A Unified Theory of 28 U.S.C. § 1331 Jurisdiction

Lumen N. Mulligan[*]

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I. INTRODUCTION

Section 1331, Title 28 of the United States Code is the general federal question jurisdictional statute, which grants federal district courts with original subject matter jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States."[1] This statute grounds the majority of civil actions heard in federal court.[2] Given the weighty doctrinal[3] and pragmatic[4] consequences that

1. 28 U.S.C. § 1331 (2000).

2. From March 2005 to March 2006, 244,068 civil cases were filed in the federal courts. Of these, 47,298 cases took subject matter jurisdiction by virtue of the United States being a party. Of the cases not involving the federal government, 134,582 were filed as federal question cases while only 62,188 took jurisdiction due to the diversity of the parties. ADMIN. OFFICE OF THE U.S.

flow from determining whether a claim falls within the scope of § 1331, it is surprising to learn that we lack a coherent view of what statutory federal question jurisdiction entails. Professor Mishkin famously forwarded the classic theory that § 1331 jurisdiction lies when a plaintiff raises "a substantial claim founded 'directly' upon federal law."[5] But the federal courts have failed to establish a unified theory or practice of § 1331 in conformity with this view or any other.[6] Academia has similarly failed to coalesce around Mishkin's, or anyone else's, principles.[7] This is not to say that § 1331 jurisdiction is always

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COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS, tbl. C-2 (2006), *available at* http://www.uscourts.gov/caseload2006/tables/C02_Mar_06.pdf (last visited Sept. 6, 2008).

3. *See, e.g.*, *Ex parte* McCardle, 74 U.S. 506, 514 (1868) (holding that without subject matter jurisdiction a federal court is only empowered to dismiss the cause before it).

4. *See, e.g.*, Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction*, 83 CORNELL L. REV. 581, 593–95 (1998) (empirical study finding that the removal of a case from the state court system to the federal system reduced plaintiff's statistical likelihood of winning from 53% to 33%).

5. Paul J. Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157, 168 (1953).

6. *See, e.g.*, Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 314 (2005) ("These considerations have kept us from stating a 'single, precise, all-embracing' test for jurisdiction over federal issues embedded in state-law claims between nondiverse parties."); Steel Co. v. Citizens for Better Env't, 523 U.S. 83, 90 (1998) ("Jurisdiction . . . is a word of many, too many, meanings . . . ." (internal quotation marks omitted)); Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust for S. Cal., 463 U.S. 1, 8 (1983):

> Since the first version of § 1331 was enacted, Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470, the statutory phrase 'arising under the Constitution, laws, or treaties of the United States' has resisted all attempts to frame a single, precise definition for determining which cases fall within, and which cases fall outside, the original jurisdiction of the district courts.

Willy v. Coastal Corp., 855 F.2d 1160, 1165 (5th Cir. 1988) ("Defining when a claim arises under federal law has drawn much attention but no simple solutions."), *aff'd*, 503 U.S. 131 (1992); Stone & Webster Eng'g Corp. v. Ilsley, 690 F.2d 323, 328 n.4 (2d Cir. 1982) ("Attempting to define an all inclusive test which will determine if a case 'arises under' the Constitution, laws, or treaties of the United States is like the exercise performed by the daughters of Danaus, condemned for eternity, as they were, to draw water with a sieve."), *aff'd sub nom.* Arcudi v. Stone & Webster Eng'g Corp. 463 U.S. 1220 (1983); Div. 587, Amalgamated Transit Union, AFL-CIO v. Municipality of Metro. Seattle, 663 F.2d 875, 877 (9th Cir. 1981) ("Commentators on the issue of the proper scope of federal question jurisdiction seem agreed on only one proposition: no completely satisfactory analytical framework has yet been devised."); First Nat'l Bank of Aberdeen v. Aberdeen Nat'l Bank, 627 F.2d 843, 849 (8th Cir. 1980) ("Formulation of a general test for determining when an action 'arises under' federal law has eluded the courts for more than a century . . . .").

7. *See, e.g.*, G. Merle Bergman, *Reappraisal of Federal Question Jurisdiction*, 46 MICH. L. REV. 17, 18–45 (1946) (tracing the history of federal question jurisprudence); James H. Chadbourn & A. Leo Levin, *Original Jurisdiction of Federal Questions*, 90 U. PA. L. REV. 639, 671 (1942) (calling for a more technical, rule-based approach to jurisdiction); William Cohen, *The Broken Compass: The Requirement that a Case Arise "Directly" Under Federal Law*, 115 U. PA. L. REV. 890, 916 (1967) (noting that without the well-pleaded complaint rule, more careful thought about federal question jurisdiction would be required); Ray Forrester, *The Nature of a "Federal*

a puzzle.[8] It is assuredly true that in most cases, a plaintiff's suit raising a federal claim will arise under § 1331, while a plaintiff's suit to litigate state-law questions will not.[9] But there remains a significant proportion of cases where determining the existence of § 1331 jurisdiction is vexatious.[10]

In an effort to determine the contours of § 1331's border, scholars have converged upon two perceived truths, which now predominate our understanding of § 1331 federal question jurisdiction. First, the predominant view holds that federal question jurisdiction has little to do with congressional intent despite Congress's constitutional power to regulate the statutory jurisdiction of the lower federal courts.[11] Professor Friedman, in one of the definitive works in

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Question," 16 TUL. L. REV. 362, 364–85 (1942) (describing the various interpretations of "arising under"); Richard D. Freer, *Of Rules and Standards: Reconciling Statutory Limitations on "Arising Under" Jurisdiction*, 82 IND. L.J. 309, 340 (2007) (suggesting that "federal question jurisdiction might be more compelling for questions of law rather than application of clearly established law to fact"); Linda R. Hirshman, *Whose Law Is It, Anyway? A Reconsideration of Federal Question Jurisdiction Over Cases of Mixed State and Federal Law*, 60 IND. L.J. 17, 22 (1984) (suggesting that "courts may make sensible judgments about both what is necessary and what is sufficient to support federal jurisdiction by returning to the [Holmes's] standard . . . of 'the law that creates the cause of action' "); Ernest J. London, *"Federal Question" Jurisdiction—A Snare and a Delusion*, 57 MICH. L. REV. 835, 835 (1959) (arguing that the federal question criterion is an unsuitable test for original jurisdiction); Mishkin, *supra* note 5 ("[T]he criterion for original federal jurisdiction [is a] substantial claim founded 'directly' upon federal law."); John B. Oakley, *Federal Jurisdiction and the Problem of the Litigative Unit: When Does What "Arise Under" Federal Law*?, 76 TEX. L. REV. 1829, 1831 (1998) (suggesting that the claim is the "fundamental unit of litigation for purposes of federal jurisdiction"); Charles A. Willard, *When Does a Case "Arise" Under Federal Laws*?, 45 AM. L. REV. 373 (1911) (describing the various interpretations of "arising under"); Note, *Mr. Smith Goes to Federal Court: Federal Question Jurisdiction Over State Law Claims Post*-Merrell Dow, 115 HARV. L. REV. 2272, 2273 (2002) [hereinafter *Mr. Smith*] (arguing that "shaping the doctrine on the basis of the competencies of and the comity between the federal and state systems may best serve the values of federal question jurisdiction while allowing for relatively clear jurisdictional rules").

8. 13B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3562 (2d ed. 1984) ("This lack of clarity in an important jurisdictional statute would be intolerable were it not for the fact that the cases raising a serious question whether jurisdiction exists are comparatively rare.").

9. *Id.*

10. In fact, the Court's guidance in this regard often amounts to statements such as: jurisdiction vests upon the "common-sense accommodation of judgment to [the] kaleidoscopic situations" that present a federal issue, in "a selective process which picks the substantial causes out of the web and lays the other ones aside." Gully v. First Nat. Bank in Meridian, 299 U.S. 109, 117–18 (1936).

11. The Constitution prescribes the limits of subject matter jurisdiction for the federal courts. U.S. CONST. art. III, § 2, cl. 1. As a matter of constitutional law, the scope of federal question jurisdiction, jurisdiction "arising under the Constitution, laws, or treaties of the United States," is quite broad. *See* Osborn v. Bank of the United States, 22 U.S. 738, 822–23 (1824) (holding that any federal "ingredient" is sufficient to satisfy the Constitution's federal question jurisdiction parameters). Despite this broad constitutional scope, the Constitution is not self-executing in this regard. Merrell Dow Pharm., Inc. v. Thompson, 478 U.S. 804, 807 (1986).

this regard, argues that "Congress's intent [in enacting § 1331] has had little or nothing to do with the Court's decisions concerning what constitutes a federal question."[12] Many others contend forcefully that jurisdiction is properly a function of judicial discretion[13] in which judges, not Congress, must determine the proper division of labor between the state and federal courts.[14]

Congress retains broad control of the jurisdiction of the inferior federal courts, and it may grant a narrower scope of subject matter jurisdiction than is found in Article III. *See, e.g.*, Paul M. Bator, *Congressional Power Over the Jurisdiction of the Federal Courts*, 27 VILL. L. REV. 1030, 1031 (1982) (espousing the traditional view that Congress is not required by Article III to vest full constitutional subject matter jurisdiction in the inferior federal courts). *Contra* Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 209 (1985) (arguing that Congress must vest some of the Article III heads of jurisdiction in the federal judiciary); Laurence H. Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts*, 16 HARV. C.R.-C.L.L. REV. 129, 134 (1981) (arguing that there are non-Article III limits to Congress's discretion in vesting inferior federal courts with subject matter jurisdiction). Exercising this control over inferior courts, Congress withheld general federal question jurisdiction from them until 1875. *See* Judiciary Act of Mar. 3, 1875, ch. 137, 18 Stat. 470; Kenneth C. Randall, *Federal Questions and the Human Rights Paradigm*, 73 MINN. L. REV. 349, 363, 365 n.76 (1988) (stating that the 1875 Act was the first general congressional grant of federal question jurisdiction to the inferior federal courts and that it is the predecessor statute to § 1331, the current statutory grant of federal question jurisdiction).

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

13. *See* Ann Althouse, *The Humble and the Treasonous: Judge-Made Jurisdiction Law*, 40 CASE W. RES. L. REV. 1035, 1049 (1990) (contending that judges are in a good position "to fill out some of the details in jurisdictional statutes"); Jack M. Beermann, *"Bad" Judicial Activism and Liberal Federal-Courts Doctrine: A Comment on Professor Doernberg and Professor Redish*, 40 CASE W. RES. L. REV. 1053, 1061–66 (1990) (suggesting that judicial discretion helps federal courts avoid overload); David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 588 (1985) (arguing that "the responsibility of the federal courts to adjudicate disputes does and should carry with it significant leeway for the exercise of reasoned discretion in matters relating to federal jurisdiction"); David L. Shapiro, *Reflections on the Allocation of Jurisdiction Between State and Federal Courts: A Response to "Reassessing the Allocation of Judicial Business Between State and Federal Courts,"* 78 VA. L. REV. 1839 (1992) (arguing that "history, tradition, and policy support the existence of limited judicial discretion to interpret and apply jurisdictional grants and to refrain from reaching the merits of a controversy even when the existence of jurisdiction is clear"); Michael Wells, *Why Professor Redish is Wrong About Abstention*, 19 GA. L. REV. 1097, 1132 (1985) (contending that "judge made rules restricting federal jurisdiction are not a judicial usurpation of power").

14. *See* Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust for S. Cal., 463 U.S. 1, 8 (1983) (stating that the vesting of § 1331 jurisdiction "masks a welter of issues regarding the interrelation of federal and state authority and the proper management of the federal judicial system" (footnote omitted)); Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 622 (1981) ("[State and federal courts] will continue to be partners in the task of defining and enforcing federal constitutional principles. The question remains as to where to draw the lines; but line-drawing is the correct enterprise."); Barry Friedman, *Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts*, 104 COLUM. L. REV. 1211, 1216 (2004) ("A central task of the law of federal jurisdiction is allocating cases between state and federal courts."); Martin H. Redish, *Reassessing the Allocation of Judicial Business Between State and Federal Courts: Federal Jurisdiction and "The Martian Chronicles,"* 78 VA. L. REV. 1769, 1772–87 (1992) (discussing seven factors relevant to

The second assumption of the predominant view is that § 1331 jurisdiction doctrine is an internally inconsistent body of law. For instance, scholars have often noted that there are two distinct bodies of doctrine (viz., the Holmes test and the *Smith* test)[15] that offer competing rubrics for the vesting of federal question jurisdiction.[16] Others argue that § 1331 is even more fractured than this bipartite division suggests. Professor Cohen, for example, rejects the notion that § 1331 can be, "or should be, [understood in terms of] a single, all-purpose, neutral analytical concept which marks out federal question jurisdiction."[17] This perceived incoherence has led some courts to complain that § 1331 jurisdiction is more of a "Serbonian bog"[18] than an easily applied rule, while others lament that "[a]ttempting to define an all inclusive test which will determine if a case 'arises under' the Constitution, laws, or treaties of the United States is like the exercise performed by the daughters of Danaus, condemned for eternity, as they were, to draw water with a sieve."[19]

Naturally, not everyone is pleased with the assumptions of the predominant view. Many would welcome a greater focus on legislative intent in the area of statutory federal question jurisdiction.[20]

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determining the proper allocation of judicial power between the states and the federal government); Michael Wells, *Behind the Parity Debate: The Decline of the Legal Process Tradition in the Law of Federal Courts*, 71 B.U. L. REV. 609, 625 (1991) (stating that "the challenge [of allocating cases between state and federal court] lies in finding a principled means of identifying those cases that belong in federal court").

15. *See* discussion *infra* Part II.A.

16. *See, e.g.*, Laura S. Fitzgerald, *Is Jurisdiction Jurisdictional?*, 95 NW. U. L. REV. 1207, 1241–45 (2001) (describing the Court's "two-track" approach to § 1331 jurisdiction); Freer, *supra* note 7, at 324–28 (arguing that the *Smith* line of cases employs a different test than the Holmes line of cases); Oakley, *supra* note 7, at 1837–43 (describing the distinction between Category-I and Category-II jurisdiction).

17. Cohen, *supra* note 7, at 907; *see also* Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 314 (2005) (admitting that the Court has consistently refused to "stat[e] a single, precise, all-embracing test for jurisdiction over federal issues embedded in state-law claims between nondiverse parties" (internal quotation marks omitted)).

18. Amoco Prod. Co. v. Sea Robin Pipeline Co., 844 F.2d 1202, 1205 (5th Cir. 1988); *see also* sources cited *supra* note 14.

19. Stone & Webster Eng'g Corp. v. Ilsley, 690 F.2d 323, 328 n.4 (2d Cir. 1982), *aff'd*, 463 U.S. 1220 (1983).

20. *See, e.g.*, Snyder v. Harris, 394 U.S. 332, 341–42 (1969) (finding that the Constitution places the power to "expand the jurisdiction of [the lower federal] courts . . . specifically . . . in the Congress, not in the courts"); Mishkin, *supra* note 5, at 159 ("[I]t is desirable that Congress be competent to bring to an initial national forum all cases in which the vindication of federal policy may be at stake."); Redish, *supra* note 14, at 1790–91 (welcoming a greater focus upon congressional intent to vest § 1331 jurisdiction); Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 1007 (2000) ("Rather than naturalizing a set of problems as intrinsically and always 'federal [questions for jurisdictional purposes],' I urge an understanding of 'the federal' as (almost) whatever Congress

Similarly, numerous jurists and scholars have called for a "bright-line" approach to jurisdictional doctrine in order to bring clarity and certainty to these issues.[21] I contend that (absent wholesale statutory revision) both of these goals can be achieved to the greatest extent possible by reconceptualizing § 1331 jurisdiction. In furtherance of this end, in this Article I recast § 1331 jurisdiction as a function of the viability of the federal right a plaintiff asserts and congressional control over the subject matter jurisdiction of the federal courts, as expressed by the creation of a cause of action.[22]

This reconceptualization in terms of both rights and causes of action affords two benefits over leading theories of statutory federal question jurisdiction. First, this reinterpretation affords congressional intent a more prominent role in grounding § 1331 jurisdiction. This is the case because Congress expresses an intent to vest § 1331 jurisdiction not only when it creates a cause of action, as the Holmes test suggests, but also when it creates rights. Because congressional control over the subject matter jurisdiction of the lower federal courts is indubitably a constitutionally enshrined prerogative,[23] this new

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deems to be in need of national attention, be it kidnapping, alcohol consumption, bank robbery, fraud, or nondiscrimination.").

21. *See, e.g.*, *Grable & Sons*, 545 U.S. at 320–22 (Thomas, J., concurring) (lamenting the lack of clear cut rules for § 1331 jurisdiction); Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 818 (1988) (arguing that uncertain jurisdictional rules have the regrettable effect of allowing "[p]arties [to] . . . spend years litigating claims only to learn that their efforts and expense were wasted in a court that lacked jurisdiction"); Merrell Dow Pharm., Inc. v. Thompson, 478 U.S. 804, 821 n.1 (1986) (Brennan, J., dissenting) (stating a view held by many that § 1331 doctrine as it now stands is "infinitely malleable"); Friedman, *supra* note 14, at 1225 ("One ought not make a fetish of bright line rules, but they have their place, and one place in particular is the law of jurisdiction."); John F. Preis, *Jurisdiction and Discretion in Hybrid Law Cases*, 75 U. CIN. L. REV. 145, 190–92 (2006) (calling for the adoption of a rule, as opposed to a standard, in *Smith*-style cases); Redish, *supra* note 14, at 1794 (suggesting that "jurisdictional uncertainty can surely lead to both a waste of judicial time and added expense to the litigants").

22. This Article is solely focused upon § 1331 jurisdiction. To be clear, there are numerous important jurisdictional concepts that I am not addressing in this Article. First, this is an analysis of § 1331 federal question jurisdiction, not the scope of the Constitution's grant of federal question jurisdiction or any other federal question jurisdictional statute. Second, this Article does not address discretionary abstentions from the exercise of jurisdiction. My interest here is only whether § 1331 vests in the first instance, not whether a court should decline to exercise jurisdiction it statutorily possesses. Nor does this Article address other doctrines, such as standing or sovereign immunity, that have jurisdiction implications which are not unique to § 1331 jurisdiction. Finally, this Article focuses solely on the conditions necessary for vesting jurisdiction under § 1331. While in most cases these conditions will be sufficient as well, Congress certainly may add additional requirements before a case can arise under § 1331 (e.g., Congress may add an amount in controversy requirement). *See infra* note 32 (discussing amount in controversy requirements previously attached to federal question jurisdiction).

23. *See supra* note 11.

view advances deeply rooted constitutional values[24] by taking all indicators of congressional intent into account.

Second, this reinterpretation of the § 1331 canon fosters clarity. The Court often asserts that the Holmes test, which focuses exclusively upon the federal versus state origin of the cause of action as the controlling factor for the taking of § 1331 jurisdiction, supports the majority of § 1331 cases.[25] Yet, the Holmes test is neither a necessary nor sufficient condition for § 1331 jurisdiction. Given the supposed prominence of the Holmes test, its many exceptions appear unprincipled, leading only to confusion.

I contend that the Court's apparently disparate § 1331 opinions may be better explained in terms of balancing federal rights against the source of the cause of action asserted. This reinterpretation shapes the Court's § 1331 jurisprudence into three standards, which increasingly restrict access to the federal courts. Under the first standard, § 1331 jurisdiction lies when a plaintiff asserts a cause of action arising from either a statute, treaty, or the Constitution that is paired with a "colorable" federal right. Under the second standard, § 1331 lies when a plaintiff alleges a state-law-created cause of action and asserts a "substantial" federal right. Under the third standard, § 1331 jurisdiction lies when a plaintiff asserts a pure federal common law cause of action and a substantial federal common law right coupled with a sufficient showing to support the right.

Because all three standards involve the same process of balancing federal rights against causes of action, these three standards should not be seen as competing tests. Rather, these standards are different instantiations of a unified approach: a test that seeks to vest § 1331 jurisdiction where there is congressional intent to do so as evidenced by the balancing of asserted federal rights against causes of action. I coin this approach the unified balancing principle. These three instantiations of the unified balancing principle, then, foster important efficiency and transparency values by explicitly laying out relevant jurisdictional standards and reconciling when these competing standards apply.

I proceed as follows. In Part II, I first review traditional federal question jurisdiction doctrine. Next, I lay out the key concepts of right, cause of action, colorable, and substantial. I employ these concepts in reinterpreting § 1331 jurisprudence in the remainder of this Article.

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24. *See, e.g.*, *supra* note 20.

25. *Merrell Dow*, 478 U.S. at 808.

In Part III, I proceed to reinterpret the § 1331 canon in terms of the source for the federal right asserted: namely, statutory,[26] constitutional, or federal common law. In so doing, I contend that the Court's holdings are best understood, not by focusing solely upon the origin of the cause of action, but by focusing upon two concepts: the viability of the federal right asserted and the cause of action asserted. These dual foci guide the reinterpretation of the Court's § 1331 jurisprudence into the three clarity-inducing standards outlined above.

In Part IV, I argue that these standards are best understood as instantiations of a unified balancing principle. Under this principle, as the indicia that Congress wishes to grant plaintiffs the ability to vindicate particular rights in federal court increases, plaintiffs' need to assert a viable federal right lessens. Conversely, when there are few other indicia that Congress wishes plaintiffs to vindicate particular rights in federal court, plaintiffs must assert a more robust claim to a federal right for § 1331 jurisdiction to lie. Under this analysis, the existence of a nonjudicially created[27] federal cause of action constitutes significant (but not the only) evidence of congressional intent to vest § 1331 jurisdiction. I further contend that this unified understanding of § 1331 jurisdiction not only brings clarity to this important body of jurisdictional doctrine but it advances the important constitutional norm of congressional control over the jurisdiction of the lower federal courts.

II. LAYING A NEW CONCEPTUAL FOUNDATION

In this Part, I seek to lay the conceptual foundation for a fruitful reinterpretation of the Court's § 1331 jurisprudence. I begin with a brief primer on blackletter federal question jurisdiction doctrine. I note that cases comprising the heart of the traditional view often present analyses of § 1331 jurisdiction in terms of "right," "cause of action," or "claims," as modified by the notions of "colorable" and "substantial." As such, I turn next to an introduction of the contemporary understandings of the concepts of right, cause of action, claim, and remedy in an effort to obtain a deeper understanding of the

26. I also include rights created by treaty under this rubric.

27. I do not consider causes of action inferred from a statute or the Constitution to be judicially created. The Court consistently holds that such an inference is an exercise in statutory interpretation, not judicial fiat. *See infra* note 358. Of course, this is a contested issue. I have no desire to enter into this fray in this Article. *See* cases cited *infra* note 362. I am merely employing "nonjudicially created" to distinguish causes of action created as a matter of federal common law, which I consider judicially created, from all others. I intend nothing more.

Court's often clichéd statements of jurisdiction doctrine. I conclude by defining the terms colorable rights and substantial rights, which play a central role in Part III's recharacterization of § 1331 cases.

A. Federal Question Jurisdiction Doctrine Primer

In 1875, Congress passed the first general grant of federal question jurisdiction now codified in § 1331.[28] Even though the language of § 1331 parallels that of Article III of the Constitution, the Supreme Court does not hold that § 1331 federal question jurisdiction is identical in scope to the constitutional federal question jurisdiction provision.[29] Indeed, the Court interprets § 1331 as granting a much narrower scope of jurisdiction than the Constitution permits.[30] In furtherance of this generally restrictive interpretive principle, all § 1331 jurisdictional cases are subject to the well-pleaded complaint rule.[31] Following this rule, only federal issues raised in a plaintiff's complaint, not anticipated defenses, establish federal question jurisdiction.[32]

Doctrinal orthodoxy states that the Court has established two independent and irreconcilable tests for determining when a complaint raises a well-pleaded federal question.[33] According to the blackletter view, the majority of federal question cases[34] vest under § 1331 because federal law—be it by statute, treaty, Constitution or

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28. 28 U.S.C. § 1331 (2000). This statute has not always been codified here. Nevertheless, I do not employ the cumbersome "predecessor statute to § 1331" locution when referring to cases dealing with the Act as codified in a different location. Instead, I simply refer to this Act as § 1331, even if at a previous time it was codified at a different location. This approach is sound because, excepting statutory amounts in controversy, the Act has been essentially unchanged since 1875. *See, e.g.*, Pub. L. No. 96-486, 94 Stat. 2369 (1980) (striking out the minimum amount in controversy requirement of $10,000); Pub. L. No. 85-554, 72 Stat. 415 (1958) (raising the minimum amount in controversy requirement from $3,000 to $10,000). Finally, following most scholars, I exclude the short-lived general grant of federal question jurisdiction passed at the end of President John Adams's term and treat the 1875 Act as the first general federal question grant.

29. Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 494 (1983).

30. *Id.* The Constitution prescribes the limits of subject matter jurisdiction for the federal courts. U.S. CONST. art. III, § 2, cl. 1. As a matter of constitutional law, the scope of federal question jurisdiction–jurisdiction "arising under the Constitution, laws, or treaties of the United States"–is quite broad. *See* Osborn v. Bank of the United States, 22 U.S. 738, 822–23 (1824) (holding that any federal "ingredient" is sufficient to satisfy the Constitution's federal question jurisdiction parameters). Despite this broad constitutional scope, the Constitution is not self-executing in this regard. Merrell Dow Pharm., Inc. v. Thompson, 478 U.S. 804, 807 (1986).

31. Randall, *supra* note 11, at 370.

32. *See* Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149, 152 (1908) (establishing the rule).

33. *See* sources cited *supra* note 16.

34. *Merrell Dow*, 478 U.S. at 808.

federal common law[35]—creates the plaintiff's cause of action.[36] Justice Holmes so forcefully advocated for this understanding of § 1331 that this view is often referred to as the Holmes test. Pursuant to the second blackletter test, federal question jurisdiction will lie over state-law causes of action that necessarily require construction of an embedded federal question.[37] As *Smith v. Kansas City Title & Trust Co.*[38] is the Court's classic statement of this position, this line of cases is often referred to as the *Smith* test. In *Smith*, a stockholder-plaintiff brought a breach of fiduciary duty cause of action under state law. Thus, this case would not satisfy the Holmes test as it was not brought under a federal cause of action. But the Court held that federal question jurisdiction arose under § 1331 because an element of the plaintiff's state-law claim required adjudication of the constitutionality of a federal act.[39]

The traditional view thus places the Court's § 1331 canon into two camps. Under the Holmes test, § 1331 jurisdiction arises if, and only if, the cause of action is created by federal law. Under the *Smith* test, a state-law cause of action may arise under § 1331 if an element of the claim necessarily requires the construction of federal law. As a corollary to the predominant view's depiction, the traditional view treats these tests as irreconcilable.

B. Rights, Causes of Action, Claims, and Remedies

While the classic formulations of the Holmes and *Smith* tests appear to place great importance upon the "law that creates the cause of action,"[40] the Court has not focused consistently upon the source of the cause of action in rendering jurisdictional decisions. In many

35. Illinois v. Milwaukee, 406 U.S. 91, 100 (1972) ("[Section] 1331 jurisdiction will support claims founded upon federal common law as well as those of a statutory origin.")

36. Am. Well Works Co. v. Layne & Bowler Co., 241 U.S. 257, 260 (1916) (Holmes, J.) (applying this language: "arises under the law that creates the cause of action").

37. *See* Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust for S. Cal., 463 U.S. 1, 9 (1983) (finding the Holmes test as a rule of inclusion (quoting T.B. Harms Co. v. Eliscu, 339 F.2d 823, 827 (2d Cir. 1964) (Friendly, J.))); *see also* Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 312–13 (2005) (discussing the *Smith* test); *Merrell Dow*, 478 U.S. at 808–09 (same); Smith v. Kansas City Title & Trust Co., 255 U.S. 180, 199 (1921):

> The general rule is that, where it appears from the bill or statement of the plaintiff that the right to relief depends upon the construction or application of the Constitution or laws of the United States, and that such federal claim is not merely colorable, and rests upon a reasonable foundation, the District Court has jurisdiction under this provision.

38. 255 U.S. 180 (1921).

39. *Id.* at 199–202.

40. *Am. Well Works*, 241 U.S. at 260.

cases, the Court states that a suit will arise under § 1331 if "the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law."[41] Still other cases state that § 1331 vests upon the presentation of a "federal interest"[42] or a "federal issue."[43] This myriad of locutions only creates confusion, presenting an ever-changing conceptual focus for the jurisdictional question.[44] The situation is made worse by the fact that the contexts from which many of these terms are drawn are now outdated, draped in jargon no longer employed,[45] couched in antiquated modes of pleading, or inappropriately borrowed from analyses of Supreme Court appellate jurisdiction.[46] Thus, I proceed by deconstructing these stock phrases and begin my analysis of § 1331 with a crisper understanding of the following notions—"right," "cause of action," "claim," and "remedy"—that the Court continually employs as foundational jurisdictional concepts for its § 1331 jurisprudence.

Traditionally, the concepts of right, cause of action, and remedy were thought to be immutably linked—one did not exist without the other.[47] As Justice Harlan noted, "contemporary modes of jurisprudential thought . . . appeared to link 'rights' and 'remedies' in a 1:1 correlation."[48] Indeed, *Marbury v. Madison* held that "it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded."[49] Moreover, under this earlier jurisprudence, "courts did not

41. *Franchise Tax Bd.*, 463 U.S. at 27–28.

42. *Merrell Dow*, 478 U.S. at 814 n.12.

43. Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 312 (2005); Oneida Indian Nation v. Oneida County, 414 U.S. 661, 666–67 (1974).

44. Oakley, *supra* note 7, at 1853 (noting various uses of the terms "claim" and "theory").

45. LARRY W. YACKLE, RECLAIMING THE FEDERAL COURTS 91 (1994) (lamenting Supreme Court doctrine that "needlessly confuse[s] matters with outdated jargon and misleading generalizations," and advocating "jurisdictional rules that can easily be applied at the outset of litigation"). Further, many of these stock phrases were inappropriately transferred from old cases involving appellate jurisdiction, rendering their use in the § 1331 context highly suspect. *See* Cohen, *supra* note 7, at 904; Mishkin, *supra* note 5, at 160–63.

46. Cohen, *supra* note 7, at 904 (noting that phrases had been uncritically transferred from earlier cases).

47. *See, e.g.*, Anthony J. Bellia, Jr., *Article III and the Cause of Action*, 89 IOWA L. REV. 777, 783 (2004) ("At the time of the American Founding, the question whether a plaintiff had a cause of action was generally inseparable from the question whether the forms of proceeding at law and in equity afforded the plaintiff a remedy for an asserted grievance."); Donald H. Zeigler, *Rights, Rights of Action, and Remedies: An Integrated Approach*, 76 WASH. L. REV. 67, 71–83 (2001) (describing the traditional approach to rights, causes of action and remedies).

48. Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 401 n.3 (1971) (Harlan, J., concurring).

49. 5 U.S. (1 Cranch) 137, 163 (1803) (quoting WILLIAM BLACKSTONE, 3 COMMENTARIES *23).

view a cause of action as a separate procedural entity, independent of a right and remedy, that had to be present for an action to go forward."[50] Given this congruity, it is understandable that in times past, the Court would use the terms cause of action, right, and remedy interchangeably in jurisdictional analyses. But the traditional understanding of these terms as synonyms is no longer an accurate reflection of doctrine. Thus, the continued treatment of these terms as synonyms in jurisdictional analyses induces confusion.

This traditional jurisprudence of congruity had, by the 1970s, given way to a new regime.[51] Starting with *National Railroad Passenger Corp. v. National Association of Railroad Passengers*,[52] *Securities Investor Protection Corp. v. Barbour*,[53] and *Cort v. Ash*,[54] the Court began explicitly differentiating rights from the ability to enforce them by way of a cause of action.[55] By the end of the decade, the Court in *Davis v. Passman*[56] squarely held that the notions of right, cause of action, claim, and remedy constituted distinct analytic concepts. The Court continues to adhere to this basic framework established in *Passman*.

A "right," under the contemporary analysis, is an obligation owed by the defendant to which the plaintiff is an intended beneficiary.[57] This notion of obligation can be thought of in a Hohfeldian sense in that the obligation imposes a correlative duty upon the defendant to either refrain from interfering with, or to assist, the plaintiff.[58] In the Court's view, however, an obligation standing alone is not sufficient for the recognition of a right. To qualify as a

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50. Zeigler, *supra* note 47, at 72.

51. *Id.* at 84–104. Zeigler notes this as a sea-change. *But see* Fitzgerald, *supra* note 16 (noting how the two-track approach has developed over many decades).

52. 414 U.S. 453, 457 (1974) (acknowledging the existence of rights and duties under the Amtrak Act but questioning whether respondent had a cause of action to enforce them).

53. 421 U.S. 412, 420–23 (1975) (acknowledging that the Securities Investor Protection Act grants plaintiffs beneficial rights, but questioning whether they have a cause of action to force the agency to enforce them).

54. 422 U.S. 66, 74–85 (1975) (noting that the corporate action in question was in violation of a federal criminal statute, but questioning whether plaintiffs had a cause of action to privately enforce the prohibition).

55. Zeigler, *supra* note 47, at 85–86.

56. 442 U.S. 228, 238–39 (1979).

57. *Id.*

58. Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710, 710–70 (1917) (critiquing legal analysis for imprecise use of terminology, and introducing the idea that rights are best understood as obligations coupled with correlative duties); Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 16–59 (1913) (same).

right, an obligation must be mandatory, not merely hortatory.[59] Further, for obligations to constitute rights, the language at issue must not be "too vague and amorphous" or "beyond the competence of the judiciary to enforce."[60] This three-part test (viz., identifying mandatory obligation, clear statement, and enforceability[61]) remains the standard by which the Court determines when a right exists.[62]

A "cause of action," by contrast, is a determination of whether the plaintiff falls into a class of litigants empowered to enforce a right in court.[63] Or as the *Passman* Court alternatively put the concept, "a cause of action is a question of whether a particular plaintiff is a member of the class of litigants that may, as a matter of law, appropriately invoke the power of the court."[64] The concept of cause of action, then, is necessarily related to the concept of a right insofar as plaintiffs must have rights before they can be persons empowered to enforce them. But the concept of cause of action is not to be confused with the notion of a right itself under this contemporary view. Indeed, one may have a right, yet lack the power to enforce the right. For example, an individual's rights under certain statutory schemes may only be vindicated by an administrative agency.[65] That is, Congress may vest individuals with rights but not vest them with causes of action to enforce those rights by way of private suit. As a corollary,

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59. Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 24 (1981) (finding that provisions of the Developmentally Disabled Assistance and Bill of Rights Act "were intended to be hortatory, not mandatory").

60. Wright v. Roanoke Redevelopment & Hous. Auth., 479 U.S. 418, 431–32 (1987).

61. This last prong is, or nearly is, identical to the concept of remedy. But whether a court can issue an effective remedy is best understood as a matter of standing. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992) (discussing redressability). Including redressability in the rights analysis is double counting at best. A more troubling result could be the collapse of the distinction between rights and remedy as this final statement appears to incorporate redressability as part of the rights analysis. Given that the Court has consistently striven since the 1970s to distinguish between rights and remedies, *see* Zeigler, *supra* note 47, at 84–104, however, it would be a disservice to read this collapse into this Article's jurisdictional analysis unless it is absolutely necessary. I will, therefore, focus on the notions of mandatory obligation and clear statement.

62. Golden State Transit Corp. v. Los Angeles, 493 U.S. 103, 106 (1989); *see also* Blessing v. Freestone, 520 U.S. 329, 340–41 (1997) (discussing the three-part test); Lividas v. Bradshaw, 512 U.S. 107, 132–33 (1994) (same); Suter v. Artist M., 503 U.S. 347, 363 (1992) (same); Wilder v. Va. Hosp. Ass'n, 496 U.S. 498, 509–10 (1990) (same).

63. Davis v. Passman, 442 U.S. 228, 239 (1979).

64. *Id.* at 239 n.18.

65. *See, e.g.*, Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers, 414 U.S. 453, 457 (1974) (holding that the power to vindicate rights rests with the Attorney General); *see also Passman*, 442 U.S. at 241 ("For example, statutory rights and obligations are often embedded in complex regulatory schemes, so that if they are not enforced through private causes of action, they may nevertheless be enforced through alternative mechanisms, such as criminal prosecutions, or other public causes of actions." (internal citations omitted)).

then, a plaintiff in a federal question case can fail to present a cause of action either by failing to implicate a federal right or by failing to be a member of the class of litigants empowered to enforce the federal right at issue.

A "claim" constitutes its own concept. As the *Passman* Court held, in order to have a claim, one must have a cause of action.[66] But again, cause of action is but a necessary, not a sufficient, condition to having a claim. To be clear, the *Passman* Court uses cause of action in the sense that a plaintiff is a member of a class entitled to enforce rights in court, not in the sense that the term was used under the former code and writ pleading schemes. Those older usages of the term were rejected by the authors of the Federal Rules of Civil Procedure.[67] Thus, in order to have a federal claim in this contemporary sense, a plaintiff must: (1) assert a federal right; (2) be a member of the class of persons entitled to enforce the right (i.e., assert a cause of action); and (3) possess the other attributes of a claim, which means an assertion of a transaction or occurrence sufficient, if true, to justify a remedy.[68] Thus, one may possess a right and a cause of action without possessing a claim. For example, a plaintiff may possess a cause of action—in the sense that a plaintiff has a right and is empowered to enforce it in court—yet lack a claim due to the inability to allege adequate facts that would justify a remedy.[69]

Finally, under the contemporary view, the notion of claim is analytically distinct from, and prior to, the question of what "relief" may be afforded.[70] Traditionally, the correlation of rights with remedies empowered federal courts to employ all available remedies to

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66. *Passman*, 442 U.S. at 239 ("If a litigant is an appropriate party to invoke the power of the courts, it is said that he has a 'cause of action' under the statute, and that this cause of action is a necessary element of his 'claim.' ").

67. *Id.* at 237–39. *But see* Bellia, *supra* note 47, *passim* (arguing that the understanding of cause of action as it was used under common law writ pleading illuminates the original meaning of constitutional federal question jurisdiction).

68. *See* Douglas D. McFarland, *The True Compass: No Federal Question in a State Law Claim*, 55 U. KAN. L. REV. 1, 27 n.160 (2006) ("Understanding the fact-based, transactional nature of a claim is important throughout the federal rules and federal jurisdictional statutes. Kinship of the 'claim' to the commonly encountered 'transaction or occurrence' is apparent."). On the other hand, Professor John Oakley has attempted to distinguish causes of action from claims in the following way: a cause of action should refer to "a transaction or occurrence," and a claim for relief should refer to "the legal theories upon which relief depends." Oakley, *supra* note 7, at 1858–59.

69. *See* FED. R. CIV. P. 12(b)(6) (listing as a defense to a claim for relief, "failure to state a claim upon which relief can be granted").

70. *Passman*, 442 U.S. at 239.

vindicate the violation of a federal right.[71] More recently, the Court has been reserved in its statements about the presumption that all wrongs always have an available remedy; the Court has even allowed for the possibility that a right coupled with a cause of action might sometimes provide no relief.[72]

C. Colorable and Substantive Rights

Not every invocation of the Holmes or *Smith* test will arise under § 1331, however. The Court further limits federal question jurisdiction to those cases raising substantial rights.[73] But the Court does not consistently employ the modifier "substantial." Often, it holds that a merely "colorable" federal claim will arise under § 1331.[74] In some instances, the Court appears to use these terms—substantial and colorable—as synonyms.[75] In still other instances, it employs the term colorable as an antonym to substantial.[76] In yet other cases, it appears that substantial is used in a manner meant to convey something more than merely colorable.[77] The best course here is to proceed, as the Court once noted, by considering these concepts within the context of each case.[78] To this end, I will define colorable and

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71. Ziegler, *supra* note 47, at 95; *see also* Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 595 (1983) ("[W]here legal rights have been invaded and a cause of action is available, a federal court may use any available remedy to afford full relief.").

72. Ziegler, *supra* note 47, at 96; *see also* City of Sherrill v. Oneida Indian Nation., 544 U.S. 197, 213 (2005) ("The distinction between a claim or substantive right and a remedy is fundamental." (quotations and citations omitted)).

73. *See, e.g.*, Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 89 (1998) (noting that jurisdiction lies unless it is "wholly insubstantial and frivolous").

74. *See, e.g.*, Arbaugh v. Y&H Corp., 546 U.S. 500, 513 n.10 (2006) ("A claim invoking federal-question jurisdiction under 28 U.S.C. § 1331, *Bell* held, may be dismissed for want of subject matter jurisdiction if it is not colorable . . . .").

75. *See, e.g.*, Duke Power Co. v. Carolina Env'l Study Group, Inc., 438 U.S. 59, 71–72 (1978) ("It is enough for present purposes that the claimed cause of action to vindicate appellees' constitutional rights is sufficiently substantial and colorable to sustain jurisdiction under § 1331(a).").

76. *See, e.g.*, Hagans v. Lavine, 415 U.S. 528, 555 (1974) ("Of course, the Federal question must not be merely colorable or fraudulently set up for the mere purpose of endeavoring to give the court jurisdiction." (citation omitted)).

77. *See, e.g.*, Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust for S. Cal., 463 U.S. 1, 27–28 (1983) (holding that federal question jurisdiction lies in "only those cases in which a well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law").

78. Merrell Dow Pharm., Inc. v. Thompson, 478 U.S. 804, 823 n.3 (1986):

> *Franchise Tax Board* states that the plaintiff's right to relief must necessarily depend upon resolution of a "substantial" federal question. In context, however, it is clear that this was simply another way of stating that the

substantial as differing terms, but in employing them I will attempt to use these terms, per my definitions of them, in a contextually appropriate manner regardless of the terms employed by the Court.

I define "colorable right" in the following manner. An assertion of a federal right is colorable so long as it is not "patently without merit,"[79] "frivolous,"[80] "immaterial or made solely for the purpose of obtaining jurisdiction."[81] A right fails to meet this low bar if, for example, it is merely a procedural right (i.e., applicable only in the context of litigation) as opposed to a substantive right (i.e., applicable outside of the context of litigation).[82] Similarly, if a plaintiff's allegation of a right is absolutely foreclosed by prior decisions of the Supreme Court, and it is not a good faith attempt to overrule the precedent, it is not an assertion of a colorable right.[83] Conversely, a substantive right meets this standard if it has "any arguable basis in law."[84] That is to say, a right is colorable if it is not merely procedural and there is at least one interpretation of the federal law alleged, which is not absolutely barred, that would allow a plaintiff to

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> federal question must be colorable and have a reasonable foundation. This understanding is consistent with the manner in which the *Smith* test has always been applied, as well as with the way we have used the concept of a "substantial" federal question in other cases concerning federal jurisdiction.

79. *Hagans*, 415 U.S. at 542–43.

80. Bell v. Hood, 327 U.S. 678, 683 (1946).

81. *Id.*

82. *See* Syngenta Crop Prot., Inc. v. Henson, 537 U.S. 28, 34 (2002) (finding a removal statute "requires that a federal court have original jurisdiction over an action in order for it to be removed from a state court. The All Writs Act, alone or in combination with the existence of ancillary jurisdiction in a federal court, is not a substitute for that requirement."); Palkow v. CSX Transp., Inc., 431 F.3d 543, 555 (6th Cir. 2005) ("Merely invoking the Federal Rules of Civil Procedure [60] is not sufficient grounds to establish federal question jurisdiction."); Milan Express, Inc. v. Averitt Express, Inc., 208 F.3d 975, 979 (11th Cir. 2000) (holding in regard to Rule 65.1 that a "federal rule cannot be the basis of original jurisdiction"); Cresswell v. Sullivan & Cromwell, 922 F.2d 60, 70 (2d Cir. 1990) ("The Rules do not provide an independent ground for subject matter jurisdiction over an action for which there is no other basis for jurisdiction."); Port Drum Co. v. Umphrey, 852 F.2d 148, 150 (5th Cir. 1988) (holding the court lacks jurisdiction to hear a suit directly under Rule 11); Rogers v. Platt, 814 F.2d 683, 688 (D.C. Cir. 1987) (holding that the Parental Kidnapping Prevention Act does not create colorable rights, but rather provides a choice of law rule and as such the court lacks jurisdiction).

83. *See* Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 666 (1974):

> [T]he basis for petitioners' assertion that they had a federal right to possession governed wholly by federal law cannot be said to be so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy within the jurisdiction of the District Court, whatever may be the ultimate resolution of the federal issues on the merits.

84. Mich. S. R.R. Co. v. Branch & St. Joseph Counties Rail Users Ass'n, Inc., 287 F.3d 568, 573 (6th Cir. 2002).

prevail—even if the courts refuse to adopt this interpretation.[85] Further, a right is colorable in cases where neither party is contesting the legal content of the right, but rather where the parties are contesting only factual issues related to the vindication of the right.[86] Further still, the veracity of the plaintiff's factual averments is immaterial to this jurisdictional question.[87]

I define "substantial rights" using a more rigorous test, following the *Smith* line of cases.[88] To be substantial, an allegation of a right must be at least a colorable one. But a substantial allegation of a right must present more than a mere assertion that there is at least one interpretation of a federal substantive right that is not absolutely barred, under which the plaintiff could prevail. In cases using the substantiality standard, § 1331 jurisdiction "demands . . . a serious federal interest in claiming the advantages thought to be inherent in a federal forum."[89] Or as Professor Freer explains the term, to be substantial the right at issue must be central to the litigation and contested by the parties.[90] That is, the federal right at issue must be the dispositive issue in the case, not merely one of several issues that

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85. *See Bell*, 327 U.S. at 685 ("[T]he right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another.").

86. Mishkin, *supra* note 5, at 169–74.

87. *Bell*, 327 U.S. at 682 ("Jurisdiction . . . is not defeated . . . by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover.").

88. *See* Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 312 (2005) (using substantial in this manner); *see also* Freer, *supra* note 7, at 329 (arguing that the *Smith* line of cases employs a different test than the Holmes line of cases).

89. *Grable & Sons*, 545 U.S. at 313 (citing Chicago v. Int'l Coll. of Surgeons, 522 U.S. 156, 164 (1997)); *see also* Merrell Dow Pharm., Inc. v. Thompson, 478 U.S. 804, 814, 816 n.14 (1986) (noting that a federal court may review a federal issue in a state cause of action); Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust for S. Cal., 463 U.S. 1, 27–28 (1983):

> Congress has given the lower federal courts jurisdiction to hear, originally or by removal from a state court, only those cases in which a well-pleaded complaint established either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law.

Gully v. First Nat. Bank in Meridian, 299 U.S. 109, 112 (1936) (noting that a federal question exists when a "right or immunity created by the Constitution or laws of the United States [is] an element, and an essential one, of the plaintiff's cause of action"); Shulthis v. McDougal, 225 U.S. 561, 569 (1912):

> A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction, or effect of such a law, upon the determination of which the result depends.

90. Freer, *supra* note 7, at 310.

could throw the outcome to one party or the other.[91] Further, to allege a substantial federal right, the parties must contest the legal content of the right, meaning they are not fighting solely about the facts that would vindicate the federal right.[92] Substantiality, in sum, means that the right asserted is not merely colorable, but that the case depends upon the vindication of the right asserted and that the parties actually contest the legal content of the right. Of course, as with colorable claims to a right, plaintiffs need not actually win or state a claim to assert a substantial right.[93]

These distinctions have explanatory force for federal question subject matter jurisdiction. While preserving a full defense of this contention until Part III, I contend that whether federal question jurisdiction under § 1331 lies is a function of both the viability of the federal right and the cause of action asserted, understood in the contemporary sense outlined above.

III. THREE JURISDICTIONAL STANDARDS

With these essential concepts at hand, I turn now to a reinterpretation of the Court's § 1331 canon in terms of rights, both colorable and substantial, and causes of action. This analysis is organized by the origin of the asserted federal right. I begin with a discussion of federal statutory and treaty rights, turning next to constitutional rights and ending with an analysis of federal common law rights.

I focus upon rights and causes of action not to downplay the importance of the concepts of remedy and claim to a successful suit. Indeed, the Constitution's Cases and Controversies provision requires, as a jurisdictional matter, that plaintiffs establish the likelihood that a federal court can afford a remedy should they prevail.[94] This important jurisdictional rule, however, is not uniquely germane to § 1331 cases, but rather constitutes part of the Article III "standing" requirement to which every font of federal subject matter jurisdiction is subject.[95] Claim is also a key concept to a successful suit, but as the

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91. *Id.*

92. *See, e.g.*, *Grable & Sons*, 545 U.S. at 313 (citing cases supporting this proposition); Mishkin, *supra* note 5, at 169–74 (describing this requirement as applying to all § 1331 cases and critiquing it).

93. *See, e.g.*, Smith v. Kansas City Title & Trust Co., 255 U.S. 180, 199 (1921) (describing a losing plaintiff).

94. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992).

95. *See, e.g.*, Massachusetts v. EPA, 127 S.Ct. 1438, 1453 (2007) ("Article III of the Constitution limits federal-court jurisdiction to 'Cases' and 'Controversies.' ").

Court has often held, whether plaintiffs present a claim, even in a federal question case, is not a jurisdictional matter.[96] (I will revisit the veracity of this proposition during my discussion of federal common law rights.)

Although most scholars organize § 1331 into two standards that roughly track the Holmes and *Smith* tests,[97] in conducting this reinterpretation, I conclude that the Court's opinions are better grouped into three standards, which further can be explained as instantiations of the same unified balancing principle. First, if a plaintiff alleges a nonjudicially created federal cause of action, then § 1331 jurisdiction lies if the plaintiff makes a colorable allegation of a federal right—whether created by a federal statute, treaty, or the Constitution. Second, if a plaintiff alleges a state-law cause of action, then § 1331 jurisdiction lies if a plaintiff makes a substantial assertion of a federal right. Third, if a plaintiff alleges a right and a cause of action created as a matter of "pure" federal common law, the plaintiff must not only allege a substantial right but must also make a showing sufficient to vindicate that right (i.e., plaintiff must present a claim). These three standards offer both a better explanation of the Court's past § 1331 holdings and a more transparent guide to future cases than the traditional Holmes and *Smith* tests afford.

A. Congressionally Created Rights

This Section analyzes the Court's taking § 1331 jurisdiction in situations where the plaintiff asserts a congressionally created right, including rights created by treaties. I proceed by reviewing the Court's § 1331 cases in terms of the strength of the congressionally created right asserted and the type of cause of action asserted in five differing combinations. From this investigation, I draw two conclusions. First, despite the emphasis upon the source of the cause of action in the Holmes test as the key jurisdictional factor, an assertion of a federal

96. Montana-Dakota Utils. Co. v. Nw. Pub. Serv. Co., 341 U.S. 246, 249 (1951) ("As frequently happens where jurisdiction depends on subject matter, the question [of] whether jurisdiction exists . . . [is often] confused with the question whether the complaint states a cause of action."). *But see infra* Part III.C (discussing the Court's treatment of federal common law cases).

97. *See* Fitzgerald, *supra* note 16, at 1241–45 (noting this trend). Further, I am excluding so-called "protective jurisdiction" from my analysis given that a majority of the Court has never applied it. The Court's only suggestion as to its appropriateness comes in Justice Harlan's concurring opinion in *Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448, 460 (1957) (Harlan, J., concurring). Further, as Professor Chemerinsky notes, protective jurisdiction is likely to remain only as fodder of professorial hypotheticals, not as a significant element of the Court's jurisdictional doctrine. ERWIN CHEMERINSKY, FEDERAL JURISDICTION 282 (5th ed. 2007).

right is the essential element needed for § 1331 to vest. Second, the robustness with which the plaintiff must assert the federal right in order to ground § 1331 shifts with the origin of the cause of action.

1. Non-Colorable Assertions to Congressionally Created Rights and a Congressionally Created Cause of Action

I begin with cases in which the plaintiff fails to allege a colorable federal right yet alleges a congressionally created cause of action. I analyze two circumstances where such cases arise. The first encompasses cases in which an act of Congress creates a cause of action to enforce state-law rights. The second involves the assertion of a frivolous federal right. In both circumstances, the courts hold that they lack subject matter jurisdiction because the plaintiffs fail to assert a colorable federal right. "[D]espite the usual reliability of the Holmes test,"[98] these cases, in which the plaintiff possesses a federal cause of action, illustrate that satisfying the Holmes test is not a sufficient basis for taking § 1331 jurisdiction.

a. Federal Statutory Causes of Action over State-Law Rights

I focus first upon a set of cases[99] where Congress has empowered a class of persons to bring suit (i.e., created a cause of action) to enforce state-law rights. The Court has not seen fit to hear these claims under § 1331. The lead case is *Shoshone Mining Co. v. Rutter*.[100] In *Shoshone*, Congress authorized suits to determine adverse claims to mining rights. The act, however, stated that the claims were to be determined by the "local customs and rules of miners in the several mining districts . . . or by the statute of limitations for mining claims of the state or territory."[101] Thus, the case presented a situation where state law created all the rights at issue, but Congress created the cause of action entitling a class of persons to enforce those state rights.

The issue for the Court was whether the federal act could create federal question jurisdiction for state-created rights. A straightforward application of the Holmes test would have found in

98. Merrell Dow Pharm., Inc. v. Thompson, 478 U.S. 804, 814 n.12 (1986).

99. *See* Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 317 n.5 (2005) ("For an extremely rare exception to the sufficiency of a federal right of action, see *Shoshone Mining Co. v. Rutter*, 177 U.S. 505, 507 (1900).").

100. 177 U.S. 505, 506 (1900).

101. *Id.* at 508.

favor of extending jurisdiction, because the cause of action is obviously federal in origin. Nevertheless, the Court held there was not jurisdiction under § 1331 because "the right of possession may not involve any question as to the construction . . . of the . . . laws of the United States, but may present simply . . . a determination of . . . local rules . . . or the effect of state statutes."[102] That is to say, the Court held that a congressionally created cause of action to enforce state-law rights does not arise under § 1331.[103]

Similarly, in *People of Puerto Rico v. Russell & Co.*,[104] the Court made its clearest statement that the proper focus for evaluating § 1331 jurisdiction is upon the assertion of a federal right—not the federal cause of action. In this case, Puerto Rico sought to collect a territorial tax debt.[105] Congress passed a statute requiring that the collection of this outstanding tax claim proceed by a suit at law as opposed to an attachment proceeding.[106] Puerto Rico began a suit in the Puerto Rican courts to collect the tax. The defendant, relying on the congressional creation of this cause of action, removed the suit to federal district court, contending that under the Holmes test the case arose under § 1331. The Court disagreed. Federal question jurisdiction, the Court held, may only be "invoked to vindicate a right or privilege claimed under a federal statute."[107] The Court went on to rule that statutory jurisdiction "may not be invoked where the right asserted is nonfederal, merely because the plaintiff's right to sue is derived from federal law."[108] Making the point more bluntly, the Court concluded that for jurisdictional purposes "[t]he federal nature of the right to be established is decisive—not the source of the authority to establish it."[109] This rule remains a valid part of the § 1331 fabric,

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102. *Id.* at 509.

103. *See also* Shulthis v. McDougal, 225 U.S. 561, 569–70 (1912) (holding that equitable quiet title actions, although a congressionally approved cause of action, lack statutory federal question jurisdiction when the right to the land in question is controlled by state law).

104. 288 U.S. 476, 483 (1933).

105. Puerto Rico is routinely treated as if it were a state for jurisdictional purposes. *See, e.g.*, 28 U.S.C. § 1332(e) (2000) ("The word 'States', as used in this section, includes . . . the Commonwealth of Puerto Rico."); Asociacion de Detallistas de Gasolina de P.R., Inc. v. Shell Chem. Yabucoa, Inc., 380 F. Supp. 2d 40, 43 (D.P.R. 2005) (finding no § 1331 jurisdiction because the plaintiff relied exclusively upon Puerto Rican law, which the court characterized as "state law"). Thus, the distinction between territorial law versus state law is not relevant for § 1331 purposes.

106. *Russell*, 288 U.S. at 483.

107. *Id.*

108. *Id.*

109. *Id.*; *see also* Joy v. City of Saint Louis, 201 U.S. 332, 341 (1906) ("The mere fact that the title of plaintiff comes from a patent or under an act of Congress does not show that a Federal question arises.").

although it is now eclipsed by the dominant rhetoric of the Holmes test.[110]

b. Frivolous Assertions to a Federal Statutory Right

The Court employs a like analysis in cases where the alleged federal right is so frivolous as to be non-colorable.[111] As with *Shoshone*, the colorable test is exceedingly difficult to fail, and the test is rarely used to dismiss a case.[112] A right is non-colorable under this doctrine only if it is purely procedural or it is wholly without merit, such as rights barred by previous Supreme Court holdings directly on point.[113] In *Deming v. Carlisle Packing Co.*,[114] for example, the parties, who were not completely diverse, went to trial in a Washington state court over a contract for salmon (i.e., they brought a state-law right coupled with a state-law cause of action). In a petition for removal to federal court, two of the three defendants claimed that the third defendant, who like the plaintiff was a Washington resident, was joined solely for the purpose of defeating diversity jurisdiction. The petition for removal was denied and, after losing on appeal, defendants sought United States Supreme Court review. The defendants argued "that a Federal question was involved in the

110. *See* Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 317 n.5 (2005); Jackson Transit Auth. v. Transit Union, 457 U.S. 15, 23–24 (1982) (holding that the federal courts lack § 1331 jurisdiction over claims under the Urban Mass Transportation Act because Congress instructed that these rights are to be determined by state law); Bay Shore Union Free Sch. Dist. v. Kain, 485 F.3d 730, 735 (2d Cir. 2007) (holding that the federal courts lacked § 1331 jurisdiction because the Individuals with Disabilities Education Act empowered plaintiff to sue but the rights at issue were entirely a matter of state law); City Nat'l Bank v. Edmisten, 681 F.2d 942, 945 (4th Cir. 1982) (holding that the National Bank Act "is not a sufficient basis for federal question jurisdiction simply because it incorporates state law" when the act makes usury, as defined by local state law, illegal and the non-diverse parties were only contesting the meaning of North Carolina's usury law); Standage Ventures, Inc. v. Arizona, 499 F.2d 248, 250 (9th Cir. 1974) (deeming no federal question to exist where "the real substance of the controversy . . . turns entirely upon disputed questions of law and fact relating to compliance with state law, and not at all upon the meaning or effect of the federal statute itself").

111. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 89 (1998) ("Dismissal for lack of subject matter jurisdiction because of the inadequacy of the federal claim is proper only when the claim is 'so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy.' "); Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 285 (1993); Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 666 (1974); Bell v. Hood, 327 U.S. 678, 682–83 (1946); Fair v. Kohler Die & Specialty Co., 228 U.S. 22, 25 (1913).

112. *See* Goosby v. Osser, 409 U.S. 512, 518 (1973) (discussing the difficulty of proving insubstantiality).

113. *See, e.g.*, *id.* ("A claim is insubstantial only if 'its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy.' ").

114. 226 U.S. 102, 105 (1912).

refusal to grant the petition for removal."[115] The Court disagreed. In fact, it held that the defendant's position was so contrary to well-settled and elementary doctrine that the federal question raised was "devoid of all merit" such that it failed to give rise to federal question jurisdiction.[116] This case arose in the context of the Supreme Court's appellate jurisdiction, but later Supreme Court opinions, although usually in dicta,[117] have interpreted *Deming* as a limit on § 1331.[118]

The lower courts do rely on this rule from time to time. For example, when a plaintiff attempts to ground § 1331 jurisdiction upon the assertion of a procedural right, the courts jurisdictionally dismiss the suit. Such is the case where a plaintiff attempts to use the All Writs Act,[119] a choice of law statute,[120] or a rule of procedure[121] to vest jurisdiction. These procedural bodies of law, while federal in origin,[122] do not create colorable rights because they do not impose substantive obligations upon the defendants (i.e., the obligations are inapplicable outside of the context of litigation).[123]

In reviewing these cases in which plaintiffs possess a federal cause of action yet fail to allege colorable federal rights, it is clear,

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115. *Id.*

116. *Id.*

117. Crowley Cutlery Co. v. United States, 849 F.2d 273, 276 (7th Cir. 1988) (stating that most invocations of the substantiality rule by the Court are in dicta).

118. *See supra* note 112.

119. Syngenta Crop Prot., Inc. v. Henson, 537 U.S. 28, 32, 34 (2002) (finding a removal statute "requires that a federal court have original jurisdiction over an action in order for it to be removed from a state court. The All Writs Act, alone or in combination with the existence of ancillary jurisdiction in a federal court, is not a substitute for that requirement.").

120. Rogers v. Platt, 814 F.2d 683, 689 (D.C. Cir. 1987) (holding that the Parental Kidnapping Prevention Act does not create colorable rights, but rather provides a choice of law rule, and as such the court lacks jurisdiction).

121. Palkow v. CSX Transp., Inc., 431 F.3d 543, 555 (6th Cir. 2005) ("Merely invoking the Federal Rules of Civil Procedure [60] is not sufficient grounds to establish federal question jurisdiction."); Milan Express, Inc. v. Averitt Express, Inc., 208 F.3d 975, 979 (11th Cir. 2000) (holding in regard to Rule 65.1 that a "federal rule cannot be the basis of original jurisdiction"); Cresswell v. Sullivan & Cromwell, 922 F.2d 60, 70 (2d Cir. 1990) ("The Rules do not provide an independent ground for subject matter jurisdiction over an action for which there is no other basis for jurisdiction."); Port Drum Co. v. Umphrey, 852 F.2d 148, 150 (5th Cir. 1988) (holding the court lacks jurisdiction to hear a suit directly under Rule 11).

122. In their efficacy as rules of decision, the Federal Rules of Civil Procedure have "the force of a federal statute." Sibbach v. Wilson & Co., 312 U.S. 1, 13 (1941).

123. *See, e.g.*, 28 U.S.C. § 2072(b) (1990) (stating that the rules of civil procedure "shall not abridge, enlarge or modify any substantive rights"); FED. R. CIV. P. 82 ("These rules do not extend or limit the jurisdiction of the district courts."); *cf.* United States v. Sherwood, 312 U.S. 584, 589–90 (1941) ("An authority conferred upon a court to make rules of procedure for the exercise of its jurisdiction is not an authority to enlarge that jurisdiction . . . .").

despite the numerous incantations of the Holmes test by the Court,[124] that the presence of a congressionally created cause of action is not the key factor in determining whether a claim will arise under § 1331. Rather, it is, as the *Russell & Co.* opinion states, the status of the federal right as colorable that determines whether the Court takes jurisdiction.[125]

2. Colorable Assertion of a Congressionally Created Right and the Congressionally Created Cause of Action

By focusing on whether the federal right asserted is colorable, the Court's treatment of cases with a congressionally created cause of action and a highly dubious claim to a federal right becomes less opaque. In such cases, the Court regularly takes jurisdiction.[126] A recent example can be found in the Court's decision in *Blessing v. Freestone.*[127] In this case, the plaintiffs brought a 42 U.S.C. § 1983 cause of action.[128] While § 1983 creates a statutory cause of action for the violation of federal rights by state officials, it does not create

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124. *See, e.g.*, Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 312 (2005) ("This provision for federal-question jurisdiction is invoked by and large by plaintiffs pleading a cause of action created by federal law . . . ."); Rasul v. Bush, 542 U.S. 466, 472 (2004) ("Invoking the court's jurisdiction under 28 U.S.C. §§ 1331 and 1350, among other statutory bases, they asserted causes of action under the Administrative Procedure Act . . . ."); Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 89 (1998) ("It is firmly established in our cases that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction . . . ."); City of Chicago v. Int'l Coll. of Surgeons, 522 U.S. 156, 163 (1997) ("It is long settled law that a cause of action arises under federal law only when the plaintiff's well-pleaded complaint raises issues of federal law." (internal quotation omitted)); Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 808 (1988) ("A district court's federal-question jurisdiction, we recently explained, extends over only those cases in which a well-pleaded complaint establishes . . . that federal law creates the cause of action . . . ." (internal quotations omitted)); Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 63 (1987) ("It is long settled law that a cause of action arises under federal law only when the plaintiff's well-pleaded complaint raises issues of federal law."); Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust for S. Cal., 463 U.S. 1, 27–28 (1983):

> Congress has given the lower federal courts jurisdiction to hear, originally or by removal from a state court, only those cases in which a well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law.

125. Puerto Rico v. Russell & Co., 288 U.S. 476, 483 (1933).

126. *See, e.g.*, Gonzaga Univ. v. Doe, 536 U.S. 273, 283 (2002) (holding plaintiff's 42 U.S.C. § 1983 action barred for lack of a violation of a statutory right without dismissing on jurisdictional grounds); Blessing v. Freestone, 520 U.S. 329, 341–42 (1997) (same); Suter v. Artist M., 503 U.S. 347, 363 (1992) (same). Of course citing these cases could be voluminous, these are just a sampling of recent § 1983 cases.

127. 520 U.S. 329, 340 (1997).

128. *Id.* at 333.

rights; rather, it merely empowers a class of persons to enforce federal rights located in the Constitution or other statutes.[129] Thus, § 1983 cases present instances where the existence of a congressionally created cause of action is not in question; only the validity of the federal right asserted is at issue. In *Blessing*, the plaintiffs alleged that the defendants violated their federal rights as codified in the substantial compliance provision of Title IV-D of the Social Security Act.[130] The Court held that the Social Security Act did not create federal rights.[131] It held that the substantial-compliance provision "was not intended to benefit individual children and custodial parents"; rather the provision established "a yardstick for the Secretary to measure the system wide performance of a State's Title IV-D program."[132] The plaintiffs' claims were barred, but the Court did not dismiss for lack of jurisdiction as it did in cases such as *Shoshone Mining* where the plaintiffs lacked even a colorable claim to a federal right. Rather, the Court remanded for the entry of summary judgment for the defendants.[133]

The plaintiffs' case in *Blessing*, which failed even to establish an extant federal right, vested under § 1331 because the allegation of a federal right was at least colorable. It was colorable because the plaintiffs alleged a substantive right that, while highly dubious, was not absolutely barred by precedent at the time the case was filed. Thus, this non-robust allegation of a federal right is all that is required to vest § 1331 when coupled with an assertion of a congressionally created cause of action. Again, the analysis here rests upon the validity of the right asserted, not the origin of the cause of action.

3. Colorable Claim to a Congressionally Created Right and Causes of Action Inferred from Federal Statutes

I turn next to cases where the plaintiff lacks an explicit congressionally created cause of action, but possesses a colorable claim to a congressionally created right. In an effort to overcome the lack of a cause of action in such cases, plaintiffs often move the Court to infer

129. Nevada v. Hicks, 533 U.S. 353, 403–04 (2001) (Stevens, J., concurring) ("Section 1983 creates no new substantive rights; it merely provides a federal cause of action for the violation of federal rights that are independently established either in the Federal Constitution or in federal statutory law." (citation omitted)).

130. *Blessing*, 520 U.S. at 332–33.

131. *Id.* at 343.

132. *Id.*

133. *Id.* at 338, 349.

a cause of action from the statute.[134] The federal courts regularly hold that in such situations the inference, or lack thereof, of a cause of action is not a jurisdictional question.[135] These cases again illustrate that in the realm of colorable congressionally created rights, subject matter jurisdiction rests primarily on the existence of the colorable claim to a congressionally created right, not on the existence of a federal cause of action as the Holmes test suggests. Consider the following two examples.

In *Securities Investor Protection Corp. v. Barbour*,[136] the Court held that although the Securities Investor Protection Act created rights for the shareholder plaintiffs, the plaintiffs lacked an explicit cause of action to enforce them against the federally chartered Securities Investor Protection Corporation. The plaintiffs sought an inferred cause of action. The Court held that even though

> Congress' primary purpose in enacting the [act] and creating the [Securities Investor Protection Corporation] was, of course, the protection of investors, . . . [i]t does not follow . . . that an implied right of action by investors who deem themselves to be in

134. The Court now claims to be on the wagon in regard to inferring causes of action from statutes. Alexander v. Sandoval, 532 U.S. 275, 287 (2001) ("Having sworn off the habit of venturing beyond Congress's intent, we will not accept respondents' invitation to have one last drink."). But the fact—if this is indeed the Court's long-term position, see, e.g., Jackson v. Birmingham Bd. of Educ., 544 U.S. 167 (2005) (inferring a retaliation cause of action under Title IX)—that the Court no longer infers causes of action from acts of Congress does not impact the jurisdictional importance of its previous holdings in this regard.

135. *See, e.g.*, Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 89 (1998) ("It is firmly established in our cases that the absence of a valid (as opposed to arguable) cause of action does not implicate subject matter jurisdiction, i.e., the courts' statutory or constitutional power to adjudicate the case."); Nw. Airlines, Inc. v. County of Kent, 510 U.S. 355, 365 (1994) ("The question whether a federal statute creates a claim for relief is not jurisdictional."); Air Courier Conference v. Postal Workers, 498 U.S. 517, 523 n.3 (1991) ("Whether a cause of action exists is not a question of jurisdiction, and may be assumed without being decided."); Thompson v. Thompson, 484 U.S. 174, 178 (1988) (affirming court of appeals' dismissal under FED. R. CIV. P. 12(b)(6) because there is no implied private right of action under the Parental Kidnapping Prevention Act); Burks v. Lasker, 441 U.S. 471, 476 n.5 (1979) (holding existence of implied cause of action under the Investment Company Act is not jurisdictional); Romero v. Int'l Terminal Operating Co., 358 U.S. 354, 359 (1959) ("As frequently happens where jurisdiction depends on subject matter, the question whether jurisdiction exists has been confused with the question whether the complaint states a cause of action."); Montana-Dakota Utils. Co. v. Nw. Pub. Serv. Co., 341 U.S. 246, 249 (1951) (holding existence of implied cause of action under the Federal Power Act is not jurisdictional); Utah Fuel Co. v. Nat'l Bituminous Coal Comm'n, 306 U.S. 56, 60 (1939) (holding existence of implied cause of action under the Bituminous Coal Act is not jurisdictional); Fair v. Kohler Die & Specialty Co., 228 U.S. 22, 25 (1913) ("[W]hen the plaintiff bases his cause of action upon an act of Congress jurisdiction cannot be defeated by a plea denying the merits of this claim.").

136. 421 U.S. 412, 420–21 (1975) (acknowledging that the Securities Investor Protection Act grants plaintiffs beneficial rights, but questioning whether they have a cause of action to force the agency to enforce them).

> need of the Act's protection, is either necessary to or indeed capable of furthering that purpose.[137]

In lieu of private actions, the Court noted a litany of oversight procedures that were designed to protect persons similarly situated to the plaintiffs.[138] As a result, the Court barred the suit, but not on jurisdictional grounds. Thus, despite its use of the Holmes test, *Barbour* demonstrates that the lack of a federal cause of action is not a jurisdictional defect, further undermining the usefulness of the test.

The Court takes the same jurisdictional stance on inferred causes of action when it holds that the statute in question does not create any federal rights. In *Pennhurst State School and Hospital v. Halderman*,[139] for instance, the Court held that the plaintiffs lacked rights under the Developmentally Disabled Assistance and Bill of Rights Act, and it would not infer a cause of action under the act. The Court held that the language of the act did not create rights, because "Congress made clear that the provisions of § 6010 were intended to be hortatory, not mandatory,"[140] barring the plaintiffs' action for lack of a right. Nevertheless, the Court did not hold that the plaintiffs failed to assert a colorable claim to a right under the statute for jurisdictional purposes. As a result, the Court never questioned jurisdiction here even though the claim lacks an independent, congressionally created cause of action and the plaintiffs' claim to a federal right is merely colorable. Again, the Court found § 1331 jurisdiction even though it held that the plaintiffs lacked a federal cause of action, contrary to the Holmes test.

To sum up so far, the Holmes test (i.e., the notion that § 1331 vests if federal law creates the cause of action) does not track the Court's actual practice well. As *Barbour* and *Halderman* illustrate, when a plaintiff presents a colorable claim to a congressionally created right, jurisdiction vests even in the absence of an explicit or inferred congressionally created cause of action. But, as *Shoshone* illustrates, when a plaintiff fails to present a colorable claim to a congressionally created right, the court will dismiss for lack of subject matter jurisdiction, even if Congress created a cause of action. To formulate a tentative standard, then, § 1331 vests when a plaintiff makes a colorable allegation of a congressionally created right that is coupled with an allegation of a congressionally created cause of action—be it explicitly created or sought by inference. The jurisdictional focus, as

137. *Id.* at 421.

138. *Id.* at 418–20.

139. 451 U.S. 1, 31–32 (1981).

140. *Id.* at 24.

the *Russell & Co.* Court held, is placed upon the existence of a colorable federal right, not the existence of a cause of action.

4. Colorable Rights Created by Treaties

The vesting of jurisdiction in suits to enforce treaty rights follows this same colorable right standard. Article VI, Clause Two, of the Constitution establishes that treaties are the supreme law of the land, and Article III of the Constitution, as well as § 1331, vests the federal courts with jurisdiction to hear suits arising out of the rights created by treaties. Despite these straightforward propositions, not every treaty to which the United States is a party creates federal rights enforceable in federal courts by private parties. Most international law, including treaties, is enforceable only by nation-states, not individuals.[141] As such, most claims in federal court involving a treaty would make the United States a party and therefore arise under special jurisdictional statutes that are reserved for suits in which the United States is a party, not under § 1331.[142] Nevertheless, some claims for the vindication of treaty rights do not involve the United States as a party and, thus, rely upon § 1331 for federal jurisdiction.

Of prime importance in this area is the Supreme Court's longstanding distinction between self-executing and non-self-executing treaties.[143] A self-executing treaty is one that creates domestically enforceable rights without the need for Congress to pass implementing legislation; a non-self-executing treaty, conversely, does not create domestically enforceable rights without additional legislative implementation.[144] Treaties coupled with implementing legislation do not pose a jurisdictional quandary, because the federal statute implementing the treaty obligations suffices for § 1331

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141. *See, e.g.*, DAVID J. BEDERMAN, INTERNATIONAL LAW FRAMEWORKS 50 (2001).

142. *See* 28 U.S.C. §§ 1345–34 (2000) (granting original jurisdiction to the district courts where the United States is a party).

143. Foster v. Neilson, 27 U.S. 253, 314 (1829), *overruled in part by* United States v. Percheman, 37 U.S. 51, 89 (1833); *see also* LOUIS HENKIN, FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 198–211 (2d ed. 1996) (providing a brief discussion of the self-executing doctrine); Carlos Manuel Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695, 722–23 (1995) (providing a critical review of the self-executing doctrine).

144. *See* Trans World Airlines v. Franklin Mint Corp., 466 U.S. 243, 244 (1984) (finding that because "the Convention is a self-executing treaty, no domestic legislation is required to give it the force of law in the United States"); Vazquez, *supra* note 143, at 696 (distinguishing self-executing treaties).

purposes just like any other federal statute.[145] But treaties that lack implementing legislation create a unique jurisdictional question.

When a treaty lacks implementing legislation, the federal courts treat the self-executing status as a jurisdictional issue. If the treaty is self-executing, then the court will take § 1331 jurisdiction over cases arising out of the rights created by the treaty.[146] Most treaties, however, are not self-executing.[147] When a court determines that a treaty is non-self-executing and that it lacks implementing legislation, it holds that the case does not arise under § 1331.[148]

When analyzed from a perspective that focuses upon the allegation of federal rights, this jurisprudence makes sense. A suit predicated upon a non-self-executing treaty that lacks accompanying implementing legislation does not arise under § 1331 because the treaty is not "given effect as law."[149] That is to say, in the absence of implementing legislation, the treaty simply creates no domestic legal obligations at all. Given that obligations created by treaty are equated with statutory rights,[150] it is not surprising to see that jurisdictional

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145. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 cmt. h (1987) (stating that "it is the implementing legislation, rather than the [treaty] itself, that is given effect as law").

146. *See, e.g.*, Potter v. Delta Air Lines, Inc., 98 F.3d 881, 883 (5th Cir. 1996) (taking jurisdiction based on § 1331); Dreyfus v. Von Finck, 534 F.2d 24, 30 (2d Cir. 1976) (same), *disavowed by* Filartiga v. Pena-Irala, 630 F.2d 876, 884 (2d Cir. 1980); Seth v. British Overseas Airways Corp., 329 F.2d 302, 305 (1st Cir. 1964) (same).

147. *See* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 808 (D.C. Cir. 1984) (Bork, J., concurring) ("Treaties of the United States . . . do not generally create rights that are privately enforceable in courts."); *Dreyfus*, 534 F.2d at 29 ("It is only when a treaty is self-executing, when it prescribes rules by which private rights may be determined, that it may be relied upon for the enforcement of such rights."); Canadian Transport Co. v. United States, 663 F.2d 1081, 1092 (D.C. Cir. 1980) (finding, in the absence of specific language in the treaty waiving the sovereign immunity of the United States, the treaty must be interpreted in accord with the rule that treaty violations are normally to be redressed outside the courtroom); Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1298 (3d Cir. 1979) (finding that, like private rights under law, a treaty may confer rights capable of enforcement, but indicating it is not the general rule); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 907 cmt. a (1987) ("International agreements, even those directly benefiting private persons, generally do not . . . provide for a private cause of action in domestic courts . . . .").

148. *See, e.g.*, Maugnie v. Compagnie Nationale Air France, 549 F.2d 1256, 1257 (9th Cir. 1977) (finding that "the Warsaw Convention does not create a cause of action, but merely creates a presumption of liability if the otherwise applicable substantive law provides a claim for relief based on the injury alleged"); Noel v. Linea Aeropostal Venezolana, 247 F.2d 677, 678 (2d Cir. 1957) (same), *abrogated by* Benjamins v. British European Airways, 572 F.3d 913, 919 (2d Cir. 1978).

149. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111(3).

150. *See* Breard v. Greene, 523 U.S. 371, 376 (1998) (per curiam) (stating that treaties are "on a full parity" with acts of Congress (citing Reid v. Covert, 354 U.S. 1, 18 (1957) (plurality opinion))); Whitney v. Robertson, 124 U.S. 190, 194 (1888) ("By the constitution, a treaty is placed on the same footing, and made of like obligation, with an act of legislation.").

issues for suits based upon treaty rights are governed by the same standard as statutory rights. In other words, if a plaintiff asserts a non-colorable claim to a treaty right where the treaty is non-self-executing and lacks implementing legislation, jurisdiction does not vest under § 1331.

Further, even if a treaty is self-executing, it must create substantive, as opposed to merely procedural, rights in order for jurisdiction to vest under § 1331. For example, a suit seeking to establish paternity and child support, quintessentially state-law claims, may not be brought under § 1331 by a foreign citizen against a U.S. citizen, even though the United States and the plaintiff's home nation entered into a treaty allowing each other's citizens access to their courts.[151] In *Buechold v. Ortiz*, the Ninth Circuit refused to hear such a suit on jurisdictional grounds because "the treaty gives access to the courts," a procedural right, "and does not create a [substantive] right to child support."[152] In sum, the case holds, contrary to the Holmes test, that a treaty-created cause of action (i.e., a federal cause of action) to enforce state-law rights will not arise under § 1331.

Again, the federal courts' treatment of cases predicated upon the vindication of treaty-created rights follows the jurisdictional treatment afforded statutory claims. Namely, § 1331 jurisdiction lies so long as a plaintiff makes a colorable claim to a congressionally created right (be it found in a statute or a treaty) and the plaintiff makes some allegation, either explicitly or by inference, of a congressionally created cause of action (even if the court ultimately fails to recognize the cause of action). These classes of cases, while requiring an allegation of a congressionally crafted cause of action, derive their primary jurisdictional heft from the status of the congressionally created right that a plaintiff asserts—not the origin of the cause of action that is the focus of the Holmes test.

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151. *See* Buechold v. Ortiz, 401 F.2d 371, 372 (9th Cir. 1968) (affirming the district court's dismissal based on jurisdictional grounds).

152. *Id.* at 372; *see also* Republic of Iraq v. First Nat. Bank of Chicago, 350 F.2d 645, 647 (7th Cir. 1965):

> In the complaint plaintiff alleges no specific basis of federal question jurisdiction, but it argued to the district court and here that a federal question is presented because of a number of treaties between the United States and the Republic of Iraq and because both nations are signatories of the United Nations Charter. Plaintiff points to no specific treaty provision, nor to any in the United Nations Charter, which would require a state court to recognize an Iraqi guardianship decree.

5. Congressionally Created Substantial Rights and State-Law Causes of Action

But § 1331 jurisdiction is not limited to cases where a plaintiff alleges a congressionally created cause of action. A plaintiff's case may arise under federal law even though the plaintiff explicitly relies upon state law to supply the cause of action. These cases fall into two categories. In the first category—*Smith*-style cases—federal question jurisdiction arises over suits alleging state-law causes of action containing embedded federal issues. In such cases, the primary jurisdictional factor remains the status of a plaintiff's asserted federal right, not the origin of the cause of action as the Holmes test directs. But in these cases, if the plaintiff fails to allege a congressionally created cause of action, the Court requires that the congressionally created right the plaintiff asserts be substantial, as compared to the more lenient colorable standard.[153] In the second category, complete preemption cases, the defendant upon removal asserts that the plaintiff's state-law claim is in reality a claim to recover under a federal statute. Because this is but an odd assertion of a congressionally created right and a congressionally created cause of action, the Court defaults to the requirement that the plaintiff's newly reconstituted federal complaint allege a colorable assertion of a statutory right in order to satisfy § 1331.

a. Smith-*Style Cases*

The Court recently revisited statutory *Smith*-style cases in *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*.[154] Here, the IRS seized real property belonging to Grable & Sons Metal Products, Inc., to satisfy a federal tax deficiency and sold the property to Darue Engineering & Manufacturing.[155] Five years later, Grable sued Darue in state court to quiet title, a state law

153. *See, e.g.*, Empire Healthchoice Assurance, Inc. v. McVeigh, 547 U.S. 677, 700 (2006) (distinguishing the present case from prior cases in which the question qualified as "substantial"); Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 313 (2005); Syngenta Crop Prot., Inc. v. Henson, 537 U.S. 28, 32 (2002) (holding that the removal statute "requires that a federal court have original jurisdiction over an action in order for it to be removed from a state court. The All Writs Act, alone or in combination with the existence of ancillary jurisdiction in a federal court, is not a substitute for that requirement."); Chicago v. Int'l Coll. of Surgeons, 522 U.S. 156, 164 (1997) (requiring substantial right); Merrell Dow Pharm., Inc. v. Thompson, 478 U.S. 804, 814 (1986) (same); Franchise Tax Bd. of Cal. v. Constr. Laborers' Vacation Trust for S. Cal., 463 U.S. 1, 28 (1983) (same); Gully v. First Nat'l Bank, 299 U.S. 109, 117–18 (1936) (same).

154. 545 U.S. at 308.

155. *Id.*

cause of action.[156] Grable asserted that Darue's title was invalid because the IRS had conveyed the seizure notice to Grable in violation of the Internal Revenue Code governing such actions.[157] Upon removal, the federal district court held, and the Supreme Court affirmed, that because the plaintiff's state-law cause of action depended necessarily on a claim of a substantial federal statutory right, jurisdiction under § 1331 was proper.[158]

In its opinion, the Court went to great pains to distinguish the "substantial" and "serious" claim to a congressionally created right, which was present in this case, from mere colorable assertions of a congressionally created right. Indeed, the Court held that having such a substantial and serious assertion of a federal right is necessary to establish § 1331 jurisdiction when a state-law cause of action is asserted.[159] The Court stressed that to be substantial the federal right at issue must be the central and predominant question in the case, which it was in *Grable & Sons*.[160] This need not be the case under the colorable right standard.[161] Further, the Court emphasized that the legal content of the statutory right invoked must be actually contested by the parties, which was the case in *Grable & Sons*.[162] Under the colorable right standard, however, neither party need contest the legal content of the right; they need only litigate factual issues related to the vindication of the federal right.[163] Finally, the Court considered whether taking jurisdiction in the case comported with congressional intent regarding the division of labor between the state and federal courts.[164] The Court did not undertake this analysis under the colorable right standard.[165] Thus, under *Grable & Sons*, when a

156. *Id.*

157. *Id.* Grable maintained that the IRS failed to comply with the notice procedures of 26 U.S.C. § 6335(a). *Id.*

158. *Id.* at 316.

159. *See id.* at 313 ("It has in fact become a constant refrain in such cases that federal jurisdiction demands not only a contested federal issue, but a substantial one, indicating a serious federal interest in claiming the advantages thought to be inherent in a federal forum.").

160. *Id.*

161. *See supra* Part II.C ("Often, [the court] holds that a merely 'colorable' federal claim will arise under § 1331.").

162. *Grable & Sons*, 545 U.S. at 313.

163. *See, e.g.*, Mishkin, *supra* note 5, at 169–74.

164. To be clear, the Court treats the substantial right factor as necessary, but not sufficient, for finding § 1331 jurisdiction. It also requires a finding that jurisdiction "is consistent with congressional judgment about the sound division of labor between state and federal courts governing the application of § 1331." *Grable & Sons*, 545 U.S. at 313–14.

165. *See supra* Part II.C ("That is to say, a right is colorable if it is not merely procedural and there is at least one interpretation of the federal law alleged, which is not absolutely barred, that would allow plaintiff to prevail—even if the Court refuses to adopt this interpretation.").

plaintiff asserts a state-law cause of action to enforce a congressionally created right, the Court will take § 1331 jurisdiction only if the plaintiff alleges a substantial and contested congressionally created right and taking jurisdiction in that particular case comports with congressional intent.[166]

The Court applied a similar analysis in the oft-cited *Gully v. First National Bank*[167] case but found jurisdiction lacking. In *Gully*, a national banking association conveyed all its assets to the First National Bank in Meridian in exchange for First National's promise to pay all the banking association's debts.[168] One of these debts was an overdue state tax.[169] First National failed to pay the tax and Mr. Gully, the Mississippi state tax collector, sued for breach of contract, a state-law cause of action.[170] First National sought removal to federal court on the theory that a federal statute allowed Mississippi to tax the national bank association's shares in the first instance, thus raising § 1331 jurisdiction under the *Smith* test.[171] The Supreme Court disagreed.[172] It held that although federal law granted Mississippi permission to tax, the tax collector's right to collect this particular debt was entirely a function of state law.[173] Which is to say, the plaintiff did not assert a substantial claim to a federal right. The Court explained that under the *Smith* test, mere federal permission does not create jurisdiction because the federal "right or immunity . . . must be an element, and an essential one, of the plaintiff's cause of action."[174] The Court went on to state that "a suit does not so arise [under § 1331] unless it really and substantially involves a dispute or controversy respecting the validity, construction, or effect of such a law, upon the determination of which the result depends."[175] Federal permission to tax, in effect, failed to create a federal right central to the litigation of which the parties were contesting the legal content.

While the Court's jurisdictional analysis in these cases is a rigorous investigation of the status of the federal right asserted (not

166. 545 U.S. at 308 ("Such federal jurisdiction demands not only a contested federal issue, but a substantial one. And the jurisdiction must be consistent with congressional judgment . . . .").

167. 299 U.S. 109, 114 (1936).

168. *Id.* at 111.

169. *Id.* at 112.

170. *Id.*

171. *Id.*

172. *Id.* at 114.

173. *Id.* at 115–16.

174. *Id.* at 112.

175. *Id.* at 114.

the origin of the cause of action as the Holmes test advises), it is the coupling of the asserted federal right with a state-law cause of action that triggers this more probing jurisdictional review. If the plaintiff in *Gully* had sought an inferred cause of action from a federal statute, the Court undoubtedly would have assumed jurisdiction. In *Gully*, the federal act that failed to create rights for the plaintiff was essentially the same as the federal statutory scheme in *Halderman*, which also failed to create rights for the *Halderman* plaintiff.[176] Unlike *Gully*, however, the Court in *Halderman* found § 1331 jurisdiction.[177] The key difference was that the plaintiff in *Halderman* did not rely upon a state-law cause of action but rather asserted, unsuccessfully, an inferred federal statutory cause of action.[178] As *Grable & Sons* and *Gully* illustrate, the Court requires more in terms of the viability of the federal right at issue when the plaintiff relies on state law to provide the cause of action.[179] Meeting this standard requires that the federal right asserted be substantial and that the vesting of jurisdiction in any particular case comport with congressional intent. Again, this scheme, which takes jurisdiction over state-law causes of action, simply does not comport with the Holmes test.

b. Complete Preemption

Claims finding their way into the federal courts by way of "complete preemption" receive a different jurisdictional treatment than *Smith*-style cases, even though, in both instances, a plaintiff initially alleges a state-law cause of action.[180] This again illustrates that the origin of the cause of action is not the predominant jurisdictional determinate under § 1331. Preemption doctrine falls

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176. 451 U.S. 1, 11 (1981).

177. *Id.* at 32.

178. *Id.* at 17.

179. *See Freer*, *supra* note 7, at 333–36 (discussing the Court's heightened substantiality requirements for *Smith*-style cases).

180. *See, e.g.*, Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 66 (1987) (treating issue of complete preemption as jurisdictional); Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 55–56 (1987) (same); Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust for S. Cal., 463 U.S. 1, 22–27 (1983) (same); Land v. CIGNA Healthcare of Fla., 339 F.3d 1286, 1294 (11th Cir. 2003) (defendant failed to show that claim was completely preempted by ERISA and thus removal was improper since plaintiff's well-pleaded complaint did not present federal question), *vacated*, 542 U.S. 933 (2004); Spielman v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 332 F.3d 116, 130 (2d Cir. 2003) (similar); *see also* Karen A. Jordan, *The Complete Preemption Dilemma: A Legal Process Perspective*, 31 WAKE FOREST L. REV. 927, 962–64 (1996) (providing a critical review of complete preemption doctrine); Mary P. Twitchell, *Characterizing Federal Claims: Preemption, Removal, and the Arising-Under Jurisdiction of the Federal Courts*, 54 GEO. WASH. L. REV. 812, 832–34 (1986) (same).

into two categories.[181] "Normal" preemption doctrine governs cases where the defendant presents a federal defense to the plaintiff's state-law claim.[182] Because the federal issue arises as a defense in a normal preemption case, § 1331 jurisdiction does not lie pursuant to the well-pleaded complaint rule.[183] "Complete" preemption cases, however, present a more complicated jurisdictional puzzle.

In a complete preemption case, a defendant is not merely presenting a federal defense to a state-law claim. Rather, a defendant asserts that Congress has so occupied this area of law that the plaintiff does not legally present a state-law claim, even though the complaint asserts one, and that the only possible interpretation of the plaintiff's claim is one based on federal law.[184] Complete preemption doctrine, then, is but a species of statutory interpretation; Congress can direct, either explicitly[185] or by inference,[186] when federal law provides the exclusive cause of action in particular fields.[187] Jurisdictionally speaking, if the court holds that the cause of action is completely preempted, then the case arises under § 1331 jurisdiction.[188] Moreover, because complete preemption is a function of statutory construction of congressional acts, the courts construe a plaintiff's reconstituted complaint as if it presents a claim to a colorable federal right.[189] That is to say, for jurisdictional purposes the

181. *Metro. Life Ins.*, 481 U.S. at 63.

182. *Id.*

183. *Id.* ("Federal pre-emption is ordinarily a federal defense to the plaintiff's suit. As a defense, it does not appear on the face of a well-pleaded complaint, and, therefore, does not authorize removal to federal court.").

184. *See, e.g.*, Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 8 (2003) ("When the federal statute completely pre-empts the state-law cause of action, a claim which comes within the scope of that cause of action, even if pleaded in terms of state law, is in reality based on federal law."); *Metro. Life Ins.*, 481 U.S. at 63–64 ("Congress may so completely pre-empt a particular area that any civil complaint raising this select group of claims is necessarily federal in character.").

185. *See Beneficial Nat'l Bank*, 539 U.S. at 6 (discussing 42 U.S.C. § 2014(hh) of the Price-Anderson Act).

186. *See id.* (holding that the National Banking Act preempts state-law usury claims against national banks); *Metro. Life Ins.*, 481 U.S. at 62 (holding that ERISA preempts state-law claims of improper allocation of benefits from employee benefit plans); Avco Corp. v. Machinists, 390 U.S. 557, 560 (1968) (holding that the LMRA preempts breach of contract claims regarding union agreements with employers).

187. *Beneficial Nat'l Bank*, 539 U.S. at 8.

188. *See id.* ("When the federal statute completely pre-empts the state-law cause of action, a claim which comes within the scope of that cause of action, even if pleaded in terms of state law, is in reality based on federal law.").

189. *Cf.* Twitchell, *supra* note 180, at 865 (describing a limited substantive analysis approach).

federal courts employ the same colorable right standard that they use when a plaintiff directly files a claim under a federal statute.[190]

In reviewing the cases in which a plaintiff invokes an act of Congress or a treaty as the foundation for § 1331 jurisdiction, the Court's overarching focus falls upon the concept of federal right, not federal cause of action as premised by the Holmes test. The following two rules restate the precedents from these cases. If a plaintiff alleges a congressionally created cause of action—by direct statutory command, by inference, or by complete preemption—then § 1331 jurisdiction lies if the plaintiff makes a colorable assertion of a congressionally created right.[191] If a plaintiff alleges a state-law-created cause of action, then § 1331 jurisdiction lies if the plaintiff makes a substantial claim to a congressionally created right, coupled with a determination that vesting jurisdiction in this particular case squares with congressional intent.[192]

B. Constitutionally Protected Rights

In considering jurisdiction over constitutional cases, the Court focuses, just as with the statutory cases previously discussed, on the right asserted—not on the cause of action as the Holmes test suggests. Indeed, the Court employs the same jurisdictional standards in the constitutional context as it does in statutory cases.[193] Namely, plaintiffs need only make a colorable claim to a constitutional right when they also allege either a statutory cause of action or a cause of action inferred directly from the Constitution.[194] Only in the case where the plaintiff explicitly relies upon a state-law cause of action must the plaintiff allege a substantial right.[195] As in the previous Section, I proceed by reviewing the Court's § 1331 cases in terms of the strength of the constitutional right and the type of cause of action asserted in three differing combinations.

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190. *See* Oakley, *supra* note 7, at 1845 ("But complete preemption is better understood as an integral part of the general principles governing the existence of ordinary Category-I jurisdiction over a claim that, in the final analysis, exists only as a creature of federal law.").

191. *Beneficial Nat'l Bank*, 539 U.S. at 8.

192. Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 313 (2005).

193. *Id.*

194. *Id.*

195. *Beneficial Nat'l Bank*, 539 U.S. at 8.

1. Non-Colorable Assertion of Constitutionally Protected Rights

I begin with non-colorable assertions of constitutionally protected rights. The Supreme Court in the oft-cited case, *Bell v. Hood*,[196] held that that "where the complaint . . . is so drawn as to seek recovery directly under the Constitution . . . the federal court . . . must entertain the suit."[197] That is to say, the high Court held that the federal courts have original jurisdiction to hear all claims arising directly under the Constitution.[198] Despite this strong language, a separate line of the Court's cases denies that subject matter jurisdiction always lies for suits arising directly under the Constitution.[199] I contend that such exceptions to the *Bell* rule are best understood as failures to assert colorable federal rights—not as failures to assert a federal cause of action.

Many of these cases, but not all, form the core of the political question doctrine, which has vexed scholars for years.[200] I do not intend to forward a theory of the political question doctrine here.[201] For the purposes of this jurisdictional discussion, one need only note that once the Court has held that the case raises a political question—whether this is because the plaintiff is not an intended beneficiary of the constitutional clause at issue or because it is beyond the competency of the judiciary to enforce the clause—the Court dismisses the case on jurisdictional grounds. Moreover, the courts jurisdictionally dismiss such cases even when Congress has provided a statutory cause of action, which again is contrary to a straightforward application of the Holmes test.

The Guarantee of a Republican Form of Government Clause is perhaps the most (in)famous source of law over which the Court has applied the political question doctrine.[202] The Constitution states that

196. 327 U.S. 678, 678 (1946).

197. *Id.* at 681–82.

198. *Id.*

199. *See, e.g.*, Nixon v. United States, 506 U.S. 224 (1993) (jurisdictionally dismissing claim for failing to allege a judicially cognizable right).

200. *See* Martin Redish, *Judicial Review and the Political Question*, 79 NW. U. L. REV. 1031, 1031 (1985) ("The doctrine has always proven to be an enigma to commentators. Not only have they disagreed about its wisdom and validity (which is to be expected), but they have also differed significantly over the doctrine's scope and rationale.").

201. *See id.* at 1032 (reviewing "prudential" theories and "textualist" theories of the doctrine); *see also* Jesse Choper, *The Political Question Doctrine: Suggested Criteria*, 54 DUKE L.J. 1457, 1469–71 (2005) (arguing that judicial ability to fashion coherent tests should be the guide for the application of the political question doctrine).

202. *See* Baker v. Carr, 369 U.S. 186, 218–29 (1962) (holding that plaintiff lacks a cause of action to sue directly under the guarantee of a republican form of government clause of the Constitution and that the Court lacks subject matter jurisdiction as a result); Pacific States Tel.

the "United States shall guarantee to every State in this Union a Republican Form of Government."[203] The seminal case interpreting this clause is *Luther v. Borden*,[204] which followed the Dorr rebellion of 1842 against the so-called charter government of Rhode Island. The Court declined to adjudicate whether the charter government violated the Republican Form of Government Clause.[205] Rather, it held that "the argument on the part of the plaintiff turned upon political rights and political questions," which were not properly answered in a federal court.[206]

Reinterpreted in terms of colorable rights, the question presented required the Court to determine the rights of the polity, as opposed to the individual rights of the litigants at bar. The Court's reluctance to define the polity's rights explains why the Court held that the judiciary lacked subject matter jurisdiction to resolve the case.[207] That is, the Court held that neither party to the litigation was obliged to guarantee a republican form of government to the plaintiff, and that even if that obligation was extant the Court could not impose a remedy.[208] Thus, the parties lacked both the obligation and enforceability elements of the contemporary conception of a right, rendering the alleged federal right non-colorable.[209]

& Tel. Co. v. Oregon, 223 U.S. 118, 140–51 (1912) (same); Luther v. Borden, 48 U.S. (7 How.) 1, 46–47 (1849) (declining to adjudicate a claim based on the guarantee of a republican form of government clause).

203. U.S. CONST., art. IV, § 4, cl. 1.

204. 48 U.S. (7 How.) 1 (1849).

205. *Id.* at 47.

206. *Id.* at 46.

207. *Id.* at 47.

208. *See id.* at 39, 42:

> In forming the constitutions of the different States, after the Declaration of Independence, and in the various changes and alterations which have since been made, the political department has always determined whether the proposed constitution or amendment was ratified or not by the people of the State, and the judicial power has followed its decision. . . .
>
> [T]he Constitution of the United States, as far as it has provided for an emergency of this kind, and authorized the general government to interfere in the domestic concerns of a State, has treated the subject as political in its nature, and placed the power in the hands of that department. . . . Under this article of the Constitution it rests with Congress to decide what government is the established one in a State. For as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not.

209. *See supra* Part II.C (providing the test for whether a right is colorable). Again, I make no claims as to why there is no claim to a colorable right here. Perhaps this lack of a right is a function of plaintiff not being an intended beneficiary of the clause at issue or perhaps it was

Of course, *Luther*, an 1849 case, predates the 1875 general grant of federal question jurisdiction. Indeed, the case was originally brought in a federal circuit court under diversity jurisdiction to enforce a trespass tort, and the analysis the Court employed is of a constitutional, not statutory, nature.[210] Nevertheless, the Court has often relied on this same political-question rationale to dismiss jurisdictionally suits arising under § 1331.[211] In *Nixon v. United States,*[212] for example, the Senate impeached a federal district court judge. In so doing, the Senate heard evidence in committee instead of in a meeting of the full Senate. The impeached judge brought suit alleging that this method of hearing evidence violated the Senate's constitutional duty to try impeachment cases.[213] The Court held this claim non-justiciable under the political question doctrine.[214] Because the plaintiff failed to allege judicially cognizable rights (i.e., the plaintiff presented a non-colorable claim to a constitutional right), the claim was jurisdictionally dismissed.[215]

Jurisdictional dismissals for failing to assert a colorable claim to a constitutionally protected right are not limited to instances of the political question doctrine. For example, the Court held that it lacks jurisdiction to hear claims directly under the Full Faith and Credit Clause of the Constitution.[216] This is the case, the Court ruled, because the Clause does not create substantive rights but rather provides a rule of decision (i.e., a procedural rule) for state and federal

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beyond the competency of the judiciary to enforce the clause. *See* Redish, *supra* note 200, at 1039–57 (critiquing competing justifications for the political question doctrine). Whatever the reason for finding plaintiff lacks a colorable right, the key issue for this Article is that such a ruling results in a jurisdictional dismissal.

210. *Luther*, 48 U.S. at 34.

211. *See, e.g.*, Nixon v. United States, 506 U.S. 224, 226 (1993) (holding claim non-justiciable under political question doctrine).

212. *Id.* at 224.

213. *Id.* at 288 (referring to U.S. CONST. art. I, § 3, cl. 6).

214. *Id.* at 226 ("[B]efore we reach the merits of such a claim, we must decide whether it is 'justiciable,' that is, whether it is a claim that may be resolved by the courts. We conclude that it is not.").

215. *Id.* at 237. Although the *Nixon* Court fails to state the grounds for the dismissal of the case, it is blackletter law that a dismissal under the political question doctrine is jurisdictional. *See, e.g.*, Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 215 (1974) ([T]he concept of justiciability, which expresses the jurisdictional limitations imposed upon federal courts by the 'case or controversy' requirement of Art. III, embodies . . . [the] political question doctrine[] . . . [Indeed] the presence of a political question suffices to prevent the power of the federal judiciary from being invoked by the complaining party.); Sierra Club v. Morton, 405 U.S. 727, 732 n.3 (1972) ("Congress may not confer jurisdiction on Art. III federal courts to . . . resolve political questions.").

216. Thompson v. Thompson, 484 U.S. 174, 182 (1988); Minnesota v. N. Secs. Co., 194 U.S. 48, 72 (1904).

courts.[217] The Court has taken a similar approach to claims brought to enforce the Supremacy Clause, even when Congress has provided a cause of action by statute.[218] In *Chapman v. Houston Welfare Rights Organization,*[219] a case where 42 U.S.C. § 1983 provided a statutory cause of action, the Court held that an assertion of a violation of the Supremacy Clause standing alone was insufficient to vest federal question jurisdiction. As the Court noted, the "Clause is not a source of any federal rights," but rather a choice of law rule for cases of conflict between state and federal law.[220] Again, these cases demonstrate that a plaintiff's lack of a colorable assertion of a constitutionally protected right, not the origin of the cause of action as the Holmes test states, forms the linchpin to the Court's jurisdictional ruling.

Finally, this focus upon the assertion of a colorable, constitutionally protected right is supported in instances in which the Court recognizes a right where it held previously that one did not exist. For example, in the old case of *Kentucky v. Dennison*,[221] the Court held that the Extradition Clause of Article IV, Section 2 of the Constitution did not vest state governors with a right to enforce judicially an extradition request against other states because the constitutional command installed merely a "moral duty" to do so.[222] As a result, the Court held that it lacked jurisdiction to hear such cases, given that the plaintiff did not present a colorable claim to a constitutionally protected right (i.e., the plaintiff was not legally owed a duty that the courts could enforce).[223] In 1987, the Court reversed itself.[224] It held that the extradition clause created a clear ministerial duty that it could enforce, and thus took jurisdiction.[225] Simply put,

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217. *Thompson*, 484 U.S. at 182–83:

> Rather, the Clause only prescribes a rule by which courts, Federal and state, are to be guided when a question arises in the progress of a pending suit as to the faith and credit to be given by the court to the public acts, records, and judicial proceedings of a State other than that in which the court is sitting.

218. Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 612–15 (1979) (holding no federal question jurisdiction under 28 U.S.C. § 1343(a)(3) for 42 U.S.C. § 1983 claim alleging violation of Supremacy Clause); Virgin v. County of San Luis Obispo, 201 F.3d 1141, 1144–45 (9th Cir. 2000) (holding that plaintiff does not have a cause of action directly under the Supremacy Clause of the Constitution and that the court lacks subject matter jurisdiction under 28 U.S.C. § 1331 as a result).

219. 441 U.S. at 600.

220. *Id.* at 613.

221. 65 U.S. (24 How.) 66 (1860), *overruled by* Puerto Rico v. Branstad, 483 U.S. 219, 230 (1987).

222. *Id.* at 108–09.

223. *Id.* at 110.

224. *Branstad*, 483 U.S. at 230.

225. *Id.* at 226–29.

the Court now holds that the Extradition Clause creates federal rights, thereby sustaining § 1331 jurisdiction.[226] Importantly, it was a change in the status of the right asserted, not a change in the origin of the cause of action that rendered the jurisdictional change.[227] The Holmes test does not account for changing jurisdictional treatments such as this.

In reviewing these cases in which plaintiffs fail to present a colorable claim to a constitutionally protected right, the following rule can be synthesized: the Court lacks jurisdiction over non-colorable claims to constitutional rights regardless of whether a cause of action is created by federal law, contrary to the basic tenets of the Holmes test.

2. Colorable Assertion of Constitutionally Protected Rights

Just as with statutory rights, jurisdiction over colorable claims to constitutionally protected rights depends primarily upon the status of the right asserted, not the origin of the cause of action. First, if a plaintiff presents a winning claim to a constitutionally protected right and asserts a congressionally created cause of action, the federal courts have § 1331 jurisdiction. Any 42 U.S.C. § 1983 claim that states a viable constitutional right fits this bill.[228] Of more interest here are suits that ultimately fail to establish a constitutionally protected right but in which the plaintiff manages to assert a colorable allegation to constitutional protection and asserts a congressionally created cause of action.[229]

Just such a fact pattern arose in *Duke Power Co. v. Carolina Environmental Study Group, Inc.*[230] Here plaintiffs challenged the constitutionality of the Price-Anderson Act, which caps liability for federally licensed nuclear power plant operators at $560 million should a nuclear accident occur.[231] The plaintiffs sought declaratory judgment,[232] thus employing a federal statutory cause of action.[233] The

226. *Id.*

227. *Id.*

228. *See, e.g.*, Wilkinson v. Austin, 545 U.S. 209, 229 (2005) (holding, in a § 1983 case, that the California penal system violated the Fourteenth Amendment by temporarily segregating prisoners by race).

229. *See, e.g.*, Town of Castle Rock, Colo. v. Gonzales, 545 U.S. 748, 757 (2005) (holding plaintiff failed to present a due process claim without questioning jurisdiction in a § 1983 case).

230. 438 U.S. 59, 93–94 (1978).

231. *Id.* at 84.

232. *Id.* at 67.

233. *See* 28 U.S.C. § 2201 (2000) (granting to the courts of the United States the authority to declare the rights of any interested party).

plaintiffs asserted that the substantive due process provisions of the Fifth Amendment ran contrary to this liability cap.[234] The Court disagreed, holding that the Fifth Amendment does not impart such a right to the plaintiffs.[235] Even though the Court held that there was no such right, it held this assertion of "constitutional rights is sufficiently . . . colorable to sustain jurisdiction under § 1331(a)."[236] The rule expressed here, which is the same rule applied to statutory claims, can be restated as: where Congress has created a cause of action, a plaintiff need only present a colorable claim to a constitutionally protected right for jurisdiction to lie under § 1331.

The Court takes the same approach to colorable claims of constitutionally protected rights when the cause of action is to be inferred directly from the Constitution. The cases are legion in which the Court holds that the lack of a cause of action to bring suit under the Constitution does not raise a jurisdictional defect.[237] The leading case in this regard is *Bell v. Hood*.[238] In *Bell*, the plaintiffs brought suit against several FBI agents for illegal arrest, false imprisonment, and unlawful searches and seizures.[239] The plaintiffs asserted that these acts violated the Fourth and Fifth Amendments and asked the court to infer a cause of action directly from the Constitution itself.[240] The Court assumed, based upon the complaint, that the plaintiffs alleged viable constitutional violations.[241] The only question for the Court was whether it had jurisdiction to infer a cause of action for monetary damages.[242] The Court held that it did, stating that "where the complaint . . . is so drawn as to seek recovery directly under the Constitution . . . the federal court . . . must entertain the suit" regardless of whether the cause of action is actually inferred at the

234. *Duke Power*, 438 U.S. at 69 n.12.

235. *Id.* at 83.

236. *Id.* at 72.

237. *See, e.g.*, *id.* at 71–72 (holding existence of implied cause of action directly under the Constitution is not a jurisdictional question); Mt. Healthy City Sch. Bd. of Educ. v. Doyle, 429 U.S. 274, 279 (1977) (holding existence of implied cause of action directly under the Constitution is not a jurisdictional question); Wheeldin v. Wheeler, 373 U.S. 647, 649 (1963) (same); Bell v. Hood, 327 U.S. 678, 682–83 (1946) (same); Peoples v. CCA Det. Ctrs., 422 F.3d 1090, 1096 (10th Cir. 2005) (holding plaintiff lacked a *Bivens* cause of action but reversing the district court's jurisdictional treatment of this defect), *rev'd in part*, 449 F.3d 1097 (10th Cir. 2006) (en banc) (reversing the substantive, but not the jurisdictional, opinion of the panel), *cert. denied*, 127 S. Ct. 664.

238. 327 U.S. at 682–83.

239. *Id.* at 679.

240. *Id.*

241. *Id.* at 683.

242. *Id.* at 684.

end of the day.[243] Indeed, it held that the taking of jurisdiction necessarily occurred prior to the question of whether to infer a cause of action.[244] This holding, which decouples jurisdiction from the cause of action, runs contrary to the Holmes test, which focuses the jurisdictional question upon the origin of the cause of action.[245] The Court then specifically reserved the question of whether to infer such a cause of action—thus it illustrated that the status of a cause of action was not the key jurisdictional factor so long as a colorable federal right has been alleged by the plaintiff.[246]

The Court takes the same tack when plaintiffs ask it to infer a cause of action directly from the Constitution even when the Court is unwilling to assume that the plaintiffs' constitutional rights were violated. In *Wheeldin v. Wheeler*,[247] for example, the plaintiff alleged that the chairman of the House Un-American Activities Committee signed a blank subpoena to appear before the committee and that an investigator employed by the committee filled in plaintiff's name in order to disgrace him in violation of the Fourth Amendment. The Court first noted that the plaintiff lacked a statutory cause of action.[248] The Court further held that the Fourth Amendment was not violated, and it would not infer a cause of action.[249] Nevertheless, citing *Bell*, the Court took jurisdiction over the claim on the ground that the plaintiff's unsuccessful assertion of a constitutional right was colorable.[250]

In sum, when a colorable constitutional right is asserted, the Court vests § 1331 jurisdiction under the colorable right standard. Under this standard, § 1331 jurisdiction lies if a plaintiff asserts a colorable claim to a constitutionally protected right, coupled with an allegation of a statutory or a constitutionally inferred cause of action. The Holmes test's emphasis on the origin of the cause of action fails to offer an explanatory thesis for these cases.

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243. *Id.* at 681–82.

244. *Id.* at 682 ("The reason for this is that the court must assume jurisdiction to decide whether the allegations state a cause of action on which the court can grant relief as well as to determine issues of fact arising in the controversy.").

245. *See supra* Part II.A (discussing the Holmes test).

246. *Bell*, 327 U.S. at 684.

247. 373 U.S. 647, 648 (1963).

248. *Id.* at 650.

249. *Id.* at 649.

250. *Id.*

3. Constitutionally Protected Rights and State Law Causes of Action

As with statutory rights, in *Smith*-type constitutional cases, the level of viability of a plaintiff's alleged constitutional right required by the court is heightened when the origin of the cause of action lies in state law. Here, the Court requires that the assertion of a constitutionally protected right be substantial as compared to the more common colorable standard.[251]

The leading case in this line is *Smith v. Kansas City Title & Trust Co.*[252] In *Smith*, a stockholder sued in federal court to enjoin his corporation from purchasing bonds issued pursuant to the Federal Farm Loan Act.[253] The plaintiff's theory of the case was that such a purchase constituted a breach of fiduciary duty, a state-law cause of action, because the corporation could only purchase bonds "authorized to be issued by a valid law" and that the Federal Farm Loan Act was unconstitutional.[254] Although the plaintiff pursued a state-law cause of action, the Court held that "where it appears from the bill or statement of the plaintiff that the right to relief depends upon the construction or application of the Constitution . . . , and that such federal claim is not merely colorable, . . . the District Court has jurisdiction under this provision."[255]

In so doing, the Court held that a plaintiff could avail himself of a federal forum on a state-law theory of recovery without being diverse from the defendant as long as the plaintiff's state cause of action necessarily required the court to determine the constitutionality of a federal act.[256] Reinterpreted as a function of rights and causes of action, the Court held that the plaintiff alleged a federal right (i.e., a clear, mandatory obligation that the courts can enforce) to be free of congressional regulation beyond its Commerce Clause authority.[257] Moreover, the plaintiff alleged a substantial right,

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251. *See, e.g.*, Smith v. Kansas City Title & Trust Co., 255 U.S. 180, 199 (1921) (requiring that the right be more than "merely colorable").

252. *Id.*; *see also Wheeldin*, 373 U.S. at 659–60 (Brennan, J., dissenting) (taking jurisdiction over a state law claim of abuse of process that involved "the body of federal law authorizing and defining the issuance of federal legislative process"); Ashwander v. TVA, 297 U.S. 288, 319–22 (1936) (taking jurisdiction over a state law fiduciary duty case that presented an embedded constitutional challenge to a corporate purchase of electricity from the TVA).

253. *Smith*, 255 U.S. at 195.

254. *Id.* at 198.

255. *Id.* at 199.

256. *See id.* at 199–201.

257. *Id.* at 200–01. There is some question here as to whether the plaintiff in *Smith* is asserting a right in the contemporary sense in which I employ the term in this Article. The plaintiff here contended that Congress violated the Commerce Clause of the Constitution by passing the Federal Farm Loan Act, which was "beyond the constitutional power of Congress."

because the parties were actually contesting the legal content of the right and the alleged right was the central issue in the case.[258]

In reviewing the cases in which a plaintiff claims a constitutionally protected right as the foundation for § 1331 jurisdiction, the Court's overarching focus is on the concept of right, contrary to the crux of the Holmes test. As with statutory actions, two standards apply. If a plaintiff alleges a federal cause of action, either by direct statutory command or by inference from the Constitution, then § 1331 jurisdiction lies as long as the plaintiff makes a colorable allegation to a constitutionally protected right. If a plaintiff alleges a state-law cause of action, then § 1331 jurisdiction lies only if the plaintiff makes a substantial allegation of a constitutionally protected right.

C. Federal Common Law Rights

Although the predominant scholarly view assumes that federal common law cases satisfy § 1331 under the Holmes test,[259] the Court's opinions demonstrate that, in fact, suits seeking to protect "pure" federal common law rights are governed by a different jurisdictional scheme than is used when a plaintiff asserts statutory or

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Id. at 195. In a sense, it is odd to see a plaintiff asserting a violation of the Commerce Clause by Congress as a violation of a right. Nevertheless, the federal courts will hear defenses to civil and criminal prosecutions that are grounded upon the right of the defendant not to be subjected to federal legislation that is beyond the scope of the Commerce Clause with regularity. *See, e.g.*, United States v. Morrison, 529 U.S. 598, 617 (2000) (upholding civil defendant's argument that the Violence Against Women Act's civil penalties provision was beyond the scope of Congress's Commerce Clause powers); United States v. Lopez, 514 U.S. 549, 567 (1995) (upholding criminal defendant's argument that the Gun-Free School Zones Act was beyond the scope of Congress's Commerce Clause powers). When employing the Commerce Clause as a defense, the defendant necessarily asserts that Congress owes the defendant a clear and mandatory duty and that the courts have the ability to afford relief (i.e., the defendant asserts a right grounded in the Commerce Clause). *See supra* Part II.B (discussing elements of a right). The oddity of a plaintiff, as opposed to a defendant, asserting these rights is, I contend, more a function of standing doctrine, which limits who can be a plaintiff in a case even if the wronged party is a right holder, than the capacity of the Commerce Clause to create rights. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992) (discussing standing doctrine). Given that the Court does not generally recognize taxpayer standing, *see* Hein v. Freedom from Religion Found., Inc., 127 S. Ct. 2553, 2559 (2007), it would seem that most potential Commerce Clause plaintiffs lack an injury-in-fact, which is necessary for constitutional standing. *See Lujan*, 504 U.S. at 561. The plaintiff in *Smith*, by contrast, due to the unusual set of facts lodging the Commerce Clause claim within a corporate fiduciary duty claim appears to be the exception to the general trend regarding standing.

258. *See Smith*, 255 U.S. at 199; *see also supra* Part II.C (discussing substantial rights).

259. *See supra* note 16 (outlining the standard academic view).

constitutional rights.[260] I begin by finding that in practice the Court makes a jurisdictional distinction between "statutory" federal common law cases, suits where the Court fashions federal common law pursuant to a statutory imperative to do so, and "pure" federal common law cases, suits where the Court creates federal common law with no statutory permission. The Court analyzes statutory federal common law cases within § 1331's ambit under the lenient colorable right standard. On the other hand, the federal courts require plaintiffs seeking to ground § 1331 jurisdiction on a pure federal common law claim to plead not only a substantial right but facts sufficient to justify the assertion of such a right (i.e., plaintiffs must assert a claim).[261]

There is much debate as to what actually constitutes federal common law.[262] While there are at least three views on the subject,[263] I will employ the most common view[264] in my discussion. Pursuant to

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260. *See* T.B. Harms Co. v. Eliscu 339 F.2d 823, 827 (2d Cir. 1964) (treating federal common law cases as a different category than either the Holmes or *Smith* tests for satisfying § 1331).

261. *See supra* Part II.B (defining "claim").

262. *See, e.g.*, Jay Tidmarsh & Brian J. Murray, *A Theory of Federal Common Law*, 100 NW. U. L. REV. 585, 590–94 (2006) (discussing three definitions of federal common law).

263. *Id.* The narrowest view finds that federal common law is merely a listing of those enclaves where the Court has employed the use of federal common law in the past. *Id.* On the broad side, federal common law is thought by some to include "any rule of federal law created by a court . . . when the substance of that rule is not clearly suggested by federal enactments—constitutional or congressional." Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 890 (1986) (emphasis omitted). This broad view would encompass many actions, such as inferring causes of actions from statutes or the Constitution, often not traditionally considered components of federal common law. Tidmarsh & Murray, *supra* note 262, at 591–94. Such a view of federal common law would play havoc with the reinterpretation of § 1331 doctrine I have presented here. Indeed, when taken to its logical conclusion, this broad view finds no meaningful distinction between federal common law and other judicial acts of interstitial lawmaking. *See* Louise Weinberg, *Federal Common Law*, 83 NW. U. L. REV. 805, 807 (1989); Peter Westen & Jeffrey S. Lehman, *Is There Life for* Erie *After the Death of Diversity*?, 78 MICH. L. REV. 311, 332 (1980):

> The difference between 'common law' and 'statutory interpretation' is a difference in emphasis rather than a difference in kind. The more definite and explicit the prevailing legislative policy, the more likely a court will describe its lawmaking as statutory interpretation; the less precise and less explicit the perceived legislative policy, the more likely a court will speak of common law. The distinction, however, is entirely one of degree.

Thus, at least for this jurisdictional project the expansive view is inappropriate because the Court does appear to differentiate between statutory/constitutional claims (i.e., those involving interpretation) and federal common law cases (i.e., those employing legislative authority). *Compare supra* Part III.A, *and* Part III.B, *with infra* Part III.C. Further, regardless of whether it makes sense, the courts continually assert that inferring a cause of action from a statute or the Constitution is different from creating federal common law. *See, e.g.*, Nw. Airlines, Inc. v. Transp. Workers Union of Am., 451 U.S. 77, 97 (1981) ("But the authority to construe a statute is fundamentally different from the authority to fashion a new rule or to provide a new remedy which Congress has decided not to adopt.").

264. Tidmarsh & Murray, *supra* note 262, at 591.

this standard view, federal common law denotes "federal rules of decision whose content cannot be traced by traditional methods of interpretation to federal statutory or constitutional commands."[265]

Importantly, federal common law cases can be divided into two categories.[266] I label the first category "statutory federal common law." In statutory federal common law suits, the federal courts are creating federal common law at Congress's statutory command.[267] Such is the case, for example, under the Labor Management Relations Act[268] and the Sherman Act.[269] The uniting theme for the second category of federal common law is the lack of a statutory directive to create common law.[270] I label this set of doctrines "pure federal common law." The importance of this distinction for the purposes of this discussion lies in the differing jurisdictional treatment the Court applies to statutory and pure federal common law cases. I begin with statutory federal common law suits.

1. Statutory Federal Common Law

Texas Industries v. Radcliff Materials[271] provides a strong example of the Court's jurisdictional treatment of statutory federal common law cases. In *Texas Industries*, the plaintiff brought a civil antitrust action alleging a conspiracy to set the price of concrete in the

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265. RICHARD H. FALLON, JR. ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 685 (5th ed. 2003).

266. Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640 (1981). Some might even argue for a third grouping. The Court, at times, labels the creation of substantive rules that are required to fill an interstice of a congressionally created cause of action as an act of making federal common law. *See, e.g.*, Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 97 (1991) ("Because the ICA is a federal statute, any common law rule necessary to effectuate a private cause of action under that statute is necessarily federal in character." (citing Burks v. Lasker, 441 U.S. 471, 476–77 (1979); Sola Elec. Co. v. Jefferson Elec. Co., 317 U.S. 173, 176 (1942))). I believe this is better classified as an act of statutory interpretation. In any event, because instances like *Kamen* necessarily involve a federal statute that creates a right and a cause of action, it is not surprising that these cases tend to follow the colorable right standard.

267. *Texas Indus.*, 451 U.S. at 642 ("Federal common law also may come into play when Congress has vested jurisdiction in the federal courts and empowered them to create governing rules of law.").

268. *See id.* at 642–43 (discussing the power vested in courts by the Labor Management Relations Act); Textile Workers Union of Am. v. Lincoln Mills of Ala., 353 U.S. 448, 451 (1957) (finding statutory authorization to "fashion a body of federal law for the enforcement of" collective bargaining agreements).

269. *See* Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 688 (1978) (finding that Congress intended courts to "give shape to the statute's broad mandate by drawing on common-law tradition").

270. *See Texas Indus.*, 451 U.S. at 640–41 (discussing federal common law absent explicit congressional authorization).

271. *Id.* at 640–43.

New Orleans area.[272] The defendant then filed a third-party complaint against alleged coconspirators in an effort to recover contribution for the payment of a judgment.[273] Although the text of the Sherman Act does not establish a right to contribution for antitrust defendants, the third-party plaintiff in *Texas Industries* requested that the Supreme Court create one as a matter of federal common law.[274] The Court held that Congress had, as a general matter, directed it to create federal common law emanating from the Sherman Act.[275] Nevertheless, the Court refused to create a contribution right,[276] affirming the district court's Rule 12(b)(6) dismissal.[277]

This approach is now familiar. The third-party plaintiff had a statutory basis, although attenuated,[278] for claiming a federal right—in this case a right to contribution.[279] The Court dismissed on the merits, as opposed to jurisdictionally, because the third-party plaintiff made a nonfrivolous allegation of a federal right.[280] Thus, the *Texas Industries* Court applied the colorable right standard in taking § 1331 jurisdiction in this statutory federal common law case. Indeed, the Court generally applies the colorable right standard, thereby taking § 1331 jurisdiction whenever it declines to fashion statutory federal common law rights.[281] The Court's practice in this area is readily summed up as follows: when hearing statutory federal common law claims, the federal courts take § 1331 jurisdiction pursuant to the colorable right standard.

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272. *Id.* at 632.

273. *Id.* at 633.

274. *Id.* at 640.

275. *Id.* at 640–41.

276. *Id.* at 646.

277. *Id.* at 633.

278. *See* Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 688 (1978):

> Congress, however, did not intend the text of the Sherman Act to delineate the full meaning of the statute or its application in concrete situations. The legislative history makes it perfectly clear that it expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition.

279. *Texas Indus.*, 451 U.S. at 639–40.

280. *Id.* at 647.

281. *See* Nw. Airlines, Inc. v. Transport Workers Union, 451 U.S. 77, 98 (1981) (holding that the judiciary was not authorized to create a right of contribution for an employer that was liable for discriminating against employees in violation of the Equal Pay Act and Title VII of the Civil Rights Act); *see also* Travelers Cas. & Sur. Co. of Am. v. IADA Servs., Inc., 497 F.3d 862, 867–68 (8th Cir. 2007) (taking § 1331 jurisdiction under a complete preemption theory, dismissing on the merits, and holding no federal common law right to contribution exists under ERISA); Coker v. Trans World Airlines, Inc., 165 F.3d 579, 584–86 (7th Cir. 1999) (taking § 1331 jurisdiction under a complete preemption theory, dismissing on the merits, and holding no federal common law right to promissory estoppel exists under ERISA).

2. Pure Federal Common Law

Pure federal common law claims, suits in which the courts lack a statutory directive to create common law, can arise under § 1331 as well.[282] For example, the rights and obligations of the United States, which are governed by federal common law, can apply in cases in which the United States is not a party, and thus arise under § 1331.[283] Interstate controversies, which are governed by federal common law, can arise in a suit that does not feature two states litigating directly against each other and thus arise under § 1331.[284] Finally, plaintiffs may seek to enforce a right created by the federal common law of

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282. *See, e.g.*, Illinois v. Milwaukee, 406 U.S. 91, 99–100 (1972) (concluding that "§ 1331 jurisdiction will support claims founded upon federal common law"). Pure federal common law cases fall roughly into six categories. Tidmarsh & Murray, *supra* note 262, at 594. These categories are: (1) cases affecting the rights and obligations of the United States, *see, e.g.*, Clearfield Trust Co. v. United States, 318 U.S. 363, 366 (1943) (involving "[t]he rights and duties of the United States on commercial paper which it issues"); (2) cases involving interstate controversies, *see, e.g.*, Washington v. Oregon, 297 U.S. 517, 518–19 (1936) (involving Oregon's diversion of the Walla Walla River to the alleged detriment of the residents of Washington); (3) cases that call upon the court to make substantive judgments regarding international relations, *see, e.g.*, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 401 (1964) (involving contract for the purchase of Cuban sugar between American and newly nationalized Cuban companies and the act of state doctrine); (4) cases arising in admiralty, *see, e.g.*, Am. Dredging Co. v. Miller, 510 U.S. 443, 445 (1994) (involving personal injury action brought by seaman injured on the job); (5) cases creating federal defenses to state-law claims, *see, e.g.*, Boyle v. United Techs. Corp., 487 U.S. 500, 502 (1988) (creating a federal contractor defense for state-law design defect claims brought against munitions manufactures); and (6) cases where the *Erie* doctrine requires the adoption of a federal rule of decision, *see, e.g.*, Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 499 (2001) (involving preclusive effect of federal dismissal of state-law claims). Many of these groupings are inapposite to this discussion as Congress granted separate jurisdictional authority to hear such claims. For example, cases affecting the rights and obligations of the United States typically feature the United States as a party, which take jurisdiction under 28 U.S.C. §§ 1345–47, 1491 (2000). Interstate controversies, which typically feature two or more states suing each other, arise under the Supreme Court's exclusive and original jurisdiction pursuant to § 1251(a). Most admiralty cases arise under § 1333. Federal defenses to state law causes of action, because the federal issue is not in conformity with the well-pleaded complaint rule, do not arise under § 1331. *See* Lumen N. Mulligan, *Why* Bivens *Won't Die: The Legacy of* Peoples v. CCA Detention Centers, 83 DENV. U. L. REV. 685, 703–09 (2006) (discussing federal contractor defense, and the well-pleaded complaint rule, as well as the possibility that such cases could come into federal court, absent diversity, under 28 U.S.C. § 1442(a)(1)). Finally, the creation of a substantive rule of decision under the *Erie* doctrine, by definition, must arise under diversity jurisdiction. *See* 28 U.S.C. § 1332.

283. *See, e.g.*, Empire Healthchoice Assurance, Inc. v. McVeigh, 547 U.S. 677, 682 (2006) (involving the proper forum for reimbursement claims when injured federal employee recovers medical expenses, paid by insurer, from a third party).

284. *See, e.g.*, *Milwaukee*, 406 U.S. at 93 (involving action brought by the state of Illinois against four Wisconsin cities and two sewerage commissions).

foreign relations and use § 1331 as the basis for federal jurisdiction.[285] Because my interest in these cases is jurisdictional, not substantive, the discussion that follows will focus first upon pure federal common law claims that seek the creation of a federal cause of action along with the federal right and second upon pure federal common law claims that employ a state-law cause of action along with the alleged federal common law right. I contend that the Holmes test fails to capture the Court's practice in either of these categories.

a. Pure Federal Common Law Rights and Federal Causes of Action

Many pure federal common law cases call upon the federal court to fashion both a federal right and a federal cause of action. Given that the plaintiff in such cases is asserting a federal cause of action, one might suspect that jurisdiction would easily lie under the Holmes test.[286] Or one might also suspect that jurisdiction would vest upon the assertion of a colorable federal common law right, just as in the statutory federal common law suits reviewed above. The Court, however, uses a different jurisdictional analysis for pure federal common law claims that are coupled with an allegation of a federal cause of action.

The Court's opinion in *Empire Healthchoice Assurance, Inc. v. McVeigh*[287] is illustrative of this unique jurisdictional standard. In this case, the Court dismissed a putative pure federal common law claim for lack of subject matter jurisdiction.[288] The plaintiff, a private administrator of a health insurance plan for federal employees, sued an insured's estate for reimbursement of benefits paid after the insured's estate won a state-law tort suit.[289] The insurer argued that federal common law should govern its claim and thereby secure § 1331 jurisdiction. The Court disagreed and refused to fashion a federal common law rule.[290] In so doing, the Court reaffirmed its long-held rule that it will create pure federal common law only when the issue at hand is uniquely federal and the application of state law would create a significant conflict with an identifiable federal policy or

285. *Cf.* Dole Food Co. v. Patrickson, 538 U.S. 468, 471 (2003) (presenting defendant corporation's argument for removal to federal court based on the proposition that "the federal common law of foreign relations provided federal-question jurisdiction under § 1331").

286. *See, e.g.*, Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 850–51 (1985) (invoking the Holmes test in a federal common law of Indian relations case).

287. 547 U.S. at 681.

288. *Id.* at 692–93, 701.

289. *Id.* at 682.

290. *Id.* at 692–94.

interest.[291] Despite the allegations in the complaint that these two elements were met, the Court held that the plaintiff's failure to meet this test with a "showing" that these two elements were met created a jurisdictional defect.[292]

This restrictive jurisdictional dismissal is stunning in many respects. To start, the opinion does not comport with the Holmes test. The Holmes test focuses solely on the allegation of a federal cause of action.[293] The plaintiff here nonfrivolously alleged a federal cause of action, which should be sufficient to satisfy the Holmes test.[294] Yet the Court declined to take § 1331 jurisdiction.[295] Focusing on the Holmes test as the default jurisdictional test simply fails to capture the Court's actual practice in pure federal common law cases such as these.

The *McVeigh* Court, moreover, required much more of the plaintiff than the assertion of a colorable or substantial federal right in order to take jurisdiction. It held that jurisdiction would not lie unless the plaintiff made *an actual showing*, as opposed to a nonfrivolous assertion, that unique federal concerns were at issue and the application of state law would constitute a significant conflict with federal policy.[296] This holding is quite extraordinary as it runs directly contrary to the blackletter rule that "[j]urisdiction . . . is not defeated . . . by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover."[297] Neither the colorable right standard[298] nor the substantial right standard[299] requires plaintiffs to make an actual showing that the federal right will vest in order to ground § 1331 jurisdiction.

Indeed, if either standard had been applied to the *McVeigh* plaintiff's claim to a federal common law right, § 1331 jurisdiction

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291. *Id.* at 692–93.

292. *Id.* at 688 (reviewing the lower court's decision, and noting that "federal jurisdiction exists over this dispute only if federal common law governs Empire's claims . . . courts may create federal common law only when the operation of state law would (1) significant[ly] conflict with (2) uniquely federal interest[s]" (internal quotations and citations omitted)).

293. *See supra* Part II.A.

294. *Id.*

295. *McVeigh*, 547 U.S. at 701.

296. *Id.* at 693 ("Unless and until that showing is made, there is no cause to displace state law, much less to lodge this case in federal court.").

297. Bell v. Hood, 327 U.S. 678, 682 (1946).

298. *See, e.g.*, Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 72 (1978) (finding that, although there were no such constitutional rights as alleged by the plaintiff, a claim to such "constitutional rights is sufficiently . . . colorable to sustain jurisdiction under § 1331(a)").

299. *See, e.g.*, Smith v. Kansas City Title & Trust Co., 255 U.S. 180, 213 (1921) (presenting case where plaintiff loses his constitutional challenge).

would have vested. The insurance company's assertion of a federal common law right was colorable because there was at least one interpretation of the federal law alleged, which was not absolutely barred, that would have allowed plaintiff to prevail (viz., the creation of a federal common law right to reimbursement which had up to this point not been barred).[300] Indeed, the assertion was far from frivolous because a strong argument was made, one that convinced four members of the Court, that federal common law should have controlled the case.[301] The assertion of a federal common law right in this instance appears to satisfy the substantial standard as well. The claim to a federal common law right was certainly a serious contention;[302] it was the central issue in the case and the parties were contesting the legal content of the right.[303]

The Court, instead of relying upon the plaintiff's allegation of a substantial federal right to vest jurisdiction, required the plaintiff to make a showing that the operation of state law would significantly conflict with uniquely federal interests.[304] In fact, the court's holding

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300. *See supra* Part II.C (discussing colorable rights).

301. *See McVeigh*, 547 U.S. at 706 (Breyer, J., dissenting, joined by Kennedy, Souter & Alito, JJ.) ("It seems clear to me that the petitioner's claim arises under federal common law. The dispute concerns the application of terms in a federal contract. This Court has consistently held that 'obligations to and rights of the United States under its contracts are governed exclusively by federal law.' " (quoting Boyle v. United Techs. Corp., 487 U.S. 500, 504 (1988))); Empire Healthchoice Assurance, Inc. v. McVeigh, 396 F.3d 136, 150 (2d Cir. 2005) (Sack, J., concurring):

> Empire has made a substantial showing that the *first* part of the *Boyle* test has been met because this case implicates 'uniquely federal interests,' in providing uniform healthcare coverage for federal employees and in decreasing the administrative costs associated with such insurance. It may well be that, as in *Boyle*, 'the interests of the United States will be directly affected,' by the outcome of this litigation and of litigation like it.

(citations omitted), *aff'd*, 547 U.S. 677 (2006); *Empire*, 396 F.3d at 151 (Raggi, J., dissenting):

> The court today rules that this dispute cannot be heard in federal court for lack of subject matter jurisdiction. Specifically, it rejects Empire's argument that the case arises under federal common law, concluding that Empire fails to satisfy the 'significant conflict' prong of the test established in *Boyle v. United Technologies*. I respectfully disagree.

(citations omitted).

302. *Empire*, 396 F.3d at 155 (Raggi, J., dissenting) (concluding that "federal common law does govern the parties' dispute in this case").

303. *See supra* Part II.C (discussing elements of a substantial right). Whether taking jurisdiction would have comported with congressional intent, the third element of the substantial assertion test, is more difficult to determine here. But there is certainly an argument to be had. The insurance company plaintiff was the administrator of a federal employee health insurance plan. Thus, any reimbursement it received would have indirectly benefited the government by reducing premiums. Given the unique relationship here between the plaintiff and the federal government there is at least an argument that the courts should assume congressional intent to take jurisdiction here.

304. *McVeigh*, 547 U.S. at 692–93.

that the plaintiff failed to make a showing of a right, as opposed to an inability to assert a colorable or substantial right, normally would only be grounds for a successful Rule 12(b)(6) motion, not a Rule 12(b)(1) motion.[305] The *McVeigh* Court's jurisdictional holding thus is quite restrictive of claims to pure federal common law rights when coupled with an assertion of a federal cause of action. Further, *McVeigh*'s restrictive jurisdictional approach is not an isolated one. Several courts of appeals have applied this approach to federal interest common law cases[306] and federal common law of interstate controversies cases.[307]

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305. *See* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 89 (1998) ("It is firmly established in our cases that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the courts' statutory or constitutional *power* to adjudicate the case."); Burks v. Lasker, 441 U.S. 471, 476 n.5 (1979) ("The question whether a cause of action exists is not a question of jurisdiction, and therefore may be assumed without being decided."); Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 71–72 (1978) ("[I]t is enough for present purposes that the claimed cause of action to vindicate appellees' constitutional rights is sufficiently substantial and colorable to sustain jurisdiction under § 1331(a)." (citation omitted)); Montana-Dakota Utils. Co. v. Nw. Pub. Serv. Co., 341 U.S. 246, 249 (1951) (finding "the question whether jurisdiction exists has been confused with the question whether the complaint states a cause of action"); The Fair v. Kohler Die & Specialty Co., 228 U.S. 22, 25 (1913) ("[W]hen the plaintiff bases his cause of action upon an act of Congress jurisdiction cannot be defeated by a plea denying the merits of this claim."); *see also* Baker v. Carr, 369 U.S. 186, 198–200 (1962) (discussing the fundamental difference between a dismissal on the merits and a jurisdictional dismissal); Ehm v. Nat'l R.R. Passenger Corp., 732 F.2d 1250, 1257 (5th Cir. 1984):

> A dismissal under both rule 12(b)(1) and 12(b)(6) has a "fatal inconsistency" and cannot stand. "Federal jurisdiction is not so ambidextrous as to permit a district court to dismiss a suit for want of jurisdiction with one hand and to decide the merits with the other. A federal district court concluding lack of jurisdiction should apply its brakes, cease and desist the proceedings, and shun advisory opinions. To do otherwise would be in defiance of its jurisdictional fealty."

(internal citation omitted); Johnsrud v. Carter, 620 F.2d 29, 32–33 (3d Cir. 1980) (holding that dismissal on jurisdictional grounds and for failure to state a claim are analytically distinct, implicating different legal principles and different burdens of proof); John Birch Soc'y v. Nat'l Broad. Co., 377 F.2d 194, 197 n.3 (2d Cir. 1967) (affirming only on FED R. CIV. P. 12(b)(1) grounds when the district court dismissed the case on the grounds of a failure to state a claim and lack of subject matter jurisdiction because "[t]he dismissal of these actions on jurisdictional grounds should not be construed to imply affirmance of the substantive grounds for dismissal adopted by the District Court"); *cf.* Valentin v. Hosp. Bella Vista, 254 F.3d 358, 364 (1st Cir. 2001) ("It is pellucid that a trial court's approach to a Rule 12(b)(1) motion which asserts a factual challenge is quite different from its approach to a motion for summary judgment." (citing Ohio Nat'l Life Ins. Co. v. United States, 922 F.2d 320, 324–25 (6th Cir. 1990); Kamen v. AT&T Co., 791 F.2d 1006, 1011 (2d Cir. 1986))).

306. *See, e.g.*, Virgin v. County of San Luis Obispo, 201 F.3d 1141, 1144 (9th Cir. 2000) (holding that plaintiff does not have a cause of action under federal common law of navigable waters and that court lacks subject matter jurisdiction as a result); Frank v. Bear Stearns & Co., 128 F.3d 919, 923–24 (5th Cir. 1997) (jurisdictionally dismissing federal common law breach of contract claim because no such federal right exists); City of Huntsville v. City of Madison, 24

The key to understanding the *McVeigh* line of federal common law cases as contrasted with the *Texas Industrie*s line of statutory federal common law cases, I contend, is that in the latter instances—where the Court has applied the more lenient colorable right standard—the Court had a statutory directive to begin its common-law-making endeavor.[308] In pure federal common law cases, such as *McVeigh*, where there is not a federal statute directing the courts to create common law, the federal courts tend to follow the restrictive *McVeigh* approach to jurisdiction, requiring the plaintiff to make an actual showing of a federal common law right in order to sustain jurisdiction.[309] These weaker indicia of congressional intent in pure federal common law cases, as I will expound upon in Part IV, justify the imposition of a more restrictive jurisdictional test.

b. Pure Federal Common Law and State-Law Causes of Action

Pure federal common law rights may also arise in a *Smith*-style setting where state law provides the cause of action.[310] For instance, federal common law of foreign relations suits often arise in this

F.3d 169, 172 n.3 (11th Cir. 1994) (affirming jurisdictional dismissal because the court failed to recognize a federal common law right regarding contractual rights of third party beneficiaries).

307. *See* United States v. City of Las Cruces, 289 F.3d 1170, 1186 (10th Cir. 2002) (affirming jurisdictional dismissal because federal common law of interstate controversies did not govern); Norfolk S. Ry. Co. v. Energy Dev. Corp., 312 F. Supp. 2d 833, 836–38 (S.D. W. Va. 2004) (dismissing suit jurisdictionally for failing to make a showing that the federal common law of nuisance would apply); California v. Gen. Motors Corp., 2007 WL 2726871, at *16 (N.D. Cal. Sept. 17, 2007) (holding that assertion of a federal common law right to nuisance not sufficient to vest § 1331 jurisdiction). *But see* New York v. DeLyser, 759 F. Supp. 982, 986–87 (W.D.N.Y. 1991) (dismissing federal common law of nuisance on FED. R. CIV. P. 12(b)(6) grounds). There is little case law on point that is of use to my project. The only cases that would be of use to this project are those where: (1) the plaintiff's only claim to federal jurisdiction lies with § 1331; (2) the only foundation for § 1331 jurisdiction lies with an assertion of federal common law of interstate controversies; and (3) the court dismisses the action. The only Supreme Court case to match this fact pattern is *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981). The Court in *Milwaukee* held that the Federal Water Pollution Act Amendments of 1972 displaced federal common law, which was the sole asserted ground for jurisdiction. *Id.* at 317. Frustratingly, after holding that the federal common law was displaced, the Court remanded without directing a procedural posture. *Id.* at 332. The Seventh Circuit on remand held, inter alia, that while federal common law no longer grounded the claims, the claims could proceed (if appropriately pleaded) under the Federal Water Pollution Act, thereby preserving § 1331 jurisdiction. Illinois v. City of Milwaukee, 731 F.2d 403, 414 (7th Cir. 1984). Thus, no answer to my particular question is forthcoming from the *Milwaukee* case. Furthermore, the courts of appeals are not awash in these cases. Thus, data set for this particular claim is especially small, and thus my conclusions should be appropriately limited by the small set of data that supports them.

308. Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S.630, 639–40 (1981).

309. *See supra* notes 306–07.

310. *See, e.g.*, Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 110 (1938) (applying federal common law of interstate controversies).

procedural posture.[311] Given the allegation of a state-law cause of action, one might expect the federal courts to apply the substantial-right standard as the jurisdictional test in these federal common law cases in order to create symmetry with suits bringing statutory and constitutional rights coupled with state-law causes of action.[312] Contrary to this expectation, the federal courts require the more rigorous assertion of a substantial right and the presentation of sufficient factual allegations in order to take § 1331 jurisdiction.

As in *McVeigh*, when the federal courts do not find a showing of a pure federal common law right that is coupled with a state-law cause of action, they dismiss on jurisdictional grounds.[313] In issuing these jurisdictional dismissals, the courts frequently assert, in line with *Smith*-style cases involving statutory and constitutional claims, that jurisdiction requires the presentation of a substantial federal right.[314] Nevertheless, these courts use the term "substantial" differently than it is used when plaintiffs bring statutory and constitutional claims. Recall that the term substantial, as used in the constitutional and statutory context, means that the right at issue is

311. *See, e.g.*, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 439 (1964); Republic of Venezuela v. Philip Morris, Inc., 287 F.3d 192, 199 (D.C. Cir. 2002); Patrickson v. Dole Food Co., 251 F.3d 795, 799–805 (9th Cir. 2001); Pacheco de Perez v. AT&T Co., 139 F.3d 1368, 1377–78 (11th Cir. 1998); Marathon Oil Co. v. Ruhrgas, A.G., 115 F.3d 315, 320 (5th Cir. 1997), *vacated on other grounds*, 145 F.3d 211 (5th Cir. 1998) (en banc), *rev'd and remanded on other grounds*, 526 U.S. 574 (1999); Torres v. S. Peru Copper Corp., 113 F.3d 540, 542–43 (5th Cir. 1997); Republic of Philippines v. Marcos, 806 F.2d 344, 353–54 (2d Cir. 1986); *In re* World War II Era Japanese Forced Labor Litig., 114 F. Supp. 2d 939, 942–44 (N.D. Cal. 2000); Sequihua v. Texaco, Inc., 847 F. Supp. 61 (S.D. Tex. 1994); Kern v. Jeppesen Sanderson, Inc., 867 F. Supp. 525, 531–32 (S.D. Tex. 1994); Grynberg Prod. Corp. v. British Gas, P.L.C., 817 F. Supp. 1338, 1355–57 (E.D. Tex. 1993). Such claims can also arise as a defense to a state law claim. *See, e.g.*, Zschernig v. Miller, 389 U.S. 429, 441 (1968) (taking jurisdiction on certiorari from the Oregon Supreme Court regarding federal common law of foreign relations as a defense and holding an Oregon probate law void, even in the absence of federal legislative or executive action, because it may adversely affect the power of the federal government to conduct foreign affairs); Aquafaith Shipping, Ltd. v. Jarillas, 963 F.2d 806, 808 (5th Cir. 1992) (holding federal common law of foreign relations raised as a defense insufficient for a finding of federal question jurisdiction). In some rare instances customary international common law, which is a species of federal common law of foreign relations, creates both a right and a cause of action. *See* The Paquete Habana, 175 U.S. 677, 714 (1900) (holding plaintiffs could recover under international common law the value of their fishing ships seized by the U.S. Navy during a time of war).

312. *See supra* Parts III.A.5.a, III.B.3.

313. *See, e.g.*, *Venezuela*, 287 F.3d at 199 (deciding in the context of seeking a writ of mandamus to reverse district court's jurisdictional remand); *Patrickson*, 251 F.3d at 798 (deciding in the context of defendant's request for removal to federal court); *Pacheco de Perez*, 139 F.3d at 1371–72 (deciding in the context of plaintiff's appeal of removal); *Marathon Oil*, 115 F.3d at 320 (deciding in the context of defendants request for removal).

314. *See, e.g.*, *Patrickson*, 251 F.3d at 799 (employing the term "essential"); *Pacheco de Perez*, 139 F.3d at 1377 (employing the term "substantial"); *Marathon Oil*, 115 F.3d at 320 (same); *Torres*, 113 F.3d at 542 (same); *Marcos*, 806 F.2d at 353 (employing the term "important").

more than merely colorable, it must be central to the litigation and its legal content must be contested by the parties.[315] In federal common law cases where the plaintiff relies upon a state-law cause of action, however, the courts equate the assertion of a substantial right with the making of a showing that the case falls within the scope of the right.[316]

Marathon Oil Co. v. Ruhrgas A.G.[317] is illustrative of this more rigorous jurisdictional approach. In this case, the defendant, in support of removal, asserted that the plaintiff's state-law cause of action raised a substantial issue of federal law governed by the federal common law of foreign relations.[318] The defendant relied upon circuit precedent,[319] which held that the federal common law of foreign relations governed suits in which a foreign nation that was not a party to the suit asserted that the case struck at the nation's vital economic and sovereign interests. In *Marathon Oil*, Germany certified that the suit did strike at its vital economic and sovereign interests.[320] The court affirmed that this understanding of the federal common law of foreign relations remained the law in the Fifth Circuit; that this question was central to the litigation; and, as was obvious, that the parties contested the legal content of the right.[321] Nevertheless, the Fifth Circuit dismissed the claim on jurisdictional grounds because it found the factual allegations regarding the alleged economic and sovereign interests did not truly represent vital interests to Germany.[322] That is, the court jurisdictionally dismissed the case for a failure to make a factual showing, rather than merely an assertion, that the federal common law right should apply. Once again, this holding runs contrary to the rule that the veracity of averments in the complaint has no jurisdictional import.[323] Nevertheless, this rule—that § 1331 jurisdiction in *Smith*-style federal common law cases rests upon the assertion of a substantial right and the presentation of

315. *See supra* Parts III.A.5.a, III.B.3; *see also supra* notes 180–92 and accompanying text (discussing federal preemption of state law claims).

316. *See, e.g.*, *Patrickson*, 251 F.3d at 799–804; *Pacheco de Perez*, 139 F.3d at 1377; *Marathon Oil*, 115 F.3d at 320.

317. 115 F.3d at 320.

318. *Id.*

319. Torres v. S. Peru Copper Corp., 113 F.3d 540, 543 (5th Cir. 1997).

320. *Marathon Oil*, 115 F.3d at 320.

321. *Id.*

322. *Id.*

323. Bell v. Hood, 327 U.S. 678, 682 (1946).

sufficient factual allegations—is the consistently applied rule in federal common law of foreign relations cases.[324]

This restrictive jurisdictional test is not limited to foreign relations cases. For example, in *National Audubon Society v. Department of Water,*[325] the Ninth Circuit, in a *Smith*-style case, was called upon to determine whether the federal common law of interstate controversies would apply to a suit seeking to prevent the diversion of water from a California lake to Los Angeles. The court found that the plaintiff pleaded at least a colorable, and most likely a substantial, assertion of a federal common law right.[326] Nevertheless, the court held that the plaintiff "failed to demonstrate" that the federal common law right would apply under this particular set of facts.[327] Further, it held that this failure to demonstrate the applicability of the right was a jurisdictional defect.[328] In effect, the court required the plaintiff to make a showing that the federal common law was applicable in order to vest § 1331 jurisdiction.[329]

Federal common law cases, then, are governed under two standards. If the federal court has a statutory mandate to create common law, then the lenient colorable right standard applies. If the federal court constructs common law without statutory permission, the courts apply a unique and ultra-restrictive test. The plaintiffs must present both an allegation of a substantial federal right and make a sufficient showing that the federal right applies. The Holmes test, with its myopic focus on the origin of the cause of action, offers no help here in developing a principled distinction between statutory and pure federal common law cases such as *McVeigh*. In both instances,

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324. *See, e.g.*, Patrickson v. Dole Food Co., 251 F.3d 795, 799–804 (9th Cir. 2001) (finding no federal jurisdiction even though state law causes of action implicated federal common law of foreign relations); Pacheco de Perez v. AT&T Co., 139 F.3d 1368, 1377 (11th Cir. 1998) (same); Marathon Oil Co., 115 F.3d at 320 (same).

325. 869 F.2d 1196, 1200–05 (9th Cir. 1988).

326. *Id.* at 1203 ("We acknowledge that in the context of an interstate water pollution case, the Supreme Court stated that federal courts do fashion federal laws where federal rights are involved and that there is a federal common law when dealing with air and water in their ambient or interstate aspects.").

327. *Id.* at 1204.

328. *Id.* at 1205.

329. There are cases holding to the contrary, in which the court takes jurisdiction without a showing that the pure federal common law right applies. *See, e.g.*, Herero People's Reparations Corp. v. Deutsche Bank, A.G., 370 F.3d 1192, 1195 (D.C. Cir. 2004) (holding that the court has jurisdiction to hear a claim that "federal common law should provide a private cause of action for violations of customary international law" even though "this circuit has not embraced the idea"); Musson Theatrical, Inc. v. Fed. Express Corp., 89 F.3d 1244, 1248–49 (6th Cir. 1996) (holding that the failure to recognize a federal common law right should result in a dismissal under FED. R. CIV. P. 12(b)(6), not 12(b)(1)). Yet, the weight of the practice, as the text above demonstrates, is to apply the restrictive showing standard.

the plaintiffs alleged federal causes of action, which should be sufficient to take § 1331 jurisdiction under that approach.

In closing this reinterpretation of the § 1331 canon, I have attempted to shed light upon the Court's § 1331 doctrine by reinterpreting this body of case law in terms of the contemporary notions of right and cause of action. In so doing, I conclude that, despite many references over the years to the importance of the Holmes test with its emphasis upon the origin of the cause of action,[330] the existence of a federal cause of action is neither a necessary[331] nor sufficient[332] condition for the vesting of § 1331 jurisdiction. Rather the primary determinate for the vesting of § 1331 jurisdiction is the status of the federal right asserted. The somewhat forgotten opinion of *People of Puerto Rico v. Russell & Co.* best reflects this reinterpretation of the § 1331 doctrine: "The federal nature of the right to be established is decisive, not the source of the authority to establish it."[333] The origin of a plaintiff's cause of action under this analysis remains important only insofar as it determines the strength with which the federal right must be asserted.

Pursuant to this recharacterization, the Court's § 1331 doctrine may be captured by three distinct standards—as compared to the predominant view's two—that afford more precise application than references to kaleidoscopic common sense[334] or the Holmes test. Under the first standard, § 1331 jurisdiction lies when a plaintiff makes a colorable assertion of a federal statutory, constitutional, or treaty right coupled with an assertion of a nonjudicially created federal cause

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330. The classic presentation of the Holmes test was made in 1916. Am. Well Works Co. v. Layne & Bowler Co., 241 U.S. 257, 260 (1916) (Holmes, J.) (finding a "suit arises under the law that creates the cause of action"). A Westlaw search for citations to the "headnote" corresponding to this quote returns 381 citations.

331. *See, e.g.*, Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 310 (2005) (finding lack of a federal cause of action to try claims of title to land obtained at a federal tax sale did not preclude removal to federal court of a state action with non-diverse parties raising a disputed issue of federal title law); Smith v. Kansas City Title & Trust Co., 255 U.S. 180, 202 (1921) (finding federal jurisdiction existed in a stockholder's state action to enjoin a trust company from investing its funds in farm loan bonds given that the constitutional validity of the statute under which the bonds were issued was in dispute).

332. *See, e.g.*, Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 603 (1979) (finding federal jurisdiction did not encompass a claim that a state welfare regulation was invalid because it was in conflict with the Social Security Act); Shoshone Mining Co. v. Rutter, 177 U.S. 505, 507 (1900).

333. 288 U.S. 476, 483 (1933) (finding a suit brought in support of an adverse claim to a mine under an act of Congress did not confer federal jurisdiction).

334. *See* Gully v. First Nat'l Bank in Meridian, 299 U.S. 109, 117–18 (1936) ("To define broadly and in the abstract 'a case arising under the Constitution or laws of the United States' has hazards of a kindred order. What is needed is something of that common-sense accommodation of judgment to kaleidoscope situations . . . .").

of action. Under the second standard, § 1331 jurisdiction lies when a plaintiff makes a substantial assertion of a federal statutory or constitutional right coupled with a state-law cause of action, as long as the vesting of jurisdiction in any particular instance comports with congressional intent. Finally, under the third standard, § 1331 jurisdiction lies when a plaintiff makes a substantial assertion of a pure federal common law right and a cause of action, coupled with a showing supporting the application of the federal common law right.

IV. CONGRESSIONAL INTENT AND §1331

The recharacterization of the § 1331 canon presented above not only yields a series of clarity-enhancing jurisdictional standards, but also presents a principle unifying these three standards. This unified balancing principle asserts that § 1331 jurisdiction is best understood as a function of the viability of the federal right that the plaintiff asserts balanced against other indicia of congressional intent that the plaintiff's particular claim should be heard in the federal courts. Under this analysis, congressional creation of a statutory cause of action for a particular right constitutes strong evidence of congressional intent that such rights may be vindicated in the federal courts. These two components—the federal right and cause of action—work in a teeter-totter manner in relation to congressional intent. That is to say, when there are other strong indicia of congressional intent to vest § 1331 jurisdiction such as the existence of a statutory cause of action, the plaintiff's assertion of a federal right may be quite weak. Conversely, when there are few other congressional indicia of an intent to vest § 1331 jurisdiction, the plaintiff must make a stronger allegation of a federal right in order for § 1331 jurisdiction to lie.

I turn next to a discussion of this unified balancing principle. First, I address the policy supporting this principle's focus upon legislative intent. Second, I argue that this unified balancing principle offers a coherent explanation for the application of the three jurisdictional standards synthesized in Part III to one statutory grant of federal question jurisdiction. The unified balancing principle, thus, rejects both "truths" forwarded by the predominant view of § 1331 jurisdiction (i.e., that § 1331 jurisdiction lacks a focus upon legislative intent and is internally inconsistent).

A. Constitutional Norm of Congressional Intent

A focus upon congressional intent for the vesting of statutory jurisdiction over the lower federal courts is rooted deeply in separation of powers doctrine. Indeed, absent some argument on the periphery, most jurists and scholars agree that the jurisdiction granted by Article III of the Constitution is not self-executing and that Congress retains near plenary power to vest the lower federal courts with as much or as little of that Article III power as it sees fit.[335] Thus, the lower federal courts require a statutory grant of jurisdiction to hear any case, including a federal question case.[336] Moreover, federal question jurisdiction "masks a welter of issues regarding the interrelation of federal and state authority and the proper management of the federal judicial system."[337] Congress, however, is a preeminent actor in resolving federalism questions,[338] at least in regard to the intersection

335. *See, e.g.*, MARTIN H. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 83 (2d ed., The Michie Company 1990) (1980) (stating that federal courts can hear cases only if the Constitution has authorized courts to hear such cases and Congress has vested that power in federal courts); Friedman, *supra* note 12, at 2 ("[C]ommentators mark out their individual lines defining the precise scope of Congress's authority, but no one has challenged the central assumption that Congress bears primary responsibility for defining federal court jurisdiction."); Scott C. Idleman, *The Demise of Hypothetical Jurisdiction in the Federal Courts*, 52 VAND. L. REV. 235, 241 (1999) ("For both constitutional and institutional reasons, the subject-matter jurisdiction of the federal courts is jealously guarded by its Article III keepers."); *id*. at 250–51 ("[T]he jurisdiction of the lower federal courts does not flow directly from Article III; rather, the jurisdictional grants of Article III must be first affirmed by statute . . . . Congress—let alone the separation of powers—might be doubly offended by the unauthorized exercise of judicial power."); James Leonard, *Ubi Remedium Ibi Jus, or, Where There's a Remedy, There's a Right: A Skeptic's Critique of* Ex Parte Young, 54 SYRACUSE L. REV. 215, 277 (2004) ("[T]he jurisdiction of the lower courts is a matter of legislative discretion and not of 'need' defined from Article III."); Lawrence Gene Sager, *Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 25 (1981) ("Courts and commentators agree that Congress' discretion in granting jurisdiction to the lower federal courts implies that those courts take jurisdiction from Congress and not from article III."); *see also supra* note 11.

336. *See* sources cited *supra* note 335 (discussing how Congress retains power to vest the lower federal courts with as much or as little of the federal jurisdiction that is granted by Article III).

337. Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust for S. Cal., 463 U.S. 1, 8 (1983); *see also* Merrell Dow Pharm., Inc. v. Thompson, 478 U.S. 804, 810 (1986) (finding "determinations about federal jurisdiction require sensitive judgments about congressional intent, judicial power, and the federal system").

338. The classic example of so-called process federalism is Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954); *see also* Jesse H. Choper, *The Scope of National Powers Vis-à-vis the States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552, 1557 (1977) (arguing that the national political system protects states' interests in Congress and that the federal courts should focus on individual rights); Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1324 (2001) (arguing that the separation of

of federalism and the control of the federal courts' jurisdiction.[339] Given this special competency, a course that sails a closer tack to congressional intent in the vesting of § 1331 jurisdiction than the predominant view[340] would foster foundational separation of powers norms.

But as the reinterpretation of the Court's jurisdictional doctrine above illustrates, plaintiffs must make further allegations of congressional intent to vest federal question jurisdiction than merely pointing to traditional tools of statutory construction. Indeed, if § 1331 were read as encompassing the full scope of the Article III font of authority, as many have suggested was the intent of the 1875 Congress,[341] federal question jurisdiction could well swallow many suits that are traditionally considered exclusive state-court

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powers doctrine protects states' interests in Congress by rendering the passage of federal legislation difficult); Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 219 (2000) (arguing that political parties adequately represent states' interests in Congress); Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468, 1476 (2007) ("[A]ssigning Congress primary control over interstate relations accords with precedent, federalism values, functional concerns, and history."); Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 2030–32 (2003):

> Congress can draw on its distinctive capacity democratically to elicit and articulate the nation's evolving constitutional aspirations when it enforces the Fourteenth Amendment. Because of the institutionally specific ways that Congress can negotiate conflict and build consensus, it can enact statutes that are comprehensive and redistributive, and so vindicate constitutional values in ways that courts cannot.

Of course, process federalism has its critics. *See, e.g.*, Saikrishna B. Prakash & John C. Yoo, *The Puzzling Persistence of Process-Based Federalism Theories*, 79 TEX. L. REV. 1459, 1462 (2001) (arguing that process federalism does not adequately protect states' interests and thus the federal courts must play an active role in regard); Ernest A. Young, *Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments*, 46 WM. & MARY L. REV. 1733, 1815–44 (2005) (arguing that the federal courts have a primary role to play in questions of federalism doctrine).

339. *See* Snyder v. Harris, 394 U.S. 332, 341–42 (1969) (arguing that the Constitution places the power to "expand the jurisdiction of [the lower federal] courts . . . specifically . . . in the Congress, not in the courts"); Mishkin, *supra* note 5, at 159 ("[I]t is desirable that Congress be competent to bring to an initial national forum all cases in which the vindication of federal policy may be at stake."); Resnik, *supra* note 20, at 1007 ("Rather than naturalizing a set of problems as intrinsically and always 'federal [questions for jurisdictional purposes],' I urge an understanding of 'the federal' as (almost) whatever Congress deems to be in need of national attention, be it kidnapping, alcohol consumption, bank robbery, fraud, or nondiscrimination.").

340. *See supra* note 11 (discussing the predominant view of § 1331 federal question jurisdiction).

341. *See, e.g.*, *Franchise Tax Bd.*, 463 U.S. at 8 n.8 (legislative history indicates Congress may have meant to confer all jurisdiction that the Constitution allows); 2 CONG. REC. 4986 (1874) (statement of Sen. Carpenter) (equating the statutory and constitutional grants of federal question jurisdiction); Friedman, *supra* note 12, at 21 (same); Michael G. Collins, *The Unhappy History of Federal Question Removal*, 71 IOWA L. REV. 717, 723 (1986) (same).

territory.[342] But such an approach would run afoul of fundamental federalism principles, which the Court imputes to Congress as a default legislative intention.[343] If, however, legislative intent is to be the guide for the vesting of § 1331 jurisdiction, some clear answer to the very basic question of where plaintiffs may file their complaints—state court, federal court, or both—must be forthcoming.[344] The answer I offer to this question is that the courts may find these extra indicia of congressional intent by way of the plaintiff's allegation of federal rights and causes of action.

Under this view, then, Congress controls federal question jurisdiction not only by creating jurisdictional statutes, such as § 1331, but also by creating rights and causes of action.[345] Each component, the right and the cause of action, lends strength to a

342. *See* Osborn v. United States, 22 U.S. (9 Wheat.) 738, 823 (1824) (holding a case arises under federal law for purposes of Article III if federal law "forms an ingredient of the original cause"). *But see* Anthony J. Bellia, *The Origins of Article III "arising under" Jurisdiction*, 57 DUKE L.J. 263, 264 (2007) (arguing that in light of English jurisdictional principles, the *Osborn* Court interpreted Article III "arising under" to mean that a federal court could hear cases in which a federal law was determinative of a right asserted in the proceeding before it). Bellia's reading would very much limit the scope of Article III to those cases I argue pertain to § 1331.

343. The Court's treatment of preemption cases expresses this sentiment well. Here the starting point for analyzing the preemptive effect of any federal law that operates "in a field which the States have traditionally occupied" is with a presumption against preemption. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947); *see also* Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996) (observing "we have long presumed that Congress does not cavalierly pre-empt state-law causes of action").

344. *See* Felix Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.Q. 499, 506 (1928) ("[T]he proper allocation of authority between United States and state courts is but part of the perennial concern over the wise distribution of power between the states and the nation."); Friedman, *supra* note 14, at 1216 ("A central task of the law of federal jurisdiction is allocating cases between state and federal courts."); *cf.* Deborah J. Merritt, *Federalism as Empowerment*, 47 FLA. L. REV. 541, 553–54 (1995) ("[W]e cannot empower two levels of government without offering some rule for mediating differences between them.").

345. *Cf.* Howard M. Wasserman, *Jurisdiction and Merits*, 80 WASH. L. REV. 643, 676 (2005) [hereinafter Wasserman, *Merits*] (presenting a similar two-step approach to jurisdictional questions, arguing that "[j]urisdictional grants empower courts to hear and resolve cases brought before them by parties; substantive causes of action grant parties permission to bring those cases before the court"); *see also* Howard M. Wasserman, *Jurisdiction, Merits, and Non-Extant Rights* 28 (Fla. Int'l Univ. Legal Studies Research Paper No. 07-01, 2007), *available at* http://works.bepress.com/howard_wasserman/4 [hereinafter Wasserman, *Non-Extant Rights*]:

> The reach and scope of federal judicial activity and influence can be constrained both by jurisdiction stripping and by the non-existence as law of rights and duties. Both produce the apparently same effect—fewer successful actions will be brought in federal court to vindicate individual federal rights, arguably depriving courts of the opportunity to perform their central and essential constitutional function.

As Professor Wasserman explains, the decision to "strip" a jurisdictional statute or limit rights has numerous practical differences. Wasserman, *Non-Extant Rights*, *supra*, at 29–44. However, for the narrower purposes of this Article, which focus just on the vesting of § 1331 jurisdiction, those issues are not as pressing.

plaintiff's assertion that congressional intent supports taking jurisdiction in a given case. Thus, congressional creation of rights, in most cases,[346] constitutes strong evidence of legislative intent to vest the federal courts with § 1331 jurisdiction over suits seeking to vindicate such rights. This determination of legislative intent to vest follows from the creation of rights because Congress both intends that its clearly stated, mandatory obligations will be enforced, and it legislates against a historical backdrop in which the federal courts have been essential to the enforcement of such federal rights.[347] In fact, the notion that the creation of statutory rights expresses a legislative intent to vest § 1331 jurisdiction is so strong that many scholars have noted that the creation of a federal right concomitantly

346. Congress can create rights without vesting the federal courts with jurisdiction. For instance, several courts have noted that the Telephone Consumer Protection Act, 47 U.S.C. § 227 (2000), vests jurisdiction exclusively in the state courts, pursuant to clear congressional command. *See* Murphey v. Lanier, 204 F.3d 911, 913–14 (9th Cir. 2000) (listing cases in support of this proposition). However, such acts are exceptional. *See, e.g.*, 15 U.S.C. § 2310(d) (2000) (limiting most Magnuson-Moss Warranty Act claims to state court).

347. *See, e.g.*, Federal Farmer XV (Jan. 18, 1788), *reprinted in* THE COMPLETE ANTI-FEDERALIST 315 (Herbert J. Storing ed., 1981) ("It is true, the laws are made by the legislature; but the judges and juries, in their interpretations, and in directing the execution of them, have a very extensive influence for preserving or destroying liberty, and for changing the nature of the government."); Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1397 (1953) ("Remember the Federalist papers. Were the framers wholly mistaken in thinking that, as a matter of the hard facts of power, a government needs courts to vindicate its decisions?"); *id.* at 1372–73 (discussing the role of enforcement courts and the constitutional constraints that come into play when Congress confers jurisdiction to enforce federal law); John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 712 n.163 (1997) ("[A]ny effort to pare back federal jurisdiction would deny Congress an important and historically effective forum for the implementation of its laws."); Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1611 (2000) ("Congress generally cannot ensure enforcement of its legislative mandates without providing a federal judicial forum where violators of those mandates can be prosecuted."). Of course this raises the issue of the so-called "parity" debate between the federal and state courts. The crux of this debate has been to determine which system, state or federal, better protects federal rights. I need not dip into this debate, as it is likely incapable of non-normative resolution. *See* Brett C. Gerry, *Parity Revisited: An Empirical Comparison of State and Lower Federal Court Interpretations of* Nollan v. California Coastal Commission, 23 HARV. J.L. & PUB. POL'Y 233, 237 (1999) (noting that the question "whether state courts are doing a good job of interpreting the Federal Constitution . . . inevitably lead[s] to a conclusion influenced by the normative preconceptions of the person who poses the query"). I need only assert that it makes sense to interpret Congress as generally preferring a federal forum for the protection of federal rights. Congress's preference may have no factual foundation, but the lack of a foundation for Congress's intent is neither here nor there when one is focusing upon congressional intent as it is the constitutional empowered actor here. *See* Gil Seinfeld, *The Federal Courts as a Franchise: Rethinking the Tripartite Mantra of Federal Question Jurisdiction*, CAL. L. REV. (forthcoming), *available at* http://ssrn.com/abstract=1162329 (arguing that there is no factual basis to believe that the state courts are less likely to enforce federal rights than are the federal courts).

creates § 1331 jurisdiction.[348] An allegation of a congressionally created cause of action is also strong evidence that Congress desires that cases of that type be heard in federal court. This determination of legislative intent follows from the creation of a cause of action because this amounts to a finding that Congress has determined the plaintiff is "an appropriate party to invoke the power of the [federal] courts" in the matter at hand.[349]

Of course, the opposite is also true. If Congress has not created a right, then § 1331 jurisdiction will not vest, absent the existence of federal constitutional or common law. Thus, if Congress wishes to forestall the federal courts from taking a stand on an issue, it is not required to actively reign in the judicial branch by positive legislation or jurisdiction stripping; it need only refrain from passing federal legislation in that arena. The default position, then, is that § 1331 jurisdiction does not lie,[350] which helps to preserve exclusive state-court jurisdiction over such questions. This principle of preservation of exclusive state-court jurisdiction, in turn, fosters federalism values.[351] Furthermore, looking for congressional intent by way of rights and causes of action avoids the critique that a congressional intent model of § 1331 is static and thus incapable of accounting for the changing roles of the federal and state courts since 1875.[352] That is, this reconceptualization allows Congress to retain dynamic control over which cases vest in the federal courts without wholesale reformation of the text of § 1331 itself through the creation of rights and causes of action.

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348. *See* Wasserman, *Merits*, *supra* note 345, at 677–78 ("The significance of statutory general federal question jurisdiction is that when Congress enacts a substantive law, federal district courts immediately and necessarily attain jurisdiction to hear claims under that statute, without Congress having to do anything more."). Of course, this only follows when one discusses statutory, not constitutional, federal question jurisdiction. If there were not a well established series of lower federal courts, such a presumption may well be unsound.

349. Davis v. Passman, 442 U.S. 228, 239 (1979).

350. *See, e.g.*, Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994) (holding § 1331 jurisdiction is presumed not to exist in a suit to enforce a settlement agreement).

351. *See, e.g.*, James A. Gardner, *State Constitutional Rights as Resistance to National Power: Toward a Functional Theory of State Constitutions*, 91 GEO. L.J 1003, 1004 (2003) (discussing the value of judicial federalism and the role of state courts in resisting national tyranny); James A. Gardner, *State Courts as Agents of Federalism: Power and Interpretation in State Constitutional Law*, 44 WM. & MARY L. REV. 1725, 1746–60 (2003) (same).

352. *See, e.g.*, Friedman, *supra* note 12, at 3 (discussing the need for an approach to federal jurisdiction that is "flexible enough to take into account changing conceptions of the roles" of various courts).

B. Three Instantiations of One Principle

The unified balancing principle, with its focus on legislative intent, also offers a strong explanatory thesis that reconciles the Court's use of three competing standards to vest one statutory grant of jurisdiction. Namely, as other indicia of congressional intent to vest the federal courts with federal question jurisdiction decrease, the Court becomes more demanding of the plaintiff's assertion of a federal right. I review these three standards in turn.

Consider first the use of the colorable right standard in the context of legislatively created rights and causes of action. When a plaintiff makes an allegation of a congressionally created cause of action, the plaintiff's allegations of a federal right need only be colorable to vest under § 1331.[353] That is to say, the strong indication of congressional permission to invoke the power of the federal court, as exemplified by the assertion of a congressionally created cause of action, need only be coupled with a weak allegation of a federal right in order for the federal court to find sufficient congressional intent to vest the action under § 1331. This analysis remains the same even when the cause of action is supplied by inference from a statute, because the question of whether to infer a cause of action remains one of legislative intent.[354] Actions to enforce treaty rights similarly look to

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353. *See supra* Parts III.A.1–3, III.A.5.a (discussing plaintiff's colorable allegations of a federal right).

354. *See* Alexander v. Sandoval, 532 U.S. 275, 286 (2001) ("The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy); Va. Bankshares, Inc. v. Sandberg, 501 U.S. 1083, 1102 (1991) (finding that "recognition of any private right of action for violating a federal statute must ultimately rest on congressional intent to provide a private remedy"); Merrell Dow Pharm., Inc. v. Thompson, 478 U.S. 804, 812 n.9 (1986) (listing cases that emphasize the role of legislative intent in the judiciary's inquiry into whether a private right of action exists); Daily Income Fund, Inc. v. Fox, 464 U.S. 523, 535–36 (1984) ("In evaluating such a claim, our focus must be on the intent of Congress when it enacted the statute in question."); Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 13 (1981) ("The key to the inquiry is the intent of the Legislature."); Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 639 (1981) ("Our focus, as it is in any case involving the implication of a right of action, is on the intent of Congress."); California v. Sierra Club, 451 U.S. 287, 293 (1981) ("[T]he ultimate issue is whether Congress intended to create a private right of action."); Nw. Airlines, Inc. v. Transport Workers Union of Am., 451 U.S. 77, 91 (1981) (same); Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 15 (1979) ("The question whether a statute creates a cause of action, either expressly or by implication, is basically a matter of statutory construction."); Touche Ross & Co. v. Redington, 442 U.S. 560, 568 (1979) ("The question of the existence of a statutory cause of action is, of course, one of statutory construction."). Commentators also regularly note that this separation of powers issue governs the inference of causes of action from statutes. *See, e.g.*, Richard W. Creswell, *The Separation of Powers Implications of Implied Rights of Action*, 34 MERCER L. REV. 973, 974 (1983) (discussing separation of powers concerns in implied rights of action cases); H. Miles Foy, *Some Reflections on Legislation, Adjudication, and Implied Private Rights of Actions*

legislative intent in terms of colorable rights to vest § 1331 jurisdiction, with the obvious difference that in the case of treaties, the President and the Senate wield the relevant legislative authority.[355] Thus, vesting § 1331 cases under the more lenient colorable right standard where both the right and the cause of action are legislatively crafted constitutes sound policy under the unified balancing principle's congressional intent analysis.

Constitutional cases, by contrast, present a prima facie difficulty under this analysis. Congress did not craft the rights at issue. Nevertheless, the taking of § 1331 jurisdiction over such cases by way of the colorable claim standard is readily explainable in terms of legislative intent. The Court regularly engages in a strong presumption that Congress intends for the federal courts to hear actions to enforce constitutional rights.[356] This finding of intent, when

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in the State and Federal Courts, 71 CORNELL L. REV. 501, 524–69 (1986) (discussing the history and implications of implied private rights of action); Tamar Frankel, *Implied Rights of Action*, 67 VA. L. REV. 553, 533–54 (1981) (discussing how judicially-created implied rights of action are precluded in some instances in which "they could play a useful and important role"); Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 48–54 (1985) (discussing implied statutory remedies).

355. *See supra* Part III.A.4 (discussing colorable rights created by treaties); *cf.* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 326 Reporters Note 1 (1987) ("The Senate's understanding of a treaty to which it gives consent is binding.").

356. *See, e.g.*, Demore v. Kim, 538 U.S. 510, 517 (2003) (requiring a clear statement of legislative intent to bar habeas corpus review of constitutional violations); INS v. St. Cyr, 533 U.S. 289, 308–09 (2001) (same); Preseault v. Interstate Commerce Comm'n, 494 U.S. 1, 12 (1990):

> The proper inquiry is . . . whether Congress has in the statute withdrawn the Tucker Act grant of jurisdiction to the Claims Court to hear a suit involving the statute founded upon the Constitution. Under this standard, we conclude that the Amendments did not withdraw the Tucker Act remedy. Congress did not exhibit the type of unambiguous intention to withdraw the Tucker Act remedy that is necessary . . . .

(quotations and citations omitted); Webster v. Doe, 486 U.S. 592, 603 (1988) (holding that "where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear"); Bowen v. Mich. Acad. of Family Physicians, 476 U.S. 667, 681 n.12 (1986) (requiring a heightened showing of legislative intent in part to avoid the "serious constitutional question" that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim); Bush v. Lucas, 462 U.S. 367, 378 (1983):

> The federal courts' statutory jurisdiction to decide federal questions confers adequate power to award damages to the victim of a constitutional violation. When Congress provides an alternative remedy, it may, of course, indicate its intent, by statutory language, by clear legislative history, or perhaps even by the statutory remedy itself, that the Court's power should not be exercised.

N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 112 (1982) ("We cannot impute to Congress an intent now or in the future to transfer jurisdiction from constitutional to legislative courts for the purpose of emasculating the former." (internal quotations omitted)); Johnson v. Robison, 415 U.S. 361, 373–74 (1974) (holding a federal statute will not be construed to preclude

coupled with a congressionally created cause of action to enforce the constitutional right, demonstrates sufficiently strong indicia of legislative intent to vest § 1331 jurisdiction under the colorable right standard. Instances where the Court takes jurisdiction over an assertion of a constitutional right that is coupled with a constitutionally inferred cause of action may be explained in terms of legislative intent as well. Again, the Court starts with a strong presumption that Congress intends for these cases to be heard in federal court.[357] Just as an assertion of a statutory right coupled with an assertion of an inferred statutory cause of action is a sufficient indicator of legislative intent in the statutory realm to vest § 1331, an assertion of a constitutional right and an assertion of an inferred cause of action constitutes a strong showing of intent to vest § 1331 jurisdiction in the constitutional realm.[358] Given these strong indicia of congressional approval to bring such cases under § 1331, application of the more liberal colorable standard to constitutional claims is sound under this legislative-intent model of § 1331 jurisdiction.

I turn next to the substantial rights standard. Here the Court faces cases where state law supplies a cause of action in which a federal right is embedded. The plaintiff in such cases is not alleging a congressional cause of action; thus, there are fewer indicia of congressional intent to vest § 1331 jurisdiction. Indeed, the plaintiffs in such cases essentially concede that there is not a congressional judgment that they are "appropriate part[ies] to invoke the power of the [federal] courts" in the matter at hand.[359] Rather, the existence of

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judicial review of constitutional challenges absent clear and convincing evidence of congressional intent).

357. *See* sources cited *supra* note 356 (discussing the Court's strong presumption that Congress intends for the federal courts to hear actions to enforce constitutional rights).

358. *See supra* note 354 (discussing congressional intent to provide for implied rights of action). Not all judges agree, however. Justice Powell, for example, considered any finding of a cause of action by implication to be a violation of the principle of congressional control over the jurisdiction of the federal courts. *See* Cannon v. Univ. of Chicago, 441 U.S. 677, 747 n.17 (1979) (Powell, J., dissenting):

> [W]hen a federal court implies a private action from a statute, it necessarily expands the scope of its federal-question jurisdiction . . . . [Indeed w]here a court decides both that federal-law elements are present in a state-law cause of action, and that these elements predominate to the point that the action can be said to present a 'federal question' cognizable in federal court, the net effect is the same as implication of a private action directly from the constitutional or statutory source of the federal-law elements . . . . [That is to say, such an] expansive interpretation of § 1331 permits federal courts to assume control over disputes which Congress did not consign to the federal judicial process . . . .

(internal citations omitted).

359. Davis v. Passman, 442 U.S. 228, 239 (1979).

a federal right constitutes the sole marker of legislative approval to take § 1331 jurisdiction.[360] As a result, plaintiffs in these cases must allege a substantial federal right under the second jurisdictional standard in order to invoke indicia of congressional intent sufficient to vest § 1331 jurisdiction.[361]

Further illustrating that legislative intent is key to this jurisdictional analysis, federal courts in *Smith*-style cases must also make particularized findings of congressional intent before taking jurisdiction under § 1331. As the Court recently held, "the federal issue will ultimately qualify for a federal forum only if federal jurisdiction is consistent with congressional judgment about the sound division of labor between state and federal courts governing the application of § 1331."[362] As the explicit focus on legislative intent in *Smith*-style cases demonstrates, congressional intent provides a powerful interpretative device for explaining the Court's § 1331 jurisprudence here.

Federal common law cases present the most challenging scenario for taking § 1331 jurisdiction on a congressional-intent model. Claims in such cases generally lack strong indicia of congressional intent to vest § 1331 jurisdiction because they allege neither congressionally or constitutionally created rights nor congressionally or constitutionally created causes of action. Moreover, the creation of federal common law raises separation of powers and federalism concerns, which appear to run contrary to the principles of congressional control over the federal courts.[363]

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360. *See supra* notes 347–48 and accompanying text (discussing that the creation of rights constitutes indicia of legislative intent to vest § 1331 jurisdiction).

361. *See supra* Parts III.A.5.a, III.B.3 (discussing either congressionally created substantial rights or constitutionally protected rights and state-law causes of action).

362. Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 313–14 (2005); *see also* Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust for S. Cal., 463 U.S. 1, 8 n.8 (1983) (analyzing the statute's legislative history in order to glean congressional intent). For thorough examples of lower courts conducting this congressional intent analysis, see Bennett v. Sw. Airlines Co., 484 F.3d 907, 911 (7th Cir. 2007) (expressing concern that a finding of federal jurisdiction would upset the balance struck by Congress of the division of labor between state and federal courts in air-crash litigation); Eastman v. Marine Mech. Corp., 438 F.3d 544, 553 (6th Cir. 2006) (finding that "accepting jurisdiction of this state employment action would be disruptive of the sound division of labor between state and federal courts envisioned by Congress").

363. *See, e.g.*, Atherton v. FDIC, 519 U.S. 213, 218 (1997) ("Whether latent federal power should be exercised to displace state law is primarily a decision for Congress, not the federal courts." (internal quotations omitted)); Carlos Manuel Vazquez, *W(h)ither* Zschernig?, 46 VILL. L. REV. 1259, 1273 (2001):

> The Constitution's provisions setting forth the procedures for enacting legislation impose numerous obstacles to the displacement of state law, chief among them the bicameralism and presentment requirements. These

Consider first the separation of powers concerns. In federal common law cases the Court exercises legislative power, weighing any number of policy factors—not just congressional intent—in rendering its judgments.[364] While those who see every instance of the use of this legislative power as a violation of Congress's exclusive legislative authority likely rely on an oversimplified view of our constitutional scheme,[365] the act of making federal common law without a statutory directive to do so creates a particularly troubling separation of powers issue unique to jurisdictional questions. When a federal court creates both a right and a cause of action as a matter of federal common law, the court is concomitantly creating § 1331 jurisdiction by creating the

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> requirements protect state prerogatives because the states are represented in the legislative process. At the same time, they assure that the federal lawmaking branches will be accountable for any federal decision to displace state law. When the courts decide to displace state law on the basis of federal common law, the safeguards of the bicameralism and presentment requirements are circumvented and no political actors can easily be held accountable for the displacement.

364. *See, e.g.*, O'Melveny & Myers v. FDIC, 512 U.S. 79, 89 (1994) (holding that the weighing of factors in the proposed creation of federal common law is more appropriately a legislative function); Nw. Airlines, Inc., v. Transp. Workers Union of Am., 451 U.S. 77, 98 n.41 (1981) (same); Boyle v. United Techs. Corp., 487 U.S. 500, 531–32 (1988) (Stevens, J., dissenting):

> But when we are asked to create an entirely new doctrine—to answer "questions of policy on which Congress has not spoken,"—we have a special duty to identify the proper decisionmaker before trying to make the proper decision. When the novel question of policy involves a balancing of the conflicting interests in the efficient operation of a massive governmental program and the protection of the rights of the individual—whether in the social welfare context, the civil service context, or the military procurement context—I feel very deeply that we should defer to the expertise of the Congress.

(citation omitted); Textile Workers Union of Am. v. Lincoln Mills of Ala., 353 U.S. 448, 457 (1957) (holding that in fashioning federal common law "[t]he range of judicial inventiveness will be determined by the nature of the problem"); United States v. Gilman, 347 U.S. 507, 512–13 (1954) (similar); *In re* Grand Jury Subpoena, Judith Miller, 397 F.3d 964, 979–81 (D.C. Cir. 2005), *cert. denied*, 125 S. Ct. 2977 (2005), *amended by* 438 F.3d 1141 (D.C. Cir. 2006) (arguing that creating a federal common law reporter's privilege is essentially a legislative task); Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 11 (1975) ("Thus, when a federal court announces a federal rule of decision in an area of plenary congressional competence, it exercises an initiative normally left to Congress, ousts state law, and yet acts without the political checks on national power created by state representation in Congress."); Martin H. Redish, *Federal Common Law, Political Legitimacy, and the Interpretive Process: An "Institutionalist" Perspective*, 83 NW. U. L. REV. 761, 766–67 (1989) (arguing that federal common law, as it is essentially a legislative function, violates separation of powers principles).

365. *See* Merrill, *supra* note 354, at 21 ("[T]he notion that Congress is the exclusive federal lawmaking body is an oversimplification of constitutional reality—not only the reality of today, in which administrative agencies churn out reams of edicts having the force of law, but also the reality presented by the Constitution itself."); *id.* at 13–19 (describing the federalism limitations on federal common law).

very analytical components required to vest jurisdiction under the statute.[366] But by all standard accounts, the Constitution places the power to "expand the jurisdiction of [the lower federal] courts . . . specifically . . . in the Congress, not in the courts."[367]

Pure federal common law suits raise substantial federalism concerns as well.[368] Federal common law rights typically[369] preempt state law in some fashion.[370] The Court consistently holds that

366. *See* Illinois v. Milwaukee, 406 U.S. 91, 99–100 (1972) (finding a federal common law claim constitutes "a question arising under the laws of the United States"); Tidmarsh & Murray, *supra* note 262, at 653 (arguing that "a federal common law claim creates federal jurisdiction"); *cf.* Glen Staszewski, *Avoiding Absurdity*, 81 IND. L. J. 1001, 1035 (2006) (arguing, in regard to equal protection claims, that recognizing certain "actionable federal constitutional claims would dramatically expand the jurisdiction of federal courts"). Congress retains broad control of the jurisdiction of the inferior federal courts, and it may grant a narrower scope of subject matter jurisdiction than is found in Article III. *See supra* note 335 (discussing how Congress retains power to vest the lower federal courts with as much or as little of the federal jurisdiction that is granted by Article III).

367. Snyder v. Harris, 394 U.S. 332, 341–42 (1969); *see also* Empire Healthchoice Assurance, Inc. v. McVeigh, 547 U.S. 677, 696 (2006) ("We have no warrant to expand Congress' jurisdictional grant 'by judicial decree.' "); Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994) ("Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree." (citations omitted)). By most accounts, Congress retains broad control of the jurisdiction of the inferior federal courts, and it may grant a narrower scope of subject matter jurisdiction than is found in Article III. *See supra* notes 11, 335.

368. *See, e.g.*, Clark, *supra* note 338, at 1412–19 (arguing that the limitations on federal common law reflect the idea that "the Constitution . . . constrains the manner in which the federal government may exercise [its delegated] powers to displace state law").

369. Federal common law at times may be made for the purpose of giving effect to a federal statute when there is no otherwise applicable state law that is displaced. *See, e.g.*, Textile Workers Union of Am. v. Lincoln Mills of Ala., 353 U.S. 448, 457 (1957) (finding that the Taft-Hartley Act gave federal courts jurisdiction to hear controversies involving labor contracts and authorized federal courts to make a body of federal law for enforcement of collective bargaining agreements). Or at times federal common law may explicitly adopt the law of the state as the federal rule, displacing state law only in a nominal sense. *See, e.g.*, Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 98–99 (1991) (applying the law of the state of incorporation to a derivative action brought under the Investment Company Act). Another instance lies in the federal common law of Indian relations. In the case of Indian law, the field is so dominated by federal law there is no state law to displace. *See, e.g.*, Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 850–53 (1985) (discussing the plenary power of the federal government over Indian tribes).

370. *See, e.g.*, Atherton v. FDIC, 519 U.S. 213, 218 (1997) (holding that because federal common law displaces state law, such issues properly are matters of congressional concern); O'Melveny & Myers v. FDIC, 512 U.S. 79, 83 (1994) (rejecting federal common law rule for attorney malpractice, inter alia, as it would "divest[] States of authority over the entire law of imputation"); *see also* Boyle v. United Techs. Corp., 487 U.S. 500, 504 (1988) (finding that "a few areas, involving 'uniquely federal interests,' are so committed by the Constitution and laws of the United states to federal control that state law is pre-empted and replaced, where necessary, by federal law of a content prescribed (absent explicit statutory directive) by the courts-so-called 'federal common law' " (citation omitted)); United States v. Kimbell Foods, Inc., 440 U.S. 715, 726 (1979) ("This Court has consistently held that federal law governs questions involving the rights

Congress is the better institution to make these preemption judgments than are the federal courts.[371] This institutional advantage flows from the fact that the states are represented there,[372] the actors involved are politically accountable,[373] and the process for passing federal statutes offers several opportunities for the states to give input.[374]

A full-blown determination of whether the legislative flavor of federal common law is constitutionally illegitimate[375] or a necessary element of our constitutional scheme[376] is beyond the scope of this jurisdictional discussion. But given these weighty separation of powers and federalism concerns, even if one believes that the practice of making federal common law is a necessary component of our system of government, it surely follows that the Court should exercise its "traditional reluctance . . . to expand the jurisdiction of the federal courts through a broad reading of jurisdictional statutes"[377] with a special vigor in this domain. It is not surprising, then, that the Court is stingier in finding § 1331 jurisdiction in pure federal common law

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of the United States arising under nationwide federal programs."); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 426–27 (1964) ("We conclude that the scope of the act of state doctrine must be determined according to federal law."); Mark D. Rosen, *Was* Shelley v. Kraemer *Incorrectly Decided? Some New Answers*, 95 CAL. L. REV. 451, 494–95 (2007) (finding that "constitutional preemption is a component of almost all the federal common law decisions that displace state law with a judicially created alternative"); Tidmarsh & Murray, *supra* note 262, at 615 ("Federal common law displaces state law, and thus shifts the balance of power from state to federal government.").

371. *See, e.g.*, Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977) (finding that because the states are represented in Congress but not in the federal courts, the presumption against displacement of state law is consistent with a presumption in favor of displacement of federal common law); Wallis v. Pan Am. Petroleum Corp., 384 U.S. 63, 68 (1966) (holding that "whether latent federal power should be exercised to displace state law is primarily a decision for Congress," not the federal courts).

372. See *supra* note 338 (discussing process federalism and how states' interests are protected in Congress).

373. Vazquez, *supra* note 363.

374. *Id.*

375. *See* Redish, *supra* note 364 (arguing that federal common law, as it is essentially a legislative function, violates separation of powers principles).

376. *See* D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, 470 (1942) (Jackson, J., concurring) ("Were we bereft of the common law, our federal system would be impotent. This follows from the recognized futility of attempting all-complete statutory codes, and is apparent from the terms of the Constitution itself."); Merrill, *supra* note 354, at 21 (discussing how the Court will exercise legislative power at times due to our complex constitutional scheme); Monaghan, *supra* note 364, at 14 ("[T]he authority to create federal common law springs of necessity from the structure of the Constitution, from its basic division of authority between the national government and the states.").

377. Romero v. Int'l Terminal Operating Co., 358 U.S. 354, 379 (1959).

cases, employing the substantial-right-plus-sufficient-showing standard.[378]

This is not to say that a congressional intent justification for the vesting of § 1331 jurisdiction over federal common law cases is entirely lacking. Indeed, statutory federal common law, such as rulings under the Sherman Act, is crafted pursuant to explicit congressional commands.[379] As a result, these cases do not face the same separation of powers and federalism concerns that pure federal common law cases do.[380] Because these statutorily directed federal common law cases demonstrate stronger indicia of congressional intent to vest § 1331 jurisdiction, it makes sense, from a congressional-intent perspective, that the Court apply the more lenient colorable right standard in such cases.[381] The Court takes a similar approach in federal common law of Indian relations cases, in part, because there are no federalism concerns lurking in such cases.[382]

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378. *See supra* Part III.C (discussing pure federal common law rights).

379. *See supra* note 267–69 and accompanying text (describing the first category of statutory federal common law, in which the federal courts create federal common law in response to a statutory directive).

380. *See, e.g.*, Paul Lund, *The Decline of Federal Common Law*, 76 B.U. L. REV. 895, 958 (1996):

> When a federal court acts unilaterally to "displace" governing state law, . . . it runs headlong into substantial federalism and separation of powers objections. These same concerns, however, do *not* arise when federal law governs by congressional direction that calls upon the federal courts to fill in the contours of federal law in accordance with congressionally adopted policy.

see also Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 688 (1978) ("Congress, however, did not intend the text of the Sherman Act to delineate the full meaning of the statute or its application in concrete situations. The legislative history makes it perfectly clear that it expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition.").

381. *See, e.g.*, Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 647 (1981) (holding that there is no federal common law right to contribution among fellow unlawful conspirators in restraint of trade under the Sherman Act and affirming dismissal on 12(b)(6) grounds).

382. Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 850–53 (1985) (specifically invoking the Holmes test and holding that Indian law is so predominated by federal policy that state law is never applicable); Oneida Indian Nation v. Oneida County, 414 U.S. 661, 675–77 (1974). In *Oneida Indian Nation*, the Court straddled the fence between the colorable and substantial assertion of a right standards:

> Enough has been said, we think, to indicate that the complaint in this case asserts a present right to possession under federal law. The claim may fail at a later stage for a variety of reasons; but for jurisdictional purposes, this is not a case where the underlying right or obligation arises only under state law and federal law is merely alleged as a barrier to its effectuation . . . . [W]e think the complaint before us satisfies the additional requirement formulated in some cases that the complaint reveal a "dispute or controversy respecting

By contrast, a congressional-intent justification to vest § 1331 jurisdiction over pure federal common law cases is more attenuated. Perhaps the best argument for the justification is that the Constitution requires some limited form of federal common law[383] and congressional intent to comport with the Constitution is presumed.[384] Given this less weighty legislative intent justification for vesting § 1331, it follows from a congressional intent perspective that the Court should apply a more stringent jurisdictional standard to pure federal common law cases.

Thus, the unified balancing principle explains the Court's disparate § 1331 jurisdictional standards in a rational manner and, in so doing, provides a strong retort to the assumptions of the predominant view. Indeed, this approach provides a means of employing legislative intent as the driving force for the vesting of § 1331 jurisdiction, contrary to the dictates of the predominant view.[385] Similarly, the unified balancing principle offers a means of reconciling the Court's competing vesting standards under one principle—congressional intent—again contrary to the predominant view.[386]

This approach assumes, of course, that the Court actually engages in some interpretive exercise designed to ascertain legislative intent when it takes § 1331 jurisdiction.[387] Professor Friedman, however, persuasively argues that the Court's § 1331 jurisprudence has not been focused on congressional intent pursuant to traditional statutory construction rules.[388] I have attempted, however, to find legislative intent not pursuant to traditional rules of statutory

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> the validity, construction, or effect of such a law, upon the determination of which the result depends."

414 U.S. at 675-77.

383. See *supra* note 376 for sources advocating that the legislative aspect of federal common law is a necessary element of our constitutional scheme.

384. *See, e.g.*, United States v. X-Citement Video, Inc., 513 U.S. 64, 73 (1994) ("[W]e do not impute to Congress an intent to pass legislation that is inconsistent with the Constitution."); Yates v. United States, 354 U.S. 298, 319 (1957) ("[W]e should not assume that Congress chose to disregard a constitutional danger zone so clearly marked.").

385. *See supra* notes 11–14 and accompanying text (discussing the predominant view that § 1331 jurisdiction doctrine lacks a focus upon legislative intent).

386. *See supra* notes 15–19 and accompanying text (discussing the predominant view that § 1331 jurisdiction doctrine is fundamentally inconsistent).

387. *See, e.g.*, Philbrook v. Glodgett, 421 U.S. 707, 713 (1975) ("Our objective in a case such as this [a statutory construction case] is to ascertain the congressional intent and give effect to the legislative will.").

388. *See* Friedman, *supra* note 12, at 24 ("Congress's intent [in enacting § 1331] has had little or nothing to do with the Court's decisions concerning what constitutes a federal question.").

construction. Professor Friedman is assuredly correct that the Court has not engaged in this traditional statutory construction project when it comes to § 1331. Instead, I have argued that the key to bringing legislative intent, and added clarity, back into the § 1331 analysis is to seek intent in the creation of federal rights and causes of action.

My claim that the unified balancing principle provides a mechanism to give more weight to legislative intent in § 1331 analyses is not all-encompassing either. I do not contend that every aspect of § 1331 doctrine is reducible to legislative intent. The well-pleaded complaint rule, for example, does not seem amenable to such a reinterpretation.[389] The more modest claim made here is that legislative intent, as evidenced by way of federal rights and causes of action, offers an explanatory thesis that reconciles the Court's apparently disparate tests for satisfying the well-pleaded complaint rule. One might also object that this reinterpretation strays too far from the process in which the Court was actually engaged in when these many federal question jurisdiction cases were decided. This may be true. But given the increased coherence and focus upon legislative intent that this view fosters, acting as if the Court's decisions were aiming at congressional intent would, in Plato's words, constitute a "noble falsehood."[390]

V. CONCLUSION

In this Article, I contend that the unified balancing principle can bring much-needed clarity to the Court's § 1331 jurisprudence. According to this view, § 1331 jurisdiction is best understood as a function of the viability of the federal right a plaintiff asserts in relation to other indicia of congressional permission to bring such a claim in federal court, which is often expressed by the creation of causes of action. This perspective offers a heretofore abandoned focus upon congressional intent to vest § 1331 jurisdiction, a means of reconciling apparently disparate § 1331 holdings, and greater clarity for adjudicating tough cases.

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389. *See, e.g.*, Donald L. Doernberg, *There's No Reason for It; It's Just Our Policy: Why the Well-Pleaded Complaint Rule Sabotages the Purposes of Federal Question Jurisdiction*, 38 HASTINGS L.J. 597, 601–07 (1987) (arguing that the well-pleaded complaint rule does not comport with the intent of the 1875 Congress that originally passed § 1331).

390. PLATO, REPUBLIC 91 (C.D.C. Reeve ed., G.M.A. Grube trans., Hackett Publishing Co. 1992) (arguing that it would be noble to tell the true guardians of the republic a lie, namely, that they contain gold in their soul and thus have no need for material wealth).

To this end, the unified balancing principle underlies three standards into which the Court's § 1331 cases may be characterized. Under the first standard, § 1331 jurisdiction lies when a plaintiff makes an assertion of a congressionally or constitutionally created cause of action and a colorable assertion of a federal right. Under the second standard, § 1331 lies when a plaintiff alleges a state-law cause of action and asserts a substantial federal right. Finally, under the third standard, § 1331 jurisdiction lies when a plaintiff asserts a federal cause of action created as a matter of federal common law and the plaintiff asserts a substantial federal common law right coupled with sufficient factual allegations to support the right. Of course, the unified balancing principle is not a panacea for all that ails federal question doctrine. But I contend that the replacement of inaccurate stock methods, such as the Holmes test, with a focus upon legislative intent and these three standards would be a boon for both courts and litigants who must grapple with tough questions of § 1331 jurisdiction.