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## A Return to Form for the Exceptions Clause

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# A RETURN TO FORM FOR THE EXCEPTIONS CLAUSE

ALEX GLASHAUSSE<sup>\*</sup>

**Abstract:** This Article challenges the prevailing doctrinal, political, and academic view that the Exceptions Clause—which provides that “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”—gives Congress a license to strip the Supreme Court of jurisdiction. Properly interpreted, the facially ambiguous clause instead allows Congress to shift cases within the Court’s jurisdiction from appellate to original form. The word “Exceptions,” that is to say, applies not to “Jurisdiction” but rather to “appellate.” In its initial draft, the clause unmistakably affected only the form, not the existence, of jurisdiction: “[T]his supreme jurisdiction shall be appellate only, except in those instances, in which the legislature shall make it original . . . .” The Article traces the devolution of that clear language into the final nebulous version, explaining at each step of the editing process why the Constitutional Convention delegates tinkered with the wording. As a result of what the delegates thought were innocuous changes, the legislative exceptions power became susceptible to the misconception that it was confiscatory. It was meant instead to be transformative, allowing Congress to empower the Supreme Court by shifting important cases from appellate to original form. In short, the clause was designed not to eliminate cases, but to expedite them.

## INTRODUCTION

If James Madison had gotten his way in the summer of 1787, laws proposed by Congress would, before enactment, be reviewed by federal judges, who could veto them. A “convenient” number of judges, together with the chief executive, would wield that power as a “council of

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revision.”<sup>1</sup> Though the plan was twice defeated during the early weeks of the Federal Convention in Philadelphia,<sup>2</sup> Madison kept insisting that the inclusion of judges in such a council “would be useful to the Judiciary departmt. by giving it an additional opportunity of defending itself agst: Legislative encroachments.”<sup>3</sup> A “real source of danger,” he warned, based on states’ experiences, was the “powerful tendency in the Legislature to absorb all power into its vortex.”<sup>4</sup>

A leader of the successful opposition was Nathaniel Gorham of Massachusetts, chairman of the Convention’s all-inclusive Committee of the Whole House<sup>5</sup> and former President of the Confederation Congress. Though a “genial”<sup>6</sup> and even “lusty”<sup>7</sup> fellow, Gorham found several faults with Madison’s idea: judges had no special aptitude for policy,<sup>8</sup> judges ought not have any “prepossessions” about laws they apply from the bench,<sup>9</sup> and a proliferation of judges on the council would dilute the veto power of the executive.<sup>10</sup> But he expressed no interest in subjecting the judiciary to legislative control.<sup>11</sup> “All agree,” stressed Gor-

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<sup>1</sup> 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 15 (May 29), 21 (Virginia plan) (Madison’s notes) (Max Farrand ed., 1966) [hereinafter RECORDS]. In each citation of Farrand’s *Records*, to orient the reader, I have included the page number for the start of the day in question followed by the page number for the specifically relevant material, along with a parenthetical indication of the source. The most common sources are the official but somewhat sparse journal kept by the Convention’s secretary, William Jackson, and the thorough notes of James Madison. When applicable, I have cited multiple sources within *Records*.

<sup>2</sup> See 1 *id.* at 93 (June 4), 94 (journal) (recording postponement of the original proposal in favor of resolution excluding judiciary from council), 98 (Madison’s notes); *id.* at 130 (June 6), 131 (journal) (recording the rejection of a motion to reinstate a role for judges in the council), 137–40 (Madison’s notes).

<sup>3</sup> 2 *id.* at 71 (July 21), 74 (Madison’s notes).

<sup>4</sup> *Id.*

<sup>5</sup> See 1 *id.* at 29 (May 30), 29 (journal) (documenting the election of Gorham), 33 (Madison’s notes).

<sup>6</sup> DAVID O. STEWART, THE SUMMER OF 1787: THE MEN WHO INVENTED THE CONSTITUTION 54 (2007).

<sup>7</sup> 3 RECORDS, *supra* note 1, at 87 (according to a character sketch by Georgia’s William Pierce), 88.

<sup>8</sup> 2 *id.* at 71 (July 21), 73 (Madison’s notes).

<sup>9</sup> 2 *id.* at 71 (July 21), 79 (Madison’s notes).

<sup>10</sup> *Id.*

<sup>11</sup> Other opponents of Madison’s idea voiced concerns similar to Gorham’s; none of them advocated legislative control of the judiciary. Gorham’s colleague from Massachusetts, Elbridge Gerry, assailed Madison’s plan throughout the summer, protesting that it would improperly “blend” the judiciary and the executive. *E.g.*, 2 *id.* at 71 (July 21), 74–75, 78 (Madison’s notes). That point was echoed by other opponents, such as fellow Bay Stater Caleb Strong, who agreed that “the power of making ought to be kept distinct from that of expounding, the laws.” 2 *id.* at 71 (July 21), 75 (Madison’s notes). The interest of Madison’s opponents was thus in keeping the branches separate, rather than making one sub-

ham, finding common ground, “that a check on the Legislature is necessary.”<sup>12</sup> Still, he dismissed any need for the proposed judicial weapon: “The Judges in England have no such additional provision for their defence, yet their jurisdiction is not invaded.”<sup>13</sup>

Today’s prevailing conception of federal legislative power allows for such invasion. Most observers interpret the Exceptions Clause in Article III of the Constitution as giving Congress nearly free rein to eliminate the appellate jurisdiction of the U.S. Supreme Court.<sup>14</sup> That position may not be wholly inconsistent with the somewhat ambiguous text:

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.<sup>15</sup>

Read in context, however, the Exceptions Clause more strongly suggests that Congress may transform the Court’s jurisdiction from appellate to original. The drafting history of the clause, which originated within a week of Madison’s and Gorham’s comments above, confirms that the function of the exceptions power was to allow Congress to expedite cases to the Court. Never did the delegates to the Convention conceive of the clause as a license for Congress to do what Madison feared and even Gorham would not countenance: encroach on the Court by invading its jurisdiction.

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servient to another. None of them disagreed with Gerry’s assessment that judges’ routine exposition of the laws in the course of their judicial function would be “a sufficient check agst. encroachments on their own department.” 1 *id.* at 93 (June 4), 97–98 (Madison’s notes); *see also* 1 *id.* at 93 (June 4), 100–01 (Madison’s notes) (noting a comment by Gunning Bedford of Delaware that the veto power was unnecessary because constitutionally circumscribing the legislature’s power “would give all the requisite security to the rights of the other departments”).

<sup>12</sup> 2 *id.* at 71 (July 21), 79 (Madison’s notes); *see also* Ralph A. Rossum, *The Courts and the Judicial Power*, in *THE FRAMING AND RATIFICATION OF THE CONSTITUTION* 222, 227 (Leonard W. Levy & Dennis J. Mahoney eds., 1987) (asserting that the Constitution’s drafters “knew that in any republican government the greatest threat of tyranny came from the legislative branch”).

<sup>13</sup> 2 RECORDS, *supra* note 1, at 71 (July 21), 73 (Madison’s notes).

<sup>14</sup> *See infra* notes 48–69 and accompanying text.

<sup>15</sup> U.S. CONST. art. III, § 2. The phrase “other Cases before mentioned” refers to the Extension Clause, which lists nine types of “Cases” and “Controversies” to which “[t]he judicial Power shall extend.” *Id.*

In Part I, this Article briefly surveys congressional, judicial, and academic perspectives on the extent of such invasive legislative power.<sup>16</sup> Part II analyzes the text of the Exceptions Clause, demonstrating that although it may be susceptible to two interpretations, the more natural reading protects the Supreme Court's jurisdiction from encroachment.<sup>17</sup> Part III chronicles the drafting and editing of the clause, showing that the delegates to the Federal Convention intended and understood its function as permitting Congress to send cases straight to the Court.<sup>18</sup> Loose ends of the clause are examined in Part IV; though the references to "Regulations" and "Law and Fact" add minor wrinkles to congressional authority, they do not undermine the substantive inviolability of the Court's jurisdiction.<sup>19</sup> The Article concludes that regardless of one's approach to constitutional interpretation, the case is strong for a return of the Exceptions Clause to its role of allowing exceptions not to the Court's jurisdiction per se, but rather to its appellate form.<sup>20</sup>

## I. THE (ALMOST) UNIFORM UNDERSTANDING OF AN INVASIVE POWER

### A. *Legislative Assumption of Authority*

If Congress did not purport to have the authority to withhold or withdraw cases from the Supreme Court's appellate jurisdiction, the interpretive issue raised in this Article would be purely academic. But federal legislators have repeatedly asserted that authority, whether as a way to combat perceived judicial activism<sup>21</sup> or in back-door attempts to amend the Constitution.<sup>22</sup> In recent years alone,<sup>23</sup> bills have been introduced seeking to prevent the Supreme Court from hearing cases about topics such as school prayer,<sup>24</sup> public displays of the Ten Commandments,<sup>25</sup> the Pledge of Allegiance,<sup>26</sup> abor-

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<sup>16</sup> See *infra* notes 21–94 and accompanying text.

<sup>17</sup> See *infra* notes 95–99 and accompanying text.

<sup>18</sup> See *infra* notes 100–244 and accompanying text.

<sup>19</sup> See *infra* notes 245–305 and accompanying text.

<sup>20</sup> See *infra* notes 306–323 and accompanying text.

<sup>21</sup> Vicki C. Jackson, *Congressional Control of Jurisdiction and the Future of the Federal Courts—Opposition, Agreement, and Hierarchy*, 86 GEO. L.J. 2445, 2448–49 (1998).

<sup>22</sup> E.g., Mark Tushnet & Jennifer Jaff, *Why the Debate over Congress' Power to Restrict the Jurisdiction of the Federal Courts Is Unending*, 72 GEO. L.J. 1311, 1326 (1984).

<sup>23</sup> For a comprehensive review of jurisdiction-stripping bills through the years, see Helen Norton, *Reshaping Federal Jurisdiction: Congress's Latest Challenge to Judicial Review*, 41 WAKE FOREST L. REV. 1003, 1007–10 (2006).

<sup>24</sup> Public Prayer Protection Act of 2007, H.R. 2104, 110th Cong. § 3 (2007).

<sup>25</sup> Constitution Restoration Act of 2005, S. 520, 109th Cong. § 101 (2005).

<sup>26</sup> Pledge Protection Act of 2007, H.R. 699, 110th Cong. § 2 (2007).

tion,<sup>27</sup> and same-sex marriage.<sup>28</sup> Earlier-targeted topics included racial integration of schools<sup>29</sup> and legislative reapportionment.<sup>30</sup> Even though such bills rarely become law, they have been more popular of late,<sup>31</sup> and they can have a chilling effect on the judiciary.<sup>32</sup>

The language in (if not the nomenclature of) those bills is straightforward, revealing no compunction about invading the judiciary. For example, the Marriage Protection Act of 2009 sought to provide that “the Supreme Court shall have no appellate jurisdiction . . . to hear or decide any question pertaining to the interpretation of, or the validity under the Constitution of, [the Defense of Marriage Act].”<sup>33</sup> Evidently, a premise of the politicians who try to safeguard legislation from judicial review is that Congress may strip the Court of jurisdiction. The constitutional source of that putative power has not been legislatively articulated. One way or another, however, from the time that the Judiciary Act of 1789 conferred less jurisdiction than prescribed by Article III and thus implicitly excepted certain cases,<sup>34</sup> Congress has assumed the power.

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<sup>27</sup> Sanctity of Life Act of 2005, H.R. 776, 109th Cong. § 3 (2005).

<sup>28</sup> Marriage Protection Act of 2009, H.R. 1269, 111th Cong. § 2(a) (2009).

<sup>29</sup> H.R. 1228, 85th Cong. (1957). The modern era of such bills may have been touched off by *Brown v. Board of Education*, 347 U.S. 483 (1954), after which a Representative from South Carolina introduced one providing that no federal jurisdiction “shall extend to . . . any action . . . where is drawn in question the validity of a State [law] relating in any manner to the . . . operation of the public schools . . . , on the ground of its being repugnant to the Constitution, treaties, or laws of the United States . . .” H.R. 1228.

<sup>30</sup> H.R. 11,926, 88th Cong. (1964). After the judicial door to legislative reapportionment opened in the wake of *Baker v. Carr*, 369 U.S. 186 (1962), a bill (known as the “Tuck bill”) was passed by the House of Representatives providing that neither the Supreme Court nor any inferior federal court would have jurisdiction to apportion or reapportion the legislative districts of any state. See H.R. 11,926.

<sup>31</sup> See Norton, *supra* note 23, at 1004 (noting an “unprecedented” level of support for recent jurisdiction-stripping bills).

<sup>32</sup> See DANIEL WALKER HOWE, *WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815–1848*, at 355 (2007) (detailing how an 1831 bill to repeal Supreme Court jurisdiction over appeals from state courts “seems to have intimidated” the Supreme Court into sidestepping the politically volatile issue of forced removal of Cherokees from Georgia).

<sup>33</sup> H.R. 1269, 111th Cong. § 2(a) (2009); see also Defense of Marriage Act, 28 U.S.C. § 1738C (2006) (shielding states from having to recognize acts of other states treating same-sex relationships as marriages).

<sup>34</sup> For example, Congress withheld the Supreme Court’s appellate jurisdiction over state court decisions in which a federal claim had been upheld rather than denied. Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85–87.

### B. *Judicial Submission*

Projecting power can be a self-fulfilling prophecy, and sure enough, Congress's superiority has been largely accepted by the Supreme Court. Jerome Levy exaggerated only slightly when writing a generation ago that "the governmental body most ready to assert the power of Congress to deprive the Court of its appellate jurisdiction has been the Court itself."<sup>35</sup>

The Court recently missed the chance to repudiate that power in connection with a restrictive bill that in fact became law, the Detainee Treatment Act of 2005.<sup>36</sup> Though the statute arguably differed from the bills referred to above in that it withdrew only a particular remedy, it was phrased in jurisdictional terms:

No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant . . . .<sup>37</sup>

In *Boumediene v. Bush*, a 2008 decision, the Court struck down the statute as a violation of Article I's Suspension Clause (protecting the writ of habeas corpus) and thus did not have to consider whether it was otherwise constitutional.<sup>38</sup> Two years earlier, in *Hamdan v. Rumsfeld*, a majority of the Court had expressly ducked the question of "Congress' authority to impinge upon [its] appellate jurisdiction" on the ground that the relevant provision did not apply to cases pending when it was enacted.<sup>39</sup>

Dissenting in *Hamdan*, however, Justice Antonin Scalia addressed and discounted that concern:

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<sup>35</sup> Jerome T. Levy, *Congressional Power over the Appellate Jurisdiction of the Supreme Court: A Reappraisal*, 22 N.Y.U. INTRAMURAL L. REV. 178, 183 (1967); see also Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: Early Implementation of and Departures from the Constitutional Plan*, 86 COLUM. L. REV. 1515, 1561 (1986) ("Ironically, the federal judiciary itself created the jurisdictional insecurity that continues to plague it.").

<sup>36</sup> Detainee Treatment Act of 2005 § 1005(e)(1), 28 U.S.C. § 2241(e)(1) (2006).

<sup>37</sup> *Id.*

<sup>38</sup> 553 U.S. 723, 732–33 (2008). But see Martin J. Katz, *Guantanamo, Boumediene, and Jurisdiction-Stripping: The Imperial President Meets the Imperial Court*, 25 CONST. COMMENT. 377, 395 (2009) (arguing that the *Boumediene* majority implicitly decided that in constitutional cases, Congress may not preclude all federal jurisdiction); cf. JAMES E. PFANDER, *ONE SUPREME COURT: SUPREMACY, INFERIORITY, AND THE JUDICIAL POWER OF THE UNITED STATES* 161–62 (2009) (suggesting that the Court's nondogmatic analysis in *Boumediene* "would presumably inform the Court's evaluation of [other] jurisdiction-stripping legislation").

<sup>39</sup> 548 U.S. 557, 575–76 (2006).

It is not clear how there could be any such lurking questions, in light of the aptly named “*Exceptions Clause*” of Article III, § 2, which, in making our appellate jurisdiction subject to “such Exceptions, and under such Regulations as the Congress shall make,” explicitly permits exactly what Congress has done here.<sup>40</sup>

Justice Scalia’s view is representative of that evinced by the Supreme Court over its history. The Court has not yet confronted this issue directly.<sup>41</sup> A Reconstruction-era statement in *Ex parte McCordle* was its clearest acknowledgment of legislative authority to withdraw its appellate jurisdiction,<sup>42</sup> but even that statement was arguably dictum.<sup>43</sup> Still, the justices have repeatedly made comments to the effect that the Court’s appellate jurisdiction is at the mercy of Congress.<sup>44</sup> Those comments have not always been as clear as Justice Scalia’s in identifying the

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<sup>40</sup> *Id.* at 672 (Scalia, J., dissenting).

<sup>41</sup> See Norton, *supra* note 23, at 1012 (noting that the Court “has yet to provide any definitive guidance on this controversy”).

<sup>42</sup> See 74 U.S. (7 Wall.) 506, 514 (1869). Writing for a unanimous Court, Chief Justice Salmon Chase interpreted the Exceptions Clause deferentially: “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.” *Id.* (dismissing an appeal for lack of jurisdiction on the ground that Congress had, during pendency of the appeal, repealed the jurisdictional statutory provision relied on by a habeas corpus petitioner).

<sup>43</sup> See William W. Van Alstyne, *A Critical Guide to Ex Parte McCordle*, 15 ARIZ. L. REV. 229, 246–48 (1973) (criticizing the Court for disingenuously claiming a lack of jurisdiction when an alternative to the provision cited by petitioner was available and known to the justices).

<sup>44</sup> *E.g.*, *Felker v. Turpin*, 518 U.S. 651, 661 (1996) (“[O]ur appellate powers . . . ‘are limited [by Congress].’” (quoting *Durousseau v. United States*, 10 U.S. (6 Cranch) 307, 314 (1810))); *Glidden Co. v. Zdanok*, 370 U.S. 530, 567 (1962) (noting with approval that “Congress has consistently with [Article III] withdrawn the jurisdiction of this Court to proceed with a case then *sub judice* . . .”); *Daniels v. R.R. Co.*, 70 U.S. (3 Wall.) 250, 254 (1866) (“In order to create [appellate] jurisdiction in any case, . . . an act of Congress must supply the requisite authority.”); *Barry v. Mercein*, 46 U.S. (5 How.) 103, 119 (1847) (“[T]he Supreme Court possesses no appellate power in any case, unless conferred upon it by act of Congress . . . .”); *Turner v. Bank of N. Am.*, 4 U.S. (4 Dall.) 8, 10 n.1 (1799) (“If congress has given the power to this Court, we possess it, not otherwise . . . .”). *But cf.* *Hamdan*, 548 U.S. at 575 (referring to, though not answering, “grave questions about Congress’ authority to impinge upon this Court’s appellate jurisdiction”); *Glidden Co.*, 370 U.S. at 605 n.11 (Douglas, J., dissenting) (raising doubt about whether *Ex parte McCordle* “could command a majority view today”).



Exceptions Clause as the source of the purported legislative power,<sup>45</sup> but that is the usual apparent assumption.<sup>46</sup>

Even if at some point the Court were to resist congressional encroachment on its appellate jurisdiction, it seems unlikely to decide that the Exceptions Clause permits Congress instead to expand its original jurisdiction. Though Justice John Marshall wrote little about the Exceptions Clause directly in *Marbury v. Madison*, his opinion, by holding that Congress could not add to the constitutionally designated original jurisdiction, doctrinally foreclosed that interpretation.<sup>47</sup> Given the iconic status of that case, it is no surprise that the Court has perpetuated the conventional view of the clause.

### C. Academic Rationalization (and Its Discontents)

The legislative and judicial perspective on the vulnerability of the Supreme Court's appellate jurisdiction is shared by most scholars; the orthodox view is that Congress has more or less free rein to stop cases from ever reaching the Court.<sup>48</sup> William Van Alstyne, for example, has called the power to make exceptions "as plenary as the power to regu-

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<sup>45</sup> See, e.g., *Barry*, 46 U.S. (5 How.) at 119 (citing as authority only "the constitution of the United States").

<sup>46</sup> See, e.g., *Felker*, 518 U.S. at 661 (citing the Exceptions Clause in conjunction with a statement about legislative limits on appellate jurisdiction).

<sup>47</sup> See 5 U.S. (1 Cranch) 137, 174–75 (1803).

<sup>48</sup> See Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 908 (1984) (finding "compelling" reasons to conclude that "there are no substantial internal limits on Congress' article III power to limit the Court's appellate jurisdiction"); John Harrison, *The Power of Congress to Limit the Jurisdiction of Federal Courts and the Text of Article III*, 64 U. CHI. L. REV. 203, 206 (1997) ("The textual reading . . . according to which Article III grants Congress broad power over the Supreme Court's appellate jurisdiction . . . has come to be referred to as the orthodox, or traditional, interpretation."); Peter J. Smith, *Textualism and Jurisdiction*, 108 COLUM. L. REV. 1883, 1894 (2008) ("Under the traditional view, . . . Congress has considerable—if not unlimited—power to deprive the lower federal courts of jurisdiction and to strip the Supreme Court of appellate jurisdiction."); Julian Velasco, *Congressional Control over Federal Court Jurisdiction: A Defense of the Traditional View*, 46 CATH. U. L. REV. 671, 763 (1997) (defending "the orthodox position" that Congress has "nearly plenary authority to regulate the jurisdiction of the federal courts"); see also William R. Casto, *An Orthodox View of the Two-Tier Analysis of Congressional Control over Federal Jurisdiction*, 7 CONST. COMMENT. 89, 94 (1990) (defending the theory of "plenary power"); 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, 423 (1983) (calling congressional power over the Court's appellate jurisdiction "plenary" and dismissing contrary arguments); Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1005 (1965) (defending the position that "Congress has the power . . . to strike at what it deems judicial excess by delimitations of the jurisdiction . . . of the Supreme Court's appellate jurisdiction" and finding "no basis" for limits on that power within Article III).

late commerce.”<sup>49</sup> That view is based primarily on the Exceptions Clause. To some, that clause is the direct source of the putative legislative power; to others, it is the basis for locating the power in the Necessary and Proper Clause. Either way, the conventional argument is that exceptions enable Congress to withdraw jurisdiction from the Court.<sup>50</sup>

Adherents of that view also advance another series of arguments. Although they generally accept that Section 1 of Article III vests the “judicial Power” in the Supreme Court, they have a hard time reconciling jurisdiction-stripping with the opening of Section 2: “The judicial Power shall extend to [nine categories of cases and controversies].”<sup>51</sup> Theoretically, even if the Extension Clause is a straightforward grant of jurisdiction to the Supreme Court, the Exceptions Clause later in the same section could be read to undercut that grant—that is, after all, something exceptions do.<sup>52</sup> But most conventionalists sense that such a

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<sup>49</sup> Van Alstyne, *supra* note 43, at 268 (noting that both powers are subject to external limitations, such as the Bill of Rights).

<sup>50</sup> See REYNOLDS ROBERTSON & FRANCIS R. KIRKHAM, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES 1 (1936) (citing the Exceptions Clause as the source of power to “delimit[]” the Supreme Court’s appellate jurisdiction); Charles L. Black, Jr., *The Presidency and Congress*, 32 WASH. & LEE L. REV. 841, 842, 845 (1975) (opining that “Congress may make any exceptions it regards as wise to the appellate jurisdiction of the Court” and finding “no ground at all” for limitations on that principle); Joseph Blocher, *Amending the Exceptions Clause*, 92 MINN. L. REV. 971, 1003 (2008) (“The Exceptions Clause is the broadest grant of congressional power in the original Constitution *not* found in Article I, and it gives Congress wide authority to alter and abolish federal court jurisdiction.” (footnote omitted)); Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 HARV. L. REV. 603, 608–09, 612–13 (1992) (referring to the “venerable principle” that the Exceptions Clause grants Congress’s “substantial control” over the Supreme Court’s jurisdiction); Martin H. Redish, *Congressional Power to Regulate Supreme Court Appellate Jurisdiction Under the Exceptions Clause: An Internal and External Examination*, 27 VILL. L. REV. 900, 901 (1982) (explaining the “common sense interpretation” of the Exceptions Clause as offering “fairly broad authority to curb Supreme Court appellate jurisdiction”); Charles E. Rice, *Limiting Federal Court Jurisdiction: The Constitutional Basis for the Proposals in Congress Today*, 65 JUDICATURE 190, 195–96 (1981) (refuting arguments against limitations on congressional power under Exceptions Clause).

<sup>51</sup> U.S. CONST. art. III, § 2, cl. 1.

<sup>52</sup> See Martin H. Redish, *Text, Structure, and Common Sense in the Interpretation of Article III*, 138 U. PA. L. REV. 1633, 1635–36 (1990) (arguing that regardless of the meaning of other provisions of Article III, the Exceptions Clause unambiguously empowers the legislature to restrict jurisdiction); Velasco, *supra* note 48, at 712 n.196 (arguing as a backup that “[r]egardless of whether the judicial power and jurisdiction refer to two different concepts or are synonymous, the Exceptions Clause is not limited by, but rather controls, the words ‘shall extend’”). *But cf.* 1 WILLIAM WINSLOW CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 616 (1953) (criticizing the view that the exceptions power can be read as “unconditioned by the earlier absolute provisions of Article III”).

constitutional collision would be awkward,<sup>53</sup> so they try to neutralize the Extension Clause on at least one of the following grounds: that the “judicial Power” is more inchoate than actual jurisdiction;<sup>54</sup> that “shall” is not mandatory;<sup>55</sup> or that “extend[ing]” power is less definite than conferring it.<sup>56</sup> Though beyond the scope of this Article, those arguments are unpersuasive. In any event, no scholar defending the received wisdom relies solely on the Extension Clause; fundamentally, the debate about legislative control of the Supreme Court’s jurisdiction centers on the Exceptions Clause.<sup>57</sup>

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<sup>53</sup> Though only a partial defender of the orthodoxy, Akhil Amar is one who has called such a reading “awkward.” Akhil Reed Amar, *Reports of My Death Are Greatly Exaggerated: A Reply*, 138 U. PA. L. REV. 1651, 1654 (1990) [hereinafter Amar, *Reports*]; see also Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 241 n.120 (1985) [hereinafter Amar, *Two Tiers*] (opining that such a reading “should not be lightly indulged if an alternative reading is possible”); cf. Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1163 (1992) (observing that supporters of mandatory jurisdiction maintain that for the commonly assumed congressional power to be supported by text, either the Vesting Clause or the Extension Clause would need to have a hole).

<sup>54</sup> E.g., James S. Liebman & William F. Ryan, “Some Effectual Power”: *The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 COLUM. L. REV. 696, 708, 751–52 (1998) (noting “confidently” the drafters’ distinction between the terms and concluding that “the ‘Judicial Power shall extend to’ language could not mean ‘jurisdiction shall be’”); Daniel J. Meltzer, *The History and Structure of Article III*, 138 U. PA. L. REV. 1569, 1573–74 n.14 (1990) (citing with approval a comment from a representative in the First Congress that “the failure to give the federal courts jurisdiction does not divest them of the judicial power”); Velasco, *supra* note 48, at 705 n.167 (“At most, the judicial power automatically extends to all such cases. *Jurisdiction* does not.”).

<sup>55</sup> E.g., MARTIN H. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 37–38 (2d ed. 1990) (casting doubt on whether “shall” implies a mandate as opposed to the future tense); Harrison, *supra* note 48, at 212, 217 (deriding the notion that the Extension Clause’s “shall” means “must” and paraphrasing the clause as “[t]he judicial power may be used to decide . . .”); Velasco, *supra* note 48, at 702–04 (“[T]he words ‘shall extend’ are more permissive than mandatory . . .”); cf. Meltzer, *supra* note 54, at 1573 n.14 (suggesting that even if “shall” is mandatory, the mandate is only that when the judicial power is exercised, “the exercise must be by article III courts”).

<sup>56</sup> E.g., Harrison, *supra* note 48, at 212 (defending the traditional view based on a paraphrasing of the Extension Clause as “[t]he judicial power may be used to decide . . .”); Liebman & Ryan, *supra* note 54, at 721–23, 753 (arguing that the editing of the clause about cases and controversies from “shall be” to “shall extend” changed the clause from a jurisdictional floor to a ceiling); Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1867, 1896 (2005) (“The verb ‘to extend’ suggests today just what it signified in 1789: stretching, enlarging. . . . Thus, the scope of the judicial power . . . is not entirely fixed by the Constitution but may be stretched or enlarged by acts of Congress.” (footnotes omitted)); Velasco, *supra* note 48, at 703–04 (citing the dictionary definition of “extend” to support the claim that Congress’s right to control jurisdiction stems from a “natural reading of the text of the Constitution”).

<sup>57</sup> Gunther, *supra* note 48, at 899–900 (advocating wide congressional power over appellate jurisdiction and stating that “[t]he congressional authority to make ‘Exceptions’

Not all scholars agree on the meaning of the Exceptions Clause. To take stock of the range of academic analysis, it is useful to consider the clause in context. The first paragraph of Article III vests the judicial power in a certain (“supreme”) Court (as well as, potentially, in inferior courts); the second extends that power to certain cases. The third unites those objects, describing the way the Court interacts with the cases:

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.<sup>58</sup>

The textual puzzle may be stated simply: what word is subject to “Exceptions”?

### 1. The Orthodox View

The conventional answer is “Jurisdiction,”<sup>59</sup> in that the exercise of the exceptions power takes it away.<sup>60</sup> In fact, many conventional scholars do not see a puzzle at all. To them, the congressional prerogative to withdraw appellate jurisdiction from the Supreme Court (without shifting it to original form) stems from what they call the “plain,”<sup>61</sup>

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provides the central textual foundation” for that view); *see also* Meltzer, *supra* note 54, at 1610 (noting that the orthodox view “must assign great weight to the exceptions clause, which was rather inconspicuous in the constitutional debate, at least in the Convention itself”).

<sup>58</sup> U.S. CONST. art. III, § 2.

<sup>59</sup> In a sense, the conventional answer could be the word “all,” in that only *some* cases end up with appellate jurisdiction, but that noncommittal answer ducks the question of whether the other cases then have original jurisdiction or none at all.

<sup>60</sup> *See, e.g.*, Redish, *supra* note 50, at 901 (“A common sense interpretation of the constitutional language would seem to lead to the conclusion that Congress possesses fairly broad authority to curb Supreme Court appellate jurisdiction.”); Charles E. Rice, *Congress and the Supreme Court’s Jurisdiction*, 27 VILL. L. REV. 959, 963–64 (1982) (opining that the Exceptions Clause gives Congress a “broad check” on the Supreme Court’s power); Wechsler, *supra* note 48, at 1004–05 (defending broad congressional power under the Exceptions Clause to eliminate the Supreme Court’s appellate jurisdiction).

<sup>61</sup> John Eidsmoe, *The Article III Exceptions Clause: Any Exceptions to the Power of Congress to Make Exceptions?*, 19 REGENT U. L. REV. 95, 145 (2006); *see also* *Oversight Hearings to Define the Scope of the Senate’s Authority Under Article III of the Constitution to Regulate the Jurisdiction of the Federal Courts Before the Subcomm. on Constitution of the S. Comm. on Judiciary*, 97th Cong. 51 (1981) (written statement of Paul M. Bator) (stating that the Exceptions Clause “plainly indicates that if Congress wishes to exclude a certain category of federal . . . litigation from the appellate jurisdiction, it has the authority to do so”).

“clear,”<sup>62</sup> “unambiguous”<sup>63</sup> language of the Exceptions Clause. The mystery they explore is what, if any, constraints encumber the legislative power.<sup>64</sup>

A modest strain of the conventional perspective holds that because the term “Exceptions” conveys an inherent limit, the exceptions may not swallow the appellate jurisdiction whole.<sup>65</sup> Perhaps the most commonly accepted limit is that Congress may not use the exceptions power to deny litigants a federal forum for constitutional claims.<sup>66</sup> That view is a modern gloss on what Henry Hart tentatively advanced as an admittedly indeterminate theory: “[T]he exceptions must not be such as will destroy the essential role of the Supreme Court in the constitutional plan.”<sup>67</sup> Leonard Ratner put some meat on the bones of that

<sup>62</sup> Martin H. Redish, *Constitutional Limitations on Congressional Power to Control Federal Jurisdiction: A Reaction to Professor Sager*, 77 NW. U. L. REV. 143, 149 (1982); Rice, *supra* note 60, at 975; Rossum, *supra* note 48, at 423; *The Supreme Court, 1995 Term—Leading Cases*, 110 HARV. L. REV. 277, 283 (1996) [hereinafter *Leading Cases*].

<sup>63</sup> Rice, *supra* note 60, at 975; *Leading Cases, supra* note 62, at 283; *see also* Redish, *supra* note 52, at 1637 (“[T]he inescapable implication of the text is that Congress possesses broad power to curb the jurisdiction of . . . the Supreme Court.”).

<sup>64</sup> Many scholars acknowledge limits on Congress’s power imposed by other constitutional provisions, albeit not the other provisions of Article III. *E.g.*, Gunther, *supra* note 48, at 908 (“[T]here are no substantial internal limits on Congress’ article III power to limit the Court’s appellate jurisdiction.”); Redish, *supra* note 50, at 902–03, 918–23 (conceding the possibility that other constitutional provisions, such as the Due Process Clause, might in some circumstances restrain congressional power).

<sup>65</sup> *E.g.*, Leonard G. Ratner, *Congressional Power over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157, 170–71 (1960) (“[A]n exception cannot destroy the essential characteristics of the subject to which it applies.”); Lawrence Gene Sager, *Constitutional Limitations on Congress’ Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 44 (1981) (describing the permissible level of legislative interference as “a nibble, not a bite”); Laurence H. Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights out of the Federal Courts*, 16 HARV. C.R.-C.L. L. REV. 129, 135 (1981) (arguing that the text of the Exceptions Clause bars the “total abolition” of jurisdiction).

<sup>66</sup> *E.g.*, Lea Brilmayer & Stefan Underhill, *Congressional Obligation to Provide a Forum for Constitutional Claims: Discriminatory Jurisdictional Rules and the Conflict of Laws*, 69 VA. L. REV. 819, 821–22 (1983); Sager, *supra* note 65, at 67; *see also* Leland E. Beck, *Constitution, Congress, and Court: On the Theory, Law, and Politics of Appellate Jurisdiction of the United States Supreme Court*, 9 HASTINGS CONST. L.Q. 773, 793–95, 806–07 (1982) (tentatively embracing the theory but stressing its speculative nature); Tribe, *supra* note 65, at 140–41 (arguing that legislative attempts to “manipulat[e] jurisdiction” to defeat enforcement of constitutional rights are generally impermissible). *But cf.* Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1401 (1953) (calling state courts “the primary guarantors of constitutional rights, and in many cases . . . the ultimate ones”); Rice, *supra* note 50, at 195 (calling the purported limitation on congressional power “specious”).

<sup>67</sup> Hart, *supra* note 66, at 1365; *see also* Casto, *supra* note 48, at 96 (defending the indeterminacy of Hart’s theory as producing “vague but nevertheless real limits” on Congress).

theory, positing that the Court's "essential functions" that could not be abrogated by Congress were to resolve "inconsistent or conflicting interpretations of federal law" by other courts and to maintain the supremacy of federal law in the face of conflicts with states.<sup>68</sup> Citing five eighteenth-century dictionaries, he argued that as a definitional matter, an "exception" could not "destroy the essential characteristics of the subject to which it applies."<sup>69</sup>

## 2. Alternative Views

A view popular at one time held that exceptions apply only to the word "Fact," such that the sole role of the Exceptions Clause is to let Congress protect the right to a jury trial by barring the Supreme Court from reviewing facts found by juries.<sup>70</sup> A less common view is that the reference to "Exceptions" is simply a redundant reminder that the cases with original jurisdiction are excepted from the scope of appellate jurisdiction by the word "other."<sup>71</sup> Of particular note outside the ortho-

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Martin Redish has called the theory "wishful thinking." REDISH, *supra* note 55, at 28; Redish, *supra* note 50, at 911.

<sup>68</sup> Ratner, *supra* note 65, at 161, 202; Leonard G. Ratner, *Majoritarian Constraints on Judicial Review: Congressional Control of Supreme Court Jurisdiction*, 27 VILL. L. REV. 929, 935 (1982); see also Morris D. Forkosch, *The Exceptions and Regulations Clause of Article III and a Person's Constitutional Rights: Can the Latter Be Limited by Congressional Power Under the Former?*, 72 W. VA. L. REV. 238, 257 (1970) (arguing that Congress has a broad exceptions power but may not eliminate "irreducible minimums" that protect individual rights); William S. Dodge, Note, *Congressional Control of Supreme Court Appellate Jurisdiction: Why the Original Jurisdiction Clause Suggests an "Essential Role,"* 100 YALE L.J. 1013, 1014 (1991) (arguing that Congress may not use the Exceptions Clause to "destroy the essential role of the Supreme Court as the most important court in the nation"); cf. PFANDER, *supra* note 38, at xiv, 34, 164 (asserting that Congress cannot eliminate the Supreme Court's "supervisory" role with respect to inferior courts). *But cf.* Gunther, *supra* note 48, at 908 (criticizing the "essential functions" view as "confusing what Congress *ought* not to do with what it *cannot* do").

<sup>69</sup> Ratner, *supra* note 68, at 939.

<sup>70</sup> See, e.g., RAOUL BERGER, *CONGRESS V. THE SUPREME COURT* 285–96 (1969); Irving Brant, *Appellate Jurisdiction: Congressional Abuse of the Exceptions Clause*, 53 OR. L. REV. 3, 5 (1973); Henry J. Merry, *Scope of the Supreme Court's Appellate Jurisdiction: Historical Basis*, 47 MINN. L. REV. 53, 68 (1962); Ira Mickenberg, *Abusing the Exceptions and Regulations Clause: Legislative Attempts to Divest the Supreme Court of Appellate Jurisdiction*, 32 AM. U. L. REV. 497, 515 (1983); cf. Mark Strasser, *Taking Exception to Traditional Exceptions Clause Jurisprudence: On Congress's Power to Limit the Court's Jurisdiction*, 2001 UTAH L. REV. 125, 125–26, 186–87 (arguing that the clause "is best understood as intended to protect jury findings and prevent the Court from becoming overburdened with work").

<sup>71</sup> See 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, 780 (1984) (not necessarily embracing this interpretation but stating its plausibility based on the comma after "Exceptions"); Barry Friedman, *A Different Dialogue: The Supreme Court, Congress and Federal Jurisdic-*

doxy are the theory of mandatory federal jurisdiction and the interpretation advanced here—that exceptions convert the Court’s appellate jurisdiction into original form.

a. *The Theory of Mandatory Federal Jurisdiction*

Currently, the most prominent unconventional view is that of mandatory federal jurisdiction. Proponents of that interpretation in essence tie “Exceptions” to the word “supreme” (potentially in combination with “appellate”), arguing that each case or controversy within the Extension Clause must be permitted to be adjudicated by a federal court (originally or on appeal from a state court), but not necessarily *the Supreme Court*.<sup>72</sup> Thus, like the conventional view, the mandatory jurisdiction theory recognizes Congress’s power to divest the Supreme Court of jurisdiction; the twist is that the power can be wielded only if Congress has created inferior courts and shifts the jurisdiction there.<sup>73</sup>

Akhil Amar’s bifurcated theory of federal jurisdiction adopts that reading in part.<sup>74</sup> In Amar’s view, jurisdiction over what the Extension Clause describes as “all Cases” must attach to some Article III court. As a result, he argues, with respect to those three categories of disputes, the Exceptions Clause simply facilitates the transfer of the Supreme Court’s appellate jurisdiction to inferior federal courts, whose decisions

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tion, 85 Nw. U. L. REV. 1, 33 n.177 (1990) (describing this reading as “problematic, but . . . not necessarily incorrect”).

<sup>72</sup> See, e.g., 1 CROSSKEY, *supra* note 52, at 610–18 (arguing that jurisdiction over all Article III cases must be extended to an Article III court); JULIUS GOEBEL, JR., HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801, at 247 (1971) (suggesting that the only discretion left with Congress is “to arrange how the jurisdiction conferred by [the Extension Clause is] to be disposed”); Clinton, *supra* note 71, at 749–50 (excluding “trivial” cases); David E. Engdahl, *Intrinsic Limits of Congress’ Power Regarding the Judicial Branch*, 1999 BYU L. REV. 75, 155 [hereinafter Engdahl, *Intrinsic Limits*] (arguing that the Exceptions Clause expands legislative discretion under the Necessary and Proper Clause to control judicial power by limiting certain cases to certain federal courts); David E. Engdahl, *What’s in a Name? The Constitutionality of Multiple “Supreme” Courts*, 66 IND. L.J. 457, 488 n.159 (1991) [hereinafter Engdahl, *What’s in a Name?*] (interpreting “Exceptions” as attaching to the word “supreme”).

<sup>73</sup> See Clinton, *supra* note 71, at 753, 793 (suggesting that the exceptions power was “designed to facilitate the creation of inferior federal courts”); Engdahl, *What’s in a Name?*, *supra* note 72, at 489 (“Inserting the ‘exceptions’ clause made it permissible for the legislature to repose less than the full scope of the ‘judicial power’ in the one so-called ‘supreme’ court, provided the legislature exercised its option to create other courts as well.”); cf. Harrison, *supra* note 48, at 217 (critiquing the theory on that ground).

<sup>74</sup> Akhil Reed Amar, *Taking Article III Seriously: A Reply to Professor Friedman*, 85 Nw. U. L. REV. 442, 445 (1991) (interpreting the Exceptions Clause as permitting restrictions of “only the appellate jurisdiction of the Supreme Court, not the judicial power of the United States as a whole”).

need not be subject to review.<sup>75</sup> Though again this interpretation depends on the existence of inferior courts, it is, to Amar, a “natural reading of the Exceptions Clause.”<sup>76</sup> As for what the Extension Clause describes not as “all Cases” but rather as “Controversies,” Amar interprets the lack of “all” to signal a lack of mandatory federal jurisdiction. Regarding those six “permissive” categories, his reading merges with the orthodoxy, positing that exceptions can take jurisdiction away from the federal court system altogether.<sup>77</sup>

b. *The Transformative Interpretation*

In theory, all sorts of readings of the Exceptions Clause may be conceivable; for example, exceptions could be tied to the word “Court,” such that Congress could allow appellate jurisdiction to be exercised instead by the supreme *legislative* body.<sup>78</sup> But context and common sense quickly narrow the field. The most plausible—though not airtight—interpretation of the text tethers the exceptions to the word “appellate.” And the drafting history confirms that while Congress may well be able to restrict review of facts, the primary function of “Exceptions,” as understood by the delegates to the Federal Convention, was to allow Congress to transform jurisdiction from appellate to original.

That conception of the Exceptions Clause has not been wholly dormant since 1787. But for the most part, it has been tentatively proposed in passing, by way of brainstorming.<sup>79</sup> Over the past several years, however, some scholars have begun to take the idea more seriously.

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<sup>75</sup> Amar, *Two Tiers*, *supra* note 53, at 255–57.

<sup>76</sup> Akhil Reed Amar, *Marbury, Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. CHI. L. REV. 443, 467 (1989).

<sup>77</sup> Amar, *Two Tiers*, *supra* note 53, at 255.

<sup>78</sup> That terminology is not as fanciful as it might sound; the delegates to the Federal Convention characterized the Virginia plan as calling for a “supreme Legislative, Judiciary, and Executive.” 1 RECORDS, *supra* note 1, at 29 (May 30), 30–31 (journal), 33 (Madison’s notes).

<sup>79</sup> *E.g.*, Friedman, *supra* note 71, at 32 & n.177 (calling the interpretation “plausible”); Sager, *supra* note 65, at 30 (calling the interpretation “possible”); Strasser, *supra* note 70, at 129, 136 (calling the interpretation “plausible”). Such speculation has arisen most often in the context of critiquing Justice Marshall’s holding in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), that the Supreme Court could not exercise original jurisdiction over a mandamus petition. *E.g.*, EDWARD S. CORWIN, *THE DOCTRINE OF JUDICIAL REVIEW: ITS LEGAL AND HISTORICAL BASIS AND OTHER ESSAYS* 5–6 (1914) (noting that Justice Marshall ignored this possible reading); LEONARD W. LEVY, *ORIGINAL INTENT AND THE FRAMERS’ CONSTITUTION* 81 (1988) (same); Dean Alfange, Jr., *Marbury v Madison and Original Understandings of Judicial Review: In Defense of Traditional Wisdom*, 1993 SUP. CT. REV. 329, 397 (“Why could [the Exceptions Clause] not, with perfect reason, be interpreted to mean that Congress may except matters from the Court’s appellate jurisdiction by assigning them to



Writing together, Steven Calabresi and Gary Lawson have argued that at least with respect to the three categories of the Extension Clause described as “all Cases”—they hedge their bets about Amar’s two-tier theory—Congress may not divest the Supreme Court of jurisdiction but instead may simply shift its form.<sup>80</sup> Reading the Exceptions Clause “holistically” and in the context of the rest of Article III,<sup>81</sup> they insist that the clause is not a grant of congressional power at all.<sup>82</sup> To them, the congressional power to make exceptions stems from the Necessary and Proper Clause; the Exceptions Clause simply serves as a reminder that Congress may use that power to rearrange jurisdictional form.<sup>83</sup> As it could hardly be proper to eliminate the jurisdiction of the “supreme” Court (in that its very name implies the top of a hierarchy),<sup>84</sup> they conclude that the conventional conception of the exceptions power is misguided.<sup>85</sup>

The other scholar of late to champion the form-shifting view is Laurence Claus.<sup>86</sup> He too focuses primarily on what the Supreme Court’s “suprem[acy]” entails, as well as on the Court’s singularity, to debunk the notion that the Exceptions Clause “lets Congress *deprive* the one supreme Court of jurisdiction over matters to which Article III ex-

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its original jurisdiction?”); David P. Currie, *The Constitution in the Supreme Court: The Powers of the Federal Courts, 1801–1835*, 49 U. CHI. L. REV. 646, 654 (1982) (“[T]he exceptions clause itself arguably authorized the grant of original mandamus jurisdiction: Congress had made an ‘exception’ to the appellate jurisdiction by providing original jurisdiction instead . . . .”); Edward A. Hartnett, *The Constitutional Puzzle of Habeas Corpus*, 46 B.C. L. REV. 251, 262 (2005) (describing the clause and asking whether it might “mean that Congress can transfer cases from the Supreme Court’s appellate jurisdiction to its original jurisdiction”); Wythe Holt, “*To Establish Justice*”: *Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 DUKE L.J. 1421, 1509 (calling this reading of the Exceptions Clause “less strained” than the conventional one); William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1, 32 (characterizing this reading as “reasonable” and “sensible” but not embracing it).

<sup>80</sup> Steven G. Calabresi & Gary Lawson, *The Unitary Executive, Jurisdiction Stripping, and the Hamdan Opinions: A Textualist Response to Justice Scalia*, 107 COLUM. L. REV. 1002, 1006, 1013, 1037 (2007).

<sup>81</sup> *Id.* at 1038.

<sup>82</sup> *Id.* at 1039–42.

<sup>83</sup> *Id.* at 1039–41.

<sup>84</sup> *Id.* at 1015–36 (relying on dictionaries and on parallels with the Appointments Clause of Article II and the Supremacy Clause of Article VI, as well as on an analysis of the interchangeability of “Tribunals” of Article I and “Courts” of Article III).

<sup>85</sup> *Id.* at 1042.

<sup>86</sup> See generally Laurence Claus, *Constitutional Guarantees of the Judiciary: Jurisdiction, Tenure, and Beyond*, 54 AM. J. COMP. L. SUPP. 459 (2006) [hereinafter Claus, *Constitutional Guarantees*]; Laurence Claus, *The One Court That Congress Cannot Take Away: Singularity, Supremacy, and Article III*, 96 GEO. L.J. 59 (2007) [hereinafter Claus, *One Court*].

tends the judicial Power of the United States.”<sup>87</sup> Like Calabresi and Lawson, Claus deems the Exceptions Clause to be largely redundant and cites the Necessary and Proper Clause as the source of the legislature’s exceptions power. Any attempt to strip (rather than transform) the Supreme Court’s jurisdiction, he argues, would “change the Constitution’s character” and thus fail to meet that Article I standard.<sup>88</sup>

Elsewhere in Article I, Claus finds helpful evidence in the Suspension Clause, arguing that in light of the specific provision for legislative suspension of the writ of habeas corpus, Congress could not be broadly allowed to achieve the same result by withdrawing jurisdiction to review detentions.<sup>89</sup> As for Article III, he offers a useful review of the drafting history as further support.<sup>90</sup> Interpreting the final text, he stresses the mandatory force of the word “shall” in the Vesting and Extension Clauses,<sup>91</sup> decrying the anomaly that would result from vesting the “one supreme Court” with the federal judicial power, extending that judicial power to a carefully drawn set of cases, and then permitting the legislature to block that Court from hearing some of those cases:<sup>92</sup> “If [a Court] has power to give ultimate judgment on only some Article III matters, then it is *a* supreme Court, but it is not the only one.”<sup>93</sup>

From my distinct interpretive perspective, it matters little whether one considers the Exceptions Clause to be a source of congressional power *per se*, and the nature of supremacy is largely irrelevant. Finding the text of Article III to be somewhat ambiguous, I emphasize the drafting history to unlock its intended and understood meaning. Although these other iconoclastic scholars and I approach the topic from different angles, however, we arrive at largely the same conclusions. Still, as Calabresi and Lawson lament, form-shifting theory has not yet “gained much traction in the academic community.”<sup>94</sup> Perhaps that can change.

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<sup>87</sup> Claus, *One Court*, *supra* note 86, at 61, 65.

<sup>88</sup> *Id.* at 79–80 (positing that the Exceptions Clause “merely acknowledges” that switching appellate jurisdiction to original jurisdiction is authorized by the Necessary and Proper Clause).

<sup>89</sup> *Id.* at 109–15.

<sup>90</sup> *Id.* at 81–87.

<sup>91</sup> *Id.* at 66–67, 73–74, 79.

<sup>92</sup> *Id.* at 67–73, 79 (explicating the nature of supremacy). *But see* Engdahl, *Intrinsic Limits*, *supra* note 72, at 156–57 (arguing that Congress may or may not choose the “pyramidal” structure of federal courts and that word “supreme” was used to indicate the generality of jurisdiction rather than a hierarchical position).

<sup>93</sup> Claus, *One Court*, *supra* note 86, at 69.

<sup>94</sup> Calabresi & Lawson, *supra* note 80, at 1008 n.27.

## II. TEXTUAL AND CONTEXTUAL FORM

### A. *The Suggestive Context of Article III*

Scholars have often analyzed the sentence containing the Appellate Jurisdiction and Exceptions Clauses in a vacuum, ignoring its pairing with the Original Jurisdiction Clause in a paragraph focused on the Supreme Court.<sup>95</sup> When they have mentioned the Original Jurisdiction Clause, it has been to point out how detached they find it to be from the Appellate Jurisdiction Clause.<sup>96</sup> They have focused on twigs, such as dictionary definitions of the word “exception,” and on the grand forest of political ideals of the constitutional framers’ generation,<sup>97</sup> but have ignored the clumps of trees in Article III.

The first words of the Appellate Jurisdiction Clause—“In all the other Cases before mentioned”—compel a contextual reading, simultaneously tying the sentence not only to the Original Jurisdiction Clause (which sets out the non-“other” cases) but also to the Extension Clause (which first “mention[s]” the cases). The subject of the Extension Clause, the “judicial Power,” in turn harks back to Article III’s first section, which vests that power in the “supreme Court,” whose jurisdiction is later described in the paragraph with the Exceptions Clause. The first three paragraphs of Article III thus form a tight triangle of relationships. The *judicial power* flows in active form to the *Court*, which may wield it, and in passive form to the *cases*, in which it may be wielded, while the Original and Appellate Jurisdiction Clauses sketch the protocol about

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<sup>95</sup> *E.g.*, BERGER, *supra* note 70, at 285 (setting out the Appellate Jurisdiction and Exceptions Clauses, without any reference to the Original Jurisdiction Clause, at the beginning of a chapter about the nature of the exceptions power); Blocher, *supra* note 50, at 1003–04 (purportedly setting out the clause “[i]n context” while quoting only the sentence containing it); *see also* Redish, *supra* note 50, at 907, 913 (quoting the Appellate Jurisdiction Clause as the “complete constitutional language” to be analyzed in defense of the conventional view of congressional power). *But see* Calabresi & Lawson, *supra* note 80, at 1038–39 (“The allegedly ‘literal’ reading of the Exceptions Clause is superficially plausible only if one reads the Clause in isolation.”); Claus, *One Court*, *supra* note 86, at 77–78 (noting the interdependence of two sentences about the form of the Supreme Court’s jurisdiction).

<sup>96</sup> *E.g.*, Harrison, *supra* note 48, at 249 (invoking the maxim “[e]xpressio unius est exclusio alterius” to argue that although Congress has the power to control the Court’s appellate jurisdiction, it has none over its original jurisdiction); Meltzer, *supra* note 54, at 1597 (concluding that because the Original Jurisdiction Clause lacks exceptions given to a subsequent clause, the phrase “shall have original Jurisdiction” appears “imperative”).

<sup>97</sup> *E.g.*, Ratner, *supra* note 65, at 158 (advocating the “essential functions” interpretation as way to prevent Congress from “upset[ting] the delicately poised constitutional system of checks and balances”); Rice, *supra* note 60, at 963–64 (claiming that the Exceptions Clause gave Congress a way to “check” judicial abuse).

how, or when, the Court interacts with each type of case: at the outset of the litigation, or only after other tribunals have had a say?

That mid-level contextual map of the Exceptions Clause’s terrain does not prove anything, but it shows that the orthodoxy has some explaining to do. By the time one reads Article III up to the Exceptions Clause, the judicial power has been vested in the Supreme Court and extended to the various cases; some cases have been singled out to arrive at the Court originally, and the rest must await an appeal. Might an exception nullify the power already extended? Possibly; exceptions inherently go against the grain. But more naturally, to avoid internecine friction among constitutional provisions (not to mention branches of government), an exception would entail a promotion: instead of having to proceed through local tribunals on the way to the Supreme Court for an exercise of the judicial power, some of the “other” cases may be selected for the express route.

#### B. A (*Hot and*) *Cold Reading of the Text*

A reading informed by a holistic view of Article III is supported, if not compelled, by a closer look at the words of the paragraph about the Supreme Court’s jurisdiction. To illustrate that support, an example of syntactically parallel non-legal language may be instructive. Imagine that a babysitter has been given the following rule (in bold, with comparable Article III language below):

<b>At dinner,</b>	<b>the kids shall have hot food.</b>	<b>At other mealtimes,</b>	<b>the kids shall have cold food,</b>	<b>with such exceptions as you shall make.</b>
In all Cases affecting Ambassadors . . . ,	the supreme Court shall have original Jurisdiction.	In all the other Cases before mentioned,	the supreme Court shall have appellate Jurisdiction . . . ,	with such Exceptions . . . as the Congress shall make.

What “exceptions” may the babysitter make? A switch from *cold* food—the default type for meals other than dinner—to *hot* food would seem to be acceptable. In contrast, an interpretation allowing the babysitter to make an “exception[]” by eliminating a meal altogether would be unreasonable. After all, the rule must be considered in light of a pertinent contextual principle, namely, that at mealtime, children eat a meal.

Likewise, a switch from *appellate* jurisdiction—the default type for cases other than the first ones listed—to *original* jurisdiction would seem to be acceptable. In contrast, the interpretation allowing Con-

gress to make an “Exception[]” by eliminating jurisdiction in certain cases altogether is, in the context of Article III, dubious. The provisions must be considered in light of another explicit constitutional principle, namely, that the judicial power “vested” in the Supreme Court “extend[s]” to the “Cases” described.

In short, the question for Congress is not *whether* the Supreme Court may hear certain cases any more than that for the babysitter is *whether* the children will eat. The question in both instances is *how*: Will the children eat hot or cold food? Will the Court hear cases originally or on appeal? In these contexts, the word “exceptions” applies most comfortably to the words “cold” and “appellate” rather than “food” and “Jurisdiction.” Only wooden, if not grammatically farfetched, readings would permit depriving the Court of jurisdiction or the kids of food.

An example of analogous legal language may also be illuminating. Rule 41(b) of the Federal Rules of Civil Procedure provides that “any dismissal not under this rule—except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19—operates as an adjudication on the merits.”<sup>98</sup> Might the rule’s exception clause mean that dismissals for lack of jurisdiction and the like do not operate as “adjudication[s]”? A contextual literalism would allow that interpretation, but a background principle prevents the error: as any reader of the rule knows, a dismissal is a type of adjudication. The clause thus applies instead to the modifying phrase “on the merits.” Likewise, as to Article III’s Exceptions Clause, the context provided by the Vesting and Extension Clauses suggests that the exceptions are to the “appellate” form, not to the “Jurisdiction” itself.

To be sure, the form-shifting interpretation is not the only one consistent with the text; facially, the orthodox view is not wholly implausible.<sup>99</sup> The history of the Original and Appellate Jurisdiction (and Exceptions) Clauses, however, dispels any doubt. As discussed below in Part III, the earliest draft of those provisions unambiguously addressed jurisdictional form. Through various edits, the once precise language gradually blurred, but only to accommodate collateral changes in Article III—never to change the nature of “Exceptions.”

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<sup>98</sup> FED. R. CIV. P. 41(b).

<sup>99</sup> *But cf.* Calabresi & Lawson, *supra* note 80, at 1005 n.17 (noting Steven Calabresi’s opinion that the text of the Exceptions Clause unambiguously supports the form-shifting theory).

### III. THE FORMATION OF THE EXCEPTIONS CLAUSE

It might seem surprising that the delegates in Philadelphia would “vest[]” the judicial power in the Supreme Court (and in inferior courts, if any) and “extend” that judicial power to nine categories of cases only to allow Congress to divest the Court of most of that power by making “Exceptions.” And indeed they did not. Though one noted scholar has proclaimed an academic consensus that “the intent of the framers with regard to the exceptions and regulations clause is indiscernible”<sup>100</sup> and another has scoffed at an attempt to peer behind the purportedly “unambiguous” (in support of the conventional view) text,<sup>101</sup> the drafting history of the clause reveals its meaning and purpose.

#### A. *The Evolution of the Virginia Plan*

On May 29, 1787, Edmund Randolph, the Governor of Virginia (and future first U.S. Attorney General, as well as second Secretary of State), presented to the Federal Convention the constitutional plan drafted by his state’s delegation.<sup>102</sup> According to the most widely accepted source, the plan conceived of a “National Judiciary . . . to consist of one or more supreme tribunals, and of inferior tribunals to be chosen by the National Legislature . . . .”<sup>103</sup> The plan distinguished the roles of the two levels of courts only by jurisdictional form: “the jurisdiction of the inferior tribunals shall be to hear & determine in the first instance, and of the supreme tribunal to hear and determine in the dernier resort,” a list of various cases, including “impeachments of any National officers.”<sup>104</sup> As reported by an alternative source, the Virginia plan included the establishment of a “National Judiciary” and that

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<sup>100</sup> Friedman, *supra* note 71, at 34; *see also* Blocher, *supra* note 50, at 1004 (“[C]onstitutional history does not shed much light on the reasons for the [Exceptions] Clause’s placement or meaning of its words.”).

<sup>101</sup> Redish, *supra* note 50, at 907; *see also id.* at 910–11 (writing with mind “boggle[d]” and asking what “in Heaven’s name” supported another scholar’s sophisticated interpretation if not the bare text).

<sup>102</sup> *See* IRVING BRANT, JAMES MADISON: FATHER OF THE CONSTITUTION 1787–1800, at 23–24 (1950) (concluding that Madison was “undoubtedly” the author of the plan); WILLIAM M. MEIGS, THE GROWTH OF THE CONSTITUTION IN THE FEDERAL CONVENTION OF 1787, at 13 (Fred B. Rothman & Co. 1987) (1900) (referring to Randolph as a figurehead); STEWART, *supra* note 6, at 36–38, 52–53 (describing the Virginians’ planning sessions, with Madison as the understood author). Randolph may have been chosen as the presenter at the Convention due to his “harmonious voice.” CHARLES WARREN, THE MAKING OF THE CONSTITUTION 58 (Fred B. Rothman & Co. 1993) (1928).

<sup>103</sup> 1 RECORDS, *supra* note 1, at 15 (May 29), 21 (Madison’s notes).

<sup>104</sup> 1 *id.* at 15 (May 29), 22 (Madison’s notes).

same list of cases, but did not address details such as types of courts or jurisdictional form.<sup>105</sup>

In any event, on June 5, the “Madisonian” compromise was struck; under the compromise, the Constitution would not establish inferior courts but would permit the legislature to do so.<sup>106</sup> A week later, a motion was made proposing “[t]hat the jurisdiction of the supreme Tribunal shall be to hear and determine in the dernier resort [various cases].”<sup>107</sup> If one accepts the alternative version of the Virginia plan, the motion’s mention of “dernier resort” was the first reference to jurisdictional form.<sup>108</sup> That June 12 motion was not voted on, though. And after some wrangling about the categories of cases, the delegates postponed consideration of the judiciary resolution until the following

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<sup>105</sup> John Franklin Jameson, *Studies in the History of the Federal Convention of 1787*, in 1 ANNUAL REPORT OF THE AMERICAN HISTORICAL ASSOCIATION FOR THE YEAR 1902, at 87, 106 (1903) (compiling the likely original version of Virginia plan). Jameson argued that the actual Virginia plan could not have included the composition of the judiciary. If it had, he contended, the notation of the journal on June 4 of a successful motion to “add” the language “[t]o consist of One supreme tribunal, and of one or more inferior tribunals” would not have made sense. *Id.* at 103–06. In his widely cited *Records*, Max Farrand acknowledged the unavailability of the original Virginia plan but cited several reasons in support of the version he published. 3 RECORDS, *supra* note 1, at app. C, 593–94 (respecting though disagreeing with Jameson’s different perspective).

Law professors have unquestioningly accepted Farrand’s version without mentioning the historians’ debate. *See, e.g.*, Calabresi & Lawson, *supra* note 80, at 1015 (relying on the Virginia plan’s call for “one or more supreme tribunals”); Claus, *One Court*, *supra* note 86, at 68–69 & n.41 (citing Farrand’s *Records* to support the proposition that the Convention rejected the idea of “multiple tribunals” of ultimate authority in favor of “one supreme Court”); Engdahl, *What’s in a Name?*, *supra* note 72, at 464–65 & nn.30–38 (maintaining that Randolph’s proposal of “one or more” supreme courts helps show that supremacy did not indicate final authority); James E. Pfander, *Federal Courts: Jurisdiction-Stripping and the Supreme Court’s Power to Supervise Inferior Tribunals*, 78 TEX. L. REV. 1433, 1452–53 & nn.79–81 (2000) (citing Farrand’s *Records* in a discussion of the Convention’s rejection of Randolph’s proposal of “one or more” supreme courts).

<sup>106</sup> 1 RECORDS, *supra* note 1, at 115 (June 5), 118 (journal), 127 (Yates’s notes).

<sup>107</sup> 1 *id.* at 209 (June 12), 211 (journal), 220 (Madison’s notes). The precise list of cases was not spelled out in the records of the motion. *See id.*

<sup>108</sup> Randolph was not the only delegate to present a plan on May 29; so did South Carolina’s Charles Pinckney. A document Pinckney later insisted was his plan provided that “[i]n cases of impeachment affecting Ambassadors & other public Ministers the [Supreme Court’s] Jurisdiction shall be original & in all the other cases appellate.” 3 *id.* at 595 (Pinckney document), 600. Pinckney’s claim, however, has been discredited. 3 *id.* at 602–04 (explaining its practical impossibility). Though Pinckney’s original plan is lost to history, a reconstruction of its likely contents provides that “to [the federal judicial court] an Appeal shall be allowed from the judicial Courts of the several States in all Causes wherein Questions shall arise on [various issues].” 3 *id.* at 604 (reconstruction of the Pinckney plan), 608; *see also* 2 *id.* at 134 (document found with the papers of the Committee of Detail apparently outlining the Pinckney plan), 136 (using same language). Thus, it is possible that Pinckney was the first delegate to refer to jurisdictional form, but in any event, his plan went nowhere.

day,<sup>109</sup> when the provision on jurisdiction was struck completely to allow a blank slate.<sup>110</sup>

Randolph and James Madison then advanced a resolution describing jurisdiction in a way that bypassed any mention of form: “That the jurisdiction of the national Judiciary shall extend to cases which respect the collection of the national revenue, impeachments of any national officers, and questions which involve the national peace and harmony.”<sup>111</sup> Randolph referred to the “difficulty” of the previous day’s attempt to shape the powers of the judiciary and stressed that a committee would have the job of sorting out the details.<sup>112</sup> The resolution passed unanimously,<sup>113</sup> and the door was thus open for a later configuration—or reconfiguration, under the standard account of the Virginia plan—of the jurisdictional posture in which the Supreme Court and inferior courts would hear those cases.<sup>114</sup> The next month, as a member of the envisioned committee, Randolph would confidently stride through that door.

In the meantime, two days after the passage of Randolph and Madison’s resolution, William Paterson of New Jersey submitted a competing plan for a new government, under which the judiciary would consist only of “a supreme Tribunal” that would hear impeachments of federal officers “in the first instance” and other cases “by way of appeal in the dernier resort.”<sup>115</sup> The New Jersey plan thus offered the first explicit proposal for the Supreme Court to exercise original jurisdiction.<sup>116</sup> Soon after the introduction of the New Jersey plan, Alexander

<sup>109</sup> 1 *id.* at 209 (June 12), 211–12 (journal), 220 (Madison’s notes).

<sup>110</sup> 1 *id.* at 223 (June 13), 232 (Madison’s notes).

<sup>111</sup> 1 *id.* at 223 (June 13), 223–24 (journal), 231 (journal) (compilation of resolutions), 232 (Madison’s notes).

<sup>112</sup> 1 RECORDS, *supra* note 1, at 223 (June 13), 238 (Yates’s notes).

<sup>113</sup> *Id.*

<sup>114</sup> See Liebman & Ryan, *supra* note 54, at 722 (noting this effect of Randolph and Madison’s resolution).

<sup>115</sup> 1 RECORDS, *supra* note 1, at 241 (June 15), 244 (Madison’s notes).

<sup>116</sup> See *id.* Some delegates, however—notably Pennsylvania’s James Wilson, who catalogued the differences between the Virginia and New Jersey plans—may have interpreted Randolph and Madison’s resolution as already having recommended original jurisdiction for the “national Judiciary” (which was not guaranteed to consist of anything but the Supreme Court). In Wilson’s outline of his speech summarizing differences between the plans, he noted that under the Virginia plan, “[t]he Jurisdiction of the national Tribunal” would extend to certain cases, whereas under the New Jersey plan, the national judiciary could hear such cases “[o]nly by Appeal in the dernier Resort” and would have “[o]nly limited and appellate Jurisdiction.” 1 *id.* at 248 (June 16), 278 (Wilson’s notes). Madison and Hamilton each took notes of Wilson’s speech to the same effect. See 1 *id.* at 248 (June 16), 252 (Madison’s notes) (noting Wilson’s comment that the New Jersey plan called for



Hamilton expatiated on what the Constitution ought to contain; according to his outline—which may or may not have been fully communicated to the Convention<sup>117</sup>—he advocated a court with “Supreme Judicial authority” that would have “original jurisdiction in all causes of capture, and an appellate jurisdiction in [other matters].”<sup>118</sup>

On June 19, the day after Hamilton’s speech, the Convention voted to move forward on the basis of the Virginia plan, as amended.<sup>119</sup> It would not be until a month later that the delegates reconsidered the resolution about jurisdiction. In the wake of a comment by Pennsylvania’s Gouverneur Morris that national judges might not be able to give “the Executive” a fair trial,<sup>120</sup> the reference to jurisdiction over impeachments was deleted,<sup>121</sup> and at Madison’s behest, the category of cases about collection of national revenue was broadened to “all cases arising under the Natl. laws.”<sup>122</sup> What would become the Extension Clause was taking shape, but the resolution still did not directly address jurisdictional form. Randolph and Madison had managed to duck that knotty issue before, but the proposals by Paterson and Hamilton showed that it was still on the minds of the delegates. The task of addressing that topic, and many others, fell, as Randolph had anticipated, to a committee; while other delegates vacated, the five-man Committee of Detail was to turn the amended resolutions of the Virginia plan into a working draft of a constitution.<sup>123</sup>

#### B. *The Committee of Detail’s Conception of the Exceptions Power*

The Committee of Detail crafted the Extension Clause, fleshing out Randolph and Madison’s resolution to list eight types of cases com-

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“an appellate jurisdiction only”), 269 (Hamilton’s notes) (noting Wilson’s comment that the Virginia plan proposed “Orig: Jurisdiction in all cases of Nat: Rev.” while the New Jersey plan proposed “None”). Apparently, the New Jersey plan’s provision for original jurisdiction over impeachments made little impact, at least on Wilson.

<sup>117</sup> 1 *id.* at 281 (June 18), 291 & n.7 (discussing uncertainty about the contents of Hamilton’s speech).

<sup>118</sup> 1 *id.* at 281 (June 18), 292 (Madison’s notes).

<sup>119</sup> 1 *id.* at 312 (June 19), 312 (journal), 322 (Madison’s notes).

<sup>120</sup> 2 *id.* at 37 (July 18), 42 (Madison’s notes).

<sup>121</sup> 2 RECORDS, *supra* note 1, at 37 (July 18), 39 (journal), 46 (Madison’s notes).

<sup>122</sup> 2 *id.* at 37 (July 18), 46 (Madison’s notes).

<sup>123</sup> 2 *id.* at 116 (July 26), 117 (journal), 128 (Madison’s notes). The Committee of Detail was formed on July 24 for the purpose of composing constitutional language reflecting the resolutions that had been passed by the full Convention. Membership included John Rutledge (chair), James Wilson, Edmund Randolph, Nathaniel Gorham, and Oliver Ellsworth. *See* 2 *id.* at 97 (July 24), 97 (journal), 106 (Madison’s notes).

posing the “Jurisdiction of the Supreme Court.”<sup>124</sup> The committee also addressed what form that jurisdiction would take, in the Original and Appellate Jurisdiction Clauses. Throughout the committee’s work, the role of exceptions remained constant: to shift jurisdictional form from appellate to original.<sup>125</sup>

### 1. Edmund Randolph’s Composition

The first available draft of the document the Committee of Detail eventually reported to the full Convention was penned by Edmund Randolph.<sup>126</sup> Randolph tackled the question of jurisdictional form that, until then, had been elusive. Although it was natural that most of the Supreme Court’s jurisdiction would be appellate, he recognized that some cases should be able to bypass other (inferior or state) courts. The earlier calls at the Convention for limited doses of original jurisdiction in the highest court may have inspired him. Moreover, his passion about impeachments<sup>127</sup> probably solidified his mindset that some cases were unsuited for other tribunals.

Randolph forcefully advocated a judicial role in impeachments of federal officers.<sup>128</sup> Many delegates were skeptical of that idea, particularly if the President would be appointing judges.<sup>129</sup> A week before the committee met, Randolph had lost a battle when the Convention amended the Virginia plan’s resolution by eliminating the reference to federal jurisdiction over impeachments.<sup>130</sup> But he would not surrender.

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<sup>124</sup> 2 *id.* at 176 (Aug. 6), 186 (Madison’s notes) (report of the Committee of Detail).

<sup>125</sup> See Claus, *One Court*, *supra* note 86, at 83 (noting that the Committee of Detail’s draft of the Exceptions Clause “sought *only* to distribute the Supreme Court’s *already constitutionally vested* jurisdiction between original and appellate dockets”).

<sup>126</sup> See 4 RECORDS, *supra* note 1, at 37 (Randolph draft) (transcribed from original). As with the Virginia plan, it is unclear to what extent Randolph himself formulated the ideas expressed by his hand. See STEWART, *supra* note 6, at 168–69 (speculating that the draft was a “joint product” of the committee and served as an outline of initial thoughts).

<sup>127</sup> During a discussion of whether the President ought to be impeachable, Randolph proclaimed the “[t]he propriety of impeachments” to be “a favorite principle” of his. 2 RECORDS, *supra* note 1, at 60 (July 20), 67 (Madison’s notes).

<sup>128</sup> A week before the Convention adjourned, when Randolph expounded on a litany of perceived flaws in the Constitution, his first complaint was about “the Senate’s being made the Court of Impeachment for trying the Executive.” 2 *id.* at 555 (Sept. 10), 563 (Madison’s notes).

<sup>129</sup> *E.g.*, 2 *id.* at 37 (July 18), 42 (Madison’s notes) (citing a statement by George Mason that “[i]f the Judges were to form a tribunal for [trying impeachments], they surely ought not to be appointed by the Executive”); 2 *id.* at 544 (Sept. 8), 551 (Madison’s notes) (recording a comment of Roger Sherman that putting the impeachment power in the hands of judges appointed by the President would be “improper”).

<sup>130</sup> 2 *id.* at 37 (July 18), 39 (journal), 46 (Madison’s notes).

In the section of his committee draft that would evolve into Article II of the Constitution, he wrote that the executive would be “removeable on impeachment made by the house of representatives and conviction before the supreme judiciary,”<sup>131</sup> and in the precursor to Article III, he accordingly restored the extension of federal jurisdiction to “impeachments of officers.”<sup>132</sup> As William Paterson had suggested in his plan, such cases were unsuited for inferior federal courts,<sup>133</sup> so Randolph separated the jurisdictional provisions for the national judiciary into two numbered paragraphs. The Extension Clause and Original and Appellate Jurisdiction Clauses applied only to the “supreme tribunal,” and the “assignment clause” gave the legislature discretion to confer jurisdiction on inferior courts.<sup>134</sup>

Randolph must have realized that impeachments were not the only cases that should be able to go straight to the Supreme Court. Alexander Hamilton had suggested that fast track for cases of capture,<sup>135</sup> and Pennsylvania’s James Wilson had given a speech interpreting the amended Virginia plan as calling for it in many other cases.<sup>136</sup> Instead of defining the content of the Court’s original jurisdiction—he was being brazen enough by reinstating a judicial role in impeachments, not to mention other ideas<sup>137</sup>—Randolph left Congress to decide which cases warranted consideration in the first instance rather than, as earlier envisioned (in the June 12 motion, and perhaps in the Virginia plan), in the dernier resort.<sup>138</sup>

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<sup>131</sup> 4 *id.* at 37 (Randolph draft), 46; 2 *id.* at 137 (Randolph draft), 145. Max Farrand’s version in volume 2 of *Records* is a transcription from a facsimile; his updated version in volume 4 uses slightly different punctuation based on a review of the original. 2 *id.* at 137 n.6; 4 *id.* at 37 n.6.

<sup>132</sup> 4 *id.* at 37 (Randolph draft), 48; 2 *id.* at 137 (Randolph draft), 146–47.

<sup>133</sup> 1 RECORDS, *supra* note 1, at 241 (June 15), 244 (Madison’s notes) (detailing Paterson’s proposal to have the Supreme Court hear impeachments of federal officers “in the first instance”).

<sup>134</sup> 4 *id.* at 37 (Randolph draft), 48; 2 *id.* at 137 (Randolph draft), 147.

<sup>135</sup> 1 *id.* at 281 (June 18), 292 (Madison’s notes).

<sup>136</sup> See *supra* note 116 (discussing Wilson’s speech).

<sup>137</sup> Randolph also toyed with giving the Supreme Court a veto power to void state laws. He, or perhaps someone else, crossed out that provision in his draft. 4 RECORDS, *supra* note 1, at 37 (Randolph draft), 45 (“All laws of a particular state, repugnant hereto, shall be void: and . . . the decision thereon . . . shall be vested in the supreme judiciary . . .”); 2 *id.* at 137 (Randolph draft), 144. That idea evoked the Virginia plan’s ill-fated proposal to allow the national legislature to “negative” state laws conflicting with federal law. 1 *id.* at 15 (May 29), 21 (Madison’s notes of the Virginia plan); see also 2 *id.* at 21 (July 17), 21–22 (journal), 28 (Madison’s notes) (noting the rejection of the proposal).

<sup>138</sup> 4 *id.* at 37 (Randolph draft), 48; see also 2 *id.* at 137 (Randolph draft), 147.

The creation of that legislative option was likely motivated by another factor as well. Though Randolph fought to ensure the establishment of inferior federal courts,<sup>139</sup> he realized that under the Madisonian compromise, they might not exist. In some cases, such as those with international implications, it might be crucial to avoid state courts.<sup>140</sup> If there were no inferior federal courts, that would leave only the Supreme Court. Leeway to add to its original jurisdiction would allow Congress to decide not only which cases could bypass any inferior federal courts but also, if there were none, which cases could still start (and end) in a federal court.

Whatever may have motivated Randolph, immediately following his Extension Clause defining the jurisdiction of the “supreme tribunal,” he introduced a flexible provision about that jurisdiction’s form:

But this supreme jurisdiction shall be appellate only, except in those instances, in which the legislature shall make it original: and the legislature shall organize it[.]<sup>141</sup>

Thus was born the Exceptions Clause, leaving no doubt that it contemplated the legislative power as transformative rather than confiscatory.<sup>142</sup>

## 2. John Rutledge’s Interlineation

In his review of Randolph’s draft, South Carolina’s John Rutledge, the chairman of the Committee of Detail (and future Chief Justice of the Supreme Court), preserved the legislative ratchet from appellate to original form but, rather than leaving everything for Congress to de-

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<sup>139</sup> Regardless of whether the Virginia plan did, as Max Farrand thought, include “inferior tribunals,” Randolph showed his affinity for such courts a week after the Madisonian compromise in his motion (with Madison) to set out the “jurisdiction of the national Judiciary.” 1 *id.* at 223 (June 13), 223–24 (journal), 231 (journal) (compilation of resolutions), 232 (Madison’s notes). The scope of that motion contrasted with that of one made the day before (by an unknown delegate) that sought to cover merely the “jurisdiction of the supreme Tribunal.” 1 *id.* at 209 (June 12), 211 (journal), 220 (Madison’s notes).

<sup>140</sup> See PAUL M. BATOR ET AL., HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 18 (3d ed. 1988) (noting that after the Madisonian compromise, “the Supreme Court’s original jurisdiction took on new importance as the only available means of assuring access to a federal tribunal”).

<sup>141</sup> 4 RECORDS, *supra* note 1, at 37 (Randolph draft) (transcribed from original), 48; see also 2 *id.* at 137 (Randolph draft) (transcribed from facsimile), 147.

<sup>142</sup> Randolph did propose some measure of legislative control over the content of the Supreme Court’s jurisdiction; he included in his Extension Clause certain “other cases, as the national legislature may assign.” 4 *id.* at 37 (Randolph draft), 48; see also 2 *id.* at 137 (Randolph draft), 147; *supra* note 131 (explaining the different transcriptions in volumes 2 and 4 of *Records*). That idea did not survive into the next draft.

cide, singled out one class of cases for constitutionally guaranteed original form (his addition is in angled brackets, with parentheses indicating what someone crossed out):

But this supreme jurisdiction shall be appellate only, except in <Cases of Impeachmt. & (in)> those instances, in which the legislature shall make it original: and the legislature shall organize it[.]<sup>143</sup>

It was no surprise that the first cases to be assured of expedited review by the Supreme Court (though that status did not survive into the final Constitution) were impeachments.

Rutledge's inserted language was grammatically detached from Randolph's word "original," creating a second prong of exceptions; the legislature would not need to "make" jurisdiction over impeachments original. Nonetheless, Rutledge did not see a need to specify that the exception for cases of impeachment would entail "original" jurisdiction. That much was obvious in that the jurisdiction would not "be appellate."

### 3. James Wilson's Rearrangement

The other available coherent draft of the Committee of Detail's eventual report to the full Convention was in the hand of Rutledge's frequent host during the summer, Philadelphian James Wilson.<sup>144</sup> Wilson's draft used Randolph's as a starting point, retaining the same basic structure of the judiciary article, while slightly expanding the list of cases in the Extension Clause.<sup>145</sup> Wilson kept Rutledge's constitutional floor of original jurisdiction in cases of impeachment and built on that framework by adding two other categories. His language about jurisdictional form spread over two sentences:

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<sup>143</sup> 4 *id.* at 37 (Randolph draft) (transcribed from original), 37 n.6, 48; *see also* 2 *id.* at 137 (Randolph draft) (transcribed from facsimile), 137 n.6, 147; *supra* note 131 (explaining the different transcriptions in volumes 2 and 4 of *Records*).

<sup>144</sup> STEWART, *supra* note 6, at 38, 165 (noting that Rutledge often stayed at Wilson's home). Other relevant documents written by Wilson are more fragmented and do not address the exceptions power. *See* 2 RECORDS, *supra* note 1, at 150 (partial draft of an outline), 152 (draft of portions of the eventual report), 159 (draft of portions of the eventual report). Although the recent rediscovery of the original of one of those documents was hailed as a historical bonanza, Edward Colimore, *Early Draft of the Constitution Found in Phila.*, PHILA. INQUIRER, Feb. 2, 2010, at A02, the document contains nothing substantive about the judiciary. *See* 2 RECORDS, *supra* note 1, at 150–52, *cited in* *Questions About Lorianne Updike Toler's Rediscovery of James Wilson's 3rd Draft of the Constitution*, CONSOURCE, <http://www.consource.org/WilsonDraftQuestions> (last visited Oct. 31, 2010).

<sup>145</sup> 2 RECORDS, *supra* note 1, at 163 (Wilson draft), 172–73.

In Cases of Impeachment, those affecting Ambassadors and other public Ministers, and those in which a State shall be one of the Parties, this Jurisdiction shall be original. In all the other Cases beforementioned, it shall be appellate, with such Exceptions and under such Regulations as the Legislature shall make.<sup>146</sup>

Wilson's interruption of Randolph's provision with a period would spawn misunderstanding by those reading the Exceptions Clause in the sole context of the sentence about appellate jurisdiction, ignoring the textual link to the one about original jurisdiction. But a second sentence was almost inevitable in light of the extra substance that Rutledge and then Wilson added to Randolph's draft: three types of cases in which the form of the Supreme Court's jurisdiction would be fixed by the Constitution as original. Merely interlineating rather than writing a new draft on a clean sheet, Rutledge had crudely inserted the category of impeachments into Randolph's single sentence; the meaning was clear enough. When Wilson added the foreign diplomat and state-party cases, though, eloquence demanded that the constitutional floor have its own sentence.<sup>147</sup>

Wilson's syntactic choice avoided the awkward joinder of two types of exceptions that might otherwise have resulted from preserving Randolph's sentence structure: "[T]his supreme jurisdiction shall be appellate only, except [1] in cases of impeachment, cases affecting [foreign diplomats], and those in which a state shall be a party, and [2] in those instances in which the legislature shall make it original . . . ."<sup>148</sup>

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<sup>146</sup> 2 *id.* at 163 (Wilson draft), 173. Rutledge edited this draft slightly as well, without changing the substance. *See id.*

<sup>147</sup> In a document drafted by Charles Pinckney that he later purported to be the plan he had presented on May 29 but that has been shown instead to be essentially a synopsis of the Committee of Detail's report—a report that was almost identical to Wilson's draft—Pinckney included the constitutional floor of original jurisdiction but excluded the exceptions power. Without that complicating factor, he comfortably combined the Original and Appellate Jurisdiction Clauses into a single sentence focused only on jurisdictional form: "In cases of impeachment affecting Ambassadors & other public Ministers the Jurisdiction shall be original & in all the other cases appellate." 3 *id.* at 595 (Pinckney document), 600, 602–04 (refuting Pinckney's claim that the document was his original plan). Pinckney's omission of the exceptions power may reflect the insignificance of that power, and in any event, his skeletal paraphrasing of Wilson's two sentences shows that they were understood as establishing the form, rather than the existence, of jurisdiction.

<sup>148</sup> Moreover, had Wilson strung together the two sentences he actually wrote, with a comma and an "and" rather than a period, people might have mistakenly concluded that the legislature could make exceptions not only to the appellate form but also to the constitutional floor of original jurisdiction.

Much tidier was Wilson's devotion of a whole sentence to the new element, a floor of original jurisdiction. The old elements—the default form of jurisdiction as appellate and Congress's power to shift that default—became the second sentence. The corollary that an exception to appellate form would result in original form was implicit.<sup>149</sup>

a. *Akhil Amar's Illusions of Disappearance and Appearance*

In support of his theory of mandatory federal jurisdiction for “all Cases” but not “Controversies,” Akhil Amar has criticized the notion that the exceptions power sketched by Randolph survived into Wilson's draft.<sup>150</sup> He acknowledges that Randolph had proposed “explicit” legislative authority to expand the Supreme Court's original jurisdiction.<sup>151</sup> But according to Amar, in Wilson's draft, that power “disappeared.”<sup>152</sup>

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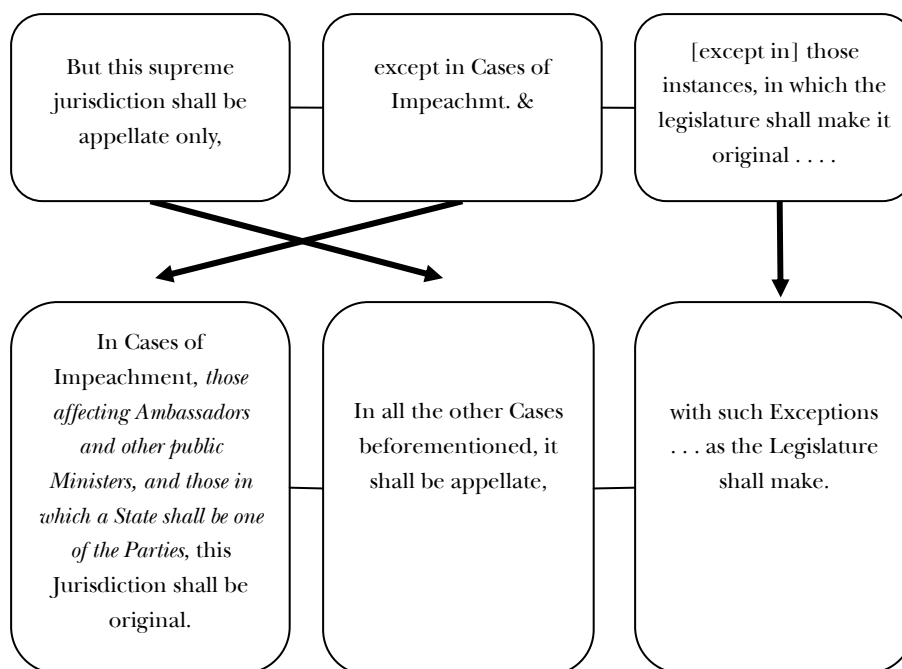
<sup>149</sup> See Claus, *One Court*, *supra* note 86, at 84 (arguing that Wilson's draft permitted exceptions to the “*appellate nature*” rather than the “*existence*” of the jurisdiction).

<sup>150</sup> Amar, *Two Tiers*, *supra* note 53, at 214–15 n.39 (criticizing the speculative interpretation proffered by Robert Clinton in Clinton, *supra* note 71, at 778, 793, 827).

<sup>151</sup> *Id.*; see also Amar, *supra* note 76, at 467 (noting that Randolph's draft “would have allowed Congress to shift cases from the Court's appellate to its original docket”).

<sup>152</sup> Amar, *Two Tiers*, *supra* note 53, at 214 n.39 (finding the recasting of the provision to be at least as likely to mean that the five-man committee affirmatively “sought to prevent additions to the Court's original jurisdiction” as to mean that Randolph's form-shifting mechanism endured); see also Amar, *supra* note 76, at 467 (arguing that the failure of Randolph's language to “c[o]me out of committee” undermines the notion that Randolph's idea was perpetuated). Robert Clinton, another mandatory federal jurisdiction theorist, also characterizes the congressional power to reconfigure appellate jurisdiction into original form as having “disappeared” after the Randolph draft. Clinton, *supra* note 71, at 777–78 (allowing for the possibility that the authority survived in less explicit form); see also Dodge, *supra* note 68, at 1023 (interpreting Wilson's change to Randolph's language as eliminating the power to increase the Supreme Court's original jurisdiction).

Comparison of Randolph-Rutledge (top) and Wilson (bottom) Drafts  
(new substantive material in *italics*)



In fact, as shown by the table above, Wilson’s draft simply restated his colleagues’ thoughts about jurisdictional form in a slightly different way.<sup>153</sup> Randolph’s provision had featured two components: (1) the default form of jurisdiction as appellate and (2) Congress’s power to make exceptions to that form. Rutledge had wedged in a third: (1½) the constitutional floor of original jurisdiction. Wilson simply extracted (and supplemented with two new categories) Rutledge’s addition, making it the lead sentence and reuniting Randolph’s two components in the next sentence. Because the new sentence about “original” jurisdiction would be read first, Wilson had no need to mention that word again in the reassembled second sentence, and so “except in . . . those

<sup>153</sup> See Claus, *One Court*, *supra* note 86, at 82–83 (“[T]he text affords no reason to infer that Wilson’s draft, any more than the Rutledge edit to Randolph’s, meant to preclude congressional additions to that original jurisdiction.”). As Claus has pointed out, the likelihood that one committee member (Randolph) intended his version of the language to allow Congress to switch jurisdiction from appellate to original while another member (Wilson) intended his quite similar version to do something wholly different is “negligible.” *Id.*



instances, in which the legislature shall make it original” became “with such Exceptions . . . as the Legislature shall make.”<sup>154</sup>

The rewrite thus understandably did not spell out explicitly that an exception to appellate jurisdiction would make it original. Yet Amar finds that shortcut to be notable: “[D]oesn’t the very existence of the Exceptions Clause make all the more significant the omission of an ‘Additions Clause’ (‘with such additions as the Congress shall make’) from the grant of original jurisdiction?”<sup>155</sup> He argues against the form-shifting reading on the ground that it would make the Exceptions Clause work overtime, “do[ing] *two* things simultaneously,” in effecting both a subtraction (of appellate jurisdiction) and an addition (of original jurisdiction).<sup>156</sup> But that protest vanishes if the role of the passage in question is to allocate when jurisdiction will be original and when appellate; with that understanding, an exception to “appellate” is but a one-step shift to “original.”

To insist that the Exceptions Clause would need a complementary Additions Clause to transform jurisdiction is to ignore the development of the relevant language from Randolph’s draft, as emended by Rutledge and then rearranged by Wilson. With his streamlined phrasing, Wilson did not need to repeat the word “original” any more than Rutledge had needed to specify the form of jurisdiction in cases of impeachment. In both situations, what else would an exception to “shall be appellate” mean?<sup>157</sup> Attributing to Wilson a dissolution of the legislative power to expand original jurisdiction is tantamount to maintaining that Rutledge had relegated cases of impeachment to tribunals other than the Supreme Court. In short, there is no basis for Amar’s claim

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<sup>154</sup> 2 RECORDS, *supra* note 1, at 163 (Wilson draft), 173. Randolph also had included a directive to the legislature to “organize” the jurisdiction; Wilson changed that word to “Regulat[e].” See *infra* notes 260–271 and accompanying text (discussing the likely import of those terms).

<sup>155</sup> Amar, *supra* note 76, at 465.

<sup>156</sup> *Id.* (finding a lack of a “textual basis” for the addition).

<sup>157</sup> See JOHN NORTON POMEROY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES §§ 732, 497 (4th ed. 1879) (“[J]urisdiction of all kinds is either original or appellate.”). The Committee of Detail left the obvious ramifications of other exceptions unspecified as well. For example, its draft provided that “[t]he trial of all criminal offences (except in cases of impeachments) . . . shall be by Jury.” 2 RECORDS, *supra* note 1, at 176 (Aug. 6), 177 (Madison’s notes) (report of the Committee of Detail), 187. In that draft, the Supreme Court’s jurisdiction extended to cases of impeachments. 2 *id.* at 186. But the committee saw no need in the clause about criminal trials to spell out that an exception to “shall be by Jury” would mean “shall be by judges.” See 2 *id.* at 187.

that Wilson's draft of the Exceptions Clause abandoned the constitutional plan that had been, as Amar admits,<sup>158</sup> clear in Randolph's.

In light of the metamorphosis perceived by Amar, his assertion that "the exceptions and regulations clause made its initial appearance" in Wilson's draft is no surprise.<sup>159</sup> In a narrow sense it did, in that the words "Exceptions" and "Regulations" first appeared in tandem there.<sup>160</sup> But to overlook the inception of the clause in Randolph's draft is to miss the clearest view of the import of an exception.<sup>161</sup>

b. *Robert Clinton's Specious Parallelism*

Robert Clinton, another adherent of mandatory federal jurisdiction (without the gloss of Amar's two tiers), also portrays the Exceptions Clause as having originated in Wilson's draft.<sup>162</sup> Clinton finds significance in its appearance alongside a "parallel"<sup>163</sup> provision—the "assignment clause"—that would have allowed the legislature to distribute the Supreme Court's jurisdiction to inferior courts "in the Manner and under the Limitations which it shall think proper."<sup>164</sup> That provision arose in Randolph's draft, but Wilson eliminated the specification that the inferior courts would sit "as original tribunals."<sup>165</sup> In Clinton's view, the deletion showed that, to Wilson (and eventually to the rest of the five-man Committee of Detail), the assignment clause would "comple-

<sup>158</sup> Amar, *Two Tiers*, *supra* note 53, at 214 n.39.

<sup>159</sup> *Id.* Amar is far from alone in that characterization. See, e.g., Engdahl, *What's in a Name?*, *supra* note 72, at 487 (calling the Wilson draft's sentence about appellate jurisdiction "the first appearance, in any records surviving the Convention, of language resembling the so-called 'exceptions' clause"); Sager, *supra* note 65, at 51 & n.98 ("The exceptions and regulations language first appears in [Wilson's] draft . . ."); cf. RICHARD H. FALLON, JR. ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 18 (4th ed. 1996) (stating that the exceptions power "is foreshadowed in Randolph's draft . . . and then appears in [Wilson's draft]"); Beck, *supra* note 66, at 790 (referring to Wilson's language as "a new version of the predecessor language").

<sup>160</sup> Randolph's draft referred to "organiz[ation]" rather than "Regulation[.]" See *infra* notes 260–271 and accompanying text (discussing the likely import of those terms).

<sup>161</sup> See Claus, *One Court*, *supra* note 86, at 81 (citing Randolph's draft as containing the "first reference to a congressional power to make exceptions to the Supreme Court's appellate jurisdiction").

<sup>162</sup> Clinton, *supra* note 71, at 776 ("Th[e Wilson] draft . . . contained the first emergence of the 'exceptions and regulations clause' . . .").

<sup>163</sup> *Id.* at 777.

<sup>164</sup> 2 RECORDS, *supra* note 1, at 163 (Wilson draft), 173.

<sup>165</sup> See 4 *id.* at 37 (Randolph draft), 48 ("The whole or a part of the jurisdiction aforesaid, according to the discretion of the legislature, may be assigned to the inferior tribunals, as original tribunals."); accord 2 *id.* at 137 (Randolph draft), 147; see also *supra* note 131 (explaining the different transcriptions in volumes 2 and 4 of *Records*).

ment[]” the purportedly new Exceptions Clause: one clause permitted Congress to take appellate jurisdiction from the Supreme Court, and the other to give it to inferior courts.<sup>166</sup> Clinton cites that coupling as evidence supporting his theory that the function of the exceptions power was to permit Congress to redirect cases to inferior courts.<sup>167</sup>

The history and wording of Wilson’s draft, however, controvert the supposed symbiosis between the congressional powers (1) to make exceptions to the mandate that (in the “other” cases) the Supreme Court’s jurisdiction “shall be appellate” and (2) to assign<sup>168</sup> parts of the Court’s jurisdiction to an inferior court. As discussed above, Randolph had already broken ground on the Exceptions Clause.<sup>169</sup> So the claim that its utility depended on Wilson’s deletion of the reference to inferior courts as “original tribunals” is anachronistic. Regardless, the relevance of the deletion is questionable in that Clinton does not explain why jurisdiction taken from the Supreme Court would have to stay in the appellate form when conferred on an inferior court.

Moreover, though Wilson joined the powers of assignment and exceptions in the same paragraph,<sup>170</sup> he did not have each depend on the other. Nothing made exceptions to the Supreme Court’s appellate jurisdiction contingent on the existence of inferior courts. Conversely, Congress could assign jurisdiction to inferior courts without touching the Supreme Court’s *appellate* jurisdiction. Even if an assignment would have divested the Supreme Court rather than leaving it with concurrent jurisdiction—a plausible though dubious interpretation<sup>171</sup>—the as-

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<sup>166</sup> Clinton, *supra* note 71, at 792 n.167.

<sup>167</sup> *Id.* at 777; *see also id.* at 753 (“The power to make exceptions was at most an allocative authority designed to facilitate the creation of inferior federal courts.”).

<sup>168</sup> Wilson amended Randolph’s word “assign[]” to “distribute”; Rutledge later changed it back to “assign.” 2 RECORDS, *supra* note 1, at 163 (Wilson draft), 173.

<sup>169</sup> *See supra* notes 126–142 and accompanying text.

<sup>170</sup> 2 RECORDS, *supra* note 1, at 163 (Wilson draft), 173. Randolph had numbered the two provisions separately. 4 *id.* at 37 (Randolph draft), 48; *accord* 2 *id.* at 137 (Randolph draft), 147; *see also supra* note 131 (explaining the different transcriptions in volumes 2 and 4 of *Records*).

<sup>171</sup> The assignment clause was not entirely clear on that point. Randolph’s provision that “[t]he whole” of the Supreme Court’s jurisdiction—appellate and original—could be assigned, however, implied that the Court would have retained concurrent jurisdiction. Otherwise, assignment would have been a way for Congress in essence to eliminate the Court itself. Wilson’s draft was less emphatic, noting only that the legislature “may distribute this Jurisdiction . . . .” 2 RECORDS, *supra* note 1, at 163 (Wilson draft), 173. Rutledge then edited the quoted language to “may assign any part of the Jurisdiction” (though he carved out an exception for “Trial of the Executive”). *Id.* Presumably, the three drafters for the committee agreed that all cases in the Extension Clause (aside from Rutledge’s excep-

signment could have been of *original* jurisdiction, which was not subject to exceptions. That an assignment did not need a complementary exception dispels the notion that the role of exceptions was to facilitate assignments.

Instead of working in tandem, the two powers played disparate roles: one allowed the transformation of the Supreme Court's jurisdiction (from appellate to original), whereas the other allowed the transfer or sharing of it (to or with inferior courts). The eventual deletion of the assignment clause, once its description of inferior courts' potential jurisdiction was obviated by a change at the beginning of the Extension Clause,<sup>172</sup> helped confirm that Wilson's side-by-side placement of the provisions had not been fraught with unstated meaning.<sup>173</sup>

Rather than (as Clinton insists) tying the two provisions together, Wilson's omission of Randolph's specification that inferior courts would sit "as original tribunals" clarified the role of those courts. Randolph may have used the word "original" to convey that their decisions would be the first by a federal court and thus subject to appellate review by the Supreme Court, not contemplating that the word might also imply that they could not hear cases from state courts.<sup>174</sup> Or he may have intended it to contrast with the "appellate only" default jurisdiction of the Supreme Court and thus to mean "not only appellate but also original."<sup>175</sup> It is even conceivable that he thought inferior courts should not hear appeals from state courts. Whatever Randolph's reason was for including the phrase "as original tribunals," Wilson evidently found it substantively or stylistically undesirable. Contrary to Clinton's claim, Wilson's deletion of that qualifier about *inferior* courts in no way

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tion) were fair game for inferior courts without contemplating a back-door method of eliminating the one court that was constitutionally guaranteed.

<sup>172</sup> See *infra* note 181 (surveying scholars' explanations of the assignment clause's deletion).

<sup>173</sup> Evading that implication, Clinton argues that the deletion of the assignment clause infused the Exceptions Clause with a grant of legislative power to confer jurisdiction on inferior courts. See *infra* note 185 and accompanying text.

<sup>174</sup> Even today, the phrase "original jurisdiction" does not unambiguously preclude review of other courts' decisions. For example, a petition for a writ of habeas corpus to review the constitutionality of a state court criminal judgment is considered as initiating an "original" proceeding in a federal district court that serves the purpose of reviewing the state judgment. See Clinton, *supra* note 71, at 753 n.22 (noting the imprecision of the terminology of jurisdictional form).

<sup>175</sup> Randolph may have taken for granted that in the types of cases important enough to warrant legislative action permitting original jurisdiction in the Supreme Court, the Court would retain appellate jurisdiction as necessary to correct state court decisions. Cf. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 395, 405 (1821) (holding that cases within the Supreme Court's Original Jurisdiction Clause are also subject to its appellate jurisdiction).

changed the meaning of the separate clause permitting exceptions to the directive that the *Supreme Court's* jurisdiction—in the words of both Randolph and Wilson—“shall be appellate.”

### C. *The Convention's Revisions*

James Wilson's rearrangement of Edmund Randolph's provision about jurisdictional form into two sentences was only the beginning of the devolution of the Exceptions Clause from unequivocal perspicuity to unwitting ambiguity. After John Rutledge lightly edited Wilson's draft, adding “Consuls” to the category of cases affecting “Ambassadors and other public Ministers,”<sup>176</sup> the Committee of Detail gave its report to the full Convention.<sup>177</sup> If editing by committee is problematic, editing by convention can be calamitous. As described below, the Convention proceeded to deform the phrase “shall be appellate,” unintentionally compounding interpreters' eventual confusion.

#### 1. Expansion of the Extension Clause

On August 27 the Convention focused on the judiciary. The controversial jurisdictional category of impeachments, which may have been the reason Randolph's draft contained a paragraph devoted to the jurisdiction of only the Supreme Court,<sup>178</sup> was “postponed,” never to return to the Extension Clause.<sup>179</sup> The jurisdictional scopes of the Supreme Court and inferior courts were then combined, as the subject of the Extension Clause changed from the “jurisdiction of the Supreme Court” to the “Judicial Power,”<sup>180</sup> embracing all Article III courts. The assignment clause, which would have permitted the legislature to confer jurisdiction on inferior courts, was then deleted, its reference to the

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<sup>176</sup> 2 RECORDS, *supra* note 1, at 163, 173 (Wilson draft, with Rutledge's additions in angled brackets).

<sup>177</sup> The report was, aside from capitalization and the like, identical to Wilson's draft as edited by Rutledge. 2 *id.* at 176 (Aug. 6), 186 (Madison's notes) (report of the Committee of Detail).

<sup>178</sup> See *supra* notes 127–134 and accompanying text.

<sup>179</sup> 2 RECORDS, *supra* note 1, at 422 (Aug. 27), 423, 424 (journal), 430, 431 (Madison's notes) (noting the postponement of consideration of the impeachment provisions in the Extension and Original Jurisdiction Clauses); see CHARLES L. BLACK, JR., IMPEACHMENT: A HANDBOOK 57–59 (1974) (noting the permanent disappearance of impeachment cases from Article III once the Convention “moved impeachment trials out of the Supreme Court and into the Senate”). The only judicial role that remained was that the Chief Justice would preside over an impeachment trial of the President. U.S. CONST. art. I, § 3.

<sup>180</sup> 2 RECORDS, *supra* note 1, at 422 (Aug. 27), 425 (journal) (“Judicial Power”), 431 (Madison's notes) (“Judicial power”).

types of cases they could hear having been obviated by the newly broadened subject of the Extension Clause.<sup>181</sup>

Defenders of theories of mandatory federal jurisdiction have made much of the shift to “Judicial Power.” In the view of Akhil Amar, who subscribes to such a theory for one “tier” of disputes (those described as “all Cases” rather than “Controversies”), that edit was “[t]he key textual change” turning the Exceptions Clause into a grant of legislative power to shift cases in that tier to inferior courts; previously, he explains, such a shift would have contravened the Extension Clause.<sup>182</sup> To Amar, the widening of the Extension Clause’s scope diminished the Supreme Court’s power, in that jurisdiction over the various “Cases” in his “mandatory” tier would now be guaranteed only in either the Supreme Court or an inferior court.<sup>183</sup>

In other words, Amar asks us to believe that the editing of the *Extension* Clause transformed the *Exceptions* Clause from a provision allowing withdrawal of the Supreme Court’s appellate jurisdiction in favor of state or other federal courts, but only as to his tier of “permissive” cases—already a stretch, in that no version of the Exceptions Clause had (or has) ever evoked the putative tiers—into a provision allowing (1) such unrestricted withdrawal of “permissive” cases and also (2) withdrawal of “mandatory” cases but only in favor of other federal courts. Recall that a month before this development, Randolph had composed the first version of the exceptions power, which as Amar acknowledges would have permitted the expansion of original jurisdiction; in the later draft by Wilson, under Amar’s roller-coaster reading,

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<sup>181</sup> 2 *id.* at 422 (Aug. 27), 425 (journal), 431 (Madison’s notes). Most scholars have surmised that the reason for the deletion of the assignment clause was redundancy, in that “[t]he Judicial Power” encompassed the jurisdiction of all Article III courts. *E.g.*, Claus, *One Court*, *supra* note 86, at 85 (calling the clause “surplusage”); Engdahl, *What’s in a Name?*, *supra* note 72, at 488 n.159 (opining that the assignment clause “ceased to be crucial” once the “Judicial Power” edit was made); James E. Pfander, *Rethinking the Supreme Court’s Original Jurisdiction in State-Party Cases*, 82 CALIF. L. REV. 555, 621 (1994) (calling the clause “redundant”); Ratner, *supra* note 65, at 164 n.34 (calling the clause “superfluous” as a result of the change to “Judicial Power”); Velasco, *supra* note 48, at 733 (calling the clause “unnecessary”). It is also possible that whereas the assignment clause would have given Congress control over the extent of inferior courts’ jurisdiction, its deletion, along with the concomitant shift to “[t]he Judicial Power,” signaled protection of that jurisdiction (albeit not the courts themselves) from legislative elimination. In other words, whereas the *description* of the (potential) jurisdiction simply moved, the *discretion* given to the legislature (beyond the question of whether to establish inferior courts at all) may have been eliminated.

<sup>182</sup> Amar, *Two Tiers*, *supra* note 53, at 241 n.120.

<sup>183</sup> *See id.* at 214 n.39, 241 n.120.

that power had “disappeared.”<sup>184</sup> With the August 27 twist of the trickle-down effect from the emendation of the Extension Clause, Amar continues to ask too much, particularly when a straightforward interpretation of the development of the Exceptions Clause is available, under which its form-shifting function never wavered.

Robert Clinton, advocating a tier-free theory of guaranteed jurisdiction for all listed cases in some Article III court, also has argued that the rewording of the Extension Clause affected the Exceptions Clause, but with a take somewhat different from Amar’s:

Once the described jurisdiction was applicable to the judicial power of the United States as a whole, . . . “exceptions” from the appellate jurisdiction of the Supreme Court could be made *only* by vesting jurisdiction over the omitted class of cases in an inferior federal court . . . . Otherwise, the deletion of the power to assign jurisdiction to the inferior federal courts would have left Congress without any explicit grant of authority in the judiciary article to so allocate the judicial power of the United States.<sup>185</sup>

Article III indeed lacks the explicit grant of congressional authority Clinton seeks. One response is that the authority resides in the Necessary and Proper Clause of Article I.<sup>186</sup> An alternative is that perhaps the authority does not exist, and the jurisdiction of inferior courts is constitutionally guaranteed by the Extension Clause.<sup>187</sup> Clinton’s conundrum is thus a contrived one. Regardless, his resolution of it is unconvincing. If, as he suggests, the only way to invest inferior federal courts with jurisdiction were through exceptions to the Supreme Court’s appellate jurisdiction, then the inferior courts’ decisions would be unreviewable. Yet on the day the Extension Clause was expanded, a motion had earlier been made proposing that in cases within the Supreme Court’s appellate jurisdiction, “original jurisdiction shall be in the Courts of the several States.”<sup>188</sup> That proposal was quickly withdrawn in favor of a successful motion settling the Appellate Jurisdiction

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<sup>184</sup> *Id.* at 214 n.39; *see supra* notes 150–161 and accompanying text.

<sup>185</sup> Clinton, *supra* note 71, at 793 (emphasis added).

<sup>186</sup> *See, e.g.*, Calabresi & Lawson, *supra* note 80, at 1041 & n.159 (surmising that the clause allows Congress to “set [the] jurisdiction” of inferior courts).

<sup>187</sup> *See supra* note 181 (speculating that deletion of the assignment clause may have eliminated legislative control of inferior courts’ jurisdiction). A thorough discussion of that possibility is beyond the scope of this Article.

<sup>188</sup> 2 RECORDS, *supra* note 1, at 422 (Aug. 27), 424 (journal).

Clause in close to its final form.<sup>189</sup> Had the delegates intended to insulate the decisions of inferior federal courts from review in the Supreme Court, they easily could have retained the withdrawn language, but instead they left open the possibility that cases on appeal to the Supreme Court might have originated in such courts.<sup>190</sup>

In short, Clinton's claim that the shift from "jurisdiction of the Supreme Court" to "Judicial Power" in the Extension Clause changed the role of the Exceptions Clause is not plausible. There is no reason to doubt that the Exceptions Clause maintained its long-settled transformative function or to think that as a result of the shift, exceptions could be exercised only in conjunction with the establishment of inferior courts.

Despite his word "only" in the paragraph quoted above, Clinton does elsewhere allow, unlike most observers, that even if the principal role of the Exceptions Clause is to move cases to inferior courts, exceptions might also change jurisdiction from appellate to original form.<sup>191</sup> Conventional scholars who discount that possibility have been misled by other ramifications of the expansion of the Extension Clause to "Judicial Power." That expansion spawned minor clarifying edits to the Original and Appellate Jurisdiction Clauses. Though innocuous at the time, the edits exacerbated the effects of James Wilson's split of the provision about jurisdictional form into two sentences and led to misinterpretations of the Exceptions Clause, as discussed below.

## 2. Clarification of the Original Jurisdiction Clause

With the revision of the Extension Clause, the reference in the succeeding sentence to "this jurisdiction" (which "shall be original") became muddled in that the antecedent "jurisdiction" had turned into "Judicial Power." Many scholars have relied on a distinction between those terms to bolster the conventional view of the exceptions power; because the Extension Clause confers judicial power rather than jurisdiction, the argument goes, interpreting the Exceptions Clause to allow the elimination of jurisdiction does not pit one constitutional clause against another.<sup>192</sup> To be sure, the terms are not synonyms—"Judicial Power" is broader than "jurisdiction"—but a court's judicial power with

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<sup>189</sup> *Id.*

<sup>190</sup> *See id.* (omitting reference to the original forum of cases within the Supreme Court's appellate jurisdiction).

<sup>191</sup> Clinton, *supra* note 71, at 778, 793 (acknowledging that reading without adopting or rejecting it).

<sup>192</sup> *See supra* note 54 and accompanying text (summarizing scholars' arguments).



respect to a given case is inoperative without jurisdiction. The delegates could not have anticipated that the Supreme Court could end up having one without the other.

Still, it would have been awkward to refer back to “Judicial Power” with “this jurisdiction”; a minor edit was in order. Moreover, the change to “Judicial Power” simultaneously deleted the qualifier “of the Supreme Court” and thus broadened the scope of the Extension Clause to include the potential inferior courts in which that power would be vested.<sup>193</sup> Would the phrase “this jurisdiction” refer to the jurisdiction of the Supreme Court, or of all federal courts?

To clear up the confusion, the delegates immediately edited the affected passage to refocus it on the Supreme Court (italics mark additions and strikethroughs deletions):

In [two types of] cases . . . , ~~this jurisdiction~~ [t]he supreme Court shall ~~be~~ have original *jurisdiction*. In all the other cases . . . , it shall be appellate . . . , with such exceptions . . . as the Legislature shall make.<sup>194</sup>

Those changes solved the syntactical problem posed by “this jurisdiction.” They were so minor that James Madison, who kept the most thorough notes at the Convention, did not even record them, let alone summarize any discussion.<sup>195</sup> But another problem had arisen. The second sentence of the passage no longer mirrored the first in structure,

<sup>193</sup> The “jurisdiction” of inferior courts was still at that time subject to the assignment clause, 2 RECORDS, *supra* note 1, at 176 (Aug. 6), 186 (report of the Committee of Detail) (Madison’s notes), which was deleted later in the day, 2 *id.* at 422 (Aug. 27), 425 (journal), 431 (Madison’s notes).

<sup>194</sup> See 2 *id.* at 422 (Aug. 27), 425 (journal) (recording the passage of the motion resulting in the above edits).

<sup>195</sup> The only recorded discussion from August 27 about the passage concerned whether the Supreme Court’s jurisdiction would “extend[] to matters of fact as well as law—and to cases of Common law as well as Civil law.” 2 *id.* at 422 (Aug. 27), 431 (Madison’s notes). Wilson commented that he believed it would, on both counts. *Id.*; see *infra* notes 286–289 and accompanying text (discussing the impact of that clarification). No discussion on that day or any other referred to a possibility that the exceptions might permit the elimination of jurisdiction.

Ralph Rossum reads that absence as support for the orthodox view: “No questions were raised concerning Congress’ plenary power to make exceptions. The 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.” Rossum, *supra* note 48, at 393. But of course no questions were raised about that power; the power did not exist. The absence of a clear statement one way or another at the Convention by the delegates proves nothing but the necessity of examining the drafting history of the Exceptions Clause.

and the pronoun “it,” now that its antecedent (“this jurisdiction”) had been deleted, stood helplessly alone.

### 3. Clarification—and Obfuscation—of the Appellate Jurisdiction Clause

Had the delegates intended to effect a substantive change when tailoring the Original Jurisdiction Clause to the revised Extension Clause, someone at that time likely would have brought up the need to consider the complementary clause about appellate jurisdiction. But it was not until the following day, August 28, that the delegates noticed the anomaly and rewrote the second sentence to fix “it”:

In [two types of] cases . . . , the supreme Court shall have original jurisdiction. In all the other cases . . . , ~~the Supreme Court~~ shall ~~be~~ have appellate *jurisdiction* . . . , with such exceptions . . . as the Legislature shall make.<sup>196</sup>

This time, Madison did record the editing, describing it as a means “to prevent uncertainty whether ‘it’ referred to the *supreme Court*, or to the *Judicial power*.”<sup>197</sup> Of course, “it” had in fact referred to neither of those two precisely but rather to the Supreme Court’s *jurisdiction*. Thus the substitution of “the Supreme Court” alone did not cure the problem; “shall be appellate” was changed to “shall have appellate jurisdiction.” One can scarcely imagine an indication clearer than Madison’s comment that the editing was grammatical housekeeping, not intended to shift the focus of the sentence from the form of jurisdiction (which an exception could make original) to a grant of jurisdiction (which an exception could withdraw). Yet the comment has been overlooked by scholars.

The editing motion passed easily. But whereas no dissent had been recorded the day before to the clarification of the Original Jurisdiction

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<sup>196</sup> See 2 RECORDS, *supra* note 1, at 434 (Aug. 28), 434 (journal), 437–38 (Madison’s notes) (recording the passage of the motion resulting in the above edits).

<sup>197</sup> 2 *id.* at 434 (Aug. 28), 437 (Madison’s notes). Soon after the previous day’s change to the Extension Clause, a motion had been made to amend the Appellate Jurisdiction Clause by removing the default position of appellate form. See *infra* notes 221–244 and accompanying text (discussing that motion). The motion, which was unsuccessful, used the phrase “the judicial power” in the place of “it,” apparently on the mistaken assumption that all references to the Supreme Court’s jurisdiction would now be turned into the judicial power. See 2 RECORDS, *supra* note 1, at 422 (Aug. 27), 425 (journal) (recording a motion that “the judicial power shall be exercised in such manner as the Legislature shall direct”), 431 (Madison’s notes).

Clause, the Maryland delegation voted against this new change.<sup>198</sup> Leading that delegation was Luther Martin, who fought all perceived encroachments on states in general<sup>199</sup> and on their courts in particular.<sup>200</sup> Martin may have hoped that the “it” would morph into “the Judicial Power”; that way, any inferior courts that were established would be largely deprived of original jurisdiction (absent legislative exceptions), leaving more cases to be tried in state courts. Instead, after the previous day’s deletion of the “assignment clause,” which would have permitted the legislature to assign jurisdiction to inferior courts “in the manner . . . which it shall think proper,”<sup>201</sup> the Constitution remained silent about the issue of jurisdictional form in cases before those courts. That silence was unsurprising; the establishment of inferior courts was not guaranteed, and any attempt to resolve that issue might have risked upsetting the delicate Madisonian compromise. In any event, the Marylanders were outvoted, and Martin would soon stalk out of the Convention,<sup>202</sup> but the drafting problems caused by the revision of the Extension Clause’s subject from “jurisdiction of the supreme court” to “Judicial Power” seemed to be solved.

a. *A Minor Interpretive Problem Solved, a Major One Spawned*

Alas, with these edits, an unforeseen problem with the paragraph about original and appellate jurisdiction had arisen. Though seemingly innocuous, the recasting of the two sentences shrouded their once apparent purpose. After the edits, that purpose could apparently be either to designate forms of jurisdiction (as had been clear before) or to grant jurisdiction. Because both instances of “shall be” had become “shall have,” people could later interpret the sentences as focusing on *having* jurisdiction rather than on the form in which the jurisdiction

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<sup>198</sup> 2 RECORDS, *supra* note 1, at 434 (Aug. 28), 434 (journal), 436 (tabulation of 9–1 vote), 437–38 (Madison’s notes).

<sup>199</sup> JOSEPH C. MORTON, SHAPERS OF THE GREAT DEBATE AT THE CONSTITUTIONAL CONVENTION OF 1787, at 194–96 (2006).

<sup>200</sup> At the Maryland ratifying convention, Martin condemned the subsidiary role for state courts he saw in the Constitution. 3 RECORDS, *supra* note 1, at app. A, CLVIII, 172 (speech of Luther Martin, as printed in newspapers), 204 (protesting that cases deciding federal law would be “*taken away* from the courts of justice of the *different States*, and *confined* to the courts of the *general government*”); 3 *id.* at 220 (complaining that “[t]hese [federal] courts, and *these only*, will have a right to decide upon the laws of the United States”).

<sup>201</sup> 2 *id.* at 176 (Aug. 6) (setting out the clause), 186–87 (Madison’s notes); 2 *id.* at 422 (Aug. 27), 425 (journal) (noting the deletion of the clause), 431 (Madison’s notes).

<sup>202</sup> See MORTON, *supra* note 199, at 196 (setting the date of Martin’s departure as September 4).

would *be*.<sup>203</sup> And this is precisely what happened: the orthodox view holds that the exceptions power enables Congress to stop the Supreme Court from *having* jurisdiction in certain cases altogether.

Neither the adjustment by the full Convention nor James Wilson's division of Edmund Randolph's provision about jurisdictional form into two sentences alone fully accounts for the distortion of the delegates' vision. Absent Wilson's division, congressional power under the orthodox view might actually have been even more sweeping: if an exception to "hav[ing] appellate Jurisdiction" would eliminate jurisdiction, why would the outcome be any different for "hav[ing] original Jurisdiction"? But that view may well not have taken hold at all because it would have been easier to divine—from the contrasting references to original and appellate jurisdiction in a single (hypothetical) sentence—that the focus of the whole sentence, and thus of its clause about exceptions, was jurisdictional form. Conversely, without the changes by the full Convention, Wilson's division on its own might not have caused much interpretive damage; the claims of Professors Amar and Clinton notwithstanding, exceptions to a mandate that jurisdiction "shall be appellate" would naturally yield non-appellate jurisdiction.<sup>204</sup>

The confluence of the tinkering by Wilson and by the Convention, however, allowed the orthodox view to flourish. Once each instance of "shall be" turned into "shall have" (thanks to the Convention), the passage appeared equally likely to be providing for the existence of jurisdiction as for its form. And because the sentence with the exceptions power referred to only the "appellate" form (thanks to Wilson), the contrast with "original" was somewhat inconspicuous and thus the form-shifting interpretation less than obvious. The Exceptions Clause was vulnerable to being hijacked, which indeed it was in the years immediately following the Convention.<sup>205</sup>

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<sup>203</sup> For example, Professors James Liebman and William Ryan acknowledge that as late as August 27, Congress "might have been permitted to make the supreme court's presumptively appellate jurisdiction in the specified cases original." Liebman & Ryan, *supra* note 54, at 756. But they do not adopt that interpretation of the final version. *Id.* at 756 n.274, 774 (rejecting the view that the Supreme Court's original jurisdiction may be expanded and opining that Congress "largely controls" federal jurisdiction).

<sup>204</sup> See *supra* notes 150–175 and accompanying text (discussing scholars' claims that the form-shifting power disappeared in Wilson's draft).

<sup>205</sup> See *infra* notes 316–318 and accompanying text (summarizing how the clause succumbed to the conventional interpretation).

b. *Second-Guessing the Delegates' Syntax*

One might protest that had the delegates of the full Convention meant to retain the Committee of Detail's vision for the paragraph about Supreme Court jurisdiction, they would not have blurred its focus by scrapping the "shall be" construction of the two sentences for "shall have." It is a truism that one can criticize the interpretation of any document on the ground that its drafters could have used language that more precisely expressed the interpreter's understanding.<sup>206</sup> Such criticism proves nothing more than the imperfection of a text, which for Article III is hardly a radical proposition. Still, it is worth contemplating why the delegates so blithely switched from "shall be" to "shall have."

Once the phrase "supreme court" was no longer in the Extension Clause, the form-of-jurisdiction sentences took on a corollary task: in addition to allocating cases between "original" and "appellate," the delegates had to specify whose jurisdiction they were describing. Apparently, the most natural way of doing that was to make the court the subject of each sentence. That was not a bad choice, stylistically; hiding the name of the court in a possessive ("the Supreme Court's jurisdiction shall be") or in the object of a prepositional phrase ("the jurisdiction of the Supreme Court shall be") would not have addressed the new question as directly. Moreover, the delegates may well have thought that the verb phrase that flowed from that choice—"shall have"—would dispel any doubts about whether, in light of the new "Judicial Power" language, the Supreme Court would necessarily have "Jurisdiction" in all the listed cases.

Ironically, that verb phrase instead helped facilitate the ahistorical argument that the Court could be deprived of "hav[ing]" jurisdiction. In retrospect, the delegates tried to pack too much into the two sentences. Perhaps instead they should have spread the ideas across three:

In all the cases before mentioned, the Supreme Court shall have jurisdiction. In [two types of] cases . . . , that jurisdiction shall be original. In all the other Cases before mentioned, it shall be appellate, with such Exceptions . . . as the Legislature shall make.

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<sup>206</sup> See Amar, *Reports*, *supra* note 53, at 1656 (positing that such criticism could be made of every reading of Article III); Meltzer, *supra* note 54, at 1574 ("[F]ar too many constitutional interpretations could be defeated by the claim that, with 20/20 hindsight, the framers could have expressed their support for a particular view more clearly.").

But one can hardly fault the delegates for valuing lexical economy or for failing to foresee that people would interpret their provision permitting Congress to expedite cases to the Supreme Court as instead stopping cases from ever getting there. The relatively limpid prose that emerged from the Committee of Detail had become, at the full Convention, unintentionally ambiguous. And so it came to pass that the insertion of the phrase “Judicial Power” led to a putative legislative power to strip the judiciary.

#### 4. Jostling over Jurisdictional Form

On August 27, the day the subject of the Extension Clause turned into the “Judicial Power,” triggering a trickle of superficial edits to the Appellate and Original Jurisdiction Clauses, the delegates debated several proposals that would have substantively altered the Committee of Detail’s plan for the distribution of jurisdictional form. Each was withdrawn or defeated. Still, the proposals and their dispositions bolster the conclusion that the deliberations of the day concerned the form federal jurisdiction would take, not whether it would be legislatively retractable.

##### a. *The Withdrawn Motion to Withhold Original Jurisdiction from Inferior Courts*

In the middle of a discussion about the jurisdictional form of the newly added category of U.S.-party cases, a motion was made—and then promptly withdrawn—to amend the Appellate Jurisdiction Clause to withhold original jurisdiction from inferior federal courts: “In all the other cases beforementioned original jurisdiction shall be in the Courts of the several States but with appeal both as to Law and fact to the courts of the United States, with such exceptions and under such regulations, as the Legislatures shall make.”<sup>207</sup> Right after the withdrawal, another motion was made and passed, settling the paragraph about jurisdictional form in close to its final wording.<sup>208</sup> Presumably, the delegates had decided that it was unnecessary to specify the original forum for cases that did not start in the Supreme Court.

Though a withdrawn motion can reveal only so much, this one helps show that the focus of the delegates at that time was on resolving the form of federal courts’ jurisdiction. Moreover, the explicit contrast

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<sup>207</sup> 2 RECORDS, *supra* note 1, at 422 (Aug. 27), 424 (journal).

<sup>208</sup> *See id.*

between the “original” and “appe[llate]” forms in the same sentence as the reference to “exceptions” evoked the single-sentence structure of Edmund Randolph’s draft for the Committee of Detail, before James Wilson’s split obscured the interplay among those three terms. The proposal’s “exceptions” presumably would have rerouted original jurisdiction from state to federal courts, allowing the Supreme Court (or perhaps inferior courts) to hear cases right away. So read, the motion was another example of the delegates’ conception of the exceptions power as a way of steering cases quickly to a federal forum.

One scholar, David Engdahl, has instead interpreted the withdrawn motion as proposing to allow Congress to withhold federal jurisdiction.<sup>209</sup> Though as a textual matter that reading may be plausible, the context of the motion suggests otherwise. The Madisonian compromise had not resolved whether inferior courts, if created, would hear cases originally or only on appeal from state courts. Randolph’s draft had described inferior courts’ jurisdiction as “original”; Wilson had made that provision indeterminate, removing the reference to jurisdictional form. The withdrawn motion rejected Randolph’s position outright, trying to confine inferior courts’ jurisdiction to appeals and thus preserve the trial function in most cases for state courts. As such, the motion was mildly provocative but hardly dramatic. Had the motion sought as well to empower Congress to bar cases that started in state courts from ever coming to the Supreme Court—as Engdahl interpreted it—it would have been quite audacious.<sup>210</sup> A premise of the Madisonian compromise appeasing the delegates who favored inferior courts was that even without those courts, “the right of appeal to the supreme national tribunal” would be “sufficient to secure the national rights & uniformity of Judgmnts.”<sup>211</sup> There is no reason to think that the motion sought to undo that right of appeal.

b. *The Failed Proposal to Distinguish U.S.-Party Cases*

The debate about jurisdictional form for U.S.-party cases sheds further light. That category of cases entered the Extension Clause just

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<sup>209</sup> Engdahl, *Intrinsic Limits*, *supra* note 72, at 114.

<sup>210</sup> Engdahl—who does not follow the conventional view of the actual Exceptions Clause—acknowledges that under his reading, the motion was jarring. *See id.* at 114–15 (calling putative power to eliminate federal jurisdiction the motion’s “most interesting feature”).

<sup>211</sup> 1 RECORDS, *supra* note 1, at 115 (June 5), 124 (Madison’s notes) (relating the comment of Rutledge, who advocated deleting inferior courts from the amended Virginia plan).

before the withdrawn motion discussed above.<sup>212</sup> As to the question of form, the new category was first explicitly added to the Original Jurisdiction Clause.<sup>213</sup> But soon after, the delegates agreed on a version of the paragraph about jurisdictional form that did not mention U.S.-party cases, implicitly relegating them to the “other” cases and thus to the default of appellate form.<sup>214</sup> A motion was then made to stake out a middle ground for U.S.-party cases by adding a third sentence to the paragraph: “But in cases in which the United States shall be a Party the jurisdiction shall be original or appellate as the Legislature may direct.”<sup>215</sup> The proposal would have left those cases without even a default position, effectively requiring Congress to resolve the issue one way or another before any such cases could be heard.<sup>216</sup>

The delegates took a step to avoid the risk of legislative inertia by striking from the proposal, by a 6–2 vote, the words “original or.”<sup>217</sup> Without those words, though, the proposal’s language was awkward at best. Most likely, it would have been taken to mean that jurisdiction in U.S.-party cases could be appellate only, without the possibility of a shift to original form (and with legislative “direct[ion]” perhaps necessary to trigger even the appellate form). The majority of the Convention rejected the amended proposal by a 5–3 vote, evidently deciding to establish the appellate form as a default, without foreclosing the legislature’s ability to authorize original jurisdiction.<sup>218</sup> Thus, no special language about the jurisdictional form of U.S.-party cases was necessary; they would be treated the same as “all the other Cases.”

The grammatical structure of the original proposal and its apparent attempt at reaching a compromise between opposing positions confirm that the issue on the floor of the Convention was not whether the

<sup>212</sup> 2 *id.* at 422 (Aug. 27), 423 (journal), 430 (Madison’s notes).

<sup>213</sup> 2 *id.* at 422 (Aug. 27), 424 (journal) (inserting “the United States or” before “a State shall be a party”).

<sup>214</sup> The successful motion amended the sentences to read as follows:

In cases of impeachment, cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, this jurisdiction shall be original[.] In all the other cases before mentioned it shall be appellate both as to law and fact with such exceptions and under such regulations as the Legislature shall make[.]

*Id.*

<sup>215</sup> 2 *id.* at 422 (Aug. 27), 424 (journal).

<sup>216</sup> *Cf.* Claus, *One Court*, *supra* note 86, at 84 (calling the proposal “ambiguous, superfluous, or both”).

<sup>217</sup> 2 RECORDS, *supra* note 1, at 422 (Aug. 27), 424 (journal).

<sup>218</sup> 2 *id.* at 422 (Aug. 27), 424–25 (journal).



Supreme Court would have jurisdiction in U.S.-party cases; that grant had presumably already been accomplished by the addition of those cases to the Extension Clause (which was still, though not for long, phrased in terms of the “jurisdiction of the Supreme Court” rather than the “Judicial Power”). Rather, the jockeying was about what form the jurisdiction would take and whether the delegates should make that decision initially or leave it completely open for Congress.

Yet Akhil Amar cites the defeat of this proposal as evidence that original jurisdiction cannot be expanded to any cases beyond those listed, in that “the Convention explicitly rejected [an] amendment[] to Article III . . . that would have permitted augmenting the Supreme Court’s original jurisdiction.”<sup>219</sup> With respect to the pre-amendment version of the proposal, that statement is true as far as it goes, but the delegates did not reject the idea that original jurisdiction could ever be augmented; such elasticity was entrenched in the paragraph in question regardless of the fate of the proposed extra sentence about U.S.-party cases. More to the point, the proposal’s failure signaled rejection of both the idea (in the pre-amendment version) of withholding a default jurisdictional form and the idea (in the amended version) of foreclosing the legislature’s ability to grant original jurisdiction in U.S.-party cases—the opposite of what Amar contends. The delegates no more denied Congress the power to augment original jurisdiction than, by voting down a proposal that “no act of the Legislature . . . regulating . . . commerce . . . shall be passed without the assent of 2/3rds of the Members of each House,”<sup>220</sup> they denied Congress the power to regulate commerce.

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<sup>219</sup> Amar, *supra* note 76, at 467–68 & n.115. Amar insists that the difficulty of travel to the nation’s capital compelled the delegates to confine original jurisdiction—exercised in trials, with their attendant need for witnesses—to a small number of cases. *Id.* at 469–78. He acknowledges, though, that days of easier travel were anticipated; in his telling, that foresight contemplated an eventual reduction in parochialism and thus justified the relegation of diversity jurisdiction to his putative “second tier” of disputes that could be taken away from federal courts. *Id.* at 477–78. Even if the geographic analysis helps account for the paucity of cases with constitutionally guaranteed original jurisdiction, so too can the delegates’ vision of a metaphorically shrinking nation help explain why they included a mechanism allowing future legislators to gauge when improved means of travel would warrant statutory additions.

<sup>220</sup> See 2 RECORDS, *supra* note 1, at 445 (Aug. 29), 445–46 (journal), 449–53 (Madison’s notes).

c. *The Rejection of Open-Ended “Manner”*

The wrangling about jurisdictional form soon continued, with the stakes not limited to U.S.-party cases. After the expansion of the subject of the Extension Clause to the “Judicial Power” came a motion to amend the Appellate Jurisdiction Clause<sup>221</sup> to read, “In all the other cases before mentioned the judicial power shall be exercised in such manner as the Legislature shall direct.”<sup>222</sup>

The proposal evidently would have punted the question of form for cases without guaranteed original jurisdiction completely to Congress, without a constitutional starting point.<sup>223</sup> As apparent from the word “manner,” the focus was not *whether* the Supreme Court (or inferior courts) could exercise the judicial power, but *how*. The phrase “all the other cases” (mirroring the existing language, which would survive) yoked the proposal to the preceding sentence fixing the Supreme Court’s jurisdiction as “original” in cases with state parties or affecting foreign sovereign agents.<sup>224</sup> Regarding the “other” cases, “manner” was a shorthand for jurisdictional form: Congress would need to decide whether the judicial power was to be exercised originally or on appeal. As it turned out, the delegates rejected the proposal by a 6–2 vote, preserving the existing default position of appellate form.<sup>225</sup>

Just before the “manner” motion was made, the operative provision of the Original Jurisdiction Clause had been changed—to conform to the reconfigured Extension Clause—from “this jurisdiction shall be original” to “[t]he supreme Court shall have original jurisdiction.”<sup>226</sup> As discussed above, that change (in conjunction with the paral-

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<sup>221</sup> Some have expressed uncertainty about where the language was to appear. See, e.g., Holt, *supra* note 79, at 1509 n.329 (noting that it was to go in an “unspecified” location). Madison’s notes referred to the motion as one to “insert.” 2 RECORDS, *supra* note 1, at 422 (Aug. 27), 431 (Madison’s notes). The journal of the Convention, however, referred to it as an “amendment,” which rings true, as the language could have logically functioned only as a replacement of the existing Appellate Jurisdiction Clause. 2 *id.* at 422 (Aug. 27), 425 (journal); see also Amar, *supra* note 76, at 468 n.115 (calling the proposal one to “alter” existing language).

<sup>222</sup> 2 RECORDS, *supra* note 1, at 422 (Aug. 27), 425 (journal), 431 (Madison’s notes).

<sup>223</sup> *But cf.* Claus, *Constitutional Guarantees*, *supra* note 86, at 468–69 n.34 (discounting the potential impact of the motion by calling the proposal “ambiguous or superfluous or both”); accord Claus, *One Court*, *supra* note 86, at 84.

<sup>224</sup> Nondiplomatic “Consuls” have been referred to, along with “Ambassadors” and “other public Ministers,” as “foreign sovereign agents.” Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 COLUM. L. REV. 830, 855, 884–85 (2006).

<sup>225</sup> 2 RECORDS, *supra* note 1, at 422 (Aug. 27), 425 (journal).

<sup>226</sup> *Id.*; see *supra* notes 192–195 and accompanying text.

lel one in the Appellate Jurisdiction Clause<sup>227</sup>) would in future years mislead interpreters by highlighting the identity of the court at the expense of the form of jurisdiction.<sup>228</sup> By using the word “manner” in the sentence to be linked with the Original Jurisdiction Clause, the rejected proposal signaled that even though that clause had been recast out of grammatical necessity, it was still understood as addressing the form in which jurisdiction would be exercised.

Several scholars have asserted that the proposal, as one put it, “would have given Congress complete control over the Court’s appellate jurisdiction,”<sup>229</sup> and thus that its defeat shows that the exceptions power was not meant to be unfettered.<sup>230</sup> For example, in support of his thesis that excepted cases must acquire jurisdiction in inferior courts, Robert Clinton has written of the “manner” motion’s fate that “[a] clearer rejection of congressional authority over judicial powers is hard to imagine.”<sup>231</sup> Likewise, Leonard Ratner interpreted the defeat as an embrace of his view, namely, that exceptions must preserve the “essential constitutional functions of the Court.”<sup>232</sup> But the proposal had raised no specter of substantive legislative control; it addressed only the “manner” of “exercis[ing]” jurisdiction.

That narrow focus has also been overlooked by scholars who view congressional power as more boundless. For example, Julian Velasco

<sup>227</sup> 2 RECORDS, *supra* note 1, at 434 (Aug. 28), 434 (journal), 437–38 (Madison’s notes); *see supra* notes 196–205 and accompanying text.

<sup>228</sup> *See supra* notes 203–205 and accompanying text.

<sup>229</sup> Sager, *supra* note 65, at 49–50 n.95 (calling this reading “commonly understood” and speculating that the proposal might have even allowed Congress to increase the Supreme Court’s original jurisdiction); *see also* Ratner, *supra* note 68, at 944 (reading the proposal as asserting “unrestricted congressional control over the Supreme Court’s appellate jurisdiction”).

<sup>230</sup> *See* Brant, *supra* note 70, at 7 (opining that the rejected language “would have given Congress the extensive power it claims it possesses”); Levy, *supra* note 35, at 183 (positing that the rejected edit would have given “full control to Congress” over the Supreme Court’s jurisdiction); Mickenberg, *supra* note 70, at 515–16 (interpreting the motion’s defeat as a rejection of full congressional power over the appellate jurisdiction of the Supreme Court); Strasser, *supra* note 70, at 175 & n.291 (interpreting the motion’s defeat as a rejection of “plenary control over the jurisdiction of the Court”); *cf.* GOEBEL, *supra* note 72, at 243 n.228 (calling the rejection of the motion evidence that “the majority wished to eliminate legislative direction and make the judicial [branch] a fully coordinate department”).

<sup>231</sup> Clinton, *supra* note 71, at 791 (acknowledging but largely discounting the possibility that the proposal’s focus was merely a distribution of jurisdictional form). Amar, who espouses in part (for his “mandatory” tier of cases) the same theory, also finds the failure of the proposal to be significant. Amar, *Two Tiers*, *supra* note 53, at 214 n.39 (interpreting the rejection as foreclosing the possibility of expanding the Supreme Court’s original jurisdiction); Amar, *supra* note 76, at 467–68 & n.115 (same).

<sup>232</sup> Ratner, *supra* note 65, at 173.

has characterized the proposal as merely “stylistic,” as Congress already had “plenary authority” over federal jurisdiction.<sup>233</sup> If anything, in his view, the proposal would have fortified legislative control by “empower[ing] Congress to dictate to the courts how they should decide the cases before them.”<sup>234</sup> Similarly, James Liebman and William Ryan interpret the rejection as having protected the “quality” or independence of adjudication guaranteed by Article III, in that the proposal would have allowed Congress to manipulate the way courts go about deciding cases.<sup>235</sup>

Those readings accord “manner” more weight than it can bear. At the time of the failed motion, the “assignment clause” (addressing inferior courts’ jurisdiction) was still part of the draft of Article III (though it would not survive the day).<sup>236</sup> The first draft of that clause had envisioned inferior courts “as original tribunals,”<sup>237</sup> but the version reported by the Committee of Detail to the Convention dropped that prescription, instead permitting the legislature to bestow jurisdiction on them “in the manner . . . which it shall think proper.”<sup>238</sup> The word “manner” evidently referred to whether inferior courts could hear cases originally or (as the failed motion discussed above had advocated<sup>239</sup>) only on appeal from state courts. Along similar lines, the earlier motion about U.S.-party cases had proposed that jurisdiction be “*original or appellate* as the Legislature may direct”;<sup>240</sup> the broader motion about “all the other cases,” by proposing that the judicial power be “*exercised in such manner* as the Legislature shall direct,” conveyed the same idea in slightly different language.<sup>241</sup>

In the context of the debates about jurisdictional form, the import of the “manner” motion—which sought to amend a paragraph devoted to that very topic—was clear. “[I]n such manner” did not mean, as the scholars above theorized, “in such cases” or “with such results”; it meant

<sup>233</sup> Velasco, *supra* note 48, at 732–33.

<sup>234</sup> *Id.* at 733; *see also* Rossum, *supra* note 48, at 393 n.44 (arguing that the existing language lets Congress control which appellate cases the Supreme Court hears, whereas the proposal would have allowed it to determine the outcome of cases).

<sup>235</sup> Liebman & Ryan, *supra* note 54, at 754 & n.271.

<sup>236</sup> *See* 2 RECORDS, *supra* note 1, at 422 (Aug. 27), 425 (journal) (striking clause), 431 (Madison’s notes).

<sup>237</sup> 4 *id.* at 37 (Randolph draft), 48; *see also* 2 *id.* at 137 (Randolph draft), 147; *supra* note 131 (explaining the different transcriptions in volumes 2 and 4 of *Records*).

<sup>238</sup> 2 RECORDS, *supra* note 1, at 176 (Aug. 6), 177 (report of the committee) (Madison’s notes), 186–87.

<sup>239</sup> *See supra* notes 207–211 and accompanying text.

<sup>240</sup> 2 RECORDS, *supra* note 1, at 422 (Aug. 27), 424 (journal) (emphasis added).

<sup>241</sup> *Id.* at 422 (Aug. 27), 425 (journal) (emphasis added).

“in original or appellate form.”<sup>242</sup> In the final Constitution, the word “manner” does not appear in Article III, but elsewhere, such as in the Article I provision about the “Times, Places and Manner” of congressional elections, it refers to procedural matters.<sup>243</sup> Reading that word in the motion as giving Congress substantive authority to deny jurisdiction overestimates its reach. The motion was simply one in a series hashing out the details of jurisdictional form. As the delegates tweaked the committee’s draft, on August 27 and beyond, not once was it suggested that Congress might control the existence, as opposed to merely the form, of the Supreme Court’s jurisdiction.<sup>244</sup>

#### IV. THE APPELLATE JURISDICTION CLAUSE IN FULL FORM

##### A. *The “Regulations” Power*

The segment of the Appellate Jurisdiction Clause undergirding the orthodox view of congressional control is of course known most formally as the Exceptions *and Regulations* Clause. Though few have constructed arguments founded squarely on the premise that the Supreme Court has appellate jurisdiction “under such Regulations as the Congress shall make,”<sup>245</sup> defenders of the orthodoxy often stress the clause’s full name. But the contention that Congress may “regulate”

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<sup>242</sup> See *supra* notes 231–235 and accompanying text.

<sup>243</sup> U.S. CONST. art. I, § 4; see also *id.* art. II, § 1 (giving state legislatures control over the “Manner” of selection of presidential electors); *id.* art. IV, § 1 (giving Congress the power to prescribe the “Manner” in which public acts of states can be proved).

<sup>244</sup> In the Committee of Detail, Randolph had floated such an idea for some cases, only to have it scotched by Wilson. See *supra* note 142 (referring to Randolph’s Extension Clause category for certain “other cases, as the national legislature may assign”).

<sup>245</sup> See Mickenberg, *supra* note 70, at 509 n.79 (“[T]he ‘regulations’ aspect of the exceptions clause generally has been ignored.”). One scholar has even renounced that potential justification for the conventional wisdom. See Velasco, *supra* note 48, at 714–15 (defending the traditional view but acknowledging that the term “regulations” does not bolster it).

Most notably, one who did rely on the regulatory power was Chief Justice John Marshall. In holding that the Supreme Court had no jurisdiction to review a criminal case from the Circuit Court for the District of Columbia, he wrote that although the Constitution would permit such jurisdiction, the relevant statute, which referred only to civil cases, did not: “[A]s the jurisdiction of the court has been described, it has been regulated by congress, and an affirmative description of its powers must be understood as a regulation, under the constitution, prohibiting the exercise of other powers than those described.” *United States v. More*, 7 U.S. (3 Cranch) 159, 173 (1805); see also Liebman & Ryan, *supra* note 54, at 756, 777 (calling the “Regulations” power “the source of [Congress’s] ability to control appeals” by “declining to authorize the transfer of records and issuance of judgments needed to permit appeals”).

appellate jurisdiction by withdrawing it from certain cases, without a shift to original form, is unpersuasive. The power to regulate may be hard to circumscribe with precision, but the constitutional text, context, and drafting history reveal it to be toothless—dispelling the notion that Congress might be able to regulate the Court’s appellate jurisdiction out of existence.<sup>246</sup>

### 1. Text and Context

If an *exception* does not deprive the Supreme Court of jurisdiction but merely reshapes it, a *regulation* could hardly effect such a dramatic result. Exceptions are the more potent modifier in that they signal a U-turn. Through an exception, a grant can be negated, as in the provision for a presidential pardon power “except in Cases of Impeachment,”<sup>247</sup> or a negation can turn into a grant, as in the provision that “[n]o Person except a natural born Citizen . . . shall be eligible to the Office of the President.”<sup>248</sup> Through an exception, a power can be channeled to a new time, as in the shifting of appellate jurisdiction into the expedited original form, or to a new place, as in the provision that “[t]he Trial of all Crimes, except in Cases of Impeachment; shall be by Jury,” which in conjunction with another clause sends impeachment trials to the Senate.<sup>249</sup> In contrast, regulations override nothing. They merely harness a power, streamlining it for efficient use.<sup>250</sup>

Having jurisdiction “under [congressional] Regulations” is thus still having jurisdiction. It is just that Congress may enact clerical controls to guide cases to and through the Supreme Court’s docket. “Regulations” are referred to several other times in the Constitution. In only one place does the context spell out what is meant. Article I provides that the “Times, Places and Manner” of congressional elections shall be set by the states but that Congress may change those “Regulations.”<sup>251</sup> The regulation of appellate jurisdiction was presumably intended to be

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<sup>246</sup> See Mickenberg, *supra* note 70, at 510 (arguing that the power to regulate jurisdiction “cannot include the ability to abolish [it]”); Ratner, *supra* note 65, at 171 n.66 (citing cases in support of the proposition that the power to regulate is not the power to eliminate).

<sup>247</sup> U.S. CONST. art. II, § 2; *see also id.* art. I, § 4 (“Congress may . . . alter [state-prescribed electoral] Regulations, except as to the Places of chusing Senators.”).

<sup>248</sup> *Id.* art. II, § 1.

<sup>249</sup> *Id.* art. III, § 2; *see also id.* art. I, § 3 (granting the Senate “the sole Power to try all Impeachments”).

<sup>250</sup> See 2 THOMAS SHERIDAN, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 1797) (defining “regulate” as “[t]o adjust by rule or method; to direct”).

<sup>251</sup> U.S. CONST. art. I, § 4.

similar, allowing Congress to promulgate rules of convenience and efficiency to control the movement of cases.<sup>252</sup> For example, a requirement that all appeals or petitions to the Supreme Court be filed within thirty days of the judgment in another court would be such a regulation. An act stripping the Court of jurisdiction over certain cases—thus elevating legislative policy over the allocation of judicial power in the Constitution—would not.<sup>253</sup>

To extend the analogy from above, consider the following instructions: “At dinner, the kids shall have hot food. At other mealtimes, the kids shall have cold food, with such exceptions, *and under such regulations*, as you shall make.”<sup>254</sup> No reasonable babysitter or parent would deem the elimination of a non-dinner meal to be an appropriate “regulation.” Procedural “housekeeping” rules,<sup>255</sup> such as that one must wash hands before a meal and refrain from yelling during it, would be legitimate. But a regulation cannot destroy what it is regulating. As with the original version of the hypothetical, context—the understood principle that at mealtimes, children eat (paralleling the constitutional principle that in listed cases, the Supreme Court is vested with the judicial power)—confirms the conclusion. Appeals may be dismissed for lateness, and children for loudness.<sup>256</sup> Doing away with a case or meal *ab initio*, though, under the guise of “regulation,” would mangle the word beyond recognition.

## 2. Drafting History

The drafting history of Article III likewise shows that “Regulations” were not intended to be paradoxically more potent than “Exceptions.” The regulatory power originated, as an organizational afterthought, in Edmund Randolph’s draft and was then incorporated,<sup>257</sup> in more for-

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<sup>252</sup> See Ratner, *supra* note 65, at 170 (citing several eighteenth-century dictionaries to the effect that “regulation” meant “rule imposed to establish good order”). In the Judiciary Act of 1789, the First Congress used a phrase that captured the non-substantive nature of regulations: “necessary rules for the orderly conducting [of] business.” Ch. 20, § 17, 1 Stat. 73, 83 (delegating to the judiciary the authority to establish such rules).

<sup>253</sup> See Beck, *supra* note 66, at 780 (arguing that whereas Congress’s exceptions power permits it to “preclude the Court from entertaining [a] claim,” the regulations power “merely sets order or method to the process”).

<sup>254</sup> See *supra* notes 97–98 and accompanying text (introducing analogy).

<sup>255</sup> See *Hanna v. Plumer*, 380 U.S. 460, 473 (1965) (reaffirming Congress’s power to prescribe nonsubstantive “housekeeping rules for federal courts”).

<sup>256</sup> Compare *Bowles v. Russell*, 551 U.S. 205, 206–07 (2007) (sending a case away after a missed deadline), with *MAURICE SENDAK, WHERE THE WILD THINGS ARE* (1963) (sending a child away after mischief).

<sup>257</sup> See *infra* notes 260–267 and accompanying text.

mal language, into James Wilson’s revision.<sup>258</sup> The apparent indifference of other delegates to the language, however, suggests that it was accorded little import at the Convention.<sup>259</sup>

a. *Edmund Randolph’s Afterthought*

The “[r]egulat[ory]” power arose explicitly in James Wilson’s draft for the Committee of Detail but had its roots in a late addition to the preceding draft by Edmund Randolph: “[T]his supreme jurisdiction shall be appellate only, except in those instances, in which the legislature shall make it original. *and the legislature shall organize it[.]*”<sup>260</sup> Though some scholars have seized on the word “organize” as an early source of authority to take cases from the Supreme Court,<sup>261</sup> to organize something is not to eliminate it. A request to organize some papers could hardly be obeyed by throwing them away, as quips about “the circular file” suggest. Elsewhere in his draft, Randolph listed a congressional power to “organize the government” in some indeterminate instances.<sup>262</sup> What he had in mind, one suspects, was not that Congress might dismantle the government, but that it would enact regulatory measures to implement the constitutional plan.<sup>263</sup> Similarly, there is no indication that Randolph thought Congress should be able to “organize” the Supreme Court’s jurisdiction by nullifying it.

The organizational directive was an afterthought. The text in Randolph’s hand shows that the spacing between the seventh and eighth subparts of the judiciary provision was consistent with that be-

<sup>258</sup> See *infra* notes 268–271 and accompanying text.

<sup>259</sup> See *infra* notes 272–279 and accompanying text.

<sup>260</sup> MEIGS, *supra* note 102, at 316-VII (reprinting facsimile of Randolph’s handwritten draft) (emphasis added); 2 RECORDS, *supra* note 1, at 137, 147; see also 4 *id.* at 37 (Randolph draft), 48 (substituting a colon for the first period); *supra* note 131 (explaining the different transcriptions in volumes 2 and 4 of *Records*).

<sup>261</sup> Liebman & Ryan, *supra* note 54, at 738 (claiming that the word “organize” in Randolph’s draft “expressly” empowered the legislature to restrict the Court’s jurisdiction).

<sup>262</sup> 4 RECORDS, *supra* note 1, at 37 (Randolph draft), 45 (in an incomplete sentence, referring to a legislative power to “organize the government in those things, which”); 2 *id.* at 137 (Randolph draft), 144. The fragment was crossed out, presumably by either Randolph or John Rutledge.

<sup>263</sup> Madison had previously spoken of the importance that the new government be “organized” in republican form. 1 *id.* at 209 (June 12), 219 (Madison’s notes). As David Engdahl has put it, Randolph’s clause would have “enabled the legislature to resolve any otherwise unresolved problems of judicial organization and work load allocation.” Engdahl, *What’s in a Name?*, *supra* note 72, at 482 (judging Randolph’s two clauses about organization to be precursors to the Necessary and Proper Clause); see also Clinton, *supra* note 71, at 774 (interpreting the organizational power to concern “rules of practice and procedure”).



tween other subparts, until he squeezed in between two lines, in smaller letters than usual, “and the legislature shall organize it.”<sup>264</sup> Those words followed a period, showing that the idea had earlier been complete with “shall make it original.”<sup>265</sup> One of the only other places where Randolph put a period in the judiciary provision was just before he likewise wedged the phrase “and [judges] shall swear fidelity to the union” in between two lines, in cramped script.<sup>266</sup> That Randolph apparently inserted the words about organization only after he had finished a preliminary draft of the provision suggests that they were collateral to the allocation of jurisdictional form.

Randolph’s draft contained no version of the eventual Necessary and Proper Clause,<sup>267</sup> and he may have feared that without the added language, Congress might be unable to enact logistical measures governing the filing of cases in the Supreme Court. His directive to the legislature to “organize” the jurisdiction contemplated a clerical duty, not a license to eviscerate another branch of the government.

#### b. *James Wilson’s Restyling*

James Wilson built on Randolph’s ideas but chose different language for his draft. The phrasing of congressional power to make exceptions to the appellate form of the Supreme Court’s jurisdiction was revised,<sup>268</sup> and in place of the mandate to “organize,” he wrote of “Regulations”: “In all the other Cases beforementioned, [jurisdiction] shall be

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<sup>264</sup> MEIGS, *supra* note 102, at 316-VII (reprinting facsimile of Randolph’s handwritten draft).

<sup>265</sup> See *id.*; 2 RECORDS, *supra* note 1, at 137 (Randolph draft), 147; *cf.* 4 *id.* at 37 (Randolph draft) (corrected version), 48 (rendering the punctuation mark as a colon rather than a period). Max Farrand’s version in volume 2 of *Records* is a transcription from a facsimile; his updated version in volume 4 uses different punctuation based on a review of the original. 2 *id.* at 137 n.6; 4 *id.* at 37 n.6. Presumably, some faint but visible marks on the original manuscript made what had in the facsimile seemed to be periods instead appear to be colons. That distinction occurs not only before “and the legislature shall organize it” but in several places throughout the judiciary provision. Compare 2 *id.* at 137 (Randolph draft), 146–47 (using periods), with 4 *id.* at 37 (Randolph draft), 47–48 (using colons). In the updated version, colons end several of the subparts, so regardless of what the punctuation mark before “and the legislature shall organize it” actually was, that language seems to have been a late addition.

<sup>266</sup> MEIGS, *supra* note 102, at 316-VII (reprinting facsimile of Randolph’s handwritten draft); see also 4 RECORDS, *supra* note 1, at 37 (Randolph draft) (corrected version), 47; 2 *id.* at 137 (Randolph draft), 146.

<sup>267</sup> Wilson inserted the “necessary and proper” power in his later draft. 2 RECORDS, *supra* note 1, at 163 (Wilson draft), 168.

<sup>268</sup> See *supra* notes 150–161 and accompanying text (comparing Wilson’s draft to Randolph’s).

appellate, with such Exceptions and *under such Regulations* as the Legislature shall make.”<sup>269</sup>

Wilson was using another phrase, a bit more legalistic, to convey the same idea as Randolph’s (though with a diluted sense of legislative duty).<sup>270</sup> In the very next clause of his draft, Wilson used a word giving Congress a substantive power to withhold jurisdiction: “Limitations.” Randolph had introduced the “assignment clause,” the provision empowering the legislature to assign the Supreme Court’s jurisdiction to *inferior* courts; Wilson elaborated that such “distribut[ion]” would be “in the Manner and under the Limitations which [the legislature] shall think proper.”<sup>271</sup> Had Wilson contemplated similar control over the jurisdiction of the *Supreme* Court, he likely would have framed the legislative power as one to limit, rather than to regulate.

### c. *The Convention’s Indifference*

The Committee of Detail was working from the resolutions approved by the Convention, none of which called for any control by Congress over whether the Supreme Court had jurisdiction. Nor did the resolutions say anything about jurisdictional form, to be sure, but the topic had been tentatively raised,<sup>272</sup> and although the Convention had not settled anything, it was natural for the committee to address that detail when fleshing out the skeletal structure of the amended Virginia plan. Likewise, enabling the legislature to organize or regulate jurisdiction through neutral procedural rules was hardly jarring.

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<sup>269</sup> 2 RECORDS, *supra* note 1, at 163 (Wilson draft), 173 (emphasis added). “[B]efore-mentioned” cases were those referred to in the Extension Clause but not in the Original Jurisdiction Clause. *See id.*

<sup>270</sup> *See* Claus, *One Court*, *supra* note 86, at 82 (“The most plausible reading of Wilson’s provision for the Court’s appellate jurisdiction is that . . . Randolph’s ‘organize’ becomes Wilson’s ‘Regulations.’”). Indeed, Wilson himself used “regulation” and “organiz[ation]” as synonyms when discussing the judicial power at the Pennsylvania ratifying convention. *See* 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 486 (Dec. 7, 1787), 488 (Jonathan Elliot ed., 2d ed. 1836) [hereinafter ELLIOT’S DEBATES] (stating that because delegates to the Federal Convention had not had time to develop appropriate “regulations” concerning the conduct of civil trials, they had left the issue to be “organized” by Congress). As with citations of Farrand’s *Records*, in order to orient the reader, I have included in each citation of Elliot’s *Debates* the page number for the start of the day in question, followed by the page number for the specifically relevant material. *See supra* note 1.

<sup>271</sup> 2 RECORDS, *supra* note 1, at 163 (Wilson draft), 173.

<sup>272</sup> *E.g.*, 1 *id.* at 209 (June 12), 211 (journal), 220 (Madison’s notes) (noting the proposal that “the jurisdiction of the supreme Tribunal shall be to hear and determine in the dernier resort [various cases]”).

Providing for the potential obliteration of the Supreme Court's appellate jurisdiction, in contrast, would have provoked dissension. After the committee reported its draft, which left Wilson's Appellate Jurisdiction Clause alone other than in capitalization,<sup>273</sup> many aspects of it were debated by the Convention, but the language about regulations went unnoticed and untouched, aside from a substitution by the Committee of Style, at summer's end, of "Congress" for "Legislature."<sup>274</sup> The delegates seemed to understand that regulations would merely facilitate the Court's jurisdiction, not negate it.

Two of the proposals rejected by the Convention are further evidence that the delegates found "regulations" to be of little import. One would have made the Appellate Jurisdiction (and Exceptions and Regulations) Clause more flexible, without a default form: "In all the other cases before mentioned the judicial power shall be exercised in such manner as the Legislature shall direct."<sup>275</sup> As discussed above, the phrase "in such manner" was primarily a proxy for "in appellate or original form."<sup>276</sup> Because the phrase also evoked the usual meaning of "regulations," it is no surprise that the proposal omitted that word.

Had "regulations" been viewed as signaling a power greater than control over the manner in which jurisdiction would be exercised—such as a power to invalidate its exercise—the proposal's omission of the word would have been dramatic. Delegates wishing to repudiate that putative power likely would have tried to do so directly by moving to strike the offending word, rather than by recasting the existing sentence to remove the default form of jurisdiction. Conversely, if defenders of the putative power had opposed the proposal for lacking language about "regulations," someone might well have offered an amended motion. Instead, the modest proposal was simply rejected, presumably on the ground that the Constitution should retain the default appellate form, subject to change by the legislature.

A similar motion, defeated earlier on the same day, proposed that the Court's jurisdiction in U.S.-party cases "shall be original or appellate as the Legislature may direct."<sup>277</sup> Whereas the other proposal at least

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<sup>273</sup> 2 *id.* at 176 (Aug. 6), 186 (Madison's notes) (report of the Committee of Detail) (also adding a space between "before" and "mentioned").

<sup>274</sup> 2 *id.* at 582 (Sept. 12), 590 (report of the Committee of Style), 601. Though the Committee of Detail's report had put "regulations" in lowercase, Wilson's capitalization was later reinstated. 2 *id.* at 651 (Constitution), 661.

<sup>275</sup> 2 *id.* at 422 (Aug. 27), 425 (journal), 431 (Madison's notes).

<sup>276</sup> See *supra* notes 221–244 and accompanying text.

<sup>277</sup> 2 RECORDS, *supra* note 1, at 422 (Aug. 27), 424–25 (journal).

gave a nod to the general regulatory power with the word “manner,” the one about U.S.-party cases was only about jurisdictional form. The absence of any reference to “regulations” apparently did not spark any debate; the motion was voted down without any recorded discussion.

The indifference of the delegates toward the “regulations” of the Supreme Court’s jurisdiction is reflected in the final Constitution. When Randolph wrote that the legislature “shall organize it,” the “it” was the Court’s jurisdiction—original and appellate.<sup>278</sup> When Wilson turned organization into regulation, he simultaneously divided Randolph’s single sentence into two.<sup>279</sup> The meaning of “Exceptions” remained clear enough, as discussed above. Despite Wilson’s probable intent, however, the regulations appeared to apply only to jurisdiction that would “be appellate.” An indiscriminate invoker of *expressio unius est exclusio alterius* might infer that the delegates, by leaving Wilson’s language about regulations alone, wanted to bar Congress from regulating jurisdiction that would “be original.” More likely, the Necessary and Proper Clause—introduced in Wilson’s draft—took over the role of authorizing Congress to enact rules facilitating both types of jurisdiction, leaving the “regulations” of the Appellate Jurisdiction Clause dispensable. The presence or absence of the word thus was not an issue of concern to most delegates.

### 3. The Limits of “Regulations”

Clear as it is that regulation may not constitutionally drift into jurisdiction-stripping, the boundary is hard to pinpoint. James Madison recognized a similar difficulty when successfully arguing that because “times places & manner . . . were words of great latitude,” federal supervisory authority over congressional elections was necessary to prevent abuses of discretion in which state legislatures would “mould their regulations as to favor the candidates they wished to succeed.”<sup>280</sup> A thirty-day filing deadline for all cases before the Supreme Court may be constitutional, but what about a sizeable amount-in-controversy floor for a single type of case?<sup>281</sup> Such a regulation might be defended as a practical response to a flood of litigation or attacked as an attempt to withhold jurisdiction from disfavored cases.

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<sup>278</sup> See 2 *id.* at 137 (Randolph draft), 147; see also 4 *id.* at 37, 48; *supra* note 131 (explaining the different transcriptions in volumes 2 and 4 of *Records*).

<sup>279</sup> 2 RECORDS, *supra* note 1, at 163 (Wilson draft), 173.

<sup>280</sup> 2 *id.* at 227 (Aug. 9), 240–41 (Madison’s notes).

<sup>281</sup> See 28 U.S.C. § 1332(a) (2006) (providing that the amount in controversy in diversity cases must exceed \$75,000).

Resolving that sort of question may depend on legislative purpose. One useful parallel is the First Amendment doctrine distinguishing between content-based speech restrictions and neutral time, place, and manner regulations largely by the reason for the government's adoption of the law in question.<sup>282</sup> Another is the constitutional principle that a state generally may, through a "neutral state rule regarding the administration of the courts," divest its courts of concurrent jurisdiction over cases that could be heard in federal court.<sup>283</sup> In its 2009 decision in *Haywood v. Drown*, the Supreme Court explicated that concept in holding that a state may not single out actions under 42 U.S.C. § 1983 against state corrections officers for an elimination of jurisdiction:

[A] State cannot employ a jurisdictional rule "to dissociate [itself] from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source." In other words, although States retain substantial leeway to establish the contours of their judicial systems, they lack authority to nullify a federal right or cause of action they believe is inconsistent with their local policies.<sup>284</sup>

Regardless of whether one agrees with the outcome of *Haywood* (a 5–4 decision), the Court's language sets up an apt framework for differentiating neutral regulations from arrogations of power. To wit, Congress may not employ a jurisdictional statute to dissociate itself from constitutional law because of disagreement with the scope of federal jurisdiction. Although Congress retains leeway to establish the contours of how the judicial power will be triggered—such as through rules about timing or, perhaps, amount in controversy—it lacks authority to nullify federal jurisdiction that it believes is inconsistent with federal policy.

At some point, even a superficially neutral rule, such as a five-million-dollar amount-in-controversy floor for all cases or a one-hour filing deadline, would violate Article III. A regulation that equally ravages the nine categories of cases with federal jurisdiction is not saved by equality. That concept too was addressed by *Haywood*: "Although the absence of discrimination is necessary to our finding a state law neutral, it is not sufficient. A jurisdictional rule cannot be used as a device to un-

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<sup>282</sup> See, e.g., *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) ("The principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.").

<sup>283</sup> *Howlett v. Rose*, 496 U.S. 356, 372 (1990).

<sup>284</sup> 129 S. Ct. 2108, 2114 (2009) (quoting *Howlett*, 496 U.S. at 371) (internal citation omitted).

dermine federal law, no matter how evenhanded it may appear.”<sup>285</sup> To complete the analogy, Congress cannot use “Regulations” to undermine federal jurisdiction, no matter how evenhanded they may appear.

### B. *The Interposition of “Both as to Law and Fact”*

The final substantive piece of the Appellate Jurisdiction (and Exceptions and Regulations) Clause was added late in the Convention. On August 27, in the midst of the discussion about which cases should be part of that jurisdiction,<sup>286</sup> Pennsylvania’s Gouverneur Morris asked for clarification of “whether it extended to matters of fact as well as law.”<sup>287</sup> After James Wilson responded on behalf of the Committee of Detail that he thought the answer was yes, Delaware’s John Dickinson moved to add “both as to law & fact” to the clause, interposing it between “it shall be appellate” and “with such exceptions and under such regulations as the Legislature shall make.”<sup>288</sup> That motion was agreed to without dissent,<sup>289</sup> and the delegates proceeded to consider the allocation of original and appellate jurisdiction.<sup>290</sup>

Despite its placement, one might contend that the new phrase was not meant to be subject to the power to make exceptions or regulations; its role may have been merely to describe the Supreme Court’s appellate jurisdiction parenthetically, and its proximity to the qualifiers mere happenstance.<sup>291</sup> That interpretation, though conceivable, rests on an assumption that the delegates were politically tone-deaf. Later at the state ratifying conventions, speaker after speaker pilloried the inclusion of the word “Fact” in the proposed Constitution as trampling on the right to a jury trial.<sup>292</sup> In Philadelphia, no delegates to the Fed-

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<sup>285</sup> *Id.* at 2116.

<sup>286</sup> See 2 RECORDS, *supra* note 1, at 422 (Aug. 27), 424 (journal) (chronicling several motions about allocating original and appellate jurisdiction).

<sup>287</sup> 2 *id.* at 422 (Aug. 27), 431 (Madison’s notes).

<sup>288</sup> 2 *id.* at 422 (Aug. 27), 424 (journal), 431 (Madison’s notes). The language had its roots in the New Jersey plan. See 1 *id.* at 241 (June 15), 242 (Madison’s notes of New Jersey plan), 243 (proposing federal jurisdiction over errors “both in law & fact”).

<sup>289</sup> 2 *id.* at 422 (Aug. 27), 424 (journal), 431 (Madison’s notes).

<sup>290</sup> 2 *id.* at 422 (Aug. 27), 424–25 (journal), 431 (Madison’s notes); see also *supra* notes 212–244 and accompanying text (discussing two failed proposals about jurisdictional form).

<sup>291</sup> See Redish, *supra* note 50, at 914 (arguing that the commas setting off “Law and Fact” show that the exceptions apply to appellate jurisdiction, not to factual review).

<sup>292</sup> *E.g.*, 3 ELLIOT’S DEBATES, *supra* note 270, at 505 (June 18, 1788), 521 (speech by George Mason to the Virginia Convention), 524 (calling appellate jurisdiction as to fact “very dangerous”); 3 *id.* at 531 (June 20, 1788), 539 (speech by Patrick Henry to the Virginia Convention), 540 (fulminating that appellate jurisdiction as to fact would “destroy

eral Convention had articulated that concern, perhaps because of an understanding that Dickinson's language was added in front of the language about exceptions and regulations for the express purpose of permitting Congress to rein in the Court's appellate review of facts. That at any rate is the explanation Federalists seized on at the state conventions to quell the populist furor.<sup>293</sup>

That defense of Article III may or may not have been a post-hoc rationalization,<sup>294</sup> but in any event, the uproar about whether the Supreme Court's authority to review findings of fact was insuperable was soon addressed by the Seventh Amendment.<sup>295</sup> Remaining open, though, were undebated questions of whether the insertion of "both as to Law and Fact" before "with such Exceptions" had either (1) severed the connection between the exceptions power and jurisdictional form or (2) crafted a legislative warrant to make exceptions to the Court's capacity to review issues of law.

As to the first question, some scholars have argued that the only role of the Exceptions Clause is to allow exceptions with respect to the

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the trial by jury"). Alexander Hamilton aptly summed up the outrage: "The propriety of this appellate jurisdiction has been scarcely called in question in regard to matters of law; but the clamors have been loud against it as applied to matters of fact." *THE FEDERALIST* No. 81, at 488 (Alexander Hamilton) (Clinton Rossiter ed., 1961); see also Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 *HARV. L. REV.* 49, 56 (1923) (noting the fervor at state ratifying conventions for an amendment to confine appellate jurisdiction "to questions of law, and not of fact").

<sup>293</sup> At the Pennsylvania convention, James Wilson stressed that "proper regulations" would ensure the protection of the right to trial by jury. 2 *ELLIOT'S DEBATES*, *supra* note 257, at 486 (Dec. 7, 1787), 488; see also *THE FEDERALIST* No. 81, at 490 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (italicizing both "*fact*" and "*exceptions*" in stressing the legislature's ability to protect the right to trial by jury). Advocating for ratification at the Virginia Convention, Edmund Randolph acknowledged the furor by referring to appellate jurisdiction as an "evil," but he found solace in the legislative power: "I hope . . . that Congress will prohibit the appeal with respect to matters of fact." 3 *ELLIOT'S DEBATES*, *supra* note 270, at 194 (June 10, 1788), 205 (adding that "no danger" could arise from appellate jurisdiction as to law); see 3 *id.* at 562 (June 21, 1788), 576 ("The appellate jurisdiction might be corrected, as to matters of fact, by the exceptions and regulations of Congress . . ."). Others in Virginia voiced similar points. *E.g.*, 3 *id.* at 531 (June 20, 1788) (James Madison), 534 ("[I]f gentlemen should contend that appeals, as to fact, can be extended to jury cases, I contend that, by the word *regulations*, it is in the power of Congress to prevent it . . ."); 3 *id.* at 505 (June 18, 1788), 519 (Edmund Pendleton) (wishing that the words "both as to law and fact" had been "buried in oblivion" but citing the Exceptions and Regulations Clause as the basis for assuaging concern about appellate review of facts).

<sup>294</sup> See Claus, *One Court*, *supra* note 86, at 92 (calling Federalists' claims "not true").

<sup>295</sup> *Cf. id.* at 117-18 (finding support for congressional restriction of the Court's review of facts not in Article III but in the Seventh Amendment, which "capture[d] the ratifying generation's desired limitation on appellate review of factual issues").

review of facts.<sup>296</sup> For example, relying on statements by Wilson and Alexander Hamilton during the ratification process (in response to charges of usurpation of the right to trial by jury) and a proposed revision of Article III found among the papers of George Mason (as well as the above exchange between Morris and Wilson), Irving Brant claimed “conclusive” proof that the clause’s “sole purpose . . . was to permit Congress to limit appellate jurisdiction over questions of fact in cases at law.”<sup>297</sup> Even if such exceptions are permitted, the “sole” has no basis. Neither the Mason document<sup>298</sup> nor the statements cited by Brant intimate such exclusivity.<sup>299</sup>

Moreover, though the text of the Exceptions Clause may admit of such a reading (among others), its history does not. The link between exceptions and jurisdictional form was established (with nary a hint that exceptions could, let alone must, be about factual review) long before the phrase “both as to law & fact” intruded,<sup>300</sup> and nothing surrounding that August 27 edit suggests that any delegate wanted to rupture that link.<sup>301</sup> The discussion about facts on that day served to circumscribe the

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<sup>296</sup> See *supra* note 70 (listing such scholars).

<sup>297</sup> Brant, *supra* note 70, at 11.

<sup>298</sup> The Mason document proposed limited review of facts: “In all other Cases before mentioned, the Supreme Court shall have appellate jurisdiction as to matters of law only—except in cases of equity, and of admiralty and maritime Jurisdiction in which the Supreme Court shall have appellate Jurisdiction both as to law and fact, with such exceptions and other regulations as the Congress may make.” *Id.* at 10 (quoting *Ratification of the Constitution by the Several States*, in DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES 1031–34 (C. Tansill ed. 1927)); see also 4 RECORDS, *supra* note 1, at 53 (Aug. 27), 54 & n.17, 55 (reprinting earlier version of same document without Exceptions Clause and noting lack of evidence of its presentation at Convention). Evidently, the point of the proposed revision was to narrow the scope of factual review, but it can still be read as providing for exceptions to the appellate form of jurisdiction.

<sup>299</sup> At the Pennsylvania ratifying convention, Wilson defended the Constitution’s inclusion of the word “Fact” on the ground that experience had shown appellate authority to overturn jury verdicts to be important in admiralty cases about capture. He added that other such cases would arise and stressed that Congress would be in a better position than the delegates in Philadelphia had been to decide what those cases would be. Thus, he suggested that Congress could control the cases in which the Supreme Court would be able to review facts, but in no way did he foreclose other functions of the Exceptions Clause. 2 ELLIOT’S DEBATES, *supra* note 270, at 486 (Dec. 7, 1787), 493–94, *quoted in* Brant, *supra* note 70, at 7–8. Similarly, Hamilton cited the clause as enabling Congress to calibrate precisely when the Court could review facts. THE FEDERALIST No. 81, at 488–90 (Alexander Hamilton) (Clinton Rossiter ed., 1961), *quoted in* Brant, *supra* note 70, at 8–9. Just as Wilson did not limit the clause to that role, though, nor did Hamilton.

<sup>300</sup> See Clinton, *supra* note 71, at 778–79, 790–91 (stressing that the Exceptions Clause arose before the “Law and Fact” addition).

<sup>301</sup> Brant asserted, with no basis, that the purpose of the Exceptions Clause had all along been narrower than its original wording suggested; in his view, the August 27 ex-



decisional breadth, not the procedural timing, of Supreme Court review. Brant professed to be “staggered” by the prospect of the Court’s emasculation under the wide-ranging congressional power that is widely assumed.<sup>302</sup> His reaction was understandable. The uplifting truth, however, is not that exceptions apply only to the review of “Fact[s],” but rather that exceptions to “appellate Jurisdiction” merely change its form.

As to the second question, if exceptions can operate on the word “Fact,” then one might argue that jurisdiction as to “Law” too is vulnerable. On its face, Dickinson’s added phrase could be read as enabling Congress to except legal questions, confining the Supreme Court’s review to factual issues. That interpretation, though, is belied by not only common legal sense but also the phrase’s origin. The clarification sought by Morris was not whether the scope of jurisdiction included questions of law; it was whether it included findings of fact.<sup>303</sup> That much was evident in his (or at least Madison’s as a reporter) choice of conjunction in asking “whether it extended to matters of fact *as well as* law.”<sup>304</sup> In that locution, the word following “as well as” is a given; the new, highlighted information precedes it.<sup>305</sup> The point of the clarifying

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change between Morris and Wilson finally conformed the language with that purpose. Brant, *supra* note 70, at 7.

<sup>302</sup> *Id.* at 28.

<sup>303</sup> Whereas it is not surprising that one conception of the Supreme Court’s appellate jurisdiction would have largely limited it to questions of “Law,” with some exceptions for “Law and Fact,” 4 RECORDS, *supra* note 1, at 53 (Aug. 27), 54 (document found among the papers of George Mason but not presented to the Convention), 54 n.17, 55; *see supra* note 298 (quoting the full provision), one could not imagine a converse plan in which the Court’s review would have been limited to issues of fact.

<sup>304</sup> 2 RECORDS, *supra* note 1, at 422 (Aug. 27), 431 (Madison’s notes) (emphasis added). Morris also asked whether jurisdiction would extend to “cases of Common law as well as Civil law” and was told by Wilson that it would. *Id.* That colloquy has been cited as support for the theory that the Exceptions Clause allows broad restrictions in general but prevents Congress from eliminating jurisdiction over constitutional cases, on the ground that constitutional law was a separate third category beyond the clause’s reach. Beck, *supra* note 66, at 793–95, 806–07. But Morris’s inquiry was about the scope of jurisdiction, not of the exceptions power. So the conclusion that constitutional cases were protected is correct but incomplete: all types of cases were.

<sup>305</sup> *Practical English Usage: As Well As*, PERFECTYOUREGLISH.COM, <http://www.perfectyour-english.com/archives/as-well-as.htm> (last visited Nov. 28, 2010); *see also* FOWLER’S MODERN ENGLISH USAGE 836–37 (R.W. Burchfield ed., rev. 3d ed. 1998) (calling “as well as” a synonym for “in addition to”); *cf.* Shaffer v. Heitner, 433 U.S. 186, 206 (1977) (framing the inquiry about the scope of the recently established standard for *in personam* cases as “whether the standard . . . should be held to govern actions *in rem* as well as *in personam*”). The phrase “as well as” is the converse of “not only . . . but also,” in which the commonly accepted point comes first. *See* FOWLER’S MODERN ENGLISH USAGE, *supra*, at 836 (noting the historical parallel of the two constructions); 12 OXFORD ENGLISH DICTIONARY W285 (1933) (noting that “as

language—“both as to Law and Fact”—was thus that the Court’s jurisdiction would reach issues not only of law, as everyone knew it would, but also of fact. In sum, if the late addition to the Appellate Jurisdiction Clause gave Congress any suppressive power at all, it was to restrict the Court’s review of “Fact[s].” Questions of “Law” remained immune.

#### CONCLUSION

James Madison’s quixotic proposal of a judicial veto need not be resurrected to stop legislative invasion of the Supreme Court’s jurisdiction. All that is necessary is a return of the Exceptions Clause to its focus on jurisdictional form.

Despite challenging centuries of conventional wisdom, the reform proposed in this Article does not depend on the notion of a “living” Constitution that evolves in concert with the society governed by it;<sup>306</sup> my dissidence springs from the wisdom of the Convention that begat the document. Nor, however, do I owe a debt to “originalism” in the usual sense. Instead, this reading of Article III seeks simply to restore its syntactic integrity.<sup>307</sup>

The modish doctrine of originalism, with strains based on intent, meaning, and understanding,<sup>308</sup> is a post-Warren Court vehicle for attacking evolutionary interpretations.<sup>309</sup> Self-styled originalists insist that if a constitutional principle would have been applied in a certain way in

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well as” conveys “weakened force” of what follows it and that in early usage the phrase approximated “not only . . . but also” with the contrasted words transposed).

<sup>306</sup> Cf., e.g., Michael L. Wells & Edward J. Larson, *Original Intent and Article III*, 70 TUL. L. REV. 75, 78, 108, 119 (1995) (suggesting that political circumstances giving rise to Article III militate against finding “enduring constitutional principles” in its terms and positing that “modern ethical and policy considerations” are the appropriate guide).

<sup>307</sup> My focus on syntactic integrity is similar in approach to what Ronald Dworkin has called “semantic’ originalism.” Ronald Dworkin, *Comment*, in ANTONIN SCALIA, A MATTER OF INTERPRETATION 115, 119 (1997) (distinguishing that interpretive theory from “‘expectation’ originalism,” which posits that principles “should be understood to have the consequences that those who made them expected them to have”); see also Michael J. Perry, *The Legitimacy of Particular Conceptions of Constitutional Interpretation*, 77 VA. L. REV. 669, 681–82 (1991) (distinguishing “sophisticated originalism” from its “unsophisticated” counterpart in which ratifiers’ opinions about applications of principles are treated as part of those principles).

<sup>308</sup> See Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 244 (2009) (referring to originalism as “a smorgasbord of distinct constitutional theories that share little in common except a misleading reliance on a single label”); Tara Smith, *Originalism’s Misplaced Fidelity: “Original” Meaning Is Not Objective*, 26 CONST. COMMENT. 1, 2–6 (2009) (sketching “three schools of originalism”).

<sup>309</sup> Colby & Smith, *supra* note 308, at 247–48, 262–63 (tracing the development of modern originalism).

the eighteenth century, so must it be today.<sup>310</sup> One may reasonably question whether such secondary levels of meaning, not explicitly enshrined in the Constitution, should bind or even guide modern interpreters.<sup>311</sup>

But that debate is irrelevant here. Unless one indulges in atextual hermeneutics, crucial to any interpretation is the semantic and syntactic integrity of the language at issue.<sup>312</sup> Deciphering which earlier part of the text “Exceptions” operate on is no less essential to an understanding of what Congress may do than is defining unfamiliar words and phrases in a provision such as the one later in Article III warning that “no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.”<sup>313</sup>

Resolving such fundamental issues of syntax and semantics is akin to ensuring that letter combinations are read as the correct words. Usually, of course, bridging the communication gap between word and idea is trivial; nobody would transpose the letters in “Senator” to be read as “treason.” But what if the letters are not fully legible? The September 17 Constitution on handwritten parchment contains a smudge or slip of the pen in the sentence about how “[t]he Senate shall ch\*se their . . . Officers.”<sup>314</sup> Regardless of approach, no interpreters would disregard the unknown letter. If it turned out to be an “a,” originalists would either proclaim a chasing mandate or invoke the doctrine of “scrivener’s error”;<sup>315</sup> “living Constitution” theorists, if they did not dismiss the provision as a “dead letter,” might announce that it had evolved into a senatorial choice. (In fact, the letter appears to be an ill-formed “u.”)

Interpretive questions about the permissible extent of legislative “Exceptions” to the Supreme Court’s appellate jurisdiction (may exceptions outweigh what remains? may they undermine the Court’s essential

<sup>310</sup> See, e.g., SCALIA, *supra* note 307, at 45–46, 145–46 (insisting that because the death penalty was accepted at the time of the Bill of Rights, the Eighth Amendment’s prohibition of “cruel and unusual punishments” cannot, to an “originalist,” be held to bar it today); *id.* at 147, 149 (embracing the “‘time-dated’ meaning” of broad constitutional principles).

<sup>311</sup> See Dworkin, *supra* note 307, at 119–21 (critiquing “‘expectation’ originalism”).

<sup>312</sup> See *id.* at 117 (“Any reader of anything must attend to semantic intention . . .”).

<sup>313</sup> As it happens, the provision about corruption of blood raises a syntactical issue as well: is its own “except[ions]” clause limited to forfeiture, or does it extend to corruption of blood?

<sup>314</sup> U.S. CONST., art. I, § 3. An image of the handwritten September 17 Constitution is available at [http://www.theindianreporter.com/historical\\_documents/constitution\\_of\\_united\\_states.html](http://www.theindianreporter.com/historical_documents/constitution_of_united_states.html) (last visited Oct. 31, 2010).

<sup>315</sup> See SCALIA, *supra* note 307, at 20–21 (claiming a license to rewrite text in “extreme cases,” when the drafter “obviously” erred).

functions?) are secondary to that of what is being excepted (jurisdiction? its appellate nature?). That primary question depends not on whether words and phrases should retain connotative baggage they once had. Instead, it raises the core inquiry of semiotics: at the most basic level, what idea do the symbols represent?

If my account of the consistent syntactic role of the Exceptions Clause is correct, then the conventional view, treating “Exceptions” to the Supreme Court’s appellate jurisdiction as confiscatory rather than transformative, misapprehends the text not in a subtle way subject to debate about how to apply broad constitutional principles, but more fundamentally, like reading “ch\*se” as “chase.” Originalism does not tolerate such historical sloppiness. Nor does living constitutionalism; the evolution is supposed to be by adaptation, not mutation.

Yet the confiscatory interpretation is nearly universal, perhaps because it was soon after the delegates left the Philadelphia Convention that a distorted view began to take hold. Some seeds were sown in the politicking of the ratification process, when Federalists defended the Constitution against the charge of trampling on jury rights by emphasizing Congress’s power to prevent the Supreme Court from reviewing findings of fact.<sup>316</sup> Little was said then about any putative power to withdraw certain cases from the Court’s jurisdiction altogether. But in crafting the Judiciary Act of 1789, the First Congress implicitly assumed that power. Interpreting that statute in cases such as *Marbury v. Madison*,<sup>317</sup> the Supreme Court more or less explicitly embraced the conception of jurisdiction-stripping power that today is all but axiomatic.<sup>318</sup>

Accepting that power as a premise, scholars have explored its contours, with one calling the question of how far Congress can go in using the Exceptions Clause to restrict the Supreme Court’s jurisdiction “one of the most difficult in the law of the federal courts.”<sup>319</sup> When “Exceptions” are understood, however, as applying not to “Jurisdiction” or

<sup>316</sup> See *supra* note 293 and accompanying text (summarizing Federalists’ responses to concerns about protection of the right to trial by jury).

<sup>317</sup> 5 U.S. (1 Cranch) 137, 174–75 (1803) (holding that Congress could not expand the Supreme Court’s original jurisdiction).

<sup>318</sup> Because the misconception of the Exceptions Clause arose, albeit faintly, during the ratification process, an originalist relying on the understanding of the voters rather than the meaning of the text or the intent of the drafters might muster some slim arguments for the conventional view. It was not until after ratification, however, that the confiscatory interpretation began to flourish. A thorough etiology of the distortion of the clause is beyond the scope of this Article.

<sup>319</sup> Mark Tushnet, “*The King of France with Forty Thousand Men*”: *Felker v. Turpin and the Supreme Court’s Deliberative Processes*, 1996 SUP. CT. REV. 163, 164.

“supreme” but rather to “appellate,” the clause becomes far less cryptic. The need perceived by some to preserve “essential functions,” such as a forum for constitutional cases, whether in the Supreme Court or in an inferior court,<sup>320</sup> is rendered moot. Of course, the term “Exceptions” itself is indeterminate; it may or may not be proper for Congress to allow the Supreme Court to hear *all* cases originally. Any vagueness, though, is relatively inconsequential, in that interpretive “errors” would not negate, but simply delay or hasten, the Supreme Court’s jurisdiction.

To be sure, the Exceptions Clause is not the only potential source of the power Congress is widely presumed to have over the Supreme Court’s jurisdiction. In an effort to harmonize the conventional view of the Exceptions Clause with the rest of Article III, many scholars have read the Extension Clause, with its list of cases to which “[t]he judicial Power shall extend,” not as a direct grant of jurisdiction to federal courts but merely as an authorization for Congress to confer jurisdiction at its discretion.<sup>321</sup> Under that reading, one could argue that even the transformative interpretation of the Exceptions Clause would not protect the Court’s jurisdiction; the paragraph about appellate and original forms might implicitly apply only to cases over which Congress has deigned to extend jurisdiction in the first place.<sup>322</sup> Though a full discussion of that view of the Extension Clause is beyond the scope of this Article, it is unpersuasive.

In any event, the central justification for the “inva[sion]” of jurisdiction feared by Nathaniel Gorham and his fellow delegates to the Federal Convention<sup>323</sup> has been that the Exceptions Clause expressly permits it. As I hope to have shown, that justification is groundless. The text and drafting history together show that the Exceptions Clause agreed to in Philadelphia was to affect not the existence of the Supreme Court’s jurisdiction but rather its form. The clause was designed to expedite cases, not to eliminate them. Although the exceptions power belongs to Congress, its beneficiary should thus be the Court.

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<sup>320</sup> See *supra* notes 59–77 and accompanying text (outlining academic perspectives).

<sup>321</sup> See *supra* notes 53–56 and accompanying text.

<sup>322</sup> Cf. Liebman & Ryan, *supra* note 54, at 755 (speculating that the Original Jurisdiction Clause “might leave the legislature with the power to decide whether to confer supreme court jurisdiction over those disputes”).

<sup>323</sup> See *supra* notes 5–13 and accompanying text.