TOO MUCH SUNLIGHT: IS SUPREME COURT TV A GOOD IDEA?

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INTRODUCTION

In a 1913 Harper's Weekly article, Justice Brandeis famously wrote that "[S]unlight is said to be the best of disinfectants,"[1] referring to the public value of information access that might, if obtained, deter corruption. In analogous spirit, the Senate recently introduced a bill that would require "television coverage of all open sessions of the [Supreme] Court unless the Court decides, by a vote of the majority of justices, that allowing such coverage in a particular case would constitute a violation of the due process rights of 1 or more of the parties before [it]."[2] Hardly different from preceding versions,[3] the Cameras in the Courtroom Act (the "Act") represents a commitment to improving judicial transparency, among other things.

This is a laudable initiative. But a more faithful, realistic description might call it a Trojan horse of constitutional infirmities. As this note will explain, the Act's validity is questionable. Further, it poses alarming practical questions that merit serious consideration, and—as a matter of policy—it is plainly ill-advised.

In the propositions following these opening remarks, it should be evident that I take no position which claims that furthering governmental transparency is a bad idea; we need sunlight. But too much of it causes problems, and the foreseeable harms that the Act here would commit are not insignificant. At the outset, there are a variety of constitutional uncertainties. The first is in a lack of grounding for the legislation. In focusing on the most likely source of authority, the Necessary and Proper Clause of Article I, Section 8, the extent to which the Act measures against the current jurisprudential standard is addressed in detail. The second and third constitutional problems relate to different types of separation-of-powers inconsistencies that prevent even a law which passes Necessary and Proper scrutiny from achieving full validity. A few other

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1. Louis D. Brandeis, *What Publicity Can Do*, HARPER'S WKLY., Dec. 20, 1913, at 10, 10.

2. Cameras in the Courtroom Act, S. 858, 118th Cong. § 2 (2023).

3. Five similar versions of this same bill have been introduced since 2013. The most recent died in a previous Congress, in 2021. Cameras in the Courtroom Act, S. 807, 117th Cong. (2021).

constitutional considerations are then discussed, raising the subject of "due process" as it appears in the text of the bill itself. Finally, a brief policy review seeks to comment on the propriety of a pro-camera initiative.

Originally this note was meant to discuss narrowly the issue of cameras in the courtroom alone. Although I never set out to make lofty assertions, I did find myself touching upon larger themes. All this is to say that maybe the subject of this inquiry should be reconsidered by others, but from a different perspective. Instead of focusing more on the public interest in, say, transparency or accountability, and starting from the conclusion that the Act should become law—as much of the available scholarship tends to do—it may be wise to think about the public's equally important interest in what I might call a "unitary Judiciary." The concept is neither radical nor really that novel. But if we neglect to at least humor the idea, we may well learn the hard way that too much sunlight at once damages the eye.

I. CONSTITUTIONALITY

To be certain, the Act must, as any intended law, possess sufficiently sturdy constitutional footing. But a search for that basis is in vain, for situating the proposal in what potential sources of authority presently exist is akin to building a house upon loose gravel. And even if validity may be established, the separation of powers principle would be offended. Still, let us consider those possible grounds.

A. Congressional Authority

1. Express Authority

The federal government is designed as one of "few and defined"[4] powers, its jurisdiction "limited to certain enumerated objects."[5] Accordingly, the legislative domain is narrowed by that principle. So, if Congress may regulate the Supreme Court by the Act's terms, its authority to do so might first be found among the enumeration. A few constitutional provisions are worth considering.

Article I vests "[a]ll legislative Powers . . . in a Congress of the United States"[6] and, in a later section, identifies eighteen such powers. Not one of these could be read to allow regulation of the Supreme Court's procedure,[7] save only the Necessary and Proper Clause. But more on that later. For now, it suffices to say that Article I is of no help, at least at first glance.

Turning now to Article III, which vests the "judicial Power of the United States . . . in one supreme Court, and in such inferior Courts as the Congress

4. THE FEDERALIST NO. 45, at 237 (James Madison) (Ian Shapiro ed., 2009).

5. THE FEDERALIST NO. 14, at 69 (James Madison) (Ian Shapiro ed., 2009).

6. U.S. CONST. art. I, § 1.

7. Only one enumerated legislative power even speaks to the Judiciary: Section 8, clause 9 empowers Congress to "constitute Tribunals inferior to the [S]upreme Court." U.S. CONST. art. I, § 8, cl. 9.

may from time to time ordain and establish,"[8] it is equally apparent that congressional authority to regulate the *Supreme Court's* procedure must come from elsewhere. Here, the Constitution describes only the basic conditions of judicial office, the Court's jurisdiction, and other, less relevant things such as the punishment of treason.

Some have pointed to other, perhaps more obscure, sources. The power of the purse, for example, may justify cameras in the Court "[i]f one assumes that Congress's general power to authorize and appropriate funds for operating the Supreme Court is not controversial . . . ."[9] But even these commentators recognize the improbability, properly noting that the Court's spending power jurisprudence would prevent Congress from, say, conditioning the Justices' compensation on admitting cameras.[10] Another less obvious source is in Congress's power to legislate with respect to the District of Columbia. Specifically, Article I, Section 8 grants legislative authority over "needful Buildings" within the "Seat of the Government,"[11] and this has been taken to include the Supreme Court building itself.[12] But, again, this is an unlikely place to find needed authority. The nature of legislation pursuant to that power is not such that it may regulate the Court's procedure.

2. Implied Authority

Perhaps the Act is grounded in constitutional implication. While the Constitution's express language is silent as to the extent of Congress's authority to control the Supreme Court, "there is no phrase in the instrument which . . . excludes incidental or implied powers" to do as much.[13] Such powers emanate from the earlier-referenced Necessary and Proper Clause, which enables Congress to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[14] The question now is whether that provision—which has

8. U.S. CONST. art. III, § 1.

9. Bruce G. Peabody, *"Supreme Court TV": Televising the Least Accountable Branch?*, 33 J. LEGIS. 144, 157 (2007).

10. *See id.* at 158 (referencing South Dakota v. Dole, 483 U.S. 203 (1987), which imposed four requirements for constitutional exercises of conditional spending power: (1) promotion of the general welfare; (2) unambiguity; (3) germaneness to the overall purposes of the funding; and (4) consistency with the Constitution). As Peabody rightly explains, *Dole* would not allow Congress to condition some part of the Justices' compensation on camera access because Article III precludes diminishing such compensation during their tenures. In other words, such action would be inconsistent with other parts of the Constitution.

11. U.S. CONST. art. I, § 8, cl. 17.

12. *See, e.g.*, 40 U.S.C. § 6102(a) (authorizing the Marshal of the Supreme Court to prescribe regulations, with the Chief Justice's approval, such as are necessary for "the adequate protection of the . . . Building and grounds and of individuals and property [therein]," as well as "the maintenance of suitable order and decorum [also therein].").

13. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 406 (1819).

14. U.S. CONST. art. I, § 8, cl. 18.

been the source of so much legislation across various subjects—creates the constitutional hook for the Act. But first, a needed digression.

The foremost case interpreting the Clause is *McCulloch v. Maryland*. In that case, the Court considered whether Congress could incorporate a national bank, first conceding that "[a]mong the enumerated powers, we do not find that of establishing a bank or creating a corporation."[15] But, Chief Justice Marshall wrote, if the Necessary and Proper Clause in fact provides for certain incidental or implied powers, they must:

> intend such . . . as are *suitable* and *fitted* to the object; such as are *best* and *most useful* in relation to the end proposed. If this be not so, and if Congress could use no means but such as were *absolutely indispensable* to the existence of a granted power, the government would hardly exist; at least, it would be wholly inadequate to the purposes of its formation. A bank is a proper and suitable instrument to assist the operations of the government, in the collection and disbursement of the revenue; in the occasional anticipations of taxes and imposts; and in the regulation of the actual currency, as being a part of the trade and exchange between the States.[16]

Thus, the Clause was understood to be a necessary and proper element for the existence of effectual government itself. And as to the limits of any legislative act taken pursuant thereto, "[l]et 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."[17]

In focus are the basic requirements that an act of Congress—when instituted under an implied powers theory—be (1) in pursuit of some enumerated power and (2) involve a means that is sufficiently connected to that legitimate end. The Court's most recent iteration of that standard provides that "determining whether the Necessary and Proper Clause grants Congress the legislative authority to enact a particular federal statute . . . [requires asking] whether the statute constitutes a means that is *rationally related to the implementation of a constitutionally enumerated power*."[18] But what power exactly?

As I have thus far shown, the Constitution is bereft of any such *legislative* power. The Clause, however, grants Congress authority to legislate with respect to non-legislative powers. Recall the text: "and *all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof*."[19] In *Missouri v. Holland*, the Court took this to mean that Congress could implement the terms of a preexisting treaty by way of legislation

15. *McCulloch*, 17 U.S. (4 Wheat.) at 406.

16. *Id.* at 324–25 (emphasis added).

17. *Id.* at 421.

18. United States v. Comstock, 560 U.S. 126, 134 (2010) (emphasis added) (citing Sabri v. United States, 541 U.S. 600, 605 (2004)).

19. U.S. CONST. art. I, § 8, cl. 18 (emphasis added).

aimed to regulate foreign commerce.[20] In other words, and more generally stated, Congress could legislate so as to "carry[] into Execution" the treaty power, which the Constitution commits jointly to the Executive Branch.[21] As to the "judicial Power," the extent of Congress's ability to carry it into execution is far less clear. It shall not of course be doubted that this principal authority is a power "vested in the Government of the United States" or in a constituent department thereof; the difficulty lies in a scarcity of precedent articulating the bounds we must discern. A need therefore arises to examine the present Act under recent Necessary and Proper jurisprudence.[22]

The most recent and comprehensive expression of Necessary and Proper doctrine admits of an expansive range of implied authority. It was after all "long ago rejected . . . that the Necessary and Proper Clause demands that an Act of Congress be "'*absolutely* necessary'" to the exercise of an enumerated power."[23] Again, "in determining whether the . . . Clause grants Congress the legislative authority to enact a particular federal statute, [a court] look[s] to see whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power."[24] Such a law, "in addition to being authorized by Art. I, § 8, must also 'not [be] prohibited' by the Constitution."[25] When presented with the means chosen by Congress, the

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20. Missouri v. Holland, 252 U.S. 416 (1920). For a more recent example, see United States v. Park, 938 F.3d 354, 375 (D.C. Cir. 2019) (holding that "Congress was acting well within its authority to 'make all Laws which shall be necessary and proper' to carry into effect the federal government's treaty power when it enacted the PROTECT Act to implement the Optional Protocol, an internationally agreed upon regulatory framework that encourages signatories to assume nationality jurisdiction over their nationals' sexual exploitation of children abroad.").

21. *See* U.S. CONST. art. I, § 8, cl. 18; U.S. CONST. art. II, § 2, cl. 2 (empowering the President, "by and with the Advice and Consent of the Senate, to make Treaties . . . .").

22. As a preliminary matter, it shall be noted that one may choose to read the Necessary and Proper Clause either narrowly or expansively. The former approach may tend to approve only those enactments which fill in constitutional gaps so as to enable departments and agencies to perform essential functions. Aligning with that conception, early skeptics like Madison and Jefferson felt the Clause empowered Congress to use only "necessary" means, not merely those "convenien[t]" or "conducive" to the exercise of an enumerated power. 2 ANNALS OF CONG. 1946–50 (1791) (speech of James Madison); THOMAS JEFFERSON, OPINION ON THE CONSTITUTIONALITY OF THE BILL TO ESTABLISH THE BANK OF THE UNITED STATES (Feb. 15, 1791), *reprinted in* LEGISLATIVE AND DOCUMENTARY HISTORY OF THE BANK OF THE UNITED STATES 91, 93–94 (M. St. Clair Clarke & D.A. Hall eds., 1832). The latter, meanwhile, is deferential to legislation that, while not absolutely necessary, advances or enhances the power sought to be carried into execution. This was Hamilton's view. He took "necessary" to mean "needful, requisite, incidental, useful, or conducive to." ALEXANDER HAMILTON, OPINION OF THE BILL TO ESTABLISH THE BANK OF THE UNITED STATES (Feb. 23, 1791), *reprinted in* LEGISLATIVE AND DOCUMENTARY HISTORY OF THE BANK OF THE UNITED STATES 95, 97 (M. St. Clair Clarke & D.A. Hall eds., 1832) (emphasis omitted). Based on the current situation of relevant doctrine, the Court has deeply waded into a Hamiltonian encampment.

23. Jinks v. Richland, 538 U.S. 456, 462 (2003) (citing McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 414 (1819)).

24. United States v. Comstock, 560 U.S. 126, 134 (2010).

25. *Id.* at 135 (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 421).

question is whether it is "[']"reasonably adapted" to the attainment of a legitimate end under['] . . . powers that the Constitution grants Congress the authority to implement."[26] Last,

> [i]f it can be seen that the means adopted are really calculated to attain the end, the degree of their necessity, the extent to which they conduce to the end, the closeness of the relationship between the means adopted and the end to be attained, are matters for congressional determination alone.[27]

In other words, Congress's choice of means will hardly be questioned.

First, it is hopeless to contend that the Article III "judicial Power" is not a legitimate end for relevant purposes. To say otherwise would diverge from a well-accepted understanding of what falls within Congress's legislative reach. It would also require that we turn back the clock to some pre-*Holland*, anti-functionalist jurisprudence that draws the harshest separation-of-powers lines. Further, that conclusion would call into question the validity of the most basic steps Congress has taken to "infus[e] with life the inert clauses of Article III . . . ."[28] Necessarily, of course, that part, "augmented by the Necessary and Proper Clause . . . empowers Congress . . . impliedly[] to establish procedural Rules governing litigation in [the federal] courts."[29] As for the Supreme Court, that implication has undergirded legislation respecting "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."[30] There is far less confidence, however, in the complimentary requirement of rational adaptation.

Instinctively, rational adaptation seems quick work, as it seems countless statutes have been rubber-stamped by a lenient doctrine. The problem is that a whole line of case law has developed from implied powers challenges which attack the connection between Congress's chosen means and Article I powers. That is, our understanding of what constitutes a rational basis comes mostly from cases involving, say, the Commerce Clause.[31] Now this is not to suggest

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26. *Id.* (quoting Gonzales v. Raich, 545 U.S. 1, 37 (2005) (Scalia, J., concurring)).

27. Burroughs v. United States, 290 U.S. 534, 547–48 (1934).

28. OLIVER WENDELL HOLMES, JR., HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801 457 (Julius Goebel, Jr. ed., 2010). Here, Justice Holmes was referring to the Judiciary Act of 1789.

29. Burlington N.R.R. Co. v. Woods, 480 U.S. 1, 5 n.3 (1987).

30. Bruce G. Peabody & Scott E. Gant, *Debate: Congress's Power to Compel the Televising of Supreme Court Proceedings*, 156 U. PA. L. REV. PENNUMBRIA 46, 53 (2007) (rebuttal by Scott E. Grant).

31. *See, e.g.*, Wickard v. Filburn, 317 U.S. 111 (1942) (permitting under the Necessary and Proper and Commerce Clauses Congress's attempt to regulate wheat surpluses to control national pricing); *see also* Gonzales v. Raich, 545 U.S. 1, 22 (2005) (holding that "Congress was acting well within its authority to 'make all Laws which shall be necessary and proper' to 'regulate Commerce . . . among the several States'" when it sought to regulate marijuana, even if it ensnared some intrastate trade.) (citing U.S. CONST. art. I, § 8 cls. 3, 18); Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 560 (2012) (identifying the Affordable Care Act's individual mandate provision as an unauthorized creation of "the necessary predicate to the exercise of [the Commerce Clause]," though upholding it according to Congress's taxing powers.).

that for present purposes, some other jurisprudence must exist specially for cases involving the judicial power, or that the Act here is *immediately* suspect due to the irrelevance of typically featured enumerated powers. I would only say that to justify the Act upon *Comstock* and its ancestry would at least be an awkward thing.

In *Comstock* itself, the Court provided five bases for its decision to uphold a federal law mandating the civil commitment of prisoners who would otherwise be released from incarceration as sexually dangerous persons. They include:

> (1) the breadth of the Necessary and Proper Clause, (2) the long history of federal involvement in this arena, (3) the sound reasons for the statute's enactment in light of the Government's custodial interest in safeguarding the public from dangers posed by those in federal custody, (4) the statute's accommodation of state interests, and (5) the statute's narrow scope.[32]

The first element has been stressed *ad nauseum*, and the second, while not entirely relevant to the adaptation analysis, is worth touching upon only briefly. The fourth is irrelevant for these purposes. Thus, of particular importance here are the third and fifth considerations; together, they counsel that the Act is not reasonably adapted to the facilitation of the judicial power. A few comparisons should suffice to explain.

In looking to the soundness of Congress's reasons to act, the *Comstock* Court provided that civil commitment was "'reasonably adapted' to Congress' power to act as a responsible federal custodian (a power that rests, in turn, upon federal criminal statutes that legitimately seek to implement constitutionally enumerated authority)."[33] The majority went on to explain that Congress could have made various reasonable conclusions about the matter at hand that would have justified the choice of means. Accordingly, Congress identified various concerns (as elaborated in a Judicial Conference report[34]) and opted for civil commitment as a way of addressing them. Juxtapose that rationale onto the present situation. Even if the judicial power is subject to regulation, it is far from intuitive that Congress' prerogative over internal administration at the Supreme Court includes peeling back some proverbial curtain to reveal to the public what it already has considerable access to. And it is one thing to say that Congress is obliged to protect the public from federal inmates' violence, but an entirely different matter to suggest that there exist analogous obligations for the Legislature to unwarrantedly run the highest institution of a coequal branch.

Second, regarding the fifth consideration, there would be too great a disconnect from means to end. That is not a claim respecting the counting of incidentals but rather that requiring cameras in the courtroom is no regulation logically expected to help dispense the judicial power. It might, though, if that power were characterized as the interpretation of law and conduct of proceedings *in a way that is publicly visible*, or if the proceedings themselves

32. United States v. Comstock, 560 U.S. 126, 149 (2010).

33. *Id.* at 143 (citations omitted).

34. *See id.* at 138–40.

required such visibility. Yet, I think that is not how we understand it. So, as we look to the Court's conclusion in *Comstock* that the "links between [the civil commitment provision] and an enumerated Article I power [were] not too attenuated,"[35] we find its reliance on cases in which more sensible inferences of implied authority are drawn. For one, the majority noted that "in *Sabri* [it] observed that 'Congress has authority under the Spending Clause to appropriate federal moneys' and that it therefore 'has corresponding authority under the Necessary and Proper Clause to see to it that taxpayer dollars' are not 'siphoned off' by 'corrupt public officers.'"[36] Similarly, said the Court, *Hall* held that:

> [T]he Necessary and Proper Clause grants Congress the power, in furtherance of Art. I, § 8, cls. 11–13, to award "pensions to the wounded and disabled" soldiers of the armed forces and their dependents; and from that implied power [a] further infer[ence of] the "[i]mplied power" "to pass laws to . . . punish" anyone who fraudulently appropriated such pensions.[37]

Of course, the enumerated powers in these cases do and should involve the incidental powers identified. But one does not look at Article III's vesting of the "judicial Power" and just as naturally deduce a congressional license to see to it that that power be administered on C-SPAN.

Last, and not entirely tangential, the statute in *Comstock* constituted "a modest addition to a set of federal prison-related mental-health statutes that have existed for many decades."[38] The bill Congress now seeks to enact is no such addition; it would be an unprecedented alteration of the way the Court—the primary trustee of judicial domain—carries out its essential constitutional functions. A similar concern was expressed in *NFIB v. Sebelius*, where the Court identified the Affordable Care Act's individual mandate provision as an impermissible exercise of implied powers pursuant to the interstate commerce authority. There, the Court propounded that the Framers "gave Congress the power to *regulate* commerce, not to *compel* it, and for over 200 years both [the Court's] decisions and Congress's actions have reflected this understanding."[39] In other words, Congress could not use its implied authority to do something not theretofore done in our nation's history.

The final requirement in Necessary and Proper analyses is the squaring of a given statute with the rest of the Constitution. Accordingly, under an implied powers theory, an act of Congress must not only be taken pursuant to some enumerated power and constitute a means that is sufficiently adapted to it, but it must also not offend some other part of the Constitution. It almost need not be said that constitutional invalidity may derive from repugnance to either a

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35. *Id.* at 146.

36. *Id.* at 146–47 (quoting Sabri v. United States, 541 U.S. 600, 605 (2004)).

37. *Id.* at 147 (citations omitted) (quoting United States v. Hall, 98 U.S. 343, 351, 346 (1879)).

38. *Id.* at 137. The Court subsequently cautioned that "even a longstanding history of related federal action does not demonstrate a statute's constitutionality," though it "can nonetheless be 'helpful[']. . . ." *Id.*

39. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 555 (2012).

particular provision or to the document's structure. As the next section explains, it is the latter offense which the Act at hand commits. But first, consider an alternate approach to the analysis thus far.

Bruce Peabody, who has written extensively on the subject, would conveniently redefine the "judicial Power" to bridge a gap between means and ends. First, he cites a 1991 decision noting that:

> From almost the founding days of this country, it has been firmly established that Congress, acting pursuant to its authority to make all laws "necessary and proper" to [the] establishment [of federal courts], also may enact laws regulating the conduct of those courts and the means by which their judgments are enforced.[40]

From this he concludes that the Court has "sanctioned, and Congress has energetically utilized, a broad legal authority to fashion rules governing the operations of the federal courts," supposedly including the Supreme Court itself.[41] Now for the sake of responding to the argument's whole, I'll pretend that a decision of the Court clearly referring to the regulation of *inferior* courts actually has some *convincingly binding* bearing on the matter; it shouldn't. Nevertheless, he proceeds to suggest that the issue may be resolved by reading Necessary and Proper as authorizing both "legislative enhancements" and "legislative rulemakings."

A legislative enhancement is said to presumably justify Congress's intentions "if it promoted, for example, the operations and effectiveness of the Court, by furthering the administration of justice and the Court's responsibilities as outlined in Article III."[42] He further assumes that the essentials of the Court's judicial power contain pedagogical and certain institutional functions. Therefore, a law requiring cameras, which could possibly educate the public on the Supreme Court, would help carry the power into execution. Similarly, if the same law guaranteed "communicat[ion] with the public," it would bolster the Court's "capacity to contribute to legal and political stability and unity" by achieving what Peabody calls "legal settlement."[43]

First, it is hard to imagine that the Court's judicial power subsumes a heuristic function simply because, as is pointed out, it chooses to invite the public to attend oral arguments or because justices occasionally read their opinions from the bench.[44] These institutional choices are cited as if they were made with the specific intent to educate. They might indeed have that effect (and for all we know, it could be true), but such choices may possibly have been made for plenty other reasons like transparency or institutional accountability. Even in the abstract, the "judicial Power" need not require pedagogical elements. Second, it is doubtful that it also subsumes a specific and distinct

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40. Peabody, *supra* note 9, at 160 (quoting Wiley v. Coastal Corp., 503 U.S. 131, 136 (1991)).

41. *Id.*

42. *Id.*

43. *Id.* at 161 (internal quotation marks omitted).

44. It is equally difficult to imagine why a justice would announce an opinion from the bench on an oral argument day. Isn't *that* the kind of proceeding that the law's proponents seek to televise?

institutional function obliging the Court to ensure "legal settlement" for the public. It is unclear what requires the Court to "contribute to legal and political stability and unity." These phenomena—as good and helpful as they are—may just be consequences of the institution's actual work. Further, it seems a bit odd that any part of the Judiciary must of necessity take steps to minimize public division. That sounds like something a political actor is equipped to do.

Legislative rulemaking, on the other hand, involves asking whether Congress can use its implied powers to "fill in the details governing aspects of the judicial power, including even the judiciary's ability to govern itself."[45] Peabody looks to the fact that Congress has passed the membership-size, quorum, and calendar laws to then say that "against this background of Congress's rather extensive history of 'filling in' the details of judicial power, the constitutional grounding of [a cameras law] looks fairly secure."[46]

Fairly secure? The statutes referenced did something which *absolutely* needed to be done in order to operationalize Article III. Of course, there need not be nine justices; the Court has had various sizes of composition in its history. Of course, the quorum need not be four; it could be whatever Congress wants, within reason. And of course, the Court's term needs not start on the first Monday of October; it could begin on *any* date. So, for Peabody, he is correct to note that it is "essential that the Court's term have some beginning," that a quorum of some kind exist, and that there be *x* number of judges. This shows that the kinds of laws used as support for one requiring cameras exist in a category of their own—one to which the present Act cannot join. It cannot be said that some form of public spectatorship must exist to seal a gap. Indeed, we are lucky to enjoy the access that we do have, the detail of which later commentary will highlight.

B. The Separation of Powers

Recall that *M'Culloch* asks a given statute "not [be] prohibited [by], [and] consist with the letter and spirit of[,] the constitution" in order for a valid exercise of implied legislative power.[47] The law cannot be otherwise unconstitutional. Indeed, this is really the last element of Necessary and Proper, but the way the Act here so offends the Constitution merits reservation to a section of its own. Now, consider how the Act flies in the face of constitutional structure.

1. Encroachment

"Each branch 'exercise[s] . . . the powers appropriate to its own department,' and no branch can 'encroach upon the powers confided to the others.'"[48] The boundaries between the branches are of course not

45. Peabody, *supra* note 9, at 162.

46. *Id.* at 163.

47. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819).

48. Patchak v. Zinke, 583 U.S. 244, 250 (2018) (quoting Kilbourn v. Thompson, 103 U.S. 168, 191 (1881)).

"hermetically sealed," but the Constitution prohibits one from invading the "central prerogatives" of another.[49] And that "division of power . . . is violated . . . whether or not the encroached-upon branch approves the encroachment."[50] Now this is not to say that the branches "ought to have no *partial agency* in, or no *control* over the acts of each other."[51] There does exist a complex tradition of checks and balances, as well as significant inter-branch coordination. The point is that there are certain core prerogatives for each department which are so purely their own and which only they can act upon. Justice Gorsuch recently provided a decent (and familiar) synthesis of them. For the Legislature, it is the power to "*write* the law," for the Executive the power to "*execute* it," and for the Judiciary "the task of applying that law as it *is* . . . ."[52] So, if an unconstitutional encroachment occurs, it is likely because one branch is engaging in a sort of usurpation of one of these tenet powers belonging to another. It may also occur in the usurpation of such ancillary prerogatives as are necessary to fulfilling those ultimate ones. This is exactly what the Act will do. To understand how first requires a consideration of what falls within that forbidden zone, so to speak.

The core of the "judicial Power"—applying the law—is neither as singular in meaning nor as simple as Article III's short length suggests. It cannot be. And just why the Framers drafted that part in so few words may be telling. Justice Holmes observed that the Judiciary was "subjected to much less critical working over than the other departments," concluding that many delegates consented to a national judiciary as "a matter of theoretical compulsion rather than of practical necessity:" a gratuitous concession to the prevalent maxim of separation generally.[53] What they really sunk their teeth into was the breadth of a court system's purview: jurisdiction.[54] Many of the first legislative acts handled by the new Congress dealt mainly with defining that component. Another key, but perhaps background, note about the Constitutional Convention was that judicial independence would be paramount. Initiatives to involve members of a judiciary in otherwise political affairs would be shot down, not unlikely in reverence to Montesquieu's "warning that unless the power of judging was held separate from the executive and legislative 'there can be then no liberty.'"[55] And up to the present that theme—along with the inverse that such independence requires not only keeping the Judiciary within itself but also the political branches without—remains nearly sanctified. Over the years it has come to be understood that the "judicial Power" is at least supposed to be one

49. Miller v. French, 530 U.S. 327, 341 (2000) (internal quotation marks omitted).

50. New York v. United States, 505 U.S. 144, 182 (1992).

51. THE FEDERALIST NO. 47, at 246 (James Madison) (Ian Shapiro ed., 2009) (emphasis in original).

52. NEIL M. GORSUCH, A REPUBLIC, IF YOU CAN KEEP IT 41 (2019).

53. HOLMES, *supra* note 28, at 205–06.

54. Justice Holmes notes the relative ease with which certain, less potent, particulars were agreed upon in Philadelphia. For example, the resolution "regarding tenure and fixed salary was . . . voted, apparently without debate," while the matter of jurisdiction was postponed, as many contentious things often are. *Id.* at 212.

55. *Id.* at 238 (quoting CHARLES L. MONTESQUIEU, THE SPIRIT OF THE LAWS 185 (1751)).

of "neither FORCE nor WILL but merely judgment,"[56] confined to "Cases" or "Controversies,"[57] and subject to limitations like those demanding judicial restraint.

That it is not all. Tribunals are said to enjoy a measure of authority that inheres in the judicial power, in their very existence. An early iteration of the Supreme Court wrote that "[c]ourts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates . . . ."[58] The same idea was recognized as late as 2017, when the Court held that "[f]ederal courts possess certain 'inherent powers,' not conferred by rule or statute, 'to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.'"[59] These stem from the "authority to protect . . . proceedings and judgments in the course of discharging . . . traditional responsibilities."[60] The extent of these powers "must be delimited with care, for there is a danger of overreaching when one branch of the Government, without benefit of cooperation or correction from the others, undertakes to define its own authority."[61] Accordingly, an exercise of inherent power must be made with caution and as "a reasonable response to the problems and needs that provoke it."[62]

Admittedly much of this sounds applicable only to the federal district courts, where such needs are likely to arise. Indeed, the cases from which the concept of inherent power itself derives (at least in American precedent) relate to the proceedings of these courts. But the authority recognized belongs to "Courts *invested with the judicial power* of the United States . . . ."[63] Does this not include the Supreme Court? Arguably the whole idea should ring most true with respect to that institution, whose constitutionally explicit creation more likely shields its autonomy from legislative attempts to degrade it.[64] Whatever the case, it must still follow that the Court, too, may utilize some category of self-prescribed tools to run oral arguments.[65] Inherency must also be understood to live in the core of essential judicial function. Otherwise,

56. THE FEDERALIST NO. 78, at 392 (Alexander Hamilton) (Ian Shapiro ed., 2009).

57. U.S. CONST. art. III, § 2, cl. 1.

58. Anderson v. Dunn, 19 U.S. 204, 227 (1821).

59. Goodyear Tire & Rubber Co. v. Haeger, 581 U.S. 101, 107 (2017) (quoting Link v. Wabash R.R. Co., 370 U.S. 626, 630–31 (1962)).

60. Degen v. United States, 517 U.S. 820, 823 (1996). That authority includes, for example, "the ability to fashion an appropriate sanction for conduct which abuses the judicial process." Chambers v. NASCO, Inc., 501 U.S. 32, 44–45 (1991) (permitting the sanction of attorney's fees upon a party acting in bad faith to be paid to the other side).

61. *Degen*, 517 U.S. at 823.

62. *Id.* at 823–24.

63. *Id.* at 823 (emphasis added).

64. Article III gives Congress the power to "ordain and establish" inferior courts; it makes decent sense to suggest that how those courts conduct their proceedings may be affected at times by statute, still not without limits. U.S. CONST. art. III, § 1.

65. To be sure, no authoritative pronouncement, at least to my knowledge, absolutely requires the use of such tools in any level of federal court to be of a reactionary character.

"inherent" has no real meaning. Therefore, a legislative, as well as executive, encroachment upon that element must offend the separation of powers principle.

The Court's current policy of prohibiting cameras in the courtroom is without a doubt its own attempt "'to manage [its] own affairs so as to achieve the orderly and expeditious disposition of cases.'"[66] In fact the Court has long adhered, by choice, to Federal Rule of Criminal Procedure 53, which states that, "[e]xcept as otherwise provided by a statute or these rules, the court must not permit . . . the broadcasting of judicial proceedings from the courtroom."[67] But in requiring cameras as a default procedure, Congress would be forcing the institution to abandon that policy, impermissibly doing for the Court what only it itself may do by inherent right. Congress would do well to take notice of those intrinsically given means, as they are "necessary to the exercise of all other[]" powers.[68] In our system of government no branch may "'impair another in the performance of its constitutional duties.'"[69] This is a different kind of separation of powers concept in that it need not involve some act of usurpation. Congress has done something like this before.

In *Free Enterprise Fund*, Congress had given double for-cause tenure protection to members of the Public Company Accounting Oversight Board, subjecting their removability only to the discretion of the Securities and Exchange Commission head. The Commissioner, in turn, enjoyed for-cause protection from the President. This scheme, the Court held, "stripped [the President] of the power our precedents have preserved, and his ability to execute the laws—by holding his subordinates accountable for their conduct—is impaired."[70] Effectively, as then-Judge Kavanaugh wrote in his lower-court dissent, the insulation "[']eliminate[d] any meaningful Presidential control over

66. Goodyear Tire & Rubber Co. v. Haeger, 581 U.S. 101, 107 (2017) (quoting Link v. Wabash R.R. Co., 370 U.S. 626, 630–31 (1962)); *see Entering the Building & Prohibited Items*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/visiting/prohibited-items.aspx [https://perma.cc/ESW2-2KHK] ("strictly prohibit[ing] in the Courtroom while Court is in session . . . [e]lectronic devices of any kind (laptops, cameras, video recorders, cell phones, tablets, smart watches, etc.)").

67. FED. R. CRIM. P. 53. It is true that although the Supreme Court authors the rules governing federal court procedure, its adoption of specific rules is always subject to congressional approval. *See* Class Action Fairness Act of 2005, Pub. L. No. 109–2, § 8, 119 Stat. 4 (2005) (''Nothing in this Act shall restrict in any way the authority of the Judicial Conference and the Supreme Court to propose and prescribe general rules of practice and procedure . . . ."); *see also* Rules Enabling Act of 1934, 28 U.S.C § 2071(a) ("Such rules shall be consistent with Acts of Congress . . . ."). And it is equally uncontentious to say that Congress' having delegated rulemaking authority to the Judiciary through the Rules Enabling Act assumes the Legislature's ability to revoke it and, yes, pass laws which the rules must not contradict. Still, although Congress may detract from the autonomy granted, it may never do so unconstitutionally. At this point, it should be clear that superimposing the camera requirement—or even rejecting a Court-proposed rule totally banning cameras, for that matter—would not pass constitutional muster under any standard this note discusses.

68. United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812).

69. Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 500 (2010) (quoting Loving v. United States, 517 U.S 748, 757 (1996)).

70. *Id.* at 496.

the [Board].'"[71] In arriving at its conclusion that two layers of removability between the President and the Board was too much, the Court looked to the character of the Board's responsibilities, finding that its members exercised "expansive powers to govern [the] entire [accounting] industry. Every accounting firm—both foreign and domestic—that participate[d] in auditing public companies under the securities laws [had to] register with the Board, pay it an annual fee, and comply with its rules and oversight."[72] Furthermore, members were "charged with enforcing the Sarbanes-Oxley Act, the securities laws, the Commission's rules, its own rules, and professional accounting standards."[73] In other words, what they did was significantly executive in nature.

Forcing the Supreme Court to permit televised coverage of proceedings by default would deprive the Court of the same meaningful control it should otherwise have over its obligation to administer the "judicial Power." These matters need not pertain to the Executive's appointment powers in order for the principles enunciated in *Free Enterprise Fund* to apply. What we have here is a case of one co-equal branch disparaging the basic dominion of another. That is enough. As such, it is not really controversial to say that the President's obligation to "take Care that the Laws be faithfully executed"[74] rhymes with the Supreme Court's obligation to administer the "judicial Power." These lyrics are verses of the same song, and the chorus reminds us of specific constitutional needs. For the Executive, it is that to control those things which are in their nature executive, in context, born of "'[t]he impossibility that *one* man should be able to perform all the great business of the State' . . . ."[75] Where the executive tenor of certain activity is so close to the core of Article II, but where the President's control over it is severely limited, the Constitution wails. Where certain activity is so judicial in nature, therefore, that instrument may cry as loud should the judicial department's control be similarly hindered.

Regarding this type of constitutional violation, Peabody calls it a "compromise" of "distinctive judicial functions,"[76] (which consist, in relevant part apparently, of "final judgment and stability") but denies it would exist.[77] To support his claim, he focuses on the unlikelihood that the news media's presence in the courtroom would change the "dynamic" between justices and advocates.[78] Concerns like those of the federal district court judge who explained that "cameras do more than just report proceedings" because they

71. *Id.* at 488 (quoting Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 537 F.3d 667, 697 (D.C. Cir. 2008) (Kavanaugh, J., dissenting)).

72. *Id.* at 485.

73. *Id.*

74. U.S. CONST. art. II, § 3.

75. *Free Enter. Fund*, 561 U.S. at 483 (emphasis added) (quoting 30 WRITINGS OF GEORGE WASHINGTON 334 (J. Fitzpatrick ed. 1939)).

76. Peabody, *supra* note 9, at 155.

77. *Id.* at 156.

78. *Id.* at 157.

"affect the substance of the proceedings,"[79] says Peabody, are slightly misplaced. These issues, tend to occur only in "the context of trial proceedings."[80] The Supreme Court, we are reminded, "is essentially an appellate court, so many of these concerns . . . would simply not apply."[81] Alternatively we might be worried that cameras would "unconstitutionally diminish the Court's contribution to both our system of laws and politics—impeding, for example, the Court's ability to resolve cases and controversies."[82] This, too, is unwarranted, as it goes, because all those on the Bench and at the Bar already know they are under national scrutiny. With or without cameras, Peabody asserts, "the Court would still be issuing decisions, declaring winners and losers, and helping to establish policy for the judicial system of the United States."[83]

I do commend the professor for his analysis because much of what it takes to answer these sorts of questions calls for speculation and references to seemingly far-fetched sources. Still, I would say it is not about whether dialogue and behavior would be affected; what is more important is whether the Court can maintain the autonomy it traditionally enjoys by virtue of its existence as a tribunal. *That* evinces the heart of judicial independence, the very concept which makes the separation of powers work. It is not wrong that finality of decision and contribution to the stability of our system of government are key facets of the institution's role. But, as was said, we would still have that finality, and no matter what happens, there will always be a sense of balance attributable to the Court's constancy. No courtroom antics can take those away. But to avoid an incidence of constitutional impairment the Justices must be able to decide for themselves what their proceedings shall look like.

How about in a more practical sense? Imagine a world in which the Act becomes law. Would some part of the process of adherence lead to another form of impairment? Possibly, if one assumes that in order for the Court to make an adequate determination of whether the due process rights of at least one litigant would be harmed by allowing cameras the Court would be forced to undertake considerable time and resources to make that preliminary determination. As will soon be suggested, such a decision may in fact be that difficult. Therefore, if the Court still maintains its inherent power "'to manage [its] own affairs so as to achieve the orderly and expeditious disposition of cases,"[84] then maybe a requirement that the Court make preliminary due process determinations could interfere with normal business.

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79. *Cameras in the Courtroom: Hearing Before the Committee on the Judiciary, United States Senate*, 109th Cong. 12 (2005) (statement of Jan E. Dubois, Judge for the District Court for the Eastern District of Pennsylvania).

80. Peabody, *supra* note 9, at 156.

81. *Id.* (footnote omitted).

82. *Id.*

83. *Id.* at 157.

84. Goodyear Tire & Rubber Co. v. Haeger, 581 U.S. 101, 107 (2017) (quoting Link v. Wabash R.R. Co., 370 U.S. 626, 630–31 (1962)).

C. Related Concerns

Now recent discussion—and perhaps remarks at some earlier point—begs the question: Doesn't the Act give the Court the power to choose whether to allow cameras anyway? As a practical matter it does not. But before an explanation, I would note that it really should not matter. If the Court truly were faced with a decision, it would reflect a set of circumstances in which the Legislature faintheartedly recognizes judicial autonomy, but on Congress's terms. "We see you are independent, and so you shall be. Let us tell you *how*." At any rate, the Act promises that which it cannot possibly give.

Per the Act's text, the default requirement of televising proceedings need not apply if, "by a vote of the majority of justices, [it is decided] that allowing such coverage in a particular case would constitute a violation of the due process rights of 1 or more of the parties before the Court."[85] But this affords no genuine decision-making authority.

First, what sort of due process violation the Act is alluding to is anyone's guess. To be sure, it is the Fifth Amendment's Due Process Clause which would apply in the case of action on the federal government's behalf or in the District of Columbia.[86] At any rate, perhaps it is simply the right to fair process that the Amendment protects.[87] This even seems the most likely case, though it could be something else. Could it be a procedural due process violation? If so, what would be the life, liberty, or property interest at stake?[88]

Second, how are justices to know whether such a right would be harmed, much less implicated in any way? As Peabody explains, "[a]lthough the Court, [now almost sixty] years ago in *Estes v. Texas,* reversed a criminal conviction partly due to concerns that television coverage of the case was prejudicial, the judiciary has generally not subsequently found that the presence of cameras in courts undermines fair procedure."[89] In a concurrence, Justice Harlan wrote:

> the day may come when television will have become so commonplace an affair in the daily life of the average person as to dissipate all reasonable likelihood that its use in courtrooms may disparage the judicial process. If and when that day arrives the constitutional judgment called for now would of course be subject to re-examination in accordance with the traditional workings of the Due Process Clause.[90]

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85. Cameras in the Courtroom Act, S. 858, 118th Cong. § 2 (2023).

86. *See, e.g.*, Bolling v. Sharpe, 347 U.S. 497, 499 (1954) (noting the applicability of the Fifth Amendment's Due Process Clause to the District of Columbia, en route to holding that said provision contains an Equal Protection element).

87. *See* Troxel v. Granville, 530 U.S. 57, 65 (2000) (reminding that the "[Fourteenth] Amendment's Due Process Clause, *like its Fifth Amendment counterpart*, 'guarantees more than fair process.'" (emphasis added) (citing Washington v. Glucksberg, 521 U.S. 702, 719 (1997))).

88. *See* Reed v. Goertz, 598 U.S 230, 236 (2023) ("A procedural due process claim consists of two elements: (i) deprivation by state action of a protected interest in life, liberty, or property, and (ii) inadequate state process.").

89. Peabody, *supra* note 9, at 170 (footnote omitted).

90. Estes v. Texas, 381 U.S. 532, 595–96 (1965) (Harlan, J., concurring).

Television is commonplace now, but Peabody's suggestion that "the disruption posed by cameras . . . might well disappear"[91] is presently unserious, given today's political atmosphere. Furthermore, the absence of cases in *Estes*-like stature[92] over such a long period of time actually equips the present Court with very little precedent with which to find a greater likelihood of due process in danger.

Third, to affirmatively determine that a due process right would be violated requires knowing all the foregoing information.[93] And since it is likely that such information is impossible to know, it is equally likely that it is impossible to conclude a violation would in fact occur. Thus, no real choice is to be made, and the default policy of television coverage must be obeyed.

II. POLICY CONSIDERATIONS

Not only do issues of legality place doubt on the Act; a perusing of the foreseeable good and bad, with an eye toward our present reality, counsels against it as well. Here, a few words are dedicated to the common policy-based arguments for and against cameras. But rather than surveying the empirical data and concluding that mere caution is warranted, a prudent mind ought to take the need for caution as a dispositive point. To explain why, this section ends through the perspective of a legislator so sensibly collected.

A. Arguments in Favor

1. The Harmlessness of Cameras

Consider the following thoughts of Chief Justice Roberts:

> I think that having cameras in the courtroom would impede [the] process . . . . I think that if there were cameras, that the lawyers would act differently. I think, frankly, some of my colleagues would act differently and that would affect what we think is a very important and well-functioning part of the decision process.[94]

The Chief Justice's view reflects the single most common concern regarding cameras—that they would negatively impact the dialogue exchanged between bench and bar. As a recent study notes, some justices believe these behavioral changes could "lessen the value of oral argument," especially if individual

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91. Peabody, *supra* note 9, at 170.

92. The facts of *Estes* were actually such that the televising of trial proceedings, following the televising of two days of pre-trial proceedings (which lacked so "judicial serenity and calm"), was objected to because the pre-trial proceedings' media coverage would allegedly prejudice the trial itself. *See Estes*, 381 U.S. at 536. These are not the kinds of facts that would help today's Court forecast a due process violation.

93. This is especially true given that the text's language is absolute: "would constitute," as opposed to "would *likely* constitute." Cameras in the Courtroom Act, S. 858, 118th Cong. § 2 (2023).

94. *See* C-SPAN, *Chief Justice Roberts on Cameras in the Court*, YOUTUBE at 0:25– 0:51 (Oct. 17, 2018), https://www.youtube.com/watch?v=Ywlk5CgwNT4&list=PL4CBB5711EF7BD211&index=5.

justices act "so as to avoid public blowback."[95] These consequences are a distant cousin to the often-forewarned sensationalism, theatricality, and grandstanding that might occur in the courtroom. Indeed, the Chief Justice is wary of that as well.[96] Taken together, these intuitions predict a less serious and less genuine conduct of proceedings. But there is much to say otherwise.

For one, evidence showing the likelihood of these consequences is generally weak. How can that not be the case? Cameras have never been allowed in the Supreme Court's courtroom, and the experiences of other courts—in lower federal courts, state courts of all levels, and foreign high courts[97]—plainly give little direction on what happens elsewhere. Further, the great weight of importance associated with arguments in the Court is such that it is "unlikely that many advocates would risk annoying or neglecting the Justices by grandstanding or otherwise addressing the remote viewing audience."[98] After all, "advocates are generally concerned above all with winning cases."[99] Respecting the risk of *judicial* grandstanding, that danger is already high in the absence of cameras. As Sonja West reminds, "the Justices . . . are well aware that members of both the media and the academy will analyze their every word, looking for clues as to how the Justices might vote."[100] But just as the evidence regarding advocates is less convincing it is similarly less clear how cameras would aggravate that risk. The Justices, too, have overarching interests to serve (e.g., maintaining institutional legitimacy).

2. Furthering Transparency

Turning to some of the act's goals, it may first be maintained that televising arguments would enhance ordinary transparency. Sunlight, after all, "is said to be the best of disinfectants."[101] It is even contended, for example, according to Senator Amy Klobuchar, one of the bill's sponsors, that "[t]he public has a *right* to see how the Court functions and how it reaches its

95. Ryan C. Black et al., *Cameras in the High Court: An Empirical Examination of Support for Supreme Court Justices*, 11 HARV. J.L. & PUB. POL'Y PER CURIAM 1, 3 (2023).

96. *See* Tony Mauro, *Let the Cameras Roll: Cameras in the Court and the Myth of Supreme Court Exceptionalism*, 1 REYNOLDS CTS. & MEDIA L.J. 259, 271 (2011).

97. *See* Erwin Chemerinsky & Eric. J. Segall, *Cameras Belong in the Supreme Court*, 101 JUDICATURE 14, 14–15, 16 (2017) (noting that, as of 2017, thirty-five state courts of last resort, more than U.S. Court of Appeals, countless state trial courts nationwide, and multiple countries' highest courts televise proceedings, but that they "know of no jurisdiction that has allowed broadcasting of appellate arguments and then, because of bad experience, changed its policy.").

98. Jonathan R. Bruno, *The Weakness of the Case for Cameras in the United States Supreme Court*, 48 CREIGHTON L. REV. 167, 200 & n.200 (2015) (referencing *Access to the Court: Televising the Supreme Court*: *Hearing Before the Subcomm. on Admin. Oversight and the Courts of the S. Comm. on the Judiciary*, 112th Cong. 9, 24 (2011) (statement of Hon. Richard Blumenthal, United States Senator from the State of Connecticut) ("I would suggest that the great fear in the back of every advocate's mind is the possibility of a rebuke from the Court, . . . especially one in the position of trying to use it as a public grandstand, so to speak, from one of the nine Justices . . . .")).

99. Bruno, *supra* note 98, at 200.

100. Sonja R. West, *The Monster in the Courtroom*, 2012 BYU L. REV. 1953, 1973 (2012).

101. Brandeis, *supra* note 1.

rulings."[102] If there be said right, the government has an obligation to the people; Jonathan Bruno's baseline characterization of that duty is worthy enough: "institutions should have to engage in whatever disclosive and discursive practices are necessary to render official conduct publicly comprehensible."[103] It is not unrealistic to suggest that cameras would do just that. At least in a general sense, some say, "the objective evidence is persuasive that open, transparent courtrooms—including broadcast proceedings with reasonable restrictions—support public understanding of the courts . . . ."[104] Even the sheer visual element of spectatorship might also contribute to that understanding. Being able to look into governmental activity may necessarily involve the ability to see.

3. Ensuring Accountability

A more focused concept of transparency tries to secure accountability. In the relevant context, the idea is based on an ages-old principle that "justice may not be done in a corner nor in any covert manner."[105] Indeed many believe that cameras would assuage fears of behind-closed-doors pseudo-justice, putting the Court on notice that the nation would be watching. In support of his nearly identical legislation (in fact the precursor bill), former Senator Arlen Specter found "a Federal judge, a State judge, a law professor and other legal experts" to attest as much.[106] All thought that televising court proceedings would engender accountability.

How, though? Consider this elusive subject in modern context. Today, as many would put it, there is more than ever a need to ensure accountability, given the heavy slate of rights-based decisions the Court has taken up and decided. Many note that for as relevant as recent terms have appeared to become, the Court "feels particularly disconnected from the people for whom it makes decisions that affect everyone, but isn't accountable to anyone."[107] Further, the transparency that members of the Court have claimed already exists may not be enough to hold the Court to account in politically-contentious cases; "*some transparency is not full transparency*."[108] Although the Court is in fact not politically accountable to the electorate, it is not unreasonable to state that

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102. Bruno, *supra* note 98, at 182 (statement of Hon. Amy Klobuchar, U.S. Sen. from the State of Minn.) (emphasis added).

103. *Id.* at 184.

104. Maureen O'Connor, Letter to the Editor, *Cameras Do Belong in the Courtroom,* WASH. POST, July 18, 2013, https://www.washingtonpost.com/opinions/cameras-do-belong-in-the-courtroom/2013/07/18/e4bc45bc-ee2f-11e2-bb32-725c8351a69e_story.html?utm_term=.9158f57684ed.

105. SUSAN N. HERMAN, THE RIGHT TO A SPEEDY AND PUBLIC TRIAL: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 15–16 (3rd ed. 2006) (citing a 1677 colonial charter).

106. *See* 151 CONG. REC. S10426, S10429 (daily ed. Sept. 26, 2005) (statement of Sen. Arlen Specter).

107. Zachary B. Wolf, *Hear Ye! No See Ye! Why the Supreme Court Is So Afraid of Cameras*, CNN (Oct. 6, 2022), https://www.cnn.com/2022/10/06/politics/supreme-court-cameras-what-matters/index.html.

108. *Id.*

when such profound and often directly-impactful things are going on in a room accessible to so few, the people who are possibly to be affected ought to have the level of access that cameras would provide in order to personally forecast what could happen to them. A measure of accountability that would keep the Justices in check, so to say, allows "interested" parties to do that.

4. Educating the People

Justice Kagan once said that cameras could "[']allow the public to see an institution working thoughtfully and deliberately and very much trying to get the right answers, all of us together' . . . ."[109] This is potentially the most obvious of benefits. And, honestly, *any* takeaway for the average viewer is a considerable gain, given that basic public knowledge about the institution is alarmingly scant or incorrect.[110] This is a serious problem. Cameras, many have suggested, would solve it.

Whether an educational benefit is to be had is difficult to gauge, yes. If it is simply assumed that the availability of televised proceedings in itself suffices to do some educating, then of course the benefit would exist. There must be something more concrete, however. One commentator lamented that the Court "could have significantly increased public understanding of [its] decision-making process" had *NFIB v. Sebelius* (discussed earlier in this note) been televised.[111] National viewership for such an important case might have informed people not only about the intricacies of the Affordable Care Act (which might apply to them), but also on fundamental civics themes like the separation of powers or what the President is empowered to do for Americans. In short, cameras would conduce education insofar as they would afford the public a chance to learn about important matters and how various facets of the government operate, including with respect to them.

B. Arguments Against

1. The Effects

Proponents of cameras downplay the effect of courtroom media on the way proceedings might occur. To this, Justice Souter said:

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109. Richard Wolf, *Cameras in the Supreme Court? Not Anytime Soon*, USA TODAY (Mar. 7, 2019), https://www.usatoday.com/story/news/politics/2019/03/07/justices-alito-kagan-say-video-cameras-have-no-place-supreme-court/3086187002/ [https://perma.cc/4NE7-34TT].

110. *See, e.g.*, Scott Bomboy, *Surveys: Many Americans Know Little about the Supreme Court*, NAT'L CONST. CTR. (Feb. 17, 2016), https://constitutioncenter.org/blog/surveys-many-americans-know-little-about-the-supreme-court (citing polls that indicate roughly ten percent of college graduates thought Judge Judy (a popular TV personality) was a Supreme Court Justice, and others reporting that "32 percent of Americans couldn't identify the Supreme Court as one of the three branches of the federal government, . . . 28 percent thought Supreme Court case decisions were returned to Congress for reconsideration[, and] another 25 percent were in favor of eliminating the Supreme Court entirely if it made too many unpopular decisions.").

111. Edward L. Carter, *Supreme Court Oral Argument Video: A Review of Media Effects Research and Suggestions for Study*, 2012 BYU L. REV. 1719, 1750–51 (2012).

> I can testify from personal experience that the cameras certainly affected my behavior [on the New Hampshire Supreme Court] because I knew that there were some questions that I might ask just . . . within the context of . . . a case, which if I asked, would be the excerpt, the soundbite totally out of context on the six o'clock news . . . my fifteen second question would be there and quoted in that way it would create a misimpression either about what was going on in the Courtroom, or about me, or about my impartiality, or about the appellate process.[112]

Justice Souter's changed behavior comports with the earlier-referenced study, conducted in 2023: "people will think less of the judge when he or she asks hard questions. The judge, in anticipation, will ask fewer questions and pull [them] at oral argument."[113] It goes to say that, based on the study,[114] "[c]ameras could shut down or reduce Justice questioning," thereby harming the Court's "legitimacy."[115] Still, it is hard to predict what would happen in the real world. But, this is equally true with respect to those claims which suggest that nothing disruptive is likely to happen because of serious pervading interests. Yes, there is little to suggest that things would change, and just because some members of the Court have expressed concerns, it does not follow that they will materialize. One thing that proponents do often sidestep is the behavior of attendees. Experience should give us pause.

While it has been argued that even the most likely case of minimal changes in dialogue and individual justices' behavior is a weak one, the possibility of something more cannot be ignored. To cite that earlier decision in *Estes v. Texas* (here, not as the basis for the Court's obligatory due process determination under the Act, which, as mentioned earlier, should require more concreteness), there are background concerns that cameras would detract from the "judicial serenity and calm to which [parties are] entitled."[116] In reality, we cannot be certain of what to expect from those inside a courtroom. For example, on at least three occasions, an activist group smuggled a camera into the Supreme Court and recorded their disruptive protest during proceedings. It is no surprise that the subject of their protest was, and still is, a contentious political issue: a corporation's First Amendment right to not be restricted in the use of its finances for campaign expenditures. The protestors called for the overturning of key precedent[117] before being escorted out of the courtroom and subsequently charged with "'mak[ing] a harangue or oration, or utter[ing] loud,

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112. *U.S. Supreme Court Appropriations*, C-SPAN at 1:16:15–57 (Mar. 28, 1996), https://www.c-span.org/video/?70835-1/us-supreme-court-appropriations&playEvent.

113. Black et al., *supra* note 95, at 8.

114. *Id.* at 3 (The survey exposed respondents to real video clips from two state supreme courts. "The experiment relied on 1,475 respondents and used a 2 (video v. audio) x 2 (contentious v. neutral) x 2 (dynamic v. static) plus control design. The treatment exposed individuals to a single 50–60 second clip of one of two state supreme court oral argument exchanges between an attorney and a Justice. Some of our respondents *listened* to an oral argument while others *watched* it.").

115. *Id.* at 8–9.

116. Estes v. Texas, 381 U.S. 532, 536 (1965).

117. *See generally* Citizens United v. FEC, 558 U.S. 310 (2010).

threatening, or abusive language in the Supreme Court Building or grounds,'" under 40 U.S.C. § 6134.[118] Not that this guarantees something will happen again, but it is wholly plausible to say that in a situation where one need not sneak a recording device into the courtroom to attract media attention, it would be much easier to only have to stand up and protest; you would get free air time.

2. Questions of Necessity

A reasonable question—indeed, point of often endless debate—preceding the passage of any law is whether the law itself is needed. Answering that question for the Act here in turn responds to the claim that cameras are needed for more transparency and accountability. A few points.

First, if one goal is "improv[ing] transparency, result[ing] in [a] more informed public perception about the Court,"[119] then whether the Court already provides transparency should be asked. As noted above, some think the Court does not. But it does. In fact, the Court—both through its own decisions and those of Congress—has exhibited a progressive history of making itself more and more available over time, with particular emphasis on the product of its substantive work and, yes, oral arguments. Progress began with the actual release of opinions. Then it went from appointing official reporters, to ordering that opinions be in writing,[120] to prohibiting the privatization of the reports themselves.[121] Later on the Court started selectively releasing argument audio in 1955 before fully releasing tapes in 1986 for educational and non-commercial purposes. Eventually the Court would offer the recordings to the whole public.[122] As to argument transcripts, the Court began archiving and releasing

118. Kyle C. Kopko & Erin Krause, *Shooting From the Hip: Concealed Cameras in the United States Supreme Court*, 99 JUDICATURE 61, 61 (2015) (quoting 40 U.S.C. § 6134 (2002)). For the video, *see* The Wall Street Journal, *Hidden Camera Snuck Into Supreme Court Session*, YOUTUBE (Feb. 27, 2014), https://www.youtube.com/watch?v=vPNIYw3j-JY.

119. Lisa T. McElroy, *Cameras at the Supreme Court: A Rhetorical Analysis*, 2012 BYU L. Rev. 1837, 1844–45 (2012) (footnote omitted). For more context on the Act, see *Grassley Renews Bipartisan Push to Put Cameras in Federal, Supreme Courts*, CHUCK GRASSLEY (Mar. 16, 2023), https://www.grassley.senate.gov/news/news-releases/grassley-renews-bipartisan-push-to-put-cameras-in-federal-supreme-courts#:~:text=The%20Sunshine%20in%20the%20Courtroom%20Act%20of%202023%20would%20grant,when%20necessary%20or%20upon%20request [https://perma.cc/C2F7-ADKE] (providing that the proposal was introduced during "Sunshine Week," which "celebrates the public's right to a transparent and accountable government" and quoting Senator Grassley's opinion that "[a]llowing cameras access to the federal and Supreme Courts would be a victory for transparency . . . .").

120. Order of Mar. 14, 1834, 33 U.S. (8 Pet.) vii (1834).

121. *See* Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 668 (1834) (holding that "no reporter has or can have any copyright in the written opinions delivered by [the Court]; and that the judges . . . cannot confer on any reporter any such right.").

122. *See* Roy M. Mersky & Kumar Percy, *The Supreme Court Enters the Internet Age*, 63 TEX. B.J. 569, 569 (2000).

them during the 1968 Term,[123] and it still continues to take steps in making its work more available. The Court currently posts argument transcripts on the day they are transcribed, and audio recordings are made public by the end of a given week of scheduled proceedings.[124] Since the Covid-19 pandemic, further changes were made out of necessity that also had the effect of increased transparency to the public; live-streaming audio became available at that time. Need more be said?

Second, regarding accountability, the best argument against cameras in that light is that accountability is irrelevant. It is important that C-SPAN covers floor debates in Congress because those proceedings involve discourse communicated by elected representatives who are directly accountable to the people. Justices of the Supreme Court are accountable to the Constitution and the laws of the United States. If there be improper handling of the decision-making process, it may show up in the opinions we get, the audio we can listen to, and in the transcripts we read. As Justice Kennedy said, "[']we teach by not having the television there, because we teach that we are judged by what we write . . . .'"[125]

3. Living-Room Law School and Miseducation

In contrast with Justice Kagan's remarks, the late Justice Scalia once opined that he was against cameras, explaining:

> I do not believe . . . that the purpose of televising our hearings would be to educate the American people. That's not what it would end up doing. If I really thought it would educate the American people I would be all for it . . . but what most of the American people would see would be 30-second, 15-second takeouts from our argument, and those takeouts would not be characteristic of what we do.[126]

If anything, this speaks to the idea that what proponents are asking for is really the wrong thing. Most of the work done, anyway, is in chambers.

If one looks to some of the arguments in favor of cameras, still on the subject of education, certain problems arise with the evidence used. Bruno correctly notes that the kinds of support cited in such positions, for example a "1996 study that found a positive association between C-SPAN viewership and performance on 'a five-item political knowledge quiz,'" are simply not convincing.[127] Much of it is also anecdotal to other contexts. It further cannot

123. *Transcripts and Recordings of Oral Arguments*, SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/oral_arguments/availabilityoforalargumenttranscripts.aspx [https://perma.cc/C6B7-ZA46].

124. Mauro, *supra* note 96, at 267.

125. Tal Kopan, *At sequestration hearing, Breyer, Kennedy say cameras in the courtroom too risky*, POLITICO (Mar. 13, 2014) http://www.politico.com/blogs/under-the-radar/2013/03/at-seques-tration-hearing-breyer-kennedy-say-cameras-in-the-court-room-too-risky-159328.

126. *See* C-SPAN, *Justice Scalia on Cameras in the Supreme Court*, YOUTUBE at 0:36–1:59 (Jul. 26, 2012), https://www.youtube.com/watch?v=F6gktBWhzc8.s; *see also* RonNell A. Jones, *U.S. Supreme Court Justices and Press Access*, 2012 BYU L. REV. 1791, 1798 (2012).

127. Bruno, *supra* note 98, at 177 (citing Carter, *supra* note 111, at 1736, 1751 n.167).

be inferred, as some would suggest, that merely because the TV is on, one will learn something from it, especially when the nature of the substance discussed in oral arguments is hard to comprehend. Of course, "[o]ne might observe a government proceeding and understand nothing if, for instance, the institution's rules and procedures are obscure, or if the scope of the proceeding is unclear, or if the particular proceeding is not situated or contextualized relative to the institution's work more generally."[128]

A strong argument comes in the form of concerns about what the news media could do with clips and soundbites. Members of the Court have expressed this concern, but Chemerinsky and Segall write it off, saying that maybe the justices are "afraid that an excerpt of oral arguments might appear on John Oliver or Jimmy Fallon and be used for entertainment purposes; perhaps they will even be mocked."[129] Chemerinsky and Segall then, seemingly unseriously, call that possibility "a cost of being a democratic society and of holding a prominent position in government."[130] While it is certainly true that serving on the Supreme Court exposes one to public thought, any public lambasting of a particular justice is no more or less likely than a given fact about that justice, relating to what they may have said at argument, being spun negatively in the news. Imagine what pundits might do with video footage containing important points of law or constitutional issues presented in a hypothetical. The point is that a sort of miseducation could result from the media misuse of decontextualized clips, leading to a public armed with improperly-framed or incorrect information.

C. The Prudent Senator

Taking all the foregoing into account, how should the wise and informed senator respond to the Cameras in the Courtroom Act? In the real world, there are many things for legislators to think about, chiefly among them constituents' preferences. Set these background sensitivities aside for the moment. A cumulative assessment of the evidence and practical considerations should, uncontroversially, find itself best described in one word: caution. Many scholars and members of the legal community arrive at the same conclusion but exit there. Here, I will not. In this case, yellow means "Stop!"

Today, it is so self-evident that the United States is politically split. A vast ravine sits between many reasonable people who tend to see the world differently, and for each side to be sure that the other hears across that abyss, shouting becomes the preferred method of communication. It may be so loud that an exchange of ideas never truly takes place, the result being something like an entrenchment of perspective, wherein ideas mature without the benefit of meaningful conflict. In the background, what news we receive of the goings-on in our government is translated into a language comprehensible to these specific and intended audiences only.

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128. *Id.* at 186.

129. Chemerinsky & Segall, *supra* note 97, at 16.

130. *Id.*

This is not a world in which so innovative a change in the way the Court performs its work should enter. If there be one institution capable of insulating itself from national tension—though at times it may be said that it cannot help itself—it is the Judiciary. The prudent senator ought to be willing to say that this hallmark of independence cannot be allowed to walk into the crossfire. The very last thing a disunited state could benefit from is the caricature of some monster that is comprised of people exactly like those who shout the loudest and which bears a power of both "FORCE" and "WILL."[131]

CONCLUSION

In short, the Cameras in the Courtroom Act sits on shaky foundations. Undoubtedly it is promulgated with good intention and seeks to achieve important goals. The cost of letting it become the law of the land, however, presently appears too great. With various constitutional uncertainties surrounding it, and accounting for its host of practical implications, the best course of action is to wait and let the Court decide for itself. Of course, all the sun's light in just one flash is a bit too much for the eye.

131. Hamilton, *supra* note 56.