4-8-2010

The Structural Safeguards of Federal Jurisdiction

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VOLUME 124 FEBRUARY 2011 NUMBER 4

HARVARD LAW REVIEW

ARTICLE

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Tara Leigh Grove[*]

Scholars have long debated Congress's power to curb federal jurisdiction and have consistently assumed that the constitutional limits on Congress's authority (if any) must be judicially enforceable and found in the text and structure of Article III. In this Article, I challenge that fundamental assumption. I argue that the primary constitutional protection for the federal judiciary lies instead in the bicameralism and presentment requirements of Article I. These Article I lawmaking procedures give competing political factions (even political minorities) considerable power to "veto" legislation. Drawing on recent social science and legal scholarship, I argue that political factions are particularly likely to use their structural veto to block jurisdiction-stripping legislation favored by their opponents. Notably, this structural argument is supported by the history of congressional control over federal jurisdiction. When the federal courts have issued controversial opinions that trigger wide public condemnation, supporters of the judiciary — even when they were only a political minority in Congress — repeatedly used their structural veto to block jurisdiction-stripping proposals. This structural approach also provides one answer to a puzzle that has particularly troubled scholars: whether there are any constitutional limits on Congress's authority to make "exceptions" to the Supreme Court's appellate jurisdiction. The structural safeguards of Article I have proven especially effective at preventing encroachments on the Supreme Court's Article III appellate review power.

I. INTRODUCTION

There is a recurring concern among scholars of federal courts and federal jurisdiction that Article III is at war with itself.[1] Article

* Assistant Professor, Florida State University College of Law. Many thanks for helpful comments and suggestions to Amy Barrett, Kris Collins, Robin Kundis Craig, Brannon Denning, Neal Devins, Michael Dorf, Richard Fallon, Barry Friedman, Michael Gerhart, Mike Klarman, David Landau, Gary Lawson, Daryl Levinson, Wayne Logan, John Manning, Dan Markel, Dan Meltzer, Gillian Metzger, Henry Monaghan, Jim Pfander, Gregg Polsky, Jim Rossi, Mark Seidenfeld, and David Shapiro. Many thanks also to the participants at the Junior Scholars' Federal Courts Workshop, Michigan State University College of Law (October 2009) and to those at the workshops of Vanderbilt University Law School (April 2010), Florida State University College of Law (May 2010), William and Mary Law School (September 2010), Boston University School of Law (October 2010), and Emory University School of Law (November 2010). I am also grateful to my husband David Davies for his help and support throughout the process of researching and writing this Article.

[1] *See, e.g.*, Laurence Claus, *The One Court that Congress Cannot Take Away: Singularity, Supremacy, and Article III*, 96 GEO. L.J. 59, 61 (2007) ("The Article III about which we learn in Federal Jurisdiction class is a text at war with itself."); 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) (suggesting that, if Article III gives Congress unlimited power over the Supreme Court's appellate jurisdiction, then "the Constitution . . . authoriz[es] its own destruction"); 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, 67–

III states that "[t]he judicial Power . . . *shall be vested* in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[2] That provision further states that this "judicial Power *shall extend* to *all* Cases" arising under federal law,[3] and that the Supreme Court "*shall have* appellate Jurisdiction" over such federal question cases.[4] But Article III also declares that the Court's appellate review power is subject to "such Exceptions, and . . . such Regulations as the Congress shall make"[5] and does not require Congress to create any inferior federal courts to exercise the jurisdiction that is "excepted" from the Supreme Court's purview. Article III thereby suggests that, although the Constitution "vest[s]" the federal courts with the "judicial Power" to resolve issues of federal law, the Constitution also allows Congress to take that power away.

I argue here that this apparent constitutional tension largely disappears once we expand our focus beyond Article III. The federal judicial power is primarily protected not by the provisions defining the courts' authority, but instead by the structural provisions controlling the authority of Congress. The constitutional process for enacting legislation, which requires all legislative proposals to pass through two chambers of Congress and be presented to the President (or, in the event of a presidential veto, to survive supermajority votes in the House and Senate), provides considerable protection for federal jurisdiction. These bicameralism and presentment requirements allow political minorities to veto, or restrict the content of, any legislation.

Recent social science and legal scholarship suggests that political minorities will be particularly inclined to exercise this veto power over jurisdiction-stripping legislation favored by their opponents. First, scholars have argued that, in a competitive political system (like the United States), risk-averse politicians favor an independent judiciary as a useful means of controlling their political opponents during periods when their own side is out of power. Likewise, such risk-averse politicians should be inclined to veto legislation that would allow their opponents' policies to escape federal court review. This assumption is further supported by a separate group of social scientists who urge that, in our politically divided society, the overall content of federal court decisions is generally favored by at least one major political faction.

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68 (1981) (arguing that, if Article III gives Congress plenary power over federal jurisdiction, then the provisions of Article III are "at war with one another," *id.* at 67).

[2] U.S. CONST. art. III, § 1 (emphasis added).

[3] U.S. CONST. art. III, § 2, cl. 1 (emphasis added).

[4] U.S. CONST. art. III, § 2, cl. 2 (emphasis added).

[5] *Id.*

Social scientists argue that such political conditions facilitate the establishment and long-term maintenance of an independent judiciary. But, standing alone, these political incentives are a "fragile" protection for the federal courts.[6] When courts issue controversial and unpopular decisions, political leaders may forget the long-term benefits of an independent judiciary and attempt to strip federal jurisdiction.

The bicameralism and presentment requirements of Article I provide a "check" on such short-term political incentives. As long as the faction supporting the judiciary retains sufficient political strength in one chamber of Congress or the Presidency — even if it is only a political minority — it can veto such jurisdiction-stripping attempts.

This structural argument is supported by the history of congressional control over federal jurisdiction. In the late nineteenth and early twentieth centuries, the federal judiciary was viewed as biased in favor of big business, and there were accordingly numerous attempts to strip federal jurisdiction over suits involving corporations. Beginning in the mid-twentieth century, and as recently as 2006, the primary target was the constitutional jurisprudence of the Warren Court (and its progeny). Countless bills were introduced to strip Supreme Court and inferior federal court jurisdiction over constitutional issues ranging from reapportionment to the use of "under God" in the Pledge of Allegiance.

But, in both cases, the overall content of federal jurisprudence had the support of at least one major political faction. In the late nineteenth and early twentieth centuries, economic nationalists within the Republican Party, who sought to enhance the industrial and commercial power of the United States, strongly supported the federal judiciary's pro-business decisions. In more recent times, the federal courts' constitutional jurisprudence has found favor with social progressives (primarily housed in the Democratic Party). Each political faction — even when it was only a political minority in Congress — repeatedly used its structural veto points to prevent encroachments on the federal judicial power.

Notably, I do not claim that these structural constraints are an absolute bulwark against attempts to limit federal jurisdiction. On several occasions, Congress has displaced the inferior federal courts by referring matters to state courts or to administrative and military tribunals (albeit leaving the latter subject to Supreme Court review). And although it has proven more difficult to strip the Supreme Court's appellate jurisdiction, two such efforts have successfully navigated the bicameralism and presentment hurdles of Article I. Nevertheless, despite these limitations, supporters of the judiciary have repeatedly used

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[6] *See* sources cited *infra* note 83 and accompanying text.

the structural veto points created by Article I to safeguard federal jurisdiction.

This structural approach differs considerably from prior scholarship on Congress's authority over federal jurisdiction.[7] Previously, scholars have assumed either that there must be judicially enforceable limits on Congress's power, or that there are no constitutional limits and the federal judicial power is simply a matter of legislative will (or benevolence). These scholars have overlooked a central feature of our constitutional design: that the primary protection for many of our most precious rights and liberties (of which the independent judiciary forms a crucial part) would be structural.[8]

Indeed, this method of constitutional enforcement accords with the purpose of our constitutional system of separated powers. James Madison hoped that the Constitution "could be made politically self-enforcing by aligning the political interests of officials . . . with constitutional rights and rules."[9] "The great security . . . consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments" on constitutional principles.[10] Although I do not claim that all constitutional values can be effectively protected by the lawmaking processes of Article I, I do contend that political factions have repeatedly found it in their interest to use the structural tools of Article I to protect the Article III judicial power.

I lay out the argument for these structural safeguards as follows. In Part II, I explain that prior scholarship, in searching for constraints on Congress's power to curb federal jurisdiction, has repeatedly looked for judicially enforceable limits in Article III. I assert that the primary protection for the federal judiciary can instead be found in the lawmaking processes of Article I. In Parts III and IV, I provide historical

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[7] See *infra* pp. 874–75 for a discussion of the prior scholarship.

[8] Moreover, this analysis links up with a growing literature in constitutional law, which emphasizes that the structural constraints on federal power are inherently intertwined with (and largely dependent upon) the political processes of government. *See* Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 219 (2000) (urging that "federalism . . . has been safeguarded by a complex system of informal political institutions (of which political parties have historically been the most important)"); Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2329 (2006) (arguing that "any understanding of the . . . separation of powers should start from the recognition" that it works alongside a political party system). For a brief discussion of how the analysis here differs from some of that prior work, see *infra* note 268.

[9] Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1791, 1832 (2009); *see also* Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 662 (2011) (noting that Madison "hoped and hypothesized that the Constitution could be made politically self-enforcing by selectively empowering political decisionmakers whose interests and incentives would remain in alignment with constitutional values").

[10] THE FEDERALIST NO. 51, at 318–19 (James Madison) (Clinton Rossiter ed., 2003).

support for this claim. I argue that, from the post–Civil War era to the present day, the political factions supporting the judiciary have repeatedly used their structural veto points to preserve federal jurisdiction. Finally, in Part V, I discuss the scope and limits of these structural safeguards, noting that they have been especially effective at protecting the Supreme Court's appellate jurisdiction. Even when Congress has displaced the inferior federal courts, it has consistently preserved the Supreme Court's Article III judicial power.

II. THE THEORY

Scholars have long puzzled over the scope of Congress's authority to regulate federal jurisdiction, and particularly the Supreme Court's appellate jurisdiction. Although most scholars agree that Congress's power is limited by constitutional sources other than Article III (known as "external" limits),[11] they strongly dispute whether there are any "internal" limits — that is, whether the provisions of Article III (as elucidated by the constitutional text, structure, and history) themselves constrain Congress. Commentators differ considerably in their approaches to this question, but they do appear to agree on one thing: any such constitutional limits must be judicially enforceable. I argue that this scholarship overlooks a critical structural protection for the federal judiciary: the bicameralism and presentment procedures of Article I.[12]

A. The Search for a Judicially Enforceable Baseline in Article III

Many commentators have concluded, based on the text and structure of Article III, that Congress has plenary power to restrict federal

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[11] For example, there is broad consensus that Congress may not enact a jurisdictional measure that violates the Equal Protection Clause or the Suspension Clause of Article I, Section 9. Although scholars dispute the precise scope of these external constraints, they generally agree that these provisions limit Congress's power. *See* Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 916–22 (1984) (discussing some of the debates and noting that all scholars seem to agree that "the Bill of Rights applies to all areas of congressional action" and that "Congress could not limit access to the federal courts on the basis of race," *id.* at 916); Amanda L. Tyler, *Suspension as an Emergency Power*, 118 YALE L.J. 600, 607–08 (2009) (noting that the Suspension Clause, "[b]y its terms, . . . constitutes . . . a limitation upon . . . congressional power" over habeas jurisdiction, *id.* at 607, but also observing that scholars have debated whether the clause imposes an affirmative duty on Congress to confer habeas jurisdiction).

[12] I use the term "jurisdiction stripping" throughout this Article to refer to efforts to restrict federal jurisdiction over a class of cases (such as cases involving abortion or school prayer). Such jurisdictional restrictions are likewise the focus of other scholarly literature on this subject. Accordingly, I do not include within that definition other types of statutory limitations on federal jurisdiction, such as amount-in-controversy requirements.

jurisdiction.[13] Article III, they observe, does not purport to place any constraints on Congress's authority over the Supreme Court's appellate jurisdiction, but expressly states that the Court's jurisdiction is subject to "*such Exceptions, and . . . such Regulations as the Congress shall make*."[14] According to these scholars, this Exceptions Clause gives Congress broad power to remove cases from the Court's appellate oversight.[15] There is even greater consensus on Congress's authority over inferior federal court jurisdiction. Under Article III, the creation of the lower federal courts is left to the discretion of Congress.[16] Most commentators conclude that Congress may also determine to what extent such courts are needed to enforce federal law.[17] Notably, the Supreme Court has likewise consistently stated (albeit often in dicta) that Congress's authority over federal jurisdiction, including the Court's appellate jurisdiction, is unconstrained by Article III.[18]

Of course, even those who subscribe to this "plenary power" theory doubt the wisdom of Congress actually exercising its authority.[19] For example, Professor Paul Bator argued that "[a] statute depriving the

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[13] *See* CHARLES L. BLACK, JR., DECISION ACCORDING TO LAW 18 (1981) ("My own position is . . . that Congress does have very significant power over the courts' jurisdiction."); Raoul Berger, *Insulation of Judicial Usurpation: A Comment on Lawrence Sager's "Court-Stripping" Polemic*, 44 OHIO ST. L.J. 611, 614 (1983) (urging that Congress has plenary power over federal 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) (same); 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"); Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1005 (1965) (same); *see also* Daniel J. Meltzer, *The History and Structure of Article III*, 138 U. PA. L. REV. 1569, 1569 (1990) (describing this "plenary authority" position as "the traditional view of article III").

[14] U.S. CONST. art. III, § 2, cl. 2 (emphasis added).

[15] *See* Paul M. Bator, *Congressional Power over the Jurisdiction of the Federal Courts*, 27 VILL. L. REV. 1030, 1038 (1982) (urging that the Exceptions Clause "plainly seems to indicate that if Congress wishes to exclude a certain category of federal constitutional (or other) litigation from the [Supreme Court's] appellate jurisdiction, it has the authority to do so"); Berger, *supra* note 13, at 622 (same); Gunther, *supra* note 11, at 901 (same); Martin H. Redish, *Congressional Power to Regulate Supreme Court Appellate Jurisdiction Under the Exceptions Clause: An Internal and External Examination*, 27 VILL. L. REV. 900, 901–02 (1982) (same).

[16] *See* U.S. CONST. art. III, § 1; Sager, *supra* note 1, at 48.

[17] *See, e.g.*, Bator, *supra* note 15, at 1030–31 (arguing that the Constitution "leaves it to Congress to decide, having created lower federal courts, what their jurisdiction should be"); sources cited *supra* note 13.

[18] *See, e.g.*, The "Francis Wright," 105 U.S. 381, 386 (1882) ("Not only may whole classes of cases be kept out of the [Supreme Court's appellate] jurisdiction altogether, but particular classes of questions may be subjected to re-examination and review, while others are not."); Sheldon v. Sill, 49 U.S. (8 How.) 441, 449 (1850) ("Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies.").

[19] *See* Peter J. Smith, *Textualism and Jurisdiction*, 108 COLUM. L. REV. 1883, 1894 (2008) ("Advocates of the traditional view . . . emphasize that although Congress's power is broad, . . . generally speaking, Congress would be unwise to exercise the power.").

Supreme Court of appellate jurisdiction over . . . constitutional litigation *would* . . . violate the spirit of the Constitution, even if it would not violate its letter."[20] Likewise, Professor Martin Redish has urged that, "as a matter of policy," Congress should have a "very strong presumption against" restrictions on federal jurisdiction.[21] Nevertheless, these scholars reach what they view as the "inescapable" conclusion from Article III that "Congress possesses broad power to curb the jurisdiction of *both* the lower courts *and* the Supreme Court."[22]

But other commentators have concluded that there must be judicially enforceable limits on Congress's power, and that the substantive baseline for such limits can be derived from the text, structure, and history of Article III. Several scholars have focused on preserving the authority of the federal judiciary as a whole. These scholars emphasize that, by guaranteeing life tenure and salary protections to federal judges,[23] Article III renders federal courts structurally distinct from state courts.[24] This lack of "parity" between federal and state courts requires that certain matters be referred to the independent federal judiciary.[25]

For example, Professor Robert Clinton argues that Congress must "allocate to the federal judiciary as a whole each and every type of case or controversy" listed in Article III.[26] Professors Akhil Amar and Lawrence Sager offer related (but more nuanced) accounts. Professor Amar asserts that the federal judiciary must retain jurisdiction over all cases arising under federal law,[27] while Professor Sager insists that

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[20] Bator, *supra* note 15, at 1039.

[21] Martin H. Redish, *Same-Sex Marriage, the Constitution, and Congressional Power to Control Federal Jurisdiction: Be Careful What You Wish For*, 9 LEWIS & CLARK L. REV. 363, 369 (2005).

[22] Redish, *supra* note 13, at 1637.

[23] *See* U.S. CONST. art. III, § 1.

[24] *See* Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 230 (1985) (emphasizing that "[t]he structural mechanisms to assure independence and competence in the federal judiciary . . . are the same for all Article III judges, supreme and inferior. No similar mechanisms are prescribed by the Constitution for state judges"); Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741, 754, 762 (1984) (noting that "federal judges . . . , unlike their state counterparts, were constitutionally guaranteed judicial independence," *id.* at 754); Sager, *supra* note 1, at 66 (urging that, "[i]f there were no limits on congressional power to make state courts the exclusive, unreviewed arbiters of article III business, Congress could run roughshod over article III's tenure and salary requirements").

[25] *E.g.*, Amar, *supra* note 24, at 230 (arguing that because "state court judges do not enjoy . . . constitutional parity" with federal judges, state courts may not "be trusted with the power to resolve finally federal questions and admiralty issues").

[26] Clinton, *supra* note 24, at 750. Clinton also notes the possibility of an exception to this rule for "trivial" cases that would unnecessarily burden the federal courts.

[27] *See* Amar, *supra* note 24, at 209–10 (arguing that under Article III Congress must give the federal courts jurisdiction over cases arising under federal law as well as admiralty and ambassador suits but may leave other matters to state courts).

some Article III forum must be available to resolve federal constitutional claims.[28] Under this approach, Congress may take federal jurisdiction over such Article III matters away from either the inferior federal courts or the Supreme Court, but not both.

By contrast, a growing number of commentators have focused more specifically on the Supreme Court's appellate jurisdiction. They assert that the Court has a unique role in the constitutional scheme and that Congress must provide the Court with sufficient jurisdiction to perform that role. The foundation for this argument was laid in a famous essay by Professor Henry Hart. Professor Hart declared that "the exceptions [to the Court's appellate jurisdiction] must not be such as will destroy the essential role of the Supreme Court in the constitutional plan."[29] Professor Leonard Ratner later expanded upon this theory by arguing that the Supreme Court's "essential appellate functions" are to preserve the uniformity and supremacy of federal law.[30]

Scholars have recently supplemented these arguments by focusing on the structure of the judiciary. They urge that the Constitution creates a hierarchical judiciary and thereby gives the Supreme Court the authority to instruct lower courts on the content of federal law.[31] These commentators focus on the language in Article III designating one Court as "supreme" and all other federal courts as "inferior."[32] Most scholars also conclude that state courts must abide by Supreme Court decisions as part of the "supreme" federal law under the Supremacy Clause.[33]

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[28] *See* Sager, *supra* note 1, at 66 (contending that "Congress . . . must provide persons who advance claims of federal constitutional right an opportunity to secure review — in some article III court — of the state court's disposition").

[29] Hart, *supra* note 1, at 1365.

[30] Leonard G. Ratner, *Congressional Power over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157, 161 (1960); *see also* Leonard G. Ratner, *Majoritarian Constraints on Judicial Review: Congressional Control of Supreme Court Jurisdiction*, 27 VILL. L. REV. 929, 935 (1982).

[31] *See* Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 873 (1994) (urging that the Court's "essential function" is to "provid[e] general leadership in defining federal law") (internal quotation marks omitted); *see also* Tara Leigh Grove, *The Structural Case for Vertical Maximalism*, 95 CORNELL L. REV. 1, 9 (2009) (noting that the Court has long been viewed as having "a leading role in defining the content of federal law for the judiciary").

[32] U.S. CONST. art III, § 1.

[33] *See* Steven G. Calabresi & Gary Lawson, *Equity and Hierarchy: Reflections on the Harris Execution*, 102 YALE L.J. 255, 276 n.106 (1992) (contending that lower federal and state courts have an "obligation to follow Supreme Court precedent"); Caminker, *supra* note 31, at 834 (commenting on the forcefulness of the proposition that "Article III commands all inferior federal courts to obey Supreme Court precedent"); Claus, *supra* note 1, at 71 (asserting that the Constitution "subordinates all other courts' conclusions on Article III issues to those of the one [Supreme] Court"); Daniel A. Farber, *The Supreme Court and the Rule of Law:* Cooper v. Aaron *Revisited*, 1982 U. ILL. L. REV. 387, 390 (contending that the Court's constitutional decisions "are at least a form of federal common law" and "are binding federal law under the supremacy clause"); James

Many commentators have argued that the Court's "supreme" role atop the judicial hierarchy places judicially enforceable limits on Congress's authority over the Court's appellate jurisdiction. Professor Evan Caminker, for example, contends that the Court's supreme status supports the "essential functions" theory of Professors Hart and Ratner.[34] Professor Caminker asserts that the Supreme Court's "essential function" is to "provid[e] general leadership in defining federal law" for the judiciary.[35] He thus concludes that Congress must provide the Court with "subject matter jurisdiction sufficiently broad" to perform that function.[36]

Several other scholars have recently claimed that, in order to maintain its "supreme" role, the Supreme Court must have the authority to review every lower court case involving federal law. Professor James Pfander asserts that the Court must be able to review all lower federal and state court decisions either on direct appeal or by issuing "supervisory writs," such as writs of habeas corpus or mandamus, in individual cases.[37] Other commentators, including Professors Steven Calabresi and Gary Lawson, have argued that the Supreme Court must have the authority to review every federal question, either as an original matter or on appeal from a lower court.[38] These scholars claim that the Exceptions Clause does not permit Congress to "strip" the Supreme Court's jurisdiction at all, but only to move cases between the Court's original and appellate jurisdiction (a position that, they acknowledge,

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E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 649 (2004) (asserting that lower federal courts "must respect" Supreme Court precedent); James E. Pfander, *Federal Supremacy, State Court Inferiority, and the Constitutionality of Jurisdiction-Stripping Legislation*, 101 NW. U. L. REV. 191, 202 (2007) [hereinafter Pfander, *Federal Supremacy*] (arguing that state courts must "give effect to federal law as pronounced by the Supreme Court"). A few scholars, however, doubt that all lower courts must abide by Supreme Court precedent. *See* Caminker, *supra* note 31, at 837–38 (urging that inferior federal courts have such an obligation, but doubting that "state courts [must] obey Supreme Court federal law precedents," *id.* at 838); *see also* Michael Stokes Paulsen, *Accusing Justice: Some Variations on the Themes of Robert M. Cover's* Justice Accused, 7 J.L. & RELIGION 33, 82–88 (1989) (arguing that lower courts can initially disregard "clearly erroneous" constitutional interpretations but must comply with precedent if a higher court reverses that decision, *id.* at 87).

[34] *See* Caminker, *supra* note 31, at 835.

[35] *Id.* at 873 (internal quotation marks omitted).

[36] *Id.* at 837.

[37] Pfander, *Federal Supremacy*, *supra* note 33, at 236 (making a similar claim with respect to state courts); James E. Pfander, *Jurisdiction-Stripping and the Supreme Court's Power to Supervise Inferior Tribunals*, 78 TEX. L. REV. 1433, 1500 (2000) [hereinafter Pfander, *Jurisdiction-Stripping*] (arguing that it would raise "serious constitutional questions" if Congress eliminated both the Court's appellate jurisdiction and its authority to supervise lower federal courts by issuing discretionary writs).

[38] *See* 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, 1023, 1032–33 (2007) [hereinafter Calabresi & Lawson, *Jurisdiction Stripping*]; Claus, *supra* note 1, at 64.

is at odds with the holding of *Marbury v. Madison*[39] that Congress may not enlarge the size of the Court's original jurisdiction).[40]

Although each of the above proposals offers a forceful analysis, each one has difficulties as an account of judicially enforceable limits on congressional power. First, the notion that the Supreme Court must be permitted to review every federal question is difficult to reconcile with the text of the Exceptions Clause, which seems to permit Congress to leave at least *some* federal questions to the lower courts for final resolution.[41] Second, the "essential functions" thesis does leave space for the exercise of Congress's authority under the Exceptions Clause but is also largely indeterminate.[42] This approach does not seem to offer a judicially manageable standard to guide the Court in determining "how much" jurisdiction is necessary for it to perform its "essential functions." Finally, the contention that Congress must confer on the federal courts as a whole the power to hear some number of Article III cases is (as others have noted) difficult to reconcile with the history of federal jurisdiction and may give insufficient weight to the "important role that delegates to the Convention expected the Supreme Court to play."[43]

But despite the differences among these analyses of Article III, the above proposals do reflect certain shared normative assumptions. Scholars repeatedly rely on the following two normative premises: Congress has a duty to provide the federal courts with sufficient jurisdiction to exercise the Article III "judicial Power," and a more specific duty to ensure the Supreme Court's unique role in the judiciary.[44]

I accept these normative assumptions as a starting point of analysis. I also agree that there should be constitutional constraints on Congress's power to curb federal jurisdiction. But in contrast to the above accounts, I do not seek to derive a judicially enforceable test from the text and structure of Article III. Instead, I begin by asking a descriptive question: why the Supreme Court has almost never faced the question whether Article III contains any such substantive limits

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[39] 5 U.S. (1 Cranch) 137 (1803).

[40] *Id.* at 174–80; *see* Calabresi & Lawson, *Jurisdiction Stripping*, *supra* note 38, at 1036–43; Claus, *supra* note 1, at 77–80, 107. Professor William Van Alstyne previously proposed this reading of the Exceptions Clause. *See* William W. Van Alstyne, *A Critical Guide to* Marbury v. Madison, 1969 DUKE L.J. 1, 31–33.

[41] *Cf.* Sager, *supra* note 1, at 33 ("Readings of the exceptions clause that give Congress no power to limit the kinds of cases the Court can review . . . have a very hard go of it.").

[42] *See* Gunther, *supra* note 11, at 903 ("Critics of the ['essential functions'] thesis . . . emphasize the . . . open-ended nature of the limit . . . .").

[43] Meltzer, *supra* note 13, at 1610; *see id.* at 1585–93, 1599–1602, 1617–18.

[44] Indeed, even scholars who subscribe to the "plenary power" theory seem to share these normative assumptions. *See* sources cited *supra* notes 19–21 and accompanying text.

on congressional power. In other words, I examine why Congress has so rarely enacted jurisdiction-stripping legislation.

This analysis leads me to challenge the widespread assumption among scholars that the federal judiciary can only be protected (if at all) by a judicially enforceable standard found in Article III. Instead, I argue that certain structural and political constraints in Article I help protect federal jurisdiction generally and, more specifically, help ensure that Congress respects the Supreme Court's spot atop the judicial hierarchy.[45]

B. The Structural Safeguards of Article I

Article I provides that "[e]very Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President."[46] If the President signs the bill, it becomes law.[47] But if the President vetoes the bill, then "it shall become a Law" only "if approved by two thirds" of the members of both the House and the Senate.[48]

As various social scientists and legal scholars have observed, these bicameralism and presentment procedures effectively create a supermajority requirement for all federal legislation, because they force representatives of different political constituencies to agree before any bill is enacted into law.[49] "To secure a majority in two different houses, which are elected by different groups of voters, requires more support from the public than simply securing a majority in one house."[50] As Professor John Manning has pointed out, that is uniquely true of "[t]he particular brand of bicameralism established by the U.S. Constitution,"[51] which gives each state an equal vote in the Senate.[52] This structure effectively "assign[s] the inhabitants of the small states

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[45] Notably, my analysis draws upon the widely accepted practice of making inferences from constitutional structure. For a discussion of this approach, see CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 7–32 (1969).

[46] U.S. CONST. art. I, § 7, cl. 2.

[47] *Id.*

[48] *Id.*

[49] *See* JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT 233–36 (1962); Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1339 (2001); John F. Manning, *Competing Presumptions About Statutory Coherence*, 74 FORDHAM L. REV. 2009, 2039 (2006) ("[B]y dividing the legislative process among three institutions answering to distinct constituencies, the bicameralism and presentment requirements . . . in effect create a supermajority requirement.").

[50] Michael B. Rappaport, *Amending the Constitution to Establish Fiscal Supermajority Rules*, 13 J.L. & POL. 705, 712 (1997).

[51] John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 75 (2001) [hereinafter Manning, *Equity*].

[52] *See* U.S. CONST. art. I, § 3, cl. 1.

disproportionate power, relative to their populations, to defeat legislation."[53]

Furthermore, in our "particular brand of bicameralism," each chamber of Congress represents not only different geographic but also different temporal constituencies. Because members of the House are elected every two years,[54] while members of the Senate serve six-year terms,[55] each chamber responds at different rates to changing political winds.[56] Even if a new political movement can gain sufficient momentum to capture the House of Representatives, the movement may not be able to sustain such momentum long enough to gain a majority in the Senate. Perhaps in part for that reason, "[m]any [measures] which would pass in the House will fail in the Senate."[57]

These bicameralism and presentment requirements have two important effects on the development of federal law. First, they tend to favor the status quo by making federal legislation more difficult to enact.[58] Furthermore, by imposing these supermajority requirements, the lawmaking procedures of Article I "unmistakably afford" political factions — even political minorities — "extraordinary power to block legislation."[59]

The Constitution also authorizes each chamber of Congress to supplement these constitutional veto gates by setting "the Rules of its Proceedings."[60] Each chamber has invoked these rules to adopt procedures that accentuate the protection of political minorities.[61] For example, the House and Senate typically delegate matters to committees, whose members may not be representative of the views of the en-

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53 Manning, *Equity*, *supra* note 51, at 76.

54 *See* U.S. CONST. art. I, § 2, cl. 1.

55 *See* U.S. CONST. amend. XVII.

56 *See* Mark A. Graber, *James Buchanan as Savior? Judicial Power, Political Fragmentation, and the Failed 1831 Repeal of Section 25*, 88 OR. L. REV. 95, 152 (2009) ("The Presidency, Senate, and House react to the same external stimulus in different ways partly because . . . they are always likely to be moving at somewhat different speeds . . . .").

57 BUCHANAN & TULLOCK, *supra* note 49, at 247. The presentment requirement adds an additional hurdle because the President represents a separate (national) constituency, which speaks every four years. *See id.* at 248. And, of course, in the event of a presidential veto, the text of the Constitution itself specifies the supermajority rule: an override by two-thirds of both the House and the Senate. U.S. CONST. art. I, § 7, cl. 2.

58 *See* GEORGE TSEBELIS, VETO PLAYERS 2, 37 (2002) (observing that, as the number of "veto players" increases, the likelihood of change from the status quo decreases); Clark, *supra* note 49, at 1345–46.

59 John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 77 (2006).

60 U.S. CONST. art. I, § 5, cl. 2 ("Each House may determine the Rules of its Proceedings . . . .").

61 *See* John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003, 2016 (2009) (asserting that "the legislative procedures adopted by each House — including . . . committee gatekeeping[and] the Senate filibuster [—] . . . enhance the protection of [political] minorities" in Congress).

tire body.[62] These committees can often prevent (even popular) legislation from going to the House or Senate floor for a vote. Furthermore, the Senate has established Rule 22, which allows one member to filibuster a bill, absent a cloture vote by three-fifths of the Senate (sixty members).[63] Such rules create additional hurdles for legislation and thus give political factions alternative ways to veto their opponents' proposals.[64]

Although these lawmaking processes make enactment of any sort of federal legislation difficult, there is good reason to believe that they are especially effective at preventing restrictions on federal jurisdiction. Drawing on two strands of recent legal and social science literature, I argue that political factions are particularly likely to veto jurisdiction-stripping legislation favored by their opponents.

First, scholars have urged that an independent judiciary is more likely to flourish in a politically competitive society, like the United States. In such a political system, risk-averse politicians favor an independent judiciary as a useful means of controlling their political opponents during periods when their own side is out of power.[65] Accordingly, the faction in power will often adhere to an adverse judicial decision, with the expectation that its opponents will do the same when they are in control.[66] Each political faction relies on the judiciary as a long-term "check" on its political opponents.

This system of "mutual cooperation" "resembles an indefinitely repeated Prisoner's Dilemma," with each side "implicitly agreeing to use cooperative strategies" to achieve some long-term objective (here, an

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[62] *See* John R. Boyce & Diane P. Bischak, *The Role of Political Parties in the Organization of Congress*, 18 J.L. ECON. & ORG. 1, 1–3 (2002) (noting the disagreement among political scientists over how much parties control committees and arguing that the majority party does not have "free rein" over committees, as it is "constrained by heterogeneity within its own party," which allows the "minority party to influence" committees, *id.* at 3).

[63] SARAH A. BINDER & STEVEN S. SMITH, POLITICS OR PRINCIPLE? 8 (1997).

[64] *See* Kenneth A. Shepsle & Barry R. Weingast, *The Institutional Foundations of Committee Power*, 81 AM. POL. SCI. REV. 85, 89 (1987) (observing that "veto groups are pervasive in legislatures" and that "[a] small group of senators . . . may engage in filibuster and other forms of obstruction").

[65] *See* J. Mark Ramseyer, *The Puzzling (In)Dependence of Courts: A Comparative Approach*, 23 J. LEGAL STUD. 721, 722, 741–42 (1994) (arguing that, in countries like the United States, "politicians offer independent courts" because "politicians in both parties expect the electoral system to continue, but no one gives either party high odds of controlling the government indefinitely," *id.* at 722); Matthew C. Stephenson, *"When the Devil Turns . . . ": The Political Foundations of Independent Judicial Review*, 32 J. LEGAL STUD. 59, 71–73 (2003).

[66] *See* Ramseyer, *supra* note 65, at 741–42; Stephenson, *supra* note 65, at 63–64 ("[I]ndependent judicial review allows parties to minimize the risks associated with political competition. Respecting judicial independence may require the party that currently controls the government to sacrifice some policy objectives, but it also means that when that party is out of power, its opponent faces similar limitations.").

independent judiciary).[67] However, as Professor Mark Ramseyer has pointed out, "[p]arties to [such] indefinitely repeated Prisoner's Dilemmas do not necessarily cooperate."[68] Instead, in some contexts, the party in power may react to an adverse judicial decision by engaging in court-curbing efforts, like jurisdiction stripping.[69] I contend that, in such instances, the opposing political faction has a strong incentive to veto that jurisdiction-stripping legislation to ensure that the judiciary can continue to "check" the actions of its political opponents.

Second, social scientists who dub themselves scholars of "American Political Development" (APD)[70] offer a set of arguments that further underscore why politicians may be inclined to veto jurisdiction-stripping proposals. APD scholars assert that, in our politically divided society, the overall content of federal court decisions is generally favored by at least one major political faction.[71] APD scholars have relied on this theory to explain why the political branches empower the judiciary (by, for example, expanding the size and jurisdiction of the courts)[72] or defer matters to the judiciary.[73] These scholars further argue that political leaders place "special importance"[74] on empower-

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[67] Ramseyer, *supra* note 65, at 742.

[68] *Id.*

[69] *See* sources cited *infra* notes 82–83 and accompanying text.

[70] *See* Ronald Kahn & Ken I. Kersch, *Introduction* to THE SUPREME COURT AND AMERICAN POLITICAL DEVELOPMENT 1, 7–8 (Ronald Kahn & Ken I. Kersch eds., 2006) [hereinafter THE SUPREME COURT] (describing the work of "scholars of American political development, or 'APD,'" *id.* at 7, as "large-scale historical studies" on "how [political] institutions structure their choices," *id.* at 8).

[71] *See* KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY 18 (2007) (arguing that "[p]olitical actors defer to . . . courts because the judiciary can be useful to their own political and constitutional goals"); *cf.* Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, STUD. AM. POL. DEV., Spring 1993, at 43 (urging that "politicians may facilitate judicial policymaking in part because they have good reason to believe that the courts will announce those policies they . . . favor").

[72] *See* WHITTINGTON, *supra* note 71, at 93 (asserting that "legislators can help constitute a programmatically friendly judiciary" "[b]y manipulating [its] size, structure, [and] jurisdiction"); Howard Gillman, *How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875–1891*, 96 AM. POL. SCI. REV. 511, 512–13 (2002) (arguing that, in the late nineteenth century, the Republican Party expanded federal jurisdiction so that the courts could serve as "the principal agents of [the party's economic] agenda," *id.* at 513).

[73] *See* Graber, *supra* note 71, at 36 (asserting that "when the dominant national coalition is unable or unwilling to settle some public dispute," "prominent elected officials consciously invite the judiciary to resolve" the issue); Keith E. Whittington, *"Interpose Your Friendly Hand": Political Supports for the Exercise of Judicial Review by the United States Supreme Court*, 99 AM. POL. SCI. REV. 583, 584 (2005) (urging that "[t]he establishment and maintenance of judicial review is a way of delegating some kinds of political decisions to a relatively politically insulated institution"). Notably, APD scholars recognize that this rationale for judicial independence does not mean that the federal courts are subservient to the political branches. *See* WHITTINGTON, *supra* note 71, at 288 (noting that Supreme Court decisions cannot "be reduced to the political interests of the party in power").

[74] Gillman, *supra* note 72, at 517.

ing the Supreme Court because its "decisions . . . establish the legal and ideological framework within which [the lower courts] operat[e]."[75] In short, APD scholars argue that at least one major political faction generally supports the judiciary. I contend that this same faction should also have an incentive to veto jurisdiction-stripping proposals.

Although it may seem surprising that the federal judiciary consistently has the support of at least one major political faction, this historical reality is largely a result of our constitutional structure. The appointment and confirmation process established by the Constitution (requiring both presidential and senatorial approval) effectively guarantees that each federal judge has been selected by a dominant political group.[76] Thus, our process helps ensure that, at least at the outset, a judge's views on constitutional and other legal issues align to some degree with those of political leaders. Notably, as APD scholars concede, the fact that judges are chosen by a dominant political faction does *not* mean that federal courts always issue decisions that accord with the views of that faction.[77] But this political group does tend to support the overall content of federal court decisions. The selection process of Article II thus gives a major political faction an incentive to support the relatively "friendly" judiciary that it put in place.

For example, in the late nineteenth century, economic nationalists in the Republican Party sought to use the judiciary to advance their pro-business economic goals. Accordingly, this faction used its control over the Presidency and the Senate to appoint judges who were likely to be sympathetic to the concerns of large corporations. And when this faction had sufficient political support in Congress, it sought to expand the size of the federal judiciary and the scope of federal jurisdiction.[78] In the mid- to late twentieth century, social progressives (primarily in the Democratic Party) sought to use the judiciary to advance progressive goals, such as racial civil rights. Accordingly, progressive Presidents appointed judges who seemed likely to issue decisions that would accord with progressive values.[79] And the

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[75] *Id.* at 518.

[76] *See* U.S. CONST. art. II, § 2, cl. 2 ("[The President] . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court, and all other Officers of the United States . . . ."). The Constitution does not expressly state that inferior federal court judges are "principal" officers who must be appointed in this manner. But that has been our practice to date.

[77] *See, e.g.*, WHITTINGTON, *supra* note 71, at 288 (noting that Supreme Court decisions cannot "be reduced to the political interests of the party in power"). For example, although progressive legislators in the mid- to late twentieth century generally supported the civil liberties jurisprudence of the Warren Court, they did not agree with all of the Court's rulings. Indeed, several of the Court's criminal justice decisions had little political support. *See id.* at 159.

[78] *See infra* Part III, pp. 888–899.

[79] *See* WHITTINGTON, *supra* note 71, at 126–34 (discussing how the Roosevelt and Truman Administrations sought to defer racial civil rights to the judiciary and then the Kennedy Adminis-

Department of Justice under progressive Presidents filed briefs encouraging the courts to issue such "favorable" decisions.[80]

Notably, these political factions had a particularly strong incentive to appoint jurists to the Supreme Court who were sympathetic to their views. The Court has the power to "establish the legal and ideological framework within which [the lower courts] . . . operat[e]."[81] Thus, to the extent that these political factions sought to advance their goals through the judiciary, they could most effectively do so if they had the support of the Supreme Court.

As these examples illustrate, a political faction often seeks to empower the judiciary during periods when its side is in control. This dynamic has an important impact on that faction's political incentives once it is no longer in power. These supporters of the judiciary have a strong incentive to veto jurisdiction-stripping legislation that could undermine the authority of this "friendly" judiciary.

Social scientists and legal scholars argue that the above political incentives (that is, ongoing political competition and the support of a major political faction) are necessary conditions for the empowerment and long-term maintenance of an independent judiciary.[82] But, as these scholars themselves suggest, these political incentives are not sufficient short-term protections for federal jurisdiction, especially if the political faction in power opposes the judiciary.[83]

I argue that the lawmaking requirements of Article I provide a crucial structural safeguard. These procedures give the political faction supporting the judiciary — even if it is only a political minority —

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tration sought to defer the issue of reapportionment); Howard Gillman, *Party Politics and Constitutional Change: The Political Origins of Liberal Judicial Activism*, *in* THE SUPREME COURT, *supra* note 70, at 138, 140, 146–55, 158 (asserting that the "modern judicial liberalism" of the Warren Court and post–Warren Court era "can be traced to the self-conscious efforts of Democratic Party officeholders in the 1960s," *id.* at 140, because the Kennedy and Johnson Administrations sought to appoint judges who would favor civil rights and other progressive causes and thereby "set in motion an important constitutional legacy," *id.* at 158).

[80] *See* Gillman, *supra* note 79, at 153; WHITTINGTON, *supra* note 71, at 126–27, 129, 132–33.

[81] Gillman, *supra* note 72, at 518.

[82] *See* WHITTINGTON, *supra* note 71, at 4 ("For constitutions and institutions like judicial review to exist in historical reality . . . , there must be political reasons for powerful political actors to support them over time."); Ran Hirschl, *The Political Origins of Judicial Empowerment Through Constitutionalization: Lessons from Four Constitutional Revolutions*, 25 LAW & SOC. INQUIRY 91, 116 (2000) (arguing that political leaders will empower the judiciary only if they have "a sufficient level of certainty . . . that the judiciary in general and the supreme court in particular are likely to produce decisions that . . . reflect their ideological preferences"); Ramseyer, *supra* note 65, at 722 (urging that independent courts are unlikely to flourish in a system that lacks sustained political competition).

[83] *See* Ramseyer, *supra* note 65, at 742 (stating that, even in a politically competitive society, the political strategies that protect the judiciary are "fragile" because politicians "might agree to insulate their courts. Then again, they might not"); Whittington, *supra* note 73, at 585 (noting that the Supreme Court may espouse "constitutional understandings . . . not shared by political leaders" and that "[i]f the obstruction is . . . serious, . . . the political reaction might be . . . severe").

multiple opportunities to veto jurisdiction-stripping legislation favored by its opponents. The constitutional structure thus gives supporters of the judiciary the tools to do what they are already inclined to do: protect the federal judiciary that they sought to empower.

This structural argument (as discussed below in Parts III and IV) has considerable historical support. In the late nineteenth and early twentieth centuries, economic nationalists in the Republican Party repeatedly used their structural veto in the Senate (along with procedural tools like the filibuster) to block efforts to restrict federal jurisdiction over suits involving corporations. In more recent times, social progressives (primarily in the Democratic Party) have used their veto points in both the House and the Senate (along with procedural tools like committee blockage) to preserve federal jurisdiction over constitutional claims. Furthermore, supporters of the judiciary have been especially inclined to veto attempts to strip the Supreme Court's appellate jurisdiction in order to preserve the Court's "special" role in "establish[ing] . . . the legal . . . framework"[84] for the lower federal and state courts.

Thus, the historical evidence seems to support my contention that, although the Article I lawmaking process makes it difficult to enact any legislation, it is especially hard to enact jurisdiction-stripping proposals. The Article II appointment process gives political factions an opportunity to "invest" in the judiciary and to construct a judiciary that will issue favorable decisions. These supporters of the judiciary then have a strong incentive to use their structural veto in the House or in the Senate to protect the scope of federal jurisdiction.[85]

At the outset, however, I should note some qualifications and clarifications about this argument. First, I do not claim that these structural safeguards block all efforts to strip federal jurisdiction. As discussed below (in Part V), political actors have managed on rare occasions to assemble the supermajority necessary to enact jurisdiction-stripping legislation. I assert only that the Article I lawmaking process offers a strong (and previously unrecognized) protection for the federal courts.

Furthermore, although my argument focuses on the structural safeguards of Article I, I do not mean to suggest that Article III is irrelevant to debates over federal jurisdiction. On the contrary, I assert that these lawmaking procedures help protect a constitutional principle based in Article III: that Congress should give the federal courts sufficient jurisdiction to exercise the Article III judicial power. Nor do I

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[84] Gillman, *supra* note 72, at 518.

[85] The same incentives may also lead supporters of the judiciary to oppose other court-curbing measures. But full consideration of that issue is beyond the scope of this Article.

assert that the legislators who oppose jurisdiction-stripping legislation do so only for political reasons, without regard to these Article III values. I do not doubt that many legislators vote against jurisdiction-stripping bills in part out of a conviction that such proposals "violate the spirit of the Constitution, even if [they do] not violate its letter."[86] I do assert, however, that the political incentives of legislators help ensure that they vote in accordance with that constitutional judgment.

I also want to clarify that I do *not* contend that every constitutional principle can be adequately enforced through the lawmaking processes of Article I. My argument here depends on the fact that, throughout our history, the overall content of federal court decisions has had the support of a major political faction. This historical reality (which, as discussed, is tied to the constitutional structure)[87] ensures that at least one major political faction has an incentive to veto jurisdiction-stripping legislation. I argue that our constitutional structure gives that political group the tools to exercise such a veto — even when the faction is only a minority in Congress.

Notably, this account of federal jurisdiction accords with the original purpose of our constitutional scheme of separated powers. The bicameralism and presentment procedures of Article I were expressly designed to channel — and thereby curtail — the influence of "factions."[88] As Professor Larry Kramer has recounted, James Madison understood at the Founding that the nation was replete with diverse regional and political groups.[89] "The key to making the Constitution work lay in finding a way to harness these [competing] political interests . . . by using constitutional authority granted to the institutions in which the officials worked, for the benefit of constitutional enforcement."[90] In this context, the bicameralism and presentment processes

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[86] Bator, *supra* note 15, at 1039; *see also* 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, 83 (Matthew D. Adler & Kenneth Einar Himma eds., 2009) (asserting that Congress may be enforcing a "customary norm" against jurisdiction stripping).

[87] *See* sources cited *supra* notes 70–81 and accompanying text. I am not aware of historical evidence suggesting that political leaders have a similar inclination to protect, for example, the Bill of Rights provisions addressing the rights of criminal defendants — although politicians may indirectly safeguard those rights by preserving federal jurisdiction. *See supra* note 77 (noting that, although the Warren Court's jurisprudence generally found favor with progressive Democrats, several of the Court's criminal justice decisions had little political support).

[88] *See* THE FEDERALIST NO. 51 (James Madison); RICHARD HOFSTADTER, THE IDEA OF A PARTY SYSTEM 50 (1969) ("[F]or the Fathers [the] checks [on power] had to be built *into the constitutional structure itself*. They were not content . . . to rest their hopes on . . . the political process alone . . . .").

[89] *See* Larry D. Kramer, *Madison's Audience*, 112 HARV. L. REV. 611, 632 (1999); sources cited *infra* note 94 (noting some of those regional differences).

[90] Larry D. Kramer, *"The Interest of the Man": James Madison, Popular Constitutionalism, and the Theory of Deliberative Democracy*, 41 VAL. U. L. REV. 697, 727 (2006).

of Article I have repeatedly harnessed these competing interests to safeguard the Article III judicial power.

III. STRUCTURAL VETO POINTS IN POST–CIVIL WAR AMERICA

From 1789 until the Civil War, the jurisdiction of the federal courts was governed — with few modifications — by the Judiciary Act of 1789.[91] As Professor Charles Warren has observed, this statute was a compromise among the competing political forces of the day.[92] Throughout the antebellum period, the locus of political competition was between "nationalists" who favored a more robust federal government and "states' rights advocates" who wished to leave matters to the states.[93] There were also cross-cutting political disputes among the several states.[94] These competing political factions seemed to agree on the need for Supreme Court review of state court decisions.[95] But there was far less political consensus on the need for, or the utility of, inferior federal courts.[96] Ultimately, these competing factions settled

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[91] *See* Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 131 (1923).

[92] *See id.* at 53; *infra* notes 95–99 and accompanying text. Notably, throughout this Article, for the party affiliation of members of Congress, I rely on Congress's online database, BIOGRAPHICAL DIRECTORY OF THE U.S. CONGRESS, http://bioguide.congress.gov/biosearch/biosearch.asp (last visited Jan. 8, 2011).

[93] *See* GERALD LEONARD, THE INVENTION OF PARTY POLITICS 2–4, 252, 268–69 (2002).

[94] There were divisions among small and large states, *see* Bradford R. Clark, *Federal Lawmaking and the Role of Structure in Constitutional Interpretation*, 96 CALIF. L. REV. 699, 703 (2008), between slave and free states, *see* MARK A. GRABER, *DRED SCOTT* AND THE PROBLEM OF CONSTITUTIONAL EVIL 92 (2006), and between agrarian and commercial interests (and debtors and creditors) within states, *see* BRUCE H. MANN, REPUBLIC OF DEBTORS 166–82 (2002).

[95] Nationalists were worried that state courts might interfere with the operations of the new government. *See* 1 ANNALS OF CONG. 798 (1789) (Joseph Gales ed., 1834) (statement of Rep. William Loughton Smith, Pro-Admin., S.C.) (urging that it was "indispensable" to have an appeal to the Supreme Court from every state court decision involving federal law). States' rights advocates hoped that the Court would keep the national government within its prescribed bounds and also police the actions of sister states. *See, e.g.*, *id.* at 809 (statement of Rep. Michael Stone, Anti-Admin., Md.) (asserting that "those who framed" "the scheme of the present Government" "supposed that it had a natural tendency to destroy the State Governments; or, on the other hand, they supposed that the State Governments had a tendency to abridge the powers of the General Government; therefore it was necessary to guard against either taking place, and this was to be done properly by establishing a Judiciary for the United States" — the "Supreme Federal Court").

[96] *See* Warren, *supra* note 91, at 67 (reporting that the "crucial contest" was over the scope of inferior federal jurisdiction). Nationalists favored such a lower federal court system to ensure the proper enforcement and administration of federal law. *See, e.g.*, 1 ANNALS OF CONG. 806–07 (1789) (Joseph Gales ed., 1834) (statement of Rep. Fisher Ames, Pro-Admin., Mass.) (urging that lower federal courts were necessary). States' rights advocates insisted that state courts could handle most federal matters, especially since their decisions would be subject to Supreme Court review. *See, e.g.*, *id.* at 831 (statement of Rep. James Jackson, R-Ga.) (arguing that "the check furnished by the Supreme Court[], to revise and correct [state court] judgments" would be "sufficient").

on a compromise measure that placed the bulk of federal jurisdiction in the Supreme Court and established a limited set of lower federal courts with jurisdiction only over matters that seemed outside the purview of a particular state, such as admiralty and federal criminal law.[97]

This political compromise on the scope of federal jurisdiction remained fairly stable throughout the antebellum period. Notably, this early period seems to accord with the contention of social scientists and legal scholars that an independent judiciary can flourish only in a politically competitive system and only when it has some political support. The competing factions of this era agreed on a limited amount of inferior federal court jurisdiction (largely because the states' rights advocates opposed a large federal judiciary).[98] By contrast, all the factions (even the states' rights advocates) favored Supreme Court review to resolve disputes among the several states and between the national and state governments.[99] The scope of jurisdiction under the 1789 Act reflected this political consensus.

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[97] *See* Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85–86 (authorizing Supreme Court review of any state court decision arising under federal law when the state court denied a federal right); *id.* §§ 2–4, 9, 11, 1 Stat. at 73–79 (creating thirteen district courts and six circuit courts — which would be staffed by district court judges and Supreme Court Justices riding circuit — and giving the courts jurisdiction over admiralty and maritime cases, suits arising under international or federal criminal law, and diversity actions when the amount in controversy exceeded $500); *see also* Warren, *supra* note 91, at 67–68 (noting that states' rights advocates were forced to "yield" and permit some limited jurisdiction in the lower federal courts). The Act gave the Supreme Court some authority to oversee the lower federal courts. *See* Judiciary Act of 1789, ch. 20, §§ 13–14, 22, 1 Stat. at 80–82, 84–85 (permitting the Court to review federal appeals when the amount in controversy exceeded $2000 and to issue writs of prohibition, mandamus, and habeas corpus); Pfander, *Jurisdiction-Stripping*, *supra* note 37, at 1488–90 (noting that the Court's habeas jurisdiction allowed it to review federal criminal cases).

[98] *See supra* note 96. There was one (short-lived) effort to expand inferior federal court jurisdiction. Following the election of 1800, the outgoing Federalist Congress enacted the Midnight Judges Act, which greatly expanded the size and jurisdiction of the lower federal courts and ended circuit riding by Supreme Court Justices. *See* Judiciary Act of 1801, ch. 4, §§ 11, 27, 2 Stat. 89, 92, 98. However, the incoming Republican Congress quickly repealed the statute and resurrected the system established by the 1789 Judiciary Act. *See* Repeal Act, ch. 8, § 1, 2 Stat. 132, 132 (1802); Kathryn Turner, *Federalist Policy and the Judiciary Act of 1801*, 22 WM. & MARY Q. 3, 32 (1965). Notably, this event supports the argument of social scientists that political support is a necessary condition of judicial independence. There was, of course, some support for lower court jurisdiction, since the Republicans restored the courts' authority under the 1789 Act. But no major political faction supported the jurisdictional expansion. (The Federalist Party did not prove to be a major political faction; the party was crippled by its defeat in 1800 and was "all but defunct" by the end of the War of 1812. LEONARD, *supra* note 93, at 35.) As noted in the text, I assume that such political support is a necessary condition of judicial independence. Absent such support, there will be no major political faction to exercise the veto created by the lawmaking processes of Article I and, accordingly, those processes cannot prevent jurisdiction stripping — as the 1802 repeal itself illustrates.

[99] *See supra* note 95. During the nineteenth century, there were occasional proposals to restrict the Supreme Court's appellate jurisdiction, but no such measure gained traction in Congress. The most significant challenge occurred in 1831, when the House Judiciary Committee recommended that Congress repeal section 25 of the 1789 Act (the provision authorizing Supreme

For the purposes of this Article, I assume that such political support is a necessary condition for the establishment and maintenance of an independent judiciary. But even proponents of this theory do not contend that it is a sufficient condition for judicial independence.[100] As Professor Ramseyer has pointed out, such a system of "implicit cooperation" among competing political factions is "fragile at best."[101] "Parties to [these] indefinitely repeated Prisoner's Dilemmas do not necessarily cooperate. . . . They might agree to insulate their courts. Then again, they might not."[102]

Our constitutional structure offers an additional "check" that helps to preserve the federal judicial power. The Article I process of bicameralism and presentment requires a supermajority to pass any piece of legislation and thus allows political factions — even political minorities — to veto legislation favored by their opponents. These veto points, as discussed below (and in Part IV), became increasingly important in the post-Reconstruction era and have remained crucial in the present day.

A. Jurisdictional Battle: Suits Involving Corporations

The first sustained set of jurisdiction-stripping attempts occurred in the late nineteenth and early twentieth centuries (following a significant jurisdictional expansion).[103] During this period, the federal judiciary was viewed as biased in favor of big business and, accordingly, populists and progressives (primarily in the Democratic Party) repeatedly sought to restrict federal jurisdiction over suits involving corporations.

The fate of these jurisdiction-stripping bills vividly illustrates the roadblocks created by the Article I lawmaking process. Although these measures consistently passed the House of Representatives, the proposals were always defeated in the Senate — largely due to the efforts of economic nationalists within the Republican Party, who supported the judiciary's pro-business decisions. This faction dominated

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Court review of state court decisions). *See* 7 REG. DEB. app. at lxxvii (1831) (Report upon the Judiciary). The House of Representatives, however, overwhelmingly rejected the bill by a vote of 138–51 — without even holding a debate. *See id.* at 542; 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, 163–64 (1913) (discussing the proposal). It does not appear that any other proposal to strip the Supreme Court's appellate jurisdiction even went to a vote in either chamber of Congress. *See* 3 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 55–58 (1922) (discussing unsuccessful jurisdiction-stripping efforts in response to the Court's decisions upholding the fugitive slave laws).

100 *See supra* p. 885.

101 Ramseyer, *supra* note 65, at 742.

102 *Id.*

103 The single effort to strip the Supreme Court's appellate jurisdiction in 1868 is discussed below in section V.B.2, pp. 922–27.

the Republican Party in the late nineteenth century and, accordingly, as long as the party controlled the Senate, had ample power to block the Democrats' jurisdiction-stripping efforts. Later on, in the early twentieth century, the Progressive movement gained strength in both political parties, and the economic nationalists became a smaller faction within their own party. Nevertheless, this faction — even when it was a political minority in Congress — successfully used its structural veto points (and procedural tools, like the filibuster) to protect federal jurisdiction.

1. Establishing the Battleground: The Jurisdictional Expansion of 1875. — In the late nineteenth century, the major political parties were internally cohesive and reasonably united in pursuing their political agendas.[104] For the Republicans, that agenda focused on economic nationalism.[105] The party thus appealed to corporate interests, particularly in the Northeast, that supported national economic policies and opposed state restrictions on corporations (such as the "Granger laws" that limited the rates that railroads could charge consumers[106]). The Democrats, by contrast, were largely supported by agrarian and rural voters in the South and the West.[107] They opposed many of the Republicans' national economic policies and argued that each state had the right to regulate corporations doing business within its territory.[108]

Political science professor Howard Gillman argues that the expansion of federal jurisdiction was part and parcel of the Republicans'

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[104] *See* WHITTINGTON, *supra* note 71, at 255–56 (observing that "[n]ational legislators in the late nineteenth century displayed substantial party discipline, and the divisions between the two parties were stark"); William Nisbet Chambers, *Party Development and the American Mainstream*, *in* THE AMERICAN PARTY SYSTEMS 14 (William Nisbet Chambers & Walter Dean Burnham eds., 1967) (stating that, from 1865 until the early 1890s, the United States was in its "third party system," which was highlighted by strong party loyalties and unprecedented turnout in presidential elections).

[105] *See* Gillman, *supra* note 72, at 516. As various scholars have recounted, in the immediate aftermath of the Civil War, the Republican Party focused more on civil rights. To protect free blacks in the South, the Reconstruction Republicans enacted several civil rights statutes and significantly expanded the federal courts' habeas jurisdiction to enforce those new laws (along with the new protections of the Fourteenth and Fifteenth Amendments). *See* William M. Wiecek, *The Reconstruction of Federal Judicial Power, 1863–1875*, 13 AM. J. LEGAL HIST. 333, 344 (1969). However, the political support for federal civil rights enforcement waned in the 1870s, and the Republicans turned instead toward building a strong national economy. *See* Gillman, *supra* note 72, at 516.

[106] *See* JAMES W. ELY, JR., RAILROADS AND AMERICAN LAW 86–87 (2001) (discussing "Granger laws" in Illinois, Iowa, Minnesota, and Wisconsin, which were viewed "with dismay" by "[r]ailroads and eastern investors," *id.* at 87).

[107] *See* EDWARD A. PURCELL, JR., LITIGATION AND INEQUALITY 15 (1992) (asserting that, during this period, the Democrats represented interests in the Midwest, West, and South that were increasingly "hostil[e] to eastern financial interests and national corporations"). I do not mean to suggest that there were no "business conservatives" in the Democratic Party. *See infra* note 115. But the party seems to have been heavily supported by agrarian and rural voters.

[108] *See* Gillman, *supra* note 72, at 516.

economic agenda.[109] Federal courts were viewed as a favorable forum for large corporations.[110] Because federal judges were appointed, rather than elected, they were less susceptible than state judges to anti-corporate local sentiments.[111] Moreover, under the doctrine of *Swift v. Tyson*,[112] federal courts could (and often did) apply "a nationally uniform common law"[113] in commercial cases, thereby helping to ensure that corporations were not subject to different standards in different states.[114] Republicans also controlled the Presidency and the Senate during much of the late nineteenth century and were thus able to appoint judges who were generally sympathetic to the party's national economic agenda.[115] Finally, corporate defendants favored federal court procedures, which gave federal judges more control over local juries (who might be sympathetic to plaintiffs in suits against large corporations) and required the twelve-person jury to be unanimous.[116]

Professor Gillman further argues that Supreme Court supervision of these lower federal courts was "[o]f special importance in fortifying [the Republicans' national economic] agenda."[117] Although "[t]he justices would not have the day-to-day responsibilities of administering this policy in individual cases, . . . their decisions would establish the legal and ideological framework within which [the inferior federal court judges] would be operating."[118]

The Republicans controlled both chambers of Congress and the Presidency throughout the early 1870s.[119] But they did not succeed in enacting any significant judicial reform until they were about to lose (at least part of) that political control. In the 1874 elections, the Dem-

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[109] *Id.* at 513, 516–17 (arguing that "the main purpose of the Judiciary and Removal Act of 1875 was to redirect civil litigation involving national commercial interests out of state courts and into the federal judiciary," *id.* at 516–17, so that federal judges could serve as "the principal agents of [the Republicans' economic] agenda," *id.* at 513).

[110] BARRY FRIEDMAN, THE WILL OF THE PEOPLE 154–55 (2009).

[111] *See* PURCELL, *supra* note 107, at 24.

[112] 41 U.S. (16 Pet.) 1 (1842) (holding that federal courts in diversity cases were not bound by state common law).

[113] PURCELL, *supra* note 107, at 24.

[114] *Id.* at 23–24.

[115] *See* FRIEDMAN, *supra* note 110, at 159–60; *see also* PURCELL, *supra* note 107, at 25 (observing that "[f]ederal judges . . . were more frequently chosen from the ranks of prominent and successful corporation attorneys," who were "disposed . . . [to] more readily sympathize with the . . . arguments that national corporations advanced"). Moreover, the only Democrat who controlled the Presidency during this period (Grover Cleveland) was a "business conservative." President Cleveland also tended to select judges who were sympathetic to pro-business concerns. *See* WHITTINGTON, *supra* note 71, at 213; Gillman, *supra* note 72, at 517.

[116] PURCELL, *supra* note 107, at 24.

[117] Gillman, *supra* note 72, at 517.

[118] *Id.* at 518.

[119] *See* 5 HISTORICAL STATISTICS OF THE UNITED STATES, MILLENNIAL EDITION ONLINE 5-201 (Susan B. Carter et al. eds., 2006) [hereinafter HISTORICAL STATISTICS].

ocrats captured the House of Representatives.[120] Following that election, but before the actual transfer of political power, the Republicans passed a sweeping jurisdictional statute.[121]

The Judiciary Act of 1875[122] completely transformed the jurisdictional scheme created in 1789. The statute allowed the federal courts to hear all cases arising under federal law[123] and significantly expanded their jurisdiction in diversity suits, including by adding opportunities to remove cases from state to federal court.[124] This expansion of federal jurisdiction was a major policy achievement for the Republican Party and a major source of irritation for the Democrats. The 1875 Act thus precipitated a bitter partisan struggle over federal jurisdiction.

2. Jurisdiction-Stripping Efforts: 1875–1890. — The 1875 Judiciary Act led to an explosion in federal litigation.[125] Corporations, particularly railroads and insurance companies, took advantage of their opportunities to remove cases from state to federal court.[126] And they were helped in this endeavor by Supreme Court jurisprudence. The Court had previously adopted an irrebuttable presumption that a corporation was a citizen only of the state in which it was incorporated (a legal rule that enhanced the opportunities for removal, especially after 1875).[127] The Court also invalidated state laws that sought to stem the tide of removal. For example, a few states, including Wisconsin and Iowa, enacted statutes providing that out-of-state corporations could do business within the state only if they agreed to waive their right to remove common law actions to federal court. The Supreme Court

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120 *See id.* (showing that, after the 1874 elections, the Democrats had a 169–109 majority in the House).

121 *See* Judiciary Act of 1875, ch. 137, 18 Stat. 470. The Act was signed on March 3, 1875. *See* 3 CONG. REC. 2275 (1875); Gillman, *supra* note 72, at 516 (observing that, "in the wake of the midterm elections of 1874, where Democrats regained control of the House . . . , Republican leaders in 1875 quickly" sought to enact the legislation).

122 Ch. 137, 18 Stat. 470.

123 *Id.* § 1, 18 Stat. at 470 (conferring jurisdiction over "all suits . . . arising under" the federal Constitution, laws, and treaties when the amount in controversy exceeded $500).

124 *See id.* §§ 1–2, 18 Stat. at 470–71.

125 *See* FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT 65 (1928); PURCELL, *supra* note 107, at 15.

126 *See* PURCELL, *supra* note 107, at 20 (noting that, according to an 1876 House report, "[d]iversity suits were 'the largest and most rapidly-increasing class of Federal cases,'" and that most such litigation consisted of suits against railroads and insurance companies); Wiecek, *supra* note 105, at 342 (noting that, after 1875, "removal was quickly and enthusiastically resorted to by railroads and other interstate corporations").

127 *See* Marshall v. Balt. & Ohio R.R. Co., 57 U.S. (16 How.) 314, 328 (1854) (holding that stockholders of a corporation are presumed to be citizens of the corporation's state of incorporation); Louisville, Cincinnati, & Charleston R.R. Co. v. Letson, 43 U.S. (2 How.) 497, 555 (1844) (holding that a corporation created by a state is a citizen of that state). Corporations also took advantage of this legal rule by incorporating in states with favorable incorporation laws, such as New Jersey and Delaware. *See* PURCELL, *supra* note 107, at 19.

struck down those laws, stating that "[t]he Constitution of the United States secures to citizens of another state . . . an absolute right to remove their cases into . . . Federal court, upon compliance with the terms of the removal statute."[128]

The Democrats were, as a whole, highly critical of the 1875 Act and the Supreme Court decisions that facilitated it. Accordingly, they sought to undo the Court's rulings by legislation.[129] For several decades, Democratic legislators in the House of Representatives proposed bills that would curb federal jurisdiction over suits involving corporations. Representative David Culberson led the charge in the late 1870s and the 1880s.[130] He repeatedly proposed legislation that would define a corporation as a citizen of any state in which it did business and thereby largely eliminate federal diversity jurisdiction over common law actions involving corporations.[131]

The debates over this legislation reflected the partisan divides of the period. In support of the jurisdiction-stripping bills, Representative Culberson and others emphasized in part the challenges that their poorer constituents faced in federal litigation against large corporations.[132] But they also took aim at the Supreme Court decisions inva-

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[128] Barron v. Burnside, 121 U.S. 186, 198 (1887); *see id.* at 197–98, 200 (invalidating an Iowa law that required corporations to waive their right to remove cases to federal court); Home Ins. Co. v. Morse, 87 U.S. (20 Wall.) 445, 458 (1874) (invalidating a similar Wisconsin law).

[129] *See* PURCELL, *supra* note 107, at 15 ("Beginning in 1878, southerners and their allies [in the Midwest and the West] mounted a persistent campaign to restrict the federal courts, prevent corporate removals, and limit diversity jurisdiction."). Notably, these proposals did attract some (modest) Republican support. *See infra* note 139.

[130] *See* 15 CONG. REC. 118 (1883); 13 CONG. REC. 427 (1882); 10 CONG. REC. 43 (1879); 7 CONG. REC. 4000 (1878).

[131] *See* 10 CONG. REC. 681–82 (1880). The legislation provided:

> That the circuit courts of the United States shall not take original cognizance of any suit . . . between a corporation created or organized by or under the laws of any State and a citizen of any State in which such corporation at the time the cause of action accrued may have been carrying on any business . . . except in like cases in which said courts are authorized by this act to take original cognizance of suits between citizens of the same State. Nor shall any such suit . . . be removed to any circuit court of the United States . . . .

Id. at 682. Later versions of the bill were virtually identical but also specified that the jurisdictional limitation would not apply to pending cases or to cases arising under the copyright or patent laws. *See* 24 CONG. REC. 217 (1892); 15 CONG. REC. 4879 (1884); 14 CONG. REC. 1244 (1883).

[132] *See* 10 CONG. REC. 702 (1880) (statement of Rep. David Culberson, D-Tex.) ("Persons who are poor and without the means to litigate with wealthy corporations are . . . denied justice [in federal court]. They are unable to prosecute their causes, and, tired out with delays, surrender their claims for such pittance as may be offered in compromise."); *see also* PURCELL, *supra* note 107, at 27 ("[R]emoval often gave corporations a dramatically increased ability to exploit their social and economic power when confronting relatively weak individual litigants. An ordinary suit heard in a federal court was or could easily become far more burdensome and expensive than it would have been if heard in a state court."). Some representatives recounted compelling stories:

> A citizen of my own county was killed by a railroad train. He was a laboring-man with a large family, earning his living by his daily toil. There was little question in my mind,

lidating state restrictions on removal.[133] For example, Representative James Knott observed that "[a] number of the States . . . endeavored to correct this most unjust and oppressive [corporate] evil," but their efforts were "in vain; for the Supreme Court . . . declared [those laws] void for repugnance to the Constitution."[134] Likewise, Representative Benton McMillin described the Court's holdings as "a barrier over which no State Legislature or State constitution can pass . . . . The people . . . cry out for relief. There is but one tribunal on earth which can give it to them, and that is the Congress of the United States."[135]

In response, the Republicans defended the federal judiciary and emphasized its importance to national economic growth and development.[136] For example, Representative George Robinson argued that, given the populist developments in some states, such as the "granger laws and granger excitements [in the West]," corporations could not trust partisan state judicial systems to adjudicate their claims.[137] Likewise, Representative Hiram Barber urged that "[c]apital [in the North and East] is timid; it demands security" and the "best guarantee of security to investments [is] found in recourse to the national courts."[138]

These jurisdiction-stripping bills repeatedly passed the House of Representatives.[139] Each time, however, the legislation was defeated

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> having investigated the facts, of the liability of the railroad company. His widow brought suit in the State court, but the railroad being a foreign corporation made application for removal, and the case was sent to the Federal court. This had the effect to close the doors of justice to this widow and her children. She was unable to attend or to pay the expenses of attending the Federal court held at a distance of a hundred miles from the place where the injury was inflicted.

10 CONG. REC. 725 (1880) (statement of Rep. James Weaver, Greenbacker-Iowa).

[133] *See* 15 CONG. REC. app. at 363 (1884) (statement of Rep. Richard Townshend, D-Ill.) ("Th[e] encroachment of the Federal judiciary is so far-reaching in its effects they have declared that a State is powerless to deprive a corporation of this right of removal, even where the corporations have made an agreement to waive the privilege.").

[134] 10 CONG. REC. 951 (1880) (statement of Rep. James Knott, D-Ky.).

[135] *Id.* at 818 (statement of Rep. Benton McMillin, D-Tenn.).

[136] *See id.* at 850 (statement of Rep. George Robinson, R-Mass.) (arguing that, given the importance of the federal courts for economic disputes, "let us stand by the national courts; let us preserve their power"); *see also* 15 CONG. REC. app. at 279 (1884) (speech of Rep. Horatio Bisbee, Jr., R-Fla.) (asserting that the Culberson bill "is designed to accomplish what the Supreme Court decided a State by its legislation could not accomplish," and therefore "is as plainly repugnant to the Constitution" as the state law).

[137] 10 CONG. REC. 850 (1880) (statement of Rep. George Robinson, R-Mass.); *see* ELY, *supra* note 106, at 86–87 (noting that railroads and eastern investors opposed state "Granger laws," which limited the rates that railroads could charge consumers).

[138] 10 CONG. REC. 820 (1880) (statement of Rep. Hiram Barber, Jr., R-Ill.).

[139] In 1880, the bill passed the House by a vote of 162–74. *Id.* at 1305. In 1883, it passed by a vote of 134–67. 14 CONG. REC. 1254 (1883); *infra* Appendix, p. 934 (showing the breakdown of votes in 1880 and 1883). In 1884, the bill passed without a recorded vote. 15 CONG. REC. 4879 (1884). Notably, these bills passed not only when the Democratic Party controlled the House. In 1883, the Republicans had a slight majority in the House, *see* HISTORICAL STATISTICS, *supra*

in the Republican-controlled Senate. The economic nationalists at that time dominated their (unified) party and thus dominated the Senate, rendering it very receptive to "appeals . . . from manufacturers[and] business organizations" about the importance of preserving a federal forum for corporations.[140] Accordingly, once each bill made its way to the Senate Judiciary Committee, "it never emerged."[141]

In 1890, Representative Culberson complained:

> Since I have been in Congress I have labored, in season and out of season, to improve the Federal judicial system and to relieve the people of the several States of the wrong and oppression and inconvenience resulting from it . . . .
>
> I have advocated the withdrawal of jurisdiction from the Federal courts of controversies [involving] corporations . . . . I have had the satisfaction of passing such a measure through the House of Representatives in four Congresses . . . . [B]ut the fate of the measure in the Senate heretofore warns us that it can never become the law.[142]

Thus, as Professor Gillman has observed, "[r]epeal [of the 1875 legislation] was avoided throughout this formative period" of 1875–1890 "because Republicans maintained a political veto over such efforts by holding onto at least one institution of the national government."[143]

B. Jurisdiction Stripping in a Changing Party System: 1891–1912

In 1891, during another period of unified government (and following a bitter partisan fight), the Republicans enacted a second reform to strengthen the federal judiciary.[144] The Circuit Court of Appeals Act of 1891[145] established nine courts of appeals and gave the Supreme Court discretionary review via writs of certiorari over certain types of

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note 119, at 5-201 (showing a 147–135 Republican majority), but not enough to block the legislation. The jurisdiction-stripping bill gained the support of a sufficient number of Republican legislators to pass the House by a vote of 134–67. *See* 14 CONG. REC. 1254 (1883). There were 135 House Democrats at the time, who overwhelmingly supported the legislation. Not a single Democrat voted against the bill. But forty Democrats did not vote on the bill (a seemingly common occurrence during that era — perhaps a result of transportation difficulties). The Democrats thus had to rely on some Republican support. *See infra* Appendix, p. 934.

140 FRANKFURTER & LANDIS, *supra* note 125, at 92; *see* WHITTINGTON, *supra* note 71, at 98 ("In the late nineteenth century, the Republican-controlled Senate was the graveyard of Democratic proposals to retrench federal jurisdiction.").

141 FRANKFURTER & LANDIS, *supra* note 125, at 90 n.154; *see id.* at 91 nn.155–56.

142 21 CONG. REC. 3405–06 (1890) (statement of Rep. David Culberson, D-Tex.).

143 Gillman, *supra* note 72, at 521.

144 *See* FRANKFURTER & LANDIS, *supra* note 125, at 89, 93 (noting that, in the late 1870s and 1880s, "[t]he two houses were deadlocked. . . . After the Davis Bill [to restructure the federal judiciary] passed the Senate, it was buried in the House Judiciary Committee," *id.* at 93); Gillman, *supra* note 72, at 521 (observing that the final version of the statute was enacted by a "lame-duck" Republican-controlled Congress, just before the Democrats retook the House of Representatives).

145 Ch. 517, 26 Stat. 826.

cases from the newly created appellate courts.[146] This legislation was designed to give the federal judiciary sufficient personnel and resources to handle the additional duties created by the 1875 Act, so that "the 1875 jurisdictional changes [could] persist" into the next century.[147]

The Democrats soon took back the House of Representatives, however, and continued to press for restrictions on federal jurisdiction. Representative Culberson, and then other members of the House,[148] repeatedly introduced legislation to curb jurisdiction over suits involving corporations.[149] During the 1890s, these bills (as before) fared well in the House, passing that body on several occasions.[150] But, once again, each bill "found its way to the Senate morgue."[151] In 1894, Representative Culberson again lamented that, although the proposal had passed the House in multiple Congresses, that body had never "been able to get the concurrence of the Senate in this measure."[152]

After the turn of the century, however, the prospects for this legislation appeared to be much more promising. In the early 1900s, the Progressive movement gained strength in both political parties,[153] and the Republican Party was soon divided between the (once dominant) economic nationalists and a new Progressive wing (led by Theodore Roosevelt).[154] Accordingly, even though the Republicans controlled

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146 *See id.* § 6, 26 Stat. at 828 (authorizing discretionary review from the new appellate courts over diversity actions as well as cases arising under patent laws, revenue laws, federal criminal law, and admiralty cases). The statute also gave the Supreme Court direct appellate review over certain matters from the lower federal courts, including prize cases, many criminal cases, and any case challenging the constitutionality of federal or state law or otherwise requiring the construction of a constitutional provision. *See id.* § 5, 26 Stat. at 827–28.

147 Gillman, *supra* note 72, at 521.

148 After Representative Culberson left Congress in 1897, other members proposed the legislation. *See* FRANKFURTER & LANDIS, *supra* note 125, at 137–38 & 137 n.155.

149 *See, e.g.*, 33 CONG. REC. 221 (1899); 26 CONG. REC. 3408 (1894); 23 CONG. REC. 200 (1892). Other variants of the same theme were proposed. For example, Representative William Terry, an Arkansas Democrat, introduced a bill that would restrict diversity jurisdiction in suits involving railroads. *See* 25 CONG. REC. 1360 (1893).

150 *See, e.g.*, 24 CONG. REC. 218 (1892) (showing that the House by a two-thirds majority agreed to suspend the rules and pass the Culberson bill); 26 CONG. REC. 7608–09 (1894) (showing that the House passed by a vote of 158–12 Representative Terry's proposal to limit federal jurisdiction in diversity suits involving railroads).

151 FRANKFURTER & LANDIS, *supra* note 125, at 137.

152 26 CONG. REC. 8594 (1894) (statement of Rep. David Culberson, D-Tex.).

153 *See* Chambers, *supra* note 104, at 14 (noting that, during the fourth party system, which lasted from 1896 to 1932, Progressive reformers gained political strength).

154 *See* WHITTINGTON, *supra* note 71, at 261 (observing that "conservatives faced new challenges in the first decades of the twentieth century from progressive reformers within the Republican Party," including Theodore Roosevelt, who managed to "fractur[e] apparent legislative majorities").

the Senate throughout the first decade of the twentieth century, it was no longer clear that the economic nationalist faction of the party would be able to block additional jurisdiction-stripping measures.

In this environment, Representative Finis Garrett, the new champion of limiting federal jurisdiction, introduced a bill to prevent corporations from removing any diversity suit to federal court. On January 18, 1911, Representative Garrett sought to add this "corporation clause" as an amendment to a larger judiciary bill.[155] Although there was still opposition from some Republicans, particularly from the North,[156] other Republicans expressed support for the measure.[157] The bill (with the amendment included) ultimately passed the House with this bipartisan support.[158]

In contrast to the other jurisdiction-stripping bills, the Garrett amendment was not buried by the Senate Judiciary Committee. Instead, the measure was incorporated into the conference report negotiated by the House and Senate.[159] It appeared that the long-advocated restriction on federal jurisdiction might finally be enacted into law.

However, when the conference report was presented to the Senate, Republican Senator Albert Beveridge objected to the Garrett amendment and threatened to filibuster the bill as long as it contained that provision.[160] There was apparently insufficient support to withstand such a filibuster, because the Senate and House conferees relented.

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[155] *See* 46 CONG. REC. 1060 (1911). Representative Garrett's amendment, in its final form, provided as follows:

> *Provided further*, That no suit against a corporation or joint-stock company brought in a State court of the State in which the plaintiff resides or in which the cause of action arose, or within which the defendant has its place of business, or carries on its business, shall be removed to any court of the United States on the ground of diverse citizenship.

Id. at 1071.

[156] *See, e.g.*, *id.* at 1068 (statement of Rep. Reuben Moon, R-Pa.) (urging that "in new States and in new Territories foreign capital goes there because of what is regarded to be the greater security extended by the Federal courts," and that if Congress took away corporations' right to remove cases to federal court, "my theory is that you may drive capital away").

[157] *See id.* at 1067 (statement of Rep. Eben Martin, R-S.D.) ("[T]here has been a growing abuse in the habit of corporations seeking removals from State courts merely for the purpose of delaying or annoying litigants in just cases. . . . [T]he legislation is both needed and wise.").

[158] *See id.* at 1073. The *Congressional Record* does not show the precise number of votes. But the Republicans had a majority of 219–172 in this House, *see* HISTORICAL STATISTICS, *supra* note 119, at 5-201, so the bill could not have passed without the support of at least some Republicans.

[159] *See* 46 CONG. REC. 3760–61 (1911) (including the Garrett amendment as Section 28 of the conference report).

[160] *See id.* at 3853; source cited *infra* note 165 and accompanying text.

They agreed to withdraw the conference report and present a new one without the jurisdictional limit on corporate suits.[161]

When the revised measure went back to the House, Representative Garrett complained that his "amendment [was not] rejected by the other legislative body."[162] He declared: "[I]f this House yields, it does not yield to the judgment" of the full Senate, but instead "yield[s] to one man."[163] The House nevertheless voted to accept the conference report.[164] Accordingly (as one Democrat remarked in dismay), the scope of federal jurisdiction was preserved by a "one-man filibuster."[165]

Throughout this period, and despite the increasing political power of the Progressives, the economic nationalist wing of the Republican Party managed to veto efforts to curb federal jurisdiction over suits involving corporations. When such proposals made it through the House, they were always defeated in the Senate.[166] Indeed, no other jurisdiction-stripping measure made it as far as the Garrett amendment.[167]

The economic nationalists may have retained sufficient political power in the Senate to block this jurisdiction-stripping legislation in part because of that body's structural design. Senators serve six-year terms, and only one-third of the chamber may change hands in a given election cycle. Accordingly, the Senate is structured in such a manner as to be less responsive to emerging political trends, such as the Progressive movement. Moreover, until the adoption of the Seventeenth Amendment in 1913, Senators were elected by state legislatures; the Senate was thus designed to be even less responsive to the general public will.[168] These structural features, along with Senate-created rules like the filibuster, seem to have enabled the economic nationalists to maintain their "political veto over [the Progressives' jurisdiction-stripping] efforts."[169]

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[161] *See* 46 CONG. REC. 3847, 3853 (1911) (showing that the Senate modified the conference report to "stri[ke] out" section 28 (the Garrett amendment), *id.* at 3853); *id.* at 4001 (statement of House conferees).

[162] *Id.* at 4007 (statement of Rep. Finis Garrett, D-Tenn.).

[163] *Id.*

[164] *Id.* at 4012 (showing that, on March 2, 1911, the House voted 161–36 to adopt the report).

[165] *Id.* at 4007 (statement of Rep. Charles Carlin, D-Va.).

[166] *See* FRANKFURTER & LANDIS, *supra* note 125, at 138–43 & 138 n.156, 142 n.169 & 143 n.171 (noting various unsuccessful efforts to restrict federal jurisdiction).

[167] *See id.*

[168] *See* U.S. CONST. amend. XVII; LEONARD, *supra* note 93, at 27 (observing that, under the original constitutional design, "Senators would remain few in number, chosen by the state legislatures and given long terms to insulate them from popular pressures and encourage collegial deliberation in the public interest").

[169] Gillman, *supra* note 72, at 521.

IV. STRUCTURAL VETO POINTS IN THE MODERN ERA

The next major set of challenges to federal jurisdiction came in the mid- to late twentieth and early twenty-first centuries in response to Supreme Court and inferior federal court decisions involving federal constitutional claims. But this time the objections came primarily from conservatives. Federal court decisions involving abortion, reapportionment, desegregation, and religion aroused objections among a number of social conservatives, who repeatedly introduced bills to strip Supreme Court and lower federal court jurisdiction over these constitutional claims. As in the late nineteenth and early twentieth centuries, however, one political faction (this time, social progressives — principally in the Democratic Party) consistently maintained sufficient structural veto points to preserve federal jurisdiction.

A. Jurisdiction-Stripping Efforts: 1970s and 1980s

As political science professor Keith Whittington has explained, the political parties of the twentieth century were coalition parties.[170] The Democrats, in particular, were sharply split between a progressive wing that favored the civil rights movement and other social reforms and a more conservative faction based largely in the South.[171] The Republicans were still the party of fiscal restraint but also included a growing number of social conservatives.[172]

As in the late nineteenth and early twentieth centuries, the overall content of federal jurisprudence found favor with one of these political factions. The Supreme Court's civil liberties decisions generally accorded with the views of the socially progressive wing of the Demo-

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[170] *See* WHITTINGTON, *supra* note 71, at 273 (observing that, during this era, the parties "integrat[ed] disparate ideological elements into their electoral and legislative coalitions that persistently resisted the direction of presidential and party leadership"). The parties became far less internally cohesive after the Progressive reforms of the early twentieth century (such as the secret ballot and the direct primary) weakened the parties' control over their members. *See* MORRIS FIORINA, DIVIDED GOVERNMENT 7 (2d ed. 2003); Chambers, *supra* note 104, at 13–15.

[171] *See* WHITTINGTON, *supra* note 71, at 268–69 (noting "basic divisions within the New Deal coalition" between politicians who were more progressive on racial and other social issues and "[a] substantial group of conservative Democrats, especially from the South"); *see also* FIORINA, *supra* note 170, at 165 (similarly suggesting that, even when the Democrats had a unified government, "defections by Southern Democrats blocked some parts of the agendas of Democratic presidents such as Roosevelt and Kennedy").

[172] *See* Mark D. Brewer, *The Rise of Partisanship and the Expansion of Partisan Conflict Within the American Electorate*, 58 POL. RES. Q. 219, 220 (2005) (noting that the Republican Party has long included a number of economic conservatives and that, since the late 1970s and the 1980s, the party has taken a steadily more conservative stance on "matters relating to race [and] cultural concerns"); Graber, *supra* note 71, at 54–55 (observing that Republicans of this period "urged less interference with private market forces," *id.* at 54, and were "internally divided over [social] issues, but to a lesser degree [than the Democrats], at least initially," *id.* at 55).

cratic Party.[173] Notably, such social progressives were not concentrated exclusively in the Democratic Party; there were also progressive Republicans who opposed jurisdiction-stripping proposals during this period.[174] By contrast, socially conservative Republicans, aligned with conservative Southern Democrats, generally supported jurisdiction-stripping legislation.[175] But the more progressive legislators always maintained sufficient political power in one chamber of Congress — during this period, the Democrat-controlled House of Representatives — to veto these jurisdiction-stripping efforts.

Of course, the progressives did not need to exercise their structural veto in every instance. Many of the bills that sought to strip federal jurisdiction never even made it out of committee.[176] But several other proposals in the mid- to late twentieth century went to the floor of at least one chamber of Congress.[177]

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[173] *See* WHITTINGTON, *supra* note 71, at 119–20, 271 ("Just as national conservatives in the Republican Party in the first decades of the twentieth century had welcomed judicial monitoring of the states and Congress for progressive legislation that violated their constitutional understandings, so national liberals in the Democratic Party in the middle decades of the twentieth century welcomed judicial action against conservative states and Congress that violated liberal constitutional commitments." *Id.* at 271.).

[174] *See* Graber, *supra* note 71, at 55; *infra* Appendix, pp. 935–37 (noting the breakdown of votes on the jurisdiction-stripping proposals).

[175] *See infra* Appendix, pp. 935–37 (noting the breakdown of votes).

[176] *See* Max Baucus & Kenneth R. Kay, *The Court Stripping Bills: Their Impact on the Constitution, the Courts, and Congress*, 27 VILL. L. REV. 988, 992–94 (1982) (discussing various unsuccessful jurisdiction-stripping attempts).

[177] For example, during the second Red Scare, there was an effort to strip the Supreme Court's appellate jurisdiction over cases involving alleged communist "subversives." Senator William Jenner, an Indiana Republican, introduced a measure in 1957 that sought to eliminate the Court's jurisdiction over five categories of "subversive activity" cases. *See* C. HERMAN PRITCHETT, CONGRESS VERSUS THE SUPREME COURT 1957–1960, at 31 (1973). Following a Senate Judiciary Committee hearing (in which a number of people, including President Eisenhower's second Attorney General William Rogers, testified against the Jenner bill, *see Limitation of Appellate Jurisdiction of the Supreme Court: Hearing Before the Subcomm. to Investigate the Admin. of the Internal Sec. Act and Other Internal Sec. Laws of the S. Comm. on the Judiciary*, 85th Cong. 572–74 (1958)), Senator John Butler (R-Md.) introduced a modified bill that eliminated all but one of the jurisdiction-stripping provisions. *See* PRITCHETT, *supra*, at 32–33 (noting that the Butler amendment "substantially changed the character of the bill"). Ultimately, the Senate rejected the "Jenner-Butler bill" in its entirety. *See* 104 CONG. REC. 18,687 (1958) (showing that the Senate defeated the measure by a vote of 49–41).

There was also an effort to modify *Miranda v. Arizona*, 384 U.S. 436 (1966), by restricting federal jurisdiction. *See* S. REP. NO. 90-1097, at 9–10 (1968) (proposing an amendment that would prohibit the Supreme Court or any inferior federal court from "disturb[ing]," *id.* at 10, a state court decision admitting a confession into evidence, as long as the confession was given voluntarily). But this provision was later eliminated from the bill. *See* 114 CONG. REC. 14,175–77 (1968) (showing that the Senate voted 52–32 to remove the provision from the bill). Accordingly, much like the Jenner-Butler bill, this jurisdiction-stripping proposal did not pass one chamber of Congress.

In 1964, Representative William Tuck, a Virginia Democrat, introduced a measure to eliminate federal jurisdiction over reapportionment cases. The House of Representatives passed the bill, *see* 110 CONG. REC. 20,300 (1964) (showing that the House passed the measure by a vote of

I focus here on two of those proposals. These bills sought to strip Supreme Court and lower federal court jurisdiction over cases involving voluntary school prayer and to remove the courts' authority to order mandatory busing in school desegregation cases. I highlight these two measures because, in many respects, they seemed to have the greatest chance of success. Both measures passed the Senate in the late 1970s or early 1980s. Furthermore, the school prayer and busing decisions were among the least popular of the Supreme Court's civil liberties rulings. According to a study by Professors Nathaniel Persily, Jack Citrin, and Patrick Egan, the vast majority of Americans in the 1970s and 1980s opposed these decisions.[178] Over seventy percent of the public disapproved of the Court's school prayer decisions,[179] and over eighty percent opposed the use of busing to integrate public schools.[180] Given the state of public opinion, these two proposals presented a strong test for the structural safeguards of federal jurisdiction.

1. School Prayer. — In the 1970s, Senator Jesse Helms repeatedly proposed legislation to strip Supreme Court and inferior federal court jurisdiction over cases involving voluntary school prayer.[181] Senator

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218–175), but the Senate rejected the measure, *see Reapportionment of State Legislatures: Hearing Before the Subcomm. on Constitutional Amendments of the S. Comm. on the Judiciary*, 89th Cong. 257 (1965) (showing a report from a Senate committee concluding that the Tuck bill and other jurisdictional restrictions were "extremely ill-advised"). Although this measure passed one chamber of Congress, I do not focus on this example for two reasons. The Supreme Court's reapportionment decisions were unique in their impact on members of the House; modifying the districting scheme could have cost House members their jobs. By contrast, the Court's decisions had no effect on the Senate. Accordingly, the House's passage (and the Senate's rejection) of this jurisdiction-stripping bill may not be generalizable to other contexts. Moreover, unlike the school prayer and busing cases that I highlight, the public by and large supported the Court's reapportionment decisions. *See* FRIEDMAN, *supra* note 110, at 269.

178 *See* Michael Murakami, *Desegregation*, *in* PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 18, 34–35 (Nathaniel Persily, Jack Citrin & Patrick J. Egan eds., 2008) (busing); Alison Gash & Angelo Gonzales, *School Prayer*, *in* PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY, *supra*, at 62, 68–70, 77 (school prayer).

179 *See* Gash & Gonzales, *supra* note 178, at 70.

180 *See* Murakami, *supra* note 178, at 36.

181 *See* LOUIS FISHER, RELIGIOUS LIBERTY IN AMERICA 130 (2002) (noting that Senator Helms "took the lead in promoting this type of court-stripping bill" and began introducing such measures in 1974). The school prayer measure provided:

> § 1259. Appellate jurisdiction; limitations
>
> [T]he Supreme Court shall not have jurisdiction to review, by appeal, writ of certiorari, or otherwise, any case arising out of any State statute, ordinance, rule, regulation, or any part thereof, or arising out of any Act, interpreting, applying, or enforcing a State statute, ordinance, rule, or regulation, which relates to voluntary prayers in public schools and public buildings. . . .
>
> . . . .
>
> § 1364. Limitations on jurisdiction
>
> [T]he district courts shall not have jurisdiction of any case or question which the Supreme Court does not have jurisdiction to review under section 1259 of this title.

125 CONG. REC. 7577 (1979).

Helms argued that the Supreme Court erred in *Engel v. Vitale*[182] and *School District of Abington Township v. Schempp*,[183] when it struck down state laws requiring the recitation of prayer in public school.[184] "In both rulings," he contended, "the Court went beyond the language of the establishment clause to construct an interpretation of it which would overturn the long-standing State practices."[185] He complained that the Court had invalidated the state laws in *Engel* and *Schempp*, "even though the prayer and Bible-reading activities were voluntary," because the students could opt out.[186]

Senator Helms argued that Congress had ample authority to correct such errors by regulating the Court's jurisdiction:

> In anticipation of judicial usurpations of power, the framers of our Constitution wisely gave the Congress the authority, by a simple majority of both Houses, to check the Supreme Court by means of regulation of its appellate jurisdiction. Section 2 of article III states in clear and unequivocal language that the appellate jurisdiction of the Court is subject to "such exceptions, and under such regulations as the Congress shall make."[187]

He also emphasized that, under his proposal (which would eliminate all federal court jurisdiction over school prayer cases), a citizen could still obtain "a judicial settlement of his rights" in state court.[188]

The opponents of this legislation criticized it as applied to all federal courts, but they raised special concerns about the Supreme Court's jurisdiction.[189] Senator Birch Bayh and others argued that the bill, if

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[182] 370 U.S. 421, 430–33 (1962) (invalidating, on Establishment Clause grounds, a school prayer program created by New York).

[183] 374 U.S. 203, 223 (1963) (invalidating, on Establishment Clause grounds, programs in Maryland and Pennsylvania that required students to read Bible verses and recite the Lord's Prayer).

[184] *See* 125 CONG. REC. 7577 (1979) (statement of Sen. Jesse Helms, R-N.C.).

[185] *Id.*

[186] *Id.* at 7578; *see Schempp*, 374 U.S. at 224–25 (noting that students were permitted to opt out of the religious activities); *Engel*, 370 U.S. at 430 (same).

[187] 125 CONG. REC. 7579 (1979) (quoting U.S. CONST. art. III, § 2, cl. 2); *see id.* at 7637 (statement of Sen. Gordon Humphrey, R-N.H.) (similarly noting favorably that Congress has "the authority, by a simple majority of both Houses, to check the Supreme Court through regulation of its appellate jurisdiction").

[188] *Id.* at 7579 (statement of Sen. Jesse Helms, R-N.C.) ("Implicit in this bill is the understanding that the American citizen will have recourse to a judicial settlement of his rights . . . in the State courts . . . . This is where our religious freedoms were always safeguarded for 173 years until they were nationalized by the Supreme Court.").

[189] *See id.* at 7631 (statement of Sen. Edward Kennedy, D-Mass.) (stating that "[n]o one really questions that we in this body have the power effectively to destroy the [federal] judiciary," urging senators to be wary of exercising that power, and emphasizing in particular that the Helms amendment constituted an "assault on the Supreme Court"); *id.* at 7579 (statement of Sen. Abraham Ribicoff, D-Conn.) (opposing the Helms amendment, in part because it "challenge[d] the authority of the Supreme Court").

enacted, would set "a very dangerous precedent"[190] that would make it easier for future Congresses to strip federal jurisdiction over other constitutional issues.[191] Senator Ted Kennedy warned that a future legislature might even target constitutional claims that most conservatives favored, passing laws providing that "no [inferior] Federal court or Supreme Court" could adjudicate free speech or property rights cases.[192] Some senators also questioned whether Congress had the power to eliminate the Supreme Court's jurisdiction over constitutional issues.[193] Others insisted that, even if Congress had such authority, it would be unwise to leave the resolution of federal constitutional questions to fifty different states.[194]

The executive branch (which was then led by President Jimmy Carter) also opposed the school prayer measure, expressing particular concern about the restriction on Supreme Court jurisdiction. The Department of Justice advised Congress in a memorandum that "the so-called 'Helms amendment' [was] unconstitutional to the extent that it would purport to divest the Supreme Court of . . . jurisdiction."[195] The DOJ also urged that the measure, even if valid, "would run afoul

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[190] *Id.* at 7654 (statement of Sen. Birch Bayh, D-Ind.) ("We are setting a very dangerous precedent that could go far beyond prayer."); *see id.* at 7632 (statement of Sen. Edward Kennedy, D-Mass.) ("I hope we understand the extraordinarily dangerous aspect and precedent of this amendment.").

[191] *See id.* at 7644 (statement of Sen. John Durkin, D-N.H.) ("This type of restriction on the judicial power, once applied in this instance, will become ever easier to apply in the future. The appetite for this restrictive practice will grow . . . . The result will be to weaken, if not cripple, the independence of the Federal judiciary . . . .").

[192] *Id.* at 7632 (statement of Sen. Edward Kennedy, D-Mass.) ("I would think that others in this body would be somewhat leery of this particular procedure. It might not be long before Members of this body . . . say, 'We are going to confiscate certain business properties in this country,' and then . . . say that no Federal court or Supreme Court will have jurisdiction over this matter, or over compensation, or due process for businesses. . . . [S]ometime in the future, the free press might be under assault or attack. . . . The Helms amendment establishes a precedent for all types of mis[c]hief.").

[193] *See id.* at 7633 (statement of Sen. Charles Mathias, Jr., R-Md.) (arguing that the Helms amendment was "a back door for changing the organic law of the country," and thereby would "bypass[] article V of the Constitution").

[194] *See, e.g.*, *id.* at 7632 (statement of Sen. Edward Kennedy, D-Mass.) ("We are going to run into a situation in which 50 States could have 50 different interpretations of what the law of the land is . . . .").

[195] *Prayer in Public Schools and Buildings — Federal Court Jurisdiction: Hearing on S. 450 Before the Subcomm. on Courts, Civil Liberties, & the Admin. of Justice of the H. Comm. on the Judiciary*, 96th Cong. 14 (1980) [hereinafter *Prayer in Public Schools Hearing*] (memorandum of Larry L. Sims, Deputy Assistant Att'y Gen., in response to request for Office of Legal Counsel's views on the Helms amendment). The DOJ urged in part that the bill was at odds with the Supremacy Clause, *id.* at 19–20 (statement of John Harmon, Assistant Att'y Gen., Office of Legal Counsel, U.S. Dep't of Justice), because it would prevent the Supreme Court from "insur[ing] that . . . 'the judges in every State will [sic] be bound' by the provisions of the Constitution guaranteeing religious freedom." *Id.* at 20 (statement of John Harmon, Assistant Att'y Gen., Office of Legal Counsel, U.S. Dep't of Justice) (quoting U.S. CONST. art. VI, cl. 2).

of the public interest in . . . a uniform, definitive and dispositive nation-wide resolution of issues of constitutional magnitude."[196] In testimony before Congress, Assistant Attorney General John Harmon declared that he was "confident" the Attorney General would recommend that President Carter veto any bill containing the Helms amendment.[197]

In response, Senator Helms pointed to prior jurisdiction-stripping bills, including proposals to strip the Supreme Court's jurisdiction over reapportionment cases and *Miranda* issues, as precedent to support the constitutionality and propriety of his school prayer measure.[198] Senator Kennedy responded, however, that "[t]he fact is that none of those [bills] is law."[199]

For several years, these school prayer bills died in the Senate Judiciary Committee.[200] So, in 1979, Senator Helms brought the jurisdiction-stripping proposal to the Senate floor, seeking to attach it to a bill that would create the Department of Education.[201] On April 5, 1979, the school prayer measure passed the Senate with the support of socially conservative Republicans and Democrats (principally from the South).[202]

Several senators (including supporters of the measure) were, however, concerned that the Helms amendment would not be acceptable to the House of Representatives and would lead the House to reject (or delay) the establishment of the Department of Education.[203] Accordingly, on April 9, 1979, at the suggestion of Senate Majority Leader Robert Byrd, the jurisdiction-stripping provision was removed from the education bill and attached to a separate bill relating to the judi-

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196 125 CONG. REC. 7637 (1979) (quoting Letter from Griffin B. Bell, Att'y Gen., to Sen. Abraham Ribicoff, D-Conn., Chairman, Senate Comm. on Gov't Operations (Apr. 9, 1979)).

197 *Prayer in Public Schools Hearing*, *supra* note 195, at 23.

198 *See* 125 CONG. REC. 7636 (1979) (statement of Sen. Jesse Helms, R-N.C.). For a discussion of those proposals, see *supra* note 177.

199 125 CONG. REC. 7636 (1979) (statement of Sen. Edward Kennedy, D-Mass.).

200 *See id.* at 7634–35 (statement of Sen. Jesse Helms, R-N.C.) (noting that "this matter has been referred to the Judiciary Committee time and time and time again," *id.* at 7634, and that he had "[pled] for hearings for at least 5 years, and not a syllable of interest has been shown," *id.* at 7635).

201 *See id.* at 7576–77.

202 The Senate voted 47–37 to add the jurisdiction-stripping amendment to the Department of Education bill. *See id.* at 7581; *infra* Appendix, p. 935 (showing the breakdown of votes on the measure).

203 *See* 125 CONG. REC. 7630 (1979) (statement of Sen. Robert C. Byrd, D-W. Va.) ("I am afraid that [the Helms] amendment, if it stays on the education bill, will endanger the possible future enactment of that legislation."); *id.* at 7650 (statement of Sen. Abraham Ribicoff, D-Conn.) ("There is no question in my mind that if the Helms amendment were attached . . . it would tend to kill the Department of Education bill.").

ciary.[204] Senator Byrd explained that, although he supported the proposal, "in the minds of many, the [addition] of this amendment to the Department of Education bill could prove . . . fatal to the bill" in the House.[205] Senator Helms and other supporters complained that this procedural move was "the surest way to kill the prayer amendment."[206]

The school prayer bill went to the House Judiciary Committee, where it lingered without action for fifteen months.[207] Finally, a subcommittee held hearings on the measure. The members of the subcommittee made clear at the outset that they had serious reservations about the jurisdiction-stripping proposal.[208] For example, Representative Robert Kastenmeier, the subcommittee chairman, declared that he was "troubled by the prospect . . . of denying citizens access to the Federal courts with regard to an important constitutional issue."[209] And Representative Harold Sawyer stated that, although he was "in favor of allowing voluntary prayer in the schools," "the thing that frighten[ed] [him] about the Helms amendment" was that it might encourage future efforts to "deprive the Supreme Court of any jurisdiction to cover the due process clause, or civil rights, or equal treatment" and thereby "virtually emasculate the Bill of Rights."[210]

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[204] *See id.* at 7630 (statement of Sen. Robert C. Byrd, D-W. Va.) (urging that the judiciary bill "would be a more appropriate vehicle"). The Senate voted 51–40 to add the Helms amendment to the judiciary bill (which would have reduced the Supreme Court's mandatory appellate jurisdiction and expanded its discretionary certiorari jurisdiction, *see Prayer in Public Schools Hearing*, *supra* note 195, at 4–8). *See* 125 CONG. REC. 7644 (1979); *infra* Appendix, p. 936 (showing the breakdown of votes on the measure). That bill ultimately passed the Senate by a vote of 61–30. *See* 125 CONG. REC. 7648 (1979). The Senate later voted 53–40 to remove the Helms amendment from the education bill. *See id.* at 7657; *infra* Appendix, p. 937 (showing the breakdown of votes).

[205] 125 CONG. REC. 7652 (1979) (statement of Sen. Robert C. Byrd, D-W. Va.).

[206] *Id.* at 7630 (statement of Sen. Jesse Helms, R-N.C.) (opposing Senator Byrd's proposal, and stating that "some Senators are concerned that this is the surest way to kill the prayer amendment. . . . [T]here is great doubt that the House will even have an opportunity to vote on [the judiciary bill] once it goes to the House Judiciary Committee"); *see also id.* at 7656 (statement of Sen. James McClure, R-Idaho) (urging that this change was designed to "give [the amendment] a convenient vehicle upon which it can conveniently die").

[207] *See Prayer in Public Schools Hearing*, *supra* note 195, at i (showing that the subcommittee did not begin hearings until July 1980, even though the Senate passed the bill in April 1979).

[208] *See id.* at 25 (statement of Rep. George Danielson, D-Cal.) (stating that he "agree[d] with" the Department of Justice that the school prayer amendment was unconstitutional).

[209] *Id.* at 3 (statement of Rep. Robert Kastenmeier, D-Wis., Chairman, S. Comm. on Courts, Civil Liberties, & the Admin. of Justice of the H. Comm. on the Judiciary) ("[A]s chairman . . . I have become keenly aware of the problems of 'access to justice' in this country. I am troubled by the prospect in this legislation of denying citizens access to the Federal courts with regard to an important constitutional issue such as this.").

[210] *Id.* at 26 (statement of Rep. Harold Samuel Sawyer, R-Mich.).

One member of the House sought to have the school prayer bill removed from the Judiciary Committee and sent to the House floor.[211] But ultimately the House never voted on the measure.

2. Busing. — Soon after the 1980 elections,[212] Senator John Bennett Johnston introduced a bill that would strip federal jurisdiction to order mandatory busing of children in school desegregation cases.[213] The debates over this measure mirrored those involving the school prayer proposal. Many Democrats and some Republicans questioned the constitutionality of the bill and also doubted the propriety of interfering with the federal courts' handling of civil rights cases.[214] And once again the Senators expressed particular concern about interfering with the Supreme Court's jurisdiction.[215]

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[211] *See id.* at 386 (statement of Martha Rountree, President, Leadership Found.) ("When almost 7 months went by without any action on the part of [the House subcommittee], Congressman Phil Crane [(R-Ill.)] filed discharge petition No. 7, on Helms' bill, S. 450. This meant that if 218 Members in the House — a simple majority — signed this discharge petition it would automatically go to the floor of the House for a vote."); EDWARD KEYNES WITH RANDALL K. MILLER, THE COURT VS. CONGRESS 200 (1989).

[212] The Republicans gained a majority in the Senate in the 1980 elections. *See* HISTORICAL STATISTICS, *supra* note 119, at 5-202 (showing that, after the 1980 elections, the Republicans had a 53–46 majority in the Senate and that the Democrats controlled the House 243–192).

[213] *See* 127 CONG. REC. 13,190 (1981). The bill provided in pertinent part:

> (c)(1) No court of the United States may order or issue any writ ordering directly or indirectly any student to be assigned or to be transported to a public school other than that which is closest to the student's residence unless —
>
> (i) such assignment or transportation is provided incident to the voluntary attendaance [sic] at a 'magnet', vocational, technical, or other school of specialized or individual instruction;
>
> (ii) such assignment or transportation is provided incident to the voluntary attendance of a student at a school; or
>
> (iii) the requirement of such transportation is reasonable.

Id. The bill further specified that "the assignment of transportation of students shall not be reasonable . . . if," for example, "the total actual daily [travel] time . . . exceeds by 30 minutes the actual daily time consumed in travel by schoolbus to and from the public school with a grade level identical to that of the student and which is closest to the student's residence." *Id.*

[214] *See* 128 CONG. REC. 885 (1982) (statement of Sen. Donald Riegle, Jr., D-Mich.) (stating that, although he was "strongly opposed to forced school busing," he was "voting against this amendment because [he] believe[d] it [was] unconstitutional"); *id.* at 874 (statement of Sen. Lowell Weicker, Jr., R-Conn.) (stating that "[s]ooner or later . . . if we follow this precedent, it will be some other portion of our society that has become unpopular . . . . Maybe it will be the elderly . . . . Maybe it will be the workingman, the laborer. Maybe it will be the politician. Maybe it will be the news media" who will lose federal court protection); *id.* at 864 (statement of Sen. Carl Levin, D-Mich.) (stating that, although he "share[d] . . . the general dislike of busing children away from their neighborhood schools," he was "deeply troubled by this amendment," because it "would remove from the Federal courts the power to enforce the Constitution").

[215] *See, e.g.*, *id.* at 868–69 (statement of Sen. Carl Levin, D-Mich.) (emphasizing the need for uniformity in federal constitutional law, and stating that "Supreme Court decisions requiring social change are often unpopular. . . . This amendment is the modern version of Court packing"). The Senate also received a letter from the Conference of Chief Justices of the state courts, in which they expressed their disapproval of various bills to limit the Supreme Court's jurisdiction over school prayer, busing, and other issues. *See id.* at 869. The judges vowed "to give full force to controlling Supreme Court precedents." *Id.* (quoting Conference of Chief Justices, Resolution,

The executive branch (then led by President Ronald Reagan) also defended the Court's jurisdiction. Assistant Attorney General Ted Olson informed Congress that the Department of Justice interpreted the busing restriction so as to exempt the Supreme Court and that, so construed, it was constitutional.[216] He asserted that the validity of the measure would be "far more debatable" if it applied to the Supreme Court's appellate jurisdiction.[217]

Senator Lowell Weicker filibustered the school busing bill for nearly eight months and successfully fought off three cloture motions.[218] But, on February 4, 1982, Senator Johnston and other supporters managed to assemble the sixty votes necessary for cloture.[219] The jurisdiction-stripping bill ultimately passed the Senate by a considerable margin.[220]

However, again like the school prayer bill, this jurisdiction-stripping measure was defeated in the House Judiciary Committee. During hearings on the proposal, Representative Kastenmeier underscored that he viewed the bill "as part and parcel of various bills pending before [his subcommittee] which seek to eliminate the jurisdiction of the Federal judiciary to consider constitutional claims."[221] The subcommittee members had "certainly made no secret of [their] reservations" about such legislation.[222] And although one representative

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Jan. 30, 1982). But they also expressed concern about the lack of uniformity that would invariably result from stripping the Court's appellate jurisdiction. *Id.* ("Without the unifying function of United States Supreme Court review, there inevitably will be divergence in state court decisions, and thus the United States Constitution could mean something different in each of the fifty states . . . .").

216 *See Limitations on Court-Ordered Busing — Neighborhood School Act: Hearings Before the Subcomm. on Courts, Civil Liberties, & the Admin. of Justice of the H. Comm. on the Judiciary*, 97th Cong. 133–34 (1982) [hereinafter *Limitations on Court-Ordered Busing Hearings*] (statement of Theodore B. Olson, Assistant Att'y Gen., Office of Legal Counsel, Dep't of Justice).

217 *Id.* at 134. Senator Johnston stated, however, that the bill did apply to the Supreme Court. *Id.* at 35, 47 (statement of Sen. John Bennett Johnston, Jr., D-La.) ("[L]et there be no mistake . . . the language of the act . . . 'no Court of the United States may' . . . clearly . . . appl[ies] to all [federal] courts.").

218 The bill was introduced on June 22, 1981, *see* 127 CONG. REC. 13,189–90 (1981), and was filibustered in the Senate for eight months until February 4, 1982, *see Limitations on Court-Ordered Busing Hearings*, *supra* note 216, at 70 (statement of Rep. Harold Sawyer, R-Mich.) (noting that Senator Weicker, R-Conn., "tied everybody up in a filibuster"); *id.* (statement of Rep. William "Henson" Moore, III, R-La.) (stating that there were "three different cloture motions and the Senate voted not to close the debate"); 128 CONG. REC. 864 (1982) (showing that there was a cloture motion on February 4).

219 *See* 128 CONG. REC. 864, 886 (1982).

220 The Senate passed the bill by a vote of 58–38. *See id.* at 886; *infra* Appendix, p. 937 (showing the breakdown of votes).

221 *Limitations on Court-Ordered Busing Hearings*, *supra* note 216, at 2 (statement of Rep. Robert W. Kastenmeier, D-Wis., Chairman, Subcomm. on Courts, Civil Liberties, & the Admin. of Justice of the H. Comm. on the Judiciary).

222 *Id.*; *see id.* at 48 (statement of Rep. Tom Railsback, R-Ill.) ("I am really troubled that we may be setting a precedent by inhibiting or restricting the Federal courts' jurisdiction in this area,

sought to discharge the bill from the Judiciary Committee and send it to the House floor,[223] that effort failed. The bill never emerged from committee.

It may seem surprising that these two bills, which arose out of strong popular opposition to Supreme Court decisions, made it through the Senate and not the (typically more responsive) House. But this may reflect different structural features of the Senate. As discussed, the Senate is designed to give disproportionate power to individual state concerns,[224] and opposition to the Supreme Court's school prayer and busing decisions was particularly high in specific geographic regions.[225]

Moreover, by the late 1970s and early 1980s, these issues had been on the legal landscape for some time and had already experienced the Senate "lag" (that is, the Senate's tendency to respond slowly to popular sentiment). The Supreme Court issued its school prayer decisions in the early 1960s,[226] and Senator Helms brought up the school prayer proposal for years — and had to bypass the Senate Judiciary Commit-

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which could lead to us restricting it as well in other areas."); *id.* at 59 (statement of Rep. Patricia Schroeder, D-Colo.) (stating that "this is a very dangerous precedent"); *id.* at 61 (statement of Rep. Harold S. Sawyer, R-Mich.) ("I think that it is so flagrantly and patently an attempt to amend the Constitution by a simple vote of both Houses that you will never survive in the Supreme Court . . . . [A]nd I am basically in favor of getting rid of busing."); *id.* at 215 (statement of Rep. Barney Frank, D-Mass.) (urging that, if the bill were to pass and be "upheld . . . , then the distinction between the Constitution and statutory law . . . would have simply gone away").

223 *See id.* at 217–18 (statement of Rep. James Collins, R-Tex.) (explaining that he filed a discharge petition on May 25, 1982, and that, "[o]nce we reach 218 [signatures], the bill will be brought to the House floor for consideration," *id.* at 218).

224 *See* sources cited *supra* notes 51–53 and accompanying text.

225 The effects of the Supreme Court's busing decisions were concentrated in specific geographic regions, particularly the South. The Supreme Court first upheld busing in the South, *see* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 29–31 (1971), and many of the early busing cases involved school districts in that region, *see* J. HARVIE WILKINSON III, FROM *BROWN* TO *BAKKE* 135–39, 149–60 (1979) (discussing the strong opposition to some of the early busing orders in the late 1960s and early 1970s in southern cities, such as Richmond, Virginia, and Charlotte, North Carolina). Mandatory busing orders began to emerge in other areas in the mid-1970s. *See id.* at 197–202, 206–15 (discussing busing orders in Denver and Boston).

Likewise, opposition to the Court's school prayer decisions is especially high among certain religious groups (such as evangelical Protestants) who are heavily concentrated in the South. *See* Gash & Gonzales, *supra* note 178, at 74–75 (reporting, based on a statistical analysis, that "Christians who tend to adhere to an evangelical tradition (white evangelical Protestants and black Protestants)," *id.* at 74, are more likely than Catholics or mainline Protestants to disapprove of the Supreme Court's school prayer decisions); THE PEW FORUM ON RELIGION & PUB. LIFE, U.S. RELIGIOUS LANDSCAPE SURVEY 8 (2008), *available at* http://religions.pewforum.org/pdf/report-religious-landscape-study-full.pdf ("The South, by a wide margin, has the heaviest concentration of members of evangelical Protestant churches."); Jon T. Kilpinen, *Map Gallery of Religion in the United States*, AM. ETHNIC GEOGRAPHY, http://www.valpo.edu/geomet/geo/courses/geo200/religion.html (last visited Jan. 8, 2011) (similarly indicating that evangelical Protestants, such as Baptists, are concentrated in the South).

226 *See* Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962).

tee — before it finally went to a vote in that body.[227] Likewise, mandatory busing orders dated from the late 1960s,[228] and the Senate had already defeated several jurisdiction-stripping proposals.[229] Even the proposal by Senator Johnston was subject to a lengthy filibuster and three cloture motions before the Senate finally agreed to close debate and vote on the measure.[230]

The House of Representatives, by contrast, remained firmly within the control of the Democratic Party throughout the mid- to late twentieth century.[231] Moreover, the House Judiciary Committee (particularly the subcommittee that examined these jurisdiction-stripping bills) seems to have been dominated by social progressives from both parties who "made no secret of [their] reservations" about proposals that "seek to eliminate [federal] jurisdiction . . . [over] constitutional claims."[232] And although there is no indication that a majority of the representatives favored the Supreme Court's busing or school prayer decisions,[233] there seems to have been sufficient support in the House for the Court's overall constitutional jurisprudence for the representatives to oppose all jurisdiction-stripping measures. There was at least sufficient support to keep members from discharging the jurisdiction-stripping bills from committee and bringing them to the House floor for a vote.

But regardless of the reasons for the different outcomes in the House and Senate, this period further illustrates the difficulty of assembling the supermajority necessary for jurisdiction-stripping legislation, at least when one major political faction supports the overall content of federal court decisions. "Repeal was avoided" in the late twentieth century "because [supporters of the federal judiciary] maintained a political veto" in "at least one institution of the national government."[234]

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[227] *See* sources cited *supra* notes 200–01 and accompanying text.

[228] *See supra* note 225.

[229] *See* Robert F. Nagel, *A Comment on the Burger Court and "Judicial Activism,"* 52 U. COLO. L. REV. 223, 232 n.38 (1981) (noting the defeat of several proposals in 1978 and 1979).

[230] *See supra* notes 218–19 and accompanying text.

[231] *See* Jeffrey M. Stonecash & Mack D. Mariani, *Republican Gains in the House in the 1994 Elections: Class Polarization in American Politics*, 115 POL. SCI. Q. 93, 93 (2000) (noting that, in 1994, Republicans broke "the Democrats' forty-year hold on the House of Representatives").

[232] *Limitations on Court-Ordered Busing Hearings*, *supra* note 216, at 2 (statement of Rep. Robert W. Kastenmeier, D-Wis., Chairman, Subcomm. on Courts, Civil Liberties, & the Admin. of Justice of the H. Comm. on the Judiciary).

[233] Indeed, some progressive supporters of the judiciary expressly stated that they opposed the Court's school prayer or busing decisions but sought to protect the judiciary's overall authority to issue decisions in the cases they did favor. *See, e.g.*, *supra* text accompanying note 210 (statement of Rep. Harold S. Sawyer, R-Mich.); *supra* note 214 (statement of Sen. Carl Levin, D-Mich.).

[234] Gillman, *supra* note 72, at 521.

B. Present Day: Pledge and Marriage Protection Acts

In the 1990s, the national political parties began to undergo some structural changes. First, many voters from the South switched their official party allegiance to the Republicans, enabling that party in 1994 to gain control of the House of Representatives for the first time in several decades.[235] Second, during that same period, the parties began to look less like amalgamations of diverse coalitions. Both parties became more internally cohesive and more ideologically distinct from their opponents.[236] The Republican Party was increasingly associated with not only pro-business concerns but also conservative social values.[237] The Democratic Party, by contrast, was more closely aligned with the progressives,[238] who had by and large supported the civil liberties jurisprudence of the Supreme Court.[239] In other words, while the social conservatives left the Democratic Party, the social progressives began to exit the GOP.

Accordingly, following the 2000 elections, when the Republicans gained control of both chambers of Congress and also held the Presidency in George W. Bush,[240] it may have seemed that the party had sufficient political strength to strip federal jurisdiction, if it so chose.

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[235] *See* FIORINA, *supra* note 170, at 135–37 (noting that, in 1994, Republicans captured the House for the first time since 1952, in part because of the "normal mid-term loss," *id.* at 136 — that is, the loss of seats typically suffered by the party that holds the Presidency — and in part because of a "realignment in the South," *id.* at 137); Jonathan Knuckey, *Explaining Recent Changes in the Partisan Identifications of Southern Whites*, 59 POL. RES. Q. 57, 66 (2006) (observing that "[s]ince the mid-1990s, a Republican advantage has emerged in the party identifications of southern whites").

[236] *See* Brewer, *supra* note 172, at 219–20 ("By the end of the 1980s, partisanship in Congress had risen dramatically and has remained at a high level ever since. . . . At the same time the parties were becoming more internally cohesive in their voting behavior, they were also becoming more ideologically polarized from each other[,] . . . with the Democrats becoming more liberal and the GOP becoming more conservative . . . ." (citations omitted)); Gary C. Jacobson, *A House and Senate Divided: The Clinton Legacy and the Congressional Elections of 2000*, 116 POL. SCI. Q. 5, 6 (2001) (arguing that, in the 1990s, "the stark partisan polarization among the parties' politicians . . . accelerated").

[237] *See* Brewer, *supra* note 172, at 220 (arguing that "party elites are currently engaged in coherent ideological conflict that reaches across issue[] areas; a Republican Party that is consistently conservative on matters relating to race, cultural concerns, and economic equality, and a Democratic Party that is equally liberal on the same issues").

[238] *See id.*

[239] *See* WHITTINGTON, *supra* note 71, at 271.

[240] Following the 2000 elections, the Senate was evenly divided, but the Republicans controlled that body because Vice President Dick Cheney could break a tie. *See* U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 2009, at 245 (128th ed. 2008) [hereinafter STATISTICAL ABSTRACT] (showing that, after the 2000 elections, the Republicans had a 221–212 majority in the House and the Democrats and Republicans were split 50–50 in the Senate); Jacobson, *supra* note 236, at 5. The Republicans' control over the Senate was short-lived because, in May 2001, Senator Jim Jeffords left the Republican Party and became an Independent. But the party regained control following the 2002 elections. *See* STATISTICAL ABSTRACT, *supra*, at 245.

Moreover, the Republicans' control over Congress only increased after the 2002 and 2004 elections.[241]

Several politically controversial cases did emerge during this period. There were a number of challenges to the Defense of Marriage Act,[242] which provides that states need not recognize same-sex marriages from other states.[243] Moreover, in *Newdow v. U.S. Congress*,[244] the Ninth Circuit Court of Appeals invalidated the mandatory recitation of the Pledge of Allegiance in public schools because the Pledge contains the phrase "under God." The court explained that, under Supreme Court precedents (dating from the Warren and Burger Court eras), it had to examine the purpose of the statute[245] and found that the legislative history plainly indicated that the "*sole* purpose [of the 1954 statute adding 'under God' to the Pledge] was to advance religion, in order to differentiate the United States from nations under communist rule."[246] The *Newdow* decision met with severe disapproval in Congress. Both the House and the Senate voted overwhelmingly in favor of resolutions condemning the ruling.[247] And although the Supreme Court later reversed *Newdow* on standing grounds, it did not decide the merits of the controversy.[248]

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[241] *See* STATISTICAL ABSTRACT, *supra* note 240, at 245 (showing that the Republicans had a 229–204 majority in the House after the 2002 elections and a 232–202 majority after 2004 and that they had a 51–48 majority in the Senate after the 2002 elections and a majority of 55–44 after the 2004 elections).

[242] Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2006) and 28 U.S.C. § 1738C (2006)).

[243] *See* 28 U.S.C. § 1738C; Smelt v. Cnty. of Orange, 447 F.3d 673, 686 (9th Cir. 2006) (holding that the plaintiffs lacked standing to challenge the Defense of Marriage Act (DOMA)); Wilson v. Ake, 354 F. Supp. 2d 1298, 1309 (M.D. Fla. 2005) (rejecting constitutional challenge to DOMA); *In re* Kandu, 315 B.R. 123, 148 (Bankr. W.D. Wash. 2004) (same). Section 3 of DOMA also defines marriage for purposes of federal law as "a legal union between one man and one woman." 1 U.S.C. § 7. Two recent challenges to this part of the statute have succeeded at the district court level. *See* Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374, 377 (D. Mass. 2010) (holding that section 3 of DOMA violates the Equal Protection Clause); Massachusetts v. U.S. Dep't of Health & Human Servs., 698 F. Supp. 2d 234, 266 (D. Mass. 2010) (holding that section 3 of DOMA violates the Tenth Amendment and the Spending Clause). Both decisions are being appealed.

[244] 292 F.3d 597 (9th Cir. 2002), *amended by* 328 F.3d 466 (9th Cir. 2003), *rev'd sub nom.* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004).

[245] *See id.* at 605–12 (relying in part on the "*Lemon* test" from *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971), and the "endorsement" test from Justice O'Connor's concurrence in *Lynch v. Donnelly*, 465 U.S. 668, 694 (1984) (O'Connor, J., concurring)).

[246] *Id.* at 610.

[247] *See* H.R. REP. NO. 108-691, at 7–9 (2004) (noting that, on March 20, 2003, the House voted 400–7 to declare that the decision was "inconsistent with the Supreme Court's interpretation of the first amendment and should be overturned," *id.* at 7, and that, on June 26, 2002, "the Senate reaffirmed support for the Pledge . . . by a vote of 99–0," *id.* at 8–9).

[248] *See Newdow*, 542 U.S. at 15–18 (holding that the plaintiff lacked standing to bring the challenge on behalf of his public school daughter because he did not have custody); *see also id.* at 18 (Rehnquist, C.J., concurring in the judgment) (declaring that "[t]he Court today erects a novel prudential standing principle in order to avoid reaching the merits of the constitutional claim").

Both sets of cases generated jurisdiction-stripping efforts in Congress. Following the Ninth Circuit's decision in *Newdow*, a group of representatives proposed legislation to strip inferior federal court jurisdiction over challenges to the use of "under God" in the Pledge of Allegiance.[249] The bill was later amended to encompass the Supreme Court's appellate jurisdiction as well.[250] There was also a separate proposal to strip both Supreme Court and lower federal court jurisdiction over constitutional challenges to the Defense of Marriage Act.[251]

Notably, during the House debates over these measures, the representatives were particularly concerned about the attempt to strip Supreme Court jurisdiction. Indeed, some supporters of the original Pledge of Allegiance bill, who sought to eliminate lower federal court jurisdiction over the issue, opposed the measure once it also applied to the Supreme Court.[252] For example, Representative Melvin Watt urged that, even if Congress could "constitutionally strip the jurisdiction of the Supreme Court to hear appeals," it was not "advisable, because the result of that would be to leave each State and its highest courts with the final word" on the federal Constitution.[253] He continued: "[M]aybe I am naive, but it seems to me that we need a final arbiter in the court system and hierarchy . . . ."[254]

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[249] *See* 149 CONG. REC. 10,981 (2003); 148 CONG. REC. 12,110 (2002). The bill provided: "No court established by Act of Congress shall have jurisdiction to hear or determine any claim that the recitation of the Pledge of Allegiance . . . violates the first article of amendment to the Constitution of the United States." H.R. 2028, 108th Cong. sec. 2(a), § 1632 (2003) (as introduced).

[250] The revised bill provided: "No court created by Act of Congress shall have any jurisdiction, and the Supreme Court shall have no appellate jurisdiction, to hear or decide any question pertaining to the interpretation of, or the validity under the Constitution of, the Pledge of Allegiance . . . or its recitation." H.R. 2028, 108th Cong. sec. 2(a), § 1632 (2004) (as reported); *see* 150 CONG. REC. H7328 (daily ed. Sept. 21, 2004).

[251] *See* 150 CONG. REC. H6580 (daily ed. July 22, 2004). The bill provided: "No court created by Act of Congress shall have any jurisdiction, and the Supreme Court shall have no appellate jurisdiction, to hear or decide any question pertaining to the interpretation of, or the validity under the Constitution of[, section 2 of the Defense of Marriage Act]." H.R. 3313, 108th Cong. sec. 2(a), § 1632 (2004).

[252] Representative Melvin Watt, D-N.C., sought to return the bill to its original form by amending it to apply only to the inferior federal courts. *See* H.R. REP. NO. 108-691, at 78 (2004) (transcript of committee hearings) (statement of Rep. Melvin Watt, D-N.C.) (stating that he supported the original bill, which sought to eliminate inferior federal court jurisdiction); 152 CONG. REC. H5415 (daily ed. July 19, 2006) (introducing the amendment to protect Supreme Court jurisdiction in 2006); 150 CONG. REC. H7472 (daily ed. Sept. 23, 2004) (introducing the same amendment in 2004). The Watt amendment was ultimately rejected in both 2006 and 2004. *See* 152 CONG. REC. H5432 (daily ed. July 19, 2006) (showing that the House voted 241–183 against the 2006 amendment); 150 CONG. REC. H7477 (daily ed. Sept. 23, 2004) (showing that the House voted 217–202 against the 2004 amendment).

[253] H.R. REP. NO. 108-691, at 78 (2004) (transcript of committee hearings) (statement of Rep. Melvin Watt, D-N.C.) (also stating that he was a supporter of the initial bill).

[254] *Id.*; *accord* 150 CONG. REC. H7393 (daily ed. Sept. 22, 2004) (statement of Rep. Judy Biggert, R-Ill.) (stating that she supported the original bill, which "took care of [the] renegade [lower

Likewise, the (mostly Democratic) opponents of these measures, much like their predecessors in the 1970s and 1980s, defended the federal judiciary as a whole but focused on the Supreme Court's appellate review power.[255] Many representatives expressed concern about the uniform enforcement of federal law.[256] For example, Representatives John Conyers and Barney Frank warned that "the chaos that would ensue from 50 States . . . issuing conflicting opinions"[257] would send the country "back in history to the Articles of Confederation."[258] Representative John Dingell and others also warned that the bills would set "a precedent which is going to live to curse us" by encouraging future jurisdiction-stripping attempts over issues ranging from gun rights and property rights[259] to abortion and racial and gender equality.[260]

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federal court] jurists, but . . . retained the jurisdiction of the Supreme Court over this important constitutional issue").

[255] *See* 150 CONG. REC. H6583 (daily ed. July 22, 2004) (statement of Rep. Steny Hoyer, D-Md.) ("If this [marriage protection] bill becomes law, it will represent the first time in our history that Congress has enacted legislation that completely bars any Federal court, including the United States Supreme Court, from considering the constitutionality of Federal legislation. Thus, it contradicts . . . Marbury v. Madison . . . ."); *id.* at H6581 (statement of Rep. John Conyers, Jr., D-Mich.) ("The legislation is the first of its kind that has ever been brought to the floor of the House of Representatives. Never have we ever tried to do something as breathtaking as taking away the right of a Federal appeal . . . even to go to the Supreme Court . . . . This would be the only instance in the history of the Congress that we have totally precluded the Federal courts from considering the constitutionality of Federal legislation.").

[256] For such arguments during debates over the Marriage Protection Act, see *infra* notes 257–58. Opponents of the Pledge Protection Act made similar claims. *See* 152 CONG. REC. H5399–5400 (daily ed. July 19, 2006) (statement of Rep. Robert Scott, D-Va.) (arguing that the bill "will result in unprecedented confusion . . . . We may well end up with 50 interpretations and applications of a single Federal constitutional right").

[257] 150 CONG. REC. H6581 (daily ed. July 22, 2004) (statement of Rep. John Conyers, Jr., D-Mich.) ("[M]ake no mistake about it, were the bill to be enacted, the chaos that would ensue from 50 States plus the District of Columbia issuing conflicting opinions on the marriage law would be irrational.").

[258] *Id.* at H6569 (statement of Rep. Barney Frank, D-Mass.) (arguing that the marriage protection bill would send the country "back in history to the Articles of Confederation. Passage of this bill will mean that the United States Constitution, in this particular area, will have different meanings in different States").

[259] 152 CONG. REC. H5412 (daily ed. July 19, 2006) (statement of Rep. John Dingell, Jr., D-Mich.) ("This [Pledge bill] is a precedent which is going to live to curse us . . . . Maybe a future Congress will want to strip court challenges to gun control legislation by gun owners or sportsmen."). For such arguments over the Marriage Protection Act, see 150 CONG. REC. H6569 (daily ed. July 22, 2004) (statement of Rep. Barney Frank, D-Mass.), urging that, if Congress passed the measure, there would be future attempts to strip federal jurisdiction over "the second amendment and gun rights; and environmental land takings under the fifth amendment; the commerce clause[and] financial regulation."

[260] *See* 150 CONG. REC. H6563 (daily ed. July 22, 2004) (statement of Rep. James McGovern, D-Mass.) (arguing that "if this [marriage protection] bill passes its proponents will be back for more. . . . Other issues will be on the table, civil rights and civil liberties, voting rights, choice, environmental protection, worker protections, all will be at risk . . . . This bill would set a dangerous, dangerous precedent").

Both measures passed the House of Representatives by wide margins.[261] But the bills ran into trouble once they reached the Senate Judiciary Committee. The committee took no action on either proposal.[262] Thus, much like the jurisdiction-stripping measures of the late nineteenth and early twentieth centuries, each bill "found its way to the Senate morgue."[263]

As discussed, the Senate's design ensures that it is slower to respond to changes in the political winds than the House. Indeed, the gaining strength and growing conservatism of the Republican Party impacted the Senate more gradually. Following the 2000 elections, the Senate was evenly divided fifty to fifty (with the Republicans in control only because Vice President Dick Cheney could break a tie).[264] And although the Republicans made further gains in that body in the 2002 and 2004 elections, they never had a filibuster-proof majority.[265]

Moreover, these "pledge" and "marriage" issues had only recently appeared on the horizon; the Ninth Circuit issued its *Newdow* ruling in 2002, and several of the early challenges to the Defense of Marriage Act came even later (perhaps encouraged by the Supreme Court's 2003 decision in *Lawrence v. Texas*[266]).[267] These issues were thus likely to experience the usual Senate "lag." Finally, there was (apparently) no champion of these jurisdiction-stripping measures akin to Senator Helms who sought to dislodge the bills from the Senate Judiciary Committee. Thus, much like the economic nationalists in the late nineteenth and early twentieth centuries, the progressives of the twenty-first century (even if now more concentrated in the minority Demo-

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[261] *See* 152 CONG. REC. H5433 (daily ed. July 19, 2006) (showing that the House passed the Pledge Protection Act of 2005 by a vote of 260–167); 150 CONG. REC. H7478 (daily ed. Sept. 23, 2004) (showing that the House passed the Pledge Protection Act of 2004 by a vote of 247–173); 150 CONG. REC. H6612 (daily ed. July 22, 2004) (showing that the House passed the Marriage Protection Act of 2004 by a vote of 233–194); *infra* Appendix, pp. 938–39 (showing the breakdown of votes).

[262] For the (lack of) Senate proceedings, see Bill Summary & Status – 109th Congress (2005–2006) – H.R.2389, THOMAS, http://thomas.loc.gov/cgi-bin/bdquery/z?d109:HR02389:@@@X (last visited Jan. 8, 2011); Bill Summary & Status – 108th Congress (2003–2004) – H.R.2028, THOMAS, http://thomas.loc.gov/cgi-bin/bdquery/z?d108:HR02028:@@@X (last visited Jan. 8, 2011); and Bill Summary & Status – 108th Congress (2003–2004) – H.R.3313, THOMAS, http://thomas.loc.gov/cgi-bin/bdquery/z?d108:HR03313:@@@X (last visited Jan. 8, 2011).

[263] FRANKFURTER & LANDIS, *supra* note 125, at 137.

[264] *See* Jacobson, *supra* note 236, at 5.

[265] *See* STATISTICAL ABSTRACT, *supra* note 240, at 245 (showing that, after the 2002 elections, the Republicans had a 51–48 majority in the Senate and that, after 2004, the party had a majority of 55–44).

[266] 539 U.S. 558, 578–79 (2003) (invalidating a Texas law that prohibited intimate sexual contact between members of the same sex and overruling the Court's decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986)).

[267] *See* cases cited *supra* note 243.

cratic Party) maintained sufficient structural veto points in the Senate to safeguard the federal "judicial Power."[268]

V. THE SCOPE AND LIMITS OF STRUCTURAL SAFEGUARDS

The history of federal jurisdiction from the late nineteenth century to the present day demonstrates that the lawmaking procedures of Article I have repeatedly safeguarded the federal judiciary. These processes are not, however, an absolute bulwark against jurisdiction-stripping efforts. On several occasions, when there has been a persistent political consensus in favor of limiting jurisdiction, Congress has successfully displaced the inferior federal courts. But it has proven far more difficult for Congress to curb the Supreme Court's appellate review power.

A. Successful Efforts to Strip Inferior Federal Court Jurisdiction

Congress has managed to restrict the jurisdiction of the inferior federal courts (at least in part) on several occasions. Such jurisdiction-

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[268] Notably, as the pledge and marriage cases illustrate, the lawmaking processes of Article I have worked to safeguard the judiciary even during periods of unified government, and even when the supporters of the judiciary were only a political minority. That was likewise true during the Progressive era of the early twentieth century, when the economic nationalist faction of the Republican Party (despite its status as a political minority) managed to veto efforts to strip federal jurisdiction over corporate suits. *See* section III.B, pp.896–99. It thus appears that the fate of jurisdiction-stripping legislation cannot be explained by a theory that has gained traction in recent years: that partisan politics has eclipsed the checks and balances created by the Constitution, so that we now live in a world dominated by the "separation of parties, not powers." *See* Levinson & Pildes, *supra* note 8, at 2385 (asserting that "the separation of powers as the Framers understood it . . . ha[s] ceased to exist" and that "[t]he enduring institutional form of democratic political competition has turned out to be not branches but political parties"). Professors Daryl Levinson and Richard Pildes have argued that the scheme of separated powers envisioned by James Madison — with each branch of government "checking" to ensure that the other branches do not infringe on constitutional values — is unlikely to work during periods of unified government. Instead, when the President, House, and Senate belong to the same political party, they are likely to cooperate, rather than compete. *See id.* at 2316 ("The greatest threat to constitutional law's conventional understanding of, and normative goals for, separation of powers comes when government is unified and interbranch political dynamics shift from competitive to cooperative."); *see also* Bruce Ackerman, *2006 Oliver Wendell Holmes Lectures — The Living Constitution*, 120 HARV. L. REV. 1737, 1809 n.222 (2007) (agreeing with Professors Levinson and Pildes that "the branches operate very differently depending on whether they are all controlled by the same party"); Neal Devins & David E. Lewis, *Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 B.U. L. REV. 459, 478–79 (2008) (same). However, the Article I lawmaking process gives political minorities considerable power to veto constitutionally problematic legislation — even during periods of unified government. And as the historical survey in this Article demonstrates, political minorities have used those "veto points" to block jurisdiction-stripping legislation and thereby protect the constitutional value in an independent judiciary during periods of both divided and unified government. Accordingly, in this context, it does not appear that the success of the scheme of separated powers has depended on the separation of parties. Although a more extensive examination of this issue is beyond the scope of this Article, I hope to explore it in future work.

stripping attempts seem most likely to succeed when there is a major event that creates overwhelming political support for limitations on federal jurisdiction. For example, Congress mustered the necessary political momentum following the stock market crash of 1929 and the ensuing economic depression;[269] during World War II;[270] and more recently, in the wake of the attacks of September 11, 2001, and the subsequent war on terror.[271] These events led to multiple successful efforts to restrict federal jurisdiction,[272] two of which I highlight here.

Notably, as the preceding Parts demonstrate, it is not easy for Congress to assemble a supermajority to strip inferior federal court jurisdiction. Indeed, there is good reason to believe that the above restrictions would not have been enacted into law absent these historical triggers. The labor injunction case nicely illustrates this point. For many years, labor leaders and progressive legislators sought to curb inferior federal court jurisdiction to issue injunctions in labor disputes.[273] The progressives preferred to send such cases to state courts (which might be more favorable to workers' claims), followed by Supreme Court review.[274] But the same faction of economic nationalists in the

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[269] *See* Tax Injunction Act, ch. 726, § 1, 50 Stat. 738, 738 (1937) (codified as amended at 28 U.S.C. § 1341 (2006)) (restricting federal courts' authority to issue injunctions in disputes over state taxation); Norris-LaGuardia Act, ch. 90, § 1, 47 Stat. 70, 70 (1932) (codified at 29 U.S.C. § 101 (2006)) (restricting federal courts' authority to issue injunctions in labor disputes).

[270] *See* Emergency Price Control Act of 1942, ch. 26, § 204, 56 Stat. 23, 31–33 (lapsed 1947) (allowing a special "Emergency Court of Appeals" and the Supreme Court, but not any lower federal or state court, to review certain administrative orders); Yakus v. United States, 321 U.S. 414, 429–30, 443 (1944) (upholding the statute).

[271] The Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e), 119 Stat. 2739, 2742 (codified as amended at 28 U.S.C. § 2241(e)), and the Military Commissions Act of 2006, Pub. L. No. 109-366, § 7, 120 Stat. 2600, 2635–36 (amending § 2241(e)), together restrict federal habeas jurisdiction over the claims of noncitizens designated as "enemy combatants." *See infra* note 279 (discussing the legislation).

[272] Another example could be the jurisdictional limitations in the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of the U.S. Code); and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, 110 Stat. 3009-546 (codified as amended in scattered sections of 8 and 18 U.S.C.). Some members of Congress had sought for years to enact habeas reform but assembled the supermajority necessary only after the Oklahoma City bombing in 1995. *See infra* notes 286, 323 and accompanying text.

[273] *See* S. REP. NO. 72-163, pt. 1, at 2–4 (1932) (stating that "[t]he Committee on the Judiciary has been considering the subject of injunctions in labor disputes for several years," *id.* at 2, and detailing the efforts from 1927 to 1932); WILLIAM G. ROSS, A MUTED FURY 11, 71, 289–90 (1994) (noting that, beginning in 1907, labor unions advocated legislation to restrict the labor injunction).

[274] *See* Gunther, *supra* note 11, at 920 (noting that "[t]he Tax Injunction Act and the Norris-LaGuardia Act . . . evolved from disagreements with the way federal courts handled state tax and labor injunction cases" and were designed to send such cases to "state tribunals"). Although the Norris-LaGuardia Act purported to apply to any "court of the United States," *see* § 7, 47 Stat. at 71, legislators involved in the debates apparently understood the restriction to apply only to the inferior federal courts and not to the Supreme Court. *See* S. REP. NO. 72-163, pt. 1, at 10 (stating

Republican Party — who, as we saw, successfully fought off proposals to restrict jurisdiction over corporate suits — also repeatedly blocked this proposal.[275] It was not until the Great Depression that the progressive supporters of this legislation mustered sufficient political momentum to overcome their opponents' structural veto and enact this reform. The Norris-LaGuardia Act[276] became law on March 23, 1932.[277]

More recently, Congress restricted federal jurisdiction in response to the war on terror. The Military Commissions Act of 2006[278] was designed to eliminate federal jurisdiction over habeas corpus claims filed by noncitizens who were detained by the United States government and designated as "enemy combatants."[279] The statute routed the claims of alleged "enemy combatants" to a military tribunal (either

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that Congress has the authority to "give to the inferior courts such jurisdiction as Congress in its wisdom deems just," and that "having given this jurisdiction, it can, by act of Congress, take away all or any part of it"); H.R. REP. NO. 72-669, at 11–16 (1932) (stating that the Act applies only to "the inferior Federal courts," *id.* at 11, and relying solely on Congress's authority to regulate lower federal court jurisdiction in explaining the legality of the legislation). Likewise, the Supreme Court construed the statute to apply only to inferior federal court jurisdiction. *See* Lauf v. E.G. Shinner & Co., 303 U.S. 323, 330 (1938).

275 *See* S. REP. NO. 72-163, pt. 1, at 3–4 (observing that previous versions of the labor injunction bill had been delayed and ultimately rejected due to opposition by "attorneys representing corporations and organizations opposed to the enactment of this kind of legislation," *id.* at 3).

276 Ch. 90, 47 Stat. 70 (1932) (codified at 29 U.S.C. § 101 (2006)).

277 *See id.* at 70. It may seem surprising that this law was enacted in 1932 during the Presidency of Herbert Hoover. But the political support for labor reform increased dramatically in the wake of the stock market crash. The pro-labor Democrats made major gains in Congress in the 1930 elections. *See* HISTORICAL STATISTICS, *supra* note 119, at 5-201 (showing that, before the 1930 elections, Republicans had a 267–167 majority in the House and a 56–39 majority in the Senate, but, after the elections, Democrats had a 220–214 majority in the House and Republicans controlled the Senate only 48–47). Moreover, as political science professor Stephen Skowronek recounts, progressive Republicans formed an alliance with these new Democratic members of Congress to pass measures that would address the financial crisis. *See* STEPHEN SKOWRONEK, THE POLITICS PRESIDENTS MAKE 277–78 (1997). In this environment, the economic nationalist faction of the Republican Party could not block the labor injunction bill in Congress. Indeed, the legislation was enacted by a veto-proof majority. *See* 75 CONG. REC. 5019, 5511 (1932) (showing that the Senate passed the measure 75–5, and the House passed it 362–14); Robert H. Bremner, *The Background of the Norris-La Guardia Act*, 9 HISTORIAN 171, 174–75 (1947).

278 Pub. L. No. 109-366, 120 Stat. 2600 (codified in scattered sections of 10, 18, 28, and 42 U.S.C.).

279 *See* 28 U.S.C. § 2241(e)(1) (2006) ("No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination."). Congress first sought to restrict habeas jurisdiction for Guantánamo Bay detainees in the Detainee Treatment Act of 2005 (DTA). Pub. L. No. 109-148, § 1005(e), 119 Stat. 2742, 2742 (codified as amended at 28 U.S.C. § 2241(e)). After the Supreme Court narrowly construed the jurisdiction-stripping provision in the DTA, *see* Hamdan v. Rumsfeld, 548 U.S. 557, 581–84 (2006) (concluding that the DTA did not strip habeas jurisdiction over pending cases), Congress amended the provision with the Military Commissions Act of 2006 by extending it to any detainee held by the United States and expressly stating that the provision applied to pending claims. *See* Military Commissions Act § 7, 120 Stat. at 2635–36.

a combatant status review tribunal or a military commission), followed by judicial review in the D.C. Circuit and the Supreme Court.[280]

Interestingly, the debates over the constitutionality of this measure centered around the Suspension Clause of Article I, not Article III — perhaps because the Military Commissions Act left some Article III review in place. Opponents of the legislation (primarily socially progressive Democrats) argued that the provision constituted an invalid suspension of the writ of habeas corpus.[281] Proponents, however, countered that the detainees had no constitutional right to habeas review[282] and that, even if they did have such a right, the alternative review processes would serve as an adequate substitute — especially given the availability of Article III review.[283] Ultimately, opponents could not muster sufficient votes in Congress to block this jurisdictional restriction.[284] (The habeas restriction was thus in effect until the

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[280] *See* Detainee Treatment Act of 2005, sec. 105(e), § 2241(e)(2)(A), (C), 119 Stat. 2680, 2742; Military Commissions Act of 2006, sec. 3, §§ 950g, 950j, 120 Stat. at 2622–24. Although the DTA gives the D.C. Circuit "exclusive" jurisdiction to review decisions of combatant status review tribunals, and does not expressly provide for Supreme Court review, such "exclusivity" provisions are generally construed so as to preserve Supreme Court review. *See, e.g.*, Administrative Orders Review Act, 28 U.S.C. § 2342 (2006) (providing that "[t]he court of appeals . . . has exclusive jurisdiction to enjoin, set aside, suspend . . . , or to determine the validity of . . . final orders" from certain federal agencies); Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 750–51 (2002) (reviewing a court of appeals decision in a case brought under 28 U.S.C. § 2342); *see also* Calabresi & Lawson, *Jurisdiction Stripping*, *supra* note 38, at 1009 (similarly concluding that the DTA left Supreme Court review in place).

[281] *See* 152 CONG. REC. S10,366 (daily ed. Sept. 28, 2006) (statement of Sen. Robert Byrd, D-W. Va.) (stating that "the military commissions bill before us would strip the U.S. Constitution of one of its most precious protections: the writ of habeas corpus" and claiming that the bill violated the Suspension Clause); 152 CONG. REC. H7515 (daily ed. Sept. 27, 2006) (statement of Rep. Nancy Pelosi, D-Cal.) ("By seeking to strip Federal courts of habeas corpus review, this bill is practically begging to be overturned by the courts. Habeas corpus is one of the hallmarks of our legal system . . . . It is the last line of defense against arbitrary executive power.").

[282] *See* 152 CONG. REC. S10,268 (daily ed. Sept. 27, 2006) (statement of Sen. Jon Kyl, R-Ariz.) ("[N]ever has the Court come close to holding that for alien enemy combatants there is a constitutional right of habeas."); *id.* at S10,266 (statement of Sen. Lindsey Graham, R-S.C.) (similarly arguing that the Supreme Court had not recognized a constitutional right to habeas review for "an enemy combatant noncitizen alien").

[283] *See id.* at S10,273 (statement of Sen. John Cornyn, R-Tex.) (urging that "the Detainee Treatment Act . . . provides an adequate substitute remedy sufficient to meet Supreme Court scrutiny").

[284] During the debates over the Military Commissions Act, Senator Arlen Specter (R-Pa.) offered an amendment that would have restored habeas jurisdiction. *See id.* at S10,264. The amendment was rejected by a small margin — a vote of 51–48. 152 CONG. REC. S10,369 (daily ed. Sept. 28, 2006). Some members of the House of Representatives sought to bring up a similar amendment, but that effort was defeated. *See* 152 CONG. REC. H7517, H7519–20 (daily ed. Sept. 27, 2006). The Senate passed the final bill by a vote of 65–34. 152 CONG. REC. S10,420 (daily ed. Sept. 28, 2006). The House adopted it by a vote of 250–170. 152 CONG. REC. H7959 (daily ed. Sept. 29, 2006). *See infra* Appendix, pp. 939–40 (showing the breakdown of votes).

Supreme Court in *Boumediene v. Bush*[285] invalidated it on Suspension Clause grounds.[286])

There may have been multiple political factors underlying the enactment of this legislation, and I do not seek here to provide an exhaustive account of when proposals to restrict inferior federal court jurisdiction are most likely to succeed. But these examples do suggest that, following certain major historical events (like the 1929 stock market crash and the September 11 attacks), legislators are more capable of assembling the supermajority necessary to bypass the bicameralism and presentment hurdles of Article I.

B. Special Safeguards for Supreme Court Review

Even when Congress has assembled sufficient political momentum to displace inferior federal court jurisdiction, it has consistently left the Supreme Court's appellate review power in place. For example, although the Norris-LaGuardia Act and the Military Commissions Act limited lower federal court jurisdiction, the statutes left open an avenue for Supreme Court review. Indeed, Congress has on only two occasions eliminated the Supreme Court's appellate jurisdiction. The structural safeguards of Article I thus seem to be particularly effective

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[285] 128 S. Ct. 2229 (2008).

[286] *Id.* at 2274. A separate provision of the Military Commissions Act warrants mention. The provision purports to eliminate federal jurisdiction over any action "against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement" of a designated "enemy combatant." 28 U.S.C. § 2241(e)(2) (2006). It is unclear how the courts will interpret this provision. *See Boumediene*, 128 S. Ct. at 2274 (declining to "discuss the reach of the writ with respect to claims of unlawful conditions of treatment or confinement"). Given the Supreme Court's practice of construing statutes so as to preserve review of at least constitutional claims, *see* sources cited *infra* note 352 and accompanying text, it seems doubtful that the Court will read it to eliminate all federal jurisdiction. But notably, the government also seems (at least in some cases) to have conceded jurisdiction over constitutional claims, instead seeking to prevail in "conditions of confinement" cases on other grounds. *See, e.g.*, Brief for the Respondents in Opposition, Rasul v. Myers, 130 S. Ct. 1013 (2009) (No. 09-227), 2009 WL 3844433 (failing to raise the jurisdictional argument in a case raising constitutional challenge to mistreatment at Guantánamo Bay). This approach is consistent with the government's practice in litigation under the Antiterrorism and Effective Death Penalty Act of 1996 and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, when the government conceded that the statutes preserved review of constitutional claims. *See* David M. McConnell, *Judicial Review Under the Immigration and Nationality Act: Habeas Corpus and the Coming of REAL ID (1996–2005)*, 51 N.Y.L. SCH. L. REV. 75, 92 (2006/07). This consistent government practice suggests another possible safeguard of federal jurisdiction (one stemming from Article II). It may be that the Department of Justice's role as a "repeat player" in the federal courts (and particularly in the Supreme Court) makes the DOJ hesitant to argue that a statute precludes all Article III jurisdiction. Although this intriguing possibility is beyond the scope of this Article, I explore it in separate work. *See infra* notes 353–55 and accompanying text (noting this potential Article II safeguard).

at preserving what scholars have described as the Supreme Court's "unique role" in the judiciary.[287]

1. Possible Explanations for the Supreme Court's "Special Safeguards." — The above debates provide some insight into why Supreme Court jurisdiction has received such special protection. First, for those who favor the overall direction of federal jurisprudence, the Court's appellate jurisdiction is "[o]f special importance"[288] because the Court's "decisions . . . establish the legal and ideological framework within which [the lower courts] . . . operat[e]."[289] Accordingly, these political factions have a strong incentive to exercise their structural veto to preserve the Court's authority to define the content of federal law for the judiciary. And indeed, as the above debates illustrate, supporters of the judiciary have repeatedly emphasized the "special importance" of preserving Supreme Court review.[290]

But even for those who oppose the federal courts' jurisprudence, and are therefore willing to rein in "renegade [lower court] jurists,"[291] there are practical reasons to preserve Supreme Court review. It may not serve a faction's political goals to leave the interpretation of federal law to multiple administrative tribunals or to fifty different state courts. For example, as Representative Watt asserted during the debates over the Pledge bill: "Rather than protect the Pledge of Allegiance, this bill invites a patchwork of interpretations from all over the country."[292] He argued that Congress should preserve the "role of the U.S. Supreme Court in establishing uniform standards" for federal law.[293] This was necessary to avoid what Representative Watt had previously described as "an absolute hodgepodge of final opinions" from the various state courts.[294]

Furthermore, it could be extremely expensive and administratively cumbersome if state court (or lower federal court) decisions required the federal government to enforce federal law differently in different regions of the country.[295] That may partly explain why both the Cart-

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[287] *See supra* notes 29–40 and accompanying text (discussing scholarship on Supreme Court's role).

[288] Gillman, *supra* note 72, at 517.

[289] *Id.* at 518.

[290] *See supra* notes 29–40, 215, 255–58 and accompanying text.

[291] 150 CONG. REC. H7393 (daily ed. Sept. 22, 2004) (statement of Rep. Judy Biggert, R-Ill.) (stating that she supported the original Pledge protection bill, which "took care of [the] renegade [lower court] jurists, but . . . retained the jurisdiction of the Supreme Court over this important constitutional issue").

[292] 152 CONG. REC. H5415 (daily ed. July 19, 2006) (statement of Rep. Melvin Watt, D-N.C.).

[293] *Id.*

[294] H.R. REP. NO. 108-691, at 78 (2004) (transcript of the Pledge Protection Act of 2004 markup) (statement of Rep. Melvin Watt, D-N.C.).

[295] Indeed, the federal government often seeks certiorari on this basis. *See, e.g.*, Brief for the United States at 11, Lockhart v. United States, 546 U.S. 142 (2005) (No. 04-881), 2005 WL 460918,

er and the Reagan Justice Departments defended the Supreme Court's appellate review power despite the two Presidents' distinct views of the Court's jurisprudence.[296] During the debates over the school prayer bill in the late 1970s, Attorney General Griffin Bell underscored that such jurisdiction-stripping measures "run afoul of the public interest in . . . a uniform, definitive and dispositive nation-wide resolution of issues of constitutional magnitude."[297] Likewise, in the early 1980s, Attorney General William French Smith doubted not only the constitutionality but also the wisdom of proposals to strip Supreme Court jurisdiction.[298] Attorney General Smith, much like his predecessor, warned that "[s]tate courts could reach disparate conclusions on identical questions of federal law" and declared that "[t]he integrity of our system of federal law depends upon a single court of last resort having a final say on the resolution of federal questions."[299]

Accordingly, although "uniformity" may not be a constitutional requirement,[300] it seems to be a matter of great practical (and bipartisan) concern to political leaders. There appears to be a strong consensus that the country needs "a final arbiter in the court system and hierarchy."[301] As we have seen, this consensus is not strong enough to prevent Supreme Court jurisdiction-stripping bills from passing one chamber of Congress. But this sentiment, combined with the veto efforts of supporters of the judiciary, generally seems strong enough to prevent such bills from attaining the supermajority required by Article I.

2. Breakdown in the Article I Process. — There have been only two instances in which efforts to strip the Supreme Court's appellate review power have successfully navigated the bicameralism and presentment protections of Article I. Notably, both cases involved an (arguable) breakdown in the Article I legislative process.

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at *11 (urging that "[t]his Court's review is warranted to resolve [a] direct circuit conflict, which prevents the uniform administration of . . . the federal student loan program").

296 *See* WHITTINGTON, *supra* note 71, at 66–68 (noting the Presidents' "radically different" approaches, with Carter deferring to the Court on issues like abortion, and Reagan attacking it).

297 125 CONG. REC. 7637 (1979) (quoting Letter from Griffin B. Bell, Att'y Gen., to Sen. Abraham Ribicoff, D-Conn., Chairman, S. Comm. on Gov't Operations (Apr. 9, 1979)).

298 *See* 128 CONG. REC. 9093–97 (1982) (letter dated May 6, 1982, from Attorney General William French Smith to Senate Judiciary Committee Chairman Strom Thurmond) (arguing that laws preventing the Court from hearing federal constitutional claims would unconstitutionally interfere with its "core functions").

299 *Id.* at 9097.

300 *See* Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1578 & n.27 (2008) (noting that "many . . . disagree with the claim that uniformity is constitutionally prescribed," *id.* at 1578, and citing legal scholars who argue that any claim that uniformity is constitutionally required lacks textual support).

301 H.R. REP. NO. 108-691, at 78 (2004) (transcript of the Pledge Protection Act of 2004 markup) (statement of Rep. Melvin Watt, D-N.C.).

The first such attempt was in 1868 and arose out of the case of William McCardle. In 1867, federal authorities in Mississippi detained McCardle for publishing newspaper articles that severely criticized the military's Reconstruction activities.[302] The lower courts denied McCardle's habeas petition, so he sought review in the Supreme Court under the Habeas Corpus Act of 1867,[303] which permitted direct appeals from the lower federal courts.[304] (Prior to that 1867 statute, under the Judiciary Act of 1789, the Supreme Court could review such cases only if the detained individual filed an original habeas petition in the Court.[305]) The Supreme Court heard oral argument in the case, during which McCardle challenged not only the legality of his detention but also the constitutionality of the Reconstruction laws.[306]

Notably, in the late 1860s, Congress was controlled by the Republican Party, in large part because the representatives of the predominantly Democratic Southern states were excluded from the legislature.[307] This Republican Congress was heavily invested in the Reconstruction efforts and other civil rights reforms in the South.[308] (The party did not turn its focus to economic nationalism until the early 1870s.[309]) Thus, soon after the oral argument in *Ex Parte McCardle*, several House Republicans introduced a rider to repeal the Court's appellate jurisdiction under the 1867 Act.[310] The measure passed the House with no debate and was subject to very little debate before passing the Senate.[311] The bill was then, however, vetoed by President Andrew Johnson.[312]

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[302] *See* William W. Van Alstyne, *A Critical Guide to Ex parte* McCardle, 15 ARIZ. L. REV. 229, 236 (1973) (observing that McCardle was "charged with disturbing the peace . . . and impeding reconstruction, solely on the basis of several" statements he authored and published in the *Vicksburg Times*).

[303] Ch. 28, 14 Stat. 385.

[304] *See id.* § 1, 14 Stat. at 385–86; Van Alstyne, *supra* note 302, at 237.

[305] *See* Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81–82 (permitting the Court to issue writs of habeas corpus).

[306] *See* Van Alstyne, *supra* note 302, at 238 (noting that McCardle argued for the unconstitutionality of the Military Reconstruction Act of 1867, ch. 153, 14 Stat. 428).

[307] *See* 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 104 (1998) (noting that, during this era, "Congress excluded *all* representatives . . . from the Southern states"); HISTORICAL STATISTICS, *supra* note 119, at 5-201 (showing the Republican control of Congress in the late 1860s).

[308] *See supra* note 105.

[309] *See supra* note 105.

[310] *See* Van Alstyne, *supra* note 302, at 239.

[311] *See* CONG. GLOBE, 40TH CONG., 2D SESS. 2098 (1868) (statement of Sen. Thomas Andrews Hendricks, D-Ind.) (noting during the debate to override the President's veto that originally the bill "was gotten through the Senate . . . without an opportunity to debate"); Van Alstyne, *supra* note 302, at 239.

[312] *See* CONG. GLOBE, 40TH CONG., 2D SESS. 2094 (1868) (showing that, on March 25, 1868, Andrew Johnson vetoed the bill on the ground that it was "not in harmony with the spirit and intention of the Constitution").

Both chambers held somewhat more extensive debates in determining whether to override the veto. The Democrats in Congress accused the Republicans of seeking to block Supreme Court review of the Southern Reconstruction efforts.[313] And the Radical Republicans, at least in the House, did not deny the charge.[314] But in 1868, the Republicans had considerable majorities in both chambers of Congress[315] and were more than able to assemble the two-thirds majority necessary to override President Johnson's veto and enact the jurisdiction-stripping legislation.[316]

In *Ex parte McCardle*,[317] the Supreme Court applied this newly established limit on its appellate jurisdiction and dismissed McCardle's appeal.[318] But the Court also stated that "[t]he act of 1868 does not except from [its] jurisdiction any cases but appeals . . . under the act of 1867. It does not affect the jurisdiction which was previously exercised."[319] In *Ex parte Yerger*,[320] the Court clarified this declaration, holding that it could still review lower court decisions by way of an original habeas petition under the Judiciary Act of 1789.[321]

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[313] *See id.* at 2167 (statement of Rep. George Woodward, D-Pa.) (declaring that the legislation was motivated "merely by a desire to prevent the Supreme Court of the United States from deciding McCardle's case. And the reason of this desire was a fear that the Supreme Court would declare the reconstruction laws unconstitutional and void"); *id.* at 2127 (statement of Sen. Charles Buckalew, D-Pa.) ("This law is to be repealed, this jurisdiction is to be withdrawn from the Supreme Court, because it is necessary to preserve the reconstruction system enacted by Congress from molestation, injury, perhaps demolition, by the court.").

[314] *See id.* at 2061 (statement of Rep. James F. Wilson, R-Iowa) ("Most assuredly it was my intention to take away the jurisdiction given by the act of 1867 reaching the McCardle case . . . ."); *see also id.* at 2064 (statement of Rep. Horace Maynard, R-Tenn.) ("[T]his McCardle case was brought up for no purpose in the world except to test and settle political questions. . . . [D]ecency and propriety . . . require that we should, by our legislation, put an end to that suit and save the court from further annoyance or further occasion to . . . make any decision of that kind.").

[315] *See* HISTORICAL STATISTICS, *supra* note 119, at 5-201 (showing that the Republicans had a 143–49 majority in the House and a 42–11 majority in the Senate).

[316] *See* Repeal Act of 1868, ch. 34, § 2, 15 Stat. 44, 44 (providing "[t]hat so much of the act approved February [5, 1867,] . . . as authorizes an appeal from the judgment of the circuit court to the Supreme Court of the United States, or the exercise of any such jurisdiction by said Supreme Court on appeals which have been or may hereafter be taken, be, and the same is, hereby repealed"); CONG. GLOBE, 40TH CONG., 2D SESS. 2170 (1868) (showing that, on March 27, 1868, the House voted 114–34 to override the veto); *id.* at 2128 (showing that, on March 26, 1868, the Senate voted 33–9 to override President Johnson's veto); *infra* Appendix, p. 933 (showing the breakdown of votes). Notably, Congress restored this part of the Court's appellate jurisdiction in 1885. *See* William M. Wiecek, *The Great Writ and Reconstruction: The Habeas Corpus Act of 1867*, 36 J. S. HIST. 530, 543–44 (1970).

[317] 74 U.S. (7 Wall.) 506 (1869).

[318] *Id.* at 515 ("It is quite clear . . . that this court cannot proceed to pronounce judgment in this case, for it has no longer jurisdiction of the appeal . . . .").

[319] *Id.*

[320] 75 U.S. (8 Wall.) 85 (1869).

[321] *Id.* at 105–06.

The Supreme Court's appellate jurisdiction was again targeted in a provision of the Antiterrorism and Effective Death Penalty Act of 1996[322] (AEDPA). The history behind this statute differs in important respects from the events of 1868. First, AEDPA was not a sudden exercise of legislative will, but instead was the culmination of years of habeas reform efforts (which assembled sufficient political momentum only after the Oklahoma City bombing in 1995).[323] Moreover, AEDPA reflected legislative *deference* to the Court in some respects. It directed inferior federal courts to respect final state court decisions in criminal cases unless they violated "clearly established Federal law, as determined by the Supreme Court."[324] Such a provision seems to signal, as Professor Vicki Jackson has suggested, a "congressional belief that the Supreme Court's powers with respect to . . . federal law are broader than those of the lower federal courts,"[325] because of its "supreme hierarchical position"[326] in the judiciary.

Nevertheless, one provision of AEDPA did restrict the Court's appellate review power. The statute requires an inmate to obtain leave from a federal court of appeals before filing a second (or "successive") habeas petition and provides that "[t]he grant or denial of [such] an authorization . . . shall not be appealable and shall not be the subject of a petition . . . for a writ of certiorari."[327]

As in *McCardle* and *Yerger*, the Supreme Court read this restriction narrowly. In *Felker v. Turpin*,[328] the Court declared that, although the statute prohibited a direct appeal from a lower court decision "exercising [this] 'gatekeeping' function,"[329] it had "not repealed [the Court's] authority to entertain original habeas petitions."[330] While this "reservation of authority" may have seemed at the time like a fairly empty gesture (given that the Court had not granted an original habeas petition in decades),[331] recent events have demonstrated the importance of

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[322] Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of the U.S. Code).

[323] *See* Carrie M. Bowden, Note, *The Need for Comity: A Proposal for Federal Court Review of Suppression Issues in the Dual Sovereignty Context After the Antiterrorism and Effective Death Penalty Act of 1996*, 60 WASH. & LEE L. REV. 185, 215–16 (2003).

[324] 28 U.S.C. § 2254(d)(1) (2006).

[325] Vicki C. Jackson, *Introduction: Congressional Control of Jurisdiction and the Future of the Federal Courts — Opposition, Agreement, and Hierarchy*, 86 GEO. L.J. 2445, 2455 (1998).

[326] *Id.* at 2454.

[327] 28 U.S.C. § 2244(b)(3)(E).

[328] 518 U.S. 651 (1996).

[329] *Id.* at 661.

[330] *Id.* at 660.

[331] *See* RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 271, 298–99 (6th ed. 2009).

this protection. On August 17, 2009, the Court in *In re Davis*[332] granted an original petition in a capital case and directed the federal district court to consider the inmate's claim of actual innocence.[333]

In both *McCardle* and *Felker*, the Supreme Court applied what Professor Ernest Young has referred to as "resistance norms."[334] The Court did not declare that Congress *lacked* the constitutional authority to restrict its appellate jurisdiction, but instead (applying "modern" principles of constitutional avoidance) read the relevant statutes so as to preserve its jurisdiction.[335] Understood in light of the analysis in this Article, the Court's approach may be defensible. Additional judicial oversight seems particularly appropriate when there is a breakdown in the usual Article I safeguards.

McCardle involved perhaps the paradigmatic case for caution. As Professor Bruce Ackerman has pointed out (in his work on the Fourteenth Amendment), in the late 1860s, "Congress excluded *all* representatives, however qualified they may have been, from the Southern states."[336] For that reason, the Reconstruction Republicans managed easily not only to push their jurisdiction-stripping measure through Congress, but also to override President Johnson's veto.[337] As Professor Ackerman has argued, this complete exclusion of one-third of the country raises serious questions about the constitutional status of this Congress.[338] In this context, given the lack of structural safeguards, the Supreme Court's use of resistance norms seems justified.

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[332] 130 S. Ct. 1 (2009).

[333] *See id.* at 1. On remand, the district court held that Davis failed to establish innocence by clear and convincing evidence. *See In re* Davis, No. CV409-130, slip op. at 166–68, 2010 WL 3385081, at *59–60 (S.D. Ga. Aug. 24, 2010).

[334] *See* Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1585 (2000) (proposing "the concept of 'resistance norms' — that is, constitutional rules that raise obstacles to particular governmental actions without barring those actions entirely"); *see also* Matthew C. Stephenson, *The Price of Public Action: Constitutional Doctrine and the Judicial Manipulation of Legislative Enactment Costs*, 118 YALE L.J. 2, 4 (2008) (asserting that "courts often can, do, and should craft doctrines that raise the costs to government decisionmakers of enacting constitutionally problematic policies, rather than attempting to designate certain government actions . . . as permissible or impermissible").

[335] *See supra* notes 317–21, 328–30 and accompanying text; Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1947 (1997) (distinguishing "the classical version of avoidance, which directs courts to interpret statutes to save them from a formal ruling of unconstitutionality" from "the modern version of avoidance, which directs courts to interpret statutes to avoid constitutional *questions* as well as rulings of unconstitutionality").

[336] ACKERMAN, *supra* note 307, at 104.

[337] Notably, President Johnson's political authority was rather weak at the time, because he had already been impeached by the House. *See* CONG. GLOBE, 40TH CONG., 2D SESS. 2095 (1868) (statement of Sen. George Williams, R-Or.) (urging legislators to override the veto promptly — indeed, by the next day — because "there is very little time in which to consider matters of legislation before the impeachment trial commences" in the Senate).

[338] *See* ACKERMAN, *supra* note 307, at 103 (questioning whether a "*federal assembly* excluding these states" may "count as a 'Congress'").

AEDPA, however, is a more complex story. In that case, there was no formal breakdown in the Article I bicameralism and presentment process (at least not at the federal level). Indeed, the country at that time had a divided government — a Republican-controlled Congress and a Democratic President — all of whom supported habeas reform.[339] Nor was the statute targeted at the Supreme Court in the same way as the 1868 Repeal Act; on the contrary, other provisions of the law expressly recognized a special role for the Court in defining the content of federal law.

In one sense, however, AEDPA did involve a breakdown in electoral processes analogous to that in the late 1860s. In virtually every state, prison inmates are denied access to the ballot.[340] Thus, much like the Southerners in the late 1860s (such as William McCardle), the individuals with the most at stake in the AEDPA appellate review process effectively had no representation in Congress. Accordingly, there is at least an argument that the application of resistance norms in *Felker* was appropriate to correct for this "gap" in the usual Article I protections.[341]

Nevertheless, it is more difficult to describe the jurisdictional restriction in AEDPA as an instance of structural breakdown.[342] Accordingly, the Court's interpretive approach in *Felker* may not be justifiable along the same lines as that in *McCardle*. This case thus seems to raise the important normative question of how the judiciary should react when a jurisdiction-stripping measure (in the absence of a structural breakdown) gains the supermajority necessary to be enacted into law.

C. Implications

The lawmaking processes of Article I have proven to be an important safeguard for the federal judiciary. Indeed, the structural safeguards of Article I have largely met the concerns raised by academics in the literature on jurisdiction stripping. Scholars who argue that Congress has "plenary power" over federal jurisdiction still contend

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[339] *See* HISTORICAL STATISTICS, *supra* note 119, at 5-202; Bowden, *supra* note 323, at 215 (noting that the bill was a product of compromise from "opposing sides of the reform movement").

[340] *See* Lani Guinier, *Supreme Democracy:* Bush v. Gore *Redux*, 34 LOY. U. CHI. L.J. 23, 39–40 (2002); ACLU, VOTING WITH A CRIMINAL RECORD 3 (2008), *available at* http://www.aclu.org/files/pdfs/racialjustice/votingwithacriminalrecord_report.pdf (noting that only two states — Maine and Vermont — currently allow citizens to vote after a felony conviction).

[341] *Cf.* JOHN HART ELY, DEMOCRACY AND DISTRUST 101–04 (1980) (urging that judicial review should be reserved for cases where the political process has broken down).

[342] Notably, the courts have, by and large, upheld laws that disenfranchise prisoners against substantive constitutional challenge. *See, e.g.*, Richardson v. Ramirez, 418 U.S. 24, 54–56 (1974) (rejecting equal protection challenge to such a restriction); Johnson v. Governor of Fla., 405 F.3d 1214, 1224 (11th Cir. 2005) (en banc) (same).

that Congress should generally refrain from exercising that power.[343] Furthermore, scholars who contest the "plenary power" view have argued either that Congress should leave jurisdiction in some federal court or that Congress has a special obligation to preserve the Supreme Court's unique role.[344] Supporters of the judiciary have used the veto points created by Article I to meet both concerns by blocking most jurisdiction-stripping attempts and by making particularly strong efforts to protect the Supreme Court.

But these procedures have not prevented all restrictions on federal jurisdiction. The imperfection of these structural safeguards raises the question of how courts should react in those rare instances when legislators do assemble the supermajority necessary to strip jurisdiction. Although I do not seek to resolve this important normative question here, I offer some thoughts on how this Article's analysis might impact the debate.

First, these Article I safeguards could work in conjunction with judicial enforcement of Article III. Indeed, nothing in my argument is necessarily inconsistent with the scholarship proposing judicially enforceable limits on Congress's power over federal jurisdiction. One could view my argument as supplementing that prior scholarship: The first line of defense for the federal judiciary is the Article I bicameralism and presentment process. The second line of defense is judicial enforcement — according to whichever scholarly theory one chooses to adopt (such as Professor Hart's "essential functions" theory or Professor Amar's contention that some federal court must be available to hear federal question cases).[345] Thus, if Congress were to go "too far" (a concept defined by whatever theory of judicial enforcement that one adopts), the courts could step in and strike down the jurisdiction-stripping law.

But such reliance on judicial enforcement may give insufficient weight to the political process. Thus, courts could instead treat these Article I safeguards as the only protection for the federal judiciary. Under this approach, in the absence of a structural breakdown (such as the one in *McCardle*), the courts should generally give effect to the jurisdictional limitations that survive the Article I lawmaking process.

This approach would accord with much of the Supreme Court's jurisprudence. The Court has repeatedly given effect to jurisdictional limits on the lower courts — at least when such limitations were challenged as a violation of Article III. For example, in *Lauf v. E.G. Shinner & Co.*,[346] the Court expressly upheld the jurisdictional limitation

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[343] *See* sources cited *supra* notes 19–22 and accompanying text.

[344] *See supra* notes 23–40 and accompanying text.

[345] *See* sources cited *supra* notes 27, 29 and accompanying text.

[346] 303 U.S. 323 (1938).

in the Norris-LaGuardia Act, stating that "[t]here can be no question of the power of Congress . . . to define and limit the jurisdiction of the inferior courts of the United States."[347] The Court has likewise upheld other jurisdictional restrictions on the lower courts[348] and has (at least in dicta) affirmed Congress's power to remove classes of cases from the Court's appellate jurisdiction.[349] Thus, the Court has often indicated a willingness to enforce the jurisdictional limitations that survive the Article I lawmaking process.

This approach would have strong normative underpinnings. As Professor Charles Black observed, the very existence of a congressional power to limit federal jurisdiction can serve to legitimize judicial decisions.[350] Professor Black explained: "'Jurisdiction' is the *power to decide*. If Congress has wide and deep-going power over the courts' *jurisdiction*, then the courts' *power to decide* is a continuing and visible concession from a democratically formed Congress."[351] Thus, when Congress fails to enact a statute like the Norris-LaGuardia Act and leaves federal jurisdiction in place, it signals (by its forbearance) that it has decided to trust certain matters to the independent federal judiciary.

As we have seen, the structural safeguards of Article I are quite effective at ensuring that Congress exercises such restraint. As a result, when the political impetus for reform is strong enough to overcome those structural hurdles (except in cases of a structural breakdown), federal courts should perhaps respect that overwhelming democratic consensus. That may be particularly true given that some federal jurisdiction (at the Supreme Court level) is likely to remain in place. It has proven especially challenging for legislators to assemble the supermajority necessary to strip the Court's appellate review power.

But this latter approach may not be entirely satisfying in those (rare) instances when Congress does enact jurisdiction-stripping legislation, including that which applies to the Supreme Court. There may, however, be an intermediate alternative — one that would extend the concept of "resistance norms" beyond cases of structural breakdown, and one that would accord with another line of Supreme Court jurisprudence. The courts could resist efforts to strip federal jurisdiction through statutory construction, requiring a super-strong "clear state-

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347 *Id.* at 330.

348 *See* Yakus v. United States, 321 U.S. 414, 429–30, 437–38 (1944) (upholding a law that allowed the Supreme Court, but not a lower court, to review certain administrative orders); Sheldon v. Sill, 49 U.S. 441, 449–50 (1850).

349 *See, e.g.*, The "Francis Wright," 105 U.S. 381, 386 (1882) ("Not only may whole classes of cases be kept out of the [Supreme Court's appellate] jurisdiction altogether, but particular classes of questions may be subjected to re-examination and review, while others are not.").

350 *See* BLACK, *supra* note 13, at 18.

351 *Id.*

ment" from Congress before concluding that a statute has eliminated all federal review power.

Although the Supreme Court has repeatedly stated that Congress has plenary authority to limit (and even eliminate) the jurisdiction of the lower federal courts and its own appellate jurisdiction, it has been reluctant to construe statutes as removing all avenues of federal court review. That has been true even in the absence of a (clear) structural breakdown. Thus, the Court in *Felker* identified an avenue through which, in exceptional cases, it could examine lower court decisions in habeas cases. Likewise, although the Court has upheld restrictions on the lower courts, it has always interpreted such provisions narrowly in order to preserve review of constitutional claims.[352]

Furthermore, and perhaps surprisingly, this "intermediate" approach has repeatedly been supported by the executive branch. Thus, in *Felker*, the Solicitor General encouraged the Supreme Court to adopt a narrow construction of the appellate review provision in AEDPA.[353] Likewise, the Department of Justice has (especially in recent decades) repeatedly urged the courts to construe broadly worded jurisdiction-stripping laws narrowly in order to preserve federal jurisdiction over constitutional claims.[354] This support from a coequal branch of the federal government undoubtedly gives the judiciary enhanced confidence in construing jurisdiction-stripping laws narrowly. Indeed, this consistent executive branch practice suggests an additional structural protection for the federal courts — one based in Article II.

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[352] *See, e.g.*, Demore v. Kim, 538 U.S. 510, 517 (2003); Webster v. Doe, 486 U.S. 592, 603 (1988); Johnson v. Robison, 415 U.S. 361, 373–74 (1974); David Cole, *Jurisdiction and Liberty: Habeas Corpus and Due Process as Limits on Congress's Control of Federal Jurisdiction*, 86 GEO. L.J. 2481, 2490 (1998) ("The presumption . . . is so strong that the Supreme Court has *never* found that a jurisdictional statute barred judicial review of a constitutional claim.").

[353] *See* Brief for the United States as Amicus Curiae at 11–12, Felker v. Turpin, 518 U.S. 651 (1996) (No. 95-8836), 1996 WL 284697, at *11–12 (asserting that AEDPA "does not divest this Court of its jurisdiction to entertain original petitions for habeas corpus" and thus "does not work an unconstitutional restriction of the jurisdiction of this Court," *id.* at *12).

[354] The most well known example is the Justice Department's approach in litigation over AEDPA and the Illegal Immigration Reform and Immigrant Responsibility Act, when the government conceded that these statutes preserved review of constitutional questions. *See* Cole, *supra* note 352, at 2484 (observing that "the federal government . . . conceded . . . that statutory language appearing to preclude all judicial review should be read to preserve review" of substantial constitutional claims); McConnell, *supra* note 286, at 90 (same). But the government has also encouraged the courts to construe jurisdiction-stripping laws narrowly in other contexts. *See, e.g.*, Transcript of Oral Argument at 4, *Demore*, 538 U.S. 510 (No. 01-1491), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/01-1491.pdf (Solicitor General Ted Olson stating, in response to a question from Justice Scalia regarding whether the relevant statute precluded jurisdiction, that "it's the Government's position . . . that that provision does not apply to a habeas corpus challenge to the constitutionality of the statute itself").

(Although a full discussion of this possibility is beyond the scope of this Article, I explore it in separate work.[355])

Notably, this interpretive approach would not affect Congress's ability to enact *most* jurisdiction-stripping measures. The Court applies this clear statement rule only in certain contexts that implicate what it views as particularly important constitutional values (such as limits on its own appellate jurisdiction and judicial review of constitutional claims). This theory would leave Congress free to enact other jurisdiction-stripping laws, such as the Norris-LaGuardia Act, that do not impinge on such values.

This "clear statement" approach may thus have the dual benefit of not only giving some effect to the Article I legislative process, but also ensuring (in certain areas of particular constitutional concern) that this process works. As Professor Young has stated, clear statement rules "add to the hurdles that any legislation must pass, by increasing the political costs that proponents must incur in order to achieve their objectives."[356] Under this approach, Congress could potentially respond to a judicial decision by reenacting the jurisdiction-stripping law in more clearly articulated terms. But supporters of the judiciary (even if they were only in the minority) could again seek to use the structural veto offered by the bicameralism and presentment process.

This approach is not without flaw. Clear statement rules have recently been the target of substantial negative academic commentary.[357] Although such rules may interfere with congressional power less than outright invalidation, they nevertheless impose a "clarity tax" on Congress that may be unwarranted.[358] Such an approach may be particularly inappropriate in this context, where the bicameralism and presentment procedures already serve remarkably well in the first instance to block jurisdiction-stripping measures.

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[355] *See* Tara Leigh Grove, The Article II Safeguards of Federal Jurisdiction (Nov. 8, 2010) (unpublished manuscript) (on file with the Harvard Law School Library); *supra* note 286.

[356] Young, *supra* note 334, at 1608–09.

[357] *See, e.g.*, William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 629–40 (1992) (criticizing the Court's recent use of clear statement rules on multiple grounds). Many clear statement rules, including those discussed here, are a subset of the canon of constitutional avoidance and accordingly are subject to the numerous critiques that have been levied against that canon. *See, e.g.*, Richard A. Posner, *Statutory Interpretation — in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 816 (1983) (arguing that the avoidance canon "create[s] a judge-made constitutional 'penumbra'"); Frederick Schauer, Ashwander *Revisited*, 1995 SUP. CT. REV. 71, 74 (asserting that the avoidance canon may at times be as great a "judicial intrusion" as outright invalidation because it leads courts to interpret statutes "in ways that its drafters did not anticipate[] and . . . may not have preferred").

[358] John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 403, 449 (2010).

Ultimately, my goal here is not to advocate one approach over another. Indeed, the primary focus of my Article is not to determine how the courts should react on the rare occasions when Congress *does* enact jurisdiction-stripping legislation. Instead, it is to show that our Article I lawmaking process offers a crucial (and previously overlooked) protection for the federal judiciary that renders such legislation extremely difficult to enact.

Thus, the federal judiciary is not (as many scholars have previously assumed) at the mercy of Congress. Supporters of the judiciary have repeatedly used the structural tools of Article I to protect the Article III judiciary. That has been particularly true at the level of the Supreme Court. The structural safeguards of Article I have worked especially well to ensure the Court's position as the "final arbiter in the court system and hierarchy."[359]

VI. CONCLUSION

The bicameralism and presentment procedures of Article I were expressly designed to channel the influence of "factions."[360] "The key to making the Constitution work lay in finding a way to harness these [competing] political interests . . . for the benefit of constitutional enforcement."[361] This structural design seems to have served its purpose in protecting the federal judiciary. Even when the federal courts have issued controversial opinions that trigger wide public condemnation, supporters of the judiciary have repeatedly used their structural veto points to block jurisdiction-stripping proposals.

These structural safeguards have been especially effective at ensuring the Supreme Court's role atop the judicial hierarchy. Supporters of the federal judiciary have, in all but two instances, managed to preserve the Court's "special" role in "establish[ing] the legal . . . framework within which [the lower courts] . . . operat[e]."[362]

Thus, contrary to the concerns of many scholars, the Constitution does not, by permitting Congress to regulate federal jurisdiction, "authoriz[e] its own destruction."[363] Instead, our system has relied — with apparent success — on the structural safeguards of Article I to preserve the Article III judicial power.

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[359] H.R. REP. NO. 108-691, at 78 (2004) (transcript of committee hearings) (statement of Rep. Melvin Watt, D-N.C.).

[360] *See* THE FEDERALIST NO. 51 (James Madison).

[361] Kramer, *supra* note 90, at 727.

[362] Gillman, *supra* note 72, at 518.

[363] Hart, *supra* note 1, at 1365.

APPENDIX

SENATE VOTE ON BILL TO REPEAL 1867 APPELLATE REVIEW PROVISIONS MARCH 26, 1868

CONG. GLOBE, 40TH CONG., 1ST SESS. 2128 (1868)

	Vote			
Party	Nay	Yea	No Vote	**Total**
Democrat	5	1	2	**8**
Republican	2	31	9	**42**
Unconditional Unionist		1	1	**2**
Unionist	2			**2**
Total	**9**	**33**	**12**	**54**

HOUSE VOTE ON BILL TO REPEAL 1867 APPELLATE REVIEW PROVISIONS MARCH 27, 1868

CONG. GLOBE, 40TH CONG., 1ST SESS. 2170 (1868)

	Vote			
Party	Nay	Yea	No Vote	**Total**
Conservative			1	**1**
Conservative Republican			1	**1**
Democrat	33		11	**44**
Independent Republican	1	1		**2**
Republican		113	28	**141**
Total	**34**	**114**	**41**	**189**

HOUSE VOTE ON CULBERSON BILL: 1880
MARCH 4, 1880

10 CONG. REC. 1305 (1880)

	Vote			
Party	Nay	Yea	No Vote	**Total**
Democrat	1	117	23	**141**
Greenbacker		5	2	**7**
Independent Democrat		6	1	**7**
National		3		**3**
Republican	73	28	30	**131**
None		3		**3**
Total	**74**	**162**	**56**	**292**

HOUSE VOTE ON CULBERSON BILL: 1883
JANUARY 16, 1883

14 CONG. REC. 1254 (1883)

	Vote			
Party	Nay	Yea	No Vote	**Total**
Democrat		89	40	**129**
Greenbacker		4		**4**
Independent			1	**1**
Independent Democrat			2	**2**
Independent Republican			1	**1**
National		1		**1**
Republican	67	40	43	**150**
None			3	**3**
Total	**67**	**134**	**90**	**291**

SENATE VOTE ON SCHOOL PRAYER AMENDMENT[364] (ADDING THE AMENDMENT TO THE DEPARTMENT OF EDUCATION BILL) APRIL 5, 1979

125 CONG. REC. 7581 (1979)

		Vote			
Party	**Region**	Nay	Yea	No Vote	**Total**
Democrat	South	1	16	3	**20**
	Non-South	26	8	4	**38**
Independent	South		1		**1**
	Non-South				**0**
Republican	South	1	5	1	**7**
	Non-South	9	17	8	**34**
Total		**37**	**47**	**16**	**100**

[364] For the purposes of this appendix, the "South" includes the following states: Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and West Virginia.

SENATE VOTE ON SCHOOL PRAYER AMENDMENT
(ADDING THE AMENDMENT TO THE JUDICIARY BILL)
APRIL 9, 1979

125 CONG. REC. 7644 (1979)

		Vote			
Party	**Region**	Nay	Yea	No Vote	**Total**
Democrat	South		18	2	**20**
	Non-South	28	7	2	**37**
Independent	South		1		**1**
	Non-South				**0**
Republican	South	1	5	1	**7**
	Non-South	11	20	3	**34**
Total		**40**	**51**	**8**	**99**

SENATE VOTE ON SCHOOL PRAYER AMENDMENT
(PASSING THE AMENDMENT AS PART OF THE JUDICIARY BILL)
APRIL 9, 1979

125 CONG. REC. 7648 (1979)

		Vote			
Party	**Region**	Nay	Yea	No Vote	**Total**
Democrat	South	1	16	3	**20**
	Non-South	18	17	3	**38**
Independent	South		1		**1**
	Non-South				**0**
Republican	South		6	1	**7**
	Non-South	11	21	2	**34**
Total		**30**	**61**	**9**	**100**

SENATE VOTE ON SCHOOL PRAYER AMENDMENT
(REMOVING THE AMENDMENT FROM THE DEPARTMENT OF EDUCATION BILL)
APRIL 9, 1979

125 CONG. REC. 7657 (1979)

		Vote			
Party	**Region**	Nay	Yea	No Vote	**Total**
Democrat	South	12	7	1	**20**
	Non-South	4	32	2	**38**
Independent	South	1			**1**
	Non-South				**0**
Republican	South	6		1	**7**
	Non-South	17	14	3	**34**
Total		**40**	**53**	**7**	**100**

SENATE VOTE ON BUSING
FEBRUARY 4, 1982

128 CONG. REC. 886 (1982)

		Vote			
Party	**Region**	Nay	Yea	No Vote	**Total**
Democrat	South	2	14		**16**
	Non-South	22	7	1	**30**
Independent	South		1		**1**
	Non-South				**0**
Republican	South		9	2	**11**
	Non-South	14	27	1	**42**
Total		**38**	**58**	**4**	**100**

HOUSE VOTE ON MARRIAGE PROTECTION ACT OF 2004
JULY 22, 2004

150 CONG. REC. H6612 (daily ed. July 22, 2004)

	Vote			
Party	Nay	Yea	No Vote	**Total**
Democrat	176	26	3	**205**
Democrat/Republican		2		**2**
Independent	1			**1**
Republican	17	205	5	**227**
Total	**194**	**233**	**8**	**435**

HOUSE VOTE ON PLEDGE PROTECTION ACT OF 2004
SEPTEMBER 23, 2004

150 CONG. REC. H7478 (daily ed. Sept. 23, 2004)

	Vote			
Party	Nay	Yea	No Vote	**Total**
Democrat	165	35	5	**205**
Democrat/Republican		2		**2**
Independent	1			**1**
Republican	7	210	8	**225**
Total	**173**	**247**	**13**	**433**

HOUSE VOTE ON PLEDGE PROTECTION ACT OF 2006
JULY 19, 2006

152 CONG. REC. H5433 (daily ed. July 19, 2006)

	Vote			
Party	Nay	Yea	No Vote	**Total**
Democrat	158	39	4	**201**
Independent	1			**1**
Republican	8	221	1	**230**
Total	**167**	**260**	**5**	**432**

SENATE VOTE ON SPECTER AMENDMENT TO
PRESERVE HABEAS JURISDICTION
SEPTEMBER 28, 2006

152 CONG. REC. S10,369 (daily ed. Sept. 28, 2006)

	Vote			
Party	Nay	Yea	No Vote	**Total**
Democrat	1	43		**44**
Independent		1		**1**
Republican	50	4	1	**55**
Total	**51**	**48**	**1**	**100**

SENATE VOTE ON MILITARY COMMISSIONS ACT OF 2006
SEPTEMBER 28, 2006

152 CONG. REC. S10,420 (daily ed. Sept. 28, 2006)

	Vote			
Party	Nay	Yea	No Vote	**Total**
Democrat	32	12		**44**
Independent	1			**1**
Republican	1	53	1	**55**
Total	**34**	**65**	**1**	**100**

HOUSE VOTE ON MILITARY COMMISSIONS ACT OF 2006
SEPTEMBER 29, 2006

152 CONG. REC. H7959 (daily ed. Sept. 29, 2006)

	Vote			
Party	Nay	Yea	No Vote	**Total**
Democrat	162	32	7	**201**
Independent	1			**1**
Republican	7	218	5	**230**
Total	**170**	**250**	**12**	**432**