THE FEDERAL QUESTION JURISDICTION UNDER ARTICLE III: "FIRST IN THE MIND OF THE FRAMERS," BUT TODAY, PERHAPS, FALLING SHORT OF THE FRAMERS' EXPECTATIONS

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ABSTRACT

As Chief Justice Marshall explained, "the primary motive" for creating a "judicial department" for the new national government was "the desire of having a [national] tribunal for the decision of all national questions." Thus, although Article III of the Constitution lists nine kinds of "Cases" and "Controversies" to which the "judicial Power" of the United States "shall extend," "the objects which stood first in the mind of the framers" were the cases "arising under" the Constitution, laws, and treaties of the United States. Today we refer to this as the federal question jurisdiction.

Of all federal question cases, the Framers were most concerned to provide a federal forum for those in which a litigant seeks to enforce the supremacy of federal law against alleged encroachment by a state. Consistent with that view, for more than 100 years, the federal trial courts have exercised a jurisdiction, as one prominent judge put it, "to grant equitable relief against unconstitutional penalties and prosecutions threatened under state authority." But in 2021, in Whole Women's Health v. Jackson*, the Supreme Court vindicated a stratagem designed by a state legislature to foreclose resort to that jurisdiction to challenge a state abortion law that plainly violated the Federal Constitution as then interpreted.*

The decision in Whole Women's Health *is one of several developments over the last four decades that have raised concerns about the operation of the federal*

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Throughout the Article, in quotations from Founding Era sources, I have modernized spelling, capitalization, and punctuation, and have spelled out abbreviations.

question jurisdiction today. These developments include Congressional legislation, judicial doctrines, and the Supreme Court's management of its docket. They affect both the ability of federal courts to provide a forum for individual litigants—particularly in cases challenging state action—and the ability of the system to foster uniformity rather than "balkanization" in the interpretation of federal law.

These developments are troubling from another perspective as well. For the first eight decades under the Constitution, federal questions were generally litigated in the first instance in state courts, with a national tribunal playing a role only upon completion of the state-court proceedings, and then only if the state-court decision was adverse to the federal claim. Change came in the aftermath of the Civil War. Nationalism was triumphant, and Congress passed three major statutes enlarging the jurisdiction of federal trial courts to enforce federal rights: the Habeas Corpus Act of 1867, the Civil Rights Act of 1871, and, most broadly, the 1875 Act creating a *general* federal question jurisdiction. With these enactments, as Felix Frankfurter and James Landis famously wrote, the federal courts "became the primary and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States." Over the last four decades, however, Supreme Court decisions have limited the jurisdiction and remedies available under the modern-day descendants of all three Reconstruction-era statutes, with the result that many litigants cannot rely on federal courts to vindicate their rights.

These decisions and the other developments have received attention individually, but this Article is the first to identify a broader pattern and suggest its possible significance. Drawing on a novel synthesis of history, doctrine, and institutional arrangements, the Article chronicles the various developments and places them in context. It first reviews the drafting history and ratification debates and the judicial interpretation of the jurisdictional grant. It then examines how Congress has implemented the jurisdiction and why there is reason to be concerned that the operation of the jurisdiction today falls short of the Framers' expectations. It concludes with an invitation to further research.

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INTRODUCTION

Chief Justice John Marshall's opinion in *McCulloch v. Maryland*[1] is justly famous for its broad delineation of the power of Congress under Article I of the Constitution.[2] But from the perspective of Marshall himself, the decision is also significant for the light it sheds on the scope and purpose of the federal judicial power under Article III.

Section 2 of Article III defines the federal judicial power by listing nine kinds of "Cases" and "Controversies" to which the "judicial Power" of the United States "shall extend."[3] First in the enumeration is the category encompassing "*all Cases*, in law and equity, *arising under* this *Constitution*, the *Laws* of the United States, and *Treaties* made, or which shall be made, under their Authority."[4] This is often referred to as the "federal question" jurisdiction, and, although the Constitution does not use the term, it is a convenient label.[5]

In a published essay defending the Court's authority to hear the *McCulloch* case, Marshall made clear that the primacy of the federal question jurisdiction in the constitutional text is not happenstance.[6] Federal question cases, Marshall observed, "are, as was to be expected, the objects which stood first in the mind of the framers of the constitution."[7] Indeed, as Marshall explained, "the primary motive" for creating a "judicial department" for the new national government was "the desire of having a [national] tribunal for the decision of all national questions."[8]

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[1] 17 U.S. (4 Wheat.) 316 (1819).

[2] *See id.* at 421 ("Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.").

[3] U.S. CONST. art. III, § 2.

[4] *Id.* (emphasis added). This Article focuses on the "arising under" jurisdictional grant quoted in the text. For a brief discussion of other provisions of Article III, see *The Heritage Guide to the Constitution*, HERITAGE FOUND., https://www.heritage.org/constitution/#!/articles/3/judicial [https://perma.cc/MU49-YW77] (last visited Dec. 11, 2024).

[5] In this Article, the terms "arising under" and "federal question" will be used interchangeably to refer to the jurisdictional grant.

[6] *See* John Marshall, *A Friend of the Constitution*, *in* JOHN MARSHALL'S DEFENSE OF *MCCULLOCH V. MARYLAND* 155, 203-04 (Gerald Gunther ed., Stanford Univ. Press 1969) (1819). The essays by "A Friend of the Constitution" responded to arguments made in published essays by "Hampden" (Spencer Roane) and primarily addressed the issue of Congressional power. But Hampden also argued that the Court in *McCulloch* violated the Constitution "by deciding a cause not within its jurisdiction," *see id.* at 200, and Marshall responded to that accusation with a discussion of the "arising under" clause. Counsel for the state of Maryland did not raise the jurisdictional issue, so it is not addressed in the Court's opinion. *See id.* at 201.

[7] *Id.* at 204. Although Marshall did not participate in the drafting of the Constitution, he gave one of the principal speeches in defense of Article III at the Virginia ratifying convention. *See* JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 137-38 (1996).

[8] Marshall, *supra* note 6, at 203-04.

History has vindicated the Framers' view of the importance of the federal question jurisdiction. Almost from the beginning, the "arising under" grant has furnished the authority for Supreme Court decisions that have changed the nation.[9] Today, however, there is reason to be concerned that the judicial system falls short of the Framers' expectations—primarily by denying many litigants in cases presenting federal questions "their real day in an Article III court,"[10] but also by fostering "balkanization" rather than uniformity in the interpretation of federal law.[11] The concern is grounded in a wide range of developments, including Congressional legislation, judicial doctrines, and the Supreme Court's management of its docket. A prominent example is the Court's recent decision in *Whole Woman's Health v. Jackson*,[12] which vindicated a stratagem designed by a state legislature to foreclose the federal courts' jurisdiction, exercised for more than 100 years, "to grant equitable relief against unconstitutional penalties and prosecutions threatened under state authority."[13]

Whole Woman's Health and the other developments have received no shortage of attention individually, but this Article is the first to identify a broader pattern. The Article also takes the first steps in investigating the significance of the pattern in light of the origins of the federal question jurisdiction. It does so by offering a novel synthesis that incorporates history, doctrine, and institutional arrangements. The Article is in four parts. Part I traces the drafting history of the jurisdictional grant and summarizes key points made during the ratification debates. A recurring theme is that the Framers viewed the "arising under" jurisdiction as an essential mechanism for enforcing the supremacy of federal law against encroachments by states. Part II discusses the leading Supreme Court decisions that define when a case "arises under" federal law, so that it falls within the "judicial power of the United States." Part III traces the evolution of the federal question jurisdiction conferred by Acts of Congress. It outlines the key features of the "general" statutory jurisdiction and contrasts that model with the many variations that Congress has utilized in its specialized grants. Part IV explains how history has vindicated the Framers' view of the importance of the jurisdiction—and why the system in operation today may fall short of the Framers' expectations. The Article concludes with an invitation to further research.

9 *See infra* Section IV.A.

10 Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 267 (1985). Although Amar was speaking in general terms about what he called the "mandatory-tier cases," his examples all involve the "arising under" jurisdiction.

11 *See* Thomas E. Baker, *Imagining the Alternative Futures of the U.S. Courts of Appeals*, 28 GA. L. REV. 913, 959 (1994); *see also infra* Part IV.

12 595 U.S. 30 (2021).

13 Joseph C. Hutcheson, Jr., *A Case for Three Judges*, 47 HARV. L. REV. 795, 799 n.9 (1934). For discussion, see *infra* Section IV.B and Conclusion.

Before turning to this agenda, one preliminary matter warrants brief mention. The third enumerated category in Article III, Section 2 extends the judicial power to "all cases of admiralty and maritime jurisdiction."[14] As the Supreme Court has observed, this grant of jurisdiction gives federal courts "authority to create and apply maritime law."[15] That law "operat[es] uniformly in the whole country,"[16] and it may sometimes preempt state law.[17] Maritime law is thus a species of federal law. But that does not mean that "cases in admiralty" are cases "arising under the laws and Constitution of the United States" under Article III.[18] On the contrary, as Chief Justice Marshall forcefully stated, the admiralty jurisdiction delineates a "distinct class[] of cases" from those encompassed within the federal question jurisdiction.[19] The admiralty jurisdiction will not be further considered in this Article.[20]

I. DRAFTING HISTORY AND RATIFICATION DEBATES

To understand the design and purpose of the federal question jurisdiction, we look first at the drafting process at the 1787 Constitutional Convention, then at the debates over ratification in the states.[21]

A. *The Constitutional Convention*

The drafting history of the "arising under" clause is meager but telling. We also can gain insight from considering the evolution of another provision that uses parallel language—the Supremacy Clause.[22]

1. The "Arising Under" Clause

The federal question jurisdiction, in embryonic form, made its first appearance at the Constitutional Convention as part of the Virginia Plan. The ninth of the fifteen resolutions in that Plan would have authorized federal courts

[14] U.S. CONST. art. III, § 2. The second category encompasses "all cases affecting Ambassadors, other public Ministers and Consuls." *Id.*

[15] Great Lakes Ins. SE v. Raiders Retreat Realty Co., 601 U.S. 65, 69 (2024).

[16] Am. Dredging Co. v. Miller, 510 U.S. 443, 451 (1994).

[17] *See* David W. Robertson, *Displacement of State Law by Federal Maritime Law*, 28 J. MAR. L & COM. 325 (1995) (examining the confused state of the Supreme Court's preemption jurisprudence).

[18] Am. Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, 545 (1828).

[19] *Id.*; *see also* Romero v. Int'l Terminal Operating Co., 358 U.S. 354, 364-65 (1959) (reiterating this point).

[20] For a brief discussion of the admiralty jurisdiction under Article III, see *The Heritage Guide to the Constitution*, *supra* note 4.

[21] For a detailed account of the Convention and the ratification debates, see MICHAEL J. KLARMAN, THE FRAMERS' COUP: THE MAKING OF THE UNITED STATES CONSTITUTION (2016); *see also* RICHARD BEEMAN, PLAIN, HONEST MEN: THE MAKING OF THE AMERICAN CONSTITUTION (2009) (on the Constitutional Convention).

[22] U.S. CONST. art. VI, cl. 2.

to hear "questions which may involve the national peace and harmony."[23] In presenting the Plan to the Committee of the Whole, Edmund Randolph "observed the difficulty in establishing the powers of the judiciary," but he emphasized that one purpose was "to preserve the harmony of states and that of the citizens thereof."[24]

The next critical step occurred on the floor of the Convention. James Madison proposed adding to the Virginia Plan's language a grant of jurisdiction over "cases arising under laws passed by the general Legislature."[25] The proposal passed unanimously. But when the Committee of Detail reported to the Convention, the reference to "national peace and harmony" had disappeared; only the "arising under" language remained.[26]

The delegates devoted little more time to the federal question jurisdiction.[27] In the course of a single day, the Convention made three important changes. It replaced the reference to "laws passed by the Legislature" with "laws of the United States."[28] And, on separate motions, it extended the judicial power first to cases arising under the Constitution and then to cases arising under treaties, in addition to the cases arising under federal laws.[29]

The motion to insert the reference to the Constitution generated a brief but significant discussion prompted by a comment by Madison. Madison expressed doubt "whether it was not going too far to extend the jurisdiction of the court generally to cases arising under the Constitution and whether it ought not to be limited to cases of a judiciary nature."[30] He added: "The right of expounding the Constitution in cases not of this nature ought not to be given to that department."[31] But the motion was agreed to unanimously, "it being generally supposed that the jurisdiction given was constructively limited to cases of a judiciary nature."[32]

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[23] 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 22 (Max Farrand ed., rev. ed. 1966) [hereinafter Farrand]. The same resolution would also have authorized federal courts to hear (inter alia) "cases . . . which respect the collection of the national revenue [and] impeachments of any national officers." *Id.* When the resolution came to the convention floor, the first phrase was dropped and the second was struck out. *See* 2 *id.* at 46.

[24] 1 *id.* at 238.

[25] 2 *id.* at 39, 46.

[26] *Id.* at 186.

[27] The paucity of consideration on the floor was not unique to the federal question jurisdiction. *See* KLARMAN, *supra* note 21, at 167 ("The convention delegated to the Committee of Detail the task of spelling out the specific jurisdictional provisions that ultimately appeared in Article III of the Constitution and then devoted very little time or attention to debating the committee's jurisdictional proposals.").

[28] 2 Farrand, *supra* note 23, at 431.

[29] *Id.* at 430-31.

[30] *Id.* at 430.

[31] *Id.*

[32] *Id.*

That was in late August. When the Committee of Style reported to the Convention in September, the provision read substantially as it does today: the federal judicial power extended "to all cases, both in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority."[33]

The delegates then approved the Constitution as a whole.[34] Article III, in addition to specifying the nine categories of "cases" and "controversies" that fell within the judicial power, delineated the structure of the "judicial department" of the proposed national government. There would be "one Supreme Court"; that was made mandatory. There would also be "inferior" federal courts, but only if Congress chose to create them.[35] Two small classes of cases—cases "in which a state shall be party" and "Cases affecting ambassadors, other public ministers, and consuls"—were placed within the Supreme Court's original jurisdiction.[36] As to all other cases within the federal judicial power, including federal question cases, the Supreme Court was to have "appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make."[37] Nothing was said about the jurisdiction of the "inferior courts."[38]

2. The Supremacy Clause

Significantly, the evolution of the "arising under" jurisdiction proceeded in parallel with that of the Supremacy Clause. As ultimately adopted by the Convention, the Supremacy Clause—part of Article VI—provided as follows:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and

[33] *Id.* at 600.

[34] *Id.* at 633. The only change from the "arising under" provision as reported by the Committee of Style was the omission of the word "both." *See id.* at 660-61.

[35] *Id.* at 660 (in Article III, section 1, vesting judicial power "in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish"). This language reflected what is often called the "Madisonian Compromise"—a compromise between delegates who wanted to mandate the creation of inferior federal courts and those who opposed any provision for such courts. The latter believed that the "one Supreme Court" could adequately protect federal interests. *See* KLARMAN, *supra* note 21, at 165-66; Patchak v. Zinke, 583 U.S. 244, 252 (2018) (noting that "the so-called Madisonian Compromise . . . resolved the Framers' disagreement about creating lower federal courts by leaving that decision to Congress").

[36] 2 Farrand, *supra* note 23, at 661.

[37] *Id.*

[38] The proposed article also included provisions dealing with the tenure and compensation of judges. *See infra* Section I.A.2.

> the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.[39]

The initial version of the Supremacy Clause was part of the New Jersey Plan; it provided that "acts" of Congress and "treaties" of the United States "shall be the supreme law of the respective states."[40] It also specified that state judges "shall be bound" by federal laws and treaties even if state laws were "to the contrary."[41] The New Jersey Plan was not adopted, but immediately after the Convention rejected the provision in the Virginia Plan allowing the *legislature* to "negative" state laws, Luther Martin proposed a supremacy provision that closely tracked the one in the New Jersey Plan.[42] The proposal was adopted unanimously,[43] and it appeared, in streamlined and strengthened language, in the report of the Committee of Detail.[44] The Convention then agreed to an amended version of the provision that accorded supremacy not only to federal laws and treaties but also to the Constitution itself.[45] It was only four days later that the Convention made the conforming change in the "arising under" clause.[46]

In sum, as James Liebman and William Ryan concluded after a painstaking examination of the drafting process, the Framers "self-consciously and irrevocably forged the constitutional structural link between the front-line decision-making of 'the Judges in every State' under the supremacy clause and the supervisory decision-making of the federal judiciary when called upon to exercise the 'arising under' jurisdiction permitted by the judiciary article."[47]

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[39] 2 Farrand, *supra* note 23, at 663.

[40] 1 *id.* at 242, 245.

[41] *Id.*

[42] 2 *id.* at 28-29. Under the legislative "negative" in the Virginia Plan, the national legislature would have been given the power "to negative all laws passed by the several States (contravening in the opinion of the national legislature the articles of Union, or any treaties subsisting under the authority of the Union)." 2 *id.* at 27. Madison strongly supported the proposal, arguing that without the legislative negative, the states "can pass laws which will accomplish their injurious objects before they can be repealed by the national legislature or be set aside by the national tribunals." *Id.* Madison repeatedly pressed the proposal, but the delegates rejected it on each occasion. *See* KLARMAN, *supra* note 21, at 156-58. For Luther Martin's account of the relation between the legislative negative and the Supremacy Clause, see 3 Farrand, *supra* note 23, at 286-87.

[43] *See* 2 Farrand, *supra* note 23, at 22.

[44] *See id.* at 183. The Committee of Detail version added that state constitutions as well as state laws would be subordinate to federal laws and treaties.

[45] *See id.* at 381-82, 389.

[46] *Id.* at 381, 431 (listing approval date for Supremacy Clause language as August 23rd, 1787, and approval date for "arising under" clause as August 27th, 1787). Madison, in his report on the proceedings, made clear that the parallelism was deliberate. *See id.* at 431.

[47] James S. Liebman & William F. Ryan, *"Some Effectual Power": The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 COLUM. L. REV. 696, 747 (1998); *see id.* at 705-73. For a briefer account, see Anthony J. Bellia Jr., *The Origins of Article III "Arising Under" Jurisdiction*, 57 DUKE L.J. 263, 292-304 (2007) (explaining how

The Convention had good reason to link the Supremacy Clause and the "arising under" jurisdiction: only federal judges would have the independence necessary to stand up to state encroachments on federal prerogatives. The Virginia Plan and the New Jersey Plan, though divergent in many other respects, both provided that federal judges would hold office "during good behavior," and that the salaries of the judges could not be diminished during their time in office.[48] The Virginia Plan's provisions were approved unanimously,[49] and thereafter the Convention's commitment to those two features never wavered.[50] To be sure, late in the Convention John Dickinson of Pennsylvania proposed that judges could be removed "by the executive on the application by the Senate and the House of Representatives."[51] But the proposal was overwhelmingly rejected, with Randolph explicitly arguing that it would "weaken[] too much the independence of the judges."[52]

In contrast, most of the states, although nominally providing for tenure during good behavior, also "retained some mechanism for removing judges at the will of either the executive or the legislature (or both)."[53] Moreover, "recognition of the principle of the separation of powers" by the states was often "verbal merely," so that legislatures felt free to reverse judicial decisions or "even [to] determine[] the merits of disputes."[54] Under those circumstances, it is hardly surprising that the delegates would conclude that state courts could "not be trusted with the administration of the national laws."[55]

The "constitutional structural" linkage that emerged from the Convention is thus threefold: the "arising under" jurisdiction in Article III, Section 2 and the

at the "Federal Convention, the delegates came to include the Arising Under Clause as a means of ensuring the supremacy of federal law through national courts").

48 1 Farrand, *supra* note 23, at 21-22 (Virginia Plan); *id.* at 244 (New Jersey Plan).

49 2 *id.* at 38; *see also id.* at 44-45.

50 The Virginia Plan also provided that the salaries of the judges could not be *increased* during their time in office. *See* 1 *id.* at 21-22. The delegates debated whether a prohibition on increasing salaries was necessary or desirable to protect the independence of the judges. *See* 2 *id.* at 44-45. A majority of the states voted to delete the prohibition. *See id.* at 45. Later, supporters of the Virginia Plan's language sought to reinsert the prohibition against increasing salaries, but their motion was rejected. *Id.* at 429-30.

51 *Id.* at 428.

52 *Id.* at 428-29.

53 DANIEL A. FARBER & SUZANNA SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION 73 (3d ed. 2013).

54 Edward S. Corwin, *The Progress of Constitutional Theory Between the Declaration of Independence and the Meeting of the Philadelphia Convention*, 30 AM. HIST. REV. 511, 514-15 (1925).

55 2 Farrand, *supra* note 23, at 46 (remarks of Edmund Randolph). Randolph was speaking in support of a resolution to empower (but not require) the national legislature to create federal trial courts. *See id.* at 45 (listing the twelfth resolution to be discussed as the proposal "that [the] National Legislature be empowered to appoint inferior tribunals"). The resolution was agreed to unanimously. *Id.*

protections of judicial independence in Article III, Section 1 provide the means of enforcing the supremacy of federal law established by Article VI.

B. *The Ratification Debates*

When the proposed Constitution came before the states for ratification, as Professor Anthony Bellia has observed, "the meaning of Article III 'arising under' jurisdiction did not dominate [the] . . . debates about the federal judicial power."[56] Nevertheless, some insights do emerge.

First, the apparent breadth of the language prompted criticism by opponents of the proposed Constitution. For example, in the key state of Virginia, George Mason quoted the language and asked rhetorically: "What objects will not this expression extend to?"[57] Madison, speaking the next day in support of ratification, did not directly respond to Mason's question; rather, he asserted that "[w]ith respect to the laws of the Union, it is so necessary and expedient that the judicial power should correspond with the legislative, that it has not been objected to."[58] Indeed, this latter point was a recurring theme of supporters of the Constitution in the ratification debates.[59]

For opponents of the Constitution, however, the coextensiveness that Madison and Hamilton saw as inevitable did pose concerns. The Antifederalist "Brutus," writing in New York, quoted and analyzed the "arising under" clause and explained, step by step, how the jurisdictional grant—particularly for cases arising under the Constitution—would result in enlarging national power at the expense of the states.[60] Emphasizing that "[e]very body of men invested with office are tenacious of power," he argued that federal judges would "lean strongly in favor of the general government, and will give such an explanation to the Constitution as will favor an extension of its jurisdiction."[61] The result would be to enable the judges "to mold the government into almost any shape they please."[62]

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[56] Bellia, *supra* note 47, at 305.

[57] 10 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE FEDERAL CONSTITUTION 1402 (John P. Kaminski & Gaspare J. Saladino eds., 1993) [hereinafter DOC. HIST.] (remarks of George Mason at the Virginia ratifying convention).

[58] *Id.* at 1413 (remarks of James Madison).

[59] *See, e.g.*, *id.* at 1398 (remarks of Edmund Pendleton at the Virginia ratifying convention) (arguing that "the power of [the national] Judiciary must be coextensive with the Legislative power"); THE FEDERALIST NO. 80, at 535 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) ("If 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.").

[60] *See* 15 DOC. HIST., *supra* note 57, at 512-17 (Brutus XI). The identity of "Brutus" remains uncertain, but the Federalists recognized him as a formidable adversary.

[61] 15 *id.* at 515-16.

[62] *Id.* at 517. In expressing the fear that the federal question jurisdiction would allow the federal judiciary to aggrandize its own power, Brutus placed heavy emphasis on the fact that the jurisdiction would extend to cases "not only . . . [in] law, but also . . . [in] equity." *Id.* at 513. Brutus believed that equity jurisdiction gave courts essentially unlimited discretion, so

The Federalists portrayed the future differently. For example, they argued that independent federal judges would have the "intrepidity" to strike down acts of Congress that exceeded the powers granted in the Constitution.[63] They also predicted that Congress would be restrained in creating federal courts and in vesting them with jurisdiction.[64] But by insisting that the judicial power should correspond with the legislative, the Federalists did little to dissipate concerns about the potential breadth of the federal question jurisdiction. Indeed, Brutus turned the Federalists' arguments about the independence of the judiciary against them; he pointed out that if "the construction of the constitution [had] been left with the legislature," and the legislature exceeded its powers, "the people from whom they derived their power could remove them," but for "encroachments" by the judiciary, there was no remedy.[65]

Second, the ratification debates confirm that the Framers viewed the "arising under" jurisdiction as an essential mechanism for enforcing the Supremacy Clause. For example, Alexander Hamilton called attention to the various limitations on the authority of state legislatures contained in the Constitution and argued that to enforce these prohibitions, there must be "some effectual power in the [national] government to restrain or correct the infractions of them."[66] That power, he added, could be exercised in only two ways: either as "a direct negative on the state laws, or [as] an authority in the federal courts, to overrule such [laws] as might be in manifest contravention of the articles of union."[67] The Convention had opted for the latter.[68]

The connection between the federal question jurisdiction and the Supremacy Clause was recognized even by opponents of the new Constitution. Luther Martin, for example, in arguing against ratification in Maryland, insisted that with the Supremacy Clause in force, there was no reason to create lower federal courts and authorize them to hear cases "that should arise under" federal law.[69] But, he reported, "a majority" at the Convention believed that the supremacy of federal law would be at risk if state judges were "entrusted with the administration of" federal laws.[70]

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that the judges would "not confine themselves to any fixed or established rules," but would decide on the basis of their own views of "the reason and spirit of the Constitution." *Id.* at 514. This aspect of the argument is beyond the scope of this Article.

[63] 2 *id.* at 451 (remarks of James Wilson at the Pennsylvania ratifying convention); *see also id.* at 517 (same) (explicitly grounding this authority in the "arising under" jurisdiction).

[64] *See* KLARMAN, *supra* note 21, at 352 ("Federalists also offered assurances that it was 'highly probable' that the first Congress would invest state courts with most of the inferior federal jurisdiction . . . . ").

[65] 16 DOC. HIST., *supra* note 57, at 435 (Brutus XV).

[66] THE FEDERALIST NO. 80, *supra* note 59, at 535.

[67] *Id.*

[68] As noted earlier, the Convention explicitly rejected the "direct negative on . . . state laws." *Id*; *see* sources cited *supra* note 42.

[69] 3 Farrand, *supra* note 23, at 206.

[70] *Id.* at 207.

Third, the debates show that, to a lesser degree, the Framers also viewed the "arising under" jurisdiction as an essential means for securing uniformity in the interpretation of federal law.[71] Perhaps the best-known expression of this position is found in *The Federalist No. 80*, in which Hamilton referred to "[t]he . . . necessity of uniformity in the interpretation of the national laws,"[72] and added: "thirteen independent courts of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government, from which nothing but contradiction and confusion can proceed."[73]

II. JUDICIAL INTERPRETATION

When does a case "arise under" federal law, so that it falls within the judicial power of the United States under Article III? The authoritative answer to this question is found in a series of Supreme Court decisions starting with two landmark opinions authored by Chief Justice Marshall in the early years of the Republic. Almost without exception, these decisions confirm the breadth of the constitutional grant.

The better-known of the two Marshall Court cases is *Osborn v. Bank of the United States*,[74] decided in 1824. Marshall's delineation of the constitutional scope of the jurisdictional grant proceeds in two steps. First, he declares that a "question" is "federal" 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, provided the facts necessary to support the action be made out."[75] In other words, a federal question is a question whose answer depends in some way on federal law. Marshall then says that a case "arises under" the Constitution or laws of the United States if a federal question "forms an ingredient of the original cause"—that is, is an element of the plaintiff's claim.[76]

The breadth of this definition is made clear by a companion case, *Bank of the United States v. Planter's Bank of Georgia*,[77] in which the Court upheld federal jurisdiction over a suit by the Bank of the United States to recover on negotiable notes issued by a state bank.[78] In his opinion for the Court, Marshall says simply

[71] Professor Amar somewhat denigrates the importance of the uniformity rationale, *see, e.g.*, Amar, *supra* note 10, at 263, probably because one of the planks of his theory is "the structural equality of *all* federal judges." *Id.* at 262 (emphasis added).

[72] THE FEDERALIST NO. 80 (Alexander Hamilton), *supra* note 59, at 535.

[73] *Id.*

[74] 22 U.S. (9 Wheat.) 738 (1824).

[75] *Id.* at 822.

[76] *Id.* at 823.

[77] 22 U.S. (9 Wheat.) at 904.

[78] *Planters' Bank* was argued together with *Osborn* by the same counsel and decided on the following day. The jurisdictional issue was initially raised in the *Planters' Bank* case, not *Osborn*. *See* 10 THE PAPERS OF JOHN MARSHALL 39-40 (Charles F. Hobson, ed., 2000) [hereinafter MARSHALL PAPERS]. But Marshall chose to address the issue in *Osborn*.

that the jurisdictional issue "was fully considered" in *Osborn* and that it required no further discussion.[79] Yet in *Planter's Bank*, the liability of the defendant state bank depended solely on state law.[80] How, then, could Marshall have concluded that a federal question formed an element of the "original cause"? What Marshall says in *Osborn* is that there are some federal questions—for example, the bank's capacity to sue—that necessarily exist in every case brought by the bank, even though the particular proposition is not questioned.[81] Here, the Bank of the United States was created by an Act of Congress, and that provided the required federal ingredient.[82] *Osborn* thus establishes that, so long as a proposition of federal law is a logical antecedent of the plaintiff's claim, it is sufficient as a constitutional matter to support federal judicial power over the case.[83]

Osborn could be read as allowing jurisdiction based on the mere possibility that a federal question would be presented.[84] But in the *Verlinden*[85] case in 1983 the Court implied that that interpretation is too broad. The Court held that the Foreign Sovereign Immunities Act of 1976 (FSIA), by authorizing suits against foreign states in federal courts on non-federal causes of action, did not overstep the boundaries of Article III. This was because the FSIA, in "comprehensively regulating the amenability of foreign nations to suit in the United States,"[86]

[79] *Planters' Bank of Ga.*, 22 U.S. (9 Wheat.), at 905.

[80] *See* 10 MARSHALL PAPERS, *supra* note 78, at 83 (describing the Bank's claim).

[81] *See Osborn*, 22 U.S. (9 Wheat.) at 823-24.

[82] Marshall notes that "[t]he charter of incorporation gives [the Bank] every faculty which it possesses, ... and that charter is a law of the United States. This being can . . . bring no suit, which is not authorized by a law of the United States." *Id.* at 823. He then asks: "Can a being, thus constituted, have a case which does not arise literally, as well as substantially, under the law?" *Id.*

[83] One narrow aspect of *Osborn*'s constitutional holding deserves brief mention. In support of that holding, Marshall emphasizes that the Bank "can . . . *bring* no suit" except as authorized by the law that created it. *See id.* (emphasis added). Later decisions interpreted *Osborn* as establishing that "a suit by *or against* a corporation . . . [created by an Act of Congress] is a suit arising under the laws of the United States" within the meaning of Article III. Pac. R.R. Removal Cases, 115 U.S. 1, 11 (1885) (emphasis added). The Court now reads *Osborn* as holding "that Article III's 'arising under' jurisdiction is broad enough to authorize Congress to confer federal-court jurisdiction over actions *involving* federally chartered corporations." Am. Nat'l Red Cross v. S.G., 505 U.S. 247, 264 (1992) (emphasis added).

[84] That appears to be Justice Frankfurter's reading of the case. *See* Textile Workers Union v. Lincoln Mills of Ala., 353 U.S. 448, 481 (1957) (Frankfurter, J., dissenting) ("The basic premise [of *Osborn*] was that every case in which a federal question might arise must be capable of being commenced in the federal courts, and when so commenced it might, because jurisdiction must be judged at the outset, be concluded there despite the fact that the federal question was never raised."); *see also id.* at 482 (declining to "perpetuat[e] a principle that permits assertion of original federal jurisdiction on the remote possibility of presentation of a federal question").

[85] Verlinden B.V. v. Bank of Nigeria, 461 U.S. 480 (1983).

[86] *Id.* at 493.

established sovereign immunity as the default rule.[87] Thus, "a suit against a foreign state under this Act necessarily raises questions of substantive federal law at the very outset"—namely, whether one of the statute's exceptions to sovereign immunity applies.[88] That was enough to support "arising under" jurisdiction under *Osborn*, and the Court did not have to go further. But it quoted a dissenting opinion by Justice Frankfurter that questioned the broadest reading of *Osborn*.[89]

Three years before *Osborn*, in *Cohens v. Virginia*,[90] the Court considered a challenge to its own authority to exercise appellate jurisdiction over a case originating in Virginia's state court. The defendants, convicted of a crime under state law, invoked what we would today call a defense of preemption: they "claimed the protection of an act of Congress."[91] When the Virginia court ruled against them, they sought review in the Supreme Court under section 25 of the Judiciary Act of 1789.[92] Section 25 authorized review of state-court decisions that rejected a claim under the Federal Constitution or laws.[93] But the State of Virginia insisted that whatever section 25 might say, "the constitution g[ave] no jurisdiction to the [Supreme Court] in the case."[94] The defendants responded that the Supreme Court could consider their appeal because it was a case "arising under" federal law within the meaning of Article III.[95] Virginia disagreed, taking the position that a case could "arise under" the Federal Constitution or federal law only if the Constitution or law was the basis for the claim of the party who had initiated the lawsuit.[96]

The State's interpretation is a plausible reading of the language of Article III,[97] but the Supreme Court rejected it as "too narrow."[98] The Court said that cases are defined by the rights of both parties, and a case "may truly be said

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[87] *See id.* at 496-97; 28 U.S.C. § 1604.

[88] *See Verlinden*, 461 U.S. at 493.

[89] *Id.* at 492 (quoting *Lincoln Mills*, 353 U.S. at 482 (Frankfurter, J., dissenting)); *see supra* note 84. The later decision in *Mesa v. California*, 489 U.S. 121 (1989), discussed *infra*, also casts doubt on the broad reading of *Osborn*.

[90] 19 U.S. (6 Wheat.) 264 (1821).

[91] *Id.* at 375.

[92] *See* Judiciary Act of 1789, § 25, 1 Stat. 73, 85.

[93] Under section 25, review was by writ of error, a form of mandatory jurisdiction. *See infra* Section III.A.

[94] *Cohens*, 19 U.S. (6 Wheat.) at 312 (argument of counsel).

[95] *Id.* at 345-46 (argument of counsel).

[96] *Id.* at 378-79 (Court opinion).

[97] Recall that Marshall himself, three years later, would write that a case "arises under" the Constitution or laws of the United States if a federal question "forms an ingredient of the *original cause*." *See supra* text accompanying note 76 (emphasis added). To be sure, Marshall did not say that that was the exclusive test for "arising under" jurisdiction. But the "arising under" language does suggest a focus on the case as presented by the party initiating the litigation.

[98] *Cohens*, 19 U.S. (6 Wheat.) at 379.

to arise under the constitution or a law of the United States, whenever *its correct decision depends* on the construction of either."[99] The *Cohens* definition thus supports the Supreme Court's jurisdiction to hear appeals from state courts when those courts have decided federal questions.[100]

Capacious though they are, neither the *Osborn* definition nor the one in *Cohens* would necessarily cover all of the cases in which Congress has authorized the *removal* of actions from state to federal court. But in a series of nineteenth-century decisions the Court made plain that Article III empowers Congress to authorize removal of any case in which a defense under federal law has been invoked, even though the federal issue may prove not to be dispositive.

The leading case is *Tennessee v. Davis*.[101] Davis was a federal revenue officer whose duties included seizing illicit distilleries. In the course of one such effort "he was assaulted and fired upon by a number of armed men."[102] He fired back, killing one of the men, and was prosecuted in state court for murder.[103] Davis removed the case to federal court under an Act of Congress (section 643 of the Revised Statutes) that allowed removal of any suit brought against a federal revenue officer on account of any act done "under color of" any revenue law.[104] The state challenged the constitutionality of the removal statute, but the Supreme Court, in an opinion by Justice William Strong, rejected the challenge.

The Court first construed the statute to provide for the removal of "criminal prosecutions in State courts . . . that are instituted for alleged violations of State laws, in which *defences* [sic] are *set up or claimed* under United States laws or authority."[105] The Court then held that the statute was "a constitutional exercise of the power vested in Congress" under the "arising under" clause of Article III and the Necessary and Proper Clause.[106] With respect to the former, the Court relied heavily on Marshall's opinion in *Cohens*; it also quoted from his opinion in *Osborn*.[107] The Court emphasized that in order to preserve the supremacy of federal judicial power, it is essential that the national government be able to

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[99] *Id.* (emphasis added). The Court noted that this interpretation was consistent with what "Congress seems to have intended" when it enacted section 25. *Id.*

[100] The Court considered and rejected the argument that the Supreme Court's appellate jurisdiction "cannot be exercised, in any case, over the judgment of a state court." *Id.* at 413; *see id.* at 418 (finding nothing in Article III "which would justify the withdrawal of a judgment rendered in a state court, on the constitution, laws, or treaties of the United States, from [the] appellate jurisdiction").

[101] 100 U.S. 257 (1880).

[102] *Id.* at 261. The description of *Davis* is taken in part from ARTHUR D. HELLMAN, DAVID R. STRAS, RYAN W. SCOTT, F. ANDREW HESSICK & DEREK T. MULLER, FEDERAL COURTS: CASES AND MATERIALS ON JUDICIAL FEDERALISM AND THE LAWYERING PROCESS 48 (5th ed. 2022).

[103] *Davis*, 100 U.S. at 260-61.

[104] *Id.* at 261; *see* 13 Rev. Stat. § 643 (1874).

[105] *Davis*, 100 U.S. at 262 (emphasis added).

[106] *Id.* at 262-64.

[107] *See id.* at 264.

"take control" "whenever and wherever a case arises under the Constitution and laws or treaties of the United States . . . whether it be civil or criminal, *in any stage of its progress*."[108] And it is no "objection [to the jurisdiction] that questions are involved which are not at all of a Federal character. If one of the latter exist, if there be a single such ingredient in the mass, it is sufficient."[109]

In another case decided on the same day, the Court applied the rule of *Tennessee v. Davis* to uphold the constitutionality of a different removal provision. The case was *Strauder v. West Virginia*,[110] a state prosecution for murder, and removal was based on the civil rights removal statute, section 641 of the Revised Statutes.[111] Section 641 authorized the removal of a civil suit or criminal prosecution by a defendant who is "denied, or cannot enforce, in the judicial tribunals of the state . . . any right secured to him by any law providing for the equal civil rights of citizens of the United States."[112] Strauder's removal petition alleged that the state had discriminated against him "in the selection of jurors, because of their color,"[113] in violation of the Equal Protection Clause and what is now 42 U.S.C. § 1981. The Court, again speaking through Justice Strong, held that section 641 was a constitutional exercise of power by Congress. Although the Court relied in part on section 5 of the Fourteenth Amendment, it also cited *Tennessee v. Davis* as "affirm[ing] the constitutional power of Congress to authorize [removal] . . . when the defence [sic] presents a Federal question, or when a right under the Federal Constitution or laws is involved."[114]

The Supreme Court's decisions have thus established that Congress can authorize federal courts to hear cases in which a federal question is: (1) a logical antecedent of the plaintiff's claim (whether or not contested); or (2) the basis of a defense actually raised (even though it may not be dispositive); or (3) the basis of the decision actually made (typically by a state court). The area of uncertainty involves Congress's power to authorize jurisdiction over cases in which a federal question is an element neither of the original cause nor of a defense, but in which a litigant is a member of a class that Congress seeks to protect (e.g., federal

[108] *Id.* at 266 (emphasis added).

[109] *Id.* at 270 (quoting The Mayor v. Cooper, 73 U.S. (6 Wall.) 247, 252 (1867)). The Court also referred with approval to the "full and instructive discussion" in a state-court case. *See* State v. Hoskins, 77 N.C. 530, 540-41 (1877) (upholding constitutionality of 13 Rev. Stat. § 643; citing *Cohens* and *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816) as "settl[ing] for all time" the power of Congress to authorize removal of suits involving "a Federal ingredient").

[110] 100 U.S. 303 (1880).

[111] 13 Rev. Stat. § 641. This provision was originally enacted, with narrower language, as section 3 of the Civil Rights Act of 1866. *See* Civil Rights Act of 1866, § 3, 14 Stat. 27; Georgia v. Rachel, 384 U.S. 780, 786-92 (1966) (chronicling the statute's complex history). The statute is today codified at 28 U.S.C. § 1443(1). *See infra* note 196 and accompanying text.

[112] 13 Rev. Stat. § 641.

[113] *Strauder*, 100 U.S. at 312.

[114] *Id.*

employees sued in state court) or the area is one in which Congress has taken an interest under an Article I grant of power (e.g., consumer protection or nuclear accidents).

Until the late twentieth century, Supreme Court case law cast little doubt on the breadth of Congress's authority to vest federal question jurisdiction in federal courts. However, the 1989 decision in *Mesa v. California*[115] makes clear that the power is not unlimited. In *Mesa*, the Court construed the statute that allows removal to federal court of suits brought against federal officers for acts done under color of their federal office (a modern-day version of the statute involved in *Tennessee v. Davis*). The Court held that the statute allows removal only if the officer alleges a federal defense to the state-law claim. The Court explained that if the statute were construed to allow grant of district-court jurisdiction simply because a federal officer is a defendant, it would "unnecessarily present grave constitutional problems."[116]

The Court's reasoning implies that to support "arising under" jurisdiction, a federal question must be present somewhere in the case. Thus, even more strongly than in *Verlinden*, the Court cast doubt on the broadest reading of *Osborn*.[117] However, as in *Verlinden*, the Court took pains not to reject (or endorse) any theory of so-called "protective jurisdiction"—the idea that the Constitution might allow Congress to vest "arising under" jurisdiction to protect federal interests even in the absence of a federal question.[118]

The Court may never have to confront the issue. Article III also authorizes several *party-based* heads of jurisdiction. With respect to these, as Chief Justice Marshall explained, "the jurisdiction depends entirely on the character of the *parties*," and "it is entirely unimportant what may be the subject of controversy."[119] Included here are so-called "diversity cases"—in the language of the Constitution, "controversies . . . between citizens of different states."[120]

[115] 489 U.S. 121 (1989).

[116] *Id.* at 137.

[117] In *Mesa*, the party seeking to invoke the federal judicial power was a federal employee and the petition for removal asserted that "the state charges arose from an accident involving defendant which occurred while defendant was on duty and acting in the course and scope of her employment with the Postal Service." *Id.* at 123. Yet even with those federal connections, the Government's statutory argument posed "grave constitutional problems" under Article III. *Id.* at 137.

[118] *Id.* at 137-38 (noting that in *Verlinden*, the Court found no need to adopt a theory of "protective jurisdiction" and saying that it saw no "need for doing so here"). *See generally* Textile Workers Union v. Lincoln Mills of Ala., 353 U.S. 448, 473-77 (1957) (Frankfurter, J., dissenting) (discussing theories of "protective jurisdiction").

[119] Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 378 (1821) (emphasis added).

[120] U.S. CONST. art. III, § 2. Also included are "controversies to which the United States shall be a party" and controversies "between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." *Id.* The latter provision is known as the "alienage jurisdiction." *See* JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure Ltd., 536 U.S. 88, 94-95

The Court has held that this language requires only "minimal diversity," i.e., Congress can vest the jurisdiction "so long as *any two adverse parties* are not co-citizens."[121] In recent decades, Congress has used minimal diversity and the party-based heads of jurisdiction to "accomplish much of what it might otherwise seek to achieve through protective jurisdiction."[122]

It is important to emphasize that the broad construction of the "arising under" language of Article III has no bearing on the scope of the statutory grant of federal question jurisdiction in 28 U.S.C. § 1331, even though the statute uses language identical to that of the Constitution. The Court has read the statutory jurisdiction far more narrowly than the grant in Article III. The most important limitations will be discussed later in this Article; for now, it is sufficient to note that neither a federal defense (as in *Cohens*) nor a "logical antecedent" (as in *Osborn*) provides a basis for district court jurisdiction under § 1331. Rather, the federal question must be, at a minimum, a necessary element of a "well pleaded complaint"—the plaintiff's claim for relief.[123]

Finally, a few words about what is encompassed within a "case" that arises under federal law. *Osborn* established that when a case presents a federal question sufficient to satisfy the requirements of Article III, the jurisdiction extends to the "*whole* case."[124] This means that the federal court will have authority to decide other issues in the case, whether state or federal.[125] In the 1966 decision in *United Mine Workers v. Gibbs*,[126] the Court explained that this "supplemental" jurisdiction exists whenever "the relationship between [the federal] claim and the [nonfederal] claim permits the conclusion that the entire action before the court comprises but *one constitutional 'case*.'"[127] That in turn requires that the federal and nonfederal claims "derive from a common nucleus of operative fact" and "are such that [the plaintiff] would ordinarily be expected

(2002). The party-based heads of jurisdiction will be referenced only occasionally in this Article.

[121] State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523, 531 (1967) (emphasis added). In contrast, the identical language in the jurisdictional statute is construed to require *complete* diversity, i.e., no party on one side may be a co-citizen of any party on the other side. *See id.* at 530-31 (citing Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267, 267 (1806)).

[122] James E. Pfander, *Protective Jurisdiction, Aggregate Litigation, and the Limits of Article III*, 95 CALIF. L. REV. 1423, 1447 (2007); *see also* 28 U.S.C. § 4103 (2010) (allowing removal, based on minimal diversity, of actions to enforce certain foreign judgments for defamation).

[123] *See* Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149, 152 (1908); *see also* Gunn v. Minton, 568 U.S. 251, 257-58 (2013) (summarizing elements of the statutory "arising under" jurisdiction). For brief discussion, see *infra* Section IV.B.

[124] *See* Osborn v. Bank of the U.S., 22 U.S. (9 Wheat.) 738, 822 (1824) (emphasis added).

[125] *See id.* (noting that other questions may involve "principles unconnected with [federal] law").

[126] 383 U.S. 715 (1966).

[127] *Id.* at 715 (emphasis added). At the time of *Gibbs*, the concept was referred to as "pendent jurisdiction." *Id.*

to try them all in one judicial proceeding."[128] The *Gibbs* approach to supplemental jurisdiction was codified by Congress in 1990.[129]

As the just-quoted language makes clear, the *Gibbs* test is addressed to trial-court jurisdiction. In 1875, in *Murdock v. City of Memphis*,[130] the Court heard argument on whether the Constitution allows the Supreme Court, in reviewing state-court judgments resting on federal law, to decide "all the questions presented by the record which are necessary to a final judgment or decree."[131] The issue arose because Congress, in 1867, reenacted section 25 of the Judiciary Act of 1789 but omitted a sentence that explicitly limited the Court's jurisdiction to the federal questions presented by the record.[132] The Court held that the 1867 Act did not enlarge the jurisdiction to include the nonfederal questions;[133] there was thus no need to reach the constitutional issue.[134] *Murdock*'s statutory holding remains good law,[135] and the constitutional issue remains unresolved.[136] At the same time, the Court has repeatedly exercised its authority to "review and set aside a state supreme court's interpretation of state law . . . when state courts use their interpretive powers over state law to thwart litigants' efforts to vindicate their federal rights."[137]

III. EVOLUTION OF THE STATUTORY JURISDICTION

From the Marshall Court onwards, as Part II has shown, the Supreme Court has given a broad construction to the "arising under" language of Article III. However, from 1789 to the present, Congress has been selective in vesting the judicial power that the Court's decisions would allow. This Part briefly describes

[128] *Id.* The Court noted a threshold requirement that the federal claim "have substance sufficient to confer subject matter jurisdiction on the court." *Id.*

[129] Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 310, 104 Stat. 5089, 5113-14 (codified as 28 U.S.C. § 1367); *see* H.R. REP. NO. 101-734, at 29 n.15 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 6860, 6875. The statute allows district courts to decline to exercise supplemental jurisdiction under specified circumstances. *See* 28 U.S.C. § 1367(c).

[130] 87 U.S. (20 Wall.) 590 (1875).

[131] *Id.* at 616.

[132] *See id.* at 618.

[133] *See id.* at 618-33.

[134] *See id.* at 633.

[135] *See* Moore v. Harper, 600 U.S. 1, 34 (2023) ("State courts are the appropriate tribunals . . . for the decision of questions arising under their local law, whether statutory or otherwise." (quoting *Murdock*, 87 U.S. (20 Wall.) at 626)).

[136] *See* Jonathan F. Mitchell, *Reconsidering* Murdock*: State-Law Reversals as Constitutional Avoidance*, 77 U. CHI. L. REV. 1335, 1343-45 (2010) (arguing that the Constitution does allow the Supreme Court to decide state-law issues in cases presenting federal questions).

[137] *Id.* at 1356; *see also Moore*, 600 U.S. at 34 (stating that "where the exercise of federal authority or the vindication of federal rights implicates questions of state law, [the Supreme Court has] an obligation to ensure that state court interpretations of that law do not evade federal law").

the deployment of the jurisdiction historically and under current law. Section A chronicles the main currents of the legislation starting with the Judiciary Act of 1789. Section B first outlines the key features of the "general" federal question jurisdiction; it then examines the many ways in which Congress has departed from that model in its specialized grants.[138]

Two caveats are in order at the outset. First, implicit in this account is the assumption that the "arising under" jurisdiction authorized by Article III is not self-executing, and that federal courts may exercise that jurisdiction only to the extent conferred by an Act of Congress. That proposition has been questioned,[139] but the Supreme Court and Congress have taken it as a given,[140] and I do so also.[141]

Second, just as Congress has never vested the full measure of the "arising under" jurisdiction allowed by the Supreme Court's decisions interpreting Article III, so the Supreme Court, in interpreting jurisdictional legislation, has often imposed limitations not inherent in the statutory language.[142] Some of these limitations will be discussed below and in Part IV.

A. *The Main Currents of Jurisdictional Legislation*

In the first judiciary act, the Judiciary Act of 1789, Congress created a system of federal trial courts,[143] but it did not authorize those courts to hear the general

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[138] For a more detailed account, see RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 20-47, 461-63, 779-83, 849-50 (7th ed. 2015) [hereinafter HART & WECHSLER].

[139] *See* David R. Dow, *Is the "Arising Under" Jurisdictional Grant in Article III Self-Executing?*, 25 WM. & MARY BILL RTS J. 1, 1 (2016) ("I will argue this widespread agreement rests on a faulty understanding of constitutional history.").

[140] *See, e.g.*, Merrell Dow Pharms., Inc. v. Thompson, 478 U.S. 804, 807 (1986) (stating that "arising under" grant "is not self-executing"); Richard D. Freer, *Of Rules and Standards: Reconciling Statutory Limitations on "Arising Under" Jurisdiction*, 82 IND. L.J. 309, 312 (2007) (stating that "the federal judicial power created in Article III is not self-executing, and Congress must vest it in the lower federal courts by statute").

[141] The proposition applies equally (albeit indirectly) to the Supreme Court. *See* Durousseau v. United States, 10 U.S. (6 Cranch) 307, 314 (1810) (Marshall, C.J.) (holding that when Congress affirmatively vests appellate jurisdiction in the Supreme Court, this is understood "to imply a negative on the exercise of such appellate power as is not comprehended within it").

[142] *See* Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning, 578 U.S. 374, 389-90 (2016) (noting that Court's decisions reflect a "deeply felt and traditional reluctance . . . to expand the jurisdiction of federal courts through a broad reading of jurisdictional statutes").

[143] The Judiciary Act of 1789 created two sets of trial courts, district courts and circuit courts. Judiciary Act of 1789, ch. 20, §§ 3-4, 1 Stat. 73, 73-74. For present purposes, the allocation of jurisdiction between the two sets of courts can be ignored. The circuit courts were not abolished until 1911.

run of cases arising under the federal Constitution, laws, or treaties.[144] Nor did it authorize removal from state to federal court based on a federal question. Rather, in section 25 it authorized the Supreme Court to review final judgments of state courts in cases where the state court rejected a claim under federal law.[145] Review was by writ of error, a form of mandatory jurisdiction.

The 1789 Act thus established a system under which federal questions would generally be litigated in the first instance in state courts, with a national tribunal playing a role only upon completion of the state-court proceedings, and then only if the state-court decision was adverse to the federal claim. That system remained in place for the first eight decades of the nation's history.[146]

It may seem odd that the first Congress, composed of many of the same men who took part in the drafting of the Constitution, would have implemented the federal question jurisdiction so narrowly. But at that time there were few federal rights to be enforced, so Supreme Court review might well have seemed adequate to protect federal interests. As for the limitation in section 25 to cases *rejecting* federal claims, the Framers were concerned that state courts would "make decisions . . . in *derogation* to the [national] government,"[147] not that they would "over-read" the obligations of federal law.[148]

Change came in the aftermath of the Civil War. As Felix Frankfurter and James Landis put it, "[n]ationalism was triumphant; in national administration

[144] *See* William R. Casto, *The First Congress's Understanding of Its Authority over the Federal Courts' Jurisdiction*, 26 B.C. L. REV. 1101, 1116-17 (1985). One tiny subset of private civil actions was covered by section 9 of the Act, which gave federal trial courts jurisdiction over "all causes where an alien sues for a tort only in violation of . . . a treaty of the United States." *See* Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76-77. Section 9 also authorized trial-court jurisdiction over criminal and quasi-criminal cases arising under the laws of the United States. *See id.*

[145] Judiciary Act of 1789, § 25, 1 Stat. 73, 85.

[146] There were exceptions to this general approach. Early on, Congress authorized suits in federal trial courts for particular kinds of federal claims—for example, those arising under federal patent laws. *See, e.g.*, Patent Act of 1793, ch. 11, § 5, 1 Stat. 318, 322 (authorizing suits for patent infringement to be brought in federal circuit court). And federal questions could be litigated in federal trial court if there was some other basis for jurisdiction—in particular, diversity of citizenship. A prominent example is *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810) (holding, in diversity case, that Georgia statute violated the Contracts Clause). *See generally* Ann Woolhandler, *The Common Law Origins of Constitutionally Compelled Remedies*, 107 YALE L.J. 77, 80 (1997) (concluding, after an extensive examination of cases, that "[t]hroughout the nineteenth century, both before and after Reconstruction, the [Supreme] Court saw diversity jurisdiction as an appropriate vehicle to raise federal questions, sometimes providing an expansive scope to diversity explicitly to accommodate this use of it").

[147] 10 DOC. HIST., *supra* note 57, at 1451 (remarks of Edmund Randolph at the Virginia ratifying convention) (emphasis added).

[148] *See* Preble Stolz, *Federal Review of State Court Decisions of Federal Questions: The Need for Additional Appellate Capacity*, 64 CALIF. L. REV. 943, 971 (1976) (noting that the "problem [of over-reading] has not always been regarded as important").

was sought its vindication."[149] The Fourteenth Amendment created new, broadly delineated rights against state official action, and Congress passed three major statutes enlarging the jurisdiction of federal trial courts to enforce those and other federal rights.

- First, in 1867 Congress amended the federal habeas corpus statute to make the writ available to "any person . . . restrained of his or her liberty" by *state* authorities in violation of federal law.[150]
- Next, section 1 of the Civil Rights Act of 1871 created a cause of action for any person deprived, by someone acting under color of state law, of rights "secured by" the Federal Constitution or laws.[151] The Act also gave federal courts jurisdiction to hear such claims.[152] The remedial provision is now codified as 42 U.S.C. § 1983, and the cause of action is generally referred to as "section 1983."
- Finally and most broadly, the Judiciary Act of 1875 authorized federal trial courts to hear "all suits of a civil nature . . . arising under the Constitution," laws or treaties of the United States.[153] Such cases, if filed in state court, could be removed by either party to federal court.[154] Both provisions were subject to a requirement that the amount in controversy exceed $500.[155] If, after removal, the federal court found that jurisdiction was lacking, it was required to remand the case to state court.[156] Orders of remand were made "reviewable by the Supreme Court on writ of error or appeal, as the case may be."[157]

[149] FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM 64 (1928).

[150] Habeas Corpus Act of 1867, ch. 28, 14 Stat. 385, 385. Although the Act did not specify its applicability to persons in state custody, it provided that the new authority was "in addition to the authority already conferred," and section 14 of the Judiciary Act of 1789 made the writ available to persons in *federal* custody. *See* Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81-82.

[151] Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13, 13.

[152] *Id.* The remedial and jurisdictional provisions were separated when the statutes were revised in 1874. *See* Maine v. Thiboutot, 448 U.S. 1, 6-7 (1980). The jurisdictional provision is now codified as 28 U.S.C. § 1343(3).

[153] Judiciary Act of 1875, ch. 137, § 1, 18 Stat. 470, 470.

[154] *Id.* § 2.

[155] *Id.* §§ 1-2 (requiring that the "matter in dispute exceeds, exclusive of costs," $500).

[156] *Id.* § 5, 18 Stat. at 472. If jurisdiction was found to be lacking in a case originally filed in federal court, the court was required to dismiss. *Id.*

[157] *Id.* Orders of dismissal were similarly reviewable. *Id.* The pre-1875 treatment of review of remand orders is confused, but Professor Rhonda Wasserman's research has shown that such review—by the Supreme Court—did occur. *See* Rhonda Wasserman, *Rethinking Review of Remands: Proposed Amendments to the Federal Removal Statute*, 43 EMORY L.J. 83, 90-94 (1994) (chronicling inconsistent Supreme Court decisions).

The consequence of these enactments, was, as Frankfurter and Landis famously wrote, that the federal courts "became the primary and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States."[158]

Two years almost to the day after the 1875 Act, the Compromise of 1877 resolved the disputed presidential election of 1876 and brought an end to Reconstruction.[159] A decade later, the Judiciary Act of 1887 cut back on the jurisdiction granted in 1875.[160] The amount-in-controversy requirement was raised to $2,000.[161] Henceforth, only defendants could remove cases from state to federal court.[162] The scope of removal jurisdiction was linked to that of original jurisdiction.[163] And, in separate provisions, the 1887 Act not only repealed the 1875 Act's authorization of appellate review of remand orders;[164] it provided explicitly that "no appeal or writ of error from [an order of remand] shall be allowed."[165] Overall, the backsliding in the 1887 Act was so substantial that contemporary commentators viewed it as "reactionary" and perhaps even "confederate" legislation.[166] It is striking that although the 1875 Act is celebrated

[158] FRANKFURTER & LANDIS, *supra* note 149, at 65. Frankfurter and Landis were speaking about the 1875 Act, but the comment applies equally to the three statutes taken together.

[159] *See* C. VANN WOODWARD, REUNION AND REACTION: THE COMPROMISE OF 1877 AND THE END OF RECONSTRUCTION (Oxford Univ. Press 1991) (1951).

[160] Judiciary Act of 1887, ch. 373, 24 Stat. 552, *corrected by* Act of Aug. 13, 1888, ch. 866, 25 Stat. 433.

[161] *See id.* § 1, 24 Stat. at 552.

[162] *See id.* § 2, 24 Stat. at 553.

[163] The Act itself was arguably ambiguous in linking removal to original jurisdiction, but that is the reading adopted by the Supreme Court. *See infra* note 182.

[164] § 6, 24 Stat. at 555.

[165] *Id.* § 2, 24 Stat. at 553.

[166] *See* Wasserman, *supra* note 157, at 99 n.71 (quoting contemporary commentators). The "confederate" characterization finds some support in a colloquy on the Senate floor in May 1882. The Senate was considering a bill to create an intermediate appellate court for the federal system. Senator Benjamin F. Jonas (D., La.) proposed an amendment to curtail the jurisdiction of the trial courts. *See* 13 CONG. REC. 3546 (1882). Sen. Jonas had served as an officer in the Confederate States Army before going into politics in post-war Louisiana. *Appendix U: In Memoriam*, *in* REPORT OF THE LOUISIANA BAR ASSOCIATION FOR 1912-1913, LA. BAR ASS'N 398, 401 (1913); *JONAS, Benjamin Franklin*, BIOGRAPHICAL DIRECTORY OF THE U.S. CONG., https://bioguide.congress.gov/search/bio/J000204 (last visited Dec. 11, 2024). Senator William P. Frye (R., Me.) argued against taking up the amendment. In the course of his remarks, he made a comment suggesting that politics had something to do with how Senators and Representatives voted on bills to cut back on federal court jurisdiction. When Sen. Jonas questioned the imputation, Sen. Frye responded that Sen. Jonas "knows as . . . well as I do . . . that the provisions conferring new jurisdiction upon the United States Courts have been ingrafted upon our law through and following the war; and, therefore, it is perfectly natural that Senators and Representatives . . . from the South should be the Senators and Representatives desiring the repeal of those sections. . . . I have never heard Senators and

as the foundation of modern federal question jurisdiction,[167] the law of *removal* based on a federal question can be traced primarily to the 1887 Act and the Supreme Court's 1894 decision interpreting that law.[168]

In the decades that followed, Congress moved in opposing directions. The jurisdictional amount was raised twice—to $3,000 in 1911 and to $10,000 in 1958.[169] But the dominant trend was to create "myriad new federal rights and [to enact] specific jurisdictional provisions authorizing the enforcement of these rights in the national courts, ordinarily without regard to jurisdictional amount."[170] Finally, in 1980, Congress eliminated the amount-in-controversy requirement in the general federal question statute.[171]

Congress also altered the arrangements governing Supreme Court review of federal questions litigated in state courts. In 1914, Congress expanded the Court's jurisdiction to encompass cases in which the state court *upheld* a claim of federal right as well as those in which the state court rejected the federal claim.[172] Review of such cases was by certiorari—i.e. discretionary rather than mandatory. Subsequently, by stages, Congress shifted to certiorari as the mode of review for all state-court cases, including those that rejected federal claims.[173]

A similar trajectory can be seen in legislation governing Supreme Court review of federal question cases litigated in the lower federal courts. Initially all such jurisdiction was mandatory.[174] The Evarts Act of 1891 created intermediate appellate courts and gave those courts mandatory appellate jurisdiction over some categories of federal question cases.[175] With respect to those cases, further review by the Supreme Court was by certiorari.[176] A generation later, the "Judges' Bill" expanded the certiorari jurisdiction to almost all categories of

Representatives from the North demanding the repeal of those sections." 13 CONG. REC. 3639 (1882).

167 *See, e.g.*, Zwickler v. Koota, 389 U.S. 241, 246-47 (1967).

168 *See infra* note 183.

169 Judicial Code of 1911, Pub. L. 61-475, § 24, 36 Stat. 1087, 1091; Act of July 25, 1958, Pub. L. No. 85-554, 72 Stat. 415, 415.

170 HART & WECHSLER, *supra* note 138, at 783.

171 Federal Question Jurisdictional Amendments Act of 1980, Pub. L. 96-486, § 1, 94 Stat. 2369; *see also* H.R. REP. NO. 96-1461, at 1 (1980), *as reprinted in* 1980 U.S.C.C.A.N. 5063, 5063 (noting that the legislation "resolves the anomalous situation faced by persons who, although their Federal rights have been violated, are barred from a Federal forum solely because they have not suffered a sufficient economic injury").

172 Act of Dec. 23, 1914, ch. 2, 38 Stat. 790, 790.

173 The final step was taken in the Act of June 27, 1988, Pub. L. No. 100-352, 102 Stat. 662, 662. *See* Bennett Boskey & Eugene Gressman, *The Supreme Court Bids Farewell to Mandatory Appeals*, 121 F.R.D. 81, 95-96 (1988).

174 *See* HART & WECHSLER, *supra* note 138, at 24. Not all federal question decisions of the lower courts were reviewable, however.

175 Evarts Act of 1891, ch. 517, §§ 2, 5-6, 26 Stat. 826, 827-28.

176 *See id.* § 6, 26 Stat. at 828.

federal question cases.[177] Legislation in 1988 completed the reform, leaving only a small residue of federal question cases within the Court's mandatory jurisdiction.[178]

B. *The "General" Jurisdiction and the Specialized Grants*

The Act of 1875, now codified in 28 U.S.C. § 1331, vested the federal trial courts with a "general" jurisdiction over cases "arising under" the federal Constitution, laws, and treaties.[179] Almost from the beginning, that jurisdiction has been characterized by three key features, generated by a combination of statutory language and judicial interpretation:

- The original jurisdiction of the trial courts is governed by the well-pleaded complaint rule. Under that rule, the jurisdiction is available "only when the plaintiff's statement of his own cause of action shows that it is based upon" federal laws, treaties, or the Constitution.[180] A federal defense, even if anticipated by the plaintiff's complaint, will not suffice.[181]
- The jurisdiction is concurrent with that of the state courts.[182] The plaintiff thus has the option of choosing between federal and state court for pursuit of his or her federal claims.

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[177] *See* FRANKFURTER & LANDIS, *supra* note 149, at 280.

[178] *See generally* Boskey & Gressman, *supra* note 173. The residue includes some cases under the Voting Rights Act, reapportionment cases, and occasional special statutes for new legislation that Congress thought should get expedited review. *See* Michael E. Solimine, *The Three-Judge District Court in Voting Rights Litigation*, 30 U. MICH. J.L. REFORM 79, 104-09 (1996) [hereinafter Solimine, *Three-Judge District Court*]; Michael E. Solimine, *The Fall and Rise of Specialized Federal Constitutional Courts*, 17 U. PA. J. CONST. L. 115, 129-31 (2014) [hereinafter Solimine, *Fall and Rise*].

[179] *See, e.g.*, Merrill Lynch, Pierce, Fenner, & Smith Inc. v. Manning, 578 U.S. 374, 378 (2016) (referring to "the general federal question jurisdiction statute, § 1331"). This "general" federal question jurisdiction is distinct from the general *personal* jurisdiction considered in *Daimler AG v. Bauman*, 571 U.S. 117 (2014).

[180] Louisville & Nashville R.R. v. Mottley, 211 U.S. 149, 152 (1908). *Mottley* traced the origin of the rule to *Metcalf v. City of Watertown*, 128 U.S. 586 (1888), decided little more than a decade after the establishment of the jurisdiction. Later decisions established that there are two ways of satisfying the well-pleaded complaint rule. *See infra* Section IV.B.

[181] *See Mottley*, 211 U.S. at 153 (noting that the Court had rejected jurisdiction in a case where the plaintiff "alleged, for the purpose of showing jurisdiction . . . that the defendant would set up in defense certain laws of the United States").

[182] This was explicit in the 1875 Act and the 1887 revision. *See* Judiciary Act of 1875, ch. 137, § 1, 18 Stat. 470, 470 (providing that federal courts "shall have original cognizance, concurrent with the courts of the several States, of" specified suits); Judiciary Act of 1887, ch. 373, § 1, 24 Stat. 552, 552, *corrected by* Act of Aug. 13, 1888, ch. 866, § 1, 25 Stat. 433, 433-34 (same). The proviso was dropped in the Judicial Code of 1911, probably because Congress recognized that it was unnecessary. Judicial Code of 1911, ch. 231, § 24, 36 Stat.

- If the plaintiff chooses the state forum, the defendant may override that choice by removing the case to federal court. Removal in the general run of cases is governed by what is now 28 U.S.C. § 1441(a). Removal is permissible if—and only if—the case satisfies the requirements for original jurisdiction, including compliance with the well-pleaded complaint rule.[183] If the district court finds that the requirements of § 1331 are not satisfied, it must remand the case to state court.[184] An order remanding the case for want of jurisdiction under § 1331 "is not reviewable on appeal or otherwise."[185]

But § 1331 and § 1441(a) do not stand alone. Over the decades, Congress has enacted *special* jurisdictional statutes that depart from the § 1331/§ 1441(a) model in one respect or another. Comprehensive discussion is beyond the scope of this Article, but it will be useful to consider some of the ways in which Congress has expanded, contracted, or modified the federal question jurisdiction otherwise available under § 1331 and § 1441(a).[186]

First, Congress has sometimes rejected concurrent jurisdiction and provided instead that certain kinds of federal question cases may be brought *only* in federal district court.[187] An important example is 28 U.S.C. § 1338, which gives district courts jurisdiction over cases arising under the patent, copyright, and

1087, 1091; *see* Tafflin v. Levitt, 493 U.S. 455, 459 (1990) (referring to the "deeply rooted presumption in favor of concurrent state court jurisdiction").

183 The requirement of compliance with the well-pleaded complaint rule as a condition of removal derives from the Supreme Court's decision in *Tennessee v. Union & Planters' Bank*, 152 U.S. 454 (1894), in which the Court interpreted the 1887 Act as compelling that construction. Professor Michael Collins has argued forcefully that the Court "probably got it wrong when it held that Congress had grafted the [well-pleaded complaint] rule onto defendant removal of cases raising federal defenses." Michael G. Collins, *The Unhappy History of Federal Question Removal*, 71 IOWA L. REV. 717, 757 (1986).

184 28 U.S.C. § 1447(c) ("If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.").

185 *Id.* § 1447(d). The Supreme Court has recognized exceptions to the seemingly absolute language of § 1447(d), but none of them allow review of remand orders squarely based on a finding that subject matter jurisdiction is lacking. *See* Kircher v. Putnam Funds Tr., 547 U.S. 633, 640 (2006) (reiterating that any remand order issued on the ground of lack of jurisdiction "is immunized from all forms of appellate review"). Section 1447(d) itself contains exceptions for cases removed under § 1442, the federal officer removal statute, and § 1443, the civil rights removal statute. *See* discussion *infra* this Section.

186 For a detailed critique of the Supreme Court's jurisprudence defining the general federal question jurisdiction of the district courts, see Robert J. Pushaw, Jr., *A Neo-Federalist Analysis of Federal Question Jurisdiction*, 95 CALIF. L. REV. 1515 (2007).

187 *See Tafflin*, 493 U.S. at 471 (Scalia, J., concurring) (cataloguing statutes vesting exclusive jurisdiction in federal courts).

plant variety protection laws and specifies that "[n]o State court shall have jurisdiction over any claim for relief arising under" those laws.[188]

Second, Congress has authorized removal of cases that would be barred from original jurisdiction by the well-pleaded complaint rule. We have already encountered the most prominent example of this approach, the federal officer removal statutes.[189] The current codification, 28 U.S.C. § 1442(a), allows removal by federal officers of state-law actions brought in state court "for or relating to any act under color of [the federal] office," as long as the removing defendant asserts a federal defense.[190] Removal is also permitted, under the same terms, by "any person *acting under*" a federal officer.[191] This language allows removal by some defendants in the private sector—for example, corporations who invoke the judicially created "government contractor defense" in suits seeking damages under state tort law.[192] In 2011, Congress amended Title 28 to provide that an order remanding a case "removed pursuant to section 1442," unlike cases removed pursuant to § 1441, *is* reviewable.[193] The Supreme Court has held that if a defendant invokes § 1442 and also other bases for removal—for example, § 1441—and the district court rejects all of the proffered grounds, the amended statute "authorizes a court of appeals to review each and every one of them."[194]

A narrower example of federal defense removal is the Securities Litigation Uniform Standards Act of 1998 (SLUSA), which first preempts certain state-law class actions alleging fraud in the purchase or sale of securities, then provides that such actions, when brought in state court, "shall be removable" to

[188] *See* 28 U.S.C. § 1338(a). The statute also gives the district court original jurisdiction over trademark claims, but it does not make that jurisdiction exclusive.

[189] *See supra* Part II. The first such statute was enacted in 1815. *See* HART & WECHSLER, *supra* note 138, at 853 & n.6.

[190] 28 U.S.C. § 1442(a). This is a simplified summary of a complex statute. As already noted, the language of the statute does not explicitly require the assertion of a federal defense, but the Supreme Court found the requirement implicit based on constitutional concerns. *See supra* Part II.

[191] 28 U.S.C. § 1442(a) (emphasis added).

[192] *See, e.g.*, Latiolais v. Huntington Ingalls, Inc., 951 F.3d 286 (5th Cir. 2020) (en banc); *see also* Boyle v. United Techs. Corp, 487 U.S. 500 (1988) (recognizing government contractor defense as a matter of federal common law). Outside the government contractor context, the "acting under" language has been construed narrowly. *See, e.g.*, Watson v. Philip Morris Cos., 551 U.S. 142, 152 (2007) (holding that "precedent and statutory purpose make clear that the private person's 'acting under' must involve an effort to *assist*, or to help *carry out*, the duties or tasks of the federal superior").

[193] Removal Clarification Act of 2011, Pub. L. No. 112-51, § 2, 125 Stat. 545, 545-46 (2011).

[194] BP p.l.c. v. Mayor of Baltimore, 593 U.S. 230, 237 (2021). This holding also applies to cases removed under the civil rights removal statute, 28 U.S.C. § 1343. *See infra* note 196.

federal court.[195] An example of potentially broad applicability is the civil rights removal statute, 28 U.S.C. § 1443, but Supreme Court interpretations have reduced that statute to a near nullity.[196]

In the realm of intellectual property, Congress has departed further from the rules that ordinarily limit removal based on a federal question. Under 28 U.S.C. § 1454, a state-court case in which "*any party* asserts a claim for relief arising under any Act of Congress relating to patents, plant variety protection, or copyrights" may be removed to federal court.[197] This means that a case may be removed based on a counterclaim—an exercise of jurisdiction that would be barred by the well-pleaded complaint rule.[198] Section 1454 also provides that "the action may be removed by any party," not just the defendant.[199]

Third, Congress has also taken the opposite approach—prohibiting removal by defendants of suits that could be brought in district court under § 1331 by plaintiffs. That is the arrangement that now holds for personal injury and wrongful death actions under the Federal Employers' Liability Act (FELA), applicable to railroad employees, and the Jones Act, applicable to seamen.[200]

Fourth, preemption is ordinarily a federal defense that, under the well-pleaded complaint rule, will not support either original or removal jurisdiction.[201] However, the Supreme Court has held that Congress, in enacting a federal cause of action statute, may "*completely* pre-empt"—i.e., *displace*—any state cause of action that comes within its scope.[202] Sometimes the displacement is explicit in the statute;[203] more commonly, the Court has inferred the displacement from

[195] *See* Cyan, Inc. v. Beaver Cnty. Emps. Ret. Fund, 583 U.S. 416, 422-24 (2018) (summarizing preemption and removal provisions).

[196] *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION 767-81 (5th ed. 2006). That is not to say that § 1443 can never be invoked successfully. In October 2024, the Fourth Circuit, reversing the district court's order of remand, found that a suit filed by a political party against the state board of elections was properly removed under the "refusal" clause of § 1443. *See* Repub. Nat'l Comm. v. N.C. State Bd. of Elections, 120 F.4th 390, 405-08 (4th Cir. 2024) (holding that a provision of the Civil Rights Act of 1964 and a section of the National Voter Registration Act of 1993 are "law[s] providing for equal rights" within the meaning of 28 U.S.C. § 1443(2) and thus support removal). The order of remand was reviewable because § 1443 is a statutory exception to the general prohibition on review of remand orders. *See* 28 U.S.C. § 1447(d) (2011).

[197] 28 U.S.C. § 1454(a) (emphasis added).

[198] *See* Holmes Grp., Inc. v. Vornado Air Circulation Sys., Inc., 535 U.S. 826 (2002). Section 1454 was enacted as part of legislation designed to override *Holmes Group*. *See* H.R. REP. NO. 109-407 (2006); H.R. REP. NO. 112-98, at 81 (2011).

[199] 28 U.S.C. § 1454(b)(1).

[200] *See* 28 U.S.C. § 1445(a) (FELA); 46 U.S.C. app. § 688 (Jones Act). For additional examples, see HART & WECHSLER, *supra* note 138, at 850 n.2.

[201] *See* Caterpillar Inc. v. Williams, 482 U.S. 386, 393 (1987).

[202] *See* Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 63 (1987) (emphasis added).

[203] *See, e.g.*, Maglioli v. Alliance HC Holdings LLC, 16 F.4th 393, 407-10 (3d Cir. 2021) (discussing Public Readiness and Emergency Preparedness Act).

text, legislative history, and precedent.[204] Any complaint asserting a claim within the scope of the displacement "necessarily 'arises under' federal law" and thus may be brought in federal court—or removed there—even if the complaint makes no mention of any federal matter.[205]

Fifth, in some regulatory statutes, Congress has given federal district courts exclusive jurisdiction "of all suits in equity and actions at law *brought to enforce* any liability or duty created by" the statute.[206] The Supreme Court has held that this "brought to enforce" language "mean[s] exactly the same thing" as the "arising under" language in jurisdictional grants like 28 U.S.C. § 1331.[207] Thus, all of the limitations on jurisdiction developed in § 1331 cases also apply to the "brought to enforce" statutes.[208]

Some variants are sui generis. Two are particularly important. The Foreign Sovereign Immunity Act (FSIA), discussed earlier, specifies a class of defendants—foreign states—and authorizes suits against those defendants to be brought in federal court (or removed there) if the case comes within an exception, defined by federal law, to sovereign immunity.[209] It does not matter whether the plaintiff's claim is created by federal or state law. The Bankruptcy Act vests broad jurisdiction in the district courts over cases "under" (not "arising under") the bankruptcy title of the United States Code as well as "civil proceedings . . . arising in or *related* to cases under [the bankruptcy title]."[210] The "related to" language has been construed expansively; in some instances, the jurisdiction can even extend to "state law claims asserted by one third-party against another."[211]

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[204] *See* Beneficial Nat'l Bank v. Anderson, 539 U.S. 1 (2003) (discussing the Labor Management Relations Act, the Employee Retirement Income Security Act (ERISA), and the National Bank Act).

[205] *See id.* at 7-8 (internal quotation omitted). The Supreme Court views complete preemption as a "corollary of the well-pleaded complaint rule," not an exception to it. *See Metro. Life*, 481 U.S. at 63. For a lucid exposition of the complete preemption doctrine, see *Maglioli*, 16 F.4th at 406-11.

[206] *See, e.g.*, 15 U.S.C. § 78aa(a) (originally enacted as part of the Securities Exchange Act of 1934, Pub. L. No. 73-291, 48 Stat. 881, 992) (emphasis added).

[207] Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning, 578 U.S. 374, 384-85 (2016) (internal quotation omitted).

[208] *See id.* at 384 n.4.

[209] *See* 28 U.S.C. § 1330(a) (vesting jurisdiction); *id.* §§ 1605-07 (defining exceptions to immunity); *supra* Part II. If the case does not come within one of the exceptions, the suit cannot be brought in any court, state or federal. *See* 28 U.S.C. § 1604.

[210] *See* 28 U.S.C. § 1334 (emphasis added); HART & WECHSLER, *supra* note 138, at 794-95.

[211] *In re* Farmland Indus., Inc., 567 F.3d 1010, 1020 (8th Cir. 2009); *see also* Celotex Corp. v. Edwards, 514 U.S. 300, 307-08 (1995) (noting that Congress's "choice of words suggests a grant of some breadth"). The recent Supreme Court decision in *Harrington v. Purdue Pharma L.P.*, 144 S. Ct. 2071 (2024), considered the permissibility of non-consensual third-party releases; the petitioner did not question the holding of the court below that "the

One other variation deserves mention. Although Congress has abrogated the amount-in-controversy requirement for the general federal question jurisdiction, it has retained the requirement in some specialized jurisdictional statutes—for example, suits for damages under the Consumer Product Safety Act.[212]

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As this brief survey makes clear, Congress's deployment of the federal question jurisdiction today is vastly different from what it was early in the nation's history. Under the Judiciary Act of 1789, a single model substantially predominated: federal questions were litigated initially in state courts, with review by the Supreme Court available as of right if the state court rejected the claim under federal law. Today, we find original and removal jurisdiction in the district courts, in varying combinations and with different limitations depending on the nature of the case, with discretionary review by the Supreme Court of state-court decisions resolving federal questions. Overall, a federal forum is available for the litigation of federal questions to a much greater extent than it was under the 1789 Act. But of course the scope of federal law is far greater also. The question arises: do the present arrangements enable the federal courts to exercise the federal question jurisdiction in a way that serves the purposes for which the Framers designed it? To answer that question, it is necessary to look more closely at the actual operation of the system.

IV. PAST ACCOMPLISHMENTS AND CURRENT CONCERNS

History has vindicated the Framers' view of the importance of the federal question jurisdiction. This vindication can be seen both in the consequences for American society and in the ordinary run of litigation involving federal questions. Thus, a century ago, then-Professor Felix Frankfurter could observe that as a result of Reconstruction-era legislation, the federal courts had become "the primary and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States."[213] Today, however, there is reason to be concerned that many of the litigants who seek to assert a federal right cannot *rely* on the availability of an Article III court in which to do so. This Part briefly examines the operation of the federal question jurisdiction during the first two centuries under the Constitution; it then canvasses some of the developments over the last several decades that raise doubts about the adequacy of the current jurisdictional arrangements.

bankruptcy court had subject-matter jurisdiction . . . over the released claims." *In re* Purdue Pharma L.P., 69 F.4th 45, 71 (2d Cir. 2023).

[212] *See* 15 U.S.C. § 2072 (matter in controversy must exceed $10,000).

[213] *See supra* text accompanying note 158.

A. *The First Two Centuries Under Article III*

In the two centuries and more since the Constitution's ratification, the "arising under" jurisdictional grant has furnished the authority for Supreme Court decisions that have shaped the life of the nation. To give but a few familiar examples, the Court ordered an end to state-enforced segregation in public schools,[214] imposed a rule of "one person, one vote" in state electoral districting,[215] and required an array of procedural safeguards for criminal defendants in state courts.[216] It protected freedom of speech and religion against state action[217] and rejected state laws that obstructed the development of a national economy.[218] And when Congress, starting in the late nineteenth century and at an accelerating pace in the twentieth century, federalized vast areas of human activity that had previously been regulated only by the states (if at all), the Court took on the task of expounding the meaning of the new laws, clarifying ambiguities and filling in gaps.[219]

But in assessing the operation of the federal question jurisdiction, it would be a mistake to consider only the Supreme Court's unique role as authoritative expositor of federal law. We must also (and indeed primarily) ask: to what extent

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[214] *See* Brown v. Bd. of Educ., 347 U.S. 483 (1954); JACK BASS, UNLIKELY HEROES (1981) (describing the role played by Fifth Circuit judges in implementing *Brown*).

[215] *See* Reynolds v. Sims, 377 U.S. 533 (1964). Chief Justice Warren believed that "the most important case of [his] tenure on the Court" was not *Brown v. Board of Education*, but *Baker v. Carr*, 369 U.S. 186 (1962), "the progenitor of the 'one man, one vote' rule." EARL WARREN, THE MEMOIRS OF EARL WARREN 306 (1977); *see also* Fred P. Graham, *Warren Defends Johnson's Naming of a Successor*, N.Y. TIMES, July 6, 1968, at 42 (reporting Warren's comment that "many of the problems that now confronted the nation could have been disposed of earlier if the legislatures had been properly apportioned before the Supreme Court required it").

[216] *See, e.g.*, Mapp v. Ohio, 367 U.S. 643 (1961) (Fourth Amendment exclusionary rule); Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel); Miranda v. Arizona, 384 U.S. 436 (1966) (right against self-incrimination). Chief Justice Warren listed *Gideon* as the third most important decision of his tenure, after *Brown* and the reapportionment decisions. *See* Graham, *supra* note 215, at 42.

[217] *See, e.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964) (freedom of speech); Engel v. Vitale, 370 U.S. 421 (1962) (freedom of religion).

[218] *See, e.g.*, Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) (holding that New York's steamboat monopoly was preempted by federal law); H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525 (1949) (holding that Dormant Commerce Clause barred New York's refusal to license a facility for shipping milk in interstate commerce).

[219] *See, e.g.*, Felix Frankfurter & Henry M. Hart, Jr., *The Business of the Supreme Court at October Term, 1933*, 48 HARV. L. REV. 238, 279 (1934) (listing "measures of social and economic policy" enacted by Congress in 1933 and 1934 and noting that "[n]either careful draftsmanship nor conscientious administration can avert the steady and difficult process of judicial distillation of the meaning of complicated new legislation"); Arthur D. Hellman, *Case Selection in the Burger Court: A Preliminary Inquiry*, 60 NOTRE DAME L. REV. 947, 992-96 (1985) (describing effect of legislation of the 1960s and 1970s).

is an Article III court available to litigants seeking to enforce federal rights, particularly rights secured against infringement by persons acting under color of state law?

The answer to that question has varied over time. An important determinant has been the Court's view of the relationship between the "arising under" jurisdiction of Article III and the Eleventh Amendment. The Eleventh Amendment was ratified in 1795 in response to a Supreme Court decision holding that state sovereign immunity did not protect a state from a suit in federal court authorized by an Act of Congress.[220] The amendment provides: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."[221] In *Hans v. Louisiana*,[222] decided in 1890, the Court held that the Eleventh Amendment applies in full force to federal question cases and prohibits a federal court from hearing suits against the state—including the plaintiff's own state—seeking to enforce rights under the Federal Constitution.[223] That ruling, if it stood alone, might have significantly limited the availability of the federal courts as a forum for challenging state laws as violating federal rights.

But *Hans* was not the Court's last word. A turning-point came in 1908, when the Court decided *Ex parte Young*.[224] The decision recognized a federal cause of action to enjoin state officials whose conduct in enforcing state law violates, or threatens to violate, rights under federal law.[225] The Court also held that a suit of that kind is not barred by the Eleventh Amendment.[226] The Court reasoned that if the state official is enforcing a state law that violates the Federal Constitution, "he is . . . stripped of his official or representative character," and "[t]he State has no power to impart to him any immunity from responsibility to the supreme authority of the United States."[227] It is no exaggeration to say that

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[220] *See* Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793). *Chisholm* involved a suit brought under the Supreme Court's original jurisdiction.

[221] U.S. CONST. amend. XI. The Eleventh Amendment and state sovereign immunity are the subject of a vast literature. *See* HART & WECHSLER, *supra* note 138, at 905-81 (citing numerous sources).

[222] 134 U.S. 1 (1890).

[223] *Id.*

[224] 209 U.S. 123 (1908).

[225] The opinion is not explicit on this point, but later decisions have cited *Ex parte Young* as authority for the proposition. *See, e.g.*, Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 96 n.14 (1983) ("It is beyond dispute that federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights."). Recently the Court has emphasized that the *Ex parte Young* cause of action is not grounded in the Supremacy Clause, but in equitable practice "tracing back to England." Armstrong v. Exceptional Child Ctr., Inc., 575 U.S. 320, 326-27 (2015).

[226] *Ex parte* Young, 209 U.S. at 159-60.

[227] *Id.*

modern constitutional law (outside the realm of criminal procedure) is largely the product of litigation made possible by the doctrine of *Ex parte Young*.[228]

In the middle decades of the twentieth century—a period that coincides roughly with the tenure of the Warren Court (1953-1969)—the federal courts came closer than ever before to providing a federal tribunal for all federal questions, particularly those implicating the Supremacy Clause.[229] The Supreme Court handed down a series of decisions that made § 1983 broadly available to challenge state official action as violative of federal constitutional rights,[230] to the point where a prominent federal judge was "tempted to conclude that the chief weapon expected to forestall Orwell's 1984 is the United States Code's § 1983."[231] Another set of decisions expanded the availability of federal habeas corpus for state prisoners challenging their criminal convictions; the effect was to institute a system of collateral review in federal district court at least as broad as the direct review of state-court rulings that the Supreme Court might have provided if not limited by caseload capacity.[232] The Court recognized implied causes of action for the breach of federal statutory duties and for violation of federal constitutional rights by federal employees, thus allowing suit under

[228] *E.g.*, Brown v. Bd. of Educ., 347 U.S. 483 (1954) (school desegregation); Reynolds v. Sims, 377 U.S. 533 (1964) (reapportionment); Obergefell v. Hodges, 576 U.S. 644 (2015) (same-sex marriage). For a compilation of authorities, judicial and academic, highlighting the importance of *Ex parte Young* to constitutional litigation, see Michael E. Solimine, *Congress, Ex parte* Young*, and the Fate of the Three-Judge District Court*, 70 U. PITT. L. REV. 101, 102 (2008). Professor Solimine points out that "previous decisions had accomplished much of [the] work" of "expanding the exceptions to the Eleventh Amendment." *Id.* at 112. Nevertheless, "the decision [in *Young*] was perceived to be an important break with the past." *Id.* For discussion of the aftermath of *Young*, see *infra* Section IV.B.

[229] For a thorough and readable account of the Warren Court's decisions, see LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS (2000). The Warren Court was followed by the Burger Court (1969-1986); the record for that period is mixed. The Burger Court "occasionally displayed a penchant for . . . the expansion of federal court authority." Vincent Blasi, *The Rootless Activism of the Burger Court*, *in* THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T 198, 208 (Vincent Blasi ed., 1983). But probably the dominant pattern was to "reverse[] [the] procedural trends" of the Warren Court. Gene R. Nichol, Jr., *An Activism of Ambivalence*, 98 HARV. L. REV. 315, 319 (1984) (book review). For brief discussion of cases in the latter group, see *infra* Section IV.C.

[230] *See, e.g.*, Monroe v. Pape, 365 U.S. 167 (1961) (holding that state officials act "under color of" state law for purposes of § 1983 even if their conduct violates state law); McNeese v. Bd. of Educ. for Cmty. Unit Sch. Dist. 187, 373 U.S. 668 (1963) (holding that a plaintiff in a § 1983 suit need not first seek a remedy under state law).

[231] Frank M. Coffin, *Justice and Workability:* Un Essai, 5 SUFFOLK U. L. REV. 567, 570 (1971).

[232] *See* Stolz, *supra* note 148, at 960-62. Indeed, as Professor Stolz pointed out, the "doctrinal tour de force" of *Fay v. Noia*, 372 U.S. 391 (1963), "somehow invest[ed] a district court with *more* power than the Supreme Court would have on direct review." Stolz, *supra* note 148, at 961-62 (emphasis added). *Fay v. Noia* was later overruled. *See* Coleman v. Thompson, 501 U.S. 722, 744-51 (1991).

§ 1331 in federal district court.[233] In pathbreaking decisions, the Court tore down the doctrinal barriers that closed the federal courts to constitutional challenges in two important areas: Government spending[234] and legislative reapportionment.[235] State sovereign immunity suffered two blows.[236] The Court affirmed district court judgments that ordered states to make retroactive payments of benefits wrongfully withheld, notwithstanding state officials' arguments that such orders violated the Eleventh Amendment and were not authorized by *Ex parte Young*.[237] With respect to statutory claims, the Court upheld a broad authority in Congress to abrogate states' immunity from suits for money damages when legislating pursuant to plenary powers granted by the Constitution.[238] Meanwhile, on the other side of First Street, Congress considered a proposal by the American Law Institute to authorize removal of civil cases based on a federal defense such as preemption.[239]

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[233] *See, e.g.*, J. I. Case Co. v. Borak, 377 U.S. 426 (1964) (recognizing cause of action for violation of § 14(a) of Securities Exchange Act of 1934); Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971) (recognizing damages remedy for violation of Fourth Amendment by federal agent acting under color of his authority). The Court later repudiated the approach taken in these cases. *See* Alexander v. Sandoval, 532 U.S. 275 (2001); Egbert v. Boule, 596 U.S. 482 (2022); *infra* Section IV.B.

[234] *See* Flast v. Cohen, 392 U.S. 83 (1968) (allowing suits for violation of Establishment Clause; distinguishing *Massachusetts v. Mellon*, 262 U.S. 447 (1923)). Later decisions have substantially narrowed the reach of *Flast*. *See, e.g.*, Hein v. Freedom from Religion Found., Inc., 551 U.S. 587 (2007) (holding that *Flast* does not extend to suits challenging expenditures made pursuant to general appropriations to Executive Branch).

[235] *See* Baker v. Carr, 369 U.S. 186 (1962) (holding that *Colegrove v. Green*, 328 U.S. 549 (1946), was not controlling).

[236] One commentator has gone so far as to say that as a result of the Warren Court decisions, "[t]he Eleventh Amendment's prohibition on federal suits against states appeared to be moribund." Michael Wells, *Who's Afraid of Henry Hart?*, 14 CONST. COMMENT. 175, 187 (1997).

[237] *See* Edelman v. Jordan, 415 U.S. 651, 670-71 (1974) (summarizing the decisions); *id.* at 682-83 (Douglas, J., dissenting) (stating that grants of relief that included retroactive payments constituted "established law"). Only one of the cases received plenary consideration, and the Court's opinion made no mention of the Eleventh Amendment argument. *See* Shapiro v. Thompson, 394 U.S. 618 (1969). Nevertheless, the Supreme Court acknowledged that "*Shapiro v. Thompson* and these three summary affirmances obviously are of precedential value in support of the contention that the Eleventh Amendment does not bar the [retroactive] relief awarded by the District Court in this case." *Edelman*, 415 U.S. at 671. The *Edelman* Court went on to "disapprove the Eleventh Amendment holdings of those cases to the extent that they are inconsistent with our holding today." *Id.*; *see infra* Section IV.B.

[238] *See* Dep't of Agric. Rural Dev. Rural Hous. Serv. v. Kirtz, 601 U.S. 42, 55 (2024) (noting that "[f]or a period in the mid-20th century . . . . this Court was content to do away with state sovereign immunity without clear authorization from Congress") (citing Parden v. Terminal Ry. of the Ala. State Docks Dep't, 377 U.S. 184 (1964)).

[239] *See* Diversity Jurisdiction[,] Multi-Party Litigation[,] Choice of Law in the Federal Courts: Hearings on S. 1876 Before the Subcomm. on Improvements in Judicial Machinery

B. *The Third Century: Retrenchment, Mostly . . .*

As early as 1985, however, Professor Akhil Reed Amar expressed concern that "the system . . . seem[ed] to fall short by denying" many litigants in cases presenting federal questions "their real day in an Article III court."[240] In voicing this concern, Amar focused primarily on the effects of caseload growth.[241] He did not consider decisions of the Burger Court (1969-1986) which, by 1985, had begun to cut back on access to federal courts for litigation of federal claims.[242] For example, the Court strengthened the doctrine of Eleventh Amendment immunity as a barrier to suits seeking redress for violation of federal law by states.[243] The Court held in the landmark case of *Younger v. Harris*[244] that in a suit challenging a state law, the federal court generally must abstain in deference to a pending state proceeding in which the federal plaintiff is being prosecuted for violation of that law.[245] The Court then extended the *Younger* doctrine to the realm of civil litigation[246] and to cases in which no state proceeding is pending

of the S. Comm. on the Judiciary, Part I, 92nd Cong. 20 (1971) (reprinting federal defense removal proposal); *id.* at 96 (statement of Prof. Herbert Wechsler) (explaining proposal).

240 Amar, *supra* note 10, at 267. Although Amar spoke of "mandatory-tier cases" generally, his examples all involve the "arising under" jurisdiction.

241 *See id.* at 268. He also pointed to "restrictions on district court jurisdiction created by the 'well-pleaded complaint' rule and limitations on removal." *Id.* (punctuation altered). *See* discussion *infra* this Section.

242 It is happenstance that Amar's article was published one year before the end of the Burger Court. But the fortuity is fortunate, because the Burger Court has been the subject of an extensive literature. *See, e.g.*, sources cited *supra* note 229. It is not happenstance that the Burger Court ended just before the bicentennial of the Constitution. Chief Justice Burger retired in 1986 so that he could serve as chairman of the commission created to commemorate the bicentennial. *See* Retirement of Chief Justice Burger, 478 U.S. xiii, xiv (1986).

243 *See* Edelman v. Jordan, 415 U.S. 651 (1974) (reversing district court decree ordering retroactive payments of benefits found to have been wrongfully withheld under federal law); *see also* Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89 (1984) (holding that Eleventh Amendment barred exercise of pendent jurisdiction over claim seeking to remedy violation of *state* law by state officials). Contemporary commentators viewed *Pennhurst* as emblematic of the Burger Court's "hostility to public law litigation." *See* George D. Brown, *Beyond* Pennhurst*—Protective Jurisdiction, the Eleventh Amendment, and the Power of Congress to Enlarge Federal Jurisdiction in Response to the Burger Court*, 71 VA. L. REV. 343, 345 (1985).

244 401 U.S. 37 (1971).

245 *See id. Younger* came close to overruling the Warren Court decision in *Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965) (allowing federal-court injunction against pending state criminal proceedings where plaintiffs showed a "chilling effect on free expression"). For further discussion of *Younger*, see *infra* Section IV.C.

246 *See, e.g.*, Moore v. Sims, 442 U.S. 415, 423 (1979) (stating that the "basic concern" underlying *Younger* "is also fully applicable to civil proceedings in which important state interests are involved"); Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 432 (1982) (similar).

against the federal plaintiff at the time of filing the federal complaint.[247] The Court also limited the availability of federal habeas corpus to prisoners challenging a state conviction.[248] In cases spanning a variety of settings, the Court held that challenges to governmental practices could not proceed in federal court because the plaintiffs lacked standing to sue.[249]

Scholars have disagreed about the extent to which these and other decisions of that era closed the doors of federal courts to litigants seeking to vindicate federal rights.[250] But there is no doubt that developments since 1985 have, on balance, pushed further in that direction, thus arguably violating what Amar views as "the underlying logic and *spirit* of Article III."[251] These developments are particularly troubling because they disproportionately affect cases that implicate one of the most important purposes of the federal question jurisdiction—to protect the supremacy of federal law against state encroachments.[252]

First, in 1985 Amar could write that "[i]n criminal cases, the historical expansion of federal habeas corpus has enabled lower federal courts to monitor more closely the decisions of state courts entrenching on federal constitutional rights."[253] Amar was referring to the jurisdiction created initially by the 1867 Act[254] and to mid-twentieth-century Supreme Court decisions that interpreted the Act to permit state prisoners to obtain "[f]ull-blown constitutional error correction" in federal court.[255] But in 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act (AEDPA), which severely cut back on the

[247] *See, e.g.*, Hicks v. Miranda, 422 U.S. 332 (1975).

[248] *See, e.g.*, Stone v. Powell, 428 U.S. 465, 494 (1976) (excluding Fourth Amendment claims from federal habeas as long as the state "provided an opportunity for full and fair litigation of [the] claim"); Wainwright v. Sykes, 433 U.S. 72 (1977) (holding that state procedural default bars consideration of federal constitutional claim on habeas unless the prisoner can show cause and prejudice to excuse the default).

[249] *See, e.g.*, City of Los Angeles v. Lyons, 461 U.S. 95 (1983) (challenge to police chokeholds); Warth v. Seldin, 422 U.S. 490 (1975) (challenge to zoning ordinance that allegedly prevented construction of low-income housing); United States v. Richardson, 418 U.S. 166 (1974) (alleged violations of Statement and Account Clause); O'Shea v. Littleton, 414 U.S. 488 (1974) (allegations of racial discrimination in law enforcement).

[250] *Compare* Blasi, *supra* note 229, at 208 (stating that, overall, the decisions have not "reduced significantly the role of the federal courts in the American system of government"), *with* Nichol, *supra* note 229, at 320 (asserting that "[a]s a result of access limitations, state criminal and federal administrative decisionmaking have become increasingly insulated from direct federal judicial review").

[251] Amar, *supra* note 10, at 267.

[252] *See supra* Section I.A.2.

[253] Amar, *supra* note 10, at 265-66.

[254] *See supra* note 150 and accompanying text.

[255] *See* Brown v. Davenport, 596 U.S. 118, 130 (2022). Justice Kagan, in dissent, disputed the majority's account of the pre-1953 history, but not the characterization of the mid-twentieth century law. *See id.* at 151 & n.3 (Kagan, J., dissenting).

availability of federal habeas corpus as a device for asserting federal constitutional challenges to state-court convictions.[256] The Supreme Court has zealously enforced AEDPA's strictures, both substantive and procedural, to the point where critics lament "[t]he collapse of habeas corpus as a remedy for even the most glaring of constitutional violations."[257] That is an overstatement,[258] but certainly the law as applied today places many obstacles in the path of state prisoners seeking to challenge their convictions through federal habeas.[259] One line of authority strikes particularly deep into the pre-AEDPA regime: the Court has interpreted a key provision of the statute "to bar habeas relief even if the state court's decision was erroneous, as long as it was not 'unreasonably' so."[260]

Second, in the realm of civil litigation, Professor Amar pointed out that the combination of the well-pleaded complaint rule and the statutory linkage of original to removal jurisdiction has meant that "many federal cases must be litigated in state trial courts."[261] Of particular importance, as the Supreme Court has summarized the law, a federal *defense* to a state-law claim is not a basis for

[256] Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of the U.S. Code).

[257] Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 MICH. L. REV. 1219, 1219 (2015).

[258] *See, e.g.*, Shoop v. Cunningham, 143 S. Ct. 37, 43 (2022) (Thomas, J., dissenting from denial of certiorari) (denouncing Sixth Circuit for record of "plain and repetitive AEDPA error" in granting relief in habeas cases); Allen v. Stephan, 42 F.4th 223 (4th Cir. 2022) (holding, over dissent, that imposition of death sentence was contrary to clearly established federal law), *cert. denied sub nom.* Chestnut v. Allen, 143 S. Ct. 2517 (2023) (mem.); Smith v. Brookhart, 996 F.3d 402 (7th Cir. 2021) (unconditionally granting habeas on ground that evidence at state criminal trial was constitutionally insufficient to sustain conviction for murder and robbery), *cert. denied sub nom.* Brookhart v. Smith, 142 S. Ct. 1413 (2022) (mem.).

[259] *See* Brown v. Davenport, 596 U.S. 118, 137 (2022) ("[I]f AEDPA makes winning habeas relief more difficult, it is because Congress adopted the law to do just that.").

[260] Carlos M. Vázquez, *AEDPA as Forum Allocation: The Textual and Structural Case for Overruling* Williams v. Taylor, 56 AM. CRIM. L. REV. 1, 2 (2019) (first citing Williams v. Taylor, 529 U.S. 362 (2000); and then 28 U.S.C. § 2254(d)(1)); *see also* William A. Fletcher, *Symposium Introduction*, 107 CALIF. L. REV. 999, 1003 (2019) ("I have been a federal appellate judge for twenty years. I have lost count of the number of erroneous state court convictions I have been required to let stand because of the deference required by AEDPA."). Professor Vázquez argues that in interpreting AEDPA, the Court relied on arguments that "are deeply flawed," Vázquez, *supra*, at 13, and that "evidence of Congress's actual intent . . . . reveals that Congress did not intend to bar relief for wrong but reasonable state court errors," *id.* at 12.

[261] Amar, *supra* note 10, at 268; *see supra* note 183 and accompanying text (noting Professor Collins' argument that the Supreme Court "probably got it wrong when it held that Congress had grafted the [well-pleaded complaint] rule onto defendant removal of cases raising federal defenses").

removal to federal court "even if both parties admit that the defense is the only question truly at issue in the case."[262] In recent years, plaintiffs have made aggressive use of "artful pleading" to keep their cases out of federal district court even when the suit seeks to "'effectively override . . . the policy choices made by' the federal government."[263] The phenomenon is exemplified by the numerous climate change lawsuits filed by cities and states. These suits "take[] aim at the production and sale of fossil fuels worldwide"[264] and seek to "change the [energy] companies' behavior on a global scale."[265] Nevertheless, defendants' efforts to remove the cases to federal court have been uniformly rejected.[266] To be sure, review by the Supreme Court will be available after the state court has issued a final judgment, but, very often, by that time the harm to federal interests will have been done (perhaps by a settlement generated by the pressure of the lawsuit itself).[267]

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[262] Franchise Tax Bd. v. Constr. Laborers Vacation Tr. for S. Cal., 463 U.S. 1, 14 (1983). Justice Brennan, in drafting the *Franchise Tax Board* opinion, was willing to modify the rule, at least in declaratory judgment cases like the one before him, but the other Justices expressed no interest in taking that step. *See* Arthur D. Hellman, *A Neo-Federalist View of the Supreme Court's Docket: Analyzing Case Selection and Ideological Alignment*, 86 U. PITT. L. REV. (forthcoming 2025) (manuscript at 16-17), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4948948 [https://perma.cc/A6HA-24C7].

[263] Minnesota *ex rel.* Ellison v. Am. Petroleum Inst., 63 F.4th 703, 717, 719 (2023) (API) (Stras, J., concurring); *see also* City of New York v. Chevron Corp., 993 F.3d 81, 93 (2d Cir. 2021) (noting "real risk that subjecting the [oil companies'] global operations to a welter of different states' laws could undermine important federal policy choices").

[264] API, 63 F.4th at 717 (Stras, J., concurring).

[265] *Id.* at 719.

[266] *See* District of Columbia v. Exxon Mobil Corp., 89 F.4th 144, 149 & n.1 (2023) (citing decisions of other circuits).

[267] *See* Brief of Wash. Legal Found. as Amicus Curiae in Support of Petitioners at 13-14, BP p.l.c. v. Mayor of Baltimore, 143 S. Ct. 1795 (2022) (No. 22-361) (noting pressure created by "the number and variety of similar suits around the country"); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 559 (2007) (noting that "the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching [summary judgment] proceedings"). Notwithstanding multiple amicus briefs urging the Court to consider the issue, the Court repeatedly denied certiorari in the climate change cases. *See, e.g.*, Am. Petroleum Inst. v. Minnesota, 144 S. Ct. 620 (2024) (mem.) (noting that Kavanaugh, J., would grant certiorari).

At this writing, the Court is considering two cert petitions from a decision of the Hawai'i Supreme Court that present the same preemption issues underlying the climate change cases that the energy companies sought unsuccessfully to remove to federal court. *See* City & Cnty. of Honolulu v. Sunoco LP, 537 P.3d 1173 (Haw. 2023), *petitions for cert. filed*, Nos. 23-947, 23-952 (U.S. Feb. 28, 2024). The respondent argues that the Supreme Court "lacks jurisdiction under 28 U.S.C. § 1257(a) because the Hawai'i Supreme Court's decision is interlocutory and does not satisfy any exception to the final judgment rule." Brief for Respondents City and County of Honolulu and Honolulu Board of Water Supply at 2, Sunoco

Third, the Court has aggravated the restrictive effect of the well-pleaded complaint rule by adopting a narrow view of what used to be referred to as *Smith* jurisdiction—jurisdiction based on the presence of federal issues in a complaint asserting a cause of action created by state law. As the Court has explained, "the vast bulk of suits that arise under federal law" do so on the basis that "federal law creates the cause of action asserted."[268] Such cases satisfy the well-pleaded complaint rule without more.[269] But *Smith* provides an alternative route. In the 1921 case that gave the doctrine its name, the Court stated the rule simply: jurisdiction under what is now § 1331 is proper "where it appears from the [complaint] that the right to relief depends upon the construction or application of [federal law], and that such federal claim . . . rests upon a reasonable foundation."[270]

Over the next eight decades, however, the Court did not adhere to that simple formulation; instead, what followed was a convoluted course of decision that Chief Justice Roberts aptly likened to a Jackson Pollock painting.[271] In two twenty-first century cases—*Grable & Sons Metal Products v. Darue Engineering & Manufacturing*[272] and *Gunn v. Minton*[273]—the Court sought "to bring some order to this unruly doctrine" through a four-part test.[274] The third

LP v. City & Cnty of Honolulu, Nos. 23-947, 23-952 (U.S. May 1, 2024). For discussion of the final judgment rule, see *infra* this Subsection.

There is another possible obstacle to Supreme Court review of the Hawaii Supreme Court decision. Justice Alito is recused, see Sunoco LP v. City & Cnty. of Honolulu, 144 S. Ct. 2627 (2024) (order inviting Solicitor General to express views of the United States), and the eight participating Justices may be reluctant to grant review because of a concern that the Court will be evenly divided and unable to resolve the issues.

[268] Gunn v. Minton, 568 U.S. 251, 257 (2013). The paradigm of the federal cause of action is § 1983. *See supra* Section II.A.

[269] Here it is obligatory to note an apparent exception—an ancient case that has no modern progeny. *See* Shoshone Mining Co. v. Rutter, 177 U.S. 505 (1900).

[270] Smith v. Kan. City Title & Tr. Co., 255 U.S. 180, 199 (1921). Justice Holmes dissented, insisting that "a suit arises [only] under the law that creates the cause of action." *Id.* at 215 (Holmes, J., dissenting) (internal quotation marks omitted). However, a careful historical study concluded that *Smith*-type cases were "central exemplars of federal question jurisdiction" in the decades preceding *Smith*, and that "it was Holmes who was out of step with long tradition when he claimed [otherwise]." Ann Woolhandler & Michael G. Collins, *Federal Question Jurisdiction and Justice Holmes*, 84 NOTRE DAME L. REV. 2151, 2187 (2009).

[271] *Gunn*, 568 U.S. at 258. One court helpfully explains: "Pollock, an abstract expressionist painter, was noted for his convoluted and chaotic works." Old Dominion Elec. Coop. v. PJM Interconnection, LLC, 24 F.4th 271, 280 n.5 (4th Cir. 2022).

[272] 545 U.S. 308 (2005).

[273] 568 U.S. 251 (2013).

[274] *Id.* at 258. In addition to the three elements mentioned in the text, the party seeking entry to federal court must show that the federal issue is "capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Id.*

element of that test requires that the federal question be "substantial."[275] But "substantial" does not mean (as *Smith* would suggest) "rest[ing] upon a reasonable foundation," nor is it "enough that the federal issue be significant to the particular parties in the immediate suit."[276] Rather, "[t]he substantiality inquiry under *Grable* looks . . . to the importance of the issue *to the federal system as a whole*."[277]

This rule reflects a troubling way of looking at the federal question jurisdiction of the district courts. Under the first two prongs of the test, the federal issue must be "necessary" to the plaintiff's case and "actually disputed."[278] If those elements are satisfied, why should the litigant also have to show that the issue is important "to the federal system as a whole?"[279] That makes sense as a criterion for the Supreme Court's exercise of its (discretionary) certiorari jurisdiction.[280] But it is hard to see why it should control the availability of a federal *trial* forum for disputes that by hypothesis turn on federal law.

The Court in *Gunn* made clear that it expects few cases to satisfy its four-part test: the category is "special and small."[281] To be sure, "small" does not mean nonexistent, and lower courts have allowed § 1331 jurisdiction under *Grable* and *Gunn* in a variety of settings where the plaintiff did not assert a federal cause of action.[282] But it is remarkable that the Court attributes to Congress an overarching concern for "the system," coupled with a complete indifference to the preference that a *litigant* might have for litigating a "dispute respecting the effect of federal law"[283] in federal rather than state court.[284] And it is disturbing

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[275] *Id.* The word "substantial" became part of the test in 1983, when the Court said that *Smith* jurisdiction is available when "it appears that some substantial, disputed question of federal law is a necessary element of [a] well-pleaded state claim[]." Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Tr. for S. Cal., 463 U.S. 1, 13 (1983).

[276] *Gunn*, 568 U.S. at 258.

[277] *Id.* at 260 (emphasis added).

[278] *See id.* at 259.

[279] I say "litigant" rather than "plaintiff," because it appears from a review of the cases on Westlaw that *Grable*-*Gunn* jurisdiction (as it can now be called) is invoked more frequently by defendants seeking removal than by plaintiffs seeking to invoke original jurisdiction.

[280] *Cf.* SUP. CT. R. 10 (listing considerations governing review on certiorari and repeatedly emphasizing importance).

[281] *Gunn*, 568 U.S. at 258 (quotation omitted).

[282] *See, e.g.*, NASDAQ OMX Grp., Inc. v. UBS Sec., LLC, 770 F.3d 1010 (2d Cir. 2014) (federal securities laws); Sarauer v. Int'l Ass'n of Machinists, Dist. No. 10, 966 F.3d 661 (7th Cir. 2020) (federal labor law); Tantaros v. Fox News Network, LLC, 12 F.4th 135 (2nd Cir. 2021) (Federal Arbitration Act); R.I. Truck Ctr. v. Daimler Trucks N. Am., 92 F.4th 330 (1st Cir. 2024) (Dormant Commerce Clause). All of these cases except the first were brought in state court and removed to federal court by a defendant invoking §§ 1331 and 1441(a).

[283] *Gunn*, 568 U.S. at 259 (cleaned up).

[284] I recognize that *Grable* repudiated the position taken in *Merrell Dow Pharms. Inc. v. Thompson*, 478 U.S. 804 (1986), that the absence of a federal cause of action "is tantamount

that the Court does all this with no inquiry into the background of the 1875 Act—an inquiry that would show that *Smith*-type cases were "a significant and likely anticipated use of the [Act's] 'arising under' provisions."[285]

Fourth, although neither Congress nor the Supreme Court has cut back on the jurisdiction of federal courts to hear § 1983 civil rights claims,[286] the Court's decisions have imposed a substantial barrier to the recovery of damages for the violation of federal constitutional rights by persons acting under color of state law. That barrier is created by the doctrine of qualified immunity, which bars recovery from individual government officials unless the plaintiff can show that the defendant's actions "violated a statutory or constitutional right that was *clearly established* at the time of the challenged conduct."[287] This is a demanding standard; it does "not require a case directly on point, but existing precedent must have placed the statutory or constitutional question *beyond debate*."[288] The Supreme Court has repeatedly reversed lower courts for allowing suits to proceed by "defin[ing] clearly established law at too high a level of generality."[289] And lower courts, perhaps chastened by these reversals, have granted immunity in egregious cases.[290]

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to a congressional conclusion that the presence of a claimed violation of the statute as an element of a state cause of action is insufficiently 'substantial' to confer federal-question jurisdiction." *Id.* at 814; *see Grable*, 545 U.S. at 317-18. That is a step forward. But even if the *Grable-Gunn* view of substantiality does not distort the prior jurisprudence as much as *Merrell Dow*'s did, that does not make it persuasive.

[285] Woolhandler & Collins, *supra* note 270, at 2178. One commentator has suggested that although the Court in *Grable* purported to follow the intent of Congress, it was really making "its own assessment of the impact that the exercise of jurisdiction would have on the allocation of judicial power." F. Andrew Hessick III, *The Common Law of Federal Question Jurisdiction*, 60 ALA. L. REV. 895, 922 (2009). In *Gunn*, the Court largely, but not entirely, abandoned the pretense that it is following Congressional intent.

[286] *See supra* Section III.A.

[287] Reichle v. Howards, 566 U.S. 658, 664 (2012) (emphasis added).

[288] Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011) (emphasis added).

[289] City of Tahlequah v. Bond, 595 U.S. 9, 12 (2021) (per curiam); *see, e.g.*, Mullenix v. Luna, 577 U.S. 7, 12 (2015) (per curiam) (reversing determination that police officer who killed fleeing suspected felon violated clearly established law); *al-Kidd*, 563 U.S. at 742 (reversing determination that pretextual arrest pursuant to material-witness warrant violated clearly established law).

[290] *See, e.g.*, Cope v. Cogdill, 3 F.4th 198, 209 (5th Cir. 2021) (holding that jailer did not violate clearly established law in 2017 by "watching an inmate attempt suicide and failing to call for emergency medical assistance"); Sampson v. Cnty. of Los Angeles *ex rel.* L.A. Cnty. Dep't of Child. & Fam. Servs., 974 F.3d 1012, 1025 (9th Cir. 2020) ("Unfortunately, the Supreme Court's exceedingly narrow interpretation of what constitutes a 'clearly established' right precludes us from holding what is otherwise obvious to us—that the right of private individuals to be free from sexual harassment at the hands of public officials outside of the workplace and school contexts was clearly established under the Equal Protection Clause at the time of Defendants' conduct."); Jessop v. City of Fresno, 936 F.3d 937, 939 (9th Cir. 2019) (holding that in 2013 "there was no clearly established law holding that [police] officers

Two procedural aspects of the Court's qualified immunity jurisprudence raise the barrier for plaintiffs even higher. The Court now takes the position that federal courts may grant qualified immunity on the ground that the asserted right was not clearly established, without deciding whether there was a constitutional violation.[291] This discretionary "order of battle"[292] "reduc[es] the frequency with which lower courts announce clearly established law"[293] and effectively forecloses the damages remedy in many cases.[294] And if, notwithstanding the heavy burden, the plaintiff persuades the district court to deny qualified immunity, the defendant can take an immediate interlocutory appeal from the adverse ruling.[295] These interlocutory appeals "run the risk of wearing down worthy plaintiffs with extended litigation."[296]

This brief discussion has focused on the ways in which the Court's qualified immunity jurisprudence diminishes the role of federal courts in providing redress for the violation of federal rights by persons acting under color of state law.[297] Scholars and judges have also attacked the doctrinal and historical

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violate the Fourth or Fourteenth Amendment when they steal property seized pursuant to a warrant").

[291] *See* Pearson v. Callahan, 555 U.S. 223 (2009).

[292] *See id.* at 234 (rejecting "rigid order of battle" that required courts to consider first whether the facts alleged showed violation of a constitutional right (quoting Purtell v. Mason, 527 F.3d 615, 622 (7th Cir. 2008)).

[293] Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1816 (2018).

[294] *See, e.g.*, Dundon v. Kirchmeier, 85 F.4th 1250, 1256-57 (8th Cir. 2023) (holding that it is not clearly established that a use of force to disperse a crowd constitutes a seizure under the Fourth Amendment; relying on similar decisions issued in 2021 and 2022).

[295] *See* Mitchell v. Forsyth, 472 U.S. 511 (1985). Moreover, defendants can raise the qualified immunity defense more than once, "at successive stages" of a litigation, and if immunity is denied, can take an appeal at each stage. *See* Behrens v. Pelletier, 516 U.S. 299, 306-07 (1996).

[296] JASON TIEZZI, ROBERT MCNAMARA & ELYSE SMITH POHL, UNACCOUNTABLE: HOW QUALIFIED IMMUNITY SHIELDS A WIDE RANGE OF GOVERNMENT ABUSES, ARBITRARILY THWARTS CIVIL RIGHTS, AND FAILS TO FULFILL ITS PROMISES 27 (Institute for Justice 2024) [hereinafter UNACCOUNTABLE], https://ij.org/wp-content/uploads/2023/11/Unaccountable-qualified-immunity-web.pdf [https://perma.cc/M48L-7ELQ].

[297] That jurisprudence is deeply entrenched, but two developments may point to a shift in the way it is applied. First, during the second decade of this century, it was not uncommon for the Court "to summarily reverse courts for wrongly denying officers the protection of qualified immunity." Kisela v. Hughes, 584 U.S. 100, 121 (2018) (Sotomayor, J., dissenting). Two such decisions were issued early in the 2021 Term, but none have come down since then. *See* City of Tahlequah v. Bond, 595 U.S. 9 (2021) (per curiam); Rivas-Villegas v. Cortesluna, 595 U.S. 1 (2021) (per curiam). Nor, as of this writing (December 2024), have there been any plenary reversals, or indeed any rulings from the Court on qualified immunity. Second, a weekly newsletter that monitors federal court of appeals decisions provides some evidence that the qualified immunity defense is not the death knell for § 1983 damages claims that the Supreme Court's pronouncements and the long string of reversals by that Court might suggest.

foundations of that jurisprudence, saying, for example, that it "lacks legal justification"[298] under "ordinary principles of legal interpretation"[299] and that in creating the doctrine, the Court "disregarded the explicit (albeit obscured) statutory text of the 1871 Civil Rights Act, the original version of Section 1983."[300]

Fifth, although the doctrine of qualified immunity has no application to suits seeking forward-looking (injunctive) relief against state official action,[301] another and more powerful doctrine comes into play: the doctrine of state sovereign immunity. As already noted, in the landmark decision in *Ex parte Young*, the Supreme Court, implicitly recognizing the essential role of the federal courts in enforcing the Supremacy Clause, held that sovereign immunity does not bar suits for equitable relief in which the named defendant is a state official charged with enforcing the law that is the subject of the federal

The newsletter is *Short Circuit*, and it is published by the Institute for Justice, an organization that seeks to limit qualified immunity. *See* UNACCOUNTABLE, *supra* note 296; *Short Circuit Newsletter & Podcast*, INST. FOR JUST., https://ij.org/center-for-judicial-engagement/sc/ (last visited Dec. 11, 2024). In September 2024, Short Circuit reported on seventeen qualified immunity decisions by the courts of appeals. (This count excludes cases that decided only the constitutional question.) All but one rejected the qualified immunity defense. (One of these was a split decision.)

Admittedly, this is a small sample. And most of the opinions were issued at an early stage of the litigation, so the qualified immunity defense might yet prevail. *See supra* note 295 (noting that defendants can renew qualified immunity defense after initial rejection). Further, the results are at odds with those of other recent studies. *See, e.g.*, UNACCOUNTABLE, *supra* note 296, at 21 (reporting that in the period 2010 through 2020, courts of appeals denied qualified immunity, in whole or in part, in only 30% of cases). Still, it is at least possible that the Supreme Court's apparent withdrawal from the field has, to some degree, emboldened courts of appeals to move away from draconian application of a doctrine that has come under such severe and multi-pronged criticism from judges as well as scholars. *See infra* text accompanying notes 298-300.

[298] William Baude, *Is Qualified Immunity Unlawful*, 106 CALIF L. REV. 45, 88 (2018); *see also* Villarreal v. City of Laredo, 94 F.4th 374, 408-09 n.14 (5th Cir. 2024) (Willett, J., dissenting) (arguing that the "clearly established law" is a "made-up defense" that is "untethered from § 1983's text and history and nigh impossible to defend), vacated *sub nom.* Villarreal v. Alaniz, 2024 WL 4486343 (U.S. Oct. 15, 2024).

[299] Baude, *supra* note 298, at 77.

[300] Alexander A. Reinert, *Qualified Immunity's Flawed Foundation*, 111 CALIF. L. REV. 201, 204 (2023). For a partial defense of the Court's approach, see Scott A. Keller, *Qualified and Absolute Immunity at Common Law*, 73 STAN. L. REV. 1337, 1345 (2023) (arguing that "while the common law recognized the existence of a freestanding qualified immunity, the common law's test for overcoming this immunity looked quite different from the Supreme Court's modern clearly-established-law doctrine").

[301] *See* Alan K. Chen, *The Ultimate Standard: Qualified Immunity in the Age of Constitutional Balancing Tests*, 81 IOWA L. REV. 261, 339 (1995) (noting that "qualified immunity is inapplicable to all injunctive relief claims against individual officials or government entities").

challenge.[302] But in 2021, the state of Texas came up with a stratagem designed to frustrate the use of *Ex parte Young* to challenge state laws. The state enacted a law, known as the Texas Heartbeat Act or S. B. 8, that did three things. It restricted abortion in a way that plainly violated the Federal Constitution as it was then interpreted.[303] It authorized private individuals to bring civil actions for statutory damages (with a minimum of $10,000) against anyone who performed or assisted in the performance of a prohibited abortion.[304] And it specified in the statute that various state officials were to have no role in enforcing the statutory restrictions.[305] Decisions by the Supreme Court and the Fifth Circuit in *Whole Woman's Health v. Jackson* allowed the stratagem to succeed: suits challenging the abortion law were dismissed without reaching the merits.[306]

A dissent in the Supreme Court noted that "S. B. 8's architects designed [the statutory] scheme to evade *Young* as historically applied,"[307] and it warned that "the Court clears the way for States to reprise and perfect Texas' scheme in the future to target the exercise of any right recognized by this Court with which they disagree."[308] The Court, in response, downplayed the importance of the *Ex parte Young* cause of action and its § 1983 counterpart, saying that "[t]his Court has never recognized an unqualified right to pre-enforcement review of constitutional claims in federal court,"[309] and that "many federal constitutional rights are as a practical matter asserted typically as defenses to state-law claims, not in federal pre-enforcement cases like this one."[310]

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[302] *See Ex parte* Young, 209 U.S. 123 (1908); *supra* Section IV.A.

[303] *See* Whole Woman's Health v. Jackson (Whole Woman's Health I), 595 U.S. 30, 58-59 (2021) (Roberts, C.J., concurring in the judgment in part and dissenting in part) (noting that Texas law was contrary to the Court's decisions in *Roe* and *Casey* (citing Roe v. Wade, 410 U.S. 113 (1973); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992))). A few months after considering the challenge to S. B. 8, the Court repudiated the abortion right it had previously recognized. *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

[304] *See Whole Woman's Health I*, 595 U.S. at 35-36 (majority opinion); *id.* at 63 (Sotomayor, J., concurring in the judgment in part and dissenting in part).

[305] *See Whole Woman's Health I*, 595 U.S. at 35 (majority opinion); *id.* at 54 (Thomas, J., concurring in part and dissenting in part).

[306] *See id.* at 51 (majority opinion) (directing dismissal of claims against some defendants); Whole Woman's Health v. Jackson, 31 F.4th 1004, 1006 (5th Cir. 2022) (per curiam) (after receiving answer to certified question from Texas Supreme Court, directing district court to "dismiss all challenges to the private enforcement provisions of the statute").

[307] *Whole Woman's Health I*, 595 U.S. at 68 (Sotomayor, J., concurring in the judgment in part and dissenting in part).

[308] *Id.* at 72; *see also* Richard H. Fallon, Jr., *Constitutional Remedies: In One Era and Out the Other*, 136 HARV. L. REV. 1300, 1303 (2023) (characterizing *Whole Woman's Health* as "a break in [a] pattern" extending over more than 100 years in which courts have "routinely issued injunctions necessary to make constitutional rights meaningful in practice").

[309] *Whole Woman's Health I*, 595 U.S. at 49 (majority opinion).

[310] *Id.* at 49-50.

The Court's response relied in part on history, but the opinion recounted that history in a way that understated how deeply engrained in federal practice is the equitable remedy sought by the Texas plaintiffs. The Court noted that "pre-enforcement review *under the statutory regime the petitioners invoke*, 42 U.S.C. § 1983, was not prominent *until the mid-20th century*."[311] That is true, but long before the mid-twentieth century, federal courts routinely heard pre-enforcement challenges under the authority of *Ex parte Young*.[312] In 1934, Fifth Circuit Judge Joseph C. Hutcheson, writing in the *Harvard Law Review*, noted that *Ex parte Young* "exerted an enormous influence to extend further the exercise of the jurisdiction of federal courts to grant equitable relief against unconstitutional penalties and prosecutions threatened under state authority."[313] Judge Hutcheson listed "numerous cases" in which the Supreme Court had "without variation announced and applied [the jurisdiction]."[314] Thus, contrary to the Court's account of the history, the decision in *Whole Woman's Health* is rightly characterized as "a deviation from once-traditional norms."[315]

Sixth, the Court has severely limited the availability of the *Bivens* cause of action allowing a damages remedy for the violation of federal constitutional rights by federal employees.[316] In eleven cases spanning forty-two years, the Court has consistently "declined . . . to imply a . . . cause of action for [various] constitutional violations."[317] The most recent ruling "all but nailed the door shut" on future use of the *Bivens* remedy as a means of imposing "accountability on

[311] *Id.* at 49 (emphasis added).

[312] *See, e.g.*, Cavanaugh v. Looney, 248 U.S. 453, 456 (1919) (quoting *Ex parte Young*'s holding allowing pre-enforcement injunctions against state officers and characterizing it as "settled doctrine"); Terrace v. Thompson, 263 U.S. 197, 214-15 (1923) (allowing pre-enforcement suit and citing *Ex parte Young* among many other cases). The perceived proliferation of injunction suits in the wake of *Young* prompted Congress to enact a statute requiring that such suits be heard by a district court of three judges, with a direct appeal to the Supreme Court. *See* Solimine, *supra* note 228, at 111-17. The requirement was largely abolished in 1976. *See id.* at 134-45.

[313] Hutcheson, *supra* note 13, at 799 n.9. Judge Hutcheson would later participate in enforcing *Brown v. Board of Education* against recalcitrant state officials. *See, e.g.*, Jackson v. Rawdon, 235 F.2d 93, 96 (5th Cir. 1956); BASS, *supra* note 214, at 126 (noting Fifth Circuit's affirmance of order rejecting state legislature's attempt to circumvent desegregation ruling).

[314] Hutcheson, *supra* note 13, at 799 n.9 (citing cases from 1913 through 1932).

[315] Fallon, *supra* note 308, at 1337; *see also* David A. Strauss, *Rights, Remedies, and Texas's S.B. 8*, 2022 SUP. CT. REV. 81, 107 (2023) (criticizing Court's "failure to recognize the consistent and unquestioning acceptance, over time, of a broad understanding of [the *Young*] principle" and noting that *Ex parte Young* "has been understood . . . as authorizing injunctive relief against unconstitutional state actions generally").

[316] *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971) (recognizing judicially created damages remedy for violation of Fourth Amendment by federal agent acting under color of his authority).

[317] Egbert v. Boule, 596 U.S. 482, 486 (2022).

bad-acting federal officials."[318] A prominent federal judge joined commentators in "express[ing] unease that [under the Court's decisions,] individuals whose constitutional rights are violated at the hands of federal officers are essentially remedy-less."[319] This is not simply a matter of policy; scholars have argued that the Court's entire approach is inconsistent with "the understanding when the Constitution was ratified, and subsisting long thereafter, that damages [are] an appropriate remedy for constitutional violations by federal (and state) officials."[320]

Seventh, since 1985, the Court's decisions have tightened the requirements for standing to sue in federal court, thus denying any federal forum for some federal claims.[321] In particular, the Court has given new rigor to the definition of the "injury in fact" that is necessary to bring a case within federal jurisdiction under Article III.[322] Plaintiffs must show, inter alia, "that they suffered a *concrete harm*,"[323] and "[c]entral to assessing concreteness is whether the asserted harm has a 'close relationship' to a harm 'traditionally' recognized as providing a basis for a lawsuit in American courts."[324] Even where Congress has created "a statutory prohibition or obligation and a cause of action," "[o]nly those plaintiffs who have been *concretely harmed* by a defendant's statutory violation may sue that private defendant over that violation in federal court."[325]

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[318] Jennifer L. Mascott & R. Trent McCotter, Egbert v. Boule*: Federal Officer Suits by Common Law*, CATO SUP. CT. REV., 2021-2022, at 111, 111.

[319] Byrd v. Lamb, 990 F.3d 879, 884 (5th Cir. 2021) (Willett, J., specially concurring). Judge Willett assumed, as have others, that Congress "has pre-empted the state tort suits that traditionally served as the mechanism by which damages were recovered from federal officers." *Id.* at 883 n.8 (citation omitted).

[320] Carlos M. Vázquez, Bivens *and the* Ancien Régime, 96 NOTRE DAME L. REV. 1923, 1929 (2021); *see also Byrd*, 990 F.3d at 884 & n.11 (Willett, J., specially concurring) (citing "constitutional scholars [who assert] that judge-made tort remedies against lawless federal officers date back to the Founding").

[321] The decision in *Allen v. Wright*, 468 U.S. 737 (1984), articulated the now-canonical three-part test for standing. *See id.* at 751 ("A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.").

[322] *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992) (noting that "plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not 'conjectural' or 'hypothetical'" (citations omitted)).

[323] TransUnion LLC v. Ramirez, 594 U.S. 413, 417 (2021) (emphasis added). *TransUnion* built on the earlier decision in *Spokeo, Inc. v. Robins*, 578 U.S. 330 (2016).

[324] *TransUnion*, 594 U.S. at 417 (quoting *Spokeo*, 578 U.S. at 340). Such harms include physical harms, monetary harms, and "harms specified by the Constitution itself." *Id.* at 425. Professor Sunstein has characterized this aspect of the decision in *TransUnion* as "an astonishing innovation." Cass R. Sunstein, *Injury in Fact, Transformed*, 2021 SUP. CT. REV. 349, 365 (2022).

[325] *TransUnion*, 594 U.S. at 426-27.

These decisions have led to the anomalous result that a congressionally created cause of action for violation of federal law may be cognizable only in state court, with the federal court unavailable either originally or through removal.[326]

Eighth, in assessing the availability of a federal forum for the litigation of federal claims, it is necessary to take account not only of the jurisdictional and remedial law, but also of the procedures—both the written rules and the manner in which they are administered. In 1977, Professor Bert Neuborne published a landmark article explaining why, "[a]s a civil liberties lawyer," he assumed that "persons advancing federal constitutional claims against local officials will fare better, as a rule, in a federal, rather than a state, trial court."[327] He outlined "a series of institutional factors (including procedural differences)" that supported that assumption.[328] Seventeen years later, Professor Neuborne revisited his thesis. He acknowledged that "[m]uch has changed,"[329] but he reiterated his belief that "a relative institutional advantage for the plaintiff exists in federal court; an advantage resulting from a mix of political insulation, tradition, better resources and superior professional competence."[330]

Now consider, by way of example, the § 1983 action seeking damages for death or injury resulting from the alleged use of excessive force by police officers.[331] A lawsuit of that kind would seem to be the paradigm of the suit for which, based on Professor Neuborne's analysis, a plaintiff would prefer the federal court.[332] Yet, today, it is not at all uncommon for plaintiffs with excessive

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[326] *See id.* at 459 n.9 (Thomas, J., dissenting); *see also* Thomas B. Bennett, *The Paradox of Exclusive State-Court Jurisdiction over Federal Claims*, 105 MINN. L. REV. 1211 (2021). The state forum may be unavailable also. *See id.* at 1233-34 (noting that state-by-state variation in jurisdictional rules "effectively robs many plaintiffs of any effective remedy").

[327] Bert Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1115-16 (1977).

[328] Bert Neuborne, *Parity Revisited: The Uses of a Judicial Forum of Excellence*, 44 DEPAUL L. REV. 797, 797 (1995) (summarizing the 1977 article). Not everyone agreed with Neuborne's assessment. *See, e.g.*, Michael E. Solimine & James L. Walker, *State Court Protection of Federal Constitutional Rights*, 12 HARV. J.L. & PUB. POL'Y 127, 131 (1989) (stating that "the data that we and others have collected . . . shows that state courts have not subverted the adjudication and enforcement of federal constitutional rights").

[329] Neuborne, *supra* note 328, at 797. Among other changes, Neuborne mentioned "a modest renaissance in state constitutional jurisprudence" and "a general decline in the ability to win a novel individual rights case anywhere." *Id.* at 798-99.

[330] *Id.* at 799.

[331] Most excessive force claims are governed by the rules laid down by the Supreme Court in *Graham v. Connor*, 490 U.S. 386 (1989). *Graham* established two propositions. First, "all claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard." *Id.* at 395 (emphasis omitted). Second, whether force is reasonable in a particular case depends on "a careful balancing" of the governmental and individual interests. *Id.* at 396.

[332] Typically, these suits seek to impose liability both on the individual officers and on the employing municipality. *See* cases cited *infra* note 333. If nothing else, the "political

force claims under § 1983 to file suit in *state court*, and for the *defendant*—opposing the federal claim—to remove to federal court.[333] And the phenomenon is not limited to excessive force suits; on the contrary, it extends across a wide spectrum of federal question cases, statutory as well as constitutional.[334] This tells us that lawyers on both sides often act upon the belief that federal courts are *less* likely than state courts to vindicate federal claims. What accounts for this development? No doubt there are many explanations, but the evidence suggests that a major reason why the federal forum has become much less attractive to plaintiffs asserting federal claims is the "procedural differences" from state court—notably including the (perceived) greater willingness of federal courts to grant summary judgment.[335]

To be sure, removal means that the federal claims *are* litigated in federal court. But if procedures or other practices in federal court create substantial

insulation" that Neuborne emphasized in both of his articles would seem to make the federal court the preferable forum from the standpoint of the plaintiff.

[333] *See, e.g.*, Caraway v. City of Pineville, 111 F.4th 369, 377 (4th Cir. 2024) (removal from North Carolina state court); Quinn v. Zerkle, 111 F.4th 281, 288 (4th Cir. 2024) (removal from West Virginia state court); Heeter v. Bowers, 99 F.4th 900, 907 (6th Cir. 2024) (removal from Ohio state court); Acosta v. Miami-Dade Cnty., 97 F.4th 1233, 1237-38 (11th Cir. 2024) (removal from Florida state court); Barnes v. Felix, 91 F.4th 393, 396 (5th Cir. 2024), *cert. granted* (Oct. 4, 2024) (No. 23-1239) (removal from Texas state court); Whitworth v. Kling, 90 F.4th 1215, 1217 (8th Cir. 2024) (removal from Arkansas state court); Mosier v. Evans, 90 F.4th 541, 545 (6th Cir. 2024) (removal from Tennessee state court); Rush v. City of Philadelphia, 78 F.4th 610, 614-15 (3d Cir. 2023) (removal from Pennsylvania state court); Howell v. Municipality of Anchorage, 646 F. Supp. 3d 1047, 1059 (D. Alaska 2022) (removal from Alaska state court); Tuuamalemalo v. Greene, 946 F.3d 471, 475 (9th Cir. 2019) (removal from Nevada state court).

[334] *See, e.g.*, DeVillier v. Texas, 601 U.S. 285, 289-90 (2024) (Takings Clause; removal from Texas state court); Noon v. City of Platte Woods, 94 F.4th 759, 763 (8th Cir. 2024) (First Amendment retaliation; removal from Missouri state court); Brox v. Hole, 83 F.4th 87, 90-91 (1st Cir. 2023) (free exercise and due process; removal from Massachusetts state court); Ashford v. PricewaterhouseCoopers LLP, 954 F.3d 678, 681 (4th Cir. 2020) (Title VII; removal from South Carolina state court); Cloutier v. GoJet Airlines, LLC, 996 F.3d 426, 433 (7th Cir. 2021) (Americans With Disabilities Act and Family Medical Leave Act; removal from Illinois state court); Hines v. State Room, Inc., 665 F.3d 235, 239 (1st Cir. 2011) (Fair Labor Standards Act; removal from Massachusetts state court).

[335] See Arthur D. Hellman, *Another Voice for the "Dialogue": Federal Courts as a Litigation Course*, 53 ST. LOUIS U. L. REV. 761, 765-68 (2009) (outlining reasons for plaintiffs' preference for state court, including perception that federal judges feel more comfortable granting summary judgment to defendants); STEVEN H. STEINGLASS, SECTION 1983 LITIGATION IN STATE AND FEDERAL COURTS § 8:2 (2023-2024), Westlaw S1983LITIG (stating that "[f]ederal policies on pleading, sanctions, summary judgment, discovery, and interlocutory appellate review place burdens on § 1983 plaintiffs, especially those with limited resources"); *id.* § 8:11 (examining "different policies and practices concerning summary judgment" in state and federal courts; noting that "even in states that follow the federal model, the use of summary judgment by state courts to dismiss § 1983 actions may not occur as often as in federal court").

obstacles to the enforcement of federal rights, as so many lawyers apparently believe, the mere availability of the federal forum—at the initiative of the defendant resisting the federal claim—may not do much to serve the purposes of the federal question jurisdiction.[336]

Ninth, when Amar was writing in 1985, the Supreme Court's mandatory jurisdiction still included all cases in which a state court upheld a state statute against a claim that the statute violated federal law.[337] The Court did not have to give plenary consideration to all such cases, but it did have to decide whether the state court correctly rejected the federal claim.[338] That statute was repealed in 1988, and review is now discretionary with the Court.[339] Indeed, virtually all of the Court's jurisdiction is now discretionary.[340]

Moreover, as has been the law since the Judiciary Act of 1789, the Court's jurisdiction to review state-court decisions is limited to "[f]inal judgments or decrees."[341] In the latter part of the twentieth century, the Court took a "pragmatic approach" to determining finality,[342] particularly in situations where "a refusal immediately to review the state court decision might seriously erode federal policy."[343] But that doctrine has seldom been invoked in recent years,[344]

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[336] There is a particular irony when the federal questions are raised in a suit under § 1983. The Supreme Court has famously said that "[t]he very purpose of § 1983 was to interpose the *federal* courts between the States and the people, as guardians of the people's federal rights." Mitchum v. Foster, 407 U.S. 225, 242 (1972) (emphasis added). But, in no small part because of changes in federal procedure over the last thirty years, many of the lawyers seeking to vindicate "the people's federal rights" today prefer to do so in *state* court.

[337] *See* 28 U.S.C. § 1257(2) (1976) (repealed 1988).

[338] *See* Hellman, *supra* note 219, at 953-54.

[339] Act of June 27, 1988, Pub. L. No. 100-352, 102 Stat. 662; *see* Boskey & Gressman, *supra* note 173.

[340] The only exceptions are some cases under the Voting Rights Act, reapportionment cases, and occasional special statutes for legislation that Congress thought should get expedited review. *See* Michael E. Solimine, *The Three-Judge District Court in Voting Rights Litigation*, 30 U. MICH. J.L. REFORM 79, 80-81 (1996); Michael E. Solimine, *The Fall and Rise of Specialized Federal Constitutional Courts*, 17 U. PA. J. CONST. L. 115, 129-31 (2014).

[341] 28 U.S.C. § 1257.

[342] Cox Broad. Corp. v. Cohn, 420 U.S. 469, 486 (1975).

[343] *Id.* at 483. This approach was not limited to cases in which the Court, upon plenary review, reversed the state-court decision. *See* Belknap, Inc. v. Hale, 463 U.S. 491, 497 n.5 (1983).

[344] The controversial decision in *Moore v. Harper*, 600 U.S. 1 (2023), did rely on *Cox Broadcasting*, but on the basis that "the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings." *See id.* at 16. The Court has sometimes relied on the "serious erosion" rationale without saying so in its opinion. *See* Reply Brief for the Petitioners at 3, Sunoco LP v. City & Cnty. of Honolulu, No. 23-947 (U.S. May 21, 2024) (citing Coventry Health Care of Mo., Inc. v. Nevils, 581 U.S. 87, 92-94 (2017); Dan's City Used Cars, Inc. v. Pelkey, 569 U.S. 251, 259 (2013)). In both of the cited cases, the reference to serious erosion is found in a cert-stage document filed by petitioner. *See* Petition for a Writ of Certiorari at 36-37, *Coventry Health*,

and there is evidence that the finality requirement may sometimes lead the Court to withhold intervention in cases where a state may have violated a federal right.[345] To be sure, the final judgment rule results in postponement, not denial, of access to a federal court, but even well-heeled litigants may be unwilling to bear the burdens of further proceedings in state court in order to vindicate their federal rights.[346]

Finally, in the early 1980s, the Supreme Court was giving plenary consideration to about 150 cases a Term and deciding another 10 or 15 by summary opinion.[347] Even with those numbers, Professor Amar feared that the Court was denying a hearing to "many . . . probably meritorious" cases.[348] In recent Terms, the number of plenary decisions has seldom gone much above sixty, and the summary opinion has almost disappeared from the pages of the U.S. Reports.[349]

The decline in cases from state courts has been particularly precipitous. In the early 1990s, the Supreme Court was generally deciding more than twenty state-

581 U.S. 87 (2017) (No. 16-149), 2016 WL 4088378; Petitioner's Reply to Brief in Opposition at 2-3, *Dan's City*, 569 U.S. 251 (2013) (No. 12-52), 2012 WL 5872832. There is no mention in the opinions of the final judgment rule or of the fourth *Cox* exception.

345 *See, e.g.*, Thompson v. Henderson, 143 S. Ct. 2412, 2412-13 (2023) (statement of Alito, J., respecting the denial of certiorari) (concurring in denial of certiorari despite "serious and troubling issues of due process and equal protection" because "it is not clear whether [the case] presents any 'federal issue' that has been 'finally decided by the' Washington Supreme Court"); Gordon Coll. v. DeWeese-Boyd, 142 S. Ct. 952, 955 (2022) (statement of Alito, J., respecting the denial of certiorari) (concurring in denial of review despite "doubts about the state court's understanding of religious education" because state court ruling may not have been a final judgment).

346 In *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003), the Court dismissed as improvidently granted a case in which the California Supreme Court rejected Nike's argument that Kasky's "false advertising" claim was barred by the First Amendment. *See id.* at 666 (Breyer, J., dissenting). There was no opinion for the Court, but a concurring opinion relied in part on the final-judgment requirement. *See id.* at 658-60 (Stevens, J., concurring). The concurring opinion anticipated the development of "a full factual record," *see id.* at 664, but there were no further proceedings, because shortly after the case returned to the California Supreme Court, the parties settled. *See* David C. Vladeck, *Lessons from a Story Untold:* Nike v. Kasky *Reconsidered*, 54 CASE W. RSRV. L. REV. 1049, 1051 n.6 (2004).

347 *See* Hellman, *supra* note 219, at 951, 955-56.

348 Amar, *supra* note 10, at 268.

349 In the 2022 Term, the Court handed down fifty-seven plenary decisions and one summary opinion. In the 2023 Term, there were sixty plenary decisions and a single summary opinion. (Author's database.) The summary opinion in the 2023 Term was unusual in two respects. It was issued after the Court recessed for the summer, and it rejected an application for emergency relief, thus effectively *affirming* the action of the court below. *See* Dep't of Educ. v. Louisiana, 144 S. Ct. 2507 (2024). Early in the 2024 Term, the Court handed down a brief summary opinion vacating (not reversing) a court of appeals decision. *See* Hamm v. Smith, 2024 WL 4654458 (U.S. Nov. 4, 2024) (per curiam).

court cases a Term with full opinion.[350] In the four most recent Terms, the *total* was seventeen.[351] A study published in 2018 found "a consistent underrepresentation of state courts [compared with federal courts] in merits opinions involving argued cases."[352]

The effect of these developments is twofold. Compared with 1985, in both civil and criminal cases, the lower federal courts are less readily available to litigants seeking to enforce federal rights. Meanwhile, for those who have no choice but to litigate their federal claims initially in state court, the possibility of Supreme Court review is now almost more theoretical than real.[353]

The shrunken docket of the Supreme Court has also given rise to other concerns. When Hamilton warned of the "contradiction and confusion" that would result from "[t]hirteen independent courts of final jurisdiction" deciding federal questions, he was referring to the thirteen states in the Union to be created by the Constitution.[354] Today there are thirteen appellate courts in the federal system alone and fifty more in the states, all resolving federal questions independently of the others.[355] When the Supreme Court is deciding fewer than seventy cases a year from all of those courts, what becomes of "[t]he . . . necessity of uniformity in the interpretation of the national laws"?[356]

One related development deserves mention. The preceding discussion has assumed that federal questions will be litigated either in an "inferior" federal court or in state court with the possibility of appellate review by the Supreme

[350] *See* Michael E. Solimine, *Supreme Court Monitoring of State Courts in the Twenty-First Century*, 35 IND. L. REV. 335, 353 (2002).

[351] *See The Supreme Court, 2020 Term—The Statistics*, 135 HARV. L. REV. 491, 500 (2021) (noting three cases in 2020 term); *The Supreme Court, 2021 Term—The Statistics*, 136 HARV. L. REV. 500, 510 (2022) (noting five cases in 2021 term); *The Supreme Court, 2022 Term—The Statistics*, 137 HARV. L. REV. 490, 500 (2023) (noting five cases in 2022 term). There were four state-court cases on the plenary docket for the 2023 Term. (Author's database.) The figure for the 2021 Term includes one summary reversal. *See* Wis. Legislature v. Wis. Elections Comm'n, 595 U.S. 398 (2022). One decision adjudicated cases from two state courts. *See* Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 592 U.S. 351 (2021).

[352] Jeffrey S. Sutton & Brittany Jones, *The Certiorari Process and State Court Decisions*, 131 HARV. L. REV. F. 167, 172 (2018).

[353] Commentators disagree as to the extent of the problem presented by the shrinking number of state court cases reviewed by the Supreme Court. *Compare id.* at 176 (arguing that the "additional space for error at the state court level" is troubling, given that "state courts, by one count, handle 95% of the civil and criminal cases in the country"), *with* Solimine, *supra* note 350, at 358 (citing studies suggesting "that, by and large, state courts (or at least state high courts) comply with Supreme Court precedent").

[354] *See supra* text accompanying notes 72-73.

[355] *See* Joseph F. Weis, Jr., *Disconnecting the Overloaded Circuits—A Plug for a Unified Court of Appeals*, 39 ST. LOUIS U. L.J. 455, 459 (1995) (noting that judges in each circuit view it as "their duty to independently examine questions of federal law even if the precise point had already been decided by another . . . court of appeals").

[356] *See supra* text accompanying notes 72-73.

Court. There is a third possibility, available only for a very small but important class of cases. When one state seeks to assert claims of violation of federal law by another state, the case falls within the original jurisdiction of the Supreme Court, and that jurisdiction is exclusive.[357] Nevertheless, the Court, with minimal explanation, has taken the position that it has discretion to entirely decline to hear state-versus-state actions, even when those actions present federal questions.[358] As the leading treatise on Supreme Court practice has observed, the Court's approach has made its original jurisdiction "almost as discretionary as its certiorari jurisdiction over appellate cases."[359] The result is "to deny any forum to a State that is asserting claims that another State is engaging in conduct that federal law forbids."[360] Thus, although the Court's practice is independent of the various strands of doctrine implementing the federal question jurisdiction, it arguably undercuts the purposes of that jurisdiction as much as any doctrinal development, because the federal questions are being raised by entities that occupy a unique position under the Constitution—states that retain "a residuary and inviolable sovereignty."[361]

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[357] *See* 28 U.S.C. § 1251(a)(1) ("The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States."). To be sure, this provision implements one of the party-based heads of jurisdiction in Article III, section 2, and thus "it is entirely unimportant what may be the subject of controversy." Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 378 (1821); *see supra* text accompanying note 119. What *is* important is that the provision includes cases that present federal questions, even though the basis for original jurisdiction in the Supreme Court is the presence of the state as a party. The Supreme Court may also decide federal questions under its original jurisdiction in cases brought by a state against the United States. *See, e.g.*, South Carolina v. Baker, 485 U.S. 505 (1988) (upholding constitutionality of federal tax statute). But that jurisdiction is not exclusive, see 28 U.S.C. § 1251(b)(2), and indeed in recent years it has become commonplace for states to file suit in federal district court challenging Federal Government policies. *See, e.g.*, Biden v. Nebraska, 600 U.S. 477 (2023) (holding that student loan forgiveness program was not authorized by federal statutes).

[358] *See* Arizona v. New Mexico, 425 U.S. 794, 796 (1976) (per curiam); Texas v. California, 141 S. Ct. 1469, 1474 (2021) (Alito, J., dissenting from denial of motion for leave to file complaint) (chronicling evolution of Court's practice).

[359] STEPHEN M. SHAPIRO, KENNETH S. GELLER, TIMOTHY S. BISHOP, EDWARD A. HARTNETT & DAN HIMMELFARB, SUPREME COURT PRACTICE 639 (10th ed. 2013) (cleaned up).

[360] Brief of Amici Curiae Federal Courts Scholars in Support of Movants at 19, Alabama v. California, No. 158 (U.S. July 23, 2024) [hereinafter Federal Courts Scholars' Brief], https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4931923 [https://perma.cc/AF6W-NB3H].

[361] Murphy v. Nat'l Collegiate Athletic Ass'n, 584 U.S. 453, 470 (2018) (citing THE FEDERALIST NO. 39, at 245 (C. Rossiter ed., 1961)) (cleaned up). Recall, too, that the Virginia Plan, the antecedent of the federal question jurisdiction, would have authorized federal courts to hear "questions which may involve the national peace and harmony." *See supra* text accompanying note 23. State-versus-state cases presenting federal questions would seem to fit squarely within that description. For a detailed critique of the Court's position, see Federal Courts Scholars' Brief, *supra* note 360. For a defense of the Court's practice, see Steve

C. . . . *But Not Entirely*

Not all of the movement has been in one direction, however. In four different areas, Supreme Court decisions since 1985 have—at least doctrinally—expanded the availability of a federal forum for the litigation of federal questions.

First, the Court cut back somewhat on the doctrine of *Younger v. Harris*, under which a federal court must sometimes abstain from hearing a federal-law challenge to state action in deference to a pending proceeding in state court.[362] *Younger* itself involved a state criminal proceeding, but, as already noted, the Court soon extended the doctrine into the civil realm.[363] How far would that extension go? For more than two decades, most lower courts answered that question by "strictly and mechanically" applying a three-part test from a 1982 decision, an approach that "commonly resulted in abstention."[364] In the *Sprint* decision in 2013, the Supreme Court rejected that approach, holding that *Younger* extends only to three "exceptional circumstances."[365] But *Sprint* was not a major shift in the law. Within its sphere, the *Younger* doctrine continues to allow federal courts to decline to hear cases "within the scope of federal [statutory] jurisdiction."[366]

Earlier, the Court performed more radical surgery on the *Rooker-Feldman* doctrine, which limits district court jurisdiction in cases where the federal claim implicates a state-court proceeding that has *concluded*.[367] In *Exxon Mobil Corp.*

Vladeck, *38. "Original" Jurisdiction and the* Wyandotte *Doctrine*, ONE FIRST (July 31, 2023), https://www.stevevladeck.com/p/38-original-jurisdiction-and-the [https://perma.cc/7ZLT-46GY].

362 Younger v. Harris, 401 U.S. 37 (1971); *see supra* Section IV.A.

363 *See supra* text accompanying note 246.

364 ACRA Turf Club, LLC v. Zanzuccki, 748 F.3d 127, 135 (3d Cir. 2014).

365 *See* Sprint Commc'ns, Inc. v. Jacobs, 571 U.S. 69, 82 (2013). The Court had said much the same thing in *New Orleans Public Service, Inc. v. Council of New Orleans*, 491 U.S. 350 (1989) (*NOPSI*), but the lower courts did not get the message. *See ACRA Turf Club*, 748 F.3d at 135 (noting that after *NOPSI*, "district courts demonstrated greater and greater willingness to abstain from adjudicating federal claims in deference to ongoing state proceedings").

366 *Sprint*, 571 U.S. at 72; *see, e.g.*, Altice USA, Inc. v. N.J. Bd. of Pub. Utils., 26 F.4th 571 (3d Cir. 2022) (reversing district court that found utility board order preempted by federal law; holding that court should have abstained under *Younger*); Oglala Sioux Tribe v. Fleming, 904 F.3d 603 (8th Cir. 2018) (reversing district court that vindicated challenge to state procedures for temporarily removing children from their homes in exigent circumstances; holding that court should have abstained under *Younger*); Doe v. Univ. of Ky., 860 F.3d 365 (6th Cir. 2017) (affirming abstention in student's federal constitutional challenge to state university's disciplinary proceeding).

367 The doctrine "bars lower federal courts from conducting appellate review of final state-court judgments because 28 U.S.C. § 1257 vests sole jurisdiction to review such claims in the Supreme Court." Berry v. Schmitt, 688 F.3d 290, 298 (6th Cir. 2012); *see* Rooker v. Fid. Tr. Co., 263 U.S. 413 (1923); D.C. Ct. of Appeals v. Feldman, 460 U.S. 462 (1983).

v. Saudi Basic Industries Corp.,[368] the Court noted that lower courts had sometimes extended the doctrine "far beyond the contours" of the cases from which it originated.[369] Henceforth the doctrine would be confined to cases "brought by state-court losers" seeking "review and rejection" of a state-court judgment.[370] Here too, however, the Court's decision has not entirely opened the doors of the federal courts; "[l]itigants continue to make expansive *Rooker-Feldman* arguments, . . . [a]nd lower courts keep buying them."[371]

Neither *Sprint* nor *Exxon Mobil* overruled any Supreme Court precedents. The Court did take that step in *Knick v. Township of Scott*,[372] decided in 2019. Decisions of the Warren and Burger Courts had established the general rule that a plaintiff challenging state action under § 1983 need not exhaust state remedies before filing suit[373]—but with an exception for claims seeking just compensation under the Takings Clause. The exception, articulated in the *Williamson County* case of 1985, was grounded in a constitutional holding: if the state provides an adequate procedure for seeking just compensation, there is no violation of the Takings Clause until the property owner "has used the procedure and been denied just compensation."[374] The Court in *Knick* found that this ruling "effectively established an exhaustion requirement for § 1983 takings claims."[375] The requirement was both "wrong" and "unworkable,"[376] and it was overruled.[377]

Less than a year after *Knick* came down, a Ninth Circuit panel affirmed the dismissal of a § 1983 takings claim on the basis that the plaintiff did not give the government an "opportunity to exercise its 'flexibility or discretion'" after the government had expressed its position on the application of the challenged regulation.[378] The Supreme Court summarily reversed, reiterating that

[368] 544 U.S. 280 (2005).

[369] *Id.* at 283.

[370] *Id.* at 284.

[371] VanderKodde v. Mary Jane M. Elliott, P.C., 951 F.3d 397, 407 (6th Cir. 2020) (Sutton, J., concurring); *see also* Raphael Graybill, Comment, *The Rook That Would Be King:* Rooker-Feldman *Abstention Analysis After* Saudi Basic, 32 YALE J. ON REGUL. 591, 592 (2015) (concluding, based on empirical study ten years after *Exxon Mobil*, that "the case has had virtually no effect in curtailing [the doctrine's] use by district courts").

[372] 588 U.S. 180 (2019).

[373] *See* McNeese v. Bd. of Educ. for Cmty. Unit Sch. Dist. 187, 373 U.S. 668, 671 (1963); Patsy v. Fla. Bd. of Regents, 457 U.S. 496, 500, 533 (1982) (reaffirming *McNeese* over dissent).

[374] Williamson Cnty. Reg'l Plan. Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 195 (1985).

[375] *Knick*, 588 U.S. at 194.

[376] *Id.* at 182, 202.

[377] *Id.* at 206.

[378] Pakdel v. City & Cnty. of San Francisco, 952 F.3d 1157, 1167-68 (9th Cir. 2020) (cleaned up), *rehearing en banc denied*, 977 F.3d 928 (2020).

"administrative exhaustion of state remedies is not a prerequisite for a takings claim when the government has reached a conclusive position."[379]

The fourth development is the most surprising. One of the decisions that best encapsulates the jurisprudence of the Rehnquist Court is the Chief Justice's opinion in *Seminole Tribe v. Florida*.[380] The specific holding was that the Indian Commerce Clause does not grant Congress the power to abrogate the sovereign immunity of unconsenting states from suit in federal court.[381] But the case's importance lay in the rule it laid down. The Court used broad and uncompromising language: "Even when the Constitution vests in Congress *complete law-making authority* over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States."[382] This prohibition applies irrespective of the type of relief sought.[383] "The Eleventh Amendment restricts the judicial power under Article III, and *Article I cannot be used* to circumvent the constitutional limitations placed upon federal jurisdiction."[384] A few years later, the Court summarized the *Seminole Tribe* rule: "Congress may not abrogate state sovereign immunity pursuant to its Article I powers."[385]

Notwithstanding this unequivocal language, in 2006, less than five months after Chief Justice Rehnquist died, the Court changed direction. In *Central Virginia Community College v. Katz*,[386] the Court held that a bankruptcy trustee's proceeding to recover alleged preferential transfers by the debtor to state agencies is not barred by sovereign immunity.[387] In distinguishing *Seminole Tribe* and other precedents, the Court did not rely on any theory of abrogation. The rationale, rather, was, in essence, one of *waiver*—that "States *agreed in the plan of the Convention* not to assert any sovereign immunity defense they might have had in proceedings brought pursuant to 'Laws on the subject of Bankruptcies.'"[388]

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[379] Pakdel v. City & Cnty. of San Francisco, 594 U.S. 474, 480 (2021) (cleaned up).

[380] 517 U.S. 44 (1996).

[381] *Id.* at 53.

[382] *Id.* at 72 (emphasis added).

[383] *Id.* at 58.

[384] *Id.* at 72-73 (emphasis added).

[385] Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 636 (1999) (holding that Congress's power to protect patents does not authorize Congress to authorize suits against unconsenting states for patent infringement). In contrast, the Court unhesitatingly held that Congress does have the power to abrogate state sovereign immunity under the Fourteenth Amendment. *See* Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) (Rehnquist, J.).

[386] 546 U.S. 356 (2006).

[387] *Id.* at 362.

[388] *Id.* at 377 (emphasis added). The majority in *Katz* was composed of the four *Seminole Tribe* dissenters joined by Justice O'Connor, who retired from the Court one week later. Justice O'Connor had joined the majority in *Seminole Tribe* and the cases following it. She did not write separately in *Katz*.

Katz was a startling departure from the *Seminole Tribe* line of cases,[389] and in 2020 the Court itself described the decision as "a good-for-one-clause-only holding."[390] But one year later, in another surprising turn, the Court elevated the "plan of the Convention" theory to the status of established doctrine, as an alternative to actual consent or abrogation under the Fourteenth Amendment.[391] Applying that doctrine, the Court held that "the States consented in the plan of the Convention to the exercise of federal eminent domain power, including in condemnation proceedings brought by private delegatees."[392] A year after that, the Court took the "plan of the Convention" theory as its starting-point and gave it a new name: "structural waiver."[393] The Court applied the theory to "the war powers"—a grant of authority found "not in a single, simple phrase, but in many broad, interrelated provisions."[394] The Court held that "when the states entered the federal system," they gave up their immunity to unconsented suits to enforce Congress's exercise of these "war powers."[395] It is too early to say whether the "structural waiver" theory will trump *Seminole Tribe*, but a broad reading of the new case "could undermine the Rehnquist Court's state sovereign immunity holdings and revive challenges to state immunity across a wide spectrum of congressional powers."[396]

CONCLUSION

For the past quarter century and more, as Part IV has shown, a wide range of developments has had the effect of reducing the availability of an Article III court to litigants seeking to vindicate federal rights. These developments have included Congressional legislation, judicial doctrines, and the Supreme Court's management of its docket.

True, there has also been movement in the opposite direction. But today, in an era when the reach of federal law has never been more expansive, it seems

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[389] *See The Supreme Court, 2005 Term—Leading Cases*, 120 HARV. L. REV. 125, 129-30 & n.42 (2006) (noting that "the Solicitor General declined to defend federal bankruptcy law in *Katz*, because he felt 'there was no reasonable argument to be made in favor of its constitutionality'").

[390] Allen v. Cooper, 589 U.S. 248, 259 (2020). In *Allen*, the Court followed *Florida Prepaid* and held that Congress's power to provide copyright protection does not authorize Congress to abrogate the states' Eleventh Amendment immunity to unconsented suits for copyright infringement.

[391] PennEast Pipeline Co. v. New Jersey, 594 U.S. 482, 501 (2021).

[392] *Id.*

[393] Torres v. Tex. Dep't of Pub. Safety, 597 U.S. 580, 588 (2022).

[394] *Id.* at 590.

[395] *Id. Torres* involved a proceeding in state court, but the Court made clear that its holding applies irrespective of the court system in which the suit is litigated. *See id.* at 598 (stating that "a waiver pursuant to the plan of the Convention . . . displaces the background principles of state sovereign immunity wherever those suits proceed").

[396] *The Supreme Court, 2021 Term—Leading Cases*, 136 HARV. L. REV. 380, 385 (2022).

anomalous that legislation and judicial decisions have diminished, not increased, the availability of a federal court for litigation of cases presenting federal questions.[397] It is particularly troubling that, overwhelmingly, the litigants who are denied "their real day in an Article III court"[398] by these developments are those seeking "to restrain or correct the infractions" of federal rights by states—one of the primary purposes for which the federal question jurisdiction was established.[399]

Meanwhile, the ability of the federal courts to promote uniformity in the interpretation of federal law has also diminished. Today, as in the past, the Supreme Court is "the only court with the power to hand down judgments which constitute binding precedents [on federal questions] in all state and federal courts."[400] But the number of binding precedents emanating from the current Court is not even half of what it was when the Commission on Revision of the Federal Court Appellate System (Hruska Commission) recommended creation of a National Court of Appeals to provide a necessary expansion in the "national appellate capacity."[401] Commentators have suggested that "[r]esolving legal

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[397] Some commentators have argued that it would be desirable to reduce the reach of federal law and "devolve" power to state and local governments. Among other reasons, they believe that such a move would diminish the "political warfare" in which "lawmakers from California and Alabama battle over which side gets to impose its national solution on the other side." BRIAN RIEDL, DEVOLUTION: FOUR PROPOSALS TO EMPOWER STATES AND REDUCE WASHINGTON'S POLITICAL STRIFE 6 (2021), https://media4.manhattan-institute.org/sites/default/files/proposals-empower-states-and-reduce-political-strife-BR.pdf [https://perma.cc/8Q3D-KFJL]; *see also* Ilya Shapiro, Opinion, *Judicial Nominations Have Always Been Political*, NEWSWEEK (Oct. 21, 2020, 7:00 AM), https://www.newsweek.com/judicial-nominations-have-always-been-political-opinion-1540600 [https://perma.cc/J662-U6C5] (arguing that "the only way we'll defuse tensions in Washington" is for "the federal government to be making fewer decisions in this large, diverse, pluralistic country"). Whatever the merit of these suggestions, there is no reason to think that either Congress or the Supreme Court will adopt them in the foreseeable future. The decision in *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022), may appear to be an exception. *See id.* at 302 (holding that "[t]he Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion"). But abortion cases have continued to come to the Court. *See, e.g.*, FDA v. All. for Hippocratic Medicine, 602 U.S. 367 (2024) (finding plaintiffs lacked standing to challenge abortion drug regulation). It is thus reasonable to take as a given the expansive reach of federal law that exists today.

[398] *See supra* text accompanying note 10.

[399] *See supra* text accompanying note 66. In contrast, litigants seeking to enforce federal rights not implicating the Supremacy Clause—typically claims under federal regulatory statutes—will almost always be able to sue in federal court. *See supra* text accompanying note 170. *But see supra* text accompanying note 326.

[400] Commission on Revision of the Federal Court Appellate System, Structure and Internal Procedures: Recommendations for Change, 67 F.R.D. 195, 209 (1975).

[401] *Id.* at 246; *see also id.* at 208-09 (noting that at the time of the report, the Court was hearing "about 150 cases on the merits"). For data on the number of Supreme Court decisions, see sources cited *supra* notes 347-50.

uncertainty created by persistent circuit splits appears to be at least as important a judiciary reform goal today as it was in the early 1970s."[402]

Do these developments mean that the federal court system today is violating "the underlying logic and *spirit* of Article III"[403] by failing to implement the federal question jurisdiction in the manner expected by the Framers—particularly its role in enforcing the Supremacy Clause against state encroachments? Should Congress and the Court be rethinking the steps they have taken that have brought us further away from Marshall's vision of "having a [national] tribunal for the decision of all national questions?"[404] These questions certainly require investigation.

That investigation can proceed on two tracks. With respect to the trial courts, the normative element comes to the fore, because there will often be disagreement over the nature and strength of the federal interests implicated by the various categories of cases.[405] Consider, for example, the habeas jurisdiction of the district courts over collateral challenges to state court criminal convictions. Judge Stephen Reinhardt believed that a federal court should have "the authority, yes even the duty, to grant a writ of habeas corpus to a prisoner who was imprisoned or sentenced in violation of the Constitution."[406] In contrast, Judge Henry Friendly suggested in an influential article that as long as the prisoner received a fair hearing in state court, habeas corpus should generally be limited to constitutional claims that cast doubt on the prisoner's guilt.[407] The choice between these (or other) starting points will influence one's view of the limitations on habeas in effect today.

Or consider the equity jurisdiction of the district courts over suits seeking injunctive relief from state laws on the ground of repugnance to federal law. Forty years ago, then-Justice Rehnquist—notwithstanding his deep commitment to state sovereign immunity[408]—recognized that "the availability of prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy

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[402] Peter S. Menell & Ryan Vacca, *Revisiting and Confronting the Federal Judiciary Capacity "Crisis": Charting a Path for Federal Judiciary Reform*, 108 CALIF. L. REV. 789, 869 (2020).

[403] *See supra* text accompanying note 251.

[404] *See supra* text accompanying note 8.

[405] This is not to say that there is no room for empirical work. *See* Meredith R. Aska McBride, *Parity as Comparative Capacity: A New Empirics of the Parity Debate*, 90 U. CIN. L. REV. 68, 116 (2021) (suggesting that a "wealth of [recent] empirical research" can shed light on "the comparative capacities of the state and federal courts"); HART & WECHSLER, *supra* note 138, at 299-303 (noting the difficulty of separating empirical and normative approaches).

[406] Reinhardt, *supra* note 257, at 1224.

[407] *See* Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 167 (1970); *see also id.*, at 151-54 (noting exceptions to this general approach).

[408] *See supra* Section IV.C.

Clause."[409] He added: "Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law."[410] But in the *Whole Woman's Health* case, discussed earlier, the Court denigrated the importance of the *Ex parte Young* cause of action. It characterized *Young* as "a narrow exception" to the general rule of state sovereign immunity.[411] It emphasized that a suit for injunctive relief in federal court is just one of several routes for challenging state laws as violative of federal constitutional rights—and perhaps no more important than any other.[412] And it viewed with apparent equanimity the prospect that states would implement stratagems designed to foreclose resort to the *Ex parte Young* cause of action (or its § 1983 counterpart) for challenges to particular disfavored rights.[413] This attitude is worlds apart from one that views the availability of forward-looking relief in federal court as "giv[ing] life to the Supremacy Clause."[414] And it would carry over into other issues relating to the availability of the federal forum.

There is of course a vast literature on the issue of "parity"—the equivalence (or not) of state and federal courts as forums for the litigation of federal questions, particularly those implicating the Supremacy Clause.[415] The suggestion here is that it is necessary to look separately at each class of cases (criminal prosecutions in state courts, constitutional challenges to state laws, etc.) to make judgments about whether existing institutional arrangements adequately protect federal rights and interests. And if the ultimate goal is to change the law in a way that bring us closer to the Framers' vision, what is needed are *collective* judgments that reflect a variety of experiences and perspectives.

Two entities that might pursue these inquiries are the American Law Institute (ALI)[416] and the Committee on Federal-State Jurisdiction of the Judicial

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[409] Green v. Mansour, 474 U.S. 64, 68 (1985).

[410] *Id.* Justice Rehnquist's language was quoted with approval by Justice O'Connor, joined by Justice Scalia and Justice Thomas. *See* Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 293 (1997) (O'Connor, J., concurring in part and concurring in the judgment). All three Justices joined the Court opinion in *Seminole Tribe*. 517 U.S. 44, 46-47 (1996).

[411] *Whole Woman's Health I*, 595 U.S. 30, 39 (2021).

[412] *Id.* at 48-49. As already noted, the Court also chronicled the history in a way that obscured the extent to which "suits to restrain state officers from enforcing unconstitutional statutes . . . were a part of the recognized and settled jurisdiction of the [federal trial courts]" from the early years of the twentieth century. *See* Hutcheson, *supra* note 13, at 799; *supra* Section IV.B.

[413] *See Whole Woman's Health I*, 595 U.S. at 49.

[414] *See supra* text accompanying note 409.

[415] *See, e.g.*, McBride, *supra* note 405, at 69-71 (summarizing the debate); Akhil Reed Amar, *Law Story*, 102 HARV. L. REV. 688, 715 (1989) (book review) (stating that "the question of parity . . . has implications for a vast set of . . . doctrinal issues"); sources cited *supra* notes 327-28.

[416] In 1959, Chief Justice Warren encouraged the ALI to "undertake a special study and publish a report defining, in the light of modern conditions, the appropriate bases for the

Conference of the United States (FSJ Committee).[417] The ALI has already begun work on a "Restatement of the Law, Constitutional Torts."[418] That project "will focus its attention on providing clarification to statutory interpretations of 42 U.S.C. § 1983."[419] That is a welcome initiative that will include two of the issue areas discussed in this Article—*Bivens* and qualified immunity.[420] But the ALI will not be proposing amendments to the United States Code.[421] That is unfortunate, because the existing doctrines that so often deny any remedy for the violation of constitutional rights are well entrenched in Supreme Court decisions, and anything more than marginal departures will almost certainly require legislation.[422] The same can be said of other developments chronicled

jurisdiction of federal and state courts." Herbert Wechsler, *Foreword* to AM. L. INST., STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS, at ix (1969). Ten years later, the ALI published a detailed report, with scholarly memoranda and appendices, recommending "a proposed revision of those provisions of Title 28 of the United States Code that now delineate the jurisdiction of the District Courts, the procedure for its invocation and the limitations on its exercise in certain cases." *Id.* Some of the ALI's recommendations were enacted (e.g., the elimination of the amount in controversy requirement for federal question cases, see *supra* note 155 and accompanying text), but the most far-reaching were not (e.g., the proposal for removal based on a federal defense, see *supra* note 239 and accompanying text). At the turn of the twentieth century, the ALI completed another set of recommendations for amendments to the Judicial Code. *See* AM. LAW INST., FEDERAL JUDICIAL CODE REVISION PROJECT (2004). This study was limited to three subjects: supplemental jurisdiction, venue, and removal. It did not renew or revisit the proposal for federal defense removal.

[417] The Judicial Conference of the United States is the administrative policymaking body of the federal judiciary. The Federal-State Jurisdiction Committee has generally confined itself to recommending technical changes to Title 28 that do not alter the fundamental allocation of business between state and federal courts or otherwise create controversy. *See* H.R. REP. NO. 112-10, at 2-3 (2011) (describing evolution of Federal Courts Jurisdiction and Venue Clarification Act of 2011); James E. Pfander, *Jurisdictional Reform In and Out of Congress: An Essay for Judge Weis*, 85 U. PITT. L. REV. 579, 598-600 (2024) (describing the work of the FSJ Committee and noting that the Committee "proposes non-controversial fixes to the jurisdictional statutes"). But the Committee could, if it wished, serve as a forum for exploring broader topics and presenting recommendations—or even just options—to Congress.

[418] *See Speakers at the Annual Meeting*, ALI REP. (Am. Legal Inst., Philadelphia, Pa.), Summer 2024, at 8, https://www.ali.org/media/filer_public/74/47/7447dc73-8085-4755-9d75-82790cbd25b6/ali-reporter-summer-2024-3170.pdf [https://perma.cc/5J25-6888].

[419] *Id.*

[420] *See The American Law Institute Launches Restatement of the Law, Constitutional Torts*, ALI (Oct. 21, 2022), https://www.ali.org/news/articles/american-law-institute-launches-restatement-law-constitutional-torts/ [https://perma.cc/P4V5-9KK2] (outlining topics to be addressed by the Restatement).

[421] *See id.* (noting that Restatements "are primarily addressed to courts and aim at clear formulations of common law and its statutory elements, and reflect the law as it presently stands or might appropriately be stated by a court").

[422] To be sure, Justice Thomas has called upon the Court to reconsider its "qualified immunity jurisprudence" in "an appropriate case." Ziglar v. Abbasi, 582 U.S. 120, 160

here—for example, those involving habeas corpus and federal defense removal.[423] Moreover, it is far from clear that case-by-case adjudication is the best way to cure the shortfalls in the present system.[424] There is thus room for other entities to examine today's law with a view to recommending statutory changes that would close gaps in federal jurisdiction or remedies without undermining countervailing values.[425]

In this connection, it is worth flagging a striking feature that links several of the jurisdictional and remedial issues discussed in Part IV: historical research suggesting that the Court-created doctrines that limit access to federal courts for litigation of federal questions probably misinterpret the statutes that underlie the decisions. Consider first the basic statutes, §§ 1331 and 1441(a). Professors Woolhandler and Collins have shown that the cramped version of *Smith* jurisdiction reflected in the *Grable-Gunn* doctrine is hard to reconcile with the likely expectations of the Congress that enacted the predecessor legislation, the Judiciary Act of 1875.[426] And Professor Collins has concluded that the Court "probably got it wrong when it held that Congress had grafted the [well-pleaded complaint] rule onto defendant removal of cases raising federal defenses."[427] The phenomenon can also be seen in two important lines of precedent governing challenges to state official action. Professor Vázquez has argued that, contrary to the Court's interpretation, Congress in enacting AEDPA "did not intend to bar relief for wrong but reasonable state court errors."[428] And several scholars have questioned the origins of the Court's qualified immunity doctrine or challenged its fidelity to the text and purpose of § 1983.[429] It may turn out that on one or more of these issues, the optimal resolution is to enact legislation that explicitly embodies what Congress thought it was doing when it passed the original statute.

With respect to the Supreme Court, important empirical work remains to be done. Two questions are central. First, to what extent, and with what effect, has the Court declined to hear cases presenting a colorable claim that a state court

(Thomas, J., concurring in part and concurring in the judgment); *see also* Baxter v. Bracey, 140 S. Ct. 1862 (2020) (Thomas, J., dissenting from the denial of certiorari). But no other Justice joined him.

[423] Of course, limitations grounded in the Constitution—notably Article III standing—are not subject to Congressional modification. Procedural limitations can be modified through amendments to Enabling Act Rules.

[424] For example, legislation could deal with both qualified immunity and municipal liability, creating a better system of compensation for injuries resulting from violation of constitutional rights.

[425] For example, any proposals for expanding federal collateral review of state-court criminal convictions should take account of the interest in finality. *See* Friendly, *supra* note 407, at 149-50.

[426] *See supra* note 270 and accompanying text.

[427] *See supra* note 183.

[428] *See supra* note 260.

[429] *See* Reinert, *supra* note 300, at 203-04 nn.3 & 5 (citing academic works).

has improperly denied a right under federal law?[430] Second, to what extent, and with what effect, is the Court turning aside cases that would enable it to resolve conflict or disarray in the lower courts on recurring issues of federal law? The task will not be easy,[431] but a forthcoming article will provide the analytical tools for pursuing the inquiry.[432]

430 Admittedly, this question posits that the Court should take some cases solely to engage in error correction—a task that the Court has generally disclaimed. But state-court decisions rejecting federal claims or defenses are an exception. *See* Arthur D. Hellman, *The Shrunken Docket of the Rehnquist Court*, 1996 SUP. CT. REV. 403, 428, 430 (1997).

431 Professor Solimine has noted the difficulty of testing "how, if at all, the shrunken docket [of the Supreme Court] has affected adjudications in state courts." Solimine, *supra* note 350, at 354. The broader inquiry suggested here would be even more difficult.

432 *See* Hellman, *supra* note 262.