

# JURISDICTION STRIPPING AS A TOOL FOR DEMOCRATIC REFORM OF THE SUPREME COURT

Written Testimony for The Presidential Commission  
On The Supreme Court of the United States  
August 15, 2021

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Back in April, we learned that a right-wing imprint controlled by a major publisher paid newly-confirmed Justice Amy Coney Barrett a \$2 million advance for a book about how judges are not supposed to bring their personal feelings into how they rule.<sup>1</sup>

Set aside for a moment the unseemliness of Barrett so rapidly cashing in on her new position. Far more important is the signal Barrett's book deal sends about the Supreme Court. If it weren't for the Court's extraordinary power—to create rights, and, as *Roe v. Wade* and the right to legal abortion hang in the balance, to take them away—no publisher would pay that kind of money for the opinions of a novice judge.

It is time for the American people to start asking why nine judges on the Supreme Court are given the power to make so many important decisions for a nation of 331 million people. That same question extends to the lower federal courts as well. Judges on all of America's courts interpret a federal Constitution framed largely in "majestic generalities."<sup>2</sup> In translating those generalities into holdings in specific cases, judges cannot help but act, at least in part, according to their political priors. Of course, that isn't all that

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<sup>1</sup> Hillel Italie, *Amy Coney Barrett has book deal with conservative imprint* (April 19, 2021), <https://abcnews.go.com/Entertainment/wireStory/amy-coney-barrett-book-deal-conservative-imprint-77177325>.

<sup>2</sup> *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2689 (2015) (Roberts, C.J., dissenting) (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943)).

they do—judges interpret and apply text and precedent, and they work within a judicial culture which frowns on decisions that are purely or straightforwardly political. But judging does not have to be *all* politics for politics to matter.

That is why the selection of judges has come to play a central role in our nation’s politics—America’s elected politicians understand that judges are political actors. That is also why Supreme Court confirmation hearings have devolved, in the words of Justice Elena Kagan when she was a law professor, into “vapid and hollow charade[s]” in which both Senators and nominees mouth pieties about the modest role of judges in “calling balls and strikes” and “enforcing the Constitution as written.”<sup>3</sup>

If we want to put an end to the politicization of the judiciary, we need to get unelected judges out of the business of deciding so many of our country’s most difficult political, social, and cultural issues. The way to do that is through structural reform that will allow the democratic process to push back against judicial overreach.

In this written testimony I will focus in depth on what I believe to be the most promising strategy for reducing the power of courts. That is for Congress to use the power that the Constitution has always given it to override, in appropriate cases, decisions of the Supreme Court and indeed any federal court. Not through an Article V amendment, which is virtually always an impossible hurdle to clear. But rather through Congress’s Article III authority to strip the jurisdiction of both the Supreme Court and the lower federal courts.<sup>4</sup> Congress’s virtually plenary power to determine courts’ jurisdiction is, if used with discretion and determination, a power to enforce Congress’s interpretations of the Constitution’s meaning, and to deprive courts of jurisdiction to review those interpretations. It is, in effect, a power to limit, or to *qualify*, judicial supremacy.

To understand how Congress’s Article III power could be used, consider two examples:

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<sup>3</sup> Elena Kagan, *Confirmation Messes, Old and New*, 62, U. CHI. L. REV. 919, 941 (1995).

<sup>4</sup> This Commission’s charge focuses on potential reforms of the Supreme Court, but the merits of jurisdiction stripping as a reform proposal can properly be assessed only by considering Congress’s power as a whole—i.e., as a power to shape the jurisdiction not only of the Supreme Court, but also of the lower federal courts.

First, imagine that Congress passes and the President signs legislation enacting a wealth tax.<sup>5</sup> Imagine further that Congress includes in that legislation a provision removing the jurisdiction of federal courts to review the legislation for congruence with the Constitution's requirement that any "direct tax" must be apportioned among the states by population.<sup>6</sup>

The Supreme Court has not yet ruled on the constitutionality of a wealth tax. If Congress legislates according to its preference and strips courts of jurisdiction to examine that legislation, it will have claimed authority to determine the constitutionality of the tax.

Note that Congress's actions are in fact reviewable, albeit not by courts. The review is by *voters*. If enough voters object to Congress's use of its Article III power in a particular case, the preemption of judicial review may soon be reversed. 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 on which the Supreme Court has already ruled. Imagine that Congress passes and the President signs a law establishing a set of campaign finance restrictions—including limits on corporate contributions—that is significantly more far-reaching than the Supreme Court's recent First Amendment decisions would permit.<sup>7</sup> Congress can use its Article III power to remove courts' jurisdiction to hear challenges to its campaign finance rules. Again, if either the campaign restrictions themselves or Congress's use of its Article III power to shield them from hostile courts proves unpopular, Congress will face discipline from voters, not judges.

Immersed as we are in a legal culture that tends to equate judicial review with the rule of law, it may be difficult to embrace the idea that Congress

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<sup>5</sup> 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).

<sup>6</sup> 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.

<sup>7</sup> *See* *Citizens United v. Federal Election Comm'n*, 558 U.S. 310 (2010).

has the power to override judicial decisions--or that it should do so, even if it has the power. The first step in fairly assessing the merits of legislative override requires that we stop conflating judicial review with the rule of law. What we get from the Supreme Court so often seems more like the "rule of five" than the "rule of law." Many Americans understand that. America's politicians certainly do, which is why control of the courts has emerged as a central theater of partisan warfare.

More broadly, the "rule of law" is of little value if law does not rest on a foundation of democracy. But judges are not democratically accountable and the Constitution that they interpret is, at best, very imperfectly democratic. No one alive now ever voted for it. And given Article V's very demanding amendment rules, we are, barring some enormous change in America's partisan polarization, stuck—unless we can find a way for the elected branches to push back.

In the remainder of this testimony, I will describe how Congress could use jurisdiction stripping to restrain politicized courts. I will show that jurisdiction stripping is *constitutional*, even if Congress employs it to override existing judicial interpretations of the Constitution's meaning. I will also show that jurisdiction stripping is *desirable*; that we should welcome it as a strategy to defend democratic self-governance against courts attempting to enforce their political preferences as law. And finally, I will show that a legislative power to qualify judicial supremacy is not unknown to liberal democracies. A legislative override is in fact an explicit feature of the constitutional order in Canada. I will describe that arrangement, the so-called "Notwithstanding Clause" of the Canadian Charter of Rights and Freedoms, and show how Congress's power over courts' jurisdiction can be understood as a sort of functional analogue to that arrangement.

In sum, Congress has, and has always had, the power to exert a democratic check on judicial review. The real question is whether Congress will use that power.

### **THE PROBLEM OF POLITICIZED COURTS**

I teach law at New York University. When I talk to my students, most seem to understand constitutionalism, and in particular, judicial review, as working comfortably hand-in-hand with democracy. But in reality, the relationship is more difficult and subtle: Constitutionalism and democracy are more like *frenemies*. By enforcing constitutional rules, judicial review helps to smooth out democracy's rough edges. But when they overturn

democratically enacted laws, judges shrink our capacity to make decisions for ourselves. And if judges overdo it, judicial review can preempt necessary democratic development. At the extreme, instead of making democratic life more decent and predictable, interventionist courts can spark long-lasting and intense conflict.

We are in such a period of conflict now. And we are all witnesses to the powerful temptation that the judiciary's encompassing power presents to America's political parties: to capture the federal courts for partisan ends, to stack the courts with judges believed to be ideologically reliable. The goal is to achieve through court rulings political victories that may be unrealizable through democratic processes, while constraining the legislative agenda of political opponents.

Whether judges are acting according to partisan commitments is difficult to establish empirically, although creditable, methodologically sophisticated attempts have been made.<sup>8</sup> But observing the GOP's actions over the past dozen years—first in slowing and eventually blocking judicial appointments during the Obama presidency,<sup>9</sup> then in pushing through appointments during Donald Trump's first term (by, among other things, eliminating so-called “blue slips” for appellate court nominees<sup>10</sup> and the filibuster for Supreme Court nominees,<sup>11</sup> and ignoring recommendations of

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<sup>8</sup> 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).

<sup>9</sup> Tom Latek, *History-Making Senator Mitch McConnell Tells Fancy Farm Faithful He Intends to Run Again in 2020*, NORTHERN KENTUCKY TRIBUNE (Aug. 5, 2018), <https://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”).

<sup>10</sup> 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>.

<sup>11</sup> 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>.

the American Bar Association<sup>12</sup>), and late in Donald Trump's term, 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 election<sup>13</sup>—it is difficult not to conclude that some political payoff is expected from these political investments.<sup>14</sup> Certainly many Democrats view the GOP's strategy as a bid to re-fashion the federal judiciary into a partisan political weapon, and some Democrats now appear eager to respond in kind, including via explicit court-packing schemes.<sup>15</sup>

The bottom line is that one of America's major political parties openly views the federal courts as just another theater for political struggle and acts accordingly, and the other is rushing in the same direction. That is no way to run a constitutional democracy. Our disagreements over issues like abortion, gun safety, affirmative action, and even free speech and the validity of most economic and social legislation are fundamentally struggles about *values*. A resolution to any of these disputes, at least one that commands the assent of those who disagree, will rarely be found in the spare, oracular, anachronistic text of the Constitution, or in its history, or in precedent. Decisions about values are political. They should be made democratically, according to regular voting procedures that apply to the people and their representatives. They should not be made according to the preferences of five lawyers.

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<sup>12</sup> Adam Liptak, *White House Ends Bar Association's Role in Vetting Judges*, N.Y. TIMES (March 31, 2017), <https://www.nytimes.com/2017/03/31/us/politics/white-house-american-bar-association-judges.html>.

<sup>13</sup> 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](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).

<sup>14</sup> 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), <https://twitter.com/realDonaldTrump/status/1257303100815261696> (emphasis added).

<sup>15</sup> 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>.

The judicialization of our politics should lead us to ask anew whether it is necessary that judges possess, in every case, the final word on the Constitution's meaning. One alternative is for Congress to use its Article III power to establish "qualified" judicial supremacy: that is, a more flexible form of democratic constitutionalism where the political branches retain the power to re-claim interpretive authority where it is obvious that values, and not law, are at stake.

### JURISDICTION STRIPPING IS CONSTITUTIONAL

The Constitution provides a textual foundation for Congress's power to strip the jurisdiction of federal courts. Article III, section 1 gives Congress discretion over whether to create the lower federal courts,<sup>16</sup> a power that Congress has used from the founding to limit lower courts' jurisdiction.<sup>17</sup> And Article III, section 2, clause 2 explicitly empowers Congress to make "exceptions" to the Supreme Court's appellate jurisdiction<sup>18</sup>—that is, to pick and choose for approximately 99% of the Supreme Court's total docket what cases the Court has the power to hear. As I explain in an article published in 2020 in the *New York University Law Review*, Congress can remove the Supreme Court's appellate jurisdiction over particular cases, or particular issues, largely without constraint.<sup>19</sup>

These parts of Article III, taken together, add up to something potentially profound: they give Congress the power to take back from the courts, and in particular from the Supreme Court, final authority to determine the Constitution's meaning. That is, Article III establishes a legislative power to *qualify* judicial supremacy. Using this power, Congress is empowered to override particular judicial interpretations of the

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<sup>16</sup> 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 . . .").

<sup>17</sup> 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. The 1789 Act made no provision for general federal question jurisdiction in the lower courts, but instead left to state courts the task of resolving disputes involving federal law, with appeal to the federal Supreme Court.

<sup>18</sup> U.S. CONST. art. III, § 2, cl. 2.

<sup>19</sup> Christopher Jon Sprigman, *Congress's Article III Power and the Process of Constitutional Change*, 95, N.Y.U. L. REV. 1178, 1-72 (1995). There is a very extensive literature on this question, which is collected at notes 57-79 of the article.

Constitution. It may do so by passing a law that embodies its own interpretation, and that strips the courts' jurisdiction to review the enactment for constitutionality.

Can Congress really do this? There is no obvious textual barrier to Congress's exercise of the power. Nor is there a clear historical or precedential barrier. The Court has remarked in dicta that Congress eliminating judicial review of "colorable constitutional claims"<sup>20</sup> raises a "serious constitutional question."<sup>21</sup> And in its 2018 decision, *Patchak v. Zinke*,<sup>22</sup> a plurality of the Court stated, again in dicta, that Congress could not eliminate judicial review of a statute that would violate the Constitution.<sup>23</sup> But the Court has never actually *held* that. And the Court has, in other instances, signaled deference to enactments stripping courts' jurisdiction: In its 1869 decision in *Ex Parte McCordle*,<sup>24</sup> the Court gave effect to a jurisdiction-stripping provision, holding that "[w]ithout jurisdiction the court cannot proceed at all in any cause"<sup>25</sup> and refusing to inquire whether Congress was motivated to strip jurisdiction by the desire to insulate unconstitutional legislation from review. "We are not at liberty," the *McCordle* Court held, "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."<sup>26</sup>

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<sup>20</sup> *Webster v. Doe*, 486 U.S. 592, 593 (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").

<sup>21</sup> *Bowen v. Michigan 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").

<sup>22</sup> 583 U.S. \_\_\_, 138 S. Ct. 897 (2018).

<sup>23</sup> *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))).

<sup>24</sup> *Ex parte McCordle*, 74 U.S. (7 Wall.) 506 (1869).

<sup>25</sup> *Id.* at 512–15.

<sup>26</sup> *Id.*



*McCardle* is only one decision, and the Court's discussion there of Congress's power is thin. But it is the clearest, most relevant precedent we have.

Some may assert that the Supreme Court would strike down any attempt by Congress to use its Article III power to strip courts' jurisdiction. But that assertion, in a very important sense, misses the point. The Constitution's text gives Congress a more-than-plausible claim to this power, and neither history nor precedent refute the claim. A Congress committed to its own understanding of Article III would simply insist on it, and the Supreme Court would have little power to resist. The federal courts are utterly dependent on the political branches, in the very practical sense that they control neither their own budgets nor even their own facilities.<sup>27</sup> Similarly, the courts are dependent on the executive for execution of their orders.<sup>28</sup> 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.<sup>29</sup>

It is also worth remembering that there is not a word in the Constitution that provides explicitly for judicial review, and the Constitution certainly does not mandate *unqualified* judicial supremacy—i.e., judicial supremacy

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<sup>27</sup> ADMIN. OFFICE OF THE U.S. COURTS, *Funding/Budget – Annual Report 2019* (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* (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).

<sup>28</sup> See, e.g., Exec. Order No. 10,730, 22 Fed. Reg. 7628 (Sept. 23, 1957) (authorizing the use of federal troops to enforce school desegregation in Little Rock, Arkansas).

<sup>29</sup> Alexander Hamilton, *No. 78: The Judiciary Department*, in THE FEDERALIST PAPERS 464 (Clinton Rossiter ed., 1961).

in every case, and on every issue. In fact, Article III provides Congress with a power over courts' jurisdiction which points in the opposite direction.

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 power to override judicial decisions 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."<sup>30</sup> 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.<sup>31</sup> The Constitution presents Congress with an opportunity to take back a measure of that power.

#### JURISDICTION STRIPPING AS AN ELEMENT OF POPULAR CONSTITUTIONALISM

It may be difficult for lawyers, in particular, to accept the idea that voters can do the work of enforcing the Constitution--a model that some writers have referred to as "popular constitutionalism."<sup>32</sup> But the idea is neither new nor fanciful. In a passage from his famous article that considers political enforcement of the Constitution in general,<sup>33</sup> 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 the courts as well as by the executive. Indeed, consistent with Marshall's own observation that *the people*

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<sup>30</sup> *Id.* at 1077.

<sup>31</sup> 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.").

<sup>32</sup> See, e.g., LARRY KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); Mark V. Tushnet, *Popular Constitutionalism as Political Law*, 81 CHI.-KENT L. REV. 991 (2006).

<sup>33</sup> William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 WM. & MARY L. REV. 1, 19 (1969).

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.<sup>34</sup>

Organizing public opposition to any political decision is 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; courts are not perfect enforcers of the Constitution either (assuming such a thing as “perfect” enforcement of a constitution as indeterminate as ours is a coherent concept in the first place). The relevant question here is whether political enforcement offers a mix of benefits and drawbacks that is, 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 political enforcement of the Constitution *in general*, the effect of Congress’s use of its Article III power is not a general reliance on political checks, but to opt for a political check in a particular instance. Compared with judicial review, the political constraint is both less formal and, in the run of cases, likely to be less predictable.<sup>35</sup> There is no formula that tells us what weight to give those advantages, versus the greater democratic legitimacy that political enforcement would produce. The calculus is intractably dependent on normative arguments, over which people will inevitably disagree. In the absence of clear direction in the Constitution, the choice between modes of constitutional enforcement is necessarily dependent on both values and context. It is, in other words, a *political* choice.

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<sup>34</sup> *Id.* at 19.

<sup>35</sup> 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).

There are reasons to believe, moreover, that political enforcement would be more constraining than lawyers might initially anticipate. 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 most 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.<sup>36</sup> If Congress's use of its Article III power lacks political support, or if initial support wanes, then congressional proponents are likely to face a powerful political sanction.

For these reasons, and given the practical realities of American politics, Congress's recognition and use of its Article III power would almost certainly leave judicial supremacy in place with respect to most important constitutional questions. It would, however, establish a democratic counterforce which, even if rarely invoked, would help both moderate and legitimate judicial review.

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There are, of course, reasons to hesitate. First among them is the power of convention: We have traditionally acquiesced to an expansive role for the federal courts, albeit mostly without thinking about the alternatives. But given how badly the judiciary has been politicized, we should be asking whether we are willing now to continue down the path of unqualified judicial supremacy. Reining in the role of courts is the best way to dampen the incentive that drives both parties to seek to appoint political loyalists to the federal bench.

It is important, finally, to grapple with the inevitability that, once established, Congress's power to rein in the courts through jurisdiction-stripping will be used—and misused—by Republicans and Democrats

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<sup>36</sup> 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 that 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).

alike. In this vein, commentators have offered a parade of horrors linked to the prospect of Congress stripping courts' jurisdiction. Henry Monaghan, for example, imagines Congress passing a law that restricts black or Catholic litigants from filing claims in federal court.<sup>37</sup> 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 enact 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 Henry Monaghan's nightmare scenario. But this points up a problem with this sort of "catastrophe constitutionalism" thought experiment, and with the ideology that lies underneath it.

Having a written 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 pointless to invoke 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

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<sup>37</sup> Henry P. Monaghan, *Jurisdiction Stripping Circa 2020: What The Dialogue (Still) Has to Teach Us*, 69 DUKE L.J. 1, 16–17 (2019) (“[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.”).

guarantees are under maximum stress, the possibility of legislative override of court rulings may *strengthen* judicial review as a guarantor of rights.

Take as an example the Supreme Court's odious decision in *Korematsu v. United States*<sup>38</sup> upholding the 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."<sup>39</sup> In his dissent, Justice Jackson acknowledged that 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."<sup>40</sup> Jackson was nonetheless 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."<sup>41</sup> 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 .... 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.<sup>42</sup>

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,<sup>43</sup> the holding in *Korematsu* was not disavowed until the Supreme Court's perhaps equally odious 5-4 decision in *Trump v. Hawaii* upholding a presidential proclamation restricting travel

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<sup>38</sup> 323 U.S. 214 (1944).

<sup>39</sup> *Id.* at 223.

<sup>40</sup> *Id.* at 245.

<sup>41</sup> *Id.* at 248.

<sup>42</sup> *Id.* at 246.

<sup>43</sup> See *Korematsu v. United States*, 584 F. Supp. 1406, 1420 (N.D. Cal. 1984).

into the United States by people from a group of mostly Muslim-majority countries.<sup>44</sup>

The story of *Korematsu* points to the possibility that the prospect of legislative override might actually *strengthen* judicial review. In a country that recognized Congress's Article III power to override the Court's decision, might the *Korematsu* Court have found the courage to avoid debauching constitutional protections in the face of government claims of necessity? A counter-factual is always challenging, but it's imaginable that the Court might have upheld those protections in the knowledge that the political branches would, in the end, be responsible for deciding whether the policy should go forward regardless.

Those who would argue that recognizing Congress's Article III power is a route to legislative tyranny should reckon with this example.

*Korematsu* also illustrates a broader point: we tend to overrate the role of federal courts in protecting us from the possibility of bad things happening. We tend also to underrate how much our long-running American tendency to turn our deepest political disagreements into legal disputes drains the energy out of our democracy. The surest protection in the long term is a citizenry that works both to strengthen democracy and to leaven it with decency. We can't sub-contract that job to judges, even to good ones.

#### CONGRESS'S ARTICLE III POWER AS THE FUNCTIONAL ANALOGUE TO CANADA'S "NOTWITHSTANDING CLAUSE"

Congress's use of its Article III power would open a path toward a 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. This more flexible model of democratic constitutionalism is not unknown to the world. It is in fact the understanding 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

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<sup>44</sup> *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018).

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).<sup>45</sup>

Section 33 was the product of a compromise between Prime Minister Pierre Trudeau and the provincial premiers with whom he negotiated the text of what became Canada's 1982 Constitution.<sup>46</sup> The provinces were concerned about what they perceived to be the 1982 Constitution's transfer of power from legislatures to courts, and insisted on the override provision as a way of preserving a legislative check.<sup>47</sup> But in the decades since, Section 33 has been invoked infrequently.<sup>48</sup> This may be due in part to Section 1 of

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<sup>45</sup> Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, § 33.

<sup>46</sup> See 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*"); 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); 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 Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c 11 (U.K.).

<sup>47</sup> See LAURENCE BROSSEAU & MARC-ANDRÉ ROY, LIBRARY OF PARLIAMENT, BACKGROUND PAPER: THE NOTWITHSTANDING CLAUSE OF THE CHARTER 4-6 (2018), <https://lop.parl.ca/staticfiles/PublicWebsite/Home/ResearchPublications/BackgroundPapers/PDF/2018-17-e.pdf>.

<sup>48</sup> *Id.* at 6–8.



the Charter, which permits legislatures to impose reasonable limits on Charter rights that can be “demonstrably justified in a free and democratic society.”<sup>49</sup> This 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.<sup>50</sup>

That said, 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 overriding 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”).<sup>51</sup> When exercised in legislation, the Clause 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.<sup>52</sup> The power must be exercised in an act of ordinary legislation (and not via a mere regulation), and must be expressly invoked.<sup>53</sup> A declaration made under the Notwithstanding

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<sup>49</sup> *Id.* at 10.

<sup>50</sup> Compare Constitution Act, 1982, § 1 (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 (Attorney General)*, [2015] 1 S.C.R. 331, para. 95 (upholding a higher standard for violations of section 7 *Charter* rights); *Frank v. Canada (Attorney General)*, [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 (concluding that infringing upon the section 11(d) presumption of innocence “cannot be justified under s. 1”).

<sup>51</sup> BROSSEAU & ROY, *supra* note 47, at 1. Section 33 may not be used retrospectively. See *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712, pp. 744–45.

<sup>52</sup> BROSSEAU & ROY, *supra* note 47, at 1.

<sup>53</sup> *Id.* (“[A] use of the notwithstanding power must be contained in an Act, and not subordinate legislation (regulations), and must be express rather than implied.”).

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).<sup>54</sup>

For our purposes here, the main takeaway is this: Section 33 establishes a legislative power that is functionally 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 judicial interpretations of the Charter that conflict with the legislature's preferences, Canadian national and provincial legislatures are empowered simply to override those interpretations.<sup>55</sup>

Notably, Section 33 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).”<sup>56</sup> This careful specification is characteristic of modern constitutions.<sup>57</sup>

Has the Section 33 override led to legislative predominance in constitutional interpretation? It has not. As Henry J. Friendly Professor of Law, Emeritus at Harvard Law School Paul C. Weiler recognized, the Clause is essential to the reconciliation of rights-based constitutionalism and democracy. But not because it is frequently used. It has *never* been used on the national level. And on the provincial level, its use has been subject, in most cases, to strong political constraint:

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. .

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<sup>54</sup> *Id.*

<sup>55</sup> *Id.* (“Section 33(1) . . . permits Parliament or a provincial legislature to adopt legislation to override section 2 . . . and sections 7–15 of the Charter . . .”).

<sup>56</sup> *Id.* at 1–2.

<sup>57</sup> *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).

. 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.<sup>58</sup>

It is important to note that Section 33 has been, and remains, controversial in Canada.<sup>59</sup> And yet, despite the continuing controversy, 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 judicial enforcement of rights does 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.<sup>60</sup> Nonetheless, all of these accounts integrate Section 33 as a

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<sup>58</sup> Paul C. Weiler, “The Evolution of the Charter: A View from the Outside,” in *LITIGATING THE VALUES OF A NATION* (Robert M. Elliot & Joseph M. Weiler, eds, 1986), p. 57.

<sup>59</sup> BROSSEAU & ROY, *supra* note 47, at 6–7. See generally Francois Cote & 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. 463 (2020) (arguing that Quebec developed “its own coherent theory and practice concerning the legitimacy of referring to legislative overrides”).

<sup>60</sup> 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

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 *forbearance* 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 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.<sup>61</sup>

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.”<sup>62</sup> 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.

Comparative constitutional analysis should always be approached with care, and there are elements of the Canadian arrangement (e.g., the power

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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 225–26.

<sup>61</sup> 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) (noting 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).

<sup>62</sup> Hogg & Bushell, *Charter Dialogue*, at 83.

of provincial legislatures to override court decisions) that are simply not comparable to Congress’s Article III power. Nevertheless, 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.

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## CONCLUSION

As noted earlier, 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 Professor Weiler asserts would discipline an unpopular use of the Notwithstanding Clause in Canada?

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—and these features of our system will limit Congress’s exercise of the power, in most cases, to instances in which popular support for a legislative override 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. 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,<sup>63</sup> and the requirement of royal assent to legislation (accomplished through the Governor General, appointed by the Queen) is nominal and does not constrain in the way that presentment does in the

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<sup>63</sup> 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).

U.S.<sup>64</sup> For all these reasons, the political barriers to invocation of Section 33 in Canada are likely to be lower than the political constraints on Congress's exercise of its Article III power.

I'll make a final point about the viability of political enforcement of the United States Constitution—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 still relevant today:

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.<sup>65</sup>

Tocqueville notes the centrality of legal discourse in America—a characteristic of our culture that has endured. If American voters have indeed absorbed “a part of the habits and tastes of the magistrate,”<sup>66</sup> and if American legal culture is generated and sustained 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,”<sup>67</sup> might assert constitutional discipline against an errant use of Congress's Article III power even when jurists cannot.

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<sup>64</sup> 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.”).

<sup>65</sup> ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 182 (Univ. of Chi. Press, 2002).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

In doing so, voters would bring a measure of democratic legitimacy to the imposition of constitutional rules. 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.<sup>68</sup> But when voters enforce constitutional 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 not only adds flexibility to the system by allowing durable, deliberative majorities to change constitutional arrangements without amending the Constitution, but also provides a means through which current majorities can signal their acceptance of the Constitution as it exists.

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<sup>68</sup> 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 this problem) 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 of it).