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Excepting Nondelegation from Supreme Court Review

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EXCEPTING NONDELEGATION FROM SUPREME COURT REVIEW

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For almost a century, the nondelegation doctrine has allowed Congress to create hundreds of distinct federal agencies—provided the delegation meets the "intelligible principle" requirement. While not exacting, this standard underlies the current administrative state, and absent a sufficiently defined alternative, the intelligible principle should remain undisturbed. A recent dissent and a separate pending case, however, give pause. Both present opportunities to rework the intelligible principle, but the solutions offered do not advance the ball. Rather, they suggest replacing a vague interpretive standard with a troublesome interpretive standard, which is unwarranted when a meaningfully clearer one is unfeasible. Further still, conceptualizing agency power as a commingling of the two political branches implicates the political question doctrine, potentially immunizing congressional delegations from judicial review.

Under Article III's Exceptions Clause, Congress has the power to regulate the Supreme Court's appellate jurisdiction, implying some authority to determine justiciability as well. Invoking the political question doctrine, Congress can thus remove nondelegation claims from Supreme Court review by statute, funneling these cases instead to the D.C. Circuit to ensure an Article III court hears the claims. By doing so, Congress would effectively adopt the intelligible principle, limiting undue alternatives and crystallizing it in amber within the federal courts.

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I. INTRODUCTION

Federal agencies are part and parcel of the modern administrative state.[1] Comprised of fifteen executive departments, overseeing hundreds of distinct agencies and more than two million employees,[2] the federal bureaucracy is vast and consistently criticized.[3] But it remains validated by the courts: Provided the administrative powers are delegated under an intelligible principle[4] and the agencies are acting within reasonable and permissible limits,[5] political branches have leeway in building and maintaining the state—until recently.

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[1] *See* Michael Dichio, Logan Strother & Ryan J. Williams, *"To Render Prompt Justice": The Origins and Construction of the U.S. Court of Claims*, 36 STUD. AM. POL. DEV. 120, 122 n.14 (2022) ("We use 'administrative state' in the way it is typically used in American political development studies: the complex constellation of federal bureaucratic politics and their related effects."). Like the authors, this Note uses "bureaucracy" and "administrative state" interchangeably. *Id.*

[2] For a list of departments and their employment figures, see U.S. OFF. OF PERS. MGMT., FEDERAL EXECUTIVE BRANCH CHARACTERISTICS (FEBC): FISCAL YEAR 2010 TO FISCAL YEAR 2018, at 7, https://www.opm.gov/policy-data-oversight/data-analysis-documentation/federal-employment-reports/reports-publications/federal-executive-branch-characteristics-2010-2018.pdf [https://perma.cc/69TX-Y22N]. However, the exact number of federal agencies is difficult to discern, though most estimates put the number between two hundred and four hundred. *See* Clyde Wayne Crews Jr., *How Many Federal Agencies Exist? We Can't Drain the Swamp Until We Know*, FORBES (July 5, 2017, 4:03 PM), https://www.forbes.com/sites/waynecrews/2017/07/05/how-many-federal-agencies-exist-we-cant-drain-the-swamp-until-we-know/?sh=39439f5f1aa2 [https://perma.cc/JVP5-W2D4] ("No one can even say with certainty anymore how many federal agencies exist . . . .").

[3] Perhaps the most interesting criticism for purposes of this Note is that federal agencies themselves are illegitimate—at least where their actions lack accountability and democratic responsiveness. *See* Nina A. Mendelson, Foreword, *Rulemaking, Democracy, and Torrents of E-Mail*, 79 GEO. WASH. L. REV. 1343, 1348–49 (2011) ("When an agency's authority is meaningfully constrained, an agency can be seen as accountable for acting in a constrained, nonarbitrary way. To be accountable, the agency should be obligated to disclose and justify its actions in light of its constraints and suffer consequences on the basis of its performance." (footnote omitted)).

[4] *See* J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928) ("If Congress shall lay down by legislative act an intelligible principle to which the person or body . . . is directed to conform, such legislative action is not a forbidden delegation of legislative power.").

[5] This means many things, and the Supreme Court has adopted varying levels of deference based on the precise issue presented. Two early and influential forms are *Skidmore* deference and *Chevron* deference. *See* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) ("The weight of [an agency's] judgment in a particular case will depend upon the thoroughness evident in

The dissent in *Gundy v. United States*[6] has signaled a shift in the U.S. Supreme Court's view of the nondelegation doctrine.[7] Arguing for a move away from the intelligible principle, Justice Neil Gorsuch used the framers' "guiding principles"[8] to construct a more prohibitive three-part test. Adoption of this test narrowly failed, but Justice Brett Kavanaugh took no part in the decision, and Justice Samuel Alito only concurred in the judgment.[9] With *SEC v. Jarkesy*,[10] a fresh nondelegation challenge pending before the Court, Justice Gorsuch may finally have the numbers he needs. But the Gorsuch test[11] is concerning because it proposes a troublesome

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its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."); Chevron U.S.A. Inc. v. Nat. Res. Def. Council, 467 U.S. 837, 843 (1984) ("[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."). However, for a recent example of a judicial limitation on the exercise of delegated power, see generally West Virginia v. EPA, 142 S. Ct. 2587 (2022) (introducing the major questions doctrine).

[6] Gundy v. United States, 139 S. Ct. 2116, 2131–48 (2019) (Gorsuch, J., dissenting).

[7] But this is not the first time. Forty years before *Gundy*, Chief Justice William Rehnquist envisioned the nondelegation doctrine as a three-part inquiry: First, is Congress delegating policymaking power? Second, is there an intelligible principle? And third, did the agency exceed the delegated power? Indus. Union Dep't v. Am. Petroleum Inst., 448 U.S. 607, 685–86 (1980) (Rehnquist, J., concurring); *see also* Johnathan Hall, Note, *The Gorsuch Test:* Gundy v. United States*, Limiting the Administrative State, and the Future of Nondelegation*, 70 DUKE L.J. 175, 203–04 (2020) (describing Justice Gorsuch's more recent discussion of modifying the nondelegation doctrine).

[8] *Gundy*, 139 S. Ct. at 2135–37.

[9] *See* Mila Sohoni, *Opinion Analysis: Court Refuses to Resurrect Nondelegation Doctrine*, SCOTUSBLOG (June 20, 2019, 10:32 PM), https://www.scotusblog.com/2019/06/opinion-analysis-court-refuses-to-resurrect-nondelegation-doctrine/ [https://perma.cc/58DA-3FWJ] (describing the background and implications of *Gundy*).

[10] SEC v. Jarkesy, No. 22-859 (U.S. argued Nov. 29, 2023). The relevant issue presented is "whether statutory provisions that authorize the SEC to choose to enforce the securities laws through an agency adjudication instead of filing a district court action violate the nondelegation doctrine." *Securities and Exchange Commission v. Jarkesy*, SCOTUSBLOG, https://www.scotusblog.com/case-files/cases/securities-and-exchange-commission-v-jarkesy/ [perma.cc/8RKJ-J2FY]. Notably, however, the Supreme Court will also weigh whether the SEC's enforcement of civil penalties "violate the Seventh Amendment." *Id.* At the time of this writing, a decision has not yet come. It may be that the Court invalidates the action as a violation of the Seventh Amendment, sidestepping the nondelegation problem entirely. Otherwise, if the Court finds that the SEC cannot clear the intelligible principle hurdle, it may just invalidate on that ground alone without a full reworking of the principle itself.

[11] For the origin of the term "Gorsuch test," see Hall, *supra* note 7, at 177 n.13.

interpretive standard to replace another interpretive standard, and despite the many alternatives appearing over the years,[12] the Court has for a century remained committed to the intelligible principle.

Agencies have passed hundreds of thousands of regulations relying on the current nondelegation doctrine.[13] To shift gears now—when the Court has developed a deep body of law addressing the exercise of delegated power[14]—is thus unwarranted, especially where a meaningfully clearer standard is impractical. Further still, absent the possibility of a *better* intelligible principle, and conceptualizing agency delegation as a commingling of the two other branches, the political question doctrine should immunize delegation from judicial review altogether.

This Note argues that Congress should use Article III's Exceptions Clause[15] to remove the Supreme Court's ability to hear appeals invoking the nondelegation doctrine vis-à-vis federal agencies. Congress's control of the Court's appellate jurisdiction further implies a capacity to determine justiciability, and the political question doctrine can justify exception of agency delegations from Supreme Court review. Instead, Congress should channel final review of all such claims to the U.S. Court of Appeals for the District of Columbia Circuit. This would crystallize the intelligible principle while providing claimants an Article III court in which to argue against the delegation.

Part II provides an extensive background on the nondelegation doctrine, the political question doctrine, and Congress's power to control federal jurisdiction. Part III then applies the political question doctrine to congressional delegations, justifying use of the Exceptions Clause to strip Supreme Court jurisdiction over nondelegation claims. Part IV suggests funneling these appeals to the D.C. Circuit. Part V discusses the implications of this decision and concludes.

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[12] For a broad discussion of competing proposals, see generally Paul J. Larkin, *Revitalizing the Nondelegation Doctrine*, 23 FEDERALIST SOC'Y REV. 238, 251–56 (2022) (book review).

[13] In fact, invalidating the statute at issue in *Gundy* could have imperiled over 300,000 similarly worded regulations. Transcript of Oral Argument at 8, Gundy v. United States, 139 S. Ct. 2116 (2019) (No. 17-6086).

[14] For three of these doctrines, see *supra* note 5 and accompanying text.

[15] U.S CONST. art. III, § 2, cl. 2.

II. FRAMING THE POLITICAL PROBLEM OF NONDELEGATION

To best understand how congressional delegations and control of jurisdiction fit against the political question doctrine, background is necessary. Section II.A explores the history of the nondelegation doctrine and its treatment by the Supreme Court, most recently in *Gundy v. United States*. Section II.B outlines theoretical views of the political question doctrine, their synthesis, and further literature discussing the use and implications of the doctrine. Section II.C examines the Exceptions Clause and the extent of its power, historically and practically, to strip judicial review.

A. THE LORE OF NONDELEGATION

For the most part, the three coequal branches live entirely within their respective spheres: Congress makes laws,[16] the President executes those laws,[17] and the Supreme Court rules on the constitutionality of both.[18] Less clear is the extent to which these branches can share their powers. Outside of the respective Vesting Clauses of Articles I, II, and III, which merely state what actual authority each branch has,[19] the U.S. Constitution is silent on the issue.[20]

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[16] *See id.* art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States . . . .").

[17] *See id.* art. II, § 1 ("The executive Power shall be vested in a President of the United States of America.").

[18] *See id.* art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court . . . .").

[19] *Cf.* Myers v. United States, 272 U.S. 52, 117 (1926) ("The vesting of the executive power in the President was *essentially a grant of the power* to execute the laws." (emphasis added)).

[20] *See, e.g.*, Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 290 (2021) ("[O]riginalist arguments for the nondelegation doctrine all rest on one or both of two descriptive claims about the Anglo-American legal order. . . . No version of either claim has ever been historically substantiated."); Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1722 (2002) ("[T]here just is no constitutional nondelegation rule, nor has there ever been. The nondelegation position lacks any foundation in constitutional text and structure, in standard originalist sources, or in sound economic and political theory."); Keith E. Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. PA. L. REV. 379, 381 (2017) ("[T]here was never a time in which the courts used the nondelegation doctrine to limit legislative delegations of power.").

Among the first cases taking aim at nondelegation is *Cargo of the Brig Aurora*.[21] Having previously enacted certain trade prohibitions against Great Britain, Congress renewed these restrictions in 1810—contingent on specific actions by the President.[22] But rather than strike down the law as an unconstitutional delegation of power, the Supreme Court did the opposite, finding "no sufficient reason[] why the legislature should not exercise its discretion" in passing the statute in question.[23] In so holding, the Supreme Court made its earliest foray into judicial interpretations of delegation.[24] Indeed, the case established the first of two permissible delegations: contingent legislation.[25] Provided the delegation hinges on clearly defined executive factfinding, the Court will typically let the matter stand,[26] and this idea has not seriously been challenged since. Instead, the complication addressed by this Note arises when Congress delegates authority with only a general principle or policy in mind and leaves the exercise of that authority to the President (or federal agency).[27] In these cases, the discretion may just be too much.

Wayman v. Southard first confronted this distinction two hundred years ago when the Kentucky state legislature attempted to prescribe procedural rules on the federal courts within the state.[28] One point of contention was whether Congress even had the power

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[21] Cargo of the Brig Aurora v. United States, 11 U.S. (7 Cranch) 382 (1813).

[22] *See id.* at 383–84 (providing background on the Act at issue).

[23] *Id.* at 388.

[24] For an earlier case touching on delegatory powers within the context of, ironically, Congress's ability to set federal court jurisdiction, see United States v. Hudson, 11 U.S. (7 Cranch) 32, 33–34 (1812).

[25] *See* 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 979 (3d ed. 2000) ("Congress may condition the operation of legislation upon an administrative agency official's determination of certain facts.").

[26] *See* Field v. Clark, 143 U.S. 649, 692–93 (1892) (holding that, although "Congress cannot delegate legislative power to the President," the "President ascertain[ing] the existence of a particular fact" did not amount to lawmaking).

[27] *See* TRIBE, *supra* note 25, at 979 ("Alternatively, Congress may grant authority to another branch to specify rules in areas where Congress itself has declared only general principles.").

[28] *See* Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 3 (1825) ("On the part of the plaintiffs it was insisted, that the executions issued by the [federal district courts], are to be regulated and governed by the laws of the United States, and not by the laws of the State of Kentucky.").

to delegate procedural rulemaking to the federal courts.[29] In rejecting this challenge, Chief Justice John Marshall opined that, while Congress could not generally delegate legislative responsibilities, Congress did have some delegatory capacity.[30] Indeed, the question was one of reach,[31] with the Court determining that the offending delegation was "properly within the [the delegatee's] province, and [was] always so considered."[32] In other words, since the delegated power fell under the traditional scope of the delegatee's authority, the delegation was proper.

This mandate would evolve into the "intelligible principle" test one hundred years later in *J.W. Hampton*.[33] Requiring that Congress, in authorizing grants of power, "lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform,"[34] this broad test moved away from the more traditional view espoused in *Wayman*. But in the one hundred years since its adoption, the intelligible principle has largely remained impervious to change.[35] In fact, even Justice

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[29] *See id.* at 11 ("On the part of the defendants it was insisted . . . [that Congress] could not delegate its authority to the Supreme and other Courts of the United States.").

[30] *See id.* at 42–43 ("It will not be contended that Congress can delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative. But Congress may certainly delegate to [the courts], powers which the legislature may rightfully exercise itself.").

[31] *See id.* at 43 ("The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to *fill up the details*. To determine the character of the [delegated power], we must inquire into its extent."(emphasis added)).

[32] *Id.* at 45.

[33] J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394 (1928).

[34] *Id.* at 409.

[35] Since 1928, the Supreme Court has only invoked the nondelegation doctrine twice—both times in 1935. *See* Pan. Refin. Co. v. Ryan, 293 U.S. 388, 415 (1935) ("[The Act] establishes no criterion to govern the President's course. It does not require any finding by the President as a condition of his action. . . . So far as this section is concerned, it gives to the President an unlimited authority to determine the policy and to lay down the prohibition."); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 553 (1935) (Cardozo, J., concurring) ("This is delegation running riot."). However, acquiescence does not mean approval nor even acceptance. Clearly, Justice Gorsuch is opposed to congressional delegations. *See* Gundy v. United States, 139 S. Ct. 2116, 2135 (2019) (Gorsuch, J., dissenting) ("[E]nforcing the separation of powers isn't about protecting institutional prerogatives or governmental turf. It's about respecting the people's sovereign choice to vest the legislative power in Congress

Antonin Scalia accepted the intelligible principle as established Supreme Court precedent,[36] holding that the Court could appropriately defer to the policy judgments of those branches "executing or applying the law."[37] But like Chief Justice Marshall two centuries earlier, Justice Scalia also had feedback: "[T]he degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred."[38] It is this continued adherence to traditional spheres of authority that informs the Gorsuch test.

The circumstances behind the decision in *Gundy v. United States* are muddy. Newly minted Justice Brett Kavanaugh had not yet been confirmed when the case was argued in October 2018,[39] and with a four-member plurality, the Court turned away the nondelegation challenge.[40] Justice Alito concurred in the judgment but signaled his willingness to reconsider the matter in a future case and with a future Court.[41] Justice Gorsuch dissented,[42] and his analysis was notable.

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alone."). But even the author of the plurality opinion in *Gundy* lightly regards the nondelegation doctrine. *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2364 (2001) ("It is, after all, a commonplace that the nondelegation doctrine is no doctrine at all.").

[36] *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 474 (2001) ("The scope of discretion . . . is in fact well within the outer limits of our nondelegation precedents.").

[37] *Id.* at 474–75 (Scalia, J., dissenting) (quoting Mistretta v. United States, 488 U.S. 361, 416 (1989)).

[38] *Id.* at 475; *accord* Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 43 (1825) (Marshall, C.J.) ("The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made . . . .").

[39] *See* Sohoni, *supra* note 9 ("[O]nly eight justices participated in deciding the case, because Justice Brett Kavanaugh had not yet been confirmed to the court when the case was argued last October.").

[40] *See id.* ("Elena Kagan's plurality opinion was joined by Justices Ruth Bader Ginsburg, Stephen Breyer and Sonia Sotomayor.").

[41] *See Gundy*, 139 S. Ct. at 2131 (Alito, J., concurring in the judgment) ("If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort.").

[42] *See id.* at 2148 (Gorsuch, J., dissenting) ("In a future case with a full panel, I remain hopeful that the Court may yet recognize that . . . [Congress] may never hand off to the nation's chief prosecutor the power to write his own criminal code.").

Two of Justice Gorsuch's three "guiding principles" to delegation are not particularly new.[43] "Filling in the details" is already assumed in most cases of delegated authority,[44] and legislation contingent on executive factfinding is similarly accepted.[45] But the third guiding principle—limiting congressional delegation to "nonlegislative responsibilities"—produces more than a few questions. According to Justice Gorsuch, nonlegislative responsibilities only include legislative authority that is also separately vested in another branch.[46] For this reason, in *Cargo of the Brig Aurora*, the Executive's traditional foreign affairs powers under Article II made for an appropriate delegation.[47] But how does one determine whether the powers at issue traditionally belong to the Executive? The Constitution is a starting reference, but whether the Executive's powers at the time of the founding so closely resemble the powers as understood today is debatable, especially considering the size and strength of the current administrative state. Then, if not the Constitution, where is the boundary for an understanding of the President's traditional powers? In a world controlled by the Gorsuch test, tightly restricted but important agencies could lose their teeth, and some could cease to exist altogether.[48]

To be fair, the Supreme Court has not been shy about wading into the swamp of nondelegation only to swim back out.[49] Even then, cases presenting a delegation issue have often cleared the

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[43] *See id.* at 2135–36 ("[T]he framers took [separation of powers] seriously and offered us important guiding principles.").

[44] *See, e.g.*, *supra* notes 27, 31 and accompanying text.

[45] *See, e.g.*, *supra* note 25 and accompanying text.

[46] *See Gundy*, 139 S. Ct. at 2137 (Gorsuch, J., dissenting) ("While the Constitution vests all federal legislative power in Congress alone, Congress's legislative authority sometimes overlaps with authority the Constitution separately vests in another branch.").

[47] *See id.* ("Though the case was decided on different grounds, the foreign-affairs-related statute in *Cargo of the Brig Aurora* may be an example of this kind of permissible lawmaking, given that many foreign affairs powers are constitutionally vested in the president under Article II.").

[48] *See* Hall, *supra* note 7, at 206–07 (discussing how a strict application of the Gorsuch test could undo core functions of, for example, the SEC and the Federal Reserve).

[49] *See, e.g.*, Clinton v. City of New York, 524 U.S. 417, 448 (1998) (holding that the presidential line-item veto violated the Presentment Clause, without reaching the nondelegation question of whether Congress had inappropriately given the President a power it could not grant).

intelligible principle hurdle with ease,[50] instead becoming exercises in statutory interpretation. To that point, the Court has repeatedly strengthened the tests used to adjudicate the exercise of these powers.[51]

But attacking the intelligible principle outright has disruptive consequences, with a century's worth of regulations at risk of new challenges.[52] This is not to say the federal bureaucracy is immune to substantive change in another fashion,[53] or that the Court cannot continue imposing restrictive canons to the exercise of administrative power. But agency delegation at the intersection of Congress and the Executive does touch on justiciability, which should insulate it from judicial review.

B. DEFINING POLITICAL QUESTIONS

The theory behind the political question doctrine is simple: Even when all questions of jurisdiction are answered, some subject matter may be inappropriate for judicial review and better left to the political branches instead.[54] But when and where does the doctrine apply? Generally speaking, political questions appear in matters where the coordinate branches of government should appropriately have the final word.[55] To define these areas, legal

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[50] In one hundred years, only two cases have not. *See supra* text accompanying note 35.

[51] For recent implementation of the major questions doctrine, see generally West Virginia v. EPA, 142 S. Ct. 2587 (2022).

[52] At least in 2019, that number was in the hundreds of thousands. *See* Transcript of Oral Argument, *supra* note 13, at 8 (citing 300,000 regulations). For more background figures see *supra* text accompanying note 2.

[53] Ostensibly, these changes would come from within the Executive when a new administration takes over. Otherwise, Congress could repeal or modify any of its statutes authorizing agency action—past or present. In both cases, the vote controls.

[54] *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 2.6.1, at 143–44 (4th ed. 2003) ("[T]he 'political question doctrine' refers to subject matter that the Court deems to be inappropriate for judicial review. Although there is an allegation that the Constitution has been violated, the federal courts . . . leav[e] the constitutional question to be resolved in the political process.").

[55] *See* TRIBE, *supra* note 25, at 367 ("These 'political questions,' it is said, concern matters as to which departments of government other than the courts, or perhaps the electorate as a whole, must have the final say. With respect to these matters, the judiciary does not define constitutional limits.").

scholars and the Supreme Court itself have advanced three distinct approaches: one classical, one prudential, and one functional.[56]

The Court first discussed the doctrine in its landmark case *Marbury v. Madison*.[57] Making clear that violations of enumerated individual rights were always justiciable,[58] the Court stopped short of declaring that all constitutional issues could be. Indeed, some violations were by their nature purely political, and the Court could not—and indeed should not—rule on them.[59] Chief Justice Marshall thus adopted what is considered the classical view of political questions: that all matters were justiciable unless the Constitution had committed the determination of that matter to another branch.[60]

This approach is closely aligned with the prudential view of political questions: namely, that the Court should pass on determining the merits of a case when such a determination would compromise some important principle or undermine the Court's authority in some way.[61] Unlike the classical view, the prudential view does not merely lean on express principles of separation of powers. Rather, the prudential view looks more at the role of the Court and whether a given decision would support that role.[62]

Finally, the functional view represents a more expansive and flexible take on the political question doctrine. Accepting that the Court could, in theory, proffer a determination on matters falling within the political sphere, the functional view posits that the Court must consider certain factors before deciding whether a given

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[56] *See id.* at 366 (outlining "three different theories" concerning the relationship between the judiciary and other two branches).

[57] Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

[58] *See id.* at 170 ("The province of the court is, solely, to decide on the rights of individuals . . . .").

[59] *See id.* ("Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.").

[60] TRIBE, *supra* note 25, at 366.

[61] *Id*.

[62] *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 70 (2d ed. 1962) ("[I]n withholding constitutional judgment, the Court does not necessarily forsake an educational function, nor does it abandon principle. It seeks merely to elicit the correct answers to certain prudential questions that . . . lie in the path of ultimate issues of principle.").

matter was actually justiciable.[63] These factors include the difficulty of accessing relevant information and deference to the wider responsibilities of the political departments.[64] But synthesizing these views within case law remained an uneven effort until *Baker v. Carr*.[65]

After a federal court in Tennessee dismissed a redistricting complaint, citing the political question doctrine, the Supreme Court reversed, further offering six factors to help guide the lower courts moving forward:

> Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[66]

Meeting any one of the factors would be sufficient to constitute a political question, which could trigger dismissal by the courts.[67] In

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[63] *See* TRIBE, *supra* note 25, at 366 ("[A] *functional* approach . . . would have [the Court] consider such factors as the difficulties in gaining judicial access to relevant information, the need for uniformity of decision, and the wider responsibilities of the other branches of government . . . .").

[64] *See* Fritz W. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517, 587 (1966) ("[T]he Court may apply the political question doctrine when its access to relevant information is insufficient to assure the correct determination of particular issues . . . or when an independent determination by the Court would interfere with the specific responsibilities of another department . . . .").

[65] Baker v. Carr, 369 U.S. 186 (1962).

[66] *Id.* at 217.

[67] *Id.*

practice, though, the factors have seen little use. Indeed, only a few cases since *Baker* have been deemed nonjusticiable as a political question.[68]

Criticisms of invoking the political question doctrine have limited its appeal. Some legal scholars have flatly rejected the doctrine, arguing that it would be inappropriate to leave constitutional questions to the political branches, which themselves are limited by the Constitution.[69] Moreover, political capital should not weigh on the courts when deciding cases.[70] An even more structuralist view holds that, by refusing to rule on political questions, courts are actively abdicating their responsibilities.[71]

Professor Alexander Bickel, while defending the role of the Supreme Court, takes the opposite stance. In *The Least Dangerous Branch*, he presents a straightforward view of the Court's relationship with political questions: declining cases posing such a question preserves the Court's legitimacy—specifically doing so by giving wide discretion to the political branches in areas that, by their nature, do not appropriately belong to judicial review.[72] In this

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[68] *See, e.g.*, Gilligan v. Morgan, 413 U.S. 1, 10 (1973) (holding that a governor's decision to deploy the National Guard during civil unrest was a "clear[] example of the type of governmental action that was intended by the Constitution to be left to the political branches"); *see also* Nixon v. United States, 506 U.S. 224, 235 (1993) (holding that judicial review of impeachment proceedings posed a political question).

[69] *See* Martin H. Redish, *Judicial Review and the "Political Question*,*"* 79 NW. U. L. REV. 1031, 1059 (1985) ("If the federal government or one of its branches is permitted to breach [its constitutional limitations], immune from judicial review, we are effectively left with a lawless government, a result harmful to society, both in itself and for the message it communicates to its citizens.").

[70] *See* TRIBE, *supra* note 25, at xvi ("[T]he highest mission of the Supreme Court . . . is not to conserve judicial credibility, but in the Constitution's own phrase, 'to form a more perfect Union' . . . .").

[71] *See* CHEMERINSKY, *supra* note 54, § 2.6.2, at 149 ("[I]n areas where the federal courts lack expertise, they should be more deferential to the other branches of government. . . . But deference need not mean abdication.").

[72] Professor Bickel's argument on safeguarding the Supreme Court's legitimacy, while expansive, touches only briefly on the political question doctrine. According to Professor Bickel, some matters were "political [and] pursuant to a decision on a principle that there ought to be discretion free of principled rules." BICKEL, *supra* note 62, at 186. Moreover, these discretionary matters were appropriately "unprincipled on principle" and should be regarded separately from areas in which the Constitution had granted plenary authority, such as Congress's commerce powers. *Id.* In so doing, the Supreme Court was not "abandon[ing] its concomitant role of 'teacher to the citizenry.'" *Id.* at 188 (citation omitted). Rather, the Court

way, the doctrine supports the allocation of such decisions to the branches with the most expertise to make those decisions.[73]

At least in some areas, the Supreme Court has agreed. As noted earlier, the Court has routinely found political questions present in matters of foreign affairs, mostly on the grounds that the cases understandably reflected deep policy concerns.[74] But the Court has also addressed political questions when present in strictly constitutional matters. Cases involving the Guarantee Clause[75] are common in this regard (i.e., apportionment),[76] and issues of

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was holding the political branches responsible to their constituencies. *See id.* at 193 ("The need is met . . . not by one but by a troika of institutions, each answering to a differently weighted constituency . . . .").

[73] *See* Scharpf, *supra* note 64, at 567 ("When an absolute solution is not acceptable, an information problem which is inherent in an issue may justify the application of the political question doctrine.").

[74] *See, e.g.*, Com. Tr. Co. of N.J. v. Miller, 262 U.S. 51, 57 (1923) (when wars begin and end); United States v. Belmont, 301 U.S. 324, 332 (1937) (actions of foreign governments); Goldwater v. Carter, 444 U.S. 996, 1002 (1979) (Rehnquist, J., concurring in the judgment) (mem.) (ratification and interpretation of treaties). Additionally, the lower courts consistently found political questions in cases presented during the Vietnam and Gulf Wars, and the Supreme Court consistently denied cert in those cases. For a list of these cases, see CHEMERINSKY, *supra* note 54, § 2.6.4, at 157 n.67.

[75] U.S. CONST. art. IV, § 4.

[76] *See, e.g.*, Baker v. Carr, 369 U.S. 186, 218 (1962) ("Guarant[ee] Clause claims involve those elements which define a 'political question,' and for that reason and no other, they are nonjusticiable."); *see also* Luther v. Borden, 48 U.S. (7 How.) 1, 42 (1849) ("Under [the Guarantee Clause] it rests with Congress to decide what government is the established one in a State. . . . And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal."). When paired with the Equal Protection Clause, however, these cases are often more successful. *See, e.g.*, Gomillion v. Lightfoot, 364 U.S. 339, 347 (1960) ("A statute which is alleged to have worked unconstitutional deprivations of petitioners' rights is not immune to attack simply because the mechanism employed by the legislature is a redefinition of municipal boundaries.").

impeachment[77] and amending the Constitution[78] have come up in the courts as well.

But the area of cases most relevant here involves the internal processes of Congress and the Court's reluctance to review them. On the one hand, the Court held over one hundred thirty years ago that it had to respect Congress's internal processes.[79] When the cause of action involves a direct violation of a constitutional provision, however, the Court has shown more willingness to suspend the doctrine.[80] Laurence Tribe addresses this distinction head-on and

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[77] The Supreme Court has held that judicial review of impeachment proceedings is improper, as the Constitution vests plenary powers in Congress to conduct impeachments. *See* Nixon v. United States, 506 U.S. 224, 235 (1993) ("Judicial involvement in impeachment proceedings, even if only for purposes of judicial review, is counterintuitive because it would eviscerate the 'important constitutional check' placed on the Judiciary by the Framers."). However, if the Constitution is being seriously undermined in some way, the Court may have to step in. *See id.* at 253–54 (Souter, J., concurring in the judgment) ("If the Senate were to act in a manner seriously threatening the integrity of its results . . . judicial interference might well be appropriate. In such circumstances, the Senate's action might be so far beyond the scope of its constitutional authority . . . as to merit a judicial response despite the prudential concerns that would ordinarily counsel silence.").

[78] The Supreme Court has unevenly applied the political question doctrine to constitutional amendments. In early cases, the Court decided that political questions could not allow the President to veto passed amendments. *See* Hollingsworth v. Virginia, 3 U.S. (3 Dall.) 378, 381 n.* (1798) (Chase, J.) ("[The President's veto power] applies only to the ordinary ca[s]es of legi[s]lation: He has nothing to do with the propo[s]ition, or adoption, of amendments to the Con[s]titution."). Nor could the doctrine disqualify judicial review of state certifications of amendments. *See* Leser v. Garnett, 258 U.S. 130, 137 (1922) ("[T]he function of a state legislature in ratifying a proposed amendment to the Federal Constitution, like the function of Congress in proposing the amendment, is a federal function derived from the Federal Constitution; and it transcends any limitations sought to be imposed by the people of a State."). On the other hand, the Court makes clear that it should have no business ruling on amendment cases. *See* Coleman v. Miller, 307 U.S. 433, 459 (1939) (Black, J., concurring) ("The process itself is 'political' in its entirety . . . and is not subject to judicial guidance, control or interference at any point.").

[79] *See* Field v. Clark, 143 U.S. 649, 672 (1892) ("The *respect due* to coequal and independent departments requires the judicial department . . . to accept, as having passed Congress, all bills authenticated in the manner stated: leaving the courts to determine, when the question properly arises, whether the act, so authenticated, is in conformity with the Constitution." (emphasis added)).

[80] *Id.*; *see also* Powell v. McCormack, 395 U.S. 486, 548 (1969) ("[T]he intention of the Framers . . . [and] the basic principles of our democratic system persuade us that the Constitution does not vest in the Congress a discretionary power to deny membership by a majority vote. . . . [T]he political question doctrine does not bar federal courts from adjudicating [these] claims.").

provides a way to make sense of the political question doctrine against the backdrop of congressional power. According to Professor Tribe, the primary inquiry is "whether it is possible and appropriate to translate the principles underlying the constitutional provision at issue into restrictions on government, or affirmative definitions of individual liberty, which courts can articulate and apply."[81] Put another way, can the constitutional provisions at issue actually be interpreted as guaranteeing "judicially enforceable rights?"[82] If so, the courts should theoretically decide the matter.

Agencies seem to be the exception. While the Court has ruled that judicial review in some cases involving the actions of coordinate branches are appropriately deemed nonjusticiable,[83] the Court has generally had no problem weighing in on administrative actions, though questions still remain as to whether the congressional delegation itself violates the Constitution in some way.[84] To this end, it does seem curious that the Court would restrict grants of power not explicitly prohibited anywhere in the Constitution.[85] With that in mind, where courts have previously defined the boundaries of the political question doctrine in its cases, Congress could—in theory—do the same.

C. THE EXCEPTIONS CLAUSE AND JUDICIAL REVIEW

The Exceptions Clause is among the more peculiar grants of congressional power in the Constitution. The full text lies in the last sentence of Article III, Section 2, Clause 2:

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[81] TRIBE, *supra* note 25, at 368.

[82] *Id.* Aligning closely with the *Baker* factors, Professor Tribe argues that, to make this determination, courts must (1) construe all relevant constitutional text, (2) identify the purposes of the provision against the scheme as a whole, (3) decide whether the provision grants power to another branch of government, (4) identify conflicting conclusions, and (5) find a need for judicial or political remedies. *Id.* at 385.

[83] *See, e.g.*, Gilligan v. Morgan, 413 U.S. 1, 10 (1973) (holding that "complex, subtle, and professional decisions" regarding military matters were appropriately and completely vested in the two political branches).

[84] *See* TRIBE, *supra* note 25, at 367–68 ("[T]he Court retains the power to determine whether a particular congressional or executive action comes within the terms of the constitutional grant of authority, and whether it transgresses a cross-cutting constitutional limitation.").

[85] *See supra* note 20 and accompanying text.

> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.[86]

The Clause, on its face, is unassuming. The Supreme Court has original jurisdiction over cases involving ambassadors and like officials, as well as cases where a state is a litigant.[87] In all other cases, the Court has appellate jurisdiction, which Congress can regulate as it deems necessary.[88] Determining the extent of this language, however, has proven less straightforward.

Intuitively, the idea that Congress can remove the Court's ability to hear cases appears problematic. At the very least, the Founders did not seem warm to the idea.[89] But the early Courts construed the clause literally—even if begrudgingly.[90] The result was a general acceptance, both by the Court and by Congress, that the latter could limit the former by invoking the Exceptions Clause to remove

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[86] U.S. CONST. art. III, § 2, cl. 2.

[87] *Id.*

[88] *Id.*

[89] In prior drafts of the Constitution, the following language was proposed and quickly discarded: "In all the other cases before mentioned the judicial power shall be exercised in such manner as the legislature shall direct." Leonard G. Ratner, *Congressional Power over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157, 172 (1960) (citations omitted). Patrick Henry, in particular, was a vocal critic:

> Congress cannot, by any act of theirs, alter [the appellate jurisdiction of the Supreme Court]. It appears to me that no law of Congress can alter or arrange it. It is subject to be regulated, but is it subject to be abolished? If Congress alter this part, they will repeal the Constitution. Does it give them power to repeal itself?

Patrick Henry, Statement in the Debates in the Convention of the Commonwealth of Virginia on the Adoption of the Federal Constitution (June 2, 1788), *in* 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 540 (Jonathan Elliott ed., 2d ed. 1836).

[90] *See* Durousseau v. United States, 10 U.S. (6 Cranch) 307, 314 (1810) ("The appellate powers of this court are not given by [Congress]. They are given by the constitution. But they are limited and regulated by [Congress].").

appellate jurisdiction.[91] And considering the Court's limited original jurisdiction, what Congress effectively had was the broad power to control what cases could reach the Court in the first place.

For the most part, Congress has not exercised this power indiscriminately. Indeed, Congress expressly supplied the Court with appellate jurisdiction in the Judiciary Act of 1789.[92] Congress further refined the ability of litigants to bring suit before the Court by petitions for a writ of certiorari.[93] The exigencies of the Civil War, however, would produce new limitations the Court would confront head-on.

At the height of Reconstruction, the Chase Court decided two cases in 1868 involving petitions for habeas corpus: *McCardle*[94] and *Yerger*.[95] Though the Act of 1789 had given the Court power to decide writs of habeas corpus,[96] the early Court construed the Act narrowly and often would not exercise its appellate jurisdiction.[97] To address the issue, Congress expressly authorized these appeals with the Habeas Corpus Act of 1867.[98] Then came *McCardle*.

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[91] *See, e.g.*, Barry v. Mercein, 46 U.S. (5 How.) 103, 120–21 (1847) ("[The] court can exercise no appellate power unless it is conferred by act of Congress . . . ."); Daniels v. R.R. Co., 70 U.S. (3 Wall.) 250, 254 (1865) ("[I]t is for Congress to determine how far, within the limits of the capacity of this court to take, appellate jurisdiction shall be given, and when conferred, it can be exercised only to the extent and in the manner prescribed by law. In these respects it is wholly the creature of legislation."); *see also* Walker v. Taylor, 46 U.S. (5 How.) 64, 67 (1847) ("If [Congress has withheld] jurisdiction, the consent of parties will not justify its assumption.").

[92] *See* Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 81 ("The Supreme Court shall also have appellate jurisdiction from the circuit courts and courts of the several states, in the cases herein after specially provided for . . . .").

[93] *See* 28 U.S.C. § 1254(1) ("Cases in the courts of appeals may be reviewed by the Supreme Court . . . by writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment . . . .").

[94] *Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1868).

[95] *Ex parte* Yerger, 75 U.S. (8 Wall.) 85 (1868).

[96] *See* Judiciary Act of 1789 § 14 ("[T]he justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment.").

[97] *See, e.g.*, *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 100–01 (1807) (holding that the Court possessed only appellate jurisdiction over writs of habeas, which Congress had not explicitly granted).

[98] *See* Habeas Corpus Act of 1867, ch. 28, § 1, 14 Stat. 386 ("From the final decision of any judge, justice, or court, inferior to the circuit court, an appeal may be taken to the circuit court

Accused of libel and impeding Reconstruction efforts through his newspapers, William McCardle was charged with various insurrectionary crimes and detained in Mississippi.[99] He appealed under the Act of 1867, but with President Andrew Johnson's impeachment trial calling away Chief Justice Salmon Chase, a decision in *McCardle* would not come for several months.[100] In the meantime, Congress repealed the Act of 1867[101] and, with it, the Court's ability to hear habeas petitions through that Act.[102] In a unanimous decision, the Court upheld Congress's ability to restrict appellate jurisdiction, though with the important caveat that repealing jurisdiction in one way and in one area did not alter the Court's jurisdiction expressed through other statutes.[103] The Court then decided *Ex parte Yerger* and further qualified *McCardle*'s qualification.

Under the First Reconstruction Act of 1867,[104] a military tribunal charged Edward Yerger with murder in Mississippi.[105] Yerger appealed to the Supreme Court, and despite Congress recently repealing the Habeas Corpus Act of 1867, the Court heard and

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of the United States for the district in which said cause is heard, and from the judgment of said circuit court to the Supreme Court of the United States . . . .").

[99] *See McCardle*, 74 U.S. (7 Wall.) at 508 ("[T]he petitioner was . . . held in custody by military authority for trial before a military commission, upon charges founded upon the publication of articles alleged to be incendiary and libellous, in a newspaper of which he was editor. The custody was alleged to be under the authority of certain acts of Congress.").

[100] *See id.* at 509 ("[T]he Chief Justice being detained from his place here, by his duties in the Court of Impeachment, the cause was continued under advisement.").

[101] *See* Act of Mar. 27, 1868, ch. 34, § 2, 15 Stat. 44 ("[The Habeas Corpus Act of 1867], as authorizes an appeal from the judgment of the circuit court to the Supreme Court of the United States, or the exercise of any such jurisdiction by said Supreme Court . . . is[] hereby repealed.").

[102] *See McCardle*, 74 U.S. (7 Wall.) at 514 ("The provision of the act of 1867, affirming the appellate jurisdiction of this court in cases of *habeas corpus* is expressly repealed. It is hardly possible to imagine a plainer instance of positive exception.").

[103] *See id.* at 515 ("The act of 1868 does not except from that jurisdiction any cases but appeals from the Circuit Courts under the act of 1867. It does not affect the jurisdiction which was previously expressed.").

[104] First Reconstruction Act of 1867, ch. 152, 153, 14 Stat. 428–32 (1867).

[105] *See Ex parte* Yerger, 75 U.S. (8 Wall.) 85, 88 (1868) ("[T]he petitioner had been arrested, and was held for trial, upon a charge of murder, by a *military commission*, under the [First Reconstruction Act of 1867].").

decided the case, citing the Judiciary Act of 1789.[106] Further still, Chief Justice Chase implied that, while Congress certainly held power to regulate appellate jurisdiction, Congress could not remove it entirely: the Court's appellate powers coming directly from the Constitution meant that the Court had to have *some* appellate jurisdiction.[107] Still, what this means on a practical level has been mostly undecided.

Without firm rejection by the Court,[108] Congress has not shied away from attempting to limit appellate review. The 97th Congress was particularly active, introducing at least thirty bills to restrict the Court's appellate jurisdiction in cases ranging from abortion to prayer in public schools.[109] But where those bills failed, Congress found success in other matters. Most controversially, Congress has continued limiting rights for inmates and aliens.[110] Congress has similarly blocked judicial review to expedite completion of the

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[106] *See id.* at 102 ("[T]he case is one of those expressly declared not to be excepted from the general grant of jurisdiction [in the Judiciary Act of 1789].").

[107] *See* Morris D. Forkosch, *The Exceptions and Regulations Clause of Article III and a Person's Constitutional Rights: Can the Latter be Limited by Congressional Power Under the Former?*, 72 W. VA. L. REV. 238, 254 (1970) ("[I]t is really [Justice] Chase who explicitly and impliedly upholds the Constitutional inviolability of the Court's appellate jurisdiction . . . and who would declare unconstitutional a Congressional statute removing all appellate jurisdiction from the Supreme Court . . . thereby permitting the Court to exercise only its original jurisdiction."); *see also Yerger*, 75 U.S. (8 Wall.) at 102–03 ("[I]t is too plain for argument that the denial to this court of appellate jurisdiction . . . seriously hinder[s] the establishment of that uniformity in deciding upon questions of personal rights which can only be attained through appellate jurisdiction . . . .").

[108] *But see, e.g.*, Patchak v. Zinke, 138 S. Ct. 897, 905 (2018) ("One way that Congress can cross the line from legislative power to judicial power is by 'usurp[ing] a court's power to interpret and apply the law to the [circumstances] before it.' The simplest example would be a statute that says, 'In *Smith v. Jones*, Smith wins.'" (alterations in original) (citations omitted) (quoting Bank Markazi v. Peterson, 136 S. Ct. 1310, 1323 (2016))).

[109] For a comprehensive list of all such bills, see Max Baucus & Kenneth R. Kay, *The Court Stripping Bills: Their Impact on the Constitution, the Courts, and Congress*, 27 VILL. L. REV. 988, 992 n.18 (1982).

[110] *See, e.g.*, 42 U.S.C. § 1997e(a) ("No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted."); 8 U.S.C. § 1252(g) ("[N]o court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.").

Mountain Valley Pipeline.[111] On the other end, the Tax Anti-Injunction Act[112] has remained notably immune to Supreme Court review since the 1800s, and it provides a framework for stripping jurisdiction over substantive but less controversial issues—assuming Congress can deem the exception appropriate.

III. EXCEPTING DELEGATED POWER BY THE POLITICAL QUESTION DOCTRINE

The Exceptions Clause may give Congress the ability not only to regulate appellate jurisdiction but to define justiciability as well. If so, Congress could invoke the political question doctrine as justification for stripping judicial review of nondelegation claims. First, section III.A argues how congressional delegations fit the political question doctrine. Next, section III.B discusses Congress's relationship with justiciability and whether the Exceptions Clause implicitly vests in Congress some authority to make this determination. Section III.C concludes by examining current legislation as a roadmap for limiting judicial review.

A. THE POLITICAL FOUNDATION OF DELEGATED POWER

Some scholars view delegations of power between Congress and the Executive as presenting political questions[113]—just not the

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[111] *See* Fiscal Responsibility Act of 2023, Pub. L. No. 118-5, § 324(e)(1), 137 Stat. 47 (removing judicial review over "any action taken by the Secretary of the Army, the Federal Energy Regulatory Commission, the Secretary of Agriculture, the Secretary of the Interior, or a State administrative agency" to regulate and oversee construction of the Mountain Valley Pipeline). Predictably, the pipeline itself has met stiff opposition from advocacy groups. *See, e.g.*, Amy Mall, *10 Reasons to Stop Mtn. Valley & Atlantic Coast Pipelines*, NRDC (Oct. 23, 2017), https://www.nrdc.org/bio/amy-mall/10-reasons-stop-mtn-valley-atlantic-coast-pipelines [https://perma.cc/YBX9-6DLC] (discussing the negative economic and environmental effects of the pipeline).

[112] 26 U.S.C. § 7421.

[113] For a robust discussion on how the political question doctrine should invalidate judicial review altogether, see generally JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 260–379 (1980). Relevant here is Professor Choper's treatment of delegated powers. Indeed, he summarizes the rationale succinctly:

> [T]he judiciary may employ other methods—such as statutory interpretations, judge-made administrative law, and, ultimately, application of constitutionally secured personal liberties—to oversee the integrity of a

courts. Nevertheless, under a functional view of political questions, and taking the Supreme Court at its word in *Baker v. Carr*,[114] congressional delegations do fit within the doctrine and can be dismissed.

1. Congressional Delegations Are Deliberate Policy Choices Protected Under a Functional View of the Political Question Doctrine. To be sure, a classical or prudential view would hold against agency delegation.[115] First, classically, if all cases are justiciable unless the Constitution has already committed the matter to a coordinate branch, political questions are only implicated where the judiciary attempts to adjudicate a matter entirely within the constitutional province of one of the other two political branches. Delegation is thus open to judicial review precisely because it does not involve a matter strictly dedicated to either Congress or the Executive but rather the impermissible action of sharing power between the two. Second, prudentially, if courts should withhold judgment only where such judgment would compromise an important principle or undermine judicial authority, political questions probably do not exist within the delegation itself. While an argument can be made that empowering federal agencies furthers constitutionally protected objectives,[116] invoking

> delegee's decisionmaking process, as well as to insure the individual fairness and other aspects of formal justice. But if Congress intentionally and unmistakably delegates its power—whether it be to enact taxes or declare war—and if no individual constitutional rights are in issue, the Court should remit to the political process the question of Congress's constitutional authority to do so.

Id. at 374 (footnote omitted). What distinguishes this Note is that Professor Choper's treatment of delegation is both passing and part of a broader argument respecting the function of judicial review. Professor Aziz Huq, arguing that the political question doctrine should apply to the presidential removal power, calls Professor Choper's approach "wholesale." Aziz Z. Huq, *Removal as a Political Question*, 65 STAN. L. REV. 1, 7–8 n.25 (2013). This Note, however, is neither wholesale nor merely retail. It covers distribution.

[114] For the full list of *Baker* factors, see Baker v. Carr, 369 U.S. 186, 217 (1962).

[115] *See supra* section II.B.

[116] For example, the Constitution gives Congress the power to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. CONST. art. I, § 8, cl. 8. Hence, Congress has established two relevant administrative agencies: the U.S. Copyright Office and the U.S. Patent and Trademark Office. *Overview*, U.S. COPYRIGHT OFF., https://www.copyright.gov/about/ [https://perma.cc/T337-Z6SK]; *About Us*, USPTO, https://www.uspto.gov/about-us [https://perma.cc/39B6-SP59].

separation of powers is a readymade counter. Further still, claiming that the Court's authority would be undermined by the exercise of the same authority, on its face, presents a tough hill to climb.

Under a functional view,[117] however, the political nature of delegation becomes more apparent. The view posits that relevant concerns in determining a political question include, in part, the extent to which the judgment would encroach on the other branches. This view is memorialized in the fourth *Baker* factor, justifying non-review as deference to Congress and the President. To this extent, the Court appears willing to suspend judgment when the matter falls within a given policy area—specifically those in which the affected branch has some qualifications[118]—and questions of agency delegation should similarly lie.

The modern administrative state can certainly be described as political, or at least couched in policy,[119] with congressional delegations functioning as deliberate choices to entrust execution[120] within a defined policy area (e.g., public health) to an agency.[121] When courts then invalidate agency delegation outright, policy choices made by Congress are naturally restricted.

This may be warranted depending on the nature of the violation,[122] but to suggest that Congress is helpless without such judicial intervention is disingenuous. In fact, as the body directly responsible for the delegation, Congress is perhaps in the best position to restrict agency power post-delegation—another

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[117] *See supra* section II.B.

[118] Professor Scharpf discusses this treatment vis-à-vis international diplomacy. Scharpf, *supra* note 64, at 578–81 (citing Harisiades v. Shaughnessy, 342 US. 580, 591 (1952)).

[119] *See* Mendelson, *supra* note 3, at 1347 ("[A]gency officials receive broad powers to resolve not only questions requiring substantial technical expertise, but also questions that can only be understood as value-laden. One might characterize these decisions not as an exercise of expertise, but of judgment.").

[120] *See* U.S. CONST. art. I, § 8, cl. 18 ("The Congress shall have Power . . . To make all Laws which shall be necessary and proper for *carrying into Execution* the foregoing Powers . . . ." (emphasis added)).

[121] *See, e.g.*, Mendelson, *supra* note 3, at 1347–48 (discussing the exercise of policy choices by the FDA and EPA).

[122] Even when lawfully authorized to exercise a specific power, agencies can take the grants too far. Consequently, the Court has adopted several interpretive schemes to assess and curtail agency actions. *See supra* note 5 for a few of these doctrines.

deliberate policy choice.[123] For example, Congress can refuse to appropriate funds, refuse to enact "presidentially sponsored legislation," refuse to confirm executive appointments, and, ultimately, impeach executive officials.[124] Further dissatisfaction with Congress's actions or inactions can then be remedied at the ballot box, pressuring Congress to repeal the offending statute if necessary.[125] All else aside, where Congress has satisfied its burden under the intelligible principle and marshalled resources to fulfill a policy goal, a standard reversing the choice must be exact.

2. The Political Question Doctrine Should Bar Further Limitations to the "Intelligible Principle" Test Absent Sufficiently Defined Alternatives. The second *Baker* factor, proscribing judicial review without available standards for determining the issue, is complicated but ultimately informative. Professor Louis Jaffe explains the factor well:

> [T]he question is one for the decision of which there are no well-developed principles, or the issue is felt to be so closely related to a complex of decisions not within the court's jurisdiction that its resolution by the court would either be poor in itself or would jeopardize sound decisions in the larger complex.[126]

On the one hand, courts have employed a standard for resolving nondelegation claims for years (i.e., the intelligible principle), and there is no reason why the Supreme Court cannot continue modifying the standard. But therein lies the complication. The intelligible principle is loose because the issue is thorny. Today,

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[123] *Cf.* CHOPER, *supra* note 113, at 281 ("Above all others, it is Congress itself that stands as the greatest barrier blocking the President from successfully taking action that the Constitution reserves to the legislature.").

[124] For a more focused discussion on these "protective devices of Congress," see generally *id.* at 281–88.

[125] Professor Jerry Mashaw summarizes this position persuasively: "Assuming that our current representatives in the legislature vote for laws that contain vague delegations of authority, we are presumably holding them accountable for that at the polls. How is it that we are not being represented?" Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 87 (1985).

[126] Louis L. Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265, 1304 (1961).

hundreds of agencies and hundreds of thousands of regulations rely on the standard[127]—which has only invalidated *two* actions in the past one hundred years[128]—and judicial alternatives have been sparse.

The Gorsuch test is the most recent, and exact it is not. In fact, its first two prongs are unnecessary: *Wayman v. Southard* already established congressional power to authorize an agency to "fill up the details," and *Cargo of the Brig Aurora* permitted delegations contingent on executive factfinding ten years before *Wayman*.[129] Arguably, the intelligible principle superseded both prongs long before *Gundy*, and instead, the Gorsuch test truly differentiates itself on the third: "nonlegislative responsibilities," or assessing whether a given power or policy area traditionally fell within the scope of the Executive.[130] But different courts can read a traditional power in different ways, and on a practical level, the Gorsuch test is as vulnerable to time and place as any other interpretive canon.[131] As such, it is not that there are no available judicial standards for determining the issue of agency delegation. Rather, the current standard is established and reasonable, and alternatives are unnecessary or vague.[132]

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[127] *See supra* notes 2, 13 (discussing the number of executive departments, agencies, and agency employees that comprise the federal bureaucracy and the number of regulations relying on the current nondelegation doctrine).

[128] *See supra* note 35 and accompanying text.

[129] *See supra* section II.A.

[130] *See* Gundy v. United States, 139 S. Ct. 2116, 2137 (2019) ("[W]hen a congressional statute confers wide discretion to the executive, no separation-of-powers problem may arise if the 'the discretion is to be exercised over matters already within the scope of executive power.'" (quoting David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 MICH. L. REV. 1223, 1260 (1985))).

[131] *See, e.g.*, Kristin E. Hickman, Gundy, *Nondelegation, and Never-Ending Hope*, REGUL. REV. (Jul. 8, 2019), https://www.theregreview.org/2019/07/08/hickman-nondelegation/ [https://perma.cc/M63N-CURK] ("[A]ny more rigorous replacement for the intelligible principle standard will need to facilitate [better] line drawing. Justice Gorsuch's first effort . . . seems too susceptible to the whim of the moment.").

[132] If any recent Supreme Court member had the qualifications to rewrite the intelligible principle, it would certainly have been Justice Antonin Scalia. Indeed, Justice Scalia advocated for a strengthened nondelegation doctrine as a law professor—only to back down after taking the bench. But whether this was, at its core, a mere change in opinion or a recognition of some impossibility of the task is unclear. *See* Cody Ray Milner, *Into the Multiverse: Replacing the Intelligible Principle Standard with a Modern Multi-Theory of*

Legal theorists, naturally, would claim otherwise. Paul Larkin provides a helpful summary of currently proposed alternative versions of the nondelegation doctrine. For example, the courts can limit congressional delegations via principles of equal protection law, applying either strict or lenient review depending on whether individuals' private rights are at stake.[133] This theory would further hold that any activity not concerned with interpreting law, finding facts, and applying law to fact would be impermissible policymaking.[134] Yet another theory would approach nondelegation claims by incorporating existing interpretive frameworks: i.e., using the intelligible principle, the clear statement rule, and the major questions doctrine to invalidate agency delegations that have no discernable principle or otherwise relate to one of Congress's "core legislative functions."[135]

The problem with these theories, much like with the Gorsuch test, is that they are new coats of paint on the same old car. First, the Court has made clear from the beginning that the constitutional rights of individuals lie within the "province of the court."[136] As such, borrowing due process concepts, while appealing, does little to meaningfully advance the ball when the issue is not an infringement of individual rights but a contested delegation of power between two coequal branches. Second, simply applying post-delegation interpretive canons to a nondelegation claim is the current state of affairs with fewer steps.

Conversely, Ilan Wurman argues that the nondelegation doctrine requires no such overhaul but rather a simple refashioning into an

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Nondelegation, 28 GEO. MASON L. REV. 395, 421 n.177 (2020) (recounting Justice Scalia's relationship with the nondelegation doctrine).

[133] *See* Larkin, *supra* note 12, at 253 (describing Professor Michael Rappaport's "two-tiered approach to delegation questions" (citing Michael B. Rappaport, *A Two-Tiered and Categorical Approach to the Nondelegation Doctrine*, *in* THE ADMINISTRATIVE STATE BEFORE THE SUPREME COURT: PERSPECTIVES ON THE NONDELEGATION DOCTRINE 156, 196 (Peter J. Wallison & John Yoo eds., 2022))).

[134] *Id.*

[135] *See id.* at 254–55 (discussing an alternative "three-step inquiry" (citing Mark Chenoweth & Richard Samp, *Reinvigorating Nondelegation with Core Legislative Power*, *in* THE ADMINISTRATIVE STATE BEFORE THE SUPREME COURT, *supra* note 133, at 69, 89–92)).

[136] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803).

"as-applied doctrine" to deal with implicit delegations.[137] By leaning on statutory canons, as-applied nondelegation would not normally invalidate a delegation for failing to meet the intelligible principle.[138] Instead, judicial review would invalidate an *implicit* delegation created by an ambiguity present in the statutory scheme *only if* that delegation would be unlawful if *explicit*.[139] But again, the inquiry here seems, under the surface, to really point at what to do *after* the delegation has taken place. In that regard, the courts already have no problem limiting agency power. The theory would eliminate a step in a thoughtful way, to be sure, but this appears again more a question of the exercise of power and not necessarily of the delegation itself.

In this discussion is the second *Baker* factor illustrated in full: If a workable, neutral standard in an area is not possible, the political branches should control. The Gorsuch test, as a judicial alternative, is simply not so defined to warrant undoing a century-old principle guiding a core congressional action. Theoretical alternatives have similar shortcomings limiting broad acceptance as well. Still, congressional delegations remain under attack, and at a certain point Congress can and should protect itself.

B. POLITICAL JUSTICIABILITY AND CONTROL OF JURISDICTION

Through the Exceptions Clause, Congress has the express ability to regulate the Supreme Court's appellate jurisdiction and has further established and maintained the jurisdiction of the lower courts from their inception.[140] If Congress can thus determine

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[137] *See* Ilan Wurman, *As-Applied Nondelegation*, 96 TEX. L. REV. 975, 977 (2018) ("The [as-applied] doctrine would not challenge statutory language that in most applications creates no nondelegation concerns, but rather would treat particular *ambiguities* created by that statutory language just as *Chevron* does—as implicit delegations of authority—and then assess those implicit delegations for nondelegation violations.")

[138] *See id.* at 990 ("An as-applied nondelegation doctrine would not challenge the key statutory language at issue in these cases on its face. After all, in almost all applications, the agencies had reasonably clear guidance on what the [specific statutory language] required.").

[139] *See id.* ("An as-applied nondelegation doctrine would . . . assess[] whether such an implicit delegation would be unlawful if made *explicitly* by Congress in clear statutory language. If such a delegation would be impermissible, then Congress cannot make that same delegation implicitly through statutory ambiguities.").

[140] *See supra* section II.C.

jurisdiction so explicitly, it should follow that Congress can determine justiciability as well.

To be sure, jurisdiction and justiciability are not the same thing, but they do go hand in hand. The Supreme Court distinguished the two in *Baker v. Carr*:

> In the instance of nonjusticiability, consideration of the cause is not wholly and immediately foreclosed; rather, the Court's inquiry necessarily proceeds to the point of deciding whether the duty asserted *can be* judicially identified and its breach judicially determined, and whether protection for the right asserted *can be* judicially molded. In the instance of lack of jurisdiction the cause either *does not* "arise under" the Federal Constitution, laws or treaties . . . or *is not* a "case or controversy" within the meaning of that section; or the cause *is not* one described by any jurisdictional statute.[141]

In other words, the federal courts must have jurisdiction under Article III to hear a case.[142] At the same time, justiciability doctrines "weed out" cases that may be inappropriate for judicial review.[143]

The distinction thus comes down to source: jurisdiction is set by the Constitution and justiciability is set by the Court.[144] Put differently, Congress can control what cases may reach the Court under the Exceptions Clause,[145] and the Court may then determine

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[141] Baker v. Carr, 369 U.S. 186, 198 (1962) (emphases added).

[142] *See* U.S. CONST. art. III, § 2, cl. 1 (defining federal judicial power); *see also* Zachary D. Clopton, *Justiciability, Federalism, and the Administrative State*, 103 CORNELL L. REV. 1431, 1438 (2018) ("In order for the federal courts to take jurisdiction, they must identify a 'case' or 'controversy' within the heads of jurisdiction in Article III.")

[143] *See* Clopton, *supra* note 142, at 1438 ("In applying [case-or-controversy requirements], the federal courts have fashioned various doctrines to weed out non-justiciable claims.").

[144] *See id.* (referencing the case-or-controversy jurisdictional language in Article III and the justiciability doctrines fashioned by federal courts).

[145] A notable exception, of course, is the Supreme Court's original jurisdiction, which the Constitution, not Congress, prescribes. *See* U.S. CONST. art. III, § 2 (setting forth those cases where the Court has original jurisdiction).

what cases it will hear under its own justiciability doctrines.[146] Even more succinctly, justiciability is irrelevant without jurisdiction, and in this way, justiciability falls within the penumbra of congressional control of jurisdiction.[147] Accordingly, if Congress can man the gates, it must, by implication, have some capacity to determine what is justiciable beyond them. At the very least, Congress could invoke a justiciability doctrine as justification for an otherwise lawful exclusion of jurisdiction—especially when the exclusion does not, by itself, foreclose constitutional redress for violations of individual liberties[148] nor impede the Court's ability to restrict the use of a delegated power.

C. A ROADMAP TO INVOKING THE EXCEPTIONS CLAUSE

Where measures to limit review of abortion and school prayer have failed,[149] the Tax Anti-Injunction Act (TAIA)[150] is among the best examples of Congress's ability to invoke the Exceptions Clause in a responsible way and over reasonable subject matter. Securing initial passage in 1867,[151] it specifically states that no federal court can hear a suit to enjoin the IRS from assessing or collecting taxes.[152] But this is not to say that taxpayers are unable to bring suits after, or even before, payment.

The Act is important here because it shows precisely how and to what extent Congress can remove judicial review over a particular

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[146] In addition to the political question doctrine, there are (to name a few) the ripeness, mootness, and standing doctrines. For a full treatment, see generally TRIBE, *supra* note 25, §§ 3-10 to -11, -14, at 334–61, 385–92.

[147] Penumbras, typically associated with substantive rights, were most famously noted by Justice William O. Douglas: "The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance." Griswold v. Connecticut, 381 U.S. 479, 484 (1965). But the concept—at least to Justice Douglas and as adopted by this Note—can extend beyond the enumerated rights. *See* Henry T. Greely, *A Footnote to "Penumbra" in* Griswold v. Connecticut, 6 CONST. COMMENT. 251, 260 (1989) (describing Justice Douglas's use of "penumbras" to include business practices). Here, the penumbra is set by jurisdiction, and justiciability falls within it.

[148] *See supra* note 58 and accompanying text.

[149] For these bills, see Baucus & Kay, *supra* note 109, at 992 n.18.

[150] 26 U.S.C. § 7421.

[151] Act of Mar. 2, 1867, ch. 169, § 10, 14 Stat. 471, 475.

[152] 26 U.S.C. § 7421(a).

issue. In fact, Congress can do so quite broadly: "[N]o suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person."[153] The power is thus clear: Congress may limit judicial review.

Of course, the exceptions built into the statute itself no doubt help with its wider acceptance. For example, challenges may still be heard when based on a request for innocent spouse relief[154] or to enjoin IRS collections while a refund lawsuit is pending.[155] Moreover, the Supreme Court has certainly qualified its tolerance. In *South Carolina v. Regan*, the Court added that "only when Congress has provided an alternative avenue for an aggrieved party to litigate its claims" could the Act apply.[156] Put another way, though Congress did have the power to strip jurisdiction over a matter, it still had to furnish a means for claimants to seek redress. But this is not novel commentary. The Court has implied before that even if its own appellate jurisdiction could be curtailed, some court had to exist to hear the claim.[157] In this way, the TAIA points to both the Tax Court[158] and federal district courts.[159] But deciding the lawfulness of agency delegation should terminate somewhere else.

IV. THE D.C. CIRCUIT AS FINAL ARBITER

By funneling appeals of nondelegation claims through the D.C. Circuit, Congress would preserve Article III judicial review in the most appropriate venue to hear the claims. To illustrate, section IV.A provides the history of the D.C. Circuit, and section IV.B discusses the court's relationship with and capacity to hear administrative law appeals.

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[153] *Id.* Moreover, the language in the 1867 Act is almost identical. *See* 14 Stat. 475 ("[N]o suit for the purpose of restraining the assessment or collection of tax shall be maintained in any court.").

[154] 26 U.S.C. § 6015(e); *see also* Comm'r v. Neal, 557 F.3d 1262, 1264–65 (11th Cir. 2009) (outlining the applicability of § 6015 to claims involving innocent spouse relief).

[155] *Id.* § 6331(i).

[156] South Carolina v. Regan, 465 U.S. 367, 381 (1984).

[157] *See supra* note 107 and accompanying text.

[158] 26 U.S.C. § 6330(e)(1); *id.* § 7429(b)(2)(B).

[159] *Id.* § 7426(a); *id.* § 7429(b)(2)(A).

A. THE ROLE OF THE D.C. CIRCUIT AMONG THE COURTS OF APPEALS

The D.C. Circuit was established in its current form in 1893,[160] but its roots stretch back ninety years before. Most notably, the D.C. Circuit was not created with the other circuit courts by the Judiciary Act of 1801[161] but by a separate Act with the same name passed two weeks later.[162] The prior Act, more infamously known as the Midnight Judges Act, was swiftly repealed by the incoming Jeffersonians—and set the stage for *Marbury v. Madison*.[163] The later Act, however, would survive,[164] and this distinction is in many ways emblematic of the role of the D.C. Circuit among the other Courts of Appeals.

The D.C. Circuit (first known as the Circuit Court of the District of Columbia) was originally composed of three judges and, like the other circuit courts, presided over both trials and appeals.[165] But unlike the others, the D.C. Circuit had not only federal but also regional jurisdiction, serving as the local court for the District, and while this may have been one reason the Jeffersonians spared it,[166] President Abraham Lincoln did not. At his request, the court was abolished in 1863 and replaced with the Supreme Court of the

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[160] *See* Act of Feb. 9, 1893, ch. 74, §1, 27 Stat. 434, 434 ("[T]here shall be, and there is hereby, established in the District of Columbia a court, to be known as the court of appeals of the District of Columbia . . . .").

[161] Act of Feb. 13, 1801, ch. 4, 2 Stat. 89 (repealed 1802).

[162] *See* Act of Feb. 27, 1801, ch. 15, § 3, 2 Stat. 103, 105 (repealed 1863) ("[T]here shall be a court in said district, which shall be called the circuit court of the district of Columbia . . . .").

[163] *See* Theodore Voorhees, *The District of Columbia Courts: A Judicial Anomaly*, 29 CATH. U. L. REV. 917, 920 n.18 (1980) (providing political context behind the creation of the D.C. federal courts).

[164] Chief Justice John Roberts offers two reasons why the D.C. Circuit survived the purge. John G. Roberts, Jr., *What Makes the D.C. Circuit Different? A Historical View*, 92 VA. L. REV. 375, 378–80 (2006). First, the original court had both federal and local jurisdiction over the District, derived from Maryland and Virginia. *Id.* at 378–79. Second, of the three circuit judges, one was a Jeffersonian appointee. *Id.* at 379–80. This "political diversity" not only came to define the D.C. Circuit but may well have saved it too.

[165] *See* Susan Low Bloch & Ruth Bader Ginsburg, *Celebrating the 200th Anniversary of the Federal Courts of the District of Columbia*, 90 GEO. L.J. 549, 552 (2002) (describing the first hundred years of the D.C. Circuit).

[166] *See supra* note 164 and accompanying text.

District of Columbia.[167] Packed with appointees pooled from well outside the local area, the court began to assume a national character,[168] achieving its final iteration as a federal circuit court in 1893.[169]

Not until 1933, however, would the D.C. Circuit achieve incontestable Article III protections. Due in part to Congress's treatment of the court's jurisdiction,[170] the D.C. Circuit lacked firm Article III status at the time of the Great Depression.[171] To be sure, the judges of the D.C. Circuit obviously thought they were Article III judges, bringing suit against the national government when salary reductions for federal employees (but not circuit court judges) were levied against them.[172] Arguing that the D.C. Circuit's jurisdiction included those "controversies which are national in character, and which have no relation to the District other than the fact that the executive and legislative branches of the Government are located in . . . the Capital,"[173] the judges prevailed.[174] The crux of the Supreme Court's opinion was that, by virtue of its "extensive jurisdiction in cases affecting the operations of the general government and its various departments," the D.C. Circuit simply had to be an Article III court.[175]

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[167] *See* Bloch & Ginsburg, *supra* note 165, at 555–56 (explaining the political reasons why President Lincoln "[s]ack[ed] the court").

[168] *See* Roberts, *supra* note 164, at 384–85 (listing early appointees to the court and the reasoning behind these nationwide selections).

[169] Congress established the current Courts of Appeals in 1891 with one notable exception: the D.C. Circuit. Act of Mar. 3, 1891, ch. 517, § 2, 26 Stat. 826. Like with the Acts of 1801, the D.C. Circuit would come later, eventually taking its full name as the U.S. Court of Appeals for the D.C. Circuit in 1948. Bloch & Ginsburg, *supra* note 165, at 559, 561.

[170] For example, the D.C. Circuit was granted exclusive jurisdiction in 1870 to hear appeals from the Commissioner of Patents, which was the first time a court had been given exclusive authority to review the decisions of a federal agency. Roberts, *supra* note 164, at 385. This comes into greater focus later.

[171] *Id.* at 385–86 ("[I]n the period between the Civil War and World War II the court did not look much like a national court. . . . [H]alf of the cases resembled typical state supreme court cases and half were patent appeals.").

[172] *See* O'Donoghue v. United States, 289 U.S. 516, 520 (1933) ("[T]he claimants sought to recover sums withheld from their respective salaries by . . . an appropriation act which reduced the salaries of all [non-Article III judges].").

[173] *Id.* at 521.

[174] *See id.* at 551 (holding that the D.C. Circuit was "ordained and established" under Article III).

[175] *Id.* at 535.

The matter now settled, the role of the D.C. Circuit would grow well into the 1970s, when its local jurisdiction was finally removed[176] and replaced with authority to review the decisions (de facto if not de jure) of many existing federal agencies.[177] Keeping in line with its "unique character" and its "special responsibility to review legal challenges to the conduct of the national government,"[178] the D.C. Circuit has now assumed its place as perhaps the most prominent of the Courts of Appeals when it comes not only to the national government but to broader administrative law.[179]

B. THE D.C. CIRCUIT AS AN APPROPRIATE VENUE FOR NONDELEGATION CLAIMS

Congress has already laid the foundation for channeling specific claims through Article III courts; indeed, the Federal Circuit's existence is predicated on it.[180] But where Congress has created certain courts with the intention of hearing certain cases, the D.C. Circuit was not specifically established to be the repository for nondelegation claims. Instead, what makes the D.C. Circuit an appropriate venue for these cases is its extensive history deciding matters of administrative law. Moreover, as an Article III court, channeling nondelegation cases to the D.C. Circuit would preserve judicial review and remove the possibility of circuit splits.

1. The D.C. Circuit Hears Relatively More Administrative Law Cases than the Other Courts of Appeals. Since 1986, whenever the Supreme Court hears cases that originated in agency action, almost

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[176] Along with the creation of the district court system, continuing issues with the D.C. Circuit's local jurisdiction led to its eventual loss in 1970. Roberts, *supra* note 164, at 388.

[177] *See id.* ("The growth of the administrative state in the 1960s and 1970s led to the rise of agency appeals that more than made up for the loss of this local jurisdiction by the D.C. Circuit.").

[178] *Id.* at 389.

[179] *See id.* (discussing the D.C. Circuit's relationship with administrative law).

[180] With the Federal Courts Improvement Act, both the Court of Claims and the Court of Customs and Patent Appeals were merged to create the U.S. Court of Appeals for the Federal Circuit in 1982. Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 (codified in scattered sections of 28 U.S.C.). Unlike the other Courts of Appeals, what distinguishes the Federal Circuit is that its jurisdiction is based on the subject matter of the appeal and not necessarily on where the suit arose. 28 U.S.C. § 1295(a).

half of them have come from the D.C. Circuit.[181] In fact, many landmark administrative law decisions were appealed from the D.C. Circuit.[182] Compared to the other Courts of Appeals, only the Second and Ninth Circuits heard more cases involving administrative agencies in 2023.[183] Claims from the Board of Immigration Appeals (BIA), however, accounted for the vast majority of these circuits' administrative law cases.[184] By comparison, of the D.C. Circuit's 351 claims involving administrative agencies, not one originated in the BIA.[185] As a percent of its own cases, one-third of the docket of the D.C. Circuit involved administrative agencies, and only the Ninth Circuit comes close to that proportion (26.7%).[186] Additionally, since the D.C. Circuit hears fewer cases than all other Courts of Appeals,[187] it could ostensibly weather an increase in nondelegation claims.

To challenge the actions of the federal agencies naturally involves the nondelegation doctrine: without a delegation of power, there is no agency to commit an action. For the D.C. Circuit to thus hear so many administrative appeals, it follows not only that the

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[181] *See* Adam Feldman, *Empirical SCOTUS: The Singular Relationship Between the D.C. Circuit and the Supreme Court*, SCOTUSBLOG (Oct. 3, 2019, 10:44 AM), https://www.scotusblog.com/2019/10/empirical-scotus-the-singular-relationship-between-the-d-c-circuit-and-the-supreme-court [https://perma.cc/63RG-G95F] ("[A]t 48 percent, cases from the D.C. Circuit comprise almost 10 percent more of the Supreme Court's administrative-law docket than cases from any other circuit . . . .").

[182] For two such cases, see Chevron U.S.A. Inc. v. Nat. Res. Def. Council, 467 U.S. 837 (1984); West Virginia v. EPA, 142 S. Ct. 2587 (2022). A current case that may overturn Chevron deference also came from the D.C. Circuit. Loper Bright Enters. v. Raimondo, 45 F.4th 359 (D.C. Cir. 2022), *argued*, No. 22-451 (U.S. Jan. 17, 2024).

[183] ADMIN. OFF. U.S. CTS., JUDICIAL BUSINESS 2023 tbl. B-3 (2023), https://www.uscourts.gov/statistics/table/b-3/judicial-business/2023/09/30 [perma.cc/T49C-RN5F].

[184] *Id.*

[185] *Id.*

[186] ADMIN. OFF. U.S. CTS., JUDICIAL BUSINESS 2023 tbl. B-6 (2023), https://www.uscourts.gov/statistics/table/b-6/judicial-business/2023/09/30 [https://perma.cc/HKN2-HXER].

[187] ADMIN. OFF. U.S. CTS., JUDICIAL BUSINESS 2023 tbl. B-1 (2023), https://www.uscourts.gov/statistics/table/b-1/judicial-business/2023/09/30 [perma.cc/W9B3-4B8D]. This even includes the U.S. Court of Appeals for the Federal Circuit. ADMIN. OFF. U.S. CTS., JUDICIAL BUSINESS 2023 tbl. B-8 (2023), https://www.uscourts.gov/statistics/table/b-8/judicial-business/2023/09/30 [https://perma.cc/3EAY-G7W7].

Court must have some "special competence"[188] to review administrative law but that it has a fine capacity to determine whether an agency's delegated power was lawful from the start. At minimum, the D.C. Circuit can appropriately be trusted with the task because of its unique history deciding agency matters.

2. The D.C. Circuit Already Has Exclusive Jurisdiction over Some Agency Actions. Congress first granted a court exclusive jurisdiction to review the decisions of a federal agency one hundred fifty years ago, and that court was the D.C. Circuit.[189] Since then, at one time or another, the D.C. Circuit has had exclusive authority to review the decisions of several administrative agencies: among them the SEC, the FDA, and the FTC.[190] To this day, the D.C. Circuit continues to have statutorily exclusive jurisdiction to hear many environmental matters.[191] Further still, where jurisdiction is concurrent, litigants often come to the D.C. Circuit precisely because of its experience with administrative law.[192]

Considering how uniquely tied the D.C. Circuit is to agency appeals, it requires no leap to say it has special qualifications for exclusive jurisdiction. And in recognition, Congress has granted exactly that.[193] Consequently, where the nondelegation doctrine is concerned, and as compared to the other circuit courts, there is little

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[188] *See* Bloch & Ginsburg, *supra* note 165, at 605 ("The federal courts of the District of Columbia are unique because of their location in the Capital City and their special competence to review actions of officialdom.").

[189] The agency was the Commissioner of Patents, and the jurisdiction was ultimately removed in 1929 and given to the newly minted Court of Customs and Patent Appeals. Act of July 8, 1870, ch. 230, § 48, 16 Stat. 198, 205 (repealed 1929). For a brief overview of this jurisdiction in both the D.C. and Federal Circuits, see *supra* text accompanying notes 170, 180.

[190] For a comprehensive list of federal agencies over which the D.C. Circuit held jurisdiction in 1976, see E. BARRETT PRETTYMAN, JR. ET AL., HISTORY OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT IN THE COUNTRY'S BICENTENNIAL YEAR 80–81 (1976).

[191] *See generally* ENV'T L. INST., ELI BRIEF: SELECTED PROVISIONS FROM FEDERAL ENVIRONMENTAL STATUTES CONFERRING JURISDICTION ON THE D.C. CIRCUIT (AND THE D.C. DISTRICT COURT) (2003), https://www.eli.org/events/eli-professional-practice-seminar-future-standing-environmental-cases-trends-dc-circuit-and [perma.cc/A8VE-FVFF] (identifying statutes that provide for direct appeal of agency action to the D.C. Circuit).

[192] *See* Roberts, *supra* note 164, at 389 ("Even when the jurisdiction is concurrent . . . lawyers frequently prefer to litigate in the D.C. Circuit because there is a far more extensive body of administrative law developed there than in other circuits.").

[193] PRETTYMAN, *supra* note 190, at 79–80.

reason why the D.C. Circuit should not have exclusive jurisdiction over these claims as well. Moreover, as an Article III tribunal with such expertise, the D.C. Circuit is in the best position to prevent circuit splits on the topic.

3. The D.C. Circuit Preserves Article III Review and Crystallizes Supreme Court Precedent. Outside of its original jurisdiction, the Supreme Court has appellate review over all other matters arising under the Constitution.[194] But arguments suggesting that the Exceptions Clause can remove this core judicial power are met with strong rebuttals.[195] Even the Supreme Court itself has considered the criticism, holding that some Article III court had to exist to hear a claim—just not necessarily the Supreme Court.[196]

O'Donoghue v. United States made clear that the D.C. Circuit is an Article III tribunal,[197] and both its history and current caseload show the D.C. Circuit to have specific qualifications to hear administrative appeals. So rather than have the other twelve circuit courts competitively assessing nondelegation claims,[198] perhaps a wiser choice would be to channel all such claims into the one Court of Appeals best equipped to handle the matter—in turn freezing Supreme Court precedent in the most natural venue to hear the case. And just as Congress has done for the actions of certain agencies,[199] it may, and should, do so here.

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[194] *See supra* section II.C.

[195] *See, e.g.*, Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 224 (1985) ("Congress may no more waive the Article III *judicial* power of federal judges . . . than it may waive the Article II *executive* power of the President to grant pardons or command state militias.").

[196] *See supra* note 107 and accompanying text.

[197] *See* O'Donoghue v. United States, 289 U.S. 516, 551 (1933) ("We hold that the . . . Court of Appeals of the District of Columbia [is a] constitutional court[] of the United States, ordained and established under Art. III of the Constitution . . . .").

[198] For a stimulating article assessing the current state of administrative law, see generally Thomas O. McGarity, *Administrative Law as Blood Sport: Policy Erosion in a Highly Partisan Age*, 61 DUKE L.J. 1671 (2012). The connective tissues here are money and politics: One can imagine that the same issues motivating certain regulatory changes would also bleed into, for example, forum shopping. *See generally* Thomas O. McGarity, *Multi-Party Forum Shopping for Appellate Review of Administrative Action*, 129 U. PA. L. REV. 302 (1980) (discussing forum shopping of administrative appeals and suggesting areas for reform).

[199] *See supra* notes 190–191 (listing examples of Congress vesting jurisdiction of agency appeals in the D.C. Circuit).

V. IMPLICATIONS AND THE FUTURE OF DELEGATED POWER

If the Exceptions Clause can remove the Supreme Court's ability to review nondelegation claims, Congress could just as easily use the power to limit judicial review in an almost limitless number of cases—only the Supreme Court's original jurisdiction, constitutionally protected, would remain intact. But the sheer number of failed legislative proposals, and the narrowness of those bills having passed, indicate that the fear of an Exceptions Clause run amok is unwarranted. Even acknowledging this fear, can it really be said that the delegation of power from Congress to the federal agencies, in and of itself, is as controversial as Christian prayer in public schools or the regulation of abortion? Indeed, delegated power neither touches on a protected constitutional right nor violates any express constitutional grant and has instead been an accepted federal practice for over two centuries.[200]

Perhaps because of this, the Supreme Court has hesitated to make broad changes to the nondelegation doctrine. Where cases may have hit the issue, the Court found other avenues, and outside of Justice Gorsuch's dissent, a viable judicial alternative from on high has yet to come. But Congress should not wait for that day. Considering not only the size of the federal bureaucracy but the number of regulations threatened by an updated standard, the morass of administrative delegation should remain where it is: let through the gate and picked apart beyond it.

To this end, the Exceptions Clause undeniably gives Congress the power to remove specific cases from Supreme Court appellate review. And so long as a federal court can hear the issue, and provided the matter does not violate a constitutional right, the Court has agreed. With congressional delegations allowed by the Constitution and the doors of the D.C. Circuit open to the claims, both requirements are met. Nondelegation is exceptable.

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[200] *See* Posner & Vermeule, *supra* note 20, at 1728–29 ("The burden on nondelegation proponents, then, is to show that the Constitution contains some implicit principle that constrains the permissible scope or precision of otherwise valid statutory grants.").