

ESSAY

THE ORIGINS OF SUPREME COURT QUESTION SELECTION

*Benjamin B. Johnson**

Arbitrary control over its own docket is the hallmark of the modern Supreme Court. While the Court's power to choose its cases is a frequent subject of study, its practice of preselecting questions for review has received almost no attention. This is particularly surprising since the Court openly adds or subtracts questions in some of its most consequential and politicizing cases. Yet despite the significance of this practice, its origins are poorly understood. This Essay uncovers the hidden history of the Court's question-selection powers and reveals an important—and possibly intractable—conflict between the Court's legal authority and its practice.

Scholars usually explain the Court's agenda control as either a power granted by Congress or a natural component of the judicial power. Tracing the statutory, legislative, and common law histories, this Essay presents a novel challenge to these standard narratives. The Court's custom of targeting specific questions is not grounded in the history of appellate practice and Congress never intended to, and likely never did, give the Supreme Court the power to select its own questions. This history has profound repercussions for the Court's appellate jurisdiction. The question-selection power rests uneasily with both statutory law and Article III's "case or controversy" requirement, risks doing fundamental injustice to litigants, and pulls the Court deeper into politics—all of which put its legitimacy at risk. Abandoning this practice would almost certainly limit the Court's ability to answer hot-button political questions, but it might also help to preserve the Court's legitimacy.

* Assistant Professor, Penn State Law (University Park). I am grateful to many for helpful comments and conversations that informed this Essay, especially Will Baude, Lisa Bernstein, Samuel Bray, Christian Burset, Miguel de Figueiredo, Chris Drahozal, Don Elliott, Kellen Funk, Jonah Gelbach, Heather Gerken, Tara Leigh Grove, Philip Hamburger, Harold Hongju Koh, Jason Iuliano, Jim Lindgren, Jane Manners, Jud Mathews, Adam Muchmore, Michael O'Connor, Hari Osofsky, Nicholas Parrillo, James Pfander, Robert Post, Judith Resnik, Steve Ross, Tom Schmidt, Mark Storslee, Logan Strother, Daniel Walters, Amy Wildermuth, Keith Whittington, and Megan Wright. I am also thankful for comments from presentations at the University of Chicago Law School, Northwestern Pritzker School of Law, and the University of Pittsburgh School of Law. I thank Tori Bates and Heather Walser for research assistance.

INTRODUCTION	794
I. CASES, QUESTIONS, AND STATUTES.....	804
II. COMMON LAW ORIGINS AND EARLY AMERICAN PRACTICE	808
A. The Writ of Error	809
B. The Writ of Certiorari.....	812
C. The First Century of Supreme Court Appellate Review.....	814
1. Statutory Jurisdiction Over Cases.....	816
D. Procedures: Bringing the Whole Case to the Court.....	818
1. The Writ of Error.....	818
2. Appeals.....	819
3. <i>Murdock v. City of Memphis</i>	821
III. THE EVARTS ACT AND EARLY TWENTIETH CENTURY PRACTICE.....	823
A. The Evarts Act's Effects on the Court's Appellate Jurisdiction.	824
1. Appellate Jurisdiction Under the Evarts Act	825
B. Developments From 1891 Through 1925	829
IV. THE ERA OF GREAT DISCRETION.....	835
A. The Judges' Bill	837
B. <i>Olmstead</i> : Internal Disagreements About Limiting Review on Certiorari	840
C. <i>Maryland Casualty</i> : From Internal Disagreement to Irony	844
D. The Legacy of Chief Justice Taft.....	845
E. Statutory Developments After the Judges' Bill: Changes to the Language	848
F. Statutory Developments After the Judges' Bill: Reducing the Workload	850
V. IS FUNCTIONALISM THE ANSWER?	853
A. Agenda-Setting in the Administrative State: Do as We Say, Not as We Do?.....	853
B. Agenda-Setting in the Lower Courts	855
C. The Costs of Picking Questions.....	859
1. Questions and the Judicial Power	860
2. Preselected Questions and Judicial Review	862
CONCLUSION	864

INTRODUCTION

Congress's decision to give the Supreme Court vast power to select cases remains one of the most consequential decisions of the twentieth century. That power—implemented through the writ of certiorari—allows the Court to dodge cases it does not want to decide. Not only is certiorari

the primary way the Court exercises the famous passive virtues,¹ it was a necessary precondition for the expansion of individual, constitutional rights.² But the Court does not simply use certiorari to choose its cases; it also uses the writ to select its questions.³ Indeed, it is far more accurate to say the Court takes and decides questions than to say it picks and judges cases.

The Court most obviously exercises its question-selection power by adding questions to or subtracting them from a case. For example, when the Court extended First Amendment protections to corporations' political speech in *Citizens United*, it did so by adding its own question that nobody had asked.⁴ By contrast, in *Shapiro v. Thompson*, the Court simply ignored the question of whether the Eleventh Amendment barred retroactive relief and affirmed the judgment below ordering payment.⁵ When the Court examined the question five years later in *Edelman v. Jordan*, it

1. See generally Alexander M. Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 *Harv. L. Rev.* 40 (1961) (discussing various doctrines used by the Court to withhold constitutional adjudication).

2. Before the Court received certiorari power, it was required to hear and decide any case in which an individual claimed a state violated their constitutional rights. It is difficult to imagine that the Court would have incorporated the Fourth, Fifth, Sixth, and Eighth Amendments if every state criminal conviction or sentence challenged on those grounds would come before the Court for mandatory review. See Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 *Colum. L. Rev.* 1643, 1732 (2000); see also *infra* section II.C.

3. To my knowledge, only one paper focuses on the phenomenon of limited grants of certiorari to particular questions. See Scott H. Bice, *The Limited Grant of Certiorari and the Justification of Judicial Review*, 1975 *Wis. L. Rev.* 343, 344. Other scholars have recognized the phenomenon in passing while considering other aspects of the Court's agenda-setting. See Hartnett, *supra* note 2, at 1707; see also H.W. Perry, Jr., *Deciding to Decide: Agenda Setting in the United States Supreme Court* 221 (1991) (noting that Justices and clerks "used 'case' and 'issue' interchangeably" and that "it is the issue, not the case that is primary").

4. Concurring in part in *Citizens United*, Justice John Paul Stevens stated:
[T]he majority decides this case on a basis relinquished below, not included in the questions presented to us by the litigants, and argued here only in response to the Court's invitation. . . . Our colleagues' suggestion that "we are asked to reconsider *Austin* and, in effect, *McConnell*," . . . would be more accurate if rephrased to state that "we have asked ourselves" to reconsider those cases.

Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 396 (2010) (Stevens, J., concurring in part) (citation omitted).

5. See 394 U.S. 618, 642 (1969) (affirming the lower court judgments without any mention of the Eleventh Amendment); Jurisdictional Statement at *8, *Shapiro*, 394 U.S. 618 (No. 9), 1967 WL 129526 (raising the question, "In View of the 11th Amendment, May the Court Award Money Damages?"). The Court summarily affirmed similar judgments in several other cases, including *Sterrett v. Mothers & Childs. Rts. Org.*, 409 U.S. 809, 809 (1972) (mem.); *State Dep't of Health & Rehab. Servs. v. Zarate*, 407 U.S. 918, 918 (1972) (mem.); *Wyman v. Bowens*, 397 U.S. 49, 49 (1970) (mem.) (per curiam) (citing *Shapiro*). These summary affirmances were judgments on the merits and thus represented binding precedent on the included questions. See *Hicks v. Miranda*, 422 U.S. 332, 344 (1975).

had to sheepishly admit that it had fouled up earlier cases because it had not been paying attention to all of the questions included in the case.⁶ These cases are striking because the question-targeting decision directly affected prominent constitutional holdings, but the practice is extensive and present in many landmark cases, like *Carolene Products*,⁷ *Gideon v. Wainwright*,⁸ and *Furman v. Georgia*,⁹ as well as in recent cases dealing with same-sex marriage,¹⁰ class certification,¹¹ recess-appointments,¹² the recognition of Jerusalem as a part of Israel,¹³ and whether the Deferred Action

6. 415 U.S. 651, 670–71 (1974) (noting that the *Shapiro* opinion “did not . . . refer to or substantively treat the Eleventh Amendment argument” and, after “an opportunity to more fully consider the Eleventh Amendment issue after briefing and argument,” the Court disapproved of the Eleventh Amendment holdings of *Shapiro* and three cases decided on summary judgment).

7. See *Carolene Prods. Co. v. United States*, 321 U.S. 760, 760 (1944) (mem.). The Court’s order dropped the following questions: (1) “Did the Government establish liability on the part of the individual petitioners?”; and (2) “Did the Government violate the individual petitioners’ constitutional rights in calling them as witnesses against themselves?” See id.; Petition for Writ of Certiorari at 7, *Carolene Prods.*, 321 U.S. 760 (No. 674-21).

8. See *Gideon v. Cochran*, 370 U.S. 908, 908 (1962) (mem.), cert. granted sub nom. *Gideon v. Wainwright*, 372 U.S. 335, 338 (1963) (adding the question, “Should this Court’s holding in *Betts v. Brady* be reconsidered?” (citation omitted)).

9. The Court’s order added the question: “Does the imposition and carrying out of the death penalty in this case constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments?” See 403 U.S. 952, 952 (1971) (mem.). The Court’s order dropped the following questions: (1) “Whether a prospective juror was improperly excluded from petitioner’s jury in violation of the rule of *Witherspoon v. Illinois*?”; (2) “Whether Georgia’s practice of allowing capital trial juries absolute discretion to impose the death penalty, uncontrolled by standards or directions of any kind, violates the Due Process Clause of the Fourteenth Amendment?”; and (3) “Whether punishment of death by electrocution pursuant to provisions of Georgia law for the crime of murder constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments?” See id.; Petition for Writ of Certiorari at 2, *Furman*, 408 U.S. 238 (No. 5059).

10. In *Hollingsworth v. Perry*, 568 U.S. 1066, 1066 (2012) (mem.), the Court’s order added the question: “Whether petitioners have standing under Article III, § 2 of the Constitution in this case.” In *United States v. Windsor*, 568 U.S. 1066, 1066 (2012) (mem.), the Court’s order added the following questions: (1) “Whether the executive branch’s agreement with the court below that DOMA is unconstitutional deprives this court of jurisdiction to decide this case?”; and (2) “[W]hether the Bipartisan Legal Advisory Group of the United States House of Representatives has Article III standing in this case.”

11. The Court’s order in *Wal-Mart Stores, Inc. v. Dukes*, 562 U.S. 1091, 1091 (2010) (mem.), dropped the question: “Whether the certification order conforms to the requirements of Title VII, the Due Process Clause, the Seventh Amendment, the Rules Enabling Act, and Federal Rule of Civil Procedure 23,” and added the question: “Whether the class certification ordered under Rule 23(b)(2) was consistent with Rule 23(a).” See id.; Petition for Writ of Certiorari at *2, *Wal-Mart Stores*, 562 U.S. 1091 (2010) (No. 10-277), 2010 U.S. S. Ct. Briefs LEXIS 2028.

12. In *Nat’l Lab. Rels. Bd. v. Noel Canning*, 570 U.S. 916, 916 (2013) (mem.), the Court’s order added the question: “Whether the President’s recess-appointment power may be exercised when the Senate is convening every three days in *pro forma* sessions.”

13. In *M.B.Z. ex rel. Zivotofsky v. Clinton*, 563 U.S. 973, 973 (2011) (mem.), the Court added the question: “Whether Section 214 of the Foreign Relations Authorization Act,

for Parents of Americans (DAPA) program violated the Take Care Clause,¹⁴ among others.¹⁵

Even when the Court does not narrow or add questions explicitly, it is still only considering questions. Its rules are quite clear on this point: “Only the questions set out in the petition, or fairly included therein, will be considered by the Court.”¹⁶ From where did this question-selection power come?

One potential answer is the Article III judicial power itself. That is, perhaps the power to limit review to prespecified questions is incidental to the Court’s appellate powers over cases and controversies generally or the common law writ of certiorari in particular.¹⁷ A second answer would stress Congress’s Article III power over the Court’s appellate jurisdiction. This approach would locate the source of the power in a series of statutes that expanded the Court’s statutory certiorari jurisdiction in response to an overcrowded Supreme Court docket. Neither of these answers is entirely persuasive in light of the history uncovered below.

The former explanation struggles to deal with the relevant procedural and intellectual history. Originally, the Court exercised its appellate jurisdiction through two common law devices: the writ of error and the appeal.¹⁸ Neither device allowed Justices to limit review to preselected questions. The main difference between them was that appeals required review of facts as well as law.¹⁹ Review on either method was *mandatory* (the Court was required to review the case if the petitioner satisfied procedural requirements), *limited* to the record, and *comprehensive* (Justices had to review the entire record).²⁰

Fiscal Year 2003, impermissibly infringes the President’s power to recognize foreign sovereigns.”

14. In *United States v. Texas*, 577 U.S. 1101, 1101 (2016) (mem.), the Court added the question: “Whether the Guidance violates the Take Care Clause of the Constitution, Art. II, § 3.”

15. See, e.g., Thomas W. Merrill, *Step Zero After City of Arlington*, 83 *Fordham L. Rev.* 753, 769–75 (2014) (describing how the Court decided only the “meta-question” in the case and relied on “drive-by” precedents where the cases providing authority had not actually discussed the relevant question).

16. *Sup. Ct. R.* 14.1(a).

17. See, e.g., Philip Hamburger, *The Development of the Law of Seditious Libel and the Control of the Press*, 37 *Stan. L. Rev.* 661, 729 n.206 (1985) (noting the historical use of certiorari to investigate jurisdictional issues).

18. For an overview of appellate practice in the Founding Era, see Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence From the Federal Tax on Private Real Estate in the 1790s*, 130 *Yale L.J.* 1288, 1417–29 (2021) [hereinafter Parrillo, *Originalist Case Against Administrative Regulatory Power*].

19. See *infra* section II.D.

20. See, e.g., *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) (observing how review is mandatory if jurisdiction exists).

Nor can the common law writ of certiorari provide historical support. The Court did not use the common law writ to take a case until the late nineteenth century.²¹ And when it eventually did begin to use the writ, it took the case and then proceeded as if acting on a writ of error or appeal.²²

The judicial power explanation also runs aground upon Chief Justice John Marshall's famed statement in *Cohens v. Virginia*: "[W]ith whatever difficulties, a case may be attended, we must decide it . . . [The Court has] no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution."²³ Marshall's next lines are particularly relevant: "Questions may occur which we would gladly avoid; but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty."²⁴

This makes it difficult to understand question-selection as a lesser included power of case selection. Per Chief Justice Marshall, the power to answer questions is not a lesser power than deciding questions.²⁵ Rather, the ability to authoritatively answer questions is derivative of the obligation to render judgment in a case.²⁶ It follows then that, if the Court is not deciding a case, it lacks the power to answer questions. Thus, even if certiorari gives the Court power to choose which cases to decide, it is the deciding of the case that provides the power to answer a question, not certiorari discretion itself.

The second possible explanation is that Congress exercised its Article III power over the Court's appellate jurisdiction to empower the Court to target particular questions, not just select cases. It is true that Congress empowered the Court with certiorari powers through the Evarts Act in 1891.²⁷ Still, Congress explicitly linked certiorari to the appeal and writ of error by requiring that, once the Court granted certiorari, it must then proceed "with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court."²⁸ Writing about this newly created certiorari power, the Court averred that, "[f]rom the

21. See *infra* section III.B.

22. See *infra* section III.B.

23. *Cohens*, 19 U.S. (6 Wheat.) at 404.

24. *Id.* It also seems incongruent with the classic justification of judicial review. Traditionally, the Court's power "to say what the law is" is derivative of its obligation to decide cases. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176–77 (1803); see also Bickel, *supra* note 1, at 42–43; Hartnett, *supra* note 2, at 1714–15. For a book-length examination of judicial duty with particular attention to *Marbury*, see generally Philip Hamburger, *Law and Judicial Duty* (2008) [hereinafter *Hamburger, Law and Judicial Duty*].

25. See *Cohens*, 19 U.S. (6 Wheat.) at 404; *Marbury*, 5 U.S. (1 Cranch) at 178; Bickel, *supra* note 1, at 42; Hartnett, *supra* note 2, at 1713–17.

26. See Bickel, *supra* note 1, at 42; Hartnett, *supra* note 2, at 1713–17.

27. Judiciary Act of 1891, Pub. L. No. 51-517, § 6, 26 Stat. 826, 828.

28. *Id.*

very foundation of our judicial system the object and policy of the acts of Congress in relation to appeals and writs of error . . . [has] been . . . to have the whole case and every matter in controversy in it decided in a single appeal”²⁹ and further noted that “a case cannot be brought to this court in fragments.”³⁰

The Evarts Act also gave circuit courts the ability to certify individual questions of law to the Supreme Court³¹—just as federal courts certify questions of state law to state supreme courts.³² Thus, Congress explicitly provided for review of questions but not through certiorari. It linked review of questions to certification. In contrast, it tied certiorari to cases.³³

If question selection did not arise through statute or common law tradition, where did it come from? In 1925, Congress greatly expanded the Court’s certiorari jurisdiction through the Judges’ Bill.³⁴ Testifying in favor of the bill, the Justices repeatedly promised that certiorari review encompassed the entire case.³⁵ Despite their promises, the Justices, on their own initiative, soon eradicated the traditional strictures on appellate review.³⁶

29. *McLish v. Roff*, 141 U.S. 661, 665–66 (1891).

30. *Id.* at 665.

31. Judiciary Act of 1891 § 6, 26 Stat. at 828.

32. See Jonathan Remy Nash, *Examining the Power of Federal Courts to Certify Questions of State Law*, 88 *Cornell L. Rev.* 1672, 1674 (2003) (discussing how most state high courts offer federal courts the opportunity to “certify” those questions to the state high court).

33. *Id.* Indeed, the legislative history suggests Congress intended certiorari to be merely a backup power in case the circuit courts were negligent in certifying questions, but that power was to be exercised by bringing the entire case up for review. See Hartnett, *supra* note 2, at 1656; see also Peter Linzer, *The Meaning of Certiorari Denials*, 79 *Colum. L. Rev.* 1227, 1235–36 (1979) (“[Evarts’s] remarks make clear that the draftsmen of the 1891 Act intended the specific reference to certiorari not to create a totally new statutory form of discretionary appeal but simply to serve as a safety valve . . .”).

34. See Judiciary Act of 1925 (Judges’ Bill of 1925), Pub. L. No. 68-415, § 240(a), 43 Stat. 936, 938–39 (providing for allowance of certiorari to courts of appeals on petition of either party).

35. See *infra* section IV.A.

36. See *infra* section IV.B. This stands in stark contrast to the modern Court’s careful adherence to limiting remedies to historical analogues. See Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 *Ind. L.J.* 223, 234–36 (2003) (discussing the Court’s conclusion in *Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 333 (1999), that, “because the remedy would not ‘historically’ have been available from a court of equity, the district court had no power to prevent the disposition of assets pending adjudication”).

The doctrine of constitutional avoidance is also relevant here. See *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring) (“When the validity of an act of the Congress is drawn in question . . . it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.” (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932))). What is commonly thought to be a doctrine that restrains the Court from overreach is often instead a tool for judicial lawmaking. See Neal Kumar Katyal & Thomas P. Schmidt, *Active Avoidance: The*

First, they abandoned comprehensive review of the record in favor of limited review of the questions specified by the parties.³⁷ Later, they began to write their own questions, even questions nobody had asked or questions that were no longer part of the case.³⁸ Today, the limited and comprehensive review mandated by Congress—and promised by the Justices when they lobbied for expanded discretion³⁹—is no more. While the statute still says that the Court should review cases on certiorari, by rule, the Court only considers a preselected subset of questions.⁴⁰

The Evarts Act, the Judges' Bill, and several other legislative efforts to expand the scope of certiorari emerged when the Court was overburdened and unable to keep up with its work.⁴¹ Two things are notable. First, in every instance, Congress expanded the Court's certiorari jurisdiction but maintained the clear textual distinction between certification and certiorari, linking questions to the former and cases to the latter.⁴² Second, the point of expanding certiorari was to reduce the number of cases the Court was required to decide.⁴³ Certiorari at common law removed entire cases

Modern Supreme Court and Legal Change, 128 Harv. L. Rev. 2109, 2118–23 (2015) (suggesting the Court uses avoidance as an excuse to radically reinterpret statutes).

37. See *infra* section IV.B.

38. See *infra* section IV.C; see also Margaret L. Moses, *Beyond Judicial Activism: When the Supreme Court Is No Longer a Court*, 14 U. Pa. J. Const. L. 161, 162 (2011) (examining cases in which the Court “decided issues that were not based on a record below, had not been the subject of decisions by lower courts, and sometimes had not even been briefed by parties or amici”). Cases Professor Margaret Moses identified include *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010), *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009), *Montejo v. Louisiana*, 556 U.S. 778 (2009), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). See Moses, *supra*, at 174–75.

39. See *infra* section IV.A.

40. Sup. Ct. R. 14.1(a). The Court is careful to avoid the “tempt[ation]” to decide questions that are relevant to cases but not included in the petition. See *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 34 (1993) (*per curiam*) (“Our faithful application of Rule 14.1(a) thus helps ensure that we are not tempted to engage in ill-considered decisions of questions not presented in the petition.”).

41. One of the best contemporary discussions regarding the changing workload of the Court during this period is in Felix Frankfurter & James M. Landis, *The Business of the Supreme Court: A Study in the Federal Judicial System* (1928) [hereinafter *Frankfurter & Landis, Business of the Supreme Court: A Study*]. Additional contemporary accounts can be found in H.R. Rep. No. 50-942, at 3–4 (1888) (noting that the Supreme Court was over three years behind on its docket and supporting a measure to narrow its jurisdiction), and in many of the writings and speeches of William Howard Taft in the 1920s. See, e.g., William H. Taft, *The Attacks on the Courts and Legal Procedure*, Ky. L.J., Oct. 1916, at 3, 18 (arguing that narrowing the Supreme Court's jurisdiction would facilitate the quicker resolution of cases); see also Justin Crowe, *Building the Judiciary: Law, Courts, and the Politics of Institutional Development 201–03* (2012) (recounting the preeminent role Taft played in advocating for reforms to the federal judiciary, including granting the Supreme Court greater control over its docket); Hartnett, *supra* note 2, at 1664–66 (surveying Taft's arguments for expanding the Supreme Court's ability to choose the cases that it hears).

42. See 28 U.S.C. § 1254 (2018).

43. See Crowe, *supra* note 41, at 185–87.

for ordinary review. If the Court could satisfy its appellate obligations by reviewing only a subset of questions—especially a subset chosen by the Justices—then there would be no need to slog through all of those cases in such detail and thus no need for the backlogs in the first place. The Court never had the power to cherry-pick questions, and Congress’s grant of certiorari discretion was not designed to give it such power.

This state of affairs is no mere academic concern.⁴⁴ The modern Court has effectively abandoned the traditional judicial role of deciding cases in favor of targeting preselected questions.⁴⁵ This arrangement may serve the Court’s institutional interests,⁴⁶ but it also pulls the Court into politics.⁴⁷ Professor Alexander Bickel’s defense of certiorari as a way to avoid contested cases is thus inverted; the Supreme Court now uses certiorari to directly engage with the most contentious underlying issues.⁴⁸

As a result, the Court now faces the very challenges to its legitimacy and standing in our political process that Bickel feared. Leading law reviews warn of “grave threat[s] to the Court’s legitimacy” in the wake of “seismic” shifts at the Court.⁴⁹ Leading academics and a former Attorney

44. See Jane S. Schacter, *Judicial Capacities*, 2020 *Wis. L. Rev.* 283, 285 (“[The] ability to act *selectively* is itself an important form of power, and one that animates many critiques of the Court.”).

45. See Hartnett, *supra* note 2, at 1707 (noting that, “under current Supreme Court practice, all writs of certiorari are limited writs: None brings forth all properly preserved claims of error within the Supreme Court’s jurisdiction”).

46. As Professor Judith Resnik described the judiciary in a parallel context, the Court is acting like “a principal, acting on its own behalf to forward particular agendas.” Resnik, *supra* note 36, at 228. That analysis concerns implied rights and available remedies in the judiciary as a whole, but the common thread is that the Court uses the pose of restraint—limiting its remedies or inquiries—to advance the Justices’ preferred agenda.

47. See Schacter, *supra* note 44, at 288–89 (noting that “charges of ‘judicial supremacy’ . . . are in fact inspired and fueled *precisely* by the discretion the Court has to intervene unevenly and to shape policy unpredictably”).

48. See Sanford Levinson, *Comment on Ruben and Blocher: Too Damn Many Cases, and an Absent Supreme Court*, 68 *Duke L.J. Online* 17, 26 (2018) (“The current Court, when it wishes to, can be quite aggressive indeed, as demonstrated in *Shelby County*, *Sibelius* [sic], and *Obergefell*, to name only three obvious examples.”).

49. See Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 *Yale L.J.* 148, 150–51 (2019). Scholarly treatments of legitimacy concerns are easy to find. See generally, e.g., Richard H. Fallon, Jr., *Law and Legitimacy in the Supreme Court* (2018) (examining the concept of legitimacy and concluding that the Supreme Court’s sociological legitimacy is decreasing); Brian Christopher Jones, *Disparaging the Supreme Court, Part II: Questioning Institutional Legitimacy*, 2016 *Wis. L. Rev.* 239 (remarking that a spate of controversial decisions has cast the Supreme Court’s legitimacy into doubt, thereby threatening the future of judicial review); Christopher Sundby & Suzanna Sherry, *Term Limits and Turmoil: Roe v. Wade’s Whiplash*, 98 *Tex. L. Rev.* 121, 156–57 (2019) (using statistical modeling to argue that term limits for Justices of the Supreme Court would be unlikely to increase doctrinal stability). But see Stephen E. Sachs, *Supreme Court as Superweapon: A Response to Epps & Sitaraman*, 129 *Yale L.J. Forum* 93, 95 (2019) (arguing that a Supreme Court that seeks to appease both sides of public opinion is ultimately unable to remain above politics).

General warn that the Court's legitimacy is in question.⁵⁰ Partisan reformers reach for both old ideas to curb the Court—term limits, court packing, jurisdiction stripping⁵¹—and some ideas that require a “radical rethinking of how the Court has operated for more than two centuries.”⁵²

Before we abandon more than two hundred years of institution building, perhaps solving the puzzle of the Court's question-selection power could provide a way through the Court's current legitimacy crisis. The following history and analysis strongly suggest that the Court would be on firmer ground if it returned to a more traditional role of deciding entire cases. This shift would likely curb the Justices' role in setting national policy and hopefully de-escalate fights over the Court.

In raising these issues, this Essay joins a larger literature examining the Court's agenda-setting process. The importance of agenda-setting is well-known in law⁵³ and political science.⁵⁴ Over the years, scholars have attacked the Court's certiorari process on a variety of grounds. Some critics say the Court takes too few cases;⁵⁵ some say it takes too many.⁵⁶ Others say the Court's agenda-setting process is too beholden to the Supreme Court bar,⁵⁷ too dependent on clerks,⁵⁸ or possibly gives the Chief Justice too

50. See Justin Wise, *Holder: Supreme Court's Legitimacy Can Be Questioned After Kavanaugh Confirmation*, Hill (Oct. 8, 2018), <https://thehill.com/homenews/administration/410356-holder-supreme-courts-legitimacy-can-be-questioned-after-kavanaugh> [<https://perma.cc/DK6G-R5AV>]; see also Tara Leigh Grove, *The Supreme Court's Legitimacy Dilemma*, 132 *Harv. L. Rev.* 2240, 2240 & n.1, 2241 & nn.2–6, 2252 & n.13 (2019) (reviewing Fallon, *supra* note 49) (collecting examples).

51. On the history of such suggestions, see Tara Leigh Grove, *The Origins (and Fragility) of Judicial Independence*, 71 *Vand. L. Rev.* 465, 467, 488–517 (2018).

52. Epps & Sitaraman, *supra* note 49, at 148.

53. See, e.g., Lee Epstein, Jeffrey A. Segal & Jennifer Nicoll Victor, *Dynamic Agenda-Setting on the United States Supreme Court: An Empirical Assessment*, 39 *Harv. J. on Legis.* 395, 399–403 (2002); Aziz Z. Huq, *The Constitutional Law of Agenda Control*, 104 *Calif. L. Rev.* 1401, 1403 (2016); Daniel B. Magleby, Nathan W. Monroe & Gregory Robinson, *Amendment Politics and Agenda Setting: A Theory With Evidence From the US House of Representatives*, 34 *J.L. Econ. & Org.* 108, 108–09 (2018).

54. For some famous examples, see, e.g., David P. Baron & John A. Ferejohn, *Bargaining in Legislatures*, 83 *Am. Pol. Sci. Rev.* 1181, 1181–82 (1989); Thomas Romer & Howard Rosenthal, *Political Resource Allocation, Controlled Agendas, and the Status Quo*, 33 *Pub. Choice* 27, 27 (1978).

55. See, e.g., Arthur D. Hellman, *The Shrunken Docket of the Rehnquist Court*, 1996 *Sup. Ct. Rev.* 403, 432–38; Kenneth W. Starr, *The Supreme Court and Its Shrinking Docket: The Ghost of William Howard Taft*, 90 *Minn. L. Rev.* 1363, 1378–82 (2006).

56. See, e.g., Samuel Estreicher & John Sexton, *Redefining the Supreme Court's Role: A Theory of Managing the Federal Judicial Process* 4–6 (1986).

57. Richard J. Lazarus, *Docket Capture at the High Court*, 119 *Yale L.J. Online* 89, 89–90 (2009).

58. See, e.g., David R. Stras, *The Supreme Court's Gatekeepers: The Role of Law Clerks in the Certiorari Process*, 85 *Tex. L. Rev.* 947, 950 (2007); William H. Rehnquist, *Opinion, Who Writes Decisions of the Supreme Court?*, *U.S. News & World Rep.*, Dec. 13, 1957, at 74.

much power.⁵⁹ Some point out the consequences of the Court's tendency to select questions from narrow doctrinal areas.⁶⁰ Others have asked why Congress facilitated much of the expansion of the Court's agenda-setting power.⁶¹ These studies have largely ignored the statutes that govern the Court's appellate jurisdiction as well as the Court's practice of preselecting questions.⁶² This Essay is the first to squarely examine the roots of the Court's question-selection practices. It questions the uncritical acceptance⁶³ of the Court's practice by directing attention back to those ignored statutes and their histories.

The Essay proceeds in five parts. Part I uses the current statute governing certiorari review of lower federal courts to introduce the textual link between cases and certiorari as distinct from that between certification and questions. It then briefly describes the statutory history described in greater detail in later parts of the Essay. Part II explores the common law history of appellate review from the English legal history through most of nineteenth-century America to understand the role of several important legal devices: the writs of certiorari and error, and error's equitable analogue, the appeal. Part III focuses on the Evarts Act, which gave the Court certiorari power to choose some cases, and its effects. The key takeaway is that Congress clearly intended—and the Court plainly understood this intent—that the Court take and decide entire cases through certiorari and decide discrete questions through certification. Part IV continues the story, starting with the Judges' Bill of 1925, which vastly expanded the Court's power over its docket. Once again, Congress and the Court agreed that certiorari review encompassed entire cases in contrast to certification,

59. Benjamin Johnson, *The Supreme Court's Political Docket: How Ideology and the Chief Justice Control the Court's Agenda and Shape Law*, 50 *Conn. L. Rev.* 581, 587 (2018).

60. See Daniel Epps & William Ortman, *The Lottery Docket*, 116 *Mich. L. Rev.* 705, 717–20 (2018).

61. For various theories, see, e.g., Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases 10–11* (2003) (demonstrating that politics shapes and is shaped by judicial review); Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 *Stud. Am. Pol. Dev.* 35, 36 (1993) (punting disruptive political controversies); Tara Leigh Grove, *The Exceptions Clause as a Structural Safeguard*, 113 *Colum. L. Rev.* 929, 940–44 (2013) [hereinafter Grove, *Exceptions Clause*] (facilitating settlement); Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 *Int'l Org.* 217, 228 (2000) (locking in partisan gains); J. Mark Ramseyer, *The Puzzling (In)Dependence of Courts: A Comparative Approach*, 23 *J. Legal Stud.* 721, 722, 741–42 (1994) (maximizing political influence during future periods when a party is out of power); Matthew C. Stephenson, "When the Devil Turns . . .": *The Political Foundations of Independent Judicial Review*, 32 *J. Legal Stud.* 59, 63–64, 71–73 (2003) (purchasing insurance); 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, 583–84 (2005) (achieving partisan gains and avoiding hard questions).

62. See Kathryn A. Watts, *Constraining Certiorari Using Administrative Law Principles*, 160 *U. Pa. L. Rev.* 1, 5 (2011) (noting that scholars "generally have not focused on the source of the Court's discretion (namely, delegations from Congress)").

63. Hartnett, *supra* note 2, at 1706.

which limited review to questions. The remainder of Part IV traces the Court's subsequent rejection of that agreement in favor of using certiorari to select questions. Part V first explores the consequences of the Court's departure from its traditional and statutorily authorized role as a decider of cases in favor of a self-guided declarer of law. It then contrasts the Court's interpretation of the statutes that govern its agenda-control powers with its interpretation of parallel statutes that guide administrative agencies and lower courts.

I. CASES, QUESTIONS, AND STATUTES

The distinction between cases and questions is subtle but important. Cases are composed of questions. Questions come in a variety of forms: procedural, substantive, legal, factual, or mixed.⁶⁴ For a court to decide a case, it must answer some—but not necessarily all—questions. Judgment in a case emerges when a *sufficient* set of questions has been answered. For instance, if a federal court determines it does not have subject matter jurisdiction, that single answer is sufficient to dismiss the case.⁶⁵ If a court observes that a claim was filed after the relevant statute of limitations expired, that would not be a sufficient answer, since the court would also have to decide that there were no intervening factors that tolled the statute of limitations.⁶⁶ If the claim is late and there is no tolling, then the court has answered enough of the questions to justify a judgment.⁶⁷

For an appellate court, the distinction between a case and its constitutive questions intersects with the posture of the case on appeal. Like all courts, appellate courts must decide a sufficient set of questions to justify judgment.⁶⁸ If the lower court got a single question wrong, that might be

64. See, e.g., Henry P. Monaghan, *Constitutional Fact Review*, 85 Colum. L. Rev. 229, 232–34, 237–38 (1985) (discussing the distinction the legal system attempts to draw between questions of law and questions of fact).

65. Fed. R. Civ. P. 12(h)(3).

66. See Katharine F. Nelson, *The 1990 Federal “Fallback” Statute of Limitations: Limitations by Default*, 72 Neb. L. Rev. 454, 458–61 (1993) (explaining that a variety of factors may impact the measurement of statutes of limitation, including “tolling provisions, conditions precedent to filing a claim, and provisions for borrowing other periods of limitations”).

67. See *id.* at 457 (“If the plaintiff fails to commence the action before the statute of limitations has run, his or her right to relief is lost.”).

68. See *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 374–75 (2010) (Roberts, C.J., concurring) (“When constitutional questions are ‘indispensably necessary’ to resolving the case at hand, ‘the court must meet and decide them.’” (quoting *Ex parte Randolph*, 20 F. Cas. 242, 254 (C.C.D. Va. 1833) (No. 11,558))); *Md. Cas. Co. v. Jones*, 279 U.S. 792, 794–97 (1929) (reversing and remanding when the circuit court of appeals failed to consider and rule on questions that the Supreme Court deemed essential to a complete judgment: questions about the assignments of error related to rulings during the trial); Chad M. Oldfather, *Defining Judicial Inactivism: Models of Adjudication and the Duty to Decide*, 94 Geo. L.J. 121, 122, 129–33, 163–64 (2005) (discussing the duty to adjudicate, what types of questions and arguments courts must rule on in order to satisfy that duty, and

enough to justify a reversal. On the other hand, the prevailing party below is still free to defend the judgment below on alternative grounds. This means that finding a mistake in a lower court's justifications may or may not be sufficient to overturn the judgment.

However, it will often be the case that there are multiple sufficient grounds for an appellate court to reverse (or affirm) a judgment.⁶⁹ So long as the court answers a sufficient set of questions, it satisfies its duty.⁷⁰ This gives the court a great deal of freedom as to which questions it will answer as it fulfills its duty. But this freedom emerges from and can only be exercised in service to the duty to decide cases.⁷¹

This duty, and thus the relationship between cases and questions, has a constitutional dimension. As a matter of plain text, the judicial power extends to cases and controversies.⁷² The Framers were not unaware of the power to answer freestanding questions, as the Massachusetts Supreme Judicial Court had and maintains that power.⁷³ Thus, any power to answer questions must be incidental to the judicial duty to decide cases.⁷⁴ For Article III purposes, the possibility that some case might depend on the answer is insufficient justification for a federal court to take up a question. The paradigmatic example of the Court refusing to offer an advisory opinion emerged from its refusal to answer questions of treaty interpretation that could easily have decided cases.⁷⁵ Perhaps a cleaner example is the federal judiciary's longstanding inability to answer certified questions from state courts, even when the answer to the federal question is determinative. In such instances, there is a case that turns on the question, but

the "broad range of judicial behavior that might qualify as a failure to decide" in certain cases).

69. See *Citizens United*, 558 U.S. at 374–75 (Roberts, C.J., concurring); *Md. Cas. Co.*, 279 U.S. at 794–97.

70. See Oldfather, *supra* note 68, at 163–64 (discussing an example of an appeal in which a court's decision on the first of three questions may obviate the need to decide the second and third questions).

71. See *id.* at 122, 129–33.

72. See *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 303 (1821) ("By the original text of the constitution, the judicial power . . . was extended to the following cases, in which States were parties; to wit, to controversies between two or more States, between a State and citizens of another State, and between a State and foreign States, citizens, and subjects."); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 147 (1803) (stating that the Constitution permits Supreme Court appellate jurisdiction for cases arising under laws and the Constitution of the United States).

73. Mass. Sup. Jud. Ct. R. 1:03.

74. See David E. Engdahl, John Marshall's "Jeffersonian" Concept of Judicial Review, 42 *Duke L.J.* 279, 280, 299, 326 (1992) ("[Marshall's] point—in *Marbury* as it had been consistently before—was that the judiciary's determination of constitutional questions is limited both in opportunity and in authoritative impact to a particular 'case.'").

75. See, e.g., Richard H. Fallon, Jr., John F. Manning, Daniel J. Meltzer & David L. Shapiro, *Hart and Wechsler's The Federal Courts and The Federal System* 50–58 (7th ed. 2015).

since that case is not pending before a federal court, the federal judiciary has no power to answer the question.⁷⁶

Given this relationship between cases and questions, consider the statute that empowers the Supreme Court to review cases from the courts of appeals, 28 U.S.C. § 1254:

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

The statute plainly distinguishes between questions and cases. By statute, the Court can review specific *questions of law* when they are certified by a lower federal court. *Cases* may be reviewed in two ways: certiorari or after a circuit court certifies a question and the Supreme Court orders the lower court to send up the “entire record . . . for decision of the entire matter in controversy.”⁷⁷

The statute makes clear that certification differs from certiorari in two important ways. First, the Court grants certiorari while the courts of appeals certify questions. That is, the two processes differ based on who acts as the first mover. Second, certification explicitly applies to questions while certiorari applies to cases. This distinction is suggestive, though perhaps not conclusive evidence, that the statute does not give the Court power to target questions. Indeed, the scholarly defense of the Court’s question-selection power demonstrates only that the statute “do[es] not preclude the limited grant procedure.”⁷⁸

If the plain text neither prohibits nor empowers, it does hint at where one could look for further evidence. The statute prescribes, but does not define, a statutory certiorari power. The Court has long recognized that the statutory grant of certiorari differs in some ways from the traditional common law writ.⁷⁹ A promising way forward, then, seems to be to inquire

76. This last point is made clear by the corollary examples of certified questions in the statute discussed below and interlocutory appeals in the lower courts. In those instances, the reviewing court is only answering a question to aid another federal court in its obligation to decide a live case. See 28 U.S.C. §§ 1254(2), 1292(b) (2018).

77. *Id.* § 1254(2).

78. Bice, *supra* note 3, at 363.

79. There is a similar distinction between the statutory and common law forms of the writ of habeas corpus. See generally Marc D. Falkoff, Back to Basics: Habeas Corpus Procedures and Long-Term Executive Detention, 86 *Denv. U. L. Rev.* 961 (2009) (discussing the history of the statutory and common law forms of habeas corpus); Stephen I. Vladeck, The

into the history of the writ of certiorari both at common law and in the statutes.

As to the latter, Congress introduced the statutory writ in 1891 in the Evarts Act, the same legislation that created the courts of appeals.⁸⁰ For modern Court observers, it seems strange to imagine an era when the Court did not select its cases. In fact, the Court had almost no control over its agenda until given some such power through the Evarts Act, which was a response to an overly crowded Supreme Court docket.⁸¹ The Act lightened the Court's future load by creating the modern circuit courts of appeals and gave them the "final" word on many types of cases. To allow for Supreme Court oversight of such doctrinal areas, Congress allowed lower courts to certify questions to the Supreme Court.⁸² Certiorari was then included merely 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."⁸³

Even then, the Evarts Act was careful to tie certiorari review—as well as review if the Court called up the entire matter pursuant to a certified question—to writs of error and appeals because those were the primary devices used to engage the Court's appellate jurisdiction going back to 1789.⁸⁴ The Judges' Bill of 1925, which gave birth to the modern Court by expanding the set of cases subject to the Court's certiorari powers, maintained this linkage.⁸⁵ In language copied nearly word-for-word from the Evarts Act, the Judges' Bill empowered the Court to "require by certiorari . . . that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal."⁸⁶ Similarly, the statute allowed circuit courts of appeals

to certify to the Supreme Court . . . any questions or propositions of law concerning which instructions are desired for the proper decision of the cause; and thereupon the Supreme Court may either give binding instructions on the questions and propositions certified or may require that the entire record in the cause be sent up for its consideration, and thereupon shall decide the

New Habeas Revisionism, 124 Harv. L. Rev. 941 (2011) (reviewing Paul D. Halliday, *Habeas Corpus: From England to Empire* (2012)) (same).

80. See Hartnett, *supra* note 2, at 1651–57.

81. See *id.* at 1649–57.

82. *Id.* For discussion regarding the use of certification, see H.R. Res. 9014, 51st Cong., 21 Cong. Rec. 3402 (1890); H.R. Rep. No. 50-942, at 1–4 (1888); 21 Cong. Rec. 10,222 (1890) (statement of Sen. William M. Evarts).

83. Hartnett, *supra* note 2, at 1656.

84. See *id.* at 1655 & n.52.

85. See *infra* section IV.A.

86. Judiciary Act of 1925 (Judges' Bill of 1925), Pub. L. No. 68-415, § 240(a), 43 Stat. 936, 938–39.

whole matter in controversy in the same manner as if it had been brought there by writ of error or appeal.⁸⁷

To explore the statutory writ of certiorari, then, we must also uncover what was required by writs of error and appeals. Such an understanding can serve multiple purposes. First, it informs our understanding of the statute. Congress had something in mind when it granted the Court certiorari power. Its plan was explicitly premised on the writ of error and the appeal.⁸⁸

Second, the history of error and appeal informs an inquiry into an alternative basis for the Court's power to target questions. One might imagine that the power to select questions is simply implied by the nature of appellate review. If appellate courts proceeding on error or appeal could select their questions, that would provide strong evidence that the Court's core appellate powers include the power to limit grants of certiorari to preselected questions. Yet the history reveals instead that the Court never wielded such power. Indeed, the Court implicitly disclaimed this power numerous times throughout its history.⁸⁹

II. COMMON LAW ORIGINS AND EARLY AMERICAN PRACTICE

The writ of certiorari is an ancient legal device with roots dating back to medieval England.⁹⁰ The writ requires a lower court or tribunal to certify the record of a proceeding and to send it to a higher court for review.⁹¹ Historically, certiorari was rarely used to obtain jurisdiction on appeal. The First Judiciary Act maintained this tradition by giving the Supreme Court appellate jurisdiction over common law cases through writs of error and over cases in equity, admiralty, and other areas through appeals.⁹² Writs of error required the appellate court to review the entire record (and only the record) for legal error.⁹³ Appeals were the equitable analogue to the writ of error.⁹⁴ The difference was that on appeal, the reviewing court had

87. *Id.* § 239, 43 Stat. at 938. The older statute explicitly required the Court to proceed on certiorari as if on a writ of error or appeal, but Congress removed that language for stylistic reasons in 1948. See *infra* section IV.D.

88. See *infra* section II.C.

89. See *infra* section II.D.

90. See *infra* section II.B.

91. See, e.g., A.T. Carter, *A History of the English Courts* 57–58 (6th ed. 1935).

92. Judiciary Act of 1789, Pub. L. No. 1-20, § 3, 1 Stat. 73, 81.

93. There were some exceptional facts reviewable on error, such as whether the relevant party was an infant, but such exceptions were limited, well-defined, and irrelevant to the larger appeals process. See Carter, *supra* note 91, at 58.

94. See *United States v. Goodwin*, 11 U.S. (7 Cranch) 108, 110–11 (1812) (“An appeal is a civil law process, and removes a cause entirely, subjecting the law and fact, to a review and retrial. A writ of error is a common law process, and removes for re-examination, nothing but the law.”); see also *Wiscart v. D’Auchy*, 3 U.S. (3 Dall.) 321, 327 (1796) (Elsworth, C.J., concurring) (comparing appeals and the writ of error in a similar fashion to the Court’s discussion in *Goodwin*).

an obligation to decide questions of law *and facts*.⁹⁵ The key takeaway is that both writs of error and appeals required review of the entire record—not just a subset of questions. Their respective histories are important because, as will be seen, Congress always channeled the Supreme Court’s appellate powers—even certiorari powers—through the writ of error and the appeal.

This Part explores the history of these traditional appellate devices with particular attention to practice before the Supreme Court from the Founding through the late nineteenth century. It begins by explaining the common law roots of the writs of error and certiorari. It then explores how these devices flowered in the first century of Supreme Court practice. It concludes by considering the powerful example of *Murdock v. City of Memphis*.⁹⁶

A. *The Writ of Error*

Throughout most recorded English legal history, the writ of error was used to challenge a decision of a common law court of record.⁹⁷ When proceeding on error, the reviewing court only had power to examine legal determinations, since factual determinations were within the province of juries.⁹⁸ After deciding the questions of law,⁹⁹ the reviewing court would return the case to the trial court for additional proceedings consistent with the decision.¹⁰⁰

It was at first not clear how one could challenge the decision of a judge or jury without challenging the integrity of that judge or those jurors.¹⁰¹ As

95. For good accounts of the history of error and appeal, see J.H. Baker, *An Introduction to English Legal History* 135–43 (4th ed. 2005); see also 3 William Blackstone, *Commentaries on the Law of England* 453–55 (1773); William Searle Holdsworth, *History of English Law* 373 (1922).

96. *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590 (1874).

97. See Baker, *supra* note 95, at 136–38. Other common law writs worked to a similar purpose. For example, a writ of attainment could be used to challenge a jury verdict as false, an action of deceit was used to reverse a judgment obtained by fraud in the court of common pleas, and an arrest of judgment was used when there was an error or defect in the proceedings (e.g., a verdict inconsistent with the pleadings or a declaration insufficient to justify the underlying action). See John Palmer, *Practice in the House of Lords, on Appeals, Writs of Error, and Claims of Peerage* 117–18 (1830).

98. See Palmer, *supra* note 97, at 129–30.

99. Factual errors that would limit the jurisdiction of the court and might not appear on the face of the record could be raised. Palmer mentions three specific instances: (1) minors who sue or are sued in their own names; (2) married women who sue or are sued without their husbands; and (3) when a party dies before a verdict or interlocutory judgment. See *id.* at 131–32.

100. See *id.* at 175–76.

101. See 2 Frederick Pollock & Frederic William Maitland, *The History of English Law Before the Time of Edward I*, at 668 (1898) (“The idea of a complaint against a judgment which is not an accusation against a judge is not easily formed.”). See generally John H.

a result, procedures in error originated as quasi-criminal proceedings that effectively charged the jury with perjury or the judge with malfeasance.¹⁰² Accordingly, an appeal on a writ of error was not merely a further stage of ongoing litigation; it was a new proceeding. This had consequences for the writ's further development.¹⁰³ Since it was a new action, the old action had to be completed. To get a writ of error, the judgment in the earlier case had to be final, and plaintiffs in error had to be able to point to the defect in the now-completed trial that caused them damage. If they could do so, the defendants in error were summoned to defend the judgment.¹⁰⁴

A writ of error commanded judges from lower common law courts to dispatch the record of a legal proceeding to a higher court for review. The record—also known as a plea roll—consisted of the formal minutes of litigation from inception to judgment;¹⁰⁵ it provided conclusive proof of its contents,¹⁰⁶ and it was the sole basis for review. Appellate courts could not look behind the record to see if either there were errors not apparent in the record or if errors that did appear in the record actually occurred.

The writ of error expanded over time to allow higher courts greater latitude in reviewing trial courts. Initially, review was limited only to information contained on the face of the parchment.¹⁰⁷ This limited and technical review provided too little information for higher courts to attend to anything but superficial formalities.¹⁰⁸ Accordingly, in 1285, the Statute of Westminster introduced a second writ of error that enabled review based

Langbein, Renee Lettow Lerner & Bruce P. Smith, *History of the Common Law: The Development of Anglo-American Legal Institutions* 416–19 (2d ed. 2009) (describing the medieval remedy for false jury verdicts, which included not just reversing the verdict, but also imposing “savage penalties” on the jurors for their wrongdoing).

102. See Holdsworth, *supra* note 95, at 213–14.

103. See *id.* at 214.

104. Review was initially at the King's Bench, since the writ of error was a prerogative of the King. Writs of error in civil cases quickly became a matter of right. In criminal cases, the King had discretion to grant or withhold the writ until 1705. See Holdsworth, *supra* note 95, at 214–15; see also Joseph Henry Smith, *Appeals to the Privy Council From the American Plantations* 111 (1950). The final say on a writ of error, however, came to rest with the House of Lords. See Baker, *supra* note 95, at 137.

105. Baker, *supra* note 95, at 136.

106. See Blackstone, *supra* note 95, at 406–07 (“A writ of error lies for some supposed mistake in the proceedings of a court of record; . . . [t]he writ of error only lies upon matter of *law* arising upon the face of the proceedings, so that no evidence is required to substantiate or support it.”). The incontestability of the record seems to have emerged from extending the King's privilege of not being contradicted about what happened in his presence to the King's courts. See also Note, *Influence of the Writ of Error on the Scope of Appellate Review in the Federal Courts*, 32 *Colum. L. Rev.* 860, 861–62 (1932).

107. Baker, *supra* note 95, at 136; see also Blackstone, *supra* note 95, at 23–24 (noting that the “truth [of the record] is not to be called in question[;] . . . nothing shall be averred against a record, nor shall any plea, or even proof, be admitted to the contrary”).

108. See Baker, *supra* note 95, at 136–37.

on a bill of exceptions.¹⁰⁹ The plaintiff in error wrote down the legal rulings made by the trial judge and the exceptions the plaintiff in error made to those rulings, and the judge would seal these exceptions and attach the bill to the parchment record.¹¹⁰

Even with these changes, the writ of error was still inadequate for the purpose of searching review.¹¹¹ Important facts were left out of the record, making substantive review of the evidence largely impossible.¹¹² Similarly, legal determinations were usually absent from the parchment, often making legal review unavailable.¹¹³ Thus, prior to the sixteenth century, review on a writ of error was still largely a technical exercise.¹¹⁴ Legal reforms in the sixteenth century—notably the rise of actions on the case and special verdicts—led to more details being included in the record.¹¹⁵

With more in the record, there was more to review for error, including points of law. This proved both a blessing and a curse. The writ required the higher court to revoke the lower court's judgment if any error appeared on the record, even where the lower court was correct on the merits and had erred on only a technical point.¹¹⁶ Assuming the lower court had made a significant mistake, expanding the record increased the chances that the higher court would have adequate grounds to reverse. But if the lower court had ruled correctly but made a technical error, the more voluminous record increased the chances the higher court would be compelled to reverse on a technicality.¹¹⁷ Thus, in the words of one commentary, "it may be doubted whether the disadvantages attending the Writs of Error at that early period, did not overbalance the benefit derived from them."¹¹⁸

109. See Statute of Westminster II 1285, 13 Edw. c. 35, § XXXI (Eng.).

110. See Holdsworth, *supra* note 95, at 223–24.

111. See, e.g., *id.* at 224 (noting multiple reasons for the inadequacy of review based on a bill of exceptions).

112. See Baker, *supra* note 95, at 137; see also Holdsworth, *supra* note 95, at 215–16 (“[T]he writ could do nothing to remedy the only errors that were really substantial.”).

113. See Holdsworth, *supra* note 95, at 215–16.

114. See Baker, *supra* note 95, at 137; see also Holdsworth, *supra* note 95, at 223.

115. Holdsworth, *supra* note 95, at 223.

116. See *id.* at 223–24 (“[The writ] was too wide because any error on the record, however trifling, was ground for a writ . . .”).

117. Blackstone, *supra* note 95, at 407 (“[S]uitors were much perplexed by writs of error brought upon very slight and trivial grounds, as misspellings and other mistakes of the clerks . . .”); see also Palmer, *supra* note 97, at 120 (“After verdicts and Judgments given upon the merits, they were frequently reversed for slips of the pen, or mis-spellings; and Justice was perpetually entangled in a net of mere technical jargon.”). This was possible because “once the record was made up, it was formerly held that by the common law no amendment could be permitted, unless within the very term[s] in which the judicial act so recorded was done; for during the term the record is in the breast of the court, but afterward it admitted of no alteration.” Blackstone, *supra* note 95, at 407.

118. Palmer, *supra* note 97, at 124.

By the eighteenth century, statutory reforms and judicial innovations had liberalized procedures to amend the record to correct technical defects so that “trifling exceptions are so thoroughly guarded against that writs of error cannot now be maintained but for some material mistake assigned.”¹¹⁹ Importantly, material mistakes came not only to include material mistakes in form but also substantive mistakes including “a wrong Decision on the merits of the Case.”¹²⁰

Clearly, the writ of error underwent significant liberalization over the centuries. Nonetheless, its core remained unchanged: The reviewing court—usually the King’s Bench or the Lords—would review the entire (and gradually expanded) record for legal error.¹²¹ The legal questions that needed answering were contained in that record, and the court’s power to answer those questions was entirely incidental to its obligation to examine the record and correct the legal errors contained therein.¹²²

Moreover, the changes themselves always followed a consistent pattern. First, changes were always designed to help the appellate court do justice in the case. Each change brought additional questions and more materials to the reviewing court, giving those judges more work.¹²³ The changes did not give the court greater flexibility to avoid questions. Second, the significant changes to the writ were accomplished by statute. While courts worked at the margins to ensure that typographical errors would not subvert justice, fundamental transformations of the writ apparently required Parliament.¹²⁴

B. *The Writ of Certiorari*

Certiorari is a writ that orders an inferior tribunal to certify and send all records to the higher court.¹²⁵ The key phrase was “*certiorari volumus*”:

119. Blackstone, *supra* note 95, at 408; see also Palmer, *supra* note 97, at 120; cf. Blackstone, *supra* note 95, at 407.

120. Palmer, *supra* note 97, at 118.

121. See Baker, *supra* note 95, at 136–38. The device used to remit the proceedings was called a remittitur. See George Jarvis Thompson, Development of the Anglo-American Judicial System, 17 Cornell L. Rev. 395, 426 n.525 (1932).

122. See Baker, *supra* note 95, at 137 (noting that, originally, error did not encompass legal questions but did require review of the entire record; and the writ of error could not contribute to legal development until answers to legal questions were included in the record).

123. Whether this trend reflected the interests of justice or the financial interests of judges—who received fees from plaintiffs—is unclear. For the latter explanation, see Daniel Klerman, Jurisdictional Competition and the Evolution of the Common Law, 74 U. Chi. L. Rev. 1179, 1218–19 (2007).

124. See, e.g., Statute of Westminster II 1285, 13 Edw. c. 35, § XXXI (Eng.) (making it possible for plaintiffs in error to attach exceptions to the record).

125. See James E. Pfander, Jurisdiction-Stripping and the Supreme Court’s Power to Supervise Inferior Tribunals, 78 Tex. L. Rev. 1433, 1444 (2000) [hereinafter Pfander, Jurisdiction-Stripping] (“Certiorari effected the removal of a judicial record or cause (often an

“[W]e wish to be informed.”¹²⁶ The King used the writ as a tool of governance,¹²⁷ but English courts came to use this writ in distinct ways.

The oldest and most common use of the writ was to order the transfer of records to a superior court.¹²⁸ When reviewing a lower court’s decision, the appellate court needed the full record. If parts of the record were still at the lower court, the reviewing court would issue a certiorari to bring the remaining parts of the record up for review.¹²⁹

A second use emerged primarily in criminal cases.¹³⁰ The King’s Bench used certiorari to remove a case when the accused could not get a fair trial in the lower court.¹³¹ Until the seventeenth century, this use of certiorari was limited to review of indictments.¹³² Once the indictment was brought before the King’s Bench, that court would hold the trial itself, quash the indictment, or send it for trial in the country.¹³³ However, since review was limited to the indictments, it was often superficial and limited to technical defects.¹³⁴

Finally, certiorari could issue “in the nature of a writ of error.”¹³⁵ Dating back to King Edward I, the writ ran to courts to take jurisdiction over appeals as if on error.¹³⁶ The practice then expanded over time to cover review by other tribunals. By the time of the early Stuarts, certiorari was also used to bring administrative actions before the King’s Bench.¹³⁷ Originally, the King’s Bench oversaw the justices of the peace, who were in

indictment) from a lower court for trial or other disposition in King’s Bench.”). Holdsworth helpfully includes various versions of the language of writs of certiorari. See Holdsworth, *supra* note 95, at 658–59. For a history of certiorari from the Middle Ages to the twentieth century, see Jerome J. Hanus, *Certiorari and Policy-Making in English History*, 12 *Am. J. Legal Hist.* 63 (1968).

126. See Baker, *supra* note 95, at 148 n.78.

127. See S. A. de Smith, *The Prerogative Writs*, 11 *Cambridge L.J.* 40, 45 (1951).

128. See Baker, *supra* note 95, at 148; see also Holdsworth, *supra* note 95, at 228.

129. See Frank J. Goodnow, *The Writ of Certiorari*, 6 *Pol. Sci. Q.* 493, 500 (1891).

130. See, e.g., Blackstone, *supra* note 95, at 320–21.

131. *Id.* at 265. This was apparently not an uncommon practice in the fifteenth and sixteenth centuries. See Holdsworth, *supra* note 95, at 213.

132. See Baker, *supra* note 95, at 148.

133. *Id.* Certiorari accomplished this in tandem with habeas corpus, which could require production of the body but not the record, whereas certiorari could demand the record but not the person. See Dallin H. Oaks, *The “Original” Writ of Habeas Corpus in the Supreme Court*, 1962 *Sup. Ct. Rev.* 153, 182.

134. Baker, *supra* note 95, at 148–49.

135. de Smith, *supra* note 127, at 46.

136. *Id.*

137. See Pfander, *Jurisdiction-Stripping*, *supra* note 125, at 1446–47 (“[I]n 1700, Lord Chief Justice Holt of King’s Bench relied on the writ of certiorari to secure judicial review of the decisions of an administrative tribunal.”).

charge of local administrative matters.¹³⁸ The rule soon came to be that “certiorari would lie to any body created by statute which acted judicially . . . ; statutes creating powers outside the common law were to be strictly construed; and before conviction a man was entitled to be summoned so that he had an opportunity to present his case.”¹³⁹ Thus, the Crown used the King’s Bench to ensure justice was done administratively, and the writ of certiorari was its key tool in that effort.

Importantly, all of these uses of certiorari only allowed the superior court to review an existing record for defects. In the first instance, the record was already before the higher court but was incomplete. In the latter instances, certiorari was used to bring the record before the reviewing court for the first time. Certiorari did not permit courts to hold new trials or examine facts as if on appeal,¹⁴⁰ and it did not offer the reviewing court the opportunity to select individual questions or issues for review. Instead, common law certiorari enabled courts to proceed as if on a writ of error.¹⁴¹

C. *The First Century of Supreme Court Appellate Review*

It was against this backdrop that the First Congress drafted the Judiciary Act of 1789, which gave the Supreme Court “appellate jurisdiction from the circuit courts and courts of the several states, in the cases herein after specially provided for.”¹⁴² The Act provided for Supreme Court review in civil cases through the writ of error and appeals, both of which issued as a matter of right; if the appellant filled out the paperwork correctly, review was effectively mandatory.¹⁴³ Appeals were effectively the equitable analogue to the common law writ of error. There were, however, notable differences: Equity offered its own set of remedies, there was no jury, and all testimony was written. Accordingly, when reviewing appeals (as opposed to writs of error), the appellate court had a complete, and therefore much more voluminous, set of documents to review. The reason for the additional factual material was that review on appeal covered both law and facts.¹⁴⁴

138. See Parrillo, *Originalist Case Against Administrative Regulatory Power*, supra note 18, at 1419–21.

139. Baker, supra note 95, at 149.

140. Id. at 149.

141. See, e.g., Hamburger, *Law and Judicial Duty*, supra note 24, at 387–90.

142. Judiciary Act of 1789, Pub. L. No. 1-20, § 13, 1 Stat. 73, 81.

143. See John M. Simpson, *Turning Over the Reins: The Abolition of the Mandatory Appellate Jurisdiction of the Supreme Court*, 6 *Hastings Const. L.Q.* 297, 303 n.23 (1978). John Simpson notes that, while some states treated writs of error as discretionary, the Court followed the traditional English rule: “The mandatory nature of the writ of error had its roots firmly entrenched in English jurisprudence.” Id. at 304.

144. See generally Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 *Cornell L. Rev.* 1181, 1198–210 (2005) (outlining developments over time in equity doctrine and procedure).

The Court's certiorari powers flowed from section fourteen of the Judiciary Act, a section that has come to be known as the All Writs Act.¹⁴⁵ That section gave all federal courts "power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law."¹⁴⁶ Certiorari plainly fell within the "all other writs not specially provided for" category.

The Supreme Court recognized three uses of certiorari that tracked the traditional common law usage of the writ explained above. First, certiorari "issue[s] as original process, to remove a cause, and change the venue, when the Superior Court is satisfied, that a fair and impartial trial will not otherwise be obtained."¹⁴⁷ Second, "it is sometimes used, as auxiliary process, where, for instance, diminution of the record is [alleged], on a writ of error: But in such cases, the Superior Court must have jurisdiction of the controversy."¹⁴⁸ Third, a certiorari was used "to bring up after judgment the proceedings of an inferior court . . . in the nature of a writ of error."¹⁴⁹

The Supreme Court used certiorari almost exclusively to complete the record of a case before it on a writ of error.¹⁵⁰ For more than a century following the First Judiciary Act, the Court never took a case through certiorari.¹⁵¹ While it acknowledged that taking cases was one traditional use of the writ, it never used the writ that way itself.¹⁵² Instead, the Court relied almost entirely on writs of error and appeals to fill out its appellate juris-

One way in which the First Judiciary Act differed from the English practice was the more expansive set of remedies available to the Court after appellate review. Traditionally, the reviewing court on a writ of error had to either affirm or reverse for a new trial. The Judiciary Act allowed the Court "to render such judgment . . . as the district court should have rendered." Judiciary Act of 1789, Pub. L. No. 1-20, § 24, 1 Stat. 73, 85; see also Aaron-Andrew P. Bruhl, *The Remand Power and the Supreme Court's Role*, 96 *Notre Dame L. Rev.* 171, 188–89 (2020) (discussing the difference between review on a writ of error and appeal).

145. Today, this section is codified at 28 U.S.C. § 1651 (2018).

146. Judiciary Act of 1789 § 14, 1 Stat. at 81–82. The short-lived Judiciary Act of 1801 expressly gave the Court certiorari power. See James E. Pfander, *Marbury*, Original Jurisdiction, and the Supreme Court's Supervisory Powers, 101 *Colum. L. Rev.* 1515, 1583–84 n.285 (2001).

147. *Fowler v. Lindsey*, 3 U.S. (3 Dall.) 411, 412–15 (1799) (opinion of Washington, J.).

148. *Id.*

149. *Harris v. Barber*, 129 U.S. 366, 369 (1889).

150. See, e.g., *United States v. Young*, 94 U.S. 258, 259–60 (1876) (explaining that "this court" only uses the writ of certiorari "[a]s auxiliary process to enable a court to obtain further information in respect to some matter already before it for adjudication").

151. See *infra* notes 261–266 and accompanying text.

152. See *Young*, 94 U.S. at 259–60 (noting that one of the two purposes "[a]t common law" for the writ of certiorari is "[a]s an appellate proceeding for the re-examination of some action of an inferior tribunal" but that "this court" does not employ certiorari for that purpose).

diction. This reliance on error and appeal meant that the Court's appellate docket was almost entirely mandatory and always required the Court to decide cases rather than to select preferred questions.

1. *Statutory Jurisdiction Over Cases.* — Under the Judiciary Act, appeals and writs of error applied somewhat differently to cases depending on whether they arose in state or federal courts. For cases emerging from state courts, appeals and writs of error were only available to litigants under limited circumstances. The 1789 Act placed four requirements on cases emerging from state courts. First, the Court could only review “final judgment[s] or decree[s]” from “the highest court of law or equity of a State.”¹⁵³ Second, the case needed to fall within one of three categories.¹⁵⁴ Third, such cases required a certificate signed by the chief judge of the lower court or any Justice of the Supreme Court.¹⁵⁵ Fourth, the Supreme Court could only address federal issues in the cases.¹⁵⁶

Most analyses of this aspect of the early Court's jurisdiction focus on the second of these categories: the types of issues that would elevate a state case to the Supreme Court.¹⁵⁷ However, for present purposes, the other three are particularly important. First, the requirement that the case must be final conformed Supreme Court review to the traditional writ of error.¹⁵⁸ Further, the requirement of finality guaranteed the Court would possess the completed record when it decided the case. The statute did not permit (and to this day does not permit) the Supreme Court to reach into ongoing state litigation to address individual questions.

Similarly, the procedural requirement that cases required a certificate plays an interesting and informative role. Because the certificate had to be signed by either the chief judge of the state's highest court or a Justice of

153. Judiciary Act of 1789, Pub. L. No. 1-20, § 25, 1 Stat. 73, 85.

154. The three categories were: (1) The state court ruled against the validity of a federal statute, treaty, or “an authority exercised under the United States”; (2) the state court ruled in favor of a state statute or exercise of state authority against a constitutional challenge; or (3) “where is drawn in question the construction of any clause of the constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed by either party, under such clause.” *Id.* § 25, 1 Stat. at 85–86.

155. *Id.* § 25, 1 Stat. at 86.

156. *Id.* § 25, 1 Stat. at 86–87.

157. See, e.g., 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, 58–60 (1981); Paul Taylor, *Congress's Power to Regulate the Federal Judiciary: What the First Congress and the First Federal Courts Can Teach Today's Congress and Courts*, 37 *Pepp. L. Rev.* 847, 861–76 (2010); Ann Woolhandler, *Powers, Rights, and Section 25*, 86 *Notre Dame L. Rev.* 1241, 1242–43 (2011).

158. Recall that the writ of error emerged as a new proceeding to contest the final judgment of another court. Thus, the lower court's decision needed to be final before it could be reviewed on error. See *supra* note 97 and accompanying text.

the Supreme Court, the writ would not be allowed if there was no signature.¹⁵⁹ If the chief judge of the state court refused to sign the certificate, the appellant could apply to the Justice of the Supreme Court with responsibility for that circuit.¹⁶⁰ That Justice could sign the certificate, deny it, or refer it to the full Court.¹⁶¹ Publicly, the Court said that the only relevant consideration for the Justice was whether the appeal involved a question properly within the Court's appellate jurisdiction.¹⁶² In practice, however, the Justices would not sign certificates if they would simply end up affirming the state court.¹⁶³

The certificate requirement thus played something of a screening role for review of state court cases.¹⁶⁴ The Court's ability to refuse a certificate was its primary source of discretion. This teaches two lessons: First, the Court was willing and able to dodge cases, though it thought it only proper to do so under limited circumstances (e.g., when the lower court judges and Supreme Court Justices agreed that the case outcome was obvious); second, discretion operated at the case level. The certificate did not operate at the level of individual questions. Instead, the Court signed the certificate and took the entire case.

Finally, the limitation of review to federal questions makes two points clear. First, Congress was able to recognize a distinction between review of cases and review of a subset of the questions within a case, and it was able to direct the Court accordingly. Second, Congress understood that the Court was not the proper institution to make the determination as to what questions it should answer. Its job was to decide the whole case unless Congress removed some questions from its jurisdiction.

The early Court was also clear about its obligation to decide cases rather than questions. Justice Marshall's words in *Cohens v. Virginia*, quoted above,¹⁶⁵ bear repeating:

With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. . . . Questions may occur which we would gladly avoid; but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty.¹⁶⁶

159. See Simpson, *supra* note 143, at 305.

160. *Id.*

161. *Id.*

162. *Id.* at 305–06 (citing *Twitchell v. Pennsylvania*, 74 U.S. (7 Wall.) 321, 324–25 (1868)).

163. *Id.* at 306.

164. *Id.* at 306–07 (“With these early screening techniques, the Court was determining whether the plaintiff in error had made out a *prima facie* case under the jurisdictional statute.”).

165. See *supra* text accompanying note 23.

166. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821).

Dodging a hard question or failing to decide a case properly before the Court would be “treason to the constitution.”¹⁶⁷ For Marshall, the writ of error did not provide the power to select or to avoid questions; it provided the obligation to decide cases, even if that meant taking up questions the Court would rather avoid.

D. *Procedures: Bringing the Whole Case to the Court*

1. *The Writ of Error.* — For the first century of the Court’s existence, the writ of error was the Court’s sole method to reexamine legal decisions by lower courts in common law matters.¹⁶⁸ The procedures were, roughly, as follows. The party losing in the lower court would petition the Supreme Court for a writ of error.¹⁶⁹ The writ then issued as a matter of right by the Supreme Court to the lower court.¹⁷⁰ To proceed further—for the writ to be allowed—the plaintiff in error, as the appellant was known, would have to attach four things to the writ and file it with the Court by a date provided in the writ itself.¹⁷¹

First, the Court required “an authenticated transcript of the record.”¹⁷² The record itself consisted of four pieces: a summary of the pleadings, a jury statement,¹⁷³ the bill of exceptions, and the judgment.¹⁷⁴ Of these features, the bill of exceptions is perhaps the most important. It was the plaintiff in error’s vehicle to set out the relevant evidence from trial or material facts the Court would need to decide the legal issues raised. This factual recitation had to walk a careful line because the Court was not concerned about factual determinations on a writ of error, but some facts were necessary in order to answer the questions of law.¹⁷⁵ The exceptions raised

167. *Id.*

168. See *supra* section II.C.

169. See 1 George Ticknor Curtis, *Commentaries on the Jurisdiction, Practice, and Peculiar Jurisprudence of the Courts of the United States* § 177, at 224–26, § 361, at 502 (1854) (noting that for “final” judgments of lower courts, “the party against whom the judgment is rendered can alone sue out the writ”).

170. See, e.g., *Campbell v. Doe*, 54 U.S. (13 How.) 244, 247 (1851) (“As both parties claim under an act of Congress, either, is entitled to a writ of error to have the judgment against the right asserted, revised in this court.”). The Act of May 8, 1792 required that writs issue in the name of the Chief Justice. Act of May 8, 1792, Pub. L. No. 2-3, § 1, 1 Stat. 275, 275–76.

171. Judiciary Act of 1789, Pub. L. No. 1-20, § 22, 1 Stat. 73, 84.

172. Curtis, *supra* note 169, § 377, at 510–11.

173. *Id.* § 381, at 512 (“A statement of the empanelling of the jury to try the issue made by the pleadings, the trial, and the verdict . . .”).

174. *Id.*

175. The Court might get testy if litigants stuffed the record full of factual matters that did not pertain to the legal questions at issue on error. See, e.g., *Carver v. Jackson ex dem. Astor*, 29 U.S. (4 Pet.) 1, 80–81 (1830) (“[T]he practice . . . of bringing the charge of the court below, at length, before this court for review . . . is an unauthorised practice, and extremely inconvenient both to the inferior and to the appellate court.”). Justice Joseph Story

in this part of the record were limited to exceptions raised during trial pertaining to legal determinations and evidentiary rulings.¹⁷⁶ Thus, along with the facts, the bill of exceptions had to carefully point to the rulings or jury instructions that the plaintiff in error objected to at trial.

Along with the record, the writ was to be accompanied by a prayer for relief and an assignment of error.¹⁷⁷ The latter was the list of errors alleged by the plaintiff in error. Even though parties asked the Court to consider specific questions, the Court's judicial duty on error required examining the entire record. The Court could not cherry-pick its own questions. It could and would reverse based on errors not assigned so long as the exception was made at trial and included in the record.¹⁷⁸ As the Court put it, "[I]t is the duty of the court to give judgment on the whole record, and not merely on the points started by counsel."¹⁷⁹

2. *Appeals.* — A key feature of the writ of error process was that the appellate court had to decide the entire legal case—not just particular questions of interest to the court or to counsel.¹⁸⁰ The same was true for appeals, except review on appeal encompassed facts as well as legal questions.¹⁸¹ Unlike cases at law, equity did not have a jury.¹⁸² Facts were for the court to determine. Accordingly, a key difference for the Court between an appeal and a writ of error was that only the former brought facts before the Court.¹⁸³

The Judiciary Act of 1801 set out the procedures for an appeal: A "transcript of the libel, bill, answer, depositions, and all other proceedings of what kind soever in the cause, shall be transmitted to the said supreme

was particularly annoyed by the practice. See David Lynch, *The Role of the Circuit Courts in the Formation of United States Law in the Early Republic: Following Supreme Court Justices Washington, Livingston, Story and Thompson* 123 (2018) ("Story was unhappy with the long-accepted tradition of excessively lengthy pleadings and legal argument because it stood in the way of a reasonably manageable docket.").

176. Curtis, *supra* note 169, § 382, at 513.

177. The final element necessary to bring a case before the Supreme Court on a writ of error was "a citation to the adverse party, signed by the judge of such district court, or a Justice of the Supreme Court, the adverse party having at least twenty days' notice." Judiciary Act of 1789, Pub. L. No. 1-20, § 22, 1 Stat. 73, 84.

178. See *Garland v. Davis*, 45 U.S. (4 How.) 131, 143 (1846) (noting that, although "exceptions to the opinions given by courts below must all be taken at the time the opinions are pronounced[,] . . . when the whole record is before the court above," counsel may take "any exception appearing on it . . . which could have been taken below").

179. *Id.*

180. *Id.*

181. See *United States v. Goodwin*, 11 U.S. (7 Cranch) 108, 110–11 (1812); *Wiscart v. D'Auchy*, 3 U.S. (3 Dall.) 321, 327 (1796) (opinion of Elsworth, C.J.).

182. See *Baker*, *supra* note 95, at 103.

183. See Ira Mickenberg, *Abusing the Exceptions and Regulations Clause: Legislative Attempts to Divest the Supreme Court of Appellate Jurisdiction*, 32 *Am. U. L. Rev.* 497, 517 (1983).

court . . . ”¹⁸⁴ Further, “no new evidence shall be received in the said court, on the hearing of such appeal . . . ”¹⁸⁵

The Act of March 3, 1803 clarified the subject matters appropriate for appeals, and by implication, it carved out the proper scope of writs of error.¹⁸⁶ The statute, however, clearly linked the procedures for the two methods. By referring to the “rules, regulations, and restrictions” provided for writs of error, the statute required that appeals follow the same timeline and provide the same appellate bond as required for writs of error.¹⁸⁷

The record for an appeal was to contain all of the evidence from the trial.¹⁸⁸ Before the 1803 Act, the substance of the testimony was included in the judge’s report as part of the statement of facts and sent up along with the record.¹⁸⁹ The 1803 Act, however, effectively repealed the provision in the First Judiciary Act that required the record to include a statement of facts in equity cases.¹⁹⁰ Instead, the record was supposed to include “depositions, and all other proceedings of what kind soever in the cause.”¹⁹¹ The Court required “that all the testimony on which the judge finds his opinion, should, in cases within the jurisdiction of this Court, appear in the record.”¹⁹² Effectively, any oral testimony must be reduced to writing and included in the record for an appeal.¹⁹³

These differences between appeals and writs of error should not obscure the shared obligatory nature of the two. On appeal, the Court said, “[I]t would seem, since this Court must judge of the fact, as well as the law, that all the testimony which was before the Circuit Court ought to be laid before this court.”¹⁹⁴ This statement explains the procedural similarities and differences between the two appellate devices; more importantly, it demonstrates that the Court understood it had an independent duty to examine all of the law and facts relevant to the appeal. On appeal, as on

184. Judiciary Act of 1801, Pub. L. No. 6-4, § 33, 2 Stat. 89, 99.

185. *Id.* The Act went on to require that “such appeals shall be subject to the same rules, regulations and restrictions, as are prescribed by law in case of writs of error; and that the said supreme court shall be, and hereby is authorized and required, to receive, hear and determine such appeals.” *Id.*

186. See *The San Pedro*, 15 U.S. (2 Wheat.) 132, 138–42 (1817) (interpreting the Act of 1803 to mean that, in common law cases, “[t]he writ of error . . . remains in force” and submits only issues of law to the Court, whereas appeals are “confined to admiralty and equity cases, and bring[] before the supreme court” issues of fact and law).

187. Curtis, *supra* note 169, § 408, at 533.

188. Ferdinand Fairfax Stone, *The Record on Appeal in Civil Cases*, 23 Va. L. Rev. 766, 770 (1937).

189. *Id.*

190. See Act of Mar. 3, 1803, Pub. L. No. 7-4, § 2, 2 Stat. 244, 244.

191. *Id.*

192. *Conn v. Penn*, 18 U.S. 424, 426 (1820).

193. Curtis, *supra* note 169, § 413, at 535–36.

194. *Conn*, 18 U.S. at 426.

error, there was no picking and choosing.¹⁹⁵

These appellate procedures are consistent with the statutory mandate to decide the entire case. For a writ of error, the Court needed the full record, not just the parts the plaintiff in error wanted reviewed. For appeals, the Court needed all the facts as well. Congress and the Court adopted and maintained these traditional processes in order to achieve the traditional ends of the writ of error and the appeal: to decide cases.

3. *Murdock v. City of Memphis*. — Many of these points appear in *Murdock v. City of Memphis*.¹⁹⁶ The case is famous for the Court's determination that it lacked jurisdiction over the state law question on an appeal from a state court.¹⁹⁷ The Court concluded that Congress did not grant jurisdiction over such questions.¹⁹⁸ Buried within the opinion, however, is an extended discussion of the writ of error and appeal.¹⁹⁹

The case grew out of a dispute over land that Murdock's ancestors once owned.²⁰⁰ They had donated the land to the city so the federal government could use it for a naval depot.²⁰¹ The gift included language that seemingly would cause the land to revert to the original owners if it was not used for a naval base.²⁰² Many years later, an act of Congress closed the depot and returned the land to the city.²⁰³ Murdock raised state and federal claims in an effort to regain ownership of the land.²⁰⁴ After losing below, Murdock petitioned the Court to review on error.²⁰⁵ Murdock argued that “the office of a writ of error . . . is to remove the whole case to this

195. Indeed, Congress made the obligatory nature of appeal explicit. See Act of Mar. 3, 1803 § 2, 2 Stat. at 244.

196. *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590 (1874). For a fuller account of the historical background, see generally William M. Wiecek, *Murdock v. Memphis*: Section 25 of the 1789 Judiciary Act and Judicial Federalism, in *Origins of the Federal Judiciary: Essays on the Judiciary Act of 1789* (Maeva Marcus ed., 1992).

197. Congress had revised the jurisdictional statute, possibly in an effort to get the Court to review such questions. See Richard A. Matasar & Gregory S. Bruch, *Procedural Common Law, Federal Jurisdictional Policy, and Abandonment of the Adequate and Independent State Grounds Doctrine*, 86 Colum. L. Rev. 1291, 1319 (1986) (“After the Civil War, Congress had undertaken a broad-scale reordering of the relations between federal and state governments . . . Congress’ intent to give litigants a chance to avoid state courts was evident . . .”).

198. *Murdock*, 87 U.S. (20 Wall.) at 629–33.

199. *Id.* at 620–25. Professor Michael Collins points out another important innovation in *Murdock*: The Court determined that the state court’s opinion would henceforth comprise part of the record. See Michael G. Collins, *Reconstructing Murdock v. Memphis*, 98 Va. L. Rev. 1439, 1447–48 (2012).

200. *Murdock*, 87 U.S. (20 Wall.) at 596–97.

201. *Id.* at 596.

202. *Id.* at 597.

203. *Id.*

204. *Id.* at 597–99.

205. *Id.* at 598.

court for revision upon its merits . . . [and] therefore *all* the errors found in a record . . . must be reviewed so far as they are essential to a correct final judgment on the whole case.”²⁰⁶

The majority disagreed but only in part.²⁰⁷ It began by noting the “two principal methods known to English jurisprudence, and to the jurisprudence of the Federal courts, by which cases may be removed . . . for review. These are the writ of error and the appeal.”²⁰⁸ The key difference, the Court recognized, was that the latter “bring[s] up the whole case for re-examination on all the merits, whether of law or fact,” *de novo*.²⁰⁹ In contrast, the writ of error brings up all other cases, “but every controverted question of fact is excluded from consideration, and only such errors as this court can see that the inferior court committed, and not all of these, can be the subject of this court’s corrective power.”²¹⁰ Specifically, the Court noted that some errors are immaterial, and sometimes judgment can sufficiently rest on one question, obviating the need to answer another.²¹¹ The Court also noted that some errors may fall outside the Court’s jurisdiction, notably those related to “motion[s] for a new trial, or to quash an indictment, or for a continuance, or amendment of pleadings . . .”²¹² The Court then went on to discuss the rules and regulations that attend a writ of error.²¹³

Murdock’s argument that the Court had an obligation to consider everything before it was correct to a point. Where his petition erred was in recognizing what was actually before the Court. The Court decided that Murdock’s description of the office of a writ of error covered too much.²¹⁴ The Court agreed that the writ of error required review of all legal questions within the Court’s jurisdiction.²¹⁵ But the writ of error did not expand appellate jurisdiction beyond its statutory or constitutional limits.²¹⁶ Since the Court found that Congress intended to remove state law questions from the Court’s jurisdiction in cases like *Murdock*, the Court lacked

206. *Id.* at 620–21.

207. See *id.* at 621–22.

208. *Id.* at 621.

209. *Id.*

210. *Id.* at 621–22.

211. *Id.* at 623.

212. *Id.*

213. *Id.* at 623–24.

214. *Id.* at 621–22.

215. *Id.* at 623.

216. In its own words, “the effect of the writ [of error] and its function and purpose” is to “transfer the case to the Supreme Court, and with it the record of the proceedings in the court below.” Later, “[w]hen the court comes to consider the case . . . what it shall review, and what it shall not, must depend upon the jurisdiction of the court in that class of cases as fixed by the law governing that jurisdiction.” *Id.*

jurisdiction.²¹⁷

For the *Murdock* Court, there is little discretion under the writ of error: “When the court comes to consider the case . . . what it shall review, and what it shall not, must depend upon the jurisdiction of the court in that class of cases as fixed by the law governing that jurisdiction.”²¹⁸ The “shall” language is notable and strong. The Court’s obligation extends to all matters—but only those matters—that fall within its jurisdiction as provided for in the statutes.²¹⁹ Conspicuously absent is any hint that the Court has any control over the limits of its review.

III. THE EVARTS ACT AND EARLY TWENTIETH CENTURY PRACTICE

The fundamental structure of the federal judiciary in general and the Supreme Court’s appellate jurisdiction in particular remained relatively unchanged until the close of the nineteenth century.²²⁰ While civil rights legislation and the introduction of federal question jurisdiction transformed the functions of Article III courts, the organization of the judiciary and the statutes governing the Court’s appellate jurisdiction went largely unreformed.²²¹ Reconstruction and the ascendant Republican Party’s increasing concern with economic development and business interests, however, finally led to a change.²²²

The Evarts Act of 1891 kicked off an era of tinkering with the Supreme Court’s jurisdiction that culminated in the Judges’ Bill of 1925.²²³ The former introduced discretionary jurisdiction through certiorari, and the latter vastly expanded this power.²²⁴ Both statutes, however, made explicit the traditional common law understanding of certiorari: Cases taken through certiorari proceeded as if on a writ of error or appeal.

This Part discusses the impact of the Evarts Act, which for the first time gave the Court a statutory power of certiorari to select some cases for review. It also provides a novel account of the Court’s slow—and likely accidental—transition from recognizing an independent obligation to review the entire record to limiting review to the questions presented by the parties. This was a necessary first step in the move to taking up the power to select its own questions.

217. *Id.* at 621–22.

218. *Id.* at 623.

219. A note of caution is in order. This is, so far as I know, the first attempt at a general history of the Court’s appellate practices. It is not an attempt at a definitive history. The conclusions are consistent with the leading cases and authorities, but an exhaustive study of the period is beyond the scope of this Essay.

220. See *infra* section III.A.

221. See *infra* section III.A.

222. See *infra* section III.A.

223. See *infra* section III.B.

224. See *infra* section IV.A.

A. *The Evarts Act's Effects on the Court's Appellate Jurisdiction*

Republican reforms after the Civil War led to a massive increase in the workload of the federal courts. Congress contributed to the growth in federal litigation through statutes such as the Habeas Corpus Act of 1867²²⁵ and the Jurisdiction and Removal Act of 1875.²²⁶ This latter piece of legislation finally provided for federal question jurisdiction and brought a vast array of cases into federal courts.²²⁷ Admiralty cases, railroad litigation, and bankruptcy proceedings crowded the dockets as congressional Republicans looked to the federal courts to help facilitate the party's emphasis on national economic development.²²⁸

The federal judiciary—and especially the Supreme Court—strained under the new load. The structure of the judiciary was largely unchanged from 1789.²²⁹ The district courts were exclusively, and circuit courts were largely, trial courts. Litigants enjoyed an automatic right to appeal, and since there was no dedicated appellate court, most appeals went directly to the Supreme Court itself.²³⁰ The result was an explosion in the Court's workload. In 1860, the Court had 310 cases on its docket.²³¹ In 1890, it had 1,816 cases, after including the 623 filed in that year and was three years behind on its work.²³² Adding to the burden on the Justices, they were still required to ride circuit, which often meant crossing the country (now much larger than it had been in 1802) to serve as trial judges on circuit courts. The crushing workload drove Chief Justice Morrison Waite into an early grave.²³³

Congress addressed these problems through the Circuit Courts of Appeals Act of 1891.²³⁴ Known as the Evarts Act, the legislation created the circuit courts of appeals, providing the federal judicial structure known today. For present purposes, the most relevant part of the Evarts Act was the reorganization of the Supreme Court's appellate jurisdiction. It transformed the Court's workload in two ways. First, fewer litigants could

225. Habeas Corpus Act of 1867, Pub. L. No. 39-28, 14 Stat. 385.

226. Jurisdiction and Removal Act of 1875, Pub. L. No. 43-137, 18 Stat. 470. Tara Leigh Grove attributes most of the expansion of the Court's docket to this Act. Grove, *Exceptions Clause*, *supra* note 61, at 951.

227. Jurisdiction and Removal Act of 1875 § 1, 18 Stat. at 470.

228. Crowe, *supra* note 41, at 173–75.

229. *Id.*

230. *Id.*

231. See Russell R. Wheeler & Cynthia Harrison, *Creating the Federal Judicial System* 16 (2005) (citing Frankfurter & Landis, *Business of the Supreme Court: A Study*, *supra* note 41, at 101–02).

232. *Id.*; see also Hartnett, *supra* note 2, at 1650.

233. See Peter Charles Hoffer, William James Hull Hoffer & N. E. H. Hull, *The Federal Courts: An Essential History* 200 (2016).

234. Judiciary Act of 1891, Pub. L. No. 51-517, § 6, 26 Stat. 826, 828.

directly appeal to the Court.²³⁵ Congress channeled diversity cases and all criminal matters to the new circuit courts of appeals, and those decisions were made final. This removed a large set of appeals from the Court's mandatory jurisdiction. Second, it maintained the Court's ability to enforce and unify federal law through certification or certiorari. The Act thus reduced the number of cases the Court had to decide but not the number of cases it might decide.

1. *Appellate Jurisdiction Under the Evarts Act.* — The Evarts Act allocated the Court's appellate jurisdiction across three distinct avenues that were not entirely mutually exclusive. The primary pathway to Supreme Court review was through section five, which gave the Court mandatory jurisdiction over a defined set of cases. It provided for direct review of the district courts in some cases²³⁶ and review of the circuit courts of appeals in others.²³⁷ It also required that “[i]n any case in which the jurisdiction of the court is in issue . . . the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision.”²³⁸

Section five's limitations teach important lessons. First, Congress was entirely capable of channeling particular types of cases to the Court using the writ of error. Second, Congress was willing and able to direct particular questions to the Court without any input from the Justices. Third, this question-specific review of questions was accomplished through certification of the question itself rather than through certiorari. Finally, the Court itself had no power to expand or contract its jurisdiction on appeal. Consistent with Article III, Congress created the exceptions and regulations through statute.

The second avenue to appellate review at the Supreme Court was certification of particular questions by the new circuit courts of appeals.²³⁹ In any case before the circuit courts, circuit judges had the option to certify

235. See Crowe, *supra* note 41, at 185.

236. Judiciary Act of 1891, Pub. L. No. 51-517, § 5, 26 Stat. at 827–28. There were five types of cases that went straight from the trial court to the Supreme Court. These consisted of cases involving “final sentences and decrees in prize causes,” capital convictions, cases of constitutional construction, cases that drew the constitutionality of a federal statute or treaty into question, and cases where the constitutionality of a state law or state constitution was at issue. *Id.*

237. The courts of appeals were final in diversity, admiralty, and criminal cases, along with cases arising under patent and revenue laws. In other cases, the Court had mandatory review, subject to a \$1,000 amount in controversy requirement. *Id.*

238. *Id.*

239. Starting in 1802, Congress permitted circuit courts to certify questions to the Supreme Court. Judiciary Act of 1802, Pub. L. No. 7-31, § 6, 2 Stat. 156, 159–61. When the circuit court was divided on a question, it could send that discrete question to the Supreme Court and await instructions. *Id.* Certification was only available from circuit courts—not from state courts—a distinction that remains to the present time. See *id.* (making reference to circuit courts only); Sup. Ct. R. 19.1.

questions to the Supreme Court.²⁴⁰ When a question was certified, the Court had the option of either answering the question or requiring the lower court to send the entire case up to the Court for review.²⁴¹

The differences between this form of certification and that from section five of the Evarts Act are apparent. Certification of the jurisdictional question from the district court was mandatory, and the Supreme Court could not require the entire case be brought up.²⁴² Its jurisdiction was limited to the question itself. In contrast, certification of questions from the circuit courts was in the discretion of the lower court judges, and the Supreme Court had the option of deciding the specified question or the entire case.²⁴³

The similarities between the two are also clear. Congress never gave the Court discretion to narrow review to particular questions.²⁴⁴ Certification was in the hands of the litigants (section five) or the circuit court judges. In addition, the language is consistent: Certification is the tool that limits jurisdiction to particular questions.

For cases flowing through the new courts of appeals, Congress believed that the question-certification procedure would be the primary method for bringing important issues to the Court for resolution.²⁴⁵ But Congress had some worry that the circuit courts might not always certify questions that should be resolved by the Supreme Court.²⁴⁶ Congress wanted the new circuit courts to serve as a filter between the district courts and the Supreme Court.²⁴⁷ It did not want these new courts to be able to avoid review by shirking their duty to certify questions when necessary. Accordingly, it gave the Court an independent power to bring cases before the Justices: certiorari.²⁴⁸ Certiorari was intended “as a sort of fallback pro-

240. Judiciary Act of 1891 § 6, 26 Stat. at 826, 828.

241. *Id.*

242. *Id.* § 5, 26 Stat. at 827–28.

243. *Id.* § 6, 26 Stat. at 828.

244. See *id.* §§ 5–6, 26 Stat. at 827–28.

245. See Hartnett, *supra* note 2, at 1656.

246. After Evarts introduced the certification provision to the Senate, he added, “[A]nother guard against . . . a careless or inadvertent disposition of important litigation by these courts; . . . there should be something besides a mere judgement within these courts as to what ought to be reviewed in the interest of jurisprudence and uniformity of decision” See 21 Cong. Rec. 10,222 (1890) (statement of Sen. William M. Evarts).

247. Thus, the new circuit courts of appeals found themselves stuck in the middle. See John Fabian Witt, Introduction: Constraint, Authority, and the Rule of Law in a Federal Circuit Court of Appeals, 85 *Fordham L. Rev.* 3, 3 (2016).

248. Evarts clearly described certiorari as the “guard” against “diversity of judgements” or the failure of the Court to certify a question. His statement before the Senate continued:

[T]he Supreme Court shall have a right, in any of these cases that are thus made final, by certiorari to take up to itself for final determination . . . and in that way the scheme of the [Senate Judiciary] committee does firmly

vision should the circuit courts of appeals prove, on occasion, to be surprisingly careless in deciding cases or issuing certificates.”²⁴⁹

Given its historical origins, certiorari was the natural device to use, but it constituted a significant break from the Court’s previous certiorari practice. In the past, the Court had used the writ of certiorari exclusively as an auxiliary device to bring up the entire record of a case already within the Court’s jurisdiction.²⁵⁰ The new statute left it to the Court to use certiorari to reach out and take jurisdiction of a case in addition to the record.²⁵¹ This was a traditional use of the writ at common law and in some states,²⁵² but the use of certiorari as an ordinary device to bring up cases for review was new for the Supreme Court.²⁵³

That said, the statute was careful to track the common law contours of certiorari. As the Court itself had noted previously, when certiorari was the vehicle used to bring about appellate review, the reviewing court would proceed as it would under a writ of error.²⁵⁴ This common law understanding was made explicit in the Evarts Act. Certiorari to the circuit court

and peremptorily make a finality on such subjects . . . and at the same time leaves flexibility, elasticity, and openness for supervision by the Supreme Court.

See 21 Cong. Rec. 10,222 (1890) (statement of Sen. William M. Evarts). It is worth noting that certiorari was not included in the House version of the bill but added by Evarts when the bill was in the Senate Judiciary Committee. Before writing his version of the bill, Evarts submitted a memorandum of the proposed measures with a general plan to “the Justices of the Supreme Court and one or two judges of the Circuit Court, inviting criticism and suggestion.” William Maxwell Evarts, *Arguments and Speeches of William Maxwell Evarts* 324 (Sherman Evarts ed., 1919). After receiving responses indicating “the general approval of the members of the bench,” Evarts dictated what became the Judiciary Act of 1891 to his secretary. See *id.* at 324–25. It is unclear if Evarts’s proposal initially included certiorari or if a member of the bench recommended its inclusion in the final version of the bill. Regardless, in an interview before passage of the bill, Evarts specifically identified the seemingly simple change of including certiorari as a principal feature which distinguished his bill from the version that had already passed the House. Mr. Evarts on His New Law, *N.Y. Trib.*, March 8, 1891, at 5.

249. Hartnett, *supra* note 2, at 1656; see also *Am. Constr. Co. v. Jacksonville, Tampa & Key W. Ry. Co.*, 148 U.S. 372, 383–84 (1893) (noting that the Court had only granted certiorari in two important questions and only because the courts of appeals “had declined to certify the question[s]”).

250. See *Am. Constr. Co.*, 148 U.S. at 380; see also *Hodges v. Vaughan*, 86 U.S. (19 Wall.) 12, 13 (1873) (“A motion for certiorari is founded upon a suggestion of diminution, and is designed to bring up some part of the record left back and not included in the transcript.”).

251. See Judiciary Act of 1891, Pub. L. No. 51-517, § 6, 26 Stat. 826, 828.

252. See *Harris v. Barber*, 129 U.S. 366, 369 (1889) (collecting cases).

253. See Fallon et al., *supra* note 75, at 30 (“[T]he Evarts Act introduced the then revolutionary, but now familiar, principle of discretionary review of federal judgments on writ of certiorari.”).

254. See *Harris*, 129 U.S. at 369. As the Court noted in *Harris*:

A writ of *certiorari*, when its object is not to remove a case before trial, or to supply defects in a record, but to bring up after judgment the proceedings of an inferior court or tribunal, whose procedure is not according to

would compel the lower court to “certif[y] to the Supreme Court for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court.”²⁵⁵ In this regard, Congress was merely stating the ordinary consequences of using a writ of certiorari as an appellate device. When the Court did issue a certiorari, it was “in the nature of a writ of error . . . [and] when the writ [was] granted, and the record certified in obedience to it, the questions arising upon that record must be determined according to fixed rules of law.”²⁵⁶ In essence, Supreme Court review of these cases was not mandatory—certiorari is always discretionary—but once the Court granted the writ, subsequent review was comprehensive. The Court decided the case as if on a writ of error.

The Evarts Act made a clear distinction throughout between cases—reviewed on appeal, error, or certiorari—and questions, which were to be reviewed on certification. These distinctions remain in the statutes to the present time. Section five of the Act, which governed direct review of certain district court actions on appeals or writs of error, included one additional category to those mentioned above.²⁵⁷ What set certification under section five apart from ordinary certification was (1) that the question was certified directly from the district court, and (2) that the lower court did not have discretion as to whether to certify the question.²⁵⁸ Section five demonstrates Congress could and would direct particular questions—instead of entire cases—to the Court if it thought it wise. What is more, Congress had a consistent language to handle such matters. Review of a question was handled through certification of the question.

the course of the common law, is in the nature of a writ of error. Although the granting of the writ of certiorari rests in the discretion of the court, yet after the writ has been granted, and the record certified in obedience to it, the questions arising upon that record must be determined according to fixed rules of law, and their determination is reviewable on error.

Id.

255. Judiciary Act of 1891 § 6, 26 Stat. at 828.

256. *Am. Constr. Co. v. Jacksonville, Tampa & Key W. Ry. Co.*, 148 U.S. 372, 387 (1893) (citing *Harris*, 129 U.S. at 369). *Harris* seems to suggest that certiorari only allows the superior court to inquire into jurisdiction. See *Harris*, 129 U.S. at 371–72 (“*Certiorari* goes only to the jurisdiction. It does not go to any errors of judgment that may have been committed by the justice [of the peace] in the progress of the exercise of that jurisdiction.” (internal quotation marks omitted) (quoting *Barber v. Harris*, 17 D.C. (6 Mackey) 586, 595 (1888))). To the extent common law certiorari prior to 1891 was actually limited to jurisdiction when used as an appellate device, that limitation did not apply to statutory certiorari, which specified that certiorari caused the case to go to the Court “as if it had been carried by appeal or writ of error to the Supreme Court.” See Judiciary Act of 1891 § 6, 26 Stat. at 828.

257. See Judiciary Act of 1891 § 5, 26 Stat. at 827–28.

258. See *id.*

B. *Developments From 1891 Through 1925*

The Evarts Act provided the architecture for the Court's appellate jurisdiction going forward. Henceforth, there were three paths to appellate review: mandatory review of cases, discretionary review of cases through certiorari, or review of particular questions through certification.²⁵⁹ Congress, through statute, reassigned various types of cases to different paths, but these three alternative pathways remained largely unaltered. What has changed over time are the sets of cases assigned to each alternative. For instance, in 1914 and 1916, Congress added review of certain state court decisions to the set of cases reviewable through certiorari.²⁶⁰

In addition to these congressional changes, the Court also altered its certiorari jurisdiction in the years following the Evarts Act. Specifically, it began using common law writs of certiorari to take cases. While the Court always had certiorari power under the All Writs Act provision of the Judiciary Act of 1789,²⁶¹ it had never used certiorari to take jurisdiction of a case on appeal.²⁶² After the Evarts Act, the Court occasionally used certiorari for cases that did not fit into categories specified in the reorganization of the Court's jurisdiction.²⁶³ When a lower court "acted without jurisdiction, or in disregard of statutory provisions," the Court "resorted to [certiorari] from necessity to afford a remedy where there would otherwise have been a denial of justice."²⁶⁴ For instance, in *Ex parte Chetwood*, the Court found that the circuit court had exceeded its jurisdiction and allowed certiorari because a writ of error was not available.²⁶⁵ Similarly, in *McClellan v. Carland*, the Court used certiorari to review an interlocutory appeal that did not fall within the parameters of certiorari under the Evarts Act.²⁶⁶

259. See *id.* The Court retained the option of ordering the entire case up for review when a question was certified. *Id.* § 6, 26 Stat. at 828.

260. Act of Sept. 6, 1916, Pub. L. No. 64-258, sec. 2, § 237, 39 Stat. 726, 726-27; Act of Dec. 23, 1914, Pub. L. No. 63-224, 38 Stat. 790 (codified as amended at 28 U.S.C. § 1257 (1994)). Prior to 1914, it was settled law that the Court lacked jurisdiction to hear cases from state courts when the judgment below upheld the federal claim. Arthur D. Hellman, Lauren K. Robel & David R. Stras, *Federal Courts: Cases and Materials on Judicial Federalism and the Lawyering Process* 1187 (2d ed. 2009).

261. Judiciary Act of 1789, Pub. L. No. 1-20, § 14, 1 Stat. 73, 81-82 (codified as amended at 28 U.S.C. § 1651 (1994)).

262. See *Am. Constr. Co. v. Jacksonville, Tampa & Key W. Ry. Co.*, 148 U.S. 372, 380 (1893).

263. See *infra* note 275 and accompanying text.

264. *Degge v. Hitchcock*, 229 U.S. 162, 170 (1913).

265. 165 U.S. 443, 461-62 (1897). Interestingly, the Court concludes by saying, "We presume, after what we have said, it will not be necessary for the writ to issue." *Id.* at 462.

266. 217 U.S. 268, 278-79 (1910); see also Pfander, *Jurisdiction-Stripping*, *supra* note 125, at 1493 & n.269 (citing *McClellan* as an example of the Court "securing discretionary review of actions of inferior federal tribunals" by "issuing common law certiorari . . . because statutory certiorari was unavailable"). An interesting question is why the Court did not use

Aside from this development, the striking feature of the Court's cases in the wake of the Evarts Act is how little changed about the Court's role in the cases it decided. For one thing, it rarely used certiorari,²⁶⁷ and when it did, it primarily acted as Congress intended: It took cases when the circuit courts of appeals neglected to certify important questions.²⁶⁸ But when the Court took a case on certiorari, it reviewed the entire case, not just the important question.²⁶⁹

Indeed, the Court explicitly reaffirmed that certiorari did nothing to amend the Court's obligations when deciding a case as if on error or appeal. In one of its first cases interpreting the Act, the Court affirmed that "appeals or writs of error,' must be understood within the meaning of those terms as used in all prior acts of Congress relating to the appellate powers of this court."²⁷⁰ The Court was explicit that, in appeals, "[A] case cannot be brought to this court in fragments."²⁷¹ Even more to the point, the Court declared, "From the very foundation of our judicial system the object and policy of the acts of Congress in relation to appeals and writs of error . . . have been . . . to have the whole case and every matter in controversy in it decided in a single appeal."²⁷²

certiorari in similar cases before the Evarts Act. It seems that once Congress opened the door to use certiorari to take jurisdiction of some cases, the Court discovered some preexisting power to use certiorari to reach areas Congress did not specify as appropriate for certiorari jurisdiction. This raises an interesting question about the Court's power: Was the use of certiorari in these and similar cases appropriate? An originalist view would find firmly in the affirmative, as the 1789 statute plainly intended to incorporate the common law powers of the writ. But because the Court's regular, established, and publicly stated use of the writ was explicitly confined to certiorari as an auxiliary process, considerations of precedent and concerns for America's unique legal development—to say nothing of the value of consistency and predictability—would counsel that the Court erred.

267. For instance, two years after the passage of the Evarts Act, the Court noted that its certiorari power "should be exercised sparingly and with great caution." *Am. Constr. Co.*, 148 U.S. at 383. It noted that "while there have been many applications to this court for writs of certiorari . . . two only have been granted . . . and in each of those cases the circuit court of appeals had declined to certify the question to this court." *Id.* at 383–84.

268. *Id.* Circuit courts were admonished to exercise their unilateral power to certify questions of sufficient "gravity and importance." *In re Lau Ow Bew*, 141 U.S. 583, 586–87 (1891).

269. See *In re Lau Ow Bew*, 141 U.S. at 587 ("[A]ny case in which the judgment of the circuit court of appeals is made final may be required by this court, by certiorari or otherwise, to be certified to it for review and determination, as if it had been brought here on appeal or writ of error." (emphasis added)).

270. *McLish v. Roff*, 141 U.S. 661, 665 (1891). Another interesting passage of *McLish* is worth noting. The dispute in the case was whether the question of jurisdiction could be appealed before the Court entered final judgment. *Id.* at 664. In deciding it could not, the Court noted that, if Congress had intended to change a fundamental requirement of the writ of error or the appeal, it "would have been indicated in express and explicit terms." *Id.* at 667.

271. *Id.* at 665.

272. *Id.* at 665–66. The major issue for the Court was not whether it could narrow its focus to questions. Instead, the chief problem was whether the Court could grant certiorari

Put differently, the Court still viewed its job as deciding entire cases as if on writs of error or appeal.²⁷³ The Court continued to exercise its obligation to review the entire record for error even if the record or testimony was extensive.²⁷⁴ And questions the Court explicitly noted were not worth its time were still reviewed because they were part of the case.²⁷⁵

* * *

The most significant change during this era was the Court's quiet—and perhaps accidental—limitation of review to the questions mentioned in the assignment of error. This was a seemingly small shift, but it was an early first step on the Court's path toward narrowing certiorari jurisdiction to questions instead of cases. The story begins in 1898 in a case called *Hubbard v. Tod*.²⁷⁶ The facts of the case are not important, but the

before a circuit court entered final judgment. The Court decided that the Evarts Act gave the Court “a comprehensive and unlimited power” to transfer cases from the circuit courts to itself for review. *Forsyth v. City of Hammond*, 166 U.S. 506, 513 (1897). Even when deploying such grandiose language, however, the Court never presumed it could do anything but take the entire case. *Id.* at 513–14.

273. See *supra* note 269 and accompanying text; see also *United States v. Dickinson*, 213 U.S. 92, 98 (1909) (quoting Judiciary Act of 1891, Pub. L. No. 51-517, § 6, 26 Stat. 826, 828).

274. See, e.g., *Adams v. Cowen*, 177 U.S. 471, 482 (1900).

275. *Crossman v. Burrill*, 179 U.S. 100, 115 (1900) (“[Q]uestions of payment . . . are pure questions of fact, . . . [and] had they been the only questions presented by the record, a writ of certiorari would not have been granted; . . . [the questions] appear to this court . . . to have been rightly decided by the circuit court of appeals”); see also *Cal. Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 306, 325 (1905) (“Other questions have been discussed by counsel, but they do not require special notice at our hands. We are content with the disposition made of them in the courts below.”).

That said, the Court felt free not to write about particular questions—especially fact-laden questions—if the circuit court had written extensively on the matter and the Court was satisfied with its description and conclusions. See, e.g., *Farmers' Loan & Tr. Co. v. Penn Plate Glass Co.*, 186 U.S. 434, 457–58 (1902); *Adams*, 177 U.S. at 482. An interesting example is *Moffett, Hodgkins & Clarke Co. v. Rochester*, 178 U.S. 373, 387–88 (1900). The lower courts had each reached a common conclusion about a contract at issue in the case. The Court notes that it “usually accepts such concurrence as conclusive,” but in this case, it went on to disagree with the lower courts. *Id.* at 387. The Court was paying close attention to the record even in questions in which it usually treated the lower court decision as conclusive.

Further, the Court continued its longstanding practice of treating agreement between the lower courts on an issue of fact as conclusive in equity and admiralty cases. See, e.g., *Workman v. City of New York*, 179 U.S. 552, 555 (1900) (recognizing “the well-settled doctrine that where both courts below have concurred in a finding of fact, it will, in this court, be accepted as conclusive, unless it affirmatively appears that the lower courts obviously erred”). Even here, however, the Court did not accept factual findings blindly. The Justices still examined the record to make sure such factual determinations were justified. See, e.g., *id.* (explaining that “the testimony” on the record “would not justify the assertion” “that both the courts below had manifestly erred in their appreciation of the facts”); *Moffett, Hodgkins & Clarke Co.*, 178 U.S. at 387–88.

276. 171 U.S. 474 (1898). It arguably began two years earlier in *Saltonstall v. Birtwell*, 164 U.S. 54 (1896). Joseph Birtwell sued the customs collector in Boston to recover duties

procedural history is. By statute, the Eighth Circuit's decision in the case was final, but the Court could take the case through certiorari.²⁷⁷ The Court did so, and in the course of deciding the case, it first noted that the case, "having been brought up by certiorari on the application of petitioner below, is pending before us as if on his appeal."²⁷⁸ Next, it mentioned in passing that, "as respondents did not apply for certiorari, we shall confine our consideration of the case to the examination of errors assigned by petitioner."²⁷⁹ Essentially, the Court was noting that there was no cross-appeal in this case, so it was only addressing the record on behalf of the party that had, through certiorari, effectively obtained an appeal.²⁸⁰

There is no indication that this breezy aside was meant to upend the traditional understanding that the Court would examine the entire record for error in cases coming before the Justices on a writ of error.²⁸¹ Indeed, the Court continued to insist, in a series of cases from 1910 to 1915, that it was "not limited to a consideration of the points presented by the plaintiff."²⁸² Instead, "the entire record is before [the Court], with power to decide the case as it was presented to the Circuit Court of Appeals."²⁸³ Further, the Court explicitly extended this understanding of the writ in the context of certiorari.²⁸⁴

that had been overcharged. *Id.* at 65. The government agreed that Birtwell had been overcharged but argued he did not protest in time. *Id.* Birtwell prevailed at trial, during which the judge made some special findings in favor of Birtwell. *Id.* at 66. The government appealed the timing question to the First Circuit Court of Appeals, but it did not assign error to the special findings. See *Saltonstall v. Birtwell*, 66 F. 969, 970 (1st Cir. 1895). Birtwell prevailed on the initial appeal, and the government petitioned for certiorari. See *Saltonstall*, 164 U.S. at 65. Once again, it argued the timing question, but the Solicitor General raised the special findings in the petition and again in the merits brief. See Brief for Plaintiffs in Error at 11, *Saltonstall*, 164 U.S. 54 (No. 588).

Affirming the judgment below, the Court refused to consider whether the circuit court had committed error "as a matter of practice" in directing judgment based on special findings. *Saltonstall*, 164 U.S. at 70. Instead, it noted that "[n]o such error was assigned in the circuit court, or was considered in the court of appeals." *Id.* The petitioner assigned this error for the first time in the application for certiorari, and the Court implicitly decided the claim was waived. *Id.* The Court's opinion provides no authority justifying its refusal. Interestingly, *Saltonstall* predates both *Hubbard* and *Alice State Bank*. See *Alice State Bank v. Hous. Pasture Co.*, 247 U.S. 240 (1918); *Hubbard*, 171 U.S. 474; *Saltonstall*, 164 U.S. 54. Neither case, however, cites *Saltonstall* as authority to deviate from the traditional requirement to review the entire record. See *Alice State Bank*, 247 U.S. 240; *Hubbard*, 171 U.S. 474.

277. See *Hubbard*, 171 U.S. at 494.

278. *Id.*

279. *Id.*

280. The Court said as much about *Hubbard* in *Montana Mining Co. v. St. Louis Mining & Milling Co. of Montana*, 186 U.S. 24, 31 (1902).

281. See, e.g., *Garland v. Davis*, 45 U.S. (4 How.) 131, 143 (1846).

282. *Baker v. Warner*, 231 U.S. 588, 593 (1913).

283. *Lutcher & Moore Lumber Co. v. Knight*, 217 U.S. 257, 267 (1910).

284. See *id.*; see also *Delk v. St. Louis & S.F. R.R. Co.*, 220 U.S. 580, 588–89 (1911) ("As the case is here upon certiorari . . . this court has the entire record before it, with the power

In 1918, the Court granted certiorari in *Alice State Bank v. Houston Pasture Co.*²⁸⁵ The case involved an ownership dispute over 1,280 acres of land granted to General Sam Houston by the Republic of Texas.²⁸⁶ Houston's executor passed the title to Colman, Mathis, and Fulton, who apparently lived on the 1,280 acres until they transferred the title to Alice State Bank in 1914.²⁸⁷ The 1918 case resulted from a dispute over the ownership of the land, which was also claimed by the Houston Pasture Company.²⁸⁸ Complicating matters, an 1870 Texas statute "declared that a land certificate for 1,280 acres theretofore issued to General Sam Houston for military services was a 'just claim from its original date' and authorized the issue of a 'patent on the same, in the name of the heirs of General Sam Houston, deceased.'"²⁸⁹

Alice State Bank argued that, even if the statutory grant was invalid, the heirs had obtained the title through adverse possession.²⁹⁰ Evidence showed that the heirs had paid taxes on, grazed cattle on, and excluded others from the land.²⁹¹ The district court disallowed the adverse possession defense because the land was fenced on only three sides.²⁹² The fourth side of the land was bounded by the Nueces Bay, which the trial judge ruled was insufficient to start the statute of limitations running.²⁹³ The Supreme Court reversed and sent the case back down for a new trial, finding for the bank that water could be a sufficient barrier for an adverse possession claim, thus starting the statute of limitations clock.²⁹⁴

In the third paragraph of an otherwise insignificant four-paragraph opinion, Justice Oliver Wendell Holmes offered the bank some advice.²⁹⁵ He asserted that there was a "plausible argument" that the bank could have won on alternative grounds given the materials in the record.²⁹⁶ Citing *Hubbard*, Holmes went on to say that "as that is not the ground upon which the writ of certiorari was asked or granted we confine our discussion to the matter relied upon in asking the intervention of this Court."²⁹⁷ From

to review the action of that court, as well as direct such disposition of the case as that court might have done . . .").

285. 247 U.S. 240 (1918).

286. *Id.* at 241.

287. *Id.* at 241–42.

288. See *id.* at 241.

289. *Id.*

290. *Id.* at 242.

291. *Id.*

292. See *id.*

293. *Id.*

294. *Id.* at 242–43.

295. *Id.* at 242.

296. *Id.*

297. *Id.*

there, he moved on to describe the adverse possession claim that the Court found persuasive.²⁹⁸

Holmes's opinion in *Alice State Bank* did not itself deviate from traditional practice; it decided a sufficient set of questions to justify its judgment.²⁹⁹ When the Court can conceivably reverse on multiple grounds, there is no obligation to review every question.³⁰⁰ The Court has the obligation to decide the case, and if it can do that by reversing on question one before considering question two, it is free to do so.³⁰¹ Of course, it might be beneficial for the Court to signal its views on other questions to help lower courts decide the case on remand,³⁰² but such guidance, while permissible, is not necessary to fulfill the obligation to render judgment. Further, in cases like *Alice State Bank*, there might be prudential reasons to focus review on the specified questions. If the Court could reverse on either an asked question or an unasked question, perhaps it should respect the parties' wishes and focus on the presented issue.³⁰³ And in *Alice State Bank*, the unasked, alternative ground dealt with the interpretation of a state statute, so perhaps it was more appropriate for the Court to focus on the issue of general interest—adverse possession—instead of focusing on a federal interpretation of a Texas statute.³⁰⁴

Though Holmes's opinion was thus consistent with traditional writ of error practice, his brief aside into the potential dispositive issue of the effects of the Texas statute allowed him to quietly change the Court's practice regarding review of cases from federal courts. In the past, the Court had an independent obligation to examine the whole record in cases on a writ of error to a lower federal court.³⁰⁵ But now, even if the Court noted an error in the record, it felt free to pass it by if the plaintiff-in-error had not raised it.³⁰⁶ After *Alice State Bank*, the Court did not always feel

298. *Id.*

299. See *id.* at 242–43; *supra* notes 64–71 and accompanying text.

300. See *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 374–75 (2010) (Roberts, C.J., concurring) (discussing the Court's practice of avoiding broad constitutional questions when there is a valid narrower ground of decision).

301. See *supra* notes 68–71 and accompanying text.

302. But see *Citizens United*, 558 U.S. at 405–06 (Stevens, J., concurring) (arguing that the majority “transgressed yet another ‘cardinal’ principle of the judicial process: ‘[I]f it is not necessary to decide more, it is necessary not to decide more.’” (alteration in original) (quoting *PDK Labs. Inc. v. Drug Enf't Admin.*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring in part and concurring in the judgment))).

303. See Oldfather, *supra* note 68, at 166 (explaining that adjudicating the presented issues is appropriate since “those claims represent the parties’ conceptualization of the specific dispute . . . and thus stand as strong evidence of the legally significant facts that ought to anchor the court’s reasoning”).

304. *Alice State Bank*, 247 U.S. at 242.

305. See *supra* note 179 and accompanying text.

306. See, e.g., *Fed. Trade Comm'n v. Pac. States Paper Trade Ass'n.*, 273 U.S. 52, 66 (1927) (stating that the Court would not decide certain issues that the respondents failed

compelled to review the full record for errors; it just looked at the questions included in the assignment of error.³⁰⁷

IV. THE ERA OF GREAT DISCRETION

The ascension of William Howard Taft to the role of Chief Justice kicked off perhaps the most transformative few years the Court has ever known. Taft took his position and inherited a judiciary facing a great deal of strain.³⁰⁸ Just as the Civil War and Reconstruction had expanded the scope of federal law and overwhelmed the judiciary in the mid-nineteenth century, the courts were again overworked at the sunset of the Progressive Era, due in large part to World War I and Prohibition.³⁰⁹ The former brought espionage cases and litigation pertaining to cancelled wartime contracts.³¹⁰ The latter brought not only the Volstead Act³¹¹ but also the rise of organized crime and the pursuant federal response.³¹² Criminal caseloads in the federal courts increased eight hundred percent, and the

to petition for certiorari on, despite respondents' subsequent request for Court review of those issues); *Webster Elec. Co. v. Splitdorf Elec. Co.*, 264 U.S. 463, 464 (1924) (“[T]he petition upon which the writ was granted challenged the decision below only in respect of [one disputed] patent, and we are not called upon to consider the contentions now advanced as to the others.”).

307. See, e.g., *Charles Warner Co. v. Indep. Pier Co.*, 278 U.S. 85, 91 (1928) (limiting the Court's review to questions in the assignment of error and citing *Alice State Bank*, 247 U.S. at 242, to support that action); *Com. Credit Co. v. United States*, 276 U.S. 226, 229–30 (1928) (same); *Steele v. Drummond*, 275 U.S. 199, 203 (1927) (same).

308. See Frankfurter & Landis, *Business of the Supreme Court: A Study*, supra note 41, at 258–59.

309. See Crowe, supra note 41, at 201.

310. *Id.* at 199.

311. National Prohibition (Volstead) Act, Pub. L. No. 66-66, 41 Stat. 305 (1919) (codified at 27 U.S.C. §§ 1–5 (1925) (repealed 1933)).

312. See Crowe, supra note 41, at 199. Taft traced a longer list of the sources of judicial overwork in a speech to the Chicago Bar Association in 1921:

Dormant powers of the Federal Government under the Constitution have been made active, and the Federal Government has poked its nose into a great many fields where it was not known before, for lack of Congressional initiation. In the first place, the giving to the Federal trial courts jurisdiction of suits involving federal questions without regard to citizenship was one addition. Then the enactment of the Interstate Commerce law and the casting upon Federal Courts the revisory power over the action of the Interstate Commerce Commission was another. Then, the Anti Trust Law, the Railroad Safety Appliance Law, the Adamson Law, the Federal Trade Commission Law, the Clayton Act, the Federal Employers' Liability Law, the Pure Food Law, the Narcotic Law, the White Slave Law and other acts, and finally the Eighteenth Amendment and the Volstead Act, have expanded the civil and criminal jurisdiction of the Federal Courts of first instance to such an extent that unless something is done, they are likely to be swamped, and delay is a denial of justice.

William Howard Taft, *Three Needed Steps of Progress*, 8 ABA J. 34, 34 (1922).

number of certiorari petitions awaiting the Court's review effectively doubled from 270 to 539.³¹³

Taft arrived at the Court with a preexisting interest in judicial reform. While serving previously as president of the American Bar Association, Taft had pushed for judicial reforms.³¹⁴ As Chief Justice, he marshalled the bar to continue the campaign. Taft was a "crackerjack administrator" with a keen interest in making the judiciary more efficient from top to bottom.³¹⁵

His first victory was the Judicial Conference Act of 1922.³¹⁶ The bill created twenty-four new district court judges to help handle the growing caseload.³¹⁷ Second, it gave the Chief Justice the power to transfer district judges between circuits so that those judges with excess capacity could be assigned to help out in regions where the work was overwhelming the current complement of judges.³¹⁸ Third, the bill established the Conference of Senior Circuit Judges, which eventually became known as the Judicial Conference.³¹⁹ This annual meeting allowed the Chief Justice to convene a gathering of the nation's top judges, gather information, generate new ideas, and make recommendations to Congress.³²⁰

His second victory was the Judges' Bill of 1925.³²¹ Citing the Court's ever-expanding workload, Taft and his colleagues pressed for an expansion of the Court's certiorari powers.³²² This legislation codified Taft's vision—then new, now so entrenched that modern lawyers struggle to imagine an alternative—that the Supreme Court should oversee the federal judiciary³²³ by focusing on cases that raised constitutional questions or divided the lower courts.

313. Crowe, *supra* note 41, at 199 (citing Deborah J. Barrow, Gary Zuk, & Gerard S. Gryski, *The Federal Judiciary and Institutional Change* 32 (1996); Frankfurter & Landis, *Business of the Supreme Court: A Study*, *supra* note 41, at 295).

314. See Robert C. Post, *Mr. Taft Becomes Chief Justice*, 76 U. Cin. L. Rev. 761, 764 n.13 (2008) (noting that Taft advocated for reforms designed to reduce the delay in hearing and deciding cases as well as the increasing costs of litigation).

315. *Id.* at 779–80 (quoting Charles Evans Hughes's observation that the "efficient administration of justice was, after all, the dominant interest of his public life").

316. Act of Sept. 14, 1922, Pub. L. No. 67-298, 42 Stat. 837.

317. *Id.* § 1, 42 Stat. at 837–38.

318. *Id.* § 3, 42 Stat. at 839.

319. *Id.* § 2, 42 Stat. at 838–39.

320. *Id.*

321. Judiciary Act of 1925, Pub. L. No. 68-415, sec. 1, § 239, 43 Stat. 936, 937–38.

322. See *Jurisdiction of Circuit Courts of Appeals and the Supreme Court of the United States: Hearing on H.R. 8206 Before the H. Comm. on the Judiciary, 68th Cong. 10, 19–20, 24, 28 (1924)* (statements of Willis Van Devanter, J., James C. McReynolds, J., George Sutherland, J. & William H. Taft, C.J.).

323. Robert Post, *The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court*, 85 Minn. L. Rev. 1267, 1271 (2001) [hereinafter Post, *Supreme Court Opinion as Institutional Practice*].

Over the decades, Congress would continue to expand the Court's discretion by expanding the types of cases the Court would hear through certiorari. However, as this Part demonstrates, Congress never approved—or even considered—the idea that the Court would focus on self-selected questions. This Part begins by recounting the legislative history of the Judges' Bill and the Justices' promise that certiorari review encompassed the entire case. It next examines *Olmstead v. United States*, the case in which the Court took for itself the power to select its own questions for review.³²⁴ The remainder of the Part traces subsequent twentieth-century statutory changes to the Court's appellate jurisdiction.

A. *The Judges' Bill*

The Judges' Bill did not change the available forms of appellate review. Mandatory cases still came before the Court through writs of error and appeals. Mandatory questions still came up through certification.³²⁵ Similarly, the Judges' Bill did not change the certiorari mechanism. As before, the Court could use certiorari “to require that there be certified to it [from a state court] for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment . . . has been rendered.”³²⁶ In federal cases, the Court could issue certiorari and proceed “with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal.”³²⁷

The transformational nature of the Judges' Bill was due not to any procedural innovation but rather due to the shifting of large sets of cases out of the Court's mandatory jurisdiction. The Judges' Bill dramatically

324. See 277 U.S. 438, 466 (1928) (noting that the preceding discussion had resolved “the only question that comes within the terms of our order granting certiorari” but proceeding to the merits of other claims rejected in the lower courts), overruled on other grounds in part by *Katz v. United States*, 389 U.S. 347 (1967); *infra* section IV.B.

325. Judiciary Act of 1925 sec. 1, § 239, 43 Stat. at 938. As before, when a circuit court of appeals certified “any questions or propositions of law concerning which instructions are desired,” the Supreme Court could

either give binding instructions on the questions and propositions certified or may require that the entire record in the cause be sent up for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there by writ of error or appeal.

Id.

Under the Judges' Bill, jurisdictional questions from district courts were no longer appealed directly to the Supreme Court; however, the language allowing circuit courts to certify questions and for the Supreme Court to force certification of cases through certiorari was essentially unchanged. See *id.* sec. 1, §§ 238–240, 43 Stat. at 938; see also Judicial Code of 1911, Pub. L. No. 61-475, §§ 238–240, 36 Stat. 1087, 1157.

326. Judiciary Act of 1925 sec. 1, § 237(b), 43 Stat. at 937.

327. *Id.* sec. 1, § 240(a), 43 Stat. at 938–39. The notable change here was to refer to the writ of error in federal cases as “unrestricted.”

reduced the mandatory docket. It limited mandatory review of state decisions to cases where the state court (1) upheld a state statute or authority against a challenge based on constitutional or federal law, or (2) struck down a federal statute, treaty, or authority as unconstitutional.³²⁸ In federal cases, the Court still had to take cases where a court of appeals struck down a state statute³²⁹ and a few other specified types of cases directly from the district courts.³³⁰ The remainder of the docket was made discretionary.

At the congressional hearings on the Judges' Bill, the Justices consistently assumed that certiorari was simply a pathway to traditional review on a writ of error.³³¹ The ability of a "writ of error . . . improvidently sought" to be "regarded and acted on as a petition for certiorari" in the final bill³³² demonstrated just how similarly the Justices believed the two writs functioned. While Taft testified in 1922 that a distinction between writs of error and certiorari was "necessary to maintain," he pointed out the writs functioned so similarly that, when a case was wrongly brought upon writ of error instead of certiorari, it should not be dismissed as the existing statutes required.³³³ He argued the ability of the Court to consider a writ of error wrongly sought "as an application for certiorari and acted upon as such" was an important remedy provided by the proposed legislation and would allow for the Court to hear additional cases.³³⁴ Justices James McReynolds and Willis Van Devanter made the same argument two years later.³³⁵ McReynolds testified that, if counsel is unsure whether to apply for writ of error or certiorari, they "can be perfectly safe by applying for a writ of certiorari."³³⁶ When Senator Selden Spencer sought to clarify McReynolds's point by asking, "[Counsel] can apply for a writ of error, and if it is found that the writ of error was improvidently granted, then it is treated as a petition for writ of certiorari?"³³⁷ Van Devanter confirmed that

328. *Id.* sec. 1, § 237, 43 Stat. at 937–38.

329. *Id.* sec. 1, § 240(b), 43 Stat. at 939.

330. *Id.* sec. 1, § 238, 43 Stat. at 938.

331. See *infra* notes 333–343 and accompanying text.

332. Judiciary Act of 1925 sec. 1, § 237(c), 43 Stat. at 938.

333. Jurisdiction of Circuit Courts of Appeals and United States Supreme Court: Hearing on H.R. 10479 Before the H. Comm. on the Judiciary, 67th Cong. 8 (1922).

334. *Id.* at 6. Taft went so far as to note that "some very wise lawyers have not only taken out a writ of error but have also filed a petition for the writ of certiorari, so that if they miss on one they can catch it with the other." *Id.*

335. See Jurisdiction of Circuit Courts of Appeals and of the Supreme Court of the United States: Hearing on H.R. 8206, *supra* note 322, at 18–19 (statement of Willis Van Devanter, J.); Procedure in Federal Courts: Hearing on S. 2060 and S. 2061 Before a Subcomm. of the S. Comm. on the Judiciary, 68th Cong. 36 (1924) (statement of James McReynolds, J.).

336. Procedure in Federal Courts: Hearing on S. 2060 and S. 2061 Before a Subcomm. of the S. Comm. on the Judiciary, *supra* note 335, at 25, 36 (statement of James McReynolds, J.).

337. *Id.* at 36 (statement of Sen. Selden Spencer).

the proposed legislation intentionally provided this type of relief. Use of the wrong writ “does not shut [counsel] out; the mistake is not fatal,” Van Devanter reassured Spencer, because “[t]he bill has provisions at every point which are intended to save people from mistakes in mere procedure.”³³⁸

Van Devanter testified that granting certiorari, like granting a writ of error, implied that the Justices all understood “that, in the entire environment of the case, it is one that should be argued at length before them, be considered by them in the light of that presentation and then deliberately decided.”³³⁹ He continued, “Granting the writ means, and only means, that the court finds probable cause for a full consideration of the case in ordinary course.”³⁴⁰ Indeed, Van Devanter expressly promised that expanding the scope of certiorari would do nothing to adjust the Court’s procedures.³⁴¹ Justice McReynolds affirmed that certiorari meant the full case should be “reheard upon its merits.”³⁴² Taft and the other Justices argued for broader discretionary powers in federal cases, especially since certiorari jurisdiction “extend[ed] to the whole case and every question presented in it.”³⁴³

After passage of the Judges’ Bill, the Court still recognized—at least at first—that review after granting certiorari required treating the case as if it had appeared on a writ of error.³⁴⁴ But this recognition soon faded. Before the end of the 1920s, the Court decided it had the power to limit review on certiorari to questions.³⁴⁵ This transition was not embraced at first by all of the Justices.³⁴⁶ But any resistance on the Court quickly collapsed.

338. *Id.* at 37 (statement of Willis Van Devanter, J.).

339. James Craig Peacock, *Purpose of Certiorari in Supreme Court Practice and Effect of Denial or Allowance*, 15 *ABA J.* 681, 684 (1929).

340. *Id.*

341. Consider Justice Van Devanter’s response to Senator Andrew J. Montague’s question in the House hearings. Montague asked Van Devanter, “Although you ask for discretionary power, you propose to exercise it in the method you have heretofore exercised it,” to which Van Devanter replied, “Certainly. Of course, we could not maintain the institution and make it accomplish its purpose unless we did, and there is no purpose to do anything else.” See *Jurisdiction of Circuit Courts of Appeals and of the Supreme Court*, Hearing on H.R. 8206, *supra* note 322, at 18.

342. See *Procedure in Federal Courts: Hearing on S. 2060 and S. 2061 Before a Subcomm. of the S. Comm. on the Judiciary*, *supra* note 335, at 30.

343. See 66 *Cong. Rec.* 2921 (1925) (reproducing Letter from William H. Taft, C.J., U.S. Sup. Ct., to Royal S. Copeland, Sen., U.S. Senate (Dec. 31, 1924)).

344. *Fed. Trade Comm’n v. Pac. States Paper Trade Ass’n*, 273 U.S. 52, 66 (1927) (“This court has the same power and authority as if the case had been carried here by appeal or writ of error.”).

345. See *Md. Cas. Co. v. Jones*, 278 U.S. 596, 596 (1928) (mem.); *Olmstead v. United States*, 276 U.S. 609, 609 (1928) (mem.); *Pueblo of Santa Rosa v. Fall*, 273 U.S. 678, 678 (1926) (mem.).

346. See *infra* text accompanying notes 362–375.

B. *Olmstead: Internal Disagreements About Limiting Review on Certiorari*

Olmstead is a foundational case in criminal procedure. It is also the first case in which the Court unambiguously asserted the power to use certiorari to take particular questions instead of reviewing the case as a whole.³⁴⁷ As such, it deserves a place in the federal courts canon.

In brief, the facts of the case involve a somewhat large conspiracy to traffic in illicit alcohol in the state of Washington during the Prohibition Era.³⁴⁸ Without a warrant, federal officials tapped the phones of several key players in the scheme in violation of a state statute prohibiting such taps.³⁴⁹ The transcripts of many of these recordings were read to the jury during the trial, and the defense objected repeatedly, thus preserving the evidentiary ruling for an eventual appeal on error.³⁵⁰ The conspirators were convicted and lost their subsequent appeal at the Ninth Circuit.³⁵¹

Several defendants then applied to the Supreme Court for certiorari. The defendants all claimed that the wiretaps violated their constitutional rights and that the district court erred by admitting the transcripts into evidence.³⁵² At least one of the defendants also alleged that the district court erred in admitting the transcripts because such taps were illegal in Washington, and it is improper to admit illegally obtained evidence.³⁵³

Consistent with the Court's rules, the petitioners' briefs followed the form for writs of error. In particular, the briefs set out their complaints about the lower courts' legal decisions in an "Assignment of Errors."³⁵⁴ The parties had every reason to expect that, if certiorari were issued, the Court would proceed as if on a writ of error and examine the entire record, especially all of these alleged errors.

As it turns out, the Court did grant certiorari on January 9, 1928. But the order limited consideration "to the single question [of] whether the use of evidence of private telephone conversations between the defend-

347. See *Olmstead*, 276 U.S. at 609.

348. *Olmstead v. United States*, 277 U.S. 438, 455–57 (1928).

349. See *id.*

350. *Id.* at 471 (Brandeis, J., dissenting).

351. *Id.* at 438.

352. *Id.* at 455.

353. See Petition for Writ of Certiorari at 11, *Olmstead*, 277 U.S. 438 (No. 533) (arguing that "[b]ecause the tapping of the telephone wires was unlawful, being a direct violation of the penal statutes of the State of Washington, . . . the evidence[,] . . . having been obtained unlawfully, was inadmissible").

354. Sup. Ct. R. 25 (1926). The Court's rules from this period are a bit convoluted on the subject. Rule 8 separately required an assignment of errors for appeals or writs of error. Sup. Ct. R. 8 (1926). For certiorari, Rule 35 only required the transcript, "a summary and short statement of the matter involved and the reasons relied on for the allowance of the writ." Sup. Ct. R. 35 (1926). The rule also permitted a supporting brief that must follow Rule 25, which required an assignment of errors. Sup. Ct. R. 25 (1926).

ants and others, intercepted by means of wire tapping, amounted to a violation of the Fourth and Fifth Amendments”³⁵⁵ What exactly this limitation meant became a matter of some dispute among the Justices.

Writing for a five-member majority, Chief Justice Taft declared that wiretaps were not searches or seizures under the Constitution.³⁵⁶ The four dissenters each wrote separately. Each dissenter had a different view on how the Court should have reached a different decision.

Three dissenters were convinced that the evidentiary question fell within the Court’s jurisdiction despite the limitation in the order granting certiorari. Justice Louis Brandeis wrote a thorough and colorful dissent arguing that the transcripts should not have been allowed into evidence.³⁵⁷ He argued that the petitioners were correct that warrantless wiretaps violated their constitutional rights and that it was improper to admit illegally obtained evidence.³⁵⁸ Justice Holmes similarly thought that the government should not be able to use illegally obtained evidence,³⁵⁹ but unlike Brandeis, Holmes was unwilling to support the petitioners’ constitutional claims.³⁶⁰ He did not dismiss the argument outright, but he would have avoided the question, apparently since he thought it properly decided in favor of the petitioners on the evidentiary claim.³⁶¹

Justices Harlan Fiske Stone and Pierce Butler most squarely took up the jurisdictional questions. Stone agreed with Brandeis that the petitioners should win on both questions but wrote separately to question the majority’s assumption that the limited grant of certiorari constrained the Court’s jurisdiction in the case.³⁶² Stone believed that the effect of limiting certiorari to the constitutional question was “to limit the argument to a single question.”³⁶³ He did not view the grant of certiorari as “restrain[ing] the [C]ourt from . . . consider[ing]. . . any question . . . presented by the record.”³⁶⁴ He reasoned that under section 240(a) of the Judicial Code, the Court “determine[d] a case . . . on certiorari ‘with the same power and authority, and with like effect, as if the cause had been brought . . . by unrestricted writ of error or appeal.’”³⁶⁵ If operating according to a writ of

355. *Olmstead*, 276 U.S. at 609. Interestingly, the Court initially denied certiorari, but it changed its mind upon a petition for rehearing. *Id.*

356. *Olmstead*, 277 U.S. at 438, 455, 466.

357. *Id.* at 471–85 (Brandeis, J., dissenting).

358. *Id.* at 479–80.

359. *Id.* at 469–71 (Holmes, J., dissenting).

360. *Id.* at 469 (“While I do not deny it I am not prepared to say that the penumbra of the Fourth and Fifth Amendments covers the defendant . . .”).

361. See *id.* at 469–70.

362. *Id.* at 488 (Stone, J., dissenting).

363. *Id.*

364. *Id.*

365. *Id.* (alteration in original) (quoting 28 U.S.C. § 347(a) (1926)).

error, all potential errors observable in the record are on the table.³⁶⁶

In contrast, Justice Butler ignored the evidentiary claim entirely. He was of the view that, since “[t]he order allowing the writs of certiorari operated to limit arguments of counsel to the constitutional question . . . [he] prefer[red] to say nothing concerning those questions because they are not within the jurisdiction taken by the order.”³⁶⁷ Still, he would have decided in favor of the petitioners on the constitutional question and reversed the convictions.³⁶⁸

The scattering of opinions in *Olmstead* demonstrates a range of different understandings as to the Court’s power to constrain appellate review through certiorari. Brandeis and Holmes wrote as if the order limiting certiorari to the constitutional questions were irrelevant.³⁶⁹ They openly considered alternative grounds of relief with the same care and concern as they did the constitutional questions.³⁷⁰ They took the arguments grounded in the effect of the state statute just as seriously as they did the constitutional claims.³⁷¹

Justice Stone agreed with Brandeis and Holmes that the Court could and should consider claims that fell outside of the announced scope of certiorari.³⁷² But he believed it was appropriate for the Court to direct lawyers to narrow the scope of their arguments.³⁷³ In some ways, this directive could be seen as loosely binding, friendly advice to counsel. Lawyers would be well advised to talk about the questions of primary interest to the Justices, but the Court would still consider the full panoply of questions involved in the case.

In contrast, Justice Butler believed that when the Court limited certiorari to the constitutional question, it also limited the Court’s jurisdiction.³⁷⁴ Under Butler’s view, the Court could bind itself—at least temporarily—so that it only had power to review particular and identified questions. This jurisdictional limitation would have significant impact, as the Court had longstanding and strongly held views about acting beyond the scope of its subject matter jurisdiction.³⁷⁵

366. See *id.*; *supra* section II.D.1.

367. *Olmstead*, 277 U.S. at 486 (Butler, J., dissenting).

368. *Id.* at 488.

369. See *id.* at 479–85 (Brandeis, J., dissenting); *id.* at 469–70 (Holmes, J., dissenting).

370. *Id.* at 479–85 (Brandeis, J., dissenting); *id.* at 469–70 (Holmes, J., dissenting).

371. *Id.* at 479–85 (Brandeis, J., dissenting); *id.* at 469–70 (Holmes, J., dissenting).

372. *Id.* at 488 (Stone, J., dissenting).

373. *Id.*

374. *Id.* at 486 (Butler, J., dissenting). Justice Butler did not offer an argument or citation in support of this proposition. *Id.*

375. See, e.g., *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) (remarking that usurping jurisdiction where none is given “would be treason to the constitution”); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 138 (1803) (holding that the Supreme Court had no power to issue a writ of mandamus since doing so was beyond its subject matter jurisdiction).

The majority of the Court occupied something of a middle ground on this jurisdictional question. It was plainly annoyed at the dissenters for raising the matter of illegally obtained evidence.³⁷⁶ After explaining the majority's decision on the constitutional question, Taft averred that said explanation "disposes of the only question that comes within the terms of our order granting certiorari."³⁷⁷ However, since some Justices, "departing from that order, . . . concluded that there [was] merit" in arguments about admitting illegally obtained evidence, the majority went on to deal with those questions.³⁷⁸

The majority position differed from Butler's in that Taft's majority clearly assumed its jurisdiction to answer questions outside the limits set by the certiorari grant. But the majority also seemed to feel that dealing with questions outside of the grant was merely permissible, not obligatory, given that it said it chose to discuss the question only because dissenting Justices dealt with it.³⁷⁹ In this way, the Court differed from Stone, Brandeis, and Holmes, all of whom thought the Court must deal with all plausible errors in the record. The majority would probably have been perfectly happy to answer only the constitutional question, affirm, and leave the other questions unexamined. They seemed to think that the Court did not need to decide everything within its jurisdiction.³⁸⁰

The understanding of the majority—which included Taft, McReynolds, and Van Devanter—directly contradicted the testimony these same Justices had given to Congress about the Judges' Bill,³⁸¹ as well as the Court's established certiorari practice.³⁸² Recall that these Justices told Congress that review on certiorari extended to "the whole case and every question presented in it."³⁸³ The Justices never suggested the capaciousness of such review would be at the pleasure of the Justices. Moreover, the

376. *Olmstead*, 277 U.S. at 466 ("[S]ome of our number, departing from [the Court's order granting certiorari], have concluded that there is merit in the twofold objection, overruled in both courts below, that evidence obtained through intercepting of telephone messages by . . . government agents was inadmissible . . .").

377. *Id.*

378. *Id.*

379. *Id.*

380. Taft was a great admirer of Chief Justice Marshall. See Robert C. Post, Chief Justice William Howard Taft and the Concept of Federalism, 9 *Const. Comment.* 199, 202 (1992). But here, he seems to part with Marshall's reasoning in *Cohens*. See *Cohens*, 19 U.S. (6 Wheat.) at 404 ("Questions may occur which we would gladly avoid; but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty.").

381. See *supra* notes 341–343 and accompanying text.

382. See, e.g., *Am. Constr. Co. v. Jacksonville, Tampa & Key W. Ry. Co.*, 148 U.S. 372, 382 (1893) (noting that, by certiorari, the Court "orders the whole case to be sent up for its review and determination").

383. 66 *Cong. Rec.* 2921 (1925) (reproducing Letter from William H. Taft, C.J., U.S. Sup. Ct., to Royal S. Copeland, Sen., U.S. Senate (Dec. 31, 1924)).

majority rejected the Court's traditional understanding that "it is the duty of the court to give judgment on the whole record."³⁸⁴ Taft and the *Olmstead* majority denied any such duty.³⁸⁵

C. Maryland Casualty: *From Internal Disagreement to Irony*

If *Olmstead* showed that the Court was divided over its power to limit the scope of review through certiorari, *Maryland Casualty Co. v. Jones*³⁸⁶ suggests that such disagreements lasted only about a year. The Court released its decision in *Olmstead* on June 4, 1928.³⁸⁷ Less than a year later, on December 10, 1928, the Court granted certiorari in *Maryland Casualty*, but the Justices limited certiorari "to the question [of] whether the Circuit Court of Appeals erred in failing to review the rulings of the District Court in the progress of the trial, excepted to at the time and duly presented by a bill of exceptions."³⁸⁸ The Justices unanimously reversed the lower court and remanded the case.³⁸⁹

Note the irony of the Court's decision. The Court—proceeding "with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal"³⁹⁰—reviewed the Ninth Circuit, which was also proceeding on a writ of error.³⁹¹ The Court limited review to the question of whether the Ninth Circuit erred in limiting its own review to a particular question.³⁹² It then decided that, "[s]ince on the face of the record the failure of the Circuit Court of Appeals to consider the assignments of error relating to rulings at the hearing is unexplained, and its action appears to have been erroneous, its judgment must be reversed."³⁹³ In effect, the Court slapped down the Ninth Circuit for doing exactly what the Supreme Court was doing: cherry-picking questions when proceeding according to a writ of error. No Justice wrote

384. *Garland v. Davis*, 45 U.S. (4 How.) 131, 143 (1846).

385. *Olmstead v. United States*, 277 U.S. 438, 438 (1928) (noting that the petitions for certiorari in the consolidated cases were "granted with the distinct limitation that the hearing should be confined to the single question").

386. *Md. Cas. Co. v. Jones*, 278 U.S. 596 (1928) (mem.).

387. *Olmstead*, 277 U.S. at 438.

388. *Md. Cas. Co.*, 278 U.S. at 596. The petitioner also claimed that the circuit court erred in finding and holding that "[a]ll the assignments of error [were] based upon the insufficiency of the testimony to support the special findings" Brief on Behalf of Maryland Casualty Co., Petitioner at 6–7, *Md. Cas. Co. v. Jones*, 279 U.S. 792 (1929) (No. 524) (quoting *Md. Cas. Co. v. Jones*, 27 F.2d 521, 522 (9th Cir. 1928)).

389. *Md. Cas. Co.*, 279 U.S. at 795–97.

390. Judiciary Act of 1925, Pub. L. No. 68-415, sec. 1, § 240(a), 43 Stat. 936, 939.

391. *Md. Cas. Co.*, 27 F.2d at 522.

392. *Md. Cas. Co.*, 279 U.S. at 794.

393. *Id.* at 796.

separately to renew the argument about the effect of limiting the certiorari grant.³⁹⁴

Yet, while the Court felt free to narrow review through orders that limited certiorari, it did not treat such orders as limiting its own jurisdiction. If the Justices wanted to look beyond the questions presented, they felt free to do so. The Court made this clear in *Langnes v. Green*, stating that it could look to any objection raised at trial, even if not set out in a petition for certiorari.³⁹⁵ That opinion revisited Holmes's majority opinion in *Hubbard*, which limited review to issues included in the assignments of error. The *Langnes* Court said *Hubbard* offered a "rule of practice" but not a limitation on the Court's power to decide any question based on the record before it.³⁹⁶ In reaffirming its ability to reach the full record, the *Langnes* majority added a useful qualifier: The Court could go beyond the assignment of error "if [it] deems there is good reason to do so."³⁹⁷ Thus, the Court could now narrow or expand the scope of its review to the questions it desired. Taft brought the Court a long way from any "duty to give judgment on the whole record."³⁹⁸

D. *The Legacy of Chief Justice Taft*

This radical departure is all the more surprising given the Taft Court's commitment to "normalcy"³⁹⁹ in its substantive jurisprudence. Nonetheless, Taft's procedural reforms radically reshaped the Court's internal behaviors and external role in public life. These changes were only partly intentional. Clearly, Taft intended to transform the Court through the Judges' Bill from the court of last resort to protect all federal rights to an expositor of "important principles of law" that would "help the people at large to a knowledge of their rights and duties, and to make the law clearer."⁴⁰⁰

This implied a shift of audiences. The Court shifted its primary focus from persuading the litigants of the legitimacy of the Court's decision to

394. *Id.* at 797. Yet in two other cases, Holmes, Brandeis, and Stone—three of the *Olmstead* dissenters—joined the majority when the Court limited review to a subset of questions presented. See *Fed. Trade Comm'n v. Raladam*, 283 U.S. 643, 644–54 (1931); *Aldridge v. United States*, 283 U.S. 308, 309–18 (1931).

395. 282 U.S. 531, 538 (1931).

396. *Id.* The Court had been rather firm about this rule of practice in the past. See *Webster Elec. Co. v. Splittorf Elec. Co.*, 264 U.S. 463, 464 (1924); see also Reynolds Robertson, *Appellate Practice and Procedure in the Supreme Court of the United States* 26 (1928).

397. *Langnes*, 282 U.S. at 538.

398. *Garland v. Davis*, 45 U.S. (4 How.) 131, 143 (1846).

399. See Robert C. Post, *Defending the Lifeworld: Substantive Due Process in the Taft Court Era*, 78 B.U. L. Rev. 1489, 1494–505 (1998).

400. Post, *Supreme Court Opinion as Institutional Practice*, *supra* note 323, at 1273 (quoting William Howard Taft, *Address to the New York County Lawyers' Association* 6–7 (Feb. 18, 1922) (Taft Papers, Reel 590)).

persuading the nation. Taft thought the Court could do this while still “enunciating the same kind of stable and definite legal principles”⁴⁰¹ it had when operating as a court of last resort speaking to individual litigants. The Judges’ Bill was supposed to make the Court more efficient, not change the nature of its work.⁴⁰²

The Judges’ Bill put the Court’s destiny on a knife’s edge. Given power to choose its cases and opportunity to address a larger public, the Court could have gone one of two ways. It might have tried to decide a smaller set of more important cases and worked hard to explain the outcome of those cases to the larger public.⁴⁰³ On this model, the Court would still conceive of itself as merely finding the law, treating opinions as vehicles to make that law clearer to the masses. The other possibility was for the Court to function “as a lawgiver, as an originator of law.”⁴⁰⁴

Taft was naturally inclined to the former view, but the turn to a more public audience and the selection of cases based on their importance to the public put a great deal of strain on that model.⁴⁰⁵ The pressures of operating almost exclusively in a more politically salient set of cases and self-consciously speaking to a vastly larger audience naturally pushed the Court into broader and more politicized conversations than it had previously entered.⁴⁰⁶

These pressures pushed Taft’s preferred model to the breaking point, and *Olmstead* and the continuing shift to taking questions snapped it. Before *Olmstead*, the Court had to repeatedly return to the mundane and ordinary parts of even the most atypical and significant litigation to decide a case. It had to use a familiar and distinctly legal set of tools to reach a decision about who should win or lose a case based on the totality of the record. After *Olmstead*, the “interesting” questions could be plucked from the record and considered in the abstract. As the Court gradually abandoned the case adjudication model in certiorari, it pushed on. In the following years, the Court expanded its agenda-control powers in numerous ways. For instance, in 1939, it amended its relevant rule governing certiorari petitions to limit review to the questions presented in the petition,⁴⁰⁷

401. Id. at 1306.

402. Id. at 1308.

403. One leading scholar has forcefully argued that this is exactly what the Court should do and what Congress intended. See Tara Leigh Grove, *The Structural Case for Vertical Maximalism*, 95 *Cornell L. Rev.* 1, 2–5, 40–59 (2009); Tara Leigh Grove, *Tiers of Scrutiny in a Hierarchical Judiciary*, 14 *Geo. J.L. & Pub. Pol’y* 475, 475–87 (2016).

404. Post, *Supreme Court Opinion as Institutional Practice*, supra note 323, at 1308.

405. Robert Post is of the view that this shift in audience was a sufficient condition to move the Court into the jurigenerative mode. Id.

406. See id. (tracking the shift in the Court’s opinions and noting they become longer and begin to engage more with legal scholarship).

407. See Sup. Ct. R. 38.2, 479 F.3d 1 (1939) (repealed 1954) (“Only the questions specifically brought forward by the petition for writ of certiorari will be considered.”). This language was not included in rules promulgated in 1931, 1932, 1934, or 1936. See Sup. Ct.

effectively codifying the rule traced back to *Alice State Bank*. It began to treat its mandatory docket as if it were discretionary,⁴⁰⁸ effectively ended question certification as a meaningful pathway to review,⁴⁰⁹ and gave itself

R. 38, 275 U.S. 595 (1928) (repealed 1934); Sup. Ct. R. 38, 292 U.S. 671 (1934) (repealed 1936). By the time the Court formally changed its rule in 1939, the legal community had already noted the change in practice over the previous decade—and if the term analysis of the business of the Court by Frankfurter and Landis is any indicator—widely accepted this change and attributed it, yet again, to an overburdened Court. In their analysis of the Court’s 1927 term, Felix Frankfurter and James Landis noted the “enlargement of the area of discretionary jurisdiction opened the door to new difficulties” and the steady increase of petitions for certiorari planted “the seeds of competition between the task of deciding cases and the necessity of disposing of petitions.” Felix Frankfurter & James M. Landis, *The Supreme Court Under the Judiciary Act of 1925*, 42 *Harv. L. Rev.* 1, 11–21 (1928). After the Court began restricting the scope of review in the following year, Frankfurter and Landis acknowledged the “stringent policy” of sound judicial discretion laid out by the Court in Rule 38.5 regarding the granting of certiorari but argued “the circumstances under which it is employed—the pressure of the Court’s business—make extremely difficult the application of the Court’s avowed criteria.” Felix Frankfurter & James M. Landis, *The Business of the Supreme Court at October Term, 1928*, 43 *Harv. L. Rev.* 33, 50 (1929). They urged the Court to find a suitable remedy to avoid grievances that might result from “an unequal administration of discretionary jurisdiction” to prevent “crude attempts at legislative correction.” *Id.* By 1934, Felix Frankfurter and Henry Hart argued certiorari “made possible the Court’s extraordinary achievement of . . . keeping abreast of its docket” but warned such an accomplishment would certainly “be impaired by continuing increase in the number of petitions filed.” Felix Frankfurter & Henry M. Hart, Jr., *The Business of the Supreme Court at October Term, 1933*, 48 *Harv. L. Rev.* 238, 263 (1934). They commended the “great wisdom of Congress in its more recent legislation governing the Supreme Court” in avoiding “detailed and explicit” acts which might “sterilize the Court’s own resourcefulness in suiting its ways of doing business” and relying “more and more on the Supreme Court’s wisdom in the conduct of the Court’s business.” *Id.* at 277. Seemingly interpreting the increase in discretionary jurisdiction granted in the Judges’ Bill as an increase in discretion across the board, Frankfurter and Hart acknowledged the Court’s actions, attributed them to workload management, and believed they were in the best interests of the Court and the pursuit of justice as early as 1934. See *id.* at 277–78.

408. See, e.g., Herbert Wechsler, *The Appellate Jurisdiction of the Supreme Court: Reflections on the Law and the Logistics of Direct Review*, 34 *Wash. & Lee L. Rev.* 1043, 1061 (1977) (asserting that the Supreme Court has disregarded its “statutory duty to decide appealed cases on the merits” and more freely dismisses cases).

409. See Hartnett, *supra* note 2, at 1710–12 (“[J]ust as the Court increased its power to set its own agenda by tending to treat appeals more like petitions for certiorari, so too it largely deprived the lower courts of their promised role [through certification] in controlling the Supreme Court’s docket.”); Aaron Nielson, *The Death of the Supreme Court’s Certified Question Jurisdiction*, 59 *Cath. U. L. Rev.* 483, 486–87 (2010) (noting that “there is little hope of resurrection” of certification as a meaningful route to Supreme Court review); Amanda L. Tyler, *Setting the Supreme Court’s Agenda: Is There a Place for Certification?*, 78 *Geo. Wash. L. Rev.* 1310, 1320–21 (2010) (noting the Supreme Court’s resistance to accepting cases through certification); see also Eugene Gressman, Kenneth S. Geller, Stephen M. Shapiro, Timothy S. Bishop & Edward A. Hartnett, *Supreme Court Practice* 597 (9th ed. 2007). As Gressman et al. explain:

The disfavor with which the Court regards certificates may result from its fear that unrestricted use of the certification process would frustrate the Court’s discretionary power to limit its review to cases it deems worthy. For if the courts of appeals were free to request instructions from the

more flexibility over cases emerging from the states.⁴¹⁰

E. *Statutory Developments After the Judges' Bill: Changes to the Language*

There is an obvious, and potentially important, difference between the language in the Judges' Bill and the language in today's operative statute. The former explicitly linked certiorari review to the writ of error and appeal, while the modern statute does not. The previous sections demonstrate that certiorari, when used as a device to take jurisdiction on appeal, was, prior to *Olmstead*, always understood to lead to a comprehensive and limited review of the case as if on a writ of error or appeal.⁴¹¹ That history is informative, but if Congress removed that language in order to free the Court to target questions instead of cases, the history would likely be irrelevant. How then did this language leave the statute?

Two statutes help to answer this question. First, in 1928, Congress passed a statute abolishing the writ of error but requiring that "[a]ll relief which heretofore could be obtained by writ of error shall hereafter be obtainable by appeal."⁴¹² Within a matter of weeks, Congress reversed course and passed a new statute amending the former. The law henceforth was that "[t]he statutes regulating the right to a writ of error, defining the relief which may be had thereon, and prescribing the mode of exercising that right and of invoking such relief . . . shall be applicable to the appeal which the preceding section substitutes for a writ of error."⁴¹³ The general consensus is that Congress only managed to swap out the name "appeal" for "writ of error."⁴¹⁴ Indeed, the statutes still make the distinction between

Supreme Court on any doubtful question, the effect might be to vest in them a substantial part of the discretion to determine what cases the Supreme Court should hear. Whatever the reason, the Court has made the statutory provision authorizing the certificate procedure virtually, but not quite, a dead letter.

Id.

410. See, e.g., *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 477 (1975) ("There are now at least four categories of such cases in which the Court has . . . taken jurisdiction without awaiting the completion of the additional proceedings anticipated in the lower state courts."); *N.D. State Bd. of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 159-64 (1973) (reviewing and overruling a North Dakota Supreme Court decision by treating the state court's decision as "final" such that the finality requirement of 28 U.S.C. § 1257 did not restrict the Court's ability to review the state court decision).

411. See *supra* sections II.C-IV.A.

412. An Act in Reference to Writs of Error, Pub. L. No. 70-12, § 1, 45 Stat. 54, 54 (1928), amended by an Act to Amend Section 2 of An Act entitled "An Act in Reference to Writs of Error", Pub. L. No. 70-322, 45 Stat. 466, 466 (1928).

413. An Act to Amend Section 2 of an Act entitled "An Act in Reference to Writs of Error", Pub. L. No. 70-322, § 2, 45 Stat. 466, 466 (1928).

414. See Philip M. Payne, *The Abolition of Writs of Error in the Federal Courts*, 15 Va. L. Rev. 305, 318 (1929) ("A mere change of terminology appears to be the only result of the seven years of effort by Congress to adopt the proposed simplified procedure for the Federal courts. A writ of error is now called an appeal, but otherwise the practice and procedure

judgments and decrees today.⁴¹⁵

Second, in 1948, Congress codified the judicial code in Title 28, leaving the core of the Court's obligations unchanged. The text neither changed the Court's obligations nor mentioned its new practice of focusing on questions through certiorari.⁴¹⁶ The revision dropped the traditional language about "like effect as if the case had been brought there with unrestricted appeal,"⁴¹⁷ but the surviving language maintained the traditional links from certiorari to cases and from certification to questions. It is therefore difficult to interpret the revised language as a ratification of the Court's willingness to look at questions instead of cases.⁴¹⁸

Any implicit congressional ratification, then, must proceed as an argument from silence. As the Court itself has said, "It is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law."⁴¹⁹ Such arguments require a showing that Congress "considered [the interpretation] in great detail."⁴²⁰ Moreover, the bar is especially high when trying to use such arguments to amend the Court's jurisdiction.⁴²¹ When Congress fails to consider a substantial change in traditional jurisdictional rules, that fact alone "readily disposes of any argument that Congress unmistakably intended to" change those rules.⁴²²

remain unchanged."). Left unmentioned in the new statute is whether the Court should treat the "appeal," once it has gone through the writ of error procedure, as a writ of error (limiting review to the law) or as an appeal, which would give the Court power to review the facts. The Court soon took to reviewing facts in important cases. See Vicki C. Jackson, Thayer, Holmes, Brandeis: Conceptions of Judicial Review, Factfinding, and Proportionality, 130 *Harv. L. Rev.* 2348, 2388–89 (2017) (discussing examples of cases in which the Court reviewed lower court fact-finding, including *Norris v. Alabama*, 294 U.S. 587, 589–90 (1935), and *Gonzales v. Carhart*, 550 U.S. 124, 165 (2007)). Such a review would have been impossible on a traditional writ of error.

415. See, e.g., 28 U.S.C. § 1258 (2018) ("Final judgments or decrees rendered by the Supreme Court of the Commonwealth of Puerto Rico may be reviewed by the Supreme Court by writ of certiorari . . ."). Judgments resolve an action at law; decrees are the analogue in equity. See *Decree*, *Black's Law Dictionary* (11th ed. 2019).

416. See 28 U.S.C. §§ 1251–1260.

417. Judiciary Act of 1925, Pub. L. No. 68-415, sec. 1, § 240(a), 43 Stat. 936, 939; see also Act of June 25, 1948, Pub. L. No. 80-773, § 1257, 62 Stat. 869, 929 (codified at 28 U.S.C. § 1257 (1948)).

418. To do so would be akin to looking for elephants in mouseholes. See, e.g., *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

419. *Girouard v. United States*, 328 U.S. 61, 69–70 (1946).

420. *Nat'l Lab. Rels. Bd. v. Gullett Gin Co.*, 340 U.S. 361, 366 (1951).

421. See *Tafflin v. Levitt*, 493 U.S. 455, 462 (1990) (stating that "the question is not whether any intent at all may be divined from legislative silence on the issue, but whether Congress in its deliberations may be said to have affirmatively or unmistakably intended" to amend jurisdictional practices).

422. *Id.*

Far from endorsing, Congress was quite likely unaware that the Court was shifting its practice. The Court did not change its rules to limit consideration to the questions presented until 1939,⁴²³ when the world was descending into war. From *Olmstead* through 1938, the Court only limited its certiorari grant in sixty cases, which amounts to less than five percent of its orders granting certiorari.⁴²⁴

Nor does the legislative history suggest Congress intended to ratify the Court's new, but still rare, practice.⁴²⁵ To the contrary, it plainly suggests Congress wanted to leave the existing statutory law unchanged. The House Judiciary Committee's report said that the effect of codification would be "to preserve existing law" regarding the Court's certiorari powers so that it would "retain the power of unrestricted review of cases certified or brought up on certiorari."⁴²⁶ The report asserted that the changes are merely "in phraseology and arrangement."⁴²⁷ For its part, the Senate Judiciary Committee report asserts that "great care [was] exercised to make no changes in the existing law which would not meet with substantially unanimous approval."⁴²⁸

F. *Statutory Developments After the Judges' Bill: Reducing the Workload*

For the next forty years, Congress continued to transfer cases from the Court's mandatory "appeal" jurisdiction to its discretionary certiorari jurisdiction.⁴²⁹ This process culminated in the Supreme Court Case Selections Act of 1988, which ended all mandatory jurisdiction save cases coming from three-judge panels.⁴³⁰

Once again, the Justices lobbied hard for this statutory change, and once again, their argument before Congress seemed to differ somewhat from the Court's subsequent practices. The Justices' argument was built on the familiar claim that the Court was overburdened with cases and

423. Sup. Ct. R. 41 (1939).

424. List of limitations collected by and available from the author.

425. The 1940s saw a marked increase in the importance of legislative history, reflecting the New Deal lawyers' growing abilities to generate and use such history in litigation. See Nicholas R. Parrillo, *Leviathan and Interpretive Revolution: The Administrative State, the Judiciary, and the Rise of Legislative History, 1890–1950*, 123 *Yale L.J.* 266, 283 (2013).

426. H.R. Rep. No. 80-308, at A107 (1947).

427. *Id.* Similarly, in codifying section 1257 regarding certiorari to state courts, the report notes that the language requiring certiorari to lead to review "'with the same power and authority and with like effect as if brought up by appeal' was omitted as unnecessary." *Id.* at A108.

428. S. Rep. No. 80-1559, at 2 (1948).

429. See generally Mark Tushnet, *The Mandatory Jurisdiction of the Supreme Court—Some Recent Developments*, 46 *U. Cin. L. Rev.* 347 (1977) (noting that historically, in line with the "natural bias" of the Court, Congress has acted to reduce the Court's mandatory jurisdiction).

430. See Act of June 27, 1988, Pub. L. No. 100-352, 102 Stat. 662, 662.

needed relief.⁴³¹ The culprit was the set of mandatory appeals that “require[d] cases to be decided by the Supreme Court . . . without regard to the importance of the issue.”⁴³² The alleged result was that the Court “must often call for full briefing and oral argument” in these cases.⁴³³ These irrelevant appeals were crowding out time that could be better spent on “the more important cases facing the nation” (notice, the Court still used “cases” instead of “questions” when addressing Congress) that came through the certiorari docket.⁴³⁴

This argument implied that the Court would start taking more cases through certiorari if Congress eliminated most of its mandatory jurisdiction. Some important cases previously taken as appeals would shift over to certiorari. Also, relieved of unimportant mandatory appeals, the Court would have more time to spend on additional certiorari cases. Had these claims been true, the result should have been that the Court granted certiorari more often after the passage of the 1988 Act than before. This did not happen.

After the 1988 reforms, the Court cut its workload by a third.⁴³⁵ Not only did the Justices take fewer cases in total but they granted fewer petitions for certiorari. The Court granted certiorari in 1,287 cases in the ten terms leading up to the 1988 Act and only 1,012 in the following ten terms.⁴³⁶ Once again, what the Supreme Court told Congress it would do with increased discretion and what it actually did with that new power differed notably.

431. H.R. Rep. No. 100-660, at 2 (1988).

432. *Id.* app. at 27 (quoting Letter from William Rehnquist, C.J., U.S. Sup. Ct., to Robert Kastenmeier, Chair, H. Subcomm. on Antitrust, Com. & Admin. L. (June 17, 1982)).

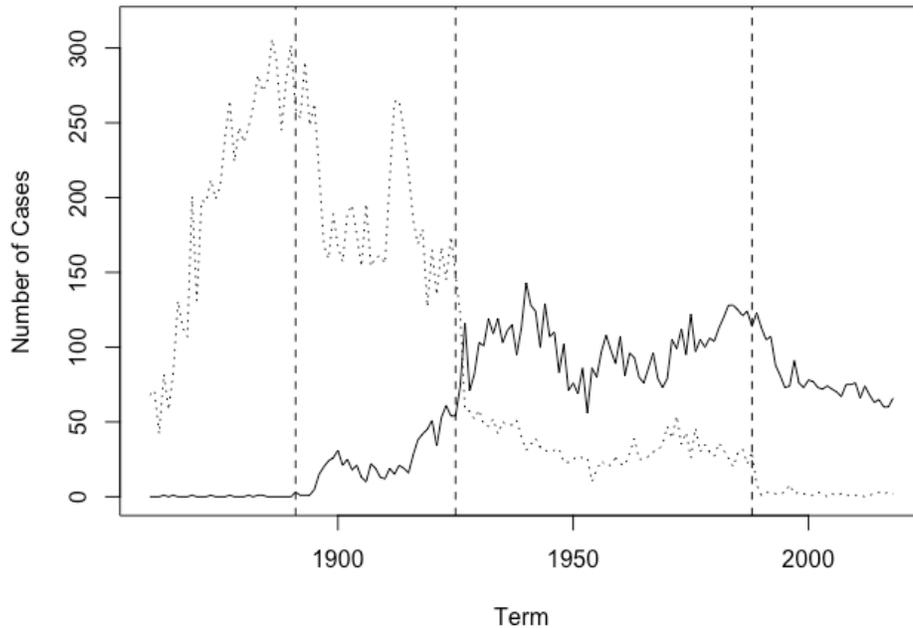
433. *Id.*

434. *Id.*; see also S. Rep. 100-300, at 2 (1988) (“[A]ppeals not only take up a disproportionate amount of the Court’s resources but may do so at the expense of petitions for certiorari which might otherwise have been granted.” (quoting Letter from William Rehnquist, C.J., U.S. Sup. Ct., to Robert Kastenmeier, Chair, H. Subcomm. on Antitrust, Com. & Admin. L. (Dec. 2, 1987))).

435. In the ten terms from 1979–1988, the Court decided, on average, 162 cases per year. In the ten subsequent terms (1989–1998), the average fell to under 108 cases per term. See The Supreme Court Database, Wash. U. Sch. of L., <http://www.scdb.wustl.edu/> [<https://perma.cc/KDA9-SYBC>] (last visited Nov. 2, 2021). To recover the numbers, use the SCDB_2021_01 release of the case-centered citation database. First, count the number of unique cases—identified by the caseId variable—included in the database for the 1979–1988 and 1989–1998 terms (1622 and 1078, respectively). Then divide by ten.

436. Counts compiled by the author based on data from Wash. U. Sch. of L., *supra* note 435. To recover the numbers, use the SCDB_2021_01 release of the case-centered citation database. The counts are the number of unique cases—identified by the caseId variable—where the Court took jurisdiction through certiorari (jurisdiction=1) for the 1979–1988 and 1989–1998 terms.

This trend is visible in the following chart. The dotted line counts the number of unique opinions issued following oral argument in each term, leaving out cases taken through certiorari or the Court's original docket. The solid line represents the number of opinions issued after oral argument in cases taken through certiorari. The vertical dashed lines denote the passage of the Evarts Act, the Judges' Bill, and the Supreme Court Case Selections Act, respectively.



This picture makes a few things clear. First, the drop after the right-most vertical line shows that the Court took fewer certiorari cases after Congress removed mandatory jurisdiction in 1988, contradicting Chief Justice William Rehnquist's assertions. Second, despite the Court's protestations of being overburdened, the Court was deciding roughly 150 cases each term in 1988. This is a far cry from the 200 or more cases the Court decided in the years leading up to the Judges' Bill when Justices did not have clerks, computers, or electronic legal databases. Today, the Court decides roughly seventy cases a year.

V. IS FUNCTIONALISM THE ANSWER?

In the wake of the 1988 Act, the Court has nearly complete control of its agenda to take the cases—and questions—it wants.⁴³⁷ This state of affairs seems to rest uneasily with the text and history of the relevant statutes. This descriptive observation raises some normative concerns. If the Court did not pursue question selection at the direction of Congress or pursuant to the traditional appellate power, on what grounds could the Court defend the practice? The most obvious theory would be a functionalist account that would stress the benefits of agenda control as a justification for overriding the text. This Part considers two questions related to such a functionalist defense. First, how has the Court treated parallel arguments from administrative bodies and lower courts? Second, are there costs from question selection that must be accounted for in any functionalist defense?

A. *Agenda-Setting in the Administrative State: Do as We Say, Not as We Do?*

The Court is not the only entity tasked by Congress with reviewing decisions. In recent cases, the Court has encountered administrative agencies and lower courts that have taken it upon themselves to narrow the scope of review. In each instance, the limitation of review was defended—at least in part—on functionalist grounds. In each instance, the Court rejected the functionalist arguments in favor of the plain text.

Consider *SAS Institute Inc. v. Iancu*, which involved the scope of inter partes review: an adversarial process before the Patent Office.⁴³⁸ To begin this process, one party challenges a previously issued patent by filing a petition to institute review. The petition must identify, “with particularity, each claim challenged, the grounds on which the challenge to each claim is based, and the evidence that supports the grounds for the challenge to each claim.”⁴³⁹ The statute then allows for a response.⁴⁴⁰ If the Director determines “that there is a reasonable likelihood that the petitioner would prevail with respect to at least 1 of the claims challenged in the petition,”⁴⁴¹ then the Director “determine[s] whether to institute an inter partes review.”⁴⁴² If the Director determines an inter partes review is appropriate, the review culminates in “a final written decision with respect to the patentability of any patent claim challenged by the petitioner.”⁴⁴³

437. See Hartnett, *supra* note 2, at 1707.

438. 138 S. Ct. 1348, 1352–53 (2018).

439. 35 U.S.C. § 312(a)(3) (2018).

440. *Id.* § 313.

441. *Id.* § 314(a).

442. *Id.* § 314(b).

443. *Id.* § 318(a).

The Court took up the question of whether the Patent Office must “resolve *all* of the claims in the case, or . . . only *some* of them.”⁴⁴⁴ The Court held that the Patent Office had to answer all of the questions.⁴⁴⁵ The majority opinion is worthy of examination in light of the preceding examination of the Court’s own appellate history and practice.

In *Iancu*, the majority began by noting that the expansive language in § 318 requires a determination on “*any* patent claim challenged by the petitioner.”⁴⁴⁶ The Court contrasted this expansive language with an alternative review mechanism in § 303 that gives the Director the power to investigate individual questions.⁴⁴⁷ “If Congress had wanted to give the Director” power to choose what questions to answer under inter partes review, “it knew exactly how to do so—it could have simply borrowed from the statute next door.”⁴⁴⁸

It is hard to read this language and not think of the similarly contrasting language in the statute governing the Court’s certiorari jurisdiction.⁴⁴⁹ That statute links certiorari to cases and certification to questions.⁴⁵⁰ If Congress had wanted to give the Court certiorari jurisdiction over questions, it knew exactly how to do so—it could have simply borrowed from the same section.

The Court’s *Iancu* decision then noted that, under § 314, the Director gets to decide “whether to institute an inter partes review.”⁴⁵¹ “That language indicates a binary choice—either institute review or don’t.”⁴⁵² The majority reasoned that, though the statute “invests the Director with discretion on the question *whether* to institute review, it doesn’t follow that the statute affords him discretion regarding *what* claims that review will encompass.”⁴⁵³

The Court was unimpressed by the Director’s argument that allowing him to select the important questions “is efficient because it permits the Board to focus on the most promising challenges and avoid spending time and resources on others.”⁴⁵⁴ Such “[p]olicy arguments,” the Court said,

444. *SAS Inst. Inc. v. Iancu*, 138 S. Ct. 1348, 1353 (2018).

445. *Id.* (“The [Patent Office] cannot curate the claims at issue but must decide them all.”).

446. *Id.* at 1353 (internal quotation marks omitted) (quoting 35 U.S.C. § 318(a)).

447. *Id.* at 1355.

448. *Id.*

449. See 28 U.S.C. § 1254 (2018).

450. *Id.*

451. *Iancu*, 138 S. Ct. at 1355 (internal quotation marks omitted) (quoting 35 U.S.C. § 314(b)).

452. *Id.*

453. *Id.* at 1356.

454. *Id.* at 1357.

“are properly addressed to Congress.”⁴⁵⁵ Further, “[t]he Director may (today) think his approach makes for better policy, but policy considerations cannot create an ambiguity when the words on the page are clear.”⁴⁵⁶ In the end, the Court decided that “[n]othing suggests the Director enjoys a license to depart from the petition and institute a *different* . . . review of his own design.”⁴⁵⁷

And yet the Court seems to be in an analogous situation to the Director. Section 1254 arguably invests the Court “with discretion on the question whether to institute review, [but] it doesn’t follow that the statute affords” the Justices “discretion regarding *what* claims that review will encompass.”⁴⁵⁸ Perhaps there are policy arguments in favor of allowing the Court to select the important questions “because it permits” the Court “to focus on the most promising challenges and avoid spending time and resources on others.”⁴⁵⁹ But aren’t these policy questions best addressed to Congress?⁴⁶⁰ The Court may think its current approach “makes for better policy, but policy considerations cannot create an ambiguity when the words on the page are clear.”⁴⁶¹

B. *Agenda-Setting in the Lower Courts*

Iancu dealt with the administrative state, but the Court has had little time for functionalist arguments from circuit courts either.⁴⁶² In *BP P.L.C. v. Mayor of Baltimore*, the Court considered the scope of appellate review over an order remanding a case to state court.⁴⁶³ Baltimore sued various energy companies in state court, and the defendants removed the case to

455. *Id.* at 1358.

456. *Id.*

457. *Id.* at 1356.

458. *Id.*; accord 28 U.S.C. § 1254 (2018) (“Cases in the courts of appeals may be reviewed by the Supreme Court . . . [b]y writ of certiorari granted upon the petition of any party to any civil or criminal case.”).

459. *Iancu*, 138 S. Ct. at 1357.

460. *Id.* at 1358. Despite making policy arguments on other grounds, the Court distinctly omitted policy arguments regarding the extent of its review in 1988. See *supra* note 434 and accompanying text (noting that the Court still used “cases” instead of “questions” when addressing Congress).

461. *Iancu*, 138 S. Ct. at 1358.

462. *C.f.* *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579–82 (2020) (“[A] court is not hidebound by the precise arguments of counsel, but the Ninth Circuit’s radical transformation of this case goes well beyond the pale.”). The Ninth Circuit had sua sponte invited amici to brief questions that were not part of the appeal. *Id.* at 1580–81. The Supreme Court reversed, asserting that this violated the principle of party presentation. *Id.* at 1578. For a discussion of *Sineneng-Smith*, see generally Thomas P. Schmidt, *Judicial Minimalism in the Lower Courts*, 108 *Va. L. Rev.* (forthcoming 2022), <https://ssrn.com/abstract=3914201> [<https://perma.cc/N9TX-VTP6>]. The Court, however, does not worry overmuch about the party presentation principle. See Henry Paul Monaghan, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 *Colum. L. Rev.* 665, 689–93 (2012).

463. 141 S. Ct. 1532, 1537 (2021).

federal court.⁴⁶⁴ One of the defendants' eight proffered grounds for removal was that some of their challenged exploration and drilling took place at the direction of the federal government, and 28 U.S.C. § 1442(a)(1) provides for a federal forum for claims against individuals working under an officer of the United States.⁴⁶⁵ The district court rejected all eight grounds for removal and remanded to state court.⁴⁶⁶ The defendants appealed.⁴⁶⁷

Ordinarily, remand orders are not reviewable on appeal, but under the Removal Clarification Act, those "orders" are appealable if the case was removed pursuant to section 1442.⁴⁶⁸ The Fourth Circuit limited its review of the remand order to the section 1442 grounds and affirmed.⁴⁶⁹ The Supreme Court granted certiorari.⁴⁷⁰

Writing for the majority, Justice Neil Gorsuch said that the Fourth Circuit was wrong.⁴⁷¹ In a decision reminiscent of *Maryland Casualty*,⁴⁷² the Court said the lower court erred in only reviewing one of the questions instead of the entire case.⁴⁷³ Gorsuch took a textualist approach and looked up "order" in Black's Law Dictionary, which defines it as a "written direction or command delivered by . . . a court or judge."⁴⁷⁴ Thus, the proper scope of appellate review was the direction or command, not just the answer to the particular section 1442 question.⁴⁷⁵ The Court seemed to agree with the petitioner energy companies that Congress knows how to direct appellate review to particular questions when it wants to.⁴⁷⁶

The Court's discussion of judicial obligation is instructive. First, it notes that federal jurisdiction is generally not optional.⁴⁷⁷ Because "courts are obliged to decide cases within the scope of federal jurisdiction," the

464. *Id.* at 1536.

465. *Id.*

466. *Mayor of Balt. v. BP P.L.C.*, 388 F. Supp. 3d 538, 549 (D. Md. 2019).

467. *BP P.L.C.*, 141 S. Ct. at 1537.

468. Removal Clarification Act of 2011, Pub. L. No. 112-51, § 2, 125 Stat. 545, 545-46 (codified as amended at 28 U.S.C. §§ 1442, 1446-1447 (2018)); *BP P.L.C.*, 141 S. Ct. at 1536.

469. *Mayor of Balt. v. BP P.L.C.*, 952 F.3d 452, 457 (4th Cir. 2020).

470. *Mayor of Balt. v. BP P.L.C.*, 141 S. Ct. 222, 222 (mem.) (2020).

471. *BP P.L.C.*, 141 S. Ct. at 1543.

472. See *supra* section IV.C.

473. *BP P.L.C.*, 141 S. Ct. at 1543.

474. *Id.* at 1537, 1537 n.1 (alteration in original) (citing Order, Black's Law Dictionary (11th ed. 2019)).

475. *Id.* at 1538 ("[W]hen a district court[] . . . rejects all of the defendants' grounds for removal, § 1447(d) authorizes a court of appeals to review each and every one of them. After all, the statute allows [them] to examine the whole of a district court's 'order,' not just some of its parts or pieces.").

476. *Id.* at 1539.

477. *Id.* at 1537.

district court had to deal with all eight grounds for removal before ordering remand.⁴⁷⁸ Thus, the order under review encompassed all eight grounds for removal, not just the section 1442 issue.

Baltimore also offered functionalist arguments. It suggested that limiting review to only the removal grounds mentioned in the statutes would serve efficiency goals.⁴⁷⁹ The Court did not bite. It explained that “even the most formidable’ policy arguments cannot ‘overcome’ a clear statutory directive.”⁴⁸⁰

Given the Court’s strong endorsement that the “order” is what is reviewed—not merely the question—two questions come to mind. First, how should we think of the remainder of the statutes that give the Court certiorari jurisdiction over “[f]inal judgments or decrees” of state and territorial courts?⁴⁸¹ A final judgment is “[a] court’s final determination of the rights and obligations of the parties in a case.”⁴⁸² It would seem to follow that the Court’s review of judgments should be no less comprehensive than a circuit court’s review of an order.

The second question is what to make of the Court’s decision to vacate the Fourth Circuit court’s order and remand it for further proceedings.⁴⁸³ On a fair reading, the case consisted of eight questions: the eight grounds for removal.⁴⁸⁴ The Court was quite clear about this in stating that the Fourth Circuit was wrong to limit review to the single question. The case—those eight questions—was before the Court. In an opinion built on the recognition that an appellate court reviewing a remand order should consider every part of that order, the Court refused to consider *any* of the grounds proffered by the petitioners for removal.⁴⁸⁵ Nor did it give Baltimore the opportunity to defend the judgment below on all grounds available in the record.⁴⁸⁶ And why not? Because doing so would “not implicate the circuit split that [the Court] took th[e] case to resolve and [the Court] believe[d] the wiser course [was] to leave these matters for the Fourth Circuit to resolve in the first instance.”⁴⁸⁷

With this in mind, consider that not only do the statutes tie certiorari to “cases” emerging from lower federal courts⁴⁸⁸ but other statutes give the

478. *Id.* at 1537–38 (quoting *Sprint Commc’ns, Inc. v. Jacobs*, 571 U.S. 69, 72 (2013)).

479. *Id.* at 1542.

480. *Id.* (quoting *Kloeckner v. Solis*, 568 U.S. 41, 56 n.4 (2012)).

481. See, e.g., 28 U.S.C. § 1257(a) (2018) (review of state courts).

482. Judgment, *Black’s Law Dictionary* (11th ed. 2019).

483. *BP P.L.C.*, 141 S. Ct. at 1543.

484. *Id.* at 1536.

485. *Id.* at 1543.

486. *Id.*

487. *Id.*

488. See 28 U.S.C. § 1254 (2018). Interestingly, the statute allows for certiorari to bring the case to the Court even before it is final in the lower courts. See James Lindgren &

Court certiorari power to review “[f]inal judgments or decrees” from the highest court of each state,⁴⁸⁹ the Supreme Court of Puerto Rico,⁴⁹⁰ and the Supreme Court of the Virgin Islands.⁴⁹¹ Just as an order encompasses all of its component parts, so does a judgment or decree include more than a discrete question. There may be policy reasons to prefer a narrower review, but that is not what the text says. If orders are orders, should not decrees be decrees?

* * *

The Roberts Court’s rejection of functionalist arguments is perhaps unsurprising. Textualism—at least in statutory matters—is ascendant.⁴⁹² In both *Iancu* and *BP P.L.C.*, the Court followed text over function. Both the Director and the lower courts had good reasons to limit review, but the Court looked to the statute and deferred to Congress, determining that the language said that the Director and the lower courts had to look at all of the questions.⁴⁹³ The certiorari statutes seem at least as clear as the statutes involved in these two cases, yet the Court’s functionalist desires appear to overcome the clear statutory directive.⁴⁹⁴

Insofar as defenders of question selection would turn to the raw Article III judicial power, the originalist majority on the Roberts Court would also have to face up to the history of certiorari and the Court’s appellate jurisdiction. No originalist account can simply ignore the historical understanding that the power to answer questions is derivative of the obligation to decide cases.⁴⁹⁵

And so we find ourselves in the following situation. The Roberts Court holds the American people and the other branches of government to eighteenth- and nineteenth-century meanings of constitutional language.

William P. Marshall, *The Supreme Court’s Extraordinary Power to Grant Certiorari Before Judgment in the Court of Appeals*, 1986 Sup. Ct. Rev. 259, 272–73.

489. 28 U.S.C. § 1257(a).

490. *Id.* § 1258.

491. *Id.* § 1260. The Court can also review “[d]ecisions” from the Court of Appeals for the Armed Forces. *Id.* § 1259.

492. As Justice Elena Kagan put it, “We’re all textualists now.” Harvard L. Sch., *The 2015 Scalia Lecture: A Dialogue With Justice Elena Kagan on the Reading of Statutes*, YouTube, at 08:29 (Nov. 25, 2015), <https://www.youtube.com/watch?v=dpEtszFT0Tg> (on file with the *Columbia Law Review*).

493. See *supra* notes 438–487 and accompanying text.

494. See *supra* notes 458–461 and accompanying text; cf. *BP P.L.C. v. Mayor of Balt.*, 141 S. Ct. 1532, 1537–38 (2021) (employing textualism to determine the meaning of “order” as it applies to authorizing appellate review); *SAS Inst. Inc. v. Iancu*, 138 S. Ct. 1348, 1355 (2018) (finding that, despite potential policy reasons for interpreting the statute differently, the statute’s language clearly limits the agency’s power).

495. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.”).

It forces lower courts to focus intensely on statutory text, and the Justices increasingly clamp down on agencies that broadly interpret their own delegated discretion in ways that contradict congressional intent.⁴⁹⁶ And yet, when it comes to certiorari, the Court's actual practice seems inconsistent with the statutory text and Congress's intent as to how the Court should use its certiorari discretion—to say nothing of the Justices' own testimony to Congress in 1925 or 1988. The best reading of the history seems to be that the modern Court has taken this power for itself. The origin and development of the Court's practice of limiting grants of certiorari raise serious questions about the legitimacy of the practice that bite particularly hard under a textualist or originalist methodology.

If the Court holds others—but not itself—to a standard of originalist and textualist fidelity to history and statutes, how can it expect litigating parties—or the public—to view its methods as legitimate? On an originalist or textualist account, the responsibility that Congress imposed on the Court is seemingly unambiguous. The Court is to decide *cases* it takes through certiorari as if on a writ of error—that means deciding the whole case, not just the questions the Court finds interesting. If the Court were to live up to its own methodological commitments in the area of agenda-setting, Justices might have to accept more certified questions, engage more deeply with individual cases, and forgo opportunities to declare law. Important, discrete questions might go unanswered longer than before. Justices might have to work harder, take fewer cases, or write shorter opinions. These are interesting and important normative and policy questions, but those questions appear to have been decided by the statute.

C. *The Costs of Picking Questions*

Part of any functionalist appraisal of question selection would also have to consider the costs. Such consideration is important not only because it would inform a functionalist analysis but even more so because the Court is actually picking questions, and the practice has real consequences. This brief section cannot hope to fully explore, much less resolve, the questions it raises, but it is nonetheless important to put these issues on the table. They are fundamentally important for our understanding of and the Court's exercise of its appellate jurisdiction. But these questions

496. See, e.g., *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019) (“[I]f there is only one reasonable construction of a regulation . . . then a court has no business deferring to any other reading, no matter how much the agency insists it would make more sense.”); *Iancu*, 138 S. Ct. at 1355 (“Where a statute’s language carries a plain meaning, the duty of an administrative agency is to follow its commands as written, not to supplant those commands with others it may prefer. . . . Congress’s choice . . . is a choice neither we nor the agency may disregard.”); *Util. Air Regul. Grp. v. Env’t Prot. Agency*, 573 U.S. 302, 324 (2014) (“EPA’s interpretation is also unreasonable because it would bring about an enormous and transformative expansion in EPA’s regulatory authority without clear congressional authorization.”).

have been largely obscured by our collective failure to recognize that the Court takes questions, not cases.

1. *Questions and the Judicial Power.* — A first-order consideration suggested by the Court's question-selection power is the extent to which the judicial power, which extends to cases and controversies, empowers the Court to review a subset of questions that make up the larger case.⁴⁹⁷ The historical account presented above suggests it may not. If question selection is naturally part of the appellate power, it raises the question of why the Court never used it even when it was overloaded with work in the late nineteenth century⁴⁹⁸ or why Justices implicitly denied that the Court possessed such power when testifying in favor of the Judges' Bill.⁴⁹⁹ Apart from the history, there are structural concerns as well.

Courts traditionally must answer a sufficient set of questions to justify their judgment and can only ignore a question if it could not affect the outcome.⁵⁰⁰ This tradition allows some discretion in many instances. Even on the traditional writ of error, appellate courts have some power to choose questions. For instance, if there are multiple errors on the record sufficient to justify reversal, a court can choose which one to consider as sufficient grounds to reverse.⁵⁰¹ Yet this power to choose also coincides with the right of the respondent to defend the judgment on any other ground present in the record.⁵⁰² Traditionally, appellate courts have even less discretion when affirming, since the appellate court must ensure the entire record is free of error to affirm.⁵⁰³ An appellate court cannot simply

497. One might ask if question selection does not often lead to advisory opinions. Recall *BP P.L.C. v. Baltimore*, 141 S. Ct. 1532 (2021); see also *supra* section V.B. The case, as the Court made clear, involved eight questions: the eight grounds on which the defendants removed the case to federal court. See *supra* text accompanying note 466. The circuit court answered one of the eight questions. See *supra* text accompanying note 469. The Supreme Court answered none of them. See *supra* text accompanying notes 472–476. Instead, it answered a question that was not part of the case at all: a question that—regardless of how the Court answered it—could not be sufficient to reverse or to affirm the remand order. See *supra* text accompanying notes 472–473. Might one fairly consider such an opinion advisory insofar as it did not—and could not—actually decide the case?

498. See *supra* section III.A.

499. See *supra* section IV.A.

500. See *supra* text accompanying notes 65–67.

501. It is true that appellate courts, when faced with multiple errors, could choose between them as the sufficient ground to reverse the judgment below. Nonetheless, there are constraints on even this ability. For instance, the canon of constitutional avoidance and judicial minimalism would seem to counsel avoiding some questions—likely the most interesting and consequential ones—if at all possible.

502. See *Smith v. Phillips*, 455 U.S. 209, 215 n.6 (1982) (“Respondent may, of course, defend the judgment below on any ground which the law and the record permit, provided the asserted ground would not expand the relief which has been granted.”).

503. See *Garland v. Davis*, 45 U.S. (4 How.) 131, 143 (1846) (“[I]t is the duty of the court to give judgment on the whole record, and not merely on the points started by counsel.”).

assume that, because the answer to one question was correct, all answers are correct.⁵⁰⁴ Thus, while it is true that courts have always had some ability to choose questions on the margin, that power has traditionally been tethered to the obligation to decide cases, which often entailed answering more questions than the Court would prefer.⁵⁰⁵

Nonetheless, there are several notable exceptions to the general rule that courts decide cases. As we have seen, Congress has—at different times—empowered the Court to consider a limited set of questions in a case, such as certified questions,⁵⁰⁶ jurisdictional questions,⁵⁰⁷ or federal questions in state cases.⁵⁰⁸ Congress itself selected the questions in the latter two instances, limiting the Court’s review to the jurisdictional questions in the underlying federal litigation and the federal questions in cases emerging from the states. Question certification, on the other hand, does not include congressional limits on the questions themselves.⁵⁰⁹ However, such certification leaves both the agenda-setting power and the case itself in the hands of lower court judges.⁵¹⁰ These two conditions clearly distinguish certification from question selection in important ways. First, certification denies the Court agenda-setting power: The Court can answer questions but not questions it selects. Thus, certification places the Court in the position of exercising judgment—answering a question it cannot avoid—rather than will.⁵¹¹ Second, the certified question is answered while the entire case is still with the circuit court. Thus, the traditional duty for the appellate court with jurisdiction over the case to consider the entire record would not apply to the Supreme Court unless it ordered the lower court to certify the entire record up to the Justices for review of the entire

504. Again, if the Court could satisfy its duty to decide a case by answering any question of its choosing, there would have been no need for the Court to turn to Congress for expanded certiorari powers.

505. See *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) (“It is most true that this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction if it should. . . . Questions may occur which we would gladly avoid; but we cannot avoid them.”).

506. 28 U.S.C. § 1254 (2018); see also *supra* Part I.

507. Judiciary Act of 1891, Pub. L. No. 51-517, § 6, 26 Stat. 826, 828; see also *supra* notes 32–33 and accompanying text.

508. Judiciary Act of 1789, Pub. L. No. 1-20, § 25, 1 Stat. 73, 85–86; see also *supra* notes 153–156 and accompanying text.

509. See 28 U.S.C. § 1254(2).

510. See *id.*

511. See *The Federalist* No. 78, at 469 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body.”); see also Hartnett, *supra* note 2, at 1718–26 (“While the judiciary still lacks its own military force, the Judges’ Bill gave the Supreme Court an important tool with which to exercise will: The ability to set one’s own agenda is at the heart of exercising will.”).

matter in controversy.⁵¹² Either way, parties are still before an appellate court with an independent obligation to decide the case as a whole, not merely a single question. If the Court grants certiorari to a question after the circuit court gives its judgment, the case is no longer before that court. Any review of a discrete question would thus not be part of an actual appellate process evaluating the entire case.⁵¹³

2. *Preselected Questions and Judicial Review.* — The Court's judicial review power is classically rooted in the Court's duty to decide cases in its jurisdiction.⁵¹⁴ Going back to *Marbury*, it is the obligation that generates the power.⁵¹⁵ Chief Justice Marshall's answer to the question of where the Court gets the power to strike down a statute as unconstitutional is to plead necessity.⁵¹⁶ The Court had to hear and decide the case—it had no choice—and deciding the case required exercising judicial review.⁵¹⁷ Thus, judicial review is a consequence of the Court's unavoidable obligation to decide a case within its jurisdiction. Certiorari poses a problem for this account. As Professor Edward Hartnett powerfully puts the problem:

A court that can simply refuse to hear a case can no longer credibly say that it had to decide it. If asked, "Why did you exercise the awesome power to declare an Act of Congress unconstitu-

512. 28 U.S.C. § 1254.

513. A follow-on question would be whether the Court could make a limited grant of certiorari to target a particular question while litigation was ongoing. To this, some things are certain and others are speculative. The Court can grant certiorari to cases in the lower courts. See Lindgren & Marshall, *supra* note 488, at 259. However, in the statute and historically, certiorari runs to cases not discrete questions. Thus, granting certiorari at such a point would seem to bring the entire case to the Court. For the Court to target a question while the case is in a lower court, someone would have to present the question to the Court. If the lower court judges do, it would be traditional certification. Further, there would seem to be no way for the parties to do so, since they cannot appeal a question, only a judgment.

514. See John Harrison, *The Role of the Legislative and Executive Branches in Interpreting the Constitution*, 73 *Cornell L. Rev.* 371, 373 (1988) ("The power to interpret the Constitution . . . comes from the case-deciding power. To suggest that the power to interpret is primary and the case deciding power secondary, is to misinterpret the Constitution and to confuse cause and effect."); see also *United States v. Raines*, 362 U.S. 17, 20 (1960) ("The very foundation of the power of the federal courts to declare Acts of Congress unconstitutional lies in the power and duty of those courts to decide cases and controversies properly before them."); Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 *Harv. L. Rev.* 26, 32 (2000) (offering a complementary account of Marshall's justification of judicial review in *Marbury*).

515. See Steven D. Smith, *Courts, Creativity, and the Duty to Decide a Case*, 1985 *U. Ill. L. Rev.* 573, 580 ("Without the assumption that courts must decide cases within their jurisdiction, Marshall's argument would collapse; a court could avoid the dilemma described by Marshall simply by declining to decide the case at all."); see also Akhil Reed Amar, *Marbury*, Section 13, and the Original Jurisdiction of the Supreme Court, 56 *U. Chi. L. Rev.* 443, 449 (1989) (describing judicial review as "the incidental byproduct of applying rules to 'particular cases'" (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803))).

516. See *Marbury*, 5 U.S. (1 Cranch) at 178.

517. See *id.*; see also *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821).

tional?” the Justices of the Supreme Court can no longer say, “Because we had to.” Instead, they must say, “Because we chose to.”⁵¹⁸

This criticism, however, does not force the conclusion that judicial review is no longer legitimate. It allows for another alternative, albeit an implicit alternative that does not cast the Court in a kind light. It could be that the Court still has the obligation to decide all of the cases,⁵¹⁹ it just chooses not to. The Court could simply be shirking its duty—worse, strategically shirking to maximize its power—but the duty would remain. Thus, when the Court does grant certiorari and take a case, it operates out of obligation and so retains the power of judicial review on the standard account. This alternative, however, is not available in the context of preselected questions since the Court is not actually deciding the case.

Put differently, the classic justification for judicial review is a three-step process: (1) The Court has an obligation to decide the case; (2) pursuant to that obligation it decides the case; and (3) deciding the case requires the exercise of judicial review.

Hartnett locates his objection at step one, arguing that the power to avoid cases implicitly eliminates the obligation.⁵²⁰ The problem presented by preselected questions appears at step two.⁵²¹ The Court is not deciding the case at all. Even if the Court could avoid Hartnett’s objection by admitting its failure to decide all the cases it should decide, that resolution would not explain how the Court could exercise judicial review if it is not actually deciding cases.

In sum, question selection raises questions about, indeed perhaps threatens, the foundations of the Court as an appellate body. It is unclear that the Court is exercising the Article III judicial power or that it has any workable justification for judicial review. This seems to be quite a price to pay for some marginal gains in function.⁵²²

518. Hartnett, *supra* note 2, at 1717. Hartnett observed that as of the time of his writing, there were no works that took up the challenge to “reconcile certiorari with the classic conception of judicial review.” *Id.* at 1716.

519. Or at least the nonfrivolous claims that relate to federal and constitutional law.

520. Hartnett, *supra* note 2, at 1717.

521. Hartnett gestures at this problem as well. See *id.* (“[The] Justices can no longer say they had to decide the case To the contrary, they can grant certiorari as to a particular question in a case, ignoring the presence of other legal errors, even if this means that the Court affirms a judgment that is, by hypothesis, erroneous.”).

522. For an empirical account of the interesting intersection between certiorari and judicial review, see Benjamin Johnson & Keith E. Whittington, *Why Does the Supreme Court Uphold So Many Laws?*, 2018 U. Ill. L. Rev. 1001.

CONCLUSION

The Supreme Court no longer decides cases. This statement is not particularly contestable. Its very rules limit consideration to questions presented.⁵²³ The Justices regularly add or subtract questions to frame cases in ways that allow the Justices to make the policy they want to make. This practice is so commonplace that it has largely escaped notice, to say nothing of close scrutiny. Such an examination is long overdue, and it turns out that the historical development of the practice is not flattering to the Court. Question-selection power rests uneasily with text and history.

Once we begin to consider the objective fact that the Court answers questions instead of deciding cases, many new questions will appear. Is a cherry-picked question a case or controversy? Is it just for the Court to treat parties and their litigation as means rather than ends? How can a textualist Court ignore the text or an originalist Court ignore the history and retain any legitimacy? More broadly, is there a ceiling on the Court's agenda control powers or any limit on what the Court can do with its own procedures and jurisdiction?

These are important questions that remain unasked and unanswered. But they become urgent and inescapable once we stare at the undeniable truth that the Court no longer decides cases: It asks and answers questions. This is an awesome power that gives the Court the ability to choose what law to declare on its own timetable. And it is a power that the Court seems to have taken for itself.

523. See Sup. Ct. R. 14.1(a).