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ARTICLE III AS A GRANT OF POWER: PROTECTIVE JURISDICTION, FEDERALISM AND THE FEDERAL COURTS

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A reconsideration of the entire federal question field would appear necessary if the court is to clarify the present judicial disorder.[1]

I. INTRODUCTION

In the aftermath of the terrorist attacks of September 11, 2001, Congress enacted a law vesting exclusive jurisdiction in the Southern

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1. Ray Forrester, *The Jurisdiction of Federal Courts in Labor Disputes*, 13 LAW & CONTEMP. PROBS. 114, 127 (1948).

District of New York over all claims arising out of the airplane crashes.[2] This new statute does not create any federal standards, defenses or obligations and provides that the governing law will be the law of the place where the crash occurred.[3] Some of the lawsuits covered by the statute, therefore, may be federal cases among nondiverse parties where state law furnishes the rule of decision. The validity of federal jurisdiction over such cases implicates one of the oldest and most difficult questions of constitutional law.[4]

Article III of the United States Constitution sets forth the classes of cases to which the "Judicial Power" of the United States may extend.[5] The only category which could even arguably support a case under the Air Safety Act between nondiverse parties is the one allowing for federal jurisdiction in cases "arising under . . . the Laws of the United States."[6] It is far from obvious, however, how a case that is governed completely by state tort law and raises no substantive federal issues or defenses can "arise" under federal law for Article III purposes.[7]

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2. Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, § 408(b)(3), 115 Stat. 230 (2001) [hereinafter Air Safety Act].

3. *Id.* § 408(b)(2). "The substantive law for decision in any such suit [under the act] shall be derived from the law, including choice of law principles, of the State in which the crash occurred unless such law is inconsistent with or preempted by Federal law." *Id.*

4. The Air Safety Act also creates an alternative voluntary compensation program whereby those injured in airplane crashes can file claims with a federal master. *See id.* § 405. Legal issues arising out of this part of the Air Safety Act are beyond the scope of this Article.

5. U.S. CONST. art. III, § 2 extends the federal judicial power to cases

> in Law and Equity, arising under the Constitution, the Laws of the United States, and Treaties made . . . to all Cases affecting Ambassadors . . . Ministers and Counsuls; to all Cases of admiralty and maritime Jurisdiction; to controversies to which the United States [is] a party; to controversies between two or more states [or] between a State and Citizens of another state; to controversies between citizens of different States; [to controversies] between Citizens of the same State claiming Lands under Grants of different States and to controversies between a state or its citizens and a foreign state and its citizens.

Id.

6. *Id.*

7. *See id.* Although Congress has created a "federal claim" under the Air Safety Act, the difficult Article III questions cannot be avoided by Congress transferring what is essentially a state law claim to federal court and then incorporating state law wholesale. *See In re* TMI Litig. Cases Consol. II, 940 F.2d 832, 864 (3d Cir. 1991) (Scirica, J., concurring) (stating that, "Mere incorporation of state law cannot by itself satisfy Article III. If it could, every purely jurisdictional grant would become constitutional if Congress simply added language declaring that state law operates as federal law."); Carole Goldberg-Ambrose, *The Protective Jurisdiction of the Federal Courts*, 30 UCLA L. REV. 542, 550 (1983) ("Claims in which the only federal law is an incorporation of existing state law [should] be treated the same as claims based on state law alone because the incorporation, by definition, would not alter any elements of the claim."). Although

In the first significant judicial interpretation of Article III's "arising under" language almost two hundred years ago, Chief Justice John Marshall interpreted the phrase broadly to allow federal courts to exercise jurisdiction over every case involving the Second National Bank, even where state law furnished the rule of decision and the parties were not diverse.[8] Ever since then, Supreme Court Justices and constitutional law scholars have debated the proper interpretation of Marshall's decision, as well as the appropriate limits on Congress's power to grant "arising under" jurisdiction to the federal courts.[9] Although the Supreme Court has upheld jurisdiction in nondiverse cases arising under state or foreign law,[10] it has never adequately justified its decisions, leading to creative efforts by academics to fill that gap.[11] Unfortunately, there has been more disagreement than unity over a proper rationale for the Court's cases, resulting in great uncertainty about the scope of Congress's Article III powers.

Starting in 1948, and continuing to the present, constitutional commentators have developed a theory called "protective jurisdiction," in an effort to justify an interpretation of Article III that gives Congress broad

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this Article concludes that the Air Safety Act is constitutional, it is not because Congress used the magic phrase "federal claim" in what is essentially a pure jurisdictional statute. Rather, this Article argues that pure jurisdictional statutes are constitutional if they are rationally related to legitimate Article I concerns. *See infra* notes 96-107 and accompanying text.

8. *See* Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 824 (1824); *see also* Bank of the United States v. Planters' Bank, 22 U.S. (9 Wheat.) 904, 905 (1824).

9. This is one of the few areas of constitutional law where Supreme Court Justices have explicitly discussed and criticized the doctrinal suggestions of constitutional law scholars. *See* Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 462 (1957) (Frankfurter, J., dissenting).

10. *See, e.g., Planters Bank*, 22 U.S. at 905 (allowing a state law breach of contract suit in a case involving the National Bank); Verlinden v. Cent. Bank of Nig., 461 U.S. 480 (1983) (allowing a foreign corporation to sue a foreign country under nonfederal law in federal court); Am. Nat'l Red Cross v. S.G. & A.E., 505 U.S. 247 (1992) (allowing state law claim against a federally chartered corporation in federal court).

11. *See, e.g.*, William R. Casto, *The Federal Courts Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467 (1986) (arguing that 28 U.S.C. § 1350 should be construed liberally); John Cross, *Congressional Power to Extend Federal Jurisdiction to Disputes Outside Article III: A Critical Analysis from the Perspective of Bankruptcy*, 87 NW. U. L. REV. 1188 (1993) (discussing the Tidewater jurisdictional problem and bankruptcy); Thomas Galligan, *Article III and the "Related to" Bankruptcy Jurisdiction: A Case Study in Protective Jurisdiction*, 11 U. PUGET SOUND L. REV. 1, 54 (1987); Goldberg-Ambrose, *supra* note 7; Paul J. Mishkin, *The Federal 'Question' in the District Courts*, 53 COLUM. L. REV. 157 (1953); Linda S. Mullenix, *Complex Litigation Reform and Article III Jurisdiction*, 59 FORDHAM L. REV. 169 (1990); Herbert Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROBS. 216 (1948) (discussing whether the expansion of federal court jurisdiction withstands Article III scrutiny); Louise Weinberg, *The Power of Congress Over Courts in Nonfederal Cases*, 1995 BYU L. REV. 731 (discussing the limits on the national interest in federal jurisdiction).

authority to provide for federal jurisdiction in nondiverse cases devoid of federal law issues.[12] The core idea, though expressed in a variety of different ways, is that Congress is allowed to "protect" legitimate Article I concerns by granting jurisdiction to the federal courts even if the law governing the case is nonfederal.[13] Some scholars suggest that Congress has this authority under Article I, while others argue Congress can accomplish this goal by enacting a pure jurisdictional statute under Article III.[14] Either way, the theory of protective jurisdiction allows Congress to further Article I interests by creating federal jurisdiction for nonfederal cases. Although some of the Court's decisions seem to be explainable only under a theory of protective jurisdiction, the Court has been reluctant to explicitly accept the idea,[15] and has stated that pure jurisdictional statutes do not meet Article III's requirements, thereby adding to the confusion.[16]

The protective jurisdiction question has implications far beyond the constitutionality of the Air Safety Act. For a myriad of important reasons, Congress has attempted to give jurisdiction to the federal courts in nondiverse cases where nonfederal law furnishes the rule of decision. For example, Congress has wanted certain federal instrumentalities, such as the American Red Cross, which are not technically considered to be part of the government but are chartered thereby, to have access to federal courts (as plaintiff or defendant) even where there is no federal issue in the case.[17] Congress has also vested jurisdiction in federal courts to hear bankruptcy cases where the dispute is between nondiverse parties over state law breach of contract and tort claims.[18] And, Congress has provided a federal forum to foreign countries as defendants even if the plaintiff's cause of action is completely nonfederal and there is no diversity.[19]

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12. *See, e.g.*, Galligan, *supra* note 11, at 54; Wechsler, *supra* note 11, at 224-25; Weinberg, *supra* note 11, at 802.

13. *See* Wechsler, *supra* note 11, at 224-25.

14. *Compare id. with* Galligan, *supra* note 11, at 54.

15. *See Verlinden*, 461 U.S. at 491 n.17.

16. *See* Mesa v. California, 489 U.S. 121, 136 (1989) ("[P]ure jurisdictional statutes which seek 'to do nothing more than grant jurisdiction over a particular class of cases' cannot support Art. III 'arising under' jurisdiction.") (quoting *Verlinden*, 461 U.S. at 496).

17. *See* Am. Nat'l Red Cross v. S.G. & A.E., 505 U.S. 247, 257 (1992).

18. *See* Schumacher v. Beeler, 293 U.S. 367, 371 (1934).

19. *See, e.g., Verlinden*, 461 U.S. at 480. Numerous other federal laws raise similar Article III issues. For example, the Alien Tort Claims Act provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350 (2002). This statute, which appears to be jurisdictional only, authorizes a suit between two aliens arising under the law of a foreign country. *See* Casto, *supra* note 11, at 472. Without diversity or a federal question present, it is not obvious how such a case can properly be brought in federal court. Another federal law which raises difficult Article III questions is the Diplomatic Relations Act of 1978, which allows suits in federal court against insurance companies which insure foreign diplomats and their families.

The Supreme Court has been unable to set forth a coherent approach to the validity of these statutes and other "arising under" questions partly because of its concern for federalism.[20] Arguably, the more power Congress has to vest jurisdiction in the federal courts, especially over nondiverse, nonfederal law cases, the less authority remains with the state courts. Therefore, the Court has been reluctant to embrace any broad theory of protective jurisdiction that would transcend one specific case and significantly enlarge Congress's authority.[21] Similarly, most commentators, even those who support one of the many variants of protective jurisdiction, are sensitive to federalism concerns and suggest some form of balancing test between national goals and state interests.[22]

This Article provides a comprehensive analysis of Congress's authority to give the federal courts jurisdiction over cases where the parties are not diverse and federal law does not govern the controversy. Relying on the traditional tools of constitutional interpretation (text, history, precedent, and policy), I argue that if Congress has the political will to enact a statute vesting jurisdiction in the federal courts and if that jurisdictional statute furthers an enumerated power, then the law is constitutional without regard to any balancing of federalism concerns and regardless of the diversity of the parties or the source of law Congress chooses to govern the case. The Court should interpret Article III, not as a limitation on Congress's Article I powers, but as an authorization to implement those powers. This rule would not only justify the validity of the Air Safety Act (a political

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28 U.S.C. § 1364 (1981). The purpose of this law is to allow for the recovery of damages from foreign diplomats who cause Americans injury, particularly in automobile accidents. *See* RICHARD FALLON ET.AL, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 906-07 (4th ed. 1996). The idea is that, although the diplomats may have immunity, the insurance companies do not. The legislative history of the law, however, makes it clear that state law governs any lawsuits brought under the act. *Id.* Therefore, the statute provides for jurisdiction, despite the absence of diversity, in a case to be decided under state law. In addition to these laws that are actually on the books, Congress has proceeded cautiously with important pieces of legislation because of doubts about the proper scope of Article III's "arising under" language. For example, in 1969, Congress considered an important bill that would have allowed plaintiffs to enforce state consumer protection laws in federal court. *See* Note, *Federal Jurisdiction—Protective Jurisdiction and Adoption as Alternative Techniques for Conferring Jurisdiction on Federal Courts in Consumer Class Actions*, 69 MICH. L. REV. 710 (1971) [hereinafter *Michigan Note*]. Doubts about the constitutionality of the law were expressed at the hearings, and the bill was never enacted. *See* Goldberg-Ambrose, *supra* note 7, at 565. For further discussion, *see infra* notes 110-11 and accompanying text.

20. *See Mesa*, 489 U.S. at 136-37 (interpreting federal officer removal statute as applying only when the defendant raises a federal defense to avoid serious federalism questions raised by requiring state prosecutors to try traffic offenses against officers in federal courts).

21. *See id.* at 139.

22. *See infra* notes 178-81 and accompanying text.

inevitability), but all other federal laws granting jurisdiction to the federal courts that are rationally related to legitimate Article I concerns.

The Supreme Court has, in practice, reached a conclusion similar to the one offered here, but has refused to say so openly in its opinions. Although the Court has been unwilling to give Congress significant authority to vest jurisdiction in the federal courts by adopting a broad theory of protective jurisdiction, the Court has approved specific grants of federal jurisdiction over state and foreign law claims on a case-by-case basis.[23] This schizophrenia has confused lower courts and created great uncertainty about the scope of the Court's decisions.[24] This Article argues that the Court should make transparent its decisions and admit that Congress may provide for federal jurisdiction under Article III whenever a federal law, including a purely jurisdictional one, furthers one of Congress's enumerated powers.

Although this interpretation of Article III appears at odds with the Court's recent sensitivity to states' rights, allowing federal judges to interpret state law in order to further national concerns is far less intrusive than congressional preemption of state law or allowing federal judges to create federal common law. Thus, allowing Congress broad authority to vest jurisdiction in the federal courts is not only consistent with text, history, and case law, but is the best way to insure a healthy relationship between the state and federal governments.[25]

Part II discusses the relevant constitutional text and its history. Part III summarizes how scholars have tried to make sense of the Court's cases, describes the various theories of protective jurisdiction, and explores their strengths and weaknesses. Part IV explains why federalism is best served by an interpretation of Article III that gives Congress broad authority to vest jurisdiction in the federal courts and uses the recently enacted Air Safety Act to support this thesis.

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23. *See, e.g., Verlinden*, 461 U.S. at 480 (allowing foreign corporation to sue a foreign country under nonfederal law in federal court); Am. Nat'l Red Cross v. S.G. & A.E., 505 U.S. 247, 247 (1992) (allowing state law claim against a federally chartered corporation in federal court).

24. *See In Re* TMI Litig. Cases Consol. II, 940 F.2d 832, 866 (3d Cir. 1991) (Scirica, J., concurring) (stating that "[p]rior case law does not dictate the applicable standards when Congress has granted federal jurisdiction over cases in which the existence of federal questions is speculative .... *Osborn* and *Verlinden* ... do not ... provide a complete framework for deciding the precise issue confronting us.").

25. *See infra* notes 162-83 and accompanying text. A few other commentators have reached similar conclusions as to the proper scope of Article III. *See, e.g.*, Galligan, *supra* note 11; Wechler, *supra* note 11; Weinberg, *supra* note 11. None of these commentators, however, wrote prior to the Supreme Court's recent federalism revolution, which might explain why the articles do not present comprehensive discussions of the effects of protective jurisdiction on state-federal relationships. In addition, none of the scholars wrestled with the constitutionality of the Air Safety Act, an obviously important piece of federal legislation.

II. TEXT AND HISTORY

Article III allows Congress to grant the federal courts jurisdiction over cases that arise under federal law.[26] If Congress creates a substantive federal right or defense, it is authorized by the Constitution to place the enforcement of that right or defense in the federal system. The question this Article is concerned with is whether Congress may create federal jurisdiction for the enforcement of rights and defenses that arise under nonfederal law. There are a number of reasons Congress may want to establish federal jurisdiction over nonfederal obligations or defenses. First, Congress may want to protect federal instrumentalities from state court hostility.[27] Second, Congress may want a certain set of obligations to be litigated in a more uniform setting than the fifty state court systems.[28] Third, Congress may believe that certain federal procedures, such as liberal class action rules, may further national interests even though the law to be applied in such cases is state law.[29]

To achieve any or all of these goals, Congress may pass a statute which does nothing more than authorize federal jurisdiction over a certain class of cases without creating any federal rights or obligations. There is no constitutional difference between this approach and, as Congress did in the Air Safety Act, creating a "federal claim" where there was once a state claim and incorporating state law wholesale as the rule of decision.[30] Either way, the only substantive issues in the case will be governed by state law. The constitutional question is whether such a statute satisfies the "arising under" language of Article III.

There is little helpful history on this question because the debates of the constitutional convention do not reveal what the participants specifically meant by the phrase "arising under." The limited evidence that exists, however, suggests that there was strong agreement at the convention that Article III was intended to allow for federal jurisdiction over all cases involving the "national peace [and] harmony."[31] The idea was that matters internal to one state would be beyond the reach of the federal judicial power (other than diversity cases), but "where the Union is in some

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26. U.S. CONST. art. III, § 2.

27. *See* Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824); *see also infra* notes 47-56 and accompanying text.

28. *See* Goldberg-Ambrose, *supra* note 7, at 575.

29. *Id.* at 569.

30. *See supra* note 7.

31. *See* Goldberg-Ambrose, *supra* note 7, at 586-87 (citing 3 J. ELLIOTT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 565 (2d ed. 1941)); THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 238 (Max Farrand ed., 1937) (quoting Governor Randolph).

measure concerned," federal jurisdiction would be appropriate.[32] In fact, the breadth of jurisdiction over matters of national interest was so broad that one objector to Article III argued that the "arising under" language was of a "stupendous magnitude."[33] The debates as a whole seem to indicate that Article III authorized Congress to extend federal jurisdiction to those cases implicating Congress's enumerated powers.[34]

The text of Article III leads to the same conclusion. Federal question jurisdiction requires that a case "arise under" a law of the United States. There is no limitation in Article III on what kind of law that has to be or whether it has to be based on substantive rather than procedural concerns.[35] If Congress authorizes federal jurisdiction in a statute that furthers a legitimate Article I interest, a case can arise under that law regardless of which substantive law governs the controversy or whether that Article I interest is related to the law governing the case. There is no constitutional language, inside or outside Article III, indicating such a jurisdictional grant is improper.

This interpretation of Article III is supported by numerous statements by the framers that federal courts must be able to interpret any law Congress has the power to enact.[36] Similarly, in a famous and off-quoted passage from *Osborn v. Bank of the United States*,[37] Chief Justice John Marshall stated that:

> [T]he legislative, executive and judicial powers, of every well constructed government, are co-extensive with each other . . . . The executive department may constitutionally execute every law which the Legislature may constitutionally make, and the judicial department may receive from the Legislature the power of construing every such law . . . . [Article III] enables the judicial department to receive jurisdiction to the full extent of the constitution, laws, and treaties of the United States . . . .[38]

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32. *See* 4 THE FOUNDERS' CONSTITUTION 233 (Phillip Kurland & Ralph Lerner eds. 1987) (quoting JAMES IREDELL, MARCUS, ANSWERS TO MR. MASON'S OBJECTIONS TO THE NEW CONSTITUTION, Pamphlet No. 342-44 (1788)).

33. *See* Goldberg-Ambrose, *supra* note 7, at 586 n.246 (citing 3 J. ELLIOT, *supra* note 31, at 565).

34. *See* Scott A. Rosenberg, Note, *The Theory of Protective Jurisdiction*, 57 N.Y.U. L. REV. 933, 952 (1982). This excellent student Note has become a significant part of the scholarship on issues of protective jurisdiction, and like others before me, I will refer to it throughout this Article. *See, e.g.*, Galligan, *supra* note 11, at 2 n.3; Weinberg, *supra* note 11, at 809 n.250.

35. *See* U.S. CONST. art. II, § 2.

36. *See* Rosenberg, *supra* note 34, at 944 n.62 (citing numerous statements by the framers supporting the idea that the judicial power had to correspond to the legislative power).

37. 22 U.S. (9 Wheat.) 738 (1824).

38. *Id.* at 818-19.

These statements suggest that federal courts have the power to interpret and enforce any law Congress may constitutionally pass.[39] Sometimes, Congress creates substantive rights and defenses, and the "arising under" language is easily satisfied. But if Congress has a legitimate Article I interest in vesting jurisdiction in the federal courts for procedural reasons, such as making sure that foreign countries receive uniform treatment, then the equivalence principle should also apply.[40] In other words, there may be a national interest in vesting jurisdiction in the federal courts even where the law to be applied is nonfederal.[41] In such cases, the history of Article III supports federal jurisdiction.

There is a plausible structural argument against an interpretation of Article III that allows Congress to pass pure jurisdictional statutes that further its Article I powers. If the "arising under" language reaches that far, the other categories of jurisdiction listed in Article III would be unnecessary and redundant because all of those classes of cases also implicate the national interest and Congress's Article I powers. For example, Congress could pass laws relating to "Ambassadors... Ministers and Counsuls,"[42] pursuant to its foreign affairs powers, and enact laws relating to diversity cases pursuant to the Commerce Clause. Thus, the argument goes, a reading of the "arising under" clause that permits jurisdiction over any case implicating national concerns renders the remainder of Article III superfluous and therefore cannot be correct.[43]

The argument that the Supreme Court should interpret the Constitution in a way which forecloses overlapping sources of congressional authority, however, cannot be reconciled with much of the case law of the twentieth century. For example, even the current Supreme Court interprets the Commerce Clause, supplemented by the Necessary and Proper Clause, as allowing Congress to regulate most, if not all, economic activity.[44] Thus, under the Commerce Clause, Congress could create Post Offices, coin money, and regulate bankruptcy, all of which it is authorized to do under more specific Article I provisions.[45] That Congress can point to different and intersecting sources of power in Article I to justify various laws does not mean that the Court is mistaken when it allows Congress to regulate

39. *See id.*

40. *See* Rosenberg, *supra* note 34, at 952 n.102.

41. *See id.*

42. U.S. CONST. art. III, § 2.

43. *See* Galligan, *supra* note 11, at 58-59 (citing, Rosenberg, *supra* note 34, at 956).

44. *See* United States v. Lopez, 514 U.S. 549, 559, 566 (1995) (adopting a commercial/noncommercial test to decide whether a particular local activity substantially affects commerce so that Congress can regulate it); *see also* United States v. Morrison, 529 U.S. 598, 613 (2000).

45. *See* Galligan, *supra* note 11, at 59.

economic activity under the Commerce Clause. The framers simply could not have anticipated how the powers given to Congress would be interpreted over time and which ones would become the most useful. Just as the Commerce Clause may swallow up other Article I powers, the "arising under" language of Article III may do the same for other Article III powers.

Furthermore, Congress's authority to vest jurisdiction in the federal courts should remain parallel over time with Congress's powers under Article I. It may be that the framers would be surprised by an interpretation of Article III that gives Congress the power to place many cases in federal court that traditionally would have been tried in state court. But they also could not have anticipated the growth of federal power under Article I. The equivalence principle discussed above was well accepted by the framers and makes sense. Congress's authority to vest jurisdiction in the federal courts must "wag the tail" of its Article I powers in order for the government to operate efficiently.[46] As long as Congress's desire to create federal jurisdiction is supported by an enumerated power, "arising under" jurisdiction in such cases is consistent with the text and history of Article III regardless of whether the law providing for jurisdiction is supported by substantive or procedural concerns.[47]

III. JUDICIAL AND SCHOLARLY THEORIES OF "ARISING UNDER" JURISDICTION

A. Osborn v. Bank of the United States

The focal point of any discussion of Congress's power to create "arising under" jurisdiction must be *Osborn* and the academic commentary spawned by the case. Much of the current uncertainty about federal question jurisdiction can be traced to Justice Marshall's opinion.

In *Osborn*, the Bank of the United States sought an injunction in federal court to avoid paying taxes to the State of Ohio.[48] After finding that Congress intended the Federal Bank to be able to sue and be sued in federal court, Marshall considered whether the suit could constitutionally arise under federal law for purposes of Article III.[49] Although the answer in this

46. *See* Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 818-19 (1824); *see also supra* note 38 and accompanying text (discussing *Osborn*).

47. *See* Rosenberg, *supra* note 34, at 948 ("Congress might find that federal jurisdiction itself is necessary for the effectuation of an Article I interest regardless of the rules of decision imposed. In such instances, federal jurisdiction itself may be necessary and proper without respect to the existence of federal rules of decision.").

48. *See Osborn*, 22 U.S. at 816.

49. *Id.* at 819; *see also* MARTIN REDISH, FEDERAL JURISDICTION: TENSIONS IN THE

particular case was easy, the Bank's defense was that federal law preempted state law and this was a federal issue, Justice Marshall's explanation for finding jurisdiction created much confusion.[50]

Marshall first argued that the presence of any federal issue in a case provides the Court with jurisdiction to resolve all the questions raised, even nonfederal ones.[51] This statement of supplemental jurisdiction has not proven controversial. Marshall then posed a hypothetical case, similar to a real one the Court decided the same day.[52] He asked whether a state law breach of contract action brought by the bank would arise under federal law.[53] He answered the question in the affirmative by arguing that the Bank's right to sue under the relevant federal statute, which would always be the first issue in the case, was a federal question, and therefore jurisdiction would be proper in each and every case involving the Bank.[54] He went on to say that even if the Bank's statutory right to sue had been conclusively decided in a previous case, and the question was no longer being litigated, there would still be federal jurisdiction because the "question forms an original ingredient in every cause."[55] Professor Redish has suggested that this explanation means that in any case where a federal issue could possibly be raised, regardless of whether it is actually raised, and regardless of whether the issue had been conclusively determined before, federal jurisdiction would be consistent with Article III.[56]

Commentators have had a difficult time with Marshall's explanation in *Osborn* because his reasoning would allow just about any case in federal court.[57] There is always the possibility that a litigant may raise a constitutional or federal preemption issue about the plaintiff's right to sue or the defendant's right to defend a state law case. That possibility alone, according to Marshall, would satisfy Article III, even if the case, in the end, raised no federal question.[58] Because of this difficulty, constitutional law scholars have devoted considerable energy to rehabilitating *Osborn* to make its reasoning more palatable.

ALLOCATION OF JUDICIAL POWER 84 (2d ed. 1990) (citing *Osborn*, 22 U.S. at 817-18). Much of the following description of *Osborn* comes from Professor Redish's fine discussion. *See id.*

50. *See id.*

51. *Id.* at 84-85 (citing *Osborn*, 22 U.S. at 823).

52. *Osborn*, 22 U.S. at 823 (discussing United States v. Planters' Bank of Georgia, 22 U.S. (9 Wheat.) 904 (1824)).

53. *Id.* at 823-24.

54. REDISH, *supra* note 49, at 85 (citing *Osborn*, 22 U.S. at 822).

55. *Id.* at 85 (quoting *Osborn*, 22 U.S. at 824).

56. *See id.*

57. *See* Weinberg, *supra* note 11, at 782.

58. REDISH, *supra* note 49, at 85.

The first and most obvious way to limit *Osborn* is to suggest that its rationale applies only to federal instrumentalities.[59] As Justice Marshall argued in *McCulloch v. Maryland*,[60] Congress's power to create federal entities includes the authority to protect them against hostile state courts.[61] Thus, Congress should be allowed to provide a federal forum for all suits threatening such entities.[62] The Supreme Court recently affirmed this view in *American National Red Cross v. S.G. & A.E.*,[63] where it allowed the American Red Cross to remove a state law tort action to federal court.[64] The Court said that Article III is "broad enough to authorize Congress to confer federal court jurisdiction over actions involving federally chartered corporations,"[65] and there was "no reason to contemplate overruling" *Osborn*.[66]

This approach to the problem accepts the theory of protective jurisdiction for federal entities because the statutes at issue in *Red Cross* and *Osborn* were purely jurisdictional. Under Article I, Congress could probably have federalized the law governing such cases, but it did not choose that path. The suit against the Red Cross was governed by state tort law, and Marshall hypothesized a state court suit in *Osborn*. How could such cases "arise under" federal law for Article III purposes if not under a theory of protective jurisdiction? One possible answer, given by Justice Marshall in *Osborn*, is the issue of the plantiff's right to sue, which is a federal question, is sufficient to confer jurisdiction over the entire case.[67] But then the mere possibility of an issue being raised, even if it has already been decided by the Supreme Court, is enough to confer jurisdiction over every other case brought by or against that entity. Even if that rationale is limited to federal instrumentalities, it seems unpersuasive and overbroad.[68]

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59. *See* Weinberg, *supra* note 11, at 782.
60. 17 U.S. (4 Wheat.) 316 (1819).
61. *Id.* at 403-05.
62. *See id.*
63. 505 U.S. 247 (1992).
64. *See id.* at 264.
65. *See id.*
66. *Id.* at 265.
67. Osborn v. Bank of the United States, 22 U.S. (9 Wheat) 738, 823-24 (1824).
68. At one time, the Court extended the *Osborn* holding to federally chartered railroad stock companies. *See* Pac. R.R. Removal Cases, 115 U.S. 1 (1885) (ruling that cases brought against railroad companies in state court could be removed to federal court). Subsequently, Congress enacted a law requiring that the United States own at least half the stock in a federally chartered corporation before the corporation can sue and be sued in federal district court. *See* 28 U.S.C. § 1349 (2002). This federal law caused confusion in the lower courts as to whether it applied to federally chartered companies that do not have stockholders. *See* Weinberg, *supra* note 11, at 799 n.228. The Supreme Court reached the conclusion in *Red Cross* that, at least as to that specific corporation, 28 U.S.C. § 1349 did not deprive the district courts of jurisdiction. *See* Am. Nat'l Red Cross v. S.G. & A.E., 505 U.S. 247, 264-65 (1992). The statutory interpretation issues

A better explanation for *Osborn* and *Red Cross* is that Congress has the power to "protect" legitimate Article I interests, including shielding federal entities from state court hostility.[69] In 1824, the Bank of the United States might not have received fair treatment in state courts.[70] Therefore, Congress had the authority to preserve and maintain the Bank's status by requiring all suits against it to be brought in federal court.

This argument, which was not relied upon by Justice Marshall, does not depend on the notion that the lawsuit against the Bank "arises under" a federal law that creates substantive rights and obligations. Rather, the argument assumes that Congress has the power to protect important federal interests through purely jurisdictional laws. Approximately fifty years ago, several law professors began exploring this theory and argued that Congress has authority to confer federal jurisdiction to protect Article I concerns, such as preserving federally chartered corporations, or giving unions the right to enforce collective bargaining agreements, even if the cases were to be decided under state law.[71] Their arguments on behalf of protective jurisdiction were at least as persuasive as Justice Marshall's rationale in *Osborn* that even the remotest possibility of a federal issue coming into a case justified arising under jurisdiction.[72] The Supreme Court first confronted these arguments in two important cases decided shortly after the first law review article appeared.

B. Tidewater

The first case to trigger a debate among the Justices over protective jurisdiction was *National Mutual Insurance Co. v. Tidewater Transfer Co.*[73] In *Tidewater*, the Court considered a statute authorizing diversity jurisdiction over cases involving citizens of the District of Columbia.[74] The problem was that a nineteenth century Supreme Court decision had established that citizens of the District of Columbia were not citizens of a "state" for purposes of Article III diversity jurisdiction.[75] Only two Justices in *Tidewater* voted to overturn that ruling.[76] There were three votes, however, for the proposition that Congress could create diversity

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surrounding 28 U.S.C. § 1349 are beyond the scope of this Article.

69. *See* Mishkin, *supra* note 11, at 188.

70. *See* Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 481 (1957) (Frankfurter, J., dissenting) (stating "Marshall's holding was undoubtedly influenced by his fear that the bank might suffer hostile treatment in the state courts . . . .").

71. *See* Forrester, *supra* note 1; Mishkin, *supra* note 11; Wechsler, *supra* note 11.

72. *See supra* notes 51-56 and accompanying text.

73. 337 U.S. 582 (1949).

74. *Id.* at 599.

75. *See* Hepburn & Dundas v. Ellzey, 6 U.S. (2 Cranch) 445, 452 (1805).

76. *Tidewater*, 337 U.S. at 604 (Rutledge & Murphy, JJ., concurring).

jurisdiction for D.C. citizens pursuant to Congress's Article I authority to regulate the District of Columbia.[77] Thus, there were five votes to uphold the law allowing citizens of the District of Columbia access to federal court in diversity cases.

Justice Jackson, who wrote the plurality opinion, did not argue that the case arose under the jurisdictional statute. Instead, he suggested that Congress is not limited to the specific categories of cases listed in Article III, but also could create federal jurisdiction as a necessary and proper way to implement an Article I power.[78] This argument, locating Congress's power in Article I instead of Article III, was criticized by the six other Justices.[79] They relied on both history and policy for the proposition that Article III sets forth the exclusive category of cases to which the "Judicial Power" extends.[80] Furthermore, the dissenting Justices argued that if Congress may go beyond the boundaries listed in Article III, there was no reason it could not also ignore the "case and controversy" requirements of that provision.[81] Justice Frankfurter said, "if the precise enumeration of cases as to which Article III authorized Congress to grant jurisdiction to [Article III courts] does not preclude Congress from vesting these courts with authority which Article III disallows, by what rule of reason is Congress to be precluded from bringing to its aid the advisory opinions of this Court."[82] Similarly, Justice Rutledge argued that if "Article III were no longer to serve as the criterion of district court jurisdiction, I should be at a loss to understand what tasks within the constitutional competence of Congress, might not be assigned to district courts."[83] In other words, if Congress could give federal courts jurisdiction over cases not listed in Article III, there was nothing to prevent Congress from giving federal courts jurisdiction over disputes which were not "cases" or "controversies."[84] But the "case or controversy" limitation on federal judicial power is an essential component of our system of separation of powers and distinguishes the work of the judicial branch from the other branches.[85] For this reason, Justices Frankfurter[86] and Rutledge[87] persuasively argued that Article I cannot be used as a separate and

77. *Id.* at 600.
78. *Id.*
79. *Id.* at 646 (Frankfurter, J., dissenting).
80. *Id.* at 648 (Frankfurter, J., dissenting).
81. *Id.* (Frankfurter, J., dissenting).
82. *Id.* (Frankfurter, J., dissenting); *see also* REDISH, *supra* note 49, at 24 (citing Justice Frankfurter's dissent).
83. *See Tidewater*, 337 U.S. at 616 (Rutledge, J., dissenting).
84. *See* REDISH, *supra* note 49, at 24.
85. *See id.*
86. *See Tidewater*, 337 U.S. at 646 (Frankfurter, J., dissenting).
87. *Id.* at 616 (Rutledge, J., dissenting).

independent source of Congressional authority to confer federal jurisdiction on Article III courts.[88]

C. Lincoln Mills

A different theory of protective jurisdiction, that Congress can create federal jurisdiction pursuant to pure jurisdictional statutes enacted under Article III, was criticized by Justice Frankfurter in his famous dissent in *Textile Workers Union v. Lincoln Mills*.[89] The majority in *Lincoln Mills* interpreted Section 301 of the Taft-Hartley Act as a grant to the federal courts to create federal common law to govern disputes between unions and employers over collective bargaining agreements.[90] Justice Frankfurter disagreed with that conclusion and therefore had to consider whether Congress could give federal courts jurisdiction over state law claims brought by unions and employers under the federal labor laws.[91] As part of that evaluation, he reviewed and criticized the protective jurisdiction arguments that had been advanced by Professors Paul Mishkin and Herbert Wechsler.[92]

Frankfurter began by describing the theory of protective jurisdiction as follows:

> Called "protective jurisdiction," the suggestion is that in any case for which Congress has the constitutional power to prescribe federal rules of decision and thus confer "true" federal question jurisdiction, it may, without so doing, enact a jurisdictional statute, which will provide a federal forum for the application of state statute and decisional law. Analysis of [this] theory might also be attempted in terms of the language of Article III—construing "laws" to include jurisdictional statutes where Congress could have legislated substantively in a field. This is but another way of saying that because Congress could have legislated substantively and thereby could give rise to litigation under a statute of the United States, it can provide a federal forum for state-created rights although it chose not to adopt state law as federal law or to originate federal rights.[93]

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88. This does not mean, however, that Congress cannot use a pure jurisdictional statute pursuant to its Article III authority to further an Article I interest. *See infra* notes 104-07 and accompanying text.

89. 353 U.S. 448, 460 (1957) (Frankfurter, J., dissenting).

90. *Id.* at 456.

91. *Id.* at 473 (Frankfurter, J., dissenting).

92. *Id.* at 473-74 (Frankfurter, J., dissenting); *see* Mishkin, *supra* note 11; Wechsler, *supra* note 11.

93. *Lincoln Mills*, 353 U.S. at 473-74 (Frankfurter, J., dissenting). Professor Wechsler

Justice Frankfurter criticized this argument on the basis that the "restrictions" of Article III "are not met or respected by a beguiling phrase that the greater power here must necessarily include the lesser."[94] To the extent that Mishkin and Wechsler supported their theory of protective jurisdiction on the basis that Congress's power under Article I to preempt state law includes the "lesser" power to create federal jurisdiction, Frankfurter's critique has merit. It does not necessarily follow that the power to create federal jurisdiction is a power included within all of Congress's Article I powers, just as it does not necessarily follow that because states have the "greater" power to outlaw certain activities such as drinking alcoholic beverages, they also have the "lesser" power to outlaw all speech concerning that activity.[95]

Where Justice Frankfurter erred, however, was in concluding that the "arising under" clause of Article III is a "restriction" on Congress which limits its power to create federal jurisdiction to those cases governed by substantive federal law. The framers gave Congress the power to create lower federal courts in Article I,[96] and the jurisdiction of those courts is defined in Article III.[97] A case can "arise under" federal law, for Article III purposes, when Congress uses federal jurisdiction to further legitimate Article I interests, which may or may not be related to the substantive law governing cases under the jurisdictional statute. In other words, the power to enact pure jurisdictional statutes derives from authority given to Congress in both Articles I and III. Viewed this way, the protective jurisdiction argument not only makes sense of the case law, but is the best reading of the text, history, and structure of the Constitution. Before that argument can be fully developed, however, Justice Frankfurter's other arguments in *Lincoln Mills* must be addressed.

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would have allowed protective jurisdiction in all cases where Congress had Article I authority, regardless of whether or not that authority had actually been implemented. *See* Wechsler, *supra* note 11, at 224-25. Professor Mishkin, on the other hand, would have limited the use of protective jurisdiction to those situations where Congress had already entered a field and actually exercised its Article I powers. *See* Mishkin, *supra* note 11, at 189-90. This Article advances a theory similar in result to Professor Weschler's, though for different reasons. *See infra* notes 104-07 and accompanying text.

94. *Lincoln Mills*, 353 U.S. at 474.

95. *See* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 510 (1996) (rejecting the State's argument that it may ban liquor price advertising because it may ban the sale of alcoholic beverages outright; "[This] 'greater-includes-the-lesser' reasoning . . . is inconsistent with both logic and well-settled doctrine.").

96. U.S. CONST. art. I, § 8 (Congress has the power "to constitute Tribunals inferior to the supreme Court.").

97. U.S. CONST. art III, § 2, cl. 1.

Justice Frankfurter also criticized Wechsler's theory on the basis that, to the extent protective jurisdiction is supposed to safeguard certain entities or parties from hostile state courts, the diversity clause of Article III "exhausted" Congress's legitimate concerns in this area.[98] In other words, to the extent the purpose of a federal law is to "insure impartiality to some litigant,"[99] that objective is inconsistent with Article III's recognition of protective jurisdiction only in the "specified situation of diverse citizenship."[100]

The problem with this argument is that there is no historical evidence, nor is there any structural reason to assume, that the diversity clause strips Congress of the power to create federal jurisdiction in nondiverse situations where there is a federal interest in providing a federal forum to favored entities or parties.[101] The purpose of the diversity clause, like the rest of Article III, was to insure that the judicial power would extend to all cases involving the "national peace or harmony."[102] Providing a federal forum when citizens of different states sue each other certainly meets that standard, but so does providing a federal forum for labor unions when Congress has reason to believe that they will not receive fair treatment in state courts and that disparate treatment creates a national economic problem. A jurisdictional provision allowing unions access to federal court may further legitimate Article I concerns just as much as traditional diversity jurisdiction. Both the diversity and "arising under" parts of Article III grant Congress authority to create federal jurisdiction when the national interest so requires, and there is no basis for reading one as a limitation on the other.[103]

A hypothetical statute involving class action products liability suits will demonstrate this point. Assume that some states have antiquated class action procedures that make it virtually impossible to bring class actions against multistate corporations that distribute dangerous products across state lines. Congress studies the problem and determines that the national economic interest will be served if consumers can coerce larger companies to make safer products by bringing class action lawsuits. Congress could federalize products liability law under the Commerce Clause or instruct the

98. *Lincoln Mills*, 353 U.S. at 473-75 (Frankfurter, J., dissenting).

99. *Id.* at 476 (Frankfurter, J., dissenting).

100. *Id.* (Frankfurter, J., dissenting).

101. Of course, there are other reasons why Congress may enact pure jurisdictional statutes such as to achieve uniformity of procedures or to provide a necessary federal procedural device. *See infra* notes 104-07 and accompanying text.

102. *See* Goldberg-Ambrose, *supra* note 7, at 587; *see also supra* notes 32-34 and accompanying text.

103. *See* Goldberg-Ambrose, *supra* note 7, at 587-88; *see also* Weinberg, *supra* note 11, at 804-05 (arguing that Congress has authority under the "arising under" clause to enact "party-protective" statutes despite the argument that the diversity clause undercuts that power).

federal courts to make federal common law. In both of these circumstances, assuming a reading of the Commerce Clause at least as broad as the current majority's adoption of the commercial/non-commercial distinction,[104] federal jurisdiction would be proper under the "arising under" language of Article III. But Congress may decide that it wants state substantive law to apply either out of federalism concerns or because Congress wants different state laws to apply to different geographical areas. Despite those legitimate goals, Congress might still have a strong interest in federal court jurisdiction over these cases because of the utility of uniform and efficient class action procedures and pass a jurisdictional statute to that effect.[105] That law, though jurisdictional only, is consistent with an enumerated power, the Commerce Clause. Why, therefore, should such a law not be one under which a case can "arise?" Reading Article III as a grant of power, rather than a limitation on power, simply gives Congress one option other than total preemption of state law to further legitimate national goals.

Similar arguments may be made on behalf of the Air Safety Act. For security and efficiency reasons, Congress wanted all of the claims arising out of the terrorist incidents to be litigated in a single forum.[106] Numerous Article I provisions, including the War Power and the Commerce Power, probably justify this congressional action.[107] The Air Safety Act is an important law that seeks to promote important national interests by insuring a federal forum over what are essentially state law claims. Neither the importance nor the constitutionality of the Act is diminished because the governing law happens to be nonfederal.

A major obstacle to this interpretation of Article III is that the Supreme Court has suggested that federal cases cannot arise under pure jurisdictional statutes. The Court has made this statement in several recent cases so it is necessary to discuss those decisions in detail.

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104. *See* United States v. Morrison, 529 U.S. 598, 610-13 (2000).

105. This hypothetical is based on several laws that were actually proposed in Congress during the late 1960s. For a full discussion, *see* Michigan Note, *supra* note 19 (examining the constitutionality of various theories of protective jurisdiction under Congressional authority granted by Article I of the Constitution).

106. For a more specific discussion of the reasons Congress may have wanted to vest jurisdiction in the federal courts over all claims arising out of the airplane crashes, see *infra* notes 187-88 and accompanying text.

107. If one believes that there are no legitimate national interests supporting the Air Safety Act, then it would be unconstitutional because it is not rationally related to an Article I power, not because the law is purely jurisdictional and creates no new federal standards or obligations.

D. *The Modern Arising Under Cases*

In *Mesa v. California*,[108] the Court had to decide whether the federal officer removal statute allowed two federal employees to remove state court traffic prosecutions from state to federal court.[109] The removal statute allows any federal officer or "person acting under that officer," to remove "[a] civil action or criminal prosecution commenced in a State court... for any Act under color of such office . . . ."[110] As a statutory interpretation matter, the Court held that the federal employees had to assert a federal defense to gain removal otherwise the case would have raised "serious doubt whether, in enacting [the removal statute], Congress would not have expanded the jurisdiction of the federal courts beyond the bounds established by the Constitution."[111] The Court supported this statement by suggesting that the removal provision "is a pure jurisdictional statute, seeking to do nothing more than grant district court jurisdiction over cases in which a federal officer is a defendant. Section 1442(a), therefore, cannot independently support Art. III 'arising under' jurisdiction."[112]

There are numerous reasons why this statement from *Mesa* should not be taken to foreclose the constitutionality of pure jurisdictional statutes. First, it is *dicta* because the Court held that Congress did not intend Section 1442 to provide for federal jurisdiction absent a federal defense.[113] Second, the only case cited by the Court for its statement was *Verlinden v. Central Bank of Nigeria*,[114] which never held that pure jurisdictional statutes do not satisfy Article III, but merely restated the Court of Appeals decision in that case which the Court reversed.[115] Third, the Court has in fact upheld other federal statutes that do nothing more than grant jurisdiction to the federal courts. A brief review of these cases demonstrates that the Court, despite its dicta in *Mesa*, has in fact, and for good reason, affirmed "arising under" jurisdiction in cases involving pure jurisdictional statutes.

In *Verlinden*, a Nigerian company refused to take delivery of cement ordered by one of its agents from a Dutch company.[116] The lawsuit was allegedly authorized by the Foreign Sovereign Immunities Act (FSIA).[117]

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108. 489 U.S. 121 (1989).

109. *Id.* at 123.

110. 28 U.S.C. § 1442(a) (2001).

111. *Mesa*, 489 U.S. at 136 (quoting Verlinden v. Cent. Bank of Nig., 461 U.S. 480, 494 (1983)) (quotation marks omitted).

112. *Id.*

113. *Id.* at 139.

114. 461 U.S. 480 (1983).

115. *Id.* at 495-96; *see also* Mullenix, *supra* note 11, at 202.

116. *See Verlinden*, 461 U.S. at 483. For an excellent discussion of the facts, *see* Weinberg, *supra* note 11, at 784.

117. 28 U.S.C. § 1330 (2002).

This statute abrogates sovereign immunity for foreign countries under certain circumstances such as when the defendant is engaged in commercial activities or the sovereign has waived its immunity.[118] The Act creates concurrent jurisdiction in state and federal courts, but also contains a provision allowing for removal of all claims authorized by the law.[119] The FSIA explicitly states that the liability of a foreign sovereign under the Act is to be determined under the law that would be applied if the defendant were a private individual and, with limited exceptions, "under the law of the place where the action or omission occurred."[120] Thus, the FSIA vests jurisdiction in the federal courts to hear disputes between nondiverse parties under state law or even the law of a foreign country. The issue in *Verlinden* was whether this grant of jurisdiction was consistent with Article III.[121]

The Court of Appeals for the Second Circuit held that the section of the FSIA that authorized jurisdiction went beyond the permissible boundaries of Article III because it did not create substantive rights or liabilities.[122] According to the Court of Appeals, Congress cannot,

> by the mere act of passing a statute conferring jurisdiction over a class of suits . . . bring those suits within the judicial power. The reason is clear: to allow Congress to do so places no limits on the judicial power at all, and a *sina qua non* of constitutional analysis instructs that this power is limited.[123]

The Supreme Court reversed the Court of Appeals on the grounds that through the FSIA, Congress did more than simply grant jurisdiction to the federal courts, Congress also "exercised its power to regulate foreign commerce, along with other specified Art. I powers."[124] According to the Court, the FSIA "does not merely concern access to the federal courts," but instead "codifies the standards governing foreign sovereign immunity as an aspect of substantive federal law."[125] Because in every case the court will have to determine that one of the exceptions to sovereign immunity exists, "every [lawsuit] against a foreign sovereign necessarily involves application of a body of substantive federal law, and accordingly 'arises under' federal law."[126]

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118. *Id.* § 1605(a)1-(a)2.
119. *Id.* § 1441(d).
120. *Id.* § 1606; *see also* Weinberg, *supra* note 11, at 747-48.
121. *See Verlinden*, 461 U.S. at 480.
122. *See* Verlinden B.V. v. Cent. Bank of Nig., 647 F.2d 320 (2d. Cir. 1981).
123. *Id.* at 328.
124. *Verlinden*, 461 U.S. at 496.
125. *Id.* at 496-97.
126. *Id.* at 497.

The Supreme Court's analysis of the "arising under" question in *Verlinden* is incomplete and unpersuasive. In *Verlinden*, the only connection between the lawsuit and the United States was the presence of a letter of credit deposited by the Nigerian company in a New York bank.[127] The lawsuit was to be decided under either Dutch or Nigerian law.[128] There was nothing federal about the lawsuit other than the question whether the Nigerian company could assert sovereign immunity. The FSIA, however, clearly denotes this question as jurisdictional, not substantive.[129] Furthermore, the FSIA creates no substantive federal law, and the legislative history shows that is exactly what Congress intended.[130]

Despite the Court's short argument to the contrary, the sovereign immunity provisions of the FSIA are simply a gateway to jurisdiction. If, for example, the Nigerian company had explicitly and knowingly waived its sovereign immunity in its contract with the Dutch company so that any brief asserting sovereign immunity would not pass Rule 11, the case, under the Court's reasoning, could still be filed in federal court even though there would *never* be an issue of federal law in the case and the parties were not diverse. In that circumstance, there would be only two possible rationales for the exercise of federal jurisdiction. One would be Justice Marshall's theory in *Osborn* that the mere possibility of a federal question, no matter how remote, and regardless of whether it had been conclusively decided previously by the court, can satisfy Article III.[131] This theory, however, would lead to the exercise of federal jurisdiction in almost every case. Second, and far more persuasive, Congress has the power to create a pure jurisdictional statute to further legitimate Article I concerns. The FSIA, of course, easily satisfies that test. As the Court itself recognized,

> Congress has the undisputed power to decide, as a matter of federal law, whether and under what circumstances foreign nations should be amenable to suit in the United States. Actions against foreign sovereigns in our courts raise sensitive issues concerning the foreign relations of the United States, and the primacy of federal concerns is evident.[132]

These "federal concerns" are legitimate irrespective of whether the rule of decision in the case is state, federal, or even the law of a foreign country.

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127. *See* Weinberg, *supra* note 11, at 784.

128. *Id.* at 784-85.

129. *See* George 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, 374 n.194 (citing 28 U.S.C. § 1604 (1982)).

130. *See* Rosenberg, *supra* note 34, at 1013.

131. *See supra* notes 51-56 and accompanying text.

132. Verlinden v. Cent. Bank of Nig., 461 U.S. 480, 493 (1983).

Congress could, of course, create substantive law to govern these cases under the foreign commerce clause, but there is no reason why Congress should have to take that step if the FSIA's jurisdictional provisions are supported by rational Article I concerns. Here, the desire to provide uniform procedures for foreign sovereigns sued in our courts easily satisfies that standard.

An ironic aspect of *Verlinden* is that even though the case has been cited for the proposition that "arising under" jurisdiction cannot be grounded in a pure jurisdictional statute[133] and for the rejection of protective jurisdiction,[134] those are the only persuasive justifications for the result in the case. As one commentator has observed, "the Supreme Court seems to be saying 'do what I do, not what I say.'"[135] It is time for the Court to recognize that a pure jurisdictional statute such as the sovereign immunity provision of the FSIA can be the basis of "arising under" jurisdiction as long as the statute is supported by legitimate Article I concerns.

This analysis is also the best reading of *Osborn* and *Red Cross*. In both cases, the Court stated that federal entities could sue and be sued even in cases governed entirely by state law. The statute at issue in *Osborn* authorized the Bank to "sue and be sued, plead and be impleaded, answer and be answered, defend and be defended . . . in any Circuit Court of the United States."[136] The statute authorizing jurisdiction in *Red Cross* stated that it could "sue and be sued in courts of law and equity, State or Federal, within the jurisdiction of the United States."[137] Both statutes were purely jurisdictional in that they did not create any new rights or obligations.

The Court upheld jurisdiction in *Osborn* on the grounds that the question of the Bank's capacity to sue and be sued would be present (or be a federal ingredient) in every case and that possibility was enough to support "arising under" jurisdiction.[138] Part II of this Article already demonstrated the problems with this overly broad rationale.[139] In *Red Cross*, the Court did not repeat the "federal ingredient" theory but instead simply cited *Osborn* for the proposition that "Article III's 'arising under' jurisdiction is broad enough to authorize Congress to confer federal-court jurisdiction over actions involving federally chartered corporations."[140] Of

133. *See* Mesa v. California, 489 U.S. 121 (1989) (discussed *supra* notes 108-12 and accompanying text) (citing *Verlinden*, 461 U.S. at 496).

134. *See* Mullinex, *supra* note 11, at 205.

135. *Id.*

136. Osborn v. Bank of the United States, 22 U.S (9 Wheat.) 738, 817 (1824).

137. 36 U.S.C. § 300105 (2002).

138. *Osborn*, 22 U.S. at 823; *see also supra* notes 51-56 and accompanying text.

139. *See supra* notes 57-59 and accompanying text.

140. Am. Nat'l Red Cross v. S.G. & A.E., 505 U.S. 247, 265 (1992).

course, that explanation amounts simply to a conclusion, not a reason supporting federal jurisdiction over a case involving nondiverse parties and arising exclusively under state law. As demonstrated below, the most sensible reading of both cases is that Article III authorizes Congress to enact pure jurisdictional statutes if doing so furthers legitimate Article I concerns.

At the time of *Osborn*, the Second National Bank was in serious trouble. Its branch offices were excluded by two states and seven others tried to destroy the bank through their tax laws.[141] The Bank's leadership had been criticized both at the state and national levels, its President was ousted for mismanagement, and its treasurer was ousted for embezzlement.[142] The legislature of the State of Ohio officially took the position that the Court's decision in *McCulloch v. Maryland*,[143] that states could not tax the Bank, did not apply to Ohio and should be ignored.[144] In light of these events, Congress had a substantial Article I reason to vest jurisdiction over all cases involving the Bank in the federal courts. Congress's power to create and maintain a National Bank, approved in *McCulloch*, must bring with it the power to provide a fair forum for the Bank's affairs. The jurisdictional provision in *Osborn* did exactly that, and there is no good reason why such a provision cannot be a "law" of the United States under which a case can "arise" for purposes of Article III jurisdiction.[145]

In *Red Cross*, a person who received a transfusion from the Red Cross alleged that he received contaminated blood which gave him AIDS.[146] The Red Cross removed the suit to federal court, and the Supreme Court upheld jurisdiction with a short citation to *Osborn*.[147] Professor Weinberg has suggested a different and better rationale for the *Red Cross* decision.

> [I]n chartering the Red Cross, Congress means to take advantage of a cost-effective way of devolving some of the nation's need to respond to national disasters upon an independent entity with access to private funds. But to protect

141. *See* Rosenberg, *supra* note 34, at 965-66.

142. *Id.* at 966.

143. 17 U.S. (4 Wheat.) 316 (1819).

144. *See* Rosenberg, *supra* note 34, at 966.

145. *See id.* The events surrounding the National Bank at the time of *Osborn* present a particularly compelling case for the assertion of "arising under" jurisdiction under a pure jurisdictional statute. The thesis of this Article, however, does not require such extenuating circumstances. For example, the mere desire to provide uniform procedures for federal entities would support the assertion of federal jurisdiction over federally chartered corporations in most cases.

146. Am. Nat'l Red Cross v. S.G. & A.E., 505 U.S. 247, 249 (1992).

147. *Id.* at 264.

> the public from the entity's mistakes, and, at the same time, to protect the entity from local bias, Congress also sees an interest in giving the Red Cross capacity and furnishing it with the option of a federal forum.
>
> . . . .
>
> These identifiable national interests are what sustain the jurisdiction in *Red Cross*.[148]

Osborn, *Verlinden*, and *Red Cross* can all be justified on the basis that Congress had legitimate Article I concerns for vesting jurisdiction in the federal courts over cases involving the National Bank, the Red Cross, and foreign countries. Article III's "arising under" provision is best understood as allowing Congress to use pure jurisdictional statutes to further these interests. The reasons actually given by the Court in all three cases are not persuasive. Few judges and scholars accept the idea, as stated in *Osborn*, that Congress has authority to provide for federal jurisdiction over any case where there is even a remote possibility of a federal claim.[149] Similarly, the mere possibility that there may be a material issue of sovereign immunity in a case under the Foreign Sovereign Immunities Act, the law at issue in *Verlinden*, should not justify arising under jurisdiction in every case under the Act because sometimes sovereign immunity simply will not be at issue. Additionally, although the Supreme Court was probably correct in *Red Cross* that Congress can use federal jurisdiction to protect federal instrumentalities and federally chartered corporations, it gave no reason for that conclusion.[150] The reason, however, is obvious: Congress may use pure jurisdictional statutes to further legitimate Article I concerns, such as the protection of federal entities. Such statutes constitute "laws of the United States," under which a federal case can arise.

Applying these cases and principles to the Air Safety Act is illuminating. Pursuant to *Osborn*, the Court could hold that there is a remote possibility of a federal claim in every case under the Act and therefore Article III jurisdiction is proper. In every case brought under the Act, the Court will have to determine whether the plaintiff's claim is one that "arises" (as that term is used in the Act)[151] from the airplane crashes of September 11, 2001, and this federal question is sufficient to confer "arising under" jurisdiction over the entire case. This is just another way of saying, however, that the Court has jurisdiction to decide jurisdiction and then resolve all the

148. Weinberg, *supra* note 11, at 801 (italics added).
149. *See* Osborn v. Bank of the United States, 22 U.S. (9 Wheat) 738, 823-24 (1824).
150. *See Red Cross*, 505 U.S. at 247.
151. Air Safety Act, Pub. L. No. 107-42, § 408, 115 Stat. 230 (2001).

substantive claims in the case, even if no federal issue is ever raised. A better and more persuasive rationale is that Congress has legitimate Article I reasons for wanting claims arising out of the attacks of September 11 to be tried in federal court and has passed a law to that effect, and even though the law is purely jurisdictional, it is a "law of the United States," under which a federal claim can arise.

IV. FEDERALISM CONCERNS

Courts and commentators have been reluctant to embrace an interpretation of Article III that allows Congress to use pure jurisdictional statutes to confer "arising under" jurisdiction because they are concerned about federalism values.[152] Absent the unique case of diversity jurisdiction, federal courts do not usually resolve issues arising under state law. For example, when the Supreme Court hears a case with both federal and state law questions, it only reviews the federal issues.[153] There is little debate that "a deeply rooted premise" of our constitutional system is that "the bulk of state business remain[s] with the state courts."[154]

When Congress allows federal courts to interpret and then fashion state law, it arguably interferes with the development of state law by state courts. This in turn affects the ability of state citizens to influence the development of state law by the election or appointment of state judges.[155] Professor Goldberg-Ambrose stated with great clarity the federalism issues present when Congress allows federal courts to interpret state law pursuant to pure jurisdictional statutes:

> Although state legislation may be enacted or amended in order to influence federal courts' interpretations of state laws, federal courts exercising protective jurisdiction may interpret and apply the new legislation in a way contrary to state citizens' wishes. Further, this legislative recourse for state citizens can only affect future federal court decisions; prior federal court judgments will remain and may have far-reaching consequences. Finally, it may be difficult to enact any legislation that will anticipate and accommodate the myriad ways in which federal courts may depart from state court

152. *See, e.g.*, Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 469-84 (1957) (Frankfurter, J., dissenting) (arguing that protective jurisdiction invades state sovereignty); Casto, *supra* note 11, at 523 (stating that "the general theory of protective jurisdiction is inconsistent with the traditional view of Article III as a compromise of state and federal interests."); Cross, *supra* note 11, at 1223-24 ("If Congress passes a jurisdictional statute that exceeds the bounds of Article III, it encroaches on the role reserved by the Constitution for the state courts.").

153. *See* Goldberg-Ambrose, *supra* note 7, at 603.

154. Rosenberg, *supra* note 34, at 955.

155. *See* Goldberg-Ambrose, *supra* note 7, at 604.

> judges in the interpretation of state law. State citizens may have to choose between federal courts' distortions of state law on the one hand and an unsatisfactory alteration of state law on the other. For example, if protective jurisdiction is authorized over litigation involving certain energy-related facilities . . . state citizens may have to alter the zoning laws as applied to all landowners . . . in order to have some impact on the federal courts' decisions of state law.[156]

When federal courts exercise protective jurisdiction, there is also the concern that state citizens will be confused about whom to hold accountable for the development of state law. One of the core ideas of state citizenship is that people have the right to know who is responsible for governmental decisions.[157] Federal interpretations of state law questions might lead to uncertainty over which government is responsible for which policies, which could in turn deter citizen participation in governmental affairs. As Justice Kennedy wrote in a slightly different context,

> [t]he theory that two governments accord more liberty than one requires for its realization two distinct and discernable lines of political accountability: one between the citizens and the Federal Government; the second between the citizens and the States. If . . . the Federal and State Governments are to . . . hold each other in check by competing for the affections of the people . . . those citizens must have some means of knowing which of the two governments to hold accountable for the failure to perform a given function.[158]

These federalism arguments can be grouped into three general categories. First, there is a concern that state law questions should generally be decided by state courts otherwise state law might be distorted in a manner unwanted by state citizens and their leaders.[159] Second, when federal courts interpret state law, they interfere with state politics and the relationship between the people and their elected representatives.[160] Third, when federal judges decide state law questions, the lines of political accountability may get blurred, and the people will not know whom to hold responsible for important political decisions.[161] All of these arguments

156. *Id.*
157. *See id.* at 600.
158. United States v. Lopez, 514 U.S. 549, 576-77 (1995) (Kennedy, J., concurring).
159. *See* Goldberg-Ambrose, *supra* note 7, at 604.
160. *Id.* at 600.
161. *Id.*

recognize that there are important issues of state autonomy that should be left to the political processes of state and local governments.

The problem with applying these federalism arguments to protective jurisdiction, however, is that once Congress makes the determination that a certain issue is one of federal concern, and assuming that Congress has an enumerated power it could call on to govern that issue, protective jurisdiction is the *least* intrusive method of national coercion. For example, when Congress decided that states were paying insufficient attention to the needs of unions and the enforcement of collective bargaining agreements, it had several options. It could have completely preempted state law with federal legislation defining the validity of such agreements; it could have directed federal judges to make common law governing such agreements;[162] or it could have authorized federal judges to apply state law hoping they would interpret state statutes sympathetically to collective bargaining agreements. The first two options deny state legislatures any role to play in the fashioning of the relevant law.[163] The third option allows for an interplay between the federal and state systems whereby federal judges have to look to state sources of authority to fashion the relevant rules.[164] If federal judges reach the wrong result, state legislative action can correct the mistake.[165] It is hard to see why an advocate of state autonomy would prefer the complete exclusion of state authority that comes with options one and two over the cooperative framework implicit in protective jurisdiction.[166] As two noted scholars have observed:

> [I]nstead of achieving uniformity by imposing its own law, may not Congress, hoping for harmony and orchestration through expecting and desiring some continuing diversity, hand the conductor's baton to the federal courts rather than giving them a set of cymbals with which to drown out all other sounds? . . . It would be most regrettable if a federal constitution forbade the general government to exercise its regulatory powers in this forbearing, sanguine, and initially

162. This was the option that Congress actually selected, at least according to a majority of the Supreme Court. *See* Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957).

163. *See* Cross, *supra* note 11, at 1223.

164. *See id.*

165. *See* Goldberg-Ambrose, *supra* note 7, at 608.

166. *See* Cross, *supra* note 11, at 1223 (When Congress legislates on a topic or delegates to the federal courts the power to create common law on the topic, the resulting federal law displaces state law. Protective jurisdiction, although perhaps imparting a federal flavor to state law, at least preserves the underlying force of state law and arguably presents a lesser affront to state legislative authority.); Rosenberg, *supra* note 34, at 937 ("If a grant of protective jurisdiction is constitutional, Congress may afford federal jurisdiction without preempting state rules of decision—a result that tends to minimize congressional intrusions on state interests.").

> perhaps experimental manner which turns to account the genius of a federal system.[167]

The Air Safety Act demonstrates how protective jurisdiction is more responsive to state concerns than other legitimate exercises of congressional power. Under several Article I powers (the Commerce Clause and the War Power), Congress could preempt state tort law and create exclusive federal claims for those injured in the airline crashes of September 11.[168] If Congress did so, the unique aspects of New York, Pennsylvania, and Virginia tort law would be lost under the rubric of a completely federal scheme. Under the law as written, however, the judges of the Southern District of New York will have to apply the law of those jurisdictions, and there is no reason to believe they will not do so in good faith. After all, that is the task federal judges perform routinely in diversity cases. The net result is a system where state concerns as expressed through their substantive law are maintained and the federal goal of uniformity of procedure that Congress obviously desired is furthered with as little disruption of state processes as possible.[169] It may be that the states would prefer to try these claims in their own courts under their own laws, but the Federal Constitution takes that right away from them under the Supremacy Clause and Congress's enumerated powers.[170] That being the case, certainly the states would prefer a system where their own law remains viable over one where their substantive choices become completely irrelevant.

The second federalism objection to protective jurisdiction is that it interferes with the ability of state citizens to influence the development of state law by the election or appointment of state judges.[171] This concern is not related to political accountability but rather to the substantive desire that state citizens and state judges create state law. Again, however, as applied to protective jurisdiction, states are better off with federal judges interpreting state law and giving it force rather than Congress preempting state law entirely and replacing it with federal standards. Although state judges may no longer be able to influence the development of the particular

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167. Alexander Bickel & Harry Wellington, *Legislative Purpose and the Judicial Process: The* Lincoln Mills *Case*, 71 HARV. L. REV. 1, 19-20 (1957), *quoted in* Goldberg-Ambrose, *supra* note 7, at 590.

168. *See* U.S. CONST. art I, § 8, cl.3, 11.

169. Many jurisdictions also have certification procedures whereby federal courts can ask state supreme courts to answer difficult legal questions arising under state law. This beneficial mechanism is unavailable if federal judges have to apply either federal statutory standards or common law.

170. *See* Rosenberg, *supra* note 34, at 937 n.29 ("[I]n most every (if not every) instance in which Congress may confer protective jurisdiction, Congress may also preempt state law altogether.").

171. *See* Goldberg-Ambrose, *supra* note 7, at 604.

body of law under consideration (assuming the federal statute, like the Air Safety Act, is exclusive), at least state legislatures can provide clear direction to federal judges if there is enough political will to do so.

The third federalism objection to protective jurisdiction is that the political accountability of both governments is diminished when federal judges are required to apply state standards to resolve disputes. Although federal judges routinely perform this task when exercising diversity jurisdiction, most people understand the benefits of having arguably neutral judges resolving cases between citizens of different states. When federal judges exercise coercive power over citizens of the same state under state standards, however, there is a possibility that citizens of that state will be unsure whom to hold responsible for that coercion.[172]

This argument, like many of the political accountability arguments advanced by the Rehnquist Court in cases like *New York v. United States*,[173] and *Printz v. United States*,[174] ignores the reality that state officials are quite capable of explaining to their constituencies when federal law requires them to effectuate specific policies. As Justice Stevens has argued, "to the extent that [federally required] action proves politically unpopular, we may be confident that elected officials charged with implementing it will be quite clear to their constituents where the source of the misfortune lies."[175]

In addition, it seems unlikely that state judges will be held accountable for the decisions of federal judges. State judges routinely make decisions under federal law, and few argue that political accountability is threatened by this necessary consequence of the Supremacy Clause.[176] Furthermore, if Congress is prohibited from using protective jurisdiction to further Article I interests, it may instead authorize federal judges to create federal common law which will bind state actors. The development of federal common law would have a more disruptive effect on state political processes and would lead to greater confusion about political accountability than the exercise of protective jurisdiction, where at least the source of the underlying law is identifiable and changeable.

Another federalism argument that judges and scholars advance to limit the doctrine of protective jurisdiction is that if Congress is allowed to authorize federal courts to hear any case involving an activity that Congress could regulate under its enumerated powers, Congress could vest jurisdiction in the federal courts over virtually every contract or tort that

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172. *Id.* at 600-01.

173. 505 U.S. 144, 161 (1992) (holding that Congress may not commandeer state legislatures).

174. 521 U.S. 898, 924 (1997) (holding that Congress may not commandeer state executive officials).

175. *Id.* at 958 (Stevens, J., dissenting).

176. *See* Galligan, *supra* note 11, at 53.

substantially affects interstate commerce and completely emasculate state court jurisdiction.[177] Because of this concern, numerous scholars who are in favor of protective jurisdiction have suggested limiting Congress's authority in various ways. For example, Professor Goldberg-Ambrose suggests a balancing test whereby "state interests in maintaining control over state law should be balanced against federal interests in avoiding unfairness to individuals and in overseeing state laws."[178] And, Professor Mishkin, one of the earliest advocates of protective jurisdiction, would allow a pure jurisdictional statute only if it furthers "an articulated and active federal policy regulating a field."[179] Others have advanced other limitations that would allow Congress to use protective jurisdiction in only specific circumstances such as when it establishes a rule that will also be employed in state courts[180] or only when the jurisdictional statute furthers a "substantial governmental interest" and is "narrowly tailored" to further that interest.[181] All of these tests and limitations are advanced in order to mitigate the allegedly harsh effects on state autonomy that would result if Congress were allowed to enact any jurisdictional statute that furthers an Article I concern.

The advocates of these balancing tests and limitations fail to answer numerous important questions. First, how do courts distinguish "substantial" federal interests from "non-substantial" ones or decide which jurisdictional statutes take too much "control over state law" away from the states and which leave enough control to satisfy the federal standard.[182] Although these kinds of criticisms can be leveled at most balancing tests, the concern that Congress may require every lawsuit involving an interstate contract or tort to be filed in federal court does not seem like the kind of risk that should prompt such intrusive judicial interference into Congress's power to vest jurisdiction in the federal courts to further legitimate Article I concerns.

Second, the proponents of these balancing tests in the name of federalism also fail to acknowledge that there is at present the risk that Congress will federalize the law of interstate torts or contracts, or allow federal courts to create federal common law for all interstate torts or contracts. This concern, however, does not lead to the imposition of

177. *See* Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 474 (1957) (Frankfurter, J., dissenting) ("For example, every contract or tort arising out of a contract affecting commerce might be a potential cause of action in the federal courts, even though only state law was involved in the decision of the case."); *see also* Rosenberg, *supra* note 34, at 955 n.111.

178. Goldberg-Ambrose, *supra* note 7, at 615-16.

179. Mishkin, *supra* note 11, at 192.

180. *See* Sandra Slack Glover, Comment, *Article III and the Westfall Act: Identifying Federal Ingredients*, 64 U. CHI. L. REV. 925, 951 (1977).

181. *See* Rosenberg, *supra* note 34, at 1024.

182. *See* Galligan, *supra* note 11, at 54.

balancing tests when Congress regulates commerce among the states.[183] Perhaps, the Court should interpret the Commerce Clause more narrowly, but doing so would concurrently limit Congressional power to further the Commerce Clause through pure jurisdictional statutes. In other words, to the extent there is a strong federalism interest at stake here, it is in the interpretation of the specific enumerated power Congress is relying on to support a pure jurisdictional statute. If that power is properly implemented, then the use of protective jurisdiction as a means of furthering that power is less intrusive than other means Congress has at its disposal to enforce national policy on the states.

One scholar has suggested that protective jurisdiction, which he finds constitutionally problematic, is unnecessary because Congress has other means at its disposal, that is, creating federal common law, to achieve the same results.[184] The problem with this argument is that Congress may not want to impose national substantive standards on the entire nation. Uniform federal standards might not be as sensitive to unique local complexities as the laws of the various states.[185] In addition, creating new duties and obligations in a well established area of the law might be expensive and not provide adequate warnings to potential defendants of the appropriateness of their conduct.[186] And, if a particular area of the law is controversial, Congress might not want federal judges to step into the substantive fray and articulate new national goals and priorities.[187] Despite these reservations, however, Congress still might have substantial reasons for vesting jurisdiction in the federal courts over a particular category of cases. For example, Congress might have wanted the cases arising out of the September 11 attacks to be tried in one particular federal court for security reasons or to have the airlines and their insurers litigate the claims in one place for national economic reasons. Another possible rationale for the law is that Congress wanted federal judges to oversee the flow of information, some of which might involve foreign policy concerns. Congress should be allowed to further these legitimate Article I interests without, at the same time, having to displace the substantive tort standards of New York, Pennsylvania, and Virginia. Certainly, federalism is furthered in this instance by the use of protective jurisdiction rather than federal common law.

A final argument against the constitutionality of pure jurisdictional statutes is that Congress may be able to pass such laws without serious political risk, but Congress would have a harder time actually preempting

183. *See id.*

184. *See* Cross, *supra* note 11, at 1221 ("The well-developed theory of federal common law can address all the concerns expressed by the proponents of protective jurisdiction.").

185. *See* Goldberg-Ambrose, *supra* note 7, at 576.

186. *See id.* at 577.

187. *See id.* at 578.

large areas of state substantive law, and therefore Congress could effectuate a wholesale transfer of jurisdiction from state courts to federal courts without significant disadvantage if pure jurisdictional statutes satisfy Article III.[188] There are three responses to this concern. First, the assumption that Congress could effectuate such a transfer without political argument from the states is questionable. Certainly, it is hard to imagine a law such as the Uniform Interstate Tort and Contract Jurisdictional Act sailing through the Congress without significant opposition from those in favor of state autonomy. Second, Congress has never passed such a law, and the Supreme Court has said that the potential for abuse of a power is not an argument against the exercise of that power.[189] Finally, there appears to be no coherent middle ground when it comes to the validity of pure jurisdictional statutes that are rationally related to Congress's enumerated powers. They are either constitutional or not. Most would agree, however, that there are times when important Article I concerns justify such statutes (such as with the Air Safety Act). As a predictive matter it is almost impossible to imagine the Court striking down the law. As between giving this power to Congress in all circumstances or in no circumstances, the latter seems preferable in light of the fact that the perfectly constitutional alternatives to pure jurisdictional statutes completely take away state substantive choices and transfer them to either the Congress or the federal courts.

There is one, and only one, appropriate limitation on Congress's discretion to use pure jurisdictional statutes under Article III: the law must further a legitimate Article I interest or other enumerated power. The history and text of Article III demonstrate that the use of federal jurisdiction was always intended to be instrumental. Whether federal courts were to referee disputes between citizens of different states, promote the uniformity and supremacy of federal law, or govern controversies involving foreign ambassadors, jurisdiction was a means to an end, not an end in and of itself.

If Congress believes that one of its enumerated powers will be advanced by federal jurisdiction, it may place cases involving that power in federal court. Like all exercises of congressional power, that decision is subject to review. There is no reason, however, to subject that congressional decision to anything more than a deferential rational basis test. The only real interest we, as a people, have in limiting Congress's use of protective jurisdiction is to make sure that Congress is not allowed to take a truly state law case, one that Congress could not affect under its enumerated powers, and transfer it to federal court. That interest can be fully protected by making

188. I thank my colleague Kelly Timmons for raising this concern.

189. *See* Champion v. Ames, 188 U.S. 321, 363 (1903) ("The possible abuse of a power is not an argument against its existence.").

sure that pure jurisdictional statutes are rationally related to legitimate Article I concerns.

V. CONCLUSION

In enacting the Air Safety Act, Congress had a legitimate Article I interest in creating exclusive federal jurisdiction. Had it wanted to do so, Congress could have preempted state tort law and either created federal standards of liability or directed the federal courts to create federal common law. Instead, Congress chose to maintain the authority of state law over these tragic events while at the same time using federal judges to achieve efficiency, uniformity, and fairness. The statute creating federal jurisdiction is a "law" of the United States under which an Article III claim can "arise." There is no legitimate textual, historical, or federalism argument why this grant of jurisdiction should be invalidated by the Supreme Court.

These principles transcend the specific example of the Air Safety Act. A pure jurisdictional statute that furthers a legitimate Article I concern is properly a "law" under which a claim may arise. Any federalism objections to this rule should be directed at Congress's Article I powers not its authority to grant jurisdiction under Article III.