

COUNTERACTING *MARBURY*:
USING THE EXCEPTIONS CLAUSE TO OVERRULE
SUPREME COURT PRECEDENT

INTRODUCTION: THE LEGISLATIVE LIMITS OF *MARBURY*

The case provides the foundation for modern constitutional law. It contains arguably the most recognizable quote in the Supreme Court's history. In *Marbury v. Madison*,¹ Chief Justice Marshall proclaimed, "It is emphatically the province and duty of the judicial department to say what the law is."² Such judicial supremacy in constitutional interpretation has since become a hallmark of the American legal tradition.³ And the Supreme Court has consistently and vehemently reaffirmed what Marshall and the rest of *Marbury's* unanimous Court deemed "the very essence of judicial duty."⁴ No doubt, the fortress *Marbury* built to cement the Court's authority to strike down unconstitutional statutes has been repeatedly attacked: from scholarly commentary,⁵ from state officials,⁶ from the modern administrative state,⁷ and from Congress itself.⁸ However, *Marbury* has survived, and indeed, *Marbury* has thrived. As the Supreme Court explained in the wake of a state's refusal to implement one of the Court's landmark decisions:

1. 5 U.S. (1 Cranch) 137 (1803).

2. *Id.* at 177.

3. See, e.g., G. Edward White, *The Constitutional Journey of Marbury v. Madison*, 89 VA. L. REV. 1463, 1467 (2003) ("*Marbury v. Madison* has been seen as foundational to the American constitutional enterprise . . .").

4. 5 U.S. (1 Cranch) at 178.

5. See, e.g., Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1406 (2006).

6. See, e.g., *Cooper v. Aaron*, 358 U.S. 1, 19–20 (1958) (holding that Arkansas state officials were bound by the Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), and thus had to desegregate schools).

7. See *City of Arlington v. FCC*, 569 U.S. 290, 316 (2013) (Roberts, C.J., dissenting) (quoting *Marbury's* declaration of the judicial responsibility and adding that "[t]he rise of the modern administrative state has not changed that duty").

8. In the aftermath of *Miranda v. Arizona*, 384 U.S. 436 (1966), Congress passed a statute providing for the admissibility of statements made voluntarily, even if the defendant was not first read his or her so-called "*Miranda* rights." See *Dickerson v. United States*, 530 U.S. 428, 432 (2000). The Court deemed this statute unconstitutional. *Id.* at 437.

[T]he Constitution [is] “the fundamental and paramount law of the nation” . . . [Marbury] declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system.⁹

Thus, the suggestion that Congress might act on behalf of the federal government as the final arbiter for a law’s constitutionality is ostensibly at odds with *Marbury*. The idea of a single body wielding the power both to make the law and to interpret its validity seems to conflict squarely with our contemporary conception of separation of powers.¹⁰

Nevertheless, and perhaps surprisingly, the Constitution explicitly permits this type of congressional aggrandizement. An infrequently litigated provision in Article III provides that:

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, *with such Exceptions, and under such Regulations as the Congress shall make.*¹¹

Plainly read, this latter declaration—the so-called “Exceptions Clause”—instills Congress with the unqualified power to restrict the Court’s appellate jurisdiction. So long as a case does not fall within the few enumerated classes of the Supreme Court’s original jurisdiction,¹² a simple majority of Congress (with the President’s approval) could use this provision to legitimately strip the Court of its most powerful check on the legislature—the ability to declare a law unconstitutional.

Given that “hyperpartisanship has led Congress—and the United States—to the brink of institutional collapse,”¹³ this is understandably disturbing. A targeted invocation of the Exceptions

9. *Cooper*, 358 U.S. at 18 (quoting *Marbury*, 5 U.S. (1 Cranch) at 177).

10. Of course, this does not always hold true in the interpretation of statutes or regulations. See, e.g., *Auer v. Robbins*, 519 U.S. 452, 461 (1997). But that is largely irrelevant to the issue of constitutional interpretation.

11. U.S. CONST. art. III, § 2, cl. 2 (emphasis added).

12. Those being “all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party.” *Id.*

13. Cynthia R. Farina, *Congressional Polarization: Terminal Constitutional Dysfunction?*, 115 COLUM. L. REV. 1689, 1691 (2015) (internal quotation marks omitted).

Clause for pure political gain could be imminent. For example, what is to stop the Republican Party from passing a statute banning abortion and preventing the Court from reviewing the law's constitutionality?¹⁴ On the flip side, could anything prevent Democrats from statutorily overruling *Citizens United v. FEC*¹⁵ with a similar judicial review prohibition, in an effort to gain and entrench partisan advantage? Would the first invocation of such a blatantly partisan strategy result in a Constitution whose meaning effectively shifts whenever Congress changes hands? If so, the fundamental judicial role espoused in *Marbury* may soon be under constitutionally legitimate—although deeply disconcerting—legislative attack.

Part I of this Note provides an overview of the sparse historical dialog between Congress and the Supreme Court with respect to the Exceptions Clause. Part II then scrutinizes both the text and original understanding of the provision and argues that the Constitution grants Congress the near-plenary power to curb the Court's appellate jurisdiction. Finally, although most of this Note seeks to show that Congress *could* legitimately remove a statute from the Court's appellate oversight, Part III will close by arguing why Congress generally *should not* do so.

I. HISTORICAL TREATMENT OF THE EXCEPTIONS CLAUSE

A. Congressional Reluctance

The motivation for Congress to invoke the Exceptions Clause power is clear and tantalizing. Via a procedural device, the legislature can unilaterally rewrite substantive law to comport with majoritarian values, and then shield the act from federal judicial review. In doing so, Congress could bypass the inher-

14. At first glance, given the Supreme Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973), this would seem to conflict squarely with the holding in *Dickerson v. United States*, 530 U.S. 428, 437 (2000) ("Congress may not legislatively supersede [the Supreme Court's] decisions interpreting and applying the Constitution."). However, if the court lacked jurisdiction to rule on the constitutionality of the statute superseding the abortion cases in the first place, the Supreme Court would have no constitutional authority to ever render a ruling striking it down. See, e.g., *Patchak v. Zinke*, 138 S. Ct. 897, 907 (2018) (plurality opinion) ("[A] congressional grant of jurisdiction is a *prerequisite* to the exercise of judicial power." (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94–95 (1998))).

15. See 558 U.S. 310, 365 (2010) (holding that, under the First Amendment, Congress cannot restrict corporate political expenditures).

ent difficulty of the amendment process, and, in some instances, it could smoothly recalibrate the Constitution with modern ideals.¹⁶ Yet historically, Congress has nonetheless proved hesitant to flex its Exceptions Clause muscles to strong-arm federal legislation into force. Although textually the power to restrain the judiciary certainly resides with the legislature in some fashion, two primary external considerations have provided a deterring force: constitutional uncertainty and political anxieties.

As to the former, Professor Mark Tushnet argues that an emergent “scholarly consensus” supporting the unconstitutionality of such measures provides “a political force that keeps Congress from enacting jurisdiction-restricting legislation.”¹⁷ This cannot, however, be the sole restraint. For one, there is far from a “consensus” in the scholarly literature; some have gone so far as to proclaim a narrow reading of the Exceptions Clause as “antithetical to the plan of the Constitution for the courts.”¹⁸ And although judicial review provides a cornerstone of our modern separation-of-powers framework, one must also keep in mind that *Marbury* was not a foregone conclusion. Its holding does not inevitably flow from any explicit textual provisions, and “nowhere in *Marbury* did [Chief Justice Marshall] suggest that other branches of government were precluded from interpreting the Constitution for themselves.”¹⁹ Indeed, this Note seeks to show that the Exceptions Clause limits *Marbury* in a significant way. It provides the people with a necessary safeguard aimed at reconciling the institution of judicial review

16. *But cf.* THE FEDERALIST NO. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 2003) (“[W]here the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former.”).

17. Mark V. Tushnet, *Legal Realism, Structural Review, and Prophecy*, 8 U. DAYTON L. REV. 809, 813 (1983).

18. Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1005 (1965); see also Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 909 (1984) (expressing a “rejection of the arguments for narrow readings of the congressional power to make ‘exceptions’ to the Court’s appellate jurisdiction”).

19. White, *supra* note 3, at 1481.

with democratic values; and it offers the legislature a tool to counteract blatant Supreme Court overreach.²⁰

Beyond constitutional uncertainty, fears of political repercussions also inhibit Congress's use of the Exceptions Clause. And this is likely the overriding reason why targeted jurisdiction-stripping proposals have all failed to become law in the past. The mere idea of invoking such a drastic option for short-term political gain—even if fully consonant with the constitutional text—may be repugnant to participants in the two-party system. After all, the balance of power shifts nearly every election cycle, and as the adage goes, “what goes around comes around.”²¹ Playing constitutional hardball with the Exceptions Clause could ultimately backfire. That is not to say Congress members have never tried. Many have attempted to restrict the Court's ability to hear cases on school prayer,²² desegregation busing remedies,²³ state reapportionment challenges,²⁴ the composition of the military,²⁵ the constitutionality of the Defense of Marriage Act (a measure which did in fact pass the House),²⁶ *Miranda* issues,²⁷ anti-pornography measures,²⁸ the Pledge of

20. See *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101 (1998) (“The statutory and (especially) constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers, restraining the courts from acting at certain times, and even restraining them from acting permanently regarding certain subjects.”); *Leading Cases*, 110 HARV. L. REV. 135, 286 n.76 (1996) (concluding that “judicial review and expansive congressional authority under the Exceptions Clause” can “not only . . . coexist,” they are “also necessary correlates in a constitutional democracy”). Respect for the Court may, however, be another reason Congress has not yet exercised its full authority.

21. See, e.g., JUSTIN TIMBERLAKE, *WHAT GOES AROUND . . . COMES AROUND* (Jive Records 2006); see also *infra* Part III.

22. See, e.g., Voluntary School Prayer Act of 1981, S. 481, 97th Cong.; H.R. 72, 97th Cong. (1981).

23. See EDWARD KEYNES & RANDALL K. MILLER, *THE COURT VS. CONGRESS: PRAYER, BUSING, AND ABORTION* 219, 221–22 (1989).

24. See Max Baucus & Kenneth R. Kay, *The Court Stripping Bills: Their Impact on the Constitution, the Courts, and Congress*, 27 VILL. L. REV. 988, 991 (1982) (noting that a state reapportionment bill passed the House but not the Senate).

25. See *id.* at 992 n.18.

26. See ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* 189 (7th ed. 2016).

27. See Baucus & Kay, *supra* note 24, at 991 nn.13–15.

28. See Alan Choate, *Cannon tries to ban federal courts from hearing state porn cases*, DAILY HERALD (June 6, 2006), <https://web.archive.org/web/20060815173032/http://www.heraldextra.com/content/view/181240/> [<https://perma.cc/Z2V2-ABLG>].

Allegiance,²⁹ and state abortion regulations,³⁰ just to name a few.

But given the infrequency with which Congress has historically employed the Exceptions Clause, its modern use to prohibit Supreme Court review of, say, state abortion restrictions would almost certainly trigger retaliatory cries of hyperpartisanship and unfairness.³¹ Because the method for enactment would no longer conform with the rules of historical practice, a party exploiting this perceived “constitutional loophole” to try to dissolve a court-announced right—successful or not—might prove simply unpalatable to voters. And that could very well push America’s large moderate contingent towards the other side of the aisle.³² As such, pragmatic inertia has likely set in on Capitol Hill. The continued vitality of one’s own party restrains even the most politically fervent from using the Exceptions Clause to overturn Supreme Court precedent. And each year this partisan strategy lays dormant only serves to increase the potential for political backlash if it is ever deployed in the future.

Historical practice aside, this then leads to the ultimate question: Even if Congress has never actually leveraged the Exceptions Clause to remove a statute’s constitutionality from Supreme Court review, can it still legitimately do so? The answer, as re-

29. See The Pledge Protection Act of 2002, H.R. 5064, 107th Cong.

30. See H.R. 867, 97th Cong. (1981).

31. This parallels the public reaction to the Republican Party’s refusal to consider Judge Garland’s Supreme Court nomination and subsequent invocation of “the nuclear option” to confirm Justice Gorsuch with a simple majority. See, e.g., J. Stephen Clark, *Senators Can’t Be Choosers: Moratoriums on Supreme Court Nominations and the Separation of Powers*, 106 KY. L.J. 337, 384 (2018) (arguing that the incident contributed to “the public impression that Supreme Court nominees are the mere partisan plants of their ideological champions”); Michael J. Gerhardt & Richard W. Painter, *Majority Rule and the Future of Judicial Selection*, 2017 WIS. L. REV. 263, 266 (“[B]locking Judge Garland’s nomination to the Court broke the patterns of more than 100 years . . .”).

32. See, e.g., Lydia Saad, *Conservative Lead in U.S. Ideology Is Down to Single Digits*, GALLUP (Jan. 11, 2018), <https://news.gallup.com/poll/225074/conservative-lead-ideology-down-single-digits.aspx> [<https://perma.cc/P6WD-9HRF>] (finding that 35 percent of Americans identify as moderate). Indeed, the absence of “Roe rage” among constituents could itself mean the difference in control of Congress. See Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 373–74 (2007); Jonathan Turley, *Opinion, Their goal of Roe v. Wade reversal in sight, many Republicans have private second thoughts*, USA TODAY (July 6, 2018, 7:52 AM), <https://www.usatoday.com/story/opinion/2018/07/06/republicans-fear-reversing-roe-abortion-supreme-court-kennedy-trump-column/759349002/> [<https://perma.cc/9RES-UQTS>].

flected by the provision's plain text and its history, is a resounding yes.

B. *Ex parte McCardle and the Bounds of Congressional Authority*

Decided in 1869, *Ex parte McCardle*³³ still stands as the seminal Exceptions Clause decision.³⁴ The case was a unique product of Reconstruction. In 1867, Congress had expanded the availability of federal habeas petitions to “all cases” where one was unlawfully detained under the Constitution,³⁵ thereby permitting state prisoners for the first time to file for a writ of habeas corpus in federal court. Officials then arrested Mississippi newspaper editor William McCardle and detained him for trial in a military tribunal pursuant to the Military Reconstruction Act (MRA).³⁶ But, ironically enough, McCardle sought to leverage the newfound federal habeas provision—itsself designed to effectuate Reconstruction policies—to attack the MRA’s facial constitutionality.³⁷ So with the express purpose of “sweeping the *McCardle* case from the docket by taking away the jurisdiction of the [C]ourt,”³⁸ Congress repealed the expanded habeas statute via an inconsequential tax bill rider—one remarkably passed *after* oral argument.³⁹ The Supreme Court thus had its first meaningful opportunity to consider the Exceptions Clause’s scope.

Writing for a unanimous Court, Chief Justice Chase opened by noting, “The first question necessarily is that of jurisdiction; for, if the [law passed after oral argument] takes away the jurisdiction defined by the [expanded federal habeas provision], it is useless, if not improper, to enter into any discussion of

33. 74 U.S. (7 Wall.) 506 (1869).

34. See, e.g., Patchak v. Zinke, 138 S. Ct. 897, 906–07 (2018) (plurality opinion); Jason S. Greenwood, *Congressional Control of Federal Court Jurisdiction: The Case Study of Abortion*, 54 S.C. L. REV. 1069, 1082 (2003); see also William W. Van Alstyne, *A Critical Guide to Ex parte McCardle*, 15 ARIZ. L. REV. 229, 232 (1973).

35. Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385, 385.

36. See Act of Mar. 2, 1867, ch. 153, 14 Stat. 428.

37. Van Alstyne, *supra* note 34, at 238.

38. *Id.* at 239 (alteration omitted) (italics added) (quoting CONG. GLOBE, 40th Cong., 2d Sess. 2062 (1868)).

39. *Id.*; see Act of Mar. 27, 1868, ch. 34, § 2, 15 Stat. 44, 44 (1868).

other questions."⁴⁰ Then, without ever reaching the merits, and in a brief four-page opinion, the Court dismissed the case for want of jurisdiction.⁴¹ Explicitly relying on the Exceptions Clause, the Chief Justice observed, "The [expanded federal habeas provision], affirming the appellate jurisdiction of this court in cases of habeas corpus is expressly repealed. It is hardly possible to imagine a plainer instance of positive exception."⁴² He continued to reason and hold, "Without jurisdiction the court cannot proceed at all in *any* cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause."⁴³

McCardle had little else to say about the scope of Congress's legitimate jurisdiction-stripping power. Importantly though, the Court noted, "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."⁴⁴

To be sure, one can plausibly read *McCardle* narrowly as a case enabling Congress to suspend certain habeas petitions from the Supreme Court's purview,⁴⁵ but without acknowledging any unconditional authority to remove an enactment's lawfulness from the Court's oversight altogether. However, an analysis of the broad language employed by the Supreme Court in later cases subverts this narrow reading. For example,

40. *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 512 (1869); see also *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998) ("The requirement that jurisdiction be established as a threshold matter 'springs from the nature and limits of the judicial power of the United States' and is 'inflexible and without exception.'" (alteration omitted) (quoting *Mansfield, Coldwater & Lake Mich. Ry. Co. v. Swan*, 111 U.S. 379, 382 (1884))). Oddly enough, this (correct) jurisdiction-first approach is in opposition to the approach of Chief Justice Marshall in *Marbury*, where the constitutional issue of jurisdiction was left until the end of the analysis for political reasons. See Samuel R. Olken, *The Ironies of Marbury v. Madison and John Marshall's Judicial Statesmanship*, 37 JOHN MARSHALL L. REV. 391, 414 (2004).

41. See *McCardle*, 74 U.S. (7 Wall.) at 512-15.

42. *Id.* at 514 (italics omitted).

43. *Id.* (emphasis added).

44. *Id.*

45. See, e.g., Gunther, *supra* note 18, at 905 ("More substantial doubts about the precedential value of *McCardle* stem from the fact that the jurisdiction-stripping statute sustained there did not foreclose *all* appellate review . . .").

in *The "Francis Wright,"*⁴⁶ the Court said, "What [the Supreme Court's appellate] powers shall be, and to what extent they shall be exercised, are, and always have been, proper subjects of legislative control."⁴⁷ Without stating any qualifications, the Court continued in sweeping terms to conclude that both "whole classes of cases" and "particular classes of questions" may "be kept out of the jurisdiction altogether."⁴⁸ Similarly, the Court has confirmed that "an uninterrupted series of decisions" establishes that the Supreme Court "exercises appellate jurisdiction *only* in accordance with the acts of Congress upon that subject."⁴⁹ And it has recently explained, "For a court to pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act *ultra vires*."⁵⁰ Therefore, although a narrow reading of *McCardle* has its supporters,⁵¹ for many the case "has long been read as giving Congress full control over the Supreme Court's appellate jurisdiction."⁵²

C. The Klein "Rule of Decision" Qualification

In 1872, Congress afforded the Supreme Court yet another opportunity to wrestle with the Exceptions Clause, albeit less

46. 105 U.S. 381 (1882).

47. *Id.* at 386.

48. *Id.*

49. *Colo. Cent. Consol. Mining Co. v. Turck*, 150 U.S. 138, 141 (1893) (emphasis added); see *Am. Constr. Co. v. Jacksonville, Tampa & Key W. Ry. Co.*, 148 U.S. 372, 378 (1893) ("This court, therefore, as it has always held, can exercise no appellate jurisdiction, except in the cases, and in the manner and form, defined and prescribed by Congress."). Justice Frankfurter similarly argued, "Congress need not give [the Supreme] Court any appellate power; it may withdraw appellate jurisdiction once conferred and it may do so even while a case is *sub judice*." *Nat'l Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 655 (1949) (Frankfurter, J., dissenting) (citing *McCardle*, 74 U.S. (7 Wall.) at 506).

50. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101–02 (1998).

51. See, e.g., *Glidden Co. v. Zdanok*, 370 U.S. 530, 605 n.11 (1962) (Douglas, J., dissenting).

52. Julian Velasco, *Congressional Control Over Federal Court Jurisdiction: A Defense of the Traditional View*, 46 CATH. U. L. REV. 671, 676 n.15 (1997) (quoting CHARLES ALAN WRIGHT, *LAW OF FEDERAL COURTS* 42 (5th ed. 1994)) (internal quotation marks omitted); see also *Patchak v. Zinke*, 138 S. Ct. 897, 906 (2018) (plurality opinion) ("So long as Congress does not violate other constitutional provisions, its 'control over the jurisdiction of the federal courts' is 'plenary.'" (quoting *Bhd. of R.R. Trainmen v. Toledo, Peoria, & W. R.R.*, 321 U.S. 50, 63 (1944))).

directly. The enigmatic decision of *United States v. Klein*⁵³ followed in the wake of the Abandoned and Captured Property Act of 1863 (ACPA), another Civil War enactment that permitted federal officials to seize and sell abandoned or captured civilian property in states or territories rebelling against the Union.⁵⁴ Nonetheless, some individuals whose property had been seized could still recover its value, provided they could demonstrate to a reviewing court that they had “never given any aid or comfort to the present rebellion.”⁵⁵

Despite the express terms of the ACPA, in 1869, the Supreme Court in *United States v. Padelford*⁵⁶ reasoned that the ACPA “requir[ed] such a liberal construction as will give effect to the beneficent intention of Congress.”⁵⁷ It concluded that a presidential pardon of those in rebellious states fulfilled the ACPA’s statutory loyalty requirement, holding that after a pardon, “in the eye of the law the offender is as innocent as if he had never committed the offence.”⁵⁸

Congress, however, made clear that this result was not its intention. Shortly thereafter, it enacted a statute providing that without an express disclaimer of guilt, a presidential pardon would instead serve as “conclusive evidence that [a claimant] *did* take part in and give aid and comfort to the late rebellion” for purposes of the ACPA.⁵⁹ Even more importantly, the statute declared that upon “proof of such pardon . . . the jurisdiction of the court in the case” —including that of the Supreme Court— “shall cease.”⁶⁰ *Klein* held this latter proviso unconstitutional as violating the separation of powers and the President’s power to pardon.⁶¹ It explained that Congress cannot constitutionally wield its Exceptions Clause authority to “withhold appellate jurisdiction . . . as a means to an end.”⁶²

53. 80 U.S. (13 Wall.) 128 (1871).

54. See Abandoned and Captured Property Act of 1863, ch. 120, § 1, 12 Stat. 820, 820.

55. *Id.* § 3.

56. 76 U.S. (9 Wall.) 531 (1869).

57. *Id.* at 538.

58. *Id.* at 542 (quoting *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 380 (1866)) (internal quotation marks omitted).

59. Act of July 12, 1870, ch. 251, § 1, 16 Stat. 230, 235 (emphasis added).

60. *Id.*

61. See *United States v. Klein*, 80 U.S. (13 Wall.) 128, 147–48 (1871).

62. *Id.* at 145.

Now, there are two possible interpretations of the Court's assertion here. Opponents of broad jurisdiction-stripping authority point to this statement and insist that *Klein* prohibits Congress from restricting appellate jurisdiction when doing so manifests a motivation to dictate substantive outcomes.⁶³ But as discussed above, this is in extreme tension with *McCardle*, which plainly stated that the Court is "not at liberty to inquire into the motives of the legislature."⁶⁴ What's more, Chief Justice Chase authored both opinions only a few years apart, and nothing indicates that he had such a sudden change of heart as to the salience of legislative motive.

A second interpretation better reconciles *Klein's* assertion with *McCardle*.⁶⁵ By prohibiting jurisdiction stripping as "a means to an end,"⁶⁶ Chief Justice Chase meant that a jurisdictional prohibition cannot be *contingent* upon some state of affairs, one which Congress strategically manipulates to direct its desired substantive outcome.⁶⁷ This is because such a contingency is not so much an "exception" to the Supreme Court's jurisdiction, but rather a "rule of decision" which functionally declares the government as victor in the litigation.⁶⁸ This distinction logically follows from the *Klein* opinion, which declared that:

63. See, e.g., ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 168 (5th ed. 2015); Caleb Nelson, *Judicial Review of Legislative Purpose*, 83 N.Y.U. L. REV. 1784, 1790–91, 1793–94 (2008).

64. *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1869).

65. Besides the "rule of decision" qualification, *Klein* can also be distinguished on the grounds that "Congress cannot limit the Supreme Court's jurisdiction in a manner that violates other constitutional provisions." CHERMERINSKY, *supra* note 63, at 169. "[R]estoration of property was expressly pledged" by the pardon at issue, and by denying any court jurisdiction to vindicate this right, Congress had unlawfully "change[d] the effect of [the] pardon." *Klein*, 80 U.S. (13 Wall.) at 148.

66. *Klein*, 80 U.S. (13 Wall.) at 145.

67. See *id.* at 145 ("If [Congress] simply denied the right of appeal in a particular class of cases, there could be no doubt that it must be regarded as an exercise of the power of Congress to make 'such exceptions from the appellate jurisdiction' as should seem to it expedient."); see also *Patchak v. Zinke*, 138 S. Ct. 897, 919 (2018) (Roberts, C.J., dissenting); Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1373 (1953) (citing *Klein* and suggesting that Congress may not grant federal courts jurisdiction in a particular case with the additional limitation that they "tell the Court *how* to decide it").

68. See *United States v. Sioux Nation of Indians*, 448 U.S. 371, 405 (1980) ("[O]f obvious importance to the *Klein* holding was the fact that Congress was attempting to decide the controversy at issue in the Government's own favor.").

It is evident from [the statute] that the denial of jurisdiction to this court, as well as to the Court of Claims, is founded solely on the application of a rule of decision, in causes pending, prescribed by Congress. The court has jurisdiction of the cause to a given point, *but when it ascertains that a certain state of things exists*, its jurisdiction is to cease and it is required to dismiss the cause for want of jurisdiction. It seems to us that this is not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power.⁶⁹

In other words, Congress does not legitimately exercise its Exceptions Clause authority just because it calls a statute “jurisdictional.” And *Klein* shows why. Unlike the statute in *McCardle*, which removed an entire class of cases from the Court’s appellate jurisdiction, the statute in *Klein* did first confer jurisdiction. However, some of those cases were contingently shielded from judicial review based on the presence of certain evidence, in an effort to dictate an outcome favoring the government.⁷⁰ Under a commonsense definition of “jurisdiction,” this type of contingency does not act as an exception to the Court’s jurisdiction at all. *Klein* therefore fails to undercut *McCardle*’s view of Congress’s raw jurisdiction-stripping power over specific categories of cases. And because shielding a statute’s constitutionality from judicial review would not create a “rule of decision,” such a measure would fall within the ambit of *McCardle* rather than that of *Klein*.

Since Reconstruction, the Court has rarely had occasion to confront the Exceptions Clause; the speculative debate has instead raged on almost exclusively in academic circles.⁷¹ In 1996, the Supreme Court in *Felker v. Turpin*⁷² “temporarily sparked

69. 80 U.S. (13 Wall.) at 146 (emphasis added).

70. See *id.* at 146–47; see also *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1324 (2016) (noting that Congress cannot “attempt[] to direct the result” of a case).

71. The absence of precedent may be indicative of Congress’s hesitation to limit judicial review of constitutional issues without some especially pressing concern (for example, Reconstruction or the War on Terror). See Janet Cooper Alexander, *Jurisdiction-Stripping in a Time of Terror*, 95 CALIF. L. REV. 1193, 1193–94 (2007). Or it may just be the Court’s own fear of wading into such a contentious area. See David Cole, *Jurisdiction and Liberty: Habeas Corpus and Due Process as Limits on Congress’s Control of Federal Jurisdiction*, 86 GEO. L.J. 2481, 2481 (1998) (“No issue has been more studiously avoided by the courts . . . than congressional control over jurisdiction of the federal courts.”).

72. 518 U.S. 651 (1996).

hopes and fears that [it] would issue a rare pronouncement on the limits of Congress's power."⁷³ But after granting certiorari and asking for briefs on Congress's Exceptions Clause power,⁷⁴ the Court ultimately dodged the issue.⁷⁵ Nevertheless, the Court's limited Exceptions Clause jurisprudence supports a broad conception of Congress's authority to remove whole categories of cases from the Supreme Court's purview. Subject only to the limitations of *Klein* and other constitutional provisions,⁷⁶ the rule is simple: Congress "does not violate Article III when it strips federal jurisdiction over a class of cases."⁷⁷

II. THE PLAIN TEXT PREVAILS

Although the Court has generally acquiesced to congressional jurisdiction-stripping efforts in the past, it has never had occasion to squarely confront the question that this Note proposes. That is, what would happen if Congress passed a statute reversing a Supreme Court decision and providing that the Court lacked jurisdiction to review the law for conformance to the Constitution? In this Part, I argue that the Court would have

73. Velasco, *supra* note 52, at 673.

74. See James E. Pfander, *Jurisdiction-Stripping and the Supreme Court's Power to Supervise Inferior Tribunals*, 78 TEX. L. REV. 1433, 1434 (2000).

75. *Felker*, 518 U.S. at 661–62. In the opinion, Chief Justice Rehnquist explained that:

The Act does remove our authority to entertain an appeal or a petition for a writ of certiorari to review a decision of a court of appeals exercising its "gatekeeping" function over a second petition. But since it does not repeal our authority to entertain a petition for habeas corpus, there can be no plausible argument that the Act has deprived this Court of appellate jurisdiction in violation of Article III, § 2.

Id. A three-member concurrence hinted that if Congress foreclosed the Court from hearing all habeas petition avenues, that might overstep its Exceptions Clause authority. See *id.* at 667 (Souter, J., concurring) ("I write only to add that if it should later turn out that statutory avenues other than certiorari for reviewing a gatekeeping determination were closed, the question whether the statute exceeded Congress's Exceptions Clause power would be open.").

76. *Patchak v. Zinke*, 138 S. Ct. 897, 906 n.3 (2018) (plurality opinion). For example, Congress could not restrict members of a certain race from appealing to the Supreme Court. See U.S. CONST. amend. XIV, § 1; cf. *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) (holding that the Fourteenth Amendment's guarantee of equal protection applies to the federal government). This is because the jurisdictional limitation would *itself* violate equal protection. But it is an entirely different matter when Congress strips the Court of jurisdiction to rule on the *substantive* validity of a statute.

77. *Patchak*, 138 S. Ct. at 906.

to dismiss any challenges to such a statute for want of jurisdiction. This is compelled by the text and history of the Exceptions Clause, as well as the structure of the Constitution. Remarkably then, the Clause provides Congress with a potential avenue to enact laws in direct opposition to the Supreme Court's exposition of constitutional rights.

A. *One Cannot Read Limitations into the Exceptions Clause*

In the words of the late Justice Scalia, "The text is the law, and it is the text that must be observed."⁷⁸ Of course, the text of the Constitution often raises more questions than it provides answers.⁷⁹ But unlike the open-textured language of most constitutional provisions, the Exceptions Clause is clear. Returning to the "critical language of Article III, § 2":⁸⁰

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.⁸¹

Before parsing the provision, it may be useful to read the Exceptions Clause once again, and independently determine the most natural reading without any influence from the analysis below.

As an initial matter, the phrase "[i]n all the other Cases before mentioned" refers to those classes of cases enumerated in the preceding Section, those which the Framers viewed as "the proper subjects of the national judicature."⁸² Hence, the Constitution grants the Supreme Court "appellate Jurisdiction, both as to Law and Fact" for specific categories of cases, such as those producing the familiar diversity jurisdiction or arising-under

78. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3, 22 (Amy Gutmann ed., 1997).

79. For example, try ascribing a definitive meaning to "due process of law." U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1. See generally Andrew T. Hyman, *The Little Word "Due,"* 38 AKRON L. REV. 1 (2005).

80. *Felker*, 518 U.S. at 661.

81. U.S. CONST. art. III, § 2, cl. 2.

82. THE FEDERALIST NO. 80, *supra* note 16, at 480 (Alexander Hamilton); see U.S. CONST. art. III, § 2, cl. 1 (enumerating categories of cases).

jurisdiction.⁸³ Next, a “‘regulation’ in the latter part of the eighteenth century, as today, was a rule imposed to establish good order.”⁸⁴ Congress may necessarily prescribe rules of procedure or evidence under this provision. Given this ordinary meaning though, the ability of Congress to make “Regulations” neither adds to nor subtracts from the legislative branch’s jurisdiction-stripping power.

However, the phrase “with such Exceptions . . . as the Congress shall make” modifies “appellate Jurisdiction,”⁸⁵ and it thereby confers upon Congress a license to freely restrict the Supreme Court’s appellate jurisdiction as it sees fit. Simply put, there are no exceptions to this Exceptions Clause power. The language is simple and unambiguous, absolute and unqualified. Indeed, this plain meaning—that Congress has plenary authority over the Court’s appellate jurisdiction—is further supported by contemporaneous dictionaries. Just like today, those sources defined an “exception” as an “[e]xclusion from the things comprehended in a precept or position,”⁸⁶ or similarly, as an “exclusion from the application of a general rule or description.”⁸⁷ Applying those definitions, the Constitution first establishes a general rule: the Supreme Court “shall have appellate Jurisdiction” over “all the other [enumerated] Cases” not subject to the Court’s original jurisdiction.⁸⁸ Then, the Exceptions Clause explicitly permits Congress to exclude *any* portions of this appellate jurisdiction as it “shall” deem proper.⁸⁹ Plain and simple. Nothing else in the Constitution “requires the availability of

83. See U.S. CONST. art. III, § 2, cl. 1.

84. Leonard G. Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157, 170 (1960) (footnote omitted); see also Velasco, *supra* note 52, at 714–15.

85. See, e.g., *Ex parte McCordle*, 74 U.S. (7 Wall.) 506, 512–13 (1869) (concluding that the Supreme Court’s appellate jurisdiction itself is conferred by the Constitution with exceptions made by Congress).

86. THOMAS SHERIDAN, 1 A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE 465 (3rd ed. 1790), <https://babel.hathitrust.org/cgi/pt?id=nyp.33433061705111;view=1up;seq=465> [<https://perma.cc/52NU-U65Y>].

87. Ratner, *supra* note 84, at 168–70 (analyzing dictionaries at the time of the Constitutional Convention).

88. U.S. CONST. art. III, § 2, cl. 2.

89. *Id.*

Supreme Court review for particular types of claims.”⁹⁰ And this means that Congress can legitimately enact a jurisdictional exception to shield challenges to a statute’s constitutionality from the Court.⁹¹

Despite this clarity, two alternative textualist views have emerged in the literature. Neither is persuasive. First, some contend that “the exceptions are to the ‘appellate’ form, not to the ‘Jurisdiction’ itself.”⁹² These scholars allege that Congress may only shift categories of cases traditionally earmarked for the Court’s appellate jurisdiction to the Court’s original jurisdiction. But such a reading is unnatural. In fact, the Exceptions Clause is contained in a sentence that itself only references appellate jurisdiction, not original jurisdiction.⁹³ Not only that, but the plausibility of this theory suffers from several additional pitfalls. Most notably, it is squarely at odds with “the plain import of the words” as construed in *Marbury v. Madison*.⁹⁴ For if the Exceptions Clause permitted Congress to perform such an appellate-original shift, then *Marbury* would have held the Judiciary Act of 1789 entirely constitutional upon review.⁹⁵ A modern Supreme Court would be unlikely to abandon the well-established textual understanding of Chief Justice Marshall—especially in a case as foundational as *Marbury*—in favor of a directly opposing position. Furthermore, as described in the next Section, this appellate-original-shifting construction is undermined by both early historical practices of jurisdiction

90. CHEMERINSKY, *supra* note 26, at 207; see Paul M. Bator, *Congressional Power Over the Jurisdiction of the Federal Courts*, 27 VILL. L. REV. 1030, 1041 (1982); Charles L. Black, Jr., *The Presidency and Congress*, 32 WASH. & LEE L. REV. 841, 845 (1975).

91. Note that although Congress may render Supreme Court review unavailable, other mechanisms for striking down jurisdiction-stripping statutes still exist. Alternative methods include—but are not limited to—congressional repeal, state court decisions, voting out supporters of the legislation, public backlash, and other grassroots social efforts. The Supreme Court should not be viewed “as a general haven for reform movements.” *Reynolds v. Sims*, 377 U.S. 533, 625 (1964) (Harlan, J., dissenting).

92. Alex Glashauser, *A Return to Form for the Exceptions Clause*, 51 B.C. L. REV. 1383, 1402 (2010).

93. See U.S. CONST. art. III, § 2, cl. 2.

94. 5 U.S. (1 Cranch) 137, 175 (1803).

95. See *id.* (“[T]he plain import of the words seems to be, that in one class of cases [the Supreme Court’s] jurisdiction is original, and not appellate; in the other it is appellate, and not original.”).

stripping by Congress, as well as the original understanding of the Exceptions Clause.⁹⁶

Second, other scholars have attempted to argue that “Exceptions” was intended only to modify the word “Fact,” rather than the Court’s ultimate jurisdiction.⁹⁷ Again, the grammatical structure disfavors this interpretation. Read more naturally, “both as to Law and Fact” simply clarifies the potential *reach* of the “appellate Jurisdiction” of the Supreme Court. The Exceptions Clause, by contrast, acts to permit Congress to cabin the scope of this jurisdiction—“both as to Law and Fact.” Moreover, this alternative reading is dispelled by the Federalist Papers,⁹⁸ records from the Constitutional Convention,⁹⁹ countless legal scholars,¹⁰⁰ and most significantly, the First Congress preventing the Court from reviewing certain legal (meaning not factual) conclusions of state courts.¹⁰¹

But regardless of the Clause’s plain meaning, history has manifested that even the most unambiguous provisions have become distorted by layers of precedent,¹⁰² centuries of shifting

96. See *infra* Part II.B.

97. See Henry J. Merry, *Scope of the Supreme Court’s Appellate Jurisdiction: Historical Basis*, 47 MINN. L. REV. 53, 68–69 (1962).

98. See THE FEDERALIST NO. 80 (Alexander Hamilton); *infra* Part II.B.

99. See Velasco, *supra* note 52, at 721 n.244 (“A prior draft of the Constitution provided simply that ‘[i]n all other cases before mentioned, it [*i.e.*, Supreme Court jurisdiction] shall be appellate, with such exceptions and under such regulations as the Legislature shall make.’” (alterations in original) (quoting 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 186 (Max Farrand ed., 1911))).

100. See, e.g., 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, 778–79 (1984); Gunther, *supra* note 18, at 901; Ralph A. Rossum, *Congress, The Constitution, and the Appellate Jurisdiction of the Supreme Court: The Letter and the Spirit of the Exceptions Clause*, 24 WM. & MARY L. REV. 385, 401 (1983).

101. The Supreme Court could only review decisions of state courts that ruled *against* a federal claim arising under the Constitution. See Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85–87.

102. For example, the First Amendment only provides that “Congress shall make no law” abridging the freedom of speech. U.S. CONST. amend. I (emphasis added). Construed literally, the executive or judiciary could abridge the freedom of speech, but this has not proven the case. See *Citizens United v. FEC*, 558 U.S. 310, 326 (2010) (“Courts, too, are bound by the First Amendment.”); cf. Sonja R. West, *Suing the President for First Amendment Violations*, 71 OKLA. L. REV. 321, 329 (2018) (arguing that courts should hold the President accountable under the First Amendment as it has other executive officials, but noting that “[t]he question of whether the First Amendment applies directly to the President . . . remains officially unresolved”).

values,¹⁰³ and sometimes simple judicial necessity.¹⁰⁴ As one scholar observed, “If we read the text of the Constitution in a straightforward way, American constitutional law ‘contradicts’ the text of the Constitution more often than one might think.”¹⁰⁵ Therefore, my aim for the rest of this Part is to use historical evidence and the underlying structure of the Constitution to support a reading of the Exceptions Clause which is faithful to its plain text.

B. *History Reinforces Congress’s
Sweeping Exceptions Clause Power*

On July 24, 1787, after concluding the initial round of debates at the Constitutional Convention, the delegates submitted the various resolutions they had approved to the Committee of Detail, a task force charged with “report[ing] a Constitution comfortable to the Resolutions passed by the Convention.”¹⁰⁶ In its initial draft of the Exceptions Clause, the Committee of Detail captured the approved resolutions as follows: “in all the other cases before mentioned, it [the Supreme Court’s jurisdiction] shall be appellate, with such exceptions and under such regulations as the Legislature shall make.”¹⁰⁷ Notably, there are only two discrepancies between this draft and the final language enshrined in the Constitution. These include the replacement of “Congress” for “Legislature,” and the insertion of “both as to Law and Fact” to clarify the scope of “it” (the Court’s appellate

103. To illustrate, the “right to privacy” does not flow from any textual provision of the Constitution. See *Griswold v. Connecticut*, 381 U.S. 479, 530 (1965) (Stewart, J., dissenting) (“What provision of the Constitution, then, does make this state law invalid? The Court says it is the right of privacy ‘created by several fundamental constitutional guarantees.’ With all deference, I can find no such general right of privacy in the Bill of Rights, or in any case ever before decided by this Court.”).

104. In *Bolling v. Sharpe*, the Supreme Court held that the federal government could not discriminate on the basis of race in D.C. schools even though “[t]he Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states.” 347 U.S. 497, 499–500 (1954).

105. David A. Strauss, *The Supreme Court, 2014 Term—Foreword: Does the Constitution Mean What it Says?*, 129 HARV. L. REV. 1, 3 (2015).

106. Rossum, *supra* note 100, at 392 (quoting 2 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 22, 46 (rev. ed. 1937)) (internal quotation marks omitted).

107. *Id.* (quoting FARRAND, *supra* note 106, at 173) (internal quotation marks omitted).

jurisdiction). The former modification is merely semantic, and the latter was approved unanimously and with little discussion as a simple clarification of the Court's potential jurisdictional reach.¹⁰⁸ Because "[n]o questions were raised concerning Congress' plenary power to make exceptions," Professor Ralph Rossum resolves that "[t]he conclusion is inescapable: both the words chosen by the delegates and the discussion surrounding their choice of these words suggest an unlimited congressional power over the Court's appellate jurisdiction."¹⁰⁹

Though this particular evidence from the Convention does support Professor Rossum, it is not decisive on the matter. Nevertheless, his conclusion is correct. In parallel with the text, both the original public meaning and history of the Exceptions Clause strongly indicate that Congress has the essentially unconditional authority to act as jurisdictional gatekeeper. The remainder of this Section will examine three additional sources buttressing this view: the *Federalist Papers*, historical practices of the First Congress, and the role state supreme courts played in the early Republic.

1. *The Federalist Papers: Capturing the Views of the Original Public Meaning and Governmental Structure*

"The Federalist Papers long have enjoyed a special reputation as an extremely important source of evidence of the original meaning of the Constitution,"¹¹⁰ both within the academic liter-

108. *See id.* at 392–93 ("James Wilson, the principal architect of the draft reported by the Committee of Detail, answered [a question of the meaning of "it"] that the committee meant 'facts as well as law & Common as well as Civil law.' No comments were forthcoming from other members of the Committee, presumably indicating their agreement with Wilson's answer." (footnote omitted) (quoting FARRAND, *supra* note 106, at 431)).

109. *Id.* at 393.

110. Gregory E. Maggs, *A Concise Guide to the Federalist Papers as a Source of the Original Meaning of the United States Constitution*, 87 B.U. L. REV. 801, 802 (2007). Chief Justice Marshall similarly referred to them with reverence:

The opinion of the *Federalist* has always been considered as of great authority. It is a complete commentary on our constitution; and is appealed to by all parties in the questions to which that instrument has given birth. Its intrinsic merit entitles it to this high rank, and the part two of its authors [Madison and Hamilton] performed in framing the constitution, put it very much in their power to explain the views with which it was framed.

Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 418 (1821).

ature as well as for the federal judiciary.¹¹¹ Alexander Hamilton explained the breadth of the Exceptions Clause in *Federalist No. 80*. There, after enumerating “the particular powers of the federal judiciary, as marked out in the Constitution,” Hamilton argued that “it appears that [the powers] are all conformable to the principles which ought to have governed the structure of [the judicial] department and which were necessary to the perfection of the system.”¹¹² Yet after attesting to the nobility of the proposed federal judiciary’s power, Hamilton then described the rationale for a major legislative check on the jurisdiction of the Court. He continued:

If some partial inconveniences should appear to be connected with the incorporation of any of [the jurisdictional powers] into the plan[,] it ought to be recollected that the national legislature will have *ample authority to make such exceptions, and to prescribe such regulations as will be calculated to obviate or remove these inconveniences*. The possibility of particular mischiefs can never be viewed, by a well-informed mind, as a solid objection to a general principle, which is calculated to avoid general mischiefs and to obtain general advantages.¹¹³

This stark expression of the legislature’s ability to restrain the Supreme Court and “obviate or remove” any “inconveniences” which may arise because of its jurisdiction reinforces the breadth of the Exceptions Clause authority. Indeed, in *Federalist No. 81*, Hamilton further argued that the exceptions power would “enable the government to modify [the Court’s appellate jurisdiction] in such a manner as will best answer the ends of public justice and security.”¹¹⁴ Even during the course of state conventions, ratifiers such as John Marshall shared Hamilton’s view and remarked that the jurisdictional “exceptions certainly go as far as the legislature may think proper for the interest and liberty of the people.”¹¹⁵

111. See *Printz v. United States*, 521 U.S. 898, 910 (1997) (noting that the *Federalist Papers* are “usually regarded as indicative of the original understanding of the Constitution”).

112. THE FEDERALIST NO. 80, *supra* note 16, at 480 (Alexander Hamilton).

113. *Id.* (emphases added).

114. THE FEDERALIST NO. 81, *supra* note 16, at 489 (Alexander Hamilton).

115. Rossum, *supra* note 100, at 393 (quoting 3 DEBATES ON THE FEDERAL CONSTITUTION 560 (Jonathan Elliot ed., 2d ed. 1888)) (internal quotation marks omitted).

Taken together, Hamilton's insights demand substantial consideration insofar as they support Congress's legitimate ability to remove the determination of a statute's constitutionality from the Court's purview. For in addition to bolstering a far-reaching understanding of the Exceptions Clause, the *Federalist Papers* also indicate the provision's underlying purpose—to remove “inconveniences . . . connected with the incorporation of any of [the jurisdictional powers] into the plan.”¹¹⁶ By this view, if Congress deemed a statute overturning a Supreme Court decision as indispensable for maintaining public justice and security, then it could act to shield the statute from repeated Supreme Court overreach. And, in certain instances, doing so could promote the virtues of federalism¹¹⁷ or the protection of individual rights.¹¹⁸ Just as the Framers envisioned.

To be clear, it is highly unlikely that Hamilton intended to use the term “inconveniences” lightly in describing the Exceptions Clause's remedial vision.¹¹⁹ Yet cabining unnecessary and undesirable judicial politicization is a fundamental aim of the Exceptions Clause. It provides a legislatively mandated “political question doctrine” of sorts in the form of jurisdiction stripping. And it can prevent nine (potentially five) elite lawyers from announcing politically charged rights found nowhere in our nation's foundational document. In short, the Exceptions Clause “furnishes necessary legitimacy to the enterprise of judicial review . . . by recognizing that the ultimate authority over constitutional interpretation belongs not to the Court alone, but to ‘the People.’”¹²⁰

Therefore, contrary to the views of Professor Laurence Tribe, it is submitted that the “*de facto* reversal, by means far less burdensome than those required for a constitutional amendment, of several highly controversial Supreme Court decisions”¹²¹

116. THE FEDERALIST NO. 80, *supra* note 16, at 480 (Alexander Hamilton).

117. For instance, reversing *Roe v. Wade*, 410 U.S. 113 (1973), to leave it to the states to decide the right to an abortion.

118. For example, Congress could have used the Exceptions Clause to overturn *Plessy v. Ferguson*, 163 U.S. 537 (1896), thereby obviating the need for *Brown v. Board of Education*, 347 U.S. 483 (1954).

119. See THE FEDERALIST NO. 80, *supra* note 16, at 480 (Alexander Hamilton).

120. *Leading Cases*, *supra* note 20, at 285.

121. Laurence H. Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts*, 16 HARV. C.R.-C.L. L. REV. 129, 129–30 (1981) (footnote omitted).

would constitute one of the most institutionally legitimate uses of the Exceptions Clause. Although Professor Tribe is correct that this power should rarely, if ever, be used,¹²² there exists a crucial difference between empowering judges to determine what the law *is* and permitting them unchecked¹²³ to expound what the law *should be*.¹²⁴ Such activism proved a grave issue of concern for the Founders. After all, barring the difficult processes in Article V,¹²⁵ “[b]y deciding [a] question under the Constitution, the Court removes it from the realm of democratic decision” altogether.¹²⁶ When exercised improperly, this sort of judicial activism undermines the Court’s institutional legitimacy,¹²⁷ and it disrespects the relative moral proximity of Congress to the people of the United States.¹²⁸

Further, it is precisely this worry that has often motivated Congress to begin considering jurisdiction-stripping proposals in the first place. For example, in an effort to overrule *Miranda*

122. See *id.* at 130–31; see also *infra* Part III.

123. Because of the inability of either camp to muster a three-fourths majority of states, for many polarizing issues such as abortion or gun rights, a constitutional amendment fails to provide a realistic check on an overtly activist Supreme Court, regardless of which way the Court swings on the issue.

124. See *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018) (“Allowing judges to pick and choose between statutes risks transforming them from expounders of what the law *is* into policymakers choosing what the law *should be*.”).

125. One scholar has argued that Congress cannot “strip[] federal jurisdiction over amendment-based claims.” Joseph Blocher, *Amending the Exceptions Clause*, 92 MINN. L. REV. 971, 977 (2008). But this theory lacks any textual basis whatsoever. No amendment even implicitly purports to trump the Exceptions Clause or alter the Court’s jurisdiction. Indeed, the presence of a substantive right embodied in an amendment is wholly consistent with the Supreme Court’s inability to hear certain cases calling into question the scope of that right. This is because lower federal courts or state courts can still adequately vindicate the amendment-based right in those cases.

126. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2625 (2015) (Roberts, C.J., dissenting).

127. *But cf.* Tonja Jacobi, *Obamacare as a Window on Judicial Strategy*, 80 TENN. L. REV. 763, 769 (2013) (arguing that in upholding the Affordable Care Act, the “driving concern for Roberts [in *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012)] was credibility—the institutional legitimacy of the Court, and, his own reputation and legacy, including the special role of the Chief Justice”).

128. *Cf. Leading Cases*, *supra* note 20, at 285 (arguing that the Exceptions Clause provides a mechanism for “oversee[ing] the functioning of an unelected Supreme Court”).

*v. Arizona's*¹²⁹ prophylactic regime,¹³⁰ the Senate once proposed a bill that would have prohibited federal courts “to review or to reverse, vacate, modify, or disturb in any way, a rule of any trial court of any State in any criminal prosecution admitting in evidence as voluntarily made an admission or confession of any accused.”¹³¹ In simple terms, the act would have precluded the Court from using *Miranda* to exclude wholly voluntary confessions. Why would Congress (and the Framers) find this desirable? The proposed re-admissibility of *Miranda*-less but nevertheless voluntary confessions signifies an effort to “recalibrate” the Constitution in the wake of an activist Warren Court—to legislatively repeal a non-originalist right found nowhere in the Fifth Amendment’s text or history.¹³² Put differently, the *Miranda* decision arguably amounted to a de facto amendment—one well beyond the Court’s power—and Congress strove to leverage the Exceptions Clause to restore the constitutional status quo. It introduced but ultimately did not pass a failsafe check to prevent the alteration of constitutional meaning, one which would have accorded with the original understanding and intent of the Exceptions Clause. And, if the measure had passed, state courts and legislatures could have continued to safeguard rights under the federal Constitution and interpret the Fifth Amendment as it had been construed for nearly two centuries.¹³³

Such congressional curtailment of perceived judicial abuses comports with the system contemplated by the Framers—that our tripartite government is not simply one of separation of powers, but also of “checks and balances to reinforce that separation.”¹³⁴ Ignoring the significance of checks and balances in

129. See 384 U.S. 436 (1966).

130. See *id.* at 467–68 (concluding that an accused person subject to custodial interrogation cannot voluntarily waive his right to remain silent without first being read his all-too-familiar *Miranda* rights).

131. CHEMERINSKY, *supra* note 26, at 187 (quoting GERALD GUNTHER & KATHLEEN SULLIVAN, *CONSTITUTIONAL LAW* 47 (13th ed. 1997)) (internal quotation marks omitted).

132. See, e.g., *Miranda*, 384 U.S. at 526 (White, J., dissenting) (asserting that the decision “has no significant support in the history of the privilege [against self-incrimination] or in the language of the Fifth Amendment”); Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 MICH. L. REV. 2625, 2628–31 (1996) (similar).

133. See *infra* Part II.B.3.

134. *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1215–16 (2015).

this framework and focusing exclusively on the Court's vested power thereby leads opposing theories of the Exceptions Clause down a flawed and dangerous path.¹³⁵ Sure, Hamilton opined that the judiciary was "the weakest of the three departments of power,"¹³⁶ and so some may argue there exists little need for a legislative check on its opinions. But recognizing the fear of austere judicial aggrandizement into a policy-making entity, Hamilton tempered his assessment by adding: "I mean so long as the judiciary remains *truly distinct* from both the legislature and the executive. For I agree, that 'there is no liberty, if the power of judging be not separated from the legislative and executive powers.'"¹³⁷ Thomas Jefferson shared this sentiment, lamenting in 1823:

Experience . . . soon showed in what way [the judicial branch was] to become the most dangerous [Federal judges had] sapp[ed], by little and little, the foundations of the constitution, and work[ed] [their] change by construction, before any one has perceived that that invisible and helpless worm has been busily employed in consuming its substance.¹³⁸

To credit both Hamilton and Jefferson, a democracy should fear life-tenured and politically unaccountable judges willing to shift the constitutional goalposts. But by enabling Congress to rein in the Supreme Court and correct manifest errors by defining its appellate jurisdiction, the Exceptions Clause can actually *add* to the judiciary's democratic legitimacy.¹³⁹

Now, with a Court that has for better or worse declared itself "the ultimate interpreter of the Constitution,"¹⁴⁰ Hamilton's reservation must be afforded respect. Otherwise, little exists to prevent unchecked judicial politicization. Little exists to mean-

135. See *infra* Part II.C (critiquing the "essential role" theory).

136. THE FEDERALIST NO. 78, *supra* note 16, at 464 (Alexander Hamilton).

137. *Id.* at 464–65 (emphasis added) (quoting 1 MONTESQUIEU, THE SPIRIT OF THE LAWS 181 (1748)).

138. Letter from Thomas Jefferson to Adamantios Coray (Oct. 31, 1823), in 15 THE WRITINGS OF THOMAS JEFFERSON 480, 487 (Andrew A. Lipscomb ed., 1905).

139. See Black, *supra* note 90, at 846 ("Except for the original jurisdiction of the Supreme Court, every assumption of jurisdiction by every federal court since 1789 has been on the basis of an Act of Congress [This] is the rock on which rests the legitimacy of the judicial work in a democracy."); see also *Leading Cases*, *supra* note 20, at 285.

140. *Baker v. Carr*, 369 U.S. 186, 211 (1962).

ingly ensure the “complete independence of the courts of justice [which] is peculiarly essential in a limited Constitution.”¹⁴¹ The amendment process is both arduous and reserved to the States, and so on polarizing issues where it may fail, what enables the still democratically accountable legislature to prevent Lochnerian¹⁴² judicial abuse? The Exceptions Clause. It ingeniously provides a congressional guard rail—a “check”—to ensure the Supreme Court operates within its constitutional role. And as I will argue more fully below,¹⁴³ state courts act as a simultaneous judicial guard rail—a “balance”—to ensure that Congress likewise operates in accordance with the Constitution.

As such, respecting the Exceptions Clause’s breadth can prevent two of the coordinate branches—Congress *and* the courts—from violating the envisioned prerogatives of their co-equal counterparts. This “separation of powers was adopted by the Convention of 1787 . . . to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.”¹⁴⁴

2. *The First Congress: Reaffirming Broad Authority*

As with the *Federalist Papers*, “early congressional enactments ‘provide contemporaneous and weighty evidence of the Constitution’s meaning.’”¹⁴⁵ Such “contemporaneous legislative exposition of the Constitution, acquiesced in for a long term of years, fixes the construction to be given its provisions.”¹⁴⁶ Because the First Congress in particular comprised

141. THE FEDERALIST NO. 78, *supra* note 16, at 465 (Alexander Hamilton).

142. See Richard A. Primus, *Canon, Anti-Canon, and Judicial Dissent*, 48 DUKE L.J. 243, 244–45 (1998) (arguing that *Lochner v. New York*, 198 U.S. 45 (1905), “the infamous case in which the Supreme Court struck down a New York health and labor regulation limiting bakers’ workweeks to sixty hours,” is one of the “most reviled” cases in the constitutional “anti-canon” because of its judicial activism).

143. See *infra* Part II.B.3.

144. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 613–14 (1952) (Frankfurter, J., concurring) (quoting *Myers v. United States*, 272 U.S. 52, 240, 293 (Brandeis, J., dissenting)) (internal quotation marks omitted).

145. *Printz v. United States*, 521 U.S. 898, 905 (1997) (alteration omitted) (quoting *Bowsher v. Synar*, 478 U.S. 714, 723–24 (1986)).

146. *Id.* (alteration omitted) (quoting *Myers*, 272 U.S. at 175) (internal quotation marks omitted).

many members from the Constitutional Convention and state ratifying conventions, its actions produce substantial insight into the original understanding of the Constitution.¹⁴⁷

Tellingly, the Supreme Court has operated with its appellate jurisdiction mitigated or eliminated entirely in certain areas ever since the First Congress passed the Judiciary Act of 1789. Indeed, “[f]or a century, federal criminal cases were not generally reviewable in the Supreme Court.”¹⁴⁸ And that is significant to this Note’s overarching inquiry. Just like a potential law that excludes, for example, the constitutionality of state abortion statutes from Supreme Court review, so too did this enactment of the First Congress exempt a complete category of cases from review based solely upon subject matter. In other words, the First Congress’s restriction indicates that the legislature could function as gatekeeper for the types of questions which may reach the Court.

Furthermore, the early Supreme Court could only review decisions of state supreme courts that ruled against (that is, not in favor of) a federal constitutional claim.¹⁴⁹ This jurisdictional carve out remained in force even until World War I,¹⁵⁰ and serves as powerful corroborative evidence regarding the scope of the Exceptions Clause.¹⁵¹ “It follows from this [historical practice] that Congress has the power by enactment of a statute to strike at what it deems judicial excess by delimitations of . . . the Supreme Court’s appellate jurisdiction.”¹⁵² This could very well entail eliminating the jurisdictional authority to examine a specific statute’s constitutionality.

3. *State Supreme Courts: Vindicating Due Process*

Opponents of jurisdiction stripping often urge that removing judicial review could violate the right to due process.¹⁵³ That is,

147. See *Golan v. Holder*, 565 U.S. 302, 321 (2012).

148. Bator, *supra* note 90, at 1040.

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

150. See Act of Dec. 23, 1914, Pub. L. No. 63-224, 38 Stat. 790 (1914).

151. Cf. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 327–28 (1936) (“A legislative practice such as we have here, evidenced not by only occasional instances; but marked by the movement of a steady stream for a century and a half of time, goes a long way in the direction of proving the presence of unassailable ground for the constitutionality of the practice . . .”).

152. Wechsler, *supra* note 18, at 1005.

153. See, e.g., Van Alstyne, *supra* note 34, at 263–66.

due process would purportedly provide an internal constitutional constraint on restricting the Supreme Court's ability to rule on a statute's validity.

However, this contention overstates the importance of Supreme Court review. Because of our system of dual sovereignty, when Congress peels away a layer of protection by invoking its Exceptions Clause authority, multiple sublayers of judicial review still remain to vindicate constitutional rights. First, Congress may direct the inferior federal courts to hear those cases removed from the Supreme Court's appellate jurisdiction.¹⁵⁴ Second, even absent judicial review in federal courts altogether, state constitutions—often containing similar if not identical language to their federal counterpart—still act as guardians of every individual's right to due process.¹⁵⁵ And third, the federal Constitution *continues* to provide a source of relief to all litigants, regardless of Congress's decisions on whether to exercise the full extent of its Exceptions Clause power. This is because "state courts may assume subject-matter jurisdiction over a federal cause of action absent provision by Congress to the contrary or disabling incompatibility between the federal claim and the state-court adjudication."¹⁵⁶ Moreover, they generally must do so,¹⁵⁷ and via the Supremacy Clause, "Judges in every State shall be bound [by the Constitution]."¹⁵⁸ Practically speaking then, although Congress may not expressly declare a victor in the battle over a constitutional question, it may validly shift the battlefield to state courts.

Assuming state court availability, there is certainly no general due process right to Supreme Court review, for even federal litigants do not receive such as a matter of right.¹⁵⁹ It is furthermore difficult to imagine that automatic federal court review of any sort is really "due" to anybody when: (1) the Exceptions Clause explicitly provides that the Court's appellate jurisdic-

154. See, e.g., *Felker v. Turpin*, 518 U.S. 651, 661–62 (1996) (accepting the practice's constitutionality).

155. See generally JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW (2018).

156. *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 477–78 (1981).

157. See *Testa v. Katt*, 330 U.S. 386, 391 (1947) (holding that state courts have a general duty to hear federal claims).

158. U.S. CONST. art. VI, cl. 2.

159. See Judiciary Act of 1891, ch. 517, §§ 4, 6, 26 Stat. 826, 827–28 (removing certain appeals to the Supreme Court for litigants as a matter of right).

tion is subject to restrictions,¹⁶⁰ and (2) given Congress's authority to "ordain and establish" inferior tribunals,¹⁶¹ "[t]here can be no question of the power of Congress thus to define and limit the jurisdiction of the inferior courts of the United States."¹⁶² As one scholar described:

That state courts might come to different substantive conclusions than the Supreme Court does not mean that they are disregarding the Constitution. Nowhere does the Constitution state that the Constitution *as interpreted by the Supreme Court*, or that the decisions of the Supreme Court, shall be the "supreme Law of the Land." If jurisdiction is the authority to decide a case, it must include the authority to decide the case wrongly. Corrections, if any, must come on appeal. State courts may decide cases wrongly—just as the Supreme Court may decide cases wrongly. But just as the latter is constitutionally acceptable, so must be the former.¹⁶³

By this view, when Congress enacts a jurisdiction-stripping provision leaving abortion's legality to the states, restricting corporate election financing, permitting all voluntary confessions in criminal proceedings, curbing gun ownership, or expanding state regulatory freedoms under the dormant commerce clause,¹⁶⁴ the unrestrained state courts have a positive—but wholly independent—duty to uphold both the state and federal constitutions.¹⁶⁵ They would become the final arbiters of the law's constitutionality. And that is perfectly okay.

Optimistically speaking, the state courts would decline Congress's invitation to disregard Supreme Court precedent.

160. See, e.g., *Felker v. Turpin*, 518 U.S. 651, 661–62 (1996).

161. U.S. CONST. art. III, § 1.

162. *Lauf v. E.G. Shinner & Co.*, 303 U.S. 323, 330 (1938); see *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 449 (1850) ("Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies. Courts created by statute can have no jurisdiction but such as the statute confers.").

163. Velasco, *supra* note 52, at 694–95 (footnotes omitted).

164. For the purposes of overturning or limiting *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), *Citizens United v. FEC*, 558 U.S. 310 (2010), *Miranda v. Arizona*, 384 U.S. 436 (1966), *McDonald v. City of Chicago*, 561 U.S. 742 (2010), or *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), respectively.

165. More than likely, the state supreme court—even in the absence of U.S. Supreme Court review—would follow its federal counterpart, both as a matter of arguably still binding precedent (via the Supremacy Clause) and as a matter of judicial respect. To prevent the potential dissolution of the Republic and send a strong message back to Congress, they should do so. However, nothing can *stop* the state supreme court from ruling contrary to Supreme Court precedent.

Yet reasonable state courts could disagree as to the weight they would have to afford federal precedent in such a unique situation. After all, Congress would have validly abrogated Supreme Court review on the issue precisely because it viewed an earlier decision of the Court as patently incorrect. Professor Erwin Chemerinsky accordingly notes, “The limit on federal court power might be perceived by some state legislatures as an open invitation to adopt laws disregarding Supreme Court precedents and some state courts, without the prospect of Supreme Court review, might sustain such statutes.”¹⁶⁶ The point is, irrespective of which precedential position the state courts may take, they still act as perpetual safeguards from uninhibited legislative tyranny.¹⁶⁷ Even if potentially cumbersome to litigate an issue in multiple states and despite the risk of a lack of uniformity, state courts unwaveringly serve to prevent legislatures from flatly disregarding any rights embodied in the Constitution.

Such a federalist design might even be desirable in certain instances. State courts are at least as independent from interference by Congress as the Supreme Court is,¹⁶⁸ and so they may provide an even more suitable forum for the litigation of certain prickly political issues.¹⁶⁹ Not only that, but when federal judging becomes unacceptably politicized, this alternative could prevent nine unelected individuals from unilaterally injecting their policy preferences into the inner workings of fifty disparate states. With this in mind, in describing the original

166. CHEMERINSKY, *supra* note 26, at 205.

167. See Hart, *supra* note 67, at 1401 (“In the scheme of the Constitution, [state courts] are the primary guarantors of constitutional rights, and in many cases they may be the ultimate ones.”).

168. See 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, 912 (1982) (“[S]tate courts remain as independent as article III federal judges, because Congress has no power to regulate either their salary or tenure.”).

169. This intention is probably why the Framers did not allow for exceptions as to the *original* jurisdiction of the Court:

All questions in which they are concerned are so directly connected with the public peace, that, as well for the preservation of this as out of respect to the sovereignties they represent, it is both expedient and proper that such questions should be submitted in the first instance to the highest judicatory of the nation.

THE FEDERALIST NO. 81, *supra* note 16, at 486 (Alexander Hamilton).

vision of jurisdiction contemplated by the Framers, Professor Herbert Wechsler stated that:

Congress would decide from time to time how far the federal judicial institution should be used within the limits of the federal judicial power; or, stated differently, how far judicial jurisdiction should be left to the state courts, bound as they are by the Constitution as “the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the contrary notwithstanding.”¹⁷⁰

In *Lockerty v. Phillips*,¹⁷¹ the Supreme Court similarly declared, “Article III left Congress free to establish inferior federal courts or not as it thought appropriate. It could have declined to create any such courts, leaving suitors to the remedies afforded by state courts, with such appellate review by this Court as Congress might prescribe.”¹⁷² “‘To deny this position’ would undermine the separation of powers by ‘elevating the judicial over the legislative branch,’”¹⁷³ which may have good reasons for delegating constitutional questions exclusively to the states. Whether one agrees with them, such were the choices of the Framers, and we will continue to be bound by those decisions until we, as a nation, leverage the amendment mechanism granted to us in Article V.¹⁷⁴

C. The “Essential Role” Theory

Although the text and history of the Exceptions Clause are clear, much of the recent scholarly commentary has sought to limit its scope.¹⁷⁵ Perhaps most famously, Professor Henry Hart advocated for his own structural limiting principle: that “the exceptions must not be such as will destroy the essential role of the Supreme Court in the constitutional plan.”¹⁷⁶ Professor Hart conceded that his “essential role” test found neither textual nor precedential support, but argued that “whatever the difficulties

170. Wechsler, *supra* note 18, at 1005–06 (quoting U.S. CONST. art. VI, cl. 2).

171. 319 U.S. 182 (1943).

172. *Id.* at 187 (emphasis added).

173. *Patchak v. Zinke*, 138 S. Ct. 897, 907 (2018) (plurality opinion) (alteration omitted) (quoting *Cary v. Curtis*, 44 U.S. (3 How.) 236, 245 (1845)).

174. See U.S. CONST. art. V.

175. 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, 240–46 (1985); Clinton, *supra* note 100, at 753–54; Glashauser, *supra* note 92, at 1400–02.

176. Hart, *supra* note 67, at 1365.

of the test, they are less . . . than the difficulties of reading the Constitution as authorizing its own destruction."¹⁷⁷ Professor Leonard Ratner then sought to clarify Hart's indeterminacy:

[The Court's] essential appellate functions under the Constitution are: (1) to provide a tribunal for the ultimate resolution of inconsistent or conflicting interpretations of federal law by state and federal courts, and (2) to provide a tribunal for maintaining the supremacy of federal law when it conflicts with state law or is challenged by state authority.¹⁷⁸

Despite the theory's appeal as a prudential vision of how Congress should restrictively wield its authority,¹⁷⁹ it lacks any meaningful basis for concluding why Congress cannot do so uninhibited.¹⁸⁰ Nowhere does the "essential role" theory find any root within the four corners of the Constitution; rather, congressional reach under the Exceptions Clause is textually unqualified. The clause grants Congress the explicit power to remove categories of cases from the Court, and "[w]hen Congress acts *within its sphere of power and responsibilities*, it has not just the right but the duty to make its own informed judgment on the meaning and force of the Constitution."¹⁸¹ This sphere plainly includes the authority to choose whether the Supreme Court can review a statute for its conformance to the Constitution.

In addition to these textual and precedential shortcomings, Professor Hart's theory also neglects that the Court's "judicial duty is not less fitly performed by *declining* ungranted jurisdiction than in exercising firmly that which the Constitution and the laws confer."¹⁸² As the Supreme Court has explained, "The statutory and (especially) constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers, restraining the courts from acting at certain times, and even restraining them from acting permanently regarding certain subjects."¹⁸³ Thus, the Constitution has rendered the Court's appellate jurisdiction "wholly the creature of legisla-

177. *Id.*

178. Ratner, *supra* note 84, at 161.

179. *See infra* Part III.

180. *See, e.g.,* Redish, *supra* note 168, at 906 ("Professor Hart's comment could at best be characterized as conclusory and at worst as simply off-hand.")

181. *City of Boerne v. Flores*, 521 U.S. 507, 535 (1997) (emphasis added).

182. *Ex parte McCordle*, 74 U.S. (7 Wall.) 506, 515 (1869) (emphasis added).

183. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101 (1998).

tion.”¹⁸⁴ To “create such jurisdiction in any case, two things must concur: the Constitution must give the capacity to take it, *and* an act of Congress must supply the requisite authority.”¹⁸⁵ Setting aside those cases within the Court’s original jurisdiction, the “essential role” of the Supreme Court is therefore singular. It is to adjudicate those disputes—and only those disputes—which Congress has deemed appropriate for it to resolve. Only in such instances will the “judicial duty” be “fitly performed.”¹⁸⁶ Professor Hart’s misguided “essential role” limitation to the Exceptions Clause should accordingly be cast aside as “little more than constitutional wishful thinking.”¹⁸⁷ Instead, the plain text prevails: Congress may shield a statute’s constitutionality entirely from Supreme Court review.¹⁸⁸

III. POLICY CONCERNS RAISED BY SHIELDING A STATUTE FROM SUPREME COURT REVIEW

Throughout this exploration of the Exceptions Clause, I have argued that the clause confers upon Congress the near-plenary authority to curtail the appellate jurisdiction of the Supreme Court. Given the provision’s history and text, this power includes the ability to prevent the Court from ruling on a statute’s facial constitutionality altogether. Yet as the Supreme Court and Spider-Man alike have preached, “[i]n this world, with great power there must also come—great responsibility.”¹⁸⁹ In this final Part, I will argue that even if Congress could constitutionally weaponize the Exceptions Clause, it generally should not do so because of ancillary threats to institutional stability.

184. *Daniels v. R.R. Co.*, 70 U.S. (3 Wall.) 250, 254 (1866).

185. *Id.* (emphasis added); see *Barry v. Mercein*, 46 U.S. (5 How.) 103, 119 (1847) (“By the constitution of the United States, the Supreme Court possesses no appellate power in any case, unless conferred upon it by act of Congress . . .”); *Durosseau v. United States*, 10 U.S. (6 Cranch) 307, 313–14 (1810) (similar); see also *Gonzalez v. Crosby*, 545 U.S. 524, 534 (2005) (“[A]bsence of jurisdiction altogether deprives a federal court of the power to adjudicate the rights of the parties.”).

186. *McCardle*, 74 U.S. (7 Wall.) at 515.

187. Redish, *supra* note 168, at 911.

188. Subject of course to internal constraints in the Constitution like equal protection.

189. *Kimble v. Marvel Entm’t, LLC*, 135 S. Ct. 2401, 2415 (2015) (alteration in original) (quoting STAN LEE & STEVE DITKO, AMAZING FANTASY NO. 15, at 13 (1962) (containing the first appearance of Spider-Man)) (internal quotation marks omitted).

A. *The Exceptions Clause as a Contravention of Substantive Values*

Despite Congress's legitimate Exceptions Clause authority, principled legislative restraint is paramount lest the constitutional project disintegrate into the very form of despotic government the Revolution sought to proscribe. As Alexis de Tocqueville observed, the power vested in the American courts of "rul[ing] on the unconstitutionality of laws still forms one of the most powerful barriers that has ever been raised against the tyranny of political assemblies."¹⁹⁰ But cutting down that anti-majoritarian barrier would quite simply threaten the most fundamental values embodied in the Constitution. It would allow a single branch to aggrandize the federal powers wisely distributed by the Framers among discrete entities.¹⁹¹

With respect to wise policy, then, Professor Hart's "essential role" theory warrants particular attention.¹⁹² Recall that the core responsibilities of the Supreme Court arguably include both the resolution of conflicting interpretations of federal law and ensuring the supremacy of federal law.¹⁹³ Preventing the federal courts from reviewing a statute's constitutionality would clearly undermine these twin goals. For although state courts may still provide effective redress, they could very well ignore Supreme Court precedent with impunity, and it has long been recognized that a national Constitution with uniform meaning would be lost without the Supreme Court.¹⁹⁴ Whatever value inherent in federalism, it would pervert the Constitution—the unifying emblem of our nation—should its fundamental privileges be conferred unequally by dint of sheer geographic coincidence.¹⁹⁵ Thus, in supporting the "essential roles" theory,

190. ALEXIS DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA 175 (Liberty Fund new ed. 2012) (1835).

191. Cf. THE FEDERALIST NO. 51, *supra* note 16, at 320 (James Madison) ("It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part.").

192. See generally Hart, *supra* note 67.

193. See Ratner, *supra* note 84, at 161.

194. Cf. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 386 (1921) ("Different States may entertain different opinions on the true construction of the constitutional powers of Congress.").

195. This is precisely why the Supreme Court often grants certiorari on circuit splits.

Professor Ratner described the Constitution's overarching vision as follows:

The Constitution makes us one nation. It is the symbol of our shared purposes. If interpretation of that overriding document, which manifests our agreement on long term associational values, varies from state to state, respect for and confidence in the document is undermined. The nature of our governmental structure and its implications for all citizens become indistinct. Uncertainty and discontent proliferate.¹⁹⁶

Professor Ratner's warning is all the more pressing in light of the increasingly national identity of modern citizens.¹⁹⁷ No longer do we define ourselves first and foremost by our state.¹⁹⁸ Our confidence in the Constitution stems in large part from the fact that it applies equally to us all.¹⁹⁹

Furthermore, the Constitution expresses a profound respect for individual liberties, especially those of minority groups incapable of political redress.²⁰⁰ Recklessly invoking the Exceptions Clause to undercut the judicial protection of valid minority interests would thereby violate a core tenet of constitutional law.²⁰¹ Say what you will of the amorphous concept of the "spirit of the Constitution" as a legal argument. But as a practical matter, few would disagree that its use as an instrument of oppression by the majority is highly objectionable. After all, a defining characteristic of the Constitution is its careful construction aimed at "secur[ing] the Blessings of Liberty" for pos-

196. Leonard G. Ratner, *Majoritarian Constraints on Judicial Review: Congressional Control of Supreme Court Jurisdiction*, 27 VILL. L. REV. 929, 941 (1982).

197. Cf. Suzanna Sherry, Note, *Against Diversity*, 17 CONST. COMMENT. 1, 1-2 (2000) (arguing that diversity jurisdiction is a historical relic and is no longer necessary because local bias has largely faded).

198. See, e.g., Robert F. Nagel, *On the Decline of Federalism*, DAEDALUS, Winter 2006, at 127, 127-30.

199. See U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

200. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938) (expressing the need for "more searching judicial inquiry" when state action expresses "prejudice against discrete and insular minorities").

201. See Larry A. Alexander, *Painting Without the Numbers: Noninterpretive Judicial Review*, 8 U. DAYTON L. REV. 447, 456-57 (1983).

terity.²⁰² It is in broad strokes an enduring venture which seeks to protect the most basic values cherished by society. And recognizing human frailty both in times of peril and in the prospect of power, the Founders deliberately made it exceedingly difficult to change. However, if an impassioned majority irresponsibly alters this Ulysses contract in the heat of the moment²⁰³—as it could potentially do by shielding a statute’s constitutionality from the Court—the Constitution’s attempt to prophylactically tie the hands of future generations could ultimately fail.

B. The Exceptions Clause as a Political Weapon

In addition to undermining substantive values embodied in the Constitution, reckless use of the Exceptions Clause as a partisan weapon by either Republicans or Democrats could also spell mutual destruction—both to the parties and to democracy itself. At the beginning of Part I, I suggested why the political repercussions of shielding a statute’s constitutionality from the Supreme Court have likely compelled Congress to refrain from using the power in the past. Then throughout Part II, I argued why the text, history, and system of checks and balances envisioned by the Framers nonetheless collectively permit Congress to do so. This final Section will bridge that historical disconnect. Suppose that either party in Congress finally chooses to break free of its historical restraint. Even if constitutionally valid, what practical consequences would this weaponization of the Exceptions Clause have for our democracy?

In their recent book, Professors Steven Levitsky and Daniel Ziblatt explain that “our system of checks and balances has worked pretty well—but not, or not entirely, because of the constitutional system designed by the founders. Democracies work best—and survive longer—where constitutions are reinforced by unwritten democratic norms.”²⁰⁴ Standing alone, the

202. U.S. CONST. pmbl.; see also U.S. CONST. amend. XIV, § 1 (mandating equal protection of the laws).

203. Compare *Korematsu v. United States*, 323 U.S. 214, 223–24 (1944) (upholding the internment of Japanese-Americans during World War II), with *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) (“*Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—has no place in law under the Constitution.” (quoting *Korematsu*, 323 U.S. at 248 (Jackson, J., dissenting))).

204. STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* 8 (2018).

Constitution is only words on some parchment; its continued practical strength depends almost entirely upon the conduct of its institutional actors.²⁰⁵ Accordingly, one of the most critical “soft guardrails of American democracy” is “forbearance, or the idea that politicians should exercise restraint in deploying their institutional prerogatives,” and that they should “resist[] the temptation to use their temporary control of institutions to maxim[ize] partisan advantage.”²⁰⁶ When the Constitution contains an explicit provision subject to abuse like the Exceptions Clause, these soft democratic norms deliver an institutional source of shelter from governmental tyranny.

In the jurisdiction-stripping context, forbearance on Capitol Hill is therefore essential. By way of the *Citizens United* example introduced earlier,²⁰⁷ if the legislature sought to leverage the Exceptions Clause to overturn the Court’s decision and cap corporate election spending, this would directly interfere with the freedom and continuity of the electoral process. Regardless of one’s views on *Citizens United*, do we really want the current political party in power to have the final federal say on the scope of campaign speech protected by the First Amendment? Sure, state courts would act as an alternative outlet to adjudicate campaign speech claims.²⁰⁸ But in a national election—as for the presidency—few would tolerate an uneven constitutional floor of First Amendment protections.²⁰⁹ Indeed, what makes this destabilizing vision especially troubling is that under the façade of a constitutionally prescribed prerogative to control jurisdiction, overzealous Congress members would subvert democracy in an entirely lawful manner.²¹⁰ The valid measure would, however, be patently antidemocratic—aimed

205. See David E. Pozen, *Constitutional Bad Faith*, 129 HARV. L. REV. 885, 918–39 (2016) (discussing types of bad faith by institutional actors which may undermine the vitality of the Constitution).

206. LEVITSKY & ZIBLATT, *supra* note 204, at 8.

207. See *supra* note 15 and accompanying text.

208. See *supra* Part II.B.3.

209. Note that state constitutional protections for campaign speech could concededly differ. See SUTTON, *supra* note 155, at 16 (“State courts have authority to construe their own constitutional provisions however they wish. Nothing compels the state courts to imitate federal interpretations of the [U.S. Constitution].”).

210. Cf. LEVITSKY & ZIBLATT, *supra* note 204, at 5 (“Many government efforts to subvert democracy are ‘legal,’ in the sense that they are approved by the legislature or accepted by the courts.”).

at entrenching partisan advantage and sidestepping the more democratic amendment process prescribed in Article V.

Moreover, if the Exceptions Clause is invoked irresponsibly in the first instance, future Congresses with a flipped majority could more forcefully cloak their strategic behavior as merely consistent with prior practice.²¹¹ Put differently, the opposing party could diffuse accountability for their own overstepping by decrying the schoolyard classic “they started it,” a phenomenon which America has witnessed and bemoaned in the Senate’s recent Supreme Court confirmation proceedings.²¹² These sorts of “[c]onstitutional hardball tactics are viewed by the other side as provocative and unfair because they flout ‘the “go without saying” assumptions that underpin working systems of constitutional government.’”²¹³ It goes without saying that absent emergency, breaking constitutional and historic norms as simply a means for partisan ends threatens the long-term health of the political process and the two-party system.²¹⁴ To return to the *Federalist Papers* once more, when Alexander Hamilton spoke to curbing “inconveniences” via the Exceptions Clause,²¹⁵ he envisioned remedying unforeseen consequences arising from the judicial power vested in the Supreme Court by Article III. He assuredly did not mean leveraging the Exceptions Clause to dispel any inconveniences to a party’s factional political agenda.²¹⁶

211. See Josh Chafetz & David E. Pozen, *How Constitutional Norms Break Down*, 65 UCLA L. REV. 1430, 1439 (2018) (“If constitutional norms are constantly in flux and if perceived breaches trigger disapproval, as well as other possible sanctions, rational politicians will generally seek to describe their own strategic behavior as consistent with prior practice.” (footnote omitted)).

212. See Matt Flegenheimer, *The Roots of the Battle Over Neil Gorsuch: ‘They Started It,’* N.Y. TIMES (Mar. 31, 2017), <https://www.nytimes.com/2017/03/31/us/politics/supreme-court-neil-gorsuch-senate.html> [<https://perma.cc/EJN9-4N3N>].

213. Joseph Fishkin & David E. Pozen, *Asymmetric Constitutional Hardball*, 118 COLUM. L. REV. 915, 920 (2018) (quoting Mark Tushnet, *Constitutional Hardball*, 37 JOHN MARSHALL L. REV. 523, 523 n.2 (2004)).

214. Cf. LEVITSKY & ZIBLATT, *supra* note 204, at 7–8 (explaining that another “soft guardrail[] of American democracy” is “mutual toleration, or the understanding that competing parties accept one another as legitimate rivals”).

215. THE FEDERALIST NO. 80, *supra* note 16, at 480 (Alexander Hamilton).

216. In fact, “Hamilton dreaded [political] parties as ‘the most fatal disease’ of popular governments and hoped America could dispense with such groups.” RON CHERNOW, ALEXANDER HAMILTON 390 (2004) (quoting Alexander Hamilton, *The Defence No. 1*, in 13 THE PAPERS OF ALEXANDER HAMILTON 393 (Harold C. Syrett ed., 1987)).

Furthermore, that the scope of a constitutional right might seesaw haphazardly by dint of the party currently in power would frustrate constituents. It would diminish the already little remaining faith they have in Congress because of its reputation as an unnecessarily polarized institution.²¹⁷ And this diminution could lead to marked instability in the electoral process.²¹⁸ Therefore, Congress should continue to carefully consider these broader institutional factors before it enacts a constitutionality jurisdiction-stripping proposal; it should only institute such exceptions with overwhelming bipartisan support; it should seek the more palatable amendment process first before resorting to the Exceptions Clause; and it should altogether refrain from weaponizing jurisdiction stripping purely to promote political gain. No matter what the Constitution allows.

To return to this Note's initial inquiry, it will hopefully now be apparent that because of unwavering state court availability, Congress at least could not enlist the Exceptions Clause to *directly* alter the Supreme Court's interpretation of the Constitution.²¹⁹ That is to say, they could not do so entirely unchecked, because state courts would still possess the authority to hear claims regarding the statute's lawfulness. Two qualifications should be noted though. First, with no Supreme Court review to stop them, state courts may unanimously rule the opposite way of the Court (or at least split in some manner) on a contentious issue. The party invoking the Exceptions Clause may thus realistically—but unwisely—embrace the potential to gain a partial political victory as an indirect consequence of its actions.

Second, Congress can always leverage the Exceptions Clause proactively—before the Court has spoken to an issue. Indeed, as *McCardle* suggests, when in doubt as to a measure's constitutionality, Congress may even erase the Supreme Court's jurisdiction after oral argument but before a final opinion has been handed down.²²⁰ To illustrate, suppose that Congress had seri-

217. See, e.g., Farina, *supra* note 13, at 1705 (discussing views on polarization and concluding that “[t]he current level of congressional polarization is the highest since the Civil War”).

218. See Chafetz & Pozen, *supra* note 211, at 1438–39. *But cf.* Tara Leigh Grove, *The Structural Safeguards of Federal Jurisdiction*, 124 HARV. L. REV. 869, 871–72 (2011) (discussing how political minorities have at least historically garnered the votes necessary to stop federal jurisdiction-stripping bills).

219. See *supra* Part II.B.3.

220. *Ex parte McCordle*, 74 U.S. (7 Wall.) 506, 512 (1869).

ous reservations as to its authority to enact the Affordable Care Act's individual mandate.²²¹ Before the Court's disposition in *National Federation of Independent Business v. Sebelius*,²²² Congress thus could have legitimately decreed that no federal court could decide the constitutionality of the provision.²²³

Regardless of one's opinion on Obamacare, such weaponization of the Exceptions Clause as a tool to strong-arm signature legislation into force would be a short-term victory for one party and a long-term defeat for the Constitution and the American citizenry. For despite the proactivity of this jurisdiction stripping (which at least obviates the prudential risk of superseding the Supreme Court), the policy considerations above remain in full force. Firing this first shot would likely catalyze retaliatory action and incentivize the opposing political party to mirror the instigator's strategy in passing its own future signature legislation. The people would decry hyperpartisanship and would have to cumbersome litigate these measures in fifty state supreme courts, where disparate conclusions might proliferate.²²⁴ The Framers' ingenious system of "checks and balances" could instead become one of "strikes and counterstrikes" as the Supreme Court wrestles back and forth with Congress for control. And ultimately, if carelessly employed by the legislature as a blunt instrument for short-term partisan advantage, the clause targeted at jurisdictional "Exceptions" may lamentably become the rule.

CONCLUSION

Marbury famously held that the Supreme Court acts as the final arbiter and expounder of the Constitution. Yet in describing the Court's role in resolving difficult questions, Justice Robert Jackson also famously opined that:

221. See 26 U.S.C. § 5000A (2012 & Supp. V 2018).

222. 567 U.S. 519, 588 (2012) (holding that the individual mandate of the Patient Protection and Affordable Care Act was constitutional under the taxing power, but that the Act's Medicaid expansion provision was unduly coercive to the states, and thus in contravention of the spending power).

223. See *supra* Part II.

224. An outcome that is particularly troublesome for a national healthcare scheme.

[R]eversal by a higher court is not proof that justice is thereby better done. There is no doubt that if there were a super-Supreme Court, a substantial proportion of [the Supreme Court's] reversals . . . would also be reversed. We are not final because we are infallible, but we are infallible only because we are final.²²⁵

That is, unless Congress employs its Exceptions Clause authority to say otherwise. The Supreme Court has certainly been wrong in the past,²²⁶ and the Framers humbly granted Congress this unique jurisdiction-stripping authority as a measure to correct judicial overreach either discordant with or unforeseen in the envisioned constitutional design. This Note has argued that both the plain text and historical understandings of the Exceptions Clause support Congress's near-plenary power to do so, including the noteworthy ability to remove a statute's facial constitutionality from the Court's watchful eye. Although state courts would then provide an alternative forum to protect individual liberties from legislative tyranny, I have contended that Congress generally should not license this alternative as a policy matter. However, normative merits notwithstanding, one must accept that the Exceptions Clause power both exists and is of remarkable breadth. It provides a potential means by which Congress can overrule the Supreme Court without an amendment. And so ironically enough, the precise constitutional provision which *Marbury* relied on to invalidate a portion of the Judiciary Act of 1789 and thereby establish judicial review, is the very clause by which Congress may lawfully strip the Supreme Court of its future constitutional review authority.

Brian Kulp

225. *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring in the result).

226. E.g., *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 66 (1996) (overruling *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989)); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 531 (1985) (overruling *National League of Cities v. Usery*, 426 U.S. 833 (1976)); *Brown v. Bd. of Educ.*, 347 U.S. 483, 494–95 (1954) (overruling *Plessy v. Ferguson*, 163 U.S. 537 (1896)); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (overruling *Minersville School District v. Gobitis*, 310 U.S. 586 (1940)).