



NYU JOURNAL OF LAW & LIBERTY

“NINE, OF COURSE”:

A DIALOGUE ON CONGRESSIONAL POWER TO SET BY STATUTE THE NUMBER OF JUSTICES ON THE SUPREME COURT

Peter Nicolas*

Introduction

Conventional wisdom seems to hold that Congress has the power to set, by statute, the number of justices on the United States Supreme Court. But what if conventional wisdom is wrong? In this Dialogue,¹ I challenge the conventional wisdom, hypothesizing that

* Professor, University of Washington School of Law. The author wishes to thank Greg Murphy and Cheryl Nyberg for their extremely valuable research assistance, as well as to Professors William Andersen, Helen Anderson, Steve Calandrillo, Tom Cobb, Clark Lombardi, Sean O'Connor, Seth Tillman and the editors of the NYU JOURNAL OF LAW & LIBERTY for their valuable feedback and suggestions.

¹ The format of this article is inspired by Professor Henry Hart's famous *Dialogue* addressing Congress' power under the Exceptions Clause of Article III. See Henry M.

the United States Constitution does not give Congress the power to enact such a statute. Under this hypothesis, the number of justices on the Supreme Court at any given time is to be determined solely by the President and the individual members of the United States Senate in exercising their respective powers of nominating justices and consenting to their appointment. If this hypothesis is correct, the number of justices on the Supreme Court could be increased or decreased without the House and Senate voting to amend the existing statute that purports to set the number of justices on the Supreme Court at nine. Rather, the number of justices on the Court at any time would vary depending on how many individuals, if any, the President chooses to nominate and how many of those, if any, members of the Senate opt to confirm.

Day I. Background and Hypothesis

Q. How many justices are there on the United States Supreme Court?

A. Nine, of course. The chief justice and eight associate justices.

Q. Yes, but why nine, and not, say, eight, ten, or one hundred?

A. Assuming that all of the justices participate in a case, having an odd number of justices eliminates the possibility that the court will be split evenly and thus will be unable to agree on how to dispose of a case: that makes nine superior to eight or ten. And having one hundred justices would be unwieldy: do you realize how long the bench would need to be?

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

Q. Perhaps my question was not sufficiently clear. Those are all good *policy* arguments in support of why there should only be nine justices on the Supreme Court. But what *legal* constraints are there?

A. You're right. Your question was not very clear. With respect to your revised question, I don't believe that the Constitution specifies the number of justices, does it?

Q. No, it doesn't. Article III states that there "shall be . . . one supreme Court,"² without saying anything about the number of justices on it. And Article II provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court."³ During the Constitutional Convention, Alexander Hamilton initially proposed that the Constitution provide that the Supreme Court consist of between six and twelve justices, and he subsequently revised his proposal to fix the number of justices on the Court at twelve.⁴ But Hamilton's apparent reason for fixing the number of justices on the Supreme Court at a particular number had to do with the fact that under his proposed Constitution, the justices of the Supreme Court, together with the chief judges of the states, were to constitute the court for trying impeachments of federal officials.⁵ Setting the number of justices on the Supreme Court was thus important to make certain that there was an appropriate balance between federal and state judges on the impeachment court.⁶ Later drafts of the Constitution, includ-

² U.S. CONST. art. III, § 1.

³ U.S. CONST. art. II, § 2, cl. 2.

⁴ See 2 WORKS OF ALEXANDER HAMILTON 394, 395 (John C. Hamilton ed. 1851); 1 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 254 (Merrill Jensen ed. 1976).

⁵ See 3 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 618 (Max Farrand ed. 1911).

⁶ *Id.* ("Finally, in the ninth article, the various texts differ markedly in respect to the composition of the court for trying impeachments. Hamilton's copy provides that they shall be tried by a court consisting 'of the judges of the Federal Supreme Court, chief or senior judge of the superior court of law of each State.' The others make no mention of the judges of the Federal Supreme Court. Once they were introduced, it is easy to see why the blank in Article 7 should be filled with the word twelve, lest in

ing that ultimately adopted by Congress, shifted the role of trying impeachments to the Senate,⁷ resulting in the disappearance of the concern with the specific number of justices on the Supreme Court from the delegates' agenda.

A. But even if the Constitution is silent on that point, I believe that the judicial code has a provision that specifies the number of justices on the Supreme Court. Let me see...here it is, Chapter 1, section 1: "The Supreme Court of the United States shall consist of a Chief Justice of the United States and eight associate justices, any six of whom shall constitute a quorum."⁸ So, I guess that answers your question.

Q. Perhaps it does, and perhaps it doesn't. I'm not entirely convinced that Congress has the constitutional authority to enact the statute that you just cited.

A. Surely you jest! That provision has been around in some form or another since the First Judiciary Act, which specified that there would be six justices on the Supreme Court.⁹ On subsequent occasions, the number of justices has been set at anywhere from five to ten through amendments to that provision, but it has always been accomplished through congressional action to amend the statute.¹⁰ Indeed, when President Franklin D. Roosevelt sought to insti-

impeachments of Federal officers they be quite outnumbered by the thirteen chief justices of the States, or so many of them as could attend.").

⁷ U.S. CONST. art. I, §3, cl. 6.

⁸ 28 U.S.C. § 1.

⁹ Judiciary Act of 1789, ch. 20, § 1, 1 Stat. 73, 73 (Sept. 24, 1789) ("[T]he supreme court of the United States shall consist of a chief justice and five associate justices . . .").

¹⁰ In 1801, Congress amended the statute to reduce the number of justices to five, to be accomplished by not filling the next vacancy on the Court. Act of Feb. 13, 1801, § 3, 2 Stat. 89. That provision was repealed the following year, thus returning the Court's membership to six. Act of March 8, 1802, ch. 8, 2 Stat. 132. In 1807, the Court's membership was expanded to seven members, Act of Feb. 24, 1807, § 5, 2 Stat. 420, 421, and in 1837, its membership was increased again to nine members. Act of March 3, 1837, ch. 34, 5 Stat. 176. Its membership was increased to ten members in 1863, Act of March 3, 1863, ch. 100, 12 Stat. 794, reduced to seven members in 1866,

tute his famous court-packing plan, he felt compelled to persuade Congress to amend the provision by having an amendment to the provision introduced in Congress.¹¹ Isn't the statute's pedigree back to the First Judiciary Act, which was drafted by a number of people who were also involved in the drafting of the Constitution itself, sufficient proof of its constitutionality?¹²

Q. Hardly. The Supreme Court has struck down a number of provisions of the First Judiciary Act, on the ground that Congress lacked the constitutional authority to enact them.¹³ "Precedents, however early, consistent, or numerous, are simply not conclusive of constitutional questions."¹⁴ That nobody has thought to challenge the statute's constitutionality until now does not insulate it from scrutiny. If you are to persuade me of the provision's constitutionality, you must cite more than long-standing acquiescence.

A. I would very much like to do just that, but I need some time to gather my thoughts. You have obviously had much more time to contemplate this matter than I have. Let's reconvene tomorrow.

Q. Fair enough.

Act of July 23, 1866, ch. 210, 14 Stat. 209, and then returned to nine members in 1869, Act of April 10, 1869, ch. 22, 16 Stat. 44, where it has remained ever since.

¹¹ S. 1392, 75th Cong., § 1 (1937) (authorizing up to a total of fifteen justices on the supreme court).

¹² See *Bowsher v. Synar*, 478 U.S. 714, 724 n.3 (1986) (noting that the First Congress included 20 members who had been delegates to the Philadelphia Convention); *Marsh v. Chambers*, 463 U.S. 783, 790 (1983) (quoting *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 297 (1888)) ("An act 'passed by the first Congress assembled under the Constitution, many of whose members had taken part in framing that instrument, ... is contemporaneous and weighty evidence of its true meaning.'").

¹³ See *Hodgson and Thompson v. Bowerbank*, 9 U.S. (5 Cranch) 303, 303-04 (1809) (striking down Section 11 of the Judiciary Act of 1789, which gave the circuit courts jurisdiction over all suits in which an alien is a party, to the extent that it authorized jurisdiction over disputes between aliens); *Marbury v. Madison*, 5 U.S. 137, 173-180 (1803) (striking down that portion of Section 13 of the Judiciary Act of 1789 that gave the Supreme Court original jurisdiction to issue writs of mandamus).

¹⁴ Vasan Kesavan & Michael Stokes Paulsen, 91 *GEO. L.J.* 1113, 1169 (2003).

A. But before we break for today, I have one question for you. If you are correct, and Congress lacks the power to enact such a statute, what limits the number of justices on the Supreme Court at any given time?

Q. The actions of the only actors who are given a role in the Constitution with respect to the appointment of justices to the Supreme Court, the President and the Senate. If the President believes that there are a sufficient number of justices on the Supreme Court, he need not nominate any additional ones. And even if he does choose to nominate additional justices, members of the Senate need not confirm them if they conclude that there are already a sufficient number of justices on the Court.

A. So under your theory, President Roosevelt...

Q. Correct, he did not need to persuade the House and Senate to amend the judicial code. He only needed a Senate majority that was willing to confirm his additional nominees....

A. Do you realize what the consequences might be if you're correct?

Q. I am not a consequentialist.

A. Well, I am, which gives me a strong incentive to prove you wrong. See you tomorrow.

Day II. The Necessary and Proper Clause

Q. Do you come bearing citations?

A. I do, both to the Constitution and to a Supreme Court decision that is directly on point!

Q. Do tell.

A. Well, it's so obvious I don't know why I didn't think of it yesterday. The Necessary and Proper Clause gives Congress the authority "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."¹⁵ Then there is this great quote from Justice Iredell in *Chisholm v. Georgia*, where, after quoting the Necessary and Proper Clause, he writes, with reference to the Supreme Court, "None will deny, that an act of Legislation is necessary to say, at least of what number the Judges are to consist; the President with the consent of the Senate could not nominate a number at their discretion."¹⁶ Justice Iredell rather directly refutes your hypothesis.

Q. Not so fast. Justice Iredell was writing as the lone dissenter in *Chisholm*, was he not?

A. Yes, but his was no ordinary dissent. His reading of the Constitution was subsequently vindicated by swift action by Congress and the states in proposing and ratifying the Eleventh Amendment.¹⁷ Thus, his opinion should be given special deference.¹⁸

Q. I'm not persuaded that a dissenting opinion interpreting the Constitution is entitled to "special deference" simply because Congress later opted to amend the Constitution to conform to that reading of it, but even granting you that, I don't believe that the "special deference" would extend to the portion of the opinion that you quoted.

¹⁵ U.S. CONST. art. I, § 8, cl. 18.

¹⁶ 2 U.S. 419, 432-33 (1793) (Iredell, J., dissenting).

¹⁷ U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.")

¹⁸ See, e.g., *Alden v. Maine*, 527 U.S. 706, 715-734 (1999).

A. Why is that?

Q. The language that you quoted does not come from that portion of the opinion in which Justice Iredell expounds his views on whether the *Constitution* permits federal courts to exercise jurisdiction over a suit for money damages brought by a citizen of one state against a non-consenting state, the portion of his dissenting opinion “vindicated” by the Eleventh Amendment. Rather, it is from that portion of his opinion in which he interprets a *jurisdictional statute*, Section 13 of the Judiciary Act,¹⁹ as not granting the Supreme Court original jurisdiction over such suits.

A. I don’t believe that I am familiar with that. Could you please elaborate?

Q. Although much of Justice Iredell’s dissenting opinion in *Chisholm* ruminated on the question whether the Constitution permitted the federal government to subject the states to such suits, he ultimately concluded that it was unnecessary for the Court to reach the constitutional issue because he interpreted the Judiciary Act of 1789 as not granting the Supreme Court original jurisdiction over such disputes.²⁰ This holding, of course, presupposes that Congress has the power to regulate by statute the scope of the Supreme Court’s original jurisdiction. Justice Iredell does just that, explicitly

¹⁹ In pertinent part, Section 13 of the Judiciary Act of 1789 provided that “the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a State is a party, except between a State and its citizens; and except also, between a State and citizens of other States, or aliens, in which latter case it shall have original but not exclusive jurisdiction.”

²⁰ *Chisholm v. Georgia*, 2 U.S. (Dall.) 419, at 449 (1793) (“[N]o Judge should rashly commit himself upon important questions, which it is unnecessary for him to decide. My opinion being, that even if the Constitution would admit of the exercise of such a power, a new law is necessary for the purpose, since no part of the existing law applies, this alone is sufficient to justify my determination in the present case. So much, however, has been said on the Constitution, that it may not be improper to intimate that my present opinion is strongly against any construction of it, which will admit, under any circumstances, a compulsive suit against a State for the recovery of money.”).

rejecting an argument by the Attorney-General that the original jurisdiction of the Supreme Court is self-executing. His statement that Congress has the power to set by statute the number of Justices that sit on the Supreme Court is part of his larger argument that nothing about the Supreme Court is self-executing, and thus that Congress not only has the power to decide the number of Justices that will sit on the court, but also what their jurisdiction is to be.²¹

A. And why is that relevant?

Q. Because whatever merit there may be to that portion of Justice Iredell's opinion in which he ruminates on the question whether the Constitution permits the federal government to subject the states to such suits, we know that his belief that the original jurisdiction of the Supreme Court is not self-executing is absolutely incorrect. Article III provides that "[i]n all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court *shall* have original Jurisdiction."²² Since *Chisholm* was decided, the Supreme Court has re-

²¹ *Id.* at 432-33 ("The Attorney-General has indeed suggested another construction....'That the moment a Supreme Court is formed, it is to exercise all the judicial power vested in it by the Constitution, by its own authority, whether the Legislature has prescribed methods of doing so, or not.' My conception of the Constitution is entirely different. I conceive, that all the Courts of the United States must receive, not merely their organization as to the number of Judges of which they are to consist; but all their authority, as to the manner of their proceeding, from the Legislature only. This appears to me to be one of those cases, with many others, in which an article of the Constitution cannot be effectuated without the intervention of the Legislative authority. There being many such, at the end of the special enumeration of the powers of Congress in the Constitution, is this general one: 'To make all laws which shall be necessary and proper for carrying into execution the foregoing Powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof.' None will deny, that an act of Legislation is necessary to say, at least of what number the Judges are to consist; the President with the consent of the Senate could not nominate a number at their discretion. The Constitution intended this article so far at least to be the subject of a Legislative act. Having a right thus to establish the Court, and it being capable of being established in no other manner, I conceive it necessary follows, that they are also to direct the manner of its proceedings.")

²² U.S. CONST. art. III, § 2, cl. 2. (emphasis added).

peatedly held that this provision is self-executing, and that Congress lacks the power by statute to either add to or subtract from its original jurisdiction as defined by Article III.²³ Justice Iredell thus erred in not directly deciding the question whether this provision of the Constitution gave the Supreme Court original jurisdiction over suits brought against non-consenting states. His statement regarding the power of Congress to set by statute the number of Justices on the Supreme Court is thus tainted by this error.

²³ *California v. Arizona*, 440 U.S. 59, 65-66 (1979) (“The original jurisdiction of the Supreme Court is conferred not by the Congress but by the Constitution itself. This jurisdiction is self-executing, and needs no legislative implementation.... The constitutional grant to this Court of original jurisdiction is limited to cases involving the States and the envoys of foreign nations. The Framers seem to have been concerned with matching the dignity of the parties to the status of the court.... Elimination of this Court’s original jurisdiction would require those sovereign parties to go to another court, in derogation of this constitutional purpose. Congress has broad powers over the jurisdiction of the federal courts...but it is extremely doubtful that they include the power to limit in this manner the original jurisdiction conferred upon this Court by the Constitution.”); *Kentucky v. Dennison*, 65 U.S. (24 How.) 66, 96 (1860) (citing *Chisholm*, 2 U.S. at 419) (“Mr. Chief Justice Jay, Mr. Justice Cushing, Mr. Justice Wilson, and Mr. Justice Blair, decided in favor of the jurisdiction, and held that process served on the Governor and Attorney General was sufficient. Mr. Justice Iredell differed, and thought that further legislation by Congress was necessary to give the jurisdiction, and regulate the manner in which it should be exercised. But the opinion of the majority of the court upon these points has always been since followed.”); *Martin v. Hunter’s Lessee*, 14 U.S. 304, 332-333 (1816) (“It is declared that ‘in all cases affecting ambassadors, &c., that the supreme court shall have original jurisdiction.’ Could congress withhold original jurisdiction in these cases from the supreme court? The clause proceeds—‘in all the other cases before mentioned the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations, as the congress shall make.’ The very exception here shows that the framers of the constitution used the words in an imperative sense. What necessity could there exist for this exception if the preceding words were not used in that sense? Without such exception, congress would, by the preceding words, have possessed a complete power to regulate the appellate jurisdiction, if the language were only equivalent to the words ‘may have’ appellate jurisdiction. It is apparent, then, that the exception was intended as a limitation upon the preceding words, to enable congress to regulate and restrain the appellate power, as the public interests might, from time to time, require.”); *Marbury v. Madison*, 5 U.S. 137, 174-175 (1803) (holding that Congress lacked the power to expand the Supreme Court’s original jurisdiction beyond those cases delineated in Article III, § 2, cl. 2).

A. I grant you that he was incorrect in stating that the Supreme Court's original jurisdiction is not self-executing, but I believe that is a red herring. The appointment of Justices to the Supreme Court clearly is not self-executing, for Article III does not appoint by name specific individuals to the Court, nor does it set forth the number of Justices who are to serve on the Court, but rather depends on action by the other branches. Accordingly, you still need to explain why you believe that the Necessary and Proper Clause does not grant Congress the authority to enact a statute setting the number of Justices on the Supreme Court.

Q. Very well, then. Let's discuss the scope of Congress's power under that Clause, which has been described by the Supreme Court as "the last, best hope of those who defend *ultra vires* congressional action."²⁴ As you said, it gives Congress the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." The Clause itself is not an independent source of congressional power, but rather empowers Congress to make laws to further certain other enumerated powers.²⁵ Thus, the Clause can only be used to further the "foregoing Powers" or "other Powers." Setting aside for the moment the part of the Clause that refers to "other Powers", it is abundantly clear that such a law would not qualify as being "necessary and proper for carrying into Execution the *foregoing* Powers."

A. Why is that?

²⁴ *Printz v. United States*, 521 U.S. 898, 923 (1997).

²⁵ Akhil Reed Amar, *Constitutional Redundancies and Clarifying Clauses*, 33 VAL. U. L. REV. 1, 7 (1998); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute Laws*, 104 YALE L.J. 541, 588-89 (1994); Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 274-75 & nn.23-4 (1993).

Q. Because none of the preceding clauses of Article I, Section 8 of the Constitution—which list the “foregoing Powers” to which the Necessary and Proper Clause refers—gives Congress any power over the Supreme Court.

A. I’m quite certain that you’re wrong about that. In fact, I think there was a recent Supreme Court decision in which the Supreme Court upheld an act of Congress regulating the federal courts based on a combination of the Necessary and Proper Clause and one of the foregoing powers having something to do with congressional power with respect to the federal courts.

Q. You are correct that there was such a decision, but it does nothing to diminish my point. The decision to which you refer is *Jinks v. Richland County, South Carolina*.²⁶ It considered a challenge to the constitutionality of a provision of the supplemental jurisdiction statute that tolls the statute of limitations for state law claims over which a federal court declines to exercise supplemental jurisdiction.²⁷

The Supreme Court upheld the constitutionality of the provision, reasoning that it was “necessary and proper for carrying into Execution” Article I, Section 8, Clause 9, which gives Congress the power “[t]o constitute Tribunals inferior to the supreme Court.”²⁸ The Court conceded, of course, that if the word “necessary” were narrowly construed to mean “absolutely necessary,” the provision’s constitutionality could not be sustained based on the Necessary and Proper Clause, but noted that the Supreme Court had long ago, in *McCulloch v. Maryland*,²⁹ given the term a much broader scope,³⁰

²⁶ 538 U.S. 456 (2003).

²⁷ See 28 U.S.C. § 1367(d); see also *id.*, §§ 1367(b), (c) (setting forth situations in which the district court may or must decline to exercise supplemental jurisdiction).

²⁸ *Jinks*, 538 U.S. at 462-65.

²⁹ 17 U.S. 316 (1819).

³⁰ *Jinks*, 538 U.S. at 462 (“As to ‘necessity’: The federal courts can assuredly exist and function in the absence of § 1367(d), but we long ago rejected the view that the Necessary and Proper Clause demands that an Act of Congress be “absolutely neces-

essentially equating it with “rational.”³¹ In *Jinks*, the Court held that *McCulloch* in this context required only that the law be “conducive to the due administration of justice” in federal court, a test that the Court found was easily satisfied.³²

Now, *Jinks* would be a useful precedent if we were talking about statutes such as 28 U.S.C. § 44 and 28 U.S.C. § 133, which, respectively, set the number of judges on the federal courts of appeal and the federal district courts. Determining the number of judges that will serve on those courts is certainly a rational exercise of the power “[t]o constitute Tribunals *inferior* to the supreme Court.” But nothing in that Clause, or any other Clause of Article I, Section 8, speaks of a congressional power with respect to the Supreme Court *itself*, for it is the Constitution, and not the Congress, that establishes the Supreme Court.

A. [After scanning the 17 Clauses of Article I, Section 8 that precede the Necessary and Proper Clause] Point well taken. But what about the second part of the Clause that we skipped over, which gives Congress the power to make laws “necessary and proper” for

sary” to the exercise of an enumerated power.”) (citing *McCulloch v. Maryland*, 17 U.S. 316, 414-15 (1819)); *McCulloch*, 17 U.S. at 421 (“Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”)

³¹ *Sabri v. United States*, 541 U.S. 600, 605 (2004) (describing it as requiring only “means-ends rationality”); *Marshall v. Gordon*, 243 U.S. 521, 537 (1917) (describing it as requiring only that the law be “reasonably appropriate and relevant to the exercise of a granted power”); *United States v. Plotts*, 347 F.3d 873, 878 (10th Cir. 2003) (quoting *United States v. Edgar*, 304 F.3d 1320, 1326 (11th Cir. 2002)) (“[T]he Necessary and Proper Clause enables Congress to enact laws, subject to other constitutional constraints, ‘that bear a rational connection to any of its enumerated powers.’”). *But see Sabri*, 541 U.S. at 1949-50 (construing *McCulloch* to require an “obvious, simple, and direct relation between the statute and the enumerated power.”) (Thomas, J., concurring).

³² *See Jinks*, 538 U.S. at 462-64 (holding that the statute is “conducive to the administration of justice” in that it makes the administration of justice more efficient by giving the federal courts flexibility to retain or dismiss such supplemental claims and because it eliminates a potential impediment to access to the federal courts that would exist in the absence of the provision).

carrying into execution “*all other Powers* vested by this Constitution in the Government of the United States, or in any Department or Office thereof”?

Q. Let’s pick up there tomorrow. Until then, try to identify the “other Power[]” at issue, and consider whether any of the other language of the Clause poses a barrier to invoking that provision.

Day III. The Necessary and Proper Clause (continued)

A. OK, I think I have it all figured out.

Q. I’m all ears.

A. I believe that the “other Power[]” at issue is found in the first sentence of Article III, Section 1, which provides that “[t]he judicial Power of the United States, shall be vested in one supreme Court.” But as conceived by the Constitution, the Supreme Court could not and did not spring forth into full-blown existence like Athena from the brow of Zeus. The Constitution provided for a means of electing a President and Congress. In turn, those branches were responsible for carrying into execution Article III by organizing the judicial branch, including appropriating funds for its operation and appointing its members.³³ Under *McCulloch’s* liberal defi-

³³ *Rhode Island v. Massachusetts*, 37 U.S. 657, 721 (1838) (“It was necessarily left to the legislative power to organize the Supreme Court...No department could organize itself; the constitution provided for the organization of the legislative power, and the mode of its exercise, but it delineated only the great outlines of the judicial power; leaving the details to congress, in whom was vested, by express delegation, the power to pass all laws necessary and proper for carrying into execution all powers except their own.”). Once those initial steps were taken by Congress, however, the Supreme Court so established became *the* Supreme Court; in other words, Congress, it appears, could not later decide to create a new body and designate it as *the* Supreme Court. See *Abelman v. Booth*, 62 U.S. 506, 521 (1858) (“It was not left to Congress to create it by law...as the performance of its duty would sometimes come in conflict with individual ambition or interests, and powerful political combinations, an act of Congress establishing such a tribunal might be repealed in order to establish another more subservient to the predominant political influences or excited

dition, a law setting the number of Justices who would serve on the Supreme Court was certainly “necessary” to carrying into execution the Judicial Power of the United States. The Supreme Court has repeatedly stated that the Necessary and Proper Clause empowers Congress to enact laws that further the powers set forth in Article III,³⁴ as well as powers set forth in other Articles of the Constitution defining the powers of other branches.³⁵ Given such persuasive authority, you have to concede that the Necessary and Proper Clause provides Congress with the power to enact 28 U.S.C. § 1.

Q. I concede only that the Necessary and Proper Clause can be invoked to further a power vested in another branch, including the judicial power. I also concede that under *McCulloch*, a law limiting the number of Justices on the Supreme Court could be deemed

passions of the day. This tribunal, therefore, was erected, and the powers of which we have spoken conferred upon it, not by the Federal Government, but by the people of the States, who formed and adopted that Government, and conferred upon it all the powers, legislative, executive, and judicial, which it now possesses.”)

³⁴ *Jinks*, 538 U.S. at 462 (holding that 28 U.S.C. § 1367(d) is necessary and proper to assure that the federal judiciary “may fairly and efficiently exercise ‘[t]he judicial Power of the United States’”); *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22, 32 (1988) (holding that 28 U.S.C. § 1404(a), the venue transfer statute, “falls comfortably within Congress’ powers under Article III as augmented by the Necessary and Proper Clause”); *Burlington Northern R. Co. v. Woods*, 480 U.S. 1, 5 n.3 (1987) (holding that “Article III of the Constitution, augmented by the Necessary and Proper Clause of Article I, § 8, cl. 18, empowers Congress to establish a system of federal district and appellate courts and, impliedly, to establish procedural Rules governing litigation in these courts.”); *O’Donnell v. Great Lakes Dredge & Dock Co.*, 318 U.S. 36, 39 (1943) (“The constitutional authority of Congress to provide such a remedy for seamen derives from its authority to regulate commerce, and its power to make laws which shall be necessary and proper to carry into execution powers vested by the Constitution in the government or any department of it, Article I, § 8, cl. 18, including the judicial power.”); *Wayman v. Southard*, 23 U.S. 1, 21-22 (1825) (holding that the Necessary and Proper Clause gives Congress the authority to make laws for executing judgments rendered by the federal courts). See generally Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 918-919 (1986).

³⁵ See, e.g., *Missouri v. Holland*, 252 U.S. 416, 432 (1920) (holding that the Necessary and Proper Clause gives Congress the power to enact a statute that gives effect to a treaty lawfully made by the President and ratified by the Senate, reasoning that it is in furtherance of the power to make treaties set forth in Article II, Section 2).

“necessary.” But it is not enough that the law is “necessary”; it must also be “proper.”³⁶

A. What does it mean to be “proper”, or rather, what sort of law would not be “proper”?

Q. A law is not “proper” when it is inconsistent with some other provision of the constitution, either because it is inconsistent with the Constitution’s separation of powers among the coordinate branches of the federal government, or because it is inconsistent with the constitutional retention of rights to the states or the people.³⁷ I submit to you that 28 U.S.C. § 1 is not “proper” because it violates the Constitution’s separation of powers.

A. Could you please explain how it does that?

Q. Certainly. A long line of cases by the Supreme Court holds that when the Constitution’s text explicitly or by clear implication commits a power to one branch, a law that vests that power,

³⁶ Lawson & Granger, *supra* note 25, at 275-276.

³⁷ Printz v. United States, 521 U.S. 898, 923-924 (1997) (“When a ‘La[w] ... for carrying into Execution’ the Commerce Clause violates the principle of state sovereignty reflected in the various constitutional provisions we mentioned earlier, it is not a ‘La[w] ... proper for carrying into Execution the Commerce Clause,’ and is thus, in the words of The Federalist, ‘merely [an] ac[t] of usurpation’ which ‘deserve[s] to be treated as such.’”) (citing Lawson & Granger, *supra* note 25, at 297-326, 330-33). See also Alden v. Maine, 527 U.S. 706, 732-33 (1999) (quoting Printz, 521 U.S. at 923-24); Lawson & Granger, *supra* note 25, at 297 (“If the word ‘proper’ in that clause has a jurisdictional meaning, then the authority conferred by executory laws must distinctively and peculiarly belong to the national government as a whole and to the particular national institution whose powers are carried into execution. In view of the limited character of the national government under the Constitution, Congress’s choice of means to execute federal powers would be constrained in at least three ways: first, an executory law would have to conform to the ‘proper’ allocation of authority within the federal government; second, such a law would have to be within the ‘proper’ scope of the federal government’s limited jurisdiction with respect to the retained prerogatives of the states; and third, the law would have to be within the ‘proper’ scope of the federal government’s limited jurisdiction with respect to the people’s retained rights. In other words, under a jurisdictional construction of the Sweeping Clause, executory laws must be consistent with principles of separation of powers, principles of federalism, and individual rights.”).

in whole or part, in some other branch violates constitutional separation of powers principles.

One of the earlier cases in this line was *Myers v. United States*.³⁸ At issue in *Myers* was the constitutionality of a statute enacted by Congress that provided that postmasters, who were appointed by the President by and with the advice and consent of the Senate, could be removed only by and with the advice and consent of the Senate.³⁹ The Court first held that Article II, Section 2 of the Constitution⁴⁰—the Appointments Clause—by implication gives the President the exclusive authority to remove executive branch officers whom he was initially authorized to appoint.⁴¹ In light of this holding, the statute, which effectively gave the Senate the power to veto the President's removal decisions, was held to be unconstitutional since it interfered with the President's exclusive authority under the Constitution to remove such officers.⁴²

In its subsequent decision in *Buckley v. Valeo*,⁴³ the Supreme Court considered the constitutionality of a statute setting forth the manner of appointing members of the Federal Election Commission. Under the statute, two voting members of the Commission were appointed by the Senate leadership, two by the leadership of the House of Representatives, and two by the President, with all six voting members subject to confirmation by a majority of both the Senate and the House of Representatives.⁴⁴ The Court concluded that the method of appointing members of the Commission violated

³⁸ 272 U.S. 52 (1926).

³⁹ *Id.* at 107.

⁴⁰ U.S. CONST. art. II, § 2, cl. 2 (“[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint...all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law.”)

⁴¹ 272 U.S. at 121-128.

⁴² *Id.* at 176 (“the provision of the law of 1876 by which the unrestricted power of removal of first-class postmasters is denied to the President is in violation of the Constitution and invalid.”).

⁴³ 424 U.S. 1 (1976).

⁴⁴ *Id.* at 113.

the Appointments Clause because the members of the Commission were “Officers” within the meaning of that Clause and their appointments were not made in conformity with that Clause, namely, appointment by the President by and with the Advice and Consent of the Senate.⁴⁵

Three aspects of the *Buckley* opinion are noteworthy for our purposes. First, the Court made clear that even though the statute provided that two of the members would be appointed by the President subject to Senate confirmation, that part of the statute was unconstitutional as well because their appointments also required confirmation by the House.⁴⁶ In other words, for separation of powers purposes, the Senate and the House are treated as two separate entities. Second, *Buckley* explicitly rejected an argument that the Necessary and Proper Clause, when coupled with the underlying substantive Article I power to regulate federal elections, gives Congress the authority to provide for a manner of appointment that deviates from the requirements of the Appointments Clause.⁴⁷ And third, even though the President and Senate could in some sense be said to have “consented” to a diminution of their power under the Appointments Clause through their earlier ratification of the stat-

⁴⁵ *Id.* at 124-126, 139-140.

⁴⁶ *Id.* at 126 (“Although two members of the Commission are initially selected by the President, his nominations are subject to confirmation not merely by the Senate, but by the House of Representatives as well.”).

⁴⁷ *Id.* at 134-35 (“The proper inquiry when considering the Necessary and Proper Clause is not the authority of Congress to create an office or a commission, which is broad indeed, but rather its authority to that its own officers may make appointments to such office or commission. So framed, the claim that Congress may provide for this manner of appointment under the Necessary and Proper Clause of Art. I stands on no better footing than the claim that it may provide for such manner of appointment because of its substantive authority to regulate federal elections. Congress could not, merely because it concluded that such a measure was ‘necessary and proper’ to the discharge of its substantive legislative authority, pass a bill of attainder or ex post facto law contrary to the prohibitions contained in s 9 of Art. I. No more may it vest in itself, or in its officers, the authority to appoint officers of the United States when the Appointments Clause by clear implication prohibits it from doing so.”)

ute, this “consent” did not in any way alter the constitutionality of the scheme.

In its subsequent decision in *INS v. Chadha*,⁴⁸ the Court further expounded the separation of powers principle that when the Constitution’s text commits a power to one branch, a law that vests that power in whole or part in some other branch is unconstitutional. At issue in *Chadha* was the constitutionality of the so-called “one-House veto” contained within the Immigration and Nationality Act.⁴⁹ Under that provision, either a majority of the House or Senate could vote to override in any given instance the Attorney General’s exercise of the discretion given to him under the Act to suspend the deportation of an alien subject to deportation under the statute.⁵⁰ After determining that the act of voting to override the Attorney General’s exercise of discretion under the statute—like the enactment of the statute itself—was a legislative one, the Court concluded that the Constitution permitted such an act (which was tantamount to an amendment to the legislation) to occur only in the manner prescribed by the Constitution, to wit, “bicameral passage followed by presentment to the President.”⁵¹ By circumventing these requirements, the statute gave to a single house of Congress a power that the Constitution envisions is shared by both houses and the President.⁵² Just as with the statute at issue in *Buckley*, even though the House, Senate, and President in some sense “consented” to the diminution of their respective powers, the Court nonetheless held that the requirements of bicameral passage and presentment still applied.⁵³

⁴⁸ 462 U.S. 919 (1983).

⁴⁹ *Id.* at 923-25 & n.2.

⁵⁰ *Id.*

⁵¹ *Id.* at 944-55.

⁵² *Id.* at 947.

⁵³ The court’s implicit unwillingness to find consent to be sufficient makes sense, of course, given that the purpose of the Constitution’s checks and balances is to “protect the people,” not the branches themselves. *Id.* at 957. See also *id.*, at 942 n.13 (“The suggestion is made that § 244(c)(2) is somehow immunized from constitutional scru-

More recently, in *Clinton v. City of New York*,⁵⁴ the Court extended its holding in *Chadha* to strike down the Line Item Veto Act. The Court reasoned that the President's act of canceling specific expenditures in an act that has become law is, like the act of voting to override the Attorney General's exercise of discretion under the Immigration and Nationality Act, effectively the amendment or repeal of a pre-existing law.⁵⁵ Accordingly, just like the one-House veto, the line item veto was struck down as unconstitutional because it circumvented the Constitution's requirements of bicameral passage and presentment.⁵⁶

Applying these precedents to the law at issue in this case, 28 U.S.C. § 1, there appears to be a sound argument that the law violates separation of powers principles and thus cannot be deemed a "proper" law enacted pursuant to the Necessary and Proper Clause. The Constitution textually commits the appointment of justices to the Supreme Court to two specific branches of the federal government, the President and the Senate: "The President...shall nominate, and by and with the Advice and Consent of the Senate, shall appoint...Judges of the supreme Court."⁵⁷ One could certainly imply from this language a shared power to decide the number of justices on the Supreme Court. Under this interpretation, the President and the Senate together decide, through their respective pow-

tiny because the Act containing § 244(c)(2) was passed by Congress and approved by the President. *Marbury v. Madison*, 1 Cranch 137, 2 L.Ed. 60 (1803), resolved that question. The assent of the Executive to a bill which contains a provision contrary to the Constitution does not shield it from judicial review."). See also *Freytag v. CIR*, 501 U.S. 868, 880 (1991) ("the Clause forbids Congress to grant the appointment power to inappropriate members of the Executive Branch. Neither Congress nor the Executive can agree to waive this structural protection...The structural interests protected by the Appointments Clause are not those of any one branch of Government but of the entire Republic."). But see *Nixon v. Administration of General Services*, 433 U.S. 425, 441 (1977) (suggesting, albeit in dicta, that it is relevant in considering a separation of powers challenge that the executive branch signed the law at issue and that the executive branch is defending its constitutionality).

⁵⁴ 524 U.S. 417 (1998).

⁵⁵ *Id.* at 436-39.

⁵⁶ *Id.* at 438-40.

⁵⁷ U.S. CONST. art. II, § 2, cl. 2.

ers of nomination and consent, on the appropriate number of justices who should serve on the Supreme Court at any given time. 28 U.S.C. § 1 diminishes these powers by fixing the number of justices who may serve on the Supreme Court. As *Buckley* demonstrates, the House and Senate are distinct entities for separation of powers purposes. Moreover, as the entire line of cases demonstrates, that the other branches effectively “consented” to this diminution of their power by ratifying the statute is irrelevant.

A. I certainly grant you that if Congress passed a law giving the House of Representatives a role in the appointment of Supreme Court justices, for example, if the law provided that “The President shall nominate, and by and with the advice and consent of the Senate and House, shall appoint, Justices of the Supreme Court,” it would violate separation of powers principles, for that would directly contradict the constitutional command. Yet 28 U.S.C. § 1 says nothing about the manner of appointment; it simply limits the size of the Court, and the constitution is silent on who has the power to determine the Court’s size.

Q. As I said, this is *implicit* in the text of Article II, § 2, cl. 2. Just as the *Myers* Court implied from the text of the Appointments Clause that the President had the exclusive authority to remove executive branch officers whom he was initially authorized to appoint, so one could imply from the text of the Clause that the President and the Senate have the power to decide on the size of the Court through their exercise of their respective powers.

A. But why is such a power implicit with respect to the number of Justices on the Supreme Court when it is *not* implicit with other positions which involve Presidential nomination and the consent of the Senate? For example, it is not the President and Senate together who decide how many cabinet Secretaries there shall be. The number of executive departments, and thus the number of cabinet secretaries, is determined by laws enacted by Congress.

Under your theory, the Senate and President alone would have the power to decide this as well, wouldn't they?

Q. No, the two situations are very different. The Constitution does *not* create any executive departments, so legislation is required to create those departments, and that is what determines the number of cabinet secretaries to be appointed. In sharp contrast, the *Constitution* creates the Supreme Court; no act of Congress is required to create it, and thus no role for Congress sitting as House and Senate is contemplated.

This, too, explains why appointments to *other* federal courts are different as well. Articles I and III of the Constitution very clearly give Congress the power to decide whether or not to create lower federal courts,⁵⁸ and just as the greater power to create such courts encompasses within it the lesser power to restrict the scope of their jurisdiction,⁵⁹ so the greater power to create such courts encompasses within it the lesser power to determine the number of judges who will staff it. Unless you can point to a comparable power that the Constitution gives Congress with respect to the Supreme Court, I think that my conclusion is correct.

A. I'd like to have the evening to scour the Constitution for more possibilities.

Q. Very well, let's reconvene tomorrow.

Day IV. The Regulations Clause

A. I think I found the source of Congress' power to set the number of justices on the Court!

⁵⁸ See U.S. CONST. art. I, § 8, cl. 9 ("The Congress shall have Power...To constitute Tribunals inferior to the supreme Court"); *Id.* Art. III, § 1 ("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.")

⁵⁹ *Sheldon v. Sill*, 49 U.S. 441, 448-49 (1850).

Q. I can't wait to hear it.

A. I think the mistake that I have been making all along is that I focused my energy exclusively on Article I. But when you mentioned yesterday that Article III was in part the source of Congress' power to create the lower federal courts, I thought I should scour that Article as well. In doing so, I found language that provides that the Supreme Court shall exercise its jurisdiction "with such Exceptions, and under such Regulations, as the Congress shall make."⁶⁰ This Clause specifically provides that *Congress*—that is, the House and Senate *together*—have the power to enact regulations governing the Supreme Court in the exercise of its jurisdiction. Some commentators have advocated that Congress invoke the Regulations Clause to require a supermajority vote by the Supreme Court to declare laws unconstitutional, something that Members of Congress have proposed on a number of occasions.⁶¹ Wouldn't a rule setting the number of justices on the Supreme Court fit comfortably within the regulations power? Indeed, isn't the second part of 28 U.S.C. § 1, which sets forth a quorum requirement of six for the Court, also an exercise of Congress' power under the Regulations Clause?

Q. Before you jump too quickly to a conclusion, let's examine the language that you cite in its context. In full, the Clause provides, "In all Cases affecting Ambassadors, other public Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all the *other Cases* before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law

⁶⁰ U.S. CONST. art. III, § 2, cl. 2.

⁶¹ See William G. Ross, *The Resilience of Marbury v. Madison: Why Judicial Review Survived So Many Attacks*, 38 WAKE FOREST L. REV. 733, 740-741 (2003); Jed Handelsman Shugerman, *A Six-Three Rule: Reviving Consensus and Deference on the Supreme Court*, 37 GA. L. REV. 893, 971-97 (2003).

and Fact, with such Exceptions, and under such Regulations as the Congress shall make.”⁶²

Note that under this language, Congress only has the power to regulate and make exceptions to the Supreme Court’s *appellate* jurisdiction; it lacks the power to do the same with respect to the Court’s original jurisdiction.⁶³ It would thus be hard to see how setting the number of justices on the Supreme Court could be deemed a “regulation” within the meaning of the constitutional provision that you cite; since the regulation could only apply to the Court’s appellate jurisdiction, that would mean that there could be a limited number of justices on the Supreme Court (as determined by the “regulation”) when it is exercising its appellate jurisdiction, but a different number of justices on the Supreme Court when it is exercising its original jurisdiction. That would be tantamount to having *two* different Supreme Courts, which would be inconsistent with Article III’s command that there be “*one* supreme Court.”⁶⁴

A. Are you saying, then, that Congress also lacks the power to set the quorum requirement for the Supreme Court? That it lacks the power to set or cancel the Court’s term, which is also codified in Title 28,⁶⁵ and which power Congress exercised to cancel two successive terms of the Supreme Court at the start of the 19th century, delaying, *inter alia*, the Supreme Court from hearing arguments in *Marbury v. Madison*?⁶⁶ Indeed, if you are correct, does Congress even have the power under the Regulations Clause to command by statute that there is to be a *Chief* Justice of the Supreme Court, since Article III makes no mention of such an office?

⁶² U.S. CONST. art. III, § 2, cl. 2 (emphasis added).

⁶³ See *South Carolina v. Regan*, 465 U.S. 367, 395-98 (1984) (O’Connor, J., concurring in judgment); *California v. Arizona*, 440 U.S. 59, 65-6 (1979).

⁶⁴ U.S. CONST. art. III, § 1.

⁶⁵ See 28 U.S.C. § 2 (“The Supreme Court shall hold at the seat of government a term of court commencing on the first Monday in October of each year and may hold such adjourned or special terms as may be necessary.”).

⁶⁶ See Paul E. McGreal, *Ambition’s Playground*, 68 *FORDHAM L. REV.* 1107, 1139 n.147 (2000).

Q. Those are all excellent questions. Let's begin with your first two questions, the quorum requirement and the power to establish and cancel the Supreme Court's term. An argument could be made that these statutes are only effective with respect to the Supreme Court's exercise of its *appellate* jurisdiction, and that they are unconstitutional as applied to the Court's original jurisdiction. In other words, if a case is filed in the Supreme Court invoking its original jurisdiction, it could hear the case even if a quorum as defined by the statute is lacking, or even if Congress purported to cancel the current term of the Court. Under this interpretation, Congress can make exceptions to and regulate the exercise of the Court's appellate jurisdiction, but can do neither with respect to the exercise of its original jurisdiction. While it is hard to conceive of the Court consisting of a different number of members when exercising its original and appellate jurisdictions, it is much easier to conceive of different quorum rules existing under each. Moreover, a power to cancel the Court's term when exercising its appellate jurisdiction but not when exercising its original jurisdiction is consistent with allowing it to make "exceptions" to the former but not the latter. Of course, the Court is free to *choose* to adopt such rules for *itself*, and indeed it has opted to do so by reference to Sections 1 and 2 of Title 28,⁶⁷ making the point a moot one for now, although an interesting one.

As to your last question, it would at first glance seem that if the Regulations Clause does not give Congress the power to set by statute the number of Justices on the Supreme Court, it likewise does not give it the power to declare by statute that there is to be a Chief Justice. But in point of fact, the statute itself is *not* creating the position of Chief Justice; that office is created by the Constitution itself. It is true that Article III itself makes no mention of the office

⁶⁷ See Sup. Ct. R. 3 ("The Court holds a continuous annual Term commencing on the first Monday in October and ending on the day before the first Monday in October of the following year.") (citing 28 U.S.C. § 2); Sup. Ct. R. 4(2) ("Six Members of the Court constitute a quorum.") (citing 28 U.S.C. § 1).

of Chief Justice, but Article I⁶⁸ implicitly creates such an office by substituting the Chief Justice for the Vice-President as the presiding officer over impeachment trials of the President.⁶⁹ Thus, the statute is nothing more than an explicit restatement of the Constitution's implicit command.

A. Wow, this is really a lot to digest. Let's take a break for the day and reconvene tomorrow.

Q. Very well. When we reconvene, I would like to discuss two other matters with respect to my hypothesis, and I'd like you to think about them. First, how will we ever figure out if my theory is correct or not? In other words, how, exactly, would a challenge to the constitutionality of 28 U.S.C. § 1 arise, and who would adjudicate the question? And second, if my theory is correct, under what political circumstances is it likely to make a difference relative to the conventional understanding of Congress' power to set the number of Justices on the Supreme Court?

A. That's quite a lot to think about. Until tomorrow, then.

Day V. Resolution

Q. In considering my first question from yesterday, let's begin with considering how the challenge to the constitutionality of 28 U.S.C. § 1 would arise.

⁶⁸ U.S. CONST. art. I, § 3, cl. 6 ("The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.").

⁶⁹ See generally 1 JOHN R. VILE, *THE CONSTITUTIONAL CONVENTION OF 1787: A COMPREHENSIVE ENCYCLOPEDIA OF AMERICA'S FOUNDING* 84 (ABC-CLIO 2005); 2 JOHN R. VILE, *THE CONSTITUTIONAL CONVENTION OF 1787: A COMPREHENSIVE ENCYCLOPEDIA OF AMERICA'S FOUNDING* 776 (ABC-CLIO 2005).

A. I suppose that the President, believing that the statute unconstitutionally constrains his power under the Constitution to appoint justices to the Supreme Court, would have to bring a lawsuit challenging its constitutionality.

Q. Is that the only way that the challenge could arise?

A. I'm not sure what you're getting at. Perhaps members of the Senate could also bring suit, claiming that it constrains their power as well?

Q. Let's set members of the Senate to one side for the moment, and focus on the President. Is it necessary that he initiate a lawsuit to have the statute struck down, or can he simply ignore it on the ground that he believes it to be unconstitutional?

A. And so he would ignore it by...

Q. ...nominating one or more additional justices to the Supreme Court, even though the Court already has the maximum number of justices authorized by 28 U.S.C. § 1. And then the Senate could confirm them.

A. But can the President and the Senate ignore a statute based on their determination that it is unconstitutional? I thought that the Supreme Court long ago resolved, in *Marbury v. Madison*,⁷⁰ that only the courts have the power to declare a law to be unconstitutional.⁷¹

Q. In *Marbury*, the Court held that the judicial branch had the power to declare laws unconstitutional, not necessarily that they are the *only* branch with that power, although the decision is fre-

⁷⁰ 5 U.S. 137 (1803).

⁷¹ *Id.* at 178 ("It is emphatically the province and duty of the judicial department to say what the law is.").

quently so described.⁷² But Presidents have on a number of occasions refused to carry out laws that they believed to be unconstitutional on separation of powers grounds. Many Presidents refused to carry out laws with one-house veto provisions of the sort eventually struck down by the Supreme Court as unconstitutional in *Chadha*, and President Wilson refused to abide by the law giving postmasters tenure in office that was eventually struck down by the Court in *Myers*.⁷³

Thus, the President and the Senate, concluding that the law is unconstitutional, could simply refuse to enforce it, and appoint additional justices. As a result, the President would defend rather than initiate a lawsuit, with someone with standing bringing suit to challenge his refusal to abide by the terms of the statute.⁷⁴

A. Speaking of standing, who would have standing to bring a legal challenge if the President nominated, and the Senate confirmed, a tenth justice to the Supreme Court? If instead the President or members of the Senate wanted to challenge the law without violating it, would they have standing to do so?

Q. The question of standing is a rather tricky one, and the answer to that question might to some degree dictate which route the President and the Senate would have to follow if they wanted to get the issue definitively resolved. Two Supreme Court decisions considering challenges to the constitutionality of the Line Item Veto Act help to shed light on this issue.

⁷² See Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 905-6 (1990) (arguing that the President has the authority to refuse to enforce laws that he deems to be unconstitutional); Christopher N. May, *Presidential Defiance of "Unconstitutional" Laws* (1998) (arguing that the President lacks such authority).

⁷³ See Easterbrook, *supra* note 72, at 914-15.

⁷⁴ Easterbrook, *supra* note 73, at 927 ("litigation is apt to ensue even if the President refuses all enforcement. A beneficiary of the law could file suit in an effort to obtain what Congress bestowed.").

A. Two? I only knew of the decision you mentioned the other day, *Clinton v. City of New York*, in which the Supreme Court held the Act to be unconstitutional.

Q. That was the first case in which the Court had before it a plaintiff that it deemed to have standing to challenge the Act. But one year earlier, the Court in *Raines v. Byrd*⁷⁵ reversed a district court decision⁷⁶ striking the Act down on the ground that the plaintiffs lacked standing to bring suit.

In *Raines*, six members of Congress who had voted against the Line Item Veto Act filed suit in federal district court, challenging the Act's constitutionality.⁷⁷ They claimed that the Act was unconstitutional because it circumvented the Constitution's requirements of bicameral passage and presentment,⁷⁸ the very grounds on which the Supreme Court struck the Act down the following year.⁷⁹ Before reaching the merits, the district court first held that the plaintiffs' claim that the Act diluted their Article I voting power was sufficient to give them standing to challenge the Act's constitutionality.⁸⁰

The Court in *Raines* stressed that Article III standing requires that the plaintiff allege a "personal injury" that is "concrete and particularized."⁸¹ The Court distinguished two of its prior decisions finding that legislators had standing to sue. First, it distinguished its decision in *Powell v. McCormack*⁸²—in which it held that a Member of Congress had standing to challenge the constitutionality of his exclusion from the House of Representatives (along with

⁷⁵ 521 U.S. 811 (1997).

⁷⁶ The Act provided for direct, expedited review from the U.S. District Court for the District of Columbia to the United States Supreme Court. *Id.* at 815-817.

⁷⁷ *Id.* at 814-16.

⁷⁸ *Id.* at 816.

⁷⁹ See text accompanying notes 54-56.

⁸⁰ 521 U.S. at 817.

⁸¹ *Id.* at 818-819.

⁸² 395 U.S. 486 (1969).

the attendant loss of salary)—on the ground that the plaintiff in that case was singled out for unfavorable treatment as compared with other members of Congress, and that he was being deprived of something to which he was *personally* entitled, to wit, *his* seat in Congress.⁸³ By contrast, *Raines* involved a claim not of *personal* injury, but rather a claim of *institutional* injury.⁸⁴

Next, the Court distinguished its decision in *Coleman v. Miller*,⁸⁵ a case in which the Kansas Senate deadlocked 20-20 on the question whether to ratify a proposed amendment to the Federal Constitution, and the Lieutenant Governor broke the tie by voting in favor of ratification.⁸⁶ In *Coleman*, the Court held that the 20 Senators who voted against ratification had standing to seek a writ of mandamus compelling state officials to recognize that the legislature had not ratified the amendment, in effect claiming that the Lieutenant Governor lacked the power to break the tie.⁸⁷ In *Raines*, the Supreme Court conceded that *Coleman* stood for the proposition that in certain circumstances, a claim of *institutional* injury is a sufficient basis for claiming standing to bring suit, but limited it as standing for the narrow “proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified.”⁸⁸ The *Raines* Court distinguished the claim before it on the ground that the institutional injury alleged was “wholly abstract and widely dispersed,” contrasting the plaintiffs’ “abstract [claim of] vote dilution of institutional legislative power”

⁸³ 521 U.S. at 820-821.

⁸⁴ *Id.* at 821.

⁸⁵ 307 U.S. 433 (1939).

⁸⁶ 521 U.S. at 822.

⁸⁷ *Id.* at 822.

⁸⁸ *Id.* at 823.

with the *Coleman* plaintiffs' specific and concrete claim of "vote nullification."⁸⁹

Now, setting aside for one moment the specific holding in *Raines*, it also has some rather interesting dicta. To reinforce its conclusion with respect to standing, the Court pointed to the way in which the challenges to the constitutionality of the Tenure of Office (for Postmasters) Act in *Myers*, the one-house veto in *Chadha*, and the method of appointing members to the Federal Election Commission in *Buckley* arose.⁹⁰ It noted, for example, that *Myers* came before the Court after the President fired Myers and he sued in the Court of Claims to recover his lost salary.⁹¹ The Court then very strongly implied that standing would be lacking in such cases if the President or some other member of the Executive Branch sued to challenge the constitutionality of these laws:

If the appellees in the present case have standing, presumably President Wilson...would likewise have had standing, and could have challenged the law preventing the removal of a Presidential appointee without the consent of Congress. Similarly, in *INS v. Chadha*, the Attorney-General would have had standing to challenge the one-House veto provision because it rendered his authority provisional rather than final. By parity of reasoning, President Gerald Ford could have sued to challenge the appointment provisions of the Federal Election Campaign Act which were struck down in *Buckley v. Valeo*....There would be nothing irrational about a system that granted standing in these cases....But it is obviously not the regime that has obtained under our Constitution to date.⁹²

A. Wow, there's quite a bit packed into that case. So what does it all mean for a challenge to the constitutionality of 28 U.S.C. § 1?

⁸⁹ *Id.* at 826, 829.

⁹⁰ *Id.* at 827-28.

Q. Well, *Raines* appears to imply that neither the President nor members of the Senate could bring a suit challenging the constitutionality of the statute. Rather, *Raines* would seem to require that the President nominate a tenth justice.⁹³

A. Who would bring that suit, members of the House?

Q. No, that wouldn't seem to work either. The claim of House members would seem to be no different than the claim of the members of Congress who filed the suit in *Raines*.

A. So who, exactly, would have standing to bring the suit?

Q. To answer that question, let's examine the Supreme Court's *second* case involving the Line Item Veto Act—*Clinton v. City of New York*—and let's also take a look at who the plaintiffs were in *Myers*, *Chadha*, and *Buckley*.

In *Clinton*, the plaintiffs were entities who would have been the beneficiaries of federal spending that was “canceled” by the President pursuant to the authority purportedly granted to him under the Line Item Veto Act.⁹⁴ The Supreme Court held that, in contrast to *Raines*, the plaintiffs in this case had a personal rather than an institutional injury, and agreed with the district court that the plaintiffs “suffered an immediate, concrete injury the moment that the President used the Line Item Veto to cancel [the spending provision] and deprived them of the benefits of that law.”⁹⁵

Chadha made its way into court by way of a lawsuit brought by an alien, Chadha, after his deportation pursuant to the Immigra-

⁹¹ *Id.* at 827.

⁹² *Id.* at 828.

⁹³ This lends support to the claim, *supra* text accompanying notes 70-74, that the President has the authority to refuse to enforce a law that he believes to be unconstitutional.

⁹⁴ See *Clinton*, 524 U.S. at 422-27.

⁹⁵ *Id.* at 430.

tion and National Act was suspended by the Attorney General but then “vetoed” by the House pursuant to the Act’s one-house veto provision.⁹⁶ The Court concluded that *Chadha* easily had standing, reasoning that deporting him constituted “injury in fact” and noting that “if the veto provision violates the Constitution...the deportation order against Chadha will be canceled.”⁹⁷ *Buckley* made its way into court by way of a challenge brought by individual candidates and political organizations that were subject to regulation by the Federal Election Commission.⁹⁸ The *Buckley* Court stated that “[p]arty litigants with sufficient concrete interests at stake may have standing to raise constitutional questions of separation of powers with respect to an agency designated to adjudicate their rights,” and concluded that the plaintiffs’ claim that they were subject to “impending future rulings and determinations by the Commission” was a sufficient stake to give them standing.⁹⁹ And *Myers* came before the Court after the President fired Myers and he sued in the Court of Claims to recover his lost salary.¹⁰⁰ While the *Myers* Court did not discuss the issue of standing, one could imply from the *Raines* Court’s discussion of both *Myers* and *Powell* (the case in which the Member of Congress brought suit to challenge his exclusion from the House of Representatives) that the loss of his position as Postmaster (and the attendant salary) was a sufficient stake to give him standing.¹⁰¹

A. So, putting all of that together, who has standing?

Q. It might depend on what happens after the President nominates a tenth justice to the Supreme Court. If the Senate refuses to confirm the person based on its belief that it *cannot* do so because

⁹⁶ *Chadha*, 462 U.S. at 923-28.

⁹⁷ *Id.* at 935-936.

⁹⁸ *Buckley*, 424 U.S. at 7-8.

⁹⁹ *Id.* at 117. The Court also rejected an argument that the plaintiffs’ claims were unripe for resolution, reasoning that the Commission had already undertaken to issue rules and regulations and was on the verge of exercising other powers. *Id.* at 113-16.

¹⁰⁰ 272 U.S. at 106.

of the statute, perhaps the nominee himself could bring suit, arguing that he is being deprived of his position on the Supreme Court (and the attendant salary) as a direct result of this unconstitutional statute, akin to the way in which the plaintiff in *Myers* was deprived of his tenure as Postmaster and the plaintiff in *Powell* was deprived of his seat in Congress. To be sure, the claim of the prospective appointee is somewhat more attenuated than the claims of the plaintiff in *Myers*, who already was in his position, or the plaintiff in *Powell*, who had already been elected to Congress by the citizens of his district, but it isn't that far off the mark.

A. And if the Senate votes to confirm the nominee?

Q. In that case, it seems more akin to *Buckley*, in which case it would seem that a litigant who argues a case before the Court might be the one with standing to challenge the justice's appointment, on the theory that the outcome of the case might be impacted by the appointment. Indeed, an argument could be made that a litigant who argues a case before the Court would also have standing in the scenario in which the Senate fails to confirm the nominee on the belief that the statute prevents it from doing so, since the additional justice's vote could have an impact on the outcome of the case.

A. I grant you that *Buckley* might be an appropriate analogy, but are there any other cases that are more on point?

Q. Yes, there are several cases challenging the President's authority to make "recess" appointments of federal judges under the Recess Appointments Clause that provide a useful analogy to the present situation.

A. I don't believe I'm familiar with that Clause or those cases. Please elaborate.

¹⁰¹ See *supra* text accompanying notes 81-84, 90-92.

Q. The Recess Appointments Clause provides that “[t]he President shall have power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.”¹⁰² One question that has arisen with respect to this power is whether it includes the power to grant a Commission to serve as a judge on an Article III federal court, the argument against it being that it is inconsistent with Article III’s command that judges serve with life tenure.¹⁰³ A second question that has arisen is whether the word “Recess” encompasses only intersession recesses of the Senate or whether it also includes shorter intrasession recesses, such as a recess for a holiday. Several cases have answered the first question in the affirmative,¹⁰⁴ and one recent decision has interpreted the term “Recess” broadly to include intrasession holiday breaks.¹⁰⁵

The important point about the Recess Appointments Clause cases is not their specific holdings, but instead how they came to be adjudicated. All of the cases involved challenges brought by litigants whose cases were adjudicated by individuals who were appointed to the federal bench as recess appointments, claiming that the adjudication of their cases by such individuals was unconstitutional and seeking reversal.¹⁰⁶

In many ways, the Recess Appointments Clause challenges are analogous to the situation in which the President appoints and the Senate confirms a tenth justice to the Supreme Court notwithstanding the command of 28 U.S.C. § 1. In both instances, the question is basically the same: was the person’s appointment as a judge

¹⁰² U.S. CONST. art. II, § 2, cl. 3.

¹⁰³ *Id.* art. III, § 1 (“The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour....”).

¹⁰⁴ *Evans v. Stephens*, 387 F.3d 1220, 1221-24 (11th Cir. 2004); *United States v. Woodley*, 751 F.2d 1008, 1009-14 (9th Cir. 1985); *United States v. Allocco*, 305 F.2d 704, 708-15 (2d Cir. 1962).

¹⁰⁵ *Evans*, 387 F.3d at 1224-27.

¹⁰⁶ *See id.*, at 1221-22 (federal appeals court recess appointee); *Woodley*, 751 F.2d at 1009 (federal district court recess appointee); *Allocco*, 305 F.2d at 705-706 (same).

consistent with the strictures of the constitution? And just as it was litigants who had cases before those judges who challenged the validity of their appointments in the Recess Appointments Clause cases, so in our situation it would be a litigant with a case before the Supreme Court who would challenge the constitutionality of the tenth justice's appointment.

A. Very interesting. Of course, all of the Recess Appointments Clause cases that you cited were lower federal court decisions. Are there any U.S. Supreme Court decisions that are on point?

Q. There are no decisions by the U.S. Supreme Court dealing with standing to bring Recess Appointments Clause challenges. There is, however, a decision by the Supreme Court addressing a litigant's standing to bring, among other things, an Ineligibility Clause challenge to Justice Black's appointment to the Supreme Court.

A. I'm not familiar with that case at all, but it sounds as though I am in for a very interesting story!

Q. The Ineligibility Clause of the Constitution provides that "No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time."¹⁰⁷ In *Ex Parte Levitt*,¹⁰⁸ a lawyer who was a member of the Supreme Court bar brought an original action¹⁰⁹ in the Supreme Court, arguing that

¹⁰⁷ U.S. CONST. art. I, § 6, cl. 2.

¹⁰⁸ 302 U.S. 633 (1937).

¹⁰⁹ The Court could have dismissed the action on the ground that the action did not fall within the narrow scope of the Supreme Court's original jurisdiction, but the Court did not raise that issue in the opinion. See *The Constitution of the United States of America, Analysis and Interpretation, Annotations of Cases Decided by the Supreme Court of the United States to June 29, 1992*, Congressional Research Service, Document No. 103-6, p. 779 n.1052 (U.S. Government Printing Office 1996) ("In the

the appointment of Justice Black violated the Ineligibility Clause. The claim was that the Ineligibility Clause barred Black's appointment to the Supreme Court in 1937 because he was then serving as a member of the U.S. Senate for a term expiring in 1939, and Congress had earlier that year voted to establish a pension for retiring Supreme Court justices.¹¹⁰

In addition, and perhaps something that makes this case even more on point, the lawyer who brought the action claimed that Justice Black's appointment was "null and void...because there was no vacancy for which the appointment could lawfully be made."¹¹¹ This somewhat cryptic claim was based on an argument that Justice Van Devanter—whose seat Black was appointed to fill—was still a member of the Supreme Court because he retired under a newly enacted statute that allowed him to continue to exercise judicial duties even though he had retired.¹¹² The claim was based on a misunderstanding of the statute, since it only permitted a retired Supreme Court justice to hear cases within a federal judicial circuit, not cases in the Supreme Court.¹¹³ But what is important is not the correctness of the claim, but rather that it is in essence identical to the one in our hypothetical; it is a claim that the President nominated and the Senate confirmed a tenth justice to sit on the Supreme Court, even though the statute only provides for nine justices.

A. But the Court side-stepped the constitutionality of the statute limiting the number of justices on the Court to nine by pointing out the plaintiff's misunderstanding of Justice Van Devanter's role upon retirement?

curious case of *Ex parte Levitt*, 302 U.S. 633 (1937), the Court was asked to unseat Justice Black on the ground that his appointment violated Article I, Sec. 6, cl. 2. Although it rejected petitioner's application, the Court did not point out that it was being asked to assume original jurisdiction in violation of *Marbury v. Madison*.")

¹¹⁰ John F. O'Connor, *The Emoluments Clause: An Anti-Federalist Intruder in a Federalist Constitution*, 24 HOFSTRA L. REV. 89, 111-15 (1995).

¹¹¹ *Levitt*, 302 U.S. at 635-636.

¹¹² O'Connor, *supra* note 110, at 111-112.

¹¹³ *Id.* at 112.

Q. No, it side-stepped the merits of the plaintiff's claims by holding that he lacked standing to raise them. The Court's brief holding in this regard is worth quoting in full:

The motion papers disclose no interest upon the part of the petitioner other than that of a citizen and a member of the bar of this Court. That is insufficient. It is an established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained, or is immediately in danger of sustaining, a direct injury as the result of that action and it is not sufficient that he has merely a general interest common to all members of the public.¹¹⁴

Indeed, the *Levitt* Court's holding that to have standing, a plaintiff must claim an injury beyond a general one common to all members of the public, has been repeatedly cited and confirmed by more recent Supreme Court decisions addressing the issue of standing.¹¹⁵

A. And, under the rationale of the *Raines* decision, an individual U.S. Senator who voted against confirming a nominee to the federal bench would likewise lack standing to bring the challenge?

Q. That is correct. Indeed, a pre-*Raines* decision so held in a case in which a member of the U.S. Senate brought an Ineligibility Clause challenge to the appointment of a member of Congress to the U.S. Court of Appeals for the D.C. Circuit.¹¹⁶

A. So, I guess all of these decisions are pushing us in the direction of requiring that a litigant with a case before the Supreme

¹¹⁴ *Levitt*, 302 U.S. at 636.

¹¹⁵ See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 574-576 (1992); *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 219-21 (1974).

¹¹⁶ See *McClure v. Carter*, 513 F.Supp. 265, 269 (D. Idaho) (3-judge court), *aff'd sub. nom.* *McClure v. Reagan*, 454 U.S. 1025 (1981).

Court bring a challenge to the constitutionality of the tenth justice's appointment. Accepting that, and going back to the Recess Appointment Clause cases for a moment, I have another question: *Which* court adjudicated the Recess Appointments Clause claims in those cases? And which court would adjudicate the authority of the validity of the appointment of a tenth justice to the U.S. Supreme Court?

Q. Those are interesting questions. In two of the Recess Appointments Clause cases, the challenged appointment was that of a district court judge, and the issue was resolved by a federal appeals court.¹¹⁷ In the third case, the challenged appointment was that of a federal appeals court judge who sat on a panel that rendered a decision, and the challenge was adjudicated by the judges of that circuit sitting *en banc*.¹¹⁸ Our situation would be most analogous to the third case, and so it would seem that the Supreme Court itself would adjudicate the constitutionality of the tenth justice's appointment.

A. But would the tenth justice be able to adjudicate the constitutionality of her own appointment, or would she have to recuse herself? And what of the other justices—would they have a conflict of interest that might require them to recuse themselves?

Q. Well, in the *Evans* case, which considered the constitutionality of the recess appointment of a federal appeals court judge, the recess appointee recused himself.¹¹⁹ But save for one other judge, the rest of the judges on the court refused to recuse themselves, noting that they had no personal stake in the outcome of the

¹¹⁷ *Woodley*, 751 F.2d at 1009; *Allocco*, 305 F.2d at 705-706.

¹¹⁸ 387 F.3d at 1221-22.

¹¹⁹ *Id.* at 1221.

case.¹²⁰ And in *Levitt*, there is no indication in the opinion that any of the justices recused themselves, not even Justice Black!

Moreover, even if it could be said that the justices on the Supreme Court had an interest in the outcome of the case that would normally require that all of them recuse themselves, the Chief Justice has the statutory authority to either assign the case to a federal appeals court for final decision of the matter, or if all such appeals courts would likewise be disqualified from hearing the case, the Supreme Court itself could hear the case under the Rule of Necessity, which allows a judge to hear a case in which he has a personal interest if the case otherwise cannot be heard.¹²¹

A. Speaking of the other justices, are there any factual scenarios in which *they* would have standing to bring suit challenging

¹²⁰ *Id.* at 1228 n.14 (“The public has no good reason to doubt the impartiality of our decision: our own offices are not at stake in this case; we have no financial interest in the outcome; and we did not select or appoint Judge Pryor to sit on this Court. We recognize that our associate Judge Pryor has an interest in the motion, but even the naming of a judicial colleague as a defendant in litigation (and Judge Pryor is not a defendant here) does not require automatic disqualification of every judge on the same court.”).

¹²¹ *United States v. Will*, 449 U.S. 200, 212-213 (1980) (“In federal courts generally, when an individual judge is disqualified from a particular case by reason of § 455, the disqualified judge simply steps aside and allows the normal administrative processes of the court to assign the case to another judge not disqualified. In the cases now before us, however, all Article III judges have an interest in the outcome; assignment of a substitute District Judge was not possible. And in this Court, when one or more Justices are recused but a statutory quorum of six Justices eligible to act remains available, see 28 U.S.C. § 1, the Court may continue to hear the case. Even if all Justices are disqualified in a particular case under § 455, 28 U.S.C. § 2109 authorizes the Chief Justice to remit a direct appeal to the Court of Appeals for final decision by judges not so disqualified. However, in the highly unusual setting of these cases, even with the authority to assign other federal judges to sit temporarily under 28 U.S.C. §§ 291-296 (1976 ed. and Supp. III), it is not possible to convene a division of the Court of Appeals with judges who are not subject to the disqualification provisions of § 455. It was precisely considerations of this kind that gave rise to the Rule of Necessity, a well-settled principle at common law that, as Pollack put it, ‘although a judge had better not, if it can be avoided, take part in the decision of a case in which he has any personal interest, yet he not only may but must do so if the case cannot be heard otherwise.’”).

the constitutionality of the statute? For example, as currently constituted, a majority of the members of the Supreme Court concur to some degree in the Court's decision in *Roe v. Wade*,¹²² which held that the federal constitution protects the right of a woman to have an abortion under certain circumstances. Suppose that the President and the Senate were to ignore the command of 28 U.S.C. § 1 and appoint a sufficient number of justices to overturn *Roe*, and the Court subsequently overturned *Roe* in a case that came before it. Would one of the dissenting justices have standing to challenge the constitutionality of the appointment of the additional justices?

Q. Such a claim of institutional injury would suffice to give one of the other Justices standing only if it fit into the very narrow window that the *Raines* Court left open when it distinguished *Coleman*. In other words, the dissenting justices would have standing if they could show that but for the appointment of the additional justices, their opinion would have constituted the majority decision and thus become the supreme law of the land. That assumes, of course, that *Coleman* as distinguished in *Raines* would even apply to a claim of vote dilution within a federal judicial body, as *Coleman* involved a legislative body, and a state legislative body at that.¹²³

A. Well once again, you have given me a lot to absorb.

Q. Let's break for today, then, and pick up tomorrow with my final question regarding the consequences of my theory.

A. Sounds good. I'll put my thinking cap on. See you tomorrow.

¹²² 410 U.S. 113 (1973).

¹²³ In *Raines*, the Court left open the possibility that the institutional standing recognized in *Coleman* was limited to a claim by members of a *state* legislative body. See 521 U.S. at 824 n.8.

Day VI. Consequences

Q. Greetings. Since you expressed so much concern with the consequences of my theory when we began this dialogue, I wanted to end our discussion by trying to address that question. What, in your view, are the consequences if I'm correct?

A. Well, with the conservatives in solid control of the Presidency and the Senate right now, it seems pretty clear that your theory will enable them to pack the Supreme Court with like-minded justices.

Q. But they could do that today anyway under the conventional view. Conservatives are currently in control of the House, the Senate, and the Presidency. Even if 28 U.S.C. § 1 is valid, the House and Senate could vote to increase the number of Justices to 10, 11, or some other number, and the President could sign it into law.

A. That's true. So when would it make a difference?

Q. Last night, I put together this table to help us analyze the consequence of my theory. Assuming that there are only two parties, Democrats and Republicans, and that each branch is in the control of one party or the other, there are eight possible scenarios to consider:

Scenario	House	Senate	President
1	Republican	Republican	Republican
2	Democrat	Republican	Republican
3	Republican	Democrat	Republican
4	Republican	Republican	Democrat

5	Republican	Democrat	Democrat
6	Democrat	Republican	Democrat
7	Democrat	Democrat	Republican
8	Democrat	Democrat	Democrat

Where one party controls all three branches—scenarios 1 and 8—the consequences of my theory are no different from those of the conventional wisdom. Under either of those scenarios, the party in control already has the power to amend 28 U.S.C. § 1 to expand the size of the Court, so their ability to expand the size of the Court by having the President name additional justices and the Senate confirm the same would be no different.

Where one party controls both the Senate and the Presidency, but the other party controls the House—scenarios 2 and 5—the consequences of my theory would differ from those under the conventional wisdom. If 28 U.S.C. § 1 is a valid exercise of congressional power, then in these scenarios, the party in control of the Senate and the Presidency would be unable to add additional members to the Court, since it is unlikely to get the House to go along with amending the statute. By contrast, under my theory, the party in control of the Senate and the Presidency would be able to add additional justices to the Court.¹²⁴ Thus, for example, if the Democrats were able to win back the Presidency and the Senate, then they would be able to expand the size of the Court, even though the Republicans still maintained control of the House, something that would not be possible under the conventional wisdom.

¹²⁴ To be sure, under my theory they would also be able to shrink the size of the Court as well, but it seems more likely that when the same party controls both the Presidency and the Senate that if they do anything with respect to the Supreme Court, it would be to expand its size.

Finally, where different parties control the Senate and the Presidency—scenarios 3, 4, 6, and 7—the consequences of my theory would differ from those under the conventional wisdom as well, at least in a formal sense.

A. How is that? Surely when the Senate and the Presidency are in different hands, the Senate is unlikely to go along with efforts by the President to expand the size of the Court, whether that is by way of an amendment to 28 U.S.C. § 1 or by confirming additional Justices nominated by the President.

Q. That is true, but it is possible that in these scenarios, the party in control of the Senate might act to *reduce* the size of the Court by refusing to consent to *any* nominees put forward by the President, even after a justice has retired from the Supreme Court. Of course, as a practical matter, the same result might occur under the existing system, since the Senate might refuse to consent to the President's nominees on the ground that they are unqualified. But under my theory, they don't need to justify their refusal to confirm the nominee on qualifications or the like. Rather, they could simply decide that 8 or 7 or some other, smaller number of justices on the Supreme Court is enough.

A. So under your theory, if the Democrats were to regain control of the Senate between now and the next vacancy on the Supreme Court....

Q. That's right, they could then, under my theory, legitimately prevent the current President from filling the vacancy by deciding to, for the time being, reduce the size of the Court to eight members.

A. This all seems very political. Could that be what the Founders had in mind?

Q. It would be no more political than changes that have been made to the size of the Court by way of amending the con-

gressional statute believed to be constitutional. For example, in 1866, the Republican-controlled Congress amended the statute to reduce the size of the Court from ten to seven Justices in order to deprive Democratic President Andrew Johnson of the opportunity to fill three vacancies, but then increased its size to nine Justices once Republican Ulysses S. Grant was elected President.¹²⁵ It would simply involve one fewer of the political branches in the process.

A. Well if you're right, one thing's for sure.

Q. What's that?

A. We're all going to be paying much closer attention to which party and which people we elect to the U.S. Senate.

Q. True enough.

¹²⁵ Charles G. Geyh, *Judicial Independence, Judicial Accountability, and the Role of Constitutional Norms in Congressional Regulation of the Courts*, 78 IND. L. J. 153, 180 (2003).