

9-1-2012

## The Forgotten Jurisdiction

John C. Massaro

Follow this and additional works at: <https://huskiecommons.lib.niu.edu/niulr>



Part of the [Law Commons](#)

---

### Recommended Citation

Massaro, John C. (2012) "The Forgotten Jurisdiction," *Northern Illinois University Law Review*. Vol. 33: Iss. 1, Article 6.

Available at: <https://huskiecommons.lib.niu.edu/niulr/vol33/iss1/6>

This Article is brought to you for free and open access by Huskie Commons. It has been accepted for inclusion in Northern Illinois University Law Review by an authorized editor of Huskie Commons. For more information, please contact [jschumacher@niu.edu](mailto:jschumacher@niu.edu).

# The Forgotten Jurisdiction

JOHN C. MASSARO\*

I. INTRODUCTION .....	84
II. THE ORIGINS AND DEVELOPMENT OF THE AFFECTING JURISDICTION .....	87
A. THE LANGUAGE OF ARTICLE III .....	87
B. THE CONSTITUTIONAL CONVENTION.....	88
C. THE RATIFICATION DEBATES.....	91
D. THE JUDICIARY ACT OF 1789 AND THE CRIMES ACT OF 1790.....	93
E. THE ORTEGA CASE.....	96
1. <i>Background and Proceedings in the Trial Court</i> .....	96
2. <i>The Supreme Court Opinion</i> .....	98
F. DEVELOPMENTS IN THE AFFECTING JURISDICTION .....	99
1. <i>Effect on Foreign Relations and Foreign Nations</i> .....	99
2. <i>Concrete Effects</i> .....	103
3. <i>Deference To Executive Branch</i> .....	104
G. A STATUTORY GRANT OF AFFECTING JURISDICTION .....	106
III. IMPLICATIONS OF THE AFFECTING JURISDICTION'S IMPORTANCE.	109
A. SUPREME COURT ORIGINAL JURISDICTION .....	110
B. A SUBJECT-MATTER-BASED JURISDICTION .....	114
C. TAMING OTHER JURISDICTIONS .....	123
IV. IMPLICATIONS OF THE AFFECTING JURISDICTION'S LIMITS .....	128
A. THE TERMS AND RESOURCES USED IN THE STANDING DEBATE .....	128
1. <i>Federal Authorities</i> .....	129
2. <i>State and English Authorities</i> .....	133
B. THE LIGHT SHED BY THE AFFECTING JURISDICTION.....	136
1. <i>Generalized Interest In Vindication Of The Law</i> .....	137
2. <i>Injury</i> .....	139
3. <i>Summary</i> .....	141
V. CONCLUSION.....	142

---

\* Partner, Arnold & Porter, LLP, Washington, D.C. Adjunct Professor, George Mason University School of Law. J.D., Harvard Law School; B.A. Williams College. While my experience informs this Article, the views expressed here are my own and do not necessarily reflect those of my firm, my clients, or the law school.

I am thankful for the support of many people, including Stephen Friedman, Sheila Scheuerman, Anthony Franze, Rita Havens, and the members of the *Northern Illinois University Law Review* who provided helpful comments on drafts of this Article. I particularly acknowledge my debts to my parents, Vincent and Denise Massaro and to Patricia Donnelly, Anna-Sophia Massaro, and Giovanna Massaro for their support, guidance, and patience.

Imagine uncovering in grandmother's attic an undisputed original of the United States Constitution and discovering that Article III as drafted by the framers and ratified by the states contains an additional nine words inadvertently omitted from the version of the Constitution we have been relying upon for the past 223 years. Imagine too that the framers took the care to include these same nine words twice in the three sentences that the Constitution devotes to the functions and purposes for which the federal courts were created. These newly discovered words would be part of the integrated whole of Article III, and we would want to reassess our developed federal courts doctrines to take them into account.

This Article begins such a reassessment with respect to the nine words comprising the forgotten "affecting jurisdiction"—the constitutional provision for federal court jurisdiction over "all cases affecting ambassadors, other public ministers, and consuls." In the movie of Article III, federal question jurisdiction plays the lead, with the six forms of party-based jurisdictions as supporting characters, and the admiralty jurisdiction making a quirky cameo. The remaining of the nine heads of jurisdiction, the affecting jurisdiction, does not even appear in the credits. This Article argues that the affecting jurisdiction occupies a central place in Article III and was intended to play a greater role than it does today. The jurisdiction can and should help inform our current debates about the meaning of the other 147 words in the jurisdictional provisions of Article III.

## I. INTRODUCTION

Article III's discussion of the roles and purposes of the federal courts is limited to three sentences. The first sets forth nine heads of jurisdiction, including federal question jurisdiction, the affecting jurisdiction, admiralty jurisdiction, and six forms of party-based jurisdictions; the second identifies the two categories of Supreme Court original jurisdiction; and the third describes Supreme Court appellate jurisdiction:

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

Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as Congress shall make.<sup>1</sup>

The “affecting jurisdiction”—the provision for jurisdiction over “all Cases affecting Ambassadors, other public Ministers and Consuls”—appears as the second of the nine heads of jurisdiction in clause one and also as the first of the two instances of Supreme Court original jurisdiction in clause two.<sup>2</sup> Although the words of Article III are few, and presumably all of them should be fully mined for meaning, the affecting clauses receive scant attention.<sup>3</sup> This Article attempts to fill that gap.

Part I discusses the origins, purposes, and development of the affecting jurisdiction as illustrated by the final language and structure of Article III, the evolution of Article III at the Constitutional Convention, discussion of Article III during the ratification debates, implementation of the affecting jurisdiction in the Judiciary Act of 1789 and the Crimes Act of 1790, and the treatment of the affecting jurisdiction by early court decisions and their progeny. While the jurisdiction is now relatively unknown, and perhaps thought by some to be of little importance, the way the framers and early courts and congresses treated it reveals a more powerful and central role for the jurisdiction.

Based on this, Part II argues for a reconception of the affecting jurisdiction. We should view it not as a narrow party-based jurisdiction, but rather as a more broad subject-matter-based one like the federal question jurisdiction. When we do so, we find that the fully grown affecting jurisdiction can help bring some order to Article III jurisprudence. In particular, this Article identifies three examples of ways that the broadening of the jurisdiction should impact our thoughts today. First, taking the affecting jurisdiction seriously suggests that Supreme Court original affecting juris-

---

1. U.S. CONST. art. III, § 2, cls. 1 & 2.

2. *Id.*

3. For example, I could locate no articles devoted to the affecting jurisdiction and only a few that even mentioned it for more than a sentence or two. The leading casebook in the area also does not address the jurisdiction at any length. See RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 250-51 nn.2-3 (6th ed. 2009) [hereinafter HART AND WECHSLER’S].

diction in particular, and Supreme Court original jurisdiction in general, were intended to be self-implementing and should not be subject to the kind of congressional narrowing that has been permitted to occur over time. Second, courts and Congress should broaden the scope of the affecting jurisdiction in the lower federal courts. Third, as the affecting jurisdiction grows, it can help tame the unprincipled growth of other forms of jurisdiction and thereby restore order to Article III. This general point emerges from a discussion of *Verlinden B.V. v. Central Bank of Nigeria*<sup>4</sup>—a decision that could and should have been a narrow affecting clause one rather than a more broad decision with respect to the federal question jurisdiction.

Just as Part II explores the lessons we can learn by taking more seriously an expanded role for the affecting jurisdiction, Part III explores the traditional limits on the affecting jurisdiction and what they can teach us about Article III more generally. The particular example this Article explores is the debate over the existence and proper scope of a constitutional standing requirement. The Court has identified historical practice as a particularly important guidepost in this area of the law, and Part III begins by orienting the reader to the limited nature of the historical evidence that is available. Given the importance of history and the slim pickings available to discern what actually occurred in history, Part III argues that the early history of the affecting clause and its treatment by the framers, first Congress, and Supreme Court should not be ignored. When we look at that history, we find that courts early on used proto-standing language to describe the limits they placed on their inquiries under the affecting jurisdiction. This included limits akin to those we have today on citizen suits and limits akin to those we have today on suits to redress broadly held injuries that are not particularized. If these standing-like limits existed long ago with respect to the affecting clause, which was specifically intended and designed to be a broad remedy in the particular situations it implicated, the same limits were arguably intended to apply to the other roles of federal courts as well.

It is difficult to have any axe to grind when it comes to something like the affecting clause. That means that we can look at the history and development of the clause and dispassionately assess its implications. When we do so, we see some things that favor increased roles for the federal courts and some things that support those who argue for limits on the roles of federal courts. The affecting jurisdiction may never receive top billing, but when we let it have a speaking role and listen carefully to what it has to say, we find it is worth our time and attention.

---

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

## II. THE ORIGINS AND DEVELOPMENT OF THE AFFECTING JURISDICTION

A number of themes emerge from a review of the history and development of the jurisdiction over “all Cases affecting Ambassadors, other public Ministers and Consuls.”<sup>5</sup> On the one hand, the framers viewed the affecting jurisdiction as a critical part of Article III. The language and structure of Article III, the records of the Constitutional Convention, the ratification debates, and the actions of the early congresses and courts all point in this same direction. Among other things, the affecting jurisdiction was designed to serve the important role of ensuring a federal forum for disputes that implicated foreign policy concerns and that required the deference and sensitivity to the national executive and legislature that federal courts were presumed to have. For this reason, early courts did not focus on the presence of any given individual as triggering the jurisdiction but instead focused on the underlying impact on foreign policy interests. The framers and early courts viewed the stakes implicated by this jurisdiction as nothing less than the nation’s peace and survival.

At the same time, the early history of the affecting clause jurisdiction also reflects an impulse toward limiting the potentially expansive impact that the jurisdiction could have. Actions by Congress and early interpretations by courts of the term “affecting” restricted its meaning to something more narrow than it otherwise could have been, and those interpretations have stuck. Early interpretations also limit the identity of those who may vindicate the right to a federal forum that the affecting jurisdiction creates. Thus, even for this jurisdiction that the framers plainly viewed as critical, there was a need to ensure that the role of the federal courts did not expand beyond certain boundaries.

### A. THE LANGUAGE OF ARTICLE III

The affecting clause refers to jurisdiction over “all Cases affecting Ambassadors, other public Ministers and Consuls.”<sup>6</sup> This identical phrasing appears twice in section two of Article III—first as one of nine jurisdictional heads and second as one of two instances of original Supreme Court jurisdiction.

To place this latter fact in context, recall three things. First, as we know from *Marbury v. Madison*, the two instances of Supreme Court original jurisdiction are exhaustive, meaning that the affecting jurisdiction and the jurisdiction over cases in which states are parties are the only instances

---

5. U.S. CONST. art. III, § 2, cls. 1 & 2.

6. U.S. CONST. art. III, § 2, cls. 1 & 2.

in which the Supreme Court may exercise original jurisdiction.<sup>7</sup> Even an Act of Congress signed by the President cannot expand the Supreme Court's original jurisdiction beyond this role. Remember, too, the Madisonian compromise. Resolving a debate about whether lower federal courts should be created by the Constitution or forbidden by the Constitution, this compromise left the question open, creating only the Supreme Court but authorizing Congress to create such additional lower courts as it saw fit.<sup>8</sup> At the time of ratification, the Supreme Court was the only federal court certain to exist, and it could be so again if Congress wishes. Finally, the explicit text of Article III is thought by many to place within Congress' exclusive control the extent of the Supreme Court's appellate jurisdiction, providing as it does that such jurisdiction shall be "with such Exceptions and under such Regulations as the Congress shall make."<sup>9</sup>

What these three contextual points add up to is a remarkable statement about the importance of the affecting jurisdiction: it is the first and one of only two components of the only unalienable function of the only federal court required by the Constitution. But that is not all. The affecting jurisdiction also appears in the heads of jurisdiction, and its placement there is instructive. It is second; only federal question jurisdiction—widely considered to be the most essential and important of the heads of jurisdiction—appears before it. In sum, based on the text of Article III, a case could be made that the affecting jurisdiction is one of the most central aspects of the judicial power envisioned by the Constitution.

#### B. THE CONSTITUTIONAL CONVENTION

The discussion at the Constitutional Convention confirms that the affecting jurisdiction is a core part of Article III and sheds further light on its intended purpose and scope. Even when Article III was in its infancy and little of its detail had been fleshed out, Madison's notes reflect that the first discussions on the topic contained reference to federal court jurisdiction over cases in which "foreigners . . . may be interested."<sup>10</sup> At this stage, there were six heads of jurisdiction. The other five were jurisdiction involving "all piracies & felonies on the high seas, captures from an enemy[,] . . . collection of the National revenue[,] impeachments of any National officers, and questions which may involve the national peace and harmony."<sup>11</sup>

---

7. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

8. U.S. CONST. art. II, § 8, cl. 10; U.S. CONST. art. III, § 1.

9. U.S. CONST. art. III, § 2, cl. 3.

10. James Madison, *Notes of May 29, 1787*, in 1 FARRAND'S THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 22 (Max Farrand ed., 1911) [hereinafter FARRAND'S]; see also William Patterson, *Notes of May 29, 1787*, in 1 FARRAND'S, *supra*, at 28.

11. James Madison, *Notes of May 29, 1787*, in 1 FARRAND'S, *supra* note 10, at 22.

Note the absence of today's star—the federal question jurisdiction. Note too that the jurisdictional heads center around arguably “big” topics such as international relations and national peace.

As discussion evolved, one proposal would have altered the language concerning foreigners so as to limit it to “[d]isputes between Foreigners and Citizens.”<sup>12</sup> This was a forerunner of what is today part of the final head of jurisdiction relating to controversies “between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.”<sup>13</sup> The beginning of the solution to the competing proposals, a precursor to the structure we see in today's text, was to include jurisdiction relating to foreigners and foreign policy in two different places. Thus, the federal judiciary was conceived of as having eight jurisdictions, two of which related to the topic at hand. There was jurisdiction of “all cases in which foreigners may be interested” and also jurisdiction of “all cases touching the rights of Ambassadors.”<sup>14</sup> Rather than narrow the phrase relating to foreigner jurisdiction, the convention apparently recognized that two different sorts of concerns were being addressed by the two proposals—one relating to the possible bias of local tribunals against particular parties and the other relating to a subject matter, specifically the national interest in ensuring that the federal judiciary be the one dealing with issues impacting foreign relations.

It is noteworthy too that at this more developed stage, federal question jurisdiction remained in the shadows, at best. Besides the two jurisdictions relating to foreign interests, there were six other jurisdictional heads. Cases involving piracy, captures from an enemy, collection of national revenue, and impeachments of federal officers remained from the prior proposals. Jurisdiction involving “national peace and harmony” was dropped, and in its place the delegates added a narrow and focused form of federal question jurisdiction limited to that involving the construction of treaties and acts for regulation of trade.<sup>15</sup> The score, if you're counting, is: affecting jurisdiction: two; federal question jurisdiction: something less than one.

Progress slowed due to the well-known clash between the Virginia Plan and the New Jersey Plan. As part of what was ultimately a successful attempt to bridge the divide, Hamilton and Madison collaborated on a speech that included a shorthand proposal for an alternative plan. Given

---

12. William Patterson, *Notes of May 29, 1787*, in 1 FARRAND'S, *supra* note 10, at 28.

13. U.S. CONST. art. III, § 2, cl. 1.

14. James Madison, *Notes of June 15, 1787*, in 1 FARRAND'S, *supra* note 10, at 244. Later comments attributed to George Mason suggest there was some debate about the inclusion of this additional phrasing. See *Committee of Detail Report: Revisions and Marginalia*, in 1 SUPPLEMENT TO MAX FARRAND'S THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 210 (Max Farrand ed., 1937) [hereinafter SUPPLEMENT TO FARRAND'S].

15. James Madison, *Notes of June 15, 1787*, in 1 FARRAND'S, *supra* note 10, at 244.



June 18, 1787, the speech “occupied in the delivery between five and six hours, and was pronounced by a competent judge, (Gouverneur Morris), the most able and impressive he had ever heard.”<sup>16</sup> Madison’s notes of the speech reflect that its proposal for the judiciary included three heads of jurisdiction—original jurisdiction for “causes of capture” and appellate jurisdiction “in all causes in which the revenues of the general Government or the citizens of foreign nations are concerned.”<sup>17</sup> Again, there was no federal question jurisdiction but a prominent place for a form of the affecting jurisdiction.

The details of Article III, as we know it today, were subsequently fleshed out in the aptly named Committee of Detail. While other jurisdictions came and went through the various drafts of the Committee, the affecting jurisdiction was a constant in one form or another.<sup>18</sup> In one draft, the general federal question jurisdiction did not survive, but the affecting jurisdiction was expanded to include not only “all Cases in which Foreigners may be interested” and all cases “touching the Rights of Ambassadors,” but also jurisdiction of any matter implicating the “*Law of Nations*.”<sup>19</sup> The final touches achieving the precise wording we have today were achieved by insertions from Rutledge in the Committee of Detail, and the jurisdiction passed in this form through the final proposal of the Committee of Detail and through various drafts of the Committee of Style.<sup>20</sup>

One final point of a slightly broader nature: delegates to the convention were acutely aware that one failing of the Articles of Confederation was the inability to manage foreign affairs in any centralized manner, and, specifically, the inability of a central government through its central court system to ensure that the proper sensitivity to foreign affairs was reflected in any proceedings involving foreign nations and their agents. A number of highly publicized incidents involving proceedings in state courts with respect to foreign citizens and foreign affairs would have been well known to the delegates and on their minds, and, indeed, such incidents occurred dur-

---

16. James Madison, *Notes of June 18, 1787*, in 1 FARRAND’S, *supra* note 10, at 293 n.9 (quoting J.C. Hamilton, *History of the Republic of the United States*, III, 283-84).

17. *Id.* at 292.

18. See *Notes from Committee of Detail IV*, in 2 FARRAND’S, *supra* note 10, at 147 (including disputes where “citizens of other countries are concerned”); Edmund Randolph, *Notes of July 26, 1787*, in 2 SUPPLEMENT TO FARRAND’S, *supra* note 14, at 190; *Notes from Committee of Detail VII*, in 2 FARRAND’S, *supra* note 10, at 157 (quoted *infra* text accompanying note 19); *Notes from Committee of Detail IX*, in 2 FARRAND’S, *supra* note 10, at 173 (reflecting Rutledge inserting the final touches on the wording we have today).

19. *Notes from Committee of Detail VII*, in 2 FARRAND’S, *supra* note 10, at 157.

20. *Notes from Committee of Detail IX*, in 2 FARRAND’S, *supra* note 10, at 173; James Madison, *Notes of August 6, 1787*, in 2 FARRAND’S, *supra* note 10, at 186; *Committee of Style*, in 2 FARRAND’S, *supra* note 10, at 576, 601.

ing the time that the convention was ongoing.<sup>21</sup> One example was the “Marbois incident,” which occurred in 1784 in Pennsylvania.<sup>22</sup> There, Charles Julian De Longchamps, a French national living in Pennsylvania, assaulted Francis Barbe Marbois, the French Consul General. As offenses against ambassadors and other dignitaries involved violations of the law of nations, France and other countries demanded that the Continental Congress declare the law of nations to be part of the law governing the several states, that the several states pass laws implementing punishments for such misconduct as required by the law of nations, and that Pennsylvania extradite Longchamps to France for punishment. Although Pennsylvania did punish Mr. Longchamps, it refused the extradition request, and the efforts of the Continental Congress to defuse the situation were largely ineffective. Although the matter was resolved, the Marbois incident and related matters were subjects of comment and concern before, during, and following the convention.<sup>23</sup> Reviewing certain elements of this history, the United States Supreme Court has expressly linked the framers’ decision to adopt the affecting jurisdiction to these developments and concerns at the time of the convention.<sup>24</sup>

In short, the tale of Article III, from its inception to its final form, is one in which the affecting jurisdiction plays a prominent—if not the preeminent—role. The history also suggests that the jurisdiction had its origins and purpose as a subject-matter-based jurisdiction concerning foreign relations and that its purpose is separate and distinct from the purpose of its party-based cousin, the jurisdiction over cases in which foreigners are parties.

### C. THE RATIFICATION DEBATES

While Article III itself was not the primary topic of discussion in the debates over ratification of the Constitution, to the degree that the topic was discussed, the affecting jurisdiction continued to play an important role.

---

21. See, e.g., William R. Casto, *The Federal Courts’ Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 494 & n.152 (1986).

22. This description relies upon that of Kenneth C. Randall, *Federal Jurisdiction over International Law Claims: Inquiries into the Alien Tort Statute*, 18 N.Y.U. INT’L L. & POL. 1 (1985). Even those who downplay the significance of the Marbois incident acknowledge that it was likely a motivating factor for inclusion of the affecting clauses in Article III. See J. Andrew Kent, *Congress’s Under-Appreciated Power to Define and Punish Offenses Against the Law of Nations*, 85 TEX. L. REV. 843, 879-881 (2007).

23. See, e.g., James McHenry, *Notes of May 29, 1787*, in 1 FARRAND’S, *supra* note 10, at 25.

24. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 717 (2004).

The discussion adds to our understanding of the purpose of the jurisdiction and its intended scope.

Notable examples are Federalist Papers numbers 80 and 81. In the latter, Hamilton explained the purpose of the affecting jurisdiction as follows:

Public ministers of every class are the immediate representatives of their sovereigns. All questions in which they are concerned are so directly connected with the public peace, that, as well for the preservation of this, as out of respect to the sovereignties they represent, it is both expedient and proper that such questions should be submitted in the first instance to the highest judicatory of the nation. Though consuls have not in strictness a diplomatic character, yet as they are the public agents of the nations to which they belong, the same observation is in a great measure applicable to them.<sup>25</sup>

Similarly, in Federalist number 80, Hamilton links the jurisdiction to foreign affairs and the potential for war:

The judiciary authority of the union is to extend . . . [t]o treaties made, or which shall be made under the authority of the United States, and to all cases affecting ambassadors, other public ministers and consuls. These belong to the [same] class of enumerated cases [earlier categorized in Federalist 80 as potentially resulting in “an aggression upon” another sovereign], as they have an evident connection with the preservation of the national peace.<sup>26</sup>

There are a number of inferences one may draw from this, and they are discussed in more detail below.<sup>27</sup> For present purposes, it is enough to observe that the affecting jurisdiction was a key argument used by Hamilton to explain why the new nation needed a federal judiciary. Specifically, it was needed not to protect particular individual ambassadors, but rather to preserve the national peace by ensuring that disparate state court proceedings did not interfere with the foreign policy goals of the other two branches of the national government. No less an authority than *Marbury v. Madison* later confirmed this notion by identifying the affecting jurisdiction as

---

25. THE FEDERALIST NO. 81 (Alexander Hamilton).

26. THE FEDERALIST NO. 80 (Alexander Hamilton); *see also* THE FEDERALIST NO. 3 (John Jay) (commending the new Constitution as compared to the Articles of Confederation because of the ability of the new central government and its courts to deal with matters affecting foreign affairs).

27. *See infra* Part II.B.

the paradigmatic example of Supreme Court original jurisdiction and summarizing the jurisdiction as having been “induced” by “the solicitude of the convention, respecting our peace with foreign powers.”<sup>28</sup>

Further confirmation is found in delegate Luther Martin’s description of the jurisdiction in his report to the Maryland legislature:

Should any questions arise between a foreign consul and any of the citizens of the United States, however remote from the seat of empire, it is to be heard before the judiciary of the general government, and in the *first* instance to be heard in the Supreme Court, however inconvenient to the parties, and however trifling the subject of the dispute.<sup>29</sup>

This is a broad conception of the affecting jurisdiction—far broader than the one we have today. Perhaps more important, this broad conception is consistent with Hamilton’s description of the reasons for the jurisdiction as relating to the interests of the nation in smooth implementation of its foreign policy. Martin does not conceive of the jurisdiction as serving the interests of the parties—indeed, he expressly contemplates that the parties might not even want to proceed in the high court—but instead as serving the broader national interests being pursued by the federal government.

In the ratification debates, then, we see a continuation of the themes that the affecting jurisdiction was central to the role of the judiciary contemplated by Article III and that it was designed to serve a purpose relating to foreign affairs and the national peace rather than the narrow interests of particular ambassadors or consuls who might find themselves parties to a proceeding.

#### D. THE JUDICIARY ACT OF 1789 AND THE CRIMES ACT OF 1790

The Judiciary Act of 1789, widely considered to be helpful in understanding the framers’ intent, provides further insight. The Act contains omissions we, today, would consider extraordinary, most notably the failure of any general grant of federal question jurisdiction to either the lower federal courts or the Supreme Court, but which correspond to the proceedings at the convention in many ways. Without a doubt, Congress granted in the Act something substantially short of the full measure of jurisdiction con-

---

28. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 175 (1803).

29. Luther Martin, *Genuine Information*, in 3 FARRAND’S, *supra* note 10, at 172, 220. Numerous other examples abound. *See, e.g.*, Charles Anthony Smith, 42 LAW & SOC’Y REV. 75, 85-88 (2008) (collecting together quotations from John Marshall, William Davee, James Madison, and James Wilson arguing that one central role of the federal courts, as evidenced by the affecting clauses and others, was to achieve harmony in international relations).

templated by Article III with respect to almost all of the heads of jurisdiction.

Considered against this backdrop, Congress treated the affecting jurisdiction relatively well. The United States district courts received original jurisdiction of “all suits against consuls or vice consuls” and of prosecutions for violations of United States criminal law “where no other punishment than whipping not exceeding thirty stripes, a fine not exceeding one hundred dollars, or a term of imprisonment not exceeding six months is to be inflicted.”<sup>30</sup> This jurisdiction was exclusive of the state courts.<sup>31</sup> United States circuit courts received exclusive original jurisdiction over federal prosecutions for more serious federal crimes and jurisdiction concurrent with the district courts over prosecutions for the lesser federal crimes.<sup>32</sup> This jurisdiction too was interpreted as being exclusive of the state courts.<sup>33</sup> Finally, the Act carved up the Supreme Court’s original jurisdiction into three categories:

- (1) exclusively to the Court, “all such jurisdiction . . . as a court of law can have or exercise consistently with the law of nations” of suits “against ambassadors, or other public ministers, or their domestics, or domestic servants”;
- (2) concurrent jurisdiction of “all suits brought by ambassadors, or other public ministers”; and
- (3) concurrent jurisdiction of “all suits . . . in which a consul or vice consul, shall be a party.”<sup>34</sup>

In sum, Congress was not parsimonious when it came to the affecting jurisdiction. It attempted to expand upon the language used in Article III by extending the jurisdiction so that it would include original Supreme Court jurisdiction over not only ambassadors and public ministers, but also suits against their “domestics or domestic servants.” This appears to be a congressional gloss on what the term “affecting” means and a judgment that proceedings against agents or close family members of an ambassador affect the ambassador. Later decisions have applied this reading in related contexts to include the cook of the charge d’affaires of Sweden, the butler

---

30. Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76-77. The district courts appeared to have concurrent jurisdiction with the circuit courts of criminal offenses involving consuls. *Id.*; see also *United States v. Ortega*, 24 U.S. (11 Wheat.) 467 (1826).

31. Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76-77.

32. *Id.* § 11.

33. See *Commonwealth v. Kosloff*, 5 Serg. & Rawle 545 (Pa. 1820).

34. Judiciary Act, ch. 20, § 13, 1 Stat. 73, 80-81.

and chauffeur of the Czechoslovakian ambassador, and the wife and family of a consul.<sup>35</sup>

Congress also devoted effort to identifying which specific courts should address which specific kinds of disputes under the affecting clause. Indeed, Congress went out of its way to parse the affecting jurisdiction among three different sets of courts depending on the identity of the individual involved and the nature of the matter. And Congress signaled its recognition of the importance of these matters to the system created by the framers by making federal court jurisdiction exclusive of state courts in a number of such matters. This expansive treatment of and attention to the affecting jurisdiction stands in stark contrast to the Judiciary Act's more grudging treatment of the other heads of jurisdiction and is consistent with the prominent placement the framers gave this head of jurisdiction.

That said, the Judiciary Act's grant of affecting jurisdiction did not reflect a one-to-one correspondence with the scope of the jurisdictional head in Article III. The Act did not employ the term used by Article III—"affecting"—but instead seemed to grant jurisdiction based on whether ambassadors and others were parties. For example, the grant of original jurisdiction to the Supreme Court referred to instances in which ambassadors or other public ministers "brought" the suit and instances in which the suit was brought "against" them, and the grant with respect to consuls also referred to party status. The lower court grants used similar terms.

The Supreme Court grant was also limited to all jurisdiction as a court of law can have consistently with the law of nations, arguably placing a qualifier that the action must be one at law and that the evolving law of nations dictates the outer bounds of the grant, neither of which restrictions are contained expressly in the constitutional language. That said, the reference to "law of nations" is more likely an argument for expansive jurisdiction and importance of the affecting clause rather than the opposite. In so referencing, Congress harkened back to the concerns that prompted the inclusion of the affecting jurisdiction—concerns about the inability of the Continental Congress to effectuate the law of nations in a national court system.<sup>36</sup>

Finally, Congress early on further enhanced the protections afforded ambassadors and others in two ways. First, it provided them a defense to assert in any federal court proceedings—diplomatic immunity. Second, it

---

35. *United States v. LaFontaine*, 26 F. Cas. 832 (C.C.D.C. 1831) (No. 15,550) (cook of the charge d'affaires); *Carrera v. Carrera*, 174 F.2d 496 (D.C. Cir. 1949) (immunity decision with respect to butler and chauffeur); *Friedberg v. Santa Cruz*, 86 N.Y.S.2d 369 (N.Y. App. Div. 1949) (wife of United Nations representative).

36. *See supra* Part I.B; *see also* *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712 (2004) (discussing Alien Tort Statute contained in Judiciary Act and its explicit reference to and incorporation of the law of nations as well).

provided for criminal penalties of up to three years in prison for any attorney instituting an action against a diplomat in contravention of the immunity.<sup>37</sup> This one-two punch meant that ambassadors could be assured of a federal forum for any action brought against them (or by them) and could feel comfortable that actions against them would, thereafter, likely be dismissed on grounds of diplomatic immunity.<sup>38</sup>

#### E. THE ORTEGA CASE

The key early case assessing the meaning of the affecting jurisdiction is *United States v. Ortega*.<sup>39</sup> *Ortega* echoed in many ways the Marbois incident in its factual origins and was, in that sense, a test of the framers' efforts to put in place a system more effective than that of the Articles of Confederation.

##### 1. *Background and Proceedings in the Trial Court*

The story begins at the circus. Hilario de Rivas y Salmon, the Spanish Charge d'affaires, was returning from a trip there when he "heard the steps of some person walking gently behind" him.<sup>40</sup> At that point, Juan Gualberto de Ortega seized Salmon by the breast of his coat and proclaimed: "Mr. Salmon, I am Ortega, you have insulted me, and I seek satisfaction."<sup>41</sup> Mr. Salmon, wanting nothing more than to extract himself from the situation, tried various verbal approaches, but to no avail. He was forced to "thrust [Ortega] with the point of his umbrella" which, naturally, "was returned by a blow with another umbrella."<sup>42</sup>

The district attorney instituted a prosecution in the United States circuit court charging Ortega with violations of the law of nations and of the Crimes Act of 1790, which provided:

[T]hat if any person . . . shall assault, strike, wound, imprison or in any manner infract the law of nations, by offering violence to the person of an ambassador or other public minister, such person so offending on conviction shall be

---

37. Crimes Act of 1790, ch. 9, 1 Stat. 112, 118.

38. This framework is similar to the framework applicable today to foreign sovereigns whereby a federal forum is provided for all claims based on the theory that defenses under the Foreign Sovereign Immunities Act may apply. *See infra* Part II.C.

39. *United States v. Ortega*, 24 U.S. (11 Wheat.) 467 (1826).

40. *United States v. Ortega*, 27 F. Cas. 359, 359 (C.C.E.D. Pa. 1825) (No. 15,971).

41. *Id.*

42. *Id.*

imprisoned not exceeding three years and fined at the discretion of the Court.<sup>43</sup>

At trial, Mr. Salmon testified notwithstanding immunity from testimony conferred by his diplomatic status.<sup>44</sup> The prosecution also introduced the testimony of the chief clerk of the State Department, confirming that Salmon “was recognized by the president as charge d’affaires . . . and . . . accredited by the secretary of state.”<sup>45</sup> In support of the proposition that Ortega knew of Salmon’s diplomatic status, the prosecution read into evidence two letters from Ortega to Salmon, each addressed to Salmon as the charge d’affaires.

Ortega did not give in without a fight. He proffered a witness to testify as to the content of two decrees from the King of Spain, which decrees Ortega contended had not been fully complied with, rendering Salmon’s diplomatic status revoked.<sup>46</sup> The trial court barred the testimony on best evidence grounds.<sup>47</sup> Ortega’s counsel then argued that: (1) the assault was not proven as a matter of fact, in light of testimony from one eyewitness indicating that he observed no physical violence and the need to discount the testimony of Salmon as a biased witness, (2) in any event, the seizing of a coat was not an assault, (3) even if there was an assault, Salmon initiated the attack, thereby authorizing Ortega to reply in kind, and (4) Ortega believed in good faith, and correctly, that Salmon was not a diplomat.<sup>48</sup> Then, more ominously, Ortega argued that the minister appointing Mr. Salmon had no authority to do so, that the appointment was defective on other grounds, and that the President of the United States was not capable of endowing Salmon with diplomatic status if he was not duly appointed in Spain.<sup>49</sup>

The jury charge emphasized the great interest in the case held by both the defendant and the government. As to the latter, the charge noted that “the government of the United States, like that of all civilized nations, is bound to afford redress for the violations of those privileges and immunities which the law of nations confers upon foreign ministers and which are consecrated by the practice of the civilized world.”<sup>50</sup> The charge observed that “a neglect or refusal [by the United States] to perform this duty might lead

---

43. Crimes Act of 1790, ch. 9, § 28, 1 Stat. 112, 118.

44. *Ortega*, 27 F. Cas. at 361.

45. *Id.* at 359-60.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Ortega*, 27 F. Cas. at 361.

50. *Id.* at 360.



to retaliation upon our own ministers abroad and even to war.”<sup>51</sup> The charge further admonished that any discounting of the credibility of Salmon because of his status as victim was inappropriate: “the law makes him a competent witness. He has no interest whatever in the decision of the case.”<sup>52</sup> The Court also instructed that Ortega’s defense, based on lack of presidential authority and undue appointment, was beyond the jury’s—or even its own—ken:

If courts of justice could sit in judgment upon the decision of the executive in reference to the public character of a foreign minister, and by pronouncing him to be unduly appointed or improperly recognized, deprive him of the privileges of a minister, what an extraordinary anomaly would such an interference present to the world!<sup>53</sup>

In light of the overall tenor of the charge, and the facts as described, it is perhaps not surprising that the jury voted to convict. Ortega responded with a motion in arrest of judgment, arguing that the case was one affecting a public minister and was, therefore, within the exclusive original jurisdiction of the Supreme Court under the terms of Article III.<sup>54</sup> The circuit court issued a certificate of disagreement on the question, clearing the way under the then-governing jurisdictional statute for the Supreme Court to review the matter.<sup>55</sup>

## 2. *The Supreme Court Opinion*

The Supreme Court, in a unanimous decision, made short work of the case.<sup>56</sup> Eschewing as unnecessary the question of whether the Supreme Court’s original jurisdiction was exclusive of the jurisdiction of the circuit court, or concurrent with it, the Court addressed only the question of “whether this is a case affecting an ambassador or other public minister within the meaning of the second section of the third article of the constitution of the United States.”<sup>57</sup> The Court found the answer obvious:

[T]he Court is clearly of the opinion that this is not a case affecting a public minister within the plain meaning of the constitution. It is that of a public prosecution, instituted and

---

51. *Id.*

52. *Id.* at 361.

53. *Id.*

54. *Ortega*, 27 F. Cas. at 361.

55. *Id.*

56. *Id.*

57. *United States v. Ortega*, 24 U.S. 467, 468 (1826).

conducted by and in the name of the United States, for the purpose of vindicating the law of nations, and that of the United States, offended, as the indictment charges, in the person of a public minister, by an assault committed on him by a private individual. It is a case, then which affects the United States and the individual whom they seek to punish; but *one in which the minister himself, although he was the person injured by the assault, has no concern either in the event of the prosecution or in the costs attending it.*<sup>58</sup>

*Ortega*, in short, adopts a more narrow reading of the word “affecting,” as used in Article III, than contemporary readers might expect. Consider the following connections of Salmon to the case: (1) he was a testifying and material witness; (2) he was the victim of the assault; (3) his credibility was called into question by the defense; (4) he was accused by the defense of publishing insulting remarks; (5) he was accused by the defense of assaulting a private citizen; (6) his status as charge d’affaires was called into question by the defense; and (7) he was asserted by the defense to have failed to comply with an edict of his own King. No doubt, other connections or potential effects of the case on Salmon could be imagined as well. Yet, despite these extensive ways in which the case potentially affected Salmon, it was not a case “affecting” him as that term is used in Article III.<sup>59</sup>

#### F. DEVELOPMENTS IN THE AFFECTING JURISDICTION

As courts have confronted different situations over the years since *Ortega*, they have looked to the purposes of the affecting jurisdiction in gauging whether the right that it creates can be vindicated by a particular party in a particular situation. From these cases, and cases in the closely related area of immunity law, several themes emerge. Specifically, in order for courts to be able to use their affecting jurisdiction, there must be an effect on foreign relations, there must be a particular kind of injury, and generally the exercise of jurisdiction must be consistent with the position of the executive branch.

##### 1. *Effect on Foreign Relations and Foreign Nations*

Consistent with the purposes of the affecting jurisdiction, courts have measured the applicability of the rights it creates with reference to the ques-

---

58. *Id.* at 468-69 (emphasis added).

59. *Id.*

tion of whether the matter is truly one affecting foreign nations and the United States' foreign relations. Indeed, the Court has stated repeatedly that the jurisdictional grant is not a personal privilege:

It is the privilege of the country or government which the consul represents. . . . If the privilege or exemption was merely personal, it can hardly be supposed, that it would have been thought a matter sufficiently important to require a special provision in the constitution and laws of the United States.<sup>60</sup>

The provision, no doubt, was inserted in view of the important and sometimes delicate nature of our relations and intercourse with foreign governments. It is a privilege, not of the official, but of the sovereign or government which he represents, accorded from high considerations of public policy. . . .<sup>61</sup>

For example, notwithstanding the literal terms of Article III, it was recognized early on, and later confirmed by the Supreme Court, that the protections do not apply where the interests of United States ambassadors and ministers are at stake, but only where the ambassador or minister is one of another country:

The provision, no doubt, was inserted in view of the important and sometimes delicate nature of our relations and intercourse with foreign governments. It is a privilege, not of the official, but of the sovereign or government which he represents, accorded from high considerations of public policy, considerations which plainly do not apply to the United States in its own territory.<sup>62</sup>

The yin to this yang is that the protections do apply to all foreign ministers, regardless of whether they are foreign ministers to the United States. Thus, because the interests of foreign nations are at stake, the protections do apply to foreign ministers, even if the person affected is simply a "minister in transit," passing through the United States briefly on his way to another country.<sup>63</sup>

---

60. *Davis v. Packard*, 32 U.S. (7 Pet.) 276, 284 (1833).

61. *Ex parte Gruber*, 269 U.S. 302, 303 (1925).

62. *Ex parte Gruber*, 269 U.S. 302, 303 (1925); *see also* *Milward v. McSaul*, 17 F. Cas. 425 (S.D.N.Y. 1846) (No. 9,624).

63. *See* *Wilson v. Blanco*, 4 N.Y.S. 714 (Sup. Ct. 1889); *Bergman v. DiSieves*, 71 F. Supp. 334 (S.D.N.Y. 1946).

Similarly, the ministerial protections do not apply where the executive or court reach the conclusion that the foreign individual is not truly an agent of the foreign government performing diplomatic functions, but, instead, is involved in commercial functions for a private account.<sup>64</sup> This is the reason why consuls traditionally have enjoyed a lesser privileged status than diplomats.<sup>65</sup> And this doctrine eventually was reflected in the Foreign Sovereign Immunities Act (FSIA), which created an exception to the immunity of foreign sovereigns based on their having engaged in commercial functions.<sup>66</sup> The Crimes Act of 1790 is consistent, providing that immunity does not exist for antecedent debts.<sup>67</sup>

But the affecting jurisdiction does kick in, as does the immunity, where a consul is acting on behalf of his government. The Supreme Court established as much early on, in 1789, in the first of only a handful of cases in which it exercised original jurisdiction under the affecting clause.<sup>68</sup> The Court did not quarrel with plaintiff's argument that "[w]hen a Consul acts as a merchant, and draws bills for cash advanced, he is not entitled to any privilege [sic]," but determined, as a factual matter, that the contract involved there "was made on account of the government . . . as an official engagement" and therefore ruled against plaintiff.<sup>69</sup>

Another illustration of the Court walking this line is *Ohio v. Agler*.<sup>70</sup> There, the issue was whether a divorce proceeding could move forward in state court, notwithstanding that a consul was one of the divorcing parties.<sup>71</sup> Recognizing that the language of the Constitution was "pretty sweeping," and aware that permitting state court "intermeddling" with a "subject of a foreign power" could produce foreign relations problems, the Court nonetheless found that there was a narrow exception to exclusive federal jurisdiction for domestic relations.<sup>72</sup> *Agler* is the ultimate source of the Court's finding similar exceptions to the diversity jurisdiction and the Court's abstention decisions in the area of domestic relations.<sup>73</sup> In all these cases, the expressed rationale was a respect for the traditional role of states in regulat-

---

64. *Trost v. Tompkins*, 44 A.2d 226, 228 (D.C. 1946); *see also* *Hollander v. Baiz*, 43 F. 35 (S.D.N.Y. 1890).

65. *See, e.g., supra* Part I.D (contemplating judicial proceedings against consuls); *Gittings v. Crawford*, 10 Fed. Cas. 447, 450-51 (C.C.D. Md. 1838) (No. 5465).

66. *See* 28 U.S.C. § 1605(a)(2).

67. *See* Crimes Act of 1790, ch. 9, § 27, 1 Stat. 112, 118. *See also* *Carrera v. Carrera*, 174 F.2d 496 (D.C. Cir. 1949).

68. *Jones v. LeTombe*, 3 U.S. (3 Dall.) 384 (1789).

69. *Id.*

70. *See Ohio v. Agler*, 280 U.S. 379 (1930).

71. *Id.* at 383-84.

72. *Id.*

73. *Ankenbrandt v. Richards*, 504 U.S. 689, 697 n.3, 711 (1992).

ing this area.<sup>74</sup> But, ultimately, that respect and the traditional role themselves are grounded in the idea that personal relations of this sort are “what formerly would have belonged to the ecclesiastical Courts” and, therefore, are not a concern of any government, either of the United States or of foreign sovereigns.<sup>75</sup> These are activities of the individuals involved that are not in any sense occurring in an official capacity.

*The Schooner Exchange v. McFaddon* is another example in a related area.<sup>76</sup> This was an *in rem* action against a foreign ship that had come into a United States port.<sup>77</sup> The United States took the position that the ship had “an immunity from the ordinary jurisdiction, as extensive as that of an ambassador or of the Sovereign himself.”<sup>78</sup> Writing for the Court, Chief Justice Marshall to a large extent agreed. He viewed the situation as “delicate and important” and discussed at length the implications for United States foreign policy of federal courts accepting jurisdiction in a variety of cases that he viewed as analogous to one another.<sup>79</sup> Among those were the exercise of jurisdiction over foreign ministers.<sup>80</sup> In all such cases, the federal courts were essentially being asked to exercise jurisdiction over the foreign nations themselves and the implications of this for foreign policy were a strong factor to be considered. While the issue in *Schooner Exchange* was immunity as opposed to jurisdiction, the fact remains that throughout the early years of the nation, and even up to today, courts have equated the interests of ministers and of consuls acting in an official capacity with the interests of the foreign nations themselves and, by implication, with United States foreign policy.<sup>81</sup>

A final example is the practice of consuls participating in suits in a representative capacity. The Supreme Court’s decision in *The Bello Corrunes: The Spanish Consul Claimant* is a good example.<sup>82</sup> There, a Spanish vessel and cargo were stranded on Block Island and seized by the United States.<sup>83</sup> Although the precise identity of the purported Spanish owner was not known and no specific authorization had been provided by

---

74. *Agler*, 280 U.S. at 383 (“[T]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states and not to the laws of the United States . . .”) (quoting *Ex parte Burrell*, 136 U.S. 586, 593-94 (1890)).

75. *Id.* at 384; *see also* *Carbone v. Carbone*, 206 N.Y.S. 40, 41-42 (Sup. Ct. 1924).

76. *The Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812).

77. *Id.*

78. *Id.* at 132-33.

79. *Id.* at 135.

80. *Id.* at 137-38.

81. For an excellent study of six eighteenth-century cases and of a variety of more recent ones in this regard see Chimene I. Keitner, *The Forgotten History of Foreign Official Immunity*, 87 N.Y.U. L. REV. 704 (2012).

82. *The Bello Corrunes*, 19 U.S. 152 (1821).

83. *Id.*

such person, before the deadline for contesting the seizure passed, the Spanish consul filed an *in rem* action challenging the seizure and seeking return of the vessel and cargo to its rightful owner.<sup>84</sup> Over the objection of the United States, the Court approved this representative suit as consistent with longstanding practice and made clear that such representative roles were permissible in both a plaintiff and defendant role:

[A] Vice Consul duly recognised by our Government, is a competent party to assert or defend the rights of property of the individuals of his nation . . . . To watch over the rights and interests of [a foreign sovereign's] subjects, wherever the pursuits of commerce may draw them, or the vicissitudes of human affairs may force them, is the great object for which Consuls are deputed by their sovereigns; and in a country where laws govern and justice is sought for in Courts only, it would be a mockery to preclude them from the only avenue through which their course lies to the end of their mission.<sup>85</sup>

Consuls have continued to play this role to the present day.<sup>86</sup>

The bottom line is that the presence of a party with a particular title is not dispositive. The question is really whether there is some impact on foreign nations or foreign relations.

## 2. *Concrete Effects*

Courts have also examined the types of effect that are felt by an ambassador, public minister, or consul, and, consistent with *Ortega*, have limited the applicability of the jurisdiction to situations where concrete and specific effects were established. One example is *Farnsworth v. Sanford*.<sup>87</sup> There, John Farnsworth was indicted, along with two naval attachés to the

---

84. *Id.*

85. *Id.* at 168.

86. *See, e.g.,* *The Maret*, 145 F.2d 431, 438 (3d Cir. 1944); *In re B-727 Aircraft Serial No. 21010*, 272 F.3d 264, 273 (5th Cir. 2011). To be clear, *In re B-727* is an example of the Court finding that this role, while permissible, is not a role in which the consul is serving in a capacity contemplated to require exclusive federal court jurisdiction under 28 U.S.C. § 1351—the successor to the provisions of the Judiciary Act relating to consul. This decision, incorrect in my view, is nonetheless a decision of statutory interpretation, and not one relating to the scope of the affecting clause itself.

87. *Farnsworth v. Sanford*, 33 F. Supp. 400 (N.D. Ga. 1940), *aff'd*, 115 F.2d 375 (5th Cir. 1940). The case was a repeat habeas petition. Reported decisions on prior habeas petitions are at *Farnsworth v. Zerbst*, 97 F.2d 255 (5th Cir. 1938), and *Farnsworth v. Zerbst*, 98 F.2d 541 (5th Cir. 1938).

Japanese Embassy, for conspiracy to commit various federal crimes.<sup>88</sup> Although indicted, the two public ministers were not arrested and they did not appear at trial.<sup>89</sup> Echoing Ortega's argument, in this slightly different context, Farnsworth contended that the district court proceedings resulting in his ultimate conviction were improper because the matter was one affecting a public minister and so could be heard only as part of the Supreme Court's original jurisdiction.<sup>90</sup> Conceding that the "strict literal meaning" of the term would encompass these circumstances, the district court found nonetheless that:

[n]ecessarily the word 'affecting' must be given a reasonable and sensible meaning in the light of the purposes of the Constitution. A line must be drawn somewhere, and it seems to me that a proper construction of this Constitutional provision is that it was not intended to deny jurisdiction to district courts in cases like the one against petitioner.<sup>91</sup>

In affirming, the Fifth Circuit took a similar tack.<sup>92</sup> It conceded that "[e]ach [of the indicted ministers] of course would be concerned as the trial might involve reflections on the[ir] character and conduct . . . but the case in its results would not touch the person or goods or servants of any of them."<sup>93</sup> Relying on *Ortega*, the court noted that there "[t]he ambassador's feelings, his integrity as a witness, and his standing as a man might all be involved, but he is held not affected."<sup>94</sup> In sum, *Farnsworth* and other progeny of *Ortega* reaffirmed that there are limits on the types of harms that can trigger the affecting jurisdiction.

### 3. *Deference To Executive Branch*

Finally, in determining whether the affecting jurisdiction is present, and the closely related question of diplomatic immunity, federal courts have given great deference—sometimes even conclusive deference—to the judgment of the executive branch. *Ortega* itself is one early illustration. As the circuit court observed when rejecting Ortega's invitation to question the executive's position on these matters:

---

88. *Id.* at 401-02.

89. *Id.*

90. *Id.*

91. *Id.* at 402.

92. *Farnsworth v. Sanford*, 115 F.2d 375 (5th Cir. 1940).

93. *Id.* at 379.

94. *Id.*

[T]he conclusive answer to these arguments is, that these are matters of state, with which courts of justice have nothing to do. The constitution of the United States having vested in the president the power to receive ambassadors and other public ministers, has necessarily bestowed upon that branch of the government, not only the right, but the exclusive right, to judge of the credentials of the ministers so received; and so long as they continue to be recognized and treated by the president as ministers, the other branches of the government are bound to consider them as such. If courts of justice could sit in judgment upon the decision of the executive in reference to the public character of a foreign minister, and by pronouncing him to be unduly appointed, or improperly recognized, deprive him of the privileges of a minister, what an extraordinary anomaly would such an interference present to the world!

...

Besides, if it being to courts of justice to meddle with these matters, and looking beyond the acts and conduct of the president, to decide a person recognized by him as a foreign minister, to be no minister, surely that branch of the government ought to possess all the lights to guide their judgment which are possessed by the president, and should consequently be empowered to call for and to expose to public view, the archives of state, and the correspondence of the executive of this nation with foreign nations, in relation to the subject on which the decision is to be made. Yet, who would be wild enough to maintain a proposition so extravagant and absurd?

...

The only proper inquiry, in short, in cases of this nature is, has the person, claiming to be a foreign minister, been received and recognized as such by the executive of this government? If he has, the evidence of those facts is not only sufficient, but in our opinion, conclusive upon the subject of his privileges as a minister.<sup>95</sup>

---

95. *United States v. Ortega*, 27 F. Cas. 359, 361-62 (C.C.E.D. Pa. 1825) (No. 15,971).



Consistent with this, an executive branch determination that there is immunity has been deferred to as a political question that the Supreme Court did not have authority to re-examine.<sup>96</sup> The same has sometimes been held with respect to executive branch determinations that immunity is *not* present.<sup>97</sup> Other examples abound.<sup>98</sup>

#### G. A STATUTORY GRANT OF AFFECTING JURISDICTION

Finally, courts in areas closely related to the constitutional affecting jurisdiction have reaffirmed *Ortega* and its progeny and added their own detail. Congress, as noted, has not used the term “affecting” in its statutory grant of jurisdiction under Article III’s affecting head.<sup>99</sup> However, there is at least one occasion in which Congress, in a grant under the federal question head, did make use of the “affecting” terminology.<sup>100</sup> As part of the monumental Civil Rights Act of 1866, Congress included a wide range of avenues into federal courts to vindicate civil rights.<sup>101</sup> Among these was a grant of concurrent jurisdiction in the district and circuit courts “of all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the State or locality where they may be any of the rights secured to them by the first section [of the Civil Rights Act].”<sup>102</sup> Among the rights granted by the first section were most of the common law rights associated with property, contract, and tort law as well as the right “to sue, be parties, and give evidence.”<sup>103</sup> The grant ultimately vanished from the statute as part of a recodification process that was represented to Congress by the recodifiers as not having any substantive impact, and it has never returned.<sup>104</sup> Had it remained in place and been given a generous construction, the grant could have had enormous implications for the scope of federal civil rights jurisdiction today.

*Blyew v. United States*, decided before the grant was wiped from the statute books, puts an exclamation point on some of the emerging themes

---

96. See *In re Baiz*, 135 U.S. 403 (1890).

97. *United States v. Coplon*, 84 F. Supp. 472 (S.D.N.Y. 1949); see generally Wienczyslaw J. Wagner, *The Original and Exclusive Jurisdiction of the United States Supreme Court*, 2 ST. LOUIS U. L.J. 111, 127 (1952).

98. See *United States v. Skinner*, 27 Fed. Cas. 1123, 1123 (C.C.D.N.Y. 1818) (No. 16,309); *Diplomatic Privilege*, 8 Op. Att’y Gen. 471 (1855).

99. See *supra* Part I.D.

100. Civil Rights Act of 1866, ch. 31, § 3, 14 Stat. 27, 27.

101. *Id.*

102. *Id.*

103. *Id.* § 1.

104. See Ronald Goldstein, *Blyew: Variations on a Jurisdictional Theme*, 41 STAN L. REV. 469, 521 (1989).

discussed herein.<sup>105</sup> There, the State of Kentucky had adopted laws expressly permitting African Americans to testify in a variety of settings but also providing limits such as that “negroes and mulattoes shall be competent witnesses in all criminal proceedings where a negro or mulatto is a defendant” or in civil proceedings in which only non-whites were parties.<sup>106</sup> Richard Blyew and William Kennard, both white, had viciously murdered four African-American individuals and brutally assaulted a fifth.<sup>107</sup> A number of witnesses to the crime were African American, and one of the murdered had made a dying declaration identifying the killers.<sup>108</sup> Blyew and Kennard were indicted in state court for one of the murders.<sup>109</sup>

Likely because the statements of the African American victims and witnesses could not be admitted into evidence under the newly-enacted Kentucky law, as well as for other reasons one can imagine, the federal prosecutor determined that the witnesses and victims were “denied or cannot enforce” the rights to testify granted under section one of the Civil Rights Act, and, therefore, that the case was one “affecting” them within the meaning of the jurisdictional provisions of section two.<sup>110</sup> The case was removed to federal court and tried there.<sup>111</sup> Before, during, and after the trial that resulted in his conviction and death sentence, Blyew challenged the federal court’s jurisdiction.<sup>112</sup>

The case arrived at the Supreme Court in 1870 and argument centered around weighty questions of federalism and the constitutionality of the jurisdictional grant in section two of the Civil Rights Act.<sup>113</sup> After putting the case over for decision, in 1872 the Court reversed the conviction on the grounds that there was no jurisdiction in federal court.<sup>114</sup> The Court did not decide the constitutional issues but instead relied extensively on what critics have termed “an obscure forty-year-old-case”—*Ortega*.<sup>115</sup>

The majority began with a discussion of the sweeping impact that would flow from permitting federal court jurisdiction “whenever it was alleged that a citizen of the African race was or might be an important wit-

105. *Blyew v. United States*, 80 U.S. 581 (1872).

106. Act of Feb. 14, 1866, ch. 563, 1865 Ky. Acts 38 (as cited in Goldstein, *supra* note 104, at 483).

107. *Blyew*, 80 U.S. at 584-85.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Blyew*, 80 U.S. at 584-85.

113. *Id.*

114. Thankfully, upon further proceedings below, Blyew was convicted in state court. Although he was later pardoned due to old age and health concerns, he served six years in prison for his heinous acts. See Goldstein, *supra* note 104, at 565.

115. Goldstein, *supra* note 104, at 503.

ness[ ]”—concluding that “such an allegation might always be made.”<sup>116</sup> Viewing such an intent as improbable, the Court instead determined that the term affecting, as used in the jurisdictional provision, “would seem rather to have been to afford protection to persons of the colored race by giving to the federal courts jurisdiction of cases, the decision of which might injuriously affect them either in their personal, relative, or property rights.”<sup>117</sup> The Court viewed this construction not as overly narrowing the jurisdiction, but, in fact, as “conced[ing] to it a far-reaching purpose,” which included ensuring that African Americans, when parties to a case and therefore directly interested in the outcome, received fair treatment in the proceedings themselves and were not hampered by state laws or practices that, for example, imposed disparate punishments on African American defendants, disallowed African Americans from serving on juries, or otherwise prejudiced them.<sup>118</sup> Separately analyzing the interests of both the witnesses in *Blyew*, who were denied the right to testify, and the victim, who was denied a just outcome if the witnesses could not testify, the Court concluded that these individuals were too remote from the proceedings and the effects on them were too indirect to meet the jurisdictional requirement.<sup>119</sup> As support for its conclusion, the *Blyew* majority relied heavily on *Ortega*’s holding that the case there was not one affecting the minister even though he was a witness and the victim.<sup>120</sup>

The dissent, by contrast, viewed the cause as “one affecting the person murdered, as well as the whole class of persons to which she belonged.”<sup>121</sup> Further elaborating, Justice Bradley explained that:

To deprive a whole class of the community of this right, to refuse their evidence and their sworn complaints, is to brand them with a badge of slavery; is to expose them to wanton insults and fiendish assaults; is to leave their lives, their families, and their property unprotected by law. It gives unrestricted license and impunity to vindictive outlaws and felons to rush upon these helpless people and kill and slay them at will, as was done in this case.<sup>122</sup>

The Civil Rights Act was passed in the wake of a civil war over the issues it addressed and was drafted at the same time as the post war constitu-

---

116. *Blyew*, 80 U.S. at 592.

117. *Id.*

118. *Id.*

119. *Id.* at 594.

120. *Id.*

121. *Blyew*, 80 U.S. at 598 (Bradley, J., dissenting).

122. *Id.* at 599; *see also* *United States v. Rhodes*, 27 F. Cas. 785 (C.C.D. Ky. 1866) (No. 16,151) (Swayne, J.).

tional amendments.<sup>123</sup> As we can with the constitutional affecting jurisdiction, we can safely assume that those who drafted the statutory affecting jurisdiction viewed it as an important tool to address an issue they deemed critical to the nation. Yet, even in this context, the Court rejected any role for itself that involved cognizance of particular kinds of injuries. Indeed, for the most part, both majority and dissent agreed that the primary sorts of “effects” that were judicially cognizable were injury to life, liberty, and property.<sup>124</sup> The only disagreement was whether the Court was limited to considering the particular victims and witnesses in the case at hand or whether the Court could extend its consideration to encompass those who, in the future, might become victims and witnesses if the criminal law were not permitted to be enforced fully. On that point, the majority viewpoint was that the more limited role was required of the Court.

\* \* \*

The structure and language of Article III, the history of its development, and early enactments and discussions interpreting and implementing the affecting jurisdiction all confirm the central importance of this jurisdiction to the overall structure envisioned by the framers. These same sources also identify significant limits on the affecting jurisdiction. Each of these insights—the heightening of the jurisdiction’s importance in our eyes and the reminder of its limitations—teaches us something about not only the affecting jurisdiction itself, but also its neighbors in Article III and the role of the federal courts more generally. In the next two Parts, this Article takes up, in turn, some of the implications of the unexpected importance of the affecting jurisdiction (Part II) and selected implications of the jurisdiction’s limits (Part III).

## II. IMPLICATIONS OF THE AFFECTING JURISDICTION’S IMPORTANCE

The realization that the affecting jurisdiction played a central role at the Convention and was accorded great respect by the framers, first Congress, and early Court should cause us to take the jurisdiction more seriously. Doing so has immediate implications in at least three areas. *First*, an appreciation of the affecting jurisdiction’s importance points toward a greater role for the original jurisdiction of the United States Supreme Court in this area, and, more generally, provides clarity concerning the contemplated relationship between Article III’s grant of original Supreme Court

---

123. Goldstein, *supra* note 104, at 478.

124. *Compare Blyew*, 80 U.S. at 592, 594, with *id.* at 599 (Bradley, J., dissenting). Justice Bradley’s reference to the “badge of slavery” could be read as recognizing some form of psychic injury in addition to these more concrete forms of injury. In context, however, it appears more likely to be referring to what follows in the passage—the physical effects that flow from the “badge.” *Id.* at 599 (Bradley, J., dissenting).

jurisdiction and congressional enactments purporting to deliver something less than the full constitutional dose of jurisdiction. *Second*, in determining the scope of the affecting jurisdiction in the lower federal courts, Congress and the courts make reference to its underlying purposes. This means viewing the jurisdiction as a relatively broad subject-matter-based one rather than a narrow party-based one. *Finally*, when examining other jurisdictional problems, we should not forget that this clause of the Constitution exists. This Part discusses one important occasion where such a mistake occurred and identifies the ways in which proper knowledge of the affecting jurisdiction could have avoided, and still can ameliorate, the substantial constitutional problems that resulted. The broader lesson is that permitting the affecting jurisdiction to occupy its proper place on the stage will relieve other players from carrying as heavy a burden and improve the overall performance of Article III.

#### A. SUPREME COURT ORIGINAL JURISDICTION

The Supreme Court's exercise of its original affecting jurisdiction is extremely rare. By one account, there had been only three attempts to invoke the jurisdiction as of 1959—less than one percent of all original jurisdiction cases in the Court's history as of that time.<sup>125</sup> To be sure, one of the reasons for the rarity of this phenomenon is that early on, and consistently since that time, Congress has kept in place laws strictly enforcing diplomatic immunity for ambassadors and ministers.<sup>126</sup> This means fewer suits against such individuals, and, therefore, fewer occasions for the exercise of any federal court jurisdiction involving them. Concurrent jurisdiction has also played a role. The Judiciary Act of 1789 created lower federal courts and gave them some of the affecting jurisdiction, which they have held ever since.<sup>127</sup> These lower courts compete for the available cases.

But, part of the explanation for the limited number of cases is that the statutes setting forth the scope of the Supreme Court's original jurisdiction have described that jurisdiction in terms that are more cramped than those used by the framers.<sup>128</sup> To be sure, as we have seen, the first Congress gave great attention to the specific ways that the affecting jurisdiction should be

---

125. *The Original Jurisdiction of the United States Supreme Court*, 11 STAN. L. REV. 665, 667, 700-19 (1959). See also Vincent L. McKusick, *Discretionary Gatekeeping: The Supreme Court's Management of Its Original Jurisdiction Docket Since 1961*, 45 ME. L. REV. 185, 187 (1993) (finding only two successful attempts to invoke the jurisdiction as of 1993).

126. See *supra* Part I.D.

127. See *supra* Part I.D.; see also 28 U.S.C. § 1351 (current lower court jurisdiction over consuls).

128. See *supra* Part I.D.

exercised and was relatively generous in its parceling out of the jurisdiction, at least when compared to Congress's treatment of the other heads of jurisdiction.<sup>129</sup> But, undoubtedly, Congress purported to give less than the full constitutional measure of the jurisdiction. The most notable potential deficiency was Congress's decision to describe the Supreme Court's original affecting jurisdiction as party-based rather than subject-matter-based. Specifically, rather than apply to all cases "affecting" ambassadors and the like, it applied to cases "brought by" and "against" ambassadors and ministers and to suits in which consul "shall be a party."<sup>130</sup> Restrictive descriptions of this sort have been in place ever since.<sup>131</sup> Today's Supreme Court original jurisdiction applies to "[a]ll actions or proceedings to which ambassadors, other public ministers, consuls or vice consuls of foreign states are parties."<sup>132</sup>

Examination of the language, history, and purposes of the affecting jurisdiction suggests that this should not be. Instead, the Supreme Court's original jurisdiction should have a one-to-one correspondence with the terms used in Article III.

Perhaps the most powerful argument for this position is the words of Article III. It provides that "[i]n all Cases affecting Ambassadors . . . the supreme Court shall have original Jurisdiction."<sup>133</sup> The words "all" and "shall have" certainly suggest that the Constitution directly bestows on the Court the complete measure of the affecting jurisdiction. There is no equivocation in these words as there is in the words of the jurisdictional heads immediately preceding them. There, the Court seized on the fact that the word "extend" is used as the reason for countenancing delivery of less than the full measure of jurisdiction to the lower federal courts.<sup>134</sup> The term "extend" is interpreted as qualifying the "all" and "shall" terms and, much like a speed limit, marking the maximum extent of the jurisdictional heads rather than their mandatory minimum.<sup>135</sup> The fact that the framers chose not to use such qualifiers with respect to the Supreme Court's original jurisdiction, and in fact used unqualifiedly compulsory language instead, strongly suggests that the choice was intentional and that the original jurisdictional grants to the Supreme Court delineate both a maximum *and* a minimum amount of jurisdiction.

---

129. *See supra* Part I.D.

130. *See supra* Part I.D.

131. 28 U.S.C. § 1251(b)(1) (2000).

132. *Id.*

133. U.S. CONST. art. III, § 2, cl. 2.

134. U.S. CONST. art. III, § 2, cl. 1 ("The judicial Power shall extend to . . . all Cases . . ."); *See, e.g., Osborn v. Bank of United States*, 22 U.S. 738, 819 (1824).

135. *Osborn*, 22 U.S. 738, 819 (1824).

Further, supporting this conclusion is the fact that the framers used precisely the same affecting jurisdiction terminology on two different occasions in Article III. Specifically, the framers took the care to repeat the exact words used in the jurisdictional head when they described the Supreme Court's original affecting jurisdiction. They did not do this with regard to the other instance of Supreme Court original jurisdiction.<sup>136</sup> These two facts—the precise repetition in one case and the decision to paraphrase in the other—each support the idea that the framers intended the Supreme Court's original affecting jurisdiction to map exactly onto the boundaries of the affecting head.<sup>137</sup> All in all, the language of Article III suggests in various different ways that the Supreme Court should have original jurisdiction over the full spectrum of cases that fall within the affecting jurisdiction.

The history we have seen supports this conclusion as well. The affecting jurisdiction in general, and the exercise of that jurisdiction by the Supreme Court in particular, was a central and important aspect of the history of Article III as it evolved through the Constitutional Convention.<sup>138</sup> The state conventions and ratification proceedings provide further evidence to support this proposition, with delegates such as Luther Martin using the fact that the Supreme Court would hear such matters in the first instance as an argument in favor of Article III and ratification more generally.<sup>139</sup> And the Court itself has, at various times, suggested the possibility that its original jurisdiction is self-implementing, thereby implying that congressional decisions to give less than the full measure of the jurisdiction may be ineffective or unconstitutional.<sup>140</sup>

Finally, the history of concurrent jurisdiction lends some support to this idea. In an opinion often cited in the early years of the Court, Justice Iredell riding circuit in *United States v. Ravara* expressed the view that “for obvious reasons of public policy, the Constitution intended to vest an exclusive jurisdiction in the Supreme Court, upon all questions relating to the Public Agents of Foreign Nations.”<sup>141</sup> Justice Iredell also relied upon the

---

136. U.S. CONST. art. III, § 2, cl. 1.

137. Akhil Reed Amar, *Marbury, Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. CHI. L. REV. 443, 480-81 (1989).

138. See *supra* Part I.B.

139. See *supra* Part I.C.

140. *California v. Arizona*, 440 U.S. 59, 65 (1979) (citing *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816), and others); see also *South Carolina v. Katzenbach*, 383 U.S. 301, 305 (1966) (Black, J., dissenting); cf. *Ex parte McCordle*, 74 U.S. (7 Wall.) 506 (1869) (implying that the Supreme Court's appellate jurisdiction exists independent of congressional action and that only the exceptions clause permits Congress to take away some portion of that pre-existing appellate jurisdiction).

141. *United States v. Ravara*, 2 U.S. (2 Dall.) 297, 298-99, 27 F. Cas. 713 (C.C.D. Pa. 1793) (No. 16,122) (Iredell, J., dissenting).

“context of the judiciary article” as a whole.<sup>142</sup> As we have seen, in expressing this view Justice Iredell, a framer himself, was clearly in the company of other prominent framers such as Luther Martin and, perhaps, Hamilton and Madison as well.<sup>143</sup> Although Justice Iredell was outvoted by Justice Wilson and the district judge in that case, his view continued to hold currency and appeared to find support in prominent and well respected decisions of the Marshall court such as *Marbury v. Madison*, *Osborn v. Bank of U.S.*, and *Cohens v. Virginia*.<sup>144</sup> The Supreme Court studiously avoided expressly deciding the matter, however. To pick one example, *Ortega* could have been decided on the grounds that the concurrent jurisdiction in question was unconstitutional, but the Court chose a different path instead.<sup>145</sup>

In other words, this was a close constitutional question and numerous framers were arrayed on each side of it. Indeed, even those voting in favor of concurrent jurisdiction were doing so in a context where it was understood that members of the United States Supreme Court would be closely involved in the lower court proceedings. Mr. Ravara’s case, for example, had the benefit of two Supreme Court Justices on his circuit level panel and the trial, when ultimately conducted, was presided over by Chief Justice Jay.<sup>146</sup>

Not until 1884 was the question finally decided in favor of concurrent jurisdiction and even then the steps taken were cautious ones and over a dissenting opinion. In *Bors v. Preston*, the Court upheld the concurrent jurisdiction of lower courts in affecting cases but did so relying heavily on potentially narrowing grounds.<sup>147</sup> Specifically, the Court observed that the case involved a consul (not an ambassador or minister), that consular protections were more narrow than diplomatic protections, and that consuls frequently were United States citizens and residents who were designated by foreign nations to serve as their representatives on commercial matters in the United States.<sup>148</sup> In the different context of original jurisdiction involving cases where states were parties, the Court was more bold. *Ames v. Kansas*, decided after *Bors* but frequently cited as the case establishing

---

142. *Id.* at 299.

143. *See supra* Part I.B. Justice Iredell was not a full-throated advocate of federal court power. Recall that his was the prescient dissenting opinion in *Chisholm v. Georgia*, 2 U.S. 419 (1793), the Supreme Court’s decision finding state sovereign immunity inapplicable and thereby prompting immediate passage by Congress and ultimately the states of the Eleventh Amendment, which was designed for the express purpose of overruling the Court.

144. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); *Osborn v. Bank of United States*, 22 U.S. (9 Wheat.) 738 (1824); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821).

145. *See supra* Part I.E.

146. *Ravara*, 2 U.S. (2 Dall) at 299 n.\*.

147. *Bors v. Preston*, 111 U.S. 252 (1884).

148. *Id.* at 260.



concurrent jurisdiction,<sup>149</sup> expressed none of the reservations of *Bors*, implying again that Supreme Court involvement in affecting clause cases may have been viewed as a more core area of the Court's jurisdiction.<sup>150</sup>

To be sure, I am not arguing for an abandonment of concurrent jurisdiction in cases involving the affecting jurisdiction. Rather, the overall history of the Court's dealing with concurrent affecting jurisdiction is another brick in the wall. Like the language of Article III itself and like the history of the Constitutional Convention and the ratification debates, it suggests that the Court has a special role to play when it comes to the affecting jurisdiction, and it supports the notion that the framers intended the Supreme Court's jurisdiction over the affecting jurisdiction to be complete.

Today, there is nothing preventing a party from filing directly with the Supreme Court a case that falls outside the existing statutory description of original Supreme Court jurisdiction but within the grant set forth in Article III. Were this to occur, the language and history of the affecting jurisdiction would strongly push the Court to accept jurisdiction. In doing so, the Court would not only begin down the road to restoring the affecting jurisdiction to its proper place but also begin to cement for the federal courts themselves their proper place in the constitutional scheme. The Court is a constitutionally-mandated body and some unknown quantum of federal court jurisdiction is also constitutionally mandated. The Court established early on that Congress cannot expand the jurisdiction of the federal courts beyond the limits set forth in Article III.<sup>151</sup> But, while it has come close, it has never firmly established the extent of the jurisdictional floor or even confirmed that there is such a floor. Doing so unnecessarily may have its political downsides but it also would strengthen the hand of the federal courts in checking the other two branches. While various floors have been suggested from among the usual list of star players on the jurisdictional stage, the true core jurisdiction has been overlooked. Just as the Constitutional Convention began its discussion of Article III with what was to become the affecting jurisdiction, the Supreme Court's original affecting jurisdiction is the place to start establishing the jurisdictional floor of the federal courts.

#### B. A SUBJECT-MATTER-BASED JURISDICTION

Unlike the current statutory "grant" of Supreme Court original affecting jurisdiction more limited than what Article III bestows, the similarly limited statutory grants of affecting jurisdiction to lower federal courts likely are within Congress's constitutional authority to control jurisdiction of

---

149. See HART AND WECHSLER'S, *supra* note 3, at 252.

150. *Bors*, 111 U.S. 252.

151. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

federal courts. While the badge of unconstitutionality may not attach to these grants, their wisdom and interpretation are still worthy subjects of inquiry. A complete appreciation of the intended scope of the affecting jurisdiction and its purposes should lead Congress to reconsider its statutory grants and lead courts to reassess their interpretation of the existing grants.

It is easy to glide over the affecting jurisdiction as an idiosyncratic and highly specialized example of party-based jurisdiction. Like the diversity jurisdiction and the heads of jurisdiction relating to controversies to which the United States or one or more of the states is a party,<sup>152</sup> the affecting jurisdiction appears to refer to specific individuals—“Ambassadors, other public Ministers and Consuls”—who might find themselves before a court.<sup>153</sup> Further adding to this temptation is the grant of original jurisdiction to the United States Supreme Court. In the single sentence concerning this jurisdiction, the framers clumped the affecting jurisdiction together with one other jurisdiction—“Cases . . . in which a State shall be a Party”—that is plainly party-based.<sup>154</sup> Finally, there are the Judiciary Act and *Ortega*. As we have seen, the Judiciary Act does not use the word “affecting” and implements a party-based test.<sup>155</sup> Meanwhile, *Ortega* seems to stand for the idea that the Constitution requires a party-based test.<sup>156</sup>

While this view of the affecting jurisdiction deserves respect, I believe it is mistaken and that the mistake has blocked us from seeing what the affecting jurisdiction has to teach us about Article III more generally. The language of the clause itself, of course, refers to matters “affecting” ambassadors and the like. The common understanding of this term at the time of the framers was not different from what we today would consider it to mean.<sup>157</sup> On its face, then, the requirement that a case be one affecting am-

152. See U.S. CONST. art. III, § 2, cl. 1, heads 4, 5, 6, 7, 9. The head relating to controversies “between citizens of the same State claiming Lands under Grants of different States” is frequently clumped with these as well. *Id.* at head 8. While it does not expressly refer to the states as parties, it does have a party-based requirement (the controversy must be “between citizens of the same State”) and, more notably, it requires a conflict between state grants to be present, making it similar to the head of jurisdiction relating to disputes between two states. *Id.* at head 8; see also *id.* at head 5; THE FEDERALIST NO. 80 (Alexander Hamilton) (referring to this clause as relating to “bickerings and animosities [that] may spring up among members of the Union”).

153. U.S. CONST. art. III, § 2, cl. 1, head 2.

154. U.S. CONST. art. III, § 2, cl. 2.

155. Judiciary Act of 1789, ch. 20, §§ 11, 13, 1 Stat. 73, 78-81.

156. In addition to its holding that the non-party was not affected by the case within the meaning of the affecting clause, *Ortega* also contained a lengthy footnote repeatedly describing the affecting jurisdiction in party-based terms. *United States v. Ortega*, 24 U.S. (11 Wheat.) 467, 469 n.a.

157. See, e.g., THOMAS SHERIDAN, A GENERAL DICTIONARY OF THE ENGLISH LANGUAGE (London, Dodsley et al. 1780) (defining “to affect” as “to act upon, to product effects in non to move the passions”); see also Mark Moller, *A New Look at the Original*

bassadors would seem to be getting at something different than the question of whether the ambassador is a party. Indeed, it is easy to imagine cases that affect ambassadors but to which the affected ambassadors are not parties. And, so too can there be cases to which ambassadors are parties but which are not cases affecting them. Examples of both sorts of cases are discussed above in Part I.F. As we saw there, courts have viewed the privilege as one of the country and not the individual and have delicately sought to discern instances in which the interests of the former are at stake, even if the latter is not, and vice versa.

Moreover, the framers knew how to communicate the concept of party-based jurisdiction when they wanted to. Article III refers expressly to jurisdiction over “Controversies to which the United States is a Party” and cases “in which a state shall be a party.”<sup>158</sup> Where the presence of multiple parties is required, the framers described the parties and used the term “Controversies . . . between” to signal that these entities must be parties to the case.<sup>159</sup> We must view the framers’ decision to use the word “affecting,” rather than one of these other two phrasings, as intentional. As Chief Justice Marshall put it: “[The affecting clause] was intended, for reasons which all comprehend, to give the national Courts jurisdiction over all cases by which [the officers] were in any manner affected.”<sup>160</sup>

Each of the other words of the jurisdictional clause further supports the view that this is a subject matter based jurisdiction rather than a party-based one. Thus, the jurisdiction applies to “all Cases” affecting ambassadors. This makes the affecting jurisdiction like the other two subject matter jurisdictions, which apply to “all Cases in Law and Equity” and “all Cases” respectively, and unlike the party-based jurisdictions, which apply instead to “Controversies.”<sup>161</sup> Various explanations for this distinction have been offered, one of the most popular of which is the idea that the term “cases” refers to both criminal and civil proceedings while the term “controversies” refers only to civil proceedings.<sup>162</sup> In any event, whatever the explanation may be, the use of the term “cases” further supports the idea that this is a subject-matter-based jurisdiction, like the admiralty and federal question jurisdictions.

---

*Meaning of the Diversity Clause*, 51 WM & MARY L. REV. 1113, 1148-51 (2009) (arguing that the term had a distinctive legal meaning broader than the term party and meant to capture at least any of those who might be able to collaterally attack a judgment and who therefore should sensibly be joined as parties to a case).

158. U.S. CONST. art. III, § 2, cl. 1, heads 4, 10.

159. *Id.* at heads 6, 7, 8, 9.

160. *Osborn v. Bank of United States*, 22 U.S. 738, 855 (1824).

161. U.S. CONST. art. III, § 2, cl. 1.

162. See Robert J. Pushaw, Jr., *Article III’s Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447, 460 (1994).

Closely related to this point is the placement of the phrasing within Article III. The affecting jurisdiction is the second head of jurisdiction and is sandwiched in between the other two subject matter heads, while the party-based heads are all clumped together as well.<sup>163</sup> The history of the evolution of the clause at the Constitutional Convention further supports the intentionality of this grouping.<sup>164</sup> Recall that the original drafts of the affecting jurisdiction were present at the very earliest stages of the debate and that the jurisdiction was then split into two separate clauses—one focused on foreign parties and one included with the subject-matter-based jurisdictions.<sup>165</sup>

The remaining words in the jurisdictional clause—the terms “ambassadors, other public ministers and consuls”—also have some bearing on the issue. While seeming at first glance to support the party-based argument, in fact these terms are consistent with the idea that this is a subject-matter-based jurisdiction. The term ambassador is clear enough, but the definition of other public ministers and consuls is notoriously slippery, as we have seen.<sup>166</sup> What the framers appeared to have been doing with these more undefined terms, when read in context with the overall jurisdictional language, was trying to capture an idea rather than identify a particular flesh and blood human being or discrete office that would be affected by the case.<sup>167</sup> This is how Hamilton put it in Federalist Number 81:

Public ministers of every class are the immediate representatives of their sovereigns. All questions in which they are concerned are so directly connected with the public peace, that, as well for the preservation of this, as out of respect to the sovereignties they represent, it is both expedient and proper that such questions should be submitted in the first instance to the highest judicatory of the nation. Though consuls have not in strictness a diplomatic character, yet as they are the public agents of the nations to which they belong, the same observation is in a great measure applicable to them.<sup>168</sup>

Perhaps most germane to our discussion is the fact that Hamilton paraphrases the affecting jurisdiction as involving all questions in which foreign

---

163. U.S. CONST. art. III, § 2, cl. 1-2.

164. *See supra* Part I.B.

165. *See supra* Part I.B.

166. *See supra* Part I.F.

167. *See supra* Part I.B; *supra* Part I.C.

168. THE FEDERALIST NO. 81 (Alexander Hamilton).

sovereigns are “concerned” rather than paraphrasing it using party-based terminology.<sup>169</sup>

But he also discusses in more depth the issue of who and what the jurisdictional clause is all about. Beginning with the who, Hamilton notes that the clause “concern[s]” those who are the “immediate representatives of their sovereigns” and also separately those who “are the public agents of the nations to which they belong.”<sup>170</sup> The terms “Ambassadors, other public Ministers and Consuls,” then, are not referring to flesh and blood human beings who can be discretely identified and singled out for the protections presumably afforded by a federal forum. Nor are they referring exclusively to some clearly delineated office or title, like the King, or the Prime Minister. These terms, instead, refer more generically to representatives and agents of foreign nations and, by extension, to the foreign nations themselves and the sovereignty of those foreign nations.

But is not the motivation for the jurisdiction still relating to a party, even if it is a more amorphously defined or different one than would appear at first glance? Not really. Building on the jurisdictional language indicating that the case must be one affecting the sovereigns’ agents, or, as Hamilton paraphrases it, “concerning” them, Hamilton explains the reason for the jurisdiction in terms that do not relate to the parties but instead to broader concerns.<sup>171</sup> Specifically, Hamilton links the foreign sovereigns’ “concern[.]” directly to the need to respect foreign sovereignty both in its own right and also in order to avoid the disruptions to peace that result from interfering with foreign nations.<sup>172</sup> What this means is that the concerns of the foreign nations themselves are at issue and, by extension, the foreign affairs of the United States are in issue and, by further extension, the public peace.

As we have seen, Hamilton was not alone in this vision. Throughout the Constitutional Convention, in the ratification debates that followed, and in decisions such as *Marbury v. Madison*, the framers and those close to them in time repeatedly treated the affecting jurisdiction as a central and important part of Article III and as something geared toward specific subject-matter-based goals relating to the nation’s foreign policy and remedying the failure of the Articles of Confederation to properly provide for a judiciary that could handle such sensitive matters.<sup>173</sup> The decisions by the early Court and over time treating jurisdiction over and immunity with re-

---

169. *See id.*

170. *Id.*

171. *See id.*

172. *Id.*

173. *See supra* Part I.B; *supra* Part I.C.

spect to ministers and consuls as equivalent to jurisdiction and immunity of foreign sovereigns themselves further support this notion.<sup>174</sup>

A final area of support for this position is the equivalent clause contained in Article II. There, the president is authorized to “receive Ambassadors and other public Ministers.”<sup>175</sup> This power has not been restricted to a narrow one related purely to particular officers but has been interpreted as empowering the executive to deal with foreign nations broadly and to recognize nations themselves.<sup>176</sup> The affecting clause in Article III is, in fact, more broad than this power of the executive. After all, it applies not only to the most official representatives of foreign nations, their diplomats, but also to their consuls. And it does so whenever a matter is one “affecting” them. Our broad interpretations of presidential power under Article II, then, should strongly support an even broader reading of the language in the affecting clauses.

In short, the language, structure, and seeming purpose of the affecting jurisdiction and its neighbors elsewhere in the Constitution suggest that the standard for its exercise should not be a rote party-based test. Rather, it should be a substantive one relating to the case’s impact on foreign nations, the foreign affairs of the United States, and the public peace. While this broader conception has certainly not been embraced or widely thought of, it has also not been explicitly rejected.<sup>177</sup>

If this is the case, what are we to make of early actions by some of the framers, including most notably their passage of the Judiciary Act of 1789 and the Court’s unanimous decision in *Ortega*? As noted, these would seem

---

174. See *supra* Part I.F.

175. U.S. CONST. art. II, § 3.

176. See, e.g., *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 410 (1964).

177. For example, in *Federal Republic of Germany v. United States*, the government of Germany attempted to invoke the original jurisdiction of the Supreme Court to block the execution of a German citizen by the state of Arizona. See *Federal Republic of Germany v. United States*, 526 U.S. 111 (1999). Among the possible grounds for original jurisdiction was the fact that an international tribunal had found the United States to have violated the Vienna Convention on Consular Relations by not permitting consular access to the German national in question. See *id.* at 113. The Court did not exercise its original jurisdiction but did not reject the argument out of hand observing only that “it is doubtful that [the affecting clause] provides an anchor for an action to prevent execution of a German citizen who is not an ambassador or consul.” *Id.* at 112 (alteration in original). The dissent observed that there was sufficient doubt on the point and that more extensive briefing was warranted. See *id.* at 114 (Breyer, J., dissenting); see also Stephanie L. Metz, *Medellín v. Dretke and Medellín v. Texas: International Law Can’t Mess with Texas*, 36 CAP. U. L. REV. 1131, 1143-47 (discussing the case and several other similar situations); Asa Markel, *The Vienna Convention on Consular Relations: After the Federal Courts’ Abdication, Will State Courts Fill in the Breach?*, 7 CHI.-KENT J. INT’L & COMP. L. 1, 14-20 (2007) (similar).

to be the strongest arguments in favor of the view that the affecting jurisdiction was intended to be a party-based one.<sup>178</sup>

The simplest explanation of the Judiciary Act is that Congress chose not to bestow the entire measure of the affecting jurisdiction on the lower courts just as it chose not to do so with regard to numerous other jurisdictions.<sup>179</sup> Indeed, as noted, Congress's treatment of the affecting jurisdiction was generous relative to its treatment of federal question jurisdiction and others.<sup>180</sup> This is even clearer when one considers the Crimes Act of 1790 and the immunities created by Congress.<sup>181</sup> The decision of the first Congress, then, should not be seen as a slight to the affecting jurisdiction or a judgment that it should be forever limited to a rote party-based test.

Nor does *Ortega* stand for such a proposition. Recall the context. *Ortega* was tried and convicted in circuit court for a felony, pursuant to the Crimes Act and the general jurisdictional provisions giving the circuit courts jurisdiction over federal felony trials.<sup>182</sup> After conviction, he argued that, notwithstanding the Judiciary Act's limitation on Supreme Court original jurisdiction to cases in which ambassadors were parties, his trial should have occurred in that Court because the case was one affecting a public minister and was therefore within the exclusive original jurisdiction of that Court.<sup>183</sup>

Note the number of constitutional issues embedded within this argument. For *Ortega* to have won, the Court would have had to decide that: (1) the Supreme Court's original affecting jurisdiction under the Constitution is self-enabling or, at a minimum, the Constitution requires Congress to grant to the Court the full extent of that jurisdiction; (2) the Judiciary Act's statement of Supreme Court original jurisdiction was unconstitutional; (3) the Supreme Court's original affecting jurisdiction was exclusive of the jurisdiction of any other court; and (4) the Judiciary Act's grant of affecting jurisdiction to lower federal courts was unconstitutional. These amount to two holdings limiting congressional control of federal court jurisdiction as a general matter and two holdings invalidating the framer-adopted Judiciary Act of 1789 as unconstitutional. To add further fuel to the fire, the Court would have been overturning the conviction of a prosecution brought by the executive branch in service of the law of nations and treaties and in a context where vital foreign policy interests were at stake. And it would have adopted for itself the obligation and right to conduct trials in a large number of cases in this sensitive area. As the Court's last term teaches, for the Court

---

178. Judiciary Act of 1789, ch. 20, §§ 11, 13, 1 Stat. 73, 78-81.

179. See *supra* Part I.D.

180. See *id.*

181. See *id.*

182. See *supra* Part I.E.

183. *United States v. Ortega*, 27 F. Cas. 359, 361 (C.C.E.D. Pa. 1825) (No. 15,971).

of today, invalidating even a single act of Congress or making even a single declaration about the scope of congressional power to affect federal court jurisdiction is a large mouthful to bite off. For the Court at the time, the four propositions Ortega requested of it, and the collateral consequences of granting those requests, amounted to an unimaginably tall order.

Yet, each of Ortega's propositions was either correct or, at the very least, a close constitutional call. I have argued that the first is true, from which follows that the second is likely true as well. And, while the Court ultimately held that the third and fourth are incorrect, as we have seen, those holdings were subject to criticism and were close constitutional calls.<sup>184</sup> In short, the Court likely did not want to find that any of these arguments by Ortega about the Court's powers vis-à-vis Congress and the executive were incorrect. To do so would permanently limit the Court's ability to serve its role of checking and balancing the other branches.

Luckily a different path was available. In addition to depending on the above propositions, Ortega's argument also depended on the proposition that the circumstances justifying invocation of the affecting jurisdiction were present. In this argument, Ortega contended that the affecting jurisdiction was truly revolutionary. According to Ortega's argument, the jurisdiction permitted anyone to invoke the jurisdiction of the federal courts and vindicate the rights created by the clause, even if the person so invoking was not the person for whom the right was designed.<sup>185</sup> Moreover, according to Ortega's argument, the jurisdiction also contemplated that any form of "effect"—including psychic effects—was sufficient to invoke the jurisdiction. The Court viewed these two contentions implicit in Ortega's position as dictating the outcome.<sup>186</sup>

First, the Court emphasized, repeatedly, whom the case did affect in the most direct sense.<sup>187</sup> Specifically, the Court emphasized that the interests of the United States were at issue.<sup>188</sup> The case was "that of a public prosecution," which was "instituted and conducted by and in the name of the United States," and which was "for the purpose of vindicating the law of nations and that of the United States."<sup>189</sup> There was no evidence that this party, the primary one affected and the one for whom the right was created in the first place, was offended by the case proceeding in circuit court. Indeed, the United States had been the one to initiate proceedings there.<sup>190</sup>

---

184. See *supra* Part II.A.

185. *United States v. Ortega*, 24 (11 Wheat.) U.S. 467, 468 (1826).

186. *Id.* at 468-69.

187. *Id.*

188. *Id.*

189. *Id.*

190. *Ortega*, 24 U.S. at 468-69.



The same was true as to the foreign nation.<sup>191</sup> Its officer had waived his privilege against testifying and had voluntarily appeared as a witness in the circuit court.<sup>192</sup> Neither the United States nor the foreign nation was objecting to the proceedings having occurred below.<sup>193</sup> Neither was arguing that this was a case affecting the sorts of interests that prompted the jurisdiction in the first place. This was not, in short, the more interesting case in which the United States was presenting evidence at the outset of an effect on foreign policy and arguing that only an original trial in the Supreme Court would meet the government's needs in light of the international sensitivity of the situation.

Second, the information that was before the Court regarding effects on the foreign nation or its agents did not establish the kind of impact that the Constitution protected against. To be sure, the Court could observe from the record that the public minister was impacted by the case in the sense that he clearly desired a certain result and would be unhappy if it were not to occur. He had an interest in ensuring that the law was faithfully enforced, and his interest was particularly pointed in this case. Also, the proceedings would result in determinations by the Court and the jury regarding a variety of defense arguments that concerned him and reflected upon his integrity. But, none of these determinations would be binding on the public minister, and the psychic effects of the case upon him and his particularly keen interest in seeing that the law was properly enforced were not the sorts of interests that could be vindicated at common law. Against this backdrop, the Court held that the Constitution did not permit the Court to address effects of this sort.<sup>194</sup>

*Ortega*, then, is not a holding that party status determines the applicability of the affecting jurisdiction. Rather, it is an instance of the Court giving great weight to the executive's judgment that the interests served by the affecting jurisdiction did not require the exercise of original affecting jurisdiction in that case, and of the Court agreeing that the sorts of effects that the record established were present were not the sorts of effects that the Court had the ability to address. These are significant rulings and ones that we should take note of, but they are not the broad gutting of the affecting jurisdiction that they are sometimes thought to be.<sup>195</sup>

---

191. United States v. Ortega, 27 F. Cas. 359, 359 (C.C.E.D. Pa. 1825) (No. 15,971).

192. *Id.*

193. *Ortega*, 24 U.S. 467.

194. *Id.* at 468-69; see also *supra* Part I.E.

195. To be sure, there is broad language in *Ortega* setting out the scenarios under which the affecting jurisdiction may be invoked, and it uses party-based terminology to do so. See United States v. Ortega, 24 U.S. (11 Wheat.) 467, 469 (1826). But that language merely described the existing statutory grants of jurisdiction under the Judiciary Act. There is no indication that it was meant to constitutionalize that set of grants or bless that set of

## C. TAMING OTHER JURISDICTIONS

The affecting jurisdiction should grow in our eyes because the framers intended it to.<sup>196</sup> But, its growth also has the beneficial effect of taming the other jurisdictions and bringing all of Article III closer to its intended place. One example, at the opposite end of the spectrum from our earlier discussion of the original affecting jurisdiction as a mandatory minimum of federal court jurisdiction, is the question of the outer limits of that jurisdiction. For years, federal courts scholarship and jurisprudence has debated whether there is any outer boundary on Congress's ability to confer jurisdiction on the courts pursuant to the "arising under" clause of Article III.<sup>197</sup> Theories of "protective jurisdiction," some of which would place little to no limits on such powers, have been hinted at by the Court although never affirmatively endorsed by a majority.<sup>198</sup> Further, every case pushing up against the boundaries of this jurisdictional head has ultimately been decided in favor of the grant of jurisdiction.<sup>199</sup> The situation is unsatisfying to those who prefer to believe that the framers meant something when they used the term "arising under" and that the words define some kind of border, however hazy, between cases that fall within it and cases that do not. After all, if every case falls within the "arising under" head, the first clause of Article III Section 2 could simply have read "[t]he judicial Power shall extend to all Cases." There would have been no need for the "arising under" terminology and certainly no need for the other delineated heads of jurisdiction.

This problem is longstanding, but it was severely exacerbated by the Supreme Court's decision in *Verlinden B.V. v. Central Bank of Nigeria*,<sup>200</sup> which involved the Foreign Sovereign Immunities Act ("FSIA").<sup>201</sup> The

---

grants as setting forth the outer limits of the affecting jurisdiction. If that were what the Court did, *Ortega* would be a rare case indeed, for the Court is particularly wary of delineating the outer bounds of the jurisdictional heads. Moreover, as we have seen, the Court decided the case on other grounds. Even if the discussion of the overall framework of affecting jurisdiction were a constitutional discussion and not a statutory one, that discussion was the purest dicta. Indeed, the Court signaled as much by including the discussion in a footnote that appeared after the reasoning, after the holding, and after the Court's ordered result in the case.

196. See *supra* Part II.A-B.

197. This provides that "[t]he judicial power [of the United States] shall extend to all Cases . . . arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." U.S. CONST. art. III, § 2, cl. 1, head 1.

198. See, e.g., *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 460 (1957) (Burton, J., concurring).

199. See generally HART AND WECHSLER'S, *supra* note 3, at 743-73 (discussing the unbroken string of cases so holding).

200. See *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480 (1983).

201. The Act is now codified at 28 U.S.C. §§ 1330, 1332(a)(2)-(4); 1391(f); 1441(d) and 1602-11.

FSIA did at least two things: it specified the conditions under which foreign sovereigns did and did not enjoy immunity from suit, and it provided a federal forum for all such suits.<sup>202</sup> This one-two punch relating to situations in which foreign sovereigns themselves were parties to suit harkened back to the same general approach employed by Congress in the Judiciary Act of 1789 and the Crimes Act of 1790 with respect to diplomats.<sup>203</sup> In *Verlinden*, the jurisdictional grants in the FSIA providing for original and removal jurisdiction in federal court of any suit against a foreign nation came under fire.<sup>204</sup> Defenders of the FSIA contended that the grants were within the “arising under” head because the question of whether the foreign nations had an immunity defense was a federal question.<sup>205</sup> Both the Second Circuit and the district court disagreed with the defenders of the FSIA, observing that it would impose little-to-no limits on the “arising under” jurisdiction if the required interpretation of Congress’s statute granting the jurisdiction and providing some sovereigns with immunity were deemed to be the federal question allowing for “arising under” jurisdiction.<sup>206</sup> A unanimous Supreme Court reversed, concluding that an immunity grant or revocation can itself supply the federal question where it is part of a comprehensive scheme regulating the overall subject matter.<sup>207</sup> Put another way, while not expressly saying so, the Court took a step toward holding that the courts have jurisdiction because they must decide the question of whether they have jurisdiction, which itself is a federal question.<sup>208</sup>

While eminently practical given the sensitive foreign policy interests at stake, the ruling is intellectually unsatisfying and, if taken for all it may be worth, may effectively have signaled the end of the possibility of any limits on Congress’s ability to confer jurisdiction.<sup>209</sup> The only limitation would seem to be that the jurisdictional grant not be naked but, instead, be coupled with some other substantive provision capable of being termed a “scheme.” As discussed, this result seems to do violence to the constitutional text and intent.

All of this could have been avoided had Congress, the parties, or the Court had a better appreciation of the affecting jurisdiction. Simply put, the

---

202. *See id.*

203. *See supra* Part I.D.

204. *See* 28 U.S.C. §§ 1330(a), 1441(d) (2006); *Verlinden*, 461 U.S. at 320.

205. *Verlinden B.V. v. Cent. Bank of Nigeria*, 647 F.2d 320 (2d Cir. 1981); *Verlinden B.V. v. Cent. Bank of Nigeria*, 488 F. Supp. 1284 (S.D.N.Y. 1980).

206. *Verlinden*, 647 F.2d 320; *Verlinden*, 488 F. Supp. 1284.

207. *See Verlinden*, 461 U.S. at 496.

208. The Court also considered and rejected the idea that the jurisdiction might be within the diversity heads of Article III. *See id.* at 492.

209. *See Osborn v. Haley*, 549 U.S. 225 (2007); *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417 (1995) (building upon *Verlinden* and each ruling that the Westfall Act’s immunity decision suffices to supply a federal question justifying the exercise of jurisdiction).

situation and the Court's analysis in *Verlinden* fit much more easily into the affecting framework than the arising under framework. Indeed, *Verlinden* reads like an affecting clause opinion. Chief Justice Burger's analysis begins with the Court's 1812 decision in *The Schooner Exchange*, which it indicates "came to be regarded as extending virtually absolute immunity to foreign sovereigns" even though, as we have seen, the case did not involve the sovereign itself but an extension of that sovereign (one of its armed ships located in a port in the United States) and even though that case explicitly referenced foreign ministers as an appropriate analogy.<sup>210</sup> *Verlinden* then emphasizes that, in the rare cases where immunity was not present, "this Court consistently has deferred to the decisions of the political branches—in particular, those of the Executive Branch—on whether to take jurisdiction over actions against foreign sovereigns and their instrumentalities."<sup>211</sup> Burger next references the FSIA as springing from the need to recognize and respect "the potential sensitivity of actions against foreign states and the importance of developing a uniform body of law in this area."<sup>212</sup> Chief Justice Burger also emphasizes Congress's power to define "offenses against the law of nations," "regulate commerce with foreign nations," and make all laws "necessary and proper" to execute the government's powers.<sup>213</sup> *Verlinden* concludes:

By reason of its authority over foreign commerce and foreign relations, Congress has the undisputed power to decide, as a matter of federal law, whether and under what circumstances foreign nations should be amenable to suit in the United States. Actions against foreign sovereigns in our courts raise sensitive issues concerning the foreign relations of the United States, and the primacy of federal concerns is evident.<sup>214</sup>

The continuing drumbeats are of deference to the powers of Congress to legislate in the area of foreign relations, deference to the executive in its implementation of the nation's foreign relations, acknowledgement of the sensitive nature of foreign relations, and recognition that federal courts are uniquely positioned to be sensitive to these concerns and consistent in their application of a uniform law in the area. One gets the feeling that the Court was begging the reader's indulgence of its unpersuasive reasoning and at-

---

210. *Verlinden*, 461 U.S. at 486 (citing *The Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812) (discussed *supra* Part I.F.1)).

211. *Id.*

212. *Id.* at 489 (quoting H.R. REP. NO. 94-1487 at 32 (1976)).

213. U.S. CONST. art. I, § 8, cl. 3, 10, 18.

214. *Verlinden*, 461 U.S. at 493.

tempting to cabin the reasoning with respect to the arising under clause to the unique concerns posed by international relations.

But there already *is* a jurisdictional head cabined to the unique concerns posed by international relations. The FSIA employed essentially the same one-two punch framework and rationale as the original Judiciary Act and the Crimes Act of 1790, each of which unquestionably conferred jurisdiction permissible under the affecting clause.<sup>215</sup> Also, the core issues in *Verlinden* are similar to the core issues in affecting clause cases—where the courts have searched to see if the interests of foreign nations are truly at stake, thereby implicating the affecting clause, or, if instead, merely the interests of the ambassador in some personal capacity are at stake.<sup>216</sup> For these reasons, the FSIA likely would survive constitutional scrutiny under the affecting clause. Or, if it did not because of a misguided ruling that ambassadors themselves must be affected by or be parties to the case,<sup>217</sup> it would be easy enough to draft an amendment that cured this problem. For example, a procedure similar to that used in the Westfall Act with regard to United States sovereign immunity could be employed to substitute the ambassador as a party in his official capacity whenever his or her nation was sued.<sup>218</sup> This has precedent, of course, in cases like the *Bello Carrunes*.<sup>219</sup> But, while the Court considered and rejected other alternatives to the arising under clause—including the diversity heads—the parties did not argue that the affecting clause justified the law, and the Court did not discuss it.<sup>220</sup>

In *Verlinden*, the Court no doubt felt the practical need to justify the continued existence of the FSIA because of the potentially huge implications for United States foreign policy if the jurisdictional provisions were struck down.<sup>221</sup> These practical concerns were likely what led to a legal analysis and result that are in tension with the text and structure of Article III. Whenever the text of the Constitution is twisted into a shape it does not belong in, the result is *per se* problematic and the collateral consequences include unnecessary skepticism and disrespect for the Constitution itself

---

215. See *supra* Part I.D.

216. See *supra* Part I.F.

217. The FSIA even went so far as to address a situation in which ambassadors were affected by the case by providing for service of foreign nations through their ambassadors. See 28 U.S.C. § 1608(a)(4) (2006).

218. See 28 U.S.C. § 2679(d) (2006) (providing for substitution of the United States as a party when one of its agents is sued for acts in an official capacity).

219. See *supra* Part I.E.1.

220. Two amici mentioned the affecting clause briefly. See Brief for the Committee on International Law of the Association of the Bar of the City of New York at 46-49; Brief of Amici Curiae Rule of Law Committee et al. at 17-21. The Respondents devoted several non-substantive sentences to refuting the views expressed in these briefs. See Brief for Respondents.

221. *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 493 (1983).

and the Court's role in interpreting it. But the collateral consequences here are particularly troublesome because they potentially include infinite elasticity for the "arising under" jurisdiction, the potential rendering of other jurisdictions irrelevant, and giving Congress near-complete discretion to call the federal courts into service whenever it wants to.

None of this was necessary, and all of it can hopefully be fixed in time.<sup>222</sup> If Congress and the Court had a greater appreciation of the proper role of the affecting jurisdiction, it would have been the star of the FSIA. *Verlinden* was an unforced error.

It also illustrates a broader point. Just as the affecting jurisdiction cements the mandatory floor of federal court jurisdiction, so too does recognizing the affecting jurisdiction for all it should be help support the jurisdictional ceiling. Specifically, when the affecting jurisdiction is permitted to grow as it should, there is less need to stretch other forms of jurisdiction beyond the point of credibility in order to do the affecting jurisdiction's work. The result is a more coherent Article III jurisprudence, with each jurisdiction playing its proper part and less likelihood of any one jurisdiction expanding the federal courts' roles beyond those envisioned by the framers.<sup>223</sup>

---

222. The Diplomatic Relations Act, 28 U.S.C. § 1364 (2006), may give the Court the opportunity to revisit the subject and set the record straight. That statute provides for direct actions in federal court against those who insure members of diplomatic missions. It would seem to be outside the reasoning of *Verlinden* and very much inside the rationale of the affecting jurisdiction.

223. Another prominent area in which taking the affecting jurisdiction seriously has implications for today's debates is the Alien Tort Statute, 28 U.S.C. § 1350, which provides for federal court jurisdiction "of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." Enacted as part of the Judiciary Act of 1789, the statute laid dormant for most of the nation's history until the late twentieth century when it began to be used as a mechanism for bringing suit in United States courts for violations of the law of nations occurring abroad. *See, e.g.*, Anthony J. Bellia Jr. & Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. CHI. L. REV. 445, 447 (2011). There is a well-developed body of literature analyzing the origins and meaning of this portion of the Judiciary Act, and the Supreme Court will be deciding, this term, a case involving its sweep, *Kiobel v. Royal Dutch Petroleum*, 132 S. Ct. 1738 (2012). *See, e.g.*, Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 COLUM. L. REV. 830, 831 n.3 (2006) (collecting authorities). It is not the goal of this Article to resolve the many issues implicated by the Alien Tort Statute. One thing is clear, however; one's conception of the affecting jurisdiction has immediate and direct implications for the Alien Tort Statute debate. For example, a broad conception of the affecting jurisdiction, such as that argued for here, could be consistent with the arguments voiced by proponents of a broad interpretation of the Alien Tort Statute. In essence, it would be argued that the framers viewed the federal courts as integrally involved in avoiding foreign conflicts by ensuring that the new nation complied with its obligations under the law of nations, including its obligations to hold its own citizens accountable for torts committed abroad. In this way, the adoption of a potentially broad-ranging Alien Tort Statute that was intended to evolve over time as the law of nations evolved over time would be consistent with the motivations that

### III. IMPLICATIONS OF THE AFFECTING JURISDICTION'S LIMITS

We have seen one way in which accepting a broader view of the affecting jurisdiction lessens the need for unprincipled overextension of other forms of jurisdiction and thereby increases the chances for a more coherent Article III jurisprudence.<sup>224</sup> The narrowing of the affecting jurisdiction that has historically occurred also has something to teach us about Article III. Standing doctrine is one notable example.

This Part explores the interaction of limits on the affecting jurisdiction with the standing debates of today. First, Part III.A addresses one aspect of today's debates concerning standing doctrine and explores the sorts of historical evidence that are relied upon in that debate. It concludes that the historical sources being relied upon in today's debates are particularly sparse and that any assistance that can be provided by additional historical sources should be welcome. Second, Part III.B looks to the historical development of limitations on the affecting jurisdiction in two areas: (1) limitations on the identity of those whom courts will permit to vindicate the interests being protected by the affecting clause; and (2) limitations on the sorts of injuries that are sufficient to trigger the affecting clause. It analogizes each of these longstanding limits under the affecting clause to today's limits on the roles of federal courts more broadly as reflected in current standing doctrine. If these limits were imposed early on by the framers and early courts in a context where it was openly acknowledged that a broad-ranging jurisdiction was intended, this fact would support the idea that the limits existed where the federal courts acted in other contexts as well. In this way, a complete understanding of the affecting jurisdiction provides some support for aspects of today's standing doctrines.

#### A. THE TERMS AND RESOURCES USED IN THE STANDING DEBATE

There is and has been for some time a vigorous debate between those who view standing as an essential part of the system of checks and balances

---

underlay the broader affecting jurisdiction as well—each would buttress the plausibility of the other by emphasizing the broad intent of the framers to have the federal courts involved in assisting the project of avoiding foreign affairs problems. On the other hand, it could be argued that the very breadth of the affecting jurisdiction makes a broad-ranging Alien Tort Statute less necessary. The framers were focused primarily on the sorts of problems that related directly to the interests of foreign nations themselves and less on private torts of the sort that advocates of a broad-ranging Alien Tort Statute emphasize. As such, the broader affecting jurisdiction would accomplish much of the framers' intent and the Alien Tort Statute could be argued to be a small supplement to what was already primarily accomplished by the affecting jurisdiction. This Article does not take sides in this debate but emphasizes that the affecting jurisdiction should play a significant role in the debate.

224. See *supra* Part II.C.

devised by the framers and those who view it as a relatively recent invention meant to serve raw political purposes. This is a debate about history—with one side contending that the framers embodied standing requirements into the Constitution and the other arguing that today’s standing doctrines would be foreign to the framers.<sup>225</sup> The evidence to which each side retires is federal law under the new Constitution and longstanding common law in the several states and in England.<sup>226</sup> As if to heighten the stakes, the Supreme Court has repeatedly emphasized that historical practice is an important guidepost in its standing decisions.<sup>227</sup>

There is only one problem. The historical record is scant. To give a sense of that, this Part examines the authorities relied on by the principal opponents of standing.<sup>228</sup> The point of the exercise is not to demonstrate that one side or the other is using history incorrectly but, instead, to show the terms in which the debate is cast and how even the slightest authorities bearing on the question can be of assistance to the debate.

### 1. Federal Authorities

One case primarily relied upon by those who argue that standing is a recent invention of the federal courts is *Union Pacific Railroad Co. v.*

225. Compare Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163 (1992); Raoul Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 YALE L.J. 816 (1968); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371 (1988); Louis L. Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 HARV. L. REV. 255 (1961); William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221 (1988), with Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983); Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the “Case or Controversy” Requirement*, 93 HARV. L. REV. 297 (1979); Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393 (1996); Craig A. Stern, *Another Sign from Hein: Does the Generalized Grievance Fail a Constitutional or a Prudential Test of Federal Standing to Sue?*, 12 LEWIS & CLARK L. REV. 1169 (2008); James Leonard & Joanne C. Brant, *The Half-Open Door: Article III, the Injury-in-Fact Rule, and the Framers’ Plan for Federal Courts of Limited Jurisdiction*, 54 RUTGERS L. REV. 1 (2001); Neil H. Cogan, *“Standing” Before the Constitution: Membership in the Community*, 7 LAW & HIST. REV. 1 (1989); Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689 (2004); Bradley S. Clanton, *Standing and the English Prerogative Writs: The Original Understanding*, 63 BROOK. L. REV. 1001 (1997); Daniel E. Ho & Erica L. Ross, *Did Liberal Justices Invent the Standing Doctrine? An Empirical Study of the Evolution of Standing 1921-2006*, 62 STAN. L. REV. 591 (2010).

226. Sunstein, *supra* note 225; Woolhandler, *supra* note 225.

227. *Sprint Commc’ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 285 (2008); *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 774, 777 (2000).

228. See *supra* note 225. While my analysis of these authorities was conducted independently, Clanton, *supra* note 225, has separately built a case for his proposition that there is bad history associated with the standing debate.



*Hall*.<sup>229</sup> The case has acquired mythical proportions.<sup>230</sup> One prominent expert argues that in *Hall*, “the Supreme Court allowed a petition for mandamus at the behest of what it treated as citizens.”<sup>231</sup> Even more strongly, the Supreme Court is quoted as stating that the duty involved was a “duty to the public generally” and that petitioners “had no interest other than such as belonged to others.”<sup>232</sup> From the description, this would seem to support the idea that for roughly the first hundred years of the nation’s history (*Hall* was decided in 1875), citizens could seek mandamus against the government to enforce public rights, regardless of whether those citizens suffered particularized injury.

But, the historical record is not quite so clear. *Hall* involved a petition for mandamus by Messrs. Hall and Morse seeking to compel a railroad, Union Pacific:

To operate the whole of their road [for a particular stretch of the line in Iowa] . . . as one continuous line for all purposes . . . and to desist and refrain wholly from operating [a] portion of said road as an independent and separate line, and from causing freight or passengers bound . . . [on the line] to be transferred.<sup>233</sup>

Like so many of today’s airline passengers, Hall and Morse wanted a direct route rather than a transfer.

A closer examination of the case reveals that it provides no support for the opponents of standing and, in fact, arguably supports the proposition that standing was traditionally required. The key to the case is understanding who the parties were and what was the particular objection being made. First, contrary to the implication, *Hall* was not an action against the gov-

229. *Union Pac. R.R. Co. v. Hall*, 91 U.S. 343 (1875). Sunstein makes it a principal case. Sunstein, *supra* note 225, at 174. Winter relies on it as well. Winter, *supra* note 225, at 1404.

230. Jerry L. Mashaw, *Rethinking Judicial Review of Administrative Action: A Nineteenth Century Perspective*, 32 *CARDOZO L. REV.* 2241, 2251 n.38 (2011); Robert Terenzi, Jr., *When Cows Fly: Expanding Cognizable Injury-in-Fact and Interest Group Litigation*, 78 *FORDHAM L. REV.* 1559, 1567 n.55 (2009); Francisco Benzoni, *Environmental Standing: Who Determines the Value of Other Life?*, 18 *DUKE ENVTL. L. & POL’Y F.* 347, 367 n.87 (2008); Daniel Christensen, *Didrickson v. United States Department of Interior: Standing in the Right Place*, 14 *J. ENERGY NAT. RESOURCES & ENVTL. L.* 355, 360 n.36 (1994); Jonathan Poisner, *Environmental Values and Judicial Review After Lujan: Two Critiques of the Separation of Powers Theory of Standing*, 18 *ECOLOGY L.Q.* 335, 361 n.184 (1991); Thomas R. Lee, *The Standing of Qui Tam Relators Under the False Claims Act*, 57 *U. CHI. L. REV.* 543, 553 n.72 (1990).

231. Sunstein, *supra* note 225, at 174.

232. *Id.* (quoting *Union Pac. R.R. Co. v. Hall*, 91 U.S. 343, 354 (1875)).

233. *Union Pac. R.R. Co.*, 91 U.S. at 343-44.

ernment for enforcement of public law. Rather, the defendant was a railroad, Union Pacific.<sup>234</sup> The case, therefore, does not support the idea of citizen suits against the government for vindication of general public laws. Second, as to the petitioners in the case, Messrs. Hall and Morse had a direct and acute interest in the matter, which was far more particularized than a general citizen's interest.<sup>235</sup> Hall and Morse were identified by the Court as "merchants in Iowa, having frequent occasion to receive and ship goods over the company's road."<sup>236</sup> This would seem to be precisely the sort of interest that is today required by the standing doctrine. How does this reconcile with the quotation relied upon by the opponents of standing that Messrs. Hall and Morse "had no interest other than such as belonged to others"?<sup>237</sup> By reading the remainder of the quoted sentence. In point of fact, the Court stated that Messrs. Hall and Morse "had no interest other than such as belonged to others *engaged in employments like theirs*."<sup>238</sup> Coupled with the prior description of their employment as occasioning them regularly to ship product on the disputed line, this is as direct an interest as can be.

Finally, there is the particular objection being made. There was no objection to standing *per se*; rather, the issue raised was one "against the form of the proceeding."<sup>239</sup> According to the Court, the question was whether Hall and Morse could petition for mandamus without the assent or direction of the Attorney General of the United States or whether instead they should be limited to their remedies at law.<sup>240</sup> The Court held that they could pursue the writ, and the reason for the Court's holding on this question is telling.<sup>241</sup> Notably, the Court relied upon the English practice that "*all those who are legally capable of bringing an action* are also equally capable of applying to the Court of King's Bench for the writ of mandamus."<sup>242</sup> The Court further elaborated that "[t]his is true in all cases . . . where the defendant owes a duty, in the performance of which the *prosecutor has a peculiar interest*."<sup>243</sup> The Court observed that, although the practice was not uniform in all the states, "in several States it has been decided" that private persons cannot sue to enforce a public duty "unless the non-performance of it works

---

234. The Court does observe that "[t]he company is a creature of congressional legislation . . . and its powers and duties were prescribed" by acts of Congress. *Id.* at 344.

235. *See id.* at 354.

236. *Id.*

237. *See* Sunstein *supra* note 225.

238. *Union Pac. R.R. Co. v. Hall*, 91 U.S. 343, 354 (1875) (emphasis added).

239. *Id.* at 354.

240. *Id.*

241. *Id.*

242. *Id.* (emphasis added) (citations omitted) (internal quotation marks omitted).

243. *Union Pac. R.R. Co. v. Hall*, 91 U.S. 343, 354 (1875) (emphasis added).

to them a special injury.”<sup>244</sup> And the Court discussed analogous situations in which an action is allowed “when the injury complained of is common to the public at large, and only greater in degree to the complainants.”<sup>245</sup>

*Hall* has been misunderstood as supporting the idea that standing was not traditionally required by federal courts. In truth, the facts, the holding, the rationale, and the language of *Hall* suggest the contrary. At best, the record is mixed.

Another case relied upon by the opponents of standing is *Weston v. City Council of Charleston*.<sup>246</sup> One prominent expert suggests it is a “revealing early precedent[] for the citizen suit at the national level.”<sup>247</sup> Others have cited it similarly.<sup>248</sup> In point of fact, Mr. Weston was a holder of securities issued by the United States government who protested the constitutionality of a tax imposed by the City of Charleston on all property, including government-issued securities.<sup>249</sup> The issue of Mr. Weston’s standing was not even raised, much less excused by the Court. Indeed, as a holder of government securities who was in fact subject to the unconstitutional tax in issue, Mr. Weston clearly had standing and was not seeking to enforce the Constitution in some generalized way applicable to all citizens. Chief Justice Marshall recognized as much, opining that “[t]he question between the parties is precisely the same as it would have been . . . in an action of trespass,” and Justice Johnson in dissent likewise agreed that the Court would have jurisdiction over an action for trespass brought by Mr. Weston to recover the unconstitutionally-collected tax after it was collected.<sup>250</sup> The only jurisdictional issue addressed by the Court was whether, in light of the Court’s inability to issue a general writ, such as that sought by Mr. Weston, the Court had statutory appellate jurisdiction to consider a state court’s order refusing to issue that writ.<sup>251</sup> The issue was one of statutory interpretation, and the policy question it raised was whether the Court should in fact undertake to opine on the correctness of the state court ruling when the Supreme Court had no power to issue the specific relief sought by the petitioner. In this sense, the case further supports those who emphasize that

---

244. *Id.* at 355.

245. *Id.*

246. *Weston v. City Council of Charleston*, 27 U.S. (2 Pet.) 449 (1829).

247. Sunstein, *supra* note 225, at 174.

248. See Winter, *supra* note 225, at 1395 n.109, 1396 n.123. See also Jonathan E. Wells, *Shouldn’t Standing Be Closer to the Heart of Congressional Intent?*, 49 EMORY L.J. 1359, 1365 (2000); Daniel Christensen, *Didrickson v. United States Department of Interior: Standing in the Right Place*, 14 J. ENERGY NAT. RESOURCES & ENVTL. L. 355, 360 n.34 (1994).

249. *Weston*, 27 U.S. at 449.

250. *Id.* at 464; see *Weston*, 27 U.S. at 470 (Johnson, J., dissenting).

251. See *Weston*, 27 U.S. at 470 (Johnson, J., dissenting).

federal courts were not given broad writ powers of the sort that supposedly existed at English common law.

A final source of federal authority relied upon by the opponents of standing is the longstanding practice of permitting informers actions and *qui tam* actions.<sup>252</sup> These are actions in which Congress grants to private citizens the right to raise and pursue violations of law impacting the government in its commercial dealings. As a reward for their efforts and an incentive to undertake those efforts, the citizens are given a share of the cause of action or some other bounty. Even the opponents of standing admit, however, that these proceedings have some features that distinguish them from a pure citizen suit, including the fact that the actions are usually brought against a private defendant—not against the government—and that the victor receives some benefit from the action.<sup>253</sup> In fact, as the Court held in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, the differences are still more pronounced.<sup>254</sup> The relator in a *qui tam* action is bringing an action for the United States in order to redress concrete and particularized injury, usually proprietary in nature, suffered by the United States.<sup>255</sup> He does so because the government, through Congress, has “effect[ed] a partial assignment of the Government’s damages claim.”<sup>256</sup> As such, a *qui tam* litigant has standing just as much as an assignee or subrogee.

## 2. *State and English Authorities*

The opponents of standing do not rely exclusively on old federal cases, but also cite to old cases in state courts and to practice in England. The relevance of these sources of authority is limited. For example, one would not cite to the existence of state general police powers in support of an argument that the Constitution grants the federal government general police powers; indeed, the existence of state police powers is precisely one reason why the Constitution does not grant similar powers to the federal government. Examination of the distribution of police powers in England would be even less helpful for obvious reasons. A similar problem inheres in attempting to translate the traditional powers of state courts to their federal counterparts. Article III, no less than the two preceding Articles, established a

---

252. See Sunstein, *supra* note 225, at 175-76; Berger, *supra* note 225, at 816.

253. See Sunstein, *supra* note 225, at 175-76; Berger, *supra* note 225, at 816.

254. *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765 (2000).

255. *Id.* at 771.

256. *Id.* at 773. See also Myriam E. Gilles, *Representational Standing: U.S. ex rel. Stevens and the Future of Public Law Litigation*, 89 CAL. L. REV. 315 (2001).

government of limited enumerated powers, in part precisely in order to retain for state courts a role that federal courts might not fully occupy.

In any event, many of the primary authorities relied upon by the opponents of standing, in support of the argument that state courts and English courts did not impose a standing requirement at the time of ratification, are of limited value. With regard to state courts, *Zylstra v. Corporation of Charleston*<sup>257</sup> is a favorite and is said to be an instance where “a South Carolina court issued a writ of prohibition at the behest of a stranger.”<sup>258</sup> But, *Zylstra*, in fact, involved a challenge to the constitutionality of a city ordinance by a “plaintiff, Zylstra, [who] was convicted under [the ordinance] . . . and fined for the offence in the sum of 100l.”<sup>259</sup> *State v. Justices of Middlesex*<sup>260</sup> is said to be an instance “effectively allowing a citizen action” and establishing “stranger jurisdiction.”<sup>261</sup> But in *Middlesex*, the applicants were voters who alleged voter irregularities not fully detailed by the court, but described as being sufficient “to deprive the inhabitants of the free exercise of their elective franchise.”<sup>262</sup> The court referred repeatedly to the premise that the writ was available because the applicants had established an injury, as required by the precedents upon which it relied.<sup>263</sup> Perhaps equally significant, *Middlesex* is a “red flag” case; the case reporter observed that it was reversed on appeal on the grounds that the court lacked jurisdiction!<sup>264</sup> Finally, *State v. Corporation of New Brunswick*<sup>265</sup> is said to be an instance where a writ was issued “on behalf of a citizen” and where the court “expressly rejected the view that the ‘court ought not to award a certiorari on the mere prayer of an individual unless he will previously lay some cause before them tending to show that he is or may be affected by the operation of the by-law.’”<sup>266</sup> But, in fact, there was no such express rejection. Rather, the petitioner argued expressly that the law in question was extra-legal and that “the prosecutor has been injured by it”; the court assessed the arguments and agreed with the petitioner without further comment.<sup>267</sup>

257. *Zylstra v. Corp. of Charleston*, 1 S.C.L. (1 Bay) 382 (S.C. Ct. Com. Pl. 1794).

258. Sunstein, *supra* note 225, at 173; *see also, e.g.*, James Leonard & Joanne C. Brant, *The Half-Open Door: Article III, The Injury-In-Fact Rule, and the Framers' Plan for Federal Courts of Limited Jurisdiction*, 54 RUTGERS L. REV. 1, 42 n.263 (2001).

259. *Zylstra v. Corporation of Charleston*, 1 S.C.L. (1 Bay) 382, 382 (S.C. Ct. Com. Pl. 1794).

260. *State v. Justices of Middlesex*, 1 N.J.L. 244 (N.J. 1794).

261. Sunstein, *supra* note 225, at 173. The citation to the case and the pincite pages are incorrect in the text. *See also* Winter, *supra* note 225, at 1401-02.

262. *State v. Justices of Middlesex*, 1 N.J.L. 244, 252 (N.J. 1794).

263. *See id.*

264. *Id.* at 255.

265. *State v. Corp. of New Brunswick*, 1 N.J.L. 393 (N.J. 1795).

266. Sunstein, *supra* note 225, at 173.

267. *New Brunswick*, 1 N.J.L. at 393.

Although we are truly far afield when discussing English case law, there too the cases do not seem to say what the opponents of standing would have them say and in fact frequently say the exact opposite.<sup>268</sup> *Arthur v. Commissioner of Sewers* is quoted as holding that “one who comes merely as a stranger” is entitled to relief.<sup>269</sup> But those words cannot be located in the case, and the case in fact involved a situation in which “the plaintiff was chosen clerk to the commissioners of sewers at a meeting . . . and afterwards, at a second meeting, they made an order to turn him out.”<sup>270</sup> It was observed that the plaintiff would have been “entitled to several perquisites by virtue of [his] election.”<sup>271</sup> He was clearly a party with discrete injury and not proceeding “merely as a stranger.”<sup>272</sup> *Rex v. Smith* is cited for the proposition that “suits by strangers were permitted under a statute allowing an information of quo warranto.”<sup>273</sup> *Smith* held no such thing—in fact observing expressly that the plaintiffs in the case “were members of the corporation” challenging the election of the mayor on the grounds that he had not met the requirements for office.<sup>274</sup> *Attorney General v. Bucknall* is quoted for the proposition that “any persons, though the most remote in the contemplation of the charity, may be relators.”<sup>275</sup> In fact, the quoted language was immediately followed by the following important qualifier—“But it seems necessary that there should be a relator who has an interest”—effectively reversing the precedential effect of the decision.<sup>276</sup> And, in fact, there was a relator with an interest. *Bucknall* involved a contention that Mr. Ward had given both interest and principal—not just the interest as the adverse party contended—“to assist Ward’s poor relations.”<sup>277</sup> The action

---

268. One reason why English cases are less relevant is that England did not have the same separation of powers that the framers embodied in the United States Constitution, meaning that a number of the activities engaged in by judges in England were in fact activities in aid of the King or Parliament—rendering them not within the definition of “the judicial power” as contained within Article III of the Constitution. Stern, *supra* note 225, at 1196-97.

269. Sunstein, *supra* note 225, at 172; see also Berger, *supra* note 225, at 820-21.

270. *Arthur v. Comm’r of Sewers*, 88 E.R. 237 (1724).

271. *Id.*

272. The error appears to be traceable to a decision 145 years later in which Justice Blackburn incorrectly so characterized *Arthur*. See *Regina v. Justices of Surrey*, 5 Q.B. 466, 472-73 (1870).

273. Sunstein, *supra* note 225, at 173; see also Berger, *supra* n.225, at 823.

274. *Rex v. Smith*, 100 E.R. 740, 740 (1790). *Smith* does describe another case, *Rex v. Brown*, in which, according to the description, a member of one corporation was permitted to challenge the mayoral election in another corporation on the grounds that the rule—if eroded in the case of the one corporation—would also erode in the case of the other.

275. Sunstein, *supra* note 225, at 172 (citations omitted) (internal quotation marks omitted).

276. *Attorney General v. Bucknall*, 26 E.R. 600 (1741).

277. *Id.*

“was brought at the relation of one of Ward’s poor relations.”<sup>278</sup> It is hard to imagine a clearer case of standing. A final example is Coke’s discussion of *Articuloi Cleri*, identified as “a key case . . . that would have been familiar to the Americans of the late eighteenth century,” and as standing for the proposition that the court may issue the writ of prohibition upon “being informed either by the parties themselves or by any stranger.”<sup>279</sup> But, this discussion in Coke, in fact, concerns writs of prohibitions being issued “to restrain a court to intermeddle with, or execute anything, which by law they ought not to hold plea of.”<sup>280</sup> Specifically, the writ was to issue from a superior court to a lower court in instances where the lower court had hold of a matter “whereof they have not jurisdiction.”<sup>281</sup> In other words, the language in the case, as reported, contemplated a situation in which there were real live parties to a dispute, and the court could, at the insistence of those parties or on its own volition, direct the dismissal of the proceedings as being without jurisdiction. If that sounds familiar, it should.

#### B. THE LIGHT SHED BY THE AFFECTING JURISDICTION

While I have focused on one side in the standing debate, by way of example, the point is that the efforts by both sides are in the category of feeling parts of an elephant in the dark. Hopefully, with enough effort, a hazy sense of what the animal looks like will emerge. Little direct evidence is available to aid in the inquiry.

Given this difficult context, the affecting jurisdiction can help. As discussed below, affecting jurisdiction decisions suggest that, at an early stage, federal courts imposed limits on their own consideration of a case based in part upon whether: (1) the person raising the issue was the correct party to do so; and (2) the injury involved was a cognizable one. These decisions are at least as useful in discerning the framers’ intent as the authority frequently relied upon in this context. Among other things, the affecting clause decisions reflect: judgments of federal courts; at, or close to, the time of ratification; interpreting the United States Constitution; in a context where the framers had clearly expressed a desire for more expansive federal court involvement. If courts felt constrained under these circumstances, then that same constraint would arguably apply to other circumstances as well.

---

278. *Id.*

279. Sunstein, *supra* note 225, at 171 (citations omitted) (internal quotation marks omitted).

280. 5 SIR EDWARD COKE, *THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* 602 (London, E. and R. Brooke 1797) (page may also appear under ccxxii).

281. *Id.*

### 1. *Generalized Interest In Vindication Of The Law*

One element of the standing debate is whether Article III bars Congress from giving federal courts the power to decide matters where the party asserting the claim has no direct connection to the legal violation that has occurred but is primarily motivated by a more generalized interest, such as seeing that the law is enforced. The debate is sometimes summarized as whether there is properly a separate doctrine of standing or whether instead all “standing” questions should really be viewed as nothing more than an analysis of the merits of whether a particular plaintiff can recover on the facts of her particular case.

The affecting jurisdiction is an analogous context. The Constitution declares what some aspect of the law is with regard to suits affecting ambassadors, and courts have repeatedly conceived of that legal declaration as creating a “right” to a federal forum. Congress and the courts then separately set about defining the circumstances under which courts are available to enforce and fulfill that right. These are two separate inquiries.

The provisions of the Judiciary Act of 1789 relating to Supreme Court original affecting jurisdiction are an example. If Congress had made a determination that the framers intended that the “elements” of the right to a Supreme Court forum were simply that an ambassador, public minister, or consul be a party, the Act would have been simple to write—provide that the jurisdiction exists when party status is present.

That is not what the first Congress did. Instead, the Act reflects a careful parsing of under what circumstances the right is available and a careful division of the right depending on the court involved.<sup>282</sup> When an ambassador or public minister is sued, treaties and the law of nations suggest that there should be immunity in most if not all cases.<sup>283</sup> Accordingly, the core purposes of the affecting jurisdiction are present and the interests of the United States are paramount. The result is that no parties have any choice about the forum—it must be the United States Supreme Court.

On the other hand, when an ambassador or public minister is a plaintiff, the interests of the United States recede slightly. The immunity issues are not present and the likelihood of offense to other nations is further diminished by the fact that the ambassador made the choice of forum. In such a context, to require proceeding before the Supreme Court, when the ambassador would prefer another forum, would be to convert a privilege into

---

282. See *supra* Part I.D.

283. Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95; see generally Chimene I. Keitner, *The Forgotten History of Foreign Official Immunities*, 87 N.Y.U. L. REV. 704 (2012).



an obligation. Therefore, in such cases the Supreme Court is made available to the ambassador but is not a required forum.<sup>284</sup>

This parsing reflects different conceptions about who may vindicate the right to a federal forum and under what circumstances. Sometimes it is the United States that owns the right; sometimes it is the ambassador or consul. Whether we characterize these considerations as part of the right's elements or as relating to the identity of those who may vindicate the right and, therefore, a sort of standing determination may be largely a matter of semantics. But one thing is clear: in implementing the constitutional right, Congress believed that there were two different sets of considerations, one relating to the legal definition of the right—an ambassador must be affected by the case—and the other relating to the more factual circumstance of whether a particular individual is the correct person to attempt to invoke the right. There was no uniform ability on the part of any one person to always vindicate the right to a federal forum. Who could vindicate the right depended on the factual context. Certainly there was no generalized right in the citizenry at large to vindicate the right.

*Ortega* occurs against this backdrop and tests whether Congress's parsing is in service of the Constitution or in conflict with it.<sup>285</sup> To be sure, *Ortega* used some language that appeared to analyze the merits or “elements” of the claimed right. Specifically, *Ortega* concluded that the case did not in fact affect an ambassador within the meaning of the Constitution.<sup>286</sup> But *Ortega* also emphasized that the interests of the United States were those meant to be served, and that the party attempting to invoke the right was not only *not* the United States, but was in fact opposed to the United States.<sup>287</sup> The bottom line of this portion of the opinion: *Ortega* was not the correct person to be attempting to vindicate the right—there were others, more directly implicated by the right, whose interests were paramount.<sup>288</sup>

As we have seen, *Blyew* also analyzed the question in terms of whether the correct party was asserting the right.<sup>289</sup> And other cases similarly defer to the executive's judgment about whether the right is present and appropriately enforced.<sup>290</sup>

284. With respect to consuls, a similar situation was contemplated. When they were defendants, the matter had to be brought in federal court; when they were plaintiffs, the choice was theirs to make. *See supra* Part I.D. Today, there is a similar pattern—where a consul is a defendant, the matter must be in federal court, 28 U.S.C. § 1351; where a consul is a plaintiff, he *may* be, 28 U.S.C. § 1251 (2006).

285. *See supra* Part I.E.

286. *United States v. Ortega*, 24 U.S. (11 Wheat.) 467, 468-69 (1826).

287. *Id.*

288. *Id.*

289. *See supra* Part I.G.

290. *See supra* Part I.F.3.

In this sense, the actions of the First Congress and early court decisions relating to the affecting jurisdiction undermine the idea that standing is an invention of the twentieth century. To be sure, the law surrounding the affecting jurisdiction does not use the term standing expressly and the context is not on all fours with the standing decisions of today. But some of the same concepts are present. *Ortega*, in holding that the perpetrator of an assault on a public minister could not vindicate the right to a federal forum, is in many ways the forerunner of cases like *Linda R.S. v. Richard D.*, in which the Court held that a private citizen could not sue for the government's failure to indict and prosecute another.<sup>291</sup> In both situations, there were at least two other parties whose interest in the "right" in question was arguably more direct and palpable than that of the party seeking to invoke the right. In both situations, one of the more directly involved parties was the executive branch. And, in both situations, the private party was asking the court to step into an area of executive discretion and take steps that the executive branch had chosen not to take.

In short, notwithstanding the clear importance that the framers placed on the affecting jurisdiction, courts and Congress have imposed limits on the ability of courts to vindicate this right. Citizens at large may not enforce the right, even if they are affected by the circumstances. Rather, there is substantial deference to the role of the executive in enforcing the right. The affecting jurisdiction, then, is an early example of the idea that enforcement of the right by the "wrong" party could actually be counterproductive and that federal courts must be wary of displacing judgments of the executive with regard to enforcement of rights. In this sense, the affecting jurisdiction serves as an early precedent for modern notions of standing and can help inform the modern standing debate.

## 2. *Injury*

Closely intertwined with the strand of affecting clause jurisprudence concerning who may vindicate a right and under what circumstances is the strand dealing with the sorts of interests that are cognizable. *Ortega* limited these to traditional common law harms such as those to a person's body, wallet, or property.<sup>292</sup> Although they disagreed about whose harm "counts," both the majority and dissent in *Blyew* used similar terminology to describe the sorts of harm that were cognizable under the statutory affecting jurisdiction involved there. There was a requirement that the case affect the indi-

---

291. *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973). *But see* *Friends of the Earth, Inc. v. Laidlaw Envtl. Serv. (TOC), Inc.*, 528 U.S. 167 (2000) (upholding the citizen suit provision of the Clean Water Act).

292. *Blyew v. United States*, 80 U.S. 581, 592 (1871).

viduals “in their personal, relative or property rights[,]” and effects of a less directly concrete sort were deemed not to implicate the jurisdiction.<sup>293</sup> And, the terminology has carried forward from that time into the age of standing in cases like *Farnsworth*, which described the measure of “affecting” harm as requiring that “the case in its results would [] touch upon the person or goods or services” of the minister rather than simply “involv[ing] reflections on the character and conduct” of the minister.<sup>294</sup> In sum, a number of interests fail to have concrete enough effects on a person to trigger the affecting jurisdiction.

In reaching these conclusions about the framer’s intent, as reflected in the language of Article III, the Court and First Congress were interpreting terms of the Constitution that were otherwise intended to expand the reach of the federal courts beyond the sorts of circumstances that allowed jurisdiction under the other party-based jurisdictional heads. And, they were doing so in a context where the cause for that expansion was clear. That the framers were unequivocally acting to expand the federal courts’ reach and doing so for important reasons makes their decision not to still further expand the courts’ reach by permitting parties to rely on the sorts of harms involved in *Ortega* all the more clear. For these reasons, the affecting jurisdiction would seem to support those who argue that principles underlying today’s standing law were present at the creation and recognized by the framers. In this sense, *Ortega* and its progeny serve as precursors for decisions such as *Frothingham v. Mellon*, decided with *Massachusetts v. Mellon*, a case rejecting taxpayer standing to challenge government expenditures allegedly violative of law, which is sometimes said to reflect the invention of standing out of whole cloth by the modern Court.<sup>295</sup> And, too, the language in *Ortega* and its progeny about the sorts of injuries that federal courts may constitutionally redress is similar to the language used today in *Frothingham*’s progeny in cases such as *Hein v. Freedom from Religion Foundation* and *Arizona Christina School Tuition Organization v. Winn*.<sup>296</sup> Indeed, Justice Scalia’s concurrence in *Hein*, distinguishing between redressable “wallet injury” and unredressable “psychic injury” could easily have been written by the unanimous court in *Ortega* or its progeny.<sup>297</sup>

---

293. *Id.*

294. *Farnsworth v. Sanford*, 115 F.2d 375, 379 (1940).

295. *Frothingham v. Mellon*, 262 U.S. 447 (1923).

296. *Hein v. Freedom from Religion Found.*, 551 U.S. 587 (2007); *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436 (2011).

297. *Hein*, 551 U.S. at 619 (Scalia, J., concurring).

### 3. *Summary*

No matter which side one is on, the affecting jurisdiction would seem to be relevant to the ongoing debate about whether standing existed prior to *Frothingham* or was instead something foreign to the framers' experience. Indeed, the affecting jurisdiction seems particularly relevant to the debate because it is of constitutional dimension, involves the framers' views as directly expressed, and involves early decisions by the United States Supreme Court and other federal courts. It is at least as relevant a piece of information as decisions by English courts or state courts or the other sorts of historical evidence relied upon in the standing debate. My primary suggestion, then, is the humble one that the affecting jurisdiction be considered as part of this debate and others.

This Article has also taken an initial stab at how the doctrine may be relevant to the standing debate. At first blush, the framers' choice of words to effectuate the affecting jurisdiction would seem to support those who argue against the idea of any constitutional standing requirement being embodied in Article III. If there is some requirement in the word "case," the phrase "the judicial power," or in some other part of the Constitution that a party have suffered an injury in fact fairly traceable to the defendant's conduct that is redressable by the court, then it would seem there would have been no need for the framers to embody some of these same concepts into the ambassador-related jurisdiction through use of the word "affecting." The framers could simply have provided, as they did with other party-based jurisdictional heads, that the judicial power extends to all cases to which ambassadors and the like were parties. The word "cases" (or the other words already in the Constitution) would do the heavy lifting that affecting is meant to do. In short, if there really is a standing requirement elsewhere in the Constitution, the word "affecting" runs the risk of being largely redundant, clumsy, and out of synch with the language used by the framers in the jurisdictional heads of Article III.

If, on the other hand, there is no standing requirement, then the word "affecting" makes perfect sense. The framers were attempting to demonstrate that, in this one case, the factual circumstances of the parties to the litigation and the claims in the case are not the only considerations in determining whether federal jurisdiction is appropriate. Rather, in the exceptional instance of matters in which ambassadors were involved in some way, considerations beyond the claims and identities of the parties could justify federal jurisdiction. Specifically, federal jurisdiction is intended to be allowed if the matter has an impact on an ambassador—even if the ambassador is not a party. This gives meaning to the word "affecting" beyond the meaning contained in the word "case"; it explains why the framers chose not to use the word "party," as they did in nearby jurisdictional heads; and it comports with the apparent intent of the affecting head to en-

sure that ambassadors receive a measure of protection greater than other parties in the party-based grants of jurisdiction.

There is some appeal to this line of argument. In the end, however, I believe it is not the better position. The text, location, and discussion of the affecting jurisdiction in early cases such as *Marbury* make relatively clear that the framers viewed it as particularly important to emphasize and ensure that the federal courts were available as fora for cases involving ambassadors. The intent of the affecting jurisdiction, then, is to expand it beyond the circumstances in which jurisdiction is available under the other heads of jurisdiction. If the various kinds of harms we have been discussing do not support the exercise of the judicial power in the circumstances of ambassadors, where expansive jurisdiction is called for by the framers, these same harms should not support the exercise of the judicial power with regard to the other, narrower, heads of jurisdiction either. Viewed this way, the affecting jurisdiction constitutes an argument in favor of some form of standing requirement.

## V. CONCLUSION

In some ways, our historical failure to take the affecting jurisdiction seriously is a good thing. It has left the jurisdiction relatively pure and uncorrupted by today's debates. When we look at these nine words of the Constitution and the interpretations of them by Congress and the courts, we have less need than usual to filter out the biases of the players involved. We are looking just a little bit more directly than usual into the minds of the framers.

Perhaps, not surprisingly then, there is something for both sides of today's debates in the affecting jurisdiction. For those who believe in a more expansive role for the federal courts, the affecting jurisdiction is one area where expansion is plainly warranted. The existing statutory grant of Supreme Court original affecting jurisdiction is unconstitutionally narrow, and the grants of lower court jurisdiction, while constitutional, are not consistent with the purposes and role of the affecting jurisdiction because they too are too narrow. On the other hand, taking the affecting jurisdiction seriously also leads to conclusions that favor those who believe in a more limited role for the federal courts. As we can see from the example of *Verlinden*, the growth of the affecting jurisdiction in our eyes has the effect of cutting back the previously unabated growth in the federal question jurisdiction and may help keep other jurisdictions from overgrowth as well. Moreover, the very fact that the affecting jurisdiction was so important to the framers and yet still had limits on its exercise suggests that other, arguably less central, jurisdictions should have at least these same limits.

When it came to the federal courts, the framers were parsimonious with their words. For the most part, we have extracted what we can from

these few words and have moved on to other less productive resources. But, in our search for meaning, we have overlooked the nine words of the affecting jurisdiction. If we have read these words at all, likely, we passed over them as *sui generis* and irrelevant to the main issues at hand. It is time to change our ways. The affecting jurisdiction occupies a central place in Article III, and its history and development confirm that this was no accident. We cannot fully understand Article III, or any of its constituent parts, unless we understand the role played by the affecting jurisdiction.