

## DEBATE

### CONGRESS'S POWER TO COMPEL THE TELEVISIONING OF SUPREME COURT PROCEEDINGS

In this debate, Professor Bruce Peabody, of Fairleigh Dickinson University, and Scott Gant, a partner at Boies, Schiller & Flexner LLP, discuss the constitutionality of proposed legislation that would televise the oral arguments and opinion readings of the Supreme Court. Professor Peabody believes that the constitutional basis for such legislation lies in the Necessary and Proper Clause because, as he argues, televising the Supreme Court not only “promot[es] judicial operations,” but also “furthers [] legitimate government . . . objective[s] . . . such as supporting Congress’s oversight role or keeping the public informed about public affairs.” Mr. Gant takes exception to the argument that the proposed bill is justified by the Necessary and Proper Clause. He argues that “[n]o one even pretends that televising oral arguments would improve them, or the process of litigating a case before the Court,” and concludes that “[l]egislation compelling the Court to televise its oral arguments does not pass muster” under the standard established in *McCulloch v. Maryland*, which says that the Necessary and Proper Clause “authorizes only action ‘appropriate’ and ‘plainly adapted’ to the pursuit of ‘legitimate’ ends.” In his closing, Professor Peabody contends that Mr. Gant’s conceptualization of the *McCulloch* standard is too narrow and argues that “it strains credulity to believe that improving and expanding the existing means of communication is unrelated to th[e] goal of civic education.” Mr. Gant, unconvinced by Professor Peabody’s rejoinder, states, “When there is, at best, questionable authority for legislative action, I believe more exacting scrutiny should be applied to that action if it impinges on the independence or authority of a coequal branch of government.”

## OPENING STATEMENT

*A Recent Proposal Requiring the Supreme Court To Televisе Its Public Proceedings Is Constitutional*Bruce G. Peabody<sup>†</sup>

C-SPAN is closing in on its thirtieth anniversary of covering Congress, and the war in Iraq, among other developments, ensures that the executive branch is a relentless television presence. But political chatter is beginning to build about a potential new player in this television lineup of Washington potentates. Members of Congress, along with a number of legal and political commentators, are showing increasing interest in a proposal to require the Supreme Court to televise some of its proceedings. The measure, S. 344, introduced by Senator Arlen Specter, would air the Court's "open sessions"—the oral arguments and opinion readings currently accessible only to the fortunate few who can view the Court's work in person. The legislation under consideration would allow a "majority of justices" to turn the cameras off if coverage threatened "the due process rights of 1 or more of the parties before the Court."

The Court is not exactly enthusiastic about this legislation or the attention it has generated. Over the past year, Justice Anthony Kennedy has appeared twice before Congress to convey his opposition to televising the Court, and, implicitly, to the Specter bill. During one of those presentations, Justice Clarence Thomas also expressed his reservations, stating that the proposal "runs the risk of undermining the manner in which we consider cases."

To date, the legal objections raised by these and other Justices have been rather veiled, perhaps reflecting a sense that citing specific concerns would constitute an improper advisory opinion, a judgment outside of the context of an actual case or controversy. But there is a possibility, perhaps even a likelihood, that if the Court continues to resist broadcasting its proceedings, Specter's proposal, or one like it, will one day become law. At that point, the Court may be afforded a more formal opportunity to evaluate the constitutionality of such a measure, assuming its validity is challenged in a judicial forum.

But if the Court confronts a law resembling the one currently be-

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ing considered, it should affirm the legislation. The proposed television bill is consistent with the Constitution's text, traditions, and system of separated powers—notwithstanding the vague objections of the Justices.

Our analysis of this matter might begin by delineating the basis for the legislature's authority to enact the television law. While the Constitution bestows Congress with substantial leeway in determining the "Rules of its [own] Proceedings," there is no explicit textual analogue establishing its general authority to shape the organization and rules of the Supreme Court. Article III does empower Congress to make "Exceptions" to and "Regulations" of the Court's appellate jurisdiction, and this might be a plausible basis for some proposals to televise the high bench. But historically, these Article III controls have not been the legal touchstone for regulating the Court's internal procedures and, in any event, the legislation currently being considered is not limited to televising appellate matters (even though these make up the overwhelming percentage of the Court's docket).

A more general and perhaps less controversial basis for requiring the Court to televise its public proceedings can be found in Congress's broad authority to "make all laws which shall be necessary and proper for carrying into Execution" the powers of the federal government. The Necessary and Proper Clause has been the presumptive constitutional basis for an enormous amount of legislation regulating the affairs of the judiciary and helping to carry "into Execution" the "judicial Power of the United States," which the Constitution vests in the Supreme Court. For example, Title 28 of the U.S. Code includes numerous provisions through which Congress mandates how the Court conducts its business—from how many Justices sit on the Court, to what constitutes a quorum, to how "precedence" shall be recognized among Associate Justices, to what happens to gifts given to the Court or its members.

A skeptic might counter that the Necessary and Proper Clause only authorizes laws governing the internal affairs of the Court if the legislation clearly promotes the "judicial power" and, specifically, the work of the Court. Under this reading, proposals to mandate "Supreme Court TV" should be deemed constitutionally suspect because members of the Court have contended that television coverage would impede their work by, for example, changing the dynamics of oral argument and jeopardizing the Justices' relative anonymity and, consequently, personal safety.

Advancing the work of the judiciary, including the Supreme

Court, is undoubtedly *one* valid application of the Necessary and Proper Clause. For example, Congress's establishment of a system of law clerks and its creation of a Marshal of the Court assist the Justices by enhancing their ability to winnow through petitions, craft opinions, and work in a secure environment.

The Necessary and Proper Clause is designed not simply to enhance the work of the judiciary, however, but to facilitate *all* the "Powers vested by th[e] Constitution in the Government of the United States." Thus, the proposed television legislation is constitutionally sound if it furthers some legitimate government power or objective wholly separate from promoting judicial operations, such as supporting Congress's oversight role or keeping the citizenry informed about public affairs. Arguably, legislation like the Freedom of Information Act (FOIA) is constitutionally defensible under these terms. If we don't adopt this interpretation of the permissible applications of the Necessary and Proper Clause, Congress would seem to have almost no capacity to respond to a Court that sought to close its hearings entirely, keep its transcripts secret, or release them after a year—outcomes that surely run counter to our deepest commitments to governmental openness and accountability.

Moreover, the Necessary and Proper Clause historically has been the constitutional basis for legislation that serves a kind of administrative or "housekeeping" role, filling in the details of general policy areas, including those related to essential aspects of the Court's operations, such as when the Court's term begins. Thus, pursuant to the Court's opening of its building to the general public, Congress has passed laws regulating this access, stipulating where members of the public can travel ("sidewalks and other paved surfaces") and how they may conduct themselves (they are forbidden from displaying signs, placards, or other forms of advertisement in the "[b]uilding or [on its] grounds"). These uncontroversial regulations bear considerable resemblance to the current television legislation. The Court already makes its proceedings available to the public through live observation, written transcripts, and audio recordings. The television bill would provide further specification, clarification, and expansion of the means through which the Court is seen and heard.

Even if one were to set aside these arguments and focus on the Necessary and Proper Clause as a provision limited to promoting the work of the Supreme Court and enhancing the administration of justice, this restricted conception does not necessarily address the question of who should determine what laws facilitate these ends. The

Constitution identifies Congress, not the Court, as the nation's chief federal policymaker, and presumably the legislature is generally best equipped to make cost-benefit and other analyses pertinent to assessing whether various legislative initiatives would enhance or diminish the work of our different institutions of governance.

But would the television proposal satisfy the test imposed by the most narrow application of the Necessary and Proper Clause—that is, would it actually facilitate the Court's duties? While it is plausible that this television coverage could enhance the legitimacy and effectiveness, along with the profile, of the Court, the case is difficult to establish one way or the other. There is a mixed and uncertain record regarding the effects of television coverage on the efficacy of other tribunals. But this ambiguity actually underscores the argument that a court should not invalidate the proposed television legislation solely on the grounds that the bill purportedly fails to advance the work of the Court (and therefore strays beyond the Necessary and Proper Clause).

In addition to raising questions about its constitutional basis, opponents of the television bill have also hinted that it impinges upon the separation of powers. As Justice Kennedy warned, "We think that proposals mandating and directing television in our court are inconsistent with the deference and etiquette that should apply between the branches."

It's hard to know exactly what to make of this objection, but one might distill a separation of powers argument of the following form: A bill requiring the Supreme Court to televise its proceedings, even those it already makes available to the public, would encroach upon the Court's Article III "judicial Power." In addition to infringing upon the Court's authority, the television proposal would inappropriately shift inherently judicial powers to the Congress.

On one level, this objection seems tethered to a rather cramped and unrealistic view of the separation of powers. As noted previously, Congress has long exercised enormous discretion over the functioning of the judiciary, making rules and policies that impact the Court's work and even shape its very judgments (while the Court promulgates federal rules, for example, they are ultimately subject to Congress's approval and amendment). The Court can't insist that every one of these regulations is a violation of the separation of powers; the Constitution and our legal traditions implicitly recognize the legislature as our general federal rule-making body even for the other branches of government.

But presumably, there are some central elements of the Court's authority that cannot be impeded upon by Congress without compromising what *The Federalist No. 51* called "that separate and distinct exercise of the different powers of government." For example, a federal law stipulating that the Court could not publish dissenting opinions would threaten its institutional responsibility to decide cases and controversies, and thereby amount to a violation of Article III.

Does the proposed television bill look more like a permissible regulation or an encroachment upon the Court's core Article III duties? As already indicated, the television bill seeks to provide greater access to one of the central institutions of American government and, in so doing, it furthers the legitimate interests of public awareness and judicial accountability. Requiring the Court to televise proceedings it already makes available to some members of the public, so long as this coverage does not impede individual liberties, does not represent a substantive alteration of the Court's institutional role, nor does it inherently jeopardize the Court's ability to evaluate and judge specific cases. Indeed, given our current capacity to install television cameras in an unobtrusive manner, the proposed law should not really change how the Court conducts its business at all. The proceedings of the Court should look no different before and after the cameras are installed.

Perhaps, however, television cameras will threaten the Court's Article III powers more indirectly. Several commentators, including Justice Breyer, have expressed concern that television coverage of the Court might damage its prestige and reputation, thereby impeding its effectiveness and ability to perform its constitutional responsibilities. As Justice Rehnquist once asserted, frequent appearances of the Justices on the "six o'clock news every night" would lessen "the mystique and moral authority" of the Court.

But, setting aside the question of whether this concern is even plausible as an empirical matter, it's not obvious that courts should invalidate a bill on constitutional terms simply because it could have a negative effect on an institution's "mystique and moral authority." Arguably, for example, both FOIA and the (now lapsed) independent counsel statute have diminished the mystique and authority of the executive branch, but this fact alone does not make these measures constitutionally suspect.

In sum, there are compelling reasons for believing that mandating television coverage of the Supreme Court is compatible with the regulatory traditions as well as the underlying logic of the Necessary and

Proper Clause, and the Constitution as a whole. Moreover, the proposed law would not run afoul of our commitment to separated institutions and powers. The time has come for the Supreme Court to join the other branches of federal government in accepting the greater accountability, transparency, and democracy that accompanies televised proceedings. If the Court won't make this transition on its own, Congress can employ its constitutional powers to guarantee the public a valid means for scrutinizing the most powerful court in the world.

#### REBUTTAL

#### *Televising the Supreme Court*

Scott E. Gant<sup>†</sup>

I admit it. I *enjoy* watching Supreme Court oral arguments. The grilling of the lawyers. The interplay among the Justices. Hints of the decision to come. It's fascinating stuff.

Unfortunately, despite working thirty minutes from the Court, I only make it to oral arguments every now and then. If the Court's arguments were televised, I'd surely be one of the most loyal viewers. But I'm not sure that televising oral arguments would be good for the Court, or for the country. More important, however, is that I'm fairly certain a law forcing the Court to televise oral arguments would be unconstitutional.

Professor Peabody appropriately focuses his attention on the possible sources of constitutional authority to enact such a law. Although we often seem to forget it, there are limits on Congress's power. The Court has observed many times what the Constitution itself makes clear: Congress may act only if authorized by one of the powers delegated to it by the Constitution. In my judgment, none of the powers assigned to Congress allow it to force the Court to televise its proceedings over the latter's objections.

Congress is vested with broad authority to legislate—particularly under provisions like the Commerce, Spending, and Necessary and Proper Clauses of the Constitution. Yet among these, only the Necessary and Proper Clause provides anything resembling a credible justification here.

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Article I, Section 8 of the Constitution empowers Congress to “make all Laws which shall be necessary and proper for carrying into Execution” both the specific legislative powers granted to Congress by the Constitution, as well as “all other Powers vested by th[e] Constitution in the Government of the United States.” Since the Constitution establishes a Supreme Court and empowers Congress to create other “inferior” courts, it has long been recognized that Congress, acting pursuant to the Necessary and Proper Clause, may enact laws regulating the federal courts. With respect to the Supreme Court, for instance, Congress has established by statute the number of Justices on the Court, what constitutes a quorum for the Court’s activities, and the opening date of the Court’s term. Congress’s authority to create procedural rules governing the operations of the courts is particularly well-established and uncontroversial. As the Court wrote in *Burlington Northern R.R. Co. v. Woods*, “Article III of the Constitution, augmented by the Necessary and Proper Clause . . . empowers Congress to establish a system of federal district and appellate courts and, impliedly, to establish procedural Rules governing litigation in these courts.”

Of course, Congress’s authority under the Necessary and Proper Clause is not unlimited. The Court itself long ago appropriately rejected a rigid view of the Necessary and Proper Clause under which an act of Congress would have to be “absolutely necessary” to the exercise of an enumerated power for the action to be supported by the Clause. But the Necessary and Proper Clause does not empower Congress to enact any law it fancies. In *McCulloch v. Maryland*, the Court explained when the Clause supports congressional action: “Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.” For the nearly two centuries since *McCulloch*, the Court has adhered to its view that the Clause authorizes only action “appropriate” and “plainly adapted” to the pursuit of “legitimate” ends.

Legislation compelling the Court to televise its oral arguments does not pass muster under this standard. Consider an effort to justify the Specter proposal on the grounds that it facilitates or advances the execution of the “judicial Power” created by the Constitution. Such an argument would be difficult to sustain. I have yet to hear a serious explanation that relates the bill’s purposes to anything having to do with *the case before the Court* in which the argument would be broadcast. No one even pretends that televising oral arguments would improve



them, or the process of litigating a case before the Court, in any way, and the fact that Congress has enacted *other* rules regulating the activities of the Court tells us little about whether it may enact a bill like Senator Specter's.

Given the problems with defending this legislation on the basis that it is conducive to the administration of justice or otherwise advances the work of the judiciary, Professor Peabody understandably does not dwell on this ostensible justification. He, like the members of Congress promoting the legislation, looks elsewhere.

Leaving aside that some sponsors of the legislation sprinkle their rationale for the law with complaints about the *outcomes* of recent Court decisions, the more dispassionate explanations tend to invoke two goals: (1) increasing public information and knowledge about the Court's work, and (2) enhancing "accountability" of the Justices and scrutiny of their decisions. Professor Peabody sounds a similar note, defending the law on the grounds that it would promote "Congress's oversight role or keep[] the citizenry informed about public affairs"—aims he believes Congress can pursue in accordance with its authority under the Necessary and Proper Clause.

Professor Peabody cleverly analogizes these objectives to underlying statutes like the Freedom of Information Act (FOIA), claiming that if we "don't adopt this interpretation of the permissible applications of the Necessary and Proper Clause, Congress would seem to have almost no capacity to respond to a Court that sought to close its hearings entirely, keep its transcripts secret, or release them after a year . . . ." This argument proves considerably too much.

Even if Congress has the power (under the Necessary and Proper Clause, or otherwise) to enact *certain* legislation providing the public with more information about government decisions and decision making, or promoting government accountability, that does not mean *all* legislation motivated by those aims is authorized by the Constitution. Recall *McCulloch v. Maryland*: Congress's actions must be "appropriate" and "plainly adapted" to the pursuit of "legitimate" ends.

Assuming the legitimacy of the ends here, a law mandating the televising of the Court's oral arguments is not "plainly adapted" to them. In stark contrast to a law like FOIA, which gives the public access to enormous amounts of otherwise unavailable material, televised oral arguments add little to the body of available information about the Court and its decisions. Today, the Court routinely makes available oral argument transcripts the same day they are prepared, and also sometimes releases audio recordings to the public. The marginal

increase in information accessible to the public by virtue of having video images from the Court's arguments cannot reasonably be viewed as materially advancing Congress's ability to conduct "oversight" of the Court during the proceedings, and certainly would have no impact on the ability of the public to learn about the Court's *decisions*, which are available for free on the Court's website.

At the same time, there are good reasons to view this proposed law as an attempt to impair the authority or independence of the Court. It is no secret that most of the current members of the Court oppose televising oral arguments, with Justice Souter famously declaring it would happen over his "dead body." Moreover, an examination of statements by the sponsors of Specter's bill suggests that, for some at least, this initiative is animated by displeasure with the Court, and has a punitive dimension. While the relevance of legislative motive in assessing the constitutionality of a statute is legitimately subject to debate, these statements make clear that separation of powers considerations are implicated by an effort to force the Court to televise its oral arguments. And when congressional action may jeopardize the authority or independence of the executive or judiciary, claims of congressional law-making authority should be subject to heightened scrutiny. A law requiring the Court to televise its proceedings can only be supported by a reading of the Necessary and Proper Clause that seemingly places no meaningful limits on Congress's power, and lacks due regard for the separation of powers principles that infuse the Constitution.

#### CLOSING STATEMENT

Bruce G. Peabody

At the outset of his remarks, Mr. Gant concedes that Congress has broad authority under the Necessary and Proper Clause, especially in creating "procedural rules governing the operations of the courts." But he also notes that even these presumptively valid regulations must meet the test of constitutionality famously set out in *McCulloch*, a standard that requires Congress's laws to target limited, "legitimate" ends through means "plainly adapted" to achieving those objectives.

It is helpful to recall, however, that this legal construction is set out in a case often cited for recognizing the broad powers of government. *McCulloch* authorized Congress to create the Bank of the United States as an instrument implied by the great (but fairly sparse) governmental powers set out in the Constitution. As Chief Justice

Marshall wrote in the opinion:

[W]here [a] law is not prohibited, and is really calculated to effect any of the objects entrusted to the government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power.

If televising the Supreme Court effectuates “any of the objects entrusted to the government,” the *McCulloch* precedent seems to bar the Court from examining the degree or amount of necessity for this proposal. Televising the Court can be valid even if its promised gifts are modest.

But what is the legitimate constitutional end sought by the proposed television bill? Mr. Gant denies that the bill facilitates the judicial power itself, but this conclusion is not obvious. He is correct in arguing that the television measure would not assist the Court in resolving any of the specific cases it broadcasts, but this is a constrained view of what the Court’s judicial power entails.

During its open sessions, the Supreme Court not only engages in oral argument, but Justices also read summaries of their decisions. To take just one recent example, Justice Thomas read aloud a version of his dissent in the Court’s 2006 decision invalidating aspects of President Bush’s military tribunals program. Reading these summaries is surely targeted at a broader audience than the parties to a case—especially since there is no guarantee these individuals will even be in the courtroom. But if it is a valid educational exercise of the judicial power to read these opinion summaries to the relative handful of people who can attend the Court in person, it would also seem legitimate for Congress to promote these pronouncements by broadcasting them to the nation at large.

Moreover, televising the Court is a valid way of advancing another aspect of the judicial power. The Court’s supremacy, its status as the highest federal tribunal, implies its authority to foster legal clarity and stability throughout our judicial and political system. This goal is reflected in, for example, the Court’s own rules governing review of certiorari petitions, which stipulate that it will be more likely to consider cases in which there are competing or inconsistent claims about federal law among courts (so that the Court can remedy this legal uncertainty by providing a uniform legal interpretation for courts to follow). But the Court also attempts to advance this commitment to unity and stability in the law by addressing the broader public. This can be seen, for example, in its efforts to achieve a unanimous deci-

sion in *Brown v. Board of Education* (the Court apparently delayed issuing the decision in order to achieve a 9-0 ruling even while the nation at large was deeply divided about the case), and in decisions like *Planned Parenthood v. Casey* (in which Justice O'Connor spoke about the Court's responsibility to the public to "remain steadfast" in upholding law and legal precedent).

Given this aspect of the Court's role, it is at least plausible to believe that televising the Court—and making its judicially authoritative voice available to millions of U.S. viewers—could support unity and steadiness in the law, at least among the citizenry.

Finally, televising the Supreme Court may advance the judicial power in another, somewhat indirect way. Some federal laws support the work of the Court by providing specific rules within a general area of governmental organization. In these cases, while the particular rule is not itself strictly "necessary and proper" to advancing the work of the Court, establishing some specific regulatory guidelines certainly is essential. For example, 28 U.S.C. § 1 establishes that the Court shall consist of "a Chief Justice of the United States and eight associate justices, any six of whom shall constitute a quorum." As the Court's own history reveals, there's nothing magical about a Court composed of nine members or a quorum of six—the Court has conducted its business with fewer and more Justices. But we need Congress to specify some number, so that we can fill its membership and the Court can conduct its business.

The television bill can be seen in a similar light. It should be relatively uncontroversial to note that the Supreme Court needs rules governing how the public gains access to its building and proceedings. A law directing that open sessions of the Court be televised looks like a specific rule permissible under Congress's broader power to regulate the public's interface with the nation's highest tribunal.

Even if one sets aside these arguments regarding how the proposed television legislation facilitates the judicial power, we might defend the measure on other constitutional grounds. Senator Specter's bill has the capacity to deepen knowledge about government and help Congress and the populace scrutinize the work of the courts.

Mr. Gant expresses doubts about the connection between the proposed legislation and these goals, indicating that televised Court proceedings will not add much to our substantive understanding of the high bench, since it already publishes its decisions (electronically and in traditional print form), and "routinely makes available oral argument transcripts the same day they are prepared, and also some-

times releases audio recordings to the public.” Insisting upon televised presentations, he contends, would simply require a different means of disseminating existing information, without providing any additional knowledge about the Court.

But televising the Court could provide new insight that is not obviously obtained through poring over electronic transcripts. For example, assuming it is valid for the public to examine whether Justices appointed for life are still able to conduct their work despite their often advanced age (and historically some sitting Justices have clearly failed this test), then it seems plausible that citizens could gain something distinctive by seeing live images of the Court.

Moreover, it’s not clear why we should readily accept Mr. Gant’s implicit standard that congressional laws seeking to increase public knowledge under the Necessary and Proper Clause are limited to expanding the *kind* of information currently available, as opposed to also extending the *ways* through which the public educates itself. If, following the *McCulloch* standard, it is a “legitimate” constitutional end to disperse information and knowledge about government to the public, the television measure seems “plainly adapted” to this end; it strains credulity to believe that improving and expanding the existing means of communication is unrelated to this goal of civic education. Congress’s 1996 passage of the E-FOIA amendments (providing the public with greater access to government documents and information via the Internet) seems premised on a similar view.

In sum, requiring the Supreme Court to televise its open sessions is a defensible exercise of the Necessary and Proper Clause given a variety of legitimate objectives that would be advanced by this new regulation. The television bill would plausibly enhance governmental accountability, not to mention the judicial power itself. If *McCulloch* is the right test for construing the limits of Congress’s power, then the television bill passes comfortably.

Mr. Gant concludes his analysis by suggesting that separation of powers principles may be implicated by the proposed legislation. “[W]hen congressional action may jeopardize the authority or independence of the executive or judiciary,” he says, “claims of congressional law-making authority should be subject to heightened scrutiny.”

In the context of assessing the constitutionality of Specter’s television proposal, it is not entirely clear how to apply this standard. If Congress does not possess the authority to enact the bill, it cannot pass it. The supremacy of the Constitution and the presumption that ours is a government of limited, enumerated powers do not seem to

allow for or require any “heightened scrutiny” on this front. A law beyond the Constitution’s delegation of powers to Congress is null and void. As I have argued, the Specter measure does not fall into this category.

But perhaps the proposed law would violate the authority of the judicial branch—to a degree that it threatens the constitutional separation of powers. Given the lengthy history of Congress’s regulation and superintendence of the Court and its procedures, one might imagine that the burden would be on opponents of the television bill to demonstrate how it imperils the judicial power. The Specter bill, in regulating the means through which the Court publicizes and broadcasts sessions it already makes public, represents a much less menacing impingement on the Court’s autonomy than existing, widely accepted legislative practices, including Congress’s manipulation of the size of the Court, or its control of the Court’s budget.

It will not do to insist that the television measure is somehow different because it is actively resisted by some Justices. There is historical evidence that members of the Court opposed Congress’s adjustment of its size following the Civil War, and Justices have long objected to Congress’s failure to provide them with pay increases. But these complaints alone do not make Congress’s action (and inaction) unconstitutional in these cases.

Mr. Gant is surely correct that some of the political impetus for the television proposal derives from “displeasure with the Court,” and may even have a “punitive dimension.” But we do not require our lawmakers, or any of our politicians, to act in a political vacuum, unconcerned about their own institutional prerogatives or how the behavior of the other branches might sap their power. On the contrary, our political system seems premised on quite the opposite assumption: as *The Federalist No. 51* famously notes, our laws are formed from ambition counteracting ambition. Through the “opposite and rival interests” of our competing institutions, we ensure that the “private interest[s]” of our political leaders serve as “a sentinel over the public rights.”

In the case of “Supreme Court TV,” the story can be told the following way: Starting in the 1990s, the Supreme Court struck down federal laws at a rate not seen since the New Deal. Congress stewed and eventually reacted, yielding proposals like Senator Specter’s. But this result represents a productive harnessing of Congress’s irritation, and the resulting bill could provide real benefits to the public. We should only hope that every instance of institutional conflict produced

such a valuable by-product.

Mr. Gant admits that he “*enjoy[s]* watching Supreme Court oral arguments,” but only can attend them occasionally, despite working half an hour from the Court. This characterization makes the proposal to televise the Court sound more like a luxury than a vital tool in civic education and responsible governance. But the new law would provide its greatest benefits to a class of people for whom television is their most consistent means of gathering news and to the millions of Americans who live outside the Beltway and may never have a chance to visit the Supreme Court in person. The Court access that Mr. Gant clearly enjoys is not, as a practical matter, available to most ordinary citizens. We should do what we can to redress this fact, instead of pretending that the problem rests with the people themselves.

One should not overestimate the potential effects of “Supreme Court TV.” Televising the Supreme Court will not, on its own, instantly create a public that is able to appreciate, say, the evolution of the Court’s Commerce Clause jurisprudence, or the finer points of collateral estoppel. But it’s also hard to see how giving people more access will itself produce public ignorance. In a government that remains committed to rule of, by, and for the people, we ought to put our thumb on the scales of openness and information, not exclusion and secrecy.

#### CLOSING STATEMENT

Scott E. Gant

Having argued only half-heartedly in his opening statement that Congress is empowered to compel the televising of Supreme Court proceedings on the ground that it effectuates the “judicial power” enumerated in the Constitution, Professor Peabody dedicates a significant part of his rebuttal to pressing this point. I find none of the three arguments advanced in this cause persuasive.

First, while conceding that televised proceedings would not facilitate the disposition of specific cases, he characterizes the practice of sometimes reading excerpts from opinions or summaries as an “educational exercise,” and leaps to the conclusion that because the Court undertakes this practice “it would also seem legitimate” for Congress to force the Court to televise the activity. The connection between these points is elusive. The Court might voluntarily undertake a variety of practices that Congress could not properly force upon it, and that do not themselves further or effectuate the judicial power.

Second, Professor Peabody claims that compelled televising of Court proceedings promotes the judicial power because “it is at least plausible” these video images would widely disseminate the Court’s “judicially authoritative voice” and “could” aid the Court in pursuing “unity and steadiness in the law.” This argument, while imaginative, demonstrates how far one must stretch to come up with anything resembling a plausible claim that the proposed legislation furthers the judicial power. Even assuming the Constitution authorizes Congress to promote the idea that the Court speaks with a “judicially authoritative voice”—whatever that means—it is unclear how televising the Court’s proceedings would advance that goal. In fact, there are good reasons to think televised proceedings are as likely to *undermine* that goal as advance it, and Professor Peabody offers no explanation, let alone support, for his assertion.

Next, he suggests forced televising furthers the judicial power because Congress has enacted other statutes that “support the work of the Court by providing specific rules within a general area of governmental organization.” His example is the law setting the number of Justices on the Court, and defining what constitutes a quorum. Although the precise contours of Professor Peabody’s argument are not entirely clear, his claim distorts the concept of the judicial power and the scope of the Necessary and Proper Clause beyond recognition. It is not at all apparent, for instance, that rules “governing how the public gains access” to the Court have anything to do with effectuating the judicial power. Even so, the fact that Congress might have power to enact *some* rules regarding public access does not mean it has the power to enact *any* rule it wants that is conceivably related to “public access.” A statute setting the number of Justices and how many must be present to conduct business is “appropriate” and “plainly adapted” to effectuating the judicial power. Forcing the Court to televise its proceedings, which Professor Peabody admits will do nothing to further the administration of the Court’s *own* activities, is too attenuated to come within the ambit of that legitimate end.

Supplementing his effort to prove that the law furthers the judicial power, Professor Peabody returns to the argument from his opening statement that the proposed law would facilitate public oversight of the Court. Although he mischaracterizes my argument by stating that I claim televised proceedings would fail to provide *any* additional knowledge about the Court, Professor Peabody appears to believe that Congress is empowered to enact any statute so long as it provides *some* information to the public, on the basis that it promotes



“civic education.” Again, this seems to stretch the Necessary and Proper Clause beyond recognition.

Professor Peabody once more relies on the federal Freedom of Information Act for support. Of course, the fact that Congress enacted FOIA does not prove it had the power to do so (and I am unaware of any case adjudicating the issue). Nevertheless, one need not question Congress’s authority when enacting FOIA to view skeptically Congress’s power to mandate televised Court proceedings. Despite hinging his argument on the premise that televised proceedings will “disperse information and knowledge about the government to the public,” Professor Peabody never specifies exactly what “information and knowledge” will be increased if proceedings are televised. Is it whether Justice Scalia sits up straight or reclines when he hurls zingers at lawyers? Whether Justice Breyer rests his hand on his forehead when he is thinking out loud? If this were all, it surely would not be enough. Yet Professor Peabody seems to believe Congress can force the Court to televise its proceedings provided there is *any* additional data made available to the public by doing so. And, under his logic, compelled televising necessarily passes muster because video images convey information which cannot be discerned from audio or printed transcripts of proceedings.

He defends his position by quoting a section from *McCulloch*, suggesting the passage “seems to bar” an examination of necessity for the law, and concluding the law “can be valid even if its promised gifts are modest.” Read in the context of the case as a whole, this passage hardly stands for the proposition suggested by Professor Peabody. Moreover, the quotation itself refers to a law “*really calculated* to effect any of the objects entrusted to the government” (emphasis added). What Professor Peabody and I have been debating is whether a law forcing the Court to televise its proceedings is “really calculated” to further any of the “objects entrusted to the government”—and figuring that out requires an examination of those objects and the ostensible relationship of the law to them. The particular passage from *McCulloch* that Professor Peabody relies on in his rebuttal does nothing to further analysis of that issue.

Finally, Professor Peabody may misunderstand my point about the relationship between separation of powers considerations and an assessment of Congress’s power to enact the law in question. Under the separation of powers doctrine, a law or action can be deemed unconstitutional on the ground that it is inconsistent with the Constitution’s allocation of responsibilities to, or among, the branches of the federal

government. When there is, at best, questionable authority for legislative action, I believe more exacting scrutiny should be applied to that action if it impinges on the independence or authority of a coequal branch of government. Such an approach is entirely consistent with a holistic reading of the Constitution, and arguably compelled by separation of powers principles. Professor Peabody dismisses my contention out of hand, and does not seriously grapple with the idea, instead observing that Congress could do worse to the Court, even while acknowledging the impetus for the television mandate is displeasure with the Court's rulings.

Professor Peabody says we "should not overestimate" the potential benefits of televised court proceedings. He seemingly already has, calling it a "vital tool in civic education and responsible governance." Clearly, Professor Peabody and I have different perspectives about the virtues of televised Court proceedings. But it appears that, under his analysis, Congress could force its will upon the Court even if televised proceedings fostered more confusion and misunderstanding than enlightenment, and even if they undermined the Court's standing with the public. Congress, he appears to believe, has free rein to decide what will effectuate the powers enumerated in the Constitution.

Congress undoubtedly has significant latitude when exercising its judgment about whether the Constitution empowers it to act. It would be unwise, however, for Congress to precipitate a conflict with the Court by enacting Senator Specter's bill, even if the legislature believes it has the authority to do so. If Congress nonetheless presses on, the ostensible rationales for such a law seem too remotely related to the pursuit of any legitimate end, particularly given the risk that the law may impinge on the Court's independence. Admittedly, this is a close call, given the breadth of Congress's constitutional powers. Yet sometimes lines must be drawn and limits set. In my view, if enacted, this legislation would be one of the rare examples when Congress has exceeded the bounds of its considerable Article I authority.