

# THE EXCEPTIONS CLAUSE AS A STRUCTURAL SAFEGUARD

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*Scholars have long treated the Exceptions Clause of Article III as a serious threat to the Supreme Court’s central constitutional function: establishing definitive and uniform rules of federal law. This Article argues that scholars have overlooked an important function of the Clause. Congress has repeatedly used its broad “exceptions power” to facilitate, not to undermine, the Supreme Court’s constitutional role. Drawing on insights from social science, this Article asserts that Congress has an incentive to use its control over federal jurisdiction to promote the Court’s role in settling disputed federal questions. Notably, this argument has considerable historical support. When the Supreme Court’s mandatory appellate docket grew to the point that it was unmanageable for a single tribunal, Congress responded by exercising its authority under the Exceptions Clause. Congress made “exceptions” to the Court’s mandatory appellate jurisdiction and replaced it with discretionary review via writs of certiorari—precisely so that the Court could concentrate its limited resources on resolving important federal questions. Thus, contrary to conventional wisdom, Congress has often used its broad exceptions power to safeguard the Supreme Court’s role in the constitutional scheme.*

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#### INTRODUCTION

The Exceptions Clause of Article III has long been viewed as a sword of Damocles hanging over the Supreme Court.<sup>1</sup> The Clause, which provides that the Court’s appellate jurisdiction is subject to “such Exceptions, and . . . such Regulations as the Congress shall make,”<sup>2</sup> seems to give Congress a license to remove any category of cases—including those involving constitutional and other important federal issues—from the Supreme Court’s purview. Scholars thus worry that the Exceptions Clause is an ever-present threat to what they see as the Court’s central constitutional function: defining the content of federal law for the judiciary.<sup>3</sup>

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1. See, e.g., Steven G. Calabresi & Gary Lawson, *The Unitary Executive, Jurisdiction Stripping, and the Hamdan Opinions: A Textualist Response to Justice Scalia*, 107 *Colum. L. Rev.* 1002, 1044 (2007) (arguing that, broadly construed, Exceptions Clause would be “a threat to judicial review”); 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) (urging, if Exceptions Clause gives Congress unlimited power over Supreme Court’s appellate jurisdiction, then “the Constitution . . . authoriz[es] its own destruction”).

2. U.S. Const. art. III, § 2, cl. 2.

3. See, e.g., Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 *Stan. L. Rev.* 817, 837, 873 (1994) (contending Congress must give Court

This Article offers a new account of the Exceptions Clause. The Article asserts that Congress has largely used its power over the Supreme Court's appellate jurisdiction to safeguard, not to undermine, the Court's constitutional role. In other words, Congress has made "exceptions" and "regulations" that facilitate the Court's role in providing a definitive and uniform resolution of federal questions.

Although it may seem surprising that Congress would use its control over federal jurisdiction so as to benefit the Court, a strand of social science research suggests why Congress might have an incentive to facilitate the Court's role in resolving federal questions. Social scientists have argued that political actors establish (and later abide by) legal constraints, including constitutional rules and judicial decisions, because they contribute to economic and social stability. Judicial determinations serve to settle disputed issues and thereby provide focal points around which political actors and citizens can coordinate their actions. The Supreme Court performs this settlement function for issues that are referred to the judiciary. Even controversial Court decisions establish (at least temporarily) the boundaries of permissible governmental and private conduct and thereby facilitate coordination. This social science research thus suggests why Congress might be inclined to enact jurisdictional legislation that promotes the Supreme Court's settlement function. Political actors—even when they disagree with specific Supreme Court decisions—may find that the benefits of a uniform resolution of federal law outweigh the costs of "erroneous" decisions.

There is considerable historical evidence that Congress has used its control over federal jurisdiction to facilitate the Supreme Court's settlement function. Congress has not generally sought to curtail the Supreme Court's appellate jurisdiction but instead has steadily expanded it—precisely so that the Court could settle disputed federal questions. But these expansions had an adverse impact: They created a series of workload crises at the Supreme Court that undermined its capacity to provide guidance on the content of federal law. The Court simply lacked the time

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"subject matter jurisdiction sufficiently broad" to perform its "essential function": providing general leadership in defining federal law"); Laurence Claus, *The One Court that Congress Cannot Take Away: Singularity, Supremacy, and Article III*, 96 *Geo. L.J.* 59, 64 (2007) (arguing "Congress can never . . . remove from the Supreme Court the ability to have ultimate judgment of Article III matters"); Leonard G. Ratner, *Congressional Power over the Appellate Jurisdiction of the Supreme Court*, 109 *U. Pa. L. Rev.* 157, 161 (1960) (asserting Supreme Court's "essential appellate functions" are to preserve uniformity and supremacy of federal law); see also Paul M. Bator, *Congressional Power over the Jurisdiction of the Federal Courts*, 27 *Vill. L. Rev.* 1030, 1038–39 (1982) (arguing, although Exceptions Clause permits Congress to strip Court's appellate jurisdiction over any class of cases, such law would "violate the spirit of the Constitution" because Constitution "contemplate[s] . . . a federal Supreme Court with the power to pronounce uniform and authoritative rules of federal law"); *supra* note 1 (citing sources identifying Exceptions Clause as threat to Court).

and the resources to decide the mounting number of cases and legal issues before it.

Congress responded by exercising its authority under the Exceptions Clause. In a series of statutes, Congress made “exceptions” to the Court’s mandatory appellate jurisdiction and replaced it with discretionary review via writs of certiorari.<sup>4</sup> These laws, much like the jurisdictional expansions that preceded them, were designed to facilitate what Congress saw as the Supreme Court’s “principal functions”: “resolv[ing]” important issues of federal law and “ensur[ing] uniformity . . . in the law by resolving conflicts” among the lower courts.<sup>5</sup>

Notably, these jurisdictional expansions and exceptions had widespread political support. This political response contrasts sharply with the political dynamics surrounding court-curbing proposals. Congressional reactions to such measures have split largely along partisan lines. For example, in the late nineteenth and early twentieth centuries, the federal judiciary was viewed as biased in favor of big business. Thus, populists and progressives sought to strip federal jurisdiction or otherwise curtail federal judicial power, while economic conservatives (who favored the judiciary’s probusiness rulings) blocked those court-curbing efforts. In the late twentieth and early twenty-first centuries, the source of controversy was the constitutional jurisprudence of the Warren Court (and its progeny). Social conservatives repeatedly sought to strip federal jurisdiction over cases ranging from abortion to school prayer. But social progressives supported the judiciary’s constitutional rulings and successfully fought those jurisdiction-stripping attempts.

By contrast, during those same periods, both sides came together to enact legislation to preserve the Supreme Court’s role in settling the contours of federal law. Thus, in the late nineteenth and early twentieth centuries, populists and progressives joined the economic conservatives to support the first statutes granting discretionary certiorari review. Likewise, in more modern times, even as social conservatives and social progressives fought bitterly over jurisdiction-stripping proposals, both sides agreed in 1988 to expand the Court’s certiorari power to encompass virtually every appeal. This historical evidence suggests that, even when politicians disagree with specific Supreme Court decisions, they still see value in—and use the “exceptions power” to protect—the Supreme Court’s role in resolving important federal questions.

This Article does not, however, mean to suggest that the Exceptions Clause has always served to protect the Supreme Court. On the contrary, on a few occasions, Congress has used its authority to restrict the Court’s appellate jurisdiction over a class of claims. But, despite these examples,

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4. See, e.g., S. Rep. No. 100-300, at 3 (1988) (stating certiorari jurisdiction is based on Congress’s power to make “exceptions” to Court’s appellate jurisdiction).

5. H.R. Rep. No. 100-660, at 14 (1988).

the broader point remains: Contrary to conventional wisdom, the primary function of the Exceptions Clause has been to preserve, not to undermine, the Supreme Court's role in the constitutional scheme.

This argument adds an important perspective to scholarship on the federal judiciary. First, the approach here differs markedly from prior scholarship on Congress's power over federal jurisdiction, which generally assumes that the political branches and the Supreme Court have an antagonistic relationship and thus theorizes about how the Court should protect itself from (possible) future court-curbing measures.<sup>6</sup> This Article, by contrast, looks at how Congress has in practice exercised its power over federal jurisdiction. This historical account shows that Congress has repeatedly used its authority to support and empower the Supreme Court. Second, the analysis here provides an important contrast to the interpretive method employed by prior scholars. Almost without exception, commentary on jurisdiction stripping seeks to unearth the original meaning of Article III to find judicially enforceable limits on Congress's power.<sup>7</sup> In sharp contrast, the analysis here illustrates how the Exceptions Clause has been given content over time—not by the judiciary, but by the political branches. This argument thus links up with a growing literature in constitutional law emphasizing the crucial role of the political branches in constitutional interpretation.<sup>8</sup>

The argument proceeds as follows. Part I discusses prior scholarship on Congress's power over the Supreme Court's appellate jurisdiction and asserts that the Exceptions Clause serves as an important (and previously unrecognized) structural safeguard for the Court. Parts II through IV provide historical support for this claim. Even in the midst of some of the bitterest partisan struggles over the federal judiciary, political actors repeatedly came together to ensure the Supreme Court's role in defining the content of federal law. Finally, Part V examines the implications and limitations of this analysis. That Part argues that, due to both political incentives and constitutional constraints, Congress has largely safeguarded the Supreme Court's role in the constitutional scheme.

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6. See *infra* Part II.A.

7. See *infra* Part II.A.

8. See, e.g., William N. Eskridge, Jr. & John Ferejohn, *A Republic of Statutes: The New American Constitution* 14 (2010) (asserting, in *United States*, “normative commitments are announced and entrenched *not* through . . . [c]onstitutional amendments or Supreme Court pronouncements but instead through . . . legislation, administrative implementation, [and] public feedback”); Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* 109 (2004) (arguing each branch has independent role in constitutional interpretation, subject to ultimate judgment of people); Keith E. Whittington, *Constitutional Construction: Divided Powers and Constitutional Meaning* 3 (1999) (arguing political branches have crucial role in “construct[ing] constitutional meaning”).

## I. THE THEORY

Scholars have long puzzled over the scope of Congress's authority to regulate federal jurisdiction and, particularly, the Supreme Court's appellate jurisdiction. Although most scholars agree that Congress's power is limited by constitutional sources other than Article III (known as "external" limits),<sup>9</sup> they strongly dispute whether there are any "internal" limits—that is, whether the provisions of Article III (as elucidated by the text, structure, and history) themselves constrain Congress. Commentators differ considerably in their approaches to this question, but they do appear to agree on one fundamental assumption: Any plenary congressional power to make "exceptions" to the Supreme Court's appellate jurisdiction is a serious threat to the Court. This Article argues that scholars have largely overlooked the ways in which Congress can use its authority to safeguard the Supreme Court's role in defining the content of federal law.<sup>10</sup>

*A. The Debate over Congress's Power Under the Exceptions Clause*

Many commentators conclude that Congress has plenary power to restrict federal jurisdiction, including the Supreme Court's appellate jurisdiction.<sup>11</sup> These scholars observe that the Exceptions Clause, on its

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9. For example, there is broad consensus that Congress may not enact a jurisdictional measure that violates the Equal Protection Clause or the Suspension Clause. Although scholars dispute the precise scope of these external constraints, they generally agree that these provisions limit Congress's power. See Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 *Stan. L. Rev.* 895, 916 (1984) ("Scholars agree that the Bill of Rights applies to all areas of congressional action, and that . . . Congress could not limit access to the federal courts on the basis of race . . ."); Martin H. Redish, *Same-Sex Marriage, the Constitution, and Congressional Power to Control Federal Jurisdiction: Be Careful What You Wish For*, 9 *Lewis & Clark L. Rev.* 363, 368–69 (2005) [hereinafter Redish, *Same-Sex Marriage*] (asserting there are "external limitations" on Congress's power, including due process and equal protection); Amanda L. Tyler, *Suspension as an Emergency Power*, 118 *Yale L.J.* 600, 607–08 (2009) (noting Suspension Clause, "[b]y its terms, . . . constitutes . . . a limitation upon . . . congressional power" over habeas jurisdiction, but also observing scholars have debated whether Clause requires Congress to confer habeas jurisdiction).

10. Notably, in this Article, the term "jurisdiction stripping" refers to efforts to restrict federal jurisdiction over a class of cases, such as those involving school prayer. Such restrictions are likewise the focus of other scholarly literature on this subject.

11. See Charles L. Black Jr., *Decision According to Law* 18 (1981) ("My own position is . . . that Congress does have very significant power over the courts' jurisdiction."); Raoul Berger, *Insulation of Judicial Usurpation: A Comment on Lawrence Sager's "Court-Stripping" Polemic*, 44 *Ohio St. L.J.* 611, 622 (1983) (arguing "[t]he burden is on [those who would challenge Congress's authority] to demonstrate that the plenary, unequivocal terms of the exceptions clause mean less than they say"); Martin H. Redish, *Text, Structure, and Common Sense in the Interpretation of Article III*, 138 *U. Pa. L. Rev.* 1633, 1637 (1990) (arguing "the inescapable implication of the text is that Congress possesses broad power to curb the jurisdiction of *both* the lower courts *and* the Supreme Court");

face, seems to give Congress broad authority to remove classes of cases from the Court's appellate oversight.<sup>12</sup> Furthermore, this construction accords with at least some Founding-era evidence. For example, the First Congress in the Judiciary Act of 1789 did not give the Supreme Court jurisdiction over every federal question case.<sup>13</sup> Based on such textual and historical evidence, these scholars assert that "if Congress wishes to exclude a certain category of federal constitutional (or other) litigation from the appellate jurisdiction [of the Supreme Court], it has the authority to do so."<sup>14</sup> Indeed, Congress could withhold even "a large number of classes of cases potentially within [the Court's] appellate jurisdiction."<sup>15</sup>

But even those who subscribe to this "plenary power" theory argue that Congress should generally refrain from exercising its authority.<sup>16</sup> For example, Paul Bator argues that a statute eliminating Supreme Court review of federal claims would violate "the structure and spirit" of the

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Herbert Wechsler, *The Courts and the Constitution*, 65 *Colum. L. Rev.* 1001, 1005 (1965) [hereinafter Wechsler, *The Courts*] (asserting "Congress has the power by enactment of a statute to strike at what it deems judicial excess by delimitations of the jurisdiction of the lower courts and of the Supreme Court's appellate jurisdiction").

12. See Bator, *supra* note 3, at 1040 (arguing that, given text of Exceptions Clause, "arguments that would place serious limits on the power of Congress to make exceptions to the appellate jurisdiction of the Supreme Court are not, in the end, persuasive"); Berger, *supra* note 11, at 623 (contending Congress's authority to control Court's appellate jurisdiction was "a power exercised and accepted from the beginning"); Gunther, *supra* note 9, at 901 (noting that "[o]n its face, the exceptions clause of article III, section 2, seems to grant a quite unconfined power to Congress" to restrict appellate jurisdiction); Martin H. Redish, *Congressional Power to Regulate Supreme Court Appellate Jurisdiction Under the Exceptions Clause: An Internal and External Examination*, 27 *Vill. L. Rev.* 900, 901–02 (1982) [hereinafter Redish, *Congressional Power*] ("A common sense interpretation of the constitutional language [in the Exceptions Clause] would seem to lead to the conclusion that Congress possesses fairly broad authority to curb Supreme Court appellate jurisdiction.").

13. See, e.g., Berger, *supra* note 11, at 632–33 ("The Judiciary Act of 1789, enacted by the First Congress, which was privy to the Framers' intention, . . . left large gaps and gaping holes in the appellate jurisdiction of the Supreme Court."). For a description of the Court's jurisdiction under the 1789 Act, see *infra* notes 79–82 and accompanying text.

14. Bator, *supra* note 3, at 1038.

15. Gunther, *supra* note 9, at 901.

16. See, e.g., Redish, *Same-Sex Marriage*, *supra* note 9, at 368–69 (arguing, "as a matter of policy," Congress should have "a very strong presumption" against jurisdiction stripping); Wechsler, *The Courts*, *supra* note 11, at 1006–07 (asserting there are important "practical objections" to stripping Supreme Court's appellate jurisdiction, because "the judicial institution needs an organ of supreme authority" to establish uniform rules of federal law). One exception to this general sentiment is Charles Black, who argues that the existence of a plenary congressional power over federal jurisdiction was essential to legitimating judicial decisions. See Black, *supra* note 11, at 18 ("'Jurisdiction' is the *power to decide*. If Congress has wide and deep-going power over the courts' *jurisdiction*, then the courts' *power to decide* is a continuing and visible concession from a democratically formed Congress.").

Constitution.<sup>17</sup> He claims, “[T]he structure contemplated by that instrument makes sense—and was thought to make sense—only on the premise that there would be a federal Supreme Court with the power to pronounce uniform and authoritative rules of federal law.”<sup>18</sup> Likewise, Gerald Gunther urges Congress to exercise “forbearance” in using its “very broad ‘exceptions’ power.”<sup>19</sup> He states, “[O]ur system—any system—would be poorer and less coherent in the absence of a single, ultimately authoritative court at the apex of the judicial hierarchy.”<sup>20</sup>

Other scholars, however, have proposed broader and judicially enforceable limits on Congress’s power over the Supreme Court’s appellate jurisdiction. The foundation for this argument is laid in a famous essay by Henry Hart. In his *Dialogue*, Professor Hart asserts that “the exceptions [to the Court’s appellate jurisdiction] must not be such as will destroy the essential role of the Supreme Court in the constitutional plan.”<sup>21</sup> Other scholars have expanded upon this theory—primarily by relying on evidence of the original understanding of Article III.<sup>22</sup> For example, Leonard Ratner asserts (based in large part on statements made at the Constitutional Convention) that the Supreme Court’s “essential appellate functions” are to preserve the uniformity and

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17. Bator, *supra* note 3, at 1039.

18. *Id.*

19. Gunther, *supra* note 9, at 910.

20. *Id.* at 911 (emphasizing “the value of uniformity that Supreme Court review now tends to assure”).

21. Hart, *supra* note 1, at 1365.

22. See, e.g., Richard H. Fallon, Jr., *Jurisdiction-Stripping Reconsidered*, 96 Va. L. Rev. 1043, 1047 (2010) (noting “the originalist and textualist style of reasoning that has characterized nearly all leading academic writings on congressional control of jurisdiction”). Other scholarship, which does not focus solely on Supreme Court jurisdiction, likewise emphasizes the original meaning of Article III. See, e.g., Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. Rev. 205, 209, 240–46 (1985) (arguing, based on text, drafting history, and structure of Article III, Congress must give either Supreme Court or inferior federal courts jurisdiction over all cases arising under federal law); Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. Pa. L. Rev. 741, 749–50 (1984) (asserting Congress must “allocate to the federal judiciary as a whole . . . every type of case or controversy” listed in Article III, possibly excluding those “so trivial that they would pose an unnecessary burden”); Lawrence Gene Sager, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress’ Authority to Regulate the Jurisdiction of the Federal Courts*, 95 Harv. L. Rev. 17, 66 (1981) (contending, based on historical evidence, Congress must provide federal court review of constitutional claims). For a recent nonoriginalist analysis, see Fallon, *supra*, at 1048 (asserting “any modern assessment of Congress’s power . . . should ‘decenter’ originalist analysis under Article III . . . and rely [more] openly on . . . judicial precedent and functional desirability”). Like other scholars, however, Professor Fallon seems to rely primarily on judicial enforcement.

supremacy of federal law.<sup>23</sup> Accordingly, he argues that Congress must leave in place “some avenue” for the Court to resolve “persistent conflicts between state and federal law or in the interpretation of federal law by lower courts.”<sup>24</sup>

Scholars have recently supplemented these arguments by focusing on the structure of the judiciary. They assert that the Constitution creates a hierarchical judiciary and requires Congress to give the Supreme Court sufficient appellate jurisdiction to instruct inferior federal and state courts in the content of federal law.<sup>25</sup> For example, several scholars rely on this judicial structure (as elucidated by Founding-era evidence) to claim that the Supreme Court must have the power to hear every federal question case. James Pfander contends that the Court must be able to review lower court decisions either on direct appeal or by issuing “supervisory writs,” such as writs of habeas corpus or mandamus, in individual cases.<sup>26</sup> Other commentators, including Steven Calabresi and Gary Lawson, argue that the Exceptions Clause, as originally understood, permits Congress only to transfer federal cases from the Court’s appellate to its original jurisdiction.<sup>27</sup> (These scholars acknowledge that

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23. Ratner, *supra* note 3, at 161–65 (“The nature of these essential Supreme Court functions is confirmed by the proceedings of the Constitutional Convention.”).

24. *Id.* at 161.

25. See, e.g., Caminker, *supra* note 3, at 837 (contending Congress must give Court “subject matter jurisdiction sufficiently broad to provide general leadership in defining federal law”). A few scholars, however, doubt that all lower courts must abide by Supreme Court precedent. See, e.g., *id.* at 837–38 (urging that inferior federal courts have such obligation, but doubting that “state courts [must] obey Supreme Court federal law precedents”); see also Michael Stokes Paulsen, *Accusing Justice: Some Variations on the Themes of Robert M. Cover’s Justice Accused*, 7 *J.L. & Religion* 33, 86–88 (1989) (arguing lower courts can initially disregard “clearly erroneous” constitutional interpretations).

26. E.g., James E. Pfander, *One Supreme Court: Supremacy, Inferiority, and the Judicial Power of the United States* 25, 34–38 (2009); James E. Pfander, *Federal Supremacy, State Court Inferiority, and the Constitutionality of Jurisdiction-Stripping Legislation*, 101 *Nw. U. L. Rev.* 191, 236 (2007) (arguing “Congress must preserve a measure of supreme judicial oversight . . . sufficient to maintain the Court’s supremacy in relation to” state courts); James E. Pfander, *Jurisdiction-Stripping and the Supreme Court’s Power to Supervise Inferior Tribunals*, 78 *Tex. L. Rev.* 1433, 1442–65, 1500 (2000) [hereinafter Pfander, *Jurisdiction-Stripping*] (discussing historical evidence and Founding-era understandings of terms “supreme” and “inferior” in Article III, arguing it would raise “serious constitutional questions” if Congress eliminated both Court’s appellate jurisdiction and authority to supervise lower federal courts by issuing discretionary writs). Professor Pfander has also recently explored the early Scottish judiciary to support this claim. James E. Pfander & Daniel D. Birk, *Article III and the Scottish Judiciary*, 124 *Harv. L. Rev.* 1613, 1619–20 (2011) (noting Scottish Court of Session retained at least supervisory control over lower courts and suggesting this system might have served as “a model to the Framers of Article III”).

27. See Calabresi & Lawson, *supra* note 1, at 1016–42 (relying on eighteenth-century dictionary definition of “supreme” and “inferior” as well as original understanding of “court” and “tribunal” to interpret Congress’s power under Exceptions Clause); Claus, *supra* note 3, at 61, 81–97 (surveying historical evidence, including drafting history of

this position is at odds with the holding of *Marbury v. Madison* that Congress may not enlarge the size of the Court's original jurisdiction.<sup>28</sup>)

The above scholarship reflects certain shared assumptions. First, scholars agree that the Supreme Court has a crucial role in “pronounc[ing] uniform and authoritative rules of federal law.”<sup>29</sup> Second, scholars also seem to assume that the primary purpose of the Exceptions Clause is to enable Congress to remove classes of cases—including federal cases—from the Court's appellate oversight.<sup>30</sup> Thus, scholars worry that any “plenary” congressional power under the Clause poses a serious threat to the Supreme Court's central constitutional function.

This Article argues that scholars have overlooked the ways in which Congress can use its broad exceptions power to protect the Supreme Court. Congress has repeatedly enacted “exceptions” and “regulations” that enabled the Court to “pronounce uniform and authoritative rules of federal law.”<sup>31</sup>

#### B. *The Exceptions Clause and the Supreme Court's Settlement Function*

Article III establishes the power and independence of the federal judiciary and makes clear that the Supreme Court has a special role in the constitutional scheme. Although Article III gives Congress discretion as to whether to create inferior federal courts, it presumes the existence of “one supreme Court.”<sup>32</sup> Article III also defines the scope of this one Supreme Court's jurisdiction. The provision declares that “[t]he judicial

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Article III as well as ratification debates, to support this construction of Exceptions Clause); Alex Glashausser, A Return to Form for the Exceptions Clause, 51 B.C. L. Rev. 1383, 1390, 1397, 1403–12 (2010) (basing this conclusion on drafting history of Article III).

28. 5 U.S. (1 Cranch) 137, 174–80 (1803); see also Calabresi & Lawson, *supra* note 1, at 1042–43 (noting *Marbury's* inconsistency with historical interpretation of Exceptions Clause); Claus, *supra* note 3, at 107–09 (same); Glashausser, *supra* note 27, at 1390 (same).

29. Bator, *supra* note 3, at 1039; see also *supra* notes 16–24 and accompanying text (arguing Supreme Court's role is to ensure uniformity in legal rules).

30. See *supra* notes 27–28 and accompanying text (discussing historical interpretation of Exceptions Clause as allowing Congress to limit Supreme Court's appellate jurisdiction); see also Pfander & Birk, *supra* note 26, at 1622 (noting “[c]onventional wisdom [among scholars] views this Exceptions and Regulations Clause as a plenary grant of authority to Congress to curtail virtually any aspect of the Court's appellate role (subject to the requirement that Congress not overstep any other external constitutional limitations)”).

31. Bator, *supra* note 3, at 1039.

32. U.S. Const. art. III, § 1 (“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”); see also Redish, Congressional Power, *supra* note 12, at 901 (“Unlike the lower federal courts, the Supreme Court's existence is mandated by article III . . .”).

Power . . . *shall be vested* in one supreme Court”<sup>33</sup> and that this “judicial Power *shall extend* to all Cases” arising under federal law.<sup>34</sup> Article III further provides that the Supreme Court “*shall have* appellate Jurisdiction” over such federal question cases.<sup>35</sup>

If the jurisdictional provisions of Article III stopped at this point, it is not clear to what extent Congress could modify the Supreme Court’s jurisdiction.<sup>36</sup> But Article III goes on to provide that the Court’s appellate review power is subject to “such Exceptions, and . . . such Regulations as the Congress shall make.”<sup>37</sup> The unqualified language of the Exceptions Clause supports the view that Congress has broad authority over the Court’s appellate jurisdiction. Indeed, the Supreme Court itself has repeatedly adopted that construction of Congress’s exceptions power.<sup>38</sup>

But it does not necessarily follow that any such plenary congressional power presents only a threat to the Court. Although scholars have repeatedly focused on the extent to which the Exceptions Clause enables Congress to strip the Supreme Court’s appellate jurisdiction, it is not the sole function of the Clause. The Exceptions Clause is the primary source of authority for *every* federal statute affecting the Court’s appellate review power, including those with a more benign or beneficial effect.<sup>39</sup> For example (as discussed further below), the Exceptions Clause authorized the creation of discretionary certiorari review—a “plenary power” that

33. U.S. Const. art. III, § 1 (emphasis added).

34. Id. § 2, cl. 1 (emphasis added) (“The judicial Power shall extend to all Cases . . . arising under this Constitution, the Laws of the United States, and Treaties made . . . under their Authority . . .”).

35. Id. § 2, cl. 2 (emphasis added).

36. See *Durousseau v. United States*, 10 U.S. (6 Cranch) 307, 314 (1810) (stating “[t]he appellate powers of this court are not given by the judicial act” but instead “are given by the constitution” and when Congress purports to confer jurisdiction, it “must be understood as intending to execute the power . . . of making exceptions to the [Court’s] appellate jurisdiction”); *infra* notes 278–280 and accompanying text (discussing possibility, absent Exceptions Clause, Congress could not make even beneficial exceptions to Court’s appellate review power).

37. U.S. Const. art. III, § 2, cl. 2.

38. See, e.g., *The “Francis Wright,”* 105 U.S. 381, 386 (1882) (“Not only may whole classes of cases be kept out of the [Supreme Court’s appellate] jurisdiction altogether, but particular classes of questions may be subjected to reexamination and review, while others are not.”); *Daniels v. R.R. Co.*, 70 U.S. (3 Wall.) 250, 254 (1866) (“[I]t is for Congress to determine how far . . . appellate jurisdiction shall be given . . .”).

39. The Exceptions Clause may work in conjunction with the Necessary and Proper Clause. U.S. Const. art. I, § 8. But, at a minimum, the Exceptions Clause appears to give Congress a power over the Supreme Court’s appellate jurisdiction that would not be provided by the Necessary and Proper Clause alone. See *infra* note 279 (discussing scholarship indicating Exceptions Clause gives Congress additional power over Court’s appellate jurisdiction).

Congress has repeatedly exercised at the request of the Supreme Court itself.<sup>40</sup>

Thus, even if we assume that Congress has expansive power over the Supreme Court's appellate jurisdiction, it does not tell us how Congress will use its authority. This Article asserts that Congress has an incentive to use—and has in fact often used—its exceptions power to facilitate what scholars view as the Supreme Court's central constitutional role: resolving important federal questions.

It may at first seem puzzling why Congress would ever exercise its power over federal jurisdiction to protect the Supreme Court (or any other part of the federal judiciary). Although legal scholars have rarely tackled that question,<sup>41</sup> political scientists have offered various theories as to why politicians might support and empower courts. Scholars have argued, for example, that politicians may seek to advance a particular political agenda through judicial decisions,<sup>42</sup> to delegate controversial

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40. See *infra* Parts II–IV (discussing historical evidence showing Congress enacted certiorari jurisdiction at request of Court). Although scholars have rarely examined the constitutional source of the statutes establishing certiorari jurisdiction, a few have recognized that the power must stem from the Exceptions Clause. Thus, Herbert Wechsler observed in 1959 that certiorari review “rests upon the power that the Constitution vests in Congress to make exceptions to and regulate the Court’s appellate jurisdiction.” Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 *Harv. L. Rev.* 1, 9 (1959). More recently, Kathryn Watts has asserted that discretionary certiorari review constitutes a delegation of Congress’s power under the Exceptions Clause. See Kathryn A. Watts, *Constraining Certiorari Using Administrative Law Principles*, 160 *U. Pa. L. Rev.* 1, 23–24 (2011) (arguing, although Congress could have specified “the cases that the Court must hear,” it “chose to delegate [that] policymaking power to the Court”).

41. Only a few legal scholars have examined why politicians may support the judiciary. In one recent article, Professors Barry Friedman and Erin Delaney persuasively argue that the federalist structure of the Union may help explain the rise of judicial supremacy. They assert that political actors in the federal government initially supported judicial review of state and local government action because they expected the federal courts to keep states and localities in line with federal interests. Those same federal politicians later had difficulty explaining why the judiciary could not likewise review federal government action. See Barry Friedman & Erin F. Delaney, *Becoming Supreme: The Federal Foundation of Judicial Supremacy*, 111 *Colum. L. Rev.* 1137, 1140–41 (2011) (asserting “‘vertical supremacy’—the idea that judicial pronouncements govern the subnational units in a hierarchical system of government”—leads to “‘horizontal supremacy,’ in which the pronouncements of the high court are understood to bind the coordinate branches of the national government as well”); see also William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 *J.L. & Econ.* 875, 879, 894 (1975) (arguing political actors and interest groups may support independent judiciary to extent it enforces “the ‘deals’ made by effective interest groups with earlier legislatures”); *infra* note 44 (discussing arguments of Professors Mark Ramseyer and Matthew Stephenson on why political actors empower courts).

42. See Keith E. Whittington, *Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court, and Constitutional Leadership in U.S. History* 18 (2007) [hereinafter Whittington, *Political Foundations*] (“Political actors defer to . . . courts because the judiciary can be useful to their own political and constitutional goals . . .”);

issues to the judiciary,<sup>43</sup> or to use an independent judiciary as insurance against the risks of electoral loss.<sup>44</sup>

The above theories suggest why political actors might support and empower any court. But one strand of social science literature known as “coordination theory” suggests why politicians might be inclined to empower the Supreme Court in particular—and, more specifically, why they might facilitate the Court’s role in settling disputed federal questions.<sup>45</sup> Social scientists have argued that political actors establish (and later abide by) legal constraints because they contribute to economic and social stability.<sup>46</sup> As social scientists have explained, most

Ran Hirschl, *The Political Origins of Judicial Empowerment Through Constitutionalization: Lessons from Four Constitutional Revolutions*, 25 *Law & Soc. Inquiry* 91, 116 (2000) (arguing political leaders will empower judiciary only if they have “a sufficient level of certainty . . . that the judiciary in general and the supreme court in particular are likely to produce decisions that . . . reflect their ideological preferences”); see also John M. De Figueiredo & Emerson H. Tiller, *Congressional Control of the Courts: A Theoretical and Empirical Analysis of Expansion of the Federal Judiciary*, 39 *J.L. & Econ.* 435, 438, 460 (1996) (arguing Congress tends to expand size of judiciary “only when the nominating president and the confirming Senate are of the same political party as the enacting House and Senate”).

43. See Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 *Stud. Am. Pol. Dev.* 35, 36 (1993) (asserting “prominent elected officials consciously invite the judiciary to resolve” controversial issues); Keith E. Whittington, “Interpose Your Friendly Hand”: Political Supports for the Exercise of Judicial Review by the United States Supreme Court, 99 *Am. Pol. Sci. Rev.* 583, 584 (2005) (“The establishment and maintenance of judicial review is a way of delegating some kinds of political decisions to a relatively politically insulated institution.”).

44. Professors Mark Ramseyer and Matthew Stephenson have argued that, in a politically competitive society, risk-averse politicians favor an independent judiciary as a useful means of controlling their political opponents during periods when their own side is out of power. See J. Mark Ramseyer, *The Puzzling (In)Dependence of Courts: A Comparative Approach*, 23 *J. Legal Stud.* 721, 722, 741–42 (1994) (arguing, in countries like United States, “politicians offer independent courts” because “politicians in both parties expect the electoral system to continue, but no one gives either party high odds of controlling the government indefinitely”); Matthew C. Stephenson, “When the Devil Turns . . .”: The Political Foundations of Independent Judicial Review, 32 *J. Legal Stud.* 59, 63–64, 71–73 (2003) (“[I]ndependent judicial review allows parties to minimize the risks associated with political competition. Respecting judicial independence may require the party that currently controls the government to sacrifice some policy objectives, but it also means that when that party is out of power, its opponent faces similar limitations.”). Thus, the faction in power will often adhere to an adverse judicial decision, with the expectation that its opponents will do the same when they are in control. Each political faction relies on the judiciary as a long-term check on its political opponents. See Ramseyer, *supra*, at 742 (suggesting “implicit cooperation” between competing politicians often restrains them from challenging judicial independence).

45. For a foundational work on coordination theory, see generally Thomas C. Schelling, *The Strategy of Conflict* (1980 ed. 1960).

46. See Russell Hardin, *Liberalism, Constitutionalism, and Democracy* 18, 86 (1999) [hereinafter Hardin, *Liberalism*] (asserting “[i]n an even moderately diverse society, stability . . . depends on separate coordinations of various groups,” and arguing Constitu-

political and economic transactions involve some unforeseen contingencies.<sup>47</sup> Many such transactions would be “too costly to undertake” if the participants could not rely on some mechanism for resolving the inevitable disputes over those future events.<sup>48</sup> Legal institutions provide a means of resolving such disputes because they establish legal rules that clarify the boundaries of permissible conduct.<sup>49</sup> These legal rules serve as focal points around which the relevant parties can coordinate their actions.<sup>50</sup>

Social scientists have used coordination theory to explain the importance of various legal institutions. For example, political scientist Russell Hardin argues that the U.S. Constitution was “a successful coordination” of competing state and regional interests “at its core.”<sup>51</sup> Other scholars have explored the ways in which judicial decisions allow parties to coordinate their actions.<sup>52</sup> Geoffrey Garrett and Barry Weingast

tion offers stability in this sense, because it “establishes conventions . . . that make it easier for us to cooperate and to coordinate in particular moments”); Barry R. Weingast, *The Political Foundations of Democracy and the Rule of Law*, 91 *Am. Pol. Sci. Rev.* 245, 246 (1997) (“Democratic stability occurs when citizens and elites construct a focal solution that resolves their coordination dilemmas about limits on the state.”).

47. See, e.g., David M. Kreps, *Corporate Culture and Economic Theory*, in *Perspectives on Positive Political Economy* 90, 92 (James E. Alt & Kenneth A. Shepsle eds., 1990) (“[I]n many transactions, in particular ongoing ones, contingencies typically arise that were unforeseen at the time of the transaction itself.”).

48. *Id.*

49. See Weingast, *supra* note 46, at 246 (arguing certain legal institutions, including “successful pacts—such as the Glorious Revolution in seventeenth-century England[] [and] the Missouri Compromise of 1820 . . . —create a focal solution that resolves the coordination dilemmas confronting elites and citizens”); see also Geoffrey Garrett & Barry R. Weingast, *Ideas, Interests, and Institutions: Constructing the European Community’s Internal Market*, in *Ideas and Foreign Policy: Beliefs, Institutions, and Political Change* 173, 197 (Judith Goldstein & Robert O. Keohane eds., 1993) (“[A] central objective of actors wishing to engage in stable cooperation in complex environments is the construction of institutions that monitor the behavior of participants, identify transgressions, and apply the general rules of the game to myriad unanticipated contingencies.”).

50. See Weingast, *supra* note 46, at 246 (arguing certain legal institutions “create a focal solution that resolves the coordination dilemmas confronting elites and citizens”).

51. Hardin, *Liberalism*, *supra* note 46, at 88 (arguing Constitution was primarily designed to resolve economic disputes among states by creating central government with power to regulate interstate commerce). A few legal scholars have likewise recognized that the constitutional text provides crucial focal points for political actors and citizens. See Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 *Harv. L. Rev.* 657, 708 (2011) (“Coordination offers an especially perspicacious explanation of the ongoing relevance of the big-C Constitution.”); David A. Strauss, *Common Law Constitutional Interpretation*, 63 *U. Chi. L. Rev.* 877, 934 (1996) (arguing “[t]he written text does play a crucial role as a focal point”).

52. See, e.g., Zachary Elkins et al., *The Endurance of National Constitutions* 108 (2009) (asserting “[i]f the constitution is vague on a certain point, . . . [c]onstitutional review provides focal points for enforcement”).

contend that international tribunals can help countries police their treaty partners by clarifying when other nations have violated their treaty commitments.<sup>53</sup> They argue that “governments no longer need to . . . determine whether a particular action constitutes a transgression. Instead, they need only observe the pronouncements of the courts.”<sup>54</sup>

Notably, such a coordination regime tends to become more entrenched over time.<sup>55</sup> That is because once the regime is in place it becomes “extremely difficult to re-coordinate large numbers on doing things some other way.”<sup>56</sup> Not only must a large number of citizens and political actors object to the old regime, but a sufficient number must also agree on the same alternative.<sup>57</sup> Thus, Professor Hardin argues, “The Constitution of 1787 worked in the end because enough of the relevant people worked within its confines long enough to get it established in everyone’s expectations that there was no point in not working within its confines.”<sup>58</sup>

The above social science literature suggests why political actors may be inclined to facilitate the Supreme Court’s role in defining the content of federal law. The Supreme Court performs a crucial settlement function for disputed federal questions.<sup>59</sup> Although some constitutional

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53. See Garrett & Weingast, *supra* note 49, at 197–98 (explaining how European courts help nations identify and monitor treaty violations).

54. *Id.* at 198.

55. See John M. Carey, *Parchment, Equilibria, and Institutions*, 33 *Comp. Pol. Stud.* 735, 754 (2000) (asserting “if institutions are products of coordination . . . then institutional equilibria are sticky”).

56. Hardin, *Liberalism*, *supra* note 46, at 15.

57. Russell Hardin, *Why a Constitution?*, in *The Federalist Papers and the New Institutionalism* 100, 113 (Bernard Grofman & Donald Wittman eds., 1989) (asserting “once we have settled on a constitutional arrangement, it is not likely to be in the interest of some of us then to try to renege” and “[t]o do better, we would have to carry enough others with us to set up an alternative, and that will typically be too costly to be worth the effort”). Although social scientists do not appear to have identified the precise conditions under which such a recoordination can occur, they do agree that such regime changes are rare. See Hardin, *Liberalism*, *supra* note 46, at 15 (noting “[i]t took the massive politics of 1787–8 . . . to devise the constitutional order of the United States”); Weingast, *supra* note 46, at 261 (asserting “a society cannot establish a coordination device at just any time” and “[b]reaking [the prior] equilibrium is difficult and requires something exogenous to the model,” such as crisis or major economic or demographic changes).

58. Hardin, *Liberalism*, *supra* note 46, at 136; see also Weingast, *supra* note 46, at 254 (noting “U.S. constitutional restrictions on elected officials are self-enforcing,” in part “because citizens are willing to defend [the Constitution] by reacting against proposed violations” and, “[a]nticipating that reaction, political leaders rarely attempt violations”).

59. Other scholars have recognized that the Court performs a crucial settlement function—at least in the context of constitutional law. See Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 *Harv. L. Rev.* 1359, 1385 (1997) (emphasizing Supreme Court’s role “as the authoritative settler of constitutional meaning”). Notably, this Article does not mean to suggest that political actors empower the Supreme Court *solely* to promote its settlement function. Social scientists have

or statutory questions may be answered by the President, Congress, or administrative agencies, many legal issues are left to the courts.<sup>60</sup> Lower courts (particularly the federal courts of appeals and state supreme courts) can specify the boundaries of permissible conduct within their respective jurisdictions. But only the Supreme Court can provide a definitive and nationally uniform resolution of federal law.<sup>61</sup>

Political actors thus have some reason to promote the Supreme Court's settlement function. Moreover, these political incentives are likely to increase over time, as the Court's role becomes more entrenched. Over the past two centuries, both Congress and the general public have grown increasingly accustomed to the Supreme Court's role in providing a definitive and uniform resolution of federal questions.<sup>62</sup> That is true—not because Supreme Court decisions necessarily provide the best resolution of disputed issues, but because “enough of the relevant people [have] worked within [this judicial system] long enough to get it established in everyone's expectations”<sup>63</sup> that the Court has a crucial role in defining the content of federal law. Congress should therefore be increasingly inclined to enact “exceptions” and “regulations” that facilitate the Court's role.

This theory finds support in the history of congressional control over the Supreme Court's appellate jurisdiction. As discussed in Parts II–IV, Congress has not generally used its authority to restrict the Court's

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identified other reasons that politicians empower the judiciary as a whole. See *supra* notes 41–44 and accompanying text (discussing political science literature). But coordination theory does help explain why politicians support the Supreme Court in particular—even when they strongly disagree with its jurisprudence. All political actors benefit from the Court's role in establishing definitive and uniform rules of federal law.

60. Indeed, some social scientists argue that political actors deliberately defer controversial matters to the judiciary. See *supra* note 43 (discussing political science scholarship making this argument).

61. Some legal scholars have recognized that Supreme Court decisions can provide focal points for decisionmaking. See Eric A. Posner & Adrian Vermeule, *Constitutional Showdowns*, 156 U. Pa. L. Rev. 991, 999 (2008) (observing “[p]recedents may create focal points that coordinate behavior” and “constitutional ‘precedent’ . . . may, but need not, be a judicial precedent”). But see Richard H. McAdams, *Beyond the Prisoners' Dilemma: Coordination, Game Theory, and Law*, 82 S. Cal. L. Rev. 209, 240–41 (2009) (stating “few constitutional law scholars [have] examine[d] focal point theory”).

62. See Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 Am. J. Pol. Sci. 635, 658 (1992) (asserting, based on empirical study, modern Supreme Court enjoys “diffuse support” among mass public); Neal Devins, *The Majoritarian Rehnquist Court?*, *Law & Contemp. Probs.*, Summer 2004, at 63, 70 (“Today's Congress . . . rarely casts doubt on either the correctness of [a Supreme Court] ruling or, more fundamentally, the Court's power to authoritatively interpret the Constitution.”); Richard H. Pildes, *Is the Supreme Court a “Majoritarian” Institution?*, 2010 *Sup. Ct. Rev.* 103, 145 (“That the power and stature of the Court have increased dramatically over time is widely recognized.”).

63. Hardin, *Liberalism*, *supra* note 46, at 136.

appellate review power but instead has steadily expanded it. These jurisdictional expansions, however, had an adverse impact: They created a series of workload crises at the Supreme Court that undermined its capacity to provide a definitive resolution of federal questions.<sup>64</sup> The Court called upon Congress to provide relief and, each time, Congress responded by exercising its authority under the Exceptions Clause. In a series of statutes, Congress made “exceptions” to the Court’s mandatory appellate jurisdiction and replaced it with discretionary review via writs of certiorari.<sup>65</sup>

Notably, the political support for these exceptions was reasonably widespread and increased over time. This broad political support was rather remarkable, because each of the statutes governing certiorari jurisdiction was enacted during an era of intense conflict over the federal judiciary. In the late nineteenth and early twentieth centuries, populists and progressives sought to curtail the power of the probusiness judiciary, while economic conservatives steadfastly defended the courts. In more modern times, social conservatives took aim at the Court’s progressive civil rights jurisprudence, while social progressives sought to protect the courts.<sup>66</sup>

Nevertheless, both sides were willing to support measures that protected the Supreme Court’s settlement function. Thus, in 1891, a group of key progressives joined economic conservatives to support the creation of certiorari review in order to safeguard the Court’s role in “enforc[ing]” the “uniformity of decision” on legal questions.<sup>67</sup> In the early twentieth century, an even larger number of progressives joined the conservatives to significantly expand the Court’s discretionary certiorari jurisdiction.<sup>68</sup> Finally, in a series of statutes throughout the 1970s, culminating in the Judiciary Act of 1988,<sup>69</sup> Congress gave the Court

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64. See *infra* notes 109–113, 220–222 and accompanying text (describing caseload crises in federal judiciary in nineteenth and twentieth centuries).

65. See S. Rep. No. 100-300, at 3 (1988) (“In establishing the Court’s appellate jurisdiction under Article III, Congress can confer as much or as little compulsory jurisdiction as it deems necessary and proper, *including such exceptions as Congress thinks appropriate.*” (emphasis added)); S. Rep. No. 96-35, at 2–3 (1979) (“[A]n ‘appeal’ to any Federal appellate court, including the Supreme Court, is solely a creature of legislative choice. . . . If Congress wants to make the Court’s appellate jurisdiction totally discretionary or totally obligatory in nature, nothing in the Constitution says ‘no.’” (citations omitted)).

66. See Tara Leigh Grove, *The Structural Safeguards of Federal Jurisdiction*, 124 *Harv. L. Rev.* 869, 888–916 (2011) [hereinafter *Grove, Structural Safeguards*] (describing Congress’s jurisdiction-stripping efforts after Civil War).

67. 21 *Cong. Rec.* 3405 (1890) (statement of Rep. David Culberson, D-Tex.).

68. See *infra* notes 209–214 and accompanying text (noting support from progressives for certiorari expansion in Judiciary Act of 1925).

69. Act of June 27, 1988, Pub. L. No. 100-352, §§ 2–4, 102 Stat. 662, 662–63 (codified at 28 U.S.C. §§ 1254, 1257–58 (2006)).

certiorari review over virtually every appeal. These statutes had broad support among both social conservatives and social progressives; the 1988 Act was enacted with no recorded dissent.<sup>70</sup> By 1988, virtually all legislators seemed to view the Supreme Court's "principal functions" as "resolv[ing]" important issues of federal law and "ensur[ing] uniformity . . . in the law by resolving conflicts" among the lower courts.<sup>71</sup> Thus, Congress enacted "exceptions" that safeguarded the Supreme Court's power to "pronounce uniform and authoritative rules of federal law."<sup>72</sup>

At the outset, however, it is important to note a few qualifications and clarifications about this argument. First, this Article does not assert that Congress can only use its exceptions power to protect the Supreme Court. On the contrary (as discussed in Part V), the Article acknowledges that Congress has the raw power to strip the Court's appellate jurisdiction over certain classes of claims, as it has done on a few occasions. But the Article suggests that the incentives of Congress—combined with other structural and political constraints (which are described further in Part V)—help explain why such uses of the Exceptions Clause have been rare.

Second, the Article does not seek to defend the Supreme Court's exercise of its discretionary review power.<sup>73</sup> Instead, the focus here is on why Congress created and expanded the Court's certiorari jurisdiction. As described below, it appears that Congress sought in large part to facilitate the Court's role in resolving federal questions.<sup>74</sup> That is not to say that every Supreme Court decision in fact provides a definitive resolution of a disputed federal question. Although many Court decisions serve this function,<sup>75</sup> other opinions are written narrowly and resolve only the

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70. See *infra* note 261 and accompanying text (noting there was no expressed opposition to granting Supreme Court certiorari jurisdiction over most appeals).

71. H.R. Rep. No. 100-660, at 14 (1988).

72. Bator, *supra* note 3, at 1039.

73. The Supreme Court's certiorari jurisdiction has been severely criticized by some scholars. See, e.g., Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 *Colum. L. Rev.* 1643, 1647 (2000) (doubting whether Court's certiorari power can be reconciled with "classic conceptions of judicial review, judicial power, and the rule of law"); see also Amanda L. Tyler, *Setting the Supreme Court's Agenda: Is There a Place for Certification?*, 78 *Geo. Wash. L. Rev.* 1310, 1310 (2010) (noting many critics claim either "the Court is taking too few cases" or "the Court is not taking the 'right' cases").

74. See *infra* Parts III–V (describing efforts by Congress to assist Court through expansion of certiorari jurisdiction).

75. Notably, such broad decisions need not be "activist." Although some Court decisions clarify the content of federal law by limiting the scope of governmental power, other broad decisions require lower courts to defer to the political branches. Compare *Miranda v. Arizona*, 384 U.S. 436, 444–45 (1966) (requiring police to give specific warnings before interrogating any suspect in custody), and *Reynolds v. Sims*, 377 U.S. 533,

particular case before the Court.<sup>76</sup> Nevertheless, as many political actors have recognized, the Supreme Court is the only judicial institution that can provide a nationally uniform resolution of federal questions. It is this potential settlement function that Congress can facilitate in exercising its power over federal jurisdiction.

Third, the Article does not mean to suggest that all political actors supported the creation and expansion of certiorari jurisdiction *solely* to promote the Court's settlement function. There were undoubtedly multiple motivations for these laws. For example, political supporters of the judiciary (probusiness conservatives in the late nineteenth and early twentieth centuries and social progressives in more modern times) likely sought in part to enhance the Court's power to issue decisions they favored.<sup>77</sup> But coordination theory does help explain why even political opponents of the judiciary agreed to these certiorari measures. Such opponents had few short-term incentives to empower the Supreme Court. But both supporters and opponents of the judiciary would benefit from the Court's long-term role in providing focal points around which government actors and citizens could organize their affairs.

Finally, the goal here is *not* to demonstrate that the Exceptions Clause was originally designed to protect the Supreme Court's role in settling federal questions. In fact, that is one way in which the approach of this Article differs from prior literature on Congress's power over federal jurisdiction, virtually all of which seeks to unearth the original meaning of Article III.<sup>78</sup>

The historical survey below suggests instead that Congress's authority under the Exceptions Clause has been defined over time, as the Supreme Court's constitutional role has become more entrenched and as the need for certain exceptions (like discretionary certiorari review) has become apparent. Legislators have gradually come to accept—indeed, to depend upon—the Court's role in providing an authoritative and uniform resolution of federal questions. For that reason, Congress has used its broad authority under the Exceptions Clause to safeguard the Supreme Court's Article III judicial power.

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568 (1964) (establishing one-person, one-vote rule for legislative apportionment), with *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984) (requiring deference to administrative interpretations of ambiguous statutes), and *Hodel v. Indiana*, 452 U.S. 314, 331–32 (1981) (requiring rational basis review of economic legislation).

76. See Tara Leigh Grove, *The Structural Case for Vertical Maximalism*, 95 *Cornell L. Rev.* 1, 11–21 (2009) (describing recent “minimalist” rulings by Supreme Court).

77. See *supra* notes 41–44 and accompanying text (discussing reasons politicians may support judiciary).

78. See *supra* notes 22–24 and accompanying text (discussing prior scholarship on jurisdiction stripping that relied on originalism to ascertain meaning of Article III).

## II. EXPANSIONS AND EXCEPTIONS IN POST-CIVIL WAR AMERICA

From 1789 until the Civil War, the jurisdiction of the Supreme Court was governed—with few modifications—by the Judiciary Act of 1789.<sup>79</sup> This statute reflected Congress's early (and rather limited) understanding of the Supreme Court's constitutional role. The first Congress viewed the Court primarily as a forum for resolving disputes among the states and ensuring state court compliance with federal law.<sup>80</sup> Accordingly, under the 1789 Act, the Court had the power to review all state court decisions denying federal rights but no authority over other state court rulings on federal questions.<sup>81</sup> The Court had even less power to oversee the inferior federal courts.<sup>82</sup>

However, as discussed below (and in Part III), by the late nineteenth and early twentieth centuries, legislators began to develop a more expansive conception of the Supreme Court's role. The Court was increasingly viewed as an institution that should establish definitive and uniform rules of federal law.<sup>83</sup> Thus, legislators described the Supreme Court as “the final tribunal which should pass upon the meaning of the

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79. See Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 *Harv. L. Rev.* 49, 131 (1923) (observing that, during first eighty-six years, Judiciary Act of 1789 had minor modifications).

80. Thus, in 1789, there was widespread political support for Supreme Court review of state court decisions. Nationalists were worried that state courts might interfere with the operations of the new government. See 1 *Annals of Cong.* 797–98 (1789) (Joseph Gales ed., 1834) (statement of Rep. William Smith, Pro-Admin.-S.C.) (urging it was “indispensable” to have appeal from every state court decision involving federal law). States’ rights advocates hoped the Court would keep the national government within its prescribed bounds and also police the actions of sister states. See, e.g., *id.* at 809 (statement of Rep. Michael Stone, Anti-Admin.-Md.) (asserting Framers “supposed that [the federal government] had a natural tendency to destroy the State Governments [or] that the State Governments had a tendency to abridge the powers of the General Government; therefore it was necessary to guard against either . . . and this was to be done properly by establishing” the “Supreme Federal Court”). For the party affiliations of members of Congress, this Article relies on Congress's online database, *Biographical Directory of the United States Congress: 1774–Present*, <http://bioguide.congress.gov/biosearch/biosearch.asp>, (last visited April 23, 2013).

81. Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85–87.

82. Under the 1789 Act, the lower federal courts could hear admiralty and maritime cases, suits arising under international or federal criminal law, and diversity actions when the amount in controversy exceeded \$500. *Id.* §§ 2–4, 9, 11, 1 Stat. at 73–79. The Court could review those decisions when the amount in controversy exceeded \$2,000. *Id.* §§ 13–14, 1 Stat. at 80–82, 84–85. The Court could also review some lower federal court decisions through its power to issue supervisory writs, such as writs of mandamus and habeas corpus. *Id.*

83. See *infra* notes 147–148 and accompanying text (describing how Congress valued Court's ability to provide consistent judicial rules).

Constitution, treaties, and statutes of the United States”<sup>84</sup> in order to “enforc[e]” uniform decisions “throughout the entire judicial system.”<sup>85</sup>

This conception of the Court’s role is nicely illustrated by the debates surrounding the Judiciary Act of 1891.<sup>86</sup> That statute transformed the appellate review scheme created in 1789. Under the 1789 Act, the Supreme Court had only limited appellate jurisdiction but was required to review every case that came before it on appeal. The 1891 Act (along with other reforms of the late nineteenth century) dramatically expanded the Supreme Court’s appellate jurisdiction but also created discretionary certiorari review. This discretionary review system was designed to ensure that the Court could establish uniform rules in a broader class of federal cases.<sup>87</sup>

Notably, the 1891 Act was enacted during an era that was characterized by intense partisan struggles over the authority of the federal courts. While economic conservatives sought to expand and protect federal jurisdiction, populists and progressives generally fought to curtail it. But even during this era of intense partisanship, these political factions proved to be less divided when it came to the Supreme Court. A group of key

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84. 52 Cong. Rec. 276 (1914) (statement of Rep. Edwin Webb, D-N.C.); see also, e.g., 21 Cong. Rec. 3405 (1890) (statement of Rep. David Culberson, D-Tex.) (“As the Supreme Court is the Federal head of the judicial department of the Government, it would appear illogical and improper to exclude from it questions of a Federal character . . .”).

85. 21 Cong. Rec. 3405 (1890) (statement of Rep. David Culberson, D-Tex.); see also, e.g., 48 Cong. Rec. 6012 (1912) (statement of Sen. Elihu Root, R-N.Y.) (“The sole object of the [1914 law extending review over state court appeals] . . . is to make it possible for the Supreme Court to pass upon Federal questions so as to have uniformity of law.”). At the same time (and relatedly), political actors were increasingly willing to accept the Court’s role in resolving constitutional controversies. See Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. Rev. 333, 431 (1998) (asserting, by late nineteenth century, people “were beginning to understand their need for a Supreme Court” to resolve constitutional questions).

86. See *infra* Part II.B (discussing Act and surrounding controversy).

87. Notably, the Court’s appellate jurisdiction was established by Article III. Accordingly, when the first Congress in the 1789 Act declined to grant the Court jurisdiction in all federal cases, it made exception to the Court’s preexisting constitutional jurisdiction. See *Durousseau v. United States*, 10 U.S. (6 Cranch) 307, 314 (1810) (“When the first legislature of the union proceeded to carry the third article of the constitution into effect, they must be understood as intending to execute the power they possessed of making exceptions to the appellate jurisdiction of the supreme court.”). As already mentioned, this Article does not argue that Congress in 1789 sought to use its exceptions power to promote the Court’s settlement function; Congress at that time had a much narrower conception of the Supreme Court’s role. See *supra* text accompanying notes 79–82 (noting First Congress’s understood Court’s role to be settling state disputes and guaranteeing adherence to federal law). Congress’s subsequent jurisdictional “expansions” could thus be characterized as “restorations” of the Court’s Article III jurisdiction. For the purposes of this Article, the characterization makes little difference. Whether Congress was expanding or restoring the Court’s jurisdiction, it was doing so in order to facilitate the Court’s settlement function.

progressives crossed party lines to vote in favor of legislation designed to protect the Court's role in overseeing the judiciary.

*A. Partisan Divides and Jurisdiction-Stripping Efforts*

The political parties of the late nineteenth century were internally cohesive and sharply at odds with their political opponents.<sup>88</sup> By the mid-1870s, the Republican Party was dominated by economic conservatives, whose primary goal was to build a strong national economy by encouraging industrial development and powerful corporations.<sup>89</sup> The Democrats, by contrast, represented more populist and progressive voters, and opposed many of the Republicans' procorporate policies.<sup>90</sup>

The economic conservatives sought to advance their agenda in large part through the federal judiciary.<sup>91</sup> The Republicans controlled the presidency and the Senate during much of this period and were thus able to appoint judges who were generally sympathetic to the party's economic goals.<sup>92</sup> Indeed, the members of the Supreme Court were selected almost entirely based on "their devotion to party principles and 'soundness' on the major economic questions of the day."<sup>93</sup>

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88. See William N. Chambers, *Party Development and the American Mainstream*, in *The American Party Systems: Stages of Political Development* 3, 14 (William Nisbet Chambers & Walter Dean Burnham eds., 2d ed. 1975) (noting "party loyalties [were brought] to a pitch of almost military fervor and discipline").

89. In the immediate aftermath of the Civil War, the Republican Party focused more on civil rights (i.e., protecting free blacks in the South from abuses). See William M. Wiecek, *The Reconstruction of Federal Judicial Power, 1863–1875*, 13 *Am. J. Legal Hist.* 333, 333, 344 (1969) (observing federal courts' enlarged removal and habeas jurisdictions were originally designed to allow them to "protect[] the rights of Negroes and federal officials in the South"). However, the political support for civil rights enforcement waned in the 1870s, and the Republicans turned instead toward building a strong national economy. See Howard Gillman, *How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875–1891*, 96 *Am. Pol. Sci. Rev.* 511, 516 (2002) (asserting, "despite a spate of [pro-civil rights] activity culminating in the passage of the Civil Rights Act of 1875, by the mid-1870s the national enthusiasm for the vigorous protection of civil rights was diminishing," and Republican party began to "increasingly . . . focus on nationalism, and especially economic nationalism").

90. See Edward A. Purcell, Jr., *Litigation and Inequality: Federal Diversity Jurisdiction in Industrial America, 1870–1958*, at 15 (1992) (asserting, during this period, Democrats represented interests in Midwest, West, and South that were increasingly "hostil[e] to eastern financial interests and national corporations").

91. Gillman, *supra* note 89, at 513, 516–17 (arguing Republicans sought to make federal judges "principal agents of [Republicans' economic] agenda").

92. See Richard Franklin Bensel, *The Political Economy of American Industrialization, 1877–1900*, at 7 (2000) (noting Supreme Court appointees supported economic agenda of Republican party); Barry Friedman, *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution* 159–60 (2009) ("The priority of business thus became to ensure a federal bench, and particularly a Supreme Court, that was 'sound' on the issues that mattered.").

93. Bensel, *supra* note 92, at 7.

The Republicans endeavored to empower this “friendly” judiciary by expanding federal jurisdiction. During a period of unified government,<sup>94</sup> the party ushered in a sweeping jurisdictional statute. The Judiciary Act of 1875 enabled the federal courts to hear all cases arising under federal law and significantly expanded their jurisdiction in diversity suits, including the opportunities to remove cases from state to federal court.<sup>95</sup> The Act had the desired effect: Corporations soon took advantage of their opportunities to take cases to the federal courts, leading to an explosion in federal litigation.<sup>96</sup>

The 1875 Act also precipitated a bitter partisan struggle over federal jurisdiction.<sup>97</sup> For the next several decades, Democratic legislators proposed bills to curb federal jurisdiction over suits involving corporations. Representative David Culberson led the charge from the 1870s to the 1890s.<sup>98</sup> He repeatedly proposed legislation that would define a corporation as a citizen of any state in which it did business, thereby largely eliminating federal diversity jurisdiction over common law actions involving corporations.<sup>99</sup> Representative Culberson emphasized that “[p]ersons who are poor and without the means to litigate with wealthy corporations are . . . denied justice” in federal court.<sup>100</sup> He argued, “There can be no

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94. 5 Historical Statistics of the United States: Earliest Times to the Present 5-201 tbl.Eb296-308 (Susan B. Carter et al. eds., millennial ed. 2006) [hereinafter Historical Statistics] (showing, from 1873 to 1875, Republicans had 194-92 majority in House, 49-19 majority in Senate, and held presidency in Ulysses S. Grant).

95. See Judiciary Act of 1875, ch. 137, §§ 1-2, 18 Stat. 470, 470-71 (conferring jurisdiction over “all suits . . . arising under” federal law when amount in controversy exceeded \$500, and expanding diversity jurisdiction).

96. See Felix Frankfurter & James M. Landis, *The Business of the Supreme Court: A Study in the Federal Judicial System* 60-65 (Transaction Publishers 2007) (1928) (noting various statutes, especially Judiciary Act of 1875, contributed to rise in federal courts’ caseload); Purcell, *supra* note 90, at 15 (discussing statutes expanding federal jurisdiction, culminating “in the Judiciary Act of 1875[,] which pushed the reach of the federal courts toward their outer constitutional limits”).

97. See Purcell, *supra* note 90, at 15 (“Beginning in 1878, [populists and progressives] mounted a persistent campaign to restrict the federal courts, prevent corporate removals, and limit diversity jurisdiction.”).

98. See 23 Cong. Rec. 200 (1892) (introducing bill “to limit the jurisdiction of the district and circuit courts”); 15 Cong. Rec. 118 (1883) (proposing amendment to regulate removal of causes from state courts to federal courts); 13 Cong. Rec. 427 (1882) (same); 10 Cong. Rec. 43 (1879) (same); 7 Cong. Rec. 4000 (1878) (proposing bill “to regulate the removal of cases from the State courts” to federal courts).

99. See 10 Cong. Rec. 681-82 (1880) (introducing bill stripping circuit courts of original jurisdiction “of any suit . . . between a corporation . . . and a citizen of any State” in which such corporation conducted business, and preventing removal of such cases “to any circuit court of the United States”).

100. *Id.* at 702 (statement of Rep. David Culberson, D-Tex.); see also *id.* at 1015 (statement of Rep. James Waddill, D-Mo.) (complaining similarly about inability of poor plaintiffs, including widows and children, to receive justice against corporations in federal court).

higher duty imposed on this Congress than to lessen [the] power [of corporations] to oppress the citizen in the courts of the United States.”<sup>101</sup>

The Republicans reacted by defending the federal judiciary and underscoring its importance to the nation’s economic growth and development.<sup>102</sup> For example, Representative Hiram Barber argued that “[c]apital [in the North and East] is timid; it demands security,” and the “best guarantee of security to investments [is] found in recourse to the national courts.”<sup>103</sup> Likewise, Representative George Robinson emphasized the importance of ensuring a federal forum for large corporations, stating, “[L]et us stand by the national courts; let us preserve their power.”<sup>104</sup>

These jurisdiction-stripping bills repeatedly passed the House of Representatives,<sup>105</sup> which was controlled by the Democratic Party during much of this period.<sup>106</sup> Each time, however, the Republicans used their control over the Senate to block the proposal.<sup>107</sup> Thus, as Representative Culberson complained in 1890, “[T]he fate of [this jurisdiction-stripping] measure in the Senate . . . warns us that it can never become the law.”<sup>108</sup>

#### *B. The Introduction of Certiorari Review: 1891*

The rise in litigation resulting from the 1875 Judiciary Act and other contemporaneous reforms created a caseload crisis throughout the federal judiciary.<sup>109</sup> But the situation in the Supreme Court was particularly severe. The Court’s appellate jurisdiction was still largely defined by the Judiciary Act of 1789, which required it to review every case properly

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101. 14 Cong. Rec. 1246 (1883) (statement of Rep. David Culberson, D-Tex.).

102. Grove, *Structural Safeguards*, supra note 66, at 895.

103. 10 Cong. Rec. 820 (1880) (statement of Rep. Hiram Barber, Jr., R-Ill.).

104. *Id.* at 850 (statement of Rep. George Robinson, R-Mass.).

105. See Grove, *Structural Safeguards*, supra note 66, at 934 (showing results of House votes on jurisdiction-stripping bills introduced in 1880 and 1883).

106. See *Historical Statistics*, supra note 94, at 5-201 tbl.Eb296-308 (noting Democrats controlled House for six of ten Congresses spanning from 1871 to 1891).

107. See Grove, *Structural Safeguards*, supra note 66, at 893-96 (describing political battles over jurisdiction stripping during this period).

108. 21 Cong. Rec. 3406 (1890) (statement of Rep. David Culberson, D-Tex.); see also 26 Cong. Rec. 8594 (1894) (statement of Rep. David Culberson, D-Tex.) (lamenting that, although his bill had passed through House in multiple Congresses, that body had never “been able to get the concurrence of the Senate in this measure”).

109. See supra note 96 and accompanying text (discussing higher caseload in wake of expansion of federal jurisdiction under 1875 Act); see also Wiecek, supra note 89, at 342-48 (describing expansion of federal habeas jurisdiction in nineteenth century); *infra* Part V.B.1 (discussing repeal and restoration of Supreme Court jurisdiction over certain habeas appeals).

before it on appeal.<sup>110</sup> This mandatory appellate review scheme was sustainable during the Court's early years, when it heard at most 250 cases per year.<sup>111</sup> But by 1890, the Court's mandatory appellate docket had swelled to over 1,800 cases,<sup>112</sup> only four or five hundred of which it could dispose of in a given year.<sup>113</sup>

Chief Justice Morrison Waite urged Congress to use its authority under the Exceptions Clause to provide relief to the Court.<sup>114</sup> He emphasized that the Supreme Court's "appellate jurisdiction is subject entirely to congressional control. It may be more or it may be less, as the ever-changing circumstances of a great and growing country shall require."<sup>115</sup> Although he declined to suggest "what [the] relief shall be," he sought legislation that would "help to make the Supreme Court what its name implies, a powerful auxiliary in the administration of justice," rather than "an obstacle standing in the way" of the final resolution of cases.<sup>116</sup>

Members of the executive branch echoed Chief Justice Waite's calls for reform. Attorneys General under both Democratic President Grover Cleveland and Republican President Benjamin Harrison urged Congress to "find a remedy for the crying evil of delay" caused by the caseload crisis.<sup>117</sup> President Harrison raised the issue himself in his 1889 State of

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110. See Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 81 (stating Court "shall . . . have appellate jurisdiction from the circuit courts and courts of the several states"); Eugene Gressman, *Requiem for the Supreme Court's Obligatory Jurisdiction*, 65 A.B.A. J. 1325, 1327 (1979) ("From 1789 to 1891 the Court was under congressional mandate to take jurisdiction over every case that properly came before it, to consider the briefs, to hear the oral argument, and to resolve the merits of each case by written opinions or otherwise.").

111. See David M. O'Brien, *Storm Center: The Supreme Court in American Politics* 160 (Aaron Javicas ed., 9th ed. 2011) (providing chart showing Court's docket from 1800 until 1850 generally included 250 cases or fewer).

112. Frankfurter & Landis, *supra* note 96, at 60 (noting that, from 1850 to 1890, Court's docket grew from 253 to 1,816 cases).

113. See H.R. Rep. No. 51-1295, at 3 (1890) (referring to Justice Harlan's statement that, in 1886, Court disposed of only 451 out of 1,396 cases on docket).

114. Specifically, Chief Justice Waite explained:

As to the Supreme Court, the Constitution provides that in all cases affecting ambassadors [sic], other public ministers and consuls, and those in which a State shall be a party, it shall have original jurisdiction, and in all others within the judicial power appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as Congress shall make. The original jurisdiction is thus fixed by the Constitution, and it cannot be taken away by Congress, but the appellate jurisdiction is subject entirely to congressional control. . . . If at any time too large . . . , it may be reduced, and a part transferred to an inferior court . . . .

Remarks of Chief Justice Waite, 36 Albany L.J. 318, 318 (1887).

115. *Id.*

116. *Id.*

117. Annual Report of the Attorney General for the Year 1889, at xviii–xix (1889) (emphasizing "[t]he importance of some change in the judicial system of the United

the Union address, arguing that “[t]he necessity of providing some more speedy method for disposing of the cases . . . [in] the Supreme Court becomes every year more apparent and urgent.”<sup>118</sup>

Several Republican legislators, including Senator William Evarts, proposed bills to respond to the Court’s concerns. Senator Evarts argued that Congress had an “obligation[] under the Constitution” to provide relief to the Court, while “leav[ing] entirely uncurtailed” the Court’s authority over constitutional questions and “other questions of a public nature.”<sup>119</sup> Under the Evarts plan, the Supreme Court would retain mandatory appellate jurisdiction over virtually all cases arising under federal law.<sup>120</sup> But the Court would have the discretion to review other classes of cases, including diversity suits.<sup>121</sup> A new system of appellate courts would have primary responsibility for deciding those nonfederal cases, subject to review in the Supreme Court in one of two ways—either by certification from the court of appeals or by way of a writ of certiorari.<sup>122</sup> Senator Evarts stated that such Supreme Court oversight was necessary to “guard against diversity of judgment in these [new appellate] courts” and to preserve the “uniformity of decision” within the federal judiciary.<sup>123</sup>

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States, which will enable the courts, and especially the Supreme Court, to dispose of the large number of cases”); see also, e.g., Annual Report of the Attorney General for the Year 1885, at 36–43 (1885) (advocating intermediate court of appeals in part on ground that “[i]t will undoubtedly very largely reduce the docket of the Supreme Court”). Notably, President Cleveland’s Attorney General, Augustus Garland, supported the Court’s request for relief, even as he also advocated the proposal to restrict federal jurisdiction over corporate suits. See *id.* at 42 (“[C]orporations doing business in States other than those from which they derive their . . . powers should . . . be placed strictly on the footing of domestic corporations [and] . . . should not be permitted to invoke Federal jurisdiction . . . So, too, [should] corporations created by acts of Congress . . .”).

118. First Annual Message of President Benjamin Harrison (Dec. 3, 1889), *in* 2 *The State of the Union Messages of the Presidents, 1790–1966*, at 1638 (Fred L. Israel ed., 1966) [hereinafter *State of the Union Messages*]. Both President Harrison and the Attorneys General supported the proposal for an intermediate court of appeals. See *infra* notes 119–122 and accompanying text (describing how appellate courts would function).

119. 21 Cong. Rec. 10,220 (1890) (statement of Sen. William Evarts, R-N.Y.) (“[T]he great point . . . is to provide intermediate courts that shall answer the purpose of our obligations under the Constitution, that shall leave entirely uncurtailed the authority of the Supreme Court in . . . the supervision of laws in the sense of constitutionality and other questions of a public nature . . .”).

120. See S. Rep. No. 51-1571, at 1–2 (1890) (detailing Court’s broad jurisdiction over federal cases under Evarts plan).

121. See *id.* at 2 (proposing to give circuit courts final jurisdiction in diversity, patent, revenue, criminal, and admiralty cases).

122. *Id.*

123. 21 Cong. Rec. 10,222 (1890) (statement of Sen. William Maxwell Evarts, R-N.Y.) (stating provisions for certification and certiorari review would “guard against diversity of judgment in these [new appellate] courts” and ensure Supreme Court “review[] in the

The political dynamics surrounding this proposal in many respects mirrored those of the Culberson bill. Republican legislators strongly supported the reform, which would empower the probusiness judiciary by giving it sufficient personnel and resources to handle the additional duties created by the 1875 Act.<sup>124</sup> But many Democratic lawmakers strongly opposed the plan. They refused to support any bill that would enlarge the size of the federal judiciary, particularly given that the additional judges would be selected by a Republican.<sup>125</sup> President Harrison had two more years remaining in his term, and he already had a track record of appointing staunchly probusiness individuals to the federal bench.<sup>126</sup> The Democrats argued instead that, if the Supreme Court was overworked, the solution was to reduce the scope of federal jurisdiction.<sup>127</sup> Indeed, some Democrats pointed out that the Culberson bill, if enacted, would resolve many of the Court's workload problems.<sup>128</sup>

Accordingly, Congress could have remained "deadlocked" on judicial reform.<sup>129</sup> The Democrats would continue to support efforts to restrict federal jurisdiction, while the Republicans would oppose them. The Republicans would favor the creation of a new appellate court system to relieve the Supreme Court, while the Democrats would block

interest of jurisprudence and uniformity of decision," and system would "leave[] flexibility, elasticity, and openness for supervision by the Supreme Court").

124. See, e.g., 21 Cong. Rec. 10,227 (1890) (statement of Sen. Joseph Dolph, R-Or.) (arguing "the plain imperative duty of Congress . . . [i]s to provide adequate judicial machinery for the prompt transaction of the business of the federal courts").

125. See *id.* at 10,678 (statement of Rep. William Breckinridge, D-Ky.) (opposing new judgeships); *id.* at 10,306 (statement of Sen. George Vest, D-Mo.) ("It has been suggested . . . that I want no more Federal judges because there is a Republican Administration in power which might . . . appoint them. I have thought of that, and I would rather have in any office men who agree with me politically. I am a Democrat.").

126. See Henry J. Abraham, *Justices, Presidents, and Senators: A History of the U.S. Supreme Court Appointments from Washington to Clinton* 111 (1999) (noting Harrison Justices adhered to "freedom of contract, absence of governmental restraint on business activities, and the sanctity of property").

127. See 22 Cong. Rec. 3586 (1891) (statement of Rep. William Breckinridge, D-Ky.) (stating "the first and main remedy [to the workload crisis] . . . is to take from the Federal judiciary the vast amount of jurisdiction which does not under our system properly belong to it"); 21 Cong. Rec. 3406 (1890) (statement of Rep. William Oates, D-Ala.) (contending Congress could relieve Supreme Court by repealing federal courts' entire diversity jurisdiction).

128. See 10 Cong. Rec. 951 (1880) (statement of Rep. James Knott, D-Ky.) (supporting Culberson bill, in part because it would reduce Supreme Court's docket by "fully one-third, if not one-half"); *id.* at 993 (statement of Rep. Frank Hurd, D-Ohio) (supporting bill for similar reasons: "The Supreme Court . . . is complaining [that] it cannot dispose of the causes upon . . . [its] docket [and because] [t]he judges are now more than three years behind").

129. Frankfurter & Landis, *supra* note 96, at 89, 93 (observing, in 1870s and 1880s, "[t]he two houses were deadlocked" and recounting "[a]fter the [bill to restructure the judiciary] passed the Senate, it was buried in the House Judiciary Committee").

that reform. Such a deadlock should have been particularly likely, given that the Supreme Court was as dominated by probusiness jurists as the rest of the federal judiciary.<sup>130</sup> And, indeed, for several years, these partisan divisions did delay efforts to provide relief to the Court.<sup>131</sup>

However, ultimately, Senator Evarts's proposal attracted some notable bipartisan support. A group of key Democrats in both the House and the Senate supported the creation of the new appellate court system—principally because the measure appeared to be the only means of addressing the Supreme Court's caseload crisis.<sup>132</sup> For example, Senator John Reagan stated that the need to “secur[e] relief” for the Court “reconciles me to consent to the appointment of this additional number of judges, which I suppose we are to have appointed in a partisan way.”<sup>133</sup>

But the most remarkable support came from Representative Culberson. This champion of jurisdiction-stripping legislation was also one of the leading proponents of the Evarts plan. Representative Culberson argued that there was an “absolute necessity . . . to relieve the Supreme Court of the burden of business imposed upon it by existing laws.”<sup>134</sup> He also insisted that “[t]he remedy” for the Court's caseload crisis was “within the easy reach of Congress” under the Exceptions Clause:

The authority vested in Congress to make exceptions to and regulate the appellate jurisdiction of the Supreme Court was granted for the purpose of enabling the Congress to adapt the

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130. See *supra* notes 91–93 and accompanying text (noting Republicans advanced party's economic goals by appointing economic conservatives to federal judiciary).

131. See Frankfurter & Landis, *supra* note 96, at 89, 93 (noting “[t]he [often Democratic] House was for curtailment of power,” but Senate “resisted” and “sought to provide [federal courts] with more efficient machinery and more judges to dispose of their increased business”).

132. See, e.g., 21 Cong. Rec. 3408 (1890) (statement of Rep. John Rogers, D-Ariz.) (stating although he “heartily sympathize[d]” with those who favored jurisdictional restrictions and supported Culberson's bill, such legislation had “not yet passed the Senate” and Congress could not “reasonably hope” to lessen Court's workload “by a repetition of that action which we have found of no avail”); *id.* at 10,285 (statement of Sen. John Reagan, D-Tex.) (supporting bill in part because it would help to “unload the Supreme Court”).

133. *Id.* at 10,285 (statement of Senator John Reagan, D-Tex.).

134. *Id.* at 3403 (statement of Rep. David Culberson, D-Tex.) (supporting House bill to create new appellate court system for this reason); see also 22 Cong. Rec. 3585 (1891) (statement of Rep. David Culberson, D-Tex.) (supporting Evarts plan “for the reasons which induced me to support the House bill . . . . The same objects and results . . . are secured by the Senate amendment”). Representative Culberson also favored the reform because it would enhance the Supreme Court's power to oversee the inferior federal courts, and thereby end the “judicial despotism” exercised by some lower court judges. 21 Cong. Rec. 3403 (statement of Rep. David Culberson, D-Tex.); see also *infra* notes 142–146 and accompanying text (noting jurisdictional expansions in new law).

appellate jurisdiction of the court to the varying demands of the business, trade, and commerce of the country and to protect and shield that great tribunal from the conditions which exist to-day. . . . [T]his bill will, in my opinion, reasonably protect the court from an excessive burden of litigation and conform its appellate jurisdiction to the enormous growth of the business of the country.<sup>135</sup>

Representative Culberson further observed that the Supreme Court could still review the cases “excepted” from its mandatory appellate jurisdiction.<sup>136</sup> He argued that it was crucial for the Court to retain such “supervisory control over all questions . . . within the judicial power of the United States.”<sup>137</sup> This “supervisory control” would enable the Court to enforce the “uniformity of decision . . . throughout the entire judicial system of the United States.”<sup>138</sup>

The Evarts bill ultimately passed both the House and the Senate with this (modest) bipartisan support.<sup>139</sup> The Judiciary Act of 1891 largely

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135. 21 Cong. Rec. 3403–04 (statement of Rep. David Culberson, D-Tex.).

136. Representative Culberson was referring to the original House bill, which provided that cases outside the Supreme Court’s mandatory jurisdiction would reach the Court upon certification by the courts of appeals. The House bill required certification whenever there was a conflict among the courts of appeals. See H.R. Rep. No. 51-1295, at 2 (1890) (“[A]ny question which has been decided differently in another circuit court shall be certified to the Supreme Court for determination.”). The House bill did not provide for writs of certiorari. See *id.* at 1–2. But as Edward Hartnett has observed, legislators at the time viewed certification and writs of certiorari as largely indistinguishable. See Hartnett, *supra* note 73, at 1656 (noting Senator Evarts and others “viewed certification and certiorari as ‘parallel provisions’” and envisioned “certiorari . . . as a sort of fallback provision should the circuit courts of appeals prove, on occasion, to be surprisingly careless in deciding cases or issuing certificates”). Indeed, Representative Culberson supported the Senate bill, because he believed it accomplished the same objectives as the House bill. See *supra* note 134 (discussing Culberson’s support of Senate bill).

137. 21 Cong. Rec. 3405 (1890) (statement of Rep. David Culberson, D-Tex.).

138. *Id.*; see also *id.* at 10,221 (statement of Sen. William Evarts, R-N.Y.) (noting one crucial question was how to reduce “the burden of the docket of the Supreme Court” while “maintain[ing] . . . [the] just uniformity of decision”).

139. The Evarts bill passed the Senate by a vote of 44-6. *Id.* at 10,364–65. Sixteen of the Senators voting in favor of the measure were Democrats. *Id.* at 10,364. Given that the Senate at the time included thirty-nine Republicans and thirty-seven Democrats, see Historical Statistics, *supra* note 94, at 5-201 tbl.Eb296-308, some Democratic support was likely necessary for passage of the bill. Indeed, at that time, a single senator could have filibustered the measure. See Filibuster and Cloture, United States Senate, [http://www.senate.gov/artandhistory/history/common/briefing/Filibuster\\_Clature.htm](http://www.senate.gov/artandhistory/history/common/briefing/Filibuster_Clature.htm) (on file with the *Columbia Law Review*) (last visited Apr. 23, 2013) (discussing history of filibuster and noting Senate did not adopt cloture rule until 1917). The bipartisan support was more modest in the House. The House passed a version of the reform on April 15, 1890, by a vote of 131-13. 21 Cong. Rec. 3410. Only a handful of Democrats (eight) voted in favor of the final bill. But, notably, only thirteen Democrats voted against the measure; 132 Democrats simply declined to vote. *Id.* The House accepted the Evarts bill, as it passed the Senate, by a vote of 107-62. 22 Cong. Rec. 3587 (1891). The individual votes in the House

codified the Evarts plan. Under the Act, the Supreme Court had mandatory appellate jurisdiction over federal question cases from the lower federal courts<sup>140</sup> and only discretionary review power (through certiorari or certification) over other classes of cases.<sup>141</sup>

Notably, the Act did not reduce the Court's jurisdiction in every respect. The statute expanded the Supreme Court's appellate review power over federal question cases by reducing the amount-in-controversy requirement from \$5,000 to \$1,000.<sup>142</sup> The Act also significantly expanded the Court's jurisdiction in criminal cases, providing for review in any case involving "a capital or otherwise infamous crime."<sup>143</sup> Although some legislators worried that these provisions would undermine the proposed relief for the Court,<sup>144</sup> others argued that any additional burden was justified by the importance of providing for Supreme Court review of important federal questions.<sup>145</sup> Representative Culberson, for example, strongly supported these expansions, arguing that "[a]s the Supreme Court is the Federal head of the judicial department of the Government," the Court should review all "questions of a Federal character."<sup>146</sup>

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on that final measure were not recorded. *Id.* President Benjamin Harrison signed the measure into law on March 2, 1891. See *id.* at 3760.

140. See Circuit Court of Appeals Act §§ 5–6, 26 Stat. 826, 827–28 (1891) (providing for mandatory review in federal cases when amount in controversy exceeded \$1,000).

141. See *id.* §§ 1, 2, 6, 26 Stat. at 826, 828 (authorizing discretionary review over cases from new appellate courts involving diversity, revenue laws, patent laws, federal criminal laws, and admiralty).

142. See *id.* § 6, 26 Stat. at 828 (authorizing right of appeal in diversity cases "where the matter in controversy shall exceed one thousand dollars").

143. *Id.* § 5, 26 Stat. at 827–28. Two years earlier, Congress had given the Supreme Court mandatory appellate jurisdiction over capital cases. Act of Feb. 6, 1889, ch. 113, § 6, 25 Stat. 655, 656. Prior to these statutes, the Supreme Court could review criminal cases only if two circuit judges certified the matter to the Court, see Frankfurter & Landis, *supra* note 96, at 109, or (in some cases) via a petition for a writ of habeas corpus, see Pfander, *Jurisdiction-Stripping*, *supra* note 26, at 1488–90.

144. Indeed, these modifications led Representative John Rogers, one of the leading proponents of the reform in the House, to withdraw his support for the bill. See 22 Cong. Rec. 3585 (1891) (statement of Rep. John Rogers, D-Ark.) (arguing additional jurisdiction over criminal appeals would "intensif[y]" Court's caseload difficulties). Senator Evarts also initially opposed the expansion of the Court's appellate jurisdiction in criminal cases. See 21 Cong. Rec. 10,302–03 (1890) (statement of Sen. William Evarts, R-N.Y.) (worrying criminal appeals "would be a great burden" on Court). But he ultimately compromised on this point. See *id.* at 10,308–09 (statement of Sen. William Evarts, R-N.Y.) (agreeing to restrict amendment to cover "capital or otherwise infamous" crimes).

145. See 22 Cong. Rec. 3584, 3587 (statement of Rep. Nathan Frank, R-Mo.) (asserting any burden on Court would be "counterbalanced by the . . . justice of getting it this [criminal] jurisdiction on appeal"); *id.* at 3586 (statement of Rep. David Culberson, D-Tex.) ("If there is any class of judgments which deserve a higher and greater consideration than another it seems to me that a judgment which takes life or liberty falls within it.").

146. 21 Cong. Rec. 3405 (statement of Rep. David Culberson, D-Tex.).

The debates over the 1891 legislation suggest that, by the late nineteenth century, a number of legislators had begun to see value in the Supreme Court's settlement function.<sup>147</sup> Although progressives like Representative Culberson could not expect the probusiness Court to issue rulings that they favored, they could nevertheless benefit from the Court's role in "enforcing" the "uniformity of decision . . . throughout the entire judicial system of the United States."<sup>148</sup> This bipartisan political support was not, of course, universal. Many Democrats opposed the 1891 reform. But there was enough support to ensure enactment of the Evarts plan (even as court-curbing legislation was blocked by the political process). Thus, Congress was able to use its "authority . . . to make exceptions to and regulate the appellate jurisdiction of the Supreme Court" to "shield that great tribunal . . . from an excessive burden of litigation and conform its appellate jurisdiction to the enormous growth of the business of the country."<sup>149</sup>

### III. EXPANSIONS AND EXCEPTIONS IN THE EARLY TWENTIETH CENTURY

Congress again acted to facilitate the Supreme Court's settlement function in the early twentieth century. As in the 1890s, this era was a period of intense political conflict over the judiciary—now focused on the Supreme Court's constitutional jurisprudence.<sup>150</sup> Progressives increasingly attacked the Court's use of the Due Process and Commerce Clauses to limit state and federal efforts to regulate wages and workplace conditions. Meanwhile, the economic conservatives in the Republican Party continued to defend the Court's efforts to protect the free market. But, even in this charged political environment, these political factions came together to enact—by far wider margins than in 1891—legislation that protected the Supreme Court's role in the constitutional scheme.

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147. See, e.g., 21 Cong. Rec. 10,221–22 (statement of Sen. William Evarts, R-N.Y.) (emphasizing need for Supreme Court review to "guard against diversity of judgment in these [new appellate] courts" and ensure "uniformity of decision").

148. *Id.* at 3405 (statement of Rep. David Culberson, D-Tex.); see also *id.* at 3408 (statement of Rep. John Rogers, D-Ariz.) (arguing "if the bill has one feature that commends it to the country it is that it retains that great central power, the Supreme Court . . . , with ample authority to extend its arms and to bring each one of these nine circuits into harmonious adjudication upon the same question" and thereby ensure uniformity of decision).

149. *Id.* at 3404 (statement of Rep. David Culberson, D-Tex.).

150. See William G. Ross, *A Muted Fury: Populists, Progressives, and Labor Unions Confront the Courts, 1890–1937*, at 179 (1994) (observing, from 1890 to 1937, "populists, progressives, and labor leaders subjected both state and federal courts to vigorous and persistent criticism," and "[p]rogressive proposals [during the 1920s] more often involved only the Supreme Court").

A. *Progressive Attacks on the Supreme Court: 1920s*

In the early twentieth century, the progressive movement gained strength in both political parties.<sup>151</sup> There were not only progressive Democrats but also a growing number of progressive Republicans who were deeply critical of the Supreme Court's constitutional jurisprudence.<sup>152</sup> The Republican Party was thus divided between the (once dominant) economic conservatives and this new progressive wing.<sup>153</sup> Moreover, progressive Republicans appeared to be gaining political strength after the 1922 elections, when they won several important congressional seats.<sup>154</sup> Although the progressives "still held only a small number of seats in Congress, their strength exceeded their numbers."<sup>155</sup> The progressive Republicans "held the balance of power in Congress," because the economic conservatives had to rely on their support in order to enact legislation.<sup>156</sup>

During this same period, the Supreme Court was increasingly hostile to social and economic legislation.<sup>157</sup> Progressives were particularly outraged by the Court's 1918 decision in *Hammer v. Dagenhart*, which invalidated a federal child labor law.<sup>158</sup> In the wake of this and similar rulings,<sup>159</sup> progressives launched a series of attacks on the Supreme Court.

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151. See Chambers, *supra* note 88, at 14 (noting, during fourth party system, which lasted from 1896 to 1932, progressive reformers gained political strength by "weaken[ing] party structure and the hold of parties on voters" through democratic reforms).

152. See Whittington, *Political Foundations*, *supra* note 42, at 261 (noting "[p]rogressive factions challenged Republican Party leadership in both the House and the Senate, fracturing apparent legislative majorities").

153. See *id.* (observing "conservatives faced new challenges in the first decades of the twentieth century from progressive reformers within the Republican Party," who managed to "fractur[e] apparent legislative majorities").

154. See Ross, *supra* note 150, at 211 ("The general election in 1922 suggested a progressive revival.").

155. *Id.*

156. *Id.*

157. See, e.g., *Adkins v. Children's Hosp.*, 261 U.S. 525, 545-62 (1923) (invalidating minimum wage law for women and children on due process grounds as violation of liberty of contract), overruled in part by *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 36-39, 44 (1922) (striking down, on Tenth Amendment grounds, federal law that sought to ban child labor by taxing products of child labor); *Hammer v. Dagenhart*, 247 U.S. 251, 272-73 (1918) (invalidating federal statute prohibiting child labor on ground that "labor" was not "commerce"), overruled in part by *United States v. Darby*, 312 U.S. 100 (1941).

158. *Hammer*, 247 U.S. at 272-73; see also Ross, *supra* note 150, at 169 (observing *Hammer v. Dagenhart* "provided an impetus for specific proposals to curb the Court's power").

159. See *supra* note 157 (describing Court's antagonism toward progressives' legislative initiatives).

Some legislators proposed constitutional amendments to undo the Court's rulings. For example, Senator Robert La Follette suggested a constitutional amendment permitting Congress to reenact any law that had been struck down by the Supreme Court.<sup>160</sup> But other progressives sought to correct the Court's constitutional decisions by statute. These statutory proposals relied on Congress's power to make "exceptions" to and "regulate" the Supreme Court's appellate jurisdiction.

Several legislators sought to impose supermajority requirements on the Court's exercise of judicial review.<sup>161</sup> For example, Senator William Borah introduced a bill that would require the concurrence of seven Justices to invalidate any act of Congress.<sup>162</sup> He argued that "[w]hen a measure has passed the Congress and received the approval of the President it seems unreasonable that such a measure should be rejected by a decision in which no more than five out of nine judges concur."<sup>163</sup>

Other legislators advocated restrictions on the Supreme Court's appellate jurisdiction. Senator Robert Owen proposed legislation that would reenact the child labor law and prohibit the Court from ruling on the constitutionality of the new statute.<sup>164</sup> Senator Owen believed that Congress had ample power to make "such exceptions and such regulations . . . as to prevent the Supreme Court from nullifying acts of Congress, or assuming to declare questions of great national policy"<sup>165</sup>:

The Supreme Court of the United States has no jurisdiction worth mentioning, except appellate jurisdiction. That appellate jurisdiction under Article III . . . is subject to the control of Congress, and is granted "with such exceptions, and under such regulations as the Congress shall make." Therefore Congress can take from that court . . . such part of that jurisdiction as it may see fit.<sup>166</sup>

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160. See 62 Cong. Rec. 9073–74, 9081 (1922) (statement of Sen. Robert La Follette, R-Wis.) ("What I propose is that Congress shall be enabled to override this usurped judicial veto . . . just as it has the power to override the presidential veto . . .").

161. See Ross, *supra* note 150, at 222, 231–32 (discussing release of several plans to curb Court's jurisdiction).

162. See 64 Cong. Rec. 3004 (1923) (statement of Sen. William Borah, R-Idaho) (noting introduction of bill by Senator Borah "providing the number of judges which [sic] shall concur in holding an act of Congress unconstitutional").

163. *Id.* at 3959 (reproducing article by Sen. William Borah, R-Idaho); see also *id.* at 3960 (asserting Congress may "provide under the scope of 'regulations' touching the appellate jurisdiction that before an act of Congress shall be declared void at least seven judges shall concur").

164. See 56 Cong. Rec. 7431–32 (1918) (statement of Sen. Robert Owen, D-Okla.) (proposing two amendments to child labor bill). Senator Owen's proposal stated in part, "No judge of an inferior Federal court shall permit the question of the constitutionality of this act to be raised in the court over which he presides, and the United States Supreme Court shall have no appellate power to pass upon such question." *Id.* at 7432.

165. 64 Cong. Rec. 3958 (statement of Sen. Robert Owen, D-Okla.).

166. 55 Cong. Rec. 847 (1917) (statement of Sen. Robert Owen, D-Okla.).

In response, conservatives defended the Supreme Court, emphasizing the Court's role in the preservation of liberty and the protection of minorities.<sup>167</sup> For example, Senator Walter Edge decried the "attack[s] upon the highest court in our land, the bulwark of liberty and freedom."<sup>168</sup> Likewise, Senator Frank Kellogg asserted that "the highest court of the land was established to see that the citizen was protected in his constitutional rights against [legislative and executive] encroachments."<sup>169</sup> He insisted that "[t]he guaranties of th[e] Constitution could not possibly be enforced without" the Supreme Court.<sup>170</sup>

Ultimately, none of the proposals to limit the authority of the Supreme Court gained traction in Congress. Although the economic conservatives needed progressive support to enact legislation, they had ample power to block the progressives' court-curbing efforts.<sup>171</sup> Indeed, the statutory proposals by Senators Borah and Owen never even made it out of committee in either chamber of Congress.<sup>172</sup>

#### B. *Expanding Certiorari Review: 1925*

During the early twentieth century, the Supreme Court's caseload continued to increase dramatically.<sup>173</sup> The mounting volume of cases was caused in large part by Congress's expansion of the Court's appellate jurisdiction.<sup>174</sup> For example, the 1891 statute not only created certiorari review but also greatly expanded the Court's appellate jurisdiction in

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167. As William Ross has noted, these arguments were somewhat counterfactual because the Court at that time had not proven to be a great defender of individual liberty. See Ross, *supra* note 150, at 204–05 (observing, at least until *Meyer v. Nebraska*, 262 U.S. 390 (1923), which protected parental rights, "the Court's history . . . afforded scant support for [this] contention"). Notably, some progressives also opposed the attacks on the Supreme Court. See, e.g., 65 Cong. Rec. 247 (1923) (reproducing article by Sen. John K. Shields, D-Tenn.) (arguing that La Follette, Borah, and Owen proposals, "if successful, would result in the absorption by the legislative department of all judicial power, a condition subversive of all liberty"); see also Ross, *supra* note 150, at 197 (noting progressives were "divided on the issue of judicial reform").

168. 62 Cong. Rec. 9073 (1922) (statement of Sen. Walter Edge, R-N.J.).

169. 56 Cong. Rec. 7434 (statement of Sen. Frank Billings Kellogg, R-Minn.).

170. *Id.* He further argued, "We might as well wipe out the Constitution as abolish the Supreme Court of the United States, which has for more than 100 years been the rock of the liberties of the American people." *Id.*

171. See Ross, *supra* note 150, at 196, 232 (noting measures to curb Court's power failed due to conservatives' firm control of Congress).

172. See *id.* (observing proposals failed in large part because "conservatives controlled the judiciary committees in both houses"). Senator La Follette's suggested constitutional amendment was "never even embodied in a bill." *Id.* at 320.

173. See Lee Epstein et al., *The Supreme Court Compendium: Data, Decisions and Developments* 63 tbl.2-2 (4th ed. 2007) (showing rise in Court's caseload from 1,116 in 1910 to 1,316 in 1924).

174. See Frankfurter & Landis, *supra* note 96, at 65, 203 (noting 1875 and 1914 expansions in particular contributed to rise in Court's workload).

criminal and federal question cases. In 1914, Congress also voted—without recorded dissent—to extend the Court’s jurisdiction over state court rulings to encompass all federal question cases, including cases in which the state court upheld a federal right.<sup>175</sup> Prior to the 1914 Act, the Court could review only cases in which the state court rejected a federal claim.<sup>176</sup>

Notably, these jurisdictional expansions were designed to enhance the Court’s power to resolve federal questions. As noted, supporters of the expansions in the 1891 Act sought to allow the Court to review all “questions of a Federal character” from the lower federal courts.<sup>177</sup> Likewise, proponents of the 1914 Act argued that it would enable the Court to preserve “the uniformity of the Federal laws in their practical application to . . . the several States.”<sup>178</sup>

Congress, however, also recognized that these jurisdictional expansions might burden the Court and thereby undermine its capacity to settle disputed federal questions. Indeed, for that reason, the 1914 Act granted the Court discretionary certiorari review when a state court upheld a federal right.<sup>179</sup> As the Act’s sponsor Senator Elihu Root explained, certiorari jurisdiction would enable the Court to “secur[e] uniformity in the law,” without “open[ing] the gates to a flood of appeals.”<sup>180</sup> Over the next few years, Congress also authorized certiorari review in other areas, including bankruptcy cases.<sup>181</sup> But this piecemeal reduction in the Court’s mandatory appellate jurisdiction did little to ameliorate the Court’s growing caseload crisis.

175. Act of Dec. 23, 1914, ch. 2, 38 Stat. 790, 790.

176. See *supra* notes 79–82 and accompanying text (examining limitations on Court’s jurisdiction between 1789 and Civil War).

177. 21 Cong. Rec. 3405 (1890) (statement of Rep. David Culberson, D-Tex.); see also *supra* notes 140–141 and accompanying text (describing Court’s appellate jurisdiction over federal question cases).

178. H.R. Rep. No. 63-1222, at 2 (1914); see also 48 Cong. Rec. 6012 (1912) (statement of Sen. Elihu Root, R-N.Y.) (“The sole object of the [1914 legislation] . . . is to make it possible for the Supreme Court to pass upon Federal questions so as to have uniformity of law.”).

179. Act of Dec. 23, 1914, ch. 2, 38 Stat. at 790.

180. 48 Cong. Rec. 6012 (statement of Sen. Elihu Root, R-N.Y.).

181. See Act of Sept. 6, 1916, ch. 448, § 2, 39 Stat. 726, 726–27 (granting certiorari review over certain state court cases denying federal right, including those involving Federal Employers’ Liability Act); Act of Jan. 28, 1915, ch. 22, 38 Stat. 803 (granting certiorari review over circuit court judgments in bankruptcy and trademark cases). Notably, these statutes reflected Congress’s growing view that the Supreme Court should focus its limited resources on resolving important issues of federal law. See S. Rep. No. 64-775, at 2 (1916) (stating certiorari review would enable Court to focus on state court appeals involving questions of “general importance”); H.R. Rep. No. 63-1182, at 2 (1914) (granting certiorari review on ground that “[t]he bankruptcy law has now been so thoroughly construed that . . . cases now coming to the Supreme Court . . . involve complicated questions of fact rather than of law”).

As a result, Chief Justice William Howard Taft—much like Chief Justice Waite before him—urged Congress to dramatically reduce the Court’s mandatory appellate jurisdiction.<sup>182</sup> The Chief Justice insisted that such a reform was necessary to preserve the Court’s settlement function. Taft argued that “[t]he business of the court is rapidly increasing,” and absent a reduction in the Court’s mandatory jurisdiction, it would be “impossible for the court to dispatch promptly, as it should, the important questions which it is organized to settle.”<sup>183</sup>

Chief Justice Taft and other Justices argued that the Court should concentrate its limited resources on its two primary functions: resolving important issues of federal law and settling conflicts among the lower courts.<sup>184</sup> For example, Justice McReynolds stated that a case “should come to [the Supreme Court] for final disposition” only if it “involves [a] matter of general importance, some statute to be construed, some constitutional provision,” or if the “circuit courts of appeals entertain differing views.”<sup>185</sup> He declared that the “real function of our court is this: to settle the law, so the lawyers may know how to advise their clients and so that trial judges may know how . . . to decide cases that come before them.”<sup>186</sup>

As in 1891, the executive branch strongly supported the Supreme Court’s request for a reform to help it resolve important federal questions. In testimony before Congress, President Warren Harding’s Solicitor General, James Beck, stated that although “it would be

182. See Hartnett, *supra* note 73, at 1660–704 (describing Chief Justice Taft’s efforts).

183. Jurisdiction of Circuit Courts of Appeals and United States Supreme Court: Hearing Before the H. Comm. on the Judiciary, 67th Cong. 1 (1922) [hereinafter Jurisdiction of Circuit Courts Hearing] (statement of William Howard Taft, C.J., U.S. Supreme Court).

184. See, e.g., Letter from C.J. William Howard Taft to Sen. Royal S. Copeland (Dec. 9, 1924), *in* 66 Cong. Rec. 2920 (1925) (asserting “the business of the Supreme Court should be to consider and decide for the benefit of the public and for the benefit of uniformity of decision only questions of importance”); Jurisdiction of Circuit Courts of Appeals and of the Supreme Court of the United States: Hearing Before the H. Comm. on the Judiciary, 68th Cong. 17 (1924) [hereinafter Jurisdiction of the Supreme Court Hearing] (statement of Willis Van Devanter, J., U.S. Supreme Court) (stating Court would grant review only if case “involves questions of general importance or that a decision by the Supreme Court is necessary to produce needed uniformity”). Indeed, Justice Van Devanter declared that the Court always granted a certiorari petition in the event of a conflict among the lower courts. See Procedure in Federal Courts: Hearing on S. 2060 and S. 2061 Before the Subcomm. of the S. Comm. on the Judiciary, 68th Cong. 29–30 (1924) [hereinafter Procedure in Federal Courts Hearing] (statement of Willis Van Devanter, J., U.S. Supreme Court) (“Whenever we find . . . a conflict [among the state supreme courts or circuit courts of appeals] that, without more, leads to the granting of the petition . . .”).

185. Procedure in Federal Courts Hearing, *supra* note 184, at 45 (statement of James C. McReynolds, J., U.S. Supreme Court).

186. Jurisdiction of the Supreme Court Hearing, *supra* note 184, at 22 (statement of James C. McReynolds, J., U.S. Supreme Court).

admirable if in every case an appeal could be taken as a matter of right," such a requirement was impractical.<sup>187</sup> The Court should therefore have the discretion to focus on cases "involving very great and substantial questions."<sup>188</sup> Likewise, in his 1924 State of the Union address, President Calvin Coolidge asserted that the Court should have the power to "reserve its time for . . . extended consideration" of cases "of public moment."<sup>189</sup>

Economic conservatives in Congress also supported the certiorari expansion.<sup>190</sup> The conservatives had good reason to facilitate the authority of this probusiness Court to settle important federal questions.<sup>191</sup> By contrast, progressives had good reason to oppose the certiorari bill. Many believed that the Court had "to a large extent usurped the lawmaking power" by invalidating federal and state economic legislation.<sup>192</sup> Moreover, progressive Republicans "held the balance of power" in Congress.<sup>193</sup> Accordingly, even if the progressives could not enact court-curbing measures, they could at a minimum prevent legislation that would enhance the Supreme Court's power.

But the progressives did not block the certiorari bill. Even outspoken critics of the judiciary, such as Senator La Follette, failed to object to the proposal.<sup>194</sup> Furthermore, although many progressives simply remained silent on the measure, one of its chief proponents was progressive Republican Senator Albert Cummins.<sup>195</sup>

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187. Jurisdiction of Circuit Courts Hearing, *supra* note 183, at 18 (statement of James M. Beck, Solicitor Gen. of the United States) (arguing if litigants had this right, "the calendar of the court would become so congested and clogged the wheels of justice would stick in the mud").

188. *Id.* at 19.

189. Second Annual Message of President Calvin Coolidge (Dec. 3, 1924), *in* 3 State of the Union Messages, *supra* note 118, at 2662.

190. During this era, the conservatives retained control over the judiciary committees in both the House and Senate. Ross, *supra* note 150, at 196. Both houses strongly endorsed the proposed certiorari expansion. See H.R. Rep. No. 68-1075, at 1 (1925) (recommending passage of legislation); S. Rep. No. 68-362, at 1 (1924) (same).

191. See Friedman & Delaney, *supra* note 41, at 1162-66 ("Corporate interests recognized that to obtain substantive results in judicial doctrine, they needed to empower the Court by expanding its jurisdiction and affirming its position at the apex of a restructured federal judiciary branch.").

192. 62 Cong. Rec. 9076 (1922) (statement of Sen. Robert La Follette, R-Wis.); see also *supra* notes 157-159 and accompanying text (describing progressives' anger arising from Court's hostility toward social and economic legislation).

193. Ross, *supra* note 150, at 211.

194. See *id.* at 252-53 (noting lack of opposition); see also Hartnett, *supra* note 73, at 1645 (observing "Senator Thomas Walsh, a progressive Democrat from Montana . . . , attempted a lonely fight against the bill" (footnote omitted)).

195. See Ross, *supra* note 150, at 93 (noting Senator Cummins was progressive); Hartnett, *supra* note 73, at 1662 (noting lack of "serious discussion or debate" over measure in House and Senate).

Senator Cummins and other supporters argued—much like the Justices themselves—that the Supreme Court’s primary functions were to resolve important issues of federal law and to settle conflicts among the lower courts.<sup>196</sup> But the Court’s mandatory appellate jurisdiction had impaired the Court’s capacity to perform this settlement function: “Having to hear numbers of cases of trivial character . . . , the [Supreme Court] is hindered from hearing and determining more important cases and from efficiently . . . perform[ing] . . . its highest duty of interpreting the Constitution and preserving uniformity of decision” on federal questions.<sup>197</sup> Thus, Senator Cummins and others argued that Congress should “restrict or reduce the appellate jurisdiction of the Supreme Court . . . in order to enable it fairly to meet the demands that are made upon it.”<sup>198</sup>

There was very little vocal opposition to the certiorari expansion in Congress.<sup>199</sup> But, notably, even critics agreed on the need to preserve the Supreme Court’s role in resolving federal questions.<sup>200</sup> For example, Senator Thomas Walsh—the most outspoken opponent of the measure<sup>201</sup>—argued that “the primary function of [the Supreme Court] is to give an authoritative interpretation of Federal law, constitutional and statutory.”<sup>202</sup> He simply worried that the Court would not be able to perform this crucial function if it did not hear every federal question case.<sup>203</sup> Thus, Senator Walsh preferred to grant relief by limiting review

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196. See H.R. Rep. No. 68-1075, at 2 (1925) (stating Court should devote “time and attention and energy . . . to matters of large public concern” and to “preserving uniformity”); S. Rep. No. 68-362, at 3 (1924) (“[C]ases should not go to the Supreme Court . . . unless the questions involved are of grave public concern or unless serious uncertainty attends the decision of the circuit courts of appeal by reason of conflict in the rulings of these courts or the courts of the States.”).

197. H.R. Rep. No. 68-1075, at 2.

198. 66 Cong. Rec. 2752 (1925) (statement of Sen. Albert Baird Cummins, R-Iowa).

199. See Hartnett, *supra* note 73, at 1702–04 (criticizing lack of serious debate).

200. See, e.g., 66 Cong. Rec. 2753–55, 2921–22 (1925) (statement of Sen. Royal S. Copeland, D-N.Y.) (expressing concern because bill did not require review of all constitutional questions, but also asserting Court’s “time and labor should, generally speaking, be devoted to matters of general interest and importance and not to deciding private controversies”); *id.* at 2757 (statement of Sen. Claude Swanson, D-Va.) (arguing Court should have mandatory jurisdiction over rulings invalidating state or federal law).

201. See Frankfurter & Landis, *supra* note 96, at 276 (“If lawyers in the Senate had doubts about the measure, they were singularly reticent about uttering them. Only Senator Walsh of Montana expressed serious disagreement.”); Hartnett, *supra* note 73, at 1645 (discussing Senator Walsh’s “lonely fight against the bill”).

202. 62 Cong. Rec. 8548 (1922) (reprinting speech of Sen. Thomas Walsh, D-Mont.).

203. See *id.* at 8545–47 (asserting bill “proposes a radical departure from the system devised” by Founders).

in diversity cases—by providing for Supreme Court review only of any federal question involved.<sup>204</sup>

Ultimately, the certiorari expansion—embodied in the Judiciary Act of 1925<sup>205</sup>—went through both chambers of Congress with ease. The measure passed the House with virtually no debate and without any recorded opposition.<sup>206</sup> The Senate passed the bill by a vote of 76-1.<sup>207</sup> In the end, even Senator Walsh voted in favor of the legislation.<sup>208</sup> The bill also attracted the support of some progressives who otherwise sought to limit the Court’s power, including Senator Borah.<sup>209</sup> Other progressives, such as Senators Owen and La Follette, simply declined to vote.<sup>210</sup>

As Professor William Ross has stated, it seems “ironic that Congress increased the power of the [Supreme Court] at the very time that agitation by progressives and labor leaders . . . was reaching a new intensity.”<sup>211</sup> But the strong support for the measure may reflect legislators’ increasing acceptance of the Supreme Court’s settlement function.<sup>212</sup> As discussed, the Supreme Court sought—and supporters

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204. See *id.* at 8548–49 (stating “justice delayed is justice denied, and if the work of the Supreme Court is accumulating beyond its power to dispatch . . . it is incumbent on Congress . . . to grant relief,” and suggesting circuit courts of appeals be given final authority in diversity cases, “except as to any Federal question involved”).

205. Pub. L. No. 68-415, 43 Stat. 936. The Act left in place mandatory jurisdiction over (1) state court decisions invalidating a federal statute or treaty; (2) state court decisions upholding state law against a constitutional challenge; (3) certain decisions by three-judge district courts; (4) certain criminal appeals by the United States; and (5) federal appellate court decisions invalidating a state law. *Id.* § 1, 43 Stat. at 937–39.

206. See 66 Cong. Rec. 2879–80 (1925) (showing House initially passed bill on February 2, 1925, without recorded vote and with no representative opposing certiorari expansion); *id.* at 3005 (showing House passed final bill on February 4, 1925, again without recorded opposition).

207. See *id.* at 2928 (showing, on February 3, 1925, Senate passed bill by vote of 76-1, with nineteen senators abstaining). President Calvin Coolidge signed the bill into law on February 13, 1925. *Id.* at 3747–48. Accordingly, in the end, the legislation was enacted with only one recorded dissent: Senator James Heflin voted against the 1925 reform, stating that he did not “think it [was] right to withdraw from the citizen the right to appeal to the highest courts in the land if he wants to appeal.” *Id.* at 2928 (statement of Sen. James Heflin, D-Ala.). Senator Heflin had not previously raised any objection during the floor debates over the bill.

208. See *id.* at 2926, 2928 (statement of Sen. Thomas Walsh, D-Mont.) (reiterating view that Supreme Court should have mandatory jurisdiction over all federal question cases but also stating “my criticism . . . seems to have had no response” and “I do not feel like standing alone on the matter”); see also Hartnett, *supra* note 73, at 1700 (asserting “[i]f Senator Walsh had continued in his opposition, he could have . . . perhaps killed the bill”).

209. 66 Cong. Rec. 2928.

210. *Id.*

211. Ross, *supra* note 150, at 253.

212. Indeed, many supporters of the 1925 Act argued that it would facilitate the Court’s capacity to provide a uniform resolution of important federal questions. See

argued for—the certiorari expansion specifically on the ground that the reform was needed to preserve the Court’s role in resolving important federal questions.<sup>213</sup> So there is good reason to believe that progressives who voted for the measure did so because they saw value in the Court’s role in settling disputed federal issues—or, at least, they concluded that the benefits of that settlement function exceeded the costs of any “erroneous” decisions.<sup>214</sup> Indeed, even critics of the certiorari expansion argued that the Supreme Court’s “primary function . . . is to give an authoritative interpretation of Federal law.”<sup>215</sup> The principal area of contention was how best to ensure that the Court could perform this crucial function. Thus, even more so than in 1891, the 1925 Judiciary Act seems to have been premised on a view that the “real function” of the Supreme Court is to “settle” important questions of federal law.<sup>216</sup>

#### IV. EXCEPTIONS IN MODERN AMERICA

The political support for the Supreme Court’s settlement function was also evident in the mid to late twentieth century. The federal judiciary was once again a subject of intense political conflict during this era, although this time the objections came primarily from conservatives. Socially conservative Republicans and conservative Southern Democrats strongly objected to Supreme Court decisions involving abortion, reapportionment, desegregation, criminal justice, and religion. Accord-

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Procedure in Federal Courts Hearing, *supra* note 184, at 20–21 (providing general overview of bill and stating bill would “restrict the docket of [the Supreme Court] so as to enable it to dispose of the present arrears and to keep up with current business without interfering with [its] highest function of interpreting the Constitution and preserving uniformity of decisions by the intermediate courts of appeals”); H.R. Rep. No. 68-1075, at 2 (1925) (stating, absent certiorari expansion, “the court is hindered from hearing and determining more important cases and from efficiently functioning in the performance of its highest duty of interpreting the Constitution and preserving uniformity of decision by the intermediate courts of appeals”).

213. See *supra* notes 184–189, 196–198 and accompanying text (describing how proponents of certiorari expansion argued it would help Court focus on significant federal issues).

214. Indeed, Senator Cummins was explicit about this. See, e.g., 66 Cong. Rec. 2755 (statement of Sen. Albert Baird Cummins, R-Iowa) (making clear that, in his view, Supreme Court’s job was “not only to maintain a correct interpretation [of the Constitution] but to make that interpretation uniform or fairly uniform throughout the country” and further stating, absent certiorari expansion, Court could not do “its work with reasonable promptitude”).

215. 62 Cong. Rec. 8548 (1922) (reprinting speech of Sen. Thomas Walsh, D-Mont.); see also 66 Cong. Rec. 2753–55 (statement of Sen. Royal S. Copeland, D-N.Y.) (criticizing lack of mandatory appellate review in all constitutional cases and stating Supreme Court’s “time and labor should, generally speaking, be devoted to matters of general interest and importance,” such as resolution of all federal constitutional questions).

216. Jurisdiction of the Supreme Court Hearing, *supra* note 184, at 22 (statement of James C. McReynolds, J., U.S. Supreme Court).

ingly, they sought to strip both Supreme Court and lower federal court jurisdiction over these constitutional claims.<sup>217</sup> Those efforts were, however, blocked by social progressives who generally supported the Court's civil rights jurisprudence.<sup>218</sup>

But, once again, these competing political factions came together to protect the Supreme Court's constitutional role. Congress enacted a series of statutes during this period expanding the Court's certiorari jurisdiction. Finally, in 1988, Congress enacted—with no apparent opposition—a statute granting the Court discretionary review over virtually every appeal.

A. *The Exceptions Clause as a Shield Versus a Sword*

The legislative debates over one judiciary bill nicely illustrate the political dynamics surrounding jurisdictional measures during this era. A proposal to strip federal jurisdiction in school prayer cases was attached to a measure that would have substantially expanded the Supreme Court's certiorari power.<sup>219</sup> Although progressives and conservatives fought bitterly over the jurisdiction-stripping proposal, both sides endorsed the effort to protect the Supreme Court.

1. *An Early Effort to Expand Certiorari Review.* — The 1925 Judiciary Act provided temporary relief, but it did not solve the Court's workload problems. In the latter half of the twentieth century, the Court's docket grew further,<sup>220</sup> in part because of the expanding federal administrative state, and also because of changes in the Court's own doctrine, which recognized a number of new constitutional rights (particularly in the area of criminal procedure).<sup>221</sup> The Court also faced increasing

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217. See Edward Keynes & Randall K. Miller, *The Court vs. Congress: Prayer, Busing, and Abortion* 195–203, 221–25, 292–98 (1989) (discussing efforts to strip jurisdiction over abortion, busing, and school prayer); Max Baucus & Kenneth R. Kay, *The Court Stripping Bills: Their Impact on the Constitution, the Courts, and Congress*, 27 *Vill. L. Rev.* 988, 991 (1982) (noting efforts to strip jurisdiction over reapportionment and *Miranda* issues).

218. See Grove, *Structural Safeguards*, *supra* note 66, at 900–10, 935–37 (noting social progressives, mainly Democrats, “consistently maintained sufficient structural veto points to preserve federal jurisdiction”).

219. See *infra* Part IV.A.2 (discussing Helms Amendment to strip federal jurisdiction over school prayer cases after Supreme Court struck down state laws mandating prayer in public schools).

220. See Epstein et al., *supra* note 173, at 65–67 tbl.2-2 (showing Supreme Court's caseload rose from 1,321 in 1950, to 4,761 in 1975, to 8,965 in 2000).

221. See David M. O'Brien, *Managing the Business of the Supreme Court*, 45 *Pub. Admin. Rev.* 667, 669 (1985) (noting “Congress inflated the docket by expanding opportunities for the government and special-interest groups to appeal directly to the court” for issues such as “appeals from dismissals of criminal prosecutions”). In 1976, Congress also eliminated the remaining amount-in-controversy requirements for appeal to the Supreme Court. Richard H. Fallon, Jr. et al., *Hart and Wechsler's The Federal Courts and the Federal System* 746 (6th ed. 2009).

challenges in overseeing the lower courts because of a sharp increase in their workload. For example, between 1960 and 1983, the number of filings in federal district courts rose from approximately 80,000 to 280,000 cases per year, and those in the courts of appeals grew in similar proportion (from approximately 3,800 to nearly 30,000 cases per year).<sup>222</sup>

As in the early twentieth century, Congress recognized that the demand on the federal judiciary was creating a caseload crisis at the Supreme Court. As a result, in the 1970s, Congress enacted a series of statutes that reduced the Court's mandatory appellate jurisdiction in specified areas, such as antitrust.<sup>223</sup> However, once again, this piecemeal approach did little to relieve the Court.<sup>224</sup>

Accordingly, the Supreme Court—this time led by Chief Justice Warren Burger—called for more substantial reform. In successive letters to Congress, the Court sought a dramatic extension of certiorari jurisdiction to enable it to settle important federal questions.<sup>225</sup> In one such

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222. See Richard A. Posner, *The Federal Courts: Crisis and Reform* 61, 64 (1985) (reporting that, from 1960–1983, filings in district court rose from 79,200 to 277,031, and those in appellate courts rose from 3,765 to 29,580).

223. See Act of Aug. 12, 1976, Pub. L. No. 94-381 §§ 1–3, 90 Stat. 1119, 1119 (reducing number of cases in which three-judge district court is required, thereby eliminating source of direct appeals); Antitrust Procedures and Penalties Act, Pub. L. No. 93-528 § 5, 88 Stat. 1706, 1709 (1974) (abolishing virtually all direct appeals in antitrust actions); Omnibus Crime Control Act of 1970, Pub. L. No. 91-644, § 14, 84 Stat. 1880, 1890 (1971) (eliminating direct appeals by United States in criminal cases). These statutes, much like the 1925 Act, were designed to address the Court's caseload crisis, see H.R. Rep. No. 94-1379, at 4 (1976) (stating “the limited resources of the Supreme Court are strained by the direct appeal” from three-judge district courts); S. Rep. No. 94-204, at 4–5 (1975) (“Although [direct appeals from three-judge district courts] . . . account for only a small portion . . . of all cases docketed in the Supreme Court, they consume a disproportionate amount of the limited time for argument in the Supreme Court.”), and to allow the Court to focus on important federal questions, see H.R. Rep. No. 93-1463, at 12–13 (1974) (“[O]nly cases of general public importance in the administration of justice may be appealed directly to the Supreme Court . . .”); S. Rep. No. 93-298, at 4 (1973) (“Under the [antitrust] proposal only those cases of general public importance would be appealable directly to the Supreme Court . . .”).

224. There were other suggestions for how the Court could best address its capacity constraints. Much of the debate focused on the possible creation of a national court of appeals to assist the Court, particularly in resolving lower court conflicts. See Comm'n on Revision of the Fed. Court Appellate Sys., *Structure and Internal Procedures: Recommendations for Change 45–51* (1975) (recommending National Court of Appeals to hear cases referred by Supreme Court or transferred from federal courts of appeals); Fed. Judicial Ctr., *Report of the Study Group on the Case Load of the Supreme Court 18–24* (1972) (recommending National Court of Appeals to take on part of Supreme Court's workload). These proposals were, however, criticized by some Justices and scholars, and “ultimately the idea withered away.” Margaret Meriwether Cordray & Richard Cordray, *The Supreme Court's Plenary Docket*, 58 *Wash. & Lee L. Rev.* 737, 741–42 (2001).

225. See Letter from C.J. William Rehnquist to Rep. Robert W. Kastenmeier (May 11, 1988), in 134 *Cong. Rec.* 13,511 (1988) (“The effective elimination of mandatory jurisdiction . . . has for many years been the primary legislative goal of the Court.”); see

letter, the Court stated, “To the extent that we are obligated by statute to devote our energies to [the] less important cases [within our mandatory jurisdiction], we cannot devote our time and attention to the more important issues and cases constantly pressing for resolution” each term.<sup>226</sup>

The executive branch under both Democratic and Republican administrations once again supported the Court’s request for relief. A commission chaired by President Gerald Ford’s Solicitor General, Robert Bork, strongly “recommend[ed] that the remaining mandatory appellate jurisdiction of the Supreme Court be abolished.”<sup>227</sup> President Jimmy Carter’s Solicitor General, Wade McCree, agreed, emphasizing that this reform was essential to allow the “one supreme Court” created by the Constitution to oversee the growing federal business of the nation.<sup>228</sup>

Senator Dennis DeConcini led several early efforts to expand the Court’s certiorari jurisdiction in order to facilitate the Supreme Court’s settlement function.<sup>229</sup> He agreed with the Justices that the existing jurisdictional scheme “impair[ed] the Court’s ability” to provide a “definitive resolution” of important federal questions.<sup>230</sup> The elimination of mandatory appellate review was necessary to enable the Court “to effec-

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also Letter from Supreme Court of the United States to Rep. Kastenmeier (June 17, 1982), *in* H.R. Rep. No. 100-660, at 27–28 (1988) [hereinafter Court Letter to Kastenmeier] (“The only solution to the problem, and one that is consistent with the intent of the Judiciary Act of 1925 to give the Supreme Court discretion to select those cases it deems most important, is to eliminate or curtail the Court’s mandatory jurisdiction.”); Letter from Supreme Court of the United States to Sen. DeConcini (June 22, 1978), *in* S. Rep. No. 96-35, at 15–16 (1979) [hereinafter Court Letter to DeConcini] (“Various Justices have spoken out publicly on the issue on prior occasions, all stating essentially the view that the Court’s mandatory jurisdiction should be severely limited or eliminated altogether.”).

226. Court Letter to DeConcini, *supra* note 225, at 15.

227. Dep’t of Justice Comm. on Revision of the Fed. Judicial Sys., *The Needs of the Federal Courts* (1977), reprinted in *State of the Judiciary and Access to Justice: Hearings Before the Subcomm. on Courts, Civil Liberties, & the Admin. of Justice of the H. Comm. on the Judiciary*, 95th Cong. 535 (1977).

228. Supreme Court Jurisdiction Act of 1978: Hearing on S. 3100 Before the Subcomm. on Improvements in Judicial Machinery of the S. Comm. on the Judiciary, 95th Cong. 2 (1978) [hereinafter Supreme Court Jurisdiction Act of 1978: Hearing] (statement of Hon. Wade McCree, Solicitor Gen. of the United States) (arguing discretionary review was needed to “maintain the viability of this constitutional concept of a single Supreme Court as the population . . . has grown enormously and the volume of litigation has correspondingly burgeoned”).

229. See 125 Cong. Rec. 7632–33 (1979) (describing Senator DeConcini’s efforts in 1979); S. Rep. No. 95-985, at 1 (1978) (showing Senator DeConcini’s similar efforts to expand certiorari jurisdiction in 1978).

230. 125 Cong. Rec. 7633 (statement of Sen. Dennis DeConcini, D-Ariz.); see also S. Rep. No. 96-35, at 7 (“A significant number of petitioners for certiorari whose cases involve issues of considerable importance are being denied access to the Court simply because the Court has no time to hear them due to the crush of obligatory appeals.”).

tuates its constitutional mission of resolving only those matters that are of truly national significance.”<sup>231</sup>

The report of the Senate Judiciary Committee emphasized that Congress had ample power under the Exceptions Clause to enact the reform:

[A]n “appeal” to any Federal appellate court, including the Supreme Court, is solely a creature of legislative choice. . . . In establishing the Court’s appellate jurisdiction under Article III, Congress can confer as much or as little compulsory jurisdiction as it deems necessary and proper, *including such exceptions as Congress thinks appropriate*. If Congress wants to make the Court’s appellate jurisdiction totally discretionary or totally obligatory in nature, nothing in the Constitution says “no.” See *Ex parte McCordle*, 7 Wall. 506 (1869).<sup>232</sup>

Under the DeConcini bill, Congress would use that broad authority to ensure that the Court could continue to perform its crucial “function as expositor of the national law.”<sup>233</sup>

2. *The “Helms Amendment” to Strip Jurisdiction over School Prayer.* — During this era, Senator Jesse Helms led an effort to strip federal jurisdiction over school prayer cases.<sup>234</sup> He sought to attach his proposal to various bills and, in 1979, the jurisdiction-stripping measure became part of the DeConcini bill.<sup>235</sup>

231. 125 Cong. Rec. 7633 (statement of Sen. Dennis DeConcini, D-Ariz.).

232. S. Rep. No. 96-35, at 2–3 (emphasis added) (citations omitted); accord S. Rep. No. 95-985, at 3 (same). The citation to *Ex parte McCordle* may be surprising. The Court in that case provided one of the broadest declarations of Congress’s exceptions power, holding that Congress could strip the Court’s appellate jurisdiction over a pending case. *Ex parte McCordle*, 74 U.S. (7 Wall.) 506, 513–15 (1868). Yet, here, *McCordle* was used to support a bill that would strengthen the Court’s constitutional role. *McCordle* is discussed in more detail in Part V.B.1, *infra*.

233. S. Rep. No. 96-35, at 2 (asserting existing mandatory appellate jurisdiction “imposes burdens on the Justices that may hinder the Court in the performance of its function as expositor of the national law”).

234. See Louis Fisher, *Religious Liberty in America: Political Safeguards* 130 (2002) (noting Senator Helms “took the lead in promoting this type of court-stripping bill” and began introducing such measures in 1974).

235. The school prayer proposal was initially attached to a bill to create the Department of Education. See 125 Cong. Rec. 7581 (indicating senators voted to attach Helms’ amendment to bill). However, a few days later, the measure was removed from the education bill and attached to the certiorari measure. *Id.* at 7631, 7644. Notably, Senator Helms preferred to leave his school prayer amendment on both bills. He was worried (as it turned out, with good reason) that the House Judiciary Committee, which would have jurisdiction over the DeConcini bill, would be hostile to his jurisdiction-stripping measure. See *id.* at 7630 (statement of Sen. Jesse Helms, R-N.C.) (“[T]here is great doubt that the House will even have an opportunity to vote on [the measure] once it goes to the House Judiciary Committee.”); *infra* notes 252–258 and accompanying text (discussing judiciary committee’s opposition to Helms’s proposal).

Senator Helms argued that the Supreme Court erred when it struck down state laws requiring the recitation of prayer in public school<sup>236</sup> and insisted that Congress had ample authority under the Exceptions Clause to correct such mistakes:

In anticipation of judicial usurpations of power, the framers of our Constitution wisely gave the Congress the authority, by a simple majority of both Houses, to check the Supreme Court by means of regulation of its appellate jurisdiction. Section 2 of article III states in clear and unequivocal language that the appellate jurisdiction of the Court is subject to “such exceptions, and under such regulations as the Congress shall make.”<sup>237</sup>

Social progressives strongly opposed this jurisdiction-stripping effort. And, although they sought to defend the federal judiciary as a whole,<sup>238</sup> the progressives were particularly concerned about the “assault on the Supreme Court.”<sup>239</sup> Thus, Senator Birch Bayh asserted that the bill, if enacted, would set “a very dangerous precedent” that would make it easier for future Congresses to strip the Supreme Court’s jurisdiction over other constitutional issues.<sup>240</sup> Others, including Senator Ted Kennedy, expressed concern about the uniform enforcement of federal law, arguing that it would be unwise to leave the resolution of federal constitutional questions to fifty different states.<sup>241</sup>

In response, Senator Helms pointed to prior jurisdiction-stripping bills, including proposals to strip the Supreme Court’s jurisdiction over reapportionment cases and *Miranda* issues, as “precedents” to support

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236. See 125 Cong. Rec. 7577 (statement of Sen. Jesse Helms, R-N.C.) (asserting “the Court went beyond the language of the establishment clause” in invalidating state laws in *Engel v. Vitale*, 370 U.S. 421 (1962), and *School District of Abington v. Schempp*, 374 U.S. 203 (1963)).

237. 125 Cong. Rec. 7579 (statement of Sen. Jesse Helms, R-N.C.) (quoting U.S. Const. art. III, § 2).

238. See *id.* at 7644 (statement of Sen. John Durkin, D-N.H.) (“This type of restriction . . . , once applied in this instance, will become ever easier to apply in the future [and] . . . [t]he result will be to weaken, if not cripple, the independence of the Federal judiciary . . .”).

239. *Id.* at 7631 (statement of Sen. Edward Kennedy, D-Mass.); see also *id.* at 7579 (statement of Sen. Abraham Ribicoff, D-Conn.) (opposing Helms amendment in large part because it “challenge[d] the authority of the Supreme Court”).

240. *Id.* at 7654 (statement of Sen. Birch Bayh, D-Ind.); see also *id.* (statement of Sen. Edward Kennedy, D-Mass.) (arguing if Congress adopted measure, “we will establish a precedent that the Congress will be able to take any action, involving individual rights . . . and remove jurisdiction of that matter from the Federal courts and the Supreme Court”).

241. See *id.* at 7632 (statement of Sen. Edward Kennedy, D-Mass.) (“We are going to run into a situation in which 50 States could have 50 different interpretations of what the law of the land is . . .”).

the constitutionality and propriety of his school prayer measure.<sup>242</sup> Senator Kennedy responded, however, that those precedents actually undermined Helms' arguments, because those prior bills had been uniformly rejected by Congress.<sup>243</sup>

As with other jurisdiction-stripping measures during this era, the competing political factions in Congress were sharply divided over the school prayer proposal.<sup>244</sup> But the political dynamics were strikingly different during discussions of the underlying DeConcini bill. Both sides agreed on the need to expand the Supreme Court's discretionary review power.<sup>245</sup>

Thus, social progressives "strongly support[ed]" the certiorari measure, arguing that it would serve the "worthy goal" of allowing the Supreme Court to focus on the most significant cases.<sup>246</sup> And social conservatives supported both the certiorari expansion and the Helms amendment. Senator DeConcini serves as an example. Even as he tried to protect the Supreme Court's overall "constitutional mission" of resolving important issues of federal law, he endorsed the effort to eliminate the Court's role in school prayer cases.<sup>247</sup>

Likewise, Senator Strom Thurmond was a leading proponent of both measures. He strongly endorsed the Helms amendment,<sup>248</sup> asserting that Congress had "the right to make that exception" to the Supreme

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242. See *id.* at 7636 (statement of Sen. Jesse Helms, R-N.C.) (providing historical examples of Congress imposing limitations on Supreme Court jurisdiction).

243. *Id.* (statement of Sen. Edward Kennedy, D-Mass.) ("The fact is that none of those [bills] is law.").

244. See Grove, *Structural Safeguards*, *supra* note 66, at 900–16, 935–39 (describing how social progressives repeatedly defeated conservatives' efforts to strip federal jurisdiction).

245. Only two senators expressed opposition to the certiorari expansion. But their opposition was largely limited to one issue—whether individual states ought to have a right to appeal to the Supreme Court. See 125 Cong. Rec. 7646 (statement of Sen. James McClure, R-Idaho) (stating bill would "disrupt[] the rights of the States to an appeal, as a matter of right, to the highest Court of the land"); *id.* at 7646 (statement of Sen. Robert Morgan, D-N.C.) (arguing "[t]he right of a litigant . . . —and especially the right of a sovereign State—to have an appeal . . . is very important to me"). Notably, this objection appears to have disappeared by the time the legislation was enacted in 1988. No one raised this concern.

246. *Id.* at 7632 (statement of Sen. Edward Kennedy, D-Mass.) (supporting certiorari expansion, which would "insure fair consideration of matters which should be decided by the Supreme Court").

247. Senator DeConcini voted in favor of adding the Helms amendment to both the Department of Education bill and his Supreme Court Jurisdiction Act. See *id.* at 7581, 7644, 7648; see also *id.* at 7633 (statement of Sen. Dennis DeConcini, D-Ariz.) (expressing support for Helms amendment).

248. See 125 Cong. Rec. 7639 (statement of Sen. Strom Thurmond, D-S.C.) ("[I]t does not make any sense to say that little children cannot voluntarily pray at school . . .").

Court's appellate jurisdiction.<sup>249</sup> But Senator Thurmond also argued that Congress had both the power and the duty to expand the Court's certiorari review power<sup>250</sup>:

[I]t is time once again for the legislative branch to respond to increasing pressures on our Supreme Court by adjusting its appellate jurisdiction. . . . Obviously, our Supreme Court is being forced to spend a significant portion of its time on certain cases from its obligatory docket at the expense of cases presenting issues of national importance which it might have chosen to hear.<sup>251</sup>

The Senate ultimately passed the entire bill by a wide margin, with the support of socially conservative Republicans and Southern Democrats.<sup>252</sup> But the bill faced resistance in the House of Representatives. After a fifteen-month delay, a subcommittee held hearings on the bill.<sup>253</sup> Although the subcommittee members favored the DeConcini bill, they could not support that reform when it was accompanied by a jurisdiction-stripping provision.<sup>254</sup>

The subcommittee members expressed particular concern about the proposed restriction on Supreme Court review. Representative Robert McClory and others worried about uniformity, stating that the elimination of Supreme Court oversight could lead to "a situation in which 50 States could have 50 different interpretations of what the law of the land is."<sup>255</sup> And Representative Harold Sawyer stated that, although he was

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249. *Id.*

250. *Id.* at 7647 ("Neither article III nor the due process clause of the Constitution requires . . . any absolute right to 'appeal' to the Supreme Court. It is for Congress to determine how much of the Supreme Court's appellate jurisdiction is to be compulsory and how much of it is to be discretionary.").

251. *Id.* at 7648.

252. See *id.* (showing bill passed Senate by vote of 61-30); Grove, *Structural Safeguards*, *supra* note 66, at 936 (showing breakdown of votes).

253. See Prayer in Public Schools and Buildings—Federal Court Jurisdiction: Hearing on S. 450 Before the Subcomm. on Courts, Civil Liberties, & the Admin. of Justice of the H. Comm. on the Judiciary, 96th Cong., at i (1981) [hereinafter Prayer in Public Schools Hearing] (showing subcommittee began hearings in July 1980, despite Senate passage of bill in April 1979).

254. For example, Representative Robert Kastenmeier separately sponsored bills to expand the Supreme Court's certiorari jurisdiction. See 134 Cong. Rec. 13,510 (1988) (statement of Rep. Robert Kastenmeier, D-Wis.) (proposing bill to provide Court with greater discretion in selecting cases to review); 130 Cong. Rec. 24,815-16 (1984) (same); 128 Cong. Rec. 24,302-04 (1982) (same). But he strongly opposed the Helms amendment. See Prayer in Public Schools Hearing, *supra* note 253, at 3 (statement of Rep. Robert Kastenmeier, D-Wis.) (stating he was "troubled by the prospect . . . of denying citizens access to the Federal courts with regard to an important constitutional issue").

255. Prayer in Public Schools Hearing, *supra* note 253, at 9-10 (Rep. Robert McClory, R-Ill.) (stating he opposed Helms amendment on this ground, although he favored voluntary prayer in public schools); see also *id.* at 2 (statement of Rep. Robert

“in favor of allowing voluntary prayer in the schools,” he was deeply concerned that it might encourage future efforts to “deprive the Supreme Court of any jurisdiction to cover the due process clause, or civil rights, or equal treatment” and thereby “virtually emasculate the Bill of Rights.”<sup>256</sup>

One legislator sought to have the bill removed from the Judiciary Committee and sent to the House floor.<sup>257</sup> But the House never voted on the measure. Thus, as the House Judiciary Committee later stated, this early effort to expand the Supreme Court’s certiorari jurisdiction failed “because of the addition of a non-germane, controversial” jurisdiction-stripping provision.<sup>258</sup>

### B. *Expansion of Discretionary Review in the 1988 Judiciary Act*

In the ensuing years, the Supreme Court continued to request relief. Successive House and Senate judiciary committees repeatedly recommended an expansion of certiorari jurisdiction,<sup>259</sup> and the Reagan Administration also strongly endorsed the reform.<sup>260</sup> Ultimately, in 1988,

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Kastenmeier, D-Wis.) (“Conceivabl[y] this could result in 50 interpretations of the meaning of the first amendment.”).

256. *Id.* at 26 (statement of Rep. Harold Sawyer, R-Mich.).

257. See Keynes & Miller, *supra* note 217, at 200 (describing effort by Rep. Philip Crane, R-Ill., to send bill to House with goal of restoring voluntary prayer in public schools).

258. H.R. Rep. No. 100-660, at 4 (1988).

259. See S. Rep. No. 100-300, at 1 (1988) (commenting bill would give Supreme Court discretion to review important federal issues); H.R. Rep. No. 100-660, at 2 (same); H.R. Rep. No. 98-986, at 1 (1984) (same); H.R. Rep. No. 97-824, at 2 (1982) (same); S. Rep. No. 96-35, at 1 (1979) (same); S. Rep. No. 95-985, at 1 (1978) (same).

260. See Court Reform and Access to Justice Act: Hearing Before the Subcomm. on Courts, Civil Liberties, & the Admin. of Justice of the H. Comm. on the Judiciary, 100th Cong. 205 (1987) [hereinafter Hearing on Court Reform] (statement of Stephen Markman, Assistant Att’y Gen., Office of Legal Policy, U.S. Dep’t of Justice) (“The Department has long supported making the Court’s docket generally discretionary.”); Court Improvements Act of 1983: Hearings Before the Subcomm. on Courts of the S. Comm. on the Judiciary, 98th Cong. 15 (1983) (statement of Jonathan Rose, Assistant Att’y Gen., U.S. Dep’t of Justice) (“[T]he current system hinders the resolution of . . . questions of public importance.”). The Reagan Justice Department did at one point suggest that the Court retain mandatory appellate jurisdiction over lower court decisions invalidating federal statutes. The Department of Justice argued that these cases would not unduly burden the Court, and that Supreme Court oversight was needed to ensure a “single, national, uniform law of the land.” Hearing on Court Reform, *supra*, at 270 (statement of Stephen Markman, Assistant Att’y Gen., Office of Legal Policy, U.S. Dep’t of Justice) (asserting Supreme Court could handle “very, very small number of cases” in which lower courts invalidated federal laws, especially given that “[b]y and large, those would be cases of such significance that the Supreme Court would probably want to deal with those anyway under its discretionary authority”).

Congress enacted—with no opposition—a statute granting the Court certiorari jurisdiction over virtually every appeal.<sup>261</sup>

The Judiciary Act of 1988 was built on the same premises as the original DeConcini bill. Congress continued to rely on its broad power under the Exceptions Clause to “confer as much or as little compulsory jurisdiction as it deems necessary and proper, including such exceptions as Congress thinks appropriate.”<sup>262</sup>

Moreover, Congress sought to use that authority to promote the Supreme Court’s settlement function. Thus, a House Judiciary Committee report stated that the reform would enable the Court to perform its two “principal functions”: (1) “to resolve cases involving principles . . . of wide public importance”; and (2) “to ensure uniformity and consistency in the law by resolving conflicts” among the lower courts.<sup>263</sup> The committee report further stated:

During the past several terms, a substantial percentage of the Court’s workload has been devoted to mandatory cases that do not have significant public importance. . . . Many other petitions from the circuit courts have to be left unsettled. Some of these appeals . . . identify serious conflicts between circuits. Some of the neglected cases concern individual rights . . . [or] the delicate balance of powers in our Federal Union. . . .  
. . . Elimination of the Court’s mandatory jurisdiction, although not a panacea . . . , is a necessary step to relieving the Court’s calendar crisis.<sup>264</sup>

The 1988 Act was thus the “logical culmination” of the legislative trend that began in 1891.<sup>265</sup> Congress recognized that the Court’s mandatory appellate jurisdiction dated from the “early days of the Federal judiciary, when there was adequate time to dispose of every appeal on its merits.”<sup>266</sup> But, by the late twentieth century, this appellate review system

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261. Act of June 27, 1988, Pub. L. No. 100-352, 102 Stat. 662; see also 134 Cong. Rec. 4465 (1988) (showing Senate passed measure by voice vote without any senator expressing opposition); *id.* at 13,512 (showing House passed measure under suspension of rules without any representative expressing opposition).

262. S. Rep. No. 100-300, at 3. The report continued: “If Congress wants to make the Court’s appellate jurisdiction totally discretionary or totally obligatory in nature, nothing in the Constitution would prevent such action.” *Id.* (citing *Ex parte McCordle*, 74 U.S. (7 Wall.) 506 (1869)).

263. H.R. Rep. No. 100-660, at 14 (1988); see also S. Rep. No. 100-300, at 4 (“History has shown that imposing . . . mandatory functions on the Supreme Court tends to weaken the Court’s capacity both to control its own docket and to confine its labors to those cases of national importance.”).

264. H.R. Rep. No. 100-660, at 14; accord H.R. Rep. No. 98-986, at 13–14 (1984).

265. S. Rep. No. 100-300, at 2.

266. *Id.* at 3 (“The right to appeal . . . evolved out of the early days of the Federal judiciary, when there was adequate time to dispose of every appeal on its merits and when the need for developing discretionary limitations and short cuts in disposing of enormous case filings was yet unknown.”).

was “outmoded.”<sup>267</sup> This scheme “detract[ed] from the Court’s ability . . . to effectuate its constitutional mission of resolving only those matters that are of truly national significance”<sup>268</sup> and “ensur[ing] uniformity and consistency in the law by resolving conflicts” among the lower courts.<sup>269</sup> Accordingly, as in 1891 and 1925, Congress used its broad exceptions power to enable the Court to “pronounce uniform and authoritative rules of federal law.”<sup>270</sup>

#### V. THE SCOPE AND IMPLICATIONS OF THE EXCEPTIONS CLAUSE SAFEGUARD

Congress has repeatedly used its power over federal jurisdiction to facilitate what scholars see as the Supreme Court’s central constitutional function: defining the content of federal law for the judiciary. Thus, Congress has steadily expanded the Court’s appellate jurisdiction to encompass virtually every case arising under federal law. When these jurisdictional expansions created workload crises at the Court, Congress enacted “exceptions” that enabled the Court to focus its limited resources on settling important federal questions. Congress has not, of course, always used its broad exceptions power to protect the Court. Nevertheless, contrary to conventional wisdom, the Exceptions Clause has served largely to facilitate what scholars view as the Supreme Court’s essential role in the constitutional scheme.

##### A. *The Structural Safeguards of Supreme Court Review*

The Exceptions Clause empowers Congress to enact beneficial exceptions that promote the Supreme Court’s constitutional role. But the Clause is not the only structural protection for the Court. Instead, as explained below, the Exceptions Clause works in conjunction with other structural constraints in Articles I and II to ensure the Court’s role in resolving disputed federal questions.

1. *The Exceptions Clause as an Article III Safeguard.* — The Supreme Court can serve a crucial settlement function in the judicial system. Supreme Court decisions establish the boundaries of permissible governmental and private conduct and thereby provide focal points around which political actors and citizens can coordinate their actions. For this reason, legislators have an incentive to enact jurisdictional regulations that facilitate the Court’s role in settling the contours of federal law. The Exceptions Clause serves as a structural safeguard precisely because it gives Congress the power to act on those political

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267. H.R. Rep. No. 100-660, at 11.

268. 125 Cong. Rec. 7633 (1979) (statement of Sen. Dennis DeConcini, D-Ariz.).

269. H.R. Rep. No. 100-660, at 14.

270. Bator, *supra* note 3, at 1039.

incentives and enact exceptions that promote the Supreme Court's constitutional role.

As we have seen on multiple occasions, Congress's efforts to expand Supreme Court jurisdiction—in order to broaden its role in defining the content of federal law—have themselves imperiled the Court's constitutional role. The Constitution calls for “one supreme Court.”<sup>271</sup> But as the volume of federal cases increased, it became “utterly impossible for [that one Court] to pass upon all litigation that involves a Federal question.”<sup>272</sup> As a result, the Justices repeatedly called upon Congress to enact legislation that would enable this single tribunal to oversee the federal business of a growing nation.

In the late nineteenth century, Chief Justice Waite urged Congress to use its broad authority under the Exceptions Clause to address the Court's burgeoning caseload. He argued that the Supreme Court's “appellate jurisdiction is subject entirely to congressional control” and sought legislation that would “help to make the . . . Court what its name implies, a powerful auxiliary in the administration of justice,” rather than “an obstacle standing in the way” of the final resolution of cases.<sup>273</sup> Chief

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271. U.S. Const. art. III, § 1.

272. Jurisdiction of the Supreme Court Hearing, *supra* note 184, at 22 (statement of James C. McReynolds, J., U.S. Supreme Court) (“It is utterly impossible for us to pass upon all litigation that involves a Federal question, and if we undertake to do it the delay will be intolerable.”). There have been suggestions to divide the Supreme Court into panels in order to enable it to deal with its mounting workload. But these (and similar proposals to delegate the work of the Supreme Court) have not found favor in Congress or among many of the Justices. See Jurisdiction of Circuit Courts Hearing, *supra* note 183, at 3 (statement of William Howard Taft, C.J., U.S. Supreme Court) (“We could not adopt [the panel approach] because our Constitution provides that there shall be one Supreme Court, and it is doubtful whether you could constitutionally divide the court into two parts.”); *supra* note 224 (discussing rejection of such proposals in 1970s and 1980s). In 1890, the Senate discussed the issue at length after a minority report of the Senate Judiciary Committee suggested dividing the Supreme Court into three panels that would hear cases on behalf of the Court. See S. Rep. No. 51-1571, at 3–5 (1890) (Minority Rep.) (asserting Congress's power to make “exceptions” and “regulations” enabled it to provide “that any three or other convenient number of the justices may proceed at the same time to hear arguments and pronounce decisions” on behalf of Court). But the Senate overwhelmingly rejected the proposal—largely on constitutional grounds. See 21 Cong. Rec. 10,316 (1890) (showing Senate voted 36-10 against proposal); *id.* at 10,227 (statement of Sen. Joseph Dolph, R-Or.) (“The power of Congress to provide regulations for the exercise of [the Court's] jurisdiction can not be held to extend to legislation which would break up the Supreme Court into fragments and substitute several courts . . . for the one Supreme Court provided by the Constitution.”); *id.* at 10,286 (statement of Sen. John Spooner, R-Wis.) (stating he could “not vote for” minority proposal because he had “some doubt . . . as to its constitutionality,” given constitutional provision for “one Supreme Court”). Thus, even assuming arguendo that Congress could divide the Supreme Court into panels, such a measure has not been politically viable. Congress has accordingly needed to find another way for the “one Supreme Court” to oversee the federal business of a growing nation.

273. Waite, *supra* note 114, at 318.

Justices Taft and Burger renewed this call in the next century. They insisted that “[t]he business of the [Supreme Court] is rapidly increasing,” and unless Congress reduced its remaining mandatory appellate jurisdiction, it would be impossible for the Court “to dispatch promptly, as it should, the important questions which it is organized to settle.”<sup>274</sup>

Each time, the political branches responded by making exceptions to the Supreme Court’s mandatory appellate jurisdiction and granting it discretionary certiorari review. Executive officials argued that this reform was essential to allow the “one Supreme Court” created by the Constitution to continue to resolve cases “of public moment.”<sup>275</sup> Members of Congress agreed that mandatory appellate review “impair[ed] the Court’s ability” to provide a “definitive resolution” of disputed federal questions.<sup>276</sup> Accordingly, Congress enacted exceptions that would enable the Court to concentrate its limited resources on “resolv[ing]” important issues of federal law and “ensur[ing] uniformity and consistency in the law by resolving conflicts” among the lower courts.<sup>277</sup>

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274. Jurisdiction of Circuit Courts Hearing, *supra* note 183, at 1 (statement of William Howard Taft, C.J., U.S. Supreme Court); see also Court Letter to Kastenmeier, *supra* note 225, at 28 (“The . . . burdens posed by the mandatory jurisdiction provisions still on the books are nevertheless substantial and continue to cause the Court to expend its limited resources on cases that are better left to other courts.”); Court Letter to DeConcini, *supra* note 225, at 15 (asserting certiorari review would enable Court to “devote . . . [its] time and attention to the more important issues and cases constantly pressing for resolution” each term).

275. Supreme Court Jurisdiction Act of 1978: Hearing, *supra* note 228, at 2 (statement of Hon. Wade McCree, Solicitor Gen. of the United States) (arguing discretionary review was needed to “maintain the viability of this constitutional concept of a single Supreme Court as the population . . . has grown enormously and the volume of litigation has correspondingly burgeoned”); see also Second Annual Message of President Calvin Coolidge, *supra* note 189, at 2662 (asserting discretionary review would allow Court to focus on cases “of public moment”); Annual Report of the Attorney General of the United States for the Year 1885, *supra* note 117 at 42–43 (advocating discretionary review scheme that would allow Court to resolve federal questions that were “novel and of sufficient importance to justify the appeal”).

276. 125 Cong. Rec. 7633 (1979) (statement of Sen. Dennis DeConcini, D-Ariz.); see also S. Rep. No. 96-35, at 7 (1979) (stating “the Court has no time to hear [important cases] due to the crush of obligatory appeals”); S. Rep. No. 95-985, at 7 (1978) (“A significant number of petitioners for certiorari whose cases involve issues of considerable importance are being denied access to the Court simply because the Court has no time to hear them due to the crush of obligatory appeals.”); H.R. Rep. No. 68-1075, at 2 (1925) (“Having to hear numbers of cases of trivial character . . . , the [Court] is hindered from . . . performance of its highest duty of interpreting the Constitution and preserving uniformity of decision [on federal questions]”).

277. H.R. Rep. No. 100-660, at 14 (1988); see also 21 Cong. Rec. 3405 (1890) (statement of Rep. David Culberson, D-Tex.) (asserting Supreme Court should “retain, as far as practicable, a supervisory control over all questions . . . within the judicial power of

Absent the Exceptions Clause, it is not clear that Congress would have had the authority to make these needed adjustments to the Court's appellate jurisdiction.<sup>278</sup> Notably, there is widespread agreement among jurists and scholars that Congress has little to no power over the Supreme Court's original jurisdiction, which of course is not qualified by the Exceptions Clause.<sup>279</sup> If the Supreme Court's appellate jurisdiction were likewise "insulated from congressional regulation," it is not clear that Congress could have removed classes of cases from the Court's mandatory appellate oversight.<sup>280</sup>

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the United States, to the end that uniformity of decision may be enforced throughout the entire judicial system of the United States").

278. It is conceivable, of course, that the Supreme Court might have had the inherent "judicial power" to create a discretionary review scheme. But the Justices repeatedly asserted that they lacked such authority. See, e.g., Jurisdiction of the Supreme Court Hearing, *supra* note 184, at 21 (statement of James C. McReynolds, J., U.S. Supreme Court) ("We simply can not attend to [every] . . . Federal question . . . So we are face to face with a practical question, and there is no relief except through Congress.").

279. See, e.g., *California v. Arizona*, 440 U.S. 59, 65 (1979) ("The original jurisdiction of the Supreme Court is conferred not by the Congress but by the Constitution itself. This jurisdiction is self-executing, and needs no legislative implementation."); John Harrison, *The Power of Congress to Limit the Jurisdiction of Federal Courts and the Text of Article III*, 64 U. Chi. L. Rev. 203, 209 (1997) (arguing "Congress may not add to or subtract from [the Court's] original jurisdiction"); Redish, *Congressional Power*, *supra* note 12, at 901 ("[T]he Court's relatively limited original jurisdiction . . . is unequivocally insulated from congressional regulation."). But see Akhil Reed Amar, *Marbury*, Section 13, and the Original Jurisdiction of the Supreme Court, 56 U. Chi. L. Rev. 443, 444 (1989) (arguing Congress may reduce Supreme Court's original jurisdiction in cases in which State is party because judicial power does not extend to "all" such suits). Congress would presumably still have the power to make laws that are necessary and proper to carry out the Supreme Court's appellate review power. See David E. Engdahl, *Intrinsic Limits of Congress' Power Regarding the Judicial Branch*, 1999 BYU L. Rev. 75, 80 (asserting most of "Congress' power regarding the judiciary derives . . . [from] the Necessary and Proper Clause"). However, as David Engdahl has argued, the Exceptions Clause seems to authorize "exceptions" and "regulations" that would not be permitted by the Necessary and Proper Clause alone. See *id.* at 155 (asserting Exceptions Clause "enlarge[s] Congress' discretion"). Thus, it is at least debatable whether, absent the Exceptions Clause, Congress would have the power to remove classes of cases from the Court's mandatory appellate jurisdiction. That may be particularly true with respect to constitutional and other federal claims, given that Article III states that the Court "shall have appellate Jurisdiction" over "all . . . cases" arising under federal law. U.S. Const. art. III, § 2, cl. 2; cf. Amar, *supra*, at 444 (arguing Congress may not "deprive the Supreme Court of original jurisdiction" over cases if Article III provides for review of "all" such cases). The Exceptions Clause therefore, at a minimum, removes any doubt about Congress's power.

280. Redish, *Congressional Power*, *supra* note 12, at 901. That was the understanding of at least some jurists and legislators when certiorari jurisdiction was first created in 1891. See 21 Cong. Rec. 3403-04 (1890) (statement of Rep. David Culberson, D-Tex.) ("The Supreme Court was designed to be, mainly, an appellate tribunal. Its original jurisdiction . . . was fixed by the Constitution, and Congress can not add to or subtract from it."); Waite, *supra* note 114, at 318 ("The [Supreme Court's] original jurisdiction is . . . fixed by the Constitution, and it cannot be taken away by Congress, but the appellate jurisdiction is subject entirely to congressional control.").

The presence of the Exceptions Clause removes any doubt about Congress's power. The Clause ensures that the "legislative branch [may] respond to increasing pressures on our Supreme Court" by transferring cases from its mandatory to its discretionary jurisdiction.<sup>281</sup> Indeed, legislators have repeatedly asserted that such "exceptions" to the Court's appellate jurisdiction are "within the easy reach of Congress."<sup>282</sup> Thus, "[t]he authority vested in Congress to make exceptions to and regulate the appellate jurisdiction of the Supreme Court" enables Congress to "shield that great tribunal . . . from an excessive burden of litigation and conform its appellate jurisdiction to the enormous growth of the business of the country."<sup>283</sup>

2. *The Structural Safeguards of Article I and Article II.* — The Exceptions Clause is not the only structural protection for the Supreme Court. Nor is it sufficient; political actors' interest in preserving the Court's settlement function does not necessarily deter them from proposing court-curbing measures. As this Article has shown, even when legislators generally see value in the Supreme Court's role in resolving federal questions, they may still be happy to eliminate the Court's power to rule on specific issues. For example, although Senators DeConcini and Thurmond sought to protect the Court's long-term "function as expositor of the national law,"<sup>284</sup> they also endorsed Senator Helms' efforts to make an "exception" in school prayer cases.<sup>285</sup>

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281. 125 Cong. Rec. 7648 (statement of Sen. Strom Thurmond, D-S.C.) ("[I]t is time once again for the legislative branch to respond to increasing pressures on our Supreme Court by adjusting its appellate jurisdiction.")

282. 21 Cong. Rec. 3403-04 (statement of Rep. David Culberson, D-Tex.) ("The authority vested in Congress to make exceptions to and regulate the appellate jurisdiction of the Supreme Court was granted for the purpose of enabling the Congress to adapt the appellate jurisdiction of the court to the varying demands of the business, trade, and commerce of the country . . ."); see also S. Rep. No. 100-300, at 3 (1988) ("[U]nder Article III, Congress can confer as much or as little compulsory jurisdiction as it deems necessary and proper, including such exceptions as Congress thinks appropriate."); S. Rep. No. 96-35, at 2-3 (1979) ("If Congress wants to make the Court's appellate jurisdiction totally discretionary or totally obligatory in nature, nothing in the Constitution says 'no.'"); 125 Cong. Rec. 7647 (statement of Sen. Strom Thurmond, D-S.C.) ("There can be no doubt that it is within the powers of Congress to . . . [expand certiorari review] . . . [and] [i]t is for Congress to determine how much of the Supreme Court's appellate jurisdiction is to be compulsory . . . [or] discretionary."); 66 Cong. Rec. 2752 (1925) (statement of Sen. Albert Cummins, R-Iowa) (contending Congress may "restrict or reduce the appellate jurisdiction of the Supreme Court . . . in order to enable it fairly to meet the demands that are made upon it").

283. 21 Cong. Rec. 3404 (statement of Rep. David Culberson, D-Tex.).

284. 125 Cong. Rec. 7633 (statement of Sen. Dennis DeConcini, D-Ariz.).

285. See *supra* notes 247-249 and accompanying text (noting both Senator DeConcini and Senator Thurmond supported Helms' amendment).

Drawing on earlier work,<sup>286</sup> this Article suggests that other structural and political constraints built into the constitutional scheme serve to protect the judiciary against such court-curbing attempts. These additional structural safeguards help ensure that Congress uses its power over federal jurisdiction to facilitate, rather than to undermine, the Supreme Court's constitutional role.

The first barrier to jurisdiction-stripping legislation is the lawmaking process of Article I, which requires all federal legislation to pass through two chambers of Congress and be presented to the President.<sup>287</sup> These lawmaking procedures create a supermajority requirement for every piece of federal legislation and thereby give political factions (even political minorities) considerable power to veto legislation.<sup>288</sup>

Recent social science research suggests that political actors are likely to use this structural veto to block court-curbing proposals. Political scientists assert that, in this politically divided society, the overall content of federal court decisions is generally favored by at least one major political faction.<sup>289</sup> Such supporters of the judiciary have a strong incentive to veto court-curbing measures.<sup>290</sup>

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286. See generally Tara Leigh Grove, *The Article II Safeguards of Federal Jurisdiction*, 112 *Colum. L. Rev.* 250 (2012) [hereinafter *Grove, Article II Safeguards*] (arguing executive branch can act to protect against jurisdiction-stripping measures); Grove, *Structural Safeguards*, *supra* note 66 (highlighting bicameralism and presentment as critical safeguards of federal jurisdiction).

287. U.S. Const. art. I, § 7, cl. 2.

288. See James M. Buchanan & Gordon Tullock, *The Calculus of Consent: Legal Foundations of Constitutional Democracy* 233–36 (1962) (observing difficulties of passing laws in bicameral legislature without inclusive coalitions); John F. Manning, *What Divides Textualists from Purposivists?*, 106 *Colum. L. Rev.* 70, 77 (2006) (“[T]he lawmaking procedures prescribed by Article I, Section 7 of the Constitution and the congressionally prescribed rules of legislative procedure unmistakably afford political minorities extraordinary power to block legislation or insist upon compromise as the price of assent . . .”).

289. See Whittington, *Political Foundations*, *supra* note 42, at 18 (“Political actors defer to . . . courts because the judiciary can be useful to their own political and constitutional goals . . .”); Graber, *supra* note 43, at 43 (“[P]oliticians may facilitate judicial policymaking in part because they . . . believe that the courts will announce those policies that they . . . favor . . .”). Notably, this political support is tied to the constitutional structure. The appointment and confirmation process established by the Constitution (requiring both presidential and senatorial approval) effectively guarantees that each federal judge has been selected by a dominant political group. See U.S. Const. art. II, § 2, cl. 2. Thus, the process helps ensure that, at least at the outset, a judge's views on constitutional and other legal issues align to some degree with those of political leaders.

290. The author's prior work has focused on jurisdiction stripping. But political supporters of the judiciary should also be inclined to block other court-curbing measures, such as Senator Borah's effort to impose a supermajority requirement on the Court. See *supra* notes 161–163 and accompanying text (examining efforts by progressives to limit Court's judicial review).

The above historical account illustrates the importance of this structural protection.<sup>291</sup> In the late nineteenth and early twentieth centuries, when populists and progressives sought to curtail federal judicial power, economic conservatives blocked those court-curbing efforts. Indeed, in the 1920s, conservatives ensured that the “exceptions” and “regulations” proposed by Senators Borah and Owen never even emerged from committee. In more modern times, when social conservatives sought to strip jurisdiction over constitutional claims like school prayer, social progressives used their structural veto in the House of Representatives to protect the judiciary.

Moreover, these lawmaking procedures seem to work particularly well to protect the Supreme Court’s appellate review power. As the debates over the school prayer measure illustrate, political supporters of the judiciary are especially inclined to use their Article I veto to defend the Court.<sup>292</sup> And even political opponents of the judiciary (who support efforts to strip lower federal court jurisdiction) have spoken out against attempts to eliminate the Supreme Court’s appellate review power, emphasizing the Court’s “role . . . in establishing uniform standards” of federal law.<sup>293</sup>

There is an additional structural safeguard for the Supreme Court: the executive branch. The executive has various tools at its disposal to oppose constitutionally questionable legislation. The President can veto or threaten to veto problematic legislation.<sup>294</sup> The executive can also use

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291. For a more extensive description of the previously discussed examples and additional historical support, see Grove, *Structural Safeguards*, supra note 66, at 890–916.

292. See, e.g., 125 Cong. Rec. 7631 (1979) (statement of Sen. Edward Kennedy, D-Mass.) (criticizing school prayer measure as “assault on the Supreme Court”); Grove, *Structural Safeguards*, supra note 66, at 920–21 (“The structural safeguards of Article I thus seem to be particularly effective at preserving what scholars have described as the Supreme Court’s ‘unique role’ in the judiciary.”).

293. 152 Cong. Rec. 15,074 (2006) (statement of Rep. Melvin Watt, D-N.C.). Representative Watt made his comment during debates over a proposal to strip federal jurisdiction over challenges to the use of “under God” in the Pledge of Allegiance. In 2004, Representative Watt sought (unsuccessfully) to amend the bill so that it applied only to the lower courts. See H.R. Rep. No. 108-691, at 77–78 (2004) (“I certainly don’t believe that [stripping federal jurisdiction] would be advisable, because the result . . . [would] leave an absolute hodgepodge of final opinions, which I just think would be a terrible public policy result.”); see also 150 Cong. Rec. H7393 (daily ed. Sept. 22, 2004) (statement of Rep. Judy Biggert, R-Ill.) (supporting Watt amendment, which “took care of . . . renegade [lower court] jurists, but . . . retained the jurisdiction of the Supreme Court”). The bill passed the House in 2004 and 2006, but was blocked by social progressives in the Senate. See Grove, *Structural Safeguards*, supra note 66, at 911–16, 938–39.

294. See U.S. Const. art. I, § 7, cl. 2 (“If . . . [the President] approve[s] [of the bill] he shall sign it, but if not he shall return it, with his Objections . . .”); Charles M. Cameron, *Veto Bargaining: Presidents and the Politics of Negative Power* 3, 9–10 (2000) (examining “how presidents use vetoes and veto threats to wrest policy concessions from Congress”).

its role in enforcing federal laws to ensure that laws are applied in a manner that accords with constitutional values.<sup>295</sup>

Social science research suggests that the executive branch should be inclined to use this constitutional authority to safeguard the Supreme Court's appellate review power. Scholars have argued that the President often advances his constitutional philosophy through litigation in the federal courts.<sup>296</sup> Accordingly, the President has some incentive to protect the Supreme Court's authority to decide constitutional claims. These presidential incentives are reinforced by the institutional incentives of the Department of Justice (DOJ).<sup>297</sup> The Solicitor General is in charge of virtually all federal litigation in the Supreme Court.<sup>298</sup> Thus, as

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295. See U.S. Const. art. II, § 3 (“[The President] shall take Care that the Laws be faithfully executed . . .”); Dawn E. Johnsen, *Presidential Non-Enforcement of Constitutionally Objectionable Statutes*, *Law & Contemp. Probs.*, Winter/Spring 2000, at 7, 9 (“Presidents often avoid constitutional problems, as they should, through their interpretation of ambiguous statutes or through the exercise of enforcement discretion.”).

296. See Howard Gillman, *Party Politics and Constitutional Change: The Political Origins of Liberal Judicial Activism*, in *The Supreme Court and American Political Development* 138, 146–55 (Ronald Kahn & Ken I. Kersch eds., 2006) (discussing efforts of Kennedy and Johnson Administrations to appoint judges who would favor civil rights and other progressive causes); Whittington, *Political Foundations*, supra note 42, at 274 (arguing presidents often “[t]urn[] to the judiciary . . . [to] advanc[e] constitutional goals”).

297. For the DOJ's institutional incentives, this Article draws on social science theories of path dependence and institutional entrenchment. Social scientists have argued that institutions, like the judiciary, may become “entrenched” (or “locked in”), in part because they serve as sources of power and influence for other groups in society. See Paul Pierson, *Politics in Time: History, Institutions, and Social Analysis* 159 (2004) (“The emergence of courts as the site of political and legal dispute resolution generates a rapid expansion of law-centered actors who have a considerable stake in preserving and expanding the use of these procedures . . .” (footnote omitted)). This theory helps explain why the DOJ has an incentive to defend the federal judiciary. The DOJ's main job is to litigate cases in the federal courts. See 28 U.S.C. § 516 (2006) (“Except as otherwise authorized by law, the conduct of litigation in which the United States . . . is interested . . . is reserved to officers of the Department of Justice, under the direction of the Attorney General.”). The DOJ's power and influence within the executive branch is therefore greatest when decisions are hammered out in litigation. Moreover, as discussed below, this theory suggests that the DOJ has especially good reason to defend the Supreme Court, because the Solicitor General is essentially the government's exclusive representative at that level. See infra notes 298–299 and accompanying text.

298. See 28 U.S.C. § 518(a) (“Except when the Attorney General in a particular case directs otherwise, the Attorney General and the Solicitor General shall conduct and argue suits and appeals in the Supreme Court . . . in which the United States is interested.”); *FEC v. NRA Political Victory Fund*, 513 U.S. 88, 93 (1994) (“[I]f a case is one ‘in which the United States is interested, . . . it must be conducted and argued in this Court by the Solicitor General or his designee.’” (quoting *United States v. Providence Journal Co.*, 485 U.S. 693, 700 (1988))). Notably, before the Solicitor General was created in 1870, see An Act to Establish the Department of Justice, ch. 150, §§ 1–2, 16 Stat. 162 (1870), the Attorney General was the government's exclusive representative in the Supreme Court. See *Judiciary Act of 1789* § 35, 1 Stat. 73, 92–93.

former Solicitor General Drew Days stated, “Once cases reach the Supreme Court, the Solicitor General plays an important role in the development of American law” and can have a substantial “impact upon the establishment of constitutional and other principles.”<sup>299</sup> This institutional position gives the DOJ a strong interest in protecting the Supreme Court’s appellate review power.

These institutional incentives undoubtedly help explain the executive branch’s steadfast (and bipartisan) support for certiorari measures.<sup>300</sup> Empowering the Supreme Court to resolve important federal questions enhances the executive’s own influence over the development of federal law. But the same incentives also help explain the executive’s repeated opposition to efforts to strip the Supreme Court’s appellate jurisdiction.<sup>301</sup> For example, in response to the school prayer proposal (and similar measures), President Ronald Reagan’s first Attorney General, William French Smith, issued an Office of Legal Counsel (OLC) opinion concluding that Congress lacks the power to eliminate Supreme Court review of constitutional claims.<sup>302</sup> The Attorney General reasoned that such an “exception” to the Court’s appellate jurisdiction “would intrude upon [its] core functions . . . as an independent and equal branch in our system of separation of powers.”<sup>303</sup> He stated, “The integrity of our system of federal law depends upon a single court of last resort having a final say on the resolution of federal questions.”<sup>304</sup>

These structural constraints help explain why proposals to strip the Supreme Court’s appellate jurisdiction have been repeatedly defeated in the legislative process.<sup>305</sup> Indeed, even when Congress has enacted

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299. Drew S. Days, III, *Executive Branch Advocate v. Officer of the Court: The Solicitor General’s Ethical Dilemma*, 22 *Nova L. Rev.* 679, 680 (1998).

300. Indeed, during the debates over the 1891 reform, even as many Democratic legislators were reluctant to empower the Supreme Court, Attorneys General of both political parties supported the creation of discretionary review. See *supra* note 117 and accompanying text (noting support of Attorneys General under both Republican and Democratic Presidents).

301. See Grove, *Article II Safeguards*, *supra* note 286, at 268–86 (describing executive branch’s opposition to such efforts during Franklin Roosevelt, Eisenhower, Kennedy, Carter, and Reagan Administrations).

302. *Constitutionality of Legislation Withdrawing Supreme Court Jurisdiction to Consider Cases Relating to Voluntary Prayer*, 6 *Op. O.L.C.* 13 (1982).

303. *Id.* at 14.

304. *Id.* at 26; see also *Nomination of Edwin Meese III: Hearing Before the S. Comm. on the Judiciary*, 98th Cong. 185–86 (1984) (statement of Edwin Meese) (arguing Congress lacks power to “diminish or take away the core functions of the Supreme Court”).

305. See Grove, *Article II Safeguards*, *supra* note 286, at 268–90 (recounting executive’s efforts to defend Court’s jurisdiction); Grove, *Structural Safeguards*, *supra* note 66, at 890–916 (recounting how supporters of judiciary blocked efforts to strip Court’s appellate jurisdiction over school prayer, busing, reapportionment, and challenges to Defense of Marriage Act and to use of “under God” in Pledge of Allegiance).

statutes that curtail lower federal court jurisdiction, those laws have generally left the Supreme Court's appellate review power in place.<sup>306</sup>

These structural provisions work in conjunction with the Exceptions Clause to protect the Supreme Court. The structural safeguards of Articles I and II make it difficult for Congress to enact "exceptions" that undermine the Court's role in defining the content of federal law. Conversely, political actors' broad and bipartisan interest in preserving the Supreme Court's settlement function helps explain why beneficial "exceptions" like certiorari review survive the cumbersome bicameralism and presentment process.

*B. The Limitations of the Safeguards: Restrictions on Supreme Court Review*

This Article asserts that Congress has an incentive to use—and by and large has used—its broad exceptions power to facilitate the Supreme Court's settlement function. But the Article does not further claim that Congress will *only* use its power so as to benefit the Court. In fact, as discussed below, Congress has on a few occasions restricted the Supreme Court's appellate jurisdiction over a class of claims.

But one goal of this Article is to show (contrary to the assumption of most scholars) that these episodes of jurisdiction stripping are the *exceptional* uses of the Exceptions Clause. As recounted in Parts II–IV, Congress has far more often—and over a far wider range of federal questions—used its control over federal jurisdiction to facilitate the Supreme Court's settlement function. Furthermore, even these jurisdiction-stripping episodes seem more nuanced than scholars have sometimes acknowledged: When viewed in a broader context, even these episodes reflect to some degree the long-term political pressure on Congress to allow for Supreme Court oversight of the lower federal and state courts.<sup>307</sup>

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306. See Military Commissions Act of 2006, Pub. L. No. 109-366, § 7, 120 Stat. 2600, 2635–36 (amending 28 U.S.C. § 2241(e) (2006)) (maintaining limitation on lower courts' jurisdiction without limiting Supreme Court jurisdiction); Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e), 119 Stat. 2680, 2742 (codified as amended at 28 U.S.C. § 2241(e) (2006)) (restricting federal habeas jurisdiction over claims of noncitizens designated as "enemy combatants," and routing claims to military tribunals followed by judicial review in D.C. Circuit and Supreme Court); Emergency Price Control Act of 1942, Pub. L. No. 77-421, § 204, 56 Stat. 23, 31–33 (limiting jurisdiction of lower courts, but not Supreme Court, to review certain administrative orders); Norris-LaGuardia Act, Pub. L. No. 72-65, 47 Stat. 70 (1932) (codified at 29 U.S.C. § 101 (2006)) (restricting inferior federal courts' authority to issue injunctions in labor disputes). The recent war on terror legislation is discussed below in Part V.B.2.

307. Another example warrants mention. In the late 1860s, John Klein, the administrator of the estate of a Mississippi cotton farmer, whose property was taken by the federal government during the Civil War, sought to recover the proceeds of the deceased's property after the deceased received a presidential pardon. See *United States v. Klein*, 80 U.S. (13 Wall.) 128, 136–41 (1872). The Court of Claims ruled in favor of Klein, and the

1. *An Early Exception: The McCardle Episode.* — The most famous jurisdiction-stripping incident occurred in 1868 and arose out of the military reconstruction activities in the post-Civil War South. In 1867, William McCardle was detained by federal authorities in Mississippi for publishing newspaper articles that severely criticized the military's activities.<sup>308</sup> When the lower courts denied habeas relief, McCardle

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government appealed to the Supreme Court. *Id.* at 143. In 1870, while the case was on appeal, Congress enacted a law directing the Court to dismiss such claims “for want of jurisdiction.” Act of July 12, 1870, ch. 251, 16 Stat. 230, 235 (“[I]n all cases where judgment shall have been heretofore rendered in the court of claims in favor of any claimant [based on a pardon] . . . , the Supreme Court shall, on appeal, have no further jurisdiction of the cause, and shall dismiss the same for want of jurisdiction.”). The Supreme Court invalidated the statute. See *Klein*, 80 U.S. (13 Wall.) at 147–48 (“[T]he legislature cannot change the effect of . . . a pardon any more than the executive can change a law.”). Although scholars have debated the precise ground of the Court’s decision, see Howard M. Wasserman, *Constitutional Pathology, the War on Terror, and United States v. Klein*, 5 J. Nat’l Security L. & Pol’y 211, 211 & n.2 (2011) (collecting sources describing *Klein* as “opaque” and “deeply puzzling”), it appears that the Court struck down the law both as an unconstitutional infringement of the President’s pardon power and as an infringement on the judicial power to choose the rule of decision for a particular case. See *Klein*, 80 U.S. (13 Wall.) at 147–48 (“The court . . . is required to disregard pardons . . . and to deny them their legal effect . . . [and] [t]his certainly impairs the executive authority and directs the court to be instrumental to that end.”).

Notably, as the Supreme Court observed, the statute at issue in *Klein* was not a jurisdiction-stripping law akin to those discussed in this Article. See *id.* at 145–46 (“[T]he language of the proviso shows plainly that it does not intend to withhold appellate jurisdiction except as a means to an end.”). The statute *granted* the Court jurisdiction to hear claims raised by former confederates. But when (as in *Klein*) the Court of Claims had ruled in favor of the former confederate, the statute directed the Supreme Court to overrule that decision and rule for the government—by dismissing the claim for “want of jurisdiction.” See *id.* at 146 (“The court has jurisdiction of the cause to a given point; but when it ascertains that a certain state of things exists, its jurisdiction is to cease and it is required to dismiss the cause for want of jurisdiction.”). Indeed, the Court even suggested that the law was not an exercise of Congress’s exceptions power. The Court stated:

If [the Act] simply denied the right of appeal in a particular class of cases, there could be no doubt that it must be regarded as an exercise of the power of Congress to make “such exceptions from the appellate jurisdiction” as should seem to it expedient. But the language of the proviso shows plainly that it does not intend to withhold appellate jurisdiction except as a means to an end. Its great and controlling purpose is to deny [effect] to pardons granted by the President. . . . It seems to us that this is not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power . . . .

*Id.* at 145–46; see also *id.* at 147 (suggesting there is difference between law interfering with “judicial power,” as 1870 Act did, and one restricting Court’s appellate jurisdiction). Nevertheless, this example does suggest that Congress may not always exercise its power over federal jurisdiction in a manner that benefits the Court.

308. See William W. Van Alstyne, *A Critical Guide to Ex parte McCardle*, 15 *Ariz. L. Rev.* 229, 236 (1973) (describing McCardle’s arrest, detainment, and charges).

sought Supreme Court review under the Habeas Corpus Act of 1867, challenging the constitutionality of the reconstruction laws.<sup>309</sup>

Notably, during the late 1860s, Congress was controlled by the Republican Party, in large part because the (predominantly Democratic) representatives of the defeated Southern states were excluded from the legislature.<sup>310</sup> This Republican Congress was heavily invested in the reconstruction efforts and other civil rights reforms in the South.<sup>311</sup> (The party did not turn its focus to economic nationalism until the 1870s.<sup>312</sup>) Thus, while the *McCardle* case was pending, several House Republicans introduced a bill to repeal the Supreme Court's appellate jurisdiction under the 1867 Act.<sup>313</sup> Although the Democrats in Congress strongly opposed this jurisdiction-stripping effort,<sup>314</sup> the Reconstruction Republicans had considerable majorities in Congress and the bill passed both chambers with ease.<sup>315</sup>

The measure was temporarily blocked when President Andrew Johnson vetoed it, asserting that any attempt to prevent Supreme Court review of a constitutional claim was "not in harmony with the spirit and intention of the Constitution."<sup>316</sup> But the delay was short-lived. The Republicans had no difficulty assembling the two-thirds majority necessary to override the veto and enact the jurisdiction-stripping legislation.<sup>317</sup>

309. *Id.* at 237–38; see also Habeas Corpus Act of 1867, ch. 28, 14 Stat. 385, 386 (allowing appeals against adverse rulings toward writs of habeas corpus by lower courts).

310. See 2 Bruce Ackerman, *We The People: Transformations* 104 (1998) (noting, during this era, "Congress excluded *all* representatives . . . from the Southern states"); Historical Statistics, *supra* note 94, at 5-201 (showing Republican control of Congress in late 1860s).

311. See *supra* note 89 (describing how Republican Party focused on civil rights immediately following Civil War).

312. See *id.* (noting Republican Party's shift from civil rights to building strong national economy).

313. See Van Alstyne, *supra* note 308, at 239 ("[A] rider was introduced in the house of representatives . . . to strike at *McCardle's* pending case.").

314. See Cong. Globe, 40th Cong., 2d Sess. 2167 (1868) (statement of Rep. George Woodward, D-Penn.) (declaring bill was motivated "merely by a desire to prevent the Supreme Court . . . from deciding *McCardle's* case" out of fear that Court would invalidate reconstruction laws); Grove, *Structural Safeguards*, *supra* note 66, at 933 (showing Democrats voted 38-1 against jurisdiction-stripping bill).

315. See Historical Statistics, *supra* note 94, at 5-201 (showing Republicans had 143-49 majority in House and 42-11 majority in Senate); Van Alstyne, *supra* note 308, at 239 (noting measure passed House with no debate and was subject to very little debate before passing Senate).

316. Cong. Globe, 40th Cong., 2d Sess. 2094 (showing, on March 25, 1868, President Johnson vetoed bill on constitutional grounds).

317. See Act of Mar. 27, 1868, ch. 34, 15 Stat. 44 (repealing Habeas Corpus Act of 1867, ch. 28, 14 Stat. 385); Cong. Globe, 40th Cong., 2d Sess. 2128 (showing Senate voted

In *Ex parte McCardle*, the Supreme Court applied this newly established limit on its appellate jurisdiction and dismissed McCardle's appeal.<sup>318</sup> The Court went on to state, however, that the 1868 legislation had not cut off all avenues of appellate review.<sup>319</sup> As the Court later explained in *Ex parte Yerger*, it could still review lower court decisions denying habeas relief by way of an original petition under the Judiciary Act of 1789.<sup>320</sup>

The 1868 repeal resulted from the unusual political circumstances of that era.<sup>321</sup> In the late 1860s, "Congress excluded *all* representatives, however qualified they may have been, from the Southern states."<sup>322</sup> Accordingly, in stark contrast to the other historical periods examined here, the most likely political supporters for the Court (in this case, Southern Democrats) had no power to block the proposed jurisdiction-stripping measure.<sup>323</sup> The Reconstruction Republicans thus easily managed not only to push the measure through Congress but also to override President Johnson's veto. The structural safeguards of both Article I and Article II failed to protect the Court.

But the story of Congress's authority over the Supreme Court's appellate jurisdiction did not end with the 1868 repeal. Over the next decade, as lower federal courts issued rulings in habeas cases not subject to review under the 1789 Act, Congress grew increasingly concerned about the lack of Supreme Court oversight.<sup>324</sup> The House Judiciary Committee issued a report recommending that Congress restore the

33-9 to override President Johnson's veto on March 26, 1868); *id.* at 2170 (showing House voted 114-34 to override veto on March 27, 1868).

318. 74 U.S. (7 Wall.) 506, 515 (1869).

319. See *id.* at 515 ("The act of 1868 does not except from that jurisdiction any cases but appeals from Circuit Courts under the act of 1867. It does not affect the jurisdiction which was previously exercised.")

320. 75 U.S. (8 Wall.) 85, 105-06 (1869).

321. See Grove, *Structural Safeguards*, *supra* note 66, at 923-24, 926 (noting Republicans easily obtained jurisdiction-stripping measure in absence of resistance from Southern representatives).

322. Ackerman, *supra* note 310, at 102-04.

323. See *id.* (questioning legality of Congress during this period).

324. Congress's primary concern was that lower federal courts were granting habeas relief in cases that did not warrant it. See H.R. Rep. No. 48-730, at 4 (1884) ("Since the passage of the act of 1867, and especially since that portion of it allowing an appeal to the Supreme Court of the United States was repealed, Federal judges have assumed and exercised an almost unlimited jurisdiction in granting writs of *habeas corpus*."); 15 Cong. Rec. 4710 (1884) (statement of Rep. Luke Poland, R-Vt.) (stating Supreme Court review was needed because "[i]nferior Federal judges . . . have made themselves really a court of error over the decisions of the highest State tribunals"). In *McCardle* and *Yerger*, the Court interpreted the 1789 Act to permit original petitions by prisoners who were denied habeas relief. But the Court had no jurisdiction when the lower court improperly granted a habeas petition. See *Yerger*, 75 U.S. (8 Wall.) at 106; *McCardle*, 74 U.S. (7 Wall.) at 513-14.

Court's direct appellate review power in habeas cases.<sup>325</sup> The report described the 1868 repeal as a political error that could “only be excused upon the ground that the fierce and bitter feeling engendered by the [Civil War] had not then sufficiently abated for cool and dispassionate legislation.”<sup>326</sup>

In 1885, Congress corrected that mistake. Legislators voted—with very little debate and without recorded dissent—to restore the Court's appellate jurisdiction.<sup>327</sup> Thus, once again, political actors seemed to find value in the Supreme Court's settlement function. In this context, Congress enabled the Court to define the “true limits” of federal judicial power in habeas cases.<sup>328</sup>

2. *Modern Exceptions: AEDPA and MCA.* — Congress again limited the Supreme Court's appellate jurisdiction in two statutory provisions that were part of larger reform efforts. One restriction was part of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).<sup>329</sup> The statute requires an inmate to obtain leave from a federal court of appeals before filing a successive habeas petition and provides that “[t]he grant or denial of [such] an authorization . . . shall not be appealable and shall not be the subject of a petition . . . for a writ of certiorari.”<sup>330</sup>

Notably, the story of AEDPA differs, in important respects, from the events of 1868. First, the statute was not a sudden exercise of legislative will but instead the culmination of years of habeas reform efforts.<sup>331</sup> Nor was the statute targeted at the Supreme Court in the same way as the 1868 repeal; on the contrary, other provisions of the law expressly recog-

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325. H.R. Rep. No. 48-730, at 6.

326. *Id.* at 4.

327. Act of Mar. 3, 1885, ch. 353, 23 Stat. 437; see also 16 Cong. Rec. 2480–81 (1885) (showing Senate passed bill with no debate regarding bill's substance); 15 Cong. Rec. 4710 (1884) (showing House passed bill with no opposition). The President signed the measure into law on March 3, 1885. 16 Cong. Rec. 2570.

328. H.R. Rep. No. 48-730, at 6 (“With this right of appeal restored, the true extent of the act of 1867, and the true limits of the jurisdiction of the Federal courts and judges under it, will become defined, and it can then be seen whether further legislation is necessary.”). The Judiciary Committee report suggested that, if the Supreme Court did not rein in the lower federal courts, then Congress might enact legislation doing so. See *id.* at 5–6. But the statute did not contain any limitation on the scope or nature of Supreme Court review, thus allowing the Court to favor habeas petitioners. Cf. Wiecek, *supra* note 89, at 348 (observing 1867 statute ultimately served in twentieth century “as the basic authorization for extensive federal supervision of justice in the state court system”).

329. Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 28 U.S.C.).

330. 28 U.S.C. § 2244(b)(3)(E) (2006).

331. See Carrie M. Bowden, Note, The Need for Comity: A Proposal for Federal Court Review of Suppression Issues in the Dual Sovereignty Context After the Antiterrorism and Effective Death Penalty Act of 1996, 60 Wash. & Lee L. Rev. 185, 215–16 (2003) (“Congress considered habeas corpus reform for many years prior to the enactment of AEDPA . . .”).

nize a special role for the Court in defining the content of federal law.<sup>332</sup> Perhaps most importantly, the restriction in AEDPA is confined to successive habeas petitions. Thus (in sharp contrast to the 1868 measure), it applies only to cases that could have previously reached the Supreme Court on at least two occasions—on direct appeal from the original state court conviction and on appeal from the first round of federal habeas review.

Yet, in litigation over the appellate review provision, the executive branch encouraged the Supreme Court to construe the restriction even more narrowly. The Solicitor General urged the Court to permit review of successive petitions via an original habeas action under 28 U.S.C. § 2241.<sup>333</sup> The Solicitor General emphasized that, so construed, the statute would not offend the Constitution because it would leave open an avenue for the Court “to serve as expositor of the federal constitutional rules governing criminal prosecutions.”<sup>334</sup> The Supreme Court in *Felker v. Turpin* adopted that narrow construction, holding that although AEDPA prohibited a direct appeal from a lower court “gatekeeping” decision, it had “not repealed [the Court’s] authority to entertain original habeas petitions.”<sup>335</sup>

The second restriction on the Supreme Court’s jurisdiction was part of the legislation enacted in response to the war on terror. Notably, as with AEDPA, the relevant statutes largely preserved the Court’s appellate review power. The Detainee Treatment Act (DTA) and the Military Commissions Act (MCA) were designed to eliminate federal habeas jurisdiction over the claims of alleged enemy combatants.<sup>336</sup> But these statutes left open an avenue for Supreme Court review. Most of the detainees’ claims were routed to a military tribunal (either a combatant status

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332. AEDPA directs inferior federal courts to respect final state court decisions in criminal cases unless they violate “clearly established Federal law, as determined by the Supreme Court.” 28 U.S.C. § 2254(d). Such a provision may signal a “congressional belief that the Supreme Court’s powers with respect to . . . federal law are broader than those of the lower federal courts,” because of its “supreme hierarchical position” in the judiciary. Vicki C. Jackson, Introduction: Congressional Control of Jurisdiction and the Future of the Federal Courts—Opposition, Agreement, and Hierarchy, 86 *Geo. L.J.* 2445, 2454–55 (1998).

333. See Brief for the United States as Amicus Curiae at 11–12, *Felker v. Turpin*, 518 U.S. 651 (1996) (No. 95-8836), 1996 WL 277112, at \*12 (“Title I of the Act, however, does not divest this Court of its jurisdiction to entertain original petitions for habeas corpus.”).

334. *Id.* at 26.

335. 518 U.S. 651, 660–61 (1996).

336. See MCA § 2241, Pub. L. No. 109-366, 120 Stat. 2600, 2635–36 (2006) (codified at 28 U.S.C. § 2241(e)(1) (2006)) (eliminating any “writ of habeas corpus filed by or on behalf of . . . an enemy combatant”); DTA § 1005(e), Pub. L. No. 109-148, 119 Stat. 2680, 2742 (2005) (codified at 28 U.S.C. § 2241(e)(1) (2006)) (stating “no court, justice, or judge shall have jurisdiction to hear or consider . . . an application for writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba”).

review tribunal or a military commission), followed by judicial review in the D.C. Circuit and the Supreme Court.<sup>337</sup>

One provision of the MCA does, however, purport to restrict the Supreme Court's jurisdiction. The MCA prohibits any federal court from reviewing an action "against the United States or its agents relating to any aspect of the . . . conditions of confinement" of a designated "enemy combatant."<sup>338</sup> Several scholars assert that this provision is unconstitutional to the extent that it precludes federal jurisdiction over constitutional claims.<sup>339</sup> For example, Janet Alexander has argued that "the complete denial of judicial review of constitutional claims is beyond Congress's power under the Exceptions . . . Clause," because it deprives the Supreme Court of its "essential role."<sup>340</sup>

The Supreme Court has not yet ruled on the validity of the "conditions of confinement" provision.<sup>341</sup> But whatever its ultimate fate,<sup>342</sup> that provision of the MCA (together with the 1868 repeal and the

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337. MCA § 950g, 120 Stat. at 2622–24; DTA § 1005(e)(2)(A), (C), 119 Stat. at 2742. Although the DTA gives the D.C. Circuit "exclusive" jurisdiction to review decisions of combatant status review tribunals and does not expressly provide for Supreme Court review, such "exclusivity" provisions are generally construed so as to preserve Supreme Court review. See, e.g., Administrative Orders Review (Hobbs) Act, 28 U.S.C. § 2342 (providing "[t]he court of appeals . . . has exclusive jurisdiction to enjoin, set aside, suspend . . . , or to determine the validity of . . . final orders" from certain federal agencies); *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 750–51 (2002) (reviewing court of appeals decision in case brought under 28 U.S.C. § 2342); see also *Calabresi & Lawson*, *supra* note 1, at 1009 (concluding similarly that DTA left Supreme Court review in place).

338. 28 U.S.C. § 2241(e)(2).

339. See, e.g., Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 *Harv. L. Rev.* 2029, 2063 (2007) (arguing MCA's "total preclusion of review" violates fundamental "postulate of the constitutional structure" that "some court must always be open to hear an individual's claim to . . . judicial redress of a constitutional violation").

340. Janet Cooper Alexander, *Jurisdiction-Stripping in a Time of Terror*, 95 *Calif. L. Rev.* 1193, 1208, 1239 (2007). Professor Alexander also contends that this provision violates the Suspension and Due Process Clauses. See *id.* at 1208.

341. In *Boumediene v. Bush*, 553 U.S. 723 (2008), the Court struck down the MCA's habeas restrictions on Suspension Clause grounds, concluding that the alternative review process (in a military tribunal followed by federal court review) did not provide an adequate substitute for habeas corpus. *Id.* at 792. But the Court declined to rule on the validity of the "conditions of confinement" provision. *Id.*

342. When the issue does reach the Court, it is unclear whether the Solicitor General will advocate a narrow construction of the provision, as he did in the litigation over AEDPA. See *Grove*, *Article II Safeguards*, *supra* note 286, at 286–300, 314–18 (discussing cases in which DOJ urged courts to construe jurisdictional measures narrowly in order to preserve federal jurisdiction over constitutional claims and suggesting that DOJ could follow same approach in litigating "conditions of confinement" provision in MCA). The federal government has *not* advocated a narrow construction of the jurisdictional bar in recent lower court litigation, and one court of appeals held that the "conditions of confinement" provision barred even constitutional claims. See *Al-Zahrani v. Rodriguez*,

“successive petitions” provision of AEDPA) demonstrates that the Exceptions Clause may, under some circumstances, present a threat to the Supreme Court’s role in resolving federal questions. But the size and severity of that threat should be viewed in the larger context. As the full story of the *McCardle* episode demonstrates, although Congress stripped the Court’s appellate jurisdiction over a class of habeas cases in 1868, Congress later rectified that mistake itself—precisely because legislators recognized the benefits of Supreme Court oversight.<sup>343</sup> And the more recent examples of jurisdictional restrictions (AEDPA and the MCA) preserved the Supreme Court’s appellate jurisdiction over a considerable number of federal claims. Accordingly, these examples do not contradict the central claim of this Article: Congress has by and large used its power over federal jurisdiction to facilitate, not to undermine, the Supreme Court’s constitutional role.

### C. *Preserving the Supreme Court’s Constitutional Role*

The structural provisions of the Constitution have worked well to protect the Supreme Court’s role in defining the content of federal law. The Exceptions Clause of Article III empowers Congress to enact “exceptions” that enable a single Supreme Court to provide guidance on federal questions for a growing nation. The structural constraints of Articles I and II, in turn, make it difficult for Congress to enact “exceptions” that undermine the Court’s capacity to provide such guidance.

Indeed, these structural safeguards have largely met the concerns raised by academics in the literature on jurisdiction stripping. As discussed, scholars—whether they subscribe to the traditional “plenary power” theory or propose broader limits on Congress’s power—agree that the Supreme Court has a crucial role in “pronounc[ing] uniform and authoritative rules of federal law.”<sup>344</sup> But they assume that the

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669 F.3d 315, 319–20 (D.C. Cir. 2012) (holding jurisdictional restriction valid because damages remedy against government is not constitutionally required). But the Solicitor General could take a different approach in the Supreme Court. Cf. Transcript of Oral Argument at 4–5, *Demore v. Kim*, 538 U.S. 510 (2003) (No. 01-1491) (arguing that jurisdiction-stripping provision did not bar constitutional claim and noting that this position differed from DOJ position in lower courts); see also Grove, Article II Safeguards, *supra* note 286, at 297–300 (discussing *Demore v. Kim* oral argument and Court’s decision). It is also possible that Congress could restore the Court’s appellate review power, as it did in 1885. See *supra* notes 327–328 and accompanying text (discussing how Congress voted to restore Court’s appellate jurisdiction in 1885). This Article expresses no view on whether the political branches are likely to seek to narrow or repeal the “conditions of confinement” provision.

343. See *supra* notes 318–328 and accompanying text (discussing support for Supreme Court’s appellate jurisdiction).

344. Bator, *supra* note 3, at 1039; see also *supra* Part I.A (discussing scholarly analysis of such concerns).

Court's constitutional role can only be protected by the judiciary. Accordingly, they seek to identify a judicially enforceable test—principally by searching for the original meaning of Article III.

The above historical account demonstrates that the Supreme Court's constitutional role has been protected over time—not primarily by the judiciary, but by the political branches. Congress and the executive branch have, through legislative action (and inaction), given content to the meaning of “exceptions” and “regulations” in Article III.

As this Article has addressed, legislators have invoked the Exceptions Clause to support a variety of measures pertaining to the Supreme Court, including jurisdiction-stripping proposals. For example, in the 1920s, Senator Owen argued that Congress could enact “such exceptions and such regulations . . . as to prevent the Supreme Court from nullifying acts of Congress, or assuming to declare questions of great national policy.”<sup>345</sup> Likewise, Senator Helms stated that “[i]n anticipation of judicial usurpations of power, the framers of our Constitution wisely gave the Congress the authority, by a simple majority of both Houses, to check the Supreme Court by means of regulation of its appellate jurisdiction.”<sup>346</sup>

Supporters of the judiciary have worried that such “exceptions,” if enacted into law, could establish “a very dangerous precedent” that would make it easier for future Congresses to strip the Supreme Court's appellate jurisdiction.<sup>347</sup> But such measures have, of course, been repeatedly blocked by the political process. Social progressives vetoed Senator Helms' school prayer proposal in the House of Representatives, and economic conservatives ensured that Senator Owen's child labor bill did not emerge from committee.

Accordingly, these measures did not establish a precedent that could threaten the Supreme Court. Instead, the repeated failure of court-curbing attempts may have had the opposite impact, enabling supporters of the judiciary to denounce subsequent efforts as “unprecedented.”<sup>348</sup> Social progressives adopted that approach in 2004, when social conservatives sought to eliminate federal jurisdiction over challenges to the

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345. 64 Cong. Rec. 3958 (1923) (statement of Sen. Robert Owen, D-Okla.).

346. 125 Cong. Rec. 7579 (1979) (statement of Sen. Jesse Helms, R-N.C.).

347. *Id.* at 7654 (statement of Sen. Birch Bayh, D-Ind.) (“We are setting a very dangerous precedent that could go far beyond prayer.”).

348. E.g., 152 Cong. Rec. H5415 (daily ed. July 19, 2006) (statement of Rep. Melvin Watt, D-N.C.) (arguing Congress should not strip Supreme Court's appellate jurisdiction over challenges to use of “under God” in Pledge of Allegiance, and stating “the very idea of Congress unilaterally cutting off all Federal court review of a constitutional issue is both unprecedented and likely unconstitutional”); see also 125 Cong. Rec. 7654 (statement of Sen. Edward Kennedy, D-Mass.) (arguing against Helms amendment in part on ground that “we have never in the history of two hundred years of this country effectively denied appellate jurisdiction”).

Defense of Marriage Act.<sup>349</sup> The progressives argued, “If this bill becomes law, it will represent the first time in our history that Congress has enacted legislation that completely bars any Federal court, including the United States Supreme Court, from considering the constitutionality of Federal legislation.”<sup>350</sup> As Michael Gerhardt has recounted, such arguments from legislative precedent, while not decisive, have considerable resonance in Congress.<sup>351</sup>

Furthermore, Congress created a crucial precedent by using its exceptions power to establish discretionary certiorari review in 1891. As Felix Frankfurter and James Landis observed in the 1920s, the establishment of discretionary jurisdiction “had to overcome a deep professional feeling against taking away from litigants the right to resort to the Supreme Court for vindication of their federal claims.”<sup>352</sup> But once Congress established this precedent, it became far easier for Congress to expand certiorari review throughout the twentieth century. Indeed, by 1988, legislators had accepted that the elimination of mandatory jurisdiction was “necessary” to enable the Court to perform its “principal functions”: “resolv[ing]” important issues of federal law and “ensur[ing] uniformity . . . in the law by resolving conflicts” among the lower courts.<sup>353</sup>

Accordingly, the Exceptions Clause has—in actual operation by Congress—served to safeguard the Supreme Court’s settlement function. Through a process of legislative proposal, legislative defeat of court-curbing measures, and legislative enactment of beneficial exceptions, Congress has ensured that the Court could “pronounce uniform and au-

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349. See Grove, *Structural Safeguards*, supra note 66, at 911–16 (discussing this jurisdiction-stripping effort).

350. 150 Cong. Rec. H6583 (daily ed. July 22, 2004) (statement of Rep. Steny Hoyer, D-Md.); see also *id.* at H6581 (statement of Rep. John Conyers, Jr., D-Mich.) (“Never have we ever tried to do something as breathtaking as taking away the right of a Federal appeal . . . even to go to the Supreme Court . . . . This would be the only instance . . . that we have totally precluded the Federal courts from considering the constitutionality of Federal legislation.”). This measure did ultimately pass the House of Representatives, but social progressives used their structural veto in the Senate to block it. See Grove, *Structural Safeguards*, supra note 66, at 911–16 (discussing how social progressives on Senate Judiciary Committee effectively blocked measure).

351. See Michael J. Gerhardt, *The Power of Precedent* 111, 127, 133, 138–42 (2008) (emphasizing importance of nonjudicial precedents and noting “members of Congress do not just create a precedent through formal lawmaking . . . [but rather] [t]heir inaction may produce precedents,” such as “when they vote against legislation”); see also Barry Friedman, *The History of the Counter-majoritarian Difficulty, Part II: Reconstruction’s Political Court*, 91 *Geo. L.J.* 1, 64 (2002) (arguing “political economy of Court-tampering operates today” to protect Court’s exercise of judicial review as “[h]istorical precedents against Court-packing and jurisdiction-stripping pile up”).

352. Frankfurter & Landis, supra note 96, at 258.

353. H.R. Rep. No. 100-660, at 14 (1988).

thoritative rules of federal law” for a growing nation.<sup>354</sup> As Attorney General William French Smith stated in his OLC opinion, “The gloss which life has written on the Supreme Court’s jurisdiction is one which protects the essential role of the Court in the constitutional plan.”<sup>355</sup>

#### CONCLUSION

The Exceptions Clause has long been treated by scholars as a serious threat to the Supreme Court’s central constitutional function: establishing definitive and uniform rules of federal law. But scholars have overlooked the ways in which Congress has used its broad exceptions power to facilitate the Court’s constitutional role. When the Supreme Court’s mandatory appellate docket grew to the point that it was unmanageable for a single tribunal, Congress responded by exercising its authority under the Exceptions Clause. Congress made “exceptions” to the Court’s mandatory appellate jurisdiction and replaced it with discretionary review via writs of certiorari—precisely so that the Court could continue to resolve important federal questions and settle disputes among the lower courts.

Thus, contrary to the concerns of many scholars, the Constitution does not, by giving Congress broad power over the Supreme Court’s appellate jurisdiction, “authorize[] its own destruction.”<sup>356</sup> Instead, “[t]he authority vested in Congress to make exceptions to and regulate the appellate jurisdiction of the Supreme Court” has served primarily to ensure that Congress could “shield that great tribunal” and “conform its appellate jurisdiction to the enormous growth of the business of the country.”<sup>357</sup>

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354. Bator, *supra* note 3, at 1039.

355. *Constitutionality of Legislation Withdrawing Supreme Court Jurisdiction to Consider Cases Relating to Voluntary Prayer*, 6 Op. O.L.C. 13, 25 (1982).

356. Hart, *supra* note 1, at 1365.

357. 21 Cong. Rec. 3404 (1890) (statement of Rep. David Culberson, D-Tex.).

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