 1162.
138 Vermeule, Political Constraints, supra note 9, at 1162-63.
1936—a pivotal election in American history—yet his Court-packing plan was opposed vigorously by many members of his own party.  

Vermeule also submits that FDR was constrained in how he attempted to sell the plan. Correctly noting 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. “Political actors are constrained to offer a non-ideological, public-regarding justification for reform,” Vermeule suggests, “one that does not map too obviously onto their ideological views or partisan interests.”  

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.” Perhaps, but it is not clear why that would have counted against it. The Democratic Party was dominant to an extent that seems difficult to imagine today: it held more than three-fourths of the seats in the House and 75 of the Senate’s 96 seats. 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.  

Internal debates within FDR’s administration provide additional support for the above account of the constraints that FDR faced. 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. Eventually, FDR came around to that position, and he became much more forthright about the justifications for

139 For example, seven of the ten Senators who signed the adverse report of the Senate Judiciary Committee were prominent Democrats. See LEUCHTENBERG, supra note 129, at 146. Moreover, Senator Burton Wheeler of Montana, a progressive Democrat, played a leading role in opposing the plan. See id. at 137, 140.  
140 Vermeule, Political Constraints, supra note 9, at 1163.  
141 Id. at 1164.  
142 See id.  
143 Cf. LEUCHTENBURG, supra note 129, 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.”); JOSEPH ALSOPO & TURNER CATLEDGE, THE 168 DAYS, at 29 (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.”).  
the Court-packing plan—most famously in a “fireside chat” in March 1937.145 Jackson himself gave similar justifications in his Senate testimony.146 But, sure enough, those explanations—which everyone had already perceived anyway—generated expressions of intense concern about judicial independence.147 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.148 That process concern does not seem purely political.

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.149 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.150 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.151 To add insult to injury, FDR’s remaining chance to get a revised Court-

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145 See id. at 351. In the speech, FDR contended that his plan “will save our national Constitution from hardening of the judicial arteries,” and he denied that he would appoint “spineless puppets.” Id. at 351.

146 See id. at 342.

147 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).

148 See MCKENNA, supra note 144, at 303-04 (quoting letters to Congress making this point); see also Senate Report, supra note 97, 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”); Hearings, supra note 94, at 720 (testimony of Young B. Smith, Dean of Columbia Law School) (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).

149 See LEUCHTENBERG, supra note 129, at 133.

150 See MCKENNA, supra note 144, at 377 (quoting Robert Jackson as saying that Hughes’ letter “pretty much turned the tide” against FDR’s proposal). But cf. Richard D. Friedman, Chief Justice Hughes’ Letter on Court-Packing, 22 J. SUP. CT. HIST. 76 (1997) (concluding that the letter “did not have a very profound effect”).

151 See MCKENNA, supra note 144, 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”).
packing bill through Congress evaporated when the chief spokesperson for the bill in the Senate, Joe Robinson, died unexpectedly.\textsuperscript{152}

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 under a certain set of facts would have been overcome.\textsuperscript{153} 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.\textsuperscript{154}

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.\textsuperscript{155} 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 U.S. 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.”

A. Academic Debates

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.”\textsuperscript{156} The first clause of Article III, Section 2, extends the federal judicial power to nine categories of cases and controversies, including

\textsuperscript{152} See LEUCHTENBERG, supra note 129, at 152.

\textsuperscript{153} 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. \textit{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 25 (1998) (deeming it “doubtful that even a compromise bill could survive both a Senate filibuster and the House Judiciary Committee”).

\textsuperscript{154} 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.

\textsuperscript{155} See, \textit{e.g.}, HART AND WECHSLER, supra note 6, at 130.

\textsuperscript{156} U.S. Const. art III, § 1.
“all Cases . . . arising under” federal law.\textsuperscript{157} 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 all 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.”\textsuperscript{158}

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). “The 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.”\textsuperscript{159} Martin Redish also emphasizes 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.”\textsuperscript{160} “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.”\textsuperscript{161} More recently, Michael Dorf has written that, “under the most straightforward reading of the text of Article III, Congress could . . . eliminate all appellate jurisdiction of the Supreme Court.”\textsuperscript{162}

Bator’s use of the locution “plainly seems,” however, and Gunther’s similar hedge, 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 be vested with “[t]he judicial Power”—presumably not some of that power, but all of it. (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.) 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.

\textsuperscript{157} U.S. CONST. art. III, § 2, cl. 1.

\textsuperscript{158} U.S. CONST. art. III, § 2, cl. 2.

\textsuperscript{159} Paul M. Bator, Congressional Power over the Jurisdiction of the Federal Courts, 27 VILL. L. REV. 1030, 1039 (1982).

\textsuperscript{160} Martin 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).


\textsuperscript{162} Dorf, supra note 38, at 81. Notably, however, Dorf does not argue that there are no Article III limits on the scope of the Exceptions Clause.
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.\footnote{See, e.g., RAOUl BERGER, CONGRESS V. THE SUPREME COURT 285-96 (1969). Others disagree. See, e.g., Bator, supra note 159, 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 161, 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”).} 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\footnote{5 U.S. (1 Cranch) 137 (1803). See Steven G. Calabresi & Gary Lawson, The Unitary Executive, Jurisdiction Stripping, and the Hamdan Opinions: A Textualist Response to Justice Scaña, 107 COLUM. L. REV. 1002, 1036-42 (2007).} Marbury v. Madison\footnote{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 (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).} In short, the plain text of Article III does not by itself resolve the question of the permissibility of Court-stripping.\footnote{See, e.g., HART AND WECHSLER, supra note 6, at 18, 314.}

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.\footnote{See, e.g., HART AND WECHSLER, supra note 6, at 19; Bator, supra note 159, at 1038-39.} 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.\footnote{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).} 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 assumed that the Supreme Court would enjoy jurisdiction to hear appeals from the judgments of state courts on issues of federal importance.\footnote{See, e.g., RAOUl BERGER, CONGRESS V. THE SUPREME COURT 285-96 (1969). Others disagree. See, e.g., Bator, supra note 159, 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 161, 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”).}

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 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 that “the 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].”169 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.”170 On that structural vision, the permissibility of Court-stripping plays a pivotal role in reconciling judicial supremacy with majoritarian democracy.

By contrast, although he agreed with Black that Court-stripping would be constitutional, Paul Bator expressed the originalist and structuralist 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.171 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.”172

Henry Hart went further, suggesting the possibility that the Constitution does not “authoriz[es] 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.”173 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.”174 Applying that structural standard, Ratner declared the unconstitutionality of “legislation that precludes Supreme Court review in every case involving a particular subject.”175

As with those differing structural visions, Supreme Court precedent offers support for both sides of the academic debate. The key case, Ex parte McCordle,176 not-

171 Bator, supra note 159, at 1038.
172 Id. at 1039.
175 Id. at 201.
176 74 U.S. (7 Wall.) 506 (1869).
coincidentally arose during a period of changes in the size of the Court: Reconstruction. 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. 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. 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.” 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. Mere months after *McCardle*, moreover, in *Ex parte Yerger*, the Court exercised jurisdiction under that alternate basis. 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. Much closer to the present, the Court in *Felker v. Turpin* relied upon a similar rationale in upholding a congressional restriction on Supreme Court review of certain habeas petitions. Finally, given the enormous

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177 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. (13 Wall.) at 145)).

178 See HART AND WECHSLER, *supra* note 6, at 316.

179 *McCardle*, 74 U.S. at 514.

180 See 74 U.S. 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 in an error.”).

181 75 U.S. (8 Wall.) 85 (1869).

182 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 Part II, when considering options for restraining the Court during the New Deal, Deputy Solicitor-General Warner 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 93, at 50.

political pressure under which the Court in *McCardle* was operating at that time (discussed further below), the parts of the decision that are emphasized by defenders of plenary congressional control may actually constitute negative judicial precedent.\(^{184}\)

In sum, 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 structuralist reasoning turns on contestable visions of the fundamental role of the Court in the federal system, and the decision in *McCardle* offers something for everyone.

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. Moreover, few legal scholars seem to have entertained the possibility that a non-legal 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. 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.\(^{185}\) 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.”\(^{186}\) That statement has been quoted approvingly far more frequently than it has been critically analyzed.

### B. Historical Practice

Inspection of the historical practice that is typically invoked in debates over jurisdiction-stripping reveals that little of this practice even arguably amounts to Court-stripping. In the Judiciary Act of 1789, Congress did not authorize the Court to exercise the full range of appellate jurisdiction established by Article III.\(^{187}\) Nonetheless, the First Congress did authorize Supreme Court appellate jurisdiction over a broad range of cases, including over federal habeas corpus cases, and including over state court decisions invalidating federal statutes or upholding state statutes against federal constitutional

\(^{184}\) See *infra* text accompanying notes 190-193.

\(^{185}\) 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”).

\(^{186}\) Gunther, *supra* note 161, at 905.

\(^{187}\) See Hart and Wechsler, *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).
challenge. That jurisdictional grant, which was conferred by Section 25 of the First Judiciary Act, suggests that Congress was focused on ensuring the supremacy of federal law over the states, not 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. 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.

In 1868, as discussed above, the Reconstruction Congress apparently sought to engage in Court-stripping for the first time in U.S. history. 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 non-judicial 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 over those proceedings. Even at the time, Congress thought better of following its own practice. The Court was able to exercise jurisdiction in Yerger mere months after McCordle because, as Barry Friedman has noted, “the Republican Congress declined to act yet again to strip the Court of jurisdiction.” 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.”

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. And in 1914, Congress authorized the Court to exercise appellate jurisdiction over state court decisions invalidating state laws on federal

188 Judiciary Act of 1789, § 25, 1 Stat. 85.
191 See supra Part III.A.
193 Friedman, supra note 3, at 761.
194 Id.
195 See HART AND WECHSLER, supra note 6, at 297.
constitutional grounds or upholding federal laws against constitutional challenge. 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.” 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.

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 reapportionments, alleged subversive activities, busing, school prayer, abortion, the Defense of Marriage Act, and the Pledge of Allegiance. But like the doomed 1831 effort, they all failed.

To be sure, Congress has during the last several decades 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 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 McCordale, focused on any particular Supreme Court decisions. In any event, the Court found that restriction (in a move reminiscent of McCordale) not to eliminate the Supreme Court’s ability to issue original writs of habeas corpus.

In sum, 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, its having done so in 1868 may constitute negative non-judicial 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.

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197 Grove, supra note 3, at 1846.
198 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.”).
199 See HART AND WECHSLER, supra note 6, at 297.
200 See Felker v. Turpin, 518 U.S. 651, 661-62 (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).
officials when they have considered the permissibility of limiting the Court’s appellate jurisdiction.

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. The following sections focus on two of those debates: the congressional debate during 1957-58 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.

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. 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.

Among the “orgy of proposals countering the Court” 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 limit or curtail that power, under article III, paragraph 3, section 2 of the Constitution.”


202 See, e.g., Frickey, supra note 201, 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”).

203 Frickey, supra note 201, at 427; William G. Ross, Attacks on the Warren Court by State Officials: A Case Study of Why Court-Curbing Movements Fail, 50 BUFFALO 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.”).

204 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
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.”

A brief hearing was held on the bill in August 1957, and extensive hearings were subsequently held in February and March 1958. Republican Senator John Marshall Butler of Maryland 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 jurisdiction of the Supreme Court.” As for the decision to strike out the other four limitations on appellate jurisdiction that Jenner had urged, the report explained that, “[w]hile 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.”

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. 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. 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.\textsuperscript{212} In addition, as it had done in 1937 with respect to New Deal measures, the Court appeared to temper its decisionmaking with respect to anti-Communist measures, thereby reducing some of the pressure for reform.\textsuperscript{213} Finally, Congress became more liberal as a result of the 1958 mid-Term elections, and this ideological change reduced the likelihood that Court-stripping proposals would be adopted.\textsuperscript{214} 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.\textsuperscript{215} Moreover, just as in 1937, opponents 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, 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,\textsuperscript{216} 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.\textsuperscript{217} “Even 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.”\textsuperscript{218} Rauh further testified that “[w]ere you to take away substantial jurisdiction from the Supreme Court in important areas of

\begin{footnotes}
\item[212] See Friedman, supra note 202, at 196.
\item[213] 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 202, 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”).
\item[214] See Lucas A. Powe, Jr., The Warren Court and American Politics 140 (2000).
\item[216] See Hart, supra note 173.
\item[217] 1958 Subcommittee Hearings, supra note 215, at 45.
\item[218] Id.
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American life . . . you would be going contrary to the spirit of the Constitution and to the
jurisdiction of the Supreme Court.” 219

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.” 220 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. 221 But he
argued that, even if the proposed legislation was not unconstitutional, it would “impugn
the integrity of the judicial process.” 222

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, 223 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.” 224 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.” 225
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 “an
unwise and unfortunate proposal.” 226

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.” 227 He explained that he had “disapproved of such an approach
[in 1937] and I do now.” 228 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

219 Id. at 50.
220 Id. at 272.
221 Id. at 272-73, 282.
222 Id. at 273.
223 See supra text accompanying notes 133-135.
224 1958 Subcommittee Hearings, supra note 215, at 357.
225 Id.
226 Id. at 357-58.
227 Id. at 573 (printing letter from William P. Rogers, Attorney General, to Senator James O.
Eastland, Chairman, Committee on the Judiciary, dated March 4, 1958).
228 Id.
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.”229 Finally, Rogers expressed concern that “[t]his type of legislation threatens the independence of the judiciary” because “[t]he natural consequence of such an enactment is that the courts would be operating under the constant apprehension that if they rendered unpopular decisions, jurisdiction would be further curtailed.”230

Also testifying in opposition to the Jenner bill was Senator Thomas Hennings, who expressed “very serious misgivings as to the constitutionality of [the bill].”231 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.”232 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*—and quoted from a senator who had dissented from that legislation, while also noting that, unlike that legislation, the Jenner bill did not leave open an alternative avenue of Supreme Court review.233

During this period, the House of Delegates of the American Bar Association passed a resolution opposing the Jenner bill, even though the Association was strongly anti-Communist at the time and was critical of the Court’s decisions.234 The House of Delegates recalled the ABA’s support some years earlier for a proposed constitutional amendment 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.”235

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.”236 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

229 *Id.*
230 *Id.* at 574.
232 *Id.* at 384.
233 *See id.* at 382, 383.
234 *See id.* at 359 (printing the resolution).
235 *Id.*
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.”238 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.”239

During the full Senate debate over the Jenner-Butler bill, opponents similarly invoked constitutional and conventional concerns. Senator 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.”240 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.”241 The precise line marking the boundaries of this power was uncertain, he contended, and that as a result “the Founding Fathers expected we would depend upon . . . the moral sense of the legislators.”242 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 FDR’s Court-packing plan.243

Senator Hennings made clear that he agreed with the proponents of the Jenner-Butler bill that international Communism was a threat. But he emphasized that “it is incumbent upon this body to make certain that we combat the Communist danger only by the methods and with the weapons of free men.”244 Hennings, like Wiley, also observed that the Jenner-Butler bill was “reminiscent of two previous and ill-advised attacks on the Supreme Court,” in particular the legislation at issue in McCardle case and FDR’s attempt at Court-packing.245

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.246 Hand, who by that point had retired from the

237 Id. at 16.
238 Id.
239 Id. at 30.
241 Id.
242 Id.
243 Id.
244 Id. at 18685.
245 See id. at 18686.
246 See id. at 18685.
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.247 Those lectures were invoked numerous times during the hearings on the bill, both by supporters and opponents.248 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.”249 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.”250 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.”251

In sum, many of the themes illustrated by the debate over FDR’s Court-packing plan reemerged in the 1957-58 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 norm against taking such action. In a book-length treatment of the efforts in this period to curb 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.”252 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

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247 The lectures were published in LEARNED HAND, THE BILL OF RIGHTS (1958).
249 104 Cong. Rec. 18673.
250 Id. at 18685. 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 Dillard, Senator Thomas C. Hennings, Jr., and the Supreme Court, 26 MISSOURI L. REV. 429 (1961).
251 GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE 661 (1994); see also Powe, supra note 214, at 132 (“Without Hand [supporting the legislation], it really was the yahoos against the establishment.”).
252 PRITCHETT, supra note 213, at 121-22.
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.”

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. In the early 1980s, more than twenty Court-stripping bills were circulating in Congress. Responding to years of perceived liberal Supreme Court decisions concerning abortion, school desegregation, and school prayer, 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 decided a case, tell the judges they can’t decide it.” 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.

Sometime in the summer of 1981, Theodore Olson, then head of the Office of Legal Counsel, distributed a memorandum, not publicly accessible to this day, concluding that it would be unconstitutional for Congress to engage in Court-stripping. That memorandum prompted a lengthy response from another Justice Department attorney, John Roberts, who was at that time a Special Assistant to Attorney General William French Smith.

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. The memorandum, which did not become publicly available until 2005 as part of a document release by the National Archives when Roberts

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253 Id. at 122.


255 Id.


257 See Memorandum from John Roberts, Special Assistant to the Att’y Gen., Proposals to Divest the Supreme Court of Appellate Jurisdiction: An Analysis in Light of Recent Developments (no date), at http://www.archives.gov/news/john-roberts/accession-60-89-0172/006-Box5-Folder1522.pdf [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?”
was nominated to the Court, indicates that it was prepared at the suggestion of Ken Starr, who at that time was a counsel to Attorney General Smith. Roberts made clear that he had prepared the memorandum “from a standpoint of advocacy” and that his analysis “does not purport to be an objective review of the issue.”

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 relied 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.

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.” 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.” Roberts relied more heavily upon judicial precedent, especially the Court’s reasoning in *McCordale.* "McCordale," 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.” (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.”)

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 refuting 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

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258 Id. at 2.


260 Roberts Memo, supra note 257, at 2.

261 Id. at 4.

262 Id. at 8-10.

263 Id. at 12.

264 Memorandum from John G. Roberts to Fred F. Fielding, S. 47, “Voluntary School Prayer Act of 1985” (May 6, 1985), at http://www.reagan.utexas.edu/roberts/Box48JGRSchoolPrayer1.pdf. 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 not over at Justice, so there could be a push for reconsideration.” Id.
to promote uniformity and supremacy] with a constitutional requirement.” He also noted that Congress from the beginning withheld certain 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. The relatively minor role of historical practice in the 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. 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.” The beginning of the memorandum noted arguments in favor, but the bulk of it developed six “Arguments Against Jurisdictional Withdrawal.” Although labeled policy or political arguments, what is most interesting about them 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 first 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.” Olson seemed to think that more was at stake for the functioning of the constitutional system than a question of policy or politics.

Second, Olson observed that “[e]liminating Supreme Court jurisdiction would remove the possibility of modifying or overruling existing precedent.” Olson then reasoned that “[i]f 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

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265 Roberts Memo, supra note 257, at 15.
266 Id. at 16-18.
268 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).
269 See Olson Policy Memo, supra note 267, at 1-3 (stating, inter alia, 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”).
270 Id. at 3; see id. at 3-9.
271 Id. at 3-4.
272 Id. at 5.
purpose implicitly contains an invitation to state and federal court judges to violate their oaths and the principle of respect for law by issuing opinions inconsistent with binding authority.” 273 While not arguing that such a purpose would render the bills unconstitutional, Olson did suggest that it would be normatively problematic.

Third, Olson argued that Court-stripping bills “are, in effect, attempts to amend the Constitution without resort to the constitutional processes for doing so.” 274 “Even if not unconstitutional,” he insisted, “they run counter to the evident purposes of the Framers,” 275 an invocation that is similar to previous invocations of the spirit of the Constitution. Olson then 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, “even if not unconstitutional, . . . would short-circuit this accepted and legitimate way of creating the potential for altering the prevailing interpretation of the Constitution.” 276

Fourth, 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.” 277 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.

Fifth, Olson 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.” 278 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.” 279

Finally, Olson thought there were “sound political reasons to oppose these bills.” 280 “History suggests,” he wrote, “that the people are extremely wary of any frontal assault on the Court,” for it was “instructive” to consider FDR’s “experience in 1937.” 281 Olson also opined that “[o]pposition to jurisdictional limits on constitutional grounds will

273 Id..
274 Id. at 6.
275 Id.
276 Id.
277 Id.
278 Id. at 7.
279 Id.
280 Id. at 8.
281 Id.
be considered as a position of courage, integrity, and principle.²⁸² 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 that he thought Court-stripping to be more than a political affair.

Olson appears to have presupposed that he had only two conceptual categories to work with: constitutional law and ordinary policy or 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 politics/policy.

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 memorandum “of July, 16, 1981,” given all that has been “written and spoken on the subject since then.”²⁸³ 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 refuted four arguments, the first of which was that the “plain meaning” of the Exceptions Clause licenses plenary congressional power. He argued that literalism “misperceives the proper role of constitutional interpretation,” for “a literal reading of Article III would require that the entire federal judicial power be vested in some federal court,”²⁸⁴ and that in any event “a plenary authority may well be inconsistent with the plain language of the Clause” given that an “exception” connoted “only a limited deviation from a general rule.”²⁸⁵ According to Olson, the best interpretation of the language is that “Congress can regulate and make exceptions to the Supreme Court’s jurisdiction up to the point where it impairs the Court’s power and ability to perform those functions which are necessary for it to fulfill the role assigned to it by the Constitution.”²⁸⁶

Olson next rebutted the argument that the drafting history of the Exceptions Clause “is not particularly revealing.”²⁸⁷ Although conceding that the history did not decisively support any specific construction of the clause, he contended that “the nature of the debate which did occur relative to Article III and the complete absence of any contemporaneous suggestion that the Exceptions Clause gave Congress plenary power to withdraw Supreme Court jurisdiction is, in our judgment, very strong evidence that this is

²⁸² Id. at 9.
²⁸³ See Memorandum from Theodore Olson, Assistant Attorney General, Office of Legal Counsel, for the Attorney General, Constitutionality of Bills Limiting Supreme Court Jurisdiction (April 19, 1982), at 1 (on file with the authors) [hereinafter Second Olson Constitutional Memo].
²⁸⁴ Id. at 1, 2.
²⁸⁵ Id. at 4-5 n.2 (relying on Ratner, supra note 174).
²⁸⁶ Id. at 5 n.2.
²⁸⁷ Id. at 5.
not what was intended.”

Olson deemed it “virtually inconceivable that the Convention would have accepted without extensive debate and controversy a provision so contrary both to the differing treatment accorded to the Supreme Court and the inferior federal courts and to the basic principle of separation of powers” that no branch is “given inherent authority to destroy the essential constitutional functions of any other branch.”

Third, Olson refuted the claim that judicial precedent supports plenary congressional authority. In his view, “[t]he Supreme Court has provided no authoritative guidance on this question,” for “[t]he Court has never held that Congress has the power to preclude the Court from hearing a claim that a state or federal law violates the Constitution.” Olson emphasized that McCrle’s “dictum regarding alternative procedures for Supreme Court review of habeas corpus cases was converted into a holding several months later” in Yerger, and so “the Court made it clear that McCrle did not decide the question of Congress’ power to deprive it of all authority to hear constitutional claims in habeas corpus cases.”

Fourth, Olson rebutted at length the argument 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.” 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,” 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,” that “[t]he Federalist also contains a number of significant statements recognizing the Supreme Court’s essential role in the constitutional scheme,” and that “[t]he failure of Congress in the First Judiciary Act to provide the Court with the full appellate jurisdiction authorized under Article III does not, we believe, cast any substantial doubt on our conclusion that Congress cannot divest the Supreme Court of jurisdiction over constitutional cases, for several reasons.”

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 § 25 of the Judiciary Act notwithstanding “the intense

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288 Id. at 6.
289 Id. at 6, 8.
290 Id. at 11.
291 Id. at 12-13.
292 Id. at 13.
294 Id. at 15.
295 Id. at 16 (discussing THE FEDERALIST NOS. 39, 80, and 82).
296 Id. at 18.
controversy which it sparked among the states.”

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.” 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.”

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.” Olson also thought it “noteworthy” that “throughout our history there have been movements to curb the Court’s jurisdiction which have never succeeded.” 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.”

Importantly, Attorney General Smith sided with Olson over Roberts. 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.

Smith explained that he was writing in response to 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 doctrine of separation of powers, 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.”

Smith concluded that Congress possesses some authority under the Exceptions Clause to regulate the appellate jurisdiction of the Court (and possesses substantially more

297 Id. at 19.
298 Id. at 19.
299 Id.
300 Id.
301 Id. at 19-20.
302 Id. at 20.
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.”\(^{305}\)

In support of the Justice Department’s adoption of the “essential functions” thesis, Smith first explained that the language of the Exceptions Clause does not support plenary congressional power. “An exception,” he wrote, “cannot, as a matter of plain language, be read so broadly as to swallow the general rule in terms of which it is defined.”\(^{306}\) He relied more extensively on originalist claims than Roberts had, arguing that the records of the Philadelphia Convention, as well as the constitutional structure created by the Framers, establish that the Exceptions Clause was not intended to allow Congress to interfere with the core functions of the Supreme Court.\(^{307}\) Among other points, he argued that the Madisonian Compromise, which gave Congress the discretion to decide whether to create lower federal courts, “implies that the powers of Congress were to be quite different with respect to the Supreme Court and the inferior federal courts.”\(^{308}\)

Smith relied less extensively on judicial precedent than had Roberts, arguing that “an examination of the Supreme Court’s cases does not require any different interpretation.”\(^{309}\) In response to the focus of “[p]roponents of the ‘plenary power’ thesis” on \textit{McCardle}, Smith noted that the Court’s “dictum” in that case “regarding alternative procedures for Supreme Court review of habeas corpus cases was converted into a holding several months later in \textit{Ex Parte Yerger},”\(^{310}\) and that no case “constitutes an authoritative statement that Congress could deprive the Court of its core functions.”\(^{311}\)

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”\(^{312}\)—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, but 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.”\(^{313}\) In addition, Smith expressly invoked Justice Frankfurter’s

\(^{305}\) \textit{Id.} at 14.

\(^{306}\) \textit{Id.} at 16.

\(^{307}\) \textit{Id.} at 17-22.

\(^{308}\) \textit{Id.} at 19.

\(^{309}\) \textit{Id.} at 22.

\(^{310}\) \textit{Id.} at 23.

\(^{311}\) \textit{Id.} at 24.

\(^{312}\) \textit{Id.}

\(^{313}\) \textit{Id.}
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.” 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.”

Smith closed by purporting to move from constitutional law to “concerns as a
policy matter” with Court-stripping. Like the Olson “policy” memorandum, however,
Smith’s concerns sounded at least as much in conventions. “History counsels against
depriving th[e] Court of its general appellate jurisdiction over federal questions,” he
wrote. Emphasizing the need to ensure the uniformity and supremacy of federal law, he
concluded that the very “integrity of our system of federal law depends upon a single
court of last resort have a final say on the resolution of federal questions.”

This early 1980s debate within the Justice Department contains many of the same
themes that were present in the 1957-58 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. Instead, Olson and Smith 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 non-legal 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.

\[\text{\textsuperscript{314} Id. at 25.}\]
\[\text{\textsuperscript{315} Id.}\]
\[\text{\textsuperscript{316} Id. at 26.}\]
\[\text{\textsuperscript{317} Id.}\]
As with the discussion of the 1937 debate over FDR’s Court-packing plan, these accounts of debates over Court-stripping proposals are not meant 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. The claim here, rather, is that a focus only on politics misses the extent to which the political branches grapple 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 political branch context, appear to translate to the judicial context, 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, and the frequent blurring of those categories in normative argumentation. Finally, it 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, serious appeals to historical gloss and constitutional conventions. Put differently, gloss and conventions appear to be doing important work in normative arguments outside the courts about the judicial separation of powers. Although the causal influence of those normative arguments 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 incomplete as a descriptive matter.

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 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, then serious arguments can be made that Court-packing and Court-stripping violate either the Constitution or non-legal constitutional conventions. But that is all that 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 and suggested in Supreme Court opinions—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 well, an important consideration to constitutional analyses that incorporate consequentialist reasoning whether implicitly or expressly. 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, 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 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 over the centuries, so has the federal judiciary since the Founding along a number of 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 process. Those changes heighten the need for flexibility in constitutional analysis in this area so that it can continue protecting

319 See Bradley & Morrison, supra note 1, at 426-28.
320 See id. at 423 n.45.
321 See HART, supra note 53, at 58-60.
322 For an overview, see HART & WECHSLER, supra note 6, at 1-47.
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 in 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.

To say that the justifications for crediting historical practice in the congressional-executive realm also apply to the judicial realm is not to say that there are not 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 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.  

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, may also operate differently or be less applicable in the judicial separation of powers context. 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, so they may have less opportunity to express acquiescence or non-acquiescence than other institutions. That said, one tool of non-acquiescence that the Supreme Court has used a number of times in the context of jurisdiction-stripping, including arguably in *McCardle* as discussed above, is narrow statutory interpretation. Moreover, as this Article has documented, the Court

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

324 See Bradley & Morrison, *supra* note 1, at 432-38.


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 own independence.

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. Concerns about potential aggrandizement are more complicated when applied to the judiciary. On the one hand, the Supreme Court has an advantage over the other branches of government in that, based on the strong popular and political branch support for judicial review that exists today, it 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. For those reasons, the danger of aggrandizement might seem especially acute in this context. If so, one might object to crediting historical gloss 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.”

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. Moreover, unlike political actors, judges have limited ability to directly mobilize political constituencies. 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 judicial separation of powers than in separation of powers controversies not concerning the courts. Both the Court-packing and Court-stripping episodes examined in this Article involved a failure to act, not a longstanding pattern of action acquiesced in by another branch of

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327 See Bradley & Morrison, supra note 1, at 438-447.

328 But cf. 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.”).


330 THE FEDERALIST NO. 78 (Hamilton).
government.\textsuperscript{331} To be sure, even if action by the executive branch acquiesced in by Congress may be the most common type of gloss scenario outside the judicial separation of powers (such as making recess appointments, using military force, and terminating treaties), 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.\textsuperscript{332} 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.\textsuperscript{333}

\textbf{B. Distinguishing among Gloss, Conventions, and Politics}

The previous parts of the 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. This 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. Recognizing that blurring and 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, a convention, or as “mere” politics, and also 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 1957-58. Blurring of the categories is potentially useful in that it allows for greater flexibility in constitutional argumentation: actors can appeal to the Constitution without committing themselves to the proposition 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

\textsuperscript{331} See also, 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.”).

\textsuperscript{332} Zivotofsky v. Kerry, 135 S. Ct. 2076, 2091 (2015).

\textsuperscript{333} 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.”). \textit{But cf.} Curtis A. Bradley, \textit{Historical Gloss, the Recognition Power, and Judicial Review}, 109 AJIL UNBOUND 2, 5 (2015) (questioning this conclusion).
intervention in the future, something that would be valuable if—as discussed in the last section—one is concerned about the danger of judicial aggrandizement. \(^{334}\) Finally, uncertainty about categorization allows for room for continued iterative evolution of the norm in interactions among the branches.

In other contexts, however, it is necessary to distinguish gloss from conventions. 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 action or to support congressional action, need to be clear about what is and is not a legal constraint. This is why in the early 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 upon 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. \(^{335}\) 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. \(^{336}\) In discerning the constitutional views of government actors, internal documents not intended for the public may be especially probative, since 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.

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 has defined them) do not have legal status, they would not be candidates for direct judicial application, although one

\(^{334}\) 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).

\(^{335}\) See *supra* notes 58-60 and accompanying text.

\(^{336}\) See *Bradley & Morrison*, *supra* note 1, at 415, 455 (explaining why practice reflecting bipartisan views has particular weight).
could imagine that they might inform sub-constitutional reasoning such as statutory construction.\textsuperscript{337}

By contrast, gloss is a potential candidate for direct judicial application, and, as noted at the beginning of the 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 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 in \textit{McCardle}, purpose inquiries are common in many areas of 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.\textsuperscript{338} 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.\textsuperscript{339} As discussed elsewhere, relatively minimalist judicial decisions relating to historical practice may be presumptively required in order to manage the tension.\textsuperscript{340} 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.

\textbf{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

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\textsuperscript{337} See, e.g., Vermeule, \textit{Conventions of Agency Independence, supra} note 9.
\textsuperscript{338} See, e.g., \textit{id.} at 1080-81; Nelson, \textit{supra} note 177, at 1785-86.
\textsuperscript{339} See Bradley & Siegel, \textit{supra} note 2, at 63.
\textsuperscript{340} See \textit{id.} at 63-64.
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Another possible example concerns the appropriate grounds for removing a federal judge 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. 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.

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.” 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. Historical practice may also inform issues of justiciability. In Raines v. Byrd, for example, a majority of the Supreme Court rejected legislative standing in part by observing that members of the political branches historically had not sued under similar circumstances.

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 extend to” three categories of “Cases” and six categories of “Controversies.” 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 appellate form.” This vesting theory has never received much traction, but Professor Akhil

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341 See, e.g., Stern v. Marshall, 131 S. Ct. 2594, 2621 (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). For an overview of the debate, see HART & WECHSLER, supra note 6, at 345-94.

342 See GEYH, supra note 3, at 113-70.


345 See HART & WECHSLER, supra note 6, at 307-14.

346 See 521 U.S. 811, 826 (1997) (“[H]istorical practice appears to cut against [appellees] . . . . It is evident from several episodes in our history that in analogous confrontations between one or both Houses of Congress and the Executive Branch, no suit was brought on the basis of claimed injury to official authority or power.”).

347 Martin v. Hunter’s Lessee, 14 U.S. (1 Wheat.) 304, 330-31 (1816); see also HART & WECHSLER, supra note 6, at 309 (discussing this aspect of the reasoning in Hunter’s Lessee).
Amar partially revived it in a series of articles. According to Amar, Article III should be read as requiring that Congress 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. From the perspective of historical gloss, however, Story’s theory is substantially more problematic than Amar’s. Whereas the federal courts have never been vested with all of the judicial power encompassed by the “Controversies” mentioned in Article III, they have since 1914 had the ability to review essentially all matters encompassed by the three categories of “Cases” referred to in Article III. Just as in Noel Canning, where historical gloss was identified primarily on the basis of the past seventy-five years of presidential removal practice, gloss potentially supports Amar’s theory given its consistency with the past century of jurisdictional practice, a point that 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. To date, much of the attention to such practice 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 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. More generally, those debates confirm that sharp distinctions between law and politics are oversimplified in the context of the separation of powers.


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

351 See 132 S. Ct. 2550, 2654 (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)).

352 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.