

The Origins of Article III “Arising Under” Jurisdiction

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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 the import that early American courts, invoking English jurisdictional principles, gave to Article III “arising under” jurisdiction. In particular, the Article explains, in proper historical context, early 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 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 at once enabled them to enforce the supremacy of federal law, and limited 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 one. 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 Court has attempted to explain the nature of a federal question that must be part of the well-pleaded complaint in order for a

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 \$500. Act of March 3, 1875, § 1, 18 Stat. 470. Today, 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.

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 Railroad Co. v. Mottley*, 211 U.S. 149, 152 (1908).

federal district court to have statutory “arising under” jurisdiction.⁴ The 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 recent times 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

⁴ In *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180, 199 (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].” In *Merrell Dow Pharm., Inc. v. Thompson*, 478 U.S. 804, 808-12 (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 grounds that Congress had not provided a private federal right of action for a violation of the federal provision. In *Grable & Sons Metal Prods., Inc. v. Darue Eng’g and Mfg.*, 545 U.S. 308, ___ (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.”

⁵ See *Merrell Dow*, 478 U.S. at 807-08 (“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.”); *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 Article 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*, 545 U.S. at 320 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. . .”).

⁶ 22 U.S. (9 Wheat.) 738 (1824).

⁷ *Id.* at 823.

⁸ *Verlinden*, 461 U.S. at 492. 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 “has 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”); William Cohen, *The Broken Compass: The Requirement that a Case Arise “Directly”*

have questioned this reading, arguing that it has no meaningful limits,⁹ or that it simply miscomprehends *Osborn*.¹⁰

In recent times, the Supreme Court has expressly refrained from defining the operation 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 whether the foreign state has immunity.¹³ Six years later, in *Mesa v. California*,¹⁴ the Court confronted the question 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. Noting the “grave constitutional problems” and “serious constitutional doubt” surrounding the meaning of Article III “arising under” jurisdiction,¹⁵ the Court interpreted the federal officer removal statute to authorize removal only when a defendant federal officer raises an actual federal defense.¹⁶ By invoking the canon of constitutional avoidance, the Court refrained from attributing to Article III “arising under” jurisdiction any definitive scope.

Neither courts nor scholars have seriously examined the origins of Article III “arising under” jurisdiction.¹⁷ This Article undertakes such an examination. The Supreme Court has been mindful of historical understandings in determining the scope of Article III judicial power.¹⁸

Under Federal Law, 115 U. PA. L. REV. 890, 891 (1967) (characterizing *Osborn* as extending Article III “arising under” jurisdiction to “all cases where issues of federal law might possibly be an issue”); 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”).

⁹ It has been 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. Central Bank of Nigeria*, 647 F.2d 320, 328-29 (2d Cir. 1981) (arguing that *Osborn* should be limited to its facts because there should be meaningful limits on Article III jurisdiction), *rev’d*, 461 U.S. 480 (1983).

¹⁰ See Anthony J. Bellia Jr., *Article III and the Cause of Action*, 89 IOWA L. REV. 777, 800-12 (2004).

¹¹ 461 U.S. 480 (1983).

¹² *Id.* at 492.

¹³ *Id.*

¹⁴ 489 U.S. 121 (1989).

¹⁵ *Id.* at 137.

¹⁶ *Id.*

¹⁷ For an analysis of the historical foundations of statutory “arising under” jurisdiction in the late nineteenth century, see Michael G. Collins, *The Unhappy History of Federal Question Removal*, 71 IOWA L. REV. 717 (1986).

¹⁸ For recent examples, see *Vermont Agency of Natural Resources v. U.S. ex rel. Stevens*, 529 U.S. 765, 774 (2000) (explaining, regarding standing, that historical practice

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 conclusive of, or even relevant to, the meaning courts should ascribe to Article III “arising under” jurisdiction today, historical practice holds insights into what functions such jurisdiction may effectively serve.

The Article proceeds in three stages. First, it describes jurisdictional principles of English law that provide necessary context for understanding early American political and judicial judgments regarding federal “arising under” jurisdiction. Second, it explains how participants in the framing and ratification of the Constitution variously conceived of “arising under” jurisdiction. Finally, it explains the operation that early American courts, invoking English jurisdictional principles, gave to Article III “arising under” jurisdiction. 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, against the background of English jurisdictional principles, 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 is determinative of a right or title asserted in the proceeding before it.

The Article begins in Part I by explaining principles governing the jurisdiction of English courts—principles that would come to animate early judicial explanations of Article III “arising under” jurisdiction. English courts drew an explicit distinction between courts of general jurisdiction and 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. On the other hand, English courts of general jurisdiction 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 several colonial judicial systems. When Article III courts came to describe themselves as courts of limited jurisdiction, they imported into American constitutional law a body of English law governing the jurisdiction of such courts. As utilized by early American judges, this was not English law that the American Revolution and constitutional establishment rejected. Rather, as John Jay expressed it in

“in England and the American colonies . . . is particularly relevant to the constitutional standing inquiry since . . . Article III’s restriction of the judicial power to ‘Cases’ and ‘Controversies’ is properly understood to mean ‘cases and controversies’ of the sort traditionally amenable to, and resolved by, the judicial process”); *Alden v. Maine*, 527 U.S. 706, 713 (1999) (explaining, regarding state sovereign immunity, 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”).

1793, “[t]he English practice” is “more necessary to be observed here than there” in light of the federal structure that the Constitution established.¹⁹

Part II explains what light, if any, the framing and ratification history of Article III sheds on historical understandings of Article III “arising under” jurisdiction. It describes, first, how the Arising Under Clause came to be part of the final plan that the delegates adopted at the Federal Convention. Most notably, it explains how federal “arising under” jurisdiction operated as a limited mechanism—one more limited than a congressional negative on state laws—to ensure the supremacy of federal law. Second, this Part describes the various meanings that participants in ratification debates attributed to federal “arising under” jurisdiction, and the various reasons that they offered to justify it. The universe of meaningful explanations was limited; participants explained “arising under” jurisdiction as enabling federal courts to enforce and settle the meaning of federal law.

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 gave effect to the view that the Arising Under Clause operates to ensure the supremacy of federal law in a limited way. Early federal courts explained that since they were courts of limited rather than general jurisdiction in the sense of English law, they could not take original jurisdiction of different kinds of Article III cases or controversies unless the plaintiff pleaded as part of the right or title asserted facts sufficient to prove the court’s jurisdiction. For “arising under” jurisdiction, this meant that a plaintiff had to aver in the initial pleading that a federal law created or protected the 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. For purposes of reviewing state court judgments, the Supreme Court treated itself as a court of limited jurisdiction. For purposes of reviewing federal court judgments, however, Congress and the Supreme Court treated the Court as a court of general jurisdiction, capable of reviewing any question that the record of an inferior federal court proceeding fairly presented.

By 1824, when it decided *Osborn v. United States*, the Marshall Court had resolved that a federal court could take original “arising under” jurisdiction or the Supreme Court could take appellate “arising under” jurisdiction to review a state court judgment only if the party commencing the proceeding in federal court demonstrated that federal law would be determinative of the rights or titles asserted in that proceeding. Accordingly, when the Supreme Court and scholars have characterized the Marshall Court as reasoning that a federal court constitutionally may hear any case that might involve a federal law question, they have misconstrued the effect that, in historical context, the Marshall Court gave to Article III

¹⁹ *Shedden v. Custis*, 21 F. Cas. 1218, 1219 (no. 12, 736 C.C. D. Va. 1793).

“arising under” jurisdiction. By employing English jurisdictional principles, federal courts limited themselves to enforcing the supremacy of actual federal laws. They did not assume for themselves from state 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 to the establishment of the American Constitution. Early American courts would come to invoke these principles to explain the operation of Article III jurisdictional provisions. Before describing these principles, this Part pauses first, as a preliminary matter, to explain that the phrase “arising under” does not appear to have been widely used in English legal discourse. Other phrases using the word “arising,” however, provide useful context for understanding the inclusion of “arising under” jurisdiction in the Constitution and how certain proponents of the Constitution described its import.

A. “Arising” Formulations in English Legal Practice

According to the written record of judicial action available to us, English courts did use phrases that included the word “arising” in jurisdictional and other contexts, but “arising under” does not appear to have been one of them. It is worth noting these usages to the extent that certain of them appear in draft plans introduced at the Federal Convention and debates over ratification that Part II of this Article describes. Courts used the phrase “arising within” to denote the relationship between a cause of action and a place. They used the phrases “arising out of,” “arising [up]on,” and “arising from” to denote a relationship between a legal case or question and a source of law.

1. “Arising Within”

English courts commonly described actions as “arising within” the jurisdiction of a particular court. It was well established in English law that inferior courts had jurisdiction only of causes of actions that “arose within” their territorial jurisdiction. As *Bacon’s Abridgement* explained, “Inferior Courts are bounded, in their original Creation, to Causes *arising within* such limited jurisdiction.”²⁰ For an inferior court to have jurisdiction, “*the* cause of the action” or “*the* Gist of the Action” had to

²⁰ 1 MATTHEW BACON, A NEW ABRIDGEMENT OF THE LAW 562 (6th ed. 1793) (emphasis added). The 1793 edition of *Bacon’s Abridgement* is the one published closest in time to the key events of the establishment of the American constitutional structure.

“arise within” the territory of the inferior court.²¹ In other words, English courts understood there to be 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*,²² 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.”²³ Case by case, courts determined whether *the* factual causes of particular actions arose within the jurisdiction of inferior courts.

There are several examples of such cases. In *Ramsy v. Atkinson*,²⁴ the Court of King’s Bench held 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. In *Heaven v. Davenport*,²⁵ the King’s Bench held that an inferior court lacked jurisdiction over an action in assumpsit for “money laid out” because, though the plaintiff alleged the promise “to be in the jurisdiction of the Court,” the plaintiff failed to alleged that “the money was laid out in the jurisdiction,” and “the money laid out is *the* cause of action.”²⁶ In the 1790s, state courts in America used the phrase “arising within” in the same sense in several instances. In *Miller v. Lynde*,²⁷ for instance, the Superior Court of Connecticut explained in 1796 that “[t]he several state courts originally had jurisdiction of all causes of every description *arising within* their respective territorial limits.”²⁸

²¹ *Id.* at 564 (emphasis added).

²² 101 Eng. Rep. 533 (K.B. 1795).

²³ *Id.* at 534 (emphasis added). In one instance, Parliament used the phrase “rise out” in a jurisdictional act similarly to how courts used “arising within” language to describe the territorial jurisdiction of inferior courts. In defining the jurisdiction of the Courts of the Stanneries (a region in England containing tinworks), Parliament provided that they could hear, *inter alia*, cases that “rise out” of the stanneries. Similarly, courts described the jurisdiction of courts of admiralty as over causes of action “arising upon” the sea. In *Beak v. Thyrrwhit*, 87 Eng. Rep. 124 (K.B. 1688), the King’s Bench held that “the original cause arising upon the sea, shall and must be tried in the Admiralty.” *Id.* at 124. Likewise, in *Thorton v. Smith*, 1 Va. 81 (1792), the Supreme Court of Virginia explained that the admiralty courts are “confined to cases arising upon the high seas.” *Id.* at 84.

²⁴ 83 Eng. Rep. 292 (K.B. 1672).

²⁵ 88 Eng. Rep. 1092 (K.B. 1721).

²⁶ *Id.* at 1092. For other examples, see *Hanslap v. Cater*, 86 Eng. Rep. 163, 163 (K.B. 1684) (holding that Court of Coventry lacked jurisdiction over action in assumpsit where, though the debt and the promise for goods sold were within the court’s jurisdiction, “the goods were not alleged to be sold within the jurisdiction of the Court”); *Drake v. Beare*, 83 Eng. Rep. 319, 319 (K.B. 1674) (holding that Court at Exeter lacked jurisdiction over action of debt on a lease where 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”).

²⁷ 2 Root 444 (Conn. 1796).

²⁸ *Id.* at 445 (emphasis added). A case 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. 1799) (“The . . . courts of common pleas . . . were originally constituted by the style and title of inferior courts, and were in all respects considered as

2. “Arising Out,” “Arising [Up]on,” and “Arising From”

English courts used other “arising” phrases—“arising out,” “arising [up]on,” and “arising from”—to describe the relationship between a *case* or a *question* for decision and a source of law. When English courts described a *case* as arising upon or from a source of law, they meant that the source of law created the right or remedy that the plaintiff was pursuing in the case. For example, in *Hyde v. Cogan*,²⁹ the plaintiff brought an action “on” a statute providing damages for certain riotous behavior.³⁰ In his opinion in the case, Justice Francis Buller expressed that “the clause *upon* which the case *arises* is remedial.”³¹ English courts also described rights as “arising from” acts of Parliament. In 1769 in *Millar v. Taylor*, 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.”³²

In other instances, English courts described *questions* as arising out of or upon statutes. When a court described a question as arising out of or upon a statute, it meant that the court had to resolve the meaning of a legal instrument or enactment. In *Robinson v. Knight*,³³ the Court of Chancery had to determine whether the plaintiff or defendant should take a sum of money under a will. The Lord Chancellor began his opinion as follows: “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.”³⁴ In 1797 in *Westerdell v. Dale*,³⁵ Lord Kenyon described how questions “have *arisen on* the construction of this Act of Parliament.”³⁶ In *Millar v. Taylor*,³⁷ the King’s Bench explained that a question of copyright infringement could “*arise upon* the term granted by the Act of Parliament.”³⁸ In several instances, state courts in America

such. The amount of their jurisdiction was limited to 20l. In local extent, their jurisdiction was limited, as they could try no action arising out of the county.”); *Cornwell v. Hosmer*, 1 Root 282, 283 (Conn. 1791) (“[T]he cause of action . . . must have arisen out of the city . . . and so the court had not jurisdiction”).

²⁹ 99 Eng. Rep. 445 (K.B. 1781)

³⁰ *Id.* at 445.

³¹ *Id.* at 450 (emphasis added).

³² *Id.* at 212 (emphasis added).

³³ 28 Eng. Rep. 856 (Ch. 1761)

³⁴ *Id.* at 857.

³⁵ 101 Eng. Rep. 989 (K.B. 1797).

³⁶ *Id.* at 992 (emphasis added).

³⁷ 98 Eng. Rep. 201 (K.B. 1769)

³⁸ *Id.* at 206 (emphasis added). See also *Pierce v. Hopper*, 93 Eng. Rep. 503, 504 (K.B. 1720) (argument of counsel) (“The main question in this case will arise upon the first clause in the Act of Parliament”); *Villiers v. Villiers*, 27 Eng. Rep. 657, 658

used the phrase “arising [up]on” to denote the same relationship between a question for judicial resolution and a source of legal obligation. In 1794, for example, in *Roy v. Garnett*,³⁹ the Supreme Court of Appeals of Virginia explained that “a question *arises upon* the act of 1776.”⁴⁰

In sum, though the phrase “arising under” does not appear as a term of art in English practice, English courts did on occasion describe cases as *arising upon* or *from* a source of law that created a right asserted; and questions as *arising out of* or *upon* sources of law, the meanings or imports of which were in dispute. These observations provide useful context to the extent that certain of these “arising” formulations appear in proceedings of the Federal Convention and debates over ratification.

B. *Determining Jurisdiction in English Legal Practice*

More than how English courts used “arising” phrases, the principles by which English courts determined their jurisdiction provide useful context for understanding how public officials in America came to understand “arising under” jurisdiction to operate during the first decades

(Ch. 1740) (“There are other Questions in the present Cause arising upon the Deeds . . .”).

There also are instances of courts and commentators describing legal concepts as “arising upon” facts. For instance, William Blackstone, in defining “judicial power” generally, described the law governing a dispute as “arising upon” facts: The “judicial power . . . is to examine the truth of the fact, to determine the law *arising upon* that fact, and, if any injury appears to have been done, to ascertain and by it’s officer’s to apply the remedy.” 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *3 (emphasis added). A 1752 enactment for the colony of Rhode Island used the phrase “arising upon” in the same sense as Blackstone used it—to describe the relation between a legal concept and a set of facts. Specifically, the statute gave Rhode Island Inferior Courts of Common Pleas jurisdiction over “Actions between the Vendue-Masters or Sheriffs, and any other Person or Persons for Money *arising on* the Sale of Goods and Chattles, sold at Publicx-Vendue.” Laws and Acts of Her Majesties Colony of Rhode Island 30 (1752).

³⁹ 2 Va. 9 (1794).

⁴⁰ *Id.* at 35 (emphasis added). See also *Kamper v. Hawkins*, 3 Va. 20, 93 (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.”); *Simpson v. Nadiou*, 3 N.C. 39, 41 (1798) (Haywood, J.) (stating that “question . . . ought to be decided by some court . . . whose peculiar business is to decide questions arising upon the law of nations”); *Dulany v. Wells*, 3 H. & McH. 20, 42 (Md. 1790) (argument of counsel) (prefacing argument with: “if any doubt or obscurity arises upon the expressions in this article”); *Stott v. Alexander & Co.*, 1 Va. 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”). Cf. *Wayman v. Southard*, 23 U.S. 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 laws of Kentucky.”).

following ratification. This section describes these principles as they related to both original and appellate jurisdiction.

1. *Principles of Original Jurisdiction*

Regarding original jurisdiction, this section explains, 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 were operative in colonial legal systems as well. Next, this section explains the different rules by which each kind of court determined its own jurisdiction. Courts of general jurisdiction presumed themselves to have jurisdiction over the case unless the defendant showed otherwise. Courts of limited jurisdiction, on the other hand, presumed themselves to lack jurisdiction unless the plaintiff proved otherwise. (Part III proceeds to explain how in the first decades after ratification federal and state courts drew upon these principles in determining the operation of Article III jurisdictional limitations.)

a. *Courts of General and Limited Jurisdiction*

(i) *In England.*—The jurisdiction of the courts of England was, as *Bacon's Abridgement* explained, “bounded and circumscribed by certain Laws and stated Rules,” by which courts had to abide “in all their Proceedings and Judicial Determinations.”⁴¹ 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 general jurisdiction. A case might “specially appear” to be outside of the jurisdiction of a court of general jurisdiction⁴² if the case was local to the courts of another nation⁴³ or if

⁴¹ 1 BACON, *supra* note 20, at 558.

⁴² See 1 BACON, *supra* note 20, at 563 (explaining that “nothing shall be intended to be out of the jurisdiction of a Superior Court, but that which specially appears to be so”).

⁴³ See *Jennings v. Hankyn*, 90 Eng. Rep. 612, 612 (K.B. 1687) (setting forth, as an example, that the court would not have jurisdiction over a case to recover on a bond

Parliament provided that a particular court should have exclusive jurisdiction over the case.⁴⁴

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) a 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, as explained, English law limited the territorial jurisdiction of inferior courts: they could hear only actions “arising within” their territorial jurisdiction.⁴⁵

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.⁴⁶ 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.”⁴⁷ 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 “tanners.”⁴⁸ Likewise, the universities of Oxford and Cambridge, by their charters and Acts of Parliament, had jurisdiction over actions between their respective scholars.⁴⁹

Fourth, acts of Parliament limited the jurisdiction of certain inferior English courts according to the kind of legal form by which the plaintiff was bringing the action. For example, a plaintiff had to bring any informer action based upon an offense “committed against any penal statute” in specifically enumerated kinds of inferior courts having

“made at Bourdeaux in France, for in such case this Court never had any jurisdiction, because the matter did arise in a foreign nation.”)

⁴⁴ See, e.g., 4 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND 171 (1797) (reciting act of Parliament, 21 Jac. reg. ca. 4, providing that only particular courts could exercise jurisdiction over informers’ actions on penal statutes); 1 BACON, *supra* note 20, at 560 (explaining that by charter and Act of Parliament, the universities of Oxford and Cambridge had jurisdiction over actions between their scholars, respectively).

⁴⁵ See *supra* notes 20-23 and accompanying text.

⁴⁶ 4 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND 231 (1797).

⁴⁷ See 1 BACON, *supra* note 20, at 602; 4 COKE, *supra* note 44, at 122.

⁴⁸ 4 COKE, *supra* note 46, at 231.

⁴⁹ 1 BACON, *supra* note 20, at 560.

jurisdiction over the place “wherein such offences shall be committed.”⁵⁰ The 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.⁵¹

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 Marshall 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.”⁵² Parliament provided that the reason for this limitations 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, the regulation was enacted because “the court of the constable and marshal . . . daily do encroach contracts, covenants, trespasses, debts and detinues, and many other actions pleadable at common law, in great prejudice of the king and his courts, and to the great grievance and oppression of the people.”⁵³

(ii) *In the Colonies.*—The same distinction between courts of general and limited jurisdiction that subsisted in England had a life as well in colonial legal systems. The origins and histories of many colonial courts are nebulous.⁵⁴ Judicial structures emerged from the give and take of different sources of authority—including royal charters, commissions, and instructions; and acts of colonial assemblies—acting in concert or opposition.⁵⁵ 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,

⁵⁰ See 4 COKE, *supra* note 44, 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.” 3 BLACKSTONE, *supra* note 38, at *161.

⁵¹ 4 COKE, *supra* note 46, at 171.

⁵² See 1 BACON, *supra* note 20, at 602; 4 COKE, *supra* note 44, at 122.

⁵³ 4 COKE, *supra* note 46, at 122.

⁵⁴ See generally Edward Surrency, *The Courts in the American Colonies*, 254 AM. J. LEG. HIST. 253, 253 (1967) (explaining that “[t]he precise origins of many courts in America are difficult to determine because of their nebulous beginnings”).

⁵⁵ There were instances, especially in 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.

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.*”⁵⁶ 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.*”⁵⁷

As colonial legal systems matured, colonial assemblies enacted more specific jurisdictional regulations, in some instances establishing general jurisdictions meant to be co-extensive with the general jurisdictions of English courts. In 1721, 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, Common Pleas, and Exchequer, at Westminster, or any of them, may or can do.*”⁵⁸ In several instances, colonial assemblies established courts of general jurisdiction for their colonies.⁵⁹

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 what we refer to today as “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

⁵⁶ Act X, *in* 1 Henning’s Va. Stat. 303, 303 (1645) (emphasis added).

⁵⁷ Act of Nov. 1, 1683, ch. 7 *in* 1 The Colonial Laws of New York 125-26 (emphasis added).

⁵⁸ Chapter CCLV *in* Acts of the General Assembly of Pennsylvania 131 (1721).

⁵⁹ *See* Acts and Laws of His Magesties Colony of Connecticut (1710) 167 (establishing Superior Court of Judicature and giving it a general jurisdiction); Ch. CLXVII.a. *in* Acts of the State of Delaware 375-76 (1760) (giving Supreme Court a general jurisdiction); An Act for Establishing and Regulating Courts of Public Justice Within this Province, Acts & Laws of His Magesty’s Province of New Hampshire in New England 4 (Oct. 16, 1759) (establishing superior court of judicature of general jurisdiction); Laws and Acts of Her Majesties Colony of Rhode Island (1746) 27 (vesting a general jurisdiction in Superior Court of Judicature, Court of Assize, and General Goal Delivery); An Act for the Better Regulating the Court of Common Pleas, Public Laws of the Province of South Carolina 144 (1736-37) 144 (establishing 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”).

“arising within” the jurisdiction of the colony. In 1736, 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.⁶⁰ In other instances, assemblies provided for specialized tribunals having jurisdiction over actions arising within the territory of the province.⁶¹ 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 Inferior Court of Common Pleas for each county with jurisdiction “in all matters & Causes Arising within such Counties.”⁶²

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.”⁶³ A 1722 statute for Connecticut enacted that the provincial Superior Court would have special jurisdiction “to Enquire into, Hear, and Determine all Crimes Committed” in Hartford riots.⁶⁴ Similarly, a 1764 Connecticut Act

⁶⁰ Public Laws of the Province of South Carolina 144 (1736-37). In certain instances, colonial assemblies provided that provincial courts should hear cases in the local in which they arose. *See, e.g.*, Acts of the Province of Maryland 46 (1753) (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”).

⁶¹ *See, e.g.*, Act of Nov. 21, 1763, in Acts Passed by the General Assembly of Georgia 163 (1763) (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” where there would be “great inconvenience or damage” by having to pursue the matter in the ordinary course of proceeding).

⁶² Act of Apr. 29, 1769 in 3 Laws of New Hampshire 530 (Henry Harrison Metcalf ed. 1913). *See also* Acts and Laws of His Majesty’s Colony of Connecticut 24 (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”); Act of Nov. 11, 1683 in 1 The Colonial Laws of New York 125-26 (1683) (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 . . .”). Chapter XLII in 3 Hening’s Va. Stat. 404, 409 (1705) (providing “That all causes of greater value than thirty pounds sterling, arising 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.

⁶³ 1 Public Acts of the General Assembly of North Carolina 142 (1762).

⁶⁴ Acts and Laws of His Majesty’s Colony of Connecticut 284 (1722). 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

provided “That the Superior Court only, shall have Cognizance of all Pleas that relate to the Crime of Adultery”⁶⁵

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.⁶⁶ 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.⁶⁷

Fourth, many colonial enactments limited the jurisdiction of particular courts according to the kind of action a plaintiff was bringing. Colonial authorities gave local courts, such as justices of the 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”⁶⁸ New

the Town of Newport.” Laws and Acts of Her Majesties Colony of Rhode Island 10 (1768).

⁶⁵ Acts and Laws of His Magesties Colony of Connecticut 315 (1764).

⁶⁶ See Act of May 20, 1769, ch. 1388 *in* 4 The Colonial Laws of New York 1088, 1089-90 (1769) (providing that amount in controversy requirement to bring action in Supreme Court of Colony did not extend to actions brought by certain officials and government entities); Ch. XVII *in* 9 Hening’s Va. Stat. 401, 402 (1777) (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.”); Ch. XV *in* 9 Hening’s Va. Stat. 889 (1777) (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”).

⁶⁷ The Public Acts of the General Assembly 61 (1741).

⁶⁸ Act of Mar. 12, 1722, ch. 1532 *in* 5 The Colonial Laws of New York 304-05 (1772). See also Ch. LVI, *in* 1 Hening’s Va. Stat. 272, 273 (1642) (providing “that no court of justice within the collony shall proceed to determine or adjudge or at all take cognizance 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 adjoining comiss. to the creditor to sumon the debtor or deft . . . and to determine the same”); New Hampshire 4 (1696) (providing that justices of the peace may hear actions of debt or trespass “arising or happening within this Province, to the value of Forty Shillings”); Laws and Acts of Her Majesties Colony of Rhode Island 37 (1690) (giving Assistants or Justices of the Peace jurisdiction or debts and trespasses not exceeding forty shillings); Acts Passed by the General Assembly of Georgia 77 (1756-61) (giving justices of the peace jurisdiction over “all actions of debt or damage . . . for any sum not exceeding the value of eight pounds Sterling”).

York authorities also excluded actions for defamation and slander from certain local courts,⁶⁹ vesting jurisdiction instead in the Supreme Court of the colony.⁷⁰ On the criminal side, colonial authorities gave courts jurisdiction, or limited courts' jurisdiction, to hear actions for loss of life or limb,⁷¹ for thieving and stealing,⁷² or committed by slaves.⁷³

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.”⁷⁴ 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 the laws of another government. 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 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.”⁷⁵ This act, like the New York act, conferred

⁶⁹ Act of May 20, 1769, ch. 1387 *in* 4 The Colonial Laws of New York 1079, 1085 (1769) (providing that act regulating jurisdiction of local courts should not be construed to extend to, *inter alia*, “any Action or Actions of Defamation or Slander”).

⁷⁰ Act of May 20, 1769, ch. 1388 *in* 4 The Colonial Laws of New York 1088, 1089-90 (1769) (providing that amount in controversy requirement to bring action in Supreme Court of Colony did not extend to actions of assault, battery, or slander).

⁷¹ See Ch. VII *in* 5 Henings Va. Stat. 489, 491 (1748) (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”); Acts and Laws of His Majesties Colony of Connecticut (1702) (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”).

⁷² Ch. XXVI *in* Acts of the Province of Maryland 88 (1715) (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”).

⁷³ Ch. XLIII.a. *in* Laws of General Assembly of Delaware 102 (1700-34) (giving justices of the peace jurisdiction over “offences committed by any Negro or Mulatto slaves”); Acts Passed by the General Assembly of Georgia 417 (1767) (giving justices of the peace jurisdiction over crimes and offenses committed by slaves).

⁷⁴ Act of May 20, 1769, ch. 1387 *in* 4 The Colonial Laws of New York 1079, 1085 (1769) (emphasis added).

⁷⁵ Laws and Acts of Her Majesties Colony of Rhode Island 29 (1768).

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 where the amount in controversy was below a specified sum,⁷⁶ or, correspondingly, gave general courts jurisdiction where the amount in controversy was above a specified sum.⁷⁷

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 as well. At the Federal Convention, each proposed plan of government would call for a federal judiciary of limited jurisdiction, a jurisdiction limited in ways that English and colonial legal regimes limited the jurisdiction of certain courts.

b. *The Rules by Which Courts Determined Their Respective Jurisdictions*

Given these ways in which English law limited the jurisdiction of certain courts, English courts employed rules to give them effect. English

⁷⁶ See, e.g., Acts Passed by the General Assembly of Georgia 77 (1755-61) (giving justices of the peace jurisdiction over “all actions of debt or damage . . . for any sum not exceeding the value of eight pounds Sterling”); Ch. XXIII in Acts of the Province of Maryland 12 (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 Public Justice Within this Province, in Acts and Laws of His Majesty’s Province of New Hampshire in New England 1-2 (Oct. 16, 1759) (providing that justices of the peace may hear civil and criminal actions under forty shillings).

⁷⁷ See, e.g., An Act for Establishing and Regulating Courts of Public Justice Within this Province, in Acts and Laws of His Majesty’s Province of New Hampshire in New England 3 (Oct. 16, 1759) (providing that inferior court of common pleas shall have jurisdiction over actions for the value of over forty shillings); Act of Feb. 11, 1775, Ch. DCXXIII, in Acts of the Province of New Jersey 469 (1775) (providing that justices of the peace may hear actions where the amount claimed is less than six pounds); Act of Mar. 12, 1772, ch. 1532 in 5 The Colonial Laws of New York 304 (1772) (providing generally that “Justice of the Peace of any of the Counties, or the Mayor, Recorder or Alderman” have jurisdiction of actions under five pounds); Chapter CCXI, in Acts of the General Assembly of Pennsylvania 108 (1715) (giving Justice of the Peace jurisdiction of complaints for debts under forty shillings); Laws and Acts of Her Majesties Colony of Rhode Island 37 (1690) (giving Assistants or Justices of the Peace jurisdiction or debts and trespasses not exceeding forty shillings); Public Laws of the Province of South Carolina 213 (1747) (giving justices of the peace jurisdiction of actions where demand does not exceed 20 pounds); Ch. XV in 9 Henning’s Va. Stat. 389, 390 (1777) (providing that High Court of Chancery generally had original jurisdiction over “all causes in chancery,” provided the value of the suit was ten pounds or more); Ch. XVII in 9 Henning’s Va. Stat. 401 (1777) (providing that general court generally had original jurisdiction over all actions “at common law” provided the value of the suit was not less than “ten pounds, or two thousand pounds of tobacco”).

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.⁷⁸ 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.⁷⁹ 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.⁸⁰ 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.⁸¹

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* set 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.”⁸² Courts most commonly invoked this principle in determining whether cases were within the territorial jurisdiction of inferior courts. The principle operated, however, to determine the jurisdiction of inferior courts subject to any kind of jurisdictional limitation.

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

⁷⁸ As *Bacon’s Abridgment* described it, “every Thing is supposed to be done with 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 20, at 559.

⁷⁹ See 4 BACON, *supra* note 20, at 32 & n.† (explaining that defendant could plead to the jurisdiction of a superior court if the “Action accrued within a County Palatine”).

⁸⁰ 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*”).

⁸¹ *Bacon’s Abridgment* explained 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 BACON, *supra* note 20, 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 him. *Id.*; see also 4 BACON, *supra* note 20, at 33 (explaining same principles).

⁸² 1 BACON, *supra* note 20, at 562.

the jurisdiction of the court. In *Littleboy v. Wright*,⁸³ 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.⁸⁴ 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”⁸⁵ 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.⁸⁶

The rule that a plaintiff had to specifically show in its 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—namely,

⁸³ 83 Eng. Rep. 301 (K.B. 1673).

⁸⁴ *Id.* at 301.

⁸⁵ *Id.*

⁸⁶ See *Stanyon v. Davis*, 87 Eng. Rep. 974 (Q.B. 1704) (determining jurisdiction based on where the “sole *gist* of the action arose); *Drake v. Beare*, 83 Eng. Rep. 319, 319-20 (K.B. 1793) (holding that Court at Exeter lacked jurisdiction over action of debt on a lease where plaintiff did not plead that the lands lay within the jurisdiction of the Court”); *Price v. Hill*, 83 Eng. Rep. 337 (K.B. 1793) (holding that Wallingford Court lacked jurisdiction over action in assumpsit on a promise within the jurisdiction for goods sold because the plaintiff did “not show where the goods were sold and delivered”); *Heely v. Ward*, 86 Eng. Rep. 3 (K.B. 1726) (holding that Court at Hull lacked jurisdiction over action in assumpsit on 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); *Winford v. Powell*, 92 Eng. Rep. 357, 358 (K.B. 1712) (holding that inferior court lacked jurisdiction because, in *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); *Waldock v. Cooper*, 95 Eng. Rep. 661 (K.B. 754) (holding that Borough Court of Aylesbury lacked jurisdiction over action in assumpsit on 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*, 84 Eng. Rep. 1232 (K.B. 1729) (holding that Court of Carlisle lacked jurisdiction over action in assumpsit because it was not alleged that the good were sold within the jurisdiction, “which is the contract on which the assumpsit in law arose”); *Moravia v. Sloper*, 125 Eng. Rep. 1039, 1041 (C.P. 1737) (explaining that it is “necessary” for a plaintiff “to set forth that the cause of action arose within the jurisdiction of the Court”); *Titley v. Foxall*, 125 Eng. Rep. 1386, 1387 (“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”); *Rowland v. Veale*, 98 Eng. Rep. 944, 945 (K.B. 1774) (Mansfield J.) (“[I]f it was not alleged in the plaint below to be within the jurisdiction, it would have been bad on error”); *Anonymous*, 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”).

that the plaintiff was a tinner—the plaintiff had to allege in the declaration that he in fact was a tinner. In *Reignol v. Taylor*,⁸⁷ 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.”⁸⁸ 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.⁸⁹

Procedurally, there were various ways in which it could be determined that a court of limited jurisdiction lacked 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.⁹⁰ Or, the defendant could plead that the court lacked jurisdiction because the plaintiff failed to sufficiently demonstrate it.⁹¹ As a general matter, in the late eighteenth century, a plaintiff not only had to allege in the declaration that the cause of action arose within the jurisdiction of the court, but had to prove upon the trial that it was properly within the jurisdiction of the court.⁹² 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.⁹³ 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 at any time by writ of prohibition.⁹⁴

⁸⁷ 87 Eng. Rep. 1124 (Q.B. 1702).

⁸⁸ *Id.* at 1124.

⁸⁹ See 4 COKE, *supra* note 44, at 122-23 (reciting this prescription); 1 BACON, *supra* note 20, at 602-03 (same).

⁹⁰ See 4 BACON, *supra* note 20, at 33-34 (providing examples of cases in which this occurred).

⁹¹ See 4 *id.* at 34-35 (discussing how defendants would plead to the jurisdiction of an inferior court).

⁹² 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”); *King v. Danser*, 101 Eng. Rep. 533, 534 (K.B. 1795) (Lord 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.”).

⁹³ 4 BACON, *supra* note 20, at 33.

⁹⁴ 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

In sum, as Lord Willes described the operation of these jurisdictional principles in *Moravia v. Sloper*,⁹⁵ “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 it’s jurisdiction.”⁹⁶

2. *Principles of Appellate Jurisdiction*

In addition to these principles of original jurisdiction, certain principles that governed the appellate jurisdiction of English courts in the late eighteenth century provide useful background for understanding how federal courts came to understand the scope of Article III “arising under” jurisdiction. The Courts of Westminster—King’s Bench, Common Pleas, Exchequer, and Chancery, *i.e.* the superior courts—not only exercised a general original jurisdiction, but 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.”⁹⁷ 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.⁹⁸ 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.⁹⁹ To maintain a writ of error, a party had to assert an error that was “substantial” or “material,”¹⁰⁰ not “slight” or “trivial,”¹⁰¹ such as a misspelling in a verdict or judgment.¹⁰²

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 same principles).

⁹⁵ 125 Eng. Rep. 1039 (C.P. 1737).

⁹⁶ *Id.* at 1042.

⁹⁷ 4 BACON, *supra* note 20, at 32.

⁹⁸ 3 BLACKSTONE, *supra* note 38, at 410.

⁹⁹ See 3 BACON, *supra* note 20 (“A Writ of Error is a commission to judges of a superior court, by which they are authorized 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 the law.”).

¹⁰⁰ See 3 BLACKSTONE, *supra* note 38, at *407 (explaining that “writs of error cannot now be maintained, but for some material mistake alleged”).

¹⁰¹ 3 *id.* at 407.

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.¹⁰³

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.”¹⁰⁴ A bill of review could be “had upon apparent error in judgment, appearing on the face of the [equitable] decree,”¹⁰⁵ or “upon oath made of the discovery of new matter or evidence” not available at the time the decree was made.¹⁰⁶

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.”¹⁰⁷ *Bacon’s Abridgement* explained 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.¹⁰⁸ 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 them to return the records of a cause depending before them.”¹⁰⁹ 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”¹¹⁰ or “not have equal Justice”¹¹¹ in an inferior court.¹¹²

¹⁰² 3 *id.* at 409.

¹⁰³ 3 BLACKSTONE, *supra* note 38, at * 407.

¹⁰⁴ JOSEPH STORY, COMMENTARIES ON EQUITY PLEADINGS 320 (2d ed. 1840).\

¹⁰⁵ 3 BLACKSTONE, *supra* note 38, at 454; *see also* STORY, *supra* note 104, at 322 (explaining that a bill of review “may be brought for error of law, appearing upon the face of the decree”).

¹⁰⁶ 3 BLACKSTONE, *supra* note 38, at 454; *see also* STORY, *supra* note 112, at 327 (explaining that “the matter must not only be new, but it must be such, as the party, by the use of reasonable diligence, could not have known”).

¹⁰⁷ 3 BLACKSTONE, *supra* note 38, at * 112-13.

¹⁰⁸ 6 BACON, *supra* note 20, at 250.

¹⁰⁹ 1 BACON, *supra* note 20, at 349.

¹¹⁰ WILLIAM RASTAL, LES TERMES DE LA LEY 106 (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”).

¹¹¹ JOHN COWELL, A LAW DICTIONARY ce (1672) (describing certiorari as “a Writ . . . to an inferior Court, to call up the Records of a Cause therein depending, that

In colonial legal systems, governing laws provided that certain courts should have general appellate jurisdiction over the proceedings of inferior courts. For example, a 1759 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, with his Majesty’s kingdom of England have, or ought to have,” including appellate matters.¹¹³ 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.”¹¹⁴

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.¹¹⁵ 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 where the amount in dispute exceeded £300.¹¹⁶ 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

conscionable Justice may be therein administered, upon Complaint made by Bill, that the Party which seeketh the said Writ, had receiv’d hard dealing in the said Courts”).

¹¹² 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* 415-16 (1732) (“An *Accedas ad Curiam* is an Original Writ issuing out of Chancery, on a Plaintiff sued, or a judgment supposed to be given by 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 . . .”).

¹¹³ An Act for Establishing and Regulating Courts of Public Justice Within this Province, Acts & Laws of His Magesty’s Province of New Hampshire in New England 4-5 (Oct. 16, 1759).

¹¹⁴ An Act to Erect and Establish Courts in the Several Counties of this Colony, for the Tryal of Small Causes, Ch. C, in Acts of the Province of New Jersey 388, 392 (1748). While “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 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 38, at 410.

¹¹⁵ See generally JOSEPH HENRY SMITH, *APPEALS TO THE PRIVY COUNCIL FROM THE AMERICAN PLANTATIONS* 76-87, 246-48 (1950) (describing such acts and limitations).

¹¹⁶ Charter of Massachusetts Bay (1691), *reprinted in* 4 *AMERICAN CHARTERS, CONSTITUTIONS AND ORGANIC LAWS* 1492-1908 (Francis Thorpe, ed. 1909).

requirements.¹¹⁷ 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 £150.¹¹⁸

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, it appears that 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.”¹¹⁹ 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.”¹²⁰ Where royal authority limited the ability of litigants to seek review in the Privy Council, there is evidence that litigants understood themselves to be bound to specifically show that they qualified for review. Such an understanding would comport with the opinion of the Supreme Court, expressed in 1808, that, with respect to amount-in-dispute limitations on its own appellate

¹¹⁷ A typical instruction provided that a party dissatisfied with a judgment could appeal

unto us in our Privy Council, provided the matter in difference exceeded 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.

Appeals to the Governor and Council to the Privy Council in 1 ROYAL INSTRUCTIONS TO BRITISH COLONIAL GOVERNORS 1670-1776 § 449 (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 *id.* at § 449; Appeals to the Governor and Council and to Privy Council, in 1 *id.* at § 453.

¹¹⁸ See SMITH, *supra* note 115, at 246-48 (describing Rhode Island laws). Subsequent acts raised this amount to £200 in 1766 and £300 in 1771. See *id.* (describing acts). There was a question, of course, whether such colonial acts were binding on the King in Council, see *id.* (describing issue), 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.

¹¹⁹ RECORDS OF THE COURT OF CHANCERY OF SOUTH CAROLINA 566 (Anne K. Gregorie ed., 1950).

¹²⁰ *Id.* at 568-69.

jurisdiction, “*the plaintiff in error* must show that *this* court has jurisdiction.”¹²¹

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 limited evidence available suggests that litigants bringing an appellate proceeding in a court of limited appellate jurisdiction understood themselves to have to show that the jurisdictional limitation was satisfied.

II. THE FRAMING AND RATIFICATION HISTORY OF ARTICLE III

With this background in mind, this Part explains what light, if any, the framing and ratification history of Article III sheds on historical understandings of Article III “arising under” jurisdiction. The relevant written historical record is not extensive. Participants in the framing of and ratification debates about Article III focused most of their attention on the right to a jury trial in federal courts, the related power of the Supreme Court over matters of “fact,” the convenience (or lack thereof) of federal courts to potentially distant litigants, the equitable powers of federal courts, and judicial review. That said, “arising under” jurisdiction was part and parcel of a plan defining a limited federal jurisdiction in light of broader concerns about the scope of a federal judicial power.

This Part explains, first, how, at the Federal Convention, the delegates came to include the Arising Under Clause as a means of ensuring the supremacy of federal law through Article III courts. It explains, second, how, in debates over ratification, public officials described “arising under” jurisdiction as enabling federal courts to properly enforce federal law and maintain the uniformity of federal law—to ensure, in other words, the supremacy of federal law. When federal courts came to employ English jurisdictional rules to determine their jurisdiction during the first decades following ratification, they observed a practice that at once enabled them to ensure the supremacy of federal law so far as Congress saw fit, and limited the extent to which they would encroach upon the jurisdiction of state courts.

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

¹²¹ *United States v. The Brig Union*, 8 U.S. (4 Cranch) 216, 216 (1808). The Court explained that “the circuit court can neither give nor take away the jurisdiction of this court. The court must judge for itself its own jurisdiction.” *Id.*

convened at Philadelphia in 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, whether, in light of the so-called “Madisonian Compromise,” the Constitution should create inferior federal courts or authorize Congress to create them.¹²² Since the specific concern of this Article is with the meaning of Article III “arising under” jurisdiction, this section will present the framing history that is most directly relevant to that provision.

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 disputes¹²³ and disputes between states.¹²⁴ Each of the plans put forward at the Federal Convention contemplated, consistent with the overall purpose of the Convention, 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, one must 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, 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.”¹²⁵ To ensure the supremacy of federal prerogatives, Randolph’s plan would have empowered the national legislature “to negate all laws passed by the several States, contravening in the opinion of the National Legislature the articles of Union.”¹²⁶ It also would have empowered the legislature “to

¹²² 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).

¹²³ Article 9 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 in any of the said courts.

ARTICLES OF CONFEDERATION art. 9, § 1.

¹²⁴ Article 9 provided that the Confederation Congress would serve as “the last resort on appeal, in all disputes and difference now subsisting, or that hereafter may arise between two or more States concerning boundary, jurisdiction, or any other cause whatever,” *id.* art. 9, § 2, and certain controversies “concerning the private right of soil claimed under different grants from two or more states,” *id.* art. 9, § 3.

¹²⁵ Journal of the Constitutional Convention, in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 21 (Max Farrand ed., 1966) [hereinafter “FARRAND’S RECORDS”].

¹²⁶ *Id.*

call forth the force of the Union” against states that failed to fulfill their duties under the articles of the plan.¹²⁷

As for a judiciary, Randolph’s plan provided for federal court jurisdiction over several categories of cases. This proposal, 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 law. Specifically, the Virginia Plan defined categories of federal jurisdiction according to the kind of 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 kinds of categories. Under Randolph’s plan, inferior and supreme federal tribunals would have jurisdiction to hear:

all piracies & felonies on the high seas [kind of action], captures from an enemy [kind of action]; cases in which foreigners or citizens of other States applying to such jurisdictions may be interested [party character], or which respect the collection of the National revenue [subject-matter to which action relates]; impeachments of any National officers [kind of action/party character], and questions which may involve the national peace and harmony [subject-matter to which action relates].¹²⁸

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 legislature in cases “in which the harmony of the United States may be interrupted by state legislation.”

At the time that Randolph offered his plan, Charles Pinckney of South Carolina offered a different one. Pinckney’s plan would have given a national legislature a list of enumerated powers, several of which closely resembled the powers the Constitution ultimately would enumerate for Congress.¹²⁹ It made two provisions to ensure the supremacy of federal prerogatives. First, it declared the supremacy of federal laws and that state judges were bound to abide by them: “All acts made by the Legislature of the United States pursuant to this Constitution & all Treaties made under the authority of the United States shall be the Supreme Law of the Land & all Judges shall be bound to consider them as such in their decisions.”¹³⁰ It also provided that the national legislature would have a power to revise or annul state laws.¹³¹

As for a national judiciary, Pinckney’s plan defined several categories of jurisdiction, including “cases arising under the law of the United States.” The plan provided that “[t]he Legislature of the United

¹²⁷ *Id.*

¹²⁸ *Id.* at 22.

¹²⁹ 3 FARRAND’S RECORDS, *supra* note 125, at 598.

¹³⁰ *Id.* at 599.

¹³¹ *Id.* at 601.

States shall have the Power & it shall be their duty to establish such Courts of Law Equity & Admiralty as shall be necessary,” including

a Supreme Court whose jurisdiction shall extend to all cases arising under the law of the United States [source of law] or affecting ambassadors other public Ministers & Consuls [party character]—To the trial of impeachments of Officers of the United States [kind of action/party character]—To all cases of Admiralty & maritime jurisdiction [kind of action]—In cases of impeachment affecting Ambassadors & other public Ministers the Jurisdiction shall be original & in all the other cases appellate—¹³²

In his *Observations on the Plan of Government* that he submitted to the Federal Convention, 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.”¹³³ By questions “arising on the law of nations,” Pinckney must have meant questions arising in cases in which the law of nations operated as a source of governing law, regardless of whether the meaning of that law was in dispute. His proposal would have given federal courts jurisdiction over admiralty and maritime actions and cases affecting ambassadors, categories of cases in which the law of nations would have provided a rule of decision whether its content was disputed or not. If that is what Pinckney meant by “arising on,” he presumably meant “arising on . . . any of the regulations of Congress in pursuance of their powers” to encompass cases in which an Act of Congress, at some level, provided a rule of decision, regardless of whether its meaning was in dispute. Curiously, Pinckney did not say “arising on treaties,” but rather “arising on . . . the construction of treaties” to describe the jurisdiction that his proposal encompassed. Presumably, he meant to emphasize the need for federal courts rather than state courts to settle the meaning of treaties rather than to suggest that a federal court only had jurisdiction to hear cases in which a treaty provided the rule of decision if the meaning of the treaty was in dispute. His actual proposal would have given federal courts jurisdiction of cases “arising under the laws of the United States,” drawing no distinction between acts of Congress and treaties relative to whether the source of law must have a disputed meaning.

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 [subject-matter to which the action relates], impeachments of any national officers [kind of action/party character], and questions which involve the

¹³² *Id.* at 600.

¹³³ Charles Pinckney, *Observations on the Plan of Government Submitted to the Federal Convention*, 3 FARRAND’S RECORDS, *supra* note 125, at 117.

national peace and harmony [subject-matter to which action relates/possibly source of law].”¹³⁴ 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.”¹³⁵ According to Randolph, this amended plan would simply establish that principle; it would later “be the business of a sub-committee to detail it.”¹³⁶

With the Committee of the Whole having reviewed the Virginia proposal, William Paterson put forth the so-called New Jersey Plan on June 15. His plan would have augmented the powers of Congress under the Articles of Confederation to include powers to raise revenues and regulate trade and commerce.¹³⁷ To ensure the supremacy of federal prerogatives, Paterson’s plan provided

that all 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 as those Acts or Treaties shall relate to the said States or their 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 . . .

.¹³⁸

It also 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.”¹³⁹ Accordingly, the New Jersey 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.” To the extent the phrase “arising on” was familiar in English legal discourse, it denoted a relationship between a case and a governing source of law.¹⁴⁰ Fairly construed, this provision would have given the supreme tribunal appellate jurisdiction in any case in which a federal act for the collection of revenue or regulation of trade provided a governing rule of decision. Paterson’s plan also would have given the supreme tribunal limited

¹³⁴ Journal of the Constitutional Convention (June 13, 1787), in 1 FARRAND’S RECORDS, *supra* note 125, at 223-24 (emphasis added).

¹³⁵ Robert Yates, Notes (June 13, 1787), in 1 FARRAND’S RECORDS, *supra* note 125, at 238.

¹³⁶ *Id.*

¹³⁷ James Madison, Notes on the Constitutional Convention (June 15, 1787), 1 FARRAND’S RECORDS, *supra* note 125, at 243.

¹³⁸ *Id.* at 245.

¹³⁹ *Id.* at 243.

¹⁴⁰ See *supra* notes 29-40, and accompanying text.

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”¹⁴¹

Finally, Paterson’s plan would have provided for the use of force against states resisting federal authority:

[I]f any State, or any body of men in any State shall oppose or prevent ye. carrying into execution such acts or treaties, the federal Executive shall be authorized to call forth ye power of the Confederated States, or so much thereof as may be necessary to enforce and compel an obedience to such Acts, or an Observance of such Treaties.¹⁴²

Randolph, Madison, and Hamilton each denounced this proposal.¹⁴³ Rather than support force as a means of ensuring the supremacy of federal prerogatives, Madison argued again in favor of a congressional negative on state legislation.¹⁴⁴ Following deliberations on Paterson’s plan, the Committee of the Whole voted to report the Virginia Plan, rather than Paterson’s plan, to the convention.

The delegates proceeded to debate the provisions of the Virginia Plan on the floor of the Convention. On July 17, after the States secured equal suffrage in the Senate,¹⁴⁵ the Convention debated the congressional negative. Madison considered it “essential to the efficacy & security of the Genl. Govt.”¹⁴⁶ Roger Sherman deemed it 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

¹⁴¹ James Madison, Notes on the Constitutional Convention (June 15, 1787), in 1 FARRAND’S RECORDS, *supra* note 125, 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 FARRAND’S RECORDS, *supra* note 125, at 600.

¹⁴² James Madison, Notes on the Constitutional Convention (June 15, 1787), in 1 FARRAND’S RECORDS, *supra* note 125, at 245.

¹⁴³ Randolph expressed that such “coercion” was “*impracticable, expensive, cruel to individuals.*” *Id.* at 246. 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.” James Madison, Notes on the Constitutional Convention (June 15, 1787), in 1 FARRAND’S RECORDS, *supra* note 125, at 285. Madison, too, expressed that “[t]he coercion, on which the efficacy of the plan depends, can never be exerted but on themselves.” James Madison, Notes on the Constitutional Convention (June 19, 1787), in 1 FARRAND’S RECORDS, *supra* note 125, at 320.

¹⁴⁴ 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.

¹⁴⁵ James Madison, Notes on the Constitutional Convention (July 16, 1787), in 2 FARRAND’S RECORDS, *supra* note 125, at 15-16.

¹⁴⁶ James Madison, Notes on the Constitutional Convention (July 17, 1787), in 2 FARRAND’S RECORDS, *supra* note 125, at 27.

negated.”¹⁴⁷ Likewise, Robert Morris argued that “[a] law that ought to be negated will be set aside in the Judiciary departmt.”¹⁴⁸ The Convention proceeded to reject the negative. Upon its rejection, Luther Martin immediately moved to include what would become, after refinements, the Supremacy Clause:

that the Legislative acts of the U.S. made by virtue & in pursuance of the articles of Union, and all treaties made & ratified under the authority of the U.S. shall be the supreme law of the respective States, as far as those acts or treaties shall relate to the said States, or their Citizens and inhabitants—& 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.¹⁴⁹

This provision was almost identical to the Supremacy Clause that Paterson’s plan included, and the Convention unanimously adopted it.

The next day, July 18, the Convention took up the structure of the federal judiciary. There was unanimous agreement that the United States should have a judiciary. The 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 whether there should be 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.¹⁵⁰ Luther Martin, who had introduced the Supremacy Clause, argued that inferior federal tribunals “will create jealousies & oppositions in the State tribunals, with the jurisdiction of which they will interfere.”¹⁵¹ 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.”¹⁵² As is well known, the Convention proceeded to authorize Congress to establish inferior federal tribunals if it saw fit to do so.¹⁵³

After this resolution, the Convention adopted without debate a resolution proposed by Madison that federal court jurisdiction extend to “cases arising under the Natl. laws.” As adopted, this resolution set forth two categories of federal jurisdiction: “all cases arising under the Natl.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 28.

¹⁴⁹ *Id.* at 28.

¹⁵⁰ James Madison, Notes on the Constitutional Convention (July 18, 1787), in 2 FARRAND’S RECORDS, *supra* note 125, at 45.

¹⁵¹ *Id.* at 46.

¹⁵² *Id.* at 46.

¹⁵³ *Id.*

laws: and to such other questions as may involve the Natl. peace & harmony.”¹⁵⁴ It warrants emphasis that this resolution drew a distinction between cases “arising under” national law and questions that “involve the Natl. peace and harmony.” This resolution specified one category of cases involving the national peace and harmony: “cases arising under national laws.” Presumably, Madison specified this category of jurisdiction at this point to make certain, after the defeat of his negative, that Congress would have power to enable inferior federal courts administer federal law in the first instance as a means of maintaining its supremacy. 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.

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. The proposal provided:

7. The jurisdiction of the supreme tribunal shall extend
 1. to all cases, arising under laws passed by the general [Legislature]
 2. to impeachment 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 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

¹⁵⁴ *Id.* at 46.

¹⁵⁵ 2 FARRAND’S RECORDS, *supra* note 125, at 146-47 (Committee of Detail, IV) (brackets in original)

This proposal drew a clear distinction between cases “arising under” federal law and other cases implicating national interests.

Another draft in the Committee of Detail, in James Wilson’s hand, used the phrase “arising on” rather than “arising under” to specify a category of cases over which the federal judiciary would have jurisdiction:

That the Judiciary have authority to hear and determine all Impeachments of federal Officers; and, by Way of Appeal, in all Cases touching the Rights of Ambassadors—in all Cases of Capture from an Enemy—in all Cases of Piracies and Felonies on the high Seas—in *all Cases of Revenue*—in all Cases in which Foreigners may be interested in the Construction of any Treaty, or which may arise on any Act for regulating Trade or collecting Revenue *or on the Law of Nations, or general or commercial or marine Laws*.¹⁵⁶

This proposal was evidently premised upon Paterson’s proposal for federal jurisdiction in the New Jersey plan, adding the italicized clauses.

A later draft in the Committee of Detail, in 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 (National) Court, and in such (other) <inferior> Courts as shall, from Time to Time, be constituted by the Legislature of the United States.”¹⁵⁷ Regarding jurisdiction, it provided, first, for “arising under” jurisdiction: “The Jurisdiction of the Supreme (National) 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 counsels, diversity cases), and based on 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 judiciary article.¹⁵⁹ Regarding the “arising under” clause, William Samuel Johnson “moved to insert the words ‘this Constitution and the’ before the word ‘laws.’”¹⁶⁰ 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

¹⁵⁶ *Id.* at 157 (Committee of Detail, VII).

¹⁵⁷ James Madison, Notes on the Constitutional Convention (Aug. 6, 1787), in 2 FARRAND’S RECORDS, *supra* note 125, at 178.

¹⁵⁸ 2 FARRAND’S RECORDS, *supra* note 125, at 172-73 (Committee of Detail, IX).

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 James Madison, Notes on the Constitutional Convention (Aug. 27, 1787), in 2 FARRAND’S RECORDS, *supra* note 125, at 430.

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 Doctr. Johnson was agreed to nem: con: it being generally supposed that the jurisdiction given was constructively limited to cases of a Judiciary nature—¹⁶¹

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 in order to make the language of the Arising Under Clause conform to the language of the Supremacy Clause.¹⁶² (Days earlier, the Committee had amended the Supremacy Clause to refer to the Constitution, laws, and treaties of the United States.¹⁶³) The delegates unanimously agreed to this motion.¹⁶⁴ With this, and a few subsequent syntactical changes to the language of Article III, the delegates framed the Arising Under Clause. This jurisdiction would enable Congress to empower inferior federal courts to administer federal law in the first instance, if Congress saw fit to do so. Relative to the negative (or use of force), this means was a limited one for enforcing the supremacy of federal law.

"Arising under" jurisdiction would prove to be all the more limited by the rules federal courts would come to employ for determining their own jurisdiction. As explained, Madison's notes indicate that it was "generally supposed that the jurisdiction given was constructively limited to cases of a Judiciary nature."¹⁶⁵ In cases "of a judiciary nature," courts in England followed particular rules governing how a court of limited jurisdiction should determine whether it had jurisdiction over a given case. These rules operated, in part, to prevent certain courts from exercising jurisdiction reserved to other courts—a concern expressed at the Convention with the existence of an inferior federal court system. The general supposition that Madison's notes reference foreshadows how Article III courts would come to employ English jurisdictional principles to determine whether jurisdiction existed under various Article III jurisdictional heads, including Article III "arising under" jurisdiction.

¹⁶¹ *Id.*

¹⁶² *Id.* at 430-31.

¹⁶³ James Madison, Notes on the Constitutional Convention (Aug. 23, 1787), in 2 FARRAND'S RECORDS, *supra* note 125, at 381, 389, 394; James Madison, Notes on the Constitutional Convention (Aug. 25, 1787), in 2 FARRAND'S RECORDS, *supra* note 125, at 409, 417.

¹⁶⁴ James Madison, Notes on the Constitutional Convention (Aug. 27, 1787), in 2 FARRAND'S RECORDS, *supra* note 125, at 431.

¹⁶⁵ *Id.* at 430.

B. *The Ratification History*

This section describes the ratification history relating to Article III “arising under” jurisdiction. First, it 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 described it as capturing cases involving the enforcement or interpretation of federal law. Second, this section describes the different reasons that 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 descriptions and reasoned justifications all envisioned federal courts maintaining the supremacy of federal law through “arising under” jurisdiction.

Before proceeding to describe 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, just as it did not dominate the framing of Article III at the Federal Convention. More than they discussed “arising under” jurisdiction, participants in the ratification debates discussed 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.” Indeed, there were no debates specifically over the meaning of the Arising Under Clause. Participants made 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 is well known. There is every reason to believe that certain expressions of constitutional understanding were hyperbolic and calculated toward political ends. The political nature of the ratification debates raises questions regarding whether a given statement reflected the speaker’s true understanding of reasonable 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 regarding the meaning of Article III “arising under” jurisdiction. Assuming that participants in ratification debates held differing views of the meaning of Article III “arising under” jurisdiction—and that, indeed, some over- or understated truly held understandings to serve political ends—the debates may show how 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.

1. *The Meaning of “Arising Under”*

This section explains the different ways in which 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. In *The Federalist*, James Madison observed that legislatures and courts faced inherent difficulties in defining the jurisdiction of courts due to the complexity of the subject and the inherent limitations of language.¹⁶⁶ Several prominent figures argued that the delegates to the Federal Convention had not overcome such difficulties in framing Article III’s Arising Under Clause. The debate in the Virginia ratifying convention is illustrative. There, William Grayson objected “to the Federal Judiciary” on the grounds “that it is not expressed in a definite manner.”¹⁶⁷ 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 latitudes cannot be ascertained.”¹⁶⁸ 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?”¹⁶⁹ 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.”¹⁷⁰ 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.”¹⁷¹ 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.”¹⁷² He explained that if he “were to propose an amendment on this subject, it would be to limit the word *arising*.”¹⁷³ 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 extended unnecessarily . . .

¹⁶⁶ THE FEDERALIST NO. 37 (James Madison), at 235-37 (Jacob E. Cooke ed., 1961).

¹⁶⁷ 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1446 (Merrill Jensen ed., 1976) [hereinafter “DOCUMENTARY HISTORY”].

¹⁶⁸ *Id.* at 1446-47.

¹⁶⁹ *Id.* at 1401.

¹⁷⁰ *Id.* at 1403.

¹⁷¹ *Id.* at 1452.

¹⁷² *Id.*

¹⁷³ *Id.* at 1487.

.”¹⁷⁴ Certain participants in ratification debates in other states likewise characterized the words “arising under” as indefinite and not amenable to principled limitation.¹⁷⁵ The claim, of course, was not that federal jurisdiction should be unlimited, but that the federal judicial power should be subject to meaningful limitations.

On the other hand, there were those who attributed to the Arising Under Clause some definite operation. 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.”¹⁷⁶ “Brutus” used the familiar “arising on” phrase to describe the relationship between this kind of question and a source of federal law warranting judicial construction. 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, either in law or equity.”¹⁷⁷ 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.”¹⁷⁸ Luther Martin

¹⁷⁴ *Id.*

¹⁷⁵ See, e.g., Centinel I, Independent Gazetteer, 5 October 1787, in 1 DOCUMENTARY HISTORY, *supra* note 167, at 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 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, 5 January 1788, in 5 DOCUMENTARY HISTORY, *supra* note 167, at 619 (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*, 25 May 1788, in 9 DOCUMENTARY HISTORY, *supra* note 167, at 871 (stating that “when we observe that the cognizance of all cases arising under the constitution and 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.”); Brutus I, New York Journal, 18 October 1788, in 13 DOCUMENTARY HISTORY, *supra* note 167, at 415.

¹⁷⁶ Essays of Brutus No. XI, reprinted in 2 THE COMPLETE ANTI-FEDERALIST 419 (Herbert J. Storing ed., 1981); see also Centinel XVI, 16 DOCUMENTARY HISTORY, *supra* note 167, at 220 (“The 1st section of the 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.”).

¹⁷⁷ Essays of Brutus No. XI, reprinted in 2 Storing, *supra* note 176, at 419.

¹⁷⁸ Essays of Brutus No. XII, reprinted in 16 DOCUMENTARY HISTORY, *supra* note 167, at 73.

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.”¹⁷⁹

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 the 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.”¹⁸⁰ He described such cases as “those which naturally *arise from* the constitutional laws of Congress.”¹⁸¹ Hamilton used the phrases “arising out of” and “arising upon” to describe cases in which federal law would be determinative of the parties’ rights or titles. 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 . . . cases . . . which *arise out* of the laws of the United States, passed in pursuance of their just and constitutional powers of legislation.”¹⁸²

Some writers described these two understandings of “arising under” federal law—*i.e.*, 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.”¹⁸³ Luther Martin believed not only that federal courts would “have a right to decide upon the laws of the United States, and all questions arising upon their construction,” but that they would have a right “in a judicial manner to carry those laws into execution.”¹⁸⁴

¹⁷⁹ Luther Martin, *The Genuine Information Delivered to the Legislature of the State of Maryland Relative to the Proceedings of the General Convention Lately Held at Philadelphia*, reprinted in 2 Storing, *supra* note 176, at 691 [hereinafter Martin, *Genuine Information*]. 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 Federal Farmer No. 3, reprinted in 2 Storing, *supra* note 176, at 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).

¹⁸⁰ Hugh Williamson, Speech at Edenton, North Carolina, Nov. 8, 1787, reprinted in 2 THE DEBATE ON THE CONSTITUTION 230 (Bernard Bailyn ed., 1993) [hereinafter “DEBATE ON THE CONSTITUTION”].

¹⁸¹ *Id.*

¹⁸² THE FEDERALIST NO. 80 (Alexander Hamilton), at 534 (Jacob E. Cooke ed., 1961).

¹⁸³ Federal Farmer No. 15, reprinted in 2 Storing, *supra* note 176, at 185.

¹⁸⁴ Martin, *supra* note 179, at 69.

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.¹⁸⁵ 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 subject to no meaningful limits. He argued:

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.¹⁸⁶

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.¹⁸⁷

Madison likewise observed that “[w]ith respect to the laws of the Union, it is so necessary and expedient that the Judicial power should

¹⁸⁵ See, e.g., Essays of Brutus No. XIII, reprinted in 2 Storing, *supra* note 176, at 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, reprinted in 10 DOCUMENTARY HISTORY, *supra* note 176, at 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, 11 January 1788, reprinted in 3 DOCUMENTARY HISTORY, *supra* note 176, at 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 4 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 279 (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.”).

¹⁸⁶ John Marshall, Virginia Ratifying Convention, 20 June 1788, reprinted in 1 THE PAPERS OF JOHN MARSHALL 276-77 (Herbert A. Johnson et al. eds., 1974).

¹⁸⁷ 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 under the Constitution and not the laws of the United States, in the ordinary signification of the terms.” THE FEDERALIST NO. 80 (Alexander Hamilton), at 539 (Jacob E. Cooke ed., 1961).

correspond with the Legislative, that it has not been objected to.”¹⁸⁸ “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.”¹⁸⁹ In these passages, Madison appears to advocate 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.”¹⁹⁰

Other statements in ratification debates regarding Article III “arising under” jurisdiction provided little insight into its meaning. Some participants described Article III as giving the federal judiciary jurisdiction over “federal causes” or “national causes.”¹⁹¹ Such phrases convey little meaning in and of themselves. A federal or national cause could be one that bears any of a number of relationships to federal law or institutions: that a federal statute creates, that federal law otherwise governs, that implicates a disputed question of federal law, or in which the federal government has some other interest.

Statements that Article III “arising under” jurisdiction extends to federal “objects” or “concerns” likewise did not meaningfully describe a category of cases that “arising under” jurisdiction would encompass.¹⁹² James Monroe, in his *Observations on the Constitution*, explained that since the judiciary “forms the branch of a national government, so it should contemplate national objects only.”¹⁹³ As for what national objects were in the contemplation of a federal court, Monroe simply paraphrased

¹⁸⁸ James Madison, Virginia Ratifying Convention, 20 June 1788, reprinted in 10 DOCUMENTARY HISTORY, *supra* note 167, at 1413.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ See, e.g., Federal Farmer No. 3, reprinted in 2 Storing, *supra* note 176, at 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”); THE FEDERALIST NO. 81 (Alexander Hamilton), at 547 (Jacob E. Cooke ed., 1961) (“[T]he 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”).

¹⁹² See Marcus II, 1 DEBATE ON THE CONSTITUTION, *supra* note 180, at 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, 9 Jan. 1788, reprinted in 5 DOCUMENTARY HISTORY, *supra* note 167, at 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”).

¹⁹³ James Monroe, *Some Observations on the Constitution*, reprinted in 9 DOCUMENTARY HISTORY, *supra* note 167, at 866.

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.”¹⁹⁴

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 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 are not mutually exclusive. Those who described “arising under” jurisdiction as extending to cases in which federal law was determinative of the parties’ rights and titles necessarily included 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 that federal courts explicate the meaning of federal laws.

2. *The Reasons for “Arising Under” Jurisdiction*

There is something to learn 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 what Federalists were arguing against. As is well known, Federalists were arguing against an Anti-Federalist claim that the federal government, as the Constitution would establish it, would unduly encroach on the domain of state governments. Anti-Federalist arguments that “arising under” jurisdiction was potentially limitless—an argument described above—were 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.¹⁹⁵

¹⁹⁴ *Id.*

¹⁹⁵ 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, *Mr. Martin’s Information to the General Assembly of the State of Maryland*, reprinted in 2 Storing, *supra* note 179, at 27, 69. Similarly, the “Federal Farmer” wrote in 1787 that:

Against these claims, participants in ratification debates justified “arising under” jurisdiction on grounds that the Constitution must 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 to enable federal courts to enforce federal laws. Federalists and Antifederalists 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 . . . ?”¹⁹⁶ 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

[W]ith 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. I am not for bringing justice so near to individuals as to afford them any temptation to engage in law suits; though I think it one of the greatest benefits in a good government, that each citizen should find a court of justice within a reasonable distance, perhaps, within a day’s travel of his home; so that, without great inconveniences and enormous expences, he may have the advantages of his witnesses and jury

The Federal Farmer, *Letter from the Federal Farmer to the Republican* (Oct. 9, 1787), reprinted in 2 Storing, *supra*, 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.” Richard Henry Lee, *Letter of Richard Henry Lee to Governor Edmund Randolph* (Oct. 16, 1787), reprinted in 2 Storing, *supra*, at 112, 115. If Congress did not constitute inferior federal courts in each state, he wrote, “the people will be exposed to endless oppression, and the necessity of submitting in multitudes of cases, to pay unjust demands, rather than follow suitors, through great expense, to far distant tribunals, and to be determined upon there, as it may be, without a jury.” *Id.*

¹⁹⁶ Edmund Pendleton, Virginia Ratifying Convention, 20 June 1788, reprinted in 10 DOCUMENTARY HISTORY, *supra* note 167, at 1427.

to the Judiciary? There is no other body that can afford such protection.¹⁹⁷

In the words of Brutus, “[t]his 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.”¹⁹⁸

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 positive regulations neglected or contravened.”¹⁹⁹ 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 law of their States, in derogation of the General Government, . . . the Federal Government would soon be encroached upon.”²⁰⁰ 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.²⁰¹

¹⁹⁷ John Marshall, Virginia Ratifying Convention, 20 June 1788, *supra* note 186, at 277.

¹⁹⁸ Essays of Brutus No. XI, reprinted in 2 Storing, *supra* note 176, at 418. *See also* Noah Webster, *A Citizen of America*, reprinted in DEBATE ON THE CONSTITUTION, *supra* note 180, at 152 (“The jurisdiction of the federal courts is very 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 Landholder V*, 3 DOCUMENTARY HISTORY, *supra* note 167, at 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.”); *A Citizen of New Haven*, 3 DOCUMENTARY HISTORY, *supra* note 167, at 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 . . .”).

¹⁹⁹ 3 JONATHAN ELLIOT, DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 156 (1859) [hereinafter ELLIOT’S DEBATES].

²⁰⁰ Edmund Randolph, Virginia Ratifying Convention, 21 June 1788, 10 DOCUMENTARY HISTORY, *supra* note 167, at 1451.

²⁰¹ Wilson argued as follows:

The judicial power extends to all cases arising under treaties made, or which shall be made, by the United States. I shall not repeat, at this time, what has been said with regard to the power of the states to make treaties; it cannot be controverted, that, when made, they ought to be observed. But it is highly proper that this regulation should be made; for the truth is,—and I am sorry to say it,—that, in order to prevent the

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 relied upon for an inflexible execution of the national laws.”²⁰² 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.”²⁰³

In addition to the argument 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.²⁰⁴

Hamilton returned to this theme in *The Federalist No. 80*, where he argued, “[i]f there are such things as political axioms, the propriety of the judicial power of a government being coextensive with its legislative, may be ranked among the number. The mere necessity of uniformity in the interpretation of the national laws, decides the question.”²⁰⁵

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 jurisdiction of federal courts in cases “arising under the laws of the United States” was proper, asserted that “[t]he proper province

payment of British debts, and from other causes, our treaties have been violated, and violated, too, by the express laws of several states in the Union.

James Wilson, Pennsylvania Ratifying Convention, reprinted in 2 DOCUMENTARY HISTORY, *supra* note 167, at 517.

²⁰² THE FEDERALIST NO. 81 (Alexander Hamilton), at 547 (Jacob E. Cooke ed., 1961).

²⁰³ 4 ELLIOT’S DEBATES, *supra* note 199, at 172.

²⁰⁴ THE FEDERALIST NO. 22 (Alexander Hamilton), at 143 (Jacob E. Cooke ed., 1961).

²⁰⁵ THE FEDERALIST NO. 80 (Alexander Hamilton), at 535 (Jacob E. Cooke ed., 1961).

See also A Landholder V, reprinted in 3 DOCUMENTARY HISTORY, *supra* note 167, at 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.”).

of the judicial power, in any government, is, as I conceive, to *declare what is the law of the land*” and “[t]o *explain and enforce* those laws, which the supreme power or legislature may pass.”²⁰⁶ 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.”²⁰⁷

Overall, the ratification debates evidence certain bounds of understanding regarding the operation of Article III “arising under” jurisdiction. They evidence that both those who argued that the Arising Under Clause was not specific enough and those who attributed some specific meaning to it understood that federal “arising under” jurisdiction should have definable limits. Those who attributed some specific meaning to the Arising Under Clause described it as giving federal courts jurisdiction over cases in which a federal law was determinative of rights or titles that the case involved or in which the meaning of a federal law was in dispute. 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.

III. EARLY AMERICAN JUDICIAL PRACTICE

In *The Federalist*, Madison understood that ultimately it would fall upon federal courts to give Article III “arising under” jurisdiction a legally operative import. Recognizing the difficulties inherent in delineating the jurisdictions of respective courts, he anticipated that the jurisdictional provisions of Article III would “be liquidated and ascertained by a series of particular discussions and adjudications.”²⁰⁸

²⁰⁶ Brutus No. 13, reprinted in 2 Storing, *supra* note 176, at 428.

²⁰⁷ Brutus, No. 11, reprinted in 2 Storing, *supra* note 176, at 418.

²⁰⁸ It is worth quoting Madison’s words at length:

The experience of ages, with the continued and combined labors of the most enlightened legislatures and jurists, has been equally unsuccessful in delineating the several objects and limits of different codes of laws and different tribunals of justice. The precise extent of the common law, and the statute law, the maritime law, the ecclesiastical law, the law of corporations, and other local laws and customs, remains still to be clearly and finally established in Great Britain, where accuracy in such subjects has been more industriously pursued than in any other part of the world. The jurisdiction of her several courts, general and local, of law, of equity, of admiralty, etc., is not less a source of frequent and intricate discussions, sufficiently denoting the indeterminate limits by which they are respectively circumscribed. All new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning

There are few federal court cases decided in the first three decades following ratification that specifically address Article III “arising under” jurisdiction. Though in 1801 the Federalist Congress gave federal circuit courts “cognizance of all cases in law or equity, arising under the constitution and laws of the United States,”²⁰⁹ the Jeffersonian Republican Congress repealed that grant in 1802.²¹⁰ Congress did not again confer jurisdiction on federal courts to hear cases “arising under” federal law until 1875.²¹¹ In the first decade following ratification, Congress did give inferior federal courts jurisdiction over particular categories of cases “arising under” federal law. These categories generated few difficult jurisdictional questions, as they generally included actions for remedies that Congress created or actions that by definition federal law primarily would govern—actions that easily qualified under any theory as cases “arising under” federal law.²¹²

Courts struggled more in the first decades following ratification with determining whether cases fell within the “party character” grants of Article III than with determining whether cases fell within the “arising under” grant. 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.”²¹³ 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 500 dollars.²¹⁴ It also gave circuit courts jurisdiction of civil suits to which an alien was a party when more than 500 dollars was in dispute.²¹⁵

This Part explains how, following ratification, courts determined whether cases fell within the jurisdictional grants of Article III. In some cases, courts expressly invoked the distinction between “general” and

be liquidated and ascertained by a series of particular discussions and adjudications.

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

²⁰⁹ Act of Feb. 13, 1801, ch. 4, 2 Stat. 89 (1801).

²¹⁰ Act of Mar. 8, 1802, ch. 8, 2 Stat. 182 (1802).

²¹¹ See Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470.

²¹² The Judiciary Act of 1789 provided that federal district courts would have jurisdiction “all suits for penalties and forfeitures incurred, under the laws of the United States.” Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76-77. In any case in which a party sued for a penalty or forfeiture incurred under federal law, that party would have to demonstrate as part of its right to the penalty that federal law provided it. The Judiciary Act of 1789 also provided that federal district courts and circuits had jurisdiction “concurrent with the courts of the several States . . . of all causes where an alien sues for a tort only in violation of . . . a treaty of the United States.” *Id.* In any case in which an alien sued for a tort in violation of a federal treaty, the alien would have to show in the declaration and prove upon the trial the violation of the federal treaty.

²¹³ U.S. CONST. art. III, § 2.

²¹⁴ Act of Sept. 24, 1789, § 11, 1 Stat. 73, 78.

²¹⁵ *Id.*

“limited” jurisdiction, and the principles by which courts of limited jurisdiction were to determine their jurisdiction, that obtained in English practice. In other cases, most notably Chief Justice John Marshall’s opinion in *Osborn v. United States*,²¹⁶ the Court implicitly invoked the distinction and the principles that surrounded it.

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*,²¹⁷ 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:

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.²¹⁸

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.²¹⁹ 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 the difference of the general and state governments, which should be kept separate, and each left to do the business properly belonging to it.”²²⁰ 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.”²²¹

Five years later, the Supreme Court invoked the same principles in determining whether a circuit court properly heard a case on the ground that that plaintiff and the defendant were citizens of different states. In

²¹⁶ 22 U.S. (9 Wheat.) 738 (1824).

²¹⁷ 21 F.Cas. 1218 (No. 12,736 C.C. D. Va. 1793).

²¹⁸ *Id.* at 1219.

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.*

1798, in *Bingham v. Cabot*,²²² Attorney General Charles Lee 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.”²²³ Citing the English precedent *Lord Coningsby’s Case*,²²⁴ Lee argued that “[w]herever there is a limited jurisdiction, the facts that bring the suit within the jurisdiction must appear on the record.”²²⁵ (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.”²²⁶) The Supreme Court agreed with Lee. As Alexander Dallas reported the case, “[t]he 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.”²²⁷ Dallas reported, additionally, that “[t]his cause and many others, in the same predicament, were, accordingly, struck off the docket.”²²⁸

The Supreme Court invoked the same principles of English practice the following year in *Turner v. Bank of North America*.²²⁹ 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 favor 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.”²³⁰ 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 in order for the court to have jurisdiction.

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 argued to the Court that Congress enacted the “assignee clause” because it “knew, that the English courts have amplified their jurisdiction, through the medium of legal fictions” and foresaw “that by the means of a colorable assignment to an alien, or to the citizen of another state, every controversy arising upon

²²² 3 U.S. (3 Dall.) 382 (1798).

²²³ *Id.* at 383.

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

²²⁵ *Bingham*, 3 U.S. (3 Dall.) at 383.

²²⁶ *Lord Coningsby’s Case*, 88 Eng. Rep. at 338.

²²⁷ *Bingham*, 3 U.S. (3 Dall.) at 383-84.

²²⁸ *Id.* at 384.

²²⁹ 4 U.S. (4 Dall.) 8 (1799).

²³⁰ Act of Sept. 24, 1789, § 11, 1 Stat. 73,79.

negotiable paper might be drawn into the federal courts.”²³¹ Accordingly, he contended, “the original character of the debt is declared to be the exclusive test of jurisdiction, in an action to recover it.”²³² Citing *Lord Coningsby’s Case*, Ingersoll argued that the plaintiff had to aver specific facts satisfying this test in order for a federal court to exercise jurisdiction over the case. In his words, as reported, “a court of special jurisdiction cannot take cognisance of the suit, unless the case judicially appears by the record to be within its jurisdiction.”²³³ 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.”²³⁴ 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 cognisance.”²³⁵ He compared the circuit court “to the king’s bench in England, from whose general jurisdiction is excepted cognisance of cases, belonging to the counties Palatine.”²³⁶ 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.”²³⁷

In his opinion for the Court, Chief Justice Oliver Ellsworth 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

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.²³⁸

As the Court found that the plaintiff’s averments were insufficient to show jurisdiction, it reversed the judgment of the circuit court for want of jurisdiction.²³⁹

²³¹ *Turner*, 4 U.S. (4 Dall.) at 8.

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.* at 8-9.

²³⁵ *Id.* at 9.

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.* at 10.

²³⁹ *Id.* See also *Martin v. Taylor*, 16 F. Cas. 906, 906 (No. 9166 C.C. D. Pa. 1803) (Washington, Circuit J.) (“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.”).

In each of these cases, federal courts invoked principles of English law for determining judicial jurisdiction. By deeming themselves courts of “limited” jurisdiction, federal courts subjected themselves to principles that inherently limited the extent to which they would exercise jurisdiction otherwise belonging to state courts.

B. *Appellate Jurisdiction*

Since Congress did not give federal courts original jurisdiction in cases “arising under” federal law until 1875, the Supreme Court addressed the meaning of the Arising Under Clause more with respect to its appellate jurisdiction over state court judgments than with respect to federal courts’ original jurisdiction. 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*

The Supreme Court did not have occasion to address the Arising Under Clause in cases in which it exercised appellate jurisdiction over federal court judgments. Since Congress had not given inferior federal courts jurisdiction generally over cases “arising under” federal law, it is not surprising that (at least until *Osborn v. United States*) the Supreme Court did not address, on a writ of error from a federal court, what rendered a case one “arising under” federal law for purposes of original or appellate Article III jurisdiction.

That said, it does not appear that Congress viewed 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 court properly assumed jurisdiction under Article III. 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 two thousand dollars, exclusive of costs.”²⁴⁰ 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 apparently presumed that the Supreme Court could constitutionally exercise an appellate jurisdiction akin to the general jurisdiction that English “superior” courts exercised over “inferior” courts.²⁴¹

²⁴⁰ Judiciary Act of 1789, § 22, 1 Stat. 73, 84.

²⁴¹ In *Wilson v. Daniel*, 3 U.S. (3 Dall.) 401 (1798), the Supreme Court addressed whether, in ascertaining whether the 1,800 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

2. *Supreme Court Review of State Court Judgments*

On the other hand, 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 where was “drawn into question” an assertion of federal right against which the state court ruled.²⁴² 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 be “drawn into question” in the appellate proceeding. This does not prove, of course, that all members of Congress necessarily believed that they only could allow the Supreme Court to exercise jurisdiction where a federal law would prove determinative of the appellate proceeding. This statute, however, comports with such a view, a view that by available indications the justices of the Supreme Court held at the time.

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*,²⁴³ 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. The facts of the case are involved, but important to understanding the opinion of Chief Justice Marshall. Scarth, a British subject resident in England, held a mortgage upon a tract of land in Maryland. In 1732, Waters obtained a judgment against the land based on a debt that Scarth owed to him. Waters proceed to assign his right in the land to a company, under the title of which Owings claimed an interest in the land. Later, the State of Maryland gave Norwood a patent in part of the land that Owings, pursuant to his claimed interest, was occupying. Norwood brought an

given. 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.

²⁴² 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, 1 Stat. 73, 85-86.

²⁴³ 9 U.S. (5 Cranch) 344 (1809).

action of ejectment against Owings. Upon the trial, Owings claimed that the Jay Treaty of 1794 protected Scarth's mortgage from confiscation by the State. 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."²⁴⁴ 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. The court concluded that "the British treaty cannot operate to affect the plaintiff's right to recover in this ejectment," and the Court of Appeals affirmed.²⁴⁵ Owings sued out a writ of error to the Supreme Court of the United States under section 25 of the Judiciary Act of 1789.

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*."²⁴⁶ 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.²⁴⁷

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

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

²⁴⁴ Provisional Article of Peace, U.S.-Gr. Br., art. V, Nov. 30, 1782, 8 Stat. 54.

²⁴⁵ *Id.*

²⁴⁶ *Owings*, 9 U.S. (5 Cranch), at 347 (emphasis added).

²⁴⁷ *Id.* at 347-48.

Scarth, nor of any person claiming under him, can be affected by the decision of this cause.²⁴⁸

In Marshall's view, for a case to be one arising under federal law at the time the writ of error was sought, the plaintiff in error had to demonstrate that federal law created or protected the right or title that the plaintiff in error was asserting in the appellate proceeding.²⁴⁹ 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 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.²⁵⁰ 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 treaty unless federal law generates or otherwise affects of its own force a right or title the petitioner is asserting in the appellate proceeding.

In 1821, in *Cohens v. Virginia*,²⁵¹ Chief Justice Marshall again addressed what makes a case one "arising under" federal law for purposes of the appellate jurisdiction of the Supreme Court. An issue before the Court was whether it could entertain a writ of error when the defendant in error was the State. In resolving this issue, Chief Justice Marshall

²⁴⁸ *Id.* at 348.

²⁴⁹ Justice William Johnson made a similar point for the Court in *McIntyre v. Wood*, 11 U.S. (7 Cranch) 504 (1813). 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.* Justice Johnson here effectively recited how the Court read section 25 of the Judiciary Act in *Owings v. Norwood's Lessee*, as "restrained by the constitution." 9 U.S. (5 Cranch), at 347.

²⁵⁰ 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 up title in a stranger in bar of the action.

Id. at 323.

²⁵¹ 19 U.S. 264 (1821).

described what makes a case one “arising under” the Constitution or a federal law. First, Marshall explained that 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” is “too narrow.”²⁵² 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.”²⁵³ 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. Second, Marshall explained that 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.”²⁵⁴ “In such a case,” Marshall explained, the Supreme Court can exercise its jurisdiction “only in its appellate form.”²⁵⁵ This statement signifies a belief in Marshall that whether a case was one “arising under” federal law was not a question that a court necessarily can answer once and for all at the inception of an action.

C. *Osborn v. United States: In Historical Context*

Three years after it decided *Cohen*, the Supreme Court issued its most famous opinion on Article III “arising under” jurisdiction—*Osborn v. United States*.²⁵⁶ 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.”²⁵⁷ Courts and scholars have read this holding broadly, understanding Marshall to have conveyed that a case arises under federal law if a federal question might possibly arise in it.²⁵⁸

²⁵² *Id.* at 379.

²⁵³ *Id.*

²⁵⁴ *Id.* at 394.

²⁵⁵ *Id.*

²⁵⁶ 22 U.S. (9 Wheat.) 738 (1824).

²⁵⁷ *Id.* at 823.

²⁵⁸ *See, e.g.,* *Verlinden B.V. v. Cent. Bank of Nig.*, 461 U.S. 480, 492 (1983) (explaining that “*Osborn* thus reflects a broad conception of ‘arising under’ jurisdiction, according to which Congress may confer on the federal courts jurisdiction over any case or controversy that might call for the application of federal law”); MARTIN H. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 56 (1980) (arguing that Marshall “has 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

As I have argued elsewhere,²⁵⁹ Marshall’s opinion, most fairly construed, held only that a case arises under federal law if the plaintiff necessarily must plead and prove a federal law to prevail on the right or title upon which the plaintiff based the cause of action.

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. After this suit was filed, the Ohio officials took \$100,000 from the Bank’s office at Chillicothe, Ohio. The Bank filed a supplemental and amended bill of complaint, and obtained a judgment ordering the state officials to give restitution of the \$100,000. 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.

An Act of Congress had conferred on the Bank various corporate capacities, including the ability to sue and be sued in federal circuit courts.²⁶⁰ The Court had to decide whether the suit in equity that the Bank brought was a case “arising under” federal law since “general principles” of law would operate to determine the Bank’s right to relief. 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 since it formed “an ingredient of the original cause.”

At the time *Osborn* was decided, 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.²⁶¹ As his opinions in *Owings* and *Cohen* make clear, Marshall not only understood that a plaintiff had to seek relief through a particular form of proceeding in order to bring an action, but also framed questions of whether particular cases arose under federal law within the context of the rights or titles that legal and equitable modes of proceeding

federal court under the ‘arising under’ clause”); 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 extending Article III “arising under” jurisdiction to “all cases where issues of federal law might possibly be an issue”); Paul J. Mishkin, *The “Federal” Question in the District Courts*, 53 COLUM. L. REV. 157, 161 (1953) (characterizing *Osborn* as holding that if a federal issue must “be decided explicitly or taken for granted in order for a decision to be made,” it is an “original ingredient” of a cause); 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”).

²⁵⁹ See Anthony J. Bellia Jr., *Article III and the Cause of Action*, 89 IOWA L. REV. 777, 800-12 (2004).

²⁶⁰ 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, 3 Stat. 266, 269.

²⁶¹ See Bellia, *supra* note 259, at 782-800, 801 (explaining context of forms and modes of proceeding in which *Osborn* was decided).

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.”²⁶² With this background explained, Marshall proceeded to make the question whether a case arises under federal law depend upon the requirements that a plaintiff had to satisfy to have a cause of action under a particular form of proceeding: A case arises under federal law, Marshall explained, 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.”²⁶³ Where a plaintiff properly sets up such a right or title, Marshall explained, the case arises under federal law because a federal question “forms an ingredient of the original cause.”²⁶⁴

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.”²⁶⁵ Indeed, the plaintiff had to state in the bill all facts giving rise to the plaintiff’s right or title,²⁶⁶ including the plaintiff’s interest in the subject matter or title to maintain the suit.²⁶⁷ If the plaintiff failed to allege a fact necessary to make this showing, the plaintiff could not later prove it.²⁶⁸

²⁶² *Osborn*, 22 U.S. (9 Wheat.) at 819 (emphasis added).

²⁶³ *Id.* at 822 (emphasis added).

²⁶⁴ *Id.* at 823.

²⁶⁵ 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.”); HENRY MADDOCK, A TREATISE ON THE PRINCIPLES AND PRACTICE OF THE HIGH COURT OF CHANCERY 167 (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).

²⁶⁶ See DANIELL, *supra* note 265, at 638 (stating that “all preliminary acts necessary to complete the plaintiff’s title must be shown”).

²⁶⁷ *Id.* at 371 (explaining that “if 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, at their Anniversary, September 4, 1821, at Boston, in THE MISCELLANEOUS WRITINGS OF JOSEPH STORY 198, 214 (William W. Story ed., 1852) (explaining that “every 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”).

²⁶⁸ See DANIELL, *supra* note 265, at 388 (admonishing that care “must be taken in framing the bill that every thing which is intended to be proved be stated upon the face of

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 \$100,000 that the Ohio officials had taken from it, regardless 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,”²⁶⁹ 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” in order to prevail. 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 to property or title to institute a suit with respect to it, regardless of whether the defendant contested that capacity. Marshall’s ingredient test did not, as the Court has suggested in more recent days, convey that federal law forms an ingredient of the cause of action whenever a case theoretically “might call for the application of federal law.”²⁷⁰

Osborn is also interesting for what it says about the appellate jurisdiction of the Supreme Court over actions “arising under” federal law. The concern of the Court in *Osborn* was with the question whether circuit courts of the United States could exercise original jurisdiction over actions brought by the Bank. Having found that the circuit courts of the United States could constitutionally 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, consistent 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.

Relatedly, *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 determines whether it may exercise jurisdiction over an original cause. In a famous passage, Marshall explained:

it, otherwise evidence cannot be admitted to prove it”); JOSEPH STORY, A SELECTION OF PLEADINGS IN CIVIL ACTIONS 24 (2d ed. 1829) (explaining that “every 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”).

²⁶⁹ *Osborn*, 22 U.S. (9 Wheat.) at 827.

²⁷⁰ *Verlinden B.V. v. Cent. Bank of Nig.*, 461 U.S. 480, 492 (1983).

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.²⁷¹

This language has been read to support a broad reading of *Osborn*—that Congress may give inferior federal courts jurisdiction over any case in which a federal question might possibly provide grounds for appellate review in the Supreme Court. 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 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 *Cohen*, 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”—*i.e.*, in cases in which a party asserts a right or title that “grows out of, or is protected by” federal law²⁷²—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,

²⁷¹ *Osborn*, 22 U.S. (9 Wheat.) at 821 (emphasis added).

²⁷² *Owings*, 9 U.S. (5 Cranch), at 348.

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.” Only this reading makes sense of Marshall’s statement in *Cohen* 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.”²⁷³ “In such a case,” Marshall explained, the Supreme Court can exercise its jurisdiction “only in its appellate form.”²⁷⁴ There is no question that 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 his 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.²⁷⁵

²⁷³ *Id.* at 394.

²⁷⁴ *Id.*

²⁷⁵ 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 April 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.

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. 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 explained, “is not general and unlimited, but is confined to cases where the patent was obtained surreptitiously, or upon false suggestions; where the

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 determined whether they had jurisdiction. In determining whether it was proper for a federal court to exercise original jurisdiction, courts examined whether the plaintiff's initial pleading 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 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 error in the record determinative of the judgment. On the other hand, the Supreme Court (and perhaps Congress as well) seemingly presumed itself 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. This kind of relationship between an appellate court of one sovereign and courts with some claim to separate sovereignty was not unprecedented. As explained in Part II, the Privy Council had only limited jurisdiction to review the judgments of certain colonial courts. By available indications, it was incumbent upon a plaintiff in error to demonstrate that an appellate proceeding brought before the Privy Council satisfied those limitations, just as the Marshall Court required a plaintiff in error in the Supreme Court to demonstrate that the case in fact was one "arising under" federal law.

It would be beyond the scope of this article to attempt to work out all the implications of this analysis for federal jurisdiction today. The implications would involve, among other things, the level of generality at which historical principles that the Court formulated in the context of the

patentee resides within the district; and where the application is made within three years after the issuing of the patent." *Wood*, 22 U.S. (9 Wheat.) 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 that patentee was not entitled to a patent under federal law.

common law and equitable pleading regime are legally relevant in light of the transformation of pleading rules that has occurred through the course of American history. They also would involve, more generally, the role of history itself in determining constitutional meaning.

That said, there are at least two implications that are worth identifying, if not working out, here. First, broad 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: 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) will find protection of that right in federal court. It does not, however, stand for what scholars more commonly denote by “protective jurisdiction”—that Congress may give federal courts “arising under” jurisdiction in cases in which no actual federal law provides a rule of decision in order to protect “federal interests” in there being a federal forum. *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.²⁷⁶ 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 have no jurisdiction, and which of consequence could not originate in the Supreme Court.”²⁷⁷ 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.

There is a second implication that is worth identifying here. The disjoint between the way in which the Court has described statutory “arising under” jurisdiction and historical conceptions of constitutional “arising under” jurisdiction may not be as dramatic as courts and scholars have described it to be. For a time, the Court apparently did not view *Osborn*’s “ingredient” test and a “well-pleaded complaint” test as distinct. In 1894, in *Tennessee v. Union & Planters’ Bank*,²⁷⁸ the Court cited *Osborn* for the proposition that a cause of action arises under federal law if the plaintiff’s statement of the cause of action shows that it relies on a right under the Constitution or other federal law.²⁷⁹ In 1908, in *Louisville & Nashville Railroad Co. v. Mottley*,²⁸⁰ the case generally regarded as

²⁷⁶ *Osborn*, 22 U.S. (9 Wheat.) at 823.

²⁷⁷ *Cohens*, 19 U.S. at 394 (emphasis added).

²⁷⁸ 152 U.S. 454 (1894).

²⁷⁹ *Id.* At 459.

²⁸⁰ 211 U.S. 149 (1908).

establishing the “well-pleaded complaint rule,” the Court cited *Planters’ Bank* in support of it. For a time, there was a direct link between what *Osborn* had to say about Article III “arising under” jurisdiction and statutory “arising under” jurisdiction.

This is not to say that the well-pleaded complaint rule and its progeny squarely implements what Marshall articulated in *Osborn*. In its most recent exposition of what it means for a case to “arise under” federal law for purposes of § 1331, *Grable & Sons Metal Prods., Inc. v. Darue Eng’g and Mfg.*,²⁸¹ the Court explained 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.” To the extent that *Grable* requires a federal question to be “actually disputed,” it may recognize less jurisdiction than the pleading-based regime upon which *Osborn* was based would recognize. In *Osborn*, federal jurisdiction was appropriate even though there was no disputed question regarding the capacities of the Bank; the premise of the opinion was that the mere fact of federal law being part of the Bank’s right or title sufficed to make its case one “arising under” federal law. That said, to the extent that *Osborn* and *Grable* require that a federal law be determinative of a case for the case to arise under federal law, their principles more reflect historical understandings of the Arising Under Clause than a principle that would recognize a case to “arise under” federal law even if the claim asserted did not necessarily depend on the operation of any federal law for its success.

None of this is to say that, to implement a historical understanding of the Arising Under Clause, courts must constitutionalize a well-pleaded complaint rule. It is only to say that statutory “arising under” jurisdiction may have more in common with constitutional “arising under” jurisdiction, as historically described, than is generally supposed.

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 limited means 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. When federal courts confronted the task of determining their own Article III jurisdiction, they came to describe

²⁸¹ 545 U.S. 308 (2005).

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 supremacy of federal law, and limited the extent to which they would encroach upon the jurisdiction of state courts.