ADMINISTRATIVE FORUM SHOPPING

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Allowing private parties in litigation to stack the deck in their favor through forum shopping is standard fare in the United States. But not everyone realizes that public legislators engage in a similar exercise when they stack the deck in one party's favor through "jurisdiction-stripping" or "jurisdiction-channeling" provisions. Congress can strip federal courts of all or some of its jurisdiction, channel jurisdiction over a particular class of cases into one particular court, and even strip the U.S. Supreme Court of its appellate jurisdiction. Understandably, this last category has received the most attention, as scholars are drawn to the penultimate conflict between the legislative and judicial branches.

Building upon this rich foundation, this Article pivots in the other direction. It focuses on jurisdictional strips of judicial review over one specific type of action—administrative actions. A recent example of congressional forum shopping for a federal appellate court more favorable to construction of a new natural gas pipeline provides a fruitful demonstration of the attendant risks associated with this unique subspecies of jurisdiction stripping. By changing the rules of the game midstream, stripping all federal courts of any power to review agency approvals, and channeling jurisdiction from one inferior court to a coequal branch, Congress has tapped into its entire arsenal to effectuate a result for the benefit of a single party. This Article refers to this practice as "administrative forum shopping." Such singular focus to the exclusion of historical principles reflects congressional motivations that negatively impact perceptions of the legitimacy of the institutions involved. Furthermore, unlike most federal strips that retain state court forums to remedy injury, such practices completely foreclose any judicial remedy for those aggrieved by agency action and dictate a specific substantive outcome, implicating both Article III and due process concerns. This Article concludes by demonstrating how such actions merit a deeper consideration of the

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nuanced relationship between jurisdiction stripping, jurisdiction channeling, and administrative law.

INTRODUCTION

Administrative law is a bit preoccupied at the moment. After failures to defend itself from a U.S. Supreme Court intent on limiting the administrative state, it is working to reposition its relevance and redefine its strength in light of new precedent. Between *West Virginia v. EPA*,[1] which invoked the major questions doctrine to limit agency interpretations with respect to action of major political significance, and *Loper Bright Enterprises v. Raimondo*,[2] in which the Supreme Court overruled its highly deferential *Chevron* doctrine, administrative agencies are facing an inflection point. But administrative law's defensive focus should not lie solely with the judiciary. Administrative

1. 142 S. Ct. 2587 (2022).
2. 144 S. Ct. 2244 (2024).

agencies should not lose sight of attacks from another branch—the legislative branch. Congress has been known to use its power over federal jurisdiction to channel certain types of litigation into specific courts of appeals, to limit jurisdiction over certain elements of a case or controversy, and even to shift disputes from one court to another. The results can have implications not just for private parties, but for administrative agencies as well.

Allowing private parties in litigation to use forum shopping to stack the deck in their favor is standard fare in the United States.[3] Such "forum shopping" has been studied and debated at length by scholars and courts alike.[4] Not everyone is aware that public legislators engage in a similar exercise when they stack the deck in one party's favor through "jurisdiction-stripping" and/or "jurisdiction-channeling" provisions.[5] Jurisdiction-stripping statutes foreclose all judicial review of specified actions, whereas jurisdiction-channeling statutes direct judicial review to occur in one particular judicial forum (e.g., the U.S. Court of Appeals for the District of Columbia Circuit).[6] In such instances, it is Congress, not private parties, that chooses which forum will hear which disputes. Although scholars have spent decades exploring Congress's constitutional authority to modify the jurisdiction of the judicial branch through such strips, the thrust

3. Scott Dodson, *The Culture of Forum Shopping in the United States*, *in* COMPENDIUM ON COMPAR. PROCEDURAL L. & JUST. (forthcoming 2025) (manuscript at 7–8, 30–31) (recognizing the United States' "prideful acceptance of forum shopping" as an outlier in the law and providing a useful typology of private forum shopping, dividing the world into vertical shopping between federal and state court, horizontal shopping between states, and individual shopping for particular judges akin to the various types of jurisdiction stripping between federal and state courts, between coequal tribunals, and channeling to one individual tribunal).

4. *See generally* Friedrich K. Juenger, *Forum Shopping, Domestic and International*, 63 TUL. L. REV. 553 (1989) (exploring jurisdictional and venue rules and the practice of domestic and international forum shopping); Mary Garvey Algero, *In Defense of Forum Shopping: A Realistic Look at Selecting a Venue*, 78 NEB. L. REV. 79 (1999) (discussing the role of forum shopping in the American judicial system and defending the practice as it occurs within procedural and ethical limitations); Ralph U. Whitten, *U.S. Conflict-of-Laws Doctrine and Forum Shopping, International and Domestic (Revisited)*, 37 TEX. INT'L L.J. 559 (2002) (revisiting Professor Friedrich K. Juenger's scholarship on forum shopping); Christopher A. Whytock, *The Evolving Forum Shopping System*, 96 CORNELL L. REV. 481 (2011) (arguing that anti-forum shopping measures are not required to discourage transnational forum shopping).

5. By contrast, Professors Daniel Epps and Alan M. Trammell define jurisdiction stripping as "any instance when Congress reallocates decisionmaking authority among various courts and tribunals." Daniel Epps & Alan M. Trammell, *The False Promise of Jurisdiction Stripping*, 123 COLUM. L. REV. 2077, 2085 (2023).

6. Court cases that discuss jurisdiction channeling are all focused on the Immigration and Nationality Act (INA), Ch. 477, 66 Stat. 163 (1952) (codified as amended in scattered sections of the U.S. Code), as amended by the REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 302 (codified as amended in scattered sections of the U.S. Code). *See, e.g.*, J.E.F.M. v. Lynch, 837 F.3d 1026, 1031 (9th Cir. 2016) (noting how INA sections are not "jurisdiction-stripping statutes that, by their terms, foreclose *all* judicial review of agency actions. Instead, the provisions channel judicial review over final orders of removal to the courts of appeals."); Gicharu v. Carr, 983 F.3d 13 (1st Cir. 2020).

of these analyses focuses on the interplay of Congress and the Supreme Court.[7]

This Article pivots in a different direction—focusing on the interplay of Congress and the administrative branch. It situates administrative law within the crosshairs of jurisdiction stripping. As many have argued, judicial review is a cornerstone of the separation of powers, rooted in the common law long before Congress codified it in the Administrative Procedure Act of 1946[8] (APA). For that reason, congressional acts to strip or channel jurisdiction over administrative actions implicate significant separation of powers concerns by affecting the substance and optics of both federal courts and administrative law, interactions that are largely overlooked in the legal scholarship.[9]

Beyond the Constitution's vesting of original jurisdiction in the Supreme Court, arguments to counter Congress's plenary power to alter the jurisdiction of the courts face an uphill battle. Originalists cling to the explicit language in the Exceptions and Regulations Clause.[10] Functionalists

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7. *See, e.g.*, Leonard G. Ratner, *Congressional Power over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157 (1960); Charles E. Rice, *Congress and the Supreme Court's Jurisdiction*, 27 VILL. L. REV. 959 (1982); John Harrison, *The Power of Congress to Limit the Jurisdiction of Federal Courts and the Text of Article III*, 64 U. CHI. L. REV. 203 (1997).

8. Pub. L. No. 79-404, 60 Stat. 237 (codified as amended at 5 U.S.C. §§ 551–706); *see also* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 13–16 (1962) (exploring the role of the Supreme Court in democracy and supporting the use of judicial review); Burt Neuborne, *Judicial Review and Separation of Powers in France and the United States*, 57 N.Y.U. L. REV. 363, 367 (1982) (providing a separation of powers based theory of judicial review); Laura E. Little, *Envy and Jealousy: A Study of Separation of Powers and Judicial Review*, 52 HASTINGS L.J. 47, 53 (2000) (discussing the role of envy and jealousy among competing branches of government with a focus on the effect of judicial review); 5 U.S.C. § 702; Peoples Gas, Light & Coke Co. v. U.S. Postal Serv., 658 F.2d 1182, 1191 (7th Cir. 1981) (noting that the Administrative Procedure Act embodies the common law presumption of judicial review).

9. Only a few examples exist. *See* Richard H. Fallon, Jr., *Jurisdiction-Stripping Reconsidered*, 96 VA. L. REV. 1043, 1115–30 (2010) (discussing the constitutionality of Congress stripping Article III courts of jurisdiction to review decisions by administrative agency tribunals); Henry P. Monaghan, *Jurisdiction Stripping Circa 2020: What* The Dialogue *(Still) Has to Teach Us*, 69 DUKE L.J. 1, 57 (2019) (drawing upon Professor Henry M. Hart Jr.'s work for a brief discussion of administrative actions); Nicholas Bagley, *The Puzzling Presumption of Reviewability*, 127 HARV. L. REV. 1285 (2014) (urging courts to allow preclusion of judicial review of administrative claims).

10. *See The Supreme Court: Hearings Before the Subcomm. on Separation of Powers of the S. Comm. on the Judiciary*, 90th Cong. 169 (1968) (testimony of William W. Van Alstyne) (arguing that the language in the Exceptions and Regulations Clause only permits Congress to adjust the distribution between the Court's original and appellate jurisdiction); Lawrence Gene Sager, *Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 20 (1981) (arguing against Congress's attempt to "neuter" the Court); Steven G. Calabresi & Gary Lawson, *The Unitary Executive, Jurisdiction Stripping, and the* Hamdan *Opinions: A Textualist Response to Justice Scalia*, 107 COLUM. L. REV. 1002 (2007) (arguing the text of the Exceptions and Regulations Clause gives Congress authority to move jurisdiction between original and appellate jurisdiction, not to strip the Court's jurisdiction entirely); U.S. CONST. art. III, § 2.

point to the importance of Congress respecting the separation of powers,[11] other provisions of the Constitution,[12] and the importance of allowing the Supreme Court to perform its "essential functions" of supervision and uniformity.[13] But in the end, the Supreme Court has made it very clear that "[s]o long as Congress does not violate other constitutional provisions, its 'control over the jurisdiction of the federal courts' is plenary,"[14] that "Article III does not prohibit Congress from enacting new laws that apply to pending civil cases,"[15] and even that "Congress can make laws that apply retroactively to pending lawsuits, even when it effectively ensures that one side wins."[16]

With such strong statements from the Supreme Court, one may think that Congress is unstoppable. But there are two recognized exceptions to Congress's otherwise broad powers of jurisdiction stripping and channeling. One is a single case from 1871, *United States v. Klein*,[17] in which the Supreme Court held Congress's stripping of a president's pardon power to be unconstitutional.[18] As is discussed in more detail below, the holding in *Klein* is extremely narrow, with both convoluted logic and facts unique to a statute that attempted to infringe on the executive's pardon power.[19] The other is a more recent case from 2008, *Boumediene v. Bush*,[20] in which the Supreme Court held Congress's stripping of other constitutionally-protected rights—habeas rights engrained in the Suspension Clause—to be unconstitutional.[21]

Scholars have written at length about *Klein* and *Boumediene*'s influence on the jurisdiction stripping landscape.[22] Although *Boumediene* led to

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11. *See, e.g.*, Theodore J. Weiman, *Jurisdiction Stripping, Constitutional Supremacy, and the Implications of* Ex Parte Young, 153 U. PA. L. REV. 1677, 1679 (2005) ("[M]any theorists approach jurisdiction stripping primarily (if not solely) as a separation-of-powers issue.").

12. Ronald J. Krotoszynski, Jr. & Atticus DeProspro, *Against Congressional Case Snatching*, 62 WM. & MARY L. REV. 791, 801–06 (2021) (pointing to the identical Vesting Clauses of Article I and Article III as a potential formalist argument for adherence to separation of powers in jurisdiction-stripping cases).

13. 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) (suggesting that the Exceptions and Regulations Clause may not be used to limit the Supreme Court's role in the "constitutional plan"); Fallon, *supra* note 9, at 1086–87 (stating that if Congress prevents the lower federal courts and Supreme Court from hearing a constitutional issue then it violates separation of powers principles).

14. Patchak v. Zinke, 138 S. Ct. 897, 906 (2018) (plurality opinion) (citing Trainmen v. Toledo, P. & W.R. Co., 321 U.S. 50, 63–64 (1944)).

15. *Id.* at 258 (citing Plaut v. Spendthrift Farm, Inc. 514 U.S. 211, 226–27 (1995)).

16. *Id.* at 250 (citing Bank Markazi v. Peterson, 578 U.S. 212, 228–32 (2016)).

17. 80 U.S. (13 Wall.) 128 (1871).

18. *Id.* at 145–48.

19. *See infra* Part I.A.

20. 553 U.S. 723 (2008).

21. *Id.* at 792. "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. CONST. art. I., § 9, cl. 2.

22. *See, e.g.*, Helen Hershkoff & Fred Smith, Jr., *Reconstructing* Klein, 90 U. CHI. L. REV. 2101 (2023); Evan C. Zoldan, *The Vanishing Core of Judicial Independence*, 21 NEV. L.J. 531 (2021); Ronald J. Krotoszynski, Jr. & Atticus DeProspo, *Against Congressional Case*

significant discussion about the validity of jurisdiction stripping of other constitutional rights,[23] *Klein*'s impact on limiting congressional acts involving nonconstitutional rights has been virtually nonexistent.[24] In 2018, however, the Supreme Court's fractured plurality and three-justice dissent in *Patchak v. Zinke*[25] breathed new life into a possible third category of jurisdiction stripping actions that would exceed Congress's power: targeted statutes.[26]

Targeted statutes are those that Congress has passed to target specific pending lawsuits and effectively ensure that one side wins.[27] In *Patchak*, a landowner sued the secretary of the U.S. Department of the Interior, arguing that the agency lacked statutory authority to take certain property into trust for a Native American tribe.[28] While the case was pending, Congress passed the Gun Lake Trust Land Reaffirmation Act[29] (the "Gun Lake Act"), which stripped federal courts of jurisdiction to hear any action "relating to" the property.[30] Relinquishing its jurisdiction, the Supreme Court affirmed Congress's power to enact a targeted statute that stripped "judicial review" of actions related to a particular piece of property, noting the constitutionality of two other narrow statutes that targeted cases by caption and docket number and one that even targeted a single memorial.[31] However, the dissent raised the hypothetical prospect of other targeted statutes that could cross the line between legislative and judicial power.[32]

Snatching, 62 WM. & MARY L. REV. 791 (2021) (approvingly discusses Chief Justice Robert's dissent in *Patchak v. Zinke*, 138 S. Ct. 897 (2018)); Christopher Jon Sprigman, *Congress's Article III Power and the Process of Constitutional Change*, 95 N.Y.U. L. REV. 1778 (2020).

23. *See* Martin J. Katz, *Guantanamo,* Boumediene, *and Jurisdiction-Stripping: The Imperial President Meets the Imperial Court*, 25 CONST. COMMENT. 377, 411 (2009) (arguing *Boumediene* implies that Congress's jurisdiction-stripping power is more limited when applied to constitutional claims). *See generally* Heather P. Scribner, *A Fundamental Misconception of Separation of Powers:* Boumediene v. Bush, 14 TEX. REV. L. & POL. 90 (2009) (arguing that the Supreme Court upset the separation of powers by ignoring Congress's explicit and constitutionally authorized jurisdiction stripping); Andrew Tutt, Boumediene's *Wake*, 65 RUTGERS U. L. REV. COMMENTS. 52 (2013) (recognizing the importance of process in unlawful detentions of enemy combatants).

24. *See* Stephen I. Vladeck, *Why* Klein *(Still) Matters: Congressional Deception and the War on Terrorism*, 5 J. NAT'L SEC. L. & POL'Y 251, 251–52 (2011) (observing that although virtually everyone agrees *Klein* bars Congress from ordering courts to rule for a particular party in a pending case, contemporary efforts to use *Klein* reasoning to strike federal regulation have failed repeatedly).

25. 138 S. Ct. 897 (2018).

26. *See id.* at 910.

27. *See id.* at 909–10 (acknowledging that targeted statutes are newly enacted statutes that can alter the outcome in pending civil cases).

28. *Id.* at 903 (The U.S. Department of the Interior was only authorized to take land into trust for a tribe under federal jurisdiction in 1934 and this tribe was not recognized until 1999.).

29. Pub. L. No. 113-179, § 2(b), 128 Stat. 1913, 1913 (2014).

30. *Patchak*, 138 S. Ct. at 908.

31. *Id.* at 910.

32. *Id.* Others have responded to the *Patchak* dissent, but none of them focus on the inferior courts. *See, e.g.*, Ronald J. Krotoszynski, Jr. & Atticus DeProspo, *Against Congressional Case Snatching*, 62 WM. & MARY L. REV. 791 (2021) (leaning on Chief Justice Roberts's dissent to object to congressional interference); William D. Araiza, *The Once and (Maybe) Future* Klein *Principle*, 74 WASH. & LEE L. REV. ONLINE 383 (2018) (leaning on the

Although a controversy over a natural gas pipeline in West Virginia provides an unlikely place for this hypothetical to become a reality, this Article invites a closer analysis. In the midst of years of litigation over the pipeline, in *Appalachian Voices v. United States Department of the Interior*,[33] the U.S. Court of Appeals for the Fourth Circuit reluctantly acquiesced to a statute Congress enacted that both channeled jurisdiction away from the Fourth Circuit and into the D.C. Circuit as well as completely stripped all federal courts of any judicial authority to review agency decisions approving the siting of the pipeline.[34] This absolute strip of judicial review over and strip and channel of jurisdiction from one inferior court to a coequal tribunal presents an unusual example of jurisdiction stripping and raises questions distinct from the majority of jurisdiction-stripping analyses.

In this novel exploration into the implications of congressional forum shopping over administrative actions, this Article provides three important contributions. First, it isolates Congress's ability to strip courts' power to review agency action into its own distinct subset of jurisdictional stripping referred to as "administrative forum shopping." For purposes of this Article, administrative forum shopping has three elements: (1) Congress interferes with active litigation to change the rules of the game midstream with respect to agency actions, (2) Congress strips jurisdiction over agency action from at least one inferior court (as opposed to the Supreme Court) and channels at least part of that prior jurisdiction to a coequal forum, and (3) Congress strips agencies of their authority over the targeted action and completely strips judicial review of such agency action for the benefit of a single private party. Congressional meddling with jurisdiction in the midst of ongoing litigation is not new, as is evidenced by one of the more famous jurisdictional stripping cases, *Ex parte McCardle*,[35] which upheld the constitutionality of a statute stripping the Supreme Court of jurisdiction over habeas cases during active litigation.[36] But channeling between coequal inferior courts is distinct from the more frequent strips involving the Supreme Court. Recognizing this distinction is important for understanding the importance of the contributions that flow from this.

Second, while conceding that Congress has broad authority to adjust or manipulate the jurisdiction of the lower federal courts, this Article takes issue with the courts' complete dismissal of congressional motivation in their analyses. Courts and scholars alike have established that motivation is not relevant to the question of power and authority of Congress to take such steps.[37] But one can accept that motivation is independent of the authority of Congress to engage in such targeted jurisdictional statutes while

Roberts dissent as hope for a meaningful application of a *Klein* principle); Evan C. Zoldan, *The Vanishing Core of Judicial Independence*, 21 NEV. L.J. 531 (2021) (building upon the Roberts dissent to argue against legislative targeting of individual cases).

33. 78 F.4th 71 (4th Cir. 2023).

34. *See id.* at 79–80.

35. 74 U.S. (7 Wall.) 506 (1868).

36. *See id.* at 514.

37. *See infra* notes 157–62 and accompanying text.

simultaneously acknowledging that motivation is nevertheless relevant to *perceptions* of the legitimacy of the institutions involved.

This Article demonstrates how each of the three features of administrative forum shopping—targeted stripping of administrative review from one tribunal to a coequal tribunal during pending litigation for the benefit of a single private party—builds upon each other to create a negative impression of the legislature and the judiciary that weakens the public perception of separation of powers. It situates the recent administrative forum shopping regarding the natural gas pipeline within the context of prior scholarship on jurisdiction stripping more generally, elucidating how recent case law further complicates the jurisdiction-stripping landscape. It identifies how such underexplored practices present different challenges for Congress and for the inferior courts involved, strain the traditional outer bounds of congressional stripping, and come dangerously close to dictating a particular result in a case.

Third, and most importantly, a close reading of *Appalachian Voices* provides a launch point for a more instructive conversation about the nuanced relationship between jurisdiction stripping, channeling, and administrative law that has been largely ignored in federal jurisdiction scholarship.[38] The administrative forum shopping that took place in *Appalachian Voices* provides an opportunity to explore stripping's place in the broader context of agency decision-making and judicial review. The legal jujitsu that Congress had to perform to accomplish its goal of siting this pipeline was quite intentional. It not only superseded all other federal laws designed to ensure that pipelines are satisfying public participatory and environmental goals and ratified all federal approvals for the pipeline, but it also stripped agencies of their ability to make determinations about the pipeline and stripped all federal courts of their jurisdiction to review any agency approvals.[39] Although some will relish in the specificity with which Congress has spoken on this particular issue,[40] others will recoil from the logrolling and impact of private lobbying on full display. The end result should be disturbing to everyone—the unique posture of administrative agency actions is such that state courts do not have jurisdiction over challenges to agency action.[41] This means that

38. Only one scholar has explored this intersection in-depth, and his analysis is over a decade old. *See* Fallon, *supra* note 9, at 1117.

39. *See infra* Part II.A.

40. *See generally* West Virginia v. EPA, 142 S. Ct. 2597 (2022) (reinvigorating the major questions doctrine to limit deference to agencies for major questions of political significance); Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024) (reconsidering *Chevron* deference); Gary Lawson, *Who Legislates?*, 1995 PUB. INT. L. REV. 147 (reviewing Professor David Schoenbod's book *Power Without Responsibility: How Congress Abuses the People Through Delegation* and, specifically, its critique of broad congressional delegation and agreeing that delegating legislative authority is unconstitutional); Luke A. Wake, *Taking Non-delegation Doctrine Seriously*, 15 N.Y.U. J.L. & LIBERTY 751 (2022) (arguing against broad delegation of police powers as a violation of separation of power).

41. *See* 5 U.S.C. § 702 (1982); Aminoil U.S.A., Inc. v. Cal. Water Res. Control Bd., 674 F.2d 1227, 1233 (9th Cir. 1982) ("The legislative history demonstrates that section 702 was not intended to effect a waiver of sovereign immunity for suits against the United States or its officers in state courts. 'The consent to suit is also limited to claims in the courts of the United

stripping federal judicial review is effectively stripping any and all judicial review, directly contradicting the principles of our republic to provide a judicial forum to remedy harms.[42]

This analysis also demonstrates how administrative forum shopping has more practical significance than many other variations of jurisdiction stripping. Because of its focus on a single private party, the theoretical restraint that Congress may exercise and the potential for diffuse or inadvertent impacts contrary to the legislators' intent are rendered moot. Instead, altering inferior court jurisdiction in the midst of litigation for the benefit of one private party results in actual, tangible, and immediate impacts that should not be so easily dismissed.[43]

Part I of the Article provides necessary background on the contours of jurisdiction stripping and situates this analysis within the robust scholarly discussions of jurisdiction stripping. Part II then introduces the concept of administrative forum shopping, describing its critical features, and identifies how such targeted strips lay bare often hidden motivations. Although such motivations may be irrelevant for assessing congressional authority, it demonstrates how the timing, inferior court strip, and direct benefit to a single private party affect the public perception of the legislative and judicial branches. The *Appalachian Voices* case—including the channeling of authority away from the Fourth Circuit—demonstrates how such a scenario strains the outer bounds of congressional authority. Congress should be reticent to act in ways that fly in the face of long-standing norms of judicial review. Part III then situates this administrative forum shopping for a federal appellate court more favorable to construction of a new natural gas pipeline within the more complicated questions about the nuanced relationship between jurisdiction stripping and administrative law.

I. THE CONTOURS OF JURISDICTION STRIPPING

Federal courts and administrative law often remain in their separate silos. But such separate analyses fail to capture the nuances associated with their intersection. Can Congress create a specialized Article III federal court to hear only abortion cases or election cases and strip the Supreme Court of its authority to hear any such cases? Many members of the public would scoff at such a politically motivated move, but many scholars of jurisdiction

States; hence, the United States remains immune from suit in state courts.'" (quoting H.R. REP. NO. 94-1656, at 11 (1976))); 14 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE JURISPRUDENCE § 3659 Westlaw (database updated June 2024); Fed. Nat'l. Mortg. Ass'n v. LeCrone, 868 F.2d 190, 193 (6th Cir. 1989).

42. *See generally* Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887 (2003) (arguing that the Constitution authorizes judicial review of federal legislation to determine their constitutionality).

43. Even those who argue that jurisdiction stripping is a far weaker tool for policy reform than conventional wisdom suggests note that jurisdiction stripping among inferior courts is an exception. *See* Epps & Trammell, *supra* note 5, at 2080–81, 2124–27.

stripping would answer yes.[44] After over a century of jurisprudence on the matter, scholars, Congress, and the Supreme Court itself have all affirmed the extremely broad and plenary authority of Congress to create, destroy, adjust, or modify the jurisdiction of the federal courts with respect to any appellate jurisdiction not expressly articulated in the Constitution's grant of original jurisdiction to the Supreme Court.[45] This part provides the constitutional authority for such power, as well as situates a discussion of inferior court jurisdiction stripping within the robust scholarship involving Supreme Court jurisdiction stripping.

A. Constitutional Authority to Modify Jurisdiction

Article III vests "the judicial Power" in a "supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[46] Courts have repeatedly affirmed that Congress cannot strip the Supreme Court of jurisdiction over cases that fall under its original jurisdiction conferred by the Constitution, including cases involving ambassadors, public ministers, and disputes between states.[47] But beyond the original jurisdiction over these three narrow categories, the Constitution provides that the Supreme Court shall have appellate jurisdiction "with such Exceptions, and under such Regulations as the Congress shall make."[48]

As to the vesting of judicial power in the Supreme Court, the Constitution mandates that a supreme court be established.[49] But courts and scholars have

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44. *See, e.g.*, Michael Stokes Paulsen, *Checking the Court*, 10 N.Y.U. J. L. & LIBERTY 18, 54–55 (2016) (posing precisely this question); Paul M. Bator, *Congressional Power over the Jurisdiction of the Federal Courts*, 27 VILL. L. REV. 1030, 1034 (1982) ("It is commonplace to say that Congress'[s] power to regulate the jurisdiction of the lower federal courts cannot be exercised in a manner than violates some other Constitutional rule. In that sense—and that sense only—it can be said that Congress'[s] power is not plenary."); Katz, *supra* note 23, at 379 & n.8 (noting several pieces of proposed federal legislation to strip the courts of jurisdiction after *Roe v. Wade*).

45. *See* Rice, *supra* note 7, at 962–67; Harrison, *supra* note 7, at 209; *ArtIII.S.2.C2.6 Exceptions Clause and Congressional Control over Appellate Jurisdiction*, CONST. ANN., https://constitution.congress.gov/browse/essay/artIII-S2-C2-6/ALDE_00013949/ [https://perma.cc/P5BS-TDNU] (last visited Mar. 7, 2025); Patchak v. Zinke, 138 S. Ct. 897, 906 (2018) (plurality opinion) (citing Trainmen v. Toledo, P. & W.R. Co., 321 U.S. 50, 63–64 (1944)) (stating that Congress's control of federal courts is plenary).

46. U.S. CONST. art. III., § 1.

47. "In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction." *Id.* § 2; *see also* Akhil Reed Amar, Marbury, *Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. CHI. L. REV. 443, 463–64 (1989).

48. "In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." U.S. CONST. art. III, § 2.

49. "The judicial Power of the United States, shall be vested in one supreme Court." *Id.* § 1; Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 330–31 (1816) ("They might establish one or more inferior courts; they might parcel out the jurisdiction among such courts, from time to time, at their own pleasure. But the whole judicial power of the United States should be, at all times, vested either in an original or appellate form, in some courts created under its authority.").

long accepted the broad plenary authority of Congress's ability to exercise this "Exceptions and Regulations Clause" to do as it pleases with respect to stripping the Supreme Court of appellate jurisdiction over specific classes of cases.[50] This interpretation has led to substantial scholarship probing whether this authority has any limits.[51]

As to the vesting of judicial power in "inferior Courts," the Supreme Court has interpreted their existence to be entirely at the discretion of Congress.[52] Congress chose to create the first inferior courts with the Judiciary Act of 1789,[53] which created thirteen judicial districts, each of which had one district judge.[54] In 1891, Congress then created intermediate appellate courts, known as the U.S. Courts of Appeals, thirteen of which function today.[55] Over the last 133 years, it has come to be understood that Congress has the broad plenary authority to decide whether the lower federal courts should exist at all, as well as their structure, procedural rules, and jurisdiction.[56] In fact, Congress did not provide the inferior Courts with any federal-question jurisdiction until 1875.[57]

Legal scholarship focusing on stripping involving the inferior courts is thin, at best.[58] This is odd, however, because even if not perceived as

50. *See, e.g.*, Tara Leigh Grove, *The Exceptions Clause as a Structural Safeguard*, 113 COLUM. L. REV. 929, 930–31 (2013) (arguing that Congress uses its broad plenary authority to protect rather than endanger constitutional interests); Charles E. Rice, *Limiting Federal Court Jurisdiction: The Constitutional Basis for the Proposals in Congress Today*, 65 JUDICATURE 190, 192–93 (1981) (recounting the history of the Exceptions and Regulations Clause and noting that the power of Congress to authorize appellate jurisdiction is broad and widely recognized by the Court); Paulsen, *supra* note 44, at 54 ("Congress can make whatever exceptions – deletions, limitations, or qualifications – it wants, as carve-outs from the Supreme Court's appellate jurisdiction.").

51. *See, e.g.*, Hart, *supra* note 13, at 1365; Ratner, *supra* note 7, *at* 158–60; Bator, *supra* note 44, at 1037–38; Calabresi & Lawson, *supra* note 10, at 1007–09. For a discussion of the debate between literalists, who would argue that the Supreme Court's supervisory powers over inferior courts fall within the Court's appellate jurisdiction and those who adhere to the supremacy account and suggest that supervisory powers fall outside of the as-of-right appellate power that is subject to Congress's broad exceptions and regulations, see James E. Pfander, *Jurisdiction-Stripping and the Supreme Court's Power to Supervise Inferior Tribunals*, 78 TEX. L. REV. 1433, 1508–09 (2000).

52. *See, e.g.*, Palmore v. United States, 411 U.S. 389, 401 (1975) (holding Congress has the "sole power of creating the tribunals (inferior to the Supreme Court)").

53. Pub. L. No. 1-20, §§ 1–2, 1 Stat. 73, 73.

54. *See id.* § 3.

55. *See* Judiciary Act of 1891, ch. 517, 26 Stat. 826.

56. *See, e.g.*, Paul R. Dubinsky, *The Essential Function of Federal Courts: The European Union and the United States Compared*, 42 AM. J. COMP. L. 295, 299 (1994) ("The Supreme Court has repeatedly stated that Congress's power to create or decline to create inferior federal courts implies plenary power to decline to vest in them jurisdiction with respect to any or all of the categories enumerated in article III, section 2.").

57. *See* Judiciary Act of 1875, ch. 137, 18 Stat. 470 (codified as amended at 28 U.S.C. § 1331); *Palmore*, 411 U.S. at 401–02.

58. *See* Fallon, *supra* note 9, at 1087 (discussing the constitutionality of Congress stripping Article III courts of jurisdiction to review decisions by administrative agency tribunals); Monaghan, *supra* note 9, at 57 (drawing upon Professor Hart's work for a brief discussion of administrative actions); Bagley, *supra* note 9, at 286–89 (urging courts to allow preclusion of judicial review of administrative claims).

enticing as Supreme Court jurisdiction, the federal inferior courts perform yeoman's[59] work in the world of the judiciary.[60] The district courts are the fact finders of legal disputes.[61] The appellate courts review questions of law and help filter controversies worthy of review by the Supreme Court.[62] Compared to the minimal Supreme Court docket of only 100 to 150 cases per year,[63] the federal appellate courts hear more than 40,000 cases per year,[64] and federal district courts hear more than 300,000 cases per year.[65]

With such broad powers, Congress has stripped courts of many levels of jurisdiction involving various topics.[66] Examples of congressional jurisdictional-stripping statutes include the Norris-LaGuardia Act of 1932,[67] which stripped lower federal courts of jurisdiction to issue restraining orders and injunctions in labor disputes,[68] and the Tax Injunction Act of 1937,[69] which prevented lower federal courts from interfering in state tax collection disputes.[70] Both of these acts arose from Congress's dissatisfaction with federal courts' handling of these types of cases, and both acts survived Supreme Court scrutiny.[71] However, the acts did not preclude all federal

59. *See Yeoman*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/yeoman [https://perma.cc/M6KX-LPNM] (last visited Mar. 7, 2025).

60. The only two pieces of legal scholarship that directly address jurisdiction stripping and inferior courts are from forty-five years ago. Martin H. Redish & Curtis E. Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. PA. L. REV. 45, 47–49 (1975) (outlining several theories that justify limiting congressional power over lower federal courts' jurisdiction); Theodore Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 YALE L.J. 498, 499–501 (1974) (challenging the widespread consensus that Congress has carte blanche to abolish lower federal courts). *But see* Epps & Trammell, *supra* note 5, at 2124–27 (The authors provide a subsection on "Inferior Federal Courts as the Problem" and discuss such strips as rare examples that run counter to their thesis of ineffectiveness of stripping. Instead, they note that inferior court stripping provides a "subtle way that Congress can use jurisdictional stripping in a targeted and surgical fashion to promote its goals.").

61. *Court Role and Structure*, U.S. COURTS, https://www.uscourts.gov/about-federal-courts/court-role-and-structure# [https://perma.cc/2W72-X9RW] (last visited Mar. 7, 2025).

62. *About the U.S. Courts of Appeals*, U.S. COURTS, https://www.uscourts.gov/about-federal-courts/court-role-and-structure/about-us-courts-appeals [https://perma.cc/3VCB-J77C] (last visited Mar. 7, 2025).

63. *Supreme Court Procedures*, U.S. COURTS, https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1# [https://perma.cc/PAN8-Z4VK] (last visited Mar. 7, 2025).

64. *Federal Judicial Caseload Statistics 2022*, U.S. COURTS, https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2022 [https://perma.cc/6X7K-ZJWC] (last visited Mar. 7, 2025).

65. *Id.*

66. *See infra* Part II; *see, e.g.*, Trans-Alaska Pipeline Authorization Act of 1973, 43 U.S.C. § 1652(d); Foreign Affairs Reform and Restructuring Act of 1998, 8 U.S.C. § 1252(a)(2)(C); Gun Lake Trust Land Reaffirmation Act of 2014, Pub. L. No. 113-179, § 2(b), 128 Stat. 1913, 1913 (2014).

67. Ch. 90, 47 Stat. 70 (codified at 29 U.S.C. § 101).

68. *See id.*

69. Ch. 726, 50 Stat. 738 (codified at 28 U.S.C. § 1341).

70. *See id.*

71. *See* Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 920 (1984).

court review. In both cases, the Supreme Court retained jurisdiction.[72] By contrast, the Portal-to-Portal Act of 1947[73] precluded all judicial review and provided that no federal or state court had jurisdiction to hear claims related to an employer's failure to pay employees for travel time to and from work.[74]

B. The Supreme Court at the Heart of Jurisdiction-Stripping Analysis

Scholarly engagement with jurisdiction stripping followed a logical progression. Early work explored the constitutionality of jurisdiction stripping.[75] The later part of the twentieth century focused primarily on questions of Congress's power over the Supreme Court's appellate jurisdiction.[76] Such scholars debated whether Congress was to serve as a majoritarian check on judicial activism[77] or whether the Supreme Court was to serve as an independent check on the other branches.[78] Discussion of jurisdiction channeling in the courts has been largely limited to one immigration statute,[79] and scholarly discussions have focused on plaintiffs' inability to remedy systemic problems[80] and the challenges caused by

72. *See* Erwin Chemerinsky, Essay, *A Framework for Analyzing the Constitutionality of Restrictions on Federal Court Jurisdiction in Immigration Cases*, 29 U. MEM. L. REV. 295, 305–06 (1999).

73. Ch. 52, 61 Stat. 85 (1947) (codified at 29 U.S.C. § 252).

74. *See* Chemerinsky, *supra* note 72, at 311–12.

75. *See, e.g.*, Hart, *supra* note 13, at 1365; Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1004–07 (1965).

76. *See generally* Gunther, *supra* note 71; Akhil Reed Amar, *A Neo-federalism View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205 (1985); Pfander, *supra* note 51, at 1500–11 (arguing for supervisory powers of Supreme Court that may prevent Congress from jurisdiction stripping).

77. *See* Bator, *supra* note 44, at 1041.

78. *See, e.g.*, J. Skelly Wright, *The Role of the Supreme Court in Democratic Society—Judicial Activism or Restraint?*, 54 CORNELL L. REV. 1, 3–11 (1968); Michael J. Gerhardt, *A Tale of Two Textualists: A Critical Comparison of Justices Black and Scalia*, 74 B.U. L. REV. 25, 26–32 (1994).

79. Court cases that discuss jurisdiction channeling are all focused on the Immigration and Nationality Act (INA), as amended by the REAL ID Act of 2005. *See, e.g.*, J.E.F.M. v. Lynch, 837 F.3d 1026, 1034 (9th Cir. 2016); Gicharu v. Carr, 983 F.3d 13, 16 (1st Cir. 2020).

80. *See* David Ames, Cassandra Handan-Nader, Daniel E. Ho & David Marcus, *Due Process and Mass Adjudication: Crisis and Reform*, 72 STAN. L. REV. 1, 25 (2020); David Freeman Engstrom & Daniel E. Ho, *Algorithmic Accountability in the Administrative State*, 37 YALE J. ON REG. 800, 847 (2020) ("Yet jurisdiction channeling—whereby the remedy for an improper denial is to reverse the agency's decision—makes it more difficult for claimants to challenge systematic sources of error, which are much more likely to be prevalent when they stem from algorithmic decisions."); Adam J. Garnick, *Noncitizens' Access to Federal District Courts: The Narrowing of § 1252(B)(9) Post-*Jennings, 169 U. PA. L. REV. 783, 845 (2021).

channeling review of equal protection[81] and takings challenges.[82] More recent engagement questions the practical impact of such stripping.[83]

Despite this broad and seemingly unlimited power of Congress to strip all appellate authority from the Supreme Court and any inferior courts, scholars have argued that there should be internal limits. Professor Henry M. Hart Jr. led those who argued that the Exceptions and Regulations Clause should not be exercised in a way that would interfere with the essential or core functions of the Supreme Court.[84] Subsequent discussions focused on delineating those core functions, with scholars like Professor Leonard G. Ratner concluding they are "to maintain the supremacy and uniformity of federal law."[85] In *Battaglia v. General Motors Corp.*,[86] the U.S. Court of Appeals for the Second Circuit in dicta even explained that "while Congress has the undoubted power to give, withhold, and restrict the jurisdiction of courts other than the Supreme Court, it must not so exercise that power as to deprive any person of life, liberty, or property without due process of law."[87]

Of the numerous jurisdiction-stripping statutes that exist,[88] only two jurisdiction-stripping statutes have ever been struck down by the Supreme Court as unconstitutional: 137 years apart in 1871 (*Klein*)[89] and 2008 (*Boumediene*).[90] *United States v. Klein* involved a number of statutes passed between 1861 and 1870 to remedy property seizures during the Civil War (1861 to 1865).[91] The 1863 Abandoned Property Collection Act[92] allowed persons claiming to be the owners of property that had been seized "during the rebellion" to recover such property in the Court of Claims upon proof that they had "never given any aid or comfort to the present rebellion."[93] An earlier 1862 statute allowed the president to pardon, with restoration of all property rights with the exception of enslaved individuals, those who had participated in the rebellion but were willing to take a loyalty oath.[94] The

81. *See* Jason S. Greenwood, *Congressional Control of Federal Court Jurisdiction: The Case Study of Abortion*, 54 S.C. L. REV. 1069, 1104 (2003) (arguing that channeling abortion cases to a specific court would not violate equal protection rights).

82. *See* Aziz Z. Huq, *Property Against Legality: Takings After* Cedar Point, 109 VA. L. REV. 233, 243–44 (2023) (exploring the impact of channeling certain takings claims into federal court).

83. *See* Epps & Trammel, *supra* note 5.

84. *See* Hart, *supra* note 13, at 1365.

85. Leonard G. Ratner, *Majoritarian Constraints on Judicial Review: Congressional Control of Supreme Court Jurisdiction*, 27 VILL. L. REV. 929, 929, 956 (1982) (framing the question in terms of Congress's power to control the Supreme Court's jurisdiction).

86. 169 F.2d 254 (2d Cir. 1948).

87. *Id.* at 257 (citing Graham & Foster v. Goodcell, 282 U.S. 409, 431 (1931)).

88. *See* Dawn M. Chutkow, *Jurisdiction Stripping: Litigation, Ideology, and Congressional Control of the Courts*, 70 J. POL. 1053, 1058 (2008) (noting that from 1943 to 2004, "Congress passed 248 public laws containing 378 provisions expressly denying the federal courts any power of review").

89. United States v. Klein, 80 U.S. (13 Wall.) 128, 128–29 (1871).

90. Boumediene v. Bush, 553 U.S. 723, 795 (2008).

91. *Klein*, 80 U.S. (13 Wall.) at 128–29.

92. Ch. 120, 12 Stat. 820.

93. *Klein*, 80 U.S. (13 Wall.) at 131.

94. *See id.* at 131 (referring to Confiscation Act of 1862, ch. 195, 12 Stat. 589).

legal question became whether such oaths "cured" their participation in the rebellion sufficient to allow the property to be returned. After a successful claim by one who partook in the rebellion but was pardoned, Congress passed another statute in 1870, providing that "no pardon . . . shall be admissible as evidence" in support of their property claims.[95] It also included a jurisdiction-stripping provision, stating that upon "proof of such pardon and acceptance . . . the jurisdiction of the court in the case shall cease, and the court shall forthwith dismiss the suit of such claimant."[96]

Notwithstanding Congress's attempt to strip jurisdiction and declare the presidential pardon inadmissible, the Supreme Court affirmed the judgment of the Court of Claims recognizing an executive pardon as sufficient to recover property notwithstanding the 1870 law.[97] In holding the 1870 statutes unconstitutional,[98] the Court held that Congress is not allowed to "prescribe rules of decision to the Judicial Department of the government in cases pending before it[.]"[99] The Court was troubled by Congress's attempt to allow the court jurisdiction until "it ascertains that a certain state of things exists," in this case, that pardons were equivalent to proof of loyalty.[100] The Court viewed this as prescribing "a rule for the decision of a cause in a particular way."[101] It lamented that "[i]t seems to us that this is not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power."[102] The "*Klein* principle" that derives from this case is that even if Congress can strip jurisdiction from federal courts over an entire class of cases, it cannot allow a jurisdictional move to "dictate the outcomes of cases or require a court to decide cases in disregard of the Constitution."[103]

137 years later, a more modern Supreme Court provided the only other restriction on Congress's Exceptions and Regulation power: attempts to restrict jurisdiction to issue a writ for the constitutionally-provided right to habeas corpus. In *Boumediene v. Bush*, the Court held that the Military Commissions Act of 2006[104] (MCA) operated "as an unconstitutional suspension of the writ."[105] At issue in that case was the detention of enemy

95. *Id.* at 133.
96. *Id.* at 134.
97. *See id.* at 148.
98. *Id*.
99. *Id.* at 146.
100. *Id.*; *see also id.* at 148 (Miller, J., dissenting) (agreeing with "the proposition that the proviso to the act of July 12, 1870, is unconstitutional").
101. *Id.* at 146 (majority opinion).
102. *Id.*
103. Gunther, *supra* note 71, at 910 ("Whether the *Klein* principle rests on the inherent quality of the 'judicial Power' committed to the courts by article III or on the separation of powers principles reflected in part in article III, virtually all the commentators agree that, even if Congress can withdraw jurisdiction from the federal courts in a whole class of cases, it cannot allow a federal court jurisdiction but dictate the outcomes of cases, or require a court to decide cases in disregard of the Constitution.").
104. Pub. L. 109-366, 120 Stat. 2600.
105. Boumediene v. Bush, 553 U.S. 723, 733 (2008).

combatants at Guantanamo Bay after the terrorist attacks of September 11.[106] The Suspension Clause of the Constitution provides: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."[107] The Detainee Treatment Act of 2005[108] (DTA) and the MCA worked together to limit the rights of enemy combatants to challenge their detention.

Each of these statutes includes a form of jurisdiction stripping. Section 1005(e)(2)(A) of the DTA provides that "[n]o court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus" and grants the Court of Appeals for the D.C. Circuit with exclusive jurisdiction to review determinations that an individual is an enemy combatant.[109] Faced with questions about whether it would apply to pending petitions, Congress then amended the provision with § 7 of the MCA to clarify its application to pending cases and "deny jurisdiction with respect to habeas actions by detailed aliens determined to be enemy combatants . . . [and] 'any other action against the United States . . . relating to [their confinement].'"[110] Drawing upon two other instances of acceptable habeas substitutes, the Court found that Congress failed to provide means to preserve habeas corpus in these statutes.[111] Evaluating whether the DTA/MCA provide a constitutionally sufficient replacement for habeas corpus, the Court found there was "no way to construe the statute [DTA] to allow what is also constitutionally required in this context: an opportunity for the detainee to present relevant exculpatory evidence that was not made part of the record in the earlier proceedings."[112]

Although jurisdiction stripping was far from the main focus in *Boumediene*, scholars have spent significant time analyzing its implications.[113] Professor Richard H. Fallon Jr.'s commentary reflects the prevailing view "that when substantive constitutional rights exist, the Constitution requires that some court have jurisdiction to provide sufficient remedies to prevent those rights from becoming practical nullities."[114]

Armed with only these two examples, one may think that Congress is near limitless in its power to strip federal courts of their jurisdiction unless the strip dictates the outcome of a case or strips a substantive constitutional right. The next part identifies a subset of jurisdiction stripping—administrative forum shopping—that presents itself in a way that places pressure on the outer bounds of Congress's stripping authority and negatively impacts public perception of the legislative and judicial branches.

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106. *See generally id.*
107. U.S. CONST. art. I, § 9, cl. 2.
108. Pub. L. 109-148, § 1001, 119 Stat. 2739, 2739.
109. 28 U.S.C. § 2241(e)(1).
110. *Boumediene*, 553 U.S. at 724 (citing 28 U.S.C. § 2241(e)(1)).
111. *Id.* at 777 (discussing *United States v. Hayman*, 342 U.S. 205 (1952), and *Swain v. Pressley*, 430 U.S. 372 (1977)).
112. *Id.* at 789.
113. *See generally* Katz, *supra* note 23; Lindsey O. Graham & Michael D. Tomatz, *NDAA 2012: Congress and Consensus on Enemy Detention*, 69 A.F. L. REV. 1, 48 (2013).
114. Fallon, *supra* note 9, at 1050.

II. JURISDICTION STRIPPING MEETS ADMINISTRATIVE LAW

Stripping courts of jurisdiction to review agency action presents a unique problem in the world of federal courts. Just as parties forum shop to obtain a judge more favorable to their case, administrative forum shopping refers to Congress passing laws to obtain a court more favorable to a case of interest. It is a practice with three elements: (1) Congress interferes with active litigation to change the rules of the game midstream with respect to agency actions, (2) Congress strips jurisdiction over agency action from at least one inferior court (as opposed to the Supreme Court) and channels at least part of that prior jurisdiction to a coequal forum, and (3) Congress strips agencies of their authority and completely strips judicial review of such agency action for the benefit of a single private party. This part provides a recent example of administrative forum shopping that occurred in the Fourth Circuit with respect to the most unlikely of cases—the siting of a natural gas pipeline. It then situates this strip within the broader context of administrative law and separation of powers, demonstrating how negative perceptions of the separation of powers should be considered even where the actual authority it not contested.

A. Appalachian Voices *and the Mountain Valley Pipeline*

Efforts to site a natural gas pipeline in West Virginia may provide an unlikely scenario to build on over a century of disputes about the contours of jurisdiction stripping, and yet it proves instructive. Since 2015, the developer, Mountain Valley Pipeline, LLC ("Mountain Valley"), was trying to obtain various environmental approvals required to site a $6.6 billion, 300-mile Mountain Valley Pipeline (MVP) to transport natural gas from West Virginia to Virginia.[115] Various environmental groups opposed the construction of this new fossil fuel pipeline for a variety of reasons, including the enabling of fossil fuel combustion contributing to climate change.[116] Over the years, these groups challenged various aspects of administrative agency authorizations of the project, including approvals from the Federal Energy Regulatory Commission (FERC),[117] the U.S. Fish and Wildlife

115. *See The Saga of the Mountain Valley Pipeline Continues*, INST. ENERGY RSCH. (Apr. 7, 2023), https://www.instituteforenergyresearch.org/fossil-fuels/gas-and-oil/the-saga-of-the-mountain-valley-pipeline-continues/ [https://perma.cc/LYF6-78F7].

116. *See* Katie Meyers, *Inside the Last Ditch Effort to Stop the Mountain Valley Pipeline*, GRIST (Jan. 16, 2024), https://grist.org/protest/inside-the-last-ditch-effort-to-stop-the-mountain-valley-pipeline/ [https://perma.cc/ZV4K-RWT7] (describing the timeline of opposition to the Mountain Valley Pipeline).

117. *See* Order Issuing Certificates and Granting Abandonment Authority, 161 FERC ¶ 61,043 (2017).

Service (FWS),[118] and the Bureau of Land Management (BLM),[119] ultimately seeking relief in the Fourth Circuit.[120]

The Fourth Circuit exercised its "original and exclusive" jurisdiction over these challenges under the Natural Gas Act.[121] In each petition for review, the Fourth Circuit ruled against the agency and vacated the agency's approval of various aspects of the pipeline.[122] A consolidated challenge to the biological opinion and the BLM grant of the pipeline was pending in the Fourth Circuit in 2022, even though the pipeline was 95 percent completed.[123]

Such continued roadblocks to the pipeline infuriated West Virginia Senator Joe Manchin, the swing vote in Congress at the time and a necessary vote to achieve critical objectives in the democratic administration of President Joseph R. Biden Jr.[124] Foremost of these was the Fiscal Responsibility Act of 2023[125] (the "Fiscal Responsibility Act"), the passage of which was needed to temporarily suspend the federal debt limit and prevent default.[126] After months of negotiation, the Biden administration realized that the only viable pathway to obtain Senator Manchin's vote in favor of a key piece of climate legislation, the Inflation Reduction Act,[127] as

118. NAT'L MARINE FISHERIES SERV., ENDANGERED SPECIES ACT (ESA) SECTION 7(A)(2) BIOLOGICAL OPINION (2017); U.S. FISH & WILDLIFE SERV., BIOLOGICAL OPINION AND INCIDENTAL TAKE STATEMENT (2020).

119. BUREAU OF LAND MGMT., RECORD OF DECISION MOUNTAIN VALLEY PIPELINE PROJECT DECISION TO GRANT RIGHTS OF WAY AND TEMPORARY USE PERMITS (2017).

120. Ten environmental groups challenged the U.S. Fish and Wildlife Service biological opinion and incidental take statement while the Wilderness Society challenged the Records of Decision by the Bureau of Land Management and the Forest Service. *See* Appalachian Voices v. U.S. Dep't. of Interior, 78 F.4th 71, 75 (4th Cir. 2023). The 2023 *Appalachian Voices* opinion consolidated appeals for two cases and includes statutory claims based on the Endangered Species Act, 16 U.S.C. §§ 1531–1544, (ESA) (challenging biological opinion and incidental take statement) and National Environmental Policy Act, 42 U.S.C. §§ 4321, 4331–4336e, 4342–4347, (NEPA) (challenging the environmental impact statements (EISs)). *See id.* at 74–76; *see also* Wild Virginia v. U.S. Forest Serv., 24 F.4th 915 (4th Cir. 2022) (NEPA); Appalachian Voices v. U.S. Dep't. of Interior, 25 F.4th 259 (4th Cir. 2022) (ESA).

121. *Id.*

122. *See* Sierra Club Inc. v. U.S. Forest Serv., 897 F.3d 582 (4th Cir. 2018) (vacating the Forest Service's environmental impact statement and the Bureau of Land Management's record of decision (ROD)); *Appalachian Voices*, 25 F.4th at 263–64 (vacating the Fish and Wildlife Service's biological opinion (BiOp) and incidental take statement submitted to Federal Energy Regulatory Commission with respect to Roanoke logperch and candy darter species listed as protected under the ESA).

123. *See Appalachian Voices*, 78 F.4th at 75.

124. Ken Ward Jr. & Alexa Beyer, *Joe Manchin's Price for Supporting the Climate Change Bill: A Natural Gas Pipeline in His Home State*, PROPUBLICA (Aug. 5, 2022), https://www.propublica.org/article/manchin-gas-pipeline-climate-change-bill [https://perma.cc/YYZ2-S4NR] (quoting Senator Manchin as saying the Fourth Circuit has been "unmerciful" on progress).

125. Pub. L. No. 118-5, § 324, 137 Stat. 10, 47.

126. *See* Michael D. Shear, *Biden Signs Fiscal Responsibility Act in End to Debt Limit Crisis*, N.Y. TIMES (June 3, 2023), https://www.nytimes.com/2023/06/03/us/politics/biden-debt-bill.html [https://perma.cc/CR97-YPXK].

127. Inflation Reduction Act of 2022, Pub. L. 117-169, 136 Stat. 1818.

well as the Fiscal Responsibility Act, was to include a provision that facilitated completion of the MVP.[128]

The result of a negotiated Senator Manchin "yes" vote for President Biden's initiatives[129] was § 324, entitled "Expedition Completion of the Mountain Valley Pipeline."[130] With it, Congress both ratified all MVP approvals and channeled jurisdiction for any challenges to a single appellate court, stripping the Fourth Circuit of its jurisdiction to hear matters related to the construction and initial operation of the MVP. First, under § 324(c)(1), Congress "ratifie[d] and approve[d]" all authorizations and approvals "issued pursuant to Federal law necessary for the construction and initial operation at full capacity of the Mountain Valley Pipeline."[131] Under § 324(c)(2), Congress "direct[ed]" the relevant agencies to "continue to maintain" those same authorizations and approvals. Ratification is to occur "[n]otwithstanding any other provision of law."[132] Combined with § 324(f), which provides that this provision "supersede[d] any other provision of law . . . that is inconsistent with the issuance of any authorization" necessary for the Mountain Valley Pipeline, Congress secured the completion of the MVP.[133]

Second, and more relevant for purposes of this Article, are the two jurisdiction-stripping provisions that then follow. Section 324(e)(1) provides that "[n]otwithstanding any other provision of law, no court shall have jurisdiction to review any action taken by" certain listed agencies "that grants" any authorization or approval "necessary for the construction and initial operation at full capacity of the Mountain Valley Pipeline . . . whether issued prior to, on, or subsequent to the date of enactment of this section, and including any lawsuit pending in a court as of the date of enactment of this section."[134] Section 324(e)(2) then proceeds to provide an example of individual jurisdiction channeling. Congress carved out a specific jurisdictional exception to give a single court—the D.C. Circuit—"original and exclusive jurisdiction over any claim alleging the invalidity of this section or that an action is beyond the scope of authority conferred by this section."[135] That narrow grant to the D.C. Circuit limiting review to the

128. *See* Ward & Beyer, *supra* note 124.

129. *See* Bill Chappell, *The Debt Ceiling Deal Bulldozes a Controversial Pipeline's Path Through the Courts*, NPR (June 1, 2023), https://www.npr.org/2023/05/31/1179201992/mountain-valley-pipeline-west-virginia-debt-ceiling-deal [https://perma.cc/DX4A-TG9D].

130. *Id.*; Fiscal Responsibility Act § 324.

131. Fiscal Responsibility Act § 324(c)(1).

132. *Id.* § 324(c)(2).

133. *Id.* § 324(f).

134. *Id.* § 324(e)(1).

135. *Id.* § 324(e)(2). In full, § 324(e) provided:

> (e) JUDICIAL REVIEW.—
>
> (1) Notwithstanding any other provision of law, no court shall have jurisdiction to review any action taken by the Secretary of the Army, the Federal Energy Regulatory Commission, the Secretary of Agriculture, the Secretary of the Interior, or a State administrative agency acting pursuant to Federal law that grants an authorization, permit, verification, biological opinion, incidental take statement, or

constitutionality of the statute itself leaves no court with any jurisdiction to consider the merits of any of the requisite agency approvals.

Two days after Congress enacted the Fiscal Responsibility Act, Mountain Valley moved to dismiss, followed by the federal agencies.[136] The environmental petitioners argued that § 324 is unconstitutional but did not file suit in the D.C. Circuit as required by the new statute.[137] After consolidating the cases, expediting oral argument on the motion to dismiss, and staying further construction of the pipeline pending their review, the Fourth Circuit issued its opinion in the pending litigation.[138] Interestingly, the Supreme Court exercised its "supervisory" role expressed by other scholars,[139] entering an order to vacate the temporary stays while the Fourth Circuit was hearing oral argument on the motions to dismiss.[140]

After a lengthy discussion of separation of powers, more of which is discussed in Part III below, the Fourth Circuit resigned itself to its loss of jurisdiction.[141] The Fourth Circuit was not stripped of jurisdiction to consider all petitions for review of FWS or BLM approvals, nor was it stripped of jurisdiction to consider all petitions for review of FWS or BLM pipeline approvals. It was only stripped of jurisdiction to consider petitions for review of the "construction and initial operation" of this one pipeline.[142]

This scenario is emblematic of administrative forum shopping. The strip occurred in the midst of pending litigation, and it was a narrow strip with respect to a single private party. Judge Roger L. Gregory's concurrence notes,

> [t]here can be no mistake, however, that Section 324 is a blueprint for the construction of a natural gas pipeline by legislative fiat. If that provision is likewise constitutionally sanctioned, then Congress will have found the

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> any other approval necessary for the construction and initial operation at full capacity of the Mountain Valley Pipeline, including the issuance of any authorization, permit, extension, verification, biological opinion, incidental take statement, or other approval described in subsection (c) or (d) of this section for the Mountain Valley Pipeline, whether issued prior to, on, or subsequent to the date of enactment of this section, and including any lawsuit pending in a court as of the date of enactment of this section.
>
> (2) The United States Court of Appeals for the District of Columbia Circuit shall have original and exclusive jurisdiction over any claim alleging the invalidity of this section or that an action is beyond the scope of authority conferred by this section.

Id. § 324(e).

136. *See* Appalachian Voices v. U.S. Dep't. of Interior, 78 F.4th 71, 76 (4th Cir. 2023).

137. *See id.*

138. *See id.*

139. *See, e.g.*, Amy Coney Barrett, *The Supervisory Power of the Supreme Court*, 106 COLUM. L. REV. 324 (2006); Dickerson v. United States, 530 U.S. 428, 437 (2000) (The Court stated that "[t]he law in this area is clear. This Court has supervisory authority over the federal courts . . . .").

140. *See Appalachian Voices*, 78 F.4th at 76 n.1.

141. *See id.* at 81.

142. *Id.* at 76 (citing the Fiscal Responsibility Act of 2023, Pub. L. No. 118-5, § 324(c)(1), 137 Stat. 10, 47 (2023)).

> way to adjudicate by legislating for particular cases and for particular litigants, no different than the governmental excesses our Framers sought to avoid.[143]

B. The Negative Perceptions of Administrative Forum Shopping

A close reading of *Appalachian Voices* provides a launch point for a more instructive conversation about the nuanced relationship between jurisdiction stripping, channeling, and administrative law. By stripping courts of their ability to review agency action, Congress complicates discussions of the "headless fourth branch" and the administrative state.[144] On the one hand, stripping all judicial review leaves plaintiffs without a pathway to a remedy. This renders agency action unreviewable, elevating their power in a way that runs contrary to efforts to curb the headless fourth branch.[145] In effect, this provides agencies with absolute deference. As the Fourth Circuit noted in its dismissal of the natural gas pipeline case, "Congress moved well beyond the type of deference that may be accorded to agencies under the Supreme Court's decision in *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, to declare virtually unreviewable the actions of the agencies granting permits for the pipeline's construction."[146]

On the other hand, Congress has explicitly directed the agencies to approve all authorizations related to the pipeline, effectively stripping from the agencies any discretion to make their own determinations.[147] The more precise the delegation to an agency, the less discretion the agency has to implement its delegated authority.[148] Given the Supreme Court's call for more "clear" congressional authorizations,[149] some will relish in the specificity with which Congress has spoken to this particular issue.[150] Jurisdiction stripping, combined with congressional ratification, arguably provides the type of accountability sought by many critics of administrative

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143. *Id.* at 84 (Gregory, J., concurring in judgment).

144. Ilya Shapiro, *Time to Rein in the Unconstitutional Fourth Branch of Government*, 45 ADMIN. & REG. L. NEWS, Winter 2020, at 8, 9. *See generally* Bijal Shah, *The President's Fourth Branch?*, 92 FORDHAM L. REV. 499 (2023) (arguing the administrative state has been encouraged by the president to be unaccountable to Congress).

145. *See* Fallon, *supra* note 9, at 1119–20 (Fallon briefly contemplated the wide variety of stripping that "bars them from deciding issues within a case by requiring them to accord deference or preclusive effect to an agency's judgment.").

146. *Appalachian Voices*, 78 F.4th at 75 (citing Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984), *overruled by* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024)).

147. *See* Fiscal Responsibility Act of 2023, Pub. L. No. 118-5, § 324(c)–(d), 137 Stat. 10, 47.

148. TODD GARVEY & DANIEL J. SHEFFNER, CONG. RSCH. SERV., R45442, CONGRESS'S AUTHORITY TO INFLUENCE AND CONTROL EXECUTIVE BRANCH AGENCIES 8 & n.68 (2018) (citing Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 77–78 (2006) ("A key formal method Congress employs to control executive discretion is to nip discretion in the bud by legislating with precision.")).

149. West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022).

150. *See id.*; Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024).

agencies.[151] Others, however, will recoil from the logrolling and impact of private lobbying on full display, tracing a clear line from the steep separation of powers price that had to be paid to secure one legislator's votes.

Although Congress may have the authority to bypass the public participation, administrative processes, and environmental safeguards required to push through one specific project, such a scenario nevertheless raises challenges to perceptions of the legitimacy of the separation of powers. Environmentalists, for instance, have long argued for the need for more transmission lines to connect more renewable energy to the grid.[152] But permit reform discussions consistently acknowledge the need to find a balance with these administrative and environmental safeguards.[153] Steamrolling one particular infrastructure project without regard for existing laws elevates the legislature to a "super-status."[154] As others have noted, jurisdiction-stripping provisions leave the power on such issues squarely outside of the hands of the judicial branch.[155] Where courts cannot exercise

151. *See generally* Tara Leigh Grove, *The Article II Safeguards of Federal Jurisdiction*, 112 COLUM. L. REV. 250 (2012) (arguing that "the executive branch has a strong incentive to use its constitutional authority over the enactment and enforcement of federal law to oppose jurisdiction-stripping measures"); Mila Sohoni, *Agency Adjudication and Judicial Nondelegation: An Article III Canon*, 107 NW. U. L. REV. 1569 (2013) (arguing that courts should cater their degree of deference depending on whether public or private rights are at stake).

152. *See* Emily Mercer, *National Renewable Energy Laboratory, National Transmission Analysis Maps Next Chapter of US Grid Evolution*, NREL (Oct. 3, 2024), https://www.nrel.gov/news/features/2024/national-transmission-planning-study.html [https://perma.cc/9C6C-7KLZ]; Michelle Solomon, *DOE Study Highlights America's Transmission Needs, but How Do We Accelerate Buildout?*, UTILITY DIVE (March 31, 2023), https://www.utilitydive.com/news/doe-study-transmission-clean-energy/646589/ [https://perma.cc/H58U-5LHH].

153. *See* RAYAN SUD, SANJAY PATNAIK & ROBERT GLICKSMAN, HOW TO REFORM FEDERAL PERMITTING TO ACCELERATE CLEAN ENERGY INFRASTRUCTURE (2023), https://www.brookings.edu/wp-content/uploads/2023/02/20230213_CRM_Patnaik_Permitting_FINAL.pdf [https://perma.cc/JFL4-E6R6].

154. For example, the Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429 (2021) (codified as amended in scattered sections of 23 U.S.C.), set new coordination and timeline requirements for the Federal Highway Administration (FHWA), Federal Transit Administration (FTA), and Federal Railroad Administration (FRA). *See* Pub. L. No. 117-58, 135 Stat. 429 (2021) (codified as amended in scattered sections of 23 U.S.C.); 23 U.S.C. §§ 139(b), (g), (l), (n); *see also* Exec. Order No. 13927, 85 Fed. Reg. 35165 (June 4, 2020) (intending to fast track permitting required by NEPA and the Endangered Species Act) (revoked by the Biden administration); *Fact Sheet: Biden – Harris Administration Release Permitting Action Plan to Accelerate and Deliver Infrastructure Projects on Time, on Task, and on Budget*, THE WHITE HOUSE (May 11, 2022), https://bidenwhitehouse.archives.gov/briefing-room/statements-releases/2022/05/11/fact-sheet-biden-harris-administration-releases-permitting-action-plan-to-accelerate-and-deliver-infrastructure-projects-on-time-on-task-and-on-budget/ [https://perma.cc/EV9Y-7AYB]; *Congress Passes Environmental Permitting Reform in Bipartisan Fiscal Responsibility Act*, SIDLEY (June 2, 2023), https://www.sidley.com/en/insights/newsupdates/2023/06/congress-passes-environmental-permitting-reform-in-bipartisan-fiscal-responsibility-act [https://perma.cc/WDE5-BX4W].

155. *See, e.g.*, Alison Holland, *Across the Border and over the Line: Congress's Attack on Criminal Aliens and the Judiciary Under the Antiterrorism and Effective Death Penalty Act of 1996*, 27 AM. J. CRIM. L. 385, 391 (2000) ("As a result of the jurisdiction-stripping provisions, the power to decide whom to deport lies squarely within the hands of the legislative and executive branches.").

judicial review, caution must be taken as stripping can also undermine the "reliance that administrative law places on judicial review as the primary method of controlling agency action."[156]

Despite the broad legal authority of Congress to engage in such administrative forum shopping, public perception of such shopping can nevertheless be harmful to both the legitimacy of the institution (something private litigants do not need to consider) and to the resolution of private parties' claims subject to such shopping. It creates a farce of objectivity for courts when sending a claim to a particular court almost guarantees a preordained result.

As with all of legislative history, courts and scholars place varied weight on the motivations of the legislators who seek to strip courts of their jurisdiction.[157] In *Plaut v. Spendthrift Farm, Inc.*,[158] Justice Antonin Scalia noted that "[n]ot favoritism, nor even corruption, but *power* is the object of the separation-of-powers prohibition."[159] Even though the Court proceeded to hold that a federal statute instructing federal courts to reopen final judgments was unconstitutional,[160] Justice Scalia suggested that the motivation of the legislature was irrelevant to whether separation of powers has been violated.[161] Decades later in *Patchak*, Justice Thomas pointed to *McCardle* to support the Court's inability to "inquire into the motives of the legislature," doubting that the constitutional line would turn on "Congress'[s] unexpressed motives," number of cases pending, or time left on a statute of limitations.[162]

Although this may be true, motivation does impact the optics surrounding a congressional strip.[163] Examples of dissenting justices and judges abound who note the importance of congressional motivations. In *Klein*, Justice Samuel Freeman Miller noted that "I must construe this act, as all others should be construed, by seeking the *intention of its framers*."[164] Scholars

156. Dan T. Coenen, *The Constitutional Case Against Intracircuit Nonacquiescence*, 75 MINN. L. REV. 1339, 1407 n.365 (1991).

157. Bator, *supra* note 44, at 1041 (noting the "strong powerful policy arguments against such a retaliatory use of the power granted to Congress by the exceptions clause").

158. 514 U.S. 211 (1995).

159. *Id.* at 228.

160. *Id.* at 240 (holding that § 27A(b) of the Securities and Exchange Act, which sought to require courts to retroactively reopen final judgments, violated separation of power principles and was unconstitutional).

161. *Id.* at 228 (noting that separation of powers can be violated when "even the very best of reasons, such as the legislature's genuine conviction (supported by all the law professors in the land) that the judgment was wrong").

162. Patchak v. Zinke, 138 S. Ct. 897, 910 (2018).

163. Similar challenges exist for forum shopping. *See* Julianne Hill, *Forum Fixing 'Judge Shopping' in Federal Courts Should End, Resolution Says*, A.B.A. J. (Oct. 1, 2023), https://www.abajournal.com/magazine/article/judge-shopping-in-federal-courts-should-end-resolution-says [https://perma.cc/A4EV-5E4A] (The American Bar Association House of Delegates recently agreed that "federal judges should be assigned to cases randomly to prevent the appearance of litigants picking districts and judges offering the most likely path to victory.").

164. United States v. Klein, 80 U.S. (13 Wall.) 128, 149 (1871) (emphasis added) (noting also that it was clear that Congress wanted the government to retain property of disloyal citizens and restore property of loyal citizens).

remark that "it has not been difficult to distinguish legislation motivated by efficiency considerations from political reaction."[165] Justice Scalia even acknowledged in *Plaut* that "[t]o be sure, a general statute such as this one may reduce the *perception* that legislative interference with judicial judgments was prompted by individual favoritism."[166]

In contrast to a general statute, a targeted statute such as the Fiscal Responsibility Act increases the perception that legislative interference was prompted by individual favoritism. In fact, Congress could not have been clearer in its motivations regarding the Fiscal Responsibility Act, declaring that "the timely completion of construction and operation of the Mountain Valley Pipeline is required in the national interest."[167] Congress then ratified and approved all necessary federal approvals[168] and directed all "applicable" agencies to "continue to maintain" such approvals.[169]

The fact that Congress left in place the Natural Gas Act's general grant of jurisdiction to any circuit court to hear challenges to *future* pipelines or other natural gas facilities[170] as well as future challenges to operations of the Mountain Valley Pipeline not covered by the express terms of § 324 also speaks to its determination to get the MVP functioning, hoping path dependency may enable it to withstand any future challenges.[171] This section identifies three particularly troublesome aspects of such administrative forum shopping that exacerbate the negative perception of separation of powers: (1) targeting pending litigation, (2) subsequent strip and channel to coequal tribunal, and (3) absolute strip of all judicial review for the benefit of a single private party.

1. Congressional Interference Targeting Pending Litigation

The first key component of administrative forum shopping is the timing. As described earlier, Congress often dictates the contours of administrative agency review through statute.[172] But such actions deserve greater scrutinty when Congress interferes during pending litigation. Although courts have treated the timing of jurisdictional modifications as irrelevant, the endowment effect cannot be ignored.[173] Initial allocations of jurisdiction carry different optics than subsequent reallocations of jurisdiction.

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165. Eisenberg, *supra* note 60, at 519.
166. *Plaut*, 514 U.S. at 228 (emphasis added).
167. Fiscal Responsibility Act of 2023, Pub. L. No. 118-5, § 324(b), 137 Stat. 10, 47.
168. *Id.* § 324(c)(1).
169. *Id.* § 324(c)(2).
170. *See* 15 U.S.C. § 717r(d)(1).
171. Appalachian Voices v. U.S. Dep't. of Interior, 78 F.4th 71, 80–81 (4th Cir. 2023).
172. Immigration and Nationality Act, 8 U.S.C. § 1252(b)(9), (g); Clean Air Act of 1963, 42 U.S.C. § 7607(b)(1); Federal Courts Improvement Act of 1982, 28 U.S.C. § 1295(a)(4).
173. Daniel Kahneman, Jack L. Knetsch & Richard H. Thaler, *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. ECON. PERSP. 193, 194–95 (1991) (defining endowment effect as our tendency to overvalue something that we own, regardless of its objective market value). In this case, the right to judicial review, which existed at the start of litigation, was stripped away from the plaintiffs midstream.

Initial allocations of jurisdiction that occur concurrently with the enabling statute are more acceptable, akin to setting the rules of the game before play begins. Two prominent examples of congressional jurisdiction channeling that occurred concurrent with the enabling statute involve the D.C. Circuit and the U.S. Court of Appeals for the Federal Circuit. In the 1970s, Congress passed four major federal environmental statutes and included in each of them a jurisdictional limitation that allowed only private parties to challenge the Environmental Protection Agency (EPA) in the D.C. Circuit.[174] All appeals for the last fifty years have been channeled into this circuit, creating a particular expertise in these matters in that forum.[175] Similarly, Congress created the Federal Circuit "from the ashes of the Court of Claims and the Court of Customs and Patent Appeals, giving the court appellate jurisdiction over the subject matter of its predecessor courts."[176] Pursuant to statute, the Federal Circuit hears appeals from Article I courts, such as the U.S. International Trade Commission, the Patent Trial and Appeals Board, the Trademark Trial and Appeals Board, the U.S. Merit Service Protection Board, and others.[177] Such channeling may be justified by a desire for a particular tribunal to develop subject matter expertise, a goal that can be achieved by all future cases being heard by one particular court.[178] Those that are made in advance of any litigation appear much less controversial than those that are made in response to ongoing litigation, particularly when a decision is still pending before a court.

A much more troubling exercise of legislative power involves interference during an ongoing lawsuit to effectively ensure one side will win. Perhaps

174. *See, e.g.*, 42 U.S.C § 7607(b)(1) ("A petition for review of action of the Administrator . . . under this chapter may be filed only in the United States Court of Appeals for the District of Columbia."); *id.* § 9659(b)(2) ("Any action brought under subsection (a)(2) may be brought in the United States District Court for the District of Columbia.").

175. Amanda Reilly, *D.C. Circuit May Be Bulwark Against Enviro Rule Changes*, E&ENEWS (Nov. 14, 2016, 1:14 PM), https://www.eenews.net/articles/d-c-circuit-may-be-bulwark-against-enviro-rule-changes/ [https://perma.cc/NH82-BNQX] ("It's almost as though Congress long ago said, 'You be the expert court that deals with these issues because they're so complicated legally.'" (quoting Robert Percival, director of the University of Maryland Francis King Carey School of Law's Environmental Law Program)).

176. Shubha Ghosh, *Jurisdiction Stripping of the Federal Circuit?*, 52 AKRON L. REV. 391, 391–92 (2018) (recognizing that the Federal Circuit often acts as the "Supreme Court of Patent Law" and arguing that jurisdiction stripping should be used to curb the Federal Circuit's generalist tendencies) (citing Mark D. Janis, *Patent Law in the Age of the Invisible Supreme Court*, 2001 U. ILL. L. REV. 387, 387); *see* Rochelle Cooper Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 N.Y.U. L. REV. 1, 3 (1989) (discussing how Congress established the Federal Circuit to address efficiency goals in resolving patent disputes).

177. Ghosh, *supra* note 176, at 391–92.

178. Eric M. Fraser, David K. Kessler, Matthew J.B. Lawrence & Stephen A. Calhoun, *The Jurisdiction of the D.C. Circuit*, 23 CORNELL J.L. & PUB. POL'Y 131 (2013) (analyzing how Congress's decision to give the D.C. Circuit jurisdiction over many administrative agency rules has created a special role for the D.C. Circuit); Banks Miller & Brett Curry, *Expertise, Experience, and Ideology on Specialized Courts: The Case of the Court of Appeals for the Federal Circuit*, 43 LAW & SOC'Y REV. 839, 841 (2009) (noting that Congress created courts with exclusive jurisdiction over technical issues in the belief that it would increase efficiency and improve consistency in the law).

the most famous of such cases is *Ex parte McCardle*, decided in 1868.[179] In that case, McCardle appealed a lower federal court's denial of habeas corpus to the Supreme Court.[180] After the Court sustained jurisdiction and heard oral arguments, Congress intervened to repeal the statutory provisions that had authorized Supreme Court review.[181] Congress was able to strip the Supreme Court of this authority, overriding President Andrew Johnson's veto (issued while impeachment proceedings against him were pending).[182] Needless to say, there were extenuating circumstances surrounding this strip.[183] But when the Supreme Court issued its opinion the next year, the Court unanimously upheld Congress's authority to strip it of this jurisdiction and dismissed the appeal.[184]

MVP is not the only example of congressional meddling with jurisdiction over agency action. Courts have been consistent in affirming Congress's authority to amend statutes "that apply retroactively to pending lawsuits, even when it effectively ensures that one side wins."[185] To resolve pending litigation over the construction of a highway ("H-3"), Congress passed a statute requiring the secretary of transportation to approve construction of H-3 notwithstanding the requirements under the Department of Transportation Act of 1966[186] and Federal Aid Highway Act of 1968[187] (collectively referred to as "section 4(f)").[188] Environmentalists had sued the Department of Transportation, and litigation was pending on remand from the U.S. Court of Appeals for the Ninth Circuit. They were arguing that the

179. *Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1868).

180. *Id.* at 509.

181. *Id.*

182. *See* William W. Van Alstyne, *A Critical Guide to Ex Parte McCardle*, 15 ARIZ. L. REV. 229, 239–40 (1973).

183. This was a unique situation because of the contentious situation between the "Radical Republicans" in Congress (seeking more punitive treatment of the South) and the more Confederacy-sympathetic president, including his impeachment and their overruling of his veto. *Id.*

184. *McCardle*, 74 U.S. at 514.

185. Patchak v. Zinke, 138 S. Ct. 897, 905 (2018) (citing Bank Markazi v. Peterson, 578 U.S. 212, 228–32 (2016)).

186. Pub. L. No. 89-670, 80 Stat. 931 (codified as amended in scattered sections of the U.S. Code).

187. Pub. L. No. 90-495, 82 Stat. 815 (codified as amended in scattered sections of the U.S. Code).

188. Stop H-3 Ass'n v. Dole, 870 F.2d 1419, 1422–23 (9th Cir. 1989); *see also* Aviation Safety Commission Act of 1986, Pub. L. No. 99-591, § 114, 100 Stat. 3341, 3341–49. Section 4(f) states that the secretary

> may approve a transportation program or project . . . requiring the use of publicly owned land of a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance, or land of an historic site of national, State, or local significance (as determined by the Federal, State, or local officials having jurisdiction over the park, area, refuge, or site) only if—
>
> (1) there is no prudent and feasible alternative to using that land; and
>
> (2) the program or project includes all possible planning to minimize harm to the park, recreation area, wildlife and waterfowl refuge, or historic site resulting from the use.

49 U.S.C. § 303(c); 23 U.S.C. § 138(18) (containing almost identical language).

highway was approved even though other alternative uses to the land existed, and the harm was not minimized.[189] The Ninth Circuit upheld the statute, holding that Congress may "moot a pending controversy by enacting new legislation."[190] The court also rejected federalism claims that Congress was exercising judicial power. The court merely exempted H-3 from requirements and did not strip courts of judicial review over noncompliance with prior law.[191]

In contrast, when Congress added a provision into an appropriations bill approving agency plans that had been in ongoing litigation regarding timber harvesting, the Ninth Circuit held the strip to be unconstitutional under *Klein*.[192] Although the Ninth Circuit held the provision unconstitutional under *Klein* because it "directed the court to reach a specific result and make certain factual findings under existing law in connection with two pending cases," the Supreme Court eventually reversed and held that the provision sufficiently changed the law and did not direct an outcome under old law.[193]

Despite these precedents upholding congressional authority to intervene, there is no question that stripping jurisdiction during active litigation changes the rules of the game midstream. Aggrieved parties who relied on existing laws to their detriment are left without a viable pathway that existed at the beginning of their lawsuit. This is antithetical to fundamental conceptions of fairness and justice embedded in our judicial system.[194] The rule of law, stare decisis, and other principles are cornerstones of our system for precisely this reason.[195] Even though such jurisdiction stripping ties the hands of the

189. *Dole*, 870 F.2d at 1422–23.

190. *Id.* at 1432 (citing Friends of the Earth v. Weinberger, 562 F. Supp. 265, 270 (D.D.C. 1983)).

191. *Id.* at 1434 ("Section 114 does not interpret section 4(f)'s requirements but rather exempts H–3 from them, making section 4(f) irrelevant for purposes of the Secretary's decision to approve construction of H–3.").

192. Seattle Audubon Soc. v. Robertson, 914 F.2d 1311, 1317 (9th Cir. 1990) (holding that Congress had violated the separation of powers), *rev'd sub nom.* Robertson v. Seattle Audubon Soc., 503 U.S. 429 (1992); Department of the Interior and Related Agencies Appropriations Act of 1990, Pub. L. No. 101-121, § 318(b)(6)(A), 103 Stat. 701, 747 (1989) (also naming the two pending cases in the provision).

193. *Seattle Audubon*, 914 F.2d at 1316 (noting that the provision left the underlying statute intact and did not create new law); *see also* Defenders of Wildlife v. Chertoff, 527 F. Supp. 2d 119 (D.D.C. 2007) (upholding a congressional strip of judicial review of nonconstitutional challenges).

194. MODEL CODE OF JUD. CONDUCT pmbl. (AM. BAR ASS'N 2020) ("The United States legal system is based upon the principle that an independent, impartial, and competent judiciary, composed of men and women of integrity, will interpret and apply the law that governs our society."); *see* Evan Zoldan, *The Vanishing Core of Judicial Independence*, 21 NEV. L.J. 531, 538 (2021) (arguing that the core of judicial independence, which Professor Evan Zoldan defines as courts' authority to decide cases before them without legislative directive, is vanishing); Stephen J. Shapiro, *The Judiciary in the United States: A Search for Fairness, Independence and Competence*, 14 GEO. J. LEGAL ETHICS 667 (2001) (exploring the factors that lead to an independent, fair, and competent judiciary).

195. *See* Jeremy Waldron, *The Rule of Law and the Importance of Procedure*, 50 NOMOS AM. SOC'Y POL. LEGAL PHIL. 3, 3 (2011) (asserting that the rule of law is one of the ideals that "dominate[s] our political morality"); William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV.

judiciary, this reflects poorly on both the legislative and judicial branches, and potentially leaves parties feeling disillusioned about the civil justice system.[196] Even though the Supreme Court has upheld congressional stripping during pending litigation, as well as the retroactive application of a new statute, the timing and scope of such a strip nevertheless impacts perceptions of the validity of the judicial process.

2. Targeted Strip of Existing Inferior Jurisdiction and Reallocation to Coequal Court

A second unique aspect of this sort of jurisdiction strip is the reallocation of power between coequal tribunals. As has been discussed, Congress often uses its power to completely strip federal jurisdiction.[197] But sometimes Congress partially strips or channels between unequal tribunals.[198] This often manifests in a vertical strip between federal and state courts or between different levels of federal courts.[199] For instance, scholars point to statutes that involved controversial constitutional issues like abortion, elections, and the pledge of allegiance as examples where Congress sought to strip federal courts of jurisdiction in hopes that state courts may provide a more favorable forum for resolution of such issues.[200]

Prior to the MVP case, there are only a few instances of Congress stripping jurisdiction from lower district courts at all.[201] In both a labor dispute and a tax dispute, Congress intervened to curb injunction-happy district courts. In 1932, Congress enacted the Norris-LaGuardia Act, which prohibited a "court of the United States," defined as an inferior court but not the Supreme Court, from issuing such injunctions except under narrow circumstances.[202] Just a few years later, in 1937, Congress enacted the Tax Injunction Act which provided that

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735, 736 (1949) (stating that "*[s]tare decisis* serves to take the capricious element out of law and to give stability to a society").

196. *See* Caprice L. Roberts, *Jurisdiction Stripping in Three Acts: A Three String Serenade*, 51 VILL. L. REV. 593, 598 (2006) (discussing how the power struggle between Congress and the judiciary detrimentally affects public respect for courts and the rule of law).

197. *See supra* notes 45, 56 and accompanying text.

198. *See* Fallon, *supra* note 9, at 1063 (explaining that Congress has proposed many jurisdiction-stripping bills to channel judicial review of certain constitutional issues from federal courts to state courts).

199. *See id.*

200. *See, e.g.*, Epps & Trammell, *supra* note 5, at 2114 (exploring the use of jurisdiction stripping for targeted policy reform and rejecting it as a viable tool for Congress); Alexander K. Hooper, *Jurisdiction-Stripping: The Pledge Protection Act of 2004*, 42 HARV. J. ON LEGIS. 511 (2005) (considering the potential constitutional issues related to the Pledge Protection Act).

201. Although Congress has proposed many jurisdiction-stripping bills, they have rarely passed. *See, e.g.*, James E. Pfander, *Federal Supremacy, State Court Inferiority, and the Constitutionality of Jurisdiction-Stripping Legislation*, 101 NW. U. L. REV. 191, 193–95 (2007) ("Jurisdiction-stripping bills are no strangers to Capitol Hill . . . . But such legislation has rarely gained a hearing in the House Judiciary Committee and has even more rarely passed the House or Senate.").

202. 29 U.S.C. § 101; *id.* § 113(d) (defining "court of the United States" to mean inferior federal courts but not the Supreme Court).

> no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the assessment, levy, or collection of any tax imposed by or pursuant to the laws of any State where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such State.[203]

Sandwiched between these strips was the Johnson Act,[204] enacted in 1934 to amend the judicial code such that "no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the enforcement, operation, or execution of any order of an administrative board or commission of a State . . . [that] affects rates chargeable by a public utility."[205] Scholars at the time noted that it was "the result of long agitation against the alleged pernicious interference by U.S. district courts with rate regulations of the state utility commissions and the state courts" in a way that favored the utilities to the detriment of the local ratepayers.[206] In none of these situations did Congress strip jurisdiction from one federal district court and channel it to a coequal peer district court.[207]

Appalachian Voices is unique in that Congress not only stripped all federal jurisdiction to review agency approvals of the MVP, which will be discussed in Part III, but also channeled authority to challenge the constitutionality of the statute from one federal appellate court (Fourth Circuit) to an equal federal appellate court (D.C. Circuit). Such horizontal strips lack the typical justifications for channeling about expertise and invite heightened scrutiny into congressional motivations.

Senator Manchin cited the 1973 Trans-Alaska Pipeline Authorization Act[208] (TAPAA) as the model precedent for Congress's development of § 324.[209] Like § 324, Congress passed the TAPAA to prevent further litigation delays in pipeline construction.[210] The TAPAA "authorize[d] and direct[ed] the Secretary of the Interior . . . and agencies to issue and take all necessary action to administer and enforce rights-of-way, permits, leases, and other authorizations that are necessary for or related to the construction, operation, and maintenance of the trans-Alaska oil pipeline system."[211]

The TAPAA also stripped lower district courts of jurisdiction to review permitting decisions and declared that all necessary permit issuances "shall not be subject to judicial review under any law except that claims alleging the invalidity of this section may be brought within sixty days . . . or that the

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203. Ch. 726, 50 Stat. 738 (1937) (codified as amended 28 U.S.C. § 1341).

204. Ch. 283, 48 Stat. 775 (1934).

205. *Id.*; *see also* Mountain States Power Co. v. Pub. Serv. Comm'n, 299 U.S. 167, 168–69 (1936).

206. Edwin C. Goddard, *The Johnson Amendment to the Judicial Code*, 32 MICH. L. REV. 1154, 1154 (1936).

207. Boumediene v. Bush, 553 U.S. 723, 778 (2008) (acknowledging how jurisdiction channeling to one specific appellate court in the DTA limited factfinding that usually occurs at the district level).

208. 43 U.S.C. § 1652.

209. Brief for Senator Manchin III as Amicus Curiae in Support of Applicant at 6, Mountain Valley Pipeline, LLC v. Appalachian Voices, 144 S. Ct. 42 (2023) (No. 23A35).

210. *See id.*

211. 43 U.S.C. § 1652(b).

action is beyond the scope of authority conferred by this chapter."[212] Unlike § 324, the TAPAA did not channel claims to a single court. A party could bring a claim under the TAPAA in any district court, and "such court shall have exclusive jurisdiction to determine such proceeding . . . and no other court of the United States . . . shall have jurisdiction of any such claim whether in a proceeding."[213] Thus, if a party brought a claim to its desired district court, Congress limited jurisdiction to that court.

As mentioned above, arguments to support channeling to either the Federal Circuit or the D.C. Circuit are more convincing if such channeling invokes their particular expertise with the class of cases at issue. As discussed earlier, the D.C. Circuit, for instance, has been the sole source of judicial review of petitions against the EPA under the core environmental statutes.[214] But where one particular factual scenario is channeled to one of these courts, it again appears results oriented. This flies in the face of the Supreme Court in *Klein*, which found it troublesome that the statute did "not intend to withhold appellate jurisdiction except as a means to an end."[215] For how much expertise can be developed by a court that only hears challenges to a class of cases that consists of only one?

Left without an argument for particular expertise of a coequal tribunal, Congress minimizes the range of possible motivations for the channeling. Of the thirteen federal circuit courts, there is little structural difference between eleven of them other than their jurisprudence, reputations, and philosophies of the judges that sit on them.[216] Why is the D.C. Circuit in a better position to judge the constitutionality of § 324 than the Fourth Circuit? Any channeling from one inferior court to a coequal inferior court is likely in response to judicial decisions in a particular jurisdiction that are not to Congress's liking. Is there anything to stop Congress from channeling jurisdiction from other coequal circuits (i.e., Ninth Circuit to U.S. Court of Appeals for the Fifth Circuit or vice versa) in hopes of a more favorable ruling? Or, to stop it from channeling to one specific judge that Congress finds "difficult" or "uncooperative" even though checks and balances are infused with an expectation that the branches will find themselves at odds with each other?[217] Judge Stephanie D. Thacker even writes separately in

212. *Id.* § 1652(d).

213. *Id.*

214. *See supra* notes 174–75 and accompanying text.

215. United States v. Klein, 80 U.S. (13 Wall.) 128, 145 (1871).

216. *See About the U.S. Court of Appeals*, U.S. COURTS, https://www.uscourts.gov/about-federal-courts/court-role-and-structure/about-us-courts-appealsFraser [https://perma.cc/G8MW-QJ7N] (last visited Mar. 7, 2025); Fraser et al., *supra* note 178 (discussing how the D.C. Circuit differs compared to other typical circuit courts); Roy W. McLeese III, *Disagreement in D.C.: The Relationship Between the Supreme Court and the D.C. Circuit and Its Implications for a National Court of Appeals*, 59 N.Y.U. L. REV. 1048 (1984) (exploring why cases from the D.C. Circuit are three times more likely to have certiorari granted than cases from other circuits); The Committee on Patents, *The New Court of Appeals for the Federal Circuit*, 37 REC. ASS'N BAR. CITY N.Y. 732 (1982) (discussing the formation of the Court of Appeals for the Federal Circuit as a new distinct circuit with special jurisdiction).

217. Hill, *supra* note 163 (noting a similar problem with forum shopping). As of 2018, fifty-five of the ninety-four federal district courts are divided by geography, and "at least 35

Appalachian Voices to note that "Congress's use of its authority in this manner threatens to disturb the balance of power between coequal branches of government. Such exercises of the legislative authority 'should be viewed with great skepticism.'"[218] Inferior court shopping impacts perceptions of the validity of the legislative process.

3. Strip of Jurisdiction Targeted to Benefit a Single Private Party

A third troublesome aspect is the extremely narrow strip of jurisdiction to benefit a single private party. Congress has wide latitude to modify jurisdiction however it sees fit. It could strip all jurisdiction to review a particular matter or class of cases,[219] or it could merely limit particular remedies.[220] As others have noted, for example, the APA limits judicial review to final agency actions,[221] whereas the Atomic Energy Act of 1954[222] limits review to final U.S. Nuclear Regulatory Commission decisions "granting, suspending, revoking, or amending" a nuclear power facility's license or construction permit.[223]

The Supreme Court appears to consider individual grievances as a necessary sacrifice of a separation of powers system. Justice Antonin Scalia, writing for the majority in *Plaut*, acknowledged that the "individual oppression [that] may now and then proceed from the courts of justice" is worth it for the general liberty of the people created by the separation of powers.[224] The Court then held that "[i]t makes no difference whatever to that separation-of-powers violation that it is in gross rather than particularized."[225] Perhaps such singular focus is irrelevant to a separation of powers violation, but it can still affect the public perception of the legislative and judicial branches.

Justices over the decades seem to agree. In his *Plaut* concurrence, Justice Stephen G. Breyer found that three features of a statute that, taken together, show Congress was impermissibly trying to apply, as well as make, law:

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of those 55 divisions appear to have either a single district judge or two district judges assigned to each." *Id.*

218. Appalachian Voices v. U.S. Dep't. of Interior, 78 F.4th 71, 84 (4th Cir. 2023) (Thacker, J., concurring) (citing Patchak v. Zinke, 138 S. Ct. 897, 913 (2018) (Sotomayor, J., concurring in judgment)).

219. *See* Kucana v. Holder, 558 U.S. 233, 248 (2010) (interpreting Congress's strip of judicial review in § 1252(a)(2)(B) as applying only to attorney general determinations made discretionary by statute, not to determinations declared discretionary by the attorney general themself through regulation); Lucas Guttentag, *"Court Stripping" in the 1996 Immigration Laws: A Dangerous Precedent*, 20 DEF. ALIEN 213, 214 (1997) (discussing Congress's strip of federal courts' jurisdiction to review immigration deportation orders).

220. *See, e.g.*, *supra* notes 202–03 and accompanying text (limiting ability of district courts to grant injunctions).

221. *See* 5 U.S.C. § 704.

222. 42 U.S.C. § 2011 et seq.

223. *Id.* § 2231(b).

224. Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 223 (1995) (quoting THE FEDERALIST No. 78 (Alexander Hamilton)).

225. *Id.* at 239.

retroactivity, reopening of closed judgments, and *application to a limited number of individuals*.[226] The statute at issue "adversely treated a few individuals" and "singl[ed] out a few individuals for adverse treatment."[227] Although acknowledging that Congress can enact legislation that focuses on "a small group, or even a single individual," Justice Breyer focused on the importance of providing "some of the assurances against 'singling out' that ordinary legislative activity normally provides—say, prospectivity and general applicability."[228] Because Justice Breyer could find "no offsetting legislative safeguards" to minimize the risks that separation of powers seeks to avoid, he found the statute unconstitutional.[229]

The Supreme Court's opinion in *Patchak v. Zinke* is also instructive.[230] A four-justice plurality upheld the constitutionality of the strip in the Gun Lake Trust case, finding, among other things, that the statutory provision at issue (§ 2 of the Indian Reorganization Act) "extends to all suits" related to the property in question and is not "limited to Patchak's case."[231] In contrast, the Fiscal Responsibility Act's narrow language contains no general applicability beyond the private developer of the pipeline, Mountain Valley.[232] It is consistent with the admonitions of scholars who are concerned about the legitimacy of a legislature that could completely eviscerate the federal court system. Needless to say, a Congress that weaponizes its Exceptions and Regulations Clause power for the benefit of a single party reflects poorly upon an entire branch of U.S. government. The ratification of the approvals inured to the financial benefit of only Mountain Valley, who stood to profit from its nearly $10 billion investment.[233]

As if it was not enough to dictate a win for Mountain Valley, Congress went even further. The Fiscal Responsibility Act stripped parties of judicial review of only one type of agency action: approvals.[234] Interestingly, Congress left in place a court's ability to review denials. In some ways, this is similar to the troublesome conditional strip of judicial review in *Klein*.[235]

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226. *Id.* at 241 (Breyer, J., concurring) (emphasis added).

227. *Id.* at 246.

228. *Id.* at 242–43 (citing United States v. Brown, 381 U.S. 437, 461 (1965) ("Congress must accomplish [its desired] results by rules of general applicability. It cannot specify the people upon whom the sanction it prescribes is to be levied.")).

229. *Id.* at 246.

230. 138 S. Ct. 897 (2018).

231. *Id.* at 910.

232. *See supra* Part II.A.

233. Curtis Tate, *Mountain Valley Pipeline's Final Cost Close to $10B*, VPM (Dec. 3, 2024, 12:28 PM), https://www.vpm.org/news/2024-12-03/mountain-valley-pipelines-cost-10-billion [https://perma.cc/J4BX-NUJ8]; Matt Busse, *Once Again, the Mountain Valley Pipeline Will Finish Later and Cost More Than Planned*, CARDINAL NEWS (Feb. 20, 2024), https://cardinalnews.org/2024/02/20/once-again-the-mountain-valley-pipeline-will-finish-later-and-cost-more-than-planned/# [https://perma.cc/LP52-CK7B]. Mountain Valley argues that residents of the state and region receive reliability benefits from having additional access to natural gas, but that diffuse benefit is distinct from a direct financial profit that Mountain Valley receives.

234. *See supra* notes 167–69 and accompanying text.

235. United States v. Klein, 80 U.S. (13 Wall.) 128, 145 (1871).

There, the courts only lost jurisdiction if they found the pardon was to be ignored.[236] Here, the courts only lose jurisdiction if an agency "grants an authorization."[237] Presumably, this means that MVP would maintain the right of judicial review if an agency denied an authorization related to the pipeline. It may be a moot point, because of the earlier section where Congress ratified and approved all authorizations "[n]otwithstanding any other provision of law,"[238] but it creates troublesome optics regardless.

The three dissenting Supreme Court justices in *Patchak* expressed concerns about such administrative forum shopping without using this term. In his dissent, Chief Justice Roberts noted that "Congress cannot, under the guise of altering federal jurisdiction, dictate the result of a pending proceeding" and that "'changing the law' must imply *some measure of generality* or preservation of an adjudicative role for the courts."[239] The Fourth Circuit in *Appalachian Voices* agreed, cautioning that "an Act that merely deprives federal courts of jurisdiction over a single proceeding is not enough to be considered a change in the law and . . . any statute that portends to do so should be viewed with great skepticism."[240] Scholars have similarly remarked that "access to any form of judicial relief[,] . . . if it is to be provided at all, it must be provided evenhandedly."[241]

Senator Manchin's amicus brief explains that § 324 does not impinge on judicial power because, under a Ninth Circuit precedent, Congress directing an agency to act equates to amending the law.[242] He further argued that § 324 "applies equally to any lawsuit whether pending on, or filed after, the date of enactment, in any court, challenging any agency authorization necessary for the construction and initial operation of the pipeline."[243] Thus, according to Senator Manchin, § 324 does not "target a single party for adverse treatment and direct the precise disposition of his pending case," the concern Chief Justice Roberts voiced in *Patchak*.[244] But the Ninth Circuit is not the final word on this issue. There is debate about whether § 324 actually provides a new legal standard. It does not change any of the environmental laws that the Fourth Circuit found them in violation of.

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236. *See id.*

237. *See* Fiscal Responsibility Act, Pub. L. No. 118-5, § 324(e), 137 Stat. 10, 47–48 (2023); *see also supra* note 135.

238. Fiscal Responsibility Act § 324(c).

239. Patchak v. Zinke, 138 S. Ct. 897, 919–20 (2018) (Roberts, C.J., dissenting) (emphasis added).

240. Appalachian Voices v. U.S. Dep't. of Interior, 78 F.4th 71, 78–79 (4th Cir. 2023) (citing *Patchak*, 138 S. Ct. at 913 (Sotomayor, J., concurring)).

241. Laurence H. Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts*, 16 HARV. C.R.-C.L. L. REV. 129, 142–43 (1981).

242. *See* Brief for Senator Manchin III as Amicus Curiae in Support of Applicant, *supra* note 209, at 7 (citing All. for the Wild Rockies v. Salazar, 672 F.3d 1170, 1174 (9th Cir. 2012)).

243. *Id.* at 8. Senator Manchin tried to argue that § 324 applies evenly to any party seeking to challenge agency authorizations, but where only one challenge exists, this is the functional equivalent of targeting. *See id.*

244. *Id.* (quoting *Patchak*, 138 S. Ct. at 917 (Roberts, C.J., dissenting)).

Administrative forum shopping is also troubling because of what it implies for the ability of a single private party to use their financial and political influence to obtain a favorable legal decision through congressional fiat.[245] Much ink has been spent on the impacts of lobbyists on Congress,[246] but such influences can be countered by other special interests playing a game with unspoken rules contained within one branch of government.[247] When Congress lets such special interests intrude upon another branch, these actions should be viewed with much more skepticism. These narrow strips that benefit one particular private party are often the result of intensive lobbying efforts. In *Patchak*, Chief Justice Roberts notes that the tribe "persuaded Congress to enact a standalone statute . . . to terminate the suit."[248] Similarly, Mountain Valley was intimately involved in the drafting of the Fiscal Responsibility Act.[249] Though far from immune from political corruption,[250] most view the judiciary as more protected than legislators, who have a baked-in process for entertaining the views of their constituents that enables lobbyists to exercise significant influence.[251]

Administrative forum shopping also has more of a practical impact than scholars generally assume due to the targeted and narrow jurisdictional strip

245. Chappell, *supra* note 129 (reporting that Senator Manchin receives three times as much money from pipeline companies than any other member of Congress).

246. *See* Stanley S. Surrey, *The Congress and the Tax Lobbyist – How Special Tax Provisions Get Enacted*, 70 HARV. L. REV. 1145 (1957) (discussing the relationship between Congress and tax lobbyists in passing "special tax provisions"); Charles D. Ablard, *The Washington Lawyer-Lobbyist*, 38 GEO. WASH. L. REV. 641 (1970) (arguing lawyers acting as lobbyists play important roles in helping formulate legislation); Richard L. Hasen, *Lobbying, Rent-Seeking, and the Constitution*, 64 STAN. L. REV. 191 (2012) (arguing lobbyists threaten national economic welfare through rent-seeking activity); Alexander V. Hirsch, Karam Kang, B. Pablo Montagnes & Hye Young You, *Lobbyist as Gatekeepers: Theory and Evidence*, 85 J. POL. 731 (2023) (examining the gatekeeping role lobbyists play between interest groups and politicians).

247. Anita S. Krishnakumar, *Towards a Madisonian, Interest-Group-Based, Approach to Lobbying Regulation*, 58 ALA. L. REV. 513, 517 (2007) (discussing how interest groups have an incentive to "check" each other's efforts and effective regulation would harness this incentive to further public goals).

248. *Patchak*, 138 S. Ct. at 916 (Roberts, C.J., dissenting).

249. *See* Daniel Moore & Kellie Lunney, *Manchin Side-Deal Text Lacks Mention of Mountain Valley Pipeline*, BLOOMBERG GOV. (Aug. 3, 2022), https://about.bgov.com/insights/news/manchin-side-deal-text-lacks-mention-of-mountain-valley-pipeline/ [https://perma.cc/FS73-PDHK]; Chappell, *supra* note 129 ("The Fiscal Responsibility Act devotes fewer pages to the debt ceiling than it does to the pipeline."); Maxine Joselow, *How a Fossil Fuel Pipeline Helped Grease the Debt Ceiling Deal*, WASH. POST (May 31, 2023), https://www.washingtonpost.com/climate-environment/2023/05/31/debt-deal-mountain-valley-pipeline/ [https://perma.cc/3X4U-RF7H].

250. *See* U.S. SENATE COMM. ON THE JUDICIARY, AN INVESTIGATION OF THE ETHICS CHALLENGE AT THE SUPREME COURT (2024), https://drive.google.com/file/d/1ze1Xu95W-NCafPNP-mWhyeX3rENdkyM9/view [https://perma.cc/E5W4-VLUP] (cataloguing misconduct by Supreme Court justices).

251. Stephen B. Burbank, *The Architecture of Judicial Independence*, 72 S. CAL. L. REV. 315, 317 (1999). *But see* Bryan Metzger & Oma Seddiq, *More Than 60% of Americans Say the Supreme Court Is Motivated by Politics, While Just 32% Believe They Rule Based on Law: Poll*, BUS. INSIDER (Nov. 19, 2021, 11:07 AM), https://www.businessinsider.com/61-percent-think-supreme-court-motivated-politics-not-law-poll-2021-11 [https://perma.cc/U2LR-FRSJ].

to benefit a particular party.[252] Contrary to claims by Professors Daniel Epps and Alan M. Trammell, for instance, who argue that "[t]o the extent that jurisdiction stripping can prove beneficial in some contexts, it does so only in subtle, indirect, and unreliable ways,"[253] interfering with pending litigation to alter the jurisdiction of the reviewing court to benefit one particular party results in explicit, direct, and reliable impacts. Skeptics of the broader impact of the administrative forum shopping that occurred with respect to the MVP may argue that its impact is limited by the rare perfect storm that allowed Senator Manchin to have this unique leverage.[254] But this situation can still provide Congress and lobbyists with a blueprint for how to circumvent the judiciary.[255]

Courts also have expressed concern both with congressional strips where the government was a party and where the legislature put a finger on the scales in favor of the government.[256] The Supreme Court in *Klein* indicated that this "passed the limit which separates the legislative from the judicial power."[257] Here, the Fiscal Responsibility Act affirmed all federal agency approvals, a determination in favor of the government. In so doing, the determination benefited the private party, Mountain Valley, who had been waiting for the pipeline approvals. The Fourth Circuit felt similarly about the MVP case, stating that "Section 324 [of the Fiscal Responsibility Act] sought to thwart the petitions by the environmental groups for review of the permits granted by the relevant agencies."[258] Such narrow strips that benefit

252. In an attempt to address such negative optics in private forum shopping and staunch the flow of cases to one particular patent-friendly judge, for example, the U.S. District Court for the Western District of Texas announced a new policy in 2022 of randomly assigning patent cases filed in Waco to one of the twelve judges on the district court. *See* Order Assigning the Business of the Court As It Relates to Patent Cases (July 25, 2022), https://www.txwd.uscourts.gov/wp-content/uploads/Standing%20Orders/District/Order%20Assigning%20the%20Business%20of%20the%20Court%20as%20it%20Relates%20to%20Patent%20Cases%20072522.pdf [https://perma.cc/ZN8D-LK5E].

253. Epps & Trammell, *supra* note 5, at 2080–81.

254. *See* Nicholas Goldberg, *Column: How Joe Manchin Got His Superpowers*, L.A. TIMES (Aug. 4, 2022, 3:00 AM), https://www.latimes.com/opinion/story/2022-08-04/joe-manchin-swing-voter-john-roberts [https://perma.cc/6HGE-LNJE] (describing how Senator Manchin has far outsized influence due to his position as the swing vote in an otherwise divided Senate).

255. *See* Appalachian Voices v. U.S. Dep't of Interior, 78 F.4th 71, 84 (4th Cir. 2023) (Gregory, J., concurring in judgment).

256. *See* United States v. Klein, 80 U.S. (13 Wall.) 128, 147 (1871) ("Congress has already provided that the Supreme Court shall have jurisdiction of the judgments of the Court of Claims on appeal. Can it prescribe a rule in conformity with which the court must deny to itself the jurisdiction thus conferred, because and only because its decision, in accordance with settled law, must be adverse to the government and favorable to the suitor? This question seems to us to answer itself."); United States v. Sioux Nation of Indians, 448 U.S. 371, 405 (1980) (distinguishing *Klein* from the current case regarding Congress's amendments to a statute impacting the jurisdiction of the U.S. Court of Claims by explaining "First, of obvious importance to the *Klein* holding was the fact that Congress was attempting to decide the controversy at issue in the Government's own favor").

257. *Klein*, 80 U.S. (13 Wall.) at 147.

258. *Appalachian Voices*, 78 F.4th at 75.

a single party impact perceptions of the validity of the legislative process. Congress can change its own laws, but it must change them for everyone.

In short, even if administrative forum shopping is authorized by the Constitution, the timing, scope, and targeting of the Fiscal Responsibility Act reflect congressional motivations that do not comport with public perceptions of the balance of power between the legislative and judicial branches. But the circumstances of *Appalachian Voices* also provide a springboard for a more theoretical exploration of the tensions between jurisdiction stripping and administrative law.

III. LIMITING ADMINISTRATIVE FORUM SHOPPING

The obvious remedy to limit administrative forum shopping is for Congress to avoid meddling in pending litigation against a federal agency, for the benefit of a single party, that completely strips all judicial review over agency approvals. But with the weight of jurisprudence upholding broad congressional acts to strip jurisdiction with abandon, the other option is to challenge the constitutionality of the stripping provision itself.

To challenge the constitutionality of a stripping statute requires one to enter the decades-long fray about whether there is a constitutional right to judicial review of agency action, whether Article III or the Due Process Clause provides the strongest source of such authority, and the distinctions between strips of jurisdiction over only statutory claims (e.g., those related to permitting the pipeline under federal environmental statutes) and strips of jurisdiction over constitutional claims.[259]

At first glance, a challenge to § 324 appears weak because Congress has full authority to strip jurisdiction over statutory claims. Courts have opined that because those statutory claims originated with Congress in the first place, Congress is allowed to narrow or remove jurisdiction over those claims. But "while the greater power to create inferior federal courts generally includes the power to strip those courts of jurisdiction, at a certain point that lesser exercise of authority invades the judicial function."[260] The three dissenting justices in *Patchak* are the only ones who provide a potential pathway to block strips of such statutory claims—where there is a targeted statute.

On the contrary, because constitutional claims originated with the Constitution, Congress is not allowed to remove jurisdiction over those claims. Although there is much disagreement about jurisdictional stripping and administrative action, the one thing that both courts and scholars seem to agree on is that Congress cannot strip jurisdiction over constitutional claims.[261] As the D.C. Circuit has stated, the "delicate balance implicit in

259. *See infra* Part III.B.

260. Patchak v. Zinke, 138 S. Ct. 897, 919 (2018) (Roberts, C.J., dissenting).

261. *Id.* at 906 (majority opinion) (holding Congress can strip courts of jurisdiction "[s]o long as Congress does not violate other constitutional provisions"); *Klein*, 80 U.S. (13 Wall.) at 147–48 (holding Congress cannot strip courts of jurisdiction in ways that encumber other constitutionally vested powers).

the doctrine of separation of powers would be destroyed if Congress were allowed not only to legislate, but also to judge the constitutionality of its own actions."[262]

In addition to these separation of powers concerns, administrative forum shopping that completely strips all judicial review of agency action could still be constitutionally vulnerable under the Due Process Clause. As one may recall, *Klein* provided evidence that courts could strike down unconstitutional strips,[263] and the dissenters in *Patchak* suggested that targeted statutes could similarly be set aside.[264] This last section tackles the tangled route by which administrative forum shopping of MVP's variety could be enough to cause courts to finally narrow the boundary of acceptable congressional strips.

As discussed above, Congress took extreme steps to accomplish its goal of siting this pipeline. It not only superseded all other federal laws designed to ensure that pipelines are satisfying public participatory and environmental goals and ratified all federal approvals for the pipeline, but also stripped agencies of their ability to make determinations about the pipeline and stripped all federal courts of their jurisdiction to review any agency approvals.[265] Section 324 of the Fiscal Responsibility Act stripped all judicial review of the selected agency actions approving the pipeline, but provided one last pathway: "The United States Court of Appeals for the District of Columbia Circuit shall have original and exclusive jurisdiction over *any claim alleging the invalidity of this section* or that *an action is beyond the scope of authority conferred by this section*."[266] This allows petitioners to claim that § 324 itself is unconstitutional.[267] Such an analysis requires us to enter the decades-long discourse about the viability of judicial review of administrative actions and the difference between strips of statutory and constitutional claims.[268] It urges Congress to take a more cautious approach to jurisdiction stripping of judicial review over agency actions, highlighting arguments to retain rights for those aggrieved by administrative agency action, as well as urging us to be more cautious about strips that stretch the limits of *Klein* to such uncomfortable lengths. As such, this last section explores the viability of challenging stripping statutes on the basis of (1) a targeted statute that violates Article III and (2) an unconstitutional strip under the Due Process Clause.

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262. Bartlett v. Bowen, 816 F.2d 695, 707 (D.C. Cir. 1987).

263. *See Klein*, 80 U.S. (13 Wall.) at 147–48.

264. *See Patchak*, 138 S. Ct. at 917–18.

265. *See infra* Part II.A.

266. Fiscal Responsibility Act of 2023, Pub. L. No. 118-5, § 324(e)(2), 137 Stat. 10, 47–48 (emphasis added).

267. At the time of publication, only one action has been filed in the D.C. Circuit by landowners challenging Mountain Valley's use of eminent domain. *See* Bohon v. Fed. Energy Regul. Comm'n, 92 F.4th 1121, 1122 (D.C. Cir. 2024) (affirming the district court's dismissal of a challenge to the constitutionality of FERC's issuance of a certificate of public convenience and necessity for the MVP under the Natural Gas Act).

268. *See infra* Part III.B.

*A. Avoiding Article III Violations (*Klein/Patchak *Dissent Missteps)*

The dissent in *Patchak* found that because Congress's Gun Lake Act "specifies how it [the suit] must be resolved, and deprives [Patchak] of any judicial forum for his claim, . . . [the decision reflects] the highwater mark of legislative encroachment on Article III."[269] Similarly, § 324 specifies how the suit must be resolved and deprives any party from any judicial forum to challenge agency approvals. It is the epitome of a targeted statute that intrudes upon the judiciary and could reflect the factual circumstances required to push the court beyond *Patchak*. As discussed earlier, *Patchak* fractured the Supreme Court, with a bare plurality affirming, three dissenting justices, and two separate concurrences. The Chief Justice could have more success in procuring five votes in his favor with the current makeup of the Supreme Court. This section will demonstrate how § 324 can be construed to dictate how a suit must be resolved.

Similar to the concerns in *Patchak*, such a scenario could run afoul of the warnings to Congress not to "dictat[e] the result" in violation of the *Klein* principle.[270] The Supreme Court in *Plaut* acknowledged that

> [i]f the legislature cannot thus indirectly control the action of the courts, by requiring of them a construction of the law according to its own views, it is very plain it cannot do so directly, by setting aside their judgments . . . or directing what particular steps shall be taken in the progress of a judicial inquiry.[271]

Similarly, the Supreme Court in *Klein* found that it was unconstitutional for the statute to require the court to ascertain the existence of certain facts and then declare that jurisdiction on appeal has ceased.[272] The Court classified this as Congress providing an improper "rule of decision" to the Court by providing that the "court is forbidden to give the effect to evidence, which, in its own judgment, such evidence should have, and is directed to give it an effect precisely to the contrary."[273]

In the same way, § 324 forbids the Court to give effect to evidence that the agencies failed to satisfy their obligations under other federal law.[274] Instead, the statute forces all courts to give it the exact opposite effect (that such agency evaluations were valid).[275] Although Congress superseded other federal laws that normally applied, Congress did not change the law of the

269. Patchak v. Zinke, 138 S. Ct. 897, 921 (2018) (Roberts, C.J., dissenting).

270. *Id.* at 919.

271. Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 225 (1995) (quoting THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 95 (Little, Brown & Co. 1868)).

272. *See* United States v. Klein, 80 U.S. (13 Wall.) 128, 147 (1871).

273. *Id.*

274. *See* Fiscal Responsibility Act of 2023, Pub. L. No. 118-5, § 324(c), (e), 137 Stat. 10, 47–48.

275. *See id.*

Endangered Species Act,[276] the National Environmental Protection Act,[277] the Federal Power Act,[278] or the APA[279] that the Fourth Circuit had applied to the agency actions on the pipeline prior to the strip. The same legal standards are in place for every other agency action that evaluates the siting of a pipeline under these laws. Echoes of the limits of congressional jurisdiction from Supreme Courts of old ring in our ears. There is a legitimate question as to whether any new circumstances were created by the legislation.[280] Is there anything left for the courts to decide? It surely seems to specify how the suit should be resolved.

The Fourth Circuit in *Appalachian Voices* addressed this concern without reference to *Klein*. In *Klein*, the Supreme Court held that "the executive alone is intrusted the power of pardon" without limit.[281] Congress tried to change the effect of such pardon, stripping jurisdiction where a Court respected the Executive's grant of a pardon as evidence sufficient to recover their property.[282] Congress's 1870 statute would have required the Court to disregard Executive pardons and deny them their legal effect. "This certainly impairs the executive authority and directs the court to be instrumental to that end."[283]

By contrast, the MVP case does not involve a pardon, so it does not invoke the same concerns about Congress directing a court to impair executive authority. However, there are parallels in the way Congress stripped the court of its power because it ruled in a certain way. In *Klein*, jurisdiction was stripped if the court acknowledged the pardon.[284] In MVP, jurisdiction was stripped because the Fourth Circuit acknowledged limits on administrative agencies.[285]

The Fourth Circuit goes on to note that

> Petitioners in this case vehemently argue that the jurisdiction-stripping provision in Section 324(e) suffers from the same constitutional infirmities that at least four Justices saw as existing with the statute in *Patchak*. Specifically, Petitioners argue that Section 324(e) "manipulates" jurisdiction to direct entry of judgment for a particular party, the Mountain Valley Pipeline, in pending litigation.[286]

In short, these negative implications of stripping both courts and administrative agencies of authority over a specific project creates a sort of congressional superpower that disrupts the balance between the three

276. 16 U.S.C. §§ 1531–1544.
277. 42 U.S.C. §§ 4321–4347.
278. 16 U.S.C. §§ 791a–825r.
279. 5 U.S.C. §§ 551–706.
280. Patchak v. Zinke, 138 S. Ct. 897, 921–22 (2018) (Roberts, C.J., dissenting).
281. United States v. Klein, 80 U.S. (13 Wall.) 128, 147 (1871).
282. *See id.* at 148.
283. *Id.*
284. *See id.* at 143.
285. *See* Appalachian Voices v. U.S. Dep't. of Interior, 78 F.4th 71, 77–78 (4th Cir. 2023).
286. *Id.* at 79 (citing Patchak v. Zinke, 138 S. Ct. 897, 919–20 (2018) (Roberts, C.J., dissenting) (expressing the view that Congress impermissibly "exercises the judicial power when it manipulates jurisdictional rules to decide the outcome of a particular pending case")).

branches and pushes the boundaries of *Klein* and *Patchak*. Unlike the Gun Lake Act provision, which created a class of all claims "relating to the land" and directing that any such action "shall be promptly dismissed,"[287] § 324 dictates the result for one particular party, thus depriving other parties of any judicial forum for their claim and pushing the legislature even further into murkier separation of powers waters.

B. Avoiding Due Process Violations

In addition to the separation of powers concerns associated with a legislature dictating a result, there is an argument that strips of this sort deprive parties of any judicial forum for their claim and in doing so violate the Due Process Clause.[288] Constitutional scholars remark that "[d]ue process doctrine subsists in confusion."[289] But a core aspect of due process is the right to a hearing at a meaningful time and in a meaningful manner.[290] Scholars have argued that inadequate administrative procedures or delayed judicial review violate this core due process right.[291] In evaluating the extent to which inferior courts had jurisdiction over statutory claims, the Supreme Court often bases its decisions on the need for petitioners to "as a practical matter be able to obtain meaningful judicial review."[292] There is a litany of other cases where a petitioner prevailed where they "had no other means, within their control . . . to protect and enforce that right"[293] and where "petitioner had made a colorable showing that full postdeprivation relief could not be obtained."[294] There is an argument that stripping all courts of the power of judicial review does not provide the meaningful opportunity that due process requires.

In determining the boundaries of legislative authority, courts and scholars have coalesced around a distinction between congressional strips of statutory versus constitutional rights.[295] Congress has largely free reign to adjust judicial review of statutory rights but is much more restricted in its ability to strip judicial review of constitutional rights. Various legal scholars support

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287. *Patchak*, 138 S. Ct. at 904.

288. "No person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. The Supreme Court has construed the Fourteenth Amendment's Due Process Clause to impose the same procedural due process limitations on the states as the Fifth Amendment does on the federal government. *See* Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

289. Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 309 (1993).

290. *See* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538, 542 (1985); Bond v. United States, 564 U.S. 211, 222 (2011) ("[I]ndividuals sustain discrete, justiciable injury from actions that transgress separation-of-powers limitations.").

291. *See generally* Luis Inaraja Vera, *Delayed Judicial Review of Agency Action*, 56 HARV. J. ON LEGIS. 199 (2019).

292. Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 213 (1994) (citing McNary v. Haitian Refugee Ctr., Inc., 498 U.S. 479, 496 (1991)).

293. *Id.* (citing Leedom v. Kyne, 358 U.S. 184, 190 (1958)).

294. *Id.* (citing Mathews v. Eldridge, 424 U.S. 319, 331 (1976)).

295. *Compare, e.g.*, Patchak v. Zinke, 138 S. Ct. 897, 902–03 (2018) (statutory), *with* United States v. Klein, 80 U.S. (13 Wall.) 128 (1871) (constitutional).

the view that jurisdictional strips of constitutional rights violate the Due Process Clause.[296] The Second Circuit has held that "while Congress has the undoubted power to give, withhold, and restrict the jurisdiction of courts other than the Supreme Court, it must not so exercise that power as to deprive any person of life, liberty, or property without due process of law or to take private property without just compensation."[297] Supreme Court jurisprudence demonstrates the importance of an available Article III court to review alleged claims that implicate such private rights.[298] Partly for this reason, there is continued debate about whether there is a constitutional right to judicial review. If parties are found to have a right to judicial review of agency action, and if such right is denied, serious constitutional questions could arise.

1. A Constitutional Right to Judicial Review of Administrative Action?

In *Marbury v. Madison*,[299] Chief Justice John Marshall wrote that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."[300] But Professor Fallon argues that there is nevertheless "no right to an individually

296. *See, e.g.*, Martin H. Redish, *Constitutional Limitations on Congressional Power to Control Federal Jurisdiction: A Reaction to Professor Sager*, 77 NW. U. L. REV. 143, 158–59 (1982) (arguing that foreclosing all federal jurisdiction and allowing only state courts to review constitutional decisions violates the "due process right to an independent forum"); Tribe, *supra* note 241, at 138–39 (arguing that stripping federal jurisdiction to target disfavored rights would violate due process in many instances); Erwin Chemerinsky, Essay, *A Framework for Analyzing the Constitutionality of Restrictions on Federal Court Jurisdiction in Immigration Cases*, 29 U. MEM. L. REV. 295, 313 (1999) (arguing the complete preclusions of federal jurisdiction should be viewed as offending separation of powers and due process); Louise Weinberg, Symposium, *The Article III Box: The Power of "Congress" to Attack the "Jurisdiction" of "Federal Courts"*, 78 TEX. L. REV. 1405, 1424 (2000) ("[B]ecause state judicial power over federal agencies and officials is severely limited, federal jurisdiction to review their work is all but exclusive. That means that due process is likely to be at stake when access to federal courts for judicial review of federal government action is at stake.").

297. Battaglia v. Gen. Motors Corp., 169 F.2d 254, 257 (2d Cir. 1948); *see also* Mila Sohoni, *Agency Adjudication and Judicial Nondelegation: An Article III Canon*, 107 NW. L. REV. 1569, 1585 (2013) (arguing that judicial review in an Article III court should be required to vindicate the "core" private rights to life, liberty, and property"). Additionally, with Supreme Court takings jurisprudence arguably expanding the scope of the Takings Clause over time, see Michael Allan Wolf, *Superfluous Judicial Activism: The Takings Gloss*, 91 GEO. WASH. L. REV. 287, 296 (2023) (describing this expansion), and with new justices being particularly interested in defending plaintiffs' property rights, one can imagine a takings argument against jurisdiction stripping that leaves a plaintiff without any forum to seek just compensation. *See* Sheetz v. Cnty. of El Dorado, 144 S. Ct. 893, 900 (2024) (holding that the rule for determining if permit requirements amount to an unconstitutional taking under the Takings Clause applies to both legislative and administrative permits); Devillier v. Texas, 144 S. Ct. 938, 941, 944 (2024) (considering whether the Takings Clause provides for a self-executing cause of action before avoiding the question due to procedural posture).

298. *See, e.g.*, Crowell v. Benson, 285 U.S. 22 (1932); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

299. 5 U.S. (1 Cranch) 137, 163 (1803).

300. *Id.*

effective remedy for every constitutional violation."[301] According to Professor Fallon, "[u]nder Marbury, it is a judicial question whether there is a constitutional right to judicial review and, if review is granted and a violation of applicable norms is found, whether there is a right to a remedy."[302]

Seeking clarity from our forefathers does not resolve the matter. Justice Louis D. Brandeis's famous dissent in 1932 that "*under certain circumstances*, the constitutional requirement of due process is a requirement of judicial process"[303] does not clarify what those circumstances would be. A little over a decade later, Justice William O. Douglas attempted this explanation:

> Judicial review *may* indeed be required by the Constitution. Apart from constitutional requirements, the question whether judicial review will be provided where Congress is silent depends on the whole setting of the particular statute and the scheme of regulation which is adopted. (citation omitted). And *except when the Constitution requires it*, judicial review of administrative action may be granted or withheld as Congress chooses.[304]

When does the Constitution require it? What if Congress is not silent on the issue?

The Supreme Court seems more inclined to find a right to judicial review of constitutional questions.[305] While recognizing Congress's broad authority to strip jurisdiction, the Supreme Court has been skeptical of congressional efforts to strip judicial review of potentially unconstitutional government action and the serious constitutional questions that would arise if Congress were to do so.[306] In holding that constitutional claims were not precluded by a national security statute, the Supreme Court in *Webster v. Doe*[307] explained:

> [W]here Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear . . . . We require this heightened

301. Fallon, *supra* note 289, at 311.

302. *Id.* at 367.

303. *Benson*, 285 U.S. at 87 (Brandeis, J., dissenting) (emphasis added).

304. Estep v. United States, 327 U.S. 114, 120 (1946) (emphasis added) (citing Ng Fung Ho v. White, 259 U.S. 276 (1922)); *see also* Douglas E. Edlin, *A Constitutional Right to Judicial Review: Access to Courts and Ouster Clauses in England and the United States*, 57 AM. J. COMP. L. 67, 71 (2009) ("Although the Supreme Court of the United States sometimes refers to a right of access to the courts, the textual basis for this right is uncertain, the factual circumstances in which the Court has discussed the right are fairly narrow, and the right has been described as 'ancillary to the underlying claim.'" (quoting Christopher v. Harbury, 536 U.S. 403, 415 (2002))).

305. *See* Fallon, *supra* note 289, at 367 n.313; Webster v. Doe, 486 U.S. 592, 603 (1988); Bowen v. Mich. Acad. of Fam. Physicians, 476 U.S. 667, 681 (1986); *Benson*, 285 U.S. at 87 (Brandeis, J., dissenting).

306. *See, e.g.*, *Bowen*, 476 U.S. at 681 n.12 (noting a serious constitutional issue would arise if preclusion provision were read to deny a judicial forum for constitutional claims); Johnson v. Robison, 415 U.S. 361, 373–74 (1974) (holding that the prohibition of judicial review of Veterans' Administration decisions does not preclude judicial review of constitutional challenges to veterans' benefits legislation); *supra* notes 66–74 and accompanying text (citing lower court cases).

307. 486 U.S. 592 (1988).

> showing in part to avoid the "serious constitutional question" that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim.[308]

So, what happens when Congress is explicitly clear that it is stripping jurisdiction over not only statutory, but constitutional claims? The Court has expressed the need for a heightened express statement from Congress,[309] but fails to provide sufficient clarity on the full spectrum of allowable stripping.

Few scholars have explicitly focused on the interaction of jurisdiction stripping and agency actions,[310] but more have explored the fundamental legitimacy of judicial review of agency actions.[311] For decades, scholars have been lamenting over "whether and under what circumstances there is a constitutional right to judicial review of administrative action, even when the statute attempts to negate that right."[312] Some have argued that there is no constitutional right to judicial review of agency actions.[313]

But others take issue with these claims, arguing that this fundamental right is inferred by the separation of powers and nondelegation provisions of the Constitution.[314] In making his 2010 argument about the impact of

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308. *Id.* at 603.

309. *Id.* Scholars and courts coalesced around a heightened "clear statement rule" that Congress must adhere to should they seek to do so. Cass R. Sunstein, *Clear Statement Principles and National Security:* Hamdan *and Beyond*, 2006 SUP. CT. REV. 1, 46 (supporting clear statement rules in detention cases).

310. *See generally* Fallon, *supra* note 9.

311. *See, e.g.*, Richard J. Pierce Jr., *The Role of the Judiciary in Implementing an Agency Theory of Government*, 64 N.Y.U. L. REV. 1239 (1989); Edward D. Re, *Due Process, Judicial Review, and the Rights of the Individual*, 39 CLEV. ST. L. REV. 1 (1991); Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. REV. 1657 (2004).

312. *See, e.g.*, Nathaniel L. Nathanson, *The Contributions of Louis L. Jaffe to Administrative Law*, 89 HARV. L. REV. 1667, 1672–73 (1976) (referencing Professor Louis L. Jaffe's work).

313. *See* Frederick v. Schwartz, 296 F. Supp. 1321, 1322 (D. Conn. 1969), *vacated sub nom.* Meltzer v. C. Buck LeCraw & Co., 402 U.S. 936 (1971) ("Ordinarily there is no constitutional right to judicial review of administrative action." (citing Estep v. United States, 327 U.S. 114, 120 (1946))); McCall v. Shapiro, 292 F. Supp. 268, 272–73 (D. Conn. 1968) ("Nor is there any broad constitutional rule that a hearing must invariably precede every administrative action."); Hon. Don R. Willett, Jack M. Beermann, Hon. Charles J. Cooper, Thomas W. Merrill & Amy Wildermuth, *2014 National Lawyers Convention Millennials, Equity, and the Rule of Law Litigation: Time to Revisit* Chevron *Deference?*, 85 MISS. L.J. 737, 756 (2016) (Professor Jack M. Beermann transcript: "There is no constitutional right to judicial review of agency action except when agency action is an adjudication of private rights, where there might be a problem with Article III. Let me repeat that. There is no constitutional right to judicial review of agency action, period.").

314. Inaraja Vera, *supra* note 291, at 201 ("Not surprisingly, scholars have debated at length the extent to which the Constitution constrains Congress's ability to limit the jurisdiction of federal courts, especially in cases involving a challenge of some form of agency action."); RICHARD J. PIERCE, JR., SIDNEY A. SHAPIRO & PAUL R. VERKUIL, ADMINISTRATIVE LAW AND PROCESS 118 (2d ed. 1992) ("Despite the dearth of case law on the issue, dicta in several cases and scholarly analysis suggest strongly that there is a constitutional right to judicial review of constitutional issues raised by agency action."); Fallon, *supra* note 289, at 313 (noting the competing assumptions about judicial review and that "it is widely held that there is a constitutional right to judicial review of every alleged violation of a constitutional right").

Boumediene and substantive constitutional rights, Professor Fallon acknowledged how "judicial review of administrative action is a 'necessary condition' for the political legitimacy of the modern administrative state."[315] He argues that the right to judicial review is not absolute, but that it exists along a spectrum that corresponds with the available remedy.[316]

A complication lies in the limited rationale that courts have provided for the strong presumption against jurisdiction stripping. As the Supreme Court explained in *Bowen v. Michigan Academy of Family Physicians*,[317] "[w]e ordinarily presume that Congress intends the executive to obey its statutory commands and, accordingly, that it expects the courts to grant relief when an executive agency violates such a command."[318] There is an assumption that the agency will be acting in an ultra vires fashion and that the judiciary is needed to keep the agency in check. But what about situations like MVP, where Congress has changed its mind, and the agency is obeying its statutory commands? The problem is not with congressional authority. As discussed in Part I, Congress has the authority to make such changes. The problem is that in so doing, Congress is violating another provision of the Constitution—the Due Process Clause. Can Congress both have authority and be in violation of the Constitution with the same action? Yes. Even though Congress has the authority to strip jurisdiction, Congress is not allowed to exercise its power in a way that deprives a person of life, liberty, or property without due process of law. If those interests are threatened, the case for judicial review strengthens.

In the MVP context, Congress may have forgotten that natural gas pipeline approvals necessarily come with eminent domain. Recognizing that the construction of natural gas pipelines benefits the public, Congress amended § 7 of the Natural Gas Act[319] in 1947 to authorize natural gas companies in possession of a § 7 permit to exercise eminent domain when they are unable to acquire necessary rights-of-way by contract or negotiation with private parties owning land along the way.[320] Implicit in the Takings Clause of the Fifth Amendment is that the federal government possesses the power to take private property for public use through the exercise of eminent domain so long as the property owner receives "just compensation."

Even if a party received just compensation, would a statute that mandates a pipeline be constructed, triggering eminent domain against landowners threaten a private property interest delineated by the Due Process Clause? Would such a property interest demand access to an Article III court to ensure

315. Fallon, *supra* note 9, at 1117.

316. Fallon, *supra* note 289, at 372 ("The weightier the affected individual interest, the greater the likelihood that due process will mandate judicial review and individually effective remediation. The systemic concern works similarly: the more far-reaching an issue's importance, the more likely that the Due Process Clause will require judicial review and a judicial remedy in a particular case.").

317. 476 U.S. 667 (1986).

318. *Id.* at 680–81.

319. 15 U.S.C. §§ 717–717z.

320. *Id.* § 717f(h).

such rights are vindicated? Should Congress try to strip judicial review of such a determination, would it be exceeding its authority and encroaching into a constitutional area to which it is not allowed? Section 324 implicates many of these questions. But Congress has stripped the Fourth Circuit of the ability to entertain such questions, leaving only its self-selected tribunal—the D.C. Circuit. Even though the existence of a right to obtain judicial review of agency action may still in flux, the unique facts surrounding MVP could push a court to provide more clarity.

2. A Statutory Right to Judicial Review?

This last part is largely conceptual, helping to establish the lack of meaningful review provided by Congress in such a strip. In light of the constitutional uncertainty associated with a constitutional right to judicial review, Congress often provides a right of judicial review through statute.[321] Congress has granted subject matter jurisdiction to all federal district courts to review agency action.[322] Congress also has provided for judicial review of agency action through the APA since 1946.[323] Even this statute limits the review available to those that are "suffering legal wrong because of [final] agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute."[324]

Notably, the APA also reserves the power to withhold judicial review by statute. Congress expressly provides:

> [N]othing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.[325]

Because Congress also has control over administrative agencies by prescribing the procedures they must follow, most notably with the APA, it can also override its procedures by subsequent statute.[326]

In evaluating the problems of stripping judicial review over agency decisions, Professor Fallon divided judicial review of agency determinations into three categories: (1) de novo review of constitutional questions, (2) *Chevron* review of agency determinations of law, and (3) deferential

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321. *See, e.g.*, Immigration and Nationality Act, 8 U.S.C. § 1252(b)(9), (g); Clean Air Act of 1963, 42 U.S.C. § 7607(b)(1); Clean Water Act of 1972, 33 U.S.C. § 1369(b); Federal Courts Improvement Act of 1982, 28 U.S.C. § 1295(a)(4).

322. *See* 28 U.S.C. § 1331; Califano v. Sanders, 430 U.S. 99, 105–06 (1977) (explaining that § 1331, not the APA, "confer[s] jurisdiction on federal courts to review agency action").

323. 5 U.S.C. §§ 551–706.

324. *Id.* § 702.

325. *Id.*

326. *See* Stuart Shapiro, *The Role of Procedural Controls in OSHA's Ergonomics Rulemaking*, 67 PUB. ADMIN. REV. 688, 689 (2007) (discussing the way Congress may use procedural controls to influence bureaucratic autonomy).

review of agency determinations of fact.[327] If the threat to property rights that accompanies eminent domain is not enough to trigger the constitutional protections against stripping judicial review, there is still an argument (albeit uphill) for judicial review of the statutory rights at issue in *Appalachian Voices*.[328] This would capture the overwhelmingly larger category of "run-of-the-mill" agency actions concerning permit approvals under major federal environmental law that comprise the bulk of agency decision-making.[329] Even though such scenarios may not implicate fundamental constitutional rights, a strip of judicial review of nonconstitutional rights also has serious impacts. The administrative forum shopping that took place in *Appalachian Voices* provides exactly such a scenario. Various federal executive agencies made determinations about the siting of the natural gas permit.[330] Judicial review of such determinations was appropriately made to the Fourth Circuit consistent with the existing statutory authority to do so.[331] The Fourth Circuit repeatedly held that the agencies were acting in violation of the environmental statutes.[332] Congress then stripped jurisdiction to review such agency determinations from all courts, leaving those aggrieved by such agency decisions with no avenue for review despite a federal law explicitly providing them with one.[333] Doesn't this deprivation of any judicial forum for colorable statutory claims also raise "serious" questions about the perceived legitimacy of congressional actions?[334]

Perhaps the most troubling aspect of stripping all federal courts of the power to review final agency action is the unique posture of the administrative state with respect to state courts. Courts and scholars often take comfort in the idea that stripping all jurisdiction from federal courts is less troubling when state courts still provide a viable judicial remedy.[335] Professor Hart first addressed this safety net when discussing Congress's

327. Fallon, *supra* note 9, at 1116–17. *Loper Bright* has eviscerated the bulk of the second category of *Chevron* review. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024) ("*Chevron* is overruled. Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority.").

328. *See supra* note 118 and accompanying text (referencing challenges brought under two federal statutes—the National Environmental Policy Act and the Endangered Species Act).

329. *Federal Agency Permitting Dashboard*, https://www.permits.performance.gov/fpisc-content/federal-agencies [https://perma.cc/2BT6-VULE] (Apr. 5, 2024) (listing members of the Permitting Council).

330. *See supra* notes 117–20 and accompanying text.

331. *See* Joint Petition for Review, Appalachian Voices v. U.S. Dep't of Interior, 78 F. 4th 71 (4th Cir. 2023) (No. 20-2159).

332. *See supra* note 122 and accompanying text.

333. *See supra* notes 130–35 and accompanying text.

334. Order in Pending Case, 144 S. Ct. 42 (2023), https://www.supremecourt.gov/orders/courtorders/072723zr_j4ek.pdf [https://perma.cc/2TWK-RCYL] (granting MVP's motion to vacate the Fourth Circuit stays in a nonmerits opinion).

335. *See* Hart, *supra* note 13, at 1364 (explaining that state courts may have a constitutional obligation to review cases which federal courts have been stripped of jurisdiction to hear); Bator, *supra* note 44, at 1037 (discussing the important repercussions of congressional stripping of federal court jurisdiction on the residual jurisdiction of state courts).

power to limit lower federal courts' jurisdiction.[336] While arguing that Congress does indeed have plenary power over the jurisdiction of lower federal courts, Professor Hart identified state courts as the "primary guarantors of constitutional rights" and as having a constitutional obligation to hear such cases.[337] Later commentators explain that Professor Hart's argument has support in the Ordain and Establish Clause of Article III itself.[338] Congress, with its exclusive power to create lower federal courts, could have opted not to create them at all, relying solely on state courts to interpret federal law indefinitely.[339] The power to never create lower courts, some argue, includes the lesser power to limit their jurisdiction completely and for those cases to be heard by state courts.[340]

But challenges to administrative actions are unique in that state courts do not have jurisdiction over federal agencies.[341] The sovereign immunity doctrine gives the federal government immunity from suit, unless it gives consent.[342] Congress may waive the government's immunity for specific areas or issues of law and has done so by passing statutes like the APA,[343] the Federal Torts Claim Act,[344] and the Tucker Act,[345] to name a few.[346] However, the doctrine of sovereign immunity does not permit Congress to foreclose all judicial review of the constitutionality of legislation.[347] Thus, even in the administrative context, Congress must provide a forum for constitutional challenges.

Furthermore, courts have repeatedly held that the APA does not waive sovereign immunity for suits against federal administrative agencies in state court.[348] For example, when an oil and gas company sued the EPA in

336. Hart, *supra* note 13, at 1401–02.
337. *Id.* at 1401.
338. Redish, *supra* note 296, at 145.
339. *See* U.S. CONST. art. III, § 1.
340. *Id.*
341. *See supra* note 41 and accompanying text.
342. United States v. McLemore, 45 U.S. (4 How.) 286, 288 (1846); Fed. Deposit Ins. Corp. v. Meyer, 510 U.S. 471, 475 (1994); Aminoil U.S.A., Inc. v. Cal. Water Res. Control Bd., 674 F.2d 1227, 1232 (9th Cir. 1982); Dugan v. Rank, 372 U.S. 609, 620–22 (1963).
343. 5 U.S.C. §§ 551–706.
344. 28 U.S.C. § 2674.
345. *Id.* § 1346.
346. *See, e.g.*, United States v. Nordic Vill. Inc., 503 U.S. 30, 34 (1992) (explaining that Congress's insertion of a "sue and be sued" provision effects a waiver of the agency's sovereign immunity); *Meyer*, 510 U.S. at 475 (noting Congress's waiver of sovereign immunity under the FTCA for "certain torts committed by federal employees"); Franchise Tax Bd. of Cal. v. U.S. Postal Serv., 467 U.S. 512, 517–19 (1984) (finding that Congress's use of a "sue and be sued" provision in the Postal Reorganization Act of 1970 indicated that Congress broadly intended to waive the Postal Service's sovereign immunity); Fed. Hous. Admin. v. Burr, 309 U.S. 242, 245–46 (1940) (allowing a suit to proceed against the FHA in state court based on a "sue and be sued" provision in the National Housing Act); United States v. N.Y. Rayon Importing Co., 329 U.S. 654, 658–59 (1947).
347. *See* Bartlett v. Bowen, 816 F.2d 695, 707 (D.C. Cir. 1987) (explaining that Congress violates separation of powers if it attempts to "bar all courts from considering the constitutionality of a legislative act").
348. Aminoil U.S.A., Inc. v. Cal. Water Res. Control Bd., 674 F.2d 1227, 1233 (9th Cir. 1982); Friends of Newport Harbor v. Newport Beach, No. 23-CV-01701, 2023 WL 8126860,

California state court, the case was dismissed.[349] The court held that the EPA must take final action before it may be sued, and then it must be sued in federal court.[350] Because these agencies do not waive sovereign immunity, state courts do not have jurisdiction over claims against federal administrative agencies.[351] Because state courts lack jurisdiction, where Congress strips all *federal* judicial review over agency actions, it strips *all* judicial review over agency actions.

Arguably, this is even more troublesome than many of the other strip scenarios that occupy space in federal courts scholars' heads. One question is whether the Supreme Court would have any sort of appellate jurisdiction over agency actions. As others have noted, "[i]t was plainly not contemplated that the system could work effectively with the state courts as courts of *last* resort on issues of federal law."[352] And it weakens arguments that *Klein* and *Boumediene* should be narrowly construed to military or executive branch scenarios.[353] Those who point to their inapplicability beyond these contexts often rely on the alternative forums available. Yet efforts to cabin the principles derived from *Klein* and *Boumediene* to military or executive branch situations fall flat when faced with such blatant strips that foreclose *both* state and federal courts.[354]

CONCLUSION

Many scholars note the continued uncertainty about the outer bounds of Congress's jurisdiction-stripping abilities, particularly with regard to constitutional claims.[355] However, this Article demonstrates how the outer bounds of Congress's stripping powers with respect to nonconstitutional claims can present difficulties, as well as how even changes to statutory powers can place constitutional rights in jeopardy. Although the constitutional reallocation to or from the Supreme Court has been the primary focus of scholars, much less attention has been given to administrative forum

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at *3–4 (C.D. Cal. Oct. 27, 2023); Alamo Aircraft Ltd. v. City of San Antonio, No. 15-CV-00784, 2016 WL 5720860, at *3 (W.D. Tex. Sept. 30, 2016) (The "APA is 'a route through which private plaintiffs can obtain federal court review of the decisions of *federal* agencies.'" (quoting Vieux Carre Prop. Owners, Residents & Assocs., Inc. v. Brown, 875 F.2d 453, 456 (5th Cir. 1989))).

349. *Aminoil*, 674 F.2d at 1237.

350. *Id.* at 1236.

351. *Friends of Newport Harbor*, 2023 WL 8126860, at *3–4 (rejecting state jurisdiction even where the Clean Water Act required agencies to comply with state dredge and fill requirements).

352. Bator, *supra* note 44, at 1039, 1041 (noting the strong "policy arguments against such a retaliatory use of the power granted to Congress by the exceptions clause").

353. *See supra* notes 89–114 and accompanying text.

354. *See supra* note 351 and accompanying text.

355. Eric A. Posner & Adrian Vermeule, *Constitutional Showdowns*, 156 U. PA. L. REV. 991, 1038–39 (2008) ("It is still unclear whether Congress can preclude judicial review of constitutional questions or strip the Supreme Court of jurisdiction in defined categories of cases, especially cases bearing on constitutional rights."); Fallon, *supra* note 9, at 1044–52 (noting that "for better or for worse, many of the most mooted of . . . questions [about jurisdiction stripping in constitutional cases] remain unanswered").

shopping, where Congress shifts or removes federal jurisdiction over administrative actions to obtain a more favorable result. The MVP saga provides a timely opportunity to reexamine the underexplored relationships between Congress and administrative agencies.

With the jurisdictional strip in the Fiscal Responsibility Act, Congress has directed an outcome, created no new substantive law to apply, controlled various agency actions to effectuate its goal, sidestepped all federal environmental laws established over the last fifty years to force an agency approval, as well as the entire APA, stripped all federal courts with any power to review such approvals, and effectively foreclosed any judicial avenue for an aggrieved party given state courts' inability to remedy federal administrative claims. Congress has moved beyond even some of the more troubling scenarios from the annals of jurisdiction-stripping jurisprudence. The added complication of administrative agencies and revocation of any possible review of agency action—through agency procedures, federal courts, or even state courts—jeopardizes the stability and order that the judiciary has long sought to provide to citizens of the United States.[356] In the end, the proper functioning of our judicial system demands that some court has the power to review and remedy disputes. Here, Congress has indicated its willingness to throw its entire arsenal at one pipeline. What is to happen next time when it involves more than a pipeline?

We are moving forward in a world where every vote will be close. We have a Congress where one vote matters, a Supreme Court where one vote matters, and now we have jurisdiction stripped where one wealthy donor can matter. Weaponizing jurisdiction stripping to cater to one's constituents at the risk of the integrity of both the administrative state and the branches of government is just a pipeline too far.

356. Future research could further substantiate public perceptions of decreased congressional legitimacy through an empirical search of news and social media discussions surrounding the MVP or surveys of public responses to a variety of stripping scenarios.