

Jurisdiction Stripping: Reform SCOTUS's Power or Remove It?

By Emma Donahue, Fix the Court law clerk

In recent years, some legal scholars have called for “jurisdiction stripping” to rein in SCOTUS’s increased power. The argument is that if the Court continues resisting reform efforts like ours, or continues to otherwise invalidate the will of the people, Congress should strip, or at least threaten to strip, its ability to hear certain types of disputes.

The [Exceptions Clause](#) of Article III is the basis for congressional authority to strip jurisdiction. It grants the Court original jurisdiction to hear a particular category of cases and appellate jurisdiction in all the other cases “with such exceptions . . . as the Congress shall make.”

Congress could, for example, pass a comprehensive court reform package that includes a provision precluding SCOTUS from hearing any constitutional challenges to the law. Instead, these challenges would be heard by lower federal courts or be funneled to a designated court of appeals to limit inconsistency, like the D.C. Circuit. Theoretically, Congress could even pass a statute limiting SCOTUS’s ability to hear constitutional challenges to entire federal policy regimes, such as the ability to prosecute high ranking executives (see Harvard Law Prof. Niko Bowie’s [article](#) about Sen. Schumer’s No Kings Act proposal).

Or, as Bowie suggests, a sweeping jurisdiction-stripping law could require a higher standard for declaring any federal law unconstitutional; for example, only permitting invalidation with a SCOTUS supermajority or unanimous vote. This threshold would indicate that there is little (or lesser) debate that Congress really did get something wrong.

Has Congress stripped jurisdiction from SCOTUS before?

Yes. The [final report](#) of the Biden Supreme Court Commission details the history of jurisdiction stripping and its potential use for court reform efforts. When it appeared that the post-Civil War Court would nullify the Military Reconstruction Act, Congress enacted a law stripping the Court of its power to review a pending *habeas corpus* case that presented constitutional questions about Reconstruction. The Court upheld the jurisdiction strip in [Ex parte McCordle](#) but noted that the Court still had other avenues for review in future cases.

Since the 1950s, Congress has introduced legislation that would strip SCOTUS and/or lower federal courts of jurisdiction to resolve questions relating to hot-button political issues (national security, busing, abortion, same-sex marriage). Few such proposals were enacted, however. They include:

- **The Antiterrorism and Effective Death Penalty Act of 1996** stripped SCOTUS’s jurisdiction to review decisions by the appellate courts denying prisoners convicted by state courts permission to file second petitions for federal writs of *habeas corpus*. The Court upheld this action in [Felker v. Turpin](#) but emphasized that the provision stripping the Court’s certiorari jurisdiction did not strip its original jurisdiction to hear petitions for *habeas*.
- **The Military Commissions Act of 2006** attempted to strip all federal courts of *habeas* jurisdiction in cases brought by noncitizens being detained as enemy combatants. In [Boumediene v. Bush](#), the Court held that this jurisdiction stripping provision unconstitutionally violated the Suspension Clause of Article I, Section 9.

In 2024, University of Colorado Law Prof. Laura Dolbow compiled a [catalog](#) of 190 statutory provisions that expressly bar judicial review over federal agency actions. These jurisdiction-stripping provisions, especially those relating to healthcare, immigration and patents, have and will continue to be litigated.

Uncertainty remains about the broadness of Congress's jurisdictions-stripping power. SCOTUS has regularly upheld laws precluding judicial review of certain types of agency actions, but it has consistently interpreted statutes to not prevent review of significant constitutional questions. The cases above demonstrate that Congress's jurisdiction-stripping power is not unlimited, especially if the law to which it attaches inherently violates another aspect of the Constitution.

It is therefore unclear whether the Court would uphold a provision that strips its power to review the constitutionality of a court reform law. However, as recently as last decade (2018), a four-justice plurality (Justices Thomas, Breyer, Alito and Kagan) in *Patchak v. Zinke* appeared to [favor](#) a broad reading of *McCardle*, recognizing that Congress has plenary authority to regulate the jurisdiction of lower federal courts and appellate jurisdiction of SCOTUS.

Why should Congress jurisdiction strip from SCOTUS, and what are the fallbacks?

In *Marbury v. Madison*, the Court determined that it has the power to void laws it deems unconstitutional and thereby override a joint action by the other two branches. Jurisdiction stripping allows Congress and the President, in either a limited or a sweeping capacity, to retake some of this power from the Court.

Harvard Law Prof. Ryan Doerfler [argues](#) that Congress is capable of determining the constitutionality of statutes and is more suited to do so than SCOTUS because of its democratically elected members' (supposed) responsiveness to public opinion. SCOTUS has for centuries established a culture of judicial supremacy over constitutional interpretation, but Doerfler thinks that this culture is being eroded.

Critics of that view say that SCOTUS's ability to check the other branches, with its more legally educated view of the Constitution, is essential for protecting political minorities from oppression. (Throughout history the Court has invalidated its fair share of federal laws intended to protect political and racial minorities, though, as Bowie [points out](#).) This is a part of a general skepticism in the legal field about allowing majorities in Congress to insulate their preferred policy objectives via jurisdiction stripping.

Another view is that jurisdiction stripping simply puts too much faith in Congress's ability to lawfully govern. Doerfler responds by saying that Congress is at least more accountable to democratic pressures than the Court and can be ousted by displeased constituents for abuse. University of Michigan Law Prof. Leah Litman, another legal scholar in favor of jurisdiction stripping, had made the point that Congress should look to reform its own "democratic deficits" before taking power back from the Court — for starters, by ending partisan gerrymandering.

The Biden Commission's final report was skeptical that stripping jurisdiction from SCOTUS alone would increase democratic accountability within the judiciary. This is because doing so would not necessarily transfer interpretive power from the Court to Congress but would instead reallocate power to lower federal courts. As such, another side-effect could be the lack of uniformity in constitutional interpretation among the lower federal courts (assuming appellate jurisdiction is not channeled to a single court).

Finally, Wash. U. Law Prof. Dan Epps [argues](#) that stripping jurisdiction from SCOTUS could ultimately backfire, and that its benefits are subtle, indirect and unreliable. He relies heavily on the notion that the Court will ultimately find a path around a jurisdiction strip as it did in *McCardle* and *Boumediene*.

That said, Epps believes that jurisdiction stripping can be a powerful tool for putting the Court on notice that it has been diverging from the popular view on salient issues, which could encourage it to "stay its hand."