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THE ORIGINS OF ARTICLE III "ARISING UNDER" JURISDICTION

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ABSTRACT

Article III of the Constitution provides that the "judicial Power" of the United States extends to all cases "arising under" the Constitution, laws, and treaties of the United States. What the phrase "arising under" imports in Article III has long confounded courts and scholars. This Article examines the historical origins of Article III "arising under" jurisdiction. First, it describes English legal principles that governed the jurisdiction of courts of general and limited jurisdiction—principles that animated early American jurisprudence regarding the scope of "arising under" jurisdiction. Second, it explains how participants in the framing and ratification of the Constitution understood "arising under" jurisdiction to provide a limited means for ensuring the supremacy of federal law. Third, it explains how early American courts, invoking English jurisdictional principles, determined Article III "arising under" jurisdiction. In particular, this Article explains, in proper historical context, early

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Marshall Court opinions addressing the scope of Article III "arising under" jurisdiction, including the landmark 1824 case Osborn v. United States*. Contrary to conventional characterizations of these opinions, the Marshall Court did not deem any case that might involve a federal question to be one "arising under" federal law. Rather, against the background of English jurisdictional principles, the Marshall Court explicated the Arising Under Clause to mean that a federal court could hear cases in which a federal law was determinative of a right or title asserted in the proceeding before it. By observing jurisdictional rules derived from English law, federal courts embraced a practice that enabled them to enforce the supremacy of federal law, but checked the extent to which they would encroach upon the jurisdiction of state courts.*

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INTRODUCTION

Article III of the Constitution provides that the "judicial Power" of the United States extends to all cases "*arising under*" the Constitution, laws, and treaties of the United States.[1] Courts have long regarded Article III not as providing the judicial power that each federal court *must* have, but rather as specifying a limit on the jurisdiction that Congress *may* give. Since 1875, Congress has given federal courts original jurisdiction of cases "arising under" federal law.[2] Courts have long interpreted the federal statute conferring "arising under" jurisdiction upon federal district courts to require that a federal question be part of the plaintiff's "well-pleaded complaint," not a question anticipated or raised as a defense.[3] In several cases, the Supreme Court has attempted to explain the nature of a federal question that must be part of the well-pleaded complaint for a federal district court to have statutory "arising under" jurisdiction.[4] The

1. U.S. CONST. art. III, § 2 (emphasis added).

2. In 1875, Congress gave federal circuit courts jurisdiction of "all suits of a civil nature, at common law or in equity . . . arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority," subject to an amount-in-controversy requirement of five hundred dollars. Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470. Following reenactments and reformulations of the 1875 act, federal district courts "have original jurisdiction of all civil actions arising under the Constitution, law, or treaties of the United States." 28 U.S.C. § 1331 (2000).

3. Specifically, the Supreme Court of the United States has held that "a suit arises under the Constitution and laws of the United States only when the plaintiff's statement of his own cause of action shows that it is based upon those laws or that Constitution." Louisville & Nashville R.R. v. Mottley, 211 U.S. 149, 152 (1908).

4. In *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921), the Court held that a federal district court could exercise federal question jurisdiction if it "appears from the [complaint] that the right to relief depends upon the construction or application of [federal law]." *Id.* at 199. In *Merrell Dow Pharm., Inc. v. Thompson*, 478 U.S. 804 (1986), the Court held that a district court could not exercise federal question jurisdiction even though the plaintiff's claim rested upon a provision of federal law that a state law had incorporated on the ground that Congress had not provided a private federal right of action for a violation of the federal

Court has provided less clarification of what it means for a case to "arise under" federal law for purposes of Article III. The Court has explained that "arising under" in Article III encompasses more cases than "arising under" in the congressional grant of jurisdiction.[5] It has declined, however, in several cases, to provide any more fulsome explanation of Article III "arising under" jurisdiction than that. The scope of Article III "arising under" jurisdiction has long confounded judges and scholars alike.

In 1824, in *Osborn v. United States*,[6] the Supreme Court held in an opinion by Chief Justice John Marshall that a case arises under federal law for purposes of Article III if federal law "forms an ingredient of the original cause."[7] Some judges and scholars have read *Osborn* to mean that "Congress may confer on the federal courts jurisdiction over any case or controversy that *might* call for the application of federal law."[8] Others have questioned this reading,

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provision. *Id.* at 802–12. In *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 125 S. Ct. 2363 (2005), the Court attempted to reconcile this line of decisions interpreting the federal question jurisdiction statute by holding that a federal court may exercise federal question jurisdiction over a civil action that "necessarily raise[s] a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities." *Id.* at 2368.

5. *See Merrell Dow*, 478 U.S. at 807 ("Although the constitutional meaning of 'arising under' may extend to all cases in which a federal question is 'an ingredient' of the action, we have long construed the statutory grant of federal-question jurisdiction as conferring a more limited power." (citation omitted)); Verlinden B.V. v. Cent. Bank of Nig., 461 U.S. 480, 494 (1983) ("Although the language of § 1331 parallels that of the 'Arising Under' Clause of Art. III, this Court never has held that statutory 'arising under' jurisdiction is identical to Article III 'arising under' jurisdiction. Quite the contrary is true."); Romero v. Int'l Terminal Operating Co., 358 U.S. 354, 379 n.51 (1959) ("Of course the many limitations which have been placed on jurisdiction under § 1331 are not limitations on the constitutional power of Congress to confer jurisdiction on the federal courts."); *see also Grable*, 125 S. Ct. at 2371 n.* (Thomas, J., concurring) ("This Court has long construed the scope of the statutory grant of federal-question jurisdiction more narrowly than the scope of the constitutional grant of such jurisdiction. I assume for present purposes that this distinction is proper . . . ." (citing *Merrell Dow*, 478 U.S. at 807–08)).

6. Osborn v. United States, 22 U.S. (9 Wheat.) 738 (1824).

7. *Id.* at 823.

8. *Verlinden*, 461 U.S. at 492 (emphasis added). Several scholars have characterized *Osborn* as standing for this proposition. *See, e.g.*, MARTIN H. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 56 (1980) (arguing that Marshall "created a classic tail-wagging-the-dog situation; the mere possibility of a federal issue is sufficient to authorize Congress to bring a case into federal court under the 'arising under' clause"); James H. Chadbourn & A. Leo Levin, *Original Jurisdiction of Federal Questions*, 90 U. PA. L. REV. 639, 662 (1942) (characterizing *Osborn* as holding that any federal issue that "*might* be raised" is "part of the cause"); William Cohen, *The Broken Compass: The Requirement that a Case Arise "Directly" Under Federal Law*, 115 U. PA. L. REV. 890, 891 (1967) (characterizing *Osborn* as

arguing that it has no meaningful limits,[9] or that it simply miscomprehends *Osborn*.[10]

In the 1980s, the Supreme Court expressly refrained on two occasions from defining the breadth of Article III "arising under" jurisdiction. In 1983, in *Verlinden B.V. v. Central Bank of Nigeria*,[11] the Court had to resolve whether actions against foreign states are cases "arising under" federal law for purposes of Article III. Rather than "decide the precise boundaries of Article III jurisdiction,"[12] the Court resolved that such actions arise under federal law because a court necessarily must determine in each one the federal question of whether the foreign state has immunity.[13] Six years later, in *Mesa v. California*,[14] the Court confronted the question of whether Congress may give federal courts removal jurisdiction over claims brought against federal officers for actions taken within the course of performance of official duties as cases "arising under" federal law for Article III purposes.[15] Noting the "grave constitutional problems" and "serious constitutional doubt" surrounding the meaning of Article III "arising under" jurisdiction,[16] the Court interpreted the federal officer removal statute to authorize removal only when a defendant federal officer raises an actual federal defense.[17] By invoking the canon of

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extending Article III "arising under" jurisdiction to "all cases where issues of federal law might possibly be an issue").

9. Some have observed that, taken at its broadest, *Osborn* might be read as permitting "assertion of original federal jurisdiction on the remote possibility of presentation of a federal question." Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 482 (1957) (Frankfurter, J., dissenting); *see also* Verlinden B.V. v. Cent. Bank of Nig., 647 F.2d 320, 328–29 (2d Cir. 1981), *rev'd*, 461 U.S. 480 (1983) (arguing that *Osborn* should be limited to its facts because there should be meaningful limits on Article III jurisdiction).

10. *See* Anthony J. Bellia Jr., *Article III and the Cause of Action*, 89 IOWA L. REV. 777, 800–12 (2004). Paul Mishkin has characterized *Osborn* as finding "arising under" jurisdiction because "matters of federal law had to be decided explicitly or taken for granted in order for a decision to be made," Paul Mishkin, *The Federal Question in the District Courts*, 53 COLUM. L. REV. 157, 161 (1953), a reading less expansive than the "federal-question-might-be-raised" reading. This characterization of *Osborn* more aptly captures the meaning of *Osborn* in historical context, as this Article explains, than the more expansive reading does.

11. Verlinden B.V. v. Cent. Bank of Nig., 461 U.S. 480 (1983).

12. *Id.* at 492.

13. *Id.*

14. Mesa v. California, 489 U.S. 121 (1989).

15. *Id.* at 137.

16. *Id.*

17. *Id.*

constitutional avoidance,[18] the Court refrained from attempting to define the scope of Article III "arising under" jurisdiction.

Neither courts nor scholars have comprehensively examined the origins of Article III "arising under" jurisdiction.[19] This Article undertakes such an examination. The Supreme Court has been mindful of historical understandings in determining the scope of Article III judicial power.[20] Accordingly, the analysis that this Article presents is of both historical interest and doctrinal relevance. Even if one does not deem historical practice to be determinative of or relevant to the meaning courts should ascribe to Article III "arising under" jurisdiction, historical practice holds insights into what functions such jurisdiction may effectively serve.

This Article argues that early federal courts, invoking principles of English law, limited their function under the Arising Under Clause to enforcing the supremacy of actual federal laws. They did not recognize Article III "arising under" jurisdiction over cases that implicated federal interests but did not implicate actual federal laws. This Article chronologically develops the evidence that bears out this conclusion. First, it describes jurisdictional principles of English law that provide necessary context for understanding early American judicial opinions on the scope of Article III "arising under" jurisdiction. Specifically, it describes how under English law, a party invoking the jurisdiction of a court of limited jurisdiction had to affirmatively demonstrate that the court had jurisdiction over the case. Second, it explains that a key purpose of Article III "arising under" jurisdiction, evident in its framing and the ratification debates that surrounded it, was to enforce the supremacy of federal law. Finally, it explains how the Marshall Court came to rely upon English jurisdictional principles as a means of limiting Article III "arising

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18. *See id.* ("We are not inclined to abandon a longstanding reading of the officer removal statute that clearly preserves its constitutionality and adopt one which raises serious constitutional doubt.").

19. For an analysis of the historical foundations of statutory "arising under" jurisdiction in the late nineteenth century, see generally Michael G. Collins, *The Unhappy History of Federal Question Removal*, 71 IOWA L. REV. 717 (1986).

20. *E.g.*, Vt. Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 774 (2000) (explaining that historical practice "in England and the American colonies . . . is particularly relevant to the constitutional standing inquiry"); Alden v. Maine, 527 U.S. 706, 713 (1999) (explaining that "as the Constitution's structure, its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today").

under" jurisdiction to cases implicating the supremacy of actual federal laws. Contrary to conventional characterizations of its opinions, the Marshall Court did not deem any case that might involve a federal question one "arising under" federal law. Rather, the Supreme Court explicated the Arising Under Clause in the first few decades following ratification to mean that a federal court may exercise jurisdiction over cases in which an actual federal law was determinative of a right or title asserted in the proceeding before it.

Part I explains principles governing the jurisdiction of English courts that early Article III courts came to invoke to determine their own jurisdiction. English law distinguished courts of general jurisdiction from courts of limited jurisdiction. To bring an action in the original jurisdiction of an English court of limited jurisdiction, the plaintiff affirmatively had to plead, as part of the right or title asserted, facts sufficient to show that the court had jurisdiction. English courts of general jurisdiction, however, presumed themselves to have jurisdiction unless the defendant specifically proved otherwise. The distinction between courts of general and limited jurisdiction subsisted in the structures of colonial judicial systems. When Article III courts came to describe themselves as courts of limited jurisdiction, they imported English jurisdictional practice into their own practices. So imported, this was not English practice that the Court deemed inconsistent with the principles of the American Revolution and the Constitution. As John Jay expressed it in 1793, "The English practice . . . [is] more necessary to be observed here than there" in light of the federal structure that the Constitution established.[21]

Part II explains the place of "arising under" jurisdiction in the framing and ratification of the Constitution. The proceedings of the Federal Convention demonstrate that the delegates settled on "arising under" jurisdiction as a limited mechanism—more limited than a congressional negative on state laws—to ensure the supremacy of federal law. In ratification debates, participants attributed certain meanings to "arising under" jurisdiction and offered various reasons to justify it. In general, they explained "arising under" jurisdiction as a means of enabling federal courts to enforce and settle the meaning of federal law.

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21. Shedden v. Custis, 21 F. Cas. 1218, 1219 (C.C.D. Va. 1793) (No. 12,736).

Part III proceeds to explain how, post-ratification, federal courts came to describe the operation of Article III "arising under" jurisdiction. By invoking English jurisdictional principles, federal courts effectuated the Founding period vision of "arising under" jurisdiction as a limited means of ensuring the supremacy of federal law. Early federal courts explained that because they were courts of limited rather than general jurisdiction in the sense of English law, they could not take original jurisdiction of Article III cases or controversies unless the party invoking the court's jurisdiction asserted facts sufficient to demonstrate the court had jurisdiction. For "arising under" jurisdiction, this meant that a party invoking federal court jurisdiction had to aver that a federal law was determinative of a right or title asserted. The Supreme Court applied this principle not only to plaintiffs in original actions but also to plaintiffs in error in appellate actions seeking review of state court judgments.

By 1824, when it decided *Osborn v. United States*, the Marshall Court had resolved that a federal court had Article III "arising under" jurisdiction if the party seeking federal court jurisdiction properly demonstrated that federal law was determinative of a right or title asserted in that proceeding. This applied both to the original jurisdiction of federal courts and the appellate jurisdiction of the Supreme Court to review state court judgments. When, over a century later, the Supreme Court and scholars came to characterize the Marshall Court as reasoning that a federal court constitutionally may hear any case that might involve a federal law question, they misconstrued the effect that, in historical context, the Marshall Court gave to Article III "arising under" jurisdiction. By employing English jurisdictional principles, the Marshall Court limited federal courts to enforcing the supremacy of actual federal laws. The Marshall Court did not assume for federal courts a constitutional jurisdiction to vindicate federal interests divorced from the governing requirements of an identifiable federal law.

I. JURISDICTIONAL PRINCIPLES IN ENGLISH PRACTICE

This Part describes certain principles by which English courts determined their jurisdiction in the decades leading up to the establishment of the American Constitution.

It is worth noting at the outset that the phrase "arising under" was not a term of art that the Constitution's framers borrowed from English law. Indeed, it does not appear from surviving reports of pre-

Founding English judicial action that English courts (or those reporting their proceedings) used the phrase. That said, English courts did use other phrases containing the word "arising." English courts commonly described actions as "arising within" the territorial jurisdiction of a particular court,[22] as did state courts in America.[23] In such instances, courts meant that the factual cause of a particular action occurred within the territory of the court's jurisdiction. Less commonly, they described cases as "arising upon" or "arising from" a source of law. In such instances, they meant that a particular source of law generated the right or remedy the plaintiff was asserting in the case.[24] English courts occasionally described legal questions as "arising out of" or "arising upon" legal instruments that they had to

22. As *Bacon's Abridgement* explains, "Inferior Courts are bounded, in their original Creation, to Causes *arising within* such limited jurisdiction." 1 MATTHEW BACON, A NEW ABRIDGEMENT OF THE LAW 562 (6th ed., Dublin, Luke White 1793) (1736) (emphasis added). See generally *infra* notes 31–34 and accompanying text for examples of cases invoking this "arising within" principle.

Similarly, courts described the jurisdiction of courts of admiralty as over causes of action "arising upon" the sea. In *Beak v. Thyrwhit*, (1688) 87 Eng. Rep. 124 (K.B.), the King's Bench held that "the original cause *arising upon* the sea, shall and must be tried in the Admiralty." *Id.* at 124 (emphasis added). Similarly, the Supreme Court of Virginia explained that the jurisdiction of the admiralty courts is "confined to cases *arising upon* the high seas." Thorton v. Smith, 1 Va. (1 Wash.) 81, 84 (1792) (emphasis added).

23. In 1796, for instance, the Superior Court of Connecticut explained that "[t]he several state courts originally had jurisdiction of all causes of every description *arising within* their respective territorial limits." Miller v. Lynde, 2 Root 444, 445 (Conn. Super. Ct. 1796) (emphasis added). Cases that did not "arise within" the jurisdiction of a court "arose out" of its jurisdiction. *See* People v. Justices of the Del. Common Pleas, 1 Johns. Cas. 181, 183 (N.Y. Sup. Ct. 1799) (per curiam) ("The . . . courts of common pleas . . . were originally constituted by the style and title of *inferior* courts, and were in all respects considered as such. The amount of their jurisdiction was limited to 20*l.* In local extent, their jurisdiction was limited, as they could try no action *arising out of* the county." (last emphasis added)); Cornwell v. Hosmer, 1 Root 282, 283 (Conn. Super. Ct. 1791) ("[T]he cause of action . . . must have *arisen out of* the city . . . and so the court had not jurisdiction." (emphasis added)).

24. For example, in *Hyde v. Cogan*, (1781) 99 Eng. Rep. 445 (K.B.), the plaintiff brought an action "on" a statute providing damages for certain riotous behavior. *Id.* at 445. In his opinion in the case, Justice Francis Buller expressed that "the clause *upon* which the case *arises* is remedial." *Id.* at 450 (emphasis added). In *Millar v. Taylor*, (1769) 98 Eng. Rep. 201 (K.B.), the King's Bench used "arising from" language to explain that when Parliament enacts a penal statute that prescribes a remedy for a party aggrieved, the party aggrieved may pursue that statutory remedy but no other: "Upon such an Act, if the offence, and consequently the right which *arises from* the prohibition, be new, no remedy or mode of prosecution can be pursued, except what is directed by the Act." *Id.* at 212 (emphasis added).

interpret,[25] as did state courts in America.[26] To resolve a question "arising out of" or "upon" a legal instrument, the court had to settle the legal instrument's meaning relative to the disputed question. Certain of these "arising" formulations appeared in draft plans of the Federal Convention and debates over ratification. Suffice it to say for now that in using the phrase "arising under" to describe the federal judicial power, the Framers did not invoke a term of art with any well-settled and generally accepted meaning.

Though the Framers do not appear to have borrowed the phrase "arising under" from English law, early federal courts borrowed general jurisdictional principles of English law to determine Article III jurisdiction, including "arising under" jurisdiction. Accordingly, the principles by which English courts determined their jurisdiction provide useful context for understanding how public officials in America came to understand the operation of "arising under" jurisdiction during the first decades following ratification. This

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25. *See* Robinson v. Knight, (1761) 28 Eng. Rep. 856, 857 (Ch.) ("The question in this cause *arises out of* the will . . . and is, whether, upon the true construction of it, a sum of about £21,000 belongs to the plaintiff or defendant." (emphasis added)); Villiers v. Villiers, (1740) 27 Eng. Rep. 657, 658 (Ch.) ("There are other Questions in the present Cause *arising upon* the Deeds . . . ." (emphasis added)); Westerdell v. Dale, (1797) 101 Eng. Rep. 989, 992 (K.B.) (Kenyon, C.J.) (describing how questions "have *arisen on* the construction of this Act of Parliament" (emphasis added)); *Millar*, 98 Eng. Rep. at 206 (explaining that a question of copyright infringement could "*arise upon* the term granted by the Act of Parliament" (emphasis added)); Pierce v. Hopper, (1720) 93 Eng. Rep. 503, 504 (K.B.) (argument of counsel) ("The main question in this case will *arise upon* the first clause in the Act of Parliament . . . ." (emphasis added)).

26. *See* Simpson v. Nadiau, 3 N.C. (2 Hayw.) 39, 41 (Super. Ct. 1798) (Haywood, J.) (stating that "a question . . . ought to be decided by some court . . . whose peculiar business is to decide questions *arising upon* the law of nations" (emphasis added)); Kamper v. Hawkins, 3 Va. (1 Va. Cas.) 20, 93 (Va. 1793) (Tucker, J.) ("It will not, I presume, be denied that the decisions of the supreme court of appeals in this commonwealth, upon any question, whether *arising upon* the general principles of law, the operation or construction of any statute or act of assembly, or of the constitution of the commonwealth, are to be resorted to by all other courts, as expounding, in their truest sense, the laws of the land." (emphasis added)); *see also* Dulany v. Wells, 3 H. & McH. 20, 42 (Md. 1790) (argument of counsel) (prefacing argument with the phrase "if any doubt or obscurity *arises upon* the expressions in this article" (emphasis added)); Roy v. Garnett, 2 Va. (2 Wash.) 9, 35 (1794) (explaining that "a question *arises upon* the act of 1776" (emphasis added)); Stott v. Alexander & Co., 1 Va. (1 Wash.) 331, 331 (1794) (argument of counsel) (stating that "[t]here is but a single question in this cause, which *arises upon* the construction of the Act of Assembly" (emphasis added)); *cf.* Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 21 (1825) ("But the questions do not *arise on* the judgment, or the execution; and, so far as they depend on the return, enough of that is stated, to show the Court, that the Marshal has proceeded according to the late laws of Kentucky." (emphasis added)).

Section describes those principles as they related to both original and appellate jurisdiction.

A. Principles of Original Jurisdiction

This Section describes, first, the distinction that subsisted in English law between courts of general jurisdiction and courts of limited jurisdiction. It explains how the common law and acts of Parliament limited English courts' jurisdiction in various ways, including by the territory in which an action arose, the subject matter to which an action related, the status of parties to an action, and the source of law governing an action. In various ways, these jurisdictional limitations operated in colonial legal systems as well. Next, this Section describes the different rules by which courts of general and limited jurisdiction determined their respective jurisdictions. Courts of general jurisdiction presumed themselves to *have* jurisdiction over a case unless the defendant proved otherwise. Courts of limited jurisdiction, in contrast, presumed themselves to *lack* jurisdiction unless the party invoking the court's jurisdiction proved otherwise. The purpose of this Section is to describe specific English jurisdictional doctrines that federal courts would come to invoke to effectuate the jurisdictional grants of Article III.

1. *Courts of General and Limited Jurisdiction*.

a. In England. The jurisdiction of the courts of England was, as *Bacon's Abridgement* explains, "bounded and circumscribed by certain Laws and stated Rules," by which courts had to abide "in all their Proceedings and Judicial Determinations."[27] These laws and rules distinguished courts of "general" jurisdiction from courts of "limited" jurisdiction.

The superior courts of England—most notably, the courts of King's Bench, Chancery, Common Pleas, and Exchequer—held themselves to have a general jurisdiction. Certain other courts, such as the Counties Palatine, Courts of Great Sessions in Wales, and Court of Ely, also exercised a general jurisdiction. Courts of general jurisdiction exercised a "universal" jurisdiction over the rights or titles that persons subject to the jurisdiction of the court might assert. There were only limited exceptions to the jurisdiction of courts of

27. 1 BACON, *supra* note 22, at 558.

general jurisdiction. A case might "especially appear" to be outside of the jurisdiction of a court of general jurisdiction[28] if the case was local to the courts of another nation[29] or if Parliament provided that a particular court should have exclusive jurisdiction over the case.[30]

In contrast to courts of general jurisdiction, courts of limited jurisdiction did not exercise a "universal" jurisdiction. The common law and acts of Parliament defined or limited the jurisdiction of inferior courts in various ways. Specifically, they limited jurisdiction according to (1) the territory in which an action arose, (2) the subject matter to which an action related, (3) the character of a party or the parties to an action, (4) the nature of an action being brought, or (5) the source of law governing an action.

First, English law limited the territorial jurisdiction of inferior courts: they could hear only actions "arising within" their territorial jurisdiction. For an inferior court to have jurisdiction, "*the* Cause of the Action" or "*the* Gist of the Action" had to "arise within" the territory of the inferior court.[31] In other words, English courts understood that there were facts that constituted "*the*" cause of the action, and that the cause had to "arise within" the inferior court's jurisdiction. In 1795, in *King v. Danser*,[32] Lord Kenyon explained that "[g]enerally speaking, nothing is clearer than that it is necessary, in inferior jurisdictions, that the cause of action must be laid and proved to *arise within* the jurisdiction."[33] Case by case, courts determined whether *the* factual causes of particular actions arose within the jurisdiction of inferior courts.[34]

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28. *See id.* at 559 (explaining that "every Thing is supposed to be done within their Jurisdiction, unless the contrary especially appears").

29. *See* Jennings v. Hankyn, 90 (1687) Eng. Rep. 612, 612 (K.B.) (setting forth, as an example, that the court would not have jurisdiction over a case to recover on a bond "made at Bourdeaux in France, for in such case this Court never had any jurisdiction, because the matter did arise in a foreign nation").

30. *See, e.g.*, 1 BACON, *supra* note 22, at 560 (explaining that by charter and act of Parliament, the universities of Oxford and Cambridge each had jurisdiction over actions between their respective scholars); EDWARD COKE, THE FOURTH PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 171–74 (London, 1797) (1644) [hereinafter COKE, THE FOURTH PART OF THE INSTITUTES] (reciting act of Parliament, 21 Jac. reg. ca. 4, providing that only particular courts could exercise jurisdiction over informers' actions on penal statutes).

31. 1 BACON, *supra* note 22, at 564 (emphasis added).

32. King v. Danser, (1795) 101 Eng. Rep. 533 (K.B.).

33. *Id.* at 534 (emphasis added). Similarly, the courts of Admiralty had jurisdiction over actions "arising upon" the seas. *See supra* note 22.

34. *See, e.g.*, Heaven v. Davenport, (1721) 88 Eng. Rep. 1092, 1092 (K.B.) (holding that an inferior court lacked jurisdiction over an action in assumpsit for "money laid out" because,

Second, the common law and certain acts of Parliament limited the jurisdiction of inferior courts by the subject matter to which the action related. For example, the courts of the Stanneries had a limited jurisdiction over, *inter alia*, actions concerning or depending upon the stanneries.[35] Similarly, by act of Parliament, the Court of Constable and Earl Marshal could take cognizance "of Contracts touching Deeds of Arms, and of War out of the Realm."[36] Such regulations defined jurisdiction according to the relationship that subsisted between the action and a subject matter, be it a place, thing, or event.

Third, English law limited the jurisdiction of certain courts by the character of the parties. For example, in addition to having jurisdiction over actions relating to the stanneries, the courts of the Stanneries had jurisdiction over actions between tinners.[37] Likewise, the universities of Oxford and Cambridge, by their charters and acts of Parliament, had jurisdiction over actions between their respective scholars.[38]

Fourth, acts of Parliament limited the jurisdiction of certain inferior English courts according to the form of action being brought. In other words, rather than define jurisdiction according to a factual subject matter to which an action related, they defined it according to the legal form by which a plaintiff would have to bring an action. For example, a plaintiff had to bring an informer action based upon an offense "committed against any penal statute" in particular inferior courts having jurisdiction over the place "wherein such offences shall

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though the plaintiff alleged the promise "to be in the jurisdiction of the Court," the plaintiff failed to allege that "the money was laid out in the jurisdiction," and "the money laid out is *the* cause of action" (emphasis added)); Hanslap v. Cater, (1684) 86 Eng. Rep. 163, 163 (K.B.) (holding that the Court of Coventry lacked jurisdiction over an action in assumpsit when, though the debt and the promise for goods sold were within the court's jurisdiction, "the goods were not alledged to be sold within the jurisdiction of the Court"); Drake v. Beare, (1674) 83 Eng. Rep. 319, 319 (K.B.) (holding that the Court at Exeter lacked jurisdiction over an action of debt on a lease when it did "not appear that the lands lay within the jurisdiction of the Court" because "if part of the cause of action lies within the jurisdiction of the Court, and part without, the Inferior Court ought not to hold plea"); Ramsy v. Atkinson, (1672) 83 Eng. Rep. 292, 292 (K.B.) (holding that the Palace-Court lacked jurisdiction over an action in assumpsit because, though the "promise" was made within the Palace-Court's jurisdiction, the "consideration" was not).

35. COKE, THE FOURTH PART OF THE INSTITUTES, *supra* note 30, at 231.

36. 1 BACON, *supra* note 22, at 602; *see also* COKE, THE FOURTH PART OF THE INSTITUTES, *supra* note 30, at 122 (stating that the "lord constable" and "earl marshall" have jurisdiction "of contracts and deeds of arms, and of war out of the realm").

37. COKE, THE FOURTH PART OF THE INSTITUTES, *supra* note 30, at 231.

38. 1 BACON, *supra* note 22, at 560.

be committed."[39] A purpose of vesting jurisdiction of such actions in "local" courts was to prevent informers from forcing the "poor commons" to have to answer such actions in the potentially distant courts of Westminster.[40]

Finally, English law limited the jurisdiction of certain courts according to the source of the governing law. For example, the act of Parliament giving the Court of the Constable and Earl Marshal cognizance of actions "which touch War within the Realm," further provided that the court could only hear such an action if it could "[]not be determined nor discussed by the Common Law."[41] The reason for this limitation was to prevent the Court of the Constable and Earl Marshal from encroaching the jurisdiction of law courts. As the preamble to the act and *Coke's Institutes* explain, Parliament enacted the regulation because "the court of the constable and marshall . . . daily doe encroach contracts, covenants, trespasses, debts and detinues, and many other actions pleadable at common law, in great prejudice of the king and of his courts, and to the great grievance and oppression of his people."[42]

b. In the Colonies. The same distinction between courts of general and limited jurisdiction that subsisted in England operated in colonial legal systems. The origins and histories of many colonial courts are nebulous.[43] Judicial structures emerged from different sources of authority—including royal charters, commissions, and instructions; as well as acts of colonial assemblies—acting in concert

39. *See* COKE, THE FOURTH PART OF THE INSTITUTES, *supra* note 30, at 172. Informer actions referred to those actions created by statute pursuant to which an "informer" could recover a statutory penalty for suing for a particular legal violation. As Blackstone described it, "these forfeitures created by statute are given at large to any common informer; or, in other words, to any such person or persons as will sue for the same: and hence such actions are called *popular* actions, because they are given to the people in general." WILLIAM BLACKSTONE, 3 COMMENTARIES *160.

40. COKE, THE FOURTH PART OF THE INSTITUTES, *supra* note 30, at 172.

41. 1 BACON, *supra* note 22, at 602; *see also* COKE, THE FOURTH PART OF THE INSTITUTES, *supra* note 30, at 122 (stating that the statute giving the "constable" and "marshall" jurisdiction over actions "that touch war within the realm," further provided that the court could only hear such an action if it could "[]not be determined or discussed by the common law").

42. COKE, THE FOURTH PART OF THE INSTITUTES, *supra* note 30, at 123.

43. Erwin C. Surrency, *The Courts in the American Colonies*, 11 AM. J. LEGAL HIST. 253, 257 (1967) ("The precise origins of many courts in America are difficult to determine because of their nebulous beginnings.").

or opposition.[44] It is not necessary for purposes of this Article to recount all that is known of this history; it suffices to explain that during the late colonial period the distinction between courts of general and limited jurisdiction was operative in various ways in colonial legal systems.

From early in their histories, colonial authorities established (or attempted to establish) courts of general jurisdiction. There are instances, especially in the seventeenth century, of colonial authorities using simple and broad language to establish general courts. For instance, in 1645, colonial authorities in Virginia enacted that "*all causes of what value soever* between party and party shall be tried in the countie courts by verdict of a jurie if either party shall desire it."[45] Similarly, in 1683, colonial authorities in New York enacted that

> there shall be held and kept within Every County of the said province Courts of sessions yearly and Every yeare for the hearing tryeing and determining of *all Causes and Cases there brought and Comenced*, As well Cases and Causes Criminall, as Cases and Causes civill betweene party and party.[46]

As colonial legal systems developed, colonial assemblies enacted more specific jurisdictional regulations, in some instances establishing general jurisdictions meant to be coextensive with the general jurisdictions of English courts. In 1722, the General Assembly of Pennsylvania enacted that the judges of the Supreme Court of Pennsylvania

> generally shall minister justice to all persons, and exercise the jurisdictions and powers hereby granted concerning all and singular the premises according to law, as fully and amply, to all intents and purposes whatsoever, as the Justices of the Court of King's Bench,

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44. There were instances, especially in the second half of the eighteenth century, of royal authority denying jurisdiction that colonial assemblies had conferred, with or without subsequent defiance by the assembly through reenacting the regulation. *Cf.* THE DECLARATION OF INDEPENDENCE para. 10 (U.S. 1776) ("He has obstructed the Administration of Justice, by refusing his Assent to Laws for establishing Judiciary Powers.").

45. Act 10 (Nov. 20, 1645), *in* 1 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 303, 303 (William Waller Hening ed., New York, R. & W. & G. Bartow 1823) (emphasis added).

46. An Act to Settle Courts of Justice (Nov. 1, 1683), *in* 1 THE COLONIAL LAWS OF NEW YORK FROM THE YEAR 1664 TO THE REVOLUTION 125, 125 [hereinafter NEW YORK COLONIAL LAWS] (James B. Lyon, Albany, State Printer 1894) (emphasis added).

> Common Pleas, and Exchequer, at Westminster, or any of them, may or can do.[47]

In several instances, colonial assemblies established courts of general jurisdiction for their colonies.[48]

Colonial assemblies also limited the jurisdiction of certain colonial courts in the same ways that English custom or acts of Parliament limited the jurisdiction of English courts: by the territory in which the action arose, the subject matter to which the action related, the character of the parties, the kind of action brought, and, in limited instances, the source of law governing the action. In addition, acts of several colonial assemblies limited the jurisdiction of courts by imposing "amount-in-controversy" requirements.

First, several colonial assemblies enacted laws specifying the limited territorial jurisdiction of certain courts. In some instances, they provided that provincial courts would have jurisdiction over actions "arising within" the jurisdiction of the colony. In 1737, the South Carolina assembly enacted that its Court of Common Pleas could adjudicate "all common pleas happening and arising within the jurisdiction" of that court.[49] In other instances, assemblies provided

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47. An Act for Establishing Courts of Judicature in This Province, § 13 (May 22, 1722), *in* A DIGEST OF THE LAWS OF PENNSYLVANIA 310 (John Purdon ed., Phila., Philip H. Nicklin 1818).

48. *See* An Act for Establishing Superiour Courts (1711), *microformed on* Connecticut Colonial Session Laws, 1711 May Session, at 167, 167 (William S. Hein & Co.) (establishing a superior court of judicature and giving it a general jurisdiction); An Act for the Better Regulation of the Supreme Court Within This Government, ch. 167.a, § 3 (1760), *in* 1 LAWS OF THE STATE OF DELAWARE 374, 375–76 (New-Castle, Samuel & John Adams 1797) (giving the supreme court a general jurisdiction); An Act for Establishing Courts of Publick Justice Within this Province, ch. 4 (Aug. 17, 1699), *in* 1 LAWS OF NEW HAMPSHIRE 660, 663–64 (A.S. Batchellor ed., Manchester, John B. Clarke Co. 1904) (establishing a superior court of judicature of general jurisdiction); An Act for the More Regular Establishing a Superior Court of Judicature, Court of Assize, and General Goal of Delivery, Throughout the Colony (1746), *microformed on* Rhode Island Colonial Session Laws, 1746 June Regular Session, at 27, 27 (William S. Hein & Co.) (vesting a general jurisdiction in the Superior Court of Judicature, Court of Assize, and General Goal Delivery); An Act for the Better Regulating the Court of Common Pleas, No. 622 (Mar. 5, 1737), *in* 7 THE STATUTES AT LARGE OF SOUTH CAROLINA 189, 189–91 (David J. McCord ed., Columbia, S.C., A.S. Johnston 1840) (establishing the Court of Common Pleas with civil jurisdiction "in as full and ample manner to all intents and purposes whatsoever, as the court of common pleas at Westminster and the justices thereof do, can, or lawfully may there have, hold, use, exercise and enjoy").

49. An Act for the Better Regulating the Court of Common Pleas, No. 622 (Mar. 5, 1737), *in* 7 THE STATUTES AT LARGE OF SOUTH CAROLINA, *supra* note 48, at 189, 189–91. In certain instances, colonial assemblies provided that provincial courts should hear cases in the locale in which they arose. *See, e.g.*, An Act for Tryal of all Matters of Fact, § 2 (Oct. 1753), *in* ACTS OF

for specialized tribunals having jurisdiction over actions arising within the territory of the province.[50] Finally, several assemblies provided that county or town courts would have jurisdiction over causes of action "arising within" the county or town. In 1769, for example, New Hampshire's assembly established the Inferior Court of Common Pleas for each county with jurisdiction "in all matters & Causes Arising within such Counties."[51]

Second, colonial authorities enacted laws limiting the jurisdiction of courts to actions relating to a particular subject matter. A 1762 North Carolina act gave inferior and superior courts jurisdiction "to take cognizance of all matters concerning orphans and their estates."[52] A 1722 statute for Connecticut enacted that the provincial superior court would have special jurisdiction "to Enquire into, Hear, and

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THE PROVINCE OF MARYLAND 46, 47 (Annapolis, Jonas Green 1754) (providing that justices of Assize Nisi Prius, and justices of Oyer and Terminer, and Gaol Delivery may hear actions "where the Facts have arisen, or shall arise").

50. *See, e.g.*, An Act for Holding Special or Extraordinary Courts of Common Pleas, for the Trial of Causes Arising Between Merchants, Dealers, and Others, and Ship-masters, Supercargoes, and Other Transient Persons, § 1 (1763), *in* ACTS PASSED BY THE GENERAL ASSEMBLY OF GEORGIA 10, 11 (Savannah, James Johnston 1764) (authorizing the appointment of a special or extraordinary court upon petition by "any ship-master, supercargoe, or other transient person or persons, who shall have any dispute or difference with any merchant, dealer, or other person or persons, touching any contract, agreement, sale, promise, debt or demand whatsoever, made or arising within this province" when there would be "great inconvenience and damage" by having to pursue the matter in the ordinary course of proceeding).

51. An Act for Dividing this Province into Counties, and for More Easy Administration of Justice (Apr. 29, 1769), *in* 3 LAWS OF NEW HAMPSHIRE 524, 526 (Henry Harrison Metcalf ed., Bristol, Musgrove Printing House 1915); *see also* Courts (1702), *in* ACTS AND LAWS OF HIS MAJESTIES COLONY OF CONNECTICUT IN NEW-ENGLAND 22, 24 (Boston, Bartholomew Green & John Allen 1702) (giving county courts jurisdiction over "all causes, Civil and also Criminal, (not extending to Life, Limb, Banishment or Divorce,) arising or happening within such County"); An Act to Settle Courts of Justice (Nov. 1, 1683), *in* 1 NEW YORK COLONIAL LAWS, *supra* note 46, at 125, 125–26 (providing that "there shall be held and kept within Every County of the said province Courts of sessions yearly and Every yeare for the hearing tryeing and determining of all Causes and Cases there brought and Comenced, As well Cases and Causes Criminall, as Cases and Causes civill betweene party and party which Cases and Causes shall be tryed . . . within the County where the fact shall arise or grow"); An Act for Establishing Ports and Towns, ch. 42 (Oct. 1705), *in* 3 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 404, 410 (William Waller Hening ed., Phila., Thomas DeSilver 1823) (providing "[t]hat all causes of greater value than thirty pounds sterling, ariseing within the precincts or jurisdiction of any burgh, may be tryed, heard and determined by the respective county courts, wherein the said burghs ly"). Such limitations operated to preclude a court from exercising jurisdiction over "transitory" actions.

52. An Act for the Better Care of Orphans, and Security and Management of Their Estates, ch. 5, § 5 (Nov. 3, 1762), *in* 1 THE PUBLIC ACTS OF THE GENERAL ASSEMBLY OF NORTH CAROLINA 141–42 (James Iredell ed., Francois-Xavier Martin ed., rev. ed. 1804).

Determine all Crimes Committed" in Hartford riots.[53] Similarly, a 1764 Connecticut act provided "[t]hat the Superior Court only, shall have Cognizance of all Pleas that relate to the Crime of Adultery."[54]

Third, colonial authorities enacted certain laws limiting the jurisdiction of courts according to the character of the parties. New York and Virginia statutes limited the jurisdiction of certain courts to disputes of a certain value, unless the suit involved particular government officials.[55] In effect, these statutes provided jurisdiction if the plaintiff claimed a certain amount *or* the action was brought by or against the governmental officials specified. In 1741, North Carolina authorities enacted a statute giving justices of peace jurisdiction to hear complaints of persons who were free but who were being kept or sold as slaves.[56]

Fourth, many colonial enactments limited the jurisdiction of particular courts according to the form of action a plaintiff was bringing. Colonial authorities gave local courts, such as justices of the

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53. An Act for Appointing the Judges of the Superior Court to Enquire into, Hear, and Determine all Crimes Committed in a Late Riot at *Hartford* (Oct. 1722), *microformed on* Connecticut Colonial Session Laws, *supra* note 48, 1722 Oct. Session, at 274, 274. Similarly, in 1768, a statute for Rhode Island empowered the justices of the Superior Court of Judicature, Court of Assize and General Gaol Delivery "to hold a Special Court . . . to hear, try, and determine any Person or Persons concerned in the Affray that happened in the Town of *Newport*." An Act Empowering the Justices of the Superior Court of Judicature, Court of Assize and General Gaol Delivery, to Meet and Hold a Special Court, for the Trial of *Thomas Carfels*, *Charles John Marshall*, and *Robert Young* (May 1768), *microformed on* Rhode Island Colonial Session Laws, *supra* note 48, 1768 May Regular Session, at 10, 10.

54. An Act for Restraining Tryals, in Cases of Adultery, to the Superior Court (Oct. 1764), *microformed on* Connecticut Colonial Session Laws, *supra* note 48, 1764 Oct. Session, at 315.

55. *See* An Act for Preventing Suits Being Brought in the Supreme Court of This Colony for Any Sums Not Exceeding Fifty Pounds (May 20, 1769), *in* 4 NEW YORK COLONIAL LAWS, *supra* note 46, at 1088, 1089–90 (providing that the amount-in-controversy requirement to bring action in the supreme court of the colony did not extend to actions brought by certain officials and government entities); An Act for Establishing a General Court, ch. 17, § 3 (Oct. 1777), *in* 9 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 401, 402 (William Waller Hening ed., Richmond, J. & G. Cochran 1819) (providing that "no person shall sue out original process for the trial of any matter or thing in the general court of less value than ten pounds, or two thousand pounds of tobacco, except it be against the justices of a county, or other inferiour court, or the vestry of a parish, on penalty of being nonsuited, and having his suit dismissed with costs"); An Act for Establishing a High Court of Chancery, ch. 15, § 2 (Oct. 1777), *in* 9 THE STATUTES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, *supra*, at 389, 390 (providing that "no person shall commence an original suit in the [High Court of Chancery] in any matter of less value than ten pounds, except it be against the justice of any county or other inferiour court, or the vestry of any parish, on pain of having the same dismissed with costs").

56. An Act Concerning Servants and Slaves, ch. 24, § 24 (Apr. 4, 1741), *in* PUBLIC ACTS OF THE GENERAL ASSEMBLY OF NORTH CAROLINA, *supra* note 52, at 57, 61.

peace, jurisdiction over actions of debt and other specific actions, such as trespass and replevin, often subject to an amount-in-controversy requirement. In 1772, the New York assembly enacted "[t]hat all Actions, Cases and Causes of Debt, Trespass, Trespass upon the Case and Replevin" were "cognizable before any one Justice of the Peace of any of the Counties, or the Mayor, Recorder or Alderman of the Cities of New York and Albany, and Borough of Westchester respectively within this Colony."[57] New York authorities also excluded actions for defamation and slander from certain local courts,[58] vesting jurisdiction instead in the supreme court of the colony.[59] On the criminal side, colonial authorities gave courts jurisdiction, or limited courts' jurisdiction, to hear actions for loss of

57. An Act to Impower Justices of the Peace Mayors Recorders and Aldermen to Try Causes to the Value of Five Pounds and Under and for Suspending an Act Therein Mentioned (Mar. 12, 1772), *in* 5 NEW YORK COLONIAL LAWS, *supra* note 46, at 304, 304–05; *see also* An Act for the More Easy and Speedy Recovery of Small Debts and Damages, § 1 (Apr. 24, 1760), *microformed on* Georgia Colonial Session Laws, Acts 1755-1761, at 77, 77 (William S. Hein & Co.) (giving justices of the peace jurisdiction over "all actions of debt or damage . . . for any sum not exceeding the value of eight pounds *Sterling*"); An Act for Establishing Courts of Publick Justice Within This Province, ch. 4 (Aug. 17, 1699), *in* 1 LAWS OF NEW HAMPSHIRE, *supra* note 48, at 662 (granting jurisdiction to justices of the peace for "Actions of Debt and Trespass . . . arising or happening within this Province, to the value of *Forty Shillings*"); Act of May 6, 1690, *microformed on* Rhode Island Colonial Session Laws, *supra* note 48, Laws & Acts 1636-1705 1st Settlement (form 2 of 5) (giving assistants or justices of the peace jurisdiction over debts and trespasses not exceeding forty shillings); Act 56, *in* 1 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, *supra* note 45, at 272, 273 (providing "that no court of justice within the collony shall proceed to determine or adjudge or at all take cognisance of any suite hereafter to be comenced for or concerning any debt under the value of 20s. sterling or two hundred pounds of tabaccoe, but in such case, the next adjoyning comiss. to the creditor to sumon the debtor or deft . . . and to determine the same").

58. An Act to Impower Justices of the Peace, Mayors, Recorders and Aldermen to Try Causes to the Value of Ten Pounds and Under and for Suspending an Act (May 20, 1769), *in* 4 NEW YORK COLONIAL LAWS, *supra* note 46, at 1079, 1085 (providing that an act regulating jurisdiction of local courts should not be construed to extend to, *inter alia*, "any Action or Actions of Defamation or Slander").

59. An Act for Preventing Suits Being Brought in the Supreme Court of This Colony for Any Sums Not Exceeding Fifty Pounds (May 20, 1769), *in* 4 NEW YORK COLONIAL LAWS, *supra* note 46, at 1088, 1089–90 (providing that the amount-in-controversy requirement to bring action in the supreme court of the colony did not extend to actions of assault, battery, or slander).

life or limb,[60] or thieving and stealing,[61] or offenses committed by slaves.[62]

Fifth, in certain instances, colonial authorities limited the jurisdiction of colonial courts according to the source of law that would govern an action. In 1769, a New York statute enacted that

> all and every the Sum and Sums of Money under the value of ten Pounds to be sued for and recovered in any Court of Record *by virtue of any Law of this Colony* shall and hereby are made cognizable before any one Justice Mayor Recorder or Aldermen in manner as aforesaid any thing in the said Acts mentioned to the contrary in any wise notwithstanding.[63]

The import of this statute was to give local courts jurisdiction over all actions valued under ten pounds even if a prior New York law creating the liability excluded local courts from hearing actions on it. In doing so, this statute drew a distinction between actions for money due by virtue of the laws of New York and actions for money due by virtue of another source of law. In 1768, the Rhode Island assembly enacted a law giving inferior general courts jurisdiction to discharge the debts of "those who have, or that shall, or may have, granted unto them the benefit" of the Rhode Island Act of Insolvency and to

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60. *See* Courts (1702), *in* ACTS AND LAWS OF HIS MAJESTIES COLONY OF CONNECTICUT IN NEW-ENGLAND, *supra* note 51, at 23–24 (giving Courts of Assistance jurisdiction of all "Tryals for Life, Limb, Banishment and Divorce" and giving County Courts jurisdiction over "all causes, Civil and also Criminal, (not extending to Life, Limb, Banishment or Divorce,) arising or happening within such County"); An Act for Establishing County Courts and for Regulating and Settling the Proceedings Therein, ch. 7, § 5 (Oct. 1748), *in* 5 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 489, 491 (William Waller Hening ed., Richmond, W.W. Gray 1819) (excepting from the jurisdiction of county courts "such criminal causes where the judgment upon conviction, shall be for the loss of life or member, and . . . the prosecution of causes to outlawry against any person or persons").

61. An Act for the Speedy Tryal of Criminals, and Ascertaining Their Punishment, in the County-Courts, When Prosecuted There (June 3, 1715), *in* ACTS OF ASSEMBLY, PASSED IN THE PROVINCE OF MARYLAND, FROM 1692, TO 1715, at 136, 136 (London, John Baskett 1723) (providing that county courts have jurisdiction over "all Thieving and Stealing of any Goods or Chattels whatsoever, not being above the Value of One thousand Pounds of Tobacco").

62. An Act for the Trial of Negroes, ch. 43.a, § 1 (1721), *in* 1 LAWS OF THE STATE OF DELAWARE, *supra* note 48, at 102, 102 (giving justices of the peace jurisdiction over "offences committed by any Negro or Mulatto slaves"); An Act for Establishing a Jurisdiction for the Trial of Negroes and Other Slaves (Apr. 11, 1768), *microformed on* Georgia Colonial Session Laws, *supra* note 57, 1767 Oct. Session, at 417, 417 (giving justices of the peace jurisdiction over crimes and offenses committed by slaves).

63. An Act to Impower Justices of the Peace, Mayors, Recorders and Aldermen to Try Causes to the Value of Ten Pounds and Under and for Suspending an Act (May 20, 1769), *in* 4 NEW YORK COLONIAL LAWS, *supra* note 46, at 1079, 1085 (emphasis added).

enforce the Act "as fully and amply, to all Intents and Purposes, as the Justices of the Superior Court of Judicature, Court of Assize, and General Gaol-Delivery, could or might do by Virtue of said Act."[64] This act, like the New York act, conferred judicial jurisdiction over actions according to the source of law that would govern them.

Finally, numerous colonial enactments defined the jurisdiction of courts according to the "amount in controversy" in the action. Typically, they gave local courts (such as county courts and justices of the peace) jurisdiction when the amount in controversy was below a specified sum,[65] or, correspondingly, gave general courts jurisdiction when the amount in controversy was above a specified sum.[66]

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64. An Act for Empowering the Justices of the Inferior Court of Common Pleas, to Discharge Prisoners and Others, Who Have Had, or Shall Have Extended unto Them the Benefit of the Act of Insolvency (June 16, 1768), *microformed on* Rhode Island Colonial Session Laws, *supra* note 48, 1768 June Adjourned Session, at 28, 29.

65. *See, e.g.*, An Act for the More Easy and Speedy Recovery of Small Debts and Damages, § 1 (Apr. 24, 1760), *microformed on* Georgia Colonial Session Laws, *supra* note 57, Acts 1755-1761, at 77, 77 (giving justices of the peace jurisdiction over "all actions of debt or damage . . . for any sum not exceeding the value of eight pounds *Sterling*"); An Act for the Advancement of Justice, ch. 23, § 5 (Oct. 1763), *in* ACTS OF ASSEMBLY, OF THE PROVINCE OF MARYLAND (Annapolis, Jonas Green 1763) (providing that county courts may hear actions "where the Matter or Thing in Dispute shall not exceed the Sum of Twenty Pounds Sterling Money, or Five Thousand Pounds of Tobacco"); An Act for Establishing and Regulating Courts of Publick Justice Within This Province, ch. 4 (Aug. 17, 1699), *in* 1 LAWS OF NEW HAMPSHIRE, *supra* note 48, at 662, 663 (granting jurisdiction to justices of the peace for civil and criminal actions in which the amount claimed is less than forty shillings and to an inferior court of common pleas for actions in which the amount claimed is less than twenty pounds); An Act to Erect and Establish Courts in the Several Counties of This Colony, for the Tryal of Small Causes, ch. 100, § 2 (1748), *in* THE ACTS OF THE GENERAL ASSEMBLY OF THE PROVINCE OF NEW-JERSEY 388, 388 (Samuel Nevill ed., 1752) (providing that justices of the peace may hear actions in which the amount claimed is five pounds or less); An Act to Impower Justices of the Peace Mayors Recorders and Aldermen to Try Causes to the Value of Five Pounds and Under and for Suspending an Act (Mar. 12, 1772), *in* 5 NEW YORK COLONIAL LAWS, *supra* note 46, at 304, 305; An Act for Better Determining of Debts and Demands Under Forty Shillings, and for laying aside the Two Weeks Court in the City of Philadelphia, ch. 211, § 1 (May 28, 1715), *in* LAWS OF THE COMMONWEALTH OF PENNSYLVANIA 108 (photo. Reprint 1979) (M. Carey & J. Bioren eds., 1803) (giving justice of the peace jurisdiction of complaints for debts under forty shillings); Act of May 6, 1690, *microformed on* Rhode Island Colonial Session Laws, *supra* note 48, Laws & Acts 1636-1705, 1st Settlement (form 2 of 5) (giving assistants or justices of the peace jurisdiction over debts and trespasses not exceeding forty shillings); An Act for the Trial of Small and Mean Causes; and for Repealing the Several Acts Now in Force Which Relate to Recovery of Small Debts, No. 772 (June 13, 1747), *in* THE PUBLIC LAWS OF THE STATE OF SOUTH-CAROLINA 213, 213–14 (J.F. Grimké ed., Phila., R. Aitken & Son 1790) (giving justices of the peace jurisdiction of actions in which the demand does not exceed twenty pounds).

66. *See, e.g.*, An Act for Establishing Courts of Publick Justice Within This Province, ch. 4 (Aug. 17, 1699), *in* 1 LAWS OF NEW HAMPSHIRE, *supra* note 48, at 663–64 (granting jurisdiction to a superior court of judicature for cases in which the amount claimed is greater than twenty

The point of this analysis is to demonstrate that the distinction that operated in English law between courts of general jurisdiction and courts of limited jurisdiction operated in various ways in colonial legal systems. At the Federal Convention, each proposed plan of government would call for a federal judiciary of limited jurisdiction, jurisdiction limited in ways that English and colonial legal regimes limited the jurisdiction of certain courts.

2. *The Rules by Which Courts Determined Their Respective Jurisdictions.* Given the ways in which English law limited the jurisdiction of certain courts, English courts employed rules to give them effect. English courts described general principles by which courts of general and limited jurisdiction were to determine their respective jurisdictions. A court of general jurisdiction was presumed to have jurisdiction unless it "especially appear[ed]" that the court lacked jurisdiction.[67] It could "especially appear" to the court that it lacked jurisdiction in different ways. In certain cases, the defendant could properly plead that the court lacked jurisdiction. If, for example, an action brought in King's Bench arose with a county Palatine, the defendant could plead that the action should be heard by the court of the Palatine.[68] Or, if an action between scholars of Oxford or Cambridge was brought in a court of Westminster, the defendant could plead that jurisdiction properly belonged to the respective University.[69] In other cases, a court to which the King had granted the privilege of determining an action could demand jurisdiction from the court in which the plaintiff originally brought the action.[70]

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pounds); An Act for Establishing a General Court, ch. 17, § 3 (Oct. 1777) *in* 9 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, *supra* note 55, at 401, 402 (providing that the general court had original jurisdiction over actions "at common law" provided the value of the suit was not less than "ten pounds, or two thousand pounds of tobacco").

67. As *Bacon's Abridgement* explains, "every Thing is supposed to be done within the[] Jurisdiction [of a court of general jurisdiction], unless the contrary especially appears; on the other Hand, nothing shall be intended within the Jurisdiction of an Inferior Court, but what is expressly alledged." 1 BACON, *supra* note 22, at 559.

68. *See* 4 *id.* at 32 (explaining that defendant could plead to the jurisdiction of a superior court if the "Action accrued within a County Palatine").

69. *See id.* (explaining that defendant could plead to the jurisdiction of a superior court if the action was "between the Scholars of *Oxford* and *Cambridge*").

70. *Bacon's Abridgement* explains that "where a Franchise . . . hath a Privilege of holding Pleas within their Jurisdiction, if the Courts at *Westminster* intrench on their Privileges, they must demand Conuzance, that is, a desire that the Cause may be determined before them." 1 *id.*

Unlike a court of general jurisdiction, a court of limited jurisdiction presumed itself to lack jurisdiction unless the plaintiff specifically demonstrated otherwise. To bring an action in a court of limited jurisdiction, the plaintiff had to specifically plead as part of the right or title asserted facts sufficient to show that the court had jurisdiction. *Bacon's Abridgment* sets forth the principle as follows:

> Inferior Courts are bounded, in their original Creation, to Causes arising within such limited Jurisdiction: Hence it is necessary for them to set forth their Authority; for, as hath been already observed, nothing shall be intended within the Jurisdiction of an Inferior Court, but what is expressly alledged to be so.[71]

Courts most commonly invoked this principle in determining whether cases were within the territorial jurisdiction of inferior courts. To have a case heard in an inferior court, the plaintiff had to specifically set forth in the declaration that the cause of action arose within the jurisdiction of the court. In *Littleboy v. Wright*,[72] the King's Bench invoked this principle to determine whether a case was within its territorial jurisdiction. The plaintiff brought an action of case in the Palace-Court against the defendant for saying, within the jurisdiction of the Palace-Court, that the plaintiff was a "hackney whore," causing the plaintiff to lose her marriage.[73] The King's Bench held that the Palace-Court lacked jurisdiction over this action because, though the plaintiff alleged that the defendant called her a "hackney whore" within the court's territorial jurisdiction, it was "not shewn, that the loss of marriage was within the jurisdiction of the Court, and that is the cause of the action, and not the speaking of the words only."[74] English courts invoked this pleading rule to hold that a cause of action did not arise within the jurisdiction of a court in many cases.[75]

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at 560. In such a case, the defendant could not plead to the jurisdiction of the Courts at Westminster, because the defendant remained subject to the King's Writ; the holder of the franchise could demand jurisdiction based on the privilege that the king had granted to the holder. *Id.*; *see also* 4 *id.* at 33 (explaining the same principles).

71. 1 *id.* at 562.

72. Littleboy v. Wright, (1673) 83 Eng. Rep. 301 (K.B.).

73. *Id.* at 301.

74. *Id.*

75. *See* Drake v. Beare, (1793) 83 Eng. Rep. 319, 319–20 (K.B.) (holding that the Court at Exeter lacked jurisdiction over an action of debt on a lease when the plaintiff did not plead that "the lands lay within the jurisdiction of the Court"); Price v. Hill, (1793) 83 Eng. Rep. 337, 337 (K.B.) (holding that the Wallingford Court lacked jurisdiction over an action in assumpsit on a

The rule that a plaintiff had to specifically show in the initial pleading that a court of limited jurisdiction had jurisdiction applied to any kind of jurisdictional limitation. For example, when a plaintiff brought an action in the court of Stanneries on the ground of party status—in other words, that the plaintiff was a tinner—the plaintiff had to allege in the declaration that the plaintiff in fact was a tinner. In *Reignol v. Taylor*,[76] the Queen's Bench described as "error . . . that it was not alleged that the plaintiff was a *tinner*; and by several Acts of Parliament concerning their jurisdiction, they ought to shew it."[77] When a plaintiff brought an action in the Court of the Constable and Earl Marshal, which had jurisdiction only if the common law did not operate as the governing source of the law, the plaintiff had to "declare plainly his matter in his petition" so as to demonstrate that the governing law was a source other than the common law.[78]

Procedurally, there were various ways in which a court could come to determine that a court of limited jurisdiction lacked

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promise within the jurisdiction for goods sold because the plaintiff did "not show where the goods were sold and delivered"); Rowland v. Veale, (1774) 98 Eng. Rep. 944, 945 (K.B.) ("[I]f it was not alleged in the plaint below to be within the jurisdiction, it would have been bad on error . . . ."); Waldock v. Cooper, (1754) 95 Eng. Rep. 661, 661 (K.B.) (holding that the Borough Court of Aylesbury lacked jurisdiction over an action in assumpsit on a promise within the jurisdiction of the court because the plaintiff did not assert that delivery of the good was within the jurisdiction of the court); Wallis v. Squire, (1729) 84 Eng. Rep. 1232, 1232 (K.B.) (holding that the Court of Carlisle lacked jurisdiction over an action in assumpsit because it was not alleged that the goods were sold within the jurisdiction, "which is the contract on which the assumpsit in law arose"); Heely v. Ward, (1726) 86 Eng. Rep. 3, 3 (K.B.) (holding that the Court at Hull lacked jurisdiction over an action in assumpsit on a promise within the jurisdiction of the court because the plaintiff did not assert that the delivery of the good was within the jurisdiction of the court); Winford v. Powell, (1712) 92 Eng. Rep. 357, 358 (K.B.) (holding that the inferior court lacked jurisdiction because, in an indebitatus assumpsit action to recover for the defendant's use of the plaintiff's pond to wash horses, the plaintiff failed to allege that the pond was within the court's jurisdiction); Stanyon v. Davis, (1704) 87 Eng. Rep. 974, 975 (Q.B.) (per curiam) (determining jurisdiction based on where the "sole *gît* of the action" arose); Titley v. Foxall, (1758) 125 Eng. Rep. 1386, 1387 (C.P.D.) ("Here it is averred that the Court below has a jurisdiction of all actions of trespass upon the case arising within the town; it is sufficiently shewn in this plea that the cause of action arose within the jurisdiction . . . ."); Moravia v. Sloper, (1737) 125 Eng. Rep. 1039, 1041 (C.P.D.) (explaining that it is "necessary" for a plaintiff "to set forth that the cause of action arose within the jurisdiction of the Court"); Anonymus, (1732) 94 Eng. Rep. 645, 646 ("[I]f this valore recepto, which arose upon stating the account, extinguishes the mutual demands on the account; here's a new cause of action arising, which should have been laid infra jurisdiction', &c. but it does not, and therefore the assumpsit was brought for the original debt, which is laid to arise within the jurisdiction of the Court . . . .").

76. Reignol v. Taylor, (1702) 87 Eng. Rep. 1124 (Q.B.).

77. *Id.* at 1124.

78. *See* 1 BACON, *supra* note 22, at 602–03 (reciting this prescription); COKE, THE FOURTH PART OF THE INSTITUTES, *supra* note 30, at 122–23 (same).

jurisdiction over a case. A court could dismiss a case for lack of jurisdiction because the plaintiff's declaration did not make a sufficient jurisdictional showing.[79] Or the defendant could plead that the court lacked jurisdiction because the plaintiff failed to sufficiently demonstrate it.[80] There is late-eighteenth-century authority that a plaintiff not only had to allege in the declaration that the cause of action arose within the jurisdiction of the court, but also had to prove upon the trial that it was properly within the jurisdiction of the court.[81] Thus, if the plaintiff sought to prove facts in support of the right or title that would disprove the court's jurisdiction, the court would not accept the evidence; if the court did accept the evidence, the defendant could tender a bill of exceptions upon which the judgment would be deemed erroneous.[82] Finally, if the plaintiff failed to sufficiently show that the cause of action was within the jurisdiction of a court of limited jurisdiction, a superior court could remove the case from its jurisdiction by writ of prohibition.[83]

In sum, as Lord Willes described the operation of these jurisdictional principles in *Moravia v. Sloper*,[84] "a plaintiff may sue if he please in the Courts of Westminster-Hall and then he will be safe, but if he will sue in an Inferior Court he is bound at his peril to take notice of the bounds and limits of its jurisdiction."[85]

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79. *See* 4 BACON, *supra* note 22, at 33–34 (providing examples of cases in which this occurred).

80. *See id.* at 34–35 (discussing how defendants would plead to the jurisdiction of an inferior court).

81. *See* 1 *id.* at 563 ("[N]or is it sufficient to alledge the Cause of Action within the Jurisdiction of the Court; but it must be proved upon the Trial; and if the Plaintiff proves a Consideration out of the Jurisdiction it cannot be given in Evidence . . . ."); *see also* King v. Danser, (1795) 101 Eng. Rep. 533, 534–35 (K.B.) (Kenyon, C.J.) ("Generally speaking, nothing is clearer than that it is necessary, in inferior jurisdictions, that the cause of action must be laid and proved to arise within the jurisdiction . . . . But it appears from the evidence given that the cause of action did not arise within the jurisdiction of the court; and unless this Act of Parliament has given an action against all persons residing within the jurisdiction of Ecclesall, though the cause of action do not arise there, the general rule must apply to this case.").

82. 4 BACON, *supra* note 22, at 33.

83. 1 *id.* at 564 ("[I]f any Matter appears in the Declaration, which sheweth that the Cause of Action did not arise infra Jurisdictionem, a Prohibition may be granted at any Time; so if the Subject Matter in the Declaration be not proper for the Judgment and Determination of such Court."); 4 *id.* at 34 (describing the same principles).

84. Moravia v. Sloper, (1737) 125 Eng. Rep. 1039 (C.P.D.).

85. *Id.* at 1042.

B. Principles of Appellate Jurisdiction

In addition to these principles of original jurisdiction, certain principles that governed the appellate jurisdiction of English courts in the eighteenth century provide useful background for understanding how federal courts came to understand the scope of Article III "arising under" jurisdiction.

1. *In England*. The Courts of Westminster—King's Bench, Common Pleas, Exchequer, and Chancery, that is, the superior courts—not only exercised a general original jurisdiction, but also variously superintended the proceedings of inferior courts and each other by exercising appellate jurisdiction. As stated in *Bacon's Abridgement*, "the Courts of Westminster are the Superior Courts of the Kingdom, and have a Superintendency over all the other Courts by Prohibitions, if they exceed their Jurisdiction, or Writs of Error and false Judgment, if their Proceedings are erroneous."[86] To bring an "appeal," one had to file in a proper court in the proper form the writ or a bill that fit the "error" alleged.

The principal forms of "appellate" proceedings "on the merits" were writs of error and bills of review. Writs of error ran from one court to another. In his *Commentaries*, Blackstone provided a convenient summary of the most significant principles governing which court or courts could hear writs of error based on the proceedings of other courts. Most notably, a writ of error would lie from an inferior court of record or the common pleas at Westminster to the King's Bench.[87] When a plaintiff in error sought the writ from a proper superior court, that court had power to review the entire record for any substantial or material error affecting the propriety of the judgment under review.[88] To maintain a writ of error, a party had to assert an error that was "substantial" or "material,"[89] not "slight"

86. 4 BACON, *supra* note 22, at 32.

87. 3 BLACKSTONE, *supra* note 39, at *410–11.

88. *See* 2 BACON, *supra* note 22, at 187 ("A Writ of Error is a Commission to Judges of a superior court, by which they are authorised to examine the Record, upon which a Judgment was given in an inferior Court, and on such Examination to affirm or reverse the same according to Law.").

89. *See* 3 BLACKSTONE, *supra* note 39, at *406 (explaining that "writs of error cannot now be maintained, but for some material mistake assigned").

or "trivial,"[90] such as a misspelling in a verdict or judgment.[91] When a writ of error was properly sought, the reviewing court had jurisdiction to review matters of law "arising upon" the facts of the proceeding as evident in the record.[92]

A bill of review was the functional equivalent of a writ of error for equity proceedings. A party seeking review of an original proceeding in equity would file a bill of review in the High Court of Chancery. A bill of review was "in the nature of a writ of error," and its purpose was "to procure an examination, and alteration, or reversal of a decree made upon a former Bill."[93] A bill of review could be "had upon apparent error in judgment, appearing on the face of the [equitable] decree"[94] or "upon oath made of the discovery of new matter or evidence" not available at the time the decree was made.[95]

Other notable forms of proceeding by which one court would pass on the propriety of proceedings in another were writs of prohibition and certiorari. Blackstone described prohibition as a writ "directed to the judge and parties, of a suit in any inferior court, commanding them to cease from the prosecution thereof, upon a suggestion, that either the cause originally, or some collateral matter arising therein, does not belong to that jurisdiction, but to the cognizance of some other court."[96] *Bacon's Abridgement* explains in this regard that if inferior "courts assume a greater or other power than is allowed them by law, or if they refuse to allow acts of parliament, or expound them otherwise than according to the true and proper exposition of them, the superior courts will prohibit and control them" through prohibition.[97] Certiorari was "an original Writ issuing out of Chancery, or the *King's Bench*, directed in the King's Name, to the Judges or Officers . . . of Inferior Courts, commanding

90. *Id.*

91. *Id.* at *410.

92. *Id.* at *406.

93. JOSEPH STORY, COMMENTARIES ON EQUITY PLEADINGS 320 (2d ed. 1840).

94. 3 BLACKSTONE, *supra* note 39, at *454; *see also* STORY, *supra* note 93, at 322 (explaining that a bill of review "may be brought for error of law, appearing upon the face of the decree").

95. 3 BLACKSTONE, *supra* note 39, at *454; *see also* STORY, *supra* note 93, at 327 ("[T]he matter must not only be new, but it must be such, as the party, by the use of reasonable diligence, could not have known . . . .").

96. 3 BLACKSTONE, *supra* note 39, at *112.

97. 6 BACON, *supra* note 22, at 250.

them to return the Records of a Cause depending before them."[98] King's Bench or Chancery would grant certiorari in favor of the Crown as a matter of right, and had discretion to grant the writ in favor of others upon a showing that a party would receive "hard dealing"[99] or "not have equal Justice"[100] in an inferior court.[101]

2. *In the Colonies*. In colonial legal systems, governing laws provided that certain courts should have general appellate jurisdiction over the proceedings of inferior courts. For example, a 1699 New Hampshire act established a superior court at Portsmouth with jurisdiction over all "matters, as fully and amply to all intents and purposes whatsoever, as the Courts of King's Bench, Common Pleas and Exchequer, within His Majesties Kingdom of England have, or ought to have," including appellate matters.[102] Some colonial laws limited the jurisdiction of courts to hear matters on appeal according to the amount in controversy in a given dispute. For example, a 1748 New Jersey act provided that a party "aggrieved" by an inferior court judgment "for the Sum of *Twenty Shillings* or more," could appeal "to the next Court of Common-Pleas, to be held for the County, City or Town Corporate, after the Judgment given."[103]

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98. 1 *id.* at 349.

99. JOHN COWEL, A LAW DICTIONARY (London, J. Streater 1672) (describing certiorari as "a Writ . . . to an Inferior Court, to call up the Records of a Cause therein depending, that conscionable Justice may be therein administered upon Complaint made by Bill, that the Party which seeketh the said Writ, hath received hard dealing in the said Court").

100. JOHN RASTELL, LES TERMES DE LA LEY 106 (London, Eliz. Nutt & R. Gosling 1721) (describing certiorari as "a Writ that lies where a Man is impleaded in a base Court, that is of Record, and he supposes that he may not have equal justice there").

101. Relatedly, the writ of *accedas ad curiam* was appropriate for removal of a case from a court not of record into a royal court so that a record of the suit could be made. *See* WILLIAM BOHUN, THE ENGLISH LAWYER: SHEWING THE NATURE AND FORMS OF ORIGINAL WRITS, PROCESSES AND MANDATES, OF THE COURTS OF WESTMINSTER 415 (London, E. Nutt, R. Nutt & R. Gosling 1732) ("An *Accedas ad Curiam* is an Original Writ issuing out of Chancery, on a Plaint sued, or a Judgment supposed to be given in the Hundred-Court, Court-Baron, or other Court of some Lord . . . being no Court of Record, commanding the Court to make a Record of the same suit, and to return and certify the same . . . .").

102. An Act for Establishing and Regulating Courts of Public Justice Within This Province, ch. 4 (Aug. 17, 1699), *in* 1 LAWS OF NEW HAMPSHIRE, *supra* note 48, at 662, 663.

103. An Act to Erect and Establish Courts in the Several Counties of This Colony, for the Trial of Small Causes, ch. 100, § 2 (1748), *in* THE ACTS OF THE GENERAL ASSEMBLY OF THE PROVINCE OF NEW-JERSEY, *supra* note 65, at 388, 388. Although "appellate" courts in England were not subject to this kind of amount-in-controversy requirement, a plaintiff in error had certain procedural obligations in pursuing a writ of error if the amount in controversy was sufficiently low. Specifically, a plaintiff in error who sought to reverse an inferior court

Interestingly, royal commissions and acts of colonial legislatures also provided amount-in-controversy limitations on the jurisdiction of the Privy Council to hear appeals from the colonies.[104] Several royal charters provided that persons in the colonies could appeal from judgments rendered by courts in the colonies to the Privy Council in England in limited circumstances. For example, the 1691 Charter of Massachusetts Bay provided that a party could appeal in a personal action from the judgment or sentence of any court in the province when the amount in dispute exceeded £300.[105] Royal instructions to colonial governors in the eighteenth century similarly regulated appeals from colonial courts to governors and the Privy Council, providing amount-in-dispute requirements.[106] Certain colonial assemblies also purported to set limitations on rights to appeal to the King in Council. A 1746 act in Rhode Island, for instance, provided that a person aggrieved by a decision of the Supreme Court of Judicature could appeal to the King in Council if the amount in controversy was £150.[107]

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judgment awarding damages less than ten pounds had to post security to protect the defendant in error from a frivolous appeal or threat of appeal. 3 BLACKSTONE, *supra* note 39, at *410.

104. Under various enactments, the Privy Council served as a court of last resort for appeals in colonial judicial systems. *See generally* JOSEPH HENRY SMITH, APPEALS TO THE PRIVY COUNCIL FROM THE AMERICAN PLANTATIONS 76–87, 246–48 (1950) (describing such acts and limitations).

105. The Charter of Massachusetts Bay (1691), *reprinted in* 3 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS 1870, 1881–82 (Francis Newton Thorpe ed., 1909).

106. A typical instruction provided that a party dissatisfied with a judgment could appeal

> unto us in our Privy Council, provided the matter in difference exceed the real value of THREE hundred pounds sterling, AND that such appeal be made within one fortnight after SENTENCE and security first given by the appellant to answer such charges as shall be awarded in case the sentence of our governor or commander in chief and council be confirmed.

Regulation of Appeals to the Council and Crown, *reprinted in* 1 ROYAL INSTRUCTIONS TO BRITISH COLONIAL GOVERNORS 1670–1776, § 446, at 320 (Leonard Woods Labaree ed., 1935). This instruction applied to the colonies of Maryland, New Hampshire, and Virginia. For other examples of such royal instructions, see Appeals to the Privy Council, *in* 1 ROYAL INSTRUCTIONS TO BRITISH COLONIAL GOVERNORS 1670–1776, *supra*, § 449, at 322, and Appeals to Governor and Council and to Privy Council, *in* 1 ROYAL INSTRUCTIONS TO BRITISH COLONIAL GOVERNORS 1670–1776, *supra*, § 453, at 325.

107. *See* SMITH, *supra* note 104, at 246–48 (describing Rhode Island laws). Subsequent acts raised this amount to £200 lawful money in 1766 and £300 lawful money in 1771. *See id.* at 247–48. There was a question, of course, whether such colonial acts were binding on the King in Council, *see id.* at 248, but what is relevant for present purposes is the nature of the regulation enacted, not the authority of the institution that enacted it. Both royal authorities and colonial assemblies imposed—or purported to impose—the same kind of limitations on the Privy Council to hear appeals from courts in the colonies.

Just as a plaintiff bringing an original action in a court of limited jurisdiction had to demonstrate in the original pleading that the court had jurisdiction, an aggrieved party seeking review in the Privy Council had to demonstrate that the amount in controversy sufficed to satisfy amount-in-controversy limitations. In the 1768 case of *Ferguson v. Spry*, the South Carolina Court of Chancery, in explaining that the plaintiff was appealing the dismissal of his case to the Privy Council, specifically noted that there was an "[a]ffidavit by plaintiff that the matter in dispute is of £300 value and upwards."[108] Likewise, the report of *Stocker v. Rowand* noted that after the South Carolina Court of Chancery issued a decree resolving the case, the defendant submitted an affidavit "that he is not satisfied with the decree, that the matter exceeds £300 in value, and he seeks an appeal to his Majesty in Privy Council."[109] This practice comports with the opinion of the Supreme Court, expressed in 1808, that, with respect to amount-in-dispute limitations on its own appellate jurisdiction, "the *plaintiff in error* must show that *this* court has jurisdiction."[110]

In sum, during the decades preceding the establishment of the Constitution, English and colonial laws recognized a distinction between courts of general and limited jurisdiction. When a plaintiff brought an original proceeding in a court of limited jurisdiction, the plaintiff had the burden of demonstrating facts sufficient to show that the court had jurisdiction. Likewise, the available evidence suggests that litigants bringing an appellate proceeding in a court of limited appellate jurisdiction had to show that the jurisdictional limitation was satisfied.

II. THE FRAMING AND RATIFICATION HISTORY OF ARTICLE III

To understand how early federal courts explained Article III "arising under" jurisdiction, one must appreciate not only the English jurisdictional principles explained in Part I, but also the framing and ratification of Article III.

This Part first explains how, at the Federal Convention, the delegates came to include the Arising Under Clause as a means of

108. RECORDS OF THE COURT OF CHANCERY OF SOUTH CAROLINA 566 (Anne King Gregorie ed., 1950).

109. *Id.* at 568–69.

110. United States v. Brig Union, 8 U.S. (4 Cranch) 216, 216 (1808) ("[T]he circuit court can neither give nor take away the jurisdiction of this court. The court must judge for itself of its own jurisdiction.").

ensuring the supremacy of federal law through national courts. It then explains how, in debates over ratification, public officials described "arising under" jurisdiction as enabling federal courts to ensure the supremacy of federal law by properly enforcing it and maintaining its uniformity.

In examining the framing and ratification of "arising under" jurisdiction, this Part sets aside for the moment the English jurisdictional law just explained. Part III will explain the relationship between English jurisdictional law and the framing and ratification of Article III "arising under" jurisdiction. That relationship, in short, is this: Federal courts in the early nineteenth century would come to rely upon English jurisdictional principles in effectuating the purposes of "arising under" jurisdiction evident in the framing and ratification of Article III. When federal courts employed English rules to determine jurisdiction, they observed a practice that at once enabled them to ensure the supremacy of federal law but checked the extent to which they independently would encroach upon the jurisdiction of state courts. Before examining federal judicial practice, however, it is first necessary, as context, to examine the place of "arising under" jurisdiction in the framing and ratification of the Constitution.

A. The Framing History

There is no need to recount here all that is known about the framing history of Article III. The delegates to the Federal Convention of 1787 considered several questions regarding the judicial power of the United States, including who should appoint federal judges; what power Congress should have over the jurisdiction of federal courts; and, most famously, leading to the so-called "Madisonian Compromise," whether the Constitution should create inferior federal courts.[111] Because the specific concern of this Article is with the import of Article III "arising under" jurisdiction, this Section presents a streamlined framing history focused on that particular jurisdictional grant.[112] This history reveals that Article III "arising

111. *See* Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741, 757–96 (1984) (explaining the general framing history of Article III).

112. For a more extensive consideration, see James S. Liebman & William F. Ryan, *"Some Effectual Power": The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 COLUM. L. REV. 696, 705–73 (1998).

under" jurisdiction emerged as a mechanism for ensuring, along with the Supremacy Clause, the proper enforcement of federal law.

1. *The Plans of the Convention*. At the Federal Convention, the delegates commonly assumed that the United States would exercise a judicial power; the question was what form it would take. Under the Articles of Confederation, the federal judicial power extended to certain maritime disputes[113] and disputes between states.[114] Each of the plans put forward at the Convention contemplated, consistent with the Convention's overall purpose, that the national government would have more extensive judicial powers than those provided in the Articles of Confederation. To understand the jurisdiction that each plan would have given a national judiciary, it is useful to appreciate what powers each plan would have vested in a national legislature and what mechanisms each plan would have provided to ensure the supremacy of federal prerogatives.

The "Virginia Plan," as put forth by Edmund Randolph on May 29, 1787, would have empowered a national legislature "to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation."[115] To ensure the supremacy of federal prerogatives, Randolph's plan provided three primary mechanisms. First, it would have empowered the national legislature "to negative all laws passed by the several States, contravening in the opinion of the National Legislature the articles of Union."[116] Second, it would have empowered the legislature "to call forth the force of the Union" against states that failed to fulfill their duties under the articles of the

113. Article IX provided:

> The United States in Congress assembled, shall have the sole and exclusive right and power of . . . appointing courts for the trial of piracies and felonies committed on the high seas and establishing courts for receiving and determining finally appeals in all cases of captures provided that no member of Congress shall be appointed a judge of any of the said courts.

ARTICLES OF CONFEDERATION art. IX, para. 1 (U.S. 1781).

114. Article IX provided that the Confederation Congress would serve as "the last resort on appeal in all disputes and differences now subsisting or that hereafter may arise between two or more States concerning boundary, jurisdiction or any other causes whatever," *id.* art. IX, para. 2, and certain controversies "concerning the private right of soil claimed under different grants of two or more States," *id.* art. IX, para. 3.

115. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 20–21 (Max Farrand ed., rev. ed. 1966).

116. *Id.* at 21.

plan.[117] Third, it provided for a national judiciary with jurisdiction over several categories of cases.

The judiciary provision, like all proposals for federal jurisdiction introduced at the Convention, defined national judicial jurisdiction according to the kinds of categories that limited jurisdiction in English and colonial law. Specifically, the Virginia Plan defined categories of federal jurisdiction according to the nature of the action being brought, the character of the litigants or other interested parties, the subject matter to which the action related, or some combination of these categories:

> [T]he jurisdiction of the inferior tribunals shall be to hear & determine in the first instance, and of the supreme tribunal to hear & determine in the dernier resort, all piracies & felonies on the high seas, captures from an enemy; cases in which foreigners or citizens of other States applying to such jurisdictions may be interested, or which respect the collection of the National revenue; impeachments of any National officers, and questions which may involve the national peace and harmony.[118]

This final category—"questions which may involve the national peace and harmony"—roughly corresponded in language to the power the plan would have given the national legislature in cases "in which the harmony of the United States may be interrupted by state legislation."[119] In other words, the plan contemplated a jurisdiction coterminous with the national legislative power.

Debate ensued on the famous question whether a supreme national tribunal with appellate jurisdiction over state courts was sufficient to protect national prerogatives from state interference, or whether inferior national tribunals were needed in addition. The

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117. *Id.*

118. *Id.* at 22.

119. At the time that Randolph presented his plan, Charles Pinckney offered a different one. The content of Pinckney's plan has long been controversial, but, on one theory, he proposed a federal court with appellate jurisdiction "in all Causes wherein Questions shall *arise on* the Construction of Treaties made by U.S.—or on the Law of Nations—or on the Regulations of U.S. concerning Trade and Revenue." 3 *id.* at 608 (emphasis in original omitted) (emphasis added). By its terms, this plan provided appellate jurisdiction over disputed questions of the meaning of federal law and the law of nations. In his *Observations on the Plan of Government Submitted to the Federal Convention*, published after the Convention concluded, Pinckney explained that a federal judiciary was necessary not only for the trial of impeachments of officers of the United States, but for "the trial of questions *arising on* the law of nations, the construction of treaties, or any of the regulations of Congress in pursuance of their powers." *Id.* at 117 (emphasis added).

delegates generally agreed that a supreme national tribunal was necessary to protect certain defined national interests; they disagreed about whether a supreme tribunal without national courts of original jurisdiction was sufficient. On June 5, the Committee of the Whole passed the initial "Madisonian Compromise," a motion "[t]hat the national legislature be empowered to appoint inferior Tribunals."[120]

On June 13, 1787, Randolph and James Madison presented an amended plan providing "[t]hat the jurisdiction of the national Judiciary shall extend to cases which respect the collection of the national revenue, impeachments of any national officers, and questions which involve the *national peace and harmony*."[121] Reportedly, Randolph "observed the difficulty in establishing the powers of the judiciary," but understood the object of federal judicial power to be "to establish . . . the security of foreigners where treaties are in their favor, and to preserve the harmony of states and that of the citizens thereof."[122] According to Randolph, this amended plan would simply establish that principle; it would later "be the business of a sub-committee to detail it."[123] The Committee unanimously adopted the proposal and, that same day, reprinted the Virginia Plan as revised.[124]

Two days later, on June 15, William Paterson put forth the so-called "New Jersey Plan." This plan would have augmented the powers of Congress under the Articles of Confederation to include powers to raise revenues and regulate trade and commerce.[125] To ensure the supremacy of federal prerogatives, Paterson's plan provided three mechanisms: a supremacy clause, a national judiciary, and the use of force.

First, Paterson's plan provided that "acts" and "treaties" of the United States were "the supreme law of the respective States":

> [A]ll Acts of the U. States in Congs. made by virtue & in pursuance of the powers hereby & by the articles of confederation vested in them, and all Treaties made & ratified under the authority of the U. States shall be the supreme law of the respective States so far forth as those Acts or Treaties shall relate to the said States or their

120. 1 *id.* at 115–18.
121. *Id.* at 223–24 (emphasis added).
122. *Id.* at 238.
123. *Id.*
124. *Id.* at 228–32, 235–37.
125. *Id.* at 242–43.

> Citizens, and that the Judiciary of the several States shall be bound thereby in their decisions, any thing in the respective laws of the Individual States to the contrary notwithstanding.[126]

Second, it provided for a national judiciary with appellate jurisdiction over limited categories of state court judgments implicating national interests. Specifically, it provided that "all punishments, fines, forfeitures & penalties to be incurred for contravening" acts of Congress "shall be adjudged" by state courts, subject to "appeal to the Judiciary of the U. States" for "the correction of all errors, both in law & fact."[127] Correspondingly, the plan would have given a federal "supreme Tribunal" appellate jurisdiction "in all cases . . . which may *arise on* any of the Acts for regulation of trade, or the collection of the federal Revenue."[128] Paterson's plan additionally would have given the supreme tribunal limited appellate jurisdiction in other categories of cases implicating national interests, including "all cases touching the rights of Ambassadors, in all cases of captures from an enemy, in all cases of piracies & felonies on the high seas, in all cases in which foreigners may be interested, [and] in the construction of any treaty or treaties . . . ."[129]

Finally, Paterson's plan would have provided for the use of force against states resisting federal authority.[130] Notwithstanding that the Virginia Plan itself initially contained a force provision, Randolph, Madison, and Alexander Hamilton each denounced the force provision in the New Jersey Plan.[131] Rather than force, Madison advocated a congressional negative on state legislation as the

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126. *Id.* at 245.

127. *Id.* at 243.

128. *Id.* at 244 (emphasis added).

129. *Id.* at 244. Charles Pinckney also presented a plan to the Convention that would have established a supreme federal court and such inferior federal courts "as shall be necessary." 3 *id.* at 600.

130. 1 *id.* at 245.

131. Randolph expressed that such "coercion" was "*impracticable, expensive, cruel to individuals*." *Id.* at 255–56 (Madison's notes from June 16, 1787). Hamilton questioned "how can this force be exerted on the States collectively. It is impossible. It amounts to a war between the parties. Foreign powers also will not be idle spectators. They will interpose, the confusion will increase, and a dissolution of the Union ensue." *Id.* at 285. Madison, too, expressed that "[t]he coercion, on which the efficacy of the plan depends, can never be exerted but on themselves." *Id.* at 320.

appropriate means of ensuring federal supremacy.[132] Following deliberations on the New Jersey Plan, the Committee of the Whole voted to report the Virginia Plan, rather than the New Jersey Plan, to the convention.

2. *A Supremacy Provision and "Arising Under" Jurisdiction as Alternative Means to Enforce Federal Supremacy*. After rejecting the New Jersey Plan, the delegates proceeded to debate the provisions of the Virginia Plan on the floor of the Convention. Ultimately, the Convention would reject a negative in favor of judicial mechanisms for enforcing federal supremacy. In a letter dated June 20, 1787, that Madison likely received in August 1787, Thomas Jefferson, writing from Paris, discussed these competing mechanisms.[133] Jefferson argued that federal court jurisdiction over cases that federal law controlled would be preferable to the negative as a means of preventing states from thwarting federal prerogatives. Arguing against the negative, Jefferson asked, "Would not an appeal from the State Judicatures to a Federal Court, in all cases where the Act of Confederation controuled the question, be as effectual a remedy, and exactly commensurate to the defect?"[134] (By "Act of Confederation," Jefferson meant not only the articles of union, but laws made pursuant to them.[135]) Jefferson anticipated that "[i]t will be said that this Court may encroach on the jurisdiction of the State Courts,"[136] but retorted that "there will be a power, to wit Congress, to watch and restrain them."[137] The Convention ultimately would provide a stronger mechanism than Jefferson advocated—a congressional power to constitute inferior federal courts in addition to Supreme

132. Madison thought that "[t]he plan of Mr. Paterson, not giving even a negative on the Acts of the States, left them as much at liberty as ever to execute their unrighteous projects agst. each other." *Id.* at 318.

133. Letter from Thomas Jefferson to James Madison (June 20, 1787), *in* CHARLES WARREN, THE MAKING OF THE CONSTITUTION 168, 168–69 (1928).

134. *Id.*

135. By way of example, Jefferson explained:

> A British creditor, e.g., sues for his debt in Virginia; the defendant pleads an act of the State excluding him from their Courts; the plaintiff urges the Confederation and the treaty made under that, as controuling the State law; the [State] Judges are weak enough to decide according to the views of their Legislature; an appeal to a Federal Court sets all to rights.

Id. at 169.

136. *Id.*

137. *Id.*

Court appellate jurisdiction. In principle, however, Jefferson's expressed preference for a judicial rather than legislative check on state encroachments against federal power would carry the day.

On July 17, after the States secured equal suffrage in the Senate,[138] the Convention debated the merits of the negative. Madison considered the negative "essential to the efficacy & security of the Genl. Govt."[139] Only a negative would counteract "the propensity of the States to pursue their particular interests in opposition to the general interest."[140] Federal judicial review would not be as effective, in Madison's view, because state laws could "accomplish their injurious objects" before they could be "set aside by the National Tribunals."[141] Moreover, Madison argued that "[c]onfidence can <not> be put in the State Tribunals as guardians of the National authority and interests" because of the control state legislatures exercised over them.[142]

Roger Sherman and Robert Morris argued against a negative. Sherman contended it was unnecessary, "as the Courts of the States would not consider as valid any law contravening the Authority of the Union, and which the legislature would wish to be negatived."[143] And Morris asserted that the national judiciary would adequately protect federal prerogatives against obstructive state laws.[144]

The Convention proceeded to reject the negative. Thereupon, the Convention took up other measures for ensuring the supremacy of federal prerogatives. Immediately after the Convention rejected the negative, Luther Martin proposed "in substitution of" a negative[145] a supremacy provision that tracked the supremacy provision that Paterson's plan had contained:

> [T]he legislative acts of the United States made by virtue and in pursuance of the articles of the union, and all treaties made and ratified under the authority of the United States, shall be the supreme law of the respective states, so far as those acts or treaties

138. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 115, at 15–16.

139. *Id.* at 27.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. He explained that "[a] law that ought to be negatived will be set aside in the Judiciary departmt." *Id.* at 28.

145. 3 *id.* at 286.

> shall relate to the said states or their citizens and that the judiciaries of the several states shall be bound thereby in their decisions, any thing in the respective laws of the individual states to the contrary notwithstanding.[146]

As under the supremacy clause of Paterson's plan, state judiciaries would be bound by national "acts" and "treaties" as "the supreme law of the respective States." The Convention unanimously adopted this supremacy provision.

Having defined an obligation in state courts to recognize the supremacy of federal law, the Convention next took up the role of a national judiciary in maintaining the supremacy of federal law. The delegates unanimously agreed that the United States should have a judiciary. Their debate primarily concerned whether the judiciary should have just a supreme tribunal or inferior courts as well, what the procedure should be for appointment of judges, and what power Congress should have regarding judicial salaries. Regarding the question of inferior federal tribunals, opponents argued that state courts could adequately handle in the first instance any business to which a federal judicial power would extend.[147] Luther Martin, who had introduced the supremacy provision, argued that inferior federal tribunals "will create jealousies & oppositions in the State tribunals, with the jurisdiction of which they will interfere."[148] In response, Randolph argued that inferior federal tribunals were necessary to maintain the supremacy of federal law. He "observed that the Courts of the States can not be trusted with the administration of the National laws. The objects of jurisdiction are such as will often place the General & local policy at variance."[149] As is well known, the Convention resolved, as the Committee of the Whole had on June 5, to authorize Congress to establish inferior federal tribunals rather than provide directly for them in the Constitution.[150]

After this resolution, the Convention adopted a resolution proposed by Madison that federal court jurisdiction extend to "cases arising under laws passed by the general Legislature, and to such

146. *Id.* at 286–87.

147. 2 *id.* at 45.

148. *Id.* at 45–46.

149. *Id.* at 46.

150. *Id. See supra* note 120 and accompanying text (describing June 5 resolution of the Committee of the Whole).

other questions as involve the National peace and harmony."[151] In terms, this resolution drew a distinction between cases "arising under" national acts and questions that "involve the National peace and harmony." Presumably, Madison particularized the "arising under" category of jurisdiction to make certain, after the defeat of the negative, that Congress would have power to enable inferior federal courts to administer federal law in the first instance as a means of maintaining its supremacy. Luther Martin suggested as much in his famous "Information to the General Assembly of the State of Maryland." There, he explained that he thought that state court jurisdiction would be sufficient "in the *first instance* of all cases that should arise under the laws of the general government, which being by this system made the supreme law of the States, would be binding on the different State judiciaries."[152] The "majority" of delegates, however, he explained, thought that inferior federal courts were necessary "for the enforcing of [federal] laws."[153] What other categories of cases were necessary to preserve the national peace and harmony would be left to the Committee of Detail. The convention referred the Virginia Plan, as amended, to the Committee of Detail on July 26.

As James Liebman and William Ryan summarize it, the Convention, in this plan, devised a "*judicial* review device" to take the "place of federal *legislative* review of state laws for consistency with national law."[154] The plan required state judiciaries to deem federal acts and treaties supreme, and, through the "arising under" provision, authorized Congress to deploy original and appellate federal court jurisdiction as necessary to supplement the obligations of state courts to enforce federal laws.

3. *Strengthening the Supremacy Provision and "Arising Under" Jurisdiction as Means to Enforce Federal Supremacy*. Through the remainder of its proceedings, the Convention would conform the language of the Supremacy Clause to the language of the Arising Under Clause, strengthening the efficacy of both.

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151. *Id.* at 38–39.

152. Luther Martin, *Information to the General Assembly of the State of Maryland*, *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 27, 57 (Herbert J. Storing ed., 1981).

153. *Id.*

154. Liebman & Ryan, *supra* note 112, at 733.

In the Committee of Detail, Edmund Randolph submitted a draft proposal for national judicial jurisdiction containing notations by John Rutledge. This proposal maintained the "arising under" category and subdivided the category of "cases involving the national peace and harmony" into more specific categories defined by subject matter and party status:

> 7. The jurisdiction of the supreme tribunal shall extend
>   1. to all cases, arising under laws passed by the general <Legislature>
>   2. to impeachments of officers, and
>   3. to *such* other cases, as the national legislature may assign, as involving the national peace and harmony, in the collection of the revenue in disputes between citizens of different states <in disputes between a State & a Citizen or Citizens of another State> in disputes between different states; and in disputes, in which subjects or citizens of other countries are concerned <& in Cases of Admiralty Jurisdn> But this supreme jurisdiction shall be appellate only, except in <Cases of Impeachmt. & (in)> those instances, in which the legislature shall make it original. and the legislature shall organize it
> 8. The whole or a part of the jurisdiction aforesaid according to the discretion of the legislature may be assigned to the inferior tribunals, as original tribunals.[155]

This proposal drew a clear distinction between cases "arising under" federal law and other cases implicating national interests.[156]

A later draft in the Committee of Detail, in James Wilson's hand, with emendations in Rutledge's hand, more closely resembles the form that Article III ultimately would assume. The article governing the judiciary began: "The Judicial Power of the United States shall be vested in one Supreme Court, and in such inferior Courts as shall, when necessary, from time to time, be constituted by the Legislature of the United States."[157] Regarding jurisdiction, it provided, first, for

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155. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 115, at 146–47 (words in parentheses were crossed out in the original; words in brackets represent Rutledge's emendations and marginal notes).

156. Another draft in the Committee of Detail, in James Wilson's hand, used the phrase "arise on" rather than "arising under" to specify a limited category of cases over which the federal judiciary would have jurisdiction. *Id.* at 157. This proposal was evidently premised upon Paterson's proposal for federal jurisdiction in the New Jersey Plan.

157. *Id.* at 186.

"arising under" jurisdiction: "The Jurisdiction of the Supreme Court shall extend to all cases arising under laws passed by the Legislature of the United States." It provided, as well, familiar categories based on the character of the parties (cases involving ambassadors and consuls, and diversity cases) and the kind of action being brought (impeachments, admiralty and maritime matters).[158] This was essentially the draft that the Committee of Detail reported to the Convention on August 6, 1787.

Debate ensued in the Convention on various matters relating to the supremacy of federal law and, in particular, the judiciary article.[159] On August 23, John Rutledge moved, and the Convention unanimously agreed, to extend the supremacy provision to encompass not only federal acts and treaties, but the Constitution itself.[160] A motion to renew consideration of the negative failed that same day.[161]

On August 27, the Convention conformed the language of the Arising Under Clause to the language of the Supremacy Clause. First, William Samuel Johnson "moved to insert the words 'this Constitution and the' before the word 'laws.'"[162] In response, Madison's notes provide:

> Mr. Madison doubted whether it was not going too far to extend the jurisdiction of the Court generally to cases arising Under the Constitution, & whether it ought not to be limited to cases of a Judiciary Nature. The right of expounding the Constitution in cases not of this nature ought not to be given to that Department.
>
> The motion of Docr. Johnson was agreed to nem: con: it being generally supposed that the jurisdiction given was constructively limited to cases of a Judiciary nature—[163]

According to Madison's notes, Rutledge then moved to also include cases arising under "treaties made or which shall be made" under the authority of the United States. This inclusion would

158. *Id.*

159. These matters included extending the judicial power to cases "in law and equity," legislative control over judicial salaries, and the appellate jurisdiction of the Supreme Court to review questions of fact.

160. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 115, at 381–82, 389, 394–95, 409.

161. *Id.* at 382, 391.

162. *Id.* at 430.

163. *Id.*

conform the language of the Arising Under Clause to the language of the Supremacy Clause.[164] The delegates unanimously agreed to this motion.[165] With this, and a few subsequent syntactical changes to the language of Article III, the delegates framed the Arising Under Clause. As James Liebman and William Ryan have summarized the process, the Framers "self-consciously and irrevocably forged the constitutional structural link between the front-line decisionmaking of 'the Judges in every State' under the supremacy clause and the supervisory decisionmaking of the federal judiciary when called upon to exercise the 'arising under' jurisdiction permitted by the judiciary article."[166] Relative to the negative (or use of force for that matter), the Arising Under Clause provided a limited means for Congress, through the judiciary, to ensure the supremacy of federal law.

B. The Ratification History

Several participants in ratification debates attributed a meaning and purpose to the Arising Under Clause that reflected its import in the Federal Convention. This Section describes the universe of recorded ways in which participants in the ratification debates—proponents and opponents of the Constitution alike—defined the scope of Article III "arising under" jurisdiction. Those who defined it in a meaningful way deemed it to capture cases involving the enforcement or interpretation of federal law. This Section also describes the different reasons that ratification debate participants offered to explain the existence of Article III "arising under" jurisdiction. They argued that the Constitution must enable federal courts to properly carry federal law into execution and explicate its meaning. These definitions and reasoned justifications all envisioned

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164. *Id.* at 431. As Madison explained it in his report on the Virginia Resolutions, the Arising Under Clause "was meant as a guide to the judges of the United States," the Supremacy Clause "as a guide to the judges of the several states." James Madison, *Report on the Virginia Resolutions to the House of Delegates* (1798), *reprinted in* 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 546, 565 (Jonathan Elliot ed., Philadelphia, J.B. Lippincott Co., 2d ed. 1891).

165. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 115, at 431.

166. Liebman & Ryan, *supra* note 112, at 747; *see also* Robert J. Pushaw Jr., *Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447, 498–99 (1994) (explaining that for the Framers, a national judiciary with "arising under" jurisdiction was needed "horizontally, to preserve uniformity in federal law, and vertically, to ensure federal supremacy" (internal citations omitted)).

federal courts maintaining the supremacy of federal law through "arising under" jurisdiction.

Before this Section proceeds to discuss these materials, it is worth making two preliminary points. First, the meaning of Article III "arising under" jurisdiction did not dominate ratification debates about the federal judicial power. More than they discussed "arising under" jurisdiction, participants in the ratification debates addressed issues involving the right to a jury trial in federal court, the convenience of federal tribunals to potentially distant litigants, the jurisdiction of federal courts over cases "in law and equity," and the jurisdiction of the Supreme Court to review questions of both "law and fact." Participants made most assertions or assumptions about the scope of "arising under" jurisdiction in broader debates over the nature of the judicial power and the existence of judicial review. Second, the political nature of the ratification debates, including the place of *The Federalist* in them,[167] is well known. There is every reason to believe that certain expressions of constitutional understanding were calculated toward political ends. The political nature of the ratification debates raises questions regarding whether a given statement fairly depicts how the speaker or listener most reasonably would have construed constitutional meaning.

It might be asked, then, what evidence, if any, the ratification debates meaningfully hold regarding historical understandings of Article III "arising under" jurisdiction. If nothing else, the ratification debates evidence bounds of reasonable argumentation about the meaning of Article III "arising under" jurisdiction. In other words, even if some participants overstated or understated their actual understandings of the breadth of Article III "arising under" jurisdiction, their debates still may show how far participants believed they could carry an argument about constitutional import without exceeding the limits of plausibility. If the debates do not evidence a *right* answer to the question of what the scope of "arising under" jurisdiction was understood to be, they may well evidence what would have been understood to be *wrong* answers. Certainly, the ratification debates provide context for understanding the purposes of "arising under" jurisdiction that the Marshall Court attributed to its original establishment.

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167. *See, e.g.*, Dan T. Coenen, *A Rhetoric for Ratification: The Argument of* The Federalist *and Its Impact on Constitutional Interpretation*, 56 DUKE L.J. 469, 486–527 (2006) (arguing that "*The Federalist* embodies a strategic argument designed to win an intense political campaign").

1. *The Meaning of "Arising Under" Jurisdiction.* This Section explains the different ways in which ratification debate participants defined or understood the phrase "arising under" in Article III. To begin, several participants complained that the phrase "arising under" was vague and indefinite. The debate in the Virginia ratifying convention provides illustrations. There, William Grayson objected "to the Federal Judiciary" on the ground "that it is not expressed in a definite manner."[168] In particular, he argued, "[t]he jurisdiction of all cases arising under the Constitution, and the laws of the Union, is of stupendous magnitude. It is impossible for human nature to trace its extent. It is so vaguely and indefinitely expressed, that its latitude cannot be ascertained."[169] George Mason observed that "[t]he Judicial power shall extend to all cases in law and equity, arising under this Constitution" and rhetorically asked, "What objects will not this expression extend to?"[170] Mason argued that "the general description of the Judiciary involves the most extensive jurisdiction. Its cognizance in all cases arising under the system, and the laws of Congress, may be said to be unlimited."[171] Edmund Randolph similarly observed in the Virginia Convention that the jurisdiction of the federal judiciary "extends to all cases in law and equity arising under the Constitution" and proceeded to ask, "What do we mean by the words *arising under the Constitution?* What do they relate to? I conceive this to be very ambiguous."[172] Randolph was concerned that "the word *arising* will be carried so far, that it will be made use of to aid and extend the Federal jurisdiction."[173] He explained that if he "were to propose an amendment on this subject, it would be to limit the word *arising*."[174] He "would not discard it altogether, but define its extent. The jurisdiction of the Judiciary in cases arising under the system, I should wish to be defined, so as to prevent its being

168. William Grayson, Speech to the Virginia Convention (June 21, 1788), *in* 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1444, 1446 (Merrill Jensen ed., 1976) [hereinafter DOCUMENTARY HISTORY].

169. *Id.* at 1446–47.

170. George Mason, Speech to the Virginia Convention (June 19, 1788), *in* 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 168, at 1401, 1401.

171. *Id.* at 1403.

172. Edmund Randolph, Speech to the Virginia Convention (June 21, 1788), *in* 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 168, at 1450, 1452.

173. *Id.*

174. *Id*. at 1487.

extended unnecessarily . . . ."[175] Certain participants in ratification debates in other states likewise characterized the words "arising under" as indefinite and not amenable to principled limitation.[176] The claim was not that federal jurisdiction should be unlimited, but that the "arising under" language did not limit federal judicial power with sufficient certainty.

Other participants in ratification debates attributed a more definite operation to the Arising Under Clause. Some described "arising under" jurisdiction to encompass cases involving the construction of a federal law. "Brutus," widely believed to be New York judge Robert Yates, explained that "[t]he cases arising under the constitution must include such, as bring into question its meaning, and will require an explanation of the nature and extent of the powers of the different departments under it."[177] He described Article III as vesting the federal judiciary "with a power to resolve all questions that may *arise on* any case on the construction of the constitution,

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175. *Id.*

176. *See, e.g.*, Brutus I, N.Y. J., Oct. 18, 1788, *reprinted in* 13 DOCUMENTARY HISTORY, *supra* note 168, at 411, 415–16 (predicting that the federal courts "will be, in themselves, totally independent of the states . . . and in the course of human events it is to be expected, that they will swallow up all the powers of the courts in the respective states"); Centinel I, INDEP. GAZETTEER (Phila., Pa.), Oct. 5, 1787, *reprinted in* 2 DOCUMENTARY HISTORY, *supra* note 168, at 158, 163 (arguing that "[t]he objects of jurisdiction recited above are so numerous, and the shades of distinction between civil causes are oftentimes so slight, that it is more than probable that the state judicatories would be wholly superseded; for in contests about jurisdiction, the federal court, as the most powerful, would ever prevail," as "[e]very person acquainted with the history of the courts in England knows by what ingenious sophisms they have, at different periods, extended the sphere of their jurisdiction over objects out of the line of their institution, and contrary to their very nature"); Letter from Samuel Osgood to Samuel Adams (Jan. 5, 1788), *in* 5 DOCUMENTARY HISTORY, *supra* note 168, at 618–19 (observing that "[t]he Judicial Power extends to all Cases of Law & Equity arising under the Constitution &ca" and arguing that "[t]he Extent of the Judicial Power is therefore, as indefinite & unlimited as Words can make it"); *cf.* James Monroe, *Some Observations on the Constitution*, May 25, 1788, *reprinted in* 9 DOCUMENTARY HISTORY, *supra* note 168, at 844, 871–72 (stating that "when we observe that the cognizance of all cases arising under the constitution and the laws, either of a civil or criminal nature, in law or equity, with those other objects which it specifies, even between citizens of the same state, are taken from those of each state and absolutely appropriated to the courts of the United States, we are led into a view of the very important interests it comprehends, and of the extensive scale upon which it operates").

177. Brutus XI, N.Y. J., Jan. 31, 1788, *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 152, at 417, 419; *see also* Centinel XVI, INDEP. GAZETTER (Phila., Pa.), Feb. 26, 1788, *reprinted in* 16 DOCUMENTARY HISTORY, *supra* note 168, at 217, 220 ("The 1st section of 3d article gives the supreme court cognizance of not only the laws, but of all cases arising under the constitution, which empowers this tribunal to decide upon the construction of the constitution itself in the last resort.").

either in law or in equity."[178] Later, he observed that "the supreme court has the power, in the last resort, to determine all questions that may *arise* in the course of legal discussion, *on* the meaning and construction of the constitution."[179] Luther Martin similarly argued that the supreme and inferior courts in which Article III vested "the judicial power of the United States" would have an exclusive "right to decide upon the laws of the United States, and all questions *arising upon* their construction."[180]

Other participants in ratification debates described "arising under" jurisdiction as extending not only to cases calling for the construction of a federal law, but more broadly to cases in which federal law was determinative of a right or title asserted. Hugh Williamson, who represented North Carolina at the Federal Convention, explained in Edenton, North Carolina, in November 1787 that "those cases which are determinable by the general laws of the nation, are to be referred to the national Judiciary."[181] He described such cases as "those which naturally *arise from* the constitutional laws of Congress."[182] In *The Federalist No. 80*, Hamilton explained that "[i]t seems scarcely to admit of controversy that the judiciary authority of the union ought to extend to . . . causes . . .

178. Brutus XI, N.Y. J., Jan. 31, 1788, *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 152, at 417, 419 (emphasis added).

179. Brutus XII, N.Y. J., Feb. 7, 1788, *reprinted in* 16 DOCUMENTARY HISTORY, *supra* note 168, at 72, 73 (emphasis added).

180. Luther Martin, *Information to the General Assembly of the State of Maryland*, *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 152, at 27, 57 (emphasis added). The "Federal Farmer" appears to have used the phrase "arising upon" or "arising on" in this same sense in arguing that the federal courts should not hear cases "arising upon" the laws of the state. *See* Letter from the Federal Farmer No. 3 (Oct. 10, 1787), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 152, at 234, 243 ("There are some powers proposed to be lodged in the general government in the judicial department, I think very unnecessarily, I mean powers respecting questions *arising upon* the internal laws of the respective states. It is proper the federal judiciary should have powers co-extensive with the federal legislature—that is, the power of deciding finally on the laws of the union.") (emphasis added).

It is at least worth noting that these uses of "arising [up]on" to describe "arising under" jurisdiction comported with how English courts described questions as "arising [up]on" legal instruments with unsettled meanings. *See supra* note 25 and accompanying text.

181. Hugh Williamson, Speech at Edenton, North Carolina (Nov. 8, 1787), *in* 2 THE DEBATE ON THE CONSTITUTION: FEDERALIST AND ANTIFEDERALIST SPEECHES, ARTICLES, AND LETTERS DURING THE STRUGGLE OVER RATIFICATION 227, 230 (Bernard Bailyn ed., 1993) [hereinafter THE DEBATE ON THE CONSTITUTION].

182. *Id.* at 229 (emphasis added).

which *arise out* of the laws of the United States, passed in pursuance of their just and constitutional powers of legislation."[183]

Some writers described these two understandings of "cases arising under" federal law—cases involving (1) the interpretation of or (2) the enforcement of a federal law—to be of a piece. The "Federal Farmer," commonly believed to be Richard Henry Lee, explained that officers of "the judicial courts . . . have it in charge, faithfully to *decide upon*, and *execute* the laws, in judicial cases."[184] Luther Martin believed that federal courts would "have a right to decide upon the laws of the United States, and all questions arising upon their construction," as well as a right "in a judicial manner to carry those laws into execution."[185]

Several participants in ratification debates argued that the judicial power of the United States over cases "arising under" federal law was commensurate with the legislative power of Congress.[186] In so arguing, they generally stressed that the courts should have power to enforce federal law regardless of whether its meaning was in dispute. In the Virginia ratifying convention, John Marshall rejected the claim that "arising under" jurisdiction was without meaningful limit:

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183. THE FEDERALIST NO. 80, at 534 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (emphasis added).

184. Letter from the Federal Farmer No. 15 (Jan. 18, 1788), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 152, at 315, 315 (emphasis added).

185. Luther Martin, *Information to the General Assembly of the State of Maryland*, *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 152, at 27, 69.

186. *E.g.*, Brutus XIII, N.Y. J., Feb. 21, 1788, *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 152, at 428, 428 ("For, I conceive that the judicial power should be commensurate with the legislative. Or, in other words, the supreme court should have authority to determine questions arising under the laws of the union."); A Landholder V, Conn. Courant, Dec. 3, 1787, *reprinted in* 3 DOCUMENTARY HISTORY, *supra* note 168, at 483, 483 ("Their courts are not to intermeddle with your internal policy and will have cognizance only of those subjects which are placed under the control of a national legislature."); Letter from Samuel Holden Parsons to William Cushing (Jan. 11, 1788), *reprinted in* 3 DOCUMENTARY HISTORY, *supra* note 168, at 569, 572 ("[T]he judicial powers of every state must be coextensive with the legislative—and I cannot find that the legislative powers proposed in this Constitution are extended to any objects in which the nation are not immediately or mediately concerned."); *see also* 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES AND OF THE COMMONWEALTH OF VIRGINIA 419 (1803) ("The judicial power of the United States extends to all cases arising under the laws of the United States . . . now as the subjects upon which congress have the power to legislate, are all specially enumerated, so the judicial authority, under this clause, is limited to the same subjects as congress have power to legislate upon.").

> Has the Government of the United States power to make laws on every subject?—Does he understand it so?—Can they make laws affecting the mode of transferring property, or contracts, or claims between citizens of the same State? Can they go beyond the delegated powers? If they were to make a law not warranted by any of the powers enumerated, it would be considered by the Judges as an infringement of the Constitution which they are to guard:—They would not consider such a law as coming under their jurisdiction.—They would declare it void.[187]

In this argument, Marshall apparently presumed that a case could "arise under" the Constitution if a congressional statute conflicted with it, even if there was no dispute over the meaning of the statute or Constitution.[188]

Madison likewise observed that "[w]ith respect to the laws of the Union, it is so necessary and expedient that the Judicial power should correspond with the Legislative, that it has not been objected to."[189] "That causes of a federal nature will arise," he explained, "will be obvious to every Gentleman, who will recollect that the States are laid under restrictions; and that the rights of the Union are secured by those restrictions."[190] In these passages, Madison appears to have advocated a need for federal courts to ensure the supremacy of federal law regardless of whether in a particular case the meaning of that law was in dispute. That said, Madison not only identified a need for federal courts to enforce the laws of the Union, but emphasized a need for them to "explicate" them as well: "It may be no misfortune that in organizing any Government, the explication of its authority should be left to any of its co-ordinate branches."[191]

Other statements in ratification debates regarding Article III "arising under" jurisdiction provide little insight into its understood meaning. Some participants described Article III as giving the federal

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187. John Marshall, Speech to the Virginia Convention (June 20, 1788), *in* 1 THE PAPERS OF JOHN MARSHALL 275, 276–77 (Herbert A. Johnson et al. eds., 1974).

188. Hamilton made a similar argument in *The Federalist No. 80*. He gave the following as an example of a case "arising under the constitution" of the United States: "Should paper money, notwithstanding [the Constitution's prohibition against states emitting it], be emitted, the controversies concerning it would be cases arising upon the constitution, and not upon the laws of the United States, in the ordinary signification of the terms." THE FEDERALIST NO. 80 (Alexander Hamilton), *supra* note 183, at 539.

189. Virginia Convention (June 20, 1788), *reprinted in* 10 DOCUMENTARY HISTORY, *supra* note 168, at 1412, 1413 (remarks of James Madison).

190. *Id.*

191. *Id.*

judiciary jurisdiction over "federal causes" or "national causes."[192] A federal or national cause could be one that bears any of a number of relationships to federal law or institutions: one that a federal statute creates, one that federal law otherwise governs, one that implicates a disputed question of federal law, or one in which the federal government has some other interest.

Statements that Article III "arising under" jurisdiction extended to federal "objects" or "concerns" likewise did not meaningfully describe a category of cases that "arising under" jurisdiction would encompass.[193] James Monroe, in his *Observations on the Constitution*, explained that because the judiciary "forms the branch of a national government, so it should contemplate national objects only."[194] As for what national objects were in the contemplation of a federal court, Monroe simply paraphrased the language of Article III: "Whatever cases might arise under the constitution, the laws of the legislature, and the acts of the Executive in conformity thereto, (however trifling or important the interests it affected might be) should have their final decision from this court."[195]

In sum, those who ascribed any meaningful import to Article III "arising under" jurisdiction in the ratification debates described it as encompassing cases in which the meaning of a federal law would be disputed, and cases in which federal law would be determinative of the respective rights or titles of the parties. Of course, these categories were not mutually exclusive. Those who described "arising under" jurisdiction as extending to cases in which federal law was

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192. *See, e.g.*, THE FEDERALIST NO. 81 (Alexander Hamilton), *supra* note 183, at 547 ("The most discerning cannot foresee how far the prevalency of a local spirit may be found to disqualify the local tribunals for the jurisdiction of national causes . . . ."); Letter from the Federal Farmer No. 3 (Oct. 10, 1787), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 152, at 234, 244 ("There can be but one supreme court in which the final jurisdiction will centre in all federal causes—except in cases where appeals by law shall not be allowed . . . .").

193. *See* Marcus II, NORFOK & PORTSMOUTH J., Feb. 27, 1788, *reprinted in* 1 THE DEBATE ON THE CONSTITUTION, *supra* note 181, at 371, 371 ("In no case but where the Union is in some measure concerned, are the Foederal Courts to have any jurisdiction."); A.B., HAMPSHIRE GAZETTE, Jan. 9, 1788, *reprinted in* 5 DOCUMENTARY HISTORY, *supra* note 168, at 667, 668 ("With respect to the judicial powers, Brutus says, 'the powers given to these courts are very extensive: their jurisdiction comprehends all civil causes except such as arise between citizens of the same state; and it extends to all cases in law and equity, arising under this constitution.' Very true! yet it ought to be attended to, that it extends to none but cases of national and general concerns . . . .").

194. James Monroe, *Some Observations on the Constitution*, May 25, 1788, *reprinted in* 9 DOCUMENTARY HISTORY, *supra* note 168, at 844, 866–67.

195. *Id.*

determinative of the parties' rights and titles necessarily contemplated cases in which there was a dispute over the meaning of governing federal law. And those who described "arising under" jurisdiction as extending to cases in which governing federal law was in dispute may have been highlighting an important instance of "arising under" jurisdiction, not the exclusive one. They may well have understood "arising under" jurisdiction to encompass any case in which federal law governed, but stressed the importance of federal courts explicating the meaning of federal laws.

2. *The Reasons for "Arising Under" Jurisdiction*. There is something to be learned not only from the definitions or illustrations of "arising under" jurisdiction that participants in ratification debates provided, but also from the reasons that they articulated for the existence of federal "arising under" jurisdiction. To understand the reasons that participants in ratification debates offered to support a federal "arising under" jurisdiction, it is useful to call to mind the arguments that the Federalists were trying to refute. As is well known, Federalists tried to refute the Anti-Federalist claim that the federal government, as the Constitution would establish it, would unduly encroach on the domain of state governments. The Anti-Federalist argument that "arising under" jurisdiction was potentially limitless was part of a broader argument that the Constitution would vest federal institutions with excessive powers, susceptible to overreaching and other forms of abuse. A particular concern of Anti-Federalists was that Article III would empower distant federal courts to exercise jurisdiction over state citizens in unduly burdensome ways.[196]

196. Luther Martin observed, for example, that "[s]hould any question arise between a foreign consul and any of the citizens of the United States, however remote from the seat of empire, it is to be heard before the judiciary of the general government, and in the *first* instance to be heard in the supreme court, however inconvenient to the parties, and however trifling the subject of dispute." Luther Martin, *Information to the General Assembly of the State of Maryland*, *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 152, at 27, 69. Similarly, the "Federal Farmer" wrote in 1787 that "with all these moving courts, our citizens, from the vast extent of the country must travel very considerable distances from home to find the place where justice is to be administered," which was inconsistent with "good government." Letter from the Federal Farmer No. 2 (Oct. 9, 1787), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 152, at 230, 231. Richard Henry Lee (commonly believed to be the Federal Farmer) wrote in a letter to Edmund Randolph in 1787 that "power is unnecessarily given in the second section of the third article, to call people from their own country in all cases of controversy about property between citizens of different states and foreigners, with citizens of the United States, to be tried in a distant court where the congress meets." Letter of Richard

Against these claims, participants in ratification debates justified "arising under" jurisdiction on grounds that the Constitution should enable federal courts, first, to carry federal laws into execution and, second, to explicate the meaning of federal laws. These reasons comport with the classes of cases, described in the last Section, that participants described the Arising Under Clause as encompassing: cases in which federal law would provide a governing rule of decision, and cases that would call for the explication of a federal law.

The first proffered reason for arising under jurisdiction was that federal courts must be able to enforce federal laws. Federalists and Anti-Federalists alike recognized this as a justification for Article III's "arising under" clause. As Edmund Pendleton asked rhetorically in the Virginia Convention, "Must not the judicial powers extend to enforce the Federal laws . . . ?"[197] Perhaps most famously, John Marshall argued:

> Is it not necessary that the Federal Courts should have cognizance of cases arising under the Constitution, and the laws of the United States? What is the service or purpose of a Judiciary, but to execute the laws in a peaceable orderly manner, without shedding blood, or creating a contest, or availing yourselves of force? If this be the case, where can its jurisdiction be more necessary than here? To what quarter will you look for protection from an infringement on the Constitution, if you will not give power to the Judiciary? There is no other body that can afford such a protection.[198]

In the words of Brutus,

> This government is a complete system, not only for making, but for executing laws. And the courts of law, which will be constituted by it, are not only to decide upon the constitution and the laws made in pursuance of it, but by officers subordinate to them to execute all their decisions.[199]

Henry Lee to Governor Edmund Randolph (Oct. 16, 1787), *reprinted in* 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 152, at 112, 115.

197. Edmund Pendleton, Speech to the Virginia Convention (June 20, 1788), *in* 10 DOCUMENTARY HISTORY, *supra* note 168, at 1412, 1427 (remarks of Edmund Pendleton).

198. John Marshall, Speech to the Virginia Convention (June 20, 1788), *in* 1 THE PAPERS OF JOHN MARSHALL, *supra* note 187, at 275, 277.

199. Brutus XI, N.Y. J., Jan. 31, 1788, *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 152, at 417, 418; *see also* Noah Webster, *An Examination into the Leading Principles of the Federal Constitution, by a Citizen of America*, *reprinted in* 1 THE DEBATE ON THE CONSTITUTION, *supra* note 181, at 129, 152 ("The jurisdiction of the federal courts is very

Several writers offered more specific reasons why a national government should have the ability to enforce national laws through its own judiciary. One was to prevent the states from encroaching upon the federal government. William Davie argued in the North Carolina Convention that "[e]very member will agree that the positive regulations ought to be carried into execution, and that the negative restrictions ought not to [be] disregarded or violated. Without a judiciary, the injunctions of the Constitution may be disobeyed, and the positive regulations neglected or contravened."[200] Similarly, Edmund Randolph argued in the Virginia Convention that it was "necessary" that the jurisdiction of federal courts should "'extend to cases in law and equity arising under this Constitution, and the laws of the United States'" because "[i]f the State Judiciaries could make decisions conformable to the laws of their States, in derogation to the General Government . . . the Federal Government would soon be encroached upon."[201] In the Pennsylvania Convention, James Wilson argued that "arising under" jurisdiction would specifically prevent the states from undermining the obligations of treaties of the United States, such as provisions governing debts owed to British subjects.[202]

Some writers argued that state judges could not be trusted to administer federal laws impartially. In *The Federalist No. 81*, Hamilton argued that federal courts should be empowered to judicially enforce federal laws in the exercise of original jurisdiction on the ground that "[s]tate judges, holding their offices during pleasure, or from year to year, will be too little independent to be

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accurately defined and easily understood. It extends to the cases mentioned in the constitution, and to the execution of the laws of Congress, respecting commerce, revenue and other general concerns."); A Citizen of New Haven III, Conn. Courant, Jan. 7, 1788, *reprinted in* 3 DOCUMENTARY HISTORY, *supra* note 168, at 524, 527 ("It was thought necessary in order to carry into effect the laws of the Union . . . to extend the judicial powers of the United States to the enumerated cases . . . ."); A Landholder V, Conn. Courant, Dec. 3, 1787, *reprinted in* 3 DOCUMENTARY HISTORY, *supra* note 168, at 483, 483 ("It is as necessary there should be courts of law and executive officers, to carry into effect the laws of the nation, as that there be courts and officers to execute the laws made by your state assemblies.").

200. William Davie, Speech to the North Carolina Convention (July 22, 1788), *in* 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, *supra* note 164, at 155, 156.

201. Edmund Randolph, Speech to the Virginia Convention (June 21, 1788), *in* 10 DOCUMENTARY HISTORY, *supra* note 168, at 1440, 1451.

202. James Wilson, Speech to the Pennsylvania Convention (Dec. 7, 1787), *in* 2 DOCUMENTARY HISTORY, *supra* note 168, at 512, 517.

relied upon for an inflexible execution of the national laws."[203] In the North Carolina Convention, Archibald Maclaine argued in a similar vein that "[i]t is impossible for any judges, receiving pay from a single state, to be impartial in cases where local laws or interests of that state clash with the laws of the Union, or the general interests of America."[204]

In addition to arguing that federal institutions must be capable of enforcing federal laws, participants in ratification debates argued that "arising under" jurisdiction would enable federal courts to explicate the meaning of federal law and thereby maintain its uniformity. In *The Federalist No. 22*, Hamilton asserted:

> Laws are a dead letter without courts to expound and define their true meaning and operation. The treaties of the United States to have any force at all, must be considered as part of the law of the land. Their true import as far as respects individuals, must, like all other laws, be ascertained by judicial determinations. To produce uniformity in these determinations, they ought to be submitted in the last resort, to one SUPREME TRIBUNAL.[205]

Hamilton returned to this theme in *The Federalist No. 80*, in which he argued, "If there are such things as political axioms, the propriety of the judicial power of a government being co-extensive with its legislative, may be ranked among the number. The mere necessity of uniformity in the interpretation of the national laws, decides the question."[206]

For some writers, these two primary reasons for Article III "arising under" jurisdiction—to enable federal courts to enforce federal law and to settle the meaning of federal law—were of a piece. Brutus, for example, in arguing that federal court jurisdiction in cases "arising under the laws of the United States" was proper, asserted that "[t]he proper province of the judicial power, in any government, is, as I conceive, to *declare what is the law of the land*" and "[t]o

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203. THE FEDERALIST NO. 81 (Alexander Hamilton), *supra* note 183, at 547.

204. Archibald Maclaine, Speech to the North Carolina Convention (July 24, 1788), *in* 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, *supra* note 164, at 172, 172.

205. THE FEDERALIST NO. 22 (Alexander Hamilton), *supra* note 183, at 143.

206. THE FEDERALIST NO. 80 (Alexander Hamilton), *supra* note 183, at 535; *see also* A Landholder V, Conn. Courant, Dec. 3, 1787, *reprinted in* 3 DOCUMENTARY HISTORY, *supra* note 168, at 483, 483 ("A perfect uniformity must be observed thro the whole Union, or jealousy and unrighteousness will take place; and for a uniformity, one judiciary must pervade the whole.").

explain and *enforce* those laws, which the supreme power or legislature may pass."[207] Brutus argued that by having federal courts explain and enforce federal laws, "[t]he real effect of this system of government, will . . . be brought home to the feelings of the people, through the medium of judicial power."[208]

Overall, the ratification debates evidence certain bounds of understanding of the operation of Article III "arising under" jurisdiction. To be sure, there were some participants who objected to Article III on the ground that the Arising Under Clause was insufficiently definite to impose a meaningful jurisdictional limitation on national courts. They did not argue, however, that federal courts should assume an indefinite jurisdiction; rather, they expressed concern that national courts would use the text as warrant to appropriate for themselves an unwarranted jurisdiction. Those who attributed some specific meaning to the Arising Under Clause described it as giving federal courts jurisdiction over cases calling for the enforcement or explication of federal laws. These descriptive meanings comported with the normative reasons participants in ratification debates provided for why there should be an "arising under" jurisdiction: to enable a federal judiciary both to carry federal law into execution and to ensure, at an appropriate level of generality, uniformity in its meaning.

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In a reflective letter to Jefferson in 1823, Madison explained the relationship between the Supremacy Clause and the Arising Under Clause that prevailed at the Convention. He wrote that "the articles declaring that the federal Constitution & laws shall be the supreme law of the land, and that the Judicial Power of the U.S. shall extend to all cases arising under them" reflected a "prevailing view" at the Convention that "the Authority vested in the Judicial Department" was "a final resort in relation to the States."[209] Madison quickly clarified that this mechanism for ensuring federal supremacy was limited relative to his rejected negative. The judicial mechanism, by

207. Brutus XIII, N.Y. J., Jan. 31, 1788, *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 152, at 428, 428 (emphasis added).

208. Brutus XI, N.Y. J., Jan. 31, 1788, *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 152, at 417, 418.

209. Letter from James Madison to Thomas Jefferson (June 27, 1823), *reprinted in* 4 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 115, at 83, 83–84.

its nature, would be operative only in "cases resulting to [a federal court] in the exercise of its functions."[210] At the Convention, Madison noted in similar terms that it was "generally supposed that the jurisdiction given was constructively limited to cases of a Judiciary nature."[211]

Statements such as these reveal why Madison and other participants in the framing and ratification of the Constitution would have viewed "arising under" jurisdiction as a more limited means of enforcing federal supremacy than the congressional negative: the judicial function, by its nature, was more limited in regulatory scope than the legislative function. In England, in "cases of a judiciary nature," in "the exercise of their functions," courts followed particular rules for determining whether they had power to act in a given case. Courts of limited jurisdiction would not exercise jurisdiction, as explained in Part I, unless the party invoking the court's jurisdiction demonstrated facts sufficient to satisfy the jurisdictional limitations. These rules operated to prevent courts of limited jurisdiction from encroaching upon the jurisdiction properly belonging to other courts—a concern expressed at the Convention with the existence of an inferior federal court system.

The next Part explains how the national courts would come to employ English jurisdictional principles as a means for determining when it was appropriate for them, as opposed to state courts, to exercise jurisdiction over a case. For early federal courts, these principles determined when they were justified in enforcing federal law—and thereby fulfilling a key purpose contemplated for them in the Constitution's framing and ratification.

III. EARLY AMERICAN JUDICIAL PRACTICE

In *The Federalist*, Madison appreciated that ultimately it would fall upon federal courts to render Article III "arising under" jurisdiction operational in practice. Recognizing the difficulties the English legal system experienced through the "ages" in delineating the jurisdiction of various courts, he anticipated that the jurisdictional provisions of Article III would "be liquidated and ascertained by a series of particular discussions and adjudications."[212]

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210. *Id.*

211. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 115, at 430.

212. THE FEDERALIST NO. 37, at 235–37 (James Madison) (Jacob E. Cooke ed., 1961).

Few federal court cases decided in the first three decades following ratification specifically addressed Article III "arising under" jurisdiction. This may stem in part from the fact that Congress refrained from giving the Supreme Court or inferior federal courts a general "arising under" jurisdiction for eighty-six years after ratification. The first Congress authorized the Supreme Court to review state court judgments only to the extent that they denied the assertion of a federal right.[213] Though in 1801 the outgoing Federalist Congress gave federal circuit courts "cognizance . . . of all cases in law or equity, arising under the constitution and laws of the United States,"[214] the Jeffersonian Republican Congress repealed that grant in 1802 (along with other measures outgoing Federalists had enacted to strengthen the Federalist judiciary).[215] Congress did not again confer jurisdiction on federal courts to hear cases "arising under" federal law until 1875.[216]

In the first decades following ratification, Congress did give inferior federal courts jurisdiction over particular categories of cases "arising under" federal law. These categories generally included actions for remedies that Congress created and actions that by definition federal law primarily would govern.[217] It was not until *Osborn v. United States*, decided in 1824, that the Court would

213. Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85 ("[A] final judgment or decree in any suit, in the highest court of law or equity of a state . . . where is drawn in question the validity of a statute, or an authority exercised under the United States, on the grounds of their being repugnant to the constitution, treaties or laws of the United States . . . may be re-examined and reversed or affirmed in the Supreme Court of the United States.").

214. Act of Feb. 13, 1801, ch. 4, § 2, 2 Stat. 89, 92.

215. Act of Mar. 8, 1802, ch. 8, § 1, 2 Stat. 132.

216. *See* Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470. This enactment was the precursor to the federal question jurisdiction codified at 28 U.S.C. § 1331 (2000).

217. *See, e.g.*, Act of Feb. 15, 1819, ch. 19, § 1, 3 Stat. 481 (providing that circuit courts have original jurisdiction over all actions at law or in equity "arising under any law of the United States, granting or confirming to authors or inventors the exclusive right to their respective writings, inventions, and discoveries"); Act of May 10, 1800, ch. 51, § 5, 2 Stat. 70, 71 (providing "[t]hat the district and circuit courts of the United States shall have cognizance of all acts and offences against the prohibitions" the act provided against the slave trade); Act of Feb. 21, 1793, ch. 11, § 5, 1 Stat. 318, 322 (providing that circuit courts may hear treble damage actions for patent infringement); Act of May 26, 1790, ch. 12, § 1, 1 Stat. 122 (providing that district courts may hear actions for mitigation of remissions of fines, penalties, or forfeitures imposed under laws of the United States); Act of Apr. 10, 1790, ch. 7, § 5, 1 Stat. 109, 111 (providing that district courts may hear actions against patentees for surreptitiously obtaining patents); Act of Sept. 24, 1789, ch. 20, § 9, 1 Stat. 73, 76–77 (providing that district courts may hear "all suits for penalties and forfeitures incurred, under the laws of the United States").

address the constitutionality of one of these specific grants under the Arising Under Clause.[218]

Courts struggled primarily in the first decades following ratification with determining whether cases fell within the "party character" grants of Article III. Article III extends the judicial power to "Controversies . . . between citizens of different States," or "between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."[219] The Judiciary Act of 1789 provided inferior federal courts with jurisdiction over controversies "between a citizen of the State where the suit is brought, and a citizen of another State" when the amount in dispute exceeded five hundred dollars.[220] It also gave circuit courts jurisdiction of civil suits to which an alien was a party when more than five hundred dollars was in dispute.[221] A defendant in either kind of action could file a petition to remove it to federal court if the plaintiff originally filed it in state court.[222]

This Part explains how, following ratification, courts determined whether cases fell within the jurisdictional grants of Article III. In several cases, courts invoked the principles of English law by which courts of limited jurisdiction determined their jurisdiction. Most notably, in *Osborn v. United States*, the Marshall Court implicitly invoked these principles to provide a description of Article III "arising under" jurisdiction that endures as an authoritative, if widely mischaracterized, one.

A. Original Jurisdiction

In several cases, federal and state courts invoked the distinction between "general" and "limited" jurisdiction in determining the existence of original federal court jurisdiction under Article III. In 1793, in *Shedden v. Custis*,[223] the United States Circuit Court for the District of Virginia had to determine whether it had jurisdiction based on the plaintiff's status as a subject or citizen of a foreign state. Justice James Iredell (riding circuit), determined that the court lacked jurisdiction:

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218. Osborn v. Bank of U.S., 22 U.S. (9 Wheat.) 738 (1824).
219. U.S. CONST. art. III, § 2.
220. Act of Sept. 24, 1789, ch. 20, § 11, 1 Stat. 73, 78.
221. *Id.*
222. *Id.* at 79.
223. Shedden v. Custis, 21 F. Cas. 1218 (C.C.D. Va. 1793) (No. 12,736).

> The jurisdiction of the court is limited to particular persons; and, therefore, must be averred. For the difference has been rightly taken by the defendant's counsel, between courts of limited and those of general jurisdiction. In the latter, exceptions to the jurisdiction must be pleaded; but in the former the defendant is not bound to plead it, for the plaintiff must entitle himself to sue there.[224]

Chief Justice of the United States John Jay (also riding circuit) agreed with Justice Iredell. He explained that regardless of whether a court was assuming "jurisdiction over the subject-matter" or "over the person," the plaintiff had to aver in the declaration facts sufficient to show that the court had jurisdiction.[225] Indeed, he argued that it was more important that federal courts observe English rules of practice in this regard than that English courts observe them because of the federalist system that the Constitution established:

> The English practice has been rightly stated by the defendant's counsel, and those rules are more necessary to be observed here than there, on account of a difference of the general and state governments, which should be kept separate, and each left to do the business properly belonging to it.[226]

By requiring that facts necessary to support jurisdiction appear on the record, the court would "not exceed its limits, and try causes not within its jurisdiction."[227]

Five years later, the Supreme Court invoked the same principles in determining whether a circuit court properly heard a case on the ground that the plaintiff and the defendant were citizens of different states. In 1798, in *Bingham v. Cabot*,[228] Attorney General Charles Lee

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224. *Id.* at 1219.

225. *Id.*

226. *Id.*

227. *Id.* Interestingly, Michael Collins has identified a "tension between common-law procedures for raising jurisdictional objections in the federal courts and the notion of limited subject matter jurisdiction." Michael Collins, *Jurisdictional Exceptionalism*, 93 VA. L. REV. (forthcoming Dec. 2007) (manuscript at 1829, 1832, on file with the *Duke Law Journal*). Specifically, he explains how early federal courts' reliance on common-law procedures rendered them capable of exercising subject-matter jurisdiction when the plaintiff had pleaded but not factually established it, or the defendant had waived an objection to it. Accordingly, he concludes, "The Federal Rules' provision that jurisdictional objections in the district courts could be made at any time and by any means turns out to have been more of a culmination of a longer, historically determined process than a reaffirmation of long-established understandings." *Id.* (manuscript at 1834).

228. Bingham v. Cabot, 3 U.S. (3 Dall.) 382 (1798).

argued "that there was not a sufficient allegation on the record, of the citizenship of the parties, to sustain the jurisdiction of the Circuit Court, which is a limited jurisdiction."[229] Citing the English precedent *Lord Coningsby's Case*,[230] Lee argued that "[w]herever there is a limited jurisdiction, the facts that bring the suit within the jurisdiction must appear on the record."[231] The Supreme Court agreed with Lee. As Alexander Dallas reported the case,

> The Court were clearly of opinion, that it was necessary to set forth the citizenship (or alienage, where a foreigner was concerned) of the respective parties, in order to bring the case within the jurisdiction of the Circuit Court; and that the record, in the present case, was in that respect defective.[232]

Dallas reported, additionally, that "[t]his cause and many others, in the same predicament, were, accordingly, struck off the docket."[233]

The Supreme Court invoked the same principles of English practice the following year in *Turner v. Bank of North-America*.[234] In the Judiciary Act of 1789, Congress enacted that no district or circuit court was to "have cognizance of any suit to recover the contents of any promissory note or other chose in action in favour of any assignee, unless a suit might have been prosecuted in such court . . . if no assignment had been made, except in cases of foreign bills of exchange."[235] The purpose of the "assignee clause" was to prevent individuals from contriving federal jurisdiction by assigning their rights. The issue in *Turner* was whether the assignee of a promissory note, who brought suit against the payor in federal court based on diversity of citizenship, had to aver the diversity of the original parties to the note for the court to have jurisdiction.

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229. *Id.* at 383.

230. Lord Coningsby's Case, (1712) 88 Eng. Rep. 388 (Ch.). The report of *Bingham v. Cabot* cites the original report of *Lord Coningsby's Case*, "9 Mod. 95." *Bingham*, 3 U.S. (3 Dall.) at 383.

231. *Bingham*, 3 U.S. (3 Dall.) at 383. In *Lord Coningsby's Case*, the judges had "all agreed," in determining whether a case was within the jurisdiction of the Dutchy Court, "that the dutchy was a circumscribed jurisdiction, and that in all such jurisdictions, the plaintiff in his bill or declaration ought to shew, that the cause did arise within the jurisdiction." *Lord Coningsby's Case*, 88 Eng. Rep. at 338.

232. *Bingham*, 3 U.S. (3 Dall.) at 383–84.

233. *Id.* at 384.

234. Turner v. Bank of North-America, 4 U.S. (4 Dall.) 8, 9–10 (1799).

235. Act of Sept. 24, 1789, ch. 20, § 11, 1 Stat. 73, 79.

Counsel for the parties debated whether, for purposes of applying rules of English practice, circuits courts should be considered courts of general or limited jurisdiction. Jared Ingersoll deemed them courts of limited jurisdiction. He argued that Congress enacted the "assignee clause" because it "knew, that the *English* courts had amplified their jurisdiction, through the medium of legal fictions" and foresaw "that by the means of a colourable assignment to an alien, or to the citizen of another state, every controversy arising upon negotiable paper, might be drawn into the federal courts."[236] Accordingly, he contended, "the original character of the debt is declared to be the exclusive test of jurisdiction, in an action to recover it."[237] Citing *Lord Coningsby's Case*, Ingersoll argued that the plaintiff had to aver specific facts satisfying this test for a federal court to exercise jurisdiction over the case. In his words, as reported, "a court of special jurisdiction cannot take cognizance of the suit, unless the case judicially appears by the record to be within its jurisdiction."[238] Opposing counsel, William Rawle, did not "controvert the general proposition, that where a suit is brought before an *inferior* Court, the circumstances that gave it jurisdiction, must be set forth on the record."[239] He argued, rather, that a United States circuit court is not an inferior court or otherwise a court of limited jurisdiction, but "a court of *general jurisdiction*, having some cases expressly excepted from its cognizance."[240] He compared the circuit court "to the *King's Bench* in *England*, from whose general jurisdiction is excepted the cognizance of cases, belonging to the counties palatine."[241] As to courts of general jurisdiction, he concluded, "it is sufficient, if it appears to the appellate authority, that, from the subject-matter, the court below might have jurisdiction."[242]

Chief Justice Oliver Ellsworth, in his opinion for the Court, characterized circuit courts as courts of "limited jurisdiction" and subjected them to common law rules of practice governing when such courts may exercise jurisdiction. Specifically, he explained that a circuit court

236. *Turner*, 4 U.S. (4 Dall.) at 9.
237. *Id.*
238. *Id.*
239. *Id.* at 9–10.
240. *Id.* at 10.
241. *Id.*
242. *Id.*

> is of limited jurisdiction: and has cognisance, not of cases generally, but only of a few specially circumstanced, amounting to a small proportion of the cases which an unlimited jurisdiction would embrace. And the fair presumption is (not as with regard to a court of general jurisdiction, that a cause is within its jurisdiction unless the contrary appears, but rather) that a cause is without its jurisdiction, until the contrary appears.[243]

The Court proceeded to reverse the judgment of the circuit court on the ground that the plaintiff's averments were insufficient to show jurisdiction.[244] Courts applied the same principles to petitions for removal of cases from state to federal court.[245]

In each of these cases, the court invoked principles of English law to determine federal jurisdiction under Article III. By deeming themselves courts of "limited" jurisdiction, federal courts subjected themselves to principles that in application limited the extent to which they would exercise jurisdiction otherwise belonging to state courts.

It is worth noting that each of these cases was a civil case. In the first decades following ratification, a famous debate ensued regarding whether federal courts, absent congressional action, could exercise jurisdiction (necessarily "arising under" jurisdiction in most instances) over common law crimes against the United States. In 1812, in *United States v. Hudson & Goodwin*,[246] the Supreme Court held that courts of the United States cannot "exercise a common law jurisdiction in criminal causes,"[247] mooting (once the principle of *Hudson* was generally recognized) the question whether such a

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243. *Id.*

244. *Id.*; *see also* Martin v. Taylor, 16 F. Cas. 906, 906 (Washington, Circuit Justice, C.C.D. Pa. 1803) (No. 9166) ("The declaration claims more than 500 dollars; and by decisions in the supreme court, the amount of the plaintiff's claim laid in the declaration, furnishes the rule for testing the jurisdiction of the federal courts.").

245. In *Brown v. Crippen*, 14 Va. (4 Hen. & M.) 173 (1809), for example, a defendant petitioned to remove a case from a county court to federal court on the ground that he was sued by a citizen of another state on a dispute exceeding five hundred dollars. *Id.* at 178. The county court refused to permit removal for the stated reason, *inter alia*, that the defendant did not show he was a citizen of a different state than the plaintiff. *Id.* The Supreme Court of Virginia reversed, determining that the defendant's showing that he was a citizen of another state was sufficient to satisfy the requirements of the federal removal statute. "The removal of the cause in such a case is a matter of right which ought not to be refused to any defendant, who makes out his case, and complies with the terms of the law." *Id.*

246. United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32 (1812).

247. *Id.* at 32.

jurisdiction would have qualified as Article III "arising under" jurisdiction. Notably, however, in the debate that preceded *Hudson*, proponents of federal jurisdiction over common law crimes did not see themselves as necessarily rejecting the jurisdictional strictures of English law in defining the jurisdiction of federal courts.

The attorneys and judges involved in *United States v. Worrall*[248] articulated the various points of contention regarding whether a common law criminal case could be one "arising under" federal law for purposes of Article III.[249] The question in *Worrall* was whether a federal circuit court had jurisdiction to hear an indictment for the common law offense of attempting to bribe a federal officer. Alexander Dallas argued to the court that the offense did not "arise under the Constitution, or the laws of the United States" because "[a] case arising under a law, must mean a case depending on the exposition of a law, in respect to something which the law prohibits, or enjoins."[250] As neither the Constitution nor an act of Congress prohibited the act underlying the indictment, a circuit court could not constitutionally take cognizance of the indictment. Justice Samuel Chase agreed: "the *United States*, as a Federal government, have no common law; and, consequently, no indictment can be maintained in their Courts, for offences merely at the common law."[251] Judge Richard Peters, however, disagreed: "Whenever an offence aims at the subversion of any Federal institution, or at the corruption of its public officers, it is an offence against the well-being of the *United States*; from its very nature, it is cognizable under their authority."[252] Under English law, it had to be laid in every indictment that an offense was "against the king's peace, or his crown and dignity."[253] In accordance with this principle, it was laid in indictments for common law offenses against the United States before *Hudson* that the offense was "against the peace and dignity of the United States."[254]

The point is that those who argued in the first two decades following ratification that federal courts could hear "federal common law crimes" absent congressional action would establish "arising

248. United States v. Worrall, 2 U.S. (2 Dall.) 384 (C.C.D. Pa. 1798).
249. *See id.* at 389.
250. *Id.* at 390.
251. *Id.* at 394.
252. *Id.* at 395.
253. 1 BLACKSTONE, *supra* note 39, at *258.
254. *Worrall*, 2 U.S. (2 Dall.) at 386.

under" jurisdiction in a way akin to how federal courts determined Article III jurisdiction in civil cases: (1) the indictment alleged an offense against the United States, (2) the offense was a violation of a common law of the United States, and, thus, (3) the offense arose under a law of the United States. In *Hudson*, the Court rejected this reasoning, primarily on the ground that courts of the United States could not assume for themselves a common law criminal jurisdiction. But those who espoused the reasoning would not have deemed themselves to be espousing a position that contradicted the pleading-based way in which federal courts ascertained the existence of Article III jurisdiction in civil cases.

B. Appellate Jurisdiction

This Section turns from early decisions concerning original jurisdiction to early decisions concerning appellate "arising under" jurisdiction. Before 1824, when it decided *Osborn v. United States*, the Supreme Court did not consider the Arising Under Clause relative to the original jurisdiction of Article III courts; rather, it considered the clause relative to its appellate jurisdiction over state court judgments. To understand how the Court considered "arising under" jurisdiction in the appellate context, it is useful to distinguish Supreme Court review of federal court judgments from Supreme Court review of state court judgments.

1. *Supreme Court Review of Federal Court Judgments.* In a few pre-1824 cases, the Supreme Court considered its Article III appellate "arising under" jurisdiction relative to state court judgments. In no case did it consider whether it properly had "arising under" jurisdiction in reviewing a federal court judgment. This may have been because the Court did not view the Arising Under Clause as a limit upon its appellate jurisdiction once an inferior federal court properly assumed jurisdiction of a case. Congress certainly did not view the Arising Under Clause—or any other Article III jurisdictional grant—to operate as a limitation on the Supreme Court's appellate jurisdiction once an inferior federal court properly assumed jurisdiction over a case. The Judiciary Act of 1789 gave the Supreme Court jurisdiction to review final judgments or decrees of the federal circuit courts on writ of error if "the matter in dispute

exceeds the sum or value of fifty dollars, exclusive of costs."[255] The "matter in dispute" limitation was the only limitation that Congress imposed on the Supreme Court's jurisdiction to review the judgments of federal circuit courts. Once the Article III judicial power "attached" in an inferior federal court, Congress allowed the Supreme Court to constitutionally exercise an appellate jurisdiction akin to the general jurisdiction that English "superior" courts exercised over "inferior" courts.[256]

2. *Supreme Court Review of State Court Judgments.* In contrast, the Supreme Court appears to have treated the jurisdictional categories of Article III—in particular the Arising Under Clause—as an independent limitation on its appellate jurisdiction to review state court judgments, operational at the stage of review. In other words, in early decisions, the Court acted as though it could exercise jurisdiction over a state court judgment not on the ground that the action originally would have qualified as one "arising under" federal law, but on the ground that, as of the filing of the appellate proceeding, the case was one "arising under" federal law.

In the Judiciary Act of 1789, Congress gave the Supreme Court jurisdiction to review final state court judgments only when was "drawn into question" an assertion of federal right against which the state court ruled.[257] It was not sufficient that federal law operated as a rule of decision in the state court; rather, for the Supreme Court to have jurisdiction, a federal right had to be "drawn into question" in the appellate proceeding.[258] This does not prove, of course, that all

255. Judiciary Act of 1789, ch. 20, § 12, 1 Stat. 73, 84.

256. In *Wilson v. Daniel*, 3 U.S. (3 Dall.) 401 (1798), the Supreme Court addressed whether, in ascertaining whether the eighteen hundred dollar matter-in-dispute requirement was fulfilled, it should look to the amount in dispute at the time the original action was instituted, or the amount in dispute at the time the judgment in the original action was given. *Id.* at 404–05. It is worth noting that in the course of its opinion, the Court did not suggest the existence of any limitation—other than the matter-in-dispute limitation that Congress imposed—on its jurisdiction to review inferior federal court judgments. *See id.* at 401–08.

257. The Act provided that a final judgment in a state's highest court, in a suit "where is drawn in question the construction of any clause of . . . a treaty . . . and the decision is against the . . . right . . . claimed . . . under such clause of the . . . treaty . . . may be re-examined and reversed or affirmed in the Supreme Court of the United States." Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85–86.

258. The Act specified that "no other error shall be assigned or regarded as a ground of reversal in any such case as aforesaid, than such as appears on the face of the record, and immediately respects the before mentioned questions of validity or construction of the said constitution, treaties, statutes, commissions, or authorities in dispute." *Id.* at 86.

members of Congress necessarily believed that they only could allow the Supreme Court to exercise jurisdiction when a federal law would prove determinative of the appellate proceeding. The statute they enacted, however, comports with such a view, a view that the Marshall Court would come to espouse.

In determining its jurisdiction to review state court judgments, the Supreme Court required a party seeking review to demonstrate that the case was one "arising under" federal law for purposes of Article III. In 1809, in *Owings v. Norwood's Lessee*,[259] the Supreme Court addressed whether it had appellate jurisdiction over a state court judgment on the ground that the case was one "arising under" a treaty of the United States.[260] The facts of the case are complicated, but important to understanding the opinion of Chief Justice Marshall. Jonathan Scarth, a British subject resident in England, held a mortgage upon a tract of land in Maryland.[261] In 1732, Littleton Waters obtained a judgment against the land based on a debt that Scarth owed to him.[262] Waters proceed to assign his right in the land to a company, under the title of which Owings claimed an interest in the land. Pursuant to his claimed interest, Owings occupied the land.[263] Later, the State of Maryland gave Norwood a patent (evidence that Norwood held title) in part of the land that Owings was occupying. Norwood brought an action of ejectment against Owings.[264] As the case is reported, Owings claimed, among other things, that the Treaty of Paris protected Scarth's mortgage from confiscation by the State.[265] The treaty provided in relevant part that "it is agreed that all persons who have any interest in confiscated lands, either by *debts*, marriage settlements, or otherwise, shall meet with no lawful impediment in the prosecution of their just rights."[266] The General Court of Maryland held that the time for payment of money under the mortgage had expired and that Scarth's heirs therefore held a complete legal estate liable to confiscation.[267] The court concluded

259. Owings v. Norwood's Lessee, 9 U.S. (5 Cranch) 344 (1809).

260. *Id.* at 347–50.

261. *Id.* at 344.

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.* at 344–45.

266. *Id.* at 345 (quoting Definitive Treaty of Peace, U.S.-Gr. Brit., art. 5, Sept. 3, 1783, 8 Stat. 80, 83 (emphasis in *Owings*)).

267. *Owings*, 9 U.S. (5 Cranch) at 345.

that "the British treaty cannot operate to affect the plaintiff's right to recover in this ejectment," and the Court of Appeals affirmed.[268] Owings sued out a writ of error to the Supreme Court of the United States under section 25 of the Judiciary Act of 1789.[269]

In a brief opinion, Chief Justice Marshall stated the jurisdictional question as "[w]hether the present case be a case arising under a treaty, *within the meaning of the Constitution*."[270] Upon this question, the Court had "no doubt":

> The 25th section of the judiciary act must be restrained by the constitution, the words of which are, "all cases arising under *treaties*." The plaintiff in error does not contend that his right grows out of the treaty. Whether it is an obstacle to the plaintiff's recovery is a question exclusively for the decision of the courts of Maryland.[271]

The day after the Court rendered this decision, Chief Justice Marshall further explained the decision in response to what he believed to be a misunderstanding of it by Owing's counsel:

> The reason for inserting that clause ["arising under . . . treaties"] in the constitution was, that all persons who have real claims under a treaty should have their causes decided by the national tribunals. It was to avoid the apprehension as well as the danger of state prejudices. The words of the constitution are, "*cases arising under treaties*." Each treaty stipulates something respecting the citizens of the two nations, and gives them rights. Whenever a right grows out of, or is protected by, a treaty, it is sanctioned against all the laws and judicial decisions of the states; and whoever may have this right, it is to be protected. But if the person's title is not affected by the treaty, if he claims nothing under a treaty, his title cannot be protected by the treaty. If Scarth or his heirs had claimed, it would have been a case arising under a treaty. But neither the title of Scarth, nor of any person claiming under him, can be affected by the decision of this cause.[272]

In Marshall's view, for a case to be one arising under federal law at the time a writ of error was sought, the plaintiff in error had to demonstrate that federal law created or protected the right or title

268. *Id.*
269. *Id.*
270. *Id.* at 347 (emphasis added).
271. *Id.* at 347–48.
272. *Id.* at 348.

that the plaintiff in error was asserting in the appellate proceeding.[273] When a plaintiff in error made that demonstration, the Supreme Court was available to ensure the supremacy of that right against conflicting state laws. In this case, a federal treaty neither generated nor protected Owings's title to the land in question. The treaty came into play only because state law enabled a defendant in an ejectment action to defeat the action by setting up the title of a third person in bar of the action.[274] In other words, the treaty was relevant only to the extent that state law provided that Owings could show that Norwood's claim did not defeat Scarth's title. The basis of Marshall's opinion appears to have been that a case, as it comes before the Supreme Court, is not one "arising under" a federal law unless federal law generates or otherwise affects of its own force a right or title the petitioner asserts in the appellate proceeding.

In 1821, in *Cohens v. Virginia*,[275] Chief Justice Marshall again addressed what makes a case one "arising under" federal law for purposes of the appellate jurisdiction of the Supreme Court. The primary issues before the Court in *Cohens* were whether a writ of error lies from the Supreme Court to a state court, and whether the Supreme Court may exercise jurisdiction over a case to which a state is a party. In addressing these issues, Chief Justice Marshall described

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273. *See id.* Justice William Johnson made a similar point for the Court in *M'Intire v. Wood*, 11 U.S. (7 Cranch) 504 (1813), albeit a statutory case. The question before the Court in that case was whether a federal circuit court had power to issue a writ of mandamus to a particular state official. In holding that "the power of the Circuit Courts to issue writs of mandamus, is confined exclusively to those cases in which it may be necessary to the exercise of their jurisdiction," Justice Johnson explained that "although the judicial power of the United States extends to cases arising under the laws of the United States, the legislature have not thought proper to delegate the exercise of that power to its Circuit Courts, except in certain specified cases." *Id.* at 506. Rather, "[w]hen questions arise under those laws in the State Courts, and the party *who claims a right or privilege under them* is unsuccessful, an appeal is given to the Supreme Court, and this provision the legislature has thought sufficient at present for all the political purposes intended to be answered by the clause of the constitution, which relates to this subject." *Id.* (emphasis added).

274. *See Owings*, 9 U.S. (5 Cranch) at 347. In *Henderson v. Tennessee*, 51 U.S. (10 How.) 311 (1850), the apparently identical issue arose. In *Henderson*, the Court explained that

> in the language of ejectment law, an outstanding title means a title in a third person, under which the tenant in possession does not claim. . . . The right to make this defence is not derived from the treaties, nor from any authority exercised under the general government. It is given by the laws of the State, which provide that the defendant in ejectment may set up title in a stranger in bar of the action.

Id. at 323.

275. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821).

what makes a case one "arising under" the Constitution or a federal law.

First, Marshall explained the reasons for Article III "arising under" jurisdiction. An "important . . . object" of Article III, he explained, "was the preservation of the constitution and laws of the United States, so far as they can be preserved by judicial authority; and therefore the jurisdiction of the Courts of the Union was expressly extended to all cases arising under that constitution and those laws."[276] Marshall deemed "arising under" jurisdiction essential to counter "attempts which may be made, by a part, against the legitimate powers of the whole," and to ensure "[t]hat the constitution, laws, and treaties may [not] receive as many constructions as there are States."[277] In short, he argued, as was argued in ratification debates, that "arising under" jurisdiction was necessary to ensure the proper enforcement and uniformity of federal law. Marshall deemed the appellate jurisdiction of the Supreme Court over state courts judgments essential to this design: "The exercise of the appellate power over those judgments of the State tribunals which may contravene the constitution or laws of the United States, is, we believe, essential to the attainment of those objects."[278]

Second, Marshall described what makes a case one "arising under" federal law. Marshall acknowledged that the federal judicial power to maintain the supremacy of federal law by exercising "arising under" jurisdiction was limited (as the Framers recognized relative to Madison's negative):

> [Article III] does not extend the judicial power to every violation of the constitution which may possibly take place, but to "a case in law or equity," in which a right, under such law, is asserted in a Court of justice. If the question cannot be brought into a Court, then there is no case in law or equity, and no jurisdiction is given by the words of the article. But if, in any controversy depending in a Court, the cause should depend on the validity of such a law, that would be a case arising under the constitution, to which the judicial power of the United States would extend.[279]

276. *Id.* at 391.
277. *Id.* at 377.
278. *Id.* at 415.
279. *Id.* at 405.

Marshall rejected as "too narrow" an understanding that a case "arises under" federal law only if "a party comes into the Court to demand something conferred on him by the constitution or a law."[280] Rather, he explained, "A case in law or equity consists of the right of the one party, as well as of the other, and may truly be said to arise under the constitution or a law of the United States, whenever its correct decision depends on the construction of either."[281] This explanation is generally consistent with Marshall's explanation in *Owings* that a case "arises under" a treaty if the treaty generates or otherwise affects the right or title asserted before the Court. When the Constitution, laws, or treaties of the United States, by operation of their own force, create or are otherwise determinative of a right asserted in a case, that case is one "arising under" that law.

Regarding the appellate jurisdiction of the Supreme Court over state court judgments in particular, Marshall suggested that the issues determinative of the appeal were the issues determinative of jurisdiction. He explained that the Supreme Court was essential to maintaining federal supremacy because whether a case is one "arising under" federal law may not be apparent in all cases at the outset of the action:

> That the constitution or a law of the United States, is involved in a case, and makes a part of it, may appear in the progress of a cause, in which the Courts of the Union, but for that circumstance, would have no jurisdiction, and which of consequence could not originate in the Supreme Court.[282]

"In such a case," Marshall explained, the federal judicial power can be exercised "only in its appellate form."[283] In rejecting the argument that the Supreme Court lacked appellate jurisdiction under Article III to review state court judgments, Marshall stated, "The objects of appeal, not the tribunals from which it is to be made, are alone contemplated." Each of these statements suggests, in line with *Owings*, that the Supreme Court has appellate "arising under" jurisdiction over a state court judgment if it can be shown at the time of appeal that federal law is determinative of a right or title asserted on appeal.

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280. *Id.* at 379.
281. *Id.*
282. *Id.* at 394.
283. *Id.*

C. Osborn v. United States *in Historical Context*

Three years after it decided *Cohens*, the Supreme Court issued its most famous opinion on Article III "arising under" jurisdiction—*Osborn v. United States*.[284] Chief Justice Marshall explained for the Court in *Osborn* that a case arises under federal law when a federal question "forms an ingredient of the original cause."[285] Courts and scholars have read this holding in potentially limitless fashion, understanding Marshall to have conveyed that a case arises under federal law if a federal question might possibly arise in it.[286] As I have argued elsewhere, Marshall's opinion, most fairly construed, held that the case arose under federal law because the plaintiff, to prevail, necessarily had to plead and prove a right or title that federal law created.[287]

In *Osborn*, the Bank of the United States and certain of its officials brought a suit in equity in a federal circuit court for an injunction and other relief against certain Ohio officials.[288] After the Bank filed this suit, the Ohio officials took one hundred thousand dollars from the Bank's office at Chillicothe, Ohio.[289] The Bank filed a supplemental and amended bill of complaint, and obtained a judgment ordering the state officials to give restitution of the one hundred thousand dollars.[290] In its opinion affirming this judgment, the Supreme Court addressed whether this was a case "arising under" federal law, such that the circuit court properly assumed jurisdiction over it.[291]

The Court began its analysis by explaining, as it did in *Cohens*, the reason for Article III "arising under" jurisdiction. "[T]he framers," Marshall wrote, "kept this great political principle in view": that all governments "must possess, within themselves, the means of expounding, as well as enforcing, their own laws."[292] To give effect to this principle, Marshall explained, the Constitution vested federal

284. Osborn v. United States, 22 U.S. (9 Wheat.) 738 (1824).
285. *Id.* at 823.
286. *See supra* notes 8–9 and accompanying text.
287. *See* Bellia, *supra* note 10, at 800–12.
288. *Osborn*, 22 U.S. (9 Wheat.) at 739–41.
289. *Id.* at 741.
290. *Id.* at 743–44.
291. *Id.* at 819.
292. *Id.*

courts with "arising under" jurisdiction.[293] This explanation comports with the account of the framing and ratification of Article III "arising under" jurisdiction that Part II describes.

In this case, an act of Congress had conferred on the Bank various corporate capacities, including the ability to sue and be sued in federal circuit courts.[294] The Court had to decide whether the suit in equity that the Bank brought was a case "arising under" federal law given that "general principles" of law would determine the Bank's right to relief.[295] The only federal law that could provide the basis for "arising under" jurisdiction was the federal statute giving the Bank its various capacities. The Court held that the case did arise under this statute because it formed "an ingredient of the original cause."[296]

At the time the Court decided *Osborn*, a plaintiff had a cause of action only upon showing that a set of legal determinants providing a right to relief under a particular form of proceeding resolved themselves in the plaintiff's favor.[297] Marshall not only understood that a plaintiff had to seek relief through a particular form of proceeding to bring an action, but also framed the question whether a case arose under federal law within the context of the rights or titles that legal and equitable modes of proceeding required a plaintiff to aver. The judicial power, Marshall explained, "is capable of acting only when the subject is submitted to it by a party who asserts his rights in *the form prescribed by law*. It then becomes a case."[298] In light of this background, Marshall explained that whether a case arises under federal law depends upon the requirements that a plaintiff must satisfy to have a cause of action under a particular form of proceeding: a case arises under federal law if "the title or right *set up* by the party, may be defeated by one construction of the constitution or law of the United States, and sustained by the opposite construction."[299] When a plaintiff properly set up such a right or title,

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293. *Id.*

294. *See id.* at 825. The Act empowered the Bank "to sue and be sued, plead and be impleaded, answer and be answered, defend, and be defended, in all state courts having competent jurisdiction, and in any circuit court of the United States." Act of Apr. 10, 1816, ch. 44, § 7, 3 Stat. 266, 269.

295. *Osborn*, 22 U.S. (9 Wheat.) at 819–25 (1824).

296. *Id.* at 823.

297. *See* Bellia, *supra* note 10, at 782–801 (explaining the context in which *Osborn* was decided).

298. *Osborn*, 22 U.S. (9 Wheat.) at 819 (emphasis added).

299. *Id.* at 822 (emphasis added).

Marshall explained, the case arose under federal law because a federal question "forms an ingredient of the original cause."[300]

The reason that the Bank's suit in *Osborn* was one "arising under" federal law was that the federal statute conferring on the Bank its capacities was an ingredient of any action that the Bank might bring. In an action at law or a suit in equity, the plaintiff's statement of the cause of action in the declaration or bill had to show a right or title to the thing demanded. Specifically, in a suit in equity, such as *Osborn*, the bill had to state "the right, title, or claim of the plaintiff"; "the injury or grievance, of which he complains"; and "the relief, which he asks of the Court."[301] Indeed, the plaintiff had to state in the bill all facts giving rise to the plaintiff's right or title,[302] including the plaintiff's interest in the subject matter or title to maintain the suit.[303] If the plaintiff failed to allege a fact necessary to make this showing, the plaintiff could not later prove it.[304] Moreover, if the plaintiff failed to allege facts in the bill sufficient to demonstrate a right to institute the proceedings, the defendant could demur. To bring and prevail in its suit against the Ohio officials, then, the Bank had to demonstrate facts establishing its right to the one hundred thousand dollars that the Ohio officials had taken from it, regardless

300. *Id.* at 823.

301. *See* EDMUND ROBERT DANIELL, PLEADING AND PRACTICE OF THE HIGH COURT OF CHANCERY 370 (2d ed. 1851) ("In the first place, it is to be observed that every bill must show clearly that the plaintiff has a right to the thing demanded, or such an interest in the subject-matter as gives him a right to institute a suit concerning it."); 2 HENRY MADDOCK, A TREATISE ON THE PRINCIPLES AND PRACTICE OF THE HIGH COURT OF CHANCERY 168 (2d Am. ed. 1822) ("Whatever is essential to the rights of the Plaintiff, and is necessarily within his knowledge, ought to be alleged positively, and with precision . . . ."); HENRY JOHN STEPHEN, A TREATISE ON THE PRINCIPLES OF PLEADING IN CIVIL ACTIONS 321 (1824) ("When, in pleading, any right or authority is set up in respect of property personal or real, some title to that property must, of course be alleged in the party, or in some other person from whom he derives his authority." (footnote omitted)).

302. *See* DANIELL, *supra* note 301, at 638 ("[A]ll preliminary acts necessary to complete the plaintiff's title must be shown . . . .").

303. *See id.* at 371 ("[I]f it is not shown by the bill that the party suing has an interest in the subject-matter, and a proper title to institute a suit concerning it, the defendant may demur . . . ."); JOSEPH STORY, *Progress of Jurisprudence: An Address Delivered Before the Members of the Suffolk Bar*, *in* THE MISCELLANEOUS WRITINGS OF JOSEPH STORY 198, 214 (William W. Story ed., 1852) ("[E]very fact essential to the plaintiff's title to maintain the Bill, and obtain the relief, must be stated in the Bill, otherwise the defect will be fatal.").

304. See DANIELL, *supra* note 301, at 388 ("Care . . . must be taken in framing the bill that every thing which is intended to be proved be stated upon the face of it, otherwise evidence cannot be admitted to prove it."); STORY, *supra* note 93, § 28, at 24 ("[E]very material fact, to which the plaintiff means to offer evidence, ought to be distinctly stated in the premises; for otherwise he will not be permitted to offer or require any evidence of such fact.").

of whether the defendants contested them. The federal statute giving the Bank its capacities was an essential component—"ingredient," in Marshall's words—of the showing the plaintiff had to make. The fact that the act of Congress incorporating the Bank "bestow[ed] upon the being it has made, all the faculties and capacities which that being possesses,"[305] rendered federal law, in Marshall's view, a necessary ingredient of the Bank's right or title—an ingredient that the Bank had to "set up" to prevail.[306] Thus, federal law was an ingredient of any cause that the Bank might bring.

To say in *Osborn* that federal law was an ingredient of a cause of action was only to say that the Bank, as plaintiff, had to establish under federal law its capacity to have a right or title to property and a right to institute a suit with respect thereto, regardless of whether the defendant contested that capacity. Marshall's ingredient test did not, as the Court has subsequently suggested, convey that federal law forms an ingredient of the cause of action whenever a case theoretically "might call for the application of federal law."[307] This mischaracterization finds its roots in Justice William Johnson's *Osborn* dissent. Justice Johnson argued that the "possibility" that a federal question might arise in a case cannot "be a sufficient circumstance to bring it within the jurisdiction of the United States Courts."[308] "By possibility," he explained, "a constitutional question may be raised in any conceivable suit that may be instituted."[309] But Marshall's opinion did not say, as Johnson characterizes it as saying, that a case arises under federal law if a federal question may *possibly* be raised in it. Marshall reasoned that questions of the Bank's capacities, by virtue of the right or title the Bank must show, "exist in every *possible* case."[310]

Osborn is also interesting for what it says about the appellate jurisdiction of the Supreme Court over actions "arising under" federal law. The jurisdictional question at issue in *Osborn*, of course, was whether a circuit court of the United States could exercise original jurisdiction over the action the Bank brought. Having found that the circuit courts of the United States could constitutionally

305. *Osborn*, 22 U.S. (9 Wheat.) at 827.

306. *See id.*

307. Verlinden B.V. v. Cent. Bank of Nig., 461 U.S. 480, 492 (1983).

308. *Osborn*, 22 U.S. (9 Wheat.) at 876 (Johnson, J., dissenting).

309. *Id.* at 887.

310. *Id.* at 824 (majority opinion) (emphasis added).

exercise jurisdiction, the Court did not consider in a differentiated way whether it could exercise appellate jurisdiction in the case. The Court's analysis suggests, in accordance with the general jurisdiction Congress gave the Supreme Court to review judgments of inferior federal courts, that once original jurisdiction of a cause "attached" in an inferior federal court, the Supreme Court could exercise appellate jurisdiction over proceedings in the inferior court without having to establish an independent basis for its own jurisdiction.

Moreover, *Osborn*, read in historical context, appears to presume that the Supreme Court should determine its appellate jurisdiction to review state court judgments in the same pleading-based way that an Article III court should determine whether it may exercise jurisdiction over an original cause. In a famous passage, Marshall explained:

> The constitution establishes the Supreme Court, and defines its jurisdiction. It enumerates cases in which its jurisdiction is original and exclusive; and then defines that which is appellate, but does not insinuate, that in any such case, the power cannot be exercised in its original form by Courts of original jurisdiction. It is not insinuated, that the judicial power, *in cases depending on the character of the cause*, cannot be exercised in the first instance, in the Courts of the Union, but must first be exercised in the tribunals of the State; tribunals over which the government of the Union has no adequate control, and which may be closed to any claim asserted under a law of the United States.
>
> We perceive, then, no ground on which the proposition can be maintained, that Congress is incapable of giving the Circuit Courts original jurisdiction, in any case to which the appellate jurisdiction extends.[311]

Some scholars have read this language to support a seemingly boundless reading of *Osborn*—that Congress may give inferior federal courts jurisdiction over any case in which a federal question might possibly provide a ground for appellate review in the Supreme Court.[312] The theory is that if the Supreme Court could exercise "the judicial power of the United States" to review a state court judgment on the ground that a federal question would be determinative of the parties' rights in the Supreme Court, an inferior federal court could

311. *Id.* at 821 (emphasis added).

312. *See supra* note 8 and accompanying text.

have exercised the judicial power of the United States over that action originally even if the plaintiff did not demonstrate in the initial pleading that a federal question would necessarily be determinative of the parties' rights. In other words, an inferior federal court could assume "arising under" jurisdiction over any case in which a federal question might possibly arise, because, if the question in fact arose, the Supreme Court could exercise appellate "arising under" jurisdiction; and, in Marshall's words, inferior federal courts may have "original jurisdiction, in any case to which the appellate jurisdiction extends."

Considered in its historical context, Marshall's statement does not in fact support this theory. In *Owings* and *Cohens*, Marshall described the appellate jurisdiction of the Supreme Court over cases "arising under" federal law as extending to cases in which the plaintiff in error demonstrated that a federal law was determinative of the rights or titles at issue in the appellate proceeding. When Marshall said in *Osborn* that federal courts may have "original jurisdiction, in any case to which the appellate jurisdiction extends"—that is, in cases in which a party asserts a right or title that "grows out of, or is protected by" federal law[313]—he meant that federal courts may have original jurisdiction in any case, like *Osborn*, in which a party demonstrates a right or title that "grows out of, or is protected by" federal law. This was the kind of case to which Marshall referred when he limited these observations to "cases depending on the character of the cause." Indeed, he explained, the reason that original jurisdiction should extend to such cases was that, if it did not,

> words obviously intended to secure to those who claim rights under the constitution, laws, or treaties of the United States, a trial in federal court, will be restricted to the insecure remedy of an appeal upon an isolated point, after it has received the shape which may be given to it by another tribunal.[314]

Thus, he immediately explained, "when a question to which the judicial power of the Union is extended by the constitution, *forms an ingredient of the original cause*, it is in the power of Congress to give the Circuit Courts jurisdiction of that cause."[315]

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313. Owings v. Norwood's Lessee, 9 U.S. (5 Cranch) 344, 348 (1809).

314. *Osborn*, 22 U.S. (9 Wheat.) at 822–23 (emphasis added).

315. *Id.* at 823 (emphasis added).

Only this reading makes sense of Marshall's statement in *Cohens* that federal courts *lack* original jurisdiction when a federal law does not form a part of the plaintiff's case as originally filed: "That the constitution or a law of the United States, is involved in a case, and makes a part of it, may appear in the progress of a cause, in which the Courts of the Union, but for that circumstance, would have no jurisdiction."[316] "In such a case," Marshall explained, the federal judiciary can exercise its jurisdiction "only in its appellate form."[317] In *Cohens*, Marshall envisioned cases that a federal court could not hear in the exercise of its original jurisdiction, but that the Supreme Court could hear in the exercise of its appellate jurisdiction. The most reasonable import of Marshall's statement in *Osborn* is that just as the Supreme Court may exercise appellate jurisdiction over a case by virtue of the fact that a plaintiff in error has asserted a right or title that federal law creates or protects, a federal court may exercise original jurisdiction by virtue of the fact that a plaintiff has asserted a right or title that federal law creates or protects *upon a valid showing* that the right asserted grows out of or is protected by federal law.[318]

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316. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 394 (1821).

317. *Id.*

318. It is worth noting that *Osborn* is not the only early nineteenth century Supreme Court decision that rested, albeit implicitly, upon common-law jurisdictional principles to determine whether a federal court could exercise jurisdiction based on the existence of a federal question in a case. The 1824 decision in *Ex parte Wood & Brundage*, 22 U.S. (9 Wheat.) 603 (1824), relied on such principles as well. The federal statute establishing the Bank of the United States, as interpreted in *Osborn*, was one of a limited number of early federal statutes giving federal courts jurisdiction over particular cases "arising under" federal law. Other statutes giving federal courts such jurisdiction related to patents. In 1790, Congress gave district courts limited powers to revoke wrongfully obtained patents, *see* Act of Apr. 10, 1790, ch. 7, § 5, 1 Stat. 109, 111, and in 1793 provided that patentees could sue in federal circuit courts for infringement "in an action on the case founded on" the act of Congress governing patents. Act of Feb. 21, 1793, ch. 11, § 5, 1 Stat. 318, 322. In 1800, Congress repealed this provision and provided that a patentee could recover for infringement "by action on the case founded on this . . . act, in the circuit court of the United States, having jurisdiction thereof." Act of Apr. 17, 1800, ch. 25, § 3, 2 Stat. 38. In *Wood*, the Court relied on English jurisdictional principles in explaining the operation of a provision of the 1793 Act. 22 U.S. (9 Wheat.) at 606–07.

The tenth section of the 1793 patent act provided that a party could challenge the validity of a patent issued under federal law on the ground that it "was obtained surreptitiously, or upon false suggestion" by making a motion to the district court where the patentee resides "within three years" after the patent was issued. Act of Feb. 21, 1793, ch. 11, § 5, 1 Stat. 318. One issue before the Court in *Wood* was what showing, if any, was necessary to bring a proceeding under the 1793 act within the jurisdiction of a district court. 22 U.S. (9 Wheat.) at 604–05. In his opinion for the Court, Justice Story invoked the distinction between general and limited jurisdiction to determine that a plaintiff must establish facts necessary to show jurisdiction in initiating the proceeding to invalidate the patent. "The jurisdiction given to the Court," Story

This is not to assert that *Osborn* articulated a "limited" understanding of the Arising Under Clause in any absolute sense. In Marshall's view, the power of the federal judiciary to adjudicate cases "arising under" federal law would depend upon the powers of Congress to create, protect, or affect the rights of individuals and institutions. The greater the regulatory power of Congress, the greater would be the scope of constitutional "arising under" jurisdiction that Congress may authorize federal courts to exercise. And, of course, it was the Marshall Court's decision in *McCulloch v. Maryland*[319]—recognizing that Congress could create the Bank of the United States and that states could not tax it[320]—that provided the necessary predicate for its decision in *Osborn* that the Bank's case properly arose under the act of Congress constituting the Bank. If *Osborn* conveys a "broad" conception of "arising under" jurisdiction, it does so only to the extent that the powers of Congress to enact laws governing judicially enforceable individual or institutional rights are broad. This is consistent with what Ted White has described as the "coterminous power theory" prevailing at the time of the American Founding.[321] As "Brutus" explained it at the time, "[e]very extension of the power of the general legislature, as well as of the judicial powers, will increase the powers of the courts."[322]

That said, it is one thing for a federal court to exercise jurisdiction because Congress has enacted a law determinative of a

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explained, "is not general and unlimited, but is confined to cases where the patent was obtained surreptitiously, or upon false suggestions; where the patentee resides within the district; and where the application is made within three years after the issuing of the patent." *Id.* at 606. Thus, he continued, "[i]t is . . . certainly necessary, that all these facts, which are indispensable to found jurisdiction, should be stated in the motion and accompanying affidavits." *Id.*

Unlike *Osborn*, *Wood* did not specifically address whether the proceeding before it was one "arising under" federal law for purpose of Article III. It did, however, explain that to bring an action under a statute giving federal courts jurisdiction of a particular kind of case "arising under" federal law, a plaintiff had to show facts establishing jurisdiction, including the specific ingredient that the patentee was not entitled to a patent under federal law.

319. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

320. *Id.* at 435–36.

321. *See* G. EDWARD WHITE, THE MARSHALL COURT AND CULTURAL CHANGE 1815–1835, at 122–27 (1988); G. Edward White, *Recovering Coterminous Power Theory*, 14 NOVA L. REV. 155 (1989). Professor White critiqued "the difficulty with Marshall's argument" as being "that it was hard to imagine any case in which Congress, simply by passing a law affecting an institution or individual, could be prevented from giving the subject of the legislation a right to sue in the federal courts, whatever legal questions were raised by the suit." WHITE, *supra*, at 530.

322. Brutus XI, N.Y. J., Jan. 31, 1788, *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 152, at 417, 421.

right or title that actually is at issue in a case; it is another for a federal court to exercise jurisdiction because a federal law *might* be involved in a case. *Osborn* is "broad" insofar as congressional power (influenced and shaped by the Court, as it is) to define and regulate legal relations is broad. But *Osborn* is "narrow" insofar as a federal court may not exercise "arising under" jurisdiction absent an actual federal law being determinative in a proceeding before it. Under *Osborn*, for a court to constitutionally exercise "arising under" jurisdiction, Congress (absent a governing constitutional provision or treaty) must actually have enacted a regulation generating or protecting a right or title asserted in a case.

The distinction between a congressional power to give federal courts jurisdiction over cases that might possibly turn on federal law and a power to give them jurisdiction over cases that in fact turn on a question of federal law is not merely formal. Multiple federal governmental actors, subject to "procedural" and "political" safeguards of federalism, must assent for a federal law to be enacted.[323] That Congress is desirous and capable of enacting a law giving federal courts jurisdiction over cases in which federal law *possibly* might govern does not mean that it is desirous and capable of enacting federal law governing the actual transactions or occurrences underlying all such lawsuits. A congressional power under the Arising Under Clause to give federal courts jurisdiction when a federal law might *possibly* be determinative is not the functional equivalent of a congressional power to give federal courts jurisdiction when a federal law *actually* is determinative. The political will and capability to enact the former does not necessarily prove the will or capability to enact the latter. To be sure, the Marshall Court described an Article III "arising under" jurisdiction that is as broad in theory as congressional power to generate and protect justiciable legal rights. But it was a jurisdiction that was only as broad in practice as the scope of enacted congressional regulation generating and protecting justiciable legal rights.

323. *See* Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1326 (2001) ("All the procedures established by the Constitution make adoption of [federal law] difficult by requiring the participation and assent of multiple actors subject to the political safeguards of federalism.").

D. Provisional Summary

In sum, in the first few decades following ratification, federal courts determined whether they had jurisdiction over a particular proceeding according to the same principles by which English courts of limited jurisdiction determined whether they had jurisdiction. In determining whether it was proper for a federal court to exercise original jurisdiction, courts examined whether the party seeking federal court jurisdiction, originally or by removal, averred sufficient facts to show jurisdiction. In the context of "arising under" jurisdiction, the question was whether the plaintiff pleaded that its right or title grew out of or would necessarily be affected by the operation of a federal law.

Regarding the question of whether it was proper for the Supreme Court to exercise appellate jurisdiction, different principles operated depending on whether the Supreme Court was reviewing the judgment of a federal court or a state court. The first Congress appears to have presumed that the Supreme Court stood in the same relation to inferior federal courts as the superior courts of England stood to inferior English courts: so long as the inferior court properly had jurisdiction, the Supreme Court could review its decisions for any substantial error in the record determinative of the judgment. On the other hand, the Supreme Court seemingly presumed itself (and perhaps Congress presumed it as well) to stand as a court of limited jurisdiction relative to state courts: for the Court to review a state court judgment, it had to appear on the record that a federal law would be determinative of the right or title the plaintiff in error was asserting in the Supreme Court.

It would be beyond the scope of this Article to attempt to work out all the implications of this analysis for federal court jurisdiction. The analysis certainly suggests that "arising under" jurisdiction is appropriate when a party initially seeking federal court jurisdiction (originally, by removal, or on appeal) demonstrates that the Constitution, a federal statute, or a federal treaty is determinative of the legal relations upon which the court must pass. Beyond that, an analysis of implications would involve, among other things, the level of generality at which jurisdictional principles that the Supreme Court formulated in the context of common law and equitable pleading regimes are legally relevant in light of the transformation of pleading rules that has occurred through the course of American history. This analysis would have to account for the full scope of congressional

power to devise a pleading regime designed to determine the presence of a federal question in a case (by way of the claim or defense) before a court assumes jurisdiction. It also would have to account for the legitimacy of nonconventional forms of federal law, such as "federal common law," and their ability to serve as a predicate for "arising under" jurisdiction.

There is one implication that is especially worth identifying, if not working out, here. It is that seemingly boundless theories of protective jurisdiction should not rest for their legitimacy on the stated reasoning of *Osborn v. United States*, properly understood in historical context. The stated reasoning of *Osborn*, to be sure, stands for one species of "protective" jurisdiction (and a potentially "broad" one at that): that a plaintiff with a right that federal law creates or protects (such as the Bank's federally created right to hold property, namely the money Ohio officials seized from it) may find protection of that right in federal court. It does not, however, stand for what scholars more commonly denote by "protective jurisdiction"—that, to protect "federal interests," Congress may give federal courts "arising under" jurisdiction in cases in which no actual federal law provides a rule of decision.[324] *Osborn*, in context, evidences an understanding that for a federal court to have "arising under" jurisdiction, an actual federal law must be demonstrably determinative of the legal relations of the parties that are at issue.[325] Indeed, in *Cohens*, Marshall deemed the ingredient test the *necessary* one by which federal courts were to determine their Article III jurisdiction, not merely a *sufficient* one. In Marshall's words,

> That the constitution or a law of the United States, is involved in a case, and makes a part of it, may appear in the progress of a cause, in which the Courts of the Union, *but for that circumstance*, would

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324. *See* Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 473 (1957) (Frankfurter, J., dissenting) ("Called 'protective jurisdiction,' the suggestion is that in any case for which Congress has the constitutional power to prescribe federal rules of decision and thus confer 'true' federal question jurisdiction, it may, without so doing, enact a jurisdictional statute, which will provide a federal forum for the application of state statute and decisional law."). The Supreme Court has refrained from adopting such a theory. *See* Mesa v. California, 489 U.S. 121, 137 (1989) ("We have, in the past, not found the need to adopt a theory of 'protective jurisdiction' to support Art. III 'arising under' jurisdiction, and we do not see any need for doing so here . . . ." (citing Verlinden B.V. v. Cent. Bank of Nig., 461 U.S. 480, 491 n.17 (1983)); *Verlinden*, 461 U.S. at 491 n.17 ("[W]e need not consider petitioner's alternative argument that the Act is constitutional as an aspect of so-called 'protective jurisdiction.'").

325. Osborn v. United States, 22 U.S. (9 Wheat.) 738, 823 (1824).

> have no jurisdiction, and which of consequence could not originate in the Supreme Court.[326]

For the Marshall Court, a case did not "arise under" federal law if a federal question might possibly be involved in a case, or if federal jurisdiction was necessary to protect a judicially determined federal interest not actually protected by an identifiable federal law.

CONCLUSION

This Article has sought to shed light on the origins of Article III "arising under" jurisdiction. At the Federal Convention, delegates apparently extended federal judicial power to cases "arising under" the Constitution, laws, and treaties of the United States as a means—more limited than other means, such as a congressional negative—of ensuring the supremacy of federal law. In ratification debates, those who attempted to give "arising under" jurisdiction any meaningful import described it to encompass cases involving the enforcement of a federal law or a dispute over the meaning of a federal law. They argued that "arising under" jurisdiction was necessary to ensure the proper enforcement and uniformity of federal laws. It fell upon federal courts to give practical operation to these principles. When federal courts confronted the task of determining their own Article III jurisdiction, they came to describe themselves as courts of "limited" jurisdiction in the English sense of that concept. As courts of limited jurisdiction, they would not exercise jurisdiction unless the party invoking federal jurisdiction demonstrated that federal law would be determinative of the right or title asserted in the federal proceeding that party commenced. For original "arising under" jurisdiction, a plaintiff had to demonstrate that federal law was determinative of a right or title asserted. When a federal court exercised original jurisdiction over a case, the Supreme Court apparently understood itself to function as a superior court of general appellate jurisdiction. For appellate "arising under" jurisdiction to review a state court judgment, however, a plaintiff in error had to demonstrate that federal law was determinative of a right or title asserted in the appellate proceeding.

By observing these rules derived from English law, federal courts embraced a practice that at once enabled them to ensure the

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326. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 394 (1821) (emphasis added).

supremacy of federal law but checked the extent to which they would encroach upon the jurisdiction of state courts. There is no question that the breadth of "arising under" jurisdiction, as explained by the Marshall Court, was coterminous with the breadth of congressional power to create and protect justiciable rights and titles. The Marshall Court did not, however, contrary to twentieth century accounts, assume for itself an "arising under" jurisdiction to protect federal interests unmoored from the governing requirements of an identifiable federal law.