MAY FEDERAL COURTS ANSWER QUESTIONS WHEN NOT DECIDING CASES?

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Conventional wisdom says that Article III's case-or-controversy requirement prevents federal courts from answering legal questions when they are not deciding cases. This is only partially correct. This Article shows conditions under which a federal court may answer questions even when not deciding a case. To do so, it traces the appellate power back to its origins in English common law courts and through the early American judiciary. For centuries, common law judges have answered questions sent to them by lower courts when doing so would help those lower courts to decide pending cases. In England, the "case stated" procedure facilitated this; in the United States, the Judiciary Act of 1802 created the certificate of division that allowed circuit courts to send questions to the Supreme Court. These examples provide strong evidence that the Article III judicial power, as understood in 1789, included the ability to answer legal questions even when not deciding cases, at least when two conditions jointly hold. First, the answer must help a different federal court decide a pending case. Second, the judges may answer only the questions asked; they cannot choose different questions they would rather answer, even if such questions are part of the case.

This history and theory have immediate implications for the current Supreme Court's appellate docket. By rule, the Court limits review to preselected questions, and the Justices frequently add or subtract questions to manipulate the docket so that the Justices may address the issues that interest them, leaving other questions that are integral to the case unanswered. Thus, the Court frequently answers questions without deciding the larger cases on the merits. This raises the question of whether Justices may give these answers and remain within Article III's limits on the judicial power.

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INTRODUCTION

"Article III of the Constitution assigns to the Federal Judiciary the responsibility and power to adjudicate 'Cases' and 'Controversies'—concrete disputes with consequences for the parties involved."[1] But what if a court is not adjudicating—at least not deciding the merits of—a concrete dispute? What if the court only wants to answer a legal question, but it does not apply that law to any facts, does not reach the merits of any case, and does not offer a remedy that would provide any consequences for some involved party?[2] Could such a court exercise the judicial power? If so, under what conditions?

Text and orthodoxy might suggest that courts have no such power. The text of Article III says the judicial power applies to cases and controversies. By assumption, the court is not deciding a case. Further, as a matter of tradition, the power to declare law by answering legal questions has always been derived from the obligation to decide particular cases.[3] If there are no proper parties,[4] no opportunities to reach the merits, no available remedies, or no chances to offer meaningful relief, then there is no case.[5] Where, then, is the hook for the judicial power? If the court is not deciding a case, it cannot be fulfilling an obligation. Where is the obligation to render judgment that necessitates law declaration?

One could take a different approach to the federal judicial power. A functionalist committed to an ideal of federal courts as enforcers of the rule of law "with a distinctive capacity to declare and explicate norms that transcend individual controversies" could straightforwardly justify a judicial power to answer freestanding questions.[6] On this view,

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1 Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2257 (2024).

2 This framing rules out instances where the entire case is bound up in a single question (e.g., when a plaintiff seeks declaratory relief) or when, as with interlocutory appeals, the questions at issue are limited to review of the order giving rise to the appeal. Both assume the court can offer relief after considering the relevant facts in the underlying dispute.

3 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

4 *See* William Baude & Samuel L. Bray, *Proper Parties, Proper Relief*, 137 HARV. L. REV. 153, 153 (2023). There is, however, a growing body of work suggesting that, while parties must be proper, they need not be adversarial. *See generally, e.g.*, JAMES E. PFANDER, CASES WITHOUT CONTROVERSIES: UNCONTESTED ADJUDICATION IN ARTICLE III COURTS (2021); Robert J. Pushaw, Jr., *"Originalist" Justices and the Myth that Article III "Cases" Always Require Adversarial Disputes*, 37 CONST. COMMENT. 259 (2022) (reviewing PFANDER, *supra*).

5 *See* Muskrat v. United States, 219 U.S. 346, 356 (1911); Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792); *cf.* William Baude, *The Judgment Power*, 96 GEO. L.J. 1807, 1818–20 (2008).

6 RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 74 (7th ed. 2015). The historical basis for such a view would likely rely on the original view of cases as opposed to controversies. *See, e.g.*, Robert J. Pushaw, Jr., *Article III's Case/Controversy*

the judiciary's role is "independent of the task of resolving concrete disputes."[7] Freeing the courts from the constraints of individual cases facilitates such declarations.

A third approach, the one animating this Article—and the one preferred by the Supreme Court—looks to history to elucidate the contours of the judicial power.[8] This Article shows that the judicial power in 1789 encompassed a limited power to provide legal answers outside of case adjudication. English common law judges exercised this power for centuries before the Framers drafted Article III,[9] and in 1802, Congress expressly gave the Supreme Court the same ability.[10]

These two examples demonstrate that the Article III judicial power allows a federal court to answer questions even when not deciding a case so long as two conditions hold. First, the questions may be answered only to help a different (lower) federal court decide a live case or controversy pending in that court. Second, the lower court must ask the higher court for help with the specific questions, and the higher court may answer only the questions it is asked. That is, the lower court *sends* the questions; the reviewing court may not *bring* the questions before it of its own volition. Putting the two conditions together: a federal court may declare law despite not reaching a decision on the merits so long as it is answering a question asked by a different federal court to help that other court decide the merits of a case before it.

These conditions provide important limitations on the power to answer freestanding legal questions. Otherwise, courts could make law without limits. Absent these safeguards, the judicial power would be one "not of flexibility but of omnipotence."[11] Courts have the power to declare law, but they have the power to do so only when adjudicating

Distinction and the Dual Functions of Federal Courts, 69 NOTRE DAME L. REV. 447, 476, 480–84 (1994). Pushaw notes, however, that a case was "a formal cause of action demanding a remedy" that required the court to determine the legal question that was the substance of the case. *Id.* at 472, 472–73. Thus, even a more generous understanding of the history of cases and controversies does not obviously support the power to answer questions when not deciding the case and offering the remedy.

7 FALLON ET AL., *supra* note 6, at 74.

8 *See, e.g.*, Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 217–25 (1995); Owen W. Gallogly, *Equity's Constitutional Source*, 132 YALE L.J. 1213, 1224 (2023); Baude, *supra* note 5, at 1814; Amy Coney Barrett, *Procedural Common Law*, 94 VA. L. REV. 813, 846–52 (2008).

9 *See infra* Section I.A.

10 *See* Judiciary Act of 1802, ch. 31, § 6, 2 Stat. 156, 159–61; *infra* Section I.B; *see also infra* Part II.

11 Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 322 (1999).

particular cases.[12] Thus, the lawmaking power of courts is constrained by the happenstance of what disputes arise and come to court. In contrast, the legislature, which also has the power to declare law, is free to make the law it wants, when it wants. The difference between the judgment of the court and the will of the legislature,[13] then, is the power to control the agenda. As Professor Edward Hartnett reminds us, "The ability to set one's own agenda is at the heart of exercising will."[14] By limiting courts to answering only the questions sent—and limiting courts to sending only questions in pending cases—these preconditions maintain the separation of powers guardrails that keep courts from becoming unaccountable and unconstrained lawmakers.

Further, these limits prevent the answers provided by the higher court from running afoul of the prohibition on advisory opinions: "the oldest and most consistent thread in the federal law of justiciability."[15] While several states allow governors or legislatures to send questions to the state supreme court for review, such advisory opinions have always been understood as beyond the Article III powers of federal courts. One might worry that answers given to lower courts to advise them in their own work would similarly be advisory opinions. However, since the question is posed within the judiciary, there are no separation of powers problems. Further, the judicial power is always and only acting on a case or controversy pending in the judiciary, so the answers never breach the confines of Article III.[16]

So motivated, this Article develops the historical arguments and provides two key payoffs. First, it develops a theory that enriches and broadens our understanding of Article III power beyond the familiar instances where a federal court decides a case.[17] Second, and more urgently, it recognizes a tension in the Supreme Court's current

12 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule.").

13 *See* THE FEDERALIST NO. 78 (Alexander Hamilton).

14 Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643, 1718 (2000).

15 Flast v. Cohen, 392 U.S. 83, 96 (1968) (quoting CHARLES ALAN WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS 34 (1963)); *accord* FALLON ET AL., *supra* note 6, at 52; Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1844 (2001).

16 Reverse certification, a proposed system whereby state courts would certify questions of federal law to federal courts, would not be appropriate on this view, since there would not be a case pending in the federal judiciary. *See infra* Section I.E.

17 *See, e.g.*, Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 229–30 (1985).

agenda-setting practices, especially its limitation of review to preselected questions.[18]

The Court rarely—if ever—decides actual cases; it answers preselected questions.[19] The Court's rules explicitly limit review to the questions presented,[20] but the Justices freely manipulate those questions: they add, subtract, and rewrite them at whim.[21] The Court will even arrange for lawyers to brief and argue questions that are not in dispute or positions that neither party takes, just because the Justices want the opportunity to address a particular legal or policy question.[22] The Court's nearly exclusive focus on deciding the interesting or important questions rather than deciding the cases that include those questions sharpens the rather general question stated above. Can the Supreme Court answer a legal question if it is not going to decide the case? If one understands the Supreme Court to be solely answering questions, then the question becomes whether the traditional preconditions are met. If they are not met, there arise difficult questions about the constitutionality of the Court's current agenda-setting practice.

This raises an important point about the limits of this Article's scope. The focus of the Article is to understand the conditions under which a federal court might, consistent with the historical understanding of the Article III judicial power, authoritatively answer a question even if not deciding a case. Insofar as the Court decides cases on the merits,[23] the Court is beyond the scope of this Article's inquiry, which

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18 *See* Benjamin B. Johnson, *The Origins of Supreme Court Question Selection*, 122 COLUM. L. REV. 793, 795–97 (2022).

19 *Id.* at 800.

20 SUP. CT. R. 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court.").

21 *See generally* Benjamin B. Johnson, *The Active Vices*, 74 ALA. L. REV. 917 (2023).

22 *See generally* Henry Paul Monaghan, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665 (2012).

23 One might be inclined to reimagine the Court's work to be consistent with traditional case adjudication. For instance, one might reimagine the Supreme Court's practice as actually resolving cases either through vacating and remanding for further consideration or by implicitly affirming the lower court on all questions the Court does not select for review. Such an argument would seem to rely on an assumption that such a process is consistent with the judicial power as understood in 1789. Whether or not this is true is a much larger question beyond the scope of the present article, but some preliminary thoughts may counsel doubts as to this possibility. First, vacatur was primarily used when there was some irregularity in the lower court's proceedings. *See, e.g.*, Bank of the U.S. v. Ritchie, 33 U.S. (8 Pet.) 128, 147 (1834); Lutz v. Linthicum, 33 U.S. (8 Pet.) 165, 179 (1834); Bank of the U.S. v. Moss, 47 U.S. (6 How.) 31, 39 (1847). Second, if the Court vacated a judgment after finding a legal error, it always reversed. In such cases, vacatur and remand were remedies. *See, e.g.*, Penhallow v. Doane's Adm'rs, 3 U.S. (3 Dall.) 54, 102, 108 (1795) (Iredell, J.). From the first, remedies followed judgments. *See* Judiciary Act of 1789, ch. 20, §§ 24–25, 1 Stat. 73, 85–87; *see also* French's Ex'x v. Bank of Columbia, 8 U.S. (4 Cranch) 141, 164 (1807); Wilkinson v. Leland, 27 U.S. (2 Pet.) 627, 663 (1829). Finally, the first

is courts answering questions despite *not* deciding cases on the merits.[24] Insofar as the Court is not reaching the merits but still answering questions, one must worry that most of the questions the Court answers are not pending before any court and that no court asked the Justices for help with the answers.

* * *

The Article proceeds as follows: Part I establishes the conditions under which a federal court may answer questions that declare law even when not deciding a case on the merits. To do this, it identifies and describes relevant institutions in both English common law courts and in early American practice. It uses these examples to identify the requirements for courts to provide such answers. Finally, as an exercise, it applies the theory to the idea of *reverse certification*, a proposal under which state courts would certify questions of federal law to federal courts. Part II then applies the theory to the Supreme Court. It is difficult to reconcile the Court's current practice with the requirements identified in the previous Part.

I. The History of Answering Questions Apart from Cases

The text of Article III provides no obvious hook on which to hang the power of answering questions when not deciding cases. Yet a careful look into the history of common law appellate practice in England prior to the Constitution's ratification and early American practice suggests there are circumstances under which the judicial power, as understood in 1789, allows courts to answer questions even when not deciding a case.

A. The English Common Law Practice of Referring Questions to Common Law Judges

Not infrequently, trial courts face questions that are new, difficult, or of immense importance—sometimes all three at once. The

instance I can find where the Court purported to give a binding answer to a legal question before vacating and remanding without first reaching a judgment is *Kay v. United States*, 303 U.S. 1, 9–10 (1938). I can find no examples of a similar use of vacatur in eighteenth- or nineteenth-century sources or in English common law courts or Chancery. This suggests that such a use of vacatur is a relatively recent innovation rather than a traditional exercise of judicial power, which has long been understood to give federal courts the power to decide cases.

24 Similarly, the Article takes no position on the legitimacy of the answers the Supreme Court provides. What makes the law declared by the Court legitimate or illegitimate is a fraught topic. Insofar as consistency, or inconsistency, with Article III is relevant to the legitimacy of the Court's answers, this Article may inform those discussions, but it takes no position on them.

underlying case itself might be rather mundane, but one or more legal questions involved could be extraordinary. In such instances, trial courts—and the law more broadly—benefit when higher courts provide guidance on the challenging legal question.

An early, famous instance from England involved a land sale on behalf of one Robert Calvin.[25] Calvin was born in Scotland in 1605 and was granted estates in England.[26] His ownership was disputed by two men, Richard and Nicholas Smith, who seized the land.[27] Calvin's guardians sued, and the Smiths responded by arguing that no Scot could either own land or take advantage of English courts.[28]

Under feudal law, land ownership was tied to fealty to the king, which ordinarily ruled out the possibility of owning land in two kingdoms.[29] Thus, for centuries, no one could own property in both England and Scotland. Scots were aliens and thus not endowed with the rights of Englishmen, including the rights to sue and to own land. In 1603, however, James VI of Scotland ascended to the English throne upon the death of Queen Elizabeth I.[30] Since extant political theory tied political and legal rights to the person of the sovereign, "[t]he most pressing question of political debate soon became the legal status of James's Scottish subjects in England."[31] In particular, as subjects of King James, could Scots own land in England and bring suit in English courts, or were they aliens and, as such, forbidden both?

Calvin's Case became a landmark. It involved simple ownership of real property, but the question of national importance was whether Calvin, and those similarly situated, could own land in both kingdoms.[32] The substantive answer—yes, if you were born after James ascended to the English throne[33]—is the foundational precedent for the doctrine of birthright citizenship,[34] but the procedure is most relevant here.

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25 *See* Calvin's Case (1608) 77 Eng. Rep. 377, 378; 7 Co. Rep. 1a, 1b.

26 *Id.*

27 *Id.* at 378; 7 Co. Rep. at 1a.

28 *Id.* at 379; 7 Co. Rep. at 2a.

29 *See id.* at 380; 7 Co. Rep. at 2b–3a.

30 Polly J. Price, *Natural Law and Birthright Citizenship in* Calvin's Case *(1608)*, 9 YALE J.L. & HUMANS. 73, 80 (1997).

31 *Id.* at 81.

32 Calvin's Case, 77 Eng. Rep. at 379; 7 Co. Rep. at 2a.

33 *Id.* at 409–11; 7 Co. Rep. at 27a–28b.

34 *See* Lisa Maria Perez, Note, *Citizenship Denied: The* Insular Cases *and the Fourteenth Amendment*, 94 VA. L. REV. 1029, 1046–50 (2008); *see also* 1 WILLIAM BLACKSTONE, COMMENTARIES *361–62 ("The children of aliens, born here in England, are, generally speaking, natural-born subjects, and entitled to all the privileges of such."). The common law rule may be even older. *See* Lynch v. Clarke, 1 Sand. Ch. 583, 639 (N.Y. Ch. 1844) ("It is an indisputable proposition" that "[b]y the common law, all persons born within the ligeance of the crown of England, were natural born subjects, without reference to the *status*

Calvin's Case emerged from two different actions: one in King's Bench and the other in equity.[35] Because the question of young Robert's legal status was so important, the trial courts elevated it to the full complement of common law judges plus the Lord Chancellor.[36] While the judges answered the pure legal question, they left any judgment in the case and appropriate remedy to the lower court.[37]

1. The History and Procedure of Special Cases

This practice of referring specific questions to a larger body of judges was well-known to English common law. The most immediate and casual method to achieve this involved walking down the hall to canvass the opinion of other judges.[38] However, since many trials in the assizes took place far from Westminster, this casual option was often unavailable. Instead, courts found ways to reserve specific questions for review by a larger set of judges.[39] An important feature of such practices, which remained true throughout the period relevant for the current discussion, is that the group of judges that assembled to resolve the question were not hearing an appeal;[40] they were simply advising the trial judge.[41] That judge might or might not be one part of the assembled group tasked with finding the answer.[42]

Examples of English common law courts elevating difficult questions in civil cases date back to at least Magna Carta.[43] During the medieval period, petty assizes would be adjourned "for difficulty" so that problematic questions could be answered by the Common Pleas en banc.[44] Until the full court could offer an opinion on the question, the assize would withhold judgment.[45] A similar practice had developed on the criminal side. Assize commissioners would take hard questions

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or condition of their parents. . . . This was settled law in the time of Littleton, who died in 1482. And its uniformity through the intervening centuries, may be seen by reference to the authorities, which I will cite without further comment." (citation omitted)).

35 *See* Price, *supra* note 30, at 82. For a helpful sketch of the history of equity, see Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181, 1199–1210 (2005).

36 Price, *supra* note 30, at 82.

37 Calvin's Case, 77 Eng. Rep. at 410–11; 7 Co. Rep. at 28b.

38 JOHN BAKER, INTRODUCTION TO ENGLISH LEGAL HISTORY 149–51 (5th ed. 2019).

39 *See* JOHN PALMER, THE PRACTICE IN THE HOUSE OF LORDS, ON APPEALS, WRITS OF ERROR, AND CLAIMS OF PEERAGE 130–31 (London, Saunders & Benning 1830).

40 BAKER, *supra* note 38, at 149.

41 R v. Parry (1837) 173 Eng. Rep. 364, 367; 7 Car. & P. 836, 841.

42 *See* James Oldham, *Informal Lawmaking in England by the Twelve Judges in the Late Eighteenth and Early Nineteenth Centuries*, 29 LAW & HIST. REV. 181, 185 n.18 (2011).

43 *See* BAKER, *supra* note 38, at 149 n.22.

44 *Id.* at 149.

45 Oldham, *supra* note 42, at 214.

to their colleagues at Serjeants' Inn or in the Exchequer Chamber.[46] Thus, by the sixteenth century, legal questions in both civil and criminal cases in the assizes were preserved for review by an informal gathering of judges apart from the actual case.[47] While the procedures were similar across legal domains, there are enough subtle differences to distinguish between civil and criminal cases.

In the English common law system, civil cases began with pleadings filed in London in one of the three common law courts: King's Bench, Common Pleas, and Exchequer.[48] The legal fiction was that the case would be heard in London on a specific day, "*unless before* [*nisi prius*]" that date the case could be heard locally in one of the assizes.[49] It was during these trials that the judge might, if he so chose, reserve a question for consideration by the full bench.

Initially, parties would arrange for special verdicts that permitted more discrete factfinding by the jury.[50] That way, the judge had sufficient facts in hand to resolve the case once the full panel resolved the discrete questions. The problem was that such verdicts were costly.[51] While the special verdict never vanished entirely, it became normal for juries to return general verdicts and for courts to make judgment contingent on the answers to the preserved questions.[52] By the end of the seventeenth century, the parties, with the judge's consent, would create a special case involving the difficult question, which might include some stipulated facts.[53] Once the question was reserved in this "case stated," the original case carried on to verdict, but judgment was subject to the resolution of the special case.[54]

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46 BAKER, *supra* note 38, at 149.

47 Questions in civil cases were referred to the full complement of judges on the relevant common law court. Questions in criminal cases were decided by all twelve judges. *See* Oldham, *supra* note 42, at 185–87.

48 *See id.* at 181 n.1. One reason judges might have wished to reserve questions was to harmonize the law. Since there were four judges in each common law court and three different courts all working on similar matters, it was not uncommon for judges to disagree about the relevant law in similar cases. This would generate conflicting precedents across judicial institutions. The question reservation process provided a simple and effective method for judges to gather and hash out their differences and generate a common rule. *See id.* at 218–20.

49 *Id.* at 182 n.3 (alteration in original).

50 *See id.* at 182 n.4.

51 *See id.* at 182 n.5.

52 *See id.* at 182–83; *see also* 3 BLACKSTONE, *supra* note 34, at *378.

53 *See* BAKER, *supra* note 38, at 92; Oldham, *supra* note 42, at 185 n.18. By the eighteenth century, the rule came to be that if a defendant lost at trial but prevailed on the special case, the first case was nonsuited. BAKER, *supra* note 38, at 150.

54 3 BLACKSTONE, *supra* note 34, at *378; *see* Oldham, *supra* note 42, at 182–83 & nn.5–6. While the special case process saved time and money compared to the special verdict, the procedure was not without its own problems. General verdicts made a subsequent

Formally, the special case was decided by the four judges of the relevant common law court.[55] For example, if the underlying case was filed in King's Bench, those four judges would resolve the question en banc. If the legal question was significant or had a broad enough scope, the other eight judges (four each from Common Pleas and Exchequer) would participate in the resolution, and the views of the majority would prevail.[56]

By the seventeenth century, the equity side of Chancery had begun to send issues in need of resolution to the common law courts.[57] Sometimes, the High Court of Chancery would send over factual questions to be resolved by a jury.[58] More useful to Chancery was the ability to send questions of law to the common law judges.[59] Blackstone described this "case stated" procedure as follows: "[I]f a question of mere law arises . . . , it is the practice of this court to refer it to the opinion of the judges of the court of king's bench, upon a case stated for that purpose . . . ."[60]

The procedure closely paralleled the special case process described above. When the Lord Chancellor determined that there was a pure question of law that would benefit from the opinions of the common law judges, he would task a Master of the Court to work with the parties to agree to a recital of the facts that could be compiled and sent to the common law judges.[61] The matter was then referred to the common law judges who returned an answer in the form of a certificate.[62]

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appeal on error nearly impossible, since only the judgment appeared on the record. This left parties with little recourse if the informal question-answering process went against them. *See* Oldham, *supra* note 42, at 182–83 & nn.5–6; 3 BLACKSTONE, *supra* note 34, at *378.

55 *See* Oldham, *supra* note 42, at 185–86.

56 *See id.* at 185–86, 194 & n.52.

57 *See* Harold Chesnin & Geoffrey C. Hazard, Jr., *Chancery Procedure and the Seventh Amendment: Jury Trial of Issues in Equity Cases Before 1791*, 83 YALE L.J. 999, 1001 (1974).

58 To send factual questions, Chancery had two options: the action at law and the feigned issue. *See generally id.* at 1003–10.

59 Sending for legal help was plainly more useful as Chancery was usually a competent factfinder. *See* John H. Langbein, *Fact Finding in the English Court of Chancery: A Rebuttal*, 83 YALE L.J. 1620, 1620 (1974).

60 3 BLACKSTONE, *supra* note 34, at *452–53.

61 *See* Chesnin & Hazard, *supra* note 57, at 1001.

62 *See id.* at 1002. One other possible example of limited review from Chancery that this Article does not consider is an interlocutory appeal from Chancery to the House of Lords. The Lords obtained this power in 1726. *See* Aaron-Andrew P. Bruhl, *Law and Equity on Appeal*, 124 COLUM. L. REV. 2307, 2330 (2024); 1 GEORGE SPENCE, THE EQUITABLE JURISDICTION OF THE COURT OF CHANCERY 396 (London, V. & R. Stevens & G.S. Norton 1846). Its grip on the power, however, appeared to be somewhat tenuous by the time of the Founding, and treatises continued to deny the Lords had such power for the rest of the century. *See* 1 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 374–75 (Little, Brown, &

The effect of the answer was different in equity from what it was in common law courts. Recall that while the judges' opinion in a case stated was styled as mere advice to the trial judge, the decision of the assembled judges was always definitive and precedential when given to common law courts of record.[63] In equity, by contrast, the Lord Chancellor retained the option of rejecting the common law judges' advice and sending it back to the same court, or a different common law court, for a de novo consideration of the legal questions.[64] Only once the Lord Chancellor received an acceptable certificate was the cause set for final disposition.[65]

A similar question-reservation system had emerged in the criminal context by the sixteenth century.[66] The process in criminal cases followed a relatively stable pattern. During a jury trial, if the judge encountered a challenging question, he might reserve it for consideration by the twelve common law judges.[67] It was not always the judge's idea to reserve a question for further review, however. Defendant's counsel would frequently request the question move up to the twelve judges.[68] More rarely the prosecution or even "gentlemen of the bar" who happened to be at the trial might suggest that a question be reserved for further consideration by the larger group of judges.[69]

Co., 4th ed. 1931) (1903). There appears to be little evidence that this power was frequently used, widely known, or influential at the Founding.

63 *See supra* text accompanying notes 55–56.

64 *See* Chesnin & Hazard, *supra* note 57, at 1002.

65 *Id.* Famously, this process could take a very long time to complete as immortalized by Dickens:

> Equity sends questions to Law, Law sends questions back to Equity; Law finds it can't do this, Equity finds it can't do that; neither can so much as say it can't do anything, without this solicitor instructing and this counsel appearing for A, and that solicitor instructing and that counsel appearing for B; and so on through the whole alphabet . . . .

CHARLES DICKENS, BLEAK HOUSE 139 (Patricia Ingham ed., Broadview Press 2011) (1853) (footnote omitted).

66 *See* Oldham, *supra* note 42, at 182.

67 *See* Oldham, *supra* note 42, at 185–86. Recall that in civil cases, the fiction was that only four judges decided while the other eight aided. *Id.* at 194 & n.52; *see also supra* notes 55–56 and accompanying text. In criminal cases, it was understood that all twelve participated without need for fiction. *See* Oldham, *supra* note 42, at 186.

68 *See* Oldham, *supra* note 42, at 188 & n.28.

69 *See id.* at 188. On occasion, the judges would be convened by the Privy Council or the Crown to take up a question of public policy or statutory interpretation. *See id.* at 189–90. As Christian Burset has explained at length, such a judicial ruling in aid of the executive is the classic advisory opinion that fell out of favor in the eighteenth century. *See* Christian R. Burset, *Advisory Opinions and the Problem of Legal Authority*, 74 VAND. L. REV. 621, 638–43 (2021). While the same judges gathering informally to answer a legal question is common both to the process of answering reserved questions and to advisory opinions, the difference between them is clear and important. The advisory opinion issues outside of a case while

Importantly, however, it was up to the judge to reserve the question.[70] Others could ask, but the judge had the discretion to take the question to the twelve judges or not.[71] Likewise, the twelve had discretion to answer the question or to refuse.[72]

One empirical reality of the referral practice that carried over to early American practice was frequent review of criminal law questions.[73] While writs of error were technically available for criminal matters, the process was both expensive and highly technical.[74] Review on error was limited to the face of the record; accordingly, most of the substantive complaints that defendants had about their trials were not susceptible to review on error.[75] Since error was understood to be largely inadequate as a means of reviewing criminal convictions, the twelve judges used the informal procedure of referring questions to permit felony defendants a chance to prove their innocence.[76]

Judges were open to using this informal process as a meaningful appellate tool in criminal cases, although the law still largely presumed the defendant would lose in front of the twelve.[77] While it was technically possible to withhold criminal punishments after a guilty verdict pending the answer returned by the twelve, such mercies were rare.[78] Usually the defendant, if convicted, was jailed pending the response.[79] If the judges found for the defendant such that they believed him wrongly imprisoned, they would recommend to the Crown that he be pardoned.[80] The judges had to ask the Crown for a pardon because, though they acted together to give controlling answers to questions of law, they had no remedial authority in criminal cases.[81] Instead, the judges were only an advisory body, "merely advising the learned Judge who tried the case."[82]

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the reserved question is answered in service of the common law courts' obligation to decide cases.

70 *See* Oldham, *supra* note 42, at 220.

71 *See id.*

72 *See id.* at 188 ("[F]or this reason, the judges refused to proceed in the cause.").

73 These are known as Crown cases. *Id.* at 181.

74 *See* 1 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 215–16 (Little, Brown & Co., 3d ed. 1922) (1903).

75 *See id.* ("[T]he record took no account of some of the most material parts of the trial, where error was most likely to occur—the evidence and the direction of the judge to the jury[—]the writ could do nothing to remedy the only errors that were really substantial." (footnote omitted)).

76 Oldham, *supra* note 42, at 186.

77 *See* BAKER, *supra* note 38, at 149 n.25.

78 *See id.* at 149–50; Oldham, *supra* note 42, at 217–18 & nn.166–71.

79 *See* Oldham, *supra* note 42, at 219.

80 *See id.*

81 *Id.*

82 Rex v. Parry (1837) 173 Eng. Rep. 364, 367; 7 Car. & P. 836, 842.

2. Contrast with the Writ of Error

The paucity of remedial power and inability to touch the merits sharply distinguish the informal question-answering practice from the more established writ of error. The writ of error created a new case that began only after final judgment.[83] Appellate review on error was limited to the record, mandatory, and comprehensive. It was limited in the sense that the appellate court could only look at the record and could not consider new questions of substantive law.[84] It was mandatory in that the appellate court could not simply refuse to review the record for error.[85] Finally, review was comprehensive of the entire record.[86] Upon conclusion of the review, the court would reverse or affirm the judgment.[87]

Error was almost entirely—though not formally—limited to civil cases.[88] The Statute of Westminster II expanded the writ of error to require judges to attach to the record a list of exceptions to the judge's rulings.[89] This provided a significant—though still largely insufficient—amount of review of the judge's legal conclusions at trial.[90] Common law courts, however, decided that this liberalization of the writ only applied to civil cases.[91] Thus, while there was technically a

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83 The writ operated as a quasi-criminal proceeding. The idea was that the plaintiff in error charged the jury with perjury or the judge with malfeasance. *See* 1 HOLDSWORTH, *supra* note 74, at 213–14. On this view, a writ of error was an entirely new proceeding, not a subsequent stage of ongoing litigation.

84 *See* BAKER, *supra* note 38, at 146–47.

85 *See* 1 HOLDSWORTH, *supra* note 74, at 215.

86 *See* BAKER, *supra* note 38, at 146–47. Up to the sixteenth century, review on error was essentially a technical exercise. *Id.* at 147. Legal reforms in the sixteenth century—especially the emergence of actions on the case and special verdicts, alluded to above—brought additional details into the record. *Id.* The problem was that initially any error—even a minor technical error—would require reversal. *See* 1 HOLDSWORTH, *supra* note 74, at 223. This meant that adding material to the record only increased the chance of a reversal even if the judgment had been right on the merits. Reforms in the eighteenth century permitted slight revisions of the record so that "trifling exceptions are so thoroughly guarded against, that writs of error cannot now be maintained, but for some material mistake assigned." 3 BLACKSTONE, *supra* note 34, at *406. Such "material mistake[s]" came to include "a wrong Decision on the merits of the Case." PALMER, *supra* note 39, at 118.

87 BAKER, *supra* note 38, at 147.

88 *See* 1 HOLDSWORTH, *supra* note 74, at 215. Originally, the writ of error was a prerogative of the king, but in civil cases, it soon became a matter of right. *Id.* The king retained discretion in criminal cases until 1705. *See id.*; *see also* JOSEPH HENRY SMITH, APPEALS TO THE PRIVY COUNCIL FROM THE AMERICAN PLANTATIONS 111 (1950).

89 *See* Note, *Influence of the Writ of Error on the Scope of Appellate Review in the Federal Courts*, 32 COLUM. L. REV. 860, 862–63 (1932).

90 *See* 1 HOLDSWORTH, *supra* note 74, at 224.

91 *See* JOHN RAYMOND, THE BILL OF EXCEPTIONS; BEING A SHORT ACCOUNT OF ITS ORIGIN AND NATURE 44 (London, S. Sweet 1846).

writ of error in criminal matters, it was still cabined to a minimal record that did not allow for substantive review of the trial.[92]

Thus, there are several important differences between the traditional appellate review on the writ of error and the practice of answering discrete questions in special cases. While review of cases on error was mandatory, when judges reserved questions, review of those questions was discretionary. A writ of error required the appellate courts to reach the merits, but the case stated just permitted them to give advice. The court could reverse a judgment on error, but courts were powerless to direct relief to any party when simply answering a question. Error was almost never used in criminal cases, while special cases frequently presented criminal issues.[93]

There was, however, one key similarity between the two devices: both were valid ways to make law. The precedential force of review on error is obvious. Decisions made in the course of rendering judgment are classically understood to set precedent. Answering referred questions as an advisory body—and self-consciously not as a court—was something altogether different. At a minimum, the resolution of questions, especially if reported, was plainly influential at the bar, and the judges themselves regularly treated them as binding.[94]

B. The American Practice of Certification of Division

Like the English practice of reserving questions in special cases, the "certificate of division" promoted the development and settlement of uniform legal rules in the early American federal judiciary.[95] Also, as with its English predecessor, it allowed judges to reach questions of law—especially in criminal cases—that might otherwise vex judges.[96] These benefits, however, were in some sense happy accidents, since the procedure was created to solve a particular problem of Congress's own making.

The first Judiciary Act, in 1789, created circuit courts but not dedicated circuit judges.[97] Instead, the circuit courts were staffed by a district judge and two Justices of the Supreme Court.[98] Legislative changes in 1793 introduced circuit riding but reduced the number of

92 *See* Oldham, *supra* note 42, at 186 n.19.

93 *Id.* at 182, 186 & n.19.

94 *See id.* at 192 n.44.

95 Jonathan Remy Nash & Michael G. Collins, *The Certificate of Division and the Early Supreme Court*, 94 S. CAL. L. REV. 733, 735 (2021).

96 *Id.*

97 *See* Judiciary Act of 1789, ch. 20, § 4, 1 Stat. 73, 74–75.

98 *Id.*

judges on the circuit court to two: one district judge and a single Justice.[99]

Under the original plan, there was no chance of a tie, since there were three judges considering any matter. Reducing staffing levels to two judges in 1793 introduced such a possibility, but this was resolved by rotating the circuit Justice each year. That way, if there was a tie vote, a new Justice arrived the following year to break it.[100]

Things changed again with the famous Midnight Judges Act in 1801.[101] The outgoing Federalists created three new circuit judges and ended circuit riding for the Justices.[102] President Jefferson's new majority quickly repealed most of the Act in 1802[103] and reestablished the previous practice of staffing circuit courts with a district judge and a single Justice.[104] The legislative repeal did not, however, rotate the Justices through the circuits annually as had been done previously.[105] On the one hand, this made the Justices' lives a bit easier. On the other hand, it eliminated the tiebreaking mechanism.[106]

Congress addressed the problem in two ways. First, in the small set of cases where the circuit court exercised appellate jurisdiction over the district court, the views of the Justice prevailed over the district judge.[107] Second, and more important for present purposes, in cases where the circuit court exercised original jurisdiction, if the district judge and Supreme Court Justice disagreed on a pure question of law, that question (and only that question) could be—upon request by either party—certified to the Supreme Court for review.[108]

This certification process essentially followed in the footsteps of the older English practice. In the United States as in England, answering reserved questions was an appellate exercise that allowed the higher court to answer questions, when asked by a lower court, to help that inferior court decide a case before it.[109] In neither case did the appellate body (as a body) have control over the questions to be considered.[110] The question was always sent to, rather than brought by, the judges for their consideration.

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99 *See* Judiciary Act of 1793, ch. 22, § 1, 1 Stat. 333, 333–34.

100 *Id.* § 2, 1 Stat. at 334.

101 Judiciary Act of 1801, ch. 4, 2 Stat. 89.

102 *Id.* § 7, 2 Stat. at 90–91.

103 *See* Nash & Collins, *supra* note 95, at 738.

104 *Id.* at 739.

105 *See id.*

106 *See id.*

107 *Id.* at 739–40.

108 *Id.*

109 *See id.* at 736; *supra* Section I.A.

110 Individual judges would generate pro forma disagreements so that the question would be sent to the Supreme Court. *See* Nash & Collins, *supra* note 95, at 744. That is,

There was at least one important difference, though. Unlike reserved questions in the common law courts of England, Supreme Court review of questions through certificates of division was mandatory.[111] While English judges could simply refuse to answer the question, the Supreme Court did not have that option if the question was a pure question of law and if it was not a comprehensive set of questions that effectively sent up the "whole case."[112] In the United States, certificates of division were mandatory, just like writs of error and appeals.

While both devices were mandatory, the Supreme Court was clear on the key difference between traditional appeals and certified questions. The former reached the whole case, while certification reached only the questions identified by the lower court. Indeed, in *Ogle v. Lee*, the first time the Court faced a certified question,[113] the Justices wrote that they "were unanimously of opinion, that they could only consider the single question, upon which the judges below divided in opinion, but that the parties will not be precluded from bringing a writ of error, upon the final judgment below; and the *whole cause* will then be before the court."[114]

Since the Court was limited to sending answers back to the circuit court, it was unable to reach the merits, issue judgment, or provide relief. Take, for instance, *United States v. Chicago*, which involved a request for an injunction against the city to prevent it from running a street through property owned by the United States.[115] Justice Woodbury gave a lengthy discourse on certificates of division and acknowledged that the answer to the certified questions would effectively decide the case.[116] The majority answered three questions as follows:

they would frequently feign disagreement when there was none so that the issue could be settled by the Supreme Court and make a national precedent. This mirrors the practice of common law judges in England who would reserve questions for a group decision that would then become precedential across the common law courts. *See supra* note 48. Justices used the certificates of division to push questions to the Court so that a national law could develop. *See* Nash & Collins, *supra* note 95, at 744. In both places, individual judges could and did use the relevant mechanism to send questions up for further review.

Justices, like the common law judges in England, could make strategic use of institutional arrangements. *Id.* at 735–36. However, such use relied upon and did not transform those institutions. *See id.* at 740. Thus, it was still the circuit court that certified the question. *See id.* at 742. The Supreme Court, as an institution, had no role in bringing any question. *See id.* Individual Justices *acting as circuit judges* could, with the assistance of the district judge, act strategically to elevate questions, *see id.* at 744, just as English judges on common law courts before them did, *see supra* subsection I.A.1.

111 *See* Nash & Collins, *supra* note 95, at 768.

112 *See id.* at 742, 742–43, 769.

113 *See id.* at 742.

114 Ogle v. Lee, 6 U.S. (2 Cranch) 33, 33 (1804).

115 United States v. City of Chicago, 48 U.S. (7 How.) 185, 190 (1849).

116 *See id.* at 192.

(1) Chicago had "no right to open the streets through that part of the ground," (2) Chicago's powers were limited to land that had become private property, and (3) existing plans for streets did not turn the land into private property.[117] These answers would effectively justify an injunction, but the Court did not issue one.[118] Indeed, it could not, since the only power the Court had when answering a question on a certificate of division was to send the answer back to the lower court. Instead, it ordered that its answers be certified to the circuit court.[119]

Though the certificate of division had no remedial power, as a policymaking tool it was particularly important because it was frequently the only way the Court could review many issues. For instance, Congress did not give the Supreme Court general appellate jurisdiction over federal criminal law for more than a century.[120] With no other way to reach such issues, certificates of division became the primary avenue for the Court to unify federal criminal law.[121]

This was a useful workaround to a jurisdictional problem, but it too had jurisdictional limits. Specifically, certificates could only be sent before final judgment in the circuit court.[122] Since the case was still active—and in the original jurisdiction of the federal judiciary—it was important that the case itself remain in the trial court, since the Supreme Court lacked original jurisdiction over such cases.[123] Certification threaded the needle. So long as the Justices policed certified questions to make sure that only discrete questions and not whole cases were dealt with, the constitutional limits to the Court's original jurisdiction could be maintained.[124] Such policing was relatively easy since

117 *Id.* at 198.

118 *See id.*

119 *Id.*

120 *See* Nash & Collins, *supra* note 95, at 740–41. The first Judiciary Act did allow the Supreme Court to set bail in criminal cases. *See* Judiciary Act of 1789, ch. 20, § 33, 1 Stat. 73, 91–92.

121 Indeed, this seems to have been Congress's intent. The statute expressly provided "that imprisonment shall not be allowed, nor punishment in any case be inflicted, where the judges of the said court are divided in opinion upon the question touching the said imprisonment or punishment." Judiciary Act of 1802, ch. 31, § 6, 2 Stat. 156, 161.

Similarly, Congress instituted different amount-in-controversy requirements to litigate in different courts. *See* Nash & Collins, *supra* note 95, at 741. Some cases that raised significant questions of "general law" that the Court wanted to develop had high enough stakes to get into a lower court, but the money involved was not significant enough to clear the statutory threshold for Supreme Court review on a writ of error or appeal. *See id.* at 741–42. These limitations made bringing such cases to the Court impossible, but that did not mean the questions could not arrive through certification. *See id.*

122 *See* Nash & Collins, *supra* note 95, at 739–40.

123 *Id.* at 746.

124 *See* White v. Turk, 37 U.S. (12 Pet.) 238, 239 (1838) (declining to decide a certified question when it "would, in effect, be the exercise of original, rather than appellate

the Justices, while riding circuit, were the ones certifying the questions.[125]

C. Advisory Opinions

A third historical example is also useful. In both England and the American colonies, and then states, judges could answer preselected questions when offering advisory opinions.[126] In the English context, this reflected the view that the king's judges were the king's servants and so owed him advice upon request. Indeed, the oath of office required judges to "lawfully . . . counsel the King in his Business."[127] Thus offering such opinions was not only allowed, but it was also part of the judge's duty.[128]

The most important difference between advisory opinions and the examples just discussed is that advisory opinions were extrajudicial opinions by judges,[129] not binding judgments of courts in particular cases or even controlling answers to questions at issue in a case before a different court. Indeed, a defining feature of the advisory opinion is that there is no case at all. This observation accounted for one source of unease among judges. Since there was no case, judges were largely disabled from benefitting from the arguments from learned members of the bar.[130] But it also created at least an informal limit, as by the 1770s it was clear that judges should not offer opinions related to "causes actually depending."[131]

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jurisdiction"); Webster v. Cooper, 51 U.S. (10 How.) 54, 55 (1850) (declining to decide a certified question when it would "convert this court into one of original jurisdiction in questions of law, instead of being, as the Constitution intended it to be, an appellate court").

125 *See* Nash & Collins, *supra* note 95, at 735. This is not to say that the circuit Justices were always perfect. The Court did, from time to time, dismiss purported certifications for want of jurisdiction if the circuit court attempted to transfer the "whole case" to the Justices. See, for example, *Luther v. Borden*, 48 U.S. (7 How.) 1, 47 (1849), in addition to the cases cited in the previous footnote.

126 As of 2017, at least eleven states had such procedures: Alabama, Colorado, Delaware, Florida, Maine, Massachusetts, Michigan, New Hampshire, Oklahoma, Rhode Island, and South Dakota. Lucas Moench, Note, *State Court Advisory Opinions: Implications for Legislative Power and Prerogatives*, 97 B.U. L. REV. 2243, 2246 (2017). When answering these questions, state courts are careful to not go beyond the questions asked. *See, e.g.*, Advisory Op. to the Governor Re: Implementation of Amend. 4, the Voting Restoration Amend., 288 So. 3d 1070, 1084 (Fla. 2020) (per curiam) ("We express no opinion on any question other than the narrow one presented to us.").

127 Oath of the Justices 1346, 20 Edw. 3 c. 6.

128 *See* PHILIP HAMBURGER, LAW AND JUDICIAL DUTY 151–52 (2008).

129 *See* Burset, *supra* note 69, at 655.

130 *See id.* at 634–36.

131 1 EDWARD COKE, INSTITUTES *110 n.5 (Francis Hargrave ed., London, G. Kearsly & G. Robinson 1775) (emphasis omitted).

A second important feature of advisory opinions is that the advice was never given unsolicited. The executive requested the opinion, and the judges responded with an answer to the question asked.[132]

Advisory opinions were not uniquely the province of English judges. They were, and remain, within the province of various state judiciaries.[133] But such power has never been claimed by the federal judiciary. In a famous letter to President Washington, Chief Justice Jay wrote:

> The Lines of Separation drawn by the Constitution between the three Departments of Government—their being in certain Respects checks on each other—and our being Judges of a court in the last Resort—are Considerations which afford strong arguments against the Propriety of our extrajudicially deciding the questions alluded to; especially as the Power given by the Constitution to the President of calling on the Heads of Departments for opinions, seems to have been *purposely* as well as expressly limited to *executive* Departments.[134]

The letter plainly rejects advisory opinions as improper on separation of powers grounds.[135] Some work has suggested that Chief Justice Jay might have been more concerned with the topic—the law of nations—than the machinery of advisory opinions.[136] Most recently, Professor Christian Burset has posited that the American refusal to partake in advisory opinions reflected a growing consensus in the common law world.[137]

The traditional understanding, however, is that Chief Justice Jay is simply telling the truth when he claims that advisory opinions are "extrajudicial," which implies that they would also fall outside of the Constitution's judicial power.[138] The judicial power—"the power to issue binding judgments"[139]—requires a case or controversy in need of binding judgment in order to operate.[140]

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132 *See* Burset, *supra* note 69, at 631.

133 *See supra* note 126.

134 Letter to George Washington from Sup. Ct. JJ. (Aug. 8, 1793), *in* 13 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES, 1 JUNE–31 AUGUST 1793, at 392, 392 (Christine Sternberg Patrick ed., 2007).

135 *See id.* Advisory opinions were also going out of fashion in England at the time. *See* Burset, *supra* note 69, at 638–43.

136 David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. REV. 932, 1027 (2010).

137 *See* Burset, *supra* note 69, at 623.

138 *See* Felix Frankfurter, *Advisory Opinions*, 1 ENCYCLOPEDIA OF THE SOCIAL SCIENCES 475, 476 (1930).

139 *See* Baude, *supra* note 5, at 1809.

140 U.S. CONST. art. III, § 2, cl. 1.

The upshot of this discussion is that the federal judicial power did not countenance advisory opinions, at least in part, because they could not fit within the case and controversy requirements of Article III. However, even judges who did (and still) have the power to issue advisory opinions could do so only when asked. The power to offer advisory opinions was not a freestanding writ to speak to important questions whenever the judges so desired.

D. *Developing a Theory*

These historical examples suggest there is room within the judicial power to allow appellate courts to answer questions even if they are not deciding cases, but only under certain conditions. This may seem odd, since as a textual matter, the judicial power applies to cases and controversies. How then can a court exercise judicial power when not acting upon a case? More to the point, since the power to answer questions derives from the obligation to decide cases,[141] how can a court answer questions if not deciding a case?

In both the case stated and certification of division processes detailed above, a trial court sends questions to the appellate judges that emerged from a case pending before that court, and those judges answer only the questions sent. When stated in this way, two important limitations emerge. First, there must be a case pending in the court that poses the question. Second, the appellate judges answer only the questions the lower court sends to them.

The first of these requirements cashes out as a requirement that a federal appellate court may answer questions apart from cases only if those questions are part of a case pending in a different federal court. This vindicates the traditional Article III cases-and-controversies limitation. By requiring the question to come from a pending case, the Article III power has a case upon which to work. By requiring the question to come from a case in a different court—as opposed to allowing courts to preselect questions from their own cases without deciding the merits—it protects the judicial obligation to decide the cases before the court.[142]

141 *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803); *see also* Benjamin B. Johnson, *The Supreme Court, Question-Selection, Legitimacy, and Reform: Three Theorems and One Suggestion*, 67 ST. LOUIS U. L.J. 625, 627 (2023).

142 If a court had the power to only answer selected questions in its own cases and did not have to actually decide enough of the case to reach the merits and render judgment, then Chief Justice Marshall's admonition in *Cohens* would make no sense. *See* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821) ("[W]ith whatever difficulties, a case may be attended, we must decide it . . . . [The Court has] no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur which we would gladly avoid,

Notice, however, that all that is required is that the question be part of a case pending in the federal judiciary. There is no requirement that the case be pending in a *lower* court. Thus, it would not violate this condition for one district judge to certify a question to another, or even for a circuit court to certify to a district court.[143] One could imagine good reasons for doing so. Suppose that in deciding a case under its diversity jurisdiction, a district court in New York (or perhaps even the Second Circuit) is required to apply Texas law. Judges in federal courts in New York might benefit from certifying the question to a district judge in Texas who has greater familiarity with the local law.[144]

This limitation also provides an alternative explanation for why advisory opinions are not permitted under Article III. The existence of advisory opinions during the colonial period and in several states after ratification does somewhat complicate this first restriction. English courts could and did offer answers to legal questions posed by the king or other officers.[145] This too was a way those courts answered questions apart from cases. That many colonial and then state courts also answered questions posed by governors or legislatures suggests an understanding of the judicial power at the time of the Founding that encompassed advisory opinions.[146]

But in every case, it was (and remains) true of advisory opinions that the judges answered the questions sent. Judges did not get to write their own questions—for obvious reasons. If judges could simply assert that there was a legal question pending before the king or his ministers and then issue an opinion giving the answer, the judges would be largely unaccountable legislators.[147] To prevent this, judges were limited to answering only the questions asked.[148]

Similar dangers lurk in the context of the certification of division or case stated process, hence the two conditions. There are some questions that might simply never be justiciable—though they are politically and legally salient. Requiring that questions emerge from specific cases removes such policy matters from judicial purview and leaves

but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty.").

143 The "one supreme Court" language may well preclude the Justices from sending questions to lower courts. *See* U.S. CONST. art. III, § 1.

144 Of course, just because this would be constitutional and perhaps beneficial does not mean judges can do this. Congress still controls the courts' jurisdiction, and it would have to provide for such intrajudiciary certification. *See Marbury*, 5 U.S. (1 Cranch) at 175.

145 *See* Burset, *supra* note 69, at 631.

146 *See* STEWART JAY, MOST HUMBLE SERVANTS: THE ADVISORY ROLE OF EARLY JUDGES 52–56 (1997).

147 *Id.* at 14–15.

148 *See id.*

them with the legislature or executive. Still, alone, this is not much of a constraint. The set of questions present in at least one case somewhere is almost boundless. This will be especially true if courts are free to answer any such question, since those who prefer the likely judge-given answer to the status quo or to the likely outcome of a political process will conjure a way to get the question into a case.

For example, suppose a plaintiff sues a federal official under § 1983 for violating an alleged constitutional right to a living wage. The trial court would almost certainly dismiss the case as § 1983 largely applies to state officials.[149] But if the appellate court could reach into the case and grab any question contained therein, it could select the question about the living wage and ignore the § 1983 issue. Thus, the bare requirement that a question be part of a case is not a sufficient limit. Appellate courts that are free to select their questions from cases existing in other courts are effectively unconstrained policymakers. To avoid this, all of the earlier methods that brought distinct questions to English, colonial, or federal courts—the certificate of division, the case stated, and even the advisory opinion—limit the appellate court's reach to the questions sent to it. None of these devices allowed the court to reach out and select questions of its choosing.

E. Application: Reverse Certification

An interesting way to put this theory to work is to consider an idea scholars have toyed with for decades: developing a process through which states could certify questions of federal law to federal courts.[150] This "reverse certification," as it is often called, is patterned after the practice of federal courts certifying questions to state courts.[151] Reverse certification would have benefits for the federal government and federalism. Allowing state courts to certify questions to federal courts—for example, the circuit court that oversees federal courts in the state—

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149 *See* 42 U.S.C. § 1983 (2018). There would almost certainly be other standing concerns as well.

150 *See, e.g.*, Arthur R. Miller, *Artful Pleading: A Doctrine in Search of Definition*, 76 TEX. L. REV. 1781, 1820 n.211 (1998); Jon O. Newman, *Restructuring Federal Jurisdiction: Proposals to Preserve the Federal Judicial System*, 56 U. CHI. L. REV. 761, 774–76 (1989); Daniel J. Meltzer, *Overcoming Immunity: The Case of Federal Regulation of Intellectual Property*, 53 STAN. L. REV. 1331, 1356 n.93 (2001); Guido Calabresi, *Federal and State Courts: Restoring a Workable Balance*, 78 N.Y.U. L. REV. 1293, 1298–99 (2003); Andrew D. Bradt, Grable *on the Ground: Mitigating Unchecked Jurisdictional Discretion*, 44 U.C. DAVIS L. REV. 1153, 1207–18 (2011); Wayne A. Logan, *A House Divided: When State and Lower Federal Courts Disagree on Federal Constitutional Rights*, 90 NOTRE DAME L. REV. 235, 270–78 (2014); John Macy, Note, *Give and Take: State Courts Should Be Able to Certify Questions of Federal Law to Federal Courts*, 71 DUKE L.J. 907 (2022).

151 *See* Bradt, *supra* note 150, at 1160.

would promote the vital interests of supremacy and uniformity in federal law. It would also show a useful sort of reciprocity, as federal courts already may, as alluded to above, certify questions to state courts. That practice has an interesting history.

The Supreme Court first certified a question to a state court in 1960.[152] The certification was possible only because Florida, in 1945, passed a statute that empowered state courts to answer certified questions of state law from federal courts.[153] Soon after the Court certified a question to Florida, other states began to pass similar statutes.[154]

Certification emerged as federal litigation involving state law claims languished in the intersection of federal abstention doctrines[155] and *Erie*.[156] *Erie* requires federal courts to apply state substantive law, and abstention doctrines pushed federal courts to wait for state courts to supply the substantive law.[157] The combination slowed federal litigation to a crawl as district courts had to wait for state courts to resolve the state issues in separate proceedings.

Certification allowed federal litigants to skip the lengthy trial-and-appeals process in state courts that had been necessary to get the federal case moving.[158] Instead, the district court could take its best guess,[159] the appeal could run to the circuit court, and that court could certify the question to the state supreme court. Certification kept the litigation on track while preserving state control of state law.

Certification has benefits for the state as well. For instance, it allows state courts to develop state law in new contexts,[160] reduces forum

152 Clay v. Sun Ins. Off. Ltd., 363 U.S. 207, 212 (1960).

153 *See* Macy, *supra* note 150, at 917; FLA. STAT. § 25.031 (2024).

154 *See* Macy, *supra* note 150, at 917; *see also* Jonathan L. Marshfield, *America's Other Separation of Powers Tradition*, 73 DUKE L.J. 545, 570–71 (2023). For a less sanguine take on this first certification, see Bruce M. Selya, *Certified Madness: Ask a Silly Question . . .*, 29 SUFFOLK U. L. REV. 677, 680 (1995).

155 *E.g.*, R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496, 501–02 (1941) (known as "*Pullman* abstention").

156 Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938); *see* M Bryan Schneider, *"But Answer Came There None": The Michigan Supreme Court and the Certified Question of State Law*, 41 WAYNE L. REV. 273, 277 (1994); Gregory L. Acquaviva, *The Certification of Unsettled Questions of State Law to State High Courts: The Third Circuit's Experience*, 115 PENN ST. L. REV. 377, 381 (2010).

157 *See Erie*, 304 U.S. at 78; Schneider, *supra* note 156, at 284–89.

158 *See* Schneider, *supra* note 156, at 286, 299.

159 It is actually called an "*Erie* guess." *See* Haley N. Schaffer & David F. Herr, *Why Guess?* Erie *Guesses and the Eighth Circuit*, 36 WM. MITCHELL L. REV. 1625, 1626 (2010); *see also* Nolan v. Transocean Air Lines, 365 U.S. 293, 294–96 (1961); Phansalkar v. Andersen Weinroth & Co., 344 F.3d 184, 199 (2d Cir. 2003) (quoting Travelers Ins. Co. v. 633 Third Assocs., 14 F.3d 114, 119 (2d Cir. 1994)).

160 *See* Jonathan Remy Nash, *Examining the Power of Federal Courts to Certify Questions of State Law*, 88 CORNELL L. REV. 1672, 1697 (2003); Macy, *supra* note 150, at 919.

shopping,[161] and "promotes institutional comity" between state and federal courts.[162] Given the broad range of benefits, it is unsurprising that the United States Supreme Court has endorsed the practice.[163]

Now consider a parallel process that would send certified questions from state to federal courts. State courts frequently find themselves tasked with deciding vexing questions of federal law. The Supremacy Clause requires state courts to follow federal law when applicable,[164] and many states tie their own state constitutional protections (for example, free speech) to federal constitutional guarantees.[165] A proper understanding of the meaning of relevant federal laws is thus quite beneficial to state courts. Reverse certification is particularly intriguing to patent scholars who would like state courts to be able to certify patent questions to the Federal Circuit.[166]

There are, likewise, potential benefits for federal courts. Reverse certification would allow federal courts to develop law in new contexts, reduce intrastate forum shopping, and promote institutional comity. Further, it would facilitate uniformity in federal law, as states could directly bring their courts' interpretations of federal law in line with the overlapping federal circuit court.

Given these benefits, one might wonder why there is no procedure through which state courts might certify federal questions to federal courts. Though there have been supporters of the idea, reverse certification faces significant hurdles.[167] The most important potential

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161 *See* Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After* Erie, 145 U. PA. L. REV. 1459, 1544 (1997).

162 Macy, *supra* note 150, at 920, 919–20, 920 n.85 (citing John B. Corr & Ira P. Robbins, *Interjurisdictional Certification and Choice of Law*, 41 VAND. L. REV. 411, 457 (1988)).

163 *See, e.g.*, Lehman Bros. v. Schein, 416 U.S. 386, 391 (1974).

164 *See* U.S. CONST. art. VI, cl. 2.

165 *See* Joseph Blocher, *What State Constitutional Law Can Tell Us About the Federal Constitution*, 115 PENN ST. L. REV. 1035, 1037 (2011); *cf.* Jonathan L. Marshfield, *America's Misunderstood Constitutional Rights*, 170 U. PA. L. REV. 853, 872 (2022) (observing that state courts have discretion to diverge from federal constitutional rights jurisprudence, but they mostly do not).

166 *See* Paul R. Gugliuzza, *Patent Law Federalism*, 2014 WIS. L. REV. 11, 73 n.367; Mitchell N. Berman, R. Anthony Reese & Ernest A. Young, *State Accountability for Violations of Intellectual Property Rights: How to "Fix"* Florida Prepaid *(And How* Not *To)*, 79 TEX. L. REV. 1037, 1114 n.378 (2001).

167 Two such objections that are not considered here are that such a regime would undermine general federalism concerns by limiting state courts' involvement in the development of federal and constitutional law and specific concerns about the finality of federal court decisions since state courts might not treat the answer the federal court returns as binding. *See* Selya, *supra* note 154, at 685–87 (federalism); Macy, *supra* note 150, at 939 (finality).

Judge Selya also suggests the practice would have more than a whiff of being an advisory opinion. Selya, *supra* note 154, at 685–87. This would certainly make it challenging to understand the precedential value of the federal court's response within the federal

objection for present purposes is that it would put federal courts in the position of answering questions while not deciding cases.[168] As has been argued above, this is permissible only if there is a case or controversy in the federal judiciary that invokes the judicial power and if the court answers only the questions sent.

Suppose that Congress was convinced of the benefits of reverse certification and passed a statute permitting the process. It has been clear since at least *Marbury* that while Congress may limit the federal courts' jurisdiction and thus the scope of the judicial power, the legislature may not expand the reach of the judicial power beyond Article III's independent bounds.[169] So, the question becomes whether, even if legislatively authorized, such reverse certification would be constitutionally permissible.

Assuming the federal court limited itself to answering the certified question, the second prong would be satisfied. That second prong would be particularly important for federalism reasons. If the federal court could go beyond the request of the state court and instead answer other questions of its choosing, it would amount to an uninvited attempt to impose federal power on state institutions. However, if Congress did not permit, and the federal court did not attempt, anything other than answering the question sent, there is little concern that the federal court would be able to overstep the bounds of federalism.

The problem is with the first prong. Even if there were an authorizing statute, the question would not emerge from a live case in a federal court. Merely accepting a certified question does not generate a case. If it did, then the Supreme Court, when it accepted certificates of division, would have had cases before it. If there is a case, there is an obligation to decide it, reach judgment, and provide remedies if appropriate.[170] Since the entire purpose of the case stated or the certificate of division was to harness judicial power without imposing such obligations on the appellate court, it would be self-defeating for those devices to generate cases. As such, the core constitutional problem with reverse certification is that there is no case or controversy in the federal judiciary that could justify the exercise of the judicial power.

judiciary. Christian Burset defines an advisory opinion "as a legal opinion delivered by one or more judges in their official capacities but outside of the ordinary process of litigation." Burset, *supra* note 69, at 626. Burset, however, explicitly excludes certified questions—at least those certified from circuit courts to the Supreme Court—from the set of advisory opinions for largely historical reasons. *See id.* at 626–27.

168 *See* Selya, *supra* note 154, at 686.

169 *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 175 (1803).

170 *See id.* at 171.

II. The Supreme Court Answering Questions

The Article up to this point has shown that the judicial power, as understood at the Founding, allows federal courts to answer questions even when not deciding cases under limited circumstances: the questions must emerge from a case pending in a lower court, and the questions must be sent, rather than brought. This Part turns to the most important application of the theory: the Supreme Court.

There is a growing awareness that the Supreme Court does not actually decide cases; rather, it answers questions. While the Court often talks about deciding cases, internally, the Court has long used the word "case" to mean "issue."[171] If there is an overarching theme to the Court's rules, it is that the Justices have given themselves maximal discretion to decide only the issues that interest them. Consider the general rule that "[o]rdinarily, this Court does not decide questions not raised or resolved in the lower court,"[172] which holds except when it doesn't (at which times the Court may note that "this rule is not inflexible" and so consider questions "not specifically passed upon by the lower court").[173]

The most powerful tool in the Court's agenda-setting arsenal, however, is Rule 14, which purports to limit the Court's consideration to the questions presented.[174] By rule, "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court."[175] So, in function and by design, the petitions the Court grants are essentially "vehicles" to address questions of law or policy.[176] They are not treated at any point like cases in the traditional judicial sense.

This process of question selection allows the Court to focus on issues that interest the Justices regardless of the stated rules or posture of the case. Thus, "fairly included" can have a fairly broad meaning

171 *See* H.W. Perry, Jr., Deciding to Decide: Agenda Setting in the United States Supreme Court 221 (1991) ("[Justices and clerks] used 'case' and 'issue' interchangeably. . . . [I]t is the issue, not the case that is primary.").

172 Youakim v. Miller, 425 U.S. 231, 234 (1976).

173 Cap. Cities Cable, Inc. v. Crisp, 467 U.S. 691, 697 (1984). In particular, the Court is willing to look beyond the questions presented in the interest of constitutional avoidance. *See* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 216 n.2 (1995); *see also* McWilliams v. Dunn, 137 S. Ct. 1790, 1800 (2017).

174 Sup. Ct. R. 14.1(a); *see, e.g.*, Gonzales v. Duenas-Alvarez, 549 U.S. 183, 194 (2007) (declining to evaluate a litigant's claim because it did not "fall[] within the terms of the question presented" and "the lower court did not consider the claims" below).

175 Sup. Ct. R. 14.1(a).

176 *See, e.g.*, Griffin v. HM Fla.-ORL, LLC, 144 S. Ct. 1, 2 (2023) (mem.) (statement of Kavanaugh, J., respecting the denial of the application for stay) (stating that the Court is unlikely to grant certiorari in the case because it is an "imperfect vehicle" for considering a general question of law).

when it suits.[177] But the true elasticity of the rule is seen in the Court's willingness to manipulate those questions.

While the Court says that "by and large it is the petitioner himself who controls the scope of the question presented,"[178] that statement obscures more than it reveals. For one thing, the Justices frequently add questions that were "not advanced by the parties," "even where the petitioner has expressly and intentionally excluded such questions from the petition."[179] Alternatively, the Court will sometimes limit the grant of certiorari to only a subset of questions presented in the petitioner's brief.[180] The Court's regular practice of adding and subtracting questions to make sure the Justices have all of (and only) the questions that interest the Justices suggests that the petitions that are simply granted as written are those for which the petitioner's attorney correctly guessed the issues the Court wanted to address. There is only the illusion of party control.

Recent scholarship has called this practice into question as inconsistent with the plain text of the statutes that authorize certiorari and the original public meaning of those statutes.[181] The relevant statute says that the Court may take "cases" through certiorari and "questions" through a different procedure: certification.[182] Earlier versions of the statute dating back to the introduction of statutory certiorari in the Evarts Act of 1891 made clear that when the Court takes a case through certiorari, it is to decide the case as if on a writ of error or appeal.[183] This was the way the Supreme Court had always handled cases, and it is still (roughly) the way circuit courts of appeals operate today.

Such review would require the Justices to decide the merits of the entire case and to offer relief consistent with that review. But the merits potentially involve all the questions, not just some, and there is no guarantee that the "interesting" questions are the dispositive ones. As

177 *See, e.g.*, Eddings v. Oklahoma, 455 U.S. 104, 114 n.9 (1982) (observing the Court's "jurisdiction does not depend on citation to book and verse"); *see also* Vance v. Terrazas, 444 U.S. 252, 258 n.5 (1980) (allowing the Court to reach a question when it is a "predicate to an intelligent resolution" of the question on which it granted certiorari); Procunier v. Navarette, 434 U.S. 555, 560 n.6 (1978) (stating the Court may answer questions that are "essential to [the] analysis" of the lower court).

178 Yee v. City of Escondido, 503 U.S. 519, 535 (1992).

179 STEPHEN M. SHAPIRO, KENNETH S. GELLER, TIMOTHY S. BISHOP, EDWARD A. HARTNETT & DAN HIMMELFARB, SUPREME COURT PRACTICE ch. 6, § 25(H) (11th ed. 2019) (citing Colorado v. Connelly, 474 U.S. 1050 (1986) (mem.)).

180 *See, e.g.*, Dobbs v. Jackson Women's Health Org., 141 S. Ct. 2619 (2021) (mem.); Relentless, Inc. v. Dep't of Com., 144 S. Ct. 325 (2023) (mem.); Loper Bright Enters. v. Raimondo, 143 S. Ct. 2429 (2023) (mem.); Facebook, Inc. v. Amalgamated Bank, 144 S. Ct. 2629 (2024) (mem.).

181 *See, e.g.*, Johnson, *supra* note 18, at 793.

182 28 U.S.C. § 1254 (2018); *see infra* notes 230–33 and accompanying text.

183 Evarts Act, ch. 517, § 6, 26 Stat. 826, 828 (1891).

a court deciding a case, the Supreme Court would be obligated to decide enough of the questions to justify both its judgment on the merits and the relief it provides.

The Justices themselves, when lobbying for additional certiorari powers in 1925, were clear that certiorari led to traditional appellate review on a writ of error. Justice Van Devanter told Congress that granting certiorari meant the Justices all "understand that, in the entire environment of the case, it is one that should be argued at length before them, be considered by them in the light of that presentation and then deliberately decided."[184] He continued by saying, "Granting the writ means, and only means, that the court finds probable cause for a full consideration of the case in ordinary course."[185] Likewise, Justice McReynolds testified that certiorari meant the full case should be "reheard upon its merits."[186] Chief Justice Taft and the other Justices argued for broader discretionary powers in federal cases especially since certiorari jurisdiction "extend[ed] to the whole case and every question presented in it."[187]

But it is quite clear that the Court does not live up to the Justices' promises in practice. In theory, the Court still has access to the entire case before it. For instance, the traditional rule is that a respondent may defend the judgment "on any ground properly raised in the court below, even though that court rejected or ignored it."[188] The Court does not make much of that rule in practice.[189] Likewise, the plain

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184 *Procedure in Federal Courts: Hearing on S. 2060 & S. 2061 Before a Subcomm. of the S. Comm. on the Judiciary*, 68th Cong. 30 (1924) (statement of Hon. Willis Van Devanter).

185 *Id.* (statement of Hon. Willis Van Devanter).

186 *Id.* (statement of Hon. James C. McReynolds).

187 *See* Letter from Wm. H. Taft, C.J., U.S. Sup. Ct., to Royal S. Copeland, Sen., U.S. Senate (Dec. 31, 1924), *in* 66 CONG. REC. 2921, 2921 (1925). It is, of course, true that Congress expanded the Court's certiorari jurisdiction because it wanted to allow the Court to focus on its core functions: "resolving important issues of federal law and settling conflicts among the lower courts." Tara Leigh Grove, *The Exceptions Clause as a Structural Safeguard*, 113 COLUM. L. REV. 929, 964 (2013). To this end, Congress freed the Court to focus on cases that implicated those concerns. *See id.* at 962–68. This was to be accomplished, however, by taking and deciding cases "with the same power and authority and with like effect as if brought up by writ of error." Judiciary Act of 1925, ch. 229, sec. 1, § 237(b), 43 Stat. 936, 937. This required a comprehensive review of the record for reversible error. *See* Johnson, *supra* note 18, at 797.

188 SHAPIRO ET AL., *supra* note 179, at ch. 6, § 26(C); *see, e.g.*, Murr v. Wisconsin, 137 S. Ct. 1933, 1949 (2017) ("The judgment below, furthermore, may be affirmed on any ground permitted by the law and record.").

189 *See, e.g.*, Genesis Healthcare Corp. v. Symczyk, 569 U.S. 66, 72 (2013) (declining to consider respondent's claim absent a cross-appeal because the lower court rejected it below); *see also* SHAPIRO ET AL., *supra* note 179, at ch. 6, § 26(C) (first citing District of Columbia v. Wesby, 138 S. Ct. 577, 584 n.1 (2018); then citing Kasten v. Saint-Gobain Performance Plastics Corp., 563 U.S. 1, 16–17 (2011); then citing Granite Rock Co. v. Int'l Bhd. of

error rule allows the Court to "consider a plain error not among the questions presented but evident from the record and otherwise within its jurisdiction to decide."[190]

But having *access* to the case does not mean the Court makes much of that access. There is little evidence it regularly looks for plain error or considers other questions preserved for appeal and reviewable on a more stringent standard, much less that it *decides* the case in the ordinary course. The Court does not attempt to identify, much less answer, a sufficient set of questions to dispose of the case. Instead, it focuses on only those questions that relate to issues the Justices want to address. Whether those answers are sufficient to justify a judgment on the merits or not is beside the point.

There is therefore good reason to believe the Court's practice is inconsistent with the statutes that purport to govern its appellate jurisdiction. Defenders of the Court's current practice might respond in several ways. First, they might argue that since the Court has been preselecting questions for decades, Congress has implicitly blessed the practice. Second, they might assert that since Congress controls the Court's appellate jurisdiction, Congress could amend the statute to allow question selection. If one assumes that Congress would pass such a bill if asked—and explains the failure to do so as reflecting the legislature's reluctance to spend time passing a law that merely affirms the de facto status quo—then there is no real harm.

Such defenses have several weaknesses. First, both rely on arguments from congressional silence. To succeed, such arguments must show that "Congress considered [the interpretation] in great detail."[191] Moreover, the Court has observed that "[i]t is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law."[192] Such arguments are particularly disfavored when used to amend the Court's jurisdiction.[193] Indeed, when the Court's jurisdiction is at issue, if Congress has not considered the change in the Court's jurisdiction, that alone "readily disposes of any argument that Congress unmistakably intended to"[194] exercise its authority over the Court's jurisdiction.

A second weakness is revealed by the limits on judicial power shown above: if the Court is answering questions without deciding cases, it may be acting beyond the scope of the Article III judicial

Teamsters, 561 U.S. 287, 305–06 (2010); and then citing Alabama v. Shelton, 535 U.S. 654 (2002)).

190 SUP. CT. R. 24.1(a).

191 NLRB v. Gullett Gin Co., 340 U.S. 361, 366 (1951).

192 Girouard v. United States, 328 U.S. 61, 69 (1946).

193 *See* Tafflin v. Levitt, 493 U.S. 455, 462 (1990).

194 *Id.*

power. While it is true that "[t]he unqualified language of the Exceptions Clause supports the view that Congress has broad authority over the Court's appellate jurisdiction,"[195] there are limits to what Congress may sanction. If *Marbury* teaches nothing else, it teaches that Congress cannot expand the Article III judicial power by statute.[196]

Indeed, the Court said as much in *Muskrat v. United States.*[197] There, Congress passed a statute providing for direct Supreme Court review of certain decisions of the Court of Claims.[198] The "whole purpose" of the direct review requirement in the statute, though, was

> to determine the constitutional validity of [the legislation], in a suit not arising between parties concerning a property right necessarily involved in the decision in question, but in a proceeding against the Government in its sovereign capacity, and concerning which the only judgment required is to settle the doubtful character of the legislation in question.[199]

The Court found this to be improper. It observed that "judgment will not conclude private parties, when actual litigation brings to the court the question of the constitutionality of such legislation," and would be "no more than an expression of opinion upon the validity of the acts in question."[200] As such, the legislation "exceeded the limitations of legislative authority, so far as it required of this court action not judicial in its nature within the meaning of the Constitution."[201]

Muskrat demonstrated the concern that if the Court could answer freestanding questions, even if prompted by an act of Congress,

> the result will be that this court, instead of keeping within the limits of judicial power and deciding cases or controversies arising between opposing parties, as the Constitution intended it should, will be required to give opinions in the nature of advice concerning legislative action, a function never conferred upon it by the Constitution, and against the exercise of which this court has steadily set its face from the beginning.[202]

This is not to say that the Court could never opine on the constitutionality of legislation. As the majority went on to say, "The questions involved in this proceeding as to the validity of the legislation may arise in suits between individuals, and when they do and are properly brought before this court for consideration they, of course, must be

195 Grove, *supra* note 187, at 939.
196 *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803).
197 Muskrat v. United States, 219 U.S. 346 (1911).
198 *Id.* at 348.
199 *Id.* at 361–62.
200 *Id.* at 362.
201 *Id.*
202 *Id.*

determined in the exercise of its judicial functions."[203] But as *Muskrat* makes clear, not even an act of Congress gives the Court additional authority to decide questions when not adjudicating cases on the merits.

It is therefore imperative to understand the limits of Article III power as it relates to answering questions when not deciding cases.[204] Such an understanding is vital both to evaluate the Court's current practice under the correct constitutional criteria and as a prerequisite for any efforts at reforming the Court. Thus, even if one accepts the argument from silence or even if Congress were to amend the statutes to grant the Court power to preselect questions, the practice would still require constitutional analysis. The tensions between the practice and Article III are not resolved by Congress.[205]

Consistent with the theory set out in Part I, a careful examination of the Article III issue begins with a basic challenge: Is there a case pending in the federal courts that evokes the question?[206] As is so often the case, it depends. When the Court is deciding questions after granting certiorari petitions from state courts, there is clearly not a case in some other federal court that is generating the question. In those cases, it is difficult to see how the first prong could be satisfied. In some instances, the Supreme Court will grant certiorari before the circuit court renders judgment.[207] In those instances, there is a case pending in a lower federal court. Most of the time, however, the Court grants certiorari after the circuit court has rendered judgment and issued its mandate. The case, so far as the lower court is concerned, is over. Whatever the Supreme Court does after the circuit court enters its own judgment, the Justices are not answering questions to aid the circuit court's ongoing deliberations in a pending case.

Thus, in the main, it is hard to see where the case would be. Of course, once the Court grants certiorari, the case—per the statute—is before the Supreme Court. But once it is there, the traditional obligation of a federal court to decide the case—augmented by the statutory and common law history that links review on certiorari to the writ of error and appeal—takes over.

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203 *Id.*

204 Clearly, if one could conceive of the Court as somehow actually deciding the case—that is, answering a sufficient set of questions to justify a judgment on the merits—then the limitations Article III imposes on courts engaged in answering questions when not deciding cases would not apply. If this is what the Court is doing, it would be helpful for the Court to show its work.

205 *See Muskrat*, 219 U.S. at 361.

206 *See* discussion *supra* Section I.D.

207 *See* James Lindgren & William P. Marshall, *The Supreme Court's Extraordinary Power to Grant Certiorari Before Judgment in the Court of Appeals*, 1986 SUP. CT. REV. 259, 259.

The second part of the theory is also poorly fit by current Supreme Court practice. It is certainly not the case that the lower courts send questions to the Justices. The Court is hardly the passive recipient of questions. Instead, it actively curates its docket. Not only does it add questions to or subtract them from individual petitions, but the Justices also frequently use their writings to suggest questions that they would like lawyers to bring to them,[208] and they are clear that they will not consider questions that, while important to the correct resolution of a particular case, are not interesting to the Justices. The Court's current practice is thus quite distinct from the historical examples and hard to square with the requirement that judges deciding questions apart from cases take the questions sent by others.

The other potential response is to fit the Court's actions into the traditional mold of case adjudication. If one takes this path, then the Court's current practice falls outside the scope of the theory set out above. The bare claim that the Court is deciding cases would not absolve the Court entirely. Rather, it would simply shift the analysis to different grounds. One would have to ask whether the procedures the Court follows and the answers it reaches are consistent with the requirements of the judicial power, specifically the obligation to reach the merits so that the Court might "decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision."[209] For the reasons just discussed, that is a challenging task. The Court frequently removes pertinent questions from consideration and by rule limits consideration to less than full cases.

There is a historical challenge as well. Every time the Court convinced Congress to grant the Justices greater discretion over their agenda, the argument was the same: there was too much work to do. Consider the Evarts Act, the statute that created the courts of appeals and first gave the Supreme Court certiorari power.[210] The Act was a response to the explosion of federal litigation that had inundated the Supreme Court. The proximate cause was a series of Republican reforms[211] such as the Jurisdiction and Removal Act of 1875, which finally gave federal courts jurisdiction to hear cases arising under federal

208 *See, e.g.*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 486–87 (2001) (Thomas, J., concurring) (expressing his concern about a "genuine constitutional problem" that "the parties did not address").

209 *Muskrat*, 219 U.S. at 356 (quoting SAMUEL FREEMAN MILLER, LECTURES ON THE CONSTITUTION OF THE UNITED STATES 314 (New York, Banks & Bros. 1891)).

210 *See* Evarts Act, ch. 517, § 6, 26 Stat. 826, 828 (1891).

211 JUSTIN CROWE, BUILDING THE JUDICIARY: LAW, COURTS, AND THE POLITICS OF INSTITUTIONAL DEVELOPMENT 173 (2012).

law,[212] and the Habeas Corpus Act of 1867.[213] Both of the party's priorities—Reconstruction and national economic development—called for an expanded role for federal courts.[214] The result was an explosion in admiralty cases, railroad litigation, and bankruptcy across the country.[215]

This placed enormous pressure on the federal judiciary, including the Supreme Court. The infrastructure of the federal judiciary had not changed much at all from its start in 1789.[216] One feature that remained unchanged was the mandatory nature of appeals and writs of error to the Supreme Court.[217] As the number of cases in lower courts expanded, a corresponding increase in the Court's workload followed immediately behind. For instance, there were 310 cases on the Court's docket in 1860 but 1,816 thirty years later, which amounted to a three-year backlog.[218] On top of this expanding docket, the Justices were still required to ride circuit and sit as trial judges.[219] The workload proved fatal to Chief Justice Waite.[220]

Congress's response was to create new circuit courts of appeals.[221] Section 6 of the Act made the decisions of these new courts of appeals final in a large set of cases.[222] This allowed federal cases to receive review on appeal or a writ of error by a panel of senior appellate judges.[223] This reduced the docket pressure on the Court immensely.

The Evarts Act established the tripartite framework for appellate review that exists today. First, some cases remained within the Court's

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212 *See* Jurisdiction and Removal Act of 1875, ch. 137, § 1, 18 Stat. 470, 470. Tara Leigh Grove attributes a significant amount of the expansion of the Court's docket to this Act. *See* Grove, *supra* note 187, at 951.

213 Habeas Corpus Act of 1867, ch. 28, 14 Stat. 385.

214 *See* CROWE, *supra* note 211, at 173–75.

215 *See id.* at 173–74.

216 *See id.* at 175.

217 *See* Felix Frankfurter & James M. Landis, *The Supreme Court Under the Judiciary Act of 1925*, 42 HARV. L. REV. 1, 7–10 (1928).

218 *See* RUSSELL R. WHEELER & CYNTHIA HARRISON, CREATING THE FEDERAL JUDICIAL SYSTEM 16 (3rd ed. 2005) (citing FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM 101–02 (1928)); *see also* Hartnett, *supra* note 14, at 1650.

219 *See* PETER CHARLES HOFFER, WILLIAMJAMES HULL HOFFER & N.E.H. HULL, THE FEDERAL COURTS: AN ESSENTIAL HISTORY 195 (2016).

220 *See id.* at 200.

221 *See* Peter S. Menell & Ryan Vacca, *Revisiting and Confronting the Federal Judiciary Capacity "Crisis": Charting a Path for Federal Judiciary Reform*, 108 CALIF. L. REV. 789, 801 (2020); *see also* Evarts Act, ch. 517, 26 Stat. 826 (1891).

222 These included diversity cases and cases arising under patent law, revenue laws, criminal law, and admiralty. Evarts Act § 6, 26 Stat. at 828.

223 Up to this point, many cases in federal court had no path to appellate review, or if there was a path, the appeal or writ of error would be decided by a single judge. *See* Nash & Collins, *supra* note 95, at 739–41.

mandatory jurisdiction.[224] Second, a circuit court of appeals could certify a question to the Supreme Court, which then had a choice to either answer the question or order the entire case up for review.[225] Third, the Court could grant certiorari.[226]

The first of these three was a continuation of the Court's initial mandatory jurisdiction—that proceeded directly on writs of error or appeal—that was nearly all the Court's work for more than a century.[227] The Court's obligation in such cases was clear: it must review and decide these cases on the merits. This entailed a comprehensive review of the record for error.[228] If the judiciary's equitable powers were invoked, then the obligation to review may have also extended to the facts.[229]

Interestingly, the second way for the Court to exercise appellate jurisdiction under the Evarts Act was through the certified question. Senator Evarts described the process on the floor of the Senate as being available "in any case before [another court] that [that court] deems it necessary or useful to be advised by the Supreme Court on any question or proposition of law, [and] send[s] up these questions to the Supreme Court."[230] He went on to say that upon receipt of these questions the Supreme Court "shall have the right alternatively to answer the questions and send them back" or to "direct the record to be sent up, and thus the whole body of the judicial determination shall be before it."[231] This colloquial language closely mirrored the final language of the statute, which allowed a circuit court of appeals, when exercising its appellate jurisdiction, to "certify . . . any questions or propositions of law concerning which it desires the instruction of"[232] the Supreme Court.

Plainly modeled on the older certificate of division, certified questions fit cleanly within the theory provided above. The case is pending in the circuit court, and that court sends the question to the Supreme Court. The Justices' answer helps the lower court render judgment in the case before it. The certified question thus seems to be a useful

224 *See* Evarts Act § 5, 26 Stat. at 827–28. Today the Court's mandatory appellate jurisdiction is essentially limited to cases initially heard by three-judge district courts. *See* 28 U.S.C. § 1253 (2018).

225 Evarts Act § 6, 26 Stat. at 828; Judiciary Act of 1802, ch. 31, § 6, 2 Stat. 156, 159–61.

226 Evarts Act § 6, 26 Stat. at 828.

227 Grove, *supra* note 187, at 952–53.

228 *See supra* text accompanying notes 84–87.

229 *See* BAKER, *supra* note 38, at 112.

230 21 CONG. REC. 10222 (1890) (statement of Sen. Evarts).

231 *Id.*

232 Evarts Act, ch. 517, § 6, 26 Stat. 826, 828 (1891).

mechanism to allow the Court to answer prespecified questions while remaining cleanly within the Article III framework.[233]

The third option, certiorari review, was without antecedent in early federal practice. Prior to the Evarts Act, certiorari was only used to bring up missing parts of the record of a case already pending before the Court.[234] The Evarts Act introduced certiorari as an appellate device to the federal courts.[235] However, the appellate use of the

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233 Interestingly, the statutory language regarding certification is also clearly mandatory. *See* Felix Frankfurter & James M. Landis, *The Business of the Supreme Court at October Term, 1929*, 44 HARV. L. REV. 1, 35 (1930) ("Petitions for certiorari the Court can deny, but questions certified must be answered." (emphasis omitted)); James William Moore & Allan D. Vestal, *Present and Potential Role of Certification in Federal Appellate Procedure*, 35 VA. L. REV. 1, 3 (1949) ("Congress determines what courts may use certification and when, but within these limits the certifying court determines on what matters the reviewing court must pass. In other words the jurisdiction of the latter court is obligatory at the option of the certifying court."); Amanda L. Tyler, *Setting the Supreme Court's Agenda: Is There a Place for Certification?*, 78 GEO. WASH. L. REV. 1310, 1321, 1323–24 (2010). Yet the Court has effectively ignored this obligation. It has not accepted a certified question since 1981. *See* Iran Nat'l Airlines Corp. v. Marschalk Co., 453 U.S. 919 (1981) (mem.); United States v. Seale, 558 U.S. 985, 986 (2009) (statement of Stevens, J., respecting dismissal of certified question) (noting that the Court had accepted no certified cases since 1981). The leading Supreme Court treatise reports that the Justices only answered four certified questions from 1946 to 2017. SHAPIRO ET AL., *supra* note 179, at ch. 9, § 1. My research has found four additional cases, bringing the total to a still abysmally low eight. The four Shapiro and his coauthors include are *United States v. Rice*, 327 U.S. 742 (1946); *United States v. Barnett*, 376 U.S. 681 (1964); *Moody v. Albemarle Paper Co.*, 417 U.S. 622 (1974); and *Iran National Airlines Corp.*, 453 U.S. 919. To these I would add *American Stevedores, Inc. v. Porello*, 330 U.S. 446 (1947); *Shade v. Downing*, 333 U.S. 586 (1948); *Woods v. Hills*, 334 U.S. 210 (1948); and *Alison v. United States*, 344 U.S. 167 (1952).

The Court's decision to reject the explicit instructions of Congress regarding the mandatory nature of certified questions mirrors its similar practice of refusing to consider cases in its mandatory jurisdiction, a practice that drew significant criticism in the last century. *See* Tyler, *supra*, at 1310. Though the Court is required to give such cases full consideration on the merits, the Court gave itself the power to dismiss any case it wished for lack of a substantive question. *See* SUP. CT. R. 12(1) (1936) (repealed 1954). Herbert Wechsler described the use of this power as "the Court simply disregard[ing] its statutory duty to decide appealed cases on the merits" and called it "lawless." Herbert Wechsler, *The Appellate Jurisdiction of the Supreme Court: Reflections on the Law and the Logistics of Direct Review*, 34 WASH. & LEE L. REV. 1043, 1061 (1977). Erwin Griswold called it "irregular" and observed that it led to discussions that would be "rather amusing, if they did not involve the Court's unwillingness to abide by the statutory law as prescribed by Congress." Erwin N. Griswold, *Equal Justice Under Law*, 33 WASH. & LEE L. REV. 813, 821 (1976).

234 *See* Am. Constr. Co. v. Jacksonville, Tampa & Key W. Ry. Co., 148 U.S. 372, 380 (1893); Hodges v. Vaughan, 86 U.S. (19 Wall.) 12, 13 (1873) ("A motion for certiorari is founded upon a suggestion of diminution, and is designed to bring up some part of the record left back and not included in the transcript.").

235 *See* FALLON ET AL., *supra* note 6, at 30 ("[T]he Evarts Act introduced the then revolutionary, but now familiar, principle of discretionary review of federal judgments on writ of certiorari.").

common law writ of certiorari was well-known.[236] When used as an appellate device, it brought a case to the higher court for review on a writ of error or appeal.[237] Indeed, the Evarts Act and its progeny were explicit in linking certiorari to the writ of error and appeal.

The Act required the Court, if it granted certiorari, to proceed "with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court."[238] This meant the Court must—if it granted certiorari—decide the appeal on the merits in the traditional way. As the Court clearly stated in the wake of the Evarts Act, "From the very foundation of our judicial system the object and policy of the acts of Congress in relation to appeals and writs of error . . . have been . . . to have the whole case and every matter in controversy in it decided in a single appeal."[239] Thus, when deciding such an appeal, the Court must decide all the necessary questions.[240]

The Evarts Act—and there has been no meaningful statutory effort to change these pathways—plainly countenances two types of review: traditional, fulsome review of the merits or targeted review of certified questions. Both pathways keep the Court safely within the confines of Article III. The question is whether the Court's current practice conforms to the statutes, and if not, whether those deviations also generate constitutional concerns. Given the requirements identified above, insofar as the Court is neither deciding cases nor answering certified questions, its practice is difficult to fit within either the statutes or Article III.

This review of the Evarts Act raises an obvious question: If the Court could satisfy the obligation to decide cases by deciding some preselected questions while ignoring others that might be dispositive, then why did the Supreme Court fall so far behind that the Justices had to turn to Congress for relief? The Court could have simply selected questions that were easily answered and called the job done.

CONCLUSION

This suggestion is jarring to those of us who have become inured to the Court's practice of preselecting questions for review. If one ever stops to question it, the response is that what exists today is what

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236 It was used in several states, for example. *See* Harris v. Barber, 129 U.S. 366, 369 (1889) (collecting cases).

237 *See id.*; *see also Am. Constr. Co.*, 148 U.S. at 387 (recognizing that certiorari was "in the nature of a writ of error . . . [and] when [certiorari was] granted, and the record certified in obedience to it, the questions arising upon that record must be determined according to fixed rules of law" (citing *Harris*, 129 U.S. at 369)).

238 Evarts Act, ch. 517, § 6, 26 Stat. 826, 828 (1891).

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

240 *See* Johnson, *supra* note 18, at 831 n.275.

Congress intended in 1925 when it passed the Judges' Bill.[241] The story is that Congress wanted the Justices to have unilateral and exclusive control over their docket with the freedom to focus on those issues, and only those issues, the Justices found important. But that is plainly wrong.

It is quite clear, as Professor Hartnett has shown,[242] that Congress was told the Court would operate quite differently. The Justices assured the legislature that they would always decide the full case—not preselected questions—after granting certiorari.[243] The Justices assured Congress that they would always grant certiorari if there was a circuit split or a close constitutional question.[244] Finally, the Justices promised Congress that the Justices would not have exclusive control over the docket since the circuit courts could force issues onto the docket through certification.[245] The Court is thus a long way from where Congress placed it in 1925. The question is whether the Court is now also beyond the parameters of Article III.

The answer to that question depends, in large part, on whether one takes the Court at its word and accepts that the Court is only answering preselected questions and not deciding cases. If so, then one needs to understand when and if such practice can be accomplished within the historical understanding of the judicial power.

Given the obvious truism that Article III is limited to cases and controversies, it is surprising that the judicial power would allow federal courts to decide questions when they are not deciding cases. Still, a review of the relevant English and early American history demonstrates that, under certain circumstances, federal courts may do just that. The key is that the court providing answers must do so to aid a different federal court to fulfill the latter's obligation to decide a case or controversy, and must only answer the questions asked.

241 *See* Judiciary Act of 1925, ch. 229, 43 Stat. 936. *See generally* Frankfurter & Landis, *supra* note 217.

242 *See* Hartnett, *supra* note 14.

243 *See id.* at 1705–06.

244 *Id.* at 1647.

245 *See id.* at 1710.