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The Exceptions Clause as a Structural Safeguard

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ABSTRACT

Scholars have long viewed the Exceptions Clause of Article III as a serious threat to the Supreme Court’s central constitutional function: establishing definitive and uniform rules of federal law. In this Article, I argue that the Clause has been fundamentally misunderstood. The Exceptions Clause, as employed by Congress, serves primarily to facilitate, not to undermine, the Supreme Court’s constitutional role. Drawing on recent social science research, I assert that Congress has a strong incentive to use its control over federal jurisdiction to promote the Court’s role in settling disputed federal questions. Notably, this argument has considerable historical support. When the Supreme Court’s mandatory appellate docket grew to the point that it was unmanageable for a single tribunal, Congress responded by exercising its authority under the Exceptions Clause. Congress made “exceptions” to the Court’s mandatory appellate jurisdiction and replaced it with discretionary review via writs of certiorari—precisely so that the Court could concentrate its limited resources on resolving important federal questions. This analysis thus turns on its head one of the central assumptions underlying the scholarship on jurisdiction stripping: that any “plenary” congressional power under the Exceptions Clause is something to be feared. I demonstrate that Congress has used its broad “exceptions” power to safeguard the Supreme Court’s essential role in the constitutional scheme.

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I. Introduction

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

I argue here that the Exceptions Clause has been fundamentally misunderstood. The Clause, as employed by Congress, has served primarily to safeguard, not to undermine, the Supreme Court’s constitutional role. Drawing on recent social science research, I argue that Congress has a strong incentive to use its control over federal jurisdiction to facilitate the Court’s role in defining the content of federal law. Social scientists have argued that political actors establish (and later abide by) legal constraints, including constitutional rules and judicial decisions, because they contribute to economic and social stability. Judicial determinations serve to settle disputed issues and thereby provide focal points around which political actors and citizens can coordinate their actions. The Supreme Court

1 See, e.g., Steven G. Calabresi & Gary Lawson, The Unitary Executive, Jurisdiction Stripping, and the Hamdan Opinions: A Textualist Response to Justice Scalia, 107 Colum. L. Rev. 1002, 1044 (2007) (arguing that, broadly construed, the Exceptions Clause would be “a threat to judicial review”); Henry M. Hart, Jr., The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1362, 1365 (1953) (urging that, if the Exceptions Clause gives Congress unlimited power over the Supreme Court’s appellate jurisdiction, then “the Constitution […] authoriz[es] its own destruction”).

2 U.S. Const. art. III, § 2, cl. 2.

3 See, e.g., Evan H. Caminker, Why Must Inferior Courts Obey Superior Court Precedents?, 46 Stan. L. Rev. 817, 837, 873 (1994) (contending that Congress must give the Court “subject matter jurisdiction sufficiently broad” to perform its “essential function: providing general leadership in defining federal law”); Laurence Claus, The One Court That Congress Cannot Take Away: Singularity, Supremacy, and Article III, 96 Geo. L.J. 59, 64 (2007) (arguing that “Congress can never … remove from the Supreme Court the ability to have ultimate judgment of Article III matters”); Leonard G. Ratner, Congressional Power over the Appellate Jurisdiction of the Supreme Court, 109 U. Pa. L. Rev. 157, 161 (1960) (asserting that the Supreme Court’s “essential appellate functions” are to preserve the uniformity and supremacy of federal law); see also Paul M. Bator, Congressional Power Over the Jurisdiction of the Federal Courts, 27 Vt. L. Rev. 1030, 1038 (1982) (arguing that, although the Exceptions Clause permits Congress to strip the Court’s appellate jurisdiction over any class of cases, such a law would violate “the spirit of the Constitution,” “because the structure contemplated by that instrument makes sense … only on the premise that there would be a federal Supreme Court with the power to pronounce uniform and authoritative rules of federal law”).
performs this settlement function for issues that are referred to our judiciary. Even controversial Court decisions establish (at least temporarily) the boundaries of permissible governmental and private conduct and thereby facilitate coordination. This social science research thus suggests that Congress should be inclined to enact jurisdictional legislation that promotes the Supreme Court’s settlement function. In other words, Congress should seek to make “exceptions” and “regulations” that enhance the Court’s capacity to provide a definitive resolution on issues of federal law.

This argument is substantially supported by the history of congressional control over federal jurisdiction. Congress has not generally sought to curtail the Supreme Court’s appellate jurisdiction but instead has steadily expanded it—precisely so that the Court could settle disputed federal questions. But these expansions had an adverse impact: they created a series of workload crises at the Supreme Court that undermined its capacity to provide guidance on the content of federal law. The Court simply lacked the time and the resources to decide the mounting number of cases and legal issues before it.

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

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

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4 See, e.g., S. REP. No. 100-300, at 3 (1988) (stating that certiorari jurisdiction is based on Congress’s power to make “exceptions” to the Court’s appellate jurisdiction).
By contrast, during those same periods, both sides came together to enact legislation to preserve the Supreme Court’s role in settling the contours of federal law. Thus, in 1891 and 1925, populists and progressives joined the economic conservatives to support the first statutes granting discretionary certiorari review. Likewise, in more modern times, even as social conservatives and social progressives fought bitterly over jurisdiction-stripping proposals, both sides agreed in 1988 to expand the Court’s certiorari power to encompass virtually every appeal.

The historical record thus supports my contention that members of Congress have a strong incentive—separate and apart from their short-term political views of Supreme Court decisions—to preserve the Court’s role in defining the content of federal law. Even when the Court issues rulings fundamentally at odds with their political views, politicians seem to see value in the Supreme Court’s settlement function. Accordingly, they have used their authority under the Exceptions Clause to safeguard the Supreme Court’s appellate review power.

Notably, I do not mean to suggest that the Exceptions Clause has always served to protect the Supreme Court. On the contrary, on a few occasions, Congress has used its authority to restrict the Court’s appellate jurisdiction over a class of claims. But, despite these examples, the broader point remains: contrary to conventional wisdom, the primary function of the Exceptions Clause has been to preserve, not to undermine, the Supreme Court’s role in the constitutional scheme.

This argument has significant implications for scholarship in federal courts and constitutional law. First, the analysis turns on its head one of the central assumptions underlying the scholarship on jurisdiction stripping: that any “plenary” congressional power under the Exceptions Clause is something to be feared. I demonstrate that Congress has used its broad authority under that Clause to promote the Supreme Court’s constitutional role. Furthermore, the analysis here provides an important contrast to the interpretive method employed by prior scholars. Almost without exception, commentary on jurisdiction stripping seeks to unearth the original meaning of Article III to find judicially-enforceable limits on Congress’s power. In sharp contrast, my analysis illustrates how the Exceptions Clause has been given content over time—not by the judiciary, but by Congress. This argument thus links up with a growing literature in constitutional law, which emphasizes the crucial role of the political branches in constitutional interpretation.6

I lay out the argument as follows. In Part II, I discuss prior scholarship on Congress’s power over the Supreme Court’s appellate jurisdiction. I argue that the Exceptions Clause serves as an important (and previously unrecognized) structural safeguard for the Court. In Parts III through V, I provide historical support for this claim. I demonstrate that, even in the midst of some of the most bitter partisan struggles over the federal judiciary, political actors repeatedly came together to ensure the Supreme Court’s role in defining the content of federal law. Finally, in Part VI, I examine the implications and limitations of this analysis. I argue that, due to both political incentives and constitutional constraints, Congress has largely safeguarded the Supreme Court’s essential role in the constitutional scheme.

II. The Theory

Scholars have long puzzled over the scope of Congress’s authority to regulate federal jurisdiction, and particularly the Supreme Court’s appellate jurisdiction. Although most scholars agree that Congress’s power is limited by constitutional sources other than Article III (known as “external” limits), they strongly dispute whether there are any “internal” limits—that is, whether the provisions of Article III (as elucidated by the text, structure, and history) themselves constrain Congress. Commentators differ considerably in their approaches to this question, but they do appear to agree on one fundamental assumption: any plenary congressional power to make “exceptions” to the Supreme Court’s appellate jurisdiction is a serious threat to the Court. I argue that scholars have overlooked the ways in which

an independent role in constitutional interpretation, subject to the ultimate judgment of the people); Keith E. Whittington, Constitutional Construction: Divided Powers and Constitutional Meaning 3 (1999) (arguing that the political branches have a crucial role in “construct[ing] constitutional meaning”).

7 Thus, there is broad consensus that Congress may not enact a jurisdictional measure that violates the Equal Protection Clause or the Suspension Clause. Although scholars dispute the precise scope of these external constraints, they generally agree that these provisions limit Congress’s power. See Gerald Gunther, Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate, 36 Stan. L. Rev. 895, 916 (1984) (“Scholars agree that the Bill of Rights applies to all areas of congressional action, and that…. Congress could not limit access to the federal courts on the basis of race[,]”); Martin H. Redish, Same-Sex Marriage, the Constitution, and Congressional Power to Control Federal Jurisdiction: Be Careful What You Wish For, 9 Lewis & Clark L. Rev. 363, 368-69 (2005) (asserting that there are “external limitations” on Congress’s power, including due process and equal protection); Amanda L. Tyler, Suspension as an Emergency Power, 118 Yale L.J. 600, 607-08 (2009) (noting that the Suspension Clause, “[b]y its terms, … constitutes [] a limitation upon … congressional power” over habeas jurisdiction, but also observing that scholars have debated whether the Clause requires Congress to confer habeas jurisdiction).
Congress can use its authority to safeguard the Supreme Court’s role in defining the content of federal law.8

A. The Debate Over Congress’s Power Under the Exceptions Clause

Many commentators conclude that Congress has plenary power to restrict federal jurisdiction, including the Supreme Court’s appellate jurisdiction.9 These scholars observe that the Exceptions Clause, on its face, seems to give Congress broad authority to remove classes of cases from the Court’s appellate oversight.10 Furthermore, this construction accords with at least some Founding-era evidence. For example, the First Congress in the Judiciary Act of 1789 did not give the Supreme Court jurisdiction over every federal question case.11 Based on such textual and historical evidence, these scholars assert that “if Congress wishes to exclude a certain category of federal constitutional (or other) litigation from the appellate jurisdiction [of the Supreme Court], it has the authority to do so.”12 Indeed, Congress could withhold even “a large number of classes of cases potentially within [the Court’s] appellate jurisdiction.”13

But even those who subscribe to this “plenary power” theory argue that Congress should generally refrain from exercising its authority.14 For

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


10 See Bator, supra note 3, at 1038 (arguing that the Exceptions Clause “plainly seems to indicate that if Congress wishes to exclude a certain category of federal constitutional (or other) litigation from the [Court’s] appellate jurisdiction, it has the authority to do so”); Berger, supra note 9, at 622 (same); Gunther, supra note 7, at 901 (same); Martin H. Redish, Congressional Power to Regulate Supreme Court Appellate Jurisdiction Under the Exceptions Clause: An Internal and External Examination, 27 Vill. L. Rev. 900, 901-02 (1982) (same).

11 See, e.g., Berger, supra note 9, at 632-33 (“The Judiciary Act of 1789, enacted by the First Congress, which was privy to the Framers’ intention, … left large gaps and gaping holes in the appellate jurisdiction of the Supreme Court.”). For a description of the Court’s jurisdiction under the 1789 Act, see infra notes 62-65 and accompanying text.

12 Bator, supra note 3, at 1038.

13 Gunther, supra note 7, at 901.

14 See, e.g., Redish, Same-Sex Marriage, supra note 7, at 368-69 (arguing that, “as a matter of policy,” Congress should have “a very strong presumption” against jurisdiction stripping); Wechsler, supra note 9, at 1006-07 (asserting that there are important “practical objections” to stripping the Supreme Court’s appellate jurisdiction, because “the judicial institution needs an
example, Paul Bator argued that a statute eliminating Supreme Court review of federal claims would violate “the structure and spirit” of the Constitution.15 “[T]he structure contemplated by that instrument makes sense—and was thought to make sense—only on the premise that there would be a federal Supreme Court with the power to pronounce uniform and authoritative rules of federal law.”16 Likewise, Gerald Gunther urged Congress to exercise “forbearance” in using its “very broad ‘exceptions’ power.”17 “[O]ur system—any system—would be poorer and less coherent in the absence of a single, ultimately authoritative court at the apex of the judicial hierarchy.”18

Other scholars, however, have proposed broader and judicially-enforceable limits on Congress’s power over the Supreme Court’s appellate jurisdiction. The foundation for this argument was laid in a famous essay by Henry Hart. In his Dialogue, Professor Hart asserted that “the exceptions [to the Court’s appellate jurisdiction] must not be such as will destroy the essential role of the Supreme Court in the constitutional plan.”19 Other scholars have expanded upon this theory—primarily by relying on evidence of the original understanding of Article III.20 For example, Leonard Ratner

_organ of supreme authority_” to establish uniform rules of federal law). One exception to this general sentiment was Charles Black, who argued that the existence of a plenary congressional power over federal jurisdiction was essential to legitimating judicial decisions. See Black, supra note 9, at 18 (“‘Jurisdiction’ is the _power to decide_. If Congress has wide and deep-going power over the court’s _jurisdiction_, then the courts’ _power to decide_ is a continuing and visible concession from a democratically formed Congress.”).

15 Bator, supra note 3, at 1039.

16 Id.

17 Gunther, supra note 7, at 910.

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

19 Hart, supra note 1, at 1365.

20 See Richard H. Fallon, Jr., _Jurisdiction-Stripping Reconsidered_, 96 Va. L. Rev. 1043, 1047 (2010) (noting “the originalist and textualist style of reasoning that has characterized nearly all leading academic writings on congressional control of jurisdiction”). Other scholarship, which does not focus solely on Supreme Court jurisdiction, likewise emphasizes the original meaning of Article III. See, e.g., Akhil Reed Amar, _A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction_, 65 B.U. L. Rev. 205, 209, 240-46 (1985) (arguing, based on the drafting history and structure of Article III, that Congress must give either the Supreme Court or the inferior federal courts jurisdiction over all cases arising under federal law); Robert N. Clinton, _A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III_, 132 U. Pa. L. Rev. 741, 749-50 (1984) (asserting that Congress must “allocate to the federal judiciary as a whole … every type of case or controversy” listed in Article III); Lawrence Gene Sager, _The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress’ Authority to Regulate the Jurisdiction of the Federal Courts_, 95 Harv. L. Rev. 17, 66 (1981) (contending, based on historical evidence, that Congress must provide federal court review of constitutional claims). For a recent non-originalist analysis, see Fallon, _supra_, at 1047 (asserting that “any modern assessment of Congress’s power … should ‘decenter’ originalist analysis under Article III … and rely [more] openly on … judicial precedent and functional desirability”). Like other scholars, however, Professor Fallon seems to rely primarily on judicial enforcement.
asserted (based in large part on statements made at the Constitutional Convention) that the Supreme Court’s “essential appellate functions” are to preserve the uniformity and supremacy of federal law. Accordingly, he argued that Congress must leave in place “some avenue” for the Court to resolve “persistent conflicts between state and federal law or in the interpretation of federal law by lower courts.”

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

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21 Ratner, Congressional Power, supra note 3, at 161-65 (“The nature of these essential Supreme Court functions is confirmed by the proceedings of the Constitutional Convention.”).
22 Id. at 161.
23 See, e.g., Caminker, supra note 3, at 837 (contending that Congress must give the Court “subject matter jurisdiction sufficiently broad to provide general leadership in defining federal law”). A few scholars, however, doubt that all lower courts must abide by Supreme Court precedent. See id. at 837-38 (urging that inferior federal courts have such an obligation, but doubting that “state courts [must] obey Supreme Court federal law precedents”); see also Michael Stokes Paulsen, Accusing Justice: Some Variations on the Themes of Robert M. Cover’s Justice Accused, 7 J.L. & RELIGION 33, 86-88 (1989) (arguing that lower courts can initially disregard “clearly erroneous” constitutional interpretations).
24 See JAMES E. PFANDER, ONE SUPREME COURT: SUPREMACY, INFERIORITY, AND THE JUDICIAL POWER OF THE UNITED STATES 25, 34-38 (2009); James E. Pfander, Jurisdiction-Stripping and the Supreme Court’s Power to Supervise Inferior Tribunals, 78 TEX. L. REV. 1433, 1442-65, 1500 (2000) (discussing historical evidence, including the practices of the King’s Bench in seventeenth-century England, the early practices of the state courts, as well as Founding-era understandings of the terms “supreme” and “inferior” in Article III, and arguing that it would raise “serious constitutional questions” if Congress eliminated both the Court’s appellate jurisdiction and its authority to supervise lower federal courts by issuing discretionary writs); James E. Pfander, Federal Supremacy, State Court Inferiority, and the Constitutionality of Jurisdiction-Stripping Legislation, 101 NW. U. L. REV. 191, 236 (2007) (making a similar claim with respect to the state courts).
25 See Calabresi & Lawson, supra note 1, at 1016-43 (relying on an eighteenth-century dictionary definition of “supreme” and “inferior” as well as the original understanding of “court” and “tribunal” to interpret Congress’s “exceptions” power); Claus, supra note 3, at 61, 81-97, 107 (surveying historical evidence, including the drafting history of Article III as well as the Ratification debates, to support this construction of the Exceptions Clause); Alex Glashauser, A Return to Form for the Exceptions Clause, 51 B.C. L. REV. 1383, 1390, 1397, 1403-12 (2010) (similarly basing this conclusion on the drafting history of Article III).
(These scholars acknowledge that this position is at odds with the holding of *Marbury v. Madison* that Congress may not enlarge the size of the Court’s original jurisdiction.26)

The above scholarship reflects certain shared assumptions. First, scholars agree that the Supreme Court has a crucial role in “pronounc[ing] uniform and authoritative rules of federal law.”27 Scholars also seem to assume that the primary purpose of the Exceptions Clause is to enable Congress to remove classes of cases—including federal cases—from the Court’s appellate oversight. Thus, scholars worry that any “plenary” congressional power under the Clause poses a serious threat to the Supreme Court’s central constitutional function.

I argue that scholars have overlooked the ways in which Congress can use its broad “exceptions” power to protect the Supreme Court. Congress has repeatedly enacted “exceptions” and “regulations” that enabled the Court to “pronounce uniform and authoritative rules of federal law.”

**B. The Exceptions Clause as a Structural Safeguard**

Article III establishes the power and independence of the federal judiciary and makes clear that the Supreme Court has a special role in the constitutional scheme. Although Article III gives Congress discretion as to whether to create inferior federal courts, it presumes the existence of “one supreme Court.”28 Article III also defines the scope of this one Supreme Court’s jurisdiction. The provision declares that “[t]he judicial Power … shall be vested in one supreme Court” and that this “judicial Power shall extend to all Cases” arising under federal law.29 Article III further provides that the Supreme Court “shall have appellate Jurisdiction” over such federal question cases.30

If the jurisdictional provisions of Article III stopped at this point, it is not clear to what extent Congress could modify the Supreme Court’s jurisdiction.31 But Article III goes on to provide that the Court’s appellate

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26 5 U.S. (1 Cranch) 137, 174-80 (1803); see sources cited supra note 25.
27 Bator, supra note 3, at 1039.
28 See U.S. CONST. art. III, § 1 (“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”); Redish, *Congressional Power*, supra note 10, at 901 (“Unlike the lower federal courts, the Supreme Court’s existence is mandated by article III[.]”).
29 U.S. CONST. art. III, § 1, § 2, cl. 1 (“The judicial Power shall extend to all Cases … arising under this Constitution, the Laws of the United States, and Treaties made … under their Authority[,]”) (emphasis added).
30 U.S. CONST. art. III, § 2, cl. 2 (emphasis added).
31 See Durousseau v. United States, 10 U.S. (6 Cranch) 307, 314 (1810) (stating that “[t]he appellate powers of this court are not given by the judicial act. They are given by the constitution” and that when Congress purports to confer jurisdiction, it “must be understood as intending to execute the power … of making exceptions to the [Court’s] appellate jurisdiction”); *infra* notes 249-250 and accompanying text (discussing the possibility that,
review power is subject to “such Exceptions, and … such Regulations as the Congress shall make.” The unqualified language of the Exceptions Clause supports the view that Congress has plenary authority over the Court’s appellate jurisdiction. Indeed, the Supreme Court itself has repeatedly adopted that broad construction of Congress’s “exceptions” power.

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

Thus, even if we assume that Congress has plenary power over the Supreme Court’s appellate jurisdiction, the real question is how Congress will use that authority. I argue that Congress has a strong incentive to use its broad power to promote the Court’s role in defining the content of federal law.

This argument follows from the social science literature on “coordination.” Social scientists have argued that political actors establish

32 U.S. CONST. art. III, § 2, cl. 2.
33 See, e.g., The Francis Wright, 105 U.S. 381, 386 (1881) (“Not only may whole classes of cases be kept out of the [Supreme Court’s appellate] jurisdiction altogether, but particular classes of questions may be subjected to re-examination and review, while others are not.”); Daniels v. Rock Island R. Co., 70 U.S. 250, 254 (1865) (“[I]t is for Congress to determine how far … appellate jurisdiction shall be given[,]”).
34 The Exceptions Clause may work in conjunction with the Necessary and Proper Clause of Article I, section 8. But, at a minimum, the Exceptions Clause appears to give Congress a power over the Supreme Court’s appellate jurisdiction that would not be provided by the Necessary and Proper Clause alone. See infra note 249.
35 See infra note 54 and accompanying text. Although scholars have rarely examined the constitutional source of the statutes establishing certiorari jurisdiction, a few have recognized that the power must stem from the Exceptions Clause. Thus, Herbert Wechsler observed in 1959 that certiorari review “rests upon the power that the Constitution vests in Congress to make exceptions to and regulate the Court’s appellate jurisdiction[,]” Herbert Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1, 9 (1959). More recently, Katherine Watts has asserted that discretionary certiorari review constitutes a delegation of Congress’s power under the Exceptions Clause. See Kathryn A. Watts, Constraining Certiorari Using Administrative Law Principles, 160 U. Pa. L. Rev. 1, 23-24 (2011) (arguing that, although Congress could have specified “the cases the Court must hear,” it “chose to delegate [that] policymaking power to the Court”).
36 For a foundational work on coordination theory, see Thomas C. Schelling, The Strategy of Conflict (1965).
(and later abide by) legal constraints, because they contribute to economic and social stability. As social scientists have explained, most political and economic transactions involve some unforeseen contingencies. Many such transactions would be “too costly to undertake” if the participants could not rely on some mechanism for resolving the inevitable disputes over those future events. Legal institutions provide a means of resolving such disputes because they establish legal rules that clarify the boundaries of permissible conduct. These legal rules serve as “focal points” around which the relevant parties can coordinate their actions.

Social scientists have used coordination theory to explain the importance of various legal institutions. For example, political scientist Russell Hardin argues that the U.S. Constitution was “at its core” “a successful coordination” of competing state and regional interests. Other scholars have explored the ways in which judicial decisions allow parties to coordinate their actions. Geoffrey Garrett and Barry Weingast contend that international tribunals, such as the European Court of Justice, can help countries police their treaty partners by clarifying when other nations have

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37 See Russell Hardin, Liberalism, Constitutionalism, and Democracy 18, 86 (1999) (asserting that “[i]n an even moderately diverse society, stability … depends on separate coordination of various groups,” and arguing that a constitution offers stability in this sense, because it “establishes conventions … that make it easier for us to cooperate and to coordinate in particular moments”); Barry R. Weingast, The Political Foundations of Democracy and the Rule of Law, 91 Am. Pol. Sci. Rev. 245, 246 (1997) (arguing that “[d]emocratic stability occurs when citizens and elites construct a focal solution that resolves their coordination dilemmas about limits on the state”).


39 Id.

40 See Weingast, supra note 37, at 246; see also Geoffrey Garrett & Barry R. Weingast, Ideas, Interests, and Institutions: Constructing the European Community’s Internal Market, in Ideas and Foreign Policy 173, 197 (Judith Goldstein & Robert O. Keohane eds., 1993) (asserting that “a central objective of actors wishing to engage in stable cooperation in complex environments is the construction of institutions that monitor the behavior of participants, identify transgressions, and apply the general rules of the game to unanticipated contingencies”).

41 See Weingast, supra note 37, at 246 (arguing that certain legal institutions “create a focal solution that resolves the coordination dilemmas confronting elites and citizens”).

42 Hardin, supra note 37, at 88 (arguing that the Constitution was primarily designed to resolve economic disputes among the states by creating a central government with the power to regulate interstate commerce). A few legal scholars have likewise recognized that the constitutional text provides crucial focal points for political actors and citizens. See Daryl J. Levinson, Parchment and Politics: The Positive Puzzle of Constitutional Commitment, 124 Harv. L. Rev. 657, 708 (2011) (“Coordination offers an especially perspicacious explanation of the ongoing relevance of the big-C Constitution.”); David A. Strauss, Common Law Constitutional Interpretation, 63 U. Chi. L. Rev. 877, 934 (1996) (arguing that “[t]he written text does play a crucial role as a focal point”).

violated their treaty commitments. "[G]overnments no longer need to … determine whether a particular action constitutes a transgression. Instead, they need only observe the pronouncements of the courts."\(^{45}\)

Notably, such a coordination regime tends to become more entrenched over time.\(^ {46}\) That is because once the regime is in place it becomes “extremely difficult to re-coordinate large numbers on doing things some other way.”\(^{47}\) Not only must a large number of citizens and political actors object to the old regime, but a sufficient number must also agree on the same alternative.\(^ {48}\) Thus, Professor Hardin argues that “[t]he Constitution of 1787 worked in the end because enough of the relevant people worked within its confines long enough to get it established in everyone’s expectations that there was no point in not working within its confines.”\(^ {50}\)

The above social science literature suggests why Congress should be inclined to facilitate the Supreme Court’s role in defining the content of federal law. Much like the European Court of Justice, the Supreme Court performs a crucial settlement function for disputed federal questions.\(^ {50}\)

\(^{44}\) See Garrett & Weingast, supra note 40, at 197-98.

\(^{45}\) Id. at 198.

\(^{46}\) See John M. Carey, Parchment, Equilibria, and Institutions, 33 COMP. POL. STUD. 735, 754 (2000) (asserting that “if institutions are products of coordination … then institutional equilibria are sticky”).

\(^{47}\) HARDIN, supra note 37, at 15.

\(^{48}\) Russell Hardin, Why a Constitution?, in THE FEDERALIST PAPERS AND THE NEW INSTITUTIONALISM 100, 113 (Bernard Grofman & Donald Wittman eds., 1989) (asserting that “once we have settled on a constitutional arrangement, it is not likely to be in the interest of some of us then to try to renege …. To do better, we would have to carry enough others with us to set up an alternative, and that will typically be too costly to be worth the effort”).

Although social scientists do not appear to have identified the precise conditions under which such a “re-coordination” can occur, they do agree that such regime changes are rare. See HARDIN, supra note 37, at 15 (noting that “[i]t took the massive politics of 1787-8 … to devise the constitutional order of the United States”); Weingast, supra note 37, at 261 (asserting that “a society cannot establish a coordination device at just any time…. Breaking [the prior] equilibrium is difficult and requires something exogenous to the model,” such as a crisis or some major economic or demographic changes).

\(^{49}\) HARDIN, supra note 37, at 136; Weingast, supra note 37, at 254 (asserting that “U.S. constitutional restrictions on elected officials are self-enforcing” partly because “citizens are willing to defend [the Constitution] by reacting against proposed violations. Anticipating that reaction, political leaders rarely attempt violations”).

\(^{50}\) I do not mean to suggest that political actors empower the Supreme Court solely to promote its settlement function. Social scientists have identified other reasons that politicians empower the judiciary as a whole, such as a desire to use the courts to advance a political agenda, see KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY 18 (2007) (“Political actors defer to … courts because the judiciary can be useful to their own political and constitutional goals[,]”); Ran Hirschl, The Political Origins of Judicial Empowerment Through Constitutionalization: Lessons from Four Constitutional Revolutions, 25 LAW & SOC. INQUIRY 91, 116 (2000) (arguing that political leaders will empower the judiciary only if they have “a sufficient level of certainty . . . that the judiciary in general and the supreme court in particular are likely to produce decisions that . . . reflect their
Although some constitutional or statutory questions may be answered by the President, Congress, or administrative agencies, many legal issues are left to the courts.\textsuperscript{51} Lower courts (particularly the federal courts of appeals and state supreme courts) can specify the boundaries of permissible conduct within their respective jurisdictions. But only the Supreme Court can provide a definitive and nationally uniform resolution of federal law.

Congress thus has good reason to promote the Supreme Court’s settlement function. Moreover, these congressional incentives are likely to increase over time, as the Court’s role becomes more entrenched. Over the past two centuries, both Congress and the general public have grown increasingly accustomed to the Supreme Court’s role in providing a definitive and uniform resolution of federal law.\textsuperscript{52} That is true—not because Supreme Court decisions necessarily provide the best resolution of disputed issues, but because “enough of the relevant people [have] worked within [this judicial system] long enough to get it established in everyone’s expectations”\textsuperscript{53} that the Court has a crucial role in defining the content of federal law. Congress should therefore be increasingly inclined to enact “exceptions” and “regulations” that facilitate the Court’s role.

This analysis is supported by the history of congressional control over the Supreme Court’s appellate jurisdiction. As discussed in Parts III, IV, and V, Congress has not generally used its authority to restrict the Court’s appellate review power but instead has steadily expanded it. These jurisdictional expansions, however, had an adverse impact: they created a series of workload crises at the Supreme Court that undermined its capacity

\textsuperscript{51} Indeed, some social scientists argue that political actors deliberately defer controversial matters to the judiciary. \textit{See supra} note 50.

\textsuperscript{52} \textit{See} Gregory A. Caldeira & James L. Gibson, \textit{The Etiology of Public Support for the Supreme Court}, 36 Am. J. Pol. Sci. 635, 658 (1992) (asserting, based on an empirical study, that the modern Supreme Court enjoys “diffuse support” among the mass public); Neal Devins, \textit{The Majoritarian Rehnquist Court?}, 67 Law & Contemp. Probs. 63, 70 (2004) (“Today’s Congress … rarely casts doubt on either the correctness of [a Supreme Court] ruling or, more fundamentally, the Court’s power to authoritatively interpret the Constitution.”); Richard H. Pildes, \textit{Is the Supreme Court a “Majoritarian” Institution?}, 2010 Sup. Ct. Rev. 103, 145 (2010) (“That the power and stature of the Court have increased dramatically over time is widely recognized”).

\textsuperscript{53} \textit{Hardin, supra} note 37, at 136.
to provide a definitive resolution of federal questions. The Court called upon Congress to provide relief and, each time, Congress responded by exercising its authority under the Exceptions Clause. In a series of statutes, Congress made “exceptions” to the Court’s mandatory appellate jurisdiction and replaced it with discretionary review via writs of certiorari.\(^54\)

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

Nevertheless, both sides increasingly saw value in the Supreme Court’s settlement function. Thus, in 1891, a group of key progressives joined economic conservatives to support the creation of certiorari review in order to safeguard the Court’s role in “enforce[ing]” the “uniformity of decision” on legal questions.\(^55\) In 1925, an even larger number of progressives joined the conservatives to significantly expand the Court’s discretionary certiorari jurisdiction. Finally, the Judiciary Act of 1988, which gave the Court certiorari review over virtually every appeal, had broad support among both social conservatives and social progressives and was enacted with no recorded dissent. By 1988, virtually all legislators viewed the Supreme Court’s “principal functions” as “resolv[ing]” important issues of federal law and “ensur[ing] uniformity … in the law by resolving conflicts” among the lower courts.\(^56\)

The historical record thus strongly supports my contention that the Exceptions Clause has served primarily to promote the Supreme Court’s role in defining the content of federal law. Even when legislators strongly disagreed with the content of Supreme Court decisions, they found value in the Court’s settlement function. Accordingly, Congress has repeatedly enacted “exceptions” and “regulations” that safeguarded the Supreme Court’s power to “pronounce uniform and authoritative rules of federal law.”\(^57\)

\(^{54}\) See S. Rep. No. 100-300, at 3 (1988) (“In establishing the Court’s appellate jurisdiction under Article III, Congress can confer as much or as little compulsory jurisdiction as it deems necessary and proper, including such exceptions as Congress thinks appropriate. If Congress wants to make the Court’s appellate jurisdiction totally discretionary or totally obligatory in nature, nothing in the Constitution would prevent such action.”) (emphasis added); S. Rep. No. 96-35, at 3 (1979) (same).

\(^{55}\) 21 Cong. Rec. 3405 (1890) (statement of Rep. David Culberson, D-Tex.)


\(^{57}\) Bator, supra note 3, at 1039.
At the outset, however, I should note some qualifications and clarifications about this argument. First, I do not claim that Congress can only use its plenary power to protect the Supreme Court. On the contrary (as discussed in Part VI), I acknowledge that Congress has the raw power to strip the Court’s appellate jurisdiction over certain classes of claims, as it has done on a few occasions. My contention is only that the incentives of Congress—combined with other structural and political constraints (which are described further in Part VI)—make such legislation unlikely.

Second, I do not seek to defend the Supreme Court’s exercise of its discretionary review power. Instead, I am interested in why Congress created and expanded the Court’s certiorari jurisdiction—to facilitate the Court’s role in resolving federal questions. That is not to say that every Supreme Court decision in fact provides a definitive resolution of a disputed federal question. Although many Court decisions serve this function, other opinions are written narrowly and resolve only the particular case before the Court. Nevertheless, as Congress has recognized, only the Supreme Court can provide a nationally uniform resolution of issues of federal law. It is this potential settlement function that Congress seeks to facilitate in exercising its plenary power over federal jurisdiction.

Finally, my goal is not to demonstrate that the Exceptions Clause was originally designed to protect the Supreme Court’s role in settling federal questions. In fact, that is one of the principal ways in which my approach differs from prior literature on Congress’s power over federal jurisdiction—virtually all of which seeks to unearth the original meaning of Article III.

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

59 Notably, such broad decisions need not be “activist.” Although some Court decisions clarify the content of federal law by limiting the scope of governmental power, see, e.g., Miranda v. Arizona, 384 U.S. 436, 444 (1966) (requiring police to give specific warnings before interrogating any suspect in custody); Reynolds v. Sims, 377 U.S. 533, 568 (1964) (establishing the one-person/one-vote rule for legislative apportionment), other broad decisions require lower courts to defer to the political branches, see, e.g., Hodel v. Indiana, 452 U.S. 314, 331-32 (1981) (requiring rational basis review of economic legislation); Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843-44 (1984) (requiring deference to administrative interpretations of ambiguous statutes).


61 See sources cited supra notes 9-26 and accompanying text.
The historical survey below suggests instead that Congress’s authority under the Exceptions Clause has been defined over time, as the Supreme Court’s constitutional role has become more entrenched and as the need for certain exceptions (like discretionary certiorari review) has become apparent. Legislators have gradually come to accept—indeed, to depend upon—the Court’s role in providing an authoritative and uniform resolution of federal questions. For that reason, Congress has used its broad authority under the Exceptions Clause to safeguard the Supreme Court’s Article III judicial power.

III. Expansions and Exceptions in Post-Civil War America

From 1789 until the Civil War, the jurisdiction of the Supreme Court was governed—with few modifications—by the Judiciary Act of 1789.62 This statute reflected Congress’s early (and rather limited) understanding of the Supreme Court’s constitutional role. The first Congress viewed the Court primarily as a forum for resolving disputes among the states and ensuring state court compliance with federal law.63 Accordingly, under the 1789 Act, the Court had the power to review all state court decisions denying federal rights but no authority over other state court rulings on federal questions.64 The Court had even less power to oversee the inferior federal courts.65

However, as discussed below (and in Part IV), by the late nineteenth and early twentieth centuries, legislators began to develop a more expansive conception of the Supreme Court’s role. The Court was increasingly viewed

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63 Thus, in 1789, there was widespread political support for Supreme Court review of state court decisions. Nationalists were worried that state courts might interfere with the operations of the new government. See 1 ANNALS OF CONG. 797-98 (Joseph Gales ed., 1834) (statement of Rep. William Smith, Pro-Admin., SC) (urging that it was “indispensable” to have an appeal from every state court decision involving federal law). States’ rights advocates hoped that the Court would keep the national government within its prescribed bounds and also police the actions of sister States. See, e.g., id. at 809 (statement of Rep. Michael Stone, Anti-Admin., Md) (asserting that “those who framed” “the scheme of the present Government” “supposed that it had a natural tendency to destroy the State Governments; or, on the other hand, they supposed that the State Governments had a tendency to abridge the powers of the General Government; therefore it was necessary to guard against either taking place, and this was to be done properly by establishing” the “Supreme Federal Court”).

64 See Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85–86.

65 Under the 1789 Act, the lower federal courts had jurisdiction over admiralty and maritime cases, suits arising under international or federal criminal law, and diversity actions when the amount in controversy exceeded $500. Id. §§ 2–4, 9, 11, 1 Stat. at 73–79. The Court could review those decisions when the amount in controversy exceeded $2000. See id. §§ 13–14, 22, 1 Stat. at 80–82, 84–85. The Court could also review some lower federal court decisions through its power to issue supervisory writs, such as writs of mandamus and habeas corpus. See id. §§ 13–14, 22, 1 Stat. at 80–82, 84–85.
as an institution that should establish definitive and uniform rules of federal law. Thus, legislators described the Supreme Court as “the final tribunal which should pass upon the meaning of the Constitution, treaties, and statutes of the United States” in order to “enforce[ing] the uniformity of decision … throughout the entire judicial system.”

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

Notably, the 1891 statute was enacted during an era that was characterized by intense partisan struggles over the authority of the federal courts. While economic conservatives sought to expand and protect federal jurisdiction, populists and progressives generally fought to curtail it. But even during this era of intense partisanship, these political factions proved to be less divided when it came to the Supreme Court. A group of key progressives crossed party lines to vote in favor of legislation designed to protect the Court’s role in overseeing the judiciary.

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68 Notably, the Court’s appellate jurisdiction was established by Article III. Accordingly, when the first Congress in the 1789 Act declined to grant the Court jurisdiction in all federal cases, it was making “exceptions” to the Court’s preexisting constitutional jurisdiction. See Duroseau v. United States, 10 U.S. (6 Cranch) 307, 314 (1810). (As noted in the text, I do not argue that Congress in 1789 sought to use its “exceptions” power to promote the Court’s settlement function. Congress at that time had a much narrower conception of the Supreme Court’s role.) Congress’s subsequent jurisdictional “expansions” could thus be characterized as “restorations” of the Court’s Article III jurisdiction. For my purposes, the characterization makes little difference. Whether Congress was expanding or restoring the Court’s jurisdiction, it was doing so in order to facilitate the Court’s settlement function.
A. Partisan Divides and Jurisdiction-Stripping Efforts

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

The economic conservatives sought to advance their agenda in large part through the federal judiciary. The Republicans controlled the Presidency and the Senate during much of this period and were thus able to appoint judges who were generally sympathetic to the party’s economic goals. Indeed, the members of the Supreme Court were selected almost entirely based on “their devotion to party principles and ‘soundness’ on the major economic questions of the day.”

The Republicans endeavored to empower this “friendly” judiciary by expanding federal jurisdiction. During a period of unified government, the party ushered in a sweeping jurisdictional statute. The Judiciary Act of 1875 enabled the federal courts to hear all cases arising under federal law and significantly expanded their jurisdiction in diversity suits, including the

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70 See Howard Gillman, How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875–1891, 96 AM. POL. SCI. REV. 511, 516 (2002). In the immediate aftermath of the Civil War, the Republican Party focused more on civil rights (i.e., protecting free blacks in the South from abuses). See William M. Wiecek, The Reconstruction of Federal Judicial Power, 1863–1875, 13 AM. J. LEGAL HIST. 333, 333, 344 (1969). However, the political support for civil rights enforcement waned in the 1870s, and the Republicans turned instead toward building a strong national economy. See Gillman, supra, at 516.
71 See Edward A. Purcell, Jr., Litigation and Inequality: Federal Diversity Jurisdiction in Industrial America, 1870-1958 15 (1992) (asserting that, during this period, the Democrats represented interests in the Midwest, West and South that were increasingly “hostil[e] to eastern financial interests and national corporations”).
72 Gillman, supra note 70, at 513, 516-17 (arguing that the Republicans sought to make federal judges “the principal agents of [the Republicans’ economic] agenda”).
74 Bensel, supra note 73, at 7.
75 5 Historical Statistics of the United States, Millennial Edition Online 5-201 (Susan B. Carter et al. eds., 2006) [Historical Statistics] (showing that the Republicans had a 194-92 majority in the House and a 49-14 majority in the Senate and held the presidency in Ulysses S. Grant).
opportunities to remove cases from state to federal court. The Act had the desired effect: corporations soon took advantage of their opportunities to take cases to the federal courts, leading to an explosion in federal litigation.

The 1875 Act also precipitated a bitter partisan struggle over federal jurisdiction. For the next several decades, Democratic legislators proposed bills to curb federal jurisdiction over suits involving corporations. Representative David Culberson led the charge from the 1870s to the 1890s. He repeatedly proposed legislation that would define a corporation as a citizen of any state in which it did business, and thereby largely eliminate federal diversity jurisdiction over common law actions involving corporations. Representative Culberson emphasized that “[p]ersons who are poor and without the means to litigate with wealthy corporations are … denied justice” in federal court. He argued: “There can be no higher duty imposed on this Congress than to lessen [the] power [of corporations] to oppress the citizen in the courts of the United States.”

In response, the Republicans defended the federal judiciary and underscored its importance to national economic growth and development. For example, Representative Hiram Barber argued that “[c]apital [in the North and East] is timid; it demands security” and the “best guarantee of security to investments [is] found in recourse to national courts.” Likewise, Representative George Robinson emphasized the importance of ensuring a federal forum for large corporations, stating “let us stand by the national courts; let us preserve their power.”

These jurisdiction-stripping bills repeatedly passed the House of Representatives, which was controlled by the Democratic Party during much of this period. Each time, however, the Republicans used their control over

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76 See Judiciary Act of 1875, §§ 1, 2 18 Sta. 470, 470-71 (conferring jurisdiction over “all suits … arising under” federal law, when the amount in controversy exceeded $500 and expanding diversity jurisdiction).
77 See FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM 60, 65 (1928); PURCELL, supra note 71, at 15.
78 See PURCELL, supra note 71, at 15 (“Beginning in 1878, [populists and progressives] mounted a persistent campaign to restrict the federal courts, prevent corporate removals, and limit diversity jurisdiction.”).
79 See 7 CONG. REC. 4000 (1878); 10 CONG. REC. 43 (1879); 13 CONG. REC. 427 (1882); 15 CONG. REC. 118 (1883); See 23 CONG. REC. 200 (1892); 26 CONG. REC. 3408 (1894).
80 See 10 CONG. REC. 682 (1880).
82 14 CONG. REC. 1246 (1883) (statement of Rep. David Culberson, D-Tex.).
83 10 CONG. REC. 820 (1880) (statement of Rep. Hiram Barber, Jr., R-Ill.).
84 Id. at 850 (statement of Rep. George Robinson, R-Mass.) (arguing that, given the importance of the federal courts for economic disputes, “let us stand by the national courts; let us preserve their power”).
85 See HISTORICAL STATISTICS, supra note 75, at 5-201, tbl. Eb-296-308.
the Senate to block the proposal. Thus, as Representative Culberson complained in both 1890 and 1894, “the fate of [his jurisdiction-stripping] measure in the Senate … warns us that it can never become the law.”

B. The Introduction of Certiorari Review: 1891

The rise in litigation resulting from the 1875 Judiciary Act and other contemporaneous reforms created a caseload crisis throughout the federal judiciary. But the situation in the Supreme Court was particularly severe. The Court’s appellate jurisdiction was still largely defined by the Judiciary Act of 1789, which required it to review every case properly before it on appeal. By 1890, the Court’s mandatory appellate docket had swelled to over 1800 cases, only four or five hundred of which it could dispose of in a given year.

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

Chief Justice Waite’s calls for reform were echoed by members of the executive branch. Attorneys General under both President Grover Cleveland and Benjamin Harrison urged Congress to “find a remedy for the
crying evil of delay” caused by the caseload crisis. President Harrison raised the issue himself in his 1889 State of the Union Address, arguing that “[t]he necessity of providing some more speedy method for disposing of the cases … [in] the Supreme Court becomes every year more apparent and urgent.”

Several Republican legislators, including Senator William Evarts, proposed bills to respond to the Court’s concerns. Senator Evarts argued that Congress had an “obligation[] under the Constitution” to provide relief to the Court, while “leave[ing] entirely uncurtailed” the Court’s authority over constitutional questions and “other questions of a public nature.” Under the Evarts plan, the Supreme Court would retain mandatory appellate jurisdiction over virtually all cases arising under federal law. But the Court would have the discretion to review other classes of cases, including diversity suits. A new system of appellate courts would have primary responsibility for deciding those non-federal cases, subject to review in the Supreme Court in one of two ways—either by certification from the court of appeals or by way of a writ of certiorari.

The political dynamics surrounding this proposal in many respects mirrored those of the Culberson bill. The Republicans strongly supported the reform, which would empower the pro-business judiciary by giving it sufficient personnel and resources to handle the additional duties created by the 1875 Act. But many Democrats strongly opposed the plan. They

95 Annual Report of the Attorney General for the Fiscal Year 1889 at xviii-xix (William Miller) (emphasizing “[t]he importance of some change in the judicial system of the United States, which will enable the courts, and especially the Supreme Court, to dispose of the large number of cases”); see, e.g., Annual Report of the Attorney General for the Fiscal Year 1885 at 36-43 (A.H. Garland) (advocating an intermediate court of appeals in part on the ground that “[i]t will undoubtedly very largely reduce the docket of the Supreme Court”). Notably, President Cleveland’s Attorney General Augustus Garland supported the Court’s request for relief, even as he also advocated the proposal to restrict federal jurisdiction over corporate suits. See 1885 Annual Report at 42.
97 21 CONG. REC. 10220 (1890) (statement of Sen. William Maxwell Evarts, R-NY) (“[T]he great point for us to meet is to provide intermediate courts that shall answer the purpose of our obligations under the Constitution, that shall leave entirely uncurtailed the authority of the Supreme Court in …. the supervision of laws in the sense of constitutionality and other questions of a public nature.”).
98 See S. REP. NO. 51-1571, at 1-2 (1890).
99 See id. at 2 (proposing to give the circuit courts final jurisdiction in diversity, patent, revenue, criminal, and admiralty cases).
100 Id. at 2.
101 See, e.g., 21 CONG. REC. 10227 (1890) (statement of Sen. Joseph Dolph, R-Or.) (arguing that “the plain imperative duty of Congress” “is to provide adequate judicial machinery for the prompt transaction of the business of the federal courts”).
refused to support any bill that would enlarge the size of the federal judiciary, particularly given that the additional judges would be selected by a Republican.\textsuperscript{102} (President Harrison had two more years remaining in his term, and he already had a track record of appointing staunchly pro-business individuals to the federal bench.\textsuperscript{103}) The Democrats argued instead that, if the Supreme Court was overworked, the solution was to reduce the scope of federal jurisdiction.\textsuperscript{104} Indeed, some Democrats pointed out that the Culberson bill, if enacted, would resolve many of the Court’s workload problems.\textsuperscript{105}

Accordingly, Congress could have remained “deadlocked” on judicial reform.\textsuperscript{106} The Democrats would continue to support efforts to restrict federal jurisdiction, while the Republicans would oppose them. The Republicans would favor the creation of a new appellate court system to relieve the Supreme Court, while the Democrats would block that reform. Such a deadlock should have been particularly likely, given that the Supreme Court was as dominated by pro-business jurists as the rest of the federal judiciary.\textsuperscript{107} And, indeed, for several years, these partisan divisions did delay efforts to provide relief to the Court.\textsuperscript{108}

However, ultimately, Senator Evarts’ proposal attracted some notable bipartisan support. A group of key Democrats in both the House and the Senate supported the creation of the new appellate court system—principally because the measure appeared to be the only means of addressing the Supreme Court’s caseload crisis.\textsuperscript{109} For example, Senator John Morgan

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\item See id. at 10678 (statement of Rep. William Breckinridge, D-Ky.) (opposing the new judgeships); id. at 10306 (statement of Sen. George Vest, D-Missouri) (“It has been suggested … that I want no more Federal judges because there is a Republican Administration in power which might be called upon to appoint them. I have thought of that, and I would rather have in office those who agree with me politically. I am a Democrat.”).
\item See 21 \textit{Cong. Rec.} 3406 (1890) (statement of Rep. William Oates, D-Ala.) (contending that Congress could relieve the Supreme Court by repealing the federal courts’ entire diversity jurisdiction); 22 \textit{Cong. Rec.} 3586 (1891) (statement of Rep. William Breckinridge, D-Ky.) (stating that “the main remedy [to the workload crisis] … is to take from the Federal judiciary the vast amount of jurisdiction which does not under our system properly belong to it”).
\item See supra notes 73-74 and accompanying text.
\item See \textit{Frankfurter & Landis, supra} note 77, at 89, 93 (observing that, in the 1870s and 80s, “[t]he two houses were deadlocked…. After the [bill to restructure the judiciary] passed the Senate, it was buried in the House Judiciary Committee”).
\item See supra notes 73-74 and accompanying text.
\item See \textit{Frankfurter & Landis, supra} note 77, at 89, 93.
\item See, e.g., 22 \textit{Cong. Rec.} 3408 (1890) (statement of Rep. John Rogers, D-Ariz.) (stating that although he “heartily sympathize[d]” with those who favored jurisdictional restrictions,
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stated that the need to “secur[e] relief” to the Court “reconciles me to consent to the appointment of this additional number of judges, which I suppose we are to have appointed in a partisan way.”

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

The authority vested in Congress to make exceptions to and regulate the appellate jurisdiction of the Supreme Court was granted for the purpose of enabling the Congress to adapt the appellate jurisdiction of the court to the varying demands of the business, trade, and commerce of the country and to protect and shield that great tribunal from the conditions which exist to-day…. [T]his bill will, in my opinion, reasonably protect the court from an excessive burden of litigation and conform its appellate jurisdiction to the enormous growth of the business of the country.

Representative Culberson further observed that the Supreme Court could still review the cases “excepted” from its mandatory appellate jurisdiction. He argued that it was crucial for the Court to retain such

including the Culberson bill, such legislation had “not yet passed the Senate” and Congress could not “reasonably hope” to lessen the Court’s workload “by a repetition of that action which we have found of no avail”; 21 CONG. REC. 10285 (1890) (statement of Sen. John Reagan, D-Tex.) (supporting the bill in part because it would help to “unload the Supreme Court”); id. (statement of Sen. John Morgan, D-Ala.) (arguing that the need for Supreme Court supervision of “autocratic” lower federal court judges and “for the purpose of securing relief” to the Court “reconciles me to consent to the appointment of this additional number of judges, which I suppose we are to have appointed in a partisan way”).

110 21 CONG. REC. 10285 (1890) (statement of Senator John Morgan, D-Ala.).

111 See 21 CONG. REC. 3403 (1890) (statement of Rep. David Culberson, D-Tex.) (supporting a House bill to create a new appellate court system for this reason); 22 CONG. REC. 3585 (1890) (statement of Rep. David Culberson, D-Tex.) (supporting the Evarts plan “for the reasons which induced me to support the House bill…. The objects and results … are secured by the Senate amendment.”). Representative Culberson also favored the reform because it would enhance the Supreme Court’s power to oversee the inferior federal courts, and thereby end the “judicial despotism” exercised by some lower court judges. 21 CONG. REC. 3403 (1890) (statement of Rep. David Culberson, D-Tex.); see also infra notes 119-123 and accompanying text (noting the jurisdictional expansions in the new law).

112 21 CONG. REC. 3403-04 (1890) (statement of Rep. David Culberson, D-Tex.).

113 Representative Culberson was referring to the original House bill, which provided that cases outside the Supreme Court’s mandatory jurisdiction would reach the Court upon certification by the courts of appeals. (The House bill required certification whenever there was a conflict among the courts of appeals. See H.R. REP. No. 51-1295, at 1-2 (1890).) The House bill did not provide for writs of certiorari. See id. But as Edward Hartnett has
“supervisory control over all questions … within the judicial power of the United States.”

This “supervisory control” would enable the Court to “enforce[]” the “uniformity of decision … throughout the entire judicial system of the United States.”

The Evarts bill ultimately passed both the House and the Senate with this (modest) bipartisan support. The Judiciary Act of 1891 largely codified the Evarts plan. Under the Act, the Supreme Court had mandatory appellate jurisdiction over federal question cases from the lower federal courts and only discretionary review power (through certiorari or certification) over other classes of cases.

Notably, the Act did not reduce the Court’s jurisdiction in every respect. The statute expanded the Supreme Court’s appellate review power over federal question cases by reducing the amount-in-controversy requirement from $5000 to $1000. The Act also significantly expanded the Court’s jurisdiction in criminal cases, providing for review in any case observed, legislators at the time viewed certification and writs of certiorari as largely indistinguishable. See Hartnett, supra note 58, at 1656 (noting that Senator Evarts and others “viewed certification and certiorari as parallel provisions” and envisioned “certiorari … as a sort of fallback provision should the circuit courts of appeals prove, on occasion, to be surprisingly careless in deciding cases or issuing certificates”). Indeed, Representative Culberson supported the Senate bill, because he believed it accomplished the same objectives as the House bill. See supra note 111.

The Evarts bill passed the Senate by a vote of 44-6. See 21 CONG. REC. 10364-65 (1890). Given that the Senate at the time included 39 Republicans and 37 Democrats, see HISTORICAL STATISTICS, supra note 75, at 5-201, tbl. Eb-296-308, some Democratic support was likely necessary for passage of the bill. Indeed, at that time, a single Senator could have filibustered the measure. See U.S. Senate: Filibuster and Cloture, available at http://www.senate.gov/artandhistory/history/common/briefing/Filibuster_Cloture.htm (discussing the history of the filibuster and noting that the Senate did not adopt a cloture rule until 1917). The bipartisan support was more modest in the House. The House passed a version of the reform on April 15, 1890 by a vote of 131-13. 21 CONG. REC. at 3410 (1890). Only a handful of Democrats (eight) voted in favor of the final bill. But, notably, only thirteen Democrats voted against the measure; 132 Democrats simply declined to vote. The House accepted the Evarts bill, as it passed the Senate, by a vote of 107-62. 22 CONG. REC. 3587 (1890). The individual votes in the House on that final measure were not recorded. Id. President Benjamin Harrison signed the measure into law on March 2, 1891. See id. at 3760.

See Circuit Court of Appeals Act, §§ 5, 6, 26 Stat. 826, 827-28 (1891) (providing for mandatory review in federal cases when the amount in controversy exceeded $1000).

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

See id. § 6, 26 at 828.
involving “a capital or otherwise infamous crime.” Although some legislators worried that these provisions would undermine the proposed relief for the Court, others argued that any additional burden was justified by the importance of providing for Supreme Court review of important federal questions. Representative Culberson, for example, strongly supported these expansions, arguing that “[a]s the Supreme Court is the Federal head of the judicial department of the Government,” the Court should review all “questions of a Federal character.”

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

120 Circuit Court of Appeals Act, §§ 5, 26 Stat. 826, 827-28 (1891). Two years earlier, Congress had given the Supreme Court mandatory appellate jurisdiction over capital cases. See Act of Feb. 6, 1889, ch. 113, § 6, 25 Stat. 655, 656. Prior to these statutes, the Supreme Court could review criminal cases only if two circuit judges certified the matter to the Court, see Frankfurter & Landis, supra note 77, at 109, or (in some cases) via a petition for a writ of habeas corpus, see Pfander, Jurisdiction-Stripping, supra note 24, at 1488-90.

121 Indeed, these modifications led Representative John Rogers, one of the leading proponents of the reform in the House, to withdraw his support for the bill. See 22 Cong. Rec. 3484 (1890) (statement of Rep. John Rogers, D-Ariz.) (arguing that the additional jurisdiction over criminal appeals would “intensif[y]” the Court’s caseload difficulties). Senator Evarts also initially opposed the expansion of the Court’s appellate jurisdiction in criminal cases. See 21 Cong. Rec. 10302-03 (1890) (statement of Sen. William Evarts, R-N.Y.) (worrying that the criminal appeals “would be a great burden” on the Court). But he ultimately compromised on this point. See id. at 10308-09.

122 See 22 Cong. Rec. 3584, 3587 (1891) (statement of Rep. Nathan Frank, R-Missouri) (asserting that any burden on the Court would be “counterbalanced by the … justice of getting it this [criminal] jurisdiction on appeal”); id. at 3586 (statement of Rep. David Culberson, D-Tex.) (“If there is any class of judgments which deserve a higher and greater consideration than another it seems to me that a judgment which takes life or liberty falls within it.”).


124 Id.

125 Id. at 3403-04.
IV. Expansions and Exceptions in the Early Twentieth Century

The judiciary’s pro-business rulings remained a subject of significant controversy after the turn of the century. But the primary target soon turned from corporate suits to the constitutional jurisprudence of the Supreme Court.126 Progressives increasingly attacked the Court’s use of the Due Process Clause and the Commerce Clause to limit state and federal efforts to regulate wages and workplace conditions. Meanwhile, the economic conservatives in the Republican Party continued to defend the Court’s efforts to protect the free market. But, even in this charged political environment, these political factions came together to enact—by far wider margins than in 1891—legislation that protected the Supreme Court’s role in the constitutional scheme.

A. Progressive Attacks on the Supreme Court: 1920s

In the early twentieth century, the progressive movement gained strength in both political parties.127 There were not only progressive Democrats, but also a growing number of progressive Republicans who were deeply critical of the Supreme Court’s constitutional jurisprudence.128 The Republican Party was thus divided between the (once dominant) economic conservatives and this new progressive wing.129 Moreover, progressive Republicans appeared to be gaining political strength after the 1922 elections, when they won several important congressional seats.130 Although the progressives “still held only a small number of seats in Congress, their strength exceeded their numbers.”131 The progressive Republicans “held the balance of power in Congress,” because the economic conservatives had to rely on their support in order to enact legislation.132

During this same period, the Supreme Court was increasingly hostile to social and economic legislation.133 Progressives were particularly

126 See William G. Ross, A Muted Fury: Populists, Progressives, and Labor Unions Confront the Courts, 1890-1937 1, 179 (1994) (observing that from 1890 to 1937, “populists, progressives, and labor leaders subjected both state and federal courts to vigorous and persistent criticism,” and that “[p]rogressive proposals [during the 1920s] more often involved only the Supreme Court”).
127 See Chambers, supra note 69, at 14 (noting that, during the fourth party system, which lasted from 1896 to 1932, progressive reformers gained political strength).
128 See Whittington, supra note 50, at 261.
129 See id. (observing that “conservatives faced new challenges in the first decades of the twentieth century from progressive reformers within the Republican Party,” who managed to “fracture[e] apparent legislative majorities”).
130 See Ross, supra note 126, at 211.
131 Id.
132 Id.
133 See, e.g., Adkins v. Children’s Hospital, 261 U.S. 525, 545-562 (1923) (invalidating a minimum wage law for women and children on due process grounds as a violation of the liberty of contract); Bailey v. Drexel Furniture, 259 U.S. 20, 36-39, 44 (1922) (striking down,
outraged by the Court’s 1918 decision in *Hammer v. Dagenhart*, which invalidated a federal child labor law.134 In the wake of this decision (and similar rulings),135 progressives launched a series of attacks on the Supreme Court.

Some legislators proposed constitutional amendments to undo the Court’s rulings. For example, Senator Robert La Follette suggested a constitutional amendment permitting Congress to reenact any law that had been struck down by the Supreme Court.136 But other progressives sought to correct the Court’s constitutional decisions by statute. These statutory proposals relied on Congress’s power to make “exceptions” to and “regulate” the Supreme Court’s appellate jurisdiction.

Several legislators sought to impose supermajority requirements on the Court’s exercise of judicial review.137 For example, Senator William Borah introduced a bill that would require the concurrence of seven Justices to invalidate any act of Congress.138 He argued that “[w]hen a measure has passed the Congress and received the approval of the President it seems unreasonable that such a measure should be rejected by a decision in which no more than five out of nine judges concur.”139

Other legislators advocated restrictions on the Supreme Court’s appellate jurisdiction. Senator Robert Owen proposed legislation that would reenact the child labor law and prohibit the Court from ruling on the constitutionality of the new statute.140 Senator Owen argued that Congress had ample power to make “such exceptions and such regulations … as to

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134 *Hammer*, 247 U.S. at 272-73; *see Ross*, supra note 126, at 169 (observing that *Hammer v. Dagenhart* “provided an impetus for specific proposals to curb the Court’s power”).

135 *See supra* note 133.

136 *See* 62 CONG. REC. 9075-76, 9081 (1922) (statement of Sen. Robert La Follette, R-Wis.) (“What I propose is that Congress shall be enabled to override this usurped judicial veto … just as it has the power to override a presidential veto.”).

137 *See Ross*, supra note 126, at 222, 231-32.

138 *See* 64 CONG. REC. 3004 (1923).

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

140 *See* 56 CONG. REC. 7431-32 (1918) (statement of Sen. Robert Owen, D-Okla). Senator Owen’s proposal stated in part:

No judge of an inferior Federal court shall permit the question of the constitutionality of this act to be raised in the court over which he presides, and the United States Supreme Court shall have no appellate power to pass upon such question.

*Id.* at 7432.
prevent the Supreme Court from nullifying acts of Congress, or assuming to declare questions of great national policy".\footnote{141}

The Supreme Court of the United States has no jurisdiction worth mentioning, except appellate jurisdiction. That appellate jurisdiction under Article III … is subject to the control of Congress, and is granted “with such exceptions, and under such regulations as the Congress shall make.” Therefore, Congress can take from that Court … such part of that jurisdiction as it may see fit.\footnote{142}

In response, conservatives defended the Supreme Court, emphasizing the Court’s role in the preservation of liberty and the protection of minorities.\footnote{143} For example, Senator Walter Edge decried the “attack[s] upon the highest court in our land, the bulkwark of liberty and freedom.”\footnote{144} Likewise, Senator Frank Kellogg asserted that “[t]he highest court of the land was established to see that the citizen was protected in his constitutional rights against [legislative and executive] encroachments.”\footnote{145} He insisted that “[t]he guarantees of the Constitution could not possibly be enforced without” the Supreme Court.\footnote{146}

Ultimately, none of the proposals to limit the authority of the Supreme Court gained traction in Congress. Although the economic conservatives needed progressive support to enact legislation, they had ample power to block the progressives’ court-curbing efforts.\footnote{147} Indeed, the statutory proposals by Senators Borah and Owen never even made it out of committee in either chamber of Congress.\footnote{148}

\footnote{141} 64 CONG. REC. 3958 (1923) (statement of Sen. Robert Owen, D-Okla).
\footnote{143} As William Ross has noted, these arguments were somewhat counterfactual, because the Court at that time had not proven to be a great defender of individual liberty. See Ross, supra note 126, at 204-05 (observing that, at least until Meyer v. Nebraska, 262 U.S. 390 (1923), which protected parental rights, the Court’s “history … afforded scant support for [this] contention”). Notably, some progressives also opposed the attacks on the Supreme Court. See, e.g., 65 CONG. REC. 247 (1923) (reproducing article by Sen. John Shields, D-Tenn) (arguing that the La Follette, Borah, and Owen proposals, “if successful, would result in the absorption by the legislative department of all judicial power, a condition subversive of all liberty”); see also Ross, supra note 126, at 197 (1994) (noting that progressives were “divided on the issue of judicial reform”).
\footnote{144} 62 CONG. REC. 9073 (1922) (statement of Sen. Walter Edge, R-NJ).
\footnote{145} 56 CONG. REC. 7434 (1918) (statement of Sen. Frank Billings Kellogg, R-Minn).
\footnote{146} Id. (“We might as well wipe out the Constitution as abolish the Supreme Court of the United States, which has for more than one hundred years been the rock of the liberties of the American people.”).
\footnote{147} See Ross, supra note 126, at 196, 232.
\footnote{148} See id. at 196, 232 (observing that the proposals failed in large part because “conservatives controlled the judiciary committees in both houses”). Senator La Follette’s suggested constitutional amendment was “never even embodied in a bill.” Id. at 320.
B. Expanding Certiorari Review: 1925

During the early twentieth century, the Supreme Court’s caseload continued to increase dramatically. The mounting volume of cases was caused in large part by Congress’s expansion of the Court’s appellate jurisdiction, such as the addition of criminal appeals in 1891. In 1914, Congress also voted—without recorded dissent—to extend the Court’s jurisdiction over state court rulings to encompass all federal question cases, including those in which the state court had upheld a federal right. This reform was expressly designed to enable the Court to preserve “the uniformity of the Federal laws in their practical application to … the several States.”

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

As a result, Chief Justice Taft—much like Chief Justice Waite before him—urged Congress to dramatically reduce the Court’s mandatory appellate jurisdiction. Taft argued that “[t]he business of the court...
rapidly increasing,” and absent a reduction in the Court’s mandatory jurisdiction, it would be “impossible for the court to dispatch promptly, as it should, the important questions which it is organized to settle.”

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

As in 1891, the executive branch strongly supported the Supreme Court’s call for greater control over its docket. In testimony before Congress, President Warren Harding’s Solicitor General James Beck stated that although “it would be admirable if in every case an appeal could be taken as a matter of right,” such a requirement was impractical. The Court should therefore have the discretion to focus on cases “involving very great and substantial questions.”

Likewise, in his 1924 State of the Union address, President Calvin Coolidge asserted that the Court should have the

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157 Jurisdiction of Circuit Courts of Appeals and United States Supreme Court: Hearing Before the House Comm. on the Judiciary, 67th Cong. 2 (1922) (statement of C.J. Taft) [Jurisdiction of Circuit Courts Hearing].
158 See, e.g., 66 Cong. Rec. 2920 (1926) (letter from Chief Justice William Howard Taft to Sen. Royal Copeland, D-N.Y.) (asserting that “the business of the Supreme Court should be to consider and decide for the benefit of the public and for the benefit of uniformity of decision only … questions of importance”); Jurisdiction of Circuit Courts of Appeals and of the Supreme Court of the United States: Hearing Before the House Comm. on the Judiciary, 68th Cong. 17 (1924) (statement of J. Van Devanter) [Jurisdiction of the Supreme Court Hearing] (stating that the Court would grant review only if the case “involves questions of general importance or the decision by the Supreme Court is necessary to produce needed uniformity”). Indeed, Justice Van Devanter declared that the Court always granted a certiorari petition in the event of a conflict among the lower courts. See Procedure in Federal Courts: Hearing on S. 2060 and S. 2061 Before the Subcomm. of the Senate Comm. on the Judiciary, 68th Cong. 29-30 (1924) (statement of J. Van Devanter) [Procedure in Federal Courts Hearing] (“Whenever we find … a conflict [among the state supreme courts or circuit courts of appeals] that, without more, leads to the granting of the petition[.]”).
159 Id.
160 Jurisdiction of the Supreme Court Hearing, supra note 158, at 22 (statement of J. McReynolds).
161 Jurisdiction of Circuit Courts Hearing, supra note 157, at 8 (statement of Solicitor General Beck) (arguing that, if litigants had such a right, “the calendar of the court would become so congested and clogged the wheels of justice would stick in the mud”).
162 Id. at 9.
power to “reserve its time for … extended consideration of cases” “of public moment.”  

Economic conservatives in Congress also supported the certiorari expansion. The conservatives had good reason to facilitate the authority of this pro-business Court to settle important federal questions. By contrast, progressives had good reason to oppose the certiorari bill. Many believed that the Court had “to a large extent usurped the lawmaking power” by invalidating federal economic legislation. Moreover, progressive Republicans “held the balance of power” in Congress. Accordingly, even if the progressives could not enact court-curbing measures, they could at a minimum prevent legislation that would enhance the Supreme Court’s power.

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

Senator Cummins and other supporters argued—much like the Justices themselves—that the Supreme Court’s primary functions were to resolve important issues of federal law and to settle conflicts among the lower courts. But the Court’s mandatory appellate jurisdiction had impaired the Court’s capacity to perform this settlement function. “Having to hear numbers of cases of trivial character …. the [Supreme Court] is hindered from hearing and determining more important cases and from

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164 During this era, the conservatives retained control over the judiciary committees in both Houses, see Ross, supra note 126, at 196, which strongly endorsed the proposed certiorari expansion. See H.R. Rep. No. 68-1075, at 1 (1925) (recommending passage of the legislation); S. Rep. No. 68-362, at 1 (1924) (same).
165 See Barry Friedman & Erin F. Delaney, Becoming Supreme: The Federal Foundation of Judicial Supremacy, 111 Colum. L. Rev. 1137, 1162-66 (2011) (“Corporate interests recognized that to obtain substantive results in judicial doctrine, they needed to empower the Court by expanding its jurisdiction and affirming its position at the apex of a restructured federal judiciary branch.”).
166 62 Cong. Rec. 9076 (1922) (statement of Sen. Robert La Follette, R-Wis.).
167 Ross, supra note 126, at 211.
168 See id. at 252-53 (noting the lack of opposition); see also Hartnett, supra note 58, at 1645 (observing that “Senator Thomas Walsh, a progressive Democrat from Montana … attempted a lonely fight against the bill”).
169 See Ross, supra note 126, at 93 (noting that Senator Cummins was a progressive).
170 See H.R. Rep. No. 68-1075, at 2 (1925) (stating that the Court should devote its “time and attention and energy … to matters of large public concern” and to “preserving uniformity”); S. Rep. No. 68-362, at 3 (1924) (“The central thought is … [that] cases should not go to the Supreme Court … unless the questions involved are of grave public concern or unless serious uncertainty attends the decision of the circuit courts of appeal by reason of conflict in the rulings of these courts or the courts of the States.”).
efficiently ... perform[ing] its highest duty of interpreting the Constitution and preserving uniformity of decision” on federal questions. Thus, Senator Cummins and others argued that Congress should “restrict or reduce the appellate jurisdiction of the Supreme Court … in order to enable it fairly to meet the demands that are made upon it.”

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

Ultimately, the certiorari expansion—embodied in the Judiciary Act of 1925—went through both chambers of Congress with ease. The measure passed the House with virtually no debate and without any recorded opposition. The Senate passed the bill by a vote of 76-1. In the end,

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173 See Hartnett, supra note 58, at 1684-1704 (discussing, and criticizing, the lack of opposition or serious debate).
174 See, e.g., 66 CONG. REC. 2922, 2753-55 (1925) (statement of Sen. Royal Copeland, D-N.Y.) (expressing concern because the bill did not require review of all constitutional questions, but also asserting that the Court’s “time and labor should, generally speaking, be devoted to matters of general interest and importance and not deciding private controversies”); id. at 2757 (statement of Sen. Claude Swanson, D-Va.) (arguing that the Court should have mandatory appellate jurisdiction over lower court decisions invalidating a state or federal law on constitutional grounds).
175 See Frankfurter & Landis, supra note 77, at 276; Hartnett, supra note 58, at 1645.
177 See id. at 8545-47 (asserting that the bill “proposes a radical departure from the system devised” by the Founders).
178 See id. at 8548-49 (stating that “justice delayed is justice denied, and if the work of the Supreme Court is accumulating beyond its power to dispatch … it is incumbent on Congress … to grant relief,” and suggesting that the circuit courts of appeals be given final authority in diversity cases, “except as to any Federal question involved”).
179 See Pub. L. No. 68-415, 43 Stat. 936 (1925). The Act left in place mandatory jurisdiction over (1) state court decisions invalidating a federal statute or treaty; (2) state court decisions upholding state law against constitutional challenge; (3) certain decisions by three-judge district courts; (4) certain criminal appeals by the United States; and (5) federal appellate court decisions invalidating a state law. See § 1, 43 Stat. at 937-38, 39.
180 See 66 CONG. REC. 2879-80 (1925) (showing that the House initially passed the bill on February 2, 1925, without a recorded vote and with no representative opposing certiorari
even Senator Walsh voted in favor of the legislation.\textsuperscript{182} The bill also attracted the support of some progressives who otherwise sought to limit the Court’s power, including Senator Borah.\textsuperscript{183} Other progressives, such as Senators Owen and La Follette, simply declined to vote.\textsuperscript{184}

As Professor William Ross has stated, it seems “ironic that Congress increased the power of the [Supreme Court] at the very time that agitation by progressives and labor leaders … was reaching a new intensity.”\textsuperscript{185} But the strong support for the measure seems to reflect legislators’ increasing acceptance of the Supreme Court’s role in defining the content of federal law. Although progressives like Senator Borah disagreed with the Supreme Court’s rulings in specific cases, they appeared to see value in the Court’s long-term settlement function. Indeed, even critics of the certiorari expansion agreed that the Supreme Court’s “primary function … is to give an authoritative interpretation of Federal law.”\textsuperscript{186} The principal area of contention was how best to ensure that the Court could perform this crucial function. Thus, even more so than in 1891, the 1925 Judiciary Act was premised on a view that the “chief purpose” of the Supreme Court is to “settle” important questions of federal law.\textsuperscript{187}

\section*{V. Exceptions in Modern America}

The federal judiciary was once again a subject of intense political conflict in the mid-to-late twentieth century. But, this time, the objections came primarily from conservatives. Socially conservative Republicans and conservative Southern Democrats strongly objected to Supreme Court

\begin{footnotesize}
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\item \textsuperscript{181} See 66 \textsc{Cong. Rec.} 2928 (1925) (showing that, on February 3, 1925, the Senate passed the bill by a vote of 76-1, with 19 Senators not voting). President Calvin Coolidge signed the bill into law on February 14, 1925. \textit{See id.} at 3747-48. Accordingly, in the end, the legislation was enacted with only one recorded dissent. Senator James Heflin voted against the 1925 reform, stating that he did not “think it [was] right to withdraw from the citizen the right to appeal to the highest courts in the land if he wants to appeal.” \textit{Id.} at 2928 (statement of Sen. James Heflin, D-Ala). Senator Heflin had not previously raised any objection during the floor debates over the bill.

\item \textsuperscript{182} See id. at 2926, 2928 (statement of Sen. Thomas Walsh, D-Mont.) (reiterating his view that the Supreme Court should have mandatory jurisdiction over all federal question cases but also stating that “my criticism … seems to have had no response…. I do not feel like standing alone on the matter.”); \textit{see also} Hartnett, supra note 58, at 1700 (asserting that “[i]f Senator Walsh had continued in his opposition, he could have … perhaps killed the bill”).

\item \textsuperscript{183} See 66 \textsc{Cong. Rec.} 2928 (1925).

\item \textsuperscript{184} See id.

\item \textsuperscript{185} Ross, supra note 126, at 252-53.

\item \textsuperscript{186} 62 \textsc{Cong. Rec.} 8545 (1922) (statement of Sen. Thomas Walsh, D-Mont.) (reprinting a speech by Senator Walsh).

\item \textsuperscript{187} \textit{Jurisdiction of the Supreme Court Hearing}, supra note 158, at 22, 47 (statement of J. McReynolds).
\end{enumerate}
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decisions involving abortion, reapportionment, desegregation, criminal justice, and religion. Accordingly, they sought to strip both Supreme Court and lower federal court jurisdiction over these constitutional claims.\textsuperscript{188} Those efforts were, however, blocked by social progressives, who generally supported the Court’s civil rights jurisprudence.\textsuperscript{189}

But, once again, these competing political factions came together to protect the Supreme Court’s constitutional role. In 1988, Congress enacted—with no apparent opposition—a statute granting the Court discretionary review over virtually every appeal.

\textbf{A. The Exceptions Clause as a Shield versus Sword}

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

\textit{1. An Early Effort to Expand Certiorari Review}

The 1925 Judiciary Act provided temporary relief, but it did not solve the Court’s workload problems. In the latter half of the twentieth century, the Court’s docket grew further,\textsuperscript{190} in part because of the expanding federal administrative state, and also because of changes in the Court’s own doctrine, which recognized a number of new constitutional rights (particularly in the area of criminal procedure).\textsuperscript{191} The Court also faced increasing challenges in overseeing the lower courts because of a sharp increase in their workload. For example, between 1960 and 1983, the number of filings in federal district courts rose from approximately 80,000 to


\textsuperscript{189} See Grove, \textit{Structural Safeguards}, supra note 86, at 900-10, 935-37.

\textsuperscript{190} See Epstein, \textit{et. al.}, supra note 149, at 65-67 tbl.2-2 (showing that the Supreme Court’s caseload rose from 1,321 in 1950, to 4,761 in 1975, to 8,965 in 2000).

280,000 cases per year, and those in the courts of appeals grew in similar proportion (from approximately 3,800 to nearly 30,000 cases per year). As in the early twentieth century, Congress recognized that the demand on the federal judiciary was creating a caseload crisis at the Supreme Court. As a result, in the 1970s, Congress enacted a series of statutes that reduced the Court’s mandatory appellate jurisdiction in specified areas, such as antitrust. However, once again, this piecemeal approach did little to relieve the Court.

Accordingly, the Supreme Court—this time led by Chief Justice Burger—called for more substantial reform. In successive letters to Congress, the Court sought a dramatic extension of certiorari jurisdiction to enable it to settle important federal questions. “To the extent that we are obligated by statute to devote our energies to [the] less important cases [within our mandatory jurisdiction], we cannot devote our time and attention to the more important issues and cases constantly pressing for resolution” each term.

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See Act of Aug. 12, 1976, Pub. L. No. 94-381, §§ 1-3, §§ 1-3, 90 Stat. 1119 (reducing the number of cases in which a three-judge district court is required, thereby eliminating a source of direct appeals); Act of Dec. 21, 1974, Pub. L. No. 93-528, § 5, 88 Stat. 1706, 1709 (abolishing virtually all direct appeals in antitrust actions); Act of Jan. 2, 1971, Pub. L. No. 91-644, § 14, 84 Stat. 1880, 1890 (eliminating direct appeals by the United States in criminal cases). These statutes, much like the 1925 Act, were designed to address the Court’s caseload crisis, see H.R. Rep. No. 94-1379, at 4 (1976) (stating that “the limited resources of the Supreme Court are strained by the direct appeal” from three-judge district courts); S. Rep. No. 94-204, at 3, 4-5 (1975) (same), and to allow the Court to focus on important federal questions. See S. Rep. No. 93-298, at 4 (1973) (“Under the [antitrust] proposal, only those cases of general public importance would be appealable directly to the Supreme Court[.]”); H.R. Rep. No. 93-1463, at 12-13 (1974) (same).

There were other suggestions for how the Court could best address its capacity constraints. Much of the debate focused on the possible creation of a national court of appeals to assist the Court, particularly in resolving lower court conflicts. See Report of the Study Group on the Caseload of the Supreme Court, 57 F.R.D. 573, 590-95 (1972) (recommending a National Court of Appeals to take on part of the Court’s workload); Commission on Revision of the Federal Court Appellate System Structure and Internal Procedures: Recommendations for Change, 67 F.R.D. 195, 199 (1975) (recommending a National Court of Appeals to hear cases referred by the Supreme Court or transferred from a federal court of appeals). This proposal was, however, criticized by some Justices and scholars, and “ultimately the idea withered away.” Margaret Meriwether Cordray & Richard Cordray, The Supreme Court’s Plenary Docket, 58 WASH. & LEE L. REV. 737, 741-42 (2001).


The executive branch under both Democratic and Republican administrations once again supported the Court’s request for relief. A commission chaired by President Ford’s Solicitor General Robert Bork strongly “recommend[ed] that the remaining mandatory appellate jurisdiction of the Supreme Court be abolished.”197 President Carter’s Solicitor General Wade McCree agreed, emphasizing that this reform was essential to allow the “one Supreme Court” created by the Constitution to oversee the growing federal business of the nation.198

Senator Dennis Deconcini led several early efforts to expand the Court’s certiorari jurisdiction.199 He agreed with the Justices that the existing jurisdictional scheme “impair[ed] the Court’s ability” to provide a “definitive resolution” of important federal questions.200 The elimination of mandatory appellate review was necessary to enable the Court “to effectuate its constitutional mission of resolving only those matters that are of truly national significance.”201

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

[A]n “appeal” to any Federal appellate court, including the Supreme Court, is solely a creature of legislative choice.... In establishing the Court’s appellate jurisdiction under Article III, Congress can confer as much or as little compulsory jurisdiction as it deems necessary and proper, including such exceptions as Congress thinks appropriate. If Congress wants to make the Court’s appellate jurisdiction totally discretionary or totally obligatory in nature, nothing in the Constitution says “no.” See Ex parte McCardle, 7 Wall. 506 (1869).202

198 Supreme Court Jurisdiction Act of 1978: Hearing on S. 3100 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 95th Cong. 2 (1978) (statement of Solicitor General McCree) [Supreme Court Jurisdiction Act of 1978: Hearing] (arguing that discretionary review was needed to “maintain the viability of this constitutional concept of a single Supreme Court as the population … has grown enormously and the volume of litigation has correspondingly burgeoned”).
199 See 125 CONG. REC. 7630, 7632 (1979); S. REP. NO. 95-985, at 1 (1978) (showing that Senator Deconcini also introduced the legislation in 1978).
200 125 CONG. REC. 7633 (1979) (statement of Sen. Dennis DeConcini, D-Ariz.); see S. REP. NO. 96-35, at 7 (1979) (“A significant number of petitioners for certiorari whose cases involve issues of considerable importance are being denied access to the Court simply because the Court has no time to hear them due to the crush of obligatory appeals.”).
201 Id.
202 S. REP. NO. 96-35, at 2-3 (1979) (emphasis added); S. REP. NO. 95-985, at 3 (1978) (same). The citation to Ex Parte McCardle may be surprising. The Court in that case provided one of
Under the Deconcini bill, Congress would use that plenary power to ensure that the Court could continue to perform its crucial “function as expositor of the national law.”

2. The “Helms Amendment” to Strip Jurisdiction Over School Prayer

During this era, Senator Jesse Helms led an effort to strip federal jurisdiction over school prayer cases. He sought to attach his proposal to various bills and, in 1979, the jurisdiction-stripping measure became part of the Deconcini bill.

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

In anticipation of judicial usurpations of power, the framers of our Constitution wisely gave the Congress the authority, by a simple majority of both Houses, to check the Supreme Court by means of regulation of its appellate jurisdiction. Section 2 of article III states in clear and unequivocal language that the appellate jurisdiction of the Court is subject to “such exceptions, and under such regulations as the Congress shall make.”
Social progressives strongly opposed this jurisdiction-stripping effort. And, although they sought to defend the federal judiciary as a whole, the progressives were particularly concerned about the “assault on the Supreme Court.” Thus, Senator Birch Bayh asserted that the bill, if enacted, would set “a very dangerous precedent” that would make it easier for future Congresses to strip the Supreme Court’s jurisdiction over other constitutional issues. Others, including Senator Ted Kennedy, expressed concern about the uniform enforcement of federal law, arguing that it would be unwise to leave the resolution of federal constitutional questions to fifty different states.

In response, Senator Helms pointed to prior jurisdiction-stripping bills, including proposals to strip the Supreme Court’s jurisdiction over reapportionment cases and *Miranda* issues, as “precedents” to support the constitutionality and propriety of his school prayer measure. Senator Kennedy responded, however, that those precedents actually undermined Helms’ arguments, because those prior bills had been uniformly rejected by Congress.

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

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208 *See id.* at 7644 (statement of Sen. John Durkin, D-N.H.) (“This type of restriction on the judicial power, once applied in this instance, will become ever easier to apply in the future. The appetite for this restrictive practice will grow . . . . The result will be to weaken, if not cripple, the independence of the Federal judiciary . . . .”).

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

210 *Id.* at 7654 (statement of Sen. Birch Bayh, D-Ind.) (“We are setting a very dangerous precedent that could go far beyond prayer.”); *id.* at 7654 (statement of Sen. Edward Kennedy, D-Mass.) (arguing that, if Congress adopted the measure, “we will establish a precedent that Congress will be able to take any action, involving individual rights . . . and remove jurisdiction of that matter from the Federal courts and the Supreme Court”).

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


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

214 *See Grove, Structural Safeguards, supra* note 86, at 900-16, 935-39 (describing how social progressives repeatedly defeated conservatives’ efforts to strip federal jurisdiction).

215 Only two Senators expressed opposition to the certiorari expansion. But their opposition was largely limited to one issue—whether individual States ought to have a right to appeal to the Supreme Court. *See id.* at 7646 (statement of Sen. James McClure, R-Idaho) (stating that
Thus, social progressives “strongly support[ed]” the certiorari measure, arguing that it would serve the “worthy goal” of allowing the Supreme Court to focus on the most significant cases. And social conservatives supported both the certiorari expansion and the Helms amendment. Senator Deconcini serves as an example. Even as he tried to protect the Supreme Court’s overall “constitutional mission” of resolving important issues of federal law, he endorsed the effort to eliminate the Court’s role in school prayer cases.

Likewise, Senator Strom Thurmond was a leading proponent of both measures. He strongly endorsed the Helms amendment, asserting that Congress had “a right to make that exception” to the Supreme Court’s appellate jurisdiction. But Senator Thurmond also argued that Congress had both the power and the duty to expand the Court’s certiorari review power:

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

The Senate ultimately passed the entire bill by a wide margin, with the support of socially conservative Republicans and Southern Democrats. But the bill faced resistance in the House of Representatives. After a fifteen-

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216 125 CONG. REC. 7632 (1979) (statement of Sen. Edward Kennedy, D-Mass.) (supporting the certiorari expansion, which would “insure fair consideration of matters which should be decided by the Supreme Court”).
217 Senator Deconcini voted in favor of adding the Helms amendment to both the Department of Education bill and his Supreme Court Jurisdiction Act. See id. at 7581, 7644, 7648; see also id. at 7633 (1979) (statement of Sen. Dennis DeConcini, D-Ariz.) (expressing support for the Helms amendment).
218 See 125 CONG. REC. 7639 (1979) (statement of Sen. Strom Thurmond, D-S.C.) (“[I]t does not make any sense to say that little children cannot voluntarily pray at school.”).
219 Id. at 7647 (“There can be no doubt that it is within the powers of Congress to enact such legislation. Neither article III nor the due process clause of the Constitution requires that litigants be provided with any absolute right to ‘appeal’ to the Supreme Court. It is for Congress to determine how much of the Supreme Court’s appellate jurisdiction is to be compulsory and how much of it is to be discretionary.”).
220 Id. at 7648.
221 See 125 CONG. REC. 7648 (1979) (showing that the bill passed the Senate by a vote of 61-30); Grove, Structural Safeguards, supra note 86, at 936 (showing the breakdown of votes).
month delay, a subcommittee held hearings on the bill. Although the subcommittee members favored the Deconcini bill, they could not support that reform when it was accompanied by a jurisdiction-stripping provision.

The subcommittee members expressed particular concern about the proposed restriction on Supreme Court review. Representative Robert McClory and others worried that the elimination of Supreme Court oversight could lead to “a situation in which 50 States could have 50 different interpretations of what the law of the land is.” And Representative Harold Sawyer stated that, although he was “in favor of allowing voluntary prayer in the schools,” “the thing that frighten[ed] [him] about the Helms amendment” was that it might encourage future efforts to “deprive the Supreme Court of any jurisdiction to cover the due process clause, or civil rights, or equal treatment” and thereby “virtually emasculate the Bill of Rights.”

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

B. Expansion of Discretionary Review in the 1988 Judiciary Act

In the ensuing years, the Supreme Court continued to request relief. Successive House and Senate judiciary committees repeatedly recommended

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224 For example, Representative Robert Kastenmeier separately sponsored bills to expand the Supreme Court’s certiorari jurisdiction. See 134 CONG. REC. 13510 (1988) (statement of Rep. Robert Kastenmeier, D-Wis.); 130 CONG. REC. 24815-16 (1984) (same); 128 CONG. REC. 24302-03 (1982). But he strongly opposed the Helms amendment. See Prayer in Public Schools Hearing, supra note 223, at 3 (statement of Rep. Robert Kastenmeier, D-Wis.) (stating that he was “troubled by the prospect . . . of denying citizens access to the Federal courts with regard to an important constitutional issue”).

225 Id. at 9-10 (Rep. Robert McClory, R-Ill.) (stating that he opposed the Helms amendment on this ground, although he favored voluntary prayer in public schools); see id. at 2 (statement of Rep. Robert Kastenmeier, D-Wis.) (“Conceivably this could result in 50 interpretations of the meaning of the first amendment.”).

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

227 See KEYNES & MILLER, supra note 188, at 200.

an expansion of certiorari jurisdiction,\(^{229}\) and the Reagan Administration also strongly endorsed the reform.\(^{230}\) Ultimately, in 1988, Congress enacted—with no opposition—a statute granting the Court certiorari jurisdiction over virtually every appeal.\(^{231}\)

The Judiciary Act of 1988 was built on the same premises as the original Deconcini bill. Congress continued to rely on its plenary power under the Exceptions Clause to “confer as much or as little compulsory jurisdiction as it deems necessary and proper, including such exceptions as Congress thinks appropriate.”\(^{232}\)

Moreover, Congress sought to use that authority to facilitate what it saw as the Court’s “principal functions”: (1) “to resolve cases involving principles … of wide public importance”; and (2) “to ensure uniformity and consistency in the law by resolving conflicts” among the lower courts.\(^{233}\) Thus, a House Judiciary Committee report stated:

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


\(^{231}\) See Pub. L. No. 100-352, 102 Stat. 662 (1988); 134 CONG. REC. 4465 (1988) (showing the Senate passed the measure by a voice vote, without any Senator expressing opposition); 134 CONG. REC. 13512 (1988) (showing the House passed it under suspension of rules, without any representative expressing opposition).

\(^{232}\) S. REP. NO. 100-300, at 3 (1988) (“In establishing the Court’s appellate jurisdiction under Article III, Congress can confer as much or as little compulsory jurisdiction as it deems necessary and proper, including such exceptions as Congress thinks appropriate. If Congress wants to make the Court’s appellate jurisdiction totally discretionary or totally obligatory in nature, nothing in the Constitution would prevent such action. See Ex parte McCord, 7 Wall. 506 (1869).”).

\(^{233}\) H.R. REP. NO. 100-660, at 14 (1988), reprinted in 1988 U.S.C.C.A.N. 766, 779; see S. REP. NO. 100-300, at 4 (1988) (“History has shown that imposing [] mandatory functions on the Supreme Court tends to weaken the Court’s capacity both to control its own docket and to confine its labors to those cases of national importance.”).
although not a panacea ..., is a necessary step to relieving the Court’s calendar crisis.\textsuperscript{234}

The 1988 Act was thus the “logical culmination” of the legislative trend that began in 1891.\textsuperscript{235} Congress recognized that the Court’s mandatory appellate jurisdiction dated from the “early days of the Federal judiciary, when there was adequate time to dispose of every appeal on its merits.”\textsuperscript{236} But, by the late twentieth century, this appellate review system was “outmoded.”\textsuperscript{237} This scheme “detract[ed] from the Court’s ability … to effectuate its constitutional mission of resolving only those matters that are of truly national significance”\textsuperscript{238} and “ensur[ing] uniformity and consistency in the law by resolving conflicts” among the lower courts.\textsuperscript{239} Accordingly, as in 1891 and 1925, Congress used its broad “exceptions” power to enable the Court to “pronounce uniform and authoritative rules of federal law.”\textsuperscript{240}

\section*{VI. The Scope and Implications of the Exceptions Clause Safeguard}

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

\subsection*{A. The Structural Safeguards of Supreme Court Review}

The Exceptions Clause empowers Congress to enact beneficial “exceptions” that promote the Supreme Court’s constitutional role. But the Clause is not the only structural protection for the Court. Instead, the Exceptions Clause works in conjunction with other structural constraints in

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\item \textsuperscript{235} S. Rep. No. 100-300, at 2, 4 (1988).
\item \textsuperscript{236} Id. at 3 (“The right to appeal ... evolved out of the early days of the Federal judiciary, when there was adequate time to dispose of every appeal on its merits and when the need for developing discretionary limitations and short cuts in disposing of enormous case filings was yet unknown.”).
\item \textsuperscript{238} 125 Cong. Rec. 7633 (1979) (statement of Sen. Dennis DeConcini, D-Ariz.).
\item \textsuperscript{240} Bator, supra note 3, at 1039.
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Articles I and II to ensure the Court’s role in defining the content of federal law.

1. The Exceptions Clause as an Article III Safeguard

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

As we have seen, on multiple occasions, Congress’s efforts to expand Supreme Court jurisdiction—in order to broaden its role in defining the content of federal law—have themselves imperiled the Court’s constitutional role. The Constitution calls for “one supreme Court.” But as the volume of federal cases increased, it became “utterly impossible for [that one Court] to pass upon all litigation that involves a Federal question.”

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242 Jurisdiction of the Supreme Court Hearing, supra note 158, at 22 (statement of J. McReynolds) (“It is utterly impossible for us to pass upon all litigation that involves a Federal question, and if we undertake to do it the delay will be intolerable.”). There have been suggestions to divide the Supreme Court into panels in order to enable it to deal with its mounting workload. But these (and similar proposals to delegate the work of the Supreme Court) have not found favor in Congress or among many of the Justices. See supra note 194 (discussing the rejection of such proposals in the 1970s and 1980s); Jurisdiction of Circuit Courts Hearing, supra note 157, at 8 (statement of C.J. Taft) (stating that “[w]e could not adopt [the panel approach] because our Constitution provides that there shall be one Supreme Court, and it is doubtful whether you could constitutionally divide the court into two parts”). In 1890, the Senate discussed the issue at length after a minority report of the Senate Judiciary Committee suggested dividing the Supreme Court into three panels that would hear cases on behalf of the Court. See S. REP. No. 51-157, at 3-5 (1890) (Views of the Minority) (asserting that Congress’s power to make “exceptions” and “regulations” enabled it to provide “that any three or other convenient number of the justices may proceed at the same time to hear arguments and pronounce decisions” on behalf of the Court). But the Senate overwhelmingly rejected the proposal—largely on constitutional grounds. See 21 CONG. REC. 10316 (1890) (showing that the Senate voted 36-10 against the proposal); 21 CONG. REC. 10227 (1890) (statement of Sen. Joseph Dolph, R-Or.) (“The power of Congress to provide regulations for the exercise of [the Court’s] jurisdiction cannot be held to extend to legislation which would break up the Supreme Court into fragments and substitute several courts … for the one Supreme Court provided by the Constitution.”); id. at 10286 (statement of Sen. John Spooner, R-Wis.) (stating that he could “not vote for” the minority proposal because he had “some doubt … as to its constitutionality,” given the constitutional provision for “‘one Supreme Court’”). Thus, even assuming arguendo that Congress could divide the Supreme Court into panels, such a measure has not been politically viable. Congress has accordingly needed to
enact legislation that would enable this single tribunal to oversee the federal business of a growing nation.

In the late nineteenth century, Chief Justice Waite urged Congress to use its broad authority under the Exceptions Clause to address the Court’s burgeoning caseload. He argued that the Supreme Court’s “appellate jurisdiction is subject entirely to congressional control” and sought legislation that would “help to make the [] Court what its name implies, a powerful auxiliary in the administration of justice,” rather than “an obstacle standing in the way” of the final resolution of cases. Chief Justice Taft and Chief Justice Burger renewed this call in the next century. They insisted that “[t]he business of the [Supreme Court] is rapidly increasing,” and unless Congress reduced its remaining mandatory appellate jurisdiction, it would be impossible for the Court “to dispatch promptly, as it should, the important questions which it is organized to settle.”

Each time, the political branches responded by making exceptions to the Supreme Court’s mandatory appellate jurisdiction and granting it discretionary certiorari review. Executive officials argued that this reform was essential to allow the “one Supreme Court” created by the Constitution to continue to resolve cases “of public moment.” Members of Congress agreed that mandatory appellate review “impair[ed] the Court’s ability” to provide a “definitive resolution” of disputed federal questions. Accordingly, Congress enacted exceptions that would enable the Court to find another way for our “one supreme Court” to oversee the federal business of a growing nation.

243 Waite, supra note 92, at 318.

244 Jurisdiction of Circuit Courts Hearing, supra note 157, at 2 (statement of C.J. Taft); Letter from Supreme Court to Sen. DeConcini (June 22, 1978), in S. REP. NO. 96-35, at 15 (1979) (asserting that certiorari review would enable the Court to “devote our time and attention to the more important issues and cases constantly pressing for resolution” each term); see Letter from Supreme Court to Rep. Kastenmeier (June 17, 1982), in H.R. REP. NO. 100-660, at 27 (same).

245 Supreme Court Jurisdiction Act of 1978: Hearing, 95th Cong. 2 (1978) (statement of Solicitor General McCree) (arguing that discretionary review was needed to “maintain the viability of this constitutional concept of a single Supreme Court as the population … has grown enormously and the volume of litigation has correspondingly burgeoned”); Second Annual Message of President Calvin Coolidge (Dec. 3, 1924), in 3 THE STATE OF THE UNION MESSAGES OF THE PRESIDENTS, 1790-1966, at 2662 (Fred L. Israel ed., 1966) (asserting that discretionary review would allow the Court to focus on cases “of public moment”); see Annual Report of the Attorney General of the United States for the Fiscal Year 1885 at 42-43 (A.H. Garland) (advocating a discretionary review scheme that would allow the Court to resolve federal questions that were “novel and of sufficient importance to justify the appeal”).

246 125 CONG. REC. 7633 (1979) (statement of Sen. Dennis DeConcini, D-Ariz.); see S. REP. NO. 96-35, at 7 (1979) (stating that “the Court has no time to hear [important cases] due to the crush of obligatory appeals”); S. REP. NO. 95-985, at 7 (1978) (same); H.R. REP. NO. 68-1075, at 2 (1925) (“Having to hear large numbers of cases of trivial character …, the [Court] is hindered from … perform[ing] its highest duty of interpreting the Constitution and preserving uniformity of decision” on federal questions).
concentrate its limited resources on “resolv[ing]” important issues of federal law and “ensur[ing] uniformity and consistency in the law by resolving conflicts” among the lower courts.247

Absent the Exceptions Clause, it is not clear that Congress would have had the authority to make these needed adjustments to the Court’s appellate jurisdiction.248 Notably, there is widespread agreement among jurists and scholars that Congress has little to no power over the Supreme Court’s original jurisdiction, which of course is not qualified by any “Exceptions Clause.”249 If the Supreme Court’s appellate jurisdiction were likewise “insulated from congressional regulation,” it is not clear that Congress could have removed classes of cases from the Court’s mandatory appellate oversight.250

247 H.R. REP. NO. 100-660, at 14 (1988), reprinted in 1988 U.S.C.C.A.N. 766, 779; see 21 CONG. REC. 3405 (1890) (statement of Rep. David Culberson, D-Tex.) (asserting that the Supreme Court should “retain, as far as practicable, a supervisory control over all questions … within the judicial power of the United States, to the end that uniformity of decision may be enforced throughout the entire judicial system of the United States”).

248 It is conceivable, of course, that the Supreme Court might have had the inherent “judicial power” to create a discretionary review scheme. But the Justices repeatedly asserted that they lacked such authority. See, e.g., Jurisdiction of the Supreme Court Hearing, supra note 158, at 21 (statement of J. McReynolds) (“We simply cannot attend to [every] … Federal question…. So we are face-to-face with a practical question, and there is no relief except through Congress.”).

249 See, e.g., California v. Arizona, 440 U.S. 59, 65 (1979) (“The original jurisdiction of the Supreme Court is conferred not by the Congress but by the Constitution itself. This jurisdiction is self-executing, and needs no legislative implementation.”); Harrison, supra note 9, at 204, 209 (arguing that “Congress may not add to or subtract from [the Court’s] original jurisdiction”); Redish, Congressional Power, supra note 10, at 901 (“[T]he Court’s relatively limited original jurisdiction … is unequivocally insulated from congressional regulation.”); but see Akhil Reed Amar, Marbury, Section 13, and the Original Jurisdiction of the Supreme Court, 56 U. Chi. L. Rev. 443, 444 (1989) (arguing that Congress may reduce the Supreme Court’s appellate jurisdiction in cases in which a State is a party because the judicial power does not extend to “all” such suits). Congress would presumably still have the power to make laws that are “necessary” and “proper” to carry out the Supreme Court’s appellate review power. See David E. Engdahl, Intrinsic Limits of Congress’ Power Regarding the Judicial Branch, 1999 BYU L. REV. 75, 80 (asserting that most of “Congress’ power regarding the judiciary derives from the Necessary and Proper Clause”). However, as David Engdahl has argued, the Exceptions Clause seems to authorize “exceptions” and “regulations” that would not be permitted by the Necessary and Proper Clause alone. See id. at 155 (asserting that “the Exceptions Clause … enlarge[s] Congress’ discretion”). Thus, it is at least debatable whether, absent the Exceptions Clause, Congress would have the power to remove classes of cases from the Court’s mandatory appellate jurisdiction. That may be particularly true with respect to constitutional and other federal claims, given that Article III states that the Court “shall have appellate Jurisdiction” over “all cases” arising under federal law. U.S. CONST. art. III, § 2, cl. 2; cf. Amar, supra, at 444 (arguing that Congress may not “deprive the Supreme Court of original jurisdiction” over cases if Article III provides for review “all” such cases). The Exceptions Clause therefore, at a minimum, removes any doubt about Congress’s power.

250 Redish, Congressional Power, supra note 10, at 901; sources cited supra note 249. That was the understanding of at least some jurists and legislators, when certiorari jurisdiction was first created in 1891. See Waite, supra note 92, at 318 (“The [Supreme Court’s] original
The presence of the Exceptions Clause removes any doubt about Congress’s power. The Clause ensures that the “legislative branch [may] respond to the increasing pressures on our Supreme Court” by transferring cases from its mandatory to its discretionary jurisdiction.251 Indeed, legislators have repeatedly asserted that such “exceptions” to the Court’s appellate jurisdiction are “within the easy reach of Congress.”252 Thus, “[t]he authority vested in Congress to make exceptions to and regulate the appellate jurisdiction of the Supreme Court” has repeatedly enabled Congress to “shield that great tribunal … from an excessive burden of litigation and conform its appellate jurisdiction to the enormous growth of the business of the country.”253

2. The Structural Safeguards of Article I and Article II

The Exceptions Clause is not the only structural protection for the Supreme Court. Nor is this protection sufficient to ensure the Court’s role in defining the content of federal law. As we have seen, although legislators generally see value in the Supreme Court’s long-term settlement function, some members of Congress are also happy to eliminate the Court’s power to rule on specific issues. For example, even as Senators Deconcin and Thurmond sought to protect the Court’s overall “function as expositor of the national law,”254 they also endorsed Senator Helms’ efforts to make an “exception” in school prayer cases.

jurisdiction is … fixed by the Constitution, and it cannot be taken away by Congress, but the appellate jurisdiction is subject entirely to congressional control.”); 21 CONG. REC. 3403-04 (1890) (statement of Rep. David Culberson, D-Tex.) (“The Supreme Court was designed to be, mainly, an appellate tribunal. Its original jurisdiction … was fixed by the Constitution, and Congress cannot add to or subtract from it.”). 251 125 CONG. REC. 7648 (1979) (statement of Sen. Strom Thurmond, D-S.C.) (“[I]t is time once again for the legislative branch to respond to increasing pressures on our Supreme Court by adjusting its appellate jurisdiction.”). 252 21 CONG. REC. 3403-04 (1890) (statement of Rep. David Culberson, D-Tex.) (“The remedy for [the caseload crisis] is within the easy reach of Congress…. The authority vested in Congress to make exceptions to and regulate the appellate jurisdiction of the Supreme Court was granted for the purpose of enabling the Congress to … conform its appellate jurisdiction to the enormous growth of the business of the country.”); see S. REP. NO. 100-300, at 3 (1988); S. REP. NO. 96-35, at 2-3 (1979); 125 CONG. REC. 7647 (1979) (statement of Sen. Strom Thurmond, D-S.C.) (“There can be no doubt that it is within the powers of Congress to enact [a law expanding certiorari review]. Neither article III nor the due process clause of the Constitution requires that litigants be provided with any absolute right to ‘appeal’ to the Supreme Court. It is for Congress to determine how much of the Supreme Court’s appellate jurisdiction is to be compulsory and how much of it is discretionary.”); 66 CONG. REC. 2752 (1925) (statement of Sen. Albert Cummins, R-Iowa) (asserting that Congress may “restrict or reduce the appellate jurisdiction of the Supreme Court … in order to enable it fairly to meet the demands that are made upon it”). 253 1 21 CONG. REC. 3403-04 (1890) (statement of Rep. David Culberson, D-Tex.). 254 125 CONG. REC. 7633 (1979) (statement of Sen. Dennis DeConcini, D-Ariz.).
Drawing on earlier work, I argue that other structural and political constraints built into our constitutional scheme serve to protect the judiciary against such court-curbing attempts. These additional structural safeguards help ensure that Congress uses its plenary power over federal jurisdiction to facilitate, rather than to undermine, the Supreme Court’s constitutional role.

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

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

The above historical account illustrates the importance of this structural protection. In the late nineteenth and early twentieth centuries, when populists and progressives sought to curtail federal judicial power, economic conservatives blocked those court-curbing efforts. Indeed, in the 1920s, conservatives ensured that the “exceptions” and “regulations” proposed by Senators Borah and Owen never even emerged from committee. In more modern times, when social conservatives sought to strip jurisdiction

256 U.S. Const. art. I, § 7, cl. 2.
258 See Grove, Structural Safeguards, supra note 86, at 882-86.
259 See Whittington, supra note 50, at 18 (“Political actors defer to ... courts because the judiciary can be useful to their own political and constitutional goals.”); Graber, supra note 50, at 43 (“[P]oliticians may facilitate judicial policymaking in part because they ... believe that the courts will announce those policies that they ... favor.”). Notably, this political support is tied to the constitutional structure. The appointment and confirmation process established by the Constitution (requiring both presidential and senatorial approval) effectively guarantees that each federal judge has been selected by a dominant political group. See U.S. Const. art. II, § 2, cl. 2. Thus, our process helps ensure that, at least at the outset, a judge’s views on constitutional and other legal issues align to some degree with those of political leaders.
260 My prior work focused on jurisdiction stripping. But political supporters of the judiciary should also be inclined to block other court-curbing measures, such as Senator Borah’s effort to impose a supermajority requirement on the Court, see Part IV(A).
261 For a more extensive description of those and other examples, see Grove, Structural Safeguards, supra note 86, at 890-916.
over constitutional claims like school prayer, social progressives used their structural veto in the House of Representatives to protect the judiciary.

Moreover, these lawmaking procedures seem to work particularly well to protect the Supreme Court’s appellate review power. As the debates over the school prayer measure illustrate, political supporters of the judiciary are especially inclined to use their Article I veto to defend the Court. 262 And even political opponents of the judiciary (who support efforts to strip lower federal court jurisdiction) have spoken out against attempts to eliminate the Supreme Court’s appellate review power, emphasizing the Court’s “role … in establishing uniform standards” of federal law. 263

But there is an additional structural safeguard for the Supreme Court: the executive branch. The executive has various tools at its disposal to oppose constitutionally questionable legislation. The President can veto or threaten to veto problematic legislation. 264 The executive can also use its role in enforcing federal laws to ensure that laws are applied in a manner that accords with constitutional values. 265

Social science research suggests that the executive branch should be inclined to use this constitutional authority to safeguard the Supreme Court’s appellate review power. First, scholars have argued that the President often advances his constitutional philosophy through litigation in the federal courts. 266 Accordingly, the President has some incentive to protect the


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

Supreme Court’s authority to decide constitutional claims. These presidential incentives are reinforced by the institutional incentives of the Department of Justice.\textsuperscript{267} The Solicitor General is in charge of virtually all federal litigation in the Supreme Court.\textsuperscript{268} Thus, as former Solicitor General Drew Days put it, “[o]nce cases reach the Supreme Court, the Solicitor General plays an important role in the development of American law” and can have a substantial “impact upon the establishment of constitutional and other principles.”\textsuperscript{269} This institutional position gives the DOJ a strong interest in protecting the Supreme Court’s appellate review power.

These institutional incentives undoubtedly help explain the executive branch’s steadfast (and bipartisan) support for certiorari measures.\textsuperscript{270} Empowering the Supreme Court to resolve important federal questions enhances the executive’s own influence over the development of federal law. But the same incentives have also led the executive branch to oppose efforts to strip the Supreme Court’s appellate jurisdiction.\textsuperscript{271} For example, in response to the school prayer proposal (and similar measures), President Ronald Reagan’s first Attorney General William French Smith issued an Office of Legal Counsel (OLC) opinion concluding that Congress lacks the power to eliminate Supreme Court review of constitutional claims.\textsuperscript{272} The Attorney General reasoned that such an “exception” to the Court’s appellate jurisdiction “would intrude upon [its] core functions … as an independent and equal branch in our system of separation of powers.”\textsuperscript{273} “The integrity of our system of federal law depends upon a single court of last resort having a final say on the resolution of federal questions.”\textsuperscript{274}

These structural constraints help explain why proposals to strip the Supreme Court’s appellate jurisdiction have been repeatedly defeated in the

\textsuperscript{267} See Grove, \textit{Article II Safeguards}, supra note 255 (explaining how social science theories of path dependence and institutional entrenchment explain the DOJ’s support for the Court).

\textsuperscript{268} See 28 U.S.C. § 518(a); FEC v. NRA Political Victory Fund, 513 U.S. 88, 93 (1994). Notably, before the Solicitor General was created in 1870, see Act of June 22, 1870, ch. 150 §§ 1-2, 16 Stat. 162, the Attorney General was the government’s exclusive representative in the Supreme Court. See Judiciary Act of 1789, § 35, 1 Stat. 73, 92-93.


\textsuperscript{270} Indeed, during the debates over the 1891 reform, even as many Democratic legislators were reluctant to empower the Supreme Court, Attorneys General of both political parties supported the creation of discretionary review. See supra Part III(B).

\textsuperscript{271} See Grove, \textit{Article II Safeguards}, supra note 255 (describing the executive branch’s opposition to such efforts during the Franklin Roosevelt, Eisenhower, Kennedy, Carter, and Reagan Administrations).


\textsuperscript{273} Id. at 14.

\textsuperscript{274} Id. at 26; see also Nomination of Edwin Meese III: Hearing Before the Senate Comm. on the Judiciary, 98th Cong. 185-86 (1984) (arguing that Congress lacks the power to “diminish or take away the core functions of the Supreme Court,” including the power to rule on constitutional claims).
Indeed, even when Congress has enacted statutes that curtail lower federal court jurisdiction, those laws have generally left the Supreme Court’s appellate review power in place. The structural safeguards of Articles I and II have helped ensure that Congress does not enact “exceptions” that undermine the Court’s role in defining the content of federal law.

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

Congress has, on a few occasions, enacted restrictions on the Supreme Court’s appellate review power. But, particularly when viewed in a broader context, even these examples reflect to some degree the long-term political support for the Court.

1. An Early Exception: The McCordle Episode

The most famous jurisdiction-stripping incident was in 1868 and arose out of the military reconstruction activities in the post-Civil War South. In 1867, William McCordle was detained by federal authorities in Mississippi for publishing newspaper articles that severely criticized the military’s activities. When the lower courts denied habeas relief, McCordle sought Supreme Court review under the Habeas Corpus Act of 1867, challenging the constitutionality of the reconstruction laws.

Notably, during the late 1860s, Congress was controlled by the Republican Party, in large part because the (predominantly Democratic) representatives of the defeated southern states were excluded from the

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275 See Grove, Structural Safeguards, supra note 86, at 890-916 (recounting how supporters of the judiciary blocked jurisdiction-stripping efforts, including efforts to strip the Supreme Court’s appellate jurisdiction over school prayer, busing, subversive activities, reapportionment, Miranda issues, challenges to the Defense of Marriage Act and to the use of “under God” in the Pledge of Allegiance); Grove, Article II Safeguards, supra note 255 (recounting the executive’s efforts to defend the Court’s jurisdiction).


This Republican Congress was heavily invested in the reconstruction efforts and other civil rights reforms in the South.\(^\text{280}\) (The party did not turn its focus to economic nationalism until the 1870s.\(^\text{281}\)) Thus, while the McC CARDLE case was pending, several House Republicans introduced a bill to repeal the Supreme Court’s appellate jurisdiction under the 1867 Act.\(^\text{282}\)

The Democrats in Congress strongly opposed this jurisdiction-stripping effort, accusing the Republicans of seeking to block Supreme Court review of the reconstruction laws.\(^\text{283}\) And the radical Republicans, at least in the House, did not deny the charge.\(^\text{284}\) But the Reconstruction Republicans at that time had considerable majorities in Congress and the bill passed both chambers with ease.\(^\text{285}\)

The measure was temporarily blocked when President Andrew Johnson vetoed it, asserting that any attempt to prevent Supreme Court review of a constitutional claim was “not in harmony with the spirit and intention of the Constitution.”\(^\text{286}\) But the delay was short-lived. The Republicans had no difficulty assembling the two-thirds majority necessary to override the veto and enact the jurisdiction-stripping legislation.\(^\text{287}\)

In *Ex parte McC CARDLE*,\(^\text{288}\) the Supreme Court applied this newly-established limit on its appellate jurisdiction and dismissed McC CARDLE’s
In its decision, the Court emphasized the breadth of Congress’s “exceptions” power:

We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words. What, then, is the effect of the repealing act upon the case before us? We cannot doubt as to this. Without jurisdiction the court cannot proceed.

The Supreme Court went on to state, however, that the 1868 legislation had not cut off all avenues of appellate review. As the Court later explained in *Ex parte Yerger*, it could still review lower court decisions denying habeas relief by way of an original petition under the Judiciary Act of 1789.

The 1868 repeal resulted from a breakdown in the usual structural protections for the Supreme Court. In the late 1860s, “Congress excluded all representatives, however qualified they may have been, from the Southern states.” The usual supermajority requirement for enacting federal legislation was thus significantly (and perhaps illegitimately) relaxed. For that reason, the Reconstruction Republicans managed easily not only to push their jurisdiction-stripping measure through Congress but also to override President Johnson’s veto. The structural safeguards of both Article I and Article II thus failed to protect the Court.

But the story of Congress’s authority over the Supreme Court’s appellate jurisdiction did not end with the 1868 repeal. Over the next decade, as lower federal courts issued rulings in habeas cases, which were not subject to review under the 1789 Act, Congress grew increasingly concerned about the lack of Supreme Court oversight. The House

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289 See id. at 515.
290 Id. at 514-15.
291 See id. at 515 (“The act of 1868 does not except from that jurisdiction any cases but appeals from Circuit Courts under the act of 1867. It does not affect the jurisdiction which was previously exercised.”).
292 See 75 U.S. (8 Wall.) 85, 105-06 (1869).
293 See Grove, Structural Safeguards, supra note 86, at 926.
294 ACKERMAN, supra note 86, at 104.
295 See id. (questioning the legality of the Congress during this period).
296 Congress’s primary concern was that lower federal courts were granting habeas relief in cases that did not warrant it. See H.R. Rep. No. 48-730, at 4 (1884) (“Since the passage of the act of 1867, and especially since that portion of it allowing an appeal to the Supreme Court of the United States was repealed, Federal judges have assumed and exercised an almost unlimited jurisdiction in granting writs of habeas corpus.”); 15 CONG. REC. 4710 (1884) (statement of Rep. Luke Poland, R-Vt.) (stating that Supreme Court review was needed because “[i]nferior Federal judges … have made themselves really courts of error over the decisions of the highest State tribunals”). In *McCardle and Yerger*, the Court interpreted the
Judiciary Committee issued a report, recommending that Congress restore the Court’s direct appellate review power in habeas cases.\textsuperscript{297} The report described the 1868 repeal as a political error that could “only be excused upon the ground that the fierce and bitter feeling engendered by the [Civil War] had not been sufficiently abated for cool and dispassionate legislation.”\textsuperscript{298}

In 1885, Congress corrected that mistake. Legislators voted—with very little debate and without recorded dissent—to restore the Court’s appellate jurisdiction.\textsuperscript{299} Thus, once again, political actors seemed to find value in the Supreme Court’s settlement function. In this context, Congress enabled the Court to define the “true limits” of federal judicial power in habeas cases.\textsuperscript{300}

2. Modern Exceptions: AEDPA and MCA

Congress again limited the Supreme Court’s appellate jurisdiction in two provisions that were incorporated into larger reform efforts. One restriction was part of the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA).\textsuperscript{301} The statute requires an inmate to obtain leave from a federal court of appeals before filing a successive habeas petition and provides that “[t]he grant or denial of [such] an authorization … shall not be appealable and shall not be the subject of a petition … for a writ of certiorari.”\textsuperscript{302}

Notably, the story of AEDPA differs, in important respects, from the events of 1868. First, the statute was not a sudden exercise of legislative will

\begin{thebibliography}{10}
\item \textsuperscript{297} H.R. REP. NO. 48-730, at 6 (1884) (“recommend[ing] the restoration of the right of appeal to the Supreme Court, just as the act of 1867 gave it”).
\item \textsuperscript{298} Id. at 4.
\item \textsuperscript{299} See Act of March 3, 1885, ch. 353, 23 Stat. 437; 15 CONG. REC. 4710 (1884) (showing that the House passed the bill with no opposition); 16 CONG. REC. 2480-81 (1885) (showing that the Senate passed it with no debate about the substance of the bill). The President signed the measure into law on March 3, 1885. 16 CONG. REC. 2570 (1885).
\item \textsuperscript{300} H.R. REP. NO. 48-730, at 6 (1884) (“With this right of appeal restored, the true extent of the act of 1867, and the true limits of the jurisdiction of the Federal courts and judges under it, will become defined, and it can then be seen whether further legislation is necessary.”). The judiciary committee report suggested that, if the Supreme Court did not rein in the lower federal courts, then Congress might enact legislation doing so. See \textit{id.} at 5-6. But the statute did not contain any limitation on the scope or nature of Supreme Court review and thus allowed the Court to favor habeas petitioners. \textit{Cf.} Wiecek, \textit{supra} note 70, at 348 (observing that the 1867 and 1885 statutes ultimately served in the twentieth century “as the basic authorization for extensive federal supervision of justice in the state court system”).
\item \textsuperscript{302} 28 U.S.C. 2244(b)(3).
\end{thebibliography}
but instead was the culmination of years of habeas reform efforts.\textsuperscript{303} Nor was the statute targeted at the Supreme Court in the same way as the 1868 repeal; on the contrary, other provisions of the law expressly recognized a special role for the Court in defining the content of federal law.\textsuperscript{304} Perhaps most importantly, the restriction in AEDPA is confined to successive habeas petitions. Thus (in sharp contrast to the 1868 measure), it applies only to cases that could have previously reached the Supreme Court on at least two occasions—on direct appeal from the original state court conviction and on appeal from the first round of federal habeas review.

Yet, in litigation over the appellate review provision, the executive branch encouraged the Supreme Court to construe the restriction even more narrowly. The Solicitor General urged the Court to permit review of successive petitions via an original habeas action under 28 U.S.C. § 2241.\textsuperscript{305} The Solicitor General emphasized that, so construed, the statute would not offend the Constitution because it would leave open an additional avenue for the Court “to serve as expositor of the federal constitutional rules governing criminal prosecutions.”\textsuperscript{306} The Supreme Court in \textit{Felker v. Turpin} adopted that narrow construction, holding that although AEDPA prohibited a direct appeal from a lower court “gatekeeping” decision, it had “not repealed [the Court’s] authority to entertain original habeas petitions.”\textsuperscript{307}

The second restriction on the Supreme Court’s jurisdiction was part of the legislation enacted in response to the “war on terror.” Notably, as with AEDPA, the relevant statutes largely preserved the Court’s appellate review power. The Detainee Treatment Act (DTA) and the Military Commissions Act (MCA) were designed to eliminate federal habeas jurisdiction over the claims of alleged enemy combatants.\textsuperscript{308} But these statutes left open an avenue for Supreme Court review. Most of the detainees’ claims were routed to a military tribunal (either a combatant status review tribunal or a


\textsuperscript{304} AEDPA directs inferior federal courts to respect final state court decisions in criminal cases unless they violate “clearly established Federal law, as determined by the Supreme Court.” 28 U.S.C. § 2254(d). Such a provision may signal, as Vicki Jackson has suggested, a “congressional belief that the Supreme Court’s powers with respect to … federal law are broader than those of the lower federal courts,” because of its “supreme hierarchical position” in the judiciary. Vicki C. Jackson, \textit{Introduction: Congressional Control of Jurisdiction and the Future of the Federal Courts—Opposition, Agreement, and Hierarchy}, 86 \textit{GEO. L.J.} 2445, 2454, 2455 (1998).


\textsuperscript{306} Id. at 26.


\textsuperscript{308} See DTA, § 1005(e), 119 Stat. 2680, 2742; MCA, 120 Stat. 2600, 2635–36.
military commission) followed by judicial review in the D.C. Circuit and the Supreme Court.\footnote{DTA, § 1005(e)(2)(A),(C) 119 Stat. at 2742-43; MCA, §§950g, 950j. 120 Stat. at 2622-24. Although the Detainee Treatment Act gives the D.C. Circuit “exclusive” jurisdiction to review decisions of combatant status review tribunals, and does not expressly provide for Supreme Court review, such “exclusivity” provisions are generally construed so as to preserve Supreme Court review. See, e.g., 28 U.S.C. § 2342 (Hobbs Act) (providing that “[t]he court of appeals … has exclusive jurisdiction to enjoin, set aside, suspend …, or to determine the validity of” “final orders” from certain federal agencies); Federal Maritime Comm’n v. South Carolina State Ports Auth., 535 U.S. 743, 750-51 (2002) (reviewing a court of appeals decision in a case brought under 28 U.S.C. § 2342); see also Calabresi & Lawson, supra note 1, at 1009 (similarly concluding that the DTA left Supreme Court review in place).}

One provision of the MCA does, however, purport to restrict the Supreme Court’s jurisdiction. The MCA prohibits any federal court from reviewing an action “against the United States or its agents relating to any aspect of the … conditions of confinement” of a designated “enemy combatant.”\footnote{28 U.S.C. § 2241(e)(2).} Several scholars assert that this provision is unconstitutional to the extent that it precludes federal jurisdiction over constitutional claims.\footnote{See, e.g., Richard H. Fallon, Jr. & Daniel J. Meltzer, Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror, 120 HARV. L. REV. 2029, 2063 (2007) (arguing that the MCA’s “total preclusion of review” violates a fundamental “postulate of the constitutional structure”: that “some court must always be open to hear an individual’s claim to … judicial redress of a constitutional violation”).} For example, Janet Alexander has argued that “the complete denial of judicial review of constitutional claims is beyond Congress’s power under the Exceptions [] Clause,” because it deprives the Supreme Court of its “essential role.”\footnote{Janet Cooper Alexander, Jurisdiction-Stripping in a Time of Terror, 95 CAL. L. REV. 1193, 1208, 1239 (2007). Professor Alexander also contends that this provision violates the Suspension and Due Process Clauses. See id. at 1208.}

The fate of the “conditions of confinement” provision is still uncertain.\footnote{In Boumediene v. Bush, 553 U.S. 723 (2008), the Court struck down the MCA’s habeas restrictions on Suspension Clause grounds, concluding that the alternative review process (in a military tribunal followed by federal court review) did not provide an adequate substitute for habeas corpus. Id. at 792. But the Court declined to rule on the validity of the “conditions of confinement” provision. Id.}

It remains to be seen, for example, whether the executive branch will advocate a narrow construction of the provision, as it did in the litigation over AEPDA,\footnote{See Grove, Article II Safeguards, supra note 255 (discussing cases in which the DOJ has urged courts to construe jurisdictional measures narrowly in order to preserve jurisdiction over constitutional claims and suggesting that the DOJ could follow the same approach in litigating the “conditions of confinement” provision in the MCA).} or whether Congress will restore the Court’s appellate review power, as it did in 1885.

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

**C. Preserving the Supreme Court’s “Essential Role”**

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

Indeed, these structural safeguards have largely met the concerns raised by academics in the literature on jurisdiction stripping. As we have seen, scholars—whether they subscribe to the traditional “plenary power” theory or propose broader limits on Congress’s power—agree that the Supreme Court has a crucial role in “pronounc[ing] uniform and authoritative rules of federal law.” 315 But they assume that the Court’s constitutional role can only be protected by the judiciary. Accordingly, they seek to identify a judicially-enforceable test—principally by searching for the original meaning of Article III.

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

As we have seen, legislators have invoked the Exceptions Clause to support a variety of measures pertaining to the Supreme Court, including jurisdiction-stripping proposals. For example, in the 1920s, Senator Owen argued that Congress could enact “such exceptions and such regulations … as to prevent the Supreme Court from nullifying acts of Congress, or assuming to declare questions of great national policy.” 316 Likewise, Senator

315 Bator, supra note 3, at 1039; see supra Part II(A).

316 64 CONG. REC. 3958 (1923) (statement of Sen. Robert Owen, D-Okla.).
Helms stated that “[i]n anticipation of judicial usurpations of power, the framers of our Constitution wisely gave the Congress the authority, by a simple majority of both Houses, to check the Supreme Court by means of regulation of its appellate jurisdiction.”

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

Accordingly, these measures did not establish a precedent that could threaten the Supreme Court. Instead, the repeated failure of court-curbing attempts may have had the opposite impact, enabling supporters of the judiciary to denounce subsequent efforts as “unprecedented.”

Social progressives adopted that approach in 2004, when social conservatives sought to eliminate federal jurisdiction over challenges to the Defense of Marriage Act. The progressives argued: “If this bill becomes law, it will represent the first time in our history that Congress has enacted legislation that completely bars any Federal court, including the United States Supreme Court, from considering the constitutionality of Federal legislation.” As Michael Gerhardt has recounted, such arguments from legislative precedent, while not decisive, have considerable resonance in Congress.

Id. at 7654 (statement of Sen. Birch Bayh, D-Ind.) (“We are setting a very dangerous precedent that could go far beyond prayer.”).
E.g., 152 Cong. Rec. H5415 (daily ed. July 19, 2006) (statement of Rep. Melvin Watt, D-N.C.) (arguing that Congress should not strip the Supreme Court’s appellate jurisdiction over challenges to the use of “under God” in the Pledge of Allegiance, and stating “the very idea of Congress unilaterally cutting off all Federal court review of a constitutional issue is both unprecedented and likely unconstitutional”); see 125 Cong. Rec. 7654 (1979) (statement of Sen. Edward Kennedy, D-Mass.) (arguing against the Helms amendment in part on the ground that “we have never in the history of two hundred years of this country effectively denied appellate jurisdiction”).
See Grove, Structural Safeguards, supra note 86, at 911-16 (discussing this jurisdiction-stripping effort).
150 Cong. Rec. H6583 (daily ed. July 22, 2004) (statement of Rep. Steny Hoyer, D-Md.); id. at H6581 (statement of Rep. John Conyers, Jr., D-Mich.) (“Never have we ever tried to do something as breathtaking as taking away the right of a Federal appeal … even to go to the Supreme Court…. This would be the only instance in the history of the Congress that we have totally precluded the Federal courts from considering the constitutionality of Federal legislation.”). This measure did ultimately pass the House of Representatives, but social progressives used their structural veto in the Senate to block it. See Grove, Structural Safeguards, supra note 86, at 911-16, 938.
Furthermore, Congress created a crucial precedent by using its “exceptions” power to establish discretionary certiorari review in 1891. As Felix Frankfurter and James Landis observed in the 1920s, the establishment of discretionary jurisdiction “had to overcome a deep professional feeling against taking away from litigants the right to resort to the Supreme Court for vindication of their federal claims.” But once Congress established this precedent, it became far easier for Congress to expand certiorari review in 1925 and 1988. Indeed, by 1988, legislators had accepted that the elimination of mandatory jurisdiction was “necessary” to enable the Court to perform its “principal functions”: “resolv[ing]” important issues of federal law and “ensur[ing]” uniformity … in the law by resolving conflicts” among the lower courts.

Accordingly, the Exception Clause has—in actual operation by Congress—served to safeguard the Supreme Court’s settlement function. Through a process of legislative proposal, legislative defeat of court-curbing measures, and legislative enactment of beneficial exceptions, Congress has ensured that the Court could “pronounce uniform and authoritative rules of federal law” for a growing nation. As Attorney General Smith put it in his OLC opinion, “[t]he gloss which life has written on the Supreme Court’s jurisdiction is one which protects the essential role of the Court in the constitutional plan.

VII. Conclusion

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

Thus, contrary to the concerns of many scholars, the Constitution does not, by giving Congress “plenary power” over the Supreme Court’s
appellate jurisdiction, “authorize[] its own destruction.”327 Instead, “[t]he authority vested in Congress to make exceptions to and regulate the appellate jurisdiction of the Supreme Court” has served primarily to ensure that Congress could “shield that great tribunal” and “conform its appellate jurisdiction to the enormous growth of the business of the country.”328

327 Hart, supra note 1, at 1365.
328 21 CONG. REC. 3403-04 (1890) (statement of Rep. David Culberson, D-Tex.).