Court-Stripping, Court-Packing, and Court-Defying: Revisiting the Supreme Court's Essential Functions

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The "essential functions thesis" is one of the most famous structural arguments in the field of federal courts. The thesis, which has been endorsed by a number of prominent scholars and the executive branch, posits that there are implicit, structural limits on Congress's authority to "strip" the Supreme Court of its appellate jurisdiction. Court-stripping, the thesis contends, is not allowed if it would undermine the essential functions of the Court—in particular, maintaining the supremacy and uniformity of federal law. In this Article, we revisit that thesis with three goals in mind. First, we aim to show that the structural arguments underlying the essential functions thesis are relevant to the debate over whether Congress can permissibly "pack" the Court—that is, add Justices to seize ideological control of the institution. Supporters of the essential functions thesis have tended to assume that packing the Court must be constitutionally permissible. In making that assumption, they have mostly resorted to a formalist, textualist frame, a posture that seems puzzling because they do not adopt such a frame in addressing Court-stripping. Second, we contend that the literature has defined the Court's essential functions too narrowly. As we show, the structural rationales that explain why the supremacy and uniformity of federal law are essential functions also suggest other essential functions. Those additional functions, in turn, provide yet another ground for questioning the permissibility of Court-packing. Third, and most importantly, we use the example of the essential functions thesis to invite deeper consideration of the nature of structural constitutional reasoning and how it should be done, subjects that have received insufficient attention both on the Supreme Court and in the literature. For several reasons, including newfound anxiety over executive branch compliance with adverse judicial decisions, the issues analyzed here are vitally important today.

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Introduction

Imagine that there was no U.S. Supreme Court but that the federal and state court systems were otherwise unchanged. What would happen? There would be no mechanism for reviewing state court decisions that disregarded the federal Constitution, statutes, or treaties. There would also likely be sharp differences in the interpretation of federal law among the lower federal courts and state courts, and those differences would persist absent any tribunal to review them. As a practical matter, the content of federal law would depend on where you were in the country, and issues of national importance, such as disputes over federal elections or the qualifications for citizenship, would lack centralized judicial settlement. Moreover, without the Supreme Court, which is the most authoritative and prestigious judicial institution in the nation, a President bent on defying judicial orders would be more likely to succeed in doing so in the court of public opinion.

Now, imagine that we have an ideologically extreme Supreme Court because of when vacancies arose and manipulation of the confirmation process by one of the political parties. (For some readers, that will not take much imagination.) Imagine further that the Court is repeatedly invalidating federal and state legislation on dubious constitutional grounds and rolling back settled precedents. In that circumstance, is Congress powerless to respond? Is the only answer to such a countermajoritarian institution to win presidential elections and eventually change the Court's composition through regular appointments, no matter how long it takes?

Those questions are at the core of debates over one of the most famous structural arguments in the field of federal courts: the "essential functions thesis." The thesis, which has been endorsed by a number of prominent scholars and the executive branch, posits that there are implicit, structural limits on Congress's authority to "strip" the Supreme Court of its appellate jurisdiction. The Constitution states that, other than in cases falling within the Court's original jurisdiction, the Court "shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."[1] The essential functions thesis maintains that Congress may not strip the Court's appellate jurisdiction in a manner that would interfere with the Court's ability to perform its essential functions in the constitutional scheme.[2]

In this Article, we revisit that famous thesis. In doing so, we have three goals. First, we show that the structural arguments underlying the essential functions thesis are relevant to the debate over whether Congress can permissibly "pack" the Court—that is, add Justices to seize ideological

1. U.S. CONST. art. III, § 2, cl. 2.
2. *See infra* subpart I(C).

control of the institution.[3] Supporters of the essential functions thesis have tended to assume that packing the Court must be constitutionally permissible. In making that assumption, they have mostly resorted to a formalist, textualist frame. That posture seems puzzling because many of those same interpreters do not adopt such a frame in addressing other issues, including Court-stripping.

Second, we contend that the literature has defined the essential functions of the Supreme Court too narrowly. There is general agreement among federal courts scholars that, if the Court has any essential functions, they include promoting the supremacy and uniformity of federal law. But scholars have not explained why those functions and not others are essential. As we show, the structural rationales that explain why the supremacy and uniformity of federal law are essential functions also suggest additional ones. Those additional functions include protecting basic rights; sustaining the rule of law by checking the political branches, especially the President; resolving institutional impasses between the political branches; and policing the structure of democratic politics, including (in recent decades) by resolving conflicts over national elections. Those functions are essential in part because, like furthering the supremacy and uniformity of federal law, it is vital that some governmental institution perform them, and the Court is generally best positioned to do so. The Court's additional essential functions, in turn, provide yet another ground for questioning the permissibility of Court-packing.

Third, and most importantly, we use the example of the essential functions thesis to invite deeper consideration of the nature of structural constitutional reasoning and how it should be done. The Supreme Court often states that it considers not only text but also structure in interpreting the Constitution.[4] It has long been common, moreover, for the Court to rest a decision, at least in part, on a structural inference. It did so as early as 1803 in *Marbury v. Madison*,[5] where it claimed the power of judicial review of acts of Congress and certain actions of the executive branch;[6] in 1816 in *Martin v. Hunter's Lessee*,[7] where it asserted the authority to review decisions by state courts involving questions of federal law;[8] and (twice) in 1819 in *McCulloch v. Maryland*,[9] where it held that Congress could create a national bank and that a state could not tax it.[10] The Court also regularly relies

3. *See infra* subpart I(A).
4. *See infra* subpart III(A).
5. 5 U.S. (1 Cranch) 137 (1803).
6. *Id.* at 178–80.
7. 14 U.S. (1 Wheat.) 304 (1816).
8. *Id.* at 376–82.
9. 17 U.S. (4 Wheat.) 316 (1819).
10. *Id.* at 424–25, 436.

on structural reasoning in modern decisions—it did so, for example, in momentous decisions in 2024 involving Section Three of the Fourteenth Amendment and presidential immunity from prosecution.[11]

Despite decisions like these, the Court has said very little about *how* to do structural reasoning. Nor is there extensive commentary on the question, and the commentary that does exist raises as many questions as it answers.[12] Regardless of one's views about Congress's authority to pack the Supreme Court, we offer what we hope will prove a useful starting point for engaging in and assessing structural constitutional reasoning.

The issues analyzed in this Article are vitally important today. Given the extreme partisanship of the political branches and the electorate, the related erosion of governmental norms relating to the rule of law, the increasing litigation over elections and other aspects of our democratic order, and newfound anxiety over executive branch compliance with adverse judicial decisions, it is crucial to reflect on the Supreme Court's roles in our constitutional system. Also, the extensive focus in recent years on Court reform may return with a vengeance after President Donald Trump's second term, especially if he makes additional appointments to the Court. The constitutionality and wisdom of some reform proposals turn largely on the validity of certain kinds of structural inferences. Of broader significance, there is an uneasy relationship between the current Court's structural reasoning and its commitments to relatively strict versions of textualism and originalism. The extent to which those modalities of interpretation are compatible—and what follows insofar as they are not—is therefore of great practical import for many issues.

As we write these words about the essential functions of the Supreme Court, the second Trump Administration is engaging in a wide range of actions that many regard as unconstitutional or otherwise unlawful. The Supreme Court has repeatedly been asked to address those actions, often on an emergency basis. The Court has now restricted the issuance of "universal" injunctions by lower federal courts,[13] which likely will mean that there will be even more conflicts among those courts about the legality of the Administration's actions, which only the Court will be able to resolve. There has also been significant concern about the Trump Administration's lack of compliance with federal court decisions, especially decisions by the lower federal courts,[14] whereas the Administration has repeatedly stated that it will

11. *See* Trump v. Anderson, 144 S. Ct. 662, 665–69 (2024) (holding that states cannot enforce Section 3 against presidential candidates); Trump v. United States, 144 S. Ct. 2312, 2327–28 (2024) (holding that presidents have broad immunity from prosecution).

12. *See infra* subpart III(A).

13. Trump v. CASA, Inc., 145 S. Ct. 2540, 2560 (2025).

14. *See* Ryan Goodman, Siven Watt, Audrey Balliette, Margaret Lin, Michael Pusic & Jeremy Venook, *The "Presumption of Regularity" in Trump Administration Litigation*, JUST SECURITY

comply with decisions by the Supreme Court,[15] again highlighting the Court's special position.

Although there was much criticism of judicial review on the academic and political left during the first Trump Administration and the Biden Administration,[16] the federal judiciary may be the only federal institution that is functioning well enough to push back against the second Trump Administration. As a result, depending on how it chooses to execute its responsibilities in the coming terms, support for the Supreme Court may rise again on the left, at least on the comparative question of whether Congress or the Court is more likely to insist that the Trump Administration comply with legal norms. In any event, one theme of this Article is to urge a broader perspective that does not depend on the politics of the moment.

Part I contrasts the relatively narrow methodological terms of the contemporary debate over Court-packing with the longstanding and methodologically more diverse debate over Court-stripping, which has pitted the "traditional view" (which would broadly allow stripping) against the essential functions thesis (which would limit it). Part II shows that Court-packing also raises substantial constitutional questions under the essential functions thesis, albeit for somewhat different reasons than stripping. Part III reflects on the nature of structural constitutional reasoning, which plays a key role in claims about the Supreme Court's essential functions. Part IV constructs structural arguments for the supremacy and uniformity of federal law as essential functions of the Court and leverages those arguments to identify a broader set of essential functions that includes protecting rights, checking the President, resolving impasses between the political branches, and policing democratic politics. The Article concludes with reflections on the implications of that revised essential functions thesis for debates over Court reform and executive defiance of Supreme Court decisions.

(Oct. 15, 2025), https://www.justsecurity.org/120547/presumption-regularity-trump-administration-litigation/ [https://perma.cc/WU5R-DWZY] (noting "[t]he executive branch's flagrant noncompliance with court orders"); Adam Liptak, *In Showdowns with the Courts, Trump Is Increasingly Combative*, N.Y. TIMES (Apr. 15, 2025), https://www.nytimes.com/2025/04/15/us/politics/trump-defy-courts.html [https://perma.cc/5Q49-ADSX] (reporting on the Trump Administration's failure to comply with court orders).

15. *See, e.g.*, Jack Goldsmith, *The Solicitor General Embraces Judicial Supremacy*, AM. ENTER. INST. (May 16, 2025), https://www.aei.org/op-eds/the-solicitor-general-embraces-judicial-supremacy/ [https://perma.cc/9RCX-2PZY] ("[At] oral argument in the birthright citizenship emergency order case, Solicitor General John Sauer said several times that the Trump administration views itself to be bound not just by a Supreme Court *judgment*, but, much more broadly, by the *precedent* those judgments create.").

16. *See, e.g.*, MARK TUSHNET, TAKING BACK THE CONSTITUTION: ACTIVIST JUDGES AND THE NEXT AGE OF AMERICAN LAW 17 (2020) (criticizing the exercise of judicial review by conservative jurists); Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CALIF. L. REV. 1703, 1709–10 (2021) (similar); Michael J. Klarman, *The Supreme Court, 2019 Term — Foreword: The Degradation of American Democracy — and the Court*, 134 HARV. L. REV. 1, 11, 47 (2020) (similar).

I. A Methodological Puzzle

This Part contrasts the textualism and formalism that has predominated in the discussion of Court-packing with the richer interpretive picture that is evident in the longstanding debate over Congress's authority to strip the Supreme Court's appellate jurisdiction.[17] As we explain, one of the two principal schools of thought in the Court-stripping debate—known as the essential functions thesis—posits implied limitations on Congress's authority stemming from the constitutional structure. By contrast, the Court-packing debate has mostly lacked that sort of structural perspective. The next Part shows that the disconnect between the debates over the two subjects is not due primarily to any inherent differences between Court-packing and Court-stripping, but rather to the inability of constitutional interpreters to perceive that structural reasoning is also relevant to the debate over packing.

A. Court-Packing Versus Court-Stripping

Over the past decade, there have been vigorous calls for Supreme Court reform. Some of the impetus for those calls stems from frustrations by Democrats with how Republicans have managed the Supreme Court appointments process. After Justice Antonin Scalia died in February 2016, Senate Republicans refused to consider any nominee of President Barack Obama to fill the vacancy on the stated ground that the American people, in the next presidential election, should have a say in determining who the next Justice would be.[18] Democrats accused Republicans of violating an important constitutional norm requiring the Senate to consider Supreme Court nominees in good faith.[19] Republican President Donald Trump won the 2016 election and filled the Scalia vacancy as well as two others that arose during his presidency, the last of which occurred less than two months before the

17. Decades ago, Professor William Van Alstyne described the massive literature on the subject as already "choking on redundancy." Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 897 n.9 (1984) (quoting a letter from Professor Van Alstyne in 1983); *see also, e.g.*, Daniel D. Birk, *The Common-Law Exceptions Clause: Congressional Control of Supreme Court Appellate Jurisdiction in Light of British Precedent*, 63 VILL. L. REV. 189, 190 (2018) ("The scope of Congress's power to shape the appellate jurisdiction of the Supreme Court is the great enduring mystery of federal courts jurisprudence.").

18. *See* Letter from Senate Judiciary Committee Republicans, to Mitch McConnell, Senate Majority Leader (Feb. 23, 2016), *quoted in Judiciary Committee Republicans to McConnell: No Hearings on Supreme Court Nomination*, CHUCK GRASSLEY: NEWS RELEASES (Feb. 23, 2016), https://www.grassley.senate.gov/news/news-releases/judiciary-committee-republicans-mcconnell-no-hearings-supreme-court-nomination [https://perma.cc/QD4L-QY9T] ("[O]ur decision is based on constitutional principle and born of a necessity to protect the will of the American people . . . .").

19. *See, e.g.*, PRESIDENTIAL COMM'N ON THE SUP. CT. OF THE U.S., FINAL REP. 16, 75 (2021) [hereinafter BIDEN COMM'N REP.] ("Some proponents of Supreme Court expansion charge that Republican lawmakers since 2016 have disregarded institutional norms in order to secure a conservative supermajority on the Court.").

2020 elections.[20] Democrats charged Republicans with adding hypocrisy to their prior violation of Senate norms,[21] and calls for major reform of the Court on the political and academic left—especially calls for expanding its size—increased in frequency and volume.[22]

Democratic President Joseph Biden responded by creating a bipartisan commission of legal academics, other scholars, former federal judges, and lawyers to study various potential reform measures.[23] In compliance with the President's instructions, the commission heard testimony and issued a thorough report that analyzed many reform proposals without endorsing or denouncing any of them.[24] Calls for Court reform appeared to die down a bit after the Democratic Party lost control of the House of Representatives in the 2022 midterm elections, although ethics scandals involving certain Justices helped to keep the topic simmering in public debate.[25] In 2024, the topic of Supreme Court reform intensified yet again.[26] President Biden offered some

20. *See* Ed Pilkington & David Smith, *Amy Coney Barrett Confirmed to Supreme Court in Major Victory for US Conservatives*, GUARDIAN (Oct. 26, 2020), https://www.theguardian.com/us-news/2020/oct/26/amy-coney-barrett-confirmed-supreme-court-justice-vote [https://perma.cc/4RVS-ANVW] (reporting that Justice Barrett's confirmation to the Court occurred "just eight days before the election").

21. *See, e.g.*, BIDEN COMM'N REP., *supra* note 19, at 75 (observing that some proponents "see expansion of the Court as particularly justified in light of Senate Republicans' handling of the election-year nominations of Judge Garland and Justice Barrett").

22. *See, e.g.*, STEPHEN M. FELDMAN, PACK THE COURT! A DEFENSE OF SUPREME COURT EXPANSION 169 (2021) ("The Democrats should pack the Court when they have the opportunity."); Nancy Gertner & Laurence H. Tribe, *The Supreme Court Isn't Well. The Only Hope for a Cure Is More Justices.*, WASH. POST (Dec. 9, 2021), https://www.washingtonpost.com/opinions/2021/12/09/expand-supreme-court-laurence-tribe-nancy-gertner [https://perma.cc/5NMZ-MC5X] (arguing that "Congress must expand the size of the Supreme Court and do so as soon as possible").

23. *See* Press Release, White House, President Biden to Sign Executive Order Creating the Presidential Commission on the Supreme Court of the United States (Apr. 9, 2021), https://bidenwhitehouse.archives.gov/briefing-room/statements-releases/2021/04/09/president-biden-to-sign-executive-order-creating-the-presidential-commission-on-the-supreme-court-of-the-united-states/ [https://perma.cc/W5FR-JUCA] (announcing the creation of a "bipartisan group of experts on the Court and the Court reform debate"); Exec. Order No. 14023, 86 Fed. Reg. 19569 (Apr. 14, 2021) (establishing Biden's Supreme Court Commission and determining its composition of "distinguished constitutional scholars," retired federal judges, and "other individuals having experience with and knowledge of the Federal judiciary and the Supreme Court").

24. *See generally* BIDEN COMM'N REP., *supra* note 19.

25. *See, e.g.*, Alison Durkee, *Supreme Court Ethics Controversies: All the Scandals that Led Biden to Endorse Code of Conduct*, FORBES (July 29, 2024), https://www.forbes.com/sites/alisondurkee/2024/07/29/supreme-court-ethics-controversies-all-the-scandals-that-led-biden-to-endorse-code-of-conduct/ [https://perma.cc/EY48-TG3W] (reporting on a list of Supreme Court ethics scandals that, in 2024, led Biden to endorse a binding ethics code).

26. *See, e.g.*, David French, *Supreme Court Reform Is in the Air*, N.Y. TIMES (Oct. 10, 2024), https://www.nytimes.com/2024/10/10/opinion/harris-supreme-court.html [https://perma.cc/TA7E-KS8S] (reporting that "two prominent Democrats released two different plans for Supreme Court reform").

reform proposals, including term limits for the Justices.[27] Senator Ron Wyden of Oregon proposed more dramatic types of reform, including a plan to expand the Court to fifteen Justices.[28]

With Republican President Donald Trump back in the White House until 2028, one can expect substantially less enthusiasm for major Court reform over the short-term among liberal academics and activists as well as congressional Democrats. But if Justices Clarence Thomas and Samuel Alito step down during the current Administration and are replaced by young, very conservative jurists, the prospect of losing control of the Court for at least a generation may result in even more vehement calls for structural reform of the Court when the Democrats return to power. In the meantime, some Republicans may advocate major reform proposals of their own—perhaps to preempt possible reform proposals by a future Democratic Congress.

In the recurring debates over Court-packing, scholars and advocates generally assume that, because the text of the Constitution does not define the number of Justices on the Court, Congress possesses plenary power to change its size, even by "packing" it with ideologically congenial Justices to change its decisionmaking.[29] That conventional wisdom primarily reflects formalist, textualist interpretive thinking. It has appeared, among other places, in the judgment of President Franklin Roosevelt's (FDR's) Justice Department,[30] in the statements of many federal courts and constitutional law scholars,[31] in the famous Hart & Wechsler federal courts casebook,[32] and in

27. *See* Joe Biden, *My Plan to Reform the Supreme Court and Ensure No President Is Above the Law*, WASH. POST (July 29, 2024), https://www.washingtonpost.com/opinions/2024/07/29/joe-biden-reform-supreme-court-presidential-immunity-plan-announcement/ [https://perma.cc/SF2R-WPJV] (offering several proposals for Supreme Court reform).

28. Justin Jouvenal & Tobi Raji, *Sweeping Bill to Overhaul Supreme Court Would Add Six Justices*, WASH. POST (Sep. 26, 2024), https://www.washingtonpost.com/politics/2024/09/26/supreme-court-reform-15-justices-wyden/ [https://perma.cc/V6FG-F4F9].

29. *See infra* notes 120–24 and accompanying text.

30. *See* Memorandum from Warner W. Gardner, Dep't of Just., to the Solic. Gen. 55, 57 (Dec. 10, 1936) (stating that, of the ways of combatting the Court's invalidations of New Deal legislation—including jurisdiction-stripping—Court-packing was "the only [option that] is certainly constitutional" because "Congress has on numerous occasions changed the membership of the Court").

31. *See, e.g.*, AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 354–55 (2012) (contending that Congress can change the Court's size "[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"); 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, 79 (Matthew D. Adler & Kenneth Einar Himma eds., 2009) ("If, say, Congress were to increase the size of the Supreme Court to eleven Justices, neither the Court itself, nor any member of Congress, could plausibly claim that in so doing it was acting unconstitutionally.").

32. *See* WILLIAM BAUDE, JACK GOLDSMITH, JOHN F. MANNING, JAMES E. PFANDER & AMANDA L. TYLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 428 (8th ed. 2025) ("*Of course*, the political branches can exercise some control over the Court in

the aforementioned 2021 report of the Presidential Commission on the Supreme Court of the United States.[33] Professor Michael Dorf recently articulated that conventional wisdom. Commenting on Biden's reform proposals, Dorf asserted that the "easiest" Court reform, in the sense of being "clearly constitutional," would be to pack the Court.[34]

Professor William Baude has noted that, as a "textualist, formalist, originalist," he thinks Court-packing is constitutional, but he wonders why those who are not champions of those methodologies have taken its constitutionality for granted.[35] He is right to press that point. As noted, the most recent calls for Court-packing have come from liberals who are distressed about the Court's direction and who believe that Senate Republicans acted wrongfully first in refusing to consider President Obama's nomination of Judge Merrick Garland on the stated ground that the nomination took place during a presidential election year, and then in confirming Justice Amy Coney Barrett days before the next presidential election.[36]

In such a politically charged environment, there is an obvious danger that one's ideological or policy views might end up displacing or suppressing one's methodological commitments. That phenomenon can of course work both ways. Some conservative scholars have (unlike Professor Baude) reacted to the possibility of Democrats packing the Court by condemning packing as unconstitutional or questioning its constitutionality[37]—commentary that might provoke similar questions about motivated

other ways [besides jurisdiction stripping]—by selecting new Justices or by changing the size of the Court (which has happened seven times over the years . . .)." (emphasis added)).

33. *See* BIDEN COMM'N REP., *supra* note 19, at 98 n.70 ("Most scholars who have considered the issue . . . have concluded that Congress has broad power to modify the Court's size."); *see id.* at 98–99 (collecting sources).

34. Michael C. Dorf, *Could Jurisdiction-Stripping Prevent SCOTUS Invalidation of Biden's SCOTUS Term Limits Proposal?*, DORF ON LAW (Aug. 12, 2024), https://www.dorfonlaw.org/2024/08/could-jurisdiction-stripping-prevent.html [https://perma.cc/R45D-SH22]; *see also, e.g.*, Doerfler & Moyn, *supra* note 16, at 1753 ("Among personnel reforms, court-packing is probably the most uncontroversially legal.").

35. William Baude, Essay, *Reflections of a Supreme Court Commissioner*, 106 MINN. L. REV. 2631, 2633–34 (2022); *see* Will Baude, *Why Isn't Court-Packing Unconstitutional?*, THE VOLOKH CONSPIRACY (Oct. 31, 2020), https://reason.com/volokh/2020/10/31/why-isnt-court-packing-unconstitutional/?nab=0 [https://perma.cc/B45J-EQUY] (examining little-explored arguments for the unconstitutionality of Court-packing).

36. *See, e.g.*, *supra* notes 19–21 and accompanying text.

37. *E.g.*, Randy E. Barnett, Patrick Hotung Professor of Const. L., Geo. Univ. L. Ctr., Written Statement on The Unconstitutionality of Supreme Court "Reform" before the Presidential Comm'n on the Sup. Ct. of the U.S. 2 (July 20, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4912326 [https://perma.cc/GW27-LLJJ]; Mike Rappaport, *Is Court Packing Constitutional?*, L. & LIBERTY (Nov. 6, 2020), https://lawliberty.org/is-court-packing-constitutional/ [https://perma.cc/MX33-5NCF]; M. Todd Henderson, *Court-Packing Is Unconstitutional*, NEWSWEEK (Oct. 30, 2020), https://www.newsweek.com/court-packing-unconstitutional-opinion-1543290 [https://perma.cc/BR7W-2PGP].

reasoning. Our focus, however, is on the general acceptance of the constitutionality of Court-packing even by those who should be methodologically receptive to the constitutional arguments against it—arguments that are taken seriously with respect to various other issues.

For example, most of the proposed Court reforms to date have avoided calls for what is known as "Court-stripping"—that is, stripping the Court of some or all of its appellate jurisdiction. There seem to be assumptions in the literature and in public discourse that the constitutional analysis for Court-packing looks very different than the constitutional analysis for Court-stripping, but those assumptions are not defended. Advocates of reform have taken seriously the idea that stripping the Court of its appellate jurisdiction, unlike packing the Court, might raise constitutional concerns.[38]

B. The Traditional View on Court-Stripping

Reform advocates have recognized that any calls for Court-stripping would run into a longstanding debate in the federal courts literature. That debate begins with the Exceptions Clause in Article III of the Constitution. After providing that the Supreme Court shall have original jurisdiction "[i]n all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party," Article III states that "[i]n all other Cases" previously mentioned in the Article, including cases raising federal questions, "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*."[39] For the past seventy-five years or so, federal courts scholars have debated the extent to which the Exceptions Clause authorizes Congress to limit the Court's appellate jurisdiction.

There are two general schools of thought on that issue among federal courts scholars. The first is the "traditional view." It holds that Congress has plenary power to regulate the Court's appellate jurisdiction—even to the point of eliminating it entirely—if, in doing so, Congress does not violate other restrictions in the Constitution such as the Equal Protection Clause.[40] The traditional view is, first and foremost, strongly textualist. Although (as noted below) defenders of the traditional view do not offer the only way to read the language of the Exceptions Clause, they argue that its language does

38. *See, e.g.*, Doerfler & Moyn, *supra* note 16, at 1756 ("Jurisdiction stripping is perhaps the most aggressive reform and famously raises numerous constitutional questions—questions that become more difficult the more comprehensive the strip.").

39. U.S. CONST. art. III, § 2, cl. 2 (emphasis added).

40. U.S. CONST. amend. XIV, § 1. For this argument, see, for example, Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1005 (1965); Charles L. Black, Jr., *The Presidency and Congress*, 32 WASH. & LEE L. REV. 841, 846 (1975) [hereinafter Black, *The Presidency*]; and CHARLES L. BLACK, JR., DECISION ACCORDING TO LAW: THE 1979 HOLMES LECTURES 37–38 (1981) [hereinafter BLACK, DECISION ACCORDING TO LAW].

not suggest any limitations on Congress's authority to restrict the Court's appellate jurisdiction. "This language," Professor 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."[41] Professor Martin Redish similarly emphasized the plain meaning of the constitutional text, insisting that "[t]here is . . . no internal method of construing the exceptions clause to mean anything other than what it says."[42] "On its face," Professor Gerald Gunther likewise asserted, "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."[43] Decades later, Professor Michael Dorf agreed that, "under the most straightforward reading of the text of Article III, Congress could . . . eliminate all appellate jurisdiction of the Supreme Court."[44]

In modern interpretive debates, a fellow traveler with formalism and textualism is originalism. But originalism is not of great help to advocates of the traditional view. Without attempting to canvas here the originalist literature relating to the Exceptions Clause, it seems fair to suggest that that literature has not yielded an interpretive consensus.[45] In general, the Framers did not focus on Article III nearly as much as they focused on other parts of the Constitution. 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 partly because the addition triggered no discussion, let alone debate, on the floor of the Convention.[46] Granted, most modern originalists would focus not on the intent of the Framers, but on the public meaning of the Exceptions Clause or of Article III more broadly.[47] But originalist scholarship has not established that the original public meaning of the word "Exceptions" was relatively clear and allowed plenary congressional power, or that it was originally understood to imply

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

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

43. Gunther, *supra* note 17, at 901.

44. Dorf, *supra* note 31, at 81. Notably, however, Dorf does not argue that there are no Article III limits on the scope of the Exceptions Clause. *See id.* at 82 ("[I]t is possible to find support in other aspects of Article III . . . for an obligation on Congress to compensate for limitations on the high Court's appellate jurisdiction with grants to the lower federal courts . . . .").

45. *See, e.g.*, Birk, *supra* note 17, at 191 ("Other than the fact that it exists, there is little consensus on what the Exceptions Clause is supposed to mean or even, at times, on the terms of the debate.").

46. BAUDE ET AL., *supra* note 32, at 21, 422.

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

that there was no point at which an exception to a rule (or series of exceptions) would destroy that rule.[48] In addition, modern originalists commonly consult evidence of original intent as evidence of original meaning.[49] And the Framers who debated whether the existence of lower federal courts should be constitutionally required, permitted, or prohibited all assumed that the Supreme Court would possess jurisdiction to hear appeals from the judgments of state courts on issues of federal importance.[50]

As for judicial precedent, supporters of the traditional view observe that the Court in *Ex parte McCardle*[51] famously upheld a jurisdictional limitation enacted by Congress during Reconstruction.[52] In *McCardle*, the Court had to determine the constitutionality of an 1868 federal statute that repealed a provision enacted the previous year.[53] The 1867 provision had permitted appeals to the Supreme Court from denials of habeas relief by a federal circuit court.[54] Congress acted in 1868 with the apparent—although not explicit—purpose of stopping the Court from deciding the then-pending *McCardle* case, which concerned the constitutionality of military occupation and trials in the South.[55] The Court dismissed the appeal for lack of jurisdiction.[56] It concluded that Congress had acted constitutionally in 1868 because "the power to make exceptions to the appellate jurisdiction of this court is given

48. *See* Birk, *supra* note 17, at 193–95 (noting the lack of unanimity in originalist scholarship on the meaning of the Exceptions Clause); *cf. id.* at 197 (contending, based on pre-constitutional British practice, that "the background expectation likely was that Congress's exceptions power would be limited in scope").

49. *See* JACK M. BALKIN, LIVING ORIGINALISM 104–06 (2011) (recording this observation); *see also* John O. McGinnis & Michael B. Rappaport, *Unifying Original Intent and Original Public Meaning*, 113 NW. U. L. REV. 1371, 1373 (2019) (arguing for unifying original intent and original public meaning under an "original methods" approach).

50. BAUDE ET AL., *supra* note 32, at 21; *see* Bator, *supra* note 41, at 1038–39 (suggesting that Court-stripping, while constitutional, would contravene the "spirit" of the Constitution because it "would create a system inconsistent with the structure that the Framers assumed to be appropriate"); *see also* NEIL S. SIEGEL, THE COLLECTIVE-ACTION CONSTITUTION 291 (2024) (noting that opponents of creating lower federal courts—John Rutledge, Roger Sherman, and Pierce Butler—"emphasized that state-court decisions on federal questions could be appealed to the US Supreme Court, thereby ensuring uniformity in judicial interpretations of federal law and its supremacy over state law," while proponents of creating lower federal courts "[James] Madison, [James] Wilson, and John Dickinson worried about a flood of appeals from state courts to the Supreme Court"). For the debate itself, see 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 124–25 (Max Farrand ed., rev. ed. 1966).

51. 74 U.S. (7 Wall.) 506 (1868).

52. *See id.* at 514; *see infra* note 116 (quoting a young John Roberts, who was tasked with articulating the traditional view in a Justice Department memorandum).

53. *Id.* at 512, 514.

54. *Id.* at 514.

55. *See* Act of Mar. 27, 1868, ch. 34, § 2, 15 Stat. 44 (repealing the 1867 statute permitting the Court to hear appeals from denials of habeas relief in lower federal courts); *Ex Parte McCardle*, FEDERAL JUDICIAL CENTER, https://www.fjc.gov/history/cases/cases-that-shaped-the-federal-courts/ex-parte-mccardle [https://perma.cc/VVJ3-K7KB] (discussing the context of *McCardle*).

56. *McCardle*, 74 U.S. at 515.

[to Congress] by [the] express words" of the Exceptions Clause and the Court was "not at liberty to inquire into the motives of the legislature."[57] Defenders of plenary congressional authority over the Court's appellate jurisdiction emphasize those parts of the ruling: The Reconstruction Congress expected that it would disagree with the Court's decision, and the Court upheld congressional power to prevent the Justices from deciding the case.[58]

With few exceptions, champions of the traditional view have not prioritized structural constitutional reasoning to defend plenary congressional control. Professor Herbert Wechsler did offer a structural argument that was tied loosely to a claim about original intent:

> [T]he plan of the Constitution for the courts . . . was quite simply that the Congress would decide from time to time how far the federal judicial institution should be used within the limits of the federal judicial power; or, stated differently, how far judicial jurisdiction should be left to the state courts, bound as they are by [the Supremacy Clause].[59]

Professor Charles Black, a major advocate of structuralism in constitutional interpretation whose views are discussed in Part III, asserted 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."[60] From that structural perspective, the constitutionality of Court-stripping plays a pivotal role in reconciling judicial review with majoritarian democracy. But in general, structural argumentation has not been emphasized in the literature supporting the traditional view.

Scholarly defenders of the traditional view have also occasionally mentioned the historical practices of the political branches. They have not, however, tended to emphasize the interpretive relevance of historical practice as an independent source of constitutional authority or as a modality of interpretation tied to structural argumentation.[61] When proponents of the

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57. *Id.* at 514.

58. *See, e.g.*, Bator, *supra* note 41, at 1040 ("[T]he language of the Court in *McCardle* plainly proceeded on the assumption that Congress' power is plenary; and this is the only Supreme Court opinion squarely on point."); *see also* BERNARD SCHWARTZ, A BASIC HISTORY OF THE U.S. SUPREME COURT 40–41 (1968) ("The statute had as its sole purpose the prevention of a decision by the high bench on the constitutionality of the Reconstruction Act.").

59. Wechsler, *supra* note 40, at 1005.

60. Black, *The Presidency*, *supra* note 40, at 846; *see also* BLACK, DECISION ACCORDING TO LAW, *supra* note 40, at 18, 37–39, 42, 78–81 (contending that the nature and degree of federal judicial power is defensible only if Congress can decide whether the federal courts wield such authority).

61. *Cf.* Richard H. Fallon, Jr., *Jurisdiction-Stripping Reconsidered*, 96 VA. L. REV. 1043, 1047–49 (2010) (critiquing "the originalist and textualist style of reasoning that has characterized nearly all leading academic writings on congressional control of jurisdiction" and pointing out that Professor Amar "relied almost entirely on Article III's text and original understanding to support his 'neo-federalist' theory").

traditional view have noted congressional practice, they have typically done so in passing as a relatively minor consideration, and they have usually emphasized early practice, especially the Judiciary Act of 1789,[62] where Congress did not authorize the Court to exercise the full range of appellate jurisdiction established by Article III. For example, the First Congress authorized Supreme Court appellate jurisdiction over state court decisions invalidating (but not upholding) federal statutes or upholding (but not invalidating) state statutes against federal constitutional challenge.[63] That jurisdictional grant, conferred by Section 25 of the First Judiciary Act, indicates that Congress was concerned primarily with ensuring the supremacy of federal law over the states and secondarily with ensuring uniformity in the interpretation of federal law throughout the country.[64] It was not until 1914 that Congress authorized the Court to exercise appellate jurisdiction over state court decisions invalidating state laws on federal constitutional grounds or upholding federal laws against constitutional challenge.[65] The fact that there has now been more than a century of practice in which the Court has been able to review essentially any issue of federal law arising in the lower federal courts or state courts is not typically given weight by advocates of the traditional view.

The relative inattention of defenders of the traditional view to the potential relevance of historical practice is captured well by Professor Gunther's famous quip that inferring structural limits on Congress's authority to strip the Supreme Court's appellate jurisdiction "confuses the familiar with the necessary, the desirable with the constitutionally mandated."[66] That statement has been quoted favorably far more frequently than it has been critically examined.

C. The Essential Functions Thesis

The second school of thought on Court-stripping, and the principal challenger to the traditional view, is less formalist and textualist and more functionalist and structural. The second school embraces the essential functions thesis.

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62. *See, e.g.*, Bator, *supra* note 41, at 1040 (briefly discussing the "major exceptions" that Congress made to the appellate jurisdiction of the Supreme Court throughout the nation's history); *cf.* Tara Leigh Grove, *Article III in the Political Branches*, 90 NOTRE DAME L. REV. 1835, 1835–36 (2015) (observing that, relative to other separation of powers work, "[t]here is . . . far less focus on political branch practice in Article III scholarship").

63. Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85–86.

64. That said, Section 25's coverage may have been broader than is sometimes assumed because it also authorized Supreme Court review of state court decisions denying a "title, right, privilege or exemption specially set up or claimed by either party" under the Constitution or any statute, treaty, or commission of the United States. *Id.*; *see infra* text accompanying note 82.

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

66. Gunther, *supra* note 17, at 905.

1. Original Articulation and Subsequent Elaboration.—The essential functions thesis is typically traced to the prominent federal courts scholar Henry Hart, a coauthor of the influential Hart & Wechsler casebook on federal courts law. In one of the most famous law review articles ever written, crafted as a dialogue in the *Harvard Law Review*, Hart suggested (without much explanation) that the Constitution does not "authoriz[e] exceptions which engulf the rule" of appellate jurisdiction, and that "the exceptions must not be such as will destroy the essential role of the Supreme Court in the constitutional plan."[67] On that view, notwithstanding the ostensibly plain language of the Exceptions Clause, the Constitution implicitly prohibits Congress from stripping the Court's appellate jurisdiction in a way that would interfere with the Court's ability to perform its essential functions in the constitutional scheme.

Scholars have since elaborated on that idea, relying primarily upon structural reasoning and historical practice. Most notably, Professor Leonard Ratner sought to render Hart's "essential role" idea analytically more tractable 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."[68] Professor Ratner derived those functions from structural inferences from Article III and the Supremacy Clause, as well as from interpretations of early federal statutes, historical practice, and statements in various Supreme Court decisions.[69] Applying that structural standard, Professor Ratner deemed unconstitutional "legislation that precludes Supreme Court review in every case involving a particular subject."[70] Other prominent scholars, including Professors Richard Fallon, Henry Monaghan, James Pfander, and Lawrence Sager, have also endorsed some version of the essential functions thesis.[71]

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

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

69. *Id.* at 160–62, 166–67, 173–83.

70. *Id.* at 201. For elaboration of the argument, see Leonard G. Ratner, *Majoritarian Constraints on Judicial Review: Congressional Control of Supreme Court Jurisdiction*, 27 VILL. L. REV. 929, 936 (1982).

71. *See, e.g.*, Fallon, *supra* note 61, at 1089–90, 1093 ("Congressional motivations aside, some imaginable jurisdictional withdrawals might go too far . . . ."); Henry P. Monaghan, *Jurisdiction-Stripping Circa 2020: What* The Dialogue *(Still) Has to Teach Us*, 69 DUKE L.J. 1, 10–13 (2019) (agreeing with Professor Hart's view of the essential functions thesis); James E. Pfander, *Jurisdiction-Stripping and the Supreme Court's Power to Supervise Inferior Tribunals*, 78 TEXAS L. REV. 1433, 1438–42 (2000) ("Articles I and III might give Congress . . . a duty to implement and respect the Court's constitutional role in supervising inferior tribunals."); Lawrence Gene Sager, *Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 42–44 (1981) (taking up the "narrowed argument" that "the essential function claim is strongest when narrowed to Supreme Court review of state court decisions that repudiate federal constitutional claims of right").

The thesis is regularly invoked to challenge proposed or actual statutory restrictions on federal court jurisdiction.[72]

2. Historical Practice and Judicial Precedent.—The relevant historical practice can be seen as generally consistent with the essential functions thesis. 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. Moreover, the primary situation in which it did so, in 1868 in *McCardle*, may constitute "negative nonjudicial precedent"—that is, a constitutional mistake that should not be repeated.[73]

Although it is true (as noted) that, in the Judiciary Act of 1789, Congress did not authorize the Court to exercise the full range of appellate jurisdiction established by Article III, it is also true that the First Congress authorized Supreme Court appellate jurisdiction over a broad range of cases, including federal habeas corpus cases and state court decisions invalidating federal statutes or upholding state statutes against federal constitutional challenge.[74]

Like the First Congress, the Marshall Court was focused on 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.[75] In 1831, the House Judiciary Committee voted to repeal Section 25, which would have constituted Court-stripping had it succeeded.[76] But Congress rejected that attempt by a wide

72. *See* Michael C. Dorf, *What Are the "Essential Functions" of the Supreme Court?*, DORF ON LAW (Oct. 15, 2025), https://www.dorfonlaw.org/2025/10/what-are-essential-functions-of-supreme.html [https://perma.cc/XN3X-A9CS], for a recent example discussing invocations of the thesis in connection with a case pending at that time before the Supreme Court, *Bowe v. United States*.

73. *See* Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Constitutional Conventions, and the Judicial Separation of Powers*, 105 GEO. L.J. 255, 273 (2017) ("Historical practice, like judicial decisions, can sometimes create negative precedent—that is, precedent about what not to repeat rather than what is constitutionally permissible."); *cf.* Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 380 (2011) (noting that a judicial precedent in the "anticanon" "embodies a set of propositions that all legitimate constitutional decisions must be prepared to refute").

74. *See* Judiciary Act of 1789, ch. 20 § 14, 1 Stat. 73, 82 ("[T]he justices of the supreme court . . . shall have power to grant writs of *habeas corpus* . . . . *[p]rovided*, [t]hat writs of *habeas corpus* shall in no case extend to prisoners in gaol, unless where they are in custody, under or by colour of the authority of the United States . . . ."); *id.* § 25, 1 Stat. at 85–86 (authorizing Supreme Court review of state high court decisions invalidating federal statutes and upholding state statutes against federal constitutional challenges).

75. *See, e.g.*, Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 392–97 (1998) [hereinafter Friedman, *Countermajoritarian Difficulty*] (discussing state defiance of Marshall Court decisions); Barry Friedman, *"Things Forgotten" in the Debate Over Judicial Independence*, 14 GA. ST. U. L. REV. 737, 741–42 (1998) [hereinafter Friedman, *"Things Forgotten"*] ("Repeatedly throughout this period, the Supreme Court was attacked for interfering with state sovereignty.").

76. 1 GEORGE TICKNOR CURTIS, LIFE OF JAMES BUCHANAN, FIFTEENTH PRESIDENT OF THE UNITED STATES 110 (1883) (ebook).

margin.[77] The minority report opposing the bill, authored by then-Representative James Buchanan together with William W. Ellsworth and E.D. White, argued that without Section 25 "there would be no uniformity in the construction and administration of the Constitution, laws, and treaties of the United States" and that "its repeal would seriously endanger the existence of this Union" by compromising the supremacy of the federal government over the states.[78] That report has been hailed as "one of the great and signal documents in the history of American constitutional law."[79]

Notably, both opponents and proponents of repealing Section 25 agreed on its fundamental importance. To be sure, its jurisdictional grant authorized Supreme Court appellate jurisdiction over only state court decisions invalidating federal statutes or upholding state statutes against federal constitutional challenge.[80] As noted above, under-application of federal law by the states was the chief concern at that point. But from the beginning, the Court was able to reach even most of the omitted federal questions, for two reasons. First, even if most state courts upheld the federal statutes or struck down the state statutes, the Court could reach the federal issue as soon as a single state high court went the other way.[81] Second, Section 25's coverage may have been broader than is sometimes assumed because it also permitted the Court to review state court decisions denying a "title, right, privilege, or immunity specially set up or claimed by either party" under the Constitution or a federal law, treaty, or commission.[82]

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77. *Id.*

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

79. 2 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 199 (1922); *see also* FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM 44 n.143 (1927) (describing the minority report as "one of the famous documents of American constitutional law"). For an assessment of the political conditions that contributed to the defeat of the bill, see generally Mark A. Graber, *James Buchanan as Savior? Judicial Power, Political Fragmentation, and the Failed 1831 Repeal of Section 25*, 88 OR. L. REV. 95 (2009).

80. Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85–86.

81. *See* Ratner, *supra* note 68, at 185–86 ("The early rule did not obstruct the Court's essential functions . . . . Any conflict between such a decision and a prior one, not reviewed by the Supreme Court[,] could ultimately be resolved by review of a succeeding decision in accord with the first.").

82. *See id*. at 184–85 ("In early cases the Supreme Court . . . . did not perceive . . . the full scope of the third clause of the section."); Akhil Reed Amar, Colloquy, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499, 1530 (1990) (explaining that "the section 25 'gap' is largely, and perhaps wholly, an optical illusion" under even a broad reading because "[i]n virtually every case in which one party argues for a federal 'right,' the other side can argue that it has a federal 'immunity'—which is simply another way of saying that one's opponent has no federal right"). *But see* Daniel J. Meltzer, *The History and Structure of Article III*, 138 U. PA. L. REV. 1569, 1589 (1990) ("Amar should be receptive to the question of why each of section 25's three clauses includes what appears to be a limitation of jurisdiction to cases where the state court refuses to recognize a federal right, if (as he argues) inclusion of that limitation makes no difference.").

In 1868, as explained, the Reconstruction Congress apparently sought to engage in Court-stripping for the first time in U.S. history. Even after Congress enacted the jurisdictional limitation at issue in the *McCardle* case, however, Congress left open a distinct, pre-existing basis for Supreme Court review of the issue in question, a basis that the Court itself pointedly underscored at the end of its opinion.[83] Moreover, in another case that term, *Ex parte Yerger*,[84] the Court exercised appellate jurisdiction in a habeas case under that alternate basis.[85] *McCardle* may therefore not be authority for Court-stripping, which would foreclose all avenues of Supreme Court review, but may instead be authority only for the limited proposition that Congress may eliminate one avenue of appellate jurisdiction if, but only if, another avenue remains available.[86]

In any event, the problematic context of the *McCardle* decision—a situation in which the Court was under intense political pressure to avoid deciding the constitutionality of Reconstruction—should arguably limit the extent to which it serves as precedent, and, indeed, may suggest that it should be viewed as negative nonjudicial precedent. Among other things, when Congress enacted the jurisdiction-stripping measure over President Andrew Johnson's veto, it was holding impeachment hearings against him, and Chief Justice Chase had been presiding over those proceedings.[87] Even at the time, Congress thought better of following its own practice. As noted, the Court was able to exercise jurisdiction in *Yerger* mere months after *McCardle* because, as Professor Barry Friedman has observed, "the Republican Congress declined to act yet again to strip the Court of jurisdiction."[88] 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."[89]

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.[90] And in 1914, Congress authorized the Court to exercise appellate jurisdiction over state court decisions invalidating state laws on federal constitutional grounds or

83. *See Ex Parte McCardle*, 74 U.S. (7 Wall.) 506, 515 (1868) ("The act of 1868 does not except from that jurisdiction any cases but appeals from Circuit Courts under the act of 1867. It does not affect the jurisdiction which was previously exercised.").

84. 75 U.S. (8 Wall.) 85 (1868).

85. *Id.* at 106.

86. *See, e.g.*, Fallon, *supra* note 61, at 1078 ("But *McCardle* would be an easily distinguishable precedent for a Supreme Court that wanted to distinguish it.").

87. Gunther, *supra* note 17, at 904–05.

88. Friedman, *"Things Forgotten," supra* note 75, at 761.

89. *Id.*

90. BAUDE ET AL., *supra* note 32, at 403.

upholding federal laws against constitutional challenge.[91] During the era of economic substantive due process, Congress became concerned with the overprotection of federal rights and disuniformity in the interpretation of federal law.[92] In addition, "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."[93] Responding to concerns expressed by the Justices that they were overburdened with mandatory appeals, Congress acted to enable them to devote their scarce institutional resources to ensuring uniformity on important questions of federal law.[94]

In the post-*Brown* era of constitutional law, many Court-stripping measures were proposed in Congress in response to controversial Supreme Court decisions. Their subject matters included jurisdiction over the admissibility of confessions in state criminal cases, state legislative apportionments, alleged subversive activities, busing as an instrument of school desegregation, school prayer, abortion, the federal Defense of Marriage Act, and the Pledge of Allegiance.[95] But, like the doomed 1831 effort, none succeeded.

True, during the last several decades, Congress has passed 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 (and *Bivens* actions) questioning the detention of alleged terrorists in Guantanamo Bay, Cuba.[96] Most of those 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 Court's appellate review—a restriction on review of Circuit Court determinations concerning whether to allow the filing of a successive

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

92. *See* H.R. REP. NO. 63-1222, at 2 (1914) (arguing that passage of the bill eliminating "one-sided review" "would make for the uniformity of the Federal laws in their practical application to the numerous questions that would arise in the several States[,]" because "[u]nder existing laws the Federal Constitution may mean one thing in one State and the reverse in another").

93. Grove, *supra* note 62, at 1846.

94. *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."); *infra* notes 383–88 and accompanying text.

95. BAUDE ET AL., *supra* note 32, at 432.

96. *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, 1217–18 (imposing restrictions on federal court review of state habeas claims); 8 U.S.C. § 1252(g) (barring federal courts from reviewing the execution of removal orders); Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, 2636 (denying federal courts jurisdiction over habeas petitions filed by foreign citizens at Guantanamo Bay).

habeas petition—was not, unlike the restriction at issue in *McCardle*, focused on any particular Supreme Court decisions. In *Felker v. Turpin*,[97] the Court found the restriction, in a move reminiscent of *McCardle*, not to eliminate its authority to issue original writs of habeas corpus.[98] Since then, Congress has not attempted to foreclose that alternate avenue of review. Back in 1953, Professor Hart anticipated the objection that the Court has never "done or said anything to suggest that it is prepared to adopt the [essential functions thesis]"; he responded that "it has never had occasion to" because "Congress so far has never tried to destroy the Constitution."[99] The situation remains the same today.

Defenders of the essential functions thesis emphasize those structural and historical points while noting that contrary textual arguments are vulnerable. Professor Henry Monaghan, a giant in the field of federal courts who recently passed away, wrote in 2019 that "the textual argument" for plenary congressional control over the Court's appellate jurisdiction "is quite weak if one reads the clause in the context of the overall structure and relationships created by the Constitution."[100] He noted that, "[u]nlike the inferior federal courts, the Constitution itself establishes the Supreme Court, and it invests that Court with some mandatory share of 'the judicial power of the United States.'"[101] He further noted that, "in 1789, it was almost universally understood that the Court would review the validity of legislation."[102] Given those considerations (as well as Daniel Birk's historical work quoted in this Article),[103] Monaghan concluded that "the Exceptions Clause, which as a textual matter seems to connote something of relatively minor importance, is a strikingly oblique way to endow legislators with the expansive authority to eviscerate completely a central responsibility of another constitutionally ordained branch of government!"[104]

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97. 518 U.S. 651 (1996).

98. *Id*. at 660–61.

99. Hart, *supra* note 67, at 1365. Professor Ratner fleshed out that point. *See* Ratner, *supra* note 68, at 183–84 (discussing Congress's past tendency to give the Supreme Court greater discretion in exercising its essential constitutional functions).

100. Monaghan, *supra* note 71, at 17.

101. *Id.* (quoting U.S. CONST. art. III, § 1).

102. *Id.*

103. *See supra* notes 17, 45, 48 & accompanying text. For related historical work, see James E. Pfander & Daniel D. Birk, *Article III and the Scottish Judiciary*, 124 HARV. L. REV. 1613, 1615–16, 1618–19 (2011) showing that, in Scotland, a single supreme civil court exercised supremacy and maintained its power to review the decisions of inferior courts after restrictions were placed on its as-of-right appellate jurisdiction.

104. Monaghan, *supra* note 71, at 17–18. For other work that resists the traditional view on textualist grounds, see, for example, Steven G. Calabresi & Gary Lawson, *The Unitary Executive, Jurisdiction-Stripping, and the* Hamdan *Opinions: A Textualist Response to Justice Scalia*, 107 COLUM. L. REV. 1002, 1037 (2007); Laurence Claus, *The One Court That Congress Cannot Take Away: Singularity, Supremacy, and Article III*, 96 GEO. L.J. 59, 64 (2007); James E. Pfander,

3. Critiques of the Essential Functions Thesis and OLC's Position.—Not surprisingly, supporters of the traditional view have strongly criticized the essential functions thesis, mostly on formalist, textualist grounds. For example, Professor Redish complained that supporters of the thesis "have read into seemingly unambiguous constitutional language a principle that undeniably does not appear anywhere on the face of the document."[105] Professor Gunther contended that the essential functions thesis "confus[es] wisdom and constitutionality, confus[es] what Congress *ought* not to do with what it *cannot* do."[106] As noted, Professor Bator acknowledged that jurisdiction-stripping might violate the "spirit" of the Constitution, but he argued that this did not make it unconstitutional given the primacy of text over structure.[107]

The formalist and textualist orientation of critics of the essential functions thesis also appears to be reflected in the latest edition of the Hart & Wechsler federal courts casebook. Its comments and questions seem designed to lead the student reader to reject the essential functions thesis:

> How convincing is the structural argument that authority to make "exceptions" cannot swallow the rule, thereby negating the essential role of the Court?
>
> . . . .
>
> . . . With respect to maintaining the uniform application of federal law, recall the significant gaps in Supreme Court jurisdiction left by the Judiciary Act of 1789 . . . .
>
> . . . Does Hart's "essential role" thesis, as elaborated by Ratner, ask the Court to enforce a high-level constitutional purpose—uniformity and supremacy—that lacks textual or historical grounding? If understood as a judicially enforceable norm, does the "essential functions" thesis overlook the possibility that the Constitution, through Article III's Exceptions Clause, vests in Congress the authority to determine what aspects of the Court's appellate jurisdiction are essential to its constitutional role?[108]

These are good questions, but they are insufficiently balanced, especially for a textbook. Missing from the discussion is any recognition that the traditional view would vest in Congress the power to effectively eviscerate the Supreme Court—notwithstanding the constitutional requirement that the Court exist—by shrinking it to its original jurisdiction. Moreover, the reference to a lack of historical grounding omits the fact that

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Federal Supremacy, State Court Inferiority, and the Constitutionality of Jurisdiction-Stripping Legislation, 101 NW. U. L. REV. 191, 195–98 (2007); and Pfander, *supra* note 71, at 1438–41.

105. Redish, *supra* note 42, at 906.

106. Gunther, *supra* note 17, at 908.

107. Bator, *supra* note 41, at 1039.

108. BAUDE ET AL., *supra* note 32, at 423–25.

the Supreme Court has had full appellate jurisdiction over federal questions for more than a century, and that even before then it could resolve persistent conflicts in the interpretation of federal law. Most significantly, the discussion seems to view with skepticism the entire enterprise of structural reasoning—as involving the application of "a high-level constitutional purpose"—even though such reasoning has been an important part of U.S. constitutional law since the very beginning.[109]

Notwithstanding those criticisms of the essential functions thesis, the Justice Department notably endorsed it in the early 1980s, in an opinion of the Office of Legal Counsel that remains the Department's most recent statement on the matter.[110] In commenting on a bill that would strip the Supreme Court of jurisdiction over challenges to school prayer legislation, the Department reasoned that although there was "no doubt that Congress possesses some power to regulate the appellate jurisdiction of the Supreme Court," Congress could 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."[111] As for the fact that Congress did not initially give the Court appellate jurisdiction over the full range of federal law issues, the Department invoked subsequent historical practice, emphasizing that "[t]he Supreme Court now has appellate jurisdiction over all federal cases. Each of the areas of incomplete jurisdiction has long since been fulfilled."[112]

The Department reached this conclusion despite contrary arguments made by a young John Roberts, who was then working as a special assistant to the Attorney General.[113] The head of the Office of Legal Counsel, Ted Olson (who recently passed away after an illustrious legal career),[114] had distributed a lengthy memorandum arguing for the essential functions

109. The prior edition of the casebook was substantially less critical of the essential functions thesis. *See* RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 315–16 (7th ed. 2015) (presenting the essential functional role thesis as a viable competing theory rather than as lacking historical and textual grounding).

110. *See* Constitutionality of Legis. Withdrawing Sup. Ct. Jurisdiction to Consider Cases Relating to Voluntary Prayer, 6 Op. O.L.C. 13, 15 (1982) [hereinafter 1982 O.L.C. Op.] (endorsing the essential functions thesis and concluding that Congress may limit the jurisdiction of inferior federal courts); *see also* Tara Leigh Grove, *The Article II Safeguards of Federal Jurisdiction*, 112 COLUM. L. REV. 250, 268–69, 271–72, 280, 283 (2012) (documenting numerous instances of executive branch opposition to proposals to strip the federal courts of jurisdiction).

111. 1982 O.L.C. Op., *supra* note 110, at 14.

112. *Id.* at 25.

113. Bradley & Siegel, *supra* note 73, at 304, 309–11.

114. Clay Risen, *Theodore B. Olson, Conservative Lawyer Who Took Up Liberal Causes, Dies at 84*, N.Y. TIMES (Nov. 13, 2024), https://www.nytimes.com/2024/11/13/us/theodore-olson-dead.html [https://perma.cc/GLV2-VFK5].

thesis.[115] In response, Roberts circulated a memorandum arguing for the traditional view.[116] Ultimately, Attorney General William French Smith sided with Olson. Notably, Roberts was self-consciously acting in an advocacy mode when making the arguments, and, in any event, his views on that issue appear to have become more aligned with the essential functions thesis at least since he became Chief Justice.[117]

4. Contemporary Supreme Court Decisions.—Although the Court has never disavowed *McCardle*, since the late 1980s it has construed several jurisdictional restrictions narrowly in an apparent effort to avoid constitutional concerns, including (as noted above) in a case focused on the Court's appellate jurisdiction.[118] The Court's perception of constitutional concerns is in tension with the traditional view, which insists that there are no such concerns. Those decisions bolster the case for the essential functions thesis.

II. Court-Packing and the Essential Functions Thesis

The difference in methodological tenor between the constitutional debate over Court-packing and the debate over Court-stripping would make sense if there were not plausible structural and practice-based arguments that could be made against the constitutionality of Court-packing. This Part shows, however, that this is not the case. The distinction between the constitutionality of Court-stripping and the constitutionality of Court-packing is less clear than is suggested by the conventional wisdom among constitutional law and federal courts scholars as well as contemporary liberal activists. Even as the essential functions thesis has been articulated in the

115. Bradley & Siegel, *supra* note 73, at 302, 304.

116. *See id.* at 304–05 (explaining that Roberts's memorandum set forth "constitutional arguments in favor of Congress's power to control the appellate jurisdiction of the Supreme Court"). Among other things, Roberts described *McCardle* as "simply the most prominent in a long and consistent line of judicial opinions reading the exceptions clause as meaning exactly what it says." *Id*. at 305 (quoting Memorandum from John Roberts, Special Assistant to the Att'y Gen., to the Att'y Gen. (no date), https://www.archives.gov/files/news/john-roberts/accession-60-89-0172/006-Box5-Folder1522.pdf [https://perma.cc/P2C5-C7NM]).

117. *See* Monaghan, *supra* note 71, at 26 n.114 ("[N]o member of the Court since Hughes [is] more committed to protecting the institutional independence of the Court against congressional interference than Chief Justice Roberts.").

118. *See, e.g.*, Felker v. Turpin, 518 U.S. 651, 654, 660 (1996) (holding that the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996 did not affect the Court's authority over original habeas petitions); INS v. St. Cyr, 533 U.S. 289, 292, 299 (2001) (holding that AEDPA and the Illegal Immigration Reform and Immigrant Responsibility Act did not strip the courts of habeas jurisdiction because "Congress must articulate specific and unambiguous statutory directives to effect a repeal"); Webster v. Doe, 486 U.S. 592, 603–04 (1988) ("Subsections (a)(1) and (a)(2) of § 701, however, remove from judicial review only those determinations specifically identified by Congress or 'committed to agency discretion by law.'"). *But cf.* Patchak v. Zinke, 138 S. Ct. 897, 906 (2018) (plurality opinion) (citing *McCardle* for the proposition that "this Court has held that Congress generally does not violate Article III when it strips federal jurisdiction over a class of cases").

literature (that is, without the additions to it that we suggest in Part IV), it has more bite with respect to Court-packing than is commonly assumed given the potential for packing to delegitimate the Court and thereby provoke nonenforcement of, or noncompliance with, its decisions—problems that would likely grow worse after subsequent rounds of packing or unpacking.

This Part begins by canvassing arguments in favor of the constitutionality of Court-packing. It then imagines what a plausible essential functions argument against Court-packing might look like.

A. Constitutional Arguments in Favor of Court-Packing

As noted in the Introduction and the opening section of Part I, the dominant view among constitutional law and federal courts scholars is that a federal statute adding seats to the Court would be clearly constitutional, even if Congress's purpose in enacting the statute was to change the ideological orientation of the Court or (relatedly) to overturn its precedents.[119] The argument is primarily textual. Article III compels the creation and preservation of "one supreme Court" and gives it "[t]he judicial Power of the United States,"[120] but the Article does not specify the number of Justices. The Necessary and Proper Clause authorizes Congress, among other things, "[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 or in any Department or Officer thereof."[121] On a straightforward understanding of that clause as the Court has construed it since *McCulloch v. Maryland*, it would seem to give Congress authority to regulate the Court's size as a necessary (that is, reasonable) means of carrying the Court's power into execution.[122] The Court cannot function without having a certain number of members at a given time. Moreover, Congress's purpose has not been thought to matter in determining the constitutionality of legislation enacted under the Necessary and Proper Clause,[123] just as

119. *See supra* text accompanying notes 29–34.

120. U.S. CONST. art. III, § 1.

121. U.S. CONST. art. I, § 8, cl. 18.

122. *See, e.g.*, United States v. Comstock, 560 U.S. 126, 133–34 (2010) ("[T]he Necessary and Proper Clause makes clear that the Constitution's grants of specific federal legislative authority are accompanied by broad power to enact laws that are 'convenient, or useful' or 'conducive' to the authority's 'beneficial exercise.'" (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 413, 418 (1819))).

123. *See, e.g.*, *id.* at 134–35 ("[I]n determining whether the Necessary and Proper Clause grants Congress the legislative authority to enact a particular federal statute, we look to see whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power.").

Congress's purpose has not been thought to matter when it relies upon its other powers enumerated in Article I, Section 8.[124]

Supporters of that view also invoke aspects of the historical practice. Congress regulated the size of the Court from the very beginning, first setting the number at six Justices.[125] And Congress changed the Court's size seven times up through 1869.[126] Those changes, moreover, were sometimes made at least in part for partisan reasons.

More specifically, at least some of the early historical practice likely involved instances of what could reasonably be considered either Court-packing or Court-unpacking.[127] In 1801, the lame-duck Federalist Congress provided in a statute that the Court's membership would be reduced from six to five Justices upon the next vacancy, apparently to deny incoming Democratic-Republican President Thomas Jefferson an appointment.[128] The next year, before any vacancy arose, the Democratic-Republican Congress restored the Court's size to six Justices.[129] The Federalists' act of Court-unpacking was rapidly undone by the Democratic-Republicans, but that does not mean, as one scholar has argued,[130] that the episode does not count as an instance of Court-packing in an assessment of the historical practice.

To be sure, a number of the other changes to the Court's size were tied to expansions in the number of federal circuits and may not be clear instances of Court-packing or Court-unpacking. But two changes in the 1860s can plausibly be described in those terms. When Republican President Abraham Lincoln was assassinated and Vice President Andrew Johnson (a white supremacist Democrat who sympathized with the South) became president, the Republicans reduced the Court's size from ten to seven, potentially to

124. *See, e.g.*, United States v. Darby, 312 U.S. 100, 115 (1941) ("The motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control.").

125. *See* Judiciary Act of 1789, ch. 20, § 1, 1 Stat. 73, 73 ("[T]he supreme court of the United States shall consist of a chief justice and five associate justices . . . .").

126. BIDEN COMM'N REP., *supra* note 19, at 67–69.

127. "Court-unpacking" involves a reduction of the Court's size to deprive the opposing political party of appointments.

128. *See* Act of Feb. 13, 1801, ch. 4, § 3, 2 Stat. 89, 89 ("[A]fter the next vacancy that shall happen in the said court, it shall consist of five justices only . . . ."); BIDEN COMM'N REP., *supra* note 19, at 68 (speculating that the reforms of the Supreme Court in 1801 and 1802 may have coincided with the desire to control who gets to appoint Justices to the Court).

129. *See* Act of Mar. 8, 1802, ch. 8, § 1, § 3, 1 Stat. 132, 132 (repealing the Act of Feb. 13, 1801, and reinstating the pre-Act model of Court structure).

130. *See* Joshua Braver, *Court-Packing: An American Tradition?*, 61 B.C. L. Rev. 2747, 2751, 2807 (2020) ("President John Adams and the Federalists' 1801 efforts to block President-elect Thomas Jefferson's future Supreme Court appointment ultimately failed and serves as no type of precedent."). Professor Braver seems right, however, that Court-packing occurred less frequently in early U.S. history than the orthodox position claims. *Cf. id.* at 2807 ("The past is richer and more complicated than this debate suggests.").

deny Johnson appointments, although scholars have disputed the motive.[131] And then in 1869, after Republican Ulysses S. Grant was elected president, the Republican Congress again secured partisan advantage by increasing the Court's size to nine—where it has remained for the past 157 years.[132]

Some of the modern practice may also support the constitutionality of Court-packing. Recall that FDR's Justice Department concluded that Court-packing was clearly constitutional.[133] In addition, FDR's plan was defeated partly for political reasons, not only due to claims that Court-packing would be unconstitutional or anti-constitutional—that is, violative of a constitutional norm or convention.[134] Accordingly, the failure of FDR's plan does not necessarily reflect a consensus view at the time that packing the Court would be legally or normatively problematic. The failure of a subsequent effort in the 1940s and 1950s to amend the Constitution to set the Court's size at nine Justices could be seen as providing additional historical support for Court-packing.[135]

B. An Essential Functions Argument Against Court-Packing

Despite the arguments in favor of the constitutionality of Court-stripping that were canvassed in Part I, recall that influential scholars and the Justice Department have been persuaded that there is a structural limitation on the text—namely, that Congress cannot use its authority over jurisdiction to undermine the Court's essential functions in the U.S. constitutional system. A similar structural argument can be made against Court-packing.

Court-packing is not generally thought to implicate the essential functions thesis because it merely adds seats on the Court; unlike Court-stripping, packing does not prevent the Court from addressing any questions of federal law, and so (the thinking goes), it poses no threat to the uniformity and supremacy of federal law—the twin concerns of the traditional essential functions thesis. Professor Ratner, the original elaborator of the thesis,

131. *Compare* John V. Orth, *How Many Judges Does It Take to Make a Supreme Court?*, *in* HOW MANY JUDGES DOES IT TAKE TO MAKE A SUPREME COURT? AND OTHER ESSAYS ON LAW AND THE CONSTITUON 1, 6 (2006) (contending that the motive for the reduction was to deny Johnson appointments), *with* Charles Fairman, *Reconstruction and Reunion, 1864–88: Part One*, *in* 6 THE OLIVER WENDELL HOLMES DEVISE: HISTORY OF THE SUPREME COURT OF THE UNITED STATES 166–69 (Paul A. Freund ed., 1971) (documenting Chief Justice Salmon P. Chase's recommendation of the reduction to convince Congress to raise the Justices' salaries).

132. *See* Act of Apr. 10, 1869, ch. 22, 16 Stat. 44 (codified at 28 U.S.C. § 1) (establishing that the Supreme Court will consist of one Chief Justice and eight associate Justices).

133. *See supra* note 30 and accompanying text.

134. *See* Bradley & Siegel, *supra* note 73, at 283 (documenting the political explanations for the defeat of FDR's Court-packing plan).

135. For discussion of why it is difficult to read much into those events, see *id.* at 284–87. The proposed amendment also would have disallowed stripping the Supreme Court of appellate jurisdiction over constitutional questions.

invoked that distinction.[136] Describing the effects of Court-packing that way, however, assumes that a political party can capture the Court's composition by adding or subtracting Justices without affecting the Court's capabilities. That is the critical assumption underlying most advocacy of Court-packing in recent years. The risk ignored by that assumption—at least in our day, if not in Professor Ratner's—furnishes the foundation for an essential functions argument against Court-packing, which we now consider.

1. Judicial Legitimacy and the Court's Execution of Its Functions.—An essential functions argument against Court-packing would begin by noting that packing the Court—adding, say, four or six Justices at once to secure decisions that are ideologically more congenial to the party responsible for the packing—would be likely to undermine the perception and reality of the Court's partial independence from partisan politics, thereby risking its legal and public legitimacy. Undermining the Court's legitimacy would in turn impair its ability to perform critical functions—including maintaining the uniformity and supremacy of federal law.[137] That impairment might be far greater than, say, stripping the Court of authority to resolve one issue. In an ideologically polarized era with razor's-edge elections and an executive branch that is increasingly resistant to judicial orders,[138] that impairment could take the form of defiance of Court decisions or refusals by the executive branch to enforce them, as well as a spiral of tit-for-tat packing by the political parties when they control the political branches.[139]

For example, during his second term of office, President Trump is probably less likely to defy, or refuse to enforce, an adverse decision of the current 6–3 conservative Court than he would have been to reject an unfavorable decision of a Court that had been packed with four Democratic appointees to form a 7–6 liberal majority. In addition, if the Democrats had packed the Court when they controlled the political branches from 2020 to 2022, the Republicans would very likely have counterpacked during the current period of unified Republican government. The result could be a Supreme Court with at least seventeen Justices that would remain firmly in Republican control, with future rounds of packing to come. Prudentially, it is difficult to see how the Court or the country would be better off in such a scenario—unless one's objective was to undermine the institution of judicial

136. *See* Ratner, *supra* note 70, at 932–36, 939 (arguing that Court-stripping legislation would "distort the nature of the federal union" while increasing the number of Justices would not distort the Court's "ability to maintain the supremacy and uniformity of the Constitution").

137. *See* Neil S. Siegel, *The Trouble with Court-Packing*, 72 DUKE L.J. 71, 80–92, 116–17 (2022) (tying the Court's functioning to its legitimacy, and its legitimacy to its insulation from being packed).

138. *See supra* text accompanying note 14.

139. Siegel, *supra* note 137, at 91–92, 140.

review.[140] Constitutionally, the concern is not that a Court with eight more Justices would not be able to function, although at some point that could become an issue.[141] The concern, rather, is that repeated, extreme politicization of the Court would enable successful defiance of its decisions.[142]

To be sure, heavy-handed use of the appointments process to achieve ideological objectives in recent decades has not delegitimated the Court to the point of successful defiance, at least so far. But increasing politicization of the process has likely damaged the Court's reputation, especially in the eyes of liberals and moderates.[143] More importantly, public perceptions of the Court are likely to be less negatively affected by partisan fights over existing vacancies than by partisan creation of any number of new vacancies all at once. The first happens with some regularity. The second has not happened since the aftermath of the Civil War. The first is likely to be viewed as normal; the second is likely to be viewed as abnormal. Such perceptions may be informed not only by what is familiar or unfamiliar, but also by actual differences in the nature and degree of political influence over the Court between "Court-appointing" and Court-packing. Partisans in the political branches do not control when a vacancy occurs on the nine-Justice Court. If they possess sufficient political power, partisans do control when vacancies occur on a packed Court. Moreover, changes to the nine-Justice Court are likely to be more incremental—and, therefore, democratically more legitimate—than changes wrought by Court-packing. President Trump's three appointments in four years during his first term were historically

140. Some, although by no means all, advocates of Court-packing are hostile to the institution of judicial review and so are unconcerned that packing it could threaten the Court's legitimacy. *See, e.g.*, Siegel, *supra* note 137, at 96–97 (discussing the views of Professors Michael Klarman and Mark Tushnet).

141. *See* Adam Chilton, Daniel Epps, Kyle Rozema & Maya Sen, *The Endgame of Court-Packing*, AM. L. & ECON. REV. (forthcoming 2026) (manuscript at 2) (on file with *Texas Law Review*) (running simulations and finding that with repeated partisan Court-packing, the Court's composition would likely quadruple within one hundred years).

142. Potential defiance is not a new phenomenon. For examination of the "tools of judicial self-protection" that Supreme Court Justices have historically developed in response to political threats in order to preserve the Court's institutional authority while protecting the Constitution and the rule of law, see Curtis A. Bradley & Neil S. Siegel, *The Supreme Court Under Threat: Early Lessons in Judicial Self-Protection*, 139 HARV. L. REV. (forthcoming 2026) (manuscript at 2, 4–5) (on file with *Texas Law Review*).

143. In August 2000, only 29% of respondents "disapprove[d] of the way the Supreme Court is handling its job." *Supreme Court*, GALLUP, https://news.gallup.com/poll/4732/supreme-court.aspx [https://perma.cc/GTU3-ESJR]. The percentage disapproving was 58% in September 2022 and September 2023. *Id.* It was 51% in September 2024. *Id.*; *see also* Joseph Copeland, *Favorable Views of Supreme Court Remain Near Historic Low*, PEW RSCH. CTR. (Sep. 3, 2025), https://www.pewresearch.org/short-reads/2025/09/03/favorable-views-of-supreme-court-remain-near-historic-low/ [https://perma.cc/B3MC-RSK5] ("Half of Americans currently hold an unfavorable opinion of the Supreme Court, while roughly as many view the court favorably.").

exceptional.[144] FDR proposed to add six Justices overnight; that sort of immediate large increase is typical of Court-packing plans.[145] He was ultimately able to appoint more than that number because the Democratic Party kept winning elections, thereby earning the democratic warrant to keep affecting the Court's ideological composition.[146]

Those are, to be sure, uncertain predictive judgments. One difference between Court-packing and Court-stripping is that Court-stripping reduces the Court's power directly by withdrawing its jurisdiction, whereas Court-packing reduces the Court's authority indirectly by likely undermining its legitimacy. Relatedly, the probable effects of Court-stripping are less speculative than the likely effects of Court-packing. Court-stripping withdraws authority from the Court to decide specific issues with certainty and very likely will result in lower-court decisions that either unpersuasively distinguish Supreme Court precedent or outright disregard it. By contrast, the anticipated effects of Court-packing turn on predictions about how something that has not happened in more than 157 years will be perceived by politicians and the public during a hyperpolarized era. Certain other structural principles, however, also rest in part on uncertain chains of causation.[147]

In the face of empirical uncertainty, a Burkean precautionary principle may be warranted.[148] Such a principle would favor the status quo by placing the burden of uncertainty on those who would risk the legitimacy and effective functioning of the apex court in the United States by changing its size to seize ideological control of it. Comparative experience with the packing of constitutional courts in other countries, such as in Latin America

144. *See* John Gramlich, *How Trump Compares with Other Recent Presidents in Appointing Federal Judges*, PEW RSCH. CTR. (Jan. 13, 2021), https://www.pewresearch.org/short-reads/2021/01/13/how-trump-compares-with-other-recent-presidents-in-appointing-federal-judges/ [https://perma.cc/PZJ5-NNCG] (noting that Trump in his first term had the most appointments to the Supreme Court in a single term since Herbert Hoover).

145. *FDR & The Court Packing Controversy: Full Script*, SUP. CT. HIST. SOC'Y, https://supremecourthistory.org/films/fdr-courtpacking-controversy-full-script/ [https://perma.cc/YW6N-77DH] [hereinafter *FDR Court Packing Controversy*].

146. *Id.*; for discussion of differences between Court-appointing and Court-packing, see Siegel, *supra* note 137, at 104–05.

147. For example, whether the anti-commandeering doctrine preserves state regulatory autonomy depends on how Congress responds when it cannot commandeer. *See* Neil S. Siegel, *Commandeering and Its Alternatives: A Federalism Perspective*, 59 VAND. L. REV. 1629, 1646 (2006) (arguing that the anti-commandeering doctrine can compromise state regulatory autonomy by increasing federal preemption).

148. For discussions of Burkean approaches to constitutional interpretation, which emphasize longstanding traditions and understandings, see, for example, Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353, 362, 364, 368 (2006); and Thomas W. Merrill, *Bork v. Burke*, 19 HARV. J.L. & PUB. POL'Y 509, 509–11 (1996).

and in Poland, strengthens the case for such caution.[149] A major feature of recent experiences with democratic backsliding around the globe is that the political party in power gains control of the judiciary, which is much easier to accomplish in systems in which bare electoral majorities can change the composition of the courts.[150]

2. The Relevance of Congressional Purpose.—Note that, under the above structural analysis, the constitutionality of changes to the Court's size would not turn on an assessment of Congress's purpose in making the change. To be clear, there is nothing inherently wrong with considering congressional purpose. Despite what the Court said about not considering motive in *McCardle*, judicial practice has changed over the past 157 years: the modern Court often considers motive or purpose in evaluating the constitutionality of legislation. As pointed out by Professor Fallon, another giant in the fields of constitutional law and federal courts who recently passed away, "it is certainly not categorically true today that the validity of legislation cannot depend on the motivations of the legislature."[151] And if it is appropriate to read *McCardle* narrowly in connection with Court-stripping, the same should be true with respect to Court-packing.

The problems with considering congressional purpose are, rather, practical and theoretical—as revealed first by an examination of Court-stripping and then by an examination of Court-packing. Professor Fallon argued that Court-stripping is unconstitutional if it has the "constitutionally forbidden purpose of encouraging defiance of applicable Supreme Court precedent."[152] He reasoned that "it is almost always reprehensible for government officials—including judges—to engage in lawbreaking," so "Congress's power over jurisdiction should not be interpreted as a license to encourage lawbreaking by either state or federal officials or by state court judges."[153] Purpose inquiries can be challenging to conduct, however, because a legislature like Congress is a large "they," not an "it," and expressed congressional purpose may at times be different from real

149. *See, e.g.*, Mac Margolis, *Opinion: Want to Reform the Supreme Court? These Strongmen Can Show a Thing or Two*, NPR (Aug. 13, 2024), https://www.npr.org/2024/08/12/nx-s1-5069716/opinion-supreme-court-packing-latin-america [https://perma.cc/6NQA-7LFE] (discussing the negative effects of court reform on liberalism in Latin America); Allyson Duncan & John Macy, *The Collapse of Judicial Independence in Poland: A Cautionary Tale*, 104 JUDICATURE, 2020–21, at 41, 41–42 (discussing court-packing in Poland); *see also* Rosalind Dixon, *Court-Packing in Comparative Perspective*, IACL-AIDC BLOG (Mar. 22, 2022), https://blog-iacl-aidc.org/can-good-courtpacking-repair-democracy/2022/3/22/court-packing-in-comparative-perspective [https://perma.cc/TF34-55JQ] (noting that court-packing "is a tool inherently susceptible to abuse").

150. *See, e.g.*, Margolis, *supra* note 149 (discussing court-packing by legislative majorities in Venezuela).

151. Fallon, *supra* note 61, at 1080.

152. *Id.* at 1083.

153. *Id.*

congressional purpose. Theoretically, moreover, what appears most troubling about Court-stripping is less the purpose and more the probable effect. Court-stripping that had the purpose of encouraging defiance of Supreme Court precedent by government officials and judges might be more likely to produce that effect than a strip with a different congressional purpose. But in the end, it is the likely effect, not the purpose, that renders Court-stripping constitutionally dubious. Both for ease of administration and to better identify the core constitutional concern, one could reformulate Professor Fallon's argument as follows: Court-stripping is unconstitutional if it is objectively likely to produce the constitutionally forbidden *effect* of defiance of applicable Supreme Court precedent by government officials or judges.

Similarly, what makes Court-packing potentially problematic constitutionally is the likely delegitimating effect of Congress's actions, not Congress's purpose independent of that effect. True, Court-packing is distinguished from good-government reasons for adding or subtracting seats on the Court by Congress's purpose for the legislative change, and concerns about legitimacy and compliance follow from a public perception that the Court has been populated via a partisan congressional purpose to seize control of the institution.[154] In that sense, effect is differently tied to purpose with Court-packing than with Court-stripping. But Court-packing can be seen as constitutionally questionable because of its likely effect on the Court's public legitimacy and therefore its ability to execute its responsibilities in the constitutional scheme, not because Congress passed packing legislation with the purpose of seizing ideological control of the Court. Such a purpose is not unconstitutional by itself, and it is not even reprehensible. Presidents often nominate individuals to the Court with such a purpose, and Senators often decide whether to confirm such individuals with the same purpose in mind.[155] Congress also had that purpose in the 1930s when it enacted legislation guaranteeing the Justices full pay during retirement: the point was to encourage certain Justices to retire and to replace them with committed New Dealers so that the Court's ideological orientation would change decisively.[156]

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154. *See* Tara Leigh Grove, *The Supreme Court's Legitimacy Dilemma*, 132 HARV. L. REV. 2240, 2274–75 (2019) (reviewing RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT (2018)) (noting that Court-packing would likely result in "attacks on the Supreme Court . . . and perhaps even additional 'packing'").

155. *See, e.g.*, Frederick A. O. Schwarz, Jr., *Saving the Supreme Court*, BRENNAN CTR. FOR JUST. (Sep. 13, 2019), https://www.brennancenter.org/our-work/analysis-opinion/saving-supreme-court [https://perma.cc/NH28-DTYX] ("Today, however, presidents run promising to nominate justices who will hew to a rigid ideological, partisan view.").

156. *See* BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 224 (2009) ("Seeking to forestall trouble, Representative Hatton Sumners saw to it that the House quickly passed and Roosevelt signed a measure ensuring that Supreme Court justices could retire at full

3. Historical Practice.—As will be explained in Part III(C), structural reasoning is often associated with, and disciplined by, post-Founding historical practice. In the nation's early history, there were (as discussed above) at most a few instances of Court-packing or unpacking—that is, alterations to the Court's size to seize ideological control of it.[157] Moreover, some of those instances might best be understood as negative precedents. For example, in its report opposing FDR's Court-packing plan, the Senate Judiciary Committee derisively dismissed the precedential value of an 1866 reduction in the Court's size: "[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."[158] In addition, a full assessment of the historical practice would need to include the rejection of FDR's plan, an action that the Senate Judiciary Committee thought would "set a salutary precedent that will never be violated."[159]

Supreme Court decisions and our prior scholarship suggest that, for historical practice to be credited in constitutional interpretation, three requirements must be met: (1) governmental practice; (2) longstanding duration; and (3) acquiescence, which requires at least reasonable stability in the practice.[160] The last requirement demands that the practice have existed for a significant number of years without producing continued interbranch contestation, but it does not necessarily demand interbranch agreement about the meaning of the Constitution.[161] Even on that relatively broad understanding of qualifying practice, it is difficult to see how Court-packing, which has not happened since at least 1869 and was deeply contested by enough members of Congress in 1937 to defeat the passage of legislation, deserves to be credited.

By contrast, Congress has on many occasions sought to strip federal court jurisdiction. Indeed, the reason there are modern decisions applying a clear statement requirement when construing jurisdictional limitations is that

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pay; the sense was that some [J]ustices had delayed retirement because they were concerned about what it would mean financially.").

157. *See* Siegel, *supra* note 137, at 110–12 (discussing the early historical practice). The number of historical instances of Court-packing, or Court-unpacking, depends on how one defines the term. For an argument that only the changes in the 1860s count as successful packing or unpacking of the Court, defined as "manipulation of the Supreme Court's size primarily in order to change the ideological composition of the Court," see Braver, *supra* note 130, at 2749.

158. S. COMM. ON THE JUDICIARY, REORGANIZATION OF THE FEDERAL JUDICIARY, S. REP. NO. 75-711, at 13 (1937) [hereinafter SENATE REPORT].

159. *Id.* at 14.

160. Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Madisonian Liquidation, and the Originalism Debate*, 106 VA. L. REV. 1, 18–21, 23–28 (2020); *see also, e.g.*, NLRB v. Noel Canning, 573 U.S. 513, 524 (2014) ("'[L]ong settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions' regulating the relationship between Congress and the President." (quoting The Pocket Veto Case, 279 U.S. 655, 689 (1929))).

161. Bradley & Siegel, *supra* note 160, at 19–20.

Congress continues to enact them.[162] No doubt, many of the most problematic Court-stripping proposals have not been enacted. This might suggest that there is at least a norm against such measures. But the same can be said about Court-packing proposals. Indeed, until the last decade, there were no serious calls for Court-packing since the 1937 proposal, whereas calls for jurisdiction stripping have been fairly common since the New Deal.[163] Indeed, one likely reason why scholars have given much less structural attention to Court-packing than to Court-stripping is that they have perceived that packing is much less likely to occur.

4. The Likelihood of a Crisis and the Implications of the Argument.—An additional consideration is prudential and concerns the likelihood that judicial review of congressional legislation would create a constitutional crisis. Although invalidating congressional Reconstruction might have set off such a crisis in *McCardle*, today it seems unlikely that the Court's invalidation of a stripping measure would be politically momentous—although it would presumably depend upon what sort of stripping measure Congress had enacted.[164] With respect to Court-packing, if someone with standing were to request a writ of prohibition to stop new Supreme Court appointees from taking their seats, it seems to us that a full-blown constitutional crisis between the Court and the political branches would result if a majority of the existing nine Justices were to invalidate the packing legislation. Avoiding such a crisis is a prudential consideration of the highest order, and it supplements the structural and practice-based arguments against Court-packing.

Accepting an essential functions argument against Court-packing would not mean that the Constitution would categorically forbid any changes to the Court's size, just as the essential functions thesis does not insist that the Constitution categorically forbids alterations to the Court's appellate jurisdiction. But it might mean that, at least absent extraordinary

162. *See, e.g.*, INS v. St. Cyr, 533 U.S. 289, 299 (2001) (reasoning that a clear statement from Congress is required before the Court will interpret a federal statute as stripping federal court jurisdiction).

163. For a recent example, describing a proposal to strip the Supreme Court of jurisdiction over issues of presidential immunity, see Jason Willick, *Chuck Schumer's Plan to Create a Constitutional Crisis*, WASH. POST (Aug. 8, 2024), https://www.washingtonpost.com/opinions/2024/08/08/chuck-schumer-supreme-court-constitutional-crisis/ [https://perma.cc/4P7Z-948X].

164. For example, very few Americans presumably have heard of *Felker v. Turpin*, 518 U.S. 651 (1996), which is discussed in *supra* note 98 and its accompanying text. Even if the Court had invalidated the measure instead of practicing constitutional avoidance, a crisis would not have ensued. By contrast, the Court's invalidation of a restriction on jurisdiction that barred it from hearing any challenge to an action of the second Trump Administration, or that barred it from deciding any claim of discrimination, might well set off a crisis. Passage of such legislation might also set off a crisis.

circumstances,[165] there are structural constitutional limits on Court-packing, particularly after more than 157 years of stability in the historical practice. Although often forgotten today, that structural claim was made in 1937 by the Democratic-controlled Senate Judiciary Committee in explaining why it opposed FDR's Court-packing plan.[166] In doing so, the Committee made a more direct constitutional challenge to Court-packing than had been made against Court-stripping in the famous 1831 debate discussed above.[167]

5. The Constitutional Text.—The text of Article III could be invoked to support the foregoing constitutional arguments against Court-packing, but resort to the text is not especially persuasive here one way or the other. Article III's guarantees of life tenure and salary protection have the aim of enabling the Justices to stand apart from partisan politics—and to be perceived as standing apart—so that they can perform functions that partisan institutions are unlikely to perform as well.[168] One could infer from those provisions that the political branches may not permissibly act against the Court in ways that significantly undermine the point of giving the Justices such insulation.[169] The difficulty with that argument, however, is that one might also infer from those provisions that the Constitution protects the perception and reality of judicial independence only so far and no farther.[170] In any event, what appears to be doing the work in those arguments is not the original or contemporary meaning of the operative constitutional text in isolation, but structural inferences from it.

One could also argue that the Necessary and Proper Clause is not airtight authority for packing. On that view, the Clause supports changing the Court's size to facilitate the Court's functioning—for example, to allow it to handle more appeals. That was one of the main arguments for Court expansions in the nineteenth century, as the country and the number of cases (and judicial

165. For an exploration of which circumstances might qualify as extraordinary, see Siegel, *supra* note 137, at 123–26.

166. *See* SENATE REPORT, *supra* note 158, at 8–9, 11–12, 23 (explaining the structural implications that such an unprecedented proposal would have); *see also* Bradley & Siegel, *supra* note 73, at 274–75 (discussing the Senate report). Professor Dorf asserts that, during the debate over FDR's Court-packing plan, no one argued that the plan was unconstitutional. Dorf, *supra* note 34. In fact, the Senate report stated that the plan "seeks to do that which is unconstitutional" and is "in violation of the organic law." SENATE REPORT, *supra* note 158, at 9, 23.

167. *See supra* notes 78–79 & accompanying text.

168. *See* U.S. CONST. art. III, § 1 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.").

169. *See* Siegel, *supra* note 137, at 113 (making that point).

170. *See id.* at 110 ("[W]hen the Constitution does protect judicial legitimacy and independence, it arguably says so. Specifically, the tenure and salary protections of Article III are designed to insulate the Justices from partisan politics. These textual protections may suggest some caution in reading other unspecified protections of the Court into the Constitution.").

circuits) were growing.[171] But changing the Court's size to alter its decisionmaking is less obviously a way of carrying the Court's powers into execution. Tellingly, FDR initially invoked a workload justification in trying to sell his Court-packing plan, not the need to alter its decisionmaking.[172] And when he eventually came clean and gave a more candid explanation of what he was attempting to accomplish, he was condemned by members of his own Democratic Party for attacking judicial independence, undermining the separation of powers, and threatening individual rights.[173]

Again, however, that argument against use of the Necessary and Proper Clause to justify Court-packing appears more structural than strictly textual. What is doing the work in the argument is a concern with facilitating the functioning of an institution whose existence the Constitution requires. What is not doing much, if any, work is the original or contemporary meaning of the phrases "necessary and proper" or "carrying into Execution."[174] For example, Congress has long used the Necessary and Proper Clause not only to facilitate the functioning of executive branch institutions, but also to alter their functioning, including by reducing or eliminating their functioning, in accordance with Congress's current preferences. All the ways in which Congress, over the centuries, has reimagined executive branch institutions—which, unlike the Supreme Court, are not required by the Constitution to exist—have never been thought to be beyond the scope of the Necessary and Proper Clause.[175]

C. Conclusion

The conventional wisdom that Court-packing is obviously constitutional rests primarily upon a formalist, textualist orientation, a sprinkling of early historical practice that is often overstated, and an inability to perceive the strong structural- and practice-based arguments against the constitutionality of Court-packing—arguments that are given significant weight in longstanding debates over the constitutionality of Court-stripping. Such limited attention to structural reasoning is part of a broader problem, and it may have impaired the development of the essential functions thesis itself. The Supreme Court serves vital functions in addition to ensuring the

171. *See, e.g.*, Bradley & Siegel, *supra* note 73, at 271–72 (discussing the historical practice regarding changes to the Court's size up until 1869).

172. *FDR Court Packing Controversy*, *supra* note 145; *see, e.g.*, Bradley & Siegel, *supra* note 73, at 281–82 (discussing FDR's initial reluctance to candidly advocate for the need to change the Court's decisionmaking).

173. *See* Bradley & Siegel, *supra* note 73, at 281–82 ("[T]hose explanations—which everyone had already perceived anyway—generated expressions of intense concern about judicial independence.").

174. U.S. CONST. art. I, § 8, cl. 18.

175. *See, e.g.*, BALKIN, *supra* note 49, at 178 ("The power to create new cabinet departments and organize or reorganize existing ones . . . comes from [the Necessary and Proper Clause].").

supremacy and uniformity of federal law, yet a discrepancy endures between what is true in practice and what is emphasized in the federal courts literature. That broader understanding of the Court's essential functions makes it even easier to see why Court-packing may be inconsistent with the constitutional structure. Before developing the case for such an understanding, we first reflect on the nature of structural constitutional reasoning, which has played a central role in claims about the Supreme Court's essential functions.

III. Structural Constitutional Reasoning

The essential functions thesis is based on inferences from the constitutional structure. To assess what that thesis can reasonably be thought to support, it is necessary first to consider the nature of structural constitutional reasoning.

A. Prior Descriptions of Structural Reasoning

In his famous 1969 book about structural constitutional reasoning, Professor Charles Black complained that such reasoning seemed to be disfavored in our modern legal culture.[176] He gave various examples in which the Supreme Court had attempted to ground its decisions in specific constitutional text even when, in his view, structural arguments would have been more persuasive and might have been driving the result reached by the Court.[177] He also highlighted earlier decisions (such as *McCulloch*) in which the Court was more unabashed about relying on structural inferences.[178]

At least today, we do not think it is correct to describe structural reasoning as disfavored, although it does seem underexplored and underdeveloped. The Supreme Court often says that it considers both "text and structure" in constitutional interpretation.[179] Moreover, some of the Court's most significant constitutional decisions have relied directly on structural reasoning. Those decisions range from *Marbury v. Madison* in

176. *See* CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 7–8 (1969) (discussing American legal culture's preference for relying on constitutional text as opposed to inferences drawn from constitutional structure).

177. *See id.* at 8–11, 19–22 (giving various examples).

178. *See id.* at 13–15 (discussing Chief Justice Marshall's structural reasoning).

179. *See, e.g.*, Franchise Tax Bd. v. Hyatt, 139 S. Ct. 1485, 1499 (2019) ("Like [various other] doctrines, the States' sovereign immunity is a historically rooted principle embedded in the text and structure of the Constitution."); Zivotofsky v. Kerry, 576 U.S. 1, 10 (2015) ("To determine whether the President possesses the exclusive power of recognition [of foreign governments] the Court examines the Constitution's text and structure, as well as precedent and history bearing on the question."); Printz v. United States, 521 U.S. 898, 905 (1997) ("Because there is no constitutional text speaking to this precise question [of federal commandeering of state executive officials], 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.").

1803 to the presidential immunity decision in 2024, *Trump v. United States*.[180]

Even the most committed textualists and originalists on the Supreme Court accept that structural reasoning is an important part of constitutional interpretation. For example, in his 2019 opinion for the Court in *Franchise Tax Board of California v. Hyatt*,[181] Justice Thomas insisted that the doctrine of state sovereign immunity was "integral to the structure of the Constitution."[182] In response to the argument that the doctrine did not derive from a literal interpretation of the constitutional text, Thomas noted that the same is true of numerous other doctrines, including judicial review, intergovernmental tax immunity, executive privilege, executive immunity, and the President's removal power.[183] One could add to that list other forms of intergovernmental immunity, the dormant commerce doctrine, the anticommandeering doctrine, and the doctrine of equal state sovereignty, among others.[184] But neither *Franchise Tax Board* nor any of the other decisions explains how to do structural constitutional analysis properly and how that analysis relates to other interpretive materials, such as the constitutional text and various types of history.

Unsurprisingly, scholarly commentators have said more about that issue, but much of what they have said is vague and confusing. Professor Black described it as "the method of inference from the structures and relationships created by the constitution in all its parts or in some principal part."[185] That formulation is elegant and suggestive but also elliptical, as is Professor Black's apparent uncertainty regarding whether the difference between structural and textual argument is merely "stylistic" or is instead "methodological."[186] Professor Philip Bobbitt, who famously identified various "modalities" of constitutional argument, has written that "[s]tructural

180. 144 S. Ct. 2312 (2024).

181. 139 S. Ct. 1485 (2019).

182. *Id.* at 1498 (2019).

183. *Id.* at 1498–99.

184. *See, e.g.*, Tarble's Case, 80 U.S. (13 Wall.) 397, 411–12 (1871) (disallowing state court habeas review of federal detentions); McClung v. Silliman, 19 U.S. (6 Wheat.) 598, 604–05 (1821) (disallowing state court mandamus actions against federal officers); Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1159 (2023) (discussing the dormant commerce doctrine); Murphy v. NCAA, 584 U.S. 453, 479–80 (2018) (discussing the anticommandeering doctrine); Shelby Cnty. v. Holder, 570 U.S. 529, 542 (2013) (discussing the equal state sovereignty doctrine). There are, of course, numerous state sovereign immunity decisions in addition to *Franchise Tax Board* that rely on structural reasoning. *See, e.g.*, Alden v. Maine, 527 U.S. 706, 730–31, 754 (1999) (noting multiple structural bases "of soverign immunity implicit in the constitutional design" and holding that states enjoy sovereign immunity when they are sued in their own courts).

185. BLACK, *supra* note 176, at 7.

186. *See id.* at 3 ("I am going to talk, in these lectures, about a stylistic preference, or, perhaps better, a preference of intellectual method . . . ."); *id.* at 11 ("Now the stylistic, or, if you like, methodological difference between the reason I would have given and the reason the Court gave goes to the essence of what I have to say.").

arguments are inferences from the existence of constitutional structures and the relationships which the Constitution ordains among these structures."[187] Defining a word in terms of the word being defined detracts from the definition's capacity to illuminate, and Professor Bobbitt's definition begs the question of how the interpreter is to discern the relationships ordained by the Constitution. Professor Bobbitt's otherwise fascinating chapter on structural reasoning also confusingly labeled as doctrinal certain arguments that are actually structural: the Court's reasoning in *Edwards v. California*[188] and Professor Hart's essential functions thesis.[189] Professor Fallon explained that "[structural] arguments support constitutional conclusions on the basis of their fit with, or even their entailment by, the necessary presuppositions of the governmental structure that the Constitution creates."[190] It is difficult to know what to make of that definitional sentence because it mainly just refers the reader back to "governmental structure." The foregoing commentators are hardly alone.[191] It is no wonder that students (at least in our combined fifty years of experience as law teachers) often struggle to understand the structural mode of constitutional reasoning.[192]

B. The Logic of Structural Reasoning

An examination of some of the famous Supreme Court decisions that have relied on structural reasoning suggests that it frequently involves an appeal to the proper functioning of governmental institutions set up or recognized by the Constitution. That appeal can be in the service of empowering a government (or a branch of government) to act or preventing it from acting. In *Marbury*, the Court reasoned that it had the power of constitutional judicial review in part because "[i]t is emphatically the

187. PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 74 (1982).

188. 314 U.S. 160 (1941).

189. BOBBITT, *supra* note 187, at 75–76, 91. In *Edwards v. California*, the Court invalidated a state law that criminalized bringing a nonresident into California knowing that the person was indigent. 314 U.S. at 174. For discussion of the structural reasoning in *Edwards*, see SIEGEL, *supra* note 50, at 371–73.

190. Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1200 (1987).

191. *See, e.g.*, LACKLAND H. BLOOM, JR., METHODS OF INTERPRETATION: HOW THE SUPREME COURT READS THE CONSTITUTION 169 (2009) ("In a nut shell, structural reasoning is the method by which constitutional meaning is derived from the structure of the Constitution itself and the government it establishes along with the obvious purposes of that Constitution and government."); Richard C. Boldt, *Constitutional Structure, Institutional Relationships and Text: Revisiting Charles Black's White Lectures*, 54 LOY. L.A. L. REV. 675, 684 (2021) (endorsing interpretation of the Constitution that "draws inferences directly from th[e] deeper structures and institutional relationships [that ground the constitutional order]").

192. *Cf.* Vince Blasi, *Creativity and Legitimacy in Constitutional Law*, 80 YALE L.J. 176, 183 (1970) (reviewing CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969)) (noting that Professor Black "offers no guidelines for the eager law student who would master the methodology of structural inference").

province and duty of the judicial department to say what the law is."[193] In *McCulloch*, in concluding that Congress could create a national bank even though Congress was not expressly given the authority to charter corporations, the Court did not rely primarily on the Necessary and Proper Clause (as is typically assumed[194]); instead, the Court reasoned in part that:

> a government, entrusted with such ample powers [to tax, borrow money, regulate commerce, and wage war], on the due execution of which the happiness and prosperity of the nation so vitally depends, must also be entrusted with ample means for their execution. The power being given, it is the interest of the nation to facilitate its execution.[195]

Moreover, in holding that states could not tax the national bank, the Court in *McCulloch* reasoned that state authority under the Constitution should not be construed in a way that "would defeat the legitimate operations of a supreme government."[196]

Fast-forwarding to modern decisions, a key reason why the national government may not commandeer state governments is that, according to the Court, it would undermine the architecture of "dual sovereignty" implicit in the Constitution's federal design.[197] That would be problematic, the Court has explained, in part because it would enable Congress to "shift[] the costs of regulation to the States," thereby incentivizing Congress to regulate even where the costs of such regulation exceed the benefits.[198] Regarding the broad immunity that the Court has granted presidents for actions taken while in office, the Court in *Trump v. United States* considered "the Framers' design of the Presidency within the separation of powers," and it concluded that there should be broad presidential immunity from criminal prosecution "to safeguard the independence and effective functioning of the Executive Branch, and to enable the President to carry out his constitutional duties without undue caution."[199] Along similar methodological lines, the Court in

193. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

194. *See, e.g.*, United States v. Comstock, 560 U.S. 126, 133–34 (2010) (reading *McCulloch* as having authoritatively interpreted the scope of the Necessary and Proper Clause).

195. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 408 (1819).

196. *Id.* at 427. A similar logic animates arguments against "constitutional workarounds"—that is, arguments that the Constitution implicitly disallows certain government actions, even though they seem textually permissible, because the actions would substantially undermine constitutional limitations. *See, e.g.*, Daniel A. Farber, Jonathan S. Gould & Matthew C. Stephenson, *Workarounds in American Public Law*, 103 TEXAS L. REV. 503, 554 (2025) (explaining that "[e]xploiting loopholes, technicalities, incautiously broad language, or other features of the formal rules" in ways that contravene the purpose or structure of those rules "is anathema to adjudicators who place great weight on respecting the purposes or objectives of legal rules or rule systems").

197. Murphy v. NCAA, 584 U.S. 453, 470 (2018).

198. *Id.* at 474.

199. 144 S. Ct. 2312, 2329, 2331 (2024).

Nixon v. Fitzgerald[200] reasoned that, "[b]ecause of the singular importance of the President's duties, diversion of his energies by concern with private lawsuits [for money damages] would raise unique risks to the effective functioning of government."[201]

One need not agree with all of the Court's structural decisions (we do not) to understand the logic of structural argumentation in the examples above. Structural reasoning typically appeals to the proper functioning of the governmental institutions established or accepted by the Constitution. Such reasoning either empowers or limits the federal government or state governments—or a branch of those governments. When a literal reading of the constitutional text would allow for actions that would substantially undermine the functioning of one of those institutions, structural reasoning posits implied limitations on the text and protections emanating from other portions of the text that create, empower, or presuppose governmental institutions.[202]

Professor Black asked a series of incisive questions designed to show that it would be difficult to have an acceptable approach to constitutional interpretation that did not take account of structural inferences:

> Suppose there were no Fourteenth Amendment. Could a state make it a crime to file suit in a federal court? Could a state provide that lifelong disqualification from voting or holding property was to result from even a short service in the United States Army? Could a state prohibit marriage by federal officials, so long as they remained in office? Could a state disqualify voters who would not take an oath to vote for the Republican candidate for Congress?[203]

One could supplement Professor Black's list by asking whether states can tax federal instrumentalities (a question resolved by *McCulloch*) or, even more destructively, whether states can secede from the Union (a question settled by the Civil War).[204] Professor Black thought it obvious that, whatever text was or was not available, "we would still decide these, and a host of other similarly extreme cases, in the same way, on the substantial ground that such state measures interfere with and impede relations which the national

200. 457 U.S. 731 (1982).

201. *Id.* at 751.

202. *Cf.* Blasi, *supra* note 192, at 182 (noting that Professor "Black's structural and relational approach" is not distinctive because it employs "inferential reasoning," but "because the departure points for that reasoning are not the familiar textual passages of grant or prohibition, but rather other textual passages that recognize political and societal structures and relationships without expressly delineating any rights and powers that flow therefrom").

203. BLACK, *supra* note 176, at 12.

204. *See* Thomas B. Colby, *Originalism and Structural Argument*, 113 NW. U. L. REV. 1297, 1319 (2019) (adding those questions to Professor Black's list). The Articles of Confederation stated that "the Union shall be perpetual," but such language does not appear in the Constitution. Kenneth M. Stampp, *The Concept of a Perpetual Union*, 65 J. AM. HIST. 5, 5–6 (1978).

government has set up for its own purposes."[205] "The very existence and authorized functioning of a national government," he wrote, "ought in general to imply the unlawfulness of interference with its performance of those functions."[206]

Chief Justice Marshall colorfully made a similar point in *McCulloch*. He first noted that no piece of constitutional text explicitly gave the national bank immunity from state taxation: "There is no express provision for the case," he observed.[207] He nonetheless insisted that such immunity stemmed from "a principle which so entirely pervades the constitution, is so intermixed with the materials which compose it, so interwoven with its web, so blended with its texture, as to be incapable of being separated from it, without rending it into shreds."[208] "This great principle is," Marshall emphasized, "that the constitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective States, and cannot be controlled by them."[209]

Structural reasoning encompasses but goes beyond inferences from where the text of the Constitution places particular powers and limitations. To take an example, Article I, Section 9, of the Constitution states that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."[210] This clause does not say that only Congress can suspend the writ, but it is often construed that way in part because of its location in Article I, Section 9, which otherwise addresses limitations on congressional power.[211] Structural reasoning is attuned to textual placements like that one, which concern the structure of the Constitution as a document. But structural reasoning adds to inferences from the organization of the text a recognition of the historical importance of the "great writ" before and after the Constitution was ratified, as well as the relative advisability of conferring upon one person (the President) or a large group of people (Congress) the momentous authority to suspend it. Those considerations concern what structural constitutional

205. BLACK, *supra* note 176, at 12.

206. *Id.* at 24.

207. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 426 (1819).

208. *Id.*

209. *Id.* For a largely structural theory of the Constitution's division of authority between the federal government and the states (and among the states themselves) that is reflected in and reinforced by the two holdings of *McCulloch*, see generally SIEGEL, *supra* note 50.

210. U.S. CONST. art. I, § 9, cl. 2.

211. *See, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507, 537 (2004) (plurality opinion) ("Absent suspension of the writ *by Congress*, a citizen detained as an enemy combatant is entitled to [due] process.") (emphasis added). President Lincoln famously argued that the Suspension Clause should not be construed as always requiring congressional action. *See* Abraham Lincoln, Special Session Message (July 4, 1861), *in* 6 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 20, 25 (James D. Richardson ed., 1902) ("[T]he Constitution itself is silent as to which or who is to exercise the power . . . .").

reasoning is most commonly thought to entail: a focus on the functioning of the institutions set up or recognized by the Constitution.

More precisely, the example of the Habeas Suspension Clause indicates that a comprehensive account of structural constitutional reasoning would include appeals not only to the *governmental institutions* that the Constitution creates or presupposes, but also to certain *mechanisms* that the Constitution identifies or takes for granted. Access to habeas review in cases of executive detention without trial is such a mechanism. So are federal and state elections that determine who will temporarily occupy the legislative and executive branches of each level of government.[212]

C. Structural Reasoning and Other Modalities

It is important to keep in mind that structural reasoning operates in conjunction with other constitutional materials, and its persuasiveness will be affected by the strength of the other materials. The various modalities of constitutional argument, while distinguishable, are mostly interconnected and overlapping, with the strength of one kind of argument affecting the strength of the others.[213]

As an initial matter, structural reasoning is connected to the text in various ways. The text provides for the establishment of the three federal branches and allocates authority among them, thereby creating a foundation for arguments about implied limitations on how those branches can interact. The text also assumes the existence of separate states that have powers and obligations within a federalist system, again providing a foundation for arguments about implied limitations governing their relationship to the national government. In addition, the text plays a veto role over structural inferences in constitutional interpretation similar to the limits it imposes on purposivism in statutory interpretation: an interpreter may not draw a structural inference that the text will not bear. For example, given the text of the Exceptions Clause, structural reasoning must allow for at least some exceptions to the Supreme Court's appellate jurisdiction. Thus, as Professor Black explained, there is "a close and perpetual interworking between the textual and the relational and structural modes of reasoning, for the structure and relations concerned are themselves created by the text, and inference drawn from them must surely be controlled by the text."[214]

Structural reasoning is also often linked with, and disciplined by, invocations of post-Founding historical practice, also known as "historical

212. *See supra* text accompanying note 205 (reproducing Professor Black's series of questions—two of which involved voting in elections—that were designed to underscore the necessity of structural reasoning).

213. For a more detailed explanation of the connections between different modalities of constitutional interpretation, see generally Fallon, *supra* note 190.

214. BLACK, *supra* note 176, at 31.

gloss."[215] Among other things, such practice shows how the institutions in question actually operate and interact, and practice provides some grounding for what counts as the effective functioning of a governmental institution or mechanism. In part because of that linkage, it is possible for structural reasoning to yield different conclusions at different times in U.S. history, as the functions and challenges faced by the various institutions change. The Supreme Court recognized that connection between structure and practice as early as *McCulloch*:

> [A] doubtful question, one on which human reason may pause, and the human judgment be suspended, in the decision of which the great principles of liberty are not concerned, but the respective powers of those who are equally the representatives of the people, are to be adjusted; if not put at rest by the practice of the government, ought to receive a considerable impression from that practice.[216]

McCulloch is primarily a structural opinion, but Marshall began with historical practice.[217]

In addition to being guided by the constitutional text and historical practice, structural reasoning is persuasive only if it can be supported by a plausible consequentialist analysis of the impact of the action at issue on the functioning of the governmental institution in question. Structural argument and consequentialist considerations are connected precisely because structuralism is focused on threats to the functioning of governmental institutions, and those threats cannot simply be asserted. Rather, they must be demonstrated to be sufficiently serious so as to persuade the interpretive community that implying a constitutional limit is justified.

Judicial precedent also affects the persuasiveness of structural reasoning. For example, the greater the extent to which a potential structural inference is at odds with the Supreme Court's longstanding precedent, the less plausible the inference is likely to be—unless other interpretive modalities also support abandoning such precedent.

D. Structural Reasoning and Purposive Inquiry

Although the modern Court often invokes structural reasoning, it has not explained why or how that reasoning is compatible with its commitments to relatively strict versions of textualism and original public meaning originalism. As Professor Thomas Colby has noted, there is tension between

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215. *See* CURTIS A. BRADLEY, HISTORICAL GLOSS AND FOREIGN AFFAIRS: CONSTITUTIONAL AUTHORITY IN PRACTICE 2 (2024) (explaining that historical gloss consists of governmental practices that have persisted and become stable and is a "form of nonjudicial precedent" used to interpret "the Constitution's distributions of authority").

216. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 401 (1819).

217. *See id.* (beginning with the historical practice).

structural reasoning and versions of originalism that are focused on the original public meaning of specific text.[218] That is because structural reasoning considers what functions a governmental institution is designed to perform, and then considers whether various actions by that institution or another one are compatible with the performance of those functions. That can be seen as similar to the sort of "purposive" inquiry that strict textualists normally resist.[219]

Structural reasoning is potentially implicated in appeals to the "spirit" of the Constitution. Sometimes such appeals involve claims about "constitutional conventions"—that is, "maxims, beliefs, and principles that guide officials in how they exercise political discretion . . . ."[220] To violate such a convention, as Keith Whittington has noted, can be said to "violate the spirit of the constitution, even if it does not violate any particular rule."[221] At other times, however, appeals to the spirit of the Constitution involve claims about purportedly binding rules that stem from the Constitution's structure.[222] It is not always easy to tell in which sense the term is being used, and sometimes the claimants may not feel the need to choose between the two.[223] Importantly, even some originalists accept that it is sometimes proper to appeal to the spirit of the Constitution in interpreting its binding rules,[224] or—when original meaning has run out—in engaging in "constitutional

218. *See* Colby, *supra* note 204, at 1301 ("There is an obvious tension between original meaning textualism and structural argument . . . .").

219. *See* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 25–26 (1994) (noting that purposivism seeks to resolve statutory ambiguities "by identifying the purpose or objective of the statute, and then by determining which interpretation is most consistent with that purpose or goal"); John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 75 (2006) (describing purposivism and textualism as distinct interpretive frameworks).

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

221. *Id.* at 1852 (referencing constitutional conventions in the English parliamentary context); *cf.* STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE 106 (2019) (arguing that the institutional forbearance, which they define as "avoiding actions that, while respecting the letter of the law, obviously violate its spirit," is a norm critical for democracy's survival because politicians who practice forbearance "do not use their institutional prerogatives to the hilt, even if it is technically legal to do so, for such action could imperil the existing system"). Professors Levitsky and Ziblatt use the term "norm" in a manner that is similar to how legal scholars use the phrase "constitutional convention."

222. *See* Bradley & Siegel, *supra* note 73, at 277 ("When [spirit is] relied upon to support a claim of constitutionality or unconstitutionality, this can be understood as structural reasoning.").

223. *See id.* at 276, 279 (stating that appeals to the spirit of the Constitution can at times be ambiguous, referring either to claims based "on constitutional conventions" or "appeals to constitutional law").

224. *See* Saikrishna Bangalore Prakash, *Spirit*, 173 U. PA. L. REV. 937, 941 (2025) (arguing that "the Founders were not Scalian textualists" and that "[a]t the Founding, spirit was a powerful, even decisive factor in interpretation").

construction."[225] Scholars like Professor Bator, who have suggested that Court-stripping is permissible because it violates only the spirit of the Constitution rather than its letter, seem to have missed that possibility.[226]

Professor Black, it should be noted, vigorously defended the purposive orientation of structural argumentation. As he saw it, structural reasoning helps to produce better decisions because it pushes interpreters to focus on "practical rightness."[227] To succeed, Professor Black contended, a structural argument "has to make sense—current, practical sense."[228] Professor Black also contended that structural reasoning is no less determinate than textual reasoning, and he argued that it is more candid. That was because, he observed, textual reasoning is often based on implicit claims about the proper functioning of governmental institutions or mechanisms.[229] And he pointedly asked: "Why should one not explicitly base such holdings, not on Humpty-Dumpty textual manipulation, but on the sort of political inference which not only underlies the textual manipulation but is, in a well constructed opinion, usually invoked to support the interpretation of the cryptic text?"[230]

IV. Reconceiving the Supreme Court's Essential Functions

Some literature on the essential functions thesis focuses only on the Supreme Court,[231] while other literature concentrates more broadly on the federal judiciary.[232] Given the textual requirement discussed below that the Supreme Court (and only that court) exist, as well as the long history of congressional regulation of the jurisdiction of the lower federal courts (including by stripping their jurisdiction),[233] the essential functions thesis is

225. *See* Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1, 5 (2018) (defending "[g]ood-faith constitutional construction," which "seeks to implement the Constitution *faithfully* by ascertaining and adhering to the original functions of the constitutional text—its 'spirit'").

226. *See* Bator, *supra* note 41, at 1039 (arguing that "[a] statute depriving the Supreme Court of appellate jurisdiction" may violate the "spirit of the Constitution," but nevertheless be valid); *cf.* Ratner, *supra* note 70, at 940 (explaining that views like Professor Bator's are wrong because "the spirit of the Constitution, i.e., the plan and goals of the Constitution, is the essence of the Constitution and sustains the less expansive interpretation").

227. BLACK, *supra* note 176, at 23.

228. *Id.* at 22.

229. *Id.* at 22; *see* BOBBITT, *supra* note 187, at 84–85 ("Black's structural arguments yield results similar to those reached by courts employing other methods because those courts, without saying so, were aiming at results that were structurally satisfying.").

230. BLACK, *supra* note 176, at 29.

231. *See generally* Hart, *supra* note 67; Ratner, *supra* note 68.

232. Sager, *supra* note 71.

233. *See, e.g.*, Bradley & Siegel, *supra* note 73, at 320 ("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."). For discussion of those instances, see BAUDE ET AL., *supra* note 32, at 455–57.

probably strongest when focused on the Supreme Court. In any event, that is this Article's focus.

In this Part, we clarify why promoting the supremacy and uniformity of federal law are, from a structural perspective, essential functions of the Court; the case for them is stronger than the literature has made. In addition, we show that the structural rationales for supremacy and uniformity as essential functions also suggest additional essential functions of the Court. That conclusion has implications not only for Court-packing but also for other potential restrictions on the Court.

A. Maintaining Supremacy and Uniformity

We now consider why commentators generally agree that, if the Supreme Court has any essential functions, they include maintaining the supremacy and uniformity of federal law. The answer, in brief, is that several modalities of constitutional interpretation, when considered along with the Constitution's structure, strongly support such an inference.

1. Supremacy.—The place to start, as discussed in the last Part, is the constitutional text. Article III of the Constitution begins by stating that the 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."[234] The Constitution thus specifies that there shall be a Supreme Court with judicial power. Article III then proceeds to identify the nine categories of cases and controversies encompassed within the federal judicial power,[235] and it distinguishes between the two categories of cases that will fall within the Court's original jurisdiction and the seven categories that fall within its appellate jurisdiction.[236] The constitutional text thus envisions that the Court will be able to exercise both types of jurisdiction. Moreover, given that almost all the categories of jurisdiction specified in Article III fall within the Court's appellate jurisdiction, the constitutional text appears to envision that the Court will spend most of its time exercising its appellate jurisdiction.

The need for appellate jurisdiction is confirmed by the fact that the text of Article III does not require the establishment of lower federal courts. In both Article III and Article I, Section 8, Congress is authorized to establish inferior federal courts, but—pursuant to the "Madisonian Compromise"—the Constitution does not mandate their existence.[237] Without such courts, almost all issues of federal law would be adjudicated in state courts, and the

234. U.S. CONST. art. III, § 1.

235. U.S. CONST. art. III, § 2, cl. 1.

236. U.S. CONST. art. III, § 2, cl. 2.

237. The Madisonian Compromise is discussed *infra* text following note 245.

only opportunity for federal court review of such adjudications would occur in the Supreme Court.

The Supremacy Clause in Article VI of the Constitution confirms that state courts will be adjudicating issues of federal law. It states that the Constitution, federal laws, and treaties shall be the supreme law of the land "and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[238] During the pre-constitutional period, there was effectively no national judiciary, and some state courts declined to give effect to federal law, such as the peace treaty with Great Britain.[239] To address that problem, the Constitution declares the supremacy of federal law over conflicting state law, expressly requires state judges to apply federal law when it conflicts with state law, and mandates that there at least be a Supreme Court that can ensure state court compliance with federal law.[240] Importantly, that role for the Court would exist regardless of whether lower federal courts were created, given that state courts would still decide many federal questions (such as federal defenses to state law claims), and the Court is the only federal institution authorized to exercise direct appellate review over state courts.

Two famous debates during the Constitutional Convention reveal that the Framers expected the Supreme Court to enforce the Supremacy Clause by policing state court compliance with federal law. The first debate was over whether the national legislature should have the power to veto (or "negative") state laws on constitutional grounds.[241] Supporters of the proposal contended that appellate review by the national judiciary would prove an insufficient check on the states, a position that assumed the availability of such a check.[242] Opponents of the proposal, by contrast, contended that judicial review of state laws would suffice to ensure the supremacy of federal law, and their view prevailed.[243] Given that the state courts already had a track record leading up to the Convention of not consistently complying with federal law, the opponents similarly were assuming a national judicial check to ensure supremacy. Notably, after the vote defeating the congressional negative on

238. U.S. CONST. art. VI, cl. 2.

239. *See* BAUDE ET AL., *supra* note 32, at 2–3 (discussing state noncompliance with the Treaty of Paris as a motivation for the Constitutional Convention).

240. *See* U.S. CONST. art. VI, cl. 2 (declaring federal law "the supreme Law of the Land").

241. Resolution VI of the Virginia Plan provided in relevant part that "the National Legislature ought to be [e]mpowered . . . to negative all laws passed by the several States, contravening in the opinion of the National Legislature the articles of Union." 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 50, at 21.

242. James Madison argued, for example, that states "can pass laws which will accomplish their injurious objects before they can be repealed by the [General Legislature]. *or be set aside by the National Tribunals*." 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 27 (Max Farrand ed., 1911) (emphasis added).

243. The proposed negative was voted down by a vote of seven states to three. *Id.* at 28.

state laws, Luther Martin immediately proposed an initial version of the Supremacy Clause, which was unanimously approved.[244] Also unanimously approved was John Rutledge's August 23 proposal to add the words "This Constitution" to the Supremacy Clause.[245]

The second debate likewise suggested that the Framers expected the Supreme Court to possess the authority to review state court compliance with federal law. That debate—over whether the Constitution should mandate the creation of lower federal courts—culminated in the Madisonian Compromise, whereby Congress was given the power to establish those courts but would not be required to do so. Both sides in the debate assumed that the Supreme Court would exercise appellate jurisdiction over state courts.[246]

Other Founding materials support the same conclusion. "[I]n controversies relating to the boundary between the two jurisdictions" (that is, between the national and state governments), Madison wrote in *Federalist 39*, "the tribunal which is ultimately to decide is to be established under the general government."[247] Madison explained why:

> Some such tribunal is clearly essential to prevent an appeal to the sword and a dissolution of the compact; and that it ought to be established under the general rather than under the local governments, or, to speak more properly, that it could be safely established under the first alone, is a proposition not likely to be combated.[248]

In *Federalist 81*, Hamilton agreed. "That there ought to be one court of supreme and final jurisdiction," he wrote, "is a proposition which has not been, and is not likely to be contested."[249]

Historical practice and judicial precedent are consistent with the Founding materials. In Section 25 of the Judiciary Act of 1789, the First Congress—which, to reiterate, authorized Supreme Court appellate jurisdiction over state court decisions invalidating (but not upholding) federal statutes or upholding (but not invalidating) state statutes against federal constitutional challenge[250]—was concerned primarily with ensuring the supremacy of federal law over the states. Moreover, the Marshall Court

244. *Id.* at 28–29.

245. *Id.* at 389.

246. As discussed *supra* note 50 and accompanying text, opponents of creating lower federal courts emphasized that state court decisions on federal questions could be appealed to the United States Supreme Court, thereby ensuring uniformity in judicial interpretations of federal law and its supremacy over state law, while proponents of creating lower federal courts disagreed that this would be sufficient. They worried, *inter alia*, about a flood of appeals from state courts to the Supreme Court. Again, both sides in the debate assumed Supreme Court review.

247. THE FEDERALIST NO. 39, at 245 (James Madison) (Clinton Rossiter ed., 1961).

248. *Id.* at 246.

249. THE FEDERALIST NO. 81, at 481 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

250. Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85–86.

upheld the constitutionality of Section 25 in the context of both civil and criminal appeals.[251] The only thing that has changed over time is the threats to federal supremacy that Congress has perceived. For example, when Congress came to appreciate (during the *Lochner*[252] era) that state courts could overenforce federal rights in addition to underenforcing them,[253] Congress in 1914 authorized the Court to exercise appellate jurisdiction over state court decisions invalidating state laws on federal constitutional grounds or upholding federal laws against constitutional challenge.[254]

There have been periods in United States history when the role of the Supreme Court in ensuring the supremacy of federal law has been especially important in advancing the causes of national integration over state parochialism and, in the next century, of civil rights over racial segregation. During the early national period, decisions like *McCulloch v. Maryland*, *Martin v. Hunter's Lessee*, and *Cohens v. Virginia*[255] helped to protect federal institutions and federal law from being undermined by the centrifugal forces of state self-interest.[256] During the Civil Rights Era of the 1950s and 1960s, the Court's decisions in *Brown v. Board of Education*[257] and subsequent desegregation cases helped to disestablish an apartheid social order in the American South.[258] To take another example, numerous modern death penalty reforms in the states have been driven by Supreme Court decisions.[259] None of that is to suggest, of course, that the Court always decides cases

251. *See* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 350–51 (1816) (civil cases); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 379–83 (1821) (criminal cases).

252. The era is named after *Lochner v. New York*, 198 U.S. 45 (1905), where the Court invalidated a maximum hours law for bakers as violative of economic substantive due process.

253. *See* H.R. REP. NO. 63-1222, *supra* note 92, at 2 (arguing that "[the] power to review the judgment of the State court should be extended" whether the state court's construction "technically was in favor of or against the validity of the Federal right").

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

255. 19 U.S. (6 Wheat.) 264 (1821).

256. In line with *Martin* and *Cohens*, the modern Court has held that it has appellate jurisdiction to review issues of federal law in cases in which states have been sued in their own courts even if the cases could not be heard in federal district court due to state sovereign immunity. *E.g.*, McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco, 496 U.S. 18, 26–28, 28 n.9 (1990); *see also* Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1, 35 (1988) ("The proposition that once a state consents to be sued in its own courts, it likewise consents to Supreme Court review of federal questions decided therein, accords with the general structure of judicial federalism established in such early decisions as *Cohens v. Virginia* and *Martin v. Hunter's Lessee*.").

257. 347 U.S. 483 (1954).

258. *See id.* at 495 (holding segregation in public schools unconstitutional). One can, of course, debate how much difference *Brown* made in desegregating public schools and other institutions. For consideration of that question, see GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 70–71 (3d ed. 2023).

259. For a nuanced history of the Supreme Court's top-down regulation of state death penalty regimes, see generally CAROL S. STEIKER & JORDAN M. STEIKER, COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT (2016).

correctly; against its successes one can pair widely condemned decisions such as *Dred Scott*,[260] *Plessy*,[261] *Lochner*, and *Korematsu*.[262] The point, rather, is that both its successes and its failures show that the Court is in a unique position to ensure the supremacy of federal law.

Writing in the early twentieth century, Justice Oliver Wendell Holmes famously opined, "I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States."[263] Holmes's consequentialism was not ordinary but existential: Without the Supreme Court exercising its appellate jurisdiction over state courts, it is difficult to imagine what governmental institution could, in practical terms, ensure that the Constitution, treaties, and federal statutes prevail over conflicting state law.

In sum, one of the essential functions of the Supreme Court is to maintain the supremacy of federal law. That conclusion is based not on an appeal to structure in the abstract but rather in combination with the constitutional text, preratification history, historical practice, judicial precedent, and consequentialist considerations.

2. Uniformity.—With respect to maintaining uniformity, the textual case begins with the Supremacy Clause. That clause identifies various forms of national law—the Constitution itself, federal statutes, and treaties.[264] It was understood then, just as it is understood now, that judges would not always interpret national law in the same way.[265] That would inevitably lead to different outcomes in different states, and in different lower federal courts if they were established. Even so, the Supremacy Clause refers to the three kinds of federal law in the singular as "the supreme Law of the Land."[266] If there are persistent variations in how that law is applied in different parts of the country, it would lack that singular, nationwide quality. Yet no institution other than the Supreme Court is positioned to remedy such persistent variation, since it is the only institution that sits above both the state courts and the lower federal courts.[267]

260. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

261. Plessy v. Ferguson, 163 U.S. 537 (1896).

262. Korematsu v. United States, 323 U.S. 214 (1944).

263. OLIVER WENDELL HOLMES, *Law and the Court*, *in* COLLECTED LEGAL PAPERS 291, 295–96 (1920).

264. *See* U.S. CONST. art. VI, cl. 2 (identifying various forms of national law).

265. *See, e.g.*, THE FEDERALIST NO. 22, at 150 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("We often see not only different courts but the judges of the same court differing from each other.").

266. U.S. CONST. art. VI, cl. 2.

267. *See* Ratner, *supra* note 68, at 160 (grounding the Supreme Court's uniformity function partly in the Supremacy Clause because it requires "that there shall be one supreme federal law throughout the land").

As just noted, the Supreme Court's role in maintaining uniformity is not limited today to overseeing state courts. Especially after the adoption of general federal question jurisdiction in 1875,[268] the uniformity of federal law has also required supervising lower federal courts, which expanded substantially during the nineteenth century. At the Founding, there were only three circuits; today, there are twelve regional circuits, covering fifty states across a continent (and beyond).[269] While the federal courts of appeals can supervise the district courts in their own circuits, there are often ideological variations among the courts of appeals, and their perspective on the application of federal law sometimes differs from that of the Supreme Court. By supervising lower federal courts, therefore, the Court performs not only its uniformity function but its supremacy function as well.

The debates over the Constitution further suggest that the Supreme Court was expected to resolve persistent conflicts in the interpretation of federal law. At the Constitutional Convention, for example, John Rutledge opposed requiring the establishment of lower federal courts in the constitutional text by endorsing both the supremacy and uniformity functions of the Supreme Court.[270] Rutledge argued that "the State Tribunals might and ought to be left in all cases to decide in the first instance[,] the right of appeal to the supreme national tribunal being sufficient to secure the national rights *& uniformity* of [judgments]."[271] Similarly, in *The Federalist*, Hamilton repeatedly insisted that only the Supreme Court could prevent persistent disuniformity in the interpretation of federal law—although, as a nationalist, he (unlike Rutledge) contemplated appeals to the Court from the judgments of lower federal courts as well as state courts.[272]

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268. The grant of general federal question jurisdiction in the Judiciary Act of 1875 is now codified at 28 U.S.C. § 1331. Its original amount-in-controversy requirement was eliminated in 1980. Act of Dec. 1, 1980, Pub. L. No. 96–486, 94 Stat. 2369 (codified as amended at 28 U.S.C. § 1331).

269. *Federal Judicial Circuits*, FED. JUD. CTR., https://www.fjc.gov/history/administration/federal-judicial-circuits [https://perma.cc/538V-LHK9].

270. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 50, at 124.

271. *Id.* (emphasis added).

272. *E.g.*, THE FEDERALIST NO. 22, at 150 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (explaining that: "all nations have found it necessary to establish one court paramount to the rest, possessing a general superintendence and authorized to settle and declare in the last resort a uniform rule of civil justice" in order "[t]o avoid the confusion which would unavoidably result from the contradictory decisions of a number of independent judicatories"); THE FEDERALIST NO. 80, at 476 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("If there are such things as political axioms, the propriety of the judicial power of a government being coextensive with its legislative may be ranked among the number. The mere necessity of uniformity in the interpretation of the national laws decides the question."); THE FEDERALIST NO. 82, at 491, 494 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (reasoning that there must be an ability to appeal rulings by the state courts to the U.S. Supreme Court "else the judiciary authority of the Union may be eluded at the pleasure of every plaintiff or prosecutor," which "would defeat some of the most important and avowed purposes of the proposed government and would essentially embarrass its measures").

As discussed, the early historical practice (as embodied in Section 25) revealed greater congressional concern that the Supreme Court secure the supremacy of federal law over state law than that the Court ensure the uniformity of federal law.[273] Moreover, Marshall Court precedents and subsequent decisions throughout the nineteenth century read Section 25 that way.[274] In part for that reason, the case for maintaining supremacy as an essential function is stronger than the case for maintaining uniformity. (Another reason, as Holmes famously remarked, is that the Union would be imperiled without the Court's ability to fulfill the supremacy function.[275])

At the same time, the essential functions argument for "uniformity" is a bit of a misnomer. It is not important that the Court always establish perfect uniformity in the interpretation of federal law, which is impossible anyway and might be undesirable.[276] Rather, it is important that the Court be able to resolve persistent conflicts in the interpretation of federal law, which, as also discussed, Section 25 permitted the Court to do. In *Martin v. Hunter's Lessee*, Justice Story's majority opinion famously upheld the constitutionality of Section 25 in part by emphasizing the value of uniformity.[277] Without judicial review, he worried, "the laws, the treaties, and the constitution of the United States would be different in different states, and might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two states."[278] Story added that "[t]he public mischiefs that would attend such a state of things would be truly deplorable; and it cannot be believed that they could have escaped the enlightened convention which formed the constitution."[279]

In any event, modern historical practice and judicial precedent, beginning at least with the Judiciary Act of 1914, indicate that the essential functions of the Supreme Court include policing state and federal judicial disagreements over the proper interpretation of important questions of federal law. The need for the Court to fulfill that role has grown over time as the national population, the quantity of federal law, and the amount of

273. *See supra* notes 63–64, 80–82 and accompanying text.

274. *See* Meltzer, *supra* note 82, at 1589 ("In its first encounter with the restrictive language of section 25, the Court (per Chief Justice Marshall) dismissed the appeal in a one-page opinion, which read the statute as clearly precluding review where the state court upheld federal rights."); *id.* at 1590 ("In sixteen decisions stretching from 1806 to 1902, the Court invariably adhered to Marshall's understanding of section 25.").

275. HOLMES, *supra* note 263.

276. Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1571 (2008) (questioning "whether uniformity for its own sake is always worth the (sometimes significant) costs of trying to achieve it," and arguing that "under some circumstances nonuniformity may even be preferable").

277. 14 U.S. (1 Wheat.) 304, 347–48, 351 (1816).

278. *Id.* at 348.

279. *Id.*

litigation in federal court have vastly expanded.[280] When the First Judiciary Act was passed, there were thirteen states, all along the Eastern seaboard, and the total population of the country was around four million.[281] There are now fifty states extending across the continent as well as to Alaska and Hawaii, each with its own judicial system, and the country's population has grown to over 330 million.[282] When the Constitution went into effect, there was hardly any federal court litigation; today, almost 300,000 cases are brought each year in the federal district courts.[283] Against that backdrop, it is unsurprising that a principal reason why the Court will agree to review a case today is to resolve a conflict among the federal courts of appeals or state supreme courts (or between courts of the two systems).[284]

A final reason why uniformity counts as an essential function of the Supreme Court is implied in the above discussion but warrants being singled out for purposes of methodological clarity. Few people would argue that, on important matters, national law should persistently mean very different things in different parts of the nation. Indeed, in such a scenario, it would be a mistake to call such law "national" as opposed to, say, "regional." If it is desirable from a consequentialist perspective to police significant disuniformity in the construction of federal law, then it makes sense to assign that task to the only governmental institution in the nation that can possibly accomplish it.[285]

280. *Cf.* Theodore Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 YALE L.J. 498, 501, 510–11 (1974) (arguing that, given modern caseloads, Congress lacks authority to abolish the lower federal courts).

281. U.S. CENSUS BUREAU, HISTORICAL STATISTICS OF THE UNITED STATES, 1789–1945, at 25 (1949).

282. *Population*, U.S. CENSUS BUREAU, https://www.census.gov/topics/population.html [https://perma.cc/RD55-DF78].

283. *Federal Judicial Caseload Statistics 2023*, U.S. CTS., https://www.uscourts.gov/data-news/reports/statistical-reports/federal-judicial-caseload-statistics/federal-judicial-caseload-statistics-2023 [https://perma.cc/YEE7-HM7Z]; *see* Diego A. Zambrano, *Federal Expansion and the Decay of State Courts*, 86 U. CHI. L. REV. 2101, 2113 (2019) ("The Framers instead placed the burden of judicial work in the new nation on state courts, expecting they would hear most state *and* federal claims.").

284. *See* SUP. CT. R. 10 (identifying considerations governing U.S. Supreme Court review on a writ of certiorari, and including among them a decision by a U.S. court of appeals or state court of last resort that conflicts with a decision of another U.S. court of appeals or state court of last resort); H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 246 (1991) ("[T]he single most important generalizable factor in assessing certworthiness is the existence of a conflict or 'split' in the circuits.").

285. For a recent explanation of why, from a consequentialist perspective, "[o]ne of this Court's roles, in justiciable cases, is to resolve major legal questions of national importance and ensure uniformity of federal law," see Trump v. CASA, Inc., 145 S. Ct. 2540, 2571–72 (2025) (Kavanaugh, J., concurring).

B. Other Essential Functions

This Article does not endeavor to explain all the functions of the federal judicial system. It instead considers the specific functions of the Supreme Court. Like supremacy and uniformity, several additional essential functions of the Court can be inferred from the constitutional structure combined with other modalities of constitutional interpretation. In describing these functions, we make no claim that the Court always performs them well; indeed, it is easy to think of examples in which it has not done so. But these functions are vitally important for the proper functioning of our constitutional system, and the Supreme Court can often perform them better than any other institution.

1. Rights Protection.—One essential function that most Americans would likely name is the protection of individual rights—including liberty, equality, and due process rights. The self-executing nature of the rights listed in the text of the original Constitution and subsequent amendments supports viewing rights protection as an essential function of the Court, as do centuries-long historical practice and judicial precedent.[286] As James Madison noted when introducing the proposed Bill of Rights to Congress, "[i]f they are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights . . . they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights."[287] While this account of judicial motivation has often been more of an ideal than a reality, it captures a widely accepted view of the role of the judiciary in modern America, and especially of the Supreme Court. Constitutional rights are designed, in part, as limitations on majoritarian politics, so it would not make structural sense to rely solely on such politics for their protection.[288]

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286. *See, e.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803) ("The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion."); *see also* 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1568, at 426 (1833) ("In every well organized government, . . . with reference to the security both of public rights and private rights, it is indispensable, that there should be a judicial department to ascertain, and decide rights . . . .").

287. 1 ANNALS OF CONG. 439 (1789) (Joseph Gales ed., 1834).

288. Justice Robert Jackson memorably gave voice to this view:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

The Court's role in enforcing constitutional rights was substantially enhanced by ratification of the Fourteenth Amendment, and then later by the Court's steady incorporation of almost all the rights in the Bill of Rights into the Fourteenth Amendment's Due Process Clause.[289] Today, rights litigation is a staple of the Court's docket. As Professor Noah Feldman has observed, one of the "essential functions" of the "contemporary Court" is to "articulate[] the standards that ensure liberty and equality in the US."[290]

Of course, both lower federal courts and state courts also protect rights, and they often do so reasonably well. But the Court has more institutional authority than those other courts, and so it has greater ability to resist powerful political actors who seek to suppress rights. It seems unlikely that any other court could have effectively imposed the nationwide desegregation mandate in *Brown*, and even the Supreme Court struggled to achieve compliance with the mandate.[291] The Court's unique role has also been evident in some of its free speech decisions, such as the *Pentagon Papers Case*.[292]

When the rights of individuals who cannot protect themselves are at stake, the Court—both historically and today—appears less likely to respond to political threats from powerful political actors by practicing what we elsewhere call "judicial self-protection," and is more likely to risk a confrontation with the government.[293] This judicial tendency is sometimes apparent even in wartime. In its "war on terror" decision, *Hamdi v. Rumsfeld*,[294] the plurality noted that the Court had "long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."[295] The Court has similarly resisted executive action that it thought violated constitutional rights in other war-related

289. For discussion of those developments, see, for example, DANIEL FARBER & NEIL S. SIEGEL, UNITED STATES CONSTITUTIONAL LAW 261–67 (2d ed. 2024).

290. Noah Feldman, *The Last Bulwark*, N.Y. REV. (May 15, 2025), https://www.nybooks.com/articles/2025/05/15/the-last-bulwark-noah-feldman/ [https://perma.cc/J9JY-J8P2].

291. The Court expressed its exasperation in *Griffin v. Cnty. Sch. Bd.*, 377 U.S. 218 (1964):

> The case has been delayed since 1951 by resistance at the state and county level, by legislation, and by lawsuits. The original plaintiffs have doubtless all passed high school age. There has been entirely too much deliberation and not enough speed in enforcing the constitutional rights which we held in *Brown v. Board of Education* . . . had been denied Prince Edward County Negro children.

Id. at 229.

292. N.Y. Times Co. v. United States, 403 U.S. 713, 714, 718 (1971) (per curiam) (holding that the federal government had not met the "heavy burden" required to justify its use of prior restraints enjoining the press from publishing the contents of certain classified documents, despite the government's interest in keeping the documents classified on alleged national security grounds).

293. For examples of historical episodes in which the Court's responses to political threats directed at it were informed by the Justices' perceptions of whether individual rights were at stake, see generally Bradley & Siegel, *supra* note 142.

294. 542 U.S. 507 (2004).

295. *Id.* at 536 (plurality opinion).

decisions, including *Youngstown Sheet & Tube Co. v. Sawyer*[296] (which was cited by the *Hamdi* plurality for the above proposition) and *Boumediene v. Bush*,[297] both of which are discussed below.[298]

The relatively uncontroversial example of rights protection illustrates that the essential functions of the Court extend beyond promoting the supremacy and uniformity of federal law. The Court has, we submit, at least three other essential functions. The Court plays a vital role in sustaining the rule of law by supplying a check against the political branches, especially the President (a role that often, but not inevitably, will also involve the protection of rights). In addition, the Court resolves institutional impasses between the political branches. Moreover, the Court is in a unique position to police the structure of democratic politics and resolve conflicts over elections for federal offices. That list of essential functions is not necessarily comprehensive, but the functions on the list count as essential because, like supremacy, uniformity, and rights protection, several modalities of constitutional interpretation strongly support the inference that the Court should perform them. For example, from a structural and a consequentialist perspective, it is vital that some governmental institution perform those three additional functions, and the Court can generally perform them significantly better than the available alternatives.[299]

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296. 343 U.S. 579 (1952).

297. 553 U.S. 723 (2008).

298. A potentially comparable example in the second Trump Administration has been litigation over whether the Alien Enemies Act, 50 U.S.C. § 21 (originally enacted as Act July 6, 1798, ch. 66, § 1, 1 Stat. 577), which dates back to 1798, authorizes the President to remove certain noncitizens from the United States. In two orders, including one that the Court issued extraordinarily at 1:00 AM on a Saturday in an apparent effort to prevent the government from removing the detainees from the country before the Justices could act, the Court made clear by a vote of seven to two that the detainees' due process rights of notice and an opportunity to contest their removal were real and substantial, not a mere formality or technicality that the government could satisfy through last-minute notification in a language that most detainees did not speak. Elie Mystal, *Did the Supreme Court Just Grow a Spine?*, THE NATION (Apr. 22, 2025), https://www.thenation.com/article/politics/did-the-supreme-court-just-grow-a-spine/ [https://perma.cc/MG7G-THPN]; *see* A.A.R.P. v. Trump, 145 S. Ct. 1364, 1366, 1368, 1370 (2025) (per curiam) (granting the plaintiffs' emergency application for a stay of the removal of a proposed class of Venezuelan men in immigration custody who are challenging their removal under the AEA, vacating the Fifth Circuit's judgment and remanding the case with instruction, and enjoining the government "from removing the named plaintiffs or putative class members in this action under the AEA pending order by the Fifth Circuit and disposition of the petition for a writ of certiorari, if such writ is timely sought"); A.A.R.P. v. Trump, 145 S. Ct. 1034, 1034 (2025) (mem.) ("The Government is directed not to remove any member of the putative class of detainees from the United States until further order of this Court.").

299. Some of the Court's essential functions are connected historically and theoretically. For an account that explains how the Court's function of ensuring the supremacy of federal law laid the groundwork for the emergence of the Court's function of checking the political branches, see Barry Friedman & Erin F. Delaney, *Becoming Supreme: The Federal Foundation of Judicial Supremacy*, 111 COLUM. L. REV. 1137, 1140–41, 1144–46 (2011).

2. Checking the Political Branches.—Begin with the constitutional text, which divides powers among three branches of the federal government to avoid undue concentration of authority. As Madison wrote in *Federalist 47*, "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny."[300] A key question raised by the Constitution's effort to avoid tyranny is how the separation of powers is to be maintained. In *Federalist 51*, Madison argued that institutional competition would be the primary means of preventing "a gradual concentration of the several powers in the same department."[301] The Supreme Court, through its exercise of judicial review, was designed to be part of that competition.

Textual support for horizontal judicial review—that is, judicial review over the actions of Congress and the President—lies in the grant of jurisdiction to hear "all Cases, in Law and Equity, arising under this Constitution."[302] Moreover, although the Framers were most concerned with giving the Supreme Court the power of vertical judicial review—that is, judicial review over state conduct—they also anticipated horizontal judicial review. For example, Hamilton wrote broadly in *Federalist 78* that "the courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments."[303] The authority of the Supreme Court to engage in horizontal judicial review was then confirmed in *Marbury v. Madison*.[304]

Although *Marbury* involved judicial review of an act of Congress, and although the Founders feared legislative power more than executive power (because state legislatures had generally dominated state executives in those days),[305] the need for judicial review of presidential power has grown over time. As Professor Richard Pildes has observed, "[i]t is widely recognized that the expansion of presidential power from the start of the twentieth century onward has been among the central features of American political development."[306] In addition, due to partisan polarization and related

300. THE FEDERALIST NO. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961).

301. THE FEDERALIST NO. 51, at 321–22 (James Madison) (Clinton Rossiter ed., 1961).

302. U.S. CONST. art. III, § 2, cl. 1.

303. THE FEDERALIST NO. 78, at 469 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

304. *See* 5 U.S. (1 Cranch) 137, 178 (1803) (reasoning that, where they conflict, it is "the very essence of judicial duty" to determine whether the Constitution or a statute governs a case).

305. *See, e.g.*, ROBERT J. SPITZER, THE PRESIDENTIAL VETO: TOUCHSTONE OF THE AMERICAN PRESIDENCY 15–16 (1988) ("Again and again in the convention's consideration of the veto power, one central theme persistently surfaced: the veto as a device of executive self-protection against encroachments of the legislature. This had indisputably been the lesson gleaned from state experiences.").

306. Richard H. Pildes, *Law and the President*, 125 HARV. L. REV. 1381, 1381 (2012) (reviewing ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC (2010)).

phenomena, Congress checks the President substantially less in the modern United States than Madison and other Framers anticipated.[307] The Framers did not anticipate political parties, let alone the polarized parties that characterize contemporary American politics. Mostly, Congress checks the President only when there is divided government.[308] In a world of expansive executive power and relatively weak congressional checks on the President, it becomes especially important from a structural and a consequentialist perspective that there be an effective judicial check on the President. Among judicial institutions in the United States, the Supreme Court possesses by far the most authority and prestige to offer such a check in cases of the highest public significance.[309]

A classic, widely celebrated example—arguably the most important in the Supreme Court's entire separation of powers jurisprudence—is the *Steel Seizure Case*. In that case, President Harry Truman ordered a seizure of the nation's steel mills in an effort to avoid a strike that he said would damage steel production needed to prosecute the Korean War.[310] Six Justices concluded that the seizure was unconstitutional, either because it was not authorized by Congress or because it was implicitly prohibited by Congress.[311] That was true, the Court insisted, even though Truman had informed Congress of his actions and Congress had failed to act.[312] In his canonical concurrence, Justice Jackson famously cautioned that "the Constitution did not contemplate that the title Commander in Chief *of the Army and Navy* will constitute him also Commander in Chief of the country,

307. *See* NOLAN MCCARTY, POLARIZATION: WHAT EVERYONE NEEDS TO KNOW 134–36 (2019) (explaining why the American constitutional system is not designed to function well amid polarized politics); Neal Devins, *Congress, the Courts, and Party Polarization: Why Congress Rarely Checks the President and Why the Courts Should Not Take Congress's Place*, 21 CHAP. L. REV. 55, 56 (2018) ("[P]arty polarization has [made] Congress . . . outright uninterested in protecting its role in our system of divided government. Correspondingly, lawmakers of the president's party no longer use their oversight authority to check the president . . . .").

308. *See* Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312, 2315, 2343 (2006) (arguing that during periods of cohesive and polarized political parties, the degree and kind of competition between the political branches will vary substantially depending upon whether political party control of the White House, Senate, and House is divided or unified).

309. For an argument that "the original jurisdiction clause reflects the Framers' vision of the Supreme Court as the most important court in the nation" and that "[t]he exceptions power cannot include the power to strip the Supreme Court of all appellate jurisdiction because Congress could then destroy the Supreme Court's status as the nation's most important court," see William S. Dodge, Note, *Congressional Control of Supreme Court Appellate Jurisdiction: Why the Original Jurisdiction Clause Suggests an "Essential Role,"* 100 YALE L.J. 1013, 1014 (1991).

310. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 583 (1952).

311. *Id.* at 588–89; *id.* at 662 (Clark, J., concurring in judgment).

312. *See id.* at 583 (noting that "[t]he next morning the President sent a message to Congress reporting his action," but "Congress has taken no action").

its industries and its inhabitants."[313] As a former prosecutor at Nuremberg, Jackson knew firsthand the dangers of fascism, and he insisted that even if institutions that place the Executive under the law are "destined to pass away[,] . . . it is the duty of the Court to be last, not first, to give them up."[314] Despite the war context, Truman backed down in the face of an adverse Supreme Court decision, indicating the President's acquiescence to the Court's exercise of that essential function.

Another war-related example, this time of the Court's checking both political branches, is *Boumediene v. Bush*, which we referenced above. In that case, the Court held that federal courts could review the legality of the Bush Administration's "war on terror" detentions at the Guantanamo Bay naval facility in Cuba, notwithstanding an effort by Congress to disallow such review.[315] The fact that the government had placed the detention facility on foreign soil did not eliminate judicial enforcement of constitutional protections when the government exercised exclusive control over the territory in question.[316] "Our basic charter cannot be contracted away like this," the Court admonished.[317] "The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply."[318] Despite vigorously disagreeing with the decision, the administration complied with it.[319]

Again, because of an erosion of congressional checks in the modern era, the need for a judicial check on presidential action has become more pressing. Members of Congress often focus on partisan interests rather than institutional interests, which means that congressional checks are especially weak when Congress and the presidency are controlled by the same party.[320] This deficiency has grown in recent years as the result of a rise of partisan

313. *Id.* at 643–44 (Jackson, J., concurring).

314. *Id.* at 655.

315. 553 U.S. 723, 732–33 (2008).

316. *Id.* at 764–65.

317. *Id.* at 765.

318. *Id.*

319. The same can be said about the Court's 2026 decision striking down the tariffs that President Trump had imposed under the International Emergency Economic Powers Act. *See* Learning Resources, Inc. v. Trump, 146 S. Ct. 628 (2026). Despite complaining about the decision, the Administration accepted it.

320. Devins, *supra* note 307, at 56; *see* Levinson & Pildes, *supra* note 308, at 2351 (explaining that, under unified government, Congress is unlikely to resist executive power). Justice Jackson made this point in *Youngstown*, observing that the President "heads a political system as well as a legal system" and that "[p]arty loyalties and interests, sometimes more binding than law, extend his effective control into branches of government other than his own and he often may win, as a political leader, what he cannot command under the Constitution." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 654 (1952) (Jackson, J., concurring).

extremism within Congress, a phenomenon that has eliminated most of the institutionally minded centrists in that body.[321]

Given the anxieties of the current moment, in which the second Trump Administration is using executive power in disruptive and unprecedented ways, and in which there is increasing concern about the Administration's defiance of federal court orders, it should be easy to appreciate that checking the President is an essential function of the Supreme Court.[322] It would be not only unwise but constitutionally problematic for the current Republican Congress to strip the Court's appellate jurisdiction to hear challenges to any and all actions by the current Administration. It would also be constitutionally problematic for Congress to pack the Court with Trump loyalists after the current Court pushed back against the Administration's aggressive and unlawful uses of executive power. In the current political environment, possibilities like those hardly seem fanciful.[323]

3. Resolving Institutional Impasses Between the Political Branches.—The arguments from the constitutional text and original intent discussed above regarding the essential function of checking the political branches apply as well to the essential function of resolving conflicts between the two branches. Similar structural and consequentialist considerations are also relevant. Just as the Supreme Court is uniquely situated to resolve disputes between the states, so too it is uniquely situated to resolve disputes between Congress and the President. No other court possesses the authority, status, and institutional self-confidence of the Supreme Court. Moreover, with respect to judicial precedent,

321. Sean Sullivan, *The End of Moderates, and What It Means*, WASH. POST (Jan. 9, 2014), https://www.washingtonpost.com/news/the-fix/wp/2014/01/09/the-end-of-moderates-and-what-it-means/ [https://perma.cc/7HJF-94A2]; Drew DeSilver, *The Polarization in Today's Congress Has Roots That Go Back Decades*, PEW RSCH. CTR. (Mar. 10, 2022), https://www.pewresearch.org/short-reads/2022/03/10/the-polarization-in-todays-congress-has-roots-that-go-back-decades/ [https://perma.cc/YM7A-LC57]; Cynthia R. Farina, *Congressional Polarization: Terminal Constitutional Dysfunction?*, 115 COLUM. L. REV. 1689, 1693–94, 1698–99 (2015).

322. Shalev Gad Roisman, *President Trump in the Era of Exclusive Powers*, HARV. L. REV. BLOG (Apr. 12, 2025), https://harvardlawreview.org/blog/2025/04/president-trump-in-the-era-of-exclusive-powers/ [https://perma.cc/9MLD-AS46]; John Kruzel, *Trump's Government Shakeup May Test Supreme Court's Role as Firewall*, REUTERS (Feb. 9, 2025), https://www.reuters.com/legal/us-supreme-court-girds-trump-cases-can-it-be-an-effective-firewall-2025-02-07/ [https://perma.cc/GYF3-8CZD]; *see* Justin Jouvenal, *Trump Officials Accused of Defying 1 in 3 Judges Who Ruled Against Him*, WASH. POST (July 21, 2025), https://www.washingtonpost.com/politics/2025/07/21/trump-court-orders-defy-noncompliance-marshals-judges/ [https://perma.cc/269Y-BVVY] (reporting on a "comprehensive analysis" showing "dozens of examples of defiance, delay[,] and dishonesty").

323. Early in President Trump's second term, some House Republicans and others were proposing impeachment of federal judges who resisted Trump's actions. Carl Hulse, *Musk and Republican Lawmakers Pressure Judges with Impeachment Threats*, N.Y. TIMES (Mar. 3, 2025), https://www.nytimes.com/2025/03/01/us/politics/trump-musk-republicans-congress-judge-impeachment.html [https://perma.cc/89WQ-8R9C].

the Court's role in settling interbranch disputes was implicitly part of the rationale for the decision in *Youngstown*.

The Court emphasized its role in resolving institutional impasses in *Zivotofsky v. Clinton*.[324] The issue there was whether the executive branch was required to comply with a statute mandating that it mark "Israel" in the passports of children of U.S. citizens born in Jerusalem if the parents so desired.[325] The executive branch declined to follow that statutory requirement because doing so would contravene its longstanding policy of leaving the status of Jerusalem to be resolved through negotiations between Israel and the Palestinians.[326] Because of the sensitive nature of the dispute and the foreign affairs backdrop, both the district court and court of appeals held that the case presented a nonjusticiable political question.[327] But the Supreme Court disagreed, insisting that resolving the dispute was at the core of the judicial function.[328] Invoking its role in resolving institutional impasses between the political branches, the Court observed that "there is, of course, no exclusive commitment to the Executive of the power to determine the constitutionality of a statute."[329] On the contrary, the Court explained, "[t]he Judicial Branch appropriately exercises that authority, including in a case such as this, where the question is whether Congress or the Executive is 'aggrandizing its power at the expense of another branch.'"[330]

None of this is to suggest that the Court should actively insert itself into disputes between Congress and the executive branch. The Court's sound practice is to the contrary: It employs an array of doctrines, canons, and approaches to opinion writing that are designed to minimize such instances, including limits on legislative standing, ripeness doctrines, constitutional avoidance, and judicial minimalism.[331] It does so in part because it recognizes

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324. *See* 566 U.S. 189, 191 (2012) (holding that the Court could decide whether congressional or executive authority should prevail).

325. *Id.*

326. *Id.* at 191–92; *see* JENNIFER K. ELSEA, CONG. RSCH. SERV. R43773, *ZIVOTOFSKY V. KERRY*: THE JERUSALEM PASSPORT CASE AND ITS POTENTIAL IMPLICATIONS FOR CONGRESS'S FOREIGN AFFAIRS POWERS 3–4 (2015) (explaining the longstanding executive policy of not taking a stand on the status of Jerusalem in order to avoid affecting Israeli–Palestinian negotiations).

327. *Zivotofsky*, 566 U.S. at 193.

328. *See id.* at 195–96 (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)) (reasoning that "the only real question for the courts is whether the statute is constitutional," which is "a familiar judicial exercise").

329. *Id.* at 197.

330. *Id.* (quoting Freytag v. Comm'r, 501 U.S. 868, 878 (1991)).

331. *See, e.g.*, Raines v. Byrd, 521 U.S. 811, 814, 830 (1997) (holding that individual members of Congress lacked standing to challenge the federal Line Item Veto Act of 1996, which allowed the President to nullify certain provisions in appropriations statutes); Trump v. Mazars, 140 S. Ct. 2019, 2034–35 (2020) (holding narrowly that although congressional subpoenas for the President's information may be enforceable, the lower court did not adequately account for the significant separation of powers concerns raised by subpoenas from the House of Representatives seeking President Donald Trump's financial records).

that the political branches often have their own tools for resolving disputes, and in part because the Court may face dangers when it involves itself in politically charged controversies. It also does so in part because plaintiffs other than Congress or individual members of Congress can generally be found to enable the Court to resolve the interbranch dispute.[332] But as a structural and a consequentialist matter, there are times when the effective functioning of government requires the availability of an institution to help resolve a separation of powers dispute, and it is not clear what institution other than the Court can perform that function. An example is the Court's 1974 decision in *United States v. Nixon*,[333] which resolved a standoff between the President and a special prosecutor established pursuant to statutory authority—a decision that, because President Nixon accepted it, effectively ended his presidency and spared the country a protracted impeachment fight.[334]

4. Policing the Structure of Democratic Politics.—As the constitutional text repeatedly reflects, the United States has generally become more committed to democratic values over time by expanding access to the franchise and providing for more direct forms of participation in national elections. The Fifteenth Amendment prohibits race-based disenfranchisements,[335] and the Seventeenth Amendment provides for the direct election of Senators.[336] The Nineteenth Amendment prohibits sex-based disenfranchisements,[337] and the Twenty-Third Amendment includes the District of Columbia within the Electoral College.[338] The Twenty-fourth Amendment bans poll taxes,[339] and the Twenty-sixth Amendment prohibits age-based disenfranchisements for individuals who are at least eighteen years old.[340]

Moreover, as the country's commitment to democracy has generally increased relative to earlier periods in American history, the Supreme Court has played an increasing role in policing the structure of democratic politics and resolving conflicts over federal elections. For example, its

332. *See, e.g.*, Clinton v. New York, 524 U.S. 417, 421 (1998) (resolving the merits question left undecided in *Raines*).

333. 418 U.S. 683 (1974).

334. *Id.* at 687–88, 694. The Court ordered President Nixon to turn over White House tapes, and he complied. *Id.* at 714. The tapes revealed Nixon's involvement in the Watergate coverup and led to his resignation. *See* Rick Perlstein, *Watergate Scandal*, BRITANNICA (Dec. 5, 2025), https://www.britannica.com/event/Watergate-Scandal [https://perma.cc/CCY4-G8XK] ("[F]acing likely impeachment for his role in covering up the scandal, Nixon became the only U.S. president to resign.").

335. U.S. CONST. amend. XV.

336. U.S. CONST. amend. XVII.

337. U.S. CONST. amend. XIX.

338. U.S. CONST. amend. XXIII.

339. U.S. CONST. amend. XXIV.

340. U.S. CONST. amend. XXVI.

reapportionment decisions of the 1960s had dramatic effects on American democracy by requiring severely malapportioned state legislative chambers and the House of Representatives to comply with the principle of "one person, one vote." That principle compels all legislative districts in the country (other than statewide districts used for electing U.S. Senators) to be about the same in population size.[341] To be sure, one could object that the principle has been in place for only sixty-plus years. But it is deeply entrenched in American law, practice, and culture. The current Court, which is not shy about overruling major precedents,[342] has shown no interest in revisiting that principle.

Since 2000, candidates for federal office—and the public at large—have looked to the Supreme Court to help resolve controversies over national elections. At least since *Bush v. Gore*,[343] presidential elections have tended to be close and have involved significant litigation over how the votes are counted.[344] In 2020, the Trump campaign filed over sixty lawsuits in federal and state courts relating to that year's presidential election (and lost almost all of them).[345] The country closely watched the Supreme Court to see if it would do anything to call into question the election results, and its refusal to do so made it harder for the challengers to delegitimize those results.[346]

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341. *See* Reynolds v. Sims, 377 U.S. 533, 568 (1964) (invalidating malapportioned districts for state legislatures); Wesberry v. Sanders, 376 U.S. 1, 7, 18 (1964) (invalidating malapportioned districts for the House of Representatives); Gray v. Sanders, 372 U.S. 368, 379–81 (1963) (invalidating a system for electing representatives for a state legislative chamber on a malapportioned county basis).

342. *See, e.g.*, Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024) (overruling the forty-year-old *Chevron* principle in administrative law); Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2175 (2023) (overruling forty-four years of jurisprudence allowing certain forms of race-based affirmative action in higher education); Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2279 (2022) (overruling forty-nine years of jurisprudence protecting the abortion right). When we were writing this section, the Court was considering whether to overturn its ninety-year-old decision in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), which allowed Congress to place restrictions on the removal of certain executive officials. *See* Trump v. Slaughter, No. 25-332, 2025 WL 2692050 (2025) (mem.) (oral argument Dec. 8, 2025).

343. 531 U.S. 98 (2000).

344. *See id.* at 111 (reversing the recount in Florida, effectively deciding the presidential election); James M. Lindsay, *Election 2024: Close Presidential Elections Have Become the Norm*, COUNCIL ON FOREIGN RELS. (Feb. 23, 2024), https://www.cfr.org/blog/election-2024-close-presidential-elections-have-become-norm [https://perma.cc/X8C9-H2WZ] ("Two of the last six elections were won by the candidate who lost the popular vote . . . .").

345. *See Case Tracker*, OHIO STATE UNIV. MORITZ COLL. OF L., https://electioncases.osu.edu/case-tracker/?sortby=filing_date_desc&keywords=&status=all&state=all&topic=25 [https://perma.cc/9MJT-KU9F] (compiling cases). For discussion of the voluminous litigation after the 2020 presidential election, see generally Richard L. Hasen, *Record Election Litigation Rates in the 2020 Election: An Aberration or a Sign of Things to Come?*, 21 ELECTION L.J. 150 (2022).

346. *E.g.*, *US Supreme Court Rejects Trump-Backed Bid to Overturn Election*, BBC (Dec. 11, 2020), https://www.bbc.com/news/world-us-canada-55283024 [https://perma.cc/D2YU-RMDF].

The Court's 2000 decision in *Bush v. Gore* has been heavily criticized as partisan and unprincipled,[347] and we take no view here on the quality of the Court's reasoning in that case, let alone the motivations of particular Justices. But we do think it is important to underscore that the Court was at least able to resolve a hotly contested presidential election in a way that both sides accepted. The fact that the election was effectively settled through a Supreme Court decision is not ideal from a democratic perspective, but the decision avoided potentially chaotic political proceedings in Congress and, more importantly, avoided the settlement of the election through political violence. In other words, putting aside the question of who won the election (we may never know because the election was a statistical tie in Florida), *Bush v. Gore* produced consequences that enhanced the stability of the constitutional system.[348]

It is also worth recalling that there was a seven-to-two majority on the Court with respect to the substantive principle of the case, which was that manual recount of the punch-card ballots that had been ordered by the state courts violated equal protection because it allowed county canvassing boards in different districts to apply their own subjective standards even though it might have been practical to establish more objective standards.[349] That holding was designed to avoid partisan manipulation of the vote counting process, which is essential to democracy. The Court fractured five to four along ideological lines on the issue of remedy.[350] If the Court had only ensured a fair counting process and allowed the recount to continue, it is not clear what kind of reaction the decision would have provoked.

The Court's essential function of policing the structure of democratic politics provides a basis for criticizing the Court's 2019 decision in *Rucho v. Common Cause*.[351] The Court there held that federal constitutional challenges to partisan gerrymandering of electoral districts present nonjusticiable political questions.[352] The majority expressed concern about an "expansion of judicial authority . . . into one of the most intensely partisan aspects of

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For discussion of the role of the courts in rejecting Trump's claims of election fraud, see David F. Levi, Amelia Ashton Thorn & John Macy, *2020 Election Litigation: The Courts Held*, 105 JUDICATURE, no. 1, 2021, at 8, 9.

347. *See generally, e.g.*, BUSH V. GORE: THE QUESTION OF LEGITIMACY (Bruce Ackerman ed., 2002).

348. For a controversial defense of the Court's decision along those lines, see generally RICHARD A. POSNER, BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS (2001).

349. Bush v. Gore, 531 U.S. 98, 109 (2000) (per curiam); *id.* at 111 (Rehnquist, C.J., concurring).

350. *Id.* at 123 (Stevens, J., dissenting); *id.* at 129 (Souter, J., dissenting); *id.* at 135 (Ginsburg, J., dissenting); *id.* at 144 (Breyer, J., dissenting).

351. 139 S. Ct. 2484 (2019).

352. *Id.* at 2508.

American political life," an intervention that "would recur over and over again around the country with each new round of districting, for state as well as federal representatives."[353]

The majority's prudential concerns are understandable, but a countervailing consideration is that the Court is structurally much better positioned than legislatures to address the democratic harms caused by partisan gerrymandering. As Justice Kagan emphasized in dissent in *Rucho* (with the Court's reapportionment decisions partly in mind), "[t]his Court has long understood that it has a special responsibility to remedy violations of constitutional rights resulting from politicians' districting decisions."[354] "[T]he need for judicial review is at its most urgent in cases like these," she insisted, because "'here, politicians' incentives conflict with voters' interests, leaving citizens without any political remedy for their constitutional harms.'"[355] Since "politicians maintain themselves in office through partisan gerrymandering," she explained, "the chances for legislative reform are slight."[356] *Rucho* can thus be criticized for failing to perform one of the Court's essential functions—one anticipated by Professor John Hart Ely in developing his process-oriented theory of judicial review,[357] and one that Congress is very unlikely to perform.[358]

Policing the structure of democratic politics is the essential function of the Court that, at least in general, implicates the highest partisan stakes. It may therefore not be surprising that the contemporary Court—whose members are nominated and confirmed via a deeply polarized, partisan political process—likely performs less well with respect to this essential function than the others. Decisions such as *Bush v. Gore* and *Rucho v. Common Cause*, like decisions that have significantly curtailed the Voting Rights Act or the availability of racial gerrymandering claims,[359] divide the

353. *Id.* at 2507.

354. *Id.* at 2523 (Kagan, J., dissenting) (discussing Reynolds v. Sims, 377 U.S. 533 (1964)).

355. *Id.* (quoting Gill v. Whitford, 585 U.S. 48, 85–86 (2018) (Kagan, J., concurring)).

356. *Id.* at 2524.

357. *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

358. Some states have attempted to address partisan gerrymandering through state constitutional law, an effort that the Court has supported. *See* Moore v. Harper, 143 S. Ct. 2065, 2089–90 (2023) ("State courts retain the authority to apply state constitutional restraints when legislatures act under the power conferred upon them by the Elections Clause."); Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 822–24 (2015) (upholding an independent redistricting commission). When we were writing this section, however, President Trump had provoked a new wave of partisan gerrymandering efforts across the country. *See* Aziz Huq, *Short Cuts: Gerrymandering*, LONDON REV. BOOKS (Oct. 23, 2025), https://www.lrb.co.uk/the-paper/v47/n19/aziz-huq/short-cuts [https://perma.cc/Y2AZ-7DGG] ("At [Trump's] prompting, the Republican-dominated Texas legislature remapped the districts to be used in next year's elections . . . .").

359. Alexander v. S.C. State Conf. of the NAACP, 144 S. Ct. 1221, 1234 (2024) ("To make a showing [of racial gerrymandering,] a plaintiff must prove that the State 'subordinated' race-neutral

Justices along ideological or partisan lines. Often, although not always,[360] the Justices seem unable to rise above the partisan fray, which is what fulfilling this function requires.

C. Implications

Our expanded account of the essential functions of the Supreme Court makes it even more evident that Court-packing implicates the essential functions thesis. Like Court-stripping, packing would impair the Court's ability to ensure that federal law is supreme over state law and to ensure that there are not persistent inconsistencies in the interpretation of federal law. Both Court-packing and Court-stripping would also impair the Court's ability to vindicate basic rights; to check the political branches, especially the President; to resolve institutional conflicts between the political branches; and to police the structure of democratic politics. Court-packing would likely undermine the Court's ability to perform all those functions by damaging the Court's legitimacy and therefore its capacity to achieve enforcement of, and compliance with, its decisions. Court-stripping would directly withdraw from the Court the appellate jurisdiction to decide cases implicating the foregoing six functions. With a fuller appreciation of the Court's essential functions in view, it is unsurprising that both Court-packing and Court-stripping have been regarded as so extreme that they have been essentially nonexistent since the late 1860s.

Beyond Court-packing and Court-stripping, there are other congressional measures that are likely incompatible with the essential functions of the Court. For example, canceling a term of the Court would make it literally impossible for the Court to do its work, and if Congress has the constitutional authority to cancel one term, then it presumably has the authority to cancel several of them. True, in the Judiciary Act of 1802,[361] Congress effectively canceled the 1802 term of the Court to postpone a constitutional challenge to the repeal of the Judiciary Act of 1801.[362] But that aggressive move likely counts as negative nonjudicial precedent; Congress

districting criteria . . . ."); Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2350 (2021) (holding that Arizona's out-of-precinct voting rule and its ballot-collection law did not violate Section Two of the Voting Rights Act and that Arizona's redistricting map was not enacted with a racially discriminatory motive); Abbott v. Perez, 138 S. Ct. 2305, 2313–14 (2018); Shelby County v. Holder, 570 U.S. 529, 557 (2013) (invalidating Section 4(b) of the Voting Rights Act). In *Louisiana v. Callais*, No. 24-109, the Court appears poised to further restrict the Voting Rights Act and divide along partisan lines.

360. Relatively recent decisions in the areas of voting and elections that did not divide the Justices strictly along ideological or partisan lines include *Moore v. Harper*, 143 S. Ct. 2065, 2073 (2023); *Chiafalo v. Washington*, 140 S. Ct. 2316, 2319 (2020); *Cooper v. Harris*, 581 U.S. 285, 290 (2017); *Evenwel v. Abbott*, 578 U.S. 54, 55 (2016); and *Ariz. State Legis.*, 576 U.S. at 790.

361. Act of Apr. 29, 1802, ch. 31, 2 Stat. 156 (amending the U.S. judicial system).

362. Act of Mar. 8, 1802, ch. 8, 2 Stat. 132 (repealing acts related to the judiciary).

never again canceled a Supreme Court term.[363] More generally, there are many historical practices concerning structural issues, not just individual rights, that the American constitutional community has learned from and come to reject. To consider another example, even though John Marshall was serving as Secretary of State at the time that William Marbury's commission was to be delivered, Marshall still sat on the case of *Marbury v. Madison*.[364] That sort of conflict of interest would not be accepted today. Also unacceptable today would be the re-creation of another part of the Judiciary Act of 1802, which reflected the Jeffersonian position that Congress could constitutionally terminate the tenure of Article III judges by abolishing their courts.[365] Those who invoke early historical practice as authority for Court-packing today almost certainly would not invoke the other actions discussed in this paragraph as authority for similar actions.

Congress could also render the Court nonfunctional by refusing to fund it. Article III requires Congress to pay the Justices' full salaries,[366] but it does not require Congress to give the Justices administrative support, law clerks, computers and computer support staff, a modern research library with first-rate reference librarians, or—for that matter—a building with functioning heat, air conditioning, and plumbing. But if Congress were to take away those things (and others) from the Justices, the damage to the Court's functioning would be extreme. Defunding the Court is inconsistent with the Court's ability to perform its essential functions. Accordingly, there is an implicit structural limit on Congress's authority to declare financial war on the Court. One does not require a piece of constitutional text to arrive at that constitutional conclusion, even if formalist interpreters might feel more comfortable embedding it in a broad reading of the textual provision protecting the Justices against salary reductions.[367]

But what if Congress did not simply take away the above material support? What if, instead, Congress conditioned it on the Court's deciding cases in a particular way? This Article's expanded understanding of the Court's essential functions makes clear that Congress cannot constitutionally do that either. The Court's essential functions include protecting rights; checking each political branch, especially the President; and resolving impasses between them. The Court cannot perform those functions if

363. *See supra* notes 73, 157–59, and accompanying text.

364. *See, e.g.*, FARBER & SIEGEL, *supra* note 289, at 20–21 (discussing the background of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)).

365. *See* Bradley & Siegel, *supra* note 160, at 49 (discussing that episode).

366. U.S. CONST. art. III, § 1 ("The Judges . . . shall . . . receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.").

367. Total defunding is obviously an extreme case. Structural analysis of less extreme funding withdrawals would require balancing congressional control over appropriations against the degree of damage to the Court's ability to function. We cannot pursue particular line-drawing exercises here. Structural reasoning makes clear, however, that there is a line to be drawn.

Congress (alone or with the President) exercises significant power over the substance of the Court's decisionmaking.[368] For similar reasons, the House of Representatives almost certainly cannot constitutionally impeach Justices based on substantive disagreements with their votes or opinions, and the Senate cannot constitutionally convict them based on such disagreements.[369]

Turning from Congress to the President, it is clear that presidential defiance of Supreme Court orders or decisions ("Court-defying"), *in almost all plausible circumstances*, would be antithetical to the Court's ability to execute its essential functions. For example, the Court cannot check the President if the President successfully defies the Court. Similarly, the Court cannot settle disagreements over presidential elections if the incumbent presidential candidate refuses to accept the Court's resolution of the dispute—and the U.S. military ultimately sides with the sitting President. We have included the italicized qualification in the above formulation for reasons of scholarly accuracy and integrity, even though there is reason to fear that the current Administration (or some future one) would seek to exploit the qualification. In including it, we have in mind a Supreme Court decision that plainly had no basis in law in the judgment of any reasonable interpreter or that would be radically destabilizing if implemented.[370]

D. Other Checks on the Court

A prominent objection to structural constitutional reasoning is that it permits excessive interpretive discretion, including by enabling interpreters to emphasize the proper functioning of one governmental institution at the expense of another. In the context of the essential functions thesis, a key concern (as anticipated in the Introduction) is that defenders of the thesis will seek to overprotect the Court from threats to its functioning posed by the political branches while simultaneously disabling the political branches from

368. More precisely, Congress cannot permissibly pressure the Court to apply pre-existing law in a pending case in a particular way. *See* United States v. Klein, 80 U.S. (13 Wall.) 128, 146 (1871) (suggesting that Congress cannot "prescribe a rule for the decision of a cause in a particular way"). But Congress enjoys broad authority to change non-constitutional law in a pending case because it possesses federal legislative power. Bank Markazi v. Peterson, 578 U.S. 212, 215 (2016).

369. A majority vote in the House is required to impeach a Justice. *See* U.S. CONST. art. I, § 2, cl. 5 (giving the House the "sole Power of Impeachment" without any requirement for a minimum vote). A two-thirds vote in the Senate is required to convict. U.S. CONST. art. I, § 3, cl. 6.

370. Professor William Baude has argued that the President can ignore a judgment if the issuing court lacked jurisdiction over the case. William Baude, *The Judgment Power*, 96 GEO. L.J. 1807, 1834 (2008). A key question, however, is who gets to decide whether the issuing court lacked jurisdiction. The answer, in our view, is the appellate courts, including the Supreme Court, not the President. Professor Baude emphasizes the problem of courts without jurisdiction declaring that they possess it. *Id.* at 1846. He ignores the potentially more serious problem of a President who cynically denies the existence of jurisdiction where it plainly exists. In our view, the federal judicial system is likely to decide jurisdictional questions more accurately than one possibly opportunistic politician who wields the power of the modern presidency.

responding effectively when their functioning is threatened by a powerful, aggressive, and countermajoritarian Court. Recall that Professor Black rejected the essential functions thesis on structural grounds, deeming congressional power to strip the Court's appellate jurisdiction "the rock on which rests the legitimacy of the judicial work in a democracy."[371] Professor Black's position derived in part from his observations that "[j]udicial power can be effective, even in the largest matters; warnings of unacceptable political turmoil, in consequence of judicial activity, are quite unreliable; and many judges greatly like power, and eagerly use it."[372] Professor Black believed that only plenary congressional control over the Court's appellate jurisdiction could reconcile judicial review with majoritarian democracy.

We are skeptical that the most sensible way to reconcile judicial review with democratic ideals is through Court-stripping—or, for that matter, Court-packing—both of which are checks-and-balances equivalents of using nuclear weapons and so will rarely be on the table politically. Even so, Professor Black's position encourages consideration of a vitally important question, especially for those commentators inclined to perceive a structural constitutional limitation on the use of Court-stripping or Court-packing: In what ways can the political branches permissibly check the Court without running afoul of the essential functions thesis?

One possibility is the imposition of an ethics code on the Justices by Congress (beyond what the Court has imposed on itself).[373] Such a code could come with or without an identified enforcement mechanism in the form of a disciplinary framework.[374] If the code and the disciplinary framework were largely similar to the ones that bind all other Article III judges, and if they were equally applicable to all the Justices regardless of the party affiliation of the President who appointed them, it is difficult to see how the code and framework would threaten any essential function of the Court—especially if the discipline would not take the form of disqualifying Justices from voting at either the certiorari stage or the merits stage (except where recusal was plainly required). The Court would remain able to decide almost all questions of federal law, and the substantive reasonableness and equal applicability of the code provisions and disciplinary framework would protect against any attempt to politicize the Court's decisionmaking and

371. Black, *The Presidency*, *supra* note 40, at 846.

372. BLACK, DECISION ACCORDING TO LAW, *supra* note 40, at 17.

373. *See* CODE OF CONDUCT FOR JUSTICES OF THE SUP. CT. OF THE UNITED STATES 1 (Nov. 13, 2023), https://www.supremecourt.gov/about/Code-of-Conduct-for-Justices_November_13_2023.pdf [https://perma.cc/Z6ZG-2LZ6] ("The undersigned Justices are promulgating this Code . . . to set out . . . ethics rules and principles that guide the conduct of the Members of the Court.").

374. For discussion of legal and practical considerations pertinent to that proposal, see BIDEN COMM'N REP., *supra* note 19, at 216–24.

thereby undermine its legitimacy and functioning. As Professor Amanda Frost has noted, Congress already imposes obligations on the Court, such as the judicial oath of office,[375] that are similar to a code of conduct.[376] Depending on the details of the code provisions and disciplinary framework, there might be a separation-of-powers objection to such a statute other than an essential functions objection, but it is not obvious what that would be if Congress vested the enforcement mechanism in the Article III judiciary.

Another structural reform that would not appear to threaten any essential function of the Court is term limits for the Justices.[377] Again, the Court could still decide nearly all questions of federal law, and there is broad ideological agreement on the virtues of term limits in part because the reform would not favor one political party over the other, at least if the reform did not apply to the current Justices.[378] Moreover, if Justices left and joined the Court in a predictable fashion, the Court would be less likely to be out of step with the country and the outcomes of presidential and congressional elections. The current regime, based on the happenstance of when one Justice or another becomes ill and passes away, can result in one President's appointing no Justices in a four-year term and another President's appointing three or more Justices in a four-year term. It is difficult to identify any structural purpose that is served by such a random distribution of political power to make appointments to the Court.

To be sure, any major structural reform can have unintended negative consequences. For example, term limits could raise the specter of would-be Supreme Court nominees campaigning *qua* nominees for their would-be benefactor presidential candidates, and term limits could work badly if the Senate refused to confirm nominees.[379] Term limits might also increase doctrinal instability and gamesmanship in timing the Court's consideration of cases as Justices came and went more often, and term limits could generate questions about the appearance or reality of impropriety as Justices neared the end of their terms and became potentially interested in their next "gig."[380]

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375. *See* 28 U.S.C. § 453 (requiring Justices to swear or affirm that they will "administer justice without respect to persons, and do equal right to the poor and to the rich, and . . . faithfully and impartially discharge and perform all the duties incumbent upon [them] . . . under the Constitution and laws of the United States").

376. Amanda Frost, *Judicial Ethics and Supreme Court Exceptionalism*, 26 GEO. J. LEGAL ETHICS 443, 460–61 (2013).

377. For discussion of various considerations relevant to that proposal, see BIDEN COMM'N REP., *supra* note 19, at 111–51.

378. *See, e.g.*, *id.* at 111 ("Among the proposals for reforming the Supreme Court, non-renewable limited terms—or 'term limits'—for Supreme Court Justices have enjoyed considerable, bipartisan support.").

379. For suggestions of fallback mechanisms intended to avoid repeated confirmation impasses, see *id.* at 140–43.

380. For discussion of potential difficulties associated with imposing term limits on the Justices, see *id.* at 117–21.

Such concerns, among others, would need to be addressed by any serious reform proposal. In addition, Article III's "good Behaviour" language might mean that term limits could lawfully be imposed only through a constitutional amendment, not a statute.[381] But a term limits proposal could be structured so that it would not run afoul of the essential functions thesis, and it counts in favor of this reform proposal that it would not.

For example, a proposed constitutional amendment could attend to the risk that term limits would delegitimate the Court by barring anyone engaged in election-related activities during a presidential election cycle from serving on the Court for the next eight years. The proposal could also prohibit term-limited Justices from obtaining various categories of employment if they chose to leave the judiciary. By contrast, a Court-packing plan could not be structured to avoid the substantial risk of delegitimating the Court.

The foregoing discussion of term limits mostly applies as well to the imposition of a mandatory retirement age for the Justices. Relative to a mandatory retirement age, term limits have the advantage of guaranteeing regular appointments to the Court and of not incentivizing either political party to nominate relatively young lawyers, who may lack the professional seasoning and life experience of older lawyers.[382] For example, if the mandatory retirement age were seventy-five, a thirty-five-year-old appointee could serve for forty years, whereas a fifty-five-year-old appointee could serve for, at most, half that long. But like term limits, a mandatory retirement age would not implicate the concerns of the essential functions thesis.

It would also be consistent with the essential functions thesis for Congress to again require the Court to decide more mandatory appeals (as long as Congress also provided the Court with sufficient resources to manage the increased caseload).[383] With passage of the so-called Judges' Bill of 1925, the Supreme Court was, for the first time, given substantial discretion over most of its docket.[384] By using the writ of certiorari, the Court could now decide which cases it wanted to hear. The Court thereby became less of a "dispute resolution" tribunal (that is, a body that resolves whatever disputes between parties happen to arise and come before it), and more of a "law declaration" tribunal (that is, an apex court that helps to govern the constitutional system by developing the law and settling important legal

381. *See* U.S. CONST. art. III, § 1 (mandating that Judges of the Supreme Court "hold their Offices during good Behaviour").

382. BIDEN COMM'N REP., *supra* note 19, at 116–17 (discussing the perceived advantages of term limits over a mandatory retirement age).

383. For a proposal along those lines, see Stephen I. Vladeck, *Fixing the Supreme Court Through Its Docket*, 105 B.U. L. REV. 1607, 1612 (2025).

384. *See* Judiciary Act of 1925, Pub. L. No. 68-415, 43 Stat. 936 (giving the Supreme Court the authority to grant a petition for a writ of certiorari).

questions for the benefit of the public).[385] As Professor Ed Hartnett has written, on the day Congress rewarded the vigorous advocacy of Chief Justice William Howard Taft and passed the Judges' Bill, "the modern Supreme Court was born."[386]

The change in the Court's nature wrought by the Judges' Bill has proven controversial. For example, Professor Robert Post writes that "[t]hese developments have set the scene for an intractable crisis of the Court's legitimacy."[387] With the Court's exercise (or not) of judicial review no longer justifiable based only on the Court's need to resolve disputes before it, "[t]he question," Professor Post observes, "is how the Supreme Court, as a democratically unaccountable institution, can properly exercise, and be seen as exercising, essentially free-standing lawmaking authority."[388]

Fortunately, our defense of the essential functions thesis does not require us to choose between competing conceptions of the Court. Even if Congress were to return to more of a dispute-resolution view of the Court by requiring it to decide many more mandatory appeals than it currently does, the Court would still be able to maintain the supremacy and uniformity of federal law, protect rights, provide a check against the political branches, resolve institutional impasses between them, police the structure of democratic politics, and resolve disputes over elections. For example, among all the cases falling within its mandatory appellate jurisdiction, the Court could prioritize the expeditious disposition of cases implicating its essential functions over the resolution of disputes not implicating those functions—even if it ultimately had to decide all of them. To repeat, however, this analysis assumes that Congress would not swamp the Court with mandatory appeals (and deny the Court increased resources) to such an extent that the Court would be unable to provide sufficient time and attention to the cases that would rise to the top of the priority list according to the essential functions we identify.

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385. *See* Henry Paul Monaghan, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665, 669–72, 683, 730 (2012) (discussing the dispute-resolution and law-declaration models of adjudication, observing that the latter best describes the role of the modern Supreme Court, and expressing concerns about the Court's assumption of that role).

386. Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643, 1644–45 (2000).

387. Robert Post, The Supreme Court's Crisis of Authority: Law, Politics, and the Judiciary Act of 1925, at 9 (Jan. 20, 2025) (unpublished manuscript), https://ssrn.com/abstract=5075524 [https://perma.cc/ALZ6-D2QK].

388. *Id.*; *see* Hartnett, *supra* note 386, at 1713–15, 1718, 1726, 1728 (questioning on various grounds the scope of discretionary authority that the Court has exercised using its certiorari power); *see also* Monaghan, *supra* note 385, at 730 (questioning the defensibility of the Court's seeking "to establish an unfettered prerogative over what issues to decide, particularly by adding questions and amici to defend judgments," because "[t]he Court's newly acquired freedom allows it—not the litigants—to shape the disputes before it").

Advocates of Court-stripping or Court-packing may reasonably think that the foregoing checks on the Court are not sufficiently powerful or politically available. It is worth remembering, however, that stripping and packing have not generally been serious possibilities in U.S. history, and yet the Court has not been unconstrained. There are still constraints on the Justices, most notably the danger that the Court will lose its public legitimacy and be successfully disregarded by powerful political actors. As Hamilton observed, the Court possesses neither the sword nor the purse,[389] and even today the institution is not as powerful as many people assume it is. Indeed, the second Trump Administration appears to register—and to be trying to exploit—the Court's institutional vulnerability.[390] There are also important limits internal to adjudication—for example, the need to wait for controversies to develop and generate litigation, the justiciability requirements, the expectation that there will be a published explanation for a decision, and the doctrine of stare decisis, which the Court has arguably diluted but has not simply abandoned. Moreover, the Court's majority voting role often requires compromise, even on the current Court. Finally, if the Court is out of step for an extended period, the political party that did not appoint a Court majority is more likely to win national elections and thereby replace the Justices over time. That was FDR's ultimate answer to a recalcitrant Court.[391]

Conclusion

As Professor Charles Black bemoaned back in 1969, there has been too little reflection, by both the Supreme Court and scholars, on the nature and legitimacy of structural constitutional reasoning. At times, that reasoning has been taken for granted, even when observers have disagreed about its implications. Other times, its possibilities have been ignored. The need for reflection has only grown in recent years, as the Court has come to rely more

389. THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("[The judiciary] may truly be said to have neither FORCE nor WILL but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.").

390. *Compare* Noem v. Abrego Garcia, 145 S. Ct. 1017, 1018 (2025) (requiring the government to facilitate the return of an individual who was unlawfully removed to El Salvador), *with* Fritz Farrow, *Trump Says "I Could" Get Abrego Garcia Back from El Salvador*, ABC NEWS (Apr. 29, 2025), https://abcnews.go.com/Politics/trump-abrego-garcia-back-el-salvador/story?id=121298276 [https://perma.cc/5HLW-95C6] (reporting on Trump saying that he could secure Kilmar Abrego Garcia's return if he so chose but that he did not want to do so). After insisting that it was unable to bring this individual back to the United States, the government did so in June 2025 and sought to prosecute him. Sarah N. Lynch & Luc Cohen, *Abrego Garcia, Mistakenly Deported, Is Returned to US to Face Migrant-Smuggling Charges*, REUTERS (June 7, 2025), https://www.reuters.com/world/us/abrego-garcia-way-us-face-criminal-charges-abc-news-reports-2025-06-06 [https://perma.cc/2Z2G-2PE2].

391. *See* Bradley & Siegel, *supra* note 73, at 283 n.163 (observing that FDR appointed eight Justices using the regular appointments process).

openly on structural arguments while also expressing fidelity to relatively strict versions of originalism and textualism that make the legitimacy of structural arguments even less certain.

Debates over Supreme Court reform, aired extensively during the last few years and likely to resurface before long, are a good place to begin such reflection. One type of reform—Court-stripping—has long been the subject of a methodologically pluralist debate that includes an important strain of structural constitutional argumentation. But another type of reform—Court-packing—has to date largely escaped scrutiny from a structural perspective. In this Article, we have attempted to bring the essential functions thesis to that debate, while simultaneously staking out a broader conception of that thesis than currently exists in the literature.

In revisiting the essential functions thesis, our main goal has not been to argue for or against the constitutionality of either Court-stripping or Court-packing. We personally sympathize with the essential functions thesis and think that it is relevant to both debates. As for the constitutionality of Court-packing, we tend to think that there is not one, all-or-nothing answer to that constitutional question. We can imagine truly extraordinary situations in which Court-packing would be constitutionally permissible, and we can imagine other situations in which Court-packing would be unconstitutional on structural, essential functions grounds. We recognize, however, that other interpreters will disagree with us on the ultimate question of constitutional authority.

Regardless of one's views on that question, we hope to have persuaded readers of the need to give more attention to structural reasoning. Because the constitutional text does not answer many important constitutional questions, and because the governmental institutions and mechanisms established or recognized by the Constitution must function effectively if the Constitution itself is to succeed in accomplishing its purposes, structural reasoning is indispensable. The fact that structural arguments will sometimes compete with other modalities of interpretation in constitutional disputes is no indictment of such reasoning; that is true of every modality. Nor is it an indictment that there will sometimes be competing structural arguments in constitutional debates. Rather, it just means that, like other aspects of our interpretive practice, it requires participants to do the hard work of assessing the relative weight of the arguments. Such an assessment inevitably requires some contextual judgment. Or, to put it more concisely, it requires judging.