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APPOINTMENTS WITHOUT LAW

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Debates about the Appointments Clause tend to turn on drawing the right distinctions. This Article argues that the Appointments Clause draws a little-recognized distinction between the officers specifically enumerated by the Clause (“Ambassadors,” “other public Ministers and Consuls,” and “Judges of the supreme Court”) and the officers referred to only as a residual category (“all other officers of the United States”). The basic claim is that enumerated offices need not be “established by Law”—that is, by congressional legislation—but are established instead by the Constitution or the law of nations.

Although the “enumerated-residual distinction” has been essentially ignored by judges and scholars, it raises a basic interpretive puzzle. The Appointments Clause appears to give the President the same authority to appoint each category of enumerated officers. But in practice, we have construed the President’s authority to appoint diplomats and Supreme Court Justices quite differently. Since the Founding, the President has appointed diplomats without congressional authorization, but at the same time everyone has

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assumed that Congress must pass a statute before the President may appoint any Justices.

This Article argues that the President has the authority to appoint both diplomats and Justices without congressional authorization. This view accords with the Constitution's text, suits the unique constitutional status of the Supreme Court, and was advanced by political actors soon after the Constitution's ratification. But even if one rejects the strongest version of this argument, the Article's core insight—that the Appointments Clause requires parallel treatment of diplomats and Justices—has a series of potential implications for constitutional doctrine.

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INTRODUCTION

Debates about the Appointments Clause tend to turn on drawing the right distinctions. In the past, judges and scholars have focused on two distinctions: (1) between “officers of the United States” and mere “employees” and (2) between “principal” and “inferior” officers. This Article argues that the Appointments Clause also draws a third, little-recognized distinction: between officers specifically enumerated by the Clause (i.e., “Ambassadors,” “other public Ministers and Consuls,” and “Judges of the supreme Court”) and the officers referred to only in a residual category (i.e., “all *other* Officers of the United States”).

The distinction between enumerated and residual officers suggests a number of surprising implications for constitutional doctrine. The most significant is that it may be constitutional for the President and Senate to appoint a tenth or eleventh Justice to the U.S. Supreme Court *without* a statute altering the Court’s size. To be sure, many scholars have said that the political branches have the power to change the size of the Supreme Court.¹ But these scholars have all assumed that Congress must first pass a statute in order to make the change.² Indeed, Congress has purported to set the size of the Supreme Court since the Judiciary Act of 1789.³ This Article, however, challenges that common assumption. Instead, we contend that there are strong textual and structural reasons to think that

¹ See, e.g., Richard H. Fallon, Jr. et al., *Hart and Wechsler’s The Federal Courts and the Federal System* 318 (7th ed. 2015) (describing changing the Court’s size as one way for the political branches to “exercise some control over the Court”); Akhil Reed Amar, *America’s Unwritten Constitution* 354–55 (2012) (noting “several legal changes in Court size” made by Congress); Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as It Sounds*, 22 *Const. Comment.* 257, 265 (2005) (stating that Congress may set the size of the Supreme Court as an act of constitutional “construction”); Keith E. Whittington, *Yet Another Constitutional Crisis?*, 43 *Wm. & Mary L. Rev.* 2093, 2134 (2002) (stating that “the basic power of Congress to alter the total number of Justices on the Supreme Court cannot be questioned”).

² The exception is Professor Peter Nicolas, who has also argued that the President may appoint Justices to the Supreme Court without statutory authorization. See Peter Nicolas, “Nine, Of Course”: A Dialogue on Congressional Power to Set by Statute the Number of Justices on the Supreme Court, 2 *N.Y.U. J.L. & Liberty* 86 (2006). Nicolas’s article focuses on Congress’s lack of authority to set the size of the Supreme Court—under either the Necessary and Proper Clause or the Regulations Clause—rather than the President’s affirmative authority to appoint Justices under the Appointments Clause.

³ See *infra* notes 33–34 and accompanying text.

the President may appoint additional Justices without Congress authorizing such appointments by statute.

Consider first the text of the Appointments Clause.⁴ There is a baseline rule in the constitutional system that Congress must “establish[] by Law” federal offices before the President can appoint officers to fill those roles. But that baseline rule has its exceptions. Specifically, it appears that the requirement that offices be “established by Law” applies only to residual officers—that is, “all other officers of the United States.”⁵ On this view, enumerated offices need not be established by federal legislation. Instead, these offices (as many historical actors argued) are established by the Constitution or the “law of nations.”⁶ Based on this theory, the President has long appointed diplomatic officers (i.e., “Ambassadors,” “other public Ministers,” and “Consuls”) without Congress first establishing the offices by statute. But by the same logic, the Appointments Clause would appear to vest the President with an equivalent power to appoint additional Justices so long as the Senate provides its “advice and consent.”

This view also derives significant support from the Constitution’s broader structure. Article III, as everyone recognizes, creates the Supreme Court just as Article I creates Congress and Article II creates the Presidency. And according to this analogy, Article III may also establish the offices of the “Judges of the supreme Court” just as the Constitution establishes the offices of members of Congress and of the President. But if the Constitution creates such offices, then Congress need not establish them by law, nor (perhaps) may it disestablish them by statute.

Indeed, we are not the first to suggest some of these arguments. Two of the great legal scholars of the twentieth century—Professors Edward Corwin and David Currie—both suggested that the President could appoint enumerated officers without congressional authorization.⁷ And more recently, a few other scholars have noted this possibility in passing.⁸

⁴ See U.S. Const. art II, § 2, cl. 2.

⁵ See *infra* Section II.A.

⁶ See *infra* Sections II.B, III.B.

⁷ See Edward S. Corwin, *The President: Office and Powers 1787–1957*, at 70–71 (4th rev. ed. 1957); David P. Currie, *The Constitution in Congress: The Federalist Period 1789–1801*, at 44–45 (1997).

⁸ See Saikrishna B. Prakash, *Imperial from the Beginning: The Constitution of the Original Executive 172–75* (2015) (discussing the President’s unilateral power to create diplomatic posts); Edward A. Hartnett, *Recess Appointments of Article III Judges: Three Constitutional Questions*, 26 *Cardozo L. Rev.* 377, 390 n.58 (2005) (discussing Currie’s reading); Saikrishna

But so far, every scholar to consider the question has dismissed the “textual possibility” as a mere curiosity—in part because no scholar has “point[ed] to anyone who made the textual argument” before the twentieth century.⁹ Contrary to the view of existing scholarship, however, this Article demonstrates that people have been making this “textual argument” since the Founding. In fact, members of Congress have wrestled with these very questions in multiple public debates over the past two hundred years.¹⁰

That said, we admit that there are significant counterarguments to our theory. For instance, one might think that the Necessary and Proper Clause authorizes Congress to set the size of the Supreme Court—either to carry into execution Congress’s own powers, or to carry into execution those of another branch.¹¹ Alternatively, one might argue that the Constitution’s broader structure distinguishes between *foreign* and *domestic* offices and that this distinction offers a plausible reason to conclude that the Constitution creates distinct appointment mechanisms for different classes of enumerated officers.¹² Finally, and perhaps most importantly, one might think that the divergent historical practice regarding diplomats and Justices means that the Constitution has been *liquidated* or *glossed* to preclude the President from appointing Justices without statutory authorization.¹³ We acknowledge that each of these arguments has force. But in the end, this Article argues that none of these

B. Prakash & Michael D. Ramsey, The Executive Power over Foreign Affairs, 111 Yale L.J. 231, 309 n.336 (2001) (noting that “it is possible to read the Appointments Clause as providing the President the power to appoint to the Supreme Court and to diplomatic posts even in the absence of a statute creating these posts”); Michael B. Rappaport, The Original Meaning of the Recess Appointments Clause, 52 UCLA L. Rev. 1487, 1526 n.109 (2005) (discussing Currie’s reading); Tuan Samahon, The Judicial Vesting Option: Opting Out of Nomination and Advice and Consent, 67 Ohio St. L.J. 783, 831 n.222 (2006) (noting that the “Appointments Clause enumerates those offices the Constitution authorized by its own terms—that is, the self-executing offices”—but requires the “‘catch all’ category” to be “created by Congress”); E. Garrett West, Note, Congressional Power over Office Creation, 128 Yale L.J. 166, 196–99 (2018) (discussing Corwin’s reading).

⁹ Hartnett, *supra* note 8, at 390 n.58.

¹⁰ See *infra* Section II.C.

¹¹ See *infra* Section III.A.

¹² See *infra* Section III.B.

¹³ See *infra* Section III.C. Both “liquidation” and “gloss” refer to theories by which the meaning of ambiguous constitutional provisions can become fixed through subsequent historical practice. See Curtis A. Bradley & Neil S. Siegel, Historical Gloss, Madisonian Liquidation, and the Originalism Debate, 106 Va. L. Rev. (forthcoming 2020) (manuscript at 4–5) (on file with Virginia Law Review Association).

reasons foreclose the possibility of “appointments without law”—that is, appointments to offices that Congress need not “establish[] by Law.”¹⁴

More generally, we recognize that our argument may be disconcerting. How could it be lawful for the President and the Senate to break from longstanding tradition and act alone to change the size of the Supreme Court? But the Constitution sometimes declines to impose *legal* limits on institutional actors, trusting instead informal constraints. In other words, even if one thinks that the Constitution itself allows the President to appoint additional Justices without congressional authorization, there might be a strong constitutional norm—what some might call a “convention”—against such appointments. Indeed, we agree that such a convention exists in the context of judicial appointments and show how this convention can and should constrain the President and Senate’s capacity to exercise their appointment authority to its lawful maximum.

Before proceeding, we offer a short note on this Article’s methodological approach. No doubt, this Article’s core contention derives from what we take to be the best interpretation of the Constitution’s text and structure. But we also recognize that the practice of constitutional interpretation is, for many, decidedly more pluralistic—incorporating a range of doctrinal, historical, and prudential arguments.¹⁵ The Supreme Court itself often takes such an approach in constitutional cases.¹⁶ Accordingly, in presenting the case for appointments without law, we attempt to integrate arguments that go beyond the Constitution’s original meaning, or at least to respond to such arguments where appropriate.¹⁷

¹⁴ U.S. Const. art II, § 2, cl. 2. Of course, in a different sense, these offices are established by “law”—namely, by the Constitution or the law of nations. Cf. 62 Cong. Rec. 2165 (1921) (statement of Rep. John Rogers) (arguing that the appointments of enumerated officers were “authorized by . . . the supreme law of the land—the Constitution”).

¹⁵ See Michael C. Dorf, Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning, 85 *Geo. L.J.* 1765, 1787–94 (1997) (discussing “eclectic” constitutional interpretation and exploring the “perils” of such an approach); Stephen M. Griffin, Pluralism in Constitutional Interpretation, 72 *Tex. L. Rev.* 1753 (1994) (describing a similar approach as “pluralism”); see also Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* 7, 93 (1982) (describing six modalities of constitutional interpretation: historical, textual, doctrinal, prudential, structural, and ethical); Richard H. Fallon Jr., A Constructivist Coherence Theory of Constitutional Interpretation, 100 *Harv. L. Rev.* 1189 (1987) (offering a theory for reconciling the various modalities used by courts).

¹⁶ See Fallon, *supra* note 15, at 1193.

¹⁷ Of course, such arguments might still be “originalist” arguments, even if not explicitly intended to interpret the text’s original meaning. See Stephen E. Sachs, Originalism as a Theory of Legal Change, 38 *Harv. J.L. & Pub. Pol’y* 817, 857 (2015) (suggesting that “many

This approach also allows us to address some important (and interesting) methodological questions that arise when different modes of constitutional argumentation conflict. At a certain point, however, different interpreters may reach irreducible disagreement about the relative weight of competing arguments. Some, for instance, might find that the Constitution's text and structure—no matter how decisive—cannot overcome long “settled” historical practice, or that textual arguments must at points give way to pragmatic concerns. We think that, all things considered, this Article advances the best interpretation of the Constitution. But at the very least, we hope to unsettle the assumption that the Constitution's text and structure support the current consensus about the Appointments Clause.

This Article proceeds as follows. Part I introduces the distinction between enumerated and residual officers and considers the puzzling status of enumerated officers under the Appointments Clause. Part II demonstrates that this distinction derives significant support from the text and structure of the Constitution, as well as early historical debates. Part III considers the strongest counterarguments to this Article's thesis. Finally, Part IV explains that, even if the Appointments Clause does not preclude appointments without law, such appointments are still constrained by a strong constitutional convention.

I. THE PUZZLE OF ENUMERATED OFFICERS

This Part considers the undertheorized category of “enumerated” officers in the Appointments Clause. Specifically, it introduces the distinction between *enumerated* and *residual* officers. The basic claim is simple: enumerated officers (i.e., “Ambassadors,” “other public Ministers and Consuls,” and “Judges of the supreme Court”) need not arise from congressional statute, but exist through some other source of law, such as the Constitution or the law of nations. By contrast, residual officers (i.e., “all *other* Officers of the United States”) must be created by congressional statute.

Because of this distinction's novelty, this Part's purpose is limited. First, we introduce the distinction between enumerated and residual officers and situate it within the Supreme Court's broader Appointments Clause jurisprudence. Second, we suggest that this distinction applies in

different methodological commitments” might be “originalist arguments” if such commitments were “part of the Founders' law”).

two related contexts: (1) it may authorize the President (with the Senate’s “advice and consent”) to appoint enumerated officers without congressional authorization; and (2) it may authorize the President to more freely make recess appointments of such enumerated officers. Finally, we consider the different potential implications of this distinction between enumerated and residual officers. We will wait to address the specific textual, historical, and structural arguments supporting (and weighing against) our view until Parts II and III.

A. Appointments Without Law

Begin with the text of the Appointments Clause:

[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.¹⁸

As everyone recognizes, the Clause differentiates between several categories of federal officials. First, the Clause distinguishes (implicitly) between “officers of the United States” and “employees.” The officer-employee distinction is significant because the Appointments Clause governs the appointment of the former but not the hiring of the latter.¹⁹ Second, the Clause distinguishes (again implicitly) between “principal officers” and “inferior officers.”²⁰ The principal-inferior distinction is

¹⁸ U.S. Const. art. II, § 2, cl. 2.

¹⁹ See, e.g., *Lucia v. SEC*, 138 S. Ct. 2044, 2051–55 (2018) (holding that for “non-officer employees . . . the Appointments Clause cares not a whit about who named them”); Jennifer L. Mascott, *Who Are “Officers of the United States”?*, 70 *Stan. L. Rev.* 443, 447 (2018) (stating that “[t]he Appointments Clause requirements apply only to ‘Officers of the United States’”); E. Garrett West, *Clarifying the Employee-Officer Distinction in Appointments Clause Jurisprudence*, 127 *Yale L.J. Forum* 42, 42, 50 (2017) (emphasis omitted) (noting an “employee-officer distinction” and arguing that the term “officer” in the Appointments Clause means “any person who is vested with the authority to alter legal rights and obligations on behalf of the United States”).

²⁰ The Appointments Clause does not mention “principal officers,” but the Opinions Clause does. See U.S. Const. art. II, § 2, cl. 1 (noting that the President “may require the Opinion, in writing, of the principal Officer in each of the executive Departments”).

significant because the former must be appointed by the President and confirmed by the Senate, but the latter may be appointed by the “President alone,” “courts of law,” or “heads of departments”—if Congress passes a statute so allowing.²¹

For all that has been written about the Appointments Clause, however, few have considered a distinction that appears on the face of the Clause.²² Specifically, the Appointments Clause appears to distinguish between certain enumerated officers—“Ambassadors,” “other public Ministers and Consuls,” and “Judges of the supreme Court”—and a residual category of officers—“all *other* officers of the United States.”²³ We call this the “enumerated-residual distinction.”²⁴

The argument for the distinction is straightforward: the phrase “which shall be established by Law” sets the baseline constitutional rule that Congress enjoys the exclusive authority to create federal offices.²⁵

²¹ See, e.g., *Edmond v. United States*, 520 U.S. 651, 659–64 (1997) (stating that the “prescribed manner of appointment for principal officers is also the default manner of appointment for inferior officers,” but noting the Appointments Clause provides that inferior officers can be appointed through other mechanisms); Tuan Samahon, *Are Bankruptcy Judges Unconstitutional?: An Appointments Clause Challenge*, 60 *Hastings L.J.* 233, 234–36 (2008) (acknowledging this distinction); Ross E. Wiener, *Inter-Branch Appointments After the Independent Counsel: Court Appointment of United States Attorneys*, 86 *Minn. L. Rev.* 363, 404–23 (2001) (noting that the Appointments Clause “validates . . . delegation only with respect to inferior officers”).

²² For the few prior references, see sources cited *supra* notes 7–8.

²³ We use the formulation “enumerated” and “residual” because it best describes the distinction and it has support in historical usage. See, e.g., 59 *Cong. Rec.* 8625–26 (1920) (written statement of President Wilson) (referring to the Appointments Clause as “providing that certain enumerated officers and all officers whose appointments are not otherwise provided for shall be appointed by the President”); *Cong. Globe*, 29th Cong., 2d Sess. 348–49 (1847) (statement of Rep. Lewis Cass) (describing “ambassadors” as “enumerated officers” as distinct from “all other” officers); 41 *Annals of Cong.* 424 (1824) (statement of Sen. Rufus King) (“The enumerated officers are created by the Constitution; various other officers of the United States are provided for by law.”); *Ambassadors and Other Pub. Ministers of the U.S.*, 7 *Op. Att’y Gen.* 186, 193 (1856) (noting that the Constitution vested the President with the power to appoint ambassadors and public ministers “without making the appointment of them subject, like, ‘other (non-enumerated) officers,’ to the exigency of an authorizing act of Congress”).

²⁴ We should note that the enumerated-residual distinction does not simply mirror the principal-inferior distinction. For one thing, many “residual” officers are also “principal” officers (e.g., department heads). For another, some “enumerated” officers might be “inferior” officers. See Steven G. Calabresi & Gary Lawson, *Equity and Hierarchy: Reflections on the Harris Execution*, 102 *Yale L.J.* 255, 275 n.103 (1992); Samahon, *supra* note 8, at 831 n.222; *Cong. Globe*, 29th Cong., 2d Sess. 349 (1847) (statement of Rep. Lewis Cass).

²⁵ See, e.g., Michael J. Gerhardt, *The Federal Appointments Process: A Constitutional and Historical Analysis* 15 (2000) (stating that Congress is authorized “to establish . . . offices to

Generally, the President may not appoint an “officer” until Congress has established the “office” by statute. But as we elaborate below,²⁶ it appears that this requirement only modifies “all *other* officers of the United States.” By contrast, the phrase does not modify the enumerated officers—that is, “Ambassadors, other public Ministers and Consuls, [and] Judges of the supreme Court.” Stated simply, the enumerated-residual distinction means that the Appointments Clause does not require that diplomats and Justices be “established by Law.”

Indeed, since the Founding, members of all three branches have read the Appointments Clause as permitting the President to appoint ambassadors, public ministers, and consuls without congressional authorization.²⁷ In fact, President Washington’s first appointment (concerning a new minister to France) preceded any authorizing statute,²⁸ as did all of his subsequent diplomatic appointments.²⁹ Since the Washington administration, Presidents have repeatedly exercised this power,³⁰ the executive branch has long defended the President’s

be filled by people nominated by the president”); West, *supra* note 8, at 176–96 (arguing that “Congress has the *exclusive* authority to create executive-branch civil offices”).

²⁶ See *infra* Section II.A.

²⁷ See Corwin, *supra* note 7, at 70–71; Currie, *supra* note 7, at 44–45; West, *supra* note 8, at 196–97. In theory, one could read the early appropriation statutes as a form of congressional authorization. See Cong. Globe, 35th Cong., 2d Sess. 1090 (1859) (statement of Sen. Stephen Douglas) (discussing this theory). But few historical actors understood the relevant historical practice this way.

²⁸ See Letter from George Washington, President of the United States, to the United States Senate (June 15, 1789), in 2 *The Papers of George Washington: Presidential Series* 498, 498 & n.3 (Dorothy Twohig ed., 1987) [hereinafter *The Papers of George Washington*] (appointing a Minister of the United States at the Court of France to replace Thomas Jefferson); List of the Public Acts of Congress, 1 Stat., at xvii (1789) (showing that only the Oaths of Office Act had been passed by June 15).

²⁹ See Prakash & Ramsey, *supra* note 8, at 309.

³⁰ See Corwin, *supra* note 7, at 70–71. Technically, the President did not appoint an “ambassador” until 1893—after Congress authorized such a position. See Ryan M. Scoville, *Unqualified Ambassadors*, 69 *Duke L.J.* (forthcoming 2019) (manuscript at 16 n.81) (on file with Virginia Law Review Association). But it appears that most early historical actors believed that the President also had the power to appoint ambassadors without congressional authorization. See *id.* at 68–72.

prerogative,³¹ and Congress and the judiciary have seemingly acquiesced to the practice.³²

By contrast, Congress has always determined the size of the Supreme Court by statute. The Judiciary Act of 1789, for instance, established that “the supreme court of the United States shall consist of a chief justice and five associate justices.”³³ The number of seats on the Court has changed from time to time, but Congress has always made these changes by statute.³⁴ And it appears that no President has ever challenged this view.

But the same reasoning that exempts diplomats from the requirement that offices be established by law would appear to also exempt “Judges of the supreme Court.” Put another way, if “established by Law” does not modify the first three categories of enumerated officers (“Ambassadors,” “other public Ministers,” and “Consuls”), then it should not modify the fourth category (“Judges of the supreme Court”). The President’s power to appoint Justices and diplomats would seem to stand on the same footing, and if that’s so, then the President and Senate would have the power to appoint Justices without the assent of the House.

³¹ See *Officers of the U.S. Within the Meaning of the Appointments Clause*, 31 Op. O.L.C. 73, 117 n.17 (2007); *Nomination of Sitting Member of Congress to Be Ambassador to Viet.*, 20 Op. O.L.C. 284, 286 (1996) (“[T]he executive branch has historically taken the position that the President has the inherent, constitutional power to create diplomatic offices, and Congress has generally acquiesced in that view.”); *Office-Comp.*, 22 Op. Att’y Gen. 184, 186 (1898) (noting that the offices of “ambassadors, other public ministers and consuls . . . were adopted from the law of nations, and exist independently of statute or treaty”); *Ambassadors and Other Pub. Ministers of the U.S.*, 7 Op. Att’y Gen. 186, 193–94 (1855) (arguing that this power “was understood in the early practice of the Government”); *Appointment of Consuls*, 7 Op. Att’y Gen. 242, 242 (1855) (“Consuls are officers created by the Constitution and the laws of nations, not by acts of Congress.”).

³² See, e.g., *Francis v. United States*, 22 Ct. Cl. 403, 405 (Ct. Cl. 1887) (“In the diplomatic service, Congress seems to have practically conceded, whether on constitutional grounds rightly or wrongly taken or otherwise, the duty, power, or right of the Executive to appoint diplomatic agents, of any rank or title, at any time and at any place, subject to such compensation, or none at all, as the legislative branch of the Government should in its wisdom see fit to provide”); *Byers v. United States*, 22 Ct. Cl. 59, 63–64 (1887); *Impressed American Seamen* (Mar. 28, 1796), in 16 *The Papers of James Madison* 283, 284 (J.C.A. Stagg et al. eds., 1989) (statement of Rep. Joshua Coit) (arguing that “the Constitution already gave the president the authority to appoint consuls and such agents as he thought necessary”); 1 *Annals of Cong.* 1064 (1790) (Joseph Gales ed., 1834) (collecting various statements to this effect).

³³ 1 Stat. 73 (1789).

³⁴ See F. Andrew Hessick & Samuel P. Jordan, *Setting the Size of the Supreme Court*, 41 *Ariz. St. L.J.* 645, 664–71 (2009) (recounting this history).

B. Recess Appointments Without Vacancies

The enumerated-residual distinction might also apply in the context of the Recess Appointments Clause. That is, the President may have the authority to make recess appointments of enumerated officers without congressional authorization or the Senate's consent.

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.”³⁵ The Clause thus empowers the President, in some cases, to temporarily fill government offices without the Senate's “advice and consent.” Typically, the Recess Appointments Clause applies when an existing statutory office becomes vacant (or remains vacant) during a Senate recess.³⁶

But the Clause works differently for diplomatic officers. As Professor Michael Rappaport has explained, these diplomatic offices were understood “as being established under the Constitution or possibly under international law,” rather than being “the exclusive creation of federal law.”³⁷ The distinct constitutional status of diplomatic offices gave the President unique authority over such appointments: the President's appointment of such an officer during a Senate recess could simultaneously give rise to both the office and the vacancy.³⁸ Indeed, President Washington and later Presidents made recess appointments to newly created diplomatic offices.³⁹

This reasoning, as Rappaport notes, could also apply to “judges of the Supreme Court.”⁴⁰ Here again, the relevant distinction is between officers enumerated in the Appointments Clause itself and the residual officers that must be “established by Law.” Thus, under the Recess Appointments

³⁵ U.S. Const. art. II, § 2, cl. 3.

³⁶ See *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2567–73 (2014) (interpreting the Recess Appointments Clause to apply to “vacancies that initially occur during a [Senate] recess” and also to “vacancies that initially occur before a recess and continue to exist during the recess”).

³⁷ Rappaport, *supra* note 8, at 1526; see also *infra* Section III.B (discussing this understanding).

³⁸ See Edmund Randolph, Opinion on Recess Appointments (July 7, 1792), *in* 24 *The Papers of Thomas Jefferson* 165, 165–67 (John Catanzariti ed., 1990); Rappaport, *supra* note 8, at 1527–28; cf. Hartnett, *supra* note 8, at 390 n.58 (discussing Rappaport's theory but challenging its implications for other issues).

³⁹ See Rappaport, *supra* note 8, at 1528; *Nomination of Sitting Member of Congress to Be Ambassador to Viet.*, 20 *Op. O.L.C.* 284, 289–91 (1996) (showing continued executive support for this notion in 1995).

⁴⁰ See Rappaport, *supra* note 8, at 1526 n.109.

Clause, the President could (at least in theory) make as many recess appointments to the Supreme Court as he wanted.⁴¹ Of course, these appointments would only last until the end of the Senate's next session, and the Senate could essentially block any recess appointments by holding "pro forma sessions."⁴² Nevertheless, this power still raises the striking possibility of a "Recess Supreme Court" with additional Justices appointed solely by the President.

C. Potential Accounts

At this point, it might be helpful to lay out a range of potential accounts of the enumerated-residual distinction. As we discuss further below, each of these accounts derives at least some support from the Constitution's text and structure or from subsequent historical practice—although we find some accounts much more plausible than others.

One possibility is that the Appointments Clause vests the President and Senate with exclusive authority to appoint enumerated officers.⁴³ On the exclusive-authority view, the President may not only appoint enumerated offices in the absence of congressional authorization, but may also

⁴¹ See Note, Recess Appointments to the Supreme Court—Constitutional but Unwise?, 10 *Stan. L. Rev.* 124, 125 (1957) (documenting eleven recess appointments to the Supreme Court dating back to President Washington). Most (although not all) scholars view recess appointments to Article III courts as constitutionally permissible, albeit inadvisable. Compare Hartnett, *supra* note 8, at 427–41 (stating that "[a]ll but six of our presidents have made recess appointments to Article III courts"), Diana Gribbon Motz, Essay, The Constitutionality and Advisability of Recess Appointments of Article III Judges, 97 *Va. L. Rev.* 1665, 1670 (2011) (noting that for "150 years almost every President filled judicial vacancies by recess appointment without suggestion from any quarter that the practice violated the Constitution"), and Note, *supra*, at 125 (documenting eleven recess appointments to the Supreme Court), with Steven M. Pyser, Recess Appointments to the Federal Judiciary: An Unconstitutional Transformation of Senate Advice and Consent, 8 *U. Pa. J. Const. L.* 61, 65–67 (2006) (arguing "recess appointments to the federal bench were a rare and disfavored occurrence," because the period between 1897 and 1963 contained two-thirds of all recess appointments since 1789, a "majority of recess appointees did not hear any cases until a Senate confirmation," and "[t]he Senate has repeatedly voiced its opposition to the recess appointment of temporary judges").

⁴² See *NLRB v. Noel Canning*, 134 *S. Ct.* 2550, 2573–77 (2014) (holding that pro forma sessions do not count in calculating the length of a senate recess).

⁴³ See Saikrishna Bangalore Prakash, A Taxonomy of Presidential Powers, 88 *B.U. L. Rev.* 327, 339 (2008) [hereinafter Prakash, A Taxonomy of Presidential Powers] (describing "exclusive" presidential powers and suggesting the power to nominate federal officers as a possible example). One could also think of this authority as an indefeasible power. See Saikrishna Prakash, Regulating Presidential Powers, 91 *Cornell L. Rev.* 215, 225–30 (2005) (reviewing Harold J. Krent, *Presidential Powers* (2005)) [hereinafter Prakash, Regulating Presidential Powers].

disregard any statute purporting to limit his appointment of additional officers. In other words, if Congress passed a statute forbidding the President from appointing certain diplomatic officers or limiting the size of the Supreme Court, the President could lawfully ignore the statute and still make appointments. In fact, on this view, congressional attempts to cabin the President's appointment power could themselves be viewed as unlawful. The most direct implication of this view is that the President could appoint additional Supreme Court Justices notwithstanding the statute establishing the Court's size.

A second more modest possibility is that the Appointments Clause vests the President and Congress with concurrent authority over enumerated officers.⁴⁴ On the concurrent-authority view, the President can appoint enumerated officers before Congress passes a statute that establishes their offices. But if Congress passes a statute purporting to limit his appointment of additional officers, then the President must comply.⁴⁵ To be sure, the implications of this view may be less dramatic for the Supreme Court, since there has been a statute setting its size since 1789.⁴⁶ But this view has important implications for diplomatic appointments—namely, that contrary to the current view of the executive branch and longstanding historical practice,⁴⁷ Congress could restrict the President's appointment of additional diplomats.

A final possibility is that the Appointments Clause vests the President with no unique authority over enumerated officers. On the no-authority view, the President may appoint enumerated officers only after Congress has passed a statute establishing such an office—that is, the baseline rule for residual officers. Stated differently, it may be that a branch has been acting unlawfully for the past two hundred years, but not in the way that we have so far suggested. Rather than think that Congress has unlawfully attempted to set the size of the Supreme Court,⁴⁸ we might think that the

⁴⁴ See Prakash, *A Taxonomy of Presidential Powers*, *supra* note 43, at 337–38 (describing “horizontally concurrent powers” as those shared between the President and Congress).

⁴⁵ As we discuss below, this view draws support from Justice Jackson's famous *Youngstown* framework. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring); *infra* Subsection III.C.2 (discussing framework).

⁴⁶ See *supra* notes 33–34 and accompanying text.

⁴⁷ See *supra* notes 27–31 and accompanying text; see also *infra* Subsection III.C.2 (discussing historical attempts to restrict President's appointment of diplomats and executive branch opposition).

⁴⁸ Even on the exclusive-authority view, however, one need not think that Congress has acted unlawfully in purporting to limit the size of the Supreme Court. See *infra* Subsection III.C.3.

President has unlawfully appointed diplomats without law. Of course, this view would have rather important implications for the history and current practice of diplomatic appointments.

This Article primarily defends the exclusive-authority view. We think this view derives significant support from the text and structure of the Constitution, as well as the analogous historical practice of diplomatic appointments. In the course of analyzing this question, however, we will also offer arguments for the concurrent-authority view. Depending on one's interpretive priors, the concurrent-authority view might best reconcile constitutional text and structure with subsequent historical practice.⁴⁹ Finally, this Article seeks to rebut the no-authority view. Plenty of scholars have noted the longstanding practice of appointing diplomats without law. But few have attempted to explain or justify the practice as a legal matter. This Article provides such a defense.

No matter which of these accounts one finds most persuasive, the basic takeaway is that the enumerated-residual distinction has significant implications for constitutional doctrine. The Appointments Clause appears to require that we treat diplomats and Justices in the same way. On one view, the President wields more power over the appointment of enumerated officers under the Appointments Clause and Recess Appointments Clause than he does over that of all other officers of the United States. On another, the President has claimed an unconstitutional prerogative over diplomatic appointments. The puzzle that this Article attempts to address, then, is how we should resolve these divergent practices.

II. THE PRESIDENT'S POWER TO APPOINT WITHOUT LAW

This Part presents the affirmative case for the President and Senate's authority to appoint enumerated officers without law. First, the Appointments Clause, read most naturally and in light of existing practice, does not require that these offices (including those of Justices) "be established by Law." Second, the Supreme Court's unique constitutional status suggests that the Constitution *itself* creates the offices of the Justices, meaning that Congress need not establish (and perhaps may not disestablish) their offices. Finally, members of Congress have,

⁴⁹ Indeed, one of us (James) remains torn between these two views given the conflicting interpretive evidence.

throughout history, recognized that the phrase “established by Law” most likely does not modify “Judges of the supreme Court.”

A. The Appointments Clause

This Section uses the text of the Appointments Clause, its drafting history, and analogous contemporary state constitutions to show that Congress need not establish the offices of the Justices before the President may make appointments to the Supreme Court.

1. The Text

Once again, the text of the Appointments Clause reads as follows:

[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law⁵⁰

The question is whether “shall be established by Law” modifies “Judges of the supreme Court.” Consider, then, two possible interpretations of the provision. First, “established by Law” might modify only “all other Officers.” That reading would reflect the “last-antecedent rule,” under which courts read a modifying phrase to refer to only the last object in a list.⁵¹ Second, “established by Law” might modify all of the enumerated officers and the residual officers. That reading would reflect the “series-qualifier canon,” under which courts read a modifying phrase

⁵⁰ U.S. Const. art. II, § 2, cl. 2.

⁵¹ See, e.g., *Lockhart v. United States*, 136 S. Ct. 958, 962–63 (2016). The rule and its various exceptions were already well-established at the time of the Founding. See, e.g., *Sims’ Lessee v. Irvine*, 3 U.S. (3 Dall.) 425, 444 n.* (1799); *Wooster v. Parsons*, 1 Kirby 27, 29 (Conn. Super. Ct. 1786) (describing the rule but noting that it has “many exceptions”); *Rutherford v. Craik’s Ex’rs*, 3 N.C. (2 Hayw.) 262, 273 (1803) (noting that “no rule [is] better established”).

to refer to all the objects in a parallel list.⁵² Of course, neither canon is decisive, and each can be overcome by other interpretive inferences.⁵³

Regardless, “established by Law” must relate back to each category of enumerated office in the same way. It would be strange to claim that “established by Law” modified the diplomatic offices but not “Judges of the supreme Court.” To generalize, in a list “A,” “B,” “C,” and “D,” it would make no sense to say that the phrase “Z” modifies both “C” and “D,” but not “A” and “B.” The normal rules of English grammar simply do not allow such a construction.

Moreover, consider the intervening phrase: “whose Appointments are not herein otherwise provided for.” That phrase clearly modifies “all [other] officers of the United States,” and it clarifies that the Appointments Clause does not govern appointment to offices that are “otherwise provided for by the Constitution” (such as those of senators and that of the President).⁵⁴ But if the phrase also modifies the enumerated officers, then the phrase would suggest that the Constitution *elsewhere* provides for the appointment of diplomats and Justices—that is, the Appointments Clause wouldn’t be the exclusive mechanism for appointing these officers. Such a reading seems highly doubtful.⁵⁵

But if “herein otherwise provided for” does not modify the enumerated officers, then neither should “established by Law.” For one thing, the “and” between the two phrases suggests that they modify the preceding

⁵² See, e.g., *Lockhart*, 136 S. Ct. at 970 (Kagan, J., dissenting). Professor Seth Barrett Tillman has tentatively advanced this reading based on the intervening comma and early historical practice. See Seth Barrett Tillman, *Why Our Next President May Keep His or Her Senate Seat: A Conjecture on the Constitution’s Incompatibility Clause*, 4 *Duke J. Const. L. & Pub. Pol’y* 107, 127 n.47 (2009). Regarding the intervening comma, Tillman properly acknowledges that the “argument depends on the fine points of eighteenth-century usage.” *Id.* But some have argued that the intervening comma exception to the last-antecedent rule is a modern innovation, which may actually conflict with how commas were used historically. See Terri LeClercq, *Doctrine of the Last Antecedent: The Mystifying Morass of Ambiguous Modifiers*, 2 *Legal Writing: J. Legal Writing Inst.* 81, 87, 89–91 (1996). We address his second argument regarding early historical practice below. See *infra* Section III.C.

⁵³ See *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003) (last-antecedent rule); *United States v. Bass*, 404 U.S. 336, 340 (1971) (series-qualifier canon); see also Anita S. Krishnakumar, *Dueling Canons*, 65 *Duke L.J.* 909 (2016) (documenting use of “dueling canons” in the Roberts Court decisions).

⁵⁴ See *The Federalist* No. 69, at 420–21 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

⁵⁵ Cf. *United States v. Maurice*, 26 F. Cas. 1211, 1213 (Marshall, Circuit Justice, C.C.D. Va. 1823) (No. 15,747) (concluding that, other than specific exceptions listed in the Constitution, the Appointments Clause is the exclusive method for appointing all other officers of the United States).

list of officers in the same way.⁵⁶ Return again to our stylized example and consider the list “A,” “B,” “C,” and “D,” as modified by “Y and Z.” Perhaps it makes sense for “Y and Z” to modify *either* the entire list *or* just “D.” But it doesn’t make sense to say that “Y” modifies “D,” that “Z” modifies both “C” and “D,” but that neither modifies “A” or “B.”

If at this point you’re somewhat confused, don’t worry—so are we. Yet this grammatical tangle is how we currently read the Appointments Clause: we read the “herein” provision as modifying only the residual offices, and the “established by Law” provision as modifying both the residual offices and those of Justices. But we read neither provision as modifying the offices of diplomats.

To summarize: the grammatical structure of the Clause suggests that each of the categories of enumerated offices stands on the same footing as the others. Accordingly, the Clause appears to say that diplomats and Justices should be appointed according to the same constitutional mechanism. So if the Clause authorizes the President to appoint diplomats without statutory authorization, it should likewise be read to authorize the President to appoint Justices the same way. Or, as David Currie would put it, “[t]he textual argument” for appointments without law “applies to Justices as well as to diplomats.”⁵⁷

Indeed, two of the earliest interpretations of the Appointments Clause adopted just such a reading. In May 1789, Charles Thomson (the long-time Secretary of the Continental Congress who had been charged with organizing the Constitution’s new federal government) responded to a letter from President Washington about the Appointments Clause:

On this clause of the Constitution touching the powers of the President viz. [appointments]. . . . It appears that ambassadors, other public minister and consuls, and judges of the Supreme court are *on the same footing*, that is officers recognised by the Constitution & the existence of whose offices *does not depend on, or require a law for their establishment*, Though an Act will be necessary for their support The last words “and which shall be established by law” appear *by every rule of construction* to be confined to “all other officers

⁵⁶ U.S. Const. art. II, § 2, cl. 2 (providing for the appointment of officers “whose Appointments are not herein otherwise provided for, *and* which shall be established by Law” (emphasis added)); Scoville, *supra* note 30, at 66 (noting this argument).

⁵⁷ Currie, *supra* note 7, at 45.

of the United States whose appointments are not herein (namely in the constitution) otherwise provided for.[]”⁵⁸

Note that Thomson makes two textual claims in this passage. First, and more aggressively, he claims that “every rule of construction” suggests that “established by law” applies *only* to “all other officers.” Second, he observes that the “judges of the Supreme court” are “on the same footing” as the diplomatic offices. We agree with both claims; as discussed, the most natural reading of the Clause is that “established by Law” modifies only the enumerated offices. But even if Thomson is wrong on the first point (say, because the series-qualifier canon beats out the last-antecedent rule), we must grapple with his second argument—that the various enumerated officers are “on the same footing.” In other words, we must somehow reconcile the President’s longstanding practice of appointing diplomats without law with the divergent process for Justices.⁵⁹

Thomas Jefferson would soon echo Thomson’s second textual argument. In 1792, then-Secretary of State Jefferson was preparing a speech on the recess appointment of diplomatic officers. In a handwritten note to himself, Jefferson wrote:

[N]omination of ambassador &c. and judges on same footing. Could they decide whether a judge shall be appointed. May happen that one should be appointed during recess. Would his proceeding be void, because the competent judge [i.e., the Senate] had not sanctioned.⁶⁰

Thus, it seems that Jefferson, like Thomson before him, believed that the enumerated offices in the Appointments Clause were on “the same footing.” As we will discuss below, many members of Congress have read the Clause the same way.⁶¹

⁵⁸ Letter from Charles Thomson to George Washington (May 19, 1789), *in* 2 *The Papers of George Washington*, supra note 28, at 334–35 (alteration in original) (emphasis added); see also Fred S. Rolater, Charles Thomson, “Prime Minister” of the United States, 101 *Pa. Mag. Hist. & Biography* 322, 346 (1977) (“[A]fter [President Washington] took over the reins of the government, he regularly corresponded with Thomson on executive matters and received guidance from the Philadelphian, particularly on May 19 when Thomson wrote him advice on several important matters. The first concerned the meaning of the Constitution on how to choose administration officers.”).

⁵⁹ See *infra* Section III.C (considering the historical justifications for this practice).

⁶⁰ See Letter from George Washington to the Senate (Jan. 4, 1792), *in* 23 *The Papers of Thomas Jefferson* 18, 18–19 (Charles T. Cullen ed., 1990). But cf. Hartnett, supra note 8, at 391 n.58 (questioning whether we should take this “scrap seriously”).

⁶¹ See *infra* Section II.C.

2. Drafting History and Context

The drafting history of the Appointments Clause and the surrounding historical context reinforces the enumerated-residual distinction in two ways.⁶² First, the drafting history suggests that the Framers understood the phrase “established by Law” to modify only “all other officers of the United States” (not officers established by the Constitution). Early drafts distinguished between two categories of offices: those established by the Constitution and by congressional statute. Thus, early on, the Convention agreed that the President would have the power to “appoint to all offices *established by this Constitution*, except in cases herein otherwise provided for, and to all offices which may hereafter be *created by law*.”⁶³ This language, then, reflects an early instantiation of the enumerated-residual distinction.

Much of this language was inexplicably dropped by the Committee of Eleven.⁶⁴ But members of the Convention moved to add variations of the original language back into the Appointments Clause.⁶⁵ Eventually, the Convention restored the requirement that at least certain officers “be established by law.”⁶⁶ No one suggested, however, that the revisions to the Clause abandoned the enumerated-residual distinction in that early draft.

⁶² For discussions of how the records of the Constitutional Convention should be used in constitutional interpretation, see Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution’s Secret Drafting History*, 91 *Geo. L.J.* 1113 (2003); Gregory E. Maggs, *A Concise Guide to the Records of the Federal Constitutional Convention of 1787 as a Source of the Original Meaning of the U.S. Constitution*, 80 *Geo. Wash. L. Rev.* 1707 (2012).

⁶³ 2 Max Farrand, *The Records of the Federal Convention of 1787*, at 405 (1911) (emphasis added).

⁶⁴ See *id.* at 498–99 (“The President . . . shall nominate and by and with the advice and consent of the Senate shall appoint . . . all other Officers of the U[nited] S[tates], whose appointments are not otherwise herein provided for.”). The “Committee of Eleven” was formed near the end of the Convention to resolve some remaining areas of disagreement among the states. See John Frederick Martin, *Fixing the Presidential Nominating System: Past and Present*, 93 *N.Y.U. L. Rev.* 728, 736–37 (2018); John R. Vile, *The Critical Role of Committees at the U.S. Constitutional Convention of 1787*, 48 *Am. J. Legal Hist.* 147, 169–71 (2006).

⁶⁵ 2 Farrand, *supra* note 63, at 550 (“[Elbridge] Gerry mov[ed] that no officer shall be [appointed] but to offices created by the Constitution or by law.”); *id.* at 553 (“Mr. Gerry repeated his motion above made on this day, in the form following ‘The Legislature shall have the sole right of establishing offices not herein provided for.’”). The revision was “rejected as unnecessary.” *Id.* at 550, 553.

⁶⁶ *Id.* at 628.

Second, the drafting history and surrounding historical context suggest that the Framers intentionally chose to put diplomats and Justices on the same footing.⁶⁷ In early drafts, for instance, the Framers gave the Senate the power “to appoint Ambassadors, and Judges of the supreme Court” but gave the President the power to appoint “officers in all cases not otherwise provided for by this Constitution.”⁶⁸ Eventually, the Framers decided that, for each of these categories, the President would appoint with the Senate’s advice and consent.⁶⁹ Nevertheless, the Framers clearly contemplated a world in which the appointment process for diplomats and Justices would fundamentally differ from that of other officers.

Lumping diplomats and Justices together (and thus distinguishing Justices from other domestic offices) might seem odd to the modern lawyer. But it might have seemed more natural at the time of the Founding. Judges in the English and colonial systems often performed the extrajudicial function of advising the King or governor on political and diplomatic issues.⁷⁰ Under these systems, judges could perform a role like those of public ministers.

Of course, the Supreme Court soon rejected this model of extrajudicial advising.⁷¹ But those who drafted the Constitution might not have shared

⁶⁷ Cf. Kesavan & Paulsen, *supra* note 62, at 1186 n.320 (noting that the Constitution’s “secret drafting history may also be used to avoid ‘absurd results’ in constitutional interpretation”).

⁶⁸ 2 Farrand, *supra* note 63, at 183, 185; see also Lauren Cohen Bell, *Warring Factions: Interest Groups, Money, and the New Politics of Senate Confirmation* 24–25 (2002) (noting that Luther Martin told the Maryland ratification convention that “[s]ome [at the Constitutional Convention] would gladly have given the appointment of Ambassadors and Judges to the Senate”); Theodore Y. Blumoff, *Separation of Powers and the Origins of the Appointment Clause*, 37 *Syracuse L. Rev.* 1037, 1061–67 (1987) (discussing the numerous early proposals to vest the Senate with the exclusive power of appointing judges); Corwin, *supra* note 7, at 366 n.28 (“However, a question remains: why does the Constitution make specific mention of ‘ambassadors,’ etc., and of ‘judges of the Supreme Court’? Probably because the original intention of the Framers was to leave the appointment of ambassadors and judges of the Supreme Court to the Senate alone and they were accordingly listed specially for this purpose in the report of the Committee of Detail.”).

⁶⁹ See 2 Farrand, *supra* note 63, at 539–40.

⁷⁰ See Stewart Jay, *Most Humble Servants: The Advisory Role of Early Judges* 10–11, 51 (1997); Todd E. Pettys, *Choosing a Chief Justice: Presidential Prerogative or a Job for the Court?*, 22 *J.L. & Pol.* 231, 240–43 (2006).

⁷¹ See Jay, *supra* note 70, at 134–37, 149 (documenting and attempting to explain the shift); Russell Wheeler, *Extrajudicial Activities of the Early Supreme Court*, 1973 *Sup. Ct. Rev.* 123, 144–58 (same).

the Supreme Court's vision.⁷² Indeed, a number of pivotal Framers—including James Madison and James Wilson—supported proposals that would give the Justices extrajudicial roles, thus mimicking the English model.⁷³ Moreover, as Professor Russell Wheeler has argued, President Washington and the First Congress were “anxious to adopt a basic assumption of the English constitution” that “judges were obligated to serve the nation extrajudicially in various ex officio capacities in which their judicial skills would be of use.”⁷⁴

Alternatively, the Founders may have grouped diplomats and Justices together based on an expectation that the Supreme Court would play an important role in addressing issues relating to foreign affairs.⁷⁵ Most directly, Article III gave the Supreme Court original jurisdiction over “all cases affecting Ambassadors, other public Ministers and Consuls”⁷⁶ (paralleling the language in the Appointments Clause⁷⁷). According to Alexander Hamilton, this grant of jurisdiction would preserve the “PEACE of the Confederacy” as it related to “the intercourse between the United States and foreign nations”⁷⁸ and therefore it was “both expedient and proper that such questions should be submitted in the first instance to the highest judicatory of the nation.”⁷⁹

⁷² See Jay, *supra* note 70, at 76 (concluding that the Framers would have viewed “[t]he appropriateness of judicial advice” as a “matter of established custom”); Wheeler, *supra* note 71, at 126 (“An analysis of the Constitutional Convention’s debates suggests . . . that many of the framers expected judges to make off-the-court contributions to the government, and furthermore that they viewed such a prospect favorably.”).

⁷³ See Jay, *supra* note 70, at 57–76; Pettys, *supra* note 70, at 244–47; Wheeler, *supra* note 71, at 126–30.

⁷⁴ Wheeler, *supra* note 71, at 123–24; see also Jay, *supra* note 70, at 81–82, 91–94, 101–12 (providing historical examples); Pettys, *supra* note 70, at 247–49 (same).

⁷⁵ See, e.g., David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 *N.Y.U. L. Rev.* 932, 1001–07 (2010) (discussing various provisions of Article III that address foreign affairs concerns); Ariel N. Lavinbuk, Note, *Rethinking Early Judicial Involvement in Foreign Affairs: An Empirical Study of the Supreme Court’s Docket*, 114 *Yale L.J.* 855, 862–64, 885–87 (2005) (describing the “mainstream position” as viewing federal courts as playing a key role in addressing international disputes and providing empirical evidence that the early Supreme Court “was heavily involved in foreign affairs”).

⁷⁶ Compare U.S. Const. art. III, § 2, cl. 1 (“The judicial Power shall extend . . . to all Cases affecting Ambassadors, other public Ministers and Consuls . . .”), with *id.* art. II, § 2, cl. 2 (“[The President] . . . shall appoint Ambassadors, other public Ministers and Consuls . . .”).

⁷⁷ U.S. Const. art. II, § 2, cl. 2.

⁷⁸ *The Federalist* No. 80, at 475 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

⁷⁹ *The Federalist* No. 81, at 487 (Alexander Hamilton) (Clinton Rossiter ed., 1961); see also Golove & Hulsebosch, *supra* note 75, at 1005–06 (describing these cases as “particularly delicate” and as “obviously matters of great importance”).

Likewise, Article III gave the Supreme Court appellate jurisdiction over “all Cases of admiralty and maritime Jurisdiction” and over “Controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.”⁸⁰ Both admiralty cases and cases involving foreign parties could raise delicate foreign relations issues.⁸¹ Hamilton thus wrote that these cases were “not less essential to the preservation of the public faith than to the security of the public tranquillity.”⁸²

Given this context, the Founders may have reasonably concluded that diplomats and Justices should be appointed through the same mechanism. If the Justices were expected to perform extrajudicial advisory roles at the President’s request, then it’s plausible that the Framers would have wanted the President to have similar control over their appointment. Alternatively, if the Justices were expected to play a critical role in foreign relations, then the Framers might have wanted to exclude the House from the process of establishing the Supreme Court—just as they excluded the more populous and more populist House from other areas of foreign relations.⁸³ Of course, such speculation would not outweigh a strong textual argument to the contrary. But in light of the text of the Appointments Clause, this history can help us make sense of the enumerated-residual distinction.

3. *State Constitutions*

The language of analogous state constitutional provisions further confirms our reading of the Appointments Clause.⁸⁴ First, pre-ratification state constitutions reflect early versions of the enumerated-residual distinction. The Massachusetts Constitution, for instance, vested the state legislature with “full power and authority . . . to name and settle . . . , or provide by fixed laws, . . . all civil officers . . . the election and constitution of whom are *not hereafter, in this form of government,*

⁸⁰ U.S. Const. art. III, § 2, cl. 1.

⁸¹ See Golove & Hulsebosch, *supra* note 75, at 1002–06; Kevin R. Johnson, Why Alienage Jurisdiction? Historical Foundations and Modern Justifications for Federal Jurisdiction over Disputes Involving Noncitizens, 21 *Yale J. Int’l L.* 1, 20 (1996); Lavinbuk, *supra* note 75, at 877–78.

⁸² The Federalist No. 80, *supra* note 78, at 476 (Alexander Hamilton).

⁸³ See Golove & Hulsebosch, *supra* note 75, at 940, 996–98.

⁸⁴ See Gerhardt, *supra* note 25, at 17 (noting that the Framers drew extensively on their “respective state experiences” in drafting the Appointments Clause); cf. *District of Columbia v. Heller*, 554 U.S. 570, 600–01 (2008) (examining “analogous” state constitutional provisions from the Founding era to better understand the original meaning of the Second Amendment).

*otherwise provided for.*⁸⁵ Separately, the Massachusetts Constitution “otherwise provided” for the appointment of “[a]ll judicial officers . . . by the Governor, by and with the advice and consent of the Council.”⁸⁶ Other state constitutions from this period followed this same pattern.⁸⁷ This basic distinction—between offices “otherwise provided for” and those in a residual catchall—found its way into the Constitution’s Appointments Clause.⁸⁸

Second, post-ratification state constitutions reenacted the enumerated-residual distinction. Between 1787 and 1792, Delaware, Kentucky, and Pennsylvania each adopted new constitutions with identically worded appointments clauses. These clauses provided that the Governor would “appoint all officers whose offices are established by this constitution or shall be established by law, and whose appointments are not herein otherwise provided for.”⁸⁹ This language largely mirrors the Appointments Clause, but expressly states that some offices “are established by [the] constitution.” Thus, these state constitutions seem to gloss the Appointments Clause, making explicit the distinction between offices established by the Constitution and those established by law.

* * *

The upshot of the argument so far is that the enumerated-residual distinction reflects the best reading of the Appointments Clause’s text, accords with the Constitution’s drafting history and the Founders’ expectations regarding the Supreme Court’s role, and finds further support in analogous state constitutions. Next, we argue that the

⁸⁵ Mass. Const. of 1780, pt. II, ch. I, § I, art. IV (emphasis added).

⁸⁶ Id. ch. II, § I, art. IX.

⁸⁷ See N.H. Const. of 1784, pt. II, ¶ 5 (vesting the state legislature with the power “to name and settle annually, or provide by fixed laws, for the naming and settling all civil offices within this State, such officers excepted, the election and appointment of whom, are hereafter in this Form of Government otherwise provided for”); N.Y. Const. of 1777, § XXIII (“That all officers, other than those who by this constitution are directed to be otherwise appointed, shall be appointed in the manner following, to wit, the Assembly shall once in every year openly nominate and appoint . . .”); S.C. Const. of 1778, § XXXII (“That the Governor and Commander in Chief, with the Advice and Consent of the Privy Council, may appoint, during Pleasure, until otherwise directed by Law, all other necessary Officers, except such as are now by Law directed to be otherwise chosen.”).

⁸⁸ See U.S. Const. art. II, § 2, cl. 2.

⁸⁹ Del. Const. of 1792, art. III, § 8; Ky. Const. of 1792, art. 2, § 1, ¶ 7; Pa. Const. of 1790, art. II, § 8.

enumerated-residual distinction has further support in the Constitution's structure, and we offer evidence that such distinction has been long recognized by constitutional interpreters.

B. Status of the Supreme Court

The Supreme Court's unique constitutional status also supports our reading of the Appointments Clause. Under the Court's longstanding precedent, Article III's Vesting Clause⁹⁰ establishes the "existence" and "powers" of the Supreme Court without the aid of congressional legislation.⁹¹ In other words, just as Article I creates Congress and Article II creates the Presidency, Article III creates the Supreme Court.⁹² And if the Constitution itself establishes the "existence" and "powers" of the Court, then so too it should establish the "offices" on which the Court's existence depends.

By analogy, the Founders readily recognized that the Constitution itself created the "offices" of the senators, representatives, President, and Vice President. In *The Federalist No. 67*, Hamilton explained that the President's power to appoint "all other officers of the United States" did not "extend to the appointment of senators."⁹³ This was so, Hamilton reasoned, because their "appointments [were] otherwise provided for" in

⁹⁰ U.S. Const. art. III, § 1, cl. 1 ("The judicial Power of the United States[] shall be vested in one supreme Court . . .").

⁹¹ Ex parte Robinson, 86 U.S. (19 Wall.) 505, 510 (1873) (noting that the Supreme Court "derives its existence and powers from the Constitution"); *Gordon v. United States*, 117 U.S. 697, 699 (1864) ("The Supreme Court does not owe its existence or its powers to the Legislative Department of the government. It is created by the Constitution, and represents one of the three great divisions of power in the Government of the United States."); *Ableman v. Booth*, 62 U.S. (21 How.) 506, 521 (1859) (noting that the Supreme Court "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" the Constitution).

⁹² See *Gordon*, 117 U.S. at 700 ("The existence of this Court is, therefore, as essential to the organization of the government established by the Constitution as the election of a president or members of Congress.").

⁹³ *The Federalist No. 67*, at 409 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis omitted). To be sure, Congress has the power to set the number of the Representatives. See Richard Edward McLawhorn Jr., Note, Apportionment or Size? Why the U.S. House of Representatives Should Be Expanded, 62 Ala. L. Rev. 1069, 1070–80 (2011) (discussing history of congressional apportionment). But that is because Article I empowers Congress to "apportion[]" representatives "among the several States . . . according to their respective Numbers." U.S. Const. art. I, § 2, cl. 3. Indeed, the fact that the Constitution requires that each state have at least one representative and specifies the initial number of representatives for each state supports the view that these are constitutional offices. See *id.*

Article I and because their offices were “established by the Constitution” and did not require “future establishment by law.”⁹⁴

Hamilton’s reasoning applies with equal force to the “Judges of the supreme Court.” Much like with senators, the Justices’ appointments are “otherwise provided for”: Article II states that “judges of the [S]upreme Court” must be appointed through the nomination of the President and the advice and consent of the Senate (distinguishing them from “all other Officers of the United States”). Likewise, Article III establishes their offices. As Edward Corwin explained: “The Court has voiced the theory more than once that it derives its existence directly from the Constitution, an idea logically implying that membership on it arises from the same source, it being rather difficult to imagine a court without members.”⁹⁵ Many others have voiced the same view.⁹⁶ Recall that Charles Thomson made this exact point in his letter to George Washington, noting that because “judges of the Supreme court” are “recognised by the Constitution,” their “existence . . . does not depend on, or require a law for their establishment.”⁹⁷

What’s more, the Appointments Clause mirrors Article I and Article III’s divergent treatment of the Supreme Court and the inferior courts. While Article III creates the Supreme Court, Article I and Article III

⁹⁴ The Federalist No. 67, at 409 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis omitted); see also U.S. Const. art. I, § 3, cl. 1; 7 Annals of Cong. 1170 (1798) (statement of Rep. Robert Goodloe Harper) (noting that the offices of the “President, Vice President [and] Speaker of the House” are “derived from the Constitution”); Corwin, *supra* note 7, at 70 (“The contention has nevertheless been advanced at times that certain offices are the creation of the Constitution itself. This is obviously so as to the two great elective offices of President and Vice-President.”).

⁹⁵ Corwin, *supra* note 7, at 70 (footnote omitted).

⁹⁶ See, e.g., 4 Cong. Rec. 5687 (1876) (statement of Rep. William Lawrence) (“[T]he office of judge of the Supreme Court is created by the Constitution.”); 7 Reg. Deb. 225 (1831) (statement of Sen. Littleton Tazewell) (describing “[t]he offices of the judges of the Supreme Court” as “created by the constitution itself”); 41 Annals of Cong. 424 (1824) (statement of Sen. Rufus King) (noting about the Appointments Clause that “[t]he enumerated officers are created by the Constitution; various other officers of the United States are provided for by law”); 11 Annals of Cong. 169 (1802) (statement of Sen. Joseph Anderson) (“I am of opinion that the Supreme Court is created, ordained, and established by the Constitution, and must continue to exist The Constitution contemplates the existence of the Supreme Court from the very first organization of the Government”); see also John S. Ehrett, *Political Deadlocks and the Constitutional Duty to Confirm*, 24 Geo. Mason L. Rev. 1, 5 (2016) (“In short, the [Supreme] Court does not exist without judges, and Articles II and III necessitate that judges sit on a Supreme Court that actually exerts influence.”).

⁹⁷ Letter to George Washington from Charles Thomson (May 19, 1789), in 2 The Papers of George Washington, *supra* note 28, at 334, 335.

expressly grant Congress the discretionary power to “constitute”⁹⁸ and to “establish” inferior federal courts.⁹⁹ Likewise, the Appointments Clause expressly describes the appointment process for “judges of the supreme Court,” but it leaves the appointment process for inferior-court judges to be inferred from the residual category of “all other Officers of the United States.”¹⁰⁰

Further, the Constitution directly establishes the office of the “Chief Justice.”¹⁰¹ Members of the very first Congress recognized the constitutional significance of this office.¹⁰² But if the Constitution establishes the office of Chief Justice, then it makes sense that it would also establish the offices of his colleagues. Indeed, the Constitution’s use of the modifier “Chief”—meaning “principal,” “most eminent,”¹⁰³ “above the rest in any respect”¹⁰⁴—implies the existence of other Justices: the rest who the Chief is above.¹⁰⁵ Put in modern terms, if the Chief Justice is to be “first among equals,” then he needs some “equals.”¹⁰⁶

⁹⁸ See U.S. Const. art. I, § 8, cl. 9.

⁹⁹ Id. art. III, § 1, cl. 1.

¹⁰⁰ See id. art. II, § 2, cl. 2.

¹⁰¹ See id. art. I, § 3, cl. 6 (“When the President of the United States is tried, the Chief Justice shall preside . . .”); 11 *Annals of Cong.* 169–70 (1802) (statement of Sen. Joseph Anderson) (noting that the Constitution “expressly says, there shall be a Chief Justice” and “[t]hus is the Chief Justice as expressly spoken of in the Constitution as the President, and I do believe that we might as well attempt to abolish the office of President as that of Chief Justice”); John O. McGinnis, *Justice Without Justices*, 16 *Const. Comment.* 541, 545–46 (1999); Nicolas, *supra* note 2, at 109–11; G. Edward White, *The Internal Powers of the Chief Justice: The Nineteenth-Century Legacy*, 154 *U. Pa. L. Rev.* 1463, 1465–66 (2006).

¹⁰² See 1 *Annals of Cong.* 783 (1789) (Joseph Gales ed., 1834) (statement of Rep. Egbert Benson) (noting that Mr. Burke withdrew a proposal to strike the title of “Chief Justice” from the First Judiciary Act after Mr. Benson “observed that this was a provision of the Constitution”); id. at 782 (statement of Rep. Elbridge Gerry); see also 2 *Annals of Cong.* 1855 (1791) (statement of Rep. Theodore Sedgwick) (observing “that the office of Chief Justice was considered as next to that of [the] President”).

¹⁰³ Noah Webster, 1 *American Dictionary of the English Language* (1828).

¹⁰⁴ Samuel Johnson, 1 *A Dictionary of the English Language* (1755).

¹⁰⁵ See 11 *Annals of Cong.* 170 (1802) (statement of Sen. Joseph Anderson) (“Assistant justices are also necessary to fill up the true meaning of the Constitution, for without them there could not properly be a Chief Justice; there might be a justice, but he could not be a chief, unless there were subordinate justices.”).

¹⁰⁶ See Paul J. Wahlbeck, *Strategy and Constraints on Supreme Court Opinion Assignment*, 154 *U. Pa. L. Rev.* 1729, 1729 (2006). Professor Seth Barrett Tillman has argued that the Constitution distinguishes between the “Chief Justice” (who presides over presidential impeachments) and the “Chief Judge of the Supreme Court” (who sits with the other “Judges of the [S]upreme Court”). Seth Barrett Tillman, *Interpreting Precise Constitutional Text: The Argument for a “New” Interpretation of the Incompatibility Clause, the Removal & Disqualification Clause, and the Religious Test Clause—A Response to Professor Josh*

Lastly, it makes sense that the Constitution creates both the Supreme Court and the offices of the Justices because the Constitution automatically vests the Supreme Court with its original jurisdiction.¹⁰⁷ If, as the Supreme Court has said, its original jurisdiction is “self-executing,” then presumably some Justices must exist (at least as a formal matter) to exercise that jurisdiction. Indeed, some Justices have even gone so far as to say that Congress may not regulate the Supreme Court’s original jurisdiction at all, since Congress’s power to prescribe “[r]egulations” applies only to the Court’s appellate jurisdiction.¹⁰⁸ But if that’s so, how could Congress fix the number of Justices in cases involving the Court’s original jurisdiction?¹⁰⁹

One final question for this analysis: How do the statutes regulating the Supreme Court interact with the *constitutional* office? Perhaps the best view is that the Constitution creates the Justices’ offices with some “essential attributes”—say, the capacity to exercise “judicial power” in the cases in which the Constitution *must* vest jurisdiction.¹¹⁰ Congress, then, has the capacity to fund the offices¹¹¹ and to augment the essential

Chafetz’s *Impeachment and Assassination*, 61 Clev. St. L. Rev. 285, 345 n.94 (2013). But the First Judiciary Act placed the “chief justice” and the “associate justices” on the same Supreme Court, see Judiciary Act of 1789, 1 Stat. 73, and members of the First Congress equated the Chief Justice with the Chief Judge of the Supreme Court, see sources cited *supra* notes 101–102.

¹⁰⁷ See, e.g., *California v. Arizona*, 440 U.S. 59, 65 (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.”); *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 332–33 (1816).

¹⁰⁸ See U.S. Const. art. III, § 2, cl. 2; *Kansas v. Colorado*, 556 U.S. 98, 110 (2009) (Roberts, C.J., concurring); Tara Leigh Grove, *The Exceptions Clause as a Structural Safeguard*, 113 Colum. L. Rev. 929, 981 & nn. 279–80 (2013); Stephen R. McAllister, *Can Congress Create Procedures for the Supreme Court’s Original Jurisdiction Cases?*, 12 Green Bag 2D 287, 301 (2009) (predicting that, if the Supreme Court ever squarely addresses the question, the Justices would rule that Congress cannot create procedures for the Court’s original jurisdiction); Stephen R. McAllister, *Congress and Procedures for the Supreme Court’s Original Jurisdiction Cases: Revisiting the Question*, 18 Green Bag 2D 49 (2014) [hereinafter *McAllister, Congress and Procedures*] (providing further support for this position).

¹⁰⁹ Compare Nicolas, *supra* note 2, at 108–11 (noting this problem), with McAllister, *Congress and Procedures*, *supra* note 108, at 56–57 (arguing that Congress can pass general procedures that only indirectly affect the Supreme Court’s exercise of its original jurisdiction).

¹¹⁰ Cf. Evan Caminker, *Allocating the Judicial Power in a “Unified Judiciary,”* 78 Tex. L. Rev. 1513, 1513 n.1, 1517–21 (2000) (discussing various theories of the “essential attributes” of judicial power in the context of jurisdiction-stripping debates).

¹¹¹ Indeed, as we explain below, Congress’s power to fund the Supreme Court gives us a plausible reason to uphold the statute setting the size of the Supreme Court. But on this

powers with additional functions. But these augmentations may not infringe upon the constitutional offices (e.g., by disestablishing the offices). The Appointments Clause and the unique status of the Court would preclude a statute that eliminates these essential attributes.

Thus, the Constitution's structure also bolsters the textual argument for the enumerated-residual distinction. Unlike most federal offices, the Constitution itself establishes the Supreme Court. Whereas domestic federal offices draw both their existence and functions from congressional statute, the Constitution already establishes the Court and outlines its duties. On this account, Congress need not establish such offices "by law," nor on this view may it disestablish offices created by the Constitution.

C. Congressional Debates

These arguments in favor of the enumerated-residual distinction have long been advanced in the political branches. Indeed, one of this Article's contributions is to resurface this forgotten history.¹¹² As already noted, two advisers to President Washington (Charles Thomson and Thomas Jefferson) suggested that diplomats and Justices should be "on the same footing."¹¹³ And as this Section will document, that same argument recurs repeatedly in congressional debates in the eighteenth, nineteenth, and twentieth centuries.

Specifically, members of Congress have long argued that the President's power under the Appointments Clause applies equally to "Ambassadors," "other public Ministers and Consuls," and "Judges of the supreme Court." Admittedly, congressmen typically advanced this argument to *challenge* the President's authority to appoint foreign ministers without law. Just as the President can't appoint Justices without statutory authority, these congressmen reasoned, so too should the same rule apply for foreign ministers. But the reasoning could also run the other way: if the President can appoint diplomats without statutory authority, the same rule should apply to Justices.

reading, the statute does not actually prevent the President from appointing additional Justices; it just denies a salary to the new Justices. See *infra* Subsection III.C.3.

¹¹² See Hartnett, *supra* note 8, at 391 n.58 (arguing that no scholar has "point[ed] to anyone who made the textual argument about 'Judges of the Supreme Court' before Currie did so" in the 1990s).

¹¹³ See *supra* text accompanying notes 57–63.

The most extended discussion of this question occurred in the late 1790s during a debate over Congress's power to refuse to appropriate funds for foreign ministers. Representative William Findley defended Congress's right to refuse funding, reasoning that:

The Constitution gave to the President the power of "appointing Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other officers of the United States, which shall be established by law." There seemed to be a distinction between officers appointed by the Constitution, and officers appointed by law. Foreign Ministers and Judges were officers appointed by the Constitution; but did the Executive ever appoint a Judge before his office and salary were appointed by the Legislature? [N]o more than he would proceed to appoint military officers or Ambassadors, whose offices were not fixed by law.¹¹⁴

Thus, Findley acknowledged that the Constitution distinguished between enumerated offices (diplomats and Justices) and residual officers (those established by law). As other representatives said, echoing Thompson and Jefferson, the appointment of diplomats "*stood upon the same ground*" as the appointment of Justices.¹¹⁵ But Findley used this analogy to defend Congress's ability to limit the appointment of foreign ministers: just as Congress had limited the appointment of the Justices, he suggested, so too it could limit the appointment of foreign ministers.¹¹⁶

Findley's remarks revealed two tensions in the debates over the appointment of enumerated officers. First, Congress struggled with conflicting executive branch practice. President Washington waited to appoint the first six Justices to the Supreme Court until Congress established those offices, but Washington did not wait to appoint foreign ministers. Thus, if the appointment of foreign ministers and Justices "*stood upon the same ground*," it was not clear which practice should control. Second, Congress had to struggle with competing normative

¹¹⁴ 7 Annals of Cong. 904 (1798) (statement of Rep. William Findley).

¹¹⁵ Id. at 438 (1797) (statement of Rep. Samuel Sewall) (emphasis added); see also id. at 1111 (1798) (statement of Rep. Nathaniel Macon) ("The same clause of the Constitution which gave the President power to appoint Judges gave him power to appoint foreign Ministers; and he believed he had the same right to say to what place a Minister should be sent that he had to say where a court should be held.").

¹¹⁶ See also id. at 439 (1797) (statement of Rep. Albert Gallatin) ("With respect to the Judges of the Supreme Court, the President had the power only to appoint them, their number was fixed by the Legislature; so that there was a similar check in [the case of foreign Ministers].").

considerations. Many members wanted the President to have greater authority to appoint foreign ministers. But no one wanted to defend the analogous power to appoint Justices.

These tensions became more apparent later in the debate. Representative Albert Gallatin observed that the Appointments Clause “recognises the existence of Judges of the Supreme Court, as well as that of foreign Ministers, and gives the same unlimited power of appointment in both cases to the Executive.”¹¹⁷ In fact, Gallatin believed:

[T]he case of Judges is stronger than that of Ministers; for upon [Ministers] the Constitution is silent in every other part, whilst not only it is here declared that Judges of the Supreme Court, as well as public Ministers, may exist, but the 3d article of the Constitution positively enacts that there shall be a Supreme Court, and fixes its jurisdiction.¹¹⁸

But Gallatin also presented the natural counterargument to this line of reasoning. No one, he argued, has “contended that the office of Judges of the Supreme Court was created by the Constitution, or could be created by the mere appointment of the President, without the previous authorization of a law” or “that the President had . . . the power of appointing any unlimited number of those Judges, to be fixed by his own discretion.”¹¹⁹ Indeed, as Gallatin explained, Congress had passed the Judiciary Act of 1789 “defining [the] number [of Justices], before any appointment took place” and, if “the Executive can appoint more than six, as fixed by that law[,] . . . that part of the law which declares that there shall be six Judges and no more, must be unconstitutional.”¹²⁰

With these competing arguments advanced, Gallatin ultimately avoided making any strong legal claim about the appointment of ministers

¹¹⁷ Id. at 1119 (1798) (statement of Rep. Albert Gallatin); see also id. (noting “that the possible existence of [diplomatic] officers is recognised by [the Appointments Clause]” and that “it may even be thought doubtful whether a law may not be necessary to create the office before an appointment takes place”). Gallatin’s speech was discussed outside the House and later published as a pamphlet. See *The Speech of Albert Gallatin, Delivered in the House of Representatives of the United States on the First of March, 1798 Upon the Foreign Intercourse Bill* (Phila., Richard Folwell 1798) [hereinafter *Speech of Albert Gallatin*]; see also Letter from Abigail Adams to Mary Smith Cranch (Mar. 3, 1798), in 12 *The Adams Papers: Adams Family Correspondence* 425, 427 (Sara Martin et al. eds., 2015) (discussing the speech).

¹¹⁸ 7 *Annals of Cong.* 1119 (1798) (statement of Rep. Albert Gallatin).

¹¹⁹ Id.

¹²⁰ Id. But see *infra* Subsection III.C.3 (responding to the argument that the First Judiciary Act is unconstitutional).

or Justices.¹²¹ Instead, he conceded that “some nice discrimination may perhaps be drawn between the two offices” as “a different construction has heretofore prevailed in the case of Ministers.”¹²² Gallatin said that he had merely made these “preliminary observations . . . to show that the power of the Executive to appoint Ministers without the previous sanction of a law . . . is itself of a doubtful nature, and can only be admitted by a very liberal construction of that clause of the Constitution.”¹²³

Congress would address this question—whether the President could appoint enumerated officers without statutory authorization—on a handful of other occasions. In 1859, for instance, Senator Stephen Douglas raised this issue in arguing against the President’s power to appoint diplomats without law. Douglas noted that the President had “the same power to appoint judges of the Supreme Court” as he did “foreign ministers or consuls” and thus reasoned that Congress had the power to restrict the appointment of foreign ministers just as it had set the size of the Supreme Court.¹²⁴ Others pushed back against this view, arguing that diplomatic officers were distinct from judges because their “duties,” “privileges,” “rights,” and “character” were “fixed by public law, international law” rather than by statute.¹²⁵ But Douglas insisted that these officers had the same status under the Constitution.¹²⁶

¹²¹ See 7 Annals of Cong. 1119 (1798) (statement of Rep. Albert Gallatin) (“[I]t is not my intention to lay any stress upon this argument . . .”).

¹²² *Id.* At other points in the debate, others attempted to justify Gallatin’s “nice discrimination,” but they largely offered conclusory arguments. See *id.* at 1114 (statement of Rep. George Thatcher) (“[Representative Thatcher] denied that the same clause of the Constitution gave the President power to appoint public Ministers and Judges. Gentlemen confounded two parts of the Constitution together; the appointment of Judges depended upon a previous law, but no previous law was necessary for the appointment of Ministers.”); *id.* at 1157 (statement of Rep. Harrison Otis) (invoking Congress’s power to regulate the Supreme Court’s jurisdiction and arguing that the Constitution creates the Supreme Court but not the offices of the Justices); *id.* at 1220 (statement of Rep. James Bayard) (same).

¹²³ *Id.* at 1119–20 (statement of Rep. Albert Gallatin).

¹²⁴ Cong. Globe, 35th Cong., 2d Sess. 1089 (1859) (statement of Sen. Stephen Douglas); see also *id.* (“Will it be said that he could appoint a judge of the Supreme Court until Congress should have provided by law for such a court, prescribing the number of judges and their duties?”).

¹²⁵ *Id.* (statement of Sen. James Mason).

¹²⁶ See *id.* (statement of Sen. Stephen Douglas) (noting that the Appointments Clause “speaks of [a]mbassadors, ministers, consuls, judges and other public officers, showing that, within the meaning of the Constitution, [a foreign] minister is an officer of this Government as much as a judge of the Supreme Court”). The following year, another senator reiterated Douglas’s argument at length. See Cong. Globe, 36th Cong., 1st Sess. 1348 (1860) (statement of Sen. Judah Benjamin) (“The language of the Constitution is the same in relation to ministers

Likewise, in 1876, then-Representative James Garfield defended the President and Senate's authority to appoint public ministers without law in arguing that the House's authority was limited to appropriating salaries for the officers.¹²⁷ One Representative objected, resorting to the now-familiar *reductio ad absurdum*: "If the argument [advanced by Representative Garfield and others] be correct, then the President has a like right to establish and create the offices of judges of the Supreme Court, because the case of judges stands *precisely in the same way* as that of [a]mbassadors and other public ministers."¹²⁸ Several Representatives agreed with Garfield's position—even going so far as to argue that the President could appoint public ministers in the teeth of a congressional statute forbidding appointment.¹²⁹ But once again, no one was willing to expressly defend the President and Senate's authority to appoint Justices without law.

In 1885, Representative William Holman argued against the President's power to appoint foreign ministers without law by analogizing to the appointment of Supreme Court Justices. Holman reasoned that under the Appointments Clause "exactly the same powers are vested in the President of the United States with reference to foreign ministers, consuls-general, and other like officers as are provided in regard to judges of the Supreme Court."¹³⁰ And, like those in the early Congress, Holman used this analogy to argue that "[i]n both instances, the President of the United States appoints where the office is created by law, and not

as it is in relation to judges of the Supreme Court."); *id.* at 1349 (noting that the textual argument for appointments without law "would equally apply to judges of the Supreme Court; and therefore it was plain the power was not there given"). Again others pushed back against this argument. See Cong. Globe, 35th Cong., 2d Sess. 1089 (1859) (statement of Sen. James Mason).

¹²⁷ See 4 Cong. Rec. 5686–87 (1876) (statements of Rep. James Garfield).

¹²⁸ *Id.* at 5686 (statement of Rep. John Tucker) (emphasis added).

¹²⁹ See *id.* at 5687 (statement of Rep. William Lawrence) ("Is it competent for Congress to provide by law that there shall be no [a]mbassadors appointed at all? If so, then Congress has power to nullify an express declaration of the Constitution, which says that the President shall appoint [a]mbassadors . . ."); *id.* at 5688 (statement of Rep. Nathaniel Banks) ("[A]nd if the Congress of the United States should by law declare in positive terms that there should be no minister or no [a]mbassador to such government, yet nevertheless the President would have the right to appoint an [a]mbassador or minister . . . This power exists by virtue of the Constitution. It is a prerogative of the President and the Senate, and no power exists in other Departments of the Government to take it away.").

¹³⁰ 16 Cong. Rec. 617 (1885) (statement of Rep. William Holman); see also *id.* (noting "that no distinction has been made by the Constitution between a consul-general as an office under the Constitution and a judgeship in the Supreme Court").

otherwise; and whether it be a minister, consul-general, or judge of the Supreme Court, the office must be created ‘in pursuance of law.’”¹³¹

Later in the debate, others pushed back against Holman’s interpretation, noting that until 1856 “Presidents . . . were constantly nominating, and the Senate confirming” foreign ministers without statutory authorization.¹³² And the political branches did this, according to these congressmen, because the provision “established by Law” only referred to the residual category of officers, not the enumerated officers.¹³³ But these congressmen were again confronted with the counterexample of “judge[s] of the Supreme Court.”¹³⁴ In response, Congress quickly moved on to other issues, never resolving what (if anything) could justify the distinction between ambassadors and judges of the Supreme Court.¹³⁵

Finally, in 1921, Congress again considered the question of whether the President had “the right to appoint a minister or ambassador without the express and direct sanction of Congress.”¹³⁶ Representative John Rogers argued that the President’s appointments were “authorized by . . . the supreme law of the land—the Constitution”—or, more specifically, the Appointments Clause.¹³⁷

Rogers acknowledged that the Supreme Court had never resolved whether the phrase “which shall be established by Law” modified ambassadors, other public ministers, and consuls.¹³⁸ But he cited Chief Justice Marshall’s opinion in *United States v. Maurice*¹³⁹ as holding that

¹³¹ *Id.* at 617–18.

¹³² *Id.* at 618 (statement of Rep. James Burnes).

¹³³ See *id.* at 618 (noting that the established-by-law provision “has no reference to the class of officers named in the first subdivision of this provision of the Constitution”); *id.* at 618–19 (statement of Rep. Richard Townshend) (agreeing that “[t]he last clause of this provision of the Constitution relates only to such offices not enumerated as may be established by law, and has no reference to those referred to in the preceding clause”).

¹³⁴ *Id.* at 619 (statement of Rep. Nathaniel Hammond) (asking whether the President “could nominate a judge of the Supreme Court before Congress had organized a supreme court” because judges of the Supreme Court were enumerated “in the same clause”).

¹³⁵ At least one representative attempted to distinguish the appointment of Justices from the appointment of diplomats by invoking the President’s “treaty-making power.” But again, he merely asserted this point without providing a persuasive explanation of why this power justified the distinction. See *id.* at 619 (statement of Rep. Richard Townshend).

¹³⁶ 60 Cong. Rec. 2165 (1921) (statement of Rep. John Rogers).

¹³⁷ *Id.* (citing U.S. Const. art. II, § 2).

¹³⁸ *Id.*

¹³⁹ *United States v. Maurice*, 26 F. Cas. 1211 (Marshall, Circuit Justice, C.C.D. Va. 1823) (No. 15,747).

the phrase “established by Law” modified “the word ‘offices,’” and thus could not “possibly relate to the portion of the language which refers to ambassadors, other public ministers, and consuls.”¹⁴⁰ “[T]he authority,” Rogers conceded, was “not a square one,” but “it seem[ed] to indicate that [Chief Justice Marshall believed that] the President’s power to appoint ambassadors and public ministers did not depend upon any statutory enactment by Congress, but found its source directly in the Constitution itself.”¹⁴¹ Once again, others challenged Rogers’s reading by invoking the counterexample of the Supreme Court.¹⁴² And once again, Congress failed to settle the question.

These debates show that political actors have long read the Appointments Clause as vesting the President with the same authority over each category of enumerated offices. True, few (if anyone) in Congress claimed that the Appointments Clause vested the President with the authority to appoint Justices to the Supreme Court without statutory authorization. But nor did any of these congressmen offer a compelling textual or structural reason to reject the natural reading of the Clause. (If anything, they seemed perplexed by the issue.)

Moreover, it shouldn’t surprise us that at least members of the House of Representatives would resist a reading of the Appointments Clause that would entirely cut the House out of the process of establishing the Supreme Court.¹⁴³ This self-interest might suggest that we should give less weight to their *conclusion* than to their *reasoning*: that the Appointments Clause (on its face) gives the President the same authority to appoint judges of the Supreme Court as ambassadors and public ministers.

III. CONGRESS’S POWER TO SET THE SIZE OF THE SUPREME COURT

So far, we’ve challenged the conventional view that Congress must first pass a statute to establish the offices of the Justices of the Supreme

¹⁴⁰ 60 Cong. Rec. 2165 (1921) (statement of Rep. John Rogers) (citing *Maurice*, 26 F. Cas. at 1213). Technically, the word “offices” does not appear in the Appointments Clause. But Marshall argued that this “word, if not expressed, must be understood” because the Clause refers to officers “established by law.” *Maurice*, 26 F. Cas. at 1213.

¹⁴¹ 60 Cong. Rec. 2165 (1921) (statement of Rep. John Rogers).

¹⁴² See *id.* at 2167 (statement of Rep. George Huddleston) (“Can the President appoint an unlimited number of judges [of the Supreme Court] and can Congress then assume that there is authority of law for those appointments . . . ?”).

¹⁴³ But cf. *supra* notes 124–126 (discussing similar debate in Senate).

Court. In this Part, we address a series of arguments that support the conventional wisdom by offering plausible reasons to ignore the textual and structural parallelism between “Judges of the supreme Court” and “Ambassadors, other public Ministers and Consuls.” In other words, we respond to what we take to be the best arguments that the Appointments Clause does not place diplomats and Justices on equal footing.

Specifically, this Part considers (1) whether any provision of the Constitution (especially the Necessary and Proper Clause) offers a plausible textual basis for Congress’s power to set the size of the Supreme Court; (2) whether the unique constitutional status of diplomatic offices may give the President (and Senate) greater control over the appointment of foreign ministers than of Justices; or (3) whether the divergent historical treatment of foreign offices and Justices may have liquidated or glossed the Constitution’s meaning. These arguments offer what we take to be the best reasons to think that the Appointments Clause does not place diplomats and Justices on equal footing. In the end, however, we think that none of these arguments clearly foreclose the possibility of judicial appointments without law.

This Part also addresses alternatives to our exclusive-authority theory.¹⁴⁴ Specifically, we consider the historical evidence for and against the concurrent-authority theory (that is, the view that the President may appoint diplomats and Justices without congressional authorization, but not in contravention of congressional action). Finally, this Part offers reasons to reject the no-authority view (that is, the view that the President has no authority to appoint diplomats without law).

A. The Necessary and Proper Clause

If the Appointments Clause does not itself authorize Congress to set the size of the Supreme Court, some other provision in the Constitution must grant Congress such a power. No other provision of the Constitution expressly vests Congress with a power to establish the offices of the Justices (or, more importantly, to limit the President’s power to appoint Justices). But the Necessary and Proper Clause might authorize such a power. This Section thus considers whether the Necessary and Proper Clause authorizes Congress to set the size of the Supreme Court in furtherance of Congress’s own powers (what some call the Clause’s

¹⁴⁴ See *supra* Section I.C (discussing the “exclusive-authority,” “concurrent-authority,” and “no-authority” views of the President’s power to appoint enumerated offices).

“vertical” component) or in furtherance of another branch’s powers (the “horizontal” component).¹⁴⁵

I. Vertical Powers

Perhaps the Necessary and Proper Clause empowers Congress to set the size of the Supreme Court in “carrying into Execution [Congress’s own] Powers.”¹⁴⁶ Unlike Articles II and III, Article I limits Congress to those “legislative Powers *herein granted*.”¹⁴⁷ Thus, the Constitution vests Congress with specific powers (as augmented by the Necessary and Proper Clause) rather than a general grant of legislative power.¹⁴⁸ On this theory, then, some specific provision of the Constitution (either in Article I or elsewhere) must empower Congress to establish the Supreme Court’s size.

The problem is that there is no such provision. Congress has only two enumerated powers that directly touch upon the judicial branch—the power to establish inferior tribunals and the power to regulate the Supreme Court’s appellate jurisdiction.¹⁴⁹ Of course, Congress’s power to “constitute Tribunals inferior to the supreme Court,”¹⁵⁰ read along with the Necessary and Proper Clause, easily justifies Congress’s power to set the number of judges who may preside on the lower federal courts. But the Inferior Tribunals Clause says nothing about the Supreme Court.¹⁵¹ If anything, because the expression of one thing usually implies the

¹⁴⁵ See, e.g., William Baude, *Sharing the Necessary and Proper Clause*, 128 *Harv. L. Rev. Forum* 39, 44, 46 (2014).

¹⁴⁶ U.S. Const. art. I, § 8, cl. 18.

¹⁴⁷ Compare U.S. Const. art. I, § 1 (“All legislative Powers herein granted shall be vested . . .”), with *id.* art. II, § 1 (“The executive Power shall be vested . . .”), and *id.* art. III, § 1 (“The judicial Power of the United States, shall be vested . . .”). See also Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 *Harv. L. Rev.* 1153, 1186 (1992) (noting the distinction).

¹⁴⁸ See Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 *Yale L.J.* 541, 571, 574–76 (1994).

¹⁴⁹ See U.S. Const. art. I, § 8, cl. 9; *id.* art. III, § 2, cl. 2; see also David E. Engdahl, *What’s in a Name? The Constitutionality of Multiple “Supreme” Courts*, 66 *Ind. L.J.* 457, 488 (1991) (describing the two provisions authorizing the legislature to allocate judicial powers).

¹⁵⁰ U.S. Const. art. I, § 8, cl. 9; see also *id.* art. III, § 1 (“The judicial Power of the United States, shall be vested . . . in such inferior Courts as the Congress may from time to time ordain and establish.”).

¹⁵¹ See Nicolas, *supra* note 2, at 98.

exclusion of another, the Clause may well *deny* Congress such a power by negative implication.¹⁵²

Instead, the better candidate for Congress's authority to organize the Supreme Court is the Exceptions and Regulations Clause.¹⁵³ The Clause allows Congress to prescribe exceptions and regulations to the Court's appellate jurisdiction, which presumably justifies the statutes determining what constitutes a quorum at the Court, the date on which the Court's term begins, and the time to file a petition for a writ of certiorari (among other statutes).¹⁵⁴ Thus, this Clause provides a more plausible basis for Congress's power over the size of the Supreme Court; here, at least, the Clause specifically concerns the Supreme Court. Indeed, in the 1798 debates over the appointment of diplomats, at least one member of Congress advanced the argument that the Regulations Clause empowers Congress to set the Court's size.¹⁵⁵

But here again, we think the argument is weak. First, a statute establishing the Court's size is not a regulation of its jurisdiction at all. Instead, under the conventional view, such a statute *creates* the offices of the Justices. Moreover, the Clause authorizes Congress to regulate only the Court's appellate jurisdiction—not its original jurisdiction. Given this divergence, treating the number of Justices as a regulation under the Exceptions and Regulations Clause would be bizarre: the Court's size would shrink or expand depending on whether it heard a case pursuant to its original jurisdiction or its appellate jurisdiction.¹⁵⁶ Even with the Necessary and Proper Clause, it is hard to see how Congress's authority to regulate part of the Court's jurisdiction implicitly empowers Congress to establish the Justices' offices.

2. *Horizontal Powers*

The more plausible textual source for Congress's power to set the size of the Supreme Court comes from the “horizontal” sweep of the

¹⁵² See Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 107 (2012).

¹⁵³ U.S. Const. art. III, § 2, cl. 2.

¹⁵⁴ See 28 U.S.C. § 1 (2012) (quorum); *id.* § 2 (Court's term); *id.* § 2101(c) (time to file petition for a writ of certiorari); see also *The Federalist* No. 81, *supra* note 79, at 490 (Alexander Hamilton) (arguing that the Exceptions and Regulations Clause “will enable the government to modify [the Supreme Court's jurisdiction] in such a manner as will best answer the ends of public justice and security”).

¹⁵⁵ 7 *Annals of Cong.* 1157 (1798) (statement of Rep. Harrison Otis).

¹⁵⁶ See *supra* notes 107–109 and accompanying text (discussing this problem).

Necessary and Proper Clause.¹⁵⁷ Again, the Clause authorizes Congress to legislate to “carry[] into Execution . . . all other Powers vested by this Constitution in the Government of the United States or in any Department or Officer thereof.”¹⁵⁸ Specifically, Congress might argue that the statutes establishing the offices of the Justices “carry[] into execution” either the President’s power to appoint Justices or the Supreme Court’s exercise of its “judicial power.”

Indeed, this argument has some historical support. For instance, in *Chisholm v. Georgia*, Justice Iredell invoked the Necessary and Proper Clause to conclude 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.”¹⁵⁹ Likewise, in the nineteenth century, the Supreme Court observed:

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.¹⁶⁰

These two passages take a broad reading of the Necessary and Proper Clause. Under this view, the Clause might seem to vest Congress with a generic power to fill in gaps in constitutional structure.¹⁶¹ Dean John

¹⁵⁷ See generally William Van Alstyne, *The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of “The Sweeping Clause,”* 36 Ohio St. L.J. 788, 794 (1975) (arguing that the Necessary and Proper Clause “assigns to Congress alone the responsibility to say by law what additional authority, if any, the . . . courts are to have beyond that core of powers that are literally indispensable”).

¹⁵⁸ U.S. Const. art. I, § 8, cl. 18; see also David E. Engdahl, *The Necessary and Proper Clause as an Intrinsic Restraint on Federal Lawmaking Power*, 22 Harv. J.L. & Pub. Pol’y 107, 107 (1998) (arguing that it is “the Necessary and Proper Clause—not some exaggerated inference from the Article I Tribunals clause, nor the mere allusion to congressional power made in the Article III Exceptions Clause—that is the principal source of Congress’s power to enact laws regarding the federal courts” (footnotes omitted)).

¹⁵⁹ 2 U.S. (2 Dall.) 419, 432–33 (1793) (Iredell, J., dissenting) (emphasis omitted). But see Nicolas, *supra* note 2, at 93–95 (explaining why this dissent should be given little weight).

¹⁶⁰ *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 721 (1838) (citation omitted).

¹⁶¹ See John F. Manning, *Foreword, The Means of Constitutional Power*, 128 Harv. L. Rev. 1, 63 (2014) (describing it as a “master clause”); see also Engdahl, *supra* note 149, at 482–84

Manning argues, for instance, that the Clause gives Congress “precedence over the other branches,” and the Court should “place its thumb on the scale” in favor of Congress in resolving interbranch disputes.¹⁶²

Yet even if Congress deserves the benefit of the doubt, the Necessary and Proper Clause goes only so far; statutes that “unreasonably” interfere with the Constitution’s specific allocation of authority among the branches remain impermissible.¹⁶³ Here, the Constitution specifically appears to allocate to the President (with the Senate’s consent) the authority to appoint enumerated officers without congressional assistance. Indeed, Manning himself cites the Appointments Clause as an example of a provision that speaks in the kind of “precise” or “specific” terms that would normally preclude deference to congressional judgments.¹⁶⁴ And statutes that *limit* the number of Justices would seem to unreasonably interfere with this allocation of authority.¹⁶⁵ Likewise, as we argue above,¹⁶⁶ Article III establishes the Court, creates the offices of the Justices, and gives the Court self-executing judicial power within its original jurisdiction.¹⁶⁷ Under even a broad view of the Clause, it does not authorize Congress to pass statutes that “unreasonably” interfere with the essential constitutional functions of the President and the Court.¹⁶⁸

Moreover, others have adopted a narrower view of the Necessary and Proper Clause—one in which the Clause is a “servant” rather than a

(describing the Necessary and Proper Clause as authorizing Congress to resolve problems of judicial organization and workload).

¹⁶² Manning, *supra* note 161, at 7, 81.

¹⁶³ *Id.* at 78–81; see also *id.* at 6 (noting that Congress’s power under the Necessary and Proper Clause is “not limitless”); Prakash, *Regulating Presidential Powers*, *supra* note 43, at 228 (describing this view).

¹⁶⁴ John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 *Harv. L. Rev.* 1939, 1945, 1947 (2011) [hereinafter Manning, *Separation of Powers*]; Manning, *supra* note 161, at 31; John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 *Yale L.J.* 1663, 1737–38 (2004) [hereinafter Manning, *The Eleventh Amendment*]; see also Scoville, *supra* note 30, at 67 (noting the argument that the Appointments Clause’s specificity should trump the Necessary and Proper Clause).

¹⁶⁵ See Harold J. Krent, *The Lamentable Notion of Indefeasible Presidential Powers: A Reply to Professor Prakash*, 91 *Cornell L. Rev.* 1383, 1386 (2006) (“If one asks whether Congress directly can limit a presidential power such as appointments through the Necessary and Proper Clause, the answer must be no.”); see also Prakash, *Regulating Presidential Powers*, *supra* note 43, at 232 (“[I]t is paradoxical to conclude that a clause intended to help ‘carry into execution’ federal powers could be exploited to erect obstacles to the execution of those powers.”).

¹⁶⁶ See *supra* Section II.B.

¹⁶⁷ See Nicolas, *supra* note 2, at 94–107.

¹⁶⁸ Manning, *supra* note 161, at 78–79, 81.

“master.”¹⁶⁹ On this narrower view, courts should not just review congressional interpretations for reasonableness; rather, they should ask whether Congress has acted “in coordination with, and not in opposition to” the other branches.¹⁷⁰ On this view, it follows even more clearly that a statute that purports to *restrict* the President’s appointment power would be impermissible.

Of course, our argument that the Necessary and Proper Clause does not authorize Congress to restrict the President’s appointment power depends on the textual argument in Part II. Stated differently, the Appointments Clause precludes congressional interference only if the best reading of the Appointments Clause supports the exclusive-authority view. But even if that reading is wrong, however, that alone does not justify the *distinction* between the appointment of Justices and of diplomats. If the Necessary and Proper Clause authorizes Congress to cap the size of the Supreme Court, then it should also authorize Congress to prohibit the President from appointing additional diplomats. But this view, as we discuss in the next Section, conflicts with longstanding historical practice and the current view of the executive branch.

B. The Foreign-Domestic Distinction

This Section considers whether the President’s unique powers over foreign affairs offer a structural reason to distinguish between diplomats and Justices. In doing so, we explain how diplomatic offices have historically been understood to come into existence without congressional authorization.

1. The Law-of-Nations Theory

The unique status of diplomats in the constitutional system offers another reason to think that the Constitution allows their appointment

¹⁶⁹ Baude, *supra* note 145, at 46.

¹⁷⁰ Prakash & Ramsey, *supra* note 8, at 256; see also Gary Lawson & Guy I. Seidman, *Necessity, Propriety, and Reasonableness*, in *The Origins of the Necessary and Proper Clause* 120, 135 (Gary Lawson et al. eds., 2010) (arguing that the Clause grants Congress authority “to aid other actors in the implementation of the laws”); Engdahl, *supra* note 158, at 108 (“[T]he Clause acts as a ratchet to enhance, but not diminish, each branch’s discretion.”). Under the narrower view, Congress may pass laws that augment the President’s appointment power or assist the Court with the exercise of Article III’s judicial power—e.g., by passing statutes providing for the Justices’ salaries or authorizing them to hire staff. See *infra* Subsection III.C.3.

without law. Specifically, early interpreters seem to have understood the law of nations to create foreign offices.¹⁷¹ We call this view the “law-of-nations theory.”¹⁷² Under this view, Congress need not “establish[] by Law” the offices for “Ambassadors, other public Ministers and Consuls” because the law of nations already established them.

Many early interpreters of the Constitution—including James Madison—advanced this view. For instance, in an 1822 memorandum on the President’s power to use the Recess Appointments Clause to appoint public ministers, Madison wrote: “The place of a foreign minister or Consul is to be viewed, as *created by the Law of Nations* The Constitution . . . presupposes this mode of intercourse, as a branch of the Law of Nations.”¹⁷³ He reiterated similar arguments in letters to his former secretary, Edward Coles, and James Monroe.¹⁷⁴

Madison was far from alone in this view.¹⁷⁵ In 1831, for instance, Senator Littleton Tazewell offered a similar argument in the Senate. He claimed:

¹⁷¹ We use the terms “diplomats” and “foreign offices” throughout this Section as shorthand to refer to the collection of foreign positions created under the law of nations. Note, however, that some interpreters argued that such positions were not “offices” in the constitutional sense. See *infra* note 174. For background on the status of the law of nations in American law, see Anthony J. Bellia Jr. & Bradford R. Clark, *The Law of Nations as Constitutional Law*, 98 Va. L. Rev. 729 (2012); Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 Vand. L. Rev. 819 (1989).

¹⁷² For prior references to this theory, see S. Doc. No. 112-9, at 559–60 (2013); Corwin, *supra* note 7, at 70–71; Ryan M. Scoville, *Ad Hoc Diplomats*, 68 Duke L.J. 907, 955 & nn.271–72 (2019); West, *supra* note 8, at 197.

¹⁷³ James Madison, *Power of the President to Appoint Ministers and Consuls During a Recess of the Senate* (May 6, 1822), in 2 *The Papers of James Madison* 516, 516 (David B. Mattern et al. eds., 2013) (emphasis added).

¹⁷⁴ See Letter from James Madison to Edward Coles (Oct. 15, 1834) [hereinafter *Coles Letter*], <https://founders.archives.gov/documents/Madison/99-02-02-3051> [<https://perma.cc/-2T4T-M98U>]; Letter from James Madison to James Monroe (May 6, 1822), in 2 *The Papers of James Madison*, *supra* note 173, at 514–15. Monroe seems to have agreed with this interpretation. See Letter from James Monroe to James Madison (May 10, 1822), in 6 *The Writings of James Monroe* 284, 285 (Stanislaus Murray Hamilton ed., 1902). In the letter to Coles, Madison seems to claim that foreign offices were not “offices” in the constitutional sense at all, but rather “stations” or “agencies,” a view he had also expressed much earlier during his time in Congress. *Coles Letter*, *supra*; 5 *Annals of Cong.* 813 (1796) (statement of Rep. James Madison). Whatever the merits of this broader position, Madison claimed repeatedly that the President and Senate had the authority to appoint such diplomats. For a discussion of this officer-agent distinction, see S. Doc. No. 112-9, at 561–63; Scoville, *supra* note 172, at 976–77.

¹⁷⁵ See, e.g., Cong. Globe, 35th Cong., 2d Sess. 1089 (1859) (statement of Sen. James Mason) (“All the duties and privileges, the rights and the character, of a foreign minister are fixed by public law, international law.”); Cong. Globe, 27th Cong., 2d Sess. 495 (1842)

According to the opinion of some, there are three different species of offices referred to in the constitution: [first,] such as are created by statute—[second,] such as are created by the constitution itself—and [third,] such as, being *established by the usages of nations*, are merely *recognised* by the constitution. Most of our domestic executive offices are examples of the first kind; the Chief Justice, and his associates of the Supreme Court, are examples of the second; and ambassadors, other public ministers and consuls, are instances of the last.¹⁷⁶

Likewise, in 1855, Attorney General Caleb Cushing reasoned that the Appointments Clause “empowers the President to appoint . . . any such officers as *by the law of nations* are recognised as ‘public ministers.’”¹⁷⁷ Indeed, the Supreme Court has itself articulated this understanding of foreign officers.¹⁷⁸

2. Implications

Under this law-of-nations theory, the Constitution does not *create* foreign offices, but rather *recognizes* them as a “backdrop” to the

(statement of Rep. John Pope) (describing “ambassadors, ministers, consuls, and other officers recognised by the laws of and usages of nations”); 2 Reg. Deb. 2452 (1826) (statement of Rep. John Floyd) (“The office of Ambassadors, Ministers, and Consuls, is one known to all Civilized Nations, and recognized by the law of Nations.”); 7 Annals of Cong. 1171–72 (1798) (statement of Rep. Robert Goodloe Harper) (stating that it was “manifest . . . that the office of foreign Minister is established by the law of nations” and explaining how such an office comes into existence); The Speech of Albert Gallatin, *supra* note 117, at 39 (noting that offices of foreign ministers were “created, in the opinion of some gentlemen, by the constitution, and according to others, by the law of nations”); see also Scoville, *supra* note 172, at 955 nn.271–72 (collecting other sources).

¹⁷⁶ 7 Reg. Deb. 224 (1831) (statement of Sen. Littleton Tazewell) (emphasis added).

¹⁷⁷ *Ambassadors and Other Pub. Ministers of the U.S.*, 7 Op. Att’y Gen. 186, 193 (1855) (emphasis added); see also *id.* at 194 (“[T]he designation of the officer was derived from the law of nations, and the authority to appoint from the Constitution.”); cf. *Pub. Ministers*, 2 Op. Att’y Gen. 290, 291 (1829) (“What privileges attach to the public minister of a foreign nation . . . are inquiries which [are guided by] the law of nations and the constitution . . .”).

¹⁷⁸ See *In re Baiz*, 135 U.S. 403, 419 (1890) (“‘[A]mbassadors, other public ministers and consuls’ . . . are descriptive of a class existing by the law of nations, and apply to diplomatic agents whether accredited by the United States to a foreign power or by a foreign power to the United States, and the words are so used in section 2 of Art. III.”); *id.* at 420–21 (describing these positions as simply “declaratory” of the law of nations); *United States ex rel. Goodrich v. Guthrie*, 58 U.S. (17 How.) 284, 290–91 (1854) (“All offices under the government of the United States are created, either by the law of nations, such as ambassadors and other public ministers, or by the constitution and the statutes.”).

constitutional system.¹⁷⁹ This theory corresponds with how some scholars characterize the Founding-era understanding of the interplay between the law of nations and domestic law. Professors Curtis Bradley and Jack Goldsmith note, for instance, that federal courts would often resolve cases by resorting to the law of nations, “usually . . . in the absence of statutory or constitutional authorization.”¹⁸⁰ If foreign offices were incorporated into the constitutional system as a pre-*Erie* form of general common law,¹⁸¹ then such offices might fall in an intermediate category between those offices created by the Constitution itself (e.g., the President, the Chief Justice) and those residual offices that must be “established by Law.” Indeed, Senator Tazewell offered just such an explanation.¹⁸²

The law-of-nations theory differs subtly (but crucially) from the argument that the President *creates* foreign offices. The Office of Legal Counsel (“OLC”) has argued, for instance, not that the Constitution authorizes foreign offices by virtue of the law of nations, but that “the President has the inherent, constitutional power to *create* diplomatic offices.”¹⁸³ OLC’s argument coheres better with a post-*Erie* legal world that has “assimilated legal positivism into its constitutional structure,”¹⁸⁴

¹⁷⁹ Bellia Jr. & Clark, *supra* note 171, at 748 (“The Founders apparently saw no need to spell out all of these assumptions and implications in drafting the Constitution. Rather, they were content to draft the Constitution against the backdrop of well-established principles of the law of nations.”); Anthony J. Bellia Jr. & Bradford R. Clark, *Why Federal Courts Apply the Law of Nations Even Though It Is Not the Supreme Law of the Land*, 106 *Geo. L.J.* 1915, 1935 (2018) (“The Constitution was drafted against the backdrop of the law of nations and uses terms and concepts drawn directly from such law in allocating powers to all three branches of the federal government.”); see also 7 *Annals of Cong.* 1173 (1798) (statement of Rep. Robert Goodloe Harper) (describing the offices of foreign ministers under the law of nations as “inchoate office[s]”). For more on constitutional backdrops, see Stephen E. Sachs, *Constitutional Backdrops*, 80 *Geo. Wash. L. Rev.* 1813, 1823–28 (2012).

¹⁸⁰ Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 *Harv. L. Rev.* 815, 822 (1997).

¹⁸¹ See, e.g., Bellia Jr. & Clark, *supra* note 179, at 1937–39 (noting that at the Founding the law of nations was viewed as general law); John Harrison, *The Constitution and the Law of Nations*, 106 *Geo. L.J.* 1659, 1661 (2018) (same).

¹⁸² See *supra* text accompanying note 176.

¹⁸³ *Nomination of Sitting Member of Congress to Be Ambassador to Viet.*, 20 *Op. O.L.C.* 284, 286 (1996) (emphasis added). Elsewhere, OLC appears to have adopted the law-of-nations theory. See *Officers of the U.S. Within the Meaning of the Appointments Clause*, 31 *Op. O.L.C.* 73, 117 n.17 (2007) (“The President has authority to appoint to diplomatic offices without an authorizing act of Congress, because the Constitution itself expressly recognizes such offices under the law of nations.”). Whatever OLC’s official position, we use its statements to elaborate the distinction between the law-of-nations theory and the presidential-creation theory.

¹⁸⁴ Bradley & Goldsmith, *supra* note 180, at 823.

one in which it makes the most sense to identify a specific constitutional source for the office's existence—in this case, the President's inherent authority. But OLC's sources do not support its interpretation. The opinion cites congressional debates in which senators refer to foreign offices as “the offspring of the state of our relations with foreign nations” or as “emanat[ing] from the laws of nations.”¹⁸⁵ As one senator described them, the offices are “brought forth with the occasion, and disappear[] when the occasion ceases” and “[w]hen not filled, if [they] exist[] at all, it is only in contemplation.”¹⁸⁶ These statements do not suggest that the President *creates* those offices.¹⁸⁷

The law-of-nations theory, however “metaphysical,”¹⁸⁸ may support the case against appointing Justices of the Supreme Court without law. Once again, the basic interpretive problem is that the parallelism between Justices and diplomats in the Appointments Clause suggests that each category should be appointed according to the same constitutional mechanism. If the Constitution authorizes the President to create the office of an ambassador upon appointment, then one might think that the Constitution would allow the same for Justices. By contrast, under the law-of-nations theory, the President's authority to appoint is limited to the offices that already exist under the law of nations. The argument, at root, is that the office precedes appointment of the officer, and that some law—whether a congressional statute or the law of nations—must precede the President's appointment.¹⁸⁹ On this view, the foreign offices exist by virtue of pre-existing law; the Justices don't.

¹⁸⁵ Nomination of Sitting Member of Congress to Be Ambassador to Viet., 20 Op. O.L.C. 284, 290 (1996) (emphasis omitted) (quoting 26 Annals of Cong. 699 (1814) (statement of Sen. George Bibb)); *id.* at 291 (quoting 26 Annals of Cong. 712 (1814) (statement of Sen. Outerbridge Horsey)).

¹⁸⁶ 26 Annals of Cong. 712 (1814) (statement of Sen. Outerbridge Horsey) (“Upon the whole, it is an office not durable and permanent, as are the ordinary offices established by the Constitution and by law—but ephemeral, existing no longer than the occasion which gave birth to it.”). For a critique of this view, see *id.* at 655–56, 749–50 (statements of Sen. Christopher Gore).

¹⁸⁷ See 7 Annals of Cong. 1169–70 (1798) (statement of Rep. Robert Goodloe Harper) (noting “that the President and Senate cannot of themselves create an office” and stating that another representative knew “that the President cannot erect offices”).

¹⁸⁸ See Speech of Albert Gallatin, *supra* note 117, at 41 (calling the law-of-nations theory a “metaphysical subtlet[y]” and criticizing it for “reviv[ing] the scholastic entities of the 13th century”).

¹⁸⁹ See 7 Annals of Cong. 1169 (1798) (statement of Rep. Robert Goodloe Harper) (“[T]he office and the officer are distinct things; and before an officer can be appointed an office must exist . . .”).

This distinction between diplomats and Justices also makes good structural sense. The President has general preeminence in matters of foreign affairs. The President, of course, commands the “Army and Navy of the United States”; has the “Power, by and with the Advice and Consent of the Senate, to make Treaties”; and “receive[s] Ambassadors and other public Ministers.”¹⁹⁰ Further, as Professors Saikrishna Prakash and Michael Ramsey argue, “the President enjoys a ‘residual’ foreign affairs power” by virtue of the Vesting Clause.¹⁹¹ By contrast, Congress has traditionally been understood to lack any “constitutional power that would enable it to initiate diplomatic relations with a foreign nation.”¹⁹² The President’s unique status as the “sole organ of the nation in its external relations”¹⁹³ might suggest that the Founders would expect him to take a freer hand in appointing foreign officers.¹⁹⁴ Indeed, some members of Congress offered these types of arguments in trying to distinguish the appointment of diplomats from the appointment of Justices.¹⁹⁵

¹⁹⁰ U.S. Const. art. II, § 2, cl. 1–2; *id.* § 3; cf. 4 Cong. Rec. 5688 (1876) (statement of Rep. William Lawrence) (suggesting that the President and Senate’s power to make treaties without the House supports the authority to appoint public ministers accordingly).

¹⁹¹ Prakash & Ramsey, *supra* note 8, at 234. But see Julian Davis Mortenson, Article II Vests Executive Power, Not the Royal Prerogative, 119 Colum. L. Rev. 1169, 1174 (2019) (challenging the Vesting Clause thesis and the notion of a residual foreign affairs power).

¹⁹² Zivotovsky *ex rel.* Zivotovsky v. Kerry, 135 S. Ct. 2076, 2086 (2015). But see Kristen E. Eichensehr, Courts, Congress, and the Conduct of Foreign Relations, 85 U. Chi. L. Rev. 609, 624–39 (2018) (discussing examples of “nonexecutive foreign relations”); Ryan M. Scoville, Legislative Diplomacy, 112 Mich. L. Rev. 331, 337–56 (2013) (providing historical and contemporary evidence that Congress does engage in diplomatic relations with foreign nations).

¹⁹³ *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936) (quoting 10 Annals of Cong. 613 (1800) (statement of Rep. John Marshall)).

¹⁹⁴ See Jefferson’s Opinion on the Powers of the Senate Respecting Diplomatic Appointments (Apr. 24, 1790), *in* 16 The Papers of Thomas Jefferson 378, 378–80 (Julian Boyd et al. eds., 1961) (defending a broad view of the President’s power to appoint diplomatic officers).

¹⁹⁵ See 16 Cong. Rec. 619 (1885) (statement of Rep. Richard Townshend) (arguing that “[t]he appointment of a consul or [a]mbassador is the exercise of the treaty-making power of the President”); Cong. Globe, 36th Cong., 1st Sess. 1349 (1860) (statement of Sen. James Mason) (grounding the President’s appointment power in the “clause of the Constitution which vests the executive power in the President”); 8 Annals of Cong. 1219 (1798) (statement of Rep. James Bayard) (“By the Constitution, the right of receiving foreign Ministers is given to the President. . . . The powers, therefore, of appointing and receiving seem to me co-relative, and essentially belong to the same branch of Government.”); see also Currie, *supra* note 7, at 45 (also grounding the distinction in the Reception Clause).

But there are reasons to question this distinction between diplomats and Justices. First, the offices of the Supreme Court (just like foreign ones) can also lay claim to pre-existing law: the Constitution itself. On this view, just as the President can fill foreign offices as defined by the law of nations, so too he can fill the offices of the Justices as they have been defined by Article III and any complementary congressional statutes augmenting the Court's authority. Indeed, some of the interpreters who argued that the law of nations creates the offices of foreign ministers also argued that the Constitution creates the Supreme Court.¹⁹⁶

Second, the assumptions of the law-of-nations theory might actually support the textual argument we advanced in Part I. There, we claimed that the Appointments Clause's "established by Law" modifies *only* "all other officers"—not the enumerated offices. Here, the assumption that the law of nations sufficed to create such foreign offices perhaps explains why the Founders would separate them from offices that would need congressional creation. And if the Constitution assumed the sufficiency of the law of nations to create foreign offices, then it seems reasonable to think that the Constitution itself was sufficient to create the Supreme Court.

Here again, however, the law-of-nations theory raises one more difficult question: How do statutes defining the functions and duties of diplomats interact with the law of nations? Like with Justices, the law of nations might create the essential functions that congressional statutes might augment. Unlike with Justices, however, the source of these essential functions is the law of nations—not the Constitution itself. And it is commonly understood that the political branches may override the law of nations.¹⁹⁷

Does this mean that Congress could abrogate the diplomatic offices established by the law of nations and block the President from appointing diplomats without law? Probably not, we think, because Congress lacks an enumerated power to do so. The Necessary and Proper Clause might give it the authority to *augment* the diplomat's powers (to assist the

¹⁹⁶ 7 Reg. Deb. 224 (1831) (statement of Sen. Littleton Tazewell) (arguing that "the Chief Justice, and his associates of the Supreme Court, are examples of [offices created by the Constitution itself]"); cf. 4 Cong. Rec. 5687 (1876) (statement of Rep. William Lawrence) (stating that "the office of judge of the Supreme Court is created by the Constitution," but noting that "Congress cannot create the office of judge, but *may limit the number*" (emphasis added)).

¹⁹⁷ See Anthony J. Bellia Jr. & Bradford R. Clark, *The Political Branches and the Law of Nations*, 85 *Notre Dame L. Rev.* 1795, 1796–97, 1806–10 (2010).

President's use of his foreign affairs authority), but not to extinguish the offices that exist by virtue of the law of nations.¹⁹⁸ Congress can only take actions “contrary to the law of nations in the exercise of *its constitutional powers*.”¹⁹⁹ On balance, then, we think that Congress may give diplomats additional functions, but not abrogate functions created by the law of nations.

On the other hand, the Constitution might expressly authorize Congress to *supplement* the law-of-nations baseline. For instance, under the Appointments Clause, “Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone.”²⁰⁰ Reading this Clause along with the Necessary and Proper Clause, Congress could pass a statute authorizing the “President alone” to appoint certain diplomats (at least those who qualify as inferior officers). Such a statute would create a supplemental office—that is, a diplomatic office grounded not in the law of nations, but in federal legislation—designed to help the President “carry[] into execution” his foreign-affairs responsibilities.

But if Congress may supplement the diplomats available to the President under the law of nations, then Congress may also impose restrictions on the offices' functions, or to require certain qualifications on who may hold such an office. Stated differently, Congress's greater power to create such offices arguably includes the lesser power to specify

¹⁹⁸ Cf. William Baude, *Sovereign Immunity and the Constitutional Text*, 103 Va. L. Rev. 1, 14–15 (2017) (arguing that the Necessary and Proper Clause does not grant Congress the authority to abrogate the constitutional “backdrop” of common law sovereign immunity); Brief of Professors William Baude & Stephen E. Sachs as Amici Curiae in Support of Neither Party at 7, *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485 (2019) (No. 17-1299) (noting that sovereign immunity derives from the law of nations).

¹⁹⁹ Bellia Jr. & Clark, *supra* note 197, at 1811 (emphasis added); see also Louis Henkin, *International Law as Law in the United States*, 82 Mich. L. Rev. 1555, 1568 (1984) (noting that Congress can use its “constitutional powers” to “enact law inconsistent with an international agreement or other international obligation”). The Constitution elsewhere expressly empowers Congress to alter specific areas of the law of nations. See U.S. Const. art. I, § 8, cl. 10 (“To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations . . .”). This might suggest that such an authority is a “great and important . . . power[]” which cannot be generically implied from the Necessary and Proper Clause. Baude, *supra* note 198, at 15; see also William Baude, *Rethinking the Federal Eminent Domain Power*, 122 Yale L.J. 1738, 1754–55 (2013) (noting that the enumeration of a power is suggestive (although not dispositive) of the fact that it could not otherwise be implied through the Necessary and Proper Clause).

²⁰⁰ U.S. Const. art. II, § 2, cl. 2; see also Prakash, *Regulating Presidential Powers*, *supra* note 43, at 235 (citing this Clause as a rare example where “the Constitution grants Congress the power to regulate . . . a presidential power”).

the nature of the office.²⁰¹ Moreover, this view makes good functional sense: if Congress allows the President to appoint certain officers without Senate supervision, it makes sense that it might want to impose statutory restrictions on who the President may appoint. And of course, if the President chafes at such limitations, then he may always appoint a law-of-nations officer (with the Senate's consent). Thus, we think that the law-of-nations theory not only respects the Constitution's text and structure, but also strikes a sensible balance between congressional and presidential control of foreign offices.

C. Divergent Historical Practice

Historical practice in the political branches may also inform the meaning of the Appointments Clause. And in this case, the political branches have long distinguished between foreign officers and Justices of the Supreme Court.²⁰²

On one hand, Congress has always determined the size of the Supreme Court by statute.²⁰³ Indeed, though President Washington was advised that he could appoint Justices without a congressional statute,²⁰⁴ he wrote to one of his first prospective nominees, Robert Harrison, that he intended to appoint Harrison to the Supreme Court but could not send "official notice" until "the Acts which are *necessary* accompaniments of these appointments can be got ready."²⁰⁵

²⁰¹ See West, *supra* note 8, at 199–205.

²⁰² See Corwin, *supra* note 7, at 70–71; Currie, *supra* note 7, at 45, 54; Hartnett, *supra* note 8, at 390 n.58; Rappaport, *supra* note 8, at 1526 n.109; West, *supra* note 8, at 198–99.

²⁰³ See *supra* notes 33–34 and accompanying text.

²⁰⁴ See *supra* notes 57–59 and accompanying text.

²⁰⁵ Letter from George Washington to Robert Hanson Harrison (Sept. 28, 1789), in 4 *The Papers of George Washington: Presidential Series*, 98, 98–102 (Dorothy Twohig ed., 1993) (emphasis added). Admittedly, this comment might at first seem strange because Congress passed the First Judiciary Act on September 24th, and Washington wrote this letter on September 28th. See Judiciary Act of 1789, ch. 20, 1 Stat. 73. But it appears that Washington was simply waiting for the physical Acts to be printed. See Diary Entry for Monday, Oct. 5, 1789, in 5 *The Diaries of George Washington* 452, 452 (Donald Jackson & Dorothy Twohig eds., 1979) ("Dispatched the Commissions to all the Judges of the Supreme and District Courts; & to the Marshalls and Attorneys and accompanied them with all the Acts respecting the Judiciary Department."). Washington similarly referred to "Acts, which are necessary accompaniments of the appointments" when writing to tell Edmund Randolph that he had been appointed as Attorney General and to tell Edmund Pendleton and Thomas Johnson that they had been appointed as district court judges. See Letters from George Washington to Edmund Pendleton, Edmund Randolph, and Thomas Johnson (Sept. 28, 1789), in 4 *The Papers of George Washington*, *supra*, at 103–09.

By contrast, from the very beginning, President Washington appointed foreign officers without congressional authorization.²⁰⁶ Since then, as a litany of opinions from the Attorney General and OLC attest, Presidents have regularly appointed diplomatic officers without congressional authorization.²⁰⁷ Thus, the question is whether this divergent historical practice establishes a difference as a matter of constitutional law.²⁰⁸

1. *Liquidated Meaning*

On one view, such divergent historical practices might affect the Constitution's meaning under a theory of "constitutional liquidation."²⁰⁹ The concept of "liquidation," which has become increasingly prominent in legal discourse and doctrine in recent years, refers to a Founding-era theory of constitutional interpretation in which ambiguous provisions could become clarified through political practice and deliberation. In *Federalist No. 37*, for example, James Madison wrote that "[a]ll new laws . . . are considered as more or less obscure and equivocal, until their meaning be *liquidated and ascertained* by a series of particular discussions and adjudications."²¹⁰ The basic concept is that "longstanding practice" among the political branches can settle the meaning of an ambiguous constitutional text—a view which the Supreme Court has itself endorsed.²¹¹

²⁰⁶ See *supra* note 28 and accompanying text. Admittedly, Congress passed funding statutes authorizing the President to pay diplomats. See, e.g., Currie, *supra* note 7, at 44; see also, e.g., An Act Fixing the Compensation of Public Ministers and of Consuls Residing on the Coast of Barbary, ch. 44, 2 Stat. 608 (1810) (limiting the salaries of various diplomats). Perhaps these statutes could be interpreted to implicitly establish such foreign offices; nevertheless, historical figures still argued that the President could appoint without any congressional authorization. See *supra* notes 27–32.

²⁰⁷ See *supra* notes 30–32 and accompanying text.

²⁰⁸ Indeed, in prior work, one of us took the position that this historical precedent offered a decisive reason to reject the constitutionality of the appointment of Justices without law. See West, *supra* note 8, at 199. The author wishes he didn't have to confess error, but the arguments and evidence presented in this Article compel him to abandon his earlier view. Cf. Aristotle, *Nicomachean Ethics*, bk. I, ch. 6, at 5–6 (Joe Sachs trans., 2002).

²⁰⁹ See generally William Baude, *Constitutional Liquidation*, 71 *Stan. L. Rev.* 1 (2019).

²¹⁰ The *Federalist No. 37*, at 229 (James Madison) (Clinton Rossiter ed., 1961) (emphasis added); see also The *Federalist No. 82*, at 491 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("[It is] time only that can mature and perfect so compound a system, can liquidate the meaning of all the parts, and can adjust them to each other in a harmonious and consistent WHOLE.").

²¹¹ See *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2560 (2014) ("[T]he longstanding 'practice of the government' can inform [the Court's] determination of 'what the law is.'" (citations omitted)).

What does liquidation require? As Professor William Baude has recently argued, liquidation requires three elements. First, the Constitution’s meaning must be indeterminate²¹²—or, in Madison’s words, it must be “more or less obscure and equivocal.”²¹³ Second, the interpretation must be the result of a “course of deliberate practice.”²¹⁴ Third, those who contested the interpretation must have “acquiesced” to it, and further, by virtue of general agreement among the elected branches, the interpretation must have gained “public sanction.”²¹⁵

Here, the text of the Appointments Clause might have been liquidated to allow the President and Senate unilaterally to appoint foreign officers but not Justices. Although the best reading of the Constitution’s text allows appointment without a congressional statute, it is at least arguable that the text’s meaning is ambiguous.²¹⁶ In the case of judicial appointments without law, the reasons to find the provision liquidated are several: Congress has *always* established the Supreme Court’s size, even though congressional debates reveal that some politicians recognized that appointment without a statute was a possible reading of the Constitution;²¹⁷ President Washington was advised that he could appoint Justices without congressional authorization, but never exercised such a power;²¹⁸ and even President Roosevelt’s infamous court-packing plan relied on a congressional statute.²¹⁹ Such a “longstanding practice of the government” might be strong evidence that the Constitution now forbids judicial appointments without law.

²¹² Baude, *supra* note 209, at 13.

²¹³ The Federalist No. 37, *supra* note 210, at 229 (James Madison).

²¹⁴ Baude, *supra* note 209, at 16.

²¹⁵ *Id.* at 18–20.

²¹⁶ Cf. *United States v. Maurice*, 26 F. Cas. 1211, 1213 (Marshall, Circuit Justice, C.C.D. Va. 1823) (No. 15,747) (noting that he felt “no diminution of reverence for the framers of this sacred instrument [i.e., the Constitution]” in finding “some ambiguity of expression” in the Appointments Clause). We recognize that it is sometimes difficult to determine when a text is “ambiguous,” and reasonable minds will differ over what constitutes ambiguity. See Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 *Harv. L. Rev.* 2118, 2134–44 (2016) (reviewing Robert A. Katzmann, *Judging Statutes* (2014)). Indeed, for some interpreters, subsequent historical practice might itself be reason to find textual ambiguities. See Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Constitutional Conventions, and the Judicial Separation of Powers*, 105 *Geo. L.J.* 255, 265 (2017) (“[O]ne should not assume that the perceived clarity or ambiguity of the text is unaffected by other modalities of constitutional interpretation, including gloss.”).

²¹⁷ See *supra* Section II.C.

²¹⁸ See *supra* notes 33–34, 58 and accompanying text.

²¹⁹ See *infra* notes 323–326 and accompanying text.

Yet there are also reasons to question the argument that the meaning of the Appointments Clause has been liquidated. Most importantly, no President and Senate has ever tried (and failed) to appoint Justices without congressional authorization. Madisonian liquidation, according to Baude, requires the interpretation to result from a “course of *deliberate* practice,” and its detractors must have “acquiesced” to the interpretation.²²⁰ In other words, an interpretive settlement must follow not from “sheer political will” or from political disinterest, but from sustained deliberation among the political branches.²²¹ Indeed, the best evidence of such an interpretive settlement might be cases in which different political branches openly disagree about the Constitution’s meaning before settling on a particular interpretation.²²²

This rule of thumb in favor of inter-branch contestation and settlement makes good sense, depending on one’s view of the constitutional values enhanced by liquidation. If the Constitution countenances liquidation as a mechanism to resolve epistemic uncertainty, then such a requirement ensures that the best arguments for and against a position are concocted and presented by the parties in the best position to make such arguments.²²³ The President, for instance, will tend to advance pro-executive arguments, and Congress will dispute them. This position incorporates the axiom that “[a]mbition must be made to counteract ambition” into the realm of inter-branch constitutional interpretation.²²⁴ If liquidation is to maintain democratic legitimacy, then no one branch should have the right to liquidate the Constitution’s meaning; none totally and completely represents the people, so widespread inter-branch

²²⁰ Baude, *supra* note 209, at 16, 18–20 (emphasis added).

²²¹ *Id.* at 17; cf. *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2594 (2014) (Scalia, J., concurring in the judgment) (“Plainly, then, a self-aggrandizing practice adopted by one branch well after the founding, often challenged, and never before blessed by this Court . . . does not relieve us of our duty to interpret the Constitution in light of its text, structure, and original understanding.”).

²²² See Baude, *supra* note 209, at 18–21; Josh Blackman, *Defiance and Surrender*, 59 S. Tex. L. Rev. 157, 158 (2017) (“[C]ourts favor purported defiance over voluntary surrender. Disputed assertions of power by Washington and his successors in the Early Republic are more probative . . . than voluntary acquiescence by Jackson and post-Jackson presidencies.”).

²²³ See Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 Harv. L. Rev. 411, 434–35 (2012) (describing the value of historical practice in these terms).

²²⁴ *The Federalist* No. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

agreement ensures that the interpretation gains the widespread support of the populace.²²⁵

Regarding judicial appointments without law, there has never been open deliberation on the Constitution's meaning. And although one might think that the executive branch has acquiesced to the practice, this acquiescence could have been prudential rather than legal. President Washington's early decision to await congressional authorization, for instance, could have been based on constitutional principle, but could have also been a prudent political consideration in light of popular concerns about the federal judiciary.²²⁶ We recognize the irony in this line of argument. The universal failure of Presidents to contest the Constitution's meaning might seem to support the *opposite* conclusion: namely, that the Constitution forbids judicial appointments without law. But Presidents may never have challenged the orthodoxy simply because the political costs would have been too great, because they never considered the possibility, or because they simply chose to follow a constitutional norm.²²⁷

Simply put, Congress and the President might have been *aware* that the Constitution could be read to allow judicial appointments without law, but the branches have never openly debated that particular question in public. By analogy, this history in the political branches raises a similar problem as judicial dictum, and we might rightly hesitate before giving decisive weight to a practice that has not been carefully considered.²²⁸

²²⁵ See *Freytag v. Comm'r*, 501 U.S. 868, 880 (1991) (“The structural interests protected by the Appointments Clause are not those of any one branch of Government but of the entire Republic.”).

²²⁶ See Bradley & Morrison, *supra* note 223, at 434–35 (noting that sometimes acquiescence reflects “interbranch agreement . . . at the level of operational feasibility and acceptability, not legality in any express, formal sense”); Michael Bhargava, Comment, The First Congress Canon and the Supreme Court's Use of History, 94 Calif. L. Rev. 1745, 1785–86 (2006) (noting that acquiescence can arise from “political reasons” or because actors “failed to consider the constitutional implications of a measure”); see also *infra* Section IV.B (discussing President Washington's political incentives). Indeed, President Washington would have had few political incentives to appoint Justices without statutory authorization. A key political advantage to judicial appointments is that they can move the Court to one's preferred ideological outcomes by shifting the median Justice. But Congress authorized Washington to appoint all of the Justices, so he would have little reason to take a controversial position. Thanks to Will Kamin for suggesting this point.

²²⁷ See *infra* notes 299–304 and accompanying text.

²²⁸ See *United States v. Burris*, 912 F.3d 386, 410 (6th Cir. 2019) (en banc) (Kethledge, J., concurring in the judgment) (“[D]ictum is usually a bad idea, because judges think

Thus, this divergent historical practice—even if longstanding—might not be sufficient to liquidate the Constitution’s meaning.

The enumerated-residual distinction raises at least one more puzzle for theories of liquidation. What’s strange about liquidation in this context is that the “liquidated reading” of the Appointments Clause would make very little sense. Recall our discussion of the last antecedent rule above.²²⁹ Once again, in a list of “A,” “B,” “C,” and “D” modified by “X,” it would make little sense to say that “X” modifies both “C” and “D,” but not “A” and “B.” The puzzle, then, is whether liquidation must be limited to bona fide readings of the Constitution, or pragmatic working rules for what the Constitution requires as a matter of law.²³⁰

The former view seems more likely given the requirements of liquidation. For example, constitutional indeterminacy does not give the political branches unbounded discretion to reinterpret it; practice must fit within a “permissible reading.”²³¹ Likewise, even if the Appointments Clause is ambiguous, the political branches must interpret the Clause within the limits of that ambiguity. And if liquidation must be limited to plausible interpretations of the Constitution, then it seems that one of the longstanding historical practices involving the appointment of enumerated officers must be wrong.

Of course, it may be that the Constitution forbids *all* appointments without law. Perhaps, that is, the political branches have been wrong all along about the President’s power to appoint diplomatic officers without congressional sanction.²³² But as documented above, there was robust support in the eighteenth and nineteenth centuries for the proposition that the President could appoint diplomats without law. Proponents of the view had a clear legal theory for the power, the issue was debated at length in Congress, and eventually “Congress seems to have practically conceded . . . rightly or wrongly” that the President had unique powers

differently—more carefully, more focused, more likely to think things through—when our words bring real consequences to the parties before us.”)

²²⁹ See *supra* Subsection II.A.1.

²³⁰ Cf. Bradley & Siegel, *supra* note 13 (manuscript at 17) (defending historical gloss in terms of “what works well” rather than “constitutional interpretation”).

²³¹ *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2567–68 (2014) (defending its interpretation of a term in light of historical practice as “at least a permissible reading”); see also Jeffrey A. Pojanowski & Kevin C. Walsh, *Enduring Originalism*, 105 *Geo. L.J.* 97, 142 (2016) (arguing that a liquidated interpretation “must be within the range of permissible preliquidation underdeterminacy that exists after application of other appropriate interpretive conventions”).

²³² See Prakash & Ramsey, *supra* note 8, at 309 n.336 (considering this possibility).

over the appointment of diplomats.²³³ In other words, the President's exclusive authority over the appointment of diplomats seems like a classic case of liquidation.

Thus, if forced to choose between the two longstanding practices, then we would contend that it makes more sense to hold on to the President's authority to appoint diplomats. After all, the President's power to make diplomatic appointments without law is more firmly supported by a "course of *deliberate* practice" and subsequent "acquiescence" than is Congress's power to set the size of the Supreme Court.

2. *Youngstown and Historical Gloss*

But historical practice matters in other interpretive approaches as well. Justice Jackson's much-cited *Youngstown* framework might also support the claim that the President must have congressional authorization to appoint Justices. "Presidential powers," the framework posits, "are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress."²³⁴ The President's powers are greatest when acting pursuant to a congressional statute (Category I), and at their "lowest ebb" when acting "incompatible with the expressed or implied will of Congress" (Category III).²³⁵ Category II marks the middle of the continuum where "there is a zone of twilight in which [the President] and Congress may have concurrent authority, or in which its distribution is uncertain."²³⁶ And in this category "congressional inertia, indifference or quiescence may sometimes" enable "measures of independent presidential responsibility."²³⁷ Thus, Jackson's concurrence suggests that, for "uncertain" constitutional questions, the President's constitutional authority wanes or waxes as Congress acts or acquiesces.

Suppose, then, that the arguments advanced for and against judicial appointments without law render the distribution of authority "uncertain" (i.e., in Category II). If so, congressional inaction might authorize the President and Senate to act alone, while congressional action would forbid it. In essence, this represents the concurrent-authority view discussed

²³³ *Francis v. United States*, 22 Ct. Cl. 403, 405 (Ct. Cl. 1887).

²³⁴ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

²³⁵ *Id.* at 635–37.

²³⁶ *Id.* at 637.

²³⁷ *Id.*

above.²³⁸ Here, Congress's constant exercise of the authority to define the number of seats on the Court slides the question from Category II to Category III, where the President's power is at its "lowest ebb." By contrast, Congress has historically acquiesced to the President's authority to appoint foreign offices. In other words, Congress's different actions with regard to the Supreme Court and foreign ministers lead to divergent constitutional outcomes for the two sets of officers.²³⁹

One implication of the *Youngstown*-based argument is that Congress could acquiesce to a different rule. If Congress were to repeal the statute setting the size of the Court, then the President could once again take advantage of the power to appoint without a statute. In other words, under the *Youngstown* framework, congressional action does not extinguish the President's power but only qualifies it while the statute remains in place.

Historical practice offers some qualified support for the *Youngstown*-based argument against judicial appointments without law. At least once, Congress succeeded in curtailing the President's authority to appoint foreign officers. In the 1860s, Congress passed the Tenure of Office Act, in part to limit the President's authority to appoint officers.²⁴⁰ The statute prescribed that certain offices remaining vacant after a "session of the Senate" should "remain in abeyance."²⁴¹ Further, the statute imposed criminal penalties on anyone who, contrary to the Act, accepted or participated in making such an appointment.²⁴² In 1868, Attorney General William Evarts considered whether, under the Tenure of Office Act, the President had a "legal right" to fill the "office of minister of the United States to Venezuela."²⁴³ Given such provisions, Attorney General Evarts concluded that the former minister to Venezuela was "no longer to be regarded as United States minister to Venezuela" and that the President had "not a legal right now to fill [the office]."²⁴⁴

In other cases, however, Congress has not succeeded in limiting the President's authority to appoint foreign ministers. For example, in 1876,

²³⁸ See *supra* Section I.C.

²³⁹ See Currie, *supra* note 7, at 45 ("It may be that Congress thought it had the power but not the duty to fix the number of offices in both cases and chose to exercise its authority only in the case of the judges.")

²⁴⁰ An Act Regulating the Tenure of Certain Civil Offices, ch. 154, 14 Stat. 430, 430 (1867).

²⁴¹ *Id.* § 3, 14 Stat. at 431.

²⁴² See *id.* §§ 5–6, 14 Stat. at 431.

²⁴³ Case of the Office of Minister to Venez., 12 Op. Att'y Gen. 457, 459 (1868).

²⁴⁴ *Id.* at 458–59. The Act's narrow view of executive power has fallen into disrepute since its passage. See, e.g., *Myers v. United States*, 272 U.S. 52, 176 (1926).

Congress passed an appropriations bill which appeared to require the Secretary of State to close diplomatic offices that Congress had stopped funding.²⁴⁵ President Grant signed the law, but also sent a letter to the House explaining:

In the literal sense of this direction it would be an invasion of the constitutional prerogatives and duty of the Executive [to appoint diplomats]. . . . In calling attention to the passage which I have indicated I assume that the intention of the provision is only to exercise the constitutional prerogative of Congress over the expenditures of the Government . . . and not to invade the constitutional rights of the Executive, which I should be compelled to resist; and my present object is . . . to guard against the construction that might possibly be placed on the language used, as implying a right in the legislative branch to direct the closing or discontinuing of any of the diplomatic or consular offices of the Government.²⁴⁶

In adopting the non-“literal” sense of the provision, Grant effectively “interpreted the provision out of existence.”²⁴⁷

Perhaps just as important, though, is the fact that President Grant sent the letter at all. During the nineteenth century, presidential signing statements were relatively rare.²⁴⁸ Thus, Grant’s letter shows not only the executive branch’s view of its exclusive authority to appoint diplomats, but also the strength of this view.

²⁴⁵ See Act of Aug. 15, 1876, ch. 288, 19 Stat. 170, 175; see also *Byers v. United States*, 22 Ct. Cl. 59, 64 (Ct. Cl. 1887) (discussing the incident).

²⁴⁶ See Letter to the House of Representatives from President Ulysses S. Grant (Aug. 14, 1876), in 10 *A Compilation of the Messages and Papers of the Presidents* 4331, 4331–32 (James D. Richardson ed., 1897); see also 4 *Cong. Rec.* 5688 (1876) (statement of Rep. Nathaniel Banks) (“[I]f the Congress of the United States should by law declare in positive terms that there should be no minister or nor [a]mbassador to such government, yet nevertheless the President would have the right to appoint an [a]mbassador or minister It is a prerogative of the President and the Senate, and no power exists in other Departments of the Government to take it away.”).

²⁴⁷ Roy E. Brownell II, *The Constitutional Status of the President’s Impoundment of National Security Funds*, 12 *Seton Hall Const. L.J.* 1, 74 (2001); see also *Presidential Auth. to Decline to Execute Unconstitutional Statutes*, 18 *Op. O.L.C.* 199, 207 (1994) (citing the letter as “one of the earliest of many instances of a President ‘construing’ a provision (to avoid constitutional problems)”).

²⁴⁸ See *The Legal Significance of Presidential Signing Statements*, 17 *Op. O.L.C.* 131, 138–39 (1993) (discussing history and citing Grant’s letter as an early example); Christopher N. May, *Presidential Defiance of “Unconstitutional” Laws: Reviving the Royal Prerogative*, 21 *Hastings Const. L.Q.* 865, 929–30 (1994) (documenting early history and noting that signing statements remained the exception until the turn of the twentieth century).

Likewise, in 1909, Congress included in an appropriations statute a provision that prescribed that “no new ambassadorship shall be created unless the same shall be provided for by Act of Congress.”²⁴⁹ President Woodrow Wilson reportedly ignored such a restriction.²⁵⁰ And more recently, the executive branch has repeatedly taken the position that Congress may not create statutory qualifications for diplomatic officers on the theory that such restrictions would violate the President’s appointment power.²⁵¹ OLC has taken the more aggressive position that Congress may not use funding conditions to “place limits on the President’s use of his preferred agents to engage in a category of important diplomatic relations, and thereby determine the form and manner in which the Executive engages in diplomacy.”²⁵² With such a broad statement of the President’s unilateral authority (even despite Congress’s exclusive control over appropriations²⁵³), it seems highly likely that today’s OLC would reject any congressional attempt to forbid certain foreign offices.

²⁴⁹ An Act Making Appropriations for the Diplomatic and Consular Service for the Fiscal Year Ending June Thirtieth, Nineteen Hundred and Ten, ch. 235, 35 Stat. 672, 672 (1909).

²⁵⁰ See Nomination of Sitting Member of Congress to Be Ambassador to Viet., 20 Op. O.L.C. 284, 289 n.16 (1996).

²⁵¹ See Constitutionality of Statute Governing Appointment of U.S. Trade Rep., 20 Op. O.L.C. 279, 279–80 (1996); see also Appointment of U.S. Trade Rep., 41 Op. O.L.C. ___, at *1–2 (Mar. 13, 2017), <https://www.justice.gov/olc/file/1078061/download> [<https://perma.cc/7CWW-YDCU>] (reiterating position); Statement on Signing the Lobbying Disclosure Act of 1995, 2 Pub. Papers 1907, 1907 (Dec. 19, 1995) (“The Congress may not, of course, impose broad restrictions on the President’s constitutional prerogative to nominate persons of his choosing to the highest executive branch positions, and this is especially so in the area of foreign relations.”). Professor Ryan Scoville has collected examples of statutes that purport to create diplomatic offices or authorize the President to appoint diplomats beginning in the early twentieth century. See Scoville, *supra* note 30 (manuscript at 73–77). But as Scoville himself notes, the “relevance of this precedent” is debatable since these statutes by and large simply authorized the President to exercise powers that he may have believed he already had. See *id.* (manuscript at 74 n.309). In other words, the political branches may have viewed these statutes as proper because Congress had acted “in coordination with, and not in opposition to” the President’s appointment power. Prakash & Ramsey, *supra* note 8, at 255–56. In the latter half of the twentieth century, Congress began to impose such restrictions. See Scoville, *supra* note 30 (manuscript at 75–76). But as we have shown, the executive branch registered its objection to at least some of these restrictions.

²⁵² See Constitutionality of Section 7054 of the Fiscal Year 2009 Foreign Appropriations Act, 33 Op. O.L.C. ___, at *5 (June 1, 2009), <https://www.justice.gov/file/18496/download> [<https://perma.cc/F5CJ-QVSN>]. See generally Zachary S. Price, Funding Restrictions and Separation of Powers, 71 Vand. L. Rev. 357 (2018) (discussing separation-of-powers issues raised by funding conditions).

²⁵³ See *infra* Subsection III.C.3.

The historical record, then, is somewhat ambiguous. The executive branch generally, though not universally, has acted as if the President retains the authority to appoint foreign officers despite a clear congressional statute to the contrary—i.e., that his actions can be sustained even in Category III. If so, then the *Youngstown*-based argument against judicial appointments without law is somewhat weakened. If the President can defy Congress's attempts to limit his authority over foreign offices, then perhaps he can defy the statutes that establish the size of the Supreme Court. And even if we embrace the *Youngstown* framework in this context, the argument does not absolutely foreclose the President's power to appoint Justices without law. Rather, it only forecloses the power *conditionally*—that is, unless or until Congress decides to repeal the statute setting the size of the Supreme Court.

Alternatively, judicial appointments without law might be foreclosed under the other *Youngstown* framework—commonly known as the “historical gloss approach.”²⁵⁴ In his own *Youngstown* concurrence, Justice Frankfurter observed that “[i]t is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them.”²⁵⁵ Instead, he suggested that “a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, . . . may be treated as a gloss” on ambiguous constitutional provisions.²⁵⁶ Simply put, the fact that every Congress—dating back to the First Congress—has limited the size of the Supreme Court by statute provides powerful support for the gloss approach.²⁵⁷ Indeed, as far back as 1803, the Supreme Court upheld a provision of the Judiciary Act of 1789 under a theory analogous to historical gloss.²⁵⁸

Yet, even here, the argument is not decisive. Just a week before its decision upholding one provision of the Judiciary Act of 1789, the Supreme Court famously struck down a different provision of the Act as

²⁵⁴ See Bradley & Morrison, *supra* note 223, at 417–24; Bradley & Siegel, *supra* note 216, at 261–65.

²⁵⁵ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring).

²⁵⁶ *Id.* at 610–11.

²⁵⁷ See Bhargava, *supra* note 226, at 1746–62 (documenting instances where the Supreme Court gave special weight to the actions of the First Congress).

²⁵⁸ See *Stuart v. Laird*, 5 U.S. (1 Cranch) 299, 309 (1803) (“[P]ractice and acquiescence under it for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction.”).

“repugnant to the constitution.”²⁵⁹ Thus, even under the historical-gloss approach, courts must still decide whether “a law be in opposition to the constitution.”²⁶⁰ And in doing so, as the Supreme Court explained, courts can never “close their eyes” to the text of the Constitution²⁶¹: here, the seemingly precise text of the Appointments Clause.²⁶²

What’s more, strict adherence to the historical-gloss approach might also cast doubt on other widely held constitutional assumptions. For example, the Judiciary Act of 1789 purported to create the office of the Chief Justice,²⁶³ but many think that the Constitution itself creates this office.²⁶⁴ Likewise, the Act purported to give and define the Supreme Court’s original jurisdiction.²⁶⁵ But again, the Supreme Court and commentators have concluded that the Constitution itself vests the Court with this jurisdiction and that Congress cannot shape it.²⁶⁶ In both cases, the historical-gloss approach raises serious questions about Congress’s power over the Supreme Court. Before we assume that the Act divested the President of the power to appoint Justices without law, we should consider what other constitutional assumptions about the Supreme Court would require reconsideration.

3. Appropriations and Constitutional Avoidance

The prior Subsection should raise an obvious question: Has Congress been violating the Constitution since 1789 by prescribing the size of the

²⁵⁹ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 180 (1803); see also Nicolas, *supra* note 2, at 90 n.13 (citing examples).

²⁶⁰ *Marbury*, 5 U.S. at 178.

²⁶¹ *Id.*; see also *id.* at 179 (“Could it be the intention of those who gave this power, to say that, in using it, the constitution should not be looked into? That a case arising under the constitution should be decided without examining the instrument under which it arises?”); Lawrence B. Solum, *Themes from Fallon on Constitutional Theory* 22 (Dec. 5, 2018) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3374241 [<https://perma.cc/7BEJ-8DKG>] (explaining that “even early historical practice provides evidence that must be evaluated and weighed against other evidence” since “early historical practice might reflect mistaken beliefs about original meaning or a deliberate circumvention of the true meaning for various reasons”).

²⁶² See *supra* note 164 and accompanying text.

²⁶³ See Judiciary Act of 1789, ch. 20, 1 Stat. 73, 73.

²⁶⁴ See *supra* notes 101–102 and accompanying text (discussing the constitutional status of the office of the Chief Justice).

²⁶⁵ See Judiciary Act of 1789, ch. 20, 1 Stat. 73, 80.

²⁶⁶ See *supra* notes 107–108 and accompanying text.

Supreme Court?²⁶⁷ Not necessarily. The various statutes establishing the size of the Supreme Court need not be read in a way that violates the Appointments Clause. Instead, they can be read (at least as a matter of constitutional avoidance) as simply limiting the number of Justices who may receive a salary.

The argument is straightforward: the Constitution gives Congress the exclusive power to make “Appropriations . . . by Law,”²⁶⁸ and this power also authorizes Congress to *refuse* to appropriate funds.²⁶⁹ This power can raise difficult constitutional questions about the extent to which Congress can interfere with the other branches by refusing to appropriate.²⁷⁰ Historically, however, politicians have recognized that Congress may refuse to authorize salaries for diplomatic agents.²⁷¹ Thus, the President may appoint diplomats without congressional authorization, but only if he can “find men who will serve without a salary.”²⁷²

This same reasoning should apply to the Supreme Court. The Constitution does prohibit Congress from *diminishing* the salaries of the Justices,²⁷³ but it does not require Congress to appropriate salaries in the

²⁶⁷ See 7 Annals of Cong. 1119 (1798) (statement of Rep. Albert Gallatin) (raising this possibility); Nicolas, *supra* note 2, at 89–90 (same).

²⁶⁸ See U.S. Const. art. I, § 9, cl. 7; Kate Stith, Congress’ Power of the Purse, 97 Yale L.J. 1343, 1346–60 (1988).

²⁶⁹ See Prakash, Regulating Presidential Powers, *supra* note 43, at 252 (arguing “that Congress is under no obligation to use its appropriation power to fund the exercise of the President’s constitutional powers”); Stith, *supra* note 268, at 1360–63.

²⁷⁰ See J. Gregory Sidak, The President’s Power of the Purse, 1989 Duke L.J. 1162, 1183–94 (discussing the President’s inherent authority to act even without an appropriation); Stith, *supra* note 268, at 1351 (suggesting that Congress might violate the Constitution by refusing to appropriate for certain executive branch activities).

²⁷¹ See, e.g., Salaries to Ministers and Consuls, 2 Op. Att’y Gen. 470, 471 (1831) (“[T]he Executive is not permitted to award a compensation for faithful services [to a consul] beyond the emoluments affixed by law to the office.”); Advances to Pub. Ministers, 2 Op. Att’y Gen. 204, 206 (1829); Cong. Globe, 36th Cong., 1st Sess. 1349 (1860) (statement of Sen. Judah Benjamin); see also Currie, *supra* note 7, at 44–45 (collecting other sources advancing this view).

²⁷² See 7 Annals of Cong. 1121 (1798) (statement of Rep. Albert Gallatin). This raises the further question of whether the Anti-Deficiency Act, which prohibits unpaid service by federal employees, might limit the ability of diplomats (or Justices) to serve without a salary. See 31 U.S.C. § 1342 (2012). Indeed, such a restriction might itself violate the Appointments Clause. See Sidak, *supra* note 270, at 1209 (noting this potential problem). But both the Comptroller General and the executive branch have read the Anti-Deficiency Act as only prohibiting voluntary service with the expectation of future pay. On this reading, the Act would not bar “truly voluntary service,” such as when a federal employee signs away any entitlement to future pay. See Stith, *supra* note 268, at 1373.

²⁷³ See U.S. Const. art. III, § 1.

first place.²⁷⁴ If the President appoints Justices without congressional authorization, then their “compensation” has not been “diminished.”²⁷⁵ Indeed, Charles Thomson made this point in his letter to President Washington. Thomson told Washington that the President could appoint Justices without statutory authorization, but that “an Act will be necessary for their support.”²⁷⁶

Thus, the statutory provisions establishing the size of the Supreme Court might be interpreted instead to limit how many Justices may receive a salary. Indeed, this theory makes sense in light of the history of early legislation establishing the judiciary. On September 23, 1789, Congress passed a law “allow[ing] to the judges of the Supreme and other courts . . . the yearly compensations herein after mentioned.”²⁷⁷ But the statute did not say how many Justices could receive this compensation.²⁷⁸ The next day, though, Congress passed the Judiciary Act of 1789, which specified how many judges could receive compensation.²⁷⁹ Today as well, the statute that sets the salary of the Justices does not say how many Justices may receive this salary.²⁸⁰ Instead, we must look to another provision to determine how many Justices may receive this pay.²⁸¹

Even if this is not the most natural reading of these statutes, this interpretation should at least be viewed as within the range of permissible readings as a matter of constitutional avoidance.²⁸² And further, there is

²⁷⁴ Cf. *United States v. Will*, 449 U.S. 200, 228–29 (1980) (holding that Congress could repeal a planned cost-of-living increase for federal judges because the repeal was “passed before . . . increases had taken effect—before they had become a part of the compensation due Article III judges”).

²⁷⁵ We do not have any reason to think that differing salaries among the Justices raises constitutional concerns. Indeed, the salaries of district judges “were not made uniform until 1891.” James E. Pfander, *Judicial Compensation and the Definition of Judicial Power in the Early Republic*, 107 *Mich. L. Rev.* 1, 21 (2008).

²⁷⁶ Letter to George Washington from Charles Thomson (May 19, 1789), in 2 *The Papers of George Washington*, supra note 28, at 334–35.

²⁷⁷ An Act for Allowing Certain Compensation to the Judges of the Supreme and Other Courts, and to the Attorney General of the United States, ch. 18, 1 Stat. 72 (1789).

²⁷⁸ See *id.* (allowing this compensation “to the Chief Justice four thousand dollars; to each of the justices of the Supreme Court three thousand five hundred dollars”).

²⁷⁹ Judiciary Act of 1789, ch. 20, 1 Stat. 73, 73 (“That the supreme court of the United States shall consist of a chief justice and five associate justices . . .”).

²⁸⁰ See 28 U.S.C. § 5 (2012).

²⁸¹ See *id.* § 1.

²⁸² See, e.g., *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (Holmes, J., concurring) (“[T]he rule is settled that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act.”); *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 448–49 (1830) (Story, J.).

historical support for such an approach in an analogous context: as discussed, President Grant construed a statute purporting to compel him to close diplomatic offices as an “exercise [of] the constitutional prerogative of Congress over the expenditures of the Government . . . and not [an invasion of] the constitutional rights of the Executive.”²⁸³ Likewise, the statutes establishing the Court’s size might remain constitutional, even if they do not truly limit the President from appointing a tenth Justice (assuming that person is willing to serve without pay).

* * *

In concluding, we should emphasize a few points about these arguments from historical practice. First, interpreters disagree about the weight to give to historical practice and about the textual ambiguity necessary to render such practice relevant.²⁸⁴ Originalists, common-law constitutionalists, and pragmatists (among others) might disagree between (and even among) themselves about the relevance of the arguments in this Section. The problem of the weight to give historical practice is particularly great when dealing with a seemingly “precise” constitutional text like the Appointments Clause.²⁸⁵ Here, because the text of the Appointments Clause seems to speak directly to the issue, interpreters seem especially likely to disagree about the weight to give to historical practice. And even assuming the relevance of historical practice, *interpreting* such practices raises its own difficulties.²⁸⁶ Where one observer sees acquiescence or inter-branch agreement, another might see simple indifference.

Second, we reiterate that these historical arguments should be integrated into a plausible *textual* reading of the Appointments Clause. Regardless of historical evidence, most interpreters will need to grapple with the textual puzzle created by the enumerated-residual distinction—

²⁸³ Letter to the House of Representatives from President Ulysses S. Grant (Aug. 14, 1876), in 10 A Compilation of the Messages and Papers of the Presidents, supra note 246, at 4331–32.

²⁸⁴ See Bradley & Morrison, supra note 223, at 424–28.

²⁸⁵ Manning, The Eleventh Amendment, supra note 164, at 1713–20, 1736–38 (explaining why we should “give strict[] adherence to the clear lines drawn by precise constitutional texts” and describing the Appointments Clause as such a precise text).

²⁸⁶ See Curtis A. Bradley, Doing Gloss, 84 U. Chi. L. Rev. 59, 69–79 (2017) (discussing these problems).

that diplomats and Justices seem to be on the “same footing” and should receive parallel treatment. In Part I, we presented three ways in which that parallelism could be reflected: the exclusive-authority view, the concurrent-authority view, and the no-authority view. We think the historical evidence fully supports the exclusive-authority view (which we happen to think is also the best reading of the Constitution’s text). But uncritical acceptance of current practice—i.e., that Congress *must* establish the offices of the Justices, but that it *may not* interfere with those of diplomats—is a highly implausible reading of the Constitution’s text.²⁸⁷ Perhaps we have been wrong about diplomats, or perhaps we have been wrong about Justices. But giving the text its due suggests that we must have been wrong about one or the other.

IV. THE CONVENTION OF ENUMERATED OFFICERS

To be clear, we recognize the troubling implications of the exclusive-authority view: if it’s correct, then the Constitution authorizes the President—with a bare majority in the Senate—to change the composition of the Supreme Court. But perhaps this possibility is less dire than it at first seems. The Constitution often declines to provide a *legal* remedy for abuses of political power, trusting instead that non-legal remedies will prevent or correct such abuses.

This Part defends these informal constraints on the President and the Senate’s capacity to appoint Justices without congressional authorization. Even if no rule of constitutional law precludes such a practice, political actors might be constrained by “constitutional conventions” that have developed and ought to be preserved. Here, constitutional practice reflects that the President (and Senate) should not, as a matter of convention, appoint Justices without congressional authorization.²⁸⁸ Indeed, scholars generally agree that court packing *with* law—that is, by statute—is only prohibited by convention, not by the Constitution itself.²⁸⁹ We think that court packing without law might be prohibited by the same mechanism.

This constraint also blunts the force of the prudential objections to our argument. Even if the arguments from text, structure, and historical practice do not preclude appointments without law, some might still

²⁸⁷ See *supra* Subsection II.A.1.

²⁸⁸ We could imagine such a statute as authorizing salaries for additional Justices, if one accepts the view that Congress lacks the power to create the offices of the Justices. See *supra* Subsection III.C.3.

²⁸⁹ See, e.g., Bradley & Siegel, *supra* note 216, at 278.

object that it would be *undesirable* if the President and Senate could change the size of the Court without congressional authorization. Of course, not everything bad is unconstitutional. But constitutional interpreters often advance prudential arguments to support a particular reading of the Constitution.²⁹⁰ Here, the development of the constitutional convention against judicial appointments without law weakens the prudential case against our position.

This Part proceeds as follows. First, we discuss the concept of “constitutional conventions” and show that the Founders intended (without using the same terminology) that such conventions would constrain the President’s exercise of judicial appointments without law. Next, we consider the force of the convention against appointments without law. Finally, we consider the relationship between conventions and the constitutional amendment process.

A. The Nature of Conventions

Recently, legal scholarship has begun to incorporate the concept of “constitutional conventions” into American legal debates.²⁹¹ Scholars do not always clearly distinguish between conventions and other forms of historical practice (such as gloss and liquidation), as all three concepts can clarify ambiguities in the constitutional text.²⁹² Nevertheless, we posit (as most academics do) that conventions differ from other forms of historical practice in at least two key ways.²⁹³

First, constitutional conventions are not law in the “proper sense of that term.”²⁹⁴ While gloss and liquidation create legally binding obligations,

²⁹⁰ Bobbitt, *supra* note 15, at 7 (identifying “prudential” arguments as a modality of constitutional interpretation).

²⁹¹ See, e.g., Bradley & Siegel, *supra* note 216, at 265–68; Tara Leigh Grove, *The Origins (and Fragility) of Judicial Independence*, 71 *Vand. L. Rev.* 465, 539–44 (2018); David E. Pozen, *Self-Help and the Separation of Powers*, 124 *Yale L.J.* 2, 27–48 (2014); Adrian Vermeule, *Conventions of Agency Independence*, 113 *Colum. L. Rev.* 1163, 1181–94 (2013); Keith E. Whittington, *The Status of Unwritten Constitutional Conventions in the United States*, 2013 *U. Ill. L. Rev.* 1847.

²⁹² See Pozen, *supra* note 291, at 32–33, 38–39; Vermeule, *supra* note 291, at 1183; Whittington, *supra* note 291, at 1855, 1864; see also Bradley & Siegel, *supra* note 216, at 268 (noting that “it can be difficult to distinguish between conventions . . . and historical gloss”).

²⁹³ For a related discussion of the distinction between conventions and politics, see Bradley & Siegel, *supra* note 216, at 316–19; Vermeule, *supra* note 291, at 1184–94.

²⁹⁴ A.V. Dicey, *Introduction of the Study of the Constitution*, at cxli (LibertyClassics 8th ed. 1982) (1885).

conventions constitute non-legal obligations²⁹⁵—what the British legal scholar A.V. Dicey called “constitutional morality.”²⁹⁶ Second, the enforcement mechanism for constitutional conventions is political or popular rather than judicial.²⁹⁷ Those harmed by the violation of a constitutional convention must seek redress in the court of public opinion, not a court of law. Justice Jackson put the point well: “A political practice which has its origin in custom must rely upon custom for its sanctions.”²⁹⁸

Note, however, that conventions can still impose “obligations” without being judicially enforceable. Such obligations come in at least two forms: what Professor Adrian Vermeule calls “thin” and “thick” obligations.²⁹⁹ “Thin obligations” arise from concerns external to the actor, such as whether other political actors or the public will sanction a breach of the convention.³⁰⁰ “Thick obligations,” by contrast, arise from internal concerns—e.g., the actor believes that breaching the convention would be “morally wrong” regardless of external sanctions.³⁰¹ Indeed, sometimes actors might “so deeply internalize[] a convention or norm that it never occurs to them to breach it.”³⁰² This phenomenon—what Vermeule calls “the cognitive hegemony of conventions”³⁰³—may explain why Presidents have never attempted to make judicial appointments without law: perhaps it simply never occurred to them.³⁰⁴

²⁹⁵ See Bradley & Siegel, *supra* note 216, at 265–67; Grove, *supra* note 291, at 540; Vermeule, *supra* note 291, at 1182; Whittington, *supra* note 291, at 1853.

²⁹⁶ Dicey, *supra* note 294, at cxli.

²⁹⁷ See Pozen, *supra* note 291, at 29; Vermeule, *supra* note 291, at 1182; Whittington, *supra* note 291, at 1861–64. Admittedly, this distinction is less clear than it may at first seem. For example, courts cannot always enforce rules of constitutional law directly. See Bradley & Siegel, *supra* note 216, at 266–67 (discussing various justiciability doctrines). In addition, courts may sometimes be able to enforce constitutional conventions indirectly. See Adrian Vermeule, *Conventions in Court*, 38 *Dublin U. L.J.* 283, 284 (2015). As a result, some have resisted this distinction between judicially enforceable and judicially unenforceable norms. See, e.g., Daphna Renan, *Presidential Norms and Article II*, 131 *Harv. L. Rev.* 2187, 2196 & n.34, 2243 (2018).

²⁹⁸ *Ray v. Blair*, 343 U.S. 214, 233 (1952) (Jackson, J., dissenting).

²⁹⁹ See Vermeule, *supra* note 291, at 1185–86.

³⁰⁰ See *id.* at 1186–89.

³⁰¹ See *id.* at 1189–91.

³⁰² *Id.* at 1190.

³⁰³ *Id.*

³⁰⁴ This phenomenon also illustrates a potential weakness with the “empirical approach” to distinguishing between constitutional law and constitutional conventions. See Bradley & Siegel, *supra* note 216, at 267–68. If you asked a lawyer whether the President could appoint a tenth Justice without Congress expanding the size of the Supreme Court, she would almost

The Founding generation well understood the role of such non-legal obligations, even if they didn't use the same terminology. Indeed, they often invoked these concepts in debates about the Appointments Clause and the possibility that the President would abuse his power to appoint diplomats without congressional authorization. In the *Federalist Papers*, for instance, Alexander Hamilton suggested that "thin obligations" (i.e., external accountability) would discipline the President's appointment power. "The sole and undivided responsibility of one man," Hamilton reasoned, "will naturally beget a livelier sense of duty, and a more exact regard to reputation."³⁰⁵ And "[t]he blame of a bad nomination," Hamilton continued, "would fall upon the President singly and absolutely."³⁰⁶

Likewise, in the 1798 debate over the President's power to appoint foreign ministers, Representative Robert Goodloe Harper responded to the concern that the President might appoint an excessive number of foreign ministers:

All these appointments, though sanctioned by the Senate, must originate with him, and therefore he is particularly, and almost solely, responsible. His character is at stake. He is a single actor on a most conspicuous theatre, and all eyes are upon him. He is watched with all the jealousy which, in this country particularly, is entertained of Executive power. . . . This he well knows, and consequently will take care to do nothing which may strengthen their hands by giving them ground for censure. . . . These, I apprehend, are sufficient securities against wanton misconduct.³⁰⁷

Both Hamilton's and Harper's comments reflect the central role of external political (as opposed to legal) constraints under the Appointments Clause.³⁰⁸

In addition, the Founders stressed the role of "thick obligations" (i.e., internal morality) as a constraint on abuses of the appointment power. In *Federalist No. 76*, Hamilton defended the President's broad powers under the Appointments Clause by noting that the "supposition of universal

surely say "No." But that could simply be because we have all so deeply internalized the convention.

³⁰⁵ The *Federalist No. 76*, at 455 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

³⁰⁶ The *Federalist No. 77*, at 461 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

³⁰⁷ 7 *Annals of Cong.* 1167 (1798) (statement of Rep. Robert Goodloe Harper).

³⁰⁸ See also Mascott, *supra* note 19, at 558–59 (describing how the Appointments Clause promoted accountability in the appointment of officers).

venality in human nature, is little less an error in political reasoning, than that of universal rectitude.”³⁰⁹ According to Hamilton, “[t]he institution of delegated power implies[] that there is a portion of virtue and honor among mankind, which may be a reasonable foundation of confidence: . . . there is always a large proportion of the body, which consists of independent and public-spirited men.”³¹⁰

Likewise, in the 1798 debate over appointing foreign ministers without law, Representative Harrison Otis argued that “abstract questions and extreme cases were not calculated to reconcile the minds of our citizens to our excellent form of Government.”³¹¹ “[T]he Constitution is not predicated upon a presumed abuse of power by any department,” Otis (and others) reasoned, “but on the more reasonable confidence that each will perform its duty within its own sphere with sincerity, that division of sentiment will yield to reason and explanation, and that extreme cases are not likely to happen.”³¹² In other words, both Hamilton and Otis believed that the President and Senate’s internal “sincerity” would prevent certain abuses of the appointment power.

This history provides support for the claim that conventions were meant to constrain abuses of the appointment power. Yet even if we accept that constitutional conventions can constrain political actors in theory, we still have to evaluate whether a particular convention can (or, more importantly, should) constrain political actors in practice. Thus, the central question is whether we should follow a convention against judicial appointments without law—a question we take up in the next Section.

B. Defending the Convention

This Section defends the constitutional convention against judicial appointments without law. Specifically, it considers the descriptive question of *what* considerations (political, constitutional, or otherwise)

³⁰⁹ The Federalist No. 76, *supra* note 305, at 458 (Alexander Hamilton).

³¹⁰ *Id.*

³¹¹ 7 Annals of Cong. 1158 (1798) (statement of Rep. Harrison Otis).

³¹² *Id.*; see also 4 Cong. Rec. 5686 (1876) (statement of Rep. James Garfield) (“The President is under no obligation, *except as the Constitution places it on his conscience to do it*, to send ministers to France, England, or any of the kingdoms, while he might drop all of them or recall all of them.” (emphasis added)); 7 Annals of Cong. 894 (1798) (statement of Rep. James Bayard) (responding to concern that the President “might appoint an indefinite number of Ministers” by saying that the “question was predicated upon an abuse of power, whilst the Constitution supposed it would be executed with fidelity”); *id.* at 1115 (statement of Rep. George Thatcher).

caused the development of the convention in the first place, and the normative question of whether political actors *should* continue to support the convention.³¹³ Importantly, we think that this convention blunts the prudential objection to our interpretive argument because it demonstrates that quasi-constitutional informal constraints on the President's authority can sometimes supplement the Constitution's legal constraints.

Consider first the descriptive question—that is, what explains the origins of this strong constitutional convention? Doubtless, President Washington's early example gives the convention strong foundation. As Professor Akhil Amar has argued, “In the American constitutional tradition, what Washington did . . . has often mattered much more than what the written Constitution says, at least in situations where the text is arguably ambiguous and Washington's actions fall within the range of plausible textual meaning.”³¹⁴ Thus, according to Amar, “[P]residents over the centuries have quite properly asked themselves, ‘What would President Washington do?’ and, even more pointedly, ‘What did President Washington do?’”³¹⁵

Here, President Washington was advised that he could appoint Justices without a statute, but he declined to do so.³¹⁶ Admittedly, we do not know

³¹³ Like others, we focus on presidential conventions. See Whittington, *supra* note 291, at 1855–59 (noting that the presidency has been the “locus” of many of the conventions at the heart of American constitutional law). Of course, the Senate should also follow constitutional conventions. See, e.g., Charles G. Geyh, *Judicial Independence, Judicial Accountability, and the Role of Constitutional Norms in Congressional Regulation of the Courts*, 78 *Ind. L.J.* 153, 165 (2003). But given the nature of the modern appointments process, we view the presidential convention as more important. See *infra* notes 331–333 (discussing how political parties have reduced the role of the Senate in checking appointments).

³¹⁴ Amar, *supra* note 1, at 309–10; see also *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 614 (1952) (Frankfurter, J., concurring) (“In reaching the conclusion that conscience compels, I too derive consolation from the reflection that the President and the Congress between them will continue to safeguard the heritage which comes to them straight from George Washington.”); Martin S. Lederman, *Of Spies, Saboteurs, and Enemy Accomplices: History's Lessons for the Constitutionality of Wartime Military Tribunals*, 105 *Geo. L.J.* 1529, 1543 (2017) (“Washington's example, in particular, has frequently been a touchstone for constitutional understandings.”).

³¹⁵ Amar, *supra* note 1, at 309. President Washington's example has been treated as more or less binding on subsequent actors, depending on the issue. Some actions may have glossed or liquidated the Constitution's legal meaning, but others simply led political actors to adopt certain practices as less-binding constitutional conventions. Compare Stephen E. Sachs, *The “Unwritten Constitution” and Unwritten Law*, 2013 *U. Ill. L. Rev.* 1797, 1806–08 (discussing examples of liquidation), with Bradley & Siegel, *supra* note 216, at 267–68 (discussing George Washington's decision to step down after two terms as President as creating a constitutional convention).

³¹⁶ See *supra* text accompanying note 58.

why he declined to make these appointments, which may lessen the authoritativeness of his conduct.³¹⁷ But we do know President Washington was cognizant that even his insignificant actions would have “great and durable consequences from their having been established at the commencement of a new general Government,”³¹⁸ and that he “considered the first arrangement of the judicial department as essential to the happiness of our country, and to the stability of its’ [sic] political system.”³¹⁹ Moreover, we know that at the Founding, many expressed concerns about the new federal judiciary.³²⁰ Among all the branches, the judiciary was viewed as “the Sore part of the Constitution,” which “require[d] the lenient touch of Congress” to “quiet the fears of the Citizens.”³²¹ In light of this context, it would be quite understandable that President Washington would want to defer to the decision to fix the size of the Supreme Court by statute—particularly a decision made by “the people’s house.”³²²

³¹⁷ See Lederman, *supra* note 314, at 1543.

³¹⁸ Letter from George Washington to John Adams (May 10, 1789), *in* 2 *The Papers of George Washington*, *supra* note 28, at 245, 246–47.

³¹⁹ Letter from George Washington to Edmund Pendleton (Sept. 28, 1789), *in* 4 *The Papers of George Washington*, *supra* note 205, at 104–05; *id.* at 106–07.

³²⁰ See 4 *The Papers of George Washington*, *supra* note 205, at 76 (“Appointments to the Judiciary were among the most sensitive of [President Washington’s] problems in staffing the new government’s civil service. The provisions of the Constitution providing for the federal Judiciary had evoked considerable criticism from the beginning.”); Julius Goebel Jr., 1 *History of the Supreme Court of the United States: Antecedents and Beginnings to 1801*, at 458 (1971) (arguing that “the Judiciary Act must be viewed in a political context as an instrument of reconciliation deliberately framed to quiet still smoldering resentments”).

³²¹ Letter from Edmund Pendleton to James Madison (July 3, 1789), *in* 17 *The Papers of James Madison* 537, 538 (David B. Mattern ed., 1991); see also Letter from Joseph Jones to James Madison (Oct. 29, 1787), *in* 10 *The Papers of James Madison* 227, 227–29 (Robert A. Rutland & Charles F. Hobson eds., 1977) (noting the “strong objection[s]” against “the Judiciary arrangement and the undefined powers of that department” but that “[t]he legislature may and will probably make proper and wise regulations in the Judiciary”); Letter from Joseph Jones to James Madison (Nov. 22, 1787), *in* 10 *The Papers of James Madison*, *supra*, at 255, 256 (noting that “[t]here would have been less repugnance to [the Constitution] here had the judiciary been less exceptionable” and that if “the Judiciary be better established than it now stands on the paper [he] could more willingly give the Constitution [his] assent”).

³²² Akhil Reed Amar, *America’s Constitution: A Biography* 190 (2005) (referring to the House of Representatives as “the people’s house”); see also Bhargava, *supra* note 226, at 1787–88 (noting President Washington’s deferential attitude to the First Congress and specifically citing the First Judiciary Act as an example).

By contrast, President Roosevelt's attempt to pack the Supreme Court serves as a negative precedent in the American legal tradition.³²³ Roosevelt explicitly justified his court-packing plan as an attempt to alter the decisions of the Court, and thus threatened its decisional independence.³²⁴ And the failure of the plan produced "congressional homage to an 'independent Court, a fearless Court.'"³²⁵ Yet even Roosevelt did not attempt to court pack without law.³²⁶ The legislative failure of Roosevelt's court-packing plan may have further entrenched the convention that Presidents must work through the legislative process in order to change the size of the Supreme Court. And because the court-packing plan failed during the legislative process, it showed the normative value of such a convention.

Some of the same reasons that the conventions did arise (that is, ensuring democratic participation in decisions about the structure of the Court and preserving the Court's decisional independence) offer compelling reasons to preserve the constitutional convention today.

First, congressional control protects the Court's institutional legitimacy because control over the Court's personnel (loosely) ties the counter-majoritarian institution to the political branches.³²⁷ But President-Senate appointment diminishes the super-majority hurdle that requires control of *three* institutions before changing the Court's size.³²⁸ Under the Madisonian separation-of-powers theory, "political dynamics . . . were supposed to provide each branch with a 'will of its own' that would propel

³²³ See Grove, *supra* note 291, at 512–17; cf. Bradley & Siegel, *supra* note 216, at 273 (considering this analogy).

³²⁴ See, e.g., Bradley & Siegel, *supra* note 216, at 281–82; Grove, *supra* note 291, at 508–09.

³²⁵ See Lawrence Gene Sager, Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts, 95 Harv. L. Rev. 17, 20 (1981) (quoting S. Rep. No. 75-711, at 13–14 (1937)).

³²⁶ In fact, Roosevelt was deciding between two options at the other end of the spectrum: court packing by statute and court packing by constitutional amendment. See Adrian Vermeule, Political Constraints on Supreme Court Reform, 90 Minn. L. Rev. 1154, 1170–72 (2006).

³²⁷ See Amar, *supra* note 322, at 208–09 (arguing that the Constitution "tracked a . . . democratic logic in which the institutions mentioned earliest in the document rested on the broadest electoral base, with later-mentioned entities layered atop broader tiers of the democratic pyramid").

³²⁸ Cf. John O. McGinnis & Michael B. Rappaport, Supermajority Rules and the Judicial Confirmation Process, 26 Cardozo L. Rev. 543, 557–58 (2005) (arguing that supermajority confirmation rules make sense for Supreme Court nominees to temper the "countermajoritarian difficulty").

departmental “[a]mbition . . . to counteract ambition.”³²⁹ Under this view, the Senate could serve as a check on a President who might attempt to influence the Supreme Court’s decision-making through his appointment power.³³⁰ But political parties have reduced the Senate’s role as an effective check on the President’s appointment power.³³¹ In practice, as Professors Daryl Levinson and Richard Pildes have argued, party politics has become the “central mechanism driving the institutional behavior that separation-of-powers law aims to regulate.”³³² And this mechanism has particular force in the context of judicial appointments.³³³ The convention against the appointment of Justices without law therefore decreases the likelihood that a single political party could change the size of the Supreme Court.

Worse still, eliminating the House’s role in structuring the Supreme Court cuts the “people’s house” out of the process and thus might seem to contravene the Constitution’s democratic ethos.³³⁴ Indeed, given that recent arguments for court packing purportedly seek to restore the democratic legitimacy of the Court,³³⁵ it would be ironic to effect such re-legitimation process without the support of the House.

Perhaps counter-intuitively, however, this pro-democratic rationale for the convention feeds into yet another justification for its preservation: that it protects the Court’s independence from the political branches. Practically speaking, the constitutional convention might increase the costs of judicial appointments without law in at least two ways. First, it

³²⁹ Daryl J. Levinson & Richard H. Pildes, Separation of Parties, Not Powers, 119 *Harv. L. Rev.* 2311, 2313 (2006) (quoting *The Federalist* No. 51, *supra* note 224, at 321–22 (James Madison)).

³³⁰ See generally David A. Strauss & Cass R. Sunstein, The Senate, the Constitution, and the Confirmation Process, 101 *Yale L.J.* 1491 (1992) (arguing that the text, history, and structure of the Constitution contemplate that the Senate would serve as a check on the appointment of Supreme Court Justices).

³³¹ See Levinson & Pildes, *supra* note 329, at 2317–19 (critiquing the Madisonian theory of the separation of powers).

³³² *Id.* at 2315.

³³³ See Gerhardt, *supra* note 25, at 50–60; Levinson & Pildes, *supra* note 329, at 2372–74.

³³⁴ See West, *supra* note 8, at 171.

³³⁵ See, e.g., David Faris, Democrats Must Consider Court-Packing when They Regain Power. It’s the Only Way to Save Democracy, *Wash. Post* (July 10, 2018), https://www.washingtonpost.com/news/made-by-history/wp/2018/07/10/democrats-must-consider-court-packing-when-they-regain-power-its-the-only-way-to-save-democracy/?utm_term=.9545aec48d07 [<https://perma.cc/DUX2-MU5Q>]; Michael Klarman, Why Democrats Should Pack the Supreme Court, *Take Care* (Oct. 15, 2018), <https://takecareblog.com/blog/why-democrats-should-pack-the-supreme-court> [<https://perma.cc/3VDN-JHC7>].

imposes on the relevant actors a thick obligation, or an internal sense of constitutional morality. Put differently, a President might hesitate to appoint a tenth Justice because she believes such an appointment would be irresponsible or wrong. The same might be true of senators voting on the confirmation. Second, the convention might impose a thin obligation. Political actors might refrain from appointing Justices without a statute to avoid electoral sanction or popular backlash.

These increased costs may well insulate the Court's personnel from partisan control. That is, without overwhelming political consensus (manifested in a unified government), the Court's size will remain stable. If so, such insulation could encourage the neutral and non-partisan decision-making that is the hallmark of judicial independence. Put simply, the convention ensures that the Court operates independently of the political process.

C. From Convention to Amendment

Even if constitutional conventions can impose obligations on political actors, however, they remain vulnerable to change.³³⁶ For example, institutional or popular dynamics may shift in such a way that the breach of convention no longer results in political sanctions. Similarly, actors might cease to believe that violating the convention would be wrong. And if the convention against judicial appointments without law erodes, then a President with the support of the Senate might appoint additional Justices without a congressional statute expanding the Court's size.

Yet constitutional conventions play another role in our legal system: as the source for constitutional change. Specifically, the breach of a constitutional convention can inspire a constitutional amendment that embeds the convention in the Constitution's text.³³⁷ The textbook example of this phenomenon is the Twenty-Second Amendment.³³⁸ After President Roosevelt breached the convention against serving for more than two terms, the country amended the Constitution to prohibit future

³³⁶ See Dicey, *supra* note 294, at cxlv; Grove, *supra* note 291, at 542–44; Whittington, *supra* note 291, at 1862; see also Josh Chafetz & David E. Pozen, How Constitutional Norms Break Down, 65 *UCLA L. Rev.* 1430, 1435–38 (2018) (arguing that constitutional norms change “when they are *destroyed*, when they are *decomposed*, and when they are *displaced*”).

³³⁷ See Bradley & Siegel, *supra* note 216, at 286–87; Grove, *supra* note 291, at 511 (noting that “a constitutional amendment can be a way of ‘confirming’ a convention following a breach”).

³³⁸ See U.S. Const. amend. XXII.

Presidents from doing so. Another example (particularly relevant here) is that a decade after Roosevelt attempted to breach the convention against court packing,³³⁹ Congress considered a constitutional amendment to prevent future court-packing proposals.³⁴⁰ Indeed, members of Congress today have again suggested a court-packing amendment in order to embed the convention against court packing in the Constitution's text.³⁴¹

This process of change—from constitutional convention to constitutional amendment—suggests a path forward for those who (understandably) find the implications of judicial appointments without law troubling. If the constitutional convention is insufficient, then it might make good sense to codify the convention in the constitutional text. But those undertaking the laborious process of amending the Constitution should first know what the Constitution says. Right now, the Appointments Clause may very well authorize the President to appoint both diplomats and Justices without congressional authorization. Any proposed constitutional amendment should reflect that possibility.³⁴²

CONCLUSION

This Article's core contribution is to challenge the often-unstated assumptions about the nature of enumerated offices in our constitutional system. First, we identify the puzzle of enumerated offices: although the

³³⁹ We should acknowledge that scholars disagree about whether such a convention existed in 1937 or rather developed in later years. Compare Bradley & Siegel, *supra* note 216, at 278–83 (suggesting that a convention against court packing existed), with Grove, *supra* note 291, at 511 (suggesting that there was no such convention).

³⁴⁰ See Bradley & Siegel, *supra* note 216, at 284–87; Grove, *supra* note 291, at 510–11. Members of Congress have also introduced constitutional amendments against court packing on other occasions. See 81 Cong. Rec. 2511 (1937) (statement of Rep. Allen Treadway); 11 Cong. Rec. 286–87 (1880) (statement of Sen. William Whyte).

³⁴¹ See S.J. Res. 14, 116th Cong. (2019); Press Release, Marco Rubio, U.S. Senator, Rubio, Colleagues Introduce Constitutional Amendment to Keep SCOTUS at Nine Justices (Mar. 25, 2019), <https://www.rubio.senate.gov/public/index.cfm/press-releases?id=2CF9DC4-D0CA-4BBC-A44E-74573DC37004> [<https://perma.cc/D3XL-9DFC>].

³⁴² For example, one proposed constitutional amendment would provide: “If before this amendment is ratified by the States, the size of the Supreme Court has been increased by statute or constitutional amendment to more than nine members, once this amendment is ratified, those additional judicial offices beyond the nine in place in 2018 are void.” Jim Lindgren, Proposed Constitutional Amendment Against Packing the Supreme Court, *Volokh Conspiracy* (Oct. 12, 2018, 9:05 AM), <https://reason.com/volokh/2018/10/12/proposed-constitutional-amendment-against> [<https://perma.cc/55TK-HZUU>]. Yet as a matter of text, this amendment would not apply if the President increased the size of the Supreme Court without law (i.e., not “by statute or constitutional amendment”).

Appointments Clause's text places Justices and diplomats on the same footing, current constitutional practice seems to assume that Congress *must* establish the offices of the Justices, but that Congress *may not* interfere with the President's authority to appoint diplomats. Such divergence, we think, cannot be reconciled with any sensible reading of the Appointments Clause.

Instead, we argue that the Appointments Clause gives the President (with the Senate's consent) the authority to appoint *each* category of enumerated offices—both diplomats and Justices—without congressional authorization (and perhaps even in the face of congressional disapproval). We think this is the best reading of the text of the Appointments Clause, suits the unique constitutional status of the Supreme Court, and has roots in the historical record.

Regardless of whether this strong claim is persuasive, however, the textual parallel between diplomats and Justices unsettles other assumptions in constitutional law. Suppose that we're wrong and that Congress and the President have *concurrent* authority over the appointment of diplomats and Justices. If so, then Congress may disestablish (or regulate) the diplomatic offices that have long been considered within the President's prerogative to control. Stated bluntly, it seems to us that the Clause's parallel treatment creates a dilemma: jettison current practice regarding diplomats or disregard the text of the Appointments Clause.

This dilemma also sets in relief the methodological questions raised by the puzzle of enumerated officers. Generally, clear and precise constitutional text takes interpretive priority,³⁴³ but historical practice often plays a significant role in constitutional interpretation.³⁴⁴ Here, however, if the historical practices that give the President's divergent authority over diplomats and Justices are our constitutional *law*, then that law has become unmoored from the Appointments Clause's text. A set of constitutional rules authorizing the President to appoint diplomats without congressional authorization, but withholding such authority over Justices, is no longer an *interpretation* of the Constitution at all; it's a historically based constitutional doctrine that trumps the Constitution's text.

But it's possible to preserve current practice without subordinating text to history. That the President and Senate still have *legal* authority to make

³⁴³ See, e.g., Fallon, *supra* note 15, at 1195 (“Where the text speaks clearly and unambiguously . . . its plain meaning is dispositive.”).

³⁴⁴ See *supra* Section III.C.

appointments without law does not render such history irrelevant. Instead, longstanding practices in the political branches might inform the extra-constitutional conventions that rightly constrain the use of such authority. The Founders anticipated that the President's exercise of his prerogatives under the Appointments Clause would be constrained not exclusively by constitutional rules, but also by politics and constitutional morality. The strong constitutional convention against judicial appointments without law does (and should) impose a real constraint on abuses of the appointment power.