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### Article III in the Political Branches

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# WILLIAM & MARY LAW SCHOOL

## ARTICLE III IN THE POLITICAL BRANCHES

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# ARTICLE III IN THE POLITICAL BRANCHES

*Tara Leigh Grove\**

## ABSTRACT

*In many separation of powers debates, scholars excavate the practices and constitutional interpretations of Congress and the executive branch in order to discern the scope of various constitutional provisions. I argue that similar attention to political branch practice is warranted in the Article III context. That is true, in large part because much of the constitutional history of the federal courts has been written not by the federal judiciary, but by the legislative and executive branches. To illustrate this point, this Essay focuses on the Exceptions Clause of Article III. The Supreme Court has said little about the meaning of this provision, leaving the legislative and executive branches largely on their own in defining the scope of the “exceptions power.” The debates over this provision shed light not only on how the political branches have construed Article III but also on how the political branches approach constitutional interpretation more generally. This Essay concludes by raising questions about whether, or the extent to which, the practices and constitutional interpretations of the political branches should inform the way in which the judiciary interprets Article III.*

## INTRODUCTION

Many separation of powers questions—such as the scope of the war or treaty powers—rarely, if ever, reach the judiciary. Accordingly, those questions must of necessity be answered by the political branches. For this reason, scholars often excavate the practices and constitutional interpretations of Congress and the executive branch in order to discern the meaning of constitutional provisions. Indeed, “[a]rguments based on [such] historical practice are a mainstay of debates about the constitutional separation of powers.”<sup>1</sup>

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\* Professor of Law, William and Mary Law School. I am grateful to Neal Devins, John Manning, Jim Pfander, and Mark Seidenfeld for helpful discussions of this project or comments on earlier drafts. This Essay was prepared for the Federal Courts Section panel on “The Role of History in the Federal Courts Canon” at the 2015 Annual Meeting of the Association of American Law Schools.

1 Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 412–13, 461–85 (2012) (asserting that “[a]rguments based on historical practice are a mainstay of debates about the constitutional separation of powers . . . [as] [t]hese arguments are especially common in debates over the distribution of authority between Congress and the executive branch,” and discussing in detail debates

There is, however, far less focus on political branch practice in Article III scholarship. In this Essay, building on prior work,<sup>2</sup> I seek to raise questions about this Article III exceptionalism. I suggest that there are good reasons for scholars to consider the work of the legislature and the executive branch in analyzing Article III issues. As in other separation of powers arenas, many important questions arising under Article III have rarely, if ever, reached the judiciary and have instead been addressed by the political branches.<sup>3</sup> For example, the Supreme Court has said very little about Congress's power to make "exceptions" and "regulations" to the Court's appellate jurisdiction.<sup>4</sup> Thus, the political branches have largely been on their own in defining the scope of the "exceptions power."

Scholarly study of legislative and executive interpretations of Article III is important for two major reasons. First, such practices are likely to inform future executive and legislative debates. As described below, political actors often look at their own precedents in evaluating the constitutionality and propriety of jurisdictional proposals. Second, such scholarly study can provide insight into the way that the political branches approach constitutional interpretation.

I do not, however, assert that federal courts should necessarily treat political branch practice as authoritative evidence of the meaning of Article III, if and when similar issues reach the courts. In fact, I suggest that there are reasons for the judiciary to be cautious about relying heavily on the work product of political actors. The political branches may approach the process of constitutional interpretation in a way that differs considerably from what a judge deems appropriate. Moreover, it may be difficult for judges to discern

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over the war power, congressional-executive agreements, and the removal of executive officers).

2 See Tara Leigh Grove, *The Article II Safeguards of Federal Jurisdiction*, 112 COLUM. L. REV. 250 (2012) [hereinafter Grove, *Article II Safeguards*]; Tara Leigh Grove, *The Exceptions Clause as a Structural Safeguard*, 113 COLUM. L. REV. 929 (2013) [hereinafter Grove, *Exceptions Clause*]; Tara Leigh Grove, *The Structural Safeguards of Federal Jurisdiction*, 124 HARV. L. REV. 869 (2011) [hereinafter Grove, *Structural Safeguards*].

3 That is true, for example, of the meaning of "one supreme Court." U.S. CONST. art. III, § 1 ("The judicial power of the United States, shall be vested in one supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."). Scholars have debated whether the term "one supreme Court" requires the Court to sit en banc or permits the Court to decide cases in panels. See, e.g., Steven G. Calabresi & Gary Lawson, *Equity and Hierarchy: Reflections on the Harris Execution*, 102 YALE L.J. 255, 274 (1992) (noting that "one supreme Court" may suggest that "it would be unconstitutional for that Court to sit in panels"); Tracey E. George & Chris Guthrie, *Remaking the United States Supreme Court in the Courts' of Appeals Image*, 58 DUKE L.J. 1439, 1442 (2009) (advocating a panel system to enable the Court to hear more cases). The historical practice of the political branches may shed light on this debate. See Grove, *Exceptions Clause*, *supra* note 2, at 979 n.272 (offering a brief overview of the congressional debates and noting that some legislators doubt that such a reform would be consistent with the constitutional requirement of "one supreme Court").

4 U.S. CONST. art. III, § 2. The Court's main precedent on the exceptions power, *Ex parte McCordle*, 74 U.S. (7 Wall.) 506 (1869), is discussed below. See Part II.B.

whether a measure was enacted or rejected for constitutional, as opposed to policy, reasons. In sum, I suggest that the political branches and the judiciary may engage in distinct enterprises when they interpret the scope of Article III (and perhaps other constitutional provisions as well).

The Essay proceeds as follows. Part I focuses on the Exceptions Clause, providing a survey of executive and legislative practice with respect to that clause. Part II then examines what this survey might tell us about constitutional interpretation in the executive and legislative branches, and raises several questions about judicial reliance on such political branch practice.

## I. CASE STUDY: THE EXCEPTIONS CLAUSE

In prior work, I documented many of the legislative and executive debates over congressional regulations of Supreme Court jurisdiction and offered political, structural, and institutional explanations for why jurisdiction-stripping measures have generally failed, and why more beneficial regulations have been enacted.<sup>5</sup> But my earlier work did not focus on the degree to which the debates occurred on constitutional terms. Here, I highlight the constitutional side of those political debates—to see how the political branches have given meaning to the Exceptions Clause.

### A. *Background: Text and the McCardle Case*

Article III declares that the “judicial Power shall extend to all Cases” arising under federal law and that the Supreme Court “shall have appellate Jurisdiction” over such federal question cases.<sup>6</sup> The Constitution thereby seems to give the Supreme Court an important role in defining the content of federal law. But Article III goes on to provide that the Court’s appellate review power is subject to “such Exceptions, and . . . such Regulations as the Congress shall make.”<sup>7</sup>

The Supreme Court has said very little about the scope of Congress’s power under the Exceptions Clause. The Court’s primary opportunity to construe the Clause occurred during the post-Civil War era, when William McCardle brought a habeas corpus action challenging the constitutionality of

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5 See Grove, *Article II Safeguards*, *supra* note 2, at 252–55 (asserting that the executive branch has institutional incentives that lead it to oppose many jurisdiction-stripping efforts); Grove, *Exceptions Clause*, *supra* note 2, at 931–33 (suggesting that the political branches have enacted beneficial exceptions like certiorari measures to facilitate Supreme Court settlement of important federal questions); Grove, *Structural Safeguards*, *supra* note 2, at 871–73 (arguing that, throughout much of our history, some political faction has generally supported the judiciary and used its veto power in the House or the Senate to block jurisdiction-stripping measures).

6 U.S. CONST. art. III, § 2 (“The judicial Power shall extend to all Cases . . . arising under this Constitution, the Laws of the United States, and Treaties . . .”).

7 *Id.* (“[T]he supreme Court shall have appellate Jurisdiction . . . with such Exceptions, and under such Regulations as the Congress shall make.”).

the federal laws governing Reconstruction.<sup>8</sup> While the case was pending in the Supreme Court, Congress enacted—over a presidential veto—a law restricting the Court’s jurisdiction over direct appeals in habeas cases.<sup>9</sup> Congress’s goal was apparently to prevent the Court from striking down the reconstruction laws in *Ex parte McCardle*.<sup>10</sup>

In *McCardle*, the Supreme Court applied this newly established limit on its appellate jurisdiction and dismissed McCardle’s appeal.<sup>11</sup> In its decision, the Court emphasized the breadth of Congress’s exceptions power: “We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words.”<sup>12</sup> The Court went on to underscore, however, that the 1868 legislation had not cut off all avenues of Supreme Court review.<sup>13</sup> As the Court later explained in *Ex parte Yerger*, it could still review lower court decisions denying habeas relief because Congress had left in place its jurisdiction to hear original habeas petitions under the Judiciary Act of 1789.<sup>14</sup>

Scholars have long debated the implications of *McCardle*. Although many scholars view the case as demonstrating that Congress has plenary power over Supreme Court jurisdiction,<sup>15</sup> others insist that *McCardle* permits Congress to restrict jurisdiction only when it provides an alternative avenue of Court review.<sup>16</sup> The important point, for my purposes, is that political actors have recognized that *McCardle* is subject to varying interpretations and have not treated the case as the final word on the Exceptions Clause. Accordingly, legislative and executive officials have offered their own constructions of that provision of Article III.

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8 See William W. Van Alstyne, *A Critical Guide to Ex parte McCardle*, 15 ARIZ. L. REV. 229, 236–38 (1973).

9 See Repeal Act of 1868, ch. 34, § 4, 15 Stat. 44, 44; Grove, *Structural Safeguards*, *supra* note 2, at 924.

10 Grove, *Structural Safeguards*, *supra* note 2, at 923–24.

11 74 U.S. (7 Wall.) 506, 515 (1869).

12 *Id.* at 514.

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

14 75 U.S. (8 Wall.) 85, 105–06 (1869).

15 See, e.g., Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 905 (1984) (“[T]he bulk of the *McCardle* opinion speaks very broadly and does not seem to turn on the availability of an alternative route of appellate review.”).

16 See, e.g., James E. Pfander, *Jurisdiction-Stripping and the Supreme Court’s Power to Supervise Inferior Tribunals*, 78 TEX. L. REV. 1433, 1501 (2000) (noting that the Court in *McCardle* “emphasi[z]ed . . . the availability of . . . an alternative source of inferior court review”).

### B. *The Exceptions Power in Congress Post-McCardle*

In the century and a half since *McCordle*,<sup>17</sup> Congress has virtually never used its exceptions power to strip the Supreme Court's appellate jurisdiction. Instead, Congress has often used its power to facilitate the Court's capacity to oversee the lower courts—by creating and expanding discretionary certiorari review. The debates over these measures may shed light on legislators' views of the exceptions power.

#### 1. The Rejection of Jurisdiction-Stripping Measures

Virtually every jurisdiction-stripping proposal in Congress has failed, often without emerging from committee.<sup>18</sup> I discuss here three jurisdiction-stripping efforts, which were in fact debated in Congress. These three examples suggest that legislators were concerned about not only the propriety but also the constitutionality of the proposed legislation.

Admittedly, the line between “constitutional” and “policy” arguments is not always clear. Take, for example, the (frequent) comments of legislators that restrictions on Supreme Court jurisdiction would undermine the uniform enforcement of federal law.<sup>19</sup> Although some scholars have asserted that preserving the uniformity of federal law is among the Supreme Court's essential constitutional functions,<sup>20</sup> others argue that uniformity—while per-

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17 There does not appear to have been much discussion in Congress about the meaning of the exceptions power between the Founding and Reconstruction. Interestingly, what many scholars consider the most dramatic attack on the Supreme Court's appellate jurisdiction in the antebellum era did not focus on the Exceptions Clause. In 1831, a majority of the House Judiciary Committee recommended that Congress repeal section 25 of the Judiciary Act of 1789, which authorized Supreme Court review of state court decisions on federal questions. But supporters of the repeal did not rely on the Exceptions Clause; instead, they argued that Congress lacked the affirmative power to enact section 25 because (in their view) the Constitution permitted the Supreme Court to review decisions only from the inferior federal courts, not from state courts. 7 REG. DEB. app. at lxxix-lxxx (1831) (Report upon the Judiciary) (“[T]he constitution does not confer power on the federal judiciary over the judicial departments of the States”). Ultimately, this jurisdiction-stripping effort was overwhelmingly defeated. See 7 REG. DEB. 542 (1831) (showing that the House rejected the bill by a vote of 138–51).

18 See RICHARD H. FALLON, JR., ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 277–78 (6th ed. 2009); RICHARD H. FALLON, JR., ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 43 (Supp. 2014).

19 See, e.g., 152 CONG. REC. H5415 (daily ed. July 19, 2006) (statement of Rep. Melvin Watt) (underscoring “the role of the U.S. Supreme Court in establishing uniform standards”); 125 CONG. REC. 7632 (1979) (statement of Sen. Edward Kennedy) (criticizing a proposal to strip federal jurisdiction in school prayer cases on the ground that, absent Supreme Court review, “[w]e are going to run into a situation in which 50 States could have 50 different interpretations of what the law of the land is”); see also Grove, *Structural Safeguards*, *supra* note 2, at 921–22 (noting the political branches' emphasis on the need for uniform enforcement of federal law).

20 See, e.g., Leonard G. Ratner, *Congressional Power over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157, 161–65 (1960) (arguing that the Court's “essential appellate functions” are to preserve the uniformity and supremacy of federal law). Leo-

haps desirable—does not rise to the level of a constitutional concern.<sup>21</sup> I do not attempt here to classify any particular argument as inherently a “constitutional” or “policy” one. Instead, I generally rely on the legislators’ own characterizations of their arguments; if they claim to be making a constitutional argument, then I treat it as a constitutional argument.

One additional clarification. One of the trends that I have noticed in many jurisdiction-stripping debates—both those discussed here and others that I have reviewed in my prior work—is the emphasis on political branch precedent. Legislators were concerned both about the meaning of their own prior practices and (at least for those who opposed jurisdiction-stripping measures) with establishing a “bad” precedent for the future. I include these arguments here as well because legislators seemed to view their precedents as relevant to the constitutionality of jurisdiction-stripping measures.

*Subversive Activity.* In the late 1950s, Senators William Jenner and John Butler proposed a bill that would eliminate the Supreme Court’s appellate jurisdiction over certain claims by suspected communists.<sup>22</sup> Senator Jenner argued that the “so-called Warren Court” had done much to “confuse, disarm and paralyze the people in their fight . . . against the world Communist conspiracy” and thus it was “time to curtail the appellate jurisdiction of the Supreme Court.”<sup>23</sup>

Both legislators insisted that the jurisdiction-stripping measure was well within Congress’s constitutional authority. Senator Jenner argued that the words of the Exceptions Clause “are hard, firm, and clear as crystal” and give to Congress the “full, unchallengeable power to pass laws immediately which

nard Ratner built upon Henry Hart’s “essential role” theory, which is discussed below. See *infra* note 150.

21 See Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1578 (2008) (noting that “many . . . disagree with the claim that uniformity is constitutionally prescribed” and citing legal scholars who argue that any claim that uniformity is constitutionally required lacks textual support).

22 The initial bill proposed by Senator William Jenner would have cut off jurisdiction in five areas. See *Limitation of Appellate Jurisdiction of the United States Supreme Court: Hearing on S. 2646 Before the Subcomm. to Investigate the Admin. of the Internal Sec. Act and Other Internal Sec. Laws of the S. Comm. on the Judiciary*, 85th Cong. 1–2 (1957) [hereinafter *Limitation of Appellate Jurisdiction of the United States Supreme Court*] (statement of Sen. William E. Jenner) (showing that the bill sought to strip the Court’s appellate jurisdiction over (1) the functions of congressional committees; (2) decisions by executive agencies to terminate disloyal employees; (3) any state law on subversive activity; (4) any school board rule governing subversive activity among teachers; and (5) any state law pertaining to bar admissions). The new Jenner-Butler bill that emerged from the Senate Judiciary Committee sought to strip jurisdiction only over state bar admissions. See 104 CONG. REC. 18647–49 (1958) (statement of Sen. John Butler). The proposal was designed to counter Supreme Court decisions that had invalidated state court denials of bar admission to suspected communists. See *Konigsberg v. State Bar*, 353 U.S. 252, 273–74 (1957); *Schwartz v. Bd. of Examiners*, 353 U.S. 232, 246–47 (1957).

23 *Limitation of Appellate Jurisdiction of the United States Supreme Court*, *supra* note 22, at 6, 23 (statement of Sen. William Jenner).



would deprive the Supreme Court of appellate jurisdiction.”<sup>24</sup> Senator Butler asserted that the Exceptions Clause was an important part of the constitutional system of “checks and balances.”<sup>25</sup> In fact, it was the “only check which the Constitution gives to the Congress as a protection against attempted usurpation [of federal and state legislative authority] by the Supreme Court.”<sup>26</sup>

Other legislators, however, strongly opposed the measure, in part on constitutional grounds. Senator Alexander Wiley acknowledged that under the Exceptions Clause, Congress had “the legal right . . . within certain limits to constrict the appellate authority of the Supreme Court.”<sup>27</sup> But he insisted that although “[t]he right fundamentally exists,” “it can hardly be described as a total right.”<sup>28</sup> Senator Wiley asserted that the exceptions power was limited by a “principle of reasonableness.”<sup>29</sup> Applying this principle, he argued that it was unreasonable—and therefore unconstitutional—to eliminate the Supreme Court’s appellate jurisdiction solely because members of Congress disagreed with certain decisions.<sup>30</sup> Senator Thomas Hennings both doubted the constitutionality of the measure and worried that it would establish a dangerous precedent.<sup>31</sup> “[O]nce we begin to whittle at the jurisdiction of the Supreme Court, the floodgates will be open. Then heaven help the United States and our present system of checks and balances . . . .”<sup>32</sup> “This could be the first swing of the ax in chipping away the whole foundation of our independent Federal judiciary.”<sup>33</sup>

Moreover, rather than seeing *McCardle* as support for the Jenner-Butler bill, opponents used *McCardle* to condemn it.<sup>34</sup> Senator Hennings, for example, argued that the Jenner-Butler bill was “reminiscent of” that “ill-advised

24 *Id.* at 13.

25 104 CONG. REC. 18651 (1958) (statement of Sen. John Butler) (asserting that the Exceptions Clause did not get “into the Constitution by chance” and that it “is one of the specific check-and-balance provisions of the Constitution”).

26 *Id.*

27 *Id.* at 18682 (statement of Sen. Alexander Wiley).

28 *Id.*

29 *Id.* at 18682–83.

30 *Id.* at 18683 (“[T]he implementation of the disagreements with the Supreme Court decision by the enactment of law to make such decisions in the future impossible” is an “abuse . . . of the powers of the legislature to determine the appellate powers of the High Court”); *see also id.* (“This legislation violently tampers with the basic law of the land as established by the Founding Fathers.”).

31 *See id.* at 18685 (statement of Sen. Thomas Hennings) (“The [Jenner-Butler bill] . . . contains provisions which would affect the rights and liberties of all our people. In my humble opinion, a constitutional issue is raised by every provision of the amendment.”).

32 *Id.* at 18685–86.

33 *Id.* at 18686.

34 *See, e.g., id.* at 18682 (statement of Sen. Alexander Wiley) (“Had the thinking contained in [this bill] prevailed from the days of the constitutional convention how possibly—I ask—would our Government have been able to survive in its essential and original form? The destruction that would have been meted out to it in the notorious *McCardle* case . . . would then have been fatal.”).

attack[ ] on the Supreme Court.”<sup>35</sup> “I do not believe this Senate desires to join the ranks of the Reconstruction Senate of 1868 and 1869 . . . .”<sup>36</sup> Ultimately, the Senate rejected the Jenner-Butler bill in its entirety.<sup>37</sup>

*School Prayer.* In the 1970s and 1980s, Senator Jesse Helms repeatedly proposed legislation to strip federal jurisdiction over cases involving voluntary school prayer.<sup>38</sup> Senator Helms and his supporters argued that Congress had ample authority to enact such a measure: “In anticipation of judicial usurpations of power, the framers of our Constitution wisely gave the Congress the authority, by a simple majority of both Houses, to check the Supreme Court” by making “exceptions” to its appellate jurisdiction.<sup>39</sup>

Many members of Congress responded to Helms’ proposal by arguing that it was not only unwise but also unconstitutional. For example, opponents insisted that the Exceptions Clause did not permit Congress to interfere with “the core functions of the Supreme Court” by taking away its power to review state court decisions in constitutional cases.<sup>40</sup> Instead, Congress could use its exceptions power only to “‘obviate and remove’ . . . ‘inconveniences’ likely to arise within the judicial system.”<sup>41</sup> Congress could not “encroach[ ] on the judicial function” and thereby “violate the doctrine of separation of powers.”<sup>42</sup>

The legislators also debated the implications of their own precedents. Senator Helms, for his part, denied that his measure was an “‘unprecedented’ proposal,” pointing out that previous Congresses had considered

35 *Id.* at 18686 (statement of Sen. Thomas Hennings).

36 *Id.*

37 *See id.* at 18687 (recording that the Senate defeated the measure forty-nine to forty-one).

38 *See* LOUIS FISHER, RELIGIOUS LIBERTY IN AMERICA 130 (2002) (noting that Senator Helms “took the lead in promoting this type of court-stripping bill” and began introducing such measures in 1974).

39 125 CONG. REC. 7579 (1979) (statement of Sen. Jesse Helms) (“Section 2 of article III states in clear and unequivocal language that the appellate jurisdiction of the Court is subject to ‘such exceptions, and under such regulations as the Congress shall make.’”) (quoting U.S. CONST. art. III, § 2); *see also* 128 CONG. REC. 21854 (1982) (statement of Sen. Jeremiah Denton) (“The exception provision, like the commerce clause, is a plenary power to be exercised at the discretion of the Congress”).

40 128 CONG. REC. 21862 (1982) (statement of Sen. Daniel Patrick Moynihan); *id.* at 21844 (statement of Sen. Gary Hart) (Congress may not impair the Supreme Court’s “core functions”); *see also* 128 CONG. REC. 21857 (1982) (statement of Sen. Max Baucus) (noting that “the Framers of the Constitution intended that the Supreme Court enforce the supremacy clause” by reviewing state court decisions on all constitutional questions). The focus on the Court’s “core functions” built upon arguments made by the executive. I discuss the executive’s position in Part II.B.

41 128 CONG. REC. 21858 (statement of Sen. Max Baucus) (quoting THE FEDERALIST No. 80, at 481 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

42 *Id.* at 21857 (disagreeing that “the exceptions clause gives Congress power to withdraw specific categories of cases from the Court’s review”).

jurisdiction-stripping bills.<sup>43</sup> Senator Edward Kennedy responded, however, that those precedents actually undermined Helms' arguments because those prior bills had been uniformly rejected by Congress.<sup>44</sup> But, Senator Kennedy and other opponents warned, passage of the school prayer measure would establish "a very dangerous precedent" that would make it easier for future Congresses to strip federal jurisdiction over other constitutional issues.<sup>45</sup> "This type of restriction on the judicial power, once applied in this instance, will become ever easier to apply in the future. . . . The result will be to weaken, if not cripple, the independence of the Federal judiciary and subvert the U.S. Constitution."<sup>46</sup>

For most of its history, the school prayer bill died in the Senate, often without getting past the Senate Judiciary Committee.<sup>47</sup> On the one occasion when the measure passed the Senate, it was rejected by the House Judiciary Committee.<sup>48</sup> During the House committee hearings, several representatives expressed constitutional concerns about the measure.<sup>49</sup> Representative George Danielson, for example, worried that a broad construction of the exceptions power would enable Congress to "repeal the entire Bill of Rights" or indeed "any of the restrictions which are in the Constitution—simply by the device of limiting or abolishing appellate jurisdiction."<sup>50</sup>

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43 125 CONG. REC. 7636 (1979) (statement of Sen. Jesse Helms) ("I suspect that some potential difficulty with this amendment may result from a lack of knowledge regarding its legislative precedence. Some have described it as an 'unprecedented' proposal . . . . Nothing could be more incorrect.").

44 *Id.* (statement of Sen. Edward Kennedy) ("The fact is that none of those is law . . . . [T]he Senator from North Carolina would be unable to give us any action by Congress which would take away the [Supreme Court's] jurisdiction to deal with constitutional issues.").

45 *Id.* at 7654 (statement of Sen. Birch Bayh) ("We are setting a very dangerous precedent that could go far beyond prayer."); *see id.* at 7632 (statement of Sen. Edward Kennedy) ("The [bill] establishes a precedent for all types of mischief.").

46 *Id.* at 7644 (statement of Sen. John Durkin).

47 *See* Grove, *Structural Safeguards*, *supra* note 2, at 905.

48 *See id.* at 905-07; *see also* Louis Fisher, *Nonjudicial Safeguards for Religious Liberty*, 70 U. CIN. L. REV. 31, 71 (2001) (noting that from 1978–1988, Congress "rejected efforts to strip the federal courts of jurisdiction in school prayer cases").

49 *Prayer in Public Schools and Buildings—Federal Court Jurisdiction: Hearing on S. 450 Before the Subcomm. on Courts, Civil Liberties, & the Admin. of Justice of the H. Comm. on the Judiciary*, 96th Cong. 25 (1980) (statement of Rep. George Danielson) (arguing that the school prayer measure "assuming it became law—would be an unconstitutional law"); *see also id.* 2–3, 459 (statement of Rep. Robert Kastenmeier) (stating that "it would seem unreasonable to assume that Congress has indiscriminate authority" under the Exceptions Clause).

50 *Id.* at 458 (statement of Rep. George Danielson); *see also id.* at 459 (arguing that it was "imperative that we start to clarify the meaning of [the Exceptions Clause] and . . . refute [the] argument" for unlimited power "before it takes on life of its own"). Representative Danielson believed, as some scholars have argued, that Congress had the power only to move cases between the Supreme Court's original and appellate jurisdiction. *Id.* at 458–59.

*The Pledge of Allegiance.* More recently, in the first decade of the twenty-first century, legislators debated a proposal to strip federal jurisdiction over cases involving the Pledge of Allegiance.<sup>51</sup> The legislation was a reaction to a Ninth Circuit decision holding that the use of “under God” in the Pledge of Allegiance violated the Establishment Clause.<sup>52</sup>

Supporters of the Pledge bill answered claims that the measure was “anticonstitutional” by pointing to the Exceptions Clause<sup>53</sup> and to the Court’s decision in *McCardle*.<sup>54</sup> These legislators insisted that “[i]t is black letter law in the Constitution . . . that this body, this Congress, shall have the authority to set the jurisdiction of the courts.”<sup>55</sup> “The simple fact is, the framers of the Constitution did not want an unelected, unaccountable, life-tenured body, namely, the judiciary, to be able to . . . enact policy across the country,” without any mechanism for “the people themselves . . . to reverse” those decisions.<sup>56</sup>

Opponents, however, argued against the measure on both policy and constitutional grounds.<sup>57</sup> They asserted that “while Congress has the power to regulate” federal jurisdiction, “the courtstripping language of [the Pledge bill] grossly exceeds that power in violation of the principles of separation of

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51 The initial measure would have stripped only lower federal court jurisdiction. The bill was later revised to encompass Supreme Court jurisdiction as well. See H.R. REP. NO. 108-691, at 2 (2004).

52 See *Newdow v. U.S. Congress*, 292 F.3d 597, 610, 605–12 (9th Cir. 2002), amended by 328 F.3d 466 (9th Cir. 2003), *rev’d sub nom.* *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 15–18 (2004) (concluding that the “sole purpose [of the 1954 statute adding “under God” to the Pledge] was to advance religion”). The Supreme Court later reversed the Ninth Circuit’s decision on standing grounds and did not reach the merits of the constitutional claim. See *Newdow*, 542 U.S. at 15–18 (holding that the plaintiff lacked standing to bring the challenge on behalf of his public school daughter because he did not have custody).

53 152 CONG. REC. H5409 (daily ed. July 19, 2006) (statement of Rep. Mike Pence) (quoting the Exceptions Clause and stating “let us stop with all the conversation about anticonstitutional action being taken”); see 150 CONG. REC. H7473 (daily ed. Sept 23, 2004) (statement of Rep. John Hostettler) (arguing that “article III section 2 of the Constitution” provides “the basis for the legislation”).

54 See H.R. REP. NO. 108-691, at 11 (2004) (asserting that “[a] remedy to abuses by Federal judges has long been understood to lie, among other places, in Congress’s authority to limit Federal court jurisdiction,” and citing *McCardle* in support, stating that “the Supreme Court has upheld a statute removing jurisdiction from it in a pending case”); 152 CONG. REC. H5409 (daily ed. July 19, 2006) (statement of Rep. Steve King) (“[T]he landmark case is *Ex parte McCardle* [in] 1869 where Congress . . . purported to be acting under its authority under [the Exceptions Clause].”).

55 152 CONG. REC. H5409 (daily ed. July 19, 2006) (statement of Rep. Mike Pence).

56 150 CONG. REC. H7473 (daily ed. Sept. 23, 2004) (statement of Rep. John Hostettler) (“[T]he notion of an independent judiciary fails the Constitution test.”).

57 See, e.g., *id.* at H7469 (statement of Rep. Barbara Lee) (“It is unacceptable and unconstitutional to propose stripping powers from the judicial branch every time we disagree with a decision they make.”).

powers.”<sup>58</sup> “For over 200 years, since *Marbury v. Madison* in 1803, the Supreme Court has been the final arbiter of what is constitutional and what is not.”<sup>59</sup> Opponents also denied that *McCardle* supported the Pledge bill, pointing out that the Court in that case “surrendered only a single procedural avenue for appellate review.”<sup>60</sup>

Interestingly, even some legislators who favored stripping lower federal court jurisdiction over the Pledge cases strongly opposed the effort to restrict Supreme Court review.<sup>61</sup> Representative Judith Biggert, for example, had cosponsored an earlier bill that applied only to the lower federal courts but “[could] not support” the attempt to cut off Supreme Court review.<sup>62</sup> She “caution[ed her] colleagues to think twice before tampering with authorities clearly granted in the Constitution.”<sup>63</sup>

Members of Congress were also very concerned about their own precedents on the scope of the exceptions power. While some opponents of the Pledge bill cautioned that passage of the measure would establish a dangerous precedent that “would no doubt lead to further assaults on the judiciary,”<sup>64</sup> others emphasized the *lack* of past precedents for jurisdiction-stripping laws. “The fact that no other Congress has passed a law that totally eliminates the federal courts’ ability to review the constitutionality of a federal law should give all of the Members pause when considering this legislation.”<sup>65</sup> Notably, notwithstanding the constitutional objections raised by House members, the Pledge bill did pass the House on two occasions. But the measure was ultimately defeated in the Senate Judiciary Committee.<sup>66</sup>

58 152 CONG. REC. H5400 (daily ed. July 19, 2006) (statement of Rep. Robert Scott); see H.R. REP. NO. 108-691, at 94 (2004) (“By denying the Supreme Court its historical role as the final authority on the constitutionality of federal laws, [the bill] unnecessarily and unconstitutionally usurps the Court’s power.”).

59 152 CONG. REC. H5400 (daily ed. July 19, 2006) (statement of Rep. Robert Scott).

60 H.R. REP. NO. 108-691, at 107–08 (2004) (Minority Report).

61 For example, Representative Melvin Watt sought to return the bill to its original form by amending it to apply only to the inferior federal courts. See Grove, *Structural Safeguards*, *supra* note 2, at 913 n.252 (describing Representative Watt’s unsuccessful efforts to amend the bill).

62 150 CONG. REC. H7472 (daily ed. Sept. 23, 2004) (statement of Rep. Judy Biggert).

63 *Id.* (arguing that “Congress clearly has the authority under article III . . . to define the jurisdiction of the Federal district and appellate courts . . . . But this new bill strips the Supreme Court jurisdiction, and I cannot support that”); see also *id.* (“[T]he Supreme Court should be the final arbiter of all Federal questions.”).

64 H.R. REP. NO. 108-691, at 91–92 (2004) (Minority Report) (stating that “[e]nactment of [the Pledge bill] would constitute a very undesirable precedent and would no doubt lead to further assaults on the judiciary”); see 152 CONG. REC. H5412 (daily ed. July 19, 2006) (statement of Rep. John Dingell, Jr.) (“This [Pledge bill] is a precedent which is going to live to curse us . . .”).

65 H.R. REP. NO. 108-691, at 105 (2004) (Minority Report); see also *id.* at 95 (“The failure of Congress to enact legislation totally eliminating federal jurisdiction to review the constitutionality of federal statutes is evidence of the long deference and respect maintained by Congress for the principle of federal judicial review.”).

66 Grove, *Structural Safeguards*, *supra* note 2, at 915–16.

## 2. Beneficial “Exceptions”: Certiorari Review

Although scholars have long debated the scope of Congress’s (rarely used) power to strip the Supreme Court’s jurisdiction, they have largely overlooked an important way in which Congress *has* used its exceptions power—one that the Justices viewed as beneficial.<sup>67</sup> As I have detailed in prior work,<sup>68</sup> on many occasions from 1891 to 1988, Congress made “exceptions” to the Court’s mandatory appellate jurisdiction and granted it discretionary review via writs of certiorari. Congress made these exceptions in response to the Court’s own assertions that it was so burdened by the cases it was required to review that it was unable to resolve in a timely manner many important federal question cases from the lower federal and state courts. Congress thus granted certiorari review to enable the Court to focus its limited resources on resolving important issues of federal law and settling conflicts among the lower courts.<sup>69</sup>

The debates over these certiorari measures make clear that the political branches understood these measures as exercises of the “exceptions power.” Indeed, that was the power that Chief Justice Morrison Waite urged Congress to use to help the Court address its caseload crisis in the late nineteenth century.<sup>70</sup> Emphasizing that the Supreme Court’s “appellate jurisdiction is subject entirely to congressional control,” the Chief Justice requested legislation that would “help to make the . . . Court what its name implies, a powerful auxiliary in the administration of justice,” rather than “an obstacle standing in the way” of the final resolution of cases.<sup>71</sup> In the legislative debates leading up to the Judiciary Act of 1891, the first statute to grant certiorari review, prominent members of Congress likewise argued that Congress had the power to make such “exceptions” to the Court’s mandatory appellate jurisdiction. For example, House Judiciary Committee Chairman David Culbertson declared that “the authority vested in Congress to make exceptions to and regulate the appellate jurisdiction of the Supreme Court was granted for the purpose of enabling the Congress to adapt the appellate jurisdiction of the court to the varying demands of the business, trade, and commerce of

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67 See Grove, *Exceptions Clause*, *supra* note 2, at 964, 970, 971 & n. 225, 979–80 (describing the Justices’ support for certiorari legislation).

68 For a detailed discussion of the legislative debates, see *id.* at 948–78.

69 See H.R. REP. NO. 100-660, at 14 (1988), *reprinted in* 1988 U.S.C.C.A.N. 766, 779 (asserting that the expansion of certiorari review would enable the Court to perform its two “principal functions” of “resolv[ing] cases involving principles . . . of wide public importance” and “ensur[ing] uniformity and consistency in the law by resolving conflicts” among the lower courts); S. REP. NO. 68-362, at 3 (1924) (noting that “cases should not go to the Supreme Court . . . unless the questions involved are of grave public concern” or there is a conflict among the lower courts); Grove, *Exceptions Clause*, *supra* note 2, at 976–77 (noting the broad support for the measure).

70 *Remarks of Chief Justice Waite*, 36 ALB. L.J. 318, 318 (1887).

71 *Id.*

the country” and “to protect and shield that great tribunal . . . from an excessive burden of litigation.”<sup>72</sup>

Over the next century, Congress continued to assume that it had power under the Exceptions Clause to “restrict or reduce the [mandatory] appellate jurisdiction of the Supreme Court . . . in order to enable it fairly to meet the demands that are made upon it.”<sup>73</sup> Thus, in the debates leading up to the Judiciary Act of 1988, the law that granted the Supreme Court discretionary review over virtually every case,<sup>74</sup> the Senate Judiciary Committee stated:

In establishing the Court’s appellate jurisdiction under Article III, Congress can confer as much or as little compulsory jurisdiction as it deems necessary and proper, *including such exceptions as Congress thinks appropriate*. If Congress wants to make the Court’s appellate jurisdiction totally discretionary or totally obligatory in nature, nothing in the Constitution says “no.” See *Ex parte McCordle*, 7 Wall. 506 (1869).<sup>75</sup>

The Senate committee’s reliance on *McCordle* is striking. Many commentators worry that *McCordle* gives Congress a license to eliminate important federal cases from the Supreme Court’s jurisdiction. Yet, in the late twentieth century, the Senate Judiciary Committee turned that fear on its head by invoking *McCordle* to justify an “exception” that was designed to give the Court the means to decide important federal questions.

Admittedly, the fact that Congress has relied on the Exceptions Clause to enact measures that the Supreme Court viewed as beneficial does not preclude Congress from using its exceptions power in other ways. Nevertheless, these certiorari measures do demonstrate how the Exceptions Clause can serve an important function in the constitutional design, even if Congress never uses it to strip Supreme Court jurisdiction. Congress has repeatedly made “exceptions” that facilitate the Court’s capacity to resolve important questions of federal law.

### *C. The Exceptions Power in the Executive Branch*

Like most legislators, the executive branch from the late nineteenth century to modern times consistently supported the expansion of certiorari jurisdiction to facilitate Supreme Court review of important federal questions.<sup>76</sup> Beginning in the early twentieth century,<sup>77</sup> the executive branch also consid-

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<sup>72</sup> 21 CONG. REC. 3403–04 (1890) (statement of Rep. David Culberson) (arguing that “[t]he remedy” for the Court’s caseload crisis was “within the easy reach of Congress” under the Exceptions Clause).

<sup>73</sup> 66 CONG. REC. 2752 (1925) (statement of Sen. Albert Baird Cummins).

<sup>74</sup> See Act of June 27, 1988, Pub. L. No. 100-352, 102 Stat. 662 (1988).

<sup>75</sup> S. REP. NO. 96-35, at 2–3 (1979) (emphasis added); see S. REP. NO. 100-300, at 3 (1988) (same); see also S. REP. NO. 95-985, at 3 (1978) (same).

<sup>76</sup> See Grove, *Exceptions Clause*, *supra* note 2, at 980.

<sup>77</sup> The discussion here focuses on executive branch practice beginning in the early twentieth century. There were few challenges to the Supreme Court’s appellate jurisdiction in the nineteenth century. As to those challenges, the executive branch’s record is mixed. For a discussion, see Grove, *Article II Safeguards*, *supra* note 2, at 268–69 n. 80–81,

ered the scope of Congress's authority to remove classes of cases from the Court's appellate jurisdiction. The executive branch consistently opposed such jurisdiction-stripping measures—apparently in part because of doubts about the constitutionality of such measures.<sup>78</sup> That was true even when the executive branch strongly disagreed with the Supreme Court's constitutional decisions—as during the Franklin Roosevelt and Reagan Administrations. Ultimately, in the late twentieth century, the executive branch publicly announced that Congress lacks the power to make “exceptions” that undermine the Supreme Court's “core functions,” such as its power to hear constitutional claims. I offer here an overview of the executive branch's analysis of the scope of Congress's exceptions power.

In the 1930s, after the Supreme Court struck down key New Deal programs,<sup>79</sup> President Franklin Roosevelt considered a range of responses to the Court's decisions.<sup>80</sup> Although far better known for the Court-packing plan (which is discussed further below),<sup>81</sup> the Roosevelt Administration also considered proposals to restrict the Court's appellate jurisdiction.<sup>82</sup> In a series of internal memoranda, Assistant Solicitor General Warner Gardner (who, notably, would later draft the Court-packing plan)<sup>83</sup> argued that Congress lacked the power to strip Supreme Court jurisdiction over constitutional claims.<sup>84</sup> He reasoned: “It is abundantly clear that the members of the Federal Convention of 1787 viewed as one of the basic functions of the judiciary the power to declare legislation unconstitutional.”<sup>85</sup> Accordingly, the Supreme Court's jurisdiction over constitutional issues was “immun[e] from

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307 n.334; *see also id.* at 307 n.334 (observing that the executive's opposition to jurisdiction-stripping measures may be “a modern development”).

78 *See id.* at 268–86. Internal memos suggest that in the early-to-mid twentieth century, executive officials disagreed on the scope of Congress's exceptions power. *See id.* at 271–72. That may explain why the executive did not initially take a firm public position on the constitutionality of such measures.

79 *See, e.g.,* *Carter v. Carter Coal Co.*, 298 U.S. 238, 310–12 (1936) (invalidating the Bituminous Coal Conservation Act); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 551 (1935) (striking down the National Industrial Recovery Act).

80 *See Grove, Article II Safeguards, supra* note 2, at 269–71.

81 *See infra* notes 114–15 and accompanying text.

82 *See Grove, Article II Safeguards, supra* note 2, at 270–72. One administrative official argued that Congress *did* have broad power to strip the Supreme Court's appellate jurisdiction but strongly advised against that approach. *See id.* at 271–72. I focus on Assistant Solicitor General Warner Gardner's views, because my prior research indicates that he had a good deal more influence within the administration—as reflected by the fact that he was asked to draft the President's Court-packing plan. *See infra* note 83 and accompanying text.

83 *See* JEFF SHESOL, *SUPREME POWER: FRANKLIN ROOSEVELT VS. THE SUPREME COURT* 253–54, 256 (2010).

84 Memorandum from Warner W. Gardner, Department of Justice, Washington, D.C., to the Solicitor General 2–5, 10, 13 (Aug. 15, 1935) (copy on file with author) (stating that the Supreme Court's “immunity from legislative control includes the power to declare legislation unconstitutional”).

85 *Id.* at 10–11.



legislative control.”<sup>86</sup> Gardner thus recommended that the President instead go forward with a plan to “pack” the Supreme Court because that method of addressing the Court’s decisions was “certainly constitutional and . . . may be done quickly and with a fair assurance of success.”<sup>87</sup>

In the 1950s, the executive branch also opposed the effort of Senators Jenner and Butler to eliminate Supreme Court jurisdiction over certain claims involving suspected communists.<sup>88</sup> Although the executive branch stated that the Jenner-Butler bill raised constitutional concerns,<sup>89</sup> it did not take a firm public position on the scope of Congress’s exceptions power. Instead, President Dwight Eisenhower’s Attorney General William Rogers objected to the measure in language that could be construed as either constitutional or policy arguments, asserting that “[f]ull and unimpaired appellate jurisdiction in the Supreme Court is fundamental under our system of government.”<sup>90</sup> The Attorney General urged Congress not to repeat the “mistake” that it had made “during the troublous days of reconstruction,” when it stripped Supreme Court jurisdiction in habeas cases.<sup>91</sup>

Finally, in the late twentieth century, the Carter and Reagan Administrations firmly declared that any effort to strip the Supreme Court’s appellate jurisdiction over constitutional claims was not only unwise but also unconstitutional. Both administrations reasoned that Congress may not “make ‘exceptions’ to Supreme Court jurisdiction which would intrude upon [its] core functions . . . as an independent and equal branch in our system of

86 *Id.* at 10–11, 13.

87 WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* 115 (1995) (quoting Memorandum from Warner W. Gardner, *supra* note 84).

88 *Limitation of Appellate Jurisdiction of the United States Supreme Court*, *supra* note 22, at 574 (letter from Att’y Gen. William P. Rogers to Sen. James O. Eastland, Chairman, S. Comm. on the Judiciary). Notably, Attorney General William Rogers commented on what was at that time the Jenner bill. *See supra* note 22. The executive continued to oppose the jurisdiction-stripping bill after it became the Jenner-Butler bill. *See* S. REP. NO. 85-1586, at 36–37 (1958) (Minority Appendix B) (letter from Deputy Att’y Gen. Lawrence E. Walsh to Sen. Alexander Wiley) (“Aside from possible questions of constitutionality which may be raised by a provision withdrawing jurisdiction over a narrowly limited class of cases, this Department doubts the wisdom of dealing, at this time, with specific Supreme Court rulings by amendments to the Court’s jurisdictional statute.”).

89 S. REP. NO. 85-1586, at 36–37 (1958) (Minority Appendix B) (letter from Deputy Att’y Gen. Lawrence E. Walsh to Sen. Alexander Wiley) (noting that the measure raised “possible questions of constitutionality”).

90 *Limitation of Appellate Jurisdiction of the United States Supreme Court*, *supra* note 22, at 573 (letter from Att’y Gen. William P. Rogers to Sen. James O. Eastland, Chairman, S. Comm. on the Judiciary); *see also id.* at 573-74 (“I am convinced that in the absence of some final arbiter the maintenance of the balance contemplated in our Constitution as among the three co-ordinate branches of the Government and as between the States and the Federal Government would soon disappear.”).

91 *Id.* at 573 (“Because it realized that this was a mistake Congress reversed itself, restoring the jurisdiction in 1885.”).

separation of powers.”<sup>92</sup> I focus here on the analysis provided by President Ronald Reagan’s Attorney General William French Smith, which he announced in a May 1982 letter to Congress and later published as an official Office of Legal Counsel opinion.<sup>93</sup> Attorney General Smith’s analysis is the most extensive (and apparently still most recent)<sup>94</sup> public statement by the executive branch on the scope of the exceptions power.

Attorney General Smith’s analysis relied on text, structure, history, and the historical practices of the political branches. The Attorney General argued that although “Congress possesses some power to regulate the appellate jurisdiction of the Supreme Court,” “[t]he language of the Exceptions Clause . . . does not support the conclusion that Congress possesses plenary authority.”<sup>95</sup> “An ‘exception’ cannot, as a matter of plain language, be read so broadly as to swallow the general rule” of Article III—that the Supreme Court shall have appellate jurisdiction over federal question cases.<sup>96</sup> Moreover, Attorney General Smith insisted, the Framers believed that the Supreme Court would play a “vital role in the constitutional scheme” by “review[ing] state and federal laws for consistency with the Constitution.”<sup>97</sup> Accordingly, “it seems unlikely that they would have adopted, without controversy, a provision which would effectively authorize Congress to eliminate the Court’s core functions.”<sup>98</sup>

Finally, Attorney General Smith emphasized that his construction of the exceptions power was consistent with the historical practices of the executive and legislative branches. Although the executive had not always taken a firm position on the constitutionality of jurisdiction-stripping bills, “[t]he Department of Justice, in previous Administrations, has consistently opposed pro-

92 See 128 CONG. REC. 9093–97 (1982) (letter dated May 6, 1982, from Attorney General William French Smith to Senate Judiciary Committee Chairman Strom Thurmond); *Prayer in Public Schools and Buildings*, *supra* note 49, at 17 (memorandum of Larry L. Sims, Deputy Assistant Att’y Gen., in response to request for Office of Legal Counsel’s views on the Helms amendment) (showing that the Carter Administration endorsed Henry Hart’s theory that Congress could not undermine the Supreme Court’s “essential role,” and that the administration concluded that it would be “difficult to conceive of a more essential role for the Court than to preserve the unity of our constitutional law”); see also *infra* note 150 (discussing Hart’s theory).

93 128 CONG. REC. 9093–97 (letter dated May 6, 1982, from Attorney General William French Smith to Senate Judiciary Committee Chairman Strom Thurmond); *Constitutionality of Legislation Withdrawing Supreme Court Jurisdiction to Consider Cases Relating to Voluntary Prayer*, 6 Op. O.L.C. 13 (1982).

94 See *infra* notes 103, 141.

95 128 CONG. REC. 9093–94 (letter dated May 6, 1982, from Attorney General William French Smith to Senate Judiciary Committee Chairman Strom Thurmond).

96 *Id.* at 9094 (“The concept of an ‘exception’ was understood by the Framers, as it is defined today, as meaning an exclusion from a general rule or law.”).

97 *Id.* at 9095.

98 *Id.* at 9095–96 (“[I]t seems unlikely that the Framers intended the Exceptions Clause to empower Congress to impair the Supreme Court’s core functions in the constitutional scheme.”).

posals to restrict Supreme Court jurisdiction.”<sup>99</sup> Likewise, the historical practices of the legislative branch supported a narrow construction of the exceptions power. The Attorney General observed that although Congress in 1789 had not vested the Supreme Court with appellate jurisdiction over every federal question case, “[e]ach of the areas of incomplete jurisdiction has long since been filled.”<sup>100</sup> And “[t]he vast majority of constitutional decisions which are on the books today, and which affect our national life in many and important ways, have been rendered by the Court under a statutory regime which included . . . broad appellate jurisdiction.”<sup>101</sup> Accordingly, “the history of Supreme Court appellate review has confirmed the importance of its core functions.”<sup>102</sup> “The gloss which life has written on the Supreme Court’s jurisdiction is one which protects the essential role of the Court in the constitutional plan.”<sup>103</sup>

## II. ASSESSING POLITICAL BRANCH CONSTRUCTION OF ARTICLE III

The Supreme Court has said very little about the meaning of the Exceptions Clause, so political actors have been largely on their own in evaluating various proposed “exceptions” and “regulations” to the Court’s appellate jurisdiction. I consider here what the political debates might tell us about constitutional interpretation in the political branches and then raise questions about whether, or the extent to which, the judiciary should be influenced by these political branch practices.

### A. *Preliminary Concern: Principle or Politics (or Both)?*

At the outset, I want to address a preliminary question: whether it makes sense to take seriously the constitutional arguments of the political branches. The historical record certainly suggests that political actors were concerned with not only the policy but also the constitutionality of the exceptions and regulations made to the Supreme Court’s jurisdiction. For example, legislators pointed to the Exceptions Clause as the source of authority for certiorari measures, rather than simply discussing the wisdom of the legislation.<sup>104</sup>

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99 *Id.* at 9094 n.1 (citing congressional testimony by Department of Justice officials as well as internal Department of Justice memos dating from the 1950s to the 1980s).

100 *Id.* at 9096–97.

101 *Id.* at 9097.

102 *Id.* (“The Supreme Court now has appellate jurisdiction over all federal cases.”).

103 *Id.* (“As Justice Frankfurter said in another context, . . . ‘It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them.’”) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring)). Notably, Reagan’s second Attorney General Edwin Meese endorsed Attorney General Smith’s position during his confirmation hearings. *The President’s Nomination of Edwin Meese III to be Attorney General of the United States: Hearing Before the Senate Comm. on the Judiciary*, 98th Cong. 185–86 (1984) (stating that it “would be unwise as well as impermissible under the Constitution” for Congress to “diminish or take away the core functions of the Supreme Court”).

104 See *supra* subsection I.B.2.

Likewise, there was no widespread assumption that Congress had plenary power to strip the Supreme Court's jurisdiction. Supporters of jurisdiction-stripping measures went to great lengths to defend the measures against allegations that they were "anticonstitutional"—apparently anticipating that opponents would (as they did) challenge the measures on constitutional grounds.<sup>105</sup> The assumption among all political actors seemed to be that, even if some might desire as a policy matter to restrict the Supreme Court's jurisdiction, it would be inappropriate to do so if the measure were deemed unconstitutional.

It may, however, be difficult to discern the extent to which political actors were expressing their sincere beliefs about the meaning of the Constitution, rather than advancing constitutional arguments for political gain.<sup>106</sup> Although there is little reason to doubt the sincerity of legislators' arguments with respect to certiorari measures (there was generally broad and bipartisan support for such legislation),<sup>107</sup> it is more challenging to evaluate the constitutional arguments on jurisdiction-stripping proposals. As I have documented in earlier work,<sup>108</sup> a legislator's attitude toward jurisdiction-stripping measures tends to align with the legislator's overall agreement (or disagreement) with the judiciary's decisions. For example, in the late twentieth century, when the Supreme Court was known for its progressive decisions on issues like school prayer and abortion, social conservatives advocated jurisdiction-stripping measures while social progressives sought to block any effort to remove cases from the Court.<sup>109</sup>

The executive branch's consistent opposition to jurisdiction-stripping legislation cannot be explained on partisan grounds. After all, the Franklin Roosevelt and Reagan Administrations opposed efforts to strip the Supreme Court's appellate jurisdiction despite their strong disagreement with the Court's rulings; as noted, the Roosevelt Administration objected to the Court's invalidation of New Deal programs, and the Reagan Administration openly opposed the Court's school prayer and abortion decisions.<sup>110</sup> That

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105 152 CONG. REC. H5409 (daily ed. July 19, 2006) (statement of Rep. Mike Pence); *see supra* subsection I.B.1.

106 Neal Devins, for example, has raised important questions about the extent to which members of Congress are concerned about the constitutionality of legislation. *See, e.g.*, Neal Devins, *Party Polarization and Judicial Review: Lessons from the Affordable Care Act*, 106 NW. U. L. REV. 1821, 1823 (2012) (asserting that "party polarization contributes to congressional disinterest in the Constitution").

107 *See* Grove, *Exceptions Clause*, *supra* note 2, at 986–87. Although there was only modest bipartisan support for the 1891 Judiciary Act that introduced the concept of discretionary certiorari review, *see id.* at 952–59, there was broad and bipartisan support for every subsequent statute that expanded certiorari review, *see id.* at 962–68, 969–72, 976–78.

108 *See* Grove, *Structural Safeguards*, *supra* note 2, at 890–916; *id.* at 933–40 (providing an appendix, detailing the breakdown of votes on jurisdiction-stripping measures).

109 *See id.* at 900–16.

110 *See* Grove, *Article II Safeguards*, *supra* note 2, at 281–82 (documenting President Reagan public attacks on the Supreme Court's abortion and school prayer decisions); *supra* note 78–82 and accompanying text.

does not mean, however, that the executive branch's opposition to jurisdiction-stripping measures was based exclusively on its sincere constitutional views.<sup>111</sup> The President has an incentive to preserve Supreme Court jurisdiction over constitutional claims because, as political scientists have urged, Presidents often seek to advance their constitutional philosophy through litigation in the Supreme Court.<sup>112</sup> Furthermore, the Department of Justice has a strong institutional interest in preserving the Supreme Court's appellate review power because it can thereby advance its own influence over the development of federal law. The Solicitor General is in charge of virtually all federal litigation in the Supreme Court.<sup>113</sup> Thus, as former Solicitor General Drew Days put it, "[o]nce cases reach the Supreme Court, the Solicitor General plays an important role in the development of American law and can have [a substantial] impact upon the establishment of constitutional and other principles."<sup>114</sup>

Notably, these institutional incentives help explain not only the executive branch's opposition to jurisdiction-stripping measures but also the Roosevelt Administration's preference for the Court-packing plan. Presidents have an incentive to preserve Supreme Court jurisdiction because they can use the Court to advance their constitutional philosophy. For similar reasons, Presidents endeavor to nominate justices—preferably, as many as possible—who are sympathetic to that philosophy. In other words, Presidents who seek to promote their constitutional views through the judiciary have an incentive to "pack" the Court.<sup>115</sup>

The attitude of legislative and executive officials toward jurisdictional and other court-related legislation could thus be explained by something other than their sincere views about constitutional meaning. It nevertheless seems significant that these political actors made the effort to oppose—or defend—jurisdictional legislation in constitutional terms. As Curtis Bradley and Trevor Morrison have recently argued, when political actors make constitutional or other legal arguments, they tap into a culture that views the legal-

111 See Grove, *Article II Safeguards*, *supra* note 2, at 260–66.

112 See KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY* 5, 274 (2007) (arguing that Presidents often "[t]urn[ ] to the judiciary . . . [to] advanc[e] constitutional goals"); Howard Gillman, *Party Politics and Constitutional Change: The Political Origins of Liberal Judicial Activism*, in *THE SUPREME COURT AND AMERICAN POLITICAL DEVELOPMENT* 138, 146–55 (Ronald Kahn & Ken I. Kersch eds., 2006) (discussing the efforts of the Kennedy and Johnson Administrations to appoint judges who would favor civil rights and other progressive causes).

113 See 28 U.S.C. § 518(a) (2012); *FEC v. NRA Political Victory Fund*, 513 U.S. 88, 93 (1994).

114 Drew S. Days, III, *Executive Branch Advocate v. Officer of the Court: The Solicitor General's Ethical Dilemma*, 22 *NOVA L. REV.* 679, 680 (1998).

115 For that reason, "Roosevelt's proposal to pack the Court with his supporters contained no provision requiring judicial restraint at all. . . . The administration hoped to harness the power of the Court, not destroy it." WHITTINGTON, *supra* note 112, at 266–67 (emphasis added).

ity of a given action as highly salient.<sup>116</sup> There seems to be widespread agreement in this country—among government officials, the media, and the general public—that the government should not engage in “unconstitutional” conduct,<sup>117</sup> even if individuals may disagree on what counts as “unconstitutional.” That helps explain why, Bradley and Morrison argue, Presidents are careful to defend their foreign policy decisions in legal terms, even when those decisions may never be subject to challenge in court.<sup>118</sup> Executive officials recognize that the “political costs” of certain actions “may go up with their perceived illegality.”<sup>119</sup>

By the same reasoning, both proponents and opponents of jurisdiction-stripping measures seemed to assume that the proposals were less likely to be enacted if they were perceived as unconstitutional. That explains both why proponents like Senators Jenner, Butler, and Helms were so careful to defend their proposals in constitutional terms, and why opponents attacked the measures on constitutional grounds. “[T]he decision to devote resources to producing credible legal” arguments “suggests that legality is salient” in this context.<sup>120</sup> Constitutional concerns also seem to explain why, in the debates over the Pledge bill, some legislators who strongly supported the effort to strip inferior federal court jurisdiction opposed the measure as applied to the Supreme Court. Although those legislators believed that Congress had plenary power over lower federal court jurisdiction, they did want to “tamper[ ] with authorities clearly granted in the Constitution” by restricting Supreme Court review.<sup>121</sup>

There may be particularly good reason to take seriously the executive branch’s constitutional arguments on jurisdiction-stripping measures. Attorneys at the Department of Justice are trained in a legal culture that cares deeply about the constitutionality of action.<sup>122</sup> Accordingly, even if the exec-

116 Curtis A. Bradley & Trevor W. Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, 113 COLUM. L. REV. 1097, 1140–44 (2013) (“[T]he decision to devote resources to producing credible legal defenses of executive actions suggests that legality is salient.”).

117 See *id.* at 1138 (noting that “legal argumentation might have a salience with the media, the public at large, and influential elites that could provide presidential opponents in Congress and elsewhere with an incentive to criticize executive actions in legal terms”).

118 *Id.* at 1098–1100 (observing that, even in cases where there was “a low likelihood that courts would resolve the dispute,” the executive has “offered public legal justifications”).

119 *Id.* at 1151.

120 *Id.* at 1143; see also *id.* (“Over time, . . . [i]f successfully defending the legality of one’s actions has a political value, law may come to be partly constitutive of an official’s preferences.”).

121 150 CONG. REC. H7472 (daily ed. Sept. 23, 2004) (statement of Rep. Judy Biggert); *supra* notes 61–63 and accompanying text.

122 See Bradley & Morrison, *supra* note 116, at 1132–33 (“Although lawyers serve in a wide variety of roles throughout the executive branch, their experience of attending law school means that they have all had a common socialization—a socialization that typically entails taking law seriously on its own terms.”). The assertion in the text is also based upon my own experience as a litigator for the Department of Justice.

utive branch's constitutional arguments aligned with that branch's institutional interests, it seems quite plausible that many of the individual attorneys involved (including the Attorneys General) viewed themselves as making sincere constitutional claims.

### B. *Political Branch Construction of Article III*

Although I do not want to discount the importance of partisan or institutional motivations, I believe there are good reasons to credit political actors' assertions that they were concerned—at least in part—with the constitutionality of proposed “exceptions” and “regulations” to the Supreme Court's appellate jurisdiction. If nothing else, the participants in these debates seemed to assume that constitutional concerns would raise the political costs of enacting the legislation. The debates over these jurisdictional regulations thus offer a window into the way in which political actors deal with Article III (and perhaps other constitutional) issues. I highlight here a few features of this political branch practice, including political actors' reliance on their own precedents and their use of constitutional standards that might not be deemed “judicially manageable.” These features suggest that political actors are engaged in a very different enterprise than the judiciary when they interpret Article III.

#### 1. Reliance on Legislative and Executive Precedent

At the outset, I want to underscore that there was no general assumption that the Supreme Court had settled the meaning of the Exceptions Clause in *McCordle*. Although proponents of jurisdiction-stripping measures at times relied on *McCordle* to support a broad construction of the exceptions power,<sup>123</sup> opponents insisted that “*McCordle* is [ ] not the end of the matter.”<sup>124</sup> Indeed, some opponents used the controversial circumstances of that case (i.e., that Congress stripped Supreme Court jurisdiction to prevent the Court from striking down a federal law) to condemn subsequent jurisdiction-stripping measures. During the debates over the Jenner-Butler bill, Attorney General Rogers and some legislators urged Congress not to repeat the “mistake” that it had made “during the troublous days of reconstruction.”<sup>125</sup> The only consensus among legislators seemed to be that *McCordle*'s broad reading of the exceptions power supported certiorari legislation;<sup>126</sup>

123 See *supra* notes 15, 27, 54.

124 128 CONG. REC. 21862 (1982) (statement of Sen. Daniel Patrick Moynihan).

125 *Limitation of Appellate Jurisdiction of the United States Supreme Court*, *supra* note 22, at 573 (1958) (letter from Att'y Gen. William P. Rogers to Sen. James O. Eastland, Chairman, S. Comm. on the Judiciary); 104 CONG. REC. 18686 (1958) (statement of Sen. Thomas Hennings) (noting that “this bill is reminiscent of” that “ill-advised attack[ ] on the Supreme Court”).

126 *E.g.*, S. REP. NO. 96-35, at 2-3 (1979) (emphasis added) (“If Congress wants to make the Court's appellate jurisdiction totally discretionary or totally obligatory in nature, nothing in the Constitution says “no.” See *Ex parte McCordle*, 7 Wall. 506 (1869).”).

the case's meaning as to jurisdiction-stripping proposals was very much open to debate.

Accordingly, legislators and executive officials relied on constitutional sources other than Supreme Court precedent, including the constitutional text, structure, history, broad separation of powers principles, and their own legislative and executive precedents. I focus here on political actors' reliance on their own precedents, both because that seems to be a unique feature of political branch constitutional interpretation and because such practices are often overlooked in the Article III literature.<sup>127</sup>

Proponents of jurisdiction-stripping measures like Senator Helms insisted that such proposals were not "unprecedented," because earlier legislators had suggested similar bills.<sup>128</sup> Opponents, however, pointed to Congress's *failure* to enact jurisdiction-stripping legislation as evidence that such measures were unconstitutional. Senator Kennedy, for example, underscored that "none [of the bills cited by Senator Helms are] law."<sup>129</sup> Likewise, during the debates over the Pledge bill, opponents argued that "[t]he fact that no other Congress has passed a law that totally eliminates the federal courts' ability to review the constitutionality of a federal law should give all of the Members pause when considering this legislation."<sup>130</sup>

Opponents of jurisdiction-stripping measures also emphasized that the legislation, if enacted, would establish "a very dangerous precedent"<sup>131</sup> that "would no doubt lead to further assaults on the judiciary."<sup>132</sup> "The result will be to weaken, if not cripple, the independence of the Federal judiciary and subvert the U.S. Constitution."<sup>133</sup>

There is good reason to believe that such precedent-based arguments had considerable significance in the context of jurisdiction-stripping debates. Importantly, the legislative opponents of the Jenner-Butler bill, the school prayer proposal, and the Pledge bill did not purport to support the Supreme

127 In fact, only a few legal scholars have studied executive or legislative reliance on precedent. For examples of some of the excellent work that has been done in this area, see MICHAEL J. GERHARDT, *THE POWER OF PRECEDENT* 111–46 (2008) (emphasizing the importance of nonjudicial precedent); Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448 (2010) (offering an empirical analysis of the use of precedent by the Office of Legal Counsel). Barry Friedman is one of the few Article III scholars who seems to have recognized that court-curbing legislation may become more difficult to enact as "[h]istorical precedents against Court-packing and jurisdiction-stripping pile up." Barry Friedman, *The History of the Countermajoritarian Difficulty, Part II: Reconstruction's Political Court*, 91 GEO. L.J. 1, 64 (2002).

128 125 CONG. REC. 7636 (1979) (statement of Sen. Jesse Helms) ("Some have described [the school prayer measure] as an 'unprecedented' proposal. . . . Nothing could be more incorrect.")

129 *Id.* (statement of Sen. Edward Kennedy, D-Mass.) ("[T]he Senator from North Carolina would be unable to give us any action by Congress which would take away the [Supreme Court's] jurisdiction to deal with constitutional issues.")

130 H.R. REP. NO. 108-691, at 105 (2004).

131 125 CONG. REC. 7654 (statement of Sen. Birch Bayh).

132 H.R. REP. NO. 108-691, at 91.

133 125 CONG. REC. 7644 (1979) (statement of Sen. John Durkin).



Court's decisions on communism or prayer, nor did they argue that the use of "under God" in the Pledge of Allegiance was unconstitutional. On the contrary, these legislators condemned communism,<sup>134</sup> often advocated prayer in school,<sup>135</sup> and overwhelmingly agreed that the Pledge was valid.<sup>136</sup> Accordingly, what likely concerned the legislators was not so much the loss of federal jurisdiction over these specific issues, but rather the prospect that each jurisdiction-stripping measure, if enacted, could serve as a "precedent" for restricting jurisdiction over other constitutional claims that progressives favored, such as abortion and racial and gender equality. Indeed, some legislators said as much. For example, in opposing the school prayer measure, Representative Harold Sawyer stated that, although he was "in favor of allowing voluntary prayer in the schools," "the thing that frighten[ed] [him] about" the bill was that it might encourage future efforts to "deprive the Supreme Court of any jurisdiction to cover the due process clause, or civil rights, or equal treatment" and thereby "virtually emasculate the Bill of Rights."<sup>137</sup>

The executive branch was also concerned with prior political branch practice. Attorney General Smith expressly invoked precedent in support of his view that Congress lacks power under the Exceptions Clause to interfere with the Supreme Court's "core functions." He noted that Congress since 1789 had gradually expanded the Court's jurisdiction to encompass every federal question and concluded that "the history of Supreme Court appellate review" had thereby "confirmed the importance of its core functions."<sup>138</sup> Attorney General Smith also emphasized that his constitutional interpretation was consistent with prior executive branch opposition to jurisdiction-stripping measures.<sup>139</sup>

Moreover, Attorney General Smith created an important precedent by publishing his own strong defense of the Supreme Court as an official Office of Legal Counsel opinion. As Trevor Morrison has demonstrated, the execu-

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134 See, e.g., 104 CONG. REC. 18682 (1958) (statement of Sen. Alexander Wiley) (stating that he "like all of us, loathe[s] this thing called communism"); *id.* at 18685-86 (1958) (statement of Sen. Thomas Hennings) (similarly expressing his strong opposition to communism).

135 See, e.g., 125 CONG. REC. 7644 (statement of Sen. John Durkin) (agreeing with Senator Helms that "the Constitution and our own traditions offer room for allowing moments of voluntary prayer by each student"); *infra* note 137 and accompanying text.

136 See H.R. REP. NO. 108-691, at 91 ("We do not oppose the legislation because we believe that voluntary recitation of the Pledge of Allegiance is unconstitutional"); see also *id.* at 7-9 (showing that the House voted 400-7 and the Senate voted 99-0 to condemn the Ninth Circuit decision invalidating the Pledge).

137 *Prayer in Public Schools and Buildings*, *supra* note 49, at 26 (statement of Rep. Harold Sawyer).

138 128 CONG. REC. 9097 (1982) (letter dated May 6, 1982, from Attorney General William French Smith to Senate Judiciary Committee Chairman Strom Thurmond).

139 See *id.* at 9094 n.1 ("The Department of Justice, in previous Administrations, has consistently opposed proposals to restrict Supreme Court jurisdiction.").

tive branch does not often depart from such precedents.<sup>140</sup> Indeed, Attorney General's Smith analysis appears to still be the official position of the executive branch on the scope of Congress's exceptions power.<sup>141</sup>

Notably, political actors do not appear to treat precedent as binding in the same way that we generally expect judges to do.<sup>142</sup> As Michael Gerhardt has observed, arguments from precedent have considerable resonance in Congress but are not decisive.<sup>143</sup> And although the Office of Legal Counsel seems more inclined than the legislature to treat its own precedents as authoritative, it does not appear to follow prior precedent as carefully as the judiciary.<sup>144</sup> In fact, the executive branch "occasionally comes close to suggesting that mere disagreement with the substance of an earlier opinion is enough to justify overruling" it.<sup>145</sup> Accordingly, reliance on precedent

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140 Morrison, *supra* note 127, at 1457–58 (asserting, based on an empirical analysis of Office of Legal Counsel precedents from the Carter through the Obama Administrations, that "OLC does not often overrule itself").

141 The executive did not release any public documents pertaining to the Pledge bill proposed in the early twenty-first century. Nor did the executive take a public position on the constitutionality of a provision of the Military Commissions Act, which purports to strip both Supreme Court and inferior federal court jurisdiction over claims involving the "conditions of confinement" of alleged enemy combatants in the war on terror. See 28 U.S.C. § 2241 (e) (2) (2012) (stating that "no court, justice, or judge shall have jurisdiction to hear or consider any . . . action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement" of detainees). To the extent that the "conditions of confinement" provision bars Supreme Court review of constitutional claims, it would be invalid under Attorney General Smith's analysis. The passage of the Military Commissions Act (with the strong support of the executive) suggests that although the executive's attitude toward jurisdictional regulations may be partly motivated by constitutional concerns, such concerns do not always override policy matters.

142 See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 864 (1992) (joint opinion of O'Connor, Kennedy, and Souter, JJ.) ("[A] decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided."); see also *id.* at 854–55 (identifying factors to govern the overruling of precedent, including whether the rule from the prior decision has proven unworkable; whether the rule has generated significant reliance interests; whether the rule is inconsistent with subsequent legal developments in related areas; or whether the facts have changed so as to "rob[ ] the old rule of significant application or justification").

143 See GERHARDT, *supra* note 127, at 138–45. Indeed, it is difficult to discern the extent to which legislators are constrained by their precedents. After all, legislators tend to cite legislative precedents with which they agree. Cf. Fredrick Schauer, *Precedent*, 39 STAN. L. REV. 571, 576 (1987) ("If precedent matters, a prior decision now believed erroneous still affects the current decision simply because it is prior.").

144 Morrison asserts that the Office of Legal Counsel at times seems to adhere to its precedents for reasons similar to those offered by the Supreme Court in *Planned Parenthood v. Casey*, although the Office of Legal Counsel "occasionally comes close to suggesting that mere disagreement with the substance of an earlier opinion is enough to justify overruling." Morrison, *supra* note 127, at 1504–11; see *supra* note 142.

145 Morrison, *supra* note 127, at 1511. Furthermore, Morrison has argued that the executive may legitimately depart from a prior opinion that "cannot be reconciled with the current President's considered constitutional views." *Id.* at 1511.

appears to be an important part—but only part—of constitutional interpretation in the political branches.

## 2. (Lack of a) Judicially Manageable Standard

The legislative and executive debates over the Exceptions Clause reveal another feature of constitutional interpretation in the political branches. Political actors were clearly unconcerned with articulating constitutional principles that might be deemed workable for the judiciary. As Richard Fallon and others have observed, when the Supreme Court crafts constitutional tests for the lower federal and state courts, it seeks to identify a “judicially-manageable standard.”<sup>146</sup> Although the Court has not clearly defined what counts as “judicially manageable,” it has suggested that such a standard should provide sufficient guidance to lower courts to enable them to make reasonably predictable and principled rulings, rather than ad hoc, subjective judgments.<sup>147</sup>

But in debating jurisdictional proposals, political actors relied on standards that would likely not satisfy that (minimal) test. For example, in describing Congress’s power to enact certiorari measures, the Senate Judiciary Committee stated that Congress may “confer as much or as little compulsory jurisdiction *as it deems necessary and proper*, including such exceptions as Congress thinks appropriate.”<sup>148</sup> The same kind of open-ended, discretionary standards can be found in the jurisdiction-stripping debates. In opposing the Jenner-Butler bill, Senator Wiley claimed that the exceptions power was limited by a “principle of reasonableness” that, in his view, prohibited Congress from stripping Supreme Court jurisdiction simply because legislators disagreed with certain decisions.<sup>149</sup> Furthermore, many political actors have been drawn to Henry Hart’s theory that Congress may not use its exceptions

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146 See Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274, 1276 (2006) (asserting that “disparities between constitutional meaning and judicial doctrine arise frequently in constitutional adjudication as the result of the demand for judicially manageable standards”).

147 See *id.* at 1281, 1287–93, 1331 (observing that the Supreme Court has apparently “never attempted to define what it means by judicially manageable standards” but identifying various “practical desiderata that guide assessments of judicial manageability,” including whether the rule or standard can generate reasonably predictable and consistent results); Aziz Z. Huq, *Removal as a Political Question*, 65 STAN. L. REV. 1, 22 (2013) (noting that the Court has suggested that “a rule of decision fails [the] test [for judicial manageability] when it relies excessively on jurists’ subjective judgments, or when it fails to generate predictable guidance” (footnote omitted)).

148 S. REP. NO. 96-35, at 2–3 (1979) (emphasis added); see S. REP. NO. 100-300, at 3 (1988) (same); see also S. REP. NO. 95-985, at 3 (1978) (same).

149 104 CONG. REC. 18682-63 (1958) (statement of Sen. Alexander Wiley) (“[T]he implementation of the disagreements with the Supreme Court decision by the enactment of law to make such decisions in the future impossible . . . [is an] abuse . . . of the powers of the legislature to determine the appellate powers of the High Court.”); see also *id.* (“This legislation violently tampers with the basic law of the land as established by the Founding Fathers.”).

power to impair the Supreme Court's "essential role" in the constitutional plan,<sup>150</sup> even though that theory has been criticized as too indeterminate to guide courts.<sup>151</sup> Both the Carter and the Reagan Administrations as well as a number of legislators contended that the political branches could not interfere with the Supreme Court's "essential role" or "core functions."<sup>152</sup>

There may, however, be little reason for political actors to employ standards that would be deemed workable by the judiciary. As Akhil Amar and others have recognized, "judges seek[ ] 'mediating principles' to implement constitutional values in case by case adjudication" so that "adjudication [will] appear more 'legal' and less 'political.'"<sup>153</sup> But this "preference for bright-line rules is one intimately bound up with special institutional needs of courts, and thus . . . less relevant to" other government officials.<sup>154</sup> In other words, even if principles like "reasonableness" and "core functions" are not *judicially* manageable, perhaps they could be deemed *politically* manageable standards.<sup>155</sup>

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150 In 1953, Henry Hart famously suggested that any "exceptions" should "not be such as will destroy the essential role of the Supreme Court in the constitutional plan." Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1365 (1953). Although Hart presented this theory as part of a dialectic (and thus may not have believed there was such a limit on congressional power), Hart's article has long been viewed as the source of this constitutional theory.

151 See, e.g., Akhil Reed Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499, 1514 (1990) (describing the "'essential function' test[ ]" as "fuzz[y]"); see also James E. Pfander & Daniel D. Birk, *Article III and the Scottish Judiciary*, 124 HARV. L. REV. 1613, 1671 (2011) (noting that the essential role theory "has been faulted for its indeterminacy and its lack of textual foundation").

152 See *supra* notes 80, 92–103 and accompanying text.

153 Amar, *supra* note 151, at 1514 (footnote omitted).

154 *Id.* at 1514–15 (footnote omitted); see also MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 60–61 (1999) (similarly emphasizing that "[c]ourts may design some doctrines," including standards like rational basis scrutiny, "to reflect their sense of their own limited abilities, not to reflect directly substantive constitutional values").

155 Along the same lines, political actors have relied on broad separation of powers principles in arguing about jurisdiction-stripping measures. See, e.g., H.R. REP. NO. 108-691, at 94 (2004) (Minority Report) ("The [Pledge bill] intrudes upon the long-standing principle of separation of powers between the branches of government."). In recent work, John Manning has powerfully argued that "the Constitution adopts *no freestanding principle of separation of powers.*" John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1944 (2011). Thus, Manning asserts that courts should not invalidate congressional action on the ground that it violates general separation of powers principles but should recognize that the Constitution through "the Necessary and Proper Clause . . . delegates to Congress broad and explicit (though not limitless) discretion" to determine the allocation of power among the branches of government. John F. Manning, *The Supreme Court, 2013 Term—Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 6, 6–8 (2014). Notably, Manning does not appear to assert that legislators and executive officials themselves should reject the idea of a "freestanding principle of separation of powers." Indeed, there is an interesting question whether Congress, in carrying out its power under the Necessary and Proper Clause to allocate authority among the branches, *should* take

### 3. The Need for Further Study of Political Branch Interpretation

These features of constitutional interpretation by the political branches suggest that political actors engage in a very different enterprise than the judiciary when they interpret the provisions of Article III. Political actors look closely at their own precedents, without necessarily viewing those precedents as binding. Political actors also rely on loose and ambiguous standards that would likely not be deemed sufficient for courts. These differences suggest that political actors may enforce Article III in ways that differ from courts. Accordingly, there is good reason for scholars to devote more attention to legislative and executive practice in this area.

First, scholars should consider that political actors might deem a given jurisdictional proposal to be unconstitutional, even if the measure, if enacted, would be upheld by a court.<sup>156</sup> As Larry Sager and others have observed, some constitutional norms are “underenforced” by the judiciary because of the distinct institutional limitations of the courts.<sup>157</sup> In fact, that is one reason why some constitutional issues are said to be “political questions”; the judiciary lacks the institutional resources to enforce those constitutional norms.<sup>158</sup>

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such broad principles into account. The answer to that question is beyond the scope of this Essay, but I hope to explore it in future work.

156 There is a practical reason for scholars to study the political branches’ approach to Article III. Over the years, legal academics have often been called upon to testify in legislative hearings about the constitutionality of jurisdictional proposals. See, e.g., H.R. REP. NO. 108-691, at 50 (2004) (noting that the House Judiciary Committee heard testimony from two law professors on the Pledge bill). In arguing in favor of or against jurisdictional regulations, scholars should be mindful of the very different institutional context in which political actors operate. It may be that a scholar could argue in a legislative hearing that a given jurisdictional regulation was unconstitutional—even if that scholar believed the measure, if enacted, would be upheld by a court. See also TUSHNET, *supra* note 154, at 62 (suggesting that scholars should not draw only on Supreme Court opinions when advising members of Congress on the constitutionality of legislation).

157 See Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1213 (1978) (arguing that when the Supreme Court “because of institutional concerns, . . . fail[s] to enforce a provision of the Constitution to its full conceptual boundaries,” “we should treat these ‘underenforced’ constitutional norms as valid to their conceptual limits, and understand the contours of federal judicial doctrine regarding these norms to mark only the boundaries of the federal courts’ role of enforcement”); see also Richard H. Fallon, Jr., *The Supreme Court, 1996 Term—Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 57 (1997) (“A crucial mission of the Court is to *implement* the Constitution successfully. In service of this mission, the Court often must craft doctrine that is driven by the Constitution, but does not reflect the Constitution’s meaning precisely.”).

158 See, e.g., Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 240 (2002) (“Underlying the political question doctrine . . . is the recognition that the political branches possess institutional characteristics that make them superior to the judiciary in deciding certain constitutional questions.”). For an argument that the modern political question doctrine, as developed and applied by the Supreme Court, does not in fact involve such deference to

But such judicially underenforced constitutional norms could still guide—and constrain—political actors.<sup>159</sup> Thus, for example, if the “essential role” theory were the correct reading of the exceptions power—such that Congress may not make “exceptions” that deprive the Supreme Court of its essential role in the constitutional plan—that might not be a judicially enforceable constitutional norm. But the norm could still be applied and enforced by the legislative and executive branches.

Indeed, the historical practices of the political branches could support a claim that the Exceptions Clause empowers Congress only to “‘obviate and remove’ . . . ‘inconveniences’ likely to arise within the judicial system”<sup>160</sup> but not to interfere with the Supreme Court’s “core functions.”<sup>161</sup> After all, Congress has repeatedly used its exceptions power to protect the Court “from an excessive burden of litigation” by creating and expanding certiorari review,<sup>162</sup> while it has virtually never used that power to strip the Court’s appellate jurisdiction. Although this historical record may not be clear enough to justify *judicial* invalidation of a jurisdiction-stripping measure (a matter discussed further below), the argument from historical practice could have resonance in Congress. Attorney General Smith seemed to assume that such an argument would have political salience when he declared in his letter to Congress that the practices of the political branches had “confirmed the importance of [the Supreme Court’s] core functions.”<sup>163</sup> “The gloss which life has written on the Supreme Court’s jurisdiction is one which protects the essential role of the Court in the constitutional plan.”<sup>164</sup>

Second, and more generally, scholarly study of political branch practice would also call attention to—and perhaps raise normative questions about—the way in which political actors approach constitutional interpretation. Scholars could examine the two phenomena I have focused on here: political actors’ reliance on their own precedents and on rather vague principles to guide their interpretation of Article III. The legislative and executive debates

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the political branches, see Tara Leigh Grove, *Reconsidering the Political Question Doctrine*, 90 N.Y.U. L. REV. (forthcoming 2015) (draft on file with author).

159 See David Barron, *Constitutionalism in the Shadow of Doctrine: The President’s Non-Enforcement Power*, LAW & CONTEMP. PROBS., Winter/Spring 2000, at 63–64 (emphasizing “the degree to which the Supreme Court’s own institutional characteristics shape its interpretation” and arguing that the President should at times decline to enforce statutes, even when they would be upheld by courts, because the President can protect constitutional values that courts cannot enforce); Sager, *supra* note 157, at 1221, 1227 (“[The] obligation to obey constitutional norms at their unenforced margins requires governmental officials to fashion their own conceptions of these norms and measure their conduct by reference to these conceptions.”)

160 128 CONG. REC. 21858 (1982) (statement of Sen. Max Baucus) (quoting THE FEDERALIST NO. 80, at 481 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

161 *Id.* at 21862 (statement of Sen. Daniel Patrick Moynihan).

162 21 CONG. REC. 3404 (1890) (statement of Rep. David Culbertson); see *supra* Part I.B.

163 128 CONG. REC. 9093, 9097 (1982) (letter dated May 6, 1982, from Attorney General William French Smith to Senate Judiciary Committee Chairman Strom Thurmond) (“The Supreme Court now has appellate jurisdiction over all federal cases.”).

164 *Id.*

over the exceptions power also raise other questions. For example, political actors often emphasized the intent of the Framers rather than the original meaning of the Exceptions Clause.<sup>165</sup> Such intent-based originalism has been largely discredited within legal academia, at least for the judiciary.<sup>166</sup> There is an important question whether intent-based originalism is equally objectionable for the political branches.<sup>167</sup>

My goal here is not to offer a comprehensive theory of constitutional interpretation by the political branches. Instead, I seek primarily to draw attention to the fact that, as in other separation of powers arenas, political actors do seem concerned about the constitutionality of the jurisdictional regulations they enact. Examining political actors' application of Article III could not only shed light on how the political branches will approach future jurisdictional proposals but also provoke study of how the political branches do (and should) interpret the Federal Constitution.

### C. *Political Branch Precedents in the Judiciary*

Political actors seem to care about their own precedents in interpreting the scope of their power under Article III. But there is a separate question whether the judiciary should rely on the constitutional interpretations and practices of Congress and the executive branch, if and when similar issues reach the courts. I suggest here that there are reasons for the judiciary to be cautious about relying too heavily on political branch practice.

Some forms of interpretation may, of course, exclude reliance on political branch practice. For example, if a judge concluded that constitutional meaning should be determined exclusively (or almost exclusively) by Found-

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165 See, e.g., *id.* at 21857 (statement of Sen. Max Baucus) (opposing the school prayer measure on the ground that “the Framers of the Constitution intended that the Supreme Court enforce the supremacy clause”); *id.* at 9093, 9095 (letter dated May 6, 1982, from Attorney General William French Smith to Senate Judiciary Committee Chairman Strom Thurmond) (“[I]t seems unlikely that the Framers intended the Exceptions Clause to empower Congress to impair the Supreme Court’s core functions in the constitutional scheme.”).

166 See RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION* 94 (2013) (“No longer do originalists claim to be seeking the subjective intentions of the framers.”); Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 *CONST. COMMENT.* 47, 48 (2006) (“Ever since 1986, when then-Judge Antonin Scalia articulated the distinction between original intent, i.e., the subjective thoughts of historically concrete drafters and/or ratifiers, and original meaning, i.e., the meaning that a reasonable person would attribute to textual language, modern originalists have moved steadily towards the latter.”).

167 Intent-based originalism has been strongly criticized on the ground that it is difficult to ascribe any “intent” to a multimember group like those who participated in the Philadelphia Convention and Ratification debates. See Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 *B.U. L. REV.* 204, 213–17 (1980). The same objection would seem to apply to the political branches as well. But perhaps there are institutional reasons for the political branches to have more leeway than the judiciary when engaging in constitutional interpretation. In short, I seek to raise (without answering) the question whether there is a one-size-fits-all approach to constitutional interpretation.

ing-era sources, then the subsequent practices and constitutional interpretations of the political branches would be largely irrelevant. But even if a judge applied an alternative interpretive method that would not foreclose resort to political branch practice (such as forms of new originalism<sup>168</sup> or common law constitutionalism<sup>169</sup>), there are, I believe, reasons for judges to be hesitant about giving substantial weight to political branch constructions of Article III.

First, a judge may not want to rely on executive and legislative precedents that used an approach to constitutional interpretation that the judge deems inappropriate. As discussed, political actors have engaged in interpretive practices that scholars have criticized in the context of the judiciary—by, for example, looking to the intent of the Framers and invoking standards like “reasonableness” and “core functions” that might not be deemed judicially manageable.<sup>170</sup> Even if those interpretive approaches are appropriate for the political branches (a matter that, in my view, warrants further scholarly study), it may make sense for a judge to think twice before using political branch practices based on such methods as establishing the “authoritative” meaning of Article III.

Second, and perhaps more importantly, it may be challenging for a judge to discern whether a given measure was enacted or rejected on constitutional, as opposed to policy, grounds. That is particularly true with respect to legislative rejection of jurisdiction-stripping measures. As discussed, there is a high correlation between legislators’ votes on jurisdiction-stripping legislation and their general attitude toward the judiciary at a given time. That is, political actors who disapprove the general trend of judicial decisions tend to favor jurisdiction stripping; those who favor the judiciary’s rulings tend to oppose such restrictions.<sup>171</sup> Although political actors’ emphasis on the constitutionality of jurisdiction-stripping bills indicates that constitutional concerns *influenced* the debates (at least by raising the political costs of the legislation), a judge would have difficulty determining that Congress rejected

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168 Jack Balkin’s version of “new originalism” seems particularly conducive to reliance on political branch practice. See JACK M. BALKIN, *LIVING ORIGINALISM* 3–6 (2011) (“offer[ing] a constitutional theory, *framework originalism*, which views the Constitution as an initial framework for governance that sets politics in motion, and that Americans must fill out over time through constitutional construction”). For an excellent discussion of how new originalists might use such evidence, see Lawrence B. Solum, *Originalism and the Unwritten Constitution*, 2013 U. ILL. L. REV. 1935, 1978–80 (asserting that when a text is “vague or irreducibly ambiguous,” “originalists can accept the use of historical practice to liquidate constitutional meaning” but also noting that the normative question whether originalists *should* “embrace a role for historical practice in constitutional construction . . . is a complex question and different originalists may approach it differently”).

169 See DAVID A. STRAUSS, *THE LIVING CONSTITUTION* (2010). Many judges may also simply look at a range of materials—text, history, structure, and precedent—without expressly adopting any specific approach to constitutional interpretation.

170 See *supra* notes 146–55, 165–67 and accompanying text.

171 See Grove, *Structural Safeguards*, *supra* note 2, at 890-916; *id.* at 933–40 (providing an appendix, detailing the breakdown of votes on jurisdiction-stripping measures).



a given measure *because* legislators viewed it as unconstitutional. Moreover, most jurisdiction-stripping proposals have failed without committee hearings or legislative debates. In those cases, it would be even more challenging to identify the rationale for the rejection.

Courts could more easily discern the executive's official position on the scope of Congress's exceptions power. The Attorney General, who often acts through the Office of Legal Counsel, has official responsibility for determining the executive's legal views.<sup>172</sup> And since the Carter and Reagan Administrations, the executive has argued that Congress lacks the power to interfere with the Supreme Court's "core functions" by, for example, stripping its jurisdiction over constitutional claims.<sup>173</sup> Assuming that the executive's position is sufficiently longstanding,<sup>174</sup> courts could give some weight to the executive's views. But that is only the constitutional position of one branch—a branch that, as discussed, has institutional incentives to oppose jurisdiction-stripping legislation. Accordingly, courts should not treat executive practice as reflecting the settled view of the political branches.

There may, of course, be contexts in which political branch practices are so longstanding and accepted that the judiciary could treat them as strong evidence of the constitutionality of legislation. That may be true of Congress's determination that it has the power under the Exceptions Clause to grant the Supreme Court discretionary certiorari jurisdiction. Since 1891, the political branches have repeatedly exercised this power with bipartisan support. Accordingly, if the Court's certiorari power were challenged,<sup>175</sup> the Court might be able to point to this historical practice as a "gloss" on the judicial power under Article III.<sup>176</sup>

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172 See 28 U.S.C. §§ 511–512 (2012). The Attorney General had this responsibility from the outset. See Judiciary Act of 1789, § 35, 1 Stat. 73, 92–93 (requiring the Attorney General "to give his advice and opinion upon questions of law when required by the President of the United States, or when requested by the heads of any of the departments, touching any matters that may concern their departments"). The Office of Legal Counsel provides advice to the executive branch "on all constitutional questions." See U.S. DEP'T OF JUSTICE: OFFICE OF LEGAL COUNSEL, <http://www.justice.gov/olc> (last visited May 11, 2015).

173 See *supra* notes 92–103 and accompanying text.

174 As discussed, although the executive long opposed efforts to strip Supreme Court review, the executive did not take a firm public position on the constitutionality of such measures until 1980 (during the Carter Administration). It is not clear that the executive's constitutional position is sufficiently longstanding to warrant judicial deference. I do not seek to resolve that issue here.

175 Notably, Edward Hartnett has raised important questions about the Court's certiorari power. See Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years after the Judges' Bill*, 100 COLUM. L. REV. 1643, 1647 (2000) (doubting whether the Court's certiorari power can be reconciled with "classic conceptions of judicial review, judicial power, and the rule of law"). So it is not inconceivable that a litigant may seek to challenge the certiorari review scheme.

176 Cf. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring) ("Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them. It is an inadmissibly narrow conception of American constitutional law to

Outside of such contexts, however, there are good reasons for the judiciary to independently interpret Article III, giving little, if any, weight to political branch practices. In fact, such independent interpretation may make sense precisely because of the different institutional makeup and capacities of the courts. Although the political branches may be more capable of handling broad standards like “core functions,” the judiciary may be better attuned to protecting individual and minority rights in particular cases.<sup>177</sup> Each branch of the federal government should perhaps bring its own institutional strengths to bear by independently construing the provisions of Article III.

#### CONCLUSION

Much of the constitutional history of the federal courts has been written not by the judiciary but by the political branches. As an illustration, this Essay highlights how the political branches have given meaning to the Exceptions Clause of Article III over time—both by rejecting jurisdiction-stripping measures and by enacting beneficial exceptions that facilitated the Supreme Court’s capacity to oversee a growing judicial system. Such political branch practices are worthy of study because these practices not only are likely to influence political actors’ treatment of future jurisdictional proposals but also provide insight into the political branches’ approach to constitutional interpretation more generally. I do not, however, claim that the judiciary should treat such political branch precedents as establishing the authoritative meaning of Article III, if and when similar issues reach the courts. There may be good reasons for the different branches of government to implement Article III in different ways, as befits the design and capacity of the particular institution.

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confine it to the words of the Constitution and to disregard the gloss which life has written upon them.”).

<sup>177</sup> That may be particularly true in the context of challenges by detainees in the war on terror. See *supra* note 141 (briefly discussing some of the legislation pertaining to the detainees).