

CONGRESS'S ARTICLE III POWER AND THE PROCESS OF CONSTITUTIONAL CHANGE

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Text in Article III of the U.S. Constitution appears to give to Congress authority to make incursions into judicial supremacy, by restricting (or, less neutrally, “stripping”) the jurisdiction of federal courts. Article III gives Congress authority to make “exceptions” to the Supreme Court’s appellate jurisdiction. Article III also gives Congress discretion whether to “ordain and establish” lower federal courts. Congress’s power to create or abolish these courts would seem to include the power to create them but to limit their jurisdiction, and that is how the power has historically been understood.

Is Congress’s power to remove the jurisdiction of federal courts in effect a legislative power to choose the occasions on which federal courts may, and may not, have the final word on the meaning of the Constitution? That is a question on which the Supreme Court has never spoken definitively.

In this Article I argue that Congress, working through the ordinary legislative process, may remove the jurisdiction of federal and even state courts to hear cases involving particular questions of federal law, including cases that raise questions under the Federal Constitution. Understood this way, the implications of Congress’s Article III power are profound. Congress may prescribe, by ordinary legislation, constitutional rules in areas where the meaning of the Constitution is unsettled. Or it may displace otherwise settled constitutional rules by ordinary legislation.

To be clear, Article III does not permit Congress to escape accountability. Rather, Article III gives to Congress the power to choose whether it must answer, in a particular instance, to judges or to voters. Compared with judicial review, the political constraint is, of course, less formal and predictable. But that does not mean that the political constraint is weak. A successful exercise of its Article III power will require a majority in Congress, and, in most instances, a President, who agree both on the substantive policy at issue and on the political viability of overriding the

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public expectation that Congress should face a judicial check. In such instances, we should welcome the exercise of Congress's Article III power. In the push-and-pull between judicially-enforced constitutional rules and the desires of current democratic majorities, the potential for Congress's exercise of its Article III power helps legitimate both constitutionalism and judicial review.

INTRODUCTION	1779
I. UNDERSTANDING CONGRESS'S ARTICLE III POWER TO LIMIT JUDICIAL REVIEW	1791
A. <i>The Literature on Congress's Article III Power</i>	1791
B. <i>Potential "Internal" Limitations on Congress's Article III Power</i>	1801
1. <i>Lower Federal Courts: Text and History</i>	1802
2. <i>Lower Federal Courts: Supreme Court Precedent</i>	1803
3. <i>"Exceptions" and the Supreme Court's Appellate Jurisdiction</i>	1808
4. <i>Limitations Based in the "Essential Role" of the Supreme Court</i>	1811
C. <i>External Limitations on Congress's Article III Power</i>	1818
1. <i>"Unqualified" vs. "Qualified" Judicial Supremacy</i>	1818
2. <i>Post-McCardle Precedent</i>	1822
3. <i>The "Klein Principle" and Boumediene</i>	1829
D. <i>Institutional Limits of State Court Enforcement of the Federal Constitution</i>	1831
II. CONGRESS'S ARTICLE III POWER AS A PATH TO QUALIFIED JUDICIAL SUPREMACY	1836
A. <i>The Concept of Qualified Judicial Supremacy</i>	1836
B. <i>Qualified Judicial Supremacy and the Canadian "Notwithstanding Clause"</i>	1843
C. <i>The Prospects for an American Notwithstanding Clause</i>	1852
CONCLUSION	1859

INTRODUCTION

In *Marbury v. Madison*,¹ Chief Justice John Marshall pronounced that “[i]t is emphatically the province and duty of the judicial department to say what the law is.”² Many have noted the flaws in Marshall’s

¹ 5 U.S. (1 Cranch) 137 (1803).

² *Id.* at 177.

opinion that undermine his assertion of judicial power.³ Nonetheless, over the past two centuries, Americans have largely learned to accept the view that federal courts are supreme when they “say what the law is.”⁴ Yet even as judicial supremacy has become commonplace, a fundamental question persists: Is it the province and duty of the courts to say what the law is *even where the law says that they should not*?

This question is made concrete by text in Article III of the U.S. Constitution which appears to give to Congress authority to make incursions into judicial supremacy, by restricting (or, less neutrally, “stripping”) the jurisdiction of federal courts. Article III gives Congress authority to make “[e]xceptions” to the Supreme Court’s appellate jurisdiction.⁵ Article III also gives Congress discretion whether to “ordain and establish” lower federal courts.⁶ Congress’s power to create or abolish lower federal courts has long been presumed to include the power to define (and limit) their jurisdiction. Consistent with that understanding, Congress has, from the beginning, imposed limits on the jurisdiction of lower courts.⁷

These parts of Article III, taken together, add up to something potentially profound: they appear to give to Congress a means to limit

³ Flaws which perhaps detract from the opinion’s force to the degree that, as William Van Alstyne intimated in his classic article on *Marbury*, “it should be thought surprising that *Marbury v. Madison* could sensibly be considered by anyone as authoritatively establishing the doctrine of federal substantive judicial supremacy” William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1, 38; *see also* CHRISTOPHER WOLFE, *THE RISE OF MODERN JUDICIAL REVIEW: FROM CONSTITUTIONAL INTERPRETATION TO JUDGE-MADE LAW* 89 (1986) (disagreeing with Marshall’s argument that the power of courts to invalidate unconstitutional laws is a necessary implication of a written constitution and asserting “[t]here is no necessary problem with judges giving effect to unconstitutional laws, any more than with presidents enforcing unconstitutional laws passed over their vetos”). For a contrary view, see Michael Stokes Paulsen, *The Irrepressible Myth of Marbury*, 101 MICH. L. REV. 2706, 2707 (2003): “The idea that courts possess an independent power and duty to interpret the law, and . . . must refuse to give effect to acts of the legislature that contravene the Constitution, was well accepted by the time [of] *Marbury* . . . more than a dozen years after the Constitution was ratified.”

⁴ *Marbury*, 5 U.S. at 177. One measure of acceptance, though a weak one given the difficulties Article V of the Constitution places in the way, is that only three amendments to the Constitution have been adopted in response to specific decisions of the Supreme Court. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), *superseded by constitutional amendment*, U.S. CONST. amend. XI; *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIII; *Pollock v. Farmer’s Loan & Trust Co.*, 157 U.S. 429 (1895), *superseded by constitutional amendment*, U.S. CONST. amend. XVI.

⁵ U.S. CONST. art. III, § 2, cl. 2; *see also* U.S. CONST. art. I, § 8, cl. 9 (“The Congress shall have Power . . . [t]o constitute Tribunals inferior to the supreme Court . . .”).

⁶ U.S. CONST. art. III, § 1 (“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.”); *see also* U.S. CONST. art. I, § 8, cl. 9 (“The Congress shall have Power . . . [t]o constitute Tribunals inferior to the supreme Court . . .”).

⁷ *See infra* text accompanying notes 99–105.

the scope of judicial review—to take back from the federal courts, in specific cases, the power to say what the law is. Congress could re-take interpretive authority, for example, by passing a law that embodies its interpretation of a particular piece of the Constitution that may be at odds with the courts' interpretation. An example would be a law imposing more wide-ranging campaign finance restrictions than the Supreme Court has been willing to countenance.⁸ By including in that enactment a provision stripping the courts' jurisdiction to review it, Congress can displace a judicial interpretation of the Constitution's meaning with its own.

Can Congress really do this? The Supreme Court has never spoken definitively. The Court has remarked in dicta that Congress eliminating judicial review of “colorable constitutional claims”⁹ would raise a “serious constitutional question.”¹⁰ And in a 2018 decision, *Patchak v. Zinke*,¹¹ a plurality of the Court stated that Congress could not eliminate judicial review of a statute that would violate the Constitution.¹² But the Court has never actually *held* that; there was a majority in *Patchak* only for the result in that case, which was that the challenged statutory provision was, in fact, constitutional.¹³ And the Court has, in other instances, signaled deference to enactments stripping courts' jurisdiction: In its 1869 decision in *Ex parte McCardle*,¹⁴ the Court gave effect to a jurisdiction-stripping provision, holding that “[w]ithout jurisdiction the court cannot proceed at all in any cause”¹⁵ and refusing to inquire whether Congress was motivated to strip jurisdiction by the desire to insulate unconstitutional legislation from

⁸ See, e.g., *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 365 (2010) (“[T]he Government may not suppress political speech on the basis of the speaker's corporate identity.”).

⁹ *Webster v. Doe*, 486 U.S. 592, 601, 603 (1988) (holding that the National Security Act “precludes judicial review of [the CIA director's employee termination] decisions under the APA” but declining to find the Act “may be read to exclude review of constitutional claims”).

¹⁰ *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 681 n.12 (1986) (interpreting a statute “to deny a judicial forum for constitutional claims” would create a “serious constitutional question”); *Weinberger v. Salfi*, 422 U.S. 749, 762 (1975) (finding that the Social Security Act allowed constitutional challenges, therefore avoiding the serious constitutional question that might arise if it did not); *Johnson v. Robison*, 415 U.S. 361, 366–67 (1974) (construing a statute to prohibit review of constitutional issues arising under it “would, of course, raise serious questions concerning [its] constitutionality”).

¹¹ 138 S. Ct. 897 (2018).

¹² *Id.* at 906 (“So long as Congress does not violate other constitutional provisions, its ‘control over the jurisdiction of the federal courts’ is ‘plenary.’” (quoting *Trainmen v. Toledo, P. & W.R. Co.*, 321 U.S. 50, 63–64 (1944))).

¹³ See *infra* notes 226–50 and accompanying text for a discussion of *Patchak*.

¹⁴ 74 U.S. (7 Wall.) 506 (1869); see also *infra* text accompanying notes 157–68.

¹⁵ *Id.* at 512–15.

review.¹⁶ Note that *McCardle* is only one decision, and the Court's discussion there of Congress's power is, to be charitable, thin. But it is the clearest, most relevant precedent we have.

If *McCardle* makes a broad account of Congress's Article III power descriptively plausible, is there a reason to think that a legislative power to limit judicial supremacy would be normatively desirable? I believe so; in particular, this Article argues that Congress's Article III power to "qualify" judicial supremacy can both help reconcile constitutionalism with democracy and, perhaps counter-intuitively, help preserve the legitimacy of courts as enforcers of constitutional rules.

To see why, consider the powerful temptation that the judiciary's encompassing power to "say what the law is" presents to America's political parties in our age of extreme political polarization. That temptation is to stack the federal courts with partisans, both to achieve political goals that may be unachievable through ordinary legislation (prohibiting Congress from delegating legislative powers to federal agencies) and to constrain the legislative agenda of one's political opponents (e.g. by erecting new First Amendment barriers to a variety of regulations—a strategy that has been labeled "First Amendment Lochnerism"¹⁷). Whether judges are acting according to partisan commitments is difficult to establish empirically, although credible, methodologically sophisticated attempts have been made.¹⁸ But observing the GOP's actions over the past dozen years—first in slowing and eventually blocking judicial appointments during the Obama presidency,¹⁹ then in pushing through appointments

¹⁶ *Id.* ("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.")

¹⁷ See, e.g., Leslie Kendrick, *First Amendment Expansionism*, 56 WM. & MARY L. REV. 1199, 1206–09 (2015) (comparing First Amendment claims of "immunity from certain forms of government regulation" to Lochner era claims to similar immunity under the "liberty of contract"); Jeremy K. Kessler, *The Early Years of First Amendment Lochnerism*, 116 COLUM. L. REV. 1915 (2016) (exploring the history of First Amendment-based economic rights claims that have been labeled as "First Amendment Lochnerism"); Amanda Shanor, *The New Lochner*, 2016 WIS. L. REV. 133 (2016) (labeling the "commercial speech doctrine" the "New Lochner").

¹⁸ See, e.g., Alma Cohen & Crystal S. Yang, *Judicial Politics and Sentencing Decisions*, 11 AM. ECON. J. 160, 175–76 (2019) (finding that, compared to judges appointed by Democrats, Republican-appointed judges sentence Black defendants to three more months than non-Blacks and women to two fewer months than men for crimes of comparable type and severity); Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, 108 COLUM. L. REV. 1, 21, 26, 30, 34, 53 (2008) (finding that federal appellate judges deciding voting rights cases differ by party and even more by race).

¹⁹ Tom Latek, *History-Making Senator Mitch McConnell Tells Fancy Farm Faithful He Intends to Run Again in 2020*, NORTHERN KY. TRIB. (Aug. 5, 2018), <https://>

during Donald Trump's first term (by, among other things, eliminating so-called "blue slips" for all nominees²⁰ and the filibuster for Supreme Court nominees,²¹ and ignoring recommendations of the American Bar Association²²), and now, apparently, in urging GOP-appointed judges nearing retirement age to step down from the bench so that a Republican President and Senate can replace them prior to the November 2020 election²³—it is difficult to gainsay the inference that some political payoff is expected from these political investments.²⁴ Certainly many Democrats view the GOP's strategy as a bid to re-fashion the federal judiciary into a partisan political tool and appear eager to respond in kind, including via explicit court-packing schemes.²⁵

The prospect that judges are acting as partisans when they "say what the law is" should lead us to ask anew whether it is necessary to democratic constitutionalism that unelected judges possess, in every case, the final word on the Constitution's meaning. Put differently, is unqualified judicial supremacy a *sine qua non* of our system of democratic constitutionalism? Or could we, and should we, favor Congress using its Article III power to establish "qualified" judicial supremacy:

www.nkytribune.com/2018/08/history-making-senator-mitch-mcconnell-announces-intent-to-run-again-in-2020-at-fancy-farm-picnic (quoting McConnell as saying that his decision to block Obama Supreme Court nominee Merrick Garland was "the single most consequential decision I've made in my career").

²⁰ David Lat, *Good Riddance to 'Blue Slips,'* N.Y. TIMES (May 9, 2018), <https://www.nytimes.com/2018/05/09/opinion/senate-judicial-nominees-blue-slips.html>.

²¹ Jane C. Timm, *McConnell Went 'Nuclear' to Confirm Gorsuch. But Democrats Changed Senate Filibuster Rules First*, NBC NEWS (June 28, 2018, 3:15 PM), <https://www.nbcnews.com/politics/donald-trump/mcconnell-went-nuclear-confirm-gorsuch-democrats-changed-senate-filibuster-rules-n887271>.

²² Adam Liptak, *White House Ends Bar Association's Role in Vetting Judges*, N.Y. TIMES (Mar. 31, 2017), <https://www.nytimes.com/2017/03/31/us/politics/white-house-american-bar-association-judges.html>.

²³ See Harper Neidig, *McConnell Urging GOP-Appointed Judges to Retire This Year: Report*, THE HILL (Mar. 17, 2020, 10:52 AM), <https://thehill.com/regulation/court-battles/487982-mcconnell-urging-gop-appointed-judges-to-retire-this-year-report>; Felicia Sonmez, *Graham Urges Senior Judges to Step Aside Before November Elections so Republicans Can Fill Vacancies*, WASH. POST (May 28, 2020, 4:19 PM), https://www.washingtonpost.com/politics/graham-urges-senior-judges-to-step-aside-before-november-election-so-republicans-can-fill-vacancies/2020/05/28/4b014d78-a0fc-11ea-b5c9-570a91917d8d_story.html.

²⁴ As President Trump put it in a May 2020 tweet: "Republicans love the biggest Tax Cuts, Rebuilt Military, Choice for Vets, saving 2nd Amendment and many other things my Administration has done, but what they love beyond all else is 252 (so far!) Federal Judges, not including two great Supreme Court Justices. A Big Record!" Donald J. Trump (@realDonaldTrump), TWITTER (May 4, 2020, 9:36 AM) (emphasis added), <https://twitter.com/realDonaldTrump/status/1257303100815261696>.

²⁵ See, e.g., Joan Biskupic, *Democrats Look at Packing the Supreme Court to Pack the Vote*, CNN (May 31, 2019, 6:04 AM), <https://www.cnn.com/2019/05/31/politics/democrats-supreme-court-packing-politics/index.html>.

a revised and more democratic form of constitutionalism where the political branches retain the power to re-claim from courts interpretive authority in particular instances and override judicial interpretations of the Constitution without resort to Article V amendments.

In this Article, I will argue that Congress's Article III power can be understood as a means by which Congress may change the Constitution without amending it.²⁶ I will argue, further, that we should welcome it as such. Working through the ordinary legislative process (either with the assent of the Executive or, if it can override a veto, without his or her assent), Congress may remove the jurisdiction of federal courts to hear cases involving most questions of federal law, including cases that raise questions under the Federal Constitution.²⁷ To be clear, I am not arguing that the Constitution unambiguously establishes this congressional power. As on so many important issues, the Constitution is indeterminate: Article III provides a textual foundation for the power, and neither history nor precedent rule it out. In this matter, however, what Congress does is more important than anything the Constitution says. The Constitution's indeterminacy opens a space for Congress to reclaim authority, in particular cases, over constitutional interpretation. If a determined Congress acts to fill that space, courts will have little power to resist. Correction, if it comes at all, will come from *voters*.

Understood this way, the implications of Congress's Article III power are potentially transformative. Congress may prescribe, by ordinary legislation, constitutional rules in areas where the meaning of the Constitution is unsettled. Or it may displace otherwise settled constitutional rules by ordinary legislation. In either case, Congress may remove the jurisdiction of federal courts to hear constitutional challenges to its interventions. And Congress may do the same with respect to state courts. State courts are bound by the Constitution's Supremacy Clause²⁸ to prefer federal law to inconsistent state law. If Congress has the power to remove federal court jurisdiction, then it has the power to demand state courts stand down as well.²⁹ In any

²⁶ Eric Segall has argued that when constitutional text is vague and its history contested, judicial review, absent a model of strong deference to legislative interpretations, will inevitably lead to constitutional change and non-Article V amendments to the Constitution. See Eric J. Segall, *Constitutional Change and the Supreme Court: The Article V Problem*, 16 U. PA. J. CONST. L. 443 (2013).

²⁷ Congress may not remove the Supreme Court's original jurisdiction, which is constitutionally mandated. See *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 431 (1793). But that jurisdiction comprises the barest sliver of the Supreme Court's docket.

²⁸ U.S. CONST. art. VI, cl. 2.

²⁹ See Michael C. Dorf, *Congressional Power to Strip State Courts of Jurisdiction*, 97 TEX. L. REV. 1, 3–4 (2018) (arguing that when Congress strips state court jurisdiction to

event, constitutional review in state courts is, as a practical matter, no substitute for review by federal courts. Reliance on state courts to enforce constitutional arrangements would founder on the inadequacy of the remedies state courts could issue against the federal government. State courts simply lack the institutional capacity to enforce federal constitutional rules against a determined Congress.³⁰

Let me offer two examples which, I hope, will make the potential import of Congress's Article III power clear. First, imagine that a future Congress passes,³¹ and a future President signs, legislation enacting a tax levy on the total value of personal assets—in common parlance, a wealth tax. Imagine further that Congress includes in that legislation a provision removing the jurisdiction of federal courts to review the tax for congruence with the Constitution's requirement that any "direct tax" must be apportioned among the states by population.³² The constitutionality of a wealth tax has not yet been determined. So if Congress legislates according to its interpretation and strips courts of jurisdiction to examine that legislation, it will have re-taken interpretive authority. If the result of judicial review would have been to strike down the wealth tax, but Congress's exercise of its Article III power prevents that from occurring, then one might say that Congress has in effect changed the Constitution. That change will last as long as it is not overridden by *voters*, who, if they object to Congress's preemption of judicial review, may exert pressure to reverse the policy or elect new legislators who promise to do so. Reversal may come in the form of new legislation that repeals the tax. Or it may come in the form of legislation restoring the power of federal courts to subject the tax to constitutional scrutiny. The voters' role is crucial: whether they overturn Congress's decision or leave it in place, Congress's exercise of its Article III power provides an opportunity to have the Constitution's meaning more fully specified by democratic processes.

The second example, unlike the first, involves a part of the Constitution that has a clear meaning. Imagine that a future Congress passes, and a future President signs, a law removing a number of fed-

hear constitutional challenges to federal laws, it may be subject to external limitations but "the questions raised . . . are best understood as concerning issues other than Congress's affirmative power").

³⁰ See *infra* Section II.C.

³¹ That is, passes "ordinary" legislation by the procedures laid out in Article I, Section 7. See U.S. CONST. art. I, § 7 (establishing bicameralism and presentment procedures for enacting federal legislation).

³² U.S. CONST. art. I, § 9, cl. 4. I do not mean to suggest that a wealth tax proposal would, or should, be declared unconstitutional. As is true in most cases, there are plausible, but not determinative, arguments on both sides. See *infra* text accompanying notes 305–07.

eral judges. The law is enacted by a simple majority under the ordinary lawmaking process, rather than by the Constitution's prescribed process for removing a federal judge, which requires impeachment by a simple majority in the House of Representatives, followed by a two-thirds vote in the Senate to remove.³³ As in the first example, Congress adds to the legislation a provision stripping the federal courts of power to entertain any constitutional challenge to the removal. In this instance, it seems much clearer that Congress's exercise of its Article III power would *change* the Constitution, effectively displacing the supermajority requirement.

These examples illustrate the nature of Congress's Article III power. Article III gives to Congress the power to choose whether it must answer, in a particular instance, to judges or to voters. Put differently, Article III gives Congress the option to direct that a particular legislative action will be subject to political rather than judicial constraint. Compared with judicial review, the political constraint is both less formal and, in the run of cases, likely to be less predictable.³⁴ But that does not mean that the political constraint is weak. Constitutionalism in the United States draws much of its content from convention, and Americans long ago learned to expect that judges will review Congress's work. A successful exercise of its Article III power will require a majority in Congress—and, in almost all instances, the cooperation of a President—who agree both on the substantive policy at issue and the political viability of overriding the public's expectation that, in the ordinary course, Congress should face a judicial check.³⁵ If Congress's use of its Article III power lacks political support, or if

³³ U.S. CONST. art. I, § 3, cl. 6 (“[N]o Person shall be convicted without the Concurrence of two thirds of the Members present.”).

³⁴ The democratic response to an exercise of Congress's Article III power is less formal because, unlike in litigation, the procedures are not specified in advance. The democratic response is likely to be less predictable, at least over the run of cases, because, unlike litigation, it is not bound to precedent or the conventions of legal reasoning. But for an argument that the Supreme Court is in reality bound neither by precedent nor legal reasoning, see generally ERIC J. SEGALL, *SUPREME MYTHS: WHY THE SUPREME COURT IS NOT A COURT AND ITS JUSTICES ARE NOT JUDGES* (2012).

³⁵ On the political constraints on Congress's use of its Article III power, see Tara Leigh Grove, *The Article II Safeguards of Federal Jurisdiction*, 112 COLUM. L. REV. 250 (2012) (drawing upon social science evidence to argue that the executive branch has a strong incentive to use its constitutional authority over the enactment and enforcement of federal law to oppose jurisdiction-stripping measures); Tara Leigh Grove, *The Structural Safeguards of Federal Jurisdiction*, 124 HARV. L. REV. 869 (2011) (arguing that the primary constitutional protection for the federal judiciary lies instead in the bicameralism and presentment requirements of Article I and that political factions are particularly likely to use their structural veto to block jurisdiction-stripping legislation favored by their opponents).

initial support wanes, then congressional proponents are likely to face a powerful political sanction.

My account of Congress's Article III power is unlikely to find favor with those who hold to the wisdom or necessity of unqualified judicial supremacy. I would not go as far as some would, including most prominently Mark Tushnet³⁶ and Jeremy Waldron,³⁷ in restricting judicial review and taking constitutionalism out of courts.³⁸ Tushnet argues that the Constitution as a whole is politically self-enforcing and that judicial review is not needed.³⁹ Waldron argues that constitutional construction is normatively superior when done by legislators versus by courts.⁴⁰ For reasons that will be detailed later, I am sympathetic to both arguments, although Waldron's normative arguments are more important to my project than Tushnet's instrumentalism. What I am proposing would, given the practical realities of American politics, almost certainly leave judicial supremacy in place with respect to most important constitutional questions. It would, however, establish a democratic counter-force, one which, even if rarely invoked, would help both shape and legitimate judicial review.

Having now invoked Tushnet's and Waldron's attacks on judicial supremacy, I would add a cautionary note about unexamined premises. Those who equate democratic constitutionalism with judicial supremacy will argue that Congress's use of the Article III power I have described does not change the Constitution, but rather *violates* it. Characterizing Congress's exercise of the power as a "violation," however, simply recapitulates the premise of unqualified judicial supremacy—that is, the notion that every constitutional question must be addressed by a court.

That idea has deep roots in American constitutionalism; no less an authority than John Marshall endorsed it, stating in his opinion in *Marbury* that the invalidity of a legislative act that a court finds inconsistent with the Constitution was a feature "essentially attached to a

³⁶ See MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 95 (1999) ("I have argued against the position that the Constitution *ought* to be committed entirely to the courts, and that legislatures might do a decent job of implementing the thin Constitution.").

³⁷ See JEREMY WALDRON, *LAW AND DISAGREEMENT* 211–312 (1999) (laying out his argument questioning constitutional review by judges).

³⁸ See also LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004) (tracing history and making a normative case for popular constitutionalism that includes judicial review without judicial supremacy); Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CALIF. L. REV. 1027 (2004) (reviewing Kramer's book and summarizing different conceptions of popular constitutionalism).

³⁹ See *infra* text accompanying notes 287–90.

⁴⁰ See *infra* text accompanying notes 291–95.

written constitution.”⁴¹ But, as many have pointed out,⁴² Marshall elides the important question of *which institution has the power to invalidate* an unconstitutional law. Looking at democratic constitutional states around the world, there are a variety of arrangements. In some, a judicial declaration of invalidity is self-executing—that is the arrangement in the United States. Or it could be that judicial review takes the form of a declaration of incompatibility, with the decision to invalidate left to the legislature. That has been the arrangement in the U.K., where, at least prior to Brexit, courts that found an inconsistency between a U.K. statute and the European Convention of Human Rights would issue a declaration of incompatibility, with the decision whether to invalidate or alter the law in question left to Parliament.⁴³ Or it could be that courts are empowered to review proposed legislation for conformance to the constitution but are barred from examining law once it is promulgated. This was the arrangement in France under its 1958 Constitution. Until 2008 amendments extended the judicial review power to enacted legislation,⁴⁴ France’s Constitutional Council was empowered only to examine the constitutionality of a proposed statute before it became law.⁴⁵ Then there are democracies with written constitutions that either proscribe or sharply limit the judicial invalidating power. The Netherlands is an example of an outright bar; its constitution expressly proscribes judicial review of the constitutionality of laws enacted by the Dutch Parliament.⁴⁶ In Switzerland, the power of judicial review is limited to cantonal laws,⁴⁷

⁴¹ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

⁴² See, e.g., Van Alstyne, *supra* note 3, at 19 (“[C]onsistent with Marshall’s own observation [in *Marbury*] that *the people* themselves established these written limitations, the democratic approach is to leave the judgment and remedy for alleged legislative usurpation with the people.”).

⁴³ See Human Rights Act 1998, c. 42, § 4 (UK); JOINT COMMITTEE ON HUMAN RIGHTS, SIXTEENTH REPORT, 2006–07, ¶ 14, 109–39 (UK), <https://publications.parliament.uk/pa/jt200607/jtselect/jtrights/128/12804.htm>.

⁴⁴ 1958 CONST. art. 61-1 (Fr.), <http://www2.assemblee-nationale.fr/langues/welcome-to-the-english-website-of-the-french-national-assembly>. See generally Martin A. Rogoff, *Fifty Years of Constitutional Evolution in France: The 2008 Amendments and Beyond*, 6 JUS POLITICUM 1 (2011) (contextualizing the 2008 amendments).

⁴⁵ 1958 CONST. art. 61 (Fr.), <http://www2.assemblee-nationale.fr/langues/welcome-to-the-english-website-of-the-french-national-assembly>; see, e.g., Rogoff, *supra* note 44, at 47 (“Article 61-1 represents a radical change in French constitutional law, as it allows for a judicial authority to find an act of Parliament unconstitutional even though that act has already entered into force.”).

⁴⁶ See Gw. [Constitution] art. 120 (Neth.) (“The constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts.”).

⁴⁷ The twenty-six cantons of Switzerland are the member states of the Swiss Confederation. See SWISS CONFEDERATION, *The Cantons*, DISCOVER SWITZ., <https://www.eda.admin.ch/aboutswitzerland/en/home/politik/uebersicht/kantone.html> (last updated Apr. 4, 2017) (providing a brief overview of the cantons).

which are reviewed by the Federal Supreme Court.⁴⁸ Article 189 of the Swiss Federal Constitution bars judicial review of federal legislation, unless the federal legislature passes a law creating an exception.⁴⁹

And then there is the example of Canada, which, as we shall see, is particularly relevant here. Section 33 of the Canadian Charter of Rights and Freedoms explicitly qualifies judicial supremacy.⁵⁰ Commonly referred to as the “Notwithstanding Clause” or the “Non-obstante Clause,” section 33 provides that Canada’s national and provincial legislatures possess the authority to declare that a legislative enactment “shall operate notwithstanding” certain key provisions of the Charter.⁵¹ Section 33 directly permits what I argue Article III of our Constitution gives Congress authority to do indirectly: to override, in a particular case, the ordinary expectation of judicial supremacy, and to change the constitution without amending it.

We will discuss the Notwithstanding Clause in more depth in Part II. It will suffice for now to say that the presence of a rule permitting legislative override of judicial review in the constitution of a nation acknowledged to be both democratic and rights-regarding⁵² should, at

⁴⁸ See TRIBUNAL FEDERAL, *THE PATHS TO THE SWISS FEDERAL SUPREME COURT: AN OVERVIEW OF SWITZERLAND’S JUDICIAL SYSTEM* 16 (2019), https://www.bger.ch/files/live/sites/bger/files/pdf/en/BG_BroschüreA5_E_Onl.pdf (“Federal laws must also be applied by the Federal Supreme Court, even if they violate the Federal Constitution. . . . On the other hand, the Federal Supreme Court may fully review the compatibility of cantonal laws with constitutional law.”).

⁴⁹ BUNDESVERFASSUNG [BV] [CONSTITUTION] Apr. 18, 1999, SR 101, art. 189, para. 4 (Switz.) (“Acts of the Federal Assembly or the Federal Council may not be challenged in the Federal Supreme Court. Exceptions may be provided for by law.”). Federal legislation in Switzerland is reviewed only through the political procedure established by Article 141 of the Swiss constitution. *Id.* at art. 141. This article establishes a process where, within one hundred days of the enactment of federal legislation, any fifty thousand eligible voters or the governments of any eight cantons can trigger a national referendum to determine whether the law should continue in force. *Id.*

⁵⁰ Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, § 33, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.).

⁵¹ *Id.*; see LAURENCE BROUSSEAU & MARC-ANDRÉ ROY, LIBRARY OF PARLIAMENT, *BACKGROUND PAPER: THE NOTWITHSTANDING CLAUSE OF THE CHARTER* 1–2 (2018), <https://lop.parl.ca/staticfiles/PublicWebsite/Home/ResearchPublications/BackgroundPapers/PDF/2018-17-e.pdf> (summarizing section 33 of the Canadian Charter of Rights and Freedoms).

⁵² Canada outranks the United States on most measures of human freedom, even with respect to indices that focus more heavily on economic rather than social rights. *See, e.g.*, IAN VÁSQUEZ & TANJA PORÉNIK, *THE HUMAN FREEDOM INDEX 2019* 7–9 (2019) (ranking Canada fourth and the United States fifteenth in an index measuring seventy-six distinct indicators of personal and economic freedom in the areas of rule of law, security and safety, movement, religion, association, assembly and civil society, expression and information, identity and relationships, size of government, legal system and property rights, access to sound money, freedom to trade internationally, and regulation of credit, labor, and business).

minimum, give pause to those in the United States who insist that any qualification to judicial supremacy would lead inexorably to legislative tyranny.⁵³

Finally, a word about methodology. With a few notable exceptions,⁵⁴ the scholarship debating the scope of Congress's power to limit judicial review has been undertaken within textualist or originalist analytical frameworks. As will be detailed in Part II, those approaches have produced several weakly plausible arguments for limitations to Congress's Article III power. The existing scholarship, however, fails to offer the weight of evidence that would make those arguments commanding.

In the absence of a commanding argument limiting Congress's Article III power, a dose of realism is in order. There is nothing standing in the way of Congress asserting its Article III power save the will to do so and the political judgment to do so successfully. As a matter of practical politics, Congress can draw the outlines of its own authority by using its Article III power effectively and in ways that voters approve. As Richard Fallon notes, "[t]he foundations of law lie in practices of acceptance."⁵⁵ This is especially true now, when many Americans are asking uncomfortable questions about how, and how well, our constitutional democracy works. Two centuries ago, at a time of deep political division, Chief Justice John Marshall claimed for the Supreme Court the power to declare invalid laws duly enacted by the people's elected representatives.⁵⁶ The Constitution presents Congress with an opportunity to take back a measure of that power. Longstanding concerns about the democratic legitimacy of unqualified judicial supremacy, and current developments highlighting the political risks of giving judges such enormous authority, counsel that Congress should begin to consider how best to wield the power that Article III gives it.

⁵³ An override provision in Israel's basic law that is similar in concept to Canada's Notwithstanding Clause though narrower in effect will also be discussed in Part II. See Basic Law: Freedom of Occupation, 5754-1994, SH No. 1454 p. 90 (Isr.) (providing that a law that violates freedom of occupation can still be in effect "if it has been included in a law passed by a majority of the members of the Knesset, which expressly states that it shall be of effect, notwithstanding the provisions of this Basic Law").

⁵⁴ See, e.g., Richard H. Fallon, Jr., *Jurisdiction-Stripping Reconsidered*, 96 VA. L. REV. 1043, 1048 (2010) ("[A]ny modern assessment of Congress's power to control and limit federal jurisdiction should 'decenter' originalist analysis under Article III for at least some purposes and rely openly on such considerations as consistency with judicial precedent and functional desirability." (citations omitted)).

⁵⁵ *Id.* at 1077.

⁵⁶ See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-78 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

I

UNDERSTANDING CONGRESS'S ARTICLE III POWER TO
LIMIT JUDICIAL REVIEWA. *The Literature on Congress's Article III Power*

A substantial number of commentators acknowledge, in general, Congress's authority⁵⁷ to limit the jurisdiction of both the Supreme Court⁵⁸ and the lower federal courts.⁵⁹ That said, many of the same

⁵⁷ See, e.g., 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) ("Congressional control of the courts' jurisdiction under article III has the sanction of the First Congress, draftsmen of the Judiciary Act of 1789, and of an unbroken string of decisions stretching from the beginning of the Republic." (footnote omitted)); Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 920 (1984) ("[A]rticle III grants a very broad discretion to Congress in assigning federal question litigation to state or federal courts."); John Harrison, *The Power of Congress to Limit the Jurisdiction of Federal Courts and the Text of Article III*, 64 U. CHI. L. REV. 203, 204 (1997) (defending "the traditional view that Congress's authority is substantial" when it comes to Congress's power to limit the jurisdiction of federal courts); Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1005 (1965) (finding "no basis" for the view that Congress lacks broad power to limit federal jurisdiction).

⁵⁸ See, e.g., Paul M. Bator, *Congressional Power over the Jurisdiction of the Federal Courts*, 27 VILL. L. REV. 1030, 1038 (1982) (asserting that the text of 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 57, at 622 ("The burden is on [those who would challenge Congress's Article III authority] to demonstrate that the plenary, unequivocal terms of the exceptions clause mean less than they say."); Gunther, *supra* note 57, at 901 ("On its face, the exceptions clause of article III, section 2, seems to grant a quite unconfined power to Congress to withhold from the [Supreme] Court a large number of classes of cases potentially within its appellate jurisdiction."); 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 (1982) [hereinafter Redish, *An Internal and External Examination*] ("A common sense interpretation of the [Exceptions Clause] would seem to lead to the conclusion that Congress possesses fairly broad authority to curb Supreme Court appellate jurisdiction."); Martin H. Redish, *Text, Structure, and Common Sense in the Interpretation of Article III*, 138 U. PA. L. REV. 1633, 1637 (1990) [hereinafter Redish, *Text, Structure, and Common Sense*] ("[T]he inescapable implication of the text is that Congress possesses broad power to curb the jurisdiction of both the lower courts and the Supreme Court."); William W. Van Alstyne, *A Critical Guide to Ex Parte McCordle*, 15 ARIZ. L. REV. 229, 257–60, 269 (1973) (arguing that the congressional power to make exceptions to the Supreme Court's appellate jurisdiction "is a plenary power").

⁵⁹ See, e.g., Bator, *supra* note 58, at 1030–31 ("[The Constitution] leaves it to Congress to decide, having created lower federal courts, what their jurisdiction should be . . ."); Redish, *Text, Structure, and Common Sense*, *supra* note 58, at 1637 ("[T]he inescapable implication of the text is that Congress possesses broad power to curb the jurisdiction of both the lower courts and the Supreme Court.").

commentators who agree in general that Congress possesses this power argue at the same time that it is limited.

Some have asserted that Congress's authority is hemmed in by constitutional provisions outside Article III (so-called "external" constraints) and that courts can invalidate or disregard jurisdiction-stripping provisions that would allow Congress to achieve unconstitutional ends.⁶⁰ Others have argued that Congress's Article III power is subject to limitations "internal" to Article III.⁶¹ For example, Akhil Amar and Robert Clinton argue that Article III makes some categories of federal jurisdiction mandatory and that Congress cannot withdraw jurisdiction for cases within those categories.⁶² Richard Fallon suggests that Congress cannot restrict federal jurisdiction if its purpose is to invite state court defiance of Supreme Court rulings.⁶³ And Lawrence Sager argues that all constitutional claims must be heard by

⁶⁰ See, e.g., Fallon, *supra* note 54, at 1050 ("[W]hen substantive constitutional rights exist, the Constitution requires that some court have jurisdiction to provide sufficient remedies to prevent those rights from becoming practical nullities."); Gunther, *supra* note 57, at 916–22 (discussing potential external limitations); Amanda L. Tyler, *Suspension as an Emergency Power*, 118 YALE L.J. 600, 607–08 (2009) (noting the Suspension Clause "[b]y its terms . . . constitutes . . . a limitation upon . . . congressional power" over habeas jurisdiction, but also observing that scholars have debated the scope of that limit); Van Alstyne, *supra* note 58, at 268–69 (arguing that while "Congress may make exception to the appellate jurisdiction of the Supreme Court even [in] cases of constitutional significance," Congress is restricted by other constitutional provisions, including the Bill of Rights, to the same extent "uniformly applicable to all acts of Congress"); Stephen I. Vladeck, *Boumediene's Quiet Theory: Access to Courts and the Separation of Powers*, 84 NOTRE DAME L. REV. 2107, 2146–49 (2009) (arguing that the Suspension Clause imposes an external limit on jurisdiction stripping and that the reasoning may generalize beyond habeas jurisdiction).

⁶¹ See, e.g., 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, 1005, 1038 (2007) (arguing that the text of Article III limits Congress's power to strip the Supreme Court's jurisdiction and instead "requires that the federal judiciary be able to exercise all of the judicial power of the United States"); Barry Friedman, *A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction*, 85 NW. U. L. REV. 1, 32 (1990) ("[T]he article III text . . . suggest[s] there is some mandatory core of federal jurisdiction that Congress cannot divest.").

⁶² See Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 229–30 (1985) [hereinafter Amar, *A Neo-Federalist View*] (arguing that Congress must give either the Supreme Court or inferior federal courts jurisdiction over cases arising under federal law as well as admiralty and ambassador suits); Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741, 749–50 (1984) (stating that Congress must "allocate to the federal judiciary as a whole . . . every type of case or controversy" listed in Article III); see also Akhil Reed Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499 (1990) [hereinafter Amar, *The Two-Tiered Structure*].

⁶³ See Fallon, *supra* note 54, at 1083 (arguing that federal courts should strike down jurisdiction-stripping legislation if motivated by a "constitutionally forbidden purpose of encouraging defiance of applicable Supreme Court precedent").

judges with life tenure and salary protections—meaning that Article III gives Congress the power to limit federal review of a particular case or category of cases to one of either the Supreme Court or the lower federal courts, but not to remove federal jurisdiction in its entirety.⁶⁴

An especially influential group of commentators has argued for tighter constraints based on the Supreme Court's institutional role. What has become known as the “essential function” thesis originated with Henry Hart's famous *Dialogue*,⁶⁵ in which Hart argued (or rather, proclaimed) that “the exceptions [to the Supreme Court's appellate jurisdiction] must not be such as will destroy the essential role of the Supreme Court in the constitutional plan.”⁶⁶ This view has been re-asserted many times since. Henry Monaghan's 2019 article in the *Duke Law Journal* stands as the most recent example:

[The Supreme Court] is a Court established by the Constitution itself, and the line of our constitutional development—to be sure messy, sharply contested, and by no means always one directionally forward—makes clear that the Court has *now* emerged as a tribunal different in kind from all others. In our current separation of powers framework, the Court has a unique and essential role in maintaining the idea of the limited government contemplated by the written 1789 Constitution.⁶⁷

From this quick sketch of the broadest outlines of a deeply contested history, Monaghan concludes, as Hart did, that Congress cannot exercise its Article III power in ways that interfere with the Supreme Court's role as supreme interpreter of the Constitution.⁶⁸

⁶⁴ See 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, 65–66 (1981) (arguing that Congress must provide federal court review of constitutional claims and “[c]laims of constitutional right present the most compelling cases for the imposition of the article III requirements”).

⁶⁵ Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953).

⁶⁶ *Id.* at 1365; see also Leonard G. Ratner, *Congressional Power over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157, 201 (1960) (congressional restrictions on the Supreme Court's appellate jurisdiction must preserve its “essential constitutional functions of maintaining the uniformity and supremacy of federal law”).

⁶⁷ Henry P. Monaghan, *Jurisdiction Stripping Circa 2020: What The Dialogue (Still) Has to Teach Us*, 69 DUKE L.J. 1, 23 (2019); see also James E. Pfander, *Jurisdiction-Stripping and the Supreme Court's Power to Supervise Inferior Tribunals*, 78 TEX. L. REV. 1433, 1435 (2000) (accepting Congress has significant authority to strip the Supreme Court of jurisdiction but arguing that the Court's “supreme” status requires that it be able to exercise at least minimal oversight in all cases).

⁶⁸ See Monaghan, *supra* note 67, at 17–18 (“[T]he Exceptions Clause, which as a textual matter seems to connote something of relatively minor importance, is a strikingly oblique way to endow legislators with the expansive authority to eviscerate completely a central responsibility of another constitutionally ordained branch of government!”). Raoul

Other commentators have piled on, decrying jurisdiction-stripping as fundamentally at odds with the theory and practice of American democratic constitutionalism.⁶⁹ Paul Bator argues that “[a] statute depriving the Supreme Court of appellate jurisdiction over . . . constitutional litigation *would* . . . violate the spirit of the Constitution, even if it would not violate its letter.”⁷⁰ Likewise, Gerald Gunther, while admitting that Congress has the “sheer legal authority” to eliminate federal jurisdiction over constitutional claims, counsels that any such law would be “unwise” and contrary to “the ‘spirit’ of the Constitution.”⁷¹ And Monaghan decries jurisdiction-stripping as inimical to American constitutional governance, writing that “[t]his country has long since understood that it needs a supreme constitutional court. For me, the ultimately prevailing line of development in our constitutional history has crucial, normative significance.”⁷²

Finally, and crucially, virtually all commentators assert, or simply assume, that whatever power Congress has to restrict federal jurisdiction would leave the enforcement of constitutional rules in the hands

Berger takes a narrow view of the “essential function thesis,” stating that “congressional control should not, under article III, be read to extend to interpretive review” because the Framers did not intend “Congress [to be able to] judge for itself whether its own laws exceeded its granted powers.” Raoul Berger, *Michael Perry’s Functional Justification for Judicial Activism*, 8 U. DAYTON L. REV. 465, 511 (1983). Under this view, Berger would bar Congress from removing federal court jurisdiction to determine if an act of Congress was “in excess of constitutional authorization” or violated an explicitly enumerated right, but would allow Congress to strip jurisdiction over “extraconstitutional rights” created by courts “‘overleaping’ their constitutional bounds.” *Id.* at 511–14 (using the ability of Congress to withdraw “jurisdiction of busing cases from the federal courts” as an example); *see also* Berger, *supra* note 57, at 616 (“For present purposes it may be assumed that congressional control of jurisdiction does not extend to ‘rights’ specified in the Constitution.”).

⁶⁹ *See, e.g.*, Gunther, *supra* note 57, at 898 (“A good many commentators (including myself) take a rather broad view of congressional power over the jurisdiction of federal courts in terms of sheer legal authority. Very few (and I am not one of these) support jurisdiction-stripping measures as a matter of desirability and effectiveness.”); 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) (arguing that “as a matter of policy,” Congress should have “a very strong presumption against” jurisdiction-stripping); *see also* Brian Kulp, Note, *Counteracting Marbury: Using the Exceptions Clause to Overrule Supreme Court Precedent*, 43 HARV. J. L. & PUB. POL’Y 279, 281 (2020) (acknowledging Congress’s “near-plenary” power to create exceptions to the Supreme Court’s appellate jurisdiction, but arguing that doing so would both be unwise and would leave the state courts in place as arbiters of federal constitutional claims). *But see* Michael T. Morley, *The Enforcement Act of 1870, Federal Jurisdiction Over Election Contests, and the Political Question Doctrine*, 72 FLA. L. REV. (forthcoming 2020) (manuscript at 45) (on file with author) (arguing that Congress likely has the power to exclude the federal judiciary from adjudicating election-related claims).

⁷⁰ Bator, *supra* note 58, at 1039.

⁷¹ Gunther, *supra* note 57, at 921.

⁷² Monaghan, *supra* note 67, at 23–24.

of *state* courts, thus preserving judicial supremacy, albeit in a balkanized and therefore clumsier form.⁷³

There are many variations and combinations of these arguments in a literature that has been derided as “choking on redundancy.”⁷⁴ And yet there is a perspective missing. On the whole, the literature treats whatever power Article III gives Congress to restrict the jurisdiction of federal courts as an embarrassment. Fixed to the bedrock of judicial supremacy, the debate (such as it is) frames Congress’s Article III powers as a threat to our constitutional order. We find a signal example in the seminal article in the field: Hart’s *Dialogue*.⁷⁵ For non-initiates, the *Dialogue*—published in the *Harvard Law Review* in 1953 and later that same year incorporated into the equally renowned federal courts textbook Hart published with Herbert Wechsler⁷⁶—is written in the form of a Platonic dialectic, with a questioner (*Q*) tossing softballs to Hart’s proxy (*A*). Here’s the moment where the *Dialogue* finally lands on the key question:

Q. Let’s stop beating around the bush and get to the central question. The bald truth is this, isn’t it, that the power to regulate jurisdiction is actually a power to regulate rights—rights to judicial process, whatever those are, and substantive rights generally? Why, that *must* be so. What can a court do if Congress says it has no jurisdiction, or only a restricted jurisdiction? It’s helpless—helpless even to consider the validity of the limitation, let alone to do anything about it if it’s invalid.

A. Why, what monstrous illogic! To build up a mere power to regulate jurisdiction into a power to affect rights having nothing to do with jurisdiction! And into a power to do it in contradiction to all

⁷³ See, e.g., John Harrison, *Jurisdiction, Congressional Power, and Constitutional Remedies*, 86 GEO. L.J. 2513, 2514 n.4 (1998) (“Congress’s power to exclude cases from state courts comes only from its power to put them exclusively in federal court.”); Hart, *supra* note 65, at 1401 (“In the scheme of the Constitution, [the state courts] are the primary guarantors of constitutional rights, and in many cases they may be the ultimate ones.”); Redish, *An Internal and External Examination*, *supra* note 58, at 900–01; Martin H. Redish & Curtis E. Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. PA. L. REV. 45, 69, 96, 106 (1975); Wechsler, *supra* note 57, at 1005–06; cf. Brian T. Fitzpatrick, *The Constitutionality of Federal Jurisdiction-Stripping Legislation and the History of State Judicial Selection and Tenure*, 98 VA. L. REV. 839, 841–43 (2012) (arguing that shift since founding from appointment to election of state judges suggests that jurisdiction-stripping is not, or is no longer, constitutional, because state court review is no longer sufficient to guarantee federal constitutional rights).

⁷⁴ Gunther, *supra* note 57, at 897 n.9 (quoting a letter from William W. Van Alstyne, Professor of Law, Duke Law School, to Gerald Gunther, Professor of Law, Stanford Law School (Feb. 28, 1983)).

⁷⁵ Hart, *supra* note 65, at 1371–72.

⁷⁶ HENRY M. HART & HERBERT WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (1953).

the other terms of the very document which confers the power to regulate jurisdiction!

Q. Will you please explain what's wrong with the logic?

A. What's wrong, for one thing, is that it violates a necessary postulate of constitutional government—that a court must always be available to pass on claims of constitutional right to judicial process, and to provide such process if the claim is sustained.⁷⁷

This commitment to the availability of judicial review *in every case* as a “necessary postulate of constitutional government” has pervaded the debate from Hart's framing of the terms in 1953.⁷⁸ Indeed, in his most recent contribution to the debate, Monaghan's rhetorical assault on the notion that Article III grants Congress power to make exceptions to the availability of judicial review has scarcely moderated since Hart more than sixty-five years earlier accused his poor marionette of “monstrous illogic”:

Given all of this, the Exceptions Clause, which as a textual matter seems to connote something of relatively minor importance, is a strikingly oblique way to endow legislators with the expansive authority to eviscerate completely a central responsibility of another constitutionally ordained branch of government! On this point, I invoke James Madison: “An interpretation that destroys the very characteristic of the government cannot be just.” Hart's interpretive philosophy sounds exactly like Madison!⁷⁹

In sum, the scholarship largely agrees on the imperative of unqualified judicial supremacy. As a consequence, the scope of the debate over Congress's Article III power has been reduced to explicating how text, structure, and “spirit” of the Constitution restrain it. To be fair, neither Congress nor the Supreme Court has done much to encourage re-thinking. Although it regularly enacts legislation that limits judicial review (mostly with respect to the decisions of federal agencies⁸⁰), only rarely does Congress purport to strip jurisdiction to conduct constitutional review.⁸¹ Moreover, in the rare instances where

⁷⁷ Hart, *supra* note 65, at 1371–72.

⁷⁸ See *supra* notes 65–74 and accompanying text.

⁷⁹ Monaghan, *supra* note 67, at 17–18 (citing James Madison, *Speech in Congress Opposing the National Bank* (Feb. 2, 1791), in JAMES MADISON: WRITINGS 480, 482 (Jack N. Rakove ed., 1999)).

⁸⁰ See Dawn M. Chutkow, *Jurisdiction Stripping: Litigation, Ideology, and Congressional Control of the Courts*, 70 J. POL. 1053, 1058 (2008) (“Contrary to conventional wisdom, Congress explicitly and regularly removes court jurisdiction. Since 1943, Congress passed 248 public laws containing 378 provisions expressly denying the federal courts any power of review. Jurisdictional removals primarily are designed to prevent court review of administrative decision making.”).

⁸¹ Indeed, none of the legislation studied in the Chutkow article involved provisions stripping jurisdiction to conduct constitutional review. See *id.* at 1058 n.16. It is true that many bills that would preclude constitutional review in some category of cases have been

Congress appears to limit courts' authority to conduct constitutional review, the Supreme Court has often (though, as we shall see, not always) interpreted the enactments as preserving some measure of jurisdiction, likely to avoid having to rule on the scope of Congress's Article III power.⁸² The relative rarity of jurisdiction-stripping (at least of the sort that reaches constitutional review), combined with the Supreme Court's reticence on the issue, has allowed the academic debate to settle into its comfortable rut. Crucially, the possibility that Congress's Article III power could play a constructive role in our system of democratic constitutionalism has received little consideration, despite the literature's sheer volume.

As we shall see, Article III's text and history, as well as the most directly relevant Supreme Court precedent, align in supporting a more-than-plausible argument—albeit, as is so often the case when attempting to fix the meaning of our old, oracular Constitution, far from a conclusive one—that Article III gives Congress the power to reclaim from the judiciary interpretative authority on particular constitutional questions. Many of the arguments for both external and internal limitations have persuasive force only to those already committed to the view that unqualified judicial review is, as Hart put it, “a necessary postulate of constitutional government.”⁸³ Without the support of that pre-commitment, the arguments have little power of their own. At minimum, it should be clear as a matter of both theory and empirics that commitment to unqualified judicial supremacy is not a logical corollary to democratic constitutionalism, but rather a *choice* with normative consequences.

The extent to which constitutional arrangements are judicially enforceable is entwined with the most fundamental question that all democratic constitutional states must address: how to balance democratic decision-making with constitutionally prescribed rights and pro-

introduced in Congress since the early nineteenth century, but few of them have passed. For a useful summary of nineteenth- and early-twentieth-century measures, see Gunther, *supra* note 57, at 896–97. More recent jurisdiction-stripping proposals focus on restricting courts in areas of intense political controversy, including abortion, school prayer, and public school busing. See EDWARD KEYNES & RANDALL K. MILLER, *THE COURTS VS. CONGRESS: PRAYER, BUSING, AND ABORTION* (1989).

⁸² See, e.g., *INS v. St. Cyr*, 533 U.S. 289, 299–300, 314 (2001) (declining to read the Immigration and Nationality Act as removing habeas jurisdiction from the federal courts because Congress had not explicitly addressed the issue, and interpreting the Act to “preclude judicial consideration” of habeas petitions would invoke “the outer limits of Congress’[s] power” and “raise serious constitutional questions”); *Webster v. Doe*, 486 U.S. 592, 603 (1988) (holding that while the National Security Act barred judicial review of termination decisions based on “those determinations specifically identified by Congress,” the Act should not be read “to preclude consideration of colorable constitutional claims”).

⁸³ Hart, *supra* note 65, at 1372. See generally *infra* Part II.

cedures.⁸⁴ All democratic constitutional systems place certain matters out of the reach of ordinary democratic decision-making. They do this, in general, by establishing certain rights and procedures as constitutional rules, often enforced by judicial review and almost always backed by entrenchment mechanisms that limit the ability of current democratic majorities to alter those arrangements. The expectation—or, perhaps more realistically, the hope—is that by insulating a society’s basic arrangements from change by ordinary majority voting, democratic constitutional states temper democracy in ways that help preserve both the stability and the decency of democratic governance over the long term. That said, constitutionalism is a qualified good that can be taken too far. In a country like ours with an old constitution, none of the living have consented to the particular restraints on democratic self-governance imposed by people who are long dead. For that reason, constitutionalism struggles always with a legitimacy problem: Judicial review and entrenchment mean that current democratic majorities, even those that are durable and motivated by deliberate judgment rather than momentary passion, often are unable to enact their preferences into law.⁸⁵ As a constitution entrenches more issues, as the depth of entrenchment (i.e., the barriers to amendment) increases,⁸⁶ and as the deference that courts grant to legislative inter-

⁸⁴ See generally Michel Rosenfeld & András Sajó, *Introduction to THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW* 1, 19–20 (Michel Rosenfeld & András Sajó eds., 2012) (stating that “key concepts” such as “democracy” and “rights and liberties” are among “a multitude of warring conceptions” in constitutional law); Keith E. Whittington, *Constitutionalism*, in *THE OXFORD HANDBOOK OF LAW AND POLITICS* 281, 284 (Gregory A. Caldeira, R. Daniel Kelemen & Keith E. Whittington eds., 2008) (“[N]ormative constitutionalism remains centrally concerned with the problem of how to reconcile . . . the protection of minority and individual rights . . . and democracy . . .”).

⁸⁵ For an excellent discussion of the difficulties of entrenchment, see Michael D. Gilbert, *Entrenchment, Incrementalism, and Constitutional Collapse*, 103 VA. L. REV. 631 (2017).

⁸⁶ In the United States, change through the constitutionally prescribed amendment process is exceptionally difficult. See U.S. CONST. art. V. Article V’s rule for amending the Constitution imposes a two-step requirement. First, an amendment may be proposed by a two-thirds majority vote in each house of Congress, or by a convention, which Congress is required to initiate after a request from two-thirds of the state legislatures. *Id.* If an amendment makes it over this initial hurdle, then it may become effective only when ratified by three-quarters of the states, either by a vote in their state legislatures, or in special conventions called in each state; Congress may specify one or the other mode of ratification. *Id.* In other words, an amendment requires two supermajority votes, and the supermajority for the second vote (the one required for ratification) is especially demanding.

When compared with the amendment provisions of other constitutional democracies, the U.S. Constitution’s Article V stands as a particularly deep form of constitutional entrenchment. In the 231 years since the Constitution came into effect, almost twelve thousand amendments have been proposed in Congress, but only thirty-three have been sent to the states for ratification, of which twenty-seven have been approved. Even this

pretations of a constitution's meaning shrinks, the larger that legitimacy problem looms.

When assessed against these measures, the variant of democratic constitutionalism we practice in the United States is situated on the extreme end of the spectrum in terms of the degree to which constitutional rules override the preferences of current majorities. But the current balance is not hard-coded into the system—Article III gives the political branches a means to recalibrate it. As such, Congress's Article III power carries enormous potential import as a means by which substantial, durable democratic majorities can push back against constitutional entrenchment and the counter-majoritarian force of judicial supremacy. As the late Charles Black noted, in a rare

small number underplays the barriers that Article V imposes. The first ten Amendments—i.e., the Bill of Rights—are obviously a special case. These were added shortly after the Constitution's ratification as the direct result of the so-called "Massachusetts compromise," by which states requested that specific amendments be added later, but without making such an addition a condition of ratification. See RICHARD LABUNSKI, JAMES MADISON AND THE STRUGGLE FOR THE BILL OF RIGHTS 58–59 (2006); Ian Shapiro, *Introduction: The Federalist Then and Now*, in THE FEDERALIST PAPERS ix, xiv (Ian Shapiro, ed., 2009). Another special case is the Civil War Amendments—i.e., the 13th, 14th and 15th—which established national citizenship, banned slavery, required states to provide due process and equal protection of the law, and expanded voting rights. U.S. CONST. amends. XIII–XV. These amendments were enacted via a debauchery of the Article V rules: Congress required the former Confederate states to ratify the 14th Amendment as a condition of regaining representation in Congress, and President Johnson applied "unprecedented pressures" on the newly established Southern legislatures to obtain ratification of the 13th Amendment. Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453, 501, 503–04 (1989). Additionally, Congress later amended the Reconstruction Acts to require that Virginia, Mississippi, and Texas ratify the 15th Amendment in order to regain Congressional representation. See HARPER'S WKLY., Apr. 24, 1869, at 259. In the century-and-a-half following the ratification of the 15th Amendment, the Constitution has been amended on only twelve occasions, and the rate of amendment has slowed over that time. See *The Constitution: Timeline for Ratification of All Constitutional Amendments*, LEXIS NEXIS, https://www.lexisnexis.com/constitution/amendments_timeline.asp (last visited Aug. 2, 2020). Since 1971, the Constitution has been amended only once, see *id.*; the 27th Amendment requires Congress, when it votes itself a pay raise, to wait until after the next election before the raise goes into effect. U.S. CONST. amend. XXVII. This triviality was ratified 203 years after the proposed amendment was submitted to the states in 1789. See Joint Resolution of Congress Proposing 12 Amendments to the U.S. Constitution, 1st Cong. (1789). By contrast, Germany amends its Basic Law "almost once per year." See Eric Posner, *The U.S. Constitution Is Impossible to Amend*, SLATE (May 5, 2014, 4:22 PM), <https://slate.com/news-and-politics/2014/05/amending-the-constitution-is-much-too-hard-blame-the-founders.html>. The current French constitution, adopted in 1958, has been amended twenty-four times—or, on average, once every 2.5 years. See *The Constitution*, CONST. COUNCIL, <https://www.conseil-constitutionnel.fr/en> (last visited Aug. 11, 2020) ("[T]he French Constitution has been, since its publication, modified twenty four times . . ."). The same can be said of the many U.S. states that amend their constitutions frequently. In twenty-five U.S. states, the state constitution has been amended at least one hundred times. See generally *Number of State Constitutional Amendments in Each State*, BALLOTPEDIA (last accessed Sept. 29, 2020), https://ballotpedia.org/Number_of_state_constitutional_amendments_in_each_state.

acknowledgment of the desirability of a legislative check on judicial power, Congress's power to limit the Supreme Court's appellate jurisdiction stands as "the rock on which rests the legitimacy of the judicial work in a democracy."⁸⁷ Unlike Black, most commentators ignore the legitimacy question that a legislative check might help resolve. And on occasion the scholarship has gotten the legitimacy question entirely turned around.

Monaghan's 2019 article is a recent example.⁸⁸ Monaghan instances a hypothetical in which Congress enacts a law restricting abortion rights beyond what current Supreme Court precedent would allow. Included in that enactment is a provision stripping the Supreme Court's jurisdiction to review the new restrictions. How, Monaghan asks, should the Supreme Court respond? The Court, Monaghan says, should ignore the jurisdiction-stripping provision and strike down the statute. In support of this argument, Monaghan quotes Holmes: "[T]he present has a right to govern itself so far as it can."⁸⁹

The problem, obviously, is that it is Congress's legislative act, and not the Supreme Court's review and likely invalidation of it, that represents "the present . . . govern[ing] itself."⁹⁰ One may dislike (or not) the substance of what Congress has done in Monaghan's hypothetical. That does not change the fact that Congress is elected and may be disciplined by voters, whereas federal judges are unelected and, except in extreme cases, not subject to discipline. It is Congress that can claim to act on behalf of a present majority. The Supreme Court, in invalidating the statute, can claim to be acting on the (vague) instructions of the past—if you can even credibly claim that the view that state laws restricting a woman's access to abortion implicate the Fourteenth Amendment's guarantee of due process as "instructions from the past," rather than as largely unconstrained judicial divination of an intractably vague fragment of text.⁹¹ Those who take the courts' side will argue that privileging past political decisions is what constitutionalism, at its core, is about. But even under a maximalist account of

⁸⁷ Charles L. Black, Jr., *The Presidency and Congress*, 32 WASH. & LEE L. REV. 841, 846 (1975).

⁸⁸ Monaghan, *supra* note 67, at 17, 30.

⁸⁹ *Id.* at 30 (quoting Oliver Wendell Holmes, *Learning and Science, Speech at a Dinner of the Harvard Law School Association in Honor of Professor C.C. Langdell, June 25, 1895*, in COLLECTED LEGAL PAPERS 138, 139 (1920)). Monaghan notes that Holmes's specific reference was to legislation, which makes the point against judicial supremacy rather nicely. See *id.*, at 30–31 n.134.

⁹⁰ *Id.* at 30.

⁹¹ For a deep critique of the notion that courts owe a "diachronic" interpretive obligation to past sources of constitutional meaning, including either original understanding or precedent, see ABNER S. GREENE, *AGAINST OBLIGATION* 161–209 (2012).

judicial review, that principle has limits. The Constitution can be amended. The question is whether there is some mechanism, other than amendment, by which the present may reclaim the opportunity to govern itself, to adopt Monaghan's formulation. Congress's Article III power is one possible mechanism.

B. Potential "Internal" Limitations on Congress's Article III Power

In the next two Sections, we will re-examine the arguments for internal and external limitations to Congress's Article III power. Let us begin with the relevant text of Article III and examine whether it contains "internal" limitations on Congress's power to limit federal jurisdiction.

Article III, Section 1 states that "[t]he 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."⁹²

Article III, Section 2, Clause 1 defines the scope of the "judicial power," providing that it

"shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."⁹³

Article III, Section 2, Clause 2 limits the Supreme Court's original jurisdiction to "all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party"⁹⁴ The same clause then directs that for "all the other Cases before mentioned [i.e., in all the various categories of federal judicial power listed in Article III, Section 2, Clause 1], 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."⁹⁵

⁹² U.S. CONST. art. III, § 1.

⁹³ *Id.* § 2, cl. 1.

⁹⁴ *Id.* § 2, cl. 2.

⁹⁵ *Id.*

1. Lower Federal Courts: Text and History

We will first consider Congress's power to limit or remove the jurisdiction of lower federal courts. On this issue the text of Article III appears to offer clear direction; it embodies the so-called Madisonian Compromise reached at the Constitutional Convention, under which Congress was given discretion whether to establish lower federal courts.⁹⁶ Setting aside for the moment any restraints that may be imposed by provisions of the Constitution outside of Article III, it is difficult to dispute that Article III, Section 1 gives Congress encompassing power to shape, limit, or even eliminate the jurisdiction of lower federal courts. The language of that provision could not state more clearly that both the power to establish lower federal courts and the discretion whether to establish them at all belong to Congress. Nor does any provision of the Constitution, either in Article III or elsewhere, require Congress to vest in the lower federal courts jurisdiction over any particular case or category of cases that fall within the judicial power.⁹⁷ As a consequence, if Congress decides to establish lower federal courts, it retains discretion to restrict their jurisdiction.

Such has been the consistent understanding of Congress's power since the Judiciary Act of 1789, pursuant to which Congress created lower federal courts but gave them jurisdiction much more limited than what Article III, Section 2, Clause 1 would permit.⁹⁸ The 1789 Act made no provision for general federal question jurisdiction in the lower courts,⁹⁹ but instead left to state courts the task of resolving

⁹⁶ See Fallon, *supra* note 54, at 1065; see also 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 124-25 (Max Farrand ed., 1911) [hereinafter FEDERAL CONVENTION OF 1787] (documenting the debate and vote determining that the establishment of "inferior tribunals under the national authority" would be left to the discretion of Congress (emphasis omitted)). Although delegates at the Constitutional Convention appear to have initially agreed that the Constitution should establish a Supreme Court, they disagreed about whether the Constitution should establish lower federal courts, or prohibit them, or commit the question to the discretion of Congress. Fallon, *supra* note 54, at 1060 n.72. Delegates first adopted language that required the establishment of lower federal courts, but then changed course and voted tentatively in favor of prohibiting Congress from establishing any federal court aside from the Supreme Court. See FEDERAL CONVENTION OF 1787, *supra*, at 125; Fallon, *supra* note 54, at 1060 n.72. Madison then made a compromise proposal that is embodied in the language of Article III, Section 1, which provides that "[t]he 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." U.S. CONST. art. III, § 1; see also Fallon, *supra* note 54, at 1060 n.72.

⁹⁷ See *supra* text accompanying notes 93-96; *infra* text accompanying notes 98-108.

⁹⁸ See Fallon, *supra* note 54, at 1065 ("Congress can establish lower courts but give them less than the full jurisdiction that the Constitution would permit.").

⁹⁹ See *id.*

disputes involving federal law, with appeal to the federal Supreme Court.¹⁰⁰ The process by which Congress legislatively established lower federal courts as the primary forum for federal statutory and constitutional claims did not begin until the Civil Rights Act of 1866.¹⁰¹ With the goal of safeguarding the rights of freed slaves in the former Confederate states, the 1866 Act established jurisdiction in the federal circuit courts for claims under the Act, as well as the right of claimants to remove such claims from state or local courts.¹⁰² In order to ensure equal protection under the law and full access to fundamental rights for all citizens, the states ratified the Fourteenth Amendment in 1868; the Civil Rights Acts in 1868, 1870, and 1871 allowed all individuals to enforce their constitutional and statutory rights “against anyone acting ‘under color of any law’ of a state” through private causes of action in federal court.¹⁰³ General jurisdiction which covered “all cases ‘arising under’ the Constitution, laws, and treaties of the United States” as long as the amount in controversy was over \$500 was granted to the circuit courts by Congress through a statute in 1875.¹⁰⁴ By raising the minimum amount in controversy to \$2000 and placing restrictions on the removal of cases from state courts, this general grant was cut back somewhat in 1887.¹⁰⁵

2. Lower Federal Courts: Supreme Court Precedent

The Supreme Court’s precedent, beginning with its 1850 ruling in *Sheldon v. Sill*,¹⁰⁶ is consistent with both the text of Article III and Congress’s historical understanding, as reflected in its legislation conferring, and, more importantly, withholding, lower court jurisdiction. *Sheldon* involved a challenge to provisions of the Judiciary Act of 1789 which generally vested lower federal courts with diversity jurisdiction, but excepted cases in which a party attempted to manufacture diversity by transferring a “chase in action” to another, out-of-state

¹⁰⁰ The Judiciary Act of 1801, passed in the final days of the Federalist majority in Congress, granted lower federal courts federal question jurisdiction in line with the authorization granted to the Supreme Court under the “arising under” clause of Article III, but Jefferson’s Republicans took over as the majority party a few weeks later and repealed the statute the following year. 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 780–81 (7th ed. 2015); see also Fallon, *supra* note 54, at 1065 n.95.

¹⁰¹ See *Jurisdiction: Federal Question*, FED. JUD. CTR., <https://www.fjc.gov/history/courts/jurisdiction-federal-question> (last visited Aug. 10, 2020).

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ 49 U.S. (8 How.) 441 (1850).

party.¹⁰⁷ The *Sheldon* Court upheld the provisions, stating that a statute restricting the jurisdiction of the lower federal courts “cannot be in conflict with the Constitution, unless it confers powers not enumerated therein”¹⁰⁸—i.e., unless the statute purports to confer jurisdiction over a case or category of cases not placed by Article III, Section 2, Clause 1 within the scope of the federal judicial power.

The reasoning of *Sheldon* provides important guidance regarding the scope of Congress’s Article III power. Sill, the petitioner, asserted that the exception to lower court jurisdiction in the Judiciary Act violated the part of Article III, Section 2, Clause 1 that defines the scope of “judicial power” as including “controversies between citizens of different States.”¹⁰⁹ Sill argued that Article III, Section 2, Clause 1 was *itself* a grant of jurisdiction, and as a consequence lower federal courts must exercise original jurisdiction over diversity cases because that class of cases is not within the Supreme Court’s original jurisdiction.¹¹⁰ Sill argued, in other words, that some federal court must possess original jurisdiction over every class of cases that Article III, Section 2, Clause 1 locates within the federal judicial power.¹¹¹

This argument has made appearances from time to time in the contemporary debate. For example, in a 1974 article in the *Yale Law Journal*,¹¹² the late Theodore Eisenberg argues that it is “rational” to read Article III, Section 2 to vest in the lower federal courts “power to hear in the first instance many cases which are not within the Supreme

¹⁰⁷ See Act of Sept. 24, 1789, ch. 20, § 11, 1 Stat. 73, 79.

¹⁰⁸ *Sheldon*, 49 U.S. at 449. See also *Lauf v. Shinner & Co.*, 303 U.S. 323 (1938), in which the Supreme Court upheld a provision of the Norris-LaGuardia Act, ch. 90, 47 Stat. 70 (1932) (codified as amended and repealed in part at 29 U.S.C. §§ 101–15 (2006)), that barred lower federal courts from enforcing so-called “yellow dog” contracts, in which workers agree not to join or to resign from unions as a requirement for employment, and from issuing injunctions in labor disputes. In applying the exclusion from federal jurisdiction, the *Lauf* Court stated that “[t]here can be no question of the power of Congress thus to define and limit the jurisdiction of the inferior courts of the United States.” 303 U.S. at 330.

¹⁰⁹ *Sheldon*, 49 U.S. at 448.

¹¹⁰ *Id.* at 446.

¹¹¹ The relevant cases are grouped in three main ways. Some are dependent on the law in question such as cases “arising under this Constitution, the Laws of the United States, and Treaties made . . . under their Authority . . .” U.S. CONST. art. III, § 2, cl. 1. Others are dependent on the official role of parties involved such as those “affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction . . .” *Id.* The last group of explicitly identified cases is dependent on the general identity of the involved parties such as “Controversies to which the United States shall be a Party;—to Controversies between . . . States; . . . between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.” *Id.*

¹¹² Theodore Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 *YALE L.J.* 498 (1974).

Court's original jurisdiction."¹¹³ Eisenberg points to a "gap between the full reach of federal judicial power" set out in Article III, Section 2, Clause 1, and the Supreme Court's narrow original jurisdiction set out in Article III, Section 2, Clause 2.¹¹⁴ And he suggests that, "when read in conjunction with the 'shall' of § 1," the gap means that inferior courts must "exercise the residuum of federal jurisdiction withheld from the Supreme Court."¹¹⁵

The most glaring flaw in this argument is that the Supreme Court explicitly rejected it in *Sheldon*. In its unanimous opinion, the Court describes the disparity between the encompassing list of disputes that lie within the federal judicial power, as that term is defined in the first Clause of Article III, Section 2, and the relatively narrow original jurisdiction of the Supreme Court.¹¹⁶ This is the "gap" that Eisenberg identifies. The Court in *Sheldon* held unequivocally that the Constitution does not close that gap, and that Congress may choose to close it or to leave it open, as it considers best:

It must be admitted that if the Constitution had ordained and established the inferior courts and distributed to them their respective powers, they could not be restricted or divested by Congress. But as it has made no such distribution, one of two consequences must result, —either that each inferior court created by Congress must exercise all the judicial powers not given to the Supreme Court or that Congress, having the power to establish the courts, must define their respective jurisdictions. The first of these inferences has never been asserted, and could not be defended with any show of reason, and if not, the latter would seem to follow as a necessary consequence. *And it would seem to follow, also, that, having a right to prescribe, Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies.* Courts created by statute can have no jurisdiction but such as the statute confers. No one of them can assert a just claim to jurisdiction exclusively conferred on another or withheld from all.

The Constitution has defined the limits of the judicial power of the United States, but has not prescribed how much of it shall be exercised by the Circuit Court; consequently the statute which does prescribe the limits of their jurisdiction cannot be in conflict with the Constitution unless it confers powers not enumerated therein.¹¹⁷

¹¹³ *Id.* at 502.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 448–49 (1850).

¹¹⁷ *Id.* (emphasis added).

This passage makes clear that Article III, Section 2, Clause 1 is not in itself a grant of jurisdiction. Rather, it is a delimiting of the scope of the jurisdiction that *Congress may choose to grant* to federal courts.¹¹⁸ The only constitutionally-mandated jurisdiction is the orig-

¹¹⁸ In a series of articles, Akhil Amar offers a creative but ultimately unconvincing variation on Eisenberg's argument. See Akhil Reed Amar, *Marbury, Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. CHI. L. REV. 443, 487 (1989) (arguing for the Supreme Court's mandatory jurisdiction over state-diversity cases); Amar, *A Neo-Federalist View*, *supra* note 62, at 271-72 (arguing that the federal nature of the Constitution requires that "[a]ll cases arising under federal law . . . must be capable of final resolution by a federal judge"); Akhil Reed Amar, *Reports of My Death Are Greatly Exaggerated: A Reply*, 138 U. PA. L. REV. 1651, 1651 (1990) (responding to critiques of his two-tiered argument); Akhil Reed Amar, *Taking Article III Seriously: A Reply to Professor Friedman*, 85 NW. U. L. REV. 442, 445 (1991) (asserting a textual reading of Article III indicates the exceptions clause restricts the appellate power of the Supreme Court rather than federal judicial power generally); Amar, *The Two-Tiered Structure*, *supra* note 62, at 1500-01 (locating debates on the jurisdiction stripping power of Congress within broader conversations on federalism and separation of powers). Amar notes that Article III, Section 2, Clause 1 states, with respect to the first three of the nine categories of cases identified in the provision (i.e., cases "arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls; to all Cases of admiralty and maritime Jurisdiction") that the judicial power "shall extend" to "all Cases." U.S. CONST. art. III, § 2, cl. 1. (emphasis added); see Amar, *A Neo-Federalist View*, *supra* note 62, at 229-30. On the other hand, Article III, Section 2, Clause 1 does not apply the words "all cases" to the six categories that follow (i.e., "to Controversies to which the United States shall be a Party;—to Controversies between two or more States . . . between Citizens of different States . . . [or] the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects"). U.S. CONST. art. III, § 2, cl. 1. Rather, the text provides that the judicial power shall extend to "Controversies" in each category. *Id.* Amar argues that this selective use of the formula "all cases" reflects a two-tiered scheme in which the first three categories of federal jurisdiction are *mandatory*, and the six other categories are not. See, e.g., Amar, *A Neo-Federalist View*, *supra* note 62, at 240-46. For cases falling within the three first-tier categories, Amar notes, Congress retains some discretion; it need not provide original jurisdiction in the lower federal courts if it provides appellate jurisdiction in the federal Supreme Court, and vice versa. See, e.g., *id.* at 255. But, Amar argues, Article III mandates the vesting of jurisdiction over all cases in the three first-tier categories in either a lower federal court (as a matter of original jurisdiction), in the Supreme Court (as an element of the Court's appellate jurisdiction), or in both. *Id.* at 255-59. Amar makes an originalist argument for his reading of Article III, noting that earlier drafts at the Constitutional Convention of the text that became Article III, Section 2, Clause 1 provided for federal jurisdiction in all cases arising under the Constitution while omitting the "all" in describing other categories of federal judicial power. *Id.* at 242-45.

Amar's account, like Eisenberg's, is inconsistent with the understanding of Article III, Section 2, Clause 1 articulated by the Supreme Court in *Sheldon v. Sill* and its progeny. It is also contestable even if the Court had not ruled it out in *Sheldon*. In a critique of Amar's arguments, Daniel Meltzer observes that nothing in the records of the Constitutional Convention suggests that Article III was meant to have the two-tiered structure Amar argues for. Daniel J. Meltzer, *The History and Structure of Article III*, 138 U. PA. L. REV. 1569, 1577 (1990). Meltzer also offers a different, and more sensible, explanation for Article III's use of "all cases" for some categories of federal jurisdiction and "controversies" in others. Meltzer cites historical evidence suggesting that the Founding

inal jurisdiction of the Supreme Court, set out in Article III, Section 2, Clause 2, which is limited to “all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party.”¹¹⁹ The Supreme Court had earlier held in *Chisholm v. Georgia* that its own original jurisdiction is self-executing (i.e., that no further action by Congress is required to permit the Supreme Court to exercise it).¹²⁰ The Court’s holding in *Sheldon* makes clear that all other jurisdiction of the federal courts, including the Supreme Court’s appellate jurisdiction, is *not* self-executing, and that Congress must create jurisdiction by legislating.¹²¹ In the absence of a congressional grant of jurisdiction to lower courts respecting a particular category of cases, the lower courts lack that jurisdiction.

That is the congressional power that Article III, Section 2 establishes, that the Supreme Court confirmed in *Sheldon*,¹²² and that it has repeatedly reaffirmed. In judgments following *Sheldon*, the Supreme Court has: referred to Congress’s “plenary control over the jurisdic-

generation understood the word “cases” to embrace both civil and criminal actions, whereas the word “controversies” referred only to civil disputes. *Id.* at 1575 (emphasis omitted). The Framers may thus have employed the formula “all cases” to indicate that in the first three categories of cases listed in Article III, Section 2, Clause 1, Congress had the power to create jurisdiction in the federal courts for both civil and criminal actions, versus only civil cases for the latter six categories. *See also* Harrison, *supra* note 57, at 208 (critiquing Amar’s arguments).

¹¹⁹ Another variation on Eisenberg’s argument can be found in Calabresi & Lawson, *supra* note 61, at 1005, 1038. Calabresi and Lawson argue on originalist grounds that Article III requires the Supreme Court to have either original or appellate jurisdiction of all cases arising under the Constitution, laws, and treaties of the United States. According to the authors, the Exceptions Clause should be understood to permit exceptions to the Court’s appellate jurisdiction only in cases in which Congress gives the Court original jurisdiction instead. *Id.* at 1038–39. But the notion that Congress can add cases or categories of cases to the Supreme Court’s original jurisdiction was rejected in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 175 (1803)—the Court’s original jurisdiction is fixed to the (very small) categories of cases specified in Article III, Section 2, Clause 2. Calabresi and Lawson’s argument, like Eisenberg’s, is also contradicted directly by *Sheldon v. Sill*, which, as noted, held that only the Supreme Court’s original jurisdiction is mandatory. *See* 49 U.S. at 448–49.

¹²⁰ 2 U.S. (2 Dall.) 419, 420, 426–27 (1793) (“The Supreme Court [is] either vested with authority by the judicial act, to form an execution, or possess it as incidental to their jurisdiction.”).

¹²¹ *Sheldon*, 49 U.S. at 448–49.

¹²² Note that Justice Story, in dicta in *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304 (1816), offered an interpretation of Article III that is later echoed by Eisenberg and others. Justice Story concluded from the phrase “shall be vested” that the whole federal jurisdictional power must be vested in some federal court. *Id.* at 330–31. Since Article III gave federal courts jurisdiction wherever the Supreme Court lacked original jurisdiction, it followed “that congress [was] bound to create some inferior courts, in which to vest all that jurisdiction which, under the constitution, is *exclusively* vested in the United States, and of which the supreme court cannot take original cognizance.” *Id.* at 328–31 (dictum). This view of Article III has never been adopted in a holding.

tion of the federal courts";¹²³ reiterated that there was "no question" of Congress's power to limit lower court jurisdiction;¹²⁴ held that "Congress . . . possess[es] the sole power of creating the tribunals (inferior to the Supreme Court) for the exercise of the judicial power, and of . . . withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good";¹²⁵ asserted that "[t]o deny this position would be to elevate the judicial over the legislative branch of the government, and to give to the former powers limited by its own discretion merely";¹²⁶ and confirmed that "[t]he Congressional power to ordain and establish inferior courts includes the power 'of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good.'" ¹²⁷

The bottom line is clear: Congress has the authority to limit or even eliminate the jurisdiction of lower federal courts. Congress's understanding of its own power aligns with the Supreme Court's understanding as well as a straightforward reading of the text of Article III. Unless limited by some provision in the Constitution external to Article III, that power is essentially plenary. We will deal with the possibility of external limitation in Section II.B, below. But first, we will turn to possible internal limitations on Congress's Article III power to limit the Supreme Court's appellate jurisdiction.

3. "Exceptions" and the Supreme Court's Appellate Jurisdiction

Article III's "Exceptions Clause" provides that the Supreme Court's appellate jurisdiction shall be exercised "with such Exceptions, and under such Regulations as the Congress shall make."¹²⁸ Congress's authority under this provision to limit the

¹²³ *Bhd. of R.R. Trainmen, Enter. Lodge, No. 27 v. Toledo, Peoria & W.R.R.*, 321 U.S. 50, 63–64 (1944).

¹²⁴ *Lauf v. Shinner & Co.*, 303 U.S. 323, 330 (1938) ("There can be no question of the power of Congress thus to define and limit the jurisdiction of the inferior courts of the United States.").

¹²⁵ *Cary v. Curtis*, 44 U.S. (3 How.) 236, 245 (1845).

¹²⁶ *Id.*

¹²⁷ *Lockerty v. Phillips*, 319 U.S. 182, 187 (1943) (quoting *Cary*, 44 U.S. at 245) (upholding legislation denying jurisdiction to federal district courts and state courts to enjoin enforcement of certain regulations); *see also* *Kline v. Burke Constr. Co.*, 260 U.S. 226, 233–34 (1922) ("The Constitution simply gives to the inferior courts the capacity to take jurisdiction in the enumerated cases, but it requires an act of Congress to confer it. And the jurisdiction having been conferred may, at the will of Congress, be taken away in whole or in part . . .") (citations omitted).

¹²⁸ U.S. CONST. art. III, § 2, cl. 2.

Supreme Court's jurisdiction is qualified in two respects, but the qualifications, as we shall see, are narrow.

Note first that Congress's Exceptions Clause power does not apply to the Supreme Court's original jurisdiction (i.e., to categories of cases which the Supreme Court may hear first), but only to its appellate jurisdiction (i.e., to cases in which the Supreme Court reviews the decision of a lower court). As has been noted,¹²⁹ the Supreme Court's original jurisdiction is mandatory—Congress can neither remove from nor add to it¹³⁰—but it is also narrowly drawn: It includes only “[c]ases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party”¹³¹ The number of cases heard under the authority of the Supreme Court's original jurisdiction “has always been a minute portion of [the Court's] overall caseload,”¹³² generally including only one or two cases per term,¹³³ and so this first qualification of Congress's power to limit the Supreme Court's jurisdiction is of little practical moment. It would prevent Congress from removing the Supreme Court's jurisdiction over boundary and water-rights disputes between or among states.¹³⁴ But it would leave the overwhelming preponderance of the Supreme Court's docket open to exercise of Congress's Article III authority.¹³⁵

¹²⁹ See *supra* text accompanying note 119.

¹³⁰ See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174–75, 180 (1803) (holding that a grant to the Supreme Court of a form of original jurisdiction not specified in Article III, Section 2, Clause 2 was invalid).

¹³¹ U.S. CONST. art. III, § 2, cl. 2.

¹³² *Jurisdiction: Original, Supreme Court*, FED. JUD. CTR., <https://www.fjc.gov/history/courts/jurisdiction-original-supreme-court> (last visited Aug. 3, 2020).

¹³³ See David Hatton & Jay Wexler, *The First Ever (Maybe) Original Jurisdiction Standings*, 2 J.L. (1 J. LEGAL METRICS) 19, 20 (2012). “Between 1789 and 1959, the Court issued written opinions in only 123 [cases of original jurisdiction]. Since 1960, the Court has received fewer than 140 motions for leave to file original cases, nearly half of which were denied a hearing.” *Jurisdiction: Original, Supreme Court*, *supra* note 132.

¹³⁴ See, e.g., *Nebraska v. Wyoming*, 534 U.S. 40, 41 (2001) (disputing, between several states, the allocation of water flowing in North Platte River); *New Jersey v. New York*, 523 U.S. 767 (1998) (disputing territorial control over Ellis Island).

¹³⁵ Note that the original jurisdiction of the Supreme Court does not include suits by states against the United States. If suits by a state against the United States were within the Supreme Court's original jurisdiction, then Congress could not entirely remove federal court jurisdiction to hear constitutional challenges to federal statutes brought by states. But because a sovereign cannot be sued in its own courts, the judicial power does not extend to suits against the United States unless Congress by statute consents to such suits; thus, Congress has ample power to remove these suits from the jurisdiction of federal courts, or, in particular instances, to prohibit such suits altogether in federal court as an aspect of the sovereign immunity of the United States. See *United States v. Clarke*, 33 U.S. (8 Pet.) 436, 444 (1834) (noting that because the United States is “not suable of common right, the party who institutes such suit must bring his case within the authority of some act of congress, or the court cannot exercise jurisdiction over it”); *Cohens v. Virginia*, 19 U.S.

The second qualification lies in the meaning of the particular word—“exceptions”—in which Congress’s power is inscribed. We lack judicial guidance on what limitations the term imposes, so anything I say here is necessarily guess-work. Perhaps the term may be read to suggest that whatever Congress does in terms of exception cannot be so pervasive that the *absence* of Supreme Court appellate jurisdiction becomes the usual case. But that degree of constraint is almost certainly irrelevant as a practical matter. Congress could legislate a large number of exceptions to the Supreme Court’s appellate jurisdiction, exceptions that might each insulate from judicial review a significant legislative change to the Constitution, without approaching the point at which the limitations subtract so substantially from the Supreme Court’s appellate jurisdiction, or even from any particular category of cases within that jurisdiction, that a court would be justified in finding that Congress has flipped the default expectation and overrun the limits of the term “exceptions.” I should note that it is far from clear that even this minimal understanding of the restraint would be enforced. It may be, for example, that a law limiting the Supreme Court’s appellate jurisdiction to “cases involving more than ten billion

(6 Wheat.) 264, 411–12 (1821) (“The universally received opinion is, that no suit can be commenced or prosecuted against the United States . . .”); *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 478 (1793) (“[I]n all cases of actions against States or individual citizens, the National Courts are supported . . . by the arm of the Executive power of the United States; but in cases of actions against the United States, there is no power which the Courts can call to their aid.”). Note that in *Ex parte Young*, 209 U.S. 123 (1908), the Supreme Court created an exception to state sovereign immunity for actions to restrain state officials from imposing sanctions for violation of a state statute that allegedly violated the Federal Constitution. The *Ex parte Young* exception has also been applied to permit claims for equitable relief restraining federal officials from violating the Constitution. *See, e.g., Shields v. Utah Idaho Cent. R.R. Co.*, 305 U.S. 177, 183 (1938) (“Respondent has invoked the equity jurisdiction to restrain such prosecution [under the federal Railway Labor Act] and the Government does not challenge the propriety of that procedure. Equity jurisdiction may be invoked when it is essential to the protection of the rights asserted, even though the complainant seeks to enjoin the bringing of criminal actions.”). (I am grateful to Will Baude for comments making this point.) However, the Supreme Court subsequently has made clear that this exception is available only where the action is not in substance an attempt to restrain the sovereign. *See Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 688 (1949) (“In each such case the question is . . . whether, by obtaining relief against the officer, relief will not, in effect, be obtained against the sovereign. For the sovereign can act only through agents and, when the agents’ actions are restrained, the sovereign itself may, through him, be restrained.”). The *Larson* Court specifically tied the permissibility of the claim to the notion that unconstitutional actions could not be assigned to the sovereign, holding that the exception applied “where there was a claim that the taking of the property or the injury to it was *not the action of the sovereign because unconstitutional* or beyond the officer’s statutory powers.” *Id.* at 698–99 (emphasis added). In the case of Congress’s exercise of its Article III power, any argument that the claim is not aimed at restraining the sovereign would be met with the response that Congress has acted within its authority under Article III, and not extra-constitutionally, and thus the action is necessarily against the sovereign and therefore not permitted.

dollars in claimed damages” would be constitutional, although it would certainly remove the large majority of cases from Supreme Court review.¹³⁶

4. *Limitations Based in the “Essential Role” of the Supreme Court*

Some commentators have proposed a more restrictive understanding of the exceptions language based on their account of the Supreme Court’s institutional role. Hart, for example, opined in the *Dialogue* that “[t]he measure is simply that the exceptions must not be such as will destroy the essential role of the Supreme Court in the constitutional plan.”¹³⁷ Notably, Hart never explains what the Supreme Court’s “essential role . . . in the constitutional plan” is—he issues his statement, as Henry Monaghan notes, in the form of a ukase.¹³⁸ Nor does Hart consider the possibility that Congress’s Article III power is itself a central element of the constitutional plan, one which might affect how we understand the nature and scope of the Supreme Court’s “essential” role. As ever in this debate, Hart is operating from an umbilical attachment to unqualified judicial supremacy; his use of the word “simply” is telling on that point. But we can search the Constitution’s text, the Supreme Court’s precedent, and Congress’s historical practice exhaustively without locating a mandate for judicial supremacy *on every issue, at all times*.¹³⁹

Recently, Henry Monaghan attempted to fill in some of the elisions in Hart’s account of the Supreme Court’s essential role. Here is the core of Monaghan’s argument:

Even from a strictly originalist or textualist point of view, the “plain meaning” argument drawn from the Exceptions Clause is unpersuasive. In fact, the textual argument is quite weak if one reads the clause in the context of the overall structure and relationships created by the Constitution. Unlike the inferior federal courts, the Constitution itself establishes the Supreme Court, and it invests that Court with some mandatory share of “the judicial power of the United States.” Moreover, in 1789, it was almost universally understood that the Court would review the validity of legislation. (The scope, not the existence, of judicial review was the contested matter,

¹³⁶ I am indebted to Eric Segall for this example.

¹³⁷ Hart, *supra* note 65, at 1365.

¹³⁸ See Monaghan, *supra* note 67, at 12.

¹³⁹ James Pfander argues that the Supreme Court’s role in the constitutional plan prohibits Congress from limiting its appellate jurisdiction over any case or category of cases in a way that would prevent it from exercising at least minimal oversight, although Pfander leaves unclear how rigorous this oversight would have to be to avoid constitutional infirmity or how it would differ from ordinary appellate review. Pfander, *supra* note 67, at 1435.

as it remains to be now.) And finally, for what it is worth, . . . clauses creating “exceptions” to the jurisdiction of the superior and supreme courts of England and Scotland did not reach matters of fundamental importance.¹⁴⁰

These arguments are deeply flawed. First, it is true, as Monaghan notes, that the Constitution “invests th[e Supreme] Court with some mandatory share of ‘the judicial power of the United States.’”¹⁴¹ But the portion that the Constitution makes mandatory is, as has been discussed,¹⁴² a tiny element in the corpus of federal jurisdiction. If anything, the Constitution’s reduction of the Supreme Court’s mandatory jurisdiction to a few minor categories of cases suggests nothing expansive, and perhaps rather the reverse, about whatever the Supreme Court’s “essential” role might be.

Second, Monaghan has overstated the founders’ supposedly “universal” agreement on judicial review, but the real problem with the argument about original intent is its generality. Merely noting that the framers intended for the Supreme Court to engage in some form of judicial review tells us nothing specific about whether either the Supreme Court or the lower federal courts would proceed in the face of a congressional instruction to stand down. Monaghan’s argument boils down to an assertion that because the framers favored judicial review generally, they therefore favored it *without qualification*. That argument does not follow logically from its premise. Nor does it account for the text of Article III explicitly giving Congress power to make exceptions—a provision suggesting that the framers had a more nuanced view than Monaghan allows for.

Third, and finally, whether statutes permitting exceptions to the jurisdiction of the superior and supreme courts in England and Scotland were interpreted to reach “matters of fundamental importance” has little bearing on the interpretation of the Exceptions Clause in the U.S. Constitution. England and Scotland lacked a written constitution, then and now.¹⁴³ Moreover, the courts in England and Scotland were historically subject to review by the House of Lords,¹⁴⁴ and are now subject to review by the U.K.

¹⁴⁰ Monaghan, *supra* note 67, at 17 (citations omitted).

¹⁴¹ *Id.*

¹⁴² See *supra* text accompanying notes 118–27.

¹⁴³ See Robert Blackburn, *Britain’s Unwritten Constitution*, BRIT. LIBR. (Mar. 13, 2015), <https://www.bl.uk/magna-carta/articles/britains-unwritten-constitution> (last visited Aug. 9, 2020).

¹⁴⁴ See generally Philip Loft, *Litigation, the Anglo-Scottish Union, and the House of Lords as the High Court, 1660–1875*, 61 HIST. J. 943 (2018) (describing the history of appellate review by the House of Lords in Scotland and England).

Supreme Court,¹⁴⁵ and regardless, Parliament was free to simply override (by ordinary procedures) court rulings it disagreed with.¹⁴⁶ For those reasons, the legislature's power to make exceptions to the courts' jurisdiction in England and Scotland is not relevant in the same way it is in the United States to the integration of constitutionalism with democracy.

Tellingly, neither Hart nor Monaghan address the fact that the Supreme Court's present-day role is largely a creature of Congress's making. Under the 1789 Judiciary Act, Congress omitted from the Supreme Court's appellate jurisdiction both federal criminal cases¹⁴⁷ and cases in which state courts had upheld claims under the Federal Constitution or federal statutes.¹⁴⁸ Congress did not grant appellate jurisdiction to the Supreme Court in capital cases until 1889,¹⁴⁹ for "otherwise infamous crime[s]" (i.e., all cases in which a penalty of imprisonment was possible) until 1891,¹⁵⁰ and for all criminal cases until 1911.¹⁵¹ Congress did not until 1914 create Supreme Court appellate jurisdiction over cases in which a state court had upheld claims under the Federal Constitution or federal statutes.¹⁵² From the beginning, Congress has had a narrower view of the Supreme Court's "essential role" than the one Hart and Monaghan propose—if it had one at all beyond ruling in the narrow categories of cases that the Constitution places within the Court's original jurisdiction. Over time, Congress expanded the Supreme Court's role. But it would seem that the onus is on those who propose a broad essential role for the Supreme Court to explain what prevents Congress from reducing a role it was largely responsible for creating in the first place.

¹⁴⁵ See Michael Kirby, *A Darwinian Reflection on Judicial Values and Appointments to Final National Courts*, in *FROM HOUSE OF LORDS TO SUPREME COURT: JUDGES, JURISTS AND THE PROCESS OF JUDGING* 9, 10 (James Lee ed., 2011) (discussing the creation of the U.K. Supreme Court to replace the Appellate Committee of the House of Lords).

¹⁴⁶ See generally H.T. Dickinson, *The Eighteenth-Century Debate on the Sovereignty of Parliament*, 26 *TRANSACTIONS ROYAL HIST. SOC'Y* 189 (1976) (describing challenges to the doctrine of parliamentary sovereignty during the eighteenth century by proponents of judicial review).

¹⁴⁷ See Judiciary Act of 1789, ch. 20, § 22, 1 Stat. 73, 84; *United States v. More*, 7 U.S. (3 Cranch) 159, 172–74 (1805) (holding that Congress's failure to provide in the Judiciary Act of 1789 for appellate jurisdiction over federal criminal cases barred such jurisdiction).

¹⁴⁸ See Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85–86.

¹⁴⁹ See Act of Feb. 6, 1889, ch. 113, § 6, 25 Stat. 655, 656.

¹⁵⁰ Act of Mar. 3, 1891, ch. 517, § 5, 26 Stat. 826, 827, *repealed by* Act of Jan. 20, 1897, ch. 68, 29 Stat. 492.

¹⁵¹ See Act of Mar. 3, 1911, ch. 231, § 240, 36 Stat. 1087, 1157 (codified at 28 U.S.C. § 1254(3) (1976)); Brent D. Stratton, Comment, *Criminal Law: The Attenuation Exception to the Exclusionary Rule: A Study in Attenuated Principle and Dissipated Logic*, 75 *J. CRIM. L. & CRIMINOLOGY* 139, 139 n.1 (1984).

¹⁵² See Act of Dec. 23, 1914, ch. 2, 38 Stat. 790, 790.

To be clear, I do not mean to adopt an originalist approach to the question of the Supreme Court's essential role. The argument by its nature suggests that the Court's core function is best understood purposively and that it may change over time. But given that the argument, as presented by Hart, Monaghan, and others, is based not in constitutional text but rather in supposedly universal understandings of the role of the Supreme Court, the fact that *Congress* has in essence created the modern Court as we understand it is, to say the least, an inconvenience.

Indeed, the Court itself has declined repeatedly to label any element of its jurisdiction (aside from its original jurisdiction) as essential. Chief Justice Marshall's 1810 opinion in *Durousseau v. United States*¹⁵³ is an early example. There, the Court held that Congress's failure to include a particular type of case in its specification of the Supreme Court's appellate jurisdiction would be understood as an implicit exercise of its power under the Exceptions Clause.¹⁵⁴ *Durousseau* is notable not only for its broad deference to Congress's exercise of its power to make exceptions, but also for the unarticulated premise underlying the Court's refusal even to subject Congress's exceptions power to a clear statement rule. As John Manning has noted, "the Court has built an extensive regime of clear statement rules, which insist that Congress express itself clearly when it wishes to adopt a policy that presses against a favored constitutional value."¹⁵⁵ That the Court has never demanded that Congress express itself affirmatively, but has instead been willing to proceed on implication, does not fit well with any broad understanding of the Court's essential role.

Nor is the Court's accommodating stance in *Durousseau* a one-off.¹⁵⁶ Indeed, the Court went further in its 1868 decision in *Ex parte McCordle*.¹⁵⁷ That case involved a newspaper editor held in military

¹⁵³ 10 U.S. (6 Cranch) 307 (1810).

¹⁵⁴ *Id.* at 314 (holding that Congress's "affirmative description [of the Supreme Court's appellate jurisdiction] has been understood to imply a negative on the exercise of such appellate power as is not comprehended within it").

¹⁵⁵ John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 401 (2010).

¹⁵⁶ *See, e.g., Daniels v. R.R. Co.*, 70 U.S. (3 Wall.) 250, 254 (1865) ("[I]t is for Congress to determine how far, within the limits of the capacity of this Court to take, appellate jurisdiction shall be given In these respects it is wholly the creature of legislation."); *Barry v. Mercein*, 46 U.S. (5 How.) 103, 119 (1847) ("By the constitution of the United States, the Supreme Court possesses no appellate power in any case, unless conferred upon it by act of Congress; nor can it, when conferred be exercised in any other form, or by any other mode of proceeding than that which the law prescribes.").

¹⁵⁷ 74 U.S. (7 Wall.) 506 (1868).

custody¹⁵⁸ after he ran several articles critical of Reconstruction. The editor appealed to the Supreme Court, pursuant to the Habeas Corpus Act of 1867,¹⁵⁹ contesting the lower federal court's denial of his habeas petition. After the Supreme Court heard oral argument, Congress repealed the provisions of that statute granting the Court appellate jurisdiction to review denial of habeas petitions.¹⁶⁰ The Court heard argument on the constitutionality of the jurisdiction-stripping act, and upheld it. Chief Justice Chase, writing for a unanimous Court, concluded that Congress's exercise of its Exceptions Clause power deprived the Court of jurisdiction to decide whether the editor's imprisonment violated his rights under the Constitution's Fifth Amendment Due Process Clause.¹⁶¹ In *Durousseau*, Chief Justice Marshall noted, the Court had held that an "affirmative description" of the Supreme Court's appellate jurisdiction "has been understood to imply a negation of the exercise of such appellate power as is not comprehended within it."¹⁶² Chief Justice Chase stated that the intent of Congress to limit the Court's jurisdiction, as well as Congress's power to do so, was even clearer in the case before the Court:

The exception to appellate jurisdiction in the case before us . . . is not an inference from the affirmation of other appellate jurisdiction. It is made in terms. The provision of the act of 1867, affirming the appellate jurisdiction of this court in cases of *habeas corpus* is expressly repealed. It is hardly possible to imagine a plainer instance of positive exception. 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. What, then, is the effect of the repealing act upon the case before us? We cannot doubt as to this. *Without jurisdiction the court cannot proceed at all in any cause.* Jurisdiction is the 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. . . . It is quite clear, therefore, that this court cannot proceed to pronounce judgment in this case, for it has no longer jurisdiction of the appeal; and judicial duty is not less fitly performed by declining ungranted juris-

¹⁵⁸ The newspaper editor was held under the authority of the Military Reconstruction Acts of Mar. 11, 1868, ch. 25, 15 Stat. 41; July 19, 1867, ch. 30, 15 Stat. 14–16; Mar. 23, 1867, ch. 6, 15 Stat. 2–5; Mar. 2, 1867, ch. 153, 14 Stat. 428–30.

¹⁵⁹ ch. 28, 14 Stat. 385.

¹⁶⁰ *McCardle*, 74 U.S. at 510, 514.

¹⁶¹ *Id.* at 513–14.

¹⁶² *Id.* at 513 (quoting *Durousseau v. United States*, 10 U.S. (6 Cranch) 307, 314 (1810)).

diction than in exercising firmly that which the Constitution and the laws confer.¹⁶³

Note that *McCardle* had argued that the jurisdiction-stripping statute was invalid because Congress enacted it for the purpose of precluding the Court from striking down provisions in the 1867 Act designed to prevent judicial review of otherwise colorable due process claims.¹⁶⁴ In response, the Justices said flatly that “[w]e 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.”¹⁶⁵

The import of this passage is unmistakable: In the *McCardle* Court’s view, Congress is empowered to strip federal court jurisdiction even when it is doing so to prevent the federal courts from enforcing a constitutional rule which Congress is alleged to have transgressed. At minimum, the Court’s decision in *McCardle* casts substantial doubt on the argument that external limitations generally restrict Congress’s Article III power.¹⁶⁶ And the logic of *McCardle* applies equally to Congress’s power to restrict lower court jurisdiction.

Some have questioned whether *McCardle* would stand up if re-examined by today’s Court. Richard Fallon, for example, notes that the *McCardle* Court acknowledged in its opinion that the statute repealing its habeas jurisdiction left open another route for petitioner’s appeal.¹⁶⁷ As a consequence, Fallon asserts, a Court faced with a true denial of jurisdiction could distinguish *McCardle*, hold the jurisdiction-stripping provision invalid, and examine the constitutional claim.¹⁶⁸ Indeed, in the Court’s recent decision in *Patchak v. Zinke*,¹⁶⁹

¹⁶³ *Id.* at 513–15 (second emphasis added).

¹⁶⁴ *Id.* at 510.

¹⁶⁵ *Id.* at 514 (emphasis added).

¹⁶⁶ Hart’s response to *McCardle* is characteristically dismissive. The interlocutor (*Q*) states: “The *McCardle* case says that the appellate jurisdiction of the Supreme Court is entirely within Congressional control.” Hart’s proxy (*A*) responds: “You read the *McCardle* case for all it might be worth rather than the least it has to be worth, don’t you?” *Q* responds: “No, I read it in terms of the language of the Constitution and the antecedent theory that the Court articulated in explaining its decision. This seems to me to lead inevitably to the same result, whatever jurisdiction is denied to the Court.” *A* then exclaims: “You would treat the Constitution, then, as authorizing exceptions which engulf the rule, even to the point of eliminating the appellate jurisdiction altogether? How preposterous!” See Hart, *supra* note 65, at 1364 (footnotes omitted).

¹⁶⁷ Fallon, *supra* note 54, at 1078.

¹⁶⁸ *Id.*

¹⁶⁹ See 138 S. Ct. 897 (2018).

Chief Justice Roberts adopts this argument in his dissent.¹⁷⁰ But the argument has problems, as William Van Alstyne has noted:

Rightly or wrongly, the Supreme Court identified the Repealer Act to the “exceptions” clause of article III and proceeded to address itself directly to the import of *that* clause. Whatever the factual and technical niceties of the Repealer Act (including the fact that it evidently did not withdraw *any* act of Congress from the possibility of constitutional review in the Supreme Court), it is surely more precious than useful to conclude that the Court therefore meant to imply that it really did not think that the clause was made of real stuff or, rather, that the clause really does not cover very much.¹⁷¹

The language of *McCardle* is a broad repudiation of the idea of external limits on the Supreme Court’s Article III power. That repudiation was undertaken in the context of Congress’s determination, in the aftermath of the Civil War, that the Court threatened its agenda for Reconstruction. The stakes could not have been clearer: Congress was claiming ultimate authority over the interpretation and enforcement of the Due Process Clause in the specific context of the Military Reconstruction Acts, and the Court’s opinion cedes that authority. Of course, the Court is free to overrule *McCardle*, but any attempt to distinguish the holding in that case on technical grounds, as Fallon and Chief Justice Roberts would have it, would traduce the actual meaning of *McCardle*, especially given that the arguments that Congress’s Article III power is subject to external limitations are far from self-evident. We will deal further with those arguments now.

¹⁷⁰ *Id.* at 897, 914. Interestingly, in 1982, John Roberts, then working in the Justice Department, wrote a series of memos arguing for a broad understanding of Congress’s Article III power that would uphold the jurisdiction-stripping provisions in a package of twenty-two bills, introduced that year by a group of right-wing members of Congress, advocating for the elimination of the Supreme Court’s jurisdiction over cases involving “prayer in the schools, abortion, school busing and other controversial issues.” See Mark Agrast, *Judge Roberts and the Court-Stripping Movement*, CTR. FOR AM. PROGRESS (Sept. 2, 2005, 9:00 AM), <https://www.americanprogress.org/issues/courts/news/2005/09/02/1622/judge-roberts-and-the-court-stripping-movement>. Assistant Attorney General Ted Olson wrote his own memo on the issue to the attorney general, disagreeing with Roberts’s defense of Congress’s jurisdiction-stripping power and arguing that the administration’s opposition to jurisdiction-stripping measures would be perceived as politically courageous. See *id.* In the margins of Olson’s memo, Roberts hand-wrote this response about where political courage lay: “Real courage would be to read the Constitution as it should be read and not kowtow to the Tribes, Lewises, and Brinks”—i.e., liberal constitutional law professor Laurence Tribe, *New York Times* columnist Anthony Lewis, and then-president of the American Bar Association Douglas Brink. See *id.* Of course, people sometimes change their minds, and it is possible that Chief Justice Roberts’s apparent shift in position on the scope of Congress’s Article III power is unconnected to his present job title.

¹⁷¹ Van Alstyne, *supra* note 58, at 254–55.

C. *External Limitations on Congress's Article III Power*

Provisions of the Constitution external to Article III could act as limitations on Congress's Article III power. Referring back to an example in the Introduction, the requirement in Article I, Section 2, Clause 3 that "direct" taxes must be apportioned among the states might act as an external limitation if Congress attempts to use its Article III power to enact a wealth tax.¹⁷² Or the First Amendment might limit Congress's use of its Article III power to enact campaign finance restrictions more constraining than what the Supreme Court has interpreted the First Amendment to permit.¹⁷³

I. *"Unqualified" vs. "Qualified" Judicial Supremacy*

The first thing to say about "external" limitation is that it is not a rule that can be read off the Constitution. There is no text in the Constitution directing that provisions outside Article III override the power Article III gives Congress to shape courts' jurisdiction. Indeed, the Constitution's text gives us no reason to conclude that the situation is not the other way around—i.e., that Congress's exercise of its Article III power limits judicial enforcement of provisions, like the due process and equal protection clauses, that are external to Article III. Nor is external limitation clearly required (at least not in every case) by any "structural" feature of the Constitution. As we shall see, separation of powers principles suggest a relatively narrow set of external limitations to protect against congressional interference with powers that are given, either explicitly or by necessary implication, to another branch.¹⁷⁴ But any argument outside this category for external limitations based in separation of powers principles essentially boils down to an argument for unqualified judicial supremacy: Applying the label "separation of powers" adds nothing. Indeed, those arguing for a broad congressional power under Article III could equally invoke "separation of powers" to argue that any judicial resistance to a jurisdiction-stripping measure would be tantamount to seizure of a power reserved to Congress. That argument would be strengthened by the text of Article III that gives *Congress* the power to shape courts' jurisdiction either explicitly (in the case of the Exceptions Clause) or by necessary implication (in the case of Congress's power to establish or disestablish lower federal courts). By

¹⁷² See *supra* notes 29–30 and accompanying text.

¹⁷³ See *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 365 (2010) ("[T]he Government may not suppress political speech on the basis of the speaker's corporate identity.").

¹⁷⁴ See *infra* text accompanying notes 251–61.

contrast, the argument for external limitations, with the exceptions noted below,¹⁷⁵ is not supported by text identifying the branch tasked with enforcing them.

In addition to the absence of textual or structural foundations, those arguing for unqualified judicial supremacy struggle to account for the fact that courts have long directed that certain constitutional claims should receive a political rather than a judicial remedy. For example, there have been periods during which the Supreme Court held that remedies for violations of the Constitution's federalism principles were political and not judicial. Justice Blackmun captured this approach in his opinion in *Garcia v. San Antonio Metropolitan Transit Authority, Inc.*,¹⁷⁶ where he wrote that "[s]tate sovereign interests . . . are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power."¹⁷⁷ There is also the broad phenomenon of "under-enforced constitutional norms"¹⁷⁸—i.e., courts' refusal to enforce the entire content of a particular constitutional rule due to institutional concerns with the wisdom or viability of judicial enforcement. We find an example in *San Antonio Independent School District v. Rodriguez*.¹⁷⁹ In that case, Justice Powell, writing for the majority, held that the equal protection clause was not violated by Texas's system of financing public schools. The majority opinion acknowledged that institutional concerns informed its decision, not least the Court's lack of "expertise and . . . familiarity with local problems" necessary to formulate complex schemes of taxation.¹⁸⁰ And there is the political question doctrine. Unlike jurisdictional rules like standing, mootness, and ripeness, which together define the circumstances under which federal courts may hear a particular claim, the modern instantiation of the political question doctrine,¹⁸¹ as Tara

¹⁷⁵ See *infra* text accompanying notes 251–61.

¹⁷⁶ 469 U.S. 528 (1985).

¹⁷⁷ *Id.* at 552. See generally Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000) (discussing political enforcement of federalism); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954) (discussing political enforcement of federalism).

¹⁷⁸ See, e.g., Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978); Ernest A. Young, *Popular Constitutionalism and the Underenforcement Problem: The Case of the National Healthcare Law*, 75 LAW & CONTEMP. PROBS. 157 (2012).

¹⁷⁹ 411 U.S. 1 (1973).

¹⁸⁰ *Id.* at 41.

¹⁸¹ That is, the political question doctrine as articulated in *Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 133 (1912) (holding that a claim under the Constitution's Guarantee Clause was a nonjusticiable political question), and its progeny.

Leigh Grove put it, “instructs that courts may not decide certain issues—most prominently, federal constitutional claims—at all,” because decisions on those issues are best reserved to the political branches.¹⁸²

Although both the origins and scope of the doctrine are contested,¹⁸³ the circumstances in which courts will declare a constitutional claim to involve a political question and decline jurisdiction have been clear since *Baker v. Carr*¹⁸⁴:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.¹⁸⁵

The thread tying together these various triggers is a concern for the limits of judicial review in a democracy. Courts disclaim jurisdiction where there is a textual direction to do so, where resolving the claims would require judges to make political decisions directly, or where the absence of applicable legal standards would effectively force them to do so in all but name. The Court didn’t have Congress’s Article III power in mind in *Baker v. Carr*, but the guidelines it established in that case are implicated in several ways. The Exceptions Clause and Congress’s plenary control over the jurisdiction of lower courts can be understood as a “textually demonstrable constitutional commitment”¹⁸⁶ of power to Congress not to decide a particular issue, but to decide, across a range of issues, when it, and not the courts, shall decide. Congress might exercise its Article III power if it perceives that the issue presents “a lack of judicially discoverable and manageable standards” for resolution or requires an “initial policy determination” that it, and not judges, are vested with the discretion

¹⁸² Tara Leigh Grove, *The Lost History of the Political Question Doctrine*, 90 N.Y.U. L. REV. 1908, 1909 (2015).

¹⁸³ For an important revisionist take on the scope and effect of the doctrine, see *id.* (arguing both that the doctrine has shallower roots than conventional scholarship supposes, and that, in practical terms, it has been used to entrench, rather than to undermine, judicial supremacy over interpretation of the Constitution).

¹⁸⁴ 369 U.S. 186 (1962).

¹⁸⁵ *Id.* at 217.

¹⁸⁶ *Id.*

to make.¹⁸⁷ At minimum, the political question doctrine puts paid to the idea that unqualified judicial supremacy is an inevitable feature of U.S. democratic constitutionalism. The real question is narrower: Is there an argument that *only judges can restrict judicial supremacy*, and that the political branches are powerless to do so, despite the text in Article III that plausibly gives Congress that power? Seen through the particular lens of the political question doctrine, we can understand Article III to give to Congress an independent power to declare that a particular issue shall be treated as a political question.

Recall that Congress's Article III power is given either in "express words,"¹⁸⁸ as the Court in *McCardle* noted when speaking about the Exceptions Clause, or, in the case of the lower federal courts, by the force of the inference—supported by precedent and historical practice—that Congress's discretion over whether those courts will exist at all carries with it the power to limit jurisdiction. As for precedent, *McCardle*, at least, suggests that Congress's Article III power is encompassing.¹⁸⁹ In the century-and-a-half since *McCardle*, the Supreme Court has seldom spoken on the question of external limitations, and never definitively. As we shall see,¹⁹⁰ questions have arisen when Congress legislates in a way that *directs a decision in a particular pending case*, but even in such instances, the Court has made clear that it will not interfere so long as Congress changes applicable substantive law in a way that leads to a particular outcome, rather than simply directing an outcome without changing the law.¹⁹¹

Once we relax the presumption of unqualified judicial supremacy, it becomes clear that the argument for external "limitations" on Congress's Article III power is nothing more than the argument for unqualified judicial supremacy in another form. William Van Alstyne captured this idea concisely:

If the exceptions clause meant to permit Congress to "check the Court *specifically in the exercise of substantive constitutional review*, then the categorical exception of any group of cases made by Congress for that very reason cannot possibly be deemed offensive to the fifth amendment's equal protection concern: the exceptions clause *itself* would provide the source for the government's argument that that reason is both licit and compelling enough. If the clause is not seen as approving such a use of the exceptions power,

¹⁸⁷ *Id.*

¹⁸⁸ *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868).

¹⁸⁹ See discussion *supra* Section I.B.4.

¹⁹⁰ See *infra* text accompanying notes 194–210.

¹⁹¹ See discussion *supra* Section I.B.4.

on the other hand, it is difficult to imagine any other basis sufficient for the purpose.¹⁹²

I would depart from Van Alstyne's originalist framing. What the Framers "meant" on this point is neither known nor knowable—at least not with the level of certainty that should be required to constrain the power of the legislature in a democratic system. Nor should it matter very much. The Constitution contains the Exceptions Clause and the text giving Congress power over the very existence of the lower federal courts. The Constitution does not mandate unqualified judicial supremacy; it leaves open the possibility of judicial supremacy qualified by a legislative override. The key point is this: The argument over the scope of Congress's Article III power is not primarily textual, structural, or historical. Rather, it is *normative*. Do we want to give Congress this power? What are the benefits and risks of doing so?

2. *Post-McCardle Precedent*

It is important to note that in none of the post-*McCardle* cases, at least until the Court's 2008 decision in *Boumediene v. Bush*,¹⁹³ did the Court address a scenario in which Congress exercises its Article III power in a way that purports to change a constitutional rule. That said, the post-*McCardle* precedents, taken together, do suggest a narrow ground for imposing external limitations, one that prohibits Congress from seizing power that the Constitution gives explicitly to another branch. However, the Court's post-*McCardle* precedent would leave Congress otherwise largely unfettered by provisions external to Article III.

We will get to those narrow limitations, but to understand them in their historical context, we should start with the Supreme Court's 1871 decision in *United States v. Klein*.¹⁹⁴ That case arose out of the 1863 Abandoned Property Collection Act,¹⁹⁵ a statute permitting former citizens of the Confederacy to receive compensation for certain property seized by Union forces during the Civil War. A series of presidential proclamations established a process whereby individuals became eligible for compensation after receiving a presidential pardon and taking an oath of loyalty to the United States.¹⁹⁶

¹⁹² Van Alstyne, *supra* note 58, at 264.

¹⁹³ 553 U.S. 723 (2008). See discussion of *Boumediene* below and *infra* text accompanying notes 251–61.

¹⁹⁴ 80 U.S. (13 Wall.) 128 (1871).

¹⁹⁵ Abandoned Property Collection Act, ch. 120, 12 Stat. 820, 820 (1863), <https://www.loc.gov/law/help/statutes-at-large/37th-congress/session-3/c37s3ch120.pdf>; see also *Klein*, 80 U.S. at 130–31 (discussing the Act and its relation to the case).

¹⁹⁶ *Klein*, 80 U.S. at 131–32.

Klein, acting as the executor for a decedent, V.F. Wilson, who had been pardoned and taken the necessary oath, filed a claim seeking compensation for Wilson's confiscated property.¹⁹⁷ The Court of Claims awarded compensation; the government appealed to the Supreme Court.¹⁹⁸ While the appeal was pending, Congress passed a law directing that whenever a person introduces evidence of a presidential pardon in a suit instituted under the Act, "the jurisdiction of the court in the case shall cease, and the court shall forthwith dismiss the suit of such claimant."¹⁹⁹ Congress went further, and specified that, in cases where judgment had already been rendered, "the Supreme Court shall, on appeal, have no further jurisdiction of the cause, and shall dismiss the same for want of jurisdiction."²⁰⁰

Following the legislation's passage, the United States filed a motion asking the Supreme Court to remand Klein's case with instructions that it be dismissed,²⁰¹ but the Court refused. The Court acknowledged that "the legislature has complete control over the organization and existence of [the Court of Claims] and may confer or withhold the right of appeal from its decisions."²⁰² The Court also acknowledged that had Congress "simply denied the right of appeal [to the Supreme Court] in a particular class of cases, there could be no doubt that it must be regarded as an exercise of the power of Congress to make 'such exceptions from the appellate jurisdiction' as should seem to it expedient."²⁰³ In the Court's view, however, Congress had exceeded its authority by attempting to remove jurisdiction only when a presidential pardon had been *granted*,²⁰⁴ thereby attempting "to prescribe a rule for the decision of a cause in a particular way."²⁰⁵ In doing so, the Court held, Congress had "passed the limit which separates the legislative from the judicial power,"²⁰⁶ stating:

Congress has already provided that the Supreme Court shall have jurisdiction of the judgments of the Court of Claims on appeal. Can it prescribe a rule in conformity with which the court must deny to itself the jurisdiction thus conferred, because and only because its decision, in accordance with settled law, must be adverse to the gov-

¹⁹⁷ *Id.* at 132.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 134 (internal citation omitted) (quoting Appropriations Act for 1871, ch. 251, 16 Stat. 230, 235 (1870)).

²⁰⁰ *Id.* (internal citation omitted) (quoting Appropriations Act for 1871, ch. 251, 16 Stat. 230, 235 (1870)).

²⁰¹ *Id.* at 130, 134.

²⁰² *Id.* at 145.

²⁰³ *Id.*

²⁰⁴ *Id.* at 145–46.

²⁰⁵ *Id.* at 146.

²⁰⁶ *Id.* at 147.

ernment and favorable to the suitor? This question seems to us to answer itself.²⁰⁷

Note the Court's clear statement that where Congress does not otherwise attempt to prescribe a rule of decision,²⁰⁸ it has the authority to remove a class of cases from the jurisdiction of federal courts.²⁰⁹ The Court does not rule out possible external limitations on Congress's authority to remove entire classes of disputes from the federal courts' jurisdiction, but it does not identify or advert to such limitations either. Notably, since *Klein*, no legislation passed by Congress that limits federal court jurisdiction has been struck down under the rationale set out in that case.²¹⁰

The question of external limitations has rarely come up in post-*Klein* cases. The closest a court has come to endorsing external limitations is the Second Circuit's 1948 decision in *Battaglia v. General Motors Corp.*²¹¹ That case involved a dispute over the scope of the Fair Labor Standards Act of 1938 (FLSA).²¹² In a series of decisions beginning in 1944, the Supreme Court interpreted the FLSA to require that the statutory calculation of the "work week" for miners include time spent traveling from the mine entry to the work site

²⁰⁷ *Id.*

²⁰⁸ See, e.g., Stephen I. Vladeck, *Why Klein (Still) Matters: Congressional Deception and the War on Terrorism*, 5 J. NAT'L SECURITY L. & POL'Y 251, 252 (2011) ("[V]irtually all observers agree that *Klein* bars Congress from commanding the court to rule for a particular party in a pending case . . ."); Howard M. Wasserman, *The Irrepressible Myth of Klein*, 79 U. CIN. L. REV. 53, 69–70 (2010) ("What really is going on under *Klein* is a prohibition on Congress using its legislative power to predetermine litigation outcomes through explicit commands to courts as to how to resolve particular factual and legal issues or telling courts who should prevail on given facts under existing law.").

²⁰⁹ *Klein*, 80 U.S. at 145.

²¹⁰ For example, in *United States v. Sioux Nation of Indians*, 448 U.S. 371, 389 (1980), the Court reviewed Congress's removal by statute of a res judicata bar to U.S. Court of Claims review of the Indian Claims Commission's ruling that the government had committed an unconstitutional taking of certain Sioux tribal lands. The Court of Claims affirmed the Commission's ruling, and the Supreme Court granted certiorari to address whether Congress, in lifting the res judicata bar, had "inadvertently passed the limit which separates the legislative from the judicial power" by "prescribing a rule for decision that left the court no adjudicatory function to perform," as *Klein* had prohibited. *Id.* at 391–92 (quoting *Klein*, 80 U.S. at 146–47). The Court distinguished *Klein*, reasoning that Congress in removing the res judicata bar had "left no doubt that the Court of Claims was free to decide the merits of the takings claim in accordance with the evidence it found and applicable rules of law." *Id.* at 392. For a perceptive exploration of *Klein* and its progeny, see Evan C. Zoldan, *The Klein Rule of Decision Puzzle and the Self-Dealing Solution*, 74 WASH. & LEE L. REV. 2133, 2138 (2017) (arguing that *Klein* should be understood to reflect a long-standing constitutional principle which "restrains the government from acting in its own self-interest without also providing generally applicable rules of conduct").

²¹¹ 169 F.2d 254 (2d Cir. 1948).

²¹² Fair Labor Standards Act of 1938, Pub. L. No. 75-718, ch. 676, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 201–19 (2018)).

within the mine (often referred to as travel “portal-to-portal”), and that, as a consequence, miners were entitled to overtime pay.²¹³ Congress responded with the Portal-to-Portal Act of 1947, which changed the substantive law to reverse the overtime pay liability.²¹⁴ In addition, section 2(d) of the Act provided that no state or federal court (including the Supreme Court) had jurisdiction to hear any claim under the FLSA for portal-to-portal pay.²¹⁵

The Second Circuit suggested that section 2(d)’s preclusion of judicial review raised a serious constitutional question, finding that “the exercise by Congress of its control over jurisdiction is subject to compliance with at least the requirements of the Fifth Amendment.”²¹⁶ Thus, although “Congress has the undoubted power to give, withhold, and restrict the jurisdiction of courts other than the Supreme Court, it must not so exercise that power as to deprive any person of life, liberty, or property without due process of law or to take private property without just compensation.”²¹⁷ Ultimately, the Second Circuit upheld the jurisdiction-stripping provision, finding that Congress had permissibly changed applicable substantive law while plaintiffs’ claims were pending and that the statute did not purport to reverse judgments that had previously become final.²¹⁸

The holding in *Battaglia* is best understood as a straightforward application of *Klein*. And yet its statements about external limitation have been promoted, including in Hart’s *Dialogue*²¹⁹ and in Hart and Wechsler’s casebook,²²⁰ as support for the proposition that the Fifth Amendment, at least, could constrain Congress’s Article III power. But that reading of *Battaglia* has never found favor with the Supreme Court, or even with other appellate courts, and a closer look at the opinion may explain why. The Second Circuit cites four Supreme Court decisions in support of its statement that Congress’s removal of

²¹³ See *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 690–92 (1946) (holding that time spent in transit “from time clock to work bench” must be included in calculation of work week); *Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers*, 325 U.S. 161, 170 (1945) (finding underground travel in coal mines compensable time); *Tenn. Coal, Iron & R.R. v. Muscoda Local No. 123*, 321 U.S. 590, 603 (1944) (finding underground travel in iron ore mines compensable time).

²¹⁴ Portal-to-Portal Act of 1947, Pub. L. No. 80-49, ch. 52, 61 Stat. 84, 84–85 (codified as amended at 29 U.S.C. §§ 251–62 (2018)).

²¹⁵ *Id.* § 2(d), 61 Stat. at 86 (codified at 29 U.S.C. § 252(d) (2018)).

²¹⁶ *Battaglia*, 169 F.2d at 257.

²¹⁷ *Id.* (footnote omitted).

²¹⁸ *Id.* at 261–62.

²¹⁹ Hart, *supra* note 65, at 1383–84 & n.67. Note, however, that near the end of the *Dialogue*, Hart equivocates on the possibility of external limitations on Congress’s Article III power. *Id.* at 1398–99 (“I’d hesitate to say that Congress couldn’t effect an unconstitutional withdrawal of jurisdiction . . . if it really wanted to.”).

²²⁰ HART & WECHSLER, *supra* note 76, at 302.

jurisdiction must comply with the Fifth Amendment,²²¹ but none of those cases involves to jurisdiction-stripping; rather, each considers whether Congress's decision to withdraw a previously granted benefit is a due process or takings clause violation. For example, the first case cited, *Graham & Foster v. Goodcell*, involved a tax law amendment prompted by federal tax officials failing in a number of cases to collect amounts determined preliminarily to be due in ongoing tax disputes until after the statutory period to make such collections had expired.²²² The amendment excepted from classification as overpayments such late collections of monies properly determined to be due.²²³ The Supreme Court upheld the amendment against due process challenge, holding that Congress has not created a liability for a past transaction where one had not previously existed.²²⁴ The *Goodcell* Court did note that

[h]aving reached this conclusion, it is not necessary to consider the authority of the Congress to withdraw the consent of the United States to be sued. . . . If the Congress did not have the authority to deal by a curative statute with the taxpayers' asserted substantive right, in the circumstances described, it could not be concluded that the Congress could accomplish the same result by denying to the taxpayers all remedy both as against the United States and also as against the one who committed the wrong.²²⁵

That passage from *Goodcell* does not refer to Congress limiting courts' jurisdiction; it refers to Congress attempting to cloak itself (and its agents) in sovereign immunity to thwart an otherwise valid claim that has already been instituted.

Both *Klein* and *Battaglia* may be brought into focus, at least in part, through the lens offered by *Patchak v. Zinke*.²²⁶ A fractured Court in that case could muster a majority only for the determination that the challenged statute was constitutional.²²⁷ That said, there are

²²¹ See *Battaglia*, 169 F.2d at 257. The four cases were: *Graham & Foster v. Goodcell*, 282 U.S. 409, 431 (1931); *Brinkerhoff-Faris Tr. & Sav. Co. v. Hill*, 281 U.S. 673, 682 (1930); *Lynch v. United States*, 292 U.S. 571, 580 (1934); and *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 589 (1935).

²²² 282 U.S. 409, 414–16 (1931).

²²³ *Id.*

²²⁴ *Id.* at 429.

²²⁵ *Id.* at 430–31.

²²⁶ 138 S. Ct. 897 (2018).

²²⁷ Compare *id.* at 908–09 (Thomas, J.) (plurality opinion) (finding that the Act did not dictate a decision and so was permissible under *Klein*), with *id.* at 911–12 (Breyer, J., concurring) (stating that “[t]he statutory context makes clear that this is not simply a case in which Congress has said, ‘In *Smith v. Jones*, *Smith* wins.’” and joining Justice Thomas’s plurality opinion on those grounds), *id.* at 913 (Ginsburg, J., concurring) (stating that the Act merely reinstated the Government’s sovereign immunity and should be upheld on those grounds), and *id.* (Sotomayor, J., concurring) (joining Justice Ginsburg in upholding

elements in Justice Thomas's plurality opinion in *Patchak* which, although they do not represent a majority holding of the Court, nonetheless suggest a coherent argument for recognizing a narrow set of external limitations.

Patchak involved a challenge to a decision by the U.S. Department of the Interior (DOI) to place land known as the "Bradley Property" in trust under the Indian Reorganization Act (IRA) for the benefit of the Gun Lake Indian Tribe.²²⁸ *Patchak* (a nearby landowner) sued, asserting that the IRA did not give the DOI such authority.²²⁹ While the litigation was still pending, Congress enacted the Gun Lake Trust Land Reaffirmation Act (Gun Lake Act), which ratified the DOI's decision²³⁰ and also stripped federal courts of jurisdiction to hear claims related to the Bradley Property: "Notwithstanding any other provision of law, an action (including an action pending in a Federal court as of the date of enactment of [the] Act) relating to the [Bradley Property] shall not be filed or maintained in a Federal court and shall be promptly dismissed."²³¹ The House report on the Gun Lake Act stated that the jurisdiction-stripping provision was necessary because the underlying DOI decision may have been unlawful under then-existing precedent.²³² The House report also referenced the *Patchak* litigation, noting that the Gun Lake Act would "void [the] pending lawsuit."²³³

The district court concluded that it no longer had jurisdiction and dismissed.²³⁴ The D.C. Circuit, while asserting that "federal courts have 'presumptive jurisdiction . . . to inquire into the constitutionality of a jurisdiction-stripping statute,'"²³⁵ rejected *Patchak*'s argument that the Gun Lake Act violates separation of powers principles²³⁶ and affirmed the district court's dismissal of the case.²³⁷

The Supreme Court likewise affirmed. Although six Justices agreed that the Gun Lake Act was constitutional, they split on the rationale. A plurality opinion by Justice Thomas (joined by Justices

the act on sovereign immunity grounds and siding with the dissenting justices on the issue of whether the statute "direct[ed] entry of judgement for a particular party").

²²⁸ See *Patchak v. Jewell*, 828 F.3d 995, 999 (D.C. Cir. 2016).

²²⁹ *Id.* at 999–1000.

²³⁰ Gun Lake Trust Land Reaffirmation Act, Pub. L. No. 113-179, § 2(a), 128 Stat. 1913, 1913 (2014).

²³¹ *Id.* § 2(b).

²³² H.R. REP. NO. 113-590, at 2 (2014).

²³³ See *id.*

²³⁴ *Patchak v. Jewell*, 109 F. Supp. 3d 152, 165 (D.D.C. 2015).

²³⁵ *Patchak v. Jewell*, 828 F.3d 995, 1001 (D.C. Cir. 2016) (alteration in original) (quoting *Belbacha v. Bush*, 520 F.3d 452, 456 (D.C. Cir. 2008)).

²³⁶ *Id.* at 1001–03.

²³⁷ *Id.* at 999.

Breyer, Alito, and Kagan) read the statute to strip federal courts of jurisdiction over cases involving the property and held that this did not violate Article III.²³⁸ The plurality distinguished *Klein*, stating that while the statute there attempted to impermissibly alter the effect of presidential pardons and “could not achieve the same result by stripping jurisdiction,”²³⁹ the Gun Lake Act “does not attempt to exercise a power that the Constitution vests in another branch.”²⁴⁰ Moreover, while the legislation at issue in *Klein* simultaneously conferred jurisdiction to hear claims but removed that jurisdiction in the event a court found that a claimant should prevail, the Gun Lake Act removed jurisdiction altogether for an entire class of cases.²⁴¹ As noted earlier, the plurality stated that Congress cannot exercise its Article III power in a way that violates other parts of the Constitution.²⁴² But the plurality did not understand *Klein* to require a court to examine “Congress’[s] unexpressed motives.”²⁴³ Instead, the plurality approached the Gun Lake Act as a facially neutral enactment that substituted a new rule for an old one.²⁴⁴ And, crucially, it cited and quoted *McCardle*:

Section 2(b) strips federal jurisdiction over suits relating to the Bradley Property. The statute uses jurisdictional language. It states that an “action” relating to the Bradley Property “shall not be filed or maintained in a Federal court.” It imposes jurisdictional consequences: Actions relating to the Bradley Property “shall be promptly dismissed.” See *Ex parte McCardle*, 7 Wall. 506, 514, 19 L.Ed. 264 (1869) (“[W]hen [jurisdiction] ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause[.]”).²⁴⁵

²³⁸ *Patchak v. Zinke*, 138 S. Ct. 897, 905 (2018) (plurality opinion) (holding that the Gun Lake Act did not violate Article III because it merely “change[d] the law” to “strip[] federal courts of jurisdiction” and did not dictate a decision “under old law” (quoting *Robertson v. Seattle Audubon Soc’y*, 503 U.S. 429, 438 (1992))).

²³⁹ *Id.* at 909.

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.* at 906 (“So long as Congress does not violate other constitutional provisions, its ‘control over the jurisdiction of the federal courts’ is ‘plenary.’” (quoting *Trainmen v. Toledo, P & W.R. Co.*, 321 U.S. 50, 63–64 (1944))).

²⁴³ *Id.* at 910.

²⁴⁴ *Id.* (“Nothing on the face of § 2(b) is limited to Patchak’s case. . . . Instead, the text extends to all suits ‘relating to’ the Bradley property.”).

²⁴⁵ *Id.* at 905 (alterations in original). Justices Ginsburg and Sotomayor, concurring in the judgment, construed the Act as a permissible restoration of the government’s sovereign immunity and did not reach the Article III issue. See *id.* at 912–13 (Ginsburg, J., concurring); *id.* at 913–14 (Sotomayor, J., concurring).

Chief Justice Roberts, joined by Justices Kennedy and Gorsuch, dissented,²⁴⁶ arguing that the Gun Lake Act violated the rule in *Klein* because it was indistinguishable from a statute commanding that “In the case of *Smith v. Jones*, Smith wins.”²⁴⁷ The Act, the dissent further argued, does not change the law but merely strips the courts of jurisdiction over a particular lawsuit.²⁴⁸ The dissent would invalidate the Gun Lake Act, on the ground “that Congress exercises the judicial power when it manipulates jurisdictional rules to decide the outcome of a particular pending case.”²⁴⁹ The dissent’s approach is a straightforward application of *Klein*, suggesting that the majority and dissent were disagreeing over how to understand the effect of section 2(b) of the Gun Lake Act but not over the scope of Congress’s Article III power to limit courts’ jurisdiction.²⁵⁰

3. *The “Klein Principle” and Boumediene*

Although *Patchak* suggested that Congress’s Article III power is subject to external limitations, it did not so hold. But the *Patchak* plurality’s framing of the Court’s decision in *Klein* does suggest a potentially helpful way to think about the scope of external limits. The *Patchak* plurality understands *Klein* to prohibit Congress from using its Article III authority over federal courts’ jurisdiction to seize the Executive’s power to pardon.²⁵¹ That is a coherent structural account of external limitations, one which prevents qualified judicial supremacy from turning into legislative sovereignty. And there is no reason why this approach should be limited to powers the Constitution gives to the Executive: The holding in *Klein* bars Congress from using its Article III authority to seize the power of courts to rule in a particular case by conditioning jurisdiction on the court reaching the result Congress favors.

Understood this way, the *Klein* principle would also suggest that Congress cannot use its Article III authority to seize federal courts’ power to issue writs of habeas corpus. The writ is a judicial remedy,

²⁴⁶ See *id.* at 914–22 (Roberts, C.J., dissenting).

²⁴⁷ *Id.* at 915–16, 920 (quoting *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1323 n.17 (2016)).

²⁴⁸ *Id.* at 920 (“[A]ll that § 2(b) does is deprive the court of jurisdiction in a single proceeding.”).

²⁴⁹ *Id.* at 919–20.

²⁵⁰ Evan Zoldan has suggested to me that the main lesson of *Patchak* is that this Court does not hold a robust vision of *Klein*. Professor Zoldan believes that the Court would be likely to validate an instance of prospective jurisdiction stripping—i.e., one that cannot be characterized as determining the results in a particular case.

²⁵¹ Article II, Section 2, Clause 1 provides that the President “shall have Power to Grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.” U.S. CONST. art. II, § 2, cl. 1.

recognized as such in the Constitution.²⁵² And the Constitution's Suspension Clause sets up a particular (demanding) criterion determining the conditions under which Congress may suspend the writ: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."²⁵³ The presence in the Constitution of an explicit mechanism that permits Congress to suspend the availability of the writ is significant: The Suspension Clause is a *specific mechanism for congressional limitation of courts' jurisdiction*. That specific mechanism, and the limitations built into it, should take precedence over Congress's more general Article III power to limit federal courts' jurisdiction.

The *Klein* principle helps explain the Supreme Court's 2008 holding in *Boumediene v. Bush*.²⁵⁴ The Court in *Boumediene* held that the Suspension Clause applied to noncitizen detainees held at Guantanamo Bay²⁵⁵ and that the Military Commissions Act (MCA) of 2006,²⁵⁶ which removes federal jurisdiction over habeas corpus petitions brought by noncitizen "enemy combatant[s],"²⁵⁷ fails to provide an adequate alternative to the writ.²⁵⁸ There are passages in Justice Kennedy's lengthy opinion that focus on the importance of the Suspension Clause as the mechanism for congressional override of the writ. The limitations on that override, Justice Kennedy says, are a key element protecting separation of powers:

The [Suspension] Clause protects the rights of the detained by a means consistent with the essential design of the Constitution. It ensures that, except during periods of formal suspension, the Judiciary will have a time-tested device, the writ, to maintain the "delicate balance of governance" that is itself the surest safeguard of liberty. The Clause protects the rights of the detained by affirming the duty and authority of the Judiciary to call the jailer to account. The separation-of-powers doctrine, and the history that influenced its design, therefore must inform the reach and purpose of the Suspension Clause.²⁵⁹

Understood this way, the Court's holding in *Boumediene* is an important but narrow limitation on Congress's Article III power.

²⁵² See *id.* art. I, § 9, cl. 2.

²⁵³ *Id.*

²⁵⁴ 553 U.S. 723 (2008).

²⁵⁵ *Id.* at 771.

²⁵⁶ Pub. L. No. 109-366, 120 Stat. 2600 (codified in scattered sections of 10, 18, 28, 42 U.S.C.).

²⁵⁷ *Id.* § 7(a), 120 Stat. at 2635–36 (codified at 28 U.S.C. § 2241(e)(1) (2006)).

²⁵⁸ *Boumediene*, 553 U.S. at 792.

²⁵⁹ *Id.* at 745–46 (citations omitted) (quoting *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (plurality opinion)).

Boumediene directs that Congress must, absent a valid suspension, make a federal judicial forum available in habeas cases.²⁶⁰ Some have tried to generalize *Boumediene*, arguing that the decision should be understood to suggest that Congress may never exercise its Article III power in a manner at odds with the Constitution.²⁶¹ But that reading is not persuasive: The opinion says nothing about Congress's Article III power as a general matter and does not, as a logical matter, generalize outside of the context of habeas.

D. *Institutional Limits of State Court Enforcement of the Federal Constitution*

Finally, a word about Congress's power to limit the jurisdiction of state courts. In a passage near to the end of Hart's *Dialogue*, Hart's persistent interlocutor (*Q*) comes back to the central question: whether Congress can, by removing federal jurisdiction, take for itself the authority to give a final answer to particular constitutional questions. *Q* expresses his general dissatisfaction with Hart's arguments against Congress's power to limit federal jurisdiction.²⁶² At the final moment, Hart reveals what he believes to be his trump card:

A. I've given all the important answers to that question, haven't I? I would have thought the rest was clear. Why, it's been clear ever since September 17, 1787.^[263]

Q. Not to me.

A. *The state courts*. In the scheme of the Constitution, they are the primary guarantors of constitutional rights, and in many cases they may be the ultimate ones. If they were to fail, and if Congress had taken away the Supreme Court's appellate jurisdiction and been upheld in doing so, then we really would be sunk.

Q. But Congress can regulate the jurisdiction of state courts, too, in federal matters.

A. Congress can't do it unconstitutionally. The state courts always have a general jurisdiction to fall back on. And the Supremacy

²⁶⁰ Note that state courts lack the power to issue writs of habeas corpus in favor of persons in federal detention. See *Tarble's Case*, 80 U.S. (13 Wall.) 397, 409 (1871).

²⁶¹ See, e.g., Fallon, *supra* note 54, at 1050–52 (generalizing *Boumediene* to suggest that “when substantive constitutional rights exist, the Constitution requires that some court have jurisdiction to provide sufficient remedies to prevent those rights from becoming practical nullities”); Vladeck, *supra* note 60, at 2144–46 (arguing that jurisdiction-stripping statutes create separation of powers concerns which allow for judicial review).

²⁶² Hart, *supra* note 65, at 1401.

²⁶³ September 17, 1787 is the day that the delegates to the Constitutional Convention signed the final draft of the document that, when ratified on June 21, 1788, would become the U.S. Constitution.

Clause binds them to exercise that jurisdiction in accordance with the Constitution.²⁶⁴

There is a lot to unpack here. First, it is in fact not unusual for Congress to direct that federal law will be applied and developed only in federal courts. To take a familiar example, only federal courts have jurisdiction to hear claims under the U.S. patent and copyright laws.²⁶⁵ Even more broadly, Congress limits state jurisdiction over federal questions via removal provisions. Under current law, defendants in any civil action which is brought in a state court but which could have been brought originally in a federal district court may remove that action to federal court, with no diversity of citizenship required.²⁶⁶

The relevant question here, however, isn't Congress's acknowledged power to channel federal questions into federal court. Rather, the question is whether Congress may remove the jurisdiction of both federal and state courts with regard to a particular category of cases. That was precisely the issue presented in *Battaglia*; the Portal-to-Portal Act removed both federal and state court jurisdiction over the disputed overtime wages.²⁶⁷ After upholding the removal of federal jurisdiction, the Second Circuit in *Battaglia* held that the removal of state court jurisdiction was also permissible because the substantive provisions of "[t]he Portal-to-Portal Act, like the Fair Labor Standards Act," which it amended, were "passed as an exercise of the power to regulate commerce" among the states.²⁶⁸ This part of *Battaglia* reflects a consensus view that Congress possesses wide power to divest state courts of jurisdiction as a necessary and proper means of achieving

²⁶⁴ Hart, *supra* note 65, at 1401 (emphasis added) (footnote omitted).

²⁶⁵ See 28 U.S.C. § 1338(a) (2018) (mandating that federal courts "shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, plant variety protection, copyrights and trademarks. No State court shall have jurisdiction over any claim for relief arising under any Act of Congress relating to patents, plant variety protection, or copyrights").

²⁶⁶ See 28 U.S.C. § 1441(a) (2018) ("Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district . . . where such action is pending."). Some form of removal provision has existed since the Judiciary Act of 1789. See Judiciary Act of 1789, ch. 20 § 12, 1 Stat. 73, 79 ("That if a suit be commenced in any state court against an alien, or . . . citizen of another state . . . and the defendant shall . . . file a petition for the removal of the cause for trial into the next circuit court, to be held in the district where the suit is pending . . . the cause shall there proceed in the same manner as if it had been brought there by original process.").

²⁶⁷ Pub. L. No. 80-49, ch. 52, § 2(d), 61 Stat. 84, 86 (1947) (codified as amended at 29 U.S.C. § 252 (2018)) ("No court . . . shall have jurisdiction . . . to enforce liability or impose punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under [three statutes] . . . with respect to an activity which was not compensable under subsections (a) and (b) of this section.").

²⁶⁸ *Battaglia v. Gen. Motors Corp.*, 169 F.2d 254, 259 (2d Cir. 1948).

legitimate federal purposes.²⁶⁹ And that power is not, for reasons compactly summarized by Michael Dorf, limited to instances where the door of the federal courthouse remains open:

[I]f the power to close the state courthouse door is necessary and proper to the exercise of the Commerce Clause power (which in turn authorizes the [Portal-to-Portal] Act's substantive provisions) as a means of preventing state court interference with the Act's substantive provisions when the federal courthouse door remains open, it is hard to see why Congress would lack the affirmative power to close the state courthouse door on the same theory when it also closes the door to the federal courthouse. Either preventing state court interference with the carrying out of a federal statute is an exercise of the Commerce Clause power or it is not—and we have already seen that it is. Put simply, where Congress closes *both* state and federal courts to constitutional challenges to a substantive federal statute enacted pursuant to congressional power X, it aims to prevent *all* judicial interference with the federal statute, so that the jurisdiction-stripping provision is also an exercise of power X.²⁷⁰

Hart and his followers have placed a lot of faith in state courts, but the arguments on this point are especially weak. As with his defense of federal jurisdiction, Hart's account of a state court backstop rests on a presumption of unqualified judicial supremacy. This time, though, the presumption holds that the Constitution mandates the supremacy of *state court judges* over the national polity. Hart at first tries to support an argument that Congress cannot remove state courts' general jurisdiction, using the same argument he had offered for the federal courts: namely, that if an individual "has a constitutional right to have [a constitutional] question examined in court, and the court has general jurisdiction, it can disregard any special jurisdictional limitation and go ahead and examine it."²⁷¹ Then he takes it back:

Q. . . . You've brought in general grants of jurisdiction, and everything you've just been saying depends on them. What if those grants didn't exist?

A. But they *do* exist. And although they don't quite cover the waterfront, they take care of most of the basic situations. . . . The principal hole is the jurisdictional amount requirement there, which, I admit, may be a big one.

²⁶⁹ For an excellent overview of congressional power to limit the jurisdiction of state courts, see Dorf, *supra* note 29.

²⁷⁰ *Id.* at 22–23.

²⁷¹ Hart, *supra* note 65, at 1388, 1401.

Q. But suppose those statutes were repealed. Why wouldn't the executive department then be free to go ahead and violate fundamental rights at will?

A. That's a pretty unlikely situation, isn't it? You're supposing that two of the three branches of the federal government are going to gang up on the third. Congress would need the executive arm to seize persons and property, if it were going to act on an important scale. And the executive arm could be checked by the courts unless Congress had repealed the general grants of jurisdiction. *If both of them did get together, it wouldn't be long before the voters had something to say, would it?*²⁷²

In the end, Hart gives up on the "general jurisdiction" argument; a good thing, because the argument is not sustainable. Of course, courts could resort to avoidance canons, such as a clear statement rule,²⁷³ to ensure that Congress speaks clearly when it means to limit a grant of general jurisdiction. But a hurdle is hardly a prohibition. Note also that at the very end of the passage, Hart adverts to the possibility—indeed, as he frames it, the virtual certainty!—of political enforcement. This admission throws into question exactly what Hart ultimately believes to be at stake in the fight for unqualified judicial supremacy.

Hart's application of the general jurisdiction argument to state courts is simply nonsensical. State courts possess general jurisdiction (granted either by state legislatures or state constitutions) that embraces claims made under federal law, including under the Federal Constitution.²⁷⁴ But whether a state court's exercise of its general jurisdiction must comply with a federal enactment that limits it depends, as with the jurisdiction of federal courts, on whether judicial supremacy is unqualified or not. If not, then Congress's removal of either federal or state court jurisdiction to protect a substantive change to a particular constitutional arrangement is not "unconstitutional," as Hart would frame it. It is part of the constitutional plan. And state courts, subject as they are to the Constitution's Supremacy Clause,²⁷⁵ have no grounds to resist.

²⁷² *Id.* at 1396–97 (second emphasis added).

²⁷³ See *supra* text accompanying note 155.

²⁷⁴ See 13 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3522 (3d ed. 2020) ("Most state courts are courts of general jurisdiction, and the presumption is that they have subject matter jurisdiction over any controversy unless a showing is made to the contrary.").

²⁷⁵ U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.").

Even beyond the question of Congress's power, there are both precedential and institutional reasons to doubt that state courts would be effective in enforcing constitutional arrangements. First is the Supreme Court's decision in *Tarble's Case*,²⁷⁶ a Reconstruction-era case in which the Supreme Court held that state courts lack constitutional authority to issue writs of habeas corpus to federal officers.²⁷⁷ The decision retains its vitality: During the civil rights era, federal courts employed *Tarble's Case* to vacate state court injunctions against federal officials, thereby blunting attempted state interference with federal programs.²⁷⁸ And the decision has clear implication for the debate over jurisdiction-stripping: Even if Congress does not, or cannot, strip them of jurisdiction, under the rule in *Tarble's Case*, state courts lack the remedial power necessary to serve, as Hart would have it, as the "primary guarantors of constitutional rights."²⁷⁹

But what if the case "reviled by Federal Courts scholars"²⁸⁰ were to be overruled? Such a move would not, I suspect, change things very much. If Congress were to take a broad view of its Article III power, and if it were able to overcome the political hurdles to removing federal court jurisdiction to review legislation revising a particular constitutional rule, there is likely little the state courts could do, as a practical matter. The difficulty of litigating state by state, and the lack of a norm of federal officials bowing to restraints ordered by state courts or the machinery to make that happen, means that state courts were never likely to function as guarantors of unqualified judicial supremacy.²⁸¹

²⁷⁶ 80 U.S. (13 Wall.) 397, 397 (1871).

²⁷⁷ *Id.*; see also *Keely v. Sanders*, 99 U.S. 441, 443 (1879) ("[N]o State court could, by injunction or otherwise, prevent Federal officers from collecting Federal taxes.").

²⁷⁸ See, e.g., *Alabama ex rel. Gallion v. Rogers*, 187 F. Supp. 848, 852 (M.D. Ala. 1960) ("[S]tate courts are without jurisdiction to review the discretion or enjoin the acts of federal officers."), *aff'd per curiam*, 285 F.2d 430 (5th Cir. 1961).

²⁷⁹ Hart, *supra* note 65, at 1401.

²⁸⁰ Fallon, *supra* note 54, at 1084.

²⁸¹ See, e.g., Redish & Woods, *supra* note 73, at 97 n.235 (citing HAROLD M. HYMAN, *A MORE PERFECT UNION: THE IMPACT OF THE CIVIL WAR AND RECONSTRUCTION ON THE CONSTITUTION* 240–42 (1973)) (discussing a near clash during the Civil War between federal troops and Kansas state militia after "[a] Kansas state judge issued a writ against the United States Army and the commanding officer of the garrison at Fort Leavenworth," the officer refused to comply, and the judge "ordered the state militia to arrest him," leading the officer to call "for federal reinforcements"). I should make clear that Congress's exercise of its Article III power need not deprive state courts of jurisdiction to enforce federal law, including the Federal Constitution, in reviewing state laws, or the Supreme Court of its authority under 18 U.S.C. § 1257 to review decisions of States' highest courts "where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States." How this authority will be managed depends on context and may require in some instances that

II

CONGRESS'S ARTICLE III POWER AS A PATH TO QUALIFIED JUDICIAL SUPREMACY

A. *The Concept of Qualified Judicial Supremacy*

We have arrived at a point where we must confess to the limits of what we know, and even what we *can* know, about the scope of Congress's Article III power. We can confidently conclude that potential internal limitations on Congress's Article III power are narrow.²⁸² We can also put to rest the thesis that Congress's power is limited by the Supreme Court's "essential role"—unsupported by text, precedent, or historical practice, that argument treads uncomfortably close to wish-casting. The situation with regard to external limitations is more complicated. Neither text, nor history, nor precedent tells us with any certainty whether Congress's Article III power is subject to external limitations, or, instead, whether Congress's exercise of its Article III power limits judicial enforcement of provisions external to Article III. As with so many pressing issues, our old, terse Constitution leaves us at large. And where the Constitution is unclear, Congress has room to act. If it wishes to, Congress can seize interpretive authority with respect to particular cases or issues—it can qualify judicial supremacy.

The real barriers to Congress's exercise of its power, then, are not constitutional but rather political and prudential. Should we welcome a qualified version of judicial supremacy, or fear it? And, if we are willing to entertain the idea of qualifying judicial supremacy, what are the conditions under which Congress is best able to build and sustain political support for legislation limiting judicial review?

A full treatment of these questions is well beyond the scope of what I can accomplish here. I would note, however, that the normative case for unqualified judicial supremacy is sharply contested. Indeed, there are powerful general objections to judicial supremacy from both the political right and left, and the arguments for Congress's Article III power to qualify judicial review draw strength from them. On the right we have commentators like Michael Paulsen, who attacks judicial supremacy as inconsistent with the equality of the executive, legislative, and judicial branches.²⁸³ Judicial supremacy,

Congress preempt state legislation inconsistent with the substantive law Congress is enacting and protecting via jurisdiction-stripping. I am indebted to Rick Hills for helpful discussions on this point.

²⁸² See *supra* Section I.B.

²⁸³ See Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994) (urging instead that the three branches should act in "co-ordinate"). By "co-ordinate," Paulsen means that the three branches are "*ordained*

Paulsen argues, violates the Constitution's "postulate of coordinacy" by vaunting the judiciary above the political branches.²⁸⁴ The correct understanding, Paulsen contends, would treat courts' interpretations of the Constitution as merely advisory and unable to bind the other branches.²⁸⁵ Paulsen advocates for what he calls "*Merryman Power*": the power of the President to act on his own constitutional interpretations and to refuse to enforce court decrees that conflict with those interpretations.²⁸⁶ But a broad congressional power of "Legislative review," one that resembles a broad understanding of Congress's Article III power, is both equally consistent with Paulsen's critique of judicial supremacy and plausibly supported by specific constitutional text.

On the left are a group of commentators who object to judicial supremacy on both normative and pragmatic grounds. For example, Mark Tushnet argues that the Constitution is most effectively enforced through ordinary political processes,²⁸⁷ asserting that the political branches are, in general, adequately incentivized to enforce,²⁸⁸ but that judicial review weakens these incentives and stunts political enforcement.²⁸⁹ Tushnet would remove this "judicial overhang" by taking the Constitution away from the courts.²⁹⁰ Much more central for my purposes are Jeremy Waldron's normative objections.²⁹¹ Judicial review, in Waldron's account, debases issues of prin-

. . . by the same authority—the People—and are, consequently, coequal in title and rank" *Id.* at 228–29. For an argument from "interpretive pluralism" that Congress has a co-equal responsibility for constitutional interpretation, to be exercised when it legislates, see GREENE, *supra* note 91, at 215–28.

²⁸⁴ Paulsen, *supra* note 283, at 235–36.

²⁸⁵ See *id.* at 222 (arguing that constitutional interpretation should arise instead from "the interaction of competing viewpoints advanced by different interpreters representing different perspectives").

²⁸⁶ See *id.* at 276.

²⁸⁷ See TUSHNET, *supra* note 36, at 95 (analogizing to the economic concept of "incentive-compatible" arrangements to show that legislatures are adequately incentivized to enforce the Constitution).

²⁸⁸ See *id.* at 54–71, 95–128. Cass Sunstein has also expressed the view that political enforcement may be more effective over the run of cases. See CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* 7, 59–60 (1996) (contending that the judicial branch works from "modest and low-level" principles whereas the political branch works from "high principle," contrary to the conventional belief that courts engage in principled reasoning while politics works by ad hoc judgment).

²⁸⁹ TUSHNET, *supra* note 36, at 57–65.

²⁹⁰ *Id.* at 57–65, 194.

²⁹¹ See, e.g., WALDRON, *supra* note 37, at 15–16 (1999) (noting that judicial review undergoes the same majoritarian voting process as legislation and that citizens feel that "if disagreements on these matters are to be settled by counting heads, then it is their heads . . . that should be counted"). Like Tushnet, Waldron also questions the efficacy and practical necessity of constitutional review by judges, arguing that in mature democracies like the United States or England, "there are robust and established traditions of political

ciple, reframes them as quarrels ruled by legal “scholasticism,”²⁹² and denies people their “right to participate on equal terms in social decisions on issues of high principle and not just interstitial matters of social and economic policy.”²⁹³ Waldron compares the U.S. public debate on constitutional issues unfavorably with that in the United Kingdom, which lacks judicial review. In the U.K., Waldron writes, “people can discuss issues of rights and limited government, issues of abortion, discrimination, punishment, and toleration in whatever terms seem appropriate to them, free from the obsessive verbalism of a particular written charter.”²⁹⁴

But Waldron’s more fundamental point concerns the differences between judicial and legislative decisionmaking. Unlike courts, legislatures do not (at least not routinely) claim that their decisions are *required* by law, logic, or morality. Ordinarily, the claim to legitimacy of any particular legislative act is merely that it represents the preferences of the requisite share of the legislators, as expressed through whatever rules of procedure may apply. That difference is crucial. In the case of legislative decisions, the winning side may claim victory but cannot expect that the losing side will end its disagreement—and indeed, the losers, if they have not been able to extract concessions that mollify them, may simply bide their time in hopes of reversing their loss later. This characteristic of legislative decisionmaking, Waldron argues, is well adapted to a world in which moral arguments are indeterminate in almost all important cases. People who do not adhere to the particular conception of the good, or of justice, on which a decision is based will find it easier to accept that they have lost a vote than that their conception of justice is wrong. Because moral disagreement is in most cases both inevitable and intractable, legislative decision-making—which depends on “the elaboration of respectful procedures for settling on social action despite the stand-off”²⁹⁵—is superior.

These general objections to judicial review provide a jumping-off point for the more moderate argument favoring Congress’s exercise of its power to qualify judicial review. Americans have long lived in a system in which unqualified judicial review is the paradigm, and in which distrust of democracy is deeply rooted. As a consequence, any

liberty (which have flourished often *despite* the best efforts of the judiciary); and in both countries there are vigorous debates about political structure that seem able to proceed without threatening minority freedoms.” *Id.* at 281 (footnote omitted).

²⁹² *Id.* at 220.

²⁹³ *Id.* at 213.

²⁹⁴ *Id.* at 221.

²⁹⁵ *Id.* at 196.

bid by Congress to act on its Article III power would undoubtedly spark powerful opposition. Again, that opposition will draw its power not from any argument that qualified judicial supremacy violates a clear constitutional rule. Nor will the opposition be able to deny that unqualified judicial supremacy has created the legitimacy problems and the coarsening of democratic culture that Waldron describes. The opposition's source of power will be the difficulty of imagining, given how central judicial review has long been to U.S. constitutional culture, that Congress, and voters, could be stewards of the Constitution.

In this vein, leading commentators have offered a parade of horrors linked to the prospect of Congress's unfettered exercise of the power. Monaghan, for example, imagines Congress passing a law that restricts Black or Catholic litigants from filing claims in federal court.²⁹⁶ Monaghan's example is indeed jarring: Is it really possible that Congress could pass a law barring individuals from filing claims in federal court on the basis of their race or religion and use its Article III power to preempt judicial invalidation of that law?

Of course, Congress can always pass such a law if it has the votes to do so and the President is willing to assent, or if it has the votes necessary to override a President's veto. The question is whether that law will be subject to correction. The expectation of judicial supremacists is that courts will correct Congress through judicial enforcement of constitutional rules. But if our political culture has deteriorated to the point where Congress is engaged in explicit racial or religious discrimination, do we have grounds for confidence that the courts will put a stop to that?

It is only fair to admit that the alternative, correction by voters, also seems unlikely to be up to the task of dealing with Monaghan's nightmare scenario. But this points up a problem with Monaghan's thought experiment, and with the ideology that produced it. Having a constitution and strong judicial review doesn't guarantee that a society will be either democratic or rights-regarding. Constitutions may help coalesce a pre-existing liberal political culture; they may also help cement that culture in place and smooth out the vicissitudes of political life. But neither constitutions nor judicial review guarantee against the wholesale collapse of liberal values. And so, in a sense, it is unfair in general to invoke the nightmare scenario. Indecency is always waiting at the edge of what's possible, whether we adhere to unqualified judicial supremacy or not. More specifically, it is also

²⁹⁶ Monaghan, *supra* note 67, at 16–17 (“[F]ew (I suppose) would now dispute . . . that many litigant-framed limits on an Article III court’s jurisdiction (e.g., discriminating against black or Catholic litigants) are invalid and would be disregarded.”).

unfair to use the nightmare scenario to argue for the necessity of judicial review. It may be true that a debauched democracy can no longer protect itself. But in such a case, courts are no guarantor either, certainly not in the long term. Indeed, there is a perfectly plausible argument that, at least in emergencies, when constitutional guarantees are under maximum stress, the possibility of judicial override may *strengthen* judicial review as a guarantor of rights.

Take as an example the Supreme Court's odious decision in *Korematsu v. United States*²⁹⁷ upholding the federal government's wartime exclusion of Americans of Japanese descent from much of the U.S. West Coast. The Court, bowing to popular pressure, blessed an explicitly race-based policy of exclusion and detention, denying that it was race-based and holding it permissible in light of "the military urgency of the situation."²⁹⁸ In his dissent, Justice Jackson acknowledged that the courts were poorly positioned to assess the military's claims of necessity: "In the very nature of things, military decisions are not susceptible of intelligent judicial appraisal."²⁹⁹ That said, Jackson was unwilling to approve the military's action: "I do not think," he wrote, that the courts "may be asked to execute a military expedient that has no place in law under the Constitution."³⁰⁰ And he warned about a longer-term cost of judicial endorsement:

A military order, however unconstitutional, is not apt to last longer than the military emergency. Even during that period a succeeding commander may revoke it all. But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes.³⁰¹

In line with Justice Jackson's prediction, the Court's decision in *Korematsu* lasted far longer than the military emergency which provoked it. Although a district court in 1983 voided Fred Korematsu's conviction on the ground of prosecutorial misconduct,³⁰² the holding in *Korematsu* was not disavowed until the Supreme Court's perhaps

²⁹⁷ 323 U.S. 214 (1944).

²⁹⁸ *Id.* at 223.

²⁹⁹ *Id.* at 245.

³⁰⁰ *Id.* at 248.

³⁰¹ *Id.* at 246.

³⁰² See *Korematsu v. United States*, 584 F. Supp. 1406, 1420 (N.D. Cal. 1984).

equally odious 5-4 decision in *Trump v. Hawaii* upholding a presidential proclamation restricting travel into the United States by people from a group of mostly Muslim-majority countries,³⁰³ and there only in dicta. And this brings us to a counterfactual: In a country that recognized Congress's Article III power to override the Court's decision and put the military policy in place until the perception of necessity had passed, might the *Korematsu* Court have found the courage to avoid debasing constitutional protections in the face of government claims of necessity? Those who would argue that recognizing Congress's Article III power is a direct route to legislative tyranny should reckon with this example. Congress's power to qualify judicial supremacy may, in the long term, be more likely to strengthen courts' resolve to protect constitutional rights by making it less politically and institutionally inconvenient to do so.

So, let us set aside the nightmare scenarios and focus on more realistic examples. First let us revisit an example given in the introduction³⁰⁴: Imagine Congress passes, and the President signs, legislation implementing a wealth tax. The legislation includes a provision stripping federal courts of jurisdiction to hear constitutional challenges to the tax under the Constitution's Apportionment Clause,³⁰⁵ which requires that any "direct tax" must be apportioned among the states by population. If Article III provides Congress with the authority to remand the question to voters, courts must disclaim jurisdiction. If Congress's removal of courts' jurisdiction to review the wealth tax discomfites voters, or if the wealth tax itself proves unpopular, then voters will choose whether to enforce their interpretation of the constitutional text requiring apportionment of direct taxes. If voters are quiescent in the face of both the wealth tax and the removal of judicial review, then we have a signal that the voters have accepted, in this instance, both the construction that Congress has placed upon the meaning of the Constitution's Apportionment Clause and Congress's use of its Article III power to put that interpretation to the voters. In a passage from his famous article on *Marbury* that considers political enforcement of the Constitution in general, William Van Alstyne describes what this political check would look like, and how the Constitution would help inform it:

Finally, there is the purpose the Constitution would serve in providing a political check upon Congress by the people, even assuming that all acts of Congress were given the full effect of positive law by

³⁰³ *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018).

³⁰⁴ See *supra* text accompanying notes 31–32.

³⁰⁵ U.S. CONST. art. I, § 9, cl. 4.

the courts as well as by the executive. Indeed consistent with Marshall's own observation that *the people* themselves established these written limitations, the democratic approach is to leave the judgment and remedy for alleged legislative usurpation with the people. If *they* conclude the Constitution has been violated, they can exert political pressure to effect the repeal of the offending act or to replace their congressmen at times of election with representatives who will effectuate that repeal. The document thus provides the people with a firm, written normative standard to which to repair in making political decisions.³⁰⁶

Organizing public opposition to any political decision is, of course, always costly, and so democratic enforcement of constitutional rules is never going to be complete. But perfection is not the criterion for an acceptable mode of constitutional enforcement. The relevant question here is whether political enforcement offers a mix of benefits and drawbacks that are, on balance, preferable to judicial enforcement in a particular context. I emphasize *in a particular context* because while William Van Alstyne, in the passage quoted above, is considering the efficacy of *general* political enforcement of the Constitution, the argument in this Article is not for a general reliance on political checks, but for the power of Congress to opt for a political check in a particular instance. More importantly, the benefits and drawbacks of political versus judicial enforcement of the Constitution can be specified, but are not susceptible to quantification. Political enforcement offers a clear advantage over judicial enforcement in terms of democratic legitimacy, but there is no formula that tells us what weight to give that advantage, versus, say, the potential advantage of judicial enforcement in terms of consistency and predictability. The calculus is intractably dependent on normative arguments, over which people will inevitably disagree. A broad account of Congress's Article III power fits well with the understanding that the choice between modes of constitutional enforcement is necessarily dependent on both values and context. It is, in other words, a political choice.

A model of selective political enforcement could take at least two different forms. In the wealth tax example, the question whether such a tax is subject to the apportionment requirement depends on whether it is deemed "direct," and the rule for determining directness in this particular context has not been fixed by the courts.³⁰⁷ If Congress uses

³⁰⁶ Van Alstyne, *supra* note 3, at 19.

³⁰⁷ Compare Daniel Hemel & Rebecca Kysar, *The Big Problem with Wealth Taxes: Proposals by Senators Warren and Sanders May Not Pass Constitutional Muster. Then What?*, N.Y. TIMES (Nov. 7, 2019), <https://www.nytimes.com/2019/11/07/opinion/wealth->

its Article III power to legislate in accordance with its understanding of the meaning of the Apportionment Clause, it is not displacing some already-existing understanding: It is seeking, rather, to have the first word—it is making *preemptive* use of its Article III power, with voters rather than courts as a check. But what about Congress's *revisionary* use of its Article III power to insulate from judicial review legislation that is palpably at odds with a part of the Constitution laying down a rule that is clear?

An example of Congress's revisionary use of its Article III power is given in the other, likely more inflammatory, illustration outlined in this Article's Introduction—i.e., where Congress legislates to remove a group of federal judges.³⁰⁸ In this hypothetical, the law is enacted by a simple majority under the ordinary lawmaking process, rather than by the supermajority required for Congress to remove a federal judge.³⁰⁹ Congress exercises its Article III power by adding to the legislation a provision stripping the federal courts of power to entertain any constitutional challenge to the law.

In this instance, Congress has enacted a law very clearly at odds with the procedure the Constitution has prescribed. Does Article III authorize Congress to legislate in a way inimical to a clear rule laid down in the Constitution? The answer still depends on whether one adheres to unqualified judicial supremacy, a position that neither the Constitution's text, nor history, nor precedent conclusively endorses or falsifies.

B. *Qualified Judicial Supremacy and the Canadian "Notwithstanding Clause"*

At bottom, one either accepts that *qualified* judicial supremacy is a legitimate element of our constitutional democracy, or one does not. There is nothing inevitable about the unqualified version of judicial supremacy that undergirds much of the academic effort to place fetters on Congress's Article III power. And although the qualified version of judicial supremacy is not inevitable either, it is an arrangement that, practically speaking, Congress has the power to put in place. Congress's use of its Article III power would open a path toward a

tax-constitution.html (arguing that a wealth tax would necessarily be unconstitutional), with Dawn Johnsen & Walter Dellinger, *Yes, a Wealth Tax Would Be Constitutional*, WASH. POST (Jan. 11, 2020, 2:22 PM), https://www.washingtonpost.com/opinions/yes-a-wealth-tax-would-be-constitutional/2020/01/11/ef6d3b5e-330d-11ea-91fd-82d4e04a3fac_story.html (arguing that a wealth tax would not necessarily be unconstitutional).

³⁰⁸ See *supra* text accompanying note 33.

³⁰⁹ U.S. CONST. art. I, § 3, cl. 6 (“[N]o Person shall be convicted [following impeachment] without the Concurrence of two thirds of the [Senate] Members present.”).

different balance between constitutionalism and democracy: one which gives more scope to democracy, and, in the process, helps to justify both constitutionalism and judicial review. And, as mentioned in the Introduction, the model of qualified judicial supremacy is not unknown to the world. It is in fact the understanding of judicial supremacy that undergirds section 33 of the Canadian Charter of Rights and Freedoms, which provides as follows:

Section 33

(1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15

(2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

(3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.

(4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1).

(5) Subsection (3) applies in respect of a re-enactment made under subsection (4).³¹⁰

Two jurisdictions have adopted provisions similar to section 33. In Israel, section 8 of Israel's Basic Law: Freedom of Occupation (1994) contains a notwithstanding clause, which allows the Israeli Knesset (i.e., the national legislature of Israel) to enact a provision that violates freedom of occupation "if it has been included in a law passed by a majority of . . . the Knesset, which expressly states that it shall be of effect, notwithstanding the provisions of this Basic Law; such law shall expire four years from its commencement unless a shorter duration has been stated therein."³¹¹ In Australia, section 31 of the State of Victoria's Charter of Human Rights and Responsibilities Act 2006

³¹⁰ Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, § 33, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.).

³¹¹ See Basic Law: Freedom of Occupation, 5754-1994, SH No. 1454 p. 90 (Isr.). On the history of the Israeli override clause, and the debate surrounding it, see Adam Dodek, *The Canadian Override: Constitutional Model or Bête Noire of Constitutional Politics?*, 49 *ISR. L. REV.* 45 (2016); Gal Dor, *Constitutional Dialogues in Action: Canadian and Israeli Experiences in Comparative Perspective*, 11 *IND. INT'L & COMP. L. REV.* 1 (2000); Rivka Weill, *Juxtaposing Constitution-Making and Constitutional-Infringement Mechanisms in Israel and Canada: On the Interplay Between Common Law Override and Sunset Override*, 49 *ISR. L. REV.* 103 (2016); Lorraine E. Weinrib, *The Canadian Charter's Override Clause: Lessons for Israel*, 49 *ISR. L. REV.* 67 (2016); Nicholas Stephanopoulos, Comment, *The Case for the Legislative Override*, 10 *UCLA J. INT'L & FOREIGN AFF.* 250 (2005).

allows its legislature to declare that a statute will apply despite being incompatible with guaranteed rights in “exceptional circumstances.”³¹² Here, we will focus on section 33 and Canada’s experience with legislative override of judicial review, both because it is by far the most extensive, and because it has informed, in particular, Israel’s adoption of its override provision.

Section 33 was the product of a compromise between Prime Minister Pierre Elliott Trudeau and the provincial premiers with whom he negotiated the text of what became Canada’s 1982 Constitution.³¹³ The provinces were concerned about what they perceived to be the 1982 Constitution’s transfer of power from legislatures to courts.³¹⁴ But in the decades since, section 33 has been invoked infrequently.³¹⁵ This is likely due in part to section 1 of the Charter, which permits legislatures to impose reasonable limits on Charter rights that can be “demonstrably justified in a free and democratic society.”³¹⁶ Section 1, the so-called “Limitations Clause,” sets a baseline for judicial review in Canada that is generally more deferential to legislative interpretations of the Charter than U.S. courts typically are to legislative constructions of the U.S. Constitution.³¹⁷

³¹² See *Charter of Human Rights and Responsibilities Act 2006* (Vict.) s 31 (Austl.).

³¹³ See PETER H. RUSSELL, *CONSTITUTIONAL ODYSSEY: CAN CANADIANS BECOME A SOVEREIGN PEOPLE?* 89, 120–21 (3d ed. 2004) (noting that Trudeau withdrew an earlier concession in response to provinces’ demand for a legislative override); ROBERT J. SHARPE & KENT R. ROACH, *THE CHARTER OF RIGHTS & FREEDOMS* 96 (6th ed. 2017) (noting that despite the “enormous controversy” surrounding inclusion of the Notwithstanding Clause, “it was a fundamental compromise without which Canada probably would have no Charter”); Janet L. Hiebert, *The Notwithstanding Clause: Why Non-use Does Not Necessarily Equate with Abiding by Judicial Norms*, in *THE OXFORD HANDBOOK OF THE CANADIAN CONSTITUTION* 695, 697–98 (Peter Oliver et al. eds., 2017) (noting that as public pressure to accept the Charter increased, ruling out their earlier preference of “retain[ing] the principle of parliamentary supremacy,” the Notwithstanding Clause became “the best option available to moderate the impact of judicial review on legislative decision-making” for provincial opponents to the Charter); see also Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c 11 (U.K.).

³¹⁴ See BROSSEAU & ROY, *supra* note 51, at 4–6.

³¹⁵ *Id.* at 6–8.

³¹⁶ *Id.* at 10.

³¹⁷ Compare Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, § 1, being Schedule B to the Canada Act, 1982, c 11 (U.K.) (“The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”), and *R. v. Oakes*, [1986] 1 S.C.R. 103, 105–06 (Can.) (applying the rational connection test), with *City of Boerne v. Flores*, 521 U.S. 507, 519, 533–34 (1997) (stating that infringements on First Amendment rights “must demonstrate a compelling governmental interest and show that the law is the least restrictive means of furthering its interest” and holding that Congress does not have the power to define the scope of constitutional rights). Note that in certain contexts a more stringent standard of justification may apply in Canada. See, e.g., *Carter v. Canada* (Att’y Gen.), [2015] 1 S.C.R.

That said, the mechanism provided in section 33 is likely to be startling to an American attached to the idea of unqualified judicial supremacy. Section 33 gives both the federal Parliament of Canada and provincial legislatures the power to pass legislation that will prospectively take precedence over court decisions interpreting crucial sections of the Canadian Charter: section 2 (providing for rights that include “freedom of expression, freedom of conscience, freedom of association and freedom of assembly”) and sections 7–15 (providing rights “to life, liberty and security of the person, freedom from unreasonable search and seizure, freedom from arbitrary arrest or detention, . . . [and] equality,” among others).³¹⁸ The Clause, when exercised in legislation, suppresses the Charter guarantee that would otherwise protect the rights expressly targeted—i.e., it subordinates that Charter guarantee to the arrangement specified in the legislation containing the override.³¹⁹ It is not clear whether a section 33 override requires courts to disclaim jurisdiction over a lawsuit seeking a declaration of infringement of these expressly targeted rights.³²⁰ A section 33 override would, however, take precedence over a declaration of invalidity and perhaps other remedies (e.g., damages).³²¹ The

331, para. 95 (Can.) (upholding a higher standard for violations of section 7 *Charter* rights); *Frank v. Canada (Att’y Gen.)*, [2019] 1 S.C.R. 3, paras. 44–45 (Can.) (holding that “a stringent standard of justification” applies to infringements on the section 3 right to vote); *R. v. Morrison*, [2019] 2 S.C.R. 3, paras. 10, 72–73 (Can.) (concluding that infringing upon the section 11(d) presumption of innocence “cannot be justified under s. 1”).

³¹⁸ BROSSEAU & ROY, *supra* note 51, at 1. Section 33 may not be used retrospectively. See *Ford v. Quebec (Att’y Gen.)*, [1988] 2 S.C.R. 712, 744–45 (Can.).

³¹⁹ BROSSEAU & ROY, *supra* note 51, at 1.

³²⁰ There is in fact a lively debate over whether a court could—short of a declaration of invalidity—grant a declaration that a law violates *Charter* rights. Compare Grégoire Webber, Eric Mendelsohn & Robert Leckey, *The Faulty Received Wisdom Around the Notwithstanding Clause*, INST. FOR RES. ON PUB. POL’Y (May 10, 2019), <https://www.policyoptions.irpp.org/magazines/may-2019/faulty-wisdom-notwithstanding-clause> (arguing that invoking the Notwithstanding Clause “preclude judicial review”), with Maxime St-Hilaire & Xavier Focroulle Ménard, *Nothing to Declare: A Response to Grégoire Webber, Eric Mendelsohn, Robert Leckey and Léonid Sirota on the Effects of the Notwithstanding Clause*, ADVOCS. FOR RULE L. (Feb. 25, 2020), <http://www.ruleoflaw.ca/nothing-to-declare-a-response-to-gregoire-webber-eric-mendelsohn-robert-leckey-and-leonid-sirota-on-the-effects-of-the-notwithstanding-clause> (articulating a purpose-based response to arguments that a court could grant a declaration that a law violates *Charter* rights even after invocation of the Notwithstanding Clause (citing Dwight Newman, *Canada’s Notwithstanding Clause, Dialogue, and Constitutional Identities*, in CONSTITUTIONAL DIALOGUE: RIGHTS, DEMOCRACY, INSTITUTIONS 209–34 (Geoffrey Sigalet et al. eds., 2019))).

³²¹ A section 33 override’s precedence over other remedies such as damages remains a point of contention that was left open because in *Ford*—the only SCC case which considered section 33—the parties challenging the law solely sought a declaration of invalidity under section 52 of the *Charter*, and not damages under section 24(1). [1988] 2 S.C.R. at 714–15. Some thus argue that parties may still seek a damages remedy under section 24(1), as this section is not covered by section 33. See, e.g., Robert Leckey, *Quebec*

Notwithstanding Clause power must be exercised in an act of ordinary legislation (and not via a mere regulation), and the power must be expressly invoked.³²² A declaration made under the Notwithstanding Clause power is effective for a maximum period of five years, but may be renewed (with each renewal also having effect for a maximum period of five years).³²³

Section 33 establishes a power analogous to Congress's power under Article III to limit judicial review—although, of course, it operates more straightforwardly. Rather than limit courts' jurisdiction to enforce Charter provisions that conflict with the legislature's preferences, Canadian national and provincial legislatures are empowered simply to override those Charter provisions.³²⁴ Notably, the section 33 power is qualified in ways designed to limit its use: the Notwithstanding Clause power cannot be used, for example, to override "democratic rights (sections 3–5 of the Charter), mobility rights (section 6), language rights (sections 16–22), minority language education rights (section 23), [or] the guaranteed equality of men and women (section 28)."³²⁵ This careful specification is characteristic of modern constitutions like the Charter.³²⁶

In the Canadian context, the Notwithstanding Clause power, as Henry J. Friendly Professor of Law, Emeritus at Harvard Law School Paul C. Weiler recognized, is both (1) essential to the reconciliation of

Could Face Compensation Claims for Bill 21 Harms, POL'Y OPTIONS (Oct. 10, 2019), <https://policyoptions.irpp.org/magazines/october-2019/quebec-could-face-compensation-claims-for-bill-21-harms>; Leonid Sirota, *Does the Charter's "Notwithstanding Clause" Exclude Judicial Review of Legislation? Not Quite!*, DOUBLE ASPECT (May 23, 2019), <https://doubleaspect.blog/2019/05/23/concurring-opinion>. Others maintain that declarations of invalidity are effectively barred. See, e.g., Maxime St-Hilaire & Xavier Focroulle Ménard, *Nothing to Declare: Part II*, ADVOCS. FOR RULE L. (Mar. 5, 2020), <http://www.ruleoflaw.ca/nothing-to-declare-part-ii> ("[C]ourts have no jurisdiction to rule on the relationship between two legal norms, one of which, in this case a constitutional right, has been validly excepted from with respect to the other by virtue of an authorization expressly provided for in the supreme law. Such question is, indeed, theoretical.").

³²² BROSSEAU & ROY, *supra* note 51, at 1. ("[A] use of the notwithstanding power must be contained in an Act, and not subordinate legislation (regulations), and must be express rather than implied.").

³²³ *Id.*

³²⁴ *Id.* ("Section 33(1) . . . permits Parliament or a provincial legislature to adopt legislation to override section 2 . . . and sections 7–15 of the Charter . . .").

³²⁵ *Id.* at 1–2.

³²⁶ See, e.g., S. AFR. CONST., 1996, § 74 (providing that a bill to amend the Constitution requires approval of at least two-thirds of the members of the National Assembly, but if the amendment affects provincial powers or boundaries, or if it amends the Bill of Rights, at least six of the nine provinces in the National Council of Provinces must also vote for it, and if the amendment affects section 1 of the Constitution, which establishes the existence of South Africa as a sovereign, democratic state, and lays out the country's founding values, it requires the support of three-quarters of the members of the National Assembly).

rights-based constitutionalism and democracy, and (2) has been subject, in most cases, to political discipline that limits its use to instances where there is significant popular support for the override.

Since the Canadian polity had shown itself sufficiently enamoured of fundamental rights to enshrine them in its Constitution, invocation of the non obstante clause was guaranteed to produce a great deal of political flak. No government can risk taking such a step unless it is certain that there is widespread support for its position Canadian judges are given the initial authority to determine whether a particular law is a “reasonable limit [of a right] . . . demonstrably justified in a free and democratic society.” Almost all of the time, the judicial view will prevail. However, Canadian legislatures were given the final say on those rare occasions where they disagree with the courts with sufficient conviction to take the political risk of challenging the symbolic force of the very popular Charter. That arrangement is justified if one believes, as I do, that on those exceptional occasions when the court has struck down a law as contravening the Charter and Parliament re-enacts it, confident of general public support for this action, it is more likely the legislators are right on the merits than were the judges.³²⁷

It is important to note that section 33 has been, and remains, controversial in Canada; the provision has been used only sparingly, and at the provincial rather than national level.³²⁸ The most frequent user has been Quebec. Immediately after the Charter came into force in 1982, the Quebec legislature enacted a statute³²⁹ that added to each of the province’s statutes a provision invoking the Notwithstanding Clause. This had no practical effect (i.e., none of the effected statutes had been held to violate a Charter right, and so no actual override was put into effect), but was done as a symbolic protest of the enactment of the Constitution Act of 1982 (including the Charter), which had been done without Quebec’s consent.³³⁰ As with all legislation invoking section 33, Quebec’s blanket override expired at the end of a five-year term, and was never re-enacted.³³¹

³²⁷ Paul C. Weiler, *The Evolution of the Charter: A View from the Outside*, in *LITIGATING THE VALUES OF A NATION* 57 (Robert M. Elliot & Joseph M. Weiler eds., 1986).

³²⁸ BROUSSEAU & ROY, *supra* note 51, at 6–7. See generally François Côté & Guillaume Rousseau, *From Ford v. Quebec to the Act Respecting the Laicity of the State: A Distinctive Quebec Theory and Practice of the Notwithstanding Clause*, 94 SUP. CT. L. REV. (2d) 463, 464 (2020) (arguing that Quebec developed “its own coherent theory and practice concerning the legitimacy of referring to legislative overrides”).

³²⁹ An Act Respecting the Constitution Act, 1982, S.Q. 1982, c 21 (Can.).

³³⁰ See BROUSSEAU & ROY, *supra* note 51, at 6.

³³¹ Section 33 – *Notwithstanding Clause*, DEP’T OF JUST. (Can.), <https://www.justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccd1/check/art33.html> (last visited Aug. 15, 2020).

Quebec's next use of section 33 came in response to the Supreme Court of Canada's 1988 decision in *Ford v. Quebec (A.G.)*,³³² which struck down Quebec's "French-only" law for commercial signs. Following the decision in *Ford*, the Quebec legislature enacted a slightly less restrictive statute that retained the French-only rule for outdoor signs but permitted bilingual indoor signs.³³³ The statute included a provision invoking section 33.³³⁴ The Notwithstanding Clause provision in the revised statute expired in 1993 and was not re-enacted, despite the continuation in power of the Liberal Party government that had sponsored the French-only law.³³⁵ In 1993, the Quebec legislature revised its law to permit the use of languages other than French on outdoor signs as long as French was also used and was "predominant."³³⁶ The 1993 law did not invoke the Notwithstanding Clause.

Outside of Quebec, section 33 has been invoked in the 1980s in Saskatchewan to uphold legislation settling a labor dispute which the Saskatchewan Court of Appeal had declared to be a violation of the Charter.³³⁷ More recently, it was invoked in the context of a 2018 statute³³⁸ responding to a judicial decision invalidating as a violation of the Charter's religious freedom provision the provincial system providing funding for non-Catholic students at Catholic schools. Also in 2018, controversial Ontario premier Doug Ford threatened use of the Notwithstanding Clause to override an Ontario Superior Court decision invalidating provincial legislation ordering the Toronto City Council to re-draw electoral ward boundaries to reduce the number of wards.³³⁹ However, Ford never carried out the threat, and later in

³³² [1988] 2 S.C.R. 712.

³³³ An Act to Amend the Charter of the French Language, S.Q. 1988, c 54, art. 1 (Can.).

³³⁴ *Id.* at art 10.

³³⁵ See Stephanopoulos, *supra* note 311, at 257 (discussing Quebec's failure to reenact the provision); Frédéric Boily & Celine Cooper, *Quebec Liberal Party (QLP)*, THE CANADIAN ENCYCLOPEDIA (May 12, 2020), <https://www.thecanadianencyclopedia.ca/en/article/parti-liberal-du-quebec> (discussing the Liberal Party's "terms in office" from "1985–89 and 1989–94").

³³⁶ An Act to Amend the Charter of the French Language, S.Q. 1993, c 40, art. 18 (Can.).

³³⁷ See *RWDSU v. Saskatchewan* (1985), 39 Sask. R. 193, p. 31 (Can. Sask. C.A.). The use of section 33 in this instance turned out to be unnecessary; the Supreme Court of Canada overturned the decision of the Saskatchewan court and upheld the original law. See *RWDSU v. Saskatchewan*, [1987] 1 S.C.R. 460, 484 (Can.).

³³⁸ *The School Choice Protection Act*, S.S. 2018, c 39, s 2.2(1). The decision overridden was *Good Spirit Sch. Div. No. 204 v. Christ the Teacher Roman Catholic Separate Sch. Div. No. 212*, 2017 SKQB 109. This decision was subsequently overturned by the Saskatchewan Court of Appeal. See *Saskatchewan v. Good Spirit Sch. Div. No. 204*, 2020 SKCA 34, para. 304.

³³⁹ See Office of the Premier, *Doug Ford Announces Action to Uphold the Better Local Government Act*, ONTARIO: NEWSROOM (Sept. 10, 2018, 2:25 PM), <https://news.ontario.ca/opo/en/2018/09/doug-ford-announces-action-to-uphold-the-better-local-government->

2018 the Court of Appeal for Ontario first stayed and subsequently invalidated the Superior Court's decision.³⁴⁰

Most recently, in 2019, Quebec invoked the Notwithstanding Clause in its enactment of a law directing that certain public sector employees in positions of authority shall not wear religious symbols while on duty, including face coverings.³⁴¹ The law also requires persons receiving certain public services, such as public transit using a reduced-fare ID card, to uncover their faces for identification or security purposes.³⁴² Both the Quebec statute and the province's use of the Notwithstanding Clause to insulate it from judicial review have been controversial.³⁴³ However, whether people favor the Quebec policy or not, it is difficult to contend that the law is striking a balance alien to the Charter. Although the Charter has no explicit non-establishment clause, Canadian courts have enforced non-establishment principles, finding that they are implicit in the Charter's general guarantee of religious freedom.³⁴⁴ Where the particular balance should be drawn between free exercise and establishment princi-

act.html (threatening invocation of section 33 in the wake of Superior Court invalidation of provincial measure).

³⁴⁰ *City of Toronto v. Ontario (Att'y Gen.)* (2019), 146 O.R. 3d 705 (Can. Ont. C.A.) (merits decision), leave to appeal granted, 2020 CanLII 23630 (SCC); *City of Toronto v. Ontario (Att'y Gen.)* (2018), 142 O.R. 3d 481 (Can. Ont. C.A.) (stay decision); *Ontario's Highest Court Paves Way to Reduce Size of Toronto City Council*, CBC NEWS (Sept. 19, 2018, 4:00 AM), <https://www.cbc.ca/news/canada/toronto/ford-court-toronto-council-1.4829250>.

³⁴¹ See *An Act Respecting the Laicity of the State*, S.Q. 2019, c 2, 6 (Can.).

³⁴² See *id.* at c 3.

³⁴³ See, e.g., Mashoka Maimona, *Commentary: Quebec's Chilling Ban on Religious Clothing*, CHI. TRIB. (June 24, 2019, 4:26 PM), <https://www.chicagotribune.com/opinion/commentary/ct-opinion-hijab-quebec-ban-religious-clothing-20190624-dh5ii6gljbbpcjii4dkjfu6yi-story.html> (criticizing the Act and stating that the Assembly "invoked a rarely used loophole that allows the government to override basic constitutional rights"); Martin Patriquin, *Absurdity and Cruelty Come Together in One New Quebec Law*, CBC NEWS (June 24, 2019, 4:00 AM), <https://www.cbc.ca/news/opinion/religious-symbols-1.5185934> (claiming that through use of the Notwithstanding Clause, "the CAQ has tacitly admitted that . . . [the bill in question is] bad legislation"). Even after invocation of the Notwithstanding Clause, there remain challenges to the Quebec law that argue, *inter alia*, that the law exceeded provincial power, violated sections of the Charter that the Notwithstanding Clause does not cover, and is internally inconsistent such that it "violates the constitutional principle of the rule of law." Jonathan Montpetit, *One Law, Many Challenges: How Lawyers Are Trying to Overturn Quebec's Religious Symbols Ban*, CBC NEWS (Dec. 12, 2019, 4:00 AM), <https://www.cbc.ca/news/canada/montreal/bill-21-quebec-court-challenges-1.5393074>. The consolidated challenges have not fared well thus far. See, e.g., *Hak v. Procureure Générale du Que.*, 2019 QCCA 2145, 2019 CarswellQue 11620 (Can. Que. C.A.) (WL) (denying stay, leave to appeal denied).

³⁴⁴ See *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, paras. 151–52 (Can.) (invalidating the Lord's Day Act, R.S.C. 1970, c L-13, which generally prohibited commercial activity on Sunday). A more recent example is *Mouvement laïque québécois v. City of Saguenay*, 2015 SCC 16, [2015] 2 S.C.R. 3, para. 150 (Can.) (upholding a decision

ples is a difficult question to address on purely legal grounds and seems precisely the sort of issue over which legislatures, rather than courts, should exercise ultimate competence.³⁴⁵

Despite the occasional controversy over its use, section 33 has functioned as a constitutive element of a version of democratic constitutionalism in which constitutional rights play an important role in shaping legislation, but in which such rights, and, in particular, judicial enforcement of rights, do not function inevitably as a trump. Observers of Canadian constitutionalism like Paul Weiler, Brian Slattery, Lorraine Weinrib, and Tsvi Kahana have offered differing accounts of how section 33 can be justified.³⁴⁶ Nonetheless, all of these accounts integrate section 33 as a mechanism for qualifying judicial supremacy. The late Peter Hogg, a preeminent Canadian constitutional scholar, framed section 33 (accurately in my view) as helping to shape a Canadian national culture of democratic constitutionalism based in dialogue between courts and legislatures and, perhaps most importantly, an ethic of *forebearance* that shapes the behavior of both institutions:

[T]he decisions of the Court almost always leave room for a legislative response, and they usually get a legislative response. In the end, if the democratic will is there, the legislative objective will still be able to be accomplished, albeit with some new safeguards to protect individual rights and liberty. Judicial review is not “a veto over the

that ordered the Saguenay city council to stop holding prayers at council sessions based on the principle of government neutrality towards religion).

³⁴⁵ *But see, e.g.,* Multani v. Comm'n scolaire Marguerite-Bourgeoys, 2006 SCC 6, [2006] 1 S.C.R. 256 (Can.) (striking down a Quebecoise school's council of commissioners decision to ban a metal kirpan, a Sikh religious item, on the basis of qualifying as a weapon).

³⁴⁶ Tsvi Kahana understands Weiler and Slattery to frame section 33 as giving the Canadian legislatures power as a “super-court” to insist on its own judgment of the constitutionality of legislation. *See* Tsvi Kahana, *Understanding the Notwithstanding Mechanism*, 52 U. TORONTO L.J. 221, 224 (2002); *see also* Brian Slattery, *A Theory of the Charter*, 25 OSGOODE HALL L.J. 701 (1987) (arguing that a “Coordinate Model” of cooperation between courts and the legislature as political actors, rather than a rights-based model of enforcement, maximizes the strengths of the *Charter*); Paul C. Weiler, *Of Judges and Rights, or Should Canada Have a Constitutional Bill of Rights?*, 60 DALHOUSIE REV. 205 (1980) (arguing that Canada should create a bill of rights with a provision that guarantees legislative supremacy over judicial jurisdiction and decisions); Paul C. Weiler, *Rights and Judges in a Democracy: A New Canadian Version*, 18 U. MICH. J.L. REFORM 51 (1984) (highlighting the challenges of giving the judicial branch power through a constitutional bill of rights in Canada and the resulting importance of imparting the final say onto a responsive legislature). In contrast, Lorraine Weinrib frames section 33 as creating “super-legislatures.” Lorraine Eisenstat Weinrib, *Learning to Live with the Override*, 35 MCGILL L.J. 541, 569 (1990). Kahana, like Hogg, frames section 33 as constitutive not of legislative supremacy, but of constitutional dialogue between courts and legislatures. Kahana, *supra*, at 233–34.

politics of the nation,” but rather the beginning of a dialogue as to how best to reconcile the individualistic values of the *Charter* with the accomplishment of social and economic policies for the benefit of the community as a whole.³⁴⁷

Hogg suggests that “[i]n practice, section 33 has become relatively unimportant, because of the development of a political climate of resistance to its use.”³⁴⁸ Hogg nonetheless believes that the mere prospect of legislative override nudges both courts and legislatures away from confrontation and sparks public debate of *Charter* values. Courts acting in the shadow of section 33 will weigh the possibility of activating a legislative override effort, and the possible costs in terms of lost legitimacy if an override effort proves popular. But legislatures too will act in light of the costs *to them* of override efforts that fail to gain popular support.

No one is recommending that the United States adopt the Canadian model wholesale. I would not suggest, for example, that the United States give to states the same override power that Canadian provinces enjoy. But in its basic outlines, Canada’s experience over decades with the Notwithstanding Clause suggests that a system of *qualified* judicial supremacy—i.e., judicial supremacy tempered by the possibility of legislative override—can be successfully incorporated into the governing system of a liberal, rights-regarding democratic constitutional state. And this brings us to the final consideration in this Article: What are the prospects that Congress, through exercise of its Article III power, can introduce into the American system of democratic constitutionalism a rule of qualified judicial supremacy, enforced through the sort of legislative override power analogous to what section 33 grants explicitly?

C. *The Prospects for an American Notwithstanding Clause*

The most important thing to say about the prospect of the United States recognizing Congress’s power to qualify judicial supremacy is that it depends more on politics than law. The first step is Congress asserting its Article III power, and that depends on politicians in

³⁴⁷ Peter W. Hogg & Allison A. Bushell, *The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn’t Such a Bad Thing After All)*, 35 OSGOODE HALL L.J. 75, 105 (1997) [hereinafter Hogg & Bushell, *Charter Dialogue*] (footnote omitted) (quoting Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 469 (1981)); see also Peter W. Hogg, Allison A. Bushell Thornton & Wade K. Wright, *A Reply on “Charter Dialogue Revisited,”* 45 OSGOODE HALL L.J. 193, 202 (2007) (addressing that the word “dialogue,” as a metaphor, may not be appropriate for use among courts but illustrates the central argument about the relationship between court decisions and legislative responses).

³⁴⁸ Hogg & Bushell, *Charter Dialogue*, *supra* note 347, at 83.

Congress perceiving an opportunity for political gain in exercising the power, and having the political deftness and sense of timing to do so successfully. Congress's past gestures toward jurisdiction-stripping were mostly symbolic—they were, for the most part, expressions of right-wing backlash against various instances of perceived liberal judicial activism (e.g., decisions expanding abortion rights and limiting school prayer). It isn't surprising that these attempts have gone nowhere. Congress is likely to succeed in asserting its Article III power only when particular legislation is backed with a broader argument against unqualified judicial supremacy and in favor of Congress's override power as a democratic corrective. These are demanding conditions, yet we may be entering a moment when they are falling into place.

In the first volume of his ground-breaking work on American constitutionalism, *We the People*, Bruce Ackerman contends that historically, constitutional change has sometimes occurred outside the ordinary Article V process for amending the Constitution.³⁴⁹ Ackerman defines what he refers to as a “constitutional moment”—a period during which the meaning of the Constitution is redefined through a heightened form of democratic politics that he labels “higher lawmaking.”³⁵⁰ Ackerman argues that during these moments, constitutional questions that are ordinarily the province of elite discourse are taken up in the popular debate. When an election is contested on the basis of a constitutional issue to which the public has turned its collective attention—examples include the elections held during the period of the Fourteenth Amendment's ratification, the New Deal's adoption and the judicial attempt to undermine it, and the civil rights revolution of the mid-1960s—the results of that election, Ackerman argues, serve in great part as a resolution of the constitutional question and its “codification” as a non-Article V amendment to the Constitution.³⁵¹

Note, importantly, that an exercise of Congress's Article III power, as I describe it here, is *not* tantamount to an Ackermanian non-Article V amendment of the Constitution. When the Constitution

³⁴⁹ See 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 6–7, 50–52 (1991) (describing the level of citizen mobilization that is required to enact changes in the name of “the People” and explaining Presidents Reagan and Roosevelt's attempts at constitutional change outside of the Article V process).

³⁵⁰ *Id.* at 266–94.

³⁵¹ *Id.* at 266–67 (describing how in the “mobilized deliberation” phase of “higher lawmaking” an initial rejection by the Court of transformative statutes, followed by deliberative and sustained support by the people of the constitutional question through the next general election, and a subsequent passing of a new wave of similar statutes, then presents the Court with the opportunity to codify the issue via transformative opinions).

is amended, the new constitutional arrangement is entrenched—meaning, the new arrangement cannot itself be amended except through the demanding procedures prescribed by the Constitution’s Article V, or, in Ackerman’s accounting, through another non-Article V amendment, which has different, though also demanding, rules of recognition. By contrast, when Congress uses its Article III power to legislate a change to our Constitution, the change is not entrenched. It may be undone either by ordinary legislation that restores the prior constitutional arrangement or by legislation that restores the jurisdiction of the courts to review, and perhaps strike down, the legislation by which Congress displaced the original constitutional arrangement. No Article V amendment is necessary. Equally, it does not take a “constitutional moment” to reverse constitutional change that has been produced through Congress’s exercise of its Article III power. Ordinary lawmaking is all that is required.

That said, while changes to our Constitution made via Congress’s use of its Article III power may not be entrenched, they may in many cases prove quite durable. In a culture like ours, which both is committed to judicial review as a talisman of lawfulness and is accustomed to judicial supremacy, Congress is likely to make use of its Article III power only where a substantial majority of lawmakers (indeed, likely a super-majority) favor a policy goal that is threatened by seemingly politicized and minoritarian judicial review. In such cases, the political coalition that supports using Congress’s Article III power to change the Constitution may be quite durable.

Despite these differences, Ackerman’s lens remains useful; we might understand Congress’s assertion of its Article III power as a vehicle for responding to a “constitutional moment,” and as a way of formalizing the process of constitutional change outside the Article V framework. Understanding that tangency between Ackerman’s account of non-Article V amendments and Congress’s Article III power is important, for we may be entering one of Ackerman’s “constitutional moments” soon. As presidential scholar Julia Azari has argued, the political dominance of the GOP coalition that first came to power with Ronald Reagan, and which established the “small-government” paradigm within which even Democratic presidents like Bill Clinton and Barack Obama were forced to govern, may be crumbling.³⁵² Donald Trump, in Azari’s view, is a “disjunctive” president—

³⁵² See Julia Azari, *Trump’s Presidency Signals the End of the Reagan Era*, *Vox* (Dec. 1, 2016, 10:10 AM), <https://www.vox.com/mischiefs-of-faction/2016/12/1/13794680/trump-presidency-reagan-era-end>. Azari’s work builds on Stephen Skowronek’s magisterial study of the presidency, *THE POLITICS PRESIDENTS MAKE: LEADERSHIP FROM JOHN ADAMS TO BILL CLINTON* (1993).

i.e., a president elected as the dominant political coalition is beginning to erode.³⁵³ Azari argues that Trump's election has accelerated the demise of the Reagan coalition "by introducing overt race appeals into national politics at the end of an era when such appeals have typically been either coded or localized."³⁵⁴ And yet, as has been averted to earlier,³⁵⁵ the signal accomplishment of the Trump presidency thus far has been to stock the federal judiciary with judges who might entrench the commitments of the political coalition that Donald Trump has helped bury.

Franklin Roosevelt's court-packing scheme in defense of the New Deal arose in a similar context—as a small-d democratic response to a judiciary beholden to the commitments of the political coalition that Roosevelt's election had dissolved. If Azari's identification of Donald Trump as a disjunctive president is correct and a new political coalition comes to power with the leadership of a "reconstructive" President,³⁵⁶ establishing a new governing paradigm after Trump leaves office, it is possible—especially if this current moment of economic and social crisis endures—that we may see a similar desire to curb a judiciary bent on enforcing, perhaps for decades, the now-defunct coalition's constitutional commitments. As has been mentioned previously, Democrats are already threatening to revive court-packing.³⁵⁷ They are also advancing other judicial "reform" schemes, such as rotating Supreme Court justices off of the Court after a term of years while avoiding the Constitution's removal rules by re-assigning the justices to seats on the United States Courts of Appeal.³⁵⁸ But none of these proposals get at the root of the legitimacy problem that unqualified judicial review creates. Indeed, they make it worse—these proposals reinforce the idea that judicial review is judicial politics.

Note that judicial resistance to Congress's exercise of its Article III power is possible, and perhaps even likely, at least initially. What happens if the Supreme Court declares an act of jurisdiction-stripping

³⁵³ Azari, *supra* note 352.

³⁵⁴ *Id.*

³⁵⁵ See *supra* text accompanying notes 20–25.

³⁵⁶ A "reconstructive" president, like Andrew Jackson, Franklin Delano Roosevelt, and Ronald Reagan, is a president who represents new and durable governing coalitions. See generally SKOWRONEK, *supra* note 352.

³⁵⁷ See *supra* text accompanying note 25.

³⁵⁸ This proposal appears to have been first advanced in 2009 by a bipartisan group of lawyers and law professors. See Memorandum of Four Proposals for a Judiciary Act of 2009, at 4, <https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fwww.scotusblog.com%2Fwp-content%2Fuploads%2F2009%2F02%2Fjudiciary-act-of-2009.doc> (last visited Aug. 8, 2020) (describing Supreme Court rotation arrangements as part of a package of judiciary reform proposals).

unconstitutional? Everything will depend upon how determined Congress is to have its way. I am reminded of a quip, attributed by Winston Churchill to Josef Stalin, who, when asked in 1935 by French Foreign Minister Pierre Laval whether he could provide more lenient treatment to Russian Catholics to help convince the Pope to counter the rise of Nazism, supposedly replied “The Pope! How many divisions has *he* got?”³⁵⁹ In a conflict over Congress’s power to limit the courts’ jurisdiction, one might similarly ask how many divisions the courts have. The federal courts are, in fact, utterly dependent on the political branches. The courts are dependent on Congress in the very practical sense that they control neither their own budgets nor even their own facilities.³⁶⁰ Similarly, the courts are dependent on the executive for execution of their orders.³⁶¹ Hamilton acknowledged the dependence of the courts quite plainly in Federalist 78:

The executive not only dispenses the honors but holds the sword of the community. The legislature not only commands the purse but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither force nor will but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.³⁶²

A Congress determined to wield its power to control judicial jurisdiction is well-positioned to beat back any opposition by courts. If Congress’s determination were backed by a willing executive, it would be even more difficult to imagine courts daring to resist. The real question, then, is not whether courts will accept Congress’s use of its Article III power to change existing constitutional arrangements, but whether *voters* will. Given the centrality of judicial review in the American popular conception of constitutionalism, Congress’s aggressive use of its Article III power would be a risky course. Its use would

³⁵⁹ 1 WINSTON S. CHURCHILL, *THE SECOND WORLD WAR: THE GATHERING STORM*, 121 (1948).

³⁶⁰ ADMIN. OFFICE OF THE U.S. COURTS, *Funding/Budget – Annual Report 2019*, <https://www.uscourts.gov/statistics-reports/fundingbudget-annual-report-2019> (last visited Aug. 11, 2020) (“Congress appropriates funds for the Judiciary to carry out its constitutional duties and also provides funds to the General Services Administration for courthouse construction and maintenance.”); ADMIN. OFFICE OF THE U.S. COURTS, *Facilities and Security – Annual Report 2019*, <https://www.uscourts.gov/statistics-reports/facilities-and-security-annual-report-2019> (last visited Aug. 11, 2020) (discussing ownership of federal judicial facilities by the General Services Administration).

³⁶¹ See, e.g., Exec. Order No. 10,730, 22 Fed. Reg. 7628 (Sept. 25, 1957) (authorizing the use of federal troops to enforce school desegregation in Little Rock, Arkansas).

³⁶² THE FEDERALIST NO. 78, at 464 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

make sense only when political support for changing a particular constitutional arrangement is very strong and likely to be durable. The precise public reaction to any particular use of the Article III option is impossible to know in advance. But given how deeply entrenched the institution of judicial review is in our culture, convincing the public that a particular use of the Article III option is both permissible and necessary is going to take a good deal of work and courage.

Despite the obvious reasons for caution, there is always the risk that Congress will exercise its Article III power unwisely. Can we rely on voters here in the United States to launch the same “political flak” that Weiler asserts would discipline an unpopular use of the Notwithstanding Clause in Canada?³⁶³ The first thing to say on that question is a relatively simple comparative point about the scope of Congress’s Article III power and the strength of the safeguards against its incautious use. Unlike in the Canadian case, where the section 33 override may be invoked by both the federal and provincial legislatures, the Article III power that I have described here is Congress’s alone. Bicameralism and presentment both stand as barriers to Congress’s use of its Article III power—barriers that will limit the power, in most cases, to uses for which popular support is deep and likely to be enduring. Consider also that all members of the U.S. House of Representatives and one-third of U.S. Senators face election every two years. This means that partisan control of Congress is tenuous, and U.S. federal legislators are kept on a short electoral leash. Under those arrangements, the consequences of an unpopular exercise of the Article III power are likely to come quickly. By contrast, the provincial legislatures in Canada are unicameral, elections are held only quadrennially, party discipline is strong,³⁶⁴ and the requirement of royal assent to legislation (accomplished through the Governor General, appointed by the Queen) is nominal and therefore does not constrain in the way that presentment does in the United States.³⁶⁵ As a consequence, the political barriers to invocation of sec-

³⁶³ See *supra* text accompanying note 327 and discussion *supra* Section II.B.

³⁶⁴ See DONALD J. SAVOIE, *DEMOCRACY IN CANADA: THE DISINTEGRATION OF OUR INSTITUTIONS* 159–60 (2019) (discussing literature that suggests results of local candidates in provincial and federal elections are ninety-five percent attributable to central party messaging and only five percent to the individual candidate, and noting widespread agreement on the relative unimportance of individual candidates).

³⁶⁵ See Adam M. Dodek, *Omnibus Bills: Constitutional Constraints and Legislative Liberations*, 48 OTTAWA L. REV. 1, 22, 28–29 (2017) (stating that “[f]or the Governor General, there is a strong constitutional convention against the exercise of any independent discretion in granting royal assent to bills validly enacted by the House and Senate” and noting that “[n]o Governor General has ever refused to assent to a bill enacted by Parliament . . . [and] no Lieutenant Governor has refused to provide royal assent to a bill since 1945 or invoked the power of reservation since 1961”).

tion 33 by the provincial legislatures in Canada are substantially lower.

I'll make a final point about the viability of political enforcement in the United States—one which focuses more on American political culture rather than the structural safeguards of American government. Alexis de Tocqueville, writing in 1835, noticed something about the culture of the young American Republic that is relevant to the prospect of political enforcement of constitutional rules and norms:

There is hardly any political question in the United States that sooner or later does not turn into a judicial question. From that, the obligation that the parties find in their daily polemics to borrow ideas and language from the judicial system. Since most public men are or have formerly been jurists, they make the habits and the turn of ideas that belong to jurists pass into the handling of public affairs. The jury ends up by familiarizing all classes with them. Thus, judicial language becomes, in a way, the common language; so the spirit of the jurist, born inside the schools and courtrooms, spreads little by little beyond their confines; it infiltrates all of society, so to speak; it descends to the lowest ranks, and the entire people finishes by acquiring a part of the habits and tastes of the magistrate.³⁶⁶

Tocqueville notes the centrality of legal discourse in America—a characteristic of our culture that has endured. Applied to the current question, if American voters have indeed absorbed “a part of the habits and tastes of the magistrate,”³⁶⁷ and if American legal culture is generated in part outside of legal institutions, then Tocqueville's observation calls into question the necessity of unqualified judicial supremacy. Voters, acting according to the “spirit of the jurist,”³⁶⁸ might assert constitutional discipline against an errant use of Congress's Article III power even when jurists cannot. In doing so, voters would bring a measure of democratic legitimacy to the imposition of constitutional rules that jurists cannot. When constitutional rules are enforced by judges, constitutionalism's “dead hand” problem is intractable: Judges are enforcing, against the acts of contemporary majorities, arrangements ratified by people long dead and to which the living have not consented.³⁶⁹ But when voters enforce constitu-

³⁶⁶ 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 441 (Eduardo Nolla ed., James T. Schleifer trans., Liberty Fund 2012) (1835).

³⁶⁷ *Id.*

³⁶⁸ *Id.*

³⁶⁹ For a discussion on the “dead hand” problem, compare DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 99–114 (2010) (recognizing the “dead hand” problem and discussing how living constitutionalism, combined with the written constitution, addresses it), with Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 *GEO. WASH. L. REV.* 1127, 1135 (1998) (rejecting the legitimacy of the “dead hand problem” after discussing various criticisms to it).

tional rules against the decisions of their representatives, they give fresh consent to the constitutional order. In this way, Congress's use of its Article III power functions not only as a way to add flexibility to the system by allowing durable, deliberative majorities to change constitutional arrangements without amending the Constitution, but also as a way that current majorities can signal their acceptance of the Constitution as it exists.

CONCLUSION

I will conclude with some brief remarks on the politics of the Article III option, and, in particular, whether we should think of Congress's power to limit courts' jurisdiction as having any particular partisan valence. The answer is no, not in any meaningful sense.

It is true that Congress's use of the Article III power to change existing constitutional arrangements would reduce the inherent conservatism of American constitutionalism: Use of the Article III option might permit constitutional change that would not be achievable via the Article V amendment process. But increasing our system's openness to change does not mean that change is likely to come from any particular ideological or partisan political direction. If particular policies favored by political conservatives are widely and durably popular and current constitutional arrangements are standing in the way, the Article III option is available without regard to the underlying ideology of the change that is sought. So, a Congress dominated by anti-abortion sentiment could choose to pass (and a sympathetic President could choose to sign) legislation defining a range of abortion restrictions as permissible if imposed by states and then strip federal jurisdiction to review that statute. Or, a Congress with strong pro-choice leanings could, with the cooperation of a sympathetic President, pass legislation declaring abortion a federal right, with a provision stripping courts' jurisdiction to review that enactment, thereby preempting a Supreme Court decision returning the determination of abortion policy to the states.

Both sorts of enactment would be valid exercises of Congress's Article III power. In the end, the Article III option is not about right versus left, but about the push and pull between unqualified and qualified judicial supremacy, and between democracy and constitutionalism.