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Jurisdiction Stripping in Three Acts: A Three String Serenade

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INTRODUCTORY NOTE


1. This subtitle stems from MAZZY STAR, Five String Serenade, on SO TONIGHT THAT I MIGHT SEE (Capitol Records 1993). My intention with the alteration from “five” to “three” is to have the three strings symbolize the axes of tension between the three branches of federal government: executive, legislative and judicial. Although a separate string represents each branch to signify the separation of powers, the three together exist on one instrument to symbolize that they are linked together on a larger device upon which success or failure of one affects all. The instrument itself reveals the blending of relations and power that occurs when the three strings attempt to escape dissonance by achieving harmony through a certain level of balance.

* Associate Professor, West Virginia University College of Law; Washington & Lee University School of Law, J.D. 1997; Rhodes College, B.A. 1994. This Article benefited from thoughtful comments provided by Professors Mike Allen, andré douglas pond cummings, Ron Eades, Ron Krotoszynski, John Taylor, Doug Williams and others in connection with its oral presentation at the SEALS Conference (Hilton Head, July 2005). Special thanks to Professor Gerry G. Ashdown for his careful review and thought-provoking questions. The inspiration for this Article stems from a conversation with my two tremendous research assistants, Andrea Marano and Sean Cook, regarding whether members of the three branches of government ever engage in private dialogues like the narrative jurisprudence of Derrick Bell’s Space Traders, originally published in DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM (1992), and, of course, the seminal work of Henry M. Hart, Jr., The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 HARv. L. REv. 1362 (1953). While drafting this Article, my appreciation of the art of dialogue increased upon reading Ruthann Robson & James R. Elkins, A Conversation, 29 LEGAL STUD. F. 145 (2005). My deepest gratitude goes to Scott C. Nelson and Andrew M. Wright for their insights on political nuances of Congress and the Executive. For helpful revisions, thanks to Jonathan Deem, Justin Jack and Bertha Romine. Many thanks to the West Virginia University College of Law and the Hodges research grant for making this Article possible and to the students of my Judicial Power & Restraint Seminar who enriched my appreciation of the subtle contours and assumptions embedded in the ebb and flow of separation of powers tension.

Is the current state of relations among the branches business as usual, or have we reached a dangerous, escalating misadventure that spells impending doom in the form of a constitutional crisis?

The federal judiciary plays an ever increasing role in the shaping of the cultural fabric, as well as fault lines, of Americans. The court system creates a set of expectations regarding rights and liabilities. It guards the Constitution, our founding document, and interprets the meaning of its text when reasonable minds disagree. These paramount decisions carry considerable consequences. Despite the treacherous waters of controversy engulfing the federal judiciary, the Supreme Court remains at the highest end of public respect. Public reaction to the Court may well entail a combination of awe and periodic disdain. Awe likely stems from: (i) the muscle the Court flexes in maintaining the rule of law, (ii) the pedes-

3. Business as usual in this context conjures up images of “Sam Sheepdog” and “Wile E. Coyote” as “Ralph Wolf” while the two cordially chat on the way to clocking in for another day’s work where they will then battle each other with few, if any, boundaries on what constitutes fair play. See, e.g., Looney Tunes Merrie Melodies: Don’t Give up the Sheep (Warner Bros. Ent. Jan. 3, 1953); Looney Tunes Merrie Melodies: Woolen Under Where (Warner Bros. Ent. May 11, 1963). For an excellent real-life account of this phenomenon describing a “typical encounter” between his former boss Lyndon B. Johnson and then Senate Republican leader, Everett Dirksen, see Jack Valenti, The Best of Enemies, N.Y. Times, June 24, 2005, at A23. Valenti reports a classic exchange between the two behind closed doors after Dirksen has “flog[ged] the president and his policies, treating Nero and Caligula favorably in comparison to Johnson” earlier in the day. Id. The dialogue Valenti reports demonstrates how the two sparred verbally, joked, gossiped and bargained despite coming from different “sides of the aisle.” Id. Valenti eloquently closes the example: “They were like two old medieval warriors who had fought a hundred battles against each other. But when night fell, they would sit around a campfire, on neutral ground, and talk.” Id. Thus, business as usual closes with Sam Sheepdog and Ralph Wolf clocking out at the end of a day’s requisite battling over the sheep.

4. See Alexis de Tocqueville, Democracy in America 100-01 (J.P. Mayer ed., George Lawrence trans., 1969) (opining that judicial power as designed by American Constitution is “immense political power” because “Americans have given judges the right to base their decisions on the Constitution rather than on the laws... allow[ing] them not to apply laws which they consider unconstitutional”).

5. See, e.g., Steven H. Goldberg, Putting the Supreme Court Back in Place: Ideology, Yes; Agenda, No, 17 Geo. J. Legal Ethics 175, 190 (2004). Goldberg notes that: Except for short bursts from small groups, there is no evidence that any opinions have brought the [Supreme] Court into the kind of long-term public disrespect that would jeopardize the apparent approving consensus of the American people and the Court’s resulting place of influence in our constitutional republican democracy.

Id.; Symposium, American Bar Association Report on Perceptions of the U.S. Justice System, 62 Alb. L. Rev. 1307, 1309 (1999) (“[T]here is strong support for the justice system... . Respondents [to the ABA survey] have the most confidence in the U.S. Supreme Court... ”). But cf: Bush v. Gore, 531 U.S. 98, 128-29 (2000) (Stevens, J., dissenting) (warning that Supreme Court decision to weigh in on 2000 presidential election would do little to resolve election’s winner but would clearly establish loser: “the Nation’s confidence in the judge as an impartial guardian of the rule of law”).

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tal upon which our tripartite system of government places it, and (iii) the secrecy in which it often operates (to the extent its operations are public via published opinions, the language of law remains often inaccessible). Disdain emerges in reaction to controversial rulings that are contrary to a given strain of public opinion or instinct. Even though the public experiences waves of distaste for particular judicial opinions and distrust of the judiciary's mysterious inner workings, the federal court system is so firmly rooted in the American democratic framework that attempts by another branch of government to weaken its power unleash strong sentiments of fear and criticism. 6

It is against this backdrop that some members of Congress have launched an offensive to curb the power of the federal judiciary. The Executive also supports current efforts to rein in the judiciary's sphere of influence. Both the Executive and a formidable contingent in Congress are displeased with certain controversial rulings, such as constitutional interpretations regarding abortion, gay rights, religion and so on. Most typically, the Executive wields rhetoric critical of what it views as "judicial activism." 7 Congressional members bolster the rhetoric by registering their dissatisfaction in the form of a call to arms, 8 including efforts to strip all federal courts of jurisdiction over controversial constitutional issues; institute investigative powers of an inspector general for judicial oversight; cut the federal judiciary's budget; and lower the standards for impeachment. These attempts represent potential landmines and each is worthy of in-depth inquiry.

It is the ultimate battle for power among the three branches of federal government. It is a battle that we have witnessed before and will again

6. See Gunther, Congressional Power, supra note 2, at 905-06 ("The central and expanding role of the Court in our modern polity helps explain the recurrent outrage expressed in the media and in academia in response to proposed congressional assertions of power over jurisdiction.").


8. Notably, the President ultimately either signs or vetoes any congressional legislation. See Barry Friedman, A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction, 85 Nw. U. L. Rev. 1, 2 n.6 (1990) (pointing out that although most scholars focus their analysis on Congress versus courts, technically Congress shares its power with executive branch via President's approval or veto).


In truth, of course, no interest in the arcane of jurisdiction as such lies behind the proposed bills; their proponents have, without exception, fastened on "jurisdiction [only] as a means to an end," the end being no lesser than the de facto reversal, by means far less burdensome than those required for a constitutional amendment, of several highly controversial Supreme Court rulings dealing with such matters as abortion, school prayer, and busing.

Id. (quoting United States v. Klein, 80 U.S. 128, 145 (1871)); see also Gunther, Congressional Power, supra note 2, at 896 ("Jurisdiction-curbing proposals have surfaced in Congress in virtually every period of controversial federal court decisions.").
because "in politics, nothing lasts for long. Mandates fade. Power passes. And majority, as sure as the seasons change, eventually becomes minority."\textsuperscript{10} Because history has a tendency to repeat itself, lessons should be gleaned during these times of intense strife. The constants are Congress, the Executive and the judiciary. Looming behind the competition among the branches are the interests of the people. The players within the institutions change, but the incentive to preserve or aggrandize power remains whether it is the Legislature, the President or the judiciary running the tables.

The very structure of the Constitution creates the separation of powers among the three branches of government.\textsuperscript{11} The Framers purposefully separated the executive, legislative and judicial functions to avoid governmental tyranny and to foster a system of checks and balances.\textsuperscript{12} A certain degree of tension was contemplated by design. In times of inordinately strained relations, however, the tension may become so taut that the symbolic strings of the branches face real danger of snapping. The governing metaphor for this Article is that each branch of the government possesses a set of guitar strings that it controls. Those guitar strings are all connected to one larger instrument upon which the three branches combine to create either a cacophony or a symphony. The American people are both the immediate audience and, ultimately over time, the derivative conductor. Accordingly, an essential part of the American democratic ex-

\textsuperscript{10} Valenti, \textit{supra} note 3.

\textsuperscript{11} As the Supreme Court summarized in \textit{Buckley v. Valeo}:

Our inquiry of necessity touches upon the fundamental principles of the Government established by the Framers of the Constitution . . . in the recognition of the intent of the Framers that the powers of the three great branches of the National Government be largely separate from one another. James Madison, writing in the \textit{Federalist No. 47} . . . asserted that while there was some admixture, the Constitution was nonetheless true to Montesquieu's well-known maxim that the legislative, executive, and judicial departments ought to be separate and distinct.

\textsuperscript{12} See \textit{The Federalist Papers}, at xvi (Alexander Hamilton, James Madison, John Jay) (Buccaneer Books, Inc. 1992) (setting forth idea that separation of powers "looks to a horizontal alignment, a division of labor to deal with different tasks—with the enaction of law, with the execution of it, and with judgments on that execution"); \textit{id.} at xvii ("As a king is prevented from becoming a tyrant by the separation of the executive and judicial functions, so a \textit{popular} tyranny must be avoided by the separation of powers."). Regarding the intent to ward off tyranny and establish an interbranch check on power, see \textit{Northern Pipeline Construction Co. v. Marathon Pipe Line Co.}, 458 U.S. 50, 58 (1982), in which the Court stated: "The Federal Judiciary was therefore designed by the Framers to stand independent of the Executive and Legislature—to maintain the checks and balances of the constitutional structure, and also to guarantee that the process of adjudication itself remained impartial." See also \textit{Buckley}, 424 U.S. at 122 ("The Framers regarded the checks and balances that they had built into the tripartite Federal Government as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.").
periment is in many respects an experiment in tuning those strings to find the right pitch.

Should the actions and reactions of late be viewed as part of the ordinary interplay in a structure centered on the separation of powers? Evidence of increasingly strained relations between Congress and the judiciary floods the media. Further, the "cords of collegiality that used to bind the members of Congress to one another—and to the president—haven’t just frayed, they’ve snapped." Whenever a crisis threatens to boil over, the inclination is that this moment is the worst it has ever been; it feels more monumental, pressing, nuanced and complex than ever before. Thus, it simply may be an example of generational narcissism in which the crisis of the day appears paramount for all time for those held in its clutches. In academia, however, scholars examine history to determine if in reality this thread of strife is of particular moment. History shows recurring pockets of heightened tension in this arena, such as President Franklin D. Roosevelt’s plan to pack the Supreme Court or the impeachment proceedings against Justice Samuel Chase. Accordingly, the struggle is no stranger to our society.

Yet, the role of the Supreme Court and the lower federal courts in our constitutional system hinges upon how the branches navigate these embittered moments. Even assuming that a constitutional crisis will not come to fruition, the interbranch threats may poison relations among the

13. See Marc O. DeGirolami, Congressional Threats of Removal Against Federal Judges, 10 Tex. J. C.L. & C.R. 111, 111 (2005) (articulating that judiciary "has lately become the object of increasing scrutiny and distrust by its legislative counterpart"); Charles G. Geyh, Judicial Independence, Judicial Accountability, & the Role of Constitutional Norms in Congressional Regulation of the Courts, 78 Ind. L.J. 155 (2003) (critiquing judiciary trends over centuries); Adam Cohen, Editorial, Pst . . . Justice Scalia . . . You Know, You’re an Activist Judge, Too, N.Y. Times, Apr. 19, 2005, at A20 ("Not since the 1960s, when federal judges in the South were threatened by cross burnings and firebombs, have judges been so besieged."); see also Jeff Chorney, O’Connor: Make Nice with Congress, The Recorder (S.F.), July 23, 2004, at 1 ("The apparent state of relations [between Congress and the judiciary] is more tense than at any time in my lifetime.") (quoting Justice Sandra Day O’Connor, Address to Ninth Circuit Conference (July 22, 2004)); Sarah Kershaw, Court in Transition: The Retiring Justice, O’Connor Sees Strains Between the Judiciary and Some in Congress, N.Y. Times, July 22, 2005, at A14 (reporting Justice O’Connor’s view that relations between judiciary and some members of Congress are more strained than she has ever seen before such that she worries about future of federal judiciary and has concern about Congress’s failure to raise judicial salaries); Justice Ruth Bader Ginsburg, Address at West Virginia University College of Law (Oct. 20, 2005) ("I don’t remember a time where there has been such tension between the judiciary and the legislature, and I just hope that it goes back to the way it was."); cf. David D. Kirkpatrick, Conservative Gathering Is Mostly Quiet on Nominee, N.Y. Times, Aug. 15, 2005, at A15 (explaining that Rep. Tom DeLay ridiculed Supreme Court for not knowing as much as high school civics student and reporting that “DeLay, the highest ranking of six Republican congressmen who participated [in a religious telecast], questioned the Supreme Court’s power to strike down federal laws it deemed unconstitutional . . . . [He stated:] ‘That’s not judicial independence[,] [t]hat’s judicial supremacy, judicial autocracy.’”

14. Valenti, supra note 3 (describing "descent into enmity").
branches. Overblown efforts by one branch to decrease the influential sphere of another may shift the balance of power in unsound directions. Hasty recalibrations in reaction to selfish moves by another branch will do much to harm the delicate balance among the three. Moreover, the public nature of the struggle detrimentally affects public respect for the rule of law, the courts, Congress, the President, and indeed government itself. When the rhetoric reaches a boiling point, members of Congress use the momentum to sponsor concrete efforts to rein in the judicial branch, such as bills to strip federal court jurisdiction. These initiatives scratch at the sphere of federal court jurisdiction over constitutional claims. Such moves threaten to create a dangerous precedent that encourages future congresses to pick and choose which types of cases they do not want federal courts to hear in order to manage the substantive constitutional outcomes in a particular field of cases and controversies. The heart of our constitutional democracy is at stake every time the branches conduct this dance. Their performance determines whether government survives the battle as a stronger, enriched constitutional machine or a weaker one and whether the uniformity and supremacy of constitutional rights will be safeguarded by the judicial branch or left to a fifty-state patchwork quilt.

A power struggle between the Legislature and the judiciary resides at the core of this tension. Within that construct, most scholars focus on the legitimate bounds of an institution’s authority. They specifically debate the question of whether an attempt by Congress to alter the playing field, by stripping jurisdiction, would be a constitutional exercise of power granted to Congress in the Constitution. The touchstone for this inquiry is the text of Article III of the Constitution, which provides:

15. See, e.g., Paul M. Bator, Congressional Power Over the Jurisdiction of the Federal Courts, 27 VILL. L. REV. 1030, 1030, 1035 (1982) (endorsing expansive view of congressional authority over lower federal court jurisdiction, including that Congress may strip category of constitutional controversies); Gunther, Congressional Power, supra note 2, at 898 (siding with other scholars who find that Congress possesses broad “power over the jurisdiction of federal courts in terms of sheer legal authority,” but stressing that scholars should focus on wisdom of “what sound constitutional statesmanship admonishes”); 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) (reasoning that Congress cannot constitutionally exercise Article III power in ways that “will destroy the essential role of the Supreme Court in the constitutional plan”); Leonard G. Ratner, Congressional Power Over the Appellate Jurisdiction of the Supreme Court, 109 U. PA. L. REV. 157, 201 (1960) [hereinafter Ratner, Congressional Power] (concluding that “legislation that precludes Supreme Court review in every case involving a particular subject is an unconstitutional encroachment on the Court’s essential functions”); Leonard G. Ratner, Majoritarian Constraints on Judicial Review: Congressional Control of Supreme Court Jurisdiction, 27 VILL. L. REV. 999, 935 (1982) [hereinafter Ratner, Majoritarian Constraints] (rejecting plenary interpretation of Congress’s Article III power as inconsistent with “the constitutional plan” that entails Court retaining its “essential functions under the Constitution” to maintain supremacy and uniformity of federal law); Lawrence Gene Sager, Foreward: Constitutional Limitations on Congress’ Authority to Regulate the Jurisdiction of the Federal Courts, 95 HARV. L. REV. 17, 89 (1981) (arguing inter alia that “adoption of any of the bills that are part of the proposed assault on the federal
The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. . . . The judicial Power shall extend to all cases, in Law and Equity, arising under this Constitution . . . . In all [such] Cases . . . ., 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. 16

The Supreme Court has never conclusively resolved the ultimate issue of whether Congress has the power to preclude the federal forum over constitutional cases, and although scholarly treatment is rich, genuine consensus remains elusive. 17 Professor Gerald Gunther, along with others, resolved the power question in favor of Congress, but Gunther emphasized that the critical inquiry should be the wisdom of Congress's maneuvers vis-à-vis the federal judiciary. 18 Not all scholars, however, agree with the conclusion that Congress possesses the power to strip federal court jurisdiction from classes of constitutional issues whenever it chooses. 19 Their reasoning stretches from arguably internal Article III arguments regarding the essence of the judiciary 20 to arguments external to Article III, such as the Bill of Rights. 21 As such, "[t]here exists a serious and durable
controversy" regarding whether Congress maintains the authority to strip a body of constitutional cases from all federal courts.22 Still others opine that neither the branches nor scholars should resolve the question at all because the ebb-and-flow tension is a healthy component of American government.23 In this vein, this Article seeks to explore that delicate balance through meditation on the perfect tension on the strings of the branches and the sometimes-discordant path to it.

In order to demonstrate how to seek and maintain the right balance of tension, this Article engages in a tripartite conversation, a "trialogue," in which each branch contributes to the discussion.24 The trialogue will be fiery at points, mimicking the nuances of the controversies brewing, while cognizant of the historical themes and tensions. Through Socratic trialogue, in the tradition of Professor Henry Hart's dialogue,25 and colloquial narrative, this Article hopes to stimulate inquiry about constitutional and prudential questions that appear unanswerable and to simulate cycli-
cal, real-world battles that appear simultaneously cataclysmic and overblown. The construct of discourse will highlight the forces and motives of each institution with an eye towards gleaning lessons from behavioral triggers. This dialectical device is not intended to oversimplify the forces at play. The internal forces of each branch are multifaceted and difficult to characterize into one voice. Each individual is meant to be representative of a typical, or at least plausible, viewpoint from the respective branch. Further, viewpoints of any individual are not stripped from the context in which such real life actors exist. It is my intention that such context is part of the atmospherics of the Article.

Although there is an art form to balancing the tension between the branches, motivational drivers may be gleaned by pushing the dialogue. The institutional reality of heated times may transmogrify interbranch threats into damaging encroachment and systemic harm. The execution of such threats could lead to a constitutional crisis and, short of that, the increased reactionary nature of vitriolic threats could have a corrosive effect on our democratic system. Increased understanding of the motivations and the stakes at issue will assist institutional actors to exercise the wisdom of restraint.

This Article maintains that resolution of such controversies entails a periodic retuning of the strings of their connected instrument to avoid encroachments beyond the "zone of twilight" where the branches exercise overlapping authority and into the core functions of a separate branch of government. The resolution is less about dramatic conclusions and more about the benefits of allowing a healthy level of tension to remain so long as the branch actors judiciously exercise discretion and restraint on such delicate matters. This dialogue attempts to strike the chords of debate that will improve attempts to maintain a tension that is ideal.

The narrative arc of this work spans the highlights of interbranch tension regarding threats to the judiciary's power and court responses. Act One sets forth examples of the rising tides of tension between the branches. It specifically discusses the inflamed rhetoric and a host of concrete proposals to rein in the purported activist judiciary. Act Two centers on pending bills seeking to strip all federal court jurisdiction over claims related to same-sex marriage and the Pledge of Allegiance's inclusion of "under God." At the heart of the debate is the text of Article III of the


27. See, e.g., Marriage Protection Act of 2004, H.R. 3313, 108th Cong. (2004) ("No court created by Act of Congress shall have any jurisdiction, and the Supreme Court shall have no appellate jurisdiction, to hear or decide any question pertaining to the interpretation of, or the validity under the Constitution of, section 1783C [Defense of Marriage Act] or this section."); Pledge Protection Act of 2004, H.R. 2028, 108th Cong. (2004) ("No court created by Act of Congress shall have any jurisdiction, and the Supreme Court shall have no appellate jurisdiction, to hear or decide any question pertaining to the interpretation of, or the validity of..."
Constitution. Act Two analyzes the text's meaning through plain language, Framers' intent, contextual factors, case precedent and competing scholarly takes. Finally, Act Three demonstrates the dangers involved if the power players strike a bargain using political favors as trading cards. The Act then explores philosophical, as well as common sense, approaches to the controversy. Although application of philosophical doctrines falls short of curing the situational crises, the Play closes with a new perspective on the realities and recognition that open lines of communication are critical for successful diplomacy in interbranch relations.

The stage is set for a dinner meeting including a key member of each branch.

**Justice Life Tenure—a Supreme Court Justice**

**Senator Roll Call—a majority party Senator**

**Attorney General Blanche Mansion—a cabinet member for a majority party President**

**Server Vox Populi—a student and part-time restaurant employee**

**Act One: They Meet . . . Threats Abound**

*Scene One: Clearing the Air.* [The Palm Restaurant.28 A classic American steakhouse and a Washington, D.C. institution for power-broker, discreet dining.] [Enter Justice Life Tenure and Senator Roll Call, old law school classmates, both in dark suits. Each separately led to a private dining room. After some cordial chitchat regarding family and goings-on,29 the mood turns darker.]

**Justice Tenure:** We have known each other for a long time so let me be frank. My brethren and I are dismayed that you all would even consider the Constitution of, the Pledge of Allegiance . . . or its recitation.

In an unusual move, the Senate recently passed a jurisdiction-stripping bill that strips all but one civilian federal forum from military prison detainees such as those at Guantanamo Bay. See Detainees at Guantanamo Bay Amendment, S.A. 2515 to S. 1042 (Nov. 14, 2005) (passed 84-14) (providing exclusive jurisdiction to District of Columbia federal circuit court over certain habeas corpus petitions on behalf of Guantanamo Bay detainees). Although the initial amendment attempted to foreclose virtually all access to the civilian federal forum, the final version is not a complete strip of federal jurisdiction. As such, it raises related, but distinct, issues from the same-sex marriage and Pledge bills and thus is not the focus of this Article.

28. The author is not the first to suggest the Palm Restaurant as a likely locale for power-broker meetings in Washington, D.C. See Faye Fiore, *Restaurants Lobbying to Keep D.C.'s Free Lunch*, L.A. Times, Mar. 22, 2006, at A1 ("The three positions with the most sway over Congress, it can be argued, are majority leader of the Senate, speaker of the House and maitre d' of The Palm.").

29. See Valenti, *supra* note 3 (providing example of chitchat between political heads).
sider any jurisdiction-stripping bills right now.\textsuperscript{30} Didn't we all learn any lessons from such futile moves in the past?\textsuperscript{31}

\textbf{Senator Call:} Apparently, it's the judiciary who didn't learn anything from these exercises. What do you expect when the judiciary fundamentally alters the playing field with decisions advancing gay rights,\textsuperscript{32} prohibiting court displays of religious symbols,\textsuperscript{33} and barring recitation of "under God" in the Pledge of Allegiance?\textsuperscript{34}

\textbf{Justice Tenure:} Does Congress really want a constitutional crisis on its hands?

\textbf{Senator Call:} You are blowing this completely out of proportion.

\textbf{[Attorney General Blanche Mansion, having not been formally invited to the tête-à-tête, enters the private dining room sporting a two-button, poplin suit and drinking a Maker's Mark bourbon whiskey and Coke.]}\textsuperscript{35}

\textbf{Attorney General Mansion:} Justice, you forgot to send me the memo on this meeting. You should know that our boys up on the Hill don't blink without the Executive knowing it.

\textbf{Justice Tenure:} I figured as much, but I was hoping to keep the wraps on this dialogue as tight as possible. I would prefer that we never have these sorts of discussions, given their ethically suspect nature,\textsuperscript{35} but the current state of affairs commands it in my opinion.

\textsuperscript{30} For a further discussion of pending jurisdiction-stripping bills, see \textit{supra} note 27 and accompanying text.

\textsuperscript{31} \textit{See, e.g.,} Erwin Chemerinsky, \textit{Federal Jurisdiction} § 3.1, at 171 (3d ed. 1999) (proving that "between 1953 and 1968, over sixty bills were introduced into Congress to restrict federal court jurisdiction over particular topics"); Gunther, \textit{Congressional Power, supra} note 2, at 895 ("In 1981 and 1982 alone, thirty jurisdiction-stripping bills were introduced in Congress . . . .") (citing Max Baucus & Kenneth R. Kay, \textit{The Court Stripping Bills: Their Impact on the Constitution, the Courts, and Congress}, 27 \textit{Vill. L. Rev.} 988, 992 n.18 (1982) (collecting proposals)).

\textsuperscript{32} \textit{See} Lawrence v. Texas, 539 U.S. 558, 578 (2003) (protecting liberty interest under substantive due process rights regarding privacy of sexual activity between individuals of same sex).

\textsuperscript{33} \textit{See generally} McCreary County v. ACLU, 125 S. Ct. 2722 (2005). In a 5-4 opinion, the Supreme Court held that an in-courthouse display of the Ten Commandments violated the First Amendment by impermissibly establishing religion. \textit{See id.} at 2745. In a companion case, \textit{Van Orden v. Perry}, 125 S. Ct. 2854 (2005), the Supreme Court held that a Ten Commandments display in a 22-acre park withstood constitutional scrutiny.

\textsuperscript{34} \textit{See Newdow v. U.S. Cong.}, 292 F.3d 597 (9th Cir. 2002), \textit{amended by} 328 F.3d 466 (9th Cir. 2003).

\textsuperscript{35} Such meetings may be ethically suspect for the fertile ground they create for improper exchanges and for the potential appearances of impropriety. The level of ethical concern hinges upon the meeting's characteristics, such as: secrecy, case predictions, confidential information, promises, favors, and like considerations. \textit{See, e.g.,} The Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824 (codified as amended in 5 U.S.C. app. § 5 (1996)) (regulating government employees' conduct related to political activity, matters in which they have financial interests, as well as other areas); \textit{Model Code of Judicial Conduct Canon} 3B(7) (2004) (barring ex parte communications concerning pending or impending litigation); \textit{id.} at Canon 3E(1) (dictating that judge should not hear case where judge's "impartiality might reasonably be questioned"); Jeffrey M. Shaman \textit{et al.},
ATTORNEY GENERAL MANSION: I can appreciate your position, but to the extent any discussions are taking place, the Executive deserves a seat at the table. My solution is that we institute the “drinking privilege.”

Scene Two: Strained Relations & Rhetoric. [Senator Call quickly raises his Grey Goose and tonic in reassurance. Justice Tenure reluctantly clinks his glass of Penfolds Cabernet Shiraz blend.]

ATTORNEY GENERAL MANSION: Good. So, what’s on the agenda for the evening? It felt a bit tense in here when I entered.

JUSTICE TENURE [whispering]: Hold on a minute. What about the server who keeps popping in and out of our room?

ATTORNEY GENERAL MANSION: Don’t worry about Vox Populi.37 She is sworn to secrecy. I’m in here every week and she keeps all of my confidences. She appreciates the premium on being discreet. Now fill me in on what I’ve missed.

SENATOR CALL: The judiciary is bent out of shape over our jurisdiction-stripping bills. The whole issue is overblown. Everyone knows we aren’t likely to pass them. Having served five terms in Congress before making the move to the Senate, I can tell you that it may never clear.38

JUSTICE TENURE: I disagree with your representation of the current reality. The state of affairs between branches right now is as strained as it has ever been.39 The strain coupled with inflamed rhetoric detrimentally

36. The “drinking privilege” was an informally recognized objection in certain courtrooms in the Washington, D.C. area during the 1970s. The “drinking privilege” objection was offered when there was not a particular rule or case governing the objection, but nonetheless there was something untoward about the opposing counsel’s conduct or strategy. As recounted by legendary Washington lawyer Robert S. Bennett, it derived from a particular incident in which Mr. Bennett (then a young prosecutor) was preparing a police officer to testify over drinks at a local bar. The next day, defense counsel proffered information in open court that he overheard at the bar. The court was not impressed and declined to take into account information obtained in that manner.

37. The server, Vox Populi, is an homage to a character in Raymond Queneau’s, The Last Days (Barbara Wright trans., Dalkey Archive Press 2d ed. 1996) (1936)—a waiter named “Alfred,” whom Dartmouth Professor Vivian Kogan aptly described as a “living ‘philosopher.’” Id. at ix.


39. For a further discussion of the strain between branches, see supra note 13 and accompanying text. See also Terri Carter, A Cautious Embrace: Recent Salvoes Reflect Tensions Between Congress and the Federal Judiciary, 3 No. 22 A.B.A. J. E-REP. 1 (June 4, 2004) (“The long-running minuet between Congress and the federal judi-
affects our reputation. See, you are forgetting about the impact of ap-

arances, which can play a significant role in the public’s respect for the judi-

ciary. Ah, I digress. “Activist judiciary” rhetoric wears away the insulation

from politics that the framers deliberately placed around the judiciary.

ATTORNEY GENERAL MANSION: You know that rhetoric often drives pol-

cy in this town.\(^\text{40}\)

JUSTICE TENURE: Sure, but my main point is that the jurisdiction-strip-

ping efforts are at the root of a whole host of anti-judiciary moves that

Congress is currently launching. And, I might add that the Executive
doesn’t exactly have clean hands on this matter either, as evidenced by its

rhetoric and tacit support.

ATTORNEY GENERAL MANSION: Don’t drag the Executive into this. We
don’t have a dog in this fight.

JUSTICE TENURE: Given the Executive’s lack of comment on Con-

gress’s specific tactics of late,\(^\text{41}\) we are assuming that the Executive is in

favor of, or at least tolerant of, Congress’s efforts to strip jurisdiction. Oth-

erwise, how do you explain the Executive talking points mimicking the

President’s rhetoric from his last State of the Union regarding “activist

judges” that need to be stopped?\(^\text{42}\) If I recall, I think there are a handful

of political consultants whose kids have braces paid for on the strength of

our interest in rhetoric.

ATTORNEY GENERAL MANSION: Point well taken. Maybe we have a Chi-

huahua who wants to yip along the sidelines every now and then.

JUSTICE TENURE: Fine. My main issue is with Congress, although at

least in the past during heated partisan battles, the judiciary could count

\(^\text{40}\) President Ronald Reagan commented during the 1980 campaign that he

could nominate a woman to the Supreme Court. Afterward, Reagan felt con-

strained to nominate a woman, so he nominated Sandra Day O’Connor rather

than Robert Bork. See TERRY EASTLAND, ENERGY IN THE EXECUTIVE—THE CASE

FOR THE STRONG PRESIDENCY 243 (1992) (describing selection of Sandra Day O’Connor

as Supreme Court nominee).

\(^\text{41}\) The Executive has said little regarding jurisdiction-stripping efforts. But

for a further discussion regarding the Schiavo bill, which encroaches on federal
courts’ prerogatives, see infra notes 111-21 and accompanying text. President

George W. Bush stated in pertinent part: “[W]here there are serious questions and

substantial doubts, our society, our laws, and our courts should have a presump-
tion in favor of life.” President’s Statement on Terri Schiavo (Mar. 17, 2005), available


\(^\text{42}\) See George W. Bush, President of the United States of America, State of


releases/2005/02/20050202-11.html (stating that marriage is “sacred institution"

that “should not be re-defined by activist judges”); see also H.R. REP. NO. 108-691, at

104 (dissenting views) (“Efforts by the Majority to discredit our judiciary by paint-
ing it with the broad brush of ’judicial activism’ are both disingenuous and
demeaning.”).
on the Executive to make its own judgment instead of joining in the clamor. Unlike the present crisis, you could also bank on independent thinking to trump partisan allegiance on grave matters such as stripping the court of its ability to resolve matters of significant constitutional import. And, let me be clear, the devastating state of affairs between the branches is a matter of palpable concern for all of us. For instance, the very tenor of the rhetoric has reached an unbearable pitch—even for times of die-hard partisan warfare. Congress is attempting to create a feeding frenzy with the tone of their debate.

SENATOR CALL: Now you are making something out of nothing. Historically, there have been previous crises of magnitude, such as FDR's attempts to pack the Court—ultimately an unsuccessful attempt to flex Executive muscle. Maybe you are engaged in a bit of generational narcissism, which leads you to amplify the import of the current controversy. Your misplaced emphasis on mere rhetoric causes you to exaggerate the state of affairs. Are you seriously complaining about an issue as trivial as rhetoric?

ATTORNEY GENERAL MANSION: Wait a minute. Anyone who has to run for reelection knows about the critical difference rhetoric can have. In fact, the power of rhetoric is so strong that we believe you have to harness

43. See, e.g., Letter from Attorney General William French Smith to Senator Strom Thurmond (May 6, 1982), reprinted in 128 CONG. REC. S4727-30 (daily ed. May 6, 1982) (asserting unconstitutionality in Congress attempting to “make ‘exceptions’ to Supreme Court jurisdiction which would intrude upon the core functions of the Supreme Court as an independent and equal branch in our system of separation of powers”); see also Gunther, Congressional Power, supra note 2, at 902 (explaining that President Reagan’s Attorney General advanced Professor Ratner’s “essential functions’ limit” on congressional power over federal court jurisdiction). But cf. Neil A. Lewis, Newly Released Memos Show More of Roberts’s Role in Earlier Administrations, N.Y. TIMES, Aug. 12, 2005, at A14 (reporting that recently released government documents written by current Supreme Court Chief Justice, then-Judge, John G. Roberts, Jr., while working in White House Counsel’s office for Smith reveal that Roberts “provided a vigorous argument as to why it would be constitutional for Congress to enact a law that would strip the Supreme Court of jurisdiction over school prayer and busing cases,” but that note accompanying memorandum from Roberts’s then immediate supervisor, Kenneth W. Starr, stated that assignment sought aggressive defense of jurisdiction stripping for purpose of testing debates within administration).

44. See H.R. REP. No. 108-691, at 104 (dissenting views) (noting that former Senator Barry Goldwater declared jurisdiction stripping attempts of 1970s and 1980s unconstitutional and shameful and also including Robert Bork and William French Smith as other conservatives who cautioned against such encroachments on judiciary).

45. See, e.g., Dana Milbank, In Capital’s Rhetoric Wars, ‘Sorry’ Is a Temporary Pause, WASH. POST, June 26, 2005, at A04 (“The Capital has been racked by a bipartisan barrage of incautious remarks this year—a bull market in over-the-top rhetoric . . . . As the nation’s political culture grows ever coarser, it has been a big year for vituperative partisan rhetoric.”).

the rhetorical devices at the front end in order to shape the debate, the message and the ultimate effect of the content on the listener. 47

Senator Call: Certainly I appreciate the effect rhetoric may have, or the effect we hope rhetoric has, on voters. Even so, it is simply a verbal game of framing and spinning the debate in favor of your political ends.

Justice Tenure: Your singular vision of the import of dialogue is baffling. I am constantly reminded of the high premium on the expressive function of language, and specifically the need for "reasoned elaboration," in our court opinions. 48 There is value in what is said, the way it is said and the very fact that it is said.

Senator Call: But, why should our rhetoric have any impact on federal judges? Let us not forget that federal judges are spared from having to run for their offices. 49

Justice Tenure: The reason why I am voicing concern over the embarrassingly harsh rhetoric of Congress and the Executive is that the tone does a real disservice to government generally. The federal judiciary does not have the types of public relations apparatus or campaign framework in which to defend itself. 50 Rather, we have academic papers, scholarly or

47. For a provocative exploration of political scientists' treatment of rhetoric, see Patrick Thaddeus Jackson & Ronald R. Krebs, Twisting Tongues and Twisting Arms: The Power of Political Rhetoric (2003), available at http://www.polisci.umn.edu/information/mirc/kiosk/oldsched/Fall2003Papers/PastPapersfromFall2003/Jackson_KrebsMIRCFinal.pdf (advancing theory of power of political rhetoric in form of "rhetorical coercion"). For a partisan sampling of the battle for title in the rhetoric wars, see George Lakoff, Don't Think of an Elephant!: Know Your Values and Frame the Debate (2004), which attempts to offer advice for reframing issues that conservatives have already framed in the national public policy debate.

48. See Henry M. Hart Jr. & Albert M. Sacks, The Legal Process: Basic Problems in the Making and Application of the Law 143-52 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (originating phrase "reasoned elaboration"); see also Packard v. Provident Nat'l Bank, 994 F.2d 1039, 1049-50 (3d Cir. 1993) ("The purpose of reasoned elaboration is to prevent such perceptions, as well as to insure that the court gives careful consideration to the issue before it."); United States v. Drummond, 354 F.2d 132, 143 (2d Cir. 1965) ("The genius of the common law lies in the process of reasoned elaboration from past precedent; unless we explain our decisions of today with all the precision and exactitude at our command, today's holdings will become but simple fiat and will provide no guidelines for tomorrow's problems.").

49. U.S. Const. art. III, § 1 (providing for appointment, rather than election, of federal judges).

50. See id. Early in our history, the Supreme Court recognized the weakness of its own defensive abilities. The case of In re Neagle, 135 U.S. 1 (1890), involved a question of official immunity from a state homicide charge for a United States Marshal's killing of a man who attacked Justice Field. In reaction to the conundrum created by the absence of a particular statutory authorization for the marshal's use of force, the Supreme Court reasoned:

Where, then, are we to look for the protection which we have shown Judge Field was entitled to when engaged in the discharge of his official duties? Not to the courts of the United States, because, as has been more than once said in this court, in the division of powers of government between the three great departments, executive, legislative, and judicial, the
honorary speeches and judicial opinions—all of which are inappropriate for use as a defensive template. The inflamed rhetoric creates an atmosphere in which judges are legitimately concerned about real backlash. Some judges, legitimately or not, are concerned about violence in light of recent events. There is need for pause on this issue.

SENATOR CALL: Look we can all agree that we don’t want our judges facing those sorts of dangers, but such examples are freak incidents. Surely you don’t intimate that we have incited such violence, do you? In all honesty, if I could wave a magic wand and remove a clutch of judges from the federal bench, I wouldn’t hesitate, but it is ludicrous to assert that any member of Congress or the executive branch would want a judge to fear physical harm.

ATTORNEY GENERAL MANSION: I don’t think we should be quick to view Justice Tenure’s statement as an accusation. I assume it would be acceptable to the judiciary if we would dial the rhetoric back a notch.

JUSTICE TENURE: A few notches would be ideal.

judicial is the weakest for the purposes of self-protection and for the enforcement of the powers which it exercises.

Id. at 62-63.

51. Although there is relatively little violence committed against judges in the United States, assailants have murdered judges in two recent, separate incidents. See Shaila Dewan, Work Resumes at Atlanta Court Amid Grief and Fears, N.Y. TIMES, Mar. 15, 2005, at A20 (reporting on courthouse murder where three people, including one judge, were shot dead); John Kane, Senior Judge of United States District Court for Colorado, Editorial, Personal Safety and Public Justice, N.Y. TIMES, Mar. 19, 2005, at A15 (reflecting on both Georgia and Illinois incidents). Speculation abounds as to whether this violence causally links to individual decisions of judges or to the perception of judges as judicial activists in a pejorative sense. See, e.g., Milbank, supra note 45 (reporting that Senator John Cornyn (R-Tex.) contemplated on Senate floor “whether an ‘unaccountable’ judiciary leads ‘up to the point where some people . . . engage in violence’”); Editorial, Beyond the Pale, WASH. POST, Apr. 17, 2005, at B06.

Then there’s Sen. John Cornyn (R-Tex.), who posited “some connection” between recent violence against judges and “the perception in some quarters” that “judges are making political decisions.” Mr. Cornyn later insisted that he was not condoning violence against the judiciary and conceded that he knew of no “evidence whatsoever linking recent acts of courthouse violence to the various controversial rulings.”

Id. Assuming the negative perception exists, a topic worthy of further exploration is whether the perception flows from actual evidence of activism or from inflamed rhetoric. See Carl Hulse & David D. Kirkpatrick, DeLay Says Federal Judiciary Has ‘Run Amok,’ Adding Congress Is Partly to Blame, N.Y. TIMES, Apr. 8, 2005, at A21 (“Mr. DeLay, who was previously criticized by some Democrats who said his open-ended remarks about holding judges accountable might incite violence, took care to warn the few dozen attendees at the conference [entitled ‘Confronting the Judicial War on Faith’] to keep their emotions in check.”). For a partisan claim of the connection of rhetoric to violence, see Charles Babington, GOP Is Fracturing Over Power of Judiciary, WASH. POST, Apr. 7, 2005, at A04 [hereinafter Babington, GOP Is Fracturing], reporting comment by Senator Edward M. Kennedy (D-Mass.) (urging President and Senate Majority Leader Bill Frist “to call a halt to the reckless Republican rhetoric that is endangering judges’ lives”).

http://digitalcommons.law.villanova.edu/vlr/vol51/iss3/3
Senator Call: I appreciate that the judiciary lacks the apparatus to fight back, but that fact is precisely what makes the federal judiciary an easy target. Some members of Congress, whom you may consider less scrupulous, can give a few fiery speeches denouncing the judiciary in order to relieve some of the political pressure or score political points with a given constituency and not have to fear repercussions from the judiciary itself. Thus, it serves as a pressure valve that some members release in the direction of the judiciary as a rare opportunity for relief. All of which can be done without actual cost to the delicate separation-of-powers balance because there is no real encroachment. Therein lies the beauty that I believe the Justice is missing.

Justice Tenure: I fundamentally disagree with your simplistic no harm, no foul argument. The type of rhetorical so-called release you are condoning, and dare I say fostering, clearly furthers an atmosphere of disrepute. At any rate, perhaps you could persuade me if the rhetoric did not lead to direct action, for example, specific proposals by “unconscientious legislators.” Putting aside for the moment the jurisdiction-stripping efforts, numerous representatives have launched anti-judiciary trial balloons. Let’s see. Off the top of my head, here are emblematic threats of late: creating an inspector general to investigate federal judges, slashing the...

52. Periodically, state bar organizations step in to defend judges from unfounded attacks by, at minimum, instituting committees or programs geared to handle the issue. See, e.g., Thomas L. Cooper, Attacks on Judicial Independence: The PBA Response, PA. BAR ASS’N Q. (Apr. 2001) (discussing Pennsylvania Bar efforts in defending judges from unjust attacks); President’s Message, 44 R.I. BAR J., June 1996, at 3. That article expounded:

Unjust Criticism of Judges and Lawyers: One of the recent initiatives of which I am particularly pleased is the clarification and reaffirmation of the responsibility of the organized bar to respond to unjust and unwarranted criticism of attorneys and judges in the media. While bar presidents have frequently responded in the past to unjustified attacks of attorneys, our role in defending judges who are the subject of unfair criticism has been uneven.


53. Paul Brest, The Conscientious Legislator’s Guide to Constitutional Interpretation, 27 STAN. L. REV. 585, 590-94 (1975) (imploring “conscientious legislators” to vote against legislation if verboten motives were behind it); see also Gunther, Congressional Power, supra note 2, at 921 (“I would urge the conscientious legislator to vote against the recent jurisdiction-stripping devices because they are unwise and violate the ‘spirit’ of the Constitution . . . ”).

54. See, e.g., Allen, GOP Seeks Curbs, supra note 39 (reporting that House Judiciary Committee Chairman F. James Sensenbrenner Jr. (R-Wis.) advocated in speech that “Congress should create an inspector general for the courts to field com-
budget, increasing judicial impeachments, enhancing disciplinary mechanisms generally and removing life tenure. Rhetoric can create a self-fulfilling prophecy because, once a representative is on the record alleging all these problems with the judicial branch, the public may come to expect action. So, it is of little surprise when rhetoric unfolds and takes on a life of its own.

**Senator Call:** Congress is not monolithic. You ought to expect as an institutional matter that the rhetoric and proposals coming out of the House will be more shrill and aggressive than the Senate. Every institution contains rogue actors. The House is the people’s House, designed to be a forum that is a more passionate, less deliberative body. House districts are generally safe, which frees House members to be more outspoken and plaintiffs and conduct investigations"); David D. Kirkpatrick, Republican Suggests a Judicial Inspector General, N.Y. Times, May 10, 2005, at A12 (reporting suggestion of instituting Inspector General to be watchdog over judiciary).

55. See, e.g., Ron Chernow, Chopping Off the Weakest Branch, N.Y. Times, May 6, 2005, at A27 (explaining that evangelical conservatives who are displeased with federal judiciary “have now proposed that Congress cut off federal financing for judges and even abolish some lower-level courts that they feel have issued decisions that mandate a secular, anti-Christian state”). Then-House Majority Leader, Tom DeLay commented: “We set up the courts . . . . We can unset the courts. We have the power of the purse.” Id.

56. See, e.g., Hulse & Kirkpatrick, supra note 51 (reporting DeLay’s support of need for Congress to “confront” judiciary and “reassert [Congress’s] constitutional authority over the courts[,]” including setting jurisdiction and administering Congress’s responsibility “to make sure the judges administer their responsibilities”); see also id. (reporting that chief of staff to Senator Tom Coburn (R-Okla.) stated that he was “in favor of impeachment” and suggested that “mass impeachment” may be necessary).

57. See Allen, GOP Seeks Curbs, supra note 39 (reporting Representative Sensenbrenner’s plan to “curb the judiciary—starting with passage of a tougher disciplinary mechanism for judges”).

58. See Hulse & Kirkpatrick, supra note 51. Hulse & Kirkpatrick reported that congressional staff members advocate numerous concrete measures: [I]mpeaching judges deemed to have ignored the will of Congress or to have followed foreign laws; passing bills to remove court jurisdiction from certain social issues or the place of God in public life; changing Senate rules that allow the Democratic minority to filibuster Mr. Bush’s appeals court nominees; and using Congress’s authority over court budgets to punish judges whom it considers to have overstepped their authority. Id. Other plans include splitting the United States Court of Appeals for the Ninth Circuit, the largest geographic federal circuit, into three circuits with new circuits in Seattle, Washington (covering Alaska, Washington, and Oregon) and Phoenix, Arizona (covering four mountain states). See Allen, GOP Seeks Curbs, supra note 39 (relaying Representative Sensenbrenner’s assertion: “The question is not if the Ninth will be split, but when”).

59. See The Federalist No. 52 (Alexander Hamilton or James Madison), supra note 12, at 268 (“As it is essential to liberty, that the government in general shall have a common interest with the people; so it is particularly essential that [the House of Representatives] should have an immediate dependence on, and an intimate sympathy with, the people.”); Lee H. Hamilton, How Congress Works and Why You Should Care 66 (2004) (remarking Framers designed House to be “closely connected to the needs, desires, and wishes of the American people and
JUSTICE TENURE: Perhaps, but the Senate is letting the judiciary (and the people I would assert) down too. The rhetoric hasn’t been much less harsh than the House. And, the rhetoric is beginning to morph into proposals. For example, the Senate has proposed the constitutional ban on gay marriage, which does not interest the federal judiciary as such. When the constitutional amendment (“Plan A”) fails, however, ostensibly the Senate may consider the jurisdiction-stripping bill on gay marriage as “Plan B.” The Senate is already considering the jurisdiction-stripping bill regarding the Pledge of Allegiance matter.

was to be the voice of popular opinion”). Lee Hamilton served in the House of Representatives (D-Ind.) for over 30 years.

60. Senators often have this perception of Congress. Of course, one could argue that the House should act with greater caution in deliberation and action given that its members are accountable to constituents every two years versus the Senate’s six years.

61. See, e.g., The Battle Over the Filibuster, N.Y. TIMES, Apr. 29, 2005, at A24 (noting Bob Dole’s characterization of U.S. Senate). The article notes that former Senate Majority Leader and presidential candidate Bob Dole refers to the United States Senate as “the world’s greatest deliberative body,” but then editorializes: “That’s what it used to be. Now, respect for the tripartite system of power so carefully worked out by the founding fathers is being undermined by people in both parties who are looking after their own short-term self-interest. The Senate has become a shallow, shameful shadow of its former self.” See also The Senate Tries an Odd Experiment, N.Y. TIMES, Sept. 24, 2003, at A26 (discussing debate over Social Security). The article stated that:

A doughty few members of the United States Senate, dogged by the mythic conceit of membership in the “world’s greatest deliberative body,” got together in the chamber Monday evening to actually try debating . . . Social Security reform . . . and set[ting] firm limits on speaking times, interruptions and cross-examination, finishing in an hour with the 6lan of prep school debaters.

Id.

62. See, e.g., Cohen, supra note 13 (reporting federal judges are “besieged” like never before by Congress with attacks such as Senator John Cornyn (R-Tex.) asserting that “judges could be inviting physical attacks with controversial decisions”).


SENATOR CALL [savoring morsels of their shared appetizer of sweet peppers, peeled grapes and sausage]: Congressional action is motivated by a complex set of factors. Spectators and scholars submit that there are at least three rationales for congressional action: "representational, organizational, and attitudinal." The representational interest is the most intuitive in that it states the obvious—legislators want reelection and will "vote to please their constituents." But, you can’t underestimate the lengths to which a representative will go to please a fellow representative—this is known as the "organizational" pull. My personal favorite is the last model that is deemed "attitudinal" because it maintains that the competing pressures cancel each other out and thus leave the legislator to vote based upon personal convictions. I can’t say that’s how I’d describe it, but I like the end result of that theory. I am not sure where I come down on the scholarly take, but you have to appreciate that for Congress, there is the appearance, the reality and, at times, both.

ATTORNEY GENERAL MANSION: Now you are speaking my language, although reality seems so distant these days.

[SERVER VOX POPULI silently reflects: While those in government are arguing about symbolic issues, we’re all holding down multiple jobs and racing to and from daycare. The last thing we want to do with our precious downtime is listen to vitriolic talking points. It’s no wonder why such a broad cross section of Americans prefer to get their dose of vitriol from reality shows.]

Scene Three: Fourth Branch Balancing Act.

JUSTICE TENURE: Listen, you all are even making threats about life tenure of federal judges, which would require a constitutional amend-

66. See JAMES Q. WILSON, AMERICAN GOVERNMENT 206 (2d ed. 1990) ("[I]t is by no means obvious what factors will lead a representative or senator to vote for or against a bill or amendment.").

67. Id. at 206.

68. Id.

69. See id. at 207.

The organizational explanation is based on the equally reasonable assumption that since most constituents do not know how their legislator has voted it is not essential to please them. However, it is important to please fellow congressmen whose goodwill is valuable in getting things done and in acquiring status and power in Congress.

Id.

70. See id. (describing "attitudinal" explanation of how members of Congress vote).

71. Article III, § 1 of the U.S. Constitution states, "judges, both of the supreme and inferior courts, shall hold their offices during good Behaviour," which is interpreted as providing life tenure for federal judges. See N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 59 (1982) ("The 'good Behaviour' Clause guarantees that Art. III judges shall enjoy life tenure, subject only to removal by impeachment."). In response to the Schiavo decision, a member of the House Judiciary Committee asserted, "[t]hat kind of judge needs to be worried about what kind of role Congress will play in his future[,]" and warned that "most people do not realize the power Congress can exert over courts if it chooses." Babington, GOP Is Fracturing, supra note 51 (statements of Rep. Steve King (R-
ment.\textsuperscript{72} Aren't you taking it too far this time?

\textsc{Senator Call:} All we are doing is discussing whether an inspector general ought to be established to check the judiciary.\textsuperscript{73} Further, it would not require a constitutional amendment for us to eliminate certain federal courts or broaden the standards for impeachment. Don't forget that part of \textit{our} function is to provide a check on your authority.\textsuperscript{74}

\textsc{Justice Tenure:} Yes, \textit{your} function, not some fourth branch of government specifically erected to interfere with the core functions of the judiciary. As I understand it, the inspector general will serve as a roving watchdog over federal judges and the office will collect complaints, draft reports, audit court functions and investigate the court.\textsuperscript{75} You are attempting to pass the buck and contract out your purported function and inevitably, once you create this fourth arm, its powers will expand in direct correlation with improper motives of Congress until oversight shifts to investigation and then to encroachment. I assume that you want to create an inspector general to investigate judicial decision-making—which you cannot do—rather than purely procedural oversight such as review of budgetary decisions or acceptance of gifts.

\textsc{Attorney General Mansion:} I wouldn't go so far as to call it a Fourth Branch given that, depending on the context, it may connote government agencies, the people, lobbying groups or the media. But, at any rate, the Executive decidedly has not enjoyed independent investigations either. We have had it with the sweeping investigations pursued in the name of independent counsels tasked with investigating the White House. Unfortunately, the Supreme Court held in \textit{Morrison v. Olson}\textsuperscript{76} that the independent counsel provisions of the Ethics in Government Act\textsuperscript{77} did not violate the Appointments Clause of Article II, the limitations of Article III or the separation of powers by impermissibly encroaching upon the President's

\textsuperscript{72} In a Duke Law School Symposium held on April 9, 2005, Professors Paul Carrington and Roger Cramton suggested that life tenure could be eliminated through legislative means rather than a constitutional amendment. See \textit{infra} note 106 (elaborating on this proposal).

\textsuperscript{73} See \textit{supra} note 13; see also Allen, \textit{GOP Seeks Curb}s, \textit{supra} note 39 (providing that Representative Sensenbrenner stated that none of branches of government "should be given a blank check without oversight on their operations").

\textsuperscript{74} See Gunther, \textit{Congressional Power}, \textit{supra} note 2, at 907 ("But of course the constitutional scheme is one of checks and balances as well as separation[:;] Article III does provide for an independent judiciary, but independence does not mean total insulation of the judicial branch any more than it does for the other branches.").

\textsuperscript{75} See \textit{supra} note 13; see also Allen, \textit{GOP Seeks Curb}s, \textit{supra} note 39.

\textsuperscript{76} 487 U.S. 654 (1988).

authority under Article II.\(^\text{78}\) We have solace at last as the statutory provisions have lapsed.

**Justice Tenure:** Shouldn’t you take some of the blame for that one, given that President Reagan failed to veto it?\(^\text{79}\)

**Attorney General Mansion:** Server, can we get some more drinks here?

[**Server Vox Populi** responded: “Yes, of course,” but internally she lamented all the money wasted on allegedly independent commissions to investigate the “issue-gate” of the day. Then, she wondered whether her reaction was too quick given the potential therapeutic value of the 9/11 commission for the country.]

**Senator Call:** The *Morrison* decision validates the legitimacy of our mission to create an inspector general to review the federal judiciary. Such an office will serve to check the courts while not impermissibly encroaching on the separation of powers.

**Justice Tenure:** An inspector general with a sweeping jurisdictional mandate is well beyond any intended check for judges’ guaranteed life tenure, wouldn’t you say? It is an unreasonable shift in the balance of power among the three branches, yet its proponents appear to have no plans to back down on this initiative.\(^\text{80}\) Having an inspector general investigate judges for the decisions they make would offend the separation of powers doctrine.\(^\text{81}\)

\(^{78}\) See id. §§ 659-660 (stating holding in *Morrison*).

\(^{79}\) On January 4, 1983, President Ronald Reagan signed a bill that extended the Ethics in Government Act for five years and changed the term “special prosecutor” to “independent counsel.” Had President Reagan not signed the bill, it would have been struck by an automatic veto. See *Ethics Law Extended*, N.Y. TIMES, Jan. 5, 1983, at A12 (predicting bill’s fate, had President Reagan not signed it); cf. *Eastland*, supra note 40, at 270 (noting that Supreme Court sustained independent counsel statute with only dissent by Justice Scalia, who rejected stance of President Ronald Reagan’s Solicitor General, even though President Reagan had appointed Justice Scalia).

\(^{80}\) A separation of powers violation would exist to the extent Congress tasks an inspector with a function that attempts to exercise “control or coercive influence, direct or indirect” of the judicial branch. Mistretta v. United States, 488 U.S. 361, 380 (1989). See supra note 13; see also Allen, *GOP Seeks Curbs*, supra note 39 (reporting that Representative Sensenbrenner “said he will not be deterred by criticism that his party is trying to alter the balance of power among the three branches of government”).

\(^{81}\) See supra note 13; see also Allen, *GOP Seeks Curbs*, supra note 39 (“Critics contend that having such an official, who would likely have an independent office within the court system but would prepare periodic reports for Congress and answer its inquiries, would violate the separation-of-powers doctrine.”); id. (noting that Representative John Conyers, Jr. (D-Mich.) stated that his party viewed initiative as “serious weakening of the constitutional basis for the democracy” and as such party plans “to resist all of these encroachments because they compromise the whole idea of the separation of powers”). But see generally Diane M. Hartmus, *Inspection and Oversight in the Federal Courts: Creating an Office of Inspector General*, 35 CAL. W. L. REV. 243, 254 (1999) (arguing creation of office of inspector general in federal court system will not offend separation of powers doctrine).
[Justice Tenure internally reflected: The lone dissenter in *Morrison* had the better argument protecting the separation of powers, especially now that the shoe is on the other foot.]

**ATTORNEY GENERAL MANSION:** Isn't that a bit of an overstatement? Each of the branches needs a little oversight as part of the ordinary checks and balances from time to time.

**JUSTICE TENURE:** Proper oversight by the proper bodies, yes. A roving inspector general isn't the answer, you know that Blanche. This tactic is a result of misguided motives rather than a genuine intent to improve the working of the federal judiciary. Rather, it is a direct attack on the life tenure of federal judges with whom certain members of Congress vehemently disagree.

**SENATOR CALL:** You are well aware that federal judges never really had a right to life tenure because the Constitution promises tenure only as long as there is "Good Behaviour." And, we have good cause to investigate the utter lack of "Good Behaviour" that is running rampant. For example, judges should not cite to international law for reliance in court opinions or ignore the will of Congress. That's why we are planning to hold hearings on the definition of "Good Behaviour" for federal judges.

[Justice Tenure thought to himself: I wonder whether Roll even remembers the difference between international and foreign law.]

**JUSTICE TENURE:** What you are driving at is not what "Good Behaviour" targets. You know the Framers intended the Clause as a means to ensure a safety valve to catch the rare instances in which federal judges commit an impeachable offense or become unfit to serve. The proper

82. See *Morrison v. Olson*, 487 U.S. 654, 727 (1988) (Scalia, J., dissenting) (reasoning that Independent Counsel statute violated separation of powers doctrine). In rejecting the majority's separation of powers reasoning, Justice Scalia asserted: "The Court essentially says to the President: 'Trust us. We will make sure that you are able to accomplish your constitutional role.' I think the Constitution gives the President—and the people—more protection than that." *Id.*

83. See *Allen, GOP Seeks Curbs*, *supra* note 39 (explaining that although Professor Alan M. Dershowitz did not reject such proposals out of hand, he cautioned that proponents of such proposals "are the wrong people and this is the wrong political context in which to make changes to improve the judiciary").


86. See Remarks of Representative Tom DeLay, *Special Report with Brit Hume* (FOXNews television broadcast Mar. 30, 2005) ("[T]he House Judiciary Committee has announced hearing on the 'definition of good behavior' for judges.").

87. The Framers borrowed the "good behaviour" standard from an English law, the Act of Settlement, which the crown adopted in 1700 and which permitted removal of judges, but intended to provide English jurists a more secure tenure. See *William G. Ross, The Hazards of Proposals to Limit the Tenure of Federal Judges and to Permit Judicial Removal Without Impeachment*, 35 VILL. L. REV. 1063, 1067 (1990) (citing origin of Art. III's "good behaviour" standard); see also *Michael J. Gerhardt, The Federal Impeachment Process—A Constitutional and Historical Analysis*.
device to control abuse on this score is the impeachment power, which I hasten to add, is a power that you have exercised. Now in addition to threatening an inspector general, your mouthpieces are on the front lines threatening judicial impeachments. But, beware: such measures are “unwarranted and ill-considered” because “a judge’s judicial acts may not serve as a basis for impeachment.”

SENATOR CALL: Oh please, we’ve hardly flexed our muscle with the impeachment power. Most instances of federal judicial misbehavior end up being secretly handled by your own internal federal court channels, with barely a slap on the wrist, I might add. The federal judiciary is

83-86 (2d ed. 2000) (considering possible readings of “Good Behaviour” Clause). Gerhardt reasons that the “Good Behaviour” Clause:

[C]ould sensibly be read either as (1) setting a substantive standard of conduct on which judicial tenure is contingent, or as (2) employing an eighteenth-century term of art to signal that federal judges shall hold tenure for life unless impeached and, thus, that the good behavior clause itself does not establish a separate or independent basis for removal other than those specified in the impeachment clauses.

Id.

Gerhardt concludes the latter interpretation is more consistent with relevant constitutional history and structure. See id. (arguing that clause only permits removal of Art. III judges through impeachment). The writings of Alexander Hamilton lend themselves, by inference, to the position that “good behaviour” was not meant to serve as a primary mechanism for the removal of judges. Hamilton wrote: “In a monarchy, [good behaviour] is an excellent barrier to the despotism of the prince; in a republic, it is a no less excellent barrier to the encroachments and oppressions of the representative body.” THE FEDERALIST No. 78 (Alexander Hamilton), supra note 12, at 396.

88. See U.S. CONST. art. I, § 2 (“The House of Representatives . . . shall have the sole Power of Impeachment.”); id. § 3 (“The Senate shall have the sole Power to try all Impeachments.”); id. art. II, § 4 (“The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.”).

89. From 1799 to the present, the Senate has established a court of impeachment for thirteen federal jurists. See DeGirolami, supra note 13, at 114 n.16 (listing impeached judges). Samuel Chase remains the only Supreme Court justice to face impeachment. See id.; see also JAMES F. SIMON, WHAT KIND OF NATION 197-219 (2002) (detailing events surrounding attempted impeachment and ultimate acquittal of Justice Chase). Federal District Court Judge Walter L. Nixon, impeached in 1989, was the last federal jurist to be impeached by Congress. See DeGirolami, supra note 13, at 114.

90. See DeGirolami, supra note 13, at 112 (“The consequences to maverick judges who disregard the congressional will about what should not be written into American case law are not yet clear, but some in the House of Representatives have already suggested that removal from office is a distinct and viable possibility.”).


92. For example, in light of a barrage of serious confidential complaints, the United States Court of Appeals for the Sixth Circuit began an investigation of the courtroom behavior of one of its lower court judges. See A Cloud Over a Federal Courtroom, COM. APPEAL (Memphis, Tenn.), May 21, 2001, at A10. On the heels of a long-planned, unprecedented hearing by the Sixth Circuit’s investigative committee, federal district court judge Jon P. McCalla offered apologies and “accepted
seeping with arrogance and secrecy when it comes to its own misconduct. It screams out for us to place a check on these affairs.

[SERVER VOX POPULI internally recalls: People in Washington were so crazed during the impeachment attempt on former President Clinton. It was an unbridled feeding frenzy.]

Scene Four: The Nomination Dance.

JUSTICE TENURE: Our self-regulatory functions are not lip service. Case in point, the last Chief Justice established a committee to explore and investigate federal judges. The committee targets potential abuses with respect to judicial misconduct. Like the self-regulation conducted by both of the other branches, self-regulation is as important as are the checks provided within the separation of powers scheme itself.

SENATOR CALL: So-called “self-regulation” in this instance would amount to the fox guarding the henhouse. The Chief Justice’s job is not to investigate judges. Self-interest will result in protection of one’s own. Case in point: minimal, if any, corrective action has flowed from your self-regulation thus far. Given the types of abuses that are spiraling out of control within the federal judiciary, an interbranch check is imperative.

JUSTICE TENURE: The “types of abuses” you are intimating do not actually constitute abuses in the sense of the types of activities our self-regula-

a sanction of a six-month leave of absence.” Bill Dries & Louis Graham, Memphis Federal Judge Pleads Guilty to Misconduct, SCRIPPS HOWARD NEWS SERV., Aug. 30, 2001 (reporting guilty plea to misconduct charges by U.S. District Judge Jon McCalla). The investigation of judicial misconduct charges resulted in the judge’s admission of “improper and intemperate [courtroom] conduct.” Id. He delivered the plea under a cloak of “extreme secrecy and extraordinary security measures.” Id. The investigative judicial panel would have examined the judge’s “behavior, not performance,” and although the panel lacked the authority to remove the judge, it possessed the power to impose “harsher measures, includingstripping him of his caseload.” Id. Judge McCalla has since returned to the bench. See Bill Dries, McCalla’s Leave Ends; Restrictions Remain, COM. APPEAL (Memphis, Tenn.), Sept. 11, 2002, at B1.

93. See Mike Allen & Brian Faler, Judicial Discipline to Be Examined—Rehnquist Names Panel in Response to Ethics Controversies, WASH. POST, May 26, 2004, at A02 (acknowledging congressional criticism of judiciary’s handling of ethical matters and creating six-member panel to investigate potential misconduct); Tony Mauro, Rehnquist Tries to Build Bridges with Congress: Critics in the House, However, Vow to Continue Their Scrutiny of the Judiciary, 27 LEGAL TIMES 22 (May 31, 2004) (discussing then-Chief Justice Rehnquist’s response to Congress’s criticism of judiciary).

94. For example, Congress has a “Committee on Standards of Official Conduct” in the House. See U.S. House of Representatives, Committee on Standards of Official Conduct, http://www.house.gov/ethics/Rules_109th.htm (last visited Apr. 11, 2006). The Executive has a Department of Justice Public Integrity Section. See also The Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824 (gap-filling ethical guides for all branches by regulating government employees’ conduct related to political activity, matters in which they have financial interests, as well as other areas).

95. See Remarks of Representative Tom DeLay, supra note 86 (“We’re taking responsibility for being the checks and balances on an overactive, out-of-control judiciary.”).
tion targets; and I would argue they are not "abuses." Rather, they represent judicial ideological missteps from your perspective and as such should be dealt with, if at all, at the nomination phase where the Executive has the opportunity to select a wise choice and the Senate has the ability to consent or to derail the nomination.96

ATTORNEY GENERAL MANSION: It's ridiculous that the Executive only gets one shot to get it right.97 Not to mention the fact that we can't freely confirm whom we want given the constraint of advice and consent,98 or more precisely, given the ability of a faction of Senators to muck up the works. The looming possibility of filibuster greatly hampers the executive power.99

SENATOR CALL: Filibuster is less of a problem now that we have brokered a deal100—not that I was on board with the deal we made.101 In fact, I consider it a deal with the devil.102 The fourteen centrists who brokered the deal to allow the filibuster only in "exceptional circumstances" will ultimately be accountable for any fallout.103 For what it's

96. See U.S. Const. art. II, § 2 (empowering President to appoint judges with "Advice and Consent of the Senate").

97. See Eastland, supra note 40, at 268 ("A President can only control so much. He can control whom he nominates to the courts, but not how his appointees actually decide cases and controversies.").

98. See U.S. Const. art. II, § 2 (imposing limits of President's power to make appointments without Senate's approval).


101. For an insightful defense of "filibusters as a desirable feature of the current judicial confirmation process," see Catherine Fisk & Erwin Chemerinsky, In Defense of Filibustering Judicial Nominations, Juroracy and Distrust: Reconsidering the Federal Judicial Appointments Process, 26 Cardozo L. Rev. 351, 331-32 (2005) (explaining filibuster procedure has been around almost as long as Senate).

102. Two distinct political factions oppose the filibuster deal. Representatives from the far right wing of the Republican camp, presently in the majority party, oppose the deal because they believe that each nomination should receive an up or down vote. Those on the far left also oppose the compromise on an entirely different ground—that the deal will ring hollow because agreement will be unattainable on the meaning of "extraordinary circumstances." Members of the filibuster compromise maintain that "a nominee's philosophical views cannot amount to 'extraordinary circumstances' and that therefore a filibuster can be justified only on questions of personal ethics or character." See Babington & Schmidt, supra note 100, at A01 (noting argument from supporters of filibuster deal).

103. See id. ("The pact, signed by seven Democrats and seven Republicans, says a judicial nominee will be filibustered only under 'extraordinary circumstances.'").
worth, confirmations are going more smoothly now, but I agree with Mansion on this issue.

Justice Tenure: The deal would not have been necessary but for the ominous threat of the so-called “nuclear option” seeking to rewrite Senate rules in order to halt the minorities’ ability to use the filibuster to stop judicial nominations. Historically, both parties utilize the filibuster when perceived to be to its advantage, although many confirmations percolate through. Nomination fights and executive delay, however, have caused serious strains on our caseloads.

Senator Call: Nomination fights serve more purposes than evaluating a nominee’s credentials; they allow members of Congress to generate publicity on “their” issues, take heroic positions with important constituencies and gain leverage over the Executive on other pending legislation.

Attorney General Mansion: Not to mention the blatant pork barrel- ing that occurs. More than one state highway project found its way into appropriations on the strength of judicial nomination politics. The filibuster deal had a lot of other politics going on, sub rosa.

Senator Call: It is unfair that we should get only one bite at the apple. Advice and consent isn’t good enough. And that’s only the Senate; the House has no formal role. Shouldn’t our role in shaping the judiciary be more involved over time, especially given that nobody could have predicted the increasing average length of tenure.

Justice Tenure: The Framers knew exactly what they were doing in granting life tenure. They sought to insulate the federal judiciary from public concerns so that federal judges would be impartial and indepen-

104. See Colbert I. King, The Filibuster: A Tool for Good and Bad, WASH. POST, June 18, 2005, at A19 (acknowledging “[s]ince reaching the so-called bipartisan compromise on judicial nominees—in which Democrats were sold the idea of laying down their arms, i.e., the filibuster—the Senate has confirmed six of the Bush administration’s most conservative judges”).

105. See, e.g., Senate Confirms 3 Judges from Nominee Backlog, N.Y. TIMES, Jan. 29, 1998, at A14. For example, according to then-Chief Justice Rehnquist, as of 1997: “82 of the 846 Article III judicial offices in the federal Judiciary—almost one out of every ten—are vacant[;] twenty-six of the vacancies have been in existence for 18 months or longer and on that basis constitute what are called ‘judicial emergencies.’” WILLIAM H. REHNQUIST, THIRD BRANCH (1997), http://www.uscourts.gov/ttb/jan98ttb/january.htm (outlining former Chief Justice Rehnquist’s description of derogatory effect by finding “[j]udicial vacancies can contribute to a backlog of cases, undue delays in civil cases, and stopgap measures to shift judicial personnel where they are most needed”). He then implied that “[v]acancies cannot remain at such high levels indefinitely without eroding the quality ofjustice that tradition-ally has been associated with the federal Judiciary.” Id.

106. In a Duke Law School Symposium held on April 9, 2005, Paul Carrington and Roger Cramton elaborated on their proposal eliminating life tenure due to increased longevity among other reasons. Further, they redefined “office” to eighteen years of service on the “sitting Court” via a legislative change rather than a constitutional amendment. For a discussion of the harms of elongated tenure and suggested reform, see REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES (Paul Carrington & Roger Cramton eds., 2006).
dent. The Framers were not concerned with how long a judge might live. They provided Congress with a powerful tool—impeachment—107—for those rare, and I mean truly rare, scenarios where necessary. 108

ATTORNEY GENERAL MANSION: Impeachment doesn’t fill the gap. We all know that some of these appointments turn out to be mistakes. History is littered with federal judges and justices who turn out to disappoint the administration that appointed them. 109 It’s a leap of faith for us.

SENATOR CALL: Like the Executive, we have to face the music of the electorate. We face the electorate when one of the appointments does something unpopular or controversial. So, of course we’re looking for other avenues of control beyond confirmation and impeachment.

JUSTICE TENURE: Now, you are talking about controlling the very decisions that judges make. This is an area in which Congress cannot, and should not, interfere. Judges must be institutionally independent to make the decision that justice requires. 110

SENATOR CALL: Nevertheless, judges should not be free to legislate on their own. They cannot ignore what Congress says and create their own

107. See U.S. CONST. art. I, § 2 (providing House of Representatives “the sole Power of Impeachment”); id. § 3 (establishing that “the Senate shall have the sole Power to try all Impeachments” and requiring two-thirds vote for conviction); id. art. II, § 4 (“The President, Vice President and all civil officers of the United States, shall be removed from office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.”).


109. See EASTLAND, supra note 40, at 269 (citing philosophical disappointments: James C. McReyolds (by President Woodrow Wilson); Earl Warren and William Brennan (by President Dwight Eisenhower); Harry Blackmun (by President Richard Nixon)); Jason DeParle, In Battle to Pick Next Justice, Right Says, Avoid a Kennedy, N.Y. TIMES, June 27, 2005, at A1.

Ever since the elevation of Earl Warren, Republican presidents have picked justices who disappoint the Republican faithful: William J. Brennan Jr. (President Dwight D. Eisenhower), Harry A. Blackmun (President Richard M. Nixon), John Paul Stevens (President Gerald R. Ford), Sandra Day O’Connor (President Reagan) and David H. Souter (the first President Bush).

Id. (explaining conservatives’ frustration with Justice Anthony M. Kennedy, President Ronald Reagan appointment, for “writing decisions in cases that struck down prayer at public school graduations, upheld abortion rights, gave constitutional protections to pornography and gay sex and banned the death penalty for juveniles”).

110. See Peter D. Webster, Selection and Retention of Judges: Is There One “Best” Method?, 23 FLA. ST. U. L. REV. 1, 4 (1995) (defining judicial “institutional independence” as necessitating that judges must be free from control by legislative and executive branches); see also Erwin Chemerinsky et al., What Is Judicial Independence? Views from the Public, the Press, the Profession, and the Politicians, 80 JUDICATURE 73, 74 (1996) (defining judicial independence in similar vein).
legal principles out of thin air. We must be able to rein in rogue judges and justices.

**Justice Tenure:** Don’t you mean rein in judges with whom you disagree politically? You are in dangerous territory now. You all know that the Schiavo bill,\(^{111}\) in which you attempted to direct the federal court’s moves,\(^{112}\) may exceed your sphere of legitimate power. After state courts had already determined that the feeding tube must be removed from Terri Schiavo,\(^{113}\) Congress and the President passed a bill actually granting, rather than stripping, jurisdiction in federal court over Schiavo’s constitutional claims and claims under federal statute\(^{114}\)—a jurisdiction federal courts already possess under Article III’s “arising under” provision.\(^{115}\)

**Senator Call:** Congress possesses the authority to set forth standards of review and Congress has the power to waive, in a particular case, abstention doctrines that are not constitutionally grounded.\(^{116}\) In this instance,


\(^{112}\) See Sheryl Gay Stolberg, Nominee Is Pressed on End of Life Care, N.Y. Times, Aug. 10, 2005, at A18 (arguing legislature overreached their power).


\(^{114}\) Schiavo Bill § 1. The Bill provided: The United States District Court for the Middle District of Florida shall have jurisdiction . . . for alleged violation of any right of Theresa Marie Schiavo under the Constitution of laws of the United States relating to the withholding or withdrawal of food, fluids, or medical treatment necessary to sustain her life.

\(^{115}\) See U.S. Const. art. III, § 2 (“The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States . . .”); see also 28 U.S.C. § 1331 (2000) (“The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.”). Prior to the passage of the bill, Terri Schiavo’s parents had filed lawsuits in federal court. See, e.g., Schiavo ex rel. Schindler v. Greer, No. 8:05-cv-522-T-30TGW, 2005 U.S. Dist. LEXIS 4182 (M.D. Fla. Mar. 18, 2005) (providing Terri Schiavo’s parents’ action). For example, the parents petitioned for a writ of habeas corpus under 28 U.S.C. § 2254 and a temporary restraining order enjoining the withholding of food and fluids to Terri Schiavo, and asserted violations of Terri Schiavo’s rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Id. at *1 (describing parents’ complaint). Although the suits alleged federal questions, the federal courts dismissed the suits pursuant to the *Rooker/Feldman* doctrine because the suits effectively constituted an appeal of a state court judgment. Id. at *2 (concurring with prior decisions of dismissal of jurisdiction because losing party in state court cannot seek “what in substance would be appellate review of the state judgment in a United States District Court based on the losing party’s claim that the state judgment itself violates the loser’s federal rights” (quoting Johnson v. De Grady, 512 U.S. 997, 1005-06 (1994))) (citation omitted).

\(^{116}\) See Schiavo v. Schiavo, 404 F.3d 1270, 1280 (11th Cir. 2005) (Tjoflat, J., dissenting from denial of rehearing en banc) (citing comparatively Raines v. Byrd, 521 U.S. 811, 820 n.3 (1997), for proposition that Congress cannot grant Article III standing to plaintiff who lacks it, but Congress’s choice to provide specific plaintiff
Congress has legitimately formulated a specific approach to the problem at hand, which resides "in the general domain of federal jurisdiction, without presuming to dictate—in any respect—[the federal court's] performance of a court's essential function: 'to say what the law is.'"

Justice Tenure: I guess I keep forgetting that Congress believes that it has the discretion to determine whether to provide federal courts with the full realization of what Article III's "arising under" jurisdiction sets forth. Congress is empowered to make laws, while courts decide cases and controversies. The Schiavo issue is a perfect example of a specific case because the courts asked whether Terri Schiavo wanted the life-sustaining treatment under her persistent vegetative state. End-of-life decisions are traditionally within the province of state law as construed by state courts; therefore, state courts were in a unique position to hear the case.

"the right to challenge an Act's constitutionality . . . eliminates any prudential standing limitations and significantly lessens the risk of unwanted conflict with the Legislative Branch when that plaintiff brings suit"). For a succinct recitation of the relevant abstention doctrines, see Michael P. Allen, Congress and Terri Schiavo: A Primer on the American Constitutional Order, 108 W. Va. L. Rev. 309, 340-42 (2005) (hereinafter Allen, Congress and Terri Schiavo). Professor Allen views abstention as prudential rather than constitutional and accordingly asserts that "Congress may abrogate the abstention doctrines without offending the Constitution." Id. at 341 & n.153 (noting, however, that Professor Chemerinsky points out existence of uncertainty regarding whether so-called Younger abstention is completely prudential). He further clarifies that the Rooker/Feldman doctrine is statutory in its origins and thus Congress possesses the power to alter it. Id. at 342.

117. Schiavo, 404 F.3d at 1281 (Tjoflat, J., dissenting) (quoting Marbury v. Madison, 5 U.S. 137 (1803) (Marshall, C.J.)); see also Allen, Congress and Terri Schiavo, supra note 116, at 319 (reasoning that Schiavo bill "is best read to leave to the judiciary the power to 'say what the law is' by applying existing law to Terri Schiavo's situation").


119. Article III's case or controversy requirements cabin Congress's power over jurisdiction. In Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992), the Court ruled that Congress cannot provide Article III standing to all citizens generally. See id. at 573-74. The Court stated:
We have consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy.
Id. But see FEC v. Akins, 524 U.S. 11, 36-37 (1998) (Scalia, J., dissenting) (criticizing majority opinion for interpreting congressional act to confer standing upon "entire electorate" thereby authorizing "any interested person to manage (through the courts) the Executive's enforcement of any law that includes a requirement for the filing and public availability of a piece of paper").
and make the determination. The legislation you all passed, and the Executive signed, borders on an impermissible encroachment on our function. Congress granted standing to the parents in federal court to re-litigate any constitutional claims despite the abstention or exhaustion doctrines. Then, most troublingly, you all effectively attempted to direct a federal district court to reinsert Terri Schiavo's feeding tube. We all know that you cannot dictate the substantive outcome of cases. Your threats are impermissibly coercive. Congress is anxious to violate the separation of

120. Schiavo Bill, Pub. L. No. 109-3, § 2, 119 Stat. 15 (2005) (providing standing for any parent of Terri Schiavo, calling for de novo review of her claims and mandating federal court determination of claim "without any delay or abstention in favor of State court proceedings, and regardless of whether remedies available in the State courts have been exhausted"); see also Allen, Congress and Terri Schiavo, supra note 116, at 319 (explaining how bill "eliminates certain threshold barriers that might have prevented Ms. Schiavo's parents from proceeding with any litigation under the Act, even with its jurisdictional grant"). The potential barriers included: standing, abstention, exhaustion, and the Rooker/Feldman doctrine. See id. (noting Terri Schiavo's parents’ obstacles to litigation).

121. Schiavo Bill § 3 ("[T]he District Court shall issue such declaratory and injunctive relief as may be necessary to protect the rights of Theresa Marie Schiavo under the Constitution and laws of the United States relating to the withholding or withdrawal of food, fluids, or medical treatment necessary to sustain her life."). Under a strict textual read, Congress is not ordering an ultimate outcome. See Allen, Congress and Terri Schiavo, supra note 116, at 10 (reasoning that bill "does not instruct the district court as to the ultimate outcome of any litigation Ms. Schiavo's parents should file" and "is best read to leave the judiciary the power to 'say what the law is'"). The impetus for the bill's passage, coupled with the implications of the bill, create a reasonable inference that Congress sought to point the federal judiciary in a desired direction and achieve a particular end. For example, Professor Chemerinsky stated that the bill was an attempt by Congress "to determine the outcome of a specific case." David L. Hudson, Jr., Schiavo Case Prompts Constitutional Questions, ABA JOURNAL EREPORT, Mar. 25, 2005, available at http://www.abanet.org/journal/ereport/m25schiavo.html (quoting Professor Chemerinsky).

122. See Plaut v. Spendthrift, 514 U.S. 211, 219 (1995) (holding that Congress cannot undo Court's final determination); United States v. Klein, 80 U.S. 128, 146-47 (1872) (declining to give effect to statute that would prescribe rules of decision to federal judiciary in pending case). For an illustrative treatment of the opaque nature of Klein's precise holding, see Allen, Congress and Terri Schiavo, supra note 116, at 326 n.82.

123. In the context of unconstitutional conditions, Professor Mitchell N. Berman provides a useful framework for determining improper coercion:

The proposal is coercive if and only if the maker of the proposal would be engaging in a wrong were he to carry out the threat of y. Thus, the gunman's proposal—"if you don't give me your wallet, I'll shoot you; if you do give me your wallet, then I won't shoot you"—is coercive (as a matter of conventional morality) because it would be (morally) wrongful for him to shoot you. Contrariwise, the fishmonger's proposal—"if you don't give me $8.99, then I won't give you a pound of tilapia; if you do give me $8.99, then I will give you a pound of tilapia"—is not coercive if (as I assume) it is morally permissible for her to withhold the fish.

Mitchell N. Berman, Commercial Speech and the Unconstitutional Conditions Doctrine: A Second Look at "The Greater Includes the Lesser," 55 VAND. L. REV. 693, 730 (2002) (finding key factor to blackmail case is evidentiary value of conditional proposal); see also Mitchell N. Berman, Coercion Without Baselines: Unconstitutional Conditions in
powers doctrine.124 Here, you are dangerously close to instructing the federal district court to undo what Florida state courts determined, improperly mandating the standard of review,125 and then implicitly suggesting the injunctive remedy that a federal court should give a temporary restraining order to reinsert the feeding tube.126 There is no possible way to justify congressional involvement, especially with the fact of placing Terri Schiavo's name in the bill. You are not even creating law; instead,

Three Dimensions, 90 GEO. L.J. 1 (2001) (same). Applying this construct to the instant inquiry, Congress's proposal: If you don't rule in favor of maintaining 'under God' in the Pledge (reinserting Schiavo's feeding tube; upholding DOMA etc.), we will strip all federal jurisdiction over such constitutional cases; if you do uphold the Pledge, then we will not strip all federal jurisdiction. The question, under Professor Berman's framework, would be whether it "is coercive (as a matter of [constitutional] morality) because it would be (morally) wrongful" for Congress to carry out its threat and strip all federal jurisdiction. Id. Is the threat an immoral one? The answer depends upon whether one believes that complete removal of the federal forum would be a violation of the core functions of the judicial branch.

124. Regarding the separation of powers, former Chief Justice Taft eloquently stated:

The rule is that in the actual administration of the government Congress or the Legislature should exercise the legislative power, the President or the State executive, the Governor, the executive power, and the Courts or the judiciary the judicial power, and in carrying out that constitutional division into three branches it is a breach of the National fundamental law if Congress gives up its legislative power and transfers it to the President, or to the judicial branch, or if by law it attempts to invest itself or its members with either executive power or judicial power. This is not to say that the three branches are not coordinate parts of one government and that each in the field of its duties may not invoke the action of the two other branches in so far as the action invoked shall not be an assumption of the constitutional field of action of another branch. In determining what it may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the governmental co-ordination.

J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 406 (1928) (noting field of Congress involves variety of legislative action); see also Plaut, 514 U.S. at 218 (providing that Congress violates separation of powers principles if it mandates that federal courts use their Article III power "in a manner repugnant to the text, structure, and traditions of Article III").

125. See Fla. Progress Corp. v. Comm'r, 348 F.3d 954, 959 (11th Cir. 2004) (warning that courts, rather than legislatures, should decide standard of review); see also Schiavo ex rel. Schindler v. Schiavo, 404 F.3d 1270, 1274 (11th Cir. 2005) (asserting that setting standard of review is "an area traditionally left to the federal court to decide" and that its establishment "often dictates the rule of decision in a case, which is beyond Congress's constitutional power") (Birch, J., specially concurring in denial of rehearing en banc) (citing United States v. Klein, 80 U.S. 128, 146 (1871) (proposing that Congress cannot prescribe "rule of decision" for particular case)).

Congress is deciding a particular case and controversy via marionette strings.\textsuperscript{127}

\textbf{Senator Call:} Many members of Congress have strong moral opposition to taking life where the intent is in doubt. And, the Schiavo affair was a political boon to the bill’s advocates, especially to those seeking nomination for President because certain constituencies hailed their efforts.

\textbf{Justice Tenure:} The intent to usurp the Court’s role is evident given the reaction of the bill’s backers to federal court rulings to the contrary in the wake of the Schiavo bill.\textsuperscript{128} Equitable remedies are particularly within the discretionary authority of federal court judges\textsuperscript{129}—not to mention the damage to the federal judiciary inflicted by inflamed rhetoric from some members of Congress.\textsuperscript{130} The only redeemable part of the Schiavo bill is its self-limiting parameters that nothing in the bill will constitute precedent.\textsuperscript{131} The bill is a classic example of taking authority without responsibility.

\textbf{Attorney General Mansion:} Schiavo. Don’t go there. Post-coroner report: can’t we all put it to rest? After all, such remarks were heat-of-the-moment reactions and many were later withdrawn.\textsuperscript{132} The administration

\textsuperscript{127} The Supreme Court has continually reiterated \textit{Marbury’s} force: “The power to interpret the Constitution in a case or controversy remains in the Judiciary.” \textit{See City of Boerne v. Flores}, 521 U.S. 507, 524, 536 (1997) (invalidating Congress’s Religious Freedom Restoration Act, which purported to undo disfavored Supreme Court ruling, because it exceeded Congress’s § 5 enforcement powers under Fourteenth Amendment by violating, \textit{inter alia}, separation of powers).

\textsuperscript{128} \textit{See Schiavo}, 403 F.3d at 1223 (denying rehearing en banc of lower court decision); Schiavo \textit{ex rel.} Schindler v. Schiavo, 357 F. Supp. 2d 1378, 1388 (M.D. Fla. 2005) (denying temporary restraining order that would have reinserted Schiavo’s feeding tube); \textit{see also} Cohen, \textit{supra} note 13 (reporting that Representative DeLay called for investigation of federal judges involved in Schiavo case “for refusing to overturn the Florida state courts’ legal decisions, and Michael Schiavo’s decisions about his wife’s medical care”); \textit{id.} (describing Senator Cornyn’s attempt to link violence against judges to judiciary’s controversial decisions).

\textsuperscript{129} \textit{See Weinberger v. Romero-Barcelo}, 456 U.S. 305, 312 (1982) (expressing that equitable injunctive relief is extraordinary relief within province of judge’s discretion); \textit{Swann v. Charlotte-Mecklenburg Bd. of Educ.}, 402 U.S. 1, 15 (1971) (“Once a right and a violation have been shown, the scope of a district court’s equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.”).

\textsuperscript{130} \textit{See Mike Allen, DeLay Apologizes for Comments—Leader Wouldn’t Say Whether He Wants Schiavo Judges Impeached}, \textit{Wash. Post}, Apr. 14, 2005, at A05 [hereinafter Allen, \textit{DeLay Apologizes}] (explaining that House Majority Leader Tom DeLay (R-Tex.) “created a furor last month by saying that ‘the time will come’ for federal judges who refused to restore the brain-damaged Florida woman’s feeding tube ‘to answer for their behavior,’ and by criticizing what he called an ‘arrogant, out-of-control, unaccountable judiciary’


\textsuperscript{132} \textit{See Allen, DeLay Apologizes, supra} note 130 (detailing DeLay’s apology).
never endorsed the criticism of the federal judiciary in the wake of the Schiavo decisions.133

[Server Vox Populi thinks: Schiavo, yeah, what were you all thinking? I don't have a law degree, but I can tell you that you had no business passing that bill. I'm sure plenty of powerful constituents were clamoring, but everyday folks were thinking about how private such decisions are and that's true no matter what side you fall on regarding the ultimate choice that is made.]

Attorney General Mansion: Well, but for court missteps, we wouldn't get ourselves into Schiavo-type moments. It's court decisions that are killing us. Judges should have to take responsibility for their controversial decisions. These perceived "attacks" on the courts didn't just materialize out of thin air. Courts have waded in on highly controversial, hot-button issues and have put forth legal reasoning that is debatable at best. State courts aren't the only offenders. Federal court opinions have hung their hat on major divisive social issues on flimsy theories such as penumbras134 and subject classes.135 Take Lawrence136 for just one example. What do you expect the political branches to do?

Justice Tenure: I would be remiss if I did not point out that Schiavo's predicament leading up to the bill's passage was the result of individual family decision-making and numerous decisions on the state level.137 As for federal courts taking responsibility for our actions in comparison to Congress and the administration owning up to their mistakes, federal courts are readily distinguishable from both of your branches. Other than

133. See id. (reporting that President Bush, Vice President Cheney, and other head Republican leaders did not endorse original inflammatory remarks).


137. See In re Guardianship of Schiavo, 780 So. 2d 176, 180 (Fla. Dist. Ct. App. 2001) ("Schiavo I") (authorizing discontinuance of artificial life support); see also In re Guardianship of Schiavo, 851 So. 2d 182, 187 (Fla. Dist. Ct. App. 2003) ("Schiavo IV") (ruling evidence not enough to keep Ms. Schiavo on life support); In re Guardianship of Schiavo, 800 So. 2d 640, 645 (Fla. Dist. Ct. App. 2001) ("Schiavo III") (permitting limited evidentiary hearing); In re Guardianship of Schiavo, 792 So. 2d 551, 558 (Fla. Dist. Ct. App. 2001) ("Schiavo II") (ruling on motion to introduce new evidence untimely).
certiorari determinations, we don’t choose what issues find their way to our docket.

**Senator Call:** You’ve got to be kidding me. You all do decide. You have more discretion than Congress. You have nine justices and it takes a consensus of only four justices to grant the writ of certiorari and hear the case. Congress, however, has a total of 535 members—435 in the House and 100 Senators—so who knows what will make it out of Committee for further deliberation.

**Justice Tenure:** Of course you are correct that the Supreme Court has immense discretion in determining which cases to hear, but those cases must be selected from the pool of filed cases.

**Attorney General Mansion:** Given the number of cases filed per year—what is it now? Isn’t it in the thousands? It would appear that the Court has a broad array from which to select substantive issues.

**Justice Tenure:** It’s 7,000 per year now. Look, all I am trying to say is that federal courts hear only Article III controversies—whether it is federal question or diversity jurisdiction. Of course, we must also hear cases emanating from our original jurisdiction. In contrast, Congress sits down and creates its own agenda. The Executive may choose which issues to spearhead (e.g., the gay marriage ban) and has the veto power. Federal courts must address cases and controversies as they are presented, when they are ripe and in the procedural form in which they arrive. While nonprofit litigation organizations, such as the NAACP and Judicial Watch, have the luxury of formulating a long-term litigation strategy by weeding out weak cases, federal courts simply receive the cases, which parties file properly, as pled, with all their flaws. In some instances, these cases continue to seek relief at the Supreme Court level because Congress is failing to remedy the situation. We cannot let constitutional violations stand unremedied, can we?

**Senator Call:** Don’t tell me you are prepared to defend the so-called “structural” injunction remedy in which federal courts have instituted “government by injunction.” Federal courts are clearly out on the pro-

138. See Supreme Court of the United States—About the Justices’ Caseload, http://www.supremecourtus.gov/about/justicecaseload.pdf (last visited May 21, 2006) (“The Court’s caseload has increased steadily to a current total of more than 7,000 cases on the docket per Term.”).


140. See U.S. Const. art. III, § 2 (providing federal court with original jurisdiction in certain instances).

141. See id. art. I, § 7 (outlining Executive’s veto power).

142. See Tocqueville, supra note 4, at 100 (“An action must be brought before a judge can decide it. . . . An American judge can pronounce a decision only when there is litigation.”).

143. See Owen M. Fiss, The Civil Rights Injunction 7 (1978) (coining term “structural” to describe injunctive relief orders designed to cure constitutional violations by restructuring governmental bureaucracies); see also Doug Rendleman,
verbial limb with such decisions. And, you should know, given that the
Supreme Court has upheld congressional attempts to cabin such remedial
power in areas such as the Prison Litigation Reform Act\textsuperscript{144} and the An-
titerrorism and Effective Death Penalty Act.\textsuperscript{145}

**Justice Tenure:** We wouldn’t need to climb out on the limb if con-
gressional relief occurred in sufficient time to remedy constitutional
wrongs and if the Executive wouldn’t abide the constitutional wrongs to
begin with. Need I bring up the remedial progeny of *Brown v. Board of
Education*?\textsuperscript{146} Coming back to the heart of the Attorney General’s remark,
I am afraid that both branches want to hand-pick political ideology and in
turn wish that political ideology would dictate the legal conclusion in every
instance. Politics do not govern judicial decision-making.

**Senator Call:** Don’t tell me that decisions like *Bush v. Gore*\textsuperscript{147} aren’t
politically predestined.\textsuperscript{148}

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*The Inadequate Remedy at Law Prerequisite for an Injunction,* 33 FLA. L. REV. 346, 355
(1981) (noting use of Professor Fiss’s “structural injunction” term to label judicial
efforts to reform schools, mental institutions, and prisons). *But cf.* Tracy Thomas,
*The Prophylactic Remedy: Normative Principles and Definitional Parameters of Broad In-
junctive Relief,* 52 BUFF. L. REV. 301, 312-22 (advocating reclassification of “core”
injunctive relief categories to include “prophylactic” as category of “relief designed
ultimately to prevent future harm”). *See generally Owen M. Fiss, The Law As It
Could Be* (2003) (exploring structural injunctions); Ross Sandler & David
Schoenbrod, *Democracy By Decree: What Happens When Courts Run Govern-
ment* (2003) (same).

144. Prison Litigation Reform Act of 1996, 18 U.S.C. § 3626 (listing appropri-
ate remedies for prison conditions); *see also* Miller v. French, 530 U.S. 327, 336-39
(2000) (holding that language of automatic stay provision prohibited federal
courts from exercising their equitable authority to suspend operation of automatic
stay and that provision did not violate separation of powers doctrine as it simply
established new standards for enforcement of prospective relief).

145. Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L.
104-143, 110 Stat. 1214 (prohibiting federal courts from granting writs of habeas
corpus in certain instances); *see also* Allen, *Congress and Terri Schiavo,* supra
note 116, at 344-45 n.167 (exploring court treatment of AEDPA’s restraints on federal
courts).

146. 349 U.S. 294, 301 (1955) (“Brown II”) (requiring district courts to “enter
such orders and decrees consistent with [its] opinion as are necessary and proper
to admit to public schools on a racially nondiscriminatory basis with all deliberate
speed the parties to these cases”); *see also* Green v. County Sch. Bd., 391 U.S. 430,
436, 439 (1968) (commanding solution for “unitary, nonracial” public education
and requiring school boards “to come forward with a plan that promises realisti-
cally to work, and promises realistically to work now”). For a thoughtful treatment
of the historical survey of the Court’s delays in implementing remedies, see Doug
Rendleman, *Brown II’s “All Deliberate Speed” at Fifty: A Golden Anniversary or A Mid-
Life Crisis for the Constitutional Injunction as a School Desegregation Remedy?*, 41 SAN
Diego L. Rev. 1575 (2004) (outlining three stages of school desegregation reme-
dies for plaintiffs).


(exposing partisan machinations in chambers of Supreme Court relating to *Bush v. Gore*).
JUSTICE TENURE: While I would like to state that it is my sincere hope that the decision was based on purely legal principles, frankly, I'm inclined to believe that one cannot deny some role that the subconscious plays in judicial decision-making. 149

Well, I assume you all, along with the rest of America, have perused the *Vanity Fair* article in which our own law clerks aired the political sausage-making at play during the frenzied days in which we resolved the 2000 presidential election. 150 *Is there nothing sacred, I ask?* The article speaks for itself on that decision, but I assure you that such political overtones do not dictate our rulings on the bread-and-butter cases that come before us. Look at all the strange bedfellow examples. 151 My brethren and I strive to decide cases based upon the law and concomitant legal principles—not political ideology.

SENATOR CALL: Aren’t you talking out of both sides of your mouth here? How can you follow the law neutrally, yet pay attention to subconscious forces?

JUSTICE TENURE: I believe that internal guideposts of every individual judge necessarily contribute to the lenses through which the judge reads laws and legal principles. Where gray exists, these lenses color the interpretations that one makes. That said, our mission is to decide cases based upon the relevant law, and thus, in every circumstance, we do our best to take our oath very seriously.

ATTORNEY GENERAL MANSION: Well folks, this has all been interesting, but I have to get back to the office tonight. I think it’s clear that there is more we need to discuss. We have yet to grapple with the heart of the matter.

149. Justice Benjamin N. Cardozo recognized the "subconscious element" in judicial decision-making and illustrated it as follows:

I have spoken of the forces of which judges avowedly avail to shape the form and content of their judgments. Even these forces are seldom fully in consciousness. They lie so near the surface, however, that their existence and influence are not likely to be disclaimed. But the subject is not exhausted with the recognition of their power. Deep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man, whether he be litigant or judge.... Never will these [subconscious] loyalties be utterly extinguished while human nature is what it is.


150. See Margolick et al., supra note 148. For an exploration of the issue, see generally David Lane, Note, *Bush v. Gore, Vanity Fair, and a Supreme Court Law Clerk's Duty of Confidentiality*, 18 Geo. J. Legal Ethics 863 (2005) in which the author concludes that the leaks should be abided where those with information perceive injustices because even if those individuals are mistaken, history will judge them. *Id.* at 876 (“If they are misguided, let history judge them.”).

151. One does not have to look far to find numerous Supreme Court opinions with strange bedfellows joining opinions, including *Dickerson v. United States*, 530 U.S. 428 (2000) and *United States v. Booker*, 543 U.S. 220 (2005).
JUSTICE TENURE: We definitely need to address at length these attempts to strip our jurisdiction before any more extreme steps are taken.

ATTORNEY GENERAL MANSION: I can't say whether it will help matters much, but let's meet here same time next week.

[Justice Tenure nods his head in agreement. Senator Call shrugs in affirmance.]

[ Curtain falls. ]

ACT TWO: THE UNTHINKABLE EXPLORED

Scene One: Jurisdiction Stripping Bills—Protection of Marriage and the Pledge.

ATTORNEY GENERAL MANSION: Our last discussion has been marinating in my mind. Perhaps this action and counteraction are simply part of the normal ebb-and-flow conflict that the Framers intended.\footnote{152. See BATOR ET AL., supra note 23 and accompanying text.} In other words, there is nothing to fix or stop.

JUSTICE TENURE: How can you assert that there is nothing to fix when you already heard all of my remarks from our dinner last week regarding the current strained relations between the branches? I think the Senator would concede that we are at DEFCON 2 here.\footnote{153. See Federation of American Scientists, http://www.fas.org/nuke/guide/usa/c3i/defcon.htm (last visited May 21, 2006) (explaining alert conditions that may be called in event of national emergency). "DEFCON" stands for "defense condition" and ranges from level 5 ("normal peacetime readiness") to the most grave level, DEFCON 1, which indicates "maximum force readiness" while DEFCON 2 represents "further increase in force readiness, but less than maximum readiness." Id.} Then, Congress fans the fire by initiating multiple jurisdiction-stripping initiatives as if your power is plenary. In particular, the House of Representatives passed bills that attempt to remove controversial issues of federal constitutional law from the entire federal judicial arena. Two of such bills in particular hope to strip completely from the federal forum challenges in two distinct arenas. The first bill, the Marriage Protection Act,\footnote{154. The Marriage Protection Act of 2004, H.R. 3313, 108th Cong. (2004) ("No court created by Act of Congress shall have any jurisdiction, and the Supreme Court shall have no appellate jurisdiction, to hear or decide any question pertaining to the interpretation of, or the validity under the Constitution of, section 1783C [Defense of Marriage Act] or this section."). This effort continues in the Marriage Protection Act of 2005, H.R. 1100, 109th Cong. (2005) (same).} mandates stripping federal court original and appellate jurisdiction over the constitutionality of the Defense of Marriage Act,\footnote{155. See Pub. L. No. 104-199, § 2(a), 110 Stat. 2419 (1996) (codified at 28 U.S.C. § 1738C (2004)).} which provides that states may decline to give recognition to same-sex marriages legitimated by other states. The second bill, the Pledge Protection Act,\footnote{156. Pledge Protection Act of 2004, H.R. 2028, 108th Cong. (2004) ("No court created by Act of Congress shall have any jurisdiction, and the Supreme Court shall have no appellate jurisdiction, to hear or decide any question pertaining to the interpretation of, or the validity under the Constitution of, the Pledge of...")} eliminates all federal court juris-
diction over the constitutionality of the Pledge of Allegiance or its utterance. These bills represent an unwarranted assault on judicial power and should not be debated any further. The federal judiciary's only solace is that the House was wise, I am giving the House the intellectual benefit of the doubt here, in declining to pass—at this stage—an even broader bill that sought to remove all federal court jurisdiction over constitutional claims concerning same-sex marriage, the right to privacy and state and local restrictions of free exercise or establishment of religion. 157 Now, in the wake of our recent decision to prohibit the display of the Ten Commandments in a courthouse, 158 I fear the House will be emboldened to respond again with a broader bill stripping all federal courts of the ability to decide any question pertaining to constitutionality under the Establishment Clause of the Constitution's First Amendment.

SENATOR CALL: Congress is more than justified in taking such steps. The two bills passed by the House represent much needed curbs on federal judicial power. Federal courts have run amok and tilted the balance of power among the three branches too far. Congress had to act in order to stop the despotism of the federal judicial branch. The United States Court of Appeals for the Ninth Circuit is a prime example of judicial abuse. It had the audacity to rule that voluntary recitation of the Pledge of Allegiance violated the Establishment Clause of the Constitution. 159 The phrase "under God" is part of the historical glue that holds this country together.

JUSTICE TENURE: It is unclear how you can utter such allegations given that the Supreme Court in effect ruled favorably on the Pledge of Allegiance issue by reversing the Ninth Circuit's ruling in Elk Grove Unified School District v. Newdow. 160

ATTORNEY GENERAL MANSION: "Ruled favorably" isn't exactly what I'd call it. In fact, it is disingenuous to assert. Everyone knows that you all ruled on a technicality in order to avoid ruling on the merits.

Allegiance . . . or its recitation . . . The substantive initiative lives on in the Pledge Protection Act of 2005, S. 1046, 109th Cong. (2005) and has been referred twice to the Senate Judiciary Committee.

157. See We the People Act, H.R. 3893, 108th Cong. (2004) (stripping jurisdiction from federal courts and Supreme Court in areas of free exercise of religion, right to privacy regarding sexual orientation and equal protection claims regarding sexual orientation).


159. Newdow v. U.S. Congress, 328 F.3d 466, 490 (9th Cir. 2003) (holding "school district's Pledge policy violates the Establishment Clause").

SENATOR CALL: Precisely. Didn’t the Supreme Court dismiss the case on the basis of standing by developing a “novel” theory to avoid resolving the substantive constitutional issue? 161

JUSTICE TENURE: We embrace the merits of a case when the time is right. Putting aside the exact contours of our holding, we nevertheless did not affirm the Ninth Circuit’s ruling. Also, the only other federal circuit to consider the issue upheld the constitutionality of the Pledge. 162 Thus, your efforts to strip jurisdiction to the entire federal forum are unnecessary, not to mention unconstitutional. If anything, should the merits reach the Supreme Court, as currently constituted, it would likely rule that recitation of the Pledge of Allegiance is constitutional. Remember, we were without a pivotal justice who had recused himself in the Newdow matter; 163 thus, it was in your interest that we not rule on the merits without his vote. Certainly, there is no basis to launch the offensive with a jurisdiction-stripping maneuver when all we have done at this point is rule favorably towards the cause you all hope to advance.

ATTORNEY GENERAL MANSION: Sometimes preemptive strikes are a necessary component of governing well. The art of preemption requires anticipating when a maneuver is required to protect interests that face impending threats.

SENATOR CALL: Obfuscation of the issue with whether it is perceived to be necessary misses the substance of the issue—which is that states ought to be deciding important matters such as the constitutionality of reciting “under God” in the Pledge or of same-sex marriage. Local decision-making reflects local values. Courts have to give considerable deference to the elected branches that give voice to the people.

JUSTICE TENURE: And, it is the judiciary’s job to protect the minority from mob rule. That is the essence of a nation of laws rather than of men. Let’s cut to the chase. Rather than a concern for federalism with respect to same-sex marriage and the Pledge issue, aren’t you all really aimed at taking power from the federal courts? The federalism riff is a smoke-and-mirrors routine because if it were your true objective, then you would leave power in the Supreme Court’s hands because we have ruled in favor

161. See id. at 28 (Rehnquist, C.J., concurring) (“The Court today erects a novel prudential standing principle in order to avoid reaching the merits of the constitutional claim.”).

162. See Sherman v. Comm. Cons. Sch. Dist. 21, 980 F.2d 437, 439 (7th Cir. 1992) (“We conclude that schools may lead the Pledge of Allegiance daily, so long as pupils are free not to participate.”).

163. Justice Scalia recused himself without comment from the Newdow case. See Newdow, 542 U.S. at 3 (“SCALIA, J., took no part in the consideration or decision of the case.”). Presumably he did not participate in the opinion because he had directly criticized the Ninth Circuit’s holding publicly during the pendency of the appeal to the Supreme Court. For a discussion of this recusal issue and the Supreme Court’s lack of adequate recusal procedures, see Caprice L. Roberts, The Fox Guarding the Henhouse?: Recusal and the Procedural Void in the Court of Last Resort, 57 Rutgers L. Rev. 107 (2005) (discussing history and policy of recusal and recusal controversies regarding Justice Scalia).
of states' rights time and again. Also, your position on states' rights is inconsistent with your efforts to usurp state power by a constitutional amendment.

SENATOR CALL: You are oversimplifying the matter because often we are stuck with the risk of an unfavorable federal circuit court ruling providing the last word.

JUSTICE TENURE: I still submit that your true motivation is not really about states' rights as much as it is simply about pure power politics among the branches.

SENATOR CALL: Look, the bottom line is that Congress disagrees with the way the federal courts are ruling on the merits of certain constitutional rights. The overwhelming majority of the public wants the utterance of "under God" to remain a constitutional part of our fabric and also does not want gay marriage. Given that we can't trust the federal courts to rule the way the public feels, we will take the risk out of the equation by removing federal court jurisdiction on such matters.

Scene Two: On the Minds of the Framers.

SENATOR CALL: Thomas Jefferson and Abraham Lincoln were wise to see the latent risks of an overly powerful federal judiciary. According to their eminent wisdom, the federal judiciary should not be permitted to abuse its power and potentially distort the Constitution to its own design.

164. See H.R. Rep. No. 108-691, at 10 (2004) ("[T]he germ of dissolution of our Federal Government is in the constitution of the Federal judiciary; ... working like gravity by night and by day, gaining a little today and a little tomorrow, and advancing its noiseless step like a thief, over the field of jurisdiction, usurped . . . .") (quoting Letter from Thomas Jefferson to Charles Hammond (Aug. 18, 1821), in XV Thomas Jefferson, Writings of Thomas Jefferson 331-32 (Albert E. Bergh ed., 1903)); id. at 11. President Lincoln opined:

The candid citizen must confess that if the policy of the government, upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court . . . the people will have ceased to be their own rulers having, to what extent, practically resigned their government into the hands of that eminent tribunal.

Id. (quoting Abraham Lincoln's First Inaugural Address (Mar. 4, 1861), in 4 The Collected Works of Abraham Lincoln 268 (Roy P. Basler ed., 1953)).

165. See id. at 10 (2004) ("Jefferson strongly denounced the notion that the Federal judiciary should always have the final say on constitutional issues[.]"). Jefferson explicitly rejected the notion of giving the federal judiciary the final say:

If [such] opinion be sound, then indeed is our Constitution a complete feto de se [act of suicide]. For intending to establish three departments, coordinate and independent, that they might check and balance one another, it has given, according to this opinion, to one of them alone, the right to prescribe rules for the government of the others, and to that one too, which is unelected by, and independent of the nation . . . . The constitution, on this hypothesis, is a mere thing of wax in the hands of the judiciary, which they may twist and shape into any form they please.

Id. at 10-11 (quoting Letter from Thomas Jefferson to Judge Spencer Roane (Sept. 6, 1819)), in XV The Writings of Thomas Jefferson, supra note 164, at 213.
JUSTICE TENURE: First, I wouldn’t cite to Lincoln as an example of restraint in the use of power. Second, Jefferson lost those arguments. The Constitution grants vast power to the federal judiciary with respect to interpretation of the Constitution itself. And, the state nullification arguments undergirding the Democratic-Republican-sponsored Virginia and Kentucky Resolutions were soundly discredited during the Civil War. Remember, constitutional power derives from “We the People.” The proper checks on judicial power are: (1) appointments, (2) impeachments, and (3) constitutional amendment procedures. In my opinion, the Founders envisioned that the Supreme Court would hold the final say on the Constitution. As you both are well aware, the Constitution explicitly provides: “The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts.... The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution....” Need I continue?

SENATOR CALL: That’s not all the Constitution says on this score. Interestingly, when the Constitution does not contain the words you justices want, you decide that the document is a fluid, ever-changing text to be interpreted for its spirit rather than its literal meaning. When the plain

166. See Simon, supra note 89, at 24:25.
167. See Marbury v. Madison, 5 U.S. 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”). Tocqueville opines that judicial power as designed by the American Constitution is an “immense political power” because “Americans have given judges the right to base their decisions on the Constitution rather than on the laws.” Tocqueville, supra note 4, at 100-01. In other words, they allow them not to apply laws which they consider unconstitutional. See id.
168. See Simon, supra note 89, at 61, 105 (explaining that President Jefferson would have been disappointed with Virginia’s omission and Kentucky’s dilution of “[h]is most radical idea for correcting the abuses of the Alien and Sedition Acts—state nullification”).
169. See U.S. Const. art. II, § 2 (“The President shall appoint... Judges of the supreme Court...”).
170. See id. art. I, § 2 (“The House of Representatives... shall have the sole Power of Impeachment.”).
171. See id. art. V (explaining process for making constitutional amendments).
172. See Gunther, Congressional Power, supra note 2, at 906 (providing Constitutional Convention compromise and suggesting that “essential functions” advocates “can draw legitimate comfort from these debates, for an expectation of Supreme Court review of state court judgments was indeed widespread”) (citing Bator et al., supra note 23, at 12).
174. See generally Ronald Dworkin, The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve, 65 Fordham L. Rev. 1249 (1997) (articulating and exploring competing theories of constitutional interpretation). In contrast with notions of a Constitution that evolves, Professor Dworkin coins two forms of originalism “semantic originalism”—using “what the legislators meant collectively to say as decisive of constitutional meaning—and “expectation originalism”—relying on what legislators “expected to accomplish in saying what they did.” Id. at 1256. After noting Justice Scalia’s claimed adherence to “semantic originalism” and Professor

http://digitalcommons.law.villanova.edu/vlr/vol51/iss3/3
language applies to this scenario, you notably leave out two critical ingredients with respect to the derivation for congressional power in this arena. First, inferior federal courts exist only at the discretion of Congress pursuant to Article III's "ordain and establish" language,\textsuperscript{175} which you inappropriately excised from the passage you quoted. Second, your implied point that the Supreme Court has irreducible jurisdiction over all claims "arising under" the Constitution\textsuperscript{176} is unsupportable because the Supreme Court retains appellate jurisdiction, and I quote, "with such Exceptions, and under such Regulations as the Congress shall make."\textsuperscript{177} Accordingly, Congress is completely within the realm intended by the Framers when it seeks reasonably to curb federal jurisdiction in reaction to judicial abuses of power.

**Justice Tenure:** These bills are unconstitutional usurpations of judicial power. You criticize us for lack of accountability, yet I am confident that many members of Congress must know that they are passing laws that are unconstitutional.\textsuperscript{178} Thus, Congress is actually setting up the Court.

Tribe's rejection of originalism, Dworkin criticizes both. See \textit{id.} at 1256-58. He contends that they fall short of constitutional integrity because Justice Scalia claims constitutional fidelity but abandons it, while Tribe rejects fidelity yet embraces it. See \textit{id.} at 1262; see also \textsc{John Hart Ely, Democracy and Distrust—A Theory of Judicial Review} 11-20 (1980) (critiquing clause-bound interpretations based on plain meaning because due process controversies, for example, require more lenient approach).

175. \textsc{U.S. Const.} art. III, § 1; see also Sheldon v. Sill, 49 U.S. 441, 448-49 (1850) (pointing out that Congress, rather than Constitution, ordains and establishes inferior federal courts and, as such, "Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies").

176. In his groundbreaking dialogue, Hart provocatively explored the parameters of an irreducible minimum of appellate jurisdiction:

A. You would treat the Constitution, then, as authorizing exceptions which engulf the rule, even to the point of eliminating the appellate jurisdiction altogether? How preposterous!

Q. If you think an "exception" implies some residuum of jurisdiction, Congress could meet that test by excluding everything but patent cases . . . .

A. It's not impossible for me to lay down a measure. The measure is simply that the exceptions must not be such as will destroy the essential role of the Supreme Court in the constitutional plan.


177. \textsc{U.S. Const.} art. III, § 2 ("In all 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 Congress shall make.").

178. See \textit{City of Boerne v. Flores}, 521 U.S. 507, 535 (1997) ("When Congress acts within its sphere of power and responsibilities, it has not just the right but the duty to make its own informed judgment on the meaning and force of the Constitution."). Bolstering this sentiment with James Madison's statement that "it is incontrovertibly of as much importance to [the congressional] branch of Government as to any other, that the constitution should be preserved entire. It is our duty." \textit{id.} (quoting 1 \textsc{Annals of Congress} 500 (1789)); \textit{cf. Eastland, supra} note 40, at 92 (noting that Congress and President have responsibility to interpret Constitution, but that "legislators today often abdicate their responsibility to think about the Constitution as they draft legislation; too often their attitude is, 'we'll let
By passing laws on hot-button issues that Congress knows are unconstitutional, yet are popular with their constituents, Congress is attempting to make the Court responsible for taking the blame of the public when the Court strikes down the laws as it must.

**Senator Call:** Sure, in the confines of this conversation, I'll admit that there are times when I normally wouldn't be in favor of a certain vote, but because of political pressure I vote to support it without having to worry about the ultimate consequences because I trust the courts will strike it down. The desire to please a rowdy constituency on a tough issue sometimes dictates a vote in favor of an unsavory bill, but in those instances, I hope that the Court will get it right and the result will be no harm, no foul. We have to choose our battles.

**Attorney General Mansion:** Presidents have vetoed bills based upon perceived unconstitutionality.\(^{179}\) In addition, the President should utilize signing ceremonies to indicate a view that a provision of the bill is unconstitutional.\(^{180}\)

**Justice Tenure:** Just because Congress might have the power doesn't mean that it is wise for Congress to use it.\(^ {181}\) Self-governance must be, if it is about anything, about governing ourselves. The obligation of self-governance is that each actor in the machine is responsible for making a reasoned judgment about the limits and effects of his own conduct.

**Senator Call:** What do you mean “might”? Of course, Congress has the power. The Constitution explicitly grants it the power.

**Justice Tenure:** You know it's not that simple.

**Senator Call:** Certainly you cannot argue that we lack the power to strip inferior federal courts of jurisdiction. Lower federal courts wouldn't even exist but for the fact that Congress created them. And, we created the Supreme Court decide’"). Despite the apparent instances of certain congressional members advancing bills that contain constitutional infirmities, the congressional oath requires that members uphold the Constitution. *See U.S. Const.* art. VI (requiring oath “to support this Constitution”); *see also* Tribe, *supra* note 2, at 133 (“In the first instance, of course, Congress itself must assess the constitutionality of those enactments; its oath to uphold the Constitution requires no less.”).

179. *See Eastland*, *supra* note 40, at 64 (maintaining that "a large number of [President George H.W.] Bush vetoes were in fact cast to defend the constitutional rights of the executive").

180. Signing ceremonies provide an opportunity for the President to ensure the proper execution of his constitutional responsibilities by taking steps to cure any known problems. For example, during the signing ceremony for the Great Lakes Critical Program, President George H.W. Bush “advised Congress that he would be recommending legislation to correct a constitutional problem raised by the new law.” *See Eastland*, *supra* note 40, at 74.

181. *See Gunther*, *Congressional Power*, *supra* note 2, at 898 (siding with other scholars who find that Congress possesses broad “power over the jurisdiction of federal courts in terms of sheer legal authority” but stressing that scholars should focus on wisdom of “what sound constitutional statesmanship admonishes”).
them under power explicitly given to us from the Constitution. 182 The
Framers, in their wisdom, determined that Congress could, at its discre-
tion, "ordain and establish" lower federal courts. 183 Thus, we could have
decided to never create lower federal courts at all. It should go without
saying that the power to create is the power to destroy. 184 The greater
power includes the lesser power. 185 You can't deny that the legislative
branch possesses inherent authority to strip jurisdiction of lower federal
courts.

Attorney General Mansion: Isn't the argument even stronger than
the implied notion that the greater power includes the lesser power? It's
widely accepted that the Constitution is clear that Congress possesses the
power to regulate inferior federal courts. 186 It emanates from the Consti-
tutional Convention's Madisonian compromise itself, which included the
"agreement that the question whether access to the lower federal courts
was necessary to assure the effectiveness of federal law should not be an-
swered as a matter of constitutional principle, but rather, should be left a
matter of political and legislative judgment." 187

Justice Tenure: First, you know that provision was the result of a com-
plex compromise among competing interests of the Framers. The Nation-
alisit, or Federalists, argued to mandate the establishment of lower federal
courts in order to ensure enforcement of federal law; while the Localists,
or Anti-Federalists, believed that state courts would be adequate to inter-

182. See U.S. Const. art. III, § 1 ("The judicial Power of the United States,
 shall be vested . . . in such inferior Courts as the Congress may from time to time
 ordain and establish.").

183. Id.; see also Yakus v. United States, 321 U.S. 414, 438 (1944) (noting "con-
stitutional power of Congress to create inferior federal courts and prescribe their
jurisdiction"); Lockerty v. Phillips, 319 U.S. 182, 187 (1943) (describing power of
Congress under Constitution to create inferior courts and to limit their jurisdic-
tion); Sheldon v. Sill, 49 U.S. 441, 448 (1850) (articulating Congress's power to
ordain and establish inferior federal courts).

184. See, e.g., Sheldon, 49 U.S. at 449 (“Courts created by [congressional] statute
can have no jurisdiction but such as the statute confers.”); Gunther, Con-
gressional Power, supra note 2, at 899 (articulating Article III basis for view of broad
congressional powers over lower federal courts); Ratner, Congressional Power, supra
note 15, at 161 (explaining if Congress created “a procedural limitation restricting
the availability of Supreme Court review in some but not all cases involving a par-
ticular subject, legislation denying the Court jurisdiction to review any case involving
that subject would effectively obstruct . . . functions in the proscribed area”).

185. See, e.g., Palmore v. United States, 411 U.S. 389, 401 (1973) (stating that
Congress is not “required to invest [inferior federal courts] with all the jurisdiction
it was authorized to bestow under Art. III”); Sheldon, 49 U.S. at 448-49 (“[H]aving a
right to prescribe, Congress may withhold from any of the enumerated controver-
sies.”); Gunther, Congressional Power, supra note 2, at 899 (discussing text of U.S.
Const. art. III, § 1).

186. See Bator, supra note 15, at 1030 (“One of the clearest [constitutional
provisions] is the power of Congress to regulate the jurisdiction of [lower federal
courts].”); see also Gunther, Congressional Power, supra note 2, at 912 (stating that
Professor Bator's conclusion is “widely supported”).

pret federal law. You are correct that the compromise resulted in Article III leaving the creation of lower federal courts to Congress. But, remember, that the driving force behind the Localist stance was that states were competent to conduct an "initial" review bound as they are under the Supremacy Clause and as long as ultimate Supreme Court review remained. Here, Congress is attempting to strip the whole federal forum.

Second, simply because Congress possesses the power to create lower federal courts does not translate into possessing the power to control absolutely. Judicial power is "vested" in the federal courts.

188. See Gunther, Congressional Power, supra note 2, at 906 (discussing debate over whether Constitution should mandate creation of lower federal courts).

189. See id. (stating compromise at Constitutional Convention to mandate creation of Supreme Court, but leaving creation of lower courts to discretion of Congress).

190. See id. (noting that Localists argued "that state judges, compelled to apply federal law under the supremacy clause, were adequate for the initial interpretation and enforcement of federal requirements, and that ultimate review by the Supreme Court would assure sufficient supremacy and uniformity").

191. See U.S. Const. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."). The term "vested" should carry import. See Robert N. Clinton, A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III, 132 U. Pa. L. Rev. 741, 749-50 (1984) (concluding that Framers intended "shall be vested" to "mandate that Congress allocate to the federal judiciary as a whole each and every type of case or controversy defined as part of the judicial Power" under Article III's section two unless "so trivial that they would pose an unnecessary burden" on federal courts and parties). By analogy, a debate remains on the extent Congress can delegate its "vested" powers. Article I provides: "All legislative Powers herein granted shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. Const. art. I, § 1. Early cases delineated the boundaries of the nondelegation doctrine by striking down unconstitutional delegations of vested legislative power. See Panama Ref. Co. v. Ryan, 293 U.S. 388, 415 (1937) (holding that National Industrial Recovery Act was unconstitutional delegation of legislative power to Executive because it provided President with "unlimited authority" rather than setting forth any "criterion to govern the President's course"); Schechter Poultry v. United States, 295 U.S. 495, 529 (1935) ("Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested."); see also J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928) (pronouncing that congressional grants of power must contain "intelligible principle" directing use of authority in order to be constitutional delegation). Although subsequent precedent whittled these limits to a rhetorical refrain, scholarly and judicial support for renewing the doctrine to its robust stature exists. See Steven F. Heufner, The Supreme Court's Avoidance of the Nondelegation Doctrine in Clinton v. City of New York: More than "A Dime's Worth of Difference," 49 Cath. U. L. Rev. 337, 360 (2000) (citing American Trucking Ass'ns, Inc. v. EPA, 175 F.3d 1027, 1034, 1038, 1057 (D.C. Cir. 1999)) ("[I]n recent decades, a number of scholars and judges, including the recent D.C. Circuit majority in American Trucking, have encouraged or hoped for a reinvigoration of a robust form of the doctrine, which might actually result in the invalidation of some congressional acts."); cf. Cass R. Sunstein, Nondelegation Canons, 67 U. Chi. L. Rev. 315, 315-16 (2000) (rejecting notion that nondelegation doctrine is "dead," and instead advocating that "nondelegation canons" have been relocated as "a series of more specific and smaller, though quite important, nondelegation doctrines"). For a thoughtful argument advocating the resurrection of the early line of cases, see also
presidential context. Congress may create a Department of Justice that has an Attorney General, but just because Congress created the Attorney General position does not mean that Congress retains all control over the position. Rather, it becomes the President’s power to appoint the individual, 192 and Congress cannot dictate who should be selected simply on the basis that Congress created the position. The same is true if you analogize to INS v. Chadha. 193 As you will recall, Congress tried to retain budgetary veto authority on the ground that Congress created the Immigration and Naturalization Service, but as you also know the Supreme Court determined that a legislative veto violated the Presentment Clause and impermissibly interfered with the President’s veto power. 194 For instance, you can choose to create a child, but you do not retain absolute control over the child. It becomes an independent entity.

SENIOR CALL: I’ll buy your child analogy because I think we created Frankenstein. 195 Didn’t the Supreme Court already resolve this issue back in the 1800s? 196

JUSTICE TENURE: I disagree. Congress can create inferior federal courts, but once it has chosen to create them, which it did long ago, 197 those entities take on a constitutional life of their own. Those courts accordingly have all the power and inherent authority that they derive from being a part of a coequal branch of government. The distinction between the power to create and the power to regulate is a central tenet of power sharing within the construct of the separation of powers doctrine.

SENIOR CALL: Congress also has the power to curtail the appellate jurisdiction of the Supreme Court via the Exceptions Clause of the Consti-


192. See U.S. CONST. art. II, § 2 (stating President has power to appoint “Officers of United States”).


194. See id. at 959 (reasoning that House’s action was legislative in function and did not fit within any exceptions authorizing one House of Congress to act alone and holding that, because House failed to act in conformity with express constitutional procedures for enacting legislation, congressional veto provision was unconstitutional, but severable from rest of Immigration and Nationality Act); see also Louis Fisher, Constitutional Conflicts Between Congress and the President (1997).

195. See Mary Shelley, Frankenstein (Henry Colburn & Richard Bentley, 1831) (1818).

196. See Sheldon v. Sill, 49 U.S. 441, 448-49 (1850) (ruling that Congress has power to ordain and establish inferior federal courts and accordingly may withhold any controversy from any such created court down to no jurisdiction).

197. See First Judiciary Act of 1789, 1 Stat. 84 (establishing courts of United States). This Act, however, left to state courts cases arising under federal law. See id. Congress first granted federal question jurisdiction, as it exists today in 28 U.S.C. § 1331, to inferior federal courts in the Judiciary Act of 1875, 18 Stat. 470 (granting federal question jurisdiction).
tution.198 There is no limitation on what types of cases that Congress may opt to exclude from the appellate jurisdiction as set forth in the Constitution.199 Moreover, if the Constitution itself isn’t clear enough for you, leading scholars in this arena, such as Professors Van Alstyne, Gunther, and Wechsler, agree that Congress possesses the power as I have described it.200 All one needs to do is review the testimony from the congressional hearings regarding the Defense of Marriage Act. Preeminent scholars, led by the Majority’s witness, Professor Martin Redish, concluded that Congress possesses the power to strip jurisdiction.201

JUSTICE TENURE: Again, I can refute the global scope you are asserting with another apt analogy. Similar to the constitutional grant of authority to Congress under the Exceptions Clause,202 the Constitution also grants Congress the appropriations power.203 With the appropriations power, Congress again has an express textual grant to handle appropriations; but most serious constitutional scholars would agree that even though Congress has a plenary express grant of power to appropriate funds, Congress cannot zero out the budgets for the federal courts because that would be interfering with the core functions of coequal branches and thus would violate separation of powers doctrine.204 So, while Congress has an express grant of authority to manipulate the Supreme Court’s appellate jurisdiction, even this grant comes embedded with limits. The power must be exercised within the permissible sphere of authority and not interfere with the core functions of the Court. The jurisdiction stripping bills, as passed by the House, do not represent the permissible sphere of authority.

ATTORNEY GENERAL MANSION: You lack any support for your proposition that Congress lacks the power to proceed.

SENATOR CALL: That is because they have no authority for their assertion on this point.

JUSTICE TENURE: To the contrary, I can point to the seminal work of Professor Henry Hart in which he utilized Socratic dialogue to demonstrate that Congress cannot exercise the “exceptions” power without violating the core functions of the Supreme Court. Others have advanced

198. See U.S. CONST. art. III, § 2, cl. 2 (explaining appellate jurisdiction of Supreme Court).

199. See id. (setting forth Exceptions Clause).

200. See, e.g., Gunther, Congressional Power, supra note 2.


203. Id. art. I, § 8.

204. See Letter from William French Smith, Attorney General of the United States, to the Honorable Strom Thurmond, Chairman, U.S. Senate Comm. on the Judiciary (May 6, 1982), 128 CONG. REC. 9092, 9093-97 (1982) ("Congress may not . . . consistent with the Constitution, make ‘exceptions’ to Supreme Court Jurisdiction which would intrude upon the core functions of the Supreme Court as an independent and equal branch in our system of separation of powers.").
Hart’s theory. 205 For example, Professor Leonard Ratner maintains that the essential constitutional functions of the Court are to maintain supremacy and uniformity of federal law. 206 He further asserts that “some avenue must remain open to permit ultimate resolution by the Supreme Court of persistent conflicts between state and federal law or in the interpretation of federal law by lower courts.” 207 A former Attorney General for President Ronald Reagan, William French Smith, echoed Ratner’s contentions and additionally provided an argument external to Article III in that he insisted that “no one Branch of Government should have the power to eliminate the fundamental constitutional role of either of the other Branches.” 208 He knew that the role of the independent judiciary must be protected within the separation of powers scheme. The ultimate failsafe is that Congress cannot strip all avenues to the federal forum without violating due process. 209 According to Professor Akhil Amar, Congress cannot strip jurisdiction from all federal courts because Article III mandates that federal jurisdiction must extend to all “arising under” cases—whether it be original or appellate jurisdiction. 210 With two in-
artfully drawn bills, Congress has unconstitutionally left no avenue to a federal forum and thus violated the separation of powers.  

ATTORNEY GENERAL MANSION: You appear to be overlooking the trump card in favor of congressional authority—Ex parte McCardle. It’s Supreme Court precedent no less. You know that McCardle, without a doubt, stands for the proposition that Congress possesses the power to limit the Supreme Court’s appellate jurisdiction even during the pendency of an appeal. Congress hoped to derail an anticipated adverse ruling from the Supreme Court with its proposed limit on appellate jurisdiction, and the Court upheld Congress’s maneuver as a valid exercise of Congress’s Article III power under the Exceptions Clause.

SENATOR CALL: According to my Chief Counsel who looked into this issue for me, the Court, in McCardle, notably stated: “We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words.”

JUSTICE TENURE: So, your purported conclusive precedent is an 1869 case that is flatly distinguishable from the instant attempts to strip jurisdiction from the entire federal judicial forum? Your read of McCardle is inaccurate. The critical ingredient in McCardle was that a petitioner could seek a federal forum through a writ of habeas corpus, notwithstanding Congress’s appellate jurisdiction-limiting statute. The complete jurisdic-

211. See H.R. REP. No. 108-691, at 94-97 (2004) (dissenting views) (arguing that Congress’s efforts to strip jurisdiction “unconstitutionally usurps the Court’s power” and providing support for limits on congressional power).

212. 74 U.S. 506 (1869).

213. Id. at 515. In McCardle, a newspaper editor being held in military custody launched an appeal to the Supreme Court challenging a lower court’s denial of habeas corpus. See id. at 512. The appeal hinged itself on newly enacted jurisdictional statute that was part of Congress’s post-Civil War Reconstruction Acts. See id. (Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385 (repealed 1868)). Congress feared an unfavorable ruling by the Supreme Court on its post-Civil War Reconstruction Acts. See id. at 513. Accordingly, Congress passed a jurisdiction-stripping provision hoping to foreclose the Supreme Court’s ability to render an unfavorable ruling. See id. A unanimous Supreme Court validated Congress’s jurisdiction-stripping provision. See id. at 515. For an in-depth treatment of McCardle, see William W. Van Alstyne, A Critical Guide to Ex Parte McCardle, 15 ARIZ. L. REV. 229 (1973) (providing history, critical review, and current construction of McCardle decision).

214. See McCardle, 74 U.S. at 513.

215. See id. at 515.

216. Id. at 514.

217. See id. at 515 (noting that Congress’s repeal did not displace whole appellate power of Supreme Court in cases of habeas corpus because limited repeal did “not affect jurisdiction which was previously exercised”); see also Ratner, Congressional Power, supra note 15, at 180 (reasoning that Congress’s legislation in McCardle “did no more than eliminate one procedure for Supreme Court review of the decisions denying habeas corpus while leaving another equally efficacious one available”). The Court has applied narrow readings of McCardle in interpreting federal statutes to avoid what appears to be a complete strip. See INS v. St. Cyr, 533 U.S. 289 (2001) (concluding habeas jurisdiction remained absent specific and un-
tional strips that Congress is considering at present would eviscerate the Court’s core functions of supremacy and uniformity as envisioned by Justice Joseph Story in *Martin v. Hunter’s Lessee*, which upheld the constitutionality of section 25 of the 1789 Judiciary Act against an assault by the highest court in Virginia.\(^ {218} \)

Congress cannot pass an unconstitutional statute and simultaneously strip all federal courts of jurisdiction. Even if the avenue to state courts remains open, individual state courts are beholden to local politics and thus may not uphold the constitutional interest. The essence of *Marbury* would be thwarted.\(^ {220} \) The federal judiciary will not quietly stand by and let this come to pass. We will strike down the strip if necessary.

**ATTORNEY GENERAL MANSION:** You know good and well that Chief Justice Chase’s unanimous opinion in *McCardle* did not rely on the distinction regarding whether an avenue remained open when it upheld Congress’s jurisdiction-curbing provision as constitutional.\(^ {221} \)

**SENATOR CALL:** As for Justice Story, you also know that Supreme Court precedent is weak for your argument because there are “far more numerous statements from the Court suggesting very broad congressional au-

\(^ {218} \) 14 U.S. 304 (1816). Extrajudicial commentary by Justice Story supports Professor Clinton’s position, *supra* note 191, that Article III’s Vesting Clause commands Congress to leave intact a federal forum for cases “arising under” the Constitution. *See* 3 J. STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 1696 (1833). Justice Story noted:

> [I]t is clear, from the language of the constitution, that, in one form or the other [i.e., original or appellate], it is absolutely obligatory upon con- 

gress, to vest all the jurisdiction in the national courts, in that class of 

cases at least, where it has declared, that it shall extend to “all cases.”

*Id.*; *see also* Amar, *Reports of My Death, supra* note 210, at 1666-67 (advancing argument that extrajudicial statements of Justices Story and Marshall, along with other luminaries, support two-tiered approach to Article III that link to mandatory and permissive jurisdiction).

\(^ {219} \) *Martin*, 14 U.S. at 382.

\(^ {220} \) Marbury v. Madison, 5 U.S. 137 (1803).

\(^ {221} \) *See Ex parte McCordle*, 74 U.S. 506, 513-14 (1869) (upholding, under Exceptions Clause power, Congress’s repeal of earlier Act where appeal disallowed appeals from circuit courts that earlier Act allowed); Gunther, *Congressional Power, supra* note 2, at 905 & n.47 (citing *McCordle*, 74 U.S. at 515, and *Ex parte Yerger*, 75 U.S. 85, 103-06 (1869)). *But see McCordle*, 74 U.S. at 515 (emphasizing that Congress’s repeal did not displace whole appellate power of Supreme Court in cases of habeas corpus because limited repeal did “not affect the jurisdiction which was previously exercised”).

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authority" with respect to regulating federal court jurisdiction. These repeated "expressions of deference to congressional delineations of appellate jurisdiction" clearly surpass the ruminations of Justice Story. Even Justice Story himself lobbied for legislation that would be a congressional extension of the Judiciary Act. Isn't it more likely that Justice Story's words represent "exhortations regarding desirable policy [rather] than ... expressions of constitutional commands?"

JUSTICE TENURE: The bottom line is that the Court has never had to face a situation in which Congress has sought to bar all access to the federal court system over a body of constitutional issues. Assuming arguendo that you both are correct, as Bartlett makes clear, to the extent that Article III is inconsistent with the Due Process Clause of the Fifth Amendment, the Fifth Amendment effectively modifies it because of the subsequent adoption of the Fifth Amendment. For example, if the Court found that denying a right violated the Due Process or Equal Protection clause, the Fifth Amendment trumps Article III if the two clauses are inconsistent.

ATTORNEY GENERAL MANSION: The arguments that you now pose are amorphous and without bounds.

JUSTICE TENURE: Well, at any rate, I am not about to concede that Congress has the power. To be honest, I am of two minds about it, but let me be clear that you do not want to make the Supreme Court decide that case. Let me give you a little foreshadowing. If you pass a jurisdiction-stripping bill on a set of constitutional rights for example, then a case will reach federal court, and federal courts maintain inherent authority to determine whether jurisdiction is proper. We will find that it is proper

222. Gunther, Congressional Power, supra note 2, at 903.
223. Id. (statement of Van Alstyne).
224. See id.
225. Id.
226. See Bartlett v. Bowen, 816 F.2d 695, 705 (D.C. Cir. 1987) (recognizing that "most scholars agree that 'under the due process clause of the fifth amendment Congress may not exercise Article III power over the jurisdiction of the [federal] courts in order to deprive a party of a right created by the Constitution'"); see also id. at 704 ("The question we ask is whether due process places any limits on Congress' power, and we conclude, narrowly and rather uncontroversially, that it does and that these limits are broached when Congress denies any forum—federal, state or agency—for the resolution of a federal constitutional claim.").
227. Gunther, Congressional Power, supra note 2, at 903 (summarizing that critics of "essential functions" limit articulate "vague, slippery, open-ended nature of the limit, and challenge its various underpinnings at length").
228. See Friedman, supra note 8, at 2 (reasoning that "the federal jurisdiction decisions suggest that the Supreme Court plays a role in defining federal jurisdiction at least as great as, if not greater than, that played by Congress").
229. See, e.g., Hart, supra note 15, at 1387 ("If the court finds that what is being done is invalid, its duty is simply to declare the jurisdictional limitation invalid also, and then proceed under the general grant of jurisdiction"); Tribe, supra note 2, at 133 (stating that "everyone seems to agree" that court has jurisdiction to review statute and then "necessarily sees not only the statute but, standing behind

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and proceed to rule that your bill is unconstitutional as a violation of the separation of powers.\textsuperscript{230}

\textbf{SENATOR CALL: What violation?}

\textbf{JUSTICE TENURE:} A violation of the core functions of federal courts, a coequal branch of government.\textsuperscript{231} If pressed, we will strike it down as an impermissible encroachment of our core functions.\textsuperscript{232} Congress cannot pass an unconstitutional bill and simultaneously strip all federal court jurisdiction. More than violating the essential functions of the third branch, it would violate \textit{Marbury} as the Supreme Court maintains the right "to say what the law is."\textsuperscript{233} Accordingly, the jurisdictional strip in the case of an unconstitutional statute is also unconstitutional. The Court certainly retains the authority to so rule.

\textbf{ATTORNEY GENERAL MANSION:} That is a whole lot of bunk.

\textbf{SENATOR CALL:} Last I checked most scholars rejected those arguments.\textsuperscript{234}

\textbf{JUSTICE TENURE:} The scholarly verdict is still out, but it is the Court that will have the \textit{last word}.\textsuperscript{235}

\begin{itemize}
\item it, the Constitution: that is what the supremacy of the Constitution has come to mean") (citing \textit{Marbury v. Madison}, 5 U.S. 137, 178 (1803)).
\item \textsuperscript{230} Professor Gunther opines: The Justices no doubt view the pending jurisdiction-curbing bills with something less than enthusiasm, and their sense of institutional self-defense may ultimately tempt them to adopt some of the limits that have been articulated in the recent literature. It would not be the first time that a Justice inclined to take a particular road as a matter of institutional self-interest found aid and comfort for doing so in the academic literature.
\item Gunther, \textit{Congressional Power}, supra note 2, at 922. Gunther's statement intimates that self-defense would be intellectually dishonest. Yet, self-defense is contemplated by the constitutional structure itself. While not intellectually dishonest, the exercise of self-defense can be harmful, which is why restraint and deterrence are preferable.
\item \textsuperscript{231} See Hart, supra note 15, at 1365 ("[T]he exceptions must not be such as will destroy the essential role of the Supreme Court in the constitutional plan."); Ratner, \textit{Majoritarian Constraints}, supra note 15 (stating essential functions of Supreme Court).
\item \textsuperscript{232} See Hart, supra note 15, at 1365 (explaining that congressional exceptions to jurisdiction cannot function to eviscerate essential role of Supreme Court).
\item \textsuperscript{233} \textit{Marbury v. Madison}, 5 U.S. 137, 177 (1803).
\item \textsuperscript{234} See, e.g., Gunther, \textit{Congressional Power}, supra note 2.
\item \textsuperscript{235} See, e.g., Cooper v. Aaron, 358 U.S. 1, 18 (1958) (Rehnquist, C.J.) (asserting that \textit{Marbury} "declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system"); \textbf{LOUIS FISHER, AMERICAN CONSTITUTIONAL LAW} 53 (5th ed. 2003) [hereinafter FISHER, AMERICAN CONSTITUTIONAL LAW] (articulating "famous . . . proposition" of \textit{Marbury} that "Court is supreme on constitutional questions"); \textbf{LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW} 225 (2004) (explaining that former Chief Justice Rehnquist recognized that Congress and Executive "have a role in inter-}
\end{itemize}
SENATOR CALL: That's not your Court's precedent. I think you are bluffing.

ATTORNEY GENERAL MANSION: Plus, thanks to some of the Executive's predecessors the makeup of the Supreme Court contains a majority of justices who believe that "our federalism" means that states should be respected as able to decide constitutional matters. Based on modern federalist principles, I think the current Supreme Court will uphold Congress's use of power to strip federal court jurisdiction.

interpreting and applying the Constitution, but ever since Marbury this Court has remained the ultimate expositor of the constitutional text); cf. Mackey v. United States, 401 U.S. 667, 680 (1971) ("Although it is necessary for the proper functioning of the federal system that this Court possess the last word on issues of federal constitutional law, it is intolerable that we take to ourselves the sole ability to speak to such problems.").

236. See Ex parte McCardle, 74 U.S. 506 (1869).

237. Younger v. Harris, 401 U.S. 37, 44 (1971). In Younger, Justice Black eloquently sets forth the contours of "Our Federalism" from the Constitutional Debates:

The concept does not mean blind deference to "States' Rights" any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.

Id.

238. See City of Boerne v. Flores, 521 U.S. 507, 524, 534 (1997) (finding, inter alia, Congress's Religious Freedom Restoration Act impermissibly encroached on states' rights by its "considerable congressional intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens"); see also Theodore J. Weiman, Jurisdiction Stripping, Constitutional Supremacy, and the Implications of Ex Parte Young, 153 U. Pa. L. Rev. 1677, 1682 (2005) (reasoning that if Supreme Court remains consistent to its interpretation of federalism by "viewing state courts as competent and appropriate to hear cases involving federal questions[,] the Court is unlikely to find within Article III any strong limits on Congress's power to restrict federal court jurisdiction").

239. See Weiman, supra note 238, at 1682. Weiman notes:

Given the Supreme Court's current federalist momentum, it is possible that the Court might approach a jurisdiction-stripping law largely as a question of judicial federalism—the proper role of state and federal courts within the dual-court system—and interpret Article III as allowing Congress essentially to divert substantive issues to state courts.

Id. But see City of Boerne, 521 U.S. at 524, 536 (invalidating Congress's Religious Freedom Restoration Act, which purported to undo disfavored Supreme Court ruling, because Act exceeded Congress's § 5 enforcement powers under Fourteenth Amendment by violating, inter alia, separation of powers).
SENATOR CALL: What about Dickerson v. United States?\(^{240}\) The Supreme Court didn’t uphold states’ rights in that instance.\(^{241}\) Instead, the Court said enough is enough and upheld Miranda v. Arizona\(^{242}\) as constitutional in the face of states’ interests.\(^{243}\)

JUSTICE TENURE: Dickerson required an act of self-preservation.\(^{244}\)

ATTORNEY GENERAL MANSION: Dickerson is inapposite to the instant debate because the areas in which we seek to cede to the states lack Supreme Court precedent—in other words, the Supreme Court has yet to find that there is a constitutionally protected right to same-sex marriage or to rule on whether “under God” in the Pledge violates the First Amendment. I maintain my position that the Court will protect federalism with respect to the jurisdiction-stripping issue.

JUSTICE TENURE: You know our case history is limited in this arena because Congress ultimately has opted wisely to restrain itself;\(^{245}\) and certainly “has never attempted to bar all access to federal courts when a person claims that a federal statute violates the Constitution . . . .”\(^{246}\)

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240. 530 U.S. 428 (2000). In Dickerson, the Court considered a challenge to a congressional statute that provided that the Supreme Court’s Miranda warning was voluntary rather than mandatory and that the key to a confession’s admissibility is whether it was voluntarily made. See id. at 432, 435-36. At its core, the Court had to resolve the issue of “whether Congress has constitutional authority to thus supersede Miranda” and thereby trump the Supreme Court. Id. at 437. The Court plainly ruled that Congress does not have such authority. See id. at 432.

241. See id.; see also Gonzales v. Raich, 125 S. Ct. 2195, 2208-09 (2005) (holding that Congress possesses power to regulate cultivation and possession of medical marijuana under Commerce Clause because of potential for substantial effect on interstate commerce); United States v. Oakland Cannabis Buyers’ Coop., 532 U.S. 483, 494 (2001) (invalidating state law that created exception from federal law for marijuana when used because of medical necessity).

242. 384 U.S. 436, 471 (1966) (holding that “an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation under the system for protecting the privilege” against self-incrimination).

243. See Dickerson, 530 U.S. at 432 (holding that “Miranda, being a constitutional decision of this Court, may not be in effect overruled by an Act of Congress,” and “that Miranda and its progeny in this Court govern the admissibility of statements made during custodial interrogation in both state and federal courts”).

244. The Supreme Court reiterated that “Congress may not legislatively supersede our decisions interpreting and applying the Constitution.” Id. at 437 (citing City of Boerne, 521 U.S. at 517-21). The Court then secured its territory by reasoning that “Miranda is a constitutional decision” and thus untouchable by Congress. Id. at 438; see also Schiavo ex. rel. Schindler v. Schiavo, 404 F.3d 1270, 1281 (11th Cir. 2005) (Tjoflat, J., dissenting) (“It is in this domain that the Supreme Court has jealously guarded [federal court] power against instruction by Congress.”).

245. For an expression of this viewpoint, see H.R. REP. No. 108-691, at 95 (2004) (dissenting views) (“The failure of Congress to enact legislation totally eliminating federal judicial jurisdiction to review the constitutionality of federal statutes is evidence of the long deference and respect maintained by Congress for the principle of federal judicial review.”).

246. Letter from Mark Tushnet, Professor, Georgetown University Law Center, to the Honorable John Conyers, Jr., at 2 (July 19, 2004) (noting further
Moreover, you should appreciate that these issues transcend traditional, political lines. Accordingly, a prediction based upon modern federalist leanings of some justices is shaky at best. This arena is enormously complex. The very term "federalism" is not monolithic; it may well describe rulings that fall on competing sides of the political spectrum.247

Be assured that self-defense of our branch will trump ideological leanings if Congress and the Executive ratchet this to the hilt.248 You do not want to test the waters now. If you force this constitutional crisis and push our backs up against the wall, rest assured that we would deliver the deathblow.249

ATTORNEY GENERAL MANSION: Then we will pass a constitutional amendment banning gay marriage.

JUSTICE TENURE: That is not our concern. If you think you have the political muscle to pass such a ban,250 that is always the end game—just not congressional encroachment on federal judicial power. Of course, you will have to sell it to the country rather than Plan B, jurisdiction stripping. If the country desires such an amendment, then so be it. I would like to see you try to secure the requisite thirty-eight states to ratify the amendment, but I'm betting you won't be able to garner the two-thirds vote necessary for Senate approval, even if the House is poised to pass the amendment.251

SENATOR CALL: There is the private reality and the public reality. I've polled my constituency and there is no way that I could be a proponent of gay rights. The polling data clearly indicated that no matter how you

that "the very fact" of Congress's attempt to sweep all access "is itself a matter of more than minor significance"), cited in H.R. Rep. No. 108-691, at 106 (2004) (dissenting views).

247. See Dennis Herrara, What's Next for California—The 'New' New Federalism, S.F. CHRON., Jan. 3, 2005, at B05 ("[T]he 'new' New Federalism that has taken shape since Reagan's presidency reflects neither a conservative nor liberal agenda, but rather the vital creative role that states and localities play in America's governance.").

248. See H.R. Rep. No. 108-691, at 107-08 (2004) (dissenting views) (reasoning that the Supreme Court's affirmation in Ex Parte Yerger, 75 U.S. 85 (1869), of "its jurisdiction to review habeas corpus decisions from lower federal courts when the petitions were originally brought under earlier legislation . . . shows that the Justices are protective of the Court's jurisdiction and will not readily concede its appellate jurisdiction").

249. Cf. Hon. J. Harvie Wilkinson III, Federalism for the Future, 74 S. CAL. L. REV. 523, 531 (2001) ("Indeed, if the present Court has one overriding value, it is its Marbury-like role of insuring that it is the final judge of constitutional questions.").

250. The House passed a constitutional amendment on the Pledge of Allegiance matter on August 12, 2005.

251. See U.S. CONST. art. V (dictating how to propose amendment to Constitution).
couch it, my people do not want a restructuring of traditional marriage—period. 252 I have to stand as far away from that as possible.

[SERVER Vox Populi reflects: I can't believe they actually have to poll people to discover which way the wind blows. Didn't Robert Kennedy muse: If we're going to decide everything based on polls, why do we elect leaders? Plus, I don't know anyone who would answer such a poll—or at least anyone who would answer it honestly. The server thought to herself that like many issues she really doesn't give it that much thought, although she does have friends who would be presumed to care. She wondered why lawmakers spend so much time on issues that no one can ever really resolve to the satisfaction of everyone.]

JUSTICE TENURE: So, you might actually support the ban even though you believe it to be wrong.

ATTORNEY GENERAL MANSION: Of course, he'll back the ban when the time comes.

SENATOR CALL: Nobody is saying anything about wrong versus right in a moral absolutist sense. My reluctance is based on my desire to spend time on other issues. If I can speak frankly on this, Attorney General, we all know that the votes will not be there to pass a constitutional amendment on this issue, so why not drop it?

ATTORNEY GENERAL MANSION: You know the President may need to take this one as far as it will go, even if it may die in the end. [pause] A result we all wouldn't be too unhappy about.

[Attorney General Mansion takes a gulp of her usual whiskey and Coke and is certain to make no eye contact as she does so.]

JUSTICE TENURE: My primary concern regards the efforts to strip federal court jurisdiction. If Congress's approach with these two jurisdiction-stripping bills becomes law, what is to stop Congress from attaching a jurisdiction-stripping mechanism to every piece of legislation, like a severability clause, to just remove the constitutional issue du jour from judicial review? 253

252. According to a poll conducted by ABC News/Washington Post, the polled audience of 1,202 people responded to whether "it should be legal or illegal for homosexual couples to get married": 48% strongly illegal, 11% somewhat illegal, 14% legal somewhat, 24% legal strongly and 3% no opinion. ABC NEWS/WASHINGTON POST, RELATED POLLING: 2003 POLLING ON GAY AND LESBIAN ISSUES (on file with author).

253. See H.R. REP. No. 108-691, at 102 (dissenting views) (discussing what will happen if Congress is able to circumvent courts) (citing H.R. 3893, 108th Cong. (2004) (regarding government exercise of religion, sexual orientation, and right to marry)).

The legal precedent that will be set if Congress is permitted to simply "end run" the Bill of Rights by circumventing the courts could be far reaching . . . . If this bill passes, we must ask . . . what other rights will next be placed at risk? The right to vote? The right to privacy? Indeed, many of these proposals are already introduced in statutory form. Id.; see also H.R. 3799, 108th Cong. (2004) (regarding official acknowledgements of religious authority); H.R. 3190, 108th Cong. (2003) (regarding government exer-
SENATOR CALL: Hold on a minute. First, you know that slippery-slope arguments are inflammatory, non-scientific and utterly unworthy of debate.\textsuperscript{254}

JUSTICE TENURE [clearing his throat]: Excuse me, but I feel compelled to interrupt before you reach your second point. I couldn’t disagree more regarding well-framed slippery-slope arguments. In fact, wisely drawn slippery-slope theories do unfold as predicted.\textsuperscript{255} If you haven’t read Professor Volokh’s authoritative work on this issue, I commend it to your attention. Furthermore, stare decisis and following precedent\textsuperscript{256} are quintessential vehicles of institutional slippery slope. You continue to touch a hot stove until it burns you.

ATTORNEY GENERAL MANSION: I know our office enjoys using slippery-slope arguments when it’s advantageous to do so.

SENATOR CALL: Professor so-and-so or not, I need not concede to the Justice’s conclusion regarding the merit of slippery-slope arguments because clearly this particular one is misguided. Back to my second point, even assuming we would do it, your argument incorrectly assumes that state judicial review is both meaningless and necessarily inferior to federal judicial review.\textsuperscript{257} You know good and well that historically state courts were intended to resolve federal constitutional disputes and, thus, are perfectly capable of doing so.\textsuperscript{258}

JUSTICE TENURE: In response to your allegations regarding state judicial review, the federal judicial branch is, as you know, a coequal branch of the government. Specifically, since \textit{Marbury v. Madison},\textsuperscript{259} the federal court is best suited to handle constitutional review of congressional action in that it is the Supreme Court’s responsibility “to say what the law is.”\textsuperscript{260}

\begin{itemize}
\item \textsuperscript{254}See Antonin Scalia, \textit{Assorted Canards of Contemporary Legal Analysis}, 40 \textit{Case W. Res. L. Rev.} 581, 590-93 (1990) (cautioning against misuse and overuse of “the parade of horribles”).
\item \textsuperscript{255}See generally Eugene Volokh, \textit{The Mechanisms of the Slippery Slope}, 116 \textit{Harv. L. Rev.} 1026 (2003) (evaluating methodically risk of slippery slopes and finding that “slippery slopes present a real risk—not always, but often enough that we cannot lightly ignore the possibility of such slippage”).
\item \textsuperscript{257}See Gunther, \textit{Congressional Power, supra} note 2, at 914 (“[S]tate courts, at the outset and for decades after, were envisioned as not only the competent enforcers but indeed the primary enforcers of federal law.”).
\item \textsuperscript{258}See id. (same). Perhaps an apt analogy might also be taken by inference from \textit{Lockerty v. Phillips}, 319 U.S. 182, 189 (1943), to the extent that the Supreme Court declined to validate appellants’ argument that the federal administrative court in question was “inadequate to protect their constitutional rights.”
\item \textsuperscript{259}5 U.S. 137 (1803).
\item \textsuperscript{260}See id. at 177 (“It is emphatically the province and duty of the judicial department to say what the law is.”); \textit{Fisher, American Constitutional Law, supra} note 235, at 42 (articulating “famous . . . proposition” of \textit{Marbury} that “Court is supreme on constitutional questions”). For an in-depth analysis of the nuances of
\end{itemize}
Litigants have a right to seek review from a federal tribunal when a constitutional violation exists. At least with respect to the Bill of Rights, Congress cannot, and should not, strip all access to the federal forum. I don’t mean any disrespect to state judge and justice colleagues, but their holdings will apply only to the state in which they sit; and if their holding is unconstitutional, then it is unconstitutional in fifty jurisdictions plus the District of Columbia and our other territories, not just in one. Of course, what I am getting at here is the critical importance of uniformity. It is one of the most important legal principles. It is a component of justice itself. You in Congress recognize as much when you institute such items as the Federal Sentencing Guidelines, which, I can’t resist pointing out, seriously hampered judges from utilizing discretion in sentencing criminal defendants.

SENATOR CALL: No need to highlight that, given your butchering of the Guidelines in the United States v. Booker decision. I can’t imagine that lower federal court judges know whether they can exercise discretion in light of that opinion.

ATTORNEY GENERAL MANSION: Yikes. I’ve had a whole team reviewing that one and they can’t tell which end is up when attempting to reconcile the two majority opinions. So, Justice, I’d move along from that example.


261. The following provides a synopsis of the historical root and import of Congress providing full scope to the Constitution’s authorization:

Removal of cases from state to federal courts was a major source of expanded national judicial power. . . . The most important of these measures was the Jurisdiction and Removal Act of 1875, which permitted removal in all suits arising under the Constitution, laws, and treaties of the United States; suits in which the United States was a plaintiff; suits between citizens of different states; and suits between aliens. The act also gave the lower federal courts original jurisdiction in all cases arising under the Constitution, laws, and treaties. Thus the old Federalist party objective of giving the national courts jurisdiction as broad as the Constitution permitted, expressed in the short-lived Judiciary Act of 1801, was finally achieved.


262. See U.S. Const. amend. XIV (guaranteeing equal protection under law).

263. The desire for uniformity constituted the driving force for creating the Sentencing Guidelines.


266. See Booker, 543 U.S. at 226 (holding United States Sentencing Guidelines violated Sixth Amendment right to jury trial because they obliged judges to find facts with specific consequences beyond statutory range required by jury’s verdict); id. at 244 (holding that remedy for Sixth Amendment violation required severance...
Justice Tenure: Fine [internally knowing that the Sentencing Guideline debate is far from over].\textsuperscript{267} Again, my point is that uniformity is a critical ingredient to justice. Stripping jurisdiction from all federal courts on constitutional issues will cut the heart out of the Bill of Rights.

Senator Call: Doesn’t the Supremacy Clause\textsuperscript{268} take care of this argument? It requires that the Constitution be the supreme law of the country and that state judges are bound by it. Therefore, it should go without saying that state judges are bound to the text of the Constitution, and every state must abide by it.

Justice Tenure: The seeds of destruction lie in your theory. If each state’s highest judge, while ostensibly bound by the text of the Constitution, interprets the text in a conflicting manner, then Congress, through stripping appellate jurisdiction of our Court, will have eviscerated the Court’s ability to resolve the conflict. [Justice Tenure silently thought: It is hard enough to have all nine justices agree on a given constitutional issue, and everyone knows that we are all bound.] The conflict then leaves a question mark hanging over what the Constitution means and accordingly obliterates the Constitution’s function as supreme law of the land.

Attorney General Mansion: I remain fond of the notion that states can serve as a “laboratory” for experimentation on issues.\textsuperscript{269} At any rate, right now, the majority of states should rule in a manner the administration prefers.

Justice Tenure: What if the laboratory effect does not unfold as you predict or hope, but rather creates a patchwork quilt of irreconcilable rulings? The fallacy of your stance on state courts is not only based on uniformity, but also on the temptation in various states to ignore the

\textsuperscript{267.} See Zehnle, supra note 265, at 7 (“The inter-branch debate on sentencing is far from over.” (quoting Laura A. Miller, Washington, D.C., former Co-Chair of the Criminal Litigation Committee)).

\textsuperscript{268.} See U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”) (emphasis added).

\textsuperscript{269.} See New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”). Justice Brandeis also noted that the Supreme Court “has the power to prevent an experiment” by striking down a statute that fosters it on the basis of the Due Process Clause, but that the justices should let their “minds be bold.” Id. The instant debate presents a decidedly different context. Jurisdiction-stripping of a constitutional issue from the federal forum would have the consequence of creating state laboratories, without states choosing this path, while purposefully removing judicial review power from federal courts entirely. The Supreme Court must retain the power to strike down such a congressional end-run if necessary to give effect to the Due Process and Equal Protection Clauses.
Constitution. That is why federal review by judges insulated from local politics is essential.

**Attorney General Mansion:** Even a patchwork system would be preferred to one federal court, the Supreme Court, penning a constitutional interpretation that condones and fosters gay marriage. To think that a group of nine unelected justices could decide such an issue without regard to the express will of the people.

**Senator Call:** I agree with the Attorney General on this. Most states will go as we have predicted, but even if not, then at least each state will choose for itself on these deeply held values that the courts have turned into courtroom battles rather than legislative ones.

**Justice Tenure:** There is a place for patchwork rulings. Take obscenity for example. The standard is rooted in evolving community standards of the relevant community. The current jurisdiction-stripping bills aren’t geared at community standards, but instead on the essence of what our Constitution stands for. You would essentially de-federalize certain constitutional rights as we currently understand them and leave each state to its own devices.

**Attorney General Mansion:** Look, I don’t think there is a constitutional right to gay marriage, but even if there were, then only in the bluest of cities, like San Francisco, would it be acceptable. Obscenity is a perfect example because the best argument you can make for gay marriage is that it’s tied to evolving community standards. Isn’t the acceptance of gay marriage grounded in “evolving community standards”?

**Justice Tenure:** A state incubator on these critical constitutional issues is a dangerous road. For example, if there is a constitutional right to gay marriage, then it must be constitutionally protected in all fifty states plus the territories; and if the Defense of Marriage Act\(^{270}\) is unconstitutional, then it must be unconstitutional in all fifty states plus the territories.\(^{271}\) If marriage, however, is not a constitutional right, but rather derives as a privilege through civil marriage statutes or the common law, then every state is free to handle marriage as it wishes. Of course, only one tribunal is designed to announce the meaning of the Constitution for

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\(^{271}\) See Ratner, *Majoritarian Constraints*, supra note 15, at 935 (discussing jurisdiction-stripping legislation). Ratner emphasized that jurisdiction-stripping legislation:

> [W]ould distort the nature of the federal union by permitting each state to decide for itself the scope of its authority under the Constitution . . . would reduce the supreme law of the land to a hodgepodge of sometimes inconsistent decisions by fifty state supreme courts and/or twelve federal courts of appeals . . . [and] thereby fragment and vitiate constitutional protections.

*Id.*
all fifty states. The United States Supreme Court is the last word on the Constitution. To continence otherwise is to create a “balkanization” of the federal judiciary and a return to the Articles of Confederation with each state interpreting the Constitution for itself as if it were a separate country. Should we be satisfied with “one rule for Athens and another for Rome” when it comes to constitutional rights?

Senator Call: As I’ve maintained, state courts are more than adequate to interpret the federal constitution and where relevant, they will abide by Supreme Court precedent.

Attorney General Mansion: In fairness Senator, you know these two areas were selected for jurisdiction stripping precisely because there is no Supreme Court precedent on point. Take a counterexample like abortion, where state courts would be bound to follow Roe v. Wade and its progeny, which we deem to be incorrect interpretations of the Constitution. A jurisdiction-stripping bill on the abortion issue would in effect freeze negative precedent. Accordingly, we aren’t favoring bills in that arena. With the Pledge and gay marriage, however, there is a precedential

272. See H.R. Rep. No. 108-691, at 104 (dissenting views) (noting conservative icon Robert Bork’s expression following concern in response to jurisdiction-stripping legislation of 1970s). Bork stated: “You’d have 50 different constitutions running around out there, and I’m not sure even the conservatives would like the results.” Id. (citing Frank Trippet, Trying to Trim the Courts, Time, Sept. 28, 1981)).

273. See Marbury v. Madison, 5 U.S. 137, 177-78 (1803) (noting it is judicial duty to decide if law is “in opposition to the constitution”); see also Tribe, supra note 2, at 133 (“[U]nder our system it has become axiomatic that the authoritative constitutional verdict will be that of a court—ultimately the Supreme Court—when a case posing the issue is properly presented.”). The United States Supreme Court frequently overrules state supreme court decisions. The Supreme Court has the final say as the “court of last resort” and vis-à-vis other branches in a particular case of construction.

274. H.R. Rep. No. 108-691, at 91 (dissenting views) (“Dividing our nation into 50 different legal regimes, where the Pledge is permitted in some jurisdictions and not in others, is the very antithesis of this sacred principle.”).

275. To leave such issues to each state to decide would violate Cicero’s maxim that one must not “lay down one rule in Athens and another in Rome.” Cf Laird v. Tatum, 409 U.S. 824, 838 (1972) (Rehnquist, J.) (mem.) (regarding danger of recusal on Supreme Court causing passive affirmance via four-four opinion, where federal circuit court split exists).

276. For a further discussion of the Supremacy Clause of the Constitution and its effect on states, see supra note 268 and accompanying text.

277. 410 U.S. 113, 153-54 (1973) (holding that Constitution’s right of personal privacy protects abortion decision in pregnancy’s early stages); see also Planned Parenthood v. Casey, 505 U.S. 833, 846 (1992) (upholding “essential holding of Roe”). Planned Parenthood construed “the essential holding of Roe” as: [The] recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State . . . [The] confirmation of the State’s power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman’s life or health . . . And that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child.

Id.
void at the highest level. So, we need to strike while the iron is hot and shoot these issues to state courts while they are free to rule in an unrestrained fashion.

Justice Tenure: Again, your reasoning is illogical given that the Supreme Court is your best bet politically. Remember, it isn’t the Supreme Court that has ruled in favor of same-sex marriage. Courts in Massachusetts and California are your problem.278 The optimal way to hold the line on constitutional rights is to keep us as the ultimate umpire. Currently, there is no same-sex marriage right in America, but you would be creating fifty opportunities for states to rule in favor of such a right. Also, keep in mind that the precedential void is exactly the environment conducive to an unseemly patchwork of rulings on the essence of constitutional meaning.

Furthermore, where federal constitutional precedent exists, states would be free to erode, circumvent, distinguish or ignore politically unpalatable precedent with impunity. State courts would be free to overrule precedent by opining that, if the Supreme Court had the power to rehear the issue now, it would change its mind. Federal review of constitutional precedent is, therefore, essential.

Senator Call: I don’t think you are concerned about the dangers of mixed state results based on their varied interpretations. Rather, the core of your concern actually stems from losing the Supreme Court’s power to be the definitive word on what the Constitution provides. Deep down you really do believe that Supreme Court justices are far superior—superior to lower level state judges and justices and superior to your coordinate branches.

Justice Tenure: Hold on there. You are mischaracterizing my views.

Senator Call: Let me finish because I think we are sidestepping the heart of the matter. I think you believe that only the Supreme Court possesses the ultimate power to declare the final interpretation of the Constitution. Since the rise of individual liberties and the concomitant creation and expansion of substantive due process and equal protection,279 the Su-

278. The California Supreme Court announced on August 10, 2005, without comment, that it will not immediately review a March 2005 ruling by the superior court that the state ban on same-sex marriage is unconstitutional. The California superior court had found that “no rational purpose exists for limiting marriage in this state to opposite-sex partners.”

279. See, e.g., Owen Fiss, A Life Lived Twice, 100 YALE L.J. 1117, 1123 (1991) (commenting that Justice Brennan opinion extended due process revolution of sixties from criminal to civil domain). Fiss also commented that the Warren Court’s Brown decision:

[E]mbodied both a conception of law and a set of commitment that evolved into a broad-based program of constitutional reform [in which the Warren] Court saw the Bill of Rights and the Civil War Amendments as the embodiment of our highest ideals and soon made them the standard for judging the established order.

Id. at 1118; Ronald J. Krotoszynski, A Remembrance of Things Past? Reflections on the Warren Court and the Struggle for Civil Rights, 59 WASH. & LEE L. REV. 1055, 1056
Supreme Court feels a sense of ownership over the landscape it has created from a blank canvas. And, now you should just admit that the Court does not want to surrender the paintbrush and constitutional palette to an inferior set of state judges who will experiment in directions never contemplated by your designs. Not to mention that you have to acknowledge that Congress holds the keys to this ultimate demise. [pause] That’s all right, you don’t have to admit it. I know it’s true.

**Justice Tenure:** If you are so sure of my every stance, then there is no need to continue this discussion. I’ll see you later, as I have more pressing matters to attend.

[Justice Tenure exits the Palm Restaurant. Attorney General Mansion follows to smooth things over. Attorney General Mansion calls out to Justice Tenure while Justice Tenure waits at the valet stand.]

**Attorney General Mansion:** Justice, don’t take the Senator too seriously. I hope you won’t give up on this process.

**Justice Tenure:** Roll and I have a tortured, but durable, history. I have been a part of many processes in my day and I’m not sure that’s how I’d couch these meetings. Right now it feels more like a prolonged impugning of the judiciary rather than a productive process. I think we’re done here.

[Curtain drops.]

**Act Three:** Balance Restored . . . The Ideal Tension?

[Matters are percolating—a Supreme Court justice retires, the Chief Justice passes away and rumors loom large regarding the anticipated jurisprudence of the new appointments; the filibuster deal is on the brink of collapsing; and one of the jurisdiction-stripping bills begins to gain traction in the Senate. Vox, who has been privy to the past two discussions and is witnessing these events unfold, decides that an olive branch is necessary to reignite the negotiations. With trepidation, she sends each of them an unsigned note stating: “It is imperative that we talk. Much is at stake. Let’s meet at the usual place on Wednesday night. I’m ready to talk.” Each, believing another authored the note, shows up at the Palm on Wednesday.]

(2002) (“Whether in the area of freedom of speech, equal protection, or substantive due process, Chief Justice Earl Warren and his colleagues redefined—in a radical way—the relationship of the citizen to the state.”).

Scene One: Olive Branch. [The usual before-dinner drinks are waiting at the table accompanied by complimentary kalamata olive tapenade and crostini bread.]

Senator Call: Well, Justice, I'm glad you finally wised up.

Justice Tenure: What do you mean? I assumed that you regained sanity after your last display of how not to win friends and influence people.281

[Server Vox Populi winks at Blanche Mansion and then politely interrupts and states to them all: For tonight's featured item, I think you will all enjoy the prime aged Porterhouse with the Cabernet peppercorn reduction because of the exquisite blend of texture and flavor that the perfect combination of cuts provides. This pairing of bold flavors creates a harmony that is hard to match.]

[Attorney General Mansion orders the special, medium rare, without a starter course; the others follow suit. No one likes to be out-beefed at the Palm in a time of heightened tension.]

Attorney General Mansion: Look, let's not get sidetracked on "who asked whom to do what" or on "who owes whom an apology." A clean slate is the way to go tonight. What is clear is that we are all here and we should enjoy the good food and company. I can't imagine a better place to resolve this escalating crisis. So, shouldn't we pause the events and see if we can fashion a solution?

Scene Two: Unsavory Bargain. [Vox pours a 1986 bottle of Silverado cellars Cabernet Sauvignon Limited Reserve (Napa Valley) to let it breathe before the steaks arrive.]

Justice Tenure: If what you all truly desire is to remove certain issues from our purview once and for all, the proper path is constitutional amendment. I assume, however, you all don't have the votes for such an amendment on either same-sex marriage or the Pledge. I suspect you might be able to garner enough votes for the jurisdiction-stripping bill on the same-sex marriage subject if you opt to pursue that course as Plan B. What if I predict that when the suitable case reaches the Supreme Court for review, we will not rule in favor of same-sex marriage as a constitutional right?

Senator Call: Maybe. But even if the Supreme Court might rule in line with your Magic 8 ball prediction, what if the Ninth Circuit or a state's highest court for example goes for it? Then, you all decline certiorari as you do the vast majority of the time.282


282. See, e.g., Saul Brenner, Granting Certiorari by the United States Supreme Court: An Overview of the Social Science Studies, 92 Law Libr. J. 193, 195 (2000) (“In the 1995 term, for example, the Court granted certiorari to 92 of the 2,456 paid certiorari petitions (4 percent) and to 13 of the 5,998 pauperis petitions (0.3 percent).”) (citing Lee Epstein et al., The Supreme Court Compendium: Data, Decisions & Developments 83 tbl. 2-6 (2d ed. 1996)).
JUSTICE TENURE: I think that the four certiorari votes needed would likely be forthcoming. Also, my predictions are seasoned estimations based on experience rather than simple guesswork.

ATTORNEY GENERAL MANSION: What if the Senator agrees to try to kill the jurisdiction-stripping bills, but will introduce the constitutional amendment with the recognition that it will have a steep climb to pass? Can the Court provide an assurance that it will hold the line on these two issues and grant certiorari if need be to maintain the proper disposition?

Scene Three: Philosophical Bliss. [Vox serves each of them the Porterhouse with wine reduction with sides of creamed spinach and pommes frites and then waits for the right moment.]

[SERVER VOX POPULI says: *Let me know that the temperature is suitable.*]

JUSTICE TENURE: It's remarkable. Do you think the chef would be willing to fill us in on the secret ingredients in this amazing Porterhouse combination?

[SERVER VOX POPULI responds: *For you, it is likely, but I think the key to unlocking its mysteries is not knowing the ingredients in a scientific sense. Instead, you must emulate the art form of appreciating the contradictory contours of each ingredient and maintaining a flexible approach in combining them so that each retains its distinct qualities at its core while blending its outer edges of texture and emitting flavors with the other to form a perfect bite with each pass. All the while, it requires never being afraid to come at the dish from a new angle.*]

JUSTICE TENURE [soaking in Vox's remarks while swirling a refreshed glass of wine]: I am thinking better of giving you all any assurances. In fact, I don't know what we were thinking. All the stress must be getting the better of us. What we need to do is re-approach these conflicts from a more theoretical perspective.

SENATOR CALL: Don't tell me that now you are going to hearken back to philosophical meanderings.

JUSTICE TENURE: That's not a half-bad idea, Senator. Let's see, what is it we would need to do to place ourselves theoretically in Rawls's "original position" from which we could establish an apparatus for fairness to be applied to our dilemma and thereby attain justice?

ATTORNEY GENERAL MANSION: I definitely don't remember that theory. Why must you all insist on taking our discussion into the ether?

[SERVER VOX POPULI interjects: *Excuse me, but my current political philosophy professor would be highly disappointed in me, if I did not chime in to say that you are searching for the Rawlsian conception of the "veil of ignorance" under which one would remove the taint of particularized circumstances such as wealth, social or natural status when crafting "principles of justice."*]

283. See John Rawls, A Theory of Justice 15 (Harvard Univ. Press, rev. ed. 1999) (1971) ("T[the original position is the appropriate initial status quo which insures that the fundamental agreements reached in it are fair.").

284. See id. at 16 ("N[o one should be advantaged or disadvantaged by natural fortune or social circumstances in the choice of principles.").
temptation to lobby for principles that are advantageous to one's own characteristics or, in your case, the features inherent in your respective institutional structures. 285 Then, everyone acting under the veil is blind to her own individual circumstances and, in this original position, each member is presumed equally capable to establish principles of justice. 286]

JUSTICE TENURE: Excellent recitation, but on second thought, we may all be far too entrenched in our own trappings to effectively free our minds in the way that Rawls intended. 287

[SERVER VOX POPULI adds: My class registered their reservations about bringing Rawls's theory into practice as well. It certainly hasn't helped any when I have attempted to employ it to resolve disputes in my present personal relationship. Instead, all that I have figured out is that people don't fit into neat little boxes; rather their roles do and should overlap. Nor are people fully predictable. I also know that the ideal relationship isn't the one where the two never fight. So, if you assume that a healthy level of tension is desirable and that your spheres inevitably will overlap, then you ought to be able to mete out a mutually secure existence. . . . Well enough about me.]

SENATOR CALL: When it comes to our situation, it's more like "mutually assured destruction" (MAD) in which full-scale employment of nuclear-style moves by one of us would ensure the destruction of all of us. 288

285. See id. at 17 ("For example, if a man knew that he was wealthy, he might find it rational to advance the principle that various taxes for welfare measures be counted unjust; if he knew that he was poor, he would most likely propose the contrary principle.").

286. See id. ("Together with the veil of ignorance, these conditions define the principles of justice as those which rational persons concerned to advance their interests would consent to as equals when none are known to be advantaged or disadvantaged by social and natural contingencies.").


ATTORNEY GENERAL MANSION: MAD nuclear deterrence theory may be a useful construct given that it requires the real threat of deployment of the harshest tactics (for the Cold War, nuclear weapons) in order to keep each actor from ever deploying those very tactics. 289 For our purposes, our branches are playing their hands well by threatening every extreme maneuver in their arsenals.

JUSTICE TENURE: I, for one, am not confident that the threat of deployment is deterring anyone at this point. MAD theory is not a long-standing solution and the thawing of the Cold War was more the result of former President Carter and then Reagan's modifications of the strategy, 290 not to mention countless other economic and social factors.

ATTORNEY GENERAL MANSION: Touché.

JUSTICE TENURE: Back to Vox's last point. The twin themes that emerge in my mind are: (i) the overlapping roles requiring a fluidity of lines while maintaining respect of the distinct cores; and (ii) a stable level of tension that, although it is never constant, should be kept in check. With regard to the separation of powers, we must remain cognizant of Justice Jackson's "zone of twilight" in which overlapping authority exists. 291 It is in these areas that we have to be careful not to encroach too far into the sacrosanct core of another branch. In essence, we must exercise restraint with our discretionary powers. 292

ATTORNEY GENERAL MANSION: I concur that the answer is not a "solution" where tension no longer exists, but instead we must acknowledge that tension is part of the healthy balance. Then, we must act within the bounds of humility and maintain an appreciation of the underpinnings of the counter-institutions’ interests. Thus, attaining an ideal tension level understand that assured destruction is the very essence of the whole deterrence concept.

289. See id. ("[I]f the United States is to deter a nuclear attack on itself or its allies, it must possess an actual and a credible assured-destruction capability.").


291. See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) (reasoning that "zone of twilight" arises where President and Congress have concurrent authority and that "any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law").

292. Lord John Russell aptly recognized: "Every political constitution in which different bodies share the supreme power is only enabled to exist by the forbearance of those among whom this power is distributed." WOODROW WILSON, CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS 163 (1885).
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requires each of the three branches being attuned to the interests of the other branches and keeping sanity during the pressure points.

JUSTICE TENURE: Of course, it's often easy to be magnanimous regarding theory and meaningful discourse on discretion, but much harder when one is losing the fight in an ongoing battle for survival.

SENATOR CALL: The question seems to be “how do we keep real channels of dialogue open and useful as opposed to the rhetorical warfare of ships passing in the night?”

JUSTICE TENURE: Maybe we should think of our branches as constituting a three-stringed instrument; and we all need to get together periodically to reflect and retune our strings.

ATTORNEY GENERAL MANSION: Even if, in this moment, we could escape the limitations of our confinement, see true reality à la the Allegory of the Cave, and discover the ideal tension for the strings of our guitar for a three-string serenade; aren't we going to get burned when we try to take it back to our colleagues in our respective branches? We will tell them of retuning instruments and attaining balance in the universe, and they will laugh and misunderstand our enlightenment.

SENATOR CALL: No doubt about it.

293. Plato, The Allegory of the Cave, in The Republic 253-61 (Benjamin Jowett, trans., Vintage 1991) (4th c. BC) (depicting unique individual who intellectually travels from trapped cave of false reflections to mystical place of higher learning in which individual “will be able to see the sun, and not mere reflections of him in the water, but he will see him in his own proper place, and not in another; and he will contemplate him as he is”). Plato interprets his own allegory best: [T]he prison-house is the world of sight, the light of the fire is the sun, and you will not misapprehend me if you interpret the journey upwards to be the ascent of the soul into the intellectual world . . . . [T]he world of knowledge the idea of good appears last of all, and is seen only with an effort; and, when seen, is also inferred to be the universal author of all things beautiful and right . . . and the immediate source of reason and truth in the intellectual; and that this is the power upon which he would act rationally either in public or private life must have his eye fixed.

Id.

294. Id. Plato's pertinent dialogue reads:
     [Glauc] Clearly, he said he would first see the sun and then reason about him.
     [Soc] And when he remembered his old habitation, and the wisdom of the den and his fellow-prisoners, do you not suppose that he would felicitate himself on the change, and pity them?
     [Glauc] Certainly, he would.
     [Soc] And if they were in the habit of conferring honors among themselves on those who were quickest to observe the passing shadows and to remark which of them went before, and which followed after, and which were together; and who were therefore best able to draw conclusions as to the future, do you think that he would care for such honors and glories, or envy the possessors of them? Would he not say with Homer, Better to be the poor servant of a poor master, and to endure anything, rather than think as they do and live after their manner?
     [Glauc] Yes, he said, I think that he would rather suffer anything than entertain these false notions and live in this miserable manner.
Scene Four: Just Desserts. [They each pass on dessert, but order espresso drinks instead.]

Senator Call: I'm already perplexed about how to gel these theoretical musings with the hard realities of my day-to-day existence. For example, how do we accomplish and maintain the right level of tension, given the need to please our varied constituencies and interests?

Justice Tenure: Whatever the resolution, it must contain some modicum of self-restraint.

Senator Call: The bottom line is that there are certain divides that I know I will have to cross.

Justice Tenure: Back in the trenches, we each will have institutional crises of conscience. Before we each cross our respective divides, we should remember that our democracy is at stake—its well-being should be paramount to any of our individual or institutional interests.

Attorney General Mansion: The old "look before you leap" so that you are cognizant of all the consequences.

Senator Call: I think it's more a matter of examining all of your motives for leaping.

Attorney General Mansion: Well it's late, and we all need some time to reflect on these matters of grave import. Let's keep this discussion going so that we don't become a three-headed Hydra. [By now, all are tipsy.] Vox, can we get another round of drinks, and we need you to call our car services.

[Server Vox Populi asks: Are you all sure you want another round?]

Senator Call: I know we shouldn't, but we'd like another round just the same.

[Socrates] Imagine once more, I said, such a one coming suddenly out of the sun to be replaced in his old situation; would he not be certain to have his eyes full of darkness?

[Glauccon] To be sure, he said.

[Socrates] And if there were a contest, and he had to compete in measuring the shadows with the prisoners who had never moved out of the den . . . would he not be ridiculous? Men would say of him that up he went and down he came without his eyes . . . and that it was better not even to think of ascending . . . .

[Glauccon] No question, he said.

Id. 295. See Friedman, supra note 8, at 2 (articulating floating range of overlapping authority between Congress and Supreme Court in which "the boundaries of federal jurisdiction—and the authority to define that jurisdiction—evolve through a dialogic process of congressional enactment and judicial response").

296. In Greek mythology, an angry Apollo created a constellation of the three-headed Hydra out of a raven, a water snake, and a cup because the raven falsely blamed the snake for its failure to fill the cup with water when in fact the raven failed its mission due to its temptation to a fig tree. See T. Wynne Griffon, Star Maps: Your Guide to the Night Sky 48 (1992); cf. Ovid, Metamorphoses 9.69 (Sir Samuel Garth et al. trans., 1961) (A.D. 8) (regarding nine-headed hydra snake slain by Herakles).
[Server Vox Populi: You know that discretion is the better part of valor.]²⁹⁷

²⁹⁷ See William Shakespeare, The First Part of King Henry the Fourth, act 5, sc. 4 (Oxford Univ. Press 1914) (“The better part of valor is discretion.”); see also Charles Churchill, The Ghost (1762) (“[E]ven in a hero’s heart, Discretion is the better part.”).