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THE COMMON-LAW EXCEPTIONS CLAUSE: CONGRESSIONAL CONTROL OF SUPREME COURT APPELLATE JURISDICTION IN LIGHT OF BRITISH PRECEDENT

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I. INTRODUCTION

THE lengthy delay in filling the seat formerly occupied by the late Supreme Court Justice Antonin Scalia¹ recently placed in stark relief the problems that can arise when the Supreme Court is unable to serve its function as the final arbiter of questions of federal law. In multiple cases after Justice Scalia's death, an equally divided Court was forced to abdicate that function, leaving in place circuit splits, permitting regional courts to decide issues affecting the entire country, deferring the resolution of highly charged questions of constitutional law, and creating significant uncertainty for federal and state governments and litigants.² In *United States v. Texas*,³ for instance, the Supreme Court split 4-4 over a decision of the United States Court of Appeals for the Fifth Circuit upholding a nationwide injunction against then-President Barack Obama's attempted immigration reforms, leaving the Fifth Circuit's decision undisturbed but also unendorsed. Nevertheless, many scholars and jurists (including Justice Scalia) have argued that Congress could deliberately and permanently en-

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1. See generally Bruce Moyer, *Gaming the Garland Nomination*, 63-NOV FED. LAW. 6, Oct./Nov. 2016 (discussing the death of Justice Scalia and the refusal of the Republican-controlled Senate to consider President Obama's Supreme Court nominee to fill that vacancy).

2. See, e.g., Brianne J. Gorod, *A Strange Year at the Court*, 19 GREEN BAG 2D 369, 369-70, 372 (2016); Miller W. Shealy, Jr., *Eight Is [Not] Enough*, 28-NOV S.C. LAW., Nov. 2016.

3. 136 S. Ct. 2271 (2016).

trench such problems by making exceptions to the Court's appellate jurisdiction over specific questions of federal law.⁴

The scope of Congress's power to shape the appellate jurisdiction of the Supreme Court is the great enduring mystery of federal courts jurisprudence. Article III of the U.S. Constitution extends the judicial power of the United States to several categories of cases and controversies and provides that the "one supreme Court" created by Article III "shall have original Jurisdiction" over cases within certain of these categories.⁵ "In all other cases" to which the federal judicial power extends, Article III provides that the Court "shall have appellate Jurisdiction," but "with such Exceptions, and under such Regulations, as the Congress shall make."⁶

At first glance, this "Exceptions Clause" appears straightforward.⁷ Yet, for more than a half century, scholars have generated an enormous body of literature discussing whether Congress can use its "exceptions" power to remove certain categories of cases entirely from the Supreme Court's appellate purview in order to prevent the Court from deciding controversial constitutional questions or from enforcing state or lower federal court compliance with prior Court precedent.⁸ Coupled with Congress's widely acknowledged power to limit the jurisdiction of lower federal courts,⁹ the Exceptions Clause also might permit Congress to effectively overturn controversial Supreme Court precedent by leaving states free of federal court oversight.¹⁰ Some scholars have even debated whether Congress can marginalize the Supreme Court by eliminating its appellate jurisdiction entirely.¹¹

The Supreme Court itself has studiously avoided these questions. Although one Civil War-era case set forth dictum that some have read as

4. See *infra* note 16 and accompanying text.

5. U.S. CONST. art. III, §§ 1–2.

6. *Id.* § 2.

7. William Casto has called it "bafflingly simple." William R. Casto, *The First Congress's Understanding of Its Authority over the Federal Courts' Jurisdiction*, 26 B.C. L. REV. 1101, 1101 (1985).

8. See, e.g., Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1364 (1953); Martin H. Redish, *Congressional Power to Regulate Supreme Court Appellate Jurisdiction Under the Exceptions Clause: An Internal and External Examination*, 27 VILL. L. REV. 900, 901 (1982); William W. Van Alstyne, *A Critical Guide to Ex Parte McCordle*, 15 ARIZ. L. REV. 229, 230 (1973); Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1004–06 (1965); see also Joseph Blocher, *Amending the Exceptions Clause*, 92 MINN. L. REV. 971, 972–75 (2008) (listing examples of jurisdiction-stripping legislation proposed or enacted by Congress).

9. See Richard H. Fallon, Jr., *Jurisdiction-Stripping Reconsidered*, 96 VA. L. REV. 1043, 1065–68 (2010) [hereinafter Fallon, Jr., *Jurisdiction-Stripping*].

10. See *id.* at 1068. But see Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 255–59 (1985) (contending that Congress must vest jurisdiction over all Article III "cases" either in the Supreme Court or in the lower federal courts).

11. See, e.g., Leonard G. Ratner, *Congressional Power over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157, 158 (1960).

endorsing a plenary view of Congress's power under the Exceptions Clause,¹² and although the Court has frequently declared its jurisdiction dependent on statutorily granted authority,¹³ the Court always has side-stepped even the most forceful jurisdiction-stripping statutes by locating an alternative source of supervisory appellate jurisdiction or by invalidating them on other grounds.¹⁴

Other than the fact that it exists, there is little consensus on what the Exceptions Clause is supposed to mean or even, at times, on the terms of the debate.¹⁵ Many, including at least one Supreme Court justice and such notable scholars as Herbert Wechsler and Martin Redish, have taken the view that the plain language of the clause permits Congress to make any exceptions to the Supreme Court's appellate jurisdiction that it wishes in the same manner as it exercises any of its other enumerated powers.¹⁶ For many adherents of this "orthodox" view, the Exceptions Clause is just another feature of congressional power to organize the federal judicial

12. *Ex Parte McCordle*, 74 U.S. (7 Wall.) 506 (1869); see Redish, *supra* note 8, at 903–06.

13. See, e.g., *Durousseau v. United States*, 10 U.S. (6 Cranch) 307, 313–14 (1810); see also Ratner, *supra* note 11, at 157–58 ("From time to time since 1796 the Supreme Court has used language in its opinions suggesting that by virtue of the exceptions and regulations clause its appellate jurisdiction is subject to unlimited congressional control, and this language has generally been regarded as establishing that Congress has such power.").

14. See, e.g., *Boumediene v. Bush*, 553 U.S. 723, 737 (2008); *Felker v. Turpin*, 518 U.S. 651, 657 (1996); *McCordle*, 74 U.S. (7 Wall.) at 515; *Ex Parte Yerger*, 75 U.S. (8 Wall.) 85, 104–06 (1868).

15. A bibliography of the literature would be difficult to list in its entirety. For recent surveys of the major arguments and approaches, see generally Alex Glasshauser, *A Return to Form for the Exceptions Clause*, 51 B.C. L. REV. 1383, 1390–99 (2010); Tara Leigh Grove, *The Article II Safeguards of Federal Jurisdiction*, 112 COLUM. L. REV. 250, 255–60 (2012).

16. See, e.g., *Hamdan v. Rumsfeld*, 548 U.S. 557, 672 (2006) (Scalia, J., dissenting) ("Though it does not squarely address the issue, the Court hints ominously that 'the Government's preferred reading' would 'rais[e] grave questions about Congress' authority to impinge upon this Court's appellate jurisdiction, particularly in habeas cases.' It is not clear how there could be any such lurking questions, in light of the aptly named 'Exceptions Clause' of Article III, § 2, which, in making our appellate jurisdiction subject to 'such Exceptions, and under such Regulations as the Congress shall make,' explicitly permits exactly what Congress has done here." (internal citations omitted)); *Hearings Before the Subcomm. on Separation of Powers of the S. Comm. on the Judiciary*, 90th Cong. 22 (1968) (statement of Sen. Ervin) ("I don't believe that the Founding Fathers could have found any simpler words or plainer words in the English language to say what they said, which was that the appellate jurisdiction of the Supreme Court is dependent entirely upon the will of Congress."); Paul M. Bator, *Congressional Power over the Jurisdiction of the Federal Courts*, 27 VILL. L. REV. 1030, 1038–39 (1982); Redish, *supra* note 8, at 902 ("[T]here exist no real internal limitations on Congress' power under the exceptions clause."); Ralph A. Rossum, *Congress, the Constitution, and the Appellate Jurisdiction of the Supreme Court: The Letter and the Spirit of the Exceptions Clause*, 24 WM. & MARY L. REV. 385, 389 (1983) ("Those who argue against Congress' power to make exceptions to the Court's appellate jurisdiction . . . are forced to deny an explicit power of Congress, expressly granted by the Constitution . . .").

system and to ensure the orderly flow of litigation, even if its scope may invite abuse. Some even view Congress's exceptions power as a desirable majoritarian check on the Court's power of judicial review.¹⁷ Others, fearing that an unlimited exceptions power could permit Congress to virtually eliminate the Court's role as the head of the federal judicial department or prevent individuals from vindicating constitutional rights, argue that Congress must not make exceptions that would destroy the Court's "essential function" of ensuring the supremacy and uniformity of federal law or "essential role" in the constitutional scheme.¹⁸

More recently, some scholars have attempted a wholesale revision of the Exceptions Clause, arguing that the language is properly read only to permit Congress to shift cases from the Court's appellate to its original jurisdiction.¹⁹ Under this reading, advanced most categorically by Steven Calabresi, Gary Lawson, and Alex Glasshauser, Congress cannot make any exceptions to the Supreme Court's appellate jurisdiction without giving the Court concurrent original jurisdiction over the excepted cases.²⁰ For Calabresi and Lawson, moreover, the Exceptions Clause does not confer any power at all, but instead merely references power granted by Article I's "Sweeping Clause," meaning that exceptions must be "necessary and proper" in light of the overall constitutional scheme.²¹

Taking a different approach, James Pfander has argued that Congress has wide power to make exceptions to the Court's as-of-right appellate jurisdiction, but the constitutional requirements of unity, supremacy, and inferiority embodied in Article III and in the inferior tribunals clause of Article I create clear and enforceable limits on Congress's exceptions power.²² Pfander notes that the Framers would have had good reason to permit limits on as-of-right access to a distant and inaccessible appellate forum and thereby to leave final resolution of many cases to the inferior federal courts or to state courts. Nevertheless, under Pfander's "supremacy account," because the Supreme Court must remain "su-

17. See Charles L. Black, Jr., *The Presidency and Congress*, 32 WASH. & LEE L. REV. 841, 846 (1975) (arguing that Congress's power to withdraw the Supreme Court's appellate jurisdiction is "the rock on which rests the legitimacy of the judicial work in a democracy"); see also, e.g., Bator, *supra* note 16, at 1041; Charles E. Rice, *Congress and the Supreme Court's Jurisdiction*, 27 VILL. L. REV. 959, 984-85 (1982).

18. E.g., Hart, Jr., *supra* note 8, at 1365; Ratner, *supra* note 11, at 201.

19. See 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, 1037 (2007); Laurence Claus, *The One Court That Congress Cannot Take Away: Singularity, Supremacy, and Article III*, 96 GEO. L.J. 59, 64 (2007); Glasshauser, *supra* note 15, at 1385.

20. See Calabresi & Lawson, *supra* note 19, at 1037, 1039-41; Glasshauser, *supra* note 15, at 1385.

21. See Calabresi & Lawson, *supra* note 19, at 1039-41.

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

preme,” any exceptions to its appellate jurisdiction must not eliminate the Court’s ability to maintain its supremacy over “inferior” courts and tribunals through the exercise of discretionary supervisory writs, such as mandamus and prohibition.²³ The scope of this supervisory power according to Pfander, however, is limited to correcting decisions that have not complied with the Court’s prior precedents.²⁴ Moreover, the Court would be unable in many instances to review decisions of state courts, which ordinarily are not “inferior” federal courts subject to the Supreme Court’s supervision and control.²⁵

To varying degrees, Laurence Claus and Calabresi and Lawson have echoed Pfander’s invocation of supremacy as a limit on congressional power. Claus argues that Congress cannot make any issue-based exceptions to the Supreme Court’s appellate jurisdiction without compromising the Court’s supremacy, although Congress can make limited exceptions for cases below a certain amount in controversy. Calabresi and Lawson similarly argue that, to remain supreme, the Court must have the final word on all questions of federal law, and that any attempt by Congress to divest the Court of this supremacy by removing its appellate jurisdiction over any cases raising such questions would violate separation of powers principles.

Attempts at scouring the usual originalist sources, such as eighteenth-century dictionaries, notes from the Constitutional Convention, and the *Federalist Papers*, have proven largely inconclusive. Although scholars have attempted to discern the original understanding of the term “exceptions” and have traced the drafting history of the Exceptions Clause and its treatment in ratification debates in minute and insightful detail,²⁶ the conclusions scholars have drawn from these sources have diverged widely.

Given the emphasis that federal courts and scholars traditionally have placed on the practice of the English “courts at Westminster” in interpreting Article III,²⁷ it is somewhat surprising how rarely the investigation has

23. See *infra* note 30 and accompanying text.

24. See *infra* notes 67–68 and accompanying text.

25. See *infra* note 70 and accompanying text.

26. See, e.g., Claus, *supra* note 19, at 81–87, 91–97 (discussing the drafting history and ratification debates); John Eidsmoe, *The Article III Exceptions Clause: Any Exceptions to the Power of Congress to Make Exceptions?*, 19 REGENT U. L. REV. 95, 101–08, 108–17 (2006) (recounting drafting history and evolution of Exceptions Clause at Philadelphia Convention and during the ratification debates); Glasshauser, *supra* note 15, at 1403–47; Leonard G. Ratner, *Majoritarian Constraints on Judicial Review: Congressional Control of Supreme Court Jurisdiction*, 27 VILL. L. REV. 929, 939 (1982) (examining contemporary dictionary and common law definitions of the term “exceptions”).

27. Justice Frankfurter set forth the case for reading Article III in light of practice in English superior courts sitting in Westminster Hall at the time of the framing in his dissenting opinion in *Coleman v. Miller*, 307 U.S. 433, 460 (1939) (Frankfurter, J., dissenting). A more recent exposition of the view can be found, in *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.* 527 U.S. 308, 318 (1999) (“We have long held that . . . the equity jurisdiction of the federal courts is

turned to English precedent in the voluminous debate over Article III's Exceptions Clause. This omission is all the more striking not only because much of the scholarly debate over the clause has been textual and historical in character,²⁸ but also because the debate remains so stubbornly unresolved.²⁹

A few scholars have attempted to recast debates over the structure of the judicial department and over jurisdiction stripping in light of the judicial system and practice in Great Britain at the time of the American Revolution and the framing of the Constitution.³⁰ These undertakings, though limited in number, have unearthed surprising insights regarding structural and hierarchical antecedents of the federal judicial system that may have informed the drafting of Article III.

Pfander roots his supremacy account, for instance, in the manner in which the English supreme court of King's Bench maintained its supremacy over inferior courts through limited and discretionary issuance of the "prerogative writs," such as certiorari, mandamus, prohibition, and

the jurisdiction in equity exercised by the High Court of Chancery in England at the time of the adoption of the Constitution and the enactment of the original Judiciary Act [of] 1789." (citations omitted)). Examples of the importance of English practice to federal courts scholars abound. See, e.g., WILFRED J. RITZ, *REWRITING THE HISTORY OF THE JUDICIARY ACT OF 1789* 32 (1990); Benjamin H. Barton, *An Article I Theory of the Inherent Powers of the Federal Courts*, 61 CATH. U. L. REV. 1, 32–34 (2011); Anthony J. Bellia Jr., *The Origins of Article III "Arising Under" Jurisdiction*, 57 DUKE L.J. 263, 317–22 (2007); Anthony J. Bellia Jr., *Article III and the Cause of Action*, 89 IOWA L. REV. 777, 818–26 (2004); Raoul Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 YALE L.J. 816, 816 (1969); Bradley S. Clanton, *Standing and the English Prerogative Writs: The Original Understanding*, 63 BROOK. L. REV. 1001, 1005 (1997); F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 279–86 (2008); Louis L. Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265, 1308 (1961); Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 799–815 (2001); Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 171–73 (1992); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1396 (1988). For discussions, see James E. Pfander & Daniel D. Birk, *Article III Judicial Power, the Adverse-Party Requirement, and Non-Contentious Jurisdiction*, 124 YALE L.J. 1346, 1350–51 (2015); James E. Pfander & Daniel D. Birk, *Article III and the Scottish Judiciary*, 124 HARV. L. REV. 1613, 1627–28 (2011) [hereinafter Pfander & Birk, *Scottish Judiciary*].

28. See, e.g., Fallon, Jr., *Jurisdiction-Stripping*, *supra* note 9, at 1047 ("[T]he originalist and textualist style of reasoning . . . has characterized nearly all leading academic writings on congressional control of jurisdiction"); cf. Richard H. Fallon, Jr., *The Many and Varied Roles of History in Constitutional Adjudication*, 90 NOTRE DAME L. REV. 1753, 1761 (2015); Amanda L. Tyler, *Assessing the Role of History in the Federal Courts Canon: A Word of Caution*, 90 NOTRE DAME L. REV. 1739, 1739–43 (2015) ("[I]n the federal courts arena—more so than in the broader domain of constitutional law—originalism has always wielded tremendous influence over much of the judicial and scholarly thinking.").

29. See Fallon, Jr., *Jurisdiction-Stripping*, *supra* note 9, at 1045.

30. See, e.g., RITZ, *supra* note 27, at 33, 41; David E. Engdahl, *What's in a Name? The Constitutionality of Multiple "Supreme" Courts*, 66 IND. L.J. 457, 463, 466–68, 491, 504 (1991); Pfander, *Jurisdiction-Stripping*, *supra* note 22, at 1435–36.

habeas corpus, rather than necessarily through direct appellate review.³¹ For Pfander, the English conception of supremacy and the requirement in the Constitution that all courts and tribunals established or constituted by Congress remain “inferior to” the “one supreme Court” inform debates over the Exceptions Clause.

Later, Pfander and I examined the supreme Scottish civil court, the Court of Session, as well as commentary from Scottish legal writers, deeply familiar to the Framers, about judicial hierarchy.³² In our view, the Court of Session provided the Framers with a model for the hierarchical judicial branch created by Article III, and the commentary we examined tends to confirm that a court’s supremacy depended on its ability to review the judgments of inferior courts and that a supreme court’s supervisory powers were a core attribute of its supremacy.³³

Still, there has been no comprehensive examination of how statutory exceptions promulgated by Parliament were interpreted and implemented by courts in Great Britain.³⁴ This lack of focus on pre-1789 case law has left us with something of a blind spot in our attempts to understand the Exceptions Clause. Many scholars, most notably David Engdahl and now-Judge Amy Coney Barrett, have reached different conclusions than Pfander about whether hierarchical review and control were inherent features of a supreme court in England, and many have questioned whether the Exceptions Clause may have altered any shared background understanding about supremacy that the founding generation may have had.³⁵ Surveying the disputes, Richard Fallon has concluded, somewhat understandably, that the lack of historical evidence and precedent speaking directly to these points makes it difficult to adopt (or reject) the supremacy account’s proposed limitation on Congress’s jurisdiction-stripping power.³⁶

In this Article, I seek to supply that missing historical evidence by conducting an analysis of previously unexamined pre-1789 British case law and statutes concerning or referencing parliamentary restrictions on a supreme court’s original or appellate jurisdiction. The evidence that I have uncovered suggests that such restrictions (called privative provisions) were a regular feature of the legal landscape in Britain and that terms such as

31. See Pfander, *Jurisdiction-Stripping*, *supra* note 22, at 1442–47.

32. See Pfander & Birk, *Scottish Judiciary*, *supra* note 27, at 1614–18, 1653–56.

33. See *id.* at 1656–84.

34. Previously, Pfander and I engaged in a limited examination of how the Court of Session interpreted a statute vesting final appellate jurisdiction in an inferior court. See *id.* at 1681–83 (exploring how the Scottish Court of Session treated an explicit limitation on its appellate jurisdiction in a 1791 case, *Countess of Loudon v. Trustees*).

35. See Amy Coney Barrett, *The Supervisory Power of the Supreme Court*, 106 COLUM. L. REV. 324, 347–54, 364–65 (2006); Engdahl, *supra* note 30, at 466, 503–04; see also RITZ, *supra* note 27, at 35.

36. See Fallon, Jr., *Jurisdiction-Stripping*, *supra* note 9, at 1092–93.

“exclusion” and “exception” as applied to jurisdictional statutes were widely used legal terms of art with well-understood implications.

Parliament frequently excepted or “excluded” certain categories of cases from the appellate jurisdiction of King’s Bench and the Court of Session. These exceptions encompassed a wide variety of cases, including cases from certain lower courts or geographic areas, involving certain persons, and raising certain issues. Contrary to the views of Claus and Calabresi and Lawson, then, there would seem to have been nothing anomalous or improper to the Framers in empowering Congress to exclude certain issues or questions of federal law from the Court’s appellate jurisdiction, or even to make an inferior court’s determinations final in the vast majority of cases. Questions of functional organization and geographic inconvenience might even make such exceptions necessary to the orderly administration of justice.

The evidence also shows, however, that jurisdictional exceptions in Britain were subject to definite limitations. Specifically, exceptions were limited in scope and generally applied only to proscribe as-of-right appellate review, not a supreme court’s discretionary power of review by way of certiorari and other prerogative writs. By employing the term in Article III, therefore, it may be that the Framers contemplated a much more modest power over the Supreme Court’s appellate jurisdiction than adherents of the orthodox view currently believe.

In addition, and more intriguingly, a robust and well-developed line of precedent in British case law establishes that even statutes removing the power of King’s Bench or the Court of Session to exercise discretionary appellate review were always understood to leave intact the jurisdiction of these supreme courts to correct jurisdictional excesses and obvious errors or denials of due process by inferior courts and tribunals through the writs of prohibition, mandamus, and habeas corpus (and their Scottish equivalents). To be sure, the scope of this supervisory review was far more limited than it would have been on appeal or even on certiorari. But it still was flexible enough to permit the supreme courts to maintain their supremacy and to prevent inferior courts from acting outside the law of the land.

This precedent recently resurfaced in *Kirk v Industrial Relations Commission of New South Wales*,³⁷ an important decision from the High Court of Australia that has been largely overlooked by American scholars. In *Kirk*, the High Court held that a statute removing from an Australian state supreme court the power to grant discretionary review of inferior administrative court decisions was unconstitutional. Relying on early-nineteenth century English decisions regarding the supremacy of King’s Bench, the High Court concluded that the ability to conduct prerogative writ review for extraordinary errors was a defining and inherent attribute of a “su-

37. (2010) 239 CLR 531 (Austl.).

preme” court and could not be removed by a privative provision purporting to restrict a supreme court’s appellate jurisdiction.³⁸

The evidence presented in this Article thus builds on and provides important confirmation for the supremacy account’s view of the U.S. Supreme Court and the constitutional limits on Congress’s jurisdiction-stripping power. First, although the evidence establishes a firm background understanding among the Framers that Congress could make exceptions to the Supreme Court’s appellate jurisdiction, it also shows that the background expectation likely was that Congress’s exceptions power would be limited in scope. This leaves room—and provides historical support—for those who have argued that the Exceptions Clause is subject to internal limits rooted in constitutional structure and separation of powers principles.

Second, the evidence demonstrates that the Framers likely would have understood that supervisory review was an inherent feature of the Supreme Court’s appellate jurisdiction by virtue of its supremacy and that, under established British precedent, this power not only could be deployed in the absence of general as-of-right appellate jurisdiction, but also that it would survive any exceptions that Congress might make. Under this reading, and contrary to Pfander’s prior concession, Congress has no more power to remove the Court’s residual supervisory jurisdiction over state courts through exceptions than it does to free inferior federal courts from the Court’s oversight. Moreover, while Pfander previously has speculated that limitations inherent in the writs of mandamus and prohibition might preclude the Supreme Court from correcting an inferior court’s constitutional interpretations in the absence of a previously applicable precedent, an examination of practice in the British supreme and superior courts establishes that prohibition actually could be used where necessary to correct important *de novo* legal errors as well.

The Article contains six parts. Part II provides background on Article III’s Exceptions Clause and the debate regarding its meaning. Part III catalogues the various types of jurisdictional privative provisions contained in parliamentary statutes and the terms used in cases to describe those restrictions, with a particular focus on the terms “exceptions” and “exclusions.” Part IV explores the body of case law in which the British supreme and superior courts grappled with such restrictions on their jurisdiction and how they interpreted exceptions and other limitations to affect their residual supervisory review power. Part V discusses lessons that can be drawn from this evidence for the ongoing jurisdiction-stripping debate among federal courts scholars in the United States. Part VI concludes.

38. *See id.* at 566.

II. CONGRESS'S POWER OVER THE SUPREME COURT'S APPELLATE JURISDICTION

A. *The Exceptions Clause Debate*

Article III of the United States Constitution enumerates the subjects of the federal judicial power and then allocates those subjects to the Supreme Court's original and appellate jurisdiction.³⁹ The Constitution grants the Supreme Court "original" jurisdiction over certain cases and controversies, and then states that the Supreme Court's jurisdiction over all remaining subjects of federal jurisdiction shall be "appellate," but "with such Exceptions, and under such Regulations, as the Congress shall make."⁴⁰

Whether the Exceptions Clause grants Congress unlimited power to remove the Supreme Court's appellate jurisdiction over cases and controversies enumerated by the Constitution has been a subject of unending controversy. From the inception of this debate, adherents of the orthodox view, such as Herbert Wechsler, Paul Bator, Gerald Gunther, and Martin Redish, have maintained, sometimes reluctantly, that no internal limits constrain Congress's ability to remove certain cases or questions of federal law from the Supreme Court's appellate purview, even if motivated by a desire to nullify controversial precedent or to foreclose an unwanted decision.⁴¹

Troubled by this conclusion, some have argued that the Exceptions Clause should not permit Congress to compromise the Supreme Court's "essential role" or "essential function" within the constitutional scheme.⁴² Although such a limit is necessarily somewhat indeterminate, scholars who have adopted the essential function view have proposed assessing jurisdiction-stripping legislation on a case-by-case basis for compliance with general separation of powers principles or for impermissible motives.

Debates about the meaning of the Exceptions Clause have largely proceeded as if the meaning of the term "exceptions" is obvious and in little

39. U.S. CONST. art. III, § 2.

40. *Id.*

41. See, e.g., Bator, *supra* note 16, at 1033–35; Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 898 (1984); Redish, *supra* note 8, at 902–03; Wechsler, *supra* note 8, at 1004–07; see also, e.g., Julian Velasco, *Congressional Control over Federal Court Jurisdiction: A Defense of the Traditional View*, 46 CATH. U. L. REV. 671, 715 (1997) ("A plain reading of the term [exceptions] suggests that it means a departure from the general rule. The Constitution establishes a general rule—that the Supreme Court has appellate jurisdiction over all the other [enumerated] Cases—but allows Congress to make exceptions. Any departure from the general rule would be an exception. Since the Constitution permits such Exceptions . . . as the Congress shall make, there do not appear to be internal limits on this power." (internal quotations and citations omitted)).

42. See, e.g., Hart, *supra* note 8, at 1364–65; Ratner, *supra* note 11, at 201.

need of further explication.⁴³ Thus, those who have argued that an exception should not be permitted to swallow the general rule that the Court “shall” have appellate jurisdiction⁴⁴ or to destroy the Court’s “essential function” in the constitutional scheme have struggled to reconcile the seemingly clear power vested in Congress with the potentially dire separation of powers implications of that power, even as applied to only one particular constitutional question or class of cases.⁴⁵

Champions of a limited exceptions power also have had to confront the apparent lack of any basis for such a limitation in the text of the Constitution.⁴⁶ That would not necessarily be fatal to their argument. As Richard Fallon has noted, although scholarly dialogue over the Exceptions Clause focuses almost exclusively on textual arguments and claims from the drafting and ratification history, the Supreme Court’s treatment of jurisdiction-stripping statutes often has included doctrinal and theoretical considerations.⁴⁷ Indeed, the Court itself frequently has declared limitations on ostensible plenary congressional power based on separation of powers and federalism principles not actually present in constitutional text.⁴⁸ Questions of constitutional theory very well may impose limits on the extent to which Congress can use its power under the Exceptions Clause to diminish the authority of the Supreme Court or to insulate cases challenging federal or state laws or actions from the Supreme Court’s appellate review.⁴⁹

Another challenge has been more formidable: since the first Judiciary Act (of 1789), Congress has made extraordinarily broad exceptions to the Supreme Court’s appellate jurisdiction, frequently removing entire categories of cases from the Court’s as-of-right appellate jurisdiction either expressly or by negative implication,⁵⁰ and today there are actually very few

43. *But see* Ratner, *supra* note 26, at 939 (examining contemporary dictionary and common law definitions of the term and concluding that “neither an exception nor a regulation can destroy the essential characteristics of the subject to which it applies”).

44. *See, e.g., id.*

45. *See* Velasco, *supra* note 41, at 715 (“Even if an exception were made for some of the most controversial subjects—e.g., abortion, school prayer, and busing—it would not be so great as to find that there was no longer an exception but a new rule.”).

46. *See, e.g.,* Redish, *supra* note 8, at 906.

47. *See* Fallon, Jr., *Jurisdiction-Stripping*, *supra* note 9, at 1065–87.

48. *See* John F. Manning, *The Means of Constitutional Power*, 128 HARV. L. REV. 1, 31–48 (2014); *see also id.* at 44 nn.256–57 (discussing examples of interpretations of Article III).

49. *See, e.g.,* Fallon, Jr., *Jurisdiction-Stripping*, *supra* note 9, at 1044–56.

50. Blocher, *supra* note 8, at 1005 n.168 (“One striking illustration of Congress’s broad power over appellate jurisdiction, at least to modern readers, is the fact that between the passage of the Judiciary Act of 1789 . . . and the Act of December 23, 1914 . . . the Court had no appellate jurisdiction over state court decisions that struck down state laws that conflicted with the Federal Constitution.” (citing RICHARD H. FALLON, JR. ET AL., HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 320–21 (5th ed. 2003))); Casto, *supra* note 7, at 1118–20;

categories of cases left within that jurisdiction.⁵¹ Instead, almost all cases today can go to the Supreme Court only if the Court grants discretionary review, usually by certiorari, but sometimes also by mandamus or habeas corpus.⁵² These discretionary remedies typically are limited in scope; they often have stricter standards of review, are limited to one or a few discrete (usually legal) questions, and they do not permit full review of factual and legal errors below.⁵³ The vast majority of appeals today are heard by the Circuit Courts of Appeal, where an appellant can, as of right, seek full review of the factual and legal bases for a final judgment and other decisions by the trial court.⁵⁴

In recent years, a growing number of scholars have begun to revolt against the orthodox account. This revolt has come in two primary incarnations. First, several scholars, including Steven Calabresi and Gary Lawson, have argued on textual and historical grounds that the Exceptions Clause has been fundamentally misread and does not permit Congress to remove any constitutionally vested cases from the Supreme Court's appellate jurisdiction. Instead, these scholars contend, the Exceptions Clause as originally understood was designed to permit Congress to shift cases within the Court's appellate jurisdiction over to its *original* jurisdiction.⁵⁵

Proponents of this "distributive account" have mounted powerful evidence in support of their revisionist reading of the Exceptions Clause. But the evidence is far from decisive, as contrary readings of the text, structure, and drafting history call many of the distributive account scholars' conclusions into question.⁵⁶ Moreover, the distributive account faces other, perhaps insurmountable, obstacles.

For one thing, the account is inconsistent with the Court's acquiescence throughout its history in congressional limits on its appellate jurisdiction.⁵⁷ For another thing, the account's proposal that Congress may add to the Supreme Court's original jurisdiction was squarely rejected in

Daniel J. Meltzer, *The History and Structure of Article III*, 138 U. PA. L. REV. 1569, 1593-94 (1990).

51. See 16B CHARLES ALAN WRIGHT & ARTHUR R. MILLER ET AL., FEDERAL PRACTICE AND PROCEDURE § 4001 (3d ed. 2012) [hereinafter WRIGHT & MILLER]; Grove, *supra* note 15, at 251-52, 255-57.

52. See 16B WRIGHT & MILLER, *supra* note 51, § 4001; see also 28 U.S.C. § 1254(1) (2012) (providing for certiorari jurisdiction from U.S. courts of appeals); 28 U.S.C. § 1257 (providing for certiorari jurisdiction over cases from "the highest court of a State in which a decision could be had"); 28 U.S.C. § 1651(a) (authorizing the Court to "issue all writs necessary or appropriate in aid of [its] respective jurisdictions and agreeable to the usages and principles of law").

53. See SUP. CT. R. 10 (certiorari); *id.* 20(1) (extraordinary writs); Pfander, *Jurisdiction-Stripping*, *supra* note 22, at 1460.

54. See 28 U.S.C. § 1291; 15A WRIGHT & MILLER, *supra* note 51, § 3901.

55. See, e.g., Calabresi & Lawson, *supra* note 19, at 1008; Claus, *supra* note 19, at 61-62.

56. See Fallon, Jr., *Jurisdiction-Stripping*, *supra* note 9, at 1044-56.

57. See Pfander, *Jurisdiction-Stripping*, *supra* note 22, at 1434-34, 1465-66.

Marbury v. Madison.⁵⁸ *Marbury* is famous for its articulation of the principle of judicial review by Chief Justice John Marshall,⁵⁹ but the case's core holding was that a provision of the Judiciary Act purporting to grant the Supreme Court original jurisdiction over petitions for mandamus against federal officers was unconstitutional. Article III's vesting of original jurisdiction in the Supreme Court in certain specified cases, Chief Justice Marshall explained, was a ceiling as well as a floor, and Congress was not authorized to add to the categories of cases that the Court could hear in the first instance.⁶⁰ Proponents of the distributive account make a case for overruling or limiting these precedents in favor of restoring what they view as the Exceptions Clause's original understanding. But it is, as a practical matter, highly unlikely that the Supreme Court would be willing to jettison so much constitutional history and precedent to adopt the distributive account's reading.⁶¹ That ship, in other words, may have sailed.

Other scholars, most notably James Pfander, have come to champion the argument that Article III's requirements of unity, supremacy, and inferiority ("one supreme Court" and "such inferior Courts as Congress may from time to time ordain and establish"⁶²) impose a textual limitation on Congress's exceptions power by requiring that all inferior courts remain subordinate to the one "supreme Court" specified in Article III.⁶³ On this view, the capitalization of the noun in the original text is important to note, because it makes clear that the non-capitalized word "supreme" was used as an adjective rather than as a title, meaning that the court we know today as the Supreme Court of the United States was described as (rather than merely titled) "supreme."⁶⁴ Calabresi and Lawson, for example, con-

58. 5 U.S. (1 Cranch) 137, 175–80 (1803).

59. See, e.g., Dean Alfange, Jr., *Marbury v. Madison and Original Understandings of Judicial Review: In Defense of Traditional Wisdom*, 1993 SUP. CT. REV. 329, 329 (1993).

60. See *Marbury*, 5 U.S. (1 Cranch) at 174.

61. See Fallon, Jr., *Jurisdiction-Stripping*, *supra* note 9, at 1089 n.215 (concluding that "it would be preposterous for the Court to overrule *Marbury* on this point, which has been settled for over two hundred years, on the basis of a disputable claim about the original understanding of Article III that would also entail the unconstitutionality of provisions of the 1789 Judiciary Act excepting cases from the Supreme Court's appellate jurisdiction").

62. U.S. CONST. art. III, § 1 (emphasis added).

63. See Pfander, *Jurisdiction-Stripping*, *supra* note 22, at 1435; cf. Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 869 (1994) (arguing that an inferior court is obliged to follow Supreme Court precedents even where Congress has removed the Supreme Court's appellate jurisdiction).

64. See Pfander, *Jurisdiction-Stripping*, *supra* note 22, at 1508–11 (arguing that the description of the Court as supreme and of the lower federal courts as "inferior" denotes an aspect of hierarchy requiring some measure of oversight and control); Pfander & Birk, *Scottish Judiciary*, *supra* note 27, at 1674–77 (discussing Scottish legal texts explaining that supremacy and inferiority primarily denote a power of review and oversight). *But see* Barrett, *supra* note 35, at 344–53 (noting possible meanings of supreme that do not imply hierarchical control).

duct a close textual and structural analysis of Article III and conclude that the Supreme Court must have the final word in all cases raising questions of federal law.⁶⁵ Laurence Claus has made a similar argument, concluding that Congress cannot make issue-based exceptions to the Supreme Court's appellate jurisdiction.⁶⁶

Under what Pfander has termed the "supremacy account," the Constitution's use of the terms "supreme" and "inferior" requires that the Supreme Court possess enough supervisory authority—put into practice through discretionary writs such as prohibition, mandamus, and habeas corpus—to maintain its supremacy over inferior courts.⁶⁷ Congress enjoys wide authority to make exceptions and to impose restrictions on the Supreme Court's as-of-right appellate jurisdiction—as it often has done—but it cannot wholly insulate the judgments of inferior courts from the Supreme Court's discretionary supervision.⁶⁸

By providing a textual foundation for meaningful and well-defined limits on congressional control over the Supreme Court's appellate jurisdiction that are consistent with the broad exceptions power Congress has historically exercised, the supremacy account offers an elegant solution to the challenges faced by proponents of a limited exceptions power. But the supremacy account faces some difficulties of its own.

To begin with, Pfander has adhered to the modern understanding that mandamus and prohibition can be used only to prevent inferior courts from exceeding their jurisdiction or to enforce inferior court compliance with clearly established law, such as the Court's prior precedents.⁶⁹ If this were the limit of the Supreme Court's supervisory jurisdiction, then the Court might lack the power to review new interpretations of federal statutory or constitutional law or to resolve divergent interpretations among lower courts.⁷⁰ To put this in perspective, it would enable the Court to enforce compliance with its recent precedent striking down the Defense of Marriage Act, notwithstanding a congressional statute withdrawing the Court's jurisdiction to decide questions relating to gay marriage, but it would not prevent a statute aimed at preempting a possible Supreme Court decision upholding the right to carry a concealed weapon.

Another limitation is that because Article III's requirements of supremacy and inferiority apply only to the federal judicial system, the supremacy account would seem to permit Congress to remove Supreme Court appellate review over most cases in state courts. Thus, outside situations in which Congress has essentially appointed a state court as an inferior federal tribunal pursuant to its Article I powers by removing all lower

65. Calabresi & Lawson, *supra* note 19, at 1007–08.

66. Claus, *supra* note 19, at 64.

67. Pfander, *Jurisdiction-Stripping*, *supra* note 22, at 1500–01.

68. *See id.* at 1511–12.

69. *Id.* at 1505–08.

70. *See id.* at 1508.

federal court jurisdiction, the Supreme Court's constitutionally vested supervisory powers would not extend to state court decisions.⁷¹

Moreover, the constitutional source of the Court's supervisory power under Pfander's account is not entirely clear. To the extent the supremacy account proposes the existence of inherent supervisory jurisdiction independent of the Court's appellate jurisdiction, the account must address the criticism that the Supreme Court has consistently stated, since *Marbury*, that it possesses only the jurisdiction conferred on it by written law.⁷² Edward Hartnett, for example, has argued that the supremacy account fails because the Constitution creates a defined and circumscribed jurisdiction for the Supreme Court that does not include a free-standing supervisory power. Instead, for Hartnett, the Supreme Court possesses only a limited original jurisdiction conferred by Article III and an appellate jurisdiction subject to plenary congressional control.⁷³

By contrast, to the extent that one conceives of the Court's supervisory power as rooted in the appellate jurisdiction granted by Article III, then the supremacy account still must reckon with the Exceptions Clause. Although scholars have argued that the textual requirements of supremacy and inferiority set a constitutional threshold beyond which statutory exceptions cannot tread,⁷⁴ David Engdahl and Judge Amy Coney Barrett have challenged the degree to which the terms "supreme" and "inferior" connote a hierarchical or supervisory relationship between courts, let alone specify the degree of supervisory power required.⁷⁵ In this vein, although Fallon appears to sympathize with the supremacy account, he has refrained from endorsing it because of the lack of "precedent or historical material speaking clearly to the issue."⁷⁶ Pfander and I subsequently uncovered evidence in historical Scottish legal texts supporting the supremacy account's understanding of the terms, but, as Judge Barrett has also argued, the Exceptions Clause may explicitly qualify the degree of supervisory power accompanying the Court's supremacy.⁷⁷

Thus, as the debate now stands, the Exceptions Clause remains a mystery, and a deeply divisive one at that. There is little agreement about the nature of the power conferred (or not conferred) by the clause, its likely purpose, or any limits on its operation and effect. The remainder of this Article provides answers to those questions from a largely overlooked

71. See Calabresi & Lawson, *supra* note 19, at 1034 n.137 (citing James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 672–89 (2004)).

72. See Barrett, *supra* note 35, at 363–64.

73. Edward A. Hartnett, *Not the King's Bench*, 20 CONST. COMMENT. 283, 308 (2003).

74. See Pfander & Birk, *Scottish Judiciary*, *supra* note 27, at 1683–84.

75. See Barrett, *supra* note 35, at 344–53, 365; Engdahl, *supra* note 30, at 491.

76. Fallon, Jr., *Jurisdiction-Stripping*, *supra* note 9, at 1092–93; see also Pfander & Birk, *Scottish Judiciary*, *supra* note 27, at 1674–77.

77. See Barrett, *supra* note 35, at 365.

source: common law and statutory precedent from Great Britain prior to and around the time of the framing of the Constitution.

B. *Relevance of British Practice and Precedent to the Exceptions Clause Debate*

While, as noted, some scholars have reviewed the drafting history of Article III and contemporaneous commentary for signs of the Framers' intent or the original understanding of the operation of the clause as a whole, scholars have largely missed the possibility that a jurisdictional exception might have a common-law pedigree and that this pedigree and the practice of British courts in the wake of parliamentary exceptions might have informed how the Framers would have understood the Exceptions Clause to operate.

This is a potentially significant oversight. As Chief Justice William Howard Taft put it over ninety years ago:

The language of the Constitution cannot be interpreted safely except by reference to the common law and to British institutions as they were when the instrument was framed and adopted. The statesmen and lawyers of the Convention who submitted it to the ratification of the conventions of the Thirteen States, were born and brought up in the atmosphere of the common law, and thought and spoke in its vocabulary [W]hen they came to put their conclusions into the form of fundamental law in a compact draft, they expressed them in terms of the common law, confident that they could be shortly and easily understood.⁷⁸

Whatever one's view of whether such evidence of original understanding is or should be dispositive of constitutional meaning, reference to the common law and British institutions can be particularly instructive with respect to Article III. Although not all of the Framers were lawyers, Article III was crafted with an obvious eye towards America's shared legal heritage with the mother isle and with the terms, concepts, and principles developed in its law.⁷⁹ The debates among the Framers, in the public, and at the ratifying conventions show a general familiarity and sense of connec-

78. *Ex Parte Grossman*, 267 U.S. 87, 108–09 (1925); see also *Coleman v. Miller*, 307 U.S. 433, 460 (1939) (Frankfurter, J., dissenting) (arguing that “the framers of the Judiciary Article gave merely the outlines of what were to them the familiar operations of the English judicial system and its manifestations on this side of the ocean before the Union”). On the importance of Scottish law and institutions to the Framers, see Pfander & Birk, *Scottish Judiciary*, *supra* note 27, at 1631–42.

79. The Constitution undoubtedly marked a major break from and innovation upon the political models of Great Britain. Nevertheless, there is little disagreement that Article III employs multiple legal terms of art—such as “good behaviour,” “cases,” “controversies,” “law and equity,” “admiralty and maritime jurisdiction,” “corruption of the blood”—which connote a shared heritage with the mother isle.

tion with the British political and legal traditions the American people had inherited and were endeavoring to adapt to their own purposes.⁸⁰

Thus, exploring how British courts vested with a degree of supremacy—such as Scotland’s Court of Session and England’s King’s Bench—understood statutory restrictions on their appellate jurisdiction to affect their ability to supervise inferior tribunals and how they dealt with such restrictions in practice might provide the context heretofore missing in the debate over Congress’s ability to restrict the appellate jurisdiction of the U.S. Supreme Court.⁸¹

An analysis of British cases and statutes has the further benefit that Parliament was not constrained—and need not have felt any fear of being constrained—by a written constitution limiting its ability to withdraw certain cases from the appellate jurisdiction of its superior and supreme courts, or even to abolish the jurisdiction of an English superior court altogether.⁸² As such, this analysis could provide a useful guide to how an unconstrained power to make exceptions to a supreme court’s appellate jurisdiction would have been expected to operate.⁸³

80. *See id.* at 1627–49; *Brutus XV*, N.Y. J. (Mar. 20, 1788), reprinted in 16 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: COMMENTARIES ON THE CONSTITUTION, PUBLIC AND PRIVATE 431–34 (John P. Kaminski & Gaspare J. Saladino eds., 1986).

81. Supremacy in Britain was a somewhat relative concept. Ultimately, the highest “supreme” court was the House of Lords, which could reverse the judgments of all British courts except the High Court of Justiciary, Scotland’s supreme criminal court. *See Pfander & Birk, Scottish Judiciary, supra* note 27, at 1652–53. The independence of the High Court of Justiciary was guaranteed by the Articles of Union. *See id.* at 1618. Nevertheless, though inferior to Parliament, King’s Bench and the Court of Session often were referred to as “supreme” in their respective spheres and with respect to the various inferior courts of the realm. *See id.* at 1618, 1651.

82. The Articles of Union imposed quasi-constitutional limits on Parliament’s ability to make “alterations” to the Scottish Court of Session and the supreme Scottish criminal court, the High Court of Justiciary. For a discussion, *see id.* at 1661–62. The Articles also prevented Parliament from fundamentally altering the jurisdiction and hierarchical position of either court, but as discussed in Parts III.B and III.C, *infra*, these protections did not stop Parliament from making exceptions to the Court of Session’s jurisdiction as a matter of course.

83. The comparison to Parliament may not be entirely apposite, given that the lack of written constitutional constraints and the ever-present possibility of an appeal to the House of Lords also would have given Parliament less strategic motivation than the U.S. Congress to exclude superior court appellate jurisdiction for political reasons. Even if King’s Bench were to issue a final judgment that Parliament did not like or that purported to limit Parliament’s powers in any respect, the House of Lords could simply reverse that judgment on appeal or pass a law altering the landscape. On the other hand, these same structural features also would have enabled Parliament to intervene had King’s Bench contravened legislative intent by insisting on the survival of their supervisory powers in the wake of an exception.

III. VARIETIES OF JURISDICTIONAL RESTRICTIONS IN BRITISH LAW AT THE TIME OF THE FRAMING

A. *Overview of the English and Scottish Judicial Systems*

To modern observers familiar with the clean lines of the federal court system in the United States, the English judicial system at the time of the framing has something of the appearance of a Jackson Pollock painting. Unlike the centrally planned and pyramidal American federal courts, the varying jurisdictions of England's courts developed over time and through competition for business (and accompanying court fees). In addition to the profusion of local, baronial, and county courts, the English judicial system consisted of separate courts for cases at common law, equity, admiralty, and domestic matters. King's Bench held the country's central criminal jurisdiction, and also, in conjunction with the Court of Common Pleas, heard civil cases at common law, while the Court of Chancery heard civil cases at equity. The High Court of Admiralty determined matters maritime, the Court of Exchequer decided cases involving the Crown's revenue, and ecclesiastical (religious) courts generally presided over cases involving domestic relations and probate. These coordinate courts exercised at times overlapping authority. Appeals from these courts could be made to the Court of Exchequer Chamber, and from thence to the House of Lords.⁸⁴

Nevertheless, King's Bench was considered a "supreme" court and thus exercised a measure of supervisory oversight over the country's inferior courts, including the common pleas, ecclesiastical courts, and the High Court of Admiralty. In addition to possessing an as-of-right appellate jurisdiction over civil and criminal cases at common law, King's Bench heard criminal cases removed from inferior courts through the writ of certiorari.⁸⁵ Writs of mandamus and habeas corpus required inferior jurisdictions to justify their inaction or their imprisonment decisions, and writs of prohibition compelled lower courts to refrain from hearing matters outside their jurisdiction.⁸⁶

As Pfander and I have noted, Scotland offered a hierarchical model closer to the modern American understanding.⁸⁷ Scotland had two supreme courts, one for civil matters, the Court of Session, and one for criminal matters, the High Court of Justiciary. Although Scotland also had a variety of courts, including admiralty and ecclesiastical courts, all appeals,

84. See JAMES E. PFANDER, *ONE SUPREME COURT* 40–41 (2009). The Court of Exchequer Chamber initially was a common law college of jurists but later was formalized in a series of statutes enacted in the fourteenth, sixteenth, and nineteenth centuries. See George Jarvis Thompson, *The Development of the Anglo-American Judicial System* (pt. 3), 17 *CORNELL L.Q.* 9, 428–29 (1932).

85. See S. A. de Smith, *The Prerogative Writs*, 11 *CAMBRIDGE L.J.* 40, 45–48 (1951).

86. See 1 WILLIAM HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 227–29 (3d ed. 1922). For a description of the various writs, see generally de Smith, *supra* note 85.

87. See Pfander & Birk, *Scottish Judiciary*, *supra* note 27, at 1657–71.

civil or criminal, in common law or at equity, flowed to one or the other of the supreme courts. After Scotland and England were joined by the Articles of Union, the House of Lords heard appeals from the Court of Session in civil cases, but the House did not hear appeals from the High Court of Justiciary in criminal matters.

The Court of Session was considered Scotland's supreme civil court. In addition to exercising a wide-ranging original jurisdiction and deciding appeals from inferior civil courts, the Court of Session also exercised a supervisory jurisdiction over all courts in Scotland other than the High Court of Justiciary. Supervisory review in the Court of Session was conducted through "processes" that roughly approximated prerogative writ review in England: the process of "liberation" was the equivalent of habeas corpus, "advocation" was the equivalent of certiorari, and "suspension" and "reduction" were used in somewhat the same manner as mandamus and prohibition.⁸⁸

B. *Statutory Withdrawals of Jurisdiction*

By the late eighteenth century, parliamentary statutes in Great Britain allocating, regulating, and limiting the jurisdiction of various courts had cultivated an ancient and well-established pedigree. For instance, in 1399, an act issued in the first year of the reign of Henry IV provided that "all the Appeals to be made of Things done out the Realm, shall be tried and determined before the Constable and Marshal of England for the time being" and, somewhat surprisingly given the later accession of the House of Lords to its position as the dernier resort, declared that "no Appeals be from henceforth made or any wise pursued in Parliament, in any Time to come."⁸⁹ This pedigree is not especially surprising. The Crown depended on its central and local courts for general administration, and the frequent conflicts among various jurisdictions in their competition for business or for political power often called for parliamentary intervention.⁹⁰

88. *See id.* at 1654.

89. 1399, 1 Hen. 4 c. 14 (Eng.); *see also* An Act for Redresse of Erronious Judgements in the Courte Comonly called the Kinges Benche 1584–85, 27 Eliz. 1 c. 8 (Eng.) (providing for writ of error review of King's Bench decisions in the Court of Exchequer Chamber and then to the House of Lords); An Act for Prevention of Frauds and Perjuries 1667, 29 Car. 2 c. 3, § 23 (Eng.) ("And it is hereby declared, that nothing in this act shall extend to alter or change the jurisdiction or right of probate of wills concerning personal estates but that the prerogative court of the archbishop of Canterbury, and other ecclesiastical courts, and other courts having right to the probate of such wills, shall retain the same right and power as they had before, in every respect subject nevertheless to the rules and directions of this act.").

90. *See* Daniel D. Birk, Marbury, Hayburn's Case, and the Separation of the Judicial and Executive Powers 15–16 (July 20, 2016) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2811668 [<https://perma.cc/P5EB-HFD4>].

Parliament also used the courts in its own political struggles with the Catholic Church and, later, the Crown,⁹¹ and acts of Parliament extending or limiting the jurisdiction of various courts depending on their allegiances played a significant role in those struggles. For example, one of the first acts of Parliament issued in the reign of Elizabeth I (1558–1603) abolished the power of the Catholic Church and transferred ecclesiastical jurisdiction to the Crown in particularly strongly worded terms:

[N]o foreign Prince, Person, Prelate, State or Potentate Spiritual or Temporal, shall . . . use, enjoy or exercise any Manner of Power, Jurisdiction, Superiority, Authority, Preheminence [sic] or Privilege Spiritual or Ecclesiastical, within this Realm, or within any other your Majesty's Dominions or Countries that now be, or hereafter shall be, but from thenceforth the same shall be clearly abolished out of this Realm, and all other your Highness Dominions for ever

. . . .
And . . . [t]hat such Jurisdictions, Privileges, Superiorities and Preeminences [sic] Spiritual and Ecclesiastical, as by any Spiritual or Ecclesiastical Power or Authority hath heretofore been, or may lawfully be exercised or used for the Visitation of the Ecclesiastical State and Persons, and for Reformation, Order and Correction of the same, and of all Manner of Errors, Heresies, Schisms, Abuses, Offences, Contempts and Enormities, shall for ever, by Authority of this present Parliament, be united and annexed to the Imperial Crown of this Realm.⁹²

Another instance of a politically motivated jurisdictional restriction can be seen in the statute of the Long Parliament abolishing the royal prerogative court of Star Chamber in 1641. In addition to dissolving the court itself, the act removed Star Chamber's jurisdiction and stripped the King and Privy Council of any jurisdiction over private property:

Be it ordained and enacted by the Authority of this present Parliament[,] That the said Court commonly called the Star Chamber[,] and all Jurisdiction[,] Power and Authority belonging unto[,] or exercised in the same Court[,] or by any the Judges[,] Officers or Ministers thereof[,] be . . . clearly and absolutely dissolved[,] taken away and determined[;] and that . . . neither the Lord Chancellor[,] or Keeper of the Great Seal of England[,] the Lord Treasurer of England[,] the Keeper of the King's Privy Seal[,] or President of the Council[,] nor any Bishop[,] Tempo-

91. See 5 COMMONS DEBATES 1621, at 10 (Wallace Notestein et al. eds., 1935) (recording the claim of the Master of Wards that Parliament "hath not authority to determine [j]urisdiction of Courts, it belongs to the prerogative of Kinge," and the response in the House of Commons that "[j]urisdiction of courts are to be limited by parliament").

92. 1558, 1 Eliz. c. 1, §§ 16–17 (Eng.).

ral Lord[,] Privy Counsellor [sic] or Judge[,] or Justice whatsoever[,] shall have any Power or Authority to hear[,] examine or determine any Matter or Thing whatsoever[,] in the said Court commonly called the Star Chamber[,] or to make[,] pronounce or deliver any Judgment[,] Sentence[,] Order or Decree[,] or to do any Judicial or Ministerial Act in the said Court

. . . .

Be it likewise declared and enacted by Authority of this present Parliament[,] That neither His Majesty[,] nor His Privy Council[,] have or ought to have any Jurisdiction[,] Power or Authority[,] by English Bill[,] Petition[,] Articles, Libel or any other arbitrary way whatsoever[,] to examine or draw into question[,] determine or dispose of the Lands[,] Tenements[,] Hereditaments[,] Goods or Chattels of any the Subjects of this Kingdom[;] But that the same ought to be tried and determined in the ordinary Courts of Justice[,] and by the ordinary Course of the Law.⁹³

Aside from such attempts to rip out disfavored courts root and branch, most statutes restricting jurisdiction were more administrative in nature. In the reign of Mary I (1553–1558), for example, the English Parliament granted the Queen the power “to alter, change, unite, transpose, dissolve or determine” various fiscal courts, including the Courts of Firstfruits and Tenths and the Court of Augmentations of the Revenues of the King’s Crown, “and to reduce the same Courts, or any of them, into One, Two, or more Court or Courts, or to unite and annex the said Courts or any Two or more of them together, or to any other of Her Majesty’s Courts of Record, as to her it should be thought most convenient and best.”⁹⁴ Mary I exercised this power by dissolving those courts and consolidating their jurisdiction in the Court of Exchequer, which enabled the Crown to administer revenue and taxation out of a single central court.⁹⁵ Other, less drastic restrictions on the jurisdiction of various courts were routine.⁹⁶

93. An Act for [the Regulating] the Privie Councill and for Taking Away the Court Commonly Called the Star Chamber 1640, 16 Car. c. 10, §§ 1, 3 (Eng.).

94. 1558, 1 Eliz. c. 4, § 15.

95. To be sure, this act itself may have had a political motivation of promoting central over local control.

96. *See, e.g.*, An Act to Oblige the Justices of the Peace at Their General or Quarter Sessions to Determine Appeals 1732, 5 Geo. 2 c. 19, § 2 (Gr. Brit.) (prohibiting petitions for certiorari unless accompanied by a posting of a security, because of a multiplicity of petitions filed to “discourage and weary out the parties concerned in such judgments or orders by great delays and expences”); Act anent the Exchequer 1661 (RPS 1661/1/421) (Scot.) (providing that “the validity and invalidity of [grants] of his majesty’s property, or of any other [grants], may not be discussed nor decided in exchequer, neither by way of exception, action or reply, but that the discussing and decision thereof is only proper to the lords of session, reserving always to the exchequer to judge in all other businesses concerning his majesty’s rents and casualties as they might have done before the year 1633”); Act Concerning Certain Abuses in the Admiral’s Proceedings 1592 (RPS 1592/4/101)

Usage in reported cases characterizing statutory withdrawals of jurisdiction varied widely and seems to have been limited only by the breadth of a speaker's vocabulary. A court's jurisdiction could be "abolished,"⁹⁷ "abrogated,"⁹⁸ "dismembered,"⁹⁹ "dissolved,"¹⁰⁰ or "extinguished."¹⁰¹ A court might be "barred," "debarred," or "prohibited from proceeding" in a cause,¹⁰² or "interdicted from taking cognizance" of it.¹⁰³ It could be "denuded," "deprived," "disrobed," or "stripped" of its jurisdiction,¹⁰⁴ or it might be "ousted" or "outed" of it.¹⁰⁵ Some courts were "enjoined" from "meddling" or "intermeddling" in particular cases, and others had their jurisdiction over cases "taken away absolutely."¹⁰⁶ And this is just the beginning. Jurisdiction could also be adjusted, altered, circumscribed, confined, converted, diminished, impaired, limited, prohibited, regulated,

(Scot.) (providing "that the admiral of this realm, and his successors in time coming, [may] exercise or usurp no jurisdiction, neither yet exact nor crave any kind of duty, escheat nor casualty but according to that which was used to be exercised or taken by the admiral for the time before the decease of King James V").

97. *See, e.g.*, *Boyd v. Adam & Thomas Millars, & Co.* (Sess. 1769) Mor. 7617, 7618 (Scot.) ("The expense of litigation before the Judge-Ordinary, renders it highly expedient for Justices of Peace to judge in small debts; and the consequences of abolishing their jurisdiction in civil causes of small value would be fatal."); *see also, e.g.*, *Dunlop v. Royal Bank of Scot.* (Sess. 1799) Mor. 7, 10 (Scot.) (argument of counsel); *Maxwell v. M'Arthur* (Sess. 1775) Mor. 7381, 7384 (Scot.); *Dalrymple v. King's Advocate* (Sess. 1748) Mor. 7705, 7705 (Scot.). [*Citations to pre-1865 English cases deviate from THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION. Some of these sources have been translated from their original versions. -eds.*]

98. *See, e.g.*, *Melvil v. ___* (Sess. 1591) Mor. 7939, 7940 (Scot.) (argument of counsel) ("the Pope's jurisdiction being abrogated").

99. *See* *Lorn v. Panholes* (Sess. 1630) Mor. 7296, 7296 (Scot.) ("Sect. III: Jurisdiction how dismembered").

100. *Banker's Case* (K.B. 1695) 90 Eng. Rep. 270, 275; *Skinner*, 601, 612.

101. *Maxwell*, Mor. at 7382 (argument of counsel).

102. *Forum Competens No. 2, Hog v. Tennent* (Sess. 1760) Mor. 4780, 4783 ("barred"); *Ainsley v. Provost Scot* (Sess. 1707) Mor. 7330, 7330 (Scot.) (debarred or "prohibit[ed]" from "interfering").

103. *Blankley v. Winstanley* (K.B. 1789) 100 Eng. Rep. 574, 576; 3 T.R. 279, 281-83 ("interdicted from taking cognizance").

104. *Lampley & Al. and Thomas & Al.* (K.B. 1747) 95 Eng. Rep. 568, 574; 1 Wils. K. B. 193, 203 (disrobed); *Walker v. Campbell* (Sess. 1803) Mor. 7537, 7538 (Scot.) ("deprived"); *Patillo v. Maxwell* (Sess. 1797) Mor. 7386, 7387 (Scot.) (debarred); *M'Culloch v. Allan* (Sess. 1793) Mor. 7471, 7474 (Scot.) (stripped); *Dunbar v. Grant* (Sess. 1697) 4 Brn 386, 386 (Scot.) (argument of counsel) ("denuded").

105. *Doe v. Roe* (K.B. 1760) 97 Eng. Rep. 699, 700; 2 Burr. 1046, 1047; *Green v. Rutherford* (K.B. 1750) 27 Eng. Rep. 1144, 1148; 1 Ves. Sen. 464, 470; *Hill & Dechair* (K.B. 1653) 82 Eng. Rep. 795, 796; *Style* 381, 382 (Roll, C.J.).

106. *See, e.g.*, *Middleton & Ux v. Crofts* (K.B. 1733) 25 Eng. Rep. 539, 542; *W. Kel.* 148, 153; *Kendall & John* (K.B. 1722) 92 Eng. Rep. 779, 785; *Fortescue*, 104, 118; *Rex v. Sanchee* (K.B. 1697) 91 Eng. Rep. 1111, 1111; 1 Ld. Raym. 323, 323; *Maxwell*, Mor. at 7382 (argument of counsel); *Justices of the Peace v. Galloway*, (Sess. 1775) Mor. 7620, 7621 (Scot.); *Journeyman Taylors v. Inc. of Taylors* (Sess. 1770) Mor. 7364, 7365 (Scot.); *Lord Herris v. Lord Drumlanrig* (Sess. 1624) Mor. 15628, 15628 (Scot.).

restrained, restricted, secluded, or suppressed, depending on the circumstances and the scope of withdrawal.¹⁰⁷

As a general matter, however, the formal legal term of art denoting an intent to limit a court's jurisdiction, if one can judge by frequency of usage, appears to have been "excluded." For instance, in the 1653 English case *Hill & Dechair*,¹⁰⁸ Chief Justice Roll of King's Bench stated:

The question here is, whether there be an original action or not upon the statute of 18 Eliz. c. 5. And I say it doth not appear whether that statute meant to out this Court of its jurisdiction or not, but it is left at large in the statute, and me thinks it is an original action, and Plats case is, that an original action may be by bill, and I conceive the statute intended only to *exclude* Inferior Courts, and the [correct] course is, that the party . . . may be proceeded against by bill, and we will not suffer this Court to be *excluded* from its jurisdiction by obscure words in the statute¹⁰⁹

Similarly, the syllabus to the 1754 Scottish case *Buchanan v. Towart*¹¹⁰ explained that "[t]he act empowering Justices of peace to hear and finally determine offences [sic] in destroying trees, does not *exclude* the Court of Session from a power of review."¹¹¹ Other instances abound.¹¹²

107. See, e.g., *Ritchie v. James Wilson & Co.* (Sess. 1780) Mor. 7527, 7527 (Scot.) ("confined"); *Galloway*, Mor. at 7621 ("diminished"); *Gordon v. Abercromby* (Sess. 1773) Mor. 8876, 8878 (Scot.) ("converted"); *Miller v. Sawers* (Sess. 1759) Mor. 7514, 7514 (Scot.) ("prohibit[ed]" and "restrict[ed]"); *Duke of Douglas v. Two Justices of Peace* (Sess. 1754) 2 Elchies 308, 308 (Scot.) ("altered"); *Sheriff-Clerks v. Commissaries* (Sess. 1748) Mor. 7310, 7311 (Scot.) ("limited"); *Magistrates of Edinburgh v. Mackie* (Sess. 1711) 5 Brn 77, 77 (Scot.) ("circumscribed," "restrained," and "suppressed"); *Lord Herris*, Mor. at 15628 ("impaired").

108. (K.B. 1653) 82 Eng. Rep. 795; Style 381, 382 (Roll, C.J.).

109. *Id.* at 796 (emphasis added). Note that Roll uses the term "out" synonymously with "exclude."

110. (Sess. 1754) Mor. 7347 (Scot.).

111. *Id.* Mor. at 7347 (syllabus) (1 Geo. c. 18 entitled, "An act to encourage the planting of timber trees"); see also *Marquis of Abercorn v. Magistrates of Edinburgh* (Sess. 1793) Mor. 7302, 7302–03 (Scot.) (citing 25 Geo. 3 c. 28, § 43) ("[A] majority [of the court] were of opinion, that whatever the purpose of the Legislature might have been, yet the words of the statute were not such as clearly reached the present case of consequential damage, and that the jurisdiction of the ordinary courts of law was not to be excluded by implication.").

112. For English cases, see, e.g., *Att'y Gen. v. Governors of the Foundling Hosp.* (K.B. 1793) 30 Eng. Rep. 514, 516; 2 Ves. Jun. 43, 47; *Leader v. Moxton* 2 (K.B. 1773) 95 Eng. Rep. 1157, 1160; 3 Wils. K.B. 461, 467; *Rossel v. Kitchen* (K.B. 1758) 97 Eng. Rep. 423, 423; 1 Burr. 497, 498; *Att'y Gen. v. Governors of Harrow School* (K.B. 1754) 28 Eng. Rep. 351, 351; 2 Ves. Sen. 551, 551; *Green v. Rutherford* (K.B. 1750) 27 Eng. Rep. 1144, 1148; 1 Ves. Sen. 462, 470; *King v. Chancellor of the Univ. of Cambridge* (K.B. 1723) 92 Eng. Rep. 370, 370; 2 Ld. Raym. 1333, 1334; *Pierce v. Hopper* (K.B. 1719/0) 93 Eng. Rep. 503, 507; 1 Strange, 248, 256; *Clerk v. Birch* (K.B. 1719) 88 Eng. Rep. 1046, 1046; 11 Mod. 290, 290; *Bishop of Cloyne v. Gibbons* (K.B. 1705/6) 88 Eng. Rep. 887, 888; 11 Mod. 62, 63; *Regina v. Burnaby* (K.B. 1703/4) 92 Eng. Rep. 100, 101; 2 Ld. Raym.

“Excluded” is the natural corollary of the term “exclusive jurisdiction,” which denoted (and still denotes) a court having jurisdiction to the exclusion of other courts,¹¹³ and which is contrasted with a “concurrent jurisdiction.”¹¹⁴ Today, for instance, the Court of Appeals for the Federal Circuit has exclusive jurisdiction over appeals involving certain patent claims.¹¹⁵

Parliament created many exclusive (or “privative”) jurisdictions, some exclusive as to place or person, others as to causes. Such exclusions could operate as a limit on a court’s original jurisdiction “in the first instance,” such as in the statute of 25 Geo. 3, c. 51, which gave exclusive original jurisdiction to the justices of the peace in actions for small penalties and was held to exclude the jurisdiction of the superior courts at Westminster to entertain an action for a fine.¹¹⁶

900, 900; *Hilliard v. Cox* (K.B. 1700/1) 91 Eng. Rep. 1276, 1276; 1 Ld. Raym. 562, 562; *Philips & Bury* (K.B. 1694/5) Anno 6 W. & M. in B.R., 469, 470; *Comberbach* 265, 265 (Eng.); *Newland v. Horsman* (K.B. 1681) 22 Eng. Rep. 853, 853; 2 Chan. Cas. 74, 74; *King v. Apleford* (K.B. 1671/2) 84 Eng. Rep. 545, 546; 2 Keble 861, 863. For Scottish cases, see, e.g., *Cameron v. Macdonald* (Sess. 1804) Mor. 13875, 13876 (Scot.); *Hunter v. Badenoch* (Sess. 1800) Mor. 321, app. pt. 1, 2 (Scot.); *Patillo v. Maxwell* (Sess. 1797) Mor. 7386, 7386–88 (Scot.); *Foote v. Stewart* (Sess. 1778) Mor. 7385, 7386 (Scot.); *Ritchie*, Mor. at 7527–28 (citing 7 Jac. 1, ch. 15; 33 Car. 2, ch. 16); *Galloway*, Mor. at 7621 (argument of counsel); *Knox v. Hunter* (Sess. 1772) Mor. 14802, 14807 (Scot.); *Hog v. Tennent* (Sess. 1760) Mor. 4780–83 (Scot.); *Magistrates of Stirling v. Sheriff-Depute of Stirlingshire* (Sess. 1752) Mor. 7584, 7587 (Scot.); *Duke of Montrose v. M’Aulay* (Sess. 1713) Mor. 2266, 2267–68 (Scot.) (“absolute exclusion of”); *Lord Colvil v. Town of Culross* (Sess. 1666) Mor. 7296, 7297 (Scot.).

113. See, e.g., *Walker v. Campbell* (Sess. 1803) Mor. 7537, 7538 (Scot.); *Dunlop v. Muir* (Sess. 1791) Mor. 7470, 7471 (Scot.); *Chalmers v. Napier* (Sess. 1788) Hailes 797, 798 (Scot.) (“exclusive primary”); *Ritchie*, Mor. at 7527; *Martin v. Watt* (Sess. 1767) Hailes 186, 187 (Scot.); *Campbell v. Montgomery* (Sess. 1765) Mor. 7359, 7360 (Scot.); *Miller v. Sawers* (Sess. 1759) Mor. 7514, 7514 (Scot.); *Rowand v. John Freeman & Co.* (Sess. 1755) Mor. 2043, 2043 (Scot.); *A. v. B.* (Sess. 1752) Mor. 7513 (Scot.). The link between “exclusive” and “exclude” can be seen in the term “exclusive of.” See, e.g., *Earl Wigton v. Bailies & Town of Kirkintilloch* (Sess. 1735) 2 Elchies 95, 95 (Scot.); *Wigton v. Bailies of Kirkintilloch* (Sess. 1734) 1 Elchies 70, 70 (Scot.); *Sibald v. Home* (Sess. 1692) 4 Brn 17, 17 (Scot.); *Bailie of Killimure v. Burgh of Killimure* (Sess. 1668) Mor. 7298, 7298 (Scot.); *Lord Colvil*, Mor. at 7296.

114. See *Barton v. Wells* (K.B. 1789) 161 Eng. Rep. 461, 463; 1 Hag. Con. 21, 27 (“Another question is raised whether the ancient jurisdiction remained concurrent, or was excluded or removed.”).

115. See 28 U.S.C. § 1295(a) (2012).

116. See, e.g., *Cates v. Knight* (K.B. 1789) 100 Eng. Rep. 667 667; 3 T.R. 442, 442–43; see also *Shipman v. Henbest* (K.B. 1790) 100 Eng. Rep. 921, 924; 4 T.R. 109, 115 (noting exclusion of superior courts “in certain enumerated cases”); *James Wilson & Co. v. Ritchie* (Sess. 1780) Hailes 862, 862–64 (Scot.) (Court of Admiralty had only a concurrent jurisdiction over original action involving a maritime insurance contract); *Dundas v. Officers of State* (Sess. 1779) Mor. 15103, 15105 (Scot.) (Court of Session had concurrent jurisdiction with Court of Exchequer over original action seeking a declaratory judgment regarding rights to a charter transferring the plaintiff the proceeds of certain estates); *Gilchrist v. Provost of Kinghorn* (Sess. 1771) Mor. 7366, 7373–74 (Scot.) (Court of Session excluded

Notably, exclusions also could operate to preclude an appeal to the superior courts or a supreme court, as with the statute of 26 Geo. 2, which excluded an appeal to the Court of Session for decisions of the justices of the peace imposing liability for repairing a particular road,¹¹⁷ or the statute of 12 Car. 2, c. 23, which excluded the English superior courts from hearing appeals of certain decisions of the commissioners of excise.¹¹⁸ As T.T. Clark notes in the 1859 article “Excluded Jurisdiction” (a title tending to confirm the position of “excluded” as a term of art), by the eighteenth century, the standard parliamentary phrase used to denote an intent to exclude a court from exercising appellate jurisdiction was to provide a lower court with the power to “hear and finally determine” a given cause or set of causes.¹¹⁹ “To hear and finally to determine” is an old term in parliamentary usage, and dates back at least to the first reign of Henry VI (1422–1461).¹²⁰ This language, sometimes paired with the phrase “without appeal,” generally signified that a given court was the end of the line and that no further appellate review could be had in the ordinary course.¹²¹

In addition, an express statute could preclude review by certiorari in King’s Bench or by advocation in the Court of Session (roughly, the Scottish equivalent of a writ of certiorari). In *Rex v. Micklethwayte*,¹²² a statute vesting trustees of a highway with the power to punish violations of the statute and providing for appeal to Quarter-Sessions, specifically excluded the jurisdiction of King’s Bench or of any other court at Westminster.

from hearing an original action for an accounting, as jurisdiction over such actions was vested in the Court of Exchequer); *Martin v. Watt* (Sess. 1767) Hailes 186, 187 (Scot.) (division of seizures held competent only in the Exchequer); *Hog, Mor.* at 4784 (statute creating a court for the trial of actions among Scottish merchants in the Netherlands held not to exclude an original action in the Court of Session between two such merchants).

117. See *Russell v. Trustees* (Sess. 1764) Mor. 7353, 7353–54 (Scot.).

118. See *Terry v. Huntington* (K.B. 1660) 45 Eng. Rep. 557, 557; Hardres 480, 480.

119. See T.T. Clark, *Excluded Jurisdiction*, in 3 J. JURISPRUDENCE 14 (1859).

120. See 1433, 11 Hen. 6 c. 6. (Eng.). Variants appear throughout the statute rolls. See, e.g., An Act for Redress of Erroneous Judgements in the Court Commonly Called the Kings Bench 1584/5, 27 Eliz. c. 8 (“[S]uch Reversal or Affirmation [by Exchequer Chamber] of any such former Judgment shall not be so final, but that the Party who findeth him grieved therewith, shall and may sue in the High Court of Parliament for the further and due examination of the said Judgment, in such Sort as it now used upon erroneous Judgments in the said Court of King’s Bench.”); An Act for the Abridgment of Appeals in Suits of Civil and Marine Causes 1556, 8 Eliz. c. 5 (providing that “all and every such Judgment and Sentence definitive, as shall be given or pronounced in any Civil and Marine Cause, upon Appeal lawfully to be made therein to the Queen’s Majesty in her Highness Court of Chancery, by such Commissioners or Delegates as shall be nominated and appointed by her Majesty . . . shall be final, and no further Appeal to be had or made from the said Judgment or Sentence definitive, or from the said Commissioners or Delegates for or in the same . . .”).

121. See Clark, *supra* note 119, at 14–15.

122. (K.B. 1770) 98 Eng. Rep. 324; 4 Burr. 2522.

King's Bench held that the clause in the act "which takes away the certiorari" precluded their review of the decision of Quarter-Sessions on appeal affirming a conviction.¹²³ Similarly, many statutes and bequests set up "visitors" of colleges, usually bishops, who were vested with final jurisdiction over matters relating to the administration of the college and whose decrees could not be appealed or reviewed by certiorari.¹²⁴

Many of the more significant divisions of jurisdiction in England and Scotland also were made by statute. Parliament frequently enacted laws delineating the jurisdictions of the always-bickering common law, equity, and civil law courts,¹²⁵ in a sometimes-successful attempt to prevent disputes among these jurisdictions over perceived encroachments and usurpations.

In England, for example, a series of acts firmly established that the admiralty courts had exclusive jurisdiction over all prize cases—cases in which the captors of an enemy ship sought to condemn and sell the ship as a lawful prize of war—and King's Bench refused to take any cognizance of such matters, either originally or on appeal.¹²⁶ Similarly, a 1681 statute of the pre-union Scottish Parliament declared the high court of admiralty a "supreme court" and a "sovereign judicature in itself," and granted that court

sole privilege and jurisdiction in all maritime and sea-faring causes, foreign and domestic, whether civil or criminal whatsoever within this realm, and over all persons as they are concerned in the same; and also prohibit[ed] and discharg[ed] all other judges to meddle with the decision of any of the said causes in the first instance, except the great admiral and his deputies only.¹²⁷

Further, the act specifically prohibited the Court of Session from issuing an advocacy to the court of admiralty in specified causes, and it limited Session's ability to grant a suspension (the equivalent of a writ of prohibition) of any of the admiralty court's decrees.¹²⁸ Thus, in Scotland,

123. *See id.*

124. *See, e.g.*, *King v. Bishop of Ely* (K.B. 1757) 96 Eng. Rep. 39, 39; 1 Black. W. 71; *King v. Chancellor of the Univ. of Cambridge* (K.B. 1723) 92 Eng. Rep. 370, 370–71; 2 *Ld. Raym.* 1334, 1335.

125. On these disputes in England, see generally BRIAN P. LEVACK, *THE CIVIL LAWYERS IN ENGLAND 1603–1641: A POLITICAL STUDY* (1973); Birk, *supra* note 90, at 5.

126. *See, e.g.*, *Smart v. Wolff* (K.B. 1789) 100 Eng. Rep. 600, 600; 3 T.R. 323, 323–24; *Le Caux v. Eden* (K.B. 1781) 99 Eng. Rep. 375, 375; 2 *Dougl.* 594, 594–95.

127. Act Concerning the Jurisdiction of the Admiral Court and Protest 1681, (RPS 1681/7/40) (Scot.).

128. *See id.* (prohibiting the Court of Session from issuing an advocacy to the Court of Admiralty and providing "that no suspension or other stop to the execution of the decrees or acts of the said court of admiralty be passed by the lords of session, at any time hereafter, except by the whole lords being present in time of session").

the admiralty courts were set completely apart from the Court of Session, and any appeals from their decisions went to a special appellate division of the High Court of Admiralty and thence to the House of Lords.¹²⁹ The Court of Session also lacked appellate jurisdiction over the Court of Exchequer as a result of an exclusion contained in the Articles of Union.¹³⁰

C. *Exceptions and Exemptions*

The previous section of this Article examined evidence showing that parliamentary restrictions on original and appellate jurisdiction for practical and political reasons—commonly called “exclusions”—were a regular feature of the English and Scottish legal systems. This section examines evidence suggesting that the term “exception” also had a well-understood legal meaning when employed in the context of jurisdictional restrictions. Specifically, the terms “exception” and “exemption” (a synonym) appear frequently to describe a particular type of exclusionary provision; namely, one that carves out a limited reservation to a general grant or restriction on jurisdiction.

Variants of the term “exception” were used as a matter of course in statutes and in case law to describe such carve-outs. For instance, a series of pre-union Scottish statutes aimed at Highlands rebels granted the Crown the power to appoint new criminal commissions within the bounds of the Highlands, “excepting therefrom the bounds and lands lying and comprehended within the heritable right of justiciary general pertaining to the duke of Argyll within the said bounds,” and providing further requirements “for the said bounds not above-excepted.”¹³¹ And *Monro v. Jackson*,¹³² a 1778 case in the House of Lords, states that the statute confer-

129. See, e.g., *Lord Camden v. Home* (K.B. 1791) 100 Eng. Rep. 1076, 1076; 4 T.R. 382, 382–83; *Walker v. Campbell* (Sess. 1803) Mor. 7537, 7537–38 (Scot.).

130. See *In re Justices of Peace of Fifeshire* (Sess. 1753) 1 Elchies 232, 232–33 (Scot.); see also Pfander & Birk, *Scottish Judiciary*, *supra* note 27, at 1654–55 (discussing the Court of Session’s appellate jurisdiction).

131. See Act for the Justiciary in the Highlands 1702, (RPS 1702/6/56) (Scot.) (translated from original); see also Act anent the Justiciary of the Highlands 1695, (RPS 1695/5/203) (Scot.) (providing “that the foresaid persons whose bounds were *excepted* should for the space of two years be obliged to grant commissions to the same persons” appointed by the Crown (emphasis added)); Act for the Justiciary in the Highlands 1693, (RPS 1693/4/124) (Scot.) (same). For other examples, see Act Concerning the Regulation of the Judicatories 1672, (RPS 1672/6/50) § 1 (Scot.) (setting a procedure for determining the date on which the Court of Session must hear a case, “*excepting* only the causes belonging properly to the king’s majesty” (emphasis added)); Act Ratifying the Privileges of the Ordinary Lords of Session 1670, (RPS 1670/7/18) (Scot.) (“*exempt[ing]*” the lords of session from payment of certain taxes, granting the lords certain “privileges and immunities,” and providing that those privileges be preserved from any burdens imposed by subsequent acts of Parliament, “as fully as if they were particularly *excepted* out of the said acts” (emphasis added)).

132. (H.L. 1778) Mor. 7522 (Scot.).

ring jurisdiction over prize cases to the High Court of Admiralty “contains no exception nor limitation in point of place.”¹³³

As the Highlands statutes would suggest, many exceptions were geographic in nature, excepting particular towns or regions from grants of jurisdiction or power.¹³⁴ For example, the Town of New Sarum in England was described as “excepted” by statute from the jurisdiction of the county justices of the peace.¹³⁵ This exception was held to exclude the justices from exercising any jurisdiction in or over the town.¹³⁶ Similarly, the court in *Trustees v. The Magistrates & Town Council of Perth*¹³⁷ described exclusions of royal boroughs as being “excepted” from the jurisdiction conferred over counties and shires in particular instances in the “jurisdiction act.”¹³⁸

A statute might also except certain persons from a jurisdiction or impose time or amount-in-controversy limits on its exercise. For instance, in *Lord Provost & Magistrates of Edinburgh v. Faculty of Advocates*,¹³⁹ the Court of Session stated that, “[w]herever a statutory jurisdiction has been created, the members of the College of Justice are comprehended, if not specially excepted; as, for example, the jurisdiction conferred on Justices of the Peace in offense against the revenue laws.”¹⁴⁰ Many statutes excepted

133. *Id.* at 7524.

134. *See, e.g.*, *Earl of Morton v. King’s Advocate* (Sess. 1748) Mor. 7701, 7701 (Scot.) (“It is known the family of Argyle were possessed of the heritable justiciary over all Scotland, which by contract between King Charles I and Lord Lorn was resigned; reserving the justiciary within the bounds of the Sheriffdom of Argyle and Tarbot, and of the hail Isles, *excepting* Orkney and Zetland . . .” (emphasis added)).

135. *See Talbot v. Hubble* (K.B. 1741) 87 Eng. Rep. 1270, 1271; 7 Mod. 326, 326–28 (“By this clause I apprehend, that the Crown has *excepted* New Sarum from the concurrent jurisdiction of the justices of the county at large, as absolutely as if there had been an express clause of exclusion in the commission to the county-justices commanding them not to intermeddle with any matters arising within the city.” (emphasis added)). For other examples of geographic exceptions, *see, e.g.*, *Barton v. Wells* (K.B. 1789) 161 Eng. Rep. 461, 464; 1 Hag. Con. 21, 28 (“But there is no general principle that is known to have prevailed at any time, that the demesne lands of an earl should, during his residence there, be deemed appendant to his county; and it is most probable that it was by special grant that such peculiar *exceptions* were established.” (emphasis added)).

136. *See Talbot*, 87 Eng. Rep. at 1272–73; 7 Mod. at 329–32. The court noted, however, that, “in the case of an exempted or exclusive jurisdiction, the benefit is for persons living within that jurisdiction, so that those persons might waive the exclusion by consent.” *Id.* at 1272; 329–30.

137. (Sess. 1757) Mor. 13166 (Scot.).

138. *See id.* at 13170.

139. (Sess. 1788) Mor. 2418 (Scot.).

140. *Id.* at 2423. For another example, *see Justices of Peace of Ayr v. Town of Irving* (Sess. 1712) Mor. 7599, 7599 (Scot.) (“So Justices of Peace are not only, by the act 38th Parl. 1661, empowered, after elapsing of fifteen days, to convene every person, without respect to the privilege of any other jurisdiction; which *exception* of fifteen days is also taken away by the late act of the British Parliament, in the sixth year of her Majesty’s reign; but also, they are proper Judges to punish the importers of victual, act 9th Parl. 1703.” (emphasis added)).

cases above or below a certain amount-in-controversy threshold from jurisdictional grants or restrictions.¹⁴¹

In addition, “exception” was frequently used where particular causes or questions were withdrawn from a court’s jurisdiction.¹⁴² For example, in *Hillyer v. Milligan*,¹⁴³ the reporter notes counsel’s argument that the plaintiff had “a grant of all ecclesiastical jurisdiction in Bucks, *except* as to granting institutions and licences [sic] to clerks.”¹⁴⁴ Other instances of issue or subject-based exceptions include “the probate of wills,”¹⁴⁵ “matters of freehold,”¹⁴⁶ “cases of imprisonment,”¹⁴⁷ and questions of “heritable right.”¹⁴⁸

141. See, e.g., *Begbie v. Brown* (Sess. 1776) Mor. 7709, 7711 (Scot.) (“Pleaded, [t]hat the power and jurisdiction of Baron Courts are . . . clearly and expressly limited to questions where the debt and damages are under 40s. Sterling; *excepting* only from this limitation, actions for recovering and uplifting the Baron’s rents.” (emphasis added)); *Gordon v. M’Heugh* (Sess. 1624) Mor. 7573, 7573 (Scot.) (“Commissaries, in matters which were not ecclesiastic, cannot be judges to admit any probation, but the defender’s oath, *except* in matter which exceed not the value of L. 40, Scots” (emphasis added)).

142. See, e.g., *St. John’s College v. Todington* (K.B. 1757) 97 Eng. Rep. 245, 272; 1 Burr. 158, 204 (“He thought clearly, that the Bishop of Ely was general visitor, except in the instances particularly *excepted*.” (emphasis added)); *King v. Bishop of Ely* (K.B. 1756) 96 Eng. Rep. 39, 45; 1 Black. W. 71, 84 (“The founder may also appoint a general visitor, and *except* some particular cases out of his general jurisdiction; or may chalk out another method of proceeding others, without resorting to the visitor in the first instance.” (emphasis added)); *Monro v. Magistrates of Edinburgh* (Sess. 1781) Mor. 7529, 7530 (Scot.) (“Under the authority of these royal charters, the Magistrates of Edinburgh have . . . a jurisdiction in all maritime causes, without *exception*.” (emphasis added)); *Gilchrist v. Provost of Kinghorn* (Sess. 1771) Mor. 7366, 7370 (Scot.) (“[I]t was impossible to conceive that the single point of civil jurisdiction, relative to the misapplication of the revenues of boroughs, should be made the only *exception* from so universal a rule.” (emphasis added)).

143. (K.B. 1754) 161 Eng. Rep. 245; 2 Lee 6.

144. *Id.* at 246; 8, 10 (emphasis added).

145. See *Edgworth & Smallridge* (K.B. 1729) 94 Eng. Rep. 676, 676; *Fitz-G.* 110, 110 (“And Reeve for the plaintiff insisted that the *exception* in the statute [23 Hen. 8, c. 9], in favor of the archbishop’s jurisdiction, goes only to the probate of wills, and not to suits for legacies.” (emphasis added) (citations omitted)).

146. See *Stephens v. Berry* (K.B. 1683) 23 Eng. Rep. 420, 420; 1 Vern. 212, 212 (“[M]atters of freehold are *excepted* out of the patent to the University, and their court can at best have but a lame jurisdiction, as to lands in Cornwall.” (emphasis omitted)).

147. *King v. Flower* (K.B. 1799) 101 Eng. Rep. 1408, 1409; 8 T.R. 314, 315 (“[T]his Court has power to bail in all cases *except* cases of imprisonment, by either House of Parliament, so long as the session lasts.” (emphasis added)).

148. *Scott v. Laird of Barnbougall* (Sess. 1583) 1 Spottiswood 122, 122 (Scot.) (“[S]ome of the Lords were of opinion that it agreed with the law and daily Practik [sic], that the Superior might be Judge, and had ordinary Jurisdiction between him and his Vassal (*except* the question resulted upon heritable Right)” (emphasis added)).

“Exception” also was used in the reverse sense, as delineating an exception to a restriction on or removal of jurisdiction.¹⁴⁹ In *Begbie v. Brown*,¹⁵⁰ for example, the Court of Session held

that the jurisdiction of the Bailie of that barony was not taken away by the Jurisdiction Act [of 1670], but fell under the exception “That nothing in this Act shall extend, or be construed so as to take away, extinguish, or prejudice any jurisdiction or privilege by law vested in, or competent to the jurisdiction and community of any Royal Burgh in Scotland.”¹⁵¹

Although “exception” appears frequently in the English case law, it seems to have been most common in Scottish usage. In England, the more common synonymous term used was “exemption.” This is perhaps because the term “exceptions” in England was also used to describe a party’s objections to a trial court’s decisions, as in a “bill of exceptions.”¹⁵² As with an exception, an exemption might be given by statute to a particu-

149. See Act Concerning the Regulation of the Judicatories 1672, (RPS 1672/6/50) § 16 (Scot.) (discussing statute withdrawing the Court of Session’s original jurisdiction to matters above a certain monetary threshold, “*excepting* also the causes belonging to the members of the college of justice” and certain other matters (emphasis added)); *Maxwell v. M’Arthur* (Sess. 1775) Mor. 7381, 7382 (Scot.) (“The *exception* in that act, founded on by the charger, only applies to such jurisdiction as belongs to boroughs by their charters of erection; but it does not extend to those jurisdictions or privileges which may have been acquired by progress from individuals.” (emphasis added)); *Gray v. Reid* (Sess. 1771) Mor. 7685, 7686 (Scot.) (“The town and community of Kilmarnock being, by their charters, a free burgh of barony, fell directly under this *exception* (emphasis added)); *Reid*, Mor. at 7686 (“The *exception* in the statute, accordingly, related only to those Bailies or Magistrates who were absolutely independent of the Baron” (emphasis added)); *Governors of Heriot’s Hosp. v. Herburn* (Sess. 1714) Mor. 7986, 7986 (Scot.) (“[Y]et the same act contains a clause near the end of it to this import, viz. that the said act 1661 is with the whole *exceptions* and reservations contained in the acts made in *anno* 1633, which are thereby holden as repeated and expressed therein; so that the foresaid *exception* in the act of Parl. 1633, doth preserve the right of the Earl of Roxburgh, the Hospital’s author, entire to the full extent of his [vestments], and the same *exception* is repeated in the annexation act 1661 as aforesaid.” (emphasis added)); *Herburn*, Mor. at 7987 (“The clause in the act of Parl. 1633 is only an *exception* from the annexation mentioned in that act, entitled ‘Anent regalities of erection,’ which concerns only jurisdiction, and neither property nor superiority . . . and by virtue of the *exception* in the 13th act, the jurisdiction of the regality of Broughton has always been and still is continued.” (emphasis added)).

150. (Sess. 1776) Mor. 7709 (Scot.).

151. *Id.* at 7709 (syllabus) (“Found, that the jurisdiction of the Bailie of that barony was not taken away by the Jurisdiction Act, but fell under the *exception*, ‘That nothing in this act shall extend, or be construed so as to take away, extinguish, or prejudice any jurisdiction or privilege by law vested in, or competent to the jurisdiction and community of any Royal Burgh in Scotland.’” (emphasis added)).

152. See, e.g., *King v. Inhabitants of Preston* (K.B. 1735/6) 93 Eng. Rep. 199, 200; Sess. Cas. 197, 198.

lar town or other geographic location, such as a college or estate.¹⁵³ Statutory exemptions also might be made in favor of particular persons.¹⁵⁴ Scottish statutes and cases make similar use of the term, employing or discussing “clauses of exemption” with respect to places,¹⁵⁵ persons,¹⁵⁶ and courts.¹⁵⁷

153. See *Smith v. Smith* (K.B. 1831) 162 Eng. Rep. 1334, 1335; 3 Hagg. Ecc. 757, 759 (“Official Principal of the Peculiar and *Exempt* Jurisdiction of the Collegiate Church or King’s Free Royal Chapel of Wolverhampton” (emphasis added) (internal quotation omitted)); *Blankley v. Winstanley* (K.B. 1789) 100 Eng. Rep. 574, 577; 3 T.R. 279, 284 (“[A]nd inter alia that the manor should be *exempt* from the jurisdiction of the [a]dmiral, and should have [a]dmiral’s jurisdiction.” (emphasis added)); *Rex v. Cowle* (K.B. 1759) 97 Eng. Rep. 587, 595; 2 Burr. 834, 848 (“The answer that has been insisted upon, is ‘that Berwick is an *exempt* jurisdiction’” (emphasis added)); *King v. Bishop of Ely* (K.B. 1756) 96 Eng. Rep. 39, 42; 1 Black. W. 71, 76, 77 (“No set form of words is necessary to make a visitor, but the giving visitatorial powers is sufficient; the college, being founded on the site of an old priory, did originally belong to the bishop’s jurisdiction as Ordinary; and (unless it be afterwards *exempted*) must still continue so.” (emphasis added) (translated from original)); *Crosse v. Smith* (K.B. 1701/2) 88 Eng. Rep. 1575, 1576; 12 Mod. 643, 644 (“And so is the statute of 27 Hen. 8, c. 24, concerning resumption of liberties, that all these jurisdictions are detrimental to the King and his prerogative; and for that reason their power of pardoning in County Palatines, and making of justices, is taken away. And there have been always certiorari’s to correct abuses in these jurisdictions. *Exempt* jurisdiction is this, and was granted to cities or towns corporate for the benefit of trade” (emphasis omitted) (emphasis added)).

154. See *Ilderton v. Ilderton* (K.B. 1793) 126 Eng. Rep. 476, 479; 2 H. Bl. 145, 151 (“And so it shall be of monks and other *exempts*, and if the ordinary returns that he is *exempt* from his jurisdiction, then it shall be tried by the county.” (emphasis added)).

155. See, e.g., *Begbie v. Brown* (Sess. 1776) Mor. 7709, 7710 (Scot.) (argument of counsel) (“By the Town’s charter, these lands, along with some others purchased by the Town, are erected into a barony, by *novodamus*, with a clause of *exemption* from the jurisdiction of the Sheriff of the county.” (emphasis added)); *Hog v. Tennent* (Sess. 1760) Mor. 4780, 4783 (Scot.) (“The erection of the Conservator-court at Campvere was not thought to give any *exemption* from the Supreme Court of this country; but rather on the contrary, that the establishment of a Scots factory there strengthened the original jurisdiction of this Court over the Scotsmen composing that factory” (emphasis added)); *Dunbar v. Grant* (Sess. 1697) Fountainhall 386, 387 (Scot.) (argument of counsel) (“It was found by the Lords, that a regality granted by the King *exemed* [sic] the inhabitants thereof from the jurisdiction of the heritable sheriff or steward” (emphasis added)).

156. See *Patillo v. Maxwell* (Sess. 1797) Mor. 7386, 7387 (Scot.) (“[The act] does not merely give an *exemption* to men above fifty, or under size, from being made soldiers.” (emphasis added)); *Laird of Craigivar v. Vassals of Lindores* (Sess. 1673) Mor. 7298, 7298 (“[The vassals] having alleged that . . . they being now the King’s vassals, they were thereby *exempted* from the regality” (emphasis added) (emphasis omitted)); *Lorn v. Panholes* (Sess. 1630) Mor. 7296, 7296 (Scot.) (“A vassal though [invested] *cum curiis*, is not *exempted* from his superior’s courts.” (emphasis added)).

157. See *Earl of Glencairn v. Magistrates of Kilmarnock* (Sess. 1769) Mor. 6313, 6315 (Scot.) (argument of counsel) (“[S]uch [a] grant [of jurisdiction] is total *exemption* from the jurisdiction of the superior.” (emphasis added)); *Claims of Jurisdiction* (Sess. 1748) 5 Brn 750, 753 (King granted a local nobleman “an *exemption* from all other courts except the sheriff in civil matters, and the Justice-general and Justice-airs in criminal” (emphasis added)).

In *Barton v. Wells*,¹⁵⁸ a 1789 case from England, “exception” and “exemption” are used interchangeably.¹⁵⁹ The terms are also used interchangeably in the Scottish cases of *Governors of Heriot’s Hospital v. Herburn*¹⁶⁰ and *Officers of State v. Campbell*.¹⁶¹ In *Talbot v. Hubble*,¹⁶² “excepted” and “exempted” are likewise used interchangeably, but the latter is distinguished from an “exclusive” jurisdiction, though in a manner suggesting that both an exempted and an exclusive jurisdiction were created for the convenience and benefit of persons living within the geographic bounds of the exempted or excluded jurisdiction.¹⁶³ Exemption and exclusion are also used in different manners in *Patillo v. Maxwell*.¹⁶⁴ Elsewhere, however, exceptions and exemptions are used in a manner suggesting that they are a species of exclusion.

As with jurisdictional exclusions, “exceptions” and “exemptions,” including issue-based exceptions, frequently were carved out of the otherwise wide-ranging original and appellate jurisdiction of British supreme

158. (K.B. 1789) 161 Eng. Rep. 461; 1 Hag. Con. 20.

159. See *id.* at 462; 24–25 (“[A]nd it is said that it became thereby *exempt* from the ordinary jurisdiction of the Bishop of London. But that is to speak improperly, since there was no special *exemption* from London, only as every other part of Ely, or as any part of one diocese is exempt from another. There was no special *exemption* as in the nature of a peculiar jurisdiction.” (emphasis added)); *id.* at 464; 28 (“But there is no general principle that is known to have prevailed at any time, that the demesne lands of an earl should, during his residence there, be deemed appendant to his county; and it is most probable that it was by special grant that such peculiar *exceptions* were established.” (emphasis added)); *id.* at 464; 29 (“[Y]et there has been no claim of local *exemption* for [bishops]” (emphasis added)); *id.* at 464; 30 (“As respecting the bishop, the personal privilege belonging to him was that his residence should be part of the diocese of Ely, and as such *exempt* from the jurisdiction of the Bishop of London.” (emphasis added)); *id.* at 465; 31 (“Nothing arises from the possession of the Crown, as the King may hold places *exempt*, and others which are not so.” (emphasis added)); *id.* at 465; 33 (“That it has been consecrated may be an indifferent circumstance as to any question of jurisdiction, but it may furnish a good reason of expediency, why this chapel should not be *exempt* from the jurisdiction of the Bishop of London” (emphasis added)).

160. (Sess. 1714) Mor. 7986, 7986 (Scot.) (“exeem” [sic] and “exempted” used interchangeably with “excepted”).

161. (Sess. 1770) Mor. 14796, 14801 (Scot.) (“privileges or *exceptions*” and “privileges and *exemptions*” (emphasis added)).

162. (K.B. 1755) 87 Eng. Rep. 1270; 7 Mod. 305.

163. See *id.* at 1272; 327, 329 (“But in case of an *exempted* or *exclusive* jurisdiction, the benefit is for persons living within that jurisdiction” (emphasis added)).

164. (Sess. 1797) Mor. 7386, 7387 (Scot.) (“The act, therefore, excludes commissioners from exercising any jurisdiction over persons in the situation of the complainer, though the evidence were ever so clear that they came within the description of the act as disorderly persons. It does not merely give an exemption to men above fifty, or under size, from being made soldiers. The act prohibits enlisting them, even if they should be inclined to enlist; and the Commissioners are debared [sic] from sending persons of that description into his Majesty’s service.”).

courts.¹⁶⁵ Nevertheless, acts making exceptions to the jurisdiction of King's Bench or the Court of Session were not understood to preclude all review. Although such acts withdrew the ability of parties to appeal or obtain writ of error review of inferior court decisions as a matter of right, an exception did not remove the power of King's Bench or Session to exercise discretionary review. King's Bench still could grant writs of certiorari, mandamus, habeas corpus, and prohibition to review and quash erroneous decisions, and the Court of Session could do the same with its own processes of advocacy, suspension, and reduction.¹⁶⁶ This review did not issue in every case to every appellant who sought it, but only where necessary to answer important questions or to correct major injustices.

The 1759 case *Rex v. Cowle*¹⁶⁷ confirms that the power of King's Bench to superintend inferior jurisdictions in important questions survived a parliamentary exception or exemption as a matter of course. In that case, an Act of Parliament established the town of Berwick (a Scottish town conquered and annexed to England before the union) as an "exempt jurisdiction" and created "a Court of Oyer and Terminer, and a Court of Gaol Delivery, with an express exclusion of all other jurisdictions out of the town of Berwick."¹⁶⁸ The corporation-justices contended that, as a result of this exemption, no certiorari would lie to Berwick from King's Bench.¹⁶⁹ Lord Mansfield rejected this argument, holding that, because Berwick was subject to the laws of England, it also "must necessarily be collected, as part of a kingdom, and subordinate."¹⁷⁰ As such, the exemption provided Berwick did not restrain King's Bench from issuing the prerogative writs of mandamus, prohibition, habeas corpus, and certiorari in appropriate circumstances. As Mansfield explained, this was a necessary consequence of Berwick's inferiority:

165. See, e.g., Act concerning the Regulation of the Judicatories 1672, (RPS 1670/6/50) § 16 (Scot.); *Crosse v. Smith* (K.B. 1701/2) 88 Eng. Rep. 1575, 1576; 12 Mod. 643, 644; *Patillo*, Mor. at 7386.

166. For example, a statute taking away the Court of Session's jurisdiction over matters below a certain amount in controversy contained provisions implying that this restriction did not affect the court's power to grant suspensions and reductions. See Act Concerning the Regulation of the Judicatories, §§ 16, 18–19. In *M'Culloch v. Allan*, the Court of Session explained, in the face of a statute not mentioning the power of a superior court to review the decrees of an inferior court, that such a statute no more meant to exclude review by the superior court than would the failure of "an act conferring jurisdiction on the Sheriffs or Justices of the Peace, to mention the controuling [sic] power of the Court of Session" preclude the Court of Session's supervisory review. (Sess. 1793) Mor. 7471, 7475–76 (Scot.). Though dictum and slightly off point, this statement is illustrative of Session's general attitude towards its "controlling power." See *Buchanan v. Towart* (Sess. 1754) Mor. 7347, 7347 (Scot.) (syllabus) ("The act empowering Justices of the Peace to hear and finally determine offences in destroying trees, does not exclude the Court of Session from a power of review.").

167. (K.B. 1759) 97 Eng. Rep. 587; 2 Burr. 834.

168. See *id.* at 595; 847.

169. See *id.*

170. See *id.* at 598; 854.

Suppose they should adjudge a man to death, for a crime not capital by the law of England. Suppose they indict a man for disobeying an ordinance repugnant to the law of England. Suppose they should indict a man for treason, though the fact would not amount to treason within our laws;—suppose, as justices of the peace, they make illegal orders without any authority, in a summary way; there can be no redress but here; and if this Court could not interpose, they would, under the grant of a limited subordinate authority, be absolute.¹⁷¹

Another instructive example is the 1754 decision in *King v. Berkley*.¹⁷² In *Berkley*, a series of statutes had vested exclusive and final jurisdiction in the justices of the peace to decide certain cases involving the collection of excises. After receiving an unfavorable decision from the justices of the peace, the Crown sought review of the decision in King's Bench by writ of certiorari. The defendants argued that review was foreclosed because the statutes made the justices' orders "final."¹⁷³ The defendants also argued that the excise statutes foreclosed King's Bench from reviewing the decision by certiorari as well because of a provision that "no certiorari shall supersede any order made by the justices in pursuance of those Acts."¹⁷⁴ Although King's Bench "has generally such a power of removing adjudications, orders, & c of Inferior Courts, to judge of their propriety," the defendants contended, "in this particular case" the provision "finally conclude[d]" King's Bench "from interfering" so "that the matter may have a quick, easy, and determinate decision."¹⁷⁵ Although the defendants conceded that King's Bench still could interpose if the justices exceeded their jurisdiction, once they determined that the justices had jurisdiction, the court could not question the justices' decision.

Chief Justice Dudley Ryder, with the concurrence of the rest of the court expressed seriatim, disagreed. Ryder explained that an act permitting the justices of the peace to issue "final" orders "means only there shall be no appeal, not that this Court shall not see whether they are right on the face of them."¹⁷⁶ Ryder further stated:

There can be no doubt but this Court, by the common law, has in general a right to bring before it all records, in order to rectify wrong ones, if rectifiable, and, if not, to quash them. This jurisdiction is absolutely necessary: without such a one somewhere, the many inferior jurisdictions would run counter to each other,

171. *Id.* at 599; 855.

172. (K.B. 1754) 96 Eng. Rep. 923; 1 Keny. 80.

173. *See id.* at 924; 83.

174. *See id.* at 925; 84–85.

175. *Id.* at 924–26; 84–89.

176. *See id.* at 930; 100. Oddly, the case appears to have been initially brought before the justices of the peace by Chief Justice Ryder himself, while still attorney general, *see id.*, a conflict that would probably raise eyebrows today.

and be soon involved in confusion. This may be done by writ of error, mandamus, habeas corpus, & c in several cases. This general jurisdiction is vested in this Court, and this only, and has never been disputed, though often questioned, however particular Acts of Parliament might prevent the exercise of it in particular cases¹⁷⁷

Thus, the question was “whether there is any particular Act of Parliament that takes away the [certiorari] jurisdiction in the present case,” a question that Ryder answered in the negative. The provision in the acts respecting certiorari prevented the certiorari only from being a *supersedeas*, that is, from staying execution. The acts did not prevent certiorari from issuing, however.

Several points about Ryder’s opinion bear noting. First, Ryder explained quite clearly that a statute making an exception to King’s Bench’s as-of-right appellate jurisdiction (which was exercised via writ of error) did not imply a complete withdrawal of the court’s jurisdiction to supervise the decisions of inferior courts to see if they were wrong “on the face of them.” To be sure, the provision limited the scope of review, leaving most decisions final as a practical matter, but certiorari still existed to rectify or quash obvious errors as to particular questions or to prevent manifest injustice. Second, the justification provided by Ryder for review, that without it “the many inferior jurisdictions would run counter to each other, and soon be involved in confusion,” points to a shared understanding of the need for a supreme court to resolve conflicting interpretations of the law among inferior courts where necessary, even if a litigant cannot obtain a supreme court’s review as a matter of right.

Third, all parties agreed that, even if Parliament had taken away review by certiorari, even that full exclusion would not have extinguished the court’s power to prohibit the justices of the peace from exceeding their jurisdiction. Fourth, and perhaps most intriguingly, Ryder suggested that although Parliament might prevent King’s Bench from reviewing lower court decisions through one or another writ in “particular cases,” there remained always some other means by which King’s Bench could exercise its “absolutely necessary” power of supervising “inferior jurisdictions.”¹⁷⁸

IV. SUPERVISION IN THE WAKE OF LEGISLATIVE EXCEPTIONS

A. *Article III Exceptions*

The evidence from pre-1789 British statutes and practice discussed in Part III contains important lessons about the operation and scope of the Exceptions Clause in Article III of the United States Constitution. First, the evidence demonstrates that statutory provisions excepting particular

177. *Id.* at 930; 99.

178. *See id.*

places, persons, courts, causes of action, and subject matters from a court's jurisdiction were a regular feature of the British judicial systems, and that such exceptions frequently operated to exclude the original or appellate jurisdiction of the supreme and superior courts of England and Scotland.

American judges and lawyers of the founding generation, many of whom cut their teeth on British law books,¹⁷⁹ were familiar with the terminology and precedents of British jurisdictional restrictions. Usage of "exclude," "except," and even citations to the cases discussed above, cropped up with some regularity in reported arguments and opinions in America before and around the time that the Constitution was enacted.¹⁸⁰ The

179. See Pfander & Birk, *Scottish Judiciary*, *supra* note 27, at 1631–35.

180. See, e.g., *The Betsey*, 3 U.S. (1 Dall.) 6, 8 (1794) ("The question of prize, or no prize, is the boundary line, and not the locality; and the nature of that question not only excludes the Instance, but the common law, and all other courts; so that whenever a cause involves the question of prize, and a determination of that question must precede the judgment, they will decline the exercise of jurisdiction and refer it to the prize court."); *Ketland v. The Cassius*, 2 U.S. (2 Dall.) 365, 367 (Cir. Ct. D. Pa. 1796) (stating that "[t]o take jurisdiction, however, in any case, the court ought to be clearly of opinion, that the constitution and the law intended to give it; but here, the words will hardly admit a doubt upon the intention of the legislature, to exclude the jurisdiction of the Circuit Court"); *M'Grath v. Candalero*, 16 F. Cas. 128, 128 (D. S.C. 1794) (No. 8,810) (citing *Le Caux v. Eden* (K.B. 1781) 99 Eng. Rep. 375; 2 Doug. 594); *Weiberg v. The St. Oloff*, 29 F. Cas. 591, 591 (D. Pa. 1790) (No. 17,357) (argument of counsel) ("Inferring, that as by the convention with France, the French consuls in the ports of the United States have an exclusive jurisdiction in the adjustment of disputes between the captains and their mariners, so ought the regulations and discipline on board of Swedish vessels, to be governed by the Swedish laws and customs, without the interference of the courts of the United States."); *Talbot v. Commanders & Owners of Three Brigs*, 1 U.S. (1 Dall.) 95, 98 (Pa. High Ct. Err. & App. 1784) ("It is manifest from this Act, that in framing it, the legislature took into consideration the English statutes relating to things done upon the High seas, and particularly the statutes of the 13th of Richard the second, ch. 3, and 5, and the 2nd of Henry the fourth, ch. 11. by which, 'Admirals and their deputies are prohibited from meddling with any thing done within the realm of England, but only with things done upon the seas, according to that which hath been duly used in the time of Edward the third,' and it is 'declared, that the Court of the Admiral hath no manner of conusance, power, or jurisdiction of any contract, plea or quarrel, or of any other thing done or rising within the bodies of counties except in cases of death or Mayheme done in great ships being in the main stream of rivers beneath the points of the same.'"); *Dean v. Angus*, 7 F. Cas. 294, 295 (Adm. Ct. Pa. 1785) (No. 3,702) ("So, also, in the case of *Lindo v. Rodney*, 2 Doug. 612, Lord Mansfield, in giving the opinion of the court, says—'A thing being done upon the high seas, does not exclude the jurisdiction of the common law. For seizing, stopping or taking a ship upon the high seas not as prize, an action will lie; but for taking as prize, no action will lie. The nature of the question excludes, not the locality.'"); *Dean*, 7 F. Cas. at 295 (citing *Le Caux*, 99 Eng. Rep. at 375); *Mahoon v. The Gloucester*, 16 F. Cas. 499, 499 (Adm. Ct. Pa. 1780) (No. 8,970) ("The respondents have rested their cause principally on a plea to the jurisdiction of this court; alleging that the injury, if any, was exclusively of common law cognizance; because the libellants' claim was founded in articles executed on shore, within the body of a county: that although the admiralty could determine the question of prize or no prize; yet it could not determine to whose use, having no jurisdiction in disputes between owner and owner, owner and captain, or captain and mariner, except only in the case of a mariner's wages, which is

Judiciary Act of 1789 reserved “exclusive” jurisdiction over admiralty cases to the United States District Courts,¹⁸¹ and litigation in the early Republic

allowed out of special favour, and not of right, further than as *communis error facit jus.*”), *aff’d sub nom.*, *Keane v. The Gloucester*, 2 U.S. (2 Dall.) 36 (F. Ct. App. 1782); *Desborough v. Desborough*, 1 Root 126, 126–27 (Conn. Super. Ct. 1789) (“The jurisdiction of a single minister of justice is limited to the sum of £4 in all cases, except in suits on bonds or notes for money or bills of credit only vouched by two witnesses, it is extended to the sum of £10.”); *Campbell v. Morris*, 3 H. & McH. 535, 555–56 (Md. 1797) (“The law of congress, 1789, c. 20. in my opinion, does not prohibit or discountenance this proceeding; but if any inference can be made the one way or the other, rather warrants it by not allowing the jurisdiction of the state courts to be ousted except where the debt claimed exceeds five hundred dollars, and by the defendant’s complying with certain requisites.”); *State v. Tibbs*, 3 H. & McH. 83, 83–84 (Md. 1791) (argument of counsel) (“The act of November session, 1790, c. 50. s. 1. enacts, ‘That after the passage of this act, the judges of the general court shall not be capable to take cognizance [sic] of, or hold any jurisdiction over, any offences, crimes or misdemeanors whatsoever, except treasons, misprisions of treasons, murders, felonies and insurrections; but all offences, crimes and misdemeanors, shall be heard and determined by the justices of the county courts of the county wherein the said offences, crimes and misdemeanors shall be committed, and not elsewhere, except in the cases herein before excepted.’” (emphasis omitted)); *Belt v. Hepburn*, 4 H. & McH. 512, 524 (Md. Prov. 1769) (citing *Gardner’s Case* (K.B. 1620/1) 81 Eng. Rep. 725; 2 Rolle. 161); *Gov’t v. M’Gregory*, 14 Mass. 499, 499 (1780) (“This has been the practice in England; and although they may perhaps be tried also by courts-martial, that cannot oust the courts of law of their general jurisdiction.”); *Finney v. M’Mahon*, 1 Yeates 248, 248 (Pa. 1793) (“Mr. Sergeant for the plaintiffs urged, that the words of the act of assembly of 1715, giving jurisdiction to justices of the peace, were ‘any debt or demand under forty shillings,’ and that the term demand was very comprehensive in a legal sense, and that there were no exceptions in this act similar to those in the 5^l. act. Under the act of 1746, actions of trespass *vi et armis* for taking goods, are not excepted from the jurisdiction of justices of the peace, unless where the title of lands shall any wise come in question. Province Laws, 80, 207.” (emphasis omitted)); *Lawrence v. Doublebower*, 2 U.S. (2 Dall.) 73, 73 (C.P. Phila. Cty. 1790) (“Actions of Trover are expressly excepted from the jurisdiction of Justices of the Peace; and this being such a trespass, as might be made the foundation of an action of Trover, is fairly within the reason of the Legislative exception. The powers of the Justices of the Peace are, perhaps, already sufficiently great; but, at all events, it would be highly dangerous to extend them to cases like the present.”); *Cooper v. Coats*, 1 U.S. (1 Dall.) 308, 309 (C.P. Phila. Cty. 1788) (“Where the sum is under L.5, the act of 1745, 1 State Laws 204. meant to give full jurisdiction to the Justices, except in certain enumerated cases; and the same jurisdiction is afterwards extended to sums under L.10. by reference to that act.”); *King v. Oldner & Brilehan*, 1739 WL 4, at *1; 2 Va. Colonial Dec. B90 (Va. Gen. Ct. Apr. 1739) (“By several Statutes in England the Jurisdiction of the Admiralty is restrained and is confined to the main Sea or Coasts of the Sea not within the body of any County. By 15. R. 2. 3. Admiral hath no Jurisdiction of any Contract Plea or Quarrel done within the bodies of the Counties either by Land or Water Except of the Death of a Man or Maihem in great Ships hovering in the great Stream beneath the points of the Rivers.”); *cf. Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 458 (1793) (“But, in the case of the King, the sovereignty had a double operation. While it vested him with jurisdiction over others, it excluded all others from jurisdiction over him.”).

181. See *M’Grath*, 16 F. Cas. at 128 (citing § 9).

frequently engaged whether that and other privative provisions divested particular courts of some part of their jurisdiction.¹⁸²

British practice shows that excluding certain matters from the original and even appellate jurisdiction of supreme courts can offer a number of benefits. For example, parties such as merchants might be grateful for a more summary disposition of actions related to their business affairs, and inhabitants of a town grateful not to be forced to attend a geographically distant court for resolution of local controversies.¹⁸³ The courts themselves benefited by avoiding a deluge of insignificant original actions and fact-dependent appeals that could safely be handled by another court.¹⁸⁴ As Justice Gardenston of the Court of Session stated in voting to maintain exclusive jurisdiction over seizures in the Court of Exchequer, “We have enough to do of our own, without interfering with the business of another court.”¹⁸⁵ The Crown also could rely on such exceptions related to particular questions or subjects, such as revenue collection, to expedite the administration of its laws in local or specialized courts.

Thus, it is not surprising that the Framers would have granted Congress the power to limit appellate access to the Supreme Court in less important matters or to assign certain categories of cases for final determination in particular other courts. Although Calabresi and Lawson have argued that the exceptions power as usually understood is inconsistent with separation of powers principles,¹⁸⁶ it would seem that, for observers accustomed to British practice, legislative discretion to make exceptions to the Supreme Court’s appellate jurisdiction was a necessary and proper feature of judicial administration. Moreover, the evidence be-

182. See, e.g., *Georgia v. Brailsford*, 2 U.S. (2 Dall.) 402, 406 (1792) (Iredell, J.) (“[W]henver a State is a party, the Supreme court has exclusive jurisdiction of the suit; and her right cannot be effectually supported, by a voluntary appearance, before any other tribunal of the Union.”); *United States v. Ravara*, 2 U.S. (2 Dall.) 297, 298–99 (Cir. Ct. D. Pa. 1793) (No. 16,122); *Henfield’s Case*, 11 F. Cas. 1099, 1120 n.6 (Cir. Ct. D. Pa. 1793) (No. 6,360); *Collet v. Collet*, 2 U.S. (2 Dall.) 294, 295 (Cir. Ct. D. Pa. 1792) (No. 3,001); *Jennings v. Carson*, 13 F. Cas. 540, 541–43 (D. Pa. 1792) (No. 7,281), *aff’d*, 8 U.S. (4 Cranch) 2 (1807).

183. See, e.g., *Hog v. Tennent* (Sess. 1760) Mor. 4780, 4780–81 (argument of counsel) (contending that an exclusive jurisdiction in the Netherlands was created “in order to prevent [Scottish merchants abroad] from being put to the trouble and expense of coming over to Scotland to get justice”); see also Clark, *supra* note 119, at 15.

184. See, e.g., Act Concerning the Regulation of the Judicatories 1672, (RPS 167/6/50) § 16 (“To the effect the lords of session may be in better capacity to discuss the processes which come before them, not being overburdened with small and inconsiderable causes, that all causes not exceeding the value of 200 merks Scots be, in the first instance, carried on before the inferior judges . . .”).

185. *Martin v. Watt* (Sess. 1767) Hailes 186, 186. Gardenston’s colleague expressed a different concern based on the dignity of the task: “Shall we snatch at the opportunity . . . to take upon us an inferior part of jurisdiction . . . [?]” *Id.*

186. See Calabresi & Lawson, *supra* note 19, at 1047.

lies Laurence Claus's argument that exceptions cannot be made with reference to particular issues or questions.¹⁸⁷

The manner in which the terms "exceptions" and "exemptions" were employed, however, suggests that these regular exceptions were both limited in breadth—excluding particular, discrete areas from the court's broader purview—and generally were used to refer to matters of lesser significance. They were fairly limited carve-outs to a court's general jurisdiction, such as an exclusion of a particular inferior court, a particular group of people, or a particular class of cases, and when applied to a supreme court's appellate jurisdiction, they usually left the court with the discretion to review by way of certiorari or advocacion. Moreover, when Parliament excepted particular legal questions, those questions seem always to have been somewhat insignificant, what T.T. Clark in 1859 called "certain questions of inferior moment."¹⁸⁸

The conclusion that, in drafting and ratifying the Exceptions Clause, the Framers had the British understanding of "exceptions" and exclusionary provisions in mind would assuage the fears expressed by Professor Hart that the Exceptions Clause potentially could be used to marginalize the Supreme Court.¹⁸⁹ It may be that the Framers employed the term "exceptions" as a deliberate shorthand reference to the jurisdictional exceptions and exemptions familiar in British law and usage. This would imply, consistent with Claus's view,¹⁹⁰ that Article III's grant of power to Congress to make exceptions to the Supreme Court's appellate jurisdiction was understood to be limited in scope. It imparts a power to provide for finality in many cases and questions of lesser importance by withdrawing as-of-right appellate jurisdiction, but it does not permit Congress to threaten the Court's general role in the constitutional scheme or to enact overriding withdrawals of the Supreme Court's ability to exercise appellate review in most cases.

Yet, an exception for cases challenging the constitutionality of a new gun control law, say, would be a particular, limited subject-matter exception, and unless one is prepared to argue that all cases involving constitutional rights are too important to be excepted, a position at odds with historical practice,¹⁹¹ then drawing a line around what questions are "of inferior moment" and which are not would be difficult. As noted in Part II, Parliament also had entirely excluded the original and appellate jurisdiction of King's Bench and the Court of Session over cases falling within

187. See Claus, *supra* note 19, at 65.

188. See Clark, *supra* note 119, at 14.

189. See Hart, Jr., *supra* note 8, at 1363–64.

190. See Claus, *supra* note 19, at 64–65.

191. See *supra* notes 47–51 and accompanying text. By contrast, the Constitution of Ireland of 1937, whose judiciary article contains an Exceptions Clause, specifically provides that constitutional questions cannot be excepted from the Irish Supreme Court's appellate jurisdiction. See Constitution of Ireland 1937 art. 34, § 4, cl. 3.

the exclusive jurisdiction of the courts of admiralty, the Court of Exchequer, and the ecclesiastical courts, and often for explicitly political reasons. Thus, it may be that an exception could be extended to include the sort of statutes by which Parliament excluded admiralty questions from the original and appellate jurisdiction of King's Bench and the Court of Session, even if the restriction were motivated by a desire to preclude Supreme Court review. Moreover, as Chief Justice Ryder recognized in *Berkley*, Parliament might and sometimes did impose further limitations on superior court review by restricting recourse to the writ of certiorari to challenge inferior court decisions.

But this evidence should not be understood as vindicating the orthodox account of the Exceptions Clause. Even the most comprehensive of exclusions on a supreme court's jurisdiction in Britain were not absolute. Crucially, they did not exclude the jurisdiction of King's Bench and the Court of Session to utilize discretionary supervisory review to prohibit inferior courts from exceeding their jurisdiction. For instance, although the visitor to a university had ultimate and final authority to determine all matters within his jurisdiction, without appeal, which precluded review by certiorari, King's Bench still could issue writs of prohibition or mandamus if the visitor exceeded his authority or refused to take action required of him.¹⁹² Similarly, King's Bench issued writs of prohibition and mandamus, and the Court of Session suspensions and advocations, to adjudicate the scope of the admiralty courts' jurisdiction and to order those courts to take action clearly required of them, despite the fact that direct appellate jurisdiction over those courts had been removed by statute.¹⁹³ And in *Countess of Loudon v. Trustees*,¹⁹⁴ a case that Pfander and I have discussed elsewhere, the Court of Session held that although the decisions of the trustees of a turnpike could not be reviewed on appeal, still their decisions were liable to suspension "in the case of the smallest excess of power," and that the trustees had exceeded their jurisdiction in that case by refusing to follow the prior precedent of the Court of Session.¹⁹⁵ These powers were only rarely necessary, but they were significant, and they sufficed to maintain the supremacy of King's Bench and the Court of Session over inferior courts throughout the realm.

192. See, e.g., *King v. Bishop of Ely* (K.B. 1756) 96 Eng. Rep. 39, 39; 1 Black. W. 71, 71 ("prohibition"); *King v. Chancellor, Masters & Scholars of the Univ. of Cambridge* (K.B. 1736/7) 88 Eng. Rep. 111, 11; 2 Ld. Raym. 1335, 1335 ("mandamus").

193. See, e.g., *Monro v. Magistrates of Edinburgh* (Sess. 1781) Mor. 7529, 7530 (Scot.); *Jackson v. Monro* (Sess. 1778) Hailes 813, 814 (Scot.).

194. (Sess. 1793) Mor. 7398 (Scot.).

195. See *id.* at 7401; Pfander & Birk, *Scottish Judiciary*, *supra* note 27, at 1682–84. For the prior precedent, see *Napier v. Robison* (1782) Mor. 7624, 7625 (justices of the peace had exceeded their statutory powers by shutting up a road that was of importance to the public).

B. *Review for Excess of Jurisdiction*

To say that King's Bench or the Court of Session could interpose where an inferior court exceeded its jurisdiction, however, may lead modern observers astray. The eighteenth-century conception of jurisdiction was broader than we generally now conceive of it. What eighteenth-century courts and commentators had in mind in referring to an inferior court exceeding its jurisdiction is more akin to the modern administrative-law doctrine of "jurisdictional fact," as can be seen by considering the 1669 English case *Terry v. Huntington*.¹⁹⁶

In *Terry*, Parliament had imposed a tax on "strong waters" (spirits) and granted the commissioners of excise the authority to levy taxes on any goods fitting the description in the statute, with an appeal to a special commission. The plaintiff brought an action against the commissioners' officers, alleging that the commissioners had illegally levied "low wines," the low-alcohol running from the first extraction of a still, which were excluded from the statute. The officers responded that the question of whether the goods levied were taxable "strong waters" was committed to the determination of the commissioners, and the provision of an appeal to the special commission excluded the jurisdiction of the superior Court of Exchequer.

The Court of Exchequer ruled in favor of the plaintiff, holding that the commissioners' jurisdiction extended only to strong waters, not to low wines, so a decision that low wines were strong waters was an excess of their jurisdiction and was not immune from review by the superior courts at Westminster. Sir Matthew Hale, at the time Chief Baron of the Exchequer (and later Chief Justice of King's Bench) explained that if the commissioners had misjudged goods within their jurisdiction, for instance by decreeing "small beer" to be "strong beer," that decision could not be reviewed by the superior court, "for they have a jurisdiction there, and an appeal lies from their sentence."¹⁹⁷ But if the commissioners applied their power to a matter not within the power granted them by the statute in the first place, they had to be restrained:

[T]he matter here is not within their jurisdiction, which is a stinted, limited jurisdiction; and that implies a negative, viz. that they shall not proceed at all in other cases. But if they should commit a mistake in a thing that were within their power, that would not be examinable here. And it is to be considered that special jurisdictions may be circumscribed; 1. With respect to place; as a leet or a corporation: 2. With respect to persons: as in 10 Rep., the case of *The Marshalsea*: 3. With respect to the subject matter of their jurisdiction; and here statute limits their jurisdiction in all these three respects: and therefore if they give judg-

196. (Exch. Ch. 1669) 145 Eng. Rep. 557; Hardres 480.

197. *Id.* at 559; 484.

ment in a cause arising in another place, or betwixt private persons, or in other matters, all is void, and coram non iudice; as if they should adjudge rose water to be strong-water. And here low-wines are waters of the first extraction [not strong-water].¹⁹⁸

To summarize, then, the rule set down in *Terry* is that an inferior court exceeds its jurisdiction and is subject to supervisory review, even where appellate jurisdiction has been excluded, where the inferior court exercises authority over a place, person, or subject matter not within the authority granted to it by statute.

This rule also was applied in the Court of Session. During the American Revolution, Parliament enacted a law giving the County Commissioners of Supply the power to draft into the military “idle and disorderly persons” who could not prove they were employed.¹⁹⁹ The act also provided that, because of necessities of state, any person found by the commissioners to be within the description of the act “shall not be liable to be taken out of his Majesty’s service by any process, other than for some criminal matter.”²⁰⁰ In *Foote v. Stewart*,²⁰¹ the plaintiff-draftees sought review in the Court of Session by way of suspension and liberation (habeas corpus).²⁰² They argued that the commissioners of supply had erred in finding them liable to be drafted by refusing to receive the plaintiffs’ evidence of good behavior and employment. The Court of Session denied review, holding that “from the terms of the statute, it was the meaning of the legislature, that the sentence of the Commissioners should not be reviewable by any Court of law.”²⁰³

A year later, however, in *Patillo*, another plaintiff draftee sought review in the Court of Session, and this time the court granted it.²⁰⁴ The difference between *Patillo* and *Foote* was that the comprehending act prohibited the commissioners from enlisting men “above the age of fifty” or “under the size of five feet three inches without shoes.”²⁰⁵ *Patillo* claimed that he was over fifty and under five foot three (without shoes), and thus was outside the commissioners’ jurisdiction. By contrast, in *Foote*, the complaint had been that the commissioners had erred in making a determination committed to their final jurisdiction, namely, whether the plaintiffs were disorderly and unemployed. As such, the Court of Session held that although they should not interfere “except where very good and sufficient reasons are shown,” in *Patillo*’s case, Session’s “powers of reviewing the sentences of the Commissioners, arising from their inherent and constitu-

198. *Id.* at 599; 483.

199. *See* *Foote v. Stewart* (Sess. 1778) Mor. 7385, 7385 (Scot.).

200. *See id.* (internal quotation marks omitted).

201. (Sess. 1778) Mor. 7385 (Scot.).

202. *See id.* at 7385.

203. *Id.* at 7386.

204. (Sess. 1797) Mor. 7386 (Scot.).

205. *See id.* at 7387.

tional jurisdiction, were not excluded by this statute.”²⁰⁶ The court therefore granted review and ordered Patillo set free after receiving his baptism certificate.²⁰⁷

C. *Conflicting Decisions, Errors of Law, and Denials of Fundamental Justice*

The eighteenth-century conception of jurisdictional errors meriting supervisory review actually went even further than the sorts of “jurisdictional facts” governed by the rule in *Terry*. For instance, as seen in *Loudon*, the Court of Session considered it a jurisdictional error for an inferior court to fail to adhere to governing precedent.²⁰⁸ The British understanding thus is consistent with the conception of supremacy offered by Pfander, for whom the constitutional requirements of supremacy and inferiority preclude Congress from removing the Supreme Court’s jurisdiction to require inferior courts to observe prior Supreme Court precedent.²⁰⁹

But Pfander’s view of the limits of supervisory authority appear unduly narrow in light of the evidence adduced in this Article. First, jurisdictional error review also existed to quash obvious denials of due process. In *Collins v. Judge of the High Court of Admiralty*,²¹⁰ the Court of Session interposed in a prize case (over which its jurisdiction had been entirely excluded by statute) where the judge of the High Court of Admiralty refused to permit one of the parties to be represented by counsel.²¹¹ According to the Court of Session, this case “afford[ed] an example of a wrong, to which no ordinary remedy could be applied, but for which their supreme jurisdiction authorised [sic] them to provide an extraordinary one.”²¹² The failure of justice in this case was akin to “all those more important instances, where any accidental stop having been put to the usual course of administration, in distributing justice, or in regulating police, it is their privilege, by temporary appointments, to supply the deficiency.”²¹³ The court therefore remanded with instructions that the admiralty judge admit a solicitor to represent the plaintiff.

Moreover, King’s Bench and the Court of Session interposed even in the absence of guiding precedent where necessary to correct divergent and incorrect interpretations of the law in inferior courts. For example, in

206. *Id.* at 7388.

207. *See id.*; *see also* *Magistrates of Perth v. Trustees* (Sess. 1756) 5 Brn 318, 319 (Scot.) (holding that the question of whether the “justices of the peace” had power over inhabitants of royal boroughs could be reviewed despite a statute excluding the Court of Session’s appellate jurisdiction).

208. *See* Pfander & Birk, *Scottish Judiciary*, *supra* note 27, at 1682–83.

209. *See* Pfander, *Jurisdiction-Stripping*, *supra* note 22, at 1442–49.

210. (Sess. 1781) Mor. 7451 (Scot.).

211. *See id.* at 7451.

212. *Id.* at 7452.

213. *Id.*

Russell v. Trustees,²¹⁴ a statute governing the repair of roads vested original jurisdiction to decide matters relating to each road in the local Justices of the Peace, with an appeal to the county Quarter-Sessions, whose decision would be “final and conclusive.”²¹⁵ The plaintiff contended that a planned alteration in the road was not authorized by the act, but because the road at issue ran through two counties, two different Quarter-Sessions were required to decide on the issue. One Quarter-Sessions court decided that the alteration was authorized by the act, but the other Quarter-Sessions court decided that it was not. The party asserting jurisdiction in the Court of Session contended that, because the two inferior courts had “pronounced contradictory judgments,” this was a “casus incogitatus,” that is, a circumstance not contemplated by the drafters.²¹⁶ Therefore, the party contended, the Court of Session was authorized to intercede to resolve the dispute. The Court of Session agreed.

Blackstone described this feature of King’s Bench’s supervisory powers in his *Commentaries on the Laws of England*. According to Blackstone:

This writ [of prohibition] may issue either to inferior courts of common law; as, to the courts of the counties palatine or principality of Wales, if they hold plea of land or other matters not lying within their respective franchises; to the county courts or courts-baron, where they attempt to hold plea of any matter of the value of forty shillings: or it may be directed to the courts christian, the university courts . . . where they concern themselves with any matter not within their jurisdiction . . . [o]r, if, in handling matters clearly within their cognizance, they transgress the bounds prescribed to them by the laws of England; as where they require two witnesses to prove the payment of a legacy . . . in such cases also a prohibition will be awarded. For, as the act of signing a release, or actual payment, is not properly a spiritual question, but only allowed to be decided in those courts, because incident or accessory [sic] to some original question clearly within their jurisdiction; it ought therefore, when the two laws differ, to be decided, not according to the spiritual, but the temporal law; *else the same question might be determined different ways, according to the Court in which the suit is depending: an impropriety which no wise Government can or ought to endure, and which is therefore a ground for prohibition.*²¹⁷

Note that Blackstone did not consider it an impediment to the issuance of prohibition that the counties palatine, Wales, and the ecclesiastical courts had been excluded from King’s Bench’s appellate jurisdiction.

214. (Sess. 1764) Mor. 7353 (Scot.).

215. *See id.* at 7354.

216. *See id.*

217. BLACKSTONE, COMMENTARIES 112–13 (Edward Christian, 15th ed. 1809) (emphasis added) (translated from original).

Precedent further suggests that the superior courts, particularly King's Bench, also could issue a prohibition to correct an inferior court's erroneous interpretation of an act of Parliament, even where the court's writ of error and certiorari jurisdiction had been eliminated by statute. This power was exercised by the Court of Common Pleas in *Wheeler's Case*²¹⁸ in 1604, and by King's Bench in *Slawney's Case*²¹⁹ in 1622, *Carter v. Crawley*²²⁰ in 1681, *Pierce v. Hopper*²²¹ in 1720, and *Brymer v. Atkins*²²² in 1789. Lord Mansfield explained the principle: "A prohibition is ex debito justitiae, if the Court of Admiralty proceed contrary to Act of Parliament."²²³

Although many of the early decisions claimed the authority to correct erroneous statutory interpretations by arguing that ecclesiastical and admiralty courts did not have jurisdiction to construe acts of Parliament, subsequent decisions make clear that it was not a question of lack of jurisdiction; it was a misuse of jurisdiction. Ecclesiastical and admiralty courts undoubtedly had the power to interpret and apply statutes relating to the subject matter confided to them, such as the Prize Acts. But King's Bench considered erroneous interpretations a misuse or excess of power subject to correction in appropriate cases. The reason, as Blackstone explained, was that without such superintendence, "*the same question might be determined different ways, according to the Court in which the suit is depending; an impropriety which no wise government can or ought to endure.*"²²⁴ Later, Chief Justice Ellenborough put it thus: "Not that the Spiritual Court had not jurisdiction to construe it, but that the mischiefs of misconstruction were to be prevented by prohibition."²²⁵

A series of English cases decided shortly after the adoption of the U.S. Constitution confirmed the power of the superior courts to intervene and correct erroneous statutory interpretations in courts not subject to their

218. (Ct. C.P. 1604) 78 Eng. Rep. 133, 133; Godbolt 218, 218 (spiritual court misconstrued a statute setting feast days).

219. (K.B. 1622) 80 Eng. Rep. 233, 233; Hobart 83, 83 (prohibition to the prerogative court; "the meaning and exposition of the statute, and of the condition of the obligation, both are to be judged by the Courts of Common Law").

220. (K.B. 1681) 83 Eng. Rep. 259, 259–60; Raym. Sir T. 496–97 (spiritual court misconstrued Act for Settling Intestates Estates; "for whatever is determined by the common law to be the meaning of this Act must be a rule to the Ecclesiastical Courts, for the Courts of Common Law are entrusted with the exposition of Acts of Parliament, and we ought not to suffer them to proceed in any other manner than shall be adjudged by the King's Courts to be the true meaning of this Act").

221. (K.B. 1720) 93 Eng. Rep. 503, 509; 1 Strange 249, 259–60 (admiralty court misconstrued an act of Parliament).

222. (K.B. 1789) 126 Eng. Rep. 97, 110; 1 H. Bl. 164, 188.

223. *Howe v. Nappier* (K.B. 1766) 98 Eng. Rep. 13, 15; 4 Burr. 1945, 1950.

224. BLACKSTONE, *supra* note 217, at *112–13.

225. *Gould v. Gapper* (Exch. Ch. 1804) 102 Eng. Rep. 1102, 1111; 5 East. 345, 368.

ordinary appellate or certiorari jurisdiction. In *Lord Camden v. Home*,²²⁶ a 1791 case, the Court of Common Pleas had issued a prohibition to the Court of the Commissioners of Appeals in Prize Cases on the ground that the appeals court had misconstrued a provision of the prize acts.²²⁷ The losing party sought a writ of error in the Court of Exchequer Chamber, which reversed the judgment of Common Pleas. Some of the justices of Exchequer Chamber sought to impose limits on the reach of the writ of prohibition by expressing the opinion that it could be issued only where the inferior court actually lacked jurisdiction over the subject matter at issue. In this case, not only did the admiralty courts have sole and exclusive jurisdiction over prize cases; they also had jurisdiction to apply the prize acts. As such, their interpretation of those acts was not subject to review on prohibition.

On appeal to the House of Lords, Parliament upheld the judgment of the Court of Exchequer Chamber, but it did so on the ground that the Court of the Commissioners of Appeals in Prize Cases had correctly interpreted the prize acts.²²⁸ In delivering the judgment, Lord Chief Justice James Eyre called Exchequer Chamber's reasoning into question, noting the general principle "that if a court of peculiar jurisdiction will proceed contrary to the provision of the statute law of the realm (and . . . if such a court misinterprets any of those provisions, it does substantially proceed contrary to them), this is a good ground for a prohibition."²²⁹ Nevertheless, Eyre concluded that it was unnecessary to decide whether a prohibition could issue in such circumstances, because the admiralty court's interpretation was not erroneous in the first place.²³⁰

In 1804, however, the Court of Exchequer Chamber confronted the question again, and this time it held unanimously that the superior common law courts could issue prohibition to correct erroneous constructions of statutes.²³¹ According to the court, longstanding practice established that

the Courts of Common Law have in all cases, in which matter of a temporal nature has incidentally arisen, granted prohibitions to Courts acting by the rules of the civil law, where such Courts have decided on such temporal matters in a manner different from that in which the Courts of Common Law would decide upon the same.²³²

226. (Exch. Ch. 1791) 100 Eng. Rep. 1076; 4 T.R. 382.

227. *See id.* at 1076; 382.

228. *See Home v. Earl of Camden* (H.L. 1795) 126 Eng. Rep. 687, 687-88; 2 H. Bl. 533, 533.

229. *Id.* at 689; 535.

230. *See id.* at 689-90; 537.

231. *Gould v. Gapper* (Exch. Ch. 1804) 102 Eng. Rep. 1102, 1111; 5 East. 345, 368.

232. *Id.* at 1112; 371.

Further, the court explained, “this has been the doctrine of the Judges, not only in the time of Lord Coke, when a considerable degree of jealousy subsisted between the Courts of Westminster Hall and those of ecclesiastical jurisdiction,” but also “in the times of Lord Hale, Lord Holt, Lord C.J. Pratt, and as lately as in the time of Lord Mansfield, who in the case of *Full v. Hutchins* particularly instanced the misconstruction of an Act of Parliament as a ground for prohibition, even after sentence.”²³³

D. *Closing the Door on the Orthodox Account*

The evidence discussed in this Article has important implications for the debate over the scope of Congress’s control over the Supreme Court’s appellate jurisdiction. Confirming and building upon Pfander’s supremacy account and the hierarchical understanding of supremacy and inferiority advocated by Pfander and me, Claus, and Calabresi and Lawson, this Article demonstrates that, in light of the background understanding inherited from Britain, the assumptions of the orthodox account about the text of Article III’s Exceptions Clause are incorrect. A clear and unbroken line of precedent establishes that, at the time of the framing of the U.S. Constitution, acts of Parliament excluding or making exceptions to the appellate jurisdiction of the British supreme courts of King’s Bench and the Court of Session always left some residual supervisory power in those courts. Through that power, King’s Bench and Session could review the decisions of inferior courts in extraordinary cases even though they lacked the power to entertain appeals or to grant review in the ordinary course. The orthodox view of the Exceptions Clause, which is based on a textual assumption that an “exception” to a court’s “appellate jurisdiction” has no internal limits,²³⁴ cannot withstand this evidence.

Although the scope of residual review and the manner of its exercise varied depending on the circumstances and the dictates of Parliament, no one ever disputed the existence or survival of this residual power; the House of Lords never reversed a decision of King’s Bench or Session asserting it; and no act of Parliament ever attempted to make an exception to the jurisdiction of either court that included removal of the court’s power of supervisory review. A few years after the U.S. Constitution was ratified, the House of Lords and the Court of Exchequer Chamber, the two highest courts of appeal in England, effectively repudiated the only decision interpreting a parliamentary exclusion to preclude supervisory review of an inferior court’s interpretation of a statute.²³⁵ Moreover, the cases discussing statutory exclusions explain that, if the supervisory power were removed from the supreme courts in these cases, an ostensibly “infer-

233. *Id.* at 1112; 371–72. An illuminating discussion of *Gould* and *Home* can be found in *Veley v. Burder* (Exch. Ch. 1841) 113 Eng. Rep. 813; 12 AD. & E. 138.

234. See Redish, *supra* note 8, at 902.

235. See *supra* notes 225–33 and accompanying text for discussion of *Home*, *Gould*, and *Veley*.

ior” jurisdiction would become absolute and uncontrollable, an outcome that Blackstone called “an impropriety which no wise Government can or ought to endure.”²³⁶

The potential for British practice to inform the Exceptions Clause debate is further illustrated by the Australian case *Kirk v Industrial Court of New South Wales*, in which the supreme court of another former British colony recently confronted and resolved the question of whether there are constitutional limits to the legislature’s power to restrict the appellate jurisdiction of a supreme court.²³⁷ In *Kirk*, a 2010 case that has gone unremarked by American federal courts scholars, the High Court of Australia held, based on the ancient practice of King’s Bench in England, that a defining attribute of a “supreme” court protected by the Australian constitution is the court’s supervisory power “to confine inferior courts within the limits of their jurisdiction” through the issuance of certiorari, prohibition, and mandamus.²³⁸ According to the High Court, privative provisions might limit the availability of review in particular cases or confine the manner and scope of review, they cannot be used to create “islands of power immune from supervision and restraint.”²³⁹ To do otherwise, the court held, would be to render a supreme court no longer supreme. The High Court reached this conclusion by examining the British Privy Council’s view of privative provisions (statutory exceptions) at the time of Australia’s federation, and it delineated the scope of such review by reference to the longstanding common-law practice of King’s Bench.²⁴⁰

In light of the evidence discussed in this Article, the fact that the holding of the High Court of Australia in *Kirk* dovetails so nicely with the supremacy account of Article III (despite the lack of any indication that the High Court was aware of the theory, or vice versa) does not appear to have been a coincidence. To the extent that the legal heritage the Framers inherited from Britain informed the background understandings and expectations embodied in Article III, it seems likely that the British conception of supervisory power as a fundamental attribute of a supreme court and the notion that statutory exceptions did not affect this core supervisory jurisdiction were imported in some degree into the Framers’ decision to vest the judicial power in “one supreme Court” and to provide for congressional “Exceptions” to the Supreme Court’s appellate jurisdiction. If this is so, then Congress has wide discretion to allocate jurisdiction among inferior courts, as Parliament did, and to preclude Supreme Court appellate review in particular categories of cases or controversies. It

236. See BLACKSTONE, *supra* note 217, at *12–13.

237. See *Kirk v Indus. Court of New S. Wales* (2010) 239 CLR 531, 532 (Austl.).

238. See *id.* at 566.

239. See *id.* at 581.

240. On the holding in *Kirk*, see Luke Beck, *What Is a “Supreme Court of State”?*, 34 SYDNEY L. REV. 295 (2012); Wendy Lacey, *Kirk v Industrial Court of New South Wales: Breathing Life into Kable*, 34 MELB. U. L. REV. 641 (2010).

might, for instance, make the Federal Circuit's jurisdiction over patent appeals final and unreviewable on appeal or by way of certiorari.

But Congress cannot extend such "exceptions" to the Supreme Court's core supervisory power. Through the exercise of that power, the Supreme Court can, as King's Bench and the Court of Session did, ensure that inferior courts respect the Supreme Court's precedents and remain within the confines of their jurisdiction. It can also intervene to correct obvious denials of due process and other fundamental constitutional rights. And the evidence further suggests that the supervisory power goes even further than previously argued. Following the precedent of King's Bench's expansive use of prohibition to resolve disputes among inferior courts and to correct misinterpretations of acts of Parliament, the Supreme Court also can intervene where necessary to resolve circuit splits or to correct important misinterpretations of statutes or the Constitution. Thus, the evidence suggests that the Framers would have understood the Exceptions Clause to be inherently subject to limits, thereby providing Congress with much-needed administrative and political flexibility but containing a built-in safeguard against attempts to fundamentally undermine the separation of powers, constitutional protections for due process and individual liberties, or the need for unity and consistency in the administration of federal law.

The evidence examined in this Article has one additional lesson to teach. Pfander has conceded that, in the ordinary course, the Supreme Court's supervisory power does not extend to state courts.²⁴¹ That concession appears to have been premature. For Pfander, the Court's supervisory power arises by virtue of its supremacy in relation to "inferior" courts and tribunals created or designated by Congress pursuant to the Constitution. Unless Congress has designated state courts as inferior federal tribunals (for instance, by removing all inferior federal court jurisdiction over particular cases), then those state courts are not constitutionally required to be subject to the Supreme Court's oversight. But the evidence in this Article suggests that residual supervisory review is an inherent, and unalterable, component of the Supreme Court's appellate jurisdiction. And if, as is widely agreed, the Supreme Court has appellate jurisdiction over state court decisions in cases to which the federal judicial power extends under Article III, then the Supreme Court can exercise supervisory review of state courts deciding federal questions even where Congress has made an exception to the Court's appellate jurisdiction over state court cases.

V. CONCLUSION

Many proponents of the orthodox account of the Exceptions Clause have argued that the Framers—perhaps inadvertently, perhaps intentionally—left open the possibility that Congress could assign state or lower

241. See James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 738–40 (2004).

federal courts as the final arbiters of cases raising important questions of federal law. Whatever potential consequences such a power might have, these scholars and jurists argue, must ultimately be left to the political process. At the other extreme, champions of a limited Exceptions Clause power have argued that Congress has essentially no power to remove the Supreme Court's appellate jurisdiction over questions of federal law.

I cannot subscribe to either extreme. The Exceptions Clause plainly delegates to Congress significant authority to shape the docket of the Supreme Court and to leave the final resolution of the vast majority of federal question cases to state and lower federal courts. Yet this does not mean that the Framers were blind to the consequences of such authority or contemplated that Congress's authority should be unlimited. Rather, I believe that, viewed in proper context, the Exceptions Clause strikes a sensible balance between the congressional power to shape the contours of federal judicial administration and the Supreme Court's power, essential to our constitutional scheme, to supervise that administration and to determine the meaning of important questions of federal law.

The Framers had many good reasons to provide Congress with flexibility to make exceptions to the Court's appellate jurisdiction. In the ordinary run, most cases do not require Supreme Court appellate review, and the prospect of review in a potentially distant forum in every case would have occasioned substantial delay, cost, and inconvenience.²⁴² As Tara Grove has noted, Congress's Exceptions power generally benefits the Court, freeing the Court from as-of-right appeals so that it may focus its limited time and energy where they are needed most.²⁴³

But the Framers also were not naïve. They may not have anticipated the sorts of politically charged jurisdiction-stripping measures attempted today, but they were familiar with Parliament's use of privative provisions to organize the British court systems and with the frequent deployment of exceptions to the appellate jurisdiction of the British supreme courts for reasons of administrative or political convenience. And they also would have known that such exceptions were not absolute.

Article III was written with an eye towards the Americans' British legal heritage and with a shared background understanding of the common-law legal terms employed to describe the judicial system. Such terms necessarily carry with them the common-law precedent informing that background understanding. By vesting the federal judicial power in "one *supreme* Court" and in "such *inferior* Courts" as Congress may create, and by assigning a general appellate jurisdiction to the Supreme Court, the Framers of the Constitution selected terms and concepts gesturing towards a particular understanding of the attributes of supremacy and inferiority in-

242. See James E. Pfander, *Federal Supremacy, State Court Inferiority, and the Constitutionality of Jurisdiction-Stripping Legislation*, 101 NW. U. L. REV. 191, 201-02 (2007).

243. See Grove, *supra* note 15, at 318.

herent in British judicial institutions. A fundamental attribute of supremacy and inferiority within that heritage is the residual power of a supreme court to exercise supervisory review over courts inferior to it.

Between the time of Justice Scalia's passing and the confirmation of his successor, Justice Neil Gorsuch, the Supreme Court was unable to fulfill its role as the final arbiter of the law as interpreted and applied by inferior courts in many important cases. The problems that this created were anticipated by British case law and by Blackstone: namely, a lack of clarity, a profusion of conflicting standards among various courts, and the ability of inferior courts to act functionally unchecked. Unable to command a majority on particular, divisive questions, the Supreme Court was forced to affirm controversial decisions by an equally divided vote, leaving in place regional court decisions imposing standards on the federal government as a whole, and to avoid taking up and resolving important issues of federal constitutional law.

To the British, a statutory exception to a supreme court's jurisdiction could limit or even eliminate review in most cases, but it always left untouched a core of supervisory oversight "absolutely necessary" to the preservation of the rule of law. At a distance of more than two hundred years from this precedent, modern observers have found it difficult to discern whether Congress's power under the Exceptions Clause has any definite or meaningful limitations. But for the Framers, more closely connected to our common-law heritage, that question may have had an easy answer.

