

FEDERAL COURTS — JURISDICTION STRIPPING — FOURTH CIRCUIT HOLDS CONGRESS STRIPPED JURISDICTION TO HEAR PIPELINE CHALLENGE. — *Appalachian Voices v. United States Department of the Interior*, 78 F.4th 71 (4th Cir. 2023).

Jurisdiction stripping has long been controversial.¹ And lately, it has taken on a renewed salience with political progressives calling to strip the federal courts of jurisdiction to rein in a perceived conservative judiciary.² Article III of the U.S. Constitution vests the judicial power in “one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”³ This language has commonly been taken to allow Congress to vest the lower federal courts with narrower jurisdiction than what Article III would permit,⁴ though the extent of that power has not been fully adjudicated.⁵ There is generally a consensus that Congress can restrict the jurisdiction of federal courts over a particular matter.⁶ However, the power to strip jurisdiction over particular *pending* litigation is still a largely unsettled issue.⁷ Recently, in *Appalachian Voices v. United States Department of the Interior*,⁸ the Fourth Circuit held that a provision of the Fiscal Responsibility Act of 2023⁹ had effectively stripped the court of authority to hear environmental groups’ pending challenges to the Mountain Valley Pipeline. The provision did so by stripping all courts of jurisdiction over challenges to the pipeline and vesting exclusive jurisdiction over all challenges to the jurisdiction-stripping provision with the D.C. Circuit.¹⁰

¹ See, e.g., Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 896–97 (1984); PRESIDENTIAL COMM’N ON THE SUP. CT. OF THE U.S., FINAL REPORT 156 (2021). Since the 1950s, Congress has regularly considered legislation that would prohibit the Supreme Court, the lower courts, or both from hearing cases on “hotly contested and politically salient constitutional issues.” *Id.* at 157. Only one of those proposals was enacted into law, and it was subsequently invalidated. *Id.*; see also *Boumediene v. Bush*, 553 U.S. 723, 792 (2008).

² See Daniel Epps & Alan M. Trammell, *The False Promise of Jurisdiction Stripping*, 123 COLUM. L. REV. 2077, 2079 (2023).

³ U.S. CONST. art. III, § 1.

⁴ See, e.g., *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 448–49 (1850). *But see* *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 328–31 (1816).

⁵ See Richard H. Fallon, Jr., *Jurisdiction-Stripping Reconsidered*, 96 VA. L. REV. 1043, 1045 (2010).

⁶ See, e.g., *Patchak v. Zinke*, 138 S. Ct. 897, 906 (2018) (plurality opinion).

⁷ See *id.* at 913 (Sotomayor, J., concurring in the judgment); *id.* at 914 (Roberts, C.J., dissenting); see also Ronald Mann, *Opinion Analysis: Sharply Divided Court Narrowly Approves Congress’ Power to Resolve Pending Litigation*, SCOTUSBLOG (Feb. 28, 2018, 1:15 PM), <https://www.scotusblog.com/2018/02/opinion-analysis-sharply-divided-court-narrowly-approves-congress-power-resolve-pending-litigation> [<https://perma.cc/4WTD-KACZ>] (“*Patchak* is more likely to underscore than it is to settle the intractable task of demarcating the boundary between Congress’ routine exercise of its power to define the jurisdiction of the federal courts and its improper intrusion into the disposition of particular litigation.”).

⁸ 78 F.4th 71 (4th Cir. 2023).

⁹ Pub. L. No. 118-5, 137 Stat. 10.

¹⁰ *Id.* § 324(e).

Because the panel failed to analyze the provision vesting exclusive jurisdiction with the D.C. Circuit as a jurisdiction-stripping provision, the court missed the opportunity to review the merits of section 324 and potentially obtain greater clarity from the Supreme Court in a confused area of law.

In 2017, the Federal Energy Regulatory Commission (FERC) authorized the construction and operation of the Mountain Valley Pipeline, a three-hundred-plus-mile underground pipeline that would transport natural gas from West Virginia to Virginia.¹¹ Controversial since its inception, the Mountain Valley Pipeline has been the subject of multiple lawsuits by environmental groups challenging agency actions granting various approvals and permits.¹² While lawsuits seeking to prevent the final construction and initial operation of the pipeline were pending in the Fourth Circuit — and potentially in response to unfavorable rulings there¹³ — Congress stepped in by enacting the Fiscal Responsibility Act. Section 324 of that Act ratified all agency actions necessary to the pipeline's completion, stripped all courts of jurisdiction to hear challenges to these agency actions, and vested the D.C. Circuit with exclusive jurisdiction over challenges to section 324's validity.¹⁴ Armed with this new legislation, the respondents (the pipeline and federal agencies) moved to dismiss the litigation pending in the Fourth Circuit.¹⁵

The Fourth Circuit granted the motions to dismiss.¹⁶ Writing for the unanimous panel, Judge Wynn first held as a threshold matter that the court had jurisdiction to determine its own jurisdiction over the underlying petitions.¹⁷ Proceeding from the threshold question, the panel further held that section 324 “eliminated [the court's] jurisdiction over the underlying petitions in two ways.”¹⁸

First, section 324 ratified and approved all agency actions and approvals necessary for the completion of the Mountain Valley Pipeline “[n]otwithstanding any other provisions of law”¹⁹ and “supersed[ing] any other provision of law . . . that is inconsistent with the issuance of any . . . approval for the Mountain Valley Pipeline.”²⁰ Because the agency actions challenged by the petitioners fell within the domain of section 324, Judge Wynn held that Congress had amended the legal standards governing the petitioners' challenges.²¹ He wrote that

¹¹ *Appalachian Voices*, 78 F.4th at 75.

¹² *Id.*

¹³ *See id.* at 84 (Thacker, J., concurring).

¹⁴ Fiscal Responsibility Act § 324.

¹⁵ *Appalachian Voices*, 78 F.4th at 75.

¹⁶ *Id.* at 81.

¹⁷ *Id.* at 76 (citing *United States v. Ruiz*, 536 U.S. 622, 628 (2002)).

¹⁸ *Id.*

¹⁹ Fiscal Responsibility Act § 324(c).

²⁰ *Id.* § 324(f).

²¹ *Appalachian Voices*, 78 F.4th at 77.

“Congress has the power to ratify agency action”²² but can only do so by changing the underlying law rather than by “impermissibly tell[ing] this Court how to apply existing law.”²³ Here, Congress had done the former. He concluded that, because the petitioners were challenging agency actions as inconsistent with prior statutes, but Congress had superseded those statutes by ratifying the agency actions, “there [was] no longer a live controversy and the underlying petitions [were] moot.”²⁴

Second, section 324 stripped the court of jurisdiction over the underlying petitions by providing that “no court shall have jurisdiction to review any action taken by” specified agencies “that grants” any authorization or approval “necessary for the construction and initial operation at full capacity” of the pipeline, including “any lawsuit pending in a court as of the date of enactment of this section.”²⁵ Judge Wynn acknowledged that while the Constitution undoubtedly grants Congress the power to limit the jurisdiction of the lower federal courts,²⁶ “the exact confines of [that power] are still being debated, especially when it comes to jurisdiction-stripping efforts that appear to dictate the outcome of pending litigation.”²⁷ The panel cited the divided Supreme Court opinion in *Patchak v. Zinke*²⁸ for the proposition that the Court’s jurisprudence in this area is unclear.²⁹

Although Judge Wynn seemed receptive to the petitioners’ argument that section 324(e) “‘manipulates’ jurisdiction to direct entry of judgment for a particular party . . . in pending litigation,”³⁰ which at least four Justices found constitutionally questionable in *Patchak*,³¹ he concluded that the Fourth Circuit was not the court to consider these constitutional issues because section 324(e)(2) vested the D.C. Circuit with “original and exclusive jurisdiction over any claim alleging the invalidity” of section 324.³² Thus, the petitioners must bring these arguments in that court.³³ Based on its conclusions that the Fourth Circuit lacked

²² *Id.* (citing *United States v. Heinszen & Co.*, 206 U.S. 370, 382 (1907)).

²³ *Id.*

²⁴ *Id.* at 78.

²⁵ Fiscal Responsibility Act § 324(e)(1).

²⁶ *Appalachian Voices*, 78 F.4th at 78 (citing *Patchak v. Zinke*, 138 S. Ct. 897, 906 (2018) (plurality opinion) (upholding an Act of Congress that stripped all courts of jurisdiction to hear actions related to a particular property); *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 449 (1850)).

²⁷ *Id.*

²⁸ 138 S. Ct. 897.

²⁹ *Appalachian Voices*, 78 F.4th at 78–79 (citing *Patchak*, 138 S. Ct. at 906 (plurality opinion)).

³⁰ *Id.* at 79 (citing Petitioners’ Opposition to Federal Respondents’ Motion to Dismiss and Intervenor’s Motion to Dismiss or, in the Alternative, for Summary Denial at 17, *Appalachian Voices*, 78 F.4th 71 (No. 23-1384)).

³¹ See *Patchak*, 138 S. Ct. at 913 (Sotomayor, J., concurring in the judgment); *id.* at 919–20 (Roberts, C.J., dissenting).

³² *Appalachian Voices*, 78 F.4th at 79 (quoting Fiscal Responsibility Act of 2023, Pub. L. No. 118-5, § 324(e)(2), 137 Stat. 10, 48).

³³ *Id.* at 79–80.

jurisdiction over the petitions, the panel granted the motions to dismiss.³⁴

Judge Gregory concurred in the judgment but wrote separately to call attention to the novelty of the statutory scheme at work in section 324.³⁵ While Judge Gregory agreed that the Fourth Circuit lacked jurisdiction over these cases and was obligated to dismiss them,³⁶ he called section 324 a “mandate to enforce [Congress’s] will ‘without regard for [its] validity.’”³⁷ Judge Gregory extolled the constitutional separation of powers as central to the American Republic³⁸ and argued for safeguarding the judicial role from legislative encroachment.³⁹ He also questioned whether section 324 was really a change in the law or rather an instruction that “‘the court must deny to itself the jurisdiction’ originally granted to it by Congress ‘because and only because its decision, in accordance with settled law,’ is averse to the Mountain Valley Pipeline and favorable to its opponents.”⁴⁰ Judge Gregory concluded that “Section 324 is a blueprint for the construction of a natural gas pipeline by legislative fiat” and wondered if it was “a harbinger of erosion not just to the environment, but to our republic.”⁴¹

Judge Thacker concurred in the court’s conclusion that Congress had acted within its legislative authority when it enacted section 324 but wrote separately to highlight how “Congress’s use of its authority in [that] manner threatens to disturb the balance of power between co-equal branches of government.”⁴² Judge Thacker took issue with the fact that Congress, by restricting challenges to the constitutionality of section 324 to the jurisdiction of the D.C. Circuit, required the Fourth Circuit “to allow another co-equal court to answer questions central to [the Fourth Circuit’s] own jurisdictional inquiry.”⁴³ She then accused Congress of denying the Fourth Circuit jurisdiction over this issue *for the purpose of* manipulating the outcome of the pending litigation.⁴⁴ Judge Thacker questioned whether this case implied that a future Congress could, “with particular pending litigation in mind, strip a particular court of jurisdiction . . . when it disagrees politically with the view of the law that court has taken in the past” and further insulate

³⁴ *Id.* at 81.

³⁵ *Id.* (Gregory, J., concurring in the judgment).

³⁶ *Id.*

³⁷ *Id.* at 82 (quoting *Yakus v. United States*, 321 U.S. 414, 468 (1944) (Rutledge, J., dissenting) (alteration in original)).

³⁸ *Id.* at 82–83.

³⁹ *Id.* at 83.

⁴⁰ *Id.* at 83–84 (quoting *United States v. Klein*, 80 U.S. (13 Wall.) 128, 147 (1871)).

⁴¹ *Id.* at 84.

⁴² *Id.* (Thacker, J., concurring).

⁴³ *Id.*

⁴⁴ *Id.* (“Congress enacted Section 324(e)(2) as an end run around our judicial decision-making — no doubt motivated at least in part because of the view of some in Congress that the pipeline would be finished today if it weren’t for the rulings by the Fourth Circuit.”).

that provision from judicial review by enacting a law like section 324(e).⁴⁵ Finally, she bemoaned the lack of clear guidance from the Supreme Court on “where the line between legislative and judicial power lies” and called for “a firm limit on Congress’s intrusion into the judicial branch.”⁴⁶

The provisions to ratify all agency actions and to strip all courts of jurisdiction in section 324(c) and section 324(e)(1) are closely analogous to the statute at issue in *Patchak*, which ratified all agency actions with regard to a parcel of land and stripped all courts of jurisdiction to challenge those actions.⁴⁷ The Supreme Court upheld that statute, albeit with no clearly controlling opinion. However, the Fourth Circuit too quickly upheld the provision in section 324(e)(2) vesting the D.C. Circuit with exclusive jurisdiction of challenges to the statute without analyzing that provision under the same jurisdiction-stripping framework it used to analyze section 324(e)(1) in its dicta. Had the court done so, it may have caused the Supreme Court to clarify its fractured opinion in *Patchak* and establish a well-defined rule for jurisdiction stripping over pending litigation.

While the panel acknowledged that section 324(e)(2) was itself a jurisdiction-stripping provision, stripping the Fourth Circuit of jurisdiction to assess the validity of the rest of section 324,⁴⁸ the panel neglected to evaluate section 324(e)(2)’s constitutionality in any meaningful way.⁴⁹ Judge Wynn wrote that “[p]etitioners have pointed to no authority that prohibits Congress from vesting a particular court . . . with jurisdiction over a class of claims,”⁵⁰ but the court failed to analyze the provision under the same test for jurisdiction stripping over pending litigation under which the panel previously analyzed section 324(e)(1). Section 324(e)(2) also extinguished the court’s jurisdiction over the pending litigation.⁵¹ Even though it was not directly analogous to the statute at issue in *Patchak*, section 324(e)(2) still should have been analyzed under the framework the Supreme Court used in that case.

The Supreme Court has previously articulated the limit to stripping jurisdiction over pending litigation as the point where Congress “usurp[s] a court’s power to interpret and apply the law to the [circumstances] before it.”⁵² The basic formulation is that Congress cannot pass

⁴⁵ *Id.* at 85.

⁴⁶ *Id.*

⁴⁷ See *Patchak v. Zinke*, 138 S. Ct. 897, 908 (2018) (plurality opinion).

⁴⁸ *Appalachian Voices*, 78 F.4th at 80.

⁴⁹ See *id.* at 79–80.

⁵⁰ *Id.*

⁵¹ *Id.* at 80.

⁵² *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1323 (2016) (second alteration in original).

a law that says in a case *Smith v. Jones*, “Smith wins.”⁵³ Based on that formulation alone, it would appear that section 324 impermissibly usurped the court’s power by saying that “Mountain Valley Pipeline wins.” However, when presented with a case with remarkably similar statutory language in *Patchak* five years ago,⁵⁴ the Supreme Court upheld it.⁵⁵ In that case, Justice Thomas’s plurality opinion explained that Congress cannot dictate to courts how to apply existing law, but Congress can change the law governing pending cases.⁵⁶ When Congress strips jurisdiction over pending litigation, it is just changing the underlying law: before, the court had jurisdiction; now, it does not.⁵⁷ This does not violate Article III even if applying the change to pending suits “effectively ensures that one side wins.”⁵⁸ Under that reasoning, even though section 324 has the practical effect of proclaiming, in the underlying petitions, “Mountain Valley Pipeline wins,” it is just a retroactive change in substantive law and thus within Congress’s prerogative.

The *Patchak* Court did not actually settle the question of permissible jurisdiction stripping, however, because five Justices did not conclude that the relevant statute permissibly stripped federal courts of jurisdiction. Justice Ginsburg, joined by Justice Sotomayor, concurred only in the judgment on the grounds that the statute reasserted the federal government’s sovereign immunity, not that it stripped jurisdiction of the federal courts.⁵⁹ While Justice Ginsburg declined to reach the issue of jurisdiction stripping, Justice Sotomayor wrote separately to join the dissent’s conclusion that stripping jurisdiction over the underlying petitions would have been impermissible.⁶⁰ While a four-Justice plurality

⁵³ *Id.* at n.17; see also *United States v. Klein*, 80 U.S. (13 Wall.) 128, 145–46 (1871) (holding a jurisdiction-stripping statute unconstitutional in part because it was intended “as a means to an end,” *id.* at 145).

⁵⁴ Compare Gun Lake Trust Land Reaffirmation Act, Pub. L. No. 113-179, § 2(a)–(b), 128 Stat. 1913, 1913 (2014) (“[T]he actions of the Secretary of the Interior . . . are ratified and confirmed. . . . Notwithstanding any other provision of law, an action (including an action pending in a Federal court as of the date of enactment of this Act) relating to the land . . . shall not be filed or maintained in a Federal court and shall be promptly dismissed.”), with Fiscal Responsibility Act of 2023, Pub. L. No. 118-5, § 324(c)(1), (e)(1), 137 Stat. 10, 47–48 (“Congress hereby ratifies and approves all authorizations, permits . . . and any other approvals . . . necessary for the construction and initial operation . . . of the Mountain Valley Pipeline Notwithstanding any other provision of law, no court shall have jurisdiction to review any action taken . . . that grants an authorization . . . or any other approval necessary for the construction and initial operation at full capacity of [the pipeline] . . .”).

⁵⁵ See *The Supreme Court, 2017 Term — Leading Cases*, 132 HARV. L. REV. 277, 297 (2018) (“Though no line of reasoning won a majority, six Justices voted to uphold a statute difficult to distinguish from ‘Patchak loses.’”).

⁵⁶ *Patchak v. Zinke*, 138 S. Ct. 897, 905 (2018) (plurality opinion) (quoting *Robertson v. Seattle Audubon Soc’y*, 503 U.S. 429, 438 (1992); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995)).

⁵⁷ *Id.* at 906 (quoting *Plaut*, 514 U.S. at 218).

⁵⁸ *Id.* at 905 (citing *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1324–27 (2016)).

⁵⁹ *Id.* at 912–13 (Ginsburg, J., concurring in the judgment).

⁶⁰ *Id.* at 913 (Sotomayor, J., concurring in the judgment).

held that the jurisdiction-stripping provision “changes the law,” the same number of Justices disagreed with that proposition entirely.⁶¹ Whatever the precedential value of *Patchak*,⁶² it certainly does not provide a clear rule for the limits of jurisdiction stripping.

Furthermore, the insulation created by section 324(e)(2) pushes this jurisdiction-stripping scheme beyond the statute in *Patchak*, which at least four Justices found to be of questionable constitutionality. After all, when read in its totality, the statute essentially says, “a) in *Environmentalists v. Mountain Valley Pipeline*, Mountain Valley Pipeline wins, b) no court can hear Environmentalists’ challenge to this statute, and c) only the D.C. Circuit can hear challenges to the legality of this provision.”⁶³ Although the panel in *Appalachian Voices* ultimately decided it lacked jurisdiction on statutory grounds,⁶⁴ the judges’ opinions highlighted that something seemed improper about the scheme in section 324⁶⁵ but that there was also no clearly established rule for the limits of legislative jurisdiction stripping.⁶⁶ If given the opportunity to review section 324, perhaps the current Supreme Court would determine that its provisions pushing beyond *Patchak* reached those limits. Though the contours of the constitutional limit to permissible jurisdiction stripping, especially with regard to pending litigation, have not been well articulated, the thoroughness with which section 324 insulated the Mountain Valley Pipeline from judicial review may cross that ill-defined line.⁶⁷

It is unlikely that the D.C. Circuit will have the opportunity to review section 324’s application to pending litigation under this

⁶¹ See *id.*; *id.* at 919–20 (Roberts, C.J., dissenting).

⁶² See *Marks v. United States*, 430 U.S. 188, 193 (1977) (“When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, ‘the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds’” (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (plurality opinion))); see also Ryan C. Williams, *Questioning Marks: Plurality Decisions and Precedential Constraint*, 69 STAN. L. REV. 795, 806–07 (2017) (explaining three possible methods by which lower courts identify a “narrowest grounds,” *id.* at 807, none of which would be clearly applicable to *Patchak*).

⁶³ See *Appalachian Voices*, 78 F.4th at 76.

⁶⁴ *Id.* at 80.

⁶⁵ All three of the panel judges recognized the separation-of-powers issues raised by the jurisdiction-stripping scheme in section 324. *Id.* at 74; *id.* at 83–84 (Gregory, J., concurring); *id.* at 84–85 (Thacker, J., concurring). But see *The Supreme Court, 2017 Term — Leading Cases*, *supra* note 55, at 306 (“*Patchak* was typical of cases that appeal to *Klein*: something feels wrong in general, but nothing, on close examination, is convincingly wrong in particular.”).

⁶⁶ See *Appalachian Voices*, 78 F.4th at 78; *id.* at 83–84 (Gregory, J., concurring); *id.* at 85 (Thacker, J., concurring). Some scholars have interpreted the constraint to say the Constitution demands jurisdiction exist to provide remedies for violations of certain rights. See Fallon, *supra* note 5, at 1050; see also Akhil Reed Amar, *A Neo-federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 272 (1985) (“All cases arising under federal law . . . must be capable of final resolution by a federal judge.”).

⁶⁷ See *The Supreme Court, 2017 Term — Leading Cases*, *supra* note 55, at 306 (“Perhaps the [*Klein*] principle is worth keeping on the nominal books in case some future suit brings the Article III objection into sharper relief.”).

framework. While it is true that new challenges to section 324 may be brought in the D.C. Circuit, the petitioners here do not have a right to appeal the Fourth Circuit's decision in that forum. Furthermore, the only pending challenge to the Mountain Valley Pipeline in the D.C. Circuit filed before section 324's passage⁶⁸ is not expected to consider these issues.⁶⁹ Any new challenges to the Mountain Valley Pipeline would not be able to challenge section 324's application to *pending* litigation and thus would have to argue that Congress does not have the power to ratify agency actions, which is well settled to be within its legislative power.⁷⁰

More clarity is needed from the Supreme Court as to what the limits of legislative jurisdiction stripping are, and the Fourth Circuit's decision not to decide the merits of section 324 may have delayed that clarity. The lack of a well-defined rule for when and how Congress can restrict the jurisdiction of federal courts over pending litigation⁷¹ is particularly problematic at a time when calls to limit the jurisdiction of the courts are becoming more prevalent.⁷² By applying section 324(e)(2) without reviewing its constitutionality as a jurisdiction-stripping statute,⁷³ the panel missed the opportunity to review section 324's novel jurisdictional gamesmanship. Had the panel chosen to do so, the Supreme Court may have had to revisit *Patchak* and provide a definitive rule on this issue.

⁶⁸ *Bohon v. FERC*, 37 F.4th 663 (D.C. Cir. 2022), *vacated*, 143 S. Ct. 1779 (2023) (mem.), *remanded to* No. 20-5203 (D.C. Cir. Apr. 24, 2023).

⁶⁹ The petitioners in that case accept *Patchak* as governing law but have argued, inter alia, that section 324 is closer to the statute at issue in *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871), than the one in *Patchak* because the distinct feature of the unconstitutional statute in *Klein* was animus, Supplemental Brief of Landowners on *Axon* and the Debt Bill at 13–15, *Bohon*, 37 F.4th 663 (No. 20-5203); that section 324 exempted FERC and the Pipeline from generally applicable law, which is distinct from the statute at issue in *Patchak* (it isn't), *id.* at 17–19; and that section 324 is an impermissible delegation of legislative authority to the executive and of the power of eminent domain to a private party, Emergency Motion for Injunctive Relief to Halt Irreparable Injury Pending Review of Congress's Overly Broad Delegation of Legislative Power in the NGA and Section 324 of the Debt Bill at 10, *Bohon*, 37 F.4th 663 (No. 20-5203).

⁷⁰ See *United States v. Heinszen & Co.*, 206 U.S. 370, 382–83, 387 (1907).

⁷¹ PRESIDENTIAL COMM'N ON THE SUP. CT. OF THE U.S., *supra* note 1, at 158.

⁷² Progressives have most recently sought to use jurisdiction stripping to advance their political positions. See, e.g., Caroline Vakil, *Ocasio-Cortez, Progressives Call on Schumer, Pelosi to Strip SCOTUS of Abortion Jurisdiction*, THE HILL (July 15, 2022, 4:02 PM), <https://thehill.com/home-news/house/3561533-ocasio-cortez-progressives-call-on-schumer-pelosi-to-strip-scotus-of-abortion-jurisdiction> [<https://perma.cc/Y6G9-X3AJ>]; Janelle Bouie, Opinion, *The Supreme Court Is the Final Word on Nothing*, N.Y. TIMES (July 1, 2022), <https://www.nytimes.com/2022/07/01/opinion/dobbs-roe-supreme-court.html> [<https://perma.cc/V6V7-MGCL>]. However, it was not long ago that conservatives were the ones attempting to rein in what they saw as an activist Court. Adam Freedman, *Congress Can and Should Return Jurisdiction over Marriage to the States*, NAT'L REV. (July 17, 2015, 6:35 PM), <https://www.nationalreview.com/2015/07/obergefell-congress-same-sex-marriage-states> [<https://perma.cc/KG8K-YFQJ>].

⁷³ See *Appalachian Voices*, 78 F.4th at 79–80.