Fordham Law Review

Volume 61 | Issue 5 | Article 10

1993

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Recommended Citation
Loretta Shaw, *A Comprehensive Theory of Protective Jurisdiction: The Missing "Ingredient" of "Arising Under" Jurisdiction*, 61 Fordham L. Rev. 1235 (1993).
Available at: https://ir.lawnet.fordham.edu/flr/vol61/iss5/10

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COMMENT

A COMPREHENSIVE THEORY OF PROTECTIVE JURISDICTION: THE MISSING "INGREDIENT" OF "ARISING UNDER" JURISDICTION

LORETTA SHAW

INTRODUCTION

If an attorney walked by the offices of the American National Red Cross[1] (the "Red Cross") and saw a person slip and fall on the building's icy steps, that lawyer would probably anticipate the personal injury lawsuit that would likely result. Personal injury suits are a staple business of state civil courts. If asked whether this ordinary slip and fall case could be heard in federal court, that lawyer would probably reply, "not without diversity of citizenship." A recent decision of the United States Supreme Court, however, would allow the Red Cross to remove this kind of case from state to federal court, even without diversity.[2] *American National Red Cross v. S.G.*[3] (*Red Cross*) raises this difficult and recurring issue, often referred to as protective jurisdiction.

The term "protective jurisdiction" in this Comment will be used to describe the extension of Article III "arising under" jurisdiction[4] to cases in which (1) there is no diversity of citizenship between the parties; (2) the asserted claims are based on state law and state law provides the substantive rules of decision; and (3) no substantial "federal question" will be adjudicated.[5] The Court yields to the extension of "arising

1. The American National Red Cross, 36 U.S.C. §§ 1-17 (1988) (as amended), was organized by the United States government as this country's Red Cross Society pursuant to the Geneva Conventions of 1864 and following. *See* The Geneva Convention of August 22, 1864, For the Amelioration of the Wounded in Armies in the Field, 22 Stat. 940 (1882); The Geneva Convention of July 6, 1906, For the Amelioration of the Condition of the Wounded of the Armies in the Field, 35 Stat. 1885 (1907); The Geneva Convention of July 27, 1929, For the Amelioration of the Condition of the Wounded and the Sick of Armies in the Field, 47 Stat. 2074 (1932) [hereinafter collectively referred to as the Geneva Treaties].

2. *See* American Nat'l Red Cross v. S.G., 112 S. Ct. 2465 (1992).

3. 112 S. Ct. 2465 (1992).

4. *See* U.S. Const. art. III, § 2. Article III, § 2 provides that "[t]he 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" (emphasis added).

5. The term "federal question" refers to an issue where the plaintiff's right to prevail on a claim depends, at least in part, on an interpretation of federal or constitutional law; in other words, on an issue "arising under" federal law. *See* Paul Mishkin, *The Federal "Question" in the District Courts*, 53 Colum. L. Rev. 157, 157 n.6 (1953). The issue may be raised in the plaintiff's complaint or asserted as an affirmative defense.

Professor Herbert Wechsler is credited as the first commentator to describe a theory of protective jurisdiction. *See* Herbert Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 Law & Contemp. Probs. 216, 224-25 (1948). Wechsler asserted that, where Congress has the constitutional power to prescribe substantive rules of decision but

under" jurisdiction in these types of cases because they contain a federal ingredient.[6]

On June 19, 1992, the Supreme Court, in a five-to-four decision, declared that all suits involving the Red Cross could be initially filed in, or removed to, federal court.[7] The Court determined that language in the Red Cross' congressional charter[8] vested federal courts with original jurisdiction over all cases involving the Red Cross.[9] This decision raises new questions, and resurrects some old concerns, about Congress' power to control the jurisdiction of the federal courts under the "arising under" clause of Article III of the United States Constitution.[10]

On one level, *Red Cross* simply addresses the narrow issue of the extension of "arising under" jurisdiction to federally chartered corporations. Federal charter cases may be viewed as one component of protective jurisdiction.[11] Protective jurisdiction also applies to a number of different areas, including issues normally governed by state law.[12] This Comment asserts, therefore, that *Red Cross* has broader implications. Unfortunately, the *Red Cross* Court studiously avoided the most important issue—when Congress should be permitted to "expand"[13] the jurisdiction of the federal courts. Thus, it missed the opportunity to develop a meaningful and workable theory of protective jurisdiction. The

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chooses not to, it can, instead, enact a jurisdictional statute conferring federal court jurisdiction. *See id.* Professor Paul Mishkin appears to be the first commentator to coin the phrase. *See* Mishkin, *supra*, at 186. For a discussion of the protective jurisdiction theories of Professors Wechsler and Mishkin, see *infra* notes 162-74 and accompanying text.

6. Since Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824), it has been axiomatic that as long as some part of a case potentially raises a federal question, the extension of "arising under" jurisdiction is constitutional. This nascent federal question is an "ingredient of the original cause." *Id.* at 823; *see also infra* notes 32-39 and accompanying text (discussing *Osborn*).

7. *See* American Nat'l Red Cross v. S.G., 112 S. Ct. 2465, 2467 (1992).

8. *See* Act of Jan. 5, 1905, ch. 23, § 2, 33 Stat. 599 (1905) (codified as amended at 36 U.S.C. §§ 1-17 (1988)).

9. *See Red Cross*, 112 S. Ct. at 2472. The 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." The charter was amended in 1947 to add the phrase "State or Federal." *See* Act of May 8, 1947, ch. 50, 61 Stat. 80, 81 (1947). The Supreme Court determined that this key phrase conferred jurisdiction on the federal courts. *See Red Cross*, 112 S. Ct. at 2472.

10. *See* U.S. Const. art. III, § 2.

11. *See infra* notes 108-43 and accompanying text.

12. *See, e.g.*, Verlinden B. V. v. Central Bank of Nigeria, 461 U.S. 480 (1983) (federal jurisdiction over suits between foreign citizens and foreign sovereigns); Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957) (federal jurisdiction for cases involving collective bargaining agreements normally governed by state law); Williams v. Austrian, 331 U.S. 642 (1947) (federal jurisdiction over suits by bankruptcy trustees normally governed by state law).

13. Federal courts are courts of limited jurisdiction. *See* U.S. Const. art. III, § 2; *see also* Sheldon v. Sill, 49 U.S. (8 How.) 441, 448 (1850) ("The Constitution has defined the limits of the judicial power of the United States . . . ."). Congress cannot literally expand federal jurisdiction beyond the boundaries of Article III. The difficulty is in defining those boundaries.

Court's simplistic approach, which it based on the mere fact of federal incorporation and the language of the Red Cross' charter,[14] failed to take into account whether there were sufficient federal interests at stake to justify federal jurisdiction. This Comment argues that federal jurisdiction may not be proper, even in the presence of a federal ingredient, unless a case implicates a meaningful federal interest.

There are over a hundred congressionally-chartered corporations in existence today, many of which were organized to carry out the work of various government agencies.[15] Many of these corporations, however, were not organized to engage in any government-related business.[16] *Red Cross* seems to suggest that Congress could provide a federal forum for cases involving these non-government corporations simply by amending their charters to provide for federal court jurisdiction.[17] According to *Red Cross*, this extension of federal jurisdiction would be constitutional:[18] The mere fact of federal incorporation places disputes involving these corporations within the boundaries of the "arising under" jurisdiction of Article III.[19]

Federal incorporation, however, should not fully explain the Supreme Court's willingness to allow federal jurisdiction in *Red Cross*. Protective jurisdiction has been understood as a form of "arising under" federal question jurisdiction.[20] A valid exercise of "arising under" jurisdiction should require that a case not only raise a potential federal question,[21] but that it also implicate a meaningful federal interest.

This Comment examines how the Supreme Court dealt with the issue of federal jurisdiction in *Red Cross*, and explains how analyzing the issue under a proposed two-part model of protective jurisdiction facilitates a better understanding of *Red Cross*' result.[22]

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14. *See* American Nat'l Red Cross v. S.G., 112 S. Ct. 2465, 2467, 2474 (1992).

15. *See, e.g.*, 12 U.S.C. §§ 1811-1832 (1988 & Supp. III 1991) (Federal Deposit Insurance Corporation); 29 U.S.C. §§ 1301-1309 (1988 & Supp. II 1990) (Pension Benefit Guaranty Corporation); *see also* Linda S. Mullenix, *Federal Jurisdiction is Addressed*, Nat'l L.J., Aug. 31, 1992, at S5 (there are "hundreds of congressionally created organizations").

16. Title 36 of the United States Code, entitled Patriotic Societies and Observances, contains the congressional charters of 51 non-government organizations including the American National Red Cross, 36 U.S.C. §§ 1-17 (1988), the Boy Scouts of America, 36 U.S.C. §§ 21-29 (1988), and Little League Baseball, Inc., 36 U.S.C. §§ 1071-1088 (1988).

17. *See* American Nat'l Red Cross v. S.G., 112 S. Ct. 2465, 2476 (1992). Unlike private corporations, federal corporations are created by an act of Congress. Thus, a charter amendment requires congressional action through the normal legislative process. *See, e.g.*, Act of May 8, 1947, ch. 50, § 3, 61 Stat. 80, 81 (1947) (Red Cross charter amendment); Act of August 1, 1947, ch. 440, § 7, 61 Stat. 718, 719 (1947) (amendment to Federal Crop Insurance Corporation charter).

18. *See Red Cross*, 112 S. Ct. at 2475-76.

19. *See id.* at 2476.

20. *See* U.S. Const. art. III, § 2.

21. *See supra* note 5.

22. This Comment does not analyze the validity of protective jurisdiction. For judicial criticism of protective jurisdiction, see Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 470-71 (1957) (Frankfurter, J., dissenting). For a criticism of the use of protec-

Part I reviews the development of protective jurisdiction in the federal courts as well as the history of the controversy surrounding *Red Cross*. Part II examines the current theories of protective jurisdiction, and proposes a model of protective jurisdiction that would allow the federal government to vest federal courts with jurisdiction over cases in which there is both a federal ingredient[23] and a meaningful federal interest. This model would simultaneously help elucidate the boundaries of Article III. Part III shows how an analysis of *Red Cross* under the proposed model of protective jurisdiction produces a more understandable rationale for federal jurisdiction in that case, and a more reasonable precedent against which to judge the appropriateness of federal jurisdiction in future controversies.

This Comment concludes that the Supreme Court's jurisprudence has provided a framework for the constitutional exercise of protective jurisdiction that current models have failed to fully articulate. Under the proposed model, federal jurisdiction would not require that substantive federal law govern the disposition of a controversy. The presence of a federal "ingredient," as the term is used in *Osborn v. Bank of the United States*,[24] would empower Congress to extend federal jurisdiction only when a federal forum advances a meaningful federal interest.

I. THE RED CROSS AND THE HISTORICAL UNDERPINNINGS OF CONGRESS' RIGHT TO CONFER FEDERAL JURISDICTION ON FEDERALLY-CHARTERED CORPORATIONS

A. *The Concept of Protective Jurisdiction*

Protective jurisdiction is commonly viewed as "protective" from the point of view of one of the parties to the litigation. From that party's perspective, the federal courts are a more favorable forum for the case than state courts.[25] For example, the Red Cross might prefer a federal

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tive jurisdiction in the face of state sovereignty concerns, see Note, *Over-Protective Jurisdiction?: A State Sovereignty Theory of Federal Questions*, 102 Harv. L. Rev. 1948 (1989) [hereinafter *Over-Protective Jurisdiction?*]. This Comment, instead, accepts the premise that protective jurisdiction may be a constitutional exercise of "arising under" jurisdiction if the requisite federal ingredient is present, *see* Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824), and proposes a two part analysis that attempts to address the difficult question of when Congress can properly "expand" the jurisdiction of the federal courts. *See supra* note 13.

23. *See supra* note 6.

24. 22 U.S. (9 Wheat.) 738, 823 (1824).

25. An out-of-state litigant would prefer a federal forum, for example, to guard against possible bias in the state courts of the opponent's home state. *See infra* note 59 and accompanying text. Federal diversity jurisdiction reflects the belief that a federal forum diminishes this bias. *See* U.S. Const. art. III, § 2; 28 U.S.C. § 1332 (1988).

Similarly, state hostility toward federal revenue officers led Congress to provide for removal of state criminal prosecutions against federal officers when the officers' federally mandated duties provided the basis for the prosecution. *See* Act of July 13, 1866, ch. 184, 14 Stat. 98, 171 (1866) (current version at 28 U.S.C. § 1442(a)(1) (1988)); *see also* Tennessee v. Davis, 100 U.S. 257, 272 (1879) (allowing removal when a federal revenue

forum because of its convenience for consolidating cases. Specifically, if the Red Cross defends a large number of cases related to the transmission of Acquired Immune Deficiency Syndrome (AIDS), it would expend resources unnecessarily in largely duplicative litigation if those cases were scattered in various state courts.[26] Another, more general, reason might be the perception that the federal judiciary is superior to many state judiciaries.[27] Protective jurisdiction exploits the advantages of a federal forum for the benefit of a particular party or class of cases.

Often, the federal government is the party whose interests are being protected by a congressional conferral of federal jurisdiction. Accordingly, the Supreme Court has traditionally allowed Congress to extend federal jurisdiction to cases involving important federal interests.[28] *Red Cross* fits this paradigm. The continued economic viability and growth of the Red Cross qualifies as an important federal interest because the Red Cross performs vital functions on behalf of the United States government at home and abroad.[29] It is important, therefore, that Congress protect

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officer was indicted for murder for actions taken while seizing an illegal distillery). Federal courts, presumably, are more likely to credit the federal defense. State courts have a countervailing interest in enforcing the laws of the state.

26. *See, e.g.*, Edward F. Sherman, *Aggregate Disposition of Related Cases: The Policy Issues*, 10 Rev. Litig. 231, 232 (1991) (suggesting that the advantages of aggregation include "economies of scale, efficiencies through avoidance of duplication, and consistency of result"); George T. Conway III, Note, *The Consolidation of Multistate Litigation in State Courts*, 96 Yale L.J. 1099, 1099 (1987) (noting that the cost of litigating multistate claims "often exceeds the sums that are ultimately paid to plaintiffs").

27. There are strong advocates on both sides of the debate over parity between federal and state judiciaries' enforcement of federal rights. *See, e.g.*, Burt Neuborne, *The Myth of Parity*, 90 Harv. L. Rev. 1105, 1115-28 (1977) (asserting the superiority of the federal judiciary); Martin H. Redish, *Judicial Parity, Litigant Choice, and Democratic Theory: A Comment on Federal Jurisdiction and Constitutional Rights*, 36 UCLA L. Rev. 329, 331-38 (1988) (same). *But see* Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 Wm. & Mary L. Rev. 605, 629-35 (1988) (arguing that state and federal courts are equally competent).

28. The federal government's interest in the growth of the labor movement, for example, led to the development of a body of federal common law to govern collective bargaining agreements that would otherwise be governed by state contract law. *See* Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957) (enforcing contracts between employers and labor organizations under § 301 of the Taft-Hartley Act, 29 U.S.C. § 185 (1988)). Similarly, Congress' interest in a uniform system of bankruptcy adjudication allows a trustee in bankruptcy to bring suit against a non-diverse private party in federal court. *See* Williams v. Austrian, 331 U.S. 642 (1947) (allowing trustee in bankruptcy to sue non-diverse adverse claimants in federal court); Schumacher v. Beeler, 293 U.S. 367 (1934) (same).

29. *See* Wesley A. Sturges, *The Legal Status of the Red Cross*, 56 Mich. L. Rev. 1 (1957). Professor Sturges contended that the importance of the Red Cross to the United States' obligations under the Geneva Treaties, *see supra* note 1, sets it apart from other membership corporations created by Congress. *See* Sturges, *supra*, at 9. As Professor Sturges noted further, "[t]he obligations imposed upon the corporation to aid the Government of the United States in the fulfillment of its undertakings under the Geneva Treaties should, perhaps, be emphasized as the most telling indication of its stature as an instrumentality of the United States." *Id.* at 14.

In 1905, Congress reincorporated the Red Cross in its present form believing its work so important as to demand government supervision. *See* 36 U.S.C. § 1, pmbl. (1988).

the Red Cross from excessive liability stemming from its role as one of the major suppliers of blood and blood products in the United States.[30] Given the government's reliance on the Red Cross for unique and unduplicated services,[31] it is not surprising that Congress would want to extend to the Red Cross the protection of the federal courts.

Osborn v. Bank of the United States[32] sparked the idea of protective jurisdiction.[33] *Osborn* stands for the proposition that a case arises under federal law if an issue of federal law "forms an ingredient of the original cause."[34] Commentators sought to explain *Osborn* with a theory of protective jurisdiction.

In *Osborn*, the charter of the Second Bank of the United States contained a clause that authorized the bank to "sue and be sued . . . in all State Courts having competent jurisdiction, and in any circuit court in the United States."[35] The Supreme Court held that this language gave federal courts original jurisdiction over suits involving the Bank because of the specific reference to the federal circuit courts.[36] The *Osborn* Court reasoned that the jurisdictional grant was constitutional under Article III because all of the Bank's capacities flowed from the act of Congress that

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Government supervision includes the President's appointment of eight members of the Board of Governors. *See* 36 U.S.C. § 5(a) (1988). Of the eight members, one is designated the corporation's principal officer, and the remainder are officials of other departments and agencies of the federal government. *See id.*

Courts have acknowledged the important services the Red Cross provides to the armed forces. *See* Granzow v. United States, 261 F. 172, 173 (8th Cir. 1919) (uttering remarks intended to shake public confidence in the Red Cross, and thereby reduce contributions to it, violates the Espionage Act of June 15, 1917, ch. 30, 40 Stat. 217 (1917)). The Eighth Circuit recognized the Red Cross as an "auxiliary to the armed forces." *Granzow*, 261 F. at 173. Similarly, the United States Supreme Court has ruled that the Red Cross is a government instrumentality for the purposes of immunity from state taxation. *See* Department of Employment v. United States, 385 U.S. 355, 358 (1966). The Court noted that the Red Cross "perform[s] a wide variety of functions indispensable to the workings of our Armed Forces around the globe." *Id.* at 359.

30. The Red Cross supplies "more than one half of the nation's needed blood and blood products." American Red Cross, 1985 Annual Report 22 (1985).

31. *See* Sturges, *supra* note 29, at 17.

32. 22 U.S. (9 Wheat.) 738 (1824).

33. *See, e.g.*, 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, 370 (1985) ("[t]he starting point is . . . Osborn v. Bank of the United States"); Robert T. Novick, Comment, *Problems "Arising Under"* Verlinden B. V. v. Central Bank of Nigeria, 31 Am. U. L. Rev. 1039, 1052 (1982) ("Osborn v. Bank of the United States was the first case in which the Supreme Court construed the 'arising under' language of article III . . . ."); Scott A. Rosenberg, Note, *The Theory of Protective Jurisdiction*, 57 N.Y.U. L. Rev. 933, 965 (1982) ("*Osborn* is the grandfather of the theory of protective jurisdiction.").

34. *Osborn*, 22 U.S. at 823.

35. *Id.* at 817.

36. *See id. Osborn* was an extension of an earlier case in which the Court held that the lack of a specific reference to the federal courts in a charter creates only a general capacity to sue. *See* Bank of the United States v. Deveaux, 9 U.S. (5 Cranch) 61 (1809), *overruled by* Louisville, C. & C. R.R. v. Letson, 43 U.S. (2 How.) 497 (1844).

created it.[37] Hence, all suits involving the Bank arose under federal law.[38] The federal charter provided the "original ingredient" necessary to support Article III "arising under" jurisdiction.[39] *Red Cross* reaffirmed *Osborn*'s "original ingredient" test.[40]

B. *Evolution of Protective Jurisdiction in the Courts*

The Supreme Court reviews legislation purporting to extend federal jurisdiction for its conformity with Article III.[41] Article III declares that "[t]he 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."[42]

In *Osborn*, Chief Justice Marshall gave Article III a broad interpretation,[43] holding that a case "arose under" federal law if an issue of federal law "form[ed] an ingredient of the original cause."[44] Even an ingredient that is not likely to be litigated is sufficient to support jurisdiction.[45] Marshall suggested that federal courts could properly exercise jurisdiction over any case that falls within this constitutional definition of judicial power if Congress chooses to grant such jurisdiction.[46]

The Court reaffirmed Congress' broad power over federal court jurisdiction in *National Mutual Insurance Co. v. Tidewater Transfer*.[47] Although *Tidewater Transfer* focused on diversity jurisdiction, the extension of jurisdiction under the diversity clause is analogous to the Court's treatment of cases under the "arising under" clause.[48] *Tidewater Trans-*

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37. *See Osborn*, 22 U.S. at 823.
38. *See id.*
39. *See id.* at 824.
40. *See* American Nat'l Red Cross v. S.G., 112 S. Ct. 2465, 2475-76 (1992). Both *Osborn* and *Red Cross* assert that because a corporation is organized under an act of Congress, every activity of the organization is theoretically governed by federal law—the law that created the organization—and Congress can, therefore, confer or withhold federal jurisdiction. *See Osborn*, 22 U.S. at 823; *Red Cross*, 112 S. Ct. at 2475-76.
41. *See* U.S. Const. art. III, § 2. Article III, § 2 delineates 11 types of jurisdiction, including the "arising under" jurisdiction and jurisdiction based on diversity of citizenship. *See id.*
42. U.S. Const. art. III, § 2.
43. *See* Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824); *see also* Verlinden B. V. v. Central Bank of Nigeria, 461 U.S. 480, 492 (1983) ("*Osborn* thus reflects a broad conception of 'arising under' jurisdiction . . . .").
44. *Osborn*, 22 U.S. at 823.
45. *See id.* at 824 (capacity to sue granted by federal charter is unlikely to be challenged after initial judicial determination); *see also* Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 471 (1957) (Frankfurter, J., dissenting) ("The traditional interpretation . . . is that . . . Congress may confer [jurisdiction] whenever there exists in the background some federal proposition that might be challenged, despite the remoteness of the likelihood of actual presentation of such a federal question.").
46. *See Osborn*, 22 U.S. at 818-19.
47. 337 U.S. 582 (1949).
48. *See id.* at 584-85; *see also* U.S. Const. art. III, § 2 ("[t]he judicial Power shall extend to all Cases . . . between a State and Citizens of another State; between Citizens of different States").

fer exemplifies the extent of Congress' power over federal jurisdiction in the presence of important federal interests.

The plurality in *Tidewater Transfer* upheld the constitutionality of a federal statute providing federal diversity jurisdiction over civil suits between citizens of the District of Columbia and citizens of a state.[49] The statute defined the word "state," for purposes of diversity jurisdiction, to include the District of Columbia.[50] This enactment directly contradicted *Hepburn v. Ellzey*,[51] an earlier Supreme Court decision, which held that the term "state" did not include the District of Columbia.[52]

To avoid overruling *Hepburn*'s[53] narrow interpretation of the term "state", Justice Jackson, in *Tidewater Transfer*, looked beyond the bounds of Article III to uphold the constitutionality of the jurisdictional grant.[54] To find that section 1332 was constitutional, Jackson relied on Congress' exclusive power, under Article I of the Constitution,[55] to gov-

49. *See Tidewater Transfer*, 337 U.S. at 603-04. The Court upheld the Act of April 20, 1940, ch. 117, 54 Stat. 143 (1940) (codified as amended at 28 U.S.C. § 1332(d) (1988)). Section 1332 provides for federal court jurisdiction based on diversity of citizenship, and declares that "[t]he word 'States,' as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico." 28 U.S.C. § 1332(d) (1988).

50. *See* 28 U.S.C. § 1332(d) (1988).

51. 6 U.S. (2 Cranch) 445 (1805).

52. *See id.* The *Hepburn* Court construed the term "state" narrowly in both the Constitution, *see* U.S. Const. art. III, § 2, and in the Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78. *See Hepburn*, 6 U.S. (2 Cranch) at 452 ("[T]he members of the American confederacy only are the states contemplated in the [C]onstitution."). Justice Marshall, however, need not have construed the Judiciary Act as synonymous with the Constitution. Various terms have been construed broadly in the Constitution, and more narrowly in a statute, even when they contained virtually identical language. For example, both Article III, § 2, and 28 U.S.C. § 1332 use virtually identical language allowing federal jurisdiction where there is diversity of citizenship. *Compare* U.S. Const. art. III, § 2 (federal jurisdiction over cases "between a State and Citizens of another State" and "between Citizens of different States") *with* 28 U.S.C. § 1332(a) (1988) (federal jurisdiction for suits "between citizens of different States"). The Supreme Court has determined that Article III requires only minimal diversity. *See* State Farm Fire & Casualty Co. v. Tashire, 386 U.S. 523, 530-31 (1967). In contrast, diversity jurisdiction based solely on § 1332 requires complete diversity. *See* Treinies v. Sunshine Mining Co., 308 U.S. 66, 71 (1939) (construing the predecessor to § 1332, Act of March 3, 1911, ch. 231, § 24, 36 Stat. 1087, 1091 (1911)).

Marshall could have given the term "state" its broadest meaning in the context of Article III, and a more narrow interpretation for purposes of § 1332. The result in *Hepburn* would have been the same. Unlike the statute at issue in *Tidewater Transfer*, the Judiciary Act of 1789 contained no language purporting to include the District of Columbia within its definition of the term "state." The *Hepburn* Court could have found, therefore, that the definition of "state" in Article III is broad enough to include the District of Columbia, but Congress did not intend to include it for purposes of the Judiciary Act of 1789.

53. *See Hepburn*, 6 U.S. at 452.

54. *See* National Mut. Ins. Co. v. Tidewater Transfer, 337 U.S. 582, 588-89 (1949). The traditional interpretation of the Constitution was that Article III alone determined the boundaries of federal jurisdiction. *See* Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 472 (1957) (Frankfurter, J., dissenting).

55. *See* U.S. Const. art. I, § 8, cl. 17. Clause 17 provides that "Congress shall have

ern the District of Columbia.[56] Although a plurality of the Court agreed that Congress' power was broad enough to extend diversity jurisdiction to citizens of the District of Columbia,[57] a majority of the Court rejected the premise that federal jurisdiction was not governed by Article III exclusively.[58]

The federal interest in *Tidewater Transfer* was, nevertheless, clear. The extension of diversity jurisdiction to citizens of the District of Columbia reflected concern for possible bias against one of the parties to a lawsuit. That same concern led the drafters of the Constitution to open the federal courts as an alternative, and presumably neutral, forum for disputes between residents of different states.[59] The federal ingredient, however, was not as clear. Congress' Article I power to govern the District of Columbia[60] could provide the requisite federal ingredient if the jurisdictional grant is viewed as part of a comprehensive regulatory framework.[61] A challenge to the validity of that framework could, potentially, raise a federal question. Although this federal ingredient, alone, could support federal jurisdiction,[62] it seems likely that the importance of the federal interests influenced the Court's decision.

Federal interests also figured prominently in the Court's decision to uphold jurisdiction in *Textile Workers Union v. Lincoln Mills*.[63] The Court upheld federal jurisdiction in *Lincoln Mills* by using the federal courts' inherent power to fashion federal common law.[64]

Lincoln Mills involved a collective bargaining agreement that contained an arbitration clause.[65] The Textile Workers Union brought suit

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the power . . . [t]o exercise exclusive Legislation in all Cases whatsoever, over such District . . . as may . . . become the Seat of the Government of the United States . . . ."

56. *See Tidewater Transfer*, 337 U.S. at 588-89.

57. *See id.* at 604 (Rutledge, J., concurring).

58. Justice Rutledge, joined by Justice Murphy, rejected this proposition in his concurrence. *See id.* at 607 (Rutledge, J., concurring). Chief Justice Vinson, joined by Justice Douglas, rejected it in his dissenting opinion. *See id.* at 645 (Vinson, C.J., dissenting). Justice Frankfurter, joined by Justice Reed, entered a separate dissenting opinion. *See id.* at 655 (Frankfurter, J., dissenting). *Hepburn*, although superseded by statute, has still not been overruled.

59. *See* U.S. Const. art. III, § 2 ("The judicial Power shall extend to all Cases . . . between a State and Citizens of another State; between Citizens of different States . . . ."); *see also* Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 475 (1957) (Frankfurter, J., dissenting) (noting that the Constitution's diversity clause reflects "a belief in the inadequacy of state tribunals in determining state law").

60. *See* U.S. Const. art. I, § 8, cl. 17.

61. *See* Verlinden B. V. v. Central Bank of Nigeria, 461 U.S. 480, 497 (1983) (a grant of federal jurisdiction over actions involving foreign sovereigns is constitutional if it is within a broad statutory framework enacted pursuant to Article I powers); *infra* note 73 and accompanying text.

62. *See supra* note 6.

63. 353 U.S. 448 (1957).

64. *See* Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 456-57 (1957); *see also* Northwest Airlines, Inc. v. Transport Workers Union, 451 U.S. 77, 95 (1981) ("The [Supreme] Court also has recognized a responsibility, in the absence of legislation, to fashion federal common law in cases raising issues of uniquely federal concern . . . .").

65. *See Lincoln Mills*, 353 U.S. at 449.

in federal court to compel the employer to arbitrate a dispute.[66] Federal court jurisdiction was based on section 301 of the Labor Management Relations Act of 1947 ("LMRA").[67] Section 301 appears to be a pure jurisdictional statute providing no substantive law, and as the Court later held, a pure jurisdictional statute cannot support Article III "arising under" jurisdiction.[68] Anticipating this conflict with Article III, the Court determined that, along with jurisdiction, Congress intended the federal courts to fashion a body of federal substantive law to govern cases brought under the LMRA.[69]

By fashioning a body of federal common law to govern section 301 suits, the *Lincoln Mills* Court provided more than simply a federal ingredient. Section 301 suits would be governed by substantive federal law. Moreover, the federal interests that dictated the Court's decision to fashion this body of federal common law are analogous to those interests that would support protective jurisdiction. The Court focused on the importance of the federal policy behind the legislation and expressed concern that the policy could not be fully effectuated under existing state law.[70]

In a more recent case, the Supreme Court upheld Congress' right to extend federal jurisdiction to controversies between foreign citizens and foreign sovereigns, even if the law to be applied is the law of another country.[71] *Verlinden B. V. v. Central Bank of Nigeria*[72] held that a grant of federal court jurisdiction that is within a comprehensive regulatory scheme is permissible under Article III. Congress can, for example, confer jurisdiction over a class of cases in the course of exercising its power to regulate interstate commerce or some other Article I power.[73]

This approach differed from that espoused by Justice Jackson in *Tide-*

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66. *See id.*

67. Labor Management Relations Act, § 301, 29 U.S.C. § 185 (1988). Section 301 provides as follows:

> Suits for violation of contracts between an employer and a labor organization ... may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185 (1988).

68. *See* Verlinden B. V. v. Central Bank of Nigeria, 461 U.S. 480, 495-96 (1983).

69. *See* Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 451 (1957). The Court did not invalidate the statute although the jurisdictional grant arguably preceded the federal law supporting its constitutionality.

70. *See id.* at 456-57. Two important policies were to encourage collective bargaining ending in enforceable contracts, *see id.* at 453, and to decrease the likelihood of strikes by encouraging binding arbitration. *See id.* at 453-55. The Court was concerned that construing § 301 narrowly as just a jurisdictional statute, "would undercut the Act and defeat its policy." *Id.* at 456. The Court noted that promoting these policies would require fashioning a federal rule in favor of enforcing arbitration agreements as the common law rule operated against enforcement of agreements to arbitrate. *See id.* (citing Red Cross Line v. Atlantic Fruit Co., 264 U.S. 109 (1924) which discusses the common law rule).

71. *See* Verlinden B. V. v. Central Bank of Nigeria, 461 U.S. 480, 497 (1983).

72. 461 U.S. 480 (1983).

73. *See id.* at 496.

water Transfer[74] in that Congress actually provided some substantive rules of decision. Sovereign immunity was a necessary question of federal law to be decided in every case.[75]

The Foreign Sovereign Immunities Act ("FSIA"),[76] provided the federal ingredient in *Verlinden* necessary to support "arising under" jurisdiction.[77] Some of the Court's dicta, however, also emphasized the importance of the federal interest,[78] which suggested that something more than a federal law "ingredient" was required.[79]

The federal interest implicated in *Verlinden* involved foreign relations.[80] Foreign relations decisions such as sovereign immunity are rarely subject to judicial interference. The Court, therefore, recognized that Congress should be able to extend federal jurisdiction to facilitate the resolution of disputes involving foreign states.[81]

The Supreme Court's most recent look at congressional conferral of federal jurisdiction actually acknowledged the existence of a theory of protective jurisdiction predicated on the protection of federal interests.[82] In *Mesa v. California*,[83] the Court, however, declined to adopt this theory, refusing to recognize any federal interests that were not already adequately protected.[84] *Mesa* held that in the case of a state criminal prosecution, the federal officer removal statute[85] required the averment of a federal defense or removal would be improper.[86] The Court deemed

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74. *See supra* note 56 and accompanying text.

75. *See Verlinden*, 461 U.S. at 493.

76. *See* Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1332(a)(2)-(4), 1391(f), 1441(d), 1602-1611 (1988 & Supp. II 1990).

77. *See Verlinden*, 461 U.S. at 493. A suit of the type espoused in *Verlinden* could only be sustained if the foreign sovereign was not entitled to immunity under §§ 1605-1607 of the Foreign Sovereign Immunities Act (the "FSIA"), or any applicable international agreement. *See id.* at 488-89; *see also* FSIA, 28 U.S.C. §§ 1330, 1332(a)(2)-(4), 1391(f), 1441(d), 1602-1611 (1988 & Supp. II 1990).

This federal law issue is relatively minor, and once decided would no longer be a part of the case. If the sovereign is entitled to sovereign immunity, the case would be dismissed for lack of subject matter jurisdiction. *See* FSIA, 28 U.S.C. § 1330(a) (1988). Sovereign immunity could not be used as a defense in the case if United States law applied, and would probably be irrelevant if the case was governed by foreign law. The federal law issue is, however, "an ingredient of the original cause," as required by *Osborn*. *See* Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 823 (1824).

78. *See Verlinden*, 461 U.S. at 493 ("Actions against foreign sovereigns in our courts raise sensitive issues concerning the foreign relations of the United States, and the primacy of federal concerns is evident.").

79. The Court stated, for example, that a jurisdictional statute itself cannot be the federal law under which the action arises. *See id.* at 496. Presumably the Court was distinguishing between a pure jurisdictional statute and one that also grants capacity to sue and be sued, as in American Nat'l Red Cross v. S.G., 112 S. Ct. 2465 (1992).

80. *See Verlinden*, 461 U.S. at 493.

81. *See id.* at 493.

82. *See* Mesa v. California, 489 U.S. 121 (1989).

83. 489 U.S. 121 (1989).

84. *See id.* at 137.

85. 28 U.S.C. § 1442(a)(1) (1988).

86. *See Mesa*, 489 U.S. at 132. Section 1442(a) provides that:

the federal officer removal statute to be a "pure jurisdictional statute" which, therefore, could not independently support Article III "arising under" jurisdiction.[87] According to the Court, the existence of a substantial federal issue, and not the statute itself, determines whether a case is removable.[88]

Arguably, petitioners' federal officer status in *Mesa* could have provided the requisite "federal ingredient" to support jurisdiction within the bounds of Article III.[89] The Court, however, concluded that it did not.[90] This conclusion indicates that something other than federal law "somewhere in the background" is required to support jurisdiction.[91] The Court's dicta reemphasized the importance of government interests in determining the proper exercise of federal jurisdiction.[92] The Court left open the possibility that a sufficiently compelling government interest might alone support "arising under" jurisdiction, even in the absence of a contested federal issue.[93]

It is difficult to determine, from the body of protective jurisdiction case law, how willing the Supreme Court is to allow Congress to "expand" the jurisdiction of the federal courts.[94] The Supreme Court traditionally has shown great deference to Congress' choice of forum for specific classes of litigation. It clearly imposes some outer limit, however, which

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> [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 . . . .

28 U.S.C. § 1442(a) (1988).

87. *See Mesa*, 489 U.S. at 136.

88. *See id.* ("[I]t is the raising of a federal question . . . that constitutes the federal law under which the action against the federal officer arises for Art. III purposes.").

As in *Verlinden*, the Court questioned Congress' ability, within the confines of Article III of the Constitution, to extend federal jurisdiction to cases where no issue of federal law would be adjudicated. *See Mesa*, 489 U.S. at 136. Notably, the Court did not expressly reject the theory of protective jurisdiction. Rather, the Court stated, "[w]e have, in the past, not found the need to adopt a theory of 'protective jurisdiction' to support Art. III 'arising under' jurisdiction, . . . and we do not see any need for doing so here . . . ." *Id.* at 137.

89. The petitioners in *Mesa* urged removal because the traffic accidents for which they were being prosecuted arose during the performance of their federally mandated duties. *See Mesa*, 489 U.S. at 123.

90. *See id.* at 136.

91. Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 474 (1957) (Frankfurter, J., dissenting).

92. *See Mesa*, 489 U.S. at 137.

93. *See id.* The government urged the Court to adopt a theory of protective jurisdiction as a means of avoiding difficulties with Article III. *See id.* The government suggested that a "generalized congressional interest in protecting federal officers from state court interference suffices to support Art. III 'arising under' jurisdiction." *Id.* The Court did not foreclose this possibility, but denied the presence of a sufficiently compelling federal interest. *See id.*

94. *See supra* note 13.

is dictated by Article III of the Constitution.[95] The Court, nevertheless, seems disinclined to disturb the federal charter cases that appear to rest solely on the presence of a nascent "federal ingredient."[96]

Aside from the federal charter cases, more recent judicial emphasis has been on the presence of meaningful federal interests.[97] This recent trend raises the question of whether the present Court would allow federal jurisdiction to be extended to a congressionally chartered corporation when no federal interests were implicated and no federal law issues would be litigated.[98] *Red Cross* was not such a case. The government clearly had a meaningful interest in providing a federal forum for the Red Cross.[99]

C. *Background of* Red Cross—*An Examination of the Federal Charter Cases*

Since 1987, the Red Cross and its regional subsidiaries have been involved in an increasing number of law suits related to the transmission of the AIDS virus through infected blood.[100] Plaintiffs in these cases generally file suits in state court claiming negligence, malpractice, or other state law causes of action.[101] The Red Cross sought removal of these actions to the federal courts.[102] It contended that the "sue and be sued" language in its congressional charter[103] created original jurisdiction in the federal courts over all suits involving it, thus allowing removal.[104]

The controversy that led to the Supreme Court's decision in *Red Cross* started with a split in authority among the federal circuit courts concern-

95. *See, e.g.*, Verlinden B. V. v. Central Bank of Nigeria, 461 U.S. 480, 491 (1983) (Congress cannot "expand the jurisdiction of the federal courts beyond the bounds established by the Constitution").

96. *See* American Nat'l Red Cross v. S.G., 112 S. Ct. 2465, 2476 (1992) ("We would be loathe to repudiate such a longstanding and settled rule.").

97. *See, e.g.*, Mesa v. California, 489 U.S. 121, 137-38 (1989) (jurisdiction was not permitted because all federal interests were protected).

98. Direct precedent for doing so exists. *See, e.g.*, Knights of Pythias v. Kalinski, 163 U.S. 289, 290 (1896) (federal jurisdiction supported by congressional charter); Butler v. National Home for Soldiers, 144 U.S. 64, 66 (1892) (same).

99. *See supra* note 29 and accompanying text.

100. *See* Petition for a Writ of Certiorari at 10-12 nn.4-5, American Nat'l Red Cross v. S.G., 112 S. Ct. 2465 (1992) (No. 91-594) (the number of court decisions on this issue increased from 3 in 1987 to 21 in 1991).

101. *See, e.g.*, Kaiser v. Memorial Blood Ctr., 486 N.W.2d 762, 764 (Minn. 1992) (plaintiffs alleging negligence in blood donor screening); Doe v. American Red Cross Blood Servs., 377 S.E.2d 323, 325 (S.C. 1989) (same).

102. The Red Cross predicated removal on 28 U.S.C. § 1441 (1988). The text of § 1441(a) provides that:

> [A]ny civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

See 28 U.S.C. § 1441(a) (1988).

103. *See supra* note 9.

104. *See Kaiser*, 486 N.W.2d at 764.

ing whether language in the Red Cross' charter conferred original jurisdiction on the federal courts.[105] In *Kaiser v. Memorial Blood Center*,[106] the Eighth Circuit reviewed the line of federal charter cases and concluded that the Red Cross charter did confer original jurisdiction on the federal courts.[107]

The Eighth Circuit's analysis started with *Osborn v. Bank of the United States*.[108] The Supreme Court has interpreted *Osborn* to allow federal court jurisdiction over congressionally chartered corporations so long as Congress has evinced an intent to confer such jurisdiction.[109] The Supreme Court addressed the charter issue again in *Texas & Pacific Railway Co. v. Kirk (Pacific Railroad Removal Cases)*.[110] In light of the Judiciary Act of 1875,[111] which established general federal question jurisdiction, and the holding in *Osborn*, the *Pacific* Court determined that "a suit by or against a corporation of the United States is a suit arising under the laws of the United States."[112] According to the *Pacific* Court, the mere fact of incorporation by Congress transforms any dispute involving the corporation into a federal question.[113]

The decision in the *Pacific Railroad Removal Cases* greatly expanded the number of cases eligible for removal to the federal courts based on statutory federal question jurisdiction.[114] Congress responded to the increased litigation involving railroads by passing the Act of January 28, 1915,[115] which provides that "[n]o court of the United States shall have jurisdiction of any action or suit by or against any railroad company upon the ground that said railroad company was incorporated under an Act of Congress."[116]

In 1925, Congress enacted a statute that limited federal court jurisdiction over all government corporations in a manner similar to the statute

105. *Compare* Kaiser v. Memorial Blood Ctr., 938 F.2d 90, 93 (8th Cir. 1991) (finding original jurisdiction) *with* S.G. v. American Nat'l Red Cross, 938 F.2d 1494, 1501 (1st Cir. 1991), *rev'd*, 112 S. Ct. 2465 (1992) (finding no jurisdiction).

106. 938 F.2d 90 (8th Cir. 1991).

107. *See id.* at 93.

108. 22 U.S. (9 Wheat.) 738 (1824).

109. *See, e.g.*, Texas & Pac. Ry. v. Kirk, 115 U.S. 1, 11 (1885) (noting that *Osborn* settled the jurisdiction issue for congressionally chartered corporations); *see also supra* notes 42-46 and accompanying text (discussing *Osborn*).

110. 115 U.S. 1 (1885).

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

112. Texas & Pac. Ry. v. Kirk, 115 U.S. 1, 11 (1885).

113. *See id.*

114. *See* S.G. v. American Nat'l Red Cross, 938 F.2d 1494, 1497 (1st Cir. 1991), *rev'd*, 112 S. Ct. 2465 (1992).

115. Act of January 28, 1915, ch. 22, § 5, 38 Stat. 803 (amending the Judiciary Act of 1875).

116. *Id.* The Supreme Court's first opportunity to consider the effect of the Act of January 28, 1915, *see id.*, came in Bankers Trust Co. v. Texas & Pac. Ry., 241 U.S. 295 (1916). The Court confirmed that the Act did eliminate federal incorporation as an independent basis for federal question jurisdiction in cases involving railroads. *See Bankers Trust*, 241 U.S. at 307.

covering railroads.[117] The current version of the statute provides that "[t]he district courts shall not have jurisdiction of any civil action by or against any corporation upon the ground that it was incorporated by or under an Act of Congress, unless the United States is the owner of more than one-half of its capital stock."[118]

After the passage of this jurisdiction limiting statute, it was unclear whether the Red Cross could continue to rely on the fact of its incorporation under an act of Congress as a basis for statutory federal question jurisdiction.[119] The *Kaiser* court determined that, despite section 1349, the precedent established by *Osborn*—that a specific reference to federal courts in a charter confers original jurisdiction on those courts—had not been overruled.[120]

The *Kaiser* court's conclusion relied partly on the Supreme Court's decision in *D'Oench, Duhme & Co. v. FDIC.*[121] *D'Oench, Duhme* seemed to affirm that a specific reference to federal courts in a charter confers original jurisdiction.[122] The case involved a dispute over whether the Federal Deposit Insurance Corporation ("FDIC") could collect on a demand note that the original parties agreed would not be called for payment.[123] Although the basis of federal court jurisdiction was not at issue in that case, the Court, nevertheless, mentioned that jurisdiction was based on a charter that allowed the FDIC to "sue or be sued 'in any court of law or equity, *State or Federal.*' "[124] The *Kaiser* court found, accordingly, that the Red Cross charter grants original federal jurisdiction because it too included the phrase "State or Federal."[125]

In contrast to *Kaiser*, the First Circuit rejected the Eighth Circuit's interpretation of *Osborn* and its progeny.[126] In *S.G. v. American National Red Cross*,[127] the court rejected the plain meaning of Chief Justice Marshall's language in *Osborn* by stating, "We do not believe that *Os-*

117. *See* Act of February 13, 1925, ch. 229, § 12, 43 Stat. 936, 941 (1925) (codified as amended at 28 U.S.C. § 1349 (1988)).

118. 28 U.S.C. § 1349 (1988).

119. The various federal courts that have addressed the issue were unable to agree on whether the Act applied only to federally chartered business corporations of which the United States literally owned one half the capital stock, or whether the Act also applied to nonstock corporations like the Red Cross. *See* American Nat'l Red Cross v. S.G., 112 S. Ct. 2465, 2469 (1992) ("[T]he effect of the 1925 law on nonstock corporations like the Red Cross is unclear . . . ."); C.H. v. American Red Cross, 684 F. Supp. 1018, 1020-22 (E.D. Mo. 1987) (detailing the split in authority over whether § 1349 applies to nonstock corporations).

120. *See* Kaiser v. Memorial Blood Ctr., 938 F.2d 90, 93 (8th Cir. 1991).

121. 315 U.S. 447 (1942).

122. *See id.* at 455-56.

123. *See id.* at 454, 456.

124. *Id.* at 455 (emphasis added) (quoting the Federal Reserve Act, 12 U.S.C. § 264(j), ch. 89, 48 Stat. 162, 172 (1933)).

125. *See* Kaiser v. Memorial Blood Ctr., 938 F.2d 90, 93 (8th Cir. 1991).

126. *See* S.G. v. American Nat'l Red Cross, 938 F.2d 1494, 1496 (1st Cir. 1991), *rev'd*, 112 S. Ct. 2465 (1992).

127. 938 F.2d 1494 (1st Cir. 1991), *rev'd*, 112 S. Ct. 2465 (1992).

born's holding . . . should be read to confer talismanic significance on a simple reference to federal courts in a congressional charter."[128] Although *Osborn* did not make a distinction, the First Circuit found it significant that the charter at issue in *Osborn* referred specifically to the federal circuit courts,[129] rather than to the federal courts in general.[130]

The First Circuit also discounted the Supreme Court's explanation of the basis of its jurisdiction in *D'Oench, Duhme*[131] which referred to the portion of the FDIC charter that authorized the corporation to sue and be sued " 'in any court of law or equity, State or Federal.' "[132] Additional language in the charter made it clear, in *D'Oench, Duhme*, that original federal jurisdiction existed,[133] and thus, the opinion did not examine the significance of specific words in the charter.

Concluding that the language in the Red Cross charter was not specific enough to bring it within the ambit of *Osborn* and subsequent cases,[134] the First Circuit then examined the congressional history of the amendment that inserted the words "state or federal" in the charter.[135] The "sue and be sued" clause appears in a section of the charter entitled "Name of corporation; powers," which, the court reasoned, only "denominates standard corporate powers."[136] The court, therefore, concluded that absent clear intent to the contrary, this clause creates only the capacity of the corporation to litigate.[137]

The *S.G.* court found no clear intent to confer federal court jurisdiction in the legislative history of the amendment.[138] Upon examination of other congressional charters that were amended at approximately the same time as the Red Cross charter, the court concluded that the ambi-

128. *Id.* at 1497.

129. *See supra* text accompanying note 35.

130. *See S.G.*, 938 F.2d at 1496-97. The First Circuit also noted the parallel treatment of the references to state and federal courts in the Red Cross charter. *See id.* at 1498; *see also supra* note 9 (relevant excerpt of Red Cross charter). The court concluded that "[n]o clear basis exist[ed] for interpreting [the charter] as having expanded the jurisdiction of federal courts over the Red Cross while merely having conferred on the organization the power to sue in state courts . . . ." *S.G.*, 938 F.2d at 1498.

131. *See S.G.*, 938 F.2d at 1498-99.

132. D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, 455 (1942) (citations omitted). The FDIC charter actually went on to state the following:

> All suits of a civil nature at common law or in equity to which the Corporation shall be a party shall be deemed to arise under the laws of the United States and the United States district courts shall have original jurisdiction thereof, without regard to the amount in controversy . . . .

Banking (Federal Reserve) Act of 1935, ch. 614, § 101, 49 Stat. 684, 692 (codified as amended at 12 U.S.C. § 1819 (1988 & Supp. III 1991)). The Court noted the more specific jurisdictional grant in a footnote in the case. *See D'Oench, Duhme*, 315 U.S. at 455-56 n.2.

133. *See* 12 U.S.C. § 1819 (1988 & Supp. III 1991).

134. *See S.G.*, 938 F.2d at 1497.

135. *See* Act of May 8, 1947, ch. 50, § 3, 61 Stat. 80, 81 (1947).

136. *S.G.*, 938 F.2d at 1499.

137. *See id.*

138. *See id.* at 1499-1500.

guity of the language in the Red Cross charter, when compared with the clarity of the language in other charters, evinced an intent not to confer original jurisdiction.[139]

Specifically, the amendment to the Federal Crop Insurance Corporation (the "FCIC") charter provided the most striking example of Congress' ability to clearly confer federal jurisdiction because of its proximity to the Red Cross charter amendment.[140] The amended FCIC charter provided that the corporation "may sue and be sued . . . in any United States district court, and jurisdiction is hereby conferred upon such district court to determine controversies without regard to the amount in controversy."[141] In this instance, Congress clearly intended to confer original jurisdiction. At the time the Red Cross charter was amended, Congress was capable of unambiguously conferring federal jurisdiction whenever it chose.[142] The Court concluded, therefore, that the decision not to be clear and unambiguous was a conscious one.[143]

In deciding this controversy, a majority of the Supreme Court rejected the First Circuit's contention that *Osborn* was not meant to confer "talismanic significance" on a reference to federal courts in a congressional charter.[144] The majority reasoned that the Court's interpretation of other federal charters, prior to the Red Cross charter amendment, put Congress "on prospective notice" that including a specific reference to federal courts in a congressional charter would be construed as intent to confer federal jurisdiction.[145]

The Court also rejected the First Circuit's analysis of congressional intent.[146] It determined that the First Circuit's reliance on Congress' demonstrated ability to confer jurisdiction in very clear and precise terms

139. *See id.* The court referred to the congressional charter of the Federal Deposit Insurance Corporation. *See* 12 U.S.C. § 1819 (1988 & Supp. III 1991) (as amended by the Banking Act of 1935, 49 Stat. 684 (1935)). Section 1819 of the FDIC charter states as follows:

> All suits of a civil nature at common law or in equity to which the Corporation shall be a party shall be deemed to arise under the laws of the United States and the United States district courts shall have original jurisdiction thereof, without regard to the amount in controversy.

Id. This specific language showing a clear intent to confer federal jurisdiction was added twelve years before the Red Cross charter amendment that added the language at issue in American Nat'l Red Cross v. S.G., 112 S. Ct. 2465 (1992). *Compare* Act of May 8, 1947, 61 Stat. 80 (1947) (Red Cross charter amendment) *with* The Banking Act of 1935, 49 Stat. 684 (1935) (FDIC charter amendment). The court reasoned that the absence of such specific language in the Red Cross charter militated against a finding of intent to confer jurisdiction. *See S.G.*, 938 F.2d at 1499 n.5.

140. *See* Act of August 1, 1947, ch. 440, 61 Stat. 718, 719 (1947) (codified as amended at 7 U.S.C. § 1506(d) (1988 & Supp. III 1991)).

141. *Id.*

142. *See supra* 139-41 and accompanying text.

143. *See* S.G. v. American Nat'l Red Cross, 938 F.2d 1494, 1497-98 (1st Cir. 1991), *rev'd*, 112 S. Ct. 2465 (1992).

144. *See* American Nat'l Red Cross v. S.G., 112 S. Ct. 2465, 2467 (1992).

145. *See id.* at 2469.

146. *See id.* at 2474.

was misplaced.[147] Despite the explicit language in contemporaneous amendments to other charters, Congress was still on notice of the jurisdictional significance of the Red Cross charter language.[148]

The *Red Cross* Court also reiterated the importance it placed on the charter language in *D'Oench, Duhme.*[149] Although the grounds for jurisdiction were not in dispute in *D'Oench, Duhme*, the Court noted that jurisdiction was based on the language in the congressional charter that allowed the corporation to "sue or be sued 'in any court of law or equity, State or Federal.' "[150] The Court found it significant that the more specific jurisdictional provisions were only mentioned in a footnote.[151]

The *Red Cross* Court concluded, from its own analysis of congressional intent, that the 1947 charter amendment was probably intended to confer federal jurisdiction on the Red Cross.[152] The impetus for the amendment came, apparently, from a recommendation of an advisory committee (the Harriman Committee) assembled in 1946 by the Chairman of the Red Cross to review the structure and organization of the corporation.[153] Recommendation No. 22 of the Harriman Committee Report advised that " '[t]he Red Cross has in several instances sued in the Federal Courts, and its powers in this respect have not been questioned. However, in view of the limited nature of the jurisdiction of the Federal Courts it seems desirable that this right be clearly stated in the Charter.' "[154] Congress, thereafter, amended the charter by inserting the words "State or Federal" after the existing language "sue and be sued in courts of law and equity."[155]

According to the *Red Cross* Court, the history of the passage of the 1947 amendment, although not definitively clarifying congressional intent, sheds some light on the purpose of the amendment.[156] The legislative history, as the Court observed, was, at best, neutral.[157] To the extent it cuts either way, the legislative history favors the Red Cross' interpretation.[158]

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147. *See id.*
148. *See id.*
149. *See id.* at 2470.
150. *See* D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, 455 (1942). The Red Cross charter contains this same language. *See supra* note 9.
151. *See* American Nat'l Red Cross v. S.G., 112 S. Ct. 2465, 2470 (1992).
152. *See id.* at 2474.
153. *See* S. Rep. No. 38, 80th Cong., 1st Sess. 1-2 (1947), *reprinted in* 1947 U.S. Code Cong. Serv. 1028-29.
154. The American National Red Cross Report of the Advisory Committee on Organization at 35-36 (June 11, 1946), *quoted in* S.G. v. American Nat'l Red Cross, 938 F.2d 1494, 1499 (1st Cir. 1991), *rev'd*, 112 S. Ct. 2465 (1992).
155. *See* S. Rep. No. 38, 80th Cong., 1st Sess. 1-2 (1947), *reprinted in* 1947 U.S. Code Cong. Serv. 1028-29 ("The present legislation incorporates, in the main, the recommendations of the advisory committee.").
156. *See Red Cross*, 112 S. Ct. at 2474.
157. *See id.*
158. *See id.* The language of the recommendation, although referring to the limited nature of federal court jurisdiction and the Red Cross' right in that regard, is by no

Notably, the Supreme Court did not comment on the validity of the doctrine of protective jurisdiction in *Red Cross*. Nor did the Court discuss whether the extension of federal jurisdiction over a congressionally chartered corporation was such an exercise. Regrettably, the Supreme Court has rarely acknowledged the doctrine by name, or discussed the validity of the theory in any opinion of the Court.[159]

II. Current Theories and Uses of Protective Jurisdiction

A. *The Development of the Doctrine Through Scholarly Debate*

Protective jurisdiction has been the subject of extensive commentary by legal scholars.[160] Several major theories justifying the exercise of protective jurisdiction have emerged from this literary debate. Because the

means unambiguous. The First Circuit interpreted this amendment as an attempt to clarify the Red Cross' capacity to litigate in federal court rather than to confer federal subject matter jurisdiction. *See* S.G. v. American Nat'l Red Cross, 938 F.2d 1494, 1500 (1st Cir. 1991), *rev'd*, 112 S. Ct. 2465 (1992). As the Supreme Court noted, however, capacity of the corporation to litigate was never at issue. *See Red Cross*, 112 S. Ct. at 2475 (It is "extremely doubtful that capacity to sue *simpliciter* motivated that amendment").

159. *But see* Mesa v. California, 489 U.S. 121, 137 (1989) (disavowing a need to adopt a theory of protective jurisdiction); Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 473-75 (1957) (Frankfurter, J., dissenting) (objecting to the exercise of what he considers protective jurisdiction).

One commentator has suggested that the Supreme Court's reluctance to define more precisely the boundaries of Article III may be attributed to the textual ambiguity of the Constitution. *See Over-Protective Jurisdiction?*, *supra* note 22, at 1969. The Constitution does not vest the Court with exclusive authority to control the jurisdiction of the federal courts. Rather, Congress is given explicit authority to make exceptions and regulations governing the appellate jurisdiction of the Supreme Court, *see* U.S. Const. art. III, § 2, and the very existence of the lower federal courts was left to Congress' discretion. *See* U.S. Const. art. I, § 8. As Professor Barry Friedman observed, this textual ambiguity has led to "an interactive process between Congress and the Court on the appropriate uses and bounds of the federal judicial power." Barry Friedman, *A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction*, 85 Nw. U. L. Rev. 1, 2-3 (1990). Given the explicit recognition of Congress' role in defining the jurisdiction of the federal courts, the Supreme Court may be more reluctant to attempt to limit congressional action. The boundaries of Article III have, therefore, "evolve[d] through a dialogic process of congressional enactment and judicial response." *Id.* at 2.

160. *See* Paul M. Bator et al., Hart & Wechsler's The Federal Courts and the Federal System 866-70 (3d ed. 1988); Martin Redish, Federal Jurisdiction: Tensions in the Allocation of Judicial Power 59 (2d ed. 1990); Brown, *supra* note 33, at 367-82; William R. Casto, *The* Erie *Doctrine and the Structure of Constitutional Revolutions*, 62 Tul. L. Rev. 907 (1988); 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); Carole E. Goldberg-Ambrose, *The Protective Jurisdiction of the Federal Courts*, 30 UCLA L. Rev. 542 (1983); John E. Kennedy, *Federal Jurisdiction*, 19 Tex. Tech L. Rev. 603 (1988); Mishkin, *supra* note 5; Linda S. Mullenix, *Complex Litigation Reform and Article III Jurisdiction*, 59 Fordham L. Rev. 169, 198-206 (1990); Kenneth S. Rosenblatt, *Removal of Criminal Prosecutions of Federal Officials: Returning to the Original Intent of Congress*, 29 Santa Clara L. Rev. 21 (1989); Wechsler, *supra* note 5, at 224-25; Novick, *supra* note 33; Rosenberg, *supra* note 33; Note, *Bankruptcy and the Limits of Federal Jurisdiction*, 95 Harv. L. Rev. 703, 709-11 (1982) [hereinafter *Bankruptcy*]; Note, *Federal Jurisdiction and Procedure—Article III Federal Question Jurisdiction*, 97 Harv. L. Rev. 208 (1983); *Over-Protective Jurisdiction?*, *supra* note 22.

Supreme Court has generally avoided discussing the theory or exploring its contours,[161] commentators have attempted to fill the void by offering possible explanations for the Court's decisions.

Professor Herbert Wechsler advanced one of the first models of protective jurisdiction.[162] This model would allow Congress to pass a statute conferring federal jurisdiction even if it chose not to enact substantive law to govern the controversy.[163] This view considers jurisdiction just "one mode by which the Congress may assert its regulatory powers."[164]

Professor Wechsler's model is the broadest of the current formulations of protective jurisdiction. Wechsler contended that, at minimum, Congress' power to confer jurisdiction "*must* extend . . . to every case that *might* involve an issue under federal law."[165] In addition, Wechsler believed that Congress' power should extend "beyond this to all cases in which Congress has authority to make the rule to govern disposition of the controversy but is content instead to let the states provide the rule."[166] In sum, Wechsler regarded the jurisdictional statute as the federal law under which the case arose for Article III purposes.[167]

Professor Wechsler's model has been criticized in its applicability to *Osborn* as it is not clear that Congress could have enacted substantive legislation to govern all suits involving the Federal Bank.[168] It is also unclear whether Congress could enact substantive legislation to govern all legal relationships with the Red Cross.[169] In addition, the Supreme Court has clearly refuted Professor Wechsler's contention that a case can "arise under" a jurisdictional statute for Article III purposes.[170]

161. *But see* Mesa v. California, 489 U.S. 121, 137 (1989) ("We have, in the past, not found the need to adopt a theory of 'protective jurisdiction' to support Art. III 'arising under' jurisdiction . . . ."); Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 471-76 (1957) (Frankfurter, J., dissenting) (criticizing protective jurisdiction). For a discussion of possible reasons for this phenomenon, see *supra* note 159.

162. *See* Wechsler, *supra* note 5, at 224-25.

163. *See id.*

164. *Id.* at 225.

165. *Id.* at 224 (emphasis added).

166. *Id.*

167. *See id.* at 225 ("A case is one 'arising under' federal law within the sense of Article III whenever it is comprehended in a valid grant of jurisdiction . . . .").

168. *See* Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 474 (1957) (Frankfurter, J., dissenting); *see also* Mishkin, *supra* note 5, at 189 ("[I]t is far from certain even today that federal law could be made substantively to govern every one of the Bank's lawsuits.").

169. The American National Red Cross, as the national Red Cross Society for the United States, must maintain political and economic independence from the federal government in order to qualify for recognition by the International Red Cross. *See* Sturges, *supra* note 29, at 2-3 n.4. Although the Red Cross has been recognized as an instrumentality of the federal government for purposes of immunity from state taxation, *see* Department of Employment v. United States, 385 U.S. 355, 358 (1966), a body of substantive law to regulate the legal relationships of the corporation may violate the principle of political independence.

170. *See* Mesa v. California, 489 U.S. 121, 136 (1989); Verlinden B. V. v. Central Bank of Nigeria, 461 U.S. 480, 496 (1983).

A second model of protective jurisdiction, set forth by Professor Paul Mishkin, predicates federal jurisdiction on the protection of a congressional program or regulatory scheme.[171] Professor Mishkin's model received strong support from *Verlinden B. V. v. Central Bank of Nigeria*.[172] The *Verlinden* Court emphasized the presence of a comprehensive regulatory scheme of which the jurisdictional provisions were just one part.[173] Mishkin's model, however, does not go far enough. When applied to *Red Cross*, it suffers from some of the same flaws as Professor Wechsler's model. Specifically, it does not account for the absence of a federal regulatory program governing the Red Cross.[174] Thus, an extension of federal jurisdiction must be permissible even in the absence of a regulatory scheme.

A third model of protective jurisdiction would allow Congress to provide federal jurisdiction in two distinct circumstances: First, if an issue in the case will be governed by substantive federal law, the jurisdiction is "substance-based";[175] and second, when Congress desires to provide a federal forum for the adjudication of a certain class of disputes and federal law is not applicable, the jurisdiction is "forum-based."[176] The author of this model argues that jurisdiction can arise under a pure jurisdictional statute supported only by forum-based concerns.[177]

According to this model, a grant of jurisdiction supported only by forum-based concerns must meet three specific criteria.[178] First, the jurisdictional grant must further an Article I interest.[179] Second, the interest must be substantial.[180] Third, the grant must be no broader than the Article I interest warrants.[181]

This model comes closest to a comprehensive scheme of protective jurisdiction that would allow Congress the flexibility to extend jurisdiction to a wide variety of cases that implicate meaningful federal interests. It does not, however, completely accommodate *Red Cross*. *Red Cross* met only two of the author's three criteria. The Red Cross is integral to a foreign affairs program that involves Congress' powers under Article I of

171. *See* Mishkin, *supra* note 5, at 195.

172. 461 U.S. 480 (1983).

173. *See id.* at 496.

174. One might argue that because the Red Cross was established as part of the United States' obligations under the Geneva Treaties, *see supra* note 1, its creation and grant of jurisdiction are part of a federal program. The Geneva Treaties, however, do not provide any substantive or procedural law that could be said to govern tort suits against the Red Cross. *See id.*

175. *See* Rosenberg, *supra* note 33, at 948.

176. *See id.*

177. *See id.* at 951.

178. *See id.* at 958-59.

179. *See id.* at 958.

180. *See id.* at 958-59.

181. *See id.* at 959.

the Constitution.[182] Further, the interest is substantial in that the Red Cross performs unique services for the federal government at home and abroad.[183] A grant of jurisdiction over all civil actions involving the Red Cross, however, is not narrowly tailored to advance the Article I interest at issue. Rather, the concern for protecting the Red Cross from financial burdens that could interfere with the effective delivery of disaster relief services seems to be in response to the unique threat of liability in connection with the AIDS virus.[184]

This model also conflicts with other pronouncements of the Supreme Court. Inasmuch as the author suggests that a case can "arise under" a pure jurisdictional statute,[185] the Supreme Court has rejected that proposition.[186]

B. *A Comprehensive Theory of Protective Jurisdiction*

Given Supreme Court jurisprudence in this area, and Congress' need for flexibility in deciding whether to provide substantive federal law or a federal forum for protection of certain interests, an accurate theory of protective jurisdiction should recognize that the presence of a meaningful federal interest is a necessary component of the requisite "original ingredient." This two-part analysis prevents Congress from overburdening the federal courts with non-federal litigation, as the courts can ultimately determine whether the case involves a sufficiently meaningful federal interest.

1. The Federal Ingredient

The Supreme Court has suggested that a federal ingredient is some underlying issue of federal law that determines, in part, whether the plaintiff can prevail on the claim.[187] Moreover, the issue need not be contested.[188] The Court, therefore, seems to be employing a *de minimis*

182. *See supra* note 29 and accompanying text (discussing the Red Cross' importance to the federal government).

183. *See id.*

184. Some of the earliest cases in which the Red Cross tried to invoke the original jurisdiction of the district courts involved the AIDS virus. *See, e.g.*, Anonymous Blood Recipient v. Sinai Hosp., 692 F. Supp. 730, 731 (E.D. Mich. 1988) (plaintiff allegedly contracted AIDS from tainted blood); Roche v. American Red Cross, 680 F. Supp. 449, 450 (D. Mass. 1988) (plaintiff alleged her husband died of AIDS from tainted blood).

185. *See* Rosenberg, *supra* note 33, at 951.

186. *See* Mesa v. California, 489 U.S. 121, 136 (1989) ("[P]ure jurisdictional statutes which seek 'to do nothing more than grant jurisdiction over a particular class of cases' cannot support Art. III 'arising under' jurisdiction."); *see also* Verlinden B. V. v. Central Bank of Nigeria, 461 U.S. 480, 495-96 (1983) ("[T]his Court has rejected congressional attempts to confer jurisdiction on federal courts simply by enacting jurisdictional statutes.").

187. *See* Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 823-24 (1824).

188. *See id.* at 824.

standard for determining the presence of a federal ingredient.[189]

In *Verlinden B. V. v. Central Bank of Nigeria*,[190] the federal ingredient was very prominent as the court had to determine the presence or absence of sovereign immunity in every case brought under the FSIA.[191] The various sections of the FSIA provided the federal ingredient that determined whether a suit could be maintained in federal court.[192] Similarly, The Red Cross' charter also provides a federal ingredient, although not nearly as prominent an ingredient as the statutory scheme in *Verlinden*. Specifically, the charter gives the organization the capacity to sue and be sued.[193] The plaintiff could not sue the corporation without this grant of capacity, and the charter is actually a federal statute.[194]

Under the Court's *de minimis* standard, the federal character of the postal employees in *Mesa v. California*[195] should also be a cognizable federal ingredient. Congress clearly intended to make federal officer status a prerequisite to removal.[196] A federal ingredient, however, although necessary, does not alone support jurisdiction.[197]

2. Meaningful Federal Interests—A Balancing Test

A meaningful federal interest must also be present to support federal jurisdiction. For an interest to be meaningful, Congress need not demonstrate that it intends to regulate the area. An interest in providing uniform procedures or a desire that the federal judiciary develop special expertise in a given area, for example, are meaningful federal interests.[198]

A meaningful interest standard is a low threshold. The federal courts, however, would ultimately determine whether a case falls within the "arising under" jurisdiction of Article III by deciding whether a particular federal interest is meaningful. In making this determination, courts could employ a balancing test: Any discernible interest should be credited[199] absent a countervailing interest such as the federalism con-

189. *See id.* (federal law issue that will be litigated only once is enough to support jurisdiction).

190. 461 U.S. 480 (1983).

191. *See supra* note 77 and accompanying text.

192. *See* Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1332(a)(2)-(4), 1391(f), 1441(d), 1602-1611 (1988 & Supp. II 1990).

193. *See supra* note 9.

194. *See* 36 U.S.C. §§ 1-17 (1988) (as amended).

195. 481 U.S. 121 (1989).

196. *See* 28 U.S.C. § 1442(a)(1) (1988).

197. *See supra* notes 90-99 and accompanying text.

198. Other commentators have suggested that the federal interest must be "substantial" or "compelling." *See* Rosenberg, *supra* note 33, at 958; *Over-Protective Jurisdiction?*, *supra* note 22, at 1956. However, increasing the standard for judicial scrutiny imposes unnecessary barriers to federal jurisdiction; this imposition is contrary to the constitutional framework which allows Congress great latitude in defining the jurisdiction of the lower federal courts.

199. For an argument in favor of a more narrow federal interest test, see *Bankruptcy*, *supra* note 160, at 710-11.

cerns expressed in *Mesa v. California*.[200]

The *Mesa* Court based its rejection of federal jurisdiction on the absence of a meaningful federal interest.[201] This result is better explained, however, as a balancing of the state and federal interests with the Court favoring the former. The Government argued, and the Court conceded, that the federal officer removal statutes were enacted " 'to protect federal officers from interference by hostile state courts.' "[202] The Court concluded that state hostility would more likely be directed "against federal officers' efforts to carry out their federally mandated duties," rather than at federal officers *per se*.[203] Rejecting the sufficiency of the asserted federal interest, the Court determined that there was no need to guarantee protection in every case with potential for state bias, by allowing removal of any state criminal prosecution of a federal officer.[204] The Court balanced the State's interest in enforcing its criminal laws against the federal government's interest in protecting federal officers from unlikely state hostility and resolved the conflict in favor of the State.[205]

In *Pennhurst State School & Hospital v. Halderman*,[206] state sovereignty concerns also weighed against federal jurisdiction. *Pennhurst* prohibited supplemental jurisdiction[207] over state claims against state officials in section 1983 cases.[208] Professor George D. Brown raised the issue of federal jurisdiction over suits against state officials in the context of advocating the adoption of federal legislation to reverse the result in *Pennhurst*.[209] Professor Brown, relying on Professor Mishkin's model of protective jurisdiction,[210] urged Congress to adopt substantive legislation to reverse the result in *Pennhurst* and to govern *Pennhurst*-type cases.[211] Professor Brown posited that such a federal statute might be viewed as

200. 489 U.S. 121, 138 (1989) (noting that it is inconsistent with judicial policy "to permit removal of state criminal prosecutions of federal officers and thereby impose potentially extraordinary burdens on the States when absolutely no federal question is even at issue in such prosecutions").

201. *See id.* at 137-38 (1989).

202. *Id.* at 137 (quoting Willingham v. Morgan, 395 U.S. 402, 405 (1969)).

203. *See* Mesa v. California, 489 U.S. 121, 139 (1989).

204. *See id.* at 137-39 (the federal officer must aver a federal defense).

205. *See id.* at 137-38.

206. 465 U.S. 89 (1984).

207. *See* 28 U.S.C. § 1367 (Supp. II 1990).

208. *See Pennhurst*, 465 U.S. at 117. Section 1983 provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1988). As § 1983 is a federal statute creating a cause of action, suits brought under it are adjudicated in federal court.

209. *See* Brown, *supra* note 33, at 367-82.

210. *See* Mishkin, *supra* note 5, at 195-96.

211. *See* Brown, *supra* note 33, at 381-82.

an exercise of protective jurisdiction.[212] He highlighted the federal interest in having federal and constitutional claims adjudicated in federal court, and the federal policy of imposing a behavioral norm for state officials that "must supplement or even supercede [sic] existing state policy,"[213] and concluded that these interests would bolster the validity of a federal jurisdictional grant.[214]

Under a balancing test, the courts would decide whether the interests advanced by Professor Brown outweigh the Eleventh Amendment limitations on federal jurisdiction and the attendant federalism concerns relied on by the Court in *Pennhurst*.[215] It is difficult to speculate on the probable outcome of such an inquiry.

Textile Workers Union v. Lincoln Mills[216] presents an example of a meaningful federal interest that, under a balancing test, would outweigh any countervailing state interests. Congress articulated a policy in favor of enforcing collective bargaining agreements and promoting the use of arbitration to resolve labor disputes.[217] The Court was concerned that denying access to the federal courts, where a body of substantive federal law could be developed to enforce these contracts, "would undercut the Act and defeat its policy."[218] State courts would have had to contend with a common law rule against enforcement of executory agreements to arbitrate.[219] Federal jurisdiction benefitted the federal program by allowing the development of a federal common law rule favoring enforceability of executory arbitration agreements.[220] A state's interest in adjudicating labor disputes under its own contract laws is insubstantial in the face of the federal policy to promote industrial peace.

Precisely defining a meaningful federal interest would not only prove difficult, but would be less compatible with the framework of Article III. The Supreme Court and Congress each have an explicit role in determining the jurisdiction of the federal courts.[221] Thus, a comprehensive theory of protective jurisdiction should accommodate the flexibility inherent in this framework.

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212. *See id.* at 369.
213. *Id.* at 381.
214. *See id.*
215. *See* Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 117 (1984).
216. 353 U.S. 448 (1957).
217. *See id.* at 455 (noting that § 301 of the Labor Management Relations Act "expresses a federal policy that federal courts should enforce these agreements").
218. *Id.* at 456.
219. *See id.* at 456; *see also supra* note 70 and accompanying text (discussing the development of federal common law to govern collective bargaining agreements).
220. *See* Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 456 (1957).
221. *See supra* note 159.

III. *RED CROSS* AS AN EXERCISE OF PROTECTIVE JURISDICTION: APPLICATION OF THE TWO-PART MODEL OF PROTECTIVE JURISDICTION

The proposed two-part model of protective jurisdiction offers a better explanation for the result of *American National Red Cross v. S.G.*[222] than the formalistic analysis engaged in by the Court. The Court approached the decision as a mere statutory interpretation case.[223] The Court then relied on *Osborn v. Bank of the United States*[224] to justify the constitutionality of what appears to be a pure jurisdictional statute.[225] By referring to *Osborn* rather than articulating a doctrine that adequately addresses the question of Congress' ability to control the jurisdiction of the federal courts, the Court has missed an opportunity to guide any future congressional action.

Red Cross would have been particularly well suited as a vehicle for establishing the doctrine of protective jurisdiction. One important reason is that the underlying controversy involved no question of federal or constitutional law.[226] Although the Court has long held that a federal charter is a sufficient ingredient for "arising under" jurisdiction,[227] it would have been helpful for the Court to provide guidance for cases where no federal charter is involved.

As an example of protective jurisdiction, *Red Cross* suggests that Congress has broad discretion in controlling the jurisdiction of the lower federal courts. There are, however, some limits. At minimum, a case must contain a federal ingredient.[228] In addition, an important factor in determining the constitutionality of a grant of federal jurisdiction is the federal interest involved.[229]

Federal interests were evident in *Red Cross*. Specifically, the federal government relies on the corporation to fulfill several important functions, one of which is the provision of blood and blood products in the United States.[230] Blood bank liability for the transmission of the AIDS virus could threaten the financial stability of a charitable organization

222. 112 S. Ct. 2465 (1992).

223. Justice Scalia in dissent criticized the majority for creating a "magic words jurisprudence." *See id.* at 2476 (Scalia, J., dissenting).

224. 22 U.S. (9 Wheat.) 738 (1824).

225. *See Red Cross*, 112 S. Ct. at 2475-76.

226. The plaintiffs in *Red Cross* originally filed their suit in a New Hampshire state court charging the Red Cross with common law negligence for failing to screen blood donors for the AIDS virus. *See* Respondents' Brief in Opposition at 1a, American Nat'l Red Cross v. S.G., 112 S. Ct. 2465 (1992) (No. 91-594).

227. *See* American Nat'l Red Cross v. S.G., 112 S. Ct. 2465, 2476 (1992); Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 823 (1824).

228. *See Osborn*, 22 U.S. at 823.

229. The Supreme Court has only once rejected the extension of federal court jurisdiction when there was arguably a federal ingredient present. *See* Mesa v. California, 489 U.S. 121 (1989). In *Mesa*, the Court based its rejection on the lack of a sufficient federal interest in the type of issue or party involved in that case. *See id.* at 137-38.

230. *See supra* note 30.

like the Red Cross.[231] As Professor Mishkin has pointed out, "the overall federal policy thus may . . . be better protected if all connected litigation is adjudicated by courts well versed in, and receptive to, the national policies established."[232] The federal courts may be more cognizant of, and sympathetic to, the Red Cross' role in foreign affairs.[233]

The potential for complex litigation that may result from blood bank liability for transmission of the AIDS virus, and the potential liability that could be imposed on the Red Cross, weighs in favor of federal jurisdiction for these types of cases. These federal interests would probably outweigh the states' interests in having tort claims litigated in state court.

The Court's decision in *Red Cross* left open the possibility that even the hypothetical slip and fall case from the introduction to this Comment, could properly be adjudicated in federal court.[234] The proposed

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231. The Red Cross receives very little direct financial support from the federal government aside from the buildings in Washington, D.C., that the congressional charter makes available for the Red Cross to use as a national headquarters. *See* 36 U.S.C. §§ 13, 15 (1988). Most of the organization's operating revenues come from public support, cost-recovery programs, and income from investments including endowment funds. *See* American Red Cross, 1985 Annual Report 21-22 (1985).

A verdict against a blood bank for transmission of the AIDS virus was cited in the National Law Journal as among the highest jury verdicts of 1992. *See* Margaret C. Fisk, *1992's Largest Verdicts*, Nat'l L.J., Jan. 25, 1993, at S2, S23. The case marked the first time a court found the entire blood bank industry negligent in the standards employed for screening blood donors. *See* Quintana v. United Blood Servs., No. 86CV11750, 1992 WL 438987 (Colo. Dist. Ct. Aug., 1992), *discussed in* Fisk, *supra*, at S2. This case could set an expensive precedent as liability of the blood supplier would be assumed and all that plaintiffs would be required to prove is damages.

There have been several large jury verdicts against other blood suppliers related to the transmission of the AIDS virus. *See, e.g.*, Doe v. Belle Bonfils Memorial Blood Ctr., No. 87CV4127, 1989 WL 389941 (D. Colo. Mar., 1989) ($5,500,000); Edwards v. Blood Sys., Inc., No. CV87-35695, 1990 WL 463391 (Ariz. Super. Ct. June, 1990) ($28,700,000); Katz v. Childrens Hosp., No. C 683 049, 1990 WL 464747 (Cal. Super. Ct. Aug., 1990) ($3,000,000); Estate of Savt Eik v. Irwin Memorial Blood Bank, No. 898-251, 1989 WL 395596 (Cal. Super. Ct. Dec., 1989) ($400,000); Osborn v. Irwin Memorial Blood Bank, No. 891-642, 1988 WL 373534 (Cal. Super. Ct. Dec., 1988) ($750,000); Clark v. United Blood Servs., No. CV88-6981, 1990 WL 461215 (Nev. Dist. Ct. Apr., 1990) ($970,000); Doe v. Puget Sound Blood Ctr., No. 88-2-10861-7, 1990 WL 466129 (Wash. Super. Ct. Oct., 1990) ($1,900,000); Carroll v. St. Paul Fire & Marine Ins. Co., No. 753-411, 1988 WL 373420 (Wis. Cir. Ct. Dec., 1988) ($3,935,032).

232. Mishkin, *supra* note 5, at 195.

233. The presence of a meaningful federal interest in the affairs of the Red Cross is what distinguishes it from the various other patriotic societies and observances which are also federally chartered. Title 36 of the U.S.C. is entitled Patriotic Societies and Observances and contains over 50 congressional charters. The Boy Scouts of America, for example, would not satisfy the meaningful interest requirement for protective jurisdiction. *See* 36 U.S.C. §§ 21-29 (1988). The Boy Scouts function as a private organization and render no unique services to the federal government. There is no federal interest that would be apparent to a court in having disputes involving the Boy Scouts adjudicated in federal court. Congress has shown no desire to extend federal jurisdiction to any of the federally chartered organizations that make up Title 36 of the U.S.C. The language in *Red Cross* that was found to confer jurisdiction is unique to the Red Cross charter. *See* 36 U.S.C. § 2 (1988).

234. *See* American Nat'l Red Cross v. S.G., 112 S. Ct. 2465, 2467 (1992) (the Red Cross is authorized to remove any suit it is defending).

balancing test, however, would weigh in favor of a denial of federal jurisdiction in that case. More specifically, the Red Cross has been operating successfully in spite of these garden variety tort suits, and thus, the arguments in support of federal jurisdiction in the AIDS context are inapposite. An express recognition of the importance of federal interests in determining the propriety of federal jurisdiction would give federal courts greater control over their own jurisdiction.

CONCLUSION

The United States Supreme Court has traditionally allowed Congress great latitude in defining the jurisdiction of the lower federal courts. The Court has acknowledged that there is some outer limit to Congress' ability to expand federal jurisdiction that is dictated by Article III of the Constitution. Nevertheless, the Court has been unable or unwilling to precisely define that outer limit.

In the Court's jurisprudence, however, we find some guiding principles. There must be some federal ingredient in the case that is a fundamental part of a claim or defense even if not litigated. There must also be a meaningful federal interest in either the parties or the general area of litigation. This broad framework gives Congress the flexibility to use federal jurisdiction where the special attributes of federal courts, such as greater uniformity or perceived neutrality, will help further Congress' goals. The Supreme Court has never explicitly acknowledged this special type of "arising under" jurisdiction. The federal interest requirement that is the hallmark of protective jurisdiction is the missing ingredient that would provide a more complete understanding of the "arising under" jurisdiction of Article III.