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# The Power of Congress over Courts in Nonfederal Cases

*Louise Weinberg\**

## I. INTRODUCTION

We really have no clear idea about what the power of Congress is over the jurisdiction of courts. This obscurity may even lend the subject an uncanny interest, like the London fog in one of Conan Doyle's Sherlock Holmes stories. But as long as good theory eludes us we will be stumbling along like so many Dr. Watsons, without a clue.

My starting point here (but only a starting point) is the hitherto little-discussed question of national power to confer jurisdiction upon the state courts over cases that *do not* arise under federal law. This odd question is now raised by a proposal by the American Law Institute for federally-conferred state-court jurisdiction over mass torts.<sup>1</sup> In this article I will have little to say about the Proposal specifically.<sup>2</sup> The Proposal furnishes pretty barren ground for thinking about the question with which I began. For one thing, it would devolve this controversial jurisdiction upon state courts only with their consent.<sup>3</sup> Even supposing that a state would consent, if nicely

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1. COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS WITH REPORTERS STUDY: A MODEL SYSTEM FOR STATE-TO-STATE TRANSFER AND CONSOLIDATION ("ALI Proposal" or "Proposal"), §§ 4.01, 5.01 (1994) [hereinafter COMPLEX LITIGATION PROPOSAL]. The Institute proposes, among other things, that Congress authorize the discretionary removal of both federal and state mass-tort cases, without regard to the citizenship of the parties; and transfer of such cases, not only to a single federal court, but alternatively to a consenting state court, which would have the needed federal procedural and remedial powers to deal with the consolidated cases. *Id.*

2. The most comprehensive consideration of the Proposal's possible constitutional and other infirmities is Joan Steinman, *Reverse Removal*, 78 *IOWA L. REV.* 1029 (1993).

3. COMPLEX LITIGATION PROPOSAL, *supra* note 1, §§ 4.01(a)(3), 5.01(d).

asked, to such crowding, trouble, and expense, the provision for consent can only clutter the argument I want to make.

So I will be tackling broader questions. I will begin with the general subject of national power over state-court jurisdiction in nonfederal cases, a power the exercise of which the ALI Proposal presents only one model. I will move on to examine the underlying problem in its more familiar context, in which Congress confers jurisdiction upon *federal* courts over state-law cases; here, my effort will be to show not merely that theory developed for the former context can be generalized to extend to the latter, but that the theory is simply part of a more general theory of the power of Congress which has long been substantially, if implicitly, understood.

It probably has been one of our mistakes that we tend to separate the two sets of courts in our minds. As a subject of separate study each set of courts, state or federal, must inevitably be a somewhat artificial construct. After all, the two sets of courts comprise one legal system. Of course there are pockets of exclusive jurisdiction in each judicial system. We know Article III imposes limits on the Article I powers of Congress in dealing with federal, but not with state courts. Then, too, there are the prudential policies that encourage federal courts to turn certain cases away. Those things said, surely the preferred position should be one of general jurisdictional congruence. When litigants are sent shuffling from one set of courts to the other to forage for a piece of missing jurisdiction we are not deluded into thinking it an example of efficiency or even fairness in the administration of civil justice.<sup>4</sup> Whatever we know about federal supremacy on

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4. The Supreme Court contemplates bifurcated litigation in such recent interesting cases as *California v. ARC America Corp.*, 490 U.S. 93 (1989) (holding unrealistically that claims of indirect purchasers, lacking "antitrust standing" under federal case law, do not conflict with federal policy favoring the claims of direct purchasers and therefore may be pursued on state-law theories, even if the consequences include bifurcated litigation); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984) (holding that federal courts sitting in equity in civil-rights cases have no pendent jurisdiction over state-law claims, notwithstanding that this would lead to bifurcated litigation). For comment on this aspect of *Pennhurst*, see David Shapiro, *Wrong Turns: The Eleventh Amendment and the Pennhurst Case*, 98 HARV. L. REV. 61 (1984); see also Louise Weinberg, *The New Judicial Federalism: Where We Are Now*, 19 GA. L. REV. 1075 (1985). For comment on this aspect of *ARC America*, see Louise Weinberg, *The Federal-State Conflict of Laws: "Actual" Conflicts*, 70 TEX. L. REV. 1743, 1760-72 (1992). For an effort to patch up the wreckage in the wake of *ARC America*, see Barry Hawk et al., *Report of the ABA Section on Antitrust Law Task Force to Review the Supreme*

the one hand and *Erie* on the other also suggests that focusing narrowly on either set of courts may give us skew theory.

We have made other problems for ourselves. The Supreme Court has given us a body of jurisprudence that makes the subject of national power over the state courts an obligatory part of any serious course on federal courts; but our thinking has never extended much beyond *federal-law* cases. We see the supremacy of federal law as the driving force, and the correlative duty of state courts to apply federal law as the feature that makes the subject eye-opening.<sup>5</sup> Yet we still do not have a reasonably clear idea of the power of the nation even in this traditional context. We are unclear about where the duty of the state courts under the Supremacy Clause begins and ends,<sup>6</sup> and about where to locate constitutional controls on state procedures and remedies in these federal-law cases.<sup>7</sup>

As for *state-law* cases, it has been the convention to emphasize the power of Congress to confer<sup>8</sup> jurisdiction over

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*Court's Decision in California v. ARC America Corp.*, 59 ANTITRUST L.J. 273 (1990) (criticizing the case and suggesting legislative override; recommending in the alternative, among other things, that a state be recognized as a "citizen" for diversity purposes in *parens patriae* indirect-purchaser actions; and remarking that Congress could confer federal jurisdiction "by invoking the concept of protective jurisdiction. Under this theory, Congress can confer federal jurisdiction over purely state-law claims simply by enacting a jurisdictional statute.").

5. If you were wondering how it happens that state courts enforce the federal civil rights statutes, you might consult the classic, if mundane, case of *Testa v. Katt*, 330 U.S. 386 (1947) (holding under the Supremacy Clause that state courts are not free to decline jurisdiction over a federal claim arbitrarily); see also *Howlett v. Rose*, 496 U.S. 356 (1990) (same; states adjudicating federal civil-rights cases against local authorities may not dismiss even when the defendants have sovereign immunity under state law); and see *F.E.R.C. v. Mississippi*, 456 U.S. 742, 760 (1982) (holding that Congress has Commerce power to require state administrative tribunals to adjudicate disputes arising under federal standards).

6. For critiques of the jurisprudence of supremacy, see *infra* notes 100-02, 189.

7. For the debate on whether the Fourteenth or Fifth Amendment controls the validity of service of process in state courts adjudicating federal questions, see *infra* note 116 and accompanying text.

8. I pass over the enduring debate on the power of Congress to limit the jurisdiction of federal courts, see, e.g., Gordon G. Young, *A Critical Reassessment of the Case Law Bearing on Congress's Power to Restrict the Jurisdiction of the Lower Federal Courts*, 54 MD. L. REV. 132 (1995); Barry Friedman, *Federal Jurisdiction and Legal Scholarship: A (Dialogic) Reply*, 85 NW. U. L. REV. 478 (1991); Michael Wells, *Congress's Paramount Role in Setting the Scope of Federal Jurisdiction*, 85 NW. U. L. REV. 465 (1991). The position is reasonably clear, see Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895 (1984) (arguing that the power of Congress is virtually plenary).

state-law cases on *federal* rather than state courts. Article III limits the power of Congress over federal, not state courts; and it is hard to see a problem of comparable interest in the state courts. But in my view this traditional emphasis upon Article III has obscured theoretical understanding.

Why, then, do I take the bait on this occasion and begin by isolating and focusing on one set of courts only, the state courts? The real object of this paper is to shed light on the classic Article III problem of federal courts by generalizing it in advance. By deleting Article III from the picture we can consider national jurisdictional policies that may exist without Article III. It is then a further question whether Article III reflects or is surrogate for these more general concerns or represents some additional limit on the power of Congress.

My argument, spelled out in the remainder of this article, can be summarized here. I begin the excursion in terra incognita: the little-explored power of Congress over the jurisdiction of state courts in matters likely to arise under nonfederal law: state law, or perhaps foreign law. It turns out that, surprisingly, there are many ways in which Congress<sup>9</sup> or the Supreme Court<sup>10</sup> or both can and do act with impact upon the jurisdiction of the states over even nonfederal business. Sometimes this impact seems incidental, sometimes integral to the national purpose. But when the nation acts in ways having impact upon state courts in matters of apparently little national concern, whether by inadvertency or by design, the national intervention in state jurisdiction will have legitimacy

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The important insight has always been that due process ultimately requires state if not federal jurisdiction. Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953). But today the Supreme Court not infrequently struggles at the brink of total ouster of jurisdiction in all courts. See generally LOUISE WEINBERG, 1996 SUPPLEMENT 78-94 (1995) to FEDERAL COURTS: CASES AND COMMENTS ON JUDICIAL FEDERALISM AND JUDICIAL POWER (1994).

9. When I say "the power of Congress," I should be read—unless the context precludes it—as referring to the power of the nation, including the Supreme Court. The Supreme Court cannot enact a positive grant of jurisdiction, but as a practical matter its rulings can so affect the jurisdiction of either set of courts that the question of its power is bound up with the question of national power generally.

10. When I say "the Supreme Court," I mean to be understood as saying "courts." I would prefer to use "courts" because it more accurately captures the way issues of law, even issues of allocations of power between the nation and the states, must be decided in courts of first instance, even in state courts. But here I use "the Supreme Court" when I need to convey that the courts are exercising national power.

only to the extent that there is some identifiable national interest or interests that support that result.

In other words, the ultimate source of national power over nonfederal law in the state courts, as over everything else, must be an identifiable national interest. Further, the scope of national power over nonfederal adjudication in state courts is presumptively co-extensive with the national interest so identified.<sup>11</sup> The weaker the interest the weaker the interference. In the strong instance in which Congress expressly confers new jurisdiction upon state courts over nonfederal questions, the inchoate national interest in and power over federalizable but unfederalized law generally, but not always, authorizes the assertion of national power to confer such jurisdiction.

I argue, further, that within these limits the nation can and already does bestow not only jurisdiction on the state courts, but also procedural and remedial powers; these latter phenomena have interesting implications for our understandings of the nature of due process review of state procedures.

Further, the state courts, in turn, come under a proportionate duty to effectuate the national jurisdictional interest. The source of that duty is the Supremacy Clause, even when the jurisdiction that the nation has devolved upon the states is jurisdiction over state-law issues—contrary to what might have been supposed.

Further, because national power ends where the national interest ends, the nation must have a rational basis for—a legitimate governmental interest in—a federal law or decision that constrains or enlarges state jurisdiction over nonfederal issues. This requirement of a rational basis is an absolute,

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11. This assertion is particularly controversial. That national power might be coextensive with the national interest is not self-evident. For a fine student exposition of the problem, see Alan R. Greenspan, Note, *The Constitutional Exercise of the Federal Police Power: A Functional Approach To Federalism*, 41 VAND. L. REV. 1019, 1020 (1988) (arguing that deference to rational exercises of Congress's Commerce power has given to the central government general police powers properly reserved to the states). If only to protect the existence of reasonably autonomous states, we are schooled to think of national power, rather, as under special constraints—as opposed to state power, which (except for powers delegated to the nation) we are schooled to think of as plenary. When I use the limiting word "presumptively" in the text I do not refer to these supposed special constraints on federal power, but rather to general constitutional principles constraining exercises of state as well as federal power.

however liberal, limit upon national power. It is a constraint of substantive due process under the Fifth Amendment, in the sense in which the Due Process Clauses protect against arbitrary or irrational governmental action.<sup>12</sup>

Finally, although there are always extrinsic constitutional constraints on any exercise of national power—constraints deriving from the equal protection principle, the First Amendment, and other fundamental safeguards against power—the constraint of substantive due process, contrary to what might have been supposed, is intrinsic to the existence of national power. In addition, this constraint of substantive due process under the Fifth Amendment provides the only significant intrinsic limit on national power to affect state jurisdiction over nonfederal business. In this context the Tenth

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12. This traditional form of substantive due process should be distinguished from the *Lochner*-era incorporation into the Due Process Clause of "liberty of contract," see HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* (1993) (exploring the possible unity of the two concepts). The general legitimacy of rational exercises of governmental power was perceived and defended in the *Lochner* era from *Lochner*-style assault. See, e.g., *Lochner v. New York*, 198 U.S. 45, 65 (1905) (Harlan, J., dissenting) (supporting as reasonable an economic regulation supposedly affecting liberty of contract); cf. *New York Life Ins. Co. v. Dodge*, 246 U.S. 357, 377-78, 382-83 (1918) (Brandeis, J., dissenting) ("Is the subject-matter within the reasonable scope of regulation? Is the end legitimate? . . . If so, the act must be sustained . . .").

Rather, this form of substantive due process is the standard "rational-basis" scrutiny both the Constitution and the common law give, at a minimum, to law under challenge. It is an easy test, but law that is arbitrary or irrational should flunk it. The classic references are *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), and Justice Douglas's opinion in *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955). For other contexts, see *infra* notes 120, 137-45 and accompanying text. For recent writing, see R. Randall Kelso, *Considerations of Legislative Fit Under Equal Protection, Substantive Due Process, and Free Speech Doctrine: Separating Questions of Advancement, Relationship and Burden*, 28 U. RICH. L. REV. 1279 (1994); Charles B. Blackmar, *Neutral Principles and Substantive Due Process*, 35 ST. LOUIS U. L.J. 511 (1991); Robert E. Riggs, *Substantive Due Process in 1791*, 1990 WIS. L. REV. 941 (1990).

The other side of this coin, of course, is that jurisdiction devolved arbitrarily or capriciously, like all other irrational exercises of governmental power, is illegitimate and will be struck down. Cf. the analogy of the Administrative Procedure Act, 5 U.S.C. §§ 702, 706(2)(A) (providing federal judicial review for arbitrary and capricious federal agency action).

(References to *Williamson v. Lee Optical Co.*, are sometimes accompanied by references to *Roschen v. Ward*, 279 U.S. 337 (1929) (Holmes, J.). This relentlessly ophthalmological string of citations probably comes down to us from an overly specific bit of long-ago research. There is no necessary connection between eyeglasses and rational-basis scrutiny.)

Amendment, Article III, and the Due Process Clause of the Fourteenth Amendment are all substantially irrelevant.

Once we can begin to see general theory emerging from this particular context, unobscured by the special problems presented by Article III, we can then turn to the more familiar problem of the Article I power of Congress as it may conflict with Article III. I argue that the analysis offered in this paper provides more convincing theory than we now have on the classic problem of the power of Congress to vest federal jurisdiction over state-law claims without regard to the citizenship of the parties. Just as Congress may devolve upon the state courts jurisdiction over nonfederal business in the presence of a national jurisdictional interest, so may Congress confer such jurisdiction upon the federal courts.

The analysis offered here implies that substantive due process must be satisfied before any independent Article III question can be reached. Further, it is possible that Article III itself may be satisfied by a substantive due process inquiry. In other words, perhaps even for Article III purposes, nondiverse federal cases can "arise under" purely jurisdictional statutes, contrary to what has been supposed. This latter argument is not essential to my thesis; Article III can be regarded as an independent textual constraint on the power of Congress without fatally compromising my more fundamental argument; but in my own view Article III is a surrogate for rational-basis scrutiny.

In Part II,<sup>13</sup> I present a taxonomy of examples of federal intervention into the jurisdiction of state courts over nonfederal business, discussing national power over exclusive and concurrent state jurisdiction, national ouster of state jurisdiction, and national regulation of state jurisdiction, all in state-law cases.

In Part III,<sup>14</sup> I explain the counter-intuitive phenomenon of federal *supremacy* in the *nonfederal* cases described in Part II. With the material in these two Parts before us, we will have examples of jurisdiction conferred by the nation, the propriety of which we can consider free from the difficulties Article III usually introduces into such an inquiry.

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13. *Infra* notes 20-89 and accompanying text.

14. *Infra* notes 90-128 and accompanying text.



In Part IV,<sup>15</sup> I consider the sorts of national interests that might justify intervention in the jurisdiction of state courts.

In Part V,<sup>16</sup> I consider whether there might be sources of national jurisdictional power that are independent from or cumulative to national substantive interests, sources thought to be found in constitutional text, and reject these alternatives.

In Part VI,<sup>17</sup> I show how reasoning from the national interest illuminates analogous recent Supreme Court cases dealing with the jurisdiction of *federal* courts, cases in which federal jurisdiction and state jurisdiction are at least nominally concurrent. It becomes at least plausible that Article III furnishes not some independent, further test of federal jurisdiction over nonfederal questions, but rather is more intelligibly read as reflecting the scope of and limits on the national interest.

In Part VII,<sup>18</sup> I consider some of the objections that might be raised to the general theory offered in this paper, including the objection that the theory yields the apparent paradox of federal-question jurisdiction over the diversity jurisdiction.

In my final remarks<sup>19</sup> I conclude that the substantive due-process limit on national power over the jurisdiction of the state courts in state-law matters, which I have described as a theory of the national interest, is a general theory that explains national power over nonfederal business in federal courts as well, and extends in a way that has been long understood, if only implicitly, to other exercises of national power.

## II. A TAXONOMY

Let us begin with the power of Congress, if any, to confer jurisdiction upon the states in *state* cases.

We are inquiring into intervention by the nation in the litigation of nonfederal matters in state courts. This is an inquiry that seems not only unpromising, but unreal. We would not expect to find much case law, and there is very little literature.<sup>20</sup> One is reminded of Dr. Johnson's boast that he

15. *Infra* notes 129-56 and accompanying text.

16. *Infra* notes 157-90 and accompanying text.

17. *Infra* notes 191-236 and accompanying text.

18. *Infra* notes 237-81 and accompanying text.

19. *Infra* notes 282-84 and accompanying text.

20. But see the nice discussion of federally-conferred state diversity jurisdiction over mass torts in George T. Conway III, Note, *The Consolidation of Multistate Litigation in State Courts*, 96 YALE L.J. 1099 (1987).

could repeat by heart, in English, a whole chapter of a Danish book on *The Natural History of Iceland*: "CHAP. 72, *Concerning snakes*. There are no snakes to be met with throughout the whole island."<sup>21</sup>

It might be amusing, then, to see the ways in which such national interventions in state jurisdiction can occur. If we could find cases raising the question, it would be of at least theoretical importance to have some answers. If there is national power to devolve jurisdiction upon the states over business unlikely to be federal business, we would like to know the *source* of that power. We would like to know whether such jurisdiction would be compulsory or merely permissive. If this jurisdiction is compulsory upon the states, we would like to know what limits might constrain the national power to confer it. We would like to know if it matters whether or not this devolved jurisdiction over state business is new to the states or was previously exercised by them and would be exercised by them in any event. We would like to know the implications of this state jurisdiction for our understanding of national power over federal jurisdiction.

It turns out that national power can be and has been exercised so as to affect state judicial powers over state law. Many of the following examples will have some analog among the more familiar assertions of national power over *federal* law in state courts. For this and other reasons, even though both cases and commentary have for the most part been confined to this latter question, neither the jurisprudence nor the literature is without relevance to the discussion.

#### A. *National Power over Exclusive State Jurisdiction in State-Law Cases*

Before I try to describe the ways in which the nation can create a head of exclusive state jurisdiction over state law, let me begin with a caveat. Exclusive jurisdiction is almost always somewhat fictional. Even though Congress may explicitly place claims arising under some statute within the exclusive jurisdiction of federal courts, the reality is that sooner or later a claim falling within exclusive federal jurisdiction will be adjudicated

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21. I am indebted to David Gunn, Head of Reference at the Tarlton Law Library, for finding a reference for the story in *THE OXFORD DICTIONARY OF QUOTATIONS* 279 (3d ed. 1979). This source dates Dr. Johnson's joke at April 13, 1778.

in a state court anyway. Sooner or later some state court will adjudicate even an exclusively federal question, whether by way of counterclaim, or defense, or trial of a sub-issue, or other exigency of litigation. True exceptions to concurrent jurisdiction over federal questions are surprisingly rare, and generally entail exceptions to federal as well as state jurisdiction, as we shall see.

Exclusive state jurisdiction over state-law claims also turns out to mean very little as a practical matter. Sooner or later some federal court will adjudicate such a claim, whether within its ancillary jurisdiction, or by way of counterclaim, or defense, or trial of a sub-issue, or other exigency of litigation. In either set of courts, state law can even furnish a defense to a federal claim, at least when the defense is not on the merits. Federal claims can be dismissed in either set of courts because, for example, a state statute of limitations has run, or for forum non conveniens, or because a state judgment is preclusive. True exceptions to concurrent jurisdiction over state-law questions are rare. But because state courts are under few Supremacy-Clause obligations in administering state law, such exceptions do not tend to strip both sets of courts of power, as do true exceptions to concurrent jurisdiction over federal-law questions. What usually distinguishes the truly exclusive state-law question, as we shall see, is that federal courts have perceived, or that the Supreme Court has announced, a federal policy, as a matter of federal common law, of *avoiding federal* adjudication of that state-law question however it arises.

We do find occasional instances of explicit conferral upon state courts by Congress of exclusive jurisdiction of a class of claims arising under state law. One thinks, for example, of the McCarran-Ferguson Act,<sup>22</sup> providing that state courts have exclusive jurisdiction, with governance by state law, over matters relating to the business of insurance. Nothing in the pervasive ERISA<sup>23</sup> is intended to change this underlying position; ERISA explicitly "saves" state-law governance of the business of insurance.<sup>24</sup> We also have the example of the Jackson-Vanik Amendments,<sup>25</sup> which provide federal benefits in the

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22. 15 U.S.C. §§ 1011-1015, 1012(a).

23. Employees' Retirement Income and Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001-1461.

24. *Id.* § 1144(a), (b)(2)(A).

25. Trade Act of 1974 (Jackson-Vanik Amendments), 19 U.S.C. § 2192 *passim*.

form of "trade readjustment allowances" to displaced workers. Congress places administration of the program in the agencies of consenting states. What is interesting for our purposes is that Congress also provides that state courts have the sole power of judicial review of these trade readjustment allowances.<sup>26</sup> But such examples are rare; and we are not always certain whether state law in such instances is intended to operate of its own force or is incorporated as federal law—bumping the example out of our category. Finally, in some of these instances of conferred exclusive state jurisdiction, one cannot discount the possibility of federal judicial review under the Constitution or related federal statutory law, even when the litigation may have the effect of reopening the question supposedly confided to the "exclusive" jurisdiction of the state court.<sup>27</sup>

More familiarly, Congress and the Supreme Court implicitly recognize, even if Congress does not explicitly "confer," exclusive state jurisdiction over a variety of claims that seem much more convincingly to be true state-law claims. This happens, for example, when the Constitution does not explicitly permit federal judicial power to extend to a class of preexisting state-law cases.<sup>28</sup> Thus, the nation in effect isolates a sphere of ex-

26. Section 2311(d) of the Trade Act provides:

A determination by a cooperating State agency with respect to entitlement to program benefits . . . is subject to review in the same manner and to the same extent as determinations under the applicable State law [regarding unemployment compensation benefits] and only in that manner and to that extent.

19 U.S.C. § 2311(d). The Senate Report accompanying the bill explains that this provision was intended to confide exclusive jurisdiction to the state agencies and courts, under state law, over allowances to workers of trade readjustment benefits. S. REP. NO. 1298, 93rd Cong., 2d Sess., at 139 (1974) ("The bill would have the effect of channeling all questions arising from determinations by State agencies through the normal State review procedure."). Note that this "grant" of exclusive jurisdiction is only to consenting states.

27. See, e.g., *International Union, United Auto. Workers of Am. v. Brock*, 477 U.S. 274, 283 (1986) (holding that although review of federal trade readjustment allowances to displaced workers under the Trade Act of 1974 is committed by Congress to the exclusive jurisdiction of the state courts, the state agency's process is judicially reviewable by the Supreme Court).

28. U.S. CONST. art. III, § 2, provides:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens

clusive jurisdiction for the states in cases arising exclusively under law that is not federal, when the parties are not within Article III's enumeration of judicial powers extending to those parties. In this way the states can be said to have "exclusive" jurisdiction over nondiversity, nonfederal claims simply because the Constitution does not explicitly authorize anything else. But digging beneath the constitutional text, we can say on a deeper level that both the constitutional and statutory grants of federal diversity jurisdiction reflect the narrowness of, and help us to understand the nature of, the national interest in *federal* jurisdiction over some of the cases that arise exclusively under law that is *not federal*.

Similarly, when Congress requires that a minimum amount of money be in controversy before a diversity case may be heard in federal court—as it has since the First Judiciary Act<sup>29</sup>—Congress in effect creates an "exclusive" sphere of state governance over questions that today arise exclusively under law that is not federal, even when the parties *are* of diverse citizenship.<sup>30</sup>

There is a class of cases in which Congress or the Supreme Court seems implicitly to expand the area of "exclusive" state power over state-law issues by interpreting the constitutional grant of diversity jurisdiction strictly. For example, neither

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of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

29. Judiciary Act of 1789, 1 Stat. 73, § 11. The purpose of the original jurisdictional "amount-in-controversy" requirement in diversity cases seems to have been the political one of accommodating the general interest in limiting the federal judicial role in creditors' suits, and the specific concern of agrarian debtors that they might be called upon to answer for small debts in remote federal courts. This debtor interest was in opposition to the view of the Federalists that federal courts were needed, precisely, to compel payment of debts, including small private debts. Small private debts were the major part of some British creditors' assets. Just as the Federalists tended to believe that the importance to the nation's credit of repayment of the public debt outweighed the hardships of a proportional tax upon the states, so also did they tend to believe that the importance to the nation's commerce of repayment of private debts, and particularly those private debts held by foreign creditors, outweighed the hardships imposed upon debtors in difficult times. See E. JAMES FERGUSON, *THE POWER OF THE PURSE* 306-25 (1961); Wythe Holt, *"To Establish Justice": Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 DUKE L.J. 1421, 1518 (1989).

30. Cf. *Sheldon v. Sill*, 49 U.S. (8 How.) 441 (1850) (sustaining the power of Congress to vest only that part of Article III diversity jurisdiction that could not be created by an assignment of rights).

Congress nor the Court has recognized diversity jurisdiction created by assignment of a claim.<sup>31</sup> Moreover, the Court held in *Strawbridge v. Curtiss* that diversity must be "complete;" that statutory jurisdiction does not attach to a case in which one of the parties is not in diversity of citizenship vis-à-vis all adverse parties.<sup>32</sup> And in the 1973 *Zahn* case,<sup>33</sup> the Court held that each claimant in a federal class action in diversity must independently satisfy the jurisdictional amount. On the other hand, in *Supreme Tribe of Ben-Hur v. Cauble*,<sup>34</sup> the Court held that in a federal class action only the named parties need be of diverse citizenship, in effect extending ancillary diversity jurisdiction over nondiverse absentee class members, and thus in theory reducing the scope of "exclusive" state jurisdiction over diversity claims.

In another class of cases, federal courts will decline to exercise jurisdiction over some state-law diversity claims, as a prudential matter of federal common law. Those of us familiar with federal courts issues are aware of the controversial cases in which federal courts are authorized to "abstain" from exercising their jurisdiction over federal questions.<sup>35</sup> But we do

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31. *Id.* at 444-49; Judiciary Act of 1789 § 11; 28 U.S.C. § 1359 (1988). Section 1359 provides that a district court shall not have jurisdiction of a civil action in which any party "by assignment or otherwise has been improperly . . . joined to invoke the jurisdiction . . . ." *Id.*

32. 7 U.S. (3 Cranch) 267 (1806). *But see* *State Farm Fire & Casualty Co. v. Tashire*, 386 U.S. 523, 530-31 (1967) (sustaining the constitutionality of federal interpleader in the absence of complete diversity).

33. *Zahn v. International Paper Co.*, 414 U.S. 291 (1973). The Supplemental Jurisdiction Act of 1990, 28 U.S.C. § 1367(b) (Supp. 1993), probably should be read as overriding *Zahn*. *Cf.* *Free v. Abbott Labs.*, 51 F.3d 524 (5th Cir. 1995) (holding that the statute overrides *Zahn*, but noting that opinion is divided among the district courts and among writers).

34. 255 U.S. 356 (1921).

35. *E.g.*, *Younger v. Harris*, 401 U.S. 37 (1971) (holding that federal courts should dismiss actions seeking injunctions against pending state criminal proceedings); *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943) (holding that federal courts should abstain in cases in which exercise of their concurrent jurisdiction might interfere with a complex state regulatory scheme); *Railroad Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496 (1941) (holding that federal courts should abstain from reaching major constitutional questions in cases in which a reinterpretation of state law might forestall invocation of federal equity powers). For an early discussion of *Younger*, see Louise Weinberg, *The New Judicial Federalism*, 29 STAN. L. REV. 1191 (1977). For a comprehensive current survey of the debates over the legitimacy of federal abstention, see James C. Rehnquist, *Taking Comity Seriously: How to Neutralize the Abstention Doctrine*, 46 STAN. L. REV. 1049 (1994). For an informative entry into one of the major elements of the debate, see Erwin Chemerinsky, Book Review, *The Seduction of Deduction: The Allure of and Problems with a Deductive Approach to Federal Court Jurisdiction*, 86 NW. U. L. REV. 96 (1991) (re-

not always focus the same intense attention upon cases in which federal courts are authorized to "abstain" from exercising their jurisdiction over state questions. Federal courts, for example, avoid adjudicating family-law matters, notwithstanding diversity of citizenship between the parties, particularly in equity cases that might oblige them to supervise domestic relations or to gain expertise in local family service agencies.<sup>36</sup> Similarly, a federal court may decline to hear a transnational diversity case on the ground of *forum non conveniens*,<sup>37</sup> even when the court sits in a state which would adjudicate those cases.<sup>38</sup> Arguably within this category is the recent ruling that federal courts have discretion to abstain from exercising diversity jurisdiction in declaratory actions, if they deem abstention to be in the interest of "considerations of practicality and wise judicial administration."<sup>39</sup>

In *Pennhurst State School & Hospital v. Halderman*,<sup>40</sup> an

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viewing MARTIN H. REDISH, *THE FEDERAL COURTS IN THE POLITICAL ORDER: JUDICIAL JURISDICTION AND AMERICAN POLITICAL THEORY* (1991)).

36. Although *Ankenbrandt v. Richards*, 504 U.S. 689 (1992), held claims of intra-familial tort triable in federal diversity courts, Justice White, for the Court, distinguished cases falling more properly under the traditional "domestic relations exception" to federal jurisdiction. *Id.* at 702-04. Federal courts, he reasoned, should not be in the business of issuing divorce, alimony, and child custody decrees:

Issuance of decrees of this type not infrequently involves retention of jurisdiction by the court and deployment of social workers to monitor compliance . . . . [S]tate courts are more . . . suited to work of this type than are federal courts, which lack the close association with state and local government organizations dedicated to handling [such] issues.

*Id.* at 704.

37. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981).

38. The Court has never held federal *forum non conveniens* doctrine generally binding upon state courts. *Cf. American Dredging Co. v. Miller*, 114 S. Ct. 981 (1994) (holding state courts free to adjudicate transnational admiralty claims a federal court would dismiss for *forum non conveniens*); *In re Air Crash Disaster Near New Orleans*, 821 F.2d 1147 (5th Cir. 1987) (holding that federal courts in the Fifth Circuit are not bound in diversity cases by state laws declining to recognize *forum non conveniens*).

39. *Wilton v. Seven Falls Co.*, 115 S. Ct. 2137, 2143 (1995) (O'Connor, J.) (reasoning in part from the fact that federal statutory declaratory judgments are discretionary). *Wilton* is a clearer example of the phenomenon of federal abstention from state-law cases than *Colorado River Water Cons. Dist. v. United States*, 424 U.S. 800 (1976) (holding that federal courts should stay actions in which there are prior actions pending in the state courts, state adjudication is part of a complex regulatory scheme, and to go forward would result in piecemeal litigation). In *Colorado River*, the United States was a party, and important issues of federal law were involved.

40. 465 U.S. 89 (1984). It is pointed out by my august colleague, CHARLES ALAN WRIGHT, *THE LAW OF FEDERAL COURTS* 114 (5th ed. 1994), that the Supple-

important 1984 case, the Supreme Court placed certain state-law claims within the truly exclusive jurisdiction of state courts. The Court found constitutional authority in the Eleventh Amendment to hold that state-law claims for injunctive relief against local officials may not be heard by federal courts in their pendent jurisdiction over federal civil-rights claims. *Pennhurst* blocks federal court orders restraining state officials from violating state law. *Pennhurst* thus devolves upon the states an exclusive jurisdiction over all injunction suits against local authorities when pleaded as a matter of state law.

In the Westfall Act of 1988,<sup>41</sup> amending the Federal Tort Claims Act,<sup>42</sup> Congress clarifies that the states have exclusive jurisdiction over tort cases under state law against federal employees, making such cases nonremovable when the Attorney General finds that the defendant employee was not acting within the scope of federal employment when the tort occurred.<sup>43</sup> To be sure, the 1995 case of *Gutierrez de Martinez v.*

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mental Jurisdiction Statute of 1990 cannot cure *Pennhurst* because *Pennhurst* was decided under the Eleventh Amendment, not simply as a matter of the scope of federal equity or of a federal court's pendent jurisdiction. To this it might be added that Congress could override *Pennhurst* under its powers to "abrogate" the Eleventh Amendment. Cf. *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (under § 5 of the Fourteenth Amendment); *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989) (under the Commerce Clause). Congress need only use clear language extending federal pendent or diversity jurisdiction to state-law equitable claims against state officials. *Id.* at 14-15 (Brennan, J.) ("[T]he power to regulate commerce includes the power to override States' immunity from suit, but we will not conclude that Congress has overridden this immunity unless it does so clearly."). But see *id.* at 36 (Scalia, J., dissenting in part) ("Better to overrule *Hans* [*v. Louisiana*, 134 U.S. 1 (1890)] (holding the Eleventh Amendment bars federal suits against states even in nondiversity cases arising under federal law)], I should think . . . . We do not need *Hans* for the 'clear statement' rule . . . ."). For pre-*Union Gas* writing on the issue, interestingly considering, among other things, a theory of protective jurisdiction, see George D. Brown, *Beyond Pennhurst—Protective Jurisdiction, the Eleventh Amendment, and the Power of Congress to Enlarge Federal Jurisdiction in Response to the Burger Court*, 71 VA. L. REV. 343 (1985).

41. Federal Employees Liability Reform and Tort Compensation Act of 1988 (commonly known as the Westfall Act), Pub. L. 100-694, 102 Stat. 4563-67.

42. 28 U.S.C. §§ 1346(b), 2674, 2679(d) (1988). This replaced the Government [or Federal] Drivers' Act of 1961, 28 U.S.C. § 2679(b).

43. 28 U.S.C. § 2679(d)(1). Such a case will be dismissed from federal court in the absence of diversity of citizenship between the parties. When such a case is first filed in state court it becomes unremovable. In contrast, when the Attorney General certifies that a defendant employee *was* acting within the scope of her federal employment at the time of the alleged tort, the United States is substituted as party defendant; the federal courts then have exclusive jurisdiction; and any cases pending in the state courts are removed without possibility of remand. The Attorney General's certification is conclusive for purposes of removal.



*Lamagno*<sup>44</sup> may have modified this exclusivity somewhat, but leaves it untouched in the general run of cases under the Act.

In *Lamagno*, the Court held, 5:4, that the Attorney General's determination that the federal employee did or did not act within the scope of her employment is judicially reviewable. This result creates the intriguing possibility that the federal courts might have to adjudicate a nondiversity case arising under state law. This can be seen by supposing that the Attorney General issues a within-the-scope certification and removes the case. Then, since the correctness of the certification is now judicially reviewable under *Lamagno*, the district court reviews it, and holds that the certification was erroneous. There is no possibility of remand, because under the Westfall Act the Attorney General's certification is explicitly made conclusive for purposes of removal.<sup>45</sup> Thus, a case Congress intended, and Article III seems to require, to be heard exclusively in state court may wind up in federal court. I will return once or twice to this interesting hypothetical case.<sup>46</sup>

#### B. *National Power over Concurrent State Jurisdiction in State-Law Cases*

When Congress grants federal courts jurisdiction over state-law cases, there is an obvious implicit presumption of concurrent state jurisdiction. The important example, of course, is the current codification of the grant of diversity jurisdiction.<sup>47</sup> This presumption of concurrent state jurisdiction over state-law claims is somewhat analogous to the more surprising implicit presumption of concurrent state jurisdiction that is made when Congress grants federal courts jurisdiction over cases likely to be adjudicated under federal law.<sup>48</sup>

44. 115 S. Ct. 2227 (1995).

45. 28 U.S.C. § 2679(d) (1988).

46. See *infra* notes 65-69, 210-13, 233-34 and accompanying text.

47. 28 U.S.C. § 1332 (1988). The statute today omits the explicit reference to the concurrent jurisdiction of the states seen in § 11 of the Judiciary Act of 1789. On the presumptive concurrent state jurisdiction over state claims triable in federal bankruptcy proceedings, see *Claffin v. Houseman*, 93 U.S. 130, 133 (1876).

48. The federal common-law rule is that unless Congress explicitly grants exclusive federal jurisdiction, there is concurrent state jurisdiction. See, e.g., *Tafflin v. Levitt*, 493 U.S. 455 (1990) (holding civil RICO claims within the presumed concurrent jurisdiction of the states); *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 477-78 (1981) (claims arising on the outer continental shelf); *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962) (same; claims under § 301 of the National Labor Relations Act); *Claffin v. Houseman*, 93 U.S. 130, 133 (1876) (claims in

Notwithstanding this presumption, we do see explicit conferrals of concurrent jurisdiction over nonfederal claims, or at least allowances for concurrent jurisdiction. The best-known example must be section 11 of the First Judiciary Act,<sup>49</sup> which expressly granted diversity jurisdiction to the federal circuit courts, "concurrent with the courts of the several States . . . ." State jurisdiction in such cases preexisted the federal statute, and the states would have continued to adjudicate their diversity cases in the absence of the statute.

Today the phenomenon of explicit recognition of state concurrent jurisdiction over nonfederal claims can be seen, for example, in the statutory charter of the Red Cross.<sup>50</sup> That legislation gives the Red Cross the power "to sue and be sued in courts of law and equity, State or Federal, within the jurisdiction of the United States."<sup>51</sup> This head of concurrent jurisdiction has assumed recent importance in the wake of the outbreak of AIDS cases contracted from transfusions of contaminated blood from Red Cross supplies.<sup>52</sup>

Another example is seen in the Foreign Sovereign Immunities Act of 1976.<sup>53</sup> The Act provides that its standards of foreign sovereign immunity<sup>54</sup> apply in both sets of courts;<sup>55</sup> does not make its grant of federal jurisdiction exclusive,<sup>56</sup> and pro-

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bankruptcy [for the effect of the automatic federal stay of state proceedings under 11 U.S.C. § 362, see, e.g., *In re Garay*, 89 N.J. 104, 119, 444 A.2d 1107, 1115 (1982) (construing the automatic stay as not enjoining a pending state action)]; *Houston v. Moore*, 18 U.S. (5 Wheat.) 1, 16 (1820) (court-martials of draft evaders). The important exception is the implied exclusive federal jurisdiction in antitrust. *General Inv. Co. v. Lake Shore & Mich. S. Ry.*, 260 U.S. 261, 287 (1922); see, e.g., *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 379-83 (1985); *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 664 (1977); *Freeman v. Bee Mach. Co.*, 319 U.S. 448 (1943).

49. Judiciary Act of 1789, 1 Stat. 73.

50. Act of Jan. 5, 1905, ch. 23, § 2, 33 Stat. 600, 36 U.S.C. §§ 1-17 (1988).

51. 36 U.S.C. § 2 (1988).

52. For discussion of *American Nat'l Red Cross v. S.G. & A.E.*, 505 U.S. 247 (1992), an Article III case that arose in this context, see *infra* notes 218-36 and accompanying text.

53. Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1441(d), 1602-11 (1988); see *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 489 (1983) (Burger, C.J.) ("The Act expressly provides that its standards control in 'the courts of the United States and of the States,' § 1604, and thus clearly contemplates that such suits may be brought in either federal or state courts.").

54. 28 U.S.C. § 1605 (providing generally that there is no immunity for acts arising out of nongovernmental conduct occurring in this country or with direct effects in this country).

55. 28 U.S.C. § 1604.

56. 28 U.S.C. § 1330 (granting nonexclusive jurisdiction).

vides explicitly for discretionary removal of claims pleadable under the Act.<sup>57</sup> The Act is construed as intending that cases under it do *not* arise under federal law. Rather, the liability of a foreign sovereign is to be determined under the law that would be applicable if the defendant were a private individual,<sup>58</sup> and such law generally would be "the law of the place where the act or omission occurred."<sup>59</sup> The upshot is that liability under the Act typically is governed by the law of a state, or of a foreign nation.<sup>60</sup>

It might be tempting to think of the jurisdiction Congress confers upon the states under the Foreign Sovereign Immunities Act as surplusage. The states have always adjudicated claims under state and foreign law. One might want to think of the Act simply as clearing away the inhibition of a preexisting defense, the defense of sovereign immunity, in cases challenging only the nongovernmental conduct of a foreign sovereign. The Supreme Court similarly cleared away a preexisting defense to state adjudication when it extended the Federal Arbitration Act to the states.<sup>61</sup> For my purposes it does not matter how you think of the effect of the Foreign Sovereign Immunities Act upon state courts. But the Act looks increasingly like a conferral of jurisdiction upon the states as one recognizes how much else Congress does in the Act to open state courts to new business. For example, Congress endows the state courts with powers of worldwide service of process in cases under the Act.<sup>62</sup>

57. 28 U.S.C. § 1441(d).

58. 28 U.S.C. § 1606 provides:

[T]he foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but . . . except for an agency or instrumentality thereof shall not be liable for punitive damages . . . . [I]f, however, in any case wherein death was caused, *the law of the place where the action or omission occurred* provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages . . . .

*Id.* (emphases added).

59. *Id.*

60. *Cf. First Nat'l City Bank v. Banco para el Comercio Exterior de Cuba*, 462 U.S. 611, 622 n.11 (1983) (O'Connor, J.) (explaining that, although federal common law must govern threshold statutory issues under the Foreign Sovereign Immunities Act, like the amenability of a particular governmental instrumentality to suit, the substantive liability of a statutory defendant is not to be determined under federal law).

61. *Southland Corp. v. Keating*, 465 U.S. 1 (1984) (under the Federal Arbitration Act, the state courts may not refuse to enforce an agreement to arbitrate if the agreement is in interstate commerce).

62. 28 U.S.C. § 1608.

There are statutes that may fall into this category of explicit provision for concurrent state jurisdiction, but that I am hesitant to include in it. I refer to statutes in which Congress does not seem so much to be permitting or recognizing state law to govern of its own force as it seems to be incorporating state law as federal law. Thus, I have not mentioned the interesting example of the Price-Anderson Amendments of 1988,<sup>63</sup> creating a new federal cause of action for damages for nuclear accident, with original jurisdiction in both sets of courts, and mandating that the liability laws in such cases derive from the law of the place of the accident. Of course along the spectrum of such statutes there may well be some that could be viewed in either light.<sup>64</sup>

*Gutierrez de Martinez v. Lamagno*<sup>65</sup> furnishes an example of the metaphysical distinction I am trying to describe, although in the end it has to do with exclusive federal jurisdiction, and slips outside the category of concurrent cases that I have been considering. In *Lamagno*, eight of the Justices of the current Court seem prepared to assume that claims in federal court under the Federal Tort Claims Act, as amended by the Westfall Act,<sup>66</sup> are governed by state law operating of its own force.<sup>67</sup> This assumption makes sense to me only because the Justices in *Lamagno* were making it in the context of a hypothetical problem not addressed in the statutory scheme: federal adjudication of the liability, under state law, of a federal employee in an erroneously removed case.<sup>68</sup>

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63. Price-Anderson Amendments of 1988, 42 U.S.C. §§ 2014, 2273, 2282a (1988). The Price-Anderson Act, as amended, creates a new "public liability action" for nuclear accidents, and contemplates original jurisdiction over the action in both federal and state courts, subject to removal and transfer to a federal court at the place of accident. The complaint states this new cause of action only if it fulfills statutory criteria. See *In re T.M.I. Litig.* Cases Consol. II, 940 F.2d 832 (3rd Cir. 1991) (suggesting that Article III jurisdiction in an action under the Act could be sustained based on these federal statutory elements). The Act stipulates that the law governing liability under the new cause of action shall be derived from the law of the state in which the nuclear accident occurs. 42 U.S.C. § 2014(hh) (1988).

64. See, e.g., Trade Readjustment Act of 1974, *supra* note 25.

65. 115 S. Ct. 2227 (1995).

66. 28 U.S.C. § 1346(b) (1988), as amended by the Westfall Act, 28 U.S.C. §§ 2672, 2674 (Supp. 1993); see *supra* notes 41-46 and accompanying text.

67. *Lamagno*, 115 S. Ct. at 2236-37 (Ginsburg, J., for four of the Justices); *id.* at 2239 (Souter, J., dissenting for four of the Justices but making the same assumption that liabilities under the Act are governed by state law of its own force).

68. See *supra* notes 41-46 and accompanying text.

Now, once a defendant employee in a state-court case under the Act is certified as having acted within the scope of her employment, the case is removed to federal court without possibility of remand. By holding the Attorney General's certification judicially reviewable, *Lamagno* raises a curious question. What happens, if in reviewing the certification, the federal court holds that the Attorney General erred? The federal court will still have exclusive jurisdiction, but the case will be an ordinary tort case. Assuming the constitutionality of such jurisdiction,<sup>69</sup> it is here that state law surely governs of its own force.

On the other hand, in the general run of federal tort claims under the Westfall Act, the liability of the United States as substituted defendant is governed, in my view, by federal law, even though federal law incorporates state law by reference.<sup>70</sup> It is true that there is language in the statute,<sup>71</sup> similar to language we have seen in the Foreign Sovereign Immunities Act,<sup>72</sup> providing that in ordinary tort cases arising out of the activities of federal employees the United States shall be liable "in the same manner and to the same extent as a private individual under like circumstances . . . ." And it is true that I have assumed here that state law governs of its own force in cases under the Foreign Sovereign Immunities Act. But the liability of the United States is a federal concern in a direct "comes-from-Uncle-Sam's-treasury" way that the liability of a foreign sovereign is not. In actions under the Foreign Sovereign Immunities Act, the nation has little or no interest in the merits. The chief national interest affecting the merits in such suits is the foreign-relations interest of assuring foreign governments that in this country they are immune from liabilities for actions taken within their governmental sphere.<sup>73</sup> The Westfall Act cases seem quite different to me. Indeed, as we have seen, in such cases concurrent state jurisdiction is extinguished when the Attorney General makes the triggering determination.

69. See *infra* notes 210-13, 233-34 and accompanying text.

70. 28 U.S.C. § 1346(b).

71. 28 U.S.C. § 2074.

72. See *supra* notes 53-62, *infra* note 196 and accompanying text.

73. See *First Nat'l City Bank v. Banco para el Comercio Exterior de Cuba*, 462 U.S. 611, 622 n.11 (1983) (referring to the legislative history to support the view that Congress does not intend a federal common law in cases under the Act).

### C. *National Ouster of State Jurisdiction in State-Law Cases*

Ouster of state concurrent jurisdiction over state questions is not unknown. There is the explicit grant to federal courts of jurisdiction over removed diversity cases from state courts,<sup>74</sup> subject only to a federal court's discretion to remand, and state-law governance is likely in such cases. An interesting body of federal common law also permits removal of even a nondiversity state-law case to federal courts when it can be argued that the claim is "really federal."<sup>75</sup> An even more exotic form of ouster of state jurisdiction over state-law questions occurs in those rare cases in which federal courts will grant an injunction under federal law to restrain state proceedings to enforce state law.<sup>76</sup>

The Supreme Court can hold state adjudicatory as well as legislative jurisdiction over certain state-law cases to be preempted. But in such cases we find, oddly, that *federal* jurisdiction also is likely to be a casualty. We generally suppose that

74. 28 U.S.C. § 1441(a) (1988).

75. See *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 397 n.2 (1981) (approving the removal of a state-law case as an "artfully pleaded," "essentially federal law" case sounding in antitrust).

76. The classic case is *Ex parte Young*, 209 U.S. 123 (1908). Today the availability of this sort of "ouster" depends upon exceptions to the general rule of *Younger v. Harris*, 401 U.S. 37 (1971), which forbids such injunctions. In theory, a federal court can enjoin state enforcement proceedings not yet "pending," i.e., before they are under way—assuming the federal plaintiff has standing. See *Steffel v. Thompson*, 415 U.S. 452, 475-76 (1974) (Stewart, J., concurring) (explaining that standing rarely will be found). For an important example, see *O'Shea v. Littleton*, 414 U.S. 488 (1974) (holding that the named plaintiffs lacked standing to challenge criminal procedures when it was speculative that the plaintiffs would commit crimes and that they would then be arrested). Even if state proceedings are not yet pending when the federal injunction suit is filed, and even if the federal plaintiff has standing, the federal suit can be dismissed under *Younger* at any time before "proceedings of substance on the merits" have taken place in the federal court. *Hicks v. Miranda*, 422 U.S. 332, 349 (1975). See generally ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* 715-56 (2d ed. 1994); LOUISE WEINBERG, *FEDERAL COURTS: CASES AND COMMENTS ON FEDERALISM AND JUDICIAL POWER* 700-47 (1994). There is an exception to these restrictive rules for harassing state prosecutions brought repetitively in bad faith. An example is the federal injunction that ended Jim Garrison's repetitive prosecutions of Clay Shaw in New Orleans for allegedly conspiring in the assassination of President Kennedy and for perjury. (For background see the controversial fictionalizing Oliver Stone movie, *JFK*, in which, among other curious twists of reality, Garrison, the real-life prosecutor, plays Chief Justice Earl Warren). See *Robertson v. Wegmann*, 436 U.S. 584, 586 (1978) (noting the District Court's issuance of the injunction); *Shaw v. Garrison*, 467 F.2d 113 (5th Cir. 1972) (same case, approving the lower court's issuance of the injunction); *Shaw v. Garrison*, 328 F. Supp. 390 (D. La. 1971) (same case, issuing the injunction).

the natural congruence between the jurisdiction of state and federal courts is a function of the national interest in the merits; but in these cases the jurisdiction of courts typically is ousted to protect the original jurisdiction of some alternative forum for dispute resolution,<sup>77</sup> or to protect the original jurisdiction of an administrative agency.<sup>78</sup>

There is a similar class of cases in which the jurisdiction of courts is ousted to protect the prerogatives of a political branch of the government;<sup>79</sup> but here, curiously, we find that occasionally one of these so-called "political questions," although not justiciable in federal courts, remains justiciable in state courts. Some state courts, for example, will adjudicate cases under the Guarantee Clause in which a political minority attempts a court challenge to the legitimacy of state government.<sup>80</sup>

77. See *Southland Corp. v. Keating*, 465 U.S. 1 (1984) (holding under the Federal Arbitration Act that arbitration agreements must be enforced in state as well as federal courts for all agreements in interstate commerce, notwithstanding that the Act seems to have been intended for federal courts only). But see *Allied-Bruce Terminix Cos. v. Dobson*, 115 S. Ct. 834, 845 (1995) (Scalia, J., dissenting) ("I shall not in the future dissent from judgments that rest on *Southland*. I will, however, stand ready to join four other Justices in overruling it.").

78. E.g., *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959) (holding that courts may not adjudicate activities arguably protected or prohibited by the National Labor Relations Act).

79. E.g., *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964) (holding under the federal common law governing the foreign relations of the United States that the validity of an act of a foreign sovereign is not adjudicable in any court in this country, because confided to the political branches). For recent writing on *Sabbatino*, see Jack Garvey, *Judicial Foreign Policy-Making in International Civil Litigation: Ending the Charade of Separation of Powers*, 24 LAW & POL'Y INT'L BUS. 461 (1993). As this reference suggests, the issue in *Sabbatino* may be viewed more broadly as among those legal issues which are held to present "political questions" because confided to a political branch. E.g., *Nixon v. United States*, 113 S. Ct. 732 (1993) (holding that courts may not review the legitimacy of impeachment proceedings against a federal judge, where trial was by a Senate committee).

On the political-question problem in the context of the electoral process, see Symposium, "Guaranteeing a Republican Form of Government," 65 U. COLO. L. REV. 709-946 (1994), including articles by Ann Althouse, Kathryn Abrams, Akhil Amar, Erwin Chemerinsky, Jesse Choper, Richard Collins, Julian Eule, Hans Linde, Deborah Merritt, Robert Nagel, Louise Weinberg, and G. Edward White. See generally PHILIPPA P. STRUM, *THE SUPREME COURT AND "POLITICAL QUESTIONS": A STUDY IN JUDICIAL EVASION* (1974); Robert F. Nagel, *Political Law, Legalistic Politics: A Recent History of the Political Question Doctrine*, 56 U. CHI. L. REV. 643 (1989); J. Peter Mulhern, *In Defense of the Political Question Doctrine*, 137 U. PA. L. REV. 97 (1988).

80. U.S. CONST. art. IV, § 4 (guaranteeing to every state a republican form of government). For state adjudications under the Guarantee Clause notwithstanding the political-question doctrine, see *In re Initiative Petition No. 348*, State Question No. 640, 820 P.2d 772 (Okla. 1992); *Cagle v. Qualified Electors*, 470 So.2d 1208

The exclusive state jurisdiction in these "political question" cases perplexes me. The Guarantee Clause is held to be nonjusticiable because the question of the legitimacy of a state government is thought to be a question confided to Congress.<sup>81</sup> Although in my view access to courts for the political minority is generally a good thing, I fail to see how, once a question is held confided to Congress, the state courts can suppose they retain jurisdiction over it.<sup>82</sup> One suspects that the state courts take these cases not because current Supreme Court jurisprudence allows it, but rather because current Supreme Court jurisprudence is wrong.

Another variety of ouster of state jurisdiction might be supposed to attend federal preemption of state law. But federalization of a state-law question will not necessarily oust state courts of concurrent jurisdiction over the sorts of disputes federalized. Federalization does mean that federal courts will gain at least concurrent jurisdiction over the federalized claims. And the state will have to adjudicate the federalized questions as a matter of federal, not state law and policy. This is also true when a whole field of law is held "preempted" by federal law, or when state law in actual conflict with federal law must fall, under the Supremacy Clause. The state courts are not necessarily closed against such issues, but the articulate voice of the state sovereign is stilled in its own courts.

#### *D. National Regulation of State-Court Adjudication of State-Law Cases*

The nation pervasively regulates the administration even of state law in state courts. The national interest in fair procedures in state courts, manifest in the Due Process Clause of the Fourteenth Amendment, justifies federal constraints upon state assertions of jurisdiction over the person<sup>83</sup> and upon state pre-

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(Ala. 1985); Opinion of the Justices, 468 So.2d 883 (Ala. 1985).

81. The classic case is *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849); see also *Baker v. Carr*, 369 U.S. 186 (1962) (holding justiciable, under the Equal Protection Clause, the malapportionment of a state legislature; distinguishing but not overruling *Luther v. Borden*).

82. For the argument that Guarantee Clause claims are adjudicable in state courts, see Hans A. Linde, *Who Is Responsible for Republican Government*, 65 U. COLO. L. REV. 709 (1994); contra Louise Weinberg, *Political Questions and the Guarantee Clause*, 65 U. COLO. L. REV. 887, 941-45 (1994).

83. The Supreme Court exercised this power soon after the 1868 ratification of the Fourteenth Amendment. *Pennoy v. Neff*, 95 U.S. 714 (1877).



judgment attachments.<sup>84</sup> Moreover, if state law does not provide an anticipatory remedy, the state must provide "meaningful backward-looking relief" for unconstitutional taxes collected,<sup>85</sup> and the Supreme Court suggests that such relief be provided under state law.<sup>86</sup> The state must furnish appellate review of punitive damages.<sup>87</sup> Also as a matter of due process, state courts choosing among state laws must choose reasonably; they are free to apply only non-arbitrary, relevant law. On any substantive issue the state must apply the law of a state having a significant governmental interest in the issue; to fail to do so is held to be as much a violation of substantive as of procedural due process.<sup>88</sup>

A comprehensive federal code of criminal procedure has been imposed by the Supreme Court upon the states, through all phases of the state criminal process, in the interest of effectuating the procedural due process guarantees of the selectively incorporated Bill of Rights.<sup>89</sup>

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84. *E.g.*, *Mitchell v. W. T. Grant Co.*, 416 U.S. 600 (1974).

85. *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990). For discussion of *McKesson* in relation to *National Private Truck Council, Inc. v. Oklahoma Tax Comm'n*, 115 S. Ct. 2351 (1995), see LOUISE WEINBERG, 1996 SUPPLEMENT, *supra* note 8, at 92, 241-42 (1995).

86. *National Private Truck Council, Inc. v. Oklahoma Tax Comm'n*, 115 S. Ct. 2351 (1995) (holding that a state court need not try a claim against state officials as a federal civil-rights claim when federal courts would not).

87. *Honda Motor Co. v. Oberg*, 114 S. Ct. 2331 (1994).

88. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 822 (1985) (holding that a state with only insignificant contacts with a multistate case may not apply its own law to every issue); *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 313 (1981) (stating that to govern an issue by its laws, a state must have a significant contact or contacts with that issue, generating governmental interests in the state, such that application of its law will be neither arbitrary nor fundamentally unfair). *But see Sun Oil Co. v. Wortman*, 486 U.S. 717 (1988) (permitting a state with jurisdiction over multistate class claims with which it had little, if any, significant contact to apply its statute of limitations to open the door to claims time-barred in all contact states, because the forum traditionally applies its own statute of limitations).

89. Familiar examples include *Miranda v. Arizona*, 384 U.S. 436 (1966) (Fifth Amendment standards of custodial interrogation); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (Sixth Amendment right to counsel); *Mapp v. Ohio*, 367 U.S. 643 (1961) (Fourth Amendment right to be free of unreasonable searches). See Louise Weinberg, *The Monroe Mystery Solved: Beyond the "Unhappy History" Theory of Civil Rights Litigation*, 1991 B.Y.U. L. REV. 737-765 (1991) (arguing that the action for damages under the federal civil rights statute that emerged in the Warren Court period was a function of the contemporaneous selective incorporation of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment; showing that the nature of such actions is explained by this connection with the criminal process, including the absence of similar actions in equity; distinguishing actions under the Equal Protection Clause).

Arguably it is even possible to read the Due Process Clause of the Fourteenth Amendment as a source of national power to confer jurisdiction upon—or at least to grant procedural or remedial powers to—state courts adjudicating nonfederal cases, rather than—as we usually read the Clause—as a source of national power to impose constraints upon state adjudication.

In this brief summary we have seen a number of ways in which Congress or the Supreme Court can control, modify, regulate, or otherwise affect the jurisdiction of state courts over cases not likely to involve federal claims.

### III. FEDERAL SUPREMACY IN STATE-LAW CASES

We have seen that, among other things, Congress can and does allocate jurisdiction to the state courts in matters not likely to arise under federal law. We have been introduced to the example of the Foreign Sovereign Immunities Act.<sup>90</sup> The ALI proposes another such allocation for complex litigation, if you discount the provision for state consent.<sup>91</sup> We also have seen the interesting instance of section 11 of the original Judiciary Act of 1789. Although section 11 of the First Judiciary Act vested new jurisdiction in federal courts, it also purported to confer their preexisting diversity jurisdiction upon the states. The Section is fairly read as at least making room for the pre-existing jurisdiction of the states.<sup>92</sup>

These federal allocations of state jurisdiction hold little difficulty for us. They exhibit no problem analogous to the

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90. See *supra* notes 53-62 and accompanying text. 28 U.S.C. § 1608 (1988).

91. See *supra* notes 1-3 and accompanying text.

92. In either set of courts, of course, the diversity jurisdiction was one in which both nonfederal and federal claims might be heard. There was very little federal statutory law, and what there was tended actually to confer new *concurrent* jurisdiction over new federal claims. For example, although federal jurisdiction over patent claims is exclusive today, 28 U.S.C. § 1338(a) (1988), at one time state courts had concurrent jurisdiction over infringement suits, Act of July 4, 1836, ch. 357, 5 Stat. 117; Act of Feb. 15, 1819, ch. 19, 3 Stat. 481; Act of Feb. 21, 1793, ch. 11, § 6, 1 Stat. 318, 322; and claims of wrongful procurement of a patent, Act of April 10, 1790, ch. 7, § 5, 1 Stat. 109, 111.

Certain nonstatutory claims even then might have been recognizable as federal. In *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), recall that Chief Justice Marshall thought that Marbury had a cause of action "under the laws of his country," *id.* at 162, and in effect held that although the Supreme Court lacked power to hear it, Marbury's petition for a mandamus was triable in any court of competent original jurisdiction. Read broadly, *Marbury* contemplates lawsuits seeking enforcement of the Constitution in at least state courts of first instance, there then being no general federal-question jurisdiction.

problem presented by cases in which Congress purports to confer upon *federal* courts jurisdiction over state-law claims without regard to the citizenship of the parties. The latter situation is a hornet's nest. It has become a deeply metaphysical specialty of federal-courts learning. The struggle has been to reconcile Congress's Article I power with the constraints upon the jurisdiction of federal courts imposed by Article III.<sup>93</sup> I reach this latter, more familiar problem later in this article; I do so not only for any lessons the federal-courts learning may hold for the same problem transposed to state courts, but also for any perspectives my analysis may open up when applied to the federal courts. But we can see at once that when Congress confers jurisdiction upon the state courts there is no Article-III problem. The problem simply goes away. The state courts are not Article-III courts. The question becomes much more simply a question of the power of Congress under Article I.

Quite a few other issues slip their old knots as well. We find that it does not matter in any fundamental sense whether jurisdiction conferred by Congress upon the states is jurisdiction over nonfederal or federal questions. Congress can act only in the national interest; Congress must vindicate some national

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93. For a brief introduction to the arcana, one probably cannot do better than Justice Frankfurter's talky, under-organized, but illuminating dissent in *Textile Workers' Union of Am. v. Lincoln Mills*, 353 U.S. 448 (1957). The more recent cases, some of which I shall have occasion to touch upon in a later Part, include *Am. Nat'l Red Cross v. S.G. & A.E.*, 505 U.S. 247 (1992); *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983); and, although it is not always recognized as presenting the problem, *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

*Marathon Pipe Line* was a jurisdictional catastrophe. In *Marathon Pipe Line* the Court declared federal bankruptcy jurisdiction unconstitutional under Article III to the extent state claims affecting the assets of the bankrupt were adjudicated by bankruptcy judges. This was done not on the ground that such claims did not "arise under" federal law within the meaning of Article III, but on the spurious argument that if nondiversity state-law claims were triable in federal courts they must be tried by tenured judges. The actual problem the case presented was buried in a footnote, *Marathon Pipe Line*, 458 U.S. at 72 n.26, and pasted over by the customary citations to *Williams v. Austrian*, 331 U.S. 642, 653 (1947) and *Schumacher v. Beeler*, 293 U.S. 367, 374 (1934), neither of which offer supporting argumentation. See generally Susan Block-Lieb, *The Case Against Supplemental Bankruptcy Jurisdiction: A Constitutional, Statutory, and Policy Analysis*, 62 *FORDHAM L. REV.* 721 (1994); John T. 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); Thomas Galligan, Jr., *Article III and the "Related To" Bankruptcy Jurisdiction: A Case Study in Protective Jurisdiction*, 11 *U. PUGET SOUND L. REV.* 1 (1987); Note, *Bankruptcy and the Limits of Federal Jurisdiction*, 95 *HARV. L. REV.* 703 (1982).

interest when it confers jurisdiction, whatever the source of the law likely to govern the merits of cases within that jurisdiction.

Now, when Congress acts in the national interest, the Supremacy Clause should be expected to kick in. Obligations under the Supremacy Clause should attach. What I am saying is that the state cannot decline to exercise federally "conferred" jurisdiction even when, in the particular case, it is jurisdiction over nonfederal business.

The intuitive supposition might be that supremacy attaches to a federal grant of jurisdiction to the state courts over federal, but not state, business. In this view there are no federal "grants" of power over state business to a state court. Rather, Congress sometimes simply acknowledges the states' preexisting jurisdiction over their own affairs. It might be argued that when, for example, in section 11 of the First Judiciary Act, Congress recognized concurrent diversity jurisdiction in the state courts, Congress merely allowed for a preexisting jurisdiction which the states would have continued to exercise even absent the act of Congress. In the diversity statute as codified today,<sup>94</sup> concurrent jurisdiction is not even explicit but is left to implication. The natural conclusion, it might be argued, is that state courts exercise only state power over their diversity cases. Congress, in this view, must be read as simply recognizing concurrent state power. And of course we do think of the states as exercising state, not federal, power over their diversity cases. Thus—the argument would conclude—the states remain *free to withdraw* from diversity cases, at least those that arise exclusively under state law. The states remain free to confide such cases to the exclusive jurisdiction of the federal courts. No Supremacy Clause obligation could stand in the way. That, I should think, is the intuitive position.

There is a sense in which all the premises of this position are true. But the conclusion is not quite accurate. Counter-intuitively, the Supremacy Clause in an oblique way does prohibit the state courts from abjuring their diversity jurisdiction over state-law cases. Intriguingly, once Congress grants or even acknowledges concurrent jurisdiction, explicitly or by implication, the state courts' choices become circumscribed. Whereas before the First Judiciary Act—to stay with that example—the state courts might on some colorable pretext have declined to

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94. 28 U.S.C. § 1332 (1988).

adjudicate diversity cases, they cannot do so now. At least they cannot do so absent the sort of nondiscriminatory procedural bar the Supreme Court recognizes as an exception to the state courts' duties to adjudicate federal claims within their concurrent jurisdiction.<sup>95</sup>

This conclusion follows from the premise that the states, like the nation, must have a rational basis for the exercise of their powers.<sup>96</sup> If, for example, a state declined to adjudicate cases in which it might have to undertake the onerous task of choosing law, whether or not the parties to the case were from different states, under current jurisprudence that state would be free to dismiss diversity cases as well as nondiversity cases on this ground.<sup>97</sup> But there would be no convincing pretext for dismissing only diversity cases. At best, the state might argue that the reason it declines to hear cases by or against citizens of other states is to accommodate the national interest in providing a federal forum for diversity cases. The state argues that it is exercising a wise comity and deference by carving away its own jurisdiction in diversity cases, leaving those cases for the exclusive jurisdiction of the presumably less biased federal courts.

But the states are not free to make that accommodation. The states are not permitted to discriminate, in giving access to local benefits, including, presumably, local courts, between those with federal statutory rights and those without, however deferential the motive.<sup>98</sup> Thus, the states are as powerless to

95. See *infra* notes 97, 100, 102 and accompanying text.

96. See *infra* part IV, notes 129-56 and accompanying text.

97. In the analogous context of state duty to adjudicate federal claims, see *Testa v. Katt*, 330 U.S. 386 (1947) (holding under the Supremacy Clause that a state court may not arbitrarily dismiss a federal statutory claim), it is recognized that a state may dismiss a federal claim on a procedural ground on which it would also dismiss an analogous state claim. *Douglas v. New York, N.H. & H.R.R.*, 279 U.S. 377, 387-88 (1929). But the state may not discriminate against those relying on federal law. *Howlett v. Rose*, 496 U.S. 356, 371 (1990).

98. For this sort of reasoning, see *Livadas v. Bradshaw*, 114 S. Ct. 2068 (1994) (holding unanimously in a labor case that a state may not, in the interest of steering clear of interference with national governance, give the benefit of its laws only to those without federal rights); see also *National Private Truck Council, Inc. v. Oklahoma Tax Comm'n*, 115 S. Ct. 2351, 2355 (1995) (Thomas, J.) (explaining that a state is not free to decline jurisdiction on grounds of comity when federal courts also would decline). In the analogous context of state jurisdiction over federal questions, the Court holds that a state may not discriminate, in affording access to its courts, against those whose cases arise under federal, rather than state, law. *Howlett v. Rose*, 496 U.S. 356, 371 (1990). But cf. *Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197 (1991) (Kennedy, J.) (holding that because

decline to exercise jurisdiction conferred by Congress in state-law cases as they are in federal-law cases,<sup>99</sup> even though the latter may seem to come more directly under the command of the Supremacy Clause.

It also does not matter, for practical purposes, whether federally granted state jurisdiction over state-law diversity questions is actually in some sense "conferred" or whether Congress simply invokes the residual<sup>100</sup> or inherent<sup>101</sup> pow-

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many states had excluded railroad workers from their workers' compensation laws "because of the assumption that FELA provides adequate protection for those workers," an injured railway worker may sue a state in state court under the Federal Employers' Liability Act, notwithstanding the rule of *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468 (1987), that federal courts could not entertain such suits under the Eleventh Amendment in the absence of clear statutory authorization).

99. *Howlett*, 496 U.S. at 371; *Testa*, 330 U.S. 386.

100. State power over even *federal* questions is widely viewed as independent of and "residual" to federal power. This belief has roots in history. The so-called Madisonian Compromise, by which Article III created no federal courts of general original jurisdiction, but gave Congress the option of doing so, suggests that a plenary original jurisdiction over federal questions resides in state courts. For recent discussion, see Michael G. Collins, *Article III Cases, State Court Duties, and the Madisonian Compromise*, 1995 WIS. L. REV. 39 (1995). The Supreme Court's appellate jurisdiction, which was established in Article III, implies that in the absence of federal courts of first instance state courts can and must exercise original jurisdiction over federal questions, subject to Supreme Court review. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 339-40 (1816). Thus, in the silence of Congress, the states have presumptive concurrent jurisdiction over federal claims. *E.g.*, *Tafflin v. Levitt*, 493 U.S. 455, 460-66 (1990) (civil RICO claims); *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 477-78 (1981) (claims arising on the outer continental shelf); *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962) (claims under § 301 of the National Labor Relations Act); *Houston v. Moore*, 18 U.S. (5 Wheat.) 1, 16 (1820) (court-martials of draft evaders). For an interesting recent discussion of early concurrent jurisdiction over federal criminal cases, see Donald H. Zeigler, *Twins Separated at Birth: A Comparative History of the Civil and Criminal Arising Under Jurisdiction of the Federal Courts and Some Proposals for Change*, 10 VT. L. REV. 673 (1995). Indeed, under the Supremacy Clause, the state courts have no choice; they must adjudicate federal claims, *Testa*, 330 U.S. 386, at least if they would adjudicate analogous state claims, *F.E.R.C. v. Mississippi*, 456 U.S. 742, 760 (1982), and must, of course, apply federal law on the substantive issues, *Testa*, 330 U.S. at 392, including issues of their own sovereign immunity. *Howlett*, 496 U.S. 356.

But it remains a common view that the states perform these duties under their own powers. *See, e.g.*, *American Nat'l Red Cross v. S.G. & A.E.*, 505 U.S. 247, 268 (1992) (Scalia, J., dissenting) (arguing that a federal statute granting the Red Cross power to sue cannot be read as a grant of jurisdiction or it would become a grant of concurrent jurisdiction to the states, and thus "cannot reasonably be read as allowing the Red Cross to enter a state court without establishing the independent basis of jurisdiction appropriate under state law"). This view is seen in the doctrine that federal law takes the state courts as it finds them; the states are obliged to enforce federal law only insofar as their jurisdiction permits. Thus, a

ers of the state courts, or invokes the general jurisdiction the state legislature happens to have provided.<sup>102</sup> My own thinking is that in such cases state courts sit as courts of the nation, notwithstanding that they continue to administer state law,<sup>103</sup> but it should be unimportant whether one thinks they

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state that would dismiss an analogous state-law claim on procedural grounds may similarly dismiss a federal claim; the state is said to have "an otherwise valid excuse." *Douglas v. New York, N.H. & H.R.R.*, 279 U.S. 377, 387-88 (1929) (Holmes, J.).

This "otherwise valid excuse" doctrine is problematic. Federal supremacy on the merits implies federal supremacy over state jurisdictional and procedural law that can affect outcomes on the merits. *E.g.*, *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 238 (1969) (Douglas, J.) ("[The] federal [equitable] remedy for the protection of a federal right is available in the state court, if that court is empowered to grant injunctive relief generally . . ."); *Dice v. Akron, Canton & Youngstown R.R. Co.*, 342 U.S. 359 (1952) (holding that a state must afford trial by jury in a case under the Federal Employers' Liability Act).

101. For the view that state jurisdiction over federal questions is "inherent," see *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990) (O'Connor, J.) ("[We] have consistently held that state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States.").

102. For this position in federal-question cases, see *American Nat'l Red Cross v. S.G. & A.E.*, 505 U.S. 247, 268 (1992) (Scalia, J., dissenting) ("This parallel treatment of state and federal courts even further undermines a jurisdictional reading of the statute, since the provision cannot reasonably be read as allowing the Red Cross to enter a state court without establishing the independent basis of jurisdiction appropriate under state law."); see also *Brown v. Gerdes*, 321 U.S. 178, 188 (1944) (Frankfurter, J., concurring) ("[T]he jurisdiction conferred upon [the state courts] by the only authority that has power to create them and to confer jurisdiction upon them—namely the law-making power of the [states]—enables them to enforce rights no matter what the legislative source of the right may be."); *Douglas v. New York, N.H. & H.R.R.*, 279 U.S. 377 (1929) (Holmes, J.):

As to the grant of jurisdiction in the Employers' Liability Act, that statute does not purport to require State Courts to entertain suits arising under it, but only to empower them to do so, so far as the authority of the United States is concerned . . . . [T]here is nothing in the Act . . . that purports to force a duty upon [state] [c]ourts as against an otherwise valid excuse.

*Id.* at 387-88 (citation omitted).

103. In the federal-question case of *Howlett v. Rose*, 496 U.S. 356, 366 (1990), the Court took the position that the Supremacy Clause requires the two sets of courts to "form one system of jurisprudence" (quoting *Clafin v. Houseman*, 93 U.S. 130, 137 (1876)). See also *Tafflin v. Levitt*, 493 U.S. 455 (1990) (Scalia, J., concurring):

State courts have jurisdiction over federal causes of action not because it is "conferred" upon them by the Congress; nor even because their inherent powers permit them to entertain transitory causes of action arising under the laws of foreign sovereigns, . . . but because "the laws of the United States are laws in the several States, and just as much binding on the citizens and courts thereof as the State laws are . . . . The two together form one system of jurisprudence, which constitutes the law of the land for the State; and the courts of the two jurisdictions are not

do or not.

What counts is that only national, not state, policy can ground the power of Congress to devolve concurrent jurisdiction upon state courts, even when the jurisdiction so devolved or even merely acknowledged is over claims unlikely to be federal claims. The obligations of federal supremacy must attach to national policy in such cases as in others. State courts come under Supremacy Clause obligations not only when they adjudicate federal questions, but when they adjudicate those non-federal questions which it is national policy that they adjudicate. It cannot matter to this reasoning whether the state court, in some mystical sense, becomes a federal court, or whether the parties believe they invoke state jurisdiction independent of that devolved upon the states by the act of Congress under which they litigate in the state courts.

In fact, for reasons structural and practical, duties devolved by Congress upon the states to hear nonfederal claims may be *stronger* than the same duties devolved upon federal courts. Even apart from the constraints of Article III,<sup>104</sup> federal courts are under prudential constraints of federalism when they deal with nonfederal questions.<sup>105</sup> These additional constraints, like Article III, are irrelevant in state courts adjudicating nonfederal questions. Indeed, the prudential constraints on federal adjudication comprise a compelling reason why the states should and perhaps must furnish a forum. In federal-law cases, when Congress imposes constraints on federal jurisdiction,<sup>106</sup> or refuses to grant federal jurisdiction,<sup>107</sup> the ordi-

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foreign to each other . . . ."

*Id.* at 469-70 (quoting *Clafflin*, 93 U.S. at 136-37). This position is different from and better than the position Justice Scalia was to sign his name to in his dissent in *American Nat'l Red Cross*, 505 U.S. at 268.

104. See *infra* notes 159-236 and accompanying text.

105. See, e.g., *Ankenbrandt v. Richards*, 504 U.S. 689, 703-04 (1992) (acknowledging that federal diversity courts do not issue decrees in divorce or child custody cases); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984) (holding that federal courts have no pendent jurisdiction over equitable civil-rights claims arising under state law).

106. See, e.g., Tax Injunction Act of 1937, 28 U.S.C. § 1341 (1988); *National Private Truck Council, Inc. v. Oklahoma Tax Comm'n*, 115 S. Ct. 2351 (1995).

107. The great example, of course, is the failure of Congress to vest original general federal-question jurisdiction in federal trial courts until 1875. Act of March 3, 1875, ch. 137, § 1, 18 Stat. 470; see also the 1802 repeal of the abortive 1801 statute attempting to make the jurisdictional grant. Act of Feb. 13, 1801, ch. 4, § 11, 2 Stat. 89, 92; *repealed*, Act of March 8, 1802, ch. 8, 2 Stat. 132. The grant of general federal-question jurisdiction is codified today at 28 U.S.C. § 1331 (1988).



nary expectation is that the state courts must furnish the needed forum.<sup>108</sup> This is not only suggested by the elementary concerns of due process, but by federal supremacy. At the end of the 1994-1995 Term, in his opinion for the Court in *National Private Truck Council, Inc. v. Oklahoma Tax Commission*, Justice Thomas remarked,

... Nor can a desire for "intrastate uniformity" permit state courts to refuse to award relief merely because a federal court could not grant such relief. [I]t was not until 1875 that Congress provided any kind of general federal-question jurisdiction to the lower federal courts . . . . Because of the Supremacy Clause, state courts could not have refused to hear cases arising under federal law merely to ensure "uniformity" between state and federal courts located within a particular state.<sup>109</sup>

That state courts must furnish a forum should also be the ordinary expectation when federal courts labor under analogous constraints in adjudicating *nonfederal* questions. The state forum would be especially necessary to the nation in a hypothetical situation in which the Supreme Court erroneously<sup>110</sup> strikes down, as applied, an act of Congress under Article III, on the thinking that Congress cannot constitutionally confer jurisdiction over nonfederal questions upon federal courts in the absence of diversity of citizenship of the parties. State courts in such cases would be the only courts that could effectuate the intentions of Congress, just as they were in most feder-

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108. Cf. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 339-40 (1816) (Story, J.) (arguing that the absence of original federal jurisdiction over general federal questions, together with the existence of the appellate jurisdiction of the Supreme Court over federal questions, implies that the states are bound to try federal questions subject to Supreme Court review). But see *National Private Truck Council*, 115 S. Ct. 2351 (holding that where state law furnishes a remedy, the state need not adjudicate the grievance under federal civil-rights law, if a federal court would not).

109. *National Private Truck*, 115 S. Ct. at 2355 (citation omitted).

110. I say "erroneously" because I believe that a sufficient federal ingredient may be supplied by national jurisdictional policy. When the states have concurrent jurisdiction it is because it is in the national interest for them to have it, whether or not Congress has chosen to federalize the substantive law that is applied in cases within the jurisdiction. In the national interest Congress has power to vest state jurisdiction even when Congress does not have power to federalize the substantive law applicable to the dispute between the parties, as it does, for example, using its foreign relations power, in those cases against foreign sovereigns that are governed by foreign law. Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1441(d), 1602-11 (1988).

al-question cases before Congress enacted the federal-question jurisdictional statute in 1875.<sup>111</sup> Were the ALI Proposal to be enacted as law, the state forum could become especially important. There is a strong possibility—since mass torts are likely to arise under nonfederal law—that the Supreme Court would hold such an enactment unconstitutional as applied in federal courts.<sup>112</sup>

The Supreme Court has the power of summary vacatur or reversal if a state court violates the Supremacy Clause by dismissing a federal claim or refusing to decide a federal question properly presented to it. Vacatur or reversal is equally appropriate when a state court has violated the Supremacy Clause by dismissing a nonfederal claim over which Congress has conferred concurrent jurisdiction upon the states. And when Congress confers concurrent jurisdiction expressly or impliedly—whether over claims arising under federal or nonfederal law—it should come to be understood that state procedural law as well as state substantive law or policy may not be permitted to frustrate the national policy underlying the conferral.<sup>113</sup>

I have been taking the position that when Congress grants jurisdiction to the state courts over state-law claims, it is federal power that the states exercise, the nation being the formal source of their jurisdiction. Interesting theoretical consequences flow from this hypothesis, some of which have been foreshadowed in the previous discussion. For one thing, if it is in the national interest that the nation confer jurisdiction upon the states in a class of cases, it becomes obvious that in the same national interest the nation can also bestow remedial and procedural powers upon the states, whether or not the class of cases is likely to be adjudicated on the merits under federal

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111. Act of March 3, 1875, ch. 137, § 1, 18 Stat. 470.

112. See *infra* notes 159-78 and accompanying text. But it should be noted that in the context of (potential) mass torts, the Court sustained the constitutionality of federal jurisdiction in nondiversity litigation over AIDS-contaminated blood transfusions, in actions against the Red Cross, a federally chartered organization. *American Nat'l Red Cross v. S.G. & A.E.*, 505 U.S. 247 (1992).

113. The phenomenon is seen more familiarly in federal-question cases, in which from time to time the Supreme Court has forced federal procedures or remedies upon state courts. *E.g.*, *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 238 (1969) (Douglas, J.) ("[The] federal [equitable] remedy for the protection of a federal right is available in the state court, if that court is empowered to grant injunctive relief generally . . ."); *Dice v. Akron, Canton & Youngstown R.R. Co.*, 342 U.S. 359 (1952) (holding that a state must afford trial by jury in a case under the Federal Employers' Liability Act, even on evidence the state would otherwise keep from the jury).

law.<sup>114</sup> Thus, whether the claim be a federal or nonfederal one, if Congress has authorized nationwide service of process over that claim, the state court has the power of nationwide service of process. So in the Foreign Sovereign Immunities Act Congress bestows upon both sets of courts worldwide service of process.<sup>115</sup> Furthermore, if the state courts in these cases exercise federal power, the due process limits on the state's personal jurisdiction are not located in the Fourteenth Amendment, as might have been supposed, but in the Fifth Amendment.<sup>116</sup>

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114. *Cf.* F.E.R.C. v. Mississippi, 456 U.S. 742, 760 (1982) (holding that Congress has Commerce power to implement federal law in state tribunals, including the power to establish procedural minima; referring to claims "analogous" to federal claims).

115. 28 U.S.C. § 1608 (1988). Section 1608(a) in terms provides for "Service in the courts of the United States and of the States . . . ." Compare the provision for nationwide service in federal courts in the Price-Anderson Act:

With respect to any public liability action arising out of or resulting from a nuclear incident, the United States district court in the district where the nuclear incident takes place, or in the case of a nuclear incident taking place outside the United States, the United States District Court for the District of Columbia, shall have original jurisdiction without regard to the citizenship of any party or the amount in controversy. Upon motion of the defendant, . . . any such action pending in any State court . . . or United States district court shall be removed or transferred to the United States district court having venue under this subsection. Process of such district court shall be effective throughout the United States . . . .

42 U.S.C. § 2210(n)(2) (1988). The Price-Anderson Act provides for nationwide service in the federal transferee court, but does not do so in the state courts or in other federal courts. The exclusion of these courts for this purpose, coupled with the acknowledgment of their jurisdiction, suggests that this omission is simply part of the provision for venue of all litigation at the place of accident.

116. So the Supreme Court assumed in *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 619-20 (1992). In the Foreign Sovereign Immunities Act Congress grants concurrent jurisdiction to federal and state courts, 28 U.S.C. §§ 1330, and provides worldwide service of process for both sets of courts. 28 U.S.C. § 1608. Congress further provides that if the nongovernmental commercial activities giving rise to a case were conducted in this country or had direct effects in this country, the foreign sovereign is not immune from liability in the case. 28 U.S.C. § 1605(a)(2). Furthermore, the foreign sovereign, if without statutory immunity, is within the personal and subject-matter jurisdiction of the court. 28 U.S.C. § 1330(b); *Argentine Republic v. Amerasia Shipping Corp.*, 488 U.S. 428, 434 n.3 (1989). In *Weltover*, the Supreme Court considered the defendant sovereign's technical argument that to construe the nexus requirements for statutory jurisdiction less strictly than the "minimum contacts" requirement for personal jurisdiction would be to raise a problem of Fifth Amendment due process. Assuming, without deciding, that a foreign state is a "person" for purposes of Fifth Amendment due process, the Court pointed out that Argentina's nexus with the United States in that case would be sufficient even under a "minimum contacts" analysis. *Weltover*, 504 U.S. at 619-20 (Scalia, J.); see also *Lakewood Bank & Trust Co. v. Superior Court*, 129 Cal. App. 3d 463, 469-70, 180 Cal. Rptr. 914, 918-19 (1982) (sustaining

As we have already seen, there is some scope for operation of the Supremacy Clause in nonfederal cases in state court under an act of Congress. To be sure, there might well be no substantive federal law to which federal supremacy could attach, even over a threshold issue.<sup>117</sup> But we should be clear that a state exercising power conferred by the nation, even in a hypothetical case lacking a single federal-law element, would be under a duty to vindicate whatever national interest the nation had in bestowing the power upon the state. The state

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the state court's jurisdiction and venue in an action under the Securities Act of 1933 notwithstanding state-law limitations, since the state court had concurrent jurisdiction and venue under the federal statute); David Carlebach, Note, *Nationwide Service of Process in State Courts*, 13 CARDOZO L. REV. 223 (1991) (discussing the effect on state courts of federal conferral of nationwide process).

In more localized state-law cases, even a "congressional grant of nationwide jurisdiction to the state courts [might] not withstand a Fifth Amendment challenge on the basis of nothing more than the defendant's presence in, or contacts with, the United States." Steinman, *Reverse Removal*, *supra* note 2, at 1119. Perhaps in such cases, in both federal and state courts, the Fifth Amendment Due Process Clause eventually will be construed to incorporate Fourteenth Amendment standards. The Supreme Court has avoided this issue thus far in federal-court cases through statutory interpretation either of the substantive law or the federal venue statute. See *Stafford v. Briggs*, 444 U.S. 527 (1980) (disapproving jurisdiction over a remote defendant by a narrow construction of the Mandamus and Venue Act). But see *id.* at 554 (Stewart, J., dissenting) (assuming the constitutionality of the statute under a contrary interpretation); *Leroy v. Great W. United Corp.*, 443 U.S. 173 (1979) (striking down jurisdiction in an action under the Securities Exchange Act in which an out-of-state defendant was served with process under the state's long-arm statute; reaching this result by a narrow construction of the federal venue statute).

It is not clear how *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), cuts on these issues. *Shutts* is quite permissive on the power of the state over nationwide class actions, when members of the class are given an opportunity to opt out. See Mark C. Weber, *Complex Litigation and the State Courts: Constitutional and Practical Advantages of the State Forum Over the Federal Forum in Mass Tort Cases*, 21 HASTINGS CONST. L.Q. 215, 259-62 (1994) (discussing the powers of the unaided state forum in complex litigation).

117. See *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 492 (1983) (Burger, C.J.) (sustaining federal jurisdiction under art. III; reasoning that cases under the Foreign Sovereign Immunities Act "arise under" the federal substantive standards of sovereign immunity which must be applied in every case against a foreign sovereign in either set of courts, the Act being the exclusive vehicle for suits against a foreign sovereign). On the exclusivity of the remedy provided by the Foreign Sovereign Immunities Act, see 28 U.S.C. § 1604 (providing that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in . . . this chapter"); *Argentine Republic v. Amerasia Shipping Corp.*, 488 U.S. 428 (1989) (reaffirming *Verlinden*, that the Foreign Sovereign Immunities Act is the exclusive judicial remedy for the private wrongs of foreign sovereigns in both sets of courts).

courts cannot adjudicate such cases except in deference to that national interest.

When the nation's policy is unrealized in substantive law, the national interest might be a jurisdictional interest simpliciter, or it might be a substantive interest in the body of unfederalized law under which these cases will be litigated.<sup>118</sup> Either or both of these interests can generate *adjudicatory policies* which, I am arguing, become supreme in state courts to which the nation gives, or in which the nation expects, concurrent jurisdiction. At a minimum, this means that the state courts must disregard any limitations of state law upon their powers which would conflict with the federal policy underlying the jurisdictional and procedural grants of power.<sup>119</sup>

This analysis further suggests that, in seeking constraints upon national power over nonfederal law in state courts, it is to little purpose to round up the usual suspects. The Tenth Amendment is especially unhelpful here. It is true that we tend to think of state power as constraining federal power. We begin to be schooled in this pattern of thinking as we perceive that all of our jurisprudence of national constitutional empowerment emerges against a backdrop of acknowledged state "police" power.<sup>120</sup> Even more fundamentally, we are habituated to the thinking that federal law is created against a broad background of common-law understandings; and when we say "common law" in this context, we tend to refer, shedding our post-*Erie* positivism, to the typical law of some state, as modified by

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118. This is an "inchoate" interest, as I have elsewhere described the national interest in law "at the pre-federalized moment." Louise Weinberg, *Federal Common Law*, 83 NW. U. L. REV. 805, 816 (1989); Louise Weinberg, *The Curious Notion that the Rules of Decision Act Blocks Supreme Federal Common Law*, 83 NW. U. L. REV. 860, 871 (1989).

119. Also, because of the constitutional pressure for congruence of outcomes in both sets of courts, the choice-of-law rule that is part of the ALI Proposal on mass torts, § 6.01, however impolitic and irrational it may be, see Louise Weinberg, *Mass Torts at the Neutral Forum*, 56 ALB. L. REV. 807 (1993), if allowed to become operative in federal courts should apply in state courts as well. *Id.* at 852.

120. The Supreme Court has worked on the "assumption that the historic police powers of the States were not to be superseded by [a] Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). See, e.g., *New York State Conference of Blue Cross and Blue Shield Plans v. Travelers Ins. Co.*, 115 S. Ct. 1671, 1676 (1995); *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2617-18 (1992). It is thought to be a corollary of this presumption that the Constitution withholds "from Congress a plenary police power" that would enable Congress to enact any legislation without limit. *United States v. Lopez*, 115 S. Ct. 1624, 1631 (1995).

local statute. In admiralty cases to this day lawyers will argue that some issues should be preserved from federal governance by saying, interchangeably, that those issues are for "the common law" or "for the states."<sup>121</sup> These ingrained understandings find their nearest constitutional expression in the Tenth Amendment.

But even if one is prepared, with the current Supreme Court majority, to move toward preserving a larger residuum of state power from interference by the nation,<sup>122</sup> the Tenth Amendment is not necessarily relevant when brought to bear on the question we are considering. The Foreign Sovereign Immunities Act, and the ALI Proposal, both bring new jurisdiction to, rather than take existing jurisdiction from, the state courts.<sup>123</sup>

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121. This feeling that "the common law" is what is outside admiralty is a vestige of the traditional separation of "law" and "admiralty," *cf.* *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959), and the history in England of writs of prohibition issuing from the "common-law" courts to block admiralty courts from exercising jurisdiction over cases the "common-law" courts thought more appropriately triable to juries, under ordinary case and statute law. In this country, the argument that the nation should not intrude upon the states became linked in admiralty lawyers' minds with the conventional argument that the admiralty should not intrude upon "the common law." The reality, of course, is that federal courts sitting "in admiralty," and state courts with concurrent jurisdiction over maritime cases, 28 U.S.C. § 1333(1)—like state or federal courts sitting "at law" or "in equity"—all sit as common-law courts, deciding issues of law as they arise, in light of precedent and reason; and they apply state cases and statutes on issues governed by state law, and federal cases and statutes on issues governed by federal law.

122. The modern history of the Tenth Amendment begins with *United States v. Darby*, 312 U.S. 100, 124 (1941), in which the Supreme Court found the Amendment to be "but a truism." In *National League of Cities v. Usery*, 426 U.S. 833 (1976) (holding that Congress may not regulate the working conditions of state employees), the Supreme Court tried to breathe life back into the Tenth Amendment; but the Court overruled *Usery* in *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). Little was heard from the Tenth Amendment until *New York v. United States*, 505 U.S. 144 (1992), in which the Court acknowledged plenary federal power, *id.* at 160 (O'Connor, J.) ("Congress could, if it wished, preempt state radioactive waste regulation."), even as it struck down an act of Congress because Congress asserted its plenary power in the wrong fashion. Not until *United States v. Lopez*, 115 S. Ct. 1624 (1995) (deciding, under the Tenth Amendment, that Congress lacks power to regulate guns in schools), has there been a clear modern holding that Congress lacks Commerce power to regulate, in the perceived national interest, the market for an item in interstate commerce. While the Supreme Court has not required Congress to make justifying "findings," the Court in *Lopez* suggested that a specific congressional "finding" of impact upon interstate commerce might have shifted the result. *Id.* at 1631.

123. The reasoning here echoes the reasoning of the Supreme Court in *Panama R.R. Co. v. Johnson*, 264 U.S. 375 (1924), sustaining the constitutionality of the

To be sure, in *New York v. United States*,<sup>124</sup> the Supreme Court held under the Tenth Amendment that the nation may not "commandeer" state processes by requiring the states to legislate in the national interest.<sup>125</sup> But the Supremacy Clause has always required the states to *adjudicate* in the national interest,<sup>126</sup> and therefore, even without the explicit ex-

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Jones Act, 46 U.S.C. § 688 (1988), as conferring new jurisdiction upon the admiralty rather than simply transferring cases in admiralty to the federal-question jurisdiction.

124. 505 U.S. 144 (1992). Query whether *New York*, read for whatever bearing it may have on the question before us, suggests a Tenth Amendment limit on the power of Congress to vindicate a national interest through liabilities imposed under unfederalized and unincorporated *state law*. *New York* was a challenge to a provision of federal environmental law requiring the states to take title to undisposed-of hazardous wastes by January 1, 1996, and to become liable for any damages resulting from failure to dispose of these wastes. 42 U.S.C. §§ 2021b-2021j (Supp. 1994). But, typically, federal statutory environmental law allows recovery only of clean-up costs, which are very different from damages for lost profits or for personal injuries or death. *But see* Price-Anderson Amendments of 1988, 42 U.S.C. §§ 2104, 2273, 2282a, creating a "public liability action" for nuclear accidents. Nor can federal common law fill the gap; the Supreme Court has held that federal environmental statutes preempt federal, but not state, common-law remedies. *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981). Thus, *New York* is an implicit disapproval of national imposition upon the state or its officials of liabilities *under state law*.

Interestingly, the Court has placed the federal judiciary under analogous constraints. *E.g.*, *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984) (holding that principles of federalism bar federal courts from issuing injunctions on *state-law* theories in cases against state officials).

*New York* in this respect is at odds with *Ex parte Siebold*, 100 U.S. 371 (1879) (holding that Congress has power to enact a law regulating federal elections which in so doing provides penalties against state officials for violating state law); *Ex parte Clarke*, 100 U.S. 399 (1879) (same).

125. *New York*, 112 S. Ct. at 2428 (quoting *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 288 (1981)). Justice O'Connor, writing for the *New York* Court, reasoned that to permit the nation to commandeer state legislative processes would be to muddy the lines of political accountability. *New York*, 112 S. Ct. at 2424. But it is unclear how the Court's reasoning applies to the case on its own facts. In *New York*, the federal statute required a state unable to find a site for its hazardous wastes before 1996 to take title to the wastes and become liable for all resulting damages. 42 U.S.C. §§ 2021b-2021j (Supp. 1994). It is not clear that this "take title" provision required the state to legislate. Nor would it confuse the lines of political responsibility for the nation to act on the principle—sound, it seems to me—that in the first instance responsibility for wastes within their borders is upon the states. Moreover, far from being "commandeered" by the nation, the concerned states themselves had sought Congressional enforcement of their own interstate agreement for disposal of hazardous wastes. *New York*, 112 S. Ct. at 2435-38 (White, J., concurring in part and dissenting in part). For current commentary on *New York*, see generally the symposium on *New York* in 21 HASTINGS CONST. L.Q. (1994), including articles by Jesse Choper, Candice Hoke, and Martin Redish.

126. *F.E.R.C. v. Mississippi*, 456 U.S. 742, 760 (1982).

ception for adjudication allowed by the Court in *New York*,<sup>127</sup> the "no commandeering" rationale of that case is quite inapplicable to our problem.

As for other limitations, Article III is not a limit on the power of Congress over the state courts. The Fourteenth Amendment also becomes less relevant for the state's exercise of federal powers in cases under either the Foreign Sovereign Immunities Act or the ALI Proposal. It is Congress, not the state legislature, that creates the state jurisdiction in the Act and in the Proposal, and of course the Fourteenth Amendment is no limit on the power of Congress. We are left, rather, with the Due Process Clause of the Fifth Amendment, operative in this context in both its substantive<sup>128</sup> and procedural aspects.

In summary, when Congress in the national interest explicitly or implicitly devolves upon state courts jurisdiction even over possibly nonfederal cases, the states come under a duty to vindicate any such national interest in their courts, a duty imposed by the Supremacy Clause. The same governmental interest that supports the grant to the states of jurisdiction supports further grants to them of procedural or remedial powers. The constraints of Article III or the Tenth Amendment or the Fourteenth Amendment are not constraints upon either the nation or the states to the extent that the state courts are exercising powers conferred by Congress. The relevant constraint in this context, in state as well as federal courts, is the Due Process Clause of the Fifth Amendment.

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127. *New York*, 505 U.S. at 178, 179 (O'Connor, J.) ("Federal statutes enforceable in state courts do, in a sense, direct state judges to enforce them, but this sort of federal 'direction' of state judges is mandated by the text of the Supremacy Clause. No comparable constitutional provision authorizes Congress to command state legislatures to legislate."). Presumably a similar distinction would enable Congress to confer jurisdiction upon the states notwithstanding a hypothetical constitutional amendment prohibiting unfunded mandates. *But see* H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633 (1993) (arguing that *New York* is inconsistent with *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816) (holding that state courts must accept Supreme Court review of their final judgments on federal questions). For the argument that the Supremacy Clause "commandeers" all state actors, not only the state judiciary, see Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001, 1038-49 (1995).

128. See *infra* notes 129-46 and accompanying text.



## IV. THE NATIONAL INTEREST AND THE STATE COURTS

Of course, Congress, like the Supreme Court, is hardly likely to attempt to force state courts to try state-law cases otherwise beyond their powers. The nation could not, and as a practical matter would not, seek to accomplish such an end without some convincing reason. The nation cannot act in the absence of a clear national interest—a rational basis for the action it takes. The corollary of that proposition is that when the national interest—for example in affording due process in all courts—so requires, Congress or the courts may condition the manner in which state courts try state-law cases, and may even force trial of state-law cases upon the state courts.<sup>129</sup>

National interest is the foundation of national power<sup>130</sup> even when the national interest is only inchoate—that is, before national power has been exercised substantively in its vindication. Thus, it often happens that we must glean what the national interest is through purposive, teleological reasoning,<sup>131</sup> looking to text, history, analogous legislation, and the

129. See *supra* parts II, III.

130. See Louise Weinberg, *Federal Common Law*, 83 NW. U. L. REV. 805, 809-14 (1989) (arguing governmental "empowerment" has its source in legitimate governmental interest, as a corollary to the proposition that a government without significant interests in a matter is without power to regulate that matter).

131. The irrationalities in the lawmaking process that can come between inquiry and understanding do not affect the purposive reasoning upon which the identification of governmental interest depends. The comparative success of purposive reasoning flows from the fact that it *presumes* that the rule or statute under examination is based upon intelligible public policy. Actual legislators' choices, however confused, bought, or subversive, are not a feature of purposive reasoning. But see Courtney Simmons, *Unmasking the Rhetoric of Purpose: The Supreme Court and Legislative Compromise*, 44 EMORY L. J. 117 (1995). The presumption that intelligible public policy underlies the laws leads to the presumption that law generally should be applied and enforced. Purposive reasoning will reject only those laws for which no rational support in public policy can be hypothesized. At a more nuanced level, purposive reasoning rejects for application only those laws which, on balance, are insufficiently supported by reason, on the particular facts. It is true that, without taking countervailing interests into account (or by taking only countervailing interests into account, or by taking into account only the interests of those in power), judges can manipulate purposive reasoning. But so also can they manipulate intentionalist reasoning by relying on selected legislative history, or by focusing on expressions of individual legislators' motives. So also can judges manipulate textualist reasoning by subordinating the purposes of legislation to its "clear" language, or by consulting selected old dictionaries. See generally Richard J. Pierce, Jr., *The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749 (1995). It is an old Realist insight that no method of reasoning can save us from the predilections of judges. That is why judges are politically appointed, or elected outright. But purposive reasoning, which seeks an understanding of the mischiefs a rule is

analogous opinions of courts and writers. Moreover, a conclusion about the national interest is likely to be convincing only after balancing the perceived interest against equally inchoate countervailing policies.<sup>132</sup>

The importance of a finding of national interest before an assertion of national power<sup>133</sup> in what I have elsewhere called "the pre-federalized moment,"<sup>134</sup> needs to be emphasized. Indeed, it more accurately describes cases not yet decided to say that it is policy, rather than law, that decides them. What is "supreme" under Article VI is national policy rather than federal law. It is a *federal view* of the issues that the Supremacy Clause will compel. To put this another way, under the Supremacy Clause federal law is supreme where it applies even when there is no preexisting federal law.<sup>135</sup>

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meant to control, and an evaluation of the rule's current policy supports and limits, is probably the method that better invites salient debate among lawyers and judges.

For general studies in theories of rational choice as they apply to legislation, see DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE* (1991); Philip P. Frickey, *Constitutional Structure, Public Choice, and Public Law*, 12 INT'L REV. L. & ECON. 163 (1992); Edward L. Rubin, *Beyond Public Choice: Comprehensive Rationality in the Writing and Reading of Statutes*, 66 N.Y.U. L. REV. 1 (1991); Herbert Hovenkamp, *Legislation, Well-Being, and Public Choice*, 57 U. CHI. L. REV. 63 (1990); William N. Eskridge, Jr., *Politics without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275 (1988). On irrationality in the legislative process in the context of complex litigation, see Charles G. Geyh, *Complex-Litigation Reform and the Legislative Process*, 10 REV. LITIG. 401 (1991) (discussing the failure of the well-received proposals for mass accident contained in H.R. 3406, 101st Cong., 1st Sess. ["the Kastenmeier Bill"]).

132. Notwithstanding the usefulness of Justice O'Connor's interest-balancing opinion in *Mesa v. California*, 489 U.S. 121 (1989), *infra* part VI.B, I sympathize with Justice Scalia's conviction that "balancing" is not very doable. See, e.g., *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888 (1988):

Having evaluated the interests on both sides as roughly as this, the Court then proceeds to judge which is more important. This process is ordinarily called 'balancing,' *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), but the scale analogy is not really appropriate, since the interests on both sides are incommensurate. It is more like judging whether a particular line is longer than a particular rock is heavy.

*Id.* at 897 (Scalia, J., concurring); see Stephen E. Gottlieb, *The Paradox of Balancing Significant Interests*, 45 HASTINGS L.J. 825 (1994); Richard H. Pildes, *Avoiding Balancing: The Role of Exclusionary Reasons in Constitutional Law*, 45 HASTINGS L.J. 711 (1994).

133. See, e.g., *United States v. Lopez*, 115 S. Ct. 1624, 1631 (1995) (suggesting the helpfulness of a legislative "finding" of national interest when Congress purports to assert its Commerce power to ban the possession of guns within 1,000 feet of a school).

134. Weinberg, *Federal Common Law*, *supra* note 118, at 816.

135. See, e.g., *Southern Pac. Co. v. Jensen*, 244 U.S. 205 (1917), in which

Where Congress has legislated, or the Supreme Court has fashioned a body of jurisprudence, the subject already has been federalized. The legitimacy of the federalization remains dependent on the finding of a national interest or interests that justify the exercise of lawmaking power.<sup>136</sup> The Supreme Court has long recognized that the presumptive power of a sovereign is co-extensive with the sovereign's sphere of interest.<sup>137</sup> Whether the Justices reason under the Commerce Clause,<sup>138</sup> the Due Process Clause,<sup>139</sup> the Equal Protection Clause,<sup>140</sup> the Contract Clause,<sup>141</sup> or the Full Faith and Credit

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federal law was held to preempt a state statute even though there was no applicable federal rule or statute at the time. For examples of the fashioning of a federal common-law rule for a case from identified national policy, see *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

136. As the powers of Congress have been read more and more expansively, federalization has become increasingly controversial. See the symposium on federalization at 44 DEPAUL L. REV. 1995, including Linda S. Mullenix, *Mass Tort Litigation and the Dilemma of Federalization*, 44 DEPAUL L. REV. 755, 755 (1995).

137. For Supreme Court discussion of the power of a state, sometimes referred to as its "police power," when measured against federal limitations, see *Maine v. Taylor*, 477 U.S. 131 (1986) (sustaining under the Commerce Clause a state ban on the importation of live baitfish, as within legitimate state governmental purposes, relying on *Berman v. Parker*, 348 U.S. 26 (1954)); *Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984) (sustaining under the First Amendment an ordinance prohibiting the posting of signs on public property, as within legitimate state governmental purposes, relying on *Berman* and *United States v. O'Brien*, 391 U.S. 367 (1968)); *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229 (1984) (sustaining under the Fourteenth Amendment's Due Process Clause a state land-use law as within legitimate state governmental purposes, also relying on *Berman*). See Weinberg, *Federal Common Law*, *supra* note 118, at 809-14.

138. *United States v. Lopez*, 115 S. Ct. 1624, 1659 (1995) (Breyer, J., dissenting) (disagreeing with the Court's holding that Congress lacks Commerce power on regulate guns in schools in view of the national interest in the safe education of the workforce); *South Carolina Highway Dep't v. Barnwell Bros.*, 303 U.S. 177 (1938) (explaining that, notwithstanding the Commerce Clause's implied limitation on state laws affecting interstate commerce, the states retain "police power" over matters of local policy concern).

139. *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981) (holding under the Due Process Clause that the state to which a widow executrix has moved after the death of her husband has power to declare the value of the proceeds of his insurance policy; explaining that this contact, at least when combined with the defendant insurer's business presence in the state and other such contacts, generated sufficient governmental interest in the state to ensure that application of its law to that issue was neither arbitrary nor fundamentally unfair).

140. *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938) (explaining that generally a state may make classifications for which there is a rational basis in its legitimate governmental interests).

141. *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934) (explaining that a state must have power to regulate contracts when its legitimate governmental interests so require, notwithstanding the Contracts Clause).

Clause,<sup>142</sup> the requirement remains constant. A sovereign has presumptive governmental power if it has a governmental interest. It is the sovereign's governmental interest that the Court refers to when it finds the "rational basis" that enables a law to survive minimal constitutional scrutiny.<sup>143</sup>

This threshold of power, when it is the power of a state, is sometimes referred to as the state's "police power." The "police power" might be thought a concept that is exclusively described as a residuum of general power belonging to the states; and, to be sure, it is widely understood that the Constitution does not confer on the nation a general "police power."<sup>144</sup> But to the extent this understanding is sound, it is only because national interests and the interests of a particular state are different things. In the presence of a national interest the nation can and does act even in matters traditionally governed by the states. I am arguing at a higher level of generality that the true source of state power is analytically the *same* as the true source of federal power: both powers find their source in legitimate governmental interest. It is true that where Virginia's interest ends its power ends; but obviously that is no obstacle to the accomplishment of the interests Virginia does have. In just the same way, it is true that where the national interest ends the power of the nation ends; but obviously that is no obstacle to the accomplishment of the interests the nation does have.

Whether the sovereign is a state or the nation, in every case the lineaments of empowerment are the same.<sup>145</sup> Law

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142. *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493 (1939) (explaining that the state where a worker is injured has a legitimate governmental interest in furnishing a remedy to the worker and holding that that state may do so; rejecting the argument that the Full Faith and Credit Clause requires application of the law of the state where the employment contract was made, even when that state's law vests exclusive jurisdiction over such cases in the contract state's own workers' compensation board).

143. I pass over as beyond the scope of this article so-called "intermediate" scrutiny, under which the Supreme Court tests for governmental interests that are stronger than those having merely a basis in reason, and so-called "strict" scrutiny, under which the Court requires a compelling governmental interest.

144. *United States v. Lopez*, 115 S. Ct. 1624, 1631 (1995).

145. See *supra* notes 137-42. Thus, in *Lopez*, the Court held that Congress lacked Commerce power to ban the possession of guns in schools because it found insufficient national interest in so doing, at least in the absence of specific "findings" by Congress of the impact of the subject on interstate commerce. If indeed national interest was insufficient, an application of the statute would also violate the Due Process Clause of the Fifth Amendment. If the reader believes that in

that emanates from a sovereign without a governmental interest will be arbitrary and irrational, and in this country will violate the most basic principle of substantive due process. We would no more let stand a Pennsylvania conviction of a Pennsylvania defendant for embezzlement, if the embezzler were tried under the laws of Alaska because Alaska comes before Pennsylvania in the alphabet, than we would let stand that Pennsylvania conviction if obtained on evidence relevant not to the alleged embezzlement, but to an unrelated burglary because burglary comes before embezzlement in the alphabet. Law without a basis in reason is no law at all, and law outside the legitimate governmental concerns of the sovereign from which it emanates is no law at all. What I am saying is that those whose claims or defenses are adjudicated in American courts have a due process right to relevant law. That must be true whether the issue is one of state law or federal law. We have to treat the source of presumptive power of the nation, as well as of a state, as an identified legitimate governmental interest.

So, for example, the question whether Congress has power to vest jurisdiction in state courts over multistate mass torts cannot be answered definitively by searching the Constitution for some expressly delegated power. Even if there was a mass tort clause in Article I and even if it mentioned state courts it would not be conclusive. The answer to the question whether Congress may vest jurisdiction over mass torts in state courts, in the particular case, can be answered only with reference to the national interest on the particular facts. Of course, Congress has no more power than is necessary and proper to provide for our "general welfare"—"We, the people of the United States."<sup>146</sup>

Similarly, the existence of textual constitutional constraints upon the exercise of national power cannot give us a definitive answer in a particular case. Rather, the answer in each case will be found by consulting the national interest, and such limiting or countervailing interests as we can glean from available materials.

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*Lopez* Congress did not exceed its Commerce powers, it is precisely because the reader does not find a prohibition of guns in schools to be beyond the sphere of legitimate national governmental interest.

146. U.S. CONST. preamble.

This is the true usefulness of authoritative legal texts. It is a characteristic of the lawyer's analysis that an inquiry into governmental interest invites inquiry into analogical materials. Although the common law is, above all, an exercise in reason, lawyers and judges like to find some piece of authoritative text, or some historical practice, the existence of which suggests the nature of the underlying policy that might usefully extend to the issue before them. So, for example, when the Supreme Court federalized state law affecting the foreign relations of the United States, the Court sought justification in the fragments of constitutional text lodging foreign relations powers in the political branches.<sup>147</sup> And so, when the Supreme Court authorized judicial federal lawmaking in maritime cases of wrongful death, it suggested that courts in future cases glean national policy on the issues presented in those cases from such suggestions of national policy as could be inferred from preexisting analogous acts of Congress.<sup>148</sup> Sometimes the Court suggests that in fashioning federal common law, courts should refer to analogous preexisting cases.<sup>149</sup>

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147. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964) (even though the "act of state doctrine" is not found in the Constitution of the United States, it does have "'constitutional' underpinnings").

148. See *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 406 (1970) (recognizing a new federal common-law action for wrongful death; suggesting that judges fashioning new rules of decision for such cases consult the policies underlying analogous federal wrongful death statutes). Interestingly, Justice Harlan was the author of both *Sabbatino* and *Moragne*. See also *Textile Workers Union of America v. Lincoln Mills*, 353 U.S. 448 (1957):

We conclude that the substantive law to apply in suits under § 301(a) is federal law, which the courts must fashion from the policy of our national labor laws. The Labor Management Relations Act expressly furnishes some substantive law . . . . Other problems will lie in the penumbra of express statutory mandates. Some will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy . . . . Any state law applied . . . will be absorbed as federal law and will not be an independent source of private rights.

*Id.* at 456-57 (Douglas, J.) (citations omitted).

149. *E.g.*, *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943):

In absence of an applicable act of Congress it is for the federal courts to fashion the governing rule of law . . . . [W]hile the federal law merchant, developed for about a century under the regime of *Swift v. Tyson*, represented general commercial law rather than a choice of a federal rule designed to protect a federal right, it nevertheless stands as a convenient source of reference for fashioning federal rules applicable to these federal questions.

*Id.* at 367 (Douglas, J.) (citations omitted).

There is plenty of textual authorization, if that is what is wanted, for Congress to devolve jurisdiction in both sets of courts, over such currently unfederalized matters as mass tort. There is the Commerce power,<sup>150</sup> the Fourteenth Amendment power over due process in the state courts—including Congress's power under Section 5; Congress's powers over federal courts in the Tribunals Clause of Article I and in Article III; and (by parity of reasoning from the Fourteenth Amendment) in whatever powers may flow from the Fifth Amendment Due Process Clause. Depending upon what is sought to be accomplished, there may be other more specific sources of power.<sup>151</sup>

Certainly members of Congress have assumed that there is national power adequate to the vindication of national interests in mass torts, to continue with that example. Bill after bill has been introduced that, if enacted, would have federalized the substantive law of—for example—products liability, in whole or in part, preempting or limiting state power.<sup>152</sup> And of course Congress continually enacts regulatory legislation with potential impact upon state-law tort duties.<sup>153</sup> Congress long ago

150. *Cf. F.E.R.C. v. Mississippi*, 456 U.S. 742, 760 (1982) (holding that Congress has Commerce power to implement federal law in state tribunals; referring to claims "analogous" to federal claims).

151. Setting to one side for the moment the subject of jurisdiction, suppose, for example, that Congress seeks to enact uniform interstate choice-of-law rules. The various powers of Congress to enact such rules would include whatever power is conferred under the Full Faith and Credit Clause of Article IV, which explicitly grants to Congress the power to determine in what way the "acts," as well as "records" and "proceedings" of one state are to be given full faith and credit in another. U.S. CONST. art. IV, § 1. Congress has recently exercised these powers in an attempt to assist the states in administering family law. Parental Kidnapping Act of 1980, 28 U.S.C. § 1738(a) (1988) (furnishing a rule of decision for the recognition of state custody decrees in another state); *cf. Thompson v. Thompson*, 484 U.S. 174 (1988) (holding that § 1738(a) is only a rule of decision and does not confer original jurisdiction upon federal courts).

152. See Common Sense Legal Reform Act of 1995, H.R. 10, 104th Cong., 1st Sess. (Jan. 4, 1995). At the time of this writing the substance of this bill has been divided among several more specific proposals, including the Common Sense Product Liability and Legal Reform Act, H.R. 917, 104th Cong., 1st Sess. (Feb. 13, 1995). For commentary critical of these proposals, see Carl Tobias, *Common Sense and Other Legal Reforms*, 48 VAND. L. REV. 699 (1995). Earlier proposals include Fairness in Products Liability Act of 1993, H.R. 1910, 103d Cong., 1st Sess. (1993); Product Liability Reform Act of 1990, S. 1400, 101st Cong., 2d Sess. (1990); Uniform Product Liability Act of 1989, H.R. 1636, 101st Cong., 1st Sess. (1989); and Lawsuit Reform Act of 1989, S. 1100, 101st Cong., 1st Sess. (1989).

153. *E.g.*, Children's Bicycle Helmet Safety Act of 1994, 15 U.S.C. §§ 6001-06 (Supp. 1995); Aging Aircraft Safety Act of 1991, 49 U.S.C. § 1421 (Supp. 1993); the Highway Safety Act of 1991, 23 U.S.C. §§ 401-03, 410 (Supp. 1993); the Consumer

used part of its power over multistate tort even in cases involving only individual accident rather than mass disaster, for example, to address the tort duties of railroads as employers in interstate commerce.<sup>154</sup>

The pressure for federalization of mass torts is particularly strong. Widespread but disuniform state tort reforms, coupled with equally widespread state abandonment of uniform choice-of-law rules, has made rational administration of these cases a remote dream. The difficulty is compounded by federal choice-of-law rules<sup>155</sup> and other impediments to mass adjudication.<sup>156</sup> Congress appears to be at a permanent impasse when

Product Safety Improvement Act of 1990, 15 U.S.C. §§ 1193-94 & *passim*; the Hotel and Motel Fire Safety Act of 1990, 5 U.S.C. § 5707, 15 U.S.C. §§ 2201, 2203, 2224-25 (Supp. 1993).

154. See Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (1988).

155. For consolidated and transferred cases in federal courts, the federal common law of choice of law makes the mass disaster virtually unadministrable. *Van Dusen v. Barrack*, 376 U.S. 612 (1964), requires that in a state-law case transferred under § 1404(a) on motion of the defendant, the federal transferee court apply the whole law of the transferor court's state, including its choice rules. *Van Dusen* as a practical matter is applied in most transfer situations. The effect on consolidated mass litigation is to require an individual choice of law under the separate choice-of-law approach of each transferor forum state, for each issue in the case.

Similarly, for the class suit in state courts, *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), requires choosing applicable law under the choice-of-law approach of a concerned jurisdiction for each issue in the case. It is not clear how *Shutts* impacts upon federal courts administering state-law cases, since the Fifth Amendment Due Process Clause requires contacts with the nation rather than the state, and we do not know whether in state-law cases the Fifth Amendment incorporates the Fourteenth. With regard to the difficulties presented by *Shutts* in state courts, see *Duvall v. T.R.W., Inc.*, 578 N.E.2d 556, 561 (Ohio Ct. App. 1991) (holding that a class should not have been certified in a product liability case involving a defective truck steering mechanism, since the difficulties of choosing law would create "enormous case management problems").

With regard to the difficulties *Van Dusen* imposes on federal courts, see *In re San Juan DuPont Plaza Hotel Fire Litig.*, 745 F. Supp. 79, 81 (D. P.R. 1990) ("In this type of litigation, the application of choice of law standards turns into a colossal struggle for the transferee court . . ."). In *In re Agent Orange Prod. Liab. Litig.*, 580 F. Supp. 690 (E.D.N.Y. 1984), Judge Weinstein famously managed to appear simultaneously to follow *Van Dusen* while evading it, inventing a "national consensus law" which all concerned states "would" apply. But in the recent interesting case of *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995), Judge Posner thought that "Esperanto law" could not apply to all issues in a class case, and ruled, over a strong dissent, that class certification should be denied in a multistate case in part because the jury would be instructed under negligence standards applied by no particular state. *Id.* at 1300.

156. In federal courts, over and above such impediments to federal complex litigation as the class action rule itself presents, Supreme Court decisions have severely limited the utility of federal courts to plaintiffs seeking class treatment.



it comes to federalizing comprehensive substantive law for these cases; but in such circumstances it might be politically more feasible for Congress to vest jurisdiction over mass torts concurrently in federal and state courts, without substantively federalizing mass torts. Whatever the national interests that would justify substantive federalization of mass torts, the same interests are likely to justify the vesting of jurisdiction in federal and even state courts without federalizing mass torts.

Although it is widely recognized that there is a national interest in finding a way to deliver health services to the people of the United States, and although Congress might try to impose some tort reforms upon medical malpractice litigation, it would be at least controversial to say that Congress has power to federalize the tort of medical malpractice. But mass tort presents a much easier case for federalization than tort law generally. That is true even when mass injuries are localized rather than dispersed; innumerable presidential declarations and emergency appropriations by Congress reflect the understanding that a single state can suffer a national disaster.

So, assuming authorization, the issue, rather, is the existence of any national interest in federalizing mass tort liability, or at least the litigation of mass tort liability. If Congress were comprehensively to federalize multistate tort cases substantively, the fundamental purposes of the legislation presumably would have to do with enforcing national goals of safety in the interstate transportation networks and in the national market for products; in the fairness and integrity of national markets for securities or services; and in the safety of air and water. These fundamental policies are not merely the policies underly-

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*Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974) (notice must be sent at the named plaintiff's expense to all reasonably identifiable members of the class in a class action for damages under Federal Rule 23(b)(3)); *Zahn v. International Paper Co.*, 414 U.S. 291 (1973) (each member of the plaintiff class in a diversity action under Federal Rule 23(b)(3) must meet the statutory jurisdictional amount); *Snyder v. Harris*, 394 U.S. 332 (1969) (in a diversity class action, claims of the class may not be aggregated in determining the existence of the statutory jurisdictional amount); see *supra* note 33. But see *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921) (diversity of citizenship between the defendant and the named representative of the class is sufficient to ground diversity jurisdiction regardless of the citizenship of absentee class members). Beyond these rulings there is the common understanding in both federal and state courts that cases of mass personal injury are unsuitable for class certification because they have a tendency to present individual claims too valuable to be precluded by class judgments.

ing tort law generally, but are true national policies reflecting national concerns about the potential impact on the nation's markets of any declining confidence in their safety, fairness, or integrity that might result from impeded access to effective courts when those markets have a failure.

The existence of a national interest in the efficacy of justice in such cases does not delete these more fundamental substantive concerns; rather, the need for effective litigation arises, precisely, from the substantive national interests in the safety, fairness, and integrity of interstate markets. Of course countervailing enterprise- and development-protecting interests might justify Congress in including so-called "tort reform" measures to constrain mass tort litigation or alter its ground rules.

In sum, whatever national interests support the federalization of mass tort liabilities will be attended by interests that would furnish at least part of the case for the federalization of litigation of mass tort liabilities.

## V. OTHER SOURCES OF POWER

We have been considering the role of the national interest in empowering Congress to "confer" original jurisdiction upon state courts over a class of cases likely to arise under law that is not federal law. In this Part we will briefly consider possible alternative theories of power. My intention is not to show that alternative theories are not helpful, but rather to demonstrate that better theory is available. The Ptolemaic theory that the sun and the planets moved around the earth was wonderfully useful; but when Galileo saw the phases of Venus in his little telescope he knew for once and for all what he had long suspected: the Copernican theory was better. The system revolved around the sun, not the earth. It was the earth that moved.<sup>157</sup>

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157. "All the same, it moves (*E pur si muove*)," Galileo is said to have muttered after the Roman Inquisition permitted him to recant his Copernican heresies in exchange for a sentence of life under house arrest. Three and a third centuries later, when asked how he felt after undergoing hip surgery, Pope John Paul II said, "But see, it moves." *Gannett News Services* (LEXIS), Sept. 16, 1995.

At the prompting of my able editors I should acknowledge the limitations of my metaphor. Copernicus's theory was "better" than Ptolemy's only in the sense that it was more directly and simply descriptive of reality. Both theories were only Aristotelian metaphysics. For theory with explanatory power the world had to wait for Newton. But I do stick up for Galileo, who by himself made the world "move" by beginning to do real science. Anyway I am deeply gratified by the suggestion

*A. The Irrelevance of Constitutional Text**1. Article I*

It is not a question of finding some express delegation in Article I or elsewhere in the Constitution. If Congress enacted an explicit grant of jurisdiction to the state courts over a subject exclusively governed by state law, we would be skeptical enough to question the jurisdiction even if Congress explicitly relied upon any of its several more-or-less express constitutional powers over the state courts. As we have seen, there is plenty of textual authorization, surely. There is the commerce power. There is the Tribunals Clause of Article I. There is the Fourteenth Amendment power over due process in the state courts, notably including the explicit grant of power to Congress under section 5. Under one or another of these Congress arguably could purport to vest jurisdiction in the state courts quite freely, and we would still question the constitutionality of a particular grant as applied to a case arising exclusively under state law. We would feel that something more than a piece of constitutional text is needed.

It helps enormously, of course, if Congress in granting jurisdiction can rely upon some more substantive power: its power over foreign relations in the case of the Foreign Sovereign Immunities Act;<sup>158</sup> its powers over national markets and national disasters in the case of the ALI Proposal. Congress's substantive powers are helpful not because constitutional text delegating or implying those powers will satisfy our minds, but because the acknowledgment of national power in some authoritative text is evidence of the likely national interest that gave rise to it. But even when the Constitution makes a national power explicit, we read meaning into the delegation only to the extent we can understand it as a reflection of some existing national concern. Only when we see that a matter is within the sphere of national governmental interest will we be satisfied that there is national power to govern it.

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that the argument of this paper is Newtonian rather than Copernican.

158. See *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 492-93 (1983) (justifying jurisdiction on the basis of the foreign relations and international commerce powers of Congress).

## 2. Article III

If we move on to the context of *federal* jurisdiction over state-law questions,<sup>159</sup> perhaps we can see more clearly the inadequacy of constitutional text, without more, to legitimize an exercise of power, including a grant of jurisdiction to courts. For this purpose and for the separate purposes of the remaining Parts of this article, discussion from this point on will deal with cases on federal, rather than on state, jurisdiction. But this discussion of federal jurisdiction will remain relevant to the inquiry into state jurisdiction with which we began; the focus will be on cases in which Congress has granted concurrent jurisdiction over the subject matter.

The question becomes, then, what is the relevance of Article III to what has been said thus far?

For background here it will be necessary for me to touch upon the classic case of *Osborn v. Bank of the United States*.<sup>160</sup> That case, together with *Planters' Bank of Georgia*,<sup>161</sup> its companion case, traditionally is remembered<sup>162</sup> as

159. Implicitly assuming that the "arising under" powers of Article III are insufficient to justify grants of federal jurisdiction over mass torts, earlier commentators recommended expansive readings of the "diversity" powers. The leading article is Thomas D. Rowe, Jr. & Kenneth D. Sibley, *Beyond Diversity: Federal Multiparty, Multiforum Jurisdiction*, 135 U. PA. L. REV. 7 (1986).

160. 22 U.S. (9 Wheat.) 738 (1824).

161. *Bank of the United States v. Planters' Bank of Ga.*, 22 U.S. (9 Wheat.) 904 (1824). The problem of federal jurisdiction over an ordinary state-law action on the contract was actually presented not in *Osborn*, but in this companion case. *Osborn* nevertheless is the case conventionally cited for the proposition that Congress has Article III power to grant federal courts jurisdiction over cases arising under state law, if the defendant is a national instrumentality, since its capacity to sue or be sued is a federal-law "ingredient" of a case by or against the instrumentality.

162. *Osborn* itself was an action by a branch of the Bank in Ohio to restrain collection of an unconstitutional Ohio tax. As such it clearly was within the broad Article III powers of federal courts, at least under modern understandings that a claim for an injunction must state a cause of action. See Justice Harlan's post-*Erie* flash of insight about federal equitable remedial rights in *Bivens v. Six Unknown Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 400 (1971) (Harlan, J., concurring) ("However broad a federal court's discretion concerning equitable remedies, it is absolutely clear—at least after *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938)—that in a nondiversity suit a federal court's power to grant even equitable relief depends on the presence of a substantive right derived from federal law.").

The reasoning behind the broad construction of Article III is that the Supreme Court must have Article III appellate power over a federal question, even when that question is a narrow sub-issue in a case. Thus, there is Article III jurisdiction over a state-law tort action alleging negligence *per se*, when the statutory violation grounding the *per se* allegation is a violation of a federal statute. Cf. *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804 (1986), pointing out that an alle-

deciding per Chief Justice Marshall that an ordinary state-law action on a contract by a federal instrumentality "arises under" federal law for purposes of satisfying Article III.

There are two separate messages one might glean from *Osborn*. Either all suits involving federal instrumentalities "arise under," a possibility to which I shall return later, or cases "arise under" when they include some "ingredient" of federal law, notwithstanding that on the merits the rights of the parties are exclusively determinable under state law. In *Osborn*, the federal "ingredient" was the issue of the Bank's capacity to sue.<sup>163</sup> The act of Congress establishing the Bank gave it capacity to sue. Chief Justice Marshall's theory of Article III jurisdiction was that the federal issue of the Bank's juridical capacity was a sufficient basis to hold that a case by a branch of the Bank "arises under" federal law for purposes of Article III.

Chief Justice Marshall's "ingredient" theory of Article III jurisdiction is seductive when one sees, with him, that the Supreme Court must have power to review any federal question, even one that, at the time of filing of the complaint, arises only potentially, perhaps by way of defense, even in a state-law case, even in state court. Thus, Chief Justice Marshall reasoned, federal trial courts must have the same broad Article III power. Dissenting in *Osborn*, Justice Johnson complained that *Osborn* trashes Article III as a limiting principle; virtually any state-law claim potentially raises some federal question.<sup>164</sup> Perhaps for this reason, *Osborn's* "ingredient" theory of Article III jurisdiction was not very prominent in our thinking until, in 1982, the Supreme Court surprised the lower courts<sup>165</sup> by

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gation of a federal statutory violation sufficient to raise a rebuttable presumption of negligence under state law is a question "arising under" federal law, an "ingredient" that under art. III might give the Supreme Court the power of review, *id.* at 807, but distinguishing the case at bar because federal statutory "arising under" jurisdiction is narrower and must arise on the face of the well-pleaded complaint; noting, further, that there is no federal cause of action for a violation of the Federal Food, Drug, and Cosmetic Act. *Id.* at 811.

163. *Osborn*, 22 U.S. (9 Wheat.) at 822, 824.

164. *Id.* at 875 (Johnson, J., dissenting) ("[I]n all such cases, there is not only a possibility, but a probability, that a question may arise, involving the constitutionality, construction, &c. of a law of the United States. If the circumstance, that the questions which the case involves, are to determine its character, whether those questions be made in the case or not, then every case . . . may as well be transferred to the jurisdiction of the United States, as those to which this Bank is a party").

165. 461 U.S. 480 (1983) (reversing the Court of Appeals for the Second Cir-

dredging it up from the distant past. The case was *Verlinden v. Central Bank of Nigeria*.<sup>166</sup>

*Verlinden* was a case under the Foreign Sovereign Immunities Act, and that statute, as we have seen, contemplates state as well as federal jurisdiction, subject to removal.<sup>167</sup> The Article III problem in *Verlinden* was that the statute provides for liability in tort or contract under the law which would have determined liability had the defendant been a private person.<sup>168</sup> Thus, under the Act, the ordinary expectation is that state or foreign law will determine liability. In *Verlinden*, the Supreme Court laid it down that cases under the Foreign Sovereign Immunities Act nevertheless "arise under" federal law within the meaning of Article III.<sup>169</sup> Citing *Osborn*, Chief Justice Burger reasoned, for the *Verlinden* Court, that the immunity of a defendant sovereign is an "ingredient" of federal law that must be decided "at the outset" of every case.<sup>170</sup>

As an "ingredient theory" case, *Verlinden* in fact makes more sense than *Osborn*. One would suppose that *stare decisis* would establish the juridical capacity of a plaintiff branch of the Bank of the United States after the first case brought by that branch. But the immunity of a defendant sovereign in an action under the Foreign Sovereign Immunities Act involves an

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cuit). For an earlier critique of the Second Circuit's position, see Note, *Subject Matter Jurisdiction and the Foreign Sovereign Immunities Act of 1976*, 68 VA. L. REV. 893 (1982).

166. 461 U.S. 480 (1983).

167. 28 U.S.C. § 1441(d) (1988).

168. 28 U.S.C. § 1606 provides:

[T]he foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but . . . except for an agency or instrumentality thereof shall not be liable for punitive damages . . . . [I]f, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages . . . .

*Id.* (emphases added). These provisions of the Foreign Sovereign Immunities Act are construed as intending that federal law *not* apply. Cf. *First Nat'l City Bank v. Banco para el Comercio Exterior de Cuba*, 462 U.S. 611, 622 n.11 (1983) (O'Connor, J.) (explaining that, although federal common law must govern threshold statutory issues such as the amenability of a particular governmental instrumentality to suit, the liability of a statutory defendant is not to be determined under federal law but rather under the law of the state or nation where the act or omission occurred). These provisions of the Foreign Sovereign Immunities Act substantially parallel the language of the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2674 (1988), as amended.

169. *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983).

170. *Id.* at 492, 493 (Burger, C.J.).

inquiry specific to the facts of the particular case,<sup>171</sup> and in every case would have to be established under the statute's complex standards.<sup>172</sup> The national interest in assuring defendant sovereigns in this country that they will be held liable only for their nongovernmental acts is advanced by the express provision that those same federal standards of immunity will govern in both sets of courts.<sup>173</sup>

Just the same, *Verlinden* remains unconvincing. A glimpse at the facts will help to explain why. *Verlinden* arose when Nigeria could not continue to take deliveries of vast quantities of cement for which its agents had contracted. The Nigerian authorities notified sellers and factors that they would not accept further deliveries of cement. One of the cement owners, Verlinden, a Dutch company, decided to bring suit in this country. Numerous other Nigerian cement claims were pending here as well.<sup>174</sup> This exercise in shopping for effective courts was encouraged by the then recent Foreign Sovereign Immunities Act of 1976, since the statute makes commercial disputes against foreign sovereigns, if arising out of non-governmental activities,<sup>175</sup> triable in this country.

But the statute also requires that the alleged activities occur here or have direct effects here.<sup>176</sup> To the Dutch company this meant that it needed to connect its case somehow with American territory. There was only one such connection: Under the terms of Verlinden's contract with Nigeria, Nigeria had placed a letter of credit on deposit with a New York bank. So Verlinden framed its claim—at bottom a simple action for

171. Under the Act, a defendant sovereign is amenable to ordinary tort suits only if the activity giving rise to the suit was commercial activity conducted in this country or having direct effects in this country. 28 U.S.C. § 1605(a)(2).

172. The mechanistic argument might be made that Verlinden's "ingredient" theory could sustain federal "arising under" jurisdiction over mass torts in complex litigation, since at the "outset" of every case, federal requirements for transfer and consolidation would have to be met. The argument seems unsound. It is hard to see how limits upon the exercise of federal jurisdiction can be construed as grounding federal jurisdiction.

173. *Verlinden*, 461 U.S. at 488; 28 U.S.C. § 1604. Similarly, the Immunities Act's limitation of liability to compensatory damages only in personal-injury and death cases is applicable in both sets of courts. 28 U.S.C. §§ 1604, 1606.

174. See *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 310-13 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982).

175. The statute is intended to codify the "restrictive" view of sovereign immunity, opening a foreign sovereign to suit only for its nongovernmental wrongs. *Verlinden*, 461 U.S. at 487-88; 28 U.S.C. § 1602.

176. 28 U.S.C. § 1605(a)(2).

breach of contract obviously governed by either Nigerian or Dutch law—as one for anticipatory breach of Nigeria's letter of credit.

This piece of smart pleading should not be allowed to confuse the issue. The letter of credit was incidental to the agreement of the parties, as was the state of New York and the temporary deposit of a letter of credit in a bank there. Even if the deposit somehow enabled New York to pick up an interest in governance of this dispute,<sup>177</sup> the United States itself had about as much interest in it as you do.

Seeing those facts, I think what we feel wanting in *Verlinden* has little to do with Article III. What we feel wanting is a convincing argument from the national interest. We want to see what national interest justifies a federal district court in asserting statutory jurisdiction over a case that depends for substantive governance on the law of contracts of either Holland or Nigeria, when neither party is an American, and none of the events relevant to the agreement or breach has occurred in this country.<sup>178</sup>

### B. *The Relevance of Nexus*

Although *Verlinden* leaves the database after the Supreme Court's decision, the inevitable question arises whether—had the parties continued their struggle on remand—even the *statutory* requirements of the Foreign Sovereign Immunities Act would have been met. In order to ground a finding of sovereign immunity under the statute, Nigeria would have had to show only that its refusal to accept *Verlinden's* cement did not have direct effects in the United States in order to win a quick dismissal under the statute.<sup>179</sup> It is true that in the *Weltover*

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177. See, e.g., the much-criticized casebook classic, *In re Jones's Estate*, 182 N.W. 227 (Iowa 1921) (applying Iowa law, on the strength of a temporary deposit of the decedent's funds at an Iowa bank, to be paid to him on his return to the country of his birth, to a dispute between two Welsh claimants over the estate of an intestate decedent who went down with the Lusitania).

178. See *Verlinden*, 647 F.2d 320 (2d Cir. 1981).

179. 28 U.S.C. § 1330(a) (1988). Under the Act, "sovereign immunity is an affirmative defense that must be specially pleaded," H.R. Rep. No. 94-1487 at 17. Nevertheless, as the Supreme Court pointed out in *Verlinden*, 461 U.S. at 493-94 & n.20, subject-matter jurisdiction under the Act "turns on the existence of an exception to foreign sovereign immunity. 28 U.S.C. § 1330(a). Accordingly, even if the foreign state does not enter an appearance to assert an immunity defense, a district court still must determine that immunity is unavailable under the Act."



case<sup>180</sup> the Court held that the statute's requirement of "direct effects" was not a requirement of "substantial" or "foreseeable" effects; but the Court did hold that the statutory effects must be the "immediate consequence of defendant's activity."<sup>181</sup> Moreover, *Weltover* arose on very different facts from those of *Verlinden*. *Weltover* was a dispute over the restructuring of the very debt that was represented by the bonds payable in this country. It was not about supply and delivery of foreign goods abroad for foreign purposes.<sup>182</sup> In other words, the Federal Sovereign Immunities Act requires a *nexus* between the case and the United States.<sup>183</sup>

When American law requires a nexus between the forum and the case before it, the purpose of the requirement is to help ensure the reasonableness of an assertion of forum power—to avoid arbitrary or irrational governance.<sup>184</sup> But surely the Constitution requires non-arbitrary, rational governance as a matter of due process. The Due Process Clauses of the Fifth and Fourteenth Amendments protect respectively against irrational assertions of federal or state power. The point is to weed out governance that is so irrelevant as to amount to a denial of due process. As the Supreme Court puts this test of substantive due process in the context of state legislative power under the Fourteenth Amendment, the state must have a contact or contacts with the facts of a case, generating a governmental interest or interests, such that governance by the state on those

180. *Republic of Argentina v. Weltover*, 504 U.S. 607 (1992).

181. *Id.* at 618.

182. The place of performance of a contract may well be an interested sovereign in an action on the contract; as Brainerd Currie once remarked, a contract to dance naked in the streets of Rome cannot be performed without reference to the laws of Rome.

183. 28 U.S.C. § 1605 provides, in pertinent part:

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the states in any case—

...

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States . . . .

184. *Cf.* the Administrative Procedure Act, 5 U.S.C. §§ 702, 706(2)(A) (providing federal judicial review over federal agency action that is "arbitrary and capricious.")

facts will be neither arbitrary nor fundamentally unfair.<sup>185</sup> This fundamental requirement of reasonableness, under whatever constitutional language it is imposed, and however it is expressed, is as applicable to federal<sup>186</sup> as to state assertions of governmental power.<sup>187</sup>

Once we internalize this very basic premise, it becomes easier to see what has been missing from the cases and much of the commentary on the powers of Congress over the subject-

185. I am paraphrasing the test laid down in *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 313 (1981), and repeated in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985). The line of thinking goes back at least to *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930) (holding under the Due Process Clause of the Fourteenth Amendment that a state may not govern a contract case if it is without significant contacts with the contract or the parties).

For an interesting recent elaboration of nexus requirements in the context of the power to tax, see *Barclays Bank v. Franchise Tax Bd.*, 114 S. Ct. 2268, 2286 (1994) (sustaining under the Fourteenth Amendment Due Process Clause California's worldwide combined reporting requirement for calculation of its corporate franchise tax where taxpayers had an adequate nexus with the State. That is, the tax was fairly apportioned, nondiscriminatory, fairly related to the services provided by the State, and its imposition did not inevitably result in multiple taxation).

186. *Cf.*, e.g., *Chapman v. United States*, 500 U.S. 453, 465 (1991) (sustaining the constitutionality of a federal mandatory minimum penalty for distribution of LSD imposed under the Anti-Drug Abuse Act of 1986, in part on the ground that "Congress had a rational basis for its choice of penalties for LSD distribution"). The classic cases are *Williamson v. Lee Optical, Inc.*, 348 U.S. 483, 488 (1955); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 147, 151-54 (1938) (Stone, J.) (sustaining an act of Congress under various due process challenges; stating that "regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators").

187. See *supra* note 186; *cf.* *United States v. Lopez*, 115 S. Ct. 1624 (1995) (striking down under the Commerce Clause, as without rational basis, the Gun-Free School Zones Act of 1990, which forbids "any individual knowingly to possess a firearm at a place that [he] knows . . . is a school zone," 18 U.S.C. § 922(q)(1)(A)).

But even these modern-era precedents which have expanded congressional power under the Commerce Clause confirm that this power is subject to outer limits . . . . Since that time, the Court has heeded that warning and undertaken to decide whether a rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce.

*Id.* at 1628-29 (Rehnquist, C.J.) (citations omitted); see also *id.* at 1653 (Souter, J., dissenting) ("In due process litigation, the Court's statement of a rational basis test came quickly. . . . The parallel formulation of the Commerce Clause test came later. . . .") (citations omitted); *id.* at 1758 (Breyer, J., dissenting) ("Courts must give Congress a degree of leeway in determining the existence of a significant factual connection between the regulated activity and interstate commerce . . . . The traditional words 'rational basis' capture this leeway.").

matter jurisdiction of courts. If the assertion rings hollow to you that Congress can give jurisdiction to courts over state-law cases over which those courts otherwise would not have had jurisdiction, it is because it is too bald an assertion. What is wanting is a convincing argument from the national interest.

We would like to see a rational basis for the act of Congress. We would like to see a nexus between a particular case in which the conferred jurisdiction is challenged, and the particular goals Congress is trying to achieve by conferring the particular jurisdiction. If the holding in *Verlinden*, notwithstanding the obvious inevitability of some sort of "ingredient" theory of Article III, remains unconvincing to us, it is not because *Verlinden* does not contain a federal ingredient, or because that federal ingredient is insufficient to fall within the "arising under" language of Article III as interpreted in *Osborn*, but rather because we do not see any national interest in the taking of jurisdiction in *Verlinden*. The fact that Article III, without more, has been sufficient to preserve federal courts from jurisdiction over innumerable cases outside the national interest is a happy incident of the adroitness of the Framers, but it should not be allowed to obscure the necessity of identifying a national interest to justify application of an act of Congress, including an act of Congress conferring jurisdiction. As cases within the concurrent jurisdiction of state courts show, that question is one that can and must be isolated from Article III.<sup>188</sup>

### C. A Useful Hypothetical

Recall that under the Foreign Sovereign Immunities Act there is concurrent jurisdiction over cases like *Verlinden* in both state and federal courts. Suppose that the Dutch seller, for unknown tactical reasons, files its suit in New York in the state court, and that, also for unknown tactical reasons, Nigeria makes no attempt to remove the case to federal court.

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188. For similar perspectives expressed almost two centuries apart, compare *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 871 (Johnson, J., dissenting) ("[T]he present act [states], 'in all State Courts having competent jurisdiction, and in any Circuit Court of the United States.' . . . But . . . the clause could not have been intended to enlarge the jurisdiction of the State Courts, and therefore could not have been intended to enlarge that of the federal Courts.") with *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 790 (D.C. Cir. 1984) (Edwards, J., concurring) (complaining that Judge Bork's concurrence "*completely overlooks* the jurisdiction of the state courts").

Instead, Nigeria moves to dismiss, challenging the constitutionality of the jurisdictional grant by Congress on the facts of the particular case. Nigeria argues that Congress lacks power to subject it to jurisdiction in this country when this country has no significant contact with the case.

We do know that, as an initial proposition,<sup>189</sup> under the Supremacy Clause the state court must take the federal case,<sup>190</sup> if the jurisdictional grant is constitutional as applied

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189. The exceptions to the duty of state courts to adjudicate federal claims are only procedural or otherwise off the merits. This follows in part from the fact that defenses on the merits fall at once, under the Supremacy Clause. The further thinking behind the procedural exception is that federal law takes the state courts as it finds them. The theory is that nothing in federal law requires states to build courts; thus, even if a state has courts, it is obliged to enforce federal law only insofar as its own jurisdictional and procedural law permits. Hence the doctrine of the "otherwise valid excuse," under which it is held that a state that would dismiss an analogous state-law claim on procedural grounds may similarly dismiss a federal claim. *Douglas v. New York, N.H. & H.R.R.*, 279 U.S. 377, 387-88 (1929).

This thinking is flawed, as I have tried to show elsewhere. See my widely ignored Louise Weinberg, *The Federal-State Conflict of Laws: "Actual" Conflicts*, 70 TEX. L. REV. 1743, 1773-76 (1992); see also S. Candice Hoke, *Transcending Conventional Supremacy: A Reconstruction of the Supremacy Clause*, 24 CONN. L. REV. 829, 879-80 (1992) (arguing that the Supremacy Clause serves as a toggle, switching supremacy on when issues become federalized, and that Supreme Court doctrines in excess of this only produce confusion). For one thing, there is no courtless state. For another, the Supremacy Clause arguably does require a state to have courts. For a third, once we see the force of federal supremacy on the merits, of necessity we begin to see the force of federal supremacy over state procedures that might affect outcomes on the merits. *E.g.*, *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 238 (1969) (Douglas, J.) ("[The] federal [equitable] remedy for the protection of a federal right is available in the state court, if that court is empowered to grant injunctive relief generally . . . ."); *Dice v. Akron, Canton & Youngstown R.R. Co.*, 342 U.S. 359 (1952) (holding that a state must afford trial by jury in a case under the Federal Employers' Liability Act even on an issue deemed unsuitable for the jury under state standards). Thus, I question the cases holding that a state should be permitted to dismiss a federal case for forum non conveniens, even if the federal courts would not. See, *e.g.*, *Missouri ex rel. S. Ry. Co. v. Mayfield*, 340 U.S. 1 (1950); *Douglas v. New York, N.H. & H.R.R.*, 279 U.S. 377, 387-88 (1929). What I am saying is that it does not matter to their obligation to try federal cases whether or not the state courts have tried similar state-law cases.

It is a very different question whether a state should be permitted to try a case that federal courts would dismiss. *E.g.*, *American Dredging Co. v. Miller*, 114 S. Ct. 981 (1994) (holding in an admiralty case that federal law on forum non conveniens does not preempt state law not recognizing that doctrine). Indeed, a state court is under special obligation to try a federal claim in the absence of a federal forum. This may be as much a matter of due process, see *supra* note 8, as a matter of supremacy, see *supra* notes 109-11 and accompanying text.

190. *Testa v. Katt*, 330 U.S. 386, 387 (1947) (holding that a state must adjudicate a federal statutory claim when Congress grants jurisdiction to "any court of competent jurisdiction"); see also *Howlett v. Rose*, 496 U.S. 356 (1990) (holding that a state court may not immunize from suit under federal civil-rights law a defen-

in the particular case. But is the jurisdictional grant to state courts constitutional in cases like this hypothetical variant of *Verlinden*? If not, what can save it in the real *Verlinden*? Even if you think New York might have some rational basis of its own for trying the case, the question is whether *Congress* has a rational basis for requiring a court in this country to hear *Verlinden*'s case. In thinking about the power of Congress in our hypothetical case, obviously nothing in Article III, and nothing in the analysis in *Verlinden*, can help us to answer it. We see this at once, as an obvious fact, without any of the usual confusion, because state courts are not Article III courts. But that means that this same constitutional question about the power of Congress was never answered in *Verlinden*.

I am saying that the power of Congress to grant federal jurisdiction must be controlled at a deeper level than Article III by concepts of substantive due process.

## VI. REASONING FROM THE NATIONAL INTEREST

### A. *The Example of Verlinden*

What was the national interest, if any, in taking jurisdiction over *Verlinden*? The answer to that question depends on the reasons for the Foreign Sovereign Immunities Act. When granting jurisdiction, just as when enacting substantive legislation, Congress must provide for "the general Welfare"<sup>191</sup> of "the People of the United States."<sup>192</sup> In cases like *Verlinden*, Congress could do so by creating a forum for the enforcement of contracts Americans may enter into with any foreign sovereign anywhere;<sup>193</sup> or, for the enforcement of the contracts with foreign sovereigns of those foreigners whom we welcome to the

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dant not immune under federal law).

191. "We start from the settled proposition that the subject-matter jurisdiction of the lower federal courts is determined by Congress 'in the exact degrees and character which to Congress may seem proper for the public good.'" *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 433 (1989) (quoting *Cary v. Curtis*, 44 U.S. (3 How.) 236, 245 (1845)).

192. U.S. CONST. preamble.

193. The House Report refers to the growing number of disputes between "American citizens" and foreign states, and expresses the desire to ensure "our citizens . . . access to the courts." H.R. Rep. No. 94-1487 at 6. *See, e.g., Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 310-13 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982) (finding the statutory requirement of "direct effects" in this country, 28 U.S.C. § 1605(a)(2) (1988), to be satisfied in a case similar to *Verlinden* except that the plaintiff was an American cement supplier).

United States to make or perform those contracts.<sup>194</sup> Of course all law has limits. For reasons of foreign policy, Congress also would seek in creating such forums to ensure that they are well-regulated forums. Congress would want to protect foreign sovereigns from excessive litigation, or litigation giving the appearance of local bias, or litigation under disuniform standards of sovereign immunity.<sup>195</sup> In accordance with these purposes, the Foreign Sovereign Immunities Act codifies the "commercial activities" exception to the common-law doctrine of sovereign immunity;<sup>196</sup> confers jurisdiction upon both federal and state courts;<sup>197</sup> provides world-wide service of process;<sup>198</sup> provides for removal by the defendant sovereign;<sup>199</sup> and provides a single uniform standard of sovereign immunity applicable in all courts.<sup>200</sup> But Congress could not constitutionally have created, and did not intend to create, an international court of claims in cases in which the nation had no interest at all.<sup>201</sup>

A shorthand way of describing the difference the statute makes would be to say that it opens the foreign sovereign to some of the liabilities a private person might be subject to in our courts in similar circumstances. It is very hard, then, to say that we should construe the statute to subject a foreign sovereign to suit in a case in which we would subject *no* private

194. The statute limits its otherwise seemingly universal coverage to cases having substantial contact with the United States. See 28 U.S.C. § 1605.

195. *Verlinden*, 461 U.S. at 492 (1983) (describing the defendant-protective interests of Congress).

196. 28 U.S.C. §§ 1605, 1607.

197. 28 U.S.C. § 1330 (vesting federal courts with original jurisdiction not exclusive in terms over cases against foreign sovereigns); § 1441(d) (vesting federal courts with removal jurisdiction over cases against foreign sovereigns that are first filed in state courts); § 1605 (creating uniform standards of immunity applicable in both federal and state courts).

198. 28 U.S.C. § 1608.

199. 28 U.S.C. § 1441(d).

200. 28 U.S.C. §§ 1604-05, 1607; *Verlinden*, 461 U.S. at 489.

201. Congress was aware of concern that "our courts [might be] turned into small 'international courts of claims' . . . open . . . to all comers to litigate any dispute which any private party may have with a foreign state anywhere in the world...." Congress protected against this danger not by restricting the class of potential plaintiffs, but rather by enacting substantive provisions requiring some form of substantial contact with the United States.

*Verlinden*, 461 U.S. at 490 (quoting Testimony, Bruno A. Ristau, Hearings, Subcomm. on Administrative Law and Governmental Relations., House Judiciary Comm., 94th Cong., 2d Sess. 31 (1976); referring to 28 U.S.C. § 1605).

person to suit in our courts in similar circumstances. The national interests that support provision of a well-regulated forum for certain suits against foreign sovereigns by Americans wherever the parties transacted, or by foreigners transacting here, *cannot* support the provision of a forum, however well-regulated, for foreigners' suits here against foreign governments, even over disputes arising out of nongovernmental activities, when those activities are conducted abroad and have no direct effects within this country. And if the private defendant without a significant contact with this country is protected from having to submit to its governance, then the foreign sovereign must be similarly protected. At a minimum both must be protected by the basic substantive due process guarantee against arbitrary or unreasonable assertions of governmental power.

Against this background, it becomes evident that *Verlinden* was wrongly decided on its facts. Jurisdiction in that case was unsustainable, as we have seen, under the statute itself, for want of the nexus with the United States that Congress required. And for the same reason jurisdiction was unsustainable under the Due Process Clause of the Fifth Amendment, even if it was sustainable under Article III. Whether or not the *Verlinden* Court "correctly" found Article III jurisdiction will not help us over the difficulty—one of substantive due process—that a court in this country could not exercise any sort of jurisdiction over *Verlinden* that would not be arbitrary and irrational.

### B. Justice O'Connor Tries Her Hand

In the post-*Verlinden* Article III cases we can see the Supreme Court struggling toward some such recognition of the need to identify a national interest to justify an assertion of national power.

The background here also traces back to *Osborn*, but it follows the other strand of thinking for which *Osborn* is cited; that cases against *federal agents or instrumentalities* "arise under" for Article III purposes. In 1885, in the *Pacific Railroad Removal Cases*,<sup>202</sup> the Supreme Court had even extended this latter reading of *Osborn* to cover federally chartered railroad stock companies. But thirty years later, in 1915, Congress

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202. 115 U.S. 1 (1885).

partially overrode that view, requiring, at least in the case of a railroad, that the United States own at least half the capital stock.<sup>203</sup>

Despite the narrowness of this legislation, it had the effect of putting the "agents-or-instrumentalities" reading of *Osborn* under a cloud, much as the alternative "ingredient" reading of *Osborn* had been before *Verlinden* breathed new life into it in 1983. In 1989 the Supreme Court gave the agents-or-instrumentalities theory what one might have supposed to be its coup de grâce. The case was *Mesa v. California*.<sup>204</sup>

*Mesa* should have been a somewhat easier case for federal jurisdiction than *Verlinden*, to the extent that the statute invoked in *Mesa* seemed explicitly to support federal jurisdiction,<sup>205</sup> unlike the jurisdictional statute in *Verlinden*. But in *Mesa*, the Supreme Court came close to holding that if there is no national interest justifying an exercise of jurisdiction on the particular facts, clear statutory language under explicit constitutional authority will not save it.

*Mesa* began in state criminal prosecutions against two truck drivers working for the United States postal service. One of the drivers in the course of her government employment had negligently caused the death of a bicyclist and was charged with misdemeanor manslaughter. The other driver, within the course of his employment, had collided with a police car, and was charged with speeding. Both defendants removed to federal court under the federal officer-removal statute.<sup>206</sup> Notwith-

203. Act of 1915, ch. 22, § 5, 38 Stat. 803-04 (codified at 28 U.S.C. § 1349 (1988)).

204. 489 U.S. 121 (1989).

205. This was the federal officer-removal statute, 28 U.S.C. § 1442(a).

206. The statute provides:

(a) A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office . . . .

*Id.* The purpose of § 1441(a) and its various predecessor statutes was to protect federal officials from state courts in which locals might be hostile—not to the federal officer as such, but rather to the federal governmental function the officer was performing at the time of the alleged wrong or crime. Federal officer removal was first authorized to deal with local hostility to what would come to be called federal "revenueurs." In 1815, during a time of deep resentment in the New England states against federal duties, and against the embargo on trade with England, Congress enacted a temporary measure providing for removal of cases against federal cus-



standing the clear language of the officer-removal statute, the Court of Appeals ordered the case remanded.<sup>207</sup> In the Supreme Court, the drivers, of course, needed to argue that there was federal jurisdiction. For this purpose they relied on the agents-or-instrumentalities reading of *Osborn v. Bank of the United States*.<sup>208</sup> The state argued, against this, that *Osborn* should not be read to authorize federal removal mechanically whenever the state criminal defendant happened to be a federal agent. Although Article III's "arising under" clause—the state argued—extends federal judicial power to every issue of national interest, there simply was no national interest in furnishing a federal forum for the state's prosecution of these two drivers.

Arguably *Osborn's* "ingredient" theory also was available to the drivers in *Mesa*. There is a threshold issue of federal law in every such case: whether a defendant federal employee's alleged tort occurred when she was acting in the course of her employment as a federal officer. This is also certainly an issue in every case under the Federal Tort Claims Act, both before and after the Westfall Act of 1988.<sup>209</sup>

That this is so after the Act can be seen in *Gutierrez de Martinez v. Lamagno*.<sup>210</sup> Recall that in *Lamagno* the Court

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toms officials. In one form or another this jurisdiction was available for the duration of the War of 1812. In 1833, as hostility to federal revenue collection was intensifying secessionist pressures in South Carolina, Congress provided for federal removal of state prosecutions against federal revenue officials. In *Tennessee v. Davis*, 100 U.S. 257 (1879), the Supreme Court sustained the constitutionality of federal officer removal in a case in which the defendant revenueur had killed a citizen of the state in the course of confiscating an illegal distillery. In the wake of the Civil War, the hostility of southern courts to federal officials performing duties under the Reconstruction Acts led to the more general precursors of § 1441(a).

The *Mesa* Court saw, citing *Maryland v. Soper* (No. 2), 270 U.S. 36, 43-44 (1926), that the purpose of the statute, narrowly construed, was to protect, not federal officers as such, but rather their federal functions. *Mesa*, 489 U.S. at 127-28. Nevertheless the Court assumed the statutory purposes to encompass protection for a federal official attempting to assert a federal defense even in today's state courts—in most of which the constitutional presumption of local bias, seen in Article III's provision of diversity jurisdiction, might be thought fanciful.

For pre-*Mesa* discussion of earlier jurisprudence, see Kenneth S. Rosenblatt, *Removal of Criminal Prosecutions of Federal Officials: Returning to the Original Intent of Congress*, 28 SANTA CLARA L. REV. 21 (1989).

207. *California v. Mesa*, 813 F.2d 960 (9th Cir. 1987).

208. 22 U.S. (9 Wheat.) 738, 823 (1824).

209. Federal Employees Liability Reform and Tort Compensation Act of 1988 (commonly known as the Westfall Act), Pub. L. 100-694, 102 Stat. 4563-67; see *supra* notes 41-46, 66-69 and accompanying text.

210. 115 S. Ct. 2227 (1995) (Ginsburg, J.) (holding judicially reviewable an

held judicially reviewable, in Federal Tort Claims Act cases, the Attorney General's certification that an employee was acting within the scope of her employment at the time of the alleged tort.<sup>211</sup> Justice Ginsburg wrote the opinion for the *Lamagno* Court. In a part of her *Lamagno* opinion for a plurality only,<sup>212</sup> Justice Ginsburg also used this "ingredient" argument in support of Article III jurisdiction in considering a much more difficult question under Article III, a devil of a problem that, in *Lamagno*, was only hypothetical. By sustaining judicial review of the scope-of-employment issue, the Court had, in effect, given federal courts exclusive jurisdiction of unremandable removed claims which might, in fact, not be federal at all. The federal court reviewing the Attorney General's certification might hold it erroneous—that is, hold that the employee was *not* acting within the scope of her federal employment at the time of the alleged tort. Before and after the Westfall Act that case is clearly an ordinary state-law tort case and is governed by state law operating of its own force. Under the Act, such a case belongs in the exclusive jurisdiction of the state court. If a federal court holds that the Attorney General's scope-of-employment certification was in error, the United States cannot remain substituted as defendant, any more than it could have been substituted as defendant had the Attorney General refused to certify scope of employment in the first place. In this hypothesized federal case, the employee must be restored as party defendant, and must stay on in federal court and defend alone, in an unremandable case governed by state law.

Justice Ginsburg reached the question whether such federal jurisdiction could be sustained as "arising under" federal law for purposes of Article III. For the plurality, she reasoned that the threshold question in every case under the Act—whether the federal employee was within the scope of her federal employment—was a federal question within the meaning of *Verlinden* and *Osborn*. This federal question was sufficient at least to bring the case into federal court, and "considerations of judicial economy, convenience and fairness to litigants" were sufficient to keep it there even after a judicial determination

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administrative determination of the issue of scope-of-employment in a case brought under the Federal Tort Claims Act as amended by the Westfall Act in 1988).

211. *Id.* at 2228.

212. *Id.* at 2236-37.

that the employee was *not* acting within the scope of her employment.<sup>213</sup> Thus, the plurality opinion in *Lamagno* furnishes some support for the "ingredient" theory in a case removed by a federal employee.

In *Mesa*, in the different setting of the general officer-removal statute, the Government did not make an ingredient-theory argument. The Supreme Court roundly rejected the agents-or-instrumentalities argument the Government did make, affirming the judgment of the Court of Appeals. Justice O'Connor, writing for the unanimous *Mesa* Court, thought it immaterial that these defendants happened to be federal officials falling within the literal language of the statutory jurisdictional grant. What concerned her was the want of national interest in removing the case.<sup>214</sup> Even if there were some national party-protective interest, it would have to be balanced against the considerable costs removal would impose upon the prosecution, and against the strong federal policy disfavoring federal interference with state criminal proceedings.<sup>215</sup> On balance the national interest was insufficient.<sup>216</sup> Justice O'Connor thought that at a minimum the defendant must plead some federal defense. But she also suggested that removal might have been warranted if the post office drivers could have alleged local hostility to federal officials or to their partic-

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213. *Id.* at 2237. Justice Souter, for the four dissenting Justices in *Lamagno*, took strong issue with the plurality's reasoning, calling it circular. *Id.* at 2240 (Souter, J., dissenting) (arguing that the plurality's reasoning was "tantamount to saying the authority to determine whether a Court has jurisdiction over the cause of action supplies the very jurisdiction that is subject to challenge").

214. *Mesa v. California*, 489 U.S. 121, 136 (1989).

215. *Id.* at 137-38. Notwithstanding the *Mesa* Court's emphasis on the costs removal imposes on state prosecutors, *id.* at 137-38, those costs are sufficiently lower than the costs imposed by a federal injunction suit based on the same federal defense to warrant access to federal courts in removed cases but not in injunction suits. *Cf. Younger v. Harris*, 401 U.S. 37 (1971) (barring federal injunctions interfering with pending state criminal proceedings). A removed criminal case can proceed intact in the federal court. But a federal action in equity in which a preliminary injunction has issued will adjudicate the federal question only, and the state prosecutor will be enjoined from trying the criminal case at all.

216. *Mesa*, 489 U.S. at 137-38 (O'Connor, J.):

[W]e do not recognize any federal interests that are not protected by limiting removal to situations in which a federal defense is alleged. In these prosecutions, no state court hostility or interference has even been alleged by petitioners and we can discern no federal interest in potentially forcing local district attorneys to choose between prosecuting traffic violations hundreds of miles from the municipality in which the violations occurred or abandoning those prosecutions.

ular function.<sup>217</sup> In *Mesa*, in sum, an overt interest analysis is all the content Article III holds. Under Article III, the Court in *Mesa* simply attempted to discern a reasonable basis for the lower court's removal jurisdiction and found none.

### C. Justice Souter Loses the Thread

#### 1. Red Cross and capacity clauses

Consider, now, the very different analysis in the 1992 *American National Red Cross* case.<sup>218</sup> There, a recipient of a blood transfusion brought an action against the Red Cross to recover for an AIDS infection allegedly caused by contaminated blood. The Red Cross, a federally chartered corporation,<sup>219</sup> removed. Its charter gives the Red Cross the power "to sue and be sued in courts of law and equity, State or Federal, within the jurisdiction of the United States."<sup>220</sup> The Court of Appeals held that insofar as the statute purported to give federal courts jurisdiction over this state-law personal-injuries case without regard to the citizenship of the parties, the statute was unconstitutional under Article III.<sup>221</sup>

The Supreme Court reversed, 5:4. Justice Souter's opinion for the Court literalistically held, among other things, that "a congressional charter's 'sue-and-be-sued' provision may be read to confer federal court jurisdiction if, but only if, it specifically mentions the federal courts."<sup>222</sup> Justice Scalia wrote a prolix

217. One might have supposed that *Mesa* overrules *The Pacific Railroad Removal Cases*, 115 U.S. 1 (1885), insofar as those cases read *Osborn* as authorizing removal by federal agents or instrumentalities even in the absence of a national interest in the merits. The *Pacific Railroad Removal Cases* retain some scope beyond the ambit of 28 U.S.C. § 1349 (1988) (limiting federal removal jurisdiction over federally chartered railroads to companies in which the United States owns over half the stock). But if *Mesa* did kill the agents-or-instrumentalities theory, the Court was shortly to breathe life back into it. See *American Nat'l Red Cross v. S.G. & A.E.*, 505 U.S. 247 (1992).

218. *American Nat'l Red Cross v. S.G. & A.E.*, 505 U.S. 247 (1992). For interesting commentary on *American Nat'l Red Cross*, see Lorretta Shaw, *A Comprehensive Theory of Protective Jurisdiction: The Missing "Ingredient" of "Arising Under" Jurisdiction*, 61 *FORDHAM L. REV.* 1235 (1993).

219. 36 U.S.C. §§ 1-17.

220. 36 U.S.C. § 2.

221. *S.G. & A.E. v. American Nat'l Red Cross*, 938 F.2d 1494 (1st Cir. 1991).

222. *American Nat'l Red Cross*, 505 U.S. at 255. This is an astonishing remark, and not only for its literalism. Although I read Justice Souter here as talking only about the sufficiency of the language that will achieve a vesting of jurisdiction, an over-enthusiastic reader might take him to be saying that explicit language is the only condition on the power of Congress, and that all it takes is

and heated dissent focusing on the literalism of this wing of Justice Souter's opinion, charging the majority with construing law by "magic words,"<sup>223</sup> but ironically bringing little further to the problem before the Court than a different, more doctrinal reading of the same text. Justice O'Connor, the author of *Mesa*, joined in Justice Scalia's dissent; but one wishes she had dissented separately to give us the sort of rational analysis she had deployed in *Mesa*.

## 2. Red Cross and agents-or-instrumentalities

Justice Souter did not rely on the language of the capacity clause alone. He thought the case controlled by *Osborn*, reading *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."<sup>224</sup> He argued that "Congress has surely been entitled to rely" on *Osborn* and the long line of cases under it, and that *Red Cross* gave the Court "no reason to contemplate overruling" *Osborn*.<sup>225</sup>

This wing of *Red Cross* might seem particularly at odds with *Mesa*. But tucked away in a footnote is the special problem Justice Souter was trying to solve.<sup>226</sup> Congress had modified *Osborn*'s agents-or-instrumentalities rationale, at least for federally chartered railroad stock companies.<sup>227</sup> Justice Souter agreed with the Court of Appeals that this legislation had implications that were at least unclear for organizations like the Red Cross that do not have stockholders. Indeed, this legislation had put the agents-or-instrumentalities reading of

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explicit language to give Congress power to trump the limits of Article III. Only three Justices have ever been found willing to say that Article I can trump Article III in cases not arising under federal law. *Nat'l Mut. Ins. Co. v. Tidewater Transfer Co.*, 333 U.S. 860 (1948) (Jackson, J., for the plurality, joined only by Justices Black and Burton) (arguing that Congress has Article I power to vest diversity jurisdiction in federal courts over cases in which a citizen of the District of Columbia is a party).

223. Justice Scalia argued that the Court had disregarded the "natural reading" of a capacity clause referring generically to all courts. *American Nat'l Red Cross*, 505 U.S. at 265 (Scalia, J., dissenting).

224. *Id.* at 264 (Souter, J.).

225. *Id.* at 265.

226. *Id.* at 251 n.2.

227. See 28 U.S.C. § 1349 (limiting federal removal jurisdiction over federally chartered railroads to companies in which the United States owns over half the stock; overriding to that extent *The Pacific Railroad Removal Cases*, 115 U.S. 1 (1885)).

*Osborn* under a cloud in the lower courts ever since it was enacted.<sup>228</sup>

In *Red Cross*, then, the Court is telling the country that *Osborn's* agents-or-instrumentalities theory is alive and well. That is an intelligible holding. But if there is Article III "arising under" jurisdiction over federally chartered corporations, it ought to exist *whether or not* the chartering statute mentions "federal courts" explicitly. On the other hand, Chief Justice Marshall had relied on explicit statutory language to sustain jurisdiction in *Osborn*,<sup>229</sup> and one can swallow this on the thinking that the Supreme Court can require Congress to speak clearly. It may be appropriate to give narrow readings to Article III. But were it not for Justice Scalia's lengthy dissent on the "magic words" issue, the reader might forget all about it. Justice Souter fairly drops the issue after raising it, and his thundering peroration on the continuing vitality of *Osborn* never specifically mentions the supposed clear-statement requirement.<sup>230</sup>

### 3. *Red Cross and the federal "ingredient"*

By now a further question might be troubling the reader. Why did the *Red Cross* Court finesse *Osborn's* "ingredient" theory? The "sue-and-be-sued" clause in *Red Cross* so plainly invited the "ingredient" rationale. Under *Osborn*, Justice Souter could have used the capacity clause not as a piece of clear language, but rather to furnish a federal "ingredient," the threshold federal issue of the Red Cross's capacity. Of course by now the juridical capacity of the Red Cross is not a real issue, but the Bank's juridical capacity presented an equally unreal issue in *Osborn*. As long as the Court was prepared to rely on *Osborn*, why not rely on it whole hog?

Justice Souter shrugged off this possibility at the outset of his analysis. At the time when the sue-and-be-sued clause was included in the Red Cross charter, he said, Congress did not have to include it *to ensure jurisdiction*; the Red Cross already was within federal jurisdiction under the decisional law then applicable because it was a federal instrumentality.<sup>231</sup> Yet by

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228. Lower federal courts were divided on the effect of § 1349 in litigation specifically against the Red Cross. *American Nat'l Red Cross*, 505 U.S. at 250 n.1.

229. 22 U.S. (9 Wheat.) at 818 (distinguishing an earlier case on this ground).

230. *American Nat'l Red Cross*, 505 U.S. at 264-65.

231. *Id.* at 251 (citing the Pacific Railroad Removal Cases, 115 U.S. 1 (1885)).

analogy to *Verlinden's* sovereign-immunity "ingredient" and *Osborn's* capacity "ingredient," the capacity "ingredient" in *Red Cross* seemingly should have been enough for Article III jurisdiction, whether or not Justice Souter is right that Congress thought there would be jurisdiction even without the sue-and-be-sued clause.

What really stood in the way, we may speculate, was *Mesa*. When I say this I do not mean to refer to the implicit federal "ingredient" in *Mesa*. Recall that in that case, federal post office drivers sought to remove their state criminal prosecutions to federal court. In holding that there was no jurisdiction under Article III, the Government did not argue, and the Court did not deal with, the federal threshold issue of scope-of-employment in every such case. As the Government saw, it was the true difficulty of the position that scope of employment might not be enough. Any national interest in taking jurisdiction would have to overcome the countervailing national interests Justice O'Connor identified in *Mesa*.<sup>232</sup> As the 1995 *Lamagno* case<sup>233</sup> makes plain, only four of the current Justices<sup>234</sup> might be prepared to open federal courts to state-law tort cases against federal employees on mere allegations that the tort occurred while the defendant was acting within the scope of federal employment.

When I say that *Mesa* stood in the way in *Red Cross*, I mean, simply, that a federal party-protective policy failed to justify jurisdiction in *Mesa*, but seems to do so in *Red Cross*. Yet nothing in *Red Cross* confronts *Mesa* explicitly. Rather, it appears that a majority of the Justices thought that cases against the Red Cross must come within federal jurisdiction anyway—but no majority could be found to overrule *Mesa*

232. See *supra* notes 204-08, 214-17 and accompanying text.

233. *Gutierrez de Martinez v. Lamagno*, 115 S. Ct. 2227 (1995); see *supra* notes 44-46, 65-69, 210-13 and accompanying text.

234. In *Lamagno*, Justice O'Connor concurred separately to distance herself from the Court on the point, maintaining the consistency of her position in *Mesa*. She disagreed with Justice Ginsburg's opinion that exclusive federal jurisdiction would be constitutionally authorized in a state-law case irrevocably removed under the Federal Tort Claims Act even after it was ascertained that the case did not fall within the scope of the Act. *Lamagno*, 115 S. Ct. at 2227 (O'Connor, J., concurring). Thus, on this issue Justice Ginsburg's opinion for the Court becomes a plurality opinion only.

It should be noted as well that Justice Ginsburg's *Lamagno* opinion does not rely solely on an "ingredient" rationale. She buttresses her conclusion under Article III with arguments about ancillary jurisdiction and efficiency.

overtly. To be blunt about it, Red Cross is an intellectual mud-dle.

#### 4. *A better analysis*

Whatever national interest supports the chartering of a federal entity like the Red Cross might very well support the furnishing of a federal forum for suits by or against that federal entity. In *Red Cross*, the question about national interest needed to be asked. To the extent the Article III jurisdiction in *Red Cross* is a party-protective jurisdiction, *Red Cross*, like *Verlinden*, is a modern refutation of Justice Frankfurter's view that the diversity grant exhausts the national interest in providing unbiased forums for litigation of nonfederal matters.<sup>235</sup>

Reasoning purposively for ourselves, we can speculate that in 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 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 juridical capacity and furnishing it with the option of a federal forum.

These identifiable national interests are what sustain the jurisdiction in *Red Cross*, not the wording of the statute, or Congress's entitlement to rely upon *Osborn*. A jurisdictional statute vindicating national policies will be within the presumptive power of Congress even if it contains no express language about federal courts but simply gives jurisdiction to "any competent court."<sup>236</sup> After all, we have seen the other side of this coin. If there is no national interest in furnishing a federal forum, no weight need be given even to express language purporting to do so, as *Mesa* holds. This suggests not merely that a

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235. *Textile Workers Union of Am. v. Lincoln Mills*, 353 U.S. 448, 475 (1957) (Frankfurter, J., dissenting):

The theory [of protective jurisdiction] must have as its sole justification a belief in the inadequacy of state tribunals in determining state law. The Constitution reflects such a belief in the specific situation within which the Diversity Clause was confined. The intention to remedy such supposed defects was exhausted in this provision of Article III.

236. The example that comes immediately to mind is the Emergency Price Control Act of 1942, 56 Stat. 34, as amended, 58 Stat. 632, 640, the basis of the Rhode Island court's jurisdiction in *Testa v. Katt*, 330 U.S. 386 (1947).



rational basis is a threshold condition of Article III jurisdiction, but even that Article III is satisfied when there is a rational basis for a grant of federal jurisdiction.

## VII. PROBLEMS OF RAW JURISDICTIONAL POWER

In this section I will press on and take the view that the test of national interest, without more, should satisfy Article III. This position raises the question whether a federal case can "arise under" a rationally-based but purely jurisdictional grant.

This issue comes up for the most part in cases questioning the Article I power of Congress to confer jurisdiction upon federal courts within the limits of Article III. By continuing to refer our inquiry to the state courts as well, we become better equipped to deal with the classic Article III problem of federal courts, because we begin to see a way of generalizing it.

I think we are beginning to see that the effective, however generous, measure of constitutional jurisdiction over state-law cases in either set of courts is the presence of a national interest in affording the particular jurisdiction.

Interestingly, it is a real plus for the power of Congress even over state courts that a given case within the ambit of national policy does "arise under" federal law in some sense, even under law that is only jurisdictional. The interest directly generates the power. Once the power is exercised, even if only by an allowance of jurisdiction to the state courts, the states come under the obligations imposed upon them by the Supremacy Clause. The limits of national interest are also the first limits on national power.

But the power of Congress over *federal* courts seems to present a harder question. We have nearly two centuries of debate on the extent to which Article III stands in the way of Congress. We have come to suppose that federal jurisdiction cannot *constitutionally* "arise under" a purely jurisdictional statute.<sup>237</sup> Fortunately, Congress is generally able to confer federal jurisdiction when the national interest so requires, because it is usually possible to argue that some substantive policy underlies and explains what appears to be at first blush a purely jurisdictional national interest. When Congress confers jurisdiction over unfederalized cases, I would also argue

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237. See *infra* note 253.

that inchoate national substantive policy, not embodied in law, may and often does empower Congress to do so.<sup>238</sup>

But it should not be necessary for Congress to manifest its substantive concerns in substantive law in order to grant jurisdiction within the meaning of Article III. Indeed, let me inch out a bit further on this hitherto-unoccupied limb to suggest that there also may be national policies which are wholly jurisdictional in nature and which may also empower Congress. The widely-held view endorsed by the Court in *Mesa*<sup>239</sup> and *Verlinden*<sup>240</sup>—that federal jurisdiction cannot constitutionally “arise under” a purely jurisdictional statute—is a fallacy.

#### A. *The Party-Protective Paradox*

At this point a most intriguing paradox presents itself. If we try to suppose that a purely jurisdictional inchoate national interest—without more—can ground federal-question jurisdiction, a scary apparition will loom up before us, clanking its chains, ominously threatening our whole line of thought. I should give fair warning that this specter materializes whether or not I can make it vanish.

Return with me for a moment to the agents-or-instrumentalities strand of thought in *Osborn v. Bank of the United States*. The thinking there is that federal jurisdiction can be grounded in a national interest in providing the option of a presumptively more protective forum than the state provides, for litigation involving federal officers or instrumentalities.

If Congress wishes to assert a national party-protective interest by creating a head of jurisdiction, it is hard to believe that it cannot do so. To the extent this power of Congress seems evident, we will think that—whatever its rationale—the

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238. Thus, for example, in the Federal Tort Claims Act, 28 U.S.C. § 1346(b) (as amended), there is exclusive federal jurisdiction over federal tort claims against the United States. I do not doubt the constitutionality of this jurisdiction, notwithstanding that the liability is under the law of a state. Congress can provide a protective forum for tort claims against the United States, even claims governable by state law. Section 2074 of the same Title provides (with exceptions for punitive damages in death cases and for interest) that “The United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances.” And 28 U.S.C. § 2674 (1988), dealing with punitive damages in death cases, refers to the “law of the place where the act or omission occurred.” The language of these sections has always been construed under the predecessor legislation as requiring state law. *Richards v. United States*, 369 U.S. 1 (1962).

239. *Mesa v. California*, 489 U.S. 121, 136 (1989).

240. *Verlinden*, 461 U.S. at 495.

Supreme Court got it about right in *Red Cross*. To be sure, Justice Souter cannot persuade us, any more than he persuaded Justice Scalia, that the fragment of statutory text mentioning "federal courts" matters; if the jurisdictional statute is unconstitutional it cannot matter what the statute says. And it cannot matter either that there exists a threshold "ingredient" of federal law in every case by or against the Red Cross, the ingredient of the Red Cross's juridical capacity. That is a non-issue; it was decided long ago and is a matter of *stare decisis*. Justice Souter was right not to rely on it in this context. What does seem to matter in *Red Cross* is the national interest in furnishing a presumptively protective forum for state-law litigation that could threaten the assets and even the viability of a federally chartered instrumentality performing a vital national service.

But this party-protective argument seems to prove too much. The diversity jurisdiction of federal courts is a party-protective jurisdiction. An identifiable party-protective national policy sustains the diversity jurisdiction. Does this mean that, paradoxically, the diversity jurisdiction "arises under" federal law? To the extent we see that as an appalling question, we are going to think that the Supreme Court got it *wrong* in *Red Cross*. There was nothing in that case except the nation's party-protective interest to support—in a way that would convince us—the constitutionality of federal jurisdiction over the Red Cross.

For those whom a national party-protective interest cannot ground federal-question jurisdiction, then, it may seem that the Supreme Court got it about right in *Mesa*. They will overlook Justice O'Connor's consideration of other national interests in that case, and be content to read *Mesa* as declining to acknowledge the power of Congress to act in an identified national interest when that interest is merely a party-protective one. The argument from this position is that a national party-protective interest is without constitutional significance. To see it otherwise would be, in effect, to say that even diversity cases "arise under" federal law. Those for whom such a proposition can only seem perverse are not falling into the trap of supposing that diversity cases necessarily arise under *state* law. But they would argue that the judicial power that Article III extends to diversity cases is separate and distinct from the power it extends to cases "arising under" federal law. They would argue that these categories cannot be collapsed. They feel that

diversity cases do not "arise under" the diversity statute for purposes of Article III, not only because there is no need for such interpretive agility, since diversity jurisdiction is authorized independently in Article III, but simply because no one ever supposed diversity cases to be cases "arising under" federal law, and there seems to be no good reason for starting to think so now.

There you have the problem. If you tend to think that *Red Cross* was right but also think that diversity cases do not "arise under" the federal diversity statute for purposes of Article III, I think I have shown you that for you the problem of state law in federal courts is not going to be resolved any time soon. That is not because, as Justice Frankfurter thought,<sup>241</sup> the diversity jurisdiction exhausts all of the power Congress has over cases arising under state law; it does not.<sup>242</sup> Rather, it is because you are not prepared to say there is constitutional federal-question jurisdiction over diversity cases. Sooner or later you will conclude from this that a federal case cannot constitutionally "arise under" when the only national interest in its doing so is a party-protective interest. You will then, in the good company of the United States Supreme Court, try to explain *Red Cross* some other way.

But for a few intrepid readers for whom thinking the unthinkable is good sport, let me press the argument just to see how far it will go. Let me broach the question whether it is really unbearable to suppose that the diversity statute "arises under" federal law. Doesn't it, after all?<sup>243</sup> It is an act of Congress like any other. Congress has plenary power over the extent to which federal courts can invoke it.<sup>244</sup> In every case the Supreme Court must have Article III power to review the proper exercise of diversity jurisdiction, and it does so.<sup>245</sup> In reviewing the propriety of diversity jurisdiction, the Supreme Court does not *exercise* diversity jurisdiction; it exercises *feder-*

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241. *Textile Workers Union of Am. v. Lincoln Mills*, 353 U.S. 448, 460, 475 (1957) (Frankfurter, J., dissenting).

242. The Foreign Sovereign Immunities Act is a counter-example. So are the assertions of jurisdiction tested in *Osborn*, *American Nat'l Red Cross*, and *Marathon Pipe Line*. See *supra* notes 160-64, 204-08, 213-17 and accompanying text; note 92.

243. For a valiant recent struggle with this apparent anomaly, see Steven A. Childress, *Judicial Review and Diversity Jurisdiction: Solving an Irrepressible Erie Mystery*, 47 SMU L. REV. 271 (1994).

244. U.S. CONST. art. III, §. 1; *Sheldon v. Sill*, 49 U.S. (8 How.) 441 (1850).

245. *E.g.*, cases cited *supra* notes 32-39 and accompanying text.

*al-question* jurisdiction. No Congress has given the Court appellate jurisdiction over diversity cases as such; the Court hears cases about the proper scope of the diversity jurisdiction of the lower federal courts in its "arising under" jurisdiction, because the existence and proper exercise of federal statutory diversity jurisdiction present questions of federal law.

It is true that the Supreme Court has no power over the merits in issues governed by nonfederal law.<sup>246</sup> But the Supreme Court's appellate Article III power over diversity cases is co-extensive with and limited by the same national *jurisdictional* interest that justifies the jurisdictional grant. This is a clear example of the fact we have been so reluctant to admit, that a mere jurisdictional statute can "arise under" federal law for purposes of Article III.

So it is a fallacy to say that federal jurisdiction cannot constitutionally "arise under" a purely jurisdictional federal statute. In fact, it always does. The familiar but anomalous tag of jurisdiction to decide jurisdiction is a superficial way of delineating this phenomenon because it lacks explanatory power, and fails to capture the obligation of the federal courts to decide the jurisdictional issue in conformity with the limits of the national interest, a duty they share with state courts when the nation allocates similar jurisdiction to those courts.

### B. *A Test Impossible to Fail?*

The general theory of the jurisdictional power of Congress which I have been trying to set out is not most accurately described as an "Article I" theory. Rather, it is a product of substantive due process thinking. It is interest-analytic, and has to do with the rational bases of exercises of sovereign power.

In this reasoning, then, the national interest is the effective measure of the power of Congress over state-law cases in federal as well as in state courts. An alternative hypothesis might be that Congress could vest jurisdiction over nonfederal cases in state courts more easily than it could in federal courts, since in state courts no one cares whether or not cases "arise under" federal law for purposes of Article III. But the source of the power of Congress over state courts, which we now understand, may suggest to us, rather, that the effective measure of

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246. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). Of course this is true whether those issues arise in diversity or in any other head of federal jurisdiction.

the power of Congress over state-law cases in federal courts also is the national interest; that the "arising under" language of Article III should have no narrower meaning.

The conclusion that a party-protective interest can sustain a grant of federal jurisdiction under Article III would not require a conclusion that *Mesa v. California*<sup>247</sup> was wrongly decided. It will be remembered that in *Mesa* the Court struck down under Article III an application of an apparently party-protective jurisdictional grant, the federal officer-removal statute. In her opinion for the Court Justice O'Connor acknowledged the potential national interests in protecting federal officials from local biases, and in furnishing a forum for trial of a federal defense. She found no jurisdiction because these interests simply were not invoked on the facts. Any merely potential national jurisdictional interest was outweighed by other, limiting national policies.<sup>248</sup>

The reader will at once take the altogether lawyerly view that the test of national interest is so all-capacious and elastic as to amount to no test at all. That the national interest is all-capacious and elastic is undoubtedly the case. Our Commerce Clause jurisprudence establishes that. But that does not mean that it is not the test of the power of Congress, or that Congress will never fail that test. If minimal scrutiny for rational basis is what Article III in fact requires, the limiting case, I would submit, ought to have been *Verlinden*.<sup>249</sup>

As we have seen, the national interest in furnishing a regulated forum for suits in this country against foreign sovereigns when such suits are actionable in this country does not support the furnishing of a forum for such suits when they are *not* otherwise actionable in this country. When both parties are foreign, even a party-protective interest cannot be attributed to the United States; only a national interest in the merits could

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247. 489 U.S. 121 (1989).

248. *Id.* at 137-38.

249. See also *Mossman v. Higginson*, 4 U.S. (4 Dall.) 12 (1800) (holding under Article III's diversity grants that there could be no state-law action in federal court between aliens). Arguably the ongoing litigation of several other Nigerian cement claims in federal court in New York, some of which did involve American interests, see, e.g., *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 310-13 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982), justified an extension of jurisdiction over *Verlinden*'s case. But the Second Circuit found no basis for jurisdiction. *Verlinden*, 647 F.2d 320 (2d Cir. 1981).

justify suit in this country when both parties are foreign. Indeed, nothing supported jurisdiction in *Verlinden*.

There have arisen numerous other attractive theories purporting to justify *federal* jurisdiction over state-law cases, and I need not go over all that ground; we have said enough to enable us to see that no theory intended to overcome only the constraints of Article III is likely to be a useful general theory of power applicable in both sets of courts. Even if you extended such a theory—I suppose the theory of “protective jurisdiction”<sup>250</sup> is probably the most appealing candidate—to support

250. Although writers do not often take note of the usage, “protective jurisdiction” often refers simply to any grant of federal jurisdiction which, like the diversity jurisdiction, depends upon the nature of the parties rather than on the subject matter of the cases. Paul Mishkin, *The Federal “Question” in the District Courts*, 53 COLUM. L. REV. 157, 184 (1953).

The “theory” of “protective jurisdiction” is usually thought to be a bit more complex. In the simplest variant of this more complex thinking, the theory stands for the proposition that federal courts have Article III power when Congress affords federal jurisdiction over an area of law without regulating it substantively. See *Textile Workers Union of Am. v. Lincoln Mills*, 353 U.S. 448, 460 (1957) (Frankfurter, J., dissenting). The thinking here is that the law that the cases will then “arise under” for purposes of Article III is the jurisdictional grant itself. This reasoning is sometimes supported by the argument that the greater substantive power subsumes the lesser jurisdictional power of Congress. The policy argument is also sometimes made that a grant of federal protective jurisdiction over a state-law case is much less intrusive than federalization of the substantive issues. Of course, affording a special *state* forum might be thought to be the least intrusive federal approach imaginable.

The Supreme Court has noted, but never relied upon, the theory of “protective jurisdiction.” See, e.g., *Gutierrez de Martinez v. Lamagno*, 115 S. Ct. 2227 (1995) (speculating that jurisdiction over a personal-injuries claim would exist in cases removed under the 1988 amendments to the Federal Tort Claims Act, even if the defendant employee was eventually held not to have been acting within the scope of her employment, under a combined “ingredient” and “pendent jurisdiction” theory, the scope-of-employment issue furnishing the ingredient); *id.* at 2237 n.11 (citing Carole E. Goldberg-Ambrose, *The Protective Jurisdiction of the Federal Courts*, 30 UCLA L. REV. 542, 549 (1983)); see also *Mesa v. California*, 489 U.S. 121, 137 (1989) (seeing no need to adopt the theory); *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 496 (1983) (suggesting, in my view erroneously, that purely jurisdictional statutes cannot ground federal-question jurisdiction for purposes of Article III). For one of the few of Justice Frankfurter’s effusions with which I find myself in agreement, at least for a couple of sentences, see *Lincoln Mills*, 353 U.S. at 474-75 (Frankfurter, J., dissenting) (“‘Protective jurisdiction’ is a misused label . . . properly descriptive of safeguarding some of the indisputable, staple business of the federal courts. It is a radiation of an existing jurisdiction”).

From the enormous literature on the subject not otherwise mentioned in this Article, see generally John T. Cross, *Viewing Federal Jurisdiction Through the Looking Glass of Bankruptcy*, 23 SETON HALL L. REV. 530 (1993); John E. Kennedy, *Federal Jurisdiction*, 19 TEX. TECH L. REV. 603 (1988); William R. Casto, *The Federal Courts’ Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467 (1986); Richard A. Matasar, *Rediscovering “One*

an act of Congress granting jurisdiction to both sets of courts in cases not arising under federal law, what would you add to the requirement of an identified national interest in furnishing a forum on the facts of the case? Certainly, in the absence of such an interest no conceivable theory could sustain the jurisdictional grant.

### C. *Whatever Happened to Article III?*

Some commentators will object to "the national interest" as a test of the power of Congress in the context of a jurisdictional grant and insist that something more, some further test, must be imposed by Article III. Article III has been throwing litigants out of court for over 200 years, and it will go on doing so. History has taken it seriously, and no piece of academic theorizing is likely to make a jot of difference.

What is it, then, that Article III requires? Chief Justice Marshall long ago in *Osborn v. Bank* interpreted Article III as requiring only some small item of substantive federal law. We may not have believed this "ingredient" theory of Article III before *Verlinden*, but after *Verlinden* that is the reinvigorated and now orthodox position. *Verlinden* is pitched squarely on the substantive threshold "ingredient" of foreign sovereign immunity.<sup>251</sup> By insisting on at least this substantive "ingredient," *Verlinden* strongly implies that under Article III a federal case cannot "arise under" a purely jurisdictional statute.

Some courts<sup>252</sup> and writers<sup>253</sup> rely also on *The Genesee*

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*Constitutional Case:* "Procedural rules and the Rejection of the Gibbs Test for Supplemental Jurisdiction, 71 CAL. L. REV. 1399 (1983); Scott A. Rosenberg, Note, *The Theory of Protective Jurisdiction*, 57 N.Y.U. L. REV. 933 (1982). The classic articles include, apart from the Mishkin article already cited, David P. Currie, *The Federal Courts and The American Law Institute*, 36 U. CHI. L. REV. 1 (1968); Alexander M. Bickel & Harry H. Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1 (1957); Herbert Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROBS. 216, 224-25 (1948).

On protective jurisdiction for cases of mass tort, see generally Erwin Chemerinsky & Larry Kramer, *Defining the Role of the Federal Courts*, 1990 B.Y.U. L. REV. 67 (1990); George Conway, Note, *Protective Jurisdiction and Adoption as Alternative Techniques for Conferring Jurisdiction on Federal Courts in Consumer Class Actions*, 69 MICH. L. REV. 710 (1971).

251. *Verlinden*, 461 U.S. at 495, 496.

252. See, e.g., *Mesa v. California*, 489 U.S. 121, 136 (1989); *Verlinden*, 461 U.S. 480, 495-96 (dealing with the Second Circuit's reading of the cases). The *Verlinden* Court itself did not quite make this mistake, although, assuming the Second Circuit's reading to be correct, Chief Justice Burger did distinguish the Great



*Chief v. Fitzhugh*<sup>254</sup> for the proposition that a case cannot arise under a naked jurisdictional grant, even if enacted pursuant to Congress's Commerce power. But the *Verlinden* Court itself was quick to distinguish the case before it from *The Genesee Chief*, and in any event correctly saw that that case would not bear such an interpretation.<sup>255</sup> In that grand old admiralty case, the nub of the Supreme Court's difficulty was its own previous interpretation of the scope of Article III jurisdiction in admiralty cases.

In *The Thomas Jefferson*,<sup>256</sup> Justice Story, writing for the Court and relying on his own opinion on circuit in *De Lovio v. Boit*,<sup>257</sup> had limited the constitutional admiralty jurisdiction to the "ebb and flow of the tides."<sup>258</sup> But by the time of *The Thomas Jefferson*, the jurisdiction that had seemed so expansive to Story in *De Lovio v. Boit* had become much too narrow. Even Story queried whether the jurisdiction might be extended by Congress to take in the great inland seas and western riv-

Lakes Act from the Foreign Sovereign Immunities Act. He reasoned that the former was an attempt to pass off a grant of admiralty jurisdiction under the interstate commerce power, whereas the latter was grounded on the power of Congress over international commerce, and on its foreign relations power as well. *Verlinden*, 461 U.S. at 493. The trouble with the Great Lakes Act, though, is not that *The Genesee Chief* declared it unconstitutional, but rather that *The Genesee Chief* made it obsolete. See *infra* note 263 and accompanying text.

253. See, e.g., Linda S. Mullenix, *Complex Litigation Reform And Article III Jurisdiction*, 59 *FORDHAM L. REV.* 169, 225 (1990) (stating that "the Supreme Court has explicitly held that Congress may not legislatively expand federal court jurisdiction through a purely jurisdictional statute passed pursuant to the Article I power over interstate commerce") (citing *Mesa v. California*, 489 U.S. 121, 136 (1989) and, for the same, but implicit, proposition, *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. 443, 451-52 (1851)). For a different exposition of the Court's position in *The Genesee Chief*, see *infra* text accompanying note 263; cf. *supra* note 228 on *Panama v. Johnson*. For a different exposition of the Court's position in *Mesa*, see *supra* notes 214-17 and accompanying text; *infra* note 281 and accompanying text. For a refutation of language in *Mesa* suggesting on the strength of an ancient case that federal-question jurisdiction cannot arise under a jurisdictional grant, see *infra* notes 264-75 and accompanying text.

254. 53 U.S. (12 How.) 443, 451-53 (1851).

255. *Verlinden*, 461 U.S. at 495, 496.

256. 23 U.S. (10 Wheat.) 428 (1825) (Story, J.).

257. 7 F. Cas. 418 (C.C.D. Mass. 1815). One gleans from Story's sweeping language in *De Lovio* that he imagined that his tidewater test was carving out an enormous jurisdiction for federal admiralty; he seems to have been trying to draw the commercial life of the nation, then largely maritime, into the federal courts. As we can see from his even more disastrous opinion in *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), Story was still trying to draw the commercial life of the nation into the federal courts in 1842, and yet for all his intellect he was still too much of a creature of his time to invoke sufficient federal power.

258. *The Thomas Jefferson*, 23 U.S. at 429.

ers.<sup>259</sup> A delegation from Congress accepted Story's invitation, approaching Story himself for help. It was Story himself who drafted the Great Lakes Act,<sup>260</sup> trying to patch up the tide-water difficulty; he even submitted the draft bill to each of his brethren on the Court to review and approve before sending it on to its sponsors in Congress.<sup>261</sup> Story drafted the Great Lakes Act expressly under the commerce power to avoid the argument that the Act added cases to the admiralty jurisdiction; adding to the admiralty jurisdiction is always textually awkward because "all" of the jurisdiction is granted already.<sup>262</sup> But by the time *The Genesee Chief* came before the Supreme Court, the Justices had reconsidered the whole position. Back in 1852 the Commerce power seemed inadequate to them, on reflection, to authorize the needed federal jurisdiction over intrastate admiralty cases. So in *The Genesee Chief* the Court simply leapfrogged over Story's Great Lakes Act. The Court explained that the true test of admiralty jurisdiction under Article III had never been tidewater, as the Court had mistakenly supposed, but had been *navigable* water all along.<sup>263</sup> In this, the Court was not impermissibly adding more cases to "all cases" in admiralty, jurisdiction over which was given in Article III; no, the Court was merely correcting its own interpretive error. This was a master-stroke, but *The*

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259. Whether, under the power to regulate commerce between the States, Congress may not extend the remedy, by the summary process of the Admiralty, to the case of voyages on the western waters, it is unnecessary for us to consider. If the public inconvenience, from the want of a process of an analogous nature, shall be extensively felt, the attention of the Legislature will doubtless be drawn to the subject.

*Id.* at 430 (Story, J.).

260. Act of Feb. 26, 1845, ch. 20, 5 Stat. 726.

261. The story is told in DAVID W. ROBERTSON, *ADMIRALTY AND FEDERALISM* 106-16 (1971); Note, *From Judicial Grant to Legislative Power: The Admiralty Clause in the Nineteenth Century*, 67 HARV. L. REV. 1214 (1954).

262. U.S. CONST. art. III, § 2; Judiciary Act of 1789 § 9, 1 Stat. 73. The opposite problem was the subject of *Panama R.R. Co. v. Johnson*, 264 U.S. 375 (1924). There, the railway challenged the constitutionality of the Jones Act, 46 U.S.C. § 688 (1988), which creates a cause of action in negligence for injured seamen against their employers. Congress intended that Jones Act cases in federal courts be pleaded under the statutory federal-question jurisdiction. The railway argued that the Jones Act thus took these maritime cases away from the admiralty, which was supposed to have jurisdiction over "all" maritime cases. But the Supreme Court managed to sustain the Act by holding that it implicitly made these new cases concurrently pleadable under federal admiralty jurisdiction.

263. *The Genesee Chief*, 53 U.S. (12 How.) at 452.

*Genesee Chief* simply does not speak to the question whether a case can "arise under" a jurisdictional grant.

In *Mesa v. California*, Justice O'Connor also referred to the ancient case of *Mossman v. Higginson*<sup>264</sup> as holding that "pure jurisdictional statutes which seek to do nothing more than grant jurisdiction over a particular class of cases cannot support Art. III 'arising under' jurisdiction."<sup>265</sup> But that is not what *Mossman* was about, any more than it was what *The Genesee Chief* was about.

*Mossman* held, per curiam, that the statutory grant of jurisdiction to federal circuit courts in cases in which "an alien is a party"<sup>266</sup> could not constitutionally be applied, within the meaning of the *diversity* language of Article III. *Mossman* was a case in which both parties were foreigners. As far as the opinion in *Mossman* goes it is quite right and I have no quarrel with it. The whole of the Court's opinion can be set out in a footnote.<sup>267</sup> As you can see, the opinion in *Mossman* is utterly silent on the "arising under" language of Article III.

Between the report of the case by Dallas<sup>268</sup> and the arguments of counsel, one can glean that in the circuit court *Mossman* was an action *in rem* to foreclose on a mortgage of land in Georgia.<sup>269</sup> No one would have dreamed that the case "arose under" any other law than Georgia's; the Supreme Court took judicial notice of Georgia law.<sup>270</sup> *Mossman* cannot be cited for the proposition that Congress, having identified a national

264. 4 U.S. (4 Dall.) 12 (1800) (per curiam).

265. *Mesa v. California*, 489 U.S. 121, 136 (1989) (selectively quoting from Chief Justice Burger's opinion in *Verlinden*, 461 U.S. at 496).

266. First Judiciary Act of 1789, § 11.

267. By the COURT: "The decisions, on this subject, govern the present case; and the 11th section of the judiciary act can, and must, receive a construction, consistent with the constitution. It says, it is true, in general terms, that the Circuit Court shall have cognizance of suits 'where an alien is a party;' but as the legislative power of conferring jurisdiction on the federal Courts, is, in this respect, confined to suits *between citizens and foreigners*, we must so expound the terms of the law, as to meet the case, 'where, indeed, an alien is one party,' but a citizen is the other. Neither the constitution, nor the act of congress, regard, on this point, the subject of the suit, but the parties. A description of the parties is, therefore, indispensable to the exercise of jurisdiction. There is here no such description; and, of course, The writ of error must be quashed."

*Mossman*, 4 U.S. (4 Dall.) at 14.

268. Oddly, Dallas represented *Mossman* also. *Id.* at 13.

269. *Id.* at 12.

270. *Id.* at 13.

interest in conferring a head of federal-question jurisdiction, cannot do so.

On the other hand, the "arising under" clause of Article III might well have sustained jurisdiction on the particular facts. The mortgagor of the Georgia land in question had been its original owner. In 1778, during the Revolutionary War, Georgia expelled the owner as a loyalist and confiscated the land. The English creditor apparently sued virtually every surviving holder in the post-confiscation chain of title.<sup>271</sup> But the English creditor failed to challenge the validity of the confiscation itself under the Peace Treaty of 1783, which the debtor had pleaded in bar. The creditor raised that federal question only belatedly and regretfully at oral argument before the Supreme Court.<sup>272</sup>

It would be very hard to argue that there was no national interest in enforcing debts held by English creditors in the wake of the Revolutionary War, even as against English debtors, if security for the debt was land in this country. One of the reasons the Federalists supported the establishment of federal diversity courts in the first place was to assure lenders abroad that the nation would enforce obligations to foreigners flowing from their private investments here.<sup>273</sup> To be sure, pro-debtor sentiment in 1789 was at least as strong. But my point is that the problem was a national one, certainly insofar as it concerned the states' wartime confiscations of loyalists' lands. That was one of the very problems the Peace Treaty of 1783 was supposed to resolve. Of course Congress had Article III power to create a forum for hearing claims "arising under" the Treaty; apparently Congress did create a forum for federal decision of questions on the validity of a treaty.<sup>274</sup> Certainly under the

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271. Apparently only Mossman showed up. He was the surviving executor of the second owner in the post-confiscation chain of title. But the second owner had resold the land to a third. The English creditor acknowledged that Mossman was not a proper party, but argued that the action was in the nature of an action *in rem* and should go forward anyway. Dallas does not report whether Georgia's sale of the land pre-dated or post-dated the Treaty of 1783.

272. *Mossman*, 4 U.S. (4 Dall.) at 13 (argument of Tilghman and Reed for the original plaintiffs).

273. See *supra* note 29.

274. Counsel for the debtors cited an act of Congress, apparently providing for direct removal to the Supreme Court of questions on the validity of a treaty:

The jurisdiction of the federal Courts (U.S. CONST. ART. III s. 2.) is not where a question arises, that may be affected by a treaty, but where a case arises under a treaty; and if a question on the validity of a treaty,

reasoning of *Osborn* and *Verlinden*, a threshold federal "ingredient"—the effect of the Treaty—would ground Article III jurisdiction in every such case. Justice Story used the Treaty in similar fashion to sustain the Supreme Court's former jurisdiction in another, much more famous litigation flowing from a state's confiscation of a loyalist's land, *Martin v. Hunter's Lessee*.<sup>275</sup>

What is helping us in our understanding of the cases, plainly, is that we are looking to the national interest as we can glean it on the facts of the particular case. Article III can be taken to reflect or subsume national adjudicatory interests. If the Supreme Court were suddenly, unanimously, to see Article III as merely reflecting the national interests that underlie it, and were to consider the national interest directly in Article III cases, I think it fair to say, based on the analyses we have made here, that little, if anything, would be lost.

The greater danger, it seems to me, is that this will *not* happen, and that Article III will continue to be deployed without regard to the national interest. We should not have to read cases like *Verlinden*, in which a nodding Court acts against its every characteristic instinct and every dictate of reason and substantive due process, and relegates to statutory tests the job of preserving the courts of this country from universal jurisdiction over the world's grievances against sovereigns other than the United States.<sup>276</sup> We should not have to read cases like *Marathon Pipe Line*,<sup>277</sup> in which the vital services of the nation's courts in their bankruptcy jurisdiction are disrupted on the incredible reasoning that in the absence of diversity, Article III requires private state-law, but not private federal-law claims,<sup>278</sup> *to be heard by judges with life tenure*.<sup>279</sup> We should not have to read cases in which no majority rationale can be found to support diversity jurisdiction in a controversy

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arises in a state Court, there is a special provision for transferring it to the Supreme Court; 1 vol. 61. s. 22. But, in the present instance, it does not appear that any question can arise under the treaty; for, it is not referred to, directly, nor indirectly, in any part of the record.

*Mossman*, 4 U.S. (4 Dall.) at 13-14.

275. 14 U.S. (1 Wheat.) 304, 356 (1816).

276. See *supra* notes 166-78 and accompanying text.

277. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982); see discussion *supra* notes 69, 93.

278. *Marathon Pipe Line*, 458 U.S. at 84.

279. *Id.* at 85-87.

between a citizen of a state and a citizen of the District of Columbia.<sup>280</sup>

And if the best way to capture the national interest in preserving federal courts from having to entertain the local prosecution of every criminally negligent post-office driver<sup>281</sup> is to conclude that Article III stands in the way, it seems to me that the Supreme Court could not do better than to summon Article III to the aid of the courts below. As long as the Court does so in the light of reason and with an eye on the competing national interests at stake, as it did in *Mesa*, it must be doing it right.

#### VIII. REMARKS IN CLOSING

We now have a reasonably general theory. At its narrowest it is a theory of the power of Congress to confer jurisdiction over nonfederal cases upon the state courts. At a more general level it is a theory of the power of Congress to confer nonfederal business upon federal courts as well. We see that the first determinative factor is, and ought to be, the existence of an identifiable national interest in devolving such jurisdiction upon the states.

The inquiry into governmental interest is familiar to American courts and lawyers. It derives from the ordinary purposive reasoning characteristic of the common law. Courts tend to seek reasons for the common-law rules they apply, and purposes behind the statutory provisions they apply, to ensure that applications of law on the particular facts will be reasonable. This sort of inquiry is familiar, too, across the range of constitutional jurisprudence.<sup>282</sup> The inquiry into governmental interest is seen in its most fundamental form when the Supreme Court imposes a requirement of minimal rationality upon law. We traditionally have conceived of such rationality review as a matter of substantive due process.

In the absence of an identifiable national interest in conferring a particular jurisdiction over state-law matters upon state courts, the nation has no power to act, and no other limiting tests are salient. Of course there are extrinsic constraints upon the rational exercise of national power to confer jurisdic-

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280. See *National Mut. Ins. Co. v. Tidewater Transfer Co.*, 333 U.S. 860 (1948).

281. Cf. *Mesa v. California*, 489 U.S. 121 (1989).

282. See *supra* notes 131, 137-45 and accompanying text.

tion upon the states, as there are upon any exercise of governmental power. But in the presence of a national interest in conferring a certain jurisdiction over nonfederal questions upon the states, no other theory is needed to support the jurisdictional grant.

The theory extends usefully to the more familiar problem of the power of Congress to devolve jurisdiction upon the federal courts over state-law questions in nondiversity cases. To the extent Article III is serving as a surrogate for this theory, we can reason more clearly if we reason directly from the national interest. Under this theory as a theory of jurisdiction it becomes a matter of no concern in either set of courts whether a particular grant of jurisdiction by Congress is accompanied by substantive federal law, or even substantive national policy. As the numerous heads of federal party-protective jurisdiction make plain, rational national interests are possible even if they are almost wholly jurisdictional. Thus, unless it is a rational purpose of Article III to frustrate national jurisdictional policy, an identified national jurisdictional policy should support jurisdiction in federal as well as state courts; no additional theory in the nature of a theory of "protective jurisdiction" is needed.

This reflection suggests that in itself Article III probably should not be seen as imposing some further constraint upon Congress than the requirement of acting within an identified national interest.

One constraint upon the power of Congress which does go beyond minimal rationality may be viewed as intrinsic to this theory. Today we understand that whatever the underlying policy that we glean from a rule or statute, that policy is likely to be limited and conditional. Usually we can hypothesize countervailing policies which explain certain features of the case law or legislation. Moreover, we note the existence of relevant more general governmental policies, which we find reflected in other decisions and statutes, together with their bounds. Thus it sometimes becomes necessary, however awkward or difficult the process, to weigh countervailing policies in order to determine, if not the legitimacy of a jurisdictional grant, then its feasibility as applied on the particular facts.

As a theory of jurisdiction in this federal system, this theory implies that once the nation allocates jurisdiction supported by an identified national interest, concomitant judicial duties arise under the Supremacy Clause, even under a purely jurisdictional act of Congress. This is true even in the intuitively

limiting case of the states' concurrent jurisdiction over diversity cases. However counter-intuitive the proposition may seem, we have seen that the states have no option to forego their jurisdiction over their diversity cases.<sup>283</sup>

The generalizability of the described theory is unsurprising because it is the same general theory that is already implicitly used both to explain and test other exercises of governmental power. A government's power derives from and is limited by that government's interests, in this country of course always within any more exacting extrinsic constitutional constraints.

Using rational-basis scrutiny to test Article III jurisdiction has the further advantage of making the power of Congress congruent in state and federal courts when Congress seeks to provide concurrent jurisdiction. If additional, prudential, constraints on the exercise of federal power seem appropriate, history tells us that federal decisional law will supply them whether or not the Constitution does.<sup>284</sup>

We have taken up a classic problem of federal courts law—the power of Congress to vest jurisdiction in federal courts beyond the limits on federal judicial power imposed by Article III. By generalizing that problem to both sets of courts, we have been able in large part to resolve it. Once one isolates the problem from its usual Article III context, one is able to identify the actual sources of, and limitations upon, the power of the nation to vindicate national substantive policy through allocations of adjudicatory power. The textual constraints of Article III then can become more fully understood. Questions “arise under” federal law, including jurisdictional questions, across the broad field of national policy concerns.

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283. See *supra* note 98 and accompanying text.

284. See *supra* notes 35-40 and accompanying text; cf. Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L. J. 71, 89-90 (1984) (criticizing the abstention doctrines as unauthorized departures from jurisdictional statutes).