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### The Origins (And Fragility) of Judicial Independence

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# WILLIAM & MARY LAW SCHOOL

## THE ORIGINS (AND FRAGILITY) OF JUDICIAL INDEPENDENCE

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# The Origins (and Fragility) of Judicial Independence

Tara Leigh Grove\*

*The federal judiciary today takes certain things for granted. Political actors will not attempt to remove Article III judges outside the impeachment process; they will not obstruct federal court orders; and they will not tinker with the Supreme Court's size in order to pack it with like-minded Justices. And yet a closer look reveals that these "self-evident truths" of judicial independence are neither self-evident nor necessary implications of our constitutional text, structure, and history. This Article demonstrates that many government officials once viewed these court-curbing measures as not only constitutionally permissible but also desirable (and politically viable) methods of "checking" the judiciary. The Article tells the story of how political actors came to treat each measure as "out of bounds" and thus built what the Article calls "conventions of judicial independence." But implicit in this story is a cautionary tale about the fragility of judicial independence. Indeed, this account underscores the extent to which judicial independence is politically constructed and historically contingent. Particularly at a time when government officials seem willing to depart from other long-standing norms, federal judges should take none of their current protections for granted.*

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\* Professor of Law, William & Mary Law School. I am grateful to Curt Bradley, Aaron Bruhl, Andrew Crespo, Barry Cushman, Neal Devins, Richard Fallon, Josh Fischman, David Fontana, Mark Graber, Aziz Huq, Vicki Jackson, John Jeffries, Johanna Kalb, Mike Klarman, David Landau, Alli Larsen, Daryl Levinson, Marin Levy, John Manning, Gillian Metzger, Martha Minow, Henry Monaghan, Nick Parrillo, Jim Pfander, David Pozen, Daphna Renan, David Shapiro, Shirin Sinnar, Seth Tillman, Keith Whittington, Ann Woolhandler, and Tim Zick for helpful discussions or comments on earlier drafts. This project was presented at the University of Virginia School of Law, New York University School of Law, and the Federal Courts Roundtable: Historical Practice and the Federal Judicial Power at Duke Law School. I am grateful for the comments from participants at those events. I would also like to thank Mary Kathryn Atkinson, Jonathan Barsky, Sam Lee, Andrew Lowy, and William Waller for excellent research assistance.

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## INTRODUCTION

We hold certain truths of the federal judiciary to be self-evident. Article III judges are entitled to life tenure and salary protections, and cannot be removed outside the impeachment process.<sup>1</sup> Political actors must comply with federal court orders.<sup>2</sup> And “packing” the Supreme Court is wrong.<sup>3</sup> These assumptions are so deeply ingrained in our public consciousness that it rarely occurs to anyone to question them.

But a closer look reveals that these “truths” are neither self-evident nor necessary implications of our constitutional text, structure,

1. See *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 16 (1955) (“[Article III] courts are presided over by judges appointed for life, subject only to removal by impeachment.”); Vicki C. Jackson, *Packages of Judicial Independence: The Selection and Tenure of Article III Judges*, 95 GEO. L.J. 965, 987 (2007) (describing this rule as the “traditional understanding”).

2. See Daniel J. Meltzer, Lecture, *Executive Defense of Congressional Acts*, 61 DUKE L.J. 1183, 1191 (2012) (“[M]ost commentators . . . concede that the president may not defy a judicial order . . .”); David E. Pozen, *Self-Help and the Separation of Powers*, 124 YALE L.J. 2, 34 (2014) (“When modern Presidents believe the Supreme Court has misconstrued the Constitution, they nonetheless acquiesce in its judgments . . .”); see also Nicholas R. Parrillo, *The Endgame of Administrative Law: Governmental Disobedience and the Judicial Contempt Power*, 131 HARV. L. REV. 685, 688, 700, 702 (2018) (noting norms of compliance by state and federal agencies, but urging that agencies may struggle to comply with orders compelling action).

3. By “court packing,” I refer to the practice of modifying the Court’s size to change the future course of its decisions. Other scholars have recognized that this practice is “out of bounds” politically, even though there are good textual and historical reasons to assume it is valid. See Michael C. Dorf, *How the Written Constitution Crowds Out the Extraconstitutional Rule of Recognition*, in *THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION* 69, 74 (Matthew D. Adler & Kenneth Einar Himma eds., 2009); Ronald J. Krotoszynski, Jr., *The Unitary Executive and the Plural Judiciary: On the Potential Virtues of Decentralized Judicial Power*, 89 NOTRE DAME L. REV. 1021, 1063–64 (2014). My goal here is to trace how court packing came to be seen as “out of bounds.” See *infra* Part III.

and history. Instead, these rules of our federal judiciary have emerged over time through the rough and tumble of the political process. At one time, prominent government officials insisted that Article III judges could be terminated outside the impeachment process; that political actors could violate federal court orders; and that court packing was an appropriate and even desirable method of dealing with a recalcitrant Supreme Court. Yet over time, these practices became not only disfavored but utterly out of bounds. By firmly rejecting these methods of attacking the federal judiciary, political actors have built what I call conventions of judicial independence.<sup>4</sup>

Although the concept of “conventions” was first developed in British constitutional thought,<sup>5</sup> American scholars have recently begun to appreciate that our legal system also contains many such norms.<sup>6</sup> At a basic level, “conventions” are “unwritten rules of political behavior” that constrain the discretion of government officials.<sup>7</sup> Notably, when scholars label a practice as a convention, they do not simply mean that government actors are in the habit of doing (or not doing) something. A practice is a *convention* when officials widely believe that it would be fundamentally wrong to do otherwise.<sup>8</sup>

How can we recognize a practice as a convention? For purposes of this Article, a “convention” protecting judicial independence depends on two major factors.<sup>9</sup> First, the constitutional text and structure can

4. In this Article, the term “judicial independence” refers to what Vicki Jackson has helpfully called “decisional independence”—that is, an individual judge’s ability to issue a ruling without fear of sanctions. *See* Jackson, *supra* note 1, at 967–68.

5. A.V. Dicey introduced the concept over a century ago. *See* ALBERT VENN DICEY, AN INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION, at cxi–cxlvi (8th ed. 1915).

6. *See* Pozen, *supra* note 2, at 9, 27–48; Adrian Vermeule, *Conventions in Court*, 38 DUBLIN U. L.J. 283 (2015) [hereinafter Vermeule, *Conventions in Court*]; Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163 (2013) [hereinafter Vermeule, *Agency Independence*]; Keith E. Whittington, *The Status of Unwritten Constitutional Conventions in the United States*, 2013 U. ILL. L. REV. 1847; *see also* Daphna Renan, *Presidential Norms and Article II*, 131 HARV. L. REV. (forthcoming 2018) (discussing norms that govern presidential power).

7. Vermeule, *Conventions in Court*, *supra* note 6, at 288.

8. *See* GEOFFREY MARSHALL, CONSTITUTIONAL CONVENTIONS: THE RULES AND FORMS OF POLITICAL ACCOUNTABILITY 214 (1984) (“Conventions . . . are rules that not only are followed but . . . have to be followed.” (internal quotation marks omitted)); Joseph Jaconelli, *The Nature of Constitutional Convention*, 19 LEGAL STUD. 24, 30 (1999) (“A constitutional convention is no mere habit,” but is instead “a rule . . . which looks on the outward pattern of behaviour as a standard to be followed.”).

9. Even though “convention” is a well-established concept in British constitutional thought, there is a good deal of disagreement over the precise definition—and over which government practices qualify as “conventions.” *See* MARSHALL, *supra* note 8, at 10 (noting that the “unresolved problems about conventions . . . arise partly from the existence of rival tests for their establishment and partly from the disputed connections between convention and law”). Therefore, to make the concept analytically useful, it is important to specify how the term is used in this Article. That is particularly true given that one of my primary goals is to distinguish court-curbing

plausibly be read to allow a given court-curbing measure.<sup>10</sup> Second, a firm bipartisan norm has nevertheless developed, barring the practice.<sup>11</sup> For that reason, political actors rarely even consider the practice; and if a government official does propose the court-curbing measure, she will be publicly condemned not only by political opponents but also by political supporters.<sup>12</sup>

This Article offers a (largely untold) historical account of how political actors built the conventions that today protect judicial tenure, ensure compliance with federal court orders, and bar court packing.<sup>13</sup> None of these bipartisan norms developed until the mid-twentieth century. Perhaps most surprisingly to modern readers, in the

measures that are “off the table” from those that are relatively acceptable—and to explore why our legal culture makes such distinctions.

10. As other scholars have recognized, constitutional conventions can fill gaps in the written constitutional text. They are less likely to be relevant in those areas where the text is clear. *See* Whittington, *supra* note 6, at 1855 (describing constitutional conventions as a mode of constitutional construction whereby the “indeterminate text is rendered determinate”).

11. *See* Jaconelli, *supra* note 8, at 35 (“[C]onstitutional conventions impose a framework of rules the observance of which transcends the sectional interest of political party.”). In this Article, the term “bipartisan” means that the court-curbing measure is rejected even by political actors who are otherwise critical of the judiciary. This part of the definition of convention helps to overcome the possibility that political actors are acting strategically. Political actors who dislike the general trend of judicial decisions have every reason to *support* court-curbing measures; if those actors nonetheless *oppose* a given court-curbing measure, that opposition strongly suggests that there is a convention against the court-curbing measure. One more point on the term “bipartisan” as used in this Article: support for and opposition to the judiciary has not always fallen neatly along party lines in our history. For example, in the mid-twentieth century, conservative Republicans and Southern Democrats attacked the judiciary’s civil rights rulings, while progressives from both parties defended the courts. *See infra* note 177. In such a scenario, there would only be “bipartisan” opposition to a given court-curbing measure if both factions (progressive supporters of the judiciary *and* conservative opponents of the judiciary) spoke against the measure.

12. *See* Vermeule, *Agency Independence*, *supra* note 6, at 1185 (“[T]he most prominent sanctions for breach of the convention are the threat of political retaliation . . .”). There is a growing literature on whether courts can also enforce conventions. *See, e.g.,* N.W. BARBER, *THE CONSTITUTIONAL STATE* 90–95 (2011) (exploring the issue); Vermeule, *Conventions in Court*, *supra* note 6. That issue is not the focus of this Article, although I hope to address it in future work.

13. This Article thus differs from a recent piece by Curtis Bradley and Neil Siegel that explores how government officials have invoked past political branch practice (which they refer to as either “historical gloss” or “constitutional conventions”) in specific debates over judicial reform. *See* Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Constitutional Conventions, and the Judicial Separation of Powers*, 105 *GEO. L.J.* 255, 258 (2017). As illustrations, the authors discuss the 1937 debates over President Franklin Roosevelt’s Court-packing plan and two debates over the Supreme Court’s appellate jurisdiction. *See id.* at 269–83, 295–311. By contrast, my goal is to explore how conventions against certain court-curbing measures developed (or failed to develop) over time. Accordingly, with respect to court packing, my primary focus is the *post*-1937 period, when political actors increasingly used the Roosevelt plan as a negative precedent. *See infra* Part III. And I argue that there is *no* convention against jurisdiction stripping. *See infra* Part IV. In prior work, I explored the topic that interests Bradley and Siegel: how political actors rely on their own precedents in debates over the judiciary. *See* Tara Leigh Grove, *Article III in the Political Branches*, 90 *NOTRE DAME L. REV.* 1835 (2015).

nineteenth and early twentieth centuries, many government officials believed that it was constitutionally permissible to remove inferior federal court judges by abolishing their courts; in fact, Congress used this method in 1802 and 1863, and came very close to doing so again in 1913. But beginning around the 1930s, a bipartisan consensus developed that Congress could remove federal judges only through the impeachment process. The bipartisan norm requiring compliance with federal court orders emerged only in the wake of the civil rights movement of the 1950s and 1960s. And although some scholars assume that President Franklin Roosevelt violated an already-existing norm when he proposed to “pack” the Supreme Court in 1937, a closer look reveals that Roosevelt’s plan had considerable support—and came close to passage. This Article demonstrates that the current norm against court packing gained steam only around the 1950s, largely due to the rhetoric of politicians. Since that time, legislators of both parties have treated the 1937 plan as a negative precedent—by condemning other judicial reforms as reminiscent of Roosevelt’s “mortal error.”<sup>14</sup>

Today, government officials virtually never suggest any of these court-curbing practices. And if anyone does advocate firing Article III judges, disobeying federal court orders, or court packing, she faces widespread and bipartisan criticism. That is, even fellow partisans will likely denounce these ideas as “ridiculous” and “off the wall.”<sup>15</sup>

My goal in examining these conventions is threefold. First, I seek to offer a richer (and more nuanced) understanding of the protections enjoyed by our federal courts today. Much of the judicial independence that we take for granted is not clearly etched into our constitutional text and structure but has been constructed by political institutions over time.<sup>16</sup>

Second, I also want to highlight the limits of these protections. There is, I argue, no convention against other court-curbing measures that equally threaten judicial independence. Most importantly, building on prior work, I contend that there is no bipartisan norm against congressional restrictions on federal jurisdiction.<sup>17</sup> When government officials advocate jurisdiction-stripping bills, they are

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14. See, e.g., 104 CONG. REC. 18,682 (1958) (statement of Sen. Alexander Wiley, R-Wis.).

15. See *infra* notes 31–32 and accompanying text.

16. Judith Resnik has thoughtfully recognized this point—although her work focuses on different aspects of the federal judiciary than those addressed here. See Judith Resnik, *Interdependent Federal Judiciaries: Puzzling About Why and How to Value the Independence of Which Judges*, DAEDALUS, Fall 2008, at 28, 28–29, 45 (noting, for example, the growth of non-Article III courts and asserting that “history, practices, and cultural understandings” affect judicial independence).

17. See Tara Leigh Grove, *The Structural Safeguards of Federal Jurisdiction*, 124 HARV. L. REV. 869 (2011); *infra* Section IV.A.

supported by fellow partisans; in recent decades, for example, social conservatives have come together to restrict review in abortion and religion cases. And although most jurisdiction-stripping efforts still ultimately fail in the legislative process, some measures *have* been enacted (as recently as 2006) and many others have received serious consideration—passing one chamber of Congress.<sup>18</sup>

Accordingly, a jurisdiction-stripping bill is not dismissed as “ridiculous” or “off the wall.” This difference, I argue, is highly consequential for the judiciary. As political scientists have shown, judicial independence may be threatened simply when a court-curbing measure is seriously considered by Congress, even if the measure ultimately fails.<sup>19</sup> Indeed, scholars have documented how jurisdiction-stripping proposals have led the Supreme Court to pull back on protections for individual rights—even *after* the effort is defeated in Congress. Likewise, in 1937, before there was a firm convention against court packing, Roosevelt’s plan was a serious threat—and, many scholars argue, led the Supreme Court to dramatically change its constitutional jurisprudence.<sup>20</sup> Conventions, I argue, are important because they provide a higher level of protection for the judiciary, and better enable courts to decide legal questions without fear of political backlash.

That leads to my third goal: exploring why some court-curbing measures are “off the wall,” while others are relatively acceptable. Indeed, a more general aim of this Article is to encourage scholars to explore the factors that influence the development of conventions. Although I cannot exhaust this subject in a single Article, I argue here that the conventions of judicial independence depend in part on narratives crafted by our legal and political culture.<sup>21</sup> These narratives have led us to view as illegitimate any proposal to pack the Supreme Court, disobey a federal court order, or remove federal judges outside the impeachment process. By contrast (drawing on a survey of law school casebooks from 1895 to 1980), I demonstrate that legal scholars in the mid-twentieth century articulated a narrative as to why broad congressional control over federal jurisdiction could be a good thing in

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18. Thus, I disagree with scholars who have suggested that the political norm against jurisdiction stripping is as strong as the norm against, for example, court packing. *See, e.g.*, Charles G. Geyh, *Judicial Independence, Judicial Accountability, and the Role of Constitutional Norms in Congressional Regulation of the Courts*, 78 IND. L.J. 153, 156 (2003) (arguing that these different court-curbing efforts would likely evoke the same “‘oh, come now’ response”).

19. *See infra* Section IV.A.2.

20. *See infra* note 241.

21. *See infra* Sections IV.C, IV.D.

our constitutional democracy. This narrative, I argue, is one reason that jurisdiction stripping remains an acceptable method of attacking the federal courts. This account thus also suggests that legal narratives could influence what future generations deem to be “self-evident truths” about the federal judiciary.

At the outset, a few more points of clarification on terminology. First, in this Article, the term “judicial independence” refers to “decisional independence”—that is, a federal judge’s ability to issue a ruling without fear of sanctions.<sup>22</sup> Second, although legal scholars in the United States have begun to examine “conventions,” there is no yet generally agreed-upon definition of the term.<sup>23</sup> To make the concept analytically useful for this historical survey, this Article defines “convention” as a widespread bipartisan norm.<sup>24</sup> This definition makes it possible both to identify when a convention emerges, and to compare a *convention* protecting judicial independence (such as the strong norm against court packing) with weaker norms (such as the norm that makes jurisdiction-stripping proposals controversial but not “off the wall”). This comparison among norms underscores the contingency—and, thus, the fragility—of the safeguards for judicial independence.<sup>25</sup>

This study of conventions is particularly important today—a time when political actors seem willing to reject certain long-standing practices, including those relating to the judiciary. For example, in 2013 and 2017, the Senate abolished the filibuster for all judicial nominations, including those to the Supreme Court.<sup>26</sup> Perhaps even more striking, in 2016, the Senate refused to hold hearings on a Supreme Court nominee.<sup>27</sup> Such departures from tradition underscore the importance of exploring both how the current protections for the federal judiciary developed and what, if anything, gives them staying power.

The Article proceeds as follows. Parts I through III provide a detailed historical account of the development of our current

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22. I borrow this term from Vicki Jackson’s excellent work. *See supra* note 4.

23. Indeed, there is also no agreed-upon definition in British scholarship. *See supra* note 9.

24. *See supra* note 11 (explaining the term “bipartisan” as used in this Article).

25. Nothing turns on this specific nomenclature. The Article could instead define “convention” more expansively—and then distinguish “strong conventions” from “weak conventions.” Notably, other scholars, such as Curtis Bradley and Neil Siegel, seem to adopt a more capacious definition of “convention.” *See* Bradley & Siegel, *supra* note 13. That scholarship does not, however, aim to identify when a convention emerges, or to examine the (relative) strength of the norms protecting judicial independence, as this Article seeks to do.

26. *See infra* notes 294–300 and accompanying text.

27. *See* Jon Schuppe, *Merrick Garland Now Holds the Record for Longest Supreme Court Wait*, NBC NEWS (July 20, 2016), <https://www.nbcnews.com/news/us-news/merrick-garland-now-holds-record-longest-supreme-court-wait-n612541> [<https://perma.cc/7TUY-UQCU>]; *see also infra* notes 294–297 and accompanying text.

conventions against abolishing Article III judgeships, violating federal court orders, and court packing. Part IV shows that there is no similar convention against congressional restrictions on federal jurisdiction. I use that example as a jumping-off point to explore how our legal and political culture has crafted narratives that affect the scope and nature of the independence currently enjoyed by federal judges. I also offer tentative thoughts on the relationship between “conventions” and “legal rules,” and the extent to which our current conventions of judicial independence may be susceptible to future change.

### I. PROTECTING JUDICIAL TENURE

In 2011, Republican presidential candidate (and former House Speaker) Newt Gingrich announced a judicial reform that startled many observers. As president, he would “abolish whole courts to be rid of judges whose decisions” were “out of step with the country.”<sup>28</sup> Gingrich’s primary target was the Ninth Circuit Court of Appeals. He pointed to a 2003 decision, in which a panel of that court held that use of the phrase “under God” in the Pledge of Allegiance violated the Establishment Clause.<sup>29</sup> Gingrich declared: “If you have judges that are so radically anti-American that they thought ‘One Nation Under God’ was wrong, then they shouldn’t be on the court.”<sup>30</sup>

This proposal to terminate Article III judges drew a firestorm of criticism from both progressives and conservatives. Former George W. Bush Attorney General Michael Mukasey described the idea as “dangerous, ridiculous, totally irresponsible, outrageous, [and] off-the-wall.”<sup>31</sup> Two columnists for the conservative *National Review* wrote a five-part series to respond to what they dubbed “Gingrich’s Awful Proposal to Abolish Judgeships,” declaring the idea “constitutionally unsound and politically foolish.”<sup>32</sup> Fellow Republican presidential

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28. See Amy Gardner, *As Gingrich Ramps up Rhetoric on Judges, Some on Right Wince*, WASH. POST, Dec. 18, 2011, at A05 (describing a half-hour phone call between Gingrich and reporters).

29. See Jeff Zeleny & Jim Rutenberg, *As Romney Steps Cautiously, Gingrich Duels with Others*, N.Y. TIMES (Dec. 16, 2011), <http://www.nytimes.com/2011/12/16/us/politics/gingrich-parries-with-challengers-at-iowa-debate.html> [<https://perma.cc/K4AW-TWTH>]; see also *Newdow v. U.S. Cong.*, 292 F.3d 597, 612 (9th Cir. 2002) (invalidating the use of “under God” in the Pledge).

30. Zeleny & Rutenberg, *supra* note 29.

31. *Former Bush Attorneys General Call Gingrich Position on Courts ‘Dangerous,’* FOX NEWS (Dec. 15, 2011), <http://www.foxnews.com/politics/2011/12/15/former-bush-attorneys-general-call-gingrich-position-on-courts-dangerous.html> [<https://perma.cc/3QP2-VWNC>].

32. Ed Whelan, *Gingrich’s Awful Proposal to Abolish Judgeships—Part 1*, NAT’L REV. (Dec. 16, 2011, 12:54 PM), <http://www.nationalreview.com/bench-memos/286013/gingrichs-awful-proposal-abolish-judgeships-part-1-ed-whelan> [<https://perma.cc/7Y3R-KHU9>].

candidates Ron Paul and Mitt Romney argued that the Gingrich plan would open a “can of worms,” because it would enable future Congresses to terminate federal judges, including those who were sympathetic to conservative values.<sup>33</sup> Representative Paul summed up the general sentiment when he suggested that there is only one way to remove a federal judge: “[I]f a judge misbehaves or is unethical . . . the proper procedure is impeachment.”<sup>34</sup>

Notably, there was no similar bipartisan condemnation of other proposals to rein in the federal courts. During the 2012 presidential race, Gingrich also challenged judicial supremacy (the idea that political actors must act in accordance with the Supreme Court’s constitutional views in all contexts).<sup>35</sup> And several Republican presidential candidates—including Gingrich as well as Representatives Ron Paul and Michele Bachmann—wanted to strip federal jurisdiction over constitutional issues like abortion and same-sex marriage.<sup>36</sup> Yet those proposals were not dismissed as “ridiculous.” Instead, many conservatives praised the challenge to judicial supremacy,<sup>37</sup> and the *New York Times* noted that, according to prominent legal scholars, it is “hard to assess” whether Congress could strip federal jurisdiction over constitutional claims.<sup>38</sup> The proposal to remove Article III judges by abolishing courts was not simply controversial; it was of a different kind—“off the wall” and “dangerous.”

The reaction to Gingrich’s proposal reflects the broad and bipartisan consensus today that Article III judges have life tenure and

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33. *GOP Debate, Sioux City, Iowa* (Fox News television broadcast Dec. 15, 2011) (statement of Rep. Ron Paul, R-Tex.), available at <https://www.youtube.com/watch?v=yEhpLhCYohM> [<https://perma.cc/MRW5-VHRH>]; Shira Schoenberg, *Romney Slams Gingrich on ‘Activist Judges’ Stance*, BOS. GLOBE (Dec. 27, 2011), <https://www.bostonglobe.com/news/politics/2011/12/27/mitt-romney-criticizes-newt-gingrich-proposal-for-reining-federal-judges/srVyi5gLzC2yfC6WOqQ0pK/story.html> [<https://perma.cc/C649-643S>].

34. *GOP Debate*, *supra* note 33 (video at 4:50).

35. See Newt Gingrich, *Bringing the Courts Back Under the Constitution* 16–19, 22 (Oct. 7, 2011) (position paper) (copy on file with author). Notably, although some political actors are skeptical of judicial supremacy, there is a convention that political actors must abide by a federal court order in a specific case. See *infra* Part II.

36. See Bob Egelko, *Gingrich’s Plan on Courts Would Face Resistance*, SFGATE (Dec. 29, 2011, 4:00 AM), <http://www.sfgate.com/politics/article/Gingrich-s-plan-on-courts-would-face-resistance-2430131.php> [<https://perma.cc/5YHF-GPNW>]; Adam Liptak & Michael D. Shear, *Republicans Turn Judicial Power into a Campaign Issue*, N.Y. TIMES (Oct. 23, 2011), <http://www.nytimes.com/2011/10/24/us/politics/republicans-turn-judicial-power-into-a-campaign-issue.html> [<http://perma.cc/5HLG-UPTW>].

37. Indeed, the columnists for the *National Review* did so in the articles condemning Gingrich’s proposal to abolish judgeships. See Ed Whelan, *Gingrich’s Awful Proposal to Abolish Judgeships—Part 3*, NAT’L REV. (Dec. 16, 2011, 4:27 PM), <http://www.nationalreview.com/benchmark-memos/286062/gingrichs-awful-proposal-abolish-judgeships-part-3-ed-whelan> [<https://perma.cc/EKF4-PSL4>].

38. Liptak & Shear, *supra* note 36.

cannot be removed outside the impeachment process. Although most academics assume that this view is long-standing, this Article demonstrates that for much of American history, prominent political actors insisted that Congress could remove inferior federal court judges by abolishing their courts. The convention barring the practice did not take root until the mid-twentieth century.

### *A. The Uncertain Teachings of Text and History*

Many jurists and scholars have asserted that the political branches cannot remove an Article III judge except through impeachment.<sup>39</sup> But the textual basis for impeachment exclusivity is less obvious than most commentators assume. Article III provides that federal judges “shall hold their Offices during good Behaviour.”<sup>40</sup> But Article III neither defines “good Behaviour” nor says anything about removal—by impeachment or any other means. Instead, the impeachment provision is found in Article II, which provides that “[t]he President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.”<sup>41</sup> To the extent scholars consider the issue, they reason that Article III judges must be “civil Officers” within the meaning of Article II and thus subject to impeachment.<sup>42</sup>

Still, it takes a further textual step to conclude that impeachment is the *only* way to remove a federal judge. The Constitution does not say as much. And impeachment is *not* the exclusive method for removing other “civil Officers of the United States”; many executive officials, after all, can be removed by the president or other superiors.<sup>43</sup> The historical evidence is also mixed.

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39. See James E. Pfander, *Removing Federal Judges*, 74 U. CHI. L. REV. 1227, 1249 (2007); Martin H. Redish, *Response: Good Behavior, Judicial Independence, and the Foundations of American Constitutionalism*, 116 YALE L.J. 139, 157–58 (2006); sources cited *supra* note 1. Some scholars have argued that federal judges can remove other judges for “bad behavior,” but they readily concede that the political branches are confined to impeachment. See RAOUL BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* 173–74, 179–80 (1973); Saikrishna Prakash & Steven D. Smith, *How to Remove a Federal Judge*, 116 YALE L.J. 72, 77, 125 (2006). For a rare dissenting view, see Roger C. Cramton, *Reforming the Supreme Court*, 95 CALIF. L. REV. 1313, 1329–30 (2007), which suggests that “Congress may essentially remove lifetime tenure judges by abolishing the court they serve on.”

40. U.S. CONST. art. III, § 1.

41. *Id.* art. II, § 4.

42. See Pfander, *supra* note 39, at 1229.

43. See *Shurtleff v. United States*, 189 U.S. 311, 317 (1903) (explaining that the Impeachment Clause does not “prevent [the] removal [of executive officers] for other causes . . . by the

Although some founding fathers viewed impeachment as the exclusive means for removing federal judges,<sup>44</sup> as the historical account here demonstrates, that was by no means the universal view.

The next several sections provide that historical account. But for now, because the argument is so unfamiliar to modern readers, I want to sketch out the basic textual case made by early political actors who favored removing inferior federal judges by abolishing their courts.<sup>45</sup> The Constitution gives Congress broad discretion “from time to time” to “ordain and establish” inferior federal courts when they are needed.<sup>46</sup> So, the argument goes, Congress should also have the power to abolish those courts when they prove to be unnecessary. And if the judges who staffed those courts are not needed elsewhere in the judiciary, Congress has no obligation to retain them.

Early political actors also pointed to the language of the Good Behavior Clause, insisting that the Constitution protects the tenure and salary of federal judges only “during their Continuance in Office.”<sup>47</sup> Once the office (the judgeship) is eliminated, so is the federal judge. If this argument seems far-fetched and “off the wall,” as I suspect it does to many readers, we should keep in mind that there is at least one modern-day equivalent. There is fairly broad agreement that, in cases of financial necessity, colleges and universities can terminate tenured professors by abolishing their positions.<sup>48</sup>

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President”). One could read Article II to render impeachment the exclusive remedy for any official whose tenure is articulated in the Constitution—that is, the president, vice president, and federal judges. *See Pfander, supra* note 39, at 1229. My point is only that any of these moves requires more structural inference than commentators typically assume.

44. The Framers did not address the issue during the Constitutional Convention. *See* Michael J. Gerhardt, *The Constitutional Limits to Impeachment and Its Alternatives*, 68 TEX. L. REV. 1, 18 (1989). But some participants in the ratification and other early debates did advocate impeachment exclusivity. *See* 1 ANNALS OF CONG. 828 (Joseph Gales ed., 1834) (statement of Rep. William Smith); THE FEDERALIST NO. 79, at 474 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (asserting that other means of removal would be “more liable to abuse than calculated to answer any good purpose”).

45. Notably, the argument focused on the inferior federal courts; these early officials did not assert the power to abolish Supreme Court judgeships. *See infra* Sections I.B, I.C. That is true even though the tenure and salary protections of Article III seem to apply equally to all federal courts. These early government officials apparently believed that the Supreme Court had a special position in the constitutional scheme.

46. U.S. CONST. art. III, § 1.

47. *Id.* (“The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.”).

48. *See* AM. ASS’N OF UNIV. PROFESSORS, FINANCIAL EXIGENCY, ACADEMIC GOVERNANCE, AND RELATED MATTERS (2004), <https://www.aaup.org/report/financial-exigency-academic-governance-and-related-matters> [<https://perma.cc/YRD9-EEMN>] (stating that a university may “legitimately terminate faculty appointments, including appointments with tenure, on grounds of financial exigency”).

To be clear, my goal here is *not* to advocate for the termination of Article III judges outside the impeachment process. (On the contrary, I find the notion very troubling.) But I do want to suggest that the widespread consensus about impeachment exclusivity is not an obvious inference from the text. This ingrained norm is itself largely a product of history—the history that created the convention protecting judicial tenure today.

### *B. The Precedent of 1802*

The election of 1800 was a bitter partisan struggle between the Federalist Party and the Jeffersonian Republican Party.<sup>49</sup> After the Jeffersonians prevailed (but before Thomas Jefferson and the new members of Congress took their seats), the outgoing Federalist Congress enacted a sweeping reform of the federal judiciary.<sup>50</sup> The Judiciary Act of 1801 established a new system of federal appellate courts, thereby creating sixteen Article III judgeships; ended circuit riding by Supreme Court Justices; and dramatically expanded federal jurisdiction.<sup>51</sup> The 1801 Act also reduced the future size of the Supreme Court from six to five members—a move that Jefferson perceived as an effort to prevent him from filling the next vacancy.<sup>52</sup>

Notably, during the debates over the 1801 Act, the Federalists did not conceal their partisan motivations for enlarging the federal judiciary. Senator William Bingham, for example, underscored that “the Importance of filling” the judiciary “with *federal* characters must be obvious.”<sup>53</sup> In this spirit, President John Adams hastily made the appointments, seeking to fill all sixteen new judgeships just before he left office.<sup>54</sup>

Soon after the new Congress assembled, the Jeffersonian Republicans decided to repeal the 1801 Act. This proposal triggered an intense constitutional debate. The Federalists who remained in

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49. See JOHN FERLING, *ADAMS VS. JEFFERSON: THE TUMULTUOUS ELECTION OF 1800*, at 143–56 (2004); GERALD LEONARD, *THE INVENTION OF PARTY POLITICS* 2, 31–32 (Thomas A. Green & Hendrik Hartog eds., 2002) (noting the opposing views of the more nationalist Federalists and the pro-states’ rights Jeffersonians).

50. See Kathryn Turner, *Federalist Policy and the Judiciary Act of 1801*, 22 WM. & MARY Q. 3, 32 (1965).

51. See Judiciary Act of 1801, ch. 4, §§ 7, 11, 27, 2 Stat. 89, 90–92, 98; see also Turner, *supra* note 50, at 21 (summarizing the reforms).

52. See § 3, 2 Stat. at 89; 1 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 189 (Beard Books 1999) (1922).

53. Kathryn Turner, *The Midnight Judges*, 109 U. PA. L. REV. 494, 509 (1961) (emphasis added) (internal quotation marks omitted).

54. See *id.* at 495–517.

Congress insisted that repeal would be patently unconstitutional. The Constitution said in “plain old English” that federal judges hold their offices during good behavior, and if they misbehave “they shall be removed” only “on impeachment.”<sup>55</sup> But the Jeffersonians maintained that repeal would be consistent with Article III. Congress had broad power not only to create inferior federal judgeships when they were needed but also to abolish them when they were “useless and unnecessary.”<sup>56</sup> These judges, the Jeffersonians urged, were an unnecessary expense for the new nation, because the judiciary at that time did not have a large enough caseload to justify sixteen additional members.<sup>57</sup> Moreover, the Good Behavior Clause prevented Congress only from removing an Article III judge from an existing office, but not from abolishing the office itself.<sup>58</sup>

The Jeffersonian Republicans did, however, articulate an important limit on Congress’s power to remove federal judges by abolishing their courts. The Federalists argued that repeal would set a precedent for abolishing the offices of Supreme Court Justices as well, given that all Article III judges enjoyed the same tenure and salary protections.<sup>59</sup> But the Jeffersonians insisted that the Supreme Court was created by the Constitution and could not be abolished; and thus “the judges thereof must . . . continue to hold their offices independent of the Legislature, and cannot be removed but by impeachment.”<sup>60</sup> That was a significant concession, given that the Supreme Court at that time was composed entirely of Federalist sympathizers, and the Federalists themselves had sought to influence the composition of the Court in the 1801 Act.<sup>61</sup> Yet Republican Senator Joseph Anderson argued that “if the gentlemen could really persuade some of us” that the repeal would set

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55. 11 ANNALS OF CONG. 90 (1802) (statement of Sen. Gouverneur Morris, F-N.Y.).

56. *Id.* at 829 (statement of Rep. Joseph Nicholson, R-Md.) (“We have no desire to remove [the judges] and put others in their places, but we wish to abolish a . . . useless and unnecessary [system, for which] the nation is neither able nor willing to pay.”).

57. *See id.* at 564 (statement of Rep. John Bacon, R-Mass.) (urging, based on data provided by President Jefferson, that “the business of [the federal] courts may be transacted equally well by a less number”); *see also* WILLIAM SEAL CARPENTER, JUDICIAL TENURE IN THE UNITED STATES 54–55 (1918) (urging that although the Jeffersonians overestimated the costs, they had good reason to believe the larger judiciary was “an unnecessary expenditure”).

58. *See* 11 ANNALS OF CONG. 556 (1802) (statement of Rep. Thomas Davis, R-Ky.) (arguing that there is “a material distinction between removing a judge from office and abolishing the office; the first implies guilt, the latter that the office is useless”).

59. *See id.* at 177 (statement of Sen. Aaron Ogden, F-N.J.) (“[I]f the present law passes, it will be an irresistible precedent . . . to put down the Supreme Court judges.”).

60. *Id.* at 169–70 (statement of Sen. Joseph Anderson, R-Tenn.).

61. *See supra* note 52 and accompanying text.

a precedent for abolishing Supreme Court judgeships, that “might prevent the repeal.”<sup>62</sup>

After two months of debate, Congress enacted the 1802 Repeal Act and thus removed the Article III judges.<sup>63</sup> A private litigant (whose case had been transferred from a now-eliminated federal court to the 1802 system) later challenged the constitutionality of the 1802 repeal.<sup>64</sup> He specifically alleged that Congress could not remove federal judges by abolishing courts, insisting that “[t]he words *during good behaviour* cannot mean *during the will of congress*.”<sup>65</sup> The Supreme Court rejected that constitutional challenge in *Stuart v. Laird*.<sup>66</sup>

Admittedly, it is not easy to pin down the holding of *Stuart*. At first glance, it appears that the Court did not uphold the removal of the judges, because it did not specifically comment on that issue; the Court simply upheld the transfer of cases away from the now-eliminated inferior federal courts.<sup>67</sup> But the litigant’s challenge to the transfer of his case was *premised* on the idea that Congress lacked the authority to remove the previous judges.<sup>68</sup> Accordingly, by upholding the transfer, the Supreme Court implicitly approved Congress’s power to remove Article III judges by abolishing courts. The decision came just one week

62. 11 ANNALS OF CONG. 169 (1802) (statement of Sen. Joseph Anderson, R-Tenn.). The Supreme Court did not, however, escape this political transition entirely unscathed. After repealing the 1801 Act, the Jeffersonian Congress delayed the start of the Court’s next term for fourteen months—until February 1803. See Judiciary Act of 1802, ch. 31, §§ 1, 3, 2 Stat. 156, 157 (omitting the August 1802 session). As the Federalists argued, this change was likely designed to prevent the Court from considering the constitutionality of the Repeal Act “until the act [had] gone into full execution, and the excitement of the public mind [was] abated.” 11 ANNALS OF CONG. 1235–36 (1802) (statement of Rep. James Asheton Bayard, F-Del.); see WARREN, *supra* note 52, at 222. Nevertheless, the Republicans’ declarations about the Supreme Court’s distinct status seemed to have a lasting effect. Subsequent legislators, who accepted the validity of the 1802 repeal, agreed that the Justices could be removed only through impeachment. See *infra* Section I.C.

63. See Repeal Act, ch. 8, §§ 1, 3, 2 Stat. 132, 132 (1802); FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT* 26 n.75, 28 n.79 (Transaction Publishers 2007) (1928) (noting that the repeal was debated from January 8, 1802, until March 3, 1802).

64. Notably, the judges themselves pondered bringing suit but opted against it. Instead, they went to Congress, asking for the salaries that they would have earned had they remained on the bench. The House and Senate, however, declined to provide relief to the judges. See Jed Glickstein, *After Midnight: The Circuit Judges and the Repeal of the Judiciary Act of 1801*, 24 YALE J.L. & HUMAN. 543, 544–45, 558–74 (2012) (discussing these events).

65. *Stuart v. Laird*, 5 U.S. (1 Cranch) 299, 304 (1803) (argument of counsel).

66. See *id.* at 308–09.

67. See *id.* (upholding both the transfer of cases and the resurrection of circuit riding).

68. See *id.* at 303:

If the [repeal was] constitutional [such that] the judges were constitutionally removed, [then] the transfer from the one court to the other was legal. But if [the repeal was] unconstitutional, then the [previous] court . . . still exists, the judges were not removed, and the transfer of jurisdiction did not take place.

(argument of counsel).

after the Supreme Court in *Marbury v. Madison* had proclaimed the importance of judicial review of federal laws.<sup>69</sup>

*C. Congressional Power from the 1802 Repeal to the Commerce Court*

The Repeal Act of 1802 was controversial even in the early nineteenth century. Justice Joseph Story argued in his *Commentaries* that “if [the] constitutionality [of that Act] can be successfully vindicated,” that “prostrates in the dust the independence of all inferior judges . . . and leaves the constitution a miserable and vain delusion.”<sup>70</sup> Nevertheless, throughout the nineteenth and early twentieth centuries, many political actors accepted the basic principle established by the 1802 repeal: Congress had the power to remove inferior federal court judges by abolishing their courts, but could not do the same to Supreme Court Justices.

1. Removal Power in the Nineteenth Century

In the 1820s and 1830s, Congress considered proposals to expand the federal judiciary to meet the needs of a growing nation. When some legislators advocated a circuit court system—reminiscent of the 1801 scheme—Jacksonian Democrats (political heirs to the Jeffersonian Republicans) were aghast.<sup>71</sup> They warned that any attempt to create new judgeships would meet the same fate as the 1801 Act. As Representative (and later President) Martin Van Buren explained: “To remove [federal judges] . . . by abolishing their Courts” is a “harsh measure,” but “[t]o keep them in office, receiving salaries without performing service, is so hostile to the character and genius of our Government and the sentiments of the People, that public opinion would not tolerate it.”<sup>72</sup>

By contrast, the Jacksonian Democrats did not believe that Congress could likewise eliminate positions on the Supreme Court. For

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69. See 5 U.S. (1 Cranch) 137, 176–78 (1803); Jed Handelsman Shugerman, *Marbury and Judicial Deference: The Shadow of Whittington v. Polk and the Maryland Judiciary Battle*, 5 U. PA. J. CONST. L. 58, 100 (2002) (noting that the decision in *Stuart* was “issued six days after *Marbury*”).

70. 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1633, at 476 (3d ed. 1858); see also 1 ST. GEORGE TUCKER, BLACKSTONE’S COMMENTARIES app. at 361 (1803) (noting that the “interpretation [of the Constitution embodied in the 1802 repeal] seems calculated to subvert” the principle of judicial independence).

71. See 2 REG. DEB. 558 (1826) (statement of Sen. Thomas Reed, Jacksonian-Miss.) (describing the 1801 Act as “the most unpopular act of Mr. Adams’ administration” and the 1802 repeal as “the most gracious and acceptable [act] of Mr. Jefferson’s”); see also LEONARD, *supra* note 49, at 13, 73 (noting the Jacksonians were the “states’ rights” party of this era).

72. 2 REG. DEB. 415 (1826) (statement of Sen. Martin Van Buren, Jacksonian-N.Y.).

that reason, Senator Levi Woodbury opposed a separate proposal to increase the size of the Court to ten members (and thereby provide more Justices to ride circuit).<sup>73</sup> He complained: “[Y]ou never can, by mere legislation, remove Judges of the Supreme Court from office.”<sup>74</sup>

In the latter half of the nineteenth century, many legislators continued to assume that Congress could remove inferior federal court judges by abolishing their courts.<sup>75</sup> In 1863, in the midst of the Civil War, the Republican-controlled Congress did abolish a federal circuit court for the District of Columbia, and thereby terminated three judges who served “during good behavior.”<sup>76</sup> Notably, the Republicans’ primary goal was to get rid of the judges, some of whom were believed to be Confederate sympathizers.<sup>77</sup>

Senator Garrett Davis opposed the measure, arguing that the court was a “constitutional court” under Article III and that “the judges [could] be removed only by impeachment.”<sup>78</sup> But Republican legislators responded that, even if these were Article III judges, Congress could still remove them by abolishing their court. Although the Supreme Court was “beyond the reach of legislation,” inferior federal courts were “the creatures of congressional action . . . Congress ‘from time to time’ may create these inferior courts, and the power that creates them can abolish them.”<sup>79</sup> Indeed, Senator Ira Harris did not “doubt that Congress would have the right to abolish all the district courts throughout the Union, and to substitute some other tribunal in their place.”<sup>80</sup> Ultimately, Congress not only abolished the existing court (and

73. *Id.* at 481 (statement of Sen. Levi Woodbury, Jacksonian-N.H.).

74. *Id.* (describing this as “the most prevalent doctrine on this point”).

75. *See, e.g.*, CONG. GLOBE, 41st Cong., 1st Sess. 214–15 (1869) (statement of Sen. Lyman Trumbull, D-Ill.) (advocating an increase in the number of inferior federal court judges, rather than an expansion of the Supreme Court to eighteen members, in part for this reason).

76. *See* District of Columbia Organic Act of 1801, ch. 15, § 3, 2 Stat. 103, 105–06 (creating a circuit court whose judges “hold their respective offices during good behavior”); Act of March 3, 1863, ch. 91, § 16, 12 Stat. 762, 764–65 (reorganizing the courts in the District of Columbia).

77. *See* CONG. GLOBE, 37th Cong., 3d Sess. 1139 (1863) (statement of Sen. Henry Wilson, R-Mass.) (arguing that one judge’s “heart is sweltering with treason”); Cramton, *supra* note 39, at 1329–30 (the Republicans worried that “one or more of the judges were Confederate sympathizers”).

78. CONG. GLOBE, 37th Cong., 3d Sess. 1136 (1863) (statement of Sen. Garrett Davis, Unionist-Ky.). Other opponents argued that the measure would set a “dangerous precedent” that would allow future presidents to terminate lower federal court judges with whom they disagreed. *See id.* at 1138–39 (statement of Sen. Lazarus Powell, D-Ky.).

79. *Id.* at 1137 (statement of Sen. Ira Harris, R-N.Y.).

80. *Id.*; *see also* Susan Low Bloch & Ruth Bader Ginsburg, *Celebrating the 200th Anniversary of the Federal Courts of the District of Columbia*, 90 GEO. L.J. 549, 555 n.24 (2002) (“[A]ll the discussants [in these debates] assumed that federal courts in the District were Article III courts, a status not clearly established until 1933.”).

thereby terminated the federal judges) but also created a new court for the District of Columbia, which President Abraham Lincoln proceeded to fill with political supporters.<sup>81</sup>

## 2. The Fight over the Commerce Court

In 1910, Congress created the Commerce Court, a five-member court staffed by Article III judges, to review decisions of the Interstate Commerce Commission ("ICC").<sup>82</sup> From the outset, the court was controversial. Although conservative Republicans (including President William Howard Taft) supported the court,<sup>83</sup> Democrats and progressive Republicans believed that it was beholden to railroads, the primary target of ICC regulations.<sup>84</sup> (Notably, this image of the Commerce Court fit with progressives' general view that the federal judiciary of that era was biased in favor of big business.<sup>85</sup>) Thus, almost immediately after the creation of the Commerce Court, progressives in Congress sought to abolish it.<sup>86</sup>

During the debates over the abolition of the court, some progressives insisted that the judges should be terminated as well. This proposal triggered an intense debate, akin to that in 1802, over the scope of Congress's power to remove Article III judges by abolishing a court. Many legislators insisted that federal judges could be removed only through the impeachment process.<sup>87</sup> But a number of progressives responded that Congress could terminate the judges,<sup>88</sup> relying in part

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81. See John G. Roberts, Jr., *What Makes the D.C. Circuit Different? A Historical View*, 92 VA. L. REV. 375, 383 (2006).

82. See Act of June 18, 1910, Pub. L. No. 61-218, 36 Stat. 539, 539-40 (creating the Commerce Court). Under the Act, the judges would sit on the Commerce Court for five years and then return to other positions in the federal judiciary.

83. See FRANKFURTER & LANDIS, *supra* note 63, at 156.

84. See 48 CONG. REC. 7840 (1912) (statement of Sen. Miles Poindexter, R-Wash.) (lamenting "the unfortunate apparent leanings of the judges of the court in favor of the railroads").

85. See Frank Thompson, Jr. & Daniel H. Pollitt, *Impeachment of Federal Judges: An Historical Overview*, 49 N.C. L. REV. 87, 105 (1970) (noting the "anti-court sentiment of that period").

86. See George E. Dix, *Death of the Commerce Court: A Study in Institutional Weakness*, 8 AM. J. LEGAL HIST. 238, 239 (1964).

87. See 50 CONG. REC. 5595 (1913) (statement of Rep. Henry Cooper, R-Wis.) (stating that Article III judges "cannot be deprived of their offices except by impeachment"); 48 CONG. REC. 8000 (1912) (statement of Sen. Henry Cabot Lodge, R-Mass.).

88. See *infra* notes 89-91 and accompanying text. Notably, not all progressives took this position. Some progressives (who were happy to get rid of the Commerce Court itself) balked at the idea of removing federal judges. See, e.g., 50 CONG. REC. 5413-14 (1912) (statement of Sen. Thomas James Walsh, D-Mont.) (arguing that the Good Behavior Clause prohibited removal).

on the precedent established by the 1802 repeal.<sup>89</sup> Congress, the progressives insisted, had “the power to say what inferior courts we should have, how many judges should be upon them . . . increasing . . . [and] decreasing the number if Congress saw fit.”<sup>90</sup> The “good behavior” language in Article III “could not have meant” that “when Congress created offices that were subsequently found to be useless the hands of the legislative power were to be tied” into keeping judges on the payroll “perpetually or, at least, during life.”<sup>91</sup>

Notably, much like their nineteenth-century predecessors, these progressives made a sharp distinction between the inferior federal courts and the Supreme Court. They denied that Congress had the power to remove Supreme Court Justices outside the impeachment process.<sup>92</sup> “[T]he Supreme Court,” they urged, “is a constitutional court, which puts it in a class by itself.”<sup>93</sup>

The bills to abolish the Commerce Court went through a few rounds in Congress. In the first round, the Senate voted to remove the judges, while the House of Representatives insisted on retaining them and transferring them to other federal courts.<sup>94</sup> President Taft then vetoed the entire bill, because he wanted to retain the Commerce Court itself.<sup>95</sup> After Democratic President Woodrow Wilson took office in 1913, progressive legislators once again sought to abolish the Commerce Court. In this second round, the House voted to remove the judges, but the Senate insisted on retaining them.<sup>96</sup> The Senate version went to President Wilson, who signed the measure into law.<sup>97</sup> Accordingly, the

89. See 50 CONG. REC. 5410 (1913) (statement of Sen. Hoke Smith, D-Ga.) (“[E]arly in the history of the [g]overnment [this] exact view . . . was asserted by Mr. Jefferson and followed by Congress . . .”).

90. *Id.*; 48 CONG. REC. 7999 (1912) (statement of Sen. Albert Baird Cummins, R-Iowa) (“The Constitution left us free . . . to abolish offices, even though through their abolition a judge . . . might cease to be an officer of the United States.”); see also WILLIAM G. ROSS, *A MUTED FURY* 93 (1994) (noting Senator Cummins was a progressive).

91. 48 CONG. REC. 7993 (1912) (statement of Sen. Hoke Smith, D-Ga.); see also 50 CONG. REC. 5592 (1913) (statement of Rep. Charles Bartlett, D-Ga.) (“[T]he tenure of the judge can continue no longer than the existence of the office . . .”).

92. See 50 CONG. REC. 5416 (1913) (statement of Sen. Augustus Bacon, D-Ga.) (stating that the power to abolish an office “can not relate to any judge of the Supreme Court”).

93. *Id.* at 5412 (statement of Sen. Hoke Smith, D-Ga.).

94. See 48 CONG. REC. 8001 (1912) (the Senate agreed to an amendment to remove the judges); *id.* at 8389 (the House rejected the Senate version of the bill).

95. See *id.* at 11,025–27 (text of President Taft’s veto message).

96. See 50 CONG. REC. 5413, 5442–43 (1913) (showing that the Senate voted to retain the judges); *id.* at 4543 (the House voted eighty to forty to remove the judges).

97. See Act of 1913, ch. 32, Pub. L. No. 63-32, 38 Stat. 208, 219 (“Making appropriations to supply urgent deficiencies in appropriations for the fiscal year nineteen hundred and thirteen . . .”) (abolishing the Commerce Court but stating that “[n]othing herein contained shall be deemed to affect the tenure of any of the judges”).

Commerce Court was abolished, but the Article III judges were transferred to other federal courts.<sup>98</sup>

*D. The Gradual Development of the Modern Consensus*

Through the early twentieth century, although the abolition of federal court judgeships was controversial, it was by no means considered “ridiculous” or “off the wall.” Indeed, as late as the 1920s, some legal commentators continued to assume that Congress could use this method to remove inferior federal judges and thereby “avoid resort to the impeachment process.”<sup>99</sup> But beginning in the late 1930s, there was a noticeable change in the views of political actors. The 1802 repeal and the principle it established were gradually forgotten (or discredited). By the early twenty-first century, there appeared to be a broad and bipartisan consensus that impeachment was the only way to remove a federal judge.

One can see this evolution in the debates over an alternative mechanism for disciplining judges. From the 1930s through the 1970s, a group of legislators championed “judicial removal”—that is, allowing federal judges to remove other federal judges, who were found (after a hearing) to have violated the “good behavior” requirement of Article III. Representative Hatton Sumners pushed for judicial removal in the late 1930s and early 1940s.<sup>100</sup> In the 1960s and 1970s, Senators Joseph Tydings and Sam Nunn led the charge, sponsoring legislation that

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98. See *Commerce Court*, FED. JUD. CTR., <https://www.fjc.gov/history/timeline/commerce-court> (last visited Oct. 4, 2017) [<https://perma.cc/5YBY-SWPR>] (“The judges of the court continued to serve on the courts of appeals, with the exception of Robert Archbald, who was impeached and convicted earlier in 1913.”) Interestingly, one of the judges was not transferred, because he was impeached and removed from office for misconduct (apparently, bribery). See Thompson & Pollitt, *supra* note 85, at 104, 107.

99. W.F. WILLOUGHBY, PRINCIPLES OF JUDICIAL ADMINISTRATION 395–96 (1929) (stating that the 1802 repeal “definitely established the power of the legislative branch to bring about the removal of judges [by abolishing judgeships] and thus to avoid resort to the impeachment process,” although asserting that the method should be used only in “exceptional” cases). Other scholars were less certain about the constitutionality of this practice but assumed that the issue was debatable. See CARPENTER, *supra* note 57, at 95–96, 98 (asserting in 1918 that “in the absence of judicial decision on the point,” a future Congress could follow “the construction of the Jeffersonian faction”); Burke Shartel, *Federal Judges—Appointment, Supervision, and Removal—Some Possibilities Under the Constitution*, 28 MICH. L. REV. 870, 907 n.102 (1930) (“[W]hether Congress has power to abolish federal judgeships so as to deprive sitting judges of their places has often been discussed but never been decided.”).

100. See H.R. REP. NO. 75-814, at 1–2 (1937) (proposing a bill that would allow a three-judge federal court to adjudicate “good behavior”); see also H.R. REP. NO. 77-921, at 1 (1941) (similar measure).

would allow a multimember panel of judges to investigate complaints and remove federal judges for “misbehavior.”<sup>101</sup>

These proposals triggered an intense constitutional debate. Many members of Congress objected that judicial removal was unconstitutional because “the only way that we can remove a Federal judge is through the impeachment process.”<sup>102</sup> But supporters of judicial removal insisted that impeachment was not exclusive. After all, they argued, the constitutional text does not say as much.<sup>103</sup> Moreover, given the size of the modern federal judiciary, the House and Senate cannot supervise all wrongdoing through the impeachment process.<sup>104</sup> Accordingly, judicial removal was a “necessary” and “proper” means of ensuring that federal judges engaged in “good behavior.”<sup>105</sup>

But what is most important for my purposes is the constitutional argument that legislators did *not* make. Throughout these debates, supporters of judicial removal did not rely on the lengthy history suggesting that Congress could remove federal judges by abolishing courts—even though this history would certainly support an argument against impeachment exclusivity. On the contrary, these legislators often conceded that impeachment *was* exclusive in one sense: it was the only way *for the political branches* to remove a federal judge. Thus, Representative Sumners and his supporters insisted that, absent the Impeachment Clause, “the legislative branch . . . would have had no right to control” the tenure of federal judges.<sup>106</sup> Likewise, Senators

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101. See 120 CONG. REC. 36,065 (1974) (statement of Sen. Samuel Nunn, D-Ga.); 114 CONG. REC. 4558, 4561–66 (1968) (statement of Sen. Joseph Tydings, D-Md.) (proposing a bill to allow “the judiciary to deal with judges who . . . have failed to meet the standard of good behavior”).

102. See 124 CONG. REC. 28,312 (1978) (statement of Sen. William Scott, R-Va.); see also *The Independence of Federal Judges: Hearing Before the Subcomm. on Separation of Powers of the S. Comm. on the Judiciary*, 91st Cong. 115–16 (1970) [hereinafter *Independence of Federal Judges Hearing*] (statement of Sen. Samuel Ervin, D-N.C.) (stating that “the only rational conclusion you can come to” is that impeachment is exclusive); H.R. REP. NO. 77-921, pt. 2, at 1 (1941) (minority views).

103. See 115 CONG. REC. 14,912 (1969) (memorandum offered by Sen. Joseph Tydings, D-Md.) (“No language in the Constitution explicitly provides that impeachment is to be an ‘exclusive’ device.”); 87 CONG. REC. 8164 (1941) (statement of Rep. Samuel Hobbs, D-Ala.).

104. See 124 CONG. REC. 28,284–85 (1978) (statement of Sen. Dennis DeConcini, D-Ariz.).

105. See S. REP. NO. 95-1035, at 2–3 (1978); 81 CONG. REC. 6176 (1937) (statement of Rep. Chauncey Reed, R-Ill.).

106. 87 CONG. REC. 8164–65 (1941) (statement of Rep. Samuel Hobbs, D-Ala.); see 81 CONG. REC. 6164 (1937) (statement of Rep. Hatton Sumners, D-Tex.) (arguing that because of the limitations on the political branches, the judiciary is “the only agency of government that can keep those words [‘good behavior’] from being dead words in the Constitution”).

Tydings and Nunn urged that the “impeachment process . . . is the only power of Congress to remove judges.”<sup>107</sup>

Moreover, many legislators—both supporters and opponents of judicial removal—suggested that, since the founding, Congress had *never* removed an inferior federal court judge outside the impeachment process.<sup>108</sup> The comments of Senator Charles Mathias, an opponent of judicial removal, are especially remarkable. In 1978, he declared that, given “the frustration of the Jeffersonians with impeachment as a device to remove Federalist judges,” surely they would have searched for another removal mechanism.<sup>109</sup> The Jeffersonians’ “failure to notice an available alternative . . . says volumes about the [Framers’] interpretation of the impeachment clause and its application to judges.”<sup>110</sup>

The debates over judicial removal suggest that, by the latter part of the twentieth century, legislators had largely forgotten that the Jeffersonians removed Article III judges by abolishing their courts. Throughout these five decades of debate, this early history was discussed only once—and then largely dismissed. In 1970, the Department of Justice (“DOJ”) mentioned the 1802 repeal in a written memorandum supporting judicial removal.<sup>111</sup> As then-Assistant Attorney General William Rehnquist explained in oral testimony before the Senate Judiciary Committee, the DOJ cited the measure as evidence that not all Framers viewed impeachment as an exclusive removal mechanism, but not to suggest that the modern Congress could (or would) abolish federal judgeships.<sup>112</sup> Indeed, Rehnquist and Senator

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107. *Judicial Tenure Act: Hearing Before the Subcomm. on Improvements in Judicial Mach. of the S. Comm. on the Judiciary*, 94th Cong. 28 (1976) (statement of Sen. Samuel Nunn, D-Ga.); 115 CONG. REC. 14,915 (1969) (memorandum offered by Sen. Joseph Tydings, D-Md.) (“[The Framers] . . . concluded that the machinery of impeachment was the only legislative or executive intrusion consistent with” judicial independence).

108. See, e.g., 87 CONG. REC. 8153 (1941) (statement of Rep. Clarence Hancock, R-N.Y.) (suggesting the Sumners bill in 1937 “mark[ed] the first time in 150 years that the exclusiveness of Impeachment proceedings” was “brought into question”).

109. S. REP. NO. 95-1035, at 73–74 (additional views of Senator Charles Mathias, R-Md.).

110. *Id.*

111. See *Judicial Reform Act: Hearing Before the Subcomm. on Improvements in Judicial Mach. of the S. Comm. on the Judiciary*, 91st Cong. 87 (1970) [hereinafter *Judicial Reform Act Hearing*] (statement of William H. Rehnquist, Assistant Att’y Gen., Department of Justice) (pointing to the 1802 repeal as an instance “[d]uring the first thirteen years of the Constitution . . . in which the impeachment provisions . . . were not considered to be . . . exclusive”). Some later DOJ reports on judicial removal repeated this analysis. See *Judicial Tenure Act: Hearing Before the Subcomm. on Improvements in Judicial Mach. of the S. Comm. on the Judiciary*, 95th Cong. 84–89 (1977). But in other congressional proceedings, no DOJ official made any oral reference to the 1802 measure, nor did any member of Congress. It does not seem to have been a major factor in the debates.

112. See *Independence of Federal Judges Hearing*, *supra* note 102, at 336 (statement of William H. Rehnquist, Assistant Att’y Gen., Department of Justice) (“So far as the Circuit Court

Tydings seemed to look on the events of 1802 with some amusement. Rehnquist stated playfully, “If Congress were to say that there will be 100 district judges rather than 500 in the country, I suspect that you might get some flack on that.”<sup>113</sup> Removing federal judges by abolishing their courts was apparently no longer a serious idea.

Ultimately, Congress opted not to enact a judicial removal mechanism. The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 (“Judicial Discipline Act”) authorizes a judicial council in each federal circuit to investigate complaints and to “censur[e] or reprimand[ ]” judges (by, for example, ordering that no cases be assigned to a judge under investigation), but expressly provides that “in no circumstances may the council order removal.”<sup>114</sup> As a Senate Judiciary Committee report explained, the Judicial Discipline Act “respected the position that the removal of federal judges by any means other than impeachment is arguably unconstitutional.”<sup>115</sup>

In subsequent decades, there was a growing consensus among political actors that impeachment was the sole method of removing federal judges—foreclosing even judicial removal. Thus, legislators increasingly assumed that *any* “proposal for removal of a Federal judge from office by means other than impeachment would require a constitutional amendment.”<sup>116</sup> A House Judiciary Committee report in 2002 reflected this consensus, when it declared that the Judicial Discipline Act “satisfied the constitutional parameters . . . by reserving removal authority to the House and Senate.”<sup>117</sup>

This account helps explain the astonishment with which many greeted former Speaker Gingrich’s proposal to remove Article III judges

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repealor, the only reason I mentioned that . . . is a statement by [one legislator] . . . that impeachment was not the only ground for removal.”).

113. *Judicial Reform Act Hearing*, *supra* note 111, at 92 (statement of Rehnquist); *see also id.* at 92 (statement of Sen. Joseph Tydings, D-Md.) (agreeing with Rehnquist’s comment and stating he “suspect[ed] we would hear a little about it”).

114. Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, Pub. L. No. 96-458, 94 Stat. 2035, 2037; *see* 28 U.S.C. § 354(a)(3) (2012); *see also* Scott E. Gant, *Self-Regulation and an Independent Judiciary*, in *THE POLITICS OF JUDICIAL INDEPENDENCE* 214–17 (Bruce Peabody ed., 2011) (describing the complaint and investigative procedures under the law).

115. S. REP. NO. 96-362, at 4 (1979).

116. That was the conclusion of the National Commission on Judicial Discipline and Removal, which was created by Congress to examine the process for disciplining judges. *Report of the National Commission on Judicial Discipline and Removal: Hearing Before the Subcomm. on Intellectual Prop. and Judicial Admin. of the H. Comm. on the Judiciary*, 103d Cong. 2 (1993) (statement of Rep. William Hughes, D-S.C.). Accordingly, legislators proposed constitutional amendments to authorize *judicial* removal. *See, e.g., Judicial Discipline: Hearing Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 99th Cong. 1 (1986) (statement of Sen. Orrin Hatch, R-Utah) (discussing two such proposals).

117. H.R. REP. NO. 107-459, at 7 (2002) (internal quotation marks omitted).

by abolishing a court. That idea was not “ridiculous” in the nineteenth or early twentieth centuries. But beginning in the 1930s, much of that early history was largely forgotten (or dismissed). Today, there is a firm convention that the political branches cannot remove a federal judge outside the impeachment process. Any suggestion to the contrary is “radical,” “off the wall,” and even “dangerous.”<sup>118</sup>

## II. COMPLYING WITH FEDERAL COURT ORDERS

After the Supreme Court in *Bush v. Gore* ended a Florida recount<sup>119</sup> and effectively ensured that George W. Bush would win the 2000 presidential race, Democratic candidate (and Vice President) Albert Gore quickly conceded defeat.<sup>120</sup> He declared: “Now the U.S. Supreme Court has spoken. Let there be no doubt, while I strongly disagree with the court’s decision, I accept it. I accept the finality of this outcome.”<sup>121</sup> Likewise, in the wake of the September 11, 2001, terrorist attacks, the Bush Administration did not question its duty to comply with Supreme Court decisions restricting its power over alleged enemy combatants.<sup>122</sup>

These examples reflect a widespread and bipartisan consensus that political actors must abide by federal court orders. Although this norm appears to be strong today (particularly at the federal level),<sup>123</sup> throughout much of our history, prominent federal and state officials presumed that they could obstruct federal court orders with which they firmly disagreed. I argue that the current convention requiring compliance did not clearly emerge until after the civil rights movement of the 1950s and 1960s.

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118. *Supra* note 31 and accompanying text.

119. *Bush v. Gore*, 531 U.S. 98, 110–11 (2000).

120. See Richard L. Burke & Katharine Q. Seelye, *Bush Pledges to Be President for “One Nation,” Not One Party; Gore, Conceding, Urges Unity*, N.Y. TIMES, Dec. 14, 2000, at A1.

121. *In His Remarks, Gore Says He Will Help Bush “Bring America Together,”* N.Y. TIMES, Dec. 14, 2000, at A26.

122. See *Boumediene v. Bush*, 553 U.S. 723, 798 (2008) (holding that the alleged enemy combatants detained at Guantanamo Bay were entitled to habeas corpus review); *Hamdan v. Rumsfeld*, 548 U.S. 557, 635 (2006) (holding that the President did not have congressional authorization to convene a military commission to try aliens detained at Guantanamo Bay); *Hamdi v. Rumsfeld*, 542 U.S. 507, 535 (2004) (holding that due process required an American citizen be given meaningful opportunity to contest the factual basis for his detention, even when held as an enemy combatant).

123. One example (discussed below) is the Trump Administration’s compliance with judicial orders blocking the President’s travel bans. See *infra* notes 203–207 and accompanying text.

*A. Constitutional Text and Structure*

Article III provides that “[t]he judicial Power of the United States, shall be vested” in the Supreme Court and inferior federal courts, and further specifies that this “judicial Power shall extend” to certain classes of cases and controversies.<sup>124</sup> Many jurists and scholars assume that this “judicial Power” encompasses the authority to issue binding judgments in specific cases.<sup>125</sup> Yet other scholars have insisted that the textual and historical basis for such a claim is unproven.<sup>126</sup>

Moreover, several prominent scholars have argued that there are at least some circumstances in which government officials need not comply with federal court orders.<sup>127</sup> Gary Lawson and Christopher Moore contend that presidents need not obey judicial orders that clearly violate constitutional commands.<sup>128</sup> William Baude urges that Article III gives federal courts the power to issue binding judgments only when they have jurisdiction; under this view, political actors may disregard federal court decrees if the court lacked jurisdiction.<sup>129</sup> Most aggressively, Michael Paulsen asserts that the president is *never*

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124. U.S. CONST. art. III, §§ 1–2.

125. See Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 926–27 (1990) (arguing that the Article III “judicial Power” is “one to render dispositive judgments”); see also ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 259–60, 263–64 (1962) (arguing, in the context of the civil rights movement, that “specific decrees ordering certain children to be admitted to certain schools had to be obeyed”); Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1008–09 (1965).

126. See Richard H. Fallon, Jr., Lecture, *Executive Power and the Political Constitution*, 2007 UTAH L. REV. 1, 17 (“[T]he historical support for the position that presidents must always obey and enforce judicial judgments is less than wholly unequivocal . . .”); see also David A. Strauss, *Presidential Interpretation of the Constitution*, 15 CARDOZO L. REV. 113, 124 (1993) (noting that scholars have not explained how the Article III “judicial power” is “only the power to render binding judgments in particular cases”).

127. This scholarship focuses on the president. Accordingly, it also responds to the other major constitutional argument—that judicial orders are among the “laws” that the president must faithfully execute under the Take Care Clause. See U.S. CONST. art. II, § 3 (“[H]e shall take care that the laws be faithfully executed . . .”). Of course, these scholars may mean that *only* the president may refuse to enforce judicial orders. But it is not obvious why state and local officials would be bound to comply if the federal judicial power does not encompass an authority to issue binding judgments. In any event, the important point for my purposes is that the text can plausibly be read to leave the issue open.

128. See Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 83 IOWA L. REV. 1267, 1319, 1324–25 (1996) (rejecting the argument that “the President is absolutely bound to enforce court judgments,” while also asserting that the president does not have an “unlimited power of presidential review of court judgments”).

129. See William Baude, *The Judgment Power*, 96 GEO. L.J. 1807, 1809, 1813–14 (2008). Baude discusses, but does not attempt to resolve, the difficult question of who decides whether a court had jurisdiction in a given case. See *id.* at 1846–48.

required to comply with or enforce federal court orders that he deems “contrary to law.”<sup>130</sup>

For my purposes, the important point is that the constitutional text leaves room for disagreement on this issue. Nevertheless, the current “rule” among political actors is that they must obey every federal court order—no matter how erroneous, and no matter how far outside the court’s jurisdiction it may have been.<sup>131</sup> Accordingly, government officials have filled a gap in the text with a convention that requires obedience to the federal courts. The account here documents how long it took for this consensus to develop.

### *B. The Acceptance of Past Violations*

As Richard Fallon has observed, “the historical record reveals some important cases” where presidents “either refused to obey, or let it be known that they would refuse to obey, specific judicial directives.”<sup>132</sup> Likewise, for many years, state and local officials were often unapologetic about defying federal court orders. Although other scholars have recognized that these violations occurred, this Article seeks to go further and document how other political actors reacted to that defiance. That reaction tells us whether there was a bipartisan norm (a convention) against violating federal court orders. As discussed below, for much of our history, there was no such norm. Instead, when government officials disobeyed—or threatened to disobey—federal court orders, they were criticized primarily by their political opponents; fellow partisans, by contrast, defended or even enthusiastically cheered them on.

#### 1. Federal Officials

During the War of 1812, then-General Andrew Jackson proclaimed martial law in New Orleans, Louisiana—and kept the city under martial law even after the British threat had largely

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130. Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 221–22 (1994).

131. For example, in 2015, the Obama Administration adhered to a district court order blocking a key part of its immigration program, despite the Administration’s insistence that the court’s decision was both wrong on the merits and well outside the court’s jurisdiction. *See Texas v. United States*, 86 F. Supp. 3d 591, 677–78 (S.D. Tex. 2015) (enjoining the implementation of the Deferred Action for Parents of Americans and Lawful Permanent Residents (“DAPA”) program, pursuant to which the executive would decline to remove undocumented immigrants with close ties to the United States because their children were U.S. citizens or lawful permanent residents).

132. Fallon, *supra* note 126, at 7.

dissipated.<sup>133</sup> When a state legislator wrote a newspaper piece criticizing these actions, Jackson reacted by ordering his imprisonment.<sup>134</sup> The legislator then sought out (and obtained) a writ of habeas corpus from a federal court judge, and Jackson not only ignored the writ but jailed the federal judge!<sup>135</sup> Once martial law was lifted, Jackson was cited—and fined \$1000—for contempt of court.<sup>136</sup>

But perhaps even more remarkable than these events was the reaction of other federal officials. Although President James Madison initially expressed concern about Jackson's conduct, he declined to sanction the General (and even led Jackson to believe he had the President's support).<sup>137</sup> Moreover, Jackson's political supporters in Congress stood by him and blocked efforts to censure him.<sup>138</sup> And in 1844, Congress voted to refund (then-former President) Jackson the entire fine—with interest.<sup>139</sup> Although some of Jackson's political opponents objected,<sup>140</sup> the majority overwhelmingly opted to honor the

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133. See Abraham D. Sofaer, *Emergency Power and the Hero of New Orleans*, 2 CARDOZO L. REV. 233, 240–41 (1981) (noting that Jackson continued martial law even after the Treaty of Ghent—the treaty ending the War of 1812—had been signed).

134. *Id.* at 242.

135. See Ingrid Brunk Wuerth, *The President's Power to Detain "Enemy Combatants": Modern Lessons from Mr. Madison's Forgotten War*, 98 NW. U. L. REV. 1567, 1612 (2004) (noting that after the writ of habeas corpus issued, Jackson had both the judge issuing the writ and the attorney assisting the author with the same arrested).

136. Sofaer, *supra* note 133, at 248. Jackson did at least pay the fine. *Id.* at 248–49.

137. Madison's Secretary of War Alexander Dallas initially sent Jackson letters expressing Madison's concerns about both Jackson's use of martial law and, more specifically, his defiance of the judge. See DAVID J. BARRON, *WAGING WAR: THE CLASH BETWEEN PRESIDENTS AND CONGRESS* 95–96 (2016) (explaining that Dallas's letters suggested that Jackson's conduct was illegal, even if justified by military necessity, and that Jackson would have to pay the contempt fine); MATTHEW WARSHAUER, *ANDREW JACKSON AND THE POLITICS OF MARTIAL LAW* 41–43 (2006) (discussing letters from Dallas to Jackson voicing the President's disapproval). When Jackson personally went to Washington, D.C., however, Dallas made statements that led Jackson to believe that the President endorsed all of the General's conduct in New Orleans. See WARSHAUER, *supra*, at 43 (noting that Jackson described the meeting by stating that "the administrators of the Govr are perfectly contented with *all* my conduct before Neworleans [sic]"); Sofaer, *supra* note 133, at 249–50 (asserting that Dallas "assured Jackson" that he had the President's and Dallas's support). It may be that Madison personally disapproved of Jackson's conduct but believed it would be politically unwise to sanction the General, whom the public widely viewed as a war hero. See BARRON, *supra*, at 95–97 (arguing that Madison was "greatly troubled" by Jackson's actions but did not press the matter against the "war hero"); WARSHAUER, *supra*, at 42–44 (urging that Madison "fail[ed] to formally investigate Jackson" out of "political expediency"). For my purposes, the important point is Madison's *inaction* (that is, his failure to publicly sanction the General), which suggests that Jackson's defiance of a federal court order was not considered "out of bounds."

138. Sofaer, *supra* note 133, at 250.

139. *Id.* at 251–52.

140. See CONG. GLOBE, 28th Cong., 1st Sess. 94 (1843–1844) (statement of Rep. Henry Grider, Whig-Ky.) (complaining that Jackson had undermined the "invaluable right" of habeas corpus); see also *id.* at 119 (statement of Rep. Luther Severance, Whig-Me.) (urging that Jackson lacked

former general, who had “defied” the order of a “misguided” federal judge.<sup>141</sup>

During the Civil War, President Abraham Lincoln also refused to obey a judicial order. Notably, much like scholars today, President Lincoln at times suggested that judicial decisions “must be binding in any case upon the parties to [the] suit.”<sup>142</sup> But Lincoln’s actions in *Ex parte Merryman*<sup>143</sup> suggest that he believed this rule admitted of exceptions. The case involved John Merryman, a Confederate sympathizer who was detained by the Union Army, and the legal issue was whether Lincoln could unilaterally suspend the writ of habeas corpus.<sup>144</sup> Chief Justice Taney (acting as a circuit justice) granted Merryman’s habeas corpus petition and ordered his release, holding that only Congress, not the President, had the power to suspend the writ.<sup>145</sup> Apparently on Lincoln’s order, however, the military refused to comply and Merryman remained in prison.<sup>146</sup>

Lincoln’s Attorney General Edward Bates soon issued an official opinion addressing the president’s authority to “refus[e] to obey a writ of habeas corpus” issued by a federal judge.<sup>147</sup> Notably, Bates’ opinion is somewhat unclear as to what he viewed as the scope of the president’s authority. The Attorney General at times suggested that the president’s

the power to declare martial law and thus “exceeded his authority in imprisoning” the federal judge).

141. CONG. GLOBE, 28th Cong., 1st Sess. 92–93 (1843–1844) (statement of Rep. John Dawson, D-La.) (recognizing that Jackson “defied Judge Hall, and refused to notice his writ of habeas corpus” but still praising him); *see also id.* at 118 (statement of Rep. Aaron Brown, D-Tenn.) (stating that the General had “the most patriotic motive in what he did towards the defence of New Orleans”); Sofaer, *supra* note 133, at 251–52 (noting the bill passed with overwhelming support and that some Senate members viewed the bill as remedying an “injustice to Jackson”).

142. Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), in INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES 133, 138–39 (1989). Lincoln took this position in speeches on *Dred Scott v. Sanford*, 60 U.S. 393 (1857).

143. 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487).

144. *See id.* at 147–48.

145. *See id.* at 148–49.

146. *See* Michael Stokes Paulsen, *The Merryman Power and the Dilemma of Autonomous Executive Branch Interpretation*, 15 CARDOZO L. REV. 81, 97–98 (1993) (noting that Merryman was imprisoned for seven weeks and then transferred to civil authorities). In a recent article, Seth Tillman insists that Lincoln did not in fact violate a federal court order, because Chief Justice Taney simply declared that Merryman should be released and did not take the additional step of ordering his release. *See* Seth Barrett Tillman, *Ex Parte Merryman: Myth, History, and Scholarship*, 224 MIL. L. REV. 481, 492, 495–98 (2016). Whether or not that is technically correct, as discussed below, Lincoln—through his Attorney General—certainly felt compelled to explain why a president need not always comply with federal court orders. And legislators assumed that Lincoln refused to obey a court order. *See infra* notes 151–153 and accompanying text. Accordingly, this episode can still tell us a great deal about political attitudes toward compliance with judicial orders in the nineteenth century.

147. Suspension of the Privilege of the Writ of Habeas Corpus, 10 Op. Att’y Gen. 74, 74 (1861). The Attorney General also discussed the president’s power to suspend habeas corpus. *See id.* at 74–75.

power to defy a judicial decree was limited to “exceptional” circumstances, such as those existing during the Civil War.<sup>148</sup> He argued that “when [the president] has fought and captured the insurgent army, and has seized their secret spies and emissaries,” he is not “bound to bring their bodies before any judge who may send him a writ of habeas corpus” and “submit to . . . whatever the said judge” shall determine.<sup>149</sup> Other language, however, suggests that the Attorney General endorsed a broader “disobedience” principle.<sup>150</sup>

But one thing is clear: Lincoln—through his Attorney General—had publicly declared that he could defy federal judicial orders, at least under some circumstances. Yet there was no bipartisan outcry in Congress. Instead, Lincoln was criticized by his political opponents. Democrats condemned the infringement on Merryman’s liberty and praised Chief Justice Taney for his “simple and sublime courage . . . in applying the plain principles of the Constitution.”<sup>151</sup> Some Democrats also charged that the President “in holding Merryman in confinement against the decision of the Chief Justice” had “usurp[ed] the judicial power of the Government.”<sup>152</sup> But Republicans defended Lincoln’s actions as necessary, at least in a time of crisis, and denounced Taney for attempting to protect “Merryman’s treason.”<sup>153</sup>

## 2. State and Local Officials

State and local officials also did not assume that they had to obey all federal court judgments. Indeed, “[f]rom 1789 until 1828, states

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148. *See id.* at 90 (“This power in the President is no part of his ordinary duty in time of peace; it is temporary and exceptional, and was intended only to meet a pressing emergency.”).

149. *Id.*

150. *See, e.g., id.* at 74, 76–77, 85–87 (“If it be true . . . that the President and the judiciary are co-ordinate departments . . . I do not understand how it can be legally possible for a judge to issue a command to the President.”).

151. CONG. GLOBE, 37th Cong., 1st Sess. 48–49 (1861) (statement of Sen. Trusten Polk, D-Mo.); *see also id.* at 68 (statement of Sen. Lazarus Powell, D-Ky.) (“There could be no necessity that would authorize this violation of the Constitution.”). Congress discussed *Merryman* when considering whether to authorize Lincoln’s suspension. *See* Amanda L. Tyler, *Suspension as an Emergency Power*, 118 YALE L.J. 600, 638–51 (2009) (recounting those debates).

152. CONG. GLOBE, 37th Cong., 1st Sess. 49 (1861) (statement of Sen. Trusten Polk, D-Mo.) (“By the action of the President . . . in holding Merryman in confinement against the decision of the Chief Justice . . . this has extended to a usurpation of the judicial power.”).

153. *E.g.,* CONG. GLOBE, 37th Cong., 2d Sess. 2070, 2073–74 (1862) (statement of Rep. Samuel Shellabarger, R-Ohio) (denouncing a proposal “to imprison the President . . . for not exceeding two years if he shall repeat the conduct of which he has been guilty in the imprisonment of Merryman and his confederates” and condemning Chief Justice Taney’s ruling).

routinely defied federal judicial orders.”<sup>154</sup> There were also striking examples of obstruction thereafter, including two cases from Georgia. In the early 1830s, the State refused to abide by a Supreme Court order that it release two missionaries from prison.<sup>155</sup> Even more troubling, Georgia carried out a *death sentence* of a Cherokee named Corn Tassel while his appeal was pending before the Supreme Court.<sup>156</sup> In both cases, Governor George Gilmer (a Jacksonian Democrat) declared defiantly: “[O]rders received from the Supreme Court [that interfere with state court decisions] will be disregarded; and any attempt to enforce such orders will be resisted with whatever force the laws have placed at my command.”<sup>157</sup>

The response to this disobedience was split along partisan lines. Northerners and other political opponents publicly condemned Georgia “for having unjustly and cruelly imprisoned the missionaries”<sup>158</sup> and for carrying out the “illegal” execution of Corn Tassel.<sup>159</sup> But Jacksonian Democrats came to the Governor’s defense. Georgia’s legislature, for example, agreed that the Governor should “disregard any and every mandate” from the Justices in both cases.<sup>160</sup> Outside the state, President Andrew Jackson and other Democrats fully supported

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154. Mark A. Graber, *James Buchanan as Savior? Judicial Power, Political Fragmentation, and the Failed 1831 Repeal of Section 25*, 88 OR. L. REV. 95, 128 (2009).

155. See Joseph C. Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 STAN. L. REV. 500, 517, 519–24 (1969) (describing *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), which involved the prosecution of two missionaries under a state law that “prohibited white men from living in the Cherokee territory without a license from the Governor”); Charles Warren, *Legislative and Judicial Attacks on the Supreme Court of the United States—A History of the Twenty-Fifth Section of the Judiciary Act*, 47 AM. L. REV. 161, 167–73 (1913) (describing how the Georgia legislature instructed the Governor to disregard any Supreme Court decision at odds with the State’s determination of law and Georgia’s public outcry over the Supreme Court’s decision).

156. See Burke, *supra* note 155, at 512–13 (noting the State’s determination to assert its sovereignty in executing Corn Tassel despite a writ of error issued by the Supreme Court).

157. *Georgia and the Cherokees*, 39 NILES’ WKLY. REG. 329, 338 (1831) (Tassel case); see also Wilson Lumpkin, *Legislature of Georgia*, 41 NILES’ WKLY. REG. 297, 313 (1831) (missionaries case).

158. John Andrew Schulz, *Letter from Mr. Schulz*, 43 NILES’ WKLY. REG. 129, 140 (1832) (speech by former Pennsylvania Governor John Schulz); see also Eliphalet Nott et al., *Release of the Missionaries*, 44 NILES’ WKLY. REG. 353, 359 (1833) (letter signed by northern politicians criticizing Georgia’s imprisonment of the missionaries).

159. *Mr. Everett’s Speech Concluded*, DAILY NAT’L INTELLIGENCER, Mar. 19, 1831 (speech by Massachusetts Governor Edward Everett).

160. See *Georgia and the Cherokees*, *supra* note 157, at 338 (quoting a resolution of the Georgia House of Representatives regarding the Tassel case); *Georgia Legislature*, 41 NILES’ WKLY. REG. 321, 335 (1831) (missionaries case).

Georgia's defiance in the Tassel case<sup>161</sup> and did not criticize the State's treatment of the missionaries.<sup>162</sup>

By the 1850s, the political winds had shifted; the federal judiciary was dominated by pro-slavery Democrats, and anti-slavery officials in the North now asserted the authority to defy federal judicial orders. The most prominent case was in Wisconsin.<sup>163</sup> Sherman Booth was convicted in federal court of violating the Fugitive Slave Act (by helping a slave escape to freedom); but then a state court granted Booth's habeas corpus petition and ordered his release.<sup>164</sup> The Supreme Court in *Ableman v. Booth* reversed the state court decision, holding that the court had no jurisdiction over someone in federal custody, and castigating the state court for "revers[ing] and annul[ing] the judgment of the District Court of the United States."<sup>165</sup> Yet Wisconsin remained defiant. The state court refused to file the mandate issued by the Supreme Court,<sup>166</sup> and the Wisconsin legislature adopted resolutions, urging that states could oppose any "unauthorized acts" taken by the federal judiciary.<sup>167</sup>

This litigation set off a heated debate among federal officials over the propriety of Wisconsin's defiance. Once again, the reaction was divided along party lines. Pro-slavery Democrats, including Georgia Senator Robert Toombs, described Wisconsin's actions as "shameful" and as "the most striking case of reckless disregard of constitutional

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161. See Warren, *supra* note 155, at 167–68 (stating that "other States holding extreme views of States' Rights" were "sympath[etic]" with Georgia in the Tassel case); *Illustrations of Jacksonism*.—No. 2, DAILY NAT'L J., Sept. 14, 1831 (noting President Andrew Jackson's views).

162. The scholarly discussion about the missionaries' case has focused on whether President Jackson stated, "John Marshall has made his decision: *now let him enforce it!*" *E.g.*, MARK R. CHEATHAM, ANDREW JACKSON, SOUTHERNER 157–58 (2013) ("This outburst . . . almost certainly did not occur."). But for my purposes, it is more crucial that Jackson did not publicly criticize Georgia, and even suggested that the missionaries were in the wrong. See Andrew Jackson, *The President and the Missionaries*, 43 NILES' WKLY. REG. 33, 43 (1832) (denying he could enforce the Supreme Court's decision and adding, "I do not wish to comment upon [the missionaries' case] but I cannot refrain from observing that . . . they are by their injudicious zeal . . . too apt to make themselves obnoxious to those among whom they are located"). Notably, after Jackson was reelected in 1832, some Jacksonian Democrats privately pressured the Georgia governor to pardon the missionaries, because Georgia's defiance was providing ammunition for the nullification movement in South Carolina. See Burke, *supra* note 155, at 530. But that is a far cry from publicly condemning Georgia's open defiance of the Supreme Court.

163. A similar case arose in Ohio. See THOMAS D. MORRIS, FREE MEN ALL: THE PERSONAL LIBERTY LAWS OF THE NORTH 187 (photo. reprint 2010) (1974) (discussing Republican Governor Salmon Chase's threat to defy a federal court order enforcing the Fugitive Slave Act).

164. H. Robert Baker, *The Fugitive Slave Clause and the Antebellum Constitution*, 30 LAW & HIST. REV. 1133, 1169–70 (2012).

165. 62 U.S. 506, 513–14, 522–24 (1858).

166. Baker, *supra* note 164, at 1170.

167. Warren, *supra* note 155, at 184–85 (internal quotation marks omitted).

obligation which has yet occurred.”<sup>168</sup> But Republicans rushed to Wisconsin’s defense.<sup>169</sup> Several Republicans pointed out that slave states had themselves asserted the authority to defy judicial orders; in the missionaries’ case, for example, Georgia “imprison[ed two individuals], contrary to a decision of the Supreme Court of the United States.”<sup>170</sup> New Hampshire Senator John Hale declared: “I think it is a little unkind, a little out of place, for the State of Georgia to censure the State of Wisconsin or any other State, for following in the tracks which she has so plainly and so clearly indicated.”<sup>171</sup>

### *C. The Transition Period: The Civil Rights Movement*

Open defiance of the federal courts was not simply a nineteenth-century phenomenon. Following the Supreme Court’s 1954 decision in *Brown v. Board of Education*,<sup>172</sup> “[t]hroughout the South, governors and gubernatorial candidates called for defiance of court orders.”<sup>173</sup> Several followed through on this pledge. In 1956, Texas Governor Allan Shivers obstructed a desegregation order by directing state troops to block black students from entering Mansfield High School.<sup>174</sup> One year later, Arkansas Governor Orval Faubus did the same at Central High School in Little Rock.<sup>175</sup> And, in 1962, Mississippi Governor Ross Barnett violated a federal court order by blocking the admission of James Meredith, the University of Mississippi’s first black student.<sup>176</sup>

168. CONG. GLOBE, 36th Cong., 1st Sess. 892 (1860) (statement of Sen. Robert Toombs, D-Ga.); *id.* at 333 (statement of Rep. John Reagan, D-Tex.) (criticizing the state court).

169. CONG. GLOBE, 36th Cong., 1st Sess. app. 121 (1860) (statement of Sen. James Doolittle, R-Wis.); *see also* CONG. GLOBE, 36th Cong., 1st Sess. 333 (1860) (statement of Rep. John Potter, R-Wis.) (“The supreme court of Wisconsin needs no defense.”).

170. CONG. GLOBE, 36th Cong., 1st Sess. 762–63 (1860) (statement of Sen. John Hale, R-N.H.); CONG. GLOBE, 36th Cong., Spec. Sess. 121 (1860) (statement of Sen. James Doolittle, R-Wis.) (emphasizing Georgia’s defiance in the missionaries’ case and the “life and death” case of Tassel).

171. CONG. GLOBE, 36th Cong., 1st Sess. 764 (1860) (statement of Sen. John Hale, R-N.H.).

172. 347 U.S. 483 (1954).

173. GERALD N. ROSENBERG, *THE HOLLOW HOPE* 78 (2d ed. 2008).

174. *See* ROBYN DUFF LADINO, *DESEGREGATING TEXAS SCHOOLS: EISENHOWER, SHIVERS, AND THE CRISIS AT MANSFIELD HIGH* 104 (1996).

175. *See* MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 326 (2004). Governor Faubus later withdrew the state forces (when threatened with a contempt citation), but a mob of private individuals continued to prevent entry to the school, while state officials looked the other way. *Id.*

176. *See* CHARLES W. EAGLES, *THE PRICE OF DEFIANCE: JAMES MEREDITH AND THE INTEGRATION OF OLE MISS* 283–84 (2009). Barnett was later found in contempt of court. *See United States v. Barnett*, 376 U.S. 681, 682–83 (1964) (denying a jury trial in the criminal contempt proceeding).

Initially, there was no bipartisan criticism of this defiance.<sup>177</sup> Supporters of integration were certainly appalled by the state officials' conduct, warning that this "idea that the Governor of any State is immune from the processes of the Federal courts" threatened to "destroy the Federal Constitution [and] nullify the Civil War."<sup>178</sup> But segregationists heaped praise upon these governors. Governor Faubus became a "regional hero" for his "aggressive defiance of federal authorities."<sup>179</sup> Southern politicians also insisted that "Governor Barnett is entitled to the admiration and respect of all Americans."<sup>180</sup> To defend his state's authority, Barnett had "courageously and boldly pressed himself forward, both as Governor and as an individual, and obstructed an order of a U.S. Court."<sup>181</sup>

But within a few years, government officials and the general public became less comfortable with the South's massive resistance to desegregation—and with the defiance of federal court orders. We can see this evolution in President Dwight Eisenhower. Although Eisenhower never publicly criticized the *Brown* decision, he apparently disagreed with it.<sup>182</sup> Perhaps in part for this reason, the President did nothing in response to state officials' early defiance of desegregation orders. Thus, in 1956, when Texas Governor Shivers used state troops to obstruct a desegregation decree, the President took no action.<sup>183</sup> Indeed, as late as July 1957, President Eisenhower declared that he

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177. Notably, during this period, the relevant "partisan" divide was between social conservatives (conservative Republicans and Southern Democrats) who opposed racial integration and social progressives from both parties who supported integration. See MORRIS P. FIORINA, *DIVIDED GOVERNMENT* 165 (2003); KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY* 268–69, 273 (2007).

178. 108 CONG. REC. 20,818 (1962) (statement of Sen. Jacob Javits, R-N.Y.) (denouncing Governor Barnett's behavior as "contumacious"); see also Radio and Television Report to the Nation on the Situation at the University of Mississippi, 1962 PUB. PAPERS 726, 727 (Sept. 30, 1962) (statement by President John F. Kennedy: "The law which we obey includes the final rulings of the courts . . ."); *Gov. Leader Sees Faubus Blunder: Says Arkansan 'Set Back the Cause of Freedom'—McKeldin in New Attack*, N.Y. TIMES, Oct. 4, 1957, at 8 (noting criticisms of Governor Orval Faubus).

179. KLARMAN, *supra* note 175, at 398.

180. 108 CONG. REC. 20,805 (1962) (statement of Sen. James Eastland, D-Miss.); see also EAGLES, *supra* note 176, at 283–84 ("State leaders [in Mississippi] nearly unanimously supported Barnett."); KLARMAN, *supra* note 175, at 407 (Alabama's "entire congressional delegation" supported Barnett, and a number of prominent state politicians also supported him).

181. 108 CONG. REC. 20,805 (1962) (statement of Sen. James Eastland, D-Miss.); see also *id.* at 20,806 ("[T]he southern people, by and large, will not recognize, abide by, or comply with an illegal court decree . . .").

182. See 2 STEPHEN E. AMBROSE, *EISENHOWER: THE PRESIDENT* 190 (1984) ("Eisenhower personally wished that the Court had upheld *Plessy v. Ferguson*, [163 U.S. 537 (1896)].").

183. See ROSENBERG, *supra* note 173, at 119 (arguing Eisenhower did not act in Texas for political reasons: "1956 was an election year, Texas was seen as a crucial state . . .").

could not “imagine any set of circumstances that would ever induce [him] to send Federal troops . . . into any area to enforce the orders of a Federal court.”<sup>184</sup> A few months later, when Governor Faubus again obstructed a federal court order, Eisenhower still did not immediately act. The federal government stepped in only after a private mob had arrived to prevent black students from entering Little Rock High School.<sup>185</sup>

But in the aftermath of the Little Rock crisis, Eisenhower took a firm stand. He insisted that “all Americans” have a “solemn duty . . . to comply with the final orders of the court” in desegregation and other cases, regardless of their “agreement or disagreement with [the] outcome.”<sup>186</sup> Eisenhower maintained this position for the remainder of his presidency—and even after he left office. Thus, when Mississippi Governor Barnett prevented James Meredith from entering Ole Miss, (then-former President) Eisenhower denounced Barnett’s actions as “absolutely unconscionable and indefensible.”<sup>187</sup>

Other political leaders, including those that previously opposed desegregation orders, later followed suit. As Michael Klarman has recounted, not long after the Ole Miss incident, moderates throughout the South began to “call[] for . . . compliance with federal court orders.”<sup>188</sup> Every state ultimately began to implement desegregation decrees; even Governor Faubus agreed to integrate the schools.<sup>189</sup> The era in which political actors were applauded for “courageously and boldly . . . obstruct[ing] an order of a U.S. Court”<sup>190</sup> appeared to be at an end.

#### *D. The Modern Convention Requiring Compliance*

The end of massive resistance seemed to mark a turning point for the enforcement of federal court orders more broadly. Following the civil rights era, it became increasingly uncommon for any federal or state political actor to disobey a federal court decree. Moreover, if an

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184. The President’s News Conference of July 17, 1957, 1957 PUB. PAPERS 546 (July 17, 1957) (Dwight D. Eisenhower).

185. See KLARMAN, *supra* note 175, at 326.

186. Statement by the President on Compliance with Final Orders of the Courts, 1958 PUB. PAPERS 631 (Aug. 20, 1958) (Dwight D. Eisenhower).

187. ‘Unconscionable,’ *Eisenhower Says of Gov. Barnett’s Stand*, N.Y. TIMES, Sept. 28, 1962, at 23.

188. KLARMAN, *supra* note 175, at 408.

189. See *id.* at 400 (noting that “massive resistance” in Arkansas ended in 1959 and Faubus himself, who continued to politically oppose integration, “ceased interfering with school desegregation”).

190. 108 CONG. REC. 20,805 (1962) (statement of Sen. James Eastland, D-Miss.).

official did violate—or threatened to violate—a court order, he faced criticism even from political supporters. I argue below (in Part IV) that this norm likely emerged in large part *because* of the civil rights movement; subsequent political actors did not want to be equated with the segregationists who led the massive resistance to *Brown*. For now, the Article offers several examples to illustrate the bipartisan norm that emerged requiring compliance with federal court orders.

### 1. Compliance by the Federal Executive

The president's duty to comply with federal court orders became a major issue in the 1970s. During the Watergate investigation,<sup>191</sup> a special prosecutor sought tapes of conversations between President Richard Nixon and administration officials.<sup>192</sup> The President refused to turn over the tapes, contending that they were protected by executive privilege.<sup>193</sup> And throughout the litigation, Nixon suggested that he might not obey a Supreme Court decision directing him to produce the tapes.<sup>194</sup>

The response by legislators was decisive and bipartisan. Both Democrats and Republicans “repeatedly urged” the President to “abide by [any] Supreme Court decision.”<sup>195</sup> Legislators of both parties—including “leading defender[s] of the President”—further warned that, if Nixon defied a Supreme Court order, he would be impeached.<sup>196</sup> Thus, even Nixon's supporters declared that it would be a “disastrous

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191. Federal authorities were investigating a break-in at the Democratic National Committee headquarters at the Watergate office complex. For a helpful discussion, see LOUIS FISHER & NEAL DEVINS, *POLITICAL DYNAMICS OF CONSTITUTIONAL LAW* 106–12 (3d ed. 2001). *See generally* STANLEY I. KUTLER, *THE WARS OF WATERGATE: THE LAST CRISIS OF RICHARD NIXON* (1990).

192. *See United States v. Mitchell*, 377 F. Supp. 1326, 1328 (D.D.C. 1974) (discussing the special prosecutor's subpoena for the President's tapes).

193. *See id.* at 1329.

194. *See* Jules Witcover, *Nixon Stand on Court Unclear*, WASH. POST, June 4, 1974, at A3.

195. Laurence Stern & Jules Witcover, *Delivery Time Is in Doubt*, WASH. POST, July 25, 1974, at A1 (quoting Vice President Gerald Ford); *see also* John P. MacKenzie, *Court Hears Watergate Tapes Case*, WASH. POST, July 9, 1974, at A1 (“Senate leaders [of both parties] cautioned against presidential defiance of an adverse ruling.”).

196. *See* Stern & Witcover, *supra* note 195, at A1 (noting the “overwhelming bipartisan warnings”). At the time, the House Judiciary Committee was considering impeachment for any presidential misconduct related to the Watergate scandal. But many of Nixon's “leading defender[s]” believed he could successfully fight impeachment—as long as he complied with a Supreme Court decision. *See* David S. Broder, *Rhodes Warns on Nixon Stand*, WASH. POST, June 11, 1974, at A6; Rowland Evans & Robert Novak, *A Warning to President Nixon*, WASH. POST, July 7, 1974, at B7 (reporting that a “pro-Nixon” Southern Democrat sent the President a “stern warning . . . the most dangerous thing you can do is defy a ruling from the Supreme Court”).

situation” if the President failed to obey a Supreme Court decision,<sup>197</sup> because that was “the one thing he probably couldn’t survive.”<sup>198</sup>

Ultimately, the Court issued a unanimous ruling, rejecting Nixon’s claim of executive privilege, and directing him to produce the tapes.<sup>199</sup> The President soon announced that although he was “disappointed in the result,” he “respect[ed] and accept[ed] the Court’s decision,” and would “take whatever measures are necessary to comply with that decision in all respects.”<sup>200</sup>

Since Nixon, top executive officials have assumed that they must comply with federal court orders.<sup>201</sup> One of the most instructive examples is the George W. Bush Administration’s obedience in the wake of the September 11 terrorist attacks. As we have seen, historically, federal officials had proved willing to defy judicial orders in times of national crisis, like the War of 1812 and the Civil War. Moreover, the Bush Administration made bold claims about the scope of executive authority in the war on terror—leading some scholars to worry that the Administration might not comply with a judgment restricting its power.<sup>202</sup> Yet when the Supreme Court held that Guantanamo Bay detainees could file federal habeas petitions to challenge their detentions, President Bush announced: “We’ll abide by the Court’s decision. That doesn’t mean I have to agree with it.”<sup>203</sup>

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197. *Congressmen of Both Parties Applaud Decision on Tapes*, L.A. TIMES, July 24, 1974, at 2.

198. Broder, *supra* note 196, at A6.

199. *See* United States v. Nixon, 418 U.S. 683, 708–14 (1974).

200. Statement Announcing Intention to Comply with Supreme Court Decision Requiring Production of Presidential Tape Recordings, 1 PUB. PAPERS 606 (July 24, 1974). The President resigned two weeks later. *See* FISHER & DEVINS, *supra* note 191, at 111–12.

201. *See, e.g.*, Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979, 983–86 (1987) (Reagan Attorney General Ed Meese strongly criticizes the Supreme Court but states: “Obviously [a Court ruling] does have binding quality: it binds the parties in a case and also the executive branch for whatever enforcement is necessary.”). Notably, the phenomenon of “nonacquiescence” illustrates this principle. Even under this practice, a federal agency must abide by a specific judicial decree in a case in which it was a party; the agency simply reserves the right not to follow a court of appeals precedent in *other* cases (if, for example, the precedent would undermine the agency’s ability to regulate uniformly throughout the country). For a discussion of nonacquiescence, *see* Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679 (1989).

202. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 516–17, 535–36 (2004) (noting, but declining to rule on, the executive’s assertion that it “possesse[d] plenary authority to detain [enemy combatants] pursuant to Article II”); Fallon, *supra* note 126, at 4 (“The immanent logic of [the Administration’s] position” on unilateral executive power could have implied that “the President could also, under the Constitution, lawfully refuse to obey a judicial order.”).

203. Nina Totenberg, *Trump’s Criticism of Judges out of Line with Past Presidents*, NPR: POL. (Feb. 11, 2017, 6:19 AM), <http://www.npr.org/2017/02/11/514587731/trumps-criticism-of-judges-out-of-line-with-past-presidents> [<https://perma.cc/6X5U-ESFJ>] (quoting President Bush and noting that he refrained from a personal attack on the judges).

Another powerful example arose when federal district courts issued nationwide injunctions blocking President Donald Trump's "travel bans" (executive orders that suspended the entry of individuals from certain named countries with predominantly Muslim populations).<sup>204</sup> The President denounced the court rulings as "ridiculous," deriding one Article III member as a "so-called judge" and complaining that another order was "an unprecedented judicial overreach."<sup>205</sup> Yet the Trump Administration nevertheless complied with the injunctions, promising to challenge the federal court orders through the ordinary appellate process.<sup>206</sup> The executive's submission to the courts, despite the President's rhetoric, suggests that there is today a bipartisan consensus (a convention) requiring obedience to federal court decrees.<sup>207</sup>

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204. See Alexander Burns, *Federal Judge Blocks New Ban on Travel to U.S.*, N.Y. TIMES, Mar. 16, 2017, at A1 (discussing the federal court orders against President Trump's second travel ban, which suspended entry from six predominantly Muslim countries, and against the original travel ban, issued on January 25, 2017, which suspended entry from seven countries).

205. Alex Johnson, *Trump's Second Travel Ban Blocked by Hawaii Judge Derrick Watson*, NBC NEWS (Mar. 15, 2017), <https://www.nbcnews.com/news/us-news/federal-judge-hawaii-blocks-trump-s-revised-travel-order-n734141> [<https://perma.cc/EG24-GVWM>]; Amy B. Wang, *Trump Lashes out at 'So-Called Judge' Who Temporarily Blocked Travel Ban*, WASH. POST (Feb. 4, 2017), [https://www.washingtonpost.com/news/the-fix/wp/2017/02/04/trump-lashes-out-at-federal-judge-who-temporarily-blocked-travel-ban/?utm\\_term=.da84fd335888](https://www.washingtonpost.com/news/the-fix/wp/2017/02/04/trump-lashes-out-at-federal-judge-who-temporarily-blocked-travel-ban/?utm_term=.da84fd335888) [<https://perma.cc/35MS-BZ9B>] (quoting President Trump's tweet: "The opinion of this so-called judge, which essentially takes law-enforcement away from our country, is ridiculous and will be overturned!" (internal quotation marks omitted)).

206. See Laura Jarrett, *Homeland Security Suspends Travel Ban*, CNN POL. (Feb. 4, 2017), <http://www.cnn.com/2017/02/03/politics/federal-judge-temporarily-halts-trump-travel-ban-nationwide-ag-says/index.html> [<https://perma.cc/G63F-HADP>]. Notably, President Trump promised to go through the ordinary appellate process in the very same comments that denounced the federal court orders. See Johnson, *supra* note 205 (noting that, in a speech describing a court order against the second travel ban as "an unprecedented judicial overreach," President Trump said his administration "would pursue the case all the way to the Supreme Court if necessary" (internal quotation marks omitted)); Wang, *supra* note 205 (quoting President Trump's tweet: "The opinion of this so-called judge, which essentially takes law-enforcement away from our country, is ridiculous and *will be overturned!*" (emphasis added) (internal quotation marks omitted)).

207. There were reports that some Customs and Border Protection agents on the ground did not fully comply with early court decrees limiting the effects of the President's first executive order (issued on Jan. 27, 2017). See Daniel Marans, *Customs and Border Officials Defy Court Order on Lawful Residents*, HUFF. POST (Jan. 29, 2017), [http://www.huffingtonpost.com/entry/dulles-airport-feds-violated-court-order\\_us\\_588d7274e4b08a14f7e67bcf](http://www.huffingtonpost.com/entry/dulles-airport-feds-violated-court-order_us_588d7274e4b08a14f7e67bcf) [<https://perma.cc/RRK4-GRZY>] (asserting that federal agents did not permit affected individuals to meet with attorneys). But it appears that any such noncompliance may have resulted from confusion during the first forty-eight hours after the issuance of the executive order. That seems particularly likely, given the executive's compliance with the subsequent orders blocking the travel bans entirely. In any event, the recent controversy over the travel bans underscores the importance of the convention requiring compliance with federal court judgments—and raises concerns about what might happen if that convention changed. See *infra* Part IV (emphasizing the contingency of conventions).

## 2. Modern Compliance by State and Local Officials

Since the civil rights era, open defiance of federal courts by state and local officials has been rare. Much like their federal counterparts, these officials seem to assume that they must obey federal court decrees. For example, in the 1980s, after a federal district court declared that prayers before public school football games violated the Establishment Clause, many officials in nearby school districts denounced the decision and vowed to continue holding pre-game prayers.<sup>208</sup> But the school officials acknowledged that they would cease the practice as soon as “they got a direct order to stop.”<sup>209</sup>

Moreover, if state and local officials do defy court orders, they will likely face criticism even from fellow partisans. A recent episode illustrates this point. In the wake of the Supreme Court’s 2015 decision in *Obergefell v. Hodges*, which held that States must recognize same-sex marriages,<sup>210</sup> a Kentucky clerk (Kim Davis) stopped issuing marriage licenses altogether—in order to avoid providing them to same-sex couples.<sup>211</sup> (Davis alleged that assisting same-sex marriages would violate her religious beliefs.<sup>212</sup>) A federal district court ordered Davis to issue the licenses,<sup>213</sup> but she refused. The judge found Davis in contempt and directed that she be jailed until she complied.<sup>214</sup>

Although Davis was released after a five-day stay in prison,<sup>215</sup> her disobedience got a good deal of national attention. Perhaps not surprisingly, the Obama Administration argued that Davis should comply with the federal court order and issue same-sex marriage licenses.<sup>216</sup> But most Republican presidential candidates also insisted that Davis had to obey the court order, even though each one of them

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208. See Tracy Thompson, *Prayer Ruling Raises Issue of ‘Supreme Law of Land,’* ATLANTA J.-CONST., Feb. 8, 1987, at D7.

209. *Id.*

210. 135 S. Ct. 2584, 2604–05 (2015).

211. See *Miller v. Davis*, 123 F. Supp. 3d 924, 929 (E.D. Ky. 2015).

212. See *id.*

213. See *id.* at 944.

214. See Liam Stack & Ashley Southall, *Jailed Kentucky Clerk Starts Federal Appeal*, N.Y. TIMES (Sept. 6, 2015), <https://www.nytimes.com/2015/09/07/us/jailed-kentucky-clerk-starts-federal-appeal.html?mcubz=1> [<https://perma.cc/R83E-AH3H>] (Davis was “jailed for defying a federal court order . . .”).

215. David Weigel, Abby Phillip & Sarah Larimer, *Kim Davis Released from Jail, Ordered Not to Interfere with Same-Sex Marriage Licenses*, WASH. POST (Sept. 8, 2015), [https://www.washingtonpost.com/news/post-nation/wp/2015/09/08/judge-orders-kentucky-clerk-kim-davis-released-from-jail/?utm\\_term=.d801f876ab71](https://www.washingtonpost.com/news/post-nation/wp/2015/09/08/judge-orders-kentucky-clerk-kim-davis-released-from-jail/?utm_term=.d801f876ab71) [<https://perma.cc/7V3H-WKY4>].

216. See Michael Muskal, *Kentucky County Oks Marriages*, L.A. TIMES, Sept. 5, 2015, at A6 (noting that President Obama’s Press Secretary said that Davis should not defy the court’s ruling).

claimed to oppose same-sex marriage.<sup>217</sup> For example, Senator Lindsey Graham stated that, although he “‘support[ed] traditional marriage’ himself,” Davis should “comply with the law or resign.”<sup>218</sup> Ohio Governor John Kasich agreed; although he “believe[d] in traditional marriage . . . the court has ruled.”<sup>219</sup> Likewise, then front-runner (now President) Trump said that, although he “hate[d] to see [Davis] being put in jail,” “[w]e’re a nation of laws,” so she had to comply.<sup>220</sup>

Some evidence, however, suggests that the bipartisan consensus on compliance may not be as strong for state and local officials as it is for federal officials. In the Davis case, two of the sixteen Republican presidential candidates defended the clerk’s disobedience. Senator Ted Cruz and former Arkansas Governor Mike Huckabee insisted that Davis should not be required to comply with a federal court order that violated her faith.<sup>221</sup> Moreover, in 2016, former Arizona Sheriff Joe Arpaio was convicted of violating a federal district court order, which restricted his authority to arrest and detain undocumented immigrants.<sup>222</sup> Although candidate Trump had insisted on compliance by Davis, President Trump in August 2017 pardoned Sheriff Arpaio—a move that might be seen as an endorsement of not only the Sheriff’s

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217. Some candidates argued that Davis should comply with the court order but also urged states to exempt government employees with religious objections from issuing marriage licenses. *See, e.g.,* Jeremy W. Peters, *Marco Rubio Says Government Should Respect Kim Davis’s Beliefs*, N.Y. TIMES (Sept. 2, 2015), <https://www.nytimes.com/politics/first-draft/2015/09/02/marco-rubio-says-government-should-respect-kim-daviss-beliefs/> [<https://perma.cc/GWZ2-VB73>] (providing the views of Florida Senator Marco Rubio).

218. James Higdon et al., *Ky. Clerk Defies Court Order on Marriage Licenses*, WASH. POST, Sept. 2, 2015, at A1 (internal quotation marks omitted).

219. Stack & Southall, *supra* note 214 (internal quotation marks omitted).

220. Muskal, *supra* note 216, at A6.

221. *See id.* (providing quotations from Mike Huckabee and Senator Ted Cruz condemning Kim Davis’s arrest). Huckabee further suggested that a citizen need not comply with any federal court order she believed to be wrong. *See* Stack & Southall, *supra* note 214 (quoting Mike Huckabee as saying that “you obey [a law] if it’s right” (internal quotation marks omitted)). He was apparently alone in making this claim.

222. Stephen Lemons, *Joe Arpaio Guilty on Three Counts of Civil Contempt, Criminal Contempt Still Possible*, PHOENIX NEW TIMES (May 13, 2016), <http://www.phoenixnewtimes.com/news/joe-arpaio-guilty-on-three-counts-of-civil-contempt-criminal-contempt-still-possible-8293359> [<https://perma.cc/T2MR-KBZF>]. Notably, Sheriff Arpaio insisted in the criminal contempt proceeding that he did not intend to violate a federal court order. *See* Megan Cassidy, *Sheriff Joe Arpaio in Contempt of Federal Court, Judge Rules*, ARIZ. REPUBLIC (May 13, 2016), <http://www.azcentral.com/story/news/local/phoenix/2016/05/13/arpaio-contempt-federal-court-ruling/77833232/> [<https://perma.cc/WQ5H-3XSF>] (“Arpaio . . . admitted to violating the judge’s orders before the hearings’ start date but repeatedly insisted that it was due to miscommunication and confusion rather than willful defiance.”).

aggressive law enforcement tactics but also his noncompliance with a federal court order.<sup>223</sup>

I do not want to exaggerate the significance of these examples. Notably, President Trump's pardon was quickly criticized by prominent Republicans, including House Speaker Paul Ryan and Senator John McCain.<sup>224</sup> And in the Davis case, virtually all Republican presidential candidates argued, almost reflexively, that the Kentucky clerk had to obey the federal court (even though a defense of Davis might have been popular among evangelical voters).<sup>225</sup> Accordingly, in sharp contrast to the segregationists of the civil rights era, Davis and Arpaio were not widely cheered on by their fellow partisans for having "courageously and boldly pressed . . . forward . . . [to] obstruct[] an order of a U.S. Court."<sup>226</sup>

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223. The president need not articulate reasons for a pardon. *See* U.S. CONST. art. II, § 2, cl. 1 (granting the president the power to pardon without stating that the president needs to supply reasons). The press release from the White House suggested that the pardon was primarily designed to signal approval of Arpaio's enforcement tactics. *See* Press Release, The White House: Office of the Press Sec'y, President Trump Pardons Sheriff Joe Arpaio (Aug. 25, 2017), <https://www.whitehouse.gov/the-press-office/2017/08/25/president-trump-pardons-sheriff-joe-arpaio> [<https://perma.cc/V2ZW-PRFR>];

Throughout his time as Sheriff, Arpaio continued his life's work of protecting the public from the scourges of crime and illegal immigration. Sheriff Joe Arpaio is now eighty-five years old, and after more than fifty years of admirable service to our Nation, he is worthy candidate for a Presidential pardon.

My research suggests that (at least before the pardon) much of the debate over Arpaio focused on his enforcement tactics, rather than his noncompliance with a federal court order—perhaps because he asserted that he sought to comply. *See supra* note 222.

224. *See* Emily Goldberg, *Schumer, Ryan Criticize Trump for Arpaio Pardon*, POLITICO (Aug. 26, 2017), <http://www.politico.com/story/2017/08/26/schumer-mccain-trump-arpaio-pardon-242065> [<https://perma.cc/64TS-M3CB>] (noting criticism by Ryan and McCain as well as Democrats); Maggie Haberman, *Trump Asked Top Aides Months Ago if Arpaio Case Could Be Dropped, Officials Say*, N.Y. TIMES (Aug. 26, 2017), <https://www.nytimes.com/2017/08/26/us/politics/political-reaction-trump-pardon-arpaio.html> [<https://perma.cc/4K6Q-D6AJ>] (noting Republican criticism, although also reporting that at least one Republican congressman agreed with the pardon, while others "stayed quiet"); Toluse Olorunnipa, *Christie Is Latest Republican to Criticize Trump's Arpaio Pardon*, BLOOMBERG: POL. (Aug. 30, 2017, 7:52 AM), <https://www.bloomberg.com/news/articles/2017-08-30/christie-is-latest-republican-to-criticize-trump-s-arpaio-pardon> [<https://perma.cc/2MZZ-E758>] (noting criticism by New Jersey Governor Chris Christie).

225. *See* James Higdon & Sandhya Somashekhar, *Kentucky Clerk Ordered to Jail for Refusing to Issue Gay Marriage License*, WASH. POST (Sept. 3, 2015), [https://www.washingtonpost.com/national/defiant-kentucky-clerk-could-be-found-in-contempt-thursday/2015/09/03/34e50f08-51af-11e5-9812-92d5948a40f8\\_story.html?utm\\_term=.7681f46d26b4](https://www.washingtonpost.com/national/defiant-kentucky-clerk-could-be-found-in-contempt-thursday/2015/09/03/34e50f08-51af-11e5-9812-92d5948a40f8_story.html?utm_term=.7681f46d26b4) [<https://perma.cc/W3PP-4UBB>] (suggesting Senator Cruz supported Davis "to appeal to the evangelical Christian base").

226. 108 CONG. REC. 20,805 (1962) (statement of Sen. James Eastland, D-Miss.). In addition to the examples noted in the text, there is also the case of former Alabama state court judge Roy Moore, who in 2003 disregarded a federal court order to remove the Ten Commandments from the state courthouse, and in 2015 encouraged Alabama officials to violate a federal court order requiring them to issue same-sex marriage licenses. *See* Kent Faulk, *Alabama Supreme Court Chief Justice Roy Moore Suspended for Rest of Term*, AL.COM (Sept. 30, 2016), [http://www.al.com/news/birmingham/index.ssf/2016/09/alabama\\_supreme\\_court\\_chief\\_ju.html](http://www.al.com/news/birmingham/index.ssf/2016/09/alabama_supreme_court_chief_ju.html)

Nevertheless, we should keep in mind that, although state and local officials have overwhelmingly obeyed federal court orders since the civil rights era, that practice is not a given. Instead, like other conventions, this bipartisan norm was politically constructed and is historically contingent—a point to which I return in Part IV.

### III. CONVENTION AGAINST COURT PACKING

There is a strong norm today against “packing” the Supreme Court—that is, modifying the Court’s size in order to alter the future course of its decisions. As scholars have recognized, “[n]o serious person, in either major political party, suggests court packing as a means of overturning disliked Supreme Court decisions.”<sup>227</sup> That is because, even when compared with other court-curbing measures, “[c]ourt packing” is especially out of bounds.”<sup>228</sup>

My goal, as with the conventions discussed in Parts I and II, is to examine how (and when) this strong bipartisan consensus developed. Some commentators appear to assume that there was already a convention against court packing in 1937, when President Franklin Roosevelt advocated enlarging the Supreme Court.<sup>229</sup> But that seems

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[<https://perma.cc/W68W-47BY>]; Kent Faulk, *Roy Moore Timeline: Ten Commandments to Gay Marriage Stance*, AL.COM (May 6, 2016), [http://www.al.com/news/birmingham/index.ssf/2016/05/roy\\_moore\\_timeline\\_ten\\_command.html](http://www.al.com/news/birmingham/index.ssf/2016/05/roy_moore_timeline_ten_command.html) [<https://perma.cc/8VG9-7K5V>] [hereinafter Faulk, *Roy Moore Timeline*]. In September 2017, Moore became the Republican nominee for a U.S. Senate seat—an action that could be seen in part as an endorsement of his past defiance of the federal judiciary. See Jessica Taylor, *Roy Moore, Culture Warrior, Will Be Favored to Be the Next U.S. Senator from Alabama*, NPR (Sept. 27, 2017, 9:40 AM), <https://www.npr.org/2017/09/27/553856901/roy-moore-s-long-controversial-history-in-alabama-politics> [<https://perma.cc/X4NE-3ZAT>]. But again, the evidence is mixed. The Alabama state judiciary penalized Moore for his defiance of the federal courts—in 2003, by removing him from the bench, and in 2016, by suspending him for the remainder of his term—even though state officials sympathized with Moore’s views on the merits. See Bill Chappell, *Ala. Chief Justice Roy Moore Suspended for Rest of Term over Gay Marriage Stance*, NPR (Sept. 30, 2016, 12:53 PM), <http://www.npr.org/sections/thetwo-way/2016/09/30/496089488/alabamas-chief-justice-roy-moore-loses-case-over-same-sex-marriage-stance> [<https://perma.cc/276X-Y4KD>] (noting that “[t]he judgment against Moore [by the state Court of the Judiciary] was unanimous. But the nine-member court also noted that the decision is based on a review of Moore’s behavior and decisions, not on the justices’ views of the Supreme Court’s June 2015 ruling that same-sex couples have the right to marry,” and that the court emphasized that “‘some members of this court did not personally agree with’ the U.S. Supreme Court’s ruling”); Faulk, *Roy Moore Timeline*, *supra*. Moreover, Moore ultimately lost the Senate race. See Alexander Burns & Jonathan Martin, *Once a Long Shot, Democrat Doug Jones Wins Alabama Senate Race*, N.Y. TIMES (Dec. 12, 2017), <https://www.nytimes.com/2017/12/12/us/politics/alabama-senate-race-winner.html> [<https://perma.cc/247Q-SJAD>].

227. Krotoszynski, *supra* note 3, at 1064.

228. Pozen, *supra* note 2, at 34.

229. Michael Dorf appears to make this claim, albeit without using the label “convention.” See Dorf, *supra* note 3, at 79–81 (“[W]hat Roosevelt had proposed to do was *something that just isn’t done*. It violated a customary norm obligatory on Congress . . .”).

doubtful. Historical accounts have shown that, although there was strong opposition to Roosevelt's plan (some of it from fellow Democrats), the proposal also had considerable support in Congress and came close to passage.<sup>230</sup>

Instead, I argue that the current norm against court packing came later. That is likely due in part to the ultimate defeat of Roosevelt's effort.<sup>231</sup> But the norm also seems to have emerged as a result of political rhetoric. Beginning in the late 1950s, government officials of both parties increasingly treated Roosevelt's 1937 Court-packing plan as a negative precedent—and used the label “court packing” to condemn any judicial reform that they disliked.<sup>232</sup> This repeated use of court packing as a political epithet, I argue, helps explain why the practice is off the table today.

### *A. The Uncertain Teachings of Text and History*

In contrast to the court-curbing measures discussed in the previous parts, many scholars would likely agree that the norm against court packing cannot easily be derived from the constitutional text, structure, or history.<sup>233</sup> Article III provides that the “judicial Power of the United States, shall be vested in one supreme Court” but says

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230. See *infra* Section III.B.

231. Cf. Adrian Vermeule, *The Atrophy of Constitutional Powers*, 32 OXFORD J. LEGAL STUD. 421, 425 (2012) (“[T]he rejection of Roosevelt’s court-packing plan in 1937 . . . is said by many to have created an unwritten constitutional norm against court-packing.”).

232. Notably, although the focus of this Part is political discourse, this use of “court packing” as a rhetorical tool is not limited to political actors. For a fascinating account of how the 1937 plan has also been used as a rhetorical tool in Supreme Court opinions, see Laura A. Cisneros, *Transformative Properties of FDR’s Court-Packing Plan and the Significance of Symbol*, 15 U. PA. J. CONST. L. 61 (2012). Scholars have also recently responded to a proposal (by Professor Steve Calabresi and Shams Hirji) to dramatically expand the lower federal judiciary by denouncing the suggestion as “court packing.” See, e.g., Richard Primus, *More on Court-Packing: The Idaho Workaround*, BALKINIZATION (Nov. 28, 2017), <https://balkin.blogspot.com/2017/11/more-on-court-packing-idaho-workaround.html> [<https://perma.cc/QV9B-A42C>]; Ilya Somin, *The Case Against Court-Packing*, WASH. POST (Nov. 27, 2017), [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/11/27/the-case-against-court-packing/?utm\\_term=.ed8ce843fcea](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/11/27/the-case-against-court-packing/?utm_term=.ed8ce843fcea) [<https://perma.cc/9MAM-AEQP>]. Notably, this Article argues that there is a convention against packing the Supreme Court—that is, expanding the Court’s size in order to alter the future course of its decisions. The Article does not examine whether there is a similar convention as to the lower federal courts.

233. Most scholars who have considered the issue conclude that the constitutional text does not preclude “court packing.” See, e.g., AKHIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* 354, 354–55 (2012) (“Even if . . . Congress was retaliating against what it perceived as Court abuses—say, a string of dubious rulings and judicial overreaches—the legislature should still prevail.”); Keith E. Whittington, *Yet Another Constitutional Crisis?*, 43 WM. & MARY L. REV. 2093, 2134 (2002) (“[T]he Court-packing plan did not exceed the constitutional powers of the elected branches.”).

nothing about how many judges should be on that Court.<sup>234</sup> The Constitution thus seems to leave the matter to Congress, exercising its authority under the Necessary and Proper Clause.<sup>235</sup>

This textual inference is supported by the fact that, throughout the nineteenth century, Congress modified the size of the Supreme Court, and often did so in part for partisan reasons. As discussed, the outgoing Federalist Congress in 1801 reduced the Court's size from six to five members.<sup>236</sup> This change did have a neutral explanation; the Judiciary Act of 1801 ended circuit riding by Supreme Court Justices, so the Court arguably could get by with a smaller staff. However, the Federalists were probably also eager to prevent President-elect Thomas Jefferson from filling the next vacancy. Conversely, when the Jeffersonian Republicans repealed the 1801 Act, and restored the Court to six members, they were undoubtedly happy to facilitate a Jeffersonian appointment.

In the 1860s, Congress made a number of changes to the size of the Supreme Court—again, apparently in part to influence future decisions. During the Civil War, the Republican Congress in 1863 increased the Court's size to ten members, so that President Lincoln could appoint Justices who favored the Republicans' agenda of combatting slavery and preserving the union.<sup>237</sup> But in 1866, soon after Andrew Johnson assumed office (following the assassination of Lincoln), Congress reduced the Court's future membership to seven.<sup>238</sup> According to the conventional wisdom, the Reconstruction Republicans who controlled Congress in the post-Civil War era did not trust Johnson to nominate Justices sympathetic to the reconstruction efforts in the South.<sup>239</sup> By contrast, in 1869, the Republicans were happy to push the number of Justices back to nine—once fellow Republican (and former Union army general) President Ulysses S. Grant took the helm.<sup>240</sup>

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234. U.S. CONST. art. III, § 1.

235. *See id.* art. I, § 8, cl. 18.

236. *See supra* Section I.B.

237. *See* Act of March 3, 1863, ch. 100, 12 Stat. 794, 794 (setting the number of Justices on the Supreme Court at ten); JUSTIN CROWE, BUILDING THE JUDICIARY: LAW, COURTS, AND THE POLITICS OF INSTITUTIONAL DEVELOPMENT 143–46 (2012) (asserting that the Republicans increased the size of the Supreme Court to ten members to advance their antislavery agenda). The size of the Supreme Court had previously been set at nine. Act of March 3, 1837, ch. 34, 5 Stat. 176, 176.

238. Judiciary Act of 1866, ch. 210, 14 Stat. 209, 209.

239. *See* WARREN, *supra* note 52, at 143–45, 223 (stating that the Judiciary Act of 1866 was passed to deprive President Johnson of the opportunity to fill expected vacancies on the Supreme Court).

240. *See* Circuit Judges Act of 1869, ch. 22, 16 Stat. 44, 44 (lowering the number of Justices back to nine); WARREN, *supra* note 52, at 223 (writing that President Grant filled the new positions on the Supreme Court); *see also* CROWE, *supra* note 237, at 153–59 (noting that the 1866 and 1869

Accordingly, in the nineteenth century, there was no convention against modifying the size of the Court for ideological reasons. None of these changes, of course, created a clear precedent for enlarging the Supreme Court to fifteen members at one time, as President Roosevelt would propose to do. But this history does help explain why the Roosevelt Administration believed that court packing was not only constitutional but also a politically viable method of influencing the Supreme Court.

### *B. The Debates over the 1937 Court-Packing Plan*

Other scholars have recounted in detail the debates over Roosevelt's 1937 plan.<sup>241</sup> I briefly discuss those debates here—to underscore that in 1937, many government officials insisted that court packing was both constitutionally acceptable and a desirable method of reforming the Supreme Court. Thus, while the 1937 Court-packing scheme was controversial in its day, the approach was not “out of bounds.”

The Court-packing plan was a response to Supreme Court decisions invalidating federal and state efforts to regulate the economy and improve working conditions.<sup>242</sup> Under the plan, the president could appoint one additional Justice to the Supreme Court for each Justice over seventy years of age (who did not retire within six months)—for a possible total of fifteen members.<sup>243</sup> Although Roosevelt initially

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changes are often seen as partisan attempts to manipulate the Court's size but urging that the laws had more neutral purposes).

241. For just a few of the accounts, see BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* 217–29 (2009) (describing the fight over the 1937 Court-packing plan); WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* 82–162 (1995) (describing the debate over Roosevelt's plan to add more Justices to the Supreme Court); and JEFF SHESOL, *SUPREME POWER: FRANKLIN ROOSEVELT VS. THE SUPREME COURT* 307–529 (2010) (discussing in detail the fight over Roosevelt's Court-packing plan). Scholars have also long debated the cause of the Court's apparent “switch in time,” when it began upholding social and economic legislation. *Compare, e.g.,* LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* 19 (1996) (arguing that the Court “blinked” in response to the Court-packing plan), *with* BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* 3–7 (1998) (challenging the view that the Court's decisions were a “political response to political pressure”).

242. *See* *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587, 618 (1936) (striking down a New York law establishing a minimum wage for women); *Carter v. Carter Coal Co.*, 298 U.S. 238, 317 (1936) (invalidating the Bituminous Coal Conservation Act); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 542–51 (1935) (holding unconstitutional provisions of the National Industrial Recovery Act).

243. FRANKLIN D. ROOSEVELT, MESSAGE FROM THE PRESIDENT OF THE UNITED STATES: A RECOMMENDATION TO REORGANIZE THE JUDICIAL BRANCH OF THE FEDERAL GOVERNMENT, H.R. DOC. NO. 75-142, at 9–10 (1937).

claimed that the proposal was designed to improve judicial efficiency,<sup>244</sup> he soon acknowledged that the real purpose was to alter the future course of the Court's decisions.<sup>245</sup> In his Fireside Chat on March 9, 1937, the President urged that "new blood" was needed, because the Supreme Court was "acting not as a judicial body, but as a policy-making body" in invalidating federal and state laws.<sup>246</sup> "[W]e must take action to save the Constitution from the Court and the Court from itself."<sup>247</sup>

Roosevelt's proposal ignited a lengthy and national debate. From the outset, there were some prominent supporters of Roosevelt's plan. Democratic Senate Majority Leader Joe Robinson led the fight in favor of court packing, with the enthusiastic support of many other Democrats, including then-Senator (and later Supreme Court Justice) Hugo Black.<sup>248</sup> The measure seemed likely to get through the Senate, and all participants agreed that it would pass the House of Representatives by a wide margin.<sup>249</sup>

The plan also faced considerable opposition, including some from Roosevelt's fellow Democrats.<sup>250</sup> This opposition increased after the Supreme Court in late March 1937 issued *West Coast Hotel Co. v. Parrish*, which upheld a state minimum wage law for women.<sup>251</sup> The Court's apparent "switch in time" signaled that it might also be more receptive to New Deal programs, even absent a change in membership.<sup>252</sup> Moreover, in June 1937, the Senate Judiciary Committee, voting ten to eight, issued a strongly worded report

244. See *id.* at 1–3 ("[T]he judiciary has often found itself handicapped by insufficient personnel . . .").

245. See Franklin D. Roosevelt, President, Fireside Chat (Mar. 9, 1937), <http://www.presidency.ucsb.edu/ws/?pid=15381> [<https://perma.cc/64KE-NEDN>].

246. *Id.*

247. *Id.*

248. See LEUCHTENBURG, *supra* note 241, at 135 ("[I]n the first week, numbers of Democratic Senators announced themselves for the bill . . ."); SHESOL, *supra* note 241, at 514 (noting Senator Black's enthusiasm for the Court-packing plan).

249. See LEUCHTENBURG, *supra* note 241, at 141 ("[D]espite all the antagonism . . . it still seemed highly likely in the last week of March 1937 that FDR's proposal would be adopted."). But see Barry Cushman, *Rethinking the New Deal Court*, 80 VA. L. REV. 201, 224–26 (1994) (doubting that the bill could have overcome a Senate filibuster).

250. See LEUCHTENBURG, *supra* note 241, at 131–35 (providing examples of opposition to the plan, even among Democrats); SHESOL, *supra* note 241, at 467 (analyzing the impact of a committee report opposing the Court-packing bill in which seven of the ten-person majority opposing the bill were Democrats).

251. 300 U.S. 379, 386, 400 (1937).

252. See FRIEDMAN, *supra* note 241, at 226–27 ("The Court's apparent change of direction [in *West Coast Hotel* and two weeks later in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937)] was a major turning point for the plan, and everyone knew it."); LEUCHTENBURG, *supra* note 241, at 142–43 (arguing that Justice "Roberts' 'somersault' [in the *West Coast Hotel* case] gravely damaged the chances of the Court plan").

recommending against the plan.<sup>253</sup> The majority of the committee denounced Roosevelt's plan as "a needless, futile, and utterly dangerous abandonment of constitutional principle."<sup>254</sup>

Yet even after the Supreme Court's apparent "switch" in *West Coast Hotel* and other cases,<sup>255</sup> and the issuance of this scathing report, there was still considerable support in Congress for some type of Court-packing bill.<sup>256</sup> It was only after additional (lengthy) debates—and the sudden passing of the bill's staunch proponent Senate Majority Leader Robinson—that political support for the measure finally ran out.<sup>257</sup>

We can certainly see in these debates the makings of a possible convention against court packing. There was some bipartisan opposition to Roosevelt's plan, and the Senate Judiciary Committee signaled through its report that its goal *was* to create a convention against the practice. The report denounced Roosevelt's plan as "a measure which should be so emphatically rejected that its parallel will never again be presented" to the country.<sup>258</sup> But the report itself was issued by a fairly narrow margin (10 to 8); and even that scathing report did not doom the chances for Roosevelt's scheme in Congress. In 1937, there was not yet a firm bipartisan consensus against court packing.

### *C. A Constitutional Amendment to Stop Court Packing*

Even by the mid-1950s, many government officials still viewed court packing as a genuine threat to the Supreme Court. This point is illustrated by Senator John Butler's effort to push through a constitutional amendment fixing the size of the Court at nine.<sup>259</sup> He made clear that the goal of the amendment was to "forestall future [Court-packing] attempts" that would "undermine the integrity and independence of the Supreme Court."<sup>260</sup>

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253. See S. REP. NO. 75-711, at 9 (1937) ("Constitutionally, the bill can have no sanction."); SHESOL, *supra* note 241, at 467 (noting that the Senate Committee voted against the plan).

254. S. REP. NO. 75-711, at 23.

255. See *supra* note 252.

256. It appeared that Congress would authorize the President to appoint four additional Justices (one for every member over age seventy-five). See LEUCHTENBURG, *supra* note 241, at 147–48 ("[T]he prospects for enacting" this bill "appeared very promising . . .").

257. See SHESOL, *supra* note 241, at 481–89, 497–500 (describing Senator Robinson's lengthy speeches in favor of the Court-packing plan and how the Senator's passing marked the end of the plan).

258. S. REP. NO. 75-711, at 23.

259. See 99 CONG. REC. 1106 (1953) (statement of Sen. John Butler, R-Md.) (discussing a proposed resolution "to fortify the independence of the Supreme Court"). The amendment would have also barred certain restrictions on the Court's appellate jurisdiction. See *infra* Section IV.A.1.

260. 100 CONG. REC. 6255–56 (1954) (statement of Sen. John Butler, R-Md.).

As scholars have observed in the literature on conventions, a constitutional amendment can be a way of “confirming” a convention following a breach. For example, the Twenty-Second Amendment arguably reestablished the rule that U.S. presidents serve only two terms, after Franklin Roosevelt breached that convention when he ran for a third and then a fourth term.<sup>261</sup> But supporters of the Butler Amendment did not suggest that Roosevelt had breached any preexisting norm by proposing his Court-packing plan. Senator Butler readily acknowledged that there were nineteenth-century precedents for what Roosevelt sought to do, particularly during the 1860s.<sup>262</sup> Butler and his supporters also emphasized the “relatively slim margin” by which Roosevelt’s plan had failed in 1937, as proof that a future president could successfully pack the Court.<sup>263</sup> The goal of the amendment was therefore to close a worrisome “loophole” in the constitutional structure, not to reestablish a political norm.<sup>264</sup>

Senator Butler’s amendment easily mustered the two-thirds majority needed to make it through the Senate.<sup>265</sup> But the measure was held up in the House of Representatives; some members were apparently concerned that “freezing” the Supreme Court’s size would prevent even beneficial modifications (such as those to account for changes in the Court’s workload).<sup>266</sup> Nonetheless, the debate over this constitutional amendment certainly suggests that political actors, even by the mid-1950s, did not view court packing as “out of bounds.”

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261. See U.S. CONST. amend XXII, § 1 (“No person shall be elected to the office of the President more than twice . . .”); Jaconelli, *supra* note 8, at 30, 32–33 (stating that the two-term limit was “a textbook example of constitutional convention,” and noting that the Twenty-Second Amendment arguably “put [the convention] on a more secure, legal footing”).

262. See 100 CONG. REC. 6256, 6341–42 (1954) (statement of Sen. John Butler, R-Md.) (stating that the 1937 plan “does not represent the sole instance” of court packing).

263. 99 CONG. REC. 1106 (1953) (statement of Sen. John Butler, R-Md.); see also 100 CONG. REC. 6895 (1954) (statement of Sen. Francis Case, R-S.D.) (agreeing that court packing “remained as a potential threat” absent a constitutional amendment).

264. See 99 CONG. REC. 1106 (1953) (statement of Sen. John Butler, R-Md.) (explaining that “[t]hese proposed amendments are designed chiefly to plug up th[e] loopholes” present “in the strict letter of the Constitution”); *id.* at 1108 (statement of Sen. Russell Long, D-La.) (“Certainly that [threat of court packing] is one loophole which we should close in order to protect ourselves in the future.”).

265. See 100 CONG. REC. 6347 (1954) (showing that the Senate voted fifty-eight to nineteen in favor of the amendment).

266. See C.P. Trussell, *Court Amendment Tabled in House: Judiciary Group, 11-8, Kills Bid to Fix Size at 9 and Retire Justices at 75*, N.Y. TIMES, Aug. 4, 1954, at 11; see also 100 CONG. REC. 10,454 (1954) (statement of Rep. Emanuel Celler, D-N.Y.) (stating that Congress should not “force upon ourselves a rigidity which can in the future make much mischief”).

*D. Court Packing as a Negative Precedent*

One can see a gradual change in political attitudes toward court packing starting in the late 1950s—just a few years after Senator Butler’s proposed constitutional amendment. Government officials repeatedly invoked Roosevelt’s 1937 plan as a negative precedent. We can see this trend in two different lines of debate. First, opponents of *other* court-curbing measures would condemn them as equivalent to “court packing” (even when those measures had nothing to do with the size of any federal court). Second, political actors would criticize any judicial nomination that they disliked as an effort to “pack” a federal court. Recognizing the rhetorical force of the accusation, supporters of the court-curbing measure or nominee were at pains to deny the “court packing” charge. In this way, Roosevelt’s 1937 plan over time became the paradigmatic example of an illegitimate threat to the judiciary.

*1. The Use of “Court Packing” to Condemn Other Court-Curbing Bills*

In 1957, Senator William Jenner introduced a bill to eliminate the Supreme Court’s appellate jurisdiction over a range of cases involving suspected communists.<sup>267</sup> Opponents in Congress denounced the measure as “court-raiding, and therefore, to be equated with the court-packing bill of 1937.”<sup>268</sup> “[R]eprisal by the Legislature, whether done by adding new judges or by taking away jurisdiction, creates a climate of interference and intimidation in which no court in the nation can function fairly and fearlessly.”<sup>269</sup> Accordingly, opponents insisted, the bill should meet the same “well-deserved fate” as President Roosevelt’s “mortal error.”<sup>270</sup>

Senator Jenner, however, called the comparison “specious,” insisting that “[t]here is no court packing involved in any way in my

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267. See *Limitation of Appellate Jurisdiction of the United States Supreme Court: Hearing Before the Subcomm. to Investigate the Admin. of the Internal Sec. Act & Other Internal Sec. Laws of the S. Comm. on the Judiciary*, 85th Cong. 1–2 (1957) [hereinafter *Hearing on the Limitation of Appellate Jurisdiction*] (statement of Sen. William Jenner, R-Ind.) (explaining the legislation was meant to cure the “succession of blows at key points of the legislative structure erected by the Congress for the protection of the internal security of the United States against the world Communist conspiracy”).

268. 104 CONG. REC. 18,652 (1958) (statement of Sen. Jacob Javits, R-N.Y.).

269. Emanuel Celler, Letter to the Editor, *Jenner Court Bill Opposed: It is Considered an Attack on the Judiciary’s Independence*, N.Y. TIMES, Mar. 30, 1958, at E8 (letter to the editor by Rep. Emanuel Celler, D-N.Y., Chairman, House Judiciary Committee).

270. 104 CONG. REC. 18,686 (1958) (statement of Sen. Thomas Hennings, D-Mo.) (“[T]his bill is reminiscent of” the Court-packing attempt); *id.* at 18,682 (statement of Sen. Alexander Wiley, R-Wis.) (comparing the measure to that “great instance[ ] of mortal error”).

bill.”<sup>271</sup> “[T]he court-packing plan was an effort to influence the Court so as to bring about a particular kind of decision.”<sup>272</sup> His bill did “not seek to change the philosophy of the Court in any way” but instead aimed to establish a “barrier” against “the incursions of the Court into the legislative field.”<sup>273</sup>

Subsequent court-curbing measures likewise brought charges of “court packing.”<sup>274</sup> For example, in 1968, legislators brought up the 1937 plan to criticize judicial reform proposals in the wake of *Miranda v. Arizona*.<sup>275</sup> Opponents declared: “Some 30 years ago . . . a similar assault was made on the independence and the power of the judiciary by the President of the United States. . . . That assault was in the guise of the now infamous ‘Court-packing plan.’ ”<sup>276</sup> But supporters disputed that their reforms “smack[ed] of a Court-packing scheme.”<sup>277</sup> They insisted: “This is a wholly inaccurate analogy . . . . We seek not to pack the Court. We seek only equal justice for society as against the criminal and for a return to the law of the land—the Constitution as interpreted . . . since the founding . . . .”<sup>278</sup> Both sides clearly understood that, just a few decades after the 1937 plan, “court packing” was a “perjorative [sic] term.”<sup>279</sup>

This trend has continued to the present day, as legislators sought to strip federal jurisdiction over a range of issues, including

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271. *Hearing on the Limitation of Appellate Jurisdiction*, *supra* note 267, at 240, 691 (statement of Sen. William Jenner, R-Ind.) (arguing that the Court-packing comparison was “one of the specious arguments against the bill which has been repeated by various thoughtless witnesses”).

272. *Id.*

273. *Id.*

274. *See, e.g.*, 110 CONG. REC. 19,814 (1964) (statement of Sen. Wayne Morse, D-Or.) (opposing an effort by Senator Everett Dirksen, R-Ill., to require delays in reapportionment orders and arguing that “[t]he Dirksen amendment is another form of a Court-packing proposal”).

275. 384 U.S. 436 (1966); *see* 114 CONG. REC. 11,740 (1968) (statement of Sen. Joseph Tydings, D-Md.) (“It is just as necessary to defeat [these court-curbing efforts] for the same reasons it was necessary to defeat the court-packing plan.”). There were a variety of proposals, including efforts to restrict federal habeas jurisdiction and the Supreme Court’s appellate jurisdiction over cases involving confessions. The jurisdiction-stripping measures were never enacted. Another provision did become law: 18 U.S.C. § 3501 provided that a confession would be admissible in federal court as long as it was voluntary. The Supreme Court later struck that down. *See Dickerson v. United States*, 530 U.S. 428, 431–32, 444 (2000).

276. 114 CONG. REC. 11,740 (1968) (statement of Sen. Joseph Tydings, D-Md.).

277. *Id.* at 13,849 (statement of Sen. John McClellan, D-Ark.) (internal quotation marks omitted).

278. *Id.*

279. *A Proposal to Divide the Fifth Circuit: Hearing Before the Subcomm. on Monopolies and Commercial Law of the H. Comm. on the Judiciary*, 95th Cong. 107–08 (1977) (statement of Rep. Charles Wiggins, R-Cal.) (describing “court packing” as “a perjorative [sic] term”).

abortion and school prayer.<sup>280</sup> In 2004 and 2006, legislators invoked Roosevelt's plan to criticize bills that would have restricted jurisdiction over challenges to the Defense of Marriage Act and to the use of "under God" in the Pledge of Allegiance. Opponents condemned both measures as "nothing more than a modern day version of 'court packing.'" <sup>281</sup> They asserted:

Just as President Franklin Roosevelt's efforts to control the outcome of the Supreme Court by packing it with loyalists was rejected by Congress in the 1930s, thereby preserving the independence of the federal judiciary, so too must this modern-day effort to show the courts 'who is boss' fail as well.<sup>282</sup>

## 2. "Court Packing" in the Appointments Process

Modern presidents do not propose enlarging the Supreme Court in order to influence its decisions—in large part, I suspect, because Roosevelt's 1937 plan has become "infamous."<sup>283</sup> Nevertheless, legislators of both political parties often bring charges of "court packing" to criticize specific judicial nominations. For example, after President Ronald Reagan offered Robert Bork for the Supreme Court, then-Senator Joseph Biden declared: "[T]oday, 50 years after Roosevelt failed, . . . we are once again confronted with a popular President's determined attempt to bend the Supreme Court to his political ends."<sup>284</sup> More recently, in opposing the Samuel Alito nomination, Senator Patrick Leahy decried what he viewed as an "effort to pack the court with those who would give [President George W. Bush] unfettered leeway" on claims of executive power.<sup>285</sup>

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280. *See, e.g.*, 128 CONG. REC. 2246, 2250–51 (1982) (statement of Sen. Max Baucus, D-Mont.) (referring to efforts to strip jurisdiction "on the so-called 'social issues': abortion, school prayer, and school busing" as "the most serious threat to judicial independence since President Franklin Roosevelt tried to pack the Supreme Court in 1937").

281. H.R. REP. NO. 108-691, at 110 (2004) (Minority Rep.).

282. *Id.*

283. *Supra* note 276 and accompanying text.

284. 133 CONG. REC. 20,915 (1987) (statement of Sen. Joseph Biden, D-Del.) (discussing the Court-packing plan as a historical precedent where the Senate demonstrated "courage" in the face of a "powerful and popular President who attempted to bend the Court to suit his own ends"); *see also id.* at 20,915 ("Let me be clear. I am not for a moment suggesting that President Reagan is attempting to . . . enact[ ] a constitutional change by enlarging the membership of the Court itself. But . . . [b]oth had in mind the same result. Both sought to use their power of appointment to shift the balance of Courts that had repeatedly rejected their social agendas."); *see also* Edward Walsh, *Biden, Dole Debate Bork Nomination*, WASH. POST (July 24, 1987), [https://www.washingtonpost.com/archive/politics/1987/07/24/biden-dole-debate-bork-nomination/c5ce6219-7765-4865-ab98-5b2db0c7e765/?utm\\_term=.72bf8a6b0547](https://www.washingtonpost.com/archive/politics/1987/07/24/biden-dole-debate-bork-nomination/c5ce6219-7765-4865-ab98-5b2db0c7e765/?utm_term=.72bf8a6b0547) [https://perma.cc/5SUF-GSPK] (noting Senate Judiciary Committee Chairman Biden's comparison of President Reagan nominating Robert Bork to the U.S. Supreme Court to FDR's "court-packing" plan").

285. 152 CONG. REC. 51 (2006) (statement of Sen. Patrick Leahy, D-Vt.).

A scuffle between President Barack Obama and Republican legislators vividly underscores the rhetorical force of the court-packing label. The controversy arose in 2013 when there were three vacant seats on the D.C. Circuit Court of Appeals, the appellate court that oversees most federal agencies.<sup>286</sup> When President Obama sought to fill the vacancies, Senate Republicans charged that Democrats were “attempting to pack the court . . . in order to stack it in the administration’s favor.”<sup>287</sup> Several legislators also introduced bills—one entitled the “Stop Court-Packing Act”—that would have reduced the size of the D.C. Circuit to eight judges, so that the President could not fill the vacancies.<sup>288</sup>

Democrats were quick to respond. President Obama denied that he was “somehow engaging in . . . ‘court-packing.’”<sup>289</sup> He stated: “I didn’t create these seats. . . . These are open seats. And the Constitution demands that I nominate qualified individuals to fill” them.<sup>290</sup> Senator Leahy insisted that “[n]o student of history can honestly say that nominating candidates to existing vacancies is court-packing.”<sup>291</sup> (He apparently forgot that he himself had made precisely that claim with respect to Justice Alito.<sup>292</sup>) Senator Leahy further sought to flip the Roosevelt precedent against his opponents. Referring to the proposals to reduce the size of the D.C. Circuit, he argued: “This effort to manipulate the size of an important court in order to achieve political goals is simply wrong. Just as President Roosevelt’s court-packing

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286. See Jennifer Bendery, *Republicans Charge Obama with Court-Packing for Trying to Fill Empty Seats*, HUFFINGTON POST (May 28, 2013), [http://www.huffingtonpost.com/2013/05/28/obama-court-packing\\_n\\_3347961.html](http://www.huffingtonpost.com/2013/05/28/obama-court-packing_n_3347961.html) [<https://perma.cc/E6WA-PUV7>] (detailing the context in which the “court-packing” controversy arose).

287. 159 CONG. REC. S7944–45 (daily ed. Nov. 12, 2013) (statement of Sen. John Cornyn, R-Tex.); see also *Confirmation Hearings on Federal Judges: Hearings Before the S. Comm. on the Judiciary Part 1*, 113th Cong. 95–96 (2013) (statement of Sen. Ted Cruz, R-Tex.) (“[A]ny effort to pack the Court . . . should be decried.”).

288. H.R. 2239, 113th Cong. (2013), <https://www.govtrack.us/congress/bills/113/hr2239/text> [<https://perma.cc/4JUW-SW4W>] (introduced by Rep. Tom Cotton, R-Ark.); see also Bendery, *supra* note 286 (noting similar bills).

289. Remarks on the Nominations of Patricia A. Millett, Cornelia T.L. “Nina” Pillard, and Robert L. Wilkins to Be Judges on the United States Court of Appeals for the District of Columbia, 2013 DAILY COMP. PRES. DOC. 388, 2–3 (June 4, 2013) (“[S]ome Republicans recently have suggested that by nominating these three individuals, I’m somehow engaging in—and I’m quoting here—in ‘court-packing.’ [*Laughter*]”).

290. *Id.* at 3.

291. 159 CONG. REC. S7706–07 (daily ed. Oct. 31, 2013) (statement of Sen. Patrick Leahy, D-Vt.).

292. See *supra* note 285 and accompanying text.

scheme was rejected in 1937 . . . the Senate should reject this attempt to politicize the D.C. Circuit.”<sup>293</sup>

Ultimately, this controversy led the Senate Democratic majority to exercise the “nuclear option” and modify the filibuster rule, so that lower federal court judges could be confirmed by majority vote.<sup>294</sup> Republicans dubbed this rule change part of the overall effort to “pack” the federal courts.<sup>295</sup> And after taking over as majority party, Senate Republicans continued to cite this “court-packing” episode to justify blocking other nominations—including that of Merrick Garland to fill the Supreme Court seat left open when Justice Antonin Scalia passed away.<sup>296</sup> In discussing the stalemate over Garland, Senator Lindsay Graham commented that he had warned Democrats that “changing the rules in the Senate to pack the court [would] come back to haunt them.”<sup>297</sup>

This court-packing theme continued into the Trump Administration. Soon after President Trump took office, he nominated Judge Neil Gorsuch to fill the open seat on the Supreme Court. When Democrats sought to filibuster the nomination, the Republican majority abolished the filibuster for Supreme Court judgeships as well, enabling the new nominee to be confirmed by majority vote.<sup>298</sup> Senator John Cornyn justified the rule change in part by referring back to the Democrats’ effort to “pack the D.C. Circuit Court of Appeals” with judges “that would rubberstamp President Obama’s administrative

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293. *Confirmation Hearings on Federal Appointments: Hearing Before the S. Comm. on the Judiciary Part 4*, 113th Cong. 1240 (2013) (statement of Sen. Patrick Leahy, D-Vt.).

294. See 159 CONG. REC. S8417–18 (daily ed. Nov. 21, 2013) (statement of President pro tempore Sen. Patrick Leahy, D-Vt.) (“Under the precedent set by the Senate today . . . the threshold for cloture on nominations, not including those to the Supreme Court of the United States, is now a majority.”).

295. See *id.* at S8443–44 (statement of Sen. Jeff Sessions, R-Ala.) (“[T]he President . . . wants to pack [the D.C. Circuit] because he thinks he can impact regulatory matters for years to come.”).

296. See Ted Barrett, *Democrats Complain About Blockade of Garland, Lower Court Nominations*, CNN: POL., <http://www.cnn.com/2016/04/11/politics/merrick-garland-supreme-court-blockade/index.html> (last updated Apr. 11, 2016, 8:55 PM) [<https://perma.cc/TW5W-7AF8>] (discussing the Republican Senate’s attempts to block Merrick Garland’s appointment to the Supreme Court); Jonathan Bernstein, *The End of the Filibuster*, WASH. POST, Nov. 14, 2013, at A17 (discussing Republican Senate members’ attempts to block appointments to the U.S. Court of Appeals for the D.C. Circuit).

297. *GOP Insists Obama Leave Seat Open*, DENVER POST (Feb. 14, 2016), <http://www.denverpost.com/2016/02/14/gop-insists-obama-leave-supreme-court-seat-open/> [<https://perma.cc/Q8TG-BW2M>].

298. See Ed O’Keefe & Sean Sullivan, *Senate Republicans Go ‘Nuclear,’ Pave the Way for Gorsuch Confirmation to Supreme Court*, WASH. POST (Apr. 6, 2017), [https://www.washingtonpost.com/powerpost/senate-poised-for-historic-clash-over-supreme-court-nominee-neil-gorsuch/2017/04/06/40295376-1aba-11e7-855e-4824bbb5d748\\_story.html?utm\\_term=.7b2a9084ee46](https://www.washingtonpost.com/powerpost/senate-poised-for-historic-clash-over-supreme-court-nominee-neil-gorsuch/2017/04/06/40295376-1aba-11e7-855e-4824bbb5d748_story.html?utm_term=.7b2a9084ee46) [<https://perma.cc/PBM4-CM8G>] (discussing the Republican majority’s alteration of filibuster rules for Justice Gorsuch’s appointment).

actions.”<sup>299</sup> Now, Senator Cornyn declared, “we are coming full circle.”<sup>300</sup>

As these debates illustrate, legislators of both political parties clearly treat the 1937 Court-packing plan as a negative precedent. That is why no political actor today wishes to be associated with it, while many seem eager to pin that label on their opponents. This repeated use of Roosevelt’s 1937 plan as a negative precedent has helped establish and reinforce the firm convention against court packing today.

#### IV. THE CONTINGENCY OF OUR CONVENTIONS

This Article demonstrates that much of the judicial independence that we take for granted today depends on convention. That is, even when the constitutional text does not explicitly protect the judiciary from a court-curbing measure, a political norm has filled the gap. That helps explain why federal judges do not generally fear removal outside the impeachment process, or that political actors will ignore or obstruct their rulings, and why the Supreme Court need not be concerned about another Court-packing attempt.

But it is crucial to recognize the historically contingent nature of these conventions. We can see that when we compare these “political rules” to other practices that are not likewise off the table. Most significantly, there is no bipartisan norm against taking away the federal courts’ jurisdiction. Building on prior work, I provide an overview of the different political history of Congress’s power over federal jurisdiction. I use this example as a jumping-off point to consider why only certain forms of court curbing are out of bounds. I argue that the current conventions of judicial independence depend in part on narratives crafted by our political and legal culture. Accordingly, if those narratives change over time, so might the scope and the nature of the protections that are taken as a given by federal judges today.

##### *A. The Lack of a Convention Against Jurisdiction Stripping*

The Constitution sends mixed messages about the scope of Congress’s power over federal jurisdiction. Article III at first seems to

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299. 163 CONG. REC. S2185 (daily ed. Apr. 4, 2017) (statement of Sen. John Cornyn, R-Tex.) (“It was a naked power grab. It was to pack the DC Circuit Court of Appeals . . . in order to have judges confirmed by 51 Democratic votes that would rubberstamp President Obama’s administrative actions during his administration. And sadly, it worked. They did just that.”).

300. *Id.* (“So in a way, we are coming full circle . . .”).

guarantee some level of jurisdiction, providing that the federal courts' "judicial Power shall extend to all Cases" arising under federal law, and that the Supreme Court "shall have appellate Jurisdiction" over such federal question cases.<sup>301</sup> But Article III then suggests that Congress has considerable discretion over federal jurisdiction, declaring that the Supreme Court's appellate review power is subject to "such Exceptions, and . . . such Regulations as the Congress shall make," and leaving it up to Congress to decide whether to create any inferior federal courts at all.<sup>302</sup>

There is a long-standing debate over how best to read these provisions, but most scholars would (at a minimum) likely agree that the constitutional text and structure can plausibly be read to allow some types of jurisdiction-stripping measures.<sup>303</sup> Accordingly, one might expect this area to be one—much like judicial tenure, compliance with federal court orders, and court packing—in which government officials would settle on a "rule" to protect the federal courts. That is, political actors could develop a convention to fill in the gap left by the constitutional structure.

That, however, has not happened. Today, there is no broad bipartisan norm barring *any* kind of jurisdiction-stripping measure, even those aimed at the Supreme Court.<sup>304</sup> But it is not clear why that

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301. U.S. CONST. art. III, § 2.

302. *Id.* §§ 1, 2.

303. Indeed, one dominant position in the academy is that Article III places virtually no limits on Congress's authority. See CHARLES L. BLACK, JR., DECISION ACCORDING TO LAW 18–19 (1981) (arguing that "Congress has wide and deep-going power over the courts' jurisdiction"); 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, 204 (1997) (defending the position that, based on the Constitution's text, "Congress's authority is substantial"). And even theories that articulate limits on congressional power generally give Congress some room to maneuver. For example, several scholars argue that *some* federal court must hear constitutional or other federal cases; under these theories, Congress could take jurisdiction away from another federal court. See Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 209, 240–46 (1985) (federal claims); Lawrence Gene Sager, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 66 (1981) (constitutional claims). Other theories demand Supreme Court review over certain classes of cases but would give Congress leeway as to the mechanism of review, and broad discretion over lower federal courts. See JAMES E. PFANDER, ONE SUPREME COURT: SUPREMACY, INFERIORITY, AND THE JUDICIAL POWER OF THE UNITED STATES 25, 34–38 (2009) (emphasizing the Supreme Court's role in overseeing its judicial inferiors through direct appeal or through the use of supervisory writs); Steven G. Calabresi & Gary Lawson, *The Unitary Executive, Jurisdiction Stripping, and the Hamdan Opinions: A Textualist Response to Justice Scalia*, 107 COLUM. L. REV. 1002, 1016–43, 1044 (2007) (arguing that Congress must allow the Supreme Court to review all federal claims but may transfer federal cases from the Court's appellate to its original jurisdiction).

304. Although some members of Congress have balked at the idea of restricting Supreme Court review, most officials are happy to endorse all jurisdiction-stripping proposals of their fellow partisans. See Grove, *supra* note 17, at 900–16, 920–22, 935–39 (detailing debates between

is the case. In the nineteenth and early twentieth centuries, congressional restrictions on federal jurisdiction were not clearly more (or less) controversial than other possible court-curbing measures. Yet in the mid-twentieth century, as other methods were deemed “off the table,” jurisdiction stripping remained “on the table.” In this Section, I provide an overview of that political history. The next sections consider why one court-curbing method took a different path.

### 1. The Early Political History of Court-Curbing Measures

For much of our history, government officials did not treat certain court-curbing measures as categorically different from any other. For example, the Republicans who controlled the federal government during the Civil War and Reconstruction turned to a variety of methods to prevent the federal judiciary from undermining their efforts to combat slavery and reunite the country.<sup>305</sup> As we have seen, the Republican Congress abolished the federal court in the District of Columbia in order to get rid of judges who were believed to be Confederate sympathizers.<sup>306</sup> Republicans also supported President Lincoln’s decision to leave John Merryman in prison, despite Chief Justice Taney’s order, and cheered on Wisconsin’s defiance of federal court enforcement of the Fugitive Slave Act.<sup>307</sup> The Republicans further modified the size of the Supreme Court to promote their political agenda (or, at a minimum, to prevent the Court from interfering with that agenda).<sup>308</sup>

Perhaps not surprisingly, the Republicans were also willing to restrict federal jurisdiction. The issue arose most prominently during Reconstruction when William McCordle (who was detained by federal military authorities in Mississippi) filed a habeas corpus petition challenging the constitutionality of the reconstruction laws.<sup>309</sup> Congressional Republicans were alarmed; even President Lincoln’s appointees on the Supreme Court might doubt the legality of military

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Democrats and Republicans on various jurisdiction-stripping efforts, and providing appendix demonstrating that political actors support bills proposed by their fellow partisans).

305. Notably, the Republican Congress of the 1860s also *strengthened* federal judicial power in important ways—by expanding jurisdiction over civil rights and habeas claims brought by free blacks and northern sympathizers. See William M. Wiecek, *The Reconstruction of Federal Judicial Power, 1863–1875*, 13 AM J. LEGAL HIST. 333 (1969). My point is simply that when the Republicans attacked the courts, they did not seem to treat different court-curbing measures differently.

306. See *supra* Section I.C.1.

307. See *supra* Section II.B.

308. See *supra* Section III.A.

309. See William W. Van Alstyne, *A Critical Guide to Ex parte McCordle*, 15 ARIZ. L. REV. 229, 236–38 (1973) (describing William McCordle’s challenge to the reconstruction laws).

control over a large segment of the country. Accordingly, while the *McCardle* case was pending before the Court, several legislators introduced a bill to restrict the Court's appellate jurisdiction over habeas cases.<sup>310</sup>

Democrats denounced this measure as motivated “merely by a desire to prevent the Supreme Court” from “declar[ing] the reconstruction laws unconstitutional and void” in *McCardle*.<sup>311</sup> Many Republicans essentially admitted as much, but they argued that it was appropriate—indeed, crucial—to prevent the Court from getting involved in inherently political matters.<sup>312</sup> And although President Andrew Johnson sought to block the jurisdiction-stripping measure with his veto pen,<sup>313</sup> the Republicans had sufficient majorities in the House and Senate to override the President's veto and enact the law.<sup>314</sup> The Supreme Court then quickly acquiesced, dismissing *McCardle*'s appeal in light of this newly established limit on its appellate jurisdiction.<sup>315</sup> Although scholars today debate how best to read *McCardle* (because the statute at issue left in place an alternative avenue for Supreme Court review),<sup>316</sup> the opinion did suggest that Congress has broad power to restrict the Court's appellate jurisdiction.<sup>317</sup>

By the early twentieth century, the political winds had shifted, and now progressives were concerned about what they perceived as a pro-business (and anti-regulation) federal judiciary.<sup>318</sup> Accordingly,

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310. *See id.* at 239.

311. CONG. GLOBE, 40th Cong., 2nd Sess. 2167 (1868) (statement of Rep. George Woodward, D-Pa.); *id.* at 2127 (statement of Sen. Charles Buckalew, D-Pa.) (“[T]his jurisdiction is to be withdrawn . . . to preserve the reconstruction system enacted by Congress.”).

312. *See id.* at 2061 (statement of Rep. James Wilson, R-Iowa) (“Most assuredly it was my intention to take away the jurisdiction given by the act of 1867 reaching the *McCardle* case[.]”).

313. *See id.* at 2094 (quoting the veto message).

314. *See* Repeal Act of 1868, ch. 34, 15 Stat. 44; Grove, *supra* note 17, at 924.

315. *Ex Parte McCardle*, 74 U.S. (7 Wall.) 506, 515 (1869).

316. As the Court later explained in *Ex parte Yerger*, it could still review lower court decisions denying habeas relief, because Congress had left in place its jurisdiction to hear original habeas petitions under the Judiciary Act of 1789. 75 U.S. (8 Wall.) 85, 105–06 (1869).

317. *See McCardle*, 74 U.S. (7 Wall.) at 515 (“We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words.”). Compare, e.g., Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 905 (1984) (“[T]he bulk of the *McCardle* opinion speaks very broadly and does not seem to turn on the availability of an alternative route of appellate review.”), with James E. Pfander, *Jurisdiction-Stripping and the Supreme Court's Power to Supervise Inferior Tribunals*, 78 TEX. L. REV. 1433, 1501 (2000) (noting that *McCardle* “emphasiz[ed] the availability of . . . an alternative source of inferior court review”).

318. *See supra* note 85 and accompanying text.

they advocated a variety of court-curbing measures.<sup>319</sup> For example, many progressives from 1910 through 1913 were eager not only to abolish the Commerce Court itself but also to remove the Article III judges who staffed that court.<sup>320</sup> These court-curbing efforts intensified in the 1930s, after the Supreme Court struck down a series of high-profile New Deal programs.<sup>321</sup> Many progressives called for restrictions on the Court's jurisdiction, insisting that *McCardle* supported broad congressional control.<sup>322</sup> But other federal officials—including some Democratic legislators and Roosevelt Administration officials—doubted that Congress had the power to cut off Supreme Court review of constitutional claims.<sup>323</sup> Accordingly, as President Roosevelt explained a few years after the failure of his 1937 plan, he chose court packing because of its “undoubted constitutionality; and [because] it seemed . . . to have the best chance of passing both Houses of the Congress most quickly.”<sup>324</sup>

Indeed, as late as the mid-1950s, many political actors viewed jurisdiction stripping and court packing as equivalent threats to the Supreme Court. This point is illustrated by Senator Butler's amendment, which sought not only to fix the size of the Supreme Court at nine members (and thus prevent future packing) but also to guarantee the Court's appellate jurisdiction over constitutional claims.<sup>325</sup> As Butler explained, his goal was to prevent any future Congress from repeating the “abhorrent” conduct of the Reconstruction

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319. See Tara Leigh Grove, *The Exceptions Clause as a Structural Safeguard*, 113 COLUM. L. REV. 929, 960–62 (2013) (discussing bills aimed at Supreme Court review); Grove, *supra* note 17, at 890–99 (discussing efforts to restrict inferior federal court jurisdiction over business cases).

320. See *supra* Section I.C.2.

321. See LEUCHTENBURG, *supra* note 241, at 102 (“The years 1935-1937,’ Michael Nelson has noted, ‘saw more Court-curbing bills introduced in Congress than in any other three-year (or thirty-five year) period in history.’” (quoting Michael Nelson, *The President and the Court: Reinterpreting the Court-Packing Episode of 1937*, 103 POL. SCI. Q. 267, 273 (1988))).

322. See, e.g., 80 CONG. REC. 1097 (1936) (statement of Rep. Oliver Cross, D-Tex.) (proposing a bill to strip federal jurisdiction “to hold an act of Congress unconstitutional”); 79 CONG. REC. 10,404 (1935) (statement of Rep. David John Lewis, D-Md.) (“[C]ertain exceptions and regulations are plainly indicated as desirable.”).

323. See 80 CONG. REC. 1101 (1936) (statement of Rep. Edward Cox, D-Ga.) (“[I]nferior courts being the creatures of the Congress, the Congress has the right to fix their jurisdiction, but not so with the Supreme Court.”); *id.* (statement of Rep. John Hollister, R-Ohio) (asserting that it is unlikely Congress has the power to remove the Supreme Court's jurisdiction specifically given in the Constitution); Tara Leigh Grove, *The Article II Safeguards of Federal Jurisdiction*, 112 COLUM. L. REV. 250, 269–74 (2012) (describing the Roosevelt Administration's opposition to jurisdiction stripping).

324. Franklin Delano Roosevelt, *The Fight Goes On*, COLLIER'S WKLY., Sept. 20, 1941, at 16, 37.

325. 99 CONG. REC. 1106 (1953) (statement of Sen. John Butler, R-Md.).

Republicans in the *McCardle* era.<sup>326</sup> Restrictions on Supreme Court jurisdiction were, Butler insisted, “as great a potential threat to the independence of the judiciary as any plan for packing the membership of the Court.”<sup>327</sup>

## 2. The Different Path of Jurisdiction Stripping

As this Article has recounted, the political acceptance of various court-curbing measures changed dramatically beginning in the mid-twentieth century. From the late 1930s on, government officials gradually forgot that Congress had any way of removing federal judges outside the impeachment process.<sup>328</sup> Starting in the late 1950s, political actors increasingly treated Roosevelt’s 1937 Court-packing plan as a negative precedent that should never be replicated.<sup>329</sup> And in the wake of the civil rights movement of the 1950s and 1960s, government officials, particularly at the federal level, seemed to assume that they must comply with all federal court orders.<sup>330</sup>

No such evolution, however, occurred with respect to Congress’s power to restrict federal jurisdiction. Instead, jurisdiction stripping continued to be an acceptable mechanism for curbing the federal courts. We can see this phenomenon in the debates over Senator Jenner’s 1957 bill, which would have cut off Supreme Court review of certain cases involving suspected communists.<sup>331</sup> Just three years after declaring that every “citizen should have the right to have his case heard by the highest court of the land,”<sup>332</sup> Senator John Butler *co-sponsored* a version of this jurisdiction-stripping bill.<sup>333</sup> Butler acknowledged the about-face

326. 100 CONG. REC. 6258 (1954) (statement of Sen. John Butler, R-Md.).

327. *Id.*

328. *See supra* Section I.D.

329. *See supra* Section III.D.

330. *See supra* Section II.D.

331. *See supra* note 267 and accompanying text.

332. 100 CONG. REC. 6344–45 (1954) (statement of Sen. John Butler, R-Md.).

333. The new “Jenner-Butler” bill sought to remove the Court’s appellate jurisdiction over state bar admissions. *See* 104 CONG. REC. 18,647 (1958) (statement of Sen. John Butler, R-Md.). The proposal was aimed at Court decisions examining state refusals to admit suspected communists. *See* *Konigsberg v. State Bar*, 353 U.S. 252, 273–74 (1957) (reversing the state court’s finding that *Konigsberg* lacked the requisite moral character for the state bar despite no other evidence of unlawful or immoral actions). Notably, the NAACP was strongly opposed to the elimination of the Court’s appellate jurisdiction in this area. The organization was concerned that state courts would use that freedom from Supreme Court supervision to bar civil rights attorneys from practicing law in their states. *See Hearing on the Limitation of Appellate Jurisdiction, supra* note 267, at 491–92 (statement of Clarence Mitchell, Director of the Washington Bureau of the National Association for the Advancement of Colored People).

and offered only this explanation: he had “learned from experience” that at times it was important to limit Supreme Court review.<sup>334</sup>

Notably, during the debates over the Jenner-Butler bill, some legislators sought to argue (as Senator Butler had three years before) that restricting the Supreme Court’s appellate jurisdiction was just as disgraceful as court packing. Thus, progressives urged that “this bill is reminiscent of two previous and ill-advised attacks on the Supreme Court”—the 1937 Court-packing plan and the 1868 law at issue in *McCardle*.<sup>335</sup> Senator Thomas Hennings admonished: “I do not believe this Senate desires to join the ranks of the Reconstruction Senate of 1868 and 1869.”<sup>336</sup>

Some supporters of the Jenner-Butler bill were clearly uncomfortable with this charge and sought to distance themselves from that “single Civil War habeas corpus case.”<sup>337</sup> But Senators Jenner and Butler did not shy away from the *McCardle* precedent. Although Butler had previously referred to *McCardle* as an “abhorrent” and “irresponsibl[e]” moment in history,<sup>338</sup> he now cited the case as proof that “Congress does have power to limit [the Supreme Court’s] appellate jurisdiction by exceptions and regulations.”<sup>339</sup> And although Senator Jenner decried the court-packing comparison to his bill as “specious,” he found *McCardle* instructive, because the Supreme Court had validated a restriction on its appellate review power.<sup>340</sup> (Ultimately, the Jenner-Butler bill lost in the Senate by a narrow vote.<sup>341</sup>)

In subsequent decades, social conservatives sought to eliminate both Supreme Court and inferior federal court jurisdiction over a range of constitutional issues, including abortion, religion, criminal procedure, desegregation, and same-sex marriage.<sup>342</sup> Moreover, from the late 1970s on, these legislators also seemed happy to rely on (what they now characterized as) the “landmark case” of *Ex parte McCardle*

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334. 104 CONG. REC. 18,668 (1958) (statement of Sen. John Butler, R-Md.).

335. *Id.* at 18,686 (statement of Sen. Thomas Hennings, D-Mo.); *id.* at 18,682 (statement of Sen. Alexander Wiley, R-Wis.).

336. *Id.* at 18,686 (statement of Sen. Thomas Hennings, D-Mo.).

337. *Id.* at 18,679 (statement of Sen. James Eastland, D-Miss.).

338. 100 CONG. REC. 6258 (1954) (statement of Sen. John Butler, R-Md.).

339. 104 CONG. REC. 18,652 (1958) (statement of Sen. John Butler, R-Md.).

340. *Hearing on the Limitation of Appellate Jurisdiction, supra* note 267, at 691–92 (statement of Sen. William Jenner, R-Ind.) (“[T]he Supreme Court . . . held the bill to be constitutional.”).

341. *See* 104 CONG. REC. 18,687 (1958) (conveying that the Senate defeated the measure by a vote of forty-nine to forty-one).

342. *See* Grove, *supra* note 17, at 900–16, 935–39.

to support restrictions on Supreme Court review.<sup>343</sup> Social conservatives apparently no longer saw any need to distance themselves from that “single Civil War habeas corpus case.”<sup>344</sup>

Although social progressives vehemently fought these measures (and most ultimately failed), a number of bills made it through at least one chamber of Congress. The Senate, for example, in the late 1970s and early 1980s approved bills that would have cut off federal jurisdiction over school prayer cases or limited judicial authority to order busing in desegregation cases.<sup>345</sup> More recently, in 2004 and 2006, the House of Representatives voted to curtail all federal jurisdiction over constitutional challenges to the Defense of Marriage Act and to the use of “under God” in the Pledge of Allegiance.<sup>346</sup> And in 2006, Congress enacted the Military Commissions Act, which significantly restricted federal jurisdiction over cases involving suspected enemy combatants in the war on terror.<sup>347</sup>

In prior work, I have argued that structural and political safeguards built into our constitutional scheme help explain the repeated failure of most jurisdiction-stripping proposals. One important factor is the bicameralism and presentment process of Article I, which effectively creates a supermajority requirement for every piece of legislation—and thereby allows political minorities to “veto” legislation. As I have documented, political supporters of the judiciary (such as the social progressives in the late twentieth and early twenty-first centuries) have often successfully used these procedures to block jurisdiction-stripping measures.<sup>348</sup> Furthermore, the executive branch has also opposed many jurisdiction-stripping bills, in large part (I argue) because of its distinct institutional incentives.<sup>349</sup>

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343. *E.g.*, 152 CONG. REC. H5409 (daily ed. July 19, 2006) (statement of Rep. Steve King, R-Iowa) (referring to *Ex parte McCordle* as a “landmark case”); 125 CONG. REC. 7637–38 (1979) (statement of Sen. Gordon Humphrey, R-N.H.) (referring to the “well-known case of *Ex parte McCordle*”).

344. 104 CONG. REC. 18,679 (1958) (statement of Sen. James Eastland, D-Miss.).

345. *See* Grove, *supra* note 17, at 900–10 (describing the Senate’s approval of these measures).

346. *See id.* at 911–16, 938–39 (describing the House’s approval of these measures).

347. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600. The Supreme Court struck down the Act, insofar as it barred habeas claims by detainees at Guantanamo Bay. *See* *Boumediene v. Bush*, 553 U.S. 723, 792 (2008). But the Court’s decision did not address the rights of detainees held outside Guantanamo, nor the right of any detainee to challenge his “conditions of confinement.” *See* 28 U.S.C. § 2241(e) (2012); *Boumediene*, 553 U.S. at 792 (declining to “discuss the reach of the writ with respect to claims of unlawful conditions of treatment or confinement”).

348. *See* Grove, *supra* note 17, at 871–73, 900–916.

349. *See* Grove, *supra* note 323, at 252–55, 268–86, 312–14 (focusing in part on the incentives of the Department of Justice, whose primary job is to litigate in federal court).

These structural and political safeguards help prevent the enactment of most jurisdiction-stripping bills. But these political hurdles pale in comparison to the protection offered by conventions. For one thing, as the 2006 Military Commissions Act illustrates, these structural safeguards do not always work. Moreover, as political scientist Tom Clark has documented, judicial independence may be threatened simply when a court-curbing measure is seriously considered by Congress, even if the measure ultimately fails.<sup>350</sup> In the face of genuine threats, federal judges may feel less free to issue “unpopular” decisions. For example, in the wake of the Jenner-Butler bill, the Supreme Court pulled back on the procedural protections for suspected communists, even though the bill was *defeated* in the Senate.<sup>351</sup> Many scholars believe that the Court was attempting to ward off additional attacks.<sup>352</sup>

Accordingly, the protection for judicial independence would be far stronger if there were a convention leading officials not even to propose, much less seriously consider, jurisdiction-stripping bills. It seems doubtful that Newt Gingrich’s 2011 suggestion that Congress abolish the Ninth Circuit caused any great ripple of fear on that court (or any other lower federal court). Today, that idea is “ridiculous” and “off the wall” to progressives and conservatives alike. Jurisdiction stripping, by contrast, may be difficult, but it is not “out of bounds.”<sup>353</sup>

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350. See TOM S. CLARK, *THE LIMITS OF JUDICIAL INDEPENDENCE* 15–16, 193 (2011) (arguing, based on a statistical analysis of judicial reactions to legislative proposals to curb the Supreme Court from 1877–2008, that “when Court-curbing bills are introduced in Congress, the justices will exercise self-restraint by attenuating their use of judicial review to invalidate federal legislation,” and that this reaction “is not driven simply by a judicial fear that the legislation will be enacted but rather by an interpretation of those bills as indicators of waning public support for the Court”); Tom S. Clark, *The Separation of Powers, Court Curbing, and Judicial Legitimacy*, 53 AM. J. POL. SCI. 971, 972 (2009) (“Court curbing in Congress may affect judicial decision making independent of any threat of enactment . . . because it can be a credible signal about waning judicial legitimacy” with the public.); see also WALTER F. MURPHY, *CONGRESS AND THE COURT* 64 (1962) (arguing that, historically, the Justices have been “acutely aware of the attacks against their decisions, and . . . willing to make concessions when they felt that danger had become too threatening,” though also noting that the “appointing process” may lead to changes in judicial decisionmaking).

351. See Neal Devins, *Should the Supreme Court Fear Congress?*, 90 MINN. L. REV. 1337, 1343 (2006) (arguing that after Congress came “as Chief Justice Warren put it— ‘dangerously close’ to enacting [the Jenner bill] . . . [t]he Court relented” (quoting EARL WARREN, *THE MEMOIRS OF EARL WARREN* 313 (1977))); see also C. HERMAN PRITCHETT, *CONGRESS VERSUS THE SUPREME COURT, 1957–1960*, at 121 (1961) (stating that the Court’s “retreat” reduced the political momentum for additional court-curbing efforts); Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 196 (2002) (noting that the “Supreme Court tempered its prior positions in a series of decisions that might be called a second ‘switch in time,’ at least creating the appearance that it was backing away from the earlier controversial decisions”).

352. See *supra* note 351.

353. Cf., e.g., Pozen, *supra* note 2, at 34 (“[C]ourt packing’ is especially out of bounds.”).

*B. Possible Explanations?*

This historical account raises the question why there is no convention against jurisdiction stripping. That is, why did only certain forms of court-curbing come to be seen as “out of bounds” around the mid-twentieth century? After considering some alternative explanations, I argue that the narratives crafted by our legal culture help explain the relatively acceptable status of congressional restrictions on federal jurisdiction.

We can certainly imagine some reasons for the abrupt about-face of the 1950s Senate on Congress’s power over the Supreme Court’s appellate jurisdiction. Just three years after approving a constitutional amendment that would guarantee the Court “appellate jurisdiction, both as to law and fact, ‘in all cases arising under this Constitution,’ ”<sup>354</sup> the Senate nearly voted to abolish part of that very jurisdiction in the 1957 Jenner-Butler bill.<sup>355</sup> One likely important intervening factor was *Brown v. Board of Education*; the *Brown* decision came down just six days after the Senate voted in favor of the amendment.<sup>356</sup> Another factor was the series of decisions issued by the Supreme Court between 1954 and 1957 that seemed to protect the procedural rights of suspected communists.<sup>357</sup> The anti-communist and pro-segregation blocks in the Senate came together in 1957 to support limits on Supreme Court review.<sup>358</sup>

The Warren Court decisions of the 1950s may explain the change in positions of the many Senators who supported both the 1954 amendment and the 1957 jurisdiction-stripping bill. But a focus solely

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354. 100 CONG. REC. 5718 (1954) (statement of Sen. John Butler, R-Md.).

355. See 104 CONG. REC. 18,687 (1958) (the Senate defeated the measure by a vote of forty-nine to forty-one).

356. See 347 U.S. 483 (1954) (issued May 17, 1954); 100 CONG. REC. 6347 (1954) (on May 11, 1954, the Senate voted fifty-eight to nineteen in favor of the amendment).

357. See *Watkins v. United States*, 354 U.S. 178, 213–15 (1957) (holding that, when an individual was asked whether or not he knew if named persons were members of the Communist Party, he could not be compelled to “make such a determination with so little guidance”); *Yates v. United States*, 354 U.S. 298, 312 (1957) (“[S]ince the Communist Party came into being in 1945, and the indictment was not returned until 1951, the three-year statute of limitations had run on the ‘organizing’ charge, and required the withdrawal of that part of the indictment from the jury’s consideration.”); *Jencks v. United States*, 353 U.S. 657, 672 (1957) (“[S]ince the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense.”).

358. Twenty-seven senators, including Senators Butler and Jenner, favored both the amendment and the 1957 bill. All were Republicans or Southern Democrats. See 104 CONG. REC. 18,687 (1958); 100 CONG. REC. 6347 (1954); see also Devins, *supra* note 351, at 1343–44 (noting that “[s]outhern lawmakers join[ed] forces with anti-Communist lawmakers” to support the Jenner-Butler bill).

on Supreme Court decisions does not explain the long-term difference in attitude toward jurisdiction stripping. After all, legislators who opposed the progressive rulings of the Warren Court in the 1950s and 1960s might have used a variety of mechanisms to attack the courts. Indeed, until the early 1960s, segregationists *did* advocate another court-curbing measure to block the implementation of *Brown*: obstructing judicial orders. Yet even segregationists gave up on this method after the early 1960s; and social conservatives did not widely champion this or other court-curbing methods examined here (abolishing judgeships or court packing) to block the wave of progressive federal court rulings on abortion,<sup>359</sup> prayer,<sup>360</sup> or criminal procedure.<sup>361</sup> Instead, social conservatives seemed to accept the conventions barring these other approaches.

Nor, as I have tried to suggest throughout, do the constitutional text and structure clearly explain the distinctive status of jurisdiction stripping.<sup>362</sup> Some readers may insist (despite the history I have recounted) that the text rules out abolishing judgeships or violating federal court orders. But prominent scholars have argued that the text does not mandate obedience to every federal court decree. And the text and structure plainly do not distinguish court packing from jurisdiction stripping; after all, to my knowledge, *every* commentator to consider the issue has concluded that court packing is permitted by the text.<sup>363</sup> There must be some other reason these methods are politically “off the table,” while jurisdiction stripping remains very much “on the table.”

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359. One law professor did call for court packing in the wake of *Roe v. Wade*, 410 U.S. 113 (1973). See John P. Roche, *A Tory Prof. Wants to Pack the Court*, CHI. TRIB., Mar. 4, 1973, at A8. But my research suggests that there were no similar calls by political actors.

360. Cf. Alison Gash & Angelo Gonzales, *School Prayer*, in PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 62, 63–64 (Nathaniel Persily et al. eds., 2008) (discussing how officials in Alabama denounced the Supreme Court’s school prayer decisions but obeyed a specific order to stop).

361. Cf. *supra* note 275 and accompanying text (discussing proposed responses to *Miranda v. Arizona*, 384 U.S. 436 (1966), which did not include abolishing judgeships, obstructing court orders, or court packing).

362. Nor can the difference be explained by the Supreme Court’s decision in *McCardle*. For starters, that decision is subject to multiple interpretations; some prominent scholars argue that *McCardle* does not grant Congress plenary power over the Court’s appellate jurisdiction. See *supra* note 317 and accompanying text. Moreover, for many decades after that 1869 case, political actors did not treat jurisdiction stripping as distinct from the other court-curbing methods discussed in this Article.

363. See *supra* Sections II.A, III.A.

### *C. Constructing Narratives*

I argue that our legal and political culture has constructed narratives that help explain why certain court-curbing measures are out of bounds, while jurisdiction stripping remains a relatively acceptable means of attacking the federal judiciary.<sup>364</sup> But before I get into specifics, I should explain my approach to identifying those narratives. I consulted legislative history (much of which I have already documented), newspaper articles, and law school casebooks from 1895 to 1980.<sup>365</sup> Notably, I looked at casebooks—both because they reflect

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364. Other scholars have recognized the importance of narratives—"stock stories"—in our constitutional culture. See J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 987 (1998) (noting that these "stories are both descriptive and prescriptive: they not only frame our sense of what has happened and how events will unfold in the future, but also explain how those events should unfold").

365. I examined thirty-nine casebooks published between 1895 and 1980. That includes all twelve leading federal courts casebooks from that period and twenty-seven of the leading constitutional law casebooks. I focused on the time period from 1895 to 1980, because that covered the era prior to the establishment of the conventions discussed in this Article, as well as the period in which (and soon after) those conventions were established. I endeavored to look at the leading casebooks from the time period (such as James Bradley Thayer's influential constitutional law casebook), as well as some less well-known texts (such as Oliver Field's constitutional law casebook). Once I saw recurring trends in the casebooks, it seemed likely that I had examined a sufficient number of texts. The federal courts casebooks are: GEORGE W. RIGHTMIRE, *CASES AND READINGS ON THE JURISDICTION AND PROCEDURE OF THE FEDERAL COURTS* (1917); CARL C. WHEATON, *CASES ON FEDERAL PROCEDURE* (1921); HAROLD R. MEDINA, *CASES ON FEDERAL JURISDICTION AND PROCEDURE* (1926); FELIX FRANKFURTER & WILBER G. KATZ, *CASES AND OTHER AUTHORITIES ON FEDERAL JURISDICTION AND PROCEDURE* (1931); ARMISTEAD M. DOBIE, *CASES ON FEDERAL JURISDICTION AND PROCEDURE* (1935); FELIX FRANKFURTER & HARRY SHULMAN, *CASES AND OTHER AUTHORITIES ON FEDERAL JURISDICTION AND PROCEDURE* (rev. ed. 1937); ARMISTEAD M. DOBIE & MASON LADD, *CASES AND MATERIALS ON FEDERAL JURISDICTION AND PROCEDURE* (1940); CHARLES T. MCCORMICK & JAMES H. CHADBOURN, *CASES AND MATERIALS ON FEDERAL COURTS* (1946); CHARLES T. MCCORMICK & JAMES H. CHADBOURN, *CASES AND MATERIALS ON FEDERAL COURTS* (2d ed. 1950); RAY FORRESTER, *DOBIE AND LADD'S CASES AND MATERIALS ON FEDERAL JURISDICTION AND PROCEDURE* (2d ed. 1950); HENRY M. HART, JR. & HERBERT WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (1953); PAUL M. BATOR, PAUL J. MISHKIN, DAVID L. SHAPIRO & HERBERT WECHSLER, *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (2d ed. 1973).

I consulted the following constitutional law texts: JAMES BRADLEY THAYER, *CASES ON CONSTITUTIONAL LAW* (1895); CARL EVANS BOYD, *CASES ON AMERICAN CONSTITUTIONAL LAW* (2d ed. 1907); JAMES P. HALL, *CASES ON CONSTITUTIONAL LAW* (2d ed. 1926); WALTER F. DODD, *CASES AND OTHER AUTHORITIES ON CONSTITUTIONAL LAW* (1932); HENRY ROTTSCHAEFER, *CASES ON CONSTITUTIONAL LAW* (1932); ARCHIBALD B. THROCKMORTON, LAWRENCE B. EVANS: *CASES ON AMERICAN CONSTITUTIONAL LAW* (3d ed. 1933); OLIVER P. FIELD, *A SELECTION OF CASES AND AUTHORITIES ON CONSTITUTIONAL LAW* (2d ed. 1936); WALTER F. DODD, *CASES AND OTHER AUTHORITIES ON CONSTITUTIONAL LAW* (2d ed. 1937); NOEL T. DOWLING, *CASES ON AMERICAN CONSTITUTIONAL LAW* (1937); CHARLES G. FENWICK & LAWRENCE B. EVANS, *CASES ON AMERICAN CONSTITUTIONAL LAW* (4th ed. 1938); WALTER F. DODD, *CASES AND OTHER AUTHORITIES ON CONSTITUTIONAL LAW* (3d ed. 1941); NOEL T. DOWLING, *CASES ON CONSTITUTIONAL LAW* (2d ed. 1941); NOEL T. DOWLING, *CASES ON CONSTITUTIONAL LAW* (3d ed. 1946); HENRY ROTTSCHAEFER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* (rev. ed. 1948); JOHN P. FRANK, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* (1950); NOEL T. DOWLING, *CASES ON CONSTITUTIONAL LAW* (4th ed. 1950); JOHN P. FRANK, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* (2d ed. 1952);

what many academics have deemed to be the “essence” of a given field, and because that is the medium through which legal academics reach the largest body of future lawyers (many of whom go on to be government officials).<sup>366</sup> These materials do suggest that jurisdiction stripping was treated very differently from other court-curbing measures beginning around the mid-twentieth century.

## 1. Narratives that Protect Judicial Independence

### *a. Judicial Tenure*

As the debate over judicial removal illustrates, our political culture has largely forgotten the history surrounding Congress’s power to remove federal judges by abolishing their courts.<sup>367</sup> That is likely in part because our legal culture for many years overlooked (or discredited) that history. This narrative—a mixture of omission and disdain—helps explain why the idea of abolishing judgeships is today “off the wall.”

In my survey of casebooks, *none* included *Stuart v. Laird*, the 1803 case in which the Supreme Court approved the abolition of sixteen federal judgeships in the 1802 Repeal Act.<sup>368</sup> For many years, law school texts also failed to mention the Judiciary Act of 1801 or the 1802 repeal.<sup>369</sup> That changed around the early 1960s, when this history was

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PAUL G. KAUPER, CONSTITUTIONAL LAW: CASES AND MATERIALS (1954); PAUL A. FREUND, ARTHUR E. SUTHERLAND, MARK DEWOLFE HOWE & ERNEST J. BROWN, CONSTITUTIONAL LAW: CASES AND OTHER PROBLEMS (1954); NOEL T. DOWLING, CASES ON CONSTITUTIONAL LAW (5th ed. 1954); CHARLES G. FENWICK & LAWRENCE B. EVANS, CASES ON AMERICAN CONSTITUTIONAL LAW (7th ed. 1957); NOEL T. DOWLING, CASES ON CONSTITUTIONAL LAW (6th ed. 1959); PAUL A. FREUND, ARTHUR E. SUTHERLAND, MARK DEWOLFE HOWE & ERNEST J. BROWN, CONSTITUTIONAL LAW: CASES AND OTHER PROBLEMS (2d ed. 1961); NOEL T. DOWLING & GERALD GUNTHER, CONSTITUTIONAL LAW: CASES AND MATERIALS (7th ed. 1965); GERALD GUNTHER & NOEL T. DOWLING, CASES AND MATERIALS ON CONSTITUTIONAL LAW (8th ed. 1970); GERALD GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW (9th ed. 1975); GERALD GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW (10th ed. 1980).

366. Cf. Balkin & Levinson, *supra* note 364, at 1011 (“The selection of cases and materials in casebooks . . . both reflects and perpetuates particular . . . understandings of legal issues. . . . [The materials] can direct our attention toward certain problems . . . and away from others, or cause us to see certain situations as paradigmatic and others as secondary or inconsequential. . . .”).

367. See *supra* Section I.D.

368. 5 U.S. (1 Cranch) 299, 308–09 (1803); *supra* notes 65–69 and accompanying text (discussing *Stuart*). Notably, although some more recent casebooks do mention *Stuart*, the decision is still obscure today. See BRUCE ACKERMAN, THE FAILURE OF THE FOUNDING FATHERS 8–9 (2007).

369. Felix Frankfurter’s casebook contains a brief reference in the appendix to the 1801 and 1802 Acts, pointing out that Congress expanded federal jurisdiction in 1801 and repealed it in 1802. The casebook does not mention the abolition of judgeships. FELIX FRANKFURTER & WILBER G. KATZ, CASES AND OTHER AUTHORITIES ON FEDERAL JURISDICTION AND PROCEDURE 733–34

incorporated into the background story of *Marbury v. Madison*.<sup>370</sup> That case, of course, involved William Marbury's original suit in the Supreme Court to obtain a commission (for justice of the peace) from President Thomas Jefferson's Secretary of State James Madison.<sup>371</sup>

The common narrative is that Chief Justice Marshall faced a dilemma: if the Court ordered the Jefferson Administration to act, it might ignore the order—or attack the judiciary in other ways. Marshall escaped this dilemma by declaring unconstitutional the federal statutory provision that appeared to give the Court jurisdiction over the case.<sup>372</sup> Accordingly, from the 1960s on, the *Marbury* opinion was often praised as a “brilliant” political maneuver—one that both proclaimed the authority of the Supreme Court (to review the constitutionality of federal legislation), yet also avoided a direct confrontation with Jefferson (because the Court did not order Madison to do anything).<sup>373</sup> The 1802 repeal was part of the “political background” of *Marbury*, because the repeal was an example of the kind of danger that Marshall skillfully avoided with his savvy opinion.<sup>374</sup>

Because every casebook omitted *Stuart*, readers had no way of knowing that the Marshall Court, six days after *Marbury*, approved the

(1931); FELIX FRANKFURTER & HARRY SHULMAN, CASES AND OTHER AUTHORITIES ON FEDERAL JURISDICTION AND PROCEDURE 785–86 (rev. ed. 1937).

370. 5 U.S. (1 Cranch) 137, 153–54 (1803); see, e.g., NOEL T. DOWLING & GERALD GUNTHER, CONSTITUTIONAL LAW: CASES AND MATERIALS 42–44 (7th ed. 1965) (discussing the 1802 repeal in “Note: The Historical Setting of the Marbury Case”); see also Prakash & Smith, *supra* note 39, at 123–24 (noting that even today, “most students of constitutional law recall” these events “from studying *Marbury*”). Two federal courts texts published around this time briefly mention the repeal in a historical note on congressional jurisdictional reforms. See PAUL M. BATOR, PAUL J. MISHKIN, DAVID L. SHAPIRO & HERBERT WECHSLER, HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 36–37 (2d ed. 1973); HENRY M. HART, JR. & HERBERT WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 42 (1953).

371. *Marbury*, 5 U.S. (1 Cranch) at 153–54. Notably, Marbury was not one of the “midnight judges” appointed to an Article III court.

372. See *id.* at 176–78. I do not seek here to enter the debate over whether *Marbury* correctly interpreted the relevant provision of the Judiciary Act of 1789. For a summary of the debate (and an argument that Chief Justice Marshall’s construction was likely correct), see James E. Pfander, *Marbury, Original Jurisdiction, and the Supreme Court’s Supervisory Powers*, 101 COLUM. L. REV. 1515, 1515–19 (2001).

373. See, e.g., DOWLING & GUNTHER, *supra* note 370, at 43–44 (noting the view that Marshall’s opinion was “a masterwork of indirection, a brilliant example of Marshall’s capacity to sidestep danger while seeming to court it” (internal quotation marks omitted) (quoting ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 40 (1960))). This narrative endures today. See STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE’S VIEW 15–16 (2011) (emphasizing how Marshall “brilliantly escaped the dilemma”); Michael W. McConnell, *The Story of Marbury v. Madison: Making Defeat Look Like Victory*, in CONSTITUTIONAL LAW STORIES 1, 19–21, 28–31 (Michael C. Dorf ed., 2004) (“Marshall’s solution to this dilemma was strategically brilliant . . .”).

374. See, e.g., GERALD GUNTHER & NOEL T. DOWLING, CASES AND MATERIALS ON CONSTITUTIONAL LAW 13 (8th ed. 1970) (discussing the 1802 repeal as well as the attempted impeachment of Justice Samuel Chase and asserting that, following these events, “[t]he Jefferson-Marshall dispute continued, but the Court had survived the most critical stage”).

removal of judges in the 1802 repeal. That 1802 statute was also presented as an isolated event; none of the casebooks I reviewed mentioned the 1863 abolition of the D.C. circuit court, the debates over the Commerce Court, or any other evidence suggesting that the abolition of courts was once a real (if controversial) court-curbing method. The comments of Professor Alexander Bickel in 1970 during the legislative debates over judicial removal reflect this narrative. When the 1802 repeal briefly came up during those debates,<sup>375</sup> he suggested that the repeal was from the outset “seen, as the Alien Sedition Act was soon seen, as a mistake.”<sup>376</sup> After all, the repeal was “probably unconstitutional and highly politically motivated” and thus “the kind of practice that was not good and ought not to be followed.”<sup>377</sup>

*b. Complying with Federal Court Orders*

The convention requiring compliance with federal court orders seems to have emerged soon after the civil rights movement of the 1950s and 1960s. In contrast to the convention against abolishing federal judgeships, this norm did not develop because political actors forgot about the power to violate federal court orders. On the contrary, the massive resistance to desegregation decrees still looms large in our collective memory.<sup>378</sup>

This paradigm likely helped to establish (and helps to reinforce) the convention ensuring compliance with federal court orders. Although *Brown* was controversial in its day, it has over time become “canonical.” Any constitutional decision (or theory) can hope to gain acceptance only

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375. See *supra* notes 111–113 and accompanying text.

376. *Independence of Federal Judges Hearing*, *supra* note 102, at 335–36 (statement of Alexander Bickel).

377. *Id.* (“[S]ometimes the early practice is a good basis upon which to rest a constitutional construction, and sometimes is not.”).

378. That is reflected in part by a search of newspaper articles. A search from the civil rights era to the present revealed many references to Governor Faubus and the Little Rock incident. (By contrast, a search of articles from 1890 to the present revealed essentially nothing about *Merryman* and very little about the fugitive slave controversy. See *infra* note 381.) Casebooks do not contain a section on defiance of federal court orders. But the issue comes up in constitutional law casebooks in discussions of *Cooper v. Aaron*, 358 U.S. 1 (1958), a case that arose out of the Little Rock incident. Gerald Gunther’s influential casebook, for example, questioned the Court’s assertions in *Cooper* of judicial supremacy. But the casebook assumed that the officials, at a minimum, were required to abide by a federal court order. See GERALD GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 25–26, 32–33 & n.\* (10th ed. 1980); see also BATOR ET AL., *supra* note 370, at 455–60 (discussing state resistance to *Brown*).

if it affirms the correctness of *Brown*.<sup>379</sup> Conversely, the massive resistance of segregationists is now viewed as one of the most disgraceful moments in American history. Figures like Governor Faubus, who openly obstructed federal desegregation orders, have been transformed from “regional hero[es]” into historical villains.<sup>380</sup>

By contrast, my review of legislative history, casebooks, and newspaper articles suggests that other examples of defiance—such as *Merryman* and the (arguably heroic) actions of the abolitionists in the fugitive slave controversies—have been largely forgotten.<sup>381</sup> That was particularly true in the mid-twentieth century, when this convention was established. For example, one might have expected Lincoln’s actions in *Merryman* to come up during the “Nixon tapes” controversy in the 1970s. But I found only one clear reference—by Senator Ted Kennedy—and he claimed (surprisingly) that Lincoln *complied* with Chief Justice Taney’s order.<sup>382</sup>

As long as historical figures like Faubus remain the paradigm, and other examples are less well known, open defiance of federal court orders seems likely to remain “off the wall.” Modern political actors do not want to be equated with the segregationists who sought to obstruct *Brown*.

### *c. Convention Against Court Packing*

The narrative surrounding Roosevelt’s 1937 Court-packing plan is nicely captured by the political rhetoric discussed earlier. Roosevelt’s plan has, since the late 1950s, been viewed as an illegitimate threat to judicial independence. Accordingly, opponents of a given judicial reform attempt to compare it to “the now infamous ‘Court-packing plan,’ ”<sup>383</sup>

379. See Balkin & Levinson, *supra* note 364, at 1018; Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 381 (2011) (“[T]he constitutional canon” is “the set of decisions whose correctness participants in constitutional argument must always assume. *Brown* . . . is the classic example.”).

380. See *supra* Section II.C.

381. A search of newspaper articles from 1890 to the present revealed no references to the *Merryman* incident. There were also no references to the fugitive slave controversy until 2013; those references still did not focus on the resistance to a federal court order. *Merryman* has also almost never been discussed in congressional debates since the mid-twentieth century, and it does not appear that the executive branch has invoked it in any published Office of Legal Counsel opinions. As an illustration of the lack of attention to the case, some of the textbooks in my review went so far as to suggest that no president had *ever* violated a federal court order. See, e.g., DOWLING & GUNTHER, *supra* note 370, at 26–31 (stating, after discussing conflicts between various presidents (including Lincoln) and the judiciary, that “[a]ll of these [presidential] positions fell short of direct conflict with a court order” and failing to mention *Merryman*).

382. See 119 CONG. REC. 29,546 (1973) (statement of Sen. Edward Kennedy, D-Mass.) (“[S]hortly after Taney’s opinion was issued in the case and forwarded to President Lincoln, *Merryman* was actually released. So, in fact, the order was obeyed.”).

383. 114 CONG. REC. 11,740 (1968) (statement of Sen. Joseph Tydings, D-Md.).

while supporters deny that their reform “smacks of a Court-packing scheme.”<sup>384</sup> In short, “court packing” has become a “pejorative term” in our constitutional culture.<sup>385</sup>

This narrative helps explain why “[n]o serious person, in either major political party, suggests court packing as a means of overturning disliked Supreme Court decisions.”<sup>386</sup> Although legal academics (through their casebook coverage) do not appear to have created this narrative, that coverage has also not pushed against this story. With one exception, the federal courts and constitutional law casebooks in my survey did not mention “court packing” as a possible court-curbing method.<sup>387</sup> And no law school text mentioned that most academics view court packing as a constitutionally *permissible* means of congressional control. Instead, the 1937 plan was presented as a piece of history—the “constitutional crisis” that may have prompted the Supreme Court’s change in direction on the scope of federal regulatory power.<sup>388</sup> As we shall see, this narrative contrasts dramatically with that surrounding jurisdiction stripping starting in the mid-twentieth century.

## 2. A Narrative of Congressional Control

As I have documented, political actors for many years did not treat jurisdiction stripping as categorically different from any other court-curbing measure. But that changed starting around the late 1950s. Even as a bipartisan consensus developed against other court-curbing methods, congressional restrictions on federal jurisdiction were still viewed as a viable option. And *McCardle* was gradually transformed from an “abhorrent” precedent to “black-letter” law.<sup>389</sup> Although there are likely multiple explanations for this transformation, I argue that one important factor was the academic narrative

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384. *Id.* at 13,849 (statement of Sen. John McClellan, D-Ark.) (internal quotation marks omitted).

385. *See supra* Section III.D.

386. Krotoszynski, *supra* note 3, at 1064.

387. The one exception was Paul Kauper, whose constitutional law casebook briefly referred to the Court-packing plan in a short discussion of congressional control over the federal judiciary. *See* PAUL G. KAUPER, CONSTITUTIONAL LAW: CASES AND MATERIALS 117–23 (1954).

388. *See, e.g.*, PAUL A. FREUND, ARTHUR E. SUTHERLAND, MARK DEWOLFE HOWE & ERNEST J. BROWN, CONSTITUTIONAL LAW: CASES AND OTHER PROBLEMS 243–45 (2d ed. 1961) (discussing the plan in the midst of Court decisions on federal power); JOHN P. FRANK, CASES AND MATERIALS ON CONSTITUTIONAL LAW 446–49, 535–44 (2d ed. 1952) (describing “[t]he court fight of 1937” as “the most spectacular event of our constitutional history”).

389. 152 CONG. REC. 15,067 (2006) (statement of Rep. Steve King, R-Iowa) (“[T]he landmark case is *Ex parte McCardle* . . . .”); *see also id.* (statement of Rep. Mike Pence, R-Ind.) (“It is black letter law in the Constitution . . . that this body, this Congress, shall have the authority to set the jurisdiction of the courts.”).

surrounding congressional control over federal jurisdiction. In the mid-twentieth century, prominent legal academics advanced the view that broad congressional control could be a good thing for our constitutional democracy.

*a. The Gradual Development of the Narrative*

For many years, from 1895 to 1930, federal courts and constitutional law casebooks rarely mentioned Congress's power over federal jurisdiction. Most omitted *Ex parte McCordle* entirely.<sup>390</sup> Perhaps the most notable omission was that of James Bradley Thayer, one of the most influential constitutional thinkers of his day, whose 1895 constitutional law casebook was the legal standard in the field for years.<sup>391</sup> Thayer left out *McCordle*, even though his casebook included lengthy excerpts of other Reconstruction-era cases in which the litigants challenged the constitutionality of the reconstruction laws.<sup>392</sup> *McCordle* was, it seems, on its way to becoming as obscure as *Stuart v. Laird*.

The first legal academic to dust off *McCordle* was Felix Frankfurter. Frankfurter's 1931 federal courts casebook included *McCordle* as a principal case and (in sharp contrast to his predecessors) emphasized Congress's control over inferior federal court jurisdiction.<sup>393</sup> But even after the publication of this influential casebook, other texts discussed jurisdiction stripping only sporadically.<sup>394</sup>

The issue gained more prominence with the 1953 publication of Henry Hart and Herbert Wechsler's *The Federal Courts and the Federal System* ("Hart and Wechsler"). That casebook, which quickly became

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390. One early casebook mentioned *McCordle* briefly in footnotes. See JAMES P. HALL, CASES ON CONSTITUTIONAL LAW 178 n.2, 1323 n.1 (2d ed. 1926). The remainder omitted it.

391. See generally JAMES BRADLEY THAYER, CASES ON CONSTITUTIONAL LAW (1895); see also Telford Taylor, *Book Review: American Constitutional Law*, 79 COLUM. L. REV. 1209, 1211 (1979) (noting that Thayer's "work enjoyed a virtual monopoly of the casebook field until 1913" (reviewing LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW (1978))).

392. See THAYER, *supra* note 391, at 196–206 (including *Georgia v. Stanton*, 73 U.S. (6 Wall.) 50 (1868), and *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475 (1867), as principal cases).

393. See FRANKFURTER & KATZ, *supra* note 369, at 582–86 (including *McCordle*); *id.* at 246–48, 540, 595–607 (highlighting control over inferior federal court jurisdiction).

394. Compare, e.g., WALTER F. DODD, CASES AND OTHER AUTHORITIES ON CONSTITUTIONAL LAW 130–33 (3d ed. 1941) (including *McCordle*), with RAY FORRESTER, DOBIE AND LADD'S CASES AND MATERIALS ON FEDERAL JURISDICTION AND PROCEDURE 869 (2d ed. 1950) (omitting *McCordle*); see also CHARLES T. MCCORMICK & JAMES H. CHADBOURN, CASES AND MATERIALS ON FEDERAL COURTS 793–98 (2d ed. 1950) (including *McCordle* although the 1946 edition did not).

the “definitive text on the subject of federal jurisdiction,”<sup>395</sup> firmly endorsed broad congressional control over inferior federal court jurisdiction and treated *McCardle* as a principal case.<sup>396</sup> But one can see in this 1953 edition some continuing discomfort with *McCardle*. The casebook contained a lengthy excerpt of Henry Hart’s *Dialogue*, in which he doubted that *McCardle* should be read “for all it might be worth,” and suggested instead that Congress had an obligation to leave in place sufficient jurisdiction for the Court to exercise its “essential role . . . in the constitutional plan.”<sup>397</sup>

In the 1970s, beginning with the publication of the second edition of Hart and Wechsler in 1973, law school texts went further and offered an affirmative case for broad congressional control over both Supreme Court and inferior federal court jurisdiction.<sup>398</sup> This affirmative case had two basic components. First, congressional power to restrict federal jurisdiction could be a good way to keep in check an unelected and unaccountable federal judiciary. That is, “attempts to restrict jurisdiction” could “[i]n some circumstances . . . be an appropriate and important way for the political branches to register disagreement with the Court and to channel and focus such contrary opinions in a way that will come to the Court’s attention.”<sup>399</sup> The second, and related, claim was that “the legitimacy of judicial review” could be “enormously buttressed by the continuing existence of Congressional power to curtail jurisdiction.”<sup>400</sup>

According to this narrative, the Supreme Court was not vulnerable to a sustained attack, because Congress was unlikely to enact a jurisdiction-stripping bill. Congress would, after all, generally opt to leave Court review in place to provide a uniform resolution of federal questions.<sup>401</sup> This narrative thus presented broad congressional

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395. Akhil Reed Amar, *Law Story*, 102 HARV. L. REV. 688, 689–90 (1989) (internal quotation marks omitted) (quoting Philip B. Kurland, *The Federal Courts and the Federal System*, 67 HARV. L. REV. 906, 907 (1954)).

396. See HART & WECHSLER, *supra* note 370, at 288–302 (presenting *McCardle* and stating that the framers of the First Judiciary Act rejected the view that Article III casts an obligation on Congress to endow the federal courts with the full scope of the federal judicial power).

397. *Id.* at 312–13 (quoting Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1365 (1953)).

398. See BATOR ET AL., *supra* note 370, at 309–10, 313–15, 360–65 (discussing inferior federal court jurisdiction); *id.* at 363–64 (discussing Supreme Court jurisdiction); GERALD GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 55 (9th ed. 1975) (noting “that it may be ‘politically healthy’ that ‘the limits of congressional power have never been completely clarified’” (quoting HART & WECHSLER, *supra* note 370, at 363)).

399. BATOR ET AL., *supra* note 370, at 363; GUNTHER & DOWLING, *supra* note 374, at 52–53.

400. BATOR ET AL., *supra* note 370, at 364; GUNTHER & DOWLING, *supra* note 374, at 52–53.

401. See BATOR ET AL., *supra* note 370, at 363–64.

control over federal jurisdiction as the best of both worlds. The elected branches could express concerns about Supreme Court jurisprudence by proposing jurisdiction-stripping bills, while the Court was likely safe from any serious attack. Meanwhile, broad congressional control over federal jurisdiction would enhance the legitimacy of judicial review. In sum, “rather than being a threat to judicial independence,” congressional control over federal jurisdiction could be “one of its most important (though subtle) bulwarks.”<sup>402</sup>

*b. Evaluating the Narrative*<sup>403</sup>

This congressional control narrative has had tremendous influence in our legal culture.<sup>404</sup> Perhaps for that reason, this narrative has also impacted political debates over jurisdiction stripping. For example, a 2004 House report defended one such proposal in part by reciting the academic claim that broad congressional control “may be

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402. *Id.* at 364; GUNTHER, *supra* note 398, at 55 (“[A] congressional power over appellate jurisdiction [may be] a source of strength rather than weakness for the Supreme Court.”).

403. It is not clear why legal academics crafted this affirmative case for Congress’s power over federal jurisdiction. This narrative does seem to be in keeping with the legal process movement, which had great influence in the field of federal courts in the mid-twentieth century. *See* Amar, *supra* note 395, at 690–91, 700–02 (emphasizing how Hart and Wechsler were influenced by, and contributed to the influence of, legal process theory (reviewing PAUL M. BATOR ET AL., HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM (3d ed. 1988))); Michael Wells, *Behind the Parity Debate: The Decline of the Legal Process Tradition in the Law of Federal Courts*, 71 B.U. L. REV. 609, 623–24 (1991) (noting that the legal process framework was “accepted for nearly forty years by scholars and judges as a starting point of analysis of federal courts issues”). At a time when some scholars questioned the legitimacy of judicial review, legal process scholars argued that the federal courts’ authority could be both constrained and legitimated through procedure. That is, jurisdictional rules, like standing and ripeness, would determine when judges were authorized to make constitutional pronouncements. *See* KALMAN, *supra* note 241, at 30–31, 41–42 (observing that “[p]rocess theorists were . . . obsessed with procedural issues [and] with limiting the role of the federal courts,” particularly in the exercise of judicial review); GARY MINDA, POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY’S END 24 (1995) (explaining the view that process values could be used to restrain the subjective preferences of legal decisionmakers). Along the same lines, congressional statutes conferring jurisdiction could signal the political branches’ acquiescence in judicial review—particularly if Congress had broad power to restrict jurisdiction. Accordingly, the legal process movement may help explain why academics in the 1970s were drawn to the congressional control model. What is more difficult to determine is why those same academics did not also articulate an affirmative narrative for the other court-curbing methods discussed in this Article. A full analysis of that question is beyond the scope of this Article.

404. *See, e.g.*, Richard H. Fallon, Jr., *Jurisdiction-Stripping Reconsidered*, 96 VA. L. REV. 1043, 1086 (2010) (“I take seriously Charles Black’s remark that Congress’s power to withdraw the Supreme Court’s appellate jurisdiction is ‘the rock on which rests the legitimacy of the judicial work in a democracy’ . . . .” (quoting Charles L. Black, Jr., *The Presidency and Congress*, 32 WASH. & LEE L. REV. 841, 846 (1975))).

essential to making the institution of judicial review tolerable in a democratic society.”<sup>405</sup>

My goal is not to directly challenge this affirmative case for congressional control over federal jurisdiction. (I have myself expressed sympathy with this position in past work.<sup>406</sup>) Rather, I seek to point out that many of the *very same* policy arguments could be made about *any* of the court-curbing measures I have detailed in this Article.

Consider the first argument for the congressional control model. A threat to abolish federal judgeships, disobey court orders, or pack the Supreme Court could also be a “way for the political branches to register disagreement” with the federal judiciary, so that officials’ “contrary opinions” on legal issues “will come to the [courts] attention.”<sup>407</sup> After all, many progressive legislators sought to remove Commerce Court judges because of their pro-railroad decisions.<sup>408</sup> Likewise, abolitionists in the 1850s, and later segregationists in the 1950s, sought to “register disagreement” with federal court decisions by obstructing—or threatening to obstruct—judicial orders.<sup>409</sup> And this basic argument *was* made by the Roosevelt Administration in support of its 1937 Court-packing plan. In testimony before the Senate Judiciary Committee, then-Assistant Attorney General (and later Justice) Robert Jackson asserted that “[o]ur forebears” enabled Congress to alter the size of the Supreme Court as a means of “check[ing] judicial abuses and usurpations.”<sup>410</sup>

The second argument for the congressional control model could also apply to these other court-curbing methods. The very “legitimacy of judicial review” might be “enormously buttressed by the continuing

405. H.R. REP. NO. 108-691, at 24 (2004) (internal quotation marks omitted) (relying on “leading Harvard Law School Federal jurisdiction scholar Paul Bator” (quoting *Constitutional Restraints Upon the Judiciary: Hearing Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 97th Cong. 55 (1981) (statement of Paul M. Bator, Professor of Law, Harvard University))); see also *Supreme Court: Hearing Before the Subcomm. on Separation of Powers of the S. Comm. on the Judiciary*, 90th Cong. 202 (1968) (statement of Paul J. Mishkin, Professor of Law, University of Pennsylvania) (“[A]n attempt to restrict jurisdiction . . . is an appropriate check as a means of focusing or channeling contrary opinion in a way that will bring it to the attention of the Court.”). Notably, the 2004 House Report quoted Professor Paul Bator without mentioning his serious reservations about eliminating the Supreme Court’s appellate jurisdiction. See *Constitutional Restraints Upon the Judiciary*, *supra*, at 36.

406. See Grove, *supra* note 17, at 928–29.

407. Cf. BATOR ET AL., *supra* note 370, at 363.

408. See *supra* Section I.C.2 (discussing the debates over abolishing the Commerce Court).

409. See *supra* Sections II.B.2–C (discussing state and local governments’ defiance of federal court orders).

410. *Reorganization of the Federal Judiciary, Part 1: Hearing on S. 1392 Before the S. Comm. on the Judiciary*, 75th Cong. 38 (1937) [hereinafter *Hearing on Reorganization*] (statement of Robert H. Jackson, Assistant Att’y Gen. of the United States).

existence” of a congressional power to abolish judgeships, pack the Supreme Court, or by an executive authority to disregard federal court orders.<sup>411</sup> One need not worry that such an attack on the federal judiciary would happen often. After all, even before there was a firm convention against these court-curbing methods, Congress rarely removed judges outside the impeachment process; the judges on the Commerce Court were ultimately moved to other positions in the federal judiciary.<sup>412</sup> Most state and federal officials also obeyed federal court decrees, and Congress on only a few occasions altered the size of the Supreme Court.<sup>413</sup> Accordingly, we could have the best of both worlds: the political branches would not often *enact* legislation sanctioning the judiciary, nor in fact disobey federal court orders; yet their power to do so could be “the rock on which rests the legitimacy of the judicial work in a democracy.”<sup>414</sup>

I suspect that many readers are highly skeptical of these arguments. But that is precisely my point. In our current legal and political culture, it is *absurd* to discuss removing federal judges, disobeying federal court orders, or court packing in this way. We do not view these methods as “*appropriate . . . way[s]* for the political branches to register disagreement” with the federal judiciary.<sup>415</sup> But it is not logic alone that clearly distinguishes these court-curbing methods from a congressional power to take away federal jurisdiction. Instead, our legal and political culture has chosen to treat these practices as “out of bounds.” And that choice, I argue, provides tremendous protection for judicial independence.

#### *D. The (Overlooked) Fragility of Judicial Independence*

Since the mid-twentieth century, government officials have established conventions that protect judicial tenure, ensure compliance with federal court orders, and prohibit attempts to “pack” the Supreme Court. These conventions, I argue, are reinforced by narratives that help us either to overlook these court-curbing methods or to treat them with disdain. But as illustrated by the example of congressional control over federal jurisdiction, these conventions are historically contingent and, thus, subject to change. I argue here that there may be reasons

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411. *Cf.* BATOR ET AL., *supra* note 370, at 364.

412. *See supra* Section I.C.2.

413. *See supra* Section III.A (detailing Congress’s juggling of the Court’s membership three times during the 1860s).

414. Charles L. Black, Jr., *The Presidency and Congress*, 32 WASH. & LEE L. REV. 841, 846 (1975).

415. *Cf.* BATOR ET AL., *supra* note 370, at 363 (emphasis added).

today to worry about a change in these protections for judicial independence. But first I address a preliminary question about the relationship between “conventions” and “law.”

### 1. “Conventions” Versus “Law”

Some readers may assert that at least some of the protections I have identified are not simply conventions (that is, “unwritten rules of political behavior”<sup>416</sup>) but binding rules of law. Many commentators appear to make that assumption about judicial tenure. A number of scholars have insisted that the Good Behavior Clause of Article III simply *means* that federal judges are entitled to life tenure and can be removed only through the impeachment process.<sup>417</sup> Many commentators also assert that the Article III “judicial Power” plainly encompasses the authority to issue binding rulings in specific cases.<sup>418</sup>

To address this concern, I need to discuss an important difference between “conventions” (defined in this Article as widespread bipartisan norms)<sup>419</sup> and “legal rules.” At the outset, let me be clear that I do not seek here to offer a detailed jurisprudential theory of either “convention” or “law”; such an undertaking would be well outside the scope of this project. But I believe we can identify some important distinctions between “conventions” (as defined here) and “legal rules,” simply by relying on well-accepted norms of legal practice.

Lawyers, judges, and scholars who practice (or write about) law accept that there is room for reasonable disagreement about many questions. That is, even if we are convinced that we have the “right” answer to a given legal question,<sup>420</sup> we recognize that others may legitimately disagree. (This, of course, is why we are not troubled by the

416. Vermeule, *Conventions in Court*, *supra* note 6, at 288.

417. *See supra* Section I.A.

418. *See supra* Section II.A.

419. As discussed, commentators do not (yet) agree on a single definition of “convention.” I have defined “convention” as a widespread bipartisan norm in order to make the concept analytically useful for this historical survey. *See supra* notes 9–12 and accompanying text (explaining the definition as used in this Article). The lack of a single definition in either British or American scholarship would seem to present challenges for anyone in search of a sharp jurisprudential line between “law” and “convention.” Interestingly, however, British theorists often assert that constitutional “conventions” are not “law.” *See* Joseph Jaconelli, *The Proper Roles for Constitutional Conventions*, 38 DUBLIN U. L.J. 363, 371 (2015) (noting that the “orthodox approach” in British theory is that “there is a clear divide between laws and constitutional conventions”). As noted in the text, I do not seek to tackle this larger jurisprudential question.

420. For present purposes, I put to one side the debate over whether any given legal question should be deemed to have a single “right answer.” The leading advocate of the one-right-answer thesis was, of course, Ronald Dworkin. *See, e.g.,* RONALD DWORKIN, *LAW’S EMPIRE* 266–71 (1986) (advocating the one-right-answer thesis although discussing criticisms).

existence of dissenting opinions in judicial decisions.) The debate over jurisdiction stripping illustrates this point. Some scholars and political actors have argued forcefully that the text, structure, and history of Article III clearly place *no* limits on Congress's power to restrict federal jurisdiction; others argue just as forcefully that the same text, structure, and history clearly *do* limit Congress's power.<sup>421</sup> That is, commentators have a reasonable disagreement over this legal question.

As I have demonstrated, at one point, political actors and scholars also had reasonable disagreements about the Good Behavior Clause of Article III.<sup>422</sup> That is, some argued forcefully that the Constitution clearly allows Congress to remove lower federal court judges by abolishing their courts, while others argued just as forcefully that "good behavior" means life tenure, absent impeachment. Each of these competing positions was considered legitimate, even as one side viewed its position as "right" and the other as "wrong." That is why, as late as 1930, legal scholar Burke Shartel could say (as an aside in a footnote), "The question whether Congress has power to abolish federal judgeships so as to deprive sitting judges of their places has often been discussed but never been decided."<sup>423</sup>

Today, however, the idea that Congress could "abolish federal judgeships so as to deprive sitting judges of their places" is patently absurd. But that, I argue, is not because of the "law." Instead, it is because of a convention. That is, political actors of both parties have *deemed* such an argument to be "ridiculous" and "off the wall." The same is true of the rules prohibiting defiance of federal court orders and court packing. However one reads the text, structure, and history of Article III, those practices have been deemed out of bounds. There is (currently) no room for reasonable disagreement.

In this way, a convention functions as a super-protection for judicial independence—a protection that works over and above legal rules. This idea explains how the three court-curbing measures described here—abolishing judgeships, defiance of court orders, and court packing—can all be deemed equally off the table, even though many of us may read the "law" differently. As discussed, many scholars

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421. Compare, e.g., Martin H. Redish, *Text, Structure, and Common Sense in the Interpretation of Article III*, 138 U. PA. L. REV. 1633, 1637 (1990) (arguing that "the inescapable implication of the text is that Congress possesses broad power to curb the jurisdiction of *both* the lower courts and the Supreme Court"), with, e.g., Laurence Claus, *The One Court That Congress Cannot Take Away: Singularity, Supremacy, and Article III*, 96 GEO. L.J. 59, 64 (2007) (urging that "Congress can never . . . remove from the Supreme Court the ability to have ultimate judgment of Article III matters"); see also Grove, *supra* note 17, at 890–916 (recounting debates among political actors over jurisdiction-stripping measures).

422. See *supra* Sections I.A–C.

423. Shartel, *supra* note 99, at 907 n.102.

believe the constitutional text prohibits firing federal judges outside the impeachment process or defying court orders, but allows court packing. The conventions barring each of these practices—and, thus, protecting judicial independence—supplement any legal interpretations.

That is not to say that conventions have no relationship to the law. On the contrary, conventions may over time interact with, and impact, our understanding of legal rules. Indeed, I suspect that the conventions I have identified have influenced the way in which scholars, judges, and political actors today interpret Article III. That is, scholars likely assume that the Good Behavior Clause *means* life tenure, and that the “judicial Power” requires obedience to judgments, in part because of our political practices since the mid-twentieth century. Moreover, these understandings may in fact be the *best* reading of the Constitution; that is, one can argue persuasively that it is not only unconventional but *illegal* to remove Article III judges outside the impeachment process or to violate federal court orders. This analysis thus links up with important work by Curtis Bradley, Trevor Morrison, and Neil Siegel, who argue that government practices followed over a long period of time may place a “gloss” on constitutional meaning.<sup>424</sup> This work also connects with British scholarship on how conventions may “crystallize” into legal rules.<sup>425</sup>

But as the court packing example shows, such crystallization is not necessary. There can be a strong convention against a court-curbing measure, even if the legal community thinks the measure would be “legal.” Indeed, far more scholars accept the legality of court packing than jurisdiction stripping. Yet the “packing” method is the one that is today “out of bounds.” Accordingly, conventions may offer a super-protection for judicial independence, regardless of our interpretation of the “law.”

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424. See Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411 (2012); Curtis A. Bradley & Neil S. Siegel, *After Recess: Historical Practice, Textual Ambiguity, and Constitutional Adverse Possession*, 2014 SUP. CT. REV. 1, 21, 24–25 (explaining “the basic idea of historical gloss, which is that long-standing practices . . . acquiesced in by the other political branch should be given weight” by courts and political actors in separation of powers disputes); see also *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring) (emphasizing that experience may “gloss” constitutional meaning). In a somewhat similar vein, Caleb Nelson and William Baude have suggested that political practice can “liquidate” (that is, settle) the meaning of “contestable” constitutional provisions. See William Baude, *Rethinking the Federal Eminent Domain Power*, 122 YALE L.J. 1738, 1811–12 (2013); Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 521–22, 527–29 (2003). However, it may be that only early political practice can result in such “liquidation.” If so, the practices discussed in this Article (which date from the mid-twentieth century) would not qualify.

425. For excellent work on how British conventions may crystallize into laws, see N.W. Barber, *Laws and Constitutional Conventions*, 125 LAW Q. REV. 294, 294 (2009).

## 2. The Contingency of Conventions

I have argued that the conventions of judicial independence depend in part on the narratives crafted by our legal and political culture. Those narratives lead us to treat some court-curbing measures with disdain, while others appear to be more legitimate. Notably, this argument also suggests that if the narratives were to change (perhaps in response to changes in our political culture), we might see very different protections for the federal judiciary.

Such modifications could go in either direction. Currently, there is an appealing narrative in favor of broad congressional control over federal jurisdiction: that such control provides legitimacy for judicial review. If that narrative changed, so might political attitudes toward jurisdiction stripping. For example, if government officials once again viewed *McCardle* as an “abhorrent” and “irresponsibl[e]” precedent,<sup>426</sup> there might be far fewer congressional attempts to curb the Supreme Court’s appellate jurisdiction.

Conversely, practices that are out of bounds today could in the future be deemed more acceptable. The 1937 Court-packing plan, for example, is now viewed by political actors of both parties as a “mortal error” that Congress should not repeat.<sup>427</sup> But that is not the only story one can tell about court packing. If this court-curbing measure were viewed (as the Roosevelt Administration argued in 1937) as an important means of “check[ing] judicial abuses and usurpations,”<sup>428</sup> a plan to modify the size of the Court might no longer be out of bounds. Along the same lines, if the paradigm for violating federal court orders became the abolitionists of the 1850s, rather than the segregationists of the 1950s, our collective attitude toward such defiance might be very different.

Notably, the protections for judicial independence may be subject to change, even if the conventions appear to have crystallized into legal rules. After all, even legal rules are subject to modification over time. That would seem to be particularly true of legal rules that depend on the historical practice of the political branches. That is, if the Good Behavior Clause is understood as guaranteeing “life tenure” because of the conduct of government officials, the Clause might be

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426. 100 CONG. REC. 6258 (1954) (statement of Sen. John Butler, R-Md.).

427. See *supra* Section III.D.

428. *Hearing on Reorganization*, *supra* note 410.

viewed quite differently if proposals like that of Newt Gingrich became more common, or were not quickly dismissed as “off the wall.”<sup>429</sup>

To be clear, I do not want to overstate the susceptibility of conventions to future modification. Although politicians can always “propose a change of convention,” they will not succeed unless there is fairly broad agreement that the previous convention is wrong or outmoded.<sup>430</sup> Moreover, the three conventions identified here—protecting judicial tenure, complying with court orders, and barring court packing—have enjoyed a large degree of stability since the mid-twentieth century.

But there are reasons today to worry about a change in the protections for judicial independence. In an era of increasing party polarization,<sup>431</sup> government officials in both parties have recently proven willing to depart from long-standing norms in order to fulfill short-term partisan gains. As discussed, in response to the scuffle over three D.C. Circuit nominations, a Democratic-controlled Senate in 2013 abolished the filibuster for lower federal court appointments.<sup>432</sup> And partially in response to the exercise of that “nuclear option,” a Republican-controlled Senate in 2016 refused to hold hearings on a Supreme Court nominee, and then in 2017 ended the filibuster for Supreme Court judgeships to ensure the confirmation of their preferred choice.

Although one can debate the constitutionality and wisdom of the filibuster rule,<sup>433</sup> for my purposes, the important point is that the rule

429. Cf. JACK M. BALKIN, *CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD* 119 (2011) (arguing that the process of “attempting to move arguments from off-the-wall to on-the-wall is the process of constitutional development in America”).

430. MARSHALL, *supra* note 8, at 216–17 (“[Conventions] cannot be changed unilaterally and must be complied with . . . until changed by agreement.”).

431. See Mark D. Brewer, *The Rise of Partisanship and the Expansion of Partisan Conflict Within the American Electorate*, 58 POL. RES. Q. 219, 219–20 (2005) (noting that although partisanship declined throughout the 1950s and 1960s, “[b]y the end of the 1980s, partisanship in Congress had risen dramatically and has remained at a high level ever since”).

432. See *supra* Section III.D.2.

433. The rule still applies to legislation. Under Rule 22, a cloture motion to end debate requires three-fifths of the Senate (sixty votes). C. Lawrence Evans, *Politics of Congressional Reform*, in *THE LEGISLATIVE BRANCH* 490, 510 (Paul J. Quirk & Sarah A. Binder eds., 2005). For a small sample of the scholarly debate over the filibuster, see Aaron-Andrew P. Bruhl, *The Senate: Out of Order?*, 43 CONN. L. REV. 1041, 1041 (2011) (arguing that the supermajoritarian effects of the filibuster have pernicious effects on the Senate’s functionality); Josh Chafetz, *The Unconstitutionality of the Filibuster*, 43 CONN. L. REV. 1003, 1015 (2011) (arguing that Article I implicitly requires that “a determined and focused legislative majority . . . be able to get its way in a reasonable amount of time”); Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181, 181 (1997) (showing how “the nature and effects of filibusters have changed significantly as the Senate has grown larger and busier”); see also Dan T. Coenen, *The Filibuster and the*

was itself a convention.<sup>434</sup> Indeed, in 2005, a bipartisan majority of the Senate opted to preserve the filibuster for judicial nominations—even in the face of (another) bitter partisan fight—because “[t]he convention permitting filibusters had become sufficiently entrenched that politicians of both parties shied away from changing it.”<sup>435</sup> Yet a decade later, both parties (when they were in the majority) opted to dispense with the practice in order to fulfill short-term gains. These episodes raise the question whether government officials will continue to adhere to other bipartisan norms, including those that currently safeguard the judiciary—especially if federal court rulings prove to be an obstacle to the officials’ short-term goals.<sup>436</sup>

The contingent nature of judicial independence is not often appreciated by our legal culture. Instead, we generally treat it as a given that the tenure of federal judges will be respected; that political actors will comply with federal court orders; and that no one will seriously consider packing the Supreme Court. As I have tried to demonstrate, however, these features of our constitutional scheme are not self-evident truths. These conventions of judicial independence have been built over time, and could be deconstructed—or, alternatively, expanded—if we alter the way in which we think and talk about the federal judicial power.

## CONCLUSION

Much of the judicial independence that we take for granted today is not simply guaranteed by our constitutional text and structure. This Article documents how political actors have over time built

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*Framing: Why the Cloture Rule is Unconstitutional and What to Do About It*, 55 B.C. L. REV. 39, 40–41, 64–70 (2014) (summarizing some of the debate and arguing that the current rule is invalid).

434. Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408, 427–28 (2007); see Vermeule, *Agency Independence*, *supra* note 6, at 1188 (describing the filibuster rule as a Senate convention).

435. Young, *supra* note 434, at 427–28 (noting that when Senate Democrats filibustered some of President George W. Bush’s nominees, “a significant number of Republicans who disapproved of the filibusters were nonetheless unwilling to vote to change the Senate’s rules”); see also Richard Morin & Dan Balz, *Filibuster Rule Change Opposed*, WASH. POST (Apr. 26, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2004/10/26/AR2005032201677.html> [<https://perma.cc/LF5B-XQD9>] (noting that at that time, “a strong majority of Americans oppose[d] changing the rules”).

436. Some commentators have questioned whether the Trump Administration will continue to adhere to adverse federal court orders. See Aaron Blake, *What Happens If Trump Decides to Ignore a Judge’s Ruling?*, WASH. POST (Feb. 5, 2017), [https://www.washingtonpost.com/news/the-fix/wp/2017/02/05/constitutional-crisis-what-happens-if-trump-decides-to-ignore-a-judge/?utm\\_term=.439e288b492f](https://www.washingtonpost.com/news/the-fix/wp/2017/02/05/constitutional-crisis-what-happens-if-trump-decides-to-ignore-a-judge/?utm_term=.439e288b492f) [<https://perma.cc/XP8V-GGYF>] (suggesting that noncompliance with a federal court order blocking the travel ban is “not out of the question”); Totenberg, *supra* note 203 (noting that others are concerned that Trump may eventually “refuse to comply” with a court order).

conventions that prohibit the removal of federal judges outside the impeachment process; the obstruction of federal court orders; and packing the Supreme Court. These conventions serve as super-protections for judicial independence—protections that work over and above legal rules. In that way—at least for those who view these conventions as normatively appealing (as I suspect many do)—the story offered here is one of triumph. But the goal of this Article is also to sound a note of caution. What we currently view as utterly “out of bounds” could change, depending on historical developments as well as the political and legal discourse about the Article III judicial power.