Jurisdiction Stripping: A Forgotten Check and Balance?

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Introduction

The past decade has witnessed an unprecedented erosion of public confidence in the Supreme Court as an institution. Current poll numbers show a record-low number of Americans have confidence (35%)[1] or trust (45%)[2] in the nation's highest court, following a steady decline since the early 2000s. From *Citizens United v. FEC* (2010), which dramatically expanded corporate political speech rights,[3] to *Shelby County v. Holder* (2013), which invalidated key provisions of the Voting Rights Act,[4] to *Trump v. Hawaii* (2018), which upheld the controversial travel ban,[5] to *Dobbs v. Jackson Women's Health Organization* (2022), which overturned nearly fifty years of abortion-rights precedent established in *Roe v. Wade*,[6] to *Trump v. United States* (2024), which even conservatives have hailed as an "abominable decision"[7] for granting seemingly absolute immunity over presidential acts that violate the rule of law,[8] the Court's decisions have increasingly been viewed through a partisan lens.

In response, lawmakers and commentators across the political spectrum have advanced various structural reforms, from expanding the number of justices[9] to imposing term limits.[10] Amid these familiar proposals, less attention has been paid to perhaps the most textually explicit

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[1] "Americans' Confidence in Judicial System Drops to Record Low," PBS News, December 17, 2024, https://www.pbs.org/newshour/politics/americans-confidence-in-judicial-system-drops-to-record-low.
[2] Sofie Adams, "Trust in U.S. Supreme Court Continues to Sink | the Annenberg Public Policy Center of the University of Pennsylvania," The Annenberg Public Policy Center of the University of Pennsylvania, October 2, 2024, https://www.annenbergpublicpolicycenter.org/trust-in-us-supreme-court-continues-to-sink/.
[3] Citizens United v. FEC, 558 U.S. 310 (2010)
[4] Shelby County v. Holder, 570 U.S. 529 (2013)
[5] Trump v. Hawaii, 585 U.S. ___ (2018)
[6] Dobbs v. Jackson Women's Health Organization, 597 U.S. ___ (2022)
[7] Jordan King, "Supreme Court Trashed by Republican Judge: 'Abominable,'" *Newsweek*, July 8, 2024, https://www.newsweek.com/supreme-court-immunity-donald-trump-judge-j-michael-luttig-1922099.
[8] Trump v. United States, 603 U.S. ___ (2024)
[9] "Democrats Reintroduce Bill to Expand U.S. Supreme Court - Democracy Docket," Democracy Docket, May 18, 2023, https://www.democracydocket.com/news-alerts/democrats-introduce-bill-to-expand-u-s-supreme-court/.
[10] Demand Justice, "Reforming the Courts - Demand Justice," February 26, 2025, https://demandjustice.org/priorities/reforming-the-courts/.

check that Congress possesses over the judicial branch: the power to strip the Supreme Court of jurisdiction over certain categories of cases. This seemingly straightforward provision—known as the Exceptions Clause[11]—appears to grant Congress significant authority to limit the types of cases the Supreme Court may hear. Yet despite this explicit constitutional authorization and periodic calls to employ it during times of judicial controversy, jurisdiction stripping remains one of the least discussed in mainstream political discourse,[12] despite simultaneously seeing regular use in more minor legislation.[13]

This reluctance to deploy jurisdiction stripping as a major check on judicial power presents a compelling constitutional puzzle. Why does a mechanism so clearly contemplated by the Constitution's text remain largely unused, even in eras of intense conflict between the legislative and judicial branches? The answer lies in the fact that, in contemporary practice, jurisdiction stripping functions less as a genuine institutional check and more as a form of political theater: a way for legislators to signal partisan commitments or opposition to controversial rulings, rather than to alter the structure of constitutional authority.

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[11] U.S. Const. art. III, § 2, cl. 2.

[12] Sam Baker, "Most Americans Back Term Limits for Supreme Court: Poll," *Axios*, September 13, 2024, https://www.axios.com/2024/09/13/supreme-court-term-limits-ethics.; Liyanga De Silva, "Polling Roundup: Supreme Court Approval Is in the Gutter. Americans Demand Reform.," Demand Justice, August 8, 2024, https://demandjustice.org/polling-roundup-supreme-court-approval-is-in-the-gutter-americans-demand-reform/.; Steven Shepard, "Faith in the Supreme Court Is Down. Voters Now Say They Want Changes.," *POLITICO*, September 30, 2023, https://www.politico.com/news/2023/09/30/supreme-court-ethics-poll-00119236.; While hard to quantify, most polls asking Americans about potential court reforms exclusively ask about court packing, term limits, mandatory retirement age, or a binding code of ethics. I was only able to find a single poll that asked about the subject of jurisdiction stripping, (which I cite in footnote 101) although the poll didn't even use the words jurisdiction stripping, but rather explained its function. Thus, while talked about somewhat, it is proposed nowhere near the level of court packing or term limits. Additionally, although anecdotal, if you were to ask a highschooler in their government class which power Congress has to regulate the Court with checks and balances, I contend that you would be hard pressed to find one who could name jurisdiction stripping.

[13] McCann, Pamela J. Clouser, Charles R. Shipan, and Yuhua Wang. 2021. "Measuring the Legislative Design of Judicial Review of Agency Actions." *Journal of Law, Economics, and Organization*

This paper argues that although jurisdiction stripping remains a valid and potentially powerful tool under Article III, it has been functionally repurposed. Rather than operating as a regularized check on judicial supremacy, it now serves primarily as a signaling mechanism in partisan politics. When jurisdiction stripping does succeed, it tends to occur in low-salience, nonpartisan contexts or under rare conditions of institutional alignment—as in Reconstruction or select wartime exceptions. Understanding this transformation requires looking beyond constitutional doctrine and examining the political, institutional, and strategic incentives that shape congressional behavior.

To explore this shift, the paper proceeds in five parts. First, it outlines the constitutional foundations of jurisdiction stripping, including the text, original understanding, and structural implications of the Exceptions Clause. Second, it introduces a framework for distinguishing sincere and symbolic uses of the power and applies this framework to a set of case studies, ranging from *Ex parte McCardle* to FDR to recent post-*Dobbs* proposals. Third, it analyzes the strategic disincentives that make jurisdiction stripping politically unattractive despite its legal plausibility. Finally, the paper reflects on the normative implications of this institutional imbalance: whether Congress ought to revive jurisdiction stripping as a meaningful tool of democratic contestation, and what such a revival would require.

This is not a paper about whether Congress *can* strip the jurisdiction of the federal courts. It is a paper about why it *doesn't*—and what that choice reveals about the constitutional order.

I. Constitutional Foundations and Understandings of Jurisdiction Stripping

A. The Creation of the Federal Court System

The history of jurisdiction stripping is inextricably tied to the establishment of the federal judiciary itself. To understand how jurisdiction stripping has shifted from a constitutional tool to a symbolic gesture, we must begin with the incomplete but intentional framework laid out in Article III. Article III of the Constitution created a framework for federal courts that was both revolutionary and intentionally incomplete. Section 1 established that "the judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[14] This simple statement reflected a compromise reached at the Constitutional Convention, known as the "Madisonian Compromise," between those who wanted constitutionally-mandated inferior federal courts and those who believed state courts would suffice.[15] By leaving the creation of lower federal courts to congressional discretion, the founders established a critical premise for jurisdiction-stripping debates: if Congress could choose whether to create lower federal courts at all, it logically retained significant control over which cases they could hear—their jurisdiction.[16] However, it was not just lower courts whose jurisdiction was up for manipulation.

B. The Textual Basis: Article III's Exceptions Clause

The constitutional foundation for Congress's power to limit Supreme Court jurisdiction lies primarily in Article III, Section 2 of the Constitution, which provides that:

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[14] U.S. Constitution, Art. III, § 1
[15] "Historical Background on Establishment of Article III Courts | Constitution Annotated | Congress.gov | Library of Congress," n.d., https://constitution.congress.gov/browse/essay/artIII-S1-8-2/ALDE_00013558/.
[16] Eisenberg, Theodore, "Congressional Authority to Restrict Lower Federal Court Jurisdiction" (1974). Cornell Law Faculty Publications. 703. https://scholarship.law.cornell.edu/facpub/703

> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.[17]

It is here that we see the two avenues for potential cases to be brought to the Supreme Court; through original or appellate jurisdiction. The first section, which spells out the scenarios under which the Supreme Court has original jurisdiction, acts as a restriction, as Congress cannot expand or retract that jurisdiction, as stated in the seminal case of *Marbury v. Madison* (1803),[18] which will be explained shortly.

However, according to the Federal Judicial Center, "The Supreme Court's original docket has always been a minute portion of its overall caseload. Between 1789 and 1959, the Court issued written opinions in only 123 original cases. Since 1960, the Court has received fewer than 140 motions for leave to file original cases, nearly half of which were denied a hearing."[19] The few cases the court has heard on original jurisdiction recently "often involve disputes over boundaries or water rights"[20] involving states or federally recognized Native American tribes.[21]

As such, most attention, and the focus of this paper, has been on the second sentence regarding appellate jurisdiction. This clause, known as the "Exceptions Clause," appears to grant

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[17] U.S. Const. art. III, § 2.
[18] Marbury v. Madison, 5 U.S. 137 (1803)
[19] "Work of the Courts | Federal Judicial Center," n.d., https://www.fjc.gov/history/work-courts/jurisdiction-original-supreme-court%20 https://scholarship.law.bu.edu/cgi/viewcontent.cgi?article=1040&context=faculty_scholarship.
[20] Stephen Wermiel, "SCOTUS for Law Students: Original Cases," SCOTUSblog, October 14, 2014, https://www.scotusblog.com/2014/10/scotus-for-law-students-original-cases/.
[21] Jay D. Wexler and David Hatton, "The First Ever (Maybe) Original Jurisdiction Standings," journal-article, by Boston University School of Law and Boston University School of Law, *Journal of Legal Metrics*, 2012, 19, https://scholarship.law.bu.edu/cgi/viewcontent.cgi?article=1040&context=faculty_scholarship.

Congress significant authority to shape the Supreme Court's appellate jurisdiction—the cases it may hear on appeal from lower courts. The plain text suggests a broad congressional power to make "exceptions" to the Court's jurisdiction, seemingly enabling Congress to remove entire categories of cases from Supreme Court review.

C. Original Understanding and Founding-Era Debates

The historical record provides mixed evidence regarding the Founders' understanding of congressional power over jurisdiction. At the Constitutional Convention, the judiciary article underwent significant revision, but the Exceptions Clause itself received relatively little direct discussion.[22] This silence has led to competing interpretations of original intent.

Alexander Hamilton, in *Federalist* No. 81, acknowledged the Supreme Court's potential role in being able to hear any case brought to it, but emphasized the congressional ability to rein this in and empower lower courts to fit the public's needs:

> To avoid all inconveniences, it will be safest to declare generally, that the Supreme Court shall possess appellate jurisdiction both as to law and FACT, and that this jurisdiction shall be subject to such EXCEPTIONS and regulations as the national legislature may prescribe. This will enable the government to modify it in such a manner as will best answer the ends of public justice and security…
> The amount of the observations hitherto made on the authority of the judicial department is this: that it has been carefully restricted to those causes which are manifestly proper for the cognizance of the national judicature; that in the partition of this authority a very small portion of original jurisdiction has been

[22] "James Madison's Notes of the Constitutional Convention (July 18, 1787)," n.d., https://www.consource.org/document/james-madisons-notes-of-the-constitutional-convention-1787-7-18/.

> preserved to the Supreme Court, and the rest consigned to the subordinate tribunals; that the Supreme Court will possess an appellate jurisdiction, both as to law and fact, in all the cases referred to them, both subject to any EXCEPTIONS and REGULATIONS which may be thought advisable.[23]

This language by Hamilton implies that he at least thought Congress's power over jurisdiction wouldn't be so sacred, but rather regularly used so long as they thought it advisable.

D. The Judiciary Act of 1789

Congress seemed to agree and exercised its power promptly with the Judiciary Act of 1789, a statute that Associate Justice Henry Billings Brown would later call "probably the most important and the most satisfactory act ever passed by Congress."[24] This legislation created the three-tiered federal court structure that persists in modified form today: the Supreme Court, circuit courts, and district courts. The Act granted federal courts jurisdiction over cases involving federal questions, diverse citizenship, and admiralty matters, among others. However, it notably did not vest the full constitutional scope of jurisdiction permitted under Article III. For example, general federal question jurisdiction was not granted to lower federal courts until 1875.[25] This selective allocation demonstrated that, from the very beginning, Congress understood its authority to include not just the creation of courts but also the determination of what cases they could hear. Professor Richard Fallon notes that "[f]rom this grant of congressional discretion, the conclusion follows almost ineluctably that Congress can establish lower courts but give them

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[23] "Research Guides: Federalist Papers: Primary Documents in American History: Federalist Nos. 81-85," n.d., https://guides.loc.gov/federalist-papers/text-81-85#s-lg-box-wrapper-25493488.
[24] Warren, Charles. 1923. The Supreme Court in United States History (Rev. ed.). Boston: Little, Brown, and Company. Page 12.
[25] "Jurisdiction: Federal Question | Federal Judicial Center," n.d., https://www.fjc.gov/history/work-courts/jurisdiction-federal-question.

less than the full jurisdiction that the Constitution would permit."[26] This principle would become central to later jurisdiction-stripping debates.

E. Marbury v. Madison and Judicial Review

The landmark case of *Marbury v. Madison* established judicial review—the authority of federal courts to invalidate Acts of Congress that conflict with the Constitution. In doing so, Chief Justice John Marshall's opinion asserted that it is "emphatically the province and duty of the judicial department to say what the law is."[27] This pronouncement would be the first hurdle to significantly complicate future debates about jurisdiction stripping, as it seemingly asserted the Court's domain over ruling on laws. However, the use of "judicial department," rather than "Supreme Court," implies so long as the case is able to be heard by *some* court, even if not the Supreme Court, it is constitutional.

Ironically, *Marbury* itself involved a form of jurisdictional limitation. The Court held that Section 13 of the Judiciary Act of 1789, which had granted the Supreme Court original jurisdiction to issue writs of mandamus, was unconstitutional because it attempted to expand the Court's original jurisdiction beyond the bounds established in Article III.[28] This ruling simultaneously established judicial review while acknowledging limits on the Court's jurisdiction, recognizing the difference in power that Congress had over its original versus appellate.[29] However, this early assertion of judicial review would still coexist uneasily with the

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[26] Richard H. Fallon and Ralph S. Tyler, Jr. Professor of Law, Harvard Law School, "JURISDICTION-STRIPPING RECONSIDERED," journal-article, *Virginia Law Review*, vol. 96, August 19, 2010, page 1065. https://www.virginialawreview.org/wp-content/uploads/2020/12/1043.pdf.
[27] Marbury v. Madison, 5 U.S. 137 (1803)
[28] Ibid.
[29] Robert N. Clinton, "Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III," Penn Carey Law: Legal Scholarship Repository, n.d., https://scholarship.law.upenn.edu/penn_law_review/vol132/iss4/2/.

reality of congressional authority over jurisdiction, a tension thrown into sharp relief by the political fallout of the Judiciary Act of 1801.

F. The Judiciary Act of 1801 and Repeal of 1802

At the heart of *Marbury v. Madison* was the politically charged Judiciary Act of 1801, passed in the waning days of the Adams administration, which expanded federal court jurisdiction and created numerous new judgeships.[30] The incoming Jefferson administration, viewing the Act as a partisan attempt to entrench Federalist judges, promptly secured its repeal with the Judiciary Act of 1802.[31]

This repeal, in addition to ending the Supreme Court's 1802 term, eliminated newly created circuit courts and effectively stripped jurisdiction from judges who had already been appointed and confirmed.[32] When challenged in *Stuart v. Laird* (1803), the Supreme Court upheld Congress's authority to reorganize the judiciary, including the elimination of courts and the reassignment of judges, and by logic, control over their jurisdiction.[33]

G. Founding Era Cases

The Supreme Court's earliest pronouncements on congressional control over jurisdiction emphasized broad legislative authority. In *Wiscart v. D'Auchy* (1796), Chief Justice Oliver Ellsworth declared that "if Congress has provided no rule to regulate our proceedings, we cannot exercise an appellate jurisdiction; and if the rule is provided, we cannot depart from it."[34] This

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[30] Urofsky and Melvin I, "Judiciary Act of 1802 | United States Law | Britannica," Encyclopedia Britannica, n.d., https://www.britannica.com/topic/Judiciary-Act-of-1801.
[31] Ibid.
[32] Ibid.
[33] Stuart v. Laird, 5 U.S. 299 (1803)
[34] "Exceptions Clause and Congressional Control Over Appellate Jurisdiction | Constitution Annotated | Congress.gov | Library of Congress," n.d., https://constitution.congress.gov/browse/essay/artIII-S2-C2-6/ALDE_00013949/.

early acknowledgment of congressional control over appellate procedure established a deferential approach to legislative regulation of jurisdiction.

The landmark case of *Durousseau v. United States* (1810) further developed this understanding. Chief Justice Marshall wrote that the "appellate powers of this Court are not given by the judicial act. They are given by the constitution. But they are limited and regulated by the judicial act, and by such other acts as have been passed on the subject."[35] This statement shows that, while the base standard is what is given by the Constitution, Congress has the authority to curb that with simple legislation. These early patterns—of delegated discretion, selective jurisdiction, and judicial deference—laid the groundwork for a power that remains constitutionally available but politically underutilized in modern times.

II. From Constitutional Tool to Political Signal: Rethinking Jurisdiction Stripping in Practice

A. The Puzzle of Underuse

Although Article III of the Constitution explicitly authorizes Congress to make "exceptions" to the Supreme Court's appellate jurisdiction, Congress has rarely exercised this power in a sustained or impactful way. While calls for jurisdiction stripping often emerge during moments of political controversy—such as in debates over abortion, civil rights, or executive power—they almost never lead to lasting changes in the Court's role.[36] This underuse presents a puzzle: why does Congress largely refrain from using a power that is not only constitutionally permitted but also supported by historical precedent?

[35] Durousseau v. United States, 10 U.S. 307 (1810)
[36] Daniel Epps & Alan M. Trammell, The False Promise of Jurisdiction Stripping, 123 Colum. L. Rev. 2077 (2023).

One possible explanation lies in the doctrinal uncertainty surrounding the scope of the Exceptions Clause. Some scholars, including Henry Hart, have argued that jurisdiction stripping cannot be used to undermine the judiciary's "essential functions."[37] Others worry that such efforts might provoke judicial resistance or erode the legitimacy of Congress as a co-equal branch.[38] Yet these concerns alone do not fully explain the observed pattern of disuse. Rather, the relative dormancy of jurisdiction stripping is better understood as a function of institutional incentives and political strategy. Congress may possess the formal power to limit jurisdiction, but it often lacks the practical will or incentive to do so.

B. The Strategic Logic of Symbolic Jurisdiction Stripping

Jurisdiction stripping offers a revealing case study of how Congress uses constitutional powers symbolically rather than substantively. According to David Mayhew's classic analysis of congressional behavior, members of Congress are motivated above all by the desire for reelection and are therefore incentivized to engage in actions that provide credit-claiming opportunities, even when those actions have little chance of policy success.[39] Introducing a jurisdiction-stripping bill allows legislators to express ideological commitments and rally partisan support, even if the bill is destined to fail.

Truly partisan jurisdiction stripping operates under the guise of what Mark Tushnet calls "constitutional hardball,"[40] where actions are constitutionally permissible but challenge settled pre-constitutional understandings. Practitioners "see themselves as playing for keeps in a special

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[37] Jason J. Salvo, *Naked Came I: Jurisdiction-Stripping and the Constitutionality of House Bill 3313*, 29 SEATTLE U. L. REV. 963, 965 (2006).
[38] Ibid.
[39] Thomas, Paul G. "David R. Mayhew, Congress: The Electoral Connection. New Haven and London: Yale University Press, 1974, Pp. Vii, 194." Canadian Journal of Political Science 9, no. 1 (1976): 161–62. https://doi.org/10.1017/S0008423900043493.
[40] Tushnet, Mark V., Constitutional Hardball. 37 J. Marshall L. Rev. 523-553 (2004), Available at SSRN: https://ssrn.com/abstract=451960 or http://dx.doi.org/10.2139/ssrn.451960

kind of way,"[41] believing "the stakes of the political controversy their actions provoke are quite high, and that their defeat and their opponents' victory would be a serious, perhaps permanent setback to the political positions they hold."[42] Instead, these "performative" attempts at jurisdiction stripping are not meant to resolve disputes or govern effectively, but to signal partisan resolve and score political points. These actions may help legislators build reputations within their party or among constituents, but they rarely advance a coordinated institutional agenda. In this environment, jurisdiction stripping becomes a tool of rhetorical resistance rather than a serious attempt to shift the balance of constitutional power.

Part of this is due to the fact that sincere jurisdiction stripping—in which Congress actively seeks to remove judicial oversight in order to implement a policy goal—requires a level of political alignment and institutional follow-through that is increasingly rare. As Frances Lee has documented, rising partisan polarization and the decline of bipartisan coalition-building have made coordinated legislative efforts far more difficult to achieve.[43] In this context, symbolic gestures are easier, safer, and often more electorally advantageous than substantive efforts to limit the courts.

C. A Typology: Symbolic vs. Sincere Jurisdiction Stripping

To analyze the modern uses of jurisdiction stripping, this paper proposes a typology distinguishing between "symbolic" and "sincere" efforts. The distinction turns on four key dimensions:

- Intent: Was the proposal introduced with the expectation of legislative success, or as a form of political signaling?

[41] Ibid, 523.
[42] Ibid.
[43] Lee, Frances E. *Insecure Majorities: Congress and the Perpetual Campaign*. Chicago: The University of Chicago Press, 2016

- Political Context: Was the proposal introduced during a period of unified government or institutional crisis?

- Institutional Follow-through: Were there subsequent efforts to pass the proposal, coordinate with the executive, or insulate it from judicial invalidation?

- Public Salience: Was the issue high-profile and ideologically polarizing, or low-salience and procedural?

This typology allows us to differentiate between jurisdiction-stripping efforts aimed at institutional change and those aimed primarily at political communication. The next section applies this framework to several historical episodes to assess how Congress has actually used this power in practice.

D. Case Studies in Jurisdiction Stripping

i. *Ex parte McCardle* (1869): A Sincere Use Under Exceptional Conditions

The case of *Ex parte McCardle* (1869) stands as the most frequently cited and arguably most successful instance of congressional jurisdiction stripping. The case arose amid intense political conflict between Congress and President Andrew Johnson over Reconstruction policy. William McCardle, a Mississippi newspaper editor, was arrested by military authorities for publishing articles critical of Reconstruction.[44] McCardle petitioned for habeas corpus, challenging the constitutionality of the Military Reconstruction Act. His case reached the Supreme Court through the Habeas Corpus Act of 1867, which had expanded federal courts' habeas jurisdiction.[45]

[44] William W. Van Alstyne, "A Critical Guide to Ex Parte McCardle," Arizona Law Review 15, no. 2 (1973): 239, available at SSRN: https://ssrn.com/abstract=1969870.
[45] Ibid.

After the Supreme Court heard oral arguments but before it could render a decision, the Republican-controlled Congress—fearing the Court might invalidate key Reconstruction legislation—responded by repealing the specific jurisdictional statute under which McCardle had appealed.[46] The Repealing Act of 1868 explicitly withdrew the Supreme Court's jurisdiction over appeals from habeas corpus decisions made under the 1867 Habeas Corpus Act. President Johnson vetoed the law, arguing that if Congress could withdraw jurisdiction from cases that challenged the validity of federal laws, it could "sweep away every check on arbitrary and unconstitutional legislation."[47] Congress ignored him and overrode his veto, passing the law.[48]

In a unanimous decision, the Court acknowledged Congress's action and dismissed the case for lack of jurisdiction. Chief Justice Chase wrote for a unanimous court:

> We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words…
>
> Jurisdiction is power to declare the law, and, when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause. And this is not less clear upon authority than upon principle.[49]

This episode is often taken as clear doctrinal affirmation of the Exceptions Clause. But its real value for this paper lies in the political and strategic conditions under which it succeeded. *McCardle* represents a rare case of sincere jurisdiction stripping—that is, a coordinated, viable, and intentional effort to remove judicial oversight for a high-stakes policy matter. The

[46] Ibid.
[47] Salmon P. Chase and Federal Judicial Center, "Cases That Shaped the Federal Courts," 2020, https://www.fjc.gov/sites/default/files/cases-that-shaped-the-federal-courts/pdf/McCardle.pdf.
[48] Ibid.
[49] Ex parte McCardle, 74 U.S. 506 (1868)

Republicans who controlled Congress at the time viewed the Court as a serious institutional threat to Reconstruction policy and acted decisively to limit its reach.

Several features distinguish *McCardle* from later, more symbolic efforts. First, it occurred during a moment of intense national crisis and unified government. Congress had both the political will and the partisan control necessary to take dramatic action, as Republicans held the largest majority a party has ever held.[50] Second, the stakes were institutional and existential: invalidation of the Reconstruction Acts would have severely undermined the entire postwar settlement.[51] Third, the follow-through was complete: Congress passed the repeal swiftly and deliberately, and the Court, in turn, acknowledged its authority to do so without serious challenge. Fourth, this was mostly composed of the same members who had reduced the size of the Supreme Court to prevent President Johnson from appointing Justices that would have ruled against the Reconstruction Republican agenda.[52]

This success has not been replicated in the modern era, and for good reason. Few moments offer the combination of urgency, political alignment, and institutional clarity that characterized Reconstruction. *McCardle* should be viewed not as a model for regular legislative practice, but as an exceptional exercise of a power that is largely dormant in contemporary politics. The case thus marks a high-water mark for jurisdiction stripping, not a typical example.

However, the high mark of *McCardle* was not as high as it might seem. Professor William Van Alstyne has noted the significance of this qualification, stating that "*McCardle*, in

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[50] House was 173 Republicans to 47 Democrats, "Party Divisions of the House of Representatives, 1789 to Present | US House of Representatives: History, Art & Archives," n.d., https://history.house.gov/Institution/Party-Divisions/Party-Divisions/. Senate was 57 Republicans to 9 Democrats, "U.S. Senate: Party Division," February 24, 2025, https://www.senate.gov/history/partydiv.htm.

[51] Daniel Byman, "White Supremacy, Terrorism, and the Failure of Reconstruction in the United States," *International Security* 46, no. 1 (January 1, 2021): 53–103, https://doi.org/10.1162/isec_a_00410.

[52] In for a penny, in for a pound. If they were willing to shrink the Supreme Court to accomplish their goal, stripping jurisdiction doesn't seem like that much of a step up.

short, upheld only an inessential exception to the Supreme Court's jurisdiction, and did not curtail any of its important authority."[53] This is because, within its unanimous opinion acknowledging the lack of jurisdiction, the Court carefully noted that the 1868 act had not eliminated all avenues for habeas corpus review—suggesting the decision might have been different if Congress had attempted to completely foreclose review of constitutional claims.[54]

This reasoning became significant just a few months later in the subsequent case, *Ex parte Yerger* (1869). Edward Yerger had also filed a habeas petition challenging his military detention. However, rather than relying on the now-repealed 1867 jurisdiction, his attorneys invoked the Court's habeas jurisdiction under the Judiciary Act of 1789, which remained intact.[55] The Court, again through Chief Justice Chase, determined that the 1868 repeal had removed only the 1867 jurisdictional route, not the Court's original habeas jurisdiction under the 1789 Act. The Court held: "[T]he express repeal of only one [jurisdictional] act...was equivalent to an affirmation that the jurisdiction conferred by the other should remain untouched."[56]

The *Yerger* decision effectively cabined *McCardle*, demonstrating that the Court would read jurisdiction-stripping statutes narrowly and preserve alternative routes of review when possible. In practice, this meant that while Congress could close certain avenues of Supreme Court review, the Court would not easily infer congressional intent to block all possible review of constitutional questions. So while *McCardle* still remains the Court's most direct endorsement of jurisdiction-stripping authority, its precedential value is limited by its unique historical context and the Court's careful qualification that alternative avenues for review remained available.

[53] Van Alstyne, "Critical Guide to Ex Parte McCardle," 249.
[54] Ex parte McCardle, 74 U.S. 506 (1868)
[55] Ex parte Yerger, 75 U.S. 85 (1868)
[56] Ibid.

ii. Intentional and Successful: Wartime

Similar to *McCardle*, the next most successful jurisdiction-stripping effort also took place during the fervor of war. As in *McCardle*, Congress was intentional, coordinated, and reflected a genuine desire to constrain judicial oversight over politically sensitive or operationally disruptive issues. Through the Detainee Treatment Act of 2005 (DTA),[57] Congress sought to strip federal courts of jurisdiction to hear habeas petitions from Guantánamo detainees challenging their detention. The Military Commissions Act of 2006 (MCA)[58] later expanded this by explicitly removing habeas jurisdiction from all courts over claims by enemy combatants. These efforts were introduced in response to judicial decisions like *Rasul v. Bush* (2004) and *Hamdan v. Rumsfeld* (2006), which had recognized detainees' access to federal courts.[59] Congress aimed to reassert control over national security policy and limit judicial interference.

Although successfully passed with even greater congressional support than *McCardle*, due to bipartisanship and executive support,[60] the Supreme Court ultimately struck down the habeas-stripping provision of the MCA in *Boumediene v. Bush* (2008), perhaps the most significant modern case on jurisdiction-stripping.[61] While it showed that there were limits to what the court would allow when it comes to jurisdiction stripping, just as the court did with *Yerger* and *McCardle*, this was a 5-4 decision, contrasted with the unanimous *Yerger* and

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[57] United States Department of Defense, "Detainee Treatment Act of 2005 - Sec. 1001 - 1006," *Title X of the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006*, 2005, https://www.govinfo.gov/content/pkg/COMPS-489/pdf/COMPS-489.pdf.
[58] Congress.gov. "S.3930 - 109th Congress (2005-2006): Military Commissions Act of 2006." October 17, 2006. https://www.congress.gov/bill/109th-congress/senate-bill/3930.
[59] Boumediene v. Bush, 553 U.S. 723 (2008)
[60] DTA passed with a 90-9 margin in the Senate. "U.S. Senate: U.S. Senate Roll Call Votes 109th Congress - 1st Session," August 14, 2023, https://www.senate.gov/legislative/LIS/roll_call_votes/vote1091/vote_109_1_00249.htm?congress=109&session=1&vote=00249.; MCA passed with 65-34 margin in the Senate. Congress.gov. "S.3930 - 109th Congress (2005-2006): Military Commissions Act of 2006." October 17, 2006. https://www.congress.gov/bill/109th-congress/senate-bill/3930.
[61] Ibid.

McCardle. With the recent shift in the court composition today, it would probably come out differently. The main dissent, who would probably write today's majority, was by current Chief Justice John Roberts,[62] who also wrote a proposal defending the constitutionality of jurisdiction stripping measures taken by conservatives at the time while working as a lawyer in the Justice Department in the Reagen era.[63]

That said, they were partially effective for a time. Lower courts interpreted the DTA and MCA to limit detainee rights, and the legislation shaped the contours of federal litigation for several years.[64] It laid out the blueprint for how jurisdiction stripping must be structured to be viable. These cases demonstrate that jurisdiction stripping can succeed—but to do so will require large, majority support and coordinated effort.

iii. Intentional But Failed: Missed Opportunities and Strategic Retreat

The most famous example of a failed, genuine attempt at such reform is the case of Franklin D. Roosevelt. Following the Great Depression, the FDR administration enacted sweeping economic regulations that faced consistent opposition from a conservative Supreme Court. Between 1934 and 1936, the Court invalidated several key pieces of New Deal legislation, including the National Industrial Recovery Act in *Schechter Poultry Corp. v. United States* (1935) and the Agricultural Adjustment Act in *United States v. Butler* (1936).[65] This judicial resistance created what historian William Leuchtenburg termed a "constitutional crisis," as the

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[62] 553 U.S. 723
[63] "Judge Roberts and the Court-Stripping Movement," *Center for American Progress*, September 2, 2005, https://www.americanprogress.org/article/judge-roberts-and-the-court-stripping-movement/.
[64] Lyle Denniston, "U.S. to Try Again to Curb DTA Review," SCOTUSblog, August 29, 2008, https://www.scotusblog.com/2008/08/us-to-try-again-to-curb-dta-review/.
[65] Leuchtenburg, William E. *The Supreme Court reborn: the constitutional revolution in the age of Roosevelt*. New York: Oxford University Press, 1995.

Court appeared to present an insurmountable obstacle to the Roosevelt administration's economic recovery program.[66]

Frustrated by these judicial roadblocks, President Roosevelt proposed his infamous "court-packing plan" in February 1937. Formally titled the Judicial Procedures Reform Bill of 1937, the legislation would have allowed the president to appoint an additional Supreme Court justice (up to a maximum of six) for each sitting justice over the age of 70 years and 6 months.[67] While technically not a jurisdiction-stripping measure, the court-packing plan represented an alternative approach to constraining judicial power through structural means.

Professor Jeff Shesol's detailed study of this episode reveals that proposals "to remove social and economic policy from the Court's jurisdiction" were indeed actively considered by the Roosevelt administration but ultimately rejected in favor of court-packing.[68] While it is impossible to say if the court would have upheld such jurisdiction stripping legislation, hindsight shows that FDR's court packing plan failed. Given this knowledge, we can theorize that perhaps Roosevelt would have been able to achieve his goal through jurisdiction stripping means. While not quite as large margins as the Reconstruction Republicans, FDR did have a strong coalition, plus executive backing.

By starting with court packing, Roosevelt spent his political capital on a strategy that ultimately collapsed. By the time it failed, there was little momentum left for a follow-up jurisdiction-stripping push. Had he reversed the sequence, he might have succeeded. The Norris-LaGuardia Act of 1932—an example of jurisdiction stripping affecting lower federal

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[66] Ibid, viii.
[67] Lesley Kennedy, "This Is How FDR Tried to Pack the Supreme Court | HISTORY," HISTORY, February 28, 2025, https://www.history.com/articles/franklin-roosevelt-tried-packing-supreme-court.
[68] Shesol, Jeff. *Supreme power: Franklin Roosevelt vs. the Supreme Court*. First edition. Page 144. New York: W.W. Norton, 2010.

courts—had passed just five years earlier.[69] With even stronger support in 1937, Roosevelt might plausibly have secured a statute targeting Supreme Court jurisdiction.

iv. Performative and Failed: Jurisdiction Stripping as Political Theater

Perhaps the most common use of jurisdiction-stripping legislation in the modern era is not as a tool of policy reform, but as a form of political signaling. These performative and failed efforts aim less to constrain the judiciary and more to dramatize disagreement with controversial judicial rulings. As Professor David Mayhew said, "politicians often get credit for taking positions rather than achieving effects."[70] One prominent wave of such proposals emerged in the 1980s and early 1990s, when socially conservative legislators introduced bills to strip federal courts of jurisdiction over matters such as school prayer,[71] abortion restrictions,[72] and busing.[73]

These proposals, often introduced by lawmakers such as Representative Philip Crane[74] and Senator Jesse Helms,[75] were rhetorically powerful but procedurally hollow. They lacked broad legislative support, rarely advanced beyond committee, and were never accompanied by serious efforts to build bipartisan coalitions.[76] Their primary function was symbolic: to rally base voters, raise campaign funds, and communicate fidelity to conservative causes during the Reagan and Bush eras. While such actions may occasionally pass the House, passage through the higher

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[69] "29 U.S. Code Chapter 6 - JURISDICTION OF COURTS IN MATTERS AFFECTING EMPLOYER AND EMPLOYEE," LII / Legal Information Institute, n.d., https://www.law.cornell.edu/uscode/text/29/chapter-6.
[70] Congress: The Electoral Connection (2004) 2nd edition, page xv.
[71] "School Prayer: The Congressional Response, 1962 - 1998," *CRS Reports*, December 1, 1998, https://www.everycrsreport.com/reports/96-846.html.; Virginia Law Review, "History and the School Prayer Cases - Virginia Law Review," Virginia Law Review -, November 14, 2024, https://virginialawreview.org/articles/history-and-the-school-prayer-cases/.
[72] Max Baucus and Kenneth R. Kay, "The Court Stripping Bills: Their Impact on the Constitution, the Courts, and Congress," Villanova University Charles Widger School of Law Digital Repository, n.d., https://digitalcommons.law.villanova.edu/vlr/vol27/iss5/6/.
[73] Ibid.
[74] Tom Wicker, "Opinion | IN THE NATION; COURT-STRIPPING," *The New York Times*, April 24, 1981, https://www.nytimes.com/1981/04/24/opinion/in-the-nation-court-stripping.html.
[75] Baucus and Kay, "The Court Stripping Bills: Their Impact on the Constitution, the Courts, and Congress." Page 991.
[76] Ibid.

bar of the Senate is rare.[77]

This occurred during the backlash to the warren court as well, as scholars Neal Devins and Louis Fisher comment that "[f]rom 1953 to 1968, more than sixty bills were introduced in Congress to limit the jurisdiction of the federal courts over school desegregation, national security, criminal confessions, and a variety of other subjects."[78] These all saw extensive debate, but ultimately failure to make any passage. As Mayhew states, "The congressman as position taker is a speaker rather than a doer. The electoral requirement is not that he make pleasing things happen but that he make pleasing judgmental statements. The position itself is the political commodity."[79]

This is the case for both conservatives and liberals, as more recent examples can be seen in the aftermath of *Dobbs v. Jackson Women's Health Organization* (2022).[80] Progressive lawmakers floated proposals to remove the Supreme Court's jurisdiction over abortion-related legislation.[81] These measures—such as proposed statutory restrictions on federal court review of reproductive rights claims—gained media attention but were not seriously advanced through the legislative process.[82] Like their conservative predecessors, they functioned more as acts of protest than of governance.

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[77] "ACLU Says Anti-Gay House Court Stripping Bill Unconstitutional, but Vote Indicates Federal Marriage Amendment Can't Pass House | American Civil Liberties Union," American Civil Liberties Union, September 13, 2005, https://www.aclu.org/press-releases/aclu-says-anti-gay-house-court-stripping-bill-unconstitutional-vote-indicates-federal.

[78] Devins, Neal, and Louis Fisher. *The Democratic Constitution*. Second Edition. Page 26. New York, NY: Oxford University Press, 2015.

[79] Mayhew, David R. *Congress: The Electoral Connection*. Second Edition. Page 62. New Haven: Yale University Press, 1974

[80] Ian Millhiser, "10 Ways to Fix a Broken Supreme Court," *Vox*, July 2, 2022, https://www.vox.com/23186373/supreme-court-packing-roe-wade-voting-rights-jurisdiction-stripping.

[81] Caroline Vakil, "The Hill," *The Hill*, July 15, 2022, https://thehill.com/homenews/house/3561533-ocasio-cortez-progressives-call-on-schumer-pelosi-to-strip-scotus-of-abortion-jurisdiction/.

[82] Ibid.

These examples clearly fall within the category of symbolic jurisdiction stripping. They share key traits:

- Intent: Lacked serious legislative strategy; introduced for rhetorical or electoral gain.
- Political Context: Appeared during moments of heightened polarization and institutional gridlock.
- Institutional Follow-through: Minimal; often reintroduced without modification or coordination.
- Public Salience: High; issues like abortion and school prayer attracted intense partisan interest but little legislative consensus.

As political scientist Frances Lee has argued, the rise of "partisan messaging bills" reflects Congress's shift from lawmaking to symbolic representation.[83] Jurisdiction stripping, in this environment, has been repurposed into a tool of political theater—signaling discontent without producing structural change. Instead, "Party messaging undercuts the prospects for legislative success because it is aimed at defining 'us versus them' rather than finding common ground."[84]

And why do legislators do this? Because it works. As scholar Tom Clark finds "that periods of Court curbing are followed by marked periods of judicial deference to legislative preferences and posit[s] that the risk of actual changes to the Court's institutional power—through jurisdiction stripping, Court packing, or other legislative means—will create an incentive for sophisticated decision making by the Court."[85]

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[83] Lee, Frances E. *Insecure Majorities.*
[84] Ibid. Page 59.
[85] Clark, Tom S. "The Separation of Powers, Court Curbing, and Judicial Legitimacy." American Journal of Political Science 53, no. 4 (2009): 971–89.

v. Quiet Successes: Low-Salience, Nonpartisan Jurisdiction Stripping

As we have seen, many of the most visible jurisdiction-stripping efforts have often been symbolic or unsuccessful, but Congress has also enacted low-salience, nonpartisan forms of jurisdiction stripping that have quietly succeeded. These actions typically occur outside the spotlight of ideological conflict and often aim to streamline judicial administration, resolve inter-branch conflicts, or insulate specific statutory regimes from protracted litigation. Although these measures may seem modest, they demonstrate that Congress is still capable of using its Exceptions Clause power when political stakes are low and institutional incentives align.

A prominent example can be found in federal tax law, where Congress has enacted provisions restricting judicial review in certain circumstances. Under the Anti-Injunction Act, for instance, courts are barred from hearing suits intended to restrain the assessment or collection of taxes, thereby channeling disputes through specific administrative procedures before judicial review is available.[86] This jurisdictional limitation reflects a legislative judgment that tax administration requires procedural insulation from premature judicial interference.

The area that arguably sees the most jurisdiction stripping is around the regulations of agencies. As Pamela McCann et al. found that 36% of "Major Delegating Laws" contained "at least one section that specifies whether judicial review of agency actions is precluded, limited, or allowed."[87] That is, about one-third of laws governing agency behavior interrupt standard jurisdictional norms—and this is often uncontroversial. Other examples include provisions removing judicial review over decisions by specific federal or state officials—for instance, "any action taken by the Secretary of the Army, the Federal Energy Regulatory Commission, the

[86] Internal Revenue Code § 7421(a), 26 U.S.C. § 7421(a) - Prohibition of suits to restrain assessment or collection.

[87] McCann, Pamela J. Clouser, Charles R. Shipan, and Yuhua Wang. 2021. "Measuring the Legislative Design of Judicial Review of Agency Actions." *Journal of Law, Economics, and Organization*

Secretary of Agriculture, the Secretary of the Interior, or a state administrative agency" with respect to the Mountain Valley Pipeline in Virginia.[88]

What unites these examples is their low visibility and technical framing. Rather than being advanced as partisan weapons, these jurisdictional reforms are often negotiated as part of broader administrative legislation and passed with minimal fanfare. They do not challenge major constitutional doctrines or high-profile judicial decisions, but instead represent Congress using its structural powers to adjust the scope and timing of judicial review in more mundane domains.

In this way, they show that jurisdiction stripping is not inherently obsolete—only that its most dramatic invocations are politically untenable. Where incentives align, Congress can and does act to structure judicial access in deliberate and effective ways.

E. What Jurisdiction Stripping Tells Us About Congress

Taken together, the preceding case studies reveal a consistent pattern in the use—and non-use—of jurisdiction stripping. While the Constitution grants Congress broad authority under the Exceptions Clause to limit the appellate jurisdiction of the federal courts, the political and institutional conditions required to exercise this power effectively are rare. Most significantly, jurisdiction stripping has evolved from a potentially robust legislative tool into a largely symbolic instrument, deployed more for messaging than for meaningful institutional rebalancing.

Successful jurisdiction-stripping efforts, such as those seen in *Ex parte McCardle*, national security legislation, or administrative law, have occurred primarily when political salience is low, partisan polarization is minimal, and executive-legislative coordination is strong. These conditions allow Congress to act in a technocratic or institutionally focused mode, rather

[88] Congress.gov. "Text - H.R.3746 - 118th Congress (2023-2024): Fiscal Responsibility Act of 2023." June 3, 2023. https://www.congress.gov/bill/118th-congress/house-bill/3746/text.

than a partisan or performative one. By contrast, the more visible and controversial jurisdiction-stripping proposals—those involving abortion, school prayer, or challenges to judicial supremacy—tend to fail. They are often introduced without a serious path to enactment, used instead to signal political identity, dramatize constitutional conflict, or mobilize electoral bases. These efforts are not designed to succeed legislatively, and indeed, their sponsors often benefit more from failure than from success.[89]

This typological approach—distinguishing sincere from symbolic uses of jurisdiction stripping—helps explain why a constitutionally valid power has so little traction in modern politics. It is not that jurisdiction stripping is doctrinally obsolete; rather, it is strategically unattractive. The same polarization that fuels demands to "rein in" the courts also makes coordinated institutional responses nearly impossible. Congress remains divided not just by party, but by diverging incentives, legislative dysfunction, and a broader cultural deference to judicial authority. Jurisdiction stripping is best understood not simply as a dormant constitutional provision, but as a mirror of Congress itself. Where political conditions support institutional assertiveness, Congress can and has used its power deliberately and successfully. Where those conditions are absent, the Exceptions Clause becomes yet another stage for partisan performance. Understanding this dynamic is key to any serious conversation about constitutional checks and balances in the modern era.

III. Strategic Disincentives and the Political Unattractiveness of Jurisdiction Stripping

So how did we get to this point? If Congress retains the formal power to strip jurisdiction from the federal courts, why is it so rarely used with teeth? This section explores the strategic, political, and institutional disincentives that make jurisdiction stripping unattractive to modern

[89] Clark, Tom S. "The Separation of Powers, Court Curbing, and Judicial Legitimacy."

legislators. These constraints help explain why symbolic proposals dominate while sincere and coordinated efforts are rare.

A. Effectiveness

To start, in terms of effectiveness it is limited. Jurisdiction stripping faces the ultimate problem of the fact that when it is used in a retaliatory method, it cannot reach the heart of the issue—that being overturning the congressionally disfavored precedent. As Hamilton contends in *Federalist* 81, "A legislature, without exceeding its province, cannot reverse a determination once made in a particular case; though it may prescribe a new rule for future cases."[90] But even this type of rule has its limits.

It is from this reasoning that the most important counterpoint to *McCardle* emerged in the form of *United States v. Klein* (1871), which established a significant constraint on jurisdiction stripping.[91] The case involved a law passed by Congress directing courts to treat presidential pardons for Confederate participants as evidence of disloyalty, effectively reversing the Court's previous interpretation of pardons and requiring the dismissal of claims for property seized during the Civil War.[92] The Court struck down this provision, stating that Congress had "inadvertently passed the limit which separates the legislative from the judicial power."[93] Chief Justice Chase distinguished the law from *McCardle*, explaining that while Congress can regulate jurisdiction, it cannot "prescribe rules of decision to the Judicial Department of the government in cases pending before it."[94]

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[90] "Research Guides: Federalist Papers: Primary Documents in American History: Federalist Nos. 81-85."
[91] United States v. Klein, 80 U.S. 128 (1871)
[92] "Congress's Power Over Court Decisions: Jurisdiction Stripping and the Rule of Klein," Congress.gov | Library of Congress, n.d., https://www.congress.gov/crs-product/R44967.
[93] 80 U.S. 128, 147
[94] Ibid, 146.

Despite Congress trying to couch their true intent through the veil of "jurisdiction," the Court felt that:

> [T]he language of the proviso shows plainly that it does not intend to withhold appellate jurisdiction except as a means to an end. Its great and controlling purpose is to deny to pardons granted by the President the effect which this court had adjudged them to have…
>
> It seems to us that this is not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power.[95]

This established what is known as the "*Klein* principle," where Congress cannot use jurisdictional manipulation to dictate substantive outcomes in constitutional cases.[96] While Congress may remove the Court's jurisdiction, it cannot grant jurisdiction with strings attached that effectively mandate particular results in constitutional cases. This distinction between genuine jurisdictional regulation and disguised substantive legislation remains central to modern jurisprudence on the topic. Constitutional scholar Henry Hart interpreted *Klein* as establishing that "If Congress wants to frustrate the judicial check, our constitutional tradition requires that it be made to say so unmistakably, so that the people will understand and the political check can operate."[97]

The Supreme Court's jurisprudence on jurisdiction stripping reflects a delicate constitutional balance. While acknowledging Congress's textual authority, the Court has consistently identified implicit constraints that preserve judicial independence and constitutional rights. This approach serves as both shield and sword—protecting the judiciary from

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[95] Ibid, 145-146
[96] "Congress's Power Over Court Decisions: Jurisdiction Stripping and the Rule of Klein."
[97] Hart, Henry M. "The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic." Page 1399.

congressional encroachment while asserting the Court's own authority to define the limits of that encroachment.

With part of that encroachment being an inability for the court to overturn its own precedent, some scholars have pointed out that lower courts would still be bound by Supreme Court precedent.[98] As such, for jurisdiction stripping to truly be effective, Congress must be playing 'whack-a-mole' before the moles pop out, preemptively swatting down potential cases from the Supreme Court's jurisdiction before they can be decided. Even then, this would still leave some ideologically opposed Circuit or State Supreme Courts the ability to rule in line with their own interpretation if there is no "parent" in the room.

Comparatively, Congress would be better posed to bear the political fight that comes with court packing, as that is a more sure fire way to guarantee a wholesale shift on a plethora of issues in a much more permanent way rather than slowly boiling the frog by stripping one issue at a time.

B. Political Risk, Public Perception, and the Entrenchment of Judicial Supremacy

Even when jurisdiction stripping is legally plausible, it remains politically fraught. In the American political imagination, the judiciary enjoys a level of legitimacy and perceived neutrality that makes any overt effort to constrain its power appear suspect. Unlike more familiar forms of legislative activity, jurisdiction stripping touches directly on questions of constitutional authority and institutional balance, raising red flags about the erosion of the separation of powers or the undermining of the rule of law. As a result, lawmakers face significant reputational risks

[98] Steven Calabresi and Gary Lawson, "Equity and Hierarchy: Reflections on the Harris Execution," January 1, 1992, https://openyls.law.yale.edu/handle/20.500.13051/8725?show=full.

when they attempt to strip the courts of jurisdiction, even when such actions are well within their constitutional rights.

Public polling underscores this tension. While confidence in the Supreme Court has declined in recent years—especially after controversial rulings like *Dobbs*—a majority of Americans still express discomfort with overt political efforts to reform the judiciary.[99] For instance, polling on court packing consistently shows that most Americans oppose expanding the number of justices on the Court, even among those who disagree with recent decisions.[100] Jurisdiction stripping, though less well-known, triggers similar anxieties about destabilizing constitutional norms.[101] In this environment, legislators who pursue jurisdiction stripping risk being cast as anti-institutional or authoritarian, even when the action itself is procedurally modest.

These risks are amplified by the internalization of judicial supremacy within the political class. Since the mid-20th century, courts have come to be seen not just as interpreters of the Constitution, but as its ultimate guardians. Lawmakers, law students, and the media alike often defer to the judiciary on matters of constitutional meaning, treating judicial pronouncements as effectively final. This view—what Larry Kramer has called the "judicialization of constitutional interpretation"—has diminished the sense that Congress has a co-equal role in shaping constitutional meaning.[102] Even when members of Congress publicly criticize the Court, they

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[99] First Liberty Institute, "Poll: Most Americans Reject Biden's Radical Court 'Reform' Scheme - News - First Liberty," First Liberty, September 12, 2024, https://firstliberty.org/news/poll-americans-reject-court-reform-scheme/.

[100] Giulia Carbonaro, "Expanding Supreme Court Opposed by Americans, Even After Roe Decision: Poll," *Newsweek*, June 28, 2022, https://www.newsweek.com/expanding-supreme-court-opposed-americans-roe-poll-1719806.

[101] Samantha Fox, "1 In 3 Americans Say They Might Consider Abolishing or Limiting Supreme Court | the Annenberg Public Policy Center of the University of Pennsylvania," The Annenberg Public Policy Center of the University of Pennsylvania, December 15, 2021, https://www.annenbergpublicpolicycenter.org/1-in-3-americans-say-they-might-consider-abolishing-or-limiting-supreme-court/.

[102] Boston Review, "The People V. Judicial Activism - Boston Review," February 15, 2024, https://www.bostonreview.net/articles/larry-kramer-we-people/.

rarely propose serious institutional responses. Instead, they wait for future Court vacancies or file amicus briefs, implicitly accepting the Court's supremacy in constitutional adjudication.

Cultural factors reinforce this dynamic. Legal education trains future policymakers to revere the judiciary as the rational, apolitical branch.[103] Popular media often portrays the courts as impartial referees rather than political actors.[104] This makes jurisdiction stripping seem aberrant or radical, even when deployed in limited or targeted ways. By contrast, when the Court issues sweeping decisions that reshape social policy, it is often seen as exercising legitimate judicial review, rather than overstepping democratic bounds.

The entrenchment of judicial supremacy has consequences. It narrows the range of politically acceptable responses to controversial rulings and encourages legislators to channel their dissatisfaction into rhetoric rather than institutional action. As a result, even when jurisdiction stripping is raised as a possibility—by progressives after *Dobbs*, or by conservatives after *Obergefell*—the proposals often amount to little more than press releases. Lawmakers recognize the risks involved and retreat into safer forms of protest.

In short, while jurisdiction stripping is legally authorized and historically grounded, it remains politically unattractive. That unattractiveness is not solely the result of public opinion or strategic calculation, but of a broader cultural and institutional deference to the judiciary. Unless that deference is re-examined, Congress is unlikely to reclaim jurisdiction stripping as a serious tool of constitutional contestation.

[103] Joel Sabando, "The Illusion of Nonpartisanship in the Supreme Court," Harvard Political Review, November 14, 2020, https://harvardpolitics.com/illusion-nonpartisanship-court/.
[104] "CNN.com - Roberts: 'My Job Is to Call Balls And Strikes And Not to Pitch or Bat' - Sep 12, 2005," n.d., https://www.cnn.com/2005/POLITICS/09/12/roberts.statement/.

IV. Normative Reflections and Prospects for Revival

Jurisdiction stripping remains a constitutional power, but one that is increasingly dormant. This paper has argued that its current marginality reflects more than mere oversight: it is the product of strategic disincentives, institutional drift, and political polarization. Given this, can jurisdiction stripping be revived as a meaningful tool of constitutional balance? And should it be?

A. Normative Arguments for Revival

There are strong arguments in favor of reinvigorating jurisdiction stripping as part of a broader reassertion of congressional power. First, the Exceptions Clause provides a legitimate and historically grounded mechanism for legislative control over judicial review. It allows elected representatives to influence the scope and pace of constitutional development, serving as a democratic counterweight to an unelected judiciary. In a system premised on checks and balances, its consistent neglect risks leaving the judiciary unchecked.

Second, a functional jurisdiction-stripping power could reduce the judiciary's role as the ultimate arbiter of controversial policy issues. Rather than allowing courts to dictate national outcomes on matters like reproductive rights, voting access, or environmental regulation, Congress could cabin judicial review and return decision-making to the political branches. Such an approach would align with majoritarian principles and democratic responsiveness. Many scholars believe in a "departmentalist" system, the "theory that each branch, or department, of the government has an equal and independent authority to interpret the Constitution for purposes of guiding its own actions."[105]

[105] Keith Whittington, "Departmentalism, Judicial Supremacy and DACA," Default, January 18, 2023, https://www.lawfaremedia.org/article/departmentalism-judicial-supremacy-and-daca.

B. Concerns and Risks

However, the normative case is not one-sided. The deliberate use of jurisdiction stripping raises concerns about undermining constitutional protections and the rule of law. If wielded irresponsibly, it could be used to insulate unconstitutional legislation from review, eroding individual rights and enabling majoritarian overreach. Critics worry that reviving jurisdiction stripping in earnest would open the door to constitutional hardball and tit-for-tat institutional warfare.[106]

Moreover, the legitimacy of jurisdiction stripping depends heavily on context. In low-salience areas with clear administrative goals, it can be constructive. In high-salience, ideologically polarized contexts, it risks destabilizing core judicial functions. These risks have contributed to Congress's hesitancy and the public's wariness.

Conclusion

Jurisdiction stripping presents a constitutional puzzle. Although firmly grounded in Article III and historically used at key moments in American legal development, it remains largely dormant as a serious legislative tool—particularly when tensions between Congress and the Supreme Court are most pronounced. This paper has sought to explain dormancy not as a function of doctrinal uncertainty, but as a product of congressional behavior, institutional decline, and political incentives.

By tracing the history of jurisdiction-stripping efforts and distinguishing between sincere and symbolic uses, this analysis has shown that Congress is most likely to limit judicial authority

[106] Steven Wang and Columbia Law Review, "THE FALSE PROMISE OF JURISDICTION STRIPPING," *Columbia Law Review* (blog), November 21, 2023, https://columbialawreview.org/content/the-false-promise-of-jurisdiction-stripping/.

when the stakes are low, the issues are technical, and bipartisan coordination is possible. In contrast, the more visible jurisdiction-stripping proposals—especially those dealing with contentious cultural or constitutional issues—tend to be performative, lacking the coordination, follow-through, or intent necessary for enactment.

This transformation reflects deeper institutional dynamics. Members of Congress face reputational risks when confronting the judiciary, and few are willing to assume responsibility for weakening the perceived guardians of constitutional meaning. Judicial supremacy, internalized by lawmakers and reinforced by broader cultural norms, constrains the political imagination and narrows the scope of institutional response. The result is a Congress that often criticizes the Court without attempting to constrain it—a legislature rhetorically opposed to judicial power but procedurally deferential.

Yet this pattern is unlikely to fade entirely. Even if jurisdiction stripping rarely succeeds, it continues to resurface in moments of heightened political conflict. In the wake of *Trump v. United States* (2024), Senate Majority Leader Chuck Schumer introduced the No Kings Act to strip federal courts of jurisdiction over certain executive immunity claims.[107] On the opposite end of the ideological spectrum, figures like Governor Ron DeSantis have floated jurisdiction-stripping proposals targeting immigration cases in sympathetic courts.[108] These developments suggest that jurisdiction stripping may remain, at least symbolically, a recurring feature of partisan responses to judicial rulings.

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[107] Ian Millhiser, "Chuck Schumer's Ambitious Plan to Take the Supreme Court Down a Peg," *Vox*, August 1, 2024, https://www.vox.com/scotus/364438/supreme-court-chuck-schumer-trump-immunity.
[108] Alex Nitzberg, "DeSantis Proposes Solution as Trump's Agenda Is Stymied by Judges," Fox News, March 19, 2025, https://www.foxnews.com/politics/desantis-proposes-solution-trumps-agenda-stymied-judges.

Ultimately, this paper does not argue for or against jurisdiction stripping as a normative matter. Rather, it treats the power as a revealing lens into Congress's contemporary role in the constitutional system. What Congress does—and does not do—with jurisdiction stripping reflects not only strategic calculations, but evolving conceptions of institutional responsibility and constitutional authority. As partisan conflict over the judiciary intensifies, jurisdiction stripping is likely to remain on the margins of legislative power: not absent, but transformed—more often symbolic than substantive, and more expressive than structural.

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