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The False Promise of Jurisdiction Stripping

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Jurisdiction stripping is seen as a nuclear option. Its logic is simple: by depriving federal courts of jurisdiction over some set of cases, Congress ensures those courts cannot render bad decisions. In theory, it frees up the political branches and the states to act without fear of judicial second-guessing. To its proponents, it offers the ultimate check on unelected and unaccountable judges. To critics, it poses a grave threat to the separation of powers. Both sides agree, though, that jurisdiction stripping is a powerful weapon. On this understanding, politicians, activists, and scholars throughout American history have proposed jurisdiction stripping measures as a way for Congress to reclaim policymaking authority from the courts.

The conventional understanding is wrong. Whatever the scope of Congress's Article III power to limit the jurisdiction of the Supreme Court and other federal courts, jurisdiction stripping is unlikely to succeed as a practical strategy. At least beyond the very short term, Congress cannot use it to effectuate policy in the face of judicial opposition. Its consequences are chaotic and unpredictable, courts have tools they can use to push back on jurisdiction strips if they desire, and the active participation of the judiciary is ultimately necessary for Congress to achieve many of its goals. Jurisdiction stripping will often accomplish nothing and sometimes will even exacerbate the very problems it purports to solve.

Jurisdiction stripping can still prove beneficial, but only in subtle and indirect ways. Congress can regulate jurisdiction to manipulate the timing of judicial review—slowing things down or speeding them up—even if it cannot prevent review entirely. Jurisdiction stripping also provides a means for Congress to signal to the public and the judiciary the importance of an issue—and, possibly, to pressure courts to change course. But these effects are contingent, indeterminate, and unreliable. As a tool to influence policy directly, jurisdiction stripping simply is not the power that its proponents hope or its critics fear.

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INTRODUCTION

If Congress seeks to check the judiciary, jurisdiction stripping is supposedly one of the most potent weapons in its legislative arsenal.[1] The underlying logic is simple enough: depriving a court of power to hear a case entirely prevents the court from producing a bad decision. Jurisdiction stripping seemingly would let Congress legislate and the President act without fear of judicial second-guessing and would prevent federal courts from intruding on states' prerogatives. To its proponents, jurisdiction stripping offers the ultimate democratic check on unelected and unaccountable judges.[2] To critics, it poses a grave threat to the separation of powers—even "the moral equivalent of nuclear war."[3] Both sides agree, though, that jurisdiction stripping is a powerful armament.

Under this assumption, members of Congress at various points in American history have proposed bills to deprive federal courts of jurisdiction over hot-button issues such as school desegregation, abortion, school prayer, and same-sex marriage.[4] Activists and

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[1] *See, e.g.*, Stephen B. Burbank, *The Architecture of Judicial Independence*, 72 S. CAL. L. REV. 315, 333–34 (1999); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part II: Reconstruction's Political Court*, 91 GEO. L.J. 1, 16 (2002); Christopher J. Sprigman, *A Constitutional Weapon for Biden to Vanquish Trump's Army of Judges*, THE NEW REPUBLIC, August 20, 2020, https://newrepublic.com/article/158992/biden-trump-supreme-court-2020-jurisdiction-stripping.

[2] *See, e.g.*, Charles L. Black, Jr., *The Presidency and Congress*, 32 WASH. & LEE L. REV. 841, 846 (1975) (arguing that congressional control of federal court jurisdiction is "the rock on which rests the legitimacy of the judicial work in a democracy"); Ryan Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CALIF. L. REV. 1703, 1744 (2021) ("If properly calibrated, jurisdiction stripping statutes . . . could insulate precisely the attempted expansion of legislative rights from judicial limitation . . . , while leaving judges power to protect other rights from unsuspected majoritarian excess."); JOSEPH FISHKIN & WILLIAM E. FORBATH, THE ANTI-OLIGARCHY CONSTITUTION: RECONSTRUCTING THE ECONOMIC FOUNDATIONS OF AMERICAN DEMOCRACY 431 (2022) (calling jurisdiction stripping a "tactical move[]" Congress might deploy against a hostile Supreme Court); Christopher Jon Sprigman, *Congress's Article III Power and the Process of Constitutional Change*, 95 N.Y.U. L. REV. 1778, 1799–1800 (2020) (describing jurisdiction stripping as "a means by which substantial, durable democratic majorities can push back against constitutional entrenchment and the counter-majoritarian force of judicial supremacy").

[3] Laura N. Fellow, Note*, Congressional Striptease: How the Failures of the 108th Congress's Jurisdiction-Stripping Bills Were Used for Political Success*, 14 WM. & MARY BILL RTS. J. 1121, 1141 (2005) (quoting testimony by Professor Martin Redish); *see also, e.g.*, Janet Cooper Alexander, *Jurisdiction-Stripping in A Time of Terror*, 95 CAL. L. REV. 1193, 1198 (2007) (describing jurisdiction stripping as "the nuclear option"); Paul Stancil, *Congressional Silence and the Statutory Interpretation Game*, 54 WM. & MARY L. REV. 1251, 1271 (2013) (describing jurisdiction stripping as one of "the political branches' few nuclear options").

[4] *See infra* Section I.D.

pundits, too, see jurisdiction stripping as a useful policy tool.[5] Most recently, progressives have embraced it as a way to rein in an aggressively conservative Supreme Court.[6] And while scholars have extensively debated jurisdiction stripping, that conversation has focused almost exclusively on questions about its constitutionality and taken for granted that jurisdiction stripping, if permissible, is a mighty power.[7]

Yet the extensive debates almost entirely gloss over a fundamental question: Would jurisdiction stripping actually work? That is, even if the Constitution gives Congress broad power over federal courts' jurisdiction, could Congress successfully wield that power to compel its desired policy outcomes?[8] This Article argues that—contrary to what nearly everyone has assumed—the short answer is "no": as a strategy for directly circumventing hostile courts, jurisdiction stripping will often prove pointless or even backfire in practice. To the extent that jurisdiction stripping can prove beneficial in some

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[5] *See, e.g.*, Adam Freeman, *Congress Can and Should Return Jurisdiction over Marriage to the States*, NATIONAL REVIEW, July 17, 2015, https://www.nationalreview.com/2015/07/obergefell-congress-same-sex-marriage-states/; Phyllis Schlafly, *Can Congress Limit Federal Court Jurisdiction?*, EAGLE FORUM (Jan. 25, 2006), https://eagleforum.org/column/2006/jan06/06-01-25.html.

[6] *See* Kia Rahnama, *The Other Tool Democrats Have to Rein in the Supreme Court*, POLITICO, https://www.politico.com/news/magazine/2020/10/26/amy-coney-barrett-confirmation-court-packing-jursidiction-stripping-432566; Caroline Vakil, *Ocasio-Cortez, Progressives Call on Schumer, Pelosi to Strip SCOTUS of Abortion Jurisdiction*, THE HILL, July 15, 2022, https://thehill.com/homenews/house/3561533-ocasio-cortez-progressives-call-on-schumer-pelosi-to-strip-scotus-of-abortion-jurisdiction/; David Yaffe-Bellany, *Liberals Weigh Jurisdiction Stripping to Rein in Supreme Court*, BLOOMBERG.COM, October 6, 2020, https://www.bloomberg.com/news/articles/2020-10-06/to-rein-in-supreme-court-some-democrats-consider-jurisdiction-stripping; Joshua Zeitz, *How the Founders Intended to Check the Supreme Court's Power*, POLITICO, July 3, 2022, https://www.politico.com/news/magazine/2022/07/03/dont-expand-the-supreme-court-shrink-it-00043863.

[7] *See infra* at Section I.D.

[8] Several scholars have alluded to some of the practical problems with jurisdiction stripping, but none have done so in a comprehensive or systematic way. *See* Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 910–11 (1984); Michael Stokes Paulsen, *Checking the Court*, 10 N.Y.U. J.L. & LIBERTY 18, 59–62 (2016); Martin H. Redish, *Congressional Power to Regulate Supreme Court Appellate Jurisdiction under the Exceptions Clause: An Internal and External Examination*, 27 VILL. L. REV. 900, 925 (1982); Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1006 (1965). The most thorough treatment was recently laid out in the Final Report of President Biden's Commission charged with studying Supreme Court reform. *See* PRESIDENTIAL COMM'N ON THE SUPREME COURT OF THE UNITED STATES, FINAL REPORT, 159–169 (2021), https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final-12.8.21-1.pdf [https://perma.cc/3DA4-CMBK][hereinafter FINAL REPORT].

contexts, it does so only in subtle, indirect, and unreliable ways. It is thus a far weaker tool for policy reform than conventional wisdom suggests.

To prove that thesis, we work through various scenarios in which Congress might try to circumvent or countermand judicial precedents. It might, for example, strip courts of jurisdiction over a particular set of legal issues in the wake of an objectionable decision. Alternatively, it might attempt a preemptive strike—trying to protect certain precedents by stripping the Supreme Court of jurisdiction before it has the chance to overrule them. We also explore differences between jurisdiction stripping of issues that primarily emerge with respect to state law versus those that pertain to federal statutes and programs. Across all these contexts, we show that *direct* attempts to combat undesirable precedents (or prevent courts from issuing unfavorable decisions in the first place) will fail in most circumstances—at least beyond the very short term. Sometimes, jurisdiction stripping might even exacerbate the problem that it purports to solve.[9]

In parsing the various scenarios, we largely ignore whether and to what extent Congress *should* possess unfettered power over jurisdiction.[10] Instead, we ask only whether—assuming Congress has some power to regulate jurisdiction—Congress *could* accomplish its goals. In asking that question, we operate within current jurisprudence and the scholarly mainstream views about Congress's power. Under this view, Article III itself imposes few (if any) limitations on Congress's power, although other constitutional provisions (such as the Due Process Clause) might curb that power.[11] Even under this fairly broad conception of Congress's authority, and regardless of the context or how Congress manipulates the levers at its disposal, jurisdiction stripping simply is not the power that its proponents hope or its critics fear.

This is true for various reasons that depend on the particular context in which Congress seeks to strip jurisdiction. Sometimes, jurisdiction stripping will prove pointless because it will simply empower other actors (such as state courts) who will not share Congress's policy preferences. Sometimes, jurisdiction stripping will prove ineffective because the Court itself will refuse to go along. Whatever the "right" answer about the meaning of Article III, the Court in practice has sufficient doctrinal tools at its disposal to overcome the strip if it saw Congress as subverting judicial authority. Indeed, caselaw stretching over more than a century strongly suggests that the Court would find a way around a jurisdiction strip that sought to eliminate any possibility of Supreme Court review. And in other situations, jurisdiction stripping will fail because Congress cannot accomplish its goals without the active participation of the judiciary—for example, in implementing a comprehensive regulatory program. We explore all these scenarios in

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[9] *See infra* Sections II.A.1–2.

[10] These questions have dominated the immense literature in this area. *See infra* Section I.B.

[11] *See infra* Sections I.B–C.

detail below, but the overarching point is that myriad practical difficulties mean that Congress cannot achieve its goals by getting courts out of the way.

Nevertheless, jurisdiction stripping might have some value as a policy tool. But its potential is limited and contingent. While direct efforts will mostly prove fruitless, jurisdiction stripping could sometimes help Congress achieve its goals *indirectly*. Jurisdiction stripping can't undo or prevent disfavored rulings. Instead, its value lies in the potential to help sequence decisions and buy time. If Congress wants to protect a new federal program, it could engineer a jurisdictional regime that insulates the program against legal challenges for a while—but it probably can't keep those challenges at bay forever.[12]

That extra time can make all the difference. It created space for Military Reconstruction to take hold in the South after the Civil War.[13] It allowed the federal government to implement price controls and prevent potentially devastating inflation during World War II.[14] And it gave workers and unions a chance to build what would become a powerful labor movement.[15] Congress's power to sequence decisions also can speed decisions up, requiring an issue to be resolved when courts might be more likely to defer to the political branches. But even under specific and narrowly drawn circumstances, these indirect benefits are not guaranteed. Many of the same limitations that prove fatal in other contexts can still undermine Congress's attempts to use jurisdiction stripping as a sequencing mechanism.

Congress also can deploy jurisdiction stripping to make a powerful statement to the public about an issue's importance and thus raise its political salience.[16] And Congress can put the judiciary on notice that it may be overstepping its bounds. Though courts have practical and doctrinal tools to evade jurisdiction stripping, using those tools may tax courts' limited political capital. Even a credible threat by Congress to strip jurisdiction could be sufficient to get courts to stay their hands. But again, these consequences are not inevitable; jurisdiction stripping could just as easily backfire on Congress by promoting political backlash and making the judiciary feel compelled to defend its prerogatives.

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[12] *See infra* Section III.B.

[13] *See id.*

[14] *See id.*

[15] *See id.*

[16] *See infra* Section III.C.

By exploring a policy question that scholars and legislators overwhelmingly have neglected, this project sheds light on several important conversations. Perhaps most obviously, it contributes to the growing debate about court reform.[17] Supreme Court confirmation battles continue to grow more heated, and an increasingly conservative Supreme Court has begun to revisit wide swaths of legal questions that scholars, policymakers, and the general public have long considered settled. On the left, there has been a sudden surge of interest in reform proposals, and President Biden tasked a Commission comprising a number distinguished legal scholars with examining the various options.[18] (Those options included jurisdiction stripping, and the Commission's Final Report provides the most thorough treatment of the practical problems with jurisdiction stripping to date.[19]). Although major reform appears unlikely in the very near future, the reform debate is certain to continue. Understanding what might work—and what would not—will be crucial if major reforms ever become a more tangible possibility.

We also provide new perspective on longstanding debates about Congress's power to regulate jurisdiction. Though we do not advance a particular theory about Congress's power under the Constitution, our analysis has implications for those debates. Even among those who embrace a broad conception of Congress's Article III power, most worry that jurisdiction stripping is unwise. Recognizing jurisdiction stripping's practical limitations shows that those concerns are overblown. Rather than a nuclear weapon capable of decimating the separation of powers, jurisdiction stripping is a more subtle tool that Congress can use to reclaim policymaking space in response to a power grab by the Court.

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[17] For a sampling of the recent literature on Supreme Court reform, see William Baude, *Reflections of a Supreme Court Commissioner*, 106 MINN. L. REV. 2631 (2022); Joshua Braver, *Court-Packing: An American Tradition?*, 61 B.C. L. REV. 2747 (2020); Adam Chilton, Daniel Epps, Kyle Rozema & Maya Sen, *Designing Supreme Court Term Limits*, 95 S. CAL. L. REV. 1 (2021); Doerfler & Moyn, *supra* note 2; Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148 (2019); Daniel Epps & Ganesh Sitaraman, *The Future of Supreme Court Reform*, 134 HARV. L. REV. F. 398 (2021); Daniel Epps & Ganesh Sitaraman, *Supreme Court Reform and American Democracy*, 130 YALE L.J. F. 821 (2021); Daniel Epps, *Nonpartisan Supreme Court Reform and the Biden Commission*, 106 MINN. L. REV. 2609 (2021); Daniel Hemel, *Can Structural Changes Fix the Supreme Court?*, 35 J. ECON. PERSP. 119 (2021); Michael J. Klarman, *Foreword: The Degradation of American Democracy—and the Court*, 134 HARV. L. REV. 1 (2020); Stephen E. Sachs, *Supreme Court as Superweapon: A Response to Epps & Sitaraman*, 129 YALE L.J. F. 93 (2019); Eric J. Segall, *Eight Justices Are Enough: A Proposal to Improve the United States Supreme Court*, 45 PEPP. L. REV. 547 (2018); Sprigman, *supra* note 2.

[18] *See* FINAL REPORT, *supra* note 8.

[19] *See supra* note 8.

Finally, this project taps into enduring theoretical debates about the nature of precedent, the parity of state and state federal courts, and the permissible scope of non-Article III adjudication. Here, too, the debates have gained new salience. They directly address questions that scholars, judges, and even some Supreme Court Justices have raised about the constitutionality of certain agencies and the administrative state writ large.[20]

The Article proceeds in three parts. Part I offers a high-level overview of the voluminous scholarship on jurisdiction stripping as well as the current state of the jurisprudence. We also summarize various arguments that tout jurisdiction stripping as a means for Congress to achieve policy outcomes. This all sets the stage for Part II, which begins by laying out the various ways that Congress might try to use jurisdiction stripping to effectuate substantive policy goals. It then considers the best-case scenario for when jurisdiction stripping might work as well as the situations in which it almost certainly will fail. In the long run, jurisdiction stripping cannot be the potent weapon that nearly all commentators have assumed. Part III then synthesizes the findings to argue that jurisdiction stripping for the most part will fail as an attempt *directly* to prevent or countermand judicial decisions. It can work as a policy tool, but only *indirectly*. Congress can use jurisdictional levers to sequence decisions and raise the salience of issues, but those benefits remain highly contingent. In other words, jurisdiction stripping is weak, imprecise, and unpredictable—hardly the silver bullet that nearly everyone assumes.

We conclude by discussing the larger lessons of our analysis. Recognizing jurisdiction stripping's failures sheds new light on the scholarly conversations, reframing jurisdiction stripping as a tool for dialogue between the branches instead of an assault on the constitutional order. It also has practical implications for court reform debates, undermining arguments that reformers should prefer "disempowering" strategies over structural and institutional changes.[21] More broadly, our conclusions suggest that those who believe the Court has lost sight of fundamental constitutional values should not look for easy answers hidden in the constitutional text. Quite simply, there are no constitutional magic tricks.

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[20] *See, e.g.*, Gundy v. United States, 139 S. Ct. 2116, 2131 (2019) (Alito, J., concurring in the judgment); Buffington v. McDonough, 143 S. Ct. 14 (2022) (Mem.) (Gorsuch, J., dissenting in denial of certiorari); Jarkesy v. Sec. & Exch. Comm'n, 34 F.4th 446 (5th Cir. 2022); PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014); Andy S. Oldham, *The Anti-Federalists: Past as Prologue*, 12 N.Y.U. J.L. & LIBERTY 451 (2019); Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908 (2017).

[21] *See* Doerfler & Moyn, *supra* note 2.

I. RECEIVED WISDOM

A. Jurisdiction Stripping Defined

Jurisdiction stripping can be a slippery concept, so we begin by defining terms. Thus far, we have elided critical differences between the Supreme Court, lower federal courts, non-Article III adjudicators created by Congress, and state courts. Most scholarly attention has trained on proposals to strip the Supreme Court of jurisdiction after it has handed down a controversial opinion. Other scholars have usefully considered Congress's power to strip lower federal courts of jurisdiction as well.[22] And while the literature once had failed to include federal non-Article III tribunals in the conversation, several important contributions over the last generation have filled that gap.[23] As we discuss in Part II, understanding these different possibilities is critical to assessing jurisdiction stripping as a policy tool, and so we analyze all of them.

The most capacious understanding of jurisdiction stripping would include any instance when Congress reallocates decisionmaking authority among various courts and tribunals.[24] But we limit our focus somewhat by looking to situations when Congress shifts jurisdiction *away* from one or more Article III courts—whether it reallocates that jurisdiction to a different Article III court, a state court, an administrative agency, or nowhere at all.

What does our focus leave out? Instances when Congress moves jurisdiction *into* Article III courts, mainly by taking cases away from state courts. This sort of "reverse" jurisdiction stripping happens all the time. Diversity jurisdiction, which allows parties to bring certain state-law claims into federal court, offers the clearest example.[25] Sometimes Congress goes further when it confers exclusive jurisdiction on federal courts as to par-

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[22] *See, e.g.*, Theodore Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 YALE L.J. 498 (1974); Leonard G. Ratner, *Majoritarian Constraints on Judicial Review: Congressional Control of Supreme Court Jurisdiction*, 27 VILL. L. REV. 929 (1982); Martin H. Redish & Curtis E. Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. PA. L. REV. 45 (1975).

[23] *See, e.g.*, Richard H. Fallon, Jr., *Jurisdiction-Stripping Reconsidered*, 96 VA. L. REV. 1043 (2010); Henry P. Monaghan, *Jurisdiction Stripping Circa 2020: What* The Dialogue *(Still) Has to Teach Us*, 69 DUKE L.J. 1 (2019).

[24] A terminological point is in order. Congress always must allocate decisionmaking authority, including when it decided to create lower federal courts in the first instance, rather than always relying on state courts as courts of first instance. Although the term "jurisdiction stripping" has baked-in value judgments, we opt for the familiar nomenclature. *See, e.g.*, Sprigman, *supra* note 2, at 1780 (describing Congress's power to allocate jurisdiction "by restricting (or, less neutrally, 'stripping') the jurisdiction of federal courts").

[25] U.S. CONST., ART. III, § 2; 28 U.S.C. § 1332(a).

ticular federal statutes, such as those regulating federal securities, copyrights, and patents.[26] Moreover, Congress on occasion has deployed reverse jurisdiction stripping in a successful attempt to pursue substantive policies—a nice contrast to one of the theses we develop here. For example, the corporate interests that lobbied for the Class Action Fairness Act[27] sought to move many class actions from state courts to what they perceived as the more business-friendly federal courts.[28]

These examples of reverse jurisdiction stripping deserve more attention.[29] But we bracket them for several reasons. First, shifting jurisdiction from state courts to federal courts, as opposed to moving cases out of Article III courts, raises distinct structural concerns. Because federal courts have limited subject matter jurisdiction, they simply cannot hear most cases that parties otherwise litigate in state court. Moreover, while the Constitution gives Congress power to create (and destroy) lower federal courts and also to tweak the Supreme Court's appellate jurisdiction, Congress possesses no such power over state courts. Finally, on a more pragmatic level, reverse jurisdiction stripping is of less interest at this political moment. To the extent that proponents of court reform view the Supreme Court or lower federal courts as the problem, shifting *more* cases into federal courts (and away from state courts) seems counterproductive and thus unlikely to receive attention.

One last restriction on this project's scope: we focus on Congress's use of jurisdiction stripping to accomplish substantive policy goals in the face of actual or anticipated judicial impediments. Think, for instance, about proposals that aim to permit voluntary school prayer (despite Supreme Court precedent to the contrary)[30] or to protect reproductive rights[31] (to deprive the Court of a chance to overrule *Roe v. Wade*[32] and *Planned*

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[26] *See, e.g.*, 15 U.S.C. § 78aa (Securities Exchange Act of 1934); 28 U.S.C. § 1338(a) (copyright and patent).

[27] Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (2005).

[28] *See* David Marcus, Erie*, the Class Action Fairness Act, and Some Federalism Implications of Diversity Jurisdiction*, 48 WM. & MARY L. REV. 1247, 1288 (2007) (noting that the Act "was the brainchild of a group of Fortune 100 corporate counsel" seeing to "address what its members believe to be a civil justice system that has spiraled out of control").

[29] *Cf.* Michael C. Dorf, *Congressional Power to Strip State Courts of Jurisdiction*, 97 TEX. L. REV. 1 (2018) (describing and analyzing four categories of cases in which Congress exercises affirmative power by stripping state courts of jurisdiction).

[30] *See infra* Section II.A.1.

[31] *See infra* Section IIA.2.

[32] 410 U.S. 113 (1973).

Parenthood v. Casey[33] before it did so in *Dobbs v. Jackson Women's Health Organization*[34]).

We largely ignore other uses of Congress's power to control federal courts' jurisdiction. To take just one example, in 1925 Congress abolished most of the Supreme Court's mandatory appellate jurisdiction, largely giving the Court power to choose its cases through certiorari jurisdiction.[35] Under conventional accounts, Congress was not attempting to skew the substantive outcome of any case or issue. Instead, it was responding to concerns about the Court's caseload, the quality of its decisionmaking, and so on—as well as acquiescing to concerted lobbying by the Justices who sought to increase their own discretion.[36] One might also view this as an attempt "to safeguard, not to undermine, the Court's constitutional role" by "facilitat[ing] the Court's role in providing a definitive and uniform resolution of federal questions."[37] On this account, Congress might "strip" jurisdiction the Court's jurisdiction over some cases—but with the goal of giving the Court time to focus on resolving more important cases. Even if, on their face, these examples meet the definition of jurisdiction stripping, such exercises of Congressional power fall outside the scope of our inquiry. The question we seek to our answer is whether Congress can use jurisdiction stripping to deprive the Court, or other federal courts, of power in order to shape policy.

B. The Academic Debate

The question of whether, and to what extent, Congress may strip federal courts of jurisdiction has generated voluminous academic commentary. The scholarly search for potential fetters on this power seems to reflect, in part, an unspoken assumption that one day Congress might succeed in accomplishing what jurisdiction stripping proposals have threatened to do. In the next Part, we explain the deep flaws of that assumption. In sketching the commentary and jurisprudence on the question of Congressional power,

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[33] 505 U.S. 833 (1992).

[34] 142 S. Ct. 2228 (2022).

[35] *See* Tara Leigh Grove, *The Exceptions Clause as a Structural Safeguard*, 113 COLUM. L. REV. 929 (2013).

[36] *See generally, e.g.*, Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years after the Judges' Bill*, 100 COLUM. L. REV. 1643 (2000); Benjamin B. Johnson, *The Origins of Supreme Court Question Selection*, 122 COLUM. L. REV. 793 (2022). Some situations defy easy classification. For example, Congress sometimes shifts cases away from Article III courts and into non-Article III tribunals for non-result-oriented reasons. This was the situation with the Bankruptcy Act of 1978 when Congress created new bankruptcy courts to alleviate docket congestion and improve the quality of decisionmaking. *See, e.g.*, N. Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 116–17 (1982) (White, J., dissenting). By contrast, some administrative agencies are known for reflecting the political priorities of the Presidential administration of the day.

[37] Grove, *supra* note 35, at 931.

we don't offer a comprehensive overview. Instead, we concentrate on the contributions and holdings that bear directly on our inquiry. Most importantly, we highlight the few limitations that courts have recognized in this area, as they help elucidate our core conclusions.

Most of the literature on Congress's power to strip federal courts of jurisdiction falls into three broad camps.

First, the traditional theory contends that Article III gives Congress plenary authority to create, destroy, and define the jurisdiction of lower federal courts.[38] This theory posits a similarly plenary power under the Exceptions Clause to control the Supreme Court's appellate jurisdiction. Together, these principles suggest that Article III itself imposes no limits on Congress's power to strip federal courts of jurisdiction. Nevertheless, to use the now-familiar terminology, the traditional theory holds that Congress still faces *external* constraints—that is, limitations imposed by parts of the Constitution *other than* Article III.[39] For example, even if Congress can generally limit lower federal courts' jurisdiction, Congress couldn't deprive a federal court of jurisdiction over suits brought by Black or female plaintiffs, as that would surely violate the *external* constraint posed by the equal protection component of the Fifth Amendment's Due Process Clause.[40] But the traditional theory holds that Congress faces no *internal* Article III constraints.[41]

The second view, famously articulated by Henry Hart,[42] has become known as the "essential functions" thesis. Variations abound, but in broad strokes the scholars who subscribe to some version of this theory share the view that while Congress has wide latitude to control federal courts' jurisdiction, it may not exercise that power in a way that destroys the "essential role" of the Supreme Court, or the federal courts more generally, in the constitutional order.[43] As some have articulated the point, "exceptions" to

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[38] *See, e.g.*, Gunther, *supra* note 8; Redish, *supra* note 8; Wechsler, *supra* note 8.

[39] *See* Redish, *supra* note 8, at 902–03; Gunther, *supra* note 8, at 900.

[40] *See* William W. Van Alstyne, *A Critical Guide to* Ex Parte McCardle, 15 ARIZ. L. REV. 229, 263 (1973).

[41] One variant posits that Congress has plenary power but only to the extent that its restriction genuinely counts as an "exception" to the defaults in Article III. William Baude thus has suggested that Congress may strip the Court's jurisdiction so long as it removes "less than fifty percent of the Court's possible appellate jurisdiction." Baude, *supra* note 17, at 2644.

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

[43] *See, e.g.*, Fallon, *supra* note 23; Hart, *supra* note 42; Monaghan, *supra* note 23; Ratner, *supra* note 22; Lawrence Gene Sager, *Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17 (1981); *see also* Eisenberg, *supra* note

the Supreme Court's jurisdiction must remain just that—meaning that exceptions can't swallow the rule.[44] This may be more of a conceptual limitation than a practical one. It rests on a structural axiom about the judiciary's vital role in a tripartite system of government, but it offers no clear judicially administrable standard for discerning how much Congressional meddling is too much.[45]

Third, a few scholars have advocated different versions of a mandatory vesting theory—the idea that Congress must confer some (or potentially all) of the jurisdiction delineated in Article III on at least one federal court.[46] These theories would impose the greatest restrictions on Congress's power to deprive federal courts of jurisdiction. But aside from dicta in an 1816 opinion by Justice Story,[47] the federal courts have never seriously entertained these readings.

22, at 504 (arguing that lower federal courts now perform critical functions and thus may not be abolished by Congress).

[44] *See, e.g.*, Leonard G. Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157, 170 (1960) (arguing that "an exception cannot destroy the essential characteristics of the subject to which it applies").

[45] *See* Hart, *supra* note 42, at 1365 (acknowledging through dialogue that the standard "appears pretty indeterminate").

[46] Robert Clinton advocated the strongest form of the mandatory vesting view—that (at least presumptively) Article III "mandate[s] that Congress allocate to the federal judiciary as a whole each and every type of case or controversy defined as part of the judicial power of the United States." Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741, 749–50 (1984)

Akhil Amar developed an idea first espoused by Justice Story that Congress must confer the first three categories on the Article III menu—encompassing federal question jurisdiction, ambassador jurisdiction, and admiralty jurisdiction—on some federal court. Article III, Section 2 introduces each of those heads of jurisdiction with the phrase "*all* Cases," whereas the other remaining heads of jurisdiction lack the modifier "all." Thus, according to Amar's textual and historical analysis, the full extent of the first three heads of jurisdiction must be vested in some federal court, whereas Congress has discretion as to the extent of the other heads of jurisdiction that it vests in federal courts. *See* Akhil Reed Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499 (1990); Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205 (1985). For a sampling of the criticism, see John Harrison, *The Power of Congress to Limit the Jurisdiction of Federal Courts and the Text of Article III*, 64 U. CHI. L. REV. 203 (1997); Daniel J. Meltzer, *The History and Structure of Article III*, 138 U. PA. L. REV. 1569 (1990).

[47] *See* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 328–29 (1816). *Cf.* Harrison, *supra* note 46, at 207 n.12 (describing the relevant passage from *Martin* as "dictum"); Meltzer, *supra* note 46, at 1579 n.33 (same).

Finally, some scholars in recent years have advocated a variation on the traditional theory—what we call an absolutist view that Congress has truly unfettered power to regulate jurisdiction. This goes further than the traditional notion that Congress faces no *internal* constraints (from Article III). It provocatively suggests that few, if any, *external* constraints limit Congress's power over federal jurisdiction. For example, Michael Stokes Paulsen contends that when it comes to jurisdiction stripping, "Congress can pretty much do whatever it wants."[48] Christopher Sprigman has advanced the most comprehensive version of this argument. Because "[n]either text, nor history, nor precedent tells us with any certainty whether Congress's Article III power is subject to external limitations," Sprigman argues, "Congress has room to act."[49] In his telling, "[i]f a determined Congress acts to fill that space, courts will have little power to resist."[50]

* * *

In our analysis that follows, we will proceed as if the traditional view—under which Article III imposes no internal constraints on jurisdiction stripping—is the correct understanding. We do so for several practical reasons. For starters, as discussed below, the courts generally have endorsed the traditional view, so it seems most predictive of how courts would respond to jurisdiction stripping efforts in the future.

More importantly, though, treating the traditional theory enables us to make our arguments most persuasively. That is because the leading alternatives offer *more* restrictive theories of Congress's power. If one of those theories were correct, our arguments in Part II about the practical limitations of jurisdiction stripping would only become stronger, as Congress would have even less latitude to use jurisdiction strips to craft substantive policy. For that reason, we can make the best case by showing that jurisdiction stripping will not fulfill its promise *even if* Congress has the plenary power that the traditional theory presumes.

In accepting the traditional theory, however, we necessarily reject the absolutist theory that Congress is not bound even by external constitutional constraints when regulating jurisdiction. If that view were correct, some (though not all) of our arguments about jurisdiction stripping's policy failures would lose force. But the absolutist view proves too much and thus doesn't point toward a viable path around a hostile judiciary.

The idea that the Supreme Court would acquiesce in all possible jurisdiction strips, no matter how extreme, strains credulity. If Congress ever defined a federal court's juris-

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[48] Paulsen, *supra* note 8, at 49

[49] Sprigman, *supra* note 2, at 1836.

[50] *Id.* at 1784; Doerfler & Moyn, *supra* note 2, at 1725 n.109.

diction along racial lines, the Court surely would find grounds to invalidate such legislation. Taken to its logical extreme, the absolutist view also would become a way for Congress to circumvent any limitation on its powers—passing whatever legislation it wants (however constitutionally dubious) and forbidding courts from declaring it unconstitutional. This, too, seems unlikely.

The absolutist theory remains an outlier, endorsed by only a few scholars and rejected by the overwhelming majority. That is unsurprising as it finds little support in the case law. The (concededly limited) precedent on jurisdiction stripping strongly supports the claim that external constraints limit Congress's power.[51]

Moreover, an absolutist theory—and the view that jurisdiction stripping serves as the ultimate democratic check on hostile courts—depends on several questionable predicates. The only assumption under which this makes sense is that Congress could outflank a Court committed to principled formalism. So, the Court might genuinely believe that Congress has transgressed its substantive powers yet would faithfully respect a jurisdiction strip, no questions asked. But advocates of the absolutist theory don't rely on or defend such assumptions. Sprigman, for example, contends that jurisdiction stripping is necessary because the Court's conservative majority is likely to "gin up conservative interpretations of the Constitution for the purpose of killing off as much of the Democratic reform agenda as possible."[52] He then predicts that the judiciary would nonetheless submit to Congress's attempt to strip jurisdiction.[53] Yet if—as Sprigman acknowledges[54]— the outer limits of Congress's power over jurisdiction remain indeterminate, it is hard to see why a lawless, partisan Court would not be willing to "gin up" interpretations of Article III that would permit it to overcome a jurisdiction strip.

C. Judicial Precedent

For all of the academic commentary that has sought to identify textual and structural bounds on Congress's power, federal courts overwhelmingly have adhered to the traditional theory that Congress has plenary authority subject only to external constitutional constraints. The Supreme Court in *Ex parte McCardle*[55] famously endorsed this view. As part of Reconstruction after the Civil War, Congress had expanded federal courts' habeas corpus jurisdiction, allowing persons detained by *state* authorities to challenge

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[51] *See, e.g.*, Patchak v. Zinke, 138 S. Ct. 897, 906 ("So long as Congress does not violate other constitutional provisions, its 'control over the jurisdiction of the federal courts' is 'plenary.'" (quoting Trainmen v. Toledo, P. & W.R. Co., 321 U.S. 50, 63–64 (1944))).

[52] Sprigman, *supra* note 1.

[53] Sprigman, *supra* note 2, at 1784.

[54] *See id.*

[55] 74 U.S. 506 (1869).

the lawfulness of their detention. The clear objective was to protect recently emancipated Black citizens from recalcitrant southern states. But William McCardle, an unreconstructed Mississippi newspaperman who had inveighed against military occupation of the South, invoked this provision to challenge his detention and the government's plan to try him using a military commission.[56]

McCardle's case seemed poised to turn the new habeas statute on its head and use it to challenge the constitutionality of the entire Reconstruction project. So, Congress scrambled to repeal the new habeas statute. Its motive in trying to insulate Reconstruction from constitutional challenge couldn't have been clearer, especially considering that it acted after the Supreme Court had heard oral arguments.[57] Nevertheless, the Court acceded to Congress's jurisdictional wishes.[58]

In the century and a half since *McCardle*, the Supreme Court has continued to espouse the view that Congress enjoys "plenary" authority to control federal courts' jurisdiction.[59] True, Congress may not do literally anything it wants by dressing up some unlawful action in the garb of jurisdiction stripping.[60] Moreover, the Supreme Court sometimes goes out of its way to avoid having to define the outer boundaries of Congress's power in this regard.[61] But the Court has invalidated only two jurisdiction stripping statutes in the history of the Republic,[62] suggesting relatively modest boundaries on Congress's power to control federal courts' jurisdiction. Those limits fall into two major categories, one of which is probably best understood as a subset of the other.

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[56] *See* BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 140 (1993).

[57] *See* Van Alstyne, *supra* note 40, at 233–42 (describing this historical background).

[58] *See McCardle*, 74 U.S. at 515 (holding that "this court cannot proceed to pronounce judgment in this case, for it has no longer jurisdiction of the appeal"); *see also* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877 at 336 (updated ed. 2014) (noting that "the Supreme Court acceded to a law rushed through Congress stripping it of jurisdiction in habeas corpus cases, thus rendering moot [a case] that might have raised the question of the constitutionality of Reconstruction").

[59] Patchak v. Zinke, 138 S. Ct. 897, 906 (2018) (quoting Trainmen v. Toledo, P. & W. R. Co., 321 U. S. 50, 63–64 (1944)); *id*. at 907 n.4 (arguing that "the core holding of *McCardle*—that Congress does not exercise the judicial power when it strips jurisdiction over a class of cases—has never been questioned [and] has been repeatedly reaffirmed"); *see also* Lockerty v. Phillips, 319 U.S. 182, 187 (1943) (citing numerous cases for the proposition that Congress has plenary authority to control the jurisdiction of lower federal courts).

[60] United States v. Klein, 80 U.S. (13 Wall.) 128 (1871).

[61] *See, e.g.*, Hamdan v. Rumsfeld, 548 U.S. 557 (2006); Felker v. Turpin, 518 U.S. 651 (1996).

[62] *See* Fallon, *supra* note 23, at 1053 ("*Boumediene v. Bush* is the first decision since *United States v. Klein*, in 1871, to hold unequivocally that a statute framed as a withdrawal of jurisdiction from the federal courts violates the Constitution."). *Cf.* Daniel J. Meltzer, *Habeas Corpus, Suspension, and*

First, and conceptually most important, Congress may not violate a provision of the Constitution and try to insulate that unconstitutional action by stripping courts of jurisdiction over challenges to that violation. This largely tracks the distinction, noted above, between *internal* Article III constraints (of which there appear to be few to none) and *external* constraints that Congress must respect. Chief among such external constraints are due process rights. Thus, Congress may not impinge on those rights and then strip courts of jurisdiction to hear any legal challenges to the due process violation.

The chief case on point—though not a Supreme Court case—is *Battaglia v. General Motors Corp.*[63] There, the Second Circuit took seriously a due process challenge to the Portal-to-Portal Act,[64] which altered federal law on overtime compensation for mine workers and also deprived *all* courts of jurisdiction over claims seeking to hold employers liable under prior law.[65] The Second Circuit endorsed the notion of external constitutional constraints on jurisdiction stripping, reasoning that if one of the jurisdiction strip's "effects would be to deprive the appellants of property without due process or just compensation, it would be invalid."[66] The court found no such constitutional violation because it concluded Congress had the power to change the substantive law.[67]

Another external constraint comes from Article I's Suspension Clause.[68] So, Congress may not improperly suspend habeas corpus and then try to prevent judicial challenges.[69] In *Boumediene v. Bush*,[70] the Court considered a challenge to the Military Commissions Act of 2006 (MCA), which stripped federal courts of jurisdiction over habeas corpus petitions filed by enemy combatants detained at the United States Naval Station

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Guantánamo: The Boumediene Decision, 2008 SUP. CT. REV. 1, 1 & n.2 (noting the ambiguity of *Klein* as to this point and that perhaps *Boumediene* was the first true invalidation). Some scholars have argued that *McCardle* shouldn't be read for all that it seems to say. *See* Fallon, *supra* note 23, at 1081; Monaghan, *supra* note 23, at 18.

[63] 169 F.2d 254 (2d Cir. 1948).

[64] Portal to Portal Act of 1947, 61 Stat. 84 (May 14, 1947), *codified at* 29 U.S.C. § 251 *et seq.*

[65] *See* 29 U.S.C. § 252(d).

[66] *Id.* at 257; *see also id.* ("[W]hile Congress has the undoubted power to give, withhold, and restrict the jurisdiction of courts other than the Supreme Court, it must not so exercise that power as to deprive any person of life, liberty, or property without due process of law or to take private property without just compensation.").

[67] *See id.* at 259–61.

[68] U.S. Const. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").

[69] Boumediene v. Bush, 553 U.S. 723 (2008).

[70] 553 U.S. 723 (2008).

at Guantanamo Bay.[71] The Court found the withdrawal of habeas jurisdiction unconstitutional after concluding that Congress had not created an adequate alternative forum for review of detainee's status.[72] While the Court recognized that the MCA, on its face, deprived the Court itself of jurisdiction over the case, it was nonetheless willing to consider the constitutionality of the jurisdiction strip.[73]

Second, Congress may not encroach on the judicial power. Although one might view every instance of jurisdiction stripping as such an incursion, the Court has made clear that simply *regulating* jurisdiction doesn't cross the line. After all, as the Court has noted, "Congress generally does not infringe the judicial power when it strips jurisdiction because, with limited exceptions, a congressional grant of jurisdiction is a *prerequisite* to the exercise of judicial power."[74] But Congress cannot use its power to regulate jurisdiction to *usurp* the judicial power.

For example, Congress may not tell a court how to rule in a particular case, a venerable principle often associated with *United States v. Klein*.[75] Shortly after the Civil War, the Supreme Court had held that presidential pardons of former Confederate rebels constituted proof of loyalty to the United States, a condition for southerners to seek compensation in the Court of Claims for property seized during the war.[76] Congress sought to countermand these efforts. It passed a statute that deemed a presidential pardon proof of *disloyalty* and required the Court of Claims to dismiss claims based on pardons for lack of jurisdiction.[77] *Klein* found the statute unconstitutional. Congress had no authority either to redefine the effect of a presidential pardon or to command a specific result in the Court of Claims.[78]

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[71] The year before, Congress similarly had created military commissions and attempted to strip federal courts of jurisdiction. But in *Hamdan v. Rumsfeld*, 548 U.S. 557, 572–84 (2006), the Court sidestepped "grave" constitutional questions and construed the jurisdiction strip not to apply to pending cases. Congress responded with the MCA and thus teed up the questions that *Hamdan* had avoided.

[72] *See Boumediene*, 553 U.S. at 792.

[73] *See id.* at 736–39 (noting that MCA § 7 purported to strip all federal courts of jurisdiction over habeas petitions by persons whom the United States detained as enemy combatants but nonetheless proceeding to assess the statute's constitutionality).

[74] Patchak v. Zinke, 138 S. Ct. 897, 907 (2018).

[75] 80 U.S. (13 Wall.) 128 (1871).

[76] United States v. Padelford, 76 U.S. (9 Wall.) 531, 543 (1869) (holding that "the law makes the proof of pardon a complete substitute for proof that [the claimant] gave no aid or comfort to the rebellion").

[77] *Klein*, 80 U.S. (13 Wall.) at 145–46.

[78] *Id.* at 146–48.

The *Klein* opinion remains enigmatic and contested, as we explore later. But the Court routinely understands it to mean at least that Congress had unconstitutionally encroached on the judicial power by trying to direct a specific result.[79] Or, as the Court has put the point more succinctly in recent years, Congress may not pass a statute that says: "In *Smith v. Jones*, Smith wins."[80]

This second set of limitations is really a variation on or, as we've suggested, a subset of, the first. The cases in which the Court has found an invasion of the judicial power identify additional external constraints on jurisdiction stripping that Congress must respect. The only difference is that these are general structural limitations rather than individual rights rooted in particular constitutional provisions. But either way, Congress may not skirt those limitations by attempting to deprive courts of the power to call them what they are.

The case law thus reveals a fairly consistent view of Congress's power to control federal courts' jurisdiction. That power is "plenary," subject only to external constitutional constraints that Congress may not evade through the fig leaf of jurisdiction stripping.[81] The Court has, at times, left some ambiguity about where the ultimate outer boundaries of Congress's power lie. In that vein, some Justices have mused in dicta about whether wholesale deprivations of power might veer into the territory about which Hart and others warned—that is, situations in which Congress has impaired the judiciary's ability to discharge its "essential functions."[82] But aside from some minor uncertainty about the most extreme deprivations of jurisdiction, the Court appears to subscribe to the view that Article III itself imposes no limits.

D. Jurisdiction Stripping as Policy Reform

Legislators and activists have proposed various jurisdiction-stripping measures over the course of American history. Here, we document some of those efforts. In particular, consistent with the goals of the Article, we look only to jurisdiction stripping measures

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[79] Bank Markazi v. Peterson, 578 U.S. 212, 228 (2016) (arguing that Congress had "infringed the judicial power . . . because it attempted to direct the result without altering the legal standards . . . [which] Congress was powerless to prescribe"); *id.* at 245 (Roberts, C.J., dissenting) (describing *Klein*'s "central holding" as the admonition that "Congress may not prescribe the result in pending cases"); *see also* Robertson v. Seattle Audubon Soc., 503 U.S. 429, 439 (1992) (suggesting that a statute would be unconstitutional if it "failed to supply new law, but directed results under old law").

[80] *Patchak*, 138 S. Ct. at 905 (plurality opinion); *see also Bank Markazi*, 578 U.S. at 231 (same example); *id.* at 246 (Roberts, C.J., dissenting) (same example).

[81] *E.g.*, Patchak v. Zinke, 138 S. Ct. 897, 906 (2018).

[82] *See, e.g.*, Felker v. Turpin, 518 U.S. 651, 666–67 & n.2 (1996) (Souter, J., concurring) (hypothesizing such a situation and citing various scholars who have endorsed or explored the "essential functions" theory of Article III).

that were proposed as tools for influencing substantive policy in some way, rather than for reasons of judicial administration. We don't aim to provide a complete catalog of all such efforts since the Founding. But we strive to recount enough examples to show the different contexts in which advocates have conceived of jurisdiction stripping as an effective tool for congressional policy making, and the particular ways in which Congress might strip or regulate jurisdiction to effect its goals.

Arguably the first example of jurisdiction stripping on policy grounds occurred early in American history. Shortly before leaving office following their defeat in the 1800 election, the Federalists passed the Judiciary Act of 1801, which among other things created sixteen circuit court judgeships (which President Adams filled at the last minute before leaving office), reorganized the district courts, gave federal courts jurisdiction over cases involving federal questions, and eliminated a seat on the Supreme Court.[83] Once the Jeffersonians took office, they encountered an entrenched judiciary firmly controlled by Federalists. The new Congress repealed the 1801 Act in March 1802, controversially eliminating the new circuit judgeships.[84]

Recognizing that the repeal stood on shaky constitutional ground and thus "fearful of how the Court might rule on the act,"[85] Congress swiftly passed another bill canceling the Court's upcoming Term.[86] The Court had been scheduled to sit in June 1802, but the new statute prevented it from reconvening until February 1803.[87] Though Republicans asserted they were simply adjusting the Court's schedule to account for its low caseload, this contention "fooled few observers—least of all the Justices."[88] Nonetheless, the gambit worked. The Court did not have the chance to rule on the repeal's constitutionality until 1803, when *Stuart v. Laird* upheld it because "there are no words in the constitution to prohibit or restrain the exercise of legislative power" over inferior federal courts.[89]

This episode is not typically seen as an instance of jurisdiction stripping, as it did not remove the Court's power to hear any particular class of cases. Nonetheless, in our view it belongs under that heading, because it represents a situation where Congress restricted the Court's jurisdiction in order to head off a potentially unfavorable ruling—even if

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[83] *See* Judiciary Act of 1801, ch. 4, § 4, 2 Stat. 89.

[84] *See* SCHWARTZ, *supra* note 56, at 30; GORDON S. WOOD, EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789–1815 at 402 (2009).

[85] BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 58 (2009).

[86] Act of Apr. 29, 1802, ch. 31, § 1, 2 Stat. 156.

[87] *See* Jed Glickstein, Note*, After Midnight: The Circuit Judges and the Repeal of the Judiciary Act of 1801*, 24 YALE J.L. & HUMAN. 543, 550 (2012).

[88] *Id.* at 551.

[89] 5 U.S. (1 Cranch) 299, 308 (1803).

Congress did so for only a limited period of time. Typically, jurisdiction stripping means removing *some* of the Court's jurisdiction over a defined class of cases *permanently*; here, Congress effectively removed *all* of the Court's jurisdiction *temporarily*.

Shortly after the Civil War, Congress engaged in its most successful act of jurisdiction stripping when it blocked the Court from resolving *Ex parte McCardle* on the merits, which we have mentioned already and will return to shortly. Congress again became interested in jurisdiction stripping not long after *McCardle*. In 1875, Republicans in a lame-duck session of Congress passed a new judiciary act that significantly expanded federal courts' jurisdiction, with one goal of helping corporations remove cases to federal court.[90] Democratic members of Congress responded over several decades by putting forward legislation that would have restricted corporations' removal rights.[91] Though several of these bills passed the House, they were blocked in the Republican-controlled Senate.[92]

Another surge of enthusiasm about jurisdiction stripping occurred in the middle of the twentieth century. In response to various Warren Court rulings, members of Congress proposed stripping the Court's jurisdiction over numerous issues, including legislative reapportionment,[93] civil liberties for Communists,[94] the admissibility of criminal confessions,[95] and habeas corpus.[96] None passed, though some may have subtly pressured the Court to change course, as we discuss later.[97]

Jurisdiction stripping attracted renewed interest in the 1970s and 1980s. Members of Congress proposed stripping the Court's jurisdiction over issues including busing in desegregation cases, school prayer, and abortion.[98] In 1981, John Roberts, then serving as a Special Assistant to Attorney General William French Smith, wrote an internal

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[90] *See* Tara Leigh Grove, *The Structural Safeguards of Federal Jurisdiction*, 124 HARV. L. REV. 869, 891–93 (2011).

[91] *See id.* at 893–94.

[92] *See id.* at 865–96; *see also* KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY 98 (2009) ("In the late nineteenth century, the Republican-controlled Senate was the graveyard of Democratic proposals to retrench federal jurisdiction.").

[93] *See* Max Baucus & Kenneth R. Kay, *The Court Stripping Bills: Their Impact on the Constitution, the Courts, and Congress*, 27 VILL. L. REV. 988, 991 (1982).

[94] *See* Neal Devins, *Should the Supreme Court Fear Congress?*, 90 MINN. L. REV. 1337, 1342–43 (2006).

[95] *See* Baucus & Kay, *supra* note 93, at 991.

[96] *See* Larry W. Yackle, *The Habeas Hagioscope*, 66 S. CAL. L. REV. 2331, 2344 (1993).

[97] *See infra* Section III.C.

[98] *See* Sager, *supra* note 43, at 18–19 & nn.3–5.

memorandum defending such proposals' constitutionality and disagreeing with a contrary opinion by the Office of Legal Counsel.[99]

In 1996, Congress succeeded in jurisdiction stripping several times.[100] It curtailed federal courts' ability to grant habeas relief to state prisoners.[101] It limited courts' power to remedy certain constitutional claims brought by prisoners.[102] And it restricted judicial review of some discretionary immigration decisions.[103]

Interest in jurisdiction stripping picked up again in the early 2000s. One proposal sought to restrict jurisdiction over cases involving same-sex marriage.[104]

Another example, worth considering in detail, focused on challenges to the Pledge of Allegiance. In 2002, in response to a Ninth Circuit ruling that the phrase "under God" in the Pledge violated the Establishment Clause,[105] U.S. Representative Todd Akin introduced legislation to strip all federal courts of jurisdiction over such challenges.[106] In promoting the bill, Akin described jurisdiction stripping as a powerful policy tool under which "Congress has the ability to rein in a renegade judiciary."[107] The next year, the House actually passed by a wide margin a version of the bill that had been amended to

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[99] *See* Memorandum from John Roberts, Special Assistant to the Att'y Gen., Proposals to Divest the Supreme Court of Appellate Jurisdiction: An Analysis in Light of Recent Developments (n.d.), *available at* http://www.archives.gov/news/john-roberts/accession-60-89-0172/006-Box5-Folder1522.pdf.

[100] *See* Aziz Z. Huq, *Partisanship, Remedies, and the Rule of Law*, 132 YALE L.J. FORUM 469, 502 (2022).

[101] Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.

[102] Prison Litigation Reform Act of 1996, Pub. L. No. 104-134, §§801–810, 110 Stat. 1321-66 (1996).

[103] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, 110 Stat. 3009.

[104] *See* Fellow, *supra* note 3, at 1146–51; *see also* Freeman, *supra* note 5 (discussing the Marriage Protection Act).

[105] Newdow v. U.S. Congress, 292 F.3d 597 (9th Cir. 2002), amended on denial of reh'g, 321 F.3d 772 (9th Cir. 2003), *amended*, 328 F.3d 466 (9th Cir. 2003), *rev'd sub nom.* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004).

[106] Pledge Protection Act of 2022, H.R. 5064, 107th Cong. § 2(a) (2002). For a useful overview of Akin's jurisdiction-stripping proposals, see Alexander K. Hooper, *Jurisdiction-Stripping: The Pledge Protection Act of 2004*, 42 HARV. J. ON LEGIS. 511 (2005).

[107] CONGRESSMAN TODD AKIN, *Akin Introduces Pledge Protection Act of 2002* (July 8, 2002), https://perma.cc/8UJM-SST6.

make its jurisdiction-stripping language even more sweeping,[108] but the bill died in the Senate.[109]

During the War on Terror, Congress successfully enacted jurisdiction stripping legislation aimed at insulating the detention of suspected terrorists at Guantanamo Bay from Article III review. This effort ultimately failed, however, when in *Boumediene* (as recounted above) the Court held that the jurisdiction strip violated the Constitution's Suspension Clause.[110]

Most recently, jurisdiction stripping attracted renewed interest after hardball tactics by Republicans led to President Trump's being able to push the Court in a much more conservative direction by making three appointments. Progressives started debating various Supreme Court reforms as a possible response, with jurisdiction stripping emerging as a leading contender,[111] alongside term limits, Court-packing, and other structural reforms.[112] Leading scholars, including Ryan Doerfler and Samuel Moyn,[113] Christopher Sprigman,[114] and Joseph Fishkin and William Forbath,[115] endorsed it as a promising strategy. And President Biden's Commission studied jurisdiction stripping in detail.[116]

While occasionally alluding to the indirect benefits that we discuss at greater length in Part III,[117] the proponents of jurisdiction stripping overwhelmingly emphasize the

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[108] *See* Pledge Protection Act of 2003, H.R. 2028, 108th Cong, (2003). The amended bill provided that "No court created by Act of Congress shall have any jurisdiction, and the Supreme Court shall have no appellate jurisdiction, to hear or decide any question pertaining to the interpretation of, or the validity under the Constitution of, the Pledge of Allegiance . . . or its recitation." [Not sure how to cite amended bills.]

[109] Hooper, *supra* note 106, at 512 n.17. Akin reintroduced versions of his bill in 2005 and 2007. *See* Pledge Protection Act of 2005, H.R. 2389, 109th Cong. (2005); Pledge Protection Act of 2007, H.R. 699, 110th Cong. (2007).

[110] *See supra* Section I.C.

[111] *See, e.g.*, Ryan Doerfler, *The Supreme Court Is Broken. How Do We Fix It? Strip Its Power*, 2022, https://www.thenation.com/article/society/how-to-fix-supreme-court/; Michael Hiltzik, *How Congress Could Rein in the Rogue Supreme Court*, L.A. TIMES, October 20, 2022, https://www.latimes.com/business/story/2022-10-20/column-how-congress-could-rein-in-the-rogue-supreme-court; Christopher Jon Sprigman, *Stripping the Courts' Jurisdiction*, THE AMERICAN PROSPECT, May 5, 2021, https://prospect.org/api/content/89916e00-ad0e-11eb-8007-1244d5f7c7c6/; Sprigman, *supra* note 1; Rahnama, *supra* note 6; Yaffe-Bellany, *supra* note 6; Zeitz, *supra* note 6.

[112] *See* Epps & Sitaraman, *supra* note 17, at 836–50.

[113] *See generally* Doerfler & Moyn, *supra* note 2.

[114] *See generally* Sprigman, *supra* note 2.

[115] *See* FISHKIN & FORBATH, *supra* note 2, at 431.

[116] *See* FINAL REPORT, *supra* note 8, at 154–69.

[117] *See, e.g.*, Sprigman, *supra* note 2, at 1851.

notion it would permit Congress to wrest control of decisionmaking from courts and have a *direct* (perhaps even immediate) effect on substantive policies. Professors Doerfler and Moyn endorse what they call "disempowering" reforms such as jurisdiction stripping, in contrast to "personnel" reform like court packing, on these grounds:

> With jurisdiction stripping, . . . the fate of such controversial legislation would be determined by Congress and the President in September or April, and not by the Supreme Court in June. By removing the judiciary from the process, *jurisdiction-stripping legislation would thus tie policy outcomes exclusively to the most recent congressional and presidential elections*.[118]

A common thread runs through the many proposals considered above: a conception of jurisdiction stripping as an awesome power. In the next Part, we confront that common assumption. In nearly every context, it turns out to be wrong.

II. PREDICTABLE FAILURE

To evaluate jurisdiction stripping as a policy tool, we game out precisely how it would work under different scenarios. To that end, this Part explores the various ways that Congress might try to use jurisdiction stripping to compel a particular substantive policy result. In seeking to influence policy through jurisdictional regulation, Congress has a variety of options. It might attempt to strip some courts (or tribunals) of jurisdiction and intentionally direct cases into others. Or, most controversially, it might try to strip all federal tribunals of jurisdiction. The choices among these options will affect which tribunal hears a case in the first instance and which (if any) reviews decisions on appeal. And the option Congress chooses will depend on what particular problem it hopes to solve.

The efficacy of jurisdiction stripping often depends on the source of law that has motivated Congress to act. Congress might strip jurisdiction with the goal of shaping outcomes in federal constitutional challenges to *state* laws. Alternatively, it might be concerned with federal courts' power to interpret *federal law,* including both statutory and constitutional law. We thus divide our analysis into these two categories.

Within each category, we tease out further possibilities. When state law is at issue, Congress might strip federal courts of jurisdiction in order to *circumvent* Supreme Court precedent and thereby give state courts the last word over constitutional questions, thus insulating state laws from challenge. But Congress might also strip jurisdiction to *protect* Supreme Court precedent that holds state laws unconstitutional—namely, by preventing the Court from overruling that precedent. Congress might go even further and try to strip both state and federal courts of jurisdiction, leaving decisionmaking power entirely in the hands of state elected officials.

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[118] Doerfler & Moyn, *supra* note 2, at 1726 (emphasis added).

When it comes to federal law, there are again different possibilities. Congress might remove jurisdiction to avoid what it sees as erroneous decisions interpreting federal *statutory* law. But once constitutional questions come into the mix, Congress's choice will turn on a further distinction: Does Congress see only the lower federal courts as the problem? Or is Congress trying to insulate a federal program from constitutional challenges across the board?

These rough groupings may shade into one another in some instances. As ideal types, though, they help illustrate the complexities of trying to use jurisdiction stripping as a substantive policy tool. Across the range of possibilities we consider, we show that jurisdiction stripping turns out to be far less efficacious as a policy tool than almost everyone assumes. In nearly every instance, Congress is unlikely to succeed in directly achieving its desired substantive outcome—either circumventing an existing precedent or preventing an adverse decision. In some situations, this conclusion becomes obvious as soon as one plays things out. In others, understanding jurisdiction stripping's failures requires a more careful parsing of the mechanics of precedent and the few fetters on Congress's power to strip jurisdiction. But either way, jurisdiction stripping is a far weaker weapon than common wisdom assumes.

A. State Laws

1. Circumventing Precedent

The quintessential problem that invites talk of jurisdiction stripping is a constitutional ruling by the Supreme Court with which Congress disagrees. More specifically, the high-profile examples usually involve situations in which the Court has declared a *state* law or policy unconstitutional. Think about rulings that, on constitutional grounds, have invalidated state laws that permit voluntary school prayer,[119] prohibit flag burning,[120] or criminalize abortion.[121] Or rulings that require states to adopt affirmative school desegregation measures, such as busing.[122]

The most common jurisdiction stripping proposals that emerge in the wake of such rulings would deprive all federal courts of jurisdiction and thus give each state the final word on these constitutional questions. We leave aside the vibrant debate about whether

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[119] *See, e.g.*, Engel v. Vitale, 370 U.S. 421 (1962); Abington Sch. Dist. v. Schempp, 374 U.S. 203 (1963).

[120] *See* Texas v. Johnson, 491 U.S. 397 (1989) (holding that criminal conviction for desecrating the American flag was inconsistent with the First Amendment).

[121] *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973) (finding criminal prohibitions against abortion before "viability" to be unconstitutional), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

[122] *See, e.g.*, Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971) (approving judicial remedies, including busing, to rectify unconstitutional public-school segregation).

the potential disuniformity would cause chaos[123] or undermine the structural purpose of having "one supreme Court."[124] Instead, we focus one whether this would prove efficacious. That is, by directing these constitutional questions to the states, could Congress subvert or undo an unfavorable Supreme Court ruling? Maybe, the same way that firing buckshot at a fly on a window could be effective. It might hit the target, but only occasionally and haphazardly, and with plenty of collateral damage along the way.

Consider the school prayer example, which offers a best-case scenario for proponents of jurisdiction stripping's efficacy. In the 1960s, the Supreme Court's decisions in *Engel v. Vitale*[125] and *Abington School District v. Schempp*[126] found that teacher-led prayers and Bible readings in public schools violated the Establishment Clause. Over the ensuing decades, members of Congress—including, most prominently, Senator Jesse Helms—offered several proposals that would have stripped *all* federal courts of jurisdiction to hear cases challenging state laws that related to "voluntary prayer, Bible reading, or religious meetings in public schools."[127] Thus, jurisdiction stripping of this nature would force all litigation into state courts. Without the prospect of Supreme Court review, each state would have the final say on the constitutionality of state laws that authorize voluntary school prayer. So, could this gambit successfully evade the likes of *Engel* and *Schempp* and permit school prayer?[128]

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[123] *See* Eugene Gressman & Eric K. Gressman, *Necessary and Proper Roots of Exceptions to Federal Jurisdiction*, 51 GEO. WASH. L. REV. 495 (1983); Ratner, *supra* note 22.

[124] *Compare* James E. Pfander, *Jurisdiction-Stripping and the Supreme Court's Power to Supervise Inferior Tribunals*, 78 TEX. L. REV. 1433, 1451–59 (2000) (arguing that text and history mandate that Supreme Court exercise supervisory authority over inferior federal courts); Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 828–34 (1994) (arguing that lower federal courts must be "subordinate to" the Supreme Court), *with* Amar, *supra* note 46, at 254–59 (arguing that Congress may create lower Article III courts whose judgments are not subject to Supreme Court review); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV 1153 (1992); David E. Engdahl, *What's in a Name? The Constitutionality of Multiple "Supreme" Courts*, 66 IND. L.J. 457 (1991).

[125] 370 U.S. 421 (1962) (holding that recitation of prayer composed by New York Board of Regents was unconstitutional, even though individual students could opt not to participate).

[126] 374 U.S. 203 (1963) (holding that teacher-led Bible reading, even without commentary, was unconstitutional).

[127] *See* Baucus & Kay, *supra* note 93, at 991; Gressman & Gressman, *supra* note 123, at 500–02.

[128] We address only the mechanical problems here. Others have flagged further difficulties in accomplishing the goals of jurisdiction stripping. For example, other scholars have shown that most jurisdiction stripping proposals suffer from ambiguity in describing the class of cases to which they refer. *See, e.g.*, Gressman & Gressman, *supra* note 123, at 501 (noting that Sen. Helms's 1983 proposal could be read to apply to "any and all cases 'arising out of' state action relating to voluntary prayer, Bible reading, or religious meetings").

Imagine how this would work out in practice. (For purposes of the argument, we'll assume, perhaps contrary to fact, that the Court would adhere to its school prayer precedents.) The first difficulty lies in figuring out how state courts would treat the precedents that Congress finds offensive. As to the formal strength that precedents like *Engel* and *Schempp* would still have (if any), scholars disagree, creating at least a potential hurdle.[129]

One approach to the formal question contends that the Supreme Court decisions remain binding precedent, even if the Court has no power to police whether state courts have applied those precedents correctly.[130] If so, then jurisdiction stripping closes the stable door after the horse has already bolted. It freezes in place the objectionable decisions and, even worse, prevents the only court that can reconsider those precedents from doing so.[131] Other scholars disagree, contending that a precedent's binding force necessarily depends on whether the rendering court has revisory power over lower courts.[132]

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[129] *See* FINAL REPORT, *supra* note 8, at 160 (noting that "it is not clear whether state court judges would be bound by preexisting Supreme Court precedents").

[130] Paul M. Bator, *Withdrawing Jurisdiction from Federal Courts*, 7 HARV. J. L. & PUB. POL'Y 31, 33 (1984) (arguing that "the proper answer is that standing Supreme Court precedent would continue to be authoritative law"); Steven G. Calabresi & Gary Lawson, *Equity and Hierarchy: Reflections on the Harris Execution*, 102 YALE L.J. 255, 276 n.106 (1992) (arguing that "the Exceptions Clause does not permit Congress to free the inferior federal courts or the state courts from their obligation to follow Supreme Court precedent in *all* cases"); Redish, *supra* note 8, at 925 ("Removal of Supreme Court appellate jurisdiction over an area of substantive law has no legal effect whatsoever on the validity of pre-existing Supreme Court decisions."); *see also* Michael C. Dorf, *Prediction and the Rule of Law*, 42 UCLA L. REV. 651, 672–73 (1995); Wechsler, *supra* note 8, at 1006 ("The lower courts or the state courts would still be faced with the decisions of the Supreme Court as precedents—decisions which that Court would now be quite unable to reverse or modify or even to explain.").

[131] *See* Redish, *supra* note 8, at 925 ("Ironically, such congressional action would have the effect of locking in those decisions, for the only court that has power to modify, limit or overrule those decisions is the Supreme Court itself."); Wechsler, *supra* note 8, at 1006 (arguing that "[t]he jurisdictional withdrawal thus might work to freeze the very doctrines that had prompted" jurisdiction stripping).

[132] *See, e.g.*, Amar, *supra* note 46, at 258 n.170 (contending that binding precedent is "governed not by any inherent judicial hierarchy in the structure of the Constitution" and that "state courts are currently bound to follow Supreme Court precedent because . . . if they do not, they can be reversed"); Michael Stokes Paulsen, *Accusing Justice: Some Variations on the Themes of Robert M. Cover's* Justice Accused, 7 J. L. & RELIG. 33, 83–84 (1989) (endorsing Amar's view and arguing that a higher court precedent is "controlling" on a lower court only to the extent that higher court may reverse the lower court's decisions); Paulsen, *supra* note 8, at 59–60 & n.55 (similar); *cf.* Caminker, *supra* note 124, at 837–38 (arguing that neither the Supremacy Clause nor structural federalism dictates that Supreme Court precedents bind state courts).

Thus, adherents of this view argue that if the Supreme Court no longer has jurisdiction to review state-court school-prayer decisions, then precedents like *Engel* lose their binding force over state courts.[133]

This theoretical dispute touches on the rich commentary about the nature of precedent and the provenance of its rules,[134] as well as the long-running debate about judicial supremacy versus departmentalism.[135] We don't attempt to resolve those debates. Our point is that this all remains contested, including the specific question at issue here—how a conscientious state court judge should treat precedents like *Engel* and *Schempp* after a jurisdiction strip.

Regardless of who gets the better of the argument as to the old precedents' formal strength, what really matters is what would happen in practice. Proponents usually feel compelled to talk elliptically about what they hope jurisdiction stripping will accomplish. Sometimes this comes in the form of modest language about preventing federal courts—usually the Supreme Court—from "extending" supposedly errant holdings.[136]

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[133] The notion that a jurisdiction strip changes the formal bindingness of a precedent strikes us as problematic because binding precedent does not always track the chain of appellate review. For example, in California, lower state courts are bound by the decisions of *all* divisions of California Courts of Appeal, even those that lack revisory authority over the lower courts. *See* Auto Equity Sales, Inc. v. Superior Court, 369 P.2d 937, 940 (Cal. 1962) (en banc); 9 WITKIN, CALIFORNIA PROCEDURE § 497 (5th ed. 2008). Thus, neither the chain of appellate review nor geography is fully determinative of a precedent's bindingness. *See also* Alan M. Trammell, *Precedent and Preclusion*, 93 NOTRE DAME L. REV. 565, 581 (2017).

[134] *See, e.g.*, John C. Harrison, *The Power of Congress over the Rules of Precedent*, 50 DUKE L.J. 503 (2000); *see also* Michael Stokes Paulsen, *Abrogating Stare Decisis By Statute: May Congress Remove the Precedential Effects of* Roe *and* Casey?, 109 YALE L.J. 1535 (2000).

[135] WHITTINGTON, *supra* note 92, at xi (describing debate).

[136] *See, e.g.*, Carl A. Anderson, *The Power of Congress to Limit the Appellate Jurisdiction of the Supreme Court*, 1981 DET. C.L. REV. 753, 768 (arguing that one version of a school-prayer jurisdiction stripping bill wouldn't seek to "overturn" any precedents but would prevent the Supreme Court "from extending its past holdings" to new situations); Charles E. Rice, *Limiting Federal Court Jurisdiction: The Constitutional Basis for the Proposals in Congress Today*, 65 JUDICATURE 190, 197 (1981) (arguing that jurisdiction stripping "would not reverse the Supreme Court's rulings on school prayer" but "would ensure that the Court received no opportunity to further extend its errors").

As a practical matter, though, if state courts have the final word on a constitutional question, they can distinguish, narrow,[137] ignore, or openly flout Supreme Court precedents with impunity.[138]

Therein lies the hope of jurisdiction stripping and the best argument for its efficacy. A state might take up Congress's implicit invitation. The state legislature might pass a bill authorizing school prayer, the governor might sign it into law, and the state courts might then act on their own understanding of the First Amendment to declare the state policies constitutional. To work, though, all of these dominoes would need to line up. (And this leaves to one side the problem, from the perspective of the jurisdiction strip's proponents, that other states might interpret the First Amendment to impose more onerous restrictions on public religious expressions.)

Of course, this all requires the Supreme Court to willingly go along with the jurisdiction strip. It's far from certain that the Justices would feel powerless to respond. As we've discussed, the mainstream view of jurisdiction stripping still contemplates that *external* constitutional constraints curb Congress's power.[139]

Could the Court interpret the external constraints to provide a toehold for reviewing a state court's constitutional ruling notwithstanding the jurisdiction strip? Possibly, yes. Although the Court has acceded to jurisdiction strips that foreclosed its review of a constitutional question, in each case some alternative avenue still allowed the question to reach the Court. In *McCardle*, the Court went along with Congress's removal of jurisdiction over the constitutionality of McCardle's detention—but only after suggesting that another route, a habeas petition filed under the Judiciary Act of 1789, remained viable.[140] (A year later, the Court confirmed as much in *Ex parte Yerger*.[141]) In *Yakus v.*

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[137] *See* Richard M. Re, *Narrowing Precedent in the Supreme Court*, 114 COLUM. L. REV. 1861, 1862-63 (2014) (defining "distinguishing" to mean that "the precedent, when best understood, does not actually apply," whereas "narrowing" entails construing a precedent to be "more limited in scope than . . . the best available reading")

[138] *See, e.g.*, Charles E. Rice, *Congress and the Supreme Court's Jurisdiction*, 27 VILL. L. REV. 959, 985 (1981) (arguing that "some state courts would openly disregard the Supreme Court precedents . . . once the prospect of reversal by the Supreme Court had been removed"); *see also* Gunther, *supra* note 8, at 910–11 (arguing that some "courts no doubt would feel freer to follow their own constitutional interpretations if the threat of appellate review and reversal were removed"); Sager, *supra* note 43, at 47 (arguing that Congress would be "aiming a lewd wink in the state courts' direction").

[139] *See supra* Section I.C.

[140] *See* 74 U.S. at 515; DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789–1888 at 306 (1992); *see also infra* n. 229 and accompanying text.

[141] 75 U.S. 85 (1869).

United States,[142] the Court held that Congress acted within its powers when depriving a criminal defendant of the opportunity to challenge the validity of the price-control regulation he was charged with violating. But in doing so, it stressed that the statutory scheme provided a mechanism for raising constitutional objections to the regulations using the process that provided for review by a special court, the Emergency Court of Appeals, and, ultimately, by the Supreme Court itself.[143] And though the Second Circuit in *Battaglia* upheld a jurisdiction strip that foreclosed Article III review of a constitutional question, it did so only after essentially reaching the merits of the plaintiffs' constitutional objections to determine that the jurisdiction strip itself was constitutional.[144]

There is thus no precedent upholding a jurisdiction strip that denied a person the opportunity to raise his constitutional objection before *any* Article III court where the constitutional argument was potentially meritorious. Certainly none where the jurisdiction strip prevented Article III review of state conduct that contravened clearly established Supreme Court precedent (let alone a jurisdiction strip *designed* to accomplish that result). So, while the Court might go along with our hypothetical jurisdiction strip regarding school prayer, that is far from inevitable. A Court determined to thwart Congress could find the jurisdiction strip an impermissible attempt to evade the Establishment Clause.

A jurisdiction strip that deprived lower federal courts, but not the Supreme Court, of jurisdiction over school prayer cases seems much more certain to pass constitutional muster. Such a law would thus require cases to be litigated in the state courts in the first instance while preserving the possibility of Supreme Court review. If state courts were unconcerned with reversal, the measure could give states some temporary breathing room before being reined in when a case finally ends up at the Supreme Court. In that way, jurisdiction stripping would have the indirect benefit of buying time that we discuss later.[145] But it would not give states the free rein for which advocates of jurisdiction hope.[146]

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[142] 321 U.S. 414 (1944).

[143] *See* 321 U.S. at 434.

[144] *See* 169 F.3d at 257–61.

[145] *See infra* Section III.B.

[146] Another reason why Congress might favor a law precluding lower federal court review is that the Supreme Court has limited docket resources and thus might not be able to correct every single state-court decision flouting precedent. As the late Judge Stephen Reinhardt of the Ninth Circuit explained when asked why he wrote decisions that he knew the Supreme Court would want to overturn, "[t]hey can't catch 'em all." Linda Greenhouse, *Dissenting Against the Supreme Court's Rightward Shift*, N.Y. TIMES, Apr. 12, 2018, https://www.nytimes.com/2018/04/12/opinion/supreme-court-right-shift.html.

But back to our hypothetical statute that precluded Supreme Court review entirely. Perhaps state courts would embrace the opportunity to flout Supreme Court precedent, no matter what federal courts scholars might say about precedent's formal status. And perhaps the Supreme Court would accept the withdrawal of jurisdiction. Such a scenario would offer the cleanest example of how jurisdiction stripping might successfully empower states to do something that the Supreme Court has found unconstitutional. Even so, this example may overstate jurisdiction stripping's value as a policy tool.

We chose the school-prayer context as our case study because it presents the best possible case for jurisdiction stripping to succeed. But the school prayer context—while not truly sui generis—differs in important ways from many situations where Congress might seek to jurisdiction strip to insulate state law from second-guessing by federal courts. What makes school prayer different from many other scenarios is that in the archetypal school-prayer case, the person raising the constitutional objection as a plaintiff seeks to stop the state from engaging in some conduct not directed exclusively at the plaintiff.

This differs from a situation where the objector is an individual against whom the state is directing coercive force.[147] A recurring feature of Establishment Clause litigation is that plaintiffs have difficulty establishing that they are distinctly injured by the challenged government conduct and thus fail to establish standing.[148] A distinct (though related) point is that many cases involving constitutional challenges to state laws differ from the school-prayer context because the state seeks to *enforce* its laws against some person who will rely on the federal constitution as a shield. And the case for overcoming a jurisdiction strip becomes more compelling when a state tries to deny someone the right to present a constitutional defense in an enforcement proceeding.

Consider criminal enforcement. If a jurisdiction stripping measure sought to empower states to enact criminal prohibitions that the Supreme Court has found unconstitutional (say, laws criminalizing flag burning or handgun possession), the calculus becomes much more complicated. Imagine, for example, that a Congress hostile to the Court's Second Amendment jurisprudence strips federal courts of jurisdiction to hear

[147] Of course, a state that *required* a student to participate in prayers on fear of punishment would present a different case. *Cf.* W. Va. Bd. of Ed. v. Barnette, 319 U.S. 624 (1943) (holding unconstitutional a resolution requiring students to salute the flag on threat of expulsion).

[148] *See, e.g.*, Hein v. Freedom From Religion Found., Inc., 551 U.S. 587 (2007).

any cases raising constitutional challenges to firearms prohibitions. A state then criminalizes all handgun possession—a prohibition that would contravene the core holdings of *District of Columbia v. Heller*[149] and *McDonald v. City of Chicago*.[150]

How would things play out? The state would—assuming prosecutors were willing to flout Supreme Court precedent—prosecute someone for possessing a firearm in violation of state law. That defendant would raise a constitutional defense, invoking the Second Amendment rights recognized in *Heller* and *McDonald*. And the state courts, including the state's highest court, would (if all goes according to plan) reject that defense, contravening the Supreme Court's precedents. Has the jurisdiction strip worked? More concretely, would the Supreme Court stand by as all of this happens?

Probably not. Over the centuries, the Court has left open multiple avenues to address questions that a jurisdiction strip purports to make unreviewable. Not coincidentally, the cases in which the Court artfully finds its way past a jurisdiction strip have tended to involve deprivations of physical liberty.[151] So, even as the Court espouses the traditional view that Article III itself imposes no limits on Congress's power to regulate federal courts' jurisdiction, the Court construes jurisdiction strips narrowly[152] and, most relevant here, recognizes external constraints on Congress's power.[153] In the handgun prosecution hypothetical, a Supreme Court that believed state courts had trampled on a criminal defendant's Second Amendment rights could easily find a way to intervene.

How could the Court get involved? A state criminal prosecution could implicate at least two external constraints.

Most obviously, the defendant could argue that Congress's jurisdiction strip and the state's subsequent actions all conspired to violate the defendant's Second Amendment rights. This doesn't present the same exact scenario as *Klein*—where Congress attempted to redefine the President's pardon power (contrary to Supreme Court precedent) and then strip courts of jurisdiction[154]—but it seems analogous. Congress effectively has invited *states* to redefine what the Constitution means (contrary to Supreme

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[149] 554 U.S. 570 (2008) (holding that the Second Amendment embraces an individual right to bear arms).

[150] 561 U.S. 742 (2010) (incorporating the individualized Second Amendment right against the states).

[151] *Yerger* concerned a detention by the U.S. military during Reconstruction. *Felker* involved a Georgia prisoner. *Boumediene* concerned the detention of enemy combatants in Guantanamo Bay, Cuba. Relatedly, *Yakus* grappled with the propriety of a jurisdiction strip under the Due Process Clause, even as it affirmed a criminal conviction.

[152] *See supra* Section I.C (discussing narrow construction of jurisdiction strips).

[153] *See id.* (discussing external constraints).

[154] *See* United States v. Klein, 80 U.S. (13 Wall.) 128 (1871).

Court precedent on the Second Amendment) and then stripped federal courts of jurisdiction. And, as in *Klein*, the Court could step in to prevent Congress, working in tandem with a compliant state, from using jurisdiction stripping to undermine a constitutional right.[155]

Alternatively, the defendant could argue that the various machinations by Congress, the state legislature, and the state judiciary, taken together, violate her due process rights. Under this conception, the jurisdiction strip would prevent her from having a genuine opportunity to raise her constitutional defense. Such allegations of due process violations historically rank among the external constraints that federal courts have taken most seriously, even in the face of seemingly ironclad jurisdiction stripping provisions.[156] Moreover, courts take particular care to ensure that criminal defendants have adequate opportunities to raise defenses,[157] including in the context of jurisdiction stripping legislation.[158]

Thus, mechanisms for looking beyond the literal language of a jurisdiction strip have become a familiar part of the Court's jurisprudence in this area. While the Court continues to recite the principle that Article III gives Congress plenary power,[159] it remains attuned to external constraints.[160] This framework has particular force in the context of

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[155] Moreover, a jurisdiction strip of this nature tests the outer boundaries of whether state and federal courts truly enjoy parity to interpret questions of federal law. Although the traditional view of Article III and the Supremacy Clause would allow the hypothetical jurisdiction strip—by giving state courts final interpretative authority over what the Second Amendment means—several have raised powerful arguments against the assumption of parity on historical and normative grounds. *See, e.g.*, Amar, *supra* note 46; Amanda Frost, *Inferiority Complex: Should State Courts Follow Lower Federal Court Precedent on the Meaning of Federal Law?*, 68 VAND. L. REV. 53 (2015); Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977).

[156] *Battaglia v. General Motors Corp.*, 169 F.2d 254 (2d Cir. 1948), offers the clearest example. Despite language that purported to strip *all* courts of jurisdiction, the Second Circuit considered but ultimately rejected due process challenges. *See id*. at 257. The Supreme Court likewise has considered whether jurisdiction strips violate due process. *See* Yakus v. United States, 321 U.S. 414, 434–38 (1944).

[157] *See* Hart, *supra* note 42, at 1379–83; *see also* Fallon, *supra* note 23, at 1126–27.

[158] Although one can take issue with whether the Supreme Court reached the right result when it upheld—against a due process challenge—the bifurcation of administrative challenges to price controls and subsequent criminal prosecutions, the Court did entertain a meta-due process argument about the jurisdiction strip itself. *See* Yakus v. United States, 321 U.S. 414, 444-46 (1944).

[159] *See, e.g.*, Patchak v. Zinke, 138 S. Ct. 897, 906 (2018) (reaffirming this idea and cabining language from *Klein* suggesting that Congress's motive matters in the calculus); *see also supra* Section I.C.

[160] *See, e.g.*, Boumediene v. Bush, 553 U.S. 723 (2008) (habeas corpus); *Yakus*, 321 U.S. 414 (due process).

criminal prosecutions, but it could also work if a state sought to enforce potentially unconstitutional laws civilly. And as noted above, it might even provide a toehold for the Court to intervene in best-case-scenario cases like the school-prayer hypothetical.

Still, a skeptic of our overarching thesis about the inefficacy of jurisdiction stripping might contend that falling back on external constraints, at least as we've presented them, proves too much. Even among those who accept the notion of external constraints, disagreement persists about how far those restrictions reach. Unlike a more obviously unconstitutional hypothetical such as stripping jurisdiction only over claims brought by, say, Black plaintiffs, here the jurisdiction strip does not distinguish between litigants. Nor does it prevent the defendant from raising a Second Amendment defense. It simply requires the defendant to litigate that matter in state court. Federal defenses are litigated in state court all the time, often of necessity.[161]

And—the skeptic might press on—isn't it true that the Supreme Court lacked any jurisdiction over a large swath of constitutional issues litigated in state courts for much of its history? Moreover, isn't the gun-rights hypothetical far less problematic than the scheme that the Supreme Court blessed in *Yakus*, in which the defendant was forbidden from challenging the validity of a regulation he was prosecuted for violating?

On closer analysis, though, these arguments aren't persuasive. True, the Supreme Court lacked jurisdiction over many state cases for much of the history of the Republic. But the 1789 Judiciary Act only denied the Court jurisdiction over state cases *upholding* claims of constitutional right.[162] There isn't a historical tradition of stripping the Court's jurisdiction over a wide swath of state-court cases *rejecting* a constitutional defense.[163]

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[161] Under current jurisprudence, state criminal prosecutions must happen in state court. Harrison, *supra* note 46, at 230–43 (arguing that Article III permits prosecutions under state criminal laws in federal court). [Consider citing William A. Fletcher, *The "Case or Controversy" Requirement in State Court Adjudication of Federal Questions*, 78 Cal. L. Rev. 263, 266 (1990); James E. Pfander, *Rethinking the Supreme Court's Original Jurisdiction in State-Party Cases*, 82 Cal. L. Rev. 555, 605–09 (1994), for proposition that "cases" refer to both criminal and civil matters]

Moreover, under the well-pleaded complaint rule, a federal defense does not confer statutory arising-under jurisdiction. *See* Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149 (1908) (articulating well-pleaded complaint rule for statute currently codified as 28 U.S.C. § 1331).

[162] *See* RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 297 (7th ed. 2015); Amar, *supra* note 46, at 1529.

[163] For an interesting argument that, contrary to received wisdom, the 1789 Judiciary Act did not give the Court jurisdiction over state *criminal* appeals denying claims of federal right, see Kevin C. Walsh, *In the Beginning There Was None: Supreme Court Review of State Criminal Prosecutions*, 90 NOTRE DAME L. REV. 1867 (2015). The Court, though, certainly believed it had such jurisdiction. *See* Cohens v. Virginia, 19 U.S. 264 (1821).

As for *Yakus*, Congress hadn't entirely deprived someone of the right to present a constitutional argument to the Supreme Court. It had simply prescribed a procedural means for the defendant to do so. The Emergency Price Control Act bifurcated the constitutional defense and the actual criminal prosecution. It forced someone to litigate the constitutional question in front of an administrative agency (on pain of forfeiture) before he knew whether he was in actual jeopardy of prosecution. That arrangement may seem unfair, but the person subject to the regulation had an opportunity to seek review of the administrative agency's determination in the Emergency Court of Appeals (an Article III court) and, ultimately, in the Supreme Court itself. The statute channeled the Court's jurisdiction over a set of constitutional issues but did not remove it entirely.

The most important point, though, isn't a doctrinal argument. We don't claim that the broad external-constraints theory sketched above is the best or right answer to the formal legal question at stake. We thus can't argue that, in the case of such a jurisdiction stripping measure, the Court certainly would intervene using an external-constraints theory—let alone that the Court would ultimately vindicate the defendant's asserted Second Amendment rights. But, in keeping with our goals here, our external-constraints argument is a practical one. Namely, there are *plausible* arguments that would let the Court overcome a jurisdiction strip if it were inclined to do so. And if Congress thought jurisdiction stripping necessary to rein in a rogue Supreme Court, there would be plenty of reason to worry that the Court would choose the plausible interpretation of the Constitution that would preserve its own power.

* * *

This has been a long walk through some intricate scenarios, so we will summarize our principal conclusions thus far: The best-case scenario for a successful jurisdiction strip involves a situation in which Congress deprives federal courts of jurisdiction to hear challenges to state activity that does not involve enforcement actions against any individual—such as school prayer—and where the state courts could be expected to ignore Supreme Court precedent. Even there, the Supreme Court over the centuries has left open multiple ways to intervene, despite seemingly ironclad jurisdiction stripping language. The gambit seems even less likely to work when the challenged action involves enforcement actions—and, in particular, criminal prosecutions for conduct that the Supreme Court has found constitutionally protected. Jurisdiction stripping, then, seems to provide no surefire way to protect state laws from disfavored Supreme Court precedent.

2. Protecting Precedent

Over the years, enthusiasm for jurisdiction stripping also has swelled when the Supreme Court seems poised to overrule popular precedents. This idea has had allure over

the years,[164] but it's gained renewed attention since Democrats retook both Congress and the White House around the same time that conservatives solidified a 6-3 majority on the Supreme Court.[165] Progressives recently proposed jurisdiction stripping as a way to prevent the overruling of abortion precedents after Republicans locked in a conservative supermajority.[166] Democrats missed that opportunity once *Dobbs* was decided. But reacting to credible suggestions that *all* substantive due process rights might come under threat, Congress moved to codify same-sex marriage rights.[167] Could Congress go further and preemptively try to thwart the overruling of key substantive due process rights by depriving the Court of jurisdiction?

The idea sounds superficially attractive. Jurisdiction stripping would seemingly freeze favorable precedent in place before the Supreme Court can wreak havoc with it. As we explain, though, jurisdiction stripping in this context would prove ineffective at best and could have exactly the opposite effect that its proponents want and thus exacerbate the perceived problem.[168]

To see why, begin with the logistics. Precedent-protecting jurisdiction stripping involves a temporal variation on the precedent-circumventing scenarios considered immediately above. Rather than trying to circumvent a bad decision, Congress would be trying to prevent an adverse decision *proactively*. This variation matters for several reasons and demonstrates why jurisdiction stripping will backfire predictably and quickly.

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[164] Discussion of the technique long predates the commentary of the last several years. *See, e.g.*, Jason S. Greenwood, Note, *Congressional Control of Federal Court Jurisdiction: The Case Study of Abortion*, 54 S.C. L. REV. 1069 (2003).

[165] *See, e.g.*, Doerfler & Moyn, *supra* note 2, at 1744 ("If properly calibrated, jurisdiction stripping statutes . . . could insulate precisely the attempted expansion of legislative rights from judicial limitation . . . , while leaving judges power to protect other rights from unsuspected majoritarian excess."); Rahnama, *supra* note 6 (describing jurisdiction stripping as "a more palatable option to Americans for safeguarding precedent on issues like abortion"); Yaffe-Bellany, *supra* note 6 (describing Democrats' musings about jurisdiction stripping as a way to tame a conservative Supreme Court); Anthony Michael Kreis (@AnthonyMKreis), TWITTER (Dec. 2, 2021), https://twitter.com/AnthonyMKreis/status/1466387768637071364 (urging that "Congress should pass legislation stripping the Supreme Court of abortion jurisdiction until OT22. It's time for 1801-level constitutional hardball.").

[166] *See, e.g.*, Rahnama, *supra* note 6 (suggesting that jurisdiction stripping might be "might be a more palatable option to Americans for safeguarding precedent on issues like abortion").

[167] *See* Michael D. Shear, *Biden Signs Bill to Protect Same-Sex Marriage Rights*, N.Y. TIMES, Dec. 13, 2022, https://www.nytimes.com/2022/12/13/us/politics/biden-same-sex-marriage-bill.html.

[168] For a brief sketch of this argument that we laid out prior to *Dobbs*, see Daniel Epps & Alan M. Trammell, *There's no Magic Trick that Can Save Abortion Rights*, WASH. MONTHLY (May 24, 2002), https://washingtonmonthly.com/2022/05/24/theres-no-magic-trick-that-can-save-abortion-rights/.

Proposals of this nature would take primary aim at the Supreme Court—locking in a decision that Congress doesn't want the Court to revisit and forcing state courts (and potentially lower federal courts) to continue applying that precedent. But these proposals make a critical assumption about how lower courts will handle the precedent. In the context of the precedent-circumventing proposals discussed earlier, proponents assume that at least some courts will accept Congress's invitation to ignore Supreme Court precedent on, for example, school prayer or Second Amendment rights. That assumption seems defensible as a pragmatic matter, whatever the answer to the normative question about Supreme Court precedent's formal status. Here, though, Congress would be assuming that a precedent like *Obergefell*, guaranteeing same-sex marriage rights, would remain formally binding and that state courts—even those that disagree with its correctness[169]—will continue to apply it faithfully, even without the prospect of reversal.

The idea of proactively protecting certain precedents almost always trains on state laws. Most of the contemporary discussion considers the abortion rights cases specifically, but the idea encompasses other scenarios when Congress tries to prevent states from passing laws that do not pass muster under Supreme Court precedent. So, although Congress might still leave lower federal courts with jurisdiction—for example, to entertain pre-enforcement challenges[170]—the focus is really on how state courts would apply Supreme Court precedents in evaluating state laws.

Look beyond the superficial allure and consider how a proposal of this nature would play out. In May of 2022, the country was stunned when a draft Supreme Court opinion in *Dobbs v. Jackson Women's Health Organization*[171] was leaked to *Politico*. The leak revealed that the Court was on the precipice of overruling *Roe v. Wade*[172] and *Planned Parenthood v. Casey*.[173] What if Congress had rushed to try to protect a constitutional right to abortion by preventing the Supreme Court from hearing any cases presenting questions about whether the Constitution protects a right to reproductive freedom? That move would have looked a lot like what Congress did in *McCardle*, where Congress deprived the Court of jurisdiction during the pendency of a case. What would happen at the state level politically and judicially?

Begin with a state like a Vermont, which already guarantees reproductive rights far beyond what the Supreme Court articulated as a constitutional minimum under the

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[169] See, e.g., Order, Ex parte State ex rel. Ala. Policy Inst., 200 So. 3d 495, 561 (Ala. Mar. 4, 2016) (per curiam); *id*. at 600 (Bolin, J., concurring specially) ("I do not agree with the majority opinion in *Obergefell*; however, I do concede that its holding is binding authority on this Court."); Costanza v. Caldwell, 167 So. 3d 619 (La. 2015).

[170] Under the familiar paradigms of 28 U.S.C. § 1983 and *Ex parte Young*.

[171] 142 S. Ct. 2228 (2022).

[172] 410 U.S. 113 (1973).

[173] 505 U.S. 833 (1992).

Roe-Casey regime.[174] There, nothing hinges on how and whether the Supreme Court protects abortion rights. So, jurisdiction stripping—from the perspective of someone who wants to protect reproductive rights—hasn't improved the situation in Vermont.

Now consider Texas, which prior to *Dobbs* prohibited nearly all abortions after the six-week mark of a pregnancy using a devious civil enforcement regime designed to avoid judicial review.[175] As the proponents of the legislation recognized, this restriction was unconstitutional under Supreme Court jurisprudence at the time.[176] Would an attempt to freeze the law through jurisdiction stripping have helped protect abortion rights? Perhaps *Roe* and *Casey* would have formally remained binding precedents in Texas and the Supreme Court would have been denied the chance to revisit them in *Dobbs*. As we noted earlier, those arguments are debatable as a matter of formalism.[177] So, Texas judges might genuinely believe that *Roe* and *Casey* would lose their binding force. But even if the precedents remain binding as a matter of first principles, nothing would stop Texas state courts from distinguishing or narrowing them. Or the state courts, knowing that the Supreme Court has no jurisdiction to reverse, could simply ignore the Court's precedent entirely. In other words, state courts could—and, we suggest, likely would—rely on their practical freedom to interpret the Constitution free from Supreme Court interference. So, from the perspective of someone trying to protect reproductive freedom, the jurisdiction strip would have provided no benefits.

What if the Supreme Court decides to find its way through a jurisdiction strip and weigh in on the constitutionality of a state law? Here, too, the jurisdiction strip proves useless. Imagine that a state legislature goes even further than Texas and criminalizes all abortions. Suppose further that state courts reject any constitutional defenses based on *Roe* and *Casey*. As in the hypothetical gun prosecution, the Supreme Court might intercede using an external constraint theory. Perhaps the Court would then adhere to its precedents. The proponents of the jurisdiction strip would have gotten the result they want—but jurisdiction stripping would have had nothing to do with it. Alternatively,

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[174] Vermont, for example, does not impose limits on elective abortions, even limits that the Supreme Court over the years has deemed consistent with *Casey*'s "undue burden" test.

[175] The Texas Heartbeat Act, or S.B. 8, gained notoriety because it tried to skirt judicial review by creating only civil liability and prohibiting state officials from enforcing it. *See* Whole Woman's Health v. Jackson, 142 S. Ct. 522, 530 (2021).

[176] *See, e.g.*, Michael S. Schmidt, *Behind the Texas Abortion Law, a Persevering Conservative Lawyer*, N.Y. TIMES (Sept. 12, 2021); *see also Whole Woman's Health*, 142 S. Ct. at 543 (Roberts, C.J., concurring in the judgment in part and dissenting in part) ("Texas has passed a law banning abortions after roughly six weeks of pregnancy. That law is contrary to this Court's decisions in [*Roe*] and [*Casey*]." (citations omitted)).

[177] *See supra* Section II.A.1 (contrasting different formal approaches to whether precedent would remain binding if Supreme Court had no authority to police compliance with that precedent).

the Court might overcome the jurisdiction strip and do what the proponents feared all along (and what ended up happening in *Dobbs*)—overrule *Roe* and *Casey*. In this scenario, the jurisdiction strip would again have accomplished nothing.

A final possibility shows how jurisdiction stripping might even make things worse. Imagine that some states enact laws going beyond what even the *Dobbs* majority might countenance—say, prohibiting someone from traveling out of state to seek an abortion.[178] A jurisdiction strip would mean that the Court couldn't police even the most extreme and unconstitutional restrictions. So, from the perspective of abortion-rights supporters, the jurisdiction strip would lead to a *worse* result.

Thus, when used as a preemptive weapon to protect precedent, jurisdiction stripping either provides no benefits or proves counterproductive. And unlike in some of the more complex scenarios discussed in the context of *retroactive* jurisdiction stripping, such as the school-prayer hypothetical, the effort to withdraw jurisdiction *proactively* is even less likely to succeed. It can't improve the situation; it can only make it worse.[179]

3. Uncharted Territory

Finally, with respect to jurisdiction stripping aimed at protecting state laws, we flag two other possibilities that have existed only in the realm of academic discussion. One seems even more counterproductive than the proactive jurisdiction strips that we have just discussed, to say nothing of its likely unconstitutionality. The second is more intriguing but rife with constitutional concerns.

First, nearly everyone who has written about jurisdiction stripping assumes—correctly, in our view—that Congress could not foreclose *all* judicial review of state laws.[180] Suppose that it tried to do so, though. If Congress stripped all state and federal courts of jurisdiction to hear cases concerning abortion or gun rights, then it effectively would authorize state legislative supremacy. All of the unsettled questions about the nature of precedent and what constitutes binding law would descend into uncertainty and chaos

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[178] *See* Caroline Kitchener & Devlin Barrett, *Antiabortion Lawmakers Want to Block Patients From Crossing State Lines*, WASH. POST (June 30, 2022); Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2309 (2022) (Kavanaugh, J., concurring) (suggesting that if a state tried to "bar a resident of that State from traveling to another State to obtain an abortion" such a prohibition would be clearly unconstitutional).

[179] Sometimes scholars do not differentiate proactive jurisdiction stripping with respect to constitutional review of state laws versus federal law. *See, e.g.*, Doerfler & Moyn, *supra* note 2, at 1725–28. This imprecision obscures important differences. Our argument here pertains only to review of state laws. As we explain in the following section, the analysis becomes more nuanced when only federal law is at issue.

[180] A complete jurisdiction strip with respect to a federal statute presents a different question altogether, as we have mentioned with respect to the Portal-to-Portal Act and as we discuss in the following section.

as states could disregard any possibility of constitutional litigation and legislate with complete abandon. Those consequences seem sufficiently chaotic and unpredictable that it would be hard for Congress to feel confident that the jurisdiction strip would produce its desired results.

Second, Congress might engage in adventurous attempts to create some sort of federal-court review but not in what Congress perceives to be a hostile Supreme Court. Perhaps Congress might try to vest final decisionmaking authority in an existing lower federal court. But imagine an even more blatant effort, such as creating a lower court whose sole purpose is protecting abortion rights. In passing, Professor Amar hypothesized an "Abortion Court."[181]

How would that work? One model is exemplified by the statute considered in *Yakus* as well as the Foreign Intelligence Surveillance Act (FISA). Under these statutory frameworks, Congress creates a new lower court (whose purpose is clear) but one populated by existing Article III judges. The advantage here is not requiring new appointments and confirmations. It prevents expanding the Article III judiciary and, critically, allows Congress to shut the court down without controversially eliminating any judgeships because the court's members could just go back to their day jobs.

Those statutes gave the Chief Justice the power to appoint the judges.[182] That option would work only if the Chief Justice, but not the Court as a whole, were ideologically friendly to Congress and willing to use his appointment power to skew expected case outcomes by staffing the court with at least a majority of judges favorable to abortion rights.[183] Congress would have no guarantee that even an ideologically friendly Chief Justice would use his power this way. Moreover, depending on contingent events, the Chief Justice might eventually be replaced by a new Chief hostile to the rights Congress sought to protect.

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[181] Amar, *supra* note 46, at 258 (arguing that the power to structure which federal court reviews federal questions "comprehends the power to create an unreviewable Article III Tax Court—or an Abortion Court" but conceding that such "power to choose *which* Article III judge shall have the last word can be abused by Congress"); *see also* Paulsen, *supra* note 8, at 61.

[182] In the case of the Emergency Court of Appeals under the Emergency Price Control Act, this meant that the court was "staffed with New Deal judges who practically never set a regulation aside." James R. Conde & Michael S. Greve, Yakus *and the Administrative State*, 42 HARV. J. L. & PUB. POL'Y 807, 830 (2019). This seems unsurprising, given that Chief Justice Stone was widely regarded as a sympathetic New Dealer.

[183] There is reason to think that a Chief Justice would consider ideology in making appointments to a specialized court like this one. Chief Justice Roberts has been criticized for choosing almost exclusively Republican-appointed judges for the FISA Court. *See* Charlie Savage, *Roberts's Picks Reshaping Secret Surveillance Court*, N.Y. TIMES, Jul. 25, 2013, https://www.nytimes.com/2013/07/26/us/politics/robertss-picks-reshaping-secret-surveillance-court.html?ref=charliesavage.

Another approach would involve creating a new court with entirely new judges selected by the President and confirmed by the Senate. Assuming the political branches were on the same page, the President and Senate could choose judges who they expect to rule favorably on abortion rights. But political majorities are fleeting. Depending on future elections, the new court eventually could become populated with judges nominated and confirmed by the opposition. In other words, the new court quickly could become weaponized—in the same way that today's progressive critics argue the Supreme Court has been.

These machinations to create a new court might succeed in the short term. An Abortion Court, whether existing as a freestanding court or a temporary court staffed with Article III judges, could restore protections under *Roe* and *Casey* or even protect reproductive rights more rigorously than the Supreme Court ever did. The constitutionality of giving a lower federal court final authority remains unresolved, [184] but leave such legal questions aside. Even if the new court passed constitutional muster, its efficacy would be tethered to fleeting contingencies—who occupies the Chief Justice's seat and who controls the White House and Congress. If anything, the most creative approach to reallocating federal jurisdiction is consistent with our central thesis developed below—that, at best, a jurisdiction strip can buy time.

B. Federal Laws

Thus far we have considered the ultimate futility of jurisdiction stripping with respect to constitutional questions that arise through adjudication of state law. We shift focus now to consider how jurisdiction stripping can play out in several ways in adjudicating federal statutes—questions of pure statutory interpretation as well as cases concerning the constitutionality of federal statutes. Here, Congress has more options at its disposal.

We consider three basic scenarios and the ways that Congress can operate within each: first, jurisdiction stripping with respect to purely statutory questions; second, stripping lower federal courts of jurisdiction when they (rather than the Supreme Court) are the perceived problem that Congress seeks to solve; and, finally, using jurisdiction stripping to protect unique federal policies or regimes from constitutional challenge.

Walking through these scenarios reveals that Congress can sometimes exercise its power over federal courts' jurisdiction to achieve its substantive goals. Congress has used the tools of jurisdiction to influence different policies, and sometimes it has done so adroitly. Scholars have shown how Congress relied on an array of tools, including jurisdiction stripping, to empower a nascent labor movement. Other scholars have noted the way that Congress successfully implemented price controls to prevent inflation during

[184] *See supra* note 124.

World War II. But we suggest that they have drawn the wrong conclusions from those experiences.

We bring together these various examples and argue that they reveal remarkably consistent lessons. They don't, however, support the traditional understanding of jurisdiction stripping as a broad power that Congress can use to paralyze courts and directly to compel particular policy results. Rather, the common thread is that Congress can direct cases into some courts and away from others to force courts' hands or to buy time—at best delaying, but not forever precluding, federal courts' involvement in a particular issue or set of questions. And even then, jurisdiction stripping doesn't always succeed as an indirect policy tool. Thus, Congressional attempts to use jurisdiction stripping to protect federal statutes reveal some nuanced and qualified success stories, but they also show the limits—and, sometimes, failures—of jurisdiction stripping as a strategy.

1. Pure Statutory Interpretation

We begin with jurisdiction stripping as to statutory questions. Congress probably can evade *all* judicial review of federal-law questions that don't raise a constitutional issue—that is, pure statutory questions. Imagine that Congress, seeking to protect the Environmental Protection Agency's efforts to regulate carbon emissions, denies the Supreme Court jurisdiction over administrative challenges to EPA regulations concerning greenhouse gases. That move would have prevented *West Virginia v. EPA*,[185] in which the Court invalidated the EPA's Clean Power Plan rule. At first glance, that jurisdiction strip appears successful. But on closer analysis, jurisdiction stripping of this ilk doesn't achieve much, if anything, that Congress could not accomplish directly through substantive legislation.

Start with the logistics. Although Congress legislates against a background assumption that state and federal courts have concurrent jurisdiction over federal questions,[186] it can choose to vest federal courts with exclusive jurisdiction on federal statutory questions.[187] So, when enacting a federal statute, Congress may deprive state courts of jurisdiction. (Note the contrast with respect to state-law questions, over which Congress may

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[185] 142 S. Ct. 2587 (2022).

[186] *See, e.g.*, Claflin v. Houseman, 93 U.S. 130, 136-37 (1876) (articulating presumption of concurrent jurisdiction); *see also* Tafflin v. Levitt, 493 U.S. 455, 458–59 (1990) (noting the "deeply rooted presumption in favor of concurrent state court jurisdiction" to adjudicate federal questions and collecting authorities).

[187] *See, e.g.*, Mims v. Arrow Fin. Servs., LLC, 565 U.S. 368, 378 (2012) ("The presumption of concurrent state-court jurisdiction . . . can be overcome 'by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests.'") (quoting Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 478 (1981)). Iconic examples include federal securities laws and patent laws.

not deprive state courts of jurisdiction.) And then the familiar architecture of Article III comes into play. Congress has plenary authority to strip lower federal courts of jurisdiction and, under the Exceptions Clause, to prevent the Supreme Court from hearing the matter.[188]

On rare occasions, Congress has taken full advantage of these jurisdictional levers. Most famously, the Portal-to-Portal Act, which the Second Circuit examined extensively in *Battaglia*,[189] changed the underlying labor laws, effectively overruling the Supreme Court's more worker-friendly interpretations of the Fair Labor Standards Act (FLSA).[190] Furthermore, Congress stripped all courts of jurisdiction to hear any claims based on the Supreme Court's earlier decisions. These provisions, taken together, meant that workers who had sued for unpaid wages and overtime (relying on Supreme Court precedent), but who had not secured a final judgment by the time Congress passed the Portal-to-Portal Act, were out of luck.

Congress's zeal to protect the titans of industry at workers' expense was striking in its comprehensiveness, but the jurisdiction strip didn't add anything. Congress always has authority to change the underlying substantive law.[191] Moreover, even though such changes normally apply prospectively only, Congress may apply them to past conduct without violating due process.[192] In the case of the Portal-to-Portal Act, the end result for the workers may seem unfair, but Congress had sufficient legislative power to impose those new substantive standards and even to make them retroactive.

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[188] *See supra* Section I.C.

[189] Battaglia v. Gen. Motors Corp., 169 F.2d 254 (2d Cir. 1948).

[190] *See id*. at 255 (discussing *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), which determined that previously uncompensated activities were entitled to compensation and overtime under the FLSA).

[191] *See, e.g.*, Bank Markazi v. Peterson, 578 U.S. 212, 230-32 (2016) (holding that Congress does not impinge on the judicial power when it creates a "new legal standard" that courts must apply); Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421, 431-32 (1855) (finding that a change in the underlying substantive law, when applied prospectively, did not impermissibly annul a final judgment); *see also* Federalist 81 (Hamilton) ("A legislature without exceeding its province cannot reverse a determination once made, in a particular case; though it may prescribe a new rule for future cases.").

[192] *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), is the modern case most on point. It noted that "[a] statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment, or upsets expectations based in prior law." *Id*. at 269 (quoting and citing Republic Nat. Bank of Miami v. United States, 506 U.S. 80, 100 (1992) (Thomas, J., concurring in part and concurring in judgment)). Moreover *Landgraf* observed that Congress may overcome the presumption against retroactivity through a clear statement of its intent. *See id*. at 270 ("Since the early days of this Court, we have declined to give retroactive effect to statutes burdening private rights unless Congress had made clear its intent.").

Professor Fallon has succinctly summarized what he terms the "*Battaglia* principle": "[W]hen Congress can validly extinguish a substantive right, it can also strip courts of jurisdiction to enforce the right that it has abolished."[193] Note what this meant as a practical matter in *Battaglia* itself. Once Congress had changed the substantive law to abolish certain rights that the Supreme Court had read into the FLSA, the jurisdiction strip—that is, Congress's withdrawal of jurisdiction from all state and federal courts to enforce the extinguished rights—added nothing.[194]

The same basic scenario played out in *Patchak v. Zinke*.[195] At the behest of a Native American tribe in Michigan, Congress changed the underlying substantive law (albeit only as it applied to that tribe), allowing the Secretary of the Interior to take certain tribal land into trust. That move, in turn, allowed the tribe to build a casino on the property.[196] In addition to changing the substantive law, Congress—according to the plurality—stripped federal courts of jurisdiction to hear any claims related to the land in question.[197] As with the Portal-to-Portal Act, though, the substantive part of the legislation already accomplished Congress's goal. As Justice Breyer aptly summarized, the jurisdiction strip just "gilds the lily."[198]

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[193] Fallon, *supra* note 23, at 1104.

[194] In *Battaglia*, the Second Circuit did probe whether the jurisdiction strip had the effect of violating workers' Due Process rights under the Fifth Amendment. So, the court did end up evaluating the constitutionality of the underlying substantive change in the law. The *Battaglia* principle undermines the widely shared intuition that a comprehensive jurisdiction strip of all federal and state courts "would undoubtedly have a major effect in allowing Congress and state legislatures to insulate their preferences and judgments of constitutional validity from judicial review." FINAL REPORT, *supra* note 8, at 161.

[195] 138 S. Ct. 897 (2018). Technically this applied only to federal courts. But because it relied on the federal government's waiver of sovereign immunity, the suit never could have proceeded in state court.

[196] *Id*. at 903 & n.1.

[197] The language of the supposed jurisdiction strip is frustratingly imprecise. It provides: "Notwithstanding any other provision of law, an action (including an action pending in a Federal court as of the date of enactment of this Act) relating to the land described [herein] shall not be filed or maintained in a Federal court and shall be promptly dismissed." The plurality found that it stripped federal courts of jurisdiction. *Id*. at 905-06. The dissent disagreed. *See id*. at 918–20 (Roberts, C.J., dissenting). Justices Ginsburg and Sotomayor would have avoided the hard jurisdictional question by finding that Congress had reasserted the federal government's sovereign immunity. *See id*. at 912 (Ginsburg, J., concurring in the judgment).

[198] *Id*. at 911 (Breyer, J., concurring); *see also id*. (noting that "the jurisdictional part . . . does no more than provide an alternative legal standard for courts to apply that seeks the same real-world result as does the [substantive] part").

So too with our example from the beginning of this discussion. Congress could strip the Court of jurisdiction over EPA cases involving carbon emissions. But Congress just as easily could change the substantive law to make clear that EPA has authority to regulate carbon. Jurisdiction stripping is just a more complex way to accomplish indirectly what Congress could do directly. If anything, jurisdiction stripping would be less effective. If judicial review of EPA decisions about carbon emissions were eliminated, a new administration could simply repeal any prior regulations limiting emissions. And even if the new administration's repeal was arbitrary and capricious or otherwise violated administrative-law principles, opponents of the repeal could not challenge the administration's decision in court.

Shortly we will discuss what happens if Congress does not have substantive legislative power to enact a substantive provision—the flip side of the "*Battaglia* principle." On a matter of pure statutory interpretation, though, a jurisdiction strip might, at most, clarify Congress's substantive intent. But a jurisdiction strip on its own accomplishes hardly anything.

2. Constitutional Issues

What about when Congress seeks to use jurisdiction stripping to limit review in cases that involve constitutional, and not merely statutory, questions? Here, the analysis depends on what Congress's goals are: is it merely trying to get around hostile lower courts, or is it concerned with protecting a federal law or program from the Supreme Court (or the Article III judiciary more generally)?

(a) Inferior Federal Courts as the Problem

Start with situations where Congress is merely trying to get around troublesome inferior federal courts. This situation can illustrate the subtle way that Congress can use jurisdiction stripping effectively. Here, the Supreme Court itself doesn't present an actual or potential problem, so Congress isn't trying to stymie Supreme Court review and, in fact, usually leaves open the possibility that cases eventually could end up there. A couple of examples from the 1930s illustrate how this works. In both examples, Congress faced constitutional constraints that prevented it from simply changing the underlying rights but nonetheless found a way to manipulate jurisdiction in order to stop judicial meddling.

First, consider the Norris LaGuardia Act. At the turn of the twentieth century, a nascent labor movement had trouble gaining traction, in large part because federal courts issued sweeping labor injunctions that applied to enormous swaths of people. Moreover, the injunctions did not simply prevent picketing or strikes but often covered every aspect

of a union's activities.[199] At times, this meant that workers could not even vote in union elections.[200] These sweeping injunctions defied core tenets of equity—they applied far beyond the specific harm that employers alleged, covered numerous people who were not parties to the lawsuits,[201] and were based on cookie-cutter complaints rather than specific allegations of harm.[202] Temporary restraining orders, which federal courts had begun to issue as a matter of course rather than as an exceptional remedy,[203] had especially devastating effects by snuffing out strikes. At that point, the harm to workers was done.[204] Getting to trial, to say nothing of seeking appellate review, was beside the point.[205] Lower federal courts, in Congress's estimation, had thus become the central problem.

But simply changing the law faced constitutional obstacles. In *Truax v. Corrigan*,[206] the Court had held that changing state law to permit union conduct including picketing and promoting a boycott of a business, or to deny the business owner the right to obtain injunctive relief against such conduct, was unconstitutional.[207] Congress's solution was the Norris-LaGuardia Act (NLGA) in 1932.[208] Among other things, it created new sub-

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[199] *See, e.g.*, Jon R. Kerian, *Injunctions in Labor Disputes: The History of the Norris-LaGuardia Act*, 37 N.D. L. REV. 49, 51–52 (1961); Luke P. Norris, *Labor and the Origins of Civil Procedure*, 92 N.Y.U. L. REV. 462, 485 (2017).

[200] *See* Norris, *supra* note 199, at 485

[201] *See id.* (collecting examples).

[202] *See* FELIX FRANKFURTER & NATHAN GREENE, THE LABOR INJUNCTION 487 (1963) (contending that "the extraordinary remedy of injunction has become the ordinary legal remedy, almost the sole remedy").

[203] Kerian, *supra* note 199, at 52.

[204] *See id.* at 50–51 ("The aim of employers basically was not to secure a permanent restraining order but to secure a temporary restraining order. A temporary order was the most [important] of all injunctive writs because strikes are usually won or lost within a few days and they were issued as a matter of course.").

[205] *See id.* at 52 ("Appeals were rarely brought on injunction. Once the injunction was granted, the strikers' ferver [sic] was abated and the strike was lost.").

[206] 257 U.S. 312 (1921).

[207] *Id.* at 330–34. Specifically, the Court held that changing the substantive law to completely deny any remedies for the challenged conduct would violate due process, *id.* at 330, while simply denying injunctive relief when it was otherwise available would violate equal protection, *id.* at 334–35.

[208] 29 U.S.C. §§ 101–115.

stantive law, such as outlawing "yellow dog" contracts that prohibited workers from joining a union.[209] But it also stripped all lower federal courts of jurisdiction to issue injunctions except in narrowly defined circumstances.[210] Congress chose to "phrase the [NLGA] in jurisdictional terms to avoid an apparent conflict" with *Truax*.[211]

The NLGA's jurisdiction strip worked as its proponents hoped it would.[212] In large measure it prevented federal courts from granting labor injunctions, which had had a devastating effect on union organizing. Time proved critical. It created an opportunity for workers and unions to build a movement. Effective social organizing, including widespread labor protests in the summer of 1934, ultimately spurred Congress to pass the transformative National Labor Relations Act in 1935.[213] Though the NLGA left open the possibility that the Supreme Court could hear a case, the breathing room it created was most essential. By 1938, when the Supreme Court addressed the constitutionality of the jurisdiction strip,[214] "*Truax* was already discredited," meaning that the NLGA "merely ha[d] the effect of accomplishing through jurisdiction what Congress could do through substantive rulemaking."[215]

In a similar vein, Congress passed the Tax Injunction Act of 1937 in response to overly hasty district court injunctions. Here again, large corporations had turned to federal courts, which they perceived as sympathetic to their interests,[216] and often persuaded

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[209] 29 U.S.C. § 103.

[210] 29 U.S.C. § 107 (prohibiting a "court of the United States" from issuing such injunctions except under narrow circumstances); *see also* 29 U.S.C. § 113(d) (defining "court of the United States" to mean inferior federal courts but not the Supreme Court).

[211] Eisenberg, *supra* note 22, at 528–29.

[212] *See generally* Herbert N. Monkemeyer, *Five Years of the Norris-LaGuardia Act*, 2 MO. L. REV. 1 (1937) (collecting cases demonstrating marked shift in how frequently courts issued labor injunctions).

[213] *See* Michael Goldfield, *Worker Insurgency, Radical Organization, and New Deal Labor Legislation*, 83 AM. POL. SCI. REV. 1257, 1270–77 (1989) ("The most reasonable hypothesis to account for the passage of the NLRA is that labor militancy, catapulted into national prominence by the 1934 strikes and the political response to this movement, paved the way for the passage of the act.")

[214] Lauf v. E.G. Shinner & Co., 303 U.S. 323 (1938).

[215] Eisenberg, *supra* note 22, at 529.

[216] *See, e.g.*, Fulton Mkt. Cold Storage Co. v. Cullerton, 582 F.2d 1071, 1074–75 (7th Cir. 1978) (observing that Congress, as expressed in the Senate Report, feared that corporations could invoke diversity jurisdiction and persuade a federal court to enjoin the tax, whereas state residents had no such recourse) (citing and quoting S. Rep. No. 1035, 75th Cong., 1st Sess. 1–2 (1937).

those courts to enjoin certain taxes as unconstitutional.[217] Congress feared that these injunctions had created financial instability for states and localities.[218] Congress's jurisdictional and remedial response proved effective, not by changing the substantive law or circumventing ultimate Supreme Court review, but by buying time. Consider several interlocking features of the Tax Injunction Act's jurisdiction strip.

As with the labor injunctions that spurred Congress to pass the Norris-LaGuardia Act, federal courts had tipped the scales in favor of big businesses by ignoring well-settled principles of equity, which permit relief such as injunctions only when remedies at law are inadequate.[219] That is, federal courts were jumping the gun, especially when challengers hadn't demonstrated the inadequacy of legal remedies in state court. As a result, these injunctions had undermined state and local governments' financial stability. By taking away district courts' power to enjoin the payment of taxes, the Tax Injunction Act effectively compelled entities to pay a tax and only then challenge it as unconstitutional (in a refund suit or a damages action under § 1983).[220] So, Congress sought to foster financial stability for states and localities by buying time—taking away federal courts' injunctive power, except in rare cases.

Both of these examples show how Congress used its jurisdiction stripping power to prevent lower federal courts from undermining important policies through over-aggressive injunctions. In the labor context, prohibiting those injunctions essentially stymied

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[217] *See, e.g.*, Fair Assessment in Real Est. Ass'n, Inc. v. McNary, 454 U.S. 100, 109 (1981) (observing that before Congress passed the Act, many federal courts had found that "available state remedies did not adequately protect the federal rights"); Note, *Federal Court Interference with the Assessment and Collection of State Taxes*, 59 Harv. L. Rev. 780, 782–83 (1946) (noting that "prior to 1937, jurisdiction for injunctive relief was freely assumed by federal courts, readily amenable to persuasion that the state remedy was inadequate" and collecting cases).

[218] *See* Perez v. Ledesma, 401 U.S. 82, 128 n.17 (1971) (Brennan, J., concurring in part and dissenting in part) (explaining this rationale with reference to legislative history of the Tax Injunction Act); *see also* Frederick C. Lowinger, Note*, The Tax Injunction Act and Suits for Monetary Relief*, 46 U. CHI. L. REV. 736, 741–44 (1979) (detailing Congress's concern that federal court injunctions could disrupt and impede collection of state and local taxes).

[219] *See* Lowinger, *supra* note 218, at 744 ("What may have prompted Congress to act, despite the limitations on federal equity jurisdiction already recognized by courts, was the narrow construction given by the federal courts to 'adequate' remedies at law and their resulting failure to cut back sufficiently on tax-injunction suits.").

[220] The Tax Injunction Act provides: "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341.

employers' capacity to thwart labor organizing.[221] The precise mechanics of the Tax Injunction Act are different. Congress remained attuned to ensuring that taxpayers could challenge the constitutionality of taxes, but it tweaked the sequencing, largely ensuring a pay-before-you-litigate policy to protect state and local financial stability.[222] Moreover, it left the Supreme Court with the final word on the taxes' constitutionality.

(b) Protecting Federal Laws and Programs

Finally, Congress might use jurisdiction stripping to try to protect federal laws or regimes against constitutional challenges. Here, Congress sees the danger as coming from the Supreme Court, or the Article III judiciary as a whole, and not merely the lower federal courts. This particular form of jurisdiction stripping has captured the imagination of some scholars in recent years, who urge that it offers a uniquely effective way for progressives to pursue their priorities and circumvent a hostile Supreme Court.[223]

The jurisprudential building blocks, which we mentioned earlier,[224] turn on the idea that Congress may deprive state courts of jurisdiction to adjudicate federal statutes; that Congress has plenary authority to deprive inferior federal courts of jurisdiction; and that, through its plenary power under the Exceptions Clause, Congress may deprive the Supreme Court of jurisdiction, too. This sort of complete jurisdiction strip would constitute the most extreme exercise of Congress's power. Congress also has other options, including channeling cases into an administrative agency, an existing lower court, or a specially created lower court. In other words, Congress can mix and match these options, creating a bespoke system (or none at all) for constitutional review of federal statutes.

We contend that, whichever option Congress chooses, it is unlikely to succeed in forever insulating a federal law or program from constitutional scrutiny. We have two overarching points. First, we look to historical examples of jurisdiction stripping and find that, even where Congress apparently succeeded in its goals by using jurisdiction stripping, it did not preclude Article III review entirely. Second, we argue that, whatever the limits of Congress's constitutional authority, a jurisdiction strip is not a viable long-term strategy because most federal laws and programs ultimately need courts to cooperate if those laws are going to have any force.

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[221] In theory, it could have shifted litigation to state courts. *See* S. Rep. No. 72-163, at 17 (1932) (criticizing federal courts for "prohibit[ing] laboring men from litigating in State courts, under the law of the State, to sustain what they claim to be their rights"). And, again in theory, Supreme Court review remained available.

[222] *See, e.g.*, Lowinger, *supra* note 218, at 743, 761 (noting pay-before-you-litigate sequencing of challenges).

[223] *See supra* Section I.D.

[224] *See supra* Section I.C.

Lessons from history. At first blush, history justifies enthusiasm for jurisdiction stripping. Congress used it to protect Military Reconstruction of the South after the Civil War and a massive federal takeover of the American economy during World War II. We agree that these experiments with jurisdiction stripping count as successes, but only in a limited and qualified way. Other scholars, we contend, have drawn the wrong lessons from these episodes, which don't reveal an unbridled authority to evade judicial scrutiny.

We consider three examples—two successful attempts at jurisdiction stripping and one failure. Together they suggest the subtle and indirect ways that jurisdiction stripping works and begin to illustrate why the robust version—forever wresting interpretive control from the courts—won't.

The first, and probably most famous, success story comes from *McCardle*. In laying out the Supreme Court's endorsement of the view that Congress has plenary power to control both lower courts' and the Supreme Court's jurisdiction, we recounted the twists and turns of *McCardle*. For all of the complications—including the case's multiple trips to the Supreme Court and the irony that someone like McCardle would invoke the new 1867 habeas statute to attack the Reconstruction project—the jurisdiction strip was straightforward. Congress made clear that the Supreme Court's jurisdiction to hear appeals pursuant to the new 1867 statute was repealed.[225]

The Supreme Court famously acquiesced in that jurisdiction strip, which some members of Congress had openly described as an attempt to prevent the Court from opining on the constitutionality of Reconstruction.[226] Thus, Congress staved off McCardle's constitutional challenge. The ambitious Reconstruction project continued.

McCardle ranks among the most consequential Supreme Court decisions of all time. The Court broadly endorsed Congress's jurisdiction stripping power under Article III, and it showed tremendous deference to the political branches during a precarious period when the future of the United States hung in the balance. From the perspective of whether Congress succeeded in achieving its policy goals through the jurisdiction strip, most people would agree that it did.

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[225] Section 2 of the 1868 Repealer Act provided that to the extent the 1867 habeas statute "authorized an appeal from the judgment of the Circuit Court to the Supreme Court of the United States, or the exercise of any such jurisdiction by said Supreme Court, on appeals which have been, or may hereafter be taken, be, and the same is hereby repealed."

[226] *See* Van Alstyne, *supra* note 40, at 239 (quoting Representative James Wilson of Iowa as expressing fear "that the McCardle case was to be made use of to enable a majority of that [Supreme] Court to determine the invalidity and unconstitutionality of the reconstruction laws of Congress"); *see also* Ex parte McCardle, 74 U.S. 506, 514 (1869) ("We are not at liberty to inquire into the motives of the legislature.").

We do, too—but not for the reasons most assume. Congress's jurisdiction strip did not build an impenetrable jurisdictional fortress around the Reconstruction efforts. Instead, the Court in *McCardle* cryptically suggested that someone in McCardle's shoes could bring a habeas action pursuant to the original Judiciary Act of 1789, rather than the repealed 1867 statute.[227] The Court, in other words, took pains to emphasize that Congress had not closed off all avenues of review. It confirmed as much in late 1869 when it heard the case of Edward Yerger, another unreconstructed newspaper publisher from Vicksburg, Mississippi.[228]

The jurisdiction strip in *McCardle* thus did not take the Court out of the picture entirely. Instead, it succeeded as a way for Congress buy time—about a year and a half—before the Supreme Court decided *Ex parte Yerger*. In Part III, we return to what *McCardle* made possible during the Reconstruction period. For now, though, the point is that it for all that *McCardle* rightly stands for today, it's easy to overread the case as sustaining Congress's limitless power under the Exceptions Clause. No one can say with certainty what the Supreme Court would have done if Congress had truly closed off all avenues of review. But as Professors Fallon and Monaghan underscore, even in the most famous endorsement of the view that Congress has broad authority under the Exceptions Clause, the Court knew that constitutional review was still possible.[229] Moreover, in case after case since *McCardle*, the Court reminds Congress that leaving even a sliver of judicial review available is important.[230]

The second qualified success story stems from the Second World War. Congress successfully used its power over federal courts' jurisdiction to help entrench a price control regime. With the United States government infusing the economy with massive amounts of wartime spending (and deficits), the threat of inflation loomed large. In order to prevent inflation and related price speculation, which Congress feared could have

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[227] *See McCardle*, 74 U.S. at 515 (noting that the Repealer Act of 1868 "does not affect the jurisdiction which was previously exercised").

[228] *See* Ex parte Yerger, 75 U.S. 85 (1869).

[229] *See* Fallon, *supra* note 23, at 1081 (arguing against the "intractable insistence that a single sentence in *McCardle* definitively resolves a question that that case did not present—namely, whether Congress could strip all jurisdiction to entertain constitutional challenges"); Monaghan, *supra* note 23, at 18 (arguing that cases like *McCardle* "are simply unable to bear the weight put on them"); *see also* Hart, *supra* note 42, at 1364 ("A: You read the *McCardle* case for all it might be worth rather than the least it has to be worth, don't you?").

[230] *See* Felker v. Turpin, 518 U.S. 651, 660–62 (1996) (finding Congress left open an avenue for review, thus avoiding a constitutional question about the outer boundaries of Congress's Article III powers); Hamdan v. Rumsfeld, 548 U.S. 557, 575–76 (2006) (avoiding "grave" constitutional question by interpreting statute not to preclude all review); *see also* FINAL REPORT, *supra* note 8, at 167 (noting historical constitutional importance of leaving some Supreme Court review available).

destabilized the national economy in wartime, it enacted price-control mechanisms. It also crafted a unique jurisdictional arrangement for any challenges to maximum prices. If the jurisdiction strip in *McCardle* was straightforward—repealing the 1867 habeas statute and stripping the Supreme Court of jurisdiction—Congress's jurisdictional innovation in the price control context looked more like a Rube Goldberg machine.

To those who view jurisdiction stripping as an effective way to protect a federal regime against judicial review, the Emergency Price Control Act—which led to the Supreme Court's decision in *Yakus*—comes as close as one can imagine. Even here, it doesn't vindicate the idea that Congress can avoid judicial review altogether.

The Emergency Price Control Act created a bespoke method of judicial review that put a heavy thumb on the scales in favor of the government against any constitutional challenges. Someone subject to a maximum price could file an objection with the administrative agency tasked with setting those prices. If dissatisfied with the result, the person could then appeal the administrative decision to a new Article III court that Congress created—the Emergency Court of Appeals.[231] Importantly, Congress prohibited the Emergency Court of Appeals from issuing temporary or interlocutory relief. Moreover, permanent injunctions couldn't take effect for at least thirty days, and (if the aggrieved party sought certiorari) not until final disposition by the Supreme Court. The Emergency Court of Appeals shows Congress at its most innovative and aggressive. Congress created it "in order to avoid hostile courts imposing delays and jeopardizing the overall implementation of the emergency price control program."[232] In other words, as with the Norris-LaGuardia Act and the Tax Injunction Act, Congress intentionally steered cases away from the "problematic" courts.

Congress included another jurisdictional twist, creating an enormous incentive for those subject to price controls simply to comply. Someone could face criminal prosecution in federal or state court for charging prices above those set by the Administrator. But during those prosecutions, a defendant who had failed to challenge the constitutionality of the maximum prices through the new mechanism (before the Administrator and the Emergency Court of Appeals, decisions of which were reviewable by the Supreme Court) was barred from asserting a defense that the prices were unconstitutionally confiscatory.[233]

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[231] Congress did not create new judgeships. Instead, it directed the Chief Justice to appoint district and circuit judges to this new court. *See* Theodore W. Ruger, *The Judicial Appointment Power of the Chief Justice*, 7 U. PA. J. CONST. L. 341, 363 (2004).

[232] James R. Elkins, *The Temporary Emergency Court of Appeals: A Study in the Abdication of Judicial Responsibility*, 1978 DUKE L.J. 113, 118 n.17 (1978).

[233] Emergency Price Control Act of 1942, Pub L. No. 77-421, §§ 204(d), 205(a)–(f); *see also* Yakus v. United States, 321 U.S. 414, 467 (1944) (Rutledge, J., dissenting) ("The crux of this case

The Supreme Court upheld the constitutionality of the jurisdictional innovations—from the administrative exhaustion requirement to the specialized court of appeals to the bifurcation of federal defenses and criminal prosecutions.[234] From a substantive policy perspective, economists have raised important questions about whether the price controls did long-term harm. They basically agree, though, that in the short run the controls succeeded in keeping inflation down.[235] From a legal perspective, some commentators have offered unsparing criticism of what they contend was perfunctory judicial review that allowed the government to trample on individual rights.[236]

We don't necessarily endorse that perspective. But to the extent that this criticism has bite, it's because Congress's jurisdictional tweaking worked. One of the post-mortems of this entire scheme found that the Emergency Court of Appeals set aside only 30 (of nearly 400) decisions by the Price Control Administrator.[237] Perhaps even more importantly, from our viewpoint, Congress succeeded in directing cases away from "hostile" courts—preventing those courts from delaying the price control scheme or granting provisional relief that could have hobbled the endeavor.

For all that Congress accomplished through these jurisdictional innovations, notice what it *didn't* try to do—eliminate Article III review altogether. The Emergency Price Control Act provided for review as a matter of right in the new Emergency Court of Appeals and authorized the Supreme Court to review these decisions by way of its usual certiorari jurisdiction. Thus, any challenges to the validity of price-control regulations had to be resolved up front, rather than down the line after someone had violated the rules and was being prosecuted. That could have significant consequences for *how* those issues might be resolved, as we will discuss later. But this is a far cry from outright denying Article III review.[238] As in *McCardle*, scholars can grapple with counterfactual questions.

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comes . . . in the question whether Congress can confer jurisdiction upon federal and state courts in the enforcement proceedings, more particularly the criminal suit, and at the same time deny them 'jurisdiction or power to consider the validity' of the regulations for which enforcement is thus sought.").

[234] *See Yakus*, 321 U.S. 414; Lockerty v. Phillips, 319 U.S. 182 (1943).

[235] *See, e.g.*, Paul Evans, *The Effects of General Price Controls in the United States during World War II*, 90 J. POL. ECON. 944, 955 (1982) (arguing that "price controls were effective" insofar as "the inflation rate actually fell after 1943," despite the fact that "government purchases and the money supply were surging").

[236] *See* Conde & Greve, *supra* note 182.

[237] Harvey C. Mansfield et al., A Short History of OPA (1946). [NB: Cross reference this against n.134 in Conde & Greve. Some dates aren't adding up.]

[238] Some might argue that as a practical matter, Article III review didn't amount to much. The Emergency Court of Appeals was staffed with New Deal judges hand selected by Chief Justice Stone,

Would the Supreme Court have acquiesced if Congress had vested final decisionmaking authority in a politically accountable agency? Or if the Emergency Court of Appeals had been the only Article III court with jurisdiction to review those agency decisions? Maybe the Supreme Court would have stood idly by, but history, including the myriad ways that courts have nimbly dodged complete jurisdiction strips over the centuries, strongly suggests otherwise.[239]

Reconstruction and the Emergency Price Control Act illustrate, to our mind, the best-case scenario when Congress actively tries to stack the jurisdictional deck by outright depriving the Supreme Court of jurisdiction or engineering a review mechanism designed to uphold the federal program. Though both instances helped Congress effectuate its goals, for reasons we will discuss in the next Part, neither supports the notion that Congress can evade Article III review indefinitely. Nor do these examples create a foolproof blueprint for how Congress can protect federal programs, even on a short-term basis.

The clearest counterexample comes from the beginning of the current century amidst the Bush administration's so-called War on Terror. Congress had established Combatant Status Review Tribunals (CSRTs), which gave suspected terrorists detained in Guantanamo Bay, Cuba, limited opportunities to challenge their detention.[240] Several detainees sought habeas relief instead. Congress quickly intervened to strip all federal courts of jurisdiction to hear detainees' habeas petitions, making the CSRTs the exclusive form of relief.

The ensuing litigation demonstrated that jurisdiction stripping is not a trump card that Congress can play at will. For starters, during the first round of litigation, the Court, as it had in *McCardle* and *Yerger*, construed the jurisdiction strip narrowly—as applying only to future cases, not those already pending—in order to avoid a "grave" constitutional question.[241] Congress tried again and made clear that the jurisdiction strip applied to pending cases as well.[242] The second round of litigation thus teed up the question that the Court initially had avoided—whether Congress had unconstitutionally suspended

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as provided for the Emergency Price Control Act. Moreover, when Congress passed the Act in 1942, eight of the nine members of the Supreme Court had been appointed by President Roosevelt. But the fact remains that Congress did not attempt to oust all Article III courts of jurisdiction.

[239] Indeed, in the case most analogous to the *Yakus* counterfactual—permitting criminal prosecution for violation of an administrative order without *any* possibility of Article III review of the underlying order—the Court found the scheme impermissible. *See* United States v. Mendoza-Lopez, 481 U.S. 828, 837–39 (1987).

[240] Hamdan v. Rumseld, 548 U.S. 557, 572–74 (2006).

[241] *Id*. at 575.

[242] *See* Boumediene v. Bush, 553 U.S. 723 (2008); Military Commissions Act of 2006 § 7, codified at 28 U.S.C. § 2241(e).

the writ of habeas corpus and then (à la *Klein*) attempted to insulate that unconstitutional action through a jurisdiction strip. *Boumediene* determined that Congress had done both. And thus for only the second time in the country's history, the Court found the jurisdiction strip invalid.[243] Thus, when the Court really wants to weigh in on the constitutionality of a federal program, it can find a way.

The need for courts. History, then, shows that jurisdiction stripping is not a foolproof method for precluding constitutional challenges to a federal program. But assume for purposes of argument that the courts would accede to a jurisdiction strip broader than those in *McCardle* and *Yakus* or even *Boumediene*—one that eliminated any possibility of Article III review. Even here, we contend, jurisdiction stripping simply won't provide a long-term solution for guaranteeing the success of a federal law or program.

To have any real-world significance, a federal law or program ultimately will need to rely on courts to enforce its guarantees. Jurisdiction stripping's proponents, we argue, have not recognized that taking courts out of the picture entirely simply won't work. Courts are ultimately essential.

Understanding this point requires working through some examples. Consider first a hypothetical federal law, suggested in passing by Sprigman,[244] that guaranteed a right to abortion and purported to preempt state laws forbidding abortion. Imagine that Congress fears a conservative Court would strike the law down as exceeding Congress's enumerated powers.[245] So, Congress could include in the law a jurisdiction stripping provision that forbids the Court from hearing any case contesting the law's constitutionality. Indeed, progressive members of Congress have urged this strategy to insulate potential federal statutes guaranteeing various rights from being overturned by the Court.[246] Would this work?

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[243] Interestingly, the Court did not spend much time addressing the link between the unconstitutional suspension of habeas corpus and the invalidity of the jurisdiction strip. The Court seemed to assume that if Congress had violated the Suspension Clause, then the jurisdiction strip was necessarily impermissible. *See Boumediene*, 553 U.S. at 739 (concluding that "the [Act] deprives the federal courts of jurisdiction to entertain the habeas corpus actions now before us" and then in the next sentence proceeding to take up the constitutional question of whether Congress had violated the Suspension Clause).

[244] *See* Sprigman, *supra* note 2, at 1859.

[245] For the related argument that Congress lacks power under the Commerce Clause to forbid partial-birth abortion, see Allan Ides, *The Partial-Birth Abortion Ban Act of 2003 and the Commerce Clause*, 20 CONST. COMMENT. 441 (2003); David B. Kopel & Glenn H. Reynolds, *Taking Federalism Seriously:* Lopez *and the Partial-Birth Abortion Ban Act*, 30 CONN. L. REV. 59 (1997).

[246] *See* Vakil, *supra* note 6.

Almost certainly not. How, exactly, is the federal law guaranteeing abortion rights supposed to be enforced? What if Texas courts simply refused to follow it on the theory that it was unconstitutional and thus upheld a criminal conviction of a woman who received an abortion? Requiring a state court to follow federal law is one of the Supreme Court's most important roles. But if the Court has been taken out of the picture, there is no *other* institution that could obviously stop Texas from enforcing its criminal law.[247] Perhaps the President could call in the National Guard to liberate the defendant from state prison, but this seems farfetched—to say the least.

Nor is it a solution to craft the law to permit the Supreme Court to hear cases to enforce the statute while denying it jurisdiction only over the *issue* of constitutionality. If Congress tried that move, the Court almost assuredly would strike it down on one of two grounds.[248]

First, and most likely, it could conclude that the jurisdiction strip represented an impermissible attempt by Congress, as in *Klein*, to dictate the outcome of a particular case—rather than simply a removing certain cases from its docket. The Court could then resolve the constitutional question. Alternatively, the Court might accede to the jurisdiction strip, but then rule that it was powerless to overturn a conviction without jurisdiction to determine whether such an order would be consistent with the Constitution. For the jurisdiction strip to succeed in making the statute effective, one would need to believe that the Court would take neither path and instead would willingly overturn a state court ruling based on a federal statute that the Court believed exceeded Congress's powers.

What about a situation where Congress is trying to insulate a federal program, such as the Affordable Care Act (ACA), from judicial review? Imagine that, when passing the ACA, Congress paired it with a jurisdiction strip forbidding the Court from addressing any constitutional objections to it. And assume that, contrary to fact, five justices were willing to declare the entire ACA unconstitutional, but for the jurisdiction strip. So far,

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[247] The progressive commentator Ian Millhiser is perhaps the only voice in the recent debate about Supreme Court reform to have emphasized this problem with jurisdiction stripping. *See* Ian Millhiser, *10 Ways to Fix a Broken Supreme Court*, VOX (Jul. 2, 2022), https://www.vox.com/23186373/supreme-court-packing-roe-wade-voting-rights-jurisdiction-stripping ("Congress might be able to prevent the Supreme Court from striking down the Voting Rights Act, for example, by stripping the Court of jurisdiction to hear voting rights cases. But if voting rights plaintiffs cannot obtain a court order enforcing the Voting Rights Act, then that law ceases to function.").

[248] *See* FINAL REPORT, *supra* note 8, at 168 (noting constitutional problems "if Congress sought to provide for coercive enforcement of a statute by the courts while purporting to withdraw judicial jurisdiction to entertain constitutional objections to the statute").

so good while Obama was president. But what if the Trump Administration simply refused to follow and enforce any of the ACA's requirements, such as insurance subsidies to private company plans on the government-created insurance exchanges and payments to the states as part of the Medicaid expansion? The normal solution would be to go to court to get the administration to follow the law. But if the Supreme Court thought that the law as a whole was unconstitutional, it again would either (1) declare it was powerless to consider whether to enforce the law, given Congress's *Klein*-like attempt to dictate its decision in a case; or (2) overcome the jurisdiction strip by reviewing the constitutional question to determine whether it had power to order the Administration to follow the law. Yet again, the jurisdiction strip fails to accomplish its goals—at least in the long term.

The point here is that any federal program will ultimately require the active participation of the judiciary if it is to be durable as administrations change hands. Where the Court is hostile to Congress's efforts, it is unrealistic to expect the Court to nonetheless be an active partner, which would be necessary to ensure the long-term success of the program. To summarize these last points: to accomplish almost any of its goals, Congress will eventually need the judiciary's help.[249]

III. LIMITED POTENTIAL

Having worked through the various permutations that jurisdiction stripping can take, we return to the ultimate question that overlays this entire project: can jurisdiction stripping work? Our resounding answer has been "no." At least in the strong form that has animated so much of the scholarly and political conversation, jurisdiction stripping does not allow Congress to directly defy or prevent a constitutional ruling.

But jurisdiction stripping can have more subtle benefits. Throughout our discussion, we have alluded to Congress's ability to sequence decisionmaking, creating time and space for policies to take hold and gain political support. In this Part, we elaborate on that basic idea and also suggest that Congress can use jurisdiction stripping to raise the salience of issues in an exhortative way. It also can impose political and reputational costs on the judiciary.

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[249] One can also imagine a hostile Court coming up with other ways to meddle with Congress's efforts. For example, consider a case like *King v. Burwell*, 576 U.S. 473 (2015), which involved a question of statutory interpretation that was hugely consequential to the ACA's proper functioning. *See* Rachel Sachs, *King v. Burwell: Appreciating the Stakes of the Case*, BILL OF HEALTH (Mar. 15, 2015), https://blog.petrieflom.law.harvard.edu/2015/03/05/king-v-burwell-appreciating-the-stakes-of-the-case/ (noting the possibility of an "insurance death spiral" that could result if the government lost in *King*). A Court firmly opposed to the ACA (and, perhaps willing to operate in good faith, or at least one engaged in motivated reasoning) could choose an interpretation that would have crippled the ACA. *See* Epps & Sitaraman, *supra* note 17, at 844–46 (suggesting this possibility).

A. Mythology Reexamined

Before delving into the subtle and indirect ways that jurisdiction stripping might prove useful as a policy, let us revisit the mythology that has grown up around jurisdiction stripping. Amidst the robust scholarly debate about Congress's constitutional authority over jurisdiction, scholars continue to rely on an assumption about jurisdiction stripping's practical consequences that is descriptively wrong. As our polarized country wrestles with profound questions about democratic legitimacy, understanding how these levers of power do (and don't) work is critical.

Just in the last few years, several scholars have urged progressives to embrace jurisdiction stripping as the solution to the hyperconservative Court. These scholars contend that Congress could foreclose *all* constitutional challenges to a federal regime. Doerfler and Moyn suggest, for example, that Congress could pair the Green New Deal with a jurisdiction strip that would insulate the program from constitutional challenge.[250] Going further, they contend that "[a] total or near-total strip over constitutional cases would . . . dramatically reallocate decision-making authority within our constitutional scheme."[251] Similarly, Professor Sprigman argues that "[i]f it wishes to, Congress can seize interpretive authority with respect to particular cases or issues."[252] Or, to put it more bluntly, Congress could simply tell the courts to "stay out."[253] The check, these scholars all suggest, comes from the people's ability to vote out members of Congress—either because voters disagree with the substantive policy or because they believe Congress has transgressed the separation of powers.[254]

This rosy conception of jurisdiction stripping's efficacy doesn't withstand analysis.[255] In the long run, Congress cannot impermeably insulate a regime against constitutional review. We have shown that courts have numerous tools at their disposal to engage in normal judicial review, even in the face of language that purports to deprive courts of jurisdiction categorically. The idea of external constraints looms largest in this regard.

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[250] Doerfler & Moyn, *supra* note 2, at 1735.

[251] *Id*. at 1736.

[252] Sprigman, *supra* note 2, at 1836.

[253] Sprigman, *supra* note 111; Sprigman, *supra* note 1.

[254] *See* Sprigman, *supra* note 2, at 1784 ("Correction, if it comes at all, will come from *voters*."); Sprigman, American Prospect; Sprigman, New Republic; *see also* Doerfler & Moyn, *supra* note 2, at 1735 (arguing that interpretive decisions "would be made by Congress and the President and, in turn, voters, who hold those officials accountable—however imperfectly").

[255] Much of Professor Sprigman's article makes a thoughtful normative claim. *See* Sprigman, *supra* note 2, at 1836–43. So, too, Professors Doerfler and Moyn argue as a normative matter for the democratizing effect of such jurisdiction stripping. *See* Doerfler & Moyn, *supra* note 2, at 1735–36. We leave to one side these normative questions and focus here on their descriptive accounts.

Although we have discussed external constraints previously, we revisit them for a moment because they form an integral part of our descriptive claim that Congress can't really accomplish what most scholars assume it can.

One might counter that, under our argument, external constraints become an exception that swallows the rule. On this view, if any allegedly unconstitutional law implicates an external constraint, then Congress's power to strip federal courts of jurisdiction becomes meaningless where constitutional claims are at issue.[256]

Nonetheless, the limited precedent from the Supreme Court and lower federal courts suggests a broad understanding of external constraints. And while Sprigman argues that the external constraints on Congress are vanishingly small,[257] his analysis is difficult to square with the cases.[258] Going back as far as *McCardle*, federal courts consistently have construed jurisdiction strips narrowly and ensured that some avenue of constitutional review remain available.[259] Courts also inquire not just whether a jurisdiction strip itself violates the Constitution (such as a provision that would give parties access to courts based on race or gender) but whether a jurisdiction strip attempts to cloak an otherwise unconstitutional action (including potential due process violations).[260]

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[256] Of course, even the most expansive approach to external constraints doesn't categorically quash Congress's power to regulate federal courts' jurisdiction. As we have explained, Congress might still strip courts of jurisdiction as to statutory questions that don't implicate the Constitution, even if it constitutes lily-gilding. The power to regulate jurisdiction still has enormous utility when Congress acts to regulate docket congestion and promote uniformity of federal law. And the power to regulate jurisdiction remains integral to non-Article III adjudication, including agency adjudication.

[257] *See* Sprigman, *supra* note 2, at 1829–31 (cabining statements in *Patchak* about external constraints as not essential to the holding, confining *Boumediene* to its precise facts, and arguing for a narrow interpretation of *Klein*).

[258] Professors Doerfler and Moyn do not engage the descriptive problem beyond one footnote. They suggest (without fully endorsing) the notion that Congress has unfettered authority to foreclose constitutional review of federal laws, "excepting *textually grounded* external constraints such as the Suspension Clause," with a citation to *Boumediene*. Doerfler & Moyn, *supra* note 2, at 1725 n.109 (emphasis added). The long history of cases that consider a wide array of external constraints belies the implication that few such constraints exist and that they apply only in a few exceptional situations.

[259] This was the situation in *McCardle*, *Yerger*, *Felker*, and *Hamdan*.

[260] This is precisely what the Second Circuit did in *Battaglia* (by inquiring whether a jurisdiction strip masked a deprivation of workers' Due Process rights) and what the Supreme Court did in *Yakus* (similarly analyzing whether Congress's allocation of jurisdiction deprived a criminal defendant of Due Process). And, as explained above, this is also how the Supreme Court in *Boumediene* analyzed whether a jurisdiction strip tried to cover up an otherwise unconstitutional suspension of habeas corpus. Arguably the same is true of *Klein* and the Presidential pardon power, but how much or how

To crystallize the point: the Supreme Court has never acquiesced in a jurisdiction strip of the Court's power of constitutional review without *either* engaging in constitutional review in the case at hand *or* pointing to another readily available avenue for such review in a future case. And in a situation where Congress perceives the Court as so hostile that jurisdiction stripping is necessary, there is no particular reason to expect that the Court would embrace a sweeping understanding of jurisdiction stripping going well beyond precedent and the scholarly mainstream. In short, if the Court wants to decide a matter, particularly a constitutional question, it has numerous options at its disposal. Jurisdiction stripping might be a speed bump along the way; it isn't an insurmountable wall.

External constraints aren't the only reason jurisdiction stripping may fail. Even if the judiciary does not interpret external constraints broadly, Congress may not be able to effectuate its goals over the long term, at least where it is trying to enshrine federal rights. Much of what Congress wants to accomplish will ultimately require the judiciary's active participation. Where the Court thinks Congress has exceeded its constitutional powers (say, enshrining a right to abortion in federal law), it's naïve to believe that that same Court will willingly *enforce* that law simply because Congress has stripped the Court of jurisdiction over constitutional challenges. Getting courts out of the way is—at best—a temporary solution.

B. Sequencing and Delay

If Congress can't use jurisdiction stripping in the *direct* way that nearly all scholars and commentators have assumed, that doesn't mean jurisdiction stripping has no value as a policy tool. We contend that Congress still can use jurisdiction stripping to exert *indirect* influence on how and when courts decide issues. Most significantly, it can sequence courts' decisionmaking, and sequencing can have a tremendous effect on Congress's extrajudicial efforts to implement policies. Most intriguingly, many of these examples reveal that, across varied contexts, time can be a commodity even more precious than a favorable judicial decision.

On some occasions Congress has homed in on the problem of time and crafted an effective jurisdictional response. As noted above, Congress's 1802 cancellation of the Supreme Court's Term can be seen as the first example of instrumental jurisdiction strip-

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little *Klein* stands for is in the eye of the beholder. *See* Daniel J. Meltzer, *Congress, Courts, and Constitutional Remedies*, 86 GEO. L.J. 2537, 2549 (1998); Amanda L. Tyler, *The Story of* Klein*: The Scope of Congress's Authority to Shape the Jurisdiction of the Federal Courts*, *in* FEDERAL COURTS STORIES 103, 109 (Vicki C. Jackson & Judith Resnik eds., 2010).

ping. Here, Congress necessarily had the goal of delay in mind, as the strip itself was temporal rather than subject-matter-based. When the Court finally reconvened in 1803, it upheld the repeal of the 1801 Judiciary Act.[261]

Observers have attributed the Court's acquiescence to Chief Justice Marshall's realization that declaring the repeal unconstitutional could provoke a crisis that would seriously damage the judiciary.[262] We cannot know whether the case would have come out differently absent the delay. Bruce Ackerman argues, however, that by "disrupting the Court's deliberative processes" Congress's decision to cancel the Term "may have succeeded in its basic strategic objective. If the Justices had come together for their customary face-to-face deliberations in June, the dynamics may well have been different."[263] Moreover, Congress's gamesmanship delayed resolution of the constitutional question until after the Republicans' decisive victory in the 1802 election.[264] That result "immediately reshaped the debate" regarding the 1802 elimination of circuit judgeships as it revealed that "the voters were not impressed by the Federalist defense of judicial independence."[265] Marshall and his Federalist colleagues must have recognized that they stood on shaky political ground.

With the Norris-LaGuardia Act, Congress recognized that labor injunctions had become one of the single greatest impediments to collective organizing by workers. Congress responded by stripping lower federal courts of jurisdiction to issue injunctions except in narrow circumstances. It technically left alone the jurisdiction of state courts as well as the Supreme Court, but that didn't really matter. From a policy perspective, putting a halt to the temporary restraining orders was the jurisdiction strip's focal point, creating time and space for a nascent labor movement to take root.[266]

The Tax Injunction Act evinced a similar concern with hasty injunctions that in Congress's view threatened the financial stability of state and local governments. So, once again, time became valuable. Unlike in the context of labor injunctions, though, Congress sought to balance different policy concerns, and its solution reflects a sensitivity to this unique mix of problems. Congress largely put a halt to the injunctions by federal courts, yet it preserved multiple opportunities for taxpayers to litigate the constitutionality of a tax, in either state or federal court and under different causes of action. And it left untouched the Supreme Court's ultimate authority to determine whether a tax

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[261] *See supra* at I.D.

[262] *See* WOOD, *supra* note 84, at 440

[263] BRUCE ACKERMAN, THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF PRESIDENTIAL DEMOCRACY 170 (2007).

[264] *See* FRIEDMAN, *supra* note 85, at 58.

[265] ACKERMAN, *supra* note 263, at 177.

[266] *See supra* Section II.B.2(a).

passed constitutional muster. So, here, sequencing—specifying the precise order in which taxes would be paid and then when and where litigation could take place—enabled Congress to respond precisely and creatively to myriad competing concerns.

Although Congress seems to have explicitly taken a temporal strategy in the cases above, the success of the famous jurisdiction strip in *McCardle* might owe more to serendipity. Congress scrambled when it realized the profound irony that William McCardle, of all people, was trying to challenge Reconstruction using a habeas provision intended to protect Black citizens. The Court acquiesced in the jurisdiction strip, but the same issue quickly got back to the Court: In *Yerger*, the Court explicitly recognized that another avenue existed for someone in McCardle's shoes to seek habeas relief (and thus also to challenge the Military Reconstruction project). So, to the extent that the jurisdiction strip worked, it did so by delaying the Court's intervention through an alternative habeas route.

A skeptic might contend that the jurisdiction strip in *McCardle* didn't give Congress that much extra time—a year and a half.[267] Historians can debate the difference that this time made, but it seems significant. McCardle challenged his detention—and the entirety of Military Reconstruction—mere months after the Reconstruction project had commenced. Between the time that Congress repealed the habeas statute on which McCardle relied and when the Court decided *Yerger*, Reconstruction had a chance to take hold.

This consequential period saw the ratification of the Fourteenth Amendment, the election of Ulysses Grant as President (who, unlike his predecessor, was committed to the cause of civil rights), the adoption of new constitutions in southern states that guaranteed Black citizens greater rights, the readmission of most former Confederate states to the Union on terms dictated by Congress, and Congress's formal proposal of the Fifteenth Amendment to the states. We don't suggest that a jurisdiction strip magically made this all possible. But forestalling a decision on Reconstruction's constitutionality did at least create more breathing room for a Republican Congress to remake the country in the wake of the Civil War.

A modern Congress should internalize the right lesson from *McCardle* and other successful examples of jurisdiction stripping. It can't expect to pass something like the Green New Deal and then append a jurisdiction strip with the belief that it has ensured that a court will never entertain a legal challenge to a massive new government program. But what about a more modest goal of giving the program time to blossom and become

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[267] The Supreme Court had concluded the *McCardle* oral arguments in March 1868. Later that same month, Congress enacted the Repealer Act over President Johnson's veto. This stopped the Supreme Court in its tracks. The ultimate decision did not come down for more than a year—in April 1869. *See* Van Alstyne, *supra* note 40, at 242. *Ex parte Yerger* was argued and decided in October 1869.

entrenched? On this score, perhaps jurisdiction stripping could indeed serve that limited function. Although the Affordable Care Act didn't include a jurisdiction strip—and famously ended up before the Supreme Court twice[268]—it offers an example of how Congress can de facto entrench a program through politics.[269] A program vilified in its early years grew increasingly popular, so much so that even when Republicans controlled both Congress and the White House in 2017, they couldn't muster enough votes to repeal it.[270] Entrenchment, though, required time.

The Norris-LaGuardia Act's restriction on injunctive relief provides a model that Congress might use today. In recent years, the propriety of so-called universal injunctions has generated a robust debate.[271] A single court's power to enjoin particular governmental conduct in its entirety—and not just as it affects the plaintiffs to a lawsuit—offers a way for politically motivated litigants to quickly smother a controversial government program in its infancy.[272] The potential to abuse these sweeping injunctions is exacerbated when litigants forum shop by filing suit in certain jurisdictions where they are certain to appear before ideologically friendly judges.[273] Just as the Norris-LaGuardia Act limited injunctions directed at labor activity, Congress might restrict district courts' ability to issue sweeping injunctions against the government. Such a reform might give federal programs breathing room without eliminating the possibility of later judicial review.

Perhaps most significantly, in terms of modern debates about jurisdiction stripping, Congress can sequence decisions by routing them through administrative agencies. The example of the Emergency Price Control Act illustrates how Congress might do so to

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[268] *See, e.g.*, King v. Burwell, 576 U.S. 473 (2015); Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012).

[269] *See generally* Daryl Levinson & Benjamin I. Sachs, *Political Entrenchment and Public Law*, 125 YALE L.J. 400 (2015).

[270] *See* Carl Hulse, *McCain Provides a Dramatic Finale on Health Care: Thumb Down*, N.Y. TIMES (July 28, 2017), https://www.nytimes.com/2017/07/28/us/john-mccains-real-return.html.

[271] *See, e.g.*, Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417 (2017); Zachary D. Clopton, *National Injunctions and Preclusion*, 118 MICHIGAN LAW REVIEW 1 (2019); Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065 (2018); Mila Sohoni, *The Lost History of the Universal Injunction*, 133 HARV. L. REV. 920 (2019); Alan M. Trammell, *The Constitutionality of Nationwide Injunctions*, 91 U. COLO. L. REV. 977 (2020); Alan M. Trammell, *Demystifying Nationwide Injunctions*, 98 TEX. L. REV. 67 (2019).

[272] *See, e.g.*, Aaron Blake, *The Rise of Solo Judges Halting Nationwide Policies*, WASH. POST, Apr. 20, 2022, https://www.washingtonpost.com/politics/2022/04/20/nationwide-injunctions-trump-biden/.

[273] *See* Ian Millhiser, *Republicans Can Choose The Judge Who Hears Their Lawsuits. DOJ Wants to Stop That,* VOX, Feb. 14, 2023, https://www.vox.com/policy-and-politics/2023/2/14/23597741/supreme-court-matthew-kascmaryk-judge-shopping-texas-utah-walsh-justice-department.

great effect. In some ways, the story of price controls during the Second World War offers another example of how Congress used its power over courts' jurisdiction to buy time and allow a novel federal regime to become entrenched. But the broader lessons from this episode, as scholars have recognized, stem from the use of a politically accountable administrative agency whose decisions predictability skewed in favor of upholding the government's price controls.[274] This provided a significant impetus for adjudication within the administrative state.[275]

Notice that the modern administrative state does not try to prevent constitutional review of federal policies or regimes. To the contrary, Congress almost always provides for the possibility of Article III review, including before the Supreme Court. And the Court routinely notes the importance of Article III supervision of non-Article III adjudicators.[276] Moreover, Congress does not try to direct a particular outcome in any given case. In fact, this set of affairs leads to one of the central critiques of the modern administrative state: democratically accountable institutions do not actually make consequential decisions but instead delegate them to agencies. We hesitate to wade too deeply into the boisterous normative debates about the administrative state. Our point is that this kind of decisional sequencing offers one of the clearest and most powerful forms of *indirect* ways that Congress can shape policy outcomes through its power over jurisdiction.

Congress's power over sequencing isn't just about delay. It can do the opposite and manipulate jurisdiction to speed things up. Return to *Yakus*. The EPCA required constitutional objections to price control regulations to occur early: if a person subject to the regulations challenged the regulation when issued, he could obtain possible Supreme Court review of any constitutional objection. But if he failed to take advantage of that opportunity, he couldn't raise the issue when later prosecuted for violating the regulation. In practice, this meant that if the Supreme Court were to consider a constitutional objection to price-control regulations, it would do so sooner than if review were available after a prosecution. And that would mean that any Supreme Court review would occur when wartime exigencies were at their zenith, when one might expect the Court to exercise utmost deference to the political branches. Individuals subject to the regulations would know they couldn't violate the rules in the hope that, perhaps as the fog of war receded, the Supreme Court would find the scheme unlawful.

Thus, even if Congress cannot use jurisdiction stripping to preclude review of a particular constitutional question, it can use it to influence *when* that review occurs. And

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[274] *See, e.g.*, Leanora Schwartz Gruber, *Establishment and Maintenance of Price Regulations—A Study in Administration of a Statute*, 96 U. PA. L. REV. 503, 535 (1948).

[275] *See, e.g.*, Conde & Greve, *supra* note 182.

[276] *See, e.g.*, Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 138 S. Ct. 1365, 137 (2018); Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 851 (1986); Thomas v. Union Carbide Agr. Prod. Co., 473 U.S. 568, 587 (1985).

that power over sequencing can sometimes help Congress achieve its goals in the face of anticipated judicial opposition.

C. Salience and Political Costs

Beyond the power of sequencing, Congress can use jurisdiction stripping to influence policy in an even more indirect way. Even if Congress knows that it can't entirely prevent judicial review in the medium to long run, jurisdiction stripping can serve an exhortative role. By invoking the threat of jurisdiction stripping, Congress raises the political salience of an issue. Drawing attention to an issue can have political benefits of its own but also can make the Supreme Court (or other courts) less willing to diverge from Congressional preferences. And even where the Court proves unwilling to accede to the attempt to block judicial review, Congress will have forced the Court to expend valuable political capital by intervening.

Start with the value that Congress gets by using jurisdiction stripping to send a message to voters. Imagine that Congress enacts (or threatens to enact) legislation that strips federal courts of jurisdiction to hear cases involving an issue that arouses passion among the public—say, flag burning, abortion, or gun rights. By turning to the rare tool of jurisdiction stripping, Congress (or its members) shows that it deeply cares about the issue—and that Congress believes the Supreme Court has gone, or is about to go, far astray of its proper role. Precisely because jurisdiction stripping is seen as a nigh-nuclear option, supporters of the Court may feel compelled to defend the Court from its attackers—further raising the salience of the issues that Congress seeks to highlight.

Jurisdiction stripping, then, could drive a national dialogue, potentially placing an issue in the country's political consciousness far longer than even the most unpopular Supreme Court decision can. Indeed, the most famous successful jurisdiction strip in American history had the effect of drawing the nation's attention to an issue that Congress cared about. As Barry Friedman has documented, "the attention of the country was galvanized" after Congress initially passed the jurisdiction-stripping measure that ultimately led to *McCardle*.[277]

But to provide political benefits, a jurisdiction stripping proposal need not succeed or even have a real prospect of becoming law. Threatening to dial back the Court's jurisdiction provides a way for politicians to signal their disapproval of the Court to co-partisans. For example, Neal Devins has explained how Republicans in the early 2000s used jurisdiction stripping proposals "to stake out a position on . . . socially divisive issues" in order to "solidify[] support among their base."[278] A similar dynamic may explain pro-

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[277] FRIEDMAN, *supra* note 85, at 131.

[278] Neal Devins, *Congress and Judicial Supremacy*, *in* THE POLITICS OF JUDICIAL INDEPENDENCE 45, 63 (Bruce Peabody ed., 2011).

gressive Democrats' recent endorsement of jurisdiction stripping in response to disfavored Supreme Court decisions, given that such measures would seem doomed in the closely divided Senate.[279]

The political benefits of jurisdiction stripping, however, extend beyond posturing to voters. A potentially more important benefit is the potential to influence the *Court*. By using or threatening jurisdiction stripping, Congress sends an important signal to the Court: that the Justices are treading on thin ice and risking a collision with the political branches that could severely damage the Court's legitimacy. Although courts have doctrinal tools to overcome a jurisdiction strip, they may be "disinclined to play 'chicken' with the legislature on a large scale."[280]

Even where Congress does not succeed in stripping the Court of jurisdiction, the mere threat can encourage the Court to stay its hand.[281] Political science research has shown that threatened Court-curbing efforts by Congress are "followed by marked periods of judicial deference to legislative preferences."[282] According to one explanation for this finding, the Court responds to these threats because they serve as "a credible signal about waning judicial legitimacy" given that "Congress is more directly connected to the public than the Court."[283]

Several historical episodes illustrate how jurisdiction-stripping measures can cause the Court to blink. Barry Friedman has documented several examples where jurisdiction stripping, actual or threatened, put political pressure on the Court and may have caused it to change course; we rely extensively on his thorough historical excavation here.[284]

Return to Friedman's account of how the jurisdiction strip in *McCardle* attracted great public attention. Discourse in the popular press centered on whether the Court should respond to the assault on its power that the jurisdiction strip presented, with some pressing the Court to stand up for itself and others urging deference to Congress.[285]

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[279] *See* Vakil, *supra* note 6.

[280] Frank B. Cross & Blake J. Nelson, *Strategic Institutional Effects on Supreme Court Decisionmaking*, 95 NW. U. L. REV. 1437, 1464–65 (2000).

[281] *Id.* at 1464 (noting that "actual jurisdiction stripping may prove unnecessary, as the mere threat may suffice to affect judicial decisions").

[282] Tom S. Clark, *The Separation of Powers, Court Curbing, and Judicial Legitimacy*, 53 AM. J. POL. SCI. 971, 972 (2009); *see, e.g.*, Shelden D. Elliott, *Court-Curbing Proposals in Congress*, 33 NOTRE DAME LAWYER 597 (1957); Roger Handberg & Harold F. Hill, *Court Curbing, Court Reversals, and Judicial Review: The Supreme Court versus Congress*, 14 LAW & SOC'Y REV. 309 (1980); Gerald N. Rosenberg, *Judicial Independence and the Reality of Political Power*, 54 REV. POL. 369 (1992).

[283] Clark, *supra* note 282, at 972.

[284] *See generally* FRIEDMAN, *supra* note 85.

[285] *See id.* at 132.

Given the attention to the case, there's plenty of reason to suspect that the Court's decision to back down owed partly to political, not exclusively legal, considerations.

Threats of jurisdiction stripping alone can force the Court to change course. In the late 1950s, the Supreme Court ruled against the government in a number of cases involving Communists.[286] Congress took up, and nearly passed, jurisdiction stripping legislation in response.[287] Again, the proposed legislation ultimately failed after a close vote in the Senate, but the Justices seemed to get the message nonetheless. Facing the credible threat of jurisdiction stripping, the Court "relented, issuing decisions that limited the scope of earlier rulings and otherwise permitting the government to prosecute subversive cases."[288] The episode sent a strong signal to the Justices that "running afoul of public opinion . . . would mean harsh criticism and the very real possibility of reprisal."[289]

In another example of the Justices' paying close attention to jurisdiction stripping threats, the Supreme Court found itself in conflict with the states over its authority in the decades after the War of 1812. This led to debates on various proposals in Congress that would have restricted the Court's jurisdiction over decisions by state high courts.[290] These reforms never became law but still may have accomplished something. One particularly heated debate over such a proposal occurred in 1825–26; in its aftermath, Dwight Wiley Jessup argues, the Marshall Court reined itself in "so as to more nearly accord with the economic and political life of the nation."[291] Nonetheless, reform proposals continued for several years, and the Court continued to pay attention: Friedman has documented how Chief Justice Marshall and Justice Story both expressed consternation about an 1830 jurisdiction stripping bill in private correspondence.[292]

Of course, the Court sometimes holds firm even in the face of actual jurisdiction stripping laws. For the reasons we've explained, courts unquestionably have doctrinal tools to overcome a jurisdiction strip. If the Court remains determined to stand in Congress's way, it can do so. But even then, Congress could still benefit by instigating a high-stakes separation-of-powers battle. A jurisdiction strip can force courts to expend repu-

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[286] *See* Devins, *supra* note 94, at 1342–43.

[287] *See id.* at 1343.

[288] *Id.*; *see also* FRIEDMAN, *supra* note 85, at 255–58 (arguing that political pressure and criticism by legal elites played a role in the Court's switch).

[289] FRIEDMAN, *supra* note 85, at 258. For an argument that the Justices did not surrender to Congress, see DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY, 1888-1986 at 369 (1994).

[290] *See* FRIEDMAN, *supra* note 85, at 88.

[291] DWIGHT WILEY JESSUP, REACTION AND ACCOMMODATION: THE UNITED STATES SUPREME COURT AND POLITICAL CONFLICT 320 (1987)

[292] *See* FRIEDMAN, *supra* note 85, at 88.

tational and political capital if they do ultimately take up an issue that Congress supposedly has removed from their cognizance. If the Court overrules Congress and the decision backfires, the Court will have to face the political consequences.

Boumediene, for example, arose in the years following the September 11 attacks. Volatile questions of national security and civil liberties infused much of the national discourse, including during the Presidential election of 2004. Congress had staked out a firm position on Guantanamo Bay and repeatedly attempted to keep courts at arm's length. If the stakes weren't already clear enough, Justice Scalia, in dissent, put an especially fine point on the matter: "The game of bait-and-switch that today's opinion plays upon the Nation's Commander in Chief will make the war harder on us. It will almost certainly cause more Americans to be killed."[293] One must imagine that the Court did not relish finding itself in a position of countering the political branches and exposing itself to such reputational jeopardy.

As it happened, the Court seemed to suffer no real blowback from *Boumediene*. But that the decision came at the very end of the Bush Administration when support for the War on Terror had waned.[294] One can imagine alternative scenarios, though, where the Court's willingness to assert its authority over Congress could produce backlash. If, say, the current conservative Supreme Court majority overcame a jurisdiction strip to declare a novel but popular progressive policy initiative unconstitutional, Democrats could make the case to voters that the Justices were out of control.

All that said, the indirect political upsides we've described in this Section are anything but guaranteed. For each possible benefit, there is a countervailing potential cost. Stripping jurisdiction may increase the salience of an issue with voters—but it could cause a backlash given the popularity of judicial independence.[295] It might show the public that Congress cares deeply about an issue—or it might be seen as a concession by Congress that it is reaching beyond its constitutional authority. It might pressure the justices to back down—or it might make them feel compelled to protect the Court's

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[293] Boumediene v. Bush, 553 U.S. 723, 827–28 (2008) (Scalia, J., dissenting).

[294] *See, e.g.*, Jack Balkin, *This Is What a Failed Revolution Looks Like*, BALKINIZATION (June 13, 2008), https://balkin.blogspot.com/2008/06/this-is-what-failed-revolution-looks.html ("By the time Boumediene was decided, support for Bush and his unilateral vision of the Presidency was very weak indeed.").

[295] *See* Devins, *supra* note 94, at 1356 ("Americans have historically supported judicial independence . . . .").

prestige when they otherwise might have stayed their hand.[296] Here, as elsewhere, jurisdiction stripping's benefits are contingent and uncertain, making it an unreliable tool for reining in the judicial branch.

CONCLUSION

For all that academics have debated constitutional constraints on Congress's power over jurisdiction, they have paid far too little attention to the question of whether jurisdiction stripping could actually effectuate Congress's goals. Proponents and skeptics alike seem to assume that the strong form of jurisdiction stripping will work. We have shown, though, that it won't. Jurisdiction stripping can have indirect benefits as a policy tool. It might succeed in allowing Congress to sequence how and when issues are litigated and thus buy time for policies to become entrenched. And it can raise the salience of issues and put the Court on the defensive.

As a straightforward strategy for wresting control of the Constitution from the Court, jurisdiction stripping almost assuredly will fail. Its effects are chaotic and unpredictable; the Court can find a way to overcome a jurisdiction strip if it so desires; and the judiciary is ultimately needed to enforce, and to make durable, federal guarantees. To overcome a hostile judiciary, Congress and the President cannot simply get the Court out of the way. They may have no choice but to *transform* the Court. In this way, understanding jurisdiction stripping's limits offers a rejoinder to those who argue that Court reformers should seek to disempower courts rather than pursuing institutional change.[297]

Beyond this practical takeaway, clarifying how jurisdiction stripping will and won't work as a policy tool has implications for deeper normative questions. Even among those who subscribe to the plenary view of Congress's jurisdiction stripping power, many argue that taking whole classes of cases away from the courts in pursuit of a political agenda is fundamentally unwise and even dangerous.[298] Charles Black offered one of the few normative defenses of jurisdiction stripping. He supported the plenary view of Congress's

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[296] As compared to jurisdiction stripping proposals in the past, the Court today might also see such threats as toothless given extreme polarization in Congress and the ability of the minority party in the Senate to block legislation via the filibuster. For a discussion of the extent to which the Supreme Court might take into account such considerations when rendering decisions, see Richard H. Pildes, *Institutional Formalism and Realism in Constitutional and Public Law*, 2013 SUP. CT. REV. 1, 35.

[297] *See, e.g.*, Doerfler & Moyn, *supra* note 2, at 1738–46; *see also generally* Epps & Sitaraman, *supra* note 17.

[298] *See, e.g.*, Gunther, *supra* note 8, at 898 (noting that "in this area as in others, it is useful—and often difficult—to bear in mind the distinction between constitutionality and wisdom"); Redish, *supra* note 8, at 927 (arguing against "confus[ing] issues of constitutionality with questions of propriety and wisdom").

power for a "reason primarily of a political kind," arguing that, leaving to one side the Supreme Court's original jurisdiction, every federal court exercises jurisdiction only upon an explicit Congressional directive.[299] And this, he contended, "is the rock on which rests the legitimacy of the judicial work in a democracy."[300]

If our arguments are right, then Professor Black's normative defense takes on new relevance. Jurisdiction stripping can't subvert the constitutional order. But it can create space for a dialogue between the political and judicial branches. In its soft and subtle form, it can allow federal innovations—from Reconstruction to labor laws—to take root and possibly even blossom, rather than being prematurely cut down by the judiciary. Professor Black perhaps overstated the role that this Congressional power plays in legitimizing the judiciary's work. But seen in its proper and humble light, jurisdiction stripping can be consistent with—rather than a grievous affront to—the separation of powers.

There is a broader lesson, though. In our nation, at any given point there have been, and will be, those who believe the Supreme Court has lost faith with true constitutional values. Today, that describes progressives, but it could describe others yesterday or tomorrow. For those out of power, looking for easy answers is tempting. Jurisdiction stripping's allure lies in its supposed promise as a constitutional loophole that Congress can exploit to disable a hostile judiciary. But there are no constitutional cheat codes. The Supreme Court is, for all else, a political institution. Those who seek to tame and control it can do so only by building political coalitions, winning elections, and ultimately retaking control of the judiciary. That is a long and grueling path, and it is one for which the Constitution provides no shortcuts.

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[299] Black, *supra* note 2, at 846. Professor Sprigman builds his thoughtful normative defense of "the desirability of a legislative check on judicial power" around this same basic insight about democratic legitimacy. *See* Sprigman, *supra* note 2, at 1800.

[300] *Id.*