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## RESHAPING FEDERAL JURISDICTION: CONGRESS'S LATEST CHALLENGE TO JUDICIAL REVIEW

*Helen Norton\**

The power to confirm or reject federal judicial nominees, although often the subject of great attention, remains just one of several tools available to Congress for shaping the federal judiciary.<sup>1</sup> This Article examines growing congressional interest in a distinct but related legislative check on judicial power: controlling the types of cases judges may decide by expanding or contracting federal subject matter jurisdiction.

In recent years, Congress has explored a range of proposals that variously enlarge and compress federal subject matter jurisdiction, thus altering federal and state courts' respective spheres of influence. In 2004, for example, the House of Representatives twice voted to strip federal courts of their authority to decide contentious constitutional issues. First, it passed the Marriage Protection Act<sup>2</sup> to eliminate federal jurisdiction over any question involving the interpretation or constitutionality of the federal Defense of Marriage Act<sup>3</sup> (which provides that no state shall be required to give effect to a law of any other state with respect to same-sex marriage). Shortly

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\* Visiting Assistant Professor of Law, University of Maryland School of Law. Special thanks to Danielle Citron, Adam Klein, Bill Reynolds, Aaron Schuham, Greg Young, and the participants in a University of Maryland faculty workshop for their insightful suggestions and comments, and to William H. George and Allison M. Cohen for their excellent research assistance. I am also grateful to the University of Maryland School of Law for its financial support for this project.

1. Other means of judicial control available to Congress include impeaching judges, changing the judiciary's size, altering the qualifications for judicial service, and limiting the remedies that judges may award. C. HERMAN PRITCHETT, *CONGRESS VERSUS THE SUPREME COURT 1957-60*, at 26-27 (Da Capo Press 1973) (1961) (describing legislative tools for controlling the federal judiciary); TASK FORCE ON THE ROLE OF THE LEGISLATURE IN SETTING THE POWER AND JURISDICTION OF THE COURTS, *CITIZENS FOR INDEP. COURTS, BALANCING ACT: LEGISLATIVE POWER AND JUDICIAL INDEPENDENCE* (2000), *reprinted in* UNCERTAIN JUSTICE: POLITICS IN AMERICA'S COURTS 205 (2000) [hereinafter *BALANCING ACT*].

2. H.R. 3313, 108th Cong., 150 CONG. REC. H6613 (daily ed. July 22, 2004).

3. 28 U.S.C. § 1738C (2000).

thereafter, the House passed the Pledge Protection Act,<sup>4</sup> which would do away with federal courts' power to hear any First Amendment challenge to the recitation of the Pledge of Allegiance.<sup>5</sup> Although the Senate voted on neither of these bills, the House's passage of both in the same session of Congress—as well as its subsequent re-passage of the Pledge Protection Act in the next Congress<sup>6</sup>—signals unprecedented congressional support for abolishing federal courts' jurisdiction over certain constitutional controversies.

In 2005, Congress undertook an unusual expansion of federal judicial authority when it empowered federal courts to hear specific federal constitutional and statutory challenges to the order to withdraw life-sustaining measures from Terri Schiavo. Applying only to claims brought by Ms. Schiavo's parents (the Schindlers), the Schiavo Act expressly directed the federal courts to consider those claims *de novo*, regardless of the exhaustion of state remedies and notwithstanding the Florida state courts' prior determinations upholding the decision to discontinue Ms. Schiavo's food and water.<sup>7</sup> The Act thus eliminated procedural barriers that otherwise would have thwarted federal review of the Schindlers' claims.<sup>8</sup>

At about the same time, Congress's enactment of the Class Action Fairness Act<sup>9</sup> ("CAFA") dramatically increased federal courts' jurisdiction over class actions brought under state law. CAFA requires only minimal diversity to trigger federal jurisdiction in

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4. H.R. 2028, 108th Cong., 150 CONG. REC. H7478 (daily ed. Sept. 23, 2004).

5. *Id.*

6. 152 CONG. REC. H5433 (daily ed. July 19, 2006).

7. An Act for the Relief of the Parents of Theresa Marie Schiavo, Pub. L. No. 109-3, 119 Stat. 15 (2005) ("[T]he District Court shall determine *de novo* any claim of a violation of any right of Theresa Marie Schiavo within the scope of this Act, notwithstanding any prior State court determination and regardless of whether such a claim has previously been raised, considered, or decided in State court proceedings. The District Court shall entertain and determine the suit without any delay or abstention in favor of State court proceedings, and regardless of whether remedies available to the State courts have been exhausted.").

8. Michael P. Allen, *Congress and Terri Schiavo: A Primer on the American Constitutional Order?*, 108 W. VA. L. REV. 309, 313 (2005); *see also* Schiavo v. Greer, No. 8:05-CV-522-T-30TGW, 2005 WL 754121, at \*1 (M.D. Fla. Mar. 18, 2005) (in a decision prior to the Schiavo Act, applying the *Rooker-Feldman* doctrine—which bars federal district courts from reviewing claims already adjudicated in state court—to hold that that federal courts have no jurisdiction over the Schindlers' claims).

9. Pub. L. No. 109-2, 119 Stat. 4 (codified as amended in scattered sections of 28 U.S.C. (2000)).

covered cases,<sup>10</sup> rather than the complete diversity that had previously been required.<sup>11</sup> Moreover, CAFA dismantled a series of barriers to the removal of such claims to federal court when initially filed in state court.<sup>12</sup> As a result, CAFA enables federal courts to adjudicate a wide range of class actions alleging violations of state product liability, consumer fraud, environmental protection, civil rights, and other laws.<sup>13</sup>

While the Marriage Protection and Pledge Protection Acts signal the House of Representatives' suspicion of federal judges' interpretation of federal constitutional law in certain high-profile areas, the Schiavo and Class Action Fairness Acts highlight Congress's disaffection with state courts' application of state law in other matters. Congressional champions of these jurisdictional changes treated them as completely independent efforts, offering no analysis of their collective implications for the allocation of judicial authority. Indeed, their critics charged that these various measures share no common thread other than proponents' exercise of sheer political power.<sup>14</sup>

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10. 28 U.S.C.A. § 1332(d)(2) (West 2006). "Minimal diversity" describes the situation where any member of the plaintiff class and any defendant are citizens of different states. Note that CAFA does not apply to the following state law class actions: those involving classes of less than one hundred plaintiffs; those where two-thirds of the class and at least one primary defendant reside in the same state; those where the primary defendants are states or state officials; those involving shareholder or derivative suits; and those where the aggregate amount in controversy does not exceed \$5,000,000. *Id.* at § 1332(d)(2), (4)-(6), (9).

11. "Complete diversity" describes the situation where all named class representatives are citizens of states different from all defendants. Prior to CAFA's enactment, most state class actions were governed by 28 U.S.C. § 1332(a), which empowers federal courts to hear state law claims only when the parties are completely diverse and the amount in controversy exceeds \$75,000.

12. After CAFA, 28 U.S.C. § 1453(b)-(c)(1) makes clear that the following barriers to defendants' ability to remove to federal court diversity cases filed originally in state court no longer apply to covered class actions: 28 U.S.C. § 1441(b) (preventing removal of diversity claim when any defendant is a citizen of the state in which the case is pending); 28 U.S.C. § 1446(b) (barring removal one year after commencement of the state court action); 28 U.S.C. § 1447(d) (barring appellate review of a federal district court's decision to remand a case to state court).

13. Edward F. Sherman, *Class Actions After the Class Action Fairness Act of 2005*, 80 TUL. L. REV. 1593, 1606, 1615 (2006) ("CAFA is primarily a jurisdictional act, accomplishing the transfer to federal courts of most multistate class actions.").

14. See, e.g., *Limiting Federal Court Jurisdiction to Protect Marriage for the States: Hearings Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 108th Cong. 137 (2004) [hereinafter *Hearings*] (statement of Rep. John Conyers, Jr., Member, H. Comm. on the Judiciary) ("My careful analysis of

But taken together, these proposals illuminate legislators' emerging views on the appropriate distribution of power between state and federal courts, and on judicial review altogether. In particular, they signal Congress's increasingly common assessment that the courts—both federal and state—are appropriate arbiters of particular disputes only to the extent that their decisions reflect the preferences of a majority of congressional representatives. Indeed, at least in some contexts, legislative efforts to reshape the balance of power between state and federal courts may serve a strain of popular constitutionalism—which characterizes “the people,” rather than the courts, as the Constitution's only legitimate interpreters—by expressing “the people's” constitutional preferences through the jurisdictional choices made by their elected representatives. On the other hand, this technique exposes difficulties in the actual practice, if not the theory, of popular constitutionalism and its consequences for the administration of justice.

These initiatives expose Congress's mounting yet intermittent willingness to invoke popular constitutionalism to permit the legislature to redistribute jurisdiction to curb a federal or state judiciary that has produced decisions inconsistent with the preferences of a congressional majority. While these efforts help clarify the theory's costs and benefits for contemporary America, opportunistic congressional appeals to popular constitutionalism invite skepticism about the prospects for its principled application.

Part I of this Article offers some background on the history and constitutionality of congressional efforts to reallocate judicial power between federal and state judiciaries. Part II then outlines recently revived academic interest in popular constitutionalism as a challenge to judicial review.

After this foundation, Part III discusses the House debate and passage of the Marriage Protection and Pledge Protection Acts, focusing on lawmakers' rationales for withdrawing federal jurisdiction over constitutional challenges to the Defense of Marriage Act and the Pledge of Allegiance. It suggests that these proposals offer a contemporary case study of popular constitutionalism as an antidote to judicial review's countermajoritarian implications. Part III further finds that these efforts answer at least some of popular constitutionalism's critics by supplementing what has been largely a descriptive account of the theory's past practice with a concrete modern-day application.

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this matter shows that Republicans favor federal court jurisdiction when state courts and juries issue rulings that conservatives do not like. These areas generally include crime, torts, and presidential elections in which the Democratic candidate has won.”).

Moreover, by retaining a role for at least some court system in achieving finality and settlement when resolving important disputes, these initiatives may offer an especially attractive option for those suspicious of judges, yet reluctant to abandon judicial review altogether. On the other hand, these efforts expose the weaknesses of popular constitutionalism put into practice, such as the difficulty ascertaining with confidence “the people’s” constitutional preferences, the danger that Congress may be seeking to transfer power from the courts not to the people, but to itself, and the potential that “the people’s” Constitution will be interpreted to mean very different things in different parts of the country.

Part IV then compares the debates surrounding legislation that facilitated Congress’s preference for a federal, rather than state, forum for certain matters. It first examines the Schiavo Act’s shift of a high-profile family dispute from state to federal court, and then examines extension of this technique to non-constitutional cases, like the multistate class actions addressed by CAFA. This Part observes popular constitutionalism’s limited ability to explain congressional support for either proposal, noting that advocates of jurisdictional change rely only sporadically on certain values – such as federal courts’ judicial independence and greater ability to ensure uniform interpretations—when debating the division of power between state and federal courts. It concludes that Congress’s growing interest in jurisdictional realignment may be fueled more by a simple interest in changing the identity of litigation’s winners and losers than by a thoughtful reevaluation of the courts’ appropriate spheres of influence.

#### I. CONGRESSIONAL EFFORTS TO SHAPE JUDICIAL POWER

Congress has long sought to check the federal judiciary by threatening to strip it of the authority to hear certain cases.<sup>15</sup> As far

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15. Although Congress may shape courts’ jurisdiction in a number of ways, I focus here on its decisions to shift the power to hear certain disputes from the federal to state courts or vice versa. Note, of course, that Congress can act to constrain federal jurisdiction apart from leaving certain federal questions entirely to state courts. *See, e.g.*, *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2765 (2006) (finding no need to address whether the Detainee Treatment Act of 2005 unconstitutionally impinged on the Supreme Court’s appellate jurisdiction or unconstitutionally superseded the writ of habeas corpus when it vested the District of Columbia Circuit with exclusive jurisdiction over certain claims). In this Part, I use the term “court-stripping” or “jurisdiction-stripping” to refer to congressional efforts to eliminate federal jurisdiction over certain federal constitutional claims. Note, however, that commentators sometimes use these terms more broadly to include legislation that constrains federal courts in any way. John Boston, *The Prison Litigation Reform Act: The New Face of Court*

back as the 1820s, for example, members of Congress tried to abolish the Supreme Court's jurisdiction to review state court judgments addressing the constitutionality of state laws.<sup>16</sup> And in the aftermath of the Civil War, Congress attempted to thwart the Court's ability to review certain Reconstruction-era actions<sup>17</sup> by, among other efforts, repealing a statute that had authorized the Court to hear appeals from unsuccessful habeas corpus petitioners.<sup>18</sup>

Congressional interest in shifting decisionmaking over certain constitutional claims from federal to state courts deepened in the latter half of the twentieth century. Segregationists, enraged by the

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*Stripping*, 67 BROOK. L. REV. 429 (2001) (describing legislation that limits federal judges' ability to assess certain non-constitutional claims as "court-stripping"); David Cole, *Jurisdiction and Liberty: Habeas Corpus and Due Process as Limits on Congress's Control of Federal Jurisdiction*, 86 GEO. L.J. 2481, 2482 (1998) (same); Leti Volpp, *Court-Stripping and Class-Wide Relief: A Response to Judicial Review in Immigration Cases After AADC*, 14 GEO. IMMIGR. L.J. 463, 466 (2000) (same).

16. See, e.g., LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 152 (2004) (describing a range of unsuccessful congressional court-stripping efforts between 1810 and 1835); Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 896-97 (1984) (describing early nineteenth century efforts to repeal section 25 of the Judiciary Act of 1789, which authorized the Supreme Court to review certain state court judgments). For further discussion of Congress's long history of attempted court-stripping, see Maurice S. Culp, *A Survey of the Proposals to Limit or Deny the Power of Judicial Review by the Supreme Court of the United States*, 4 IND. L.J. 386 (1929); Stuart S. Nagel, *Court-Curbing Periods in American History*, 18 VAND. L. REV. 925 (1965).

17. 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, 364 (2005) ("For example, in the midst of the chaotic post-Civil War period, on a number of occasions the Radical Republican Congress sought—with varying degrees of success—to insulate significant portions of its oppressive program of Reconstruction from Supreme Court review.").

18. See *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1869). In *McCardle*, the Court upheld Congress's jurisdictional repeal. *Id.* at 514. This decision is sometimes characterized as affirming Congress's constitutional power to divest the Supreme Court of appellate jurisdiction over certain controversial matters under Article III's Exceptions Clause. On the other hand, the Court specifically noted that it still retained jurisdiction over habeas cases pursuant to another statute, and later observed potential constitutional problems if Congress were entirely to deprive the Court of jurisdiction in habeas cases. *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 105 (1869). Although the breadth of that Reconstruction-era limitation thus remains unclear, it nevertheless illustrates Congress's longstanding interest in curtailing federal judicial review of contentious constitutional disputes.

Supreme Court's decision in *Brown v. Board of Education*,<sup>19</sup> sought, but failed, to strip the federal courts of the authority to handle school desegregation matters.<sup>20</sup> Later allying themselves with those infuriated by the Court's decisions striking down various government actions designed to control "subversive" activities,<sup>21</sup> those segregationists then tried to eliminate federal jurisdiction over a range of national security issues, again without success.<sup>22</sup> Just a few years later, in response to the Court's 1964 decision in *Reynolds v. Sims*,<sup>23</sup> the House passed a proposal to remove federal jurisdiction over legal efforts to reapportion state legislatures, only to see the bill die in the Senate.<sup>24</sup>

The late 1970s and early 1980s witnessed a rash of bills seeking to move a host of hot-button constitutional issues—including school busing, abortion, and women's participation in the military—from federal to state courts.<sup>25</sup> Only one—a proposal to strip the federal courts of jurisdiction over cases relating to voluntary prayer in public schools—gained any real traction, passing in the Senate, but

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19. 347 U.S. 483, 495 (1954) (holding that segregated public schools violate the Equal Protection Clause).

20. See, e.g., H.R. 1228, 85th Cong. (1957); J. Patrick White, *The Warren Court Under Attack: The Role of the Judiciary in a Democratic Society*, 29 MD. L. REV. 181, 187-88 (1959) (describing southern efforts to "humble the Supreme Court" by introducing proposals that would have stripped the federal courts of jurisdiction over integration, only to have those proposals "referred to Congressional committees and promptly forgotten except by their sponsors").

21. See PRITCHETT, *supra* note 1, at vii, 31 (describing the Senate's proposal to withdraw five areas of controversy from the Supreme Court's jurisdiction—hereinafter referred to as the "Jenner-Butler" bill—as motivated by opposition to *Brown* as well as to the Court's national security decisions); see also White, *supra* note 20, at 189 ("Southern Congressmen, having failed in their initial effort to mobilize anti-court sentiment with desegregation as the issue, were quick to perceive that their purpose of discrediting the Court would be served whether the issue was undue concern for civil liberties or softness to communism or states' rights. They simply shifted their ground and joined with fresh vigor in the new attack on the Court.").

22. See PRITCHETT, *supra* note 1, at 37-40 (describing how these bills were reported to the full Senate, vigorously debated, and subjected to procedural maneuvering, but ultimately never brought to a final vote); Max Baucus & Kenneth R. Kay, *The Court Stripping Bills: Their Impact on the Constitution, the Courts, and Congress*, 27 VILL. L. REV. 988, 991 (1982) (same).

23. 377 U.S. 533 (1964) (requiring state legislatures to comply with "one person, one vote" reapportionment).

24. See Irving Brant, *Appellate Jurisdiction: Congressional Assertion of the Exceptions Clause*, 53 OR. L. REV. 3, 26 (1973) (describing House passage of the "Tuck bill," only to have the Senate allow it to die without action).

25. Baucus & Kay, *supra* note 22, at 992 & n.18 (noting that more than thirty bills had been introduced in the 97th Congress to remove federal jurisdiction "in one realm or another").

dying in the House without a vote.<sup>26</sup> In sum, although congressional efforts to shift certain controversial constitutional issues exclusively to state courts date back hundreds of years and gathered increased momentum late in the twentieth century,<sup>27</sup> very rarely has any court-stripping bill been passed by either House, and none has ever been enacted into law.<sup>28</sup>

These measures' constitutionality remains a matter of vigorous debate. Article III's exceptions clause describes Congress's power to limit the Supreme Court's appellate authority:

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, *with such Exceptions, and under such Regulations as the Congress shall make.*<sup>29</sup>

Section 1 of Article III addresses the lower federal courts, providing that "[t]he judicial Power of the United States, shall be vested in one supreme Court, *and in such inferior Courts as the Congress may, from time to time, ordain and establish.*"<sup>30</sup> The framers' use of the term "may" to describe Congress's discretion to

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26. *Id.* at 991. After Senate passage, the House held a series of hearings on the matter, but never brought it to a vote. *See generally Prayer in Public Schools and Buildings—Federal Court Jurisdiction: Hearings on S. 450 Before the H. Comm. on the Judiciary, Subcomm. on Courts, Civil Liberties, and the Admin. of Justice*, 96th Cong. (1980).

27. *See* William G. Ross, *The Resilience of Marbury v. Madison: Why Judicial Review Has Survived So Many Attacks*, 38 WAKE FOREST L. REV. 733, 743 (2003) ("Since 1937, limitation of jurisdiction over specific issues has been the most favored method of court-curbing among critics of the Court.").

28. ELIZABETH B. BAZAN ET AL., CONG. RES. SERV., CONGRESSIONAL AUTHORITY OVER THE FEDERAL COURTS 14, 18 (2005) ("There are few examples of Congress attempting to use its power over federal court jurisdiction to limit judicial review of substantive constitutional law, and no examples of Congress successfully precluding federal courts from an entire area of constitutional concern. . . . Elimination by Congress of all federal question review over a particular constitutional question by the Supreme Court appears to be unprecedented."); Michael J. Gerhardt, *The Constitutional Limits to Court-Stripping*, 9 LEWIS & CLARK L. REV. 347, 359 (2005) ("[T]he authors of a leading casebook on federal jurisdiction have observed, '[a]t least since the 1930s, no bill that has been interpreted to withdraw all federal court jurisdiction with respect to a particular substantive area has become law.'" (quoting RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 322 (5th ed. 2003))).

29. U.S. CONST. art. III, § 2 (emphasis added).

30. U.S. CONST. art. III, § 1 (emphasis added).



establish lower federal courts has been widely understood to include the lesser power to divest those courts of some or all of the jurisdiction authorized by Article III.<sup>31</sup>

A number of scholars argue that Congress's Article III power to curtail federal jurisdiction is thus extremely broad, limited only by separation of powers, due process, and equal protection principles.<sup>32</sup> Others contend that additional constraints further restrict congressional control over federal courts' jurisdiction. Some maintain, for example, that Congress may not target certain constitutional rights for encumbrance by foreclosing their adjudication in federal court,<sup>33</sup> while others contend that Congress may not exclude constitutional claims from both the lower courts and the Supreme Court's appellate review.<sup>34</sup> Commentators thus

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31. See, e.g., *Lauf v. E.G. Shinner & Co.*, 303 U.S. 323, 329-31 (1938) (suggesting that Congress may deprive federal courts of jurisdiction over constitutional claims). But see *Johnson v. Robinson*, 415 U.S. 361, 366-67 (1974) (suggesting that depriving the lower federal courts of jurisdiction to review constitutional challenges to veterans' benefits legislation would "raise serious questions"); *Armstrong v. United States*, 80 U.S. (13 Wall.) 154, 155-56 (1872) (striking down statute eliminating lower federal court jurisdiction over claims of pardoned Confederate sympathizers).

32. See, e.g., Paul M. Bator, *Congressional Power over the Jurisdiction of the Federal Courts*, 27 VILL. L. REV. 1030, 1031-33 (1982) (concluding that Article III confers Congress with plenary power to constrain federal courts' jurisdiction); Redish, *supra* note 17, at 363-65 (concluding that Congress may not constitutionally use its exceptions power to violate separation of powers limits by resolving substantive constitutional questions, nor may it violate equal protection by directly discriminating against minorities in accessing federal courts, nor may it violate due process by cutting off all access to independent judicial forums for adjudicating constitutional rights).

33. See, e.g., Lea Brilmayer & Stefan Underhill, *Congressional Obligation to Provide a Forum for Constitutional Claims: Discriminatory Jurisdictional Rules and the Conflict of Laws*, 69 VA. L. REV. 819, 822 (1983) (arguing that Congress "cannot discriminate against constitutional claims in drafting jurisdictional bills"); Laurence H. Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts*, 16 HARV. C.R.-C.L. L. REV. 129 (1981) (same); see also Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1365 (1953) (maintaining that congressional court-stripping is unconstitutional when it "destroy[s] the essential role of the Supreme Court in the constitutional system").

34. Akhil R. Amar, *A Non-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 238-59 (1985); see also Leonard Ratner, *Congressional Power over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157, 166-67 (1960) (maintaining that the Constitution requires that the Supreme Court have authority to review lower and state court judgments on constitutional matters to ensure the uniformity and supremacy of the U.S. Constitution and federal law).

sharply differ as to the constitutionality of these particular court-stripping bills.<sup>35</sup> The Supreme Court has yet to provide any definitive guidance on this controversy, largely because Congress has never enacted the sort of court-stripping legislation that would trigger such a constitutional confrontation.<sup>36</sup>

Congress can shape federal subject matter jurisdiction not only by restricting federal courts' authority, but also by increasing it. Article III defines the outer limits of federal judicial authority, with Congress constitutionally free to confer all, part, or none of that authority to the federal courts.<sup>37</sup> One especially prominent exercise of this expansive authority took place in 1875, when Congress conferred the federal courts with subject matter jurisdiction over all types of federal questions.<sup>38</sup> Another occurred in 1980, when Congress enabled federal courts to entertain federal questions

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35. Compare, e.g., Gerhardt, *supra* note 28, at 348-49 (concluding that the Marriage Protection Act violates separation of powers, due process, and equal protection principles) with Redish, *supra* note 17, at 379-80 (concluding that the Marriage Protection Act is constitutional but unwise). See also Gunther, *supra* note 16, at 921 (finding relatively broad constitutional authorization for congressional court-stripping, but concluding that such bills are unwise even if constitutional).

36. See, e.g., *Prayer in Public Schools and Buildings—Federal Court Jurisdiction: Hearings on S. 450 Before the H. Comm. on the Judiciary, Subcomm. on Courts, Civil Liberties, and the Admin. of Justice*, 96th Cong. 364 (1980) (statement of Professor Lawrence Sager) (“[P]rudence, restraint, and mutual respect have been characteristic of the relationships between the legislative and judicial branches of the federal government. For the legislature’s part, this has meant respect for the independence of the federal courts, bought at the price of resisting what at times have been powerful temptations to invade that independence.”); *Proceedings of the Forty-Third Annual Judicial Conference of the District of Columbia Circuit*, 96 F.R.D. 245, 276 (1982) (remarks of Professor William Van Alstyne) (noting that Congress has historically “forborne” from enacting such statutes to avoid triggering a constitutional confrontation).

37. U.S. CONST. art. III, § 2. This power extends to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; to all Cases affecting Ambassadors, other public Ministers and Consuls; to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party; to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States; between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

*Id.*

38. Judiciary Act of 1875, ch. 137, 18 Stat. 470.

regardless of the amount in controversy.<sup>39</sup> The Schiavo Act and CAFA provide especially recent illustrations of congressional enlargement of federal subject matter jurisdiction.

These expansive efforts generate constitutional controversy, too. The Schiavo Act's conferral of jurisdiction to federal courts to decide specific claims without regard to prior state court determinations, for example, triggered charges that it violated constitutional separation of powers, equal protection, and bill of attainder provisions.<sup>40</sup> That Act's validity remains unresolved as the federal courts assumed, without deciding, its constitutionality when ruling against the Schindlers on the merits.<sup>41</sup> And although CAFA's constitutionality received considerably less attention, some critics suggested that CAFA substitutes federal for state law preferences in violation of the federalism principles embodied in the Constitution.<sup>42</sup>

Although the validity of these various jurisdiction-shaping efforts remains unclear,<sup>43</sup> my analysis for the purposes of this Article

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39. Federal Questions Jurisdictional Amendments Act of 1980, Pub. L. No. 96-486, § 2, 94 Stat. 2369 (codified at 28 U.S.C. § 1331 (2000)).

40. See, e.g., BAZAN ET AL., *supra* note 28, at 29 ("An argument could be made that congressional legislation that applies to a specific court case may be construed as imposing additional burdens on the litigants involved," thus raising equal protection, due process, and bill of attainder concerns); Ross K. Baker, *Congress's Actions Not Sustained by Constitution*, NEWSDAY, Mar. 22, 2005, at A35 (suggesting that the Schiavo Act was unconstitutional on privacy and bill of attainder grounds); Bruce Fein, *Ploy Chorus . . . Law Libretto*, WASH. TIMES, Mar. 29, 2005, at A14 (arguing that the Schiavo Act "flagrantly trespassed on the judicial domain and usurped state powers. . . . Congress was unable to summon a single syllable in the constitution to authorize its action. Further, the Founding Fathers would have been outraged by the statute's violence to the separation of powers"). But see Allen, *supra* note 8, at 316 (concluding that the Schiavo Act is constitutional, albeit unwise).

41. *Schiavo ex rel. Schindler v. Schiavo*, 357 F. Supp. 2d 1378, 1382-83 (M.D. Fla. 2005) (noting that "there may be substantial issues concerning the constitutionality of the Act," but presuming the Act's constitutionality for purposes of ruling on the motion for a temporary restraining order), *aff'd* 403 F.3d 1223, 1226-28 (11th Cir. 2005) (upholding the district court's denial of the motion, and thus finding no need to decide the legislation's constitutionality), *petition for expedited reh'g en banc denied*, 404 F.3d 1270, 1271-72 (11th Cir. 2005) (Birch, J., concurring) (noting that he would have found that the Act was unconstitutional as violating separation of powers principles).

42. See, e.g., GEORGENE M. VAIRO, CLASS ACTION FAIRNESS ACT OF 2005, at 13 (2005) ("Now, however, with the renewed emphasis on state sovereignty, the dignity of the states, and their role as co-partners in governing the people, it is not frivolous to argue that legislation based on the findings articulated in CAFA is constitutionally flawed. Indeed, a target of CAFA is the state as personified by its judiciary.") (footnote omitted).

43. See, e.g., BAZAN ET AL., *supra* note 28, at 21-22 ("In sum, there is no direct court precedent on the issue of whether Congress can eliminate all

assumes that these measures would pass constitutional muster. I focus instead on the light these proposals shed on changing congressional views on the proper allocation of federal and state judicial power, and their implications for judicial review.

## II. POPULAR CONSTITUTIONALISM AND ITS CHALLENGE TO JUDICIAL POWER

Some background on popular constitutionalism as a critique of judicial review may help illuminate Congress's renewed interest (and increased success) in shaping federal jurisdiction as a technique for curbing the judiciary's power. To be sure, judicial review—the notion that the judiciary has final and binding authority to interpret the Constitution—has faced attack without cease since its embrace by the Supreme Court in *Marbury v. Madison*.<sup>44</sup> While supporters of judicial review emphasize federal judges' life tenure (and thus their independence) as an irreplaceable safeguard of individual rights from the tyranny of the majority,<sup>45</sup> its critics have long targeted its countermajoritarian implications,<sup>46</sup> characterizing "judicial supremacy over constitutional meaning as threatening the very essence of democracy itself—popular rule."<sup>47</sup> Attacks on judicial review have sprung sometimes from the left and sometimes from the right, depending on the Court's decisional trends.<sup>48</sup>

Most recently, a number of progressive scholars have joined the

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federal court jurisdiction over a constitutional issue, and little or no consensus among scholars."); Gordon G. Young, *A Critical Reassessment of the Case Law Bearing on Congress's Power to Restrict the Jurisdiction of the Lower Federal Courts*, 54 MD. L. REV. 132, 139 (1995) (describing the lack of clarity in the Court's case law on this topic).

44. 5 U.S. (1 Cranch) 137 (1803).

45. Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257, 309 (2005) ("Particularly prominent during the last century has been the belief that judges enforcing the Constitution will protect minority rights and enforce constitutional safeguards."); Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1130-31 (1977) (concluding that federal courts are better qualified to adjudicate constitutional and civil rights claims).

46. See, e.g., ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 16-23 (Yale Univ. Press 1986) (1962); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 4-9 (1980).

47. Friedman, *supra* note 45, at 309, 321 (2005) (describing critical views of judicial review).

48. See Erwin Chemerinsky, *In Defense of Judicial Review: The Perils of Popular Constitutionalism*, 2004 U. ILL. L. REV. 673, 673-74 (describing progressive criticism of judicial review in the *Lochner* era, followed by conservative challenges to judicial review as practiced by the Warren Court).

critics' ranks.<sup>49</sup> According to these advocates, judicial review's insulation from democratic processes invites "judicial overreaching and citizen passivity, which together threaten important features of our constitutional culture."<sup>50</sup> They decry the ascendancy of judicial review as enervating the public's political engagement, and contrast this contemporary trend with Americans' historic commitment to enforcing the Constitution themselves. As examples, they offer past instances of jury nullification, civil disobedience, and mob rule resisting various government actors' unacceptable constitutional interpretations;<sup>51</sup> departmentalism, whereby each branch of government assumed responsibility for interpreting the Constitution itself rather than deferring to the Court;<sup>52</sup> the growth of political parties organized around competing constitutional understandings;<sup>53</sup> and social protest movements.<sup>54</sup>

Not only do judicial review's contemporary critics assail its antidemocratic implications and its inconsistency with their understanding of longstanding American practice, they also attack the fundamental premise that an independent judiciary better protects rights than democratically elected bodies.<sup>55</sup> They charge that federal courts have instead too often remained indifferent, if not hostile, to the defense of constitutional rights and liberties:

A judicial monopoly on constitutional interpretation is now depicted as inexorable and inevitable, as something that was meant to be and that saved us from ourselves. The historical voice of judicial authority is privileged while opposition to the Court's self-aggrandizing tendencies is ignored, muted, or discredited.

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We see it in chronicles that portray the Court as a major force advancing American liberty—as if most gains were not in fact made in spite of rather than because of the Justices. *Marbury* and *Brown* loom large in these histories. The

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49. *Id.* at 675 ("In the last several years, the trendiest development in constitutional scholarship has prominent progressive scholars arguing against judicial review.").

50. Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CAL. L. REV. 1027, 1029 (2004).

51. KRAMER, *supra* note 16, at 3-5.

52. *Id.* at 209-13.

53. *Id.* at 189-203.

54. *Id.* at 221.

55. See Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1406 (2006).

judicially inspired prosecutions for sedition, *Dred Scott*, the dismantling of Reconstruction, the fifty years of opposition to social welfare legislation, *Korematsu*, complicity in the Red scares, and the current hobbling of federal power to remedy discrimination all somehow shrink into insignificance.<sup>56</sup>

These contemporary skeptics thus urge a return to “popular constitutionalism,” whereby “[f]inal interpretive authority rest[s] with ‘the people themselves.’”<sup>57</sup> Popular constitutionalism, in the words of Mark Tushnet, instead relies “on the idea that we all ought to participate in creating constitutional law through our actions in politics.”<sup>58</sup> Kramer, Tushnet, Jeremy Waldron, and others often characterize the choice between judicial review and popular constitutionalism as one between aristocracy and democracy. Kramer, for example, views judicial review’s defenders as “today’s aristocrats”: “[T]hey approach the problem of democratic governance from a position of deep ambivalence: committed to the idea of popular rule, yet pessimistic and fearful about what it might produce and so anxious to hedge their bets by building in extra safeguards.”<sup>59</sup> In contrast, popular constitutionalists “have greater faith in the capability of their fellow citizens to govern responsibly. They see risks, but are not persuaded that the risks justify circumscribing popular control by overtly undemocratic means.”<sup>60</sup>

Popular constitutionalism’s advocates thus mourn what they see as the “all-but-complete disappearance of public challenges to the Justices’ supremacy over constitutional law.”<sup>61</sup> Many close their analyses with a challenge to the American public, as exemplified by Tushnet: “As Lincoln said, the Constitution belongs to the people. Perhaps it is time for us to reclaim it from the courts.”<sup>62</sup> Kramer

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56. KRAMER, *supra* note 16, at 229; *see also* MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 172 (1999) (arguing that judicial review now largely thwarts progressive causes). *But see* William E. Forbath, *Popular Constitutionalism in the Twentieth Century*, 81 CHI-KENT L. REV. 101, 105-08 (2006) (noting popular constitutionalism’s “dark side” in advocating states’ rights to thwart legislative and judicial efforts to address race discrimination).

57. KRAMER, *supra* note 16, at 8. Some have chided popular constitutionalism’s advocates for failing to define the term with specificity. *See, e.g.*, Chemerinsky, *supra* note 48, at 675-76 (“Although the phrase ‘popular constitutionalism’ increasingly appears in constitutional scholarship, there is no precise definition of the concept. . . . A major frustration in discussing the body of scholarship arguing for popular constitutionalism is its failure to define the concept with any precision.”) (footnote omitted).

58. TUSHNET, *supra* note 56, at 157.

59. KRAMER, *supra* note 16, at 247.

60. *Id.*

61. *Id.* at 228.

62. TUSHNET, *supra* note 56, at 194.

similarly urges Americans to rescue their Constitution: “That means publicly repudiating Justices who say that they, not we, possess ultimate authority to say what the Constitution means. It means publicly reprimanding politicians who insist that ‘as Americans’ we should submissively yield to whatever the Supreme Court decides.”<sup>63</sup>

Advocates of popular constitutionalism paint an attractive picture of the theory’s objectives of enhancing democratic legitimacy and our collective “capacity for ongoing self-definition.”<sup>64</sup> But how, precisely, would this work in practice? Through what institutional mechanism should “the people” interpret and enforce the Constitution? These are not easy questions. And, as a number of critics have noted, popular constitutionalists offer little in the way of specific answers.<sup>65</sup> As David Franklin points out, earlier expressions of popular constitutionalism—like mobbing and jury nullification—

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63. KRAMER, *supra* note 16, at 247-48.

64. Domi Gewirtzman, *Glory Days: Popular Constitutionalism, Nostalgia, and the True Nature of Constitutional Culture*, 93 GEO. L.J. 897, 908 (2005).

65. See, e.g., Larry Alexander & Lawrence B. Solum, *Popular? Constitutionalism?*, 118 HARV. L. REV. 1594, 1617-18, 1635-36 (2005) (criticizing Kramer’s articulation of popular constitutionalism as failing to identify exactly how “the people” should act in practice to assert their power to interpret the Constitution); Chemerinsky, *supra* note 48, at 678 (“[O]ne can criticize popular constitutionalists for their ambiguity and for failing to spell out their visions of the judicial role . . . .”); David L. Franklin, *Popular Constitutionalism as Presidential Constitutionalism?*, 81 CHI.-KENT L. REV. 1069, 1069 (2006) (“[T]hose who march under the loose banner of popular constitutionalism have said very little about the particular institutional mechanisms that would make their vision a reality in today’s world.”); Gewirtzman, *supra* note 64, at 910 (“[P]opular constitutionalists are—almost to a person—completely silent about what their theories demand from individual citizens in order to operate effectively.”). Some commentators suggest that popular constitutionalists may want nothing more than greater political involvement, and are simply challenging us to find a contemporary way to do so. See, e.g., Franklin, *supra*, at 1071 (suggesting that Kramer’s popular constitutionalism may “entail[] primarily a change in attitude. . . . On this model, popular constitutionalism is not a specific program or institutional arrangement. It is, rather, a tonic: a much-needed reminder for people to quit acting as if the Court had a monopoly on constitutional meaning.”); Daniel J. Hulsebosch, *Bringing the People Back In*, 80 N.Y.U. L. REV. 653, 658 (2005) (“The reliance on courts to improve society . . . has enervated politics. . . . As the legalist approach to the Constitution has gained prominence, American political culture has atrophied.”); Post & Siegel, *supra* note 50, at 1043 (“We may thus interpret Kramer’s call for popular constitutionalism as sounding in the register of political virtue, rather than of legal rights. Kramer’s fundamental indictment is that as federal courts have expanded and bureaucratized, and as the articulation of constitutional law has become pervasive and routinized, the participation of the American people in the formation of the Constitution has become correspondingly enervated and attenuated.”).

“no longer have the central role they once had. . . . [T]he role once played directly by the people is now played by elected representatives, national political parties, interest groups, and the media. In short, the people ain’t what they used to be.”<sup>66</sup> More specifically, Franklin wonders, “Whom do we trust to speak for the people in constitutional matters?”<sup>67</sup>

A growing number in Congress appear increasingly poised to accept popular constitutionalism’s challenge to Americans that they reclaim the Constitution from the courts.<sup>68</sup> These legislators propose a specific technique for achieving the movement’s goals today: shifting jurisdiction to the judiciary, state or federal, more likely to replicate the constitutional preferences of a congressional majority as a proxy for “the people’s” own preferences. This Article next examines proposals to shift jurisdiction from one judiciary to another as a contemporary case study of popular constitutionalism.

### III. RECENT CONGRESSIONAL INITIATIVES TO SHIFT POWER FROM FEDERAL TO STATE COURTS

This Part first describes the House of Representatives’ reliance on popular constitutionalism to support passage of the Marriage Protection and Pledge Protection Acts, and then considers the theory’s strengths and weaknesses as exposed by this particular application.

#### A. *The House of Representatives’ Reliance on Popular Constitutionalism to Support Shifting Jurisdiction Over Certain Constitutional Claims from Federal to State Courts*

Congressional court-stripping proponents are animated by what they see as federal courts’ disregard for “the people’s” understanding of fundamental constitutional and/or moral principles. Representative Spencer Bacchus summarized these concerns when explaining his support for the Marriage Protection Act:

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66. Franklin, *supra* note 65, at 1075; *see also* Gewirtzman, *supra* note 64, at 900 (“The problem begins with ‘the People,’ a term popular constitutionalists invoke with some regularity but are reluctant to define. . . . At different times, ‘the People’ inhabit the shoes of, among other entities, the electorate, prominent interest groups, identity-based social movements, the United States Congress, the President, political parties, state government institutions, or impact-litigation plaintiffs.”) (footnotes omitted).

67. Franklin, *supra* note 65, at 1076.

68. *See* Chemerinsky, *supra* note 48, at 689 (“Popular constitutionalism is an attractive theory for progressives because it emphasizes populism and trust in the people, while turning against the courts at a time when the federal judiciary is increasingly dominated by conservative Republicans. Ironically, it has the left and the right coming together in their criticism of the courts.”).



The circumstances that we find ourselves in are occasioned by an increasingly intrusive and tyrannical judiciary, who through recent court decisions are redefining for all Americans the institution of marriage. These decisions demonstrate a judiciary out of touch with the intent of the Framers as well as the moral norms of society.<sup>69</sup>

Representative Hostettler similarly outlined his understanding of Congress's role in protecting the Constitution from an independent federal judiciary when explaining his sponsorship of the Pledge Protection Act:

[T]he notion of an independent judiciary fails the Constitution test. The simple fact is, the framers of the Constitution did not want an unelected, unaccountable, life-tenured body, namely, the judiciary, to be able to, by writ large, enact policy across the country when the people themselves would not have an obligation or an ability to reverse it. But they gave that authority in the Constitution to "the people's" representatives in the Congress.<sup>70</sup>

Members of Congress who believe that federal courts are frustrating "the people's" constitutional preferences then face the question of what to do about it. Popular constitutionalist responses might include amending Article III to abolish federal judges' life tenure or even eliminating federal courts entirely. Indeed, during hearings on the Marriage Protection Act in the 108th Congress, Representative Hostettler suggested the possibility of eradicating the federal judicial branch altogether:

Today we will hear a wide range of means by which we can deal with the situation of a judiciary that has time and time again worked outside of its boundaries, and that response can be everything from doing nothing to an amendment to the Constitution. And that amendment to the Constitution can be, in the most extreme case, repeal of article [sic] III of the Constitution itself.<sup>71</sup>

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69. *Hearings*, *supra* note 14, at 136.

70. 150 CONG. REC. H7473 (daily ed. Sept. 23, 2004); *see also* Hon. John Hostettler, Remarks to the Conservative Political Action Conference (Jan. 22, 2004), <http://www.house.gov/hostettler/Issues/Hostettler-issues-2004-01-22-CPAC-Remarks.htm> ("Not only did the Framers of the Constitution not appoint Judges God, they barely made the Judiciary relevant.").

71. *Hearings*, *supra* note 14, at 6; *see also id.* at 136 ("Whenever jurisdiction limitation is discussed, the argument that the judiciary is the final arbiter of the Constitution is sure to arise. It is time for this Congress to ask

But although a few in Congress challenged the federal judiciary's existence altogether, more chose to enforce their understanding of "the people's" constitutional preferences, not by amending the Constitution, but by transferring decisionmaking power over certain matters to more majoritarian state courts.<sup>72</sup> To this end, legislators proposed—and the House agreed—to eliminate federal court jurisdiction over constitutional challenges to the Defense of Marriage Act and the Pledge of Allegiance.<sup>73</sup>

In the 2006 floor debate on the Pledge Protection Act, Representative Akin made clear the House's goal to protect "the people's" Constitution from the federal courts:

Essentially, what our bill does, if you want to put it in a simple word picture, we are creating a fence. The fence goes around the Federal judiciary. We do that because we don't trust them. We don't trust them because of previous decisions and because of the simple fact that there are not five votes on the Supreme Court to protect our beloved Pledge of Allegiance. And 80 percent to 90 percent of Americans would like to leave the Pledge of Allegiance the way it is.<sup>74</sup>

Indeed, Representative King characterized court-stripping as a relatively mild rejoinder to federal courts' perceived abuses:

We could do far more. In fact, I voted to split the ninth circuit [sic] in half. I would vote to abolish them if they continue this kind of behavior, throwing this into the face of the American people. We are not doing that. We are very carefully, very narrowly addressing something that the American people are asking for . . . .<sup>75</sup>

A House majority pounced on renewed attention to popular constitutionalism to support selective shifts of jurisdiction from a federal judiciary perceived insistent on usurping "the people's" power to interpret the Constitution to more politically accountable state courts. Indeed, the September 2004 House Judiciary

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who gave the courts this right. The answer is the Supreme Court itself, in *Marbury v. Madison*. Over the last 200 years, however, the judiciary has continued to seize legislative powers, and the legislature has done little to stop that confiscation.").

72. Amending the Constitution is a hugely daunting task. See U.S. CONST. art. V (providing that any constitutional amendment requires first a two-thirds vote of both Houses of Congress or application by two-thirds of state legislatures, followed by ratification by three-fourths of the states).

73. See *supra* notes 2-5 and accompanying text.

74. 152 CONG. REC. H5415 (daily ed. July 19, 2006).

75. *Id.*

Committee Report for the Pledge Protection Act (which, for the most part, simply tracks that of the Marriage Protection Act produced a few months earlier) included a new section that relied heavily on Kramer's recently published book on popular constitutionalism. This new section, entitled "The Founders Considered the People to Be the Ultimate Interpreters of the Constitution," included the following extensive (but heavily excised) quotation from Kramer's work as legitimizing the Committee majority's intuitions about federal judicial power as a threat to popular constitutional values:

[The Founders'] Constitution remained, fundamentally, an act of popular will: "the people's" charter, made by the people. . . . [I]t was "the people themselves"—working through and responding to their agents in the government—who were responsible for seeing that it was properly interpreted and implemented. The idea of turning this responsibility over to judges was simply unthinkable. . . . This modern understanding [of judicial review] is . . . of surprisingly recent vintage. It reflects neither the original conception of constitutionalism nor its course over most of American history. Both in its origins and for most of our history, American constitutionalism assigned ordinary citizens a central and pivotal role in implementing their Constitution. . . . [I]t was the original understanding that [n]o one of the branches [of government] was meant to be superior to any other, unless it were the legislature, and when it came to constitutional law, all were meant to be subordinate to the people. . . . [I]n a regime of popular constitutionalism it was not the judiciary's responsibility to enforce the Constitution against the legislature. It was "the people's" responsibility: a responsibility they discharged mainly through elections. . . . It was the legislature's delegated responsibility to decide whether a proposed law was constitutionally authorized, subject to oversight by the people.<sup>76</sup>

Similarly, a 2004 Republican Policy Committee<sup>77</sup> memorandum specifically embraced court-stripping as the most manageable, and thus effective, exercise of contemporary popular constitutionalism:

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76. H.R. REP. NO. 108-691 at 25-26 (2004) (quoting KRAMER, *supra* note 16, at 7-8, 58-59) (omissions and bracketed material in House Report).

77. In 2004, House Republicans provided 213 of 247 "yes" votes for the Pledge Protection Act and 206 of 233 "yes" votes for the Marriage Protection Act. *See* 150 CONG. REC. H7478 (daily ed. Sept. 23, 2004); 150 CONG. REC. H6612 (daily ed. July 22, 2004).

The American people are not obligated to passively accept judicial decisions that are contrary to their longstanding expectations of constitutional freedom. The Constitution belongs to the people, not to the judiciary, but the people will not have any control over their Constitution if they do not exercise the checks available to them.

The best check available to the people is for their representatives to eliminate the jurisdiction of the federal courts over particular issues. The alternatives are too cumbersome for all but the most fundamental matters. For example, it is very difficult to remove judges from office, and the constitutional amendment process is inadequate to address all ill-advised judicial pronouncements. And the President has no power to check the courts beyond the initial appointment power. That leaves the legislative power to strip the courts of jurisdiction—a power that is constitutional, proper, and will enable the people to reassert their authority over the Constitution’s meaning.<sup>78</sup>

*B. Jurisdiction-Stripping’s Strengths as an Exercise in Popular Constitutionalism*

The Marriage Protection and Pledge Protection Acts thus sought to ensure that state court judges—who often are not life-tenured and instead are subject to some sort of electoral approval<sup>79</sup>—hear these claims.<sup>80</sup>

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78. S. REPUBLICAN POL’Y COMM., *THE CASE FOR JURISDICTION-STRIPPING LEGISLATION: RESTORING POPULAR CONTROL OF THE CONSTITUTION* 4 (2004).

79. Erwin Chemerinsky, *Appendix: Historical Background of the Role of the Legislature in Setting the Power and Jurisdiction of the Courts*, in *BALANCING ACT*, *supra* note 1, at 226 (state judges are subject to some form of election in thirty-eight states); BUREAU OF JUSTICE STATISTICS, U.S. DEPT OF JUSTICE, *STATE COURT ORGANIZATION* 1998, at 19 (1998) (tabulating that approximately eighty-three percent of all state judges are subject to some sort of election).

80. *See, e.g., Hearings, supra* note 14, at 8 (“The very idea that unelected, unaccountable judges could nullify both other branches of Government and the will of the American people is an offense against our right of self-government and must not be tolerated.”) (testimony of Phyllis Schlafly); *see also* Phyllis Schlafly, *We Must Reject the Rule of Judges*, *THE PHYLLIS SCHLAFLY REP.*, Mar. 2004 (“We don’t trust the federal courts or the Supreme Court to decide the cases about the Pledge of Allegiance, the Ten Commandments, and Marriage. Congress should take away all power from the federal courts to impose the rule of judges over our rights of self-government. Amending the federal [Defense of Marriage Act] by the Hostettler bill will not prevent state courts or state legislatures from legalizing same-sex marriage. However, state legislatures are usually far more responsive to their constituents than Congress, and many states are now aggressively moving to protect themselves against judicial supremacy. . . . State legislatures will also be far more willing and eager to

Indeed, the 2004 House Judiciary Committee Report on the Marriage Protection Act emphasized members' preference for state, rather than independent federal, arbiters of these matters: "[T]he Marriage Protection Act would prevent unelected, lifetime-appointed Federal judges from striking down the protection for states Congress passed in the Defense of Marriage Act[,] but it "does not attempt to dictate results: it only places the final authority over whether states must accept same-sex marriage licenses granted in other states in the hands of the states themselves."<sup>81</sup> House Judiciary Chairman Sensenbrenner similarly described the Pledge Protection Act's purpose as protecting the Pledge of Allegiance "from Federal court decisions that would have the effect of invalidating the Pledge across several States, or nationwide," while "preserv[ing] to State courts the authority to decide whether the Pledge is valid within that State's boundaries."<sup>82</sup>

Shifting jurisdiction in this direction helps achieve popular constitutionalism's objective of reasserting democratic control over the Constitution's meaning, as most state court judges are subject to some sort of election, thus requiring the public's approval to get or keep their jobs.<sup>83</sup> Moreover, because state judicial districts tend to be smaller than their federal counterparts, state court judges may feel closer ties to the surrounding community, "thereby enjoying a greater aura of democratic accountability."<sup>84</sup> For these reasons, "[a] state court's decision, which binds only the people of that state, enjoys a greater perception of democratic legitimacy and local responsiveness than that of an unelected Article III 'outsider.'"<sup>85</sup>

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impeach state judges who use judicial supremacy to rewrite state constitutions.").

81. H.R. REP. NO. 108-614, at 2 (2004).

82. 150 CONG. REC. H7451 (daily ed. Sept. 23, 2004).

83. See *supra* note 79 and accompanying text.

84. Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1887 (2001).

85. *Id.* at 1902; see also *Proceedings of the Forty-Third Annual Judicial Conference of the District of Columbia Circuit*, 96 F.R.D. 245, 258 (1982) (remarks of Randall Rader) ("[Congress] may also want state courts, which are closer to some sensitive local issues, to make the first attempt at settling them. Finally, it may see the wisdom of allowing state courts to first test the legitimacy of state policies, thus reducing the animosity which may arise from a federal court reversal of state policy."). Note, however, that some evidence suggests that the people may perceive state courts as less trustworthy precisely because of their political accountability. See DAMON CANN & JEFF YATES, *HOMEGROWN INSTITUTIONAL LEGITIMACY: ASSESSING CITIZENS' DIFFUSE SUPPORT FOR THEIR STATE COURTS* 16 (2006), <http://ssrn.com/abstract=870592> ("Citizens in states using partisan elections to select judges have lower levels of diffuse support than citizens in states that appoint their judges. This supports our

Moreover, even if never enacted into law, the mere threat of jurisdictional change may achieve popular constitutionalism's objectives. Some may hope to change courts' constitutional interpretations not by switching judicial forums but by influencing judges to change their behavior in light of challenges to their authority.<sup>86</sup> Then-House Majority Leader Tom Delay, for example, made this goal clear in explaining his support for the Pledge Protection Act at a time when challenges to the Pledge remained pending in the federal courts: "I think that would be a very good idea to send a message to the judiciary they ought to keep their hands off the Pledge of Allegiance."<sup>87</sup> Under this view, simply proposing jurisdictional change may be a successful popular constitutionalist exercise.

History suggests the success of such a strategy, as policymakers' past threats to the courts have triggered changes in judicial outcomes. Recall, for example, President Franklin D. Roosevelt's 1937 Court-packing plan, intended to change the Court's composition after its series of decisions striking down various New Deal legislation. Although Congress rejected the effort, many credit that proposal with inspiring "the switch in time that saved nine"—i.e., the Court's newfound willingness to uphold the constitutionality of Roosevelt's programs.<sup>88</sup> Similarly, although Congress failed to enact the 1957 Jenner-Butler effort to strip the Court of jurisdiction over certain national security matters,<sup>89</sup> that legislative effort was followed shortly by a series of decisions in which the Court softened some of its earlier opinions on those issues.<sup>90</sup>

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hypothesis that competitive, politicized judicial elections vitiate citizen perceptions of the legitimacy of state courts.").

86. See, e.g., Amar, *supra* note 34, at 1500 ("[I]f the political branches do indeed enjoy virtually plenary jurisdiction-stripping power, as some have claimed, savvy federal judges will keep this power in mind whenever they decide controversial cases."); Tribe, *supra* note 33, at 153 (suggesting that court-stripping bills are intended to intimidate judges into changing their minds).

87. Stephen Dinan, *DeLay Threatens to Curb Courts' Jurisdiction: Vents Ire over Pledge of Allegiance*, WASH. TIMES, Mar. 6, 2003, at A4.

88. PRITCHETT, *supra* note 1, at 13-14 ("So once again, as in 1937, the Supreme Court emerged from a test of strength with its great constitutional powers unimpaired. In 1937 [the Court] had achieved this result by abandoning the line of decisions which had brought it into conflict with the democratic forces of a new world which the justices had not comprehended.").

89. See *supra* notes 21-22 and accompanying text.

90. PRITCHETT, *supra* note 1, at 12-13 (noting that the Supreme Court's later decisions might be seen as its "strategic withdrawal from controversial positions under pressure of Congress and some sectors of public opinion. . . . Whatever the explanation for the 1959 decisions, the Court's change in direction had an immediate effect in reducing congressional enthusiasm for

Moreover, by advocating jurisdictional changes as a remedy for specific examples of what they believe to be judicial abuses, proponents signal not only the sorts of decisions but also the sorts of nominees they will embrace or oppose. To the extent that legislators then influence changes in the judiciary's composition, jurisdictional change becomes less necessary.<sup>91</sup> Focusing attention on judicial power may thus be an effective strategy for changing not only the scope of that power but also the personnel who exercise it.<sup>92</sup> Either way, the goals of popular constitutionalism advance.

Congressional proponents have thus identified a technique that may not only be effective in achieving popular constitutionalism's objectives, but also particularly ingenious in countering its detractors. Recall the significant criticism of the theory as insufficiently specific as to its modern-day applications.<sup>93</sup> In

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Court-curbing legislation").

91. See Ross, *supra* note 27, at 774 (noting no need to strip the Court of jurisdiction to hear certain cases if the Court's composition changes in a way that changes the outcome of those cases). Then-Chief Justice Rehnquist was among those suggesting that changing courts' composition through the appointments process—rather than attacking courts' jurisdiction or seeking impeachment—is the constitutionally appropriate response to unpopular decisions. CHIEF JUSTICE WILLIAM REHNQUIST, 2004 YEAR-END REPORT ON THE FEDERAL JUDICIARY 4 (2005), available at <http://www.supremecourtus.gov/publicinfo/year-end/2004year-endreport.pdf> ("The Constitution protects judicial independence not to benefit judges, but to promote the rule of law: judges are expected to administer the law fairly, without regard to public reaction. . . . [P]ublic reaction to judicial decisions, if it is sustained and widespread, can be a factor in the electoral process and lead to the appointment of judges who might decide cases differently."); *id.* at 7-8 (asserting that the only way to "be certain that the Judicial Branch is subject to the popular will" is "by the gradual process of changing the federal Judiciary through the appointment process. . . . [O]ur Constitution has struck a balance between judicial independence and accountability, giving individual judges secure tenure but making the federal Judiciary subject ultimately to the popular will because judges are appointed and confirmed by elected officials").

92. Congress may also propose court-stripping to placate constituents who demand some action in response to an unpopular decision. As William Ross observed:

[Legislators] may advocate curtailment of judicial review primarily as a means of currying favor with constituents who are piqued by the Court's decisions. Such legislators may have no personal animosity toward the Court and may well recognize that their Court-curbing efforts are futile. Throughout history, even the most adamant congressional proponents of curbing judicial review have contented themselves with dropping a bill into the hopper and making an occasional speech about the Court's iniquities.

Ross, *supra* note 27, at 786.

93. See *supra* note 65 and accompanying text.

response, congressional advocates propose to add real prescriptive content to what has been largely a descriptive account of popular constitutionalism's past practice.

Those skeptical of popular constitutionalism also question its ability definitively to resolve important constitutional disputes, emphasizing the salutary role played by both state and federal courts in ensuring finality and settlement.<sup>94</sup> The House's approach answers these objections too, at least in part, because it retains a role for the courts in achieving those functions. Rather than eliminating judicial review altogether, Congress instead proposes simply to redistribute power to the judiciary that appears more likely to replicate congressional—and thus, perhaps, “the people’s”—preferences.<sup>95</sup> These initiatives thus offer an attractive option for those who maintain that “both judicial supremacy and popular constitutionalism each contribute indispensable benefits to the American constitutional polity,” urging us to “strike a viable balance between the rule of law and “the people’s” authority to speak to issues of constitutional meaning.”<sup>96</sup>

Not only are these efforts increasingly successful, they are likely to reemerge in future proposals to shape subject matter jurisdiction and thus the balance of judicial power. The House's passage of two separate court-stripping bills in the same Congress represents a high-water mark in the court-shaping movement, as does its passage of the Pledge Protection Act in successive Congresses. Indeed, some of the dynamics that helped thwart earlier court-stripping measures appear to have diminished or disappeared altogether.<sup>97</sup> In the past, for example, the courts—and especially the Supreme Court—may have survived congressional attack due to their comparatively strong public reputation.<sup>98</sup> Shifting perceptions of government institutions may weaken that shield, as one survey found that a majority of respondents agreed “that ‘judicial activism’

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94. Post & Siegel, *supra* note 50, at 1033-34.

95. *But see* Chemerinsky, *supra* note 48, at 681.

96. Post & Siegel, *supra* note 50, at 1029. Others in fact believe that we have already struck this balance. Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596 (2003); *see also* Alexander & Solum, *supra* note 65, at 1601-02 (suggesting that the American people have already expressed their constitutional preferences by acquiescing to judicial review as a key component of our constitutional culture).

97. *See* PRITCHETT, *supra* note 1, at 119-20 (attributing the failure of the Jenner-Butler court-stripping effort to the extreme rhetoric and segregationist character of its supporters as well as to respect for the Supreme Court as an institution).

98. *See* Ross, *supra* note 27, at 757-58, 766-67 (identifying the Court's public popularity, especially compared to other governmental institutions, as a factor impeding earlier court-stripping efforts).



has reached the crisis stage, and that judges who ignore voters' values should be impeached. Nearly half agreed with a congressman who said judges are 'arrogant, out-of-control and unaccountable.'"<sup>99</sup> Other recent polls also suggest a drop in public support for the courts, including the Supreme Court, at least in some quarters.<sup>100</sup> Changes in public opinion, accompanied by proponents' sheer political power, may encourage further jurisdictional realignment.

*C. The Weaknesses of this Technique as an Exercise in Popular Constitutionalism*

But this approach has its weaknesses as well. First, challenges remain in figuring out exactly when the federal courts have thwarted "the people's" constitutional preferences, thus justifying congressional intervention. Of the various congressional advocates of popular constitutionalism, the Republican Policy Committee came closest to articulating a standard for this assessment when it proposed that courts be understood to have undermined "the people's" Constitution when their decisions are "dramatically out of the mainstream of American public opinion":

Reasonable people will not always agree when a court has engaged in judicial activism, but it is hard to deny that, in retrospect, a line of jurisprudence has deviated far from the Constitution's text and history. Court rulings such as the recent Ninth Circuit decision to bar schoolchildren from voluntarily reciting the full text of the Pledge of Allegiance are wildly unpopular; indeed, *only 6 or 7 percent* of Americans support removing "under God" from the Pledge. This unpopularity arises not only because of disagreement with the policy result, but because the decision represents such a *fundamental change* in the way that the Constitution is being interpreted. . . .

. . . .

Congress should only consider jurisdiction-stripping legislation when it is apparent that courts are likely to overreach and craft unpopular laws. Have courts been reinterpreting the Constitution in a manner inconsistent with

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99. Martha Neil, *Half of U.S. Sees 'Judicial Activism Crisis,'* ABAJOURNAL.COM, Sept. 30, 2005, <http://www.abanet.org/journal/redesign/s30survey.html>.

100. Charles Lane, *Evangelical Republicans Trust States on Social Issues,* WASH. POST, June 16, 2005, at A3 (describing polls reporting "a significant drop in public support for the U.S. Supreme Court").

its text and history? Are judges inserting their policy preferences into their decisions on a given subject, rather than following settled understandings of the law? Is the resulting decision dramatically out of the mainstream of American public opinion?<sup>101</sup>

This test's imprecision exposes some of the difficulties in converting popular constitutionalism from theory into practice. Do opinion polls indicating public disagreement with courts' constitutional interpretation trigger Congress's obligation to protect "the people's" Constitution? If so, how do we know when that threshold level of unpopularity is satisfied? As a number of commentators have observed, public opinion may be manipulated by the Court, Congress, or other elites.<sup>102</sup> Indeed, as David Franklin observes,

Any attempt to assess the capacity of any person or institution to speak for 'the people' in constitutional matters is plagued with an evidentiary problem. . . . The evidentiary problem is that in order to judge how accurately an institution conveys the constitutional views of "the people" it is necessary first to measure those views in their 'raw' form, and this is quite difficult to do.<sup>103</sup>

A growing number in Congress propose to overcome this difficulty by acting as the institutional proxy for "the people's" own constitutional preferences. But this exposes a second problem, as one may wonder whether congressional court-stripping is a principled exercise of popular constitutionalism to be applied neutrally and consistently—where the people retain the final word in constitutional interpretation—or instead a grab for legislative supremacy, whereby the legislature selectively seizes interpretive authority for itself. Indeed, the Judiciary Committee's selective omissions from Kramer's book are just as interesting as its quotations of it. The ellipses in the Report's quotations<sup>104</sup> signal excision of Kramer's following emphasis that, under popular constitutionalism, the legislature is not an adequate interpretive substitute for the judiciary:

In suggesting that the constitutionality of legislation was not a matter for judicial cognizance, no one was saying that the authoritative interpreter of the constitution was the legislature rather than the judiciary. That would have been

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101. S. REPUBLICAN POL'Y COMM., *supra* note 78, at 3-4, 11-12.

102. *See, e.g.*, Friedman, *supra* note 96, at 2634-35.

103. Franklin, *supra* note 65, at 1076.

104. *See supra* note 76 and accompanying text.

inconsistent with the whole framework of popular constitutionalism because it would have assumed that final interpretive authority rested with one or another of these public agencies. . . . Final interpretive authority rested with 'the people themselves,' and courts no less than elected representatives were subordinate to their judgments.<sup>105</sup>

Larry Alexander and Lawrence Solum would similarly define popular constitutionalism to require that the people interpret and enforce the Constitution through some form of direct action like petitions, protest, and/or resistance, rather than through the President or Congress: "Executive or legislative supremacy is an alternative to judicial supremacy—of course! But when a strong President ignores the Constitution or the Court, or a strong Congress attempts to institute rump parliamentary democracy, it is institutions and not 'We the People' who are acting."<sup>106</sup>

This concern prompts popular constitutionalism's scholarly advocates to differ as to whether court-stripping reflects a principled exercise of the theory, or instead opportunistic efforts by the legislature to snatch power from the courts. Larry Kramer, for example, appears to endorse the technique, at least as indicated in his brief sketch of popular constitutionalism's contemporary applications:

The Constitution leaves room for countless political responses to an overly assertive Court: Justices can be impeached, the Court's budget can be slashed, the President can ignore its mandates, Congress can strip it of jurisdiction or shrink its size or pack it with new members or give it burdensome new responsibilities or revise its procedures.<sup>107</sup>

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105. KRAMER, *supra* note 16, at 8, 58. At times, however, Kramer seems open to the possibility that Congress may be at least as good an interpreter as the judiciary. *See id.* at 238-39 (suggesting that Congress might do a better job at constitutional interpretation than many believe).

106. Alexander & Solum, *supra* note 65, at 1621-22.

107. KRAMER, *supra* note 16, at 249. Kramer goes on to endorse additional measures that would require constitutional amendment—like installing limited and staggered terms for federal judges and easing the difficulty of constitutional amendment—but notes that the prospect of such changes is unrealistic. *Id.* at 251. To be sure, Kramer's examples of judicial excess differ from those offered by popular constitutionalists in Congress. For example, rather than focusing on decisions involving gay rights or the Pledge, Kramer characterized the Court's decision in *Bush v. Gore* as an illegitimate exercise of judicial power, suggesting that a judicial resolution of a presidential election would be impossible in a world where the people refused to defer to the courts' characterization of the Constitution. *Id.* at 231-32.

He supports interventions whereby “the authority of judicial decisions formally and explicitly depends on reactions from the other branches and, through them, from the public,”<sup>108</sup> indicating that Congress can be trusted to accurately reflect “the people’s” constitutional preferences because it is politically accountable to the people for its choices.

Mark Tushnet, in contrast, rejects selective court-stripping measures as “transparent attempts to achieve particular substantive goals rather than serious efforts to rethink the role of the courts in society.”<sup>109</sup> Other critics similarly argue that court-stripping advocates are driven by cynical political self-interest rather than by a principled commitment to popular constitutionalism. For example, some contemporary conservatives<sup>110</sup> echoed Senator Barry Goldwater’s criticism of a series of court-stripping bills sponsored by fellow Republicans in the late 1970s and early 1980s:

What particularly troubles me about trying to override constitutional decisions of the Supreme Court by a simple bill is that I see no limit to the practice. There is no clear and coherent standard to define why we shall control the court in one area but not another. . . .

. . . .

Whether or not Congress possesses the power of curbing judicial authority, we should not invoke it.<sup>111</sup>

These concerns are exacerbated by the limits of political accountability, in that voters base their decisions to retain or reject incumbents on a wide range of considerations that may not include great attention to legislative changes in jurisdiction. Together, these dynamics expose the difficulty in parsing Congress’s preferences from “the people’s”—and thus reveal the risk that Congress may be seeking to transfer power from the courts not to

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108. *Id.* at 252.

109. TUSHNET, *supra* note 56, at 175.

110. *See, e.g.*, 152 CONG. REC. H5408 (daily ed. July 19, 2006) (statement of Rep. Rohrabacher) (“Here we are neutering our ability to have protections for the constitutional things we believe in the future, in order to achieve a temporary, I might even say a political, goal in the Pledge of Allegiance.”).

111. 128 CONG. REC. S2242 (daily ed. Feb. 24, 1982); *see also* Baucus & Kay, *supra* note 22, at 992 (“In the case of the Helms school prayer amendment, there was substantial bi-partisan opposition to the proposal within the House Judiciary Committee. The opposition appears to have been based on serious concerns over the [bill’s] constitutionality and wisdom . . .”).

the people, but to itself.<sup>112</sup>

Finally, conferring state courts with exclusive jurisdiction over specific constitutional controversies creates the likelihood that “the people’s” Constitution may mean very different things in different parts of the country.<sup>113</sup> The Pledge of Allegiance or Defense of Marriage Act, for example, might well be struck down as unconstitutional by state supreme courts in New England and on the West Coast, but not in the country’s interior.<sup>114</sup> This prospect troubles those who believe that federal courts’ greater ability to foster uniformity in interpreting federal law should guide decisions about the appropriate allocation of jurisdiction between state and federal judiciaries.<sup>115</sup> As Larry Alexander and Frederick Schauer observe:

Just as a rule of precedent recognizes the value of settlement for settlement’s sake, so too does a constitution exist partly because of the value of uniform decisions on issues as to which people have divergent substantive views and personal agendas. The decision to create a single written constitution, and thus depart from a model of parliamentary supremacy, is based on the possibility of varying views about fundamental

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112. See, e.g., Gewirtzman, *supra* note 64, at 922-30 (noting the public’s lack of trust in Congress, due in part to suspicion about the influence of special interest groups and campaign contributions).

113. See Tribe, *supra* note 33, at 154 (noting that if court-stripping legislation were passed, “[e]ven on the most optimistic of assumptions, state courts—recognizing themselves to be bound by the Constitution and constrained to follow the Supreme Court’s authoritative decisions construing it—would simply replicate the very rulings that had inspired Congress’ jurisdictional restructuring, thereby freezing the law until fact patterns clearly beyond the Supreme Court’s precedents come along to melt the ice and replace it with a churning chaos of fifty states moving in fifty different directions in their understanding and extension of the governing constitutional norms”).

114. A number of commentators contend that state courts may actually be more hospitable than federal courts in certain areas like gay rights. E.g., Nan D. Hunter, *Federal Courts, State Courts and Civil Rights: Judicial Power and Politics*, 92 GEO. L.J. 941, 948-49 (2004) (“[O]n substantive law grounds, state systems had begun by the end of the [twentieth] century to rival federal courts as the preferred arenas for constitutional adjudication, at least in certain fields.”). Indeed, state, rather than federal, courts have struck down limitations on same-sex marriage on state constitutional grounds. See, e.g., *Baehr v. Lewin*, 852 P.2d 44, 67 (Haw. 1993); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003); *Baker v. State*, 744 A.2d 864, 867 (Vt. 1999). Of course, these rulings may invite state constitutional amendments to recognize only opposite-sex marriage, as occurred in Hawaii. See HAW. CONST. art. I, § 23.

115. See Ratner, *supra* note 34, at 166-67 (maintaining that the Constitution requires that the Supreme Court have authority to review lower and state court judgments on constitutional matters to ensure the uniformity and supremacy of the U.S. Constitution and federal law).

questions, and the nondesirability of leaving their resolution to shifting political fortunes.<sup>116</sup>

Robert Bork shared this concern in congressional testimony opposing the wave of court-stripping efforts in the 1980s:

[I]f the Supreme Court should undertake to rule upon the constitutionality or the unconstitutionality of a war, and the Congress was quite upset, thinking that is not the Supreme Court's business as indeed I agree it is not, to use the exceptions clause to remove Supreme Court jurisdiction would have the result not of returning power to the Congress but of turning the question over to each of the State court systems. We could not tolerate a situation in which fifty states were deciding through their own judges the constitutionality of a war.<sup>117</sup>

While the Supreme Court's declining docket increases the possibility that different federal circuit courts of appeal may split in their interpretation of constitutional issues, at least the Court currently retains the discretion and the power to cure such inconsistencies by granting certiorari. In contrast, Congress's court-stripping efforts would deprive the Supreme Court—along with the lower federal courts—of any ability to address variations in interpretations.

Contemporary court-stripping advocates apparently view state courts' differing interpretations of the U.S. Constitution as a small price to pay for progress in achieving the goals of popular constitutionalism. As Judiciary Committee Chairman Sensenbrenner remarked, "If different States come to different decisions regarding the constitutionality of the Pledge, the effects of such decisions will be felt only within those States. A few Federal judges sitting hundreds of miles away from your State will not be able to rewrite your State's Pledge policy."<sup>118</sup>

But some court-stripping proponents acknowledge and attempt

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116. Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1376 (1997).

117. *Selections and Confirmation of Federal Judges: Hearings Before the S. Comm. on the Judiciary*, 97th Cong. 7 (1982).

118. 150 CONG. REC. H7451 (daily ed. Sept. 23, 2004). These supporters suggest that uniformity is not a paramount value when allocating jurisdiction between state and federal courts, noting that the nation tolerated the prospect of inconsistent interpretations of federal constitutional law for well over a century. Indeed, not until 1914 did Congress confer the Supreme Court with appellate jurisdiction over state court decisions striking down state laws on the basis of the United States Constitution. Judiciary Act of December 23, 1914, 38 Stat. 790.

to accommodate these uniformity concerns by suggesting a more nuanced test. More specifically, the Republican Policy Committee's ("RPC") 2004 memorandum made the case for issue-by-issue evaluation,<sup>119</sup> arguing that court-stripping is most valuable as a technique for furthering popular constitutionalist goals when a constitutional issue "can tolerate lack of uniform interpretation among the states."<sup>120</sup> Applying this test, the RPC expressed concern about the Marriage Protection Act's effects in leaving the Defense of Marriage Act's constitutionality exclusively to state courts to determine. The RPC noted that, as a practical matter, state courts' non-uniform approach to marriage would force states that did not recognize same-sex marriage to develop an approach for dealing with out-of-state same-sex marriages when those couples relocated to their state. Moreover, it expressed concern that an inconsistent definition of marriage would harm "essential national cohesion" and our common culture.<sup>121</sup> In contrast, the RPC concluded that the prospect of different approaches to the Pledge of Allegiance throughout the country did not pose the same practical and cultural dangers, and thus supported enactment of the Pledge Protection Act.<sup>122</sup>

While congressional advocates of popular constitutionalism thus demonstrate varying levels of tolerance for regional deviations in interpreting "the people's" Constitution, they all seem to accept at least some degree of inconsistency. They have yet to grapple fully with the implications of such nonuniformity for a single written Constitution.

#### IV. RECENT CONGRESSIONAL INITIATIVES TO SHIFT POWER FROM STATE TO FEDERAL COURTS

The Schiavo and Class Action Fairness Acts display the flip side of this coin, demonstrating that congressional perceptions of judicial abuse are not confined to unelected federal judges. Congress appears increasingly prepared to strip state as well as federal courts of certain authority by transferring judicial power to federal judges when they appear more likely to produce results consistent with the preferences of a congressional majority.

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119. S. REPUBLICAN POL'Y COMM., *supra* note 78, at 2.

120. *Id.* at 11, 13-14. As it explained, "just as the Supreme Court exercises discretion when it decides whether to allow inconsistent constitutional judgments in state courts and lower federal courts to stand, so too can Congress exercise the same discretion when deciding whether to limit federal jurisdiction." *Id.* at 10.

121. *Id.* at 13.

122. *Id.* at 14.

A. *The Schiavo Act*

In contrast to congressional initiatives to strip the federal courts of authority over certain controversial federal constitutional disputes, the Schiavo Act empowered a federal court to hear renewed federal law challenges to the decision to withdraw life-sustaining measures from Terri Schiavo, who had been in a persistent vegetative state since 1990.<sup>123</sup> The Act followed years of litigation in Florida's state courts between Ms. Schiavo's husband (Michael Schiavo) and her parents (the Schindlers); applying state constitutional and statutory law, the Florida courts ultimately denied the Schindlers' claims and ordered Ms. Schiavo's feeding tube removed.<sup>124</sup> Unhappy with that result, Congress expressly conferred the federal district court with jurisdiction to hear the case, specifically instructing the court to ignore the state courts' prior determination.<sup>125</sup> The Act also removed certain procedural barriers that would have prevented a federal court from deciding the merits of the parents' claims.<sup>126</sup>

As was the case for the Marriage Protection and Pledge Protection Acts, a House majority voted to reallocate jurisdiction between federal and state courts; this time, the measure was enacted into law. This time, moreover, it was the state courts who—despite their greater political accountability<sup>127</sup>—had frustrated the will of a congressional majority. As then-House Majority Leader Tom DeLay fumed: “No little judge sitting in a state district court in Florida is going to usurp the authority of Congress. This judge, and the Supreme Court of Florida, are well known to be liberal judges that have a different world view, and they're imposing their world view on the law.”<sup>128</sup>

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123. Allen, *supra* note 8, at 311.

124. See *id.* at 311-12 (“[E]very [Florida] court to consider the issue ruled that Terri Schiavo was in a persistent vegetative state and that she would not have wished to continue receiving artificial nutrition and hydration . . .”).

125. See *supra* note 7.

126. See Allen, *supra* note 8, at 319-21 (noting that the Act not only conferred the federal court with jurisdiction to hear the parents' federal claims, but also granted them standing and eliminated abstention, exhaustion, and claim and issue preclusion doctrine as barriers to addressing the parents' claims on the merits); see also Schiavo v. Greer, No. 8:05-CV-522-T-30TGW, 2005 WL 754121, at \*1 (M.D. Fla. Mar. 18, 2005) (holding, in a decision prior to the Schiavo Act, that federal courts have no jurisdiction over the Schindlers' claims under the *Rooker-Feldman* doctrine, which bars federal district courts from reviewing claims already adjudicated in state court).

127. Unlike federal judges, Florida state court judges are subject to retention elections. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, STATE COURT ORGANIZATION 1998, at 21 (1998).

128. See Susan Brinkmann, *Schiavo Clings to Life While Battle Continues*,



In charging the Florida state court judges with “usurp[ing] the authority of Congress,” Representative DeLay and his colleagues might be understood to mean that the state court judges’ constitutional interpretation strayed from the preferences of a congressional majority serving as a proxy for “the people” and their constitutional values.<sup>129</sup> Senator Talent, for example, appeared to rely on popular constitutionalism in explaining his support for the Act: “Our actions are consistent with the will of the people of Florida who have been repeatedly frustrated by the State courts.”<sup>130</sup>

Despite Senator Talent’s assessment, however, the Schiavo Act demonstrably did not reflect popular will, as a series of national polls indicated that the vast majority of Americans disapproved of Congress’s intervention.<sup>131</sup> The Act appears to fail even the notably imprecise test offered by the Republican Policy Committee memorandum, which argued that jurisdictional change is appropriate when courts’ decisions are “dramatically out of the mainstream of American public opinion.”<sup>132</sup> Congress’s determination to proceed with the Schiavo Act, despite its unpopularity, resurrects earlier questions about whether and when Congress can be trusted accurately to reflect “the people’s” constitutional preferences.<sup>133</sup>

But perhaps the Schiavo Act was motivated not by popular constitutionalism but instead by the belief that federal courts’ constitutional expertise and political insulation leave them better equipped to protect the rights of vulnerable individuals, even—or especially—when politically unpopular. Indeed, many supporters of the Schiavo Act who had earlier backed the Pledge and Marriage Protection Acts now echoed more traditional defenses of the federal courts’ role and the value of judicial independence.<sup>134</sup> For example,

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THE CATHOLIC STANDARD & TIMES, Mar. 24, 2005.

129. See Jeffrey Rosen, *But These Days the Bench is the Hot Seat*, WASH. POST, Mar. 27, 2005, at B1 (characterizing Congress as unhappy with the work of Florida’s state judges, and simply demanding a new judge by demanding a new court).

130. 151 CONG. REC. S3104 (daily ed. Mar. 20, 2005) (statement of Sen. Jim Talent).

131. PollingReport.com, Terri Schiavo, <http://pollingreport.com/news.htm> (last visited Sept. 21, 2006). For example, Pew Research Center and Gallup polls found that approximately three-fourths of Americans polled in 2005 felt that Congress should have stayed out of the matter.

132. See *supra* note 78 and accompanying text.

133. See *supra* notes 105-13 and accompanying text.

134. This switch did not escape the Schiavo Act’s critics. See, e.g., 151 CONG. REC. H1600 (daily ed. Mar. 16, 2005) (statement of Rep. Nadler) (“[W]e do not trust State courts any more. We do not trust the elected State courts, we want the unelected Federal judges that we normally excoriate in this Chamber. Now

House Judiciary Chairman James Sensenbrenner argued:

[W]hile our federalist structure reserves broad authority to the States, America's Federal courts have played a historic role in defending the constitutional rights of all Americans, including the disadvantaged, disabled, and dispossessed. Among the God-given rights protected by the Constitution, no right is more sacred than the right to life. The legislation we will consider today will ensure that Terri Schiavo's constitutional right to life will be given the Federal court review that her situation demands.<sup>135</sup>

Of course, such appeals to federal courts' institutional advantages are most often invoked by defenders of judicial review. Notably, those capabilities received no mention in the arguments made by Representative Sensenbrenner and others when seeking to strip federal courts of their authority to hear specific constitutional claims likely to be brought by religious minorities, gay men, and lesbians.<sup>136</sup> And although Representative Sensenbrenner and other advocates had earlier emphasized state courts' greater political accountability as enhancing their fealty to "the people's" constitutional values regarding the Pledge of Allegiance and same-sex marriage,<sup>137</sup> nowhere did he or other Schiavo Act supporters explain why the Florida state courts could not similarly be entrusted with "the people's" constitutional preference on end-of-life issues. In short, congressional advocates have yet to explain why popular constitutionalism is the appropriate guide for allocating jurisdiction between state and federal courts in some constitutional matters and not others, fueling fears that the theory is opportunistically invoked.

Despite Congress's best efforts, the federal courts also denied the Schindlers' claims.<sup>138</sup> Some in Congress responded with fury,

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suddenly they are trustworthy and we want to come and say they should start a whole new proceeding after everything is over and drag the case on, to the anguish of the family members, for another few years."); *id.* (statement of Rep. Blumenauer) ("I note that this is the same majority party that would seek to deny the Supreme Court the authority to be able to deal with matters that relate to marriage. They think that that is not appropriate for the Federal court. They do not trust the Supreme Court to deal with these personal issues. But if they are thinking that they can continue with efforts to have government interfere with some of the most painful, personal areas, then they are willing to cast aside consistency and move forward.").

135. 151 CONG. REC. H1701 (daily ed. Mar. 20, 2005).

136. *See* 151 CONG. REC. H1600 (daily ed. Mar. 16, 2005) (statements of Reps. Nadler and Blumenauer).

137. *See supra* notes 69-78 and accompanying text.

138. *Schiavo ex rel Schindler v. Schiavo*, 403 F.3d 1223, 1229 (11th Cir. 2005).

threatening still more jurisdictional change as a challenge to the judicial review that had stymied congressional preferences. In the words of Representative Steve King: "That kind of judge needs to be worried about what kind of role Congress will play in his future. . . . We have the constitutional authority to eliminate any and all inferior [federal] courts."<sup>139</sup> Coming from one of the House's leading advocates of popular constitutionalism,<sup>140</sup> this reaction exacerbates concerns that Congress's interest in jurisdictional change is motivated more by a desire to assert its own authority than to protect "the people's" constitutional values.

*B. The Class Action Fairness Act*

Like the Schiavo Act, CAFA's enactment reveals that even politically accountable state judges face jurisdictional change when they deliver results unpopular with Congress on state law questions.<sup>141</sup> CAFA illustrates the use of this jurisdiction-switching technique in a non-constitutional context, demonstrating its potential ubiquity. And while, of course, Congress may have a variety of motivations for its actions, Congress's willingness to alter state and federal courts' respective spheres of influence on matters unrelated to constitutional interpretation suggests that something other than popular constitutionalism may also explain Congress's growing interest in jurisdictional realignment.

While CAFA's objectives included curbing certain class action abuses such as settlements that generated large fees for attorneys but little benefit to class members,<sup>142</sup> by the time of its enactment "the main thrust of CAFA was no longer practice abuses but alleged forum shopping. In recent years, federal courts had been perceived by both plaintiffs' and defendants' lawyers as less sympathetic to class actions and to plaintiffs' cases than certain state courts."<sup>143</sup> In enacting CAFA, Congress voted to empower federal judges to decide many class actions alleging violations of state, rather than federal, law.<sup>144</sup> Affected cases include those involving "high-profile, high-stakes class actions grounded in state law theories of product

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139. Charles Babington, *GOP is Fracturing over Power of Judiciary*, WASH. POST, Apr. 7, 2005, at A4 ("DeLay and his allies, however, remain infuriated that the Atlanta-based Court of Appeals for the 11th Circuit refused Congress's orders to take control of Schiavo's case from Florida courts.").

140. See *supra* note 75 and accompanying text.

141. See, e.g., Allen, *supra* note 8, at 356 (concluding that in both the Schiavo and Class Action Fairness Acts, Congress made jurisdictional changes in hopes of altering substantive litigation outcomes).

142. *Id.* at 1594-95.

143. *Id.*

144. See *supra* note 13 and accompanying text.

liability, consumer fraud,<sup>145</sup> health, safety, environmental protection, and civil rights.<sup>146</sup> CAFA requires only minimal diversity to trigger federal jurisdiction in covered cases,<sup>147</sup> rather than the complete diversity that had previously been required.<sup>148</sup> Moreover, CAFA dismantled a series of barriers to the removal of such claims to federal court when initially filed in state court.<sup>149</sup> CAFA thus provides defendants in most multistate class actions with a federal forum.<sup>150</sup>

Whether CAFA's effects are salutary or malign is the subject of vigorous debate. Stephen Yeazell, for example, sees CAFA "as a small step toward the more intelligent deployment of diversity jurisdiction."<sup>151</sup> He maintains that the cases covered by CAFA "should be federalized because they are simply bigger than any single state, and one wants to be sure that the interests of all the relevant states, and perhaps of the national government, are being taken into account."<sup>152</sup>

On the other hand, critics point out that CAFA has shifted bargaining power to defendants by denying plaintiffs access to the forum of their choice. Most corporate defendants prefer a federal forum, in large part because they win more often there.<sup>153</sup> As Professors Clermont and Eisenberg report, "[r]emoval of civil cases from state to federal courts results in a precipitous drop in the plaintiffs' win rate."<sup>154</sup> Plaintiffs, of course, often prefer state court in these cases for the same reason. Plaintiffs (often workers and consumers) can thus expect the defendants (often corporations) promptly to remove a diversity case to federal court, a trend greatly

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145. Adam N. Steinman, *Sausage-Making, Pigs' Ears, and Congressional Expansions of Federal Jurisdiction: Exxon Mobil v. Allapattah and Its Lessons for the Class Action Fairness Act*, 81 WASH. L. REV. 279, 287-98 (2006).

146. John Conyers, Jr., *Class Action "Fairness"—A Bad Deal for the States and Consumers*, 40 HARV. J. ON LEGIS. 493, 507 (2003).

147. *See supra* notes 10-12 and accompanying text.

148. *See id.*

149. *See id.*

150. Sherman, *supra* note 13, at 1606, 1615 ("CAFA is primarily a jurisdictional act, accomplishing the transfer to federal courts of most multistate class actions.").

151. Stephen C. Yeazell, *Overhearing Part of a Conversation: Shutts As a Moment in a Long Dialogue*, 74 UMKC L. REV. 779, 780 (2006).

152. *Id.* at 794.

153. Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction*, 83 CORNELL L. REV. 581, 593-94 (1998).

154. *Id.* ("[A] shift to an unfavorable forum depresses the plaintiffs' win rate").

facilitated by CAFA's expansion of federal diversity jurisdiction.<sup>155</sup>

Either way, CAFA clearly reflects Congress's assessment that federal rather than state courts are better entrusted with these claims. As Georgene Vairo observes, "The crux of the legislation, however, is that state courts cannot be trusted to resolve fairly cases brought under state law. . . . [I]t would be difficult to envision a more explicit statement that the state courts cannot be trusted."<sup>156</sup> The statute's purposes section makes this clear: "State and local courts are—(A) keeping cases of national importance out of Federal court; (B) sometimes acting in ways that demonstrate bias against out-of-State defendants; and (C) making judgments that impose their view of the law on other States and bind the rights of the residents of those States."<sup>157</sup>

To be sure, CAFA's focus on state statutory and common law claims involves no reliance on popular constitutionalism as an underlying rationale. But that CAFA's champions assessed the relative merits of state and federal courts in terms never mentioned during debates on the Marriage Protection, Pledge Protection, and Schiavo Acts remains interesting, inviting questions. For example, while proponents of the Pledge Protection and Marriage Protection Acts remained untroubled by the inconsistent interpretations of the U.S. Constitution that would result from entrusting exclusive jurisdiction of those claims to fifty state judiciaries, CAFA's congressional advocates stressed federal courts' ability to deliver more uniform outcomes than their state counterparts: "Article III of the Constitution ensures that there will be a fair, uniform, and efficient forum (a federal court) for adjudicating interstate commercial disputes, so as to nurture interstate commerce."<sup>158</sup>

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155. Other commentators have also noted that federal courts' diversity power offers a more hospitable forum to corporate defendants than their state court alternatives. See, e.g., JoEllen Lind, "Procedural Swift": *Complex Litigation Reform, State Tort Law, and Democratic Values*, 37 AKRON L. REV. 717, 717 (2004) ("[T]he federal courts offer an ever-more-enticing package of rules that can conflict with state practice and produce profoundly different outcomes in cases. Were these results neutral, they would not be so troublesome; however, procedural differences in the federal courts typically disadvantage plaintiffs, not defendants, and so provide an increasing incentive for defendant forum shopping."); 1 FED. COURTS STUDY COMM., WORKING PAPERS AND SUBCOMMITTEE REPORTS 449-51 (1990) ("[T]he claimants able to obtain diversity consist disproportionately of the powerful and influential . . . . [T]wentieth century scholarship suggests that bias may have been less important in the creation of diversity jurisdiction than the desire to protect commercial interests from pro-debtor state courts.").

156. VAIRO, *supra* note 42, at 12-13.

157. Pub. L. No. 109-2, § 2(a)(4), 119 Stat. 1, 4-5 (2005).

158. S. REP. 109-14 (2005); see also *The Class Action Fairness Act of 1999*:

And while Pledge Protection and Marriage Protection Act supporters found that state courts' political accountability left them better suited to protect "the people's" constitutional values, Congress found that same accountability a liability in deciding multistate class actions. More specifically, CAFA supporters suggested that state courts' lack of political insulation left them all too willing to punish out-of-state class action defendants who could never hold those judges electorally accountable:

Let me refer to this chart, called "Magic Jurisdictions." This is Dickie Scruggs, one of the best plaintiffs' lawyers in the country, a man I have great respect for. But in a luncheon talk on the asbestos situation at a panel discussion at the Prudential Securities Financial Research and Regulatory Conference on May 9, 2002, he had this to say. This is Dickie Scruggs. You can believe him. This man understands the litigation field. He is a billionaire from practicing law. He said:

What I call the "Magic Jurisdictions" is where the judiciary is elected with verdict money. The trial lawyers have established relationships with the judges that are elected. They are State court judges. They are populists. They have large populations of voters who are in on the deal. They are getting their piece, in many cases. And so it's a political force in their jurisdiction and it's almost impossible to get a fair trial if you are a defendant in some of these places. The plaintiff lawyer walks in there and writes the number on the blackboard, and the first juror meets the last one coming out the door with that amount of money. The cases are not won in the courtroom. They're won on the back roads long before the case goes to trial. Any lawyer fresh out of law school can walk in there and win the case, so it doesn't matter what the evidence or the law is.

That is one of the leading plaintiffs' lawyers in the

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*Hearings Before the S. Comm. on the Judiciary, Subcomm. on Administrative Oversight and the Courts*, 106th Cong. 44 (1999) (remarks of Sen. Jeff Sessions) ("Just as a matter of public policy, wouldn't it be better that that [class action] case be settled and handled in a Federal court, where the U.S. Supreme Court may ultimately decide an issue, as opposed to the plaintiffs being able to search 50 states and then finding the most favorable law and then find the county or circuit within that State that would be most favorable to their lawsuit and filing it there?").

country. He was honest enough to call it the way it is in Madison County.<sup>159</sup>

CAFA's proponents further explained the value of federal courts' independence when opposing an amendment that would exclude class actions brought under state civil rights laws from CAFA:

[C]ivil rights litigants have nothing to fear from federal judges. Federal judges, under Article III of the Constitution, are appointed for life. One reason the Framers designed the federal judiciary that way was to protect federal judges from political pressure and ensure that they would provide equal treatment to minority groups with less political power. It is thus no accident that federal courts have issued decisions like *Brown v. Board of Education* that, although unpopular at the time, paved the way for future civil rights laws like Title VII and Section 1983.<sup>160</sup>

Congressional advocates of jurisdictional change thus have yet to explain why certain characteristics, such as federal courts' judicial independence and greater ability to deliver uniform interpretations, are only intermittently valuable when debating the division of power between state and federal courts. Their failure to do so invites the charge that proponents may be more interested in changing the identity of winners and losers in certain cases, rather than engaging in a thoughtful re-evaluation of the courts' appropriate spheres of influence. These concerns only deepen if, as some predict, the enactment of CAFA and the Schiavo Act inspire future attempts to shift jurisdiction when a congressional majority is dissatisfied with state court results.<sup>161</sup>

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159. 151 CONG. REC. S1095 (daily ed. Feb. 8, 2005) (statement of Sen. Hatch).

160. S. REP. NO. 109-14, at 56 (2005).

161. Some predict that this may be particularly likely in physician-assisted suicide, stem cell research, and other cases that raise particularly thorny constitutional issues. See John A. Robertson, *Schiavo and Its (In)Significance*, 35 STETSON L. REV. 101, 120-21 (2005). As one observer wondered: "[S]uppose a custody battle between divorced parents explodes on the national scene because one parent has become involved in a homosexual relationship. Could Congress legislate in a way that takes this traditional state matter out of state courts with the result of awarding custody to the heterosexual parent?" Marcia Coyle, *Life After Schiavo*, NAT'L L.J., Mar. 28, 2005, at 10. Indeed, Congress tried to wield its jurisdiction-shaping authority on at least one prior occasion, when it responded to another high-profile family dispute by stripping District of Columbia courts of the power to impose sanctions against Elizabeth Morgan for violating child visitation orders and prohibiting her ex-husband, Eric Foretich, from enforcing his visitation rights. See *Foretich v. United States*, 351 F.3d

## V. CONCLUSION

Inconsistent congressional assessments of judicial review are not new. Senator Butler's behavior in the mid-twentieth century offers a prime example.<sup>162</sup> In 1954, claiming dismay over the Roosevelt Administration's court-packing plan and similar attacks on judicial independence, he proposed a constitutional amendment to Article III's Exceptions Clause that would protect the Supreme Court's jurisdiction from congressional interference.<sup>163</sup> He warned:

The smoke has cleared long ago from the field of the 1937 battle, but there always is the danger of a renewal, sooner or later, of the campaign against judicial independence. The relatively slim margin by which that most recent major assault was repelled, thanks to the vigilance of the Judiciary Committee of this body, should serve as a warning that the defenses require reinforcement.

....

Upon several occasions, during attacks upon the Court's independence, there have been threats to strip it of the right to review cases raising constitutional issues. Such threats found expression as recently as the 1937 controversy.<sup>164</sup>

Just three years later, however, outraged by the Court's decisions striking down various government efforts to regulate "subversive activities," Senator Butler invoked the Exceptions Clause power he had so recently sought to eliminate and led the nearly successful movement to slash federal jurisdiction.<sup>165</sup>

With its most recent efforts to shape jurisdiction, Congress challenges judicial review once again—and once again sends mixed

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1198, 1203-04 (D.C. Cir. 2003) (striking down the court-stripping legislation as violating constitutional protections against bills of attainder). There too Congress did not trust local judges to rule in a manner consistent with the will of a congressional majority, and responded by enacting jurisdictional change. Michael Allen also predicts that Congress may be emboldened to influence other substantive litigation outcomes through jurisdictional change—for example, ensuring that more medical malpractice claims brought under state tort law are heard in federal court by eliminating the amount-in-controversy requirement and/or requiring only minimal diversity. Allen, *supra* note 8, at 356 & n.237.

162. See Ross, *supra* note 27, at 784 ("Most Court-curbing movements have been motivated by individual decisions or series of decisions rather than by any principled or consistent objections to judicial review.").

163. S.J. Res. 44, 83d Cong. (1954).

164. 99 CONG. REC. 1106-07 (daily ed. Feb. 16, 1954) (statement of Sen. Butler).

165. See *supra* notes 19-23 and accompanying text.



signals. Exploring Congress's growing interest in cutting back federal courts' jurisdiction in some areas while expanding it in others illuminates congressional assessments of the appropriate allocation of authority not only between state and federal courts, but also between the legislative and judicial branches. Taken together, these proposals reflect an increasingly dominant view of the appropriate separation of powers that permits Congress to redistribute jurisdiction to curb a federal or state judiciary that has produced results inconsistent with the preferences of a congressional majority.

These efforts also highlight Congress's mounting willingness to invoke popular constitutionalism as a justification for reshaping the balance of power between state and federal courts. Considerably less clear is whether this exercise reveals a principled commitment to institutional change, or instead the assertion of sheer political power to change litigation's winners and losers. Congress's selective embrace of popular constitutionalism—the notion that “the people,” rather than the courts, are the Constitution's legitimate interpreters—underscores the theory's shortcomings. These include the difficulty of ascertaining with confidence “the people's” constitutional preferences; the danger that Congress may be seeking to transfer power from the courts not to the people, but to itself; and the potential that state courts will interpret “the people's” Constitution to mean very different things in different parts of the country. Indeed, intermittent congressional appeals to popular constitutionalism that appear opportunistic invite skepticism that we can and should trust Congress to speak for “we the People” on matters of constitutional interpretation, thus bolstering the case for judicial review.