# RESPONSE

## IS FEDERAL QUESTION JURISDICTION ARISING OR SETTING?[†]

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CONTENTS



[†] An invited response to Arthur D. Hellman, *The Federal Question Jurisdiction Under Article III: "First in the Mind of the Framers," but Today, Perhaps, Falling Short of the Framers' Expectations*, 104 B.U. L. REV. 2143 (2024).

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## INTRODUCTION

In his article,[1] Professor Arthur D. Hellman provides a bold thesis. He argues that "there is reason to be concerned that the [federal] 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,' but also by fostering 'balkanization' rather than uniformity in the interpretation of federal law."[2] Hellman supports this position on many fronts. He argues, constitutionally, that the Framers intended a broad scope of matters to fall within federal question jurisdiction in order to ensure the supremacy of federal law.[3] This broad constitutional capacity, Hellman contends, was realized in statute, now codified primarily at 28 U.S.C. § 1331,[4] during the Reconstruction era.[5] Add to this, the federal courts through *Ex parte Young*[6] doctrine took an active role in limiting infringement of federal rights by state actors.[7] Hellman observes that this once-settled terrain has been recently turned over by a variety of causes ranging from restrictions on federal habeas corpus review of state convictions[8] to the narrowing of § 1331 jurisdiction[9] to the erosion of 42 U.S.C. § 1983 and *Bivens*[10] protections (as exemplified in *Dobbs v. Jackson Women's Health Org*.[11]) to standing doctrine[12] and to the drop in the number of cases heard by

[1] Arthur D. Hellman, *The Federal Question Jurisdiction Under Article III: "First in the Mind of the Framers," But Today, Perhaps, Falling Short of the Framers' Expectations*, 104 B.U. L. REV. 2143 (2024).

[2] *Id.* at 2147 (footnote omitted).

[3] *See id.*at 2161-63 ("[W]hen a case presents a federal question sufficient to satisfy the requirements of Article III, the jurisdiction extends to the '*whole* case.' . . . whether state or federal.").

[4] *See id.*at 2168-69 ("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.").

[5] *See id.* at 2173 ("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.'" (quoting FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM 65 (1928))).

[6] 209 U.S. 123 (1908).

[7] *See* Hellman, *supra* note 1, at 2175.

[8] *See id.* at 2179-80 ("[I]n 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act (AEDPA), which severely cut back on the availability of federal habeas corpus as a device for asserting federal constitutional challenges to state-court convictions.").

[9] *See id.* at 2172-73 (discussing Supreme Court move to apply § 1331 to "brought to enforce" statutes).

[10] Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

[11] 597 U.S. 215 (2022); *see also* Hellman, *supra* note 1, at 2187.

[12] *See* Hellman, *supra* note 1, at 2189-90.

the Supreme Court itself.[13] As a result, we find ourselves, in Hellman's view, "in an era when the reach of federal law has never been more expansive . . . [yet] legislation and judicial decisions have diminished, not increased, the availability of a federal court for litigation of cases presenting federal questions."[14] Or, to be cheeky about it, Hellman argues that we are witnessing the "setting of" arising under jurisdiction. This state of affairs, argues Hellman, runs contrary to the intent and purposes of federal question jurisdiction.[15]

It is a privilege to respond to such a thoughtful and thought-provoking piece. I worry, however, that I may agree too often with Hellman to offer an engaging response. For instance, I conclude that his take on the interplay of Eleventh Amendment doctrine, particularly *Dobbs*, and federal question jurisdiction hits the nail on the head.[16] Similarly, I find myself in agreement with Hellman's assessment of the Court's retrenchment in *Bivens* doctrine.[17] And I agree that the contraction of the size of the Supreme Court's docket, when contrasted with the growth in population and impact of federal law, is quite troubling.[18] In place of listing fully the many areas where Hellman's position clearly carries the day, in the remainder of this Essay I sketch areas where my position offers a slightly different perspective than Hellman's, which I provide in the spirit of continuing an important conversation about the role of the federal question jurisdiction in our judicial system.

To that end, in Part I, I address Article III federal question jurisdiction. There, I begin by questioning the value of originalist interpretations of Article III jurisdictional doctrine both descriptively and normatively. I then turn to an intra-originalist look at Article III federal question jurisdiction. Here, I offer an originalist account of Article III federal question jurisdiction that focuses on the power to declare authoritatively federal law, a view that is broader than Hellman's state-infringement focus.

In Part II, I turn to statutory federal question jurisdiction under 28 U.S.C. § 1331. While I find myself agreeing with Hellman's broad premises, I provide more detail on pre-1900 practice, which further illustrates the distance between legislative intent and current § 1331 doctrine. Next, I offer a brief discussion of Justice Holmes's unique role in forming current statutory jurisdictional rules. I end this Section raising pragmatic concerns with fully embracing the original legislative intent of § 1331 jurisdiction.

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[13] *See id.* at 2193-94.

[14] *Id.* at 2199-2200.

[15] *Id.* at 2200.

[16] *See id.* at 2175-76.

[17] *See id.* at 2188-89; *see also* Alexander A. Reinert & Lumen N. Mulligan, *Asking the First Question: Reframing* Bivens *After* Minneci, 90 WASH. U. L. REV. 1473, 1506-08 (2013) (arguing against further retrenchment in *Bivens* doctrine).

[18] *See* Hellman, *supra* note 1, at 2193-94.

## I. ARTICLE III FEDERAL QUESTION JURISDICTION ORIGINALISM

In this Part, I address Hellman's treatment of Article III federal question subject matter jurisdiction. Fundamentally, Hellman argues that current Article III practice deviates from the Framer's intent and that this is an unwise course.[19] In Section A, I question whether originalism plays a normatively attractive role in Article III jurisdiction doctrine at all. In Section B, I turn to an intra-originalist look at Article III federal question jurisdiction. Here, I conclude that the power to declare federal law authoritatively has the stronger claim to an original-intent foundation than Hellman's position, which focuses on enforcement of federal rights against state encroachment.

### A. *Does Originalism Have a Role in Interpretation of Article III Jurisdiction?*

Hellman argues that contemporary practice deviates from the original understanding of Article III arising under jurisdiction. Implicit in this argument is the notion that the original understanding of the Constitution, and more particularly of Article III jurisdiction, should have normative weight in assessing current practice. Without rehearsing all of the originalism debate in this Essay,[20]

[19] *See id.* at 2201 ("Do these developments mean that the federal court system today is violating 'the underlying logic and *spirit* of Article III' 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?" (footnote omitted) (quoting 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)).

[20] Originalism is a term with many different meanings. *See generally* Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599 (2004) (describing rise of original public meaning originalism). Some define it as an approach to constitutional interpretation that finds the Framers' and ratifiers' actual, subjective understandings of the constitutional text the lodestar for constitutional adjudication. *See, e.g.*, Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274, 1317 (2006) (defining originalism as "the theory that the original understanding of those who wrote and ratified various constitutional provisions determines their current meaning"); William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 694-698 (1976) (adopting similar view of interpretive methods that contrast with living constitutionalism, although focusing more upon intent of Framers and not using term "originalism"); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 13 (1971) (same). On the whole, however, this search for subjective intent has been abandoned. *See, e.g.*, Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 231-34 (1980) (critiquing subjective intent of Framers' approach to originalism). Most originalists now confine the approach to a quest for original public meaning of the text. *See also, e.g.*, Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1184 (1989) ("If a barn was not considered the curtilage of a house in 1791 or 1868 and the Fourth Amendment did not cover it then, unlawful entry into a barn today may be a trespass, but not an unconstitutional search and seizure."). *See generally* Randy E. Barnett, *An Originalism for*

in this Section, I suggest that originalism seems to have less sway in Article III jurisdictional doctrine than in other constitutional settings. This perspective could have several implications for Hellman's originalist thesis.

To begin, it is worth remembering that originalism's past is a checkered one when it comes to Article III jurisdiction. Indeed, the Court's most notorious constitutional ruling of all time is an Article III subject matter jurisdiction case: *Dred Scott v. Sandford*.[21] Infamously in *Dred Scott*, the Court held as a matter of constitutional diversity jurisdiction that people of African descent could not be citizens of a state.[22] Chief Justice Taney argued his position from an originalist perspective.[23] While there are some scholars who contend that *Dred Scott* is not an authentic originalist opinion,[24] most recognize that the opinion of

*Nonoriginalists*, 45 LOY. L. REV. 611 (1999); Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1131 (2003) ("[T]he proper approach [to Constitutional interpretation] must be . . . faithful application of the words and phrases of the text in accordance with the meaning they would have had at the time they were adopted as law . . . ."); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 856 (1989) (arguing that properly understanding Constitution's meaning "requires immersing oneself in the political and intellectual atmosphere of the time [of ratification]"). Instead of searching for subjective meanings that the Framers personally adopted, original meaning originalists seek "the meaning a reasonable speaker of English would have attached to the words, phrases, sentences, etc. at the time the particular provision was adopted." Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 105 (2001) ("It is originalist because it disregards any change to that meaning that may have occurred in the intervening years. It is objective insofar as it looks to the public meaning conveyed by the words used in the Constitution, rather than to the subjective intentions of its framers or ratifiers."); *see also* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 38 (Amy Gutmann ed., new ed. 2018) ("What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended.").

[21] 60 U.S. (19 How.) 393 (1857).

[22] *Id.* at 404-05.

[23] *Id.* at 405 ("The duty of the court is, to interpret the instrument [law makers] have framed, with the best lights we can obtain on the subject, and to administer it as we find it, according to its true intent and meaning when it was adopted."); *see also* Amy v. Smith, 11 Ky. (1 Litt.) 326, 332-33 (1822) (holding persons of African descent could not be citizens using similar reasoning). Although the multiple opinions in *Dred Scott* can be challenging to digest, it appears that three other Justices concurred in this part of Taney's opinion. *See* 60 U.S. (19 How.) at 469, 493, 518 (concurring opinions by Justice Daniel, Justice Campbell, and Justice Catron, respectively).

[24] *See* Harry V. Jaffa, Dred Scott *Revisited*, 31 HARV. J.L. & PUB. POL'Y 197, 200 (2008) ("Taney's approach in *Dred Scott*, however, was counterfeit originalism."); William Bradford Reynolds, *Another View: Our Magnificent Constitution*, 40 VAND. L. REV. 1343, 1348 (1987) (arguing fault of Chief Justice Taney's opinion is not its allegiance to originalism but its loose interpretation).

the Court in *Dred Scott* "seems a riot of originalism."[25] Indeed, Chief Justice Taney's key interpretive language insists that the Constitution "must be construed now as it was understood at the time of its adoption."[26] He continues, noting that the Constitution "speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers, and was voted on and adopted by the people of the United States."[27] The three Justices who supported the result in *Dred Scott* also relied on originalist reasoning extensively.[28] Summarizing the blackletter view, Professor Zamir Ben-Dan characterized *Dred Scott* as "one of the earliest examples of constitutional originalism."[29]

To say that this sojourn into originalism as it relates to Article III subject matter jurisdiction did not go well is, at best, an understatement. It was subject to withering critique from its inception from jurists.[30] It launched sustained

[25] Mark A. Graber, *Desperately Ducking Slavery:* Dred Scott *and Contemporary Constitutional Theory*, 14 CONST. COMMENT. 271, 294 (1997) (quoting Christopher L. Eisgruber, Dred *Again: Originalism's Forgotten Past*, 10 CONST. COMMENT. 37, 46 (1993)); *see also* Sol Wachtler, Dred Scott: *A Nightmare for the Originalists*, 22 TOURO L. REV. 575, 579 (2006) (arguing Framers would have been comfortable with *Dred Scott* decision as comporting with their original intent); William N. Eskridge, Jr., Lawrence*'s Jurisprudence of Tolerance: Judicial Review to Lower the Stakes of Identity Politics*, 88 MINN. L. REV. 1021, 1050 (2004) ("Chief Justice Taney's opinion in *Dred Scott* is a classic application of original meaning, but it has been discredited because it applied or found a squalid original intent—the immoral institution of slavery."); J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 964, 976 n.47 (1998) ("This vilification comes especially from contemporary 'originalists' who are naturally eager to disassociate themselves from the self-consciously originalist methodology adopted by Taney."); Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1, 12 (1998) ("Chief Justice Taney's opinion for the *Dred Scott* majority interpreted the Constitution's meaning as synonymous with the original intent of its Founders."); Jamin B. Raskin, Roe v. Wade *and the* Dred Scott *Decision: Justice Scalia's Peculiar Analogy in* Planned Parenthood v. Casey, 1 AM. U. J. GENDER & LAW 61, 69 (1993) ("In order to reach [his] conclusion regarding the Framers' original understanding, Justice Taney focused his lengthy analysis on the original meaning of the text of the Constitution . . . ."); Christopher L. Eisgruber, Dred *Again: Originalism's Forgotten Past*, 10 CONST. COMMENT. 37, 41 (1993) (arguing Taney embraced originalism in *Dred Scott*).

[26] *Dred Scott*, 60 U.S. (19 How.) at 426.

[27] *Id.* at 426.

[28] Graber, *supra* note 25, at 294 ("Some rhetoric in the majority opinions is forced and historically dubious, but on the whole, Taney, Daniel, Catron, and Campbell presented a reasonable interpretation of the original Constitution and subsequent legal developments.").

[29] Zamir Ben-Dan, *Deeply Rooted in American History and Tradition: The U.S. Supreme Court's Abysmal Track Record on Racial Justice and Equity*, 15 ALA. C.R. & C.L.L. REV. 45, 68 (2023).

[30] *See Dred Scott*, 60 U.S. (19 How.) at 531 (McLean, J., dissenting) (arguing plaintiff here should have access to courts); *see also id.* at 582-83 (Curtis, J., dissenting) (arguing rights conferred to citizens is up to states).

political attack and political transformation in the country as a whole.[31] It is viewed as one of, if not *the*, causes of the Civil War.[32] And it required the Fourteenth Amendment to overturn it.[33] Article III subject matter jurisdiction, then, does not come to originalism without a history (pun intended).

Since then, the Court has been decidedly purposivist and functionalist in its constitutional diversity jurisdiction rulings rather than originalist. For example, the founding generation debated diversity jurisdiction extensively.[34] Thus, we have a historical record to review when asking questions about diversity, like whether diversity jurisdiction exists between a citizen of a state and a citizen of the District of Columbia. Yet when the Court faced this question, it did not engage in originalist analysis. Rather, in *State Farm Fire & Casualty Co. v. Tashire*,[35] the Court held that minimal diversity among the parties was all the Constitution requires *without historical analysis*.[36] While there are competing accounts,[37] the standard view, as articulated in *Exxon Mobil Corp. v. Allapattah Servs., Inc.*,[38] is that *Tashire* is a purposivist holding, reasoning that "the purpose of the diversity requirement . . . is to provide a federal forum for important disputes where state courts might favor, or be perceived as favoring, home-state

[31] *See, e.g.*, Abraham Lincoln, Speech on the Dred Scott Decision (June 26, 1857) (transcript available at https://perma.cc/EMY2-CYCW).

[32] *See, e.g.*, Roberta Alexander, Dred Scott*: The Decision That Sparked a Civil War*, 34 N. KY. L. REV. 643, 643 (2007) ("Supreme Court Justice Felix Frankfurter . . . argued that not only did *Dred Scott* 'probably' help 'to promote the Civil War,' it also 'required the Civil War to bury its dicta.'" (quoting BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 116 (1993))). Many other historians have also concluded that the *Dred Scott* decision was a major, if not the major, cause of southern secession. *See, e.g.*, ROBERT K. CARR, THE SUPREME COURT AND JUDICIAL REVIEW 208 (1942) ("[T]he *Dred Scott* case . . . helped to bring about the Civil War . . . ."); R. KENT NEWMYER, THE SUPREME COURT UNDER MARSHALL AND TANEY 139 (1st ed. 1968) (arguing decision split political parties leading inexorably to war).

[33] U.S. CONST. amend. XIV, § 1.

[34] *See* CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS 142 (5th ed. 1994) (noting "vigor of the attack . . . the apathy of the defense" during Founders' debates over diversity jurisdiction (quoting Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 487 (1928))); Scott R. Haiber, *Removing the Bias Against Removal*, 53 CATH. U. L. REV. 609, 613-16 (2004) (discussing Framers' debates over diversity jurisdiction issue); Dolores K. Sloviter, *A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism*, 78 VA. L. REV. 1671, 1671 (1992) (observing diversity jurisdiction was "controversial even at the inception of the federal court system").

[35] 386 U.S. 523 (1967).

[36] *Id.* at 530 (holding only minimal diversity required while limiting analysis to language of statute, legislative purpose, and jurisprudence).

[37] *See, e.g.*, Stephen C. Yeazell, *Overhearing Part of a Conversation:* Shutts *as a Moment in a Long Dialogue*, 74 UMKC L. REV. 781, 786-88 (2006) (arguing home-state bias concerns are not only reason for diversity jurisdiction).

[38] 545 U.S. 546 (2005).

litigants."[39] The *Exxon* decision reaffirmed the Court's commitment to this type of reasoning for creating Article III diversity jurisdiction.[40]

Purposivism, rather than originalism, reigns in other areas of Article III jurisdiction as well. Take admiralty jurisdiction, for example. From an originalist lens, it is indisputable that admiralty jurisdiction was limited to "cases where the service was substantially performed, or to be performed, upon the sea, or upon waters within the ebb and flow of the tide."[41] That is to say, admiralty was a law only for ocean-going vessels and related transactions. Add to this the sentiment that "the Founding Generation's paradigm of federal admiralty jurisdiction is best described as public—not private—litigation."[42] Yet by 1845, Congress extended federal admiralty jurisdiction from oceanic, tidal, and salt waters to the Great Lakes.[43] The Court considered whether this expansion of federal admiralty law, in clear violation of original understandings, was constitutional in *The Propeller Genesee Chief v. Fitzhugh*.[44] The Court upheld Congress's extension of admiralty jurisdiction over the Great Lakes and went on to rule that Article III admiralty jurisdiction governs all navigable waterways—be they fresh or salt water. The Court reasoned purposively, holding that "[i]f it is a public navigable water, on which commerce is carried on between different States or nations, the reason for the [admiralty] jurisdiction is precisely the same."[45] As if that was not enough, admiralty jurisdiction now often governs air travel.[46] That is hard to square with original public-meaning intentionalism, to say the least. Moreover, admiralty now stretches well beyond public litigation. "Today every proctor and admiralty scholar knows that the federal courts' maritime jurisdiction is dedicated to the resolution of private disputes," not public ones.[47] Like diversity jurisdiction after *Dred Scott*, originalism now finds little traction in the Court's admiralty jurisdiction constitutional jurisprudence.

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[39] *Exxon*, 545 U.S. at 553-54.

[40] *Id.* at 553.

[41] The Steam-Boat Thomas Jefferson, 23 U.S. (10 Wheat.) 428, 429 (1825); *see also* The Steamboat Orleans v. Phoebus, 36 U.S. (11 Pet.) 175, 182-83 (1837) (holding boat that traveled on Mississippi river not in admiralty jurisdiction).

[42] William R. Casto, *The Origins of Federal Admiralty Jurisdiction in an Age of Privateers, Smugglers, and Pirates*, 37 AM. J. LEGAL HIST. 117, 118 (1993).

[43] Act of February 26, 1845, ch. 20, 5 Stat. 726 (codified as amended at 28 U.S.C. § 1873).

[44] 53 U.S. (12 How.) 443 (1851).

[45] *Id.* at 454; *see also* CARL B. SWISHER, 5 THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE TANEY PERIOD, 1836-64, at 691 (1974) (discussing impact of admiralty jurisdiction on North-South tensions in context of enslaved-person trade). *See generally* Note, *From Judicial Grant to Legislative Power: The Admiralty Clause in the Nineteenth Century*, 67 HARV. L. REV. 1214 (1954); Milton Conover, *The Abandonment of the "Tidewater" Concept of Admiralty Jurisdiction in the United States*, 38 OR. L. REV. 34 (1958).

[46] Exec. Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249, 270-71 (1972) (holding tort occurring on intercontinental flight over ocean invokes admiralty jurisdiction).

[47] Casto, *supra* note 42, at 117.

The story is similar in Article III jurisdiction where the United States is a party-defendant. In the early twentieth century, the Supreme Court, in a change of course,[48] flirted with an originalist approach and held that suits against the federal government did not fall within Article III's grant of jurisdiction over controversies in which the United States is a party-defendant.[49] The Court was decidedly originalist in these rulings.[50] From this vantage point, the Court held that "controversies to which the United States may by statute be made a party defendant, at least as a general rule, lie wholly outside the scope of the judicial power vested by Art. III in the constitutional courts."[51] Trying to play within these originalist constraints, the Court issued a series of strained opinions in which it was forced to find other constitutional bases, typically federal question, for jurisdiction over party-defendant cases. By the 1960s, however, the gig was up, and the Court in a plurality opinion found that Article III embraces party-defendant suits under Article III's United States-as-a-party clause in *Glidden Co. v. Zdanok*.[52] In so doing, it looked to functionalist rationales.[53] Despite the lack of a majority opinion in *Glidden*, the lower courts agreed that *Glidden* overruled *Williams*.[54] Thus again, one finds that the Court demonstrates little desire for originalist reasoning in Article III subject matter jurisdiction doctrine. And one could replicate this finding in other areas of Article III jurisdiction as well.[55]

Given this non-originalist treatment of other fonts of Article III jurisdiction, what should we make of Hellman's assertion that the Court's arising under constitutional jurisprudence leans non-originalist? First, (at least to me) his conclusion is not an overly surprising one. Despite the originalist impulse in other areas of constitutional law, as I sketch above, originalism has a different history and use value in Article III jurisdiction cases. Thus, the Court's Article III federal question jurisdiction doctrine, if indeed it is skewing non-originalist as Hellman contends, is in line with other areas of Article III jurisdictional thought.

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[48] Minnesota v. Hitchcock, 185 U.S. 373, 384 (1902) ("It could not fairly be adjudged that the judicial power of the United States extends to those cases in which the United States is a party plaintiff and does not extend to those cases in which it is a party defendant.").

[49] Williams v. United States, 289 U.S. 553, 577 (1933) (holding Article III jurisdiction does not apply when United States is a party-defendant).

[50] *Id.* at 575-77 (discussing views of Framers during discussion of case).

[51] *Id.* at 577.

[52] 370 U.S. 530 (1962).

[53] *Id.* at 564 (plurality opinion).

[54] *See, e.g.*, Jan's Helicopter Serv., Inc. v. Fed. Aviation Admin., 525 F.3d 1299, 1305 n.5 (Fed. Cir. 2008).

[55] *See, e.g.*, CHARLES ALAN WRIGHT & ARTHUR R. MILLER, 17 FEDERAL PRACTICE AND PROCEDURE 126 (3d ed. 2023) ("Historical scholarship has not played an important role in defining the scope of [the Supreme Court's] original jurisdiction.").

Second, and perhaps more fundamental, it is far from clear to me that the originalist impulse (even assuming it is a sound approach for other areas of constitutional analysis) is normatively attractive as it relates to Article III jurisdictional matters. At least on the standard account, *Dred Scott* is simply indefensible normatively regardless of the Framers' intent.

But even in less charged areas, Article III jurisdictional originalism can be hard to defend. Take the Supreme Court's original jurisdiction, for example, where Hellman expresses concern that the Court has limited access.[56] The roles of federal law and the federal courts have so deeply changed since 1789 as to make originalism in Article III jurisdiction challenging to accept as an interpretive principle in areas such as the Supreme Court's original jurisdiction.[57]

In this area of Article III jurisdiction, the Court itself explicitly eschews an originalist approach as inappropriate on functional grounds. It reasoned in *Ohio v. Wyandotte Chemicals Corp.*,[58] for instance, that:

> [A]lthough it may initially have been contemplated that this Court would always exercise its original jurisdiction when properly called upon to do so, it seems evident to us that changes in the American legal system and the development of American society have rendered untenable, as a practical matter, the view that this Court must stand willing to adjudicate all [such matters] . . . over which this Court does have original jurisdiction.[59]

Indeed, the original-intent role for the Supreme Court's original jurisdiction simply fails to account for the Court's current institutional capacities and roles. As the Court held,

> [T]he problem [with exclusive original jurisdiction is not] merely our lack of qualifications for many of these [fact-finding] tasks . . . it is compounded by the fact that for every case in which we might be called upon to determine the facts and apply unfamiliar legal norms we would unavoidably be reducing the attention we could give to those matters of federal law and national import as to which we are the primary overseers.[60]

No less a pair of commentators than Wright and Miller agree that contemporary original jurisdiction cost-benefit analysis, regardless of the Framers' intent, cannot support broad use of Supreme Court original jurisdiction, noting, *inter alia*, that the "prospect of a jury trial conducted by nine justices at the expense of other cases is appalling."[61]

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[56] *See* Hellman, *supra* note 1, at 2195.

[57] *See id.* at 2165 (outlining these changing roles).

[58] 401 U.S. 493 (1971).

[59] *Id.* at 497.

[60] *Id.* at 498.

[61] WRIGHT & MILLER, *supra* note 55, at 244.

While far from giving a full defense of this position, my aim here is to suggest that Article III jurisdictional originalism is the exception, not the rule. Moreover, when it has been deployed, the results have not been applauded. And that in many areas, the Court and commentators agree that an originalist swing in jurisdictional doctrine would be unwise. This is not to suggest that Hellman's critique of Article III federal question jurisdiction as straying from original intent is necessarily unsound. Rather, my aim is to suggest that perhaps uniquely in Article III jurisdiction doctrine there is a normative thumb on the scale favoring non-originalist analysis. If so, a finding that the Court's Article III federal question jurisdictional holdings are non-originalist could be less normatively troubling than Hellman presents.

### B. *Declaratory Power as Article III Federal Question Jurisdiction's Original Intent*

In this Section, I put aside my questioning of the normative value of originalism in Article III jurisdiction and explore an intra-originalism discussion of Article III federal question jurisdiction. Hellman provides an outstanding synopsis of the blackletter view of the scope of Article III federal question jurisdiction.[62] He concludes that the Supreme Court's decisions establish that a statute 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); (2) the basis of a defense actually raised (even though it may not be dispositive); or (3) the basis of the decision actually made (in state or federal court).[63] Hellman then forcefully links this blackletter understanding to, as he puts it, "one of the most important purposes of the federal question jurisdiction—to protect the supremacy of federal law against state encroachments."[64] In what follows, I offer additional exposition of the historical understanding of Article III federal question jurisdiction and a discussion linking federal question jurisdiction with declaratory legal authority and judicial independence, rather than state encroachment against federal rights.

The concept of federal question jurisdiction made its first appearance at the Constitutional Convention in the Virginia Plan, as Hellman notes.[65] It would have allowed federal courts to hear "questions which may involve the national peace and harmony."[66] Ultimately, the delegates did not much discuss the idea but rather approved phraseological revisions that extended federal judicial power to cases "arising under" the Constitution, treaties, and laws of the United

[62] *See, e.g.*, Hellman, *supra* note 1, at 2155-62.

[63] *Id.* at 2159.

[64] *Id.* at 2179; *see also id.* at 2176-77, 2182-83, 2197-98.

[65] *Id.*at 2148.

[66] 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 22 (Max Farrand ed., rev. ed. 1966).

States.[67] The great scope of the provision stoked criticism by Anti-Federalists during the ratification debates with rebuttals from the Federalists. Alexander Hamilton, for one, argued that supremacy and enforceability of federal law required this federal judicial adjudicatory power.[68] This remains for many the standard view of federal question jurisdiction's purpose today. As Professor Herbert Wechsler put it, the business of the federal courts "is the vindication of the rights conferred by federal law."[69]

Of course, mapping the original general purposes of the provision does not answer the more pressing legal question of just where the boundaries of constitutional federal question jurisdiction are. Answering that question is often the goal of an originalist interpretation of Article III federal question jurisdiction. There is, however, more historical ground to till here. The early federal courts did not meet Article III's "arising under" language in a vacuum. English jurisdictional law deployed the term "arising" from time to time, typically meaning that the action must rely upon the source of law from which it arises, or that the action must arise from a bounded physical territory.[70] Moreover, the English courts had a developed law regarding how parties could proceed in courts of limited jurisdiction, like federal courts, which placed the burden on plaintiffs to establish the jurisdiction of the court.[71]

Early federal courts borrowed from this tradition to determine the meaning of Article III federal question jurisdiction.[72] For instance, the ratification-era Supreme Court held Article III arising under jurisdiction "to mean that a federal court may exercise jurisdiction over cases in which an actual federal law was

[67] *See* Hellman, *supra* note 1, at 2149 ("[W]hen the Committee of Detail reported to the Convention, the reference to 'national peace and harmony' had disappeared; only the 'arising under' language remained." (quoting 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 46 (Max Farrand ed., rev. ed. 1966))).

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

[69] Herbert Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROBS. 216, 225 (1948).

[70] *See, e.g.*, Hyde v. Cogan [1781] 99 Eng. Rep. 445, 450; 2 Dougl. 699, 706 (describing a claim based upon "the [statutory] clause upon which this case arises"); Millar v. Taylor [1769] 98 Eng. Rep. 201, 212; 4 Burr. 2303, 2323 (describing a remedy that "arises from" a statute); Beak v. Thyrwhit [1688] 87 Eng. Rep. 124, 124; 3 Mod. 194, 194 (holding that cases "arising upon the sea" must be tried in admiralty); 2 MATTHEW BACON, A NEW ABRIDGEMENT OF THE LAW 396 (Henry Gwyllim & Charles Edward Dodd eds., 1876) (describing cases arising from statute).

[71] *See* Anthony J. Bellia Jr., *The Origins of Article III "Arising Under" Jurisdiction*, 57 DUKE L.J. 263, 273-76 (2007) (surveying the pre-Constitution English practice).

[72] *See id.* at 272; *see also* Turner v. Bank of N.-Am., 4 U.S. (4 Dall.) 8, 10-11 (1799) (construing diversity jurisdictional statute against background of English jurisdictional law); Shedden v. Custis, 10 Va. (6 Call.) 241 (C.C.D. Va. 1793) (noting in diversity case adopting English jurisdictional law that "[t]he English practice has been rightly stated by the defendant's counsel, and those rules are more necessary to be observed here than there, on account of a difference of the general and state governments").

determinative of a right or title asserted in the proceeding before it."[73] The Supreme Court followed the lower courts in this regard. Thus, in *Owings v. Norwood's Lessee*,[74] the Court held that it lacked federal question jurisdiction to hear a property claim under the Treaty of Paris, which ended the Revolutionary War, because the treaty only recognized state-law property rights.[75] If the treaty had created the property rights, then the suit would have arisen under the treaty, but since it was merely acknowledging pre-existing state-law rights, federal jurisdiction did not lie. Illustrating the other side of this coin, in *Cohens v. Virginia*,[76] the Court held that the assertion of a federal defense to a state criminal action arose under Article III federal question jurisdiction because a "case in law or equity consists of the right of the one party, as well as of the other, and may truly be said to arise under the constitution or a law of the United States, whenever its correct decision depends on the construction of either."[77] As these examples illustrate, the ratification-era Court found Article III arising under jurisdiction to require the presence of federal law that was determinative of a right or title asserted in the proceeding before it[78] well before issuing the now-canonical *Osborn* decision.[79]

From this vantage, then, the original meaning of Article III's grant of arising-under jurisdiction is best conceived against the backdrop of the then-existing procedure of writ pleading.[80] Taking this point of view, *Osborn*'s use of the term federal "ingredient" was a term of art, referencing nineteenth-century pleading practice.[81] With this understanding, it is clear that "ingredient" did not reference the mere possibility that a federal issue might arise, as some views ascribe,[82] but

[73] *See* Bellia, *supra* note 71, at 269.

[74] 9 U.S. (5 Cranch) 344 (1809).

[75] *Id.* at 347-48 (leaving issue of plaintiff's rights arising from the treaty up to courts of Maryland).

[76] 19 U.S. (6 Wheat.) 264 (1821).

[77] *Id.* at 379.

[78] *See* Bellia, *supra* note 71, at 269 ("In general, [ratifiers] explained 'arising under' jurisdiction as a means of enabling federal courts to enforce and settle the meaning of federal law.").

[79] *See* Osborn v. Bank of the U.S., 22 U.S. (9 Wheat.) 738, 822 (1824) ("[T]he 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 . . . .").

[80] *See* Anthony J. Bellia Jr., *Article III and the Cause of Action*, 89 IOWA L. REV. 777, 800-12 (2004) (arguing that Article III is best interpreted in light of writ-pleading concepts and that this insight produces important ramifications for understanding Article III federal question jurisdiction under *Osborn*, standing doctrine, and inferred-cause-of-action doctrine).

[81] *See id.* at 801-02 (discussing Marshall's understanding of "ingredient" of case being essential component of a cause of action).

[82] *See* Paul E. Lund, *Federally Chartered Corporations and Federal Jurisdiction*, 36 FLA. ST. U. L. REV. 317, 331 (2009) (arguing *Osborn* held jurisdiction appropriate because Bank was federally chartered and therefore any case involving Bank also had "potential issue" of interpretation of federal law).

rather the necessity of engaging in a federal issue, even if just in passing.[83] Indeed, under the common law writ pleading that was extant during the *Osborn* case, the United States Bank (the key actor in the case)—in every case—would have had to plead its capacity to sue or be sued, a question of federal law, in order to avoid dismissal.[84] This pleading practice illustrates this necessity requirement.

While Hellman sees potential tension between contemporary practice and this reading of *Osborn*,[85] I find the above understanding of the history comports with, rather than deviates from, contemporary practice. Take *Verlinden B.V. v. Central Bank of Nigeria*,[86] for example. There, the Court found Article III federal question arises in the context of waivers of sovereign immunity for foreign states under the Foreign Sovereign Immunity Act because of the necessity of addressing the federal waiver question in each and every case.[87] That is to say, the necessity of an actual federal issue to ground Article III jurisdiction, which is the benchmark of the *Verlinden* holding, is a continuation of, not a deviation from, the historical practice embedded in the "ingredient" test. The same can be said of the *Mesa v. California*[88] opinion, which Hellman addresses.[89] There, the Court held that Article III federal question jurisdiction arises under 28 U.S.C. § 1442 for federal officers defending against state-law claims only when the federal officer actually raises a federal-law defense.[90] Thus again, one finds a continuation of historical practice, not a deviation. All this to say, Hellman is assuredly correct that cases like *Dobbs v. Jackson Women's Health Organization* signal a closing of the federal courthouse door, contrary to traditional practice, via the Eleventh Amendment,[91] but contemporary Article III

[83] *See* Bellia, *supra* note 80, at 802 ("By 'ingredient,' Marshall did not mean something that might arise in connection with the litigation of a cause of action, but rather an essential component of a cause of action.").

[84] *Id.* at 804-05 (arguing at common law, "if the plaintiff failed to allege sufficient facts in the bill demonstrating a right to institute the proceeding, the defendant could demur. . . . And it was the federal law defining the Bank's capacities that established those facts").

[85] Hellman, *supra* note 1, at 2160.

[86] 461 U.S. 480 (1983).

[87] *Id.* at 493 ("The [FSIA] must be applied by the district courts in every action against a foreign sovereign, since subject-matter jurisdiction in any such action depends on the existence of one of the specified exceptions to foreign sovereign immunity . . . .").

[88] 489 U.S. 121 (1989).

[89] Hellman, *supra* note 1, at 2160 (noting *Mesa* decision strongly accords with *Verlinden* while notably avoided answering if "arising under" jurisdiction applies even absent federal question).

[90] *Mesa*, 489 U.S. at 129 (recognizing a single issue of federal law is decisive on jurisdictional issues).

[91] 597 U.S. 215 (2022); *see also* Hellman, *supra* note 1, at 2187 (discussing the impact of *Dobbs*).

federal question jurisdiction doctrine appears more in line with historical practices than Hellman's position suggests.[92]

This tighter historical focus on the presence of a federal right or title suggests a different original intent for Article III federal question jurisdiction than Hellman's focus does. Hellman contends that Article III federal question jurisdiction exists "primarily . . . to enforce federal rights, particularly rights secured against infringement by persons acting under color of state law."[93] Whether that purpose is normatively the best view, such a position is harder to defend as a matter of 1789 original intent.

I have argued in other work that Article III federal question jurisdiction links, as an originalist matter, to the notion that the federal court must retain declaratory authority over federal law, not just a policing of state encroachment as Hellman contends.[94] By declaratory authority, I mean that the court is empowered to state authoritatively what the law is.[95] For example, an Ohio court of general jurisdiction has the declaratory authority to state the content of Ohio law. Similarly, a federal court will have declaratory authority to state the content of federal law when sitting in arising-under jurisdiction. Declaratory authority, however, is not always linked to jurisdiction. In cases heard in diversity, for example, the federal court lacks the power to authoritatively establish the content of the substantive law at issue while retaining subject matter jurisdiction.[96]

Under this understanding, then, Article III federal question jurisdiction requires the presence of a substantive issue of federal right or title, over which the federal courts have declaratory power,[97] in order to vest constitutional jurisdiction. This focus on declaratory authority helps to explain why federal mandatory incorporation of state law (i.e., areas where the federal courts lack declaratory authority to state the law) fail to vest federal question jurisdiction under Article III. Protective jurisdiction provides a prime example.[98] Similar

[92] *See* Hellman, *supra* note 1, at 2160-62.

[93] *Id.* at 2174-75.

[94] *See* Lumen N. Mulligan, *Jurisdiction by Cross-Reference*, 88 WASH. U. L. REV. 1177, 1181 (2011) (arguing state law cross-referencing federal authority functionally preserves federal declaratory authority).

[95] *Id.* at 1180-81, 1186 (noting mandatory cross-referencing of law precludes declarative authority over referenced rule by referencing forum).

[96] *Id.* at 1186.

[97] *See* Osborn v. Bank of the U.S., 22 U.S. (9 Wheat.) 738, 822 (1824) ("[T]he 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 . . . .").

[98] *See, e.g.*, Textile Workers Union v. Lincoln Mills of Ala., 353 U.S. 448, 460 (1957) (noting protective jurisdiction applies where substantive federal law is not applied in case but federal rights may necessarily be involved); Carole E. Goldberg-Ambrose, *The Protective Jurisdiction of the Federal Courts*, 30 UCLA L. REV. 542, 549-50 (1983) (defining protective jurisdiction). There are two leading theories of protective jurisdiction. First, we have Professor Mishkin's, in which he contends that Congress may vest jurisdiction over state-law claims if

results are found in federal statutes that incorporate state standards into federal law, such as the Federal Tort Claims Act[99] and the Tucker Act,[100] which do not create federal question jurisdiction.

done as part of a broader federal program. Paul J. Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157, 195-96 (1953) (noting state-fashioned Taft-Hartley Act governing collective bargaining agreements implicate federal concerns involving interstate industry and commerce to demonstrate protective jurisdiction). Second, we have Professor Wechsler, who contends that so long as Congress could preempt state law by substantive legislation pursuant to Article I, it may deploy the lesser power to vest federal jurisdiction over state-law claims. Wechsler, *supra* note 69, at 224-25. In this piece, I need not dip too deeply into the debates swirling around protective jurisdiction. For those seeking more information, there is a wealth of literature. *See, e.g.*, Gil Seinfeld, *Article I, Article III, and the Limits of Enumeration*, 108 MICH. L. REV. 1389, 1443-48 (2010) (analyzing debate between Mishkin's and Wechsler's definitions of protective jurisdiction); Carlos M. Vázquez, *The Federal "Claim" in the District Courts:* Osborn*,* Verlinden*, and Protective Jurisdiction*, 95 CALIF. L. REV. 1731, 1760-61 (2007) (analyzing Mishkin's definition where Congress specifies extent of state law preemption of statute); Ernest A. Young, *Stalking the Yeti: Protective Jurisdiction, Foreign Affairs Removal, and Complete Preemption*, 95 CALIF. L. REV. 1775, 1776 (2007) (applying Mishkin's theory to foreign affairs removal and complete preemption); James E. Pfander, *The* Tidewater *Problem: Article III and Constitutional Change*, 79 NOTRE DAME L. REV. 1925, 1927 (2004) ("Congress may have authority to protect an area of federal interest from potentially hostile state court adjudication by shifting the litigation into the presumptively more friendly confines of a federal court . . . ., perhaps even where it fails to regulate the field through the passage of rules of federal substantive law to govern the disputes.").

[99] 28 U.S.C. § 1346(b) (waiving sovereign immunity for tort claims against United States and incorporating state law as rule of decision). Federal question jurisdiction does not arise under the FTCA. *See, e.g.*, CNA v. United States, 535 F.3d 132, 140 (3d Cir. 2008) ("[T]he District Court's jurisdiction . . . would *not* come from the general grant of federal-question jurisdiction of 28 U.S.C. § 1331. Instead, the FTCA itself is the source of federal courts' jurisdiction . . . ."); Ortiz v. United States, 595 F.2d 65, 69 n.6 (1st Cir. 1979) (noting disagreement as to whether FTCA actions are cases or controversies "to which the government is a party").

[100] 28 U.S.C. §§ 1346(a)(2), 1491 (waiving sovereign immunity for contract claims against United States by nonbonded contractors or claims of implied contract). Federal question jurisdiction generally does not arise under the Tucker Act. *See, e.g.*, Marceau v. Blackfeet Hous. Auth., 455 F.3d 974, 986 n.6 (9th Cir. 2006) ("Contrary to Plaintiffs' assertions, where a case falls under Tucker Act jurisdiction, federal question jurisdiction cannot serve as an alternative basis for jurisdiction."); Eagle-Picher Indus., Inc. v. United States, 901 F.2d 1530, 1532 (10th Cir. 1990) (similar); A.E. Finley & Assocs., Inc. v. United States, 898 F.2d 1165, 1167 (6th Cir. 1990) (similar); Graham v. Henegar, 640 F.2d 732, 734 & n.6 (5th Cir. Unit A Mar. 1981) (similar). Other circuits, however, do find federal question jurisdiction under the Tucker Act in some circumstances. *See, e.g.*, W. Sec. Co. v. Derwinski, 937 F.2d 1276, 1280-81 (7th Cir. 1991) (noting that to determine state law proper law for deciding issue is itself determination under federal law and therefore triggers a federal question); Bor-Son Bldg. Corp. v. Heller, 572 F.2d 174, 182 n.14 (8th Cir. 1978) (noting often

Not only does the need for the federal court to have declaratory power to vest jurisdiction have an old pedigree, the Court's insistence upon declaratory power to vest federal question jurisdiction speaks to the judiciary's status as a coequal branch of government. The judiciary's role as an independent and coequal branch of government rests upon its "duty . . . to say what the law is."[101] The ratification debates illustrate that the original purpose for federal question jurisdiction was to empower the judiciary to fulfill this key role as expositor of federal law[102]—not only as an enforcer of rights against the states per se. Contemporary holdings continue to highlight the importance of this original purpose—linking declaratory authority with judicial independence from the other branches of government. As Justice Stevens put it:

> When federal judges exercise their federal-question jurisdiction under the "judicial Power" of Article III of the Constitution . . . . the core of this power is the federal courts' independent responsibility—independent from its coequal branches in the Federal Government, and independent from the separate authority of the several States—to interpret federal law.[103]

This power to authoritatively interpret federal law is the key purpose, at least as an original intent matter, for federal question jurisdiction. And it is an essential one, as it implicates judicial independence and the courts' status as a coequal branch of government. Of course, the federal courts retain judicial independence when, in diversity jurisdiction or the like, they lack the power to

Tucker Act's $10,000 jurisdictional maximum results in exclusive jurisdiction in federal court for claims over that amount, unless another statute is available which waives that maximum).

[101] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

[102] *See, e.g.*, THE FEDERALIST NO. 22, *supra* note 68, at 143 (Alexander Hamilton) ("[These laws'] true import as far as respects individuals, must . . . be ascertained by judicial determinations."); Brutus, *Essay of 21 February 1788*, *reprinted in* 1 THE COMPLETE ANTI-FEDERALIST 428, 428 (Herbert J. Storing ed., 1981) ("The proper province of the judicial power, in any government, is, as I conceive, to declare what is the law of the land."); Bellia, *supra* note 71, at 316 (commenting upon ratification debates and concluding that "[t]hose who attributed some specific meaning to the Arising Under Clause described it as giving federal courts jurisdiction over cases calling for the enforcement or explication of federal laws").

[103] Williams v. Taylor, 529 U.S. 362, 378-79 (2000); *see also* Sanchez-Llamas v. Oregon, 548 U.S. 331, 354 (2006) (quoting Justice Stevens's *Williams* opinion); Michael P. Allen, *Congress and Terri Schiavo: A Primer on the American Constitutional Order?*, 108 W. VA. L. REV. 309, 336 (2005) (describing power to define law as core judicial power); H. Jefferson Powell, *The Three Independences*, 38 U. RICH. L. REV. 603, 611-12 (2004) (arguing one of three strands of judicial independence in American tradition is independence of thought, which includes power of expounding law). Some argue, however, that issues like the power to declare the law are more properly conceived of as separation-of-powers issues. *See* Thomas E. Plank, *The Essential Elements of Judicial Independence and the Experience of Pre-Soviet Russia*, 5 WM. & MARY BILL RTS. J. 1, 36-40 (1996) (noting, in American jurisprudence, independence and separation of powers issues tend to blend together).

declare law.[104] The point here is that the power to declare the law is *a* key feature of judicial independence,[105] and of course, there are others features of independence that apply in non-federal-question cases.[106] Moreover, in federal question jurisdiction cases the power to declare the law authoritatively has separation-of-powers elements that bolster its importance. As Hamilton argued in Federalist 80: "If there are such things as political axioms, the propriety of the judicial power of a government being co-extensive with its legislative, may be ranked among the number."[107] The federal courts' power to declare the content of federal law, as Hamilton notes, is a key check upon the power of Congress and the Executive to act extralegally.[108]

This originalist account of Article III federal question jurisdiction, while broader than Hellman's state-infringement focus, is not necessarily at odds with his view. Rather, it sets a wider original agenda for federal question jurisdiction's role. It is one that rests more comfortably in the antebellum era in which the states were assumed to be the primary protector of federal rights, at least in the first instance—as Hellman himself recognizes.[109]

## II. STATUTORY FEDERAL QUESTION SUBJECT MATTER JURISDICTION

I turn next to a discussion of 28 U.S.C. § 1331 jurisdiction.[110] In 1875, Congress passed the first general grant of federal question jurisdiction now

[104] *See, e.g.*, Comm'r v. Estate of Bosch, 387 U.S. 456, 465 (1967) (holding federal courts bound by state-law opinions of state supreme courts in *Erie* cases).

[105] Indeed, this power is one the federal courts thought they held even in diversity suits. *See* Swift v. Tyson, 41 U.S. (16 Pet.) 1, 9 (1842) (holding where courts of United States have jurisdiction they make the law "without respect to the decision of any state Court").

[106] *See generally* Powell, *supra* note 103 (discussing three strands of judicial independence in American tradition: position, decision, and thought).

[107] *See* THE FEDERALIST NO. 80, at 535 (Alexander Hamilton) (Jacob E. Cooke ed. 1961).

[108] *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (deploying this declaratory power to reign in unconstitutional congressional action).

[109] Hellman, *supra* note 1, at 2173 ("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.").

[110] The general federal question jurisdictional statute has not always been codified at 28 U.S.C. § 1331. Nevertheless, I do not employ the cumbersome "predecessor statute to § 1331" locution when referring to cases dealing with the Act as codified in a different location. Instead, I simply refer to this Act as § 1331, even if at a previous time it was codified at a different location. This approach is sound because, excepting statutory amounts in controversy, the Act has been essentially unchanged since 1875. *See, e.g.*, Federal Question Jurisdictional Amendments Act of 1980, Pub. L. No. 96-486, 94 Stat. 2369 (striking out $10,000 minimum amount in controversy requirement); Judicial Code of 1958, Pub. L. No. 85-554, 72 Stat. 415 (raising the minimum amount in controversy requirement from $3,000 to $10,000); Jurisdiction and Removal Act, ch. 137, § 1, 18 Stat. 470, 470 (1875) (stating

codified in § 1331. Even though the language of § 1331 parallels that of Article III of the Constitution, the Supreme Court does not hold that § 1331 federal question jurisdiction is identical in scope to the constitutional federal question jurisdiction provision.[111] In fact, the Court interprets § 1331 as granting a much narrower scope of jurisdiction than the Constitution permits. Hellman summaries these key limitations upon § 1331 well. He notes that (1) Section 1331 jurisdiction is limited by the well-pleaded complaint rule; (2) Section 1331 jurisdiction runs concurrently with state court jurisdiction; and (3) Section 1441 removal jurisdiction's scope mirrors that of § 1331.[112] He also discusses the Court's challenging doctrine surrounding *Grable & Sons*-style § 1331 jurisdiction (i.e., where jurisdiction lies over state-law causes of action that house embedded federal rights) and Holmes-test-style § 1331 jurisdiction (i.e., the view that jurisdiction only arises when a plaintiff pleads a federal cause of action) and correctly notes these doctrines' lack of engagement with legislative intent.[113] Hellman hits these points on the mark, putting forward a truism among commentators: in enacting § 1331, "Congress's intent has had little or nothing to do with the Court's decisions concerning what constitutes a federal question."[114] Indeed, as I outline below, the original intent of the 1875

federal trial courts "shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds . . . five hundred dollars, and arising under the Constitution or laws of the United States"). Finally, following most scholars, I exclude the short-lived general grant of federal question jurisdiction passed at the end of President John Adams's term and treat the 1875 Act as the first general federal question grant. *See, e.g.*, Mims v. Arrow Fin. Servs., 565 U.S. 368, 376 n.6 (2012) (discounting federal question jurisdictional act passed in Adams Administration).

[111] *See* Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 494 (1983) ("[T]his Court never has held that statutory 'arising under' jurisdiction is identical to Art. III 'arising under' jurisdiction.").

[112] Hellman, *supra* note 1, at 2168-69; *see also Mims*, 565 U.S. at 378 (noting 1331 jurisdiction presumed to run concurrently with state court jurisdiction); Caterpillar Inc. v. Williams, 482 U.S. 386, 392 (1987) ("Only state-court actions that originally could have been filed in federal court may be removed to federal court by the defendant. Absent diversity of citizenship, federal-question jurisdiction is required." (footnote omitted)); Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149, 152 (1908) (establishing well-pleaded complaint rule, which holds only matters in complaint, not defenses, may give rise to § 1331 federal questions).

[113] *See* Hellman, *supra* note 1, at 2182-83; *see also* Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 314 (2005) ("These considerations have kept us from stating a 'single, precise, all-embracing' test for jurisdiction over federal issues embedded in state-law claims between nondiverse parties." (quoting Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 821 (1988) (Stevens, J., concurring)); Lumen N. Mulligan, *A Unified Theory of 28 U.S.C. § 1331 Jurisdiction*, 61 VAND. L. REV. 1667, 1698-701 (2008) (discussing challenges posed by *Grable* and Holmes test).

[114] Barry Friedman, *A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction*, 85 NW. U. L. REV. 1, 24 (1990).

Congress that passed § 1331 does not map onto the traditional set of doctrines so ably recounted by Hellman. In what follows, I offer a slightly broader review of pre-1900 practice to further illustrate the distance between legislative intent and current § 1331 doctrine. I also briefly discuss the role that Justice Holmes played in crafting this disconnect. I conclude with pragmatic concerns about fully embracing the original legislative intent of § 1331.

I turn first to consider the 1875 Congress's intent grounding 28 U.S.C. § 1331 federal question jurisdiction. In this discussion, I follow Woolhandler and Collins's thorough historical research on late nineteenth-century jurisdictional practice.[115] As they show, federal courts regularly took federal question jurisdiction over state law causes of action with embedded federal rights (contrary to the dictates of the now-standard Holmes test) under various, special-purpose, pre-1875 federal question jurisdiction statutes.[116] This prior practice created the 1875 Congress's expectation that such a practice would continue with the passage of § 1331.

For example, antebellum Congresses regularly relied upon state law (or the general common law)[117] to supply the cause of action to enforce federal statutory rights, contrary to the dictates of the Holmes test.[118] Thus, in 1833, the federal Force Act, passed in response to the South Carolina nullification crisis,[119] allowed federal courts to take statutory federal question jurisdiction over plaintiffs' state common-law assumpsit claims to recover duties that were levied over the amount specified by federal tariff law.[120] Similarly, the Supreme Court recognized that state common law mandamus causes of action brought to enforce federal statutory rights arose under statutory federal question jurisdiction.[121] Finally, the Court recognized that common law causes of action

[115] *See* Ann Woolhandler & Michael G. Collins, *Federal Question Jurisdiction and Justice Holmes*, 84 NOTRE DAME L. REV. 2151, 2158-78 (2009).

[116] *See id.*

[117] These were pre-*Erie* days. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 79 (1938) (rejecting idea of "general" common law distinct from law of particular state).

[118] *See* Woolhandler & Collins, *supra* note 115, at 2160-68 (discussing this point in greater detail).

[119] Force Act of 1833, ch. 57, 4 Stat. 632.

[120] *Id.* § 2; *see, e.g.*, Rankin v. Hoyt, 45 U.S. (4 How.) 327, 327-28 (1846) (entertaining assumpsit action on writ of error to Circuit Court of United States for Southern District of New York); Swartwout v. Gihon, 44 U.S. (3 How.) 110, 110 (1845) (similar); *see also* Ins. Co. v. Ritchie, 72 U.S. (5 Wall.) 541, 543 (1866) ("Under [the Force Act of 1833] citizens of the same State might sue each other for causes arising under the revenue laws. A citizen injured by the proceedings of a collector might have an action . . . [in assumpsit] against him for the injury, though a citizen of the same State with himself."); Elliott v. Swartwout, 35 U.S. (10 Pet.) 137, 138 (1836) (recognizing assumpsit action against collector for excess duties paid under protest in action removed from state court).

[121] *See* Kendall v. United States *ex rel.* Stokes, 37 U.S. (12 Pet.) 524, 623-25 (1838) (recognizing Circuit Court for Washington County in District of Columbia had power to issue

could be deployed to enforce postal consumers' rights as federal questions.[122] This history shows a consistent use of statutory arising under jurisdiction that was not coupled with a version of the Holmes test (i.e., a need to raise a federal cause of action to vest jurisdiction), which now governs § 1331 jurisdiction.

The 1875 Congress passed § 1331 against this backdrop, and the best evidence suggests that Congress did not intend to adopt a Holmes-test-like rule. Rather, the legislative history to the 1875 Act strongly suggests that the Congress intended to deploy the entire scope of constitutional federal question jurisdiction when it passed § 1331.[123] That is to say, the evidence suggests that they meant to codify something close to the *Osborn* test into statute. Thus, this pre-1875 practice demonstrates the broad scope of jurisdiction § 1331 was intended to provide. Moreover, jurisdictional practice immediately after the passage of § 1331 demonstrates this originally intended breadth of scope. Indeed, § 1331 "almost seamlessly became a vehicle for [state law] nonstatutory equity and damages actions containing [federal] constitutional elements."[124] This history, then, further supports Hellman's view that the Court has long held the federal courthouse door closed to matters that the 1875 Congress intended for it to hear.

One of the primary drivers of our current more restrictive approach to § 1331, as I have discussed in other work, was Justice Holmes.[125] Justice Holmes's formulation of his § 1331 jurisdictional test (viz., the Holmes test) was delivered at a time when jurists were beginning to challenge the congruity of every right linking to a cause of action to enforce it.[126] The Holmes test's focus on cause of action is in large part a reaction, based upon his "bad man" approach to the law, to the separation of the analytic concept of cause of action from right. His philosophical bent has become a large driver of the disconnect between congressional intent and current § 1331 practice, which focuses on federal cause of action.

Allow me a brief detour to outline this concept. At the common law, the concepts of right (or what is often referred to as the "primary right" or the "rule of decision") and cause of action (or what is sometimes referred to as "remedial

mandamus to officer of federal government); *see also* Decatur v. Paulding, 39 U.S. (14 Pet.) 497, 514-15 (1840) (same).

[122] *See* Woolhandler & Collins, *supra* note 115, at 2167 (discussing *Teal v. Felton*, 53 U.S. (12 How.) 284 (1852)).

[123] *See, e.g.*, Franchise Tax Bd. v. Constr. Laborers Vacation Tr., 463 U.S. 1, 8-9 n.8 (1983) (observing legislative history indicates Congress may have meant to confer all jurisdiction that Constitution allows); Friedman, *supra* note 114, at 21 (same); Michael G. Collins, *The Unhappy History of Federal Question Removal*, 71 IOWA L. REV. 717, 723 (1986) (same).

[124] Woolhandler & Collins, *supra* note 115, at 2173 (discussing the vesting of § 1331 jurisdiction in the 1880s and 1890s).

[125] *See* Lumen N. Mulligan, *You Can't Go Holmes Again*, 107 NW. U. L. REV. 237, 244-50 (2012) (discussing Justice Holmes's formulation of § 1331 jurisdiction).

[126] *See id.* at 242-44 (discussing rights as linked to cause of action).

right" or a "right of action") were thought immutably linked.[127] *Marbury v. Madison*,[128] for example, held that "it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded."[129] Similarly, the Court in *McFaul v. Ramsey*,[130] critiqued state judicial systems that had "ruthlessly abolished" writ pleading, reasoning that "[t]he distinction between the different forms of actions for different wrongs, requiring different remedies, lies in the nature of things; it is absolutely inseparable from the correct administration of justice in common-law courts."[131] Under this earlier jurisprudence, "courts did not view a cause of action as a separate procedural entity, independent of a right and remedy, that had to be present for an action to go forward."[132] Even nineteenth-century reformers, such as John Austin, who saw a distinction between "primary rights" and causes of action (which he styled as "secondary rights") as useful for taxonomical purposes,[133] accepted that for pragmatic purposes the two notions must work in tandem.[134] Commenting upon this history, Justice Harlan noted that "contemporary modes of jurisprudential thought . . . appeared to link 'rights' and 'remedies' in a 1:1 correlation."[135]

Justice Holmes's creation of the Holmes test for § 1331 jurisdiction, in his *American Well Works Co. v. Layne & Bowler Co.*[136] opinion, was crafted against this common law backdrop. In *American Well Works*, the plaintiff held the patent for, manufactured, and sold what was then considered the best pump on the market. The plaintiff argued that the defendant stated that plaintiff's pump infringed the defendant's patent.[137] Instead of bringing an infringement case, however, the plaintiff brought libel and slander (i.e., state law) causes of action

[127] *See, e.g.*, Bellia, *supra* note 80, at 783 ("At the time of the American Founding, the question whether a plaintiff had a cause of action was generally inseparable from the question whether the forms of proceeding at law and in equity afforded the plaintiff a remedy for an asserted grievance."); Donald H. Zeigler, *Rights, Rights of Action, and Remedies: An Integrated Approach*, 76 WASH. L. REV. 67, 71-83 (2001) (describing traditional approach to rights, causes of action, and remedies).

[128] 5 U.S. (1 Cranch) 137 (1803).

[129] *Id.* at 163 (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *23).

[130] 61 U.S. (20 How.) 523 (1858).

[131] *Id.* at 525.

[132] Zeigler, *supra* note 127, at 72.

[133] *See* 2 JOHN AUSTIN, LECTURES ON JURISPRUDENCE 770-71 (Robert Campbell ed., London, John Murray 5th ed. 1885); *see also* Woolhandler & Collins, *supra* note 115, at 2155-56 (discussing Austin's views on primary and secondary rights).

[134] *See* 2 AUSTIN, *supra* note 133, at 768 ("For a primary right or duty is not of itself a right or duty, without the secondary right or duty by which it is sustained; and e converso.").

[135] Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 401 n.3 (1971) (Harlan, J., concurring); *see also* Zeigler, *supra* note 127, at 72 (quoting Harlan's concurrence in *Bivens*).

[136] 241 U.S. 257 (1916).

[137] *Id.* at 258.

in Arkansas state court. The defendant removed to federal court.[138] This removal raised a federal question jurisdictional issue for the Supreme Court. While recognizing the suit implicated matters of federal patent rights, Justice Holmes focused on the state law origin of the causes of action and held for the Court that a "suit arises under the law that creates the cause of action."[139] Justice Holmes, noting the beginnings of the jurisprudential movement to embrace rights and causes of action as distinct concepts, purposefully chose to focus upon causes of action as the key jurisdictional predicate under § 1331.[140]

Justice Holmes favored this traditional pairing of rights and causes of action as inseparable notions.[141] This position stemmed from his general philosophy that the law should be conceived from the point of view of the "bad man" who cares not for duties and rights as moral matters but only for predictable consequences to his actions, such as imprisonment or compulsory monetary payments.[142] He made this point particularly well in *The Path of the Law*, arguing that:

> Nowhere is the confusion between legal and moral ideas more manifest than in the law of contract. Among other things, here again the so-called primary rights and duties are invested with a mystic significance beyond what can be assigned and explained. The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it—and nothing else.[143]

Given this overarching focus on enforceability in Justice Holmes's approach to the law in general, it is little wonder that he chose to focus on the cause of action (i.e., the determination that the plaintiff is entitled to enforce a right) over unadorned rights that lack an enforcement mechanism in concluding whether a suit arose under federal law for jurisdictional purposes.

Justice Holmes's dissent in *Smith v. Kansas City Title & Trust Co.*[144] further proves this point. In *Smith*, a stockholder plaintiff brought a breach of fiduciary duty cause of action under state law, alleging that bonds issued by a federal agency and purchased by the company were unconstitutionally created.[145] Thus,

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[138] *Id.* at 258.

[139] *Id.* at 260.

[140] *See* Woolhandler & Collins, *supra* note 115, at 2178-83 (focusing on Holmes's conception of rights and causes of action).

[141] *Id.* at 2179 ("Holmes eschewed the concept of primary rights as distinct from remedial rights.").

[142] *See* Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897) [hereinafter Holmes, *The Path of the Law*]; *see also* Oliver Wendell Holmes, *Natural Law*, 32 HARV. L. REV. 40, 42 (1918) ("But for legal purposes a right is only the hypostasis of a prophecy—the imagination of a substance supporting the fact that the public force will be brought to bear upon those who do things to contravene it . . . .").

[143] Holmes, *The Path of the Law*, *supra* note 142, at 462.

[144] 255 U.S. 180 (1921).

[145] *Id.* at 195-98.

this case would not satisfy the Holmes test as presented in *American Well Works* because the plaintiff had not brought a federal cause of action. Nevertheless, the Court held that federal question jurisdiction arose under § 1331 because the plaintiff's state law claim required adjudication of embedded federal constitutional rights.[146] This is to say, *Smith* is an earlier form of *Grable & Sons* jurisdiction. In his dissent, Justice Holmes stressed the importance of enforceability—which is expressed doctrinally by the cause of action, not rights unadorned—to the jurisdictional question. He reasoned that:

> The mere adoption by a state law of a United States law as a criterion or test, when the law of the United States has no force *proprio vigore*, does not cause a case under the state law to be also a case under the law of the United States, and so it has been decided by this Court again and again.[147]

Reiterating this point, he argued that the federal constitutional right at issue here "depends for its relevance and effect not on its own force but upon the law that took it up, so I repeat once more the cause of action arises wholly from the law of the State."[148]

The classic Holmes test, the view that § 1331 jurisdiction only arises if federal law creates the cause of action, was conceived in large part as an attempt to retain the traditional one-to-one relationship between causes of action and rights that was beginning to disintegrate in the early twentieth century. Under the Holmesian view, any other focus would incoherently conflate mere moral duties (i.e., rights per se) with law (i.e., predictable applications of force). Regardless of what one thinks of the wisdom of the Holmes test's approach to vesting § 1331 jurisdiction, one thing is clear: it runs directly contrary to nineteenth-century practice and the best evidence of original legislative intent of § 1331. Thus we see that Holmes's philosophy is a prime causal factor for Hellman's observation that the courts fail to follow original legislative intent in § 1331 cases.

So what is one to make of this total disconnect between the original legislative intent of § 1331 jurisdiction and contemporary practice? I agree with Hellman that, ultimately, this is a normative question.[149] In other work, I have argued for a "type" of legislative intent understanding of § 1331 jurisdiction.[150] But I make

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[146] *Id.* at 199 (holding federal jurisdiction present because claim rested upon reasonable foundation of federal claim); *see also* Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 312-13 (2005) (discussing *Smith* test); Merrell Dow Pharms. Inc. v. Thompson, 478 U.S. 804, 808-09 (1986) (discussing federal question jurisdiction where state law right depended on construction of federal law); Franchise Tax Bd. v. Constr. Laborers Vacation Tr., 463 U.S. 1, 9 (1983) (finding Holmes test is a rule of inclusion (citing Flournoy v. Wiener, 321 U.S. 253, 270-72 (1944) (Frankfurter, J., dissenting)).

[147] *Smith*, 255 U.S. at 215 (Holmes, J., dissenting).

[148] *Id.* at 214.

[149] *See* Hellman, *supra* note 1, at 2201.

[150] *See* Mulligan, *supra* note 113, at 1726-41.

no pretense to capture fully the broad scope of the original 1875 Congress's aims.

And more fundamentally, one might ask if embracing this original intent is practical. As Hellman observes, we are "today, in an era when the reach of federal law has never been more expansive."[151] Yet, we have but 860 authorized Article III judgeships, including circuit court and Supreme Court seats.[152] Fully embracing 1875 congressional intent would require exponential growth of the federal judiciary, which seems a political impossibility.[153] Given these realities, I have grave concerns, on pragmatic grounds, about expanding district court dockets to the full extent of the 1875 Congress's original intent. This would flood the federal courts. The delays caused by this flooding could act as justice denied, even if as a result congressional intent was more closely mapped. Perhaps a first step in Hellman's project to ensure that the federal courts stand ready to remedy state violations of federally conferred rights is to create more judgeships rather than fully embracing original legislative intent. Still, there is no denying the force of Hellman's analytical position on this score.

## CONCLUSION

Professor Hellman, once again, provides us with a thoughtful and broad-ranging work. As is always the case, I more often than not find myself nodding yes as I read Hellman's work. My aim in this response, then, was to add a few differing prospectives on Article III jurisdiction and a bit of historical § 1331 detail that, I hope, furthers his project and this conversation. None of these bits and pieces, however, detract from Hellman's core argument: we need to look closely and skeptically at the Supreme Court's recent attempts to limit access to the federal judiciary.

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[151] Hellman, *supra* note 1, at 2199.

[152] *See Authorized Judgeships*, US COURTS, https://www.uscourts.gov/sites/default/files/allauth.pdf [https://perma.cc/9CUL -2Q43] (last visited Dec. 19, 2024).

[153] Consider just the expected resistance from the judiciary, much less Congress, to such growth. A much less robust growth plan to Article III judges in the 1970s, when Congress considered making bankruptcy judges Article III judges, led to lobbying by the Chief Justice himself against the plan on the grounds that the federal courts' small size is key to its prestige and efficacy. *See, e.g.*, Eric G. Behrens, Stern v. Marshall*: The Supreme Court's Continuing Erosion of Bankruptcy Court Jurisdiction and Article I Courts*, 85 AM. BANKR. L.J. 387, 390 (2011) ("Article III judges, however, were strongly opposed to elevating bankruptcy judges to their ranks."); *cf.* Wendy Lynn Trugman, *The Bankruptcy Act of 1984:* Marathon *Revisited*, 3 YALE L. & POL'Y REV. 231, 232-33 (1984) (addressing issues with lack of independent bankruptcy structure).