SYMPOSIUM

FOREWARD: CERTIORARI—NECESSARY, BUT LEGITIMATE?

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One of the Supreme Court's most important powers is the authority to select the cases that it hears. The creation and expansion of this certiorari jurisdiction transformed the Court's role from one of dispute resolution to law declaration. There seems to be little doubt that this reform—or at least some kind of reform—was necessary to enable the Court to continue to function beginning in the late nineteenth and early twentieth centuries. The Court lacked the capacity to review all of the many thousands (today, many hundreds of thousands) of federal law disputes in the lower federal and state courts. But even if this certiorari scheme was necessary, is it legitimate? Scholars have raised powerful questions about whether the Court's certiorari power, and accompanying law declaration function, can be reconciled with Article III. This Foreword explores such questions, arguing that it is crucial to expand the focus beyond Article III to Congress's lawmaking power under Article I. Congress's decision to create and then expand certiorari, and to facilitate the Court's law declaration function, may provide democratic legitimacy for the Court's modern role. But although this congresional imprimatur may help legitimize certiorari, it may also be evidence of a separate (and worrisome) development: the tendency of political actors and society more generally to rely on the federal judiciary to settle constitutional and other important legal questions.

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INTRODUCTION

Not everyone is familiar with the Judiciary Act of 1925. But for those who study the federal courts, the centennial anniversary of that statute—the topic of the *Notre Dame Law Review*'s 2025 Federal Courts, Practice, and Procedure Symposium—is a momentous occasion. The Judiciary Act of 1925 is widely recognized as having had a monumental impact on the Supreme Court as an institution.

Scholars broadly agree that the reform—or at least *some* kind of major reform—was necessary to the continued functioning of the Supreme Court. In the late nineteenth and early twentieth centuries, the Court could no longer handle all of the cases coming to it on appeal. Indeed, the Court was years behind on its work. That is why Congress beginning in 1891 established certiorari jurisdiction, granting the Court the discretion to decide whether to review certain sets of cases. The Judiciary Act of 1925 dramatically expanded that discretionary review power to enable the Court to focus its limited resources on cases that presented important federal questions. Another statute in 1988 further expanded certiorari jurisdiction to its present form.

But even if some kind of reform was necessary, is certiorari legitimate? Several of the contributions to this symposium thoughtfully

raise that question. One type of concern arises from the process by which the Judiciary Act of 1925 was created. The statute is nicknamed the "Judges' Bill," because it was apparently drafted by members of the Court, and the leading proponent was Chief Justice William Howard Taft. Some contributions explore whether it is problematic for judges to be involved in the legislative process, or whether such involvement is defensible when the issue on the table is judicial reform.[1]

A second, and perhaps more fundamental, concern involves whether certiorari can be reconciled with the Supreme Court's role under Article III. With its power to select the cases that it hears, the Court became the institution that we know today: one whose job is primarily to articulate principles of federal law, rather than to resolve individual disputes. Indeed, the Supreme Court's articulation of legal principles often extends beyond the Article III case or controversy before it. Some contributions to this symposium suggest that the Court's role is problematic, to the extent one assumes that judicial law declaration can be justified only as an incident of dispute resolution.[2]

This Foreword explores whether certiorari jurisdiction may be not only necessary but also legitimate. I argue that it is important to extend our focus beyond the judicial power of Article III and consider the powers of Congress to regulate the federal judiciary under both Article I and Article III. I suggest that once we turn our gaze toward Congress, some legitimacy concerns may dissipate. Congress's decisions to create and then over time to expand certiorari jurisdiction can be seen as a source of democratic legitimacy for that discretionary authority—and for the Supreme Court's (related) role as a law declaration institution.

But I also suggest that this emphasis on Congress does not offer an entirely rosy picture. First, by refocusing our attention on what Congress has (and has not) authorized, this Foreword may call into question the legitimacy of reforms that the judiciary has crafted on its own. Second, this analysis underscores the extent to which Congress has ceded the power of legal settlement to the Supreme Court. That congressional decision may help legitimize certiorari, but it may also reflect some unfortunate patterns in a constitutional democracy.

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1 *See* Daniel Epps & Marin K. Levy, *Judicial Reform from the Inside Out*, 100 NOTRE DAME L. REV. 2191 (2025); Allen C. Sumrall, *Separation of Powers and the Judiciary Act of 1925*, 100 NOTRE DAME L. REV. 2155 (2026).

2 *See* Edward A. Hartnett, *Still Questioning Certiorari*, 100 NOTRE DAME L. REV. 2123 (2025); Robert Post, *The Supreme Court's Crisis of Authority: Law, Politics, and the Judiciary Act of 1925*, 100 NOTRE DAME L. REV. 2031 (2025). Some of the contributions to the symposium recognize that the 1925 Act helped to transform the Court's role, without questioning the legitimacy of the reform or the Court's modified role. *See* Emily S. Bremer, *Making Our Ministry of Justice*, 100 NOTRE DAME L. REV. REFLECTION 255 (2025); Thomas M. Hardiman, *The Judiciary Act of 1925: Essential Change for the Supreme Court and the United States Courts of Appeals*, 100 NOTRE DAME L. REV. 2093 (2025).

I. CERTIORARI AS A CONGRESSIONAL CHOICE

Congress has considerable power over the federal judiciary, including the Supreme Court. Although Article III of the Constitution contemplates that there will be "one supreme Court,"[3] it says very little about the makeup of that institution. A good deal is left to Congress, which has power under Article I to make all laws that are "necessary and proper" to carry out the powers of all federal institutions, including the federal judiciary.[4] Using this authority, Congress has (for example) established and modified the size of the Supreme Court;[5] chosen the timing and length of the Court's term;[6] and decided whether the Justices must "ride circuit" (that is, serve in part as judges on the lower federal courts).[7]

Under the Necessary and Proper Clause of Article I, combined with the Exceptions Clause of Article III, Congress also has the authority to make "Exceptions" and "Regulations" to the Supreme Court's appellate jurisdiction.[8] Scholars have often described this exceptions power as a threat to the Court, envisioning that Congress could eliminate the Court's jurisdiction in crucial areas (as lawmakers have at times threatened to do).[9] Yet historically, Congress has more often

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3 U.S. CONST. art. III, § 1.

4 *Id.* art. I, § 8, cl. 18.

5 *See* PRESIDENTIAL COMM'N ON THE SUP. CT. OF THE U.S., FINAL REPORT 67–69 (2021).

6 One famous example happened in the aftermath of the so-called Midnight Judges Act. After the Democratic Republicans won control of the presidency and Congress in 1800 (but before the new leaders took office), the outgoing Federalist Party enacted a sweeping judicial reform. The Judiciary Act of 1801 established a new system of federal appellate courts; ended circuit riding by Supreme Court Justices; and dramatically expanded federal jurisdiction. *See* Judiciary Act of 1801, ch. 4, §§ 7, 11, 27, 2 Stat. 89, 90–92, 98; Kathryn Turner, *Federalist Policy and the Judiciary Act of 1801*, 22 WM. & MARY Q. 3, 21, 32 (1965). Soon after taking office, the new Democratic Republican Congress repealed that statute and delayed the start of the Court's next term for fourteen months—until February 1803. *See* Judiciary Act of 1802, ch. 31, §§ 1, 3, 2 Stat. 156, 157 (omitting the August 1802 session). The Federalists charged that the delay was designed to prevent the Court from ruling on the validity of the repeal. *See* 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 222 (1922).

7 *See* Steven G. Calabresi & David C. Presser, *Reintroducing Circuit Riding: A Timely Proposal*, 90 MINN. L. REV. 1386, 1390–91 (2006) ("Beginning in 1789, each circuit court was staffed with two Supreme Court Justices and one local district judge. In 1793, the system was reformed so that only one Justice . . . was required." (footnote omitted)); David R. Stras, *Why Supreme Court Justices Should Ride Circuit Again*, 91 MINN. L. REV. 1710, 1714–26 (2007).

8 U.S. CONST. art. I, § 8, cl. 18; *id.* art. III, § 2. For an argument that the Exceptions Clause authorizes "Exceptions" and "Regulations" that would not be permitted by the Necessary and Proper Clause alone, see David E. Engdahl, *Intrinsic Limits of Congress' Power Regarding the Judicial Branch*, 1999 BYU L. REV. 75, 80, 155.

9 *E.g.*, Steven G. Calabresi & Gary Lawson, *The Unitary Executive, Jurisdiction Stripping, and the* Hamdan *Opinions: A Textualist Response to Justice Scalia*, 107 COLUM. L. REV. 1002,

used the power in a way that the Justices viewed as beneficial—by making "Exceptions" to the Court's mandatory appellate jurisdiction and granting it discretionary review via writs of certiorari.[10] This Part offers an overview of that story. Part II discusses how those congressional choices may provide democratic legitimacy for the certiorari power itself.

A. The "One Supreme Court" as Hierarchical Leader

Article III vests the "judicial Power of the United States" in "one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[11] The Constitution thereby seems to establish a hierarchical judiciary[12] and to grant the Court a leading role in defining the content of federal law, at least for the federal judiciary.[13] Many scholars also assert, drawing on Article III and the Supremacy Clause of Article VI, that the Court's leading role in defining the content of federal law extends to state courts as well.[14]

1044 (2007) (arguing that, broadly construed, the Exceptions Clause would be "a threat to judicial review"); Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1365 (1953) (urging that, if the Exceptions Clause gives Congress unlimited power over the Supreme Court's appellate jurisdiction, then "the Constitution . . . authoriz[es] its own destruction").

10 *See* Tara Leigh Grove, *The Exceptions Clause as a Structural Safeguard*, 113 COLUM. L. REV. 929, 931–32, 948–78 (2013).

11 U.S. CONST. art. III, § 1.

12 *See* Amy Coney Barrett, *The Supervisory Power of the Supreme Court*, 106 COLUM. L. REV. 324, 362 (2006) (concluding that the hierarchical view is "more plausible"); Calabresi & Lawson, *supra* note 9, at 1007 (arguing that "the weight of textual, intratextual, and structural arguments points toward a hierarchical federal judiciary"); Tara Leigh Grove, *The Structural Case for Vertical Maximalism*, 95 CORNELL L. REV. 1, 31–40 (2009) (discussing the textual, structural, and historical foundations for this view); James E. Pfander, *Jurisdiction-Stripping and the Supreme Court's Power to Supervise Inferior Tribunals*, 78 TEX. L. REV. 1433, 1453 (2000) (urging that the Court is "the hierarchical leader of the judicial department"). For a contrary view, see David E. Engdahl, *What's in a Name? The Constitutionality of Multiple "Supreme" Courts*, 66 IND. L.J. 457, 503–04 (1991) (contending that the Constitution does not require a hierarchical judiciary).

13 *See* Calabresi & Lawson, *supra* note 9, at 1032–33; Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 865 (1994); Charles Fried, *Impudence*, 1992 SUP. CT. REV. 155, 189 ("The Supreme Court has the hierarchical authority to set the law for lower courts.").

14 *See* U.S. CONST. art. III, § 2; *id.* art. VI; Grove, *supra* note 12, at 35–39 (discussing the textual and historical evidence indicating that the Supreme Court would help ensure state court obedience to federal law through its appellate review power); *see, e.g.*, Frederic M. Bloom, *State Courts Unbound*, 93 CORNELL L. REV. 501, 503 (2008) (agreeing with the widely held view that "state courts must abide Supreme Court doctrine on questions of federal law"); Steven G. Calabresi & Gary Lawson, *Equity and Hierarchy: Reflections on the Harris Execution*, 102 YALE L.J. 255, 276 n.106 (1992) (urging that state courts have an "obligation to follow Supreme Court precedent in *all* cases"); James E. Pfander, *Federal Supremacy, State*

Moreover, regardless of one's views on the constitutional questions, the lower courts have long assumed that they must follow the Supreme Court's pronouncements on federal law.[15] Accordingly, historical practice supports a hierarchical vision of the judiciary. Indeed, many jurists and scholars describe vertical stare decisis—the obligation of lower courts to comply with the Supreme Court's federal law precedents—as absolute.[16]

So there is broad agreement that the Court is the hierarchical leader of the judiciary. But throughout our history, one recurring issue has been how the Court could most effectively perform its role of guiding the lower federal and state courts on legal issues.

1. Error Correction and Circuit Riding

In its early days, the Court could perform its oversight function in a few different ways. First, the Court could correct errors in lower court decisions on a case-by-case basis. The Court had mandatory appellate jurisdiction over every case within its jurisdiction.[17] Moreover, it had a manageable docket through the mid-nineteenth century, hearing at

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Court Inferiority, and the Constitutionality of Jurisdiction-Stripping Legislation, 101 NW. U. L. REV. 191, 199 (2007) (asserting that state courts "must remain subordinate to the Supreme Court" on federal issues). For an alternative view, see Caminker, *supra* note 13, at 837–38 (arguing that lower federal courts, but not necessarily state courts, must "obey Supreme Court federal law precedents," *id.* at 838, 837–38 (footnote omitted)). For an argument that lower courts are not bound by Supreme Court precedent, see Michael Stokes Paulsen, *Accusing Justice: Some Variations on the Themes of Robert M. Cover's* Justice Accused, 7 J.L. & RELIGION 33, 82–88 (1989) (urging that lower courts may initially disregard "clearly erroneous" constitutional interpretations, *id.* at 87).

15 *See, e.g.*, John P. Kastellec, *The Judicial Hierarchy*, OXFORD RSCH. ENCYCLOPEDIAS: POL. (Jan. 25, 2017), https://doi.org/10.1093/acrefore/9780190228637.013.99 [https://perma.cc/T2YA-6KE9] (stating that "there is a long empirical literature in political science on compliance, and studies generally find widespread compliance by lower courts" and providing an overview of that literature).

16 *See, e.g.*, Ramos v. Louisiana, 140 S. Ct. 1390, 1416 n.5 (2020) (Kavanaugh, J., concurring in part) ("[V]ertical *stare decisis* is absolute, as it must be in a hierarchical system with 'one supreme Court.'" (quoting U.S. CONST. art. III, § 1)); Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711, 1712 (2013) ("Vertical stare decisis is an inflexible rule that admits of no exception." (footnote omitted)); Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2025 (1994) ("A lower court must *always* follow a higher court's precedents." (footnote omitted)); Randy J. Kozel, *The Scope of Precedent*, 113 MICH. L. REV. 179, 186 (2014) ("[T]he Supreme Court's decisions are absolutely binding on inferior federal courts but susceptible to overruling by the Supreme Court itself." (footnote omitted)).

17 *See* Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 81; Eugene Gressman, *Requiem for the Supreme Courts' Obligatory Jurisdiction*, 65 AM. BAR ASS'N J. 1325, 1327 (1979) ("From 1789 to 1891 the Court was under congressional mandate to take jurisdiction over every case that properly came before it . . . .").

most 250 cases per year.[18] Second, the Justices spent a good deal of their time riding circuit—that is, serving as judges on lower federal courts.[19] Circuit riding offered the Justices a mechanism to communicate the Court's views on federal law to the lower federal courts.[20]

Accordingly, during this era, the Court did not need to articulate principles of law in its opinions in order to guide the lower courts. In fact, during these early years, that likely would have been an ineffective way of communicating with the remainder of the judiciary. During the Court's first decade, the Justices did not consistently issue a single opinion joined by a majority; instead, the Justices often wrote seriatim, issuing separate opinions reflecting their individual views on the legal issue before the Court.[21] Even after the Court—under the leadership of Chief Justice John Marshall—began to issue "opinions of the Court,"[22] the Justices could not assume that lower courts would have access to any principles of law in those opinions.[23] Supreme Court opinions were not widely published in those days.[24] So the Justices could more effectively oversee the lower courts by correcting errors in specific cases or communicating during their time sitting on lower courts.

2. The Need for Reform

Beginning in the latter half of the nineteenth century, some of these early communication mechanisms were no longer as useful. The Supreme Court's caseload began to rise dramatically.[25] In part to address those workload concerns, Congress in 1869 significantly reduced the Justices' circuit riding responsibilities, so that the Justices could

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18 *See* DAVID M. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 160 (9th ed. 2011) (providing a chart showing that the Court's docket from 1800 until 1850 generally included 250 cases or fewer).

19 For sources discussing circuit riding, see *supra* note 7.

20 *See* Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 GEO. L.J. 921, 943 (2016) ("In the Court's early years, most local judges had at best limited information on the Court's decisions, and the Justices' practice of circuit riding offered perhaps the best means of informal judicial management.").

21 *See* DONALD G. MORGAN, JUSTICE WILLIAM JOHNSON: THE FIRST DISSENTER, THE CAREER AND CONSTITUTIONAL PHILOSOPHY OF A JEFFERSONIAN JUDGE 45–46 (1954).

22 *See* SYLVIA SNOWISS, JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION 123 (1990) ("[U]nder Marshall's leadership . . . the Court abandoned the practice of seriatim opinion writing and united behind a single opinion.").

23 *See* 1 WARREN, *supra* note 6, at 455–56.

24 *See id.* Daniel Webster commented in 1818 that "[t]he sale [of Supreme Court reports] is not very rapid. The number of law libraries which contain a complete set is comparatively small." *Id.* at 456 n.1. Some important precedents, such as *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), were accessible, because they were reported in newspapers and other periodicals. *See* 1 WARREN, *supra* note 6, at 288, 455.

25 *See* FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM 60 (1927).

focus more on their appellate work.[26] Circuit riding thus became a less valuable communication mechanism. (Congress would eliminate the practice entirely in 1911.[27]) Meanwhile, those same docket pressures also made it impossible for the Court to correct errors in specific lower court cases in a timely manner. Indeed, by 1890, the Court's mandatory appellate docket had swelled to over 1,800 cases,[28] only four or five hundred of which it could dispose of in a given year.[29]

Chief Justice Morrison Waite urged Congress to use its authority under the Exceptions Clause to provide relief to the Court.[30] He emphasized that the Supreme Court's "appellate jurisdiction is subject entirely to congressional control. It may be more or it may be less, as the ever-changing circumstances of a great and growing country shall require."[31] Although he declined to suggest "what [the] relief shall be," he sought legislation that would "help to make the Supreme Court what its name implies, a powerful auxiliary in the administration of justice," rather than "an obstacle standing in the way" of the final resolution of cases.[32]

a. A Panel System?

Both executive branch officials and lawmakers recognized the need for reform.[33] But what would be the best approach? Some members of Congress advocated a panel system. Under a proposal advanced by several members of the Senate Judiciary Committee, the Court would hear most appeals in three-Justice panels, but the full Court would resolve federal constitutional questions and (at its discretion) other cases of "extraordinary difficulty or high consideration."[34]

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26 *See* Joshua Glick, Comment, *On the Road: The Supreme Court and the History of Circuit Riding*, 24 CARDOZO L. REV. 1753, 1817, 1815–17 (2003) ("Under the new system [starting in 1869], it was the duty of each Supreme Court Justice to attend at least one term of the circuit court in each district of his circuit once every two years.").

27 *See* Judicial Code of 1911, ch. 231, § 289, 36 Stat. 1087, 1167.

28 *See* FRANKFURTER & LANDIS, *supra* note 25, at 60 (noting that, from 1850 to 1890, the Court's docket grew from 253 to 1,816 cases).

29 *See* H.R. REP. NO. 51-1295, at 3 (1890) (referring to Justice Harlan's statement that, in 1886, the Court disposed of only 451 out of the 1396 cases on its docket).

30 *Remarks of Chief Justice Waite*, 36 ALB. L.J. 318, 318 (1887) ("[T]he appellate jurisdiction is subject entirely to congressional control. . . . If at any time too large . . . it may be reduced, and a part transferred to an inferior court . . . .").

31 *Id.*

32 *Id.*

33 *See, e.g.*, 1889 ATT'Y GEN. ANN. REP., at xviii-xix (emphasizing "[t]he importance of some change in the judicial system of the United States, which will enable the courts, and especially the Supreme Court, to dispose of the large number of cases," *id.* at xviii).

34 S. REP. NO. 51-1571, at 4, 3–5 (1890) (describing the views of a minority of senators).

The Senators argued that this reform would enable the Court to "dispose speedily of all causes that may be upon its calendar."[35]

The Senators further asserted that Congress could enact the reform as part of its power to make exceptions and regulations to the Supreme Court's appellate jurisdiction.[36] They pointed out that Congress had long exercised the power to declare how many Justices constituted a quorum—and, thus, how many Justices were required to speak for the Court as a whole.[37] Congress could, by extension, direct the Court to decide cases in panels.[38] Nor, the Senators argued, was such an arrangement at odds with the constitutional requirement for "one supreme Court." The Justices would "proceed at the same time to hear arguments and pronounce decisions, not as three separate Supreme Courts, but as one Supreme Court, exercising its appellate faculty in a twofold or threefold manner at the same time."[39]

Other lawmakers objected to the reform. Some argued that a panel system would violate the constitutional requirement for "one supreme Court."[40] "The power of Congress [to regulate the Court's appellate jurisdiction] can not be held to extend to legislation which would break up the Supreme Court into fragments and substitute several courts with power to hear and finally determine causes for the one Supreme Court provided by the Constitution."[41] Some opponents also worried that decisions rendered by less than the full Court would lack legitimacy with the public.[42] Ultimately, the proposal was overwhelmingly rejected by the Senate.[43]

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35 *Id.* at 3.

36 *See* U.S. CONST. art. III, § 2, cl. 2; S. REP. NO. 51-1571, at 3.

37 *See* S. REP. NO. 51-1571, at 3 ("Congress has from the beginning, from time to time, declared what number out of and less than the whole number of justices shall be such a quorum.").

38 *See id.* at 3–4.

39 *Id.* at 3.

40 *See, e.g.*, 21 CONG. REC. 10286 (1890) (statement of Sen. John Spooner) (stating that he could "not vote for" the minority proposal because he had "some doubt . . . as to its constitutionality," given the constitutional provision for "one Supreme Court"); Grove, *supra* note 10, at 979 n.272; Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643, 1654 (2000) ("Senators debated whether the proposal for panels was consistent with the constitutional mandate of one Supreme Court.").

41 21 CONG. REC. 10227 (1890) (statement of Sen. Joseph Dolph).

42 *See, e.g.*, *id.* (stating that he "sympathize[d]" with the notion held by some senators that such a division would "detract from [the Court's] dignity and importance and from the weight, if not from the authority, of its decisions").

43 *See id.* at 10316 (roll call) (showing that the proposal was rejected by a vote of 36-10).

b. The Creation of Certiorari Jurisdiction.

Congress instead focused on creating a scheme by which the Court would have some discretion over its docket. Republican Senator William Evarts argued that Congress had an "obligation[] under the Constitution" to provide relief to the Court, while "leav[ing] entirely uncurtailed" the Court's authority over constitutional questions and "other questions of a public nature."[44] Under the Evarts plan, the Supreme Court would retain mandatory appellate jurisdiction over most cases arising under federal law.[45] But the Court would have the discretion to review other classes of cases, such as diversity suits.[46] A new system of appellate courts would have primary responsibility for deciding those "excepted" cases, subject to review in the Supreme Court in one of two ways—either through certification from a court of appeals or through a writ of certiorari.[47] Senator Evarts stated that such Supreme Court oversight of the new appellate courts was necessary to preserve the "uniformity of decision" within the judiciary.[48]

This reform faced opposition from some members of Congress. During the late nineteenth century, the federal judiciary as a whole, including the Supreme Court, was seen as supportive of big business.[49] So populists in the Democratic Party were skeptical about any reform that might make it easier for the Court to do its job.[50] Instead, these Democrats argued that Congress could solve many of the Court's caseload concerns by restricting federal jurisdiction over suits involving corporations.[51]

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44 *Id.* at 10220 (statement of Sen. William Evarts) ("[T]he great point . . . is to provide intermediate courts that shall answer the purpose of our obligations under the Constitution, that shall leave entirely uncurtailed the authority of the Supreme Court in . . . the supervision of laws in the sense of constitutionality and other questions of a public nature").

45 *See* S. REP. NO. 51-1571, at 1–2 (1890) (detailing the Court's jurisdiction over federal cases under the Evarts plan).

46 *Id.* at 2 (proposing to give the circuit courts presumptively final jurisdiction in diversity, patent, revenue, criminal, and admiralty cases).

47 *Id.*

48 21 CONG. REC. 10222 (1890) (statement of Sen. William Evarts) (stating that the provisions for certification and certiorari review would "guard against diversity of judgment in these [new appellate] courts" and ensure Supreme Court "review[] in the interest of jurisprudence and uniformity of decision," and that the system would "leave[] flexibility, elasticity, and openness for supervision by the Supreme Court").

49 *See* BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 154–55 (2009).

50 *See* Grove, *supra* note 10, at 955–56.

51 *See* 10 CONG. REC. 951 (1880) (statement of Rep. James Knott) (supporting a separate jurisdiction-stripping bill, in part because it would reduce the Supreme Court's docket by "fully one-third, if not one-half"); *id.* at 993 (statement of Rep. Frank Hurd) (supporting the jurisdiction-stripping bill for similar reasons: "The Supreme Court . . . is complaining

But Senator Evarts' proposal ultimately drew bipartisan support. Most prominently, Democratic Representative David Culberson argued that there was an "absolute necessity . . . to relieve the Supreme Court of the burden of business imposed upon it by existing laws."[52] He also insisted that "[t]he remedy" for the Court's caseload crisis was "within the easy reach of Congress" under the Exceptions Clause:

> The authority vested in Congress to make exceptions to and regulate the appellate jurisdiction of the Supreme Court was granted for the purpose of enabling the Congress to adapt the appellate jurisdiction of the court to the varying demands of the business, trade, and commerce of the country and to protect and shield that great tribunal from the conditions which exist to-day . . . [T]his bill will, in my opinion, reasonably protect the court from an excessive burden of litigation and conform its appellate jurisdiction to the enormous growth of the business of the country.[53]

Representative Culberson further observed that the Supreme Court could still review the cases "excepted" from its mandatory appellate jurisdiction.[54] Much like Senator Evarts, Representative Culberson asserted that it was crucial for the Court to retain such "supervisory control," so that it could ensure the "uniformity of decision . . . throughout the entire judicial system of the United States."[55] The 1891

[that] it cannot dispose of the causes upon [its] docket [and] [t]he judges are now more than three years behind").

52 21 CONG. REC. 3403 (1890) (statement of Rep. David Culberson) (supporting a House bill to create a new appellate court system for this reason); *see also* 22 CONG. REC. 3585 (1891) (statement of Rep. David Culberson) (supporting the Evarts plan "for the reasons which induced me to support the House bill. The same objects and results . . . are secured by the Senate amendment"). Representative Culberson's support was particularly notable, because he was the sponsor of several separate measures to restrict federal jurisdiction. *See* Grove, *supra* note 10, at 951–59.

53 21 CONG. REC. 3403–04 (1890) (statement of Rep. David Culberson).

54 Representative Culberson was referring to the original House bill, which provided that cases outside the Supreme Court's mandatory jurisdiction would reach the Court upon certification by the courts of appeals. The House bill required certification whenever there was a conflict among the courts of appeals. *See* H.R. REP. NO. 51-1295, at 2 (1890). The House bill did not provide for writs of certiorari. *See id.* at 1–2. But as Professor Hartnett has observed, legislators at the time viewed certification and writs of certiorari as largely indistinguishable. *See* Hartnett, *supra* note 40, at 1656 (noting Senator Evarts and others "viewed certification and certiorari as 'parallel provisions'" and envisioned "certiorari . . . as a sort of fallback provision should the circuit courts of appeals prove, on occasion, to be surprisingly careless in deciding cases or issuing certificates"). Indeed, Representative Culberson supported the Senate bill, because he believed it accomplished the same objectives as the House bill. *See supra* note 52.

55 21 CONG. REC. 3405 (1890) (statement of Rep. David Culberson); *see also id.* at 10221 (statement of Sen. William Evarts) (noting that one crucial question was how to reduce "the burden of the docket of the Supreme Court" while "maintain[ing] . . . [the] just uniformity of decision").

Judiciary Act ultimately passed both the House and the Senate with this bipartisan support.[56]

B. Expanding Certiorari in 1925 and 1988

The creation of certiorari review in 1891 marked a significant change in the Supreme Court's appellate review scheme. But even after the 1891 Act, the Court still had mandatory appellate jurisdiction over most federal question cases. That would change dramatically in 1925, and to an even greater extent in 1988. Notably, in expanding certiorari in the twentieth century, lawmakers seemed increasingly to view the Court's central function as law declaration—providing a uniform resolution of important questions of federal law.

1. The 1925 Act

After the Court's docket continued to swell throughout the early twentieth century,[57] the Justices—led by Chief Justice William Howard Taft—argued that the "one supreme Court" "can not attend to everything that can be brought up to us under the form of a Federal question; it can not be done."[58] The Justices thus argued for the expansion of certiorari jurisdiction, so that the Court could concentrate its limited resources on what they described as its primary functions: resolving important issues of federal law and settling conflicts among the lower courts.[59]

Chief Justice Taft emphasized that "[t]he real work . . . the Supreme Court has to do is for the public at large, as distinguished from

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56 *See* Grove, *supra* note 10, at 957–58.

57 *See* LEE EPSTEIN, JEFFREY A. SEGAL, HAROLD J. SPAETH & THOMAS G. WALKER, THE SUPREME COURT COMPENDIUM: TWO CENTURIES OF DATA, DECISIONS & DEVELOPMENTS 65–66 tbl.2-2 (7th ed. 2021) (showing the rise in the Court's caseload from 1,116 in 1910 to 1,316 in 1924).

58 *Jurisdiction of Circuit Courts of Appeals and of the Supreme Court of the United States: Hearing on H.R. 8206 Before the H. Comm. on the Judiciary*, 68th Cong. 21 (1924) (statement of Justice James Clark McReynolds) ("We simply can not attend to everything that can be brought up to us under the form of a Federal question; it can not be done. So we are face to face with a practical question, and there is no relief except through Congress.").

59 *See, e.g.*, Letter from William Howard Taft, C.J., U.S. Sup. Ct., to Royal Samuel Copeland, Sen., U.S. Senate (Dec. 9, 1924), *in* 66 CONG. REC. 2920 (1925) (asserting that "the business of the Supreme Court should be to consider and decide for the benefit of the public and for the benefit of uniformity of decision only questions of importance"); *Jurisdiction of Circuit Courts of Appeals and of the Supreme Court of the United States: Hearing on H.R. 8206 Before the H. Comm. on the Judiciary*, *supra* note 58, at 17 (statement of Justice Willis Van Devanter) (asserting that the Court would grant review only if "the applicant shows that [the] case really involves questions of general importance or that a decision by the Supreme Court is necessary to produce needed uniformity of action elsewhere").

the particular litigants before it."[60] The Court should no longer, he argued, serve as a court of error, reversing flawed lower court decisions on a case-by-case basis.[61] Instead, the Court should focus on "expounding and stabilizing principles of law . . . for the public benefit."[62]

Congress and the executive branch responded with the Judiciary Act of 1925, which granted the Supreme Court discretionary certiorari review over a range of federal questions.[63] The debates over that statute strongly suggest the political branches' agreement with Chief Justice Taft that the Court's central function was to provide a uniform resolution of important federal questions.[64] Thus, a Senate report explained: "The central thought [behind the reform] is this, that . . . ordinary litigation should end [in the lower courts] and that the cases should not go to the Supreme Court . . . unless the questions involved are of grave public concern or unless" there is a "conflict in the rulings of [the lower federal or state] courts."[65] Likewise, a House of Representatives report declared that the Court should concentrate its limited resources on its "highest duty of interpreting the Constitution and preserving uniformity of decision" on federal law.[66]

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60 Chief Justice William Howard Taft, Address to the New York County Lawyers' Association 6 (Feb. 18, 1922), *microformed on* William H. Taft Papers, Reel 590 (Libr. of Cong.).

61 Letter from William Howard Taft, C.J., U.S. Sup. Ct., to Clyde B. Aitchison, Comm'r, Interstate Com. Comm'n (Dec. 4, 1925), *microformed on* William H. Taft Papers, Reel 278 (Libr. of Cong.) ("[The Court's] chief function [in writing opinions] is not to get rid of cases, it is to clarify the law and to be helpful in other cases. It is not a discharge of that function to be cryptical and leave the reader still guessing.").

62 *Jurisdiction of Circuit Courts of Appeals and United States Supreme Court: Hearing on H.R. 10479 Before the H. Comm. on the Judiciary*, 67th Cong. 2 (1922) (statement of Chief Justice William Howard Taft).

63 *See* Judiciary Act of 1925, ch. 229, 43 Stat. 936. The 1925 Act left in place mandatory appellate jurisdiction over (1) state court decisions invalidating a federal statute or treaty; (2) state court decisions upholding a state law against a constitutional challenge; (3) certain decisions by three-judge district courts; (4) certain criminal appeals by the United States; and (5) federal appellate court decisions invalidating a state law. *See id.* § 1, 43 Stat. at 937–39.

64 *See, e.g.*, *Jurisdiction of Circuit Courts of Appeals and United States Supreme Court: Hearing on H.R. 10479 Before the H. Comm. on the Judiciary*, *supra* note 62, at 18–19 (statement of James M. Beck, Solicitor General of the United States) (stating that although "it would be admirable if in every case an appeal could be taken as a matter of right," such a requirement was impractical, and so the Court should have the discretion to focus on cases "involving very great and substantial questions").

65 S. REP. NO. 68-362, at 3 (1924); *see also* President Calvin Coolidge, Second Annual Message (Dec. 3, 1924), *in* 3 THE STATE OF THE UNION MESSAGES OF THE PRESIDENTS, 1790–1966, at 2655, 2662 (Fred L. Israel ed., 1967) (asserting that discretionary review would allow the Court to focus on cases "of public moment").

66 H.R. REP. NO. 68-1075, at 2 (1925) (stating that the Court should devote its "time and attention and energy . . . to matters of large public concern" and to "preserving uniformity of decision by the intermediate courts of appeals").

2. The 1988 Reform

Throughout the remainder of the twentieth century, the Supreme Court's workload continued to rise, and it could not keep up with its remaining mandatory appellate jurisdiction. In successive letters to Congress, the Justices asked for the further expansion of certiorari jurisdiction to fulfill the promise of the 1925 Act: the Court should not spend "its limited time and resources on cases which do *not*, in Chief Justice Taft's words, 'involve principles . . . of wide public importance or governmental interest.'"[67] The Justices stated: "Because the volume of complex and difficult cases continues to grow, it is even more important that the Court not be burdened by . . . cases that are of significance only to the individual litigants."[68]

Congress in the Judiciary Act of 1988 ultimately granted the Justices' request and expanded the scope of certiorari review to encompass virtually every federal question case.[69] The debates leading up to the enactment of this statute further underscore political actors' assumption that the Supreme Court should define the content of federal law for the judiciary.

Executive officials from both Democratic and Republican administrations argued that the expansion of certiorari review was essential to allow the "one supreme Court" created by the Constitution to decide "cases . . . in which the public interest requires an authoritative resolution."[70] Members of Congress agreed that mandatory appellate review "impair[ed] the Court's ability" to provide a "definitive

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67 Letter from Supreme Court of the United States to Rep. Robert Kastenmeier (June 17, 1982), *in* H.R. REP. NO. 100-660, at 27, 27–28 (1988) (emphasis in original); *see* Letter from Supreme Court of the United States to Sen. Dennis DeConcini (June 22, 1978), *reprinted in* Gressman, *supra* note 17, at 1328.

68 Letter from Supreme Court of the United States to Rep. Robert Kastenmeier, *supra* note 67, at 27.

69 *See* Judiciary Act of 1988, Pub. L. No. 100-352, 102 Stat. 662; Grove, *supra* note 10, at 970 (discussing other certiorari statutes passed by Congress during the period between the 1925 and the 1988 Judiciary Acts).

70 *Supreme Court Jurisdiction Act of 1978: Hearing on S. 3100 Before the Subcomm. on Improvements in Jud. Mach. of the S. Comm. on the Judiciary*, 95th Cong. 7 (1978) (statement of Daniel J. Meador, Assistant Att'y Gen. for the Off. for Improvements in Jud. Admin.); *see id.* at 2 (statement of Wade H. McCree, Solicitor General of the United States) (arguing that discretionary review was needed to "maintain the viability of this constitutional concept of a single Supreme Court as the population . . . has grown enormously and the volume of litigation has correspondingly burgeoned"); *Court Improvements Act of 1983: Hearings Before the Subcomm. on Cts. of the S. Comm. on the Judiciary*, 98th Cong. 15 (1983) (statement of Jonathan C. Rose, Assistant Att'y Gen., United States Dep't of Just.) ("[T]he current system hinders the resolution of . . . questions of public importance."); *see also* Grove, *supra* note 10, at 968–78 (discussing the bipartisan support for the expansion of certiorari jurisdiction).

resolution" of important federal questions.[71] Accordingly, as a House report put it, reform was needed to enable the Court to focus on its two "principal functions": (1) "resolv[ing]" important issues of federal law, and (2) "ensur[ing] uniformity and consistency in the law by resolving conflicts" among the lower courts.[72]

C. Articulating Law for the Lower Courts

In expanding certiorari review in 1925 and 1988, lawmakers and executive officials described the Supreme Court's central functions as resolving important federal questions and settling conflicts among the lower courts on questions of federal law. That is, political actors saw the Court's role as focused on law declaration. And lawmakers described the expansion of certiorari as a way to facilitate that role.

How could the Supreme Court communicate with the lower courts in this judicial system? Notably, circuit riding was no longer an option; Congress reduced the Justices' circuit riding obligations in 1869 and eliminated them entirely in 1911.[73] Nor was error correction a meaningful way to guide the lower courts on the content of federal law. Although the Court could (and to this day still does) correct errors in some cases,[74] case-by-case review was no longer an effective method of communicating with the lower courts in most contexts. Consider some statistics: between 1960 and 1983, the number of filings in federal district courts rose from approximately 80,000 to 280,000 cases per year, and those in the courts of appeals also grew—from approximately 3,800 to nearly 30,000 cases per year.[75] So by the early 1980s, there were over 300,000 cases per year in the lower federal courts. Today, the numbers are higher: from March 2023 to March 2024, the lower federal courts decided over 400,000 cases.[76] These

71 *E.g.*, 125 CONG. REC. 7633 (1979) (statement of Sen. Dennis DeConcini).

72 H.R. REP. NO. 100-660, at 14 (1988); S. REP. NO. 68-362, at 3 (1924) (asserting that "cases should not go to the Supreme Court . . . unless the questions involved are of grave public concern" or there is a conflict among the lower courts.).

73 *See supra* notes 26–27 and accompanying text.

74 *See* William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1, 18–40 (2015) (discussing summary reversals, where "the Court will simultaneously grant the petition and decide the case on the merits," *id.* at 19, without further briefing or oral argument); *see also* Randy J. Kozel & Jeffrey A. Pojanowski, *Discretionary Dockets*, 31 CONST. COMMENT. 221, 222–25 (2016) (suggesting that the Court may oversee the lower courts by issuing broad precedents in some contexts and supervising other decisions on a case-by-case basis).

75 *See* RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 61 tbl.3.1, 64 tbl.3.2 (1985) (reporting that, from 1960–1983, filings in district courts rose from 79,200 to 277,031 and those in appellate courts rose from 3,765 to 29,580).

76 *See Federal Judicial Caseload Statistics 2024*, U.S. CTS., https://www.uscourts.gov/data-news/reports/statistical-reports/federal-judicial-caseload-statistics/federal-judicial-

figures, of course, do not encompass the many state court cases raising issues of federal law.[77] Even if the Court heard 150 or 200 cases per year (as some have suggested it could),[78] the Court could not possibly correct errors in each of many thousands of cases handled by the lower courts.

Yet the Court still has an obligation to provide meaningful leadership to the lower courts on the content of federal law. To perform that function, the Court must articulate principles of law for lower courts to apply in the many cases that it lacks the capacity to review. And, as several scholars have observed, that is precisely what the Court began to do in the wake of the 1925 Act. "From Taft onward, the justices . . . emphasized that the function of the Supreme Court is not to correct errors in the lower courts, but to 'secur[e] harmony of decision and the appropriate settlement of questions of general importance.'"[79]

This transformed role was accompanied by changes in the Supreme Court's written opinions. When the Court's job was simply to correct errors in specific lower court rulings, it could issue narrow decisions that were tailored to the circumstances of the particular dispute. But to serve a law declaration function, the Court had to craft opinions that would provide guidance beyond the dispute at issue. Robert Post has recounted in detail the changes in the Court's opinion-writing practices from the 1920s to the 1990s.[80] As Professor Post explains, "[b]y empowering the Court to choose its own jurisdiction, the [1925] Act shifted the Court's emphasis away from opinions

caseload-statistics-2024 [https://perma.cc/J4FG-WBYF] (last visited Oct. 12, 2025) (reporting that the federal district courts decided 370,225 cases, and the federal courts of appeals, including the Federal Circuit, decided 41,663 cases).

77 There do not appear to be statistics on precisely how many federal claims are heard in state court. *See* Pfander, *supra* note 14, at 233 n.184.

78 *See* ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 268 (2006) ("The Court's peak capacity runs to about 200 cases per year . . . ."); Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1100 (1987) (doubting that the Court could decide more than 150 cases per year).

79 Arthur D. Hellman, *Caseload, Conflicts, and Decisional Capacity: Does the Supreme Court Need Help?*, 67 JUDICATURE 28, 30–31 (1983) (alteration in original) (quoting Chief Justice Charles Evan Hughes, Address of Chief Justice Hughes at the American Law Institute Meeting, *in* 20 A.B.A. J. 341, 341 (1934)).

80 *See* Robert Post, *The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court*, 85 MINN. L. REV. 1267, 1287 (2001) (observing that, in the 1920s, "a full Supreme Court opinion was a routine method of deciding a large proportion of the Court's [mandatory] appellate docket," and was "relatively short and succinct," but "[b]y the 1990s," a full opinion "had become the Court's way of addressing the very few cases on its docket of exceptional importance. Each opinion accordingly received fuller and more extensive attention, manifested both by its relative length and by the full complement of concurring and dissenting opinions that was likely to accompany it").

addressed to private litigants, and toward opinions" more focused on "the development of American law."[81] Henry Monaghan and Peter Strauss have likewise noted that the modern Court has over time altered its "manner of speaking" to "emphasize[] the enunciation of doctrine over the resolution of disputes."[82]

There are prominent illustrations of this trend, such as the actual malice standard from *New York Times v. Sullivan*[83] and the interrogation requirements of *Miranda v. Arizona*.[84] But notably, the Court's doctrines not only placed restrictions on government institutions but also often required lower courts to *defer* to political actors. For example, the Supreme Court directed the judiciary to apply rational basis scrutiny to most business regulations[85] and (until recently) to defer to federal agencies' reasonable interpretations of ambiguous statutory provisions.[86] Such doctrines—and, indeed, the tiers of scrutiny more generally—provided guidance to lower courts on how to approach large numbers of cases.[87]

This shift—from dispute resolution to law declaration—was a central premise of the 1925 statute. Chief Justice Taft and others emphasized that "[t]he real work . . . the Supreme Court has to do is for the public at large, as distinguished from the particular litigants before it."[88] The Supreme Court should thus hear a case only when "the principle involved is such that it is important to have a general exposition of it for the benefit of the lawyers, for the benefit of the inferior courts,

81 *Id.* at 1306.

82 Strauss, *supra* note 78, at 1094–95 ("[F]aced with a controversy over a subject it is likely to see but once or twice a decade, the Court will tend to write an essay on that subject—hoping to put that part of the law's house in order—rather than simply decide the case in the most direct manner possible." *Id.* at 1095.); Henry Paul Monaghan, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665, 668–69 (2012) ("While still formally disclaiming any general superintendence over the conduct of other organs of government, the Court seeks to ensure and expand its hierarchical superiority in our judicial system." *Id.* at 669.).

83 N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964) (holding that, to win a defamation claim, a public official must demonstrate "'actual malice'"—that a statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not," *id.* at 280).

84 Miranda v. Arizona, 384 U.S. 436, 444–45 (1966) (requiring police to give specific warnings before interrogating any suspect in custody).

85 *E.g.*, Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 487–89 (1955).

86 Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–44 (1984), *overruled by* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2272–73 (2024).

87 *See* Tara Leigh Grove, *Tiers of Scrutiny in a Hierarchical Judiciary*, 14 GEO. J.L. & PUB. POL'Y 475, 476–78 (2016) (defending the tiers as a way to oversee lower courts).

88 Taft, *supra* note 60, at 6.

and for the benefit of the public at large."[89] Chief Justice Taft appeared to recognize that this new role would entail changes in the Court's written opinions:

> The chief duty in a court of last resort is not to dispose of the case but it is sufficiently to elaborate the principles, the importance of which justify the bringing of the case here at all, to make the discussion of those principles and the conclusion reached useful to the country and to the Bar in clarifying doubtful questions of constitutional and fundamental law.[90]

In an era of increasing docket pressures, the Court had to use law declaration to guide the remainder of the judiciary on the content of federal law. That meant written opinions that extended beyond the parties to the dispute. As Professor Post has suggested: "Crafting an opinion in order to influence the administration and development of the law . . . requires reaching out beyond particular parties" and issuing precedents that "address[] the entire community of legal actors."[91]

II. THE LEGITIMACY OF CERTIORARI

Scholars largely agree that some type of reform was needed in the late nineteenth and early twentieth centuries to enable the Supreme Court to function.[92] By 1890, with its crushing caseload, the Court could decide only a quarter of the cases presented to it on mandatory review. Today, the Court could review on a case-by-case basis at most a small fraction of the hundreds of thousands of cases in the lower courts.

To be sure, that does not mean that certiorari was the only solution.[93] At various points, lawmakers have proposed dividing the Court into panels or perhaps even reducing its jurisdiction over certain subject matters. For example, in the late nineteenth century, some

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89 *Jurisdiction of Circuit Courts of Appeals and of the United States Supreme Court: Hearing on H.R. 10479 Before the H. Comm. on the Judiciary*, *supra* note 62, at 2 (statement of Chief Justice Taft).

90 Letter from William Howard Taft, C.J., U.S. Sup. Ct., to Charles P. Taft, at 3 (Nov. 1, 1925), *microformed on* William H. Taft Papers, Reel 277 (Libr. of Cong.).

91 Post, *supra* note 80, at 1308 ("Fashioning an opinion . . . to resolve a dispute between parties . . . is rooted in the conception of the Supreme Court as a tribunal of last resort that predominated during the first 150 years of [its] existence. Crafting an opinion . . . to influence the administration and development of the law, by contrast, requires reaching out beyond particular parties and addressing the entire community of legal actors.").

92 *See supra* sub-subsection I.A.2.a.

93 Indeed, it is not the only option today. As discussed below, courts of appeals continue to have the authority to certify legal questions to the Supreme Court. S*ee infra* notes 159–61 and accompanying text.

lawmakers suggested addressing the Court's docket pressures by restricting federal jurisdiction over suits involving corporations.[94] But these alternatives have been met with considerable objections, including constitutional concerns. There has long been debate about the scope of Congress's power to restrict federal jurisdiction.[95] And lawmakers and jurists have questioned whether dividing the Supreme Court into panels is consistent with the constitutional requirement for "one supreme Court."[96] In any event, these proposals were rejected in the rough and tumble of the political process. Congress repeatedly opted for certiorari as the better mechanism to ensure that the Court could continue to serve as the hierarchical leader of the judiciary.

But is certiorari legitimate? The contributions to this symposium thoughtfully raise this question. One set of concerns surrounds the process by which the Judiciary Act of 1925 was enacted. The second, and perhaps more fundamental, set of concerns asks whether certiorari—and the Supreme Court's accompanying law declaration function—can be deemed consistent with the Court's role in our constitutional democracy.

A. The Legitimacy of the Process: A Judges' Bill?

Dan Epps, Marin Levy, and Allen Sumrall all emphasize the Justices' involvement in the crafting of the Judiciary Act of 1925.[97] Chief Justice Taft was the primary architect behind the reform; a few other members of the Court testified in favor of the measure during congressional hearings; and members of the Court were even responsible for

94 *See supra* notes 49–51 and accompanying text.

95 *See supra* notes 8–10 and accompanying text. For a recent discussion, see Daniel Epps & Alan M. Trammell, *The False Promise of Jurisdiction Stripping*, 123 COLUM. L. REV. 2077 (2023).

96 *See supra* Section I.A.; *see also Jurisdiction of Circuit Courts of Appeals and of the United States Supreme Court: Hearing on H.R. 10479 Before the H. Comm. on the Judiciary*, *supra* note 62, at 3 (statement of Chief Justice Taft) (arguing that Congress "could not adopt" a panel approach, "because our Constitution provides that there shall be one Supreme Court, and it is doubtful whether you could constitutionally divide the court into two parts"); Letter from Warren E. Burger, C.J., U.S. Sup. Ct., to Roman Hruska, Sen., U.S. Senate (May 29, 1975), *reprinted in* COMM'N ON REVISION OF THE FED. CT. APP. SYS., STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE app. d at 222 (1975) ("It has occasionally been proposed that the Supreme Court be enlarged so that the Court could sit in divisions or panels, but any such proposals would meet with almost universal opposition, even assuming their constitutionality. Such a change would appear to alter the basic concept of 'one supreme Court' under Article III." *Id.* at 223.).

97 *See* Epps & Levy, *supra* note 1; Sumrall, *supra* note 1.

drafting the legislation.[98] One may ask whether this process undermines the legitimacy of the statute.

In his contribution, Sumrall argues that the process behind the 1925 Act is, at a minimum, in some tension with a neat-and-tidy vision of the separation of powers—one that assumes the legislature makes laws, the executive branch enforces them, and the judiciary adjudicates cases and controversies surrounding them.[99] Indeed, it may seem quite odd to many observers that judges would be advocating for—and even drafting—legislation.[100] Yet, in their fascinating survey of judicial reform over time, Professors Epps and Levy recount how judges from the outset of the nation have been among the leading advocates for judicial reform.[101] Members of the Court beginning in the 1790s voiced concerns about the burdens of circuit riding and requested relief.[102] And as this Foreword has discussed, during the debates over what became the Judiciary Acts of 1891 and 1988, members of the Court called for "exceptions" to the Court's mandatory appellate jurisdiction.[103]

Professors Epps and Levy thoughtfully walk readers through the tradeoffs of such judicial involvement in judicial reform.[104] As they note, judges may be acting out of self-interest, but they are also experts in the field, who can provide extremely valuable information about how any reform might function on the ground.[105] Indeed, as Professor Post notes, the 1925 Act—perhaps in part because of the Justices' involvement—offered a more coherent appellate review scheme than the 1891 statute.[106] So there may have been good reason, as Emily

98 For overviews of the history behind the 1925 Act, see 10 ROBERT C. POST, THE OLIVER WENDELL HOLMES DEVISE: HISTORY OF THE SUPREME COURT OF THE UNITED STATES 476–501 (Maeva Marcus, ed., 2024); Grove, *supra* note 10, at 948–78; Hartnett, *supra* note 40, at 1660–1704.

99 *See* Sumrall, *supra* note 1, at 2156–57. To be clear, I do not believe that Sumrall aims to challenge the legitimacy of the 1925 Act. But his contribution allows us to consider that concern.

100 As Professor Post recounts, the Justices were at the time aware that their participation, particularly in drafting legislation, could raise concerns. *See* 10 POST, *supra* note 98, at 482. For that reason, Justice Van Devanter insisted in his congressional testimony that the Senate Judiciary Committee invited the Court to draft the legislation. *Id.* at 482, 502 (recounting that Van Devanter made this assertion, because he "was concerned that it might seem improper for the Court to be connected 'with legislative work,'" but that "[w]hat little documentary evidence we have . . . suggests that Van Devanter's recollection may be inaccurate." *Id.* at 482 (citation omitted).).

101 *See* Epps & Levy, *supra* note 1, at 2195–2214.

102 *See id.* at 2195–98.

103 *See supra* subsections I.A.2, I.B.2.

104 *See* Epps & Levy, *supra* note 1, at 2218–2223.

105 *See id.* at 2218–20.

106 *See* Post, *supra* note 2, at 2043_44 n.55 ("The [1891] Act was badly drafted and caused endless jurisdictional confusion." *Id.* at 2037 n.22).

Bremer suggests, for Congress in 1925 to "defer[] to the Supreme Court's expert judgment about how best to address the challenges it faced."[107]

These contributions suggest that the Justices' involvement in the enactment of the Judiciary Act of 1925, while at first glance surprising, was not entirely unprecedented. And it may make sense for experts in a field to propose reforms relating to that field. Moreover, regardless of how the 1925 Act was drafted, the measure was ultimately enacted by Congress and the President through the bicameralism and presentment process of Article I. So the expansion of certiorari in 1925 was very much a legislative choice.

B. The Legitimacy of Certiorari

Scholars agree that certiorari review, particularly after the Judiciary Act of 1925, fundamentally altered the Supreme Court's role in the federal judicial system. As Judge Thomas Hardiman emphasizes in his contribution to this symposium, the reform made the federal courts of appeals effectively the courts of last resort for most litigants.[108] So the law dramatically increased the authority and importance of those courts.

Moreover, in the wake of the 1925 Act, the Supreme Court dramatically changed the way that it communicated with the lower federal and state courts. The Court could no longer simply correct errors in lower court decisions on a case-by-case basis but had to articulate principles of law for the lower courts to apply in the many cases that the Court could not review. That is, the Court transformed from a tribunal of dispute resolution to one more focused on law declaration. Some contributions to this symposium—those offered by Ed Hartnett and Robert Post—question the legitimacy of this modified role.

1. Democratic Legitimacy

Professor Hartnett wonders whether certiorari can be reconciled with the justification for judicial review in our constitutional democracy. After all, in *Marbury v. Madison*, the Supreme Court explained that it had the authority to rule on the constitutionality of the actions of government institutions, as incident to its role in deciding cases.[109] Building on his earlier work (aptly named, "Questioning Certiorari"),

107 Bremer, *supra* note 2, at 258.

108 Hardiman, *supra* note 2, at 2094.

109 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. If two laws conflict with each other, the courts must decide on the operation of each.").

Professor Hartnett asks whether this justification still holds, when the Court can choose whether to hear a case.[110] Professor Post offers a related, but broader, objection. He suggests that the law declaration power of any court, in any case (even outside the constitutional realm), is legitimate only as an incident to dispute resolution.[111] That may not bode well for the Supreme Court, whose central mission is law declaration, and whose articulation of legal principles often extends beyond the case before it.[112]

These are forceful objections. But I suggest that, in evaluating the legitimacy of certiorari, it is crucial to keep in mind that the creation and expansion of this scheme was very much a congressional decision. Relatedly, members of Congress also recognized and sought to facilitate the Supreme Court's transformation from a court of error (that is, a court of dispute resolution) to a declarer of legal principles. This delegation of authority from Congress may provide democratic legitimacy for the Supreme Court's role in the modern judiciary.

As discussed, members of Congress agreed that the Supreme Court was the hierarchical leader of the judiciary—one that should define the content of federal law for the lower courts. In both the 1925 and 1988 reforms, congressional reports identified the Supreme Court's "principal functions" as "resolv[ing]" important issues of federal law, and "ensur[ing] uniformity and consistency in the law by resolving conflicts" among the lower courts.[113] But the remaining mandatory appellate jurisdiction made it challenging for the "one supreme Court" to provide a "definitive resolution" of important federal questions.[114] The virtual elimination of mandatory review, and the corresponding expansion of certiorari, were necessary to enable the Court "to effectuate its constitutional mission of resolving only those matters that are of truly national significance."[115]

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110 Hartnett, *supra* note 2, at 2141 (emphasizing "the difficulty of reconciling certiorari, even as administrative power, with the classic *Marbury* justification for judicial review. Even if one or more lower courts can rely on the classic *Marbury* justification, the Supreme Court cannot, because it has chosen to decide the case."); *see* Hartnett, *supra* note 40, at 1713–17.

111 *See* Post, *supra* note 2, at 2076.

112 *See id.* at 2076–2083.

113 H.R. REP. NO. 100-660, at 14 (1988); *accord* S. REP. NO. 68-362, at 3 (1924) (asserting that "cases should not go to the Supreme Court . . . unless the questions involved are of grave public concern" or there is a conflict among the lower courts).

114 125 CONG. REC. 7633 (1979) (statement of Sen. Dennis DeConcini); *see also* S. REP. NO. 96-35, at 7 (1979) ("A significant number of petitioners for certiorari whose cases involve issues of considerable importance are being denied access to the Court simply because the Court has no time to hear them due to the crush of obligatory appeals.").

115 125 CONG. REC. 7633 (1979) (statement of Sen. Dennis DeConcini).

To provide a "definitive resolution" of important federal questions, the Court could no longer simply decide individual disputes. Instead, as Chief Justice Taft put it, the Supreme Court's "chief duty" was "to elaborate the principles, the importance of which justify the bringing of the case here at all, to make the discussion of those principles and the conclusion reached useful to the country and to the Bar."[116] Law declaration was, in short, the Court's method in the modern era of performing its role as hierarchical leader of the judiciary—a role envisioned both by the Constitution and by lawmakers.

And, to the extent that there was any confusion in 1925, the Court's adoption of a law declaration role was crystal clear by the time Congress further expanded its certiorari jurisdiction in 1988. Consider just a few legal developments in the intervening sixty-three years: the Court announced not only the actual malice standard of *New York Times v. Sullivan*[117] and the interrogation requirements of *Miranda v. Arizona*[118] but also the one-person/one-vote rule in *Reynolds v. Sims*[119] and the trimester framework in *Roe v. Wade*.[120] The Court further instructed the lower courts to defer to political actors in a broad array of cases.[121] Regardless of how one views any of these doctrines, it was evident by 1988 that the Supreme Court had become the institution that Chief Justice Taft envisioned: one that would articulate principles of law—not simply to decide the case before it but to govern many other cases.

To my mind, one cannot assess the legitimacy—particularly the democratic legitimacy—of the Supreme Court's post-1925 role, without recognizing that Congress made the decision to permit and facilitate the transformation of the Court's role. As Charles Black suggested fifty years ago, the broad discretion exercised by the Supreme Court through certiorari can best be justified as a delegation from Congress.[122] Notably, Professor Black is well-known for his endorsement of broad congressional power to restrict federal jurisdiction.[123] He

116 Letter from William Howard Taft to Charles P. Taft, *supra* note 90, at 3.

117 N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964).

118 Miranda v. Arizona, 384 U.S. 436, 444–45 (1966).

119 Reynolds v. Sims, 377 U.S. 533, 568 (1964) (establishing the one-person/one-vote rule for legislative apportionment).

120 Roe v. Wade, 410 U.S. 113, 164–65 (1973) (establishing a framework under which virtually all regulation was invalid in the first trimester; restrictions were permitted to preserve maternal health in the second trimester; and abortion could be restricted or banned in the third trimester if there was an exception to protect maternal life and health).

121 *See supra* notes 85–87 and accompanying text.

122 Charles L. Black, Jr., *The Presidency and Congress*, 32 WASH. & LEE L. REV. 841, 846 (1975).

123 *See, e.g.*, Richard H. Fallon, Jr., *Jurisdiction-Stripping Reconsidered*, 96 VA. L. REV. 1043, 1086 (2010) ("I take seriously Charles Black's remark that Congress's power to withdraw

reasoned that the very existence of such a congressional power can serve to legitimize judicial decisions: "If Congress has wide and deep-going power over the courts' *jurisdiction*, then the courts' *power to decide* is a continuing and visible concession from a democratically formed Congress."[124] He made much the same argument about certiorari:

> [T]he Court itself has been empowered by Congress, through the conferring of the discretionary certiorari jurisdiction, to make, from time to time, "exceptions" to its own jurisdiction, on any unstated prudential ground . . . . This control of jurisdiction, on grounds not sounding in law but merely in time-allocation or political prudence . . . is hardly a full-bodied judicial function. I find myself more comfortable with it when I think of it as the exercise by the Court of an "exceptions" power quite reasonably delegated to the Court by Congress.[125]

In crafting and expanding certiorari, Congress and the executive branch not only sought to ease the Supreme Court's workload but also (relatedly) to make it possible for the Court to focus its limited resources on defining the content of federal law for the judiciary. That is, political actors made possible and seemed to invite the Supreme Court's lawmaking function. Indeed, in 1925 and even more by 1988, lawmakers widely presumed that the Court's primary role was to settle federal legal questions.[126]

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the Supreme Court's appellate jurisdiction is 'the rock on which rests the legitimacy of the judicial work in a democracy'") (quoting Black, *supra* note 122).

124 CHARLES L. BLACK, JR., DECISION ACCORDING TO LAW: THE 1979 HOLMES LECTURES 18 (1981) ("My own position is . . . that Congress does have very significant power over the courts' jurisdiction.").

125 Black, *supra* note 122, at 845–46.

126 Notably, there are some today who question Congress's authority to delegate power to federal agencies. *See* Gundy v. United States, 139 S. Ct. 2116, 2133–37 (2019) (Gorsuch, J., dissenting). For those who seek to revive the nondelegation doctrine, certiorari could be deemed problematic. Congress has, after all, granted the Court very broad discretion to decide not only which cases but also which types of cases it will hear. Much if not all of that power could be exercised by Congress. Indeed, in 1891 and 1925, Congress designated certain types of cases for mandatory appellate jurisdiction, and Congress has the power to reimpose such mandatory jurisdiction. Moreover, as Professor Bremer emphasizes, the Supreme Court's exercise of its discretionary review power mirrors in several respects the work of federal agencies. *See* Bremer, *supra* note 2, at 255–56, 258–62. This nondelegation question is beyond the scope of this Foreword. For a small sample of the literature on nondelegation in the administrative context, see Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277 (2021); Nicholas R. Parillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 YALE L.J. 1288 (2021); Ann Woolhandler, *Public Rights and Taxation: A Brief Response to Professor Parrillo*, 84 U. PITT. L. REV. ONLINE art. No. 5 (2023); Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 1490 (2021).

2. Sociological Legitimacy

This congressional imprimatur may not only provide democratic legitimacy for certiorari but also reflect a broader societal acceptance of the Supreme Court's law declaration function. Professor Post worries that the Court's discretionary review power—and its accompanying emphasis on law declaration rather than dispute resolution—may undermine its legitimacy in the eyes of the public (what many call "sociological legitimacy").[127] Although I agree that the Supreme Court faces legitimacy challenges today (a topic about which I have written extensively in separate work),[128] I believe there are reasons to doubt that such concerns are related to certiorari or to the Court's law declaration function per se.

Political scientists disagree about the source of the Supreme Court's sociological legitimacy. Many scholars have argued that the Court enjoys broad "diffuse support" from the public.[129] According to diffuse support scholars, the public generally sees the Court as distinct from the political branches, trusts the Court to make reasonable decisions, and treats those decisions as authoritative.[130] These scholars emphasize that it is crucial that those who *disagree* with a given decision

127 RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT 7 (2018) (distinguishing sociological, moral, and legal legitimacy); Robert C. Post & Neil S. Siegel, *Theorizing the Law/Politics Distinction: Neutral Principles, Affirmative Action, and the Enduring Legacy of Paul Mishkin*, 95 CALIF. L. REV. 1473, 1473–74 (2007) (examining the tension between "the social legitimacy of the law as a public institution" and "the legal legitimacy of the law as a principled unfolding of professional reason").

128 *See* Tara Leigh Grove, *Sacrificing Legitimacy in a Hierarchical Judiciary*, 121 COLUM. L. REV. 1555 (2021); Tara Leigh Grove, *The Supreme Court's Legitimacy Dilemma*, 132 HARV. L. REV. 2240 (2019) (reviewing FALLON, *supra* note 127) [hereinafter Grove, *Legitimacy Dilemma*].

129 Political scientists differentiate "specific support" (support for a single Court action) from "diffuse support" (long-term support, regardless of the Court's actions). *See* Walter F. Murphy & Joseph Tanenhaus, *Public Opinion and the United States Supreme Court: Mapping of Some Prerequisites for Court Legitimation of Regime Changes*, 2 LAW & SOC'Y REV. 357, 370 (1968).

130 *See* JAMES L. GIBSON & GREGORY A. CALDEIRA, CITIZENS, COURTS, AND CONFIRMATIONS: POSITIVITY THEORY AND THE JUDGMENTS OF THE AMERICAN PEOPLE 61 (2009) ("Although the American people are severely divided on many important issues of public policy, when it comes to the institution itself, support for the Court has little if anything to do with ideology and partisanship. Liberals trust the Court at roughly the same level as conservatives; Democrats and Republicans hold the Supreme Court in similar regard."); James L. Gibson & Michael J. Nelson, *Change in Institutional Support for the US Supreme Court: Is the Court's Legitimacy Imperiled by the Decisions It Makes?*, 80 PUB. OP. Q. 622, 623 (2016) (offering empirical findings that diffuse support is "sticky"); *see also* David Fontana & Donald Braman, *Judicial Backlash or Just Backlash? Evidence from a National Experiment*, 112 COLUM. L. REV. 731, 782 (2012) (noting evidence that the Court enjoys diffuse support "[e]ven in an era of political polarization").

view the Court as legitimate; such disappointed individuals will respect the adverse ruling if they generally trust the institution itself.[131] Notably, this scholarship postdates the Judiciary Act of 1925; much of it postdates the 1988 reform. So these scholars have found diffuse support for the Court, even in a world in which the Justices select most of the cases that they review and focus most of their attention on declaring principles of law.

Recent scholarship has challenged the diffuse support vision, arguing that the Court enjoys only "specific support." On this view, members of the public support the Court if it rules "their way" in salient cases.[132] Specific support scholars insist that "individuals grant or deny the Court legitimacy based on the ideological tenor of the Court's policymaking."[133]

Although there is considerable disagreement between these groups of scholars, there is some common ground. Even diffuse support scholars acknowledge that public support for the Supreme Court can dissipate over time; a series of "adverse" decisions can lessen the Court's support among a particular group.[134] So diffuse support scholars acknowledge that if the Supreme Court repeatedly issued "conservative" (or "progressive") decisions in high-profile cases, its institutional reputation would eventually decline with the subset of the population that disapproved of that trend.[135] In other words, public support for the Court depends at least in part on the substance of its decisions.

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131 *E.g.*, James L. Gibson, Milton Lodge & Benjamin Woodson, *Losing, but Accepting: Legitimacy, Positivity Theory, and the Symbols of Judicial Authority*, 48 LAW & SOC'Y REV. 837, 839 (2014).

132 *See* Brandon L. Bartels & Christopher D. Johnston, *On the Ideological Foundations of Supreme Court Legitimacy in the American Public*, 57 AM. J. POL. SCI. 184, 185 (2013) (arguing that "individuals grant or deny the Court legitimacy based on [their subjective view of] the ideological tenor of the Court's policymaking" in salient cases); Neil Malhotra & Stephen A. Jessee, *Ideological Proximity and Support for The Supreme Court*, 36 POL. BEHAV. 817, 819 (2014) (asserting that individuals "who are ideologically closest to the Court's position tend to exhibit the highest levels of trust and approval"); *see also* Dino P. Christenson & David M. Glick, *Chief Justice Roberts's Health Care Decision Disrobed: The Microfoundations of the Supreme Court's Legitimacy*, 59 AM. J. POL. SCI. 403, 416 (2015) (finding that public attitudes can be changed by "a single, albeit salient, case").

133 Bartels & Johnston, *supra* note 132, at 185.

134 *See* GIBSON & CALDEIRA, *supra* note 130, at 43 ("[O]ver the long haul, the repeated failure of an institution to meet policy expectations can weaken and even destroy that institution's legitimacy in the eyes of disaffected groups.").

135 *See* James L. Gibson & Michael J. Nelson, *The Legitimacy of the US Supreme Court: Conventional Wisdoms and Recent Challenges Thereto*, 10 ANN. REV. L. & SOC. SCI. 201, 206–07 (2014) (finding that "[i]ndividuals seem to keep a running tally . . . crediting the Court" for "a pleasing decision and subtracting" for "a disagreeable decision" and thus "the Court's diffuse support could suffer once some accumulated threshold level of dissatisfaction is reached").

The history of court-curbing efforts certainly suggests that external observers care about the substance of court rulings. Throughout our history, political groups who were displeased with the overall trend of the Court's decisions were those calling for Court reform. In the mid-to-late twentieth century, after a string of Supreme Court decisions expanding protections for criminal defendants,[136] vigorously enforcing the separation of church and state,[137] and recognizing a right to terminate a pregnancy,[138] social conservatives advocated court-curbing measures.[139] In recent years, with Supreme Court decisions moving in a conservative direction on gun rights,[140] abortion,[141] religion,[142] and affirmative action,[143] progressives have called for Court reform.[144]

During each era, the focus was not on certiorari or the fact that the Supreme Court's function was to articulate principles of federal law. Instead, the objection was to the legal principles that the Court had articulated.[145] Such substantive attacks have throughout history

136 *See, e.g.*, Miranda v. Arizona, 384 U.S. 436, 444–45 (1966) (police interrogation).

137 *See, e.g.*, Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 223 (1963) (invalidating, on Establishment Clause grounds, government programs that required students to read Bible verses and recite the Lord's Prayer); Engel v. Vitale, 370 U.S. 421, 430–33 (1962) (invalidating, on Establishment Clause grounds, a school prayer program).

138 *See* Roe v. Wade, 410 U.S. 113, 164–65 (1973); *see also* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 878–79 (1992) (plurality opinion) (O'Connor, Kennedy & Souter, JJ.) (rejecting "the rigid trimester framework of *Roe v. Wade*" while reaffirming the case's "central holding").

139 *See* Tara Leigh Grove, *The Structural Safeguards of Federal Jurisdiction*, 124 HARV. L. REV. 869, 900–16 (2011).

140 *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2131–33, 2156 (2022) (requiring the government to justify modern gun restrictions by pointing to a historical analogue).

141 *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2279, 2284 (2022) (overruling *Roe*, 410 U.S. 113, and *Casey*, 505 U.S. 833, and holding that there is no fundamental right to terminate a pregnancy).

142 *See* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2427–28 (2022) (overruling the test created for Establishment Clause claims by *Lemon v. Kurtzman*, 403 U.S. 602 (1971)).

143 *See* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2176 (2023).

144 For just a small sample of recent reform proposals, see Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CALIF. L. REV. 1703 (2021); Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148 (2019); and Christopher Jon Sprigman, *Congress's Article III Power and the Process of Constitutional Change*, 95 N.Y.U. L. REV. 1778 (2020). In response to the calls for reform, President Biden appointed a commission to study the issue. I served on that presidential commission. *See* PRESIDENTIAL COMM'N ON THE SUP. CT. OF THE U.S., *supra* note 5.

145 Observers have also raised concerns about the nomination and confirmation process. *See* PRESIDENTIAL COMM'N ON THE SUP. CT. OF THE U.S., *supra* note 5, at 14–16, 74–77 (discussing how the Senate's refusal to hold hearings or vote on the nomination of Merrick Garland, among other concerns, have driven some calls for Court reform).

largely driven what I have called the Supreme Court's "legitimacy dilemma."[146]

3. Concluding Thoughts on Legitimacy Concerns

Congress's decision to craft and expand certiorari review may provide democratic legitimacy for that power—and for the Court's accompanying law declaration function (even as critics continue to criticize the Court's exercise of that function). To be sure, Congress cannot empower the Supreme Court to act in a way that transgresses the judicial power of Article III. But every case that the Court decides must be a "case" or "controversy" and otherwise within the judicial power.[147] The plaintiffs must have had standing to bring suit in the lower court; those seeking review must have standing to appeal.[148] The case must be ripe, cannot be moot, and cannot present a political question.[149] So although the Court may decline to hear a case at all, it still can only resolve constitutional or other legal questions in the context of an Article III case or controversy.

To be clear, this Foreword does not seek to endorse the manner in which the Court exercises its discretionary review power. As Karen Tani has thoughtfully observed, one may reasonably question the Justices' choices about which cases present "important legal questions of national significance."[150] Professor Hartnett also highlights instances where the Court seems not to have exercised a wise discretion.[151] Nor do I mean to suggest that the Court's certiorari jurisdiction should

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146 Grove, *Legitimacy Dilemma*, *supra* note 128, at 2240–46, 2250–72.

147 U.S. CONST. art III, § 2.

148 *See* United States v. Windsor, 570 U.S. 744, 755–59 (2013); Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992).

149 *See* Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 579 (1985); Acheson Hotels, LLC v. Laufer, 144 S. Ct. 18, 21–22 (2023); Rucho v. Common Cause, 139 S. Ct. 2484, 2498–2502, 2508 (2019).

150 *See* Karen M. Tani, *Foreword: Curation, Narration, Erasure: Power and Possibility at the U.S. Supreme Court*, 138 HARV. L. REV. 1, 5, 17–42 (2024) (asserting that "*of course* the Justices ought to be concerned about answering important legal questions of national significance," but also emphasizing the "constructedness of the Court's 'merits docket,'" *id.* at 5, and examining the Court's exercise of its discretionary review power in the 2023 Term). For valuable studies of the Court's certiorari practices, see Tejas N. Narechania, *Which Splits?—Certiorari in Conflicts Cases*, 113 CALIF. L. REV. 487 (2025); Tejas N. Narechania, *Certiorari in Important Cases*, 122 COLUM. L. REV. 923 (2022). For a critical analysis of the Supreme Court's practice of crafting the questions that it hears on certiorari, see Benjamin B. Johnson, *The Origins of Supreme Court Question Selection*, 122 COLUM. L. REV. 793, 800–02 (2022) (worrying that the Court's recent tendency to decide discrete questions, rather than the entire case, raises legitimacy concerns). *See also* Tyler B. Lindley, *The Law of Certiorari*, 94 U. CHI. L. REV. (forthcoming 2027) (suggesting that common law principles should inform the Court's decision as to whether to hear a case).

151 *See* Hartnett, *supra* note 2, at 2146–48.

remain unchanged. There may well be reasons to reimpose some mandatory appellate jurisdiction, particularly given the Court's apparent reluctance to grant certiorari in recent years.[152]

Instead, my goal is to suggest that certiorari and, relatedly, the Court's law declaration function have the imprimatur of Congress. And that, I suggest, may provide democratic legitimacy for the Court's role in the modern judiciary. At a minimum, it seems that "questioning certiorari" involves questioning the power of not only the Supreme Court but also Congress.

III. FURTHER IMPLICATIONS

The Supreme Court's certiorari power and law declaration role may have democratic legitimacy. Yet that does not mean the picture is an entirely rosy one. First, this Foreword's defense of the certiorari power may in turn cast doubt upon judicial practices that did not, at least at the outset, have congressional authorization. Second, the very willingness of Congress to encourage a broad role for the Supreme Court in articulating federal law may reflect an unfortunate tendency on the part of political actors to defer legal questions to the judiciary.

A. What If Congress Has Not Approved?

Once we focus on Congress's power over the federal judiciary, practices other than certiorari may seem more suspect. The federal courts have found ways of disposing of some cases, absent statutory authorization.

I begin with a historical example. During the period between 1925 and 1988, when the Supreme Court still had important blocks of mandatory appellate jurisdiction, the Justices at times engaged in "self-help" to dispense with those mandatory cases. The Court often appeared to use its certiorari standards to dismiss mandatory appeals from state courts for want of a substantial federal question or to summarily affirm lower federal courts.[153]

Nor did the Court exercise this power in merely mundane cases. As Professor Hartnett observes, the Court's 1972 decision in *Baker v. Nelson*, which dismissed as insubstantial a constitutional challenge to a ban on same-sex marriage, complicated subsequent litigation over

152 *See* Steve Vladeck, *42(ish) Decisions to Go . . .*, ONE FIRST (May 6, 2024), https://www.stevevladeck.com/p/79-43ish-decisions-to-go [https://perma.cc/5Y4B-DBH2] (noting how for five terms in a row—from the 2019 Term through the 2023 Term—the Court would "decide 60 or fewer cases," and describing this trend as "remarkable," given that the Court had not ruled on such a small number of cases since 1864).

153 *See* H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 104–06 (1991).

marriage equality.[154] Another extraordinary example involved interracial marriage. One year after the Supreme Court's 1954 decision in *Brown v. Board of Education*, there was a challenge to Virginia's ban on interracial marriage, the same law that was later struck down in *Loving v. Virginia*.[155] Notably, the Supreme Court in 1955 had mandatory jurisdiction over the *Naim* appeal; accordingly, the Court could not avoid the case simply by denying certiorari.[156]

Yet some Justices were determined to dispose of the case without reaching the merits. Justice Frankfurter wrote an impassioned letter to his colleagues, worrying that any decision in *Naim* could "thwart[] or seriously handicap[] the enforcement of [the Court's] decision in" *Brown*, and thus urging his colleagues to dismiss the appeal.[157] The Justices ultimately dismissed the constitutional challenge as "devoid of a properly presented federal question."[158] Many commentators have described the Court's disposition in *Naim* as "specious," "ridiculous," and "wholly without basis in the law."[159]

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154 *See* Baker v. Nelson, 409 U.S. 810, 810 (1972) (mem.); Hartnett, *supra* note 2, at 2130–31; *see, e.g.*, Massachusetts v. U.S. Dep't of Health & Hum. Servs., 682 F.3d 1, 8 (1st Cir. 2012) (stating, in a constitutional challenge to the Defense of Marriage Act, that "*Baker* is precedent binding on us unless repudiated by subsequent Supreme Court precedent. . . . *Baker* does not resolve our own case but it does limit the arguments to ones that do not presume or rest on a constitutional right to same-sex marriage." (citing Hicks v. Miranda, 422 U.S. 332, 344 (1975))).

155 Loving v. Virginia, 388 U.S. 1, 12 (1967) ("The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations."); Naim v. Naim, 87 S.E.2d 749, 750, 754–56 (Va. 1955) (rejecting the plaintiffs' challenge to Virginia's ban on interracial marriage), *vacated by* 350 U.S. 891 (1955) (mem.).

156 The Judiciary Act of 1925 had greatly expanded the Court's certiorari jurisdiction. But the Act left in place mandatory jurisdiction over cases like *Naim*, which involved state court decisions upholding a state law against a federal constitutional challenge. *See supra* note 63.

157 Memorandum of Justice Frankfurter on *Naim v. Naim* (read at conference, Nov. 4, 1955), *in* Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948-1958*, 68 GEO. L.J. 1, app. D at 96, 95–96 (1979). Justice Black initially objected to the dismissal of the case, but he ultimately relented. *See* Hutchinson, *supra*, at 65–67 (recounting how Justice Black circulated a dissent stating that he would "note jurisdiction and set the case for arguments," but that he later withdrew the dissenting opinion *id.* at 66 (citation omitted))).

158 Naim v. Naim, 350 U.S. 985, 985 (1956) (mem.). That was in fact the second time the Court dismissed the case. Initially, the Court asserted that there was an inadequate record for review. *See* Naim v. Naim, 350 U.S. 891, 891 (1955) (mem.). The Supreme Court of Virginia responded to the initial vacatur by simply reinstating its prior decision. *See* Naim v. Naim, 90 S.E.2d 849, 850 (Va. 1956) (per curiam) (underscoring that the record was adequate in the case from the outset).

159 *E.g.*, Mary Anne Case, *Marriage Licenses*, 89 MINN. L. REV. 1758, 1790 (2005) (arguing that the Court "employ[ed] specious procedural objections in order to avoid a decision on the merits in *Naim v. Naim*"); Mark Tushnet, *The Warren Court as History: An Interpretation*, *in* THE WARREN COURT IN HISTORICAL AND POLITICAL PERSPECTIVE 1, 5 (Mark Tushnet ed.,

There are other examples. Congress in 1891 gave federal courts of appeals the authority to certify legal questions to the Supreme Court.[160] As Professor Hartnett discusses, that power still exists today, and yet the Supreme Court has for many years treated that statutory authority as a nullity.[161] One may reasonably wonder about the legitimacy of the Court's refusal to answer certified questions.[162]

Another example stems from the courts of appeals' practice of designating opinions as unpublished or non-precedential. Some observers have questioned the constitutionality of this practice, contending that issuing an opinion without precedential effect exceeds the Article III judicial power.[163] Scholars have also raised practical concerns about the courts' exercise of this designation authority.[164]

As Professors Epps and Levy recount, this practice began, not with a congressional statute, but with a 1964 announcement by the Judicial Conference.[165] Indeed, it is an open question whether the practice currently has the imprimatur of Congress. Although in 2006 a rule was added to the Federal Rules of Appellate Procedure to allow litigants to

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1993) (stating that the Court refused to hear the case on "entirely specious" and "quite ridiculous" grounds); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 34 (1959) (describing the dismissal as "wholly without basis in the law.").

160 *See* 28 U.S.C. § 1254(2) (2018) (allowing review in the Supreme Court "[b]y certification at any time by a court of appeals of any question of law in any civil or criminal case"); *supra* subsection I.A.2.

161 *See* Hartnett, *supra* note 2, at 2131–33 ("The Supreme Court had rendered the certification procedure nearly a dead letter by 2000, and it has not revived it." *Id.* at 2131.). For an important discussion of certification, see Amanda L. Tyler, *Setting the Supreme Court's Agenda: Is There a Place for Certification?*, 78 GEO. WASH. L. REV. 1310 (2010).

162 As Professor Hartnett notes, the courts of appeals are now disinclined to certify questions. *See* Hartnett, *supra* note 2, at 2131–33. But that appears to be because the Supreme Court has discouraged certification. *See* Aaron Nielson, *The Death of the Supreme Court's Certified Question Jurisdiction*, 59 CATH. U. L. REV. 483, 488–90 (2010).

163 Twenty-five years ago, Judge Richard Arnold penned an opinion declaring the practice unconstitutional. (That opinion was later vacated on other grounds). *See* Anastasoff v. United States, 223 F.3d 898, 899–900 (8th Cir. 2000) (stating that "[t]he Framers of the Constitution considered these principles [of precedent] to derive from the nature of judicial power, and intended that they would limit the judicial power delegated to the courts by Article III of the Constitution," such that any judicial rule that "would allow us to avoid the precedential effect of our prior decisions, purports to expand the judicial power beyond the bounds of Article III, and is therefore unconstitutional"), *vacated en banc as moot*, 235 F.3d 1054, 1056 (8th Cir. 2000).

164 *See, e.g.*, Merritt E. McAlister, *"Downright Indifference": Examining Unpublished Decisions in the Federal Courts of Appeals*, 118 MICH. L. REV. 533 (2020) (contending that cases involving indigent litigants make up a disproportionate share of unpublished decisions).

165 *See* Epps & Levy, *supra* note 1, at 2204–05.

cite non-precedential opinions,[166] it does not appear that any rule specifically authorizes the practice.[167]

My goal is not to resolve these questions about the legitimacy of judicially created practices. Instead, I raise them to underscore that, once we consider Congress's broad power over the makeup and jurisdiction of the federal judiciary, then actions taken without congressional authorization become more suspect. There may be more reasons to question these practices than to question certiorari.

B. Congress's (Over?) Reliance on the Federal Judiciary

Congress made the decision to create certiorari and enable the Court's transformation from a dispute resolution to a law declaration tribunal. That political choice may well provide legitimacy for certiorari. But it also reflects a separate (and, to my mind, concerning) development: the political branches' tendency to rely on the federal judiciary to resolve significant legal questions.

Most government officials and members of the public today seem to view the Supreme Court as the ultimate arbiter of constitutional and other legal questions.[168] This reliance on the Court began over a century ago—even before the enactment of the Judiciary Act of 1925—and solidified in subsequent decades.[169] By the 1970s, many federal

166 *See* FED. R. APP. P. 32.1(a) (stating that "[a] court may not prohibit or restrict the citation of federal judicial opinions" designated as non-precedential, if those opinions were "issued on or after January 1, 2007"); Epps & Levy, *supra* note 1, at 2205.

167 If a federal rule did specifically authorize the practice of designating certain opinions as non-precedential, that might be deemed congressional approval. Federal rules must be presented to Congress. 28 U.S.C. § 2074 (2018). I will not explore here whether the tacit approval of Congress is sufficient, but I will note that scholars have long raised doubts about that. *See* Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1102, 1177–79, 1196 n.779 (1982); Lumen N. Mulligan & Glen Staszewski, *Civil Rules Interpretive Theory*, 101 MINN. L. REV. 2167, 2183–86 (2017) ("Congress is . . . provided with an opportunity to review and potentially veto proposed rules before they go into effect, but we do not find that such a procedure imbues the Rules with the same separation-of-powers normative underpinnings as statutory law.").

168 *See, e.g.*, FRIEDMAN, *supra* note 49, at 14 (arguing that "the American people have decided to cede [this power] to the justices"); Richard H. Pildes, *Is the Supreme Court a "Majoritarian" Institution?*, 2010 SUP. CT. REV. 103, 147 ("[T]he modern Congress typically treats the Court as the exclusive authority over constitutional issues.").

169 *See* Barry Friedman & Erin F. Delaney, *Becoming Supreme: The Federal Foundation of Judicial Supremacy*, 111 COLUM. L. REV. 1137, 1172–82 (2011) (describing how the Court's role as "supreme" vis-à-vis the political branches began to take hold in the mid-twentieth century); Grove, *supra* note 10, at 948–78 (describing how, beginning in the late nineteenth century, lawmakers increasingly viewed the Court as the ultimate arbiter of constitutional and other legal questions).

lawmakers assumed that "legal and constitutional questions . . . can ultimately be answered only by the Supreme Court."[170]

Notably, this reliance on the Court extends well beyond a view that the Court is the hierarchical leader of the judiciary. The assumption is that the Supreme Court should also be the ultimate expositor of constitutional and other legal questions for the political branches and the public. This kind of thinking, at least as applied to constitutional questions, is often called "judicial supremacy."

Legal scholars have long debated the soundness of judicial supremacy as a normative matter.[171] One concern about relying too heavily on the judiciary, as Larry Sager has written, is that the judiciary lacks the institutional capacity to enforce some constitutional norms.[172] Moreover, even as to those legal questions that courts *can* address, the Supreme Court clearly cannot supervise all (or even most) constitutional and legal questions that arise in society—even if it decided as many as 150 or 200 cases per year.

Nevertheless, the political branches have over the past century relied more and more heavily on the judiciary to resolve not only constitutional but also other legal questions. Political scientists have offered

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170 S. REP. NO. 95-1035, at 9 (1978) ("Since the legal and constitutional questions raised by [the bill], as amended, can ultimately be answered only by the Supreme Court of the United States, it would unduly extend the Committee of the Judiciary's report to set forth all supporting and opposing views and all historical precedents.").

171 *Compare, e.g.*, Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1385 (1997) (advocating the Court's role "as the authoritative settler of constitutional meaning" for the political branches and the public), *with, e.g.*, Neal Devins & Louis Fisher, *Judicial Exclusivity and Political Instability*, 84 VA. L. REV. 83, 85 (1998) (doubting that the Supreme Court should have "the last word on the Constitution's meaning"), *and* Sanford Levinson, *Constitutional Protestantism in Theory and Practice: Two Questions for Michael Stokes Paulsen and One for His Critics*, 83 GEO. L.J. 373, 373–74 (1994) (rejecting judicial supremacy). *See also* Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 1947 (2003) (arguing that Congress may under the Fourteenth Amendment enact laws "premised on an understanding of the Constitution that differs from the Court's"). For related discussions, see Mark A. Lemley, *The Imperial Supreme Court*, 136 HARV. L. REV. F. 97, 113-15 (2022); Allen C. Sumrall & Beau J. Baumann, *Clarifying Judicial Aggrandizement*, 172 U. PA. L. REV. ONLINE 24, 28 (2023) (discussing "judicial self-aggrandizement," "a judicial style where judges expand their authority at the expense of other constitutional actors . . . by deploying norms and ideas about the proper allocation of authority." (footnote omitted)).

172 *See* Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1213 (1978) (arguing that when the Supreme Court "because of institutional concerns . . . fail[s] to enforce a provision of the Constitution to its full conceptual boundaries . . . we should treat these 'underenforced' constitutional norms as valid to their conceptual limits, and understand the contours of federal judicial doctrine regarding these norms to mark only the boundaries of the federal courts' role of enforcement").

multiple explanations for this phenomenon. Political actors may, for example, be tempted to use litigation to advance policies that are difficult to enact through the legislative process.[173] Alternatively, lawmakers may simply seek to delegate controversial issues to the courts, regardless of the outcome.[174] If the matter goes to litigation, political actors can celebrate any "win," or blame the courts for any displeasing decision, without having to take responsibility for answering the question themselves.[175]

It may be no accident that the expansion of certiorari in 1925 and 1988 coincided with this tendency to defer legal questions to the judiciary. To my mind, that is perhaps the most concerning aspect of these reforms. As the political branches endeavored to make it possible for the Supreme Court to resolve important federal questions, they focused less on their own responsibility to confront challenging questions of federal law.

CONCLUSION

There seems to be broad agreement that some kind of reform was needed in the late nineteenth and early twentieth centuries to ensure that the Supreme Court could continue to function as the hierarchical

173 Politicians are most likely to do this, of course, when they envision that the judiciary will be friendly to their policies. *See* Howard Gillman, *How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875–1891*, 96 AM. POL. SCI. REV. 511, 512–13, 516–17 (2002) (discussing the efforts of the Republican Party in the nineteenth century to use the judiciary to advance a pro-business agenda); Ran Hirschl, *The Political Origins of Judicial Empowerment Through Constitutionalization: Lessons from Four Constitutional Revolutions*, 25 LAW & SOC. INQUIRY 91, 116 (2000) (arguing that political leaders will empower the judiciary if they believe "the judiciary in general and the supreme court in particular are likely to produce decisions that . . . reflect their ideological preferences"). The President is especially well-positioned to use the courts for this purpose. He not only plays a central role in selecting federal judges, *see* U.S. CONST. art II, § 2, cl. 2, but also "[t]hrough control over the Justice Department . . . can exercise significant influence over . . . what arguments are presented" to the courts." KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY 196 (2007).

174 *See* Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35, 36 (1993) (asserting that "prominent elected officials consciously invite the judiciary to resolve" controversial issues); Keith E. Whittington, *"Interpose Your Friendly Hand": Political Supports for the Exercise of Judicial Review by the United States Supreme Court*, 99 AM. POL. SCI. REV. 583, 584 (2005) ("The establishment and maintenance of judicial review is a way of delegating some kinds of political decisions to a relatively politically insulated institution.").

175 *Cf.* DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 62 (2d ed. 2004) ("The congressman as position taker is a speaker rather than a doer. The electoral requirement is not that he make pleasing things happen but that he make pleasing judgmental statements.").

leader of the judiciary. Congress considered various options and ultimately settled on certiorari—granting the Court the power to focus its limited resources on settling important federal questions. There is no doubt that certiorari has transformed the Court from an institution of dispute resolution to one focused on law declaration. But in expanding certiorari, Congress seems to have accepted and invited this transformation. This congressional decision, I suggest, may provide democratic legitimacy for certiorari. But there are still reasons to worry about this congressional decision. The expansion of certiorari coincided with a tendency of the political branches to defer legal questions to the Supreme Court. Even if the Court should define the content of federal law for the judiciary, it is less clear that it should be expected to settle all constitutional and other legal questions for society.