

## A (MODEST) SEPARATION OF POWERS SUCCESS STORY

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The United States Constitution was, in many respects, designed to be “a machine that would go of itself.”<sup>1</sup> The Constitution would be made “politically self-enforcing by aligning the political interests of officials . . . with constitutional rights and rules.”<sup>2</sup> The system of separated powers was a central component of this self-enforcing “machine.”<sup>3</sup> As James Madison famously stated, “the great security . . . consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments” on constitutional principles.<sup>4</sup>

Recent scholarship has, however, cast doubt on the effectiveness of this constitutional design. First, scholars have argued that partisan politics has eclipsed the checks and balances created by the Constitution, so that the relevant “check” now depends on the “separation of parties, not powers.”<sup>5</sup> Second, and more broadly, scholars have

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1 MICHAEL KAMMEN, *A MACHINE THAT WOULD GO OF ITSELF* 18 (1986) (footnote omitted).

2 Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1791, 1832 (2009).

3 See Steven G. Calabresi & Livia Fine, *Two Cheers for Professor Balkin’s Originalism*, 103 NW. U. L. REV. 663, 678 (2009) (“The Madisonian system of checks and balances is, as Michael Kammen has described it, ‘a machine that would go of itself.’” (quoting KAMMEN, *supra* note 1, at 16–19)).

4 THE FEDERALIST NO. 51, at 321–22 (James Madison) (Clinton Rossiter ed., 1961).

5 See Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312, 2385 (2006); *infra* Part I.

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doubted that the constitutional design will lead politicians to protect constitutional values under any circumstances, because “there is no robust mechanism . . . that could even in principle align” the interests of elected officials with the public interest in constitutional enforcement.<sup>6</sup>

In this Essay (drawing upon prior work),<sup>7</sup> I argue that there is an important context in which the constitutional scheme of separated powers has functioned quite well: safeguarding the Article III federal judiciary. Efforts to strip federal jurisdiction have repeatedly been blocked by the “checks” established by our constitutional structure. Notably, the separation of powers has worked in this context not *despite* the political incentives and ambitions of elected officials, but *because of* those incentives and ambitions. Political actors have repeatedly found it in their interest to protect the authority of the independent federal judiciary.

This separation of powers “success story” may have broader implications. To the extent that the judiciary serves as a guardian of individual rights and other constitutional values, the structural safeguards for the federal judiciary may indirectly protect those constitutional concerns. Thus, by ensuring the authority of the Article III courts, politicians may also—however inadvertently—safeguard other constitutional principles. In sum, the Madisonian “machine” may work reasonably well, after all.

## I. CRITIQUES OF MADISON’S VISION

The system of separation of powers was designed to channel—and thereby curtail—the influence of “factions.”<sup>8</sup> Madison expressed particular concern about majority factions, which might gain substantial political power in government and use that power to oppress minorities.<sup>9</sup> But he argued that such an oppressive faction was

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6 Adrian Vermeule, *The Supreme Court, 2008 Term—Foreword: System Effects and the Constitution*, 123 HARV. L. REV. 4, 27 (2009); *see infra* Part I.

7 The discussion below draws upon two prior articles. *See* Tara Leigh Grove, *The Article II Safeguards of Federal Jurisdiction*, 112 COLUM. L. REV. 2507 (2012) [hereinafter Grove, *Article II Safeguards*]; Tara Leigh Grove, *The Structural Safeguards of Federal Jurisdiction*, 124 HARV. L. REV. 869 (2011) [hereinafter Grove, *Structural Safeguards*].

8 *See* THE FEDERALIST NO. 51, *supra* note 4, at 323–25.

9 *See id.* at 323 (“It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part. . . . If a majority be united by a common interest, the rights of the minority will be insecure.”).

unlikely to gain power in the federal government.<sup>10</sup> The government would be divided into three departments (the executive, legislative, and judicial), and the legislature would be further divided into the House and Senate. Much of Madison's discussion focused on the political institutions—i.e., the House, Senate, and Presidency.<sup>11</sup> Madison reasoned that, even if a dangerous faction captured one of these political institutions, the other institutions would use their constitutional authority to prevent encroachments on constitutional principles.<sup>12</sup> Thus, he stated:

[T]he great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. . . . Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place.<sup>13</sup>

Accordingly, Madison did not trust that political actors would protect constitutional principles for their own sake. “If angels were to govern men, neither external nor internal controls on government

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10 That was in part because, in a large republic like the United States, there would be a number of factions, which would compete with one another for power. *See id.* at 324–25 (asserting that the society would “be broken into so many . . . classes of citizens, that the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority”). But Madison also emphasized that the size of the country was not enough to control factions. *See THE FEDERALIST NO. 63*, at 385 (James Madison) (Clinton Rossiter ed., 1961) (arguing that the “advantage[s]” of a large republic should not “supersede the use of auxiliary precautions,” such as the division of power between the House and Senate).

11 *See* Larry D. Kramer, “*The Interest of the Man*”: *James Madison, Popular Constitutionalism, and the Theory of Deliberative Democracy*, 41 *VAL. U. L. REV.* 697, 735 (2006) (“[C]ourts were not a significant player in Madison’s thinking . . . Madison’s original theory of constitutional enforcement was political in nature, and the ‘departments’ Madison had in mind when he wrote about separation of powers were the House, the Senate, and the Executive . . .”).

12 Madison made this point most clearly in his discussion of bicameralism. *See THE FEDERALIST NO. 62*, at 378–79 (James Madison) (Clinton Rossiter ed., 1961) (“It doubles the security to the people by requiring the concurrence of two distinct bodies . . . where the ambition or corruption of one would otherwise be sufficient.”); *THE FEDERALIST NO. 63*, *supra* note 10, at 384, 387–90 (arguing that, if a dangerous faction gained control over the House of Representatives, the Senate would serve as “a defense to the people against their own temporary errors and delusions” and, conversely, in the unlikely event that the Senate were “transform[ed] . . . into a tyrannical aristocracy . . . the House of Representatives, with the people on their side, will at all times be able to bring back the Constitution to its primitive form and principles”).

13 *THE FEDERALIST NO. 51*, *supra* note 4, at 321–22.

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would be necessary.”<sup>14</sup> Instead, he assumed that many politicians would be more concerned with enhancing their own power (or, at a minimum, getting reelected). Madison’s solution was to “harness” these competing political incentives and ambitions—by arranging the government so that all these “ambitious” political actors would check one another.<sup>15</sup>

The Madisonian design has, however, recently come under attack by scholars.<sup>16</sup> First, in an influential article,<sup>17</sup> Daryl Levinson and Richard Pildes argue that this scheme is unlikely to work during periods of unified government.<sup>18</sup> Instead, when the Presidency and Congress are controlled by the same political party, the two branches are likely to cooperate rather than compete.<sup>19</sup> Accordingly, the relevant “check” arises from the “separation of parties, not powers.”<sup>20</sup>

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14 *Id.* at 322; *see also* THE FEDERALIST NO. 10, at 80 (James Madison) (Clinton Rossiter ed., 1961) (“It is in vain to say that enlightened statesmen will be able to adjust these clashing [factional] interests and render them all subservient to the public good. Enlightened statesmen will not always be at the helm.”).

15 *See* Kramer, *supra* note 11, at 726–27 (asserting that “Madison understood perfectly well that the ‘personal motives’ and ‘interests’ of elected officials would be *political* motives and *political* interests—in other words, . . . responses to the desires and beliefs of their constituents. The key to making the Constitution work lay in finding a way to harness these political interests . . . by using constitutional authority granted to the institutions in which the officials worked, for the benefit of constitutional enforcement.”). R

16 Notably, this Essay focuses on critiques of the Madisonian design itself, not analyses of the Supreme Court’s separation of powers jurisprudence. For a recent and powerful critique of the Court’s decisions in this area, *see* John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1944 (2011) (arguing that “the Constitution adopts *no freestanding principle of separation of powers*” that should be judicially enforced).

17 *See infra* note 20 (noting the scholarly acceptance of the “separation of parties” concept). R

18 Levinson & Pildes, *supra* note 5, at 2316 (arguing that “[t]he greatest threat to constitutional law’s conventional understanding of, and normative goals for, separation of powers comes when government is unified”). R

19 *Id.* at 2329 (“When government is divided, party lines track branch lines, and we should expect to see party competition channeled through the branches. The resulting interbranch political competition will look, for better or worse, something like the Madisonian dynamic of rivalrous branches. On the other hand, when government is unified . . . we should expect interbranch competition to dissipate.”).

20 This “separation of parties” concept has gained widespread acceptance among scholars. *See, e.g.,* Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1809–10 n.222 (2007) (agreeing that “the branches operate very differently depending on whether they are all controlled by the same party”); Neal Devins & David E. Lewis, *Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 B.U. L. REV. 459, 479 (2008) (“[T]he separation of powers between Congress and the White House has given way to the ‘separation of parties.’ Lawmakers advance

Second, and perhaps even more fundamentally, Adrian Vermeule has urged that Madison's analysis is simply incomplete. "The argument lacks any mechanism to ensure that competition among institutions promoting their interests or ambitions will promote a state of affairs that is . . . desirable overall."<sup>21</sup> In other words, Madison never explained why government officials would use their institutional authority to protect, rather than to harm (or be neutral toward), constitutional values.<sup>22</sup>

These powerful critiques do not necessarily undermine the Madisonian separation of powers regime. But they do call for a more refined analysis. The scheme of separated powers cannot merely be presumed to promote constitutional values. Instead, the "success" of that scheme must be demonstrated in particular contexts.<sup>23</sup> In this Essay, I aim to show that this structural design has worked well to safeguard one important constitutional value: the power of the independent federal judiciary.

## II. THE STRUCTURAL SAFEGUARDS FOR THE FEDERAL JUDICIARY

In order to ascertain whether the separation of powers has "worked" in a given area, it is necessary to identify a normative baseline.<sup>24</sup> I rely on the scholarly debate surrounding jurisdiction-stripping measures for the relevant baseline. There appears to be a substantial amount of agreement on certain principles.<sup>25</sup> First, schol-

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party interests, not Congress's institutional interests, such that relations between Congress and the White House are defined by whether there is unified or divided government." (footnote omitted)); Goodwin Liu, *The Bush Administration and Civil Rights: Lessons Learned*, 4 DUKE J. CONST. L. & PUB. POL'Y 77, 87 (2009) (agreeing that "[i]n practice . . . competition between political parties often displaces competition between the political branches"). Other scholars have, however, asserted that the "separation of parties" argument may be somewhat overstated. See Eric A. Posner & Adrian Vermeule, *Constitutional Showdowns*, 156 U. PA. L. REV. 991, 1036 (2008) (arguing that "the American constitutional system . . . displays both separation of powers and parties in a complicated interaction").

<sup>21</sup> Vermeule, *supra* note 6, at 27.

<sup>22</sup> See *id.* at 27–28.

<sup>23</sup> See Adrian Vermeule, *The Invisible Hand in Legal and Political Theory*, 96 VA. L. REV. 1417, 1429, 1447 (2010) (stating that the question whether "invisible-hand justifications actually work . . . is at least partly empirical" and that, as to Madisonian theory in particular, it "requires an elaborate analysis of particular cases").

<sup>24</sup> Indeed, as Professor Vermeule has observed, one of the difficulties of empirically "measuring" the success of various "invisible hand" arguments is that there is no agreed-upon normative baseline. See *id.* at 1448.

<sup>25</sup> Notably, I describe these normative standards in very inclusive terms—in order to accommodate the variations in scholarly emphasis. But, for present purposes, these standards should be sufficient. The scheme of separated powers has largely

ars generally agree that all jurisdiction-stripping proposals (defined here as efforts to restrict or eliminate federal jurisdiction over a class of claims)<sup>26</sup> are unwise, if not unconstitutional.<sup>27</sup> Second, there appears to be a consensus that two types of jurisdiction-stripping measures are of particular concern: efforts to restrict the Supreme Court's appellate review power and federal jurisdiction over constitutional claims.<sup>28</sup>

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satisfied all of the baselines in the scholarship. *See infra* note 84 and accompanying text.

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26 Such jurisdictional restrictions (affecting a class of claims) are likewise the focus of other scholarly literature on jurisdiction stripping. My definition does not, therefore, encompass other types of statutory limitations on federal jurisdiction, such as amount-in-controversy requirements.

27 This widespread agreement is particularly notable in the scholarship asserting that Congress has “plenary” power over federal jurisdiction (i.e., that Congress’s power is not subject to any judicially-enforceable Article III limits). *See, e.g.*, 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) (“That Congress possesses such broad constitutional power in no way implies that it would be either wise or appropriate for Congress to exercise its authority . . . . Congress should begin with a very strong presumption against seeking to manipulate judicial decisions indirectly by selectively restricting federal judicial authority.”); Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1006 (1965) (asserting that, although “[t]he difficulty with legislative withdrawal of jurisdiction is not one of constitutional dimension,” there are important “practical objections to complete withdrawal” of federal jurisdiction over a subject matter). One exception to this general sentiment was expressed by Charles Black, who argued that Congress’s power to strip federal jurisdiction served a beneficial purpose: it was essential to legitimating judicial decisions. *See* CHARLES L. BLACK, JR., *DECISION ACCORDING TO LAW* 18 (1981) (“‘Jurisdiction’ is the *power to decide*. If Congress has wide and deep-going power over the courts’ *jurisdiction*, then the courts’ *power to decide* is a continuing and visible concession from a democratically formed Congress.”).

28 That is true of scholars who propose judicially-enforceable limits on congressional power over federal jurisdiction. *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 (2007) (arguing that Congress must give the Supreme Court “the final judicial word” on federal questions); Richard H. Fallon, Jr., *Jurisdiction-Stripping Reconsidered*, 96 VA. L. REV. 1043, 1086 (2010) (contending that “a statute withdrawing both Supreme Court and lower federal court jurisdiction” over constitutional claims “would violate the Constitution”); James E. Pfander, *Federal Supremacy, State Court Inferiority, and the Constitutionality of Jurisdiction-Stripping Legislation*, 101 NW. U. L. REV. 191, 213 (2007) (asserting that lower courts must be subject to Supreme Court “oversight and control”); Lawrence Gene Sager, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress’ Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 66 (1981) (contending that Congress must provide federal court review of constitutional claims). It is also true of scholars who believe that Congress has “plenary power” over federal jurisdiction. *See, e.g.*, Paul M. Bator, *Congressional Power Over the Jurisdiction of the Federal*

Scholars have long debated the extent to which the judiciary can enforce these two normative standards.<sup>29</sup> But I argue that there is an alternative enforcement mechanism: the structural and political constraints built into our constitutional scheme. The Madisonian system of separated powers has served to block most efforts to strip federal jurisdiction and has precluded virtually all measures targeted at the Supreme Court or at constitutional claims. This structural design has accordingly “worked” reasonably well—as judged by the normative standards underlying the scholarship on jurisdiction stripping. Although the scheme may not have functioned precisely as Madison anticipated, it has nevertheless served as an “invisible hand” safeguarding the federal judiciary.

#### A. Article I Protections

The first barrier to jurisdiction-stripping legislation is the lawmaking process of Article I, which requires all federal legislation to pass through two chambers of Congress and be presented to the President.<sup>30</sup> These lawmaking procedures effectively create a supermajority requirement for every piece of federal legislation and

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*Courts*, 27 VILL. L. REV. 1030, 1039 (1981–82) (arguing that, although Congress could strip the Supreme Court’s appellate jurisdiction over any class of cases, such a law would violate “the spirit of the Constitution,” because of the need for “a federal Supreme Court . . . to pronounce uniform and authoritative rules of federal law”); Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 921 (1984) (arguing that a law eliminating jurisdiction over a class of constitutional claims would be “unwise and [would] violate the ‘spirit’ of the Constitution”).

<sup>29</sup> Some scholars argue that the federal judiciary can invalidate jurisdiction-stripping measures that violate (at least some) of the above normative standards. See, e.g., Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 206 (1985) (urging that Congress must give some federal court jurisdiction over all cases arising under federal law); *supra* note 28 (collecting sources that focus on the Supreme Court or constitutional claims). But many others respond that Congress’s power over federal jurisdiction is “plenary” and, accordingly, not limited by the provisions of Article III. See, e.g., Martin H. Redish, *Text, Structure, and Common Sense in the Interpretation of Article III*, 138 U. PA. L. REV. 1633, 1637 (1990) (arguing that “Congress possesses broad power to curb the jurisdiction of both the lower courts and the Supreme Court”); Wechsler, *supra* note 27, at 1005 (same). Most scholars do, however, agree that courts could invalidate jurisdictional measures that violate constitutional provisions other than Article III. See Gunther, *supra* note 28, at 916–22 (discussing some of the debates over such “external” constraints and noting that all scholars seem to agree that “the Bill of Rights applies to all areas of congressional action” and that “Congress could not limit access to the federal courts on the basis of race”).

<sup>30</sup> U.S. CONST. art. I, § 7, cl. 2.

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thereby give political factions—even political minorities—considerable power to “veto” legislation.<sup>31</sup>

Recent social science research suggests that political actors have a strong incentive to use this structural veto to block jurisdiction-stripping proposals. Political scientists assert that, in our politically divided society, the overall content of federal court decisions is generally favored by at least one major political faction.<sup>32</sup> Such political supporters of the judiciary have good reason both to empower the federal judiciary and to block court-curbing proposals.<sup>33</sup>

Notably, this political support is tied to the constitutional structure. The appointment and confirmation process established by the Constitution (requiring both presidential and senatorial approval) effectively guarantees that each federal judge has been selected by a dominant political group.<sup>34</sup> Thus, our process helps ensure that, at least at the outset, a judge’s views on constitutional and other legal issues align to some degree with those of political leaders. As social scientists concede, the fact that judges are chosen by a dominant political faction does *not* mean that federal courts always issue decisions that accord with the views of that faction.<sup>35</sup> But this political group does tend to favor the overall content of federal court decisions. The selection process of Article II thus gives a major political faction an

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31 See JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* 233–36 (1962); Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 *TEX. L. REV.* 1321, 1339 (2001); John F. Manning, *Second-Generation Textualism*, 98 *CALIF. L. REV.* 1287, 1314 (2010).

32 See *infra* notes 36–44 and accompanying text.

33 See KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY* 18 (2007) (“Political actors defer to . . . courts because the judiciary can be useful to their own political and constitutional goals.”); Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 *STUD. AM. POL. DEV.* 35, 43 (1993) (“[P]oliticians may facilitate judicial policymaking in part because they have good reason to believe that the courts will announce those policies they . . . favor . . . .”); Ran Hirschl, *The Political Origins of Judicial Empowerment Through Constitutionalization: Lessons from Four Constitutional Revolutions*, 25 *LAW & SOC. INQUIRY* 91, 116 (2000) (arguing that political leaders will empower the judiciary only if they have “a sufficient level of certainty . . . that the judiciary in general and the supreme court in particular are likely to produce decisions that . . . reflect their ideological preferences”).

34 See U.S. CONST. art. II, § 2, cl. 2.

35 See, e.g., WHITTINGTON, *supra* note 33, at 288 (noting that Supreme Court decisions cannot “be reduced to the political interests of the party in power”); Howard Gillman, *Party Politics and Constitutional Change: The Political Origins of Liberal Judicial Activism*, in *THE SUPREME COURT AND AMERICAN POLITICAL DEVELOPMENT* 138, 154 (Ronald Kahn & Ken I. Kersch eds., 2006) (stating that when “an institution [like the Supreme Court] . . . has extremely broad policy-making jurisdiction, . . . the appointees’ ideological disposition will inevitably manifest itself in ways that were not considered by the appointing parties”).

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incentive to support the relatively “friendly” judiciary that it put in place.

For example, in the late nineteenth century, the Republican Party was dominated by pro-business conservatives who sought to advance their economic agenda through the federal judiciary.<sup>36</sup> The party controlled the Presidency and the Senate during much of this period and used this authority to appoint judges who were likely to be sympathetic to the concerns of large corporations.<sup>37</sup> Indeed, the members of the Supreme Court were selected almost entirely based on “their devotion to party principles and ‘soundness’ on the major economic questions of the day.”<sup>38</sup> Furthermore, when the Republicans had sufficient political power in Congress, they sought to expand the size of the federal judiciary and the scope of federal jurisdiction.<sup>39</sup>

In the mid-to-late twentieth century, social progressives attempted to use the judiciary to advance progressive goals, such as racial civil rights.<sup>40</sup> Thus, progressives in Congress voted to expand the judiciary when they anticipated that a like-minded President and Senate would have the power to nominate and confirm judges.<sup>41</sup> Progressive Presidents then filled these new slots with judges who were likely to issue decisions that accorded with progressive values.<sup>42</sup> For example, in discussing one judicial candidate, President Lyndon Johnson instructed his aide to “[c]heck to be sure [the potential nominee] is all right on the Civil Rights question. I’ll approve him if he is.”<sup>43</sup>

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36 See Howard Gillman, *How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875–1891*, 96 AM. POL. SCI. REV. 511, 512–13, 516–17 (2002).

37 See RICHARD FRANKLIN BENSEL, *THE POLITICAL ECONOMY OF AMERICAN INDUSTRIALIZATION, 1877–1900*, at 7 (2000); BARRY FRIEDMAN, *THE WILL OF THE PEOPLE* 159–60 (2009).

38 BENSEL, *supra* note 37, at 7.

39 See Gillman, *supra* note 36, at 516–21.

40 See WHITTINGTON, *supra* note 33, at 119–20, 271.

41 See Gillman, *supra* note 36, at 146 (describing how, in the months preceding the 1960 presidential election, an all-Democratic Congress increased the size of the federal judiciary only when the Democrats believed—as it turned out correctly—that John F. Kennedy would be elected and would have the power to fill the vacancies).

42 See *id.* at 146–55, 158 (asserting that the “modern judicial liberalism” of the Warren and Burger Courts “can be traced to the self-conscious efforts of Democratic Party officeholders in the 1960s,” because the Kennedy and Johnson Administrations sought to appoint judges who would favor civil rights and other progressive causes); see also WHITTINGTON, *supra* note 33, at 126–34 (describing the efforts of the Roosevelt, Truman, and Kennedy Administrations to obtain favorable rulings on racial civil rights and reapportionment).

43 SHELDON GOLDMAN, *PICKING FEDERAL JUDGES* 170 (1997); see also DAVID ALISTAIR YALOF, *PURSUIT OF JUSTICES* 91 (1999) (noting that, according to one advisor,

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Political factions have thus repeatedly sought to empower the judiciary to advance political goals during periods when their own side was in control.<sup>44</sup> This dynamic has an important impact on that faction's political incentives once it is no longer in power. These supporters of the judiciary have a strong incentive to use their Article I veto to block jurisdiction-stripping legislation that could undermine the authority of this "friendly" judiciary.

Indeed, there is considerable historical evidence that political supporters of the judiciary have used their veto power to protect the federal courts. In the late nineteenth century, populists and progressives in the Democratic Party sought to curtail the power of the pro-business judiciary by restricting federal jurisdiction over suits involving corporations.<sup>45</sup> They argued that "[t]here can be no higher duty imposed on this Congress than to lessen [the] power [of corporations] to oppress the citizen in the courts of the United States."<sup>46</sup> But pro-business conservatives, who at that time dominated the Republican Party, defended the judiciary, insisting that the "best guarantee of security to investments [is] found in recourse to the national courts."<sup>47</sup>

The progressives repeatedly pushed their jurisdiction-stripping measures through the House of Representatives, which was controlled by the Democratic Party during much of this period.<sup>48</sup> But each time, the pro-business Republicans used their structural veto in the Senate to defeat those efforts.<sup>49</sup> Thus, as one progressive complained, "the

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President Johnson "viewed the [Supreme] Court as a means both of perpetuating his social reforms and of upholding various legislative compromises he had reached on controversial issues ranging from aid for parochial schools to consumer, health, and environmental legislation").

44 Indeed, political scientists have found that politicians tend to expand the judiciary only when they expect the President to nominate and the Senate to confirm judges to their liking. See John M. De Figueiredo & Emerson H. Tiller, *Congressional Control of the Courts: A Theoretical and Empirical Analysis of Expansion of the Federal Judiciary*, 39 J.L. & ECON. 435, 438, 460 (1996) (contending that such expansions tend to "occur only when the nominating president and the confirming Senate are of the same political party as the enacting House and Senate").

45 See EDWARD A. PURCELL, JR., *LITIGATION AND INEQUALITY* 15 (1992).

46 14 CONG. REC. 1246 (1883) (statement of Rep. David Culbertson, D-Tex.).

47 10 CONG. REC. 820 (1880) (statement of Rep. Hiram Barber, Jr., R-Ill.).

48 See 5 HISTORICAL STATISTICS OF THE UNITED STATES, MILLENNIAL EDITION ONLINE 5-201, tbl. Eb296-308 (Susan B. Carter et al. eds., 2006), available at [hsus.cambridge.org](http://hsus.cambridge.org).

49 See Grove, *Structural Safeguards*, *supra* note 7, at 890-96.

fate of [this jurisdiction-stripping] measure in the Senate . . . warns us that it can never become the law.”<sup>50</sup>

In the early twentieth century, the Progressive movement gained strength in both political parties, and the Republican Party was soon divided between the pro-business faction and a more progressive wing.<sup>51</sup> Accordingly, the relevant “factions” crossed party lines. During this period, progressives (now from both parties) continued to propose jurisdiction-stripping measures and to push those measures through the House of Representatives.<sup>52</sup> But the pro-business members of the Republican Party—even when they were only a political minority in Congress—still had sufficient “veto power” in the Senate to block these jurisdiction-stripping attempts.<sup>53</sup>

Beginning in the mid-to-late twentieth century, the primary target was the progressive civil rights jurisprudence of the Warren and Burger Courts. During this era, the political parties were coalition parties and, accordingly, the relevant “factions” crossed party lines. The Democrats were sharply split between a progressive wing and a more conservative faction based largely in the South.<sup>54</sup> The Republican Party was also divided (albeit to a lesser degree) between social conservatives and social progressives.<sup>55</sup>

These political factions engaged in a bitter partisan battle over the federal judiciary. Social conservatives fought hard to strip federal jurisdiction over constitutional claims ranging from school prayer, reapportionment, and abortion to the use of busing to desegregate

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50 21 CONG. REC. 3406 (1890) (statement of Rep. David Culberson, D-Tex.); *see also* 26 CONG. REC. 8594 (1894) (statement of Rep. David Culberson, D-Tex.) (lamenting that, although this jurisdiction-stripping bill had passed the House in multiple Congresses, that body had never “been able to get the concurrence of the Senate in this measure”).

51 *See* William N. Chambers, *Party Development and the American Mainstream*, in *THE AMERICAN PARTY SYSTEMS* 3, 14 (William Nisbet Chambers & Walter Dean Burnham eds., 1967); WHITTINGTON, *supra* note 33, at 261.

52 *See* Grove, *Structural Safeguards*, *supra* note 7, at 897–98.

53 *See* CLYDE P. WEED, *THE NEMESIS OF REFORM* 11, 14 (1994) (observing that, “at the height of the Progressive era (1908–1916), . . . the prestige of the [conservative] old guard [of the Republican Party] was at an all-time low” and that the conservatives had “diminished influence” during that period); Grove, *Structural Safeguards*, *supra* note 7, at 898–99 (describing how, in 1911, conservative Republicans in the Senate managed to filibuster a jurisdiction-stripping measure—despite their status as a minority faction).

54 *See* MORRIS P. FIORINA, *DIVIDED GOVERNMENT* 165 (2002).

55 *See* Mark D. Brewer, *The Rise of Partisanship and the Expansion of Partisan Conflict Within the American Electorate*, 58 *POL. RES. Q.* 219, 220 (2005).

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public schools.<sup>56</sup> The conservatives denounced the Supreme Court decisions in these areas as a “thorough distortion of the work of the authors of the Constitution” and a “judicial usurpation[ ] of power.”<sup>57</sup> But social progressives steadfastly defended the federal courts, warning that “[t]his type of restriction on the judicial power” would “weaken, if not cripple, the independence of the Federal judiciary and subvert the U.S. Constitution.”<sup>58</sup>

In the late 1970s and early 1980s, social conservatives (from both parties) managed to push the school prayer and busing measures through the Senate. But social progressives used their structural veto in the House of Representatives to preserve federal jurisdiction over these constitutional claims.<sup>59</sup>

By the early twenty-first century, the parties had realigned. Most social conservatives had joined the Republican Party, while virtually all social progressives were Democrats.<sup>60</sup> Thus, the relevant “factions” tracked party lines—much as they had during the late nineteenth century. Furthermore, during this period, the Republican Party controlled the House, Senate, and Presidency.<sup>61</sup> Social conservatives

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56 See EDWARD KEYNES, *THE COURT VS. CONGRESS 195–203*, 221–25, 292–98 (1989) (discussing the efforts to curtail federal jurisdiction over abortion, busing, and school prayer); Max Baucus & Kenneth R. Kay, *The Court Stripping Bills: Their Impact on the Constitution, the Courts, and Congress*, 27 VILL. L. REV. 988, 990–94 (1982) (similarly noting various jurisdiction-stripping attempts from the late 1950s until the early 1980s).

57 *E.g.*, 125 CONG. REC. 7578–79 (1979) (statement of Sen. Jesse Helms, R-N.C.) (condemning the Court’s school prayer rulings and stating that “[o]nly by a thorough distortion of the work of the authors of the Constitution is it even remotely possible to arrive at the sweeping condemnation of America’s spiritual heritage presented in the Court’s opinions” and further stating that the Framers enacted the Exceptions Clause “[i]n anticipation of [such] judicial usurpations of power”).

58 *E.g.*, *id.* at 7644 (statement of Sen. John Durkin, D-N.H.) (“This type of restriction on the judicial power, once applied in this instance, will become ever easier to apply in the future. . . . The result will be to weaken, if not cripple, the independence of the Federal judiciary and subvert the U.S. Constitution.”).

59 See Grove, *Structural Safeguards*, *supra* note 7, at 900–16.

60 See Brewer, *supra* note 55, at 219–20 (“By the end of the 1980s, partisanship in Congress had risen dramatically and has remained at a high level ever since. . . . At the same time the parties were becoming more internally cohesive in their voting behavior, they were also becoming more ideologically polarized from each other . . . (with the Democrats becoming more liberal and the GOP becoming more conservative) . . . .” (internal citation omitted)).

61 Following the 2000 elections, the Senate was evenly divided, but the Republicans controlled that body because Vice President Dick Cheney could break a tie. See Gary C. Jacobson, *A House and Senate Divided: The Clinton Legacy and the Congressional Elections of 2000*, 116 POL. SCI. Q. 5, 5 (2001). The Republicans’ control over the Senate was short-lived because, in May 2001, Senator Jim Jeffords left the Republican

attempted to use this political power to eliminate federal jurisdiction over challenges to the Defense of Marriage Act and to the use of “under God” in the Pledge of Allegiance.<sup>62</sup> These measures passed the House of Representatives in 2004 and 2006 by wide margins, with the support of socially conservative Republicans.<sup>63</sup> But social progressives in the Democratic Party—even though they were now only a political minority in Congress—had sufficient political power in the Senate to block those jurisdiction-stripping efforts.<sup>64</sup>

*B. Article II Protections for the Supreme Court and Constitutional Claims*

The Article I lawmaking process has thus proven to be an important safeguard for the federal judiciary. Political factions have repeatedly used their structural veto to block jurisdiction-stripping efforts. But there is an additional structural safeguard: the executive branch. The executive has various tools at its disposal to oppose constitutionally questionable legislation. The President can veto or threaten to veto problematic legislation.<sup>65</sup> The executive can also use its role in enforcing federal laws to ensure that laws are applied in a manner that accords with constitutional values.<sup>66</sup>

Social science research suggests that the executive branch has a strong incentive to use this constitutional authority to oppose efforts to curb federal jurisdiction. First, scholars have argued that the President often advances his constitutional philosophy through litigation in the federal courts.<sup>67</sup> Accordingly, the President has some incentive

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Party and became an Independent. But the party later regained control. *See* U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2009 245 (2008) (showing that, after the 2002 elections, the Republicans had a 51-48 majority in the Senate and that, after 2004, the party had a majority of 55-44).

62 *See* Neal Devins, *Should the Supreme Court Fear Congress?*, 90 MINN. L. REV. 1337, 1356–57 (2006).

63 *See* Grove, *Structural Safeguards*, *supra* note 7, at 912–15, 938–39.

64 *See id.* at 915–16.

65 *See* U.S. CONST. art. I, § 7, cl. 2; CHARLES M. CAMERON, VETO BARGAINING: PRESIDENTS AND THE POLITICS OF NEGATIVE POWER 3 (2000) (examining “how presidents use vetoes and veto threats to wrest policy concessions from Congress”).

66 *See* U.S. CONST. art. II, § 3 (“[The President] shall take Care that the Laws be faithfully executed . . .”); Dawn E. Johnsen, *Presidential Non-Enforcement of Constitutionally Objectionable Statutes*, 63 LAW & CONTEMP. PROBS. 7, 9 (Winter 2000) (“Presidents often avoid constitutional problems, as they should, through their interpretation of ambiguous statutes or through the exercise of enforcement discretion.”).

67 *See* WHITTINGTON, *supra* note 33, at 274 (arguing that Presidents often “[t]urn [ ] to the judiciary . . . [to] advanc[e] constitutional goals”); Gillman, *supra* note 35, at 146–55 (discussing the efforts of the Kennedy and Johnson Administrations to appoint judges who would favor civil rights and other progressive causes).

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to defend the scope of federal jurisdiction over constitutional claims. The President should have a particularly overriding interest in protecting the Supreme Court's appellate jurisdiction, because its "decisions . . . establish the legal and ideological framework within which [the lower courts] . . . operat[e]."68

These presidential incentives are reinforced by the institutional incentives of the Department of Justice.<sup>69</sup> The Solicitor General is in charge of virtually all federal litigation in the Supreme Court.<sup>70</sup> Thus, as former Solicitor General Drew Days put it, "[o]nce cases reach the Supreme Court, the Solicitor General plays an important role in the development of American law" and can have a substantial "impact upon the establishment of constitutional and other principles."<sup>71</sup> This institutional position gives the DOJ a strong interest in protecting the Supreme Court's appellate review power. By defending the authority of the Supreme Court, the DOJ can maximize its own power and influence over the development of federal law.<sup>72</sup>

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68 Gillman, *supra* note 36, at 518.

69 For the DOJ's institutional incentives, I draw on social science theories of path dependence and institutional entrenchment. Social scientists have argued that institutions, like the judiciary, may become "entrenched" (or "locked-in"), in part because they serve as sources of power and influence for other groups in society. See PAUL PIERSON, *POLITICS IN TIME* 159 (2004) ("[T]here are a number of mechanisms that appear to make expansions of court power virtually irreversible. The emergence of courts as the site of political and legal dispute resolution generates a rapid expansion of law-centered actors who have a considerable stake in preserving and expanding the use of these procedures . . ." (footnote omitted)). This theory helps explain why the DOJ has an incentive to defend the federal judiciary. The DOJ's main job is to litigate cases in the federal courts. See 28 U.S.C. § 516 (2006) ("Except as otherwise authorized by law, the conduct of litigation in which the United States . . . is interested . . . is reserved to officers of the Department of Justice, under the direction of the Attorney General."). The DOJ's power and influence within the executive branch is therefore greatest when decisions are hammered out in litigation. Moreover, as discussed below, this theory suggests that the DOJ has especially good reason to defend the Supreme Court, because the Solicitor General is essentially the government's exclusive representative at that level. See *infra* notes 70–72 and accompanying text.

70 See 28 U.S.C. § 518(a) ("[T]he Attorney General and the Solicitor General shall conduct and argue suits and appeals in the Supreme Court . . ."); *FEC v. NRA Political Victory Fund*, 513 U.S. 88, 93 (1994). Notably, before the Solicitor General was created in 1870, see Act of June 22, 1870, ch. 150 §§ 1–2, 16 Stat. 162, the Attorney General was the government's exclusive representative in the Supreme Court. See Judiciary Act of 1789, § 35, 1 Stat. 73, 92–93.

71 Drew S. Days, III, *Executive Branch Advocate v. Officer of the Court: The Solicitor General's Ethical Dilemma*, 22 NOVA L. REV. 679, 680 (1998).

72 Thus, in this context, the incentives of the "agents" in the executive branch fortify the protections for the judiciary. Cf. Vermeule, *supra* note 23, at 1428–29 (expressing doubt that the Madisonian scheme of separated powers could work on

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This social science research suggests that the executive branch has a strong incentive to block the two types of jurisdiction-stripping measures that most concern scholars: efforts to strip the Supreme Court's appellate jurisdiction and federal jurisdiction over constitutional claims. And there is considerable historical support for this. Attorneys General of both parties have repeatedly opposed legislation targeted at the Supreme Court or at constitutional claims, stating that "[m]atters of constitutional interpretation and adjudication are . . . pre-eminently within the province of the Federal judiciary,"<sup>73</sup> and that "[f]ull and unimpaired appellate jurisdiction in the Supreme Court is fundamental under our system of government."<sup>74</sup>

Notably, the executive branch has opposed such jurisdiction-stripping proposals, even when the President was otherwise deeply critical of the federal courts' constitutional jurisprudence, and even when the jurisdiction-stripping measures were championed by members of the President's own political faction. For example, although more famously associated with the Court-packing episode (discussed further below),<sup>75</sup> the Roosevelt Administration strongly opposed efforts to strip the Supreme Court's appellate jurisdiction. In the 1930s, after the Court struck down key New Deal legislation, certain Democratic legislators wanted to eliminate the Court's appellate jurisdiction over constitutional claims.<sup>76</sup> But the Roosevelt Administration rejected those proposals, with one administration official stating that the Supreme Court's "power to declare legislation unconstitutional" was a core "judicial power . . . immun[e] from legislative control."<sup>77</sup>

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the ground that "institutions are themselves aggregates of individual officials with competing agendas, and with a great deal of agency slack between their own interests and that of the institution").

73 125 CONG. REC. 7637 (1979) (quoting a letter from Attorney General Griffin Bell, Carter Administration).

74 104 CONG. REC. 4423 (1958) (quoting a letter from Attorney General William Rogers, Eisenhower Administration).

75 See *infra* notes 102–04 and accompanying text.

76 See WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN* 102–03 (1995).

77 Memorandum from Warner W. Gardner, Department of Justice, Washington, D.C., to the Solicitor General 10, 13 (Aug. 15, 1935) (copy on file with author); see Grove, *Article II Safeguards*, *supra* note 7, at 270–73. Gardner was a key player in the discussions over what to do about the "problem" created by the Supreme Court's invalidation of New Deal measures. President Roosevelt's first Attorney General, Homer Cummings, asked Gardner to evaluate the various court-curbing proposals that were under consideration at the time. Gardner strongly advised against jurisdiction stripping but stated that the proposal to enlarge the Supreme Court was an "undoubtedly constitutional method by which to obtain a more sympathetic majority of the Court." Memorandum from Warner W. Gardner, Department of Justice, Washington, D.C., to the Solicitor General 64–65 (Dec. 10, 1936) (copy on file with

Likewise, the Reagan Administration opposed the efforts of social conservatives to strip federal jurisdiction over constitutional claims like school prayer and abortion.<sup>78</sup> The Administration took this position, even though President Reagan described the Supreme Court's jurisprudence in those areas as "not in keeping with the Constitution at all."<sup>79</sup> The Administration was especially concerned about the attack on the Supreme Court. President Reagan's first Attorney General William French Smith issued an Office of Legal Counsel opinion concluding that Congress lacks the power to eliminate Supreme Court review of constitutional claims.<sup>80</sup> "The integrity of our system of federal law depends upon a single court of last resort having a final say on the resolution of federal questions."<sup>81</sup>

### III. IMPLICATIONS

As the above historical survey illustrates, the structural constraints of Article I and Article II have repeatedly protected the federal judiciary against jurisdiction-stripping efforts.<sup>82</sup> Indeed, the scheme of separated powers has largely met the concerns raised by academics in the literature on jurisdiction stripping. The Article I lawmaking process

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author). Cummings later asked Gardner to draft the bill that ultimately became Roosevelt's famous Court-packing plan. See JEFF SHESOL, *SUPREME POWER* 253, 256 (2010). I discuss the Court-packing proposal in more detail below. See *infra* notes 99–101 and accompanying text.

78 See *Constitutionality of Legislation Withdrawing Supreme Court Jurisdiction to Consider Cases Relating to Voluntary Prayer*, 6 Op. O.L.C. 13, 14 (1982) [hereinafter *Constitutionality of Legislation*]; *Nomination of Edwin Meese III: Hearing Before the Senate Comm. on the Judiciary*, 98th Cong. 185–86 (1984) [hereinafter *Nomination of Edwin Meese III*] (arguing that Congress lacks the power to "diminish or take away the core functions of the Supreme Court," including the power to rule on constitutional claims, and expressing the view that, as a general rule, Congress should not "limit lower Federal court jurisdiction over a Federal constitutional question").

79 Interview with Eleanor Clift, Jack Nelson, and Joel Havemann of the Los Angeles Times, 1 PUB. PAPERS 830 (June 23, 1986) (President Reagan asserting that "the decision that prevented voluntary prayer by anyone who wanted to do so in a school or a public building is just not in keeping with the Constitution at all"); see Statement on the United States Supreme Court Decision on Abortion, 1 PUB. PAPERS 876 (June 16, 1983) ("express[ing] profound disappointment" with the Court's abortion decisions).

80 *Constitutionality of Legislation*, *supra* note 78, at 14.

81 *Constitutionality of Legislation*, *supra* note 78, at 26; see also *Nomination of Edwin Meese III*, *supra* note 78, 185–86 (1984) (stating that, if he believed that a bill infringed on "a core function of the Supreme Court," such as the power to rule on constitutional claims, then he "would recommend a veto").

82 For purposes of this Essay, I provide only a summary of the historical evidence. My earlier work offers a more detailed historical account. See *supra* note 7.

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has blocked most efforts to strip federal jurisdiction, and the executive branch has used the structural tools of Article II to provide added protection for the Supreme Court and constitutional claims.<sup>83</sup>

Notably, I do not mean to suggest that these structural safeguards are an absolute bulwark against jurisdiction-stripping attempts. Congress has managed to enact some jurisdiction-stripping measures (albeit generally outside the context of the Supreme Court and constitutional claims),<sup>84</sup> and there is an important question whether the

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83 Moreover, political actors in both the legislature and the executive branch may have particularly strong reasons to protect the Supreme Court's appellate jurisdiction. Social scientists have argued that political actors establish (and later abide by) legal constraints, including constitutional rules and judicial decisions, because they help to settle disputed issues and thereby provide focal points around which political actors and citizens can coordinate their actions. See ZACHARY ELKINS ET AL., *THE ENDURANCE OF NATIONAL CONSTITUTIONS* 108 (2009) (asserting that "[i]f the constitution is vague on a certain point . . . [c]onstitutional review provides focal points for enforcement"); Barry R. Weingast, *The Political Foundations of Democracy and the Rule of Law*, 91 AM. POL. SCI. REV. 245, 246 (1997) (arguing that certain legal institutions "create a focal solution that resolves the coordination dilemmas confronting elites and citizens"). The Supreme Court performs this settlement function for legal issues that are referred to our judiciary. Even controversial Court decisions establish (at least temporarily) the boundaries of permissible governmental and private conduct and thereby facilitate coordination. This social science research thus suggests that Congress should be inclined to enact jurisdictional legislation that promotes the Supreme Court's settlement function. Although this "coordination theory" is beyond the scope of this Essay, I explore it in separate work. See Tara Leigh Grove, *The Exceptions Clause as a Structural Safeguard*, 113 COLUM. L. REV. (forthcoming 2013) [hereinafter *Exceptions Clause*] (copy on file with author).

84 See, e.g., Norris-LaGuardia Act, 29 U.S.C. § 101 (2006) (restricting the inferior federal courts' authority to issue injunctions in labor disputes); Emergency Price Control Act of 1942, Pub. L. No. 420, 56 Stat. 23 (allowing only the Supreme Court, and not any lower federal or state court, to review certain administrative orders); see also H.R. REP. NO. 72-669, at 11-16 (1932) (making clear that the Norris-LaGuardia Act applied only to "the inferior Federal courts"). The recent legislation involved in the "war on terror" serves as an example. The Detainee Treatment Act (DTA) and the Military Commissions Act (MCA) were designed to eliminate federal habeas jurisdiction over the claims of alleged enemy combatants in the war on terror. See DTA of 2005, Pub. L. No. 109-148, § 1005(e), 119 Stat. 2680, 2742; MCA, Pub. L. No. 109-366, § 7, 120 Stat. 2600, 2635-36 (amending 28 U.S.C. § 2241(e)). But the statutes created an alternative review scheme that left open an avenue for Supreme Court review. The detainees' claims were routed to a military tribunal (either a combatant status review tribunal or a military commission) followed by judicial review in the D.C. Circuit and the Supreme Court. See DTA § 1005(e)(2), 119 Stat. 2680, at 2742; MCA § 950g, 120 Stat. 2600, at 2622-24. (Although the DTA gives the D.C. Circuit "exclusive" jurisdiction to review decisions of combatant status review tribunals, such "exclusivity" provisions are generally construed so as to preserve Supreme Court review. See, e.g., Administrative Orders Review Act, 28 U.S.C. § 2342 (2006) (providing that "[t]he court of appeals . . . has exclusive jurisdiction" to review "final orders" from certain

judiciary should intervene when these structural provisions fail. But my goal here is not to examine that question.<sup>85</sup> Instead, I want to focus on how the overall “success” of the constitutional design in this context helps to answer some of the questions recently raised about the Madisonian scheme of separated powers.

### A. *Separation of Parties and Separation of Powers*

This analysis suggests that, in the context of the federal judiciary, the “separation of parties” critique offered by Professors Levinson and Pildes, while powerful, is incomplete. First, this theory does not explain the executive branch’s opposition to jurisdiction stripping. The executive has fought jurisdiction-stripping measures, even during periods of unified government, and even when the measures were sponsored by members of the President’s own party. For example, the Roosevelt Administration rejected proposals by legislators in the Democratic Party to eliminate the Supreme Court’s appellate jurisdiction over constitutional claims—even during a period of unified government, when the Democrats had overwhelming majorities in both chambers of Congress.<sup>86</sup> Likewise, the Reagan Administration

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federal agencies); *Fed. Mar. Comm’n v. S.C. Ports Auth.*, 535 U.S. 743, 750–51 (2002) (reviewing court of appeals decision in a case brought under 28 U.S.C. § 2342).) The DTA and MCA also expressly preserved jurisdiction over certain constitutional claims. *See* DTA § 1005(e)(2)(C)(ii), 119 Stat. 2680, at 2742 (permitting the D.C. Circuit to review “to the extent the Constitution and laws of the United States are applicable, whether the use of [certain] standards and procedures [by combatant status review tribunals] is consistent with the Constitution and laws of the United States”); MCA § 950g, 120 Stat. 2600, at 2622 (permitting the D.C. Circuit to consider whether, “to the extent applicable,” the military commission’s “final decision . . . was consistent with . . . the Constitution and the laws of the United States”). Congress has, however, on rare occasions enacted statutes that appeared to eliminate Supreme Court review over specific classes of cases (even those involving constitutional claims). But the Court has thus far interpreted those statutes narrowly so as to preserve an avenue of review. *See* Grove, *Structural Safeguards*, *supra* note 7, at 922–27 (discussing the statutes at issue in *Ex parte McCordle*, 74 U.S. (7 Wall.) 506 (1869), and *Felker v. Turpin*, 518 U.S. 651 (1996)).

85 Nor do I examine another issue: whether the mere proposal of jurisdiction-stripping measures (even when they are not enacted) has an impact on judicial independence. *Cf.* Tom S. Clark, *The Separation of Powers, Court Curbing, and Judicial Legitimacy*, 53 AM. J. POL. SCI. 971, 972 (2009) (arguing that “Court curbing in Congress may affect judicial decision making independent of any threat of enactment . . . because it can be a credible signal about waning judicial legitimacy” with the public). I plan to explore that issue in future work.

86 *See* HISTORICAL STATISTICS OF THE UNITED STATES, *supra* note 48, at 5-201, tbl. Eb296-308 (showing that the Democrats controlled the House 331-89 and the Senate 76-16 in 1937–38).

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strongly opposed the jurisdiction-stripping proposals championed by other socially conservative Republicans.

This dynamic can be largely explained by the institutional incentives of the executive branch. The President plays a central role in selecting federal judges<sup>87</sup> and “[t]hrough control over the Justice Department . . . can exercise significant influence over . . . what arguments are presented” to the courts.<sup>88</sup> This institutional authority enables the President to influence the development of federal law through the judiciary—an authority that many leaders have used to advance their constitutional philosophy.<sup>89</sup>

These institutional factors help explain why both the Roosevelt and the Reagan Administrations defended the federal judiciary against legislative attacks.<sup>90</sup> Both leaders sought to advance their (very different) constitutional visions through litigation in the federal courts.<sup>91</sup> Thus, President Roosevelt selected judges who would be inclined to defer to New Deal economic programs; President Reagan preferred nominees who seemed likely to favor states’ rights and to take a conservative stance on social issues.<sup>92</sup> Both Presidents also had their Justice Departments argue in favor of that constitutional vision

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87 See U.S. CONST. art. II, § 2, cl. 2 (“[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court . . . .”); Mark A. Graber, *James Buchanan as Savior? Judicial Power, Political Fragmentation, and the Failed 1831 Repeal of Section 25*, 88 OR. L. REV. 95, 103 (2009) (“Presidents . . . typically have more influence than legislators on the staffing of federal courts.”).

88 WHITTINGTON, *supra* note 33, at 196.

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89 Of course, the President can also use the judiciary to pursue other policies. See WHITTINGTON, *supra* note 33, at 197 n.124 (observing that “constitutional interpretation is not the only form of policymaking that presidents might pursue through the courts”). But, in part because of our longstanding tradition of judicial supremacy, it is easier for the President to advance his constitutional philosophy in this context. The President can use the administrative state to advance other policies. See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2248 (2001) (noting that agencies can “showcase and advance presidential policies”).

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90 I discuss below how Roosevelt’s Court-packing plan fits into this analysis. See *infra* 99–101.

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91 See STEPHEN SKOWRONEK, *THE POLITICS PRESIDENTS MAKE* 36–37, 288, 414–15 (1997) (describing Roosevelt and Reagan as “reconstructive” leaders who sought to change the constitutional and political landscape); WHITTINGTON, *supra* note 33, at 23 (“The list of [reconstructive] presidents . . . includes Thomas Jefferson, Andrew Jackson, Abraham Lincoln, Franklin Roosevelt, and less strongly Ronald Reagan.”).

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92 See GOLDMAN, *supra* note 43, at 285 (arguing that both Roosevelt and Reagan “self-consciously attempted to use the power of judicial appointment to place on the bench judges who shared their general philosophy”).

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in federal court.<sup>93</sup> These elected leaders thus had a strong incentive to *preserve* federal jurisdiction over constitutional claims, so that a more “friendly” judiciary could “fix” what the leaders saw as the constitutional errors of the past.

Congress, by contrast, has few ways to directly affect the course of judicial decisions.<sup>94</sup> Congress may, of course, seek to influence the courts by changing the size of the judiciary, declining to increase judicial pay, or even modifying the scope of federal jurisdiction. But Congress rarely speaks directly to the courts in litigation and, thus, has far less influence over the development of federal law.<sup>95</sup> Indeed, even if legislators wanted to become more involved in litigation,<sup>96</sup> it is not clear that a multi-member body like Congress could consistently craft a coherent constitutional vision to advance in court.<sup>97</sup> The executive

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93 See Neal Devins, *Government Lawyers and the New Deal*, 96 COLUM. L. REV. 237, 256–61 (1996) (reviewing WILLIAM A. LEUCHTENBURG, *THE SUPREME COURT REBORN* (1995) (arguing that the Justice Department’s efforts to defend New Deal legislation were a critical part of Roosevelt’s constitutional reform efforts); Grove, *Article II Safeguards*, *supra* note 7, at 281–82 (explaining how both Reagan’s first Attorney General William French Smith and his second Attorney General Ed Meese urged the federal courts to take a more conservative stance on social issues like school prayer, busing, and abortion).

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94 That is true, even when we take into account the Senate’s role in judicial confirmation. See Graber, *supra* note 87, at 103 (“Presidents . . . typically have more influence than legislators on the staffing of federal courts.”).

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95 For an insightful analysis of why Congress acquiesces in presidential control of litigation, see Neal Devins & Michael Herz, *The Battle That Never Was: Congress, the White House, and Agency Litigation Authority*, 61 LAW & CONTEMP. PROBS. 205 (1998).

96 Some scholars have suggested that Congress should take a more assertive role in litigation. See, e.g., Amanda Frost, *Congress in Court*, 59 UCLA L. REV. 914, 948 (2012) (arguing that “Congress needs to become an advocate for its interests in court”).

97 The recent litigation over the Defense of Marriage Act (DOMA), Pub. L. No. 104-199, 110 Stat. 2419 (1996), serves as an example. The Bipartisan House Legal Advisory Group (BLAG), which consists of five individuals (the Speaker, the majority and minority leaders, and the majority and minority whips), voted 3-2 along party lines to defend the constitutionality of DOMA. See Chris Geidner, *House Republicans Vote to Defend DOMA in Court on Party Line 3-2 Vote*, METRO WEEKLY (March 9, 2011, 6:14PM), <http://metroweekly.com/poliglot/2011/03/house-republicans-vote-to-defe.html>. But the BLAG’s position does not necessarily represent the consensus view of the House. A group of 133 House members filed a brief supporting the DOMA challengers. See Kathleen Hennessey, *Democrats File Amicus Brief Challenging Defense of Marriage Act*, L.A. TIMES, Nov. 3, 2011 (observing that “House Minority Leader Nancy Pelosi, Democratic Whip Steny Hoyer and 131 other members signed the brief, which argues that [DOMA] is unconstitutional because it was passed quickly, driven by biases, and lacks ‘a rational relationship to any legitimate federal purpose’”). Moreover, the Senate does not appear to have taken any position in the litigation. Accordingly, it is hard to say that “Congress” has adopted an official position on DOMA. By

branch, by contrast, with a single leader at the helm, has both the institutional tools and a far greater capacity to use litigation to advance the President's constitutional philosophy.<sup>98</sup>

Notably, these differing institutional incentives may also help explain the branches' different approaches to Roosevelt's Court-packing plan. Although the Court-packing plan may, at first glance, seem inconsistent with the Roosevelt Administration's rejection of jurisdiction-stripping legislation, the Administration's approach makes some sense when viewed in terms of the executive branch's institutional incentives. Presidents have an incentive to preserve federal jurisdiction, because they can use the courts to advance their constitutional philosophy. Those same incentives lead Presidents to appoint judges who are sympathetic to that philosophy. In other words, Presidents who seek to promote their constitutional views through the judiciary have a strong incentive to "pack" the federal courts.<sup>99</sup> Congress, by contrast, lacks the institutional tools that enable the President to influence the development of federal law. That may help explain why an all-Democratic Congress balked at Roosevelt's Court-packing proposal (and why many legislators instead favored jurisdiction stripping). Given the executive branch's influence with the judiciary in normal times, legislators found "abhorrent" the "idea of giving [the] president . . . the [additional] authority to remake the Supreme Court virtually overnight."<sup>100</sup>

Accordingly, the political branches have competing institutional incentives that lead them to approach jurisdiction-stripping (and, it

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contrast, the Obama Administration has clearly declared its view that DOMA is unconstitutional. See Letter from Attorney General Eric H. Holder to John A. Boehner, Speaker, House of Representatives, Involving the Defense of Marriage Act (Feb. 23, 2011), available at <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html> [hereinafter Holder, Letter] (stating that "the President . . . has made the determination that [DOMA,] as applied to same-sex couples who are legally married under state law, violates the equal protection component of the Fifth Amendment" and that the DOJ would "cease defense of [the statute]").

98 See *supra* note 97 (noting that, in contrast to Congress, the executive branch has taken a clear position on the constitutionality of the Defense of Marriage Act). Notably, one need not accept "unitary executive theory" to agree that the executive branch has a *greater* capacity than the multi-member Congress to craft a coherent constitutional vision.

99 For that reason, "Roosevelt's proposal to pack the Court with his supporters contained no provision requiring judicial restraint at all. . . . The administration hoped to *harness* the power of the Court, not destroy it." WHITTINGTON, *supra* note 35, at 266–67 (emphasis added).

100 SHESOL, *supra* note 77, at 316.

seems, other court-curbing) proposals differently.<sup>101</sup> As Madisonian theory might predict, the executive's institutional incentives—its “ambition” to have greater influence over the development of federal law—lead it to “resist” congressional encroachments on federal jurisdiction during periods of both unified and divided government.<sup>102</sup> In sum, the executive branch's approach to jurisdiction stripping has depended on the separation of powers, not parties.

By contrast, the “separation of parties” thesis does better explain how members of Congress respond to jurisdiction-stripping measures. While executive officials have strong institutional reasons to protect the judiciary (regardless of partisan affiliation), legislators vote largely along partisan lines. Of course, this “partisan” voting does not always neatly track the two major political parties. In our history, the relevant political factions have often crossed party lines.<sup>103</sup> For example, in the late twentieth century, social conservatives and social progressives from both parties battled over jurisdiction-stripping legislation. Nevertheless, as the “separation of parties” thesis would predict, these competing factions were motivated more by political incentives than by institutional ones—perhaps because legislators lack strong institutional incentives to preserve federal jurisdiction.

But, even in the context of the legislative branch, the “separation of parties” argument is incomplete. This theory largely overlooks the “supermajoritarian” nature of the Article I lawmaking process and the power that it gives political minorities to “veto” legislation.<sup>104</sup> This

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101 Indeed, the demise of the court-curbing proposals in the 1930s (Court packing and jurisdiction stripping) appears to be a tribute to the constitutional separation of powers. The executive branch resisted proposals to restrict federal jurisdiction and instead sought to “harness the power of the Court” to advance its constitutional vision, WHITTINGTON, *supra* note 35, at 266–67 (“Roosevelt’s proposal to pack the Court with his supporters contained no provision requiring judicial restraint at all. . . . The administration hoped to harness the power of the Court, not destroy it.”). Congress, in turn, sought to prevent such executive “harnessing.” Accordingly, “[a]mbition [was] made to counteract ambition” in a manner that protected the constitutional value in an independent judiciary. THE FEDERALIST NO. 51, *supra* note 4. Although a detailed examination of the Court-packing plan is beyond the scope of this Essay, this episode does further suggest that the “separation of parties” thesis does not explain the political branches’ approaches to the federal judiciary.

102 See THE FEDERALIST NO. 51, *supra* note 4.

103 Professors Levinson and Pildes acknowledge this point. See Levinson & Pildes, *supra* note 5, at 2339 (observing that “during periods of ideologically heterogeneous parties, relatively stable cross-partisan coalitions have constituted a government majority along certain policy dimensions”).

104 Professors Levinson and Pildes mention certain “supermajoritarian” aspects of the Article I lawmaking process. See *id.* at 2339, 2371–73 (noting that “[s]upermajority requirements in the lawmaking process (including veto overrides and Senate filibus-

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minority “veto power” has enabled supporters of the judiciary to block jurisdiction-stripping proposals, even during periods of unified government. Thus, pro-business conservatives in the early twentieth century and social progressives in the early twenty-first century successfully vetoed jurisdiction-stripping bills—despite their status as political minorities.

These historical examples suggest an important limitation on the “separation of parties” theory. These supporters of the judiciary were—as Professors Levinson and Pildes would predict—motivated to protect the judiciary largely because of their political interests. But the Article I lawmaking process gave them the structural tools to act on those political incentives.

Accordingly, in this context, it is incomplete to say that the checks and balances of the constitutional scheme depend on the separation of parties. The judiciary has been protected by the separation of parties *and* the separation of powers.

### B. *Structural Incentives to Protect the Federal Judiciary*

This analysis also offers a response to Professor Vermeule’s important challenge to the Madisonian design. Professor Vermeule argues that there is no reason, in the abstract, to expect political actors to use their institutional authority to safeguard constitutional values.<sup>105</sup> But, as we have seen, government officials do have an incentive to use the structural tools of Article I and Article II to protect the Article III courts.

That is largely because our constitutional structure ensures that the judiciary is politically constructed. Under Article II and Article III (in conjunction with the Necessary and Proper Clause), political actors appoint federal judges and determine the size of the judiciary as well as the scope of federal jurisdiction.<sup>106</sup> These structural tools

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ter cloture votes) often necessitate some degree of bipartisanship even when government is unified”). But they do not appear to acknowledge that the regular procedures are themselves supermajoritarian.

105 See Vermeule, *supra* note 6, at 27–28 (“Madison’s argument . . . lacks any mechanism to ensure that competition among institutions promoting their interests or ambitions will promote a state of affairs that is both patterned and desirable overall . . . .”); Vermeule, *supra* note 23, at 1427–28 (“There is no systematic reason to think that [the Madisonian scheme] will produce efficient outcomes, somehow defined, or other benefits such as the protection of liberty.”).

106 See U.S. CONST. art. II, § 2, cl. 2; U.S. CONST. art. III; David E. Engdahl, *Intrinsic Limits of Congress’s Power Regarding the Judicial Branch*, 1999 BYU L. REV. 75, 80 (asserting that most of “Congress’ power regarding the judiciary derives [from] the Necessary and Proper Clause”).

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enable a major political faction to construct a judiciary that will be sympathetic to its constitutional values—as pro-business conservatives did in the late nineteenth century, and social progressives did in the twentieth century. Once a political faction has empowered such a “friendly” judiciary, that faction has a strong incentive to use its Article I veto to protect the ongoing authority of the federal courts.

The President, of course, also has a strong incentive to protect a “friendly” judiciary that his political faction helped to empower.<sup>107</sup> But the Constitution gives the executive branch additional reasons to support the judiciary—even when the President strongly disagrees with the content of federal court decisions. The Appointments and Take Care Clauses of Article II give the executive a leading role in judicial appointments and a direct role in federal litigation. Accordingly, when the President objects to federal court decisions, he has the institutional tools to try to change them. This constitutional authority over the development of federal law gives the executive a strong (and nonpartisan) incentive to defend the jurisdiction of the federal courts.

Accordingly, in this context, there are good reasons to expect the Madisonian scheme of separated powers to “promote a state of affairs that is . . . desirable overall”<sup>108</sup>—at least as judged by the normative standards underlying the scholarship on jurisdiction stripping. The constitutional structure itself (i.e., the authority that it gives political actors to empower and influence the judiciary) provides the “robust mechanism[s]” that “align” the interests of elected officials with the public interest in an independent judiciary.<sup>109</sup>

Of course, one might wonder whether the federal judiciary can be truly “independent” of its political supporters. But historical evidence suggests that courts are not subservient to the political faction that empowered them. For example, the Warren Court’s decisions on issues like school prayer and busing were extremely unpopular—even,

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107 When the President agrees with the federal courts’ jurisprudence, the executive branch has both partisan and institutional reasons to oppose jurisdiction-stripping legislation. For example, the Kennedy Administration strongly favored reapportionment and filed briefs in support of the Supreme Court’s decisions in *Baker v. Carr*, 369 U.S. 186 (1962), and *Reynolds v. Sims*, 377 U.S. 533 (1964). See FRIEDMAN, *supra* note 37, at 270. Accordingly, it is unsurprising that Attorney General Robert Kennedy was “strongly against” congressional efforts to strip federal jurisdiction over reapportionment. See Anthony Lewis, *Democrats Weigh Policy on Seating and Districting*, N.Y. TIMES, Aug. 20, 1964, at 1.

108 Vermeule, *supra* note 6, at 27.

109 See *id.* at 27.

it seems, with many social progressives.<sup>110</sup> Nevertheless, the social progressives defended the Court and sought to block jurisdiction-stripping measures (even as they acknowledged their disagreement with individual decisions).<sup>111</sup> Thus, it appears that federal courts do have some leeway to venture beyond the agenda contemplated by their political supporters and protect “unpopular” constitutional values.

This observation suggests an important implication of the structural safeguards for the federal judiciary. By empowering and protecting the federal judiciary, political actors may also—albeit perhaps inadvertently—safeguard other (less popular) constitutional values. This possibility depends on the extent to which the judiciary serves to protect individual rights and other constitutional concerns, even in the face of majoritarian opposition. Although it appears that federal courts do have some leeway to protect unpopular constitutional values,<sup>112</sup> recent scholarship has cast doubt on their capacity to do so in most cases.<sup>113</sup> A resolution of that debate is beyond the scope of this

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110 See Alison Gash & Angelo Gonzales, *School Prayer*, in PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 62, 68–70, 77 (Nathaniel Persily et al. eds., 2008) (showing that over seventy percent of the public disagreed with the Court’s school prayer decisions in the late 1970s and early 1980s); Michael Murakami, *Desegregation*, in PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY, *supra*, at 18, 34–35 (showing that over eighty percent of the public disagreed with the Court’s busing decisions at that time).

111 For example, during the debates over the school prayer measure, Representative Harold Sawyer stated that, although he was “in favor of allowing voluntary prayer in the schools,” “the thing that frighten[ed] [him] about the [proposal]” was that it might encourage future efforts to “deprive the Supreme Court of any jurisdiction to cover the due process clause, or civil rights, or equal treatment” and thereby “virtually emasculate the Bill of Rights.” *Prayer in Public Schools and Buildings—Federal Court Jurisdiction: Hearing on S. 450 Before the Subcomm. on Courts, Civil Liberties, & the Admin. of Justice of the H. Comm. on the Judiciary*, 96th Cong. 26 (1980) (statement of Rep. Harold Sawyer, R-Mich.); see also 128 CONG. REC. 864 (1982) (statement of Sen. Carl Levin, D-Mich.) (stating, during the debates over the busing measure, that although he “share[d] . . . the general dislike of busing children away from their neighborhood schools,” he was “deeply troubled by this [jurisdiction-stripping proposal],” because it “would remove from the Federal courts the power to enforce the Constitution”).

112 See *supra* notes 110–11 and accompanying text.

113 A number of scholars have recently argued that federal court decisions rarely depart from popular opinion. See, e.g., FRIEDMAN, *supra* note 37, at 16 (arguing that “judicial review in the modern era . . . ratif[ies] the American people’s considered views about the meaning of their Constitution”); JEFFREY ROSEN, *THE MOST DEMOCRATIC BRANCH 3* (2006) (arguing that, in recent years, the Supreme Court has often “represented the views of a majority of Americans more accurately than the polarized party leadership in Congress”). For important critiques of this “majoritarian” theory, see Justin Driver, *The Consensus Constitution*, 89 TEX. L. REV. 755, 757–58 (2011) (doubting that Supreme Court decisions “reflect[] the ‘consensus’ views of the Amer-

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Essay. For present purposes, it is sufficient to recognize that, to the extent that the federal courts do have a role in enforcing constitutional norms (as many scholars still appear to assume they do),<sup>114</sup> the structural safeguards of federal jurisdiction help ensure that the courts have an opportunity to play that role.

#### CONCLUSION

For many years, scholars and jurists took for granted that the Madisonian system of separated powers would serve as a self-enforcing “machine” that would safeguard constitutional values.<sup>115</sup> Although recent scholarship has called into question that longstanding assumption, this scholarship does not necessarily undermine the Madisonian regime. The scheme of separated powers may still work well to preserve specific constitutional values—as it does for the federal judiciary. In this context, political actors have repeatedly found it in their interest to use the structural tools of Article I and Article II to safeguard the Article III judicial power.

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ican public,” because the public rarely has a united position on controversial constitutional issues); Richard H. Pildes, *Is the Supreme Court a “Majoritarian” Institution?*, 2010 SUP. CT. REV. 103, 116 (2010) (arguing that “today’s majoritarians . . . rely on constantly varying and slippery conceptions of the majority that purportedly constrains the Court” and “are not clear enough about the mechanisms or institutional pressures by which the Court is purportedly constrained”).

114 Much of our legal scholarship—including the jurisdiction-stripping literature discussed above—seems to rest on the premise that the judiciary plays an important role in enforcing constitutional norms, even in the face of political opposition. Indeed, that assumption almost certainly underlies the scholarly concern about stripping federal jurisdiction over constitutional claims. See *supra* note 28.

115 See Larry D. Kramer, *Madison’s Audience*, 112 HARV. L. REV. 611, 670–71, 679 (1999) (discussing the widespread acceptance of Madison’s theory, particularly from the early twentieth century to the present day).