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CONGRESSIONAL STRIPTEASE: HOW THE FAILURES OF THE 108TH CONGRESS'S JURISDICTION-STRIPPING BILLS WERE USED FOR POLITICAL SUCCESS

Laura N. Fellow*

INTRODUCTION

[L]egal scholars and commentators . . . have rendered a near-unanimous judgment . . . [that proposals to make exceptions to Supreme Court jurisdiction] are ill-conceived and unconstitutional. But that consensus judgment has failed to deter or dampen political support for proposals [to divest Article III federal courts and the Supreme Court of jurisdiction]. Such proposals continue to be made periodically, in seeming correlation to corresponding denouncements of some perceived instance of excessive “activism” by the Court.¹

Written nearly twenty years ago as part of an impassioned plea to stop politically motivated jurisdiction-stripping measures, the situation described above is still on point, with one exception. In the past, congressional proposals to limit federal court jurisdiction have “reflect[ed] a substantive disagreement with the way the Supreme Court, the lower federal courts, or both *have resolved particular issues*.”² However, the trickle of court-curbing bills before the 108th Congress was

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¹ Eugene Gressman & Eric K. Gressman, *Necessary and Proper Roots of Exceptions to Federal Jurisdiction*, 51 GEO. WASH. L. REV. 495, 498–99 (1983) (footnote omitted).

² RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 321 (5th ed. 2003) (emphasis added).

somewhat unique³ in that it was simply the mere possibility of action that prompted a congressional response.⁴

³ One of the only other scenarios following this pattern was the Women's Draft Exemption Act, H.R. 2791, 97th Cong. § 1259 (1981). The Women's Draft Exemption Act sought to remove Supreme Court and lower federal court jurisdiction over:

Any case arising out of any statute, ordinance, rule, regulation, concerning —

(1) establishing different standards on the basis of sex for the composition of the armed services or assignment to duty therein; or

(2) establishing different treatment for males and females concerning induction, or mandatory registration for possible induction, of individuals for training and service in the Armed Forces.

Id. (internal quotation marks omitted).

When the act was introduced to the House of Representatives on March 24, 1981, *Rostker v. Goldberg*, 453 U.S. 57 (1981), was pending before the Supreme Court. The appellant in *Rostker* challenged the constitutionality of a male-only mandatory Selective Service registration. *Id.* at 59. The Court issued its decision on June 25, 1981, holding an all-male military registration requirement to be constitutional. *Id.* at 83.

The author of H.R. 2791 feared the Court's ruling on an all-male draft and the bill was written in anticipation of an adverse decision. His worst fears were not realized as the Court upheld the constitutionality of the all-male draft. One assumes that after June 25, 1981, the bill became moot and that the subject matter suddenly became appropriate for ongoing Supreme Court review. Thus, once the Court made the "correct" decision on the issue (i.e., what one Congressman saw as "correct"), there was no need to remove the subject from the court's jurisdiction.

Max Baucus & Kenneth R. Kay, *The Court Stripping Bills: Their Impact on the Constitution, the Courts, and Congress*, 27 VILL. L. REV. 988, 1009 (1982). While Baucus and Kay disregarded two subcommittee hearings held in July following the *Rostker* decision, the basic premise of their theory still holds true. The Women's Draft Exemption Act never reached the floor of the House.

⁴ Marriage Protection Act of 2004, H.R. 3313, 108th Cong. § 1632 (2003) (amending the U.S. Code to eliminate all federal court jurisdiction over questions arising under the Defense of Marriage Act, 28 U.S.C. § 1738C (1996) [hereinafter DOMA]). The Marriage Protection Act was introduced in October 2003, over a month before the Massachusetts Supreme Court ruled that bans on homosexual unions violated the state constitution, see *Goodridge v. Dep't of Public Health*, 798 N.E.2d 941 (Mass. 2003), and before any federal courts had decided to tackle the issue. Likewise, H.R. 2028, 108th Cong. § 1632 (2003), stripping federal courts, including the Supreme Court, of the power to hear cases involving the Pledge of Allegiance, was introduced on May 8, 2003, well before the Supreme Court had decided to hear the government's appeal to the Ninth Circuit's ruling in *Newdow v. United States Congress*, 292 F.3d 597 (9th Cir. 2002). The Supreme Court case was *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004).

It has been argued that *Lawrence v. Texas*, 539 U.S. 558 (2003), with its emphasis on individual rights and a need to respect human decency, fueled the marriage protection movement. See, e.g., Linda Greenhouse, *Same-Sex Marriage: The Context; Supreme Court*

This Note does not focus on the various judicial ends Congress can hope to achieve through jurisdiction-stripping bills, such as freezing existing federal decisions in time or safeguarding against a potentially disagreeable decision. Rather, in light of the 108th Congress's preemptive attacks on federal court jurisdiction, it attempts to answer the question of why, despite eternal failure,⁵ the 108th Congress proposed and considered two jurisdiction-stripping bills, the Marriage Protection and Pledge Protection Acts.⁶ Unlike other academic musings on the jurisdiction-stripping topic, this Note does not presume success for either the Marriage Protection Act of 2004 or the Pledge Protection Act of 2003; failure of these bills is a central premise of the analysis, comfortably assumed given the past track record of congressional efforts to curtail federal court jurisdiction.⁷

Paved Way for Marriage Ruling with Sodomy Law Decision, N.Y. TIMES, Nov. 19, 2003, at A24. Despite the admonitions of Justice Scalia's dissent in *Lawrence*, cautioning that "[s]tate laws against bigamy, same-sex marriage, [etc.]" are questioned by *Lawrence* because "the Court makes no effort to cabin the scope of its decision to excuse them from its holding," *Lawrence*, 539 U.S. at 590 (Scalia, J., dissenting), the majority refused to extend its decision into the realm of homosexual unions. *Id.* at 578 (majority opinion). Justice Scalia still admonished the broad holding, suggesting the failure to extend the decision was superficial: "This case 'does not involve' the issue of homosexual marriage only if one entertains the belief that principle and logic have nothing to do with the decisions of this Court." *Id.* at 605 (Scalia, J., dissenting).

⁵ FALLON, JR., MELTZER & SHAPIRO, *supra* note 2, at 322 ("At least since the 1930s, no bill that has been interpreted to withdraw all federal court jurisdiction with respect to a particular substantive area has become law.") (footnote omitted); *see also* Stuart S. Nagel, *Court-Curbing Periods in American History*, 18 VAND. L. REV. 925 (1965) (discussing court-curbing measures put forth during the Warren Era); William G. Ross, *Attacks on the Warren Court by State Officials: A Case Study of Why Court-Curbing Movements Fail*, 50 BUFF. L. REV. 483 (2002) (comparing unsuccessful efforts during Reconstruction with those put forth during the Warren Court tenure). *But see* 150 CONG. REC. H6580, H6582 (2004) (statement of Rep. Sensenbrenner, (R-Wis.) (commenting on past successful bills that might have stripped jurisdiction)).

⁶ The Marriage Protection Act, as approved by the House of Representatives, reads: "No court created by Act of Congress shall have any jurisdiction, and the Supreme Court shall have no appellate jurisdiction, to hear or decide any question pertaining to the interpretation of, or the validity under the Constitution of, [18 U.S.C.] section 1738C or this section." H.R. 3313, 108th Cong. § 1632 (2003). The Pledge Protection Act, as approved by the House of Representatives, reads:

"No court created by Act of Congress shall have any jurisdiction, and the Supreme Court shall have no appellate jurisdiction, to hear or decide any question pertaining to the interpretation of, or the validity under the Constitution of, the Pledge of Allegiance, as defined in section 4 of title 4, or its recitation." The limitation in this section shall not apply to the Superior Court of the District of Columbia or the District of Columbia Court of Appeals.

H.R. 2028, 108th Cong. § 1632 (2003).

⁷ *See supra* note 5.

This Note will reconsider the idea that “congressional reaction to issues of federal jurisdiction has always been fitful and . . . the fits are usually induced by strong pressures imposed by particular events or by powerful constituencies that seek to influence results in particular causes that concern them.”⁸ A three-part analysis will present a political model of congressional behavior and then apply that model to make sense of the seemingly futile congressional efforts supporting these two jurisdiction-stripping bills.

Part I lays out the theoretical underpinnings of the Political Systems Theory, an undercurrent to this Note’s discussion of congressional persistence in proposing jurisdiction-stripping bills. Part II discusses the regime rules associated with jurisdiction stripping. Part III.A presents the views other legal scholars have on congressional attempts to limit jurisdiction. Part III.B develops the proposal that Congress is more likely to propose jurisdiction-stripping bills *because* they are destined for failure. This Note then concludes with the proposition that the 108th Congress’s jurisdiction-stripping bills were proposed to create low-cost opportunities for members with staunch positions on same-sex marriage or the role of deity in the Pledge of Allegiance to continue to assign their values when all other alternative forums had been defeated.

I. CONGRESS AS A SYSTEM

This Note adopts David Easton’s Political Systems Theory framework.⁹ “Political Systems,” like the United States government, have “basic unit interactions [which] are highly dependent upon and interrelated with one another and which as a set exhibit *boundary-maintaining* characteristics . . . [.] striv[ing] to maintain the system’s integrity and cohesion.”¹⁰ The crux of the theory asserts that:

Every political system exists within and is affected by the physical, biological, social, economic, and cultural environments [I]ts interactions deal with the authoritative allocation of values for a society; . . . a political system is concerned with deciding in the name of society who within that society gets what, when, where and how.¹¹

⁸ Shirley M. Hufstедler, *Comity and the Constitution: The Changing Role of the Federal Judiciary*, 47 N.Y.U. L. REV. 841, 842–43 (1972).

⁹ See generally DAVID EASTON, A FRAMEWORK FOR POLITICAL ANALYSIS (1965) [hereinafter EASTON, FRAMEWORK]; DAVID EASTON, A SYSTEMS ANALYSIS OF POLITICAL LIFE (1965) [hereinafter EASTON, SYSTEMS].

¹⁰ SHELDON GOLDMAN & THOMAS P. JAHNIGE, THE FEDERAL COURTS AS A POLITICAL SYSTEM 2 (3d ed. 1985) (emphasis in original) (citing EASTON, FRAMEWORK, *supra* note 9, at 25, 36).

¹¹ *Id.* (citing EASTON, SYSTEMS, *supra* note 9, at 50).

Within this framework, parties that “share in the effective power of the system” are *Politically Relevant Members* of the system.¹² They set policy and do the interacting.¹³ A select number of politically relevant members are considered to be *Authorities*.¹⁴ Authorities “exercise discretion and influence in making decisions for allocating such valued things as wealth, power, prestige, and ideals.”¹⁵ The value allocations by any system’s politically relevant members, particularly authorities, are dictated by that system’s regime rules.¹⁶

Because political systems are *open systems*, they are constantly buffeted by environmental stresses.¹⁷ Stresses are categorized as (1) external *demands* for the Authorities to assign particular allocations of values,¹⁸ and (2) the internal valuations of politically relevant members regarding their satisfaction with the system.¹⁹ Easton identifies two particular internal valuations: *specific* support and *diffuse* support.²⁰ *Specific support* is an attitude attributed to past value allocations.²¹ *Diffuse* support involves more general conceptions of the system as a whole.²² One of the aims of Systems Theory is to determine how a system confronts and processes these stresses, considering the goals of systemic survival and maintaining the ability of the Authorities to “allocate values for the society and to induce most members of the system to accept those allocations.”²³ The nature of any particular political system is determined by how it deals with its stresses.²⁴

A system’s Authorities are tasked with “confront[ing], evaluat[ing], reshap[ing], and process[ing]” external demands and internal valuation expectations on behalf of the system.²⁵ This stage is called *conversion* because the Authorities must convert the external and internal demands into systemic responses.²⁶ The conversion responses are called *output* and are fed back into the system.²⁷ The output aims to sufficiently address the stressors and demands placed on the system.²⁸

¹² EASTON, SYSTEMS, *supra* note 9, at 222.

¹³ *Id.*

¹⁴ *Id.* at 212–17.

¹⁵ GOLDMAN & JAHNIGE, *supra* note 10, at 2.

¹⁶ EASTON, SYSTEMS, *supra* note 9, at 205–11. For an expanded definition and discussion of the impact of regime rules, see *infra* Part II.

¹⁷ GOLDMAN & JAHNIGE, *supra* note 10, at 2.

¹⁸ EASTON, FRAMEWORK, *supra* note 9, at 119–20.

¹⁹ *Id.* at 124.

²⁰ *Id.* at 124–25.

²¹ *Id.* at 125–26.

²² *Id.* at 124–25.

²³ GOLDMAN & JAHNIGE, *supra* note 10, at 2.

²⁴ EASTON, FRAMEWORK, *supra* note 9, at 79.

²⁵ GOLDMAN & JAHNIGE, *supra* note 10, at 2.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 185–86.

Another critical aspect of Easton's Political Systems Theory is the distinction he draws between "equilibrium" and "persistence." To Easton, "equilibrium" is problematic because it is "weighted with the notion of salvaging the existing pattern of relationships and directs attention to their preservation."²⁹ It is a term that focuses on status quo and typical output responses.³⁰ "Persistence," on the other hand, encompasses systemic endurance and survival.³¹ It is "the ability [of the Authorities] to make authoritative allocations of values and to secure their acceptance regardless of the amount of change involved."³²

Applying the concept of persistence to a legislative structure like Congress helps to explain its desire to remain a meaningful political system.³³ If jurisdiction-stripping bills were seen as simply a way for Congress to make sure the courts respected distinct separations of powers, they would be Equilibrium responses. If, however, the bills were proposed as part of a scheme to secure acceptance of an idea in the public forum, they would be Persistence outputs. The bills would aim to achieve more than simply insisting upon clearly delineated separations of power. As Persistence outputs, they would serve not as a dialogue to the courts, but rather a dialogue to the American people — a way of trying to secure acceptance of a conservative agenda.

With this in mind, the consistent failure of jurisdiction-stripping bills has drastically different implications, depending on the type of expected output. If these bills are simply equilibrium responses trying to prevent abuses and maintain political status quo, then the congressional Authorities are losing ground each time the bills are rejected. Every rejection is an effective ceding of power and jurisdiction to other branches within the system, easing the American political system into a state of increasing imbalance. But, if these bills are persistence responses, the effect of failure is not as dire. Since the end goal of a persistence response is to have an authoritative allocation of value be systematically accepted,³⁴ one must look to the desired result to gauge its ultimate success. For example, in *Rostker*,³⁵ the House put forth a bill to prevent the Selective Service military draft from extending to women. Speeches were made, and passions were invoked. The Supreme Court

²⁹ EASTON, FRAMEWORK, *supra* note 9, at 88.

³⁰ *Id.*

³¹ Dean L. Yarwood, *Legislative Persistence: A Comparison of the United States Senate in 1850 and 1860*, 11 MIDWEST J. POL. SCI. 193, 193 (1967).

³² *Id.*

³³ See *id.* at 194–95, for details of Systems Theory as applied to the United States Congress and its decision-making trends. Professor Yarwood applies the concept of persistence, within the context of Political Systems Theory, EASTON, FRAMEWORK, *supra* note 9, to analyze two distinct sessions of the United States Senate, the 1850 and 1860 sessions. Yarwood, *supra* note 31, at 194–95. Yarwood identified these two sessions as models of persistence: 1850 for its successful adherence to persistence, and 1860 for its complete departure from the same. *Id.*

³⁴ See *supra* note 31 and accompanying text.

³⁵ 453 U.S. 57 (1981).

issued the *Rostker* decision after the first House hearing, premising the holding on a need for courts to “show a ‘healthy deference’ to Congress when reviewing its decisions on military matters.”³⁶ This Note posits that the House of Representatives was seeking a similar response — acceptance of desired values — from the judicial branch and the electorate.

One key element of persistence outputs involves *lines of cleavage*. Lines of cleavage are those loyalties politically relevant members of Congress consider when voting.³⁷ The Political Systems framework counters a recurring social science theme, “that superimposed cleavages may result in nonpersistence” (or Equilibrium outputs).³⁸ Instead it suggests that “when many lines of cleavage result from public policy, systemic persistence is the likely result. Tensions [among politically relevant members] are not allowed to accumulate because policy is the result of constantly shifting coalitions.”³⁹ Members of Congress are expected to act during windows of opportunity to align their constituents’ interests with the interests (lines of cleavage) represented by other congressmen. The opportunities for action are defined by public policy, which is partially dictated by the public attention span.

Most actions taken to promote the Marriage Protection and Pledge Protection Acts came after public events encouraging such action; the House was only persistent in supporting the Acts as long as doing so remained salient to the public. Following the 2004 election, no further action was taken on either bill.⁴⁰ The discrete moments when public attention was directed toward the debates over legalizing same-sex marriage and the Pledge of Allegiance created opportunities for congressmen with similar interests to work together to create persistence outputs that reflected these interests. Press conferences and hearings, scheduled at peak moments of public awareness, provided a way for Congressmen to urge acceptance of their value assignments, whether conservative or liberal.

The framework laid out in this section will be elemental in suggesting that the Marriage Protection and Pledge Protection Acts were Persistence outputs motivated by an adherence to constituent-defined lines of cleavage, designed not to truly reprimand a potentially activist court, but rather to help encourage support and acceptance for the underlying moral value allocations. Effectively, the bills were but a calculated step in systemic efforts to declare same-sex marriage illegal and assert that the United States truly is “one Nation under God.”⁴¹

³⁶ *Stand-Pat Supreme Court Defers to Others*, 37 CONG. Q. ALMANAC 3-A (1981).

³⁷ EASTON, SYSTEMS, *supra* note 9, at 233–36.

³⁸ Yarwood, *supra* note 31, at 196. For general sources that have presented the concept of non-persistence due to superimposed cleavages, see LEWIS A. COSER, *THE FUNCTIONS OF SOCIAL CONFLICT* 72–81 (1956); DAVID B. TRUMAN, *THE GOVERNMENTAL PROCESS*, 164–67 (1953).

³⁹ Yarwood, *supra* note 31, at 196.

⁴⁰ See *infra* apps. A and B for timelines showing pertinent legislative and judicial events relating to the Marriage Protection and Pledge Protection Acts.

⁴¹ The current Pledge of Allegiance reads: “I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation under God,

II. REGIME RULES

The United States Constitution, being “the supreme Law of the Land,”⁴² is the premier regime rule: Congress may not relieve any of its stresses by *passing* a law that violates the Constitution. When contemplating the constitutionality of a jurisdiction-stripping measure, members of Congress are presented with three possible outcomes: the measure is expressly unconstitutional and not permitted; the measure is expressly constitutional and is permitted; or the constitutionality is unclear. These outcomes strictly limit the type of measures Congress can pass. As Part III will point out, Congress can relieve stress by proposing and discussing unconstitutional measures.

A. Constitutional Analysis

As with any legislative branch action, the legislature must have constitutional authority to act. Proponents of House Bills 2028 and 3313 alleged that Article III of the Constitution gave Congress the authority to limit federal and Supreme Court jurisdiction.⁴³ Their argument focused on language in the article encouraging the ideas that: lower federal courts exist because of congressional creation,⁴⁴ the jurisdiction given to both the Supreme Court and the federal courts is subject to “such Exceptions, and . . . Regulations as the Congress shall make,”⁴⁵ and neither same-sex marriage nor the composition of the Pledge of Allegiance are encompassed by the Supreme Court’s original jurisdiction.⁴⁶

indivisible, with liberty and justice for all.” 4 U.S.C. § 4 (2002) (emphasis added). The Pledge of Allegiance has been codified twice in the United States Code. *Id.*; 36 U.S.C. § 172 (1998). The sections are nearly identical and are titled: “Pledge of allegiance to the flag; manner of delivery.” See 4 U.S.C. § 4 (2002); 36 U.S.C. § 172 (1998).

⁴² U.S. CONST. art. VI, cl. 2.

⁴³ H.R. REP. NO. 108-691, at 8–15 (2004) (accompanying H.R. 2028); H.R. REP. NO. 108-614, at 5–14 (2004) (accompanying H.R. 3313).

⁴⁴ U.S. CONST. art. III, § 1, cl. 1 (“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”). Congress also asserts that “[t]he word ‘shall’ in this provision is not addressed to Congress, just as the words ‘shall’ in the constitutional clauses vesting the legislative and executive authorities are not addressed to Congress.” H.R. REP. NO. 108-614, at 6, n.17 (2004). *But see* *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 329–30 (1816) (placing particular emphasis on the words “‘shall be vested’” and concluding that if Congress has a duty to vest judicial power, “it is a duty to vest the *whole* judicial power. . . . If it were otherwise, this anomaly would exist, that congress might successively refuse to vest the jurisdiction in any one class of cases enumerated in the constitution, and thereby defeat the jurisdictions as to all . . .”).

⁴⁵ U.S. CONST. art. III, § 2.

⁴⁶ *Id.* (“In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the Supreme Court shall have original Jurisdiction.”).

To bolster their reading of the Exceptions Clause, proponents of the resolutions looked to events from the nation's emergence, citing the Federalist Papers⁴⁷ and the first national judiciary act.⁴⁸ Under the Judiciary Act of 1789 and subsequent statutes, Congress has never vested Article III federal courts with the full gamut of potential powers.⁴⁹

The first Judiciary Act did not provide for general federal question jurisdiction in civil cases "arising under" the Constitution, laws, or treaties of the United States. Federal question cases that did not fall into some more specialized grant of jurisdiction had to be litigated in state court, subject to Supreme Court review.⁵⁰

Though the Supreme Court maintained jurisdiction over state court decisions regarding federal questions in these early times, it was only privy to review if the state had denied a claim of federal right.⁵¹ It was not until 1816 that the Court determined that Article III, section 2 extended judicial power to "all cases in law or equity, arising under this constitution, the laws of the United States, and the treaties made . . . under their authority."⁵²

There is little to no debate over Congress's power to control the jurisdiction of lower federal courts.⁵³ Early discussions about the power of the legislature to create lower federal courts emerged during the Constitutional Convention, but those were primarily of a fiscal nature.⁵⁴ That the "National Legislature" should have jurisdiction

⁴⁷ See THE FEDERALIST Nos. 80, 81 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (speaking for congressional power to make exceptions to judiciary jurisdiction so as to keep that branch operating within its boundaries and listing goals which would require Supreme Court appellate jurisdiction to be subject to jurisdictional exceptions). *But see* THE FEDERALIST NO. 82, (Alexander Hamilton), *supra*, at 493 ("The evident aim of the plan of the convention is that all the causes of the specified classes [of cases and controversies] shall, for weighty public reasons, receive their original or final determination in the courts of the Union.").

⁴⁸ Judiciary Act of 1789, ch. 20, 1 Stat. 73 (1789).

⁴⁹ FALLON, JR., MELTZER & SHAPIRO, *supra* note 2, at 320.

⁵⁰ *Id.* See also Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85–86 (current version at 28 U.S.C. § 1257(a)(2005)) (permitting review of constitutional errors made by State courts).

⁵¹ Federal Question Jurisdictional Amendments Act of 1980, Pub. L. No. 96-486, 94 Stat. 2369 (1980) (amending 28 U.S.C. § 1331); FALLON, JR., MELTZER & SHAPIRO, *supra* note 2, at 320.

⁵² *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 314 (1816).

⁵³ For a general acknowledgment, see Dolores K. Sloviter, *Legislative Proposals to Restrict the Jurisdiction of the Federal Courts: Are They Wise? Are They Constitutional?*, 27 VILL. L. REV. 895, 897 (1982) (noting the generally recognized principle that there is little debate regarding jurisdiction of inferior federal tribunals).

⁵⁴ Mr. Madison observed that unless inferior tribunals were dispersed throughout the Republic with *final* jurisdiction in *many* cases, appeals would be multiplied to a most oppressive degree; that, besides, an

establishment was stressed, but not debated during the drafting of the Constitution.⁵⁵ Further, there is a general belief that what Congress created, Congress can take away.⁵⁶ So it is with lower federal courts. Thus, the real debate about congressional constitutional authority to transfer jurisdiction from Article III courts to state courts focuses on how Congress can affect Supreme Court jurisdiction.

Critics argue that Congress has no authority to wrest jurisdiction from the Supreme Court for three main reasons. First, they argue, Congress cannot exercise any of its constitutional powers in such a way that violates the Constitution.⁵⁷ Congress has no authority to overrule a judicial decision, especially on constitutional law. Even if the restraints implied directly by the text of Article III do not inhibit Congress, external restraints, inferable from other provisions of the Constitution, will.⁵⁸

Second, any statute insulating a specific area from Supreme Court review interferes with the function of the Court, and thus should be unconstitutional. The

appeal would not in many cases be a remedy. . . . An effective Judiciary establishment commensurate to the Legislative authority, was essential.

. . . .

Mr. Sherman was in favor of the motion. He dwelt chiefly on the supposed expensiveness of having a new set of courts, when the existing State courts would answer the same purpose.

Mr. Dickinson contended strongly that if there was to be a National Legislature there ought to be a National Judiciary, and that the former ought to have authority to institute the latter.

. . . .

Mr. Wilson and Mr. Madison then moved, in pursuance of the idea expressed above by Mr. Dickinson, to add . . . the words following: "that the National Legislature be empowered to institute inferior tribunals." They observed that there was a distinction between establishing such tribunals absolutely, and giving a discretion to the Legislature to establish or not to establish them. They repeated the necessity of some such provision.

. . . .

Mr. King remarked, as to the comparative expense, that the establishment of inferior tribunals would cost infinitely less than the appeals that would be prevented by them.

G.J. Schulz, *Creation of the Federal Judiciary: A Review of the Debates in the Federal and State Constitutional Conventions; and Other Papers*, S. DOC. NO. 75-91, at 5 (1938) (footnote omitted) (quoting proceedings of the Constitutional Convention of 1787).

⁵⁵ *Id.* at 32-35.

⁵⁶ See Slovirer, *supra* note 53, at 897.

⁵⁷ See LINDA MULLENIX ET AL., UNDERSTANDING FEDERAL COURTS AND JURISDICTION §§ 1.05-1.06, at 6-18 (1998).

⁵⁸ "Internal" and "external" constraints were first proposed by Gerald Gunther. See Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 900 (1984).

“essential constitutional functions of the [Supreme] Court [are] to maintain the supremacy and uniformity of federal law.”⁵⁹ Stripping jurisdiction from all federal courts and leaving them in the hands of state courts undermines the Court’s ability to attain a uniform body of federal law, as there is a potential for fifty state courts to hand down fifty different, unreviewable, decisions interpreting one federal Constitution.⁶⁰

Third, judicial decisions on constitutional issues can be put aside by only two constitutionally mandated means: a constitutional amendment or judicially overturning a lower decision or existing precedent.⁶¹ In the present situation, where constitutional amendments have been defeated⁶² and the jurisdiction-stripping bills are proactive, this final argument is moot. To date there is no federal decision to be challenged that strikes down the Defense of Marriage Act or bans “under God” from the Pledge of Allegiance. With the third concern rendered irrelevant, two challenges to the constitutionality of jurisdiction-stripping remain to be discussed.

B. Congress Cannot Restrict Jurisdiction on Potential Constitutional Questions

There are three approaches to challenging a jurisdiction-stripping measure. The first, and weakest, challenge argues that jurisdiction-stripping proposals are unconstitutional because they restrain essential functions of the Supreme Court — namely, “to [s]ay what the law is”⁶³ and to declare what the Constitution means.⁶⁴ While there

⁵⁹ Leonard G. Ratner, *Majoritarian Constraints on Judicial Review: Congressional Control of Supreme Court Jurisdiction*, 27 VILL. L. REV. 929, 957 (1982).

⁶⁰ *Limiting Federal Court Jurisdiction to Protect Marriage for the States: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 108th Cong. 16 (2004) [hereinafter *Marriage Protection Hearings*] (written statement of Michael J. Gerhardt, Arthur B. Hanson Professor of Law, William & Mary Law School).

Compare 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) (congressional “exceptions” power cannot be used to advance a goal that “will destroy the essential role of the Supreme Court in the constitutional plan”), with Gunther, *supra* note 58 (generally disagreeing with Hart’s position), and Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001 (1965).

⁶¹ *Marriage Protection Hearings*, *supra* note 60, at 15 (written statement of Michael J. Gerhardt, Arthur B. Hanson Professor of Law, William & Mary Law School).

⁶² See S.J. RES. 40, 108th Cong. (2004) (proposing a constitutional amendment to prohibit same-sex marriage). A cloture vote to block a filibuster of the proposed amendment failed to garner the necessary three-fifths vote, failing by vote of 48–50 on July 14, 2004. National Coalition for the Protection of Children & Families, http://www.nationalcoalition.org/media/pr/FMA_senate_vote.html (last visited Jan. 21, 2006) (measure to consider Federal Marriage Amendment was withdrawn on July 15, 2004); see also H.R.J. RES. 106, 108th Cong. (2004) (proposing the same amendment as S.J. RES. 40). The vote was taken September 30, 2004, and failed to pass by vote of 227–186. 150 CONG. REC. H7898, H7933 (2004) (Roll No. 484).

⁶³ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

⁶⁴ See Hart, Jr., *supra* note 60; Leonard G. Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157 (1960).

is no significant judicial authority to support this proposition, there also is no legislation that specifically undermines it by detailing the exact functions and reaches of the Court.⁶⁵ The second challenge asserts that Separation of Powers principles limit congressional jurisdiction-stripping power.⁶⁶ The third challenge makes the same assertion by relying on Due Process requirements as a limiter on congressional authority.⁶⁷

Critics of jurisdiction-stripping measures assert that the measures are retaliatory maneuvers against a disfavored judicial decision or potential outcome.⁶⁸ While it is undisputed that Congress has a general power to control federal court jurisdiction, these critics contend that Congress cannot use this power to interfere with judicial independence or preclude courts from supplying effective remedies to national disputes. The crux of this argument claims that “[w]hile Congress clearly may use its power to regulate jurisdiction to provide for particular procedures and remedies in inferior federal courts, it may do so in order to increase the efficiency of Article III courts not to undermine those courts.”⁶⁹

The counter to this argument is that Congress is using its power not to undermine valid judicial authority, but to prevent judicial abuses by federal courts.⁷⁰ To do this, Congress has the power to determine the various realms of public conduct that are within the purview of the states, not the federal government. A good example of this position comes from the statements of Representative Chabot (R-Ohio) supporting the Marriage Protection Act:

If we are going to change [the definition of marriage] . . . it ought to be done through the will of the people, and the will of the people is expressed through their elected representatives, either at the State legislature, whatever State they are located within, or the Congress of the United States, should we determine to take that on nationally.

Rather than having the elected representatives do this, it has been done piecemeal by a rogue mayor, for example, in San Francisco, or a court by a 4 to 3 decision in Massachusetts. . . . [T]his is an issue which has been thrust upon us by rogue

⁶⁵ See MULLENIX ET AL., *supra* note 57, § 1.10[3], at 32–35.

⁶⁶ Theodore J. Weiman, Comment, *Jurisdiction Stripping, Constitutional Supremacy, and the Implications of Ex Parte Young*, 153 U. PA. L. REV. 1677, 1679 (2005).

⁶⁷ Louise Weinberg, *The Article III Box: The Power of “Congress” to Attack the “Jurisdiction” of “Federal Courts”*, 78 TEX. L. REV. 1405, 1407 (2000).

⁶⁸ See *supra* note 3 and accompanying text.

⁶⁹ *Marriage Protection Hearings*, *supra* note 60, at 16 (written statement of Michael J. Gerhardt, Arthur B. Hanson Professor of Law, William & Mary Law School).

⁷⁰ See *infra* note 71.

mayors and rogue courts, not something we chose but something we have to do.⁷¹

This counter position is facially problematic for two reasons. First, between the Marriage Protection Act and the Pledge Protection Act, the House is essentially pleading in the alternative. If the House simply wants to preserve for the states those issues they have historically had domain over, logic should estop a measure giving the states new powers — which is what the Pledge Protection Act tried to do by giving states control over the historically federal pledge. Second, one must ask if the House is trying to make a jurisdictional stand via these bills, what conclusion should be drawn when the bills fail to become law?

Cynics and academics (or are they one and the same?) charge Congress with more sinister motivations and see more cataclysmic problems lurking behind congressional assertions that it is merely preventing judicial abuse. In his statements before the House Judiciary Committee during discussion of the Marriage Protection Act, Professor Michael Gerhardt warned that the court-curbing proposal under consideration did little more than marginalize a suspect class and/or impinge on a fundamental right.⁷² To Gerhardt, “restricting access by [a particular, suspect class of people] to Article III courts to vindicate certain interests . . . because of mistrust of ‘unelected judges’ . . . lacks a compelling justification and thus violates the equal protection class [*sic*].”⁷³ Further, Professor Gerhardt asserted:

⁷¹ 150 CONG. REC. H6580, H6584 (daily ed. July 22, 2004) (statement of Rep. Chabot (R-Ohio)). *See also id.* at H6581 (statement of Rep. DeLay (R-Tex.)).

If it is true . . . that “marriage is an evolving paradigm,” then should not that evolution be an organic, natural evolution and left to the collective and evolving wisdom of the American people?

And if, on the other hand, no such institutional evolution exists, does not the arrogance of judges who would impose on our society their own contrary and misguided prejudices fundamentally undermine American democracy?

Id. *See also id.* at H6592 (statement of Rep. Akin (R-Mo.)) (“I somehow cannot get my mind around the concept that the Founders’ idea was that a bare majority in one State court and a bare majority in the Supreme Court can redefine the word of marriage and shove that down the throats of 49 other States.”); *id.* at H6611 (statement of Rep. Cannon (R-Utah)) (“When the judicial branch loses its moral compass, it is the responsibility of the Congress to exert its authority to keep the judicial branch in check. . . . HR 3313 is simply Congress reaffirming its intent under DOMA and disallowing judicial review.”); *id.* at H6591 (statement of Rep. Hyde (R-Ill.)) (commenting on how great it is that Congress can seize this opportunity to watch over the checks and balances of our system).

⁷² *Marriage Protection Hearings*, *supra* note 60, at 18–19 (written statement of Michael J. Gerhardt, Arthur B. Hanson Professor of Law, William & Mary Law School).

⁷³ *Id.* at 18.

A federal law restricting all federal jurisdiction may also run afoul of the Fifth Amendment by violating a fundamental right. . . . It is unlikely that the Court would find a compelling justification for burdening fundamental rights. I cannot imagine that the justices would agree that distrusting “unelected judges” qualifies as a compelling justification. Nor is a regulation excluding all federal jurisdiction over a matter involving the exercise of fundamental rights, for it precludes Article III courts even from enforcing the law.⁷⁴

Similar complaints have been made that the Pledge Protection Act silences the complaints of members of religious minorities in all fifty states by refusing them the right to challenge a pledge which pays homage to a Judeo-Christian tradition.⁷⁵ Since the bills failed to pass the 108th Congress, Professor Gerhardt’s predictions of doom are still untested.

C. Jurisdiction-Stripping Prevents the Supreme Court from Maintaining a Uniform Body of Law

The House Judiciary Committee report may have based its defense of both the Marriage and Pledge Protection Acts on the same notion acknowledged by the Supreme Court in dicta: that “virtually all matters that might be heard in Art[icle] III courts could also be left by Congress to state courts.”⁷⁶ The cornerstone of this argument is the mandate of the Supremacy Clause requiring state courts to enforce constitutional principles. Because this requirement makes state courts forums for constitutional claims, limiting federal jurisdiction does not deprive a litigant of an independent “federal” forum.⁷⁷ Advancing this theory, it has been argued that the Constitution does not restrain Congress’s Article III powers, even when the jurisdiction-stripping bills are motivated by a dislike of the court’s decision or fear of an impending decision.⁷⁸

⁷⁴ *Id.*

⁷⁵ Cf. 150 CONG. REC. E1711, 1712 (daily ed. Sept. 24, 2004) (statement of Rep. Jackson-Lee (D-Tex.) in support of the Jackson-Lee amendment which aims specifically to “protect[] religious minorities” from the potential for abuse created by the Pledge Protection Act).

⁷⁶ *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 64 n.15 (1982) (plurality opinion).

⁷⁷ During consideration of both bills, opponents decried this attempt to deprive American citizens of a forum for their claims to be heard. Most often, they turned “forum of choice” into “forum to be heard” when making this argument, entirely disregarding the Supremacy Clause argument. See Marci Hamilton, *The Pledge Protection Act: The Lunacy of Letting Only State Courts Interpret the First Amendment*, WRIT, Sept. 23, 2004, <http://writ.news.findlaw.com/hamilton/20040923.html>.

⁷⁸ Gunther, *supra* note 58, at 920 (citing Wechsler, *supra* note 60, at 1005); see also *Marriage Protection Hearings*, *supra* note 60, at 21 (testimony of Martin H. Redish, Professor

Those academics original enough to write about jurisdiction-stripping feel that reliance on the Supremacy Clause is an inadequate and destabilizing basis for such a potentially radical move.⁷⁹ Allowing fifty state courts to apply individual standards of review to federal issues could produce extreme amounts of divergence and unpredictability, rather than the desired single declaration of what the law is that the Supreme Court can provide.⁸⁰ This concern translates to a constitutional argument through a concept first proposed by Hart's dialectic: Congress may not take an action that "destroy[s] the essential role of the Supreme Court."⁸¹

The Supreme Court has determined that measures affecting the individual rights of homosexuals should be looked at by courts with heightened skepticism.⁸² While homosexuals have not been classified as a "problematic group," society has systematically followed a pattern of enacting discriminatory practices and laws against them, and the Court seemed to be considering somewhat heightened scrutiny in *Romer v. Evans*⁸³ to protect them from unjust discrimination. Opponents of the Marriage Protection Act claim that prohibiting Supreme Court oversight of the development of law in this area would be disastrous to uniform individual rights for homosexuals.⁸⁴

of Law and Public Policy, Northwestern Law School) ("If . . . Congress wishes to combine its power over the article III lower courts and the Supreme Court under the exceptions clause, the end result is that it can completely exclude the Federal judicial power over pretty much any issue, as long as the State courts remain available."). This power directly confronts the idea that Congress can be constrained by the "essential functions" of Article III courts. *Id.*

⁷⁹ See *infra* notes 82–83 and accompanying text.

⁸⁰ See *Marriage Protection Hearings*, *supra* note 60 and accompanying text (written statement of Michael J. Gerhardt, Arthur B. Hanson Professor of Law, William & Mary Law School) (voicing this widely felt concern); see also Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, in *THE COURTS: SEPARATION OF POWERS: FINAL REPORT OF THE 1983 ANNUAL CHIEF JUSTICE EARL WARREN CONFERENCE ON ADVOCACY IN THE UNITED STATES* 15, 24–25 (Bette Goulet ed., 1984).

State courts and lower federal courts, in many instances, would follow those prior rulings. But some courts would, no doubt, feel freer to follow their own constitutional interpretations if the threat of appellate review and reversal were removed. . . . The result would be differing interpretations of constitutional norms among the courts. And that would be a major subversion of the value of uniformity that Supreme Court review now tends to assure.

Id.

⁸¹ Hart, Jr., *supra* note 60, at 1365.

⁸² *Lawrence v. Texas*, 539 U.S. 558, 562 (2003) ("Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.").

⁸³ 517 U.S. 620 (1996).

⁸⁴ See *supra* note 80.

Though an emotionally compelling argument, there is nothing to suggest that same-sex marriage is an issue invoking an essential Supreme Court function. The Supreme Court has said “[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.”⁸⁵

There have been limited occasions when marriage has fallen under federal purview because of other, overreaching federal concerns. *Loving v. Virginia* is the prime example.⁸⁶ *Loving* was a case challenging Virginia’s anti-miscegenation laws prohibiting marriages between whites and members of other races.⁸⁷ The Court held that even though marriage is part of a state’s police powers,⁸⁸ the state’s power to regulate marriage is limited by the constitutional guarantees of the Fourteenth Amendment.⁸⁹ The potentially critical distinction between marriage generally and *Loving* is that the Supreme Court used *Loving* to guarantee fairness to a problematic group and was not at all concerned with states’ control over the institution of marriage.⁹⁰

Because of this traditional deference to states on the marriage front, the Supreme Court would not have jurisdiction over any cases covered by the Marriage Protection Act. The only other way the Supreme Court could be called upon to exercise an essential function is if the homosexual community were considered to be the target of systematic societal discrimination to such a degree that they would be entitled to heightened court protection. It remains to be seen whether laws preventing homosexual marriage will be subject to the same judicial scrutiny as race-based marriage laws, and thus fall within the existing grounds for Supreme Court jurisdiction.

III. WHY BOTHER?

A significant majority of legislative proposals never make it out of standing committees.⁹¹ Of the bills that get to the floor, only a small percentage are considered and voted on.⁹² “[A] successful demand for a roll call usually means that at least eighty-seven members feel that the issue is important enough to be worth an investment of a half-hour of their precious time. . . . [R]oll calls usually are taken on

⁸⁵ *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004) (alteration in original) (quoting *In re Burrus*, 136 U.S. 586, 593–94 (1890)).

⁸⁶ 388 U.S. 1 (1967).

⁸⁷ *Id.*

⁸⁸ *Id.* at 7.

⁸⁹ *Id.*

⁹⁰ The Court in *Loving* held that Virginia’s statutory scheme to prevent marriages between persons solely on the basis of race violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment. *Id.* at 12.

⁹¹ DONALD R. MATTHEWS & JAMES A. STIMSON, YEAS AND NAYS: NORMAL DECISION-MAKING IN THE U.S. HOUSE OF REPRESENTATIVES 5 (1975).

⁹² *Id.* (explaining that “80 to 90 percent” of all House proposals fail in committee).

relatively major and relatively controversial issues.”⁹³ For the Marriage Protection and Pledge Protection Acts to warrant roll call votes, members of the House must have felt the Acts either proposed politically important solutions or enjoyed significant popular support.⁹⁴

Considering the above synopsis of the tenuous legality of jurisdiction-stripping measures, the initial question of this Note still remains. Why, in light of eternal failure, and tenuous impact, does Congress continue to submit jurisdiction-stripping bills?

There is a possibility that supporters optimistically hope these bills will be the rare (only) successes. For example, in a letter to his constituents, Representative Ron Paul (R-Tex.) urged the following:

The choices are not limited to either banning gay marriage at the federal level, or giving up and accepting it as inevitable. A far better approach, rarely discussed, is for Congress to exercise its existing constitutional power to limit the jurisdiction of federal courts. Congress could statutorily remove whole issues like gay marriage from the federal judiciary, striking a blow against judicial tyranny and restoring some degree of states’ rights. We seem to have forgotten that the Supreme Court is supreme only over lower federal courts; it is not supreme over the other branches of government. The judiciary is co-equal under our federal system, but too often it serves as an unelected, unaccountable legislature.⁹⁵

He later followed up with support for the Pledge Protection Act:

I am troubled that some of my colleagues question whether Congress has the authority to limit Supreme Court jurisdiction in this case. Both the clear language of the United States Constitution and a long line of legal precedents make it clear that Congress has the authority to limit the Supreme Court’s jurisdiction. The Framers intended Congress to use the power to limit jurisdiction as a check on all federal judges, including Supreme Court judges, who, after all, have lifetime tenure and are thus unaccountable to the people.⁹⁶

⁹³ *Id.* at 10.

⁹⁴ *Id.* at 7.

⁹⁵ Rep. Ron Paul (R-Tex.), Eliminate Federal Court Jurisdiction, Lewrockwell.com, Mar. 2, 2004, <http://www.lewrockwell.com/paul/paul160.html>.

⁹⁶ Rep. Ron Paul (R-Tex.), Federal Courts and the Pledge of Allegiance, Lewrockwell.com, Sept. 25, 2004, <http://www.lewrockwell.com/paul/paul205.html>.

Or there is the possibility that Congress simply intended to force all branches of government to begin a dialogue leading to a somewhat unified position. During a Media Availability Day in June 2004 Senator Santorum (R-Pa.) described congressional activity in response to a perceived threat to the definition of marriage as imperative, and on the verge of being reactionary.⁹⁷ It was his goal to have Congress “speak in to this issue while it is still a justiciable issue in the courts,” and before it was too late for Congress to have a significant role in policy-making.⁹⁸

This Note proposes yet another, more plausible, possibility: Congressmen deliberately back a politically popular measure they know is unconstitutional. In an era of sound bites, there are countless advantages and few drawbacks to backing a measure destined to fail. Every opportunity to speak out on an issue relevant to constituents is an opportunity that should be strategically considered.⁹⁹ Further, Congressmen try to have each vote they cast speak to as many constituents as possible.¹⁰⁰ As one Congressman put it, “When you are voting right, you build up points on a cumulative basis. You lose them on a geometric basis; you can lose all your points on one vote.”¹⁰¹

It is, however, very difficult to vote “right.” To place the best vote — one that wins over constituents, has a good legislative effect, reduces systemic stresses, etc. — Congressmen must try to calculate the inherent risks and consequences of their actions and votes as much as possible.¹⁰² Even under the best of circumstances, “setting of goals, the weighing of costs and benefits of alternative courses of action, and the choice between alternatives on the basis of goal optimization [where the goals are systemic stress relief and re-election] are difficult.”¹⁰³ It is well-known that congressmen are faced with more propositions than they have time to deeply consider. Even with aides, it is difficult for one congressman to superficially comprehend the issue at hand, let alone gain a solid grasp on other sorts of information, such as the consistency of the legislation with her past voting record, her

⁹⁷ *Senate Republicans Hold Media Availability Following Closed Policy Luncheon*, FED. DOCUMENT CLEARING HOUSE, June 22, 2004, available at 2004 WL 1387426 (remarks of Sen. Rick Santorum (R-Pa.)).

⁹⁸ *Id.* Senator Santorum further cautioned, “The courts are moving. And if Congress does not move, we will find ourselves in a position where we will be reacting to a final judgment of a court that basically establishes a new right across this country. And at that point, arguably, it’s too late.” *Id.* These statements were made in response to the proposed Constitutional amendment to define marriage as a union between a man and a woman, but also speak more broadly about the Congressional desire for positioning in the debate.

⁹⁹ MATTHEWS & STIMSON, *supra* note 91, at 10 (“The desire to be publicly recorded foursquare in favor of God, country, and motherhood is strong among elective politicians . . .”).

¹⁰⁰ *Id.* at 24.

¹⁰¹ *Id.* at 30 (omission in original).

¹⁰² *Id.*

¹⁰³ *Id.* at 25.

constituents' positions on the legislation, its direct effect upon constituents, and the impact of the legislation.¹⁰⁴

Beyond the question how loudly a vote will speak, congressmen must also determine how vested in an issue their constituents are. It has been reported as a common trend that on most issues, constituents don't care.¹⁰⁵ However, there are some exceptions to constituent apathy, such as when a bill deals with something they can easily understand,¹⁰⁶ hereafter deemed "high-friction issues."¹⁰⁷ "High-friction issues" are not necessarily "those most crucial to the survival and prosperity of the Republic."¹⁰⁸ They are, however, those crucial to "do[ing] right by the folks back home."¹⁰⁹ Congressmen notice when high-friction issues arise, and they try to structure their actions to continue the accumulation of "good vote" points by acting on those issues. This Note proposes that one of the best ways to do this — when dealing with controversial social issues — is to take a stand on a weak measure.

As stated above, a congressman must consider the consequences of and alternatives to his action. To over-simplify, the alternatives to the jurisdiction-stripping bills put forth by the 108th Congress were a constitutional amendment or inaction. The consequences of the jurisdiction-stripping bills, assuming they would ultimately fail, were only positive. They carried no lasting legal or precedential effects, they did not face being overturned by another branch of government, they provided members of the House with opportunities to speak before their colleagues and constituents as well as before the media, and they kept the message of morals in the public consciousness longer in the months leading up to the election.

A. The Intangible Value of An Unpassable Measure

Congressional language justifying House Bills 3313 and 2820 track each other as much as possible¹¹⁰ and offer the same general court-curbing propositions which have been critiqued and discussed in academia to a dizzying degree. Though the

¹⁰⁴ See *id. passim*.

¹⁰⁵ From a survey of one hundred fifty congressmen, Matthews and Stimson anonymously reported the responses to questions. One question asked about the level of interest or position-taking among each congressman's constituents. One response was: "I would have to say that most of the people in my district do not know what is involved in major legislation." MATTHEWS & STIMSON, *supra* note 91, at 26.

¹⁰⁶ *Id.* at 27 (statement of same anonymous congressman) ("People generally get pretty exercised over bills concerning . . . things that they can understand readily." (omission in original)).

¹⁰⁷ *Id.* (statement of another anonymous congressman) ("I've seen a lot of interest develop on . . . high-friction issues." (omission in original)).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 30.

¹¹⁰ Compare H.R. REP. NO. 108-614 (2004) (Marriage Protection Act of 2004), with H.R. REP. NO. 108-691 (2004) (Pledge Protection Act of 2004).

above summary of arguments for and against court-curbing, as well as the significant body of literature weighing in, suggests a jurisdiction-stripping measure sending a potential constitutional question to the states is unconstitutional. Because a jurisdiction-stripping measure has never passed the legislature, the Supreme Court has not had an opportunity to weigh in on the debate in any significant capacity.¹¹¹

Like Congress, the Supreme Court is a Political System.¹¹² Public opinion protected it from Roosevelt's court-packing plan,¹¹³ and public opinion arguably played a significant role in the Warren Court issuing a unanimous decision in *Brown v. Board of Education*¹¹⁴ and subsequently refusing to expand the decision to such controversial areas as interracial marriage until nearly a decade later.¹¹⁵ If forced to make a ruling on a morally popular jurisdiction-stripping measure, political forces would also come into play as the cries of "activist judges" spiraled out of control and the legitimacy of the Court came under attack.¹¹⁶

Thus, even though presumably unconstitutional, such measures carry significant positioning value by virtue of their timely existence, at the height of discussion: Congress is able to maintain some clout in the discussion, rather than sit by as the courts deal with the issues. Even though the measures may be destined to failure, consideration of them provides an opportunity for congressional grandstanding and base mobilization.¹¹⁷ During consideration of the measure, supporters of the bills can "again criticize 'activist' judges" and discuss the importance of timely action.¹¹⁸ If (when?) the measure fails, they can go home and say they tried. This Note theorizes that failure also sends the message that while congressmen, as Authorities,

¹¹¹ *Contra Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 106 (1868) (concluding that the repeal of "an additional grant of jurisdiction" does not "operate as a repeal of jurisdiction theretofore allowed"); *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 515 (1868) (concluding that the repeal of portions of the 1867 statute conferring appellate jurisdiction on the Supreme Court in habeas corpus proceedings did "not affect the jurisdiction which was previously exercised"). *Ex parte McCardle* is the only instance where a jurisdiction-stripping proposal had the approval of both the Congress and the Supreme Court.

¹¹² See *supra* Part I for discussion of the critical elements and dynamics of a Political System.

¹¹³ Since the confrontations between FDR and the anti-New Deal Court in the 1930s, presidential criticism of the Court has been rare, and public perception that the Court is a fragile institution needing protection has been eroded as the Court has ruled on more social issues. GOLDMAN & JAHNIGE, *supra* note 10, at 224. See generally MARIAN C. MCKENNA, FRANKLIN ROOSEVELT AND THE GREAT CONSTITUTIONAL WAR: THE COURT-PACKING CRISIS OF 1937 (2002).

¹¹⁴ 347 U.S. 483 (1954).

¹¹⁵ *Loving v. Virginia*, 388 U.S. 1 (1967).

¹¹⁶ See *supra* note 64 and accompanying text for a discussion of claims made even in anticipation of a court ruling on a morally-popular jurisdiction-stripping measure.

¹¹⁷ Keith Perine, *House Conservatives Seek Voters' Attention With Action on Gay Marriage Amendment*, C.Q. WKLY., Oct. 2, 2004, at 2322.

¹¹⁸ *Id.*

tried to pass a bill reflecting a valuation of morals, there was not enough perceived support for that particular valuation to be accepted into the system. Such a message encourages action on the part of constituents to reaffirm the strength of the valuations they send to Congress.

B. "Traditional" Thoughts on Congressional Motivation

Though the debate about the constitutionality of jurisdiction-stripping clauses still rages, the traditional analysis has taken the view that, even if constitutional, the proposals are unwise.¹¹⁹ In his testimony before the House on The Marriage Protection Act, Martin Redish likened jurisdiction-stripping to the "moral equivalent of nuclear war."¹²⁰ This conclusion was reached by assuming the proposals passed and then looking at the logical extremes of potential outcomes.¹²¹

Invocation of the "exceptions" power would be unseemly and chaotic and would ultimately subvert the relations between the Court and the political branches that have worked reasonably well in our history. Moreover, as a practical matter, appellate jurisdiction-stripping laws are not orderly and effective means to implement congressional dissatisfaction with Court rulings. The disfavored rulings would, of course, remain on the books as influential precedents.¹²²

In assessing the wisdom of the proposals, the first question has been that of motivation. One perspective is a procedural approach, viewing motivation as "how" the authorities converted stresses into a decision, not "why" the authorities chose that particular valuation.¹²³ Under this view, if a proposal is driven by proper procedure, there is no problem introducing it before a body of Congress, just because

¹¹⁹ See *supra* Part III.A.

¹²⁰ See *Marriage Protection Hearings*, *supra* note 60, at 21 (testimony of Martin H. Redish, Professor of Law and Public Policy, Northwestern Law School).

¹²¹ *Id.*

¹²² Gunther, *supra* note 80, at 24.

¹²³ See Paul Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95.

Distinction should be made between two inquiries: (a) What (if any) operative rule is the decisionmaker systematically employing? (b) Why did the decisionmaker make a particular decision? . . . I believe that the term "motivation" is most usefully reserved for the latter inquiry, which focuses on the process by which a rule was adopted rather than on the content of the rule itself.

Id. at 111.

motivations are not appropriate. This view assumes that the Politically Relevant Members of the legislative system are allowed to consider impermissible factors when proposing a general rule so long as they adhere to proper procedure and also consider permissible factors during the proposal.¹²⁴ While this may be most worthwhile when looking at potentially discriminatory laws,¹²⁵ it is not as worthwhile in this context, especially because it discounts all relevant factors of the Political Systems approach.

A second view looks at “why” jurisdiction stripping bills are still being proposed. One suggested “why” is that Congress is trying “to ‘get at’ the Supreme Court, to express hostility to Supreme Court decisions, to provide a less interventionist forum for the adjudication of federal claims.”¹²⁶ Such expression of hostility is an authoritative way the legislative system can make known its value assignments and deflect environmental stresses sent from constituents. The chosen procedure — “overtun[ing] or minimiz[ing] the effect of previous activist decisions [and] . . . encourag[ing] the judicial branch to engage in more traditional decision-making that relies on the language of the Constitution and on greater adherence to precedent”¹²⁷ (or jurisdiction stripping) — is merely one means to this end. Congress could be appealing to constituencies, trying to influence an issue or bolster a stance, embracing the stresses.

A second suggested “why” motivation is that these bills are proposed to encourage the political development of an issue.¹²⁸ The impact and relevance of this “why” view depends on which developmental goal is chosen as a baseline. The first goal is that of containing activist courts. From this position, jurisdiction-stripping bills still exist because

some members of Congress believe the federal courts are continuing to engage in blatantly unconstitutional conduct and that something drastic must be done to rein in an “activist Court.” They view Congress as constitutionally bound to address a

¹²⁴ *Id.* at 114.

Rules themselves are seldom, if ever, generated by higher-level (rule-generating) rules. Rather they are adopted through an ad hoc process in which the decisionmaker considers and weighs a large variety of factors. Just as someone making an ad hoc decision of specific applicability . . . can consider an impermissible factor . . . , so too can a decisionmaker give weight to an impermissible factor in promulgating a general rule that is innocent on its face.

Id. (footnotes omitted).

¹²⁵ See *Washington v. Davis*, 426 U.S. 229, 239 (1976) (establishing a test mandating discriminatory purpose before finding a law unconstitutional).

¹²⁶ Gunther, *supra* note 80, at 29.

¹²⁷ Baucus & Kay, *supra* note 3, at 1003.

¹²⁸ See Neal Devins, *Smoke Not Fire*, 65 MD. L. REV. 197 (2006).

constitutional crisis that has been brought about by federal judges who have been prone to expand constitutional rights beyond their historic parameters and prone to create new rights out of “whole cloth.”¹²⁹

Yet, if this really is the goal to be achieved, jurisdiction-stripping bills are not the “drastic” means that should be used. Employing jurisdiction-stripping bills for this end is futile. They do not rein in an activist court; rather, they can be the means to the exact opposite end, thus introducing more stress into a floundering system.¹³⁰ Baucus and Kay suggest that jurisdiction-stripping bills cement said decisions in history as the “‘permanent’ status of the law.”¹³¹ This hypothesis was also promulgated in a statement by Senator John East of North Carolina, in the context of the abortion jurisdiction-stripping debates of the 1980s:

If Congress were to remove jurisdiction over abortion cases from the federal courts, such litigation would be conducted in the state courts. Some state courts might read the Constitution as all courts read it for two centuries prior to *Roe v. Wade*, and uphold state anti-abortion laws as constitutional. But many other state courts would probably regard the United States Supreme Court decision as a binding precedent. In these states, *Roe* would continue to be the effective law, and since the Supreme Court would never have occasion to hear another case involving abortion, it would be impossible ever to restore a uniform and correct interpretation of the Constitution.¹³²

One extreme conclusion reached when considering this ultimate goal of diluting judicial activism is that Congress only seeks to strip Supreme Court jurisdiction so it can “give the state courts a knowing wink and say, ‘go ahead — they can’t touch you now.’”¹³³ However, if this is the intended message, it has not been received willingly by the states. State courts have expressed concern over this suggested motivation of stripping jurisdiction to allow state courts to make the “correct”

¹²⁹ Baucus & Kay, *supra* note 3, at 1003.

¹³⁰ *Id.* at 1004.

¹³¹ *Id.*

¹³² *Id.* at 1004–05 (quoting John P. East, *The Case for Withdrawal of Jurisdiction*, in *A BLUEPRINT FOR JUDICIAL REFORM* 29, 34 (Patrick B. McGuigan & Randall R. Rader eds., 1981)). *But see* Ratner, *supra* note 59, at 936–38. Ratner argues that once the appellate jurisdiction of the Supreme Court is removed, the lower courts would be free to disregard prior Supreme Court rulings and interpret the Constitution differently than the now-“stripped” Supreme Court had done. *Id.*

¹³³ Baucus & Kay, *supra* note 3, at 1005.

decision. In a resolution adopted by the Conference of State Chief Justices during the 97th Congress, the justices expressed their alarm at the idea that Congress “[gave] the appearance of proceeding from the premise that state court judges will not honor their oath to obey the United States Constitution, nor their obligation to follow Supreme Court decisions.”¹³⁴ Those unable to pass resolutions such as this simply commented on the irresponsibility of this potential “open invitation to the state courts to overrule decisions of the Supreme Court.”¹³⁵ The argument is that, given the failure of this goal to do anything to eliminate systemic stresses, it seems highly unlikely that the congressional Authorities would continually introduce such legislation for the sole purpose of rebuking federal courts for making (or potentially making) a decision that state courts would be free to make as well. Such an action hardly alleviates the concerns of constituents. Rather, it would potentially satisfy some and leave others with no options for recourse. But what if members of the House never intended to strip jurisdiction? What if they never assumed that they would cement a present decision as the supreme law of the land? What if they never expected state courts to disregard the Constitution? This is the presumption of the second suggested goal of the “why” view.

C. The Advantages Behind Purposefully Supporting a Proposal Destined to Fail

The legislative system contains relative position stability because cleavages, multiple goals, decision-making limitations, and political strategy mandate such a result.¹³⁶

Members of Congress inhabit an uncertain world, one in which their prospects for the future hinge on an array of factors that often lie beyond their control. At the same time, members of Congress are goal-oriented, pursuing the goal of reelection as well as goals of personal and party power, and good policy. Meanwhile, members are human beings with limited capacities for information processing. They rely on decision shortcuts and other tools for cognitive economy, perhaps to an even greater extent than most other people as a result of the highly complicated tasks that they face.¹³⁷

¹³⁴ 128 CONG. REC. 4435 (1982).

¹³⁵ Baucus & Kay, *supra* note 3, at 1005.

¹³⁶ Scott R. Meinke, Long-Term Position Change Among U.S. House Members: The Case of the Hyde Amendment 3 (Dec. 2001) (unpublished M.A. thesis, Ohio State University), available at <http://wc.wustl.edu/workingpapers/Meinke.pdf>.

¹³⁷ *Id.*

Typically, however, members face considerable uncertainty about how their voting decisions will bring them closer to achieving their goals.¹³⁸ Looking to the result of past decisions, their own and systemic results, can provide the most reliable forecasting information about how a vote will affect their objectives.¹³⁹

Reducing uncertainty is also essential for constituents. For constituents,

[t]he chief method of ascertaining a decisionmaker's motivation involves the drawing of inferences from his conduct, viewed in the context of antecedent and concurrent events and situations. The process does not differ from that of inferring ultimate facts from basic facts in other areas of the law. It is grounded in an experiential, intuitive assessment of the likelihood that the decision was designed to further one or another objective.¹⁴⁰

To help direct the inferences of their constituents, congressional members must recognize "not only that their past decisions are reliable estimates of how to satisfy the constituency but also that maintaining stable, consistent positions on salient issues helps to build constituent trust."¹⁴¹

Assume a member of Congress has the goal of reelection in mind. "[T]hough many constituency-related factors inform a member's initial calculation of how one decision will affect reelection, an attention-getting event related to that decision" can change the way values are attributed to that issue.¹⁴² Constituents who were previously inattentive on same-sex marriage or the text of the Pledge of Allegiance may all of a sudden have formed opinions. To the congressman seeking reelection, who may not have a strong position either way, the best thing to do is temporarily appease these constituents.¹⁴³ Yet, because of the visibility and controversial nature of the topics, "members have a particularly strong incentive toward stability in their over-time position on the issue."¹⁴⁴

Past studies of congressional roll-call decisions have focused on various inputs: party,¹⁴⁵ constituency,¹⁴⁶ interest group influence,¹⁴⁷ and the positions of other

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ Brest, *supra* note 123, at 120–21.

¹⁴¹ Meinke, *supra* note 136, at 3.

¹⁴² *Id.* at 5.

¹⁴³ Ronald E. Weber & William R. Shaffer, *Public Opinion and American State Policy-Making*, 16 *MIDWEST J. POL. SCI.* 683, 697–99 (1972).

¹⁴⁴ Meinke, *supra* note 136, at 9.

¹⁴⁵ DUNCAN MACRAE, JR., *DIMENSIONS OF CONGRESSIONAL VOTING: A STATISTICAL STUDY OF THE HOUSE OF REPRESENTATIVES IN THE EIGHTY-FIRST CONGRESS* 257–60 (1958).

¹⁴⁶ MORRIS P. FIORINA, *REPRESENTATIVES, ROLLS CALLS, AND CONSTITUENCIES* (1974).

¹⁴⁷ Richard A. Smith, *Advocacy, Interpretation, and Influence in the U.S. Congress*, 78 *AM. POL. SCI. REV.* 44, 45 (1984).

members.¹⁴⁸ Modern studies tend to focus more on policy outcomes. The modern dominant congressional decision model “portrays members as seekers of policy outcomes who, when faced with a vote decision, choose policies and procedures that lead to outcomes closest to their ideal point.”¹⁴⁹

“A conscientious decisionmaker . . . considers the costs of a proposal, its conduciveness to the ends sought to be attained, and the availability of alternatives less costly to the community as a whole or to a particular segment of the community.”¹⁵⁰ Supporting a jurisdiction-stripping bill need not be as black and white as trying to directly confront an activist court. Rather, it can be conducive to communicating with constituents.

Statistically, there are very few costs behind backing a bill doomed to fail, especially when that failure is due to election year timing. Neither the Marriage Protection Act nor the Pledge Protection Act saw any further consideration once the 2004 elections had passed.¹⁵¹ Because the bills have a dire history of failure, supporting such a bill will have no real effect on the long-term legislative landscape. It is not as lasting or drastic as a constitutional amendment. But it does still send a message: look at my past behavior and see that I am willing to support your issues. The only potential cost to supporting bills such as these is social division. This is a cost which can be marginalized depending on the voter base to whom a particular congressman is pandering. In the case of same-sex marriage, the analysis below will show that it was possible to have the same message accepted by two diametrically opposed groups. Finally, there are no less costly measures than these bills for either segment of the population.

1. Application

In the months leading up to the 2004 elections, members of the House of Representatives were dealing with a large number of stresses and, at the same time, seeing their constituents’ lines of cleavage deepen. Every seat in the House was up for grabs.¹⁵² President Bush was running a reelection campaign that targeted morals and good values by consistently taking stances against same-sex marriage and in favor of the “under God” language in the Pledge.¹⁵³ The Supreme Court had refused to deal substantively with the Ninth Circuit’s rejection of the words “under God” in

¹⁴⁸ MATTHEWS & STIMSON, *supra* note 91.

¹⁴⁹ Meinke, *supra* note 136, at 6.

¹⁵⁰ Brest, *supra* note 123, at 121–22.

¹⁵¹ See *infra* apps. A and B.

¹⁵² CNN.com, Election Results, <http://www.cnn.com/ELECTION/2004/pages/results/house> (last visited Jan. 22, 2006).

¹⁵³ Kelly Beauear Vlahos, ‘Values’ Help Shape Bush Reelection, Fox News, Nov. 4, 2004, <http://www.foxnews.com/story/0,2933,137535,00.html> (last visited Jan. 22, 2006).

the Pledge of Allegiance.¹⁵⁴ Numerous state legislatures were passing resolutions of disdain for the Supreme Court and the Ninth Circuit because of their decisions in these cases.¹⁵⁵ The Massachusetts legislature, unable to reach a legal compromise, was forced by the Massachusetts Supreme Court to recognize same-sex marriage.¹⁵⁶ Five constitutional amendments, setting a federal statutory definition of marriage, were proposed in the legislative houses.¹⁵⁷ Even though they were *politically* disfavored, the Federal Marriage Amendments mobilized significant *constituent* support. On the days leading up to the Senate vote (taken on July 14, 2004), Congressional offices across the country were barraged with phone calls.¹⁵⁸ Senator Mike DeWine (R-Ohio) logged over ten thousand calls between July 13 and July 14, 2004, urging him to support a constitutional amendment banning gay marriage, while Senator George Voinovich (R-Ohio) received fifteen thousand calls in the week leading up to the vote — thirty times more than what his office would get during a normal week, and, at least for his office, the “largest volume” of calls ever for a single issue.¹⁵⁹

To let slip such a prime strategic opportunity to speak to constituents, already potentially mobilized, passionate, and willing to listen because of the increased coverage of the issues, would be ludicrous. However, a constitutional amendment carries with it drastic and serious consequences. It permanently alters the fabric of the U.S. Constitution. So, why not a jurisdiction-stripping amendment?

2. Marriage Protection Act

When the gay marriage issue was officially thrust into the political fray by the Massachusetts Supreme Court in 2002, national politicians needed to quickly assess the appropriate political strategy.¹⁶⁰ The theretofore unlitigated and unchallenged federal law dealing with same-sex marriage — The Defense of Marriage Act of 1996 (DOMA),¹⁶¹ defining marriage as a union between a man and a woman and explicitly authorizing states to refuse to recognize homosexual marriages performed in other states¹⁶² — was on tenuous legal ground. After *Lawrence* and the Massachusetts case,

¹⁵⁴ *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 5 (2004).

¹⁵⁵ See, e.g., Kavan Peterson, *50-State Rundown on Gay Marriage Laws*, Stateline.org, Nov. 3, 2004, <http://www.stateline.org/live/ViewPage.action?siteNodeId=136&languageId=1&contentId=15576>.

¹⁵⁶ *Id.*

¹⁵⁷ H.R.J. RES. 106, 108th Cong. (2004); S.J. RES. 40, 108th Cong. (2004); S.J. RES. 30, 108th Cong. (2004); S.J. RES. 26, 108th Cong. (2003); H.R.J. RES. 56, 108th Cong. (2003).

¹⁵⁸ Lee Duigon, *Can Congress Defend Marriage? House Advances, Senate Stumbles*, CHALCEDON REP., July 23, 2004, <http://www.chalcedon.edu/articles/0407/040723duigon.php>.

¹⁵⁹ *Gay Marriage: If It Won't Work in the Senate, Try the House*, HOTLINE, July 19, 2004, LEXIS, News Library, Hotline File.

¹⁶⁰ Keith Perine & Jennifer A. Dlouhy, *Parties Wary of Political Risk in Stands on Gay Marriage*, C.Q. WKLY., Jan. 10, 2004, at 84.

¹⁶¹ 28 U.S.C. § 1738C.

¹⁶² *Id.*

Goodridge v. Department of Public Health,¹⁶³ academics began to question the legality of a law whose authority was rooted in “the power to define how states shall extend ‘full faith and credit’ to the ‘public Acts, Records and judicial Proceedings of every other State,’”¹⁶⁴ especially considering that the “‘full faith and credit’ clause traditionally has been applied to reciprocal recognition of judgments and decrees — such as divorces — but not legislation or licensing laws.”¹⁶⁵ However, since Massachusetts had not adopted a state DOMA, there was no forum immediately post-*Goodridge* to politically support nor challenge the Defense of Marriage Act.¹⁶⁶

For those opposing homosexual marriages, the strongest message possible was to pass a constitutional amendment defining marriage as a union between a man and a woman. For those in favor of same-sex marriage, challenging the DOMA as an unconstitutional violation of the Fifth or Fourteenth Amendments would have been the best alternative. However, public opinion did not seem to support either outcome.¹⁶⁷

¹⁶³ 798 N.E.2d 941 (Mass. 2003). Since Massachusetts never enacted a DOMA, *Goodridge* did not challenge the constitutionality of a state or federal version. However, “[t]he constitutionality of the Defense of Marriage Act cannot be seriously challenged until one state legalizes same-sex marriage.” *What is Needed to Defend the Bipartisan Defense of Marriage Act of 1996? Hearing Before the Subcomm. on the Constitution, Civil Rights and Property Rights of the Senate Comm. on the Judiciary*, 108th Cong. (2003) (testimony of Michael P. Farris, President, Patrick Henry College), available at http://judiciary.senate.gov/testimony?cfm?id=906&wit_id=2543 (last visited Jan. 15, 2006). Thus, following this logic, the moment same-sex marriage was legalized in Massachusetts, challenges could be mounted against other states that refused to recognize Massachusetts marriage licenses.

¹⁶⁴ Perine & Dlouhy, *supra* note 160.

¹⁶⁵ *Id.*

¹⁶⁶ See *infra* app. A, noting that the first DOMA challenges came in the first few days after the November 2004 elections. Litigants are seeking to challenge the laws and state amendments through challenging their underlying foundation — the state DOMA. Their theory is simply that if the law permitting states to ignore the Full Faith and Credit clauses is struck down as unconstitutional, then, presumably, any state law that refuses to recognize same sex marriages performed in states that have legalized the practice will be unconstitutional as well.

¹⁶⁷ The following chart on people’s views of same-sex marriage is from an ABC News poll:

	LEGAL	ILLEGAL	AMEND CONSTITUTION	LEAVE TO THE STATES
All	39%	55%	46%	45%
Republicans	24%	73%	58%	36%
Democrats	47%	48%	44%	48%
Independents	44%	48%	35%	56%
Conservative	23%	73%	56%	37%
Liberal	63%	34%	38%	54%
Moderate	42%	50%	41%	50%

“Elected officials who are gambling their careers are walking on tiptoes.”¹⁶⁸ With every House of Representatives seat hypothetically open in the 2004 election,¹⁶⁹ everyone in the House was on tiptoes. Strategically, it was critical that some position be taken, but without knowing the full legal and political analysis, a rash response could have added fuel to an already festering cultural war. The exact messages being sent by constituents were unclear, and there was no past coalition on which to fall back.¹⁷⁰ More nuanced questions then arose. How much of a statement should be made considering the potential pitfalls of making a definitive stand? How much time should be spent focusing on same-sex marriage and the Pledge of Allegiance, in light of other issues like the economy and the conflict in Iraq?

A constitutional amendment was not in the cards. With moderate (and Log Cabin) Republicans publicly refusing to “support any Republican candidate who back[ed] an amendment against same-sex marriage” and vowing to redirect campaign resources to “a ground game of defeating the amendment” in every state,¹⁷¹ and extreme disagreement amongst conservative groups over just how broadly to word a constitutional amendment banning same-sex marriage,¹⁷² it would be impossible to play to a broad enough constituent base to justify amending the Constitution. Plus, “[a] lot of Republicans and Democrats [saw] this as something that could backfire.”¹⁷³

David Morris, *Marriage Amendments: Opinions Split over Amendment to Ban Same-Sex Marriages*, ABCNEWS.com, Feb. 24, 2004, available at http://abcnews.go.com/sections/us/Relationships/gay_marriage_poll_040224.html (retrieved from <http://www.archive.com>). “This ABCNEWS/*Washington Post* poll was conducted by telephone Feb. 18–22 among a random national sample of 1,028 adults. The results have a three-point error margin. Sampling, data collection and tabulation was conducted by TNS Intersearch of Horsham, Pa.” *Id.*

As can be seen here, only thirty-nine percent of the survey population believed same-sex marriages should be legal. Of the remaining fifty-five percent believing same-sex marriages should be illegal, there was a fairly even split as to how such illegality should be proclaimed — once by the federal government, or fifty times (at most), once by each state.

But see GLAAD, *In Depth: Public Opinion & Polls*, <http://www.glaad.org/media/guide/indepthpolls.php> (last visited Jan. 15, 2006); Nat’l Gay & Lesbian Task Force, *Recent National Polls on Same-Sex Marriage & Civil Unions*, <http://www.thetaskforce.org/downloads/RecentNationalMarch2004.pdf> (last visited Jan. 15, 2006) (discussing various poll results concerning the legality of same-sex marriage and a constitutional amendment).

¹⁶⁸ Perine & Dlouhy, *supra* note 160 (quoting Groner Norquist, President of Americans for Tax Reform).

¹⁶⁹ See *supra* note 152.

¹⁷⁰ Perine & Dlouhy, *supra* note 160 (quoting David Winston, a Republican pollster and advisor to Congressional leadership: “The dynamic we’re dealing with is not clear We’ve had one legal case in Massachusetts, and we don’t know what that means.”).

¹⁷¹ *Id.* (quoting Mark Mead, Political Director of the Log Cabin Republicans).

¹⁷² *Id.*

¹⁷³ *Id.* (quoting Winnie Stachelberg, Political Director of the Human Rights Campaign).

This Note proposes that the only other strategic option available to congressmen, excluding inaction, was to consider a jurisdiction-stripping bill. If past trends speak to the present, this would be a bill that would not carry many political consequences, but would provide numerous opportunities for well-timed sound bytes and speeches. The Marriage Protection Act was quietly introduced to the House in October 2003.¹⁷⁴ It was set aside for nine months, only to be revived on July 22, 2004,¹⁷⁵ eight days after the Senate rejected the Federal Marriage Amendment.¹⁷⁶

In the days leading up to the 2004 elections, the opportunity to position the issue in the minds of the fifty-five percent of Americans opposing same-sex marriage,¹⁷⁷ without polarizing the roughly ten percent of those Americans who were not willing to allow their opposition to extend to a constitutional amendment,¹⁷⁸ was priceless. The jurisdiction-stripping bill¹⁷⁹ appealed to some who opposed gay marriage but were reluctant to support a constitutional amendment so long as the federal DOMA remained unchallenged. It also created a forum for keeping the issue fresh in the minds of constituents¹⁸⁰ and created a hope that this showcasing would “drive socially conservative voters to the polls to support GOP candidates. They also [were] forcing Democratic politicians to decide whether to resist the initiative and risk alienating swing voters”¹⁸¹

On the other side of the aisle, pressure was light on the Democrats leading up to the election,¹⁸² and expectations were low that the Democrats would be able put up much of defense without further entrenching the Republican base in its anti-gay

¹⁷⁴ 149 CONG. REC. H9613, H9613 (daily ed. Oct. 16, 2003); *see also infra* app. A.

¹⁷⁵ 150 CONG. REC. H6580 (daily ed. July 22, 2004); *see also infra* app. A.

¹⁷⁶ 150 CONG. REC. S8060, S8090 (daily ed. July 14, 2004).

¹⁷⁷ Morris, *supra* note 167.

¹⁷⁸ *Id.*

¹⁷⁹ *See* 150 CONG. REC. H6580 (daily ed. July 22, 2004).

¹⁸⁰ *Id.* at H6603 (statement of Rep. DeGette (D-Colo.)).

This is the Republican leadership’s last ditch effort to get a vote on gay marriage in the House to effect the election this fall. We are considering legislation to pre-empt an action that has not taken place. The Defense of Marriage Act, which passed in 1996, is not being challenged. This is a cop out, not a compromise. They know they don’t have the votes on the Federal Marriage Amendment so they are grasping at straws.

Id.

¹⁸¹ Perine, *supra* note 117. Even though Perine’s article is referencing the politics of the Federal Marriage Amendment (FMA), proposed by Rep. Marilyn Musgrave (R-Colo.), it is also applicable to the present issue, as the jurisdiction-stripping Marriage Protection Act was a precursor to the House’s consideration of the FMA.

¹⁸² Perine & Dlouhy, *supra* note 160 (“Gay rights groups have not pressed Democrats because the groups know the minority party has no control over the congressional agenda.”).

position.¹⁸³ Lawmakers who had already positioned themselves as favoring civil unions while opposing same-sex marriage had not lost any significant support from liberals and gay rights activists.¹⁸⁴ With state constitutional amendments on the ballots of eleven states,¹⁸⁵ and anti-gay marriage statutes on the ballots of another sixteen,¹⁸⁶ stubborn entrenchment was the last thing gay rights advocates wanted.¹⁸⁷ Also, there was nothing to prove that encouraging state-centric decisions would hurt the same-sex marriage cause. In fact, Lambda Legal's strategy was to encourage just that: "What this is really about is what each state is going to decide to do," said David S. Buckel, senior staff attorney at Lambda. "We're talking to the voters and we're talking to the judges."¹⁸⁸ The goal of the gay rights activists shifting the fight to the states was to circumvent an "emotional national debate" that "could prompt a backlash and prompt lawmakers into expanding the amendment's wording so that it bars not only same-sex marriages, but civil unions and domestic partner benefits as well."¹⁸⁹ Thus, as consideration of the Marriage Protection Act was underway, Democratic supporters could keep the House on track — reminding them that the debate was about states' rights, not about marriage — and send a message to constituents that even as conservatives were trying to federalize marriage, *they* were willing to keep the decision centralized to the states, which could allow same-sex marriage.¹⁹⁰ Their only other option was to continue to bring up the presumed unconstitutionality of the bills or directly confront the same-sex marriage issue.¹⁹¹

3. Pledge Protection Act

Before the Supreme Court dismissed *Elk Grove Unified School District v. Newdow*¹⁹² on a standing technicality,¹⁹³ an Associated Press poll showed that nearly

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ Stevenson Swanson, *Amendments to Ban Practice Pass Handily In All 11 States*, CHI. TRIB., Nov. 3, 2004, at C8.

¹⁸⁶ Christi Goodman, *State of the Unions*, STATE LEGS., Apr. 2004, at 26, 27, available at http://www.ncsi.org/Programs/pubs/slmeq/2004/04SLApr_Unions.pdf.

¹⁸⁷ John M. Broder, *After Series of Losses, Gays Rethink Strategy*, INT'L HERALD TRIB., Dec. 10, 2004, at 4.

¹⁸⁸ Perine & Dlouhy, *supra* note 160. *But see* Peterson, *supra* note 155 ("It is always wrong to put basic rights up to a popular vote. In the end, the U.S. Supreme Court will decide on marriage equality and it will base its decision on the U.S. Constitution, not anything in any of the state constitutions.") (quoting Matt Foreman, Executive Director of the National Gay and Lesbian Task Force)).

¹⁸⁹ Perine & Dlouhy, *supra* note 160.

¹⁹⁰ 150 CONG. REC. H6589 (daily ed. July 22, 2004).

¹⁹¹ *See generally* Part III.

¹⁹² 542 U.S. 1 (2004).

¹⁹³ Standing is "[a] party's right to make a legal claim or seek judicial enforcement of a duty or right." BLACK'S LAW DICTIONARY 1442 (8th ed. 2004). "To have standing in federal

ninety percent of Americans felt the pledge should be retained, regardless of constitutional issues.¹⁹⁴ In his opening remarks to the House during consideration of the Pledge Protection Act, Representative Sensenbrenner claimed this jurisdiction-stripping proposal was one device to remedy abuses by federal judges.¹⁹⁵ However, as can be noted from Appendix B, there was no actualized judicial “abuse” beyond *Newdow*. However, there was significant concern that since *Newdow* was dismissed because Mr. Newdow was a non-custodial parent lacking the standing to sue on behalf of his daughter, it would wind its way back through the courts — in a non-election year — and have to be addressed.¹⁹⁶ Considering the state support that had come from the pledge immediately after the Ninth Circuit handed down the *Newdow* decision, the House had good reason to believe the states would continue to support the “under God” language, regardless of the Constitutional issues.¹⁹⁷

The election year created a window to remind the Republican conservative base and the swing voters that there was this affront to a revered tradition. While the salience of this issue may not have been as strong as the same-sex marriage issue was to constituents, it continued the trend of invoking a need to preserve “morals” that most pundits thought contributed heavily to the GOP’s electoral success.

court, a plaintiff must show (1) that the challenged conduct has caused the plaintiff actual injury, and (2) that the interest sought to be protected is within the zone of interests meant to be regulated by the statutory or constitutional guarantee in question.” *Id.* Furthermore, “standing jurisprudence contains two strands: Article III standing, which enforces the Constitution’s case or controversy requirement; and prudential standing, which embodies ‘judicially self-imposed limits on the exercise of federal jurisdiction.’” *Newdow*, 542 U.S. at 11 (citations omitted).

Plaintiff Newdow, as a non-custodial parent suing on behalf of his daughter, was unable to establish that he had a right to make a claim, because the California legal system did not permit him any method of filing on his daughter’s behalf. *Id.* at 8–9. Ultimately, the Supreme Court held, “The California cases simply do not stand for the proposition that Newdow has a right to dictate to others what they may and may not say to his child respecting religion.” *Id.* at 17.

¹⁹⁴ *Poll: Keep ‘Under God’ in Pledge of Allegiance*, ASSOCIATED PRESS, Mar. 24, 2004, available at <http://www.firstamendmentcenter.org/news.aspx?id=12989>.

¹⁹⁵ 150 CONG. REC. H7451, 7451 (daily ed. Sept. 23, 2004) (statement of Rep. Sensenbrenner (R-Wis.)).

¹⁹⁶ A new complaint was filed January 3, 2005, by Mr. Newdow and eight other custodial parents. Original Complaint, *Newdow v. Congress*, Civ. 4 No. 05CV00017, 2005 WL 1026867 (E.D. Cal. Jan. 3, 2005).

¹⁹⁷ Meghan Twohey, *Pledge of Allegiance Draws New Legislative Interest*, Stateline.org, July 31, 2002, available at <http://www.stateline.org/live/ViewPage.action?siteNodeId=136&languageId=1&contentId=14909>; National Conference of State Legislators, *2002 Pledge of Allegiance Legislative Tracking as of 1/31/2003*, available at <http://www.ncsl.org/programs/educ/pledgeupdate.htm> (last visited Mar. 25, 2005).

CONCLUSION

Political Systems Theory dictates that external stresses and internal valuations must constantly be handled by systemic Authorities if that system is to retain legitimacy and survive. For a Congress motivated by reelection concerns and strong public sentiment about same-sex marriage and retaining the words “under God” in the Pledge of Allegiance, jurisdiction-stripping bills were the appropriate stress relief.

For those members staunchly behind the Marriage Protection Act or the Pledge, the bills created an opportunity to continue to assign their values to a position when all other alternatives were no longer salient. But more importantly, they gave those members seeking reelection a low-risk opportunity to appease (potentially newly mobilized) constituents without requiring a large position shift.

Congressmen must weigh the costs of every decision, as well as the alternatives. In a situation where the costs are very slight — all that is being invested is a single vote, with little chance of any future action coming to fruition — less costly alternatives are few and far between. Presumably, many of the supporters were counting on the idea that these bills would not pass. The moment a jurisdiction-stripping bill does pass the House of Representatives and the Senate, this systemic technique will disappear because the costs of backing a jurisdiction-stripping bill will be compounded. Legislators will actually need to look at the proposal and weigh the impacts tied to the outcome.

Tangentially, some of the ends lambasted in previous discussions of jurisdiction-stripping bills — namely, trying to spark a more conscientious dialogue between Congress and the Supreme Court — may also surface. But, as mentioned throughout this Note, it is doubtful that Congress was really motivated by a deep, counter-productive need to “talk” with the Supreme Court. When Congress proposes a measure destined to fail, but which reopens debate on a politically sensitive issue, each member has renewed opportunities to send low-cost messages to constituents. It is only when one accepts this as the true Congressional motivation that a jurisdiction-stripping bill becomes strategically genius.

APPENDIX A

Marriage Protection Act of 2003, H.R. 3313, 108th Congress, 1st. Sess. **Timeline of Relevant Events during the 108th Congress**

September 10, 1996	The 104th Congress passed the Defense of Marriage Act (DOMA), federally defining marriage as a union between a man and a woman, and allowing states the right to refuse to recognize a same-sex marriage from another state. Thirty-nine states have since adopted their own versions of the DOMA.
	No challenges to the DOMA had been waged prior to November 3, 2004
March 4, 2003	Arguments were heard in <i>Goodridge v. Dep't of Pub. Health</i> , 798 N.E.2d 941 (Mass. 2003).
May 21, 2003	Representative Marilyn Musgrave (R-Colo.) introduced the Federal Marriage Amendment to the House (H.J. Res 106).
June 26, 2003	<i>Lawrence v. Texas</i> , 539 U.S. 558 (2003). Aside from its basic ruling regarding sodomy, there was also Justice Scalia's dissent, warning of an impending threat to the definition of marriage and also theorizing that the federal and state DOMAs might not withstand Constitutional scrutiny.
July 30, 2003	President Bush addressed America and discussed the need to codify the definition of marriage as a union between a man and a woman.
September 4, 2003	The Senate Committee on the Judiciary conducted oversight hearings regarding the Defense of Marriage Act and the future of DOMA.
October 16, 2003	The Marriage Protection Act (H.R. 3313) was introduced into the House of Representatives.

November 18, 2003	<i>Goodridge v. Dept. of Pub. Health</i> , 798 N.E.2d 941 (Mass. 2003) decided, finding that the state's ban on same-sex marriage violated the state's constitution. NOTE: Mass. has never had a state DOMA.
November 25, 2003	Senator Wayne Allard (R-Colo.) introduced S.J. Res. 30 (Federal Marriage Amendment) to amend the Constitution to define marriage.
Early February 2004	San Francisco, California, and Multnomah County, Oregon, began issuing same-sex marriage licenses.
February 24, 2004	President Bush announced that heterosexual marriages were in danger and implored Congress to pass a Constitutional Amendment defining marriage.
March 30, 2004	The House Committee on the Judiciary held hearings on the Defense of Marriage Act <i>and</i> the "Gay Marriage Amendment."
May 17, 2004	Massachusetts legally began recognizing same sex marriages.
July 14, 2004	The Senate voted 48 yeas to 50 nays to block the Federal Marriage Amendment.
July 22, 2004	The House of Representatives considered and approved the Marriage Protection Act by a vote of 233 yeas to 194 nays. There was not a quorum present when this vote was taken.
September 7, 2004	The Act was referred to the Senate.
September 30, 2004	The House failed to get enough support for the Federal Marriage Amendment (227 yeas to 186 nays).
October 5, 2004	A Louisiana district judge struck down the state's same-sex amendment on the grounds it violated the state's "single-subject" requirement. Georgia, Ohio, and Oklahoma have similar single-subject requirements.

- November 2, 2004 Eleven states passed constitutional amendments banning same-sex marriage (Arkansas, Georgia, Kentucky, Michigan, Mississippi, Montana, North Dakota, Ohio, Oklahoma, Oregon, Utah). This added to the six other states that had passed such amendments prior to the 2004 election.
- President Bush was reelected to a second term, largely because of conservative support.
- November 3, 2004 A lawsuit was filed in Oklahoma district court seeking to overturn Oklahoma's same-sex marriage amendment and challenging the constitutionality of Oklahoma's DOMA.
- November 29, 2004 The Supreme Court declined to hear an appeal of *Goodridge v. Mass. Dept. of Public Health*, 543 U.S. 1002 (2004).

APPENDIX B

Pledge Protection Act, 2003 U.S.H.R. 2028, Res. 781, 108th Congress, 1st Sess. **Timeline of Relevant Events during the 108th Congress**

June 27, 2002	The Ninth Circuit ruled on <i>Elk Grove Unified Sch. Dist. v. Newdow</i> , 328 F.3d 466 (9th Cir. 2002).
November 13, 2002	President Bush signed S2690, a bill reaffirming the pledge in its entirety.
2002/2003	<p>Numerous state legislatures passed bills directing disgust toward the House of Representatives and also at the Ninth Circuit decision.</p> <p>Examples:</p> <ul style="list-style-type: none">• Michigan: SR 241, calling on the Supreme Court to overturn the 9th Circuit decision• Delaware: HR 70, SR 18, urging Congress to prevent the weakening of the Pledge• New Jersey, Pennsylvania, Tennessee, West Virginia, and Colorado all passed similar laws calling for action and preservation of the pledge• Various other state legislatures passed resolutions expressing disdain for the 9th Circuit.
March 4, 2003	The Ninth Circuit stayed enforcement of its decision pending Supreme Court Appeal.
May 8, 2003	The Pledge Protection Act referred to the House Committee on the Judiciary.
October 14, 2003	Writ of Certiorari was granted for <i>Newdow</i> , 540 U.S. 945 (2003).
June 14, 2004	(Flag Day) The Supreme Court decision was issued dismissing <i>Newdow</i> for lack of standing by the petitioner (542 U.S. 1 (2004)).
September 15, 2004	The House Committee on the Judiciary ordered H.R. 2028 reported.

- September 21, 2004 The House Committee on the Judiciary filed its report on H.R. 2028, as amended.
- September 23, 2004 The House considered the bill, passing it with a roll call vote of 247 yeas to 173 nays.
- January 6, 2005 Newdow and eight other parents renewed their case challenging the Pledge (*Newdow v. Congress*, 05-00017).